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Division III
State of Washington
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NO. 35975-1-III

COURT OF APPEALS
STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

V.

JOSE ANTONIO CONTRERAS,

Defendant/Appellant.

BRIEF OF APPELLANT

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ASSIGNMENTS OF ERROR

1. Jose Antonio Contreras was denied effective assistance of counsel under the Sixth Amendment to the United States Constitution and Const. art. I, § 22.

2. Prosecutorial misconduct in closing argument deprived Mr. Contreras of a fair trial in contravention of the Fourteenth Amendment to the United States Constitution and Const. art. I, § 3.

3. The imposition of the \$200.00 filing fee and the \$100.00 DNA fee constitute error based upon the recent case of *State v. Ramirez*, slip opinion 95249-3 (September 20, 2018).

ISSUES RELATING TO ASSIGNMENTS OF ERROR

1. Was defense counsel's performance deficient when:

(a) He conceded in his closing argument that Mr. Contreras' actions were manifestly dangerous to human life;

(b) He failed to object to the prosecuting attorney's closing argument relating to the lesser included offense of reckless burning first degree; and

(c) He failed to request a voluntary intoxication instruction?

2. Did prosecutorial misconduct occur in closing argument when the prosecutor told the jury that he would rather see a not guilty verdict on first degree arson in lieu of a guilty verdict on the lesser included offense of first degree reckless burning?

3. Did the trial court err in imposing the \$200.00 filing fee and the \$100.00 DNA fee?

STATEMENT OF THE CASE

Tim Navarro resides at 130 South Conway, Apartment B10, Kennewick, Washington with his fiancée and three (3) children. (Gianguialano RP 83, ll. 7-17)

Mr. Contreras resides in Apartment B12. In the early morning hours of October 14, 2017 Mr. Contreras began knocking and kicking on the door of Apartment B10. He ripped off the outside light. Mr. Navarro had his fiancée call 9-1-1. (Gianguialano RP 84, ll. 13-21; RP 85, ll. 2-11)

Mr. Navarro watched Mr. Contreras through the peephole on his door. Mr. Contreras was acting strange as if he was high on meth and was just doing crazy stuff. (Gianguialano RP 88, ll. 21-25; RP 90, ll. 13-16)

Prior to the arrival of law enforcement officers Mr. Navarro noted that it was getting smoky when he looked out the peephole. Upon arrival Officers Scott and McGee saw that there was a fire outside the Apartment B10 door. Mr. Contreras was standing and staring at it. (Gianguialano RP 85, ll. 23-24; RP 99, ll. 7-9; RP 122, ll. 12-13; RP 123, ll. 4-9)

Officer McGee was the first officer to contact Mr. Contreras. He appeared hyper-aggressive. He had a knife in one hand and his other hand was in a fist. He took a fighting stance. He then fled into his apartment. (Gianguialano RP 100, ll. 13-20; RP 101, ll. 1-4; ll. 13-16; RP 125, ll. 8-19)

The officers extinguished the fire and called for backup. Mr. Navarro noticed that his doormat had been burned and the door and floor were charred. (Gianguialano RP 86, ll. 1-5; RP 102, ll. 2-6)

Officer Hamel went to the back of the apartment complex. He saw Mr. Contreras on his balcony wearing shorts, and no shirt. Mr. Contreras started throwing things at him. He was stabbing the wood balcony rail with a knife. In addition, Mr. Contreras was making snarling, grunting noises. (Gianguialano RP 107, ll. 7-8; RP 108, l. 21 to RP 109, l. 4; RP 110, ll. 5-8)

Officer Scott, upon his arrival, saw how Mr. Contreras was dressed and believed it was inappropriate for the cold weather. (Gianguialano RP 104, ll. 18-22)

An Information was filed on October 17, 2017 charging Mr. Contreras with first degree arson. (CP 1)

A waiver of time for trial was entered on November 30, 2017. Jury trial was scheduled for January 29, 2018. (CP 4)

Additional continuances were requested by defense counsel. (Pelletier RP 16, ll. 20-21; RP 19, l. 22; King RP 4, ll. 4-5)

During *voir dire* one of the jurors recognized a jail correction officer and referred to him as a “jailer.” The trial court then stated he was a “security officer.” (Gianguialano RP 18, ll. 16-23)

During a later recess the trial court raised the issue of the juror’s statement. The Court asked the attorneys whether any additional steps needed to be taken in order to cure the juror’s statement. There were no objections from the attorneys. (Gianguialano RP 119, l. 16 to RP 120, l. 10)

During the prosecuting attorney's closing argument he made the following statement:

"I think it would be more intellectually honest for you to just find the defendant not guilty than find him guilty only of reckless burning."

