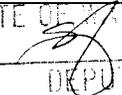


NO. 37937-6-II

FILED
COURT OF APPEALS
DIVISION II

03 APR 21 PM 2:08

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON
BY  DEPUTY

STATE OF WASHINGTON, RESPONDENT

v.

JEROMY WAYNE FREITAS, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Linda CJ Lee

No. 07-1-05997-2

BRIEF OF RESPONDENT

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Appendix A

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the trial court properly allow a defense witness to claim Fifth Amendment privilege against self-incrimination where any relevant testimony would have required him to implicate himself in a crime?

2. If the court does find that the trial court abused its discretion in giving a “blanket” privilege, was such error harmless?

B. STATEMENT OF THE CASE.

1. Procedure

On November 29, 2007, the State charged JEROMY WAYNE FREITAS, hereinafter “defendant,” with one count of unlawful possession of a stolen vehicle. CP 1¹.

The court held a CrR 3.5 hearing on June 3, 2008, and determined that defendant’s statements at the time of his arrest were admissible. RP 29.

Jury trial commenced directly after the 3.5 hearing. RP 44. The State presented testimony from Sergeant Gard, the arresting officer, and Sarah Roberts, the car’s rightful owner. RP 45, 68. The defense presented

¹ Citations to Clerk’s Papers will be to “CP.” Citations to the verbatim transcript of proceedings at trial will be to “RP,” and at sentencing will be to “RPS.”

testimony from Melissa Reeff, defendant's mother, and Carol Freitas, defendant's grandmother. RP 81, 89.

After Ms. Freitas' testimony, defendant indicated his intent to call Michael Wolfe and Patricia Wolfe to the stand. RP 96. Michael² is a friend of the defendant and Patricia is Michael's mother. RP 223. Defendant expected he would need a material witness warrant for Patricia. RP 96.

Before Michael took the stand, defendant requested the court give him a cautionary instruction regarding his Fifth Amendment right against self incrimination:

We anticipate from his testimony, and from what we both understand his potential testimony to be, that he might require a cautionary instruction from the Court. I've – both [the prosecutor] and I both tried to apprise him of why and how that happens. I expect his testimony to involve driving around in the car in question also, and that being the case, he obviously could possibly be charged with the same crime as Mr. Freitas is charged with.

RP 105. The State pointed out that documents with Michael's name were found inside the car and that he had a 2008 conviction for possession of a stolen vehicle. RP 106.

The court engaged in colloquy with Michael and explained that he had a privilege against self-incrimination under the Fifth Amendment. RP

² For the sake of clarity, Michael Wolfe and Patricia Wolfe will be referred to by their first names. The State does not intend any disrespect.

109-13. Michael was unaware of this privilege and wanted to speak with an attorney before proceeding. RP 110, 112. The court took a recess to allow Michael to consult with an attorney. RP 112-13.

Michael spoke to Jeff Kim, his attorney from an unrelated matter. RP 116. Mr. Kim explained the risks Michael would be taking by testifying in defendant's case and informed the court that Michael would be exercising the privilege. RP 116. Michael then took the stand and informed the court that he would be invoking his Fifth Amendment privilege. RP 118.

Defendant informed the court that he would still like to call Michael as a witness, just for the purpose of invoking his right in front of the jury. RP 119. The State objected on the grounds that any testimony Michael would give would not be relevant and would merely confuse the jury. RP 120.

The court ultimately granted the State's request to exclude Michael as a witness. RP 147-50. The court based its decision on his assertion that he would invoke the Fifth Amendment privilege, case law, and argument presented by the parties. RP 147. After the court's ruling, defendant attempted to add four witnesses to its witness list. RP 151-57. The court denied defendant's request, but did issue a material witness warrant for Patricia. RP 167-69, 172-73, 179. Patricia did testify in the defense case. RP 223-29.

The jury found defendant guilty of unlawful possession of a motor vehicle. CP 52, RP 284.

On June 27, 2008, the court sentenced defendant to twelve months in custody, the high end of the standard range. RPS 13.

Defendant filed this timely notice of appeal. CP 57.

