

FILED
Court of Appeals
Division III
State of Washington
3/6/2018 3:39 PM

NO. 34716-8-III

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,

Respondent

v.

NATHANIEL TILTON,

Appellant.

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

APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

The government argues that the errors committed at Mr. Tilton's trial do not warrant relief. Mr. Tilton, who suffers from mental health issues, started fighting with his father soon after they moved in. But when he assaulted his father, his permission to enter his home had not been revoked. Like *State v. Wilson*, this Court should hold that the government's failure to establish Mr. Tilton entered or remaining unlawfully in his residence requires dismissal of the burglary charge.

The failure of the court to inquire into whether Mr. Tilton was constructively deprived of the right to counsel, along with the prosecutor's misconduct, require a new trial. In addition, errors at sentencing require reversal of Mr. Tilton's sentence.

- 1. The government did not address why *State v. Wilson's* holding that where a resident commits a crime inside a building, express revocation of the right to remain in the building is required should not control. The government's failure to present sufficient evidence of this element requires reversal.**

Not every assault that takes place in a house is a burglary. *State v. Wilson*, 136 Wn. App. 596, 604, 150 P.3d 144 (2007). The prosecution would have this Court hold that when a resident of a house commits a crime against another, that the scope of their permission to reside in the house is exceeded. Brief of Respondent at 26. This Court

has already held otherwise. *Wilson*, 136 Wn. App at 604. The prosecution chose not to address *Wilson* in its response brief, instead only citing cases where permission has been expressly revoked or where a guest exceeds the scope of the permission in committing a crime. Brief of the Respondent at 26, 27. But this Court's jurisprudence cannot be ignored. Mr. Tilton asks this Court to hold that there was insufficient evidence that Mr. Tilton's ability to reside in the residence he shared his father was revoked. As such, this Court should dismiss Mr. Tilton's burglary conviction.

The government relies on the Court of Appeals decision in *State v. Howe* to assert that permission to reside in a house need not be expressly revoked, rather than the opinion issued by the Supreme Court. Brief of Respondent at 26 (citing *State v. Howe*, 57 Wn. App. 63, 71, 786 P.2d 824 (1990), *rev'd* 116 Wn.2d 466, 805 P.2d 806 (1991)). The government misreads this case, as it cites to a premise that was overruled by the Supreme Court. *State v. Howe*, 116 Wn.2d 466, 472, 805 P.2d 806 (1991). In *Howe*, the father expressly revoked his son's permission to live in his house and had ensured he would be placed into foster care. *Id.* Had Mr. Tilton's father expressly revoked his son's permission to reside in his house, that revocation would have

been effective. It did not happen here. *Howe* does not support the government's position.

The government also relies on *State v. Lambert*, recently decided by this Court. Brief of Respondent at 27; *see also State v. Lambert*, 199 Wn. App. 51, 77, 395 P.3d 1080, *review denied*, 189 Wn.2d 1017 (2017). But *Lambert* does not address shared residences. It is consistent with other cases decided in Washington, where the right of a guest to enter a house may be limited. *See State v. Collins*, 110 Wn.2d 253, 255, 751 P.2d 837 (1988). Like *Collins*, *Lambert* addresses the scope of person's invitation into a home. It does not apply here because Mr. Tilton was a resident of the home where the assault occurred and did not exceed that scope, even though he assaulted his father inside the home.

For residents, this Court has held there is insufficient evidence of burglary when a resident commits an unlawful in a building unless permission to reside in the building has been expressly revoked. *Wilson*, 136 Wn. App. at 604. Unfortunately, the government chose not to comment on why *Wilson* does not apply here. As such, the government gives this Court no reason why it should depart from its decision in *Wilson*.

In *Wilson*, this Court found insufficient evidence of burglary where there was evidence Mr. Wilson resided in the house where the crime occurred. *Id.* at 600. The *Wilson* court analyzed the question of whether there can be implied permission to revoke, rejecting the same argument made by the government here. Brief of Respondent at 28. Like this case, Mr. Wilson did considerable damage to the residence before he was arrested, including kicking in and splintering the front door. *Id.* at 601. Like here, calling 911 and locking Mr. Wilson out of the residence were insufficient to establish an unlawful entry in a shared residence. *Id.* at 611-12.

