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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

ROSS WARNER KIDD,

Appellant.

On Appeal from the Pierce County Superior Court
Cause No. 17-1-03650-3
The Honorable Shelly Speir, Judge

OPENING BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

1. The trial court violated Ross Kidd's constitutionally protected right to present a defense and confront and cross-examine witnesses by excluding relevant evidence.
2. Ross Kidd's Judgment and Sentence contains cost provisions that are no longer authorized after enactment of House Bill 1783.

II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Was Ross Kidd denied his constitutional right to present evidence and cross-examine witnesses when the trial court excluded relevant evidence regarding a history of unwanted intrusions onto the victim's property and tampering with the lock on the victim's shed? (Assignment of Error 1)
2. Should Ross Kidd's case be remanded to the trial court to amend the Judgment and Sentence to strike cost provisions that are no longer authorized after enactment of House Bill 1783? (Assignment of Error 2)

III. STATEMENT OF THE CASE

A. SUBSTANTIVE FACTS

Jeffrey and Lauren Thomas live in Fife, in a neighborhood owned and occupied primarily by their extended family members.

(2RP 133 137-38; 3RP 179-80, 264)¹ They rent a house on property owned by their cousin, Carl Anderson. (2RP 134; 3RP 179, 226) Anderson lives in a different house on the property. (2RP 134; 3RP 226) A fence on the side of Anderson's property separates his property from property owned by another cousin, Carl Sterud. (2RP 146; 3RP 262; 4RP 357-58)

Lauren owns an undeveloped lot located behind Anderson's property.² (2RP 135; 3RP 179) The only way to access Lauren's property is through other parcels that are adjacent to the road. (2RP 135; 3RP 181) There are four structures located on Lauren's property that the Thomas family uses for storage. (2RP 135; 3RP 183-84) One of the structures is a wooden shed with a plastic tarp over the top. (2RP 139, 144; 3RP 183-84) This is where the Thomases keep yard maintenance equipment, including three gas-powered weed eaters. (2RP 141-42, 144; 3RP 183-84)

The Thomases' son, Sealth Thomas, does all of the yard maintenance for Lauren's property. (2RP 145; 3RP 194-95; 4RP 348, 349) Sealth is responsible for cutting the grass and trimming

¹ The pretrial and trial transcripts labeled Volumes I thru VII will be referred to by volume number (1RP-7RP). The remaining transcripts will be referred to by the date of the proceeding contained therein.

² Several parties in this case share the last name of Thomas. For the purpose of clarity, they will be referred to by their first names.

the bushes. (4RP 349) He uses the weed eaters that are stored in the wooden shed, and a ride-on mower that is stored behind the shed. (4RP 349-50, 351-52) He testified that he typically puts the weed eaters back into the shed when he is done with the yard work because he does not want them exposed to the elements. (4RP 371-72)

The door to the shed has a metal hasp that can be latched and secured with a padlock. (2RP 144; 4RP 360) But the Thomases lost the key to the padlock years ago so now Sealth secures the shed by closing the doors and placing the padlock on the latch in such a way that it looks locked. (4RP 360, 369)

Sealth cut the grass and trimmed the bushes on September 22, 2017. (4RP 354) He was at the property from about 4:00 PM until about 7:30 PM. (4RP 354) He used two weed eaters first, then he cut the grass with the ride-on mower. (4RP 355, 362, 370) Sealth testified that when he finished, he put the weed eaters back into the shed, closed and latched the door, and placed the padlock through the latch but did not lock it. (4RP 363)

Around 7:30 the next morning, Anderson noticed a man running across his yard from the direction of the Thomases sheds. (3RP 226, 227) The man was carrying two weed eaters. (3RP

226) Anderson yelled at the man to stop, but the man threw the weed eaters over the fence onto Sterud's property, then climbed over the fence himself. (3RP 227, 228, 229, 267)

Another neighbor called Lauren and told her about the trespasser, and Lauren called the police. (3RP 180) Tribal Police Officer Jeffrey Erdt responded and eventually located the man hiding in a tree next to the fence. (3RP 283, 284, 287-88) The officer ordered the man to come down. (3RP 288) The man jumped out of the tree but landed on the opposite side of the fence from where Officer Erdt stood. (3RP 289) The man then ran away. (3RP 289)

