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No. 36069-5-III

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

STATE OF WASHINGTON,

Respondent,

v.

SANTIAGO ALBERTO SANTOS,

Appellant.

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

REPLY BRIEF OF APPELLANT

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A. ARGUMENT

1. Due process required the prosecution to disprove Mr. Santos' defense of diminished capacity beyond a reasonable doubt. The court erred by not instructing the jury that the prosecution bore this burden.

The trial court correctly found that the evidence was adequate to instruct the jury on Mr. Santos' defense of diminished capacity. RP 1052. While instructing the jury on the defense, the Court did not instruct the jury that the prosecution bore the burden to disprove this defense beyond a reasonable doubt. CP 121; RP 1064-66. Rather, the court instructed that the jury could consider evidence of mental illness or disorder in deciding if Mr. Santos had the capacity to form the mental state necessary to commit the crime. CP 121. Because the defense of diminished capacity negated the intent and knowledge elements of the charged crimes, due process required the prosecution disprove the defense beyond a reasonable doubt. Br. of App. at 17-24. Consequently, the court erred by denying Mr. Santos' request to instruct the jury that the prosecution bore the burden of disproving diminished capacity beyond a reasonable doubt. Br. of App. at 24. As this constitutional error is not harmless beyond a reasonable doubt, reversal is required. Br. of App. at 24-25.

When a defense negates an element of the offense, due process requires the prosecution to disprove that defense beyond a reasonable

doubt. Smith v. United States, 568 U.S. 106, 110, 133 S. Ct. 714, 184 L. Ed. 2d 570 (2013); State v. W.R., Jr., 181 Wn.2d 757, 762, 336 P.3d 1134 (2014). This rule is well established. See, e.g., Mullaney v. Wilbur, 421 U.S. 684, 704, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975) (prosecution bore burden to disprove heat of passion defense because it negated presumed element of malice in homicide statute)¹; W.R., 181 Wn.2d at 762-63 (prosecution must disprove defense of consent in rape prosecutions because it negates forcible compulsion element); State v. Acosta, 101 Wn.2d 612, 617-19, 683 P.2d 1069 (1984) (prosecution must disprove claim of self-defense because it negates intent and knowledge elements); State v. Hicks, 102 Wn.2d 182, 187, 683 P.2d 186 (1984) (prosecution must disprove good-faith claim of title defense in theft and robbery prosecutions because it negates intent to steal element); State v. Imokawa, 4 Wn. App. 2d 545, 556, 422 P.3d 502 (2018) (prosecution must disprove absence of superseding cause because it negates element of proximate cause), rev. granted, ___ Wn.2d ___ (2019). The prosecution fails to acknowledge this constitutional rule. Br. of Resp't at 30-37.

¹ The Supreme Court clarified that this was the rationale in support of the holding of Mullaney in Patterson v. New York, 432 U.S. 197, 215-16, 97 S. Ct. 2319, 53 L. Ed. 2d 281 (1977).

In arguing that due process does not require the prosecution to disprove the defense of diminished capacity when properly raised, the prosecution cites cases concerning the defense of *voluntary intoxication*. Br. of Resp't at 31-33.² Unlike mental illness that completely prevents a person from acting with the requisite mental state, “[a] person can be intoxicated and yet still be able to form the requisite mental state.” State v. Coates, 107 Wn.2d 882, 891, 735 P.2d 64 (1987). In contrast to diminished capacity, voluntary intoxication is not a true “defense.” Id. For these reasons, caselaw on voluntary intoxication is inapposite.

The prosecution appears to further contend that it need not disprove a defense of diminished capacity on the theory that it is not actually a defense. Br. of Resp't at 31. The contention is reminiscent of cases characterizing diminished capacity as “a rule of evidence” rather than a defense. State v. Marchi, 158 Wn. App. 823, 834, 243 P.3d 556 (2010); State v. Stumpf, 64 Wn. App. 522, 525 n.2, 827 P.2d 294 (1992). As argued, labeling diminished capacity as a “rule of evidence” does not evade the due process issue. Br. of App. at 22-23.

² Citing State v. Fuller, 42 Wn. App. 53, 708 P.2d 413 (1985); State v. James, 47 Wn. App. 605, 736 P.2d 700 (1987); State v. Coates, 107 Wn.2d 882, 735 P.2d 64 (1987).