2. Facts

On November 8, 2007, Sarah Roberts reported her car was stolen from her apartment's parking lot in University Place, Washington. RP 69. Ms. Roberts' car was a "beigish" colored 1988 Toyota Camry, license number 404NAE. RP 69. Ms. Roberts had three sets of keys to the car; one was with her boyfriend, another was in a cabin in Toledo, Washington, approximately 80 miles away from her apartment, and the third was with Ms. Roberts, on her key ring. RP 72. Ms. Roberts was able to account for all three sets of keys that night and no one had permission to drive her car. RP 71-72.

On November 28, 2008, Pierce County Sheriff's Sergeant Chris Gard was on routine patrol in Orting, Washington, when he observed a beige Toyota Camry, license number 404NAE, speeding. RP 47-49. Defendant was the driver and sole occupant of the car. RP 49. A routine records check revealed that the car was the one Ms. Roberts had reported

stolen. RP 50. Sergeant Gard arrested the defendant and read his *Miranda*³ warnings from a preprinted card. RP 51.

The defendant waived his right to remain silent and told Sergeant Gard that he “got [the car] from a friend in the Roy area,” but that he did not know the name of the friend, and could not provide a phone number for that friend. RP 52. Defendant did not have a key to the car. RP 59-60.

Sergeant Gard observed the car’s ignition was punched and the steering column was cracked. RP 52. A punched ignition is an indication that a tool had been used to forcefully manipulate the ignition in lieu of a key. RP 53. The cracked steering column could have occurred from the force of punching the ignition or, if that did not work, pulled apart to hot-wire the car. RP 53. Sergeant Gard impounded the vehicle and noticed that the truck lock was punched as well. RP 54-57.

Later that day, Ms. Roberts claimed her car from the impound lot. RP 73. She noted damage to the ignition, steering column, and trunk. RP 72-73. Prior to the car being stolen, both the ignition and the trunk were in perfect working order and required the key. RP 73. After it was recovered, a key was no longer necessary to start the car or open the trunk. RP 73. Ms. Roberts also found a lot of garbage, tools, and other belongings in the car that did not belong to her. RP 75. Some of that

³ *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

garbage consisted of receipts with Michael Wolfe's⁴ name on them. RP 106.

Melissa Reeff and Carol Frietas testified for the defense. RP 81-94. Both testified that they saw defendant and Michael driving the car during the month of November. RP 84-85, 90-92. Patricia also took the stand. RP 223-29. She testified that she had been given the car by her ex-boyfriend. RP 223-24. She claimed that she had broken the key in the ignition and had to punch the ignition in order to drive the car. RP 225-26. Patricia said she had to "put the wires together to start it." RP 226. As she did not know how to hotwire a car, Michael and defendant helped her. RP 226, 228. Patricia also said she caused the damage to the trunk when she punched the lock to get tools. RP 228-29. Patricia said she let Michael and defendant borrow the car after she had punched the locks. RP 228.

⁴ Michael is defendant's best friend and they have known each other since they were children. RP 223.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY ALLOWED MR. WOLFE TO CLAIM FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION WHERE ANY RELEVANT TESTIMONY WOULD HAVE REQUIRED HIM TO IMPLICATE HIMSELF IN A CRIME.

The Sixth Amendment to the United States Constitution and the Washington Constitution protect a defendant's right to compel the testimony of witnesses. *State v. Maupin*, 128 Wn.2d 918, 924, 913 P.2d 808 (1996). "[T]he sixth amendment right to compulsory process guarantees a criminal defendant the right to present witnesses to establish his defense." *United States v. Whittington*, 783 F.2d 1210, 1218 (1986) (citing *Washington v. Texas*, 388 U.S. 14, 17-19, 87 S. Ct. 1920, 1922-23, 18 L. Ed. 2d 1019 (1967)); *State v. Roberts*, 80 Wn. App. 342, 350, 908 P.2d 892 (1996). However, this right must be balanced against a person's Fifth Amendment right against self-incrimination in any proceeding. *State v. Lougin*, 50 Wn. App. 376, 381, 749 P.2d 173 (1988); *State v. Fish*, 99 Wn. App. 86, 93, 992 P.2d 505 (1999). "[T]he defendants' sixth amendment rights do not override the fifth amendment rights of others." *Whittington*, 783 F.2d at 1218-19 (citing *United States v. Lacouture*, 495 F.2d 1237 (5th Cir. 1974)); *State v. Lougin*, 50 Wn. App. 376, 379-80, 749 P.2d 173 (1988) (citing *State v. Parker*, 79 Wn.2d 326, 331, 485 P.2d 60 (1971)). The privilege against self-incrimination includes the right of a witness not to give incriminatory answers in any proceeding-civil or

criminal, administrative or judicial, investigatory or adjudicatory. *Lougin*, 50 Wn. App. at 380 (citing *Kastigar v. United States*, 406 U.S. 441, 92 S. Ct. 1653, 32 L. Ed. 2d 212 (1972)).

