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NO. 50679-3-II

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

STATE OF WASHINGTON,

Respondent,

v.

RUSSEL FORD,

Appellant.

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

The Honorable David Edwards, Judge
The Honorable Stephen Brown, Judge
The Honorable F. Mark McCauley, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in denying defense counsel's request for a brief recess to secure the presence of a witness material to Russel Arnold Ford's defense.

2. Defense counsel rendered constitutionally ineffective assistance of counsel in failing to request a material witness warrant.

Issues Pertaining to Assignments of Error

1. In this attempting to elude a pursuing police vehicle case, Ford's sole defense at trial was that he was not the driver. Defense sought to produce a witness to establish that another man owned the vehicle and therefore was the likely driver of the vehicle, corroborating the accounts of two other witnesses (both of whose credibility was impeached with crimes of dishonesty). Despite being subpoenaed by both the prosecution and defense, this witness refused to appear at defense counsel's request. The State commented that the witness had cooperated with the prosecution, so defense counsel suggested to take a recess to allow the State to attempt to secure the witness's presence in court. The trial court refused, stating merely, "Well, we need to have witnesses arranged and ready to go, so" Did the trial court's refusal to permit the parties to contact and secure the witness's presence deny Ford a witness necessary to defense, violating his constitutional rights to compulsory process and to present a defense?

2. Did defense counsel render constitutionally ineffective assistance of counsel for failing to move for a material witness warrant to secure the absent witness's presence in court?

B. STATEMENT OF THE CASE¹

The State charged Ford with attempting to elude a pursuing police vehicle.² CP 1-2.

On February 16, 2017 around 9:30 p.m., a Ford Aerostar van failed to stop at a stop sign in Cosmopolis. 2RP 35, 37-38. Upon seeing this, Officer Nicholas Byron activated his emergency lights and began to pursue the vehicle. 2RP 38. The vehicle slowed to approximately five to 10 miles per hour as Byron pulled behind the vehicle; Byron identified the driver as a white male with facial hair wearing a black baseball hat. 2RP 39-40.

Suddenly, the vehicle sped off without coming to a full stop. 2RP 39. As Byron pursued the vehicle, he reached a speed of 95 miles per hour and

¹ Ford refers to the verbatim reports of proceedings as follows: 1RP—consecutively paginated transcripts of April 7, 2017, April 13, 2017, April 24, 2017, May 4, 2017, and June 9, 2017; 2RP—consecutively paginated transcripts of May 4, 2017 and May 5, 2017.

² The State attempted to amend the information before trial to include charges of possession of heroin with intent to deliver (including a firearm enhancement) and unlawful possession of a firearm. 1RP 29. The trial court denied the amendment on the basis that the defense had not been “ever charged with the responsibility of undertaking the necessary steps to prepare to defend those charges at trial.” RP 38. At sentencing, the State clarified that, upon further investigation, it believed the firearm and the heroin belonged to someone else and therefore did not intend to charge Ford with these crimes. 1RP 49.

decided it was unsafe to continue to pursue the vehicle given this high velocity. 2RP 44-45. As he was terminating his pursuit Byron observed the vehicle pull onto a dead end road; Byron estimated the vehicle was then traveling at about 100 miles per hour. 2RP 45, 48-49. Byron followed the vehicle, saw it jump the curb at the end of the road, fly into the air, and stop approximately 70 feet from the end of the roadway. 2RP 48-49.

Byron saw Ford running from the van. 2RP 55. Byron waited for other officers to arrive on scene. 2RP 55. Byron observed no other occupants in the van but noted that the driver's door was wide open and that the passenger door was also cracked open. 2RP 55-56. Other officers arrived, searched the nearby wooded area, and arrested Ford. 2RP 58, 101, 117. Another officer testified that he believed that there might have been other occupants in the vehicle. 2RP 123.

Ford was administered Miranda³ warnings. When asked who the vehicle belonged to, "Ford replied that he had borrowed the vehicle from a friend and . . . that was it." 2RP 59.

Ford's sole defense at trial was that he was not driving the vehicle. He presented two witnesses who said Ford was not driving but that a man by the name of Tyler Parker was the driver. 2RP 127-28 (Ford was passenger in van,

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

and the other “guy driving the van ran that stop sign”); 2RP 148-49 (Tyler Parker was driving van and attempted to elude police).