It is unclear why the government does not address the facts or holding of *Wilson*. Just like *Wilson*, Mr. Tilton was residing in the house where the assault occurred. 7/13/16 RP 170. Mr. Tilton intended to live with his father until he formed a plan for his life. 7/13/16 RP 209. It was an open invitation with no end date set. 7/14/16 RP 252. Mr. Tilton had no other residence and all his belongings were stored at his father's house. 7/13/15 RP 209, 7/14/16 RP 236. His father had told him to keep out of his bedroom but had not otherwise restricted Mr. Tilton's use of the house while he was living there. 7/14/16 RP 252. He had no other place to live. 7/13/14 RP 209.

There was no evidence Mr. Tilton's father revoked Mr. Tilton's invitation to live in the house. 7/14/16 RP 244-45, 249. Mr. Tilton's father stated unequivocally that he never told Mr. Tilton his permission to reside in the shared residence had been revoked. 7/14/16 RP 244-45. He repeated this statement later in his testimony. 7/14/16 RP 249. Like *Wilson*, this testimony only establishes Mr. Tilton's intent to commit a crime within the building. *Wilson*, 136 Wn. App. at 600. It does not establish burglary.

Dismissal of the burglary charge is necessary where the government fails to establish the accused entered or remained unlawfully within the building. *State v. Thomson*, 71 Wn. App. 634, 640-41, 861 P.2d 492 (1993). There is no evidence Mr. Tilton had been excluded from his father's home when the assault took place. The government failed to prove the essential element of entering or remaining unlawfully. *Wilson*, 135 Wn. App. at 611-12. Without proof of this essential element, there is insufficient proof of residential burglary. *Id.* The remedy is reversal and remand for judgment of dismissal with prejudice. *State v. Hummel*, 196 Wn. App. 329, 359, 383 P.3d 592, *review denied*, 187 Wn.2d 1 (2016).

- 2. Even though the evidence was clear that Mr. Tilton’s lawyer could not communicate with his client, the government argues Mr. Tilton was not constructively denied his right to counsel. This Court should hold otherwise and order a new trial.**

The government argues that Mr. Tilton’s disruptive behavior discharged the duty of the trial court to determine whether Mr. Tilton had constructively denied his right to counsel. Brief of Respondent at 29. In the alternative, the government argues these claims should not be brought on direct appeal because the record is insufficient. *Id.* at 30.

The government correctly cites the controlling law on the issue of constructive denial of counsel. Brief of Respondent at 32. The constructive denial of counsel doctrine applies to cases where the defendant has an irreconcilable conflict with his counsel, and the trial court fails to substitute counsel. *See United States v. Nguyen*, 262 F.3d 998, 1003–04 (9th Cir.2001); *United States v. Adelzo–Gonzalez*, 268 F.3d 772, 778–79 (9th Cir.2001). “Even if [trial] counsel is competent, a serious breakdown in communications can result in an inadequate defense.” *Nguyen*, 262 F.3d at 1003(citing *United States v. Musa*, 220 F.3d 1096, 1102 (9th Cir.2000)). A reviewing court will examine the timeliness of the substitution motion and the extent of resulting inconvenience or delay, the adequacy of the inquiry into the

defendant's complaint, and whether the conflict between the defendant and his attorney was so great that it prevented an adequate defense. *United States v. Rivera-Corona*, 618 F.3d 976, 978 (9th Cir.2010).

Here, there is considerable evidence Mr. Tilton never established a relationship with his attorney. In most court appearances prior to the commencement of trial, Mr. Tilton's attorney said he had been unsuccessful in speaking with his client. *See* 8/11/16 RP 58, 64, 80, 86, 93, 98, 7/5/16 RP 4. Mr. Tilton also expressed his difficulties in speaking with his attorney, informing the court he believed his attorney had been fired on at least one occasion. 7/5/16 RP 3.

Both Mr. Tilton and his attorney informed the court that they were not able to communicate with each other. 7/5/16 RP 3, 6. And yet, the trial court made no inquiry into the extent of the conflict. 7/5/16 RP 6. Instead, when Mr. Tilton expressed his frustration again, the court told him that if he continued to interrupt the proceedings, he would be held in contempt. 7/5/16 RP 7. Mr. Tilton then declared "I have no voice." 7/5/16 RP 7.

At a minimum, the court owed Mr. Tilton the duty to inquire into why he believed his lawyer no longer represented him. There is no dispute Mr. Tilton had difficulties during the pre-trial proceedings and

the trial itself. But his behavior does not discharge the court from its obligation to inquire into the breakdown in communication that was apparent between Mr. Tilton and his attorney. Without further inquiry, this conflict constituted a constructive denial of counsel. *Rivera-Corona*, 618 F.3d at 979. The court abused its discretion by failing to make an inquiry into why Mr. Tilton believed he had fired his attorney, especially considering their failure to communicate with each other. Mr. Tilton asks this Court to reverse his convictions and order a new trial. *United States v. Brown*, 785 F.3d 1337, 1352 (9th Cir.2015).

