

NO. 74538-7-I

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

STATE OF WASHINGTON,

Respondent,

v.

SAID FARZAD,

Appellant.

FILED
May 31, 2016
Court of Appeals
Division I
State of Washington

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

The Honorable George N. Bowden, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Appellant's Fifth Amendment rights were violated when the court deemed his statements, made in an administrative hearing regarding his fitness to practice medicine, were admissible for purposes of impeachment.

2. The court erred in instructing the jury it could convict appellant of harassing persons other than the victims named in the information.

Issues Pertaining to Assignments of Error

1. The Fifth Amendment precludes admission of an accused person's statements at trial unless the statements are voluntary. Appellant was informed that, if he did not participate in the Department of Health hearing to determine the fate of his medical license, he may be held in default. Did the court err in admitting appellant's statements made at the administrative hearing?

2. A criminal defendant must only be convicted of those crimes for which he has actually been charged. Appellant was charged by information with telephone harassment of two specific individuals. Was appellant's constitutional right to a unanimous jury verdict violated when the jury instructions and evidence allowed the jury to find appellant guilty of committing harassment against a third individual that was not named in the information?

B. STATEMENT OF THE CASE

1. Procedural Facts

The Snohomish County prosecutor charged appellant Said Farzad with one count of telephone harassment – threat to kill and one count of making a bomb threat. CP 95. The jury could not agree on either count, and found Farzad guilty only on the lesser-included charge of gross misdemeanor telephone harassment. CP 37-39. The court imposed a sentence of 364 days, suspended for two years. CP 29. During that time, Farzad was ordered to obtain a mental health evaluation and follow any treatment recommendations and engage in eight hours of anger management classes. CP 30. Notice of appeal was timely filed. CP 16.

2. Substantive Facts

Psychiatry had been Farzad's livelihood and vocation for 20 years. Ex. 19. He worked in a community health clinic in Tacoma, largely serving those who could not afford and would otherwise not have access to mental health services. Ex. 19. Driven to a maximum of frustration by insurance company red tape that was denying his patients access to life-saving anti-depressant medication, he lost his temper. Ex. 19. He called Molina Healthcare in Bothell and told them that a patient who is wrongfully denied access to necessary medications, or who is forced to rely on outdated and dangerous medications could bring a gun and shoot everyone. Ex. 19. He

denied mentioning a bomb or making any threats whatsoever. Ex. 19. He insisted he only called one time on the day in question, but his call was transferred to several different phone operators. Ex. 19, 20.

Molina administers Medicaid in Washington State. RP 188. Because Farzad is a health care provider dealing with many Medicaid patients, he communicates frequently with Molina to try to obtain authorization for coverage for prescribed medications that do not fit Molina's formulary of drugs that it will cover. RP 188, 198-99, 219. Molina employees claimed they had hung up on Farzad when his language became rude on several occasions. RP 203, 206, 209.

On May 2, 2014, he left a voicemail for the call center supervisor at Molina, Fasil Woldearegay. Ex. 4. In the message, he is heard to use foul language, referring to the company as "bastards," "burglars," and "leeches." Ex. 4. He is heard to say the company is finished and will go bankrupt because he has notified his Congressman and is gathering patients who have been denied care to file a class action lawsuit. Ex. 4. Woldearegay was not concerned about this message because he understood Farzad was simply venting his frustration. RP 206-07.

The following Monday, however, three Molina employees claimed Farzad threatened to bring a machine gun and shoot everyone and bomb their building. RP 263, 270, 297, 333. Even though a recording advises

callers that calls may be recorded, Woldearegay was unable to obtain a recording of the allegedly threatening phone calls. RP 213.

Michelle Raymond testified that, after Farzad's call, she was shaking and pacing the floor. RP 271. Nevertheless, she called her supervisor instead of 911. RP 277-78. After reporting the incident, she got back to work. RP 278. Lisa Tyler testified she was very shaken up and had to take some time off work after the incident because she was in a panic every time the phone rang. RP 298-99. She claimed she was afraid because she believed he would carry out the threat. RP 312. However, on the day of the call, she did not leave work early or otherwise change her habits. RP 312.

Kim Tran testified her heart was beating fast and she was very shaken. RP 335. Unlike the others, she claimed Farzad said something about being only five minutes away, which made it feel very real to her. RP 335-36. (In reality, Farzad called from his home in Gig Harbor, far more than five minutes away from Molina's Bothell offices. Ex. 19.) She testified she was afraid to leave in case someone was in outside with a gun. RP 336. For about a month, she did not take a walk at lunchtime and was frightened every time the phone rang. RP 336-38. However, the day of the incident, she also did not call 911. RP 342.