In addition to this evidence, the defense established that Officer Nicholas Byron had constructed a photomontage “[t]o help identify the subjects that potentially purchase[d] a vehicle,” the same vehicle that had attempted to elude. 2RP 182. As defense counsel put it, “Ownership of the vehicle goes directly to who’s more likely than not to be driving the vehicle. I mean it establishes a reasonable doubt in the mind of the juror.” 2RP 183. Officer Byron testified the subject of the photomontage—i.e., the potential purchaser of the eluding vehicle—was Tyler Parker. 2RP 182.

When the defense attempted to elicit that Tyler Parker was identified in the photomontage as the vehicle purchaser, the State objected on the hearsay grounds. The State argued, “The prior owner has never testified, so his identification is hearsay.” 2RP 182; see also ER 801(d)(1)(iii) (establishing a statement is not hearsay if “[t]he declarant testifies at the trial or hearing and is subject to cross examination concerning the statement, and the statement is . . . one of identification of a person made after perceiving the person”). The court sustained the hearsay objection given that former owner of the vehicle, a Mr. Kenneth Beebe, had not testified. 2RP 184-86.

Defense counsel stated, “I did ask [Mr. Beebe] to be here. I’ve subpoenaed him, but he has not shown.” 2RP 185. The State indicated, “He

was here yesterday and he said he had received only my subpoena. And I said I wasn't going to call him as a witness and he could go home, but stay close to the phone, so . . . we can call him any time." 2RP 185. Defense counsel stated she had attempted to get ahold of Beebe and that her "office talked to him, they said about 2 o'clock yesterday and told him that he . . . indicated that he had gotten my subpoena, but that he didn't want to come back to court." 2RP 185. The State retorted, "Well, he seemed very cooperative to me." 2RP 185.

In light of the State's representation, defense counsel requested, "Maybe we could take a recess and you [referring to the prosecutor] could call him." 2RP 185. The trial court refused to allow the recess: "Well, we need to have witnesses arranged and ready to go, so. . . I'm going to sustain the objection as far as hearsay . . ." 2RP 186. Defense counsel reiterated that she believed Beebe was under subpoena to appear for court. 2RP 186.

At that point, defense counsel then attempted to establish Beebe as the owner by asking Officer Byron if he was able to determine who owned the vehicle. 2RP 187. This prompted the State's additional hearsay objection and defense counsel's failed attempt to establish the foundation for business records. 2RP 188. Thus, Beebe's prior ownership of the vehicle and his identification of Parker as the purchaser of the vehicle was never presented to the jury.

Defense counsel called Tyler Parker to testify shortly thereafter. Parker testified he had not seen Ford in years excepting for being recently in the same jail cell together. 2RP 191. Parker confirmed he never saw Ford on February 16, 2017, the date of the attempted eluding. RP 189.

The jury found Ford guilty of attempting to elude a pursuing police vehicle. CP 21; 2RP 237-40. The trial court imposed a residential drug offender sentencing alternative (DOSA) pursuant to RCW 9.94A.660 and RCW 9.94A.662. CP 24-35. Ford appealed his conviction.⁴ CP 41-42.

C. ARGUMENT

1. IT WAS ERROR TO DENY A RECESS SO THAT THE DEFENSE COULD FURTHER ATTEMPT TO CONTACT AND SECURE THE TESTIMONY OF A MATERIAL WITNESS

At trial, Ford's defense was that he was not the driver of the van that attempted to elude police. To overcome the State's hearsay objection and present a full defense, Ford's attorney sought to present the testimony of Kenneth Beebe, the former owner of the van who identified Tyler Parker as the person to whom he sold the van. Beebe's testimony would have established that Parker bought the van. As defense counsel argued, "Ownership of the vehicle goes directly to who's more likely than not to be

⁴ The appeal was initially dismissed for failure to perfect it and the case mandated; however, the mandate was later recalled and the appeal was reinstated. CP 56, 61-64.

driving the vehicle. I mean it establishes a reasonable doubt in the mind of the jury.” RP 183.

Even though Beebe was under subpoena and even though he indicated he would not honor it by appearing in court, the trial court denied the defense even an opportunity to present Beebe’s testimony because “we need to have witnesses arranged and ready to go, so” RP 186. This amounted to a denial of Ford’s constitutional right to present witnesses in his defense, which requires reversal and retrial.

