No. 43575-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Megan Mollet,

Appellant.

Kitsap County Superior Court Cause No. 12-1-00262-1

The Honorable Judge Leila Mills

Appellant's Opening Brief

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1. Ms. Mollet's conviction for rendering criminal assistance infringed her Fourteenth Amendment right to due process because the evidence was insufficient to establish the elements of the offense.

2. The prosecution failed to prove that Ms. Mollet harbored or concealed Blake with intent to prevent, hinder, or delay his apprehension.

3. The trial judge abused her discretion by admitting irrelevant evidence in violation of ER 402.

4. The trial judge abused her discretion by admitting prejudicial and cumulative evidence in violation of ER 403 and ER 404(b).

5. The trial judge abused her discretion by failing to conduct a complete ER 404(b) analysis on the record.

6. The trial court erred by admitting evidence that Ms. Mollet vandalized her jail cell by writing "white power" on a desk.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. To obtain a conviction for rendering criminal assistance, the prosecution was required to prove (inter alia) that Ms. Mollet harbored or concealed Blake with intent to prevent, hinder, or delay his apprehension. The government proved only that Ms. Mollet denied knowing Blake or having information about his whereabouts. Did the conviction for rendering criminal assistance violate Ms. Mollet's Fourteenth Amendment right to due process because the evidence was insufficient?

2. Evidence that is irrelevant or unfairly prejudicial should not be introduced at a criminal trial. Here, the trial judge admitted evidence that Ms. Mollet vandalized her jail cell by writing a racially-charged slogan on a desk. Did the trial court err by admitting irrelevant and prejudicial evidence without properly analyzing the balance of factors for and against admission?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Eighteen-year-old Megan Mollet was homeless in early 2012. RP 219.[1] She sometimes stayed at a "flop house" with Joshua Blake, a much older man whom she'd known since she was 6 years old. Blake had worked with her father, and was close friends with her sister's husband. RP 220-221. Blake and Megan did not have a romantic relationship, but he did supply her with drugs and allowed her to stay at the flop house. RP 134, 155, 222, 257.

On February 23, 2012, Megan used methamphetamine Blake had provided her. They also drank beer together. RP 203, 221-222. They decided to drive to her sister's home. RP 222.

Trooper Radulescu pulled over the car Blake was driving. RP 109, 222; Ex 1, Supp. CP. He walked up and spoke to Blake through the passenger side window. Blake reached across Megan, who thought he was reaching for documents in the glove box and reached down to help him. Then she heard a shot, and saw that Blake had killed Trooper Radulesco. Ex 1, Supp. CP; RP 222. The patrolman died. RP 334.

[1] The only portion of the transcript cited in this brief is from the jury trial volumes, whose pages were sequentially numbered.

Blake drove to the flop house where Megan was staying. RP 205. He left after fifteen minutes, and didn't tell her where he was headed. RP 205, 223-224; Ex 1, Supp. CP.

Police searched for Blake and the car involved. They spotted the vehicle in a field near the house where Megan had been staying. RP 120. Everyone in that house was taken out and questioned. RP 121, 132, 225.

Megan was questioned with two other occupants, and all three denied any knowledge. RP 135-137. The three were then questioned separately. Megan continued to deny knowing Blake or having any knowledge of the shooting. She told the officer she had spent the day helping a friend move. RP 138-140, 161. Nothing she said caused the police to change their search for Blake. RP 150.

Another officer came and questioned her; she again denied any knowledge. RP 159-163. This officer showed her a photo of Blake, whom she denied knowing, and she repeated her statement that she had helped a friend move earlier in the day. RP 161-163. Even after she was told that others in the house had confessed what they knew, she continued to deny any knowledge. RP 172-173, 178.

The next day law enforcement returned to question Megan again. RP 197. She didn't come out of her room when requested, and didn't readily submit to arrest. RP 199-201. Once in custody, she acknowledged

that she had been present during the shooting, and told the police she was afraid of Blake. RP 201. At the jail, Megan gave a recorded statement in which she admitted that she'd been in the car when the trooper was shot. Ex 1, Supp. CP.

