

NO. 35023-8-II

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

STATE OF WASHINGTON, Respondent

v.

KATHLEEN MARIE ALLEN, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
THE HONORABLE JOHN F. NICHOLS
CLARK COUNTY SUPERIOR COURT CAUSE NO. 06-1-00626-7

BRIEF OF RESPONDENT

Attorneys for Respondent:

ARTHUR D. CURTIS
Prosecuting Attorney
Clark County, Washington

MICHAEL C. KINNIE, WSBA #7869
Senior Deputy Prosecuting Attorney

Clark County Prosecuting Attorney
1013 Franklin Street
PO Box 5000
Vancouver WA 98666-5000
Telephone (360) 397-2261

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I. STATEMENT OF THE CASE

The State accepts the statement of the case as provided by the appellant in her brief.

II. RESPONSE TO ASSIGNMENT OF ERROR

The assignment of error raised by the defendant in her brief deals with a claim of ineffective assistance of counsel in two specific areas:

1. The trial defense attorney failed to request the accomplice cautionary instruction as found in WPIC 6.05;
2. The attorney failed to argue and preserve her right to a speedy trial.

The analysis for denial of the federal and state constitutional right to effective assistance of counsel consists of two parts: First, that defense counsel's performance was deficient, that is, did it fall below the objective standard of reasonableness; second, was the defendant thus prejudiced.

Strickland v. Washington, 466 U.S. 668, 687 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984); State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987); State v. Harper, 64 Wn. App. 283, 286, 823 P.2d 1137 (1992); State v. Staten, 60 Wn. App. 163, 171, 802 P.2d 1384, review denied, 117 Wn.2d 1011 (1991).

In reviewing such a claim, there is a strong presumption that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. State v. Visitacion, 55 Wn. App. 166, 173, 776 P.2d 986 (1989). The defendant has the heavy burden of showing, after a review of the entire record, State v. Mak, 105 Wn.2d 692, 718 P.2d 407, cert denied, 479 U.S. 995 (1986), sentence vacated on writ of habeas corpus sub nom. Mak v. Blodgett, 754 F. Supp. 1490 (W.D. Wash. 1991), aff'd, 970 F.2d 614 (9th Cir. 1992) cert. denied, 113 S. Ct. 1363 (1993), that counsel's performance fell below the objective standard of reasonableness after considering all surrounding circumstances. State v. Allen, 57 Wn. App. 134, 140, 788 P.2d 1084 (1990).

The Amended Information filed in this matter (CP 7) charged the defendant with one count of residential burglary. The claim was that she and her juvenile son had burglarized the residence of Gail Millmaker.

The Court's Instructions to the Jury (CP 8) included as Number 12 the normal accomplice definitional instruction, but there was no cautionary instruction provided. No exceptions were taken to the failure to give a cautionary instruction.

In general, a trial court should provide a jury with the standard accomplice instruction whenever accomplice testimony is introduced.

State v. Harris, 102 Wn.2d 148, 155, 685 P.2d (1984); State v. Sherwood, 71 Wn. App. 481, 485, 860 P.2d 407 (1993). But the court does not commit reversible error by failing to give the instruction if the accomplice testimony is substantially corroborated by independent evidence. Harris, 102 Wn.2d at 155; Sherwood, 71 Wn. App. at 485. “Whether failure to give this instruction constitutes reversible error when the accomplice testimony is corroborated by independent evidence depends upon the extent of the corroboration.” Harris, 102 Wn.2d at 155.

The State submits that the cautionary instruction was unnecessary given the nature of the evidence in the case and specifically given the testimony offered by Detective Ringo and the confession given by the defendant to him.

Specifically, the report of proceedings indicates that the detective questioned the defendant after Miranda rights and she admitted to him her involvement in the burglarizing of the home and the stealing of items from the home.

. . . ANSWER (Detective Ringo): So we continued the conversation. As the conversation continued to progress, her recollection became a little clearer and the – throughout the course of our talk, she would say, okay, well, I – I do know this person, well, I – I’ve been in that area, well, maybe I was there that day, up unto the point where she finally was willing to say, okay, I was in the house and I took the cards, and I knew that we broke in and we weren’t suppose to be there.

(RP 113, L.10-18)

Detective Ringo is then asked to flesh out in more detail the conversation with the defendant and her confession is as follows:

QUESTION (Jeannie Bryant, Deputy Prosecutor): Okay. And did you eventually get back around to asking her whether she was involved in the Millmaker burglary?