(Gianguialano RP 159, ll. 21-23)

Defense counsel, in his closing argument stated:

"This was not a case where the defendant, although admittedly doing this sort of thing was manifestly dangerous to human life. Yeah. Absolutely. Not only just human lives there in B10, but we know it was a four-plex. Okay. Okay?"

(Gianguialano RP 168, ll. 15-19)

The jury was instructed on the elements of first degree arson and first degree reckless burning as a lesser included offense. (CP 60; CP 65; CP 67)

The jury found Mr. Contreras guilty of first degree arson. A special verdict was entered determining that there were both damages to a dwelling and that the fire was manifestly dangerous to human life. (CP 75; CP 76)

Prior to sentencing Mr. Contreras sent letters to the Court claiming ineffective assistance of counsel, a violation of his constitutional rights by the prosecuting attorney, and that his trial was unfair. (CP 77; CP 80)

Judgment and Sentence was entered on April 12, 2018. Mr. Contreras declined to remain in the court during sentencing. The Judgment and Sentence included legal financial

obligations (LFOs) consisting of the \$200.00 filing fee and \$100.00 DNA fee. (CP 83; DeVoir RP 14, ll. 14-22)

Mr. Contreras filed his Notice of Appeal on April 12, 2018. (CP 92)

Following sentencing Mr. Contreras submitted two (2) additional letters to the Court claiming an unfair trial. (CP 95; CP 99)

SUMMARY OF ARGUMENT

Mr. Contreras was denied a fair and impartial trial as a result of ineffective assistance of counsel and prosecutorial misconduct.

Defense counsel's concession that the fire was manifestly dangerous to human life abrogated the successful step of having the lesser included offense of first degree reckless burning.

Additionally, defense counsel's failure to object to the prosecuting attorney's closing argument involving the lesser included offense further exacerbated the prior concession.

Defense counsel's failure to request a voluntary intoxication instruction, based upon the facts and circumstances, combined with the other errors committed by defense counsel served to preclude the jury from considering whether or not Mr. Contreras could have the requisite mental state for the offense of first degree arson.

The prosecuting attorney's closing argument telling the jury that he would rather have a not guilty verdict on the first degree arson than having them find Mr. Contreras

guilty of the lesser included offense deflected the jury's attention from the lesser included offense.

The trial court's imposition of the \$200.00 filing fee and \$100.00 DNA fee is contrary to the recent decision in *State v. Ramirez, supra*.

ARGUMENT

I. INEFFECTIVE ASSISTANCE OF COUNSEL

To demonstrate ineffective assistance of counsel, a defendant must make two showings: (1) defense counsel's representation was deficient, *i.e.*, it fell below an objective standard of reasonableness based on consideration of all of the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, *i.e.*, there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (applying the two-prong test in *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed.2d 674, 104 S. Ct. 2052 (1984)). Competency of counsel is determined based upon the entire record below. *State v. White*, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972) (citing *State v. Gilmore*, 76 Wn.2d 293, 456 P.2d 344 (1969)).

State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

Initially, Mr. Contreras maintains that defense counsel's concession in closing argument that the fire was manifestly dangerous to human life deprived him of the jury giving due consideration to the lesser included offense of first degree reckless burning.

"The right to effective assistance of counsel extends to closing arguments." *State v. Kylo*, 166 Wn.2d 856, 870, 215 P.3d 177 (2009), citing *Yarborough v. Gentry*, 540 U.S. 1, 5, 124 S. Ct. 1, 157 L. Ed.2d 1 (2003).

Defense counsel's closing argument cannot be considered either strategy or tactics. A concession that the client has committed the only offense with which he/she is charged runs contrary to the attorney's duty to provide effective and zealous representation.

