72001-5

No. 72001-5-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

ERIC SLANE,

Appellant.



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

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# APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

**Mr. Slane's constitutional rights to counsel and to due process were violated when his counsel presented mental health defenses and conceded elements of the charged offenses over his objection**

Over his objection, Eric Slane's attorneys raised a diminished capacity defense to several malicious mischief charges and an uncontrollable circumstances defense to the charge of bail jumping. Both defenses were based upon evidence of Mr. Slane's mental illness. In pursuing the unwanted defenses, counsel conceded Mr. Slane committed all of the elements of bail jumping, conceded all but the mental element of malicious mischief, and introduced evidence that helped prove Mr. Slane's guilt of the malicious mischief charges. Mr. Slane argues his lawyer's actions violated his constitutional rights to the assistance of counsel and to a jury determination of every element of the charged offenses beyond a reasonable doubt. Brief of Appellant at 8-23 (hereafter BOA).

1. Defense counsel's actions constituted an effective denial of counsel.

"The language and spirit of the Sixth Amendment contemplate that counsel, like other defense tools guaranteed by the Amendment, shall be an aid to a willing defendant." Faretta v. California, 422 U.S.

806, 820, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975) (emphasis added); accord Const. art. I § 22 (providing right to "appear and defend in person, or by counsel."). Counsel thus assists the defendant in exercising his constitutional rights, including the right to a jury determination of every element of the charged offenses beyond a reasonable doubt. United States v. Cronic, 446 U.S. 648, 653-54, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984).

Defense counsel owes a duty of loyal to her client. Strickland v. Washington, 466 U.S. 668, 692, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Counsel is required to consult with her client and to use her professional judgment in best pursuing the client's goals. Strickland, 466 U.S. at 688. Certain decisions, such as the decision to plead guilty or plead not guilty by reason of insanity, are personal to the defendant and cannot be made by counsel. Florida v. Nixon, 543 U.S. 175, 187-88, 125 S. Ct. 551, 160 L. Ed. 2d 565 (2004); State v. Jones, 99 Wn.2d 735, 664 P.2d 1216 (1983). Other decisions are considered to be "strategic" and controlled by defense counsel as long as they are consistent with the defendant's ultimate goals. Nixon, 543 U.S. at 187. The line between the two is not clear, and courts are divided as to

whether defense counsel can assert certain defenses or concede guilt to a lesser-included defense when the client does not agree.

The United States Supreme Court avoided directly addressing whether defense counsel's concession of guilt in the guilt phase of a death penalty prosecution was a strategic decision that could be made by defense counsel in Nixon. In that case the defendant did not respond when defense counsel discussed the strategy of conceding guilt. Nixon, 543 U.S. at 181-82. Because of the two-phase structure of a death penalty trial, the gravity of the potential death sentence, and the client's lack of objection, the Nixon Court held that counsel made a reasonable decision designed to save his client form the death penalty. Id. at 191-92.

The Ninth Circuit also avoided deciding whether counsel's decision to present mental health evidence over his client's objection violates a defendant's rights in United States v. Kaczynski, 239 F. 3d 1108 (9th Cir. 2001), cert. denied, 535 U.S. 933 (2002). In that death penalty case, the defendant made it clear he did not want his attorneys to argue that he was mentally ill. Id. at 1111-12. The defendant pled guilty in exchange for the government's agreement not to seek the death penalty. Id. at 1113. He later moved to vacate his convictions,

and argued his plea was involuntary because it was induced by the threat that his attorneys would raise a mental defense over his objection. Id. at 1113.

On appeal Kaczynski argued that asserting a mental defense was a decision, like the decision to plead guilty, that the defendant has the ultimate authority to make. Kaczynski, 239 F.2d at 1118. The government argued that trial counsel, and not the defendant, controlled "choice of trial tactics and the theory of the defense." Id. The open question – "where along this spectrum control of a mental defense short of insanity lies" - was not decided by the court because the defendant had agreed pre-trial that counsel could control the witnesses to be called and evidence to be elicited at the penalty phase. Id. at 1118-19.

