FILED
Court of Appeals
Division III
State of Washington
7/11/2019 1:09 PM

COA NO. 36015-6-III

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

STATE OF WASHINGTON,

Respondent,

v.

AMEL DALLUGE,

Appellant.

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

The Honorable David Estudillo, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. DEFENSE COUNSEL RENDERED INEFFECTIVE ASSISTANCE IN REQUESTING AN AFFIRMATIVE DEFENSE INSTRUCTION THAT SHIFTED THE BURDEN OF PROOF FROM THE STATE, WHERE IT BELONGED, TO DALLUGE, WHERE IT DIDN'T.

The State contends defense counsel cannot be found deficient in proposing an unquestioned pattern instruction. Brief of Respondent (BOR) at 22. There is no pattern instruction for the affirmative defense here. CP 60. The State's argument misses the mark.

The instruction that was ultimately given, and to which counsel agreed, is based on the statutory language setting forth the affirmative defense. Compare CP 83 with RCW 9A.44.130(6)(c). The State says no authority declares the statutory defense unconstitutional. BOR at 21. This is an accurate observation. But Dalluge's ineffective assistance claim does not depend on challenging the constitutionality of the statutory defense. The ineffective assistance claim arises because counsel decided to use the affirmative defense in a case that did not call for it.

In the same vein, the State claims this is not a case where, by the time of trial, there was case law holding a given instruction erroneous. BOR at 21. The affirmative defense instruction accurately states the defense as set forth in RCW 9A.44.130(6)(c). Dalluge, however, does not

argue an affirmative defense instruction based on the language of RCW 9A.44.130(6)(c) is per se erroneous.

Rather, the problem is that the instruction impermissibly shifts the burden of proof based on the facts of Dalluge's case. The question of whether counsel's performance was ineffective is not amenable to any per se rule and turns on the facts of each case. State v. Cienfuegos, 144 Wn.2d 222, 229, 25 P.3d 1011 (2001). The affirmative defense instruction in Dalluge's case, when applied to the evidence before the jury and considered in conjunction with the to-convict instruction, misstated the law in creating inconsistent burdens of proof.

The to-convict instruction required the State to prove Dalluge failed to "comply with a request from the county sheriff for an accurate accounting of where the defendant stayed during the week." CP 77. The affirmative defense instruction required Dalluge, not the State, to prove compliance with subsection (6) of the statute; i.e., that he kept an accurate accounting of where he stayed during the week and provided it to the county sheriff upon request. CP 83; see RCW 9A.44.130(6)(b).

If the State had not sought to convict Dalluge based on lack of compliance with the accounting requirement in subsection (6), the affirmative defense instruction would present no inconsistent burden of proof on the issue. But the State's decision to seek conviction based on

this means of committing the offense meant that Dalluge properly had no burden to affirmatively prove he did comply with this requirement.

The affirmative defense applies in situations where the State seeks to convict a person lacking a fixed residence for a registration violation that does not involve (a) failing to provide written notice within three days of ceasing to have a fixed residence; (b) failing to comply with subsections (4)(a)(vi) or (vii); or (c) failing to comply with subsection (6). In those situations, the person has violated some other requirement but is able to affirmatively defend himself by showing compliance in other respects. In a case where the compliance elements of the affirmative defense are the same elements to be proven by the State to secure a conviction, the burden of proof becomes contradictory. Such is the case here.

The statutory affirmative defense requires the defendant to prove compliance with subsections (4)(a)(vi)/(vii) and (6) after registering with the county sheriff within three days of ceasing to have a fixed residence. Defense counsel argued Dalluge "subsequently" complied with the requirement because there was no evidence that he didn't comply. 1RP 531-33. But the affirmative defense instruction required Dalluge to prove by a preponderance of the evidence that he did comply. Absence of evidence is not a preponderance of the evidence. The jury, then was faced with two competing questions: (1) did the State prove Dalluge failed to

provide an accurate accounting and (2) did Dalluge prove he provided an accurate accounting? The burden of proof for those two questions cannot be reconciled.

The State points out counsel can be ineffective in *not* proposing an affirmative defense instruction, suggesting Dalluge's counsel would have been ineffective had he not sought one. BOR at 23. Unlike Dalluge's situation, the cases cited by the State where counsel was deemed to be ineffective do not involve inconsistent burdens of proof created by the affirmative defense.

In each case, the defendant was charged with second degree rape under that part of the statute criminalizing sex with a person who is incapable of consent by reason of being physically helpless. In re Pers. Restraint of Hubert, 138 Wn. App. 924, 927, 158 P.3d 1282 (2007); State v. Powell, 150 Wn. App. 139, 142, 206 P.3d 703 (2009). In each case, counsel was ineffective in failing to propose an affirmative defense instruction that the defendant reasonably believed the person was not mentally incapacitated. Hubert, 138 Wn. App. at 929; Powell, 150 Wn. App. at 152. In those cases, there was no overlap between what the State needed to prove and what the affirmative defense required the defendant to prove.

Indeed, Powell rejected the State's argument that that there was a legitimate tactic for not requesting the instruction for this very reason: "The jury would have had to find that the State had met its burden and proved every element of the rape charge beyond a reasonable doubt even if the trial court had given the reasonable belief instruction. This affirmative defense was relevant only once the State proved the elements of the offense. *Thus, a 'reasonable belief' instruction would not have shifted the initial burden of proof to Powell.*" Powell, 150 Wn. App at 157 n.12 (emphasis added).

Here, the affirmative defense instruction shifted the burden of proof onto Dalluge. His case, then, compares favorably to State v. Carter, 127 Wn. App 713, 716-18, 112 P.3d 561 (2005), where counsel was ineffective in proposing an unwitting possession of a firearm instruction that required the defendant to prove unwitting possession in a case where the State had the burden of proving knowing possession. No reasonable attorney proposes an instruction that erroneously shifs the burden of proof to the defense. Id. at 717.

