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Court of Appeals
Division II
State of Washington
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No. 51049-9-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

JOHN GREYSTOKE,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLALLAM COUNTY

APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

1. Reversal is required because the trial court refused to permit Mr. Greystoke to present testimony about his mental state, denying Mr. Greystoke his constitutional right to represent himself and present his defense.

John Greystoke had a fundamental right to represent himself, and to control and present his defense at trial. *State v. Madsen*, 168 Wn.2d 496, 503, 229 P.3d 714 (2010); *State v. Jones*, 99 Wn.2d 735, 740, 664 P.2d 1216 (1983); *State v. Jones*, 168 Wn.2d 713, 719, 230 P.3d 576 (2010); U.S. Const. VI, XIV; Const. art. I, §§ 3, 22. The trial court violated these basic constitutional rights when it refused to allow Mr. Greystoke to present testimony about his mental state after determining Mr. Greystoke “waived” this defense.

The State argues there was no violation of Mr. Greystoke’s right to present a defense, but does not address the violation of Mr. Greystoke’s right to self-representation as a result of the court’s ruling. Resp. Br. at 20-22. The State concedes it was Mr. Greystoke’s attorney – not Mr. Greystoke – who waived Mr. Greystoke’s mental health defense. Resp. Br. at 22; *see also* Op. Br. at 18-19. However, the State claims the defense was “waived” because Mr. Greystoke failed to notify the court he was seeking to raise a mental health defense after discharging his attorney. Resp. Br. at 24. This claim is unsupported by the record.

Mr. Greystoke repeatedly informed the court, before and after discharging his attorney, that his mental illness was his only defense to the charge. *See* RP 11, 37, 59, 293, 334, 756, 864; CP 237. Indeed, he moved to discharge his attorney and represent himself in response to defense counsel waiving the mental health defense. RP 93. When the State moved to strike Mr. Greystoke's expert witnesses, Mr. Greystoke expressed incredulity at the State's claim he had not asserted a mental health defense and, given Mr. Greystoke's intense focus on this defense throughout the pretrial proceedings, his reaction is understandable. RP 334.

Despite Mr. Greystoke's unequivocal assertion to the trial court that his mental health defense was his only defense and that he would have no choice but to "endure the trial" and appeal if he was prohibited from pursuing it, the State now argues Mr. Greystoke never intended to pursue a mental health defense and only wished to present this evidence at sentencing. Resp. Br. at 28. In order to make this argument, the State primarily relies on statements made by Mr. Greystoke *after* the trial court found Mr. Greystoke had waived his right to present a mental health defense. Resp. Br. 28-30 (citing RP 355-59).

During Mr. Greystoke's exchange with the court cited by the State, the court reminded Mr. Greystoke it has already found his mental health defense had been waived and Mr. Greystoke acknowledged he was being

forced to proceed under a general denial defense. RP 355-56. Mr. Greystoke brought up leniency at sentencing only after the court continued to reject his argument that evidence of his mental health be permitted to go to the jury. RP 357-58. Such statements are not useful in evaluating Mr. Greystoke's original intent to pursue a mental health defense.

The only remaining statements cited by the State occurred during an earlier exchange in which the court decided it would permit "some flexibility" on the mental health evidence presented at trial, depending on the testimony presented.¹ RP 294. This discussion did not involve sentencing and any ambiguity is resolved by Mr. Greystoke's subsequent statements that his only defense was "acquittal on the grounds of mental incompatibility." RP 334. The State's claim that Mr. Greystoke only wished to present this evidence only at sentencing is meritless.

Finally, the State argues Mr. Greystoke's constitutional rights were not violated because Mr. Greystoke failed to present relevant evidence in support of his mental health defense. Resp. Br. at 24. However, this issue was not considered by the trial court. The court precluded Mr. Greystoke from presenting mental health evidence because it determined Mr. Greystoke had waived the defense. RP 334. Because the court wrongly

¹ As previously discussed, the State later strictly prohibited Mr. Greystoke from presenting any evidence of his mental state at the time of the incident. RP 334.

determined Mr. Greystoke had waived his mental health defense, it did not evaluate what evidence, specifically, Mr. Greystoke wished to present, or whether that evidence was admissible.

