

NO. 49259-8-II

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

STATE OF WASHINGTON,

Respondent,

v.

ROBERT VESTRE,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR GRAYS HARBOR COUNTY

The Honorable M. Mark McCauley, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. THE COURT ABUSED ITS DISCRETION AND DEPRIVED VESTRE OF HIS RIGHT TO PRESENT A DEFENSE WHEN IT DENIED HIS REQUEST FOR A CONTINUANCE.

In his opening brief, Vestre argues the court abused its discretion and/or violated his right to present a defense when it denied Vestre's first and only request for a continuance to secure the presence of a newly discovered witness who would testify favorably to the defense. Brief of Appellant (BOA) at 13-18 (citing inter alia State v. Downing, 151 Wn.2d 265, 87 P.3d 1169 (2004); Washington v. Texas, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967)). In response, the state claims: (1) there was no error because: (1) the court's consideration of the venire's assembly was a reasonable justification for denying the requested continuance; (2) Vestre's offer of proof was insufficient; and (3) any error was harmless because the proposed witness's testimony would not have cast doubt on whether Vestre committed a burglary. Brief of Respondent (BOR) at 3-11. The state is incorrect on all three counts.

(i) Vestre's Right to Present a Defense Outweighed the Court's Interest in Maintaining Orderly Procedure.

In arguing the court erred in denying his requested continuance, Vestre acknowledged the court's interest in taking advantage of the venire

that had been assembled that morning and going to trial. BOA at 16. However, Vestre argued the court's decision that the maintenance of orderly procedure outweighed Vestre's right to present material evidence in his defense – when he acted with due diligence in discovering that evidence – was manifestly unreasonable. BOA at 13-16.

In response, the state argues the trial court's consideration of the jury venire having already been assembled "is not without precedent." BOR at 3 (citing State v. Eller, 84 Wn.2d 90, 95, 524 P.2d 242 (1974)). However, at the time of the requested continuance in Eller, prior attempts to secure the witness (Pat Thorson) had been unsuccessful. In fact, the court authorized appointment of co-counsel in another city along with air transportation at state expense to facilitate the procurement of Thorson's attendance as a witness. Unfortunately, it appeared Ms. Thorson was purposely evading process. Eller, 84 Wn.2d at 93-94.

It was an amalgamation of circumstances that informed the court's discretion in denying the defense request for a continuance: Thorson was not cooperating; she may have had a Fifth Amendment privilege for some of her testimony due to her involvement; it was not entirely clear what she would have testified to; and the venire had been assembled. Id. at 94-95. Under those circumstances, the maintenance of orderly proceedings

outweighed Turner's interest in continuing the case to obtain the speculative testimony of an uncooperative witness who likely would invoke her privilege not to testify. Eller at 98.

The circumstances here are completely different. As will be shown below, Vestre's interest in presenting a complete defense outweighed the court's competing interest in taking advantage of the assembled venire.

(ii) The Offer of Proof Was Sufficient

The state claims Vestre failed to establish the materiality of the witness and/or that her testimony would have been admissible. BOR at 7-8. But the state imposes a more stringent burden on the defense in making its offer of proof than does the case law.

Under ER 103(a)(2), error may not be predicated on a decision to exclude evidence unless "the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked." The substance of an offer of proof need not be made know in detail. State v. Ray, 116 Wn.2d 531, 539, 806 P.2d 1220 (1991).

That the case law does not require a stringent offer of proof to establish materiality is evidenced by this Court's fairly recent decision in In re Personal Restraint of McGary, 175 Wn. App. 328, 306 P.3d 1005

(2013). In McGary's RCW 71.09 proceeding, the state moved to preclude McGary's expert, Dr. Richard Wollert, from testifying about the MATS-1 actuarial instrument he had recently developed. McGary, at 333. In an offer of proof, Wollert testified there was nothing novel about his approach to developing the MATS-1, but added he knew of only six experts nationwide who had used it since its publication in November 2010. Wollert did not explain how he would have scored McGary on the MATS-1, but he did testify that for someone McGary's age, the highest chance of recidivism possible under the test would have been 25.5 percent. The trial court ruled the MATS-1 was not the type of test reasonably relied on by experts in the field and excluded it under ER 703. McGary, at 335.