Woldearegay consulted with the building's administrator, who called 911. RP 210, 235. As a result of this incident, Molina hired extra security guards and installed closed circuit television cameras. RP 212, 255.

When police arrived at Farzad's office to investigate the next day, Farzad cooperated, voluntarily giving two lengthy interviews. Exs. 19, 20. He also freely consented to a search of his phone, which showed he called Molina five times on Monday, May 5, 2014. RP 468-69. Detective Glen Chissus testified he heard Farzad say, "I can't believe I made all those calls." RP 476.

The court also permitted the jury to hear Farzad's statements to a local television news program. RP 479; Ex. 33. The statements are taken out of context, so it is not clear what Farzad is referring to. He can be heard to say that he has no memory of what he said, that "I lost it at that point, she just argued me," and that he does not usually get so furious, but he believes he may have said certain things that his mind has simply blocked out. Ex. 33.

Roughly two months after police began investigating Farzad, he was summoned to a Department of Health hearing. CP 81. The purpose of the hearing was unfit to practice medicine. CP 81, 86-88. It informed him that, if the panel found he committed the complained-of conduct, the panel would determine the appropriate penalty. CP 81. The notice informed him that if

he did not both attend and participate in the hearing, he may be held in default. CP 81. Although he was aware his statements could be used in criminal proceedings, Farzad testified, he attended the hearing and testified without invoking his Fifth Amendment rights because he wanted to clarify what had happened. RP 58-61.

During the pre-trial hearing pursuant to CrR 3.5, Farzad argued the statements were inadmissible because they were not voluntary. CP 72-73; RP 65-67. The court admitted these statements for purposes of impeachment only, if Farzad opted to testify at trial. CP 6. At trial, Farzad did not testify.

C. ARGUMENT

1. ADMISSION OF FARZAD'S STATEMENTS VIOLATED HIS FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION.

The Fifth Amendment declares in part that “No person . . . shall be compelled in any criminal case to be a witness against himself.” U.S. Const. amend. V. The Fifth Amendment is interpreted as co-extensive with article I, section 9 of Washington’s Constitution. State v. Unga, 165 Wn.2d 95, 100, 196 P.3d 645, 648 (2008). It is well established that the privilege applies in any proceeding, whether criminal, civil, or administrative. See, e.g., In re Application of Gault, 387 U.S. 1, 47-49, 87 S. Ct. 1428, 1454, 18 L. Ed. 2d 527 (1967). Appellate courts review de novo whether the Fifth

Amendment has been violated. State v. Powell, ____ Wn. App. ____, ____ P.3d ____, 2016 WL 1212574 at *2 (no. 46957-0-II, filed March 29, 2016).

The prohibited compulsion includes both “physical and moral” compulsion. South Dakota v. Neville, 459 U.S. 553, 562, 103 S. Ct. 916, 74 L. Ed. 2d 748 (1983) (quoting Fisher v. United States, 425 U.S. 391, 397, 96 S. Ct. 1569, 48 L. Ed. 2d 39 (1976)). The Fifth Amendment precludes confronting a criminal defendant with the “cruel trilemma” of “truth, falsity, or silence.” Pennsylvania v. Muniz, 496 U.S. 582, 596-97, 110 S. Ct. 2638, 110 L. Ed. 2d 528 (1990). A criminal defendant may not be forced into a choice that involves “such pain, danger, or severity that a defendant inevitably will be forced to prefer confession.” City of Seattle v. Stalsbroten, 138 Wn.2d 227, 235, 978 P.2d 1059 (1999) (citing Schmerber v. California, 384 U.S. 757, 761, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966)).

Farzad was faced with this dilemma when summoned to the Department of Health hearing. He could appear and try to explain himself, or he could refuse and be found in default, which would almost certainly result in revocation of his license to practice medicine. Admission of these statements at his criminal trial violated Farzad’s Fifth Amendment right not to be compelled to testify against himself. First, the Fifth Amendment applied at the administrative hearing; second, Farzad’s Fifth Amendment privilege was self-executing because any statements he made would be

incriminatory; and finally, the statements were coerced because a severe penalty, namely the loss of his medical license, was attached to the refusal to speak.

a. The Fifth Amendment Privilege Was Available to Farzad at the Department of Health Hearing Because His Testimony There Was Likely to Incriminate Him.

