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41544-5-II

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

State of Washington
Respondent

v.

LEEANNA RAE WHITE
Appellant

41544-5

On Appeal from the Superior Court of Clallam County

10-1-00363-0

The Honorable Kenneth Williams, Judge

REPLY BRIEF

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II. SUMMARY OF THE CASE

(Please refer to the Statement of the Case in White's opening brief.)

As a preliminary matter, White does not dispute that the State had probable cause to proceed with the prosecution. Therefore, all references in the State's brief to the affidavit of probable cause (CP TBD) should be stricken.

Leeanna R. White is appealing her convictions for assault and violating a no-contact order (NCO). She does not dispute that she visited her grandmother, Edna Lingle, on August 17, 2010, with knowledge that an NCO was in effect, or that, while White was at her grandmother's home, a physical altercation took place between White, Ms. Lingle, and Lingle's son Larry. A neighbor called the police and testified to having witnessed White strike Ms. Lingle. White claimed Larry assaulted her and knocked her down.

White waived her right to a jury. At the start of the bench trial on October 12, 2010, defense counsel informed the court that Ms. Lingle would testify for the defense by telephone conference call from her home. RP 2. The trial court agreed to this, because Lingle was severely physically disabled with Huntington's chorea, a neurological disease that renders sufferers incapable of maintaining physical control. Ms. Lingle,

was expected to testify for the defense because she had vigorously denied that any assault occurred. 10/11 RP 2.

But the prosecutor then made the surprise announcement that the State's chief witness, the neighbor Jacquelyn Howard, could not make it and would also phone in her testimony because she had "child care issues." RP 2. Defense counsel waived any objection to this arrangement without consulting White. The court accepted the stipulation, also without consulting White. RP 2. The court did not conduct a colloquy with White on the record to ensure that she was making a knowing and intelligent waiver of her fundamental right to meet Howard face to face.

Howard proceeded to testify by telephone, accusing White of assaulting Lingle in her presence.

According to White, she helped her grandmother down from a kitchen counter where she had climbed up and could not get down by herself. RP 28. White said her grandmother was too heavy for her to lift, so she remained sitting or lying on the floor. Larry then arrived home drunk and chased White from the property. RP 29-30. Larry pushed White to the ground, and Lingle struck her in the face. RP 32. White admitted that there was a no-contact order in effect, that she knew there was, and that she had contact with Lingle anyway. RP 39.

During a recess while the Lingle conference call was set up, the prosecutor asked the court to excuse Officer Rowley who had been on duty 24 hours. RP 42. The court released him for the day subject to possible recall the next day. Defense counsel agreed yet again, with no discussion with White, that Rowley need not return but that he, also, could give the remainder of his testimony by telephone. RP 42.

After the break, Ms. Lingle testified by phone. Defense counsel plunged right in and asked if White assaulted her. Lingle departed from the script and replied that, yes, White did indeed assault her. RP 45. Lingle said she had lied before to keep White out of trouble, but now she had decided that White should take her punishment. RP 45.

Significantly, though, Lingle still insisted that White did not assault her outside (where Howard could have witnessed it). She said White assaulted her in the kitchen by pulling her hair and banging her head on the floor. RP 46-47. The defense rested. RP 47.

In closing, the prosecutor argued that Lingle's claim that White assaulted her inside, not outside, somehow corroborated Howard's testimony that she witnessed an assault outside, not inside. RP 49. Defense counsel pointed to the irreconcilable conflict between Lingle's testimony and Howard's so that it was not possible to find beyond a reasonable doubt that any assault occurred. RP 51.

The court issued an oral ruling from the bench. RP 52. After noting that it was undisputed that contact occurred in violation of an order, the court characterized the issue as whether or not that contact occurred in a manner that “constituted an assault at any time.” RP 52. The court recounted Howard’s testimony and said, “If that occurred... that would be an assault.” RP 53. The court did not say whether it found it occurred or not. The court also noted that Lingle testified to an assault inside the apartment, and that White said Lingle actually slugged her. “The question is reconciling those testimonies.” RP 53. The court speculated that Lingle had no reason to strike White unless something had happened earlier. RP 53. Therefore, the court imagined that an assault probably must have happened inside the house, maybe.

In its written findings the court decided that Howard did see White strike Lingle. Finding 5, CP 20. The court noted Lingle’s testimony that there was an assault inside the apartment, and found that an altercation took place in the house and that the combatants “took it outside,” which would be consistent with Howard’s testimony. Finding 6, 7, CP 20.

The court concluded that White was guilty beyond a reasonable doubt. CP 20; RP 54.

