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Court of Appeals
Division II
State of Washington

NO. 49115-0-II

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

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL DENTON,

Appellant.

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

The Honorable James Orlando, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. THE STATE HAS FAILED TO IDENTIFY ANY CIRCUMSTANCES THAT COULD JUSTIFY THE EXTRAORDINARY REMEDY OF EXCLUDING A DEFENSE WITNESS.

a. Exclusion is an extraordinary remedy that may not be applied for discovery violations unless other remedies would be insufficient.

In most cases, trial courts may not exclude defense testimony as sanction for violating discovery rules. State v. Hutchinson, 135 Wn.2d 863, 882, 959 P.2d 1061 (1998). Exclusion of a witness for a discovery violation is an "extraordinary remedy" that should be applied only narrowly. Id. The appropriate remedy for late disclosure is typically to continue the trial so the other party may interview the new witness. Id. at 881. Hutchinson noted a long line of cases holding exclusion was not a permissible sanction for violating discovery rules. Id. at 880 (citing State v. Ray, 116 Wn.2d 531, 538, 806 P.2d 1220 (1991); State v. Laureano, 101 Wn.2d 745, 762, 682 P.2d 889 (1984), overruled by State v. Brown, 111 Wn.2d 124, 761 P.2d 588 (1988); State v. Thacker, 94 Wn.2d 276, 280, 616 P.2d 655 (1980); State v. Glasper, 12 Wn. App. 36, 38, 527 P.2d 1127 (1974)).

The Hutchinson court distinguished those prior cases, explaining that they generally involved a mere failure to identify witnesses in a timely manner, not the extraordinary circumstances of Hutchinson. 135 Wn.2d at

881. Hutchinson involved the defendant's ongoing refusal to participate in a mental evaluation with the State's expert. Id. In this context, the court identified four factors to be considered before excluding the defense's expert: "(1) the effectiveness of less severe sanctions; (2) the impact of witness preclusion on the evidence at trial and the outcome of the case; (3) the extent to which the prosecution will be surprised or prejudiced by the witness's testimony; and (4) whether the violation was willful or in bad faith." [1] Id. at 883.

In applying these factors to the facts of Hutchinson, the court concluded that the inability to counter the defense expert with an evaluation of its own would prejudice the State. Id. at 883. The ongoing refusal to answer questions was willful and "marked by defiance." Id. No remedy other than exclusion of the defense expert's testimony would be effective because the defendant would likely continue to refuse to answer questions, thereby thwarting the State's ability to obtain its own evaluation. Id. The effect of exclusion, while significant, was mitigated by the existence of other witnesses with testimony supporting the diminished

[1] The line of cases following Hutchinson add a fourth factor to the three mandated by Jones v. City of Seattle, 179 Wn.2d 322, 343, 314 P.3d 380, 391 (2013) and Burnet v. Spokane Ambulance, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997): the impact of excluding the witness on the outcome of the trial. Hutchinson, 135 Wn.2d at 883. The other factors (the effectiveness of remedies other than exclusion, prejudice and surprise to the state, and bad faith or ill will) are the same. Compare Hutchinson, 135 Wn.2d at 883 and Jones, 179 Wn.2d at 343.

capacity defense. Id. Thus, all of the factors the court considered indicated the extraordinary remedy of suppression was appropriate in that case. Id. at 883-84.

By contrast, in State v. Venegas, 155 Wn. App. 507, 228 P.3d 813 (2010), the court reversed the trial court's decision to exclude evidence because the trial court focused solely on one of the Hutchinson factors, ignoring the other three that weighed against such an extraordinary remedy. Venegas violated discovery rules by not informing the State her medical expert would testify about causation. Id. at 521. The trial court focused only on the third Hutchinson factor, the surprise to the State. Id. at 522. On appeal, this Court determined the other factors did not support the extraordinary remedy of exclusion. Id. The trial lasted three more weeks, so postponing the expert's testimony could have provided a remedy; excluding the expert strongly undermined Venegas' defense; and the discovery violation appeared to have been an oversight. Id. at 522. This Court found the decision to exclude the defense expert, rather than allow the State time to obtain a rebuttal expert, was based on untenable grounds. Id. at 523. Thus, in Venegas, the court returned to the basic principle of Hutchinson: absent extraordinary circumstances where a continuance would not suffice, courts may not exclude witness testimony as a sanction for mere late disclosure. Id. at 521.