'When counsel's conduct can be characterized as legitimate trial strategy or tactics, performance is not deficient.' [Citation omitted.]; *State v. Garrett*, 124 Wn.2d 504, 520, 881 P.2d 185 (1994) ('[T]his court will not find ineffective assistance of counsel if "the actions of counsel complained of go to the theory of the case or to trial tactics."' (quoting *State v. Renfro*, 96 Wn.2d 902, 909, 639 P.2d 737 (1982))). A criminal defendant can rebut the presumption of reasonable performance by demonstrating that 'there is no conceivable legitimate tactic explaining counsel's performance.' *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). Not all defense counsel's strategies or tactics are immune from attack. "The relevant question is not whether counsel's choices were strategic, but whether they were reasonable." *State v. Grier*, 171 Wn.2d 17, 34, 246 P.3d 1260 (2011) quoting *Roe v. Flores-Ortega*, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed.2d 985 (2000)).

Prejudice is established when there is a reasonable probability that but for counsel's errors, the result of the trial would have been different. *In re Pers. Restraint of Brett*, 142 Wn.2d 868, 873, 16 P.3d 601 (2001). 'A reasonable probability is a probability sufficient to undermine confidence in the outcome.' [Citation omitted.]

Personal Restraint of Caldellis, 187 Wn.2d 127, 141, 385 P.3d 135 (2016).

After successfully convincing the Court and prosecuting attorney that reckless burning first degree was a lesser included offense of first degree arson, defense counsel's closing argument essentially conceded that Mr. Contreras was guilty of the first degree arson. No reasonable defense attorney would have made such an argument. It may have been a slip of a tongue; but that slip cost Mr. Contreras the opportunity to have the jury give serious consideration to the lesser included offense.

The prejudice occasioned by defense counsel's closing argument cannot be denied. It is obvious.

Mr. Contreras also asserts that defense counsel was ineffective by not requesting a voluntary intoxication instruction. The facts of the case clearly establish that Mr. Contreras was not himself on the evening of October 14, 2017. He was acting strangely. He was dressed inappropriately. Impairment was clearly present.

Failure of defense counsel to present a diminished capacity defense where the facts support such a defense has been held to satisfy both prongs of the *Strickland* test. [Citation omitted.] A diminished capacity defense requires evidence of a mental condition, which prevents the defendant from forming the requisite intent necessary to commit the crime charged. *State v. Warden*, 133 Wn.2d 559, 564, 947 P.2d 708 (1997). An intoxication defense allows consideration of the effect of voluntary intoxication by alcohol or drugs on the defendant's ability to form the requisite mental state. *State v. Coates*, 107 Wn.2d 882, 889, 735 P.2d 64 (1987).

State v. Tilton, 149 Wn.2d 775, 784, 72 P.3d 735 (2003).

The *Tilton* Court references the decision in *State v. Coates*, 107 Wn.2d 882, 735 P.2d 64 (1987).

The *Coates* Court ruled at 889-90:

... [E]vidence of voluntary intoxication is relevant to the trier of fact in determining in the first instance whether the defendant acted with a particular degree of mental culpability. The voluntary intoxication statute allows the trier of fact to consider the defendant's intoxication in assessing his mental state; the statute does not require that consideration to lead to any particular result.

As *Coates* notes a voluntary intoxication instruction is to allow the jury to consider all of the facts and circumstances of the case as they relate to the underlying charge, and to

make a reasonable and informed interpretation of whether or not the appropriate mental state was present at the time that the offense was committed.

Under RCW 9A.16.090, it is not the fact of intoxication which is relevant, but the degree of intoxication and the effect it had on the defendant's ability to formulate the requisite mental state. ...

In summary, intoxication is not a "defense" to a crime. Evidence of intoxication may bear upon whether the defendant acted with the requisite mental state, but the proper way to deal with the issue is to instruct the jury that it may consider evidence of the defendant's intoxication in deciding whether the defendant acted with the requisite mental state. *See* WPIC 18.10.

State v. Coates, supra, 891-92.

The mental state for first degree arson is that the fire must be "knowingly and maliciously" set. Voluntary intoxication can readily be seen as having a potential impact on an individual's mental state. A person could be acting knowingly; but not maliciously. The person may know that he /she is setting a fire; but there may not be any evil intent behind it.

Mr. Contreras takes the position that if defense counsel had requested a voluntary intoxication instruction in conjunction with the lesser included offense of reckless burning first degree, the jury may well have had enough information, in the absence of defense counsel's admission, to find him guilty of the lesser included offense.