III. ARGUMENTS IN REPLY

1. ALLOWING JACQUELINE HOWARD TO
PHONE IN HER ACCUSATIONS VIOLATED
THE CONFRONTATION CLAUSE OF CONST.
ART. 1, §22 AND THE SIXTH AMENDMENT.

Both Edna Lingle and the neighbor, Jacqueline Howard, testified against White by phone. The State does not see a confrontation violation. BR 12. But both the Washington and United States constitutions require accusing witnesses to face the accused while testifying. Const. art. I, § 22 (amend. 10); U.S. Const. amend. VI. *Pointer v. Texas*, 380 U.S. 400, 13 L. Ed. 2d 923, 85 S. Ct. 1065 (1965).

Even in civil proceedings, the federal rules permit witnesses to testify remotely. But only for good cause and in compelling circumstances. And even then only with appropriate safeguards. FRCP 43(a). A witness's convenience is not compelling. In *Gulino v. Board of Educ. of City School Dist. of City of New York*, No. 96 Civ. 8414(CBM), 2002 WL 32068971 (S.D.N.Y. 2003), a witness in a civil proceeding was not allowed to testify by telephone or even by video-conference to avoid the inconvenience of traveling from California to New York. Likewise, in *In re Henson*, 289 B.R. 741, 743 (Bankr. N.D. Cal. 2003), a bankruptcy debtor could not appear by video-link when only reason given was that he had moved to Canada and would "likely still be there" at time of trial.

Here, we have a criminal trial and an essential State's witness who is practically in the neighborhood.

Confrontation is indispensable to effective cross-examination. "It involves the ability to scrutinize blinking eyelids or grimacing facial gestures and hear the uneasy movement of a body in a swiveling chair." See, Susan Nauss Exon, THE INTERNET MEETS OBI-WAN KENOBI IN THE COURT OF NEXT RESORT, 8 B.U. J. Sci. & Tech. L. 1, 1 -27 (Winter, 2002).

The State attempts to distinguish *Coy v. Iowa*, 487 U.S. 1012, 108 S. Ct. 2798, 101 L. Ed. 2d. 857 (1988). BR 12. But that case merely discusses a few non-germane exceptions to illustrate the general rule that "a right to *meet face to face* all those who appear and give evidence *at trial*" is the "irreducible literal meaning of the [Confrontation] Clause." *Coy*, 487 U.S. at 1020-21 (emphasis in original.) The right to meet one's accusers face to face "comes to us on faded parchment," "with a lineage that traces back to the beginnings of Western legal culture," and possibly predating the jury trial itself. *Coy*, 487 U.S. at 1015, quoting *California v. Green*, 399 U.S. 149, 174, 90 S. Ct. 1930, 1943, 26 L. Ed. 2d 489 (1970) (Harlan, J., concurring).

Face-to-face confrontation serves the same purpose as the right to cross-examine the accuser: both ensure "the integrity of the fact-finding

process.” *Kentucky v. Stincer*, 482 U.S. 730, 736, 107 S. Ct. 2658, 96 L. Ed. 2d 631 (1987). “Simply as a matter of English” it confers at least “a right to meet face to face all those who appear and give evidence at trial.” *Id.*, at 1943-1944. This is because it is a different proposition for a witness to testify under oath while looking at the person who will be harmed by distorted or mistaken facts. *Jay v. Boyd*, 351 U.S. 345, 375-376, 76 S. Ct. 919, 935-936, 100 L. Ed. 1242 (1956); *Coy*, 487 U.S. at 1019-1020.

In *Coy*, the alleged victim in a child abuse case was allowed to testify from behind a screen in the court room, based on the State’s interest to allow the child to avoid eye contact with the accused during her testimony. *Coy*, 487 U.S. at 1019. The reviewing court found that insufficient cause and reversed the conviction. *Coy*, 487 U.S. at 1020.

Here, the State claimed no countervailing interest other than Howard’s convenience.

No Valid Waiver: The State suggests that Ms. White knowingly and voluntarily waived her right to confront the witnesses against her. But the State bears the burden of demonstrating the waiver of a trial right of this magnitude. *State v. Wicke*, 91 Wn.2d 638, 645, 591 P.2d 452 (1979). Here, White did not waive her right to confront Jacquelyn Howard face to face.

A court may accept a stipulation waiving a fundamental trial right. *State v. Thomas*, 128 Wn.2d 553, 559, 910 P.2d 475 (1996). But the record must at least contain a personal expression of waiver by the defendant. *Wicke*, 91 Wn.2d at 642. Specifically, a putative waiver by counsel with no evidence of any discussion between counsel and the accused is insufficient. *Id.* The court should have engaged White in a colloquy on the record to ensure that she understood the gravity of the right she was waiving, the flimsiness of the justification for doing so, and the absoluteness of her right to refuse to allow the State to elevate the convenience of her accusers over her own fundamental rights.