McGary challenged the court's ruling on appeal. In response, the state claimed inter alia that McGary failed to preserve the issue with an adequate offer of proof. Id. at 337. This Court disagreed:

Here, the substance of Dr. Wollert's testimony was adequately disclosed, even though he did not testify exactly what score McGary received on the MATS-1 or exactly how that score would have affected the assessment of his risk of recidivism. Wollert did testify that, given McGary's age, his maximum rate of recidivism under the MATS-1 would be 25.5 percent. Consequently, the potential significance of Wollert's testimony was disclosed: The MATS-1 would have predicted McGary's chances of recidivism as lower than the tests performed by other experts. McGary thus preserved his objection to exclusion of the MATS-1.

McGary, 175 Wn. App. at 337 (emphasis added).

Here, defense counsel offered Vestre's understanding that Samantha Phelps would testify:

...to the effect that Sarah Arends and her boyfriend, Sarah being a co-participant in this case, they all live up in Maple Valley, had, while my client and Krista Arends were in custody, had taken some stolen merchandise from the residence that Sarah and Krista shared on the same property, and took it down to Mr. Vestre's property. And some of the testimony today will be that they served a search warrant on Mr. Vestre's property and located some stolen items that are associated to the burglary in Aberdeen. So, he would like to have Miss Phelps available.

1RP 4-5.

As in McGrady, the potential significance of the proposed witness's testimony was disclosed. In Vestre's case, the witness would have provided an innocent explanation (as to Vestre) for why the stolen property was found at his purported residence. This was sufficient to show the materiality of the witness.

The state's reliance of State v. Turner is misplaced. BOR at 7 (citing State v. Turner, 16 Wn. App. 292, 294, 555 P.2d 1382, 1383 (1976)). Turner was charged with burglary and assault after voluntarily drinking a ton of alcohol, smoking marijuana and breaking into a woman's

house and hitting her with a bottle. Turner had no recollection of the events. Turner, 16 Wn. App. at 293-94.

On the day of trial, Turner moved to continue because his expert, Dr. Hummel, was out of the country and would have testified Turner suffered a “toxic reaction” to the alcohol and marijuana to support a verdict of mental irresponsibility or insanity. Turner, at 297. In affirming the denial of the requested continuance, the court noted the defense of mental irresponsibility is not available when the condition of the mind is attributable solely to the voluntary acts of the defendant. Thus, the defense could not be established, regardless of the witness’s testimony. Turner, at 297. Moreover, the court found Turner did not exercise due diligence because he knew of the witness but did not secure his presence by subpoena. Id.

In contrast, Phelps’ testimony would have cast reasonable doubt on whether Vestre ever entered or remained unlawfully in the Historic Seaport Authority. The prosecutor realized Arends had credibility issues. RP 273 (“So I realize that Crista Arends may not seem like the greatest person in the world to you.”). The state therefore relied heavily on what appeared to be corroborating evidence, the items found at Vestre’s reported trailer. See e.g. RP 265 (“there was stuff at his trailer up in

Maple Valley that obviously came from the Seaport”); RP 267 (“That was found up at the defendant’s place”); RP 286 (“The safe doors, the art work, found at the defendant Christine Ortiz’ trailer). Thus, unlike in Turner, there is a reasonable probability Phelps’ testimony would have resulted in a different outcome.

And Vestre and trial counsel acted with due diligence because Vestre had only just learned of the potential witness and defense counsel had interviewed all the other potential witnesses named by Vestre. See also BOA at 14-15.