The privilege applies only when the witness has “reasonable cause to apprehend danger from a direct answer.” *State v. Levy*, 156 Wn.2d 709, 731-32, 132 P.3d 1076 (2006) (quoting *Hoffman v. United States*, 341 U.S. 479, 486, 71 S. Ct. 814, 95 L. Ed. 1118 (1951)). “The danger of incrimination must be substantial and real, not merely speculative.” *State v. Hobbie*, 126 Wn.2d 283, 290, 892 P.2d 85 (1995). An assertion of the privilege must be “supported by facts which, aided by ‘use of ‘reasonable judicial imagination,’” show the risk of self-incrimination.” *Lougin*, 50 Wn. App. at 381 (quoting *Eastham v. Arndt*, 28 Wn. App. 524, 531-32, 624 P.2d 1159 (1981)).

“A witness does not have the absolute right to remain silent when called to testify, as does a defendant in custody or on trial.” *Lougin*, 50 Wn. App. at 381 (citations omitted). “In general, a claim of privilege may be raised only against specific questions, and not as a blanket foreclosure of testimony.” *Lougin*, 50 Wn. App. at 381; *United States v. Moore*, 682 F.2d 853, 856 (9th Cir. 1982). The trial court must inquire into the legitimacy and scope of the assertion and may allow the witness to refuse to answer all questions only if the judge has “specialized knowledge” of the likely testimony and can determine whether a blanket assertion is proper. *Levy*, 156 Wn.2d at 732; *Moore*, 682 F.2d at 856. If a witness

waives his privilege and testifies, however, he is subject to cross-examination on questions germane to his direct examination. *Lougin*, 50 Wn. App. at 380 (citation omitted). Where the disclosures could lead to other evidence which might be used in a criminal prosecution against the witness, the answer need only “furnish a link in the chain of evidence needed to prosecute the witness for a crime.” *Hobble*, 126 Wn.2d at 290.

The determination of whether the hazards of self-incrimination are genuine and not merely illusory, speculative, contrived, or false is within the sound discretion of the trial court. *Hobble*, 126 Wn.2d at 290-91. A trial court abuses its discretion if its exercise is manifestly unreasonable or based on untenable grounds or reasons. *State v. Pollard*, 66 Wn. App. 779, 785, 834 P.2d 51 (1992).

Here, the trial court properly exercised its discretion when it allowed Michael to exercise a “blanket privilege” and did not require him to testify in the case. In making its decision, the court considered Michael’s intention to assert the privilege when he took the stand and argument provided by both parties. RP 147 (*see also* CP 73-76). The court was aware of the nature of the anticipated testimony based on defendant’s arguments and an affidavit signed by Michael. RP 143, CP Exhibit 5 (Attached as Appendix A). The court was also aware that Michael’s name was on receipts found inside the recovered car. RP 106.

The court carefully considered whether defendant could ask Michael any relevant questions that would not implicate him in a crime.

RP 125. The court recessed for the evening to give both parties an opportunity to provide briefing or additional case law, and for Michael to explore the limits of the privilege, so he could testify without incriminating himself. RP 125-27. The following day, the court heard argument from both parties. The defense stated there were “a number of questions that are very valuable to [defendant] that I could ask without [Michael] even invoking the risk.” RP 142. Yet the defense never articulated what type of questions he could ask that would not implicate Michael. In fact, defense later stated:

Obviously it wouldn't be of any value to call Mr. Wolfe unless I asked him - - wouldn't ask him a question involving possession or control of or anything that could be attributed to possession of the vehicle. But obviously, the purpose I'm calling him is for his knowledge of the vehicle and what happened with the vehicle, and so those are my intended questions, Your Honor.”

