

NO. 36381-0-II

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

STATE OF WASHINGTON,

Respondent,

v.

RICHARD YORK,

Appellant.

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

The Honorable Michael J. Sullivan, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENTS IN REPLY

1. STATE'S ATTEMPT TO BLAME THE JUDGE AND BAILIFF FOR FAILING TO SECURE THE JURY ROOM IS SPECIOUS AT BEST.

Here, the prosecutor caused a mistrial when he deliberately disregarded the court's order to keep his witness out of the jury room. 1RP 56-59. The State, however, attempts to place blame for the mistrial on the bailiff and trial court. Brief of Respondent (BOR) at 7-8, 10, 15, 20-21. This attempt is specious at best.

In its "Statement of Case", The State acknowledges it was the prosecutor who initially gave the State's key witness, Rod Oleachea, license to go into the jury room. BOR at 6. The State also acknowledges that after it was learned Oleachea had gone back into the jury room at the beginning of the lunch break, the judge ordered the prosecutor to talk with Oleachea and "to make sure that no witnesses from the State during any trial go into that jury room the day of trial ever for any reason, unless there is a direct order from the Court." BOR at 7-8 (quoting 1RP 35).

Despite these acknowledgments, the State inexplicably implies the trial court had a duty to direct the bailiff, not the prosecutor, to ensure compliance with its order to keep witnesses out of the jury room, but failed to do so. BOR at 8. The remainder of the State's statement of the case ignores the prosecutor's failure to comply with the order and attempts

to disparage the after-lunch conduct of the bailiff, Millie Clements, for failing to keep Oleachea out of the jury room even though the court's order was directed at the prosecutor, not the bailiff. BOR 8-9. The State later argues, "Any error which resulted from the subsequent contact between Mr. Oleachea and the jury should be directly attributable to an inattentive bailiff," implying Clements CrR 6.7(b) responsibility for the custody of the jury relieved the prosecutor of her court-imposed duty to keep Oleachea out of the jury room. BOR at 20. The record dispels any notion that anyone but the prosecutor was to blame for failing to keep Oleachea out of the jury room.

The record shows the prosecutor admitted, albeit after the fact, that he gave Oleachea license to use the jury room. 1RP 45-46. It also shows the trial court's order to ensure State witnesses never use the jury room again was unambiguously directed at the prosecutor, not the bailiff. 1RP 35. The court's frustration with the prosecutor's failure to comply is evident from its exchange with the prosecutor after Oleachea was found back in the jury room after lunch:

... I thought the point was clear that the State better figure out how to control their witnesses in terms of what they're doing and now he's back in the jury room with two jurors this time. Did you talk to him at all before -- or after lunch ...?

1 RP 56. The prosecutor responded:

I did not have an opportunity before lunch. I left here ...
with Mr. Hatch. I didn't see Mr. Oleachea.

1 RP 57.

The trial court found the mistrial was caused by the prosecutor.
1RP 62-63. This finding is supported by substantial evidence and should
not be disturbed on appeal. State v. Lewis, 78 Wn. App. 739, 744, 898
P.2d 874 (1995).

At no time during trial did the prosecutor claim the bailiff and/or
the trial court were to blame for Oleachea ending up back in the jury after
lunch. This is understandable given the trial court's direct order to the
prosecutor to control the State's witnesses and the prosecutor admission he
failed to do so. Thus, the State's attempt to shift the blame to the trial
court and bailiff for the first time on appeal is not supported by the record,
arguably disingenuous, and specious at best. This Court should therefore
reject the State's characterization of the facts. The mistrial was caused by
the prosecutor, not the bailiff.

2. RETRIAL IS BARRED BECAUSE THE
PROSECUTOR'S PURPOSEFUL ACT CAUSED THE
MISTRIAL.

The State argues retrial here is not double jeopardy because the
prosecutor did not act in bad faith. BOR at 13. The record shows
otherwise. Both the State and Federal constitutions bar retrial after a

mistrial intentionally provoked by the government. Oregon v. Kennedy, 456 U.S. 667, 676, 690, 102 S.Ct. 2083, 72 L.Ed.2d 416 (1982); State v. Lewis, 78 Wn. App. 739, 743, 898 P.2d 874 (1995); U.S. Const. amend. 5; Wash. Const. art. 1, § 9. Prosecutorial intent to cause a mistrial may be inferred from objective facts. Kennedy, 456 U.S. at 675; Lewis, 78 Wn. App. at 744.