Anderson and Sterud, who had been watching this unfold, followed the man to try to catch him. (3RP 233-34, 271) Anderson encountered the man first, and told him to stop. (3RP 235) According to Anderson, the man threw rocks and gravel, some of which struck Anderson between the eyes. (3RP 235) Anderson testified that the man lunged at him, so he pushed the man to the ground, jumped on top of him, and placed him into a headlock. (3RP 236) The man struggled to get away, but Streud began hitting the man with a walking stick. (3RP 237, 274)

Officer Erdt eventually arrived in his patrol vehicle and took

the man into custody. (3RP 236, 275, 289, 291, 292) During a search incident to arrest, Officer Erdt found a wallet containing an identification card for Ross Kidd. (3RP 293) Officer Erdt also found a Ziplock baggie containing a small brown substance attached to the back of the identification card. (3RP 293) The item was later tested and determined to be heroin. (3RP 293-94; 4RP 386)

The weed eaters were found on the ground next to the fence on Sterud's property. (2RP 146; 3RP 267, 322) The doors of the shed were ajar. (3RP 184, 329-30) The padlock was open and hanging on the hasp. (3RP 330) Jeffrey and Lauren testified they did not know Kidd and had not given him permission to enter their property or take the weed eaters. (2RP 151; 3RP 197-98)

Kidd testified that he was low on gas and had to get to work in Bellevue, so he decided to walk the neighborhood and look for a gas can. (4RP 439, 440, 454) He saw the weed eaters propped against the outside wall of the shed, and thought he might be able to sell them and purchase gas. (4RP 441, 442, 458) Kidd acknowledged that he attempted to take the weed eaters, but denied ever entering the shed. (4RP 442, 451) He also acknowledged that he tried to run away from the officer, but denied throwing rocks at Anderson. (4RP 446, 448, 467) He testified that

he only rushed towards Anderson because he wanted to run past him and escape, and he only struggled against Anderson while he was on the ground because he was having trouble breathing due to Anderson's headlock. (4RP 447, 448)

B. PROCEDURAL HISTORY

The State charged Kidd with one count of first degree burglary, alleging that he entered the shed with the intent to commit a crime therein, and that in the process of flight he assaulted Anderson. (CP 9) The State also charged Kidd with one count of unlawful possession of a controlled substance, one count of obstructing a law enforcement officer, one count of fourth degree assault against Anderson, and one count of third degree theft. (CP 9-11)

The jury found Kidd guilty of unlawful possession of a controlled substance, obstruction, and third degree theft. (CP 81, 82, 84; 04/27/18 RP 5-6) The jury also found Kidd guilty of the lesser offense of second degree burglary, which did not require proof of an assault during the commission of the burglary. (CP 49, 56, 79, 80; 04/27/18 RP 5) The jury found Kidd not guilty of fourth degree assault. (CP 83; 04/27/18 RP 6)

The trial court imposed a standard range sentence totaling

60 months of confinement. (CP 93, 96, 103-04; 7RP 565-66) Kidd filed a timely notice of appeal. (CP 143)

IV. ARGUMENT & AUTHORITIES

A. THE TRIAL COURT'S REFUSAL TO ADMIT RELEVANT EVIDENCE VIOLATED KIDD'S RIGHT TO DUE PROCESS AND RIGHT TO A FAIR TRIAL.

Prior to trial, the State moved to preclude the defense from eliciting testimony that the Thomases suffered a history of unwanted intrusions and tampering with locks on the shed, arguing it constituted "other suspect" evidence and the defense had not met the criteria for its admission. (CP 28-33; 2RP 26-28) The defense explained the rationale for why this evidence was not "other suspect" evidence and was highly relevant to support Kidd's claim that the weed eaters were not inside the shed when he took them:

Here there's not going to be some assertion that someone other than Mr. Kidd was the person who was involved in this scuffle with Mr. Anderson. The only purpose for discussing whether or not other people had access to the shed or entered the shed is whether or not an entry was made. There's no other completed crime that Mr. Kidd is being accused of that he's saying someone else did. No one is going to be arguing that another person entered the shed, took these weed whackers, ran off and assaulted someone while fleeing from the scene. Here the argument is what is relevant is whether or not these weed whackers were outside of the shed.

