

FILED
Sept 16, 2016
Court of Appeals
Division I
State of Washington

No. 74019-9-I

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

STATE OF WASHINGTON,

Respondent,

v.

JERMAINE GREENE,

Appellant.

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

APPELLANT'S REPLY BRIEF

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A. ARGUMENT

1. The State failed to prove that Mr. Greene was an accomplice to Ms. Fortson's possession with intent to deliver.

The State does not contest Mr. Greene's argument that he may challenge the sufficiency of the evidence from the first trial. Br. of Resp't at 9. The State also does not argue that a different standard of review applies. Br. of Resp't at 9 n.4.

The State bore the burden of proving that Mr. Greene intended to facilitate Ms. Fortson's possession of cocaine (found on her person) with intent to deliver. The State agrees that more than mere knowledge and presence at a crime scene is required. Br. Resp't at 11-12; In re Welfare of Wilson, 91 Wn.2d 487, 491-92, 588 P.2d 1161 (1979). The State further agrees that merely providing information on where a person may buy drugs from is inadequate to prove complicity. Br. Resp't at 11-12; State v. Gladstone, 78 Wn.2d 306, 312, 474 P.2d 274 (1970).

Thus, the State appears to largely agree with Mr. Greene as to the law. What the State disagrees on is the application of the law to the evidence.

While acknowledging Gladstone, the State nevertheless contends that Mr. Greene's "gesturing" toward Ms. Fortson facilitated drug purchases and proved that Mr. Greene was complicit in Ms. Fortson's

subsequent possession with intent to deliver. Br. of Resp't at 12-13. But telling a person that he can buy drugs from someone does not establish complicity with the seller. Gladstone, 78 Wn.2d at 312.

The State asserts that Mr. Greene had a "significant sum of cash on his person" (\$133) and that this sum was "in denominations indicative of street-level drug transactions" (consisting of three \$20 bills, five \$10 bills, three \$5 bills, and eight \$1 bills). Br. of Resp't at 4, 13. Much of the public might be surprised to learn that \$133 is a significant sum and that carrying small bills is indicative of one being an accomplice to drug dealing. These facts are innocuous and do not prove that Mr. Greene was an accomplice. There was no evidence that this money came from drug sales or that this money was passed onto Mr. Greene by Ms. Fortson.

Contrary to the evidence, the State claims that it proved that Mr. Greene provided Ms. Fortson with the cocaine discovered on her person. Br. of Resp't at 13. At the first trial, Officer Edison committed himself to his testimony that Mr. Greene provided Ms. Fortson with loose rocks of cocaine and that these loose rocks were placed in her bra, not a plastic baggie. 1RP 85, 98-99, 119. Because the cocaine was found in a small plastic baggie, the only reasonable conclusion is that Officer Edison was wrong in asserting that Mr. Greene provided the cocaine discovered on Ms. Fortson.

The State wishes this conclusion away, arguing: “that Officer Edison did not see that Fortson may have had a baggie inside her bra that she would place the rocks of cocaine . . . is neither surprising nor dispositive.” Br. of Resp’t at 13. The State is making this up. The evidence did not prove that Ms. Fortson placed cocaine received from Mr. Greene in a baggie inside her bra. The only reasonable inference is that Ms. Fortson already had the cocaine on her person and that Officer Edison was simply incorrect about Mr. Greene passing on cocaine to Ms. Fortson shortly before their arrest.

Even assuming otherwise, supplying drugs to a person does not make a person complicit in the other person’s subsequent possession with intent to deliver. Br. of App. at 13-14. When a person delivers drugs, the person is not an accomplice to the other person’s possession of the drugs. State v. Morris, 77 Wn. App. 948, 954-55, 896 P.2d 81 (1995). Following this logic, the person who delivered the drugs is also not an accomplice to the other person’s subsequent possession with intent to deliver. Br. of App. at 13-14. The State ignores this argument, impliedly conceding the point.

The State did not present sufficient evidence for the jury to conclude beyond a reasonable doubt that Mr. Greene was an accomplice. This Court should reverse and order the charge dismissed with prejudice.

2. The court in the second trial erred in ruling that the door had been opened to highly unfair prejudicial evidence.

The purpose of the “open the door” rule is “to prevent a party from mischaracterizing evidence by only revealing advantageous details of a particular subject.” City of Seattle v. Pearson, 192 Wn. App. 802, 819, 369 P.3d 194 (2016). Even where applicable, evidence should not be admitted if its probative value is substantially outweighed by any unfair prejudice. State v. Ortiz, 34 Wn. App. 694, 696-97, 664 P.2d 1267 (1983).

After Officer Edison stubbornly refused to admit that it was *possible* that Mr. Greene’s gesturing toward Ms. Fortson had nothing to do with facilitating a drug transaction, Mr. Greene’s counsel challenged the officer’s remarkable opinion. He did this by pointing out that the officer lacked context because he had not heard what had been said. 2RP 77-82.

The State maintains that Mr. Greene was not entitled to challenge Officer Edison’s opinion on what the gesturing meant without opening the door to evidence that Officer Edison knew Mr. Lamping to be a regular user of cocaine. The State emphasizes counsel’s question asserting that Officer Edison had “no context” regarding the gesture. Br. of Resp’t at 21. Counsel’s statement on “context” was plainly referring to Officer Edison’s observations. There was no mischaracterization of the evidence.