3. While the government agrees misconduct occurred when it violated the court's in limine instruction on limiting argument regarding drug use and when it misstated the elements of burglary, it also argues Mr. Tilton was afforded a fair trial. This Court should find the intentional governmental misconduct requires reversal of Mr. Tilton's convictions.

The government argues that the misconduct committed in the closing argument does not require a new trial. Mr. Tilton asks this Court to hold otherwise. *State v. Jones*, 144 Wn. App. 284, 293, 183 P.3d 307 (2008); *State v. Allen*, 182 Wn.2d 364, 373, 341 P.3d 268 (2015). The government's misconduct requires reversal of Mr. Tilton's convictions and a new trial.

- a. *The prosecution committed misconduct when it violated the court's order not to discuss whether Mr. Tilton had ingested drugs on the day of his assault.*

The government does not dispute it violated the court's pre-trial ruling when it decided to argue Mr. Tilton was using drugs when he assaulted his father. Brief of Respondent at 39. The government then argues that asserting Mr. Tilton had been using methamphetamines was arguably improper and was not prejudicial. *Id.* This Court should hold that this misconduct requires a new trial.

A prosecutor has no right to call the jury's attention to matters jurors may not consider. *State v. Belgarde*, 110 Wn.2d 504, 508, 755 P.2d 174 (1988) (citing *State v. Case*, 49 Wn.2d 66, 74-75, 298 P.2d 500 (1956)). The government is not permitted to make prejudicial statements unsupported by the record. *Jones*, 144 Wn. App. at 293. When the prosecution argued Mr. Tilton was using methamphetamines, it violated this clear rule.

And while the government addresses the first time it violated this order, it fails to discuss why the second violation does not require a new trial. To be clear, the record establishes two instances of the government attempting to link methamphetamine use to Mr. Tilton and

not only the one the government addressed in its brief. *See* 7/15/16 RP 470, 479. In both circumstances, Mr. Tilton objected. *Id.*

There was no evidence of recent use of methamphetamines. 7/13/16 RP 243, 273, 371. The timeline of the fight made it virtually impossible. 7/13/16 RP 184. And the only witness to the incident did not see Mr. Tilton smoking anything. 7/14/16 RP 384. There was additional evidence Mr. Tilton's anger had nothing to do with drug use. His anger had developed as a child. 7/14/16/ RP 247. He was frequently angry in court, where he would have had no access to drugs. 7/14/16 RP 293, 352.

These intentional decisions to raise and then return to Mr. Tilton's possible drug use constituted misconduct. *State v. Alexander*, 64 Wn. App. 147, 155-56, 822 P.2d 150 (1992). They were also prejudicial. They were a calculated attempt to argue facts not supported by the evidence, in defiance of the court's ruling the evidence had no place in Mr. Tilton's trial. *In Re Glasmann*, 175 Wn.2d 696, 705, 286 P.3d 673 (2012) (citing *State v. Pete*, 152 Wn.2d 546, 553-55, 98 P.3d 803 (2004)).

Trained and experienced prosecutors "do not risk appellate reversal of a hard-fought conviction by engaging in improper trial

tactics unless the prosecutor feels that those tactics are necessary to sway the jury in a close case.” *State v. Fleming*, 83 Wn. App. 209, 215, 921 P.2d 1075 (1996). By arguing Mr. Tilton was high on drugs, Mr. Tilton became a far more frightening character than simply an angry son. By making this argument, the prosecution demonstrated why Mr. Tilton was out of control and why he should be punished. By acquitting Mr. Tilton, the jury would be releasing a dangerous drug addict. This misconduct was prejudicial and requires a new trial. *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2006) (citing *State v. Gregory*, 158 Wn.2d 759, 858, 147 P.3d 1201 (2006)).

b. The prosecution committed misconduct when it omitted the essential element of intent to enter or remain in a building in describing how a burglary is committed.

For some misconduct, once the bell has rung, it “cannot be unring.” *State v. Trickel*, 16 Wn. App. 18, 30, 553 P.2d 139 (1976). While the prosecution agrees that misstating the elements of the crime is misconduct, it argues that the conduct was not flagrant and ill-intentioned. Brief of Respondent at 41. This court should hold otherwise, as the element the prosecution chose to omit was the only element relevant to the question of Mr. Tilton’s guilt: whether he

entered or remained unlawfully in his shared residence when he assaulted his father.