This case is far more akin to Venegas and the prior line of cases. It involves no extraordinary circumstances such as were presented in Hutchinson, but instead a mere failure to identify a witness in a timely manner. Neither the court nor the State at trial nor the State in this appeal has suggested anything about this case that would make a continuance ineffective or otherwise necessitate the extraordinary remedy of exclusion.

b. The court abused its discretion because it failed to apply the relevant law and the record does not support the extraordinary remedy of exclusion.

Instead of identifying a justification for exclusion, the State relies on the trial court's discretion. But even when viewed through that lens, the State's argument fails. When a court relies on untenable grounds or fails to apply the correct legal standard, the court abuses its discretion. State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003). Here, the trial court did both. It failed to consider or apply the law recognizing exclusion as an extraordinary remedy and requiring consideration of factors showing that other remedies would not be sufficient. The reasons it mentioned at the time, as discussed in the opening brief, are untenable. 4RP 71 (excluding witness because he is an inmate the court had previously sentenced for custodial assault).

In civil cases, it is well established that courts must perform a "specific, on-the-record analysis" of the applicable factors before

excluding evidence as a discovery sanction. Jones v. City of Seattle, 179 Wn.2d 322, 343, 314 P.3d 380 (2013). In the criminal realm, with far greater liberty interests at stake, the same rule should pertain. Due process concerns and the right to present a defense lie at the heart of the requirement that lesser sanctions must be considered before excluding a witness as a discovery sanction. Santos v. Dean, 96 Wn. App. 849, 861, 982 P.2d 632 (1999) (citing Burnet v. Spokane Ambulance, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997)). The potential loss of liberty involved in criminal cases generally requires greater, rather than lesser, due process protection than in civil cases. See, e.g., Santosky v. Kramer, 455 U.S. 745, 755, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1984) (contrasting stringent burden of proof beyond a reasonable doubt in criminal cases where liberty is at stake with lower burden in civil cases where mere money judgment is at issue).

Generally, the amount of process due depends on three factors: 1) the nature of the liberty interest at stake, 2) the risk of error in the current process, and 3) the State's countervailing interest in maintaining that process. Mathews v. Eldridge, 424 U.S. 319, 335, 96 S. Ct. 893, 903, 47 L. Ed. 2d 18 (1976). The defense interest in presenting its witness and the liberty interest at stake are both of enormous magnitude in criminal proceedings. Requiring the trial court to consider the Hutchinson factors

on the record would reduce the risk of error in determining whether exclusion of a defense witness is truly necessary without any significant additional burden on the State. These due process concerns indicate that courts must consider, on the record, whether lesser sanctions would suffice before excluding a witness as a discovery sanction in criminal cases.

But even assuming, arguendo, that the trial court was not required to expressly consider any of the Hutchinson factors on the record, the trial court's decision is, nonetheless, untenable in light of those factors. First, the impact on the trial of excluding Denton's witness was significant because this was essentially the only defense witness. (Denton was permitted, but opted not to, call a second witness who was also a correctional officer. 4RP 70, 72. Denton told the court he only listed her because the State had done so earlier, but then did not call her to testify. 4RP 70). For the jury to hear the viewpoint of another prisoner on the scenario would have provided an alternative perspective on events.

The State argues the court "could have concluded further delay would hinder the interests of justice." Brief of Respondent at 5. But the State does not say how this could be so. No record was made of how long a delay would be required for the State to interview the witness or how that would affect the trial schedule.

