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No. 46758-5-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

ALLIXZANDER HARRIS,

Appellant.

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

The Honorable Sally F. Olson

REPLY BRIEF OF APPELLANT

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A. ARGUMENT

1. *The CCO's testimony about the contents of a DOC database was inadmissible hearsay, thus the rapid recidivism aggravating circumstance was not based on substantial evidence.*

Despite the State's attempt to distinguish it, this case is indistinguishable from *State v. Griffin,* 173 Wn.2d 467, 474, 268 P.3d 924 (2012). The State notes that in Mr. Harris's case, the Community Corrections Officer (CCO) testified regarding Mr. Harris's release date from a Department of Corrections (DOC) database; the Offender Management Network Information (OMNI) database. Brief of Respondent at 7-8. The State claims this information was an admissible business record, but the State failed to lay the necessary foundation for its admission as a business record.

In *Griffin*, the CCO testified regarding Mr. Griffin's release date from a DOC database, the "Spillman" database. *Griffin*, 173 Wn.2d at 470. Mr. Griffin objected to the testimony based upon a lack of foundation. *Id.* The trial court overruled the objection and found Mr. Griffin was guilty of the aggravating circumstance. *Id.* The Supreme Court determined the CCO's testimony to be based upon inadmissible hearsay, and since it was the only testimony supporting the aggravating circumstance, the finding was not based upon substantial evidence:

> The only evidence in support of the aggravating circumstance identified by the trial court was the testimony of Sergeant Davis. The Court of Appeals held, and the parties do not dispute, that Sergeant Davis' testimony was inadmissible under the rules of evidence. Because the only evidence supporting the trial court's finding of an aggravating circumstance was inadmissible, there is no evidence in the record supporting the trial court's aggravating circumstance finding. Accordingly, Griffin's exceptional sentence must be vacated.

Id, 173 Wn.2d at 475-76.[1]

The only distinguishing feature between Mr. Harris's case and the *Griffin* case is the name of the DOC database. In both cases the CCO testified about information he had gleaned from a DOC database, and both court's found the aggravating circumstance based upon this inadmissible hearsay evidence. Accordingly, the rapid recidivism aggravating circumstance here was not supported by substantial competent evidence and must be stricken.

The State further argues that counsel was not ineffective for failing to object to the testimony from the CCO because "to the extent there was any deficiency in the foundation, such deficiency could have easily been met *if there had been an objection*." Brief of Respondent at 11 (emphasis added). But that's exactly the point; there was no

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[1] The Supreme Court relied on the Court of Appeals finding in its unpublished decision that the evidence was inadmissible hearsay. *State v. Griffin*, 2009 WL 6383607 (December 29, 2009).

objection, and if there had been, as in *Griffin*, the testimony would still have been inadmissible hearsay evidence, where the State also failed to lay the foundation for the admission of this evidence as a business record. Counsel was ineffective for failing to object to the inadmissible evidence.

This Court should strike the rapid recidivism aggravating circumstance.

2. *Policy considerations expressed in Blazina must allow Mr. Harris to challenge the costs imposed upon him for the first time on appeal.*

The State contends Mr. Harris may not challenge the costs imposed upon him because he did not object at sentencing, relying on the decision in *State v. Lyle*, __ Wn.App. __, 2015 WL 4156773 (July 10, 2015), where the Court found that a failure to object at sentencing waived the issue on appeal. The decision in *Lyle* was poorly reasoned, directly contrary to the decision in *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015), and should be rejected.

The *Lyle* decision ignored the underlying rationale of *Blazina* and also ignored the important policy considerations the Supreme Court cited in deciding to review the issue in *Blazina* despite the lack of an objection. As Judge Bjorgen in his dissent in *Lyle* so artfully stated:

> The doctrinal tectonics, however, have shifted since our decision in *Blazina*. In that decision we followed the well trampled path of declining to reach issues for the first time on appeal if they did not fall within the exceptions of RAP 2.5. Now, the Supreme Court has concluded that the hazards of our LFO system demand consideration of this same issue, even if not raised below. As an indigent, Lyle confronts those same hazards. Although our declining of review in 2013 was a sound exercise of discretion then, it is on much shakier grounds now, after the Supreme Court has spoken.

Lyle, Slip op. at 6-7 (Bjorgen, J. dissenting).

Given these important policy considerations which take into account the underlying rational of the *Blazina* decision, Mr. Harris should be allowed to challenge the imposition of costs for the first time on appeal.

3. *Mr. Harris had a right to be present at the hearing, and his "outbursts" were directed at the failures of his appointed attorneys who were ultimately relieved for new appointed counsel.*

While the State cites a number of federal cases detailing when a defendant has a right to be present under the *federal* constitution, the State neglects to address Mr. Harris's challenge that his right to be present under the *Washington* Constitution was violated as well when the trial court removed him from the court room. Under the federal constitution, the defendant has the right to be present at "critical stages." *Rushen v. Spain,* 464 U.S. 114, 117, 104 S.Ct. 453, 78 L.Ed.2d

267 (1983). "[T]he presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence." *Snyder v. Massachusetts,* 291 U.S. 97, 107-08, 54 S.Ct. 330, 78 L.Ed. 674 (1934), *overruled in part on other grounds sub nom. Malloy v. Hogan,* 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964).

Under the Washington Constitution, a defendant has the right to be present every stage of the proceedings where his substantial rights are affected. *State v. Irby,* 170 Wn.2d 874, 884-85, 246 P.3d 796 (2011). Our Supreme Court has recognized that the state constitutional right to appear and defend is broader than the federal due process right to be present. *Id.* at 885 n. 6.

Under this standard, and even under the federal standard, Mr. Harris had a constitutional right to be present at the omnibus hearing. The hearing was one where the parties were to speak about anticipated pretrial matters as well as matters and concerns expected to occur at trial. The State was also seeking protective orders regarding discovery items linked to K.H., which Mr. Harris felt needed to be addressed. These matters went to core of the trial strategy in which Mr. Harris was actively involved and in which his distrust of his attorneys was

fostered. Mr. Harris's rights were affected and he had the right to be present.

Further, to the extent that the State wishes to consider Mr. Harris's conduct during the omnibus and other hearings to be "outbursts," in fact they were expressions of legitimate concerns about the direction his defense was, or was not, taking and his concerns about that as well as his relationships with respective counsel. Mr. Harris frequently had to be loud and argumentative to gain the attention of the court in order to express his frustrations and concerns.

Mr. Harris had a right to be present at the omnibus hearing and the court's ejection of him without considering less restrictive alternatives was error.

B. CONCLUSION

For the reasons stated in this reply brief and the previously filed Brief of Appellant, Mr. Harris asks this Court to reverse his convictions, or in the alternative, reverse his sentence.

DATED this 18th day of September 2015.

Respectfully submitted,

s/Thomas M. Kummerow

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DIVISION TWO

STATE OF WASHINGTON, Respondent, v. ALLIXZANDER HARRIS, Appellant.	)))))))))	NO. 46758-5-II

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