The decision to raise mental health defenses and concede elements of the charges involved Mr. Slane's personal rights and should have been made by Mr. Slane. Defense counsel's decisions effectively lessened the State's burden of proof despite Mr. Slane's plea of not guilty and his objection to the defenses. Mr. Slane's convictions should be reversed and remanded for a new trial because he was effectively denied counsel.

2. Defense counsel's decisions lessened the State's burden of proof of every element of the crime beyond a reasonable doubt.

The State argues that defense counsels properly pursued diminished capacity and uncontrollable circumstances defenses because their decisions were strategic and did not relieve the State of its burden of proof. Brief of Respondent at 16-25 (hereafter BOR). Counsel's pursuit of mental health defenses did lessen the State's burden of proof without Mr. Slane's consent.

Mr. Slane's counsel raised an "uncontrollable circumstances" defense to the charge of bail jumping and argued that his mental illness prevented him from attending a pretrial hearing on July 15, 2013, that formed the basis of the charge. CP 71, 91-92, 150; 3RP 427-28; 4/24/14 RP 62-67; 5/1/14 RP 98-103. Uncontrollable circumstances is an affirmative defense that the defendant must prove by a preponderance of the evidence. RCW 9A.71.170(2); State v. Fredrick, 123 Wn. App. 347, 353-54, 97 P.3d 47 (2004); CP 176. An affirmative defense "admits the defendant committed a criminal act but pleads an excuse for doing so." State v. Fry, 168 Wn.2d 1, 7, 228 P.3d 1 (2010) (citing State v. Votava, 149 Wn.2d 178, 187-88, 66 P.3d 1050 (2003)); accord State v. W.R., Jr., 181 Wn.2d 757, 762, 336 P.3d 1134 (2014).

Thus, by asserting the uncontrollable circumstances defense to bail jumping, Mr. Slane's attorneys admitted that he committed the elements of bail jumping.

For the malicious mischief charges, counsel asserted a diminished capacity defense, contesting only the mental element of the crimes. CP 70-71, 88-91, 149; 3RP 422-27; 4/24/14 RP 59-62; 5/1/14 RP 85-97. In so doing, Mr. Slane's attorneys conceded that he committed the acts required for a guilty finding on the various counts of malicious mischief. In opening statement, counsel argued that Mr. Slane slashed the tires of his neighbors' automobiles and that the "real question" for the jury was his state of mind. 3RP 424, 426. Similarly, in closing argument counsel argued that the only element at issue was Mr. Slane's ability to act maliciously. 5/1/14 RP 82-85.

In addition to concessions in closing argument, Mr. Slane's attorneys also admitted evidence that assisted the State in proving the charged offenses. For example, defense counsel elicited testimony from Mr. Slane's friend that Mr. Slane told him why he slashed the tires of his neighbors' cars, and this information was repeated by the defense psychologist. 4/23/14 RP 78-79; 4/24/14(Girgus) RP 49-50, 87, 94-97. The psychologist also testified that Mr. Slane had stored

urine in his home in the past, thus linking Mr. Slane to the malicious mischief count where a car's windows were slashed and a broken bottle that apparently contained urine was found inside. Id. at 34; 2RP 252-53; 4/22/14 RP 108, 112. Defense counsel pointed out the connection to the jury in closing argument. 5/1/14 RP 92.

Counsel was not required to concede the actus reus in order to argue the State's inability to prove the mental elements. A defendant may present alternative theories, even if one conflicts with the defendant's testimony. Mathews v. United States, 485 U.S. 58, 108 S. Ct. 883, 99 L. Ed. 2d 54 (1988) (defendant may raise entrapment defense even if he denies one or more elements of the crime); State v. Frost, 160 Wn.2d 765, 161 P.3d 361 (2007), cert. denied, 552 U.S. 1145 (2008).

The Frost Court held that the defendant's constitutional rights to counsel and to due process were violated when the trial court prohibited defense counsel from arguing alternative theories in closing argument – that State did prove accomplice liability beyond a reasonable doubt and that defendant acted under duress, an affirmative defense. As the Court noted, "By preventing counsel from arguing [the State's failure to prove accomplice liability] in closing, the trial court

lessened the State's burden to some degree" and thus "infringed upon the defendant's due process rights." Frost, 160 Wn.2d at 778. In the same manner, Mr. Slane's attorneys lessened the State's burden of proof by conceding that he committed all of the acts required to prove malicious mischief without their client's assent.

