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COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
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DEPUTY

No. 49284-9-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

P/M: 9/18/17

State of Washington, Respondent,

v.

ROBERT LEE PRY, (Appellant),

STATEMENT OF ADDITIONAL GROUNDS

#879989
ROBERT LEE PRY ~~#897989~~
Pro-Se Petitioner
Washington State Penitentiary
1313 North 13th Avenue
Walla Walla, WA 99362
~~(509)-462-4626~~

INTRODUCTION

Appellant Robert Lee Pry, pro se, submits his SAG and contends that his United States Constitutional rights to confront his accuser under the 6th amendment have been violated by the prosecutor's saturation of hearsay throughout his trial without being provided the opportunity to cross examine and face his accusers. Pry respectfully requests dismissal of his convictions for first degree murder and or a new trial. Pry additionally raises 6th Amendment Sentencing errors that violated Pry's jury trial rights and requires resentencing.

RELEVENT FACTS

Mr. Pry reaccelerates facts from his opening brief and the transcripts cited herein; Pry was charged and convicted by a jury on charges of first degree murder, robbery, kidnapping and identity theft. The sentencing court sentenced Mr. ~~Ory~~ Pry to a total exceptional sentence standard range of 958 months.

Over Pry's objection, several hearsay statements were used to convict Pry in trial and for reasons presented herein, Pry's convictions should be reversed.

GROUND ONE

HEARSAY STATEMENTS ADMITTED UNDER THE GUISE OF INAPPLICABLE HEARSAY EXCEPTIONS

The State sought to introduce statements of Pry's co-defendant, Rodger Jones, under the guise of the co-conspirator exceptions to the hearsay rule. Jones plead guilty to a count of Murder in the first degree and was not present for cross examination at Pry's trial where the co-defendant's statements were introduced through witnesses, Pry submits that his 6th amendment right to face his accuser was violated, warranting a new trial.

After a long colloquy regarding hearsay statements, the trial court allowed the introduction of the hearsay statements, under the co-conspirator exception to the

hearsay rule. See 3-22-16 RP 404-780. Several prejudicial statements were introduced and violates Pry's right to fair trial. U.S. Const. Amend 6.

a. Ocean Wilson

Over defenses objection, Ms. Wilson testified that she heard "Mr. Pry" and co-defendant Rodger Jones, a.k.a. Tiny, "talking about how they ~~has~~ had a lick they wanted to hit". For lots of money. 5-18-16 RP 2387-2388.

Ms. Wilson, was high most of the time.

Ms. Wilson was under a co-operation agreement in exchange for her testimony. Ms. Wilson provided several inconsistent statements to police detectives and provided hearsay in trial that was used to prove the state's case in chief. Further instances of hearsay are as follows:

> "I just know Tiny had them and that Bubba was asking for them. And Tiny had said that they were given to Mr. Davis." 5-18-16 RP 2403-04.
>
> "Mr. Pry and Tiny were talking about how they ~~has~~ had a lick they wanted to hit".
>
> "Tiny had asked Bubba if he got the wallets from Mr. Davis". 5-18-16 RP 2404.
>
> On cross examination, defense counsel exposed several inconsistences in Wilson's testimony: "You never said that Robert Pry told you 'I'll never get that image out of my mind'". See 5-18-16 RP 2478-80; RP 2556
>
> "You said that when you were at the casino that Pry pulled out some $100 bills.
>
> "Yes."
>
> When is the first time you ever told anybody about that?
>
> "I don't recall."
>
> Isn't it true that it was yesterday when the first time you ever told the prosecutors about that?
>
> "I did tell a prosecutor that yesterday, but I can't recall if that's the first time".
>
> "Now one of the things you never said in that transcript isn't it true this part about you saying that Robert Pry said I am God?
>
> "Yes, I did not bring that up until later".

And you never said anything about some statement that you now attribute to Robert Pry that he said that we should go back and get cookies and soda.

"I don't believe I said it in the first transcript."

And you never said that Robert Pry told you "I'll never get the image out of my mind"? "No, I did not." See. 5-18-16 RP 2252-56

The prosecutor later used this hearsay to prove the state's case in chief.

b. Alisha Small

Through Ms. Small, the state introduced more hearsay over objections. 6-9-16 RP 4001-04.

