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NO. 51746-9-II

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

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER KEFFELER,

Appellant.

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

The Honorable Amber L. Finlay, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Counsel's failure to object to evidence of Keffeler's prior assault conviction and statements about killing police officers and his stepmother was ineffective.

2. The community custody condition that prohibits Keffeler from associating with known drug users or sellers is unconstitutionally vague.

Issues Pertaining to Assignments of Error

1. Was it ineffective for counsel to fail to object to introduction of evidence regarding Keffeler's prior conviction for assault and statements about wanting to kill police officers and wanting to kill his stepmother?

2. Is the community custody condition that prohibits Keffeler from "associat[ing] with any known drug users or sellers" unconstitutionally vague?

B. STATEMENT OF THE CASE

Christopher Keffeler was charged with one count of Felony Harassment – Domestic Violence. CP 14-15.

Keffeler and his finance, Melinda Hulin, shared a home in Grapeview, Washington. RP 27. Hulin was aware that Keffeler suffered from mental illness. RP 39. However, when Keffeler was

not experiencing acute symptoms they had a "good relationship." RP 40.

On August 5, 2017, Hulin and a friend were making breakfast, and Hulin was talking with Keffeler. RP 31. As she was talking with him "his voice changed, his face changed, and he said you know who it is," and he told her he was Satan and was trying to call out two entities that he said were inside Hulin holding her hostage. RP 31. He told the entities to leave her body and that if they weren't gone by midnight, he would kill them. RP 31. Hulin testified that he then told her, as Christopher, not Satan, that they would be okay because together they would jump into another universe. RP 31-32.

The friend who was present overheard what Keffeler said and suggested that Hulin take her shopping, which she agreed to do, and they left. RP 29. Hulin called the mental health crisis hotline and was only able to leave a message. RP 29. The mental health crisis hotline returned her call later that night and told her she should call 911. RP 29. She called 911 and met a police officer down the road from the friend's house, where she was staying in order to avoid Keffeler. RP 30. Officers arrived and took Keffeler to the hospital for a mental health evaluation, which was ultimately not completed, and then to the Mason County jail. RP 15-16.

Hulin also recounted to the jury an incident from August 4, 2017 when Keffeler, who had never previously been physical with Hulin, made a fist like he was going to hit her and told her to take off her clothes and lay face down on the deck. RP 34. While she was laying on the deck, he was sitting in front of her with a knife, a rope, and a leash, and he told her that he could filet her and the neighbors would come feed on her. RP 34. He then made her "pray to him as God for forgiveness." RP 34. Hulin testified that he then told her "as Christopher" to get up and put her clothes on and come in the house where it was safe and they could talk. RP 34.

At trial, the defense called a forensic psychologist – Dr. Brett Trowbridge – who testified that because of his mental illness, Keffeler's ability to form the requisite knowledge for the charged crime was significantly diminished.[1] RP 51, 56-57. The State also called an expert witness – Dr. Roman Lokhmotov – who opined that, despite his mental illness, Keffeler was able to form the intent to commit the crime of harassment. RP 77-78.

During the State's cross examination of Dr. Trowbridge, the prosecutor asked about Keffeler's prior conviction for assault in the fourth degree. RP 60. He was also asked about an incident in

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[1] The felony harassment charge required proof that Keffeler knowingly threatened to kill Hulin. RP 97-99; RCW 9A.46.020(1)-(2).

Keffeler's history where Keffeler talked about killing police and an incident where he talked about wanting to kill his stepmother. RP 60-62. Defense counsel failed to object to the questions or answers about those prior incidents. RP 60-62.

The State asked jurors to find that Keffeler acted with the requisite knowledge. RP 105-108, 117-118. The defense argued that Keffeler lacked the capacity to form that intent. RP 109-115.

The jury found Keffeler guilty, and the court imposed a First Offender Waiver and 90 days in jail. CP 45-46, 51. The court also imposed community custody, which included the following condition: "The defendant shall not associate with any known drug users or sellers, except in the context of a chemical dependency treatment program approved by the CCO." CP 60.