Moreover, our Supreme Court has treated diminished capacity as a *defense*, holding that unless pleaded as a defense, diminished capacity is waived. State v. Clark, 187 Wn.2d 641, 650-51, 389 P.3d 462 (2017). In holding that expert testimony on diminished was properly excluded because diminished capacity had not been pleaded, our Supreme Court reasoned that “while the State is always required to prove the defendant’s *actual* culpable mental state, it is not automatically required to prove the defendant’s *capacity* to form a culpable mental state; such capacity is presumed unless the defendant places it at issue.” Id. at 653. This reasoning makes sense because the Supreme Court has defined diminished capacity as “a mental condition not amounting to insanity which prevents the defendant from possessing the requisite mental state necessary to commit the crime charged.” State v. Furman, 122 Wn.2d 440, 454, 858 P.2d 1092 (1993) (emphasis added).³

As recognized by the Third Circuit, “[i]f the defendant’s evidence on mental disease or defect is sufficient to raise a reasonable doubt about the existence of the requisite intent, it cannot constitutionally be ignored.”

³ Unlike diminished capacity, due process does not require the prosecution to disprove an insanity defense because insanity does not negate the mental elements of a criminal offense. State v. Box, 109 Wn.2d 320, 330, 745 P.2d 23 (1987). As our Supreme Court has recognized, “the burdens of proof of insanity and diminished capacity are different.” State v. Hamlet, 133 Wn.2d 314, 320, 944 P.2d 1026 (1997).

Humanik v. Beyer, 871 F.2d 432, 443 (3d Cir. 1989). Thus, a state law that placed the burden on the defendant to prove the presence of a mental defect that negates a mental element of the offense (i.e., diminished capacity) violated due process. Id. at 433, 441-43.

Similarly, here the jury instructions failed to place the burden on the prosecution to disprove diminished capacity. Although the diminished capacity instruction received by the jury did not state that Mr. Santos had the burden to prove a mental defect, the instruction did not state that the prosecution had the burden. CP 121. This ambiguity on the burden of proof is intolerable. See State v. Borsheim, 140 Wn. App. 357, 366, 165 P.3d 417 (2007) (beyond merely correctly stating the law, jury instructions must “make the relevant legal standard manifestly apparent to the average juror”) (internal quotation omitted).

To be sure, this Court rejected a similar argument in State v. Marchi, 158 Wn. App. 823, 243 P.3d 556 (2010). This Court is not obliged to follow Marchi and should not do so. In re Pers. Restraint of Arnold, 190 Wn.2d 136, 154, 410 P.3d 1133 (2018). In responding to Mr. Santos’ argument that Marchi should not be followed, the prosecution

only recounts the reasoning of Marchi and does not provide argument on why this Court should follow it.⁴ Br. of Resp't at 36-37.

The prosecution asserts that our Supreme Court's denial of review in Marchi indicates the Supreme Court agreed with the appellate court's resolution of the issue. Br. of Resp't at 34. But "the [Washington] Supreme Court's denial of review has never been taken as an expression of the court's implicit acceptance of an appellate court's decision." Matia Contractors, Inc. v. City of Bellingham, 144 Wn. App. 445, 452, 183 P.3d 1082 (2008); accord Teague v. Lane, 489 U.S. 288, 296, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989) (United States Supreme Court's denial of a writ of certiorari does not mean the court approves of the decision below).

The prosecution argues the trial court did not err by denying Mr. Santos' proposed instruction because the trial court was applying Marchi. Br. of App. at 37. This is superficially true. But given that an appellate court can disagree with a prior appellate court decision, this does not prevent this Court from holding that the trial court erred by not instructing the jury that the prosecution must prove the absence of diminished capacity beyond a reasonable doubt. See Arnold, 190 Wn.2d at 154.

⁴ This Court rejected a similar argument in the context of an ineffective assistance of counsel claim. State v. Sao, 156 Wn. App. 67, 76-77, 230 P.3d 277 (2010). Because the case concerned an ineffective assistance of counsel claim and voluntary intoxication, it is materially distinguishable. Regardless, like Marchi, it should not be followed.

In sum, if a person lacks capacity to form a requisite mental state of the charged offense due to mental illness (i.e., diminished capacity), the person is not guilty. As the lack of capacity negates an essential element, due process requires the prosecution disprove diminished capacity beyond a reasonable doubt. This Court should hold the trial court's failure to so instruct the jury was constitutional error.

The prosecution has not argued the error is harmless beyond a reasonable doubt. Given the lack of argument, the prosecution has failed to rebut the presumption of prejudice. State v. Lamar, 180 Wn.2d 576, 588, 327 P.3d 46 (2014) (presumption of prejudice stood because prosecution made no argument that constitutional error was harmless). The conviction must be reversed.