The State points out that this case is not the same as Humphries, where defense counsel entered a formal stipulation to an element of the crime without his client's agreement. State v. Humphries, 181 Wn.2d 708, 336 P.3d 1121 (2014); BOR at 20-24. The Humphries Court noted that the stipulation established the fact of the defendant's prior conviction, "thereby conceding an element of the crime" and diminishing the State's burden of proof. Humphries, 181 Wn.2d at 716. Mr. Slane's counsel went further than the lawyers in Humphries, conceding all of the elements of bail jumping and all but one of the elements of malicious mischief and presenting evidence that Mr. Slane committed some of the charged acts. The impact of their unauthorized defense was thus just as great, if not greater, than the improper stipulation in Humphries.

The State also argues that defense counsel's argument was not important because the jury was instructed it was not evidence. BOR at

23 (citing State v. Grisby, 97 Wn.2d 493, 499, 647 P.2d 6 (1982)). This is true in virtually every criminal case in Washington, yet convictions are still reversed for prosecutorial misconduct. See State v. Allen, 182 Wn.2d 364, 379-80, 341 P.3d 268 (2015) (conviction reversed where prosecutor misstated law of accomplice liability even when court gave correct written instruction). It is unrealistic to assume that the jury members were able to ignore defense counsel's entire trial strategy, apparent from voire dire to closing argument, in reaching their verdicts.

3. Mr. Slane did not agree to placing his mental health at issue by raising an uncontrollable circumstances defense or arguing diminished capacity.

Mr. Slane clearly expressed his disagreement with the defenses asserted by his attorneys, and he did not cooperate with the forensic psychologist they retained. 3RP 422-24; 4/24/14(Girgus) RP 20, 23, 37-40, 82; 5/1/14 RP 54-55, 56-67, 119-21, 127; 2RP 280-81, 287. The State, however, implies that he did not voice an objection at several stages of the case. BOR at 6-7, 9. The State is incorrect.

The State points out that Mr. Slane did not object to the diminished capacity defense mentioned by his counsel at an October 29, 2013, hearing. BOR at 6. At that hearing, Mr. Slane's attorney

referred only to a "potential" diminish capacity defense or to "dim cap." 1RP 15, 17, 18. There was no reason for Mr. Slane to object to a potential defense.

The State also refers to the April 7, 2014, proceedings when the case was initially assigned to Judge Regina Cahan and defense counsel mentioned her diminished capacity defense in arguing motions in limine. 1RP 65, 86-87; BOR at 6. It was at that hearing, however, that the trial court told Mr. Slane that he could discuss strategy with his lawyer and not raise objections to the court:

> Your lawyer is representing you. If you want to chance to speak with your lawyer, please do. You can have a chance to speak with your lawyer about your strategy. But I don't want you arguing to the Court about your strategy and having your lawyer argue to the Court.

1RP 31.

The State also asserts that Mr. Slane did not object during jury selection. BOR at 6. Defense counsel, however, twice mentioned that Mr. Slane had made comments during the jury selection process. 3RP 345; 4/23/14RP 5. While the comments were not transcribed, it is

logical to assume that Mr. Slane was reacting to his attorney's discussion of mental illness with the jurors.[1]

Defense counsel raised the issue of her client's competency mid-trial, and the trial court engaged in a brief colloquy with Mr. Slane. 4/23/14 RP 4, 9-12. The State argues Mr. Slane did not mention his opposition to the mental defense during the colloquy. BOR at 9. Mr. Slane, however, was never asked his opinion of the diminished capacity defense his attorneys were pursuing. 4/23/14 RP 9-12. While defense counsel asserted that Mr. Slane was not mad at his lawyers for pursuing mental health defenses, the trial prosecutor had the definite impression that Mr. Slane did not agree with his lawyers choices. Id. at 8, 13.

Moreover, at this hearing Mr. Slane was again informed by the trial court that he was not allowed to express an opinion or control his own defense. 4/23/14 RP 31. The stated, "Whether you agree or disagree with their strategy, the lawyers get to decide the strategy of the case." Id. at 11. The court added that Mr. Slane could discuss trial strategy with his lawyers, and asked Mr. Slane if he could "follow along" with what they were doing. Id.