The state also claims the denial of the requested continuance was proper because there was no indication Phelps directly observed the events. BOR at 8. However, there was no evidence she did not directly observe Sarah Arends plant the evidence. And the evidence established that when police served the search warrant on the Arends’ property, Sarah was there with several other people, one of whom could have been Phelps. See CP 7; RP 129. And regardless, if Phelps’ anticipated testimony was based on an out-of-court statement by Arends admitting to such conduct, it potentially would have qualified as a statement against interest, an exception to the hearsay rule. ER 804(b)(3).

Considering the offer of proof by defense counsel, and the constitutional right to present a defense, Vestre should have been granted an opportunity to locate the witness and interview her. The court's decision was manifestly unreasonable.

(iii) The Testimony Would Have Been Exculpatory

The state claims at most, Phelps' anticipated testimony "would only cast doubt on the first break-in:"

Chief Eastham, who arrested the Defendant and Ms. Arends, testified about the property that they were caught with. Some of it (the whisper poles) were specifically identifiable to the Historic Seaport Authority. Other material, such as the metal remnants of the heat pump, was fungible, but was material identified as having been taken from the Historical Seaport Authority's building.

Given that the defendant was caught with property from the Historical Seaport Authority's building, the value of the proposed testimony is of questionable probative value. Even if the witness "Samantha Phelps" could testify that Sarah Arends planted stolen property, that would only cast doubt on the fist break-in.

BOR at 9.

Vestre disagrees. There was not definitive evidence Vestre entered the building the second day, or understood what Arends was up to – Apart from Arends' testimony. As defense counsel argued in closing:

Mr. Vestre was with her down in South Bend and he got arrested. He admitted that they stopped by, picked up some stuff from Aberdeen. And – and the question you have to ask is what evidence do you actually have outside

of Ms. Arends that he went into the building. . . . The items that were found in the back of that Ranger, heat pump, heat pump parts. The heat pump was outside. . . . So that's not enter or remain unlawfully. . . .

The – the poles, whisker poles, whatever you want to call it, pretty unique. And they testified, yeah, that belonged to the Seaport. But here's the problem, nobody ever testified where the – these poles were kept. Were they kept in the building? Were they kept outside? We don't know because you don't have any evidence of it.

RP 284-85.

Jurors may have thought likewise – that the items in the truck at the time of Vestre's arrest did not prove an unlawful entry; whereas possession of the artwork and door panels from the safe did. Therefore, it cannot be said that Phelps' testimony would not have cast doubt on the state's case.

But the state's argument in this regard also brings up a question of jury unanimity. There was no instruction directing the jury it must be unanimous as to which burglary it relied upon and no election in closing. Undersigned appellate counsel was likely ineffective in failing to identify this issue beforehand, and will be moving for leave to file a supplemental brief raising this supplemental issue, and to allow the state to file a response to the supplemental brief.

2. DEFENSE COUNSEL'S FAILURE TO ARGUE VESTRE'S OFFENSES CONSTITUTED THE SAME CRIMINAL CONDUCT VIOLATED VESTRES' RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

Defense counsel agreed with the prosecutor that Vestre's offender score was 10 points, which only could be arrived at if the theft and malicious mischief counts were scored separately from the burglary. 1RP 14-15; CP 88-101. In his opening brief, Vestre argued defense counsel's agreement constituted ineffective assistance of counsel because the theft and malicious mischief constituted the same criminal conduct as the burglary and the court had discretion not to apply the burglary anti-merger statute, in which case Vestre's offender score would have been 8 points, yielding a lower standard range sentence. BOA at 18-24 (citing State v. Phuong, 174 Wn. App. 494, 299 P.3d 37 (2014), review denied, 182 Wn.2d 1022 (2015); State v. Knight, 176 Wn. App. 936, 962, 309 P.3d 776 (2013)).

