

NO. 34764-8-III

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

STATE OF WASHINGTON,

Respondent,

v.

MARKHAM WELCH,

Appellant.

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

The Honorable David Frazier, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. FAILING TO OBJECT TO THE STATE'S PROFFER OF ER 404(b) EVIDENCE CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL

The State first claims that Detective Aase's testimony does not qualify as propensity evidence and therefore falls outside the ambit of ER 404(b). Br. of Resp't at 11. Aase stated he had known of Welch's drug dealing for a long time, there was lots of talk about him selling drugs in the community, and his activity had increased earlier in the year, prompting community complaints. RP 80. This description of past acts of drug dealing had nothing to do with the evidence supporting the instant charges, and this court can readily conclude it was offered for improper propensity purposes. Welch relied primarily on State v. Wade, 98 Wn. App. 328, 989 P.2d 576 (1999), to support the proposition that Aase's testimony was not offered for a valid ER 404(b) purpose. Br. of Appellant at 9-10. The State makes no attempt to distinguish this case or cite any other authority that Aase's testimony was not propensity evidence. Its argument should be rejected.

The same goes for the State's discussion of ineffective assistance of counsel. The State argues that counsel strategically chose not to object to damaging evidence regarding Welch's longstanding drug dealing activity which had drummed up numerous community concerns. This is not sound strategy; such comments were not made in mere "passing" "to fade into the

courtroom paneling,” as the State claims. Br. of Resp’t at 13. Under State v. Hendrickson, 129 Wn.2d 61, 79, 917 P.2d 563 (1996), which the State does not acknowledge or address, there was no legitimate reason not to object.

The prejudice of a detective describing Welch as a blight on the community due to past drug dealing cannot be overstated. It encouraged the jury to convict Welch for broader policy reasons rather than the evidence the State offered at trial. This improper evidence provides a “probability sufficient to undermine confidence in the outcome.” State v. Estes, 188 Wn.2d 450, 458, 395 P.3d 1045 (2017). Welch asks this court to reverse.

2. AASE’S OPINION ON INNOCUOUS ITEMS IN WELCH’S HOME WAS AN IMPROPER OPINION ON GUILT

The State claims Aase’s did not give an opinion on guilt but one based on his expertise as a police officer. Br. of Resp’t at 17-18. But Aase testified that the only reason Welch had a baseball bat, security system, and BB guns was to protect his drugs, because there were no other items of value in the house to protect. Baseball bats, security systems, and BB guns are ubiquitous items found in a lot of American households. They cast no more suspicion on a person for criminal activity than any other item capable of causing physical harm, and cannot realistically be said to be “commonly associated with distribution of controlled substances” any more than they can be said to be commonly associated with American life. Br. of Resp’t at 18. By giving his

speculative opinion that Welch possessed these items for the purpose of securing the drugs he was dealing—and how much security do BB guns and baseball bats really provide?—Aase expressed his opinion to the jury that Welch was guilty of possession with intent to deliver. This is not a “logical leap” as the State claims. Br. of Resp’t at 18. Aase intended to and did cast his personal aspersions on Welch based on innocuous items found in his house. This opinion on guilt requires reversal.

3. THE TRIAL COURT WOULD NOT HAVE IMPOSED THE VUCSA FINE HAD IT BEEN MADE AWARE OF ITS DISCRETION; HOWEVER, WELCH CONCEDES THE \$100 LABORATORY FEE WAS PROPERLY IMPOSED

a. The trial court had discretion to defer the VUCSA fine

The State asserts, “The Appellant claims that the court was required to consider his indigence in imposing the [VUCSA] fine.” Br. of Resp’t at 21. No, Welch argues that the trial court erred in believing that the VUCSA fine was mandatory and imposing it without respect to Welch’s documented indigency. The trial court stated, “We have to be realistic here as far as ability to pay. He’ll be in prison for twelve years. I believe everything requested was mandatory.” RP 463. The trial court proceeded to waive everything nonmandatory based on indigency. RP 463-64. After defense counsel asked for the court to consider Welch’s ability to pay, the prosecutor stated, “Everything that the Court is imposing is -- is mandatory or discretionary --” and the trial court stated, “That was my intent To impose the mandatory

. . . . I am acknowledging based on what I heard at trial and the fact that he'd going to prison for a substantial period of time. He doesn't have any money.”
RP 464-65.

From this exchange, the State cannot realistically dispute that (1) the trial court did not wish to impose any nonmandatory LFOs and (2) had the trial court been told by the State or by defense counsel that it could defer the VUCSA fine, this record shows it would have done so based on indigency. Whether construed as the court's error for not recognizing its discretion or as ineffective assistance of defense counsel for not alerting the court to its discretion, the VUCSA fine should not have been imposed. Welch asks that the VUCSA fine be stricken or that this case be remanded to the trial court to strike it.

b. Welch withdraws his argument pertaining to the \$100 crime laboratory fee

Based on this court's decision in State v. Clark, 195 Wn. App. 868, 873, 381 P.3d 198 (2016), review granted in part and remanded, 187 Wn.2d 1009, 388 P.3d 487 (2017), Welch concedes that the crime lab fee is mandatorily assessed “and, then, perhaps, revised if the defendant provides adequate proof.” Accordingly, Welch withdraws his argument as to the crime lab fee.

