NO. 43987-5-II

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

STATE OF WASHINGTON,

Respondent,

v.

JASON FITZGERALD,

Appellant.

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

The Honorable Gary R. Tabor, Judge

SUPPLEMENTAL BRIEF OF APPELLANT

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A. SUPPLEMENTAL ASSIGNMENTS OF ERROR

1. The court erred in denying appellant's CrR 7.8 motion for relief from judgment based on newly discovered evidence.

2. The court erred in finding the witnesses' testimony was known to the defense before trial.

Issue Pertaining to Supplemental Assignments of Error

Relief from judgment under CrR 7.8 based on newly discovered evidence requires new evidence that could not have been discovered in time for trial with due diligence. Appellant presented affidavits from three witnesses who could not be contacted before trial, one because of a no-contact order, another because she had moved and changed her last name, and a third because appellant did not know his last name. Did the court err in denying appellant's motion on the grounds that the witnesses were known to the defense before trial?

B. SUPPLEMENTAL STATEMENT OF THE CASE

1. Procedural Facts

While his direct appeal in this case was pending, Fitzgerald, acting pro se, filed a motion to vacate his conviction under CrR 7.8. CP[1] 40-69. The Superior Court denied both that motion and Fitzgerald's motion for reconsideration. CP 72, 78. Notice of appeal was timely filed. CP 79-82.

[1] CP cites in this brief refer to the Clerk's Papers in case number 45047-0-II unless otherwise specified.

This Court consolidated appeal of the CrR 7.8 motion with the original direct appeal and permitted this supplemental brief.

2. Substantive Facts

Fitzgerald was found in a car with two men who committed a Thurston County burglary. 2RP[2] 51-52. The two burglars were seen by Levi Thompson, who called 911. 2RP 110-11, 114, 115, 117.

Thurston County sheriffs responded to Thompson's home on Summit Lake Road and also to nearby roads in hopes of finding the burglars' truck. 2RP 34-40, 173-74, 184-85. At least 15 minutes later and roughly four miles away on Mudd Bay Road, deputies stopped a truck matching Thompson's description. 2RP 34-35, 187. Inside were Ty Martin, Michael Cairns, and Fitzgerald. 2RP 51-53.

Six days before trial began, the defense requested a continuance to obtain the testimony of Michael Cairns, who had recently pled guilty. 1RP 3-4. The court denied a continuance, noting there were still six days remaining to work this out. 1RP 5. Defense counsel stated he would renew the motion if necessary. 1RP 5. The motion was never renewed. The trial record makes no mention of any attempt to call Martin as a witness.

[2] The four volumes of Verbatim Report of Proceedings from the direct appeal in case number 43987-5-II are referenced as in the opening Brief of Appellant: 1RP – Sept. 13, 2012; 2RP – Sept. 19-20, 2012; 3RP – Sept. 25, 2012.

Fitzgerald was sentenced on September 25, 2012. 3RP 31. On March 14, 2013, he filed a motion to vacate his conviction under CrR 7.8 based on newly discovered evidence. CP 40-69. He attached four affidavits.

Fitzgerald declared that the day of the burglary, he was on his way to the casino with two friends, Angel Benson and her friend John, whose last name he did not know. CP 60. When his friends decided to detour to another friend's house, Fitzgerald asked to be let out so he could return to Olympia for his own vehicle. CP 60. He was walking down the off ramp at the Summit Lake grocery when he saw Ty Martin tying down a tarp in his truck bed. CP 60. He asked Martin for a ride to Olympia, and Martin agreed. CP 60. The trio headed up Highway 8 toward Olympia, but exited onto Mudd Bay Road. CP 60. After about a quarter mile they were pulled over and arrested. CP 60. Fitzgerald declared he was only getting a ride from Martin and had no knowledge of the burglary. CP 60.

In his motion, Fitzgerald explained that before and during his trial, a no-contact order prohibited him from contacting Martin to obtain his testimony. CP 41. The conditions of pre-trial release prohibit contact with any co-defendants. CP 87, 88. Fitzgerald explained his attorney refused to contact Martin. CP 41-42. He also explained he could not contact Benson or her friend because Benson had moved and changed her name and he did not know her friend's last name. CP 42.

The second affidavit was from Martin. Martin declared he and Cairns burglarized a Summit Lake home on April 5, 2012. CP 63. He declared he stopped briefly at the Summit Lake grocery afterwards and agreed to give Fitzgerald a ride. CP 63. He declared Fitzgerald had no knowledge of the burglary. CP 63-64.

The third affidavit was by Angel Benson. CP 66-67. She declared she was driving to the casino with Fitzgerald and her friend John Balcom the day of the burglary. CP 66. She declared they let Fitzgerald out at the Summit Lake grocery and went to see another friend. CP 67. When she last saw Fitzgerald, he was walking back to Olympia. CP 67. She declared that, since that day, she had both moved and changed her name and did not know the court was looking for her. CP 66.