Small testified in parts that:

"I overheard Robert Pry, Rob Davis and Josh & Shawna, talking about disposing a body". 6-9-16 RP 4073.

"You talked about Joshua Rodgers Jones saying a statement about disposing of the ~~cat~~ car as well. Yes." 6-9-16 RP 4074

c. Miranda Bond

The prosecutor continued to use hearsay statement about co-defendant Rodgers Jones, a.k.a. Tiny.

"Can you tell me what you recall him saying? That he wanted to take it to the boat launch to get rid of it."

"Did you talk to Tiny about that?" Yes, we were in the living room and we were talking. And he got mad because I was questioning him. And he grabbed me by the throat and slammed me against the wall and told me he didn't want to listen to my mouth." 6-13-16 RP 4197.

"I told Tiny I wanted to leave and he said I need to see the paperwork first: "So he was like just let me see it and I'll leave you alone." 6-13-16 RP 4203.

"Pry and Tiny were talking and they went to the old man's house and Pry left him in the bathroom." 6-13-16 RP 4204-05.

"You had indicated that they said that they assaulted him." Can you tell me what you recall them saying to the best of you recollection? That he got pieced in." 6-13-16 RP 4203-05.

d. Hearsay In Closing Arguments

In closing arguments the prosecutor used this hearsay to prove its case in chief, by saying the following statements:

"We also know Joshua Rodgers Jones met Archie back in October." So he talks to Archie. Davis knows where he is, that he lives close by to 8686 and they start developing a plan. Ocean Wilson hears the three of them, Rodgers Jones, Pry, Davis, talking in advance, days before about the lick that they are going to hit." 6-23-16 RP 5032-34.

The prosecutor also went on to vouch for the credibility of Ocean Wilson by stating:

"She gave us these statements that she had relayed from Pry about the old man being tied up before he died. We can see the truth of her statements because who else could have known that but people that did that."

For reasons that are obvious, Pry's 6th Amendment Right to confront his accuser is violated.

The 6th Amendment's confrontation clause prohibits the admission of hearsay evidence against a criminal defendant. U.S. Const. Amend. 6; Crawford v. Washington, 541 U.S. 36.68 (2004).

In Bruton v. United States, 391 U.S. 123, 126 (1968) the United State Supreme Court held that the admission of a co-defendants statement at a joint trial violates the other

defendants right to confrontation if the confession directly incriminates that defendant. The Bruton doctrine applies to confession that directly implicates the defendant. See Sinnot v. Duval, 139 f.3d 12, 14 (1st Cir. 1998) (Confrontation clause violated by admission of co-defendants written statement because statement directly incriminates defendant); U.S. v. Parks, 285 f.3d 1133, 1139 (9th Cir. 2002) (Confrontation clause violated by admission of co-defendants redacted confession that implicated the existence of a third accomplice even though court instructed jury not to consider it against defendant); State v. Atkinson, 75 Wn. App. 515 (1994) (Statements by informant made during course of assisting police in arresting defendant were made in opposition to a conspiracy rather than in furtherance of one. Accordingly the hearsay statements were not properly admitted under the co-conspirator exception); State v. Hoskinson, 48 Wn. App. 66 (1987). (Videotaped confession of an alleged accomplice did not come within the con-conspirator exception to the hearsay rule because the statement was taken after the conspiracy had ended).

Here Pry's co-defendant was not present at trial and all of Rodgers Jones statements implicating Pry were introduced through third parties.

Without the introduction of these hearsay statements, Pry's convictions cannot stand.

The prosecutor even committed misconduct by using the hearsay in closing arguments, violating the advocate witness rule. See U.S. v. Roberts, 618 f.2d 530, 533 (9th Cir. 1980) (The prosecutor has a special obligation to void improper suggestions, insinuations and assertions of personal knowledge); U.S. v. Edwards, 154 f. 3d 1915, 921. (9th 1998) (Assertions of personal knowledge run afoul of the advocate witness rule which prohibits attorneys from testifying in cases they are litigating).

