FILED
Court of Appeals
Division II
State of Washington
1/21/2020 4:38 PM

NO. 52919-0-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL WEST,

Appellant.

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

APPELLANT'S REPLY BRIEF

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A. ARGUMENT.

1. It is well-settled that governmental mismanagement need not be done in bad faith to unfairly prejudice an accused person. The State's mismanagement unfairly prejudiced Mr. West.

The prosecution's brief focuses on irrelevant arguments while downplaying its mismanagement of the case.

It insists that "gamesmanship" was not the reason it changed the dates the alleged offense occurred on the eve of the trial date, six months after the charge was filed. Resp. Brief at 15. But the prosecution's purpose when mismanaging its case is irrelevant under CrR 8.3(b). The "*absence* of bad faith" is not an excuse for prejudicial mismanagement of a prosecution. *State v. Salgado-Mendoza*, 189 Wn.2d 420, 434, 403 P.3d 45 (2017) (emphasis in original).

Its brief woefully mispresents the egregiousness of the State's delays and its bungling of the investigation, as detailed in the Opening Brief. Most importantly, Mr. West was actually prejudiced by the prosecution's decision to fundamentally alter the time frame and the factual basis of its charge in September, six months after filing the charge against him. CP 3, 51-52. The

prejudice extends to the lack of critical discovery that upended Mr. West's ability to prepare without needing a continuance beyond the time for trial under CrR 3.3. CP 51-57. Mr. West waited in jail with little recourse other than blaming his lawyer for failing to secure him a timely trial, leading to a rift with counsel that caused him to begin trial without an attorney representing him.

Misconduct occurs when the prosecutor "inexcusably fails to act with due diligence," resulting in material facts not being disclosed "until shortly before a crucial stage in the litigation process." *Salgado-Mendoza*, 189 Wn.2d at 433. As explained in the Opening Brief, the State's mismanagement prejudiced Mr. West by impairing his right to a timely trial with a prepared attorney and with sufficient notice of the State's allegations to prepare a defense.

2. The court pressed Mr. West to waive his right to counsel without an adequate colloquy and then improperly restricted his ability to represent himself by intruding upon his relationship with stand-by counsel.

The court removed counsel from representing Mr. West by applying the wrong legal standard and the prosecution

misrepresents that standard on appeal. The court also improperly interfered with Mr. West's ability to litigate his case once he was pro se, intruding upon his confidential relationship with stand-by counsel. And finally, the court refused counsel a minor delay to prepare a defense after the court granted Mr. West his right to counsel.

These issues are addressed at length in Mr. West's opening brief. Here, Mr. West focuses on some of the errors in the prosecution's explanation of the legal error.

The prosecution encourages this Court to defer to the trial judge. But this deference only occurs when the court applied the correct legal standard. Courts must "indulge in every reasonable presumption against a defendant's waiver of his right to counsel before granting a defendant's request to waive the right to assistance of counsel." *State v. Curry*, 191 Wn.2d 475, 486, 423 P.3d 179 (2018) (internal quotations omitted). The court did not apply that standard here.

Mr. West's pro se request occurred because he was frustrated by his attorney's performance. He told the court, "I really don't" want to waive counsel, yet the court pressed

forward, encouraging the waiver of counsel. 11/2/18RP 2-3, 7. An accused person's frustration does not show an unequivocal request for self-representation. *Curry*, 191 Wn.2d at 488.

The court's colloquy proved Mr. West lacked basic knowledge of what would be required of him, further undermining the knowing intelligence of his waiver of counsel. Mr. West had not heard of the rules of evidence or trial court rules. 11/2/18RP 8-10. The court merely told him these rules existed, without any indication of how hard it might be to follow them. The court did not warn him of the difficulties untrained people encounter in following these rules and otherwise disregarded the critical component to warn Mr. West of the dangers and disadvantages in self-representation.

Rather than warn Mr. West about the disadvantages of self-representation, the court misled Mr. West about the one disadvantage he asked about. It assured Mr. West he retained his full right to appeal just like any other case, without mentioning there is a critical difference for a pro se litigant in the loss of the ability to claim ineffective representation of counsel. The likelihood that a pro se litigant will waive all

appellate issues is high yet the court downplayed the danger even though Mr. West was concerned about it.

At the time the court ruled Mr. West unequivocally waived counsel, it did not take the mandatory steps to ensure he unequivocally wanted to waive counsel and that he knowingly and intelligently understood the dangers and disadvantages of self-representation or the nature of the charges. 11/2/18RP 15.

Further, as discussed in the Opening Brief, the court interfered with Mr. West's communication with stand by counsel. Mr. West had a right to a privileged, confidential relationship with counsel. But the court dictated the content of their conversations. The court is not permitted to limit the topics and content of the conversations Mr. West had with his standby counsel. *State v. McDonald*, 143 Wn.2d 506, 512, 22 P.3d 791 (2001).

Finally, the court unfairly refused to allow counsel time to prepare once Mr. West realized it was too difficult to represent himself.