In response, the state agrees the court had discretion not to apply the burglary anti-merger statute, but claims defense counsel was not ineffective because: (1) the court was informed by the state of its discretion; (2) the court could have found the malicious mischief was separate criminal conduct; and (3) defense counsel made a tactical decision to pursue a drug offender sentencing alternative, rather than

challenge the offender score. BOR at 13-18. The state's claims are without merit.

(i) The Record Does Not Support the State's Claim It Briefed the Court on the Same Criminal Conduct Issue.

According to the state: "It is true that, pursuant to the Washington Supreme Court's decision in State v. Lessley, 118 Wn.2d 773, 827 P.2d 996 (1992) a trial court may treat crimes committed while in the course of a burglary as either the same, or separate criminal conduct." BOR at 13.

But the state claims:

However, the Defendant ignores the fact that the State did brief the court on the issue. Supplemental Clerk's Papers at _____. The Defendant's trial counsel knew this, and knew that the court need not be reminded.

BOR at 13.

It is unclear as to what in the record the state is referring. The Statement of Prosecuting Attorney filed in anticipation of sentencing did not say anything about same criminal conduct or the court's sentencing discretion.¹ Regardless, why would the court even consider whether the offenses constituted the same criminal conduct when the defense agreed – by virtue of his agreement to the offender score – that they did not?

¹ A supplemental designation of Clerk's Papers is being filed contemporaneously with this reply.

- (ii) A Reasonable Probability Exists that the Sentencing Court Would Have Found the Burglary, Theft and Malicious Mischief Constituted the Same Criminal Conduct Had Vestre's Counsel so Argued.

The state claims Vestre did not receive ineffective assistance of counsel because it's possible the court would have found the malicious mischief was committed with a different intent than the theft and burglary, which the state concedes were done with the intent to steal metal. See BOR at 14. The state points to Arends' testimony that Vestre had a smile on his face when he first got the forklift running. BOR at 14; RP 212. But Arends attributed the smile, as "You know, guys with tools." RP 212.

But regardless, the Phuong court found prejudice established where "a reasonable probability exists that the sentencing court would have found that the attempted rape and unlawful imprisonment offenses constituted the same criminal conduct had Phuong's counsel so argued." Phuong, 174 Wn. App. at 547-48. The same is true here. The crimes were committed at the same time and place and against the same victim – the Seaport Authority. Moreover, a sentencing court could find Vestre's objective criminal purpose in committing each offense was to steal wire from the Seaport. In addition, the court could determine that the burglary and malicious mischief furthered the offense of first degree theft.

The state claims that even if the court found the first degree theft and malicious mischief the same criminal conduct, Vestre's offender score for the burglary would still be a "9" and his standard range sentence would not have changed. However, if the court found each to be the same criminal conduct as the burglary, his offender score would be an "8" and his offender score would have yielded a lower range.

(iii) Defense Counsel's Failure to Argue Same Criminal Conduct Was Not a Legitimate Tactic.

Finally, the state claims: "In arguing for ineffective assistance the Defendant ignores the possibility that his trial counsel decided to focus on obtaining a Drug Offender Sentencing Alternative, rather than challenging the offender score. BOR at 17. However, defense counsel could have made both arguments. Only legitimate trial strategy or tactics constitute reasonable performance. State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999). It was not reasonable for defense counsel to agree to a higher offender score in the hopes of obtaining a DOSA, when he could have made both arguments.

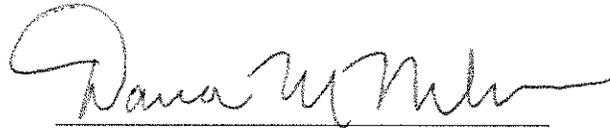
B. CONCLUSION

For the reasons stated in this reply and in the opening brief of appellant, this Court should reverse Vestre's convictions. Alternatively, this Court should remand for resentencing so that the court can consider whether Vestre's offenses constitute the same criminal conduct.

Dated this 17th day of June, 2017.

Respectfully submitted,

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