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NO. 35410-5-III

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

STATE OF WASHINGTON,

Respondent,

v.

CURTIS ANDERSON,

Appellant.

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

The Honorable Timothy B. Fennessy, Judge

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page
A. <u>ARGUMENT IN REPLY</u>	1
1. THE STATE’S FAILURE TO PROVE ANDERSON’S CONFESSION WAS VOLUNTARY UNDER <u>MIRANDA</u> REQUIRES A NEW TRIAL.	1
2. THE VAGUE NO-CONTACT ORDER IS MANIFEST CONSTITUTIONAL ERROR.	3
3. THERE IS NO VALID LEGAL STRATEGY IN ALLOWING THE PROSECUTOR TO UNDERMINE THE PRESUMPTION OF INNOCENCE AND DIMINISH THE STATE’S BURDEN OF PROOF.	4
4. THE TRIAL COURT IMPROPERLY PENALIZED ANDERSON FOR EXERCISING HIS RIGHT TO TRIAL. ..	6
5. RESENTENCING IS ALSO REQUIRED DUE TO THE VIOLATION OF ANDERSON’S RIGHT TO ALLOCUTION.....	7
B. <u>CONCLUSION</u>	9

TABLE OF AUTHORITIES

	Page
 <u>WASHINGTON CASES</u>	
<u>State v. Aguilar-Rivera</u> 83 Wn. App. 199, 920 P.2d 623 (1996).....	8
<u>State v. Erho</u> 77 Wn.2d 553, 463 P.2d 779 (1970).....	3
<u>State v. Hatchie</u> 161 Wn.2d 390, 166 P.3d 698 (2007).....	7, 8
<u>State v. Johnson</u> 48 Wn. App. 681, 739 P.2d 1209 (1987).....	3
<u>State v. Lamar</u> 180 Wn.2d 576, 327 P.3d 46 (2014).....	5
<u>State v. Tetzlaff</u> 75 Wn.2d 649, 453 P.2d 638 (1969).....	3
 <u>FEDERAL CASES</u>	
<u>Arizona v. Fulminante</u> 499 U.S. 279, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991).....	1
<u>Bruton v. United States</u> 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968).....	1
<u>Jackson v. Denno</u> 378 U.S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1964).....	2
<u>Miranda v. Arizona</u> 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).....	1, 3
<u>United States v. Medina-Cervantes</u> 690 F.2d 715 (9th Cir. 1982)	6, 7
<u>Waller v. Georgia</u> 467 U.S. 39, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984).....	2

TABLE OF AUTHORITIES (CONT'D)

Page

RULES, STATUTES AND OTHER AUTHORITIES

CrR 3.5..... 1, 2, 3

RAP 2.5..... 3, 4

A. ARGUMENT IN REPLY

1. THE STATE'S FAILURE TO PROVE ANDERSON'S CONFESSION WAS VOLUNTARY UNDER MIRANDA REQUIRES A NEW TRIAL.

The State concedes that Anderson was subjected to custodial interrogation and that the record fails to establish he was advised of his constitutional rights as required by Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). Brief of Respondent at 17. Nevertheless, the State claims the error was harmless and alternatively, the remedy is remand for a new CrR 3.5 hearing rather than a new trial. Both of these arguments should be rejected.

“A confession is like no other evidence.” Arizona v. Fulminante, 499 U.S. 279, 296, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991). A statement by the defendant comes from “the most knowledgeable and unimpeachable source of information about his past conduct.” Id. (quoting Bruton v. United States, 391 U.S. 123, 139-40, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968) (White, J., dissenting)). A confession has a profound impact on a jury. Id. This court should reject the State's argument that this profoundly impactful direct statement did not make the difference in light of circumstantial evidence such as testimony by a witness who could identify only the clothing, but not the face, of the person he had seen.

Next, the State suggests an alternative remedy of remand for a new CrR 3.5 hearing, rather than remand for a new trial. There is no support for this suggested remedy. The State relies on Waller v. Georgia, 467 U.S. 39, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984) and Jackson v. Denno, 378 U.S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1964), but neither of these cases is on point. In Waller, the court ordered the suppression hearing be closed to the public in violation of the public trial right. 467 U.S. at 42, 47-48. The remainder of the trial was properly held in open court. Id. at 43. The court held the proper remedy was a new, open, suppression hearing, with a new trial following only if the new hearing resulted in suppression. Id. at 49-50.