In sum, had the court conducted a valid colloquy, Mr. West would not have been so surprised by the dangers and

disadvantages of self-representation and would not have waived counsel. Once he did, the court made it impossible for Mr. West to succeed in self-representation or to have a prepared attorney.

3. The State's misuse of evidence and argument to insist Mr. West should be convicted because has the propensity to disregard the law undermined the fairness of the trial.

Uncharged misconduct is categorically inadmissible to indicate the accused person has a propensity for committing similar misconduct. *State v. Gresham,* 173 Wn.2d 405, 420, 269 P.3d 207 (2012). The prosecution used the warrant issued by the Department of Corrections for failing to comply with community custody conditions as substantive evidence Mr. West failed to comply with his legal obligation to register his address with the county sheriff. But community custody requirements rested on an entirely separate legal obligation, enforced and overseen by a different agency of the government. And yet the State used his failure to comply with this independent legal obligation to paint him as a person who disregards all obligations placed on him by the any government entity. This propensity evidence was erroneously admitted and its prejudicial effect tainted the jury.

On appeal, the prosecution concedes the trial court did not engage in the mandatory on-the-record analysis that has long been required before admitting ER 404(b) evidence. Resp. Brief at 35; *see State v. Gunderson*, 181 Wn.2d 916, 923, 337 P.3d 1090 (2014) (mandatory ER 404(b) "analysis must be conducted on the record"); *see also State v. Foxhoven,* 161 Wn.2d 168, 175, 163 P.3d 786 (2007) (same). This on-the-record analysis is essential because it ensures the court considers the mandatory criteria before admitting evidence that is likely to be highly prejudicial. *State v. Jackson*, 102 Wn.2d 689, 694, 689 P.2d 76 (1984) (emphasizing critical important of court enunciating reasons for admitting ER 404(b) evidence).

The prosecution insists the court's flawed analysis is "not fatal," claiming the record shows its reasons for admitting this uncharged misconduct. Resp. Brief at 35. But the record shows the prosecution misled the court about the evidence's probative value, the prosecution exceeded the scope of the court's ruling, the court's admissibility ruling was untenable, and the prosecution's thematic misuse of this evidence in its closing argument encouraged the jury to convict Mr. West for improper

reasons. Had the court actually balanced the purported probative value and prejudicial effect, no reasonable judge would have admitted evidence that Mr. West had a wholly unrelated warrant for failing to comply with a different legal obligation.

As explained in the Opening Brief, the defense warned the court that CCO Montague did not play any role in supervising Mr. West's registration requirements. 2RP 284. The prosecution incorrectly insists here, as it did in the trial court, that Mr. Montague explained Mr. West's registration obligation to him. Resp. Brief at 32, 34. But CCO Montague testified to the contrary, as the defense forewarned. Mr. Montague insisted he did not supervise Mr. West's registration obligation and he did not talk to Mr. West about it other than in the general sense that he would have told Mr. West to obey all laws. 2RP 310. Mr. West's community custody had no bearing on his knowledge of his registration obligation, as CCO Montague testified, undermining the premise for admitting this evidence under ER 404(b).

The Response Brief does not address the other misleading reason the prosecution posited to admit this evidence – that it was an element of the criminal history that must be proven to the jury. As Mr. West explained in his Opening Brief, community custody is not a fact proven to the jury, contrary to the prosecution's claim of relevance for this purpose. Opening Brief at 38-39.

It was untenable for the court to admit Mr. West's unrelated warrant and it prejudicial effect exceeded any possible probative value.

The prejudicial effect of this improperly evidence was cemented by the prosecution in its closing argument. The prosecution contended Mr. West's community custody warrant proved he was "off the grid" and "in the wind," and he must have similarly disregarded his registration obligation. 4RP 581, 603, 604. The prosecution's unmistakable efforts to persuade the jury to convict Mr. West for failing to register because of his community custody warrant demonstrates the State's belief that it otherwise did not otherwise have compelling evidence of Mr. West's knowing failure to register. Mr. West presented evidence

that he did register. The case against him was not overwhelming and the State's reliance on the improper propensity inference to convince the jury to convict undermines the fairness of the trial.

B. CONCLUSION.

For the reasons explained above and as detailed in Appellant's Opening Brief, this Court should reverse Mr. West's conviction and order further relief as appropriate to the case and in the interest of justice.

DATED this 21st day of January 2020.

Respectfully submitted,

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Attorneys for Appellant

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 52919-0-II
v.	)	
	)	
MICHAEL WEST,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 21ST DAY OF JANUARY, 2020, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION TWO** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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[X] MICHAEL WEST (ADDRESS OF RECORD) ON FILE WITH OUR OFFICE)	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 21ST DAY OF JANUARY, 2020.

X_____

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WASHINGTON APPELLATE PROJECT

January 21, 2020 - 4:38 PM

Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	52919-0
Appellate Court Case Title:	State of Washington, Respondent v Michael Rene West, Appellant
Superior Court Case Number:	18-1-01122-3

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