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Division II
State of Washington
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NO. 51633-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

JACOB LEE,

Appellant.

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

The Honorable Phillip K. Sorensen, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. THE EVIDENCE FAILS TO SUPPORT THE STATE'S CLAIM THAT LEE'S STATEMENTS WERE NOT INVOLUNTARY.

The State's response brief focuses on what it claims is evidence that Lee's statements to police were, despite his undisputed severe injuries and intoxication, voluntary. These arguments should be rejected. This court should hold that the record fails to support a finding of voluntariness and reverse Lee's conviction.

The State begins by arguing that intoxication alone does not render necessarily render a statement involuntary. Brief of Respondent at 11. This is a straw man because Lee's argument does not rest on intoxication alone. The record shows Lee was not only intoxicated but also severely injured.

The first person to encounter Lee after the accident described him as "hunched and staggering" on the shoulder of the highway. 1RP 412-13. He described Lee as confused or in shock. 1RP 418-19. He wrote in his statement that Lee did not know where he was. 1RP 429. He also had a bone sticking out of his arm. 1RP 416.

Deputy Tulloch, who is trained as an EMT, testified Lee had "bright red blood spurting out of his arm." 1RP 73. To Tulloch, the spurting indicated an "arterial bleed, which is coming from the heart." 1RP 74-75. With this type of injury, he testified, a person could bleed to death in

minutes. 1RP 75. Lee was already standing in a large pool of his own blood. 1RP 75-76. Tulloch testified, "I knew if I did not stop that bleeding, there was a good chance he was going to bleed out." 1RP 88.

Tulloch testified that both blood loss and intoxication can cause confusion. 1RP 90. Tulloch testified Lee was confused. 1RP 80. He did not know whether his buddy was with him or which direction he had been travelling. 1RP 80. In light of this testimony, this Court should reject the State's argument that Lee was capable of making a rational choice merely because he was able to correctly answer his own name and date of birth, along with his friend's first name and the street he lived on. Brief of Respondent at 14.

This case is distinguishable from State v. Butler, 165 Wn. App. 820, 269 P.3d 315 (2012), cited by the State. Brief of Respondent at 12. The defendant in Butler was interviewed in the hospital several days after his gunshot wounds. Additionally, there was strong evidence that Butler was mentally capable of exercising his rational decision-making capacity. His attending nurse believed he was well enough to speak to the detective. 165 Wn. App. at 828. He had, that same day provided informed consent to a surgical medical procedure. Id. at 825.

None of this is true for Lee. Lee was not questioned after several days of medical care. Robertson questioned Lee less than an hour after his

accident at the side of the road. 1RP 146, 168. Before Tulloch applied a tourniquet, Lee had been only minutes away from bleeding to death. 1RP 75. His arm was nearly severed from his body. 1RP 96. And he was severely intoxicated. Three hours later, at the hospital, Lee's blood alcohol level was still above the legal limit for driving, .09 grams per 100 milliliters and tests also showed he had ingested methamphetamine. 1 RP 338, 342.

The State also argues Lee was capable of making a rational decision about whether to speak to law enforcement because he was able to stagger into the road and call his mother. Brief of Respondent at 12. The ability to stagger into the road does not implicate rational mental faculties. And given the ease of dialing a phone with current technology, this argument holds no water. A phone call to one's mother does not require, as it once did, recalling and dialing a 10-digit sequence of numbers. It may be as achieved by simply saying the words, "Siri, call mom." The ability to place a phone call to one's mother does not indicate the ability to access one's rational decision-making faculties.

The State also argues Lee's statements were not the product of interrogation because Trooper Robertson was obligated to inquire into the accident in order to fulfill his duty to write an accident collision traffic report. Brief of Respondent at 14. This argument should be rejected. In questioning a suspect, a police officer is nearly always fulfilling the

obligations and duties required of him as a law enforcement officer. That fact has no rational bearing on whether the questioning is state action that implicates the Fifth Amendment, or whether the questioning was coercive under the circumstances.