Mr. Greystoke properly assigned error to the court's ruling and briefed the issue presented. Op. Br. at 2, 13-21. The State argues Mr. Greystoke was required to argue the exclusion of evidence was an abuse of discretion, but the denial of a defendant's constitutional right is necessarily an abuse of discretion, and a claim of a denial of a constitutional right is reviewed de novo. *State v. Iniguez*, 167 Wn.2d 273, 280, 217 P.3d 786 (2009); *see also State v. Blair*, 3 Wn. App. 2d 343, 356, 415 P.3d 1232 (2018) (Worswick, J. concurring) ("reviewing the trial court's decision merely for an abuse of the trial court's discretion does not fulfill our duty to address constitutional claims"); Resp. Br. at 30-31.

Here, the court violated Mr. Greystoke's fundamental right to represent himself, and control and present his defense, when it found he waived his mental health defense. As the State concedes, only Mr. Greystoke's attorney waived this defense. When Mr. Greystoke elected to represent himself, he was no longer bound by this waiver or his attorney's choice of expert. This Court should reverse.

2. Mr. Greystoke was denied a fair trial when the court allowed him to represent himself after preventing Mr. Greystoke from raising his only defense.

In his opening brief, Mr. Greystoke explained the trial court failed to ensure Mr. Greystoke's right to self-representation did not undercut his fundamental constitutional objective of a fair trial. Op. Br. at 25-31. The State does not offer a meaningful response, instead arguing only that Mr. Greystoke's waiver was knowing, intelligent, and voluntary. Resp. Br. 14-20. For the reasons presented in Mr. Greystoke's opening brief, this Court should reverse.

3. The trial court unconstitutionally interfered with Mr. Greystoke's defense by commenting on the evidence.

A judge may not make a statement that permits the jury to infer his attitude toward the merits of the case. *State v. Lane*, 125 Wn.2d 825, 838, 889 P.2d 929 (1995); Const. art. IV, § 16. During Mr. Greystoke's trial, the court made multiple statements that permitted the jury to infer the court believed Mr. Greystoke's defense was meritless and the State had the stronger case.

During voir dire, the court analogized Mr. Greystoke to a "second year college team" and the State to the highest ranked professional national football team. RP 518. The State argues the analogy was designed to point out only that the presentation of evidence by Mr. Greystoke and

the State “might not be equally polished” and this Court should examine the court’s statement in context. Resp. Br. at 33, 35. But the context shows the jury panel was alarmed by the statement and, when the court was pressed by a prospective juror, it acknowledged the analogy was poor. RP 518. The inference to be drawn from the court’s comparison was not simply that Mr. Greystoke’s presentation might be less impressive, but that he was unlikely to be successful at trial, just as a college team was unlikely to prevail over the highest ranked professional team.

Second, the court overruled Mr. Greystoke’s objection to an officer’s testimony that Mr. Greystoke had just committed “an attempted murder a few minutes before.” RP 640. The State claims the officer’s comment was neutral because he referred to Mr. Greystoke only as a “suspect” of an attempted murder, and did not testify Mr. Greystoke was actually the “perpetrator” of the attempted murder. Resp. Br. at 36.

Regardless of whether the officer referred to Mr. Greystoke as a suspect, it was evident from the officer’s statement he was referring to Mr. Greystoke and suggesting Mr. Greystoke’s actions constituted “attempted murder.” RP 640. The State argues other testimony from the officer (that this was the worst stabbing he had seen in 19 years, that the wounds looked fatal, and that he did not believe anyone could survive such a stabbing) offers support for the officer’s assessment of the crime as

“attempted murder,” but this only further demonstrates the prejudice that resulted from the statement. When the court overruled Mr. Greystoke’s valid objection, it signaled to the jury “attempted murder” was an accurate way to describe the act committed by Mr. Greystoke.