4. IF THE CRIMINAL FILING FEE IS TRULY MANDATORY, THEN ITS MANDATORY IMPOSITION VIOLATES EQUAL PROTECTION

The State asserts “the Appellant’s complaint goes to a different law than his claim would prefer. He claims that RCW 36.18.020(2)(h) violates equal protection.” Br. of Resp’t at 26. On the contrary, Welch does not argue that RCW 36.18.020(2)(h) in isolation violates equal protection, but that the mandatory imposition of the \$200 criminal filing fee is what violates equal protection. In other words, it is the judiciary’s unanalyzed insistence that the criminal filing fee is mandatory that causes the equal protection violation to occur.¹ See Br. of Appellant at 24 (“Because there is no rational basis to treat criminal litigants differently than civil litigants under a statute whose purpose is to collect filing fees to fund the state, counties, and county law libraries, interpreting and applying the RCW 36.18.020(2)(h) criminal filing fee as a nonwaivable, mandatory financial obligation violates equal protection.” (emphasis added)).

The State also asserts that Welch’s claim is a naked casting into the constitutional sea because he “cites no cases dealing with the application of

¹ The State claims that Welch’s statutory interpretation arguments “have been soundly and repeatedly rejected.” Br. of Resp’t at 25. This is not so. No case has even addressed let alone rejected Welch’s interpretation of RCW 36.18.020(2)(h), including arguments about different terms used in the same statute or the same terms used in different statutes. Instead, the courts that have addressed the issue have simplistically stated “shall be liable for” means mandatory in every circumstance without any attempt at analysis. See Br. of Appellant at 25-36.

GR 34.” Br. of Resp’t at 27. Welch has found no case addressing and equal protection claim based on the filing fee waiver GR 34 provides to civil litigants. Since the State hasn’t cited any case either, Welch assumes there is none. The State incorrectly implies that a case directly on point is necessary to consider Welch’s equal protection claim. If that were true, the law would be incapable of developing or improving.

And, although Welch’s equal protection claim is straightforward, it is not a naked casting into the constitutional sea. Welch has relied on standards set forth in Washington Supreme Court and Court of Appeals precedent to address whether ““persons similarly situated with respect to the legitimate purpose of [RCW 36.18.020] must receive like treatment.”” Br. of Appellant at 22 (quoting State v. Johnson, 194 Wn. App. 304, 307, 374 P.3d 1206 (2016) (quoting State v. Coria, 120 Wn.2d 156, 169, 839 P.2d 890 (1992))). Welch then sets forth an analysis mirroring the analyses in Johnson and Coria to demonstrate that persons similarly situated with respect to the purpose of RCW 36.18.020 do not receive like treatment. Br. of Appellant at 23-24. The analysis of this issue is plain and simple but its simplicity does not render it a naked casting into the constitutional sea, as the State claims.

It is the State’s analysis that falls short. The State fails to apprehend that the purpose of the law in question is what controls the equal protection analysis. The purpose of filing fees is indisputably to provide revenue to fund

counties, regional and county law libraries, and the state general fund. RCW 36.18.020(1); RCW 36.18.025; RCW 27.24.070; Br. of Appellant at 23. The State does not even attempt to address the stated purpose of RCW 36.18.020 filing fees in asserting that there is a rational basis for treating civil and criminal litigants differently.

The State instead relies on the timing of the filing fee's payment. Br. of Resp't at 29-30. But when the filing fee is paid has no bearing on the legitimate purpose filing fees serve, which, as discussed, is to supply money to counties, law libraries, and the state general fund. The purpose of requiring payment of filing fees does not change simply because criminal defendants are not required to pay the filing fee when the State files the information.

The State's timing argument also fails to account for a civil litigant who obtains waiver of a filing fee and then loses the case. GR 34 provides that civil plaintiffs may obtain a waiver of their filing fees, even if their arguments are completely meritless. According to the State, an indigent civil plaintiff who ultimately loses his or her case should receive a greater benefit than a similarly situated indigent criminal defendant. There is no rational reason to treat the two parties differently with respect to statutory filing fees, however, given that the purpose of the filing fee remains the same in either case. It is this purpose, not when the filing fee is paid, that matters in addressing Welch's equal protection claim. Because there is no rational basis

to treat indigent civil litigants and indigent criminal litigants differently with respect to the purpose of filing fees, mandating the imposition of a filing fee against a criminal defendant in every case violates equal protection.