ANSWER (Detective Ringo): Yes.

QUESTION: Okay. And what did she say?

ANSWER: That she was involved, and, in fact, had gone in the house.

QUESTION: Okay. And what did she describe was her involvement in the Millmaker burglary?

ANSWER: In essence, she made – gave us the understanding that as her son Allen – or, Aaron, excuse me, forced the front door open, she had her back to that and was watching the street.

When entry was gained, they went into the house and during their time in the house, they found these Safeway gift cards which they had knowledge of beforehand, and took them from the bead room.

QUESTION: Now, did she – did you ask her if she had knowledge that Mrs. Millmaker would be home or not home on this occasion?

ANSWER: Yes, she was asked that.

QUESTION: Okay. What did – how did she respond?

ANSWER: She knew that she would not be there.

QUESTION: That Mrs. Millmaker would not be there?

ANSWER: Correct. I'm –

QUESTION: And how did –

ANSWER: -- sorry.

QUESTION: -- she know that?

ANSWER: She had gained that knowledge through a third party.

QUESTION: Okay. Was the third party Ron Thorsen? Or did she tell you that third party was Ron Thorsen?

ANSWER: You know, she never did tell me exactly who it was.

She made sure – and she also indicated that she knew Ms. Millmaker wasn't there because her car wasn't there, and so she was fairly confident that Ms. Millmaker was not there.

QUESTION: Okay. Now, did you ask her or did she indicate during the conversation that she knew exactly where the property she was going after could be located inside the residence?

ANSWER (Pause; reviewing report.): I want to make sure I'm accurate, 'cause I know that at least Aaron did, and I want to make sure that –

MR. HARP: Well, object to that response, Your Honor.

THE COURT: I'll strike that.

THE WITNESS (Pause; reviewing report.): She said there was a white cabinet in a room, and it was already open, that they didn't open it.

And in the cabinet she said both doors were open, both the room and the cabinet door.

And I asked how many cards did she take, and she said she didn't know, she honestly didn't know.

And in trying to get clarification, I asked a few, a lot, and then gave an example of a few being two or three or is a big handful, and here response was, "Maybe a handful."

So as we continued on, she said twenty or thirty of them, maybe.

As far as knowing exactly where they were, there was – it doesn't seem to be that there was any real clarification given in that exact area.

MS. BRYANT: Okay.

BY MS. BRYANT: (Continuing)

QUESTION: Now, did she indicate how entry was made into the residence?

ANSWER (Pause; reviewing report.): She said that she thought "he," meaning Aaron, may have kicked it open or had something to open it, but she didn't know.

QUESTION: Okay. And did she indicate where at the residence, was it the front or the back of the door or a slider or anything of that sort?

ANSWER: The conversation was about the front door, and she said that the screen door opened, and our conversation in reference to which door was the front door.

She didn't say that it was the front door, and I believe I'm the one that was talking about the front door, so I had brought that to her attention and that was the topic of our conversation –

QUESTION: All right.

ANSWER: -- that door.

QUESTION: Did she indicate to you at that time what she was doing?

ANSWER: Again, she said that because she didn't know if he kicked it or forced it, her back, she wasn't facing him.

QUESTION: Okay. Did she tell you what she was doing?

ANSWER: She asked – I – I asked her – or, I'm sorry, Detective Rakke asked if she was looking out into the street. Her response was:

“Yeah, kind of watching around, seeing what was going on.”

QUESTION: Did you ask her how long they'd been inside the residence?

ANSWER: I did, asked once they were inside how long they spent inside, which was her response to that was:

“Five minutes.”

QUESTION: Okay, did she indicate where they went after they left?

ANSWER (Pause; reviewing report.): They left, caught a bus, went downtown to meet up with Ron, is what she said.

(RP 119, L.12 – 123, L.15)

Given the nature of this testimony, the State submits that it was unnecessary to give the cautionary accomplice instruction. The evidence that had been provided by her son, Aaron Allen, was substantially corroborated by her own admission of guilty

The second area of claim of ineffective assistance of counsel deals with the court granting a continuance because the lead investigating officer, Detective Ringo, the officer who took the statement from the defendant, was unavailable at the time that the trial was initially set because he was required to attend SWAT training. The Motion and Affidavit for Order of Continuance filed by the State (CP 3) is attached hereto and by this reference incorporated herein. It indicates that he is scheduled for SWAT training on the Oregon Coast from May 15-18, 2006, and that he would be back and available for trial during the week of May 22, 2006. The Court, in granting the continuance, noted that there was a legitimate reason for it (RP 25) and further indicated that, because of Court scheduling, the next available time was June 19. (RP 25-26). The trial attorney agreed to the continuance but the defendant refused to sign off on it. (RP 28-29).