Finally, the court interrupted Mr. Greystoke when Mr. Greystoke attempted to elicit testimony that he would not have been evicted from the apartment if not for the complaining witness’s behavior. RP 726-27. As explained in Mr. Greystoke’s opening brief, this evidence was relevant to impeach Mr. Gross’s credibility, as Mr. Gross had denied he was responsible for Mr. Greystoke’s eviction. Op. Br. at 24. The State does not respond to this argument. Resp. Br. at 38-39. The trial court’s interruption of Mr. Greystoke’s questioning, in the absence of any objection by the State, wrongly suggested to the jury that Mr. Greystoke was engaged in such improper questioning that the court was forced to intervene sua sponte.

The court’s comments on the evidence were not harmless. *See* Op. Br. at 24-25. This Court should reverse.

4. The trial court erred when it denied Mr. Greystoke’s request for a second degree assault instruction.

The difference between first degree assault and second degree assault in this case was a matter of intent: first degree assault requires the

individual intended the assault and intended to inflict great bodily harm, whereas second degree assault requires only that the individual intended the assault. RCW 9A.36.011; RCW 9A.36.021. The trial court repeatedly denied Mr. Greystoke's request for the second degree assault instruction, even after the jury explicitly requested to see it. CP 125; RP 833, 863.

When the trial court denied Mr. Greystoke's request for an instruction it misremembered the facts presented at trial and rested its decision on a basic factual error. RP 807. The trial court believed the evidence showed Mr. Greystoke had not only stabbed Mr. Gross but had taken a second step during the stabbing to open the abdominal cavity. RP 807.

The State concedes this was a factual error, as the evidence showed it was the surgeon, not Mr. Greystoke, who opened the abdominal cavity, and that it was done to treat Mr. Gross's injury. Resp. Br. at 43. But the State argues the court did not abuse its discretion because the court relied upon other evidence to deny Mr. Greystoke's request for the second degree assault instruction. Resp. Br. at 43. This claim is unsupported by the record.

When the court issued its ruling, it found the opened abdominal cavity was "significant" to its decision and "independent" from the argument offered by the State. RP 807. The evidence relied upon by the

State, both before the trial court and in its response on appeal, relates to the size of the knife and the severity of the injury inflicted. RP 804; Resp. Br. at 42. But viewed in the light most favorable to Mr. Greystoke, the evidence showed Mr. Greystoke simply wanted Mr. Gross out of his home, the assault happened so quickly Mr. Gross initially believed he had only been punched, and Mr. Greystoke seemed panicked after the assault and ran, but then quickly confessed to the police. RP 565-66, 665. *See State v. Fernandez-Medina*, 141 Wn.2d 448, 450, 6 P.3d 1150 (2000); Op. Br. at 35-36.

Indeed, the fact that the trial court felt it necessary to cite to this additional (erroneous) fact when issuing its ruling, and identify it as “significant” demonstrates the court was not persuaded the evidence relied upon by the State permitted the denial of Mr. Greystoke’s request. The trial court’s reliance on an incorrect fact, “significant” to its ruling, was an abuse of discretion.

In addition, the court’s refusal to give the instruction after the jury explicitly requested it was an abuse of discretion because the court applied the wrong legal standard when it declined to give the instruction based on its determination doing so “complicates things.” RP 833. Mr. Greystoke was entitled to have the jury instructed on second degree assault and this Court should reverse.

5. Reversal of the sentencing enhancement is required because it was not alleged in the information.

The State concedes, as it must, that it proceeded at trial against Mr. Greystoke on a deadly weapon enhancement not included in the information on which Mr. Greystoke was arraigned. Resp. Br. at 45-46. The jury returned a special verdict finding the State satisfied its burden on the enhancement and Mr. Greystoke was sentenced to an additional 24 months incarceration as a result. CP 18, 20, 123, 145.

Sentencing enhancements must be included in the information. *State v. Recuenco*, 163 Wn.2d 428, 434, 180 P.3d 1276 (2008); *State v. Theroff*, 95 Wn.2d 385, 392, 622 P.2d 1240 (1980). Due process requires the information contain specific allegations that put “the accused person upon notice that enhanced consequences will flow with a conviction.” *Theroff*, 95 Wn.2d at 392.