On the contrary, the facts of this case indicate the delay would likely have been minimal and would not have prejudiced the State. As discussed in the opening brief, the witness' location in the local jail made it relatively efficient to find and transport him. 4RP 71. Additionally, preparing to meet his testimony would not require lengthy delay because of the limited scope of the facts at issue in this case. Two extremely brief incidents were at issue, both taking place inside the jail with an extremely limited number of possible witnesses. 4RP 101-05, 154-55. Cloud's account of what he could perceive of the brief incidents would not be unduly lengthy or open other doors of inquiry requiring investigation of other rebuttal witnesses.

The State also argues there was bad faith on Denton's part because he was not confused as to the discovery rules. Brief of Respondent at 7 (citing Brief of Appellant at 9). First, Denton's brief argued that the pre-trial proceedings, wherein Denton was at times represented by counsel and at other times was pro se and at times was deprived of his legal materials by the jail, were confusing, not that Denton was personally confused about the discovery rules. Brief of Appellant at 9. However, the record shows Denton was, in fact, confused about the discovery rules because he argued to the trial court (in contravention of CrR 4.7) that he was not required to disclose the substance of his witness' testimony before trial. 4RP 69.

Particularly when the defendant's constitutional right to present a defense is at stake, this Court should not assume bad faith.

But even if this court were to accept the State's assertion regarding bad faith, Venegas shows that the presence of only one of the factors is insufficient to justify exclusion of testimony as a sanction for a discovery violation. 155 Wn. App. at 522-23. The circumstances, and the other Hutchinson factors, do not justify the extraordinary remedy of excluding the only defense witness when a short continuance or recess would have sufficed.

2. THE TRIAL COURT COMMENTED ON THE EVIDENCE IN VIOLATION OF THE WASHINGTON CONSTITUTION.

The State argues the court did not comment on the evidence in violation of article 4, section 16 of the Washington Constitution. Instead, it argues the trial court merely "ensured defendant's question was a truthful and accurate representation of the witness' previous statement." Brief of Respondent at 10. The State cites, in support of its argument, a trial court's undisputed discretion to "exercise reasonable control over the mode and order of interrogating witnesses." ER 611(a). That discretion does not encompass the trial court's conduct in this case because it does not entitle the court to comment on factual matters in front of the jury. The constitution is superior to all other rules of law. McNabb v. Dep't of Corr.,

163 Wn.2d 393, 419, 180 P.3d 1257 (2008) (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177-78, 2 L. Ed. 60 (1803)).

If the trial court were concerned about the form of Denton's question, an objection such as "assumes facts not in evidence," could be interposed and sustained. If he persisted in the question, the jury could be sent out and he could be advised that he could not ask that specific question. There was no need for the court to argue with Denton about the facts in front of the jury.

The court may have been concerned that, by asking his question, Denton was using his question to "place before the jury as evidence certain questions and answers. . . without the sworn testimony of any witness." See State v. Babich, 68 Wn. App. 438, 444, 842 P.2d 1053 (1993) (quoting State v. Yoakum, 37 Wn.2d 137, 222 P.2d 181 (1950)). But this case is utterly unlike Babich and Yoakum, and, even in those cases, the solution was not for the court to comment on the evidence.

In Babich and Yoakum, the court was concerned with the prosecutor asking a witness about prior statements that the witness denied making. Babich, 68 Wn. App. at 443-44 (discussing Yoakum, 37 Wn.2d at 140-41). The prosecutor subsequently failed to present extrinsic evidence that the statements had, in fact, been made. Babich, 68 Wn. App. at 444-46. The concern was that the jury might be misled into believing the

prosecutor's questions were, themselves, evidence. Babich, 68 Wn. App. at 443-44 (discussing 5A K. Tegland, Wash. Prac., Evidence § 254(1), at 298 (1989) and Yoakum, 37 Wn.2d at 144).