Keffeler filed a timely notice of appeal. CP 66.

C. ARGUMENT

1. FAILING TO OBJECT TO TESTIMONY ABOUT KEFFELER'S PRIOR ASSAULT CONVICTION AND STATEMENTS ABOUT KILLING OTHERS WAS INEFFECTIVE.

Article I, section 22 of the Washington Constitution and the Sixth Amendment to the United States Constitution assure criminal defendants the right to effective assistance of counsel. U.S. CONST.

amend. VI,; WASH. CONST. art. I, § 22; State v. Thomas, 109 Wn.2d 222, 225, 743 P.2d 816 (1987). Representation is not effective if an attorney's performance is deficient and the deficiency prejudices the defense. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Performance is deficient if counsel' s errors were serious enough that counsel failed to function as guaranteed by the Sixth Amendment. State v. Thomas, 109 Wn.2d at 225-26. "Trial conduct that can be characterized as legitimate trial strategy or tactics cannot form the basis for a claim of ineffective assistance of counsel." State v. Rockl, 130 Wn. App. 293, 299, 122 P.3d 759 (2005) (citing State v. McNeal, 145 Wn.2d 352, 362, 37 P.3d 280 (2002)). Counsel's deficiency prejudices the defense if "there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." In re Davis, 152 Wn.2d 647, 673, 101 P.3d 1 (2004).

Under ER 404, "[e]vidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion." ER 404(a). Prior acts of a defendant can be introduced for purposes besides proving that they acted in conformity with their prior bad behavior such as "proof of motive, opportunity, intent, preparation, plan, knowledge, identity,

or absence of mistake or accident." ER 404(b). Even if evidence is admissible under ER 404(b), it must still be relevant and "its probative value must outweigh the danger of unfair prejudice." State v. Acosta, 123 Wn. App. 424, 434, 98 P.3d 503 (2004).

In Acosta, the court held that testimony about defendant's prior convictions and arrests, where the defendant asserted diminished capacity, should not have been admitted because it did not "suggest[ ] his state of mind at the time of the current offense." Id. at 434. The defendant in Acosta was charged with first degree robbery, second degree theft, taking a motor vehicle without permission, and possession of methamphetamine. Id. at 428. He raised the defense of diminished capacity. Id. Over defense objections, the state's expert read a list of defendant's prior arrests and convictions. Id. at 429. The court found that the admission of the arrests was not probative of the defendant's state of mind at the time of the charged offense because they were unproved allegations and there was "no way to evaluate whether the underlying act, or the intent behind the act, ever occurred." Id. at 434. The court also held that admission of Acosta's prior convictions was improper because there was "no logical theory to show how [his] prior acts are relevant to his intent to commit the current offenses." Id. at 435.

In this case, the defendant's expert, Dr. Trowbridge, was asked about one prior conviction that the defendant had and two prior incidents where he made statements about himself or entities within him wanting to kill people. RP 60-63. No objections were made to the questions or answers.

The first prior bad act was Keffeler's assault conviction. RP 60. Prior to being asked about Keffeler's prior conviction, Dr. Trowbridge was asked if it was "relevant whether or not a person has been convicted of crimes involving assault when you're looking at diminished capacity defense." RP 60. He replied that he did not think it was relevant, although he did admit to looking at prior criminal history. RP 60. He was not asked how his knowledge of the prior conviction affected his conclusion that Keffeler's mental illness caused him to have diminished capacity to form intent to commit felony harassment.

Testimony about the second bad act consisted of a question by the State about anything in Keffeler's history that "discusses his attitude toward and threats toward police officers," RP 60, and Dr. Trowbridge reading the following passage regarding a prior arrest of Keffeler's from a prior medical report:

> He's been in police custody for three days. He has a new person in his body named Jeff that has been telling him to get the police agitated to the point the[y] would attack him and try to kill him, then Jeff would come out, changing into the form of The Hulk, but in fire form, and he would kill all the police, very calm and matter of fact telling his story.

