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Court of Appeal No. 35483-1-III

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

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STATE OF WASHINGTON,

Respondent,

v.

DEBRA J. SHOEMAKER

Appellant.

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APPEAL FROM THE CHELAN COUNTY SUPERIOR COURT

Cause No. 16-1-00490-4

The Honorable Lesley A. Allan

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APPELLANT'S REPLY BRIEF

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A. REPLY TO STATE’S STATEMENT OF THE CASE

The State points out that “not once during the sentencing hearing did any lawyer, party, or other person say “objection,” or otherwise utter any disagreement with the court’s sentencing procedures.” (Brief of Respondent at 1-2) However, this is not completely accurate. At least one example of a disagreement made on the record as to the court’s sentencing procedures is Ms. Shoemaker’s attempt, while the court was issuing its ruling, to dispute the court’s assertion that she did nothing to help the victim retrieve stolen items. (RP 35)

B. ARGUMENT

1. The State misunderstands and fails to address the procedural issue of allowing a victim to present evidence in a sentencing hearing

The State misunderstands Ms. Shoemaker’s argument that procedurally, the victim was not allowed to introduce outside facts at sentencing. While a victim impact statement is allowed under RCW 7.69.030, this statute does not give the victim the right to present new evidence in the case for the court to consider. The State does not address the scope of what evidence a victim can present for the court to consider at sentencing.

Instead, the State coins the argument in terms of RCW 9.94A.530 and the “real facts doctrine.” The use of substantial untested facts is

certainly an issue here as highlighted by the State's argument. But the State's argument misses the procedural issue of whether the court can allow the victim to present these new, untested facts for the judge to consider when the victim is not a party to the case. The victim had no legal authority to act as a party and present evidence related to his independent investigation or have a representative testify as a witness regarding what he personally established to be true. The facts were not introduced by the State or Ms. Shoemaker and are nowhere to be found in the record before the court. No objection was needed to preserve Ms. Shoemaker's constitutional right to a fair hearing. The error in allowing the victim's representative to present these new, untested facts was prejudicial, as the judge relied on this information when making the decision. Before hearing the testimony from the victim's representative as to what he discovered, the court was inclined to give the DOSA, which the State recommended. Ms. Shoemaker is entitled to a new sentencing hearing.

Ms. Shoemaker is entitled to a fair sentencing hearing, which does not allow a victim to participate as a party in sentencing by presenting facts from his own investigation of the crime for the court to consider in sentencing. The only parties to the case were the State and Ms. Shoemaker, and they agreed on the facts to be presented. Ms.

Shoemaker's due process rights were violated when the court allowed the victim to act as a party at the sentencing hearing.

2. Mr. Myers's statements cannot be presumed as fact merely because he is an attorney.

The State argues that Mr. Myers's statements have a minimum indicia of reliability because he is an Oregon attorney. However, Mr. Myers addressed the court as the victim's lay—not legal—representative. (RP 8) He was not acting as an attorney but as a representative and provided unsworn hearsay testimony from his investigator and statements from interviews he conducted. And even though, as the State points out, he has the same duty of candor to the court, he told the court that he has practiced in Washington, but did not disclose that he is not licensed in Washington. (RP 22) Simply because Mr. Myers's profession happens to be as an attorney in Oregon State does not make the alleged facts and hearsay statements presented by Mr. Myers admissible.

Additionally, "information relied upon at sentencing is false or unreliable if it lacks some minimal indicium of reliability *beyond mere allegation.*" *State v. Ford*, 137 Wn.2d 472, 483, 973 P.2d 452 (1999) (emphasis added). Here, Mr. Myers alleged several things. For example, Mr. Myers states as fact his assumptions about Ms. Shoemaker's involvement in the planning of the burglary, premeditated theft of the car,

disassembling a key fob, and vacuuming and wiping-down the stolen vehicle. (RP 10, 12-13) Mr. Myers's concludes his allegations by calling Ms. Shoemaker's actions "certainly depraved and insensitive." (RP 15)

3. Ms. Shoemaker's statements and actions at the trial were her attempt to get the court to understand that she did not agree with Mr. Myers's presentation of facts.

The State argues that Ms. Shoemaker had an opportunity to dispute the statements made by the victim's representative, Mr. Myers, when she addressed the court. When Ms. Shoemaker realized that the court was accepting Mr. Myers's unproven statements as fact regarding the car and items taken and relying on his allegation that this was a calculated crime, Ms. Shoemaker repeatedly told the court that what was presented was not true. (RP 27- 35) Although she did not use the word "objection" and her attorney ineffectively failed to speak up on her behalf, it was clear that Ms. Shoemaker did not agree with the facts presented by Mr. Myers or his allegations that she calculated the crime and failed to assist the victim afterwards in any way.

4. Ms. Shoemaker's lawyer assistance was ineffective for failing to object to Mr. Myers's testimony

The State argues that Ms. Shoemaker cannot claim a violation of the real facts doctrine (RCW 9.94A.530(2)) or a constitutional right to due process because she did not object. (Brief of Respondent at 5, 7-8, 10).

However, it then claims that this failure to object is not ineffective assistance of counsel. The State recognizes the detrimental effect of this claimed error.

