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NO. 34172-1-III

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

STATE OF WASHINGTON,

Respondent,

v.

COREY PUGH A/K/A COREY WILLIAMS,

Appellant.

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

The Honorable Alexander Ekstrom, Bruce Spanner, Robert Swisher,
Jacqueline Shea-Brown, & Vic Vanderschoor, Judges

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. IT IS THE STATE'S BURDEN ALONE TO PROVE PUGH ACTED WRONGFULLY OR UNDER COLOR OR AID OF DECEPTION, WHICH IT FAILED TO DO AT PUGH'S TRIAL

The State presented no evidence that Pugh obtained the rental vehicle wrongfully or by color or aid of deception, which are alternative essential elements of the crime of theft of a motor vehicle. See Br. of Appellant at 10-15. The State acknowledged that it had presented no evidence of the falsity of Pugh's lien or UCC Financing Statement. 4RP 305. Without evidence that Pugh's lien was false, the State could not have possibly carried its due process burden of proving that Pugh wrongfully obtained the vehicle or that Pugh obtained the vehicle by color or aid of deception.

The State now suggests that the jury could have viewed the financing statement as a "ridiculous attempt by [Pugh] to excuse his theft of the rental car." Br. of Resp't at 6. The State does not explain how this is so when it offered no proof that the financing statement and lien was anything other than a duly valid and binding legal document. The State must secure its convictions with actual proof, not baseless assumption or conjecture. State v. Vasquez, 178 Wn.2d 1, 16, 309 P.3d 318 (2013) (holding that elements of offense must be "established by competent evidence, aided only by such inferences as might logically be derived from the facts proved, and should not be the subject

of mere surmise or arbitrary assumption.” (quoting Bailey v. Alabama, 219 U.S. 219, 232, 31 S. Ct. 145, 55 L. Ed. 191 (1911)).

The State also claims that, even if valid, the financing statement “would not give the defendant ownership of the vehicle. It would only mean that the defendant has a collateral interest in the vehicle.” Br. of Resp’t at 7. Even assuming this is correct, the jury was not instructed about the ins and outs of financing statements or about what ownership or possessory interests they convey. Nor was any evidence presented to the jury that would illuminate the legal consequences, rights, or obligations (or lack thereof) arising from the filing of a financing statement or lien. The State’s argument merely highlights its complete lack of proof that Pugh’s lien and financing statement were invalid in any way. Because the State did not prove Pugh obtained the vehicle wrongfully or by color or aid of deception, this court must reverse his theft of a motor vehicle conviction and remand with instructions to dismiss this charge with prejudice.

2. THE PROSECUTOR IS NOT PERMITTED TO COMMENT ON SILENCE OR SUGGEST THE DEFENSE HAS A BURDEN TO PRESENT EVIDENCE

When the prosecutor asserted, “we didn’t hear any testimony about how he came to be owed a billion dollars between September 29th and October 4th when this filing was made,” she intended to and did shift the burden of proving one of the essential elements of theft—that Pugh obtained

the vehicle wrongfully or by color or aid of deception. This argument was improper because it assigned to Pugh the burden of disproving an element that the State bears the burden of proving.

The State relies on State v. Jackson, 150 Wn. App. 877, 209 P.3d 553 (2009), to assert that prosecutors are permitted to comment on the defense's failure to present evidence. Br. of Resp't at 11-12. But, in Jackson, the court acknowledged it was misconduct for a prosecutor to mention "in closing argument that the defense did not present witnesses or explain the factual basis of the charges or if he states that the jury should find the defendant guilty simply because he did not present evidence to support his defense theory." 150 Wn. App. at 885. This misconduct is precisely what happened here. See Br. of Appellant at 15-18. The Jackson court would have found misconduct in this case and thus undermines the State's position.

Unlike this case, the prosecutor in Jackson was attacking the credibility of a defense witness and the persuasiveness of defense evidence in a case where the defense actually presented witnesses and evidence of its own.

[The prosecutor] explained that the jury was the sole judge of credibility and outlined numerous reasons why it should find the State's witnesses more credible than Jackson's witnesses, Greene. He mentioned, for instance, that Green was in a romantic relationship with Jackson, she admitted she was drinking alcohol on the night of the alleged crime, and the events to which she testified seemed very unusual and did not make sense. The prosecutor also mentioned that no evidence corroborated Greene's testimony, while four police officers

corroborated each other's testimony. There mere mention that defense evidence is lacking does not constitute prosecutorial misconduct or shift the burden of proof to the defense.