[1] The comments were apparently not loud enough to be heard on the tape of the proceedings.

Mr. Slane entered a plea of not guilty, and he was entitled to expect his attorneys to honor his decision. As the New Hampshire Supreme Court noted, "To require the defendant to repeatedly object to the court that he disagreed with counsel's strategy, particularly during closing argument, would be to place an unreasonable burden upon the defendant." State v. Anaya, 134 N.H. 346, 354, 592 A.2d 1142 (1991). It is clear from the record before this Court that Mr. Slane did not consent to the defenses raised by his attorneys.

4. Mr. Slane's convictions should be reversed because he was effectively denied his right to counsel.

"Of all of the rights an accused person has, the right to be represented by counsel is by far the more pervasive because it affects his ability to assert any other rights he might have." Cronic, 466 U.S. at 654. Mr. Slane argues that his attorneys' decision to concede elements of the charged resulted in a complete denial of his constitutional right to counsel. BOA at 20-23. In such case, the error is presumed to be prejudicial and the traditional test for ineffective assistance of counsel is not used. Cronic, 466 U.S. at 659-60. The State responds that Cronic's presumption of prejudice should not be applied to Mr. Slane's case. BOR at 25-27.

The State argues that two of the cases Mr. Slane cited in his opening brief do not support his argument because in those cases attorneys argued for not guilty by reason of insanity verdicts against their client's wishes. BOR at 27-28 (citing Cooke v. State, 977 A.2d 803 (Del. 2009), cert. denied, 559 U.S. 962 (2010) and Edwards v. State, 88 So.3d 368, 370 (Fla.Dist.Ct.App. 2012)). The State also refers this Court to cases from Pennsylvania and the Ninth and Seventh Circuits that declined to follow Cronic argued for conviction of lesser charges or argued diminished capacity. BOR at 26-27.

Mr. Slane's case raises an issue where there is not uniformity throughout the county. Many jurisdictions have used the Cronic test when defense counsel conceded a client's guilt of lesser-included offenses without his permission. State v. Carter, 270 Kan. 426, 429, 441, 14 P.3d 1138 (2000) (defense counsel "abandoned" client by conceding defendant's involvement in crime but denying premeditation in conflict with defendant's claim of innocence); Jones v. State, 110 Nev. 730, 738-39, 877 P.2d 1052 (Nev. 1994) (counsel's concession in death penalty case that his client was guilty of lesser offense of second degree murder resulted in denial of counsel where defendant did not agree to argument and it conflicted with the defendant's testimony);

Anaya, 134 N.H. at 354 (Cronic applies where defense counsel asked for conviction of lesser-included of offense of second degree murder when defendant had rejected negotiated plea to the reduced charge and testified he was not guilty); State v. Moore, 458 N.W.2d 90, 96 (Minn. 1990) (defendant facing trial for first degree premeditated murder and second degree negligent manslaughter denied fair trial when his attorney argued client was guilty of heat-of passion manslaughter in closing argument, in conflict with defendant's testimony that death was an accident); State v. Harbison, 315 N.C. 175, 180, 337 S.E.2d 504 (N.C. 1985) ("we conclude that ineffective assistance of counsel, per se in violation of the Sixth Amendment, has been established in every criminal case in which the defendant's counsel admits the defendant's guilt to the jury without the defendant's consent."); Smallwood v. State, 809 So.2d 56, 58 (Fla.Dist.Ct.App. 2002) (counsel is "ineffective per se" if he concedes defendant's guilt to any of the charged offenses without the defendant's consent). For the same reasons, the Cronic test should apply in Mr. Slane's case.

Mr. Slane's counsel ignored his wishes and methodically pursued defenses he did not agree to throughout his trial. This Court should hold that counsel abandoned Mr. Slane. As when the defendant

is denied counsel, he need not show prejudice to justify the reversal of his convictions based upon the denial of counsel. Cronic, 466 U.S. at 659-62.