The State’s argument, that Mr. Greystoke received sufficient notice for purposes of due process because the State notified Mr. Greystoke of its intent to amend the information, is contrary to established law. Resp. Br. at 45. In *Theroff*, the State filed a notice of its intent to seek enhanced penalties with the original information, but failed to file the same notice with the amended information. 95 Wn.2d at 387, 392. Our supreme court found the State’s original notice did not satisfy due process. *Id.* at 392.

The court explained its concern was “more than infatuation with mere technical requirements” and because the prosecutor “did not follow the rule, he may not now ask the court to impose the rigors of our enhanced penalty statutes upon the defendant.” *Id.* at 392-93.

The State does not attempt to distinguish *Theroff* in its response and it cannot. Mr. Greystoke objected to the State’s filing of the amended information and the issue was not further addressed by the court. RP 263-64. The State merely notifying Mr. Greystoke of its intent to amend the information does not satisfy due process.

Further, the case relied upon by the State provides no guidance. In *State v. Graeber*, the court permitted an amendment to the information during trial to clarify “the method in which the crime was permitted.” 46 Wn.2d 602, 605, 283 P.2d 974 (1955). The court noted the defendants did not object to the amendment and found the trial court did not err in granting the amendment. *Id.* at 605. Here Mr. Greystoke objected to the amended information and the State failed to ask the court to amend the information over Mr. Greystoke’s objection. The State’s intent to file an information does not provide sufficient notice to Mr. Greystoke, nor govern how the State may proceed against Mr. Greystoke at trial. This Court should reverse the deadly weapon enhancement.

6. Mr. Greystoke's judgment and sentence must be amended to strike the legal financial obligations.

The State concedes Mr. Greystoke's legal financial obligations (LFOs) may not be paid from his only source of income, his social security disability benefits. Resp. Br. at 47. It asks this Court to remand for entry of such a directive by the trial court. Resp. Br. at 47. Whether such a directive should be entered, or the LFOs must be stricken in their entirety, is a question currently pending in our supreme court. *State v. Catling*, 422 P.3d 915 (2018). For the reasons stated in Mr. Greystoke's opening brief, the LFOs should be stricken in their entirety. Op. Br. at 41-44.

The State also concedes the criminal filing fee must be stricken pursuant to statutory amendments and *State v. Ramirez*, 191 Wn.2d 732, 426 P.3d 714 (2018). Resp. Br. at 48; RCW 36.18.020(2)(h); RCW 10.101.010(3)(a). It argues the \$100 DNA fee should not be stricken because the record does not show Mr. Greystoke "actually" submitted his DNA sample in the past. Resp. Br. at 48. However, the record shows Mr. Greystoke was convicted of a felony many years ago. RP 36. This Court should presume the State followed its requirements under the statute and collected Mr. Greystoke's DNA. Moreover, the State has access to its own database and can readily determine whether it previously extracted Mr.

Greystoke's DNA. At a minimum, Mr. Greystoke's case should be remanded so the trial court can make this determination before imposing the \$100 fee.

Finally, the State offers no response to Mr. Greystoke's argument the LFOs should be struck from his judgment and sentence under RCW 9.94A.777 because Mr. Greystoke's mental illness is well documented. Op. Br. at 44. For all of the reasons stated above and in Mr. Greystoke's opening brief, this Court should strike the LFOs from Mr. Greystoke's judgment and sentence.

B. CONCLUSION

This Court should reverse because John Greystoke was denied his constitutional right to present his defense, represent himself, and have a fair trial. Reversal is also required because the trial court wrongly denied Mr. Greystoke's request for a second degree assault instruction, unconstitutionally commented on the evidence, and sentenced Mr. Greystoke to an enhancement not alleged in the information.

DATED this 8th day of March, 2019.

Respectfully submitted,



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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	NO. 51049-9-II
)	
JOHN GREYSTOKE,)	
)	
Appellant.)	

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