...

There's not going to be an argument that

someone else entered the shed with the intent to commit a crime against persons or property therein and then fled and assaulted someone. We're simply going to be asking the jury to consider evidence that other people have had access to the shed; that there's statements by witnesses, Ms. Butler-Thomas herself, saying that they stopped locking the shed because the locks had been broken. Ms. Butler-Thomas also suspects that people have been sleeping in that shed. Mr. Anderson saying other people go into that back lot all the time, camp out. He's chased them off. And also Mr. Anderson's saying that people set up camp. And it's relevant to show whether or not these weed whackers were even in the shed.

(2RP 29-31) The trial court agreed with the State and excluded the line of inquiry on the basis that it was "other suspects" evidence.

(2RP 32, 34)

1. *Kidd was constitutionally entitled to present a defense which included admission of any relevant evidence which did not substantially prejudice the State.*

It is axiomatic that an accused person has the constitutional right to present a defense. U.S. Const. Amend. VI; Holmes v. South Carolina, 547 U.S. 319, 324, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006). The right to present evidence in one's defense is a fundamental element of due process of law. United States v. Whittington, 783 F.2d 1210, 1218 (5th Cir. 1986) (citing Washington v. Texas, 388 U.S. 14, 17-19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967)); State v. Ellis, 136 Wn.2d 498, 527, 963 P.2d 843 (1998).

This right includes, “at a minimum... the right to put before a jury evidence that might influence the determination of guilt.” Pennsylvania v. Ritchie, 480 U.S. 39, 56, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987); accord Washington, 388 U.S. at 19 (“The right to offer the testimony of witnesses... is in plain terms the right to present a defense, the right to present the defendant's version of the facts... [The accused] has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.”).

The Washington Constitution provides for a right to present material and relevant testimony. Art. I § 22; State v. Roberts, 80 Wn. App. 342, 350-51, 908 P.2d 892 (1996) (reversing conviction where defendant was unable to present relevant testimony). The defense bears the burden of proving materiality, relevance, and admissibility. Roberts, 80 Wn. App. at 350-51.

The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

Washington, 388 U.S. at 19.

The evidence sought to be admitted by the defendant need only be of “minimal relevance.” State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010). ER 401 provides that evidence is relevant if it makes a fact “of consequence to the determination of the action” more or less probable. “The threshold to admit relevant evidence is low, and even minimally relevant evidence is admissible.” State v. Gregory, 158 Wn.2d 759, 835, 147 P.3d 1201 (2006). To be relevant, the evidence need provide only “a piece of the puzzle.” Bell v. State, 147 Wn.2d 166, 182, 52 P.3d 503 (2002).

“[I]f [the evidence is] relevant, the burden is on the State to show the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial.” State v. Darden, 145 Wn.2d 612, 622, 41 P.3d 1189 (2002). The State’s interest in excluding prejudicial evidence must also “be balanced against the defendant’s need for the information sought,” and relevant information can be barred only “if the State’s interest outweighs the defendant’s need.” Darden, 145 Wn.2d at 622. “[T]he integrity of the truthfinding process and [a] defendant’s right to a fair trial” are important

considerations. State v. Hudlow, 99 Wn.2d 1, 14, 659 P.2d 514 (1983). For evidence of *high* probative value “it appears no state interest can be compelling enough to preclude its introduction consistent with the Sixth Amendment and Const. art. 1, § 22.” Hudlow, 99 Wn.2d at 16.

2. *Evidence that the Thomases had experienced numerous unwanted intrusions onto their property and tampering with the locks on the shed was relevant to a material issue at trial, not “other suspects” evidence, and should have been admitted.*

Testimony that the Thomases had experienced numerous unwanted intrusions onto their property over the years, and that the locks used to secure the shed had been tampered with repeatedly, was not “other suspects” evidence. Rather, this was relevant evidence that tested the State’s position that Kidd must have entered the shed in order to take possession of the weed eaters. It would have contradicted the impression from the State’s witnesses that the property was difficult to access and that the shed was always secured (2RP 135, 140, 149-50, 151; 3RP 207), and that the only way the weed eaters could have been outside the shed is if Kidd removed them. This was not “other suspects” evidence, as characterized by both the State and the trial court.