The Sixth and Fourteenth Amendments to the United States Constitution and article I, section 22 of the Washington Constitution guarantee the right to defend against the State’s charges. These provisions provide criminal defendants a meaningful opportunity to present a complete defense, a fundamental element of due process. Chambers v. Mississippi, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973); Washington v. Texas, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967); State v. Burri, 87 Wn.2d 175, 181, 550 P.2d 507 (1976). These provisions also establish that part of the right to present a complete defense is the right to compulsory process to compel the attendance of witnesses. State v. Maupin, 128 Wn.2d 918, 924, 913 P.2d 808 (1996). Both the United States and Washington Supreme Courts have held that the right to compulsory attendance of material witnesses is a fundamental element of due process, going directly to the right to present a

defense. Washington, 388 U.S. at 19; Burri, 87 Wn.2d at 180-81. Because the right to compulsory process is a fundamental right, trial courts must safeguard it with meticulous care. Burri, 87 Wn.2d at 181. The denial of the right to present a defense is reviewed de novo. State v. Jones, 168 Wn.2d 713, 719, 230 P.3d 576 (2010).

The right to compulsory process is violated when the defendant is deprived of a material witness. State v. Smith, 101 Wn.2d 36, 41, 677 P.2d 100 (1984). The burden of showing materiality is met where the defendant “establish[es] a colorable need for the person to be summoned.” Id. at 41-42.

Beebe was a material witness because he was necessary to establish that he identified Parker as the man to whom he sold his van. Parker’s ownership of the van was an important point for Ford’s defense, as it tended to corroborate that Parker was the driver who attempted to elude a pursuing police vehicle, not Ford. See 2RP 183 (defense counsel arguing precisely this).

The State served Beebe with a subpoena to attend trial. CP 68⁵; 2RP 185. Although the prosecutor told Beebe that the State would not be calling him, the State asked Beebe to “stay close to the phone, so he - we can call him

⁵ Contemporaneously with the filing of this brief, Ford designates the witness record from the superior court file. He anticipates that the subpoena issued to Kenneth Beebe will appear at CP 68.

any time.” 2RP 185. Defense counsel represented that she had also subpoenaed Beebe, but that he was not able to reach him. RP 185. She stated, “my office talked to him, they said about 2 o’clock yesterday and told him that he - he indicated that he had gotten my subpoena, but that he didn’t want to come back to court.” 2RP 185. The prosecutor then said, “Well, he seemed very cooperative to me,” prompting defense counsel to suggest a recess so that the prosecution “could call him.” 2RP 185. From this exchange, it appeared like a relatively simple administrative matter to contact Beebe again and cajole him to come back to court. Nonetheless, the trial refused this recess because “we need to have witnesses arranged and ready to go,” saying nothing else on the subject. 2RP 186.

State v. Edwards, 68 Wn.2d 246, 412 P.2d 747 (1966), compels reversal of the trial court’s decision. Edwards was charged with assault for a shooting incident at a night club. Id. at 247-48. Shortly before the jury was to begin deliberations, Edwards requested a short recess so three witnesses could be compelled to appear in court and testified. Id. at 251. He explained he had served the three witnesses with subpoenas the day before, but that they had not appeared. Id. Edwards asked for both a recess to secure their attendance and that the court compel the witnesses to appear. Id. at 251-52. The trial court denied Edwards’s request. Id. at 251-52.

This was reversible error:

The unexpected refusal of the three subpoenaed witnesses to honor the subpoenas gave defendant reasonable grounds to claim surprise at their failure to attend. Colloquy between court and counsel considered in connection with the testimony showing that the absent witnesses possessed testimonial and material knowledge of the facts in issue supplied an adequate predicate for granting the short recess and the issuance of process.

Id. 258. This was so even if the rules of compulsory process were not strictly followed given that “[n]o rule of criminal procedure can or ought to be construed or applied so as to abridge a fundamental constitutional right.” Id. “[W]here, as here, the defendant took specific steps to assure the attendance of witnesses—and then made timely application to enforce their attendance—it was an abuse of discretion for the court to refuse a recess . . . of about 45 minutes to enable the defendant to compel attendance.” Id.