Here, the State's witness, Oleachea, used the jury room twice before the noon recess. 1RP 42-43, 57-58. He had not been told to stay out. 1RP 44-46, 57-58. When the trial court learned Oleachea was using the jury room, it unambiguously directed the prosecutor to prevent Oleachea from going in again. 1RP 35. Yet the prosecutor admitted he did nothing to comply with this order. 1RP 57. He did not contact his office to obtain Oleachea's phone number so he could call Oleachea, revoke the license previously granted and tell him to stay out of the jury room. He did not ask an officer to stay at the courthouse to look for and notify Oleachea he was no longer allowed in the jury room. He did not stay in the courtroom himself to intercede if Oleachea attempted to re-enter the jury room. He did not even ask the bailiff to ensure the jury room was secure against any witness entering therein. Despite the court's direct order, the prosecutor did nothing. Id

After lunch, Oleachea returned significantly before the prosecutor. He had enough time to wait in the hallway, go into the jury room, make himself comfortable, eat, and speak to two jurors. 1RP 38, 44-47. The bailiff was there, jurors were there, Oleachea was there, but the prosecutor was not. Only a minimal effort was required on the prosecutor's part to prevent a mistrial, but the prosecutor did nothing. Under these facts, and, as discussed below, the fact that delay favored the State's attempt to prevent York's defense witness, Danyelle Stigar, from testifying, it is reasonable to infer the prosecutor failed to keep his key witness out of the jury room with the intent of causing a mistrial. Kennedy, 456 U.S. at 675; Lewis, 78 Wn. App. at 744.

Retrial is barred when the prosecutor's deliberate misconduct substantially reduces the probability of acquittal in a proceeding that was going badly for the government. Kennedy, 456 U.S. 690 (Justice Stevens, concurring). York's case turned on the credibility of Oleachea, the State's informant. 1RP 61-62. The mistrial resulting from Oleachea's visit with the jurors substantially reduced the probability of acquittal because delay could only help the State's case. The delay meant that Danyelle Stigar, who would testify it was she, not York, who sold the methamphetamine to Oleachea, would be out of custody and would therefore probably not

appear on York's behalf. 1RP 14-15; 3RP 7. There would be no witness to support York and challenge Oleachea's testimony.

The State argues delay would not help the State because it would not change Stigar's availability. The State claims the court would have suppressed her testimony for discovery violations on the original trial date and her presence could have been "ensured" by a material witness warrant on a subsequent date. BOR 17-18. These arguments are both wrong. An experienced prosecutor knows material witness warrants do not ensure the presence of witnesses who are determined to be unavailable. Secondly, there is little probability Stigar's testimony would have been suppressed.

York did not violate discovery rules. The State claims York's attorney failed to timely disclose the defense witnesses. BOR at 16 (citing CrR 4.7(b)). But CrR 4.7(b) only requires defendants to disclose information within their control concerning witnesses they intend to call at trial. CrR 4.7(b). York disclosed all the information he had concerning Stigar as soon as he decided to call her as a witness. 1RP 14-15, 33. Therefore, York complied with CrR 4.7(b).

And even if York's late witness disclosure was a discovery violation, exclusion of Stigar's testimony would not have been the appropriate remedy. Exclusion or suppression of evidence is an extraordinary remedy and is applied very narrowly. State v. Hutchinson,

135 Wn.2d 863, 883, 959 P.2d 1061 (1998). In general, trial courts do not to suppress evidence as a remedy for discovery violations. CrR 4.7(h)(7)(i); see, e.g., State v. Ray, 116 Wn.2d 531, 538, 806 P.2d 1220 (1991); State v. Glasper, 12 Wn. App. 36, 38, 527 P.2d 1127 (1974). A very narrow exception to this rule was carved out for cases involving willful misconduct and when no other remedy will suffice. Hutchinson, 135 Wn. 2d at 881-84. That exception does not apply here because there is no basis to conclude the late disclosure was a willful violation. Here it was clear from colloquy the prosecutor would have sufficient time to prepare for Stiger's testimony during the ordinary recesses of trial without need for a continuance. 1RP 19-20, 30-31. At the same time, the prosecutor was angry to find an unanticipated witness, and concerned about her impact on the case. 1RP 15-16.

Moreover, absent a valid finding of willful misconduct by defense counsel in failing to identify Stigar as a witness in a more timely manner, exclusion of Stigar's testimony would have been a violation of York's right to present a defense under the Sixth and Fourteenth Amendments to the United States Constitution and article 1, § 22 of the Washington Constitution. These constitutional guarantees provide a defendant a meaningful opportunity to present a complete defense. State v. Cheatam, 150 Wn.2d 626, 648, 81 P.3d 830 (2003); Crane v. Kentucky, 476 U.S.