The fourth affidavit was by John Balcom. CP 69. He declared he was on his way to the casino with Angel Benson and Fitzgerald. CP 69. Because Fitzgerald did not want to accompany him and Benson to another friend's house on the way, he let Fitzgerald out at the Summit Lake grocery to hitchhike back to Olympia. CP 69.

The court denied Fitzgerald's motion to vacate on the grounds that these witnesses were known to the defense before the trial. CP 72. In the oral ruling, the court noted there might be any number of tactical reasons why Fitzgerald's trial counsel did not contact these witnesses. 4/25/13RP

11. In his motion for reconsideration, Fitzgerald argued the witnesses could not have been located because a court order prevented him from contacting Martin, Benson had moved and changed her name, and he did not know Balcom's last name. CP 75. The court denied reconsideration. CP 78.

C. ARGUMENT

A NEW TRIAL IS WARRANTED BECAUSE THE WITNESSES' TESTIMONY WOULD SHOW FITZGERALD'S INNOCENCE AND FITZGERALD COULD NOT HAVE CONTACTED THEM EARLIER.

A trial court may grant relief from judgment due to "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under CrR 7.5." CrR 7.8. In deciding a motion to vacate judgment based on newly discovered evidence, a court considers whether that evidence: (1) will probably change the result of the trial; (2) was discovered since the trial; (3) could not have been discovered before trial by the exercise of due diligence; (4) is material; and (5) is not merely cumulative or impeaching. State v. State v. Slanaker, 58 Wn. App. 161, 163, 791 P.2d 575 (1990). While the decision to grant a new trial is within the trial court's discretion, denial of a new trial is entitled to less deference by a reviewing court than the granting of a new trial. Id.; State v. Briggs, 55 Wn. App. 44, 60, 776 P.2d 1347 (1989).

A trial court necessarily abuses its discretion when its ruling is based on an erroneous view of the law. State v. Quismundo, 164 Wn.2d 499, 504, 192 P.3d 342 (2008); see also State v. Jackman, 113 Wn.2d 772, 777, 783 P.2d 580 (1989) (new trial ruling should be reversed if predicated on erroneous interpretation of law). Additionally, a court abuses its discretion when its order is based on untenable grounds. Quismundo, 164 Wn.2d at 504.

Here, the court abused its discretion in denying Fitzgerald's motion to vacate his conviction under CrR 7.8. Fitzgerald presented affidavits from three exculpatory witnesses whose testimony could not have been obtained before trial. Co-defendant Martin would testify Fitzgerald was not involved in the burglary but merely asked him for a ride afterwards when he stopped at the Summit Lake grocery store. CP 63-64. Angel Benson (now Yarbrough) and John Balcom would testify Fitzgerald was with them on the way to a casino the morning of the burglary and they dropped off at the Summit Lake grocery store to hitchhike back to Olympia. CP 66-67, 69. These affidavits warranted a new trial because the witnesses could not have been contacted before trial and their testimony exonerates Fitzgerald of any involvement in the burglary.

a. The Testimony Could Not Have Been Obtained with Due Diligence Before Trial.

The second and third criteria for newly discovered evidence require that the evidence be discovered after trial and that it could not have been discovered in time with due diligence. Slanaker, 58 Wn. App. at 163. Slanaker illustrates the interdependence of these two criteria: "A previously known witness' testimony can be newly discovered when that witness could not be located before trial with the exercise of due diligence." Id.

The State charged Slanaker with robbery and assault of three victims who could not identify their attackers. Id. at 162. At trial, Slanaker presented an alibi defense. Id. at 162-63. He testified he was playing poker that night with a group from his apartment complex, and afterwards went home with two women. Id. at 162-63. His friend and roommate testified Slanaker had been at the poker game, corroborating that aspect of his testimony. Id. However, Slanaker could not locate the two women until after his conviction. Id. at 163. They each prepared affidavits stating Slanaker was with them at the time of the robbery and explaining why he could not locate them earlier. Id. The trial court determined Slanaker had exercised due diligence and granted a new trial. Id. The State appealed, arguing the witnesses were known to the defense before trial. Id. at 166.

In upholding the trial court's ruling, this Court explained a witness' testimony is not "known" for purposes of this rule, until the witness is contacted: "Although the content of an absent witness' testimony may be predicted, it is not 'known' until that witness is contacted. If the witness cannot be contacted until after trial, the evidence is 'newly discovered.'" Id. at 167 (quoting State v. Ames, 112 Idaho 144, 730 P.2d 1064 (Idaho App.1986)).[3] In discussing due diligence, the court specifically noted that reasonable diligence does not require efforts that are likely to be fruitless. Id. at 164-65.

Slanaker is directly on point. Martin, Benson, and Balcom are known witnesses whose testimony could not have been discovered before trial. While their existence was known before trial, the content of their testimony was not. Fitzgerald could not have contacted Martin because the conditions of his pre-trial release prohibited all contact between them. CP 87, 88. Because of Benson's move and name change, Fitzgerald had no way to contact her. CP 42, 66. Balcom was even less accessible than Benson because Fitzgerald did not know his last name. CP 42. Under these circumstances, attempts to contact these witnesses would have been futile.