The same impropriety that occurred in Edwards occurred here. Defense counsel took specific steps to secure the attendance of Beebe. She subpoenaed him. Her staff actually spoke to him, and he refused to cooperate. The State, by contrast, indicated he was cooperative with the prosecution and thus it was likely the State would have been able to secure his attendance. Thus, the record does not demonstrate that trial would have been unnecessarily delayed in attempting to secure Beebe’s presence and testimony. The trial court erred in refusing a recess so that the defense could present Beebe’s testimony. This error requires reversal of Ford’s conviction and a new trial.

The State might attempt to argue that Beebe's testimony was not truly necessary for Ford's defense because other witnesses established Ford was not the driver, and therefore reversal is not required. It is true that two other witnesses, Chelsie Landgraf and David Ruport, had already testified that Ford was not driving the eluding vehicle. See 2RP 127-28, 148, 156. However, only Landgraf testified that the driver was Tyler Parker; David Ruport only identified "the guy driving the van ran that stop sign," indicating he did not know him. 2RP 128, 140. And Landgraf and Ruport both had been convicted of crimes of dishonesty, diminishing the persuasive force of their testimony. 2RP 129, 152. Indeed, Landgraf had four recent theft convictions. 2RP 152. In addition, the prosecutor established that Ruport and Ford were friends and that Ruport would prefer Ford not to get in trouble, establishing Ruport's possible motive to fabricate his testimony. 2RP 145-46.

Because of the underwhelming testimony of Ruport and Landgraf, Beebe's testimony would have been extremely beneficial to Ford's defense. Beebe ostensibly did not know Ford, was ostensibly not impeachable with crimes of dishonesty, and had identified Parker as the owner of the vehicle in the past and had no personal interest in the outcome of Ford's trial. His testimony was essential to the sole defense that Ford was not driving the eluding vehicle. Because the trial court gravely erred in denying the defense even the opportunity to present Beebe's testimony, this court must reverse

Ford's conviction and remand for a new trial at which Ford may present the witnesses his constitutional rights entitle him to present.

2. DEFENSE COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL IN FAILING TO REQUEST OR OBTAIN A MATERIAL WITNESS WARRANT TO SECURE MATERIAL TESTIMONY

Alternatively, to the extent that defense counsel's efforts in securing Beebe's testimony were inadequate, defense counsel rendered ineffective assistance of counsel. She could and should have requested a material witness warrant to compel Beebe's attendance.

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington State Constitution guarantee the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Estes, 188 Wn.2d 450, 457, 395 P.3d 1045 (2017). To establish an effective assistance claim, "the defendant must show both (1) deficient performance and (2) resulting prejudice." Estes, 188 Wn.2d at 457-58 (citing Strickland, 466 U.S. at 687). Performance is deficient if it falls below an objective standard of reasonableness considering all the circumstances. Id. at 458. "Prejudice exists if there is a reasonable probability that 'but for counsel's deficient performance, the outcome of the proceedings would have been different.'" Id. (quoting State v. Kylo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009)). "[A]

‘reasonable probability’ is lower than a preponderance standard” and “is a probability sufficient to undermine confidence in the outcome.” Id. (quoting Strickland, 466 U.S. at 694).

The decision to call or not call a witness does not necessarily render counsel’s performance deficient, provided the decision is tactical. State v. Neidigh, 78 Wn. App. 71, 81, 895 P.2d 423 (1995). But the presumption of competence may be overcome by a showing that the witness is necessary to the presentation of a cogent defense. State v. Maurice, 79 Wn. App. 544, 552, 903 P.2d 514 (1995) (citing State v. Jury, 19 Wn. App. 256, 263-64, 576 P.2d 1302 (1978)).

Here, defense counsel indicated she had subpoenaed Beebe, he was not cooperative, and then requested a recess so that the State could attempt to get Beebe to cooperate. 2RP 185. However, she did not specifically request a material witness warrant to compel Beebe’s testimony ever during or before trial.

A witness who has been placed under subpoena “may be compelled to attend and testify in open court.” RCW 10.52.040. CrR 4.10 governs the issues of a material witness warrant. The rule provides, in pertinent part,

(a) Warrant. On motion of the prosecuting attorney or the defendant, the court may issue a warrant, subject to reasonable bail, for the arrest of a material witness. The warrant shall issue only on a showing, by affidavit or on the

record in open court, that the testimony of the witness is material and that

(1) The witness has refused to submit to a deposition ordered by the court pursuant to rule 4.6; or

(2) The witness has refused to obey a lawfully issued subpoena; or

(3) It may become impracticable to secure the presence of the witness by subpoena.