Jackson dealt with the proper remedy when the court fails to hold a separate hearing on the voluntariness of a confession. 378 U.S. at 377-78. When no separate hearing was held, the remedy was to hold the hearing, and a new trial only if the result of the hearing was to suppress the confession. Id. at 391-92. In short, “Since Jackson has not been given an adequate hearing upon the voluntariness of his confession he must be given one.” Id. at 391.

Neither of these cases supports the State’s suggestion of remand for only a CrR 3.5 hearing in this case. This case does not involve, as in Waller, a procedural violation that may, or may not, have affected the hearing’s outcome. Nor was it the case, as in Jackson, where no hearing was held at all. The court properly held a CrR 3.5 hearing to determine whether

Anderson's statements were voluntary. The State bore the burden at that hearing. It now concedes it failed to meet that burden. Nothing in the cases cited by the State suggests the State should receive another bite at the apple under these circumstances.

In fact, Washington precedent is to the contrary. In both State v. Tetzlaff, 75 Wn.2d 649, 652, 453 P.2d 638 (1969), and State v. Erho, 77 Wn.2d 553, 562, 463 P.2d 779 (1970), after concluding the State did not meet its burden to prove the defendant was properly advised of his Miranda rights, the court remanded for a new trial. Similarly, in State v. Johnson, 48 Wn. App. 681, 686, 739 P.2d 1209 (1987), after finding the State did not meet its burden at a CrR 3.5 hearing, this Court specifically held the confession was inadmissible. The court explained, "The State is therefore unable to meet its heavy burden of establishing that it refrained from interrogating Johnson after he invoked his right to counsel. . . . We hold that Johnson's confession is inadmissible and remand for further proceedings consistent with this opinion." Id. This Court should do likewise.

2. THE VAGUE NO-CONTACT ORDER IS MANIFEST CONSTITUTIONAL ERROR.

As argued in the opening brief, the unconstitutional vagueness of the no-contact order constitutes manifest constitutional error under RAP 2.5. The State's argument to the contrary should be rejected. The State argues the

claim is not manifest because Anderson “gave the trial court no opportunity to address whether the order itself was vague.” Brief of Respondent at 25. In short, the State argues the error was not manifest because Anderson failed to raise it below. That is not the standard.

A showing of manifest constitutional error permits an issue to be raised for the first time on appeal. RAP 2.5. If Anderson had raised this issue below, and the trial court had been presented with the opportunity to rule on it, there would be no need for the manifest constitutional error standard. This Court should review this issue because it is apparent from the language of the order and the testimony that the two-block language is unconstitutionally vague, leaving ordinary persons to guess at what area is actually prohibited and permitting selective or arbitrary enforcement.

3. THERE IS NO VALID LEGAL STRATEGY IN ALLOWING THE PROSECUTOR TO UNDERMINE THE PRESUMPTION OF INNOCENCE AND DIMINISH THE STATE’S BURDEN OF PROOF.

By arguing that, “everything we do, we do intentionally,” the State attempted to diminish, if not outright eliminate the State’s burden to prove whether Anderson knowingly violated the no-contact order by intentionally entering a prohibited area. RP 164. If the jury believed this argument was a correct interpretation of the law, it would incorrectly find Anderson guilty even if his entry into the prohibited area was inadvertent.

The State also undermined the presumption of innocence by telling the jury “you already know what that conclusion is.” RP 174. If the jury believed this argument was a correct interpretation of the law, it would believe it was permissible to make a decision on guilt or innocence before any deliberation with the other jurors. A proper and constitutional unanimous jury verdict occurs only via a consensus reached “after each juror examines the evidence and the parties’ arguments about what the evidence means, in light of the jury instructions, and all of the jurors exchange their individual perceptions, experiences, and assessments.” State v. Lamar, 180 Wn.2d 576, 585, 327 P.3d 46 (2014). In addition to undermining the presumption of innocence by permitting a premature decision, the prosecutor’s argument also undermined the importance of deliberations, wherein the jurors exchange views and review the evidence and the law.

The failure to object to these arguments deprived the jury of a corrective instruction that could have confirmed that this view of the law was incorrect. Without such an instruction, the jury was likely to be persuaded because the error in these arguments is not patently obvious to a layperson.