The sole appropriate remedy is to reverse.

2. DEFENSE COUNSEL WAS INEFFECTIVE
FOR NOT SEEKING DISMISSAL.¹

A defendant has the constitutional right to the effective assistance of counsel. Wash. Const. art. I, § 22; U.S. Const. amend. VI. To prevail on a claim that counsel was ineffective, an appellant must establish both deficient representation and resulting prejudice. *State v. Thomas*, 109 Wn.2d 222, 225, 743 P.2d 816 (1987); *Strickland v. Washington*, 466 U.S. 668, 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

¹ The Court need address this issue only if it concludes that defense counsel effectively waived White's right to confront Howard.

The only appropriate course when an indispensable prosecution witness did not show up, was to dismiss the prosecution. Instead, the court allowed the witness to phone in her testimony. This could not have happened without defense counsel's acquiescence. Absent some hint of a conceivable benefit to White, it was inexcusable for defense counsel to subjugate his client's fundamental confrontation right to the convenience of the State. Thus, counsel rendered per se ineffective assistance.

Alleged deficient performance cannot rest on matters that go to legitimate trial strategy or tactics. *State v. Grier*, 171 Wn.2d 17, 42, 246 P.3d 1260 (2011). But counsel's "strategic" choices must also be reasonable. In *Roe v. Flores-Ortega*, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000), for example, counsel's failure to consult with the defendant about possibility of appeal was unreasonable. Likewise, effective counsel would, at minimum, have made a record that the decision to forgo her confrontation right originated with his client and that she had resisted counsel's efforts to dissuade her.

Failure to bring a plausible motion that likely would have succeeded and ended the prosecution is both deficient and prejudicial. *State v. Rainey*, 107 Wn. App. 129, 136, 28 P.3d 10 (2001); *State v. Meckelson*, 133 Wn. App. 431, 135 P.3d 991 (2006), *review denied*, 159 Wn.2d 1013 (2007).

Here, failing to seek dismissal based on the State's failure to produce its chief witness in court with no showing of good cause or due diligence was deficient performance. A motion to dismiss likely would have succeeded because the State simply had not bothered to try to compel Howard's attendance. This left the court no discretion to grant a continuance, and dismissal was the only appropriate course. *State v. Day*, 51 Wn. App. 544, 549, 754 P.2d 1021 (1988), unavailability of material State witness may provide a valid basis for a continuance, provided there is a valid reason for the witness's unavailability.); *State v. Nguyen*, 68 Wn. App. 906, 915-16, 847 P.2d 936 (1993), (the party whose witness is absent must prove it acted with due diligence in seeking to secure the witness's presence.). This requires the State to produce a subpoena or evidence of other diligent attempts to procure the attendance of the witness. *State v. Smith*, 56 Wn.2d 368, 370, 353 P.2d 155 (1960); *State v. Fortson*, 75 Wn.2d 57, 59, 448 P.2d 505 (1969). Absent the "critical factor" of a subpoena, the court would abuse its discretion in granting a continuance. *State v. Wake*, 56 Wn. App. 472, 476, 783 P.2d 1131 (1989); *State v. Adamski*, 111 Wn.2d 574, 579, 761 P.2d 621 (1988).

Prejudice is manifest because a timely motion to dismiss would have terminated the prosecution. Accordingly, reversal is required.

3. LINGLE'S OUT-OF-COURT TESTIMONY
ALSO VIOLATED THE CONFRONTATION
CLAUSE.

First, the State misrepresents White's argument. BR 12. White does not contend the trial court violated the confrontation clause initially when it allowed the chief defense witness to testify from home due to an intractable physical disability. That is because the confrontation clause applies to accusers, not defense witnesses.

White does claim the court violated the confrontation clause by allowing the prosecution's chief witness to phone in her testimony merely because it was inconvenient for her to show up in court. And White does contend that the confrontation clause was triggered when Lingle, with no discernable warning (because she was not present), announced she had decided to testify for the State. White asserts her counsel was ineffective in not immediately requesting a mistrial.

Next, the State contends that confrontation clause is less vigorous than it was so that phoned-in testimony is acceptable nowadays. *This is wrong. Recognizing that it is not possible for all evidence to come from a live witness, Washington courts note that the confrontation clause "must occasionally give way to considerations of public policy and the

necessities of the case[.]” *State v. Foster*, 135 Wn.2d 441, 457, 957 P.2d 712 (1998). This permits some forms of hearsay, for example. *Id.*

Here, no public policy or necessity relieved the State from the necessity to produce its chief prosecution witness. The State questions whether Lingle was really an accuser for confrontation purposes. BR 15. This is wrong.