As a preliminary matter, the Fifth Amendment applies to Farzad's statements at the Department of Health hearing. The right to be free from compelled self-incrimination is liberally construed. Hoffman v. United States, 341 U.S. 479, 486, 71 S. Ct. 814, 95 L. Ed. 1118 (1951). Whether the right is available "does not turn upon the type of proceeding . . . but upon the nature of the statement or admission and the exposure which it invites." Gault, 387 U.S. at 49. The Fifth Amendment "protects against any disclosures which the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used." Kastigar v. United States, 406 U.S. 441, 445, 92 S. Ct. 1653, 32 L. Ed. 2d 212 (1972); accord Ohio v. Reiner, 532 U.S. 17, 20, 121 S. Ct. 1252, 149 L. E. 2d 158 (2002). Under the Fifth Amendment, a person is privileged not to answer questions in any proceeding "where the answers might incriminate him in future criminal proceedings." Lefkowitz v. Turley, 414 U.S. 70, 77, 94 S. Ct. 316, 322, 38 L. Ed. 2d 274 (1973).

The Department of Health required disclosures that Farzad reasonably believed could be used in his criminal prosecution. His Department of Health hearing was held approximately two months after police interviewed Farzad about this case. CP 81; RP 433. He knew the criminal allegations in this case were a large part of what would be discussed at the administrative hearing. RP 58. He testified he was aware that what he said could be used against him in criminal proceedings. RP 61. The Fifth Amendment applied because Farzad reasonably believed these statements could be used against him. Kastigar, 406 U.S. at 445.

b. Farzad's Fifth Amendment Rights Were Self-Executing Because He Reasonably Anticipated His Statements Might Be Used Against Him in the Criminal Case.

It is true that Farzad did not invoke the Fifth Amendment or specifically request immunity at the Department of Health hearing, likely because he was there without legal counsel. RP 59. There are two exceptions to the general rule that, to receive the protection of the Fifth Amendment, a person must expressly invoke the privilege, rather than answer questions. State v. Post, 118 Wn.2d 596, 605, 826 P.2d 172, 178, amended, 118 Wn.2d 596, 837 P.2d 599 (1992).

The “penalty” exception applies when the government attaches a coercive penalty to the exercise of the privilege.¹ Post, 118 Wn.2d at 609. When the State’s threat forecloses the free choice to remain silent, the statements are inadmissible regardless of whether the person invoked the privilege at the time. Post, 118 Wn.2d at 609-10 (discussing Minnesota v. Murphy, 465 U.S. 420, 434-35, 104 S. Ct. 1136, 79 L. Ed. 2d 409 (1984)).

The “penalty exception applies when the person makes incriminating statements after the State makes either “express or implied” assertions that exercising the right to silence will result in a penalty including “economic loss.” Post, 118 Wn.2d at 610. This case presents a classic penalty scenario. Farzad reasonably anticipated his statements would be used against him in the criminal proceedings, but he was forced to speak on pain of losing his livelihood.

Statements are incriminating, for purposes of the penalty analysis whenever the speaker faced a realistic threat of incrimination in a separate criminal proceeding based on the statements. Id. That is the case here. When Farzad was called to the administrative hearing, there was an ongoing criminal investigation into the same events he would be required to speak about. RP 433; CP 81-82, 101.

¹ The other exception, custodial interrogation under Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), is not applicable here.

Even if not amounting to an express confession, anything a defendant says may be incriminating if it deviates in the slightest from other statements a defendant has made and can be used, as in this case, as impeachment. If the defendant is entirely consistent and there are no deviations, the prosecutor may use the statement to argue the defendant's version of events is "rehearsed" rather than honest. Regardless of what Farzad said, it was likely to be incriminating in the context of the criminal trial.

c. Farzad's Fifth Amendment Rights Were Self-Executing Because He Faced a Severe Penalty – the Loss of His Medical License – If He Remained Silent.

Farzad was compelled to make these incriminating statements by the threat of state sanction, namely, the loss of his medical license. "[T]he loss of professional standing, professional reputation, and of livelihood are powerful forms of compulsion." Spevack v. Klein, 385 U.S. 511, 514-16, 87 S. Ct. 625, 628, 17 L. Ed. 2d 574 (1967). The option to lose one's livelihood or to pay the penalty of self-incrimination is "the antithesis of free choice to speak out or to remain silent." Garrity v. New Jersey, 385 U.S. 493, 497-98, 87 S. Ct. 616, 618-19, 17 L. Ed. 2d 562 (1967). That was precisely the choice presented to Farzad.