Washington permits a criminal defendant to present

evidence that another person committed the crime when he can establish “a train of facts or circumstances as tend clearly to point out someone besides the accused as the guilty party.” State v. Downs, 168 Wn. 664, 667, 13 P.2d 1 (1932); State v. Rehak, 67 Wn. App. 157, 162, 834 P.2d 651 (1992). That foundation requires a clear nexus between the person and the crime. State v. Condon, 72 Wn. App. 638, 647, 865 P.2d 521 (1993).

But a lesser foundational restriction applies to cases involving circumstantial proof of crime:

[I]f the prosecution’s case against the defendant is largely circumstantial, then the defendant may neutralize or overcome such evidence by presenting sufficient evidence of the same character tending to identify some other person as the perpetrator of the crime.

State v. Clark, 78 Wn. App. 471, 563, 898 P.2d 854 (1995). The State’s evidence against Kidd for the burglary charge, specifically whether he entered or remained in the shed, was circumstantial because no one observed Kidd enter or exit the shed.

In the classic “other suspects” case, the defendant blames the specific crime for which he has been charged on someone else. State v. Hawkins, 157 Wn. App. 739, 751, 238 P.3d 1226 (2010). That was not what happened in this case. The history of

trespassers on the Thomas property was not “other suspects” evidence but rather evidence that casted doubt upon the State’s entirely circumstantial case.

For example, in Hawkins, the defense wanted to present evidence that someone had “set him up” or “framed” him. 157 Wn. App. at 750-51. The trial court disallowed the testimony on the basis that it was “other suspects” evidence that did not meet the standard for admissibility. 157 Wn. App. at 750-51. The appellate court disagreed, finding that this was not “other suspect” evidence because Hawkins was not attempting to blame the specific crime on someone else. Therefore, the evidence “is not subject to the ‘other suspects’ foundation. Instead, the test for relevance applies[.]” 157 Wn. App. at 751.

Likewise, in this case, the defense wished to use the testimony not to claim that someone else committed the charged crimes, but simply to question the State’s theory that the weed eaters must have been securely stored in the shed on the morning of September 23. This is not “other suspect” evidence, and the trial court should have applied the traditional relevancy test for admissibility.

Evidence is admissible when it is relevant. ER 401.

Relevant evidence is any evidence that has a tendency to make the existence of a fact more or less probable. ER 401. To prove the burglary charge against Kidd, the State was required to prove that Kidd “enter[ed] or remain[ed] unlawfully in a building.” RCW 9A.52.020(1); RCW 9A.52.030(1).

Whether other people frequently trespassed on the property and tampered with the shed was relevant to Kidd’s defense that the weed eaters were already outside of the shed. The defense’s evidence was material to the question of whether Kidd was the only person who could have entered and removed the weed eaters from the shed.

In State v. Maupin, 128 Wn.2d 918, 928, 913 P.2d 808 (1996), the Supreme Court found that it was error to exclude testimony that would have shown that a kidnapped and murdered child was seen with another person after the time Maupin was accused of abducting and killing her. Maupin, 128 Wn.2d at 928. The Court found the evidence was contradictory to the State’s theory of events and thus material in determining if Maupin was the last person to be seen with the victim. 128 Wn.2d at 928.

Similarly, the evidence excluded by the trial court here was contradictory to the State’s theory of events. The property and

shed were difficult to access, according to the Thomases, and yet they were frequently accessed by unwanted persons. The shed was always secured, according to the Thomases, and yet the locks had been tampered with on several occasions.

A violation of the right to present a defense requires reversal of a guilty verdict unless the State proves that the error was harmless beyond a reasonable doubt. Ritchie, 480 U.S. at 58; Jones, 168 Wn.2d at 725. The State cannot meet its burden here. Once again, the State's burglary case against Kidd was based entirely on circumstantial evidence that Kidd entered the shed and removed the weed eaters. The proffered evidence would have cast serious doubt upon the theory that Kidd was the only person who could have removed the weed eaters because the property and shed were remote and secure. The error in barring this testimony was not harmless, and Kidd is entitled to reversal of his convictions.