The state charged Megan with Rendering Criminal Assistance in the First Degree and Making a False or Misleading Statement to a Public Servant. CP 1-3.[2] The court denied her pretrial motion to dismiss the rendering charge for insufficient evidence. RP 12-30.

During trial, Megan testified, admitting that she had lied to police about her presence at the shooting. RP 225-226. During cross examination, the state sought to question her about photos taken of writing on the desk in her jail cell. RP 227-242. Over defense objection, the judge admitted a photo showing that she'd written: "white power, RIP Josh Blake". RP 237-239, 259; Ex 4a, Supp. CP.

The state argued that Megan sought to conceal Blake by lying to the police. RP 334-339. The defense countered that she'd lied to protect herself, that after Blake left she didn't know where he went, and that the investigation hadn't been hindered or delayed by her denials. RP 350-361.

[2] Aggravating factors alleged were withdrawn before the case went to trial. RP 78-82; CP 2.

She was convicted as charged, and she timely appealed. RP 377-382; CP 15.

ARGUMENT

I. MS. MOLLET'S CONVICTION FOR RENDERING CRIMINAL ASSISTANCE VIOLATED HER FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BECAUSE THE EVIDENCE WAS INSUFFICIENT TO PROVE THE ELEMENTS OF THE OFFENSE.

A. Standard of Review

Alleged constitutional violations are reviewed de novo. McDevitt v. Harborview Med. Ctr., ___ Wn.2d___, ___, 291 P.3d 876 (2012). The sufficiency of the evidence may always be raised for the first time on appeal. State v. Kirwin, 166 Wn. App. 659, 670 n. 3, 271 P.3d 310 (2012).

B. Words in a statute must be given their plain and ordinary meaning, and criminal statutes must be construed in favor of the accused person.

The due process clause of the Fourteenth Amendment requires the state to prove every element of an offense beyond a reasonable doubt. U.S. Const. Amend. XIV; In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). The remedy for a conviction based on insufficient evidence is reversal and dismissal with prejudice. Smalis v. Pennsylvania, 476 U.S. 140, 144, 106 S.Ct. 1745, 90 L.Ed.2d 116 (1986).

Statutes that involve a deprivation of liberty must be strictly construed. In re Detention of Hawkins, 169 Wn.2d 796, 801, 238 P.3d 1175 (2010). The same is true of statutes that criminalize false statements to law enforcement; such statutes "implicate constitutional guaranties of speech and privacy and will be narrowly construed." State v. Budik, 173 Wn.2d 727, 737, 272 P.3d 816 (2012).

In interpreting a statute, the court's duty is to "discern and implement the legislature's intent." State v. Williams, 171 Wn.2d 474, 477, 251 P.3d 877 (2011). The court's inquiry "always begins with the plain language of the statute." State v. Christensen, 153 Wn.2d 186, 194, 102 P.3d 789 (2004). Absent evidence of a contrary intent, words in a statute must be given their plain and ordinary meaning. State v. Lilyblad, 163 Wn.2d 1, 6, 177 P.3d 686 (2008). The meaning of an undefined word or phrase may be derived from a dictionary. Lindeman v. Kelso Sch. Dist. No. 458, 162 Wn.2d 196, 202, 172 P.3d 329 (2007).

Where the language of a statute is clear, legislative intent is derived from the language of the statute alone. State v. Engel, 166 Wn.2d 572, 578, 210 P.3d 1007 (2009); see also State v. Punsalan, 156 Wn.2d 875, 879, 133 P.3d 934 (2006) ("Plain language does not require construction."). A court "will not engage in judicial interpretation of an

unambiguous statute." State v. Davis, 160 Wn. App. 471, 477, 248 P.3d 121 (2011).