CrR 4.10(a).

Generally, the issuance of a material witness warrant is within the trial court's discretion. City of Bellevue v. Virgil, 66 Wn. App. 891, 895-96, 833 P.2d 445 (1992). However, where not other remedy is sufficient, denying a material witness warrant may constitute an abuse of discretion. Id. at 895. Of course, the trial court's discretion is constrained by the constitutional right to compulsory process. See, e.g., United States v. Goodwin, 625 F.2d 693, 703-04 (5th Cir. 1980); see also State v. Downing, 151 Wn.2d 265, 274-75, 87 P.3d 1169 (2004) (recognizing denial of continuance motion infringes on defendant's right to compulsory process and right to present defense if denial prevents the defendant from presenting a witness material to his defense).

Had defense counsel asked, she would have satisfied the requirements of a material witness warrant in this case. As discussed, Beebe was under subpoena issued by the State. CP 68. Defense counsel also represented that she had also subpoenaed Beebe. 2RP 185-86; RPC 3.3(a)(1) (duty of candor

prevents counsel from making knowingly false statement of fact to tribunal). Despite the subpoenas, and counsel's conversation with Beebe, Beebe refused to appear. Therefore, the subpoena means of securing Beebe's presence at trial proved futile. Cf. Virgil, 66 Wn. App. at 896 (material witness warrant inappropriate absent showing that other available means of securing witness's presence proved futile). A material witness warrant to secure Beebe's presence at trial was both appropriate and necessary. CrR 4.10(a)(2), (3); RCW 10.52.040.

Nor was there any problem contacting or locating Beebe. The State said he was cooperative. 2RP 185. The defense said that he wasn't, but that she and her staff had managed to contact him and inform him about the necessity of his testimony. 2RP 185. Beebe's address appears in the record and was known to the parties, and Beebe had actually appeared for trial the day before Ford requested a recess to secure his presence. CP 65-66; 2RP 185. Thus, Beebe was easily located and could have been quickly compelled to appear at court. Cf. State v. Lane, 56 Wn. App. 286, 297, 786 P.2d 277 (1989) (no error in denying material witness warrant because defense could not guarantee it would successfully contact the informant if given additional time).

And, as discussed above, Beebe's testimony was material. He was the best witness to establish Tyler Parker's ownership of the vehicle. That

ownership tended to establish the needed inference that Parker drove the eluding vehicle, not Ford. In sum, had defense counsel moved for a material witness warrant, and had the trial court acted properly to ensure Ford's right to present a defense, the material witness warrant would have issued.

Counsel's failure to request a material witness warrant for Beebe fell below the objective standard for effective representation. Nor was there any reasonable strategy for not requesting the warrant to secure Beebe's presence. Defense counsel recognized the important of Beebe's anticipated testimony and identification of Parker for the defense. She had subpoenaed him. Counsel simply failed to exercise the additional diligence of asking for a material witness warrant—perhaps the epitome of compulsory process—to secure Beebe's presence. See Jury, 19 Wn. App. at 264 (counsel's failure to subpoena witnesses was an "omission[] which no reasonably competent counsel would have committed"). Counsel's failure to ensure Beebe's presence through a timely material witness warrant constituted deficient performance.

Counsel's deficient performance was prejudicial for the reasons discussed in Part C.1 supra. Had a material witness warrant been issued to secure Beebe's presence and testimony, there is a reasonable probability that the outcome of trial would have differed. Beebe was the only disinterested witness who could establish that Parker, not Ford, was the owner and therefore

probably the driver of the eluding vehicle. The identity of the driver was the sole issue in dispute at trial. Because defense counsel's failure to request a material witness warrant to secure Beebe's presence was deficient performance that undermines confidence in the outcome of trial, Ford asks that his conviction be reversed and that this case be remanded for a new trial.

D. CONCLUSION

Ford was denied the opportunity to present a material witness to his sole defense, requiring reversal and remand for a new and fair trial.

DATED this 25th day of June, 2018.

Respectfully submitted,

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