Finally, the State asks the court not to consider the equal protection claim because the RCW 10.01.160(4) remission procedure exists. Br. of Resp't at 30. As an initial matter, Welch is dubious that a filing fee imposed under RCW 36.18.020(2)(h) qualifies as a "cost" under RCW 10.01.160, and the State certainly cites no authority to suggest it does. Even assuming it does, the remission procedure affords a criminal defendant no counsel, no evidentiary hearing, and no appeal. State v. Shirts, 195 Wn. App. 849, 860-61, 381 P.3d 1223 (2016); State v. Smits, 152 Wn. App. 514, 524, 216 P.3d 1097 (2009). In the eyes of a pro se litigant, the remission procedure—assuming such a procedure really exists in any meaningful way in Washington—provides an illusory remedy at best.² As Division One concluded with respect to the imposition of appellate costs, the future availability of a remission proceeding cannot displace a reviewing court's obligation to consider a party's current arguments. State v. Sinclair, 192 Wn.

² The State relies on City of Richland v. Wakefield, 186 Wn.2d 596, 380 P.3d 459 (2016), to assert Welch will be entitled to relief from the filing fee under GR 34. Wakefield is an anomaly, not the norm. Wakefield had the good fortune of being represented by Northwest Justice Project free of charge. For the vast majority of criminal defendants who would benefit from remission, not only will there be no counsel, there will be no notice provided that a remission procedure even exists.

App. 380, 388, 367 P.3d 612, review denied, 185 Wn.2d 1034, 377 P.3d 733 (2016). Welch asks this court to consider his equal protection claim regardless of the hypothetical existence of a future remission proceeding. Upon consideration, the \$200 criminal filing fee should be stricken or Welch's financial circumstances should be considered before imposing it.

5. THE STATE'S FOOTNOTED MOTION TO STRIKE REFERENCE TO POLICE INFORMANT JOSEPH NIEVES IS IMPROPERLY RAISED AND OTHERWISE MERITLESS

The State moves this court to strike references to the State's informant, Joseph Nieves, in Welch's opening brief, and takes issue with Welch referring to Nieves as a snitch witness. Br. of Resp't at 4 n.1. The State's motion is procedurally and substantively baseless.

First, the State's motion appears entirely in a footnote in the statement of the case. Br. of Resp't at 4 n.1. Appellate courts need not consider arguments raised in a footnote, especially when the footnote is not even part of the brief's argument section. State v. Johnson, 79 Wn. App. 189, 194 n.4, 847 P.2d 960 (1993).

Second, "[a] party may include in a brief only a motion which, if granted, would preclude hearing the case on the merits." RAP 17.4(d). The State's motion to strike does not preclude the court's consideration of the merits and therefore must also be rejected on this procedural ground.

Third, in Washington, “[j]ustice in all cases shall be administered openly, and without unnecessary delay.” CONST. art. I, § 10. “The openness of our courts ‘is of utmost public importance’ and helps ‘foster the public’s understanding and trust in our judicial system.’” Hundtofte v. Encarnacion, 181 Wn.2d 1, 7, 330 P.3d 168 (2014) (lead opinion) (quoting Dreiling v. Jain, 151 Wn.2d 900, 903, 93 P.3d 861 (2004)). “Thus, we must start with the presumption of openness when determining whether a court record may be sealed from the public.” Id.

The State’s motion to strike is in reality an unsupported motion to seal or redact court records. Nieves’s full name appears many, many times in the presumptively public court record, as does the entirety of his testimony. RP 3, 82, 111-27, 129-32, 268-325, 358, 383-84, 387, 397-98, 401, 406-10; CP 110-13.³ Yet the State has not moved to seal or redact any portion of the record, which is required under GR 15 before such portions are removed from the public sphere. Nor has the State supported a GR 15 motion with analysis under the five-step closure framework from Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 37-39, 640 P.2d 716 (1982), which is arguably required before sealing or redacting records. See Hundtofte, 181 Wn.2d at 7 (“[A] court must

³ Contemporaneously with the filing of this brief, Welch designates the material witness warrant documents commanding Nieves to appear against his will for court. He anticipates it will be assigned pages 110 to 113 in the clerk’s papers and provides this citation accordingly.

analyze a motion to redact using both GR 15 and the five-step framework for evaluating a closure outlined in [Ishikawa].”). Because the State has not even attempted to comply with the applicable law pertaining to sealing or redacting court records—and it is doubtful Nieve’s personal interest in confidentiality would outweigh the public’s constitutional interest in the open administration of justice, notwithstanding the State’s fear mongering—this court need not address the State’s motion.

Finally, Nieves is a snitch. To “snitch” means “to give incriminating evidence against someone, esp. an associate : INFORM, TATTLE.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2157 (1993). There can be no question this definition applies to Nieves’s actions. If Nieves is truly fearful of public scorn or physical retaliation, which the State hypothesizes without supporting evidence or citation to the record, he should have thought about that before becoming a snitch. The State might be able to control a lot of things, including which crimes to charge and which investigations to pursue, but public perception of State actions to further the draconian war on drugs—an abject policy failure by virtually all accounts—is not and should never be subject to State control.

B. CONCLUSION

For the reasons state here and in the opening brief, Welch asks this court to reverse his convictions and either strike LFOs or remand for the trial court to consider their imposition under the correct legal standards.

DATED this 20th day of October, 2017.

Respectfully submitted,

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

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