RP 61-62. Dr. Trowbridge was not asked how this prior statement was relevant to his determination that Keffler had diminished capacity to form the intent necessary to commit felony harassment.

The last bad act admitted was testimony by Dr. Trowbridge in response to a question about whether he recalled anything in Keffeler's criminal history having to do with thoughts about killing his stepmother. RP 62. He replied that he did recall that and that "[a]t one point he was even hospitalized because he was feeling like killing her." RP 62.

Like the prior arrests and convictions in Acosta, the fact that Keffeler had a prior conviction for assault had no relevance to the question of whether he could form the intent to commit felony harassment. The mere existence of a prior conviction, without any reference to the circumstances surrounding the crime, does not aid the fact finder in determining what Keffeler's mental capabilities were at the time of his interaction with Hulin.

Similarly, the testimony about Keffeler's prior statement about killing police officers and feeling like killing his stepmother had no relevance to the question of whether he could form the intent to commit felony harassment. There was no explanation given about his ability to form intent in either of those occasions and no discussion about how those situations were either similar or dissimilar to what happened in this case.

Neither Dr. Trowbridge or the State's expert, Dr. Lokhmotov, relied on any of the prior bad acts in forming their conclusions. Dr. Trowbridge specifically testified that he did not believe that a prior conviction for assault was relevant to the question of diminished capacity. RP 60. Dr. Trowbridge was not asked, nor did he explain, whether Keffeler's statements about killing police officers or wanting to kill his stepmother was relevant to his determination about diminished capacity. RP 60-65.

Not only was this prior bad acts evidence irrelevant, it was highly prejudicial. Jurors were faced with the question of whether they believed that Keffeler could form the intent to commit the crime of harassment. Hearing that he was previously convicted of assault, had once talked about killing police officers, and had thoughts about killing his stepmother suggested to the jury that because he

previously committed these bad acts, he knowingly committed the current charged act.

Because the testimony about Keffeler's prior bad acts was not relevant to whether he could form intent to commit felony harassment and because it was unduly prejudicial, it should not have been allowed. Yet, counsel failed to object to this obviously damaging evidence. RP 60-63. Both experts agreed that Keffeler suffered from mental illness. RP 54, 75. Therefore, the testimony was not necessary to prove that he was mentally ill. Nor was it necessary to show whether he had the capacity to form intent at the time he made statements to Hulin because there was no comparison of his mental states at the time of the prior acts to his mental state at the time of the alleged offense.

Allowing testimony about Keffeler's prior bad acts cannot be characterized as legitimate trial strategy because there are no circumstances where the testimony could be considered favorable to Keffeler's defense. Without information about Keffeler committing a crime previously or information about his prior violent thoughts, it is likely the jury would have reached a different verdict because there was evidence that Hulin believed he was having a mental health crisis, as evidenced by her call to the mental health hotline, and

because Keffeler's expert opined that Keffeler's ability to form the requisite intent was greatly diminished at the time.

Reversal is appropriate.

2. THE COMMUNITY CUSTODY CONDITION DIRECTING KEFFELER NOT TO ASSOCIATE WITH KNOWN DRUG USERS OR SELLERS IS UNCONSTITUTIONALLY VAGUE

As a condition of community custody, the trial court ordered Keffeler not to "associate with known drug users or sellers." CP 60. The condition is unconstitutionally vague because is insufficiently definite to apprise him of prohibited conduct and permits arbitrary enforcement on the part of the Department of Corrections.

The due process vagueness doctrine requires the State to provide citizens fair warning of proscribed conduct. State v. Bahl, 164 Wn.2d 739, 752, 193 P.3d 678 (2008). It also protects against arbitrary, ad hoc, or discriminatory enforcement. State v. Halstien, 122 Wn.2d 109, 116-17, 857 P.2d 270 (1993). A prohibition is therefore void for vagueness if it does not (1) define the offense with sufficient definiteness such that ordinary people can understand what conduct is proscribed or (2) does not provide ascertainable standards of guilt to protect against arbitrary enforcement. Bahl, 164 Wn.2d at 752-53.