B. KIDD'S JUDGMENT AND SENTENCE CONTAINS COST PROVISIONS THAT ARE NO LONGER AUTHORIZED AFTER ENACTMENT OF HOUSE BILL 1783.

Kidd was sentenced on May 4, 2018. The trial court imposed the then-mandatory \$500.00 crime victim assessment fee, \$100.00 DNA database collection fee, and \$200.00 criminal filing fee. (CP 94) The Judgment and Sentence also includes a

provision stating that “[t]he financial obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full[.]” (CP 95, 106) The trial court found that Kidd did not have the financial resources to pay discretionary fees or pay for his appeal, and signed an Order of Indigency. (RP7 567; CP 147-48)

Engrossed Second Substitute House Bill 1783, 65th Leg., Reg. Sess. (Wash. 2018) (House Bill 1783) amended the legal financial obligation (LFO) system in Washington State. As recently noted by our State Supreme Court:

House Bill 1783’s amendments modify Washington’s system of LFOs, addressing some of the worst facets of the system that prevent offenders from rebuilding their lives after conviction. For example, House Bill 1783 eliminates interest accrual on the nonrestitution portions of LFOs, it establishes that the DNA database fee is no longer mandatory if the offender’s DNA has been collected because of a prior conviction, and it provides that a court may not sanction an offender for failure to pay LFOs unless the failure to pay is willful. Laws of 2018, ch. 269, §§ 1, 18, 7. ... House Bill 1783 amends the discretionary LFO statute, former RCW 10.01.160, to prohibit courts from imposing discretionary costs on a defendant who is indigent at the time of sentencing. Laws of 2018, ch. 269, § 6(3). It also prohibits imposing the \$200 filing fee on indigent defendants. *Id.* § 17.

State v. Ramirez, ___ Wn.2d ___, 426 P.3d 714, 721-22 (2018).

House Bill 1783's amendments were effective as of June 7, 2018.

In Ramirez, the Court held that these amendments applied prospectively to Ramirez's case because it was still on appeal and his judgment was not yet final. 426 P.3d at 722. The Court remanded his case for the trial court to amend the Judgment and Sentence to strike the criminal filing fee and other improperly imposed LFOs. 426 P.3d at 723. Similarly, Kidd's case is on appeal and his judgment is not yet final, so House Bill 1783's amendments apply to his case.

The trial court imposed a \$200.00 criminal filing fee, which can no longer be imposed on indigent defendants. (CP 94) Kidd was found to be indigent. (RP7 567; CP 147-48)

The trial court imposed a \$100.00 DNA collection fee. (CP 94) But Kidd has previously been convicted of a felony, so DNA has previously been collected. (CP 92-03) See RCW 43.43.7541 (mandatory DNA fee upon felony conviction).

The Judgment and Sentence also states that interest shall begin accruing immediately. (CP 95, 106) But House Bill 1783 eliminates interest accrual on all non-restitution portions of LFOs.

Like Ramirez, Kidd was sentenced before House Bill 1783 became effective, and his case is still on direct appeal. Like

Ramirez, Kidd was subjected to LFOs that are no longer authorized under House Bill 1783. Kidd's case should be remanded to the trial court to amend the Judgment and Sentence so the improper fees and the interest accrual provision can be stricken.

V. CONCLUSION

That the property and shed were not as secure as claimed was relevant to support Kidd's testimony that the weed eaters were already outside the shed when he arrived, thus negating an essential element of burglary. The error in barring this testimony was not a harmless error, and Kidd is entitled to reversal of his convictions. Alternatively, Kidd is entitled to relief from the statutory changes of House Bill 1783, and his case should be remanded so the trial court can amend the Judgment and Sentence.

DATED: November 19, 2018



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CERTIFICATE OF MAILING

I certify that on 11/19/2018, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Ross Warner Kidd, DOC# 786972, Larch Corrections Center, 15314 N.E. Dole Valley Road, Yacolt, Washington 98675-9531.



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