The notice of hearing informed him of the need not just to appear but also to actively participate. CP 81. The penalty if he did not, would be a default under RCW 34.05.440. CP 81. A dispositive order could be entered without further notice to him. RCW 34.05.440. Potential adverse rulings at this hearing included revocation or suspension of Farzad's medical license. RCW 18.130.160. His failure to admit key facts or provide full and free disclosure would be an aggravating circumstance that could justify imposing a more severe penalty. WAC 246-16-800(3)(c); WAC 246-16-890. It was clear to Farzad that if he did not appear and explain himself, he would likely lose his medical license. Because his statements at the hearing were compelled by threat of this penalty, the privilege is self-executing.

d. The Admission of Farzad's Involuntary Statements Is Constitutional Error that Requires Reversal of His Conviction.

Because Farzad was forced to provide evidence against himself, his statements must be suppressed under the Fifth Amendment. The same compulsion that renders the privilege self-executing under the penalty exception also demonstrates that the statements were involuntary and, therefore, inadmissible.

Whether as substantive evidence or impeachment, only voluntary statements by a criminal defendant are admissible at trial. State v. Tim S., 41 Wn. App. 60, 62, 701 P.2d 1120 (1985) (citing Harris v. New York, 401

U.S. 222, 224, 91 S. Ct. 643, 28 L. Ed. 2d 1 (1971)). Voluntariness requires that the decision to speak be “the product of an essentially free and unconstrained choice.” State v. Thompson, 73 Wn. App. 122, 131, 867 P.2d 691, 696 (1994) (citing Schneckloth v. Bustamonte, 412 U.S. 218, 225, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973)). While not every penalty that attaches to the decision to speak necessarily violates the Fifth Amendment, it is well established that the threat of loss of livelihood obviates any freedom of choice. Garrity, 385 U.S. at 497-98; Spevack, 385 U.S. at 514-16. The threat to Farzad’s medical license demonstrates that the statements were not voluntary.

Farzad opposed admission of these statements, even for purposes of impeachment, thereby preserving this issue for appeal. CP 72-73; RP 65-67. Even if he had not, the violation of his Fifth Amendment rights is manifest constitutional error that may be raised for the first time on appeal. RAP 2.5(a). Moreover, a criminal defendant need not testify to preserve this issue for appeal. State v. Borsheim, 140 Wn. App. 357, 371 n. 5, 165 P.3d 417, 424 (2007) (citing State v. Greve, 67 Wn. App. 166, 169, 834 P.2d 656 (1992)). Farzad asks this Court to reverse his conviction because the admission of his statements for purposes of impeaching his testimony violated his Fifth Amendment privilege against self-incrimination.

A constitutional error that violates an accused person's Fifth Amendment rights is presumptively prejudicial and requires reversal unless the State meets its burden to prove the error is harmless beyond a reasonable doubt. State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996). The conviction must be reversed unless, absent the error, any reasonable jury would reach the same result and the untainted evidence is overwhelming. Id. That is far from true here. If not threatened with impeachment by his coerced statements at the Department of Health hearing, Farzad would likely have testified in his own defense. He could have, for example, explained the context of the statements he made in the news interview. With no recording of the phone calls and the alleged threats, this case came down to whether the jury believed Farzad's statements or those of the Molina employees. The State cannot rebut the presumption of prejudice, and Farzad's conviction should be reversed.

2. THE COURT VIOLATED FARZAD'S CONSTITUTIONAL RIGHTS WHEN IT INSTRUCTED THE JURY IT COULD FIND HIM GUILTY OF A CRIME FOR WHICH HE WAS NEVER CHARGED.

Farzad was charged with telephone harassment of Lisa Tyler and/or Kim Tran. CP 95. At trial, the State presented testimony about similar phone calls to Michelle Raymond in addition to Tyler and Tran. RP 263, 270-71. The to-convict jury instruction informed the jury that, in order to

find guilt, it must determine beyond a reasonable doubt that Farzad made phone threats to “another person,” without specifying any names. CP 55. This instruction violated Farzad’s constitutional rights by permitting the jury to convict him of a crime against Raymond, for which he was never charged.

An accused person has a constitutional right to be tried only on the charged crime. State v. Jain, 151 Wn. App. 117, 121, 210 P.3d 1061 (2009) (citing State v. Pelkey, 109 Wn.2d 484, 487, 745 P.2d 854 (1987); U.S. Const. amend. VI; Const. art. I, § 22). Thus, the jury instruction defining the elements that the jury must find to convict may not extend more broadly than the charging document. Jain, 151 Wn. App. at 124 (citing State v. Brown, 45 Wn. App. 571, 726 P.2d 60 (1986)).