2. The trial court should have instructed the jury on Mr. Santos' claim of self-defense.

A trial court should instruct the jury on a defendant's claim of self-defense when there is some evidence in support. State v. Walden, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997). All the evidence at trial is considered and is viewed in the light most favorable to the defendant. McCullum, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); State v. George, 161 Wn. App. 86, 95, 249 P.3d 202 (2011).

Considering all the evidence and viewing that evidence in the light most favorable to Mr. Santos, some evidence supported Mr. Santos' claim of self-defense. Br. of App. at 26-29. Mr. Jaime, invited Mr. Santos into his home and later attacked Mr. Santos by hitting him hard on the back of his head. RP 889-92, 945-48. Because Mr. Jaime was under the influence of ketamine, he could continue to attack Mr. Santos without feeling pain from the wounds Mr. Santos inflicted upon him in self-defense. RP 593, 601, 1045. Given this evidence, the court should have instructed the jury on self-defense. Br. of App. at 29.

In opposing Mr. Santos' argument, the prosecution fails to view the evidence in the light most favorable to the party requesting the instruction, Mr. Santos. The prosecution further fails to concede the reasonable inferences from the evidence. For example, the evidence reasonably supports a conclusion that Mr. Jaime struck Mr. Santos on the head. That Mr. Santos testified another person might have struck him on the head does make this conclusion unreasonable. Br. of Resp't at 40-41.

The prosecution improperly makes inferences in its own favor and against Mr. Santos. For example, the prosecution implies Mr. Santos must have been the aggressor because he wore multiple pairs of underwear to protect himself from possible sexual assault. Br. of Resp't at 41-42. The prosecution contends that Mr. Santos' testimony that he would have

wielded a knife in self-defense shows premeditated intent. Br. of Resp't at 42. This is a misapplication of the standard, which requires viewing the evidence in Mr. Santos' favor. See State v. Henderson, 182 Wn.2d 734, 743, 344 P.3d 1207 (2015) (notwithstanding evidence tending to show that lesser offense was not committed, lesser offense instruction was warranted because evidence had to be viewed in favor of the defendant, who requested the instruction).

Because the evidence supported instructing the jury on self-defense, the trial court erred by denying Mr. Santos' self-defense instruction. The prosecution does not argue the error is harmless beyond a reasonable doubt. Therefore, the presumption of prejudice stands. Lamar, 180 Wn.2d at 588. The conviction must be reversed. Br. of App. at 29-30.

3. The exclusion of relevant evidence about ketamine violated Mr. Santos' constitutional right to present a complete defense.

Mr. Santos reiterates his argument that the trial court's exclusion of evidence about the recreational use of ketamine, particularly in the gay community, violated his constitutional right to present a complete defense. Br. of App. at 30-36.

The prosecution's argument is largely nonresponsive. The prosecution appears to contend that the standard of review is for abuse of discretion. Br. of Resp't at 44. This is incorrect. The standard of review

for a claimed violation of the right to present a defense is de novo. State v. Jones, 168 Wn.2d 713, 719, 230 P.3d 576 (2010).

Here, the excluded testimony was that ketamine had a reputation for being used recreationally by men having sex with other men. Thus, given that Mr. Jaime invited Mr. Santos in late at night, Mr. Jaime had been under the influence of ketamine, and the two men were Mr. Jaime's bedroom late at night, the excluded evidence tended to show that there had been some kind of sexual advance by Mr. Jaime. This was relevant because an unwanted sexual advance by Mr. Jaime may have caused Mr. Santos, who was in a delusional state, to act violently. RP 91-92.

Regardless, evidence about the recreational uses of ketamine was relevant to rebut any notion that Mr. Santos had used the drug against Mr. Jaime to disable him. The prosecution has no rejoinder to this point.

As the evidence was more than minimally relevant and the evidence was not so prejudicial as to disrupt the fairness of the trial, the state and federal constitutions required admission of the evidence.

The prosecution's contrary argument fails to grapple with the correct standard. This Court should hold the trial court erred by excluding highly relevant evidence about the recreational use of ketamine.

The prosecution does not argue this constitutional error is harmless beyond a reasonable doubt and therefore the presumption of prejudice

stands. Lamar, 180 Wn.2d at 588. The conviction should be reversed. Br. of App. 35-36.

4. The admission of Mr. Santos' statements and video of his interrogation violated his constitutional privilege against self-incrimination.