The State argues the error was harmless because the evidence shows Dalluge "not once, not ever" providing an accurate accounting of where he was staying. BOR at 27. There is evidence to the contrary. Dalluge exchanged text messages with Deputy Hutchison on April 17,

2017. 1RP 354-58; Ex. 16. This was within the charging period set forth in the to-convict instruction. CP 74. In one message, Dalluge gave a new address. 1RP 358; Ex.16. Hutchison responded by telling Dalluge that he would stop by and have him sign a verification sheet. 1RP 358. Hutchison attempted to arrange to meet Dalluge at the address, but nothing came of it. 1RP 358-59. Later that day, Hutchinson drove to the address. 1RP 359. Dalluge was not there, and Hutchinson was unable to "verify" that it was Dalluge's address. 1RP 360.

This is evidence that Dalluge provided an accounting of where he was staying. The statute does not require verification of the address. RCW 9.94A.130(6)(b). Being unable to confirm the accuracy of the address does not mean the State proved the accounting was inaccurate. And nothing in the statute requires the accounting be in writing on a form provided by the sheriff's office. RCW 9.94A.130(6)(b). At the very least, it is a debatable question whether Dalluge provided an accurate accounting based on this communication with the deputy. In resolving the question, the jury may have looked to the affirmative defense instruction as a guide that Dalluge had the burden of proof to clear up the matter. An affirmative defense instruction that creates a clear inconsistency in the burden of proof is presumed to have misled the jury in a manner prejudicial to the defendant. Carter, 127 Wn. App at 718. Dalluge shows

prejudice. And, as argued, Dalluge shows deficient performance. Reversal is required.

2. THE COURT VIOLATED DALLUGE'S RIGHT TO BE PRESENT AT CRITICAL STAGES OF THE TRIAL.

The law is clear. "The trial court must give a defendant the opportunity to explain the absence." State v. Garza, 150 Wn.2d 360, 371, 77 P.3d 347 (2003). This allows the accused person a chance to rebut the court's preliminary finding that the absence was voluntary. Id. at 367. At minimum, the court must "listen to the defendant's explanation" of the absence. State v. Cobarruvias, 179 Wn. App. 523, 527, 318 P.3d 784 (2014) abrogated on other grounds by State v. Thurlby, 184 Wn.2d 618, 359 P.3d 793 (2015). The court must then determine what actually happened and assess the reasonableness of the defendant's actions in light of the totality of the circumstances. Id. The court must view the defendant's explanation "in a generous light," applying every reasonable inference against waiver. State v. Thurlby, 184 Wn.2d 618, 629-30, 359 P.3d 793 (2015). "Unless the trial court determines that the circumstances justify a renewed finding of voluntary absence, the court must declare a mistrial." Garza, 150 Wn.2d at 371.

Because the trial court failed to make a renewed finding on voluntary waiver, a new trial is required. The State does not dispute the trial court failed to make a renewed finding of voluntariness.

Instead, it claims there was no need to give Dalluge an opportunity to explain his absence. BOR at 35-36. It cites no authority for the proposition. "This court does not consider conclusory arguments that are unsupported by citation to authority." State v. D.E.D., 200 Wn. App. 484, 504–05, 402 P.3d 851 (2017) (Fearing, J., concurring); see also State v. Bluford, 195 Wn. App. 570, 590, 379 P.3d 163 (2016) (The State cites no authority for this argument. For that reason alone, we could reject it."), rev'd in part on other grounds, 188 Wn.2d 298, 393 P.3d 1219 (2017).

But even if the State's argument is considered, it should be rejected. The State says Dalluge "completely" explained his absence at the beginning of the proceeding, before he went back to the jail to be examined. BOR at 35. The State does not articulate how Dalluge could explain his absence before he was absent. Dalluge alerted the court to his medical concerns and the court, upon hearing them, sent him to the jail for examination. 3RP 8-9. At this point, there was no absence from a critical stage of trial. It was not until testimony resumed and the attorneys made closing arguments that Dalluge was absent from a critical stage. At this

point, the court had not heard from Dalluge as to why he did not *return* to court.

The State argues defense counsel and the nursing assistant respectively served as Dalluge's mouthpiece in relaying information to the court. Defense counsel told the court that Dalluge authorized him to proceed in his absence but did not relay any explanation from Dalluge as to why he did not return. 3RP 36-37. The nursing assistant relayed that she thought Dalluge was physically able to return but did not relay any explanation from Dalluge about why he felt he could not return. 3RP 34-35. A subsequent firsthand account from Dalluge may have persuaded the judge that Dalluge really was too sick to return, despite the nursing assistant's lack of objective findings of a panic attack, such that a renewed finding of voluntariness could not be made. The State is essentially arguing that Dalluge's explanation would not have made a difference. That is not for the State to say. That is for the trial court to decide, after listening to what the defendant has to say. The State cites no case law that permits the court to dispense with giving the defendant an opportunity to explain the absence following a return to court.

Dalluge stands by the argument made in the opening brief that the court also erred in preliminarily finding that Dalluge voluntarily absented himself from trial. The argument need not be repeated here.

B. CONCLUSION

For the reasons stated above and in the opening brief, Dalluge requests the conviction be reversed, the challenged LFOs be vacated, and the interest notation in the judgment and sentence be corrected.

DATED this 11th day of July 2019

Respectfully Submitted,

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July 11, 2019 - 1:09 PM

Transmittal Information

Filed with Court:	Court of Appeals Division III
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Appellate Court Case Title:	State of Washington v. Amel William Dalluge
Superior Court Case Number:	17-1-00401-7

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