On the other hand, if a criminal statute is ambiguous, the ambiguity must be interpreted in favor of the defendant. Id; see also Seattle v. Winebrenner, 167 Wn.2d 451, 462, 219 P.3d 686 (2009); State v. Failey, 165 Wn.2d 673, 677, 201 P.3d 328 (2009). A statute is ambiguous when the language is susceptible to multiple interpretations. Davis, at 477.

C. The prosecution was required to prove that Ms. Mollet harbored or concealed Blake by means of an affirmative act or statement that was more than a false disavowal of knowledge.

Ms. Mollet was convicted of first degree rendering criminal assistance. CP 1. The offense is defined (in relevant part) as follows:

> [A] person "renders criminal assistance" if, with intent to prevent, hinder, or delay the apprehension or prosecution of another person [who is being sought by law enforcement for commission of a crime], he or she...Harbors or conceals such person.

RCW 9A.76.050(1).

The crime requires more than mere disavowal of knowledge. Instead, the prosecution must prove that the defendant harbored or concealed the fugitive by means of some "affirmative act or statement" beyond mere disavowal of knowledge. Budik, at 737-738. In Budik, the Supreme Court reached this conclusion by comparing the crime to two

related offenses,[3] applying the canon noscitur a sociis, discussing the legislative history of the statute, and reviewing cases from other jurisdictions. Budik, at 735-738.

Although the Budik decision addressed RCW 9A.76.050(4) and the prosecution's obligation to prove "deception," the court's reasoning applies with even greater force to the "harbors or conceals" prong of the statute. RCW 9A.76.050(1). The Budik court's decision was premised (in part) on the assumption that the "harbors or conceals" language requires an affirmative act or statement beyond mere disavowal. Budik, at 735 ("The five other means of rendering criminal assistance require some affirmative act or statement, be it harboring or concealing the person sought, RCW 9A.76.050(1)..." etc.) This interpretation is consistent with the legislature's choice of words. If mere "deception" requires proof of an affirmative act or statement, then harboring or concealing a person must necessarily require such proof. This is because the words "harbors" and "conceals" convey activity far more than the word "deception," which could also include more passive means of committing the offense.

[3] The two offenses were obstructing a law enforcement officer and making a false or misleading statement to a public servant. Budik, at 735 (citing RCW 9A.76.020 and RCW 9A.76.175).

In this case, the prosecution failed to prove that Ms. Mollet harbored or concealed Blake, or that she performed an affirmative act or made an affirmative statement beyond mere false disavowal of knowledge. Her false statements were personally exculpatory—she denied knowing him, seeing him, or being with him at the time of the shooting, and gave a false account of her own whereabouts—but they did not have the effect of harboring or concealing him. Her untruths may have amounted to obstructing, making a false or misleading statement, or even (possibly) rendering criminal assistance under the deception prong.[4]

Accordingly, the evidence was insufficient to prove the elements of the offense beyond a reasonable doubt. The rendering conviction must be reversed and the charge dismissed with prejudice. Smalis, at 144.

II. THE TRIAL JUDGE ERRONEOUSLY ADMITTED IRRELEVANT AND PREJUDICIAL EVIDENCE THAT PAINTED MS. MOLLET IN A NEGATIVE LIGHT.

A. Standard of Review

Evidentiary rulings are reviewed for abuse of discretion. State v. Fisher, 165 Wn.2d 727, 750, 202 P.3d 937 (2009); State v. Hudson, 150

[4] Under RCW 9A.76.050(4), a person renders criminal assistance if, "with intent to prevent, hinder, or delay the apprehension or prosecution of another person [who is being sought by law enforcement for commission of a crime], he or she…Prevents or obstructs, by use of [deception], anyone from performing an act that might aid in the discovery or apprehension of such person."