Yet the State argues counsel engaged in valid trial tactics by not objecting because counsel may have wanted to “avoid calling undue attention to the prosecutor’s allegedly improper arguments.” Brief of Respondent at 34. This argument should be rejected. Avoiding emphasis

may be a valid strategy, if the error involves inflammatory facts or evidence that are likely to prejudice the jury against the defense. But when the error is an error of law, that tactic is not reasonable. There is nothing to be lost by ensuring that the jury has a correct understanding of the law, and everything to be gained in ensuring the defense receives the full benefit of the burden of proof and the presumption of innocence. To the extent that a jury instruction could have cured the errors in the prosecutor's closing arguments, counsel was ineffective in failing to object to ensure the jury received such an instruction. This violation of Anderson's right to effective assistance of counsel requires a new trial.

4. THE TRIAL COURT IMPROPERLY PENALIZED ANDERSON FOR EXERCISING HIS RIGHT TO TRIAL.

Alternatively, this case should be remanded for resentencing to determine whether the judge would have imposed the same sentence without reliance on Anderson's decision to exercise his right to a jury trial. The mere fact that the judge may also have relied on other factors does not mitigate the constitutional error here.

Courts should not tolerate sentencing procedures that have a chilling effect on the constitutional right to a jury trial. As the court explained in United States v. Medina-Cervantes, 690 F.2d 715, 716, n. 3 (9th Cir. 1982):

Any indication from trial judges that persons will be punished more severely if they exercise their right to jury

trial will necessarily cause these attorneys to be reluctant to advise their client to go to trial. This reluctance will result in the “chilling” of an individual’s right to trial as surely as if the individual himself were advised by the judge that additional punishment will be meted out if he demands a jury trial.

Id. The court in Medina-Cervantes vacated the sentence and remanded for resentencing on the grounds that “even the appearance” of penalizing a person for going to trial would have a chilling effect and required reversal. Id. at 717.

“The plain fact of the matter is that, under our Constitution, a defendant should never have ‘anything to lose’ if he exercises his right to a jury trial.” Id. at 716 n. 3. Because the court’s comments in this case raise the inference that exercising his right to jury trial played a role in the Court’s decision to deny him a DOSA, the sentence should be vacated and the case remanded for resentencing.

5. RESENTENCING IS ALSO REQUIRED DUE TO THE VIOLATION OF ANDERSON’S RIGHT TO ALLOCUTION.

The State argues this error was waived under State v. Hatchie, 161 Wn.2d 390, 406, 166 P.3d 698 (2007), but fails to acknowledge the critical facts distinguishing this case from Hatchie. In Hatchie, the court announced it was “ready to rule” and then said it would impose 55 months “unless Hatchie had something else to say.” 161 Wn.2d at 394. In short, the court’s pronouncement of the sentence, before allocution, was inherently tentative

and conditional upon Hatchie's ultimate allocution. On appeal, the error was deemed waived because Hatchie's allocution ultimately occurred despite the disadvantage of having already heard the "tentative sentence." Id. at 406.

By contrast, here, the court's sentence was not tentative. The court simply announced the sentence, with no indication it was in any way tentative or conditional. The court declared, "That's the court's sentence at this time." RP 190. Only then did the Court allow Anderson to speak.

This case is more akin to State v. Aguilar-Rivera, 83 Wn. App. 199, 920 P.2d 623 (1996). In that case, the court orally announced a sentence and then belatedly asked for the defendant's allocution. Id. at 201. Unlike Hatchie, there was no suggestion that the court was making a tentative sentence. Rather, the court did nearly the same thing as it did in this case; it announced its decision and began talking about the conditions of the sentence.

Hatchie involved a situation in which the error was waived because it was caught and corrected before the court actually imposed sentence. That is not the case here. Because Hatchie is distinguishable based on the tentative nature of the sentence, this Court should instead apply Aguilar-Rivera and remand for resentencing before a different judge. 83 Wn. App. at 203.

B. CONCLUSION

For the foregoing reasons, and for the reasons stated in the opening Brief of Appellant, Anderson requests this Court reverse his conviction or, alternatively, remand for resentencing before a different judge.

DATED this 14th day of March, 2018.

Respectfully submitted,

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