Mr. Santos reiterates his arguments that the trial court erred by failing to exclude the video of his interaction with Detective Fairchild and his statements to him, which were elicited in violation of his privilege against self-incrimination. Br. of App. at 36-44.

The prosecution appears to argue that the evidence was admitted only to impeach Mr. Santos' testimony. Br. of Resp't at 47-48. To the contrary, the evidence was admitted as substantive evidence, without limitation. That the evidence was admitted in rebuttal does not mean that it was limited to impeachment.

The prosecution cursorily argues the error is harmless, asserting without explanation that the evidence was overwhelming. Br. of Resp't at 47. As explained, the error is not harmless beyond a reasonable doubt because the jury may have used the evidence to reject Mr. Santos' defense of diminished capacity. Br. of App. at 44. Accordingly, the prosecution has not rebutted the presumption of prejudice, requiring reversal.

5. The exceptional sentence should be reversed for multiple reasons, including insufficient evidence, instructional error, and unconstitutional vagueness. Legal financial obligations should also be stricken on remand.

The jury found two aggravating factors: (1) the deliberate cruelty aggravator and (2) the destructive and foreseeable impact aggravator. The court used these aggravators to impose an exceptional sentence.

a. The constitutional errors require reversal of the exceptional sentence.

The constitutional errors identified, including the unconstitutional exclusion of evidence and the violation of Mr. Santos' privilege against self-incrimination, are not harmless beyond a reasonable doubt as to the jury's findings on the two aggravators. The prosecution does not argue otherwise, only contending there was no constitutional error. Br. of Resp't at 50. For this reason, the exceptional sentence should be reversed.

b. The deliberate cruelty aggravator is not supported by sufficient evidence.

Both aggravators are not supported by sufficient evidence. Br. of App. at 49-52. The deliberate cruelty aggravator requires proof that the offense was atypical. Br. of App. at 49-50. The prosecution does not disagree. Br. of Resp't at 50-52. The prosecution does not point to any evidence establishing that the offense in this case was atypical. Instead, the prosecution contends the jurors were permitted to use their own

knowledge outside the evidence to find the offense was atypical. Br. of Resp't at 50. The prosecution cites no authority in support of its argument.⁵

Setting aside that the evidence does not establish that the jurors had knowledge of the “typical” second degree felony murder by assault, it would violate due process for the jurors to rely on evidence not developed at the trial. Evidence not developed is extrinsic evidence and a juror’s use of extrinsic evidence violates the defendant’s constitutional rights. Turner v. Louisiana, 379 U.S. 466, 472, 85 S. Ct. 546, 13 L. Ed. 2d 424 (1965); Gibson v. Clanon, 633 F.2d 851, 854-55 (9th Cir. 1980). This Court should reject the prosecutions argument and hold the evidence was insufficient to support the jury’s finding that the offense was committed with “deliberate cruelty.”

c. The destructive and foreseeable impact aggravator is not supported by sufficient evidence.

The evidence also did not support the jury’s finding that the offense involved a destructive and foreseeable impact on persons other than the victim. Br. of App. at 51-52. The evidence did no show the

⁵ This Court need not consider inadequately briefed arguments or arguments unsupported by authority. Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992); Norcon Builders, LLC v. GMP Homes VG, LLC, 161 Wn. App. 474, 486, 254 P.3d 835 (2011).

impact of the offense on other persons was foreseeable to Mr. Santos. And the evidence did not establish the destructive nature of the offense was atypical. Br. of App. at 52.

The prosecution has no rejoinder and does not specifically address Mr. Santos' argument. Br. of Resp't at 51-52. By failing to respond, the prosecution impliedly concedes that the evidence was insufficient. The implied concession should be accepted. State v. Wisdom, 187 Wn. App. 652, 668, 349 P.3d 953 (2015).

d. The trial court failed to properly instruct the jury on the destructive and foreseeable impact aggravator

Mr. Santos argues the trial court failed to properly instruct the jury on the destructive and foreseeable impact aggravator. Br. of App. at 52-55. The prosecution fails to respond to Mr. Santos' argument. RAP 10.3(a)(6) & (b) (brief of respondent should answer appellant's brief). The failure is an implied concession of error, which this Court should accept. Wisdom, 187 Wn. App. at 668.

e. Both aggravators are unconstitutionally vague.