Statements made by prosecutors in their closing arguments must be confined to the law as instructed by the court. *State v. Davenport*, 100 Wn.2d 757, 760, 675 P.2d 1213 (1984). A prosecutor commits misconduct by misstating the law. *Allen*, 182 Wn.2d at 373; *see also State v. Warren*, 165 Wn.2d 17, 28, 195 P.3d 940 (2008).

The prosecution's decision to liken burglary to "walking into Walmart" and shoplifting is clearly a misstatement of the law. 7/15/16 RP 473-74; *see also* RCW 9A.52.025. After making this argument, the prosecutor compared it to the facts of this case, arguing that Mr. Tilton committed burglary when he punched his father. 7/15/16 RP 474. This is also an inaccurate statement of the law. The government must prove that the defendant entered or remained unlawfully. RCW 9A.52.025. This was the primary issue in the case, as Mr. Tilton did not otherwise dispute the facts regarding the fight with his father.

Using a hypothetical to argue otherwise is clear misconduct. It is also not the type of misconduct that can be cured. It reduced the government's burden of proof and made the jury more likely to convict Mr. Tilton. *Allen*, 182 Wn.2d at 382. The failure of Mr. Tilton's lawyer

to object should not end this Court's analysis of whether a prosecutor may so misconstrue the elements of residential burglary. *Glasmann*, 175 Wn.2d at 678; *State v. Walker*, 182 Wn.2d 463, 476, 341 P.3d 976, *cert. denied*, 135 S. Ct. 2844 (2015). Instead, this Court should hold that the prosecutor's argument that the jury could find unlawful entering or remaining by finding Mr. Tilton intended to commit a crime inside the house constituted flagrant and ill-intentioned misconduct, particularly in this case where the complexities of the law allow a lay jury to be easily misled. This misconduct requires a new trial.

4. The evidence established Mr. Tilton suffered from a fragile mental state and did not intend to commit any new crimes on his reentry from prison. Because the sentence imposed was clearly excessive, Mr. Tilton asks this Court to order sentencing within the standard range.

The government argues Mr. Tilton's sentence was appropriate, citing to *State v. Butler*. Respondent's brief at 45. But in *Butler*, this Court found that the defendant had a disdain for the law that was so flagrant as to render him particularly culpable. 75 Wn. App. 47, 54, 876 P.2d 481, *review denied*, 125 Wn.2d 1021 (1995). Here the evidence did not establish this same disdain. Mr. Tilton hoped to get his life back together. 7/13/16 RP 170. He hoped to return to Bellingham, where he

had lived most of his life. 7/14/16 RP 252. His goal while living with his father was to create a plan to carry on his life. 7/13/14 RP 209.

Mr. Tilton's mental fragility got in the way of his plans. When in custody, he had been held in a mental health unit. 8/1/15 RP 163. At sentencing, the court considered how it could provide Mr. Tilton with mental health services while in custody. 8/1/15 RP 163. No one could argue that Mr. Tilton's behavior during this case manifested anything other than this same fragility.

Returning Mr. Tilton to custody will not improve his health or make the community safer. Studies strongly suggest that prison often exacerbates psychiatric disabilities. Michael J. Sage et al., *Butler County SAMI Court: A Unique Approach to Treating Felons with Co-Occurring Disorders*, 32 Cap. U. L. Rev. 951, 953 (2004). The evidence demonstrates that individuals with major mental illnesses face a substantial likelihood of incurring serious harm in prison and are far more likely to suffer serious harms than non-ill prisoners. E. Lea Johnston, *Vulnerability and Just Desert: A Theory of Sentencing and Mental Illness*, 103 J. Crim. L. & Criminology 147, 229 (2013). With no indication Mr. Tilton will be provided any services while in prison,

the exceptional sentence only serves to delay addressing Mr. Tilton's underlying mental health problems.

There were other options. At sentencing, Mr. Tilton's father stated he wished a drug offender sentencing alternative was available for his son. 8/11/15 RP 158. Mr. Tilton was eligible for a Drug Offender Sentencing Alternative (DOSA). RCW 9.94A.660. Sentencing Mr. Tilton to this alternative would have provided him with support for his drug addiction while in custody and would have given him a considerable amount of time where he could transition into the community while on supervision. *Id.*

And while Mr. Tilton does not argue the rapid recidivism aggravator applies, this does not discharge the sentencing court from finding that the facts of the crime distinguish it from other crimes in the same category. *State v. Pennington*, 112 Wn.2d 606, 610, 772 P.2d 1009 (1989). The court gave no reason for why it was imposing the maximum sentence possible on Mr. Tilton, other than to state it would follow the prosecutor's recommendation. CP 128. And while the prosecutor's brief urged the court to impose an exceptional sentence, no justification was made for why this case warranted an exceptional sentence, other than that the jury had found aggravating factors to exist.