Here the error connate be harmless because the hearsay is used to connect Pry to the crime scene. Pry's defense was that he and his sister gave Rodger Jones – Tiny, a ride to an abandoned house and left him there one a neighbor asked him to leave. 6-12-16 RP 60-76.

Without the hearsay, the jury would not have more than likely able to find Pry guilty.

Because the prosecutor proved its case in chief by the use of hearsay, Pry is entitled to a new trial, and or dismissal of his convictions.

GROUND TWO

MR. PRY'S CONVICTIONS FOR FIRST DEGREE FELONY MURDER AND KIDNAP AND ROBBERY IN THE FIRST DEGREE VIOLATE DOUBLE JE0PARDY

During sentencing counsel for Pry, raised the issue of merging the Kidnapping convictions and Robbery into two felony murder convictions because the crimes merge as a matter of law. See 10-3-16 RP 7-8. The sentencing court merged the Robbery but sentenced Pry on the Kidnapping charge. This was sentencing error that should be remanded. See State v. Fagundes, 26 Wn. App. 477 (1980); State v. Williams, 131 Wn. App. 488 (2006) (Merging Robbery into first degree felony murder charge); U.S. Const. Amendment 5 (Double Jeopardy).

Because the sentencing court sentenced Pry to a consecutive sentence for the kidnapping charge, Pry's right to be free from multiple punishments for the same offense is violated. See 10-3-16 RP 52. See also Whalen v. U.S., 445 U.S. 684, 693-94 (1980) (Cumulative punishment not specifically authorized by congress and may not be imposed because rape is lesser offense of felony murder in the course of rape); Williams v. Singletary, 78 f.3d 1510, 1516 (11th Cir. 1996) (Same)

The court should remand for resentencing on this ground.

GROUND THREE

THE SENTENCING COURT VIOLATED PRY'S 6TH AMENDMENT ~~JURT~~ JURY TRIAL RIGHTS BY GIVING PRY AN EXCEPTIONAL SENTENCE NOT SUPPORTED BY THE ~~JURY~~ JURY VERDICT

The sentencing court handed Pry down an exceptional sentence of 958 months. In so giving the exceptional sentence the sentencing court stated "I do find an exceptional sentence is warranted" "I am going to add a penalty for the sentence for the aggravating factors

independent of the charges themselves. The sentencing court found the multiple unpunished offense policy applies in this case was warranted although not found by the jury's verdict and not charged in Pry's information. See 10-3-16 RP 52, Ln. 11-13

For reasons presented further this was error.

In Alleyne v United States, 570 U.S.(2013) the United States Supreme Court unequivocally held that "Any fact that by law, increases the penalty for a crime, is an element of the crime and must be submitted to a jury and proved beyond a reasonable doubt". The Alleyne decision has been applied to cases just as Pry's where the exceptional sentence has been entered outside of the jury's verdict.

Here clearly the exceptional sentence was given outside of the jury's verdict and outside of the charging document, further violating Pry's right to notice of charges under the 6th Amendment. Pry further submits that running his exception sentences consecutive is a factual determination not found by the jury but only by the judge, additionally violating Pry's 6th amendment jury trial rights under Alleyne. U.S. Const. Amend. 6.

Because the exceptional sentence is in violation of the 6th Amendment, the sentence must be vacated or case remanded for resentencing.

CONCLUSION

For the forgoing reasons Mr. Pry seeks a new trial or remand for resentencing. And or Dismissal.

Respectfully submitted,

Signature: Date: 9-15-17

Robert Lee Pry #879989, Appellant
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STATE OF WASHINGTON
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DECLARATION OF SERVICE

The undersigned declares under the penalty of perjury and the laws of the State of Washington that on this day, he did deliver in the internal mail system for U.S. Mail at the Washington State Penitentiary one true and correct copy of Appellant's "Statement Of Additional Grounds", No. 49284-9-II, addressed to:

Attn: Clerk, The Court of Appeals
Division II
950 Broadway Ste 300
Tacoma, WA 98402-3694

Attn: Kitsap County Prosecuting Attorney
Kitsap County Prosecuting Attorney's Office
614 Division Street, MS 35
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Respectfully submitted this 15th day of September, 2017.

Robert Lee Ply

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