For example, in Brown, the State alleged a conspiracy involving 12 named individuals. 45 Wn. App. at 576. The to-convict jury instruction, by contrast, described a conspiracy with “one or more persons.” Id. Because several witnesses who were not named in the information testified about their involvement in the conspiracy, the court reversed. Id. at 576-77. The court concluded the jury instruction was erroneous and the jury could have convicted for an uncharged crime, namely, a conspiracy involving persons not named in the information. Id.

Similarly, in Jain, the charge was money laundering based on disposition of two named properties. 151 Wn. App. at 122-23. However,

evidence was presented at trial of disposition of other unnamed properties, and the to-convict instruction did not specify which property must be proved. Id. at 123. Again the Court reversed because the jury could have returned a guilty verdict based on acts not charged in the information. Id. at 124.

This case presents yet another instance of the same unconstitutional scenario that arose in Brown and Jain. Farzad was charged with phone threats against Tyler and Tran. CP 95. Evidence was presented of similar threats against Raymond, and the jury instruction failed to limit the jury's consideration to the charged crimes against Tyler and Tran. CP 55; RP 263, 270-71. As in Brown and Jain, the possibility that the jury convicted on an uncharged crime requires reversal of the conviction.

As Brown and Jain make clear, the erroneous "to convict" instruction is presumed prejudicial, and Farzad is entitled to a new trial unless the State can prove the error was harmless beyond a reasonable doubt. Jain, 151 Wn. App. at 121; Brown, 45 Wn. App. at 576. It was not. The verdict form for telephone harassment did not require that the jury identify the victim, making it impossible for the State to argue that the jury necessarily focused on the charged victims, Tyler and Tran. CP 55. Moreover, the State's closing argument did nothing to limit the jury's consideration or reduce the risk that the jury convicted Farzad of the uncharged phone call to Raymond. RP 520-538, 566-76. Compare State v. Moton, 51 Wn. App. 455, 459-60,

754 P.2d 687 (1988) (although more than one victim was involved, the witnesses' detailed testimony and counsels' arguments clearly identified the victim identified in the information as the focus of the jury's deliberations).

Because Farzad was never charged with telephone harassment of Raymond, but the jury instructions and evidence permitted conviction for that offense, his conviction violates the Sixth Amendment and article 1, section 22 of Washington's Constitution.

3. APPEAL COSTS SHOULD NOT BE IMPOSED

The trial court found Farzad indigent and entitled to appointment of appellate counsel at public expense. CP 13-15. If Farzad does not prevail on appeal, he asks that no appellate costs be authorized under title 14 RAP. RCW 10.73.160(1) states the "court of appeals . . . may require an adult . . . to pay appellate costs." (Emphasis added.) "[T]he word 'may' has a permissive or discretionary meaning." Staats v. Brown, 139 Wn.2d 757, 789, 991 P.2d 615 (2000). Thus, this Court has discretion to deny the State's request for costs.

Trial courts must make individualized findings of current and future ability to pay before they impose legal financial obligations (LFOs). State v. Blazina, 182 Wn.2d 827, 834, 344 P.3d 680 (2015). Only by conducting such a "case-by-case analysis" may courts "arrive at an LFO order appropriate to the individual defendant's circumstances." Id. Accordingly,

Farzad's ability to pay must be determined before discretionary costs are imposed. The trial court made no such finding. Instead, the trial court waived all non-mandatory fees. RP 618. The court specifically recognized the extreme financial hardship Farzad was enduring due to the loss of his livelihood and his marriage. RP 619. The finding of indigency made in the trial court is presumed to continue throughout the review under RAP 15.2(f).

Without a basis to determine that Farzad has a present or future ability to pay, this Court should not assess appellate costs against him in the event he does not substantially prevail on appeal.

D. CONCLUSION

For the foregoing reasons, Farzad requests this Court reverse his conviction.

DATED this 31ST day of May, 2016.

Respectfully submitted,

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 74538-7-I
)	
SAID FARZAD,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 31ST DAY OF MAY 2016, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] SAID FARZAD
3512 A STREET NW
GIG HARBOR, WA 98355

SIGNED IN SEATTLE WASHINGTON, THIS 31ST DAY OF MAY 2016.

X *Patrick Mayovsky*