5. In the alternative, the State cannot demonstrate the error was harmless beyond a reasonable doubt.

In the alternative, Mr. Slane's conviction should be reversed because the State cannot demonstrate the error was harmless beyond a reasonable doubt. Under the constitutional error standard, a conviction must be reversed when the defendant's constitutional rights are violated unless the State can demonstrate beyond a reasonable doubt that the error did not contribute to the conviction. Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967); State v. Coristine, 177 Wn.2d 370, 380, 300 P.3d 400 (2013). The harmless error test is designed to block the reversal of convictions for small errors or defects that have little likelihood of changing the result of the trial. Chapman, 386 U.S. at 22. "The inquiry . . . is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error." Sullivan v. Louisiana, 508 U.S. 275, 279, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993).

Constitutional error is presumed to be prejudicial, and the State had the burden of proving that the error was harmless. Coristine, 177 Wn.2d at 380. This Court cannot be convinced beyond a reasonable doubt that the errors in this case did not contribute to the guilty verdicts.

The State argues that defense counsel's error in raising defenses Mr. Slane did not agree to was harmless because there was overwhelming evidence of guilt. BOR at 29-31. The State, however, neglects to address the evidence supporting Mr. Slane's bail jumping conviction.

Mr. Slane was convicted of bail jumping for not appearing in court on July 18. CP 175, 190. The State produced court orders continuing Mr. Slane's case-setting hearing from July 15 to July 17 and from July 17 to July 18 because defense counsel was not present. Ex. 30-31. Mr. Slane did not sign the forms; instead they indicate that his attorney was to notify Mr. Slane of the new dates.[2] Id; 4/22/14 RP 132. The State did not prove that defense counsel did tell Mr. Slane of the new dates. Thus, there is no proof that Mr. Slane knew he was required

[2] The exhibits state "Δ◦ to notify Δ of date."

to attend a court hearing on July 18, an essential element of bail jumping as charged. RCW 9A.76.170(1); CP 42, 175.

Defense counsel did not argue this point, instead admitting the elements of the crime to assert the affirmative defense of uncontrollable circumstances due to mental illness over Mr. Slane's objection. The State cannot demonstrate this error did not contribute to the guilty verdict.

Defense counsel's diminished capacity defense to the malicious mischief charges was also not harmless. In their pursuit of that defense, Mr. Slane's attorneys argued to the jury that he committed the acts of malicious mischief and presented evidence that helped the State meet its burden of proof of those charges. 3RP 423-25, 427; 4/23/14 RP 78-79, 87-88; 4/24/14(Girgus) RP 34, 49-50, 87, 94-97; 5/1/14 RP 82-87, 92, 96, 99-103.

Mr. Slane's convictions should be reversed because the State cannot demonstrate beyond a reasonable doubt that the jury verdicts were not impacted by the presentation of the uncontrollable circumstances and diminished capacity defenses to which Mr. Slane did not agree.

B. CONCLUSION

Mr. Slane was effectively denied counsel for his defense when his attorneys raised mental health defenses over his objection. His constitutional right to a jury determination of every element of the charged offense beyond a reasonable doubt was also violated because the attorneys conceded that Mr. Slane committed bail jumping, conceded that he committed all of the acts constituting malicious mischief, and presented evidence that helped the State prove the malicious mischief counts.

Mr. Slane's convictions for two counts of malicious mischief in the second degree, five counts of malicious mischief in the third degree, and one count of bail jumping should be reversed and remanded for a new trial.

DATED this 22nd day of October 2015.

Respectfully submitted,

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| STATE OF WASHINGTON, | ) | |
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| ERIC SLANE, | ) | |
| | ) | |
| Appellant. | ) | |

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I, MARIA ARRANZA RILEY, STATE THAT ON THE 22ND DAY OF OCTOBER, 2015, 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:

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| [X] ERIC SLANE<br>(NO VALID ADDRESS)<br>C/O COUNSEL FOR APPELLANT<br>WASHINGTON APPELLATE PROJECT | ( )<br>( )<br>(X) | U.S. MAIL<br>HAND DELIVERY<br>RETAINED FOR MAILING ONCE ADDRESS OBTAINED |

**SIGNED** IN SEATTLE, WASHINGTON THIS 22ND DAY OF OCTOBER, 2015.

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