The trial court's ruling denying Fitzgerald's motion is an abuse of discretion because it is a misapprehension of law. Quismundo, 164 Wn.2d at

[3] Federal courts have reached the same result. Amos v. United States, 218 F.2d 44 (D.C.Cir. 1954).

504. The court denied Fitzgerald's motion because, "The evidence is merely testimony that was known to the defense before trial." CP 72. Under Slanaker, testimony is not "known" to the defense merely because the defense knows a witness exists and can predict what the witness might say. 58 Wn. App. at 167. For purposes of newly discovered evidence, the evidence is not "known" until the witness is contacted. Id. Because Fitzgerald had no way to contact these witnesses, as in Slanaker, he could only predict what they might say. Their testimony was newly discovered when he was able to contact them after trial.

b. Martin, Benson, and Balcom's Testimony Would Probably Change the Outcome of a New Trial.

Fitzgerald has also met the other requirements for relief under CrR 7.8. The court did not make any findings to the contrary. CP 72. The first, fourth, and fifth requirements for relief from judgment based on newly discovered evidence require that the evidence would probably change the outcome of the trial, is material, and is not merely cumulative or impeaching. Slanaker, 58 Wn. App. at 163. To determine whether the newly discovered evidence will probably result in a different outcome upon retrial, the trial court must determine the credibility, significance and cogency of the proffered evidence. State v. Barry, 25 Wn. App. 751, 758, 611 P.2d 1262

(1980). Additionally, the court considers the strength of the State's evidence. Id. at 758-59.

Here, the State's case against Fitzgerald was entirely circumstantial with no direct evidence of his involvement. Martin, Benson or Balcom's testimony, even if taken alone, would likely have changed the outcome in this case. The combined exculpatory effect of all three witnesses is even stronger.

Martin, who admitted committing the burglary and was seen by Levi Thompson, would testify Fitzgerald was merely picked up as a hitchhiker after the fact and had no knowledge of the crime. CP 63. Benson and Balcom would corroborate the circumstances leading up to Fitzgerald being picked up by Martin. CP 66-69. Their testimony is material because it establishes Fitzgerald was not present at the burglary and was not one of the burglars. See State v. Thomson, 70 Wn. App. 200, 211, 852 P.2d 1104 (1993), aff'd 123 Wn.2d 877, 872 P.2d 1097 (1994) (the identity of an offender and his presence at the crime scene is a material element that must be charged and proved beyond a reasonable doubt).

Their testimony is not cumulative because no other witness at trial gave Fitzgerald's version of events. It is substantive material evidence, not mere impeachment, because it contradicts the State's theory of the case that Fitzgerald was in the car with Martin and Cairns the whole time. 2RP 316,

320-21; see State v. Burke, 163 Wn.2d 204, 219, 181 P.3d 1 (2008) (Substantive evidence contradicting the State's case is not "mere impeachment."). If these witnesses are believed, Fitzgerald is innocent.

Their testimony would likely have changed the outcome of the trial because the jury would probably not disregard the testimony of three separate witnesses. A jury that heard them would have to find all three committed perjury in order to convict Fitzgerald. While the trial court can consider the credibility of newly discovered witness testimony in light of all the facts, the trial court in this case did not do so. CP 72. Fitzgerald attempted to have his witnesses testify at the new trial hearing so their credibility could be gauged, but the judge denied that request and made no findings about credibility. 4/25/13RP 7-8. Moreover, this is not a case where the new testimony inherently lacks credibility because it contradicts overwhelming and credible testimony presented at trial. On the contrary, the evidence linking Fitzgerald to this burglary was thin and circumstantial. Fitzgerald's motion should have been granted because the newly discovered testimony creates significant and reasonable doubt and would probably change the outcome of the trial.

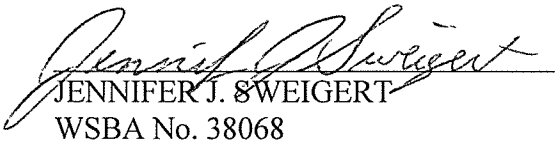
D. CONCLUSION

For the foregoing reasons as well as those stated in the opening Brief of Appellant, Fitzgerald requests this Court reverse the order denying his motion for relief from judgment and reverse his conviction.

DATED this 16th day of December, 2013.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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	)	
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 16TH DAY OF DECEMBER 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **SUPPLEMENTAL BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] JASON FITZGERALD
DOC NO. 721703
STAFFORD CREEK CORRECTIONS CENTER
191 CONSTANTINE WAY
ABERDEEN, WA 98520

SIGNED IN SEATTLE WASHINGTON, THIS 16TH DAY OF DECEMBERULY 2013.

X Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

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