RP 146.

Under RCW 9A.56.068(1): “[a] person is guilty of possession of a stolen vehicle if he or she possesses a stolen motor vehicle.” A person is guilty of taking a motor vehicle without permission in the second degree if he voluntarily rides in a motor vehicle with knowledge of the fact that the vehicle was unlawfully taken. RCW 9A.56.075(1). Knowledge that the motor vehicle is stolen is a required element of both crimes. *See* RCW 9A.56.140. A person knows of a fact by being aware of it or having information that would lead a reasonable person to conclude the fact

exists. RCW 9A.08.010(1)(b). The State would not have to prove that the defendant had actual knowledge that a car was stolen, but that he had knowledge of facts sufficient to put him on notice that the car was stolen. *State v. Rockett*, 6 Wn. App. 399, 402, 493 P.2d 321 (1972).

There was no doubt the car in this case was stolen. Ms. Roberts had already testified that she could account for every key and that no one had permission to drive her car. RP 71-72. Michael would risk self-incrimination if he made any statement regarding riding in the car combined with facts sufficient to put him on notice that the car was stolen.

The State and defendant expected Michael's testimony to consist of statements he made in an affidavit and that he had been driving the car for several weeks, during which the car was in the same condition as when defendant was arrested. RP 105-07, 144. While Michael's affidavit does not incriminate him, most of the statements were not admissible under ER 602⁵. *See* Appendix A. Michael could only testify as to what he was aware of, not what defendant or anyone else was aware of. Testimony regarding his personal knowledge would have opened the door on cross examination as to Michael's possession of the car and the reasonableness of his belief that it was not stolen. *Any* question that would require Michael to admit he drove or rode in the car could subject him to criminal

⁵ ER 602 states, in part: "A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter."

charges. Michael faced a genuine risk of self-incrimination if he had answered any question relevant to the case and, under the circumstances of this case, the court's decision to allow him to exercise a blanket privilege was reasonable.

The record also shows that the court's ruling was not made in haste and made in light of all authority presented to it. These actions do not support defendant's argument that the trial court abused its discretion.

2. IF THIS COURT DOES FIND THAT THE TRIAL COURT ABUSED ITS DISCRETION, SUCH ERROR WAS HARMLESS.

Violation of a defendant's right to compulsory process is subject to the constitutional harmless error test. *Maupin*, 128 Wn.2d, at 928-29. "A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error." *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020 (1986).

a. Michael's expected testimony would have been cumulative of Patricia's testimony.

Per ER 403, "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, . . . or needless presentation of cumulative evidence." Erroneous admission of evidence that is merely cumulative is not prejudicial. *State v. Acheson*, 48 Wn. App. 630, 635, 740 P.2d 346 (1987), *review denied*, 110 Wn.2d 1004

(1988)), *see also Saldivar v. Momah*, 145 Wn. App. 365, 396, 186 P.3d 1117 (2008) (it is not error to exclude cumulative evidence).

Here, Michael's expected testimony essentially duplicated that of Patricia. When discussing Michael's testimony, defendant stated, "I need either him *or* [Patricia] to testify[.]" RP 107 (Emphasis added). In fact, defendant was waiting to ask the court for a material witness warrant for Patricia because, if Michael testified, he would not need her. RP 107. The record supports the conclusions that only one of these two witnesses was necessary for defendant's case. As Patricia testified, defendant has failed to show that there was any continued need for Michael's testimony.

- b. The record was clear that Michael would have asserted his privilege to all relevant questions.

A court's erroneous granting of a blanket privilege is harmless where the indications are clear the witness is not going to testify to anything of substance. *Lougin*, 50 Wn. App. at 382 (holding that the trial court's error in not requiring a witness to take the stand was error, but harmless because she was an unwilling witness and would have asserted her privilege upon taking the stand).

In this case, Michael was present to testify. RP 109. Once he was advised of the risk his testimony would subject him to, he quickly changed his mind. RP 109-18. After consulting with an attorney, Michael made it clear that he would be asserting his privilege when he took the stand. RP

118. The court's granting the blanket privilege to Michael was harmless because, even if he did take the stand, he would not have testified to anything of substance.