Finally, defense counsel's performance was deficient in not challenging the prosecuting attorney's closing argument involving the lesser included offense. *See: infra*. II.

II. PROSECUTORIAL MISCONDUCT

The only authority that Mr. Contreras has been able to locate concerning the prosecuting attorney's closing argument is *State v. Fortune*, 77 Wn. App. 628, 893 P.2d 670 (1995).

Mr. Contreras contends that the *Fortune* case is based upon *dicta*. The Court indicated at 636: "... the prosecutor simply advised the jury that the State sought either a first degree murder conviction or an acquittal but did not want a second degree murder conviction."

The State's closing argument in Mr. Contreras's case is eerily similar.

The *Fortune* case was reviewed by our state Supreme Court at 128 Wn.2d 464, 909 P.2d 930 (1996). Even though there is a reference to the Court of Appeals' determination that the prosecutor's argument did not constitute misconduct it was never ruled upon by the Court.

What such an argument does is to tell a jury that they should ignore the lesser included offense. When a lesser included offense is part of the defense case an appropriate instruction must be given. WPIC 4.11. Instruction 11 satisfied this requirement. (CP 65; Appendix "A")

The prosecuting attorney's argument effectively negated the benefits to be derived from the instruction. There was no explanation by the prosecuting attorney as to why the lesser included offense was not committed.

The combination of the closing argument by the prosecuting attorney and defense counsel served to deprive Mr. Contreras of a constitutionally fair trial.

III. LEGAL FINANCIAL OBLIGATIONS (LFO'S)

Mr. Contreras asserts that the trial court improperly assessed the \$200.00 filing fee and the \$100.00 DNA fee. His Judgment and Sentence reflects that he has prior felony convictions. If the DNA fee had been collected on those prior convictions it cannot be collected again.

Neither the \$200.00 filing fee nor the \$100.00 DNA fee are to be imposed under recent legislation which was addressed in *State v. Ramirez, supra*.

At the time of Mr. Contreras's sentencing, the trial court was authorized to impose a \$200.00 criminal filing fee and a \$100.00 DNA fee.

The *Ramirez* Court ruled that LAWS OF 2018, ch. 269, § 317(2)(h) applies prospectively.

The effective date of the enactment was June 7, 2018. The enactment was based upon HB 1783 and states:

(2) Clerks of superior courts shall collect the following fees for their official services ... (h) Upon conviction ... an adult defendant in a criminal case shall be liable for a fee of two hundred dollars, except this fee shall not be imposed on a defendant who is indigent as defined in RCW 10.101.010(3)(a) through (c).

The \$100.00 DNA fee was also addressed by LAWS OF 2018, ch. 269, § 18 which added the following language to RCW 43.43.754: "... [U]nless the state has previously collected the offender's DNA as a result of a prior conviction."

Mr. Contreras contends that the presumption would be that the \$100.00 DNA fee has been collected where there are prior felony convictions set out in the Judgment and Sentence.

CONCLUSION

Mr. Contreras was denied a fair trial as a result of ineffective assistance of counsel and prosecutorial misconduct.

Mr. Contreras's convictions should be reversed and the case remanded for a new trial.

In the event that the Court determines that no new trial should be ordered, then the Judgment and Sentence should be amended to reflect removal of the \$200.00 filing fee and the \$100.00 DNA fee.

DATED this 22nd day of October, 2018.

Respectfully submitted,

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APPENDIX “A”

INSTRUCTION NO. 11

The defendant is charged with Arson in the First Degree. If, after full and careful deliberation on this charge, you are not satisfied beyond a reasonable doubt that the defendant is guilty, then you will consider whether the defendant is guilty of the lesser crime of Reckless Burning in the First Degree.

When a crime has been proved against a person, and there exists a reasonable doubt as to which of two or more crimes that person is guilty, he or she shall be convicted only of the lowest crime.

0-000000065

NO. 35975-1-III

COURT OF APPEALS

DIVISION III

STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	BENTON COUNTY
Plaintiff,)	NO. 17 1 01142 1
Respondent,)	
)	
v.)	CERTIFICATE OF SERVICE
)	
JOSE ANTONIO CONTRERAS,)	
)	
Defendant,)	
Appellant.)	
_____)	

I certify under penalty of perjury under the laws of the State of Washington that on this 22nd day of October, 2018, I caused a true and correct copy of the *BRIEF OF APPELLANT* to be served on:

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