The jury was not left with the mistaken impression that Mr. Lamping had no history with drugs.

Regardless, the evidence should have remained excluded under ER 403. The court had already ruled that this information was unfairly prejudicial. Any unfairness to the State resulting from the cross-examination did not alter the balance. Ortiz, 34 Wn. App. at 696-97.

The State argues any error was harmless, contending that evidence of Mr. Lamping being a known drug user of cocaine was not prejudicial to Mr. Greene. Contrary to the State's argument, when this evidence is connected to Mr. Greene's "gestures," it tends to show he was associating with a known drug user. It also tended to prove that his gestures were related to illicit drug sales. From this, a jury might infer that Mr. Greene was likely complicit in Ms. Fortson's subsequent possession with intent to deliver. There is a reasonable probability that the error affected the outcome, requiring reversal.

The error was prejudicial. This Court should reverse and remand for a new trial.

3. Counsel's failure to ask for a parenting sentencing alternative deprived Mr. Greene of his right to effective assistance of counsel.

A claim of ineffective assistance of counsel is established when there has been deficient performance and resulting prejudice. Strickland

v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Trial counsel acted deficiently at sentencing by not proposing a parenting sentencing alternative. The record shows that Mr. Greene likely qualified for this alternative, which if the court imposed would have resulted in a sentence of one year of community custody rather than five years of confinement. RCW 9.94A.655(4); 2RP 249. The deficient performance resulted in prejudice because the trial court's comments at sentencing show there is a reasonable probability that the court would have imposed this alternative. 2RP 246.

The State asserts there was no deficient performance because the record does not prove that Mr. Greene was eligible for a parenting sentencing alternative. Br. of Resp't at 28. Specifically, the State contends nothing in the record shows Mr. Greene had custody of his children at the time of the offense. Br. Resp't at 28. However, the reasonable inference from Mr. Greene's and Ms. Washington's comments to the sentencing court is that Mr. Greene had custody. 2RP 248-52. Regardless, the record does not show that Mr. Greene did not have custody of children at the time of the offense.

The State agrees that Mr. Greene's criminal history in his judgment and sentence did not disqualify from the alternative. Br. Resp't at 28. Rather, the State asserts that Mr. Greene might have been convicted

of a disqualifying offense subsequent to sentencing and speculates that his prior offenses for domestic violence may have involved his children. Br. Resp't at 28. These speculative assertions are irrelevant. What matters is whether Mr. Greene had any disqualifying offenses at the time of sentencing. He did not.

Accordingly, just as counsel proposed the possibility of a drug offender sentencing alternative (despite not knowing whether Mr. Greene qualified or not), 2RP 244-47, counsel should have also proposed the possibility of a parenting sentencing alternative to the court. His failure to do so was deficient performance.

The State argues there is no reasonable probability of prejudice. In support of this argument, the State points to Mr. Greene's criminal history and a purported statement by Mr. Greene that he planned to flee the state. Br. of Resp't at 29-30. This purported statement by Mr. Greene was not raised at sentencing and has not been substantiated. The State's citation refers to a prosecutor's earlier representation to the court in obtaining a bench warrant. Supp. CP __ (sub. no 88). As for Mr. Greene's criminal history, it did not disqualify him and the court preferred to provide treatment to Mr. Greene, not prison. 2RP 246, 254. If counsel had proposed the parenting sentencing alternative, there is a reasonable probability that the court would have imposed it. This Court should

reverse and remand for consideration of this alternative. See State v. Adamy, 151 Wn. App. 583, 588-89, 213 P.3d 627 (2009).

4. No costs should be awarded to the State for this appeal.

The State did not respond to Mr. Greene’s argument on costs. Thus, should Mr. Greene not prevail, the Court should direct that no costs will be imposed. State v. Sinclair, 192 Wn. App. 380, 391, 367 P.3d 612 (2016) (“The State has the opportunity in the brief of respondent to make counterarguments to preserve the opportunity to submit a cost bill.”).

B. CONCLUSION

The conviction should be reversed for insufficient evidence. If not, the conviction should be reversed for trial error and the case remanded for a new trial. If the conviction is not reversed, the court should remand with instruction for the court to consider a parenting sentencing alternative.

DATED this 16th day of September, 2016.

Respectfully submitted,

/s Richard W. Lechich
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Washington Appellate Project
Attorney for Appellant

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Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 16TH DAY OF SEPTEMBER, 2016, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<input checked="" type="checkbox"/> DENNIS MCCURDY, DPA [paoappellateunitmail@kingcounty.gov] [dennis.mccurdy@kingcounty.gov] KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	() () (X)	U.S. MAIL HAND DELIVERY AGREED E-SERVICE VIA COA PORTAL
<input checked="" type="checkbox"/> JERMAINE GREENE 799108 CEDAR CREEK CORRECTIONS CENTER PO BOX 37 LITTLEROCK, WA 98556	(X) () ()	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 16TH DAY OF SEPTEMBER, 2016.



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