The State makes much of the fact that a separate hearing on voluntariness is not necessarily required in bench trials. Brief of Respondent at 10, 19, 22. As the State correctly notes, this is because a trial judge is presumed able to determine whether the statement is voluntary or involuntary and, if involuntary, exclude that statement from its decision-making process. Brief of Respondent at 19, 22. But that argument is of no moment in a case like this one, where the court did, in fact admit the statements at issue. 1RP 129; CP 66-68. Because the court ruled the statements admissible, the court would have had no reason to exclude them from its decision-making process. And, in fact, the findings of fact show that the court did rely on Lee's statements in arriving at the judgment in this case. CP 73-74; 1RP 732.

The evidence in this case shows Lee was not capable of making a rational decision as to whether to speak with law enforcement. Under the circumstances of his extreme intoxication and injury, the officer's questioning was coercive and violated his right to be free from coerced self-incrimination. State v. Rupe, 101 Wn.2d 664, 679, 683 P.2d 571 (1984).

This error was not harmless. Constitutional error requires reversal unless it is harmless beyond a reasonable doubt. State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). The error requires reversal unless the State can prove beyond a reasonable doubt that the error did not contribute to the verdict. State v. Berube, 150 Wn.2d 498, 505, 79 P.3d 1144 (2003). Because the court expressly relied on Lee's statements, it cannot be shown that those statements did not contribute to the verdict. CP 73-74; 1RP 732.

2. THE COMMUNITY CUSTODY CONDITION PROHIBITING CONTACT WITH SURVIVING FAMILY MEMBERS IS UNCONSTITUTIONALLY VAGUE.

The State argues the community custody condition, which prohibits contact with "surviving family members" is not unconstitutionally vague because the prosecutor's argument at the sentencing hearing made clear to Lee whose family was intended. Brief of Respondent at 30. Even if Lee could be charged with knowing the State intended only to prohibit contact with Grice's family based on the argument, the same cannot be said for the Department of Corrections. The condition, as written, leaves Lee open to arbitrary and selective enforcement.

The State also argues even distant relatives may be so impacted by the death of Christopher Grice that they must be protected from contact with Lee. Brief of Respondent at 31. The State argues it is impossible to say how distant a relative must be before that impact does not exist. Id. But even

assuming even distant relatives need to be protected, this condition fails to limit its reach to those persons Lee knows to belong to Grice's family.

This is not a case like In re Pers. Restraint of Brettell, 6 Wn.App.2d 161, 430 P.3d 677 (2018), in which the condition prohibited contact with "known" drug users or sellers. The court there held it was clearly understand that "known" meant known to the defendant. Id. at 169. By contrast, here, the condition does not require that Lee, or anyone, be aware that the person is related, however distantly to the deceased. This chills Lee's freedom of association.

Finally, the State argues this condition is not vague because Lee must serve a 280-month prison term before being release on his community custody conditions. Brief of Respondent at 32. Unconstitutionally vague conditions may be challenged at the time of imposition. State v. Bahl, 164 Wn.2d 739, 751-52, 193 P.3d 678 (2008). The State cites no authority for its argument that the length of the prison term should have any bearing on the constitutionality of the condition imposed.

The vagueness doctrine is designed to protect against arbitrary and selective enforcement. State v. Halstien, 122 Wn.2d 109, 116-17, 857 P.2d 270 (1993). It is vague if it does not provide ascertainable standards of guilt. Bahl, 164 Wn.2d at 752-53. This condition does not limit the Department's

ability to sanction Lee for contact with virtually any human on earth. It is unconstitutionally vague and should be stricken.

B. CONCLUSION

For the foregoing reasons, and for the reasons stated in the opening Brief of Appellant, Lee requests this Court reverse his conviction and strike the unconstitutional condition of his community custody.

DATED this 1st day of March, 2019.

Respectfully submitted,

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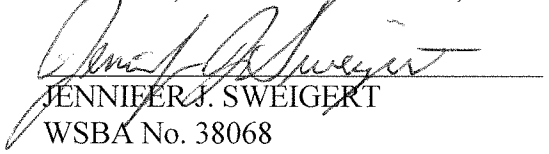

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