CP 108. No additional argument is made in the Brief of the Respondent that would otherwise justify the statutory maximum for Mr. Tilton.

This crime is not distinguishable from other residential burglaries. And other than Mr. Tilton's need for mental health services, he is not distinguishable from other defendants convicted of this crime. This Court should hold the sentencing court abused its discretion in imposing an exceptional sentence of 120 months for Mr. Tilton's conviction for residential burglary. *State v. France*, 176 Wn. App. 463, 469, 308 P.3d 812 (2013). If this Court does not dismiss Mr. Tilton's conviction for residential burglary for insufficient evidence, this Court should remand this matter for resentencing within the standard range.

5. Mr. Tilton's clear mental health issues required an inquiry into whether his legal financial obligations should have been waived. Because the sentencing court did not appear to be aware of the waiver authorized by statute, remand is required.

The prosecution argues Mr. Tilton is not entitled to relief from legal financial obligations because of his mental health. Brief of Respondent at 48. RCW 9.94A.777(1), however, requires that a sentencing court determine whether a defendant who suffers from a mental health condition can pay any LFOs, other than restitution or the

victim penalty assessment. *State v. Tedder*, 194 Wn. App. 753, 756, 378 P.3d 246 (2016).

The government now argues Mr. Tilton is somehow capable of working when he is released from custody. Brief of the Respondent at 49. But the record was clear Mr. Tilton suffers from a mental health condition as defined under RCW 9.94A.777. The court had evidence Mr. Tilton had been housed in the mental health unit when he was in prison and ordered he be examined for mental competency. 8/11/15 RP 163, 13. The record established Mr. Tilton's anger and mental health problems began to manifest when he was 11 to 12 years old. 7/14/16 RP 247. When he was released from prison, he moved in with his father to avoid being homeless. 7/13/16 RP 209. While he was in custody, his mental health deteriorated badly, with apparent weight loss noted by his attorney. 8/11/16 RP 168. He had no resources and no apparent work history. 7/13/14 RP 209. All his belongings were stored at his father's house. 7/14/16 RP 250.

In *State v. Blazina*, the Supreme Court remanded the trial court's imposition of discretionary LFOs for an individualized determination, because it found that the pernicious consequences of "broken LFO systems" on indigent defendants "demand" courts reach

the issue. 182 Wn.2d 830, 835, 344 P.3d 680 (2015); *see also City of Richland v. Wakefield*, 186 Wn.2d 596, 606, 380 P.3d 459 (2016). Mr. Tilton will face those same consequences when he is released.

And while the court found Mr. Tilton could not pay discretionary legal financial obligations, the court does not appear to have been aware it could waive the DNA fee and court costs under RCW 9.94A.777. 8/11/15 RP 168. As a result, the court failed to assess whether Mr. Tilton's mental health issues authorized waiver of all other legal financial obligations, except the victim penalty assessment and restitution. RCW 9.94A.777.

This Court should remand to trial court for a consideration of whether Mr. Tilton's remaining legal financial obligations, including the court filing fee and the DNA fee, should be waived. *Tedder*, 194 Wn. App. at 757.

B. CONCLUSION

This Court should hold that there was insufficient evidence Mr. Tilton entered or remained unlawfully in his shared residence. In the alternative, Mr. Tilton asks this Court to remand for resentencing, as his conviction on this charge was clearly excessive.

Mr. Tilton also asks this court to reverse the remainder of his convictions for misconduct and because he was constructively deprived of his right to counsel.

In addition, Mr. Tilton asks this Court to remand his case to determine whether his legal financial obligations should have been waived because of his mental health conditions.

DATED this 6th day of March 2018.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'T. Stearns', with a long horizontal flourish extending to the right.

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

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	
v.)	NO. 34716-8-III
)	
NATHANIEL TILTON,)	
)	
APPELLANT.)	

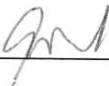
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I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 6TH DAY OF MARCH, 2018, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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March 06, 2018 - 3:39 PM

Transmittal Information

Filed with Court: Court of Appeals Division III
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Appellate Court Case Title: State of Washington v. Nathaniel E. Tilton
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