There is no presumption in favor of the constitutionality of a community custody condition. State v. Sanchez Valencia, 169 Wn.2d 782, 792-93, 239 P.3d 1059 (2010). Community custody conditions are subject to reversal when they are manifestly unreasonable. Id. at 791-92. The imposition of an unconstitutionally vague condition is ipso facto manifestly unreasonable. Id. at 792.

In Bahl, the trial court imposed the condition, "Do not possess or access pornographic materials, as directed by the supervising Community Corrections Officer." 164 Wn.2d at 743. This was unconstitutionally vague. Id. at 753. "The fact that the condition provides that Bahl's community corrections officer can direct what falls within the condition only makes the vagueness problem more apparent, since it virtually acknowledges that on its face it does not provide ascertainable standards for enforcement." Id.

In Sanchez Valencia, the challenged condition stated the defendant "shall not possess or use any paraphernalia that can be used for the ingestion or processing of controlled substances or that can be used to facilitate the sale or transfer of controlled substances including scales, pagers, police scanners, and hand held electronic scheduling an data storage devices." 169 Wn.2d at 785. The

supreme court held the condition failed under both prongs of the vagueness test.

First, the term "paraphernalia," without specifying *drug* paraphernalia, was so broad that it failed "to provide the petitioners with fair notice of what they can and cannot do." Id. at 794. Second, the condition "might potentially encompass a wide range of everyday items," like sandwich bags or paper, depending on the particular CCO's whim. Id. "A condition that leaves so much to the discretion of individual community corrections officers is unconstitutionally vague." Id. at 795.

In State v. Irwin, the trial court ordered Irwin, "Do not frequent areas where minor children are known to congregate, as defined by the supervising CCO." 191 Wn. App. 644, 652, 364 P.3d 830 (2015). The court held, "Without some clarifying language or an illustrative list of prohibited locations . . . the condition does not give ordinary people sufficient notice to 'understand what conduct is proscribed.'" Id. at 655 (quoting Bahl, 164 Wn.2d at 753). The Irwin court acknowledged that once the CCO set specific locations, Irwin would have sufficient notice of what conduct is proscribed. Id. However, this "would leave the condition vulnerable to arbitrary enforcement." Id. Therefore, the condition failed both prongs of the vagueness test. Id.

Similarly, in City of Spokane v. Neff, a city ordinance stated that one of the factors to be considered when determining whether a person "commits prostitution" is whether "the subject is a known prostitute." 152 Wn.2d 85, 87, 93 P.3d 158 (2004). The court pointed out that the ordinance "does not limit police discretion in any way when it comes to determination of who is a 'known prostitute.'" Id. at 90. Because the term "known prostitute" could include someone with a past prostitution conviction, a recent prostitution conviction, or even a person who is in an area where prostitution occurs, the court found that "[t]he ordinance invites an inordinate amount of police discretion due to the lack of guidelines" and found the ordinance unconstitutionally vague. Id. at 91.

Under the first vagueness prong, the community custody condition requiring Keffeler not to associate with "known drug users or sellers" does not provide sufficient definiteness such that Keffeler would know with whom he may or may not associate. The word "known" in the condition is too vague because it does not specify *who* must know that a particular person is a user or seller of illegal substances. Must a person be known to Keffeler as such? Known to the CCO? Known to law enforcement generally? All possibilities could qualify as "known" users or sellers under the language of the

condition. Because it does not specify who or what must know a person is a user or seller of illegal drugs, the condition fails to provide sufficient notice of what is proscribed.