While it is true that the defense, not the State, urged the court to allow Lingle to testify as a defense witness from home on grounds of medical necessity, the situation facing the court dramatically changed. One of the officers of the court — judge, prosecutor, or defense counsel — should have been alert enough to notice that the earth had moved. At minimum, the witness should have been put on ‘hold’ while the court and counsel discussed how to proceed. As argued in the opening brief, it was in the State’s interest, as well as White’s, to revisit the court’s earlier ruling to allow Lingle to testify remotely. AB at 13.

When it became apparent that Lingle was an accuser, White’s right to confront her face to face was triggered.

Ultimately, it was the duty of the court to immediately halt the proceedings and ensure that White’s fundamental trial rights under Const. art. 1, § 22 and the Sixth Amendment were in effect.

Reversal is required for this error also.

4. THE INFORMATION IS FATALLY DEFICIENT.

The State claims the Information was sufficient. BR at 6.

However, the State is supposed to prove the offense it charged, not a different offense. *State v. Porter*, 150 Wn.2d 732, 735, 82 P.3d 234 (2004). The Sixth Amendment requires the State to inform criminal defendants of the nature and cause of the accusations they will face at trial. The primary goal of the charging document is to provide notice of the charge the accused must prepare to meet. *State v. Kjorsvik*, 117 Wn.2d 93, 101, 812 P.2d 86 (1991). Due Process then requires the State to prove beyond a reasonable doubt all the necessary facts of the crime charged. *State v. Hundley*, 126 Wn.2d 418, 421, 895 P.2d 403 (1995), citing *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).

The manner of committing an offense is an element, and the defendant must be informed of this element in the information. *State v. Bray*, 52 Wn. App. 30, 34, 756 P.2d 1332 (1988). The statement of the acts constituting the offense is just as important and essential as other requirements of the information, such as the title of the action and the names of the parties. *State v. Royse*, 66 Wn.2d 552, 557, 403 P.2d 838 (1965); *State v. Recuenco*, 163 Wn.2d 428, 434, 180 P.3d 1276 (2008).

The information may charge any number of alternative means. *Bray*, 52 Wn. App. at 34. But where, as here, the information charges only one alternative means of committing a crime, it is reversible error to convict based on different means. To do so denies the defendant the opportunity to prepare a proper defense. *State v. Doogan*, 82 Wn. App. 185, 188, 917 P.2d 155 (1996).

Here, Lingle's stunning about face rendered the Information obsolete. The State was no longer alleging an assault comprising a series of acts claimed by Howard to have happened outdoors in her presence. Instead, the State was alleging an entirely different and inherently incompatible set of facts belatedly asserted by Lingle. White was prepared to defend by producing evidence that she did not strike her grandmother outside the apartment as claimed by Howard. Instead, the court convicted her of pushing Lingle and pulling her hair indoors in the kitchen. This blind-sided White completely so it was not possible for her to mount a defense.

The Court should not consider arguments based on facts alleged in the probable cause affidavit. But, even if the affidavit were admissible evidence, it supports White's argument, not the State's. It alleges that the facts constituting the assault were those asserted by Howard outside the apartment. BR 10. Contrary to the State's argument, the State did not

allege a continuous course of conduct. One witness said assaultive occurred in the kitchen but ceased before the two women went outside. Another witness said the assault commenced outside. The Information notified White solely about the second witness, Howard. There was no suggestion that anything happened inside until after the State rested its case. Rather, Lingle insisted that Howard was mistaken and no assault of any sort occurred. Accordingly, the Information is defective on its face because it does not permit White to know what she is being accused of and to prepare a defense.

Finally, the State claims White waived the issue by not demanding a Bill of Particulars. BR 11. The State presents no authority for this. Moreover, as the trial commenced, White was not confused about what the State was alleging. The only evidence offered was that of Howard, which Lingle unequivocally refuted.

Because of the fluid factual scenarios alleged, the decision-maker framed the issue as whether the State had alleged any facts at any time while White was in contact with Lingle that could conceivably be construed as an assault. RP 52. This was possible only because the Information did not specify the conduct upon which the State was basing the charge, but rather simply said White assaulted Lingle. CP 22. White

was entitled to know which set of alleged facts the State was relying on for the assault element.

Ineffective Assistance: Defense counsel's response to the debacle with Edna Lingle was ineffective. Counsel should have requested a mistrial when his chief witness started testifying by phone for the State. In addition to the confrontation issue, White was entitled to sufficient information and time to prepare a defense if the State was alleging alternative means of committing the offense.

V. CONCLUSION

For the foregoing reasons, Leeanna White asks this Court to reverse her conviction and vacate the judgment and sentence.

Respectfully submitted this 12th day of May, 2011.



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