CrR 3.3 Time for Trial:

(f) Continuances. Continuances or other delays may be granted as follows:

(2) Motion by the Court or a Party.

On motion of the court or a party, the court may continue the trial date to a specified date when such continuance is required in the administration of justice and the defendant will not be prejudiced in the presentation of his defense. The motion must be made before the time trial had expired. The court must state on the record or in writing the reasons

for the continuance. The bringing of such motion by or on behalf of any party waives that party's objection to the requested delay.

A trial court's decision to grant a continuance will be not disturbed absent a manifest abuse of discretion. State v. Campbell, 103 Wn.2d 1, 14, 691 P.2d 929 (1984). Discretion is abused if it is exercised on untenable grounds. State v. Heredia-Juarez, 119 Wn. App. 150, 152, 79 P.3d 987 (2003).

The unavailability of a material witness is a valid ground for continuing a trial when there is a valid reason for the witness's unavailability, the witness will become available within a reasonable time, and there is no substantial prejudice to the defendant.

- State v. Jones, 117 Wn. App. 721, 72 P.3d 1110 (2003)

The appellate courts have affirmed in several cases where a continuance was granted when the reason for the unavailability of the witness was a scheduled vacation or other similar commitment. See, e.g. State v. Grilley, 67 Wn. App 795, 799, 840 P.2d 903 (1992) (police officer's scheduled vacation); State v. Kelley, 64 Wn. App. 755, 767, 828 P.2d 1106 (1992) (deputy prosecutor's scheduled vacation); Nguyen, 68 Wn. App. at 915 (National Guard duty).

The State submits that there have been adequate grounds shown for the set over and, further, there is no showing in this record that the defendant would have been successful on challenging the delay of trial if

the defense attorney would have argued against the continuance. Detective Ringo was a material and necessary witness in the case. When the matter came before the court, the court indicated its next available dates and the earliest date was provided. This matter was brought to the trial court's attention as soon as the prosecution learned of the required attendance of the investigating officer for training outside the State of Washington. The trial court was within its discretion to grant the continuance and to reset the trial.

III. CONCLUSION

The trial court should be affirmed in all respects.

DATED this 24 day of January, 2007.

Respectfully submitted:

ARTHUR D. CURTIS
Prosecuting Attorney
Clark County, Washington

By:

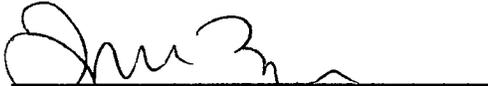

MICHAEL C. KINNIE, WSBA#7869
Senior Deputy Prosecuting Attorney

APPENDIX

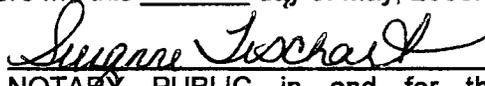
MOTION AND AFFIDAVIT FOR ORDER OF CONTINUANCE

- 1 2. The defendant is currently charged with one count of Residential Burglary and three
2 counts of Burglary in the Second degree. She is currently pending trial on this
3 matter along with Anthony Allen and Aaron Allen.
- 4 3. Detective John Ringo of the Vancouver Police department is the lead detective in
5 this case and sat in on interviews of all three of the remaining defendants.
6 Detective Ringo is a necessary and material witness in the presentation of the
7 State's case in chief and any potential impeachment of the defense witnesses.
- 8 4. Your affiant learned on Tuesday May 9, 2006 that Detective Ringo is currently
9 scheduled for SWAT training on the Oregon Coast from May 15-18, 2006. He will
10 be back and available for trial on the week of May 22, 2006.
- 11 5. Your affiant respectfully requests that the court continue the trial in this matter due to
12 the unavailability of a necessary and material state's witness.

13 Further your affiant saith not.

14 
15 Jeannie M. Bryant, WSBA #17607
16 Senior Deputy Prosecuting Attorney

17 SUBSCRIBED AND SWORN to before me this 10 day of May, 2006.

18 
19 NOTARY PUBLIC in and for the State of
20 Washington, residing at Vancouver, WA
21 My commission expires 12-15-08.