The State asserts that a “possible reason for not objecting would be that Ms. Shoemaker and her lawyer knew that what Mr. Myers said was, in all material respects, true and thus not worth contesting.” (Brief of Respondent at 11) However, this is pure speculation on the State’s part. Mr. Myers gave details about the personal belongings stolen, alleging that many of these had such sentimental value as to be priceless and irreplaceable. There is no indication in the record that Ms. Shoemaker had personal knowledge of the full extent of the belongings stolen. Per the *Statement of Defendant on Plea of Guilty to Non-Sex Offense*, Ms. Shoemaker “entered the house of another individual without permission with Cindy Simpson to take prescription pills for Cindy to sell. Cindy also packed a duffle bag with personal belongings of the residents.” (CP 45) Even defense counsel noted, when he did address the court, that Ms. Shoemaker “told [Mr. Myers] everything she knew...She even told him about what was taken when she was there. But it became apparent that...after my client had been there that someone had returned back to the home.” (RP 17)

In order to sustain a claim of ineffective assistance of counsel, the defendant “need not show that counsel's deficient conduct more likely than not altered the outcome in the case.” *Strickland v. Washington*, 466 U.S. 668, 693, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Instead, the defendant “has ... the burden of showing that the decision reached would reasonably likely have been different absent the errors.” *Id.* at 696. This standard requires evaluating the totality of the record. *Id.* at 695.

The State makes a lot of presumptions that the court would have or should have allowed the information to be admitted even if a sentencing hearing was held. While the rules of evidence do not apply at sentencing hearings, this does not mean that Mr. Myers’ hearsay statements would be let in. The right to confront a hearsay declarant at a hearing is a limited privilege and may be denied for good cause. *State v. Abd-Rahmaan*, 154 Wn.2d 280, 290, 111 P.3d 1157 (2005). Also, to reach the presumption that Mr. Myers’s alleged facts would be allowed in at the evidentiary hearing, the State must assume that the facts are true before Ms. Shoemaker has the opportunity to challenge them. This is like putting the cart before the horse. There is no grounds to make such an assumption prior to the evidentiary hearing, whose purpose is to establish the reliability of the facts.

There is simply no reason for Ms. Shoemaker's counsel to sit silent while her due process rights were violated and untested facts were used against her, especially after she repeatedly disagreed with the court's use of these facts. Had the appropriate objections been made, an evidentiary hearing would have been held to determine what to admit, if anything. The State would have been required to establish the reliability of Mr. Myers's facts.

5. Reassignment is appropriate for resentencing.

It is not a foregone conclusion that information presented at an evidentiary hearing would be admitted into evidence. But it is on this assumption that the State bases its entire argument against having a different judge preside over Ms. Shoemaker's resentencing hearing, should this case be remanded.

Based solely on this presumption, the State takes the position that "Judge Allan has not been exposed to prohibited information, nor has she expressed an opinion on the merits." (Brief of Respondent at 13) Judge Allan has already been exposed to the untested information, expressed an opinion which was formed after hearing this information, and ordered a sentence based on that opinion. However, it is not a given that all of the unproven information would be admitted at an evidentiary hearing. Among other issues that might bar admission of evidence, and as

previously noted, many of the statements made by Mr. Myers about Ms. Shoemaker's involvement were actually speculation. It is not "clear that the information supplied at sentencing would be admissible again," as the State asserts. (Brief of Respondent at 13)

The purpose of an evidentiary hearing would be to determine the truthfulness of the allegations made by Mr. Myers; not to go into the hearing with the assumption that it is all true. Otherwise there would never be a need for an evidentiary hearing. This assumption presumes that the State could just present facts to the court that would be proven as true if asked, and ignores that the State has the burden to prove the allegations as fact.

In addition, the State argues that Judge Allan could still make an unprejudiced ruling as to sentencing because she has not yet heard whatever testing of the evidence or additional evidence the defense might present at a contested hearing. Again, this assumes that all statements made by Mr. Myers, including ones regarding speculations as to the extent of Ms. Shoemaker's involvement in all aspects of the crimes, would ultimately be admitted into evidence in their entirety. Even if some of that information is determined to be inadmissible for purposes of Ms. Shoemaker's sentencing, Judge Allan will still have knowledge of all

statements made by Mr. Myers, which may prevent the judge from making an unbiased ruling. It is appropriate to reassign this case for resentencing.

C. CONCLUSION

The trial court erred by allowing the victim's lay representative to present untested, adjudicative facts at the sentencing hearing, contrary to statute and in violation of Ms. Shoemaker's right to due process. The error was not inconsequential, as the trial court based its decision on this unreliable information. Furthermore, even if permissible, Ms. Shoemaker's counsel was ineffective for failing to specifically object to the unproven facts. Resentencing before a different, impartial judge is needed.

Respectfully submitted this 10<sup>th</sup> day of May, 2018.

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CERTIFICATE OF SERVICE

The undersigned states the following under penalty of perjury under the laws of the State of Washington. On the date below, I personally e-filed and emailed and/or placed in the United States Mail the foregoing Appellant's Reply Brief with postage paid to the indicated parties:

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