Vague laws are unconstitutional because they contravene "the twin constitutional pillars of due process and separation of powers." United States v. Davis, ___ U.S. ___, 139 S. Ct. 2319, 2325, 204 L. Ed. 2d 757 (2019). Like any element of an offense, aggravating factors violate the

prohibition against vague laws if they do not provide ordinary people with fair notice of what conduct may result in greater punishment or if they permit arbitrary application. See Johnson v. United States, ___ U.S. ___, 135 S. Ct. 2551, 2556, 192 L. Ed. 2d 569 (2015).

Because they increase or alter the range of punishment, aggravating factors are “elements” of the offense. Alleyne v. United States, 570 U.S. 99, 114-15, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013); State v. Allen, 192 Wn.2d 526, 538-39, 431 P.3d 117 (2018). The jury (not a judge) must find them and *due process* requires they be proved beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 477-78, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); Blakely v. Washington, 542 U.S. 296, 301, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

Thus, the prosecution’s assertion that “Blakely concerns itself with the Sixth Amendment jury trial right” is incorrect in that it reads out the due process component of Apprendi and Blakely. And our Supreme Court in Allen rejected the prosecution’s position that the principles of Apprendi and Blakely were so limited by holding that the double jeopardy prohibition forbade retrial on an aggravator that the jury had found to not be satisfied with proof beyond a reasonable doubt. Allen, 192 Wn.2d at 528-29.

In light of the foregoing authority, our Supreme Court’s decision in State v. Baldwin, 150 Wn.2d 448, 78 P.3d 1005 (2003) that aggravating factors are immune from the constitutional prohibition against vague laws is no longer good law. It and other decisions adhering to it should not be followed. Br. of App. at 55-60.

The prosecution cursorily contends this Court should decline to address the merits of the issue because the vagueness claim is raised for the first time on appeal. Br. of Resp’t at 49. The claim is properly before this Court as manifest constitutional error. RAP 2.5(a)(3).

In analyzing a claim of manifest constitutional error, the appellate court asks: (1) is the error of constitutional magnitude, and (2) is the error manifest? State v. Kalebaugh, 183 Wn.2d 578, 583, 355 P.3d 253 (2015). To be “manifest,” there must be a showing of “actual prejudice,” meaning “that the claimed error had practical and identifiable consequences in the trial.” Lamar, 180 Wn.2d at 583. This standard is satisfied when “the record shows that there is a fairly strong likelihood that serious constitutional error occurred.” Id. The Court may examine whether the trial court could have corrected the error. Kalebaugh, 183 Wn.2d at 583. The analysis previews the claim and should not be confused with establishing an actual violation. Lamar, 180 Wn.2d at 583.

The error was plainly constitutional. It was also manifest. The record is adequate to review the claimed error. Mr. Santos challenged the aggravators, albeit for insufficient evidence. RP 1058, 1223. The trial court could have corrected the error by not instructing the jury on the aggravators or by not entering an exceptional sentence based upon them. The error also had identifiable consequences. The aggravators were the basis for the exceptional sentence. Without them, the trial court could not have imposed an exceptional sentence. Accordingly, Mr. Santos' vagueness challenge to the aggravators is properly before this Court.

On the merits, both the aggravators are unconstitutionally vague. Br. of App. at 60-63. The prosecution provides no argument in response other than a conclusory assertion. Br. of Resp't at 56. The implied concession that the aggravators are void for vagueness should be accepted. See Wisdom, 187 Wn. App. at 668.

f. The exceptional sentence must be reversed.

Because the exceptional sentence is premised on the legally unsound aggravating factors found by the jury, the sentence must be reversed. Even if this Court determines only one of the two aggravators is unsound, reversal and remand is still appropriate. Br. of App. at 63-64. The prosecution does not argue otherwise.

g. Legal financial obligations and related provisions were improperly imposed. The prosecution's concession should be accepted.

The prosecution concedes that legal financial obligations were improperly imposed against Mr. Santos and should be stricken. Br. of App. at 64-65; Br. of Resp't at 57. Accordingly, this Court should order the trial court to strike the \$200 filing fee, the interest accrual provision, and the condition requiring Mr. Santos to pay the costs of community custody. Mr. Santos does not object to the prosecution's request that this Court order the trial court to strike the \$100 DNA fee.

B. CONCLUSION

The constitutional errors demand that Mr. Santos' conviction be reversed and that he receive a new trial. Alternatively, the exceptional sentence should be reversed and the case remanded.

Respectfully submitted this 6th day of September 2019.

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	NO. 36069-5-III
)	
SANTIAGO SANTOS,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 6TH DAY OF SEPTEMBER, 2019, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE COURT OF APPEALS - DIVISION THREE AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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