Wn. App. 646, 652, 208 P.3d 1236 (2009). A trial court abuses its discretion when its order is manifestly unreasonable or based on untenable grounds. State v. Depaz, 165 Wn.2d 842, 858, 204 P.3d 217 (2009). This includes when the court relies on unsupported facts, takes a view that no reasonable person would take, applies the wrong legal standard, or bases its ruling on an erroneous view of the law. Hudson, at 652.

An erroneous ruling requires reversal if it is prejudicial. State v. Asaeli, 150 Wn. App. 543, 579, 208 P.3d 1136 (2009). An error is prejudicial if there is a reasonable probability that it materially affected the outcome of the trial. Id., at 579.

B. The trial judge abused her discretion by admitting evidence that Ms. Mollet vandalized her jail cell by writing "white power" on a desk.

Irrelevant evidence is inadmissible at trial. ER 402. ER 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Under ER 403, even relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Under ER 404(b), "[e]vidence of other... acts is

not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

Before evidence of other acts may be admitted, the trial court is required to analyze the evidence and must "'(1) find by a preponderance of the evidence that the [conduct] occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value of the evidence against its prejudicial effect.'" Asaeli, at 576 (quoting State v. Pirtle, 127 Wn.2d 628, 648-649, 904 P.2d 245 (1995)). The analysis must be conducted on the record.[5] Asaeli, at 576 n. 34. Doubtful cases should be resolved in favor of the accused person. State v. Trickler, 106 Wn. App. 727, 733, 25 P.3d 445 (2001).

Here, the trial court erroneously overruled Ms. Mollet's objection to evidence that she had written "white power" on a desk in her jail cell. RP 237-239. Although the remainder of her writing ("RIP Josh Blake")

[5] However, if the record shows that the trial court adopted a party's express arguments addressing each factor, then the trial court's failure to conduct a full analysis on the record is not reversible error. Asaeli, at 576 n. 34.

might conceivably have been relevant to help establish Ms. Mollet's intent at the time she made her false statements, the racist slogan added nothing.

The evidence was irrelevant and highly prejudicial. It did not relate to any element of the charged crimes, it painted Ms. Mollet in a very negative light, and it was likely to inflame the jury and incite their passions and prejudices against her. For these reasons, the evidence should have been excluded under ER 402, ER 403, and ER 404(b).

Furthermore, the court failed to conduct an adequate analysis on the record. The court should have identified the purpose for which the evidence was offered, considered its relevance, and weighed its probative value against its prejudicial effect. Asaeli, supra.

The error requires reversal because it is prejudicial. Asaeli, supra. There is a reasonable probability that the admission of the evidence materially affected the outcome of the trial.[6] Id., at 579. If the jury believed Ms. Mollet espoused racist beliefs, they were more likely to draw adverse conclusions from all the evidence. Accordingly, Ms. Mollet's convictions must be reversed and the case remanded for a new trial, with instructions to exclude the evidence. Id.

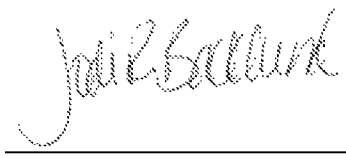
[6] This is especially true given the absence of a limiting instruction explaining the purpose for which the evidence had been admitted.

CONCLUSION

For the foregoing reasons, the conviction for rendering criminal assistance must be reversed and the charge dismissed with prejudice. In the alternative, the case must be remanded for a new trial, with instructions to exclude evidence that Ms. Mollet vandalized her jail cell by writing "white power" on a desk.

Respectfully submitted on March 4, 2013,

BACKLUND AND MISTRY



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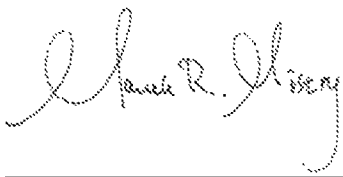

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

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With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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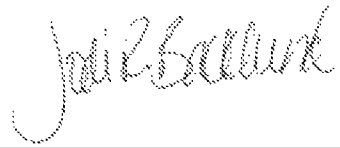
I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on March 4, 2013.



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