Jackson, 150 Wn. App. at 885-86. Unlike Jackson, neither Pugh nor the State presented evidence of the lien's validity. The prosecutor's argument that there was no evidence the lien was valid shifted the burden of proof the Pugh. Under Jackson and the cases discussed in his opening brief, the prosecutor's argument was misconduct that requires reversal.

3. THE FARETTA¹ COLLOQUY WAS INADEQUATE

The State appears to object to the nature of defense work rather than make a legitimate legal argument. Br. of Resp't at 12 ("No matter what a trial court does when a defendant requests to proceed pro se, the decision will be questioned."). Defense attorneys are obligated to provide clients with effective assistance of counsel by making all nonfrivolous arguments that may win their clients dismissal, a new trial, or resentencing. This includes making alternative and even contradictory arguments from one case to another. The constitutional obligation of a defense attorney does not undermine the fact that Pugh's waiver of counsel must be knowing, voluntary, and intelligent or the conclusion that, here, Pugh's waiver was not.

As for the merits of Pugh's claim that his waiver was not knowing, voluntary, and intelligent, he mostly rests on his opening brief. See Br. of

¹ Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975).

Appellant at 20-26. However, in response to the State's reliance on the February 11, 2016 hearing, which the State claims somehow "advised the defendant of the dangers of representing himself," Br. of Resp't at 15, the State is incorrect. The trial court stated,

Mr. Williams, I would respectfully submit to you one of the dangers of representing yourself, which is that you can take a legal term of art and turn it into what may seem like a defense, when it may not in fact be a defense.

I don't believe that the word 'complaining witness', at least from listening to you, has the meaning that you believe it does.

RP (Feb. 11, 2016) at 9. While the trial court may have provided a specific example of one of the dangers of self-representation, this statement fell far short of advising Pugh of *all* the dangers and disadvantages of self-representation, which is required. Faretta, 422 U.S. at 835; City of Bellevue v. Acrey, 103 Wn.2d 203, 211, 691 P.2d 957 (1984). The trial court's colloquy overall was inadequate and requires reversal.

4. THE MANDATORY IMPOSITION OF THE CRIMINAL FILING FEE VIOLATES EQUAL PROTECTION BECAUSE SIMILARLY SITUATED CIVIL LITIGANTS ARE PERMITTED A WAIVER

The State relies on Division Two's unpublished decision in State v. Ma, noted at 195 Wn. App. 1036, 2016 WL 4248585 (2016),² to assert that it

² Pugh cites and discusses this unpublished opinion in direct response to the State's brief and not for any other reason.

does not violate equal protection to permit civil litigants, but not criminal litigants, a waiver of filing fees. Br. of Resp't at 16. The Ma court found a rational basis for treating civil litigants differently than indigent criminal defendants because, without a waiver, "indigent [civil] parties would not be able to seek relief in the courts." 2016 WL 4248585, at *4. On the other hand, "Criminal defendants facing sentencing are not required to pay filing fees, have access to the courts, and already have been convicted." Id.

Pugh does not dispute that the waiver of the filing fee enables an indigent civil litigant to seek relief in the courts. But once relief is sought and the civil litigant fails in obtaining it, the civil litigant is in the exact same position as a criminal defendant—both indigent litigants have had "access to justice" but have not prevailed. Yet it is only the indigent criminal defendant that must pay the filing fee; the indigent civil litigant obtains a complete waiver at the outset regardless of winning or losing. There is no rational basis for this differential treatment in light of the purpose of the statute, which is to fund the state, counties, and county law libraries. RCW 36.18.020(1). The Ma court missed this point.³ This court should not. Instead, this court should hold that treating similarly situated indigent civil and criminal litigants

³ It is likely the Ma court missed this point because, unlike Pugh's argument, "Ma's equal protection argument is cursory." 2016 WL 4248585, at *4.

differently with respect to filing fees violates the promise of equal protection of the laws.

B. CONCLUSION

For the reasons stated here and in his opening brief, Pugh requests that his conviction for theft of a motor vehicle be reversed and dismissed. Alternatively, he requests a new and fair trial.

DATED this 17TH day of November, 2017.

Respectfully submitted,

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A handwritten signature in black ink, appearing to read "K. March", written over a horizontal line.

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