In addition, the condition prohibiting association with "known" users or sellers does not contain any temporal limitation. It could qualify as a violation of the condition to associate with a person who is known to have used or sold drugs decades ago but who has not used or sold drugs since. Indeed, under the language of the condition, it could constitute a violation to associate with any person who has ever used or sold a drug, even only once. Because it contains no temporal limitation, ordinary persons would not be able to distinguish with the requisite definiteness with whom they are permitted to associate.

This extremely broad prohibition on association with others implicates the First Amendment. "[W]hen a statute or other legal standard, such as a condition of community placement, concerns material protected under the First Amendment, a vague standard can cause a chilling effect on the exercise of sensitive First Amendment freedoms." Bahl, 164 Wn.2d at 753. For this reason, a heightened level of clarity is demanded. Id. "[R]estrictions implicating [Keffeler's] First Amendment rights must be clear and must be reasonably

necessary to accomplish essential state needs and public order." Id. The broad and vague prohibition on association with anyone "known" to have ever used or sold drugs must be clarified so that it conforms with stricter First Amendment scrutiny.

Aside from the vagueness of the word "known," the condition is also intolerably vague because it prohibits association with users or sellers of "drugs." In the age of recreational marijuana, it does not provide fair notice to write conditions in terms of "drugs." In Washington, those over the age of 21 may legally possess up to an ounce of useable marijuana, 16 ounces of marijuana infused products (72 ounces of marijuana-infused product in liquid form), or up to seven grams of marijuana concentrates. RCW 69.50.360(3); RCW 69.50.4013(3); RCW 69.50.4014. Thus, in Washington, marijuana possession within these limits does not qualify as an illegal drug, although it is arguably a "drug." Under federal law, however, marijuana remains an illegal drug. 21 U.S.C. § 812 (listing "Marihuana" as a Schedule I drug); 21 U.S.C. § 844(a) (making unlawful for any person to knowingly or intentionally possess a schedule I drug). The challenged condition, employing the term "drugs," does not fairly notify Keffeler whether he is or is not permitted

to associate with those who use or sell (or have ever been a user or a seller) marijuana.

The condition also fails the second prong of the vagueness test because it gives rise to arbitrary enforcement. A creative CCO could interpret the condition in such a way that maximizes it, making Keffeler's contact with any person who is known to ever have used "drugs" a violation of the judgment and sentence. Where a condition leaves so much discretion to an individual CCO, it is unconstitutionally vague. Sanchez Valencia, 169 Wn.2d at 795. The condition prohibiting association with known drug users or sellers gives Keffeler's CCO almost unfettered discretion to define known drug users and to define "drugs" to include marijuana. Without additional language to clarify its parameters, this condition "does not provide ascertainable standards for enforcement." Bahl, 164 Wn.2d at 758.

This case is different from instances where defendants were prohibited from associating with gang members. See United States v. Soltero, 510 F.3d 858 (9th Cir. 2007), and United States v. Vega, 545 F.3d 743 (9th Cir. 2008). In those cases, the conditions specified a particular "criminal street gang," the defendant was prohibited from associating with. Vega, 545 F.3d at 749; Soltero, 510 F.3d at 866.

And the Soltero court pointed out that "criminal street gang" was a term of art with a specific federal statutory definition that otherwise cured any ambiguity in the condition. 510 F.3d at 866 & n.8. As the Soltero court indicated, "the district court is entitled to presume that Soltero—who has admitted to being a member of [the Delhi gang]—is familiar with the Delhi gang's members, its places of gathering, and its paraphernalia." Id. at 866; accord Vega, 545 U.S. at 749-50 ("Here too the district court was entitled to presume Vega was familiar with the Harpys street gang: there was ample undisputed evidence in the record that Vega had been a Harpys member since at least 1995.").

"[K]nown drug users or sellers" are very different than members of gangs. Obviously, drug users are not all part of some identifiable organization. There is no way that Keffeler or anyone else would be able to accurately identify drug users or sellers, thereby dispensing with the principal reason the Vega and Soltero courts determined the condition prohibiting association with "known members of a criminal street gang" was sufficiently clear. In addition, no statutory definition clarifies what "known drug users or sellers" means. In the absence of such considerations that were present in

Vega and Soltero, the community custody condition here is intolerably vague.