It appears that defendant is attempting to distinguish this case from *Lougin* by limiting the court's harmless error ruling to only those witnesses who indicate their unwillingness to testify by refusing to appear in court. *See* Appellant's Brief at 10. There is no authority for defendant's implied suggestion that the issuance of a bench warrant is the deciding factor of whether a witness was willing or unwilling.

In *Lougin*, the defendant was convicted of first degree theft. 50 Wn. App. at 376. The defendant attempted to call Rachel Vincent to testify. *Id.* 378. Vincent was a codefendant who had entered a guilty plea and was awaiting sentencing at the time of defendant's trial. *Id.* She refused to appear in court until the trial court issued a bench warrant. *Id.* The trial court ruled that she could be subject to complete cross-examination on anything to do with the theft, and Vincent exercised her Fifth Amendment right against self-incrimination. *Id.* On appeal, this court held that the trial court erred in allowing Vincent to exercise a blanket refusal to testify but that such error was harmless. *Id.* at 382. The court based its ruling on the fact that Vincent was an unwilling witness who would have immediately claimed the privilege upon taking the stand. *Id.* at 383.

In the present case, Michael's willingness to testify continued only until he was informed of the risks inherent in testifying. As soon as those risks became clear, Michael invoked his Fifth Amendment privilege against self-incrimination and was no longer a willing participant.

In addition, it would have been inappropriate for the court to require Michael to exercise his Fifth Amendment right in front of the jury. Where a witness is found to have a blanket Fifth Amendment privilege, it is improper for either the State or the defense to call the witness for the purpose of requiring the witness to assert the privilege in front of the jury. *State v. Smith*, 74 Wn.2d 744, 758, 446 P.2d 571 (1968), *vacated in part*, 408 U.S. 934, 92 S. Ct. 2852, 33 L. Ed. 2d 747 (1972), *overruled on other grounds*, *State v. Gosby*, 85 Wn.2d 758, 539 P.2d 680 (1975); *United States v. Lyons*, 703 F.2d 815, 818 (5th Cir. 1983); *United States v. Doddington*, 822 F.2d 818, 822 (8th Cir. 1987). Claiming the privilege is not evidence, and the jury is not permitted to draw inferences from it. *Id.* at 757.

Here, after Michael informed the court he was going to invoke his Fifth Amendment privilege, defendant argued that Michael should still be called as a witness, just for the purpose of invoking his right in front of the jury. RP 119. Defendant claimed that if the court did not require Michael to invoke his privilege in front of the jury, the jury was left with the impression that there was nobody supportive of defendant's version of events. RP 122, 131.

Defendant's argument indicates he expected the jury to draw an inference of support and corroboration merely from Michael's presence. It is more likely, however, that by forcing Michael to invoke the privilege on the stand, the jury would infer from his silence that he was the culpable party, not defendant. As Michael's exercise of his privilege was not evidence, it would not have been appropriate for the jury to draw any inference from it.

D. CONCLUSION.

For the reasons stated above, the State respectfully requests this court to affirm the defendant's conviction for unlawful possession of a stolen vehicle.

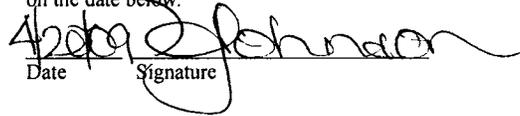
DATED: APRIL 20, 2009.

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STATE OF WASHINGTON
BY  DEPUTY
09 APR 21 PM 2:08
CLERK
COURT OF APPEALS
DIVISION II

Certificate of Service:
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.


Date _____ Signature _____

APPENDIX "A"

Affidavit of Michael James Wolfe

AFFIDAVIT

This is a true statement from Michael James Wolfe. I know that Jeromy

Freitas, was not aware that this car was stolen. Many people used this car on occasion, as it was in possession of Patricia Wolfe/Iverson to use and belonged to an ex-boyfriend of hers. No one was aware it was reported stolen, nor were any of us aware of any problems between Patricia and her ex to cause the car to be reported stolen.

Name: Michael J. Wolfe

Address: PO Box 295 Roy, Wa 98580

Date: 02/19/08

253-341-5919

patricia # 253-341-0491
wolfes

253-985-3396