The concerns of the Babich and Yoakum courts are not present here. The statements Denton was referring to in his question were the witness' statements during direct testimony a few minutes before. The jury heard the earlier statements and was fully able to judge whether or not Denton was accurately reciting them in his questions. Also, the witness was not likely to have forgotten what he had said only a few minutes earlier. The witness could, through his answer, correct any misapprehension by Denton about the substance of his earlier testimony.

Even assuming the court had valid concerns that Denton's questions could confuse the jury, that concern could only justify a ruling to exclude a specific question. It does not justify commenting on the substance and import of the witness' testimony in front of the jury. Even when the court has a duty to ensure that evidence is substantially accurate, it does so by making rulings outside the presence of the jury. See, e.g., State v. Yates, 161 Wn.2d 714, 772-73, 168 P.3d 359 (2007) ("The court ensures that the prosecution's summary chart is "substantially accurate ... by allowing the defense full opportunity to object to any portions of the summary chart before it is seen by the jury.)

The State argues a court's comment violates the constitution only when the court's attitude towards the merits of the case is reasonably inferable from the comments. Brief of Respondent at 8 (citing State v. Elmore, 139 Wn.2d 139, 276, 985 P.2d 289 (1999). It was clearly inferable from the court's comments that the court believed Denton was misrepresenting the testimony. This was an impermissible comment on the evidence in violation of article 4, section 16.

3. THE FAILURE TO ENSURE THAT ALL DELIBERATIONS MUST BE THE COMMON EXPERIENCE OF ALL JURORS IS MANIFEST CONSTITUTIONAL ERROR.

All parts of jury deliberations must be the common experience of all jurors. State v. Fisch, 22 Wn. App. 381, 383, 588 P.2d 1389 (1979). Jurors may not deliberate if even one juror is absent or not privy to the group conversation. State v. Lamar, 180 Wn.2d 576, 585, 327 P.3d 46 (2014). Nothing in the written or oral jury instructions in this case informed the jury of this requirement. 4RP 260-62; CP 36-63. Nor does the polling of the jury alleviate the concern for shared deliberations. Nothing in the jury poll asks the jury whether any part of the deliberations occurred without the presence of all 12 jurors. 4RP 260-70. The jury poll merely assures that each juror agrees with the outcome. Id. It does not ask or guarantee that each juror was present for every aspect of deliberations. Id. Because nothing in the

instructions to the jury guaranteed that the deliberations were entirely the collectively shared experience of all, the constitutional error is manifest and requires reversal of Denton's convictions. Lamar, 180 Wn.2d at 585-86.

The State claims Denton has not shown prejudice from the failure to properly instruct the jury and therefore this Court should refuse to consider the issue. Brief of Respondent at 11-13. But Denton need only show "[t]he asserted error had practical and identifiable consequences" in order to satisfy RAP 2.5 (a)(3). Lamar 180 Wn.2d at 585. He has done so by noting his jury's opportunity for deliberation that complied with the instructions received from the court, but which do not comply with the constitutional requirement for the deliberations to be the "'common experience'" of all the deliberating jurors. Id. (quoting People v. Collins, 17 Cal. 3d 687, 693, 552 P.2d 742 (1976)). Thereafter, the burden shifts to the State to prove the constitutional error was harmless beyond a reasonable doubt. Lamar, 180 Wn.2d at 588. The State has failed to meet its burden in this regard. Remand for a new trial is warranted.

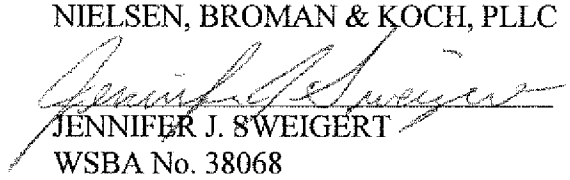
B. CONCLUSION

For the foregoing reasons and for the reasons stated in the opening Brief of Appellant, Denton requests this Court reverse his convictions.

DATED this 9th day of June, 2017.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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