The condition prohibiting associating with "known drug users or sellers" is actually more akin to a condition stricken by the Soltero court that prohibited Soltero "from associating with 'any known member of any . . . . disruptive group.'" Soltero, 510 F.3d at 867 (alteration in original). The court indicated that the condition was so broad that it "could reasonably be interpreted to include not only a criminal gang, but also a labor union on strike, a throng of political protesters, or a group of sports fans celebrating after their team's championship victory." Id. This "substantial encroachment upon Soltero's First Amendment rights could not be tolerated: "'if conditions are drawn so broadly that they unnecessarily restrict otherwise lawful activities they are impermissible.'" Id. (quoting United State v. Terrigno, 838 F.2d 371, 374 (9th Cir. 1988)).

"Disruptive groups," which the Soltero court held to be overbroad and vague, is more narrowly and clearly drawn than the prohibition on all contact with "known users of drugs." Disruptive groups, after all, are still identifiable as groups of individuals. Nothing about the prohibition on contacts with known drug users or sellers

indicates how exactly such drug users or sellers would be known or even knowable.

In addition, the condition is drawn so broadly—potentially reaching every person who has ever used a drug in his or her lifetime, even once—that it unnecessarily restricts Keffeler's associations. The State cannot demonstrate how the condition is narrowly tailored to protect public safety when it prohibits Keffeler's association with any person who has ever used a drug. Adding to the problem, marijuana is not an illegal drug in Washington, compounding the vagueness of the condition prohibiting association with "known drug users or sellers."

This court recently suggested that a condition like the one at issue here was too vague, albeit in an unpublished decision. In State v. Brown, noted at 2 Wn. App. 2d 1054, 2018 WL 1275932, at *9-10 (Mar. 12, 2018),[2] review granted, 190 Wn.2d 1025 (2018), this court considered a community custody condition requiring Brown to avoid "drug areas" as determined by his CCO. This court struck the condition: "Leaving the definition of 'drug areas' open to the CCO's discretion deprives Brown of fair warning and allows for arbitrary

[2] Pursuant to GR 14.1, Keffeler cites this decision as persuasive, nonbinding authority.

enforcement . . . ." Id. at *10. This court reasoned, "Further, the trial court held that a recommended condition that Brown 'not associate with known drug users' was impermissibly vague. It is difficult to see how that condition is distinct from that challenged with regards to vagueness." Id. That court, thus, has seemingly agreed that the condition at issue here—prohibiting contact with all known users or sellers of illegal drugs—is unconstitutionally vague. This court should apply the reasoning in Brown to the condition prohibiting association with "known drug users or sellers" and strike it from Keffeler's judgment and sentence.

D. CONCLUSION

Testimony about Keffeler's prior assault conviction and his prior statements about killing police officers and wanting to kill his stepmother were inadmissible prior bad acts under ER 404(b). There was no strategic reason for not objecting to the testimony, and there is a reasonable probability that had the evidence not been admitted, the result would have been different. Therefore, counsel was ineffective and Keffeler's conviction should be reversed.

The condition prohibiting association with "known drug users or sellers" is unconstitutional because it fails to provide reasonable notice as to what conduct is prohibited and exposes Keffeler to

arbitrary enforcement. The condition therefore does not meet the requirements of due process and must be stricken from the judgment and sentence.

DATED this 28th day of September, 2018.

Respectfully submitted,

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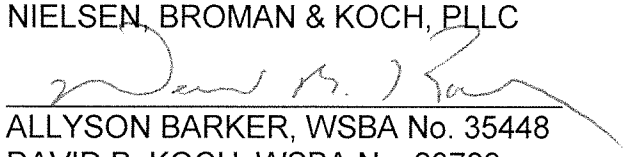

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