683, 690, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986)). "The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies." State v. Thomas, 150 Wn.2d 821, 857, 83 P. 3d 970 (2004).

The right to present a defense is a fundamental element of due process. Chambers v. Mississippi, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973). Absent a valid justification, excluding relevant defense evidence denies a defendant the right to present a defense because it "deprives a defendant of the basic right to have the prosecutor's case encounter and survive the crucible of meaningful adversarial testing." Crane v. Kentucky, 476 U.S. at 689-690. Excluding Stigar's testimony would have deprived York of his rights under the Sixth and Fourteenth Amendments and article 1, § 22.

The prosecutor's behavior showed intent to cause a mistrial. The resulting delay was beneficial to the State and jeopardized York's ability to mount a defense. Retrial therefore was barred under the Fifth Amendment.

3. STATE V. GOCKEN DOES NOT APPLY TO THE DOUBLE JEOPARDY CLAIM AT ISSUE HERE.

This Court has not decided whether to interpret Wash. Const. art 1, § 9 independently from the Fifth Amendment and adopt the reasoning in Oregon that retrial is barred when the prosecutor's indifference or recklessness causes a mistrial. Kennedy, 295 Or. at 276. York has asked this Court to apply the Gunwall factors and conclude that the Washington double jeopardy clause be interpreted independently from the Federal double jeopardy clause, and its interpretation should be consistent with that of the Oregon double jeopardy clause. State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986); Brief of Appellant (BOA) at 9-10.

The State claims York's Gunwall argument has already been settled against him in State v. Gocken, 127 Wn.2d 95, 869 P.2d 1269 (1995), a case concerning the definition of "same offense" for the ban against successive prosecutions. BOR at 18-19. This argument ignores a basic principle of constitutional interpretation.

An interpretation of a state constitutional provision in a particular context does not mandate the same result in a different context. State v. McKinney, 148 Wn.2d 20, 26, 60 P.3d 46 (2002). When the court rejects an expansion of rights under a particular state constitutional provision in one context, it does not necessarily foreclose such an interpretation in

another context. State v. Russell, 125 Wn.2d 24, 58, 882 P.2d 747 (1994).

In Russell, Russell sought independent interpretation of Const. art. 1, § 9. The State argued the matter had been settled, claiming a case from an unrelated context, State v. Earls, 116 Wn.2d 364, 805 P.2d 211 (1991), held the protections of article 1, § 9 are coextensive with those under the Fifth Amendment. The Court corrected the State's misunderstanding stating:

The State, however, takes . . . language [from Earl] out of context, thereby running afoul of an important principle of constitutional construction. A determination that a given state constitutional provision affords enhanced protection in a particular context does not necessarily mandate such a result in a different context. Similarly, when the court rejects an expansion of rights under a particular state constitutional provision in one context, it does not necessarily foreclose such an interpretation in another context.

Id. (citing State v. Boland, 115 Wn.2d 571, 576, 800 P.2d 1112 (1990))

(footnote omitted).

The State makes the same mistake here that it made in Russell, because Gocken concerned the definition of "same offense" for the ban against successive prosecutions, not mistrials caused by prosecutorial misconduct. 127 Wn.2d. at 102. Thus, Gocken is not on point.

Properly interpreted, the Washington Constitution bars retrial after mistrial caused by a prosecutor's conscious indifference or reckless

misconduct. Actual intent is not necessary. Here, the prosecutor chose to do nothing to despite a direct order from the trial court. This choice caused a mistrial. As discussed in the opening brief, under the Oregon double jeopardy rule, retrial was barred. BOA at 9-15.

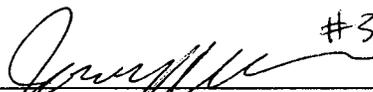
B. CONCLUSION

The prosecutor's intentional and reckless actions caused a mistrial. In such circumstances, retrial is barred under both the State and Federal constitutions. This Court should therefore reverse York's conviction and dismiss the charges with prejudice.

DATED this 29TH day of March, 2008.

Respectfully submitted,

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
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STATE OF WASHINGTON)	
)	
Respondent,)	
)	
vs.)	COA NO. 36381-0-II
)	
RICHARD YORK,)	
)	
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 28TH DAY OF MARCH 2008, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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SIGNED IN SEATTLE WASHINGTON, THIS 28TH DAY OF MARCH 2008.

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