

FILED

MAR 27, 2014
Court of Appeals
Division III
State of Washington

No. 31579-7-III

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,
Plaintiff/Respondent,

vs.

JAIME SALVADOR SILVA-GONZALES,
Defendant/Appellant.

APPEAL FROM THE YAKIMA COUNTY SUPERIOR COURT
Honorable Michael McCarthy, Superior Court Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The court erred in not examining the potential conflict of interest raised by counsel’s motion to withdraw on the basis the admitting of the jail phone call evidence made counsel a necessary witness.

2. The court erred in not allowing counsel to withdraw as attorney when the conflict was disclosed.

3. The court erred in not allowing the defense to admit certified copies of certain court orders to help prove the defense case.

4. The court erred in not granting a new trial.

Issue Pertaining to Assignments of Error

Where Mr. Silva-Gonzales’ Sixth Amendment and Article 1, § 22 rights to present a defense were violated, did the trial court abuse its discretion in denying his motion for a new trial?

B. STATEMENT OF THE CASE

A jury convicted Jaime Salvador Silva-Gonzales of first degree unlawful possession of a firearm and attempting to elude a pursuing police vehicle. The jury found him not guilty of felony harassment—threat to kill and the lesser included crime of harassment of another. CP 62–63, 65–66.

During trial, the following pertinent evidence was presented. In June an incident occurred in which Marisela Mora was being driven by the

house of her brother-in-law, Kyle Woods. Woods said she had taken things from him and others before and he suspected she had recently entered his home and stolen more items. He pulled his gun out and shot 4–5 times trying to flatten the car’s rear tire as it was driven away. 3/27/13 43–47. Woods acknowledged his actions were hasty and that he should have let police handle it. 3/27/13 54.

Several weeks later, Silva-Gonzales drove his friend Mora by her mother’s house. 3/27/13 RP 73, 88–89, 110; 3/28/13 RP 282. The family was having an annual July 4 barbeque gathering, with about 20 adults and kids. Woods was there. 3/27/13 RP 72, 84, 110. Mora had not been invited and was not welcome. 3/27/13 RP 84, 106.

They drove by again in the evening. 3/27/13 RP 73, 88–89, 110. Some people saw Silva-Gonzales make a pointing gesture towards the group and heard Mora laughing and saying, “yeah, that’s him”. 3/27/13 RP 74, 76–77; 3/28/13 RP 285. The car stopped and Silva-Gonzales started to get out. 3/27/13 RP 99, 102. Mora’s sister thought he held a black gun in his left hand, while their mother thought it was in his right hand. 3/27/13 RP 91, 93–94, 99, 101, 104, 110, 117–18, 125. Others did not see any gun. 3/27/13 RP 78; 3/28/13 RP 247. Mora pulled Silva-Gonzales back into the car and they sped off. 3/27/13 RP 77, 90, 92, 99, 118.

Someone called police and they arrived quickly. 3/27/13 RP 81, 119, 179–80. Officers located the car, and turned on their car lights and sirens. 3/27/13 RP 132–33, 146, 182. Silva-Gonzales continued driving below the posted speed limit for a few minutes and then pulled into the opposite lane on the North Meyers Road bridge and stopped. 3/27/13 RP 134–35, 147, 149, 174. Mora got out and jumped over the railing into the Yakima River. 3/27/13 RP 135; 3/28/13 RP 288. Police arrived as Silva-Gonzales stepped over the railing, hesitated and then jumped. 3/27/13 RP 136, 175–76. Police followed along the shore, and a quarter-mile later took Silva-Gonzales and Mora into custody. 3/27/13 RP 140–43, 163–65, 167; 3/28/13 RP 290. They were taken in separate patrol cars to jail. 3/28/13 RP 292.

The black gun allegedly seen at the family barbeque was never recovered. Police discovered a sawed-off rifle in the trunk of the car registered to and being driven by Silva-Gonzales, and 3 live bullet rounds in the pocket of a flannel shirt on the driver's seat that was wrinkled as if someone had been sitting on it. 3/28/13 RP 197–98, 201–03, 207, 210, 224–25, 250–52. Mora told police and testified at trial she drove the car on a daily basis, the sawed-off rifle was hers, and that Silva-Gonzales had no knowledge it was in the trunk. 3/28/13 RP 294–97, 322.

Trial proceedings began on Monday, March 25, 2013, and the subject of recorded jail telephone calls was discussed at pretrial. 3/25/13 RP 4–8. The prosecution stated it was “probably not going to” or “just depend[ing] how things play out” or “likely going to be” using portions of the recordings. 3/25/13 RP 5–6. Defense counsel objected to any use of the recordings. 3/25/13 RP 6–8. The court reserved ruling, and asked the State to provide copies of proposed portions for the court to review. 3/25/13 RP 8. The State e-mailed copies to the parties late that afternoon. CP 99.

Three days later, the court heard argument. The State wanted to submit as evidence portions of two phone calls made by Silva-Gonzales roughly two weeks after his arrest on July 4, 2012. 3/28/13 RP 187–92.

In the first call, made July 19, Silva-Gonzales talked to another person about wanting to speak to his attorney.

[DEFENDANT]: The main reason why I wanted to talk to you is because I want to know, I want to know what it is that is in the report that - -

[FEMALE]: Yeah.

[DEFENDANT]: -- he’s got.

[FEMALE]: Uhm-hm.

[DEFENDANT]: And then I need him to find out what's in the report on my home girl case, exactly word-for-word.

[FEMALE]: Uhm-hm.

[DEFENDANT]: -- you know, that’s the case.

[FEMALE]: (inaudible).

[DEFENDANT]: Yeah, I know, but I know that when I .. as soon as I get out I gotta take care of her and send her money and shit, too, because, man she's saying everything was hers, you know?

[FEMALE]: Yes.

[DEFENDANT]: That's fucking - - that's some down ass shit.

3/28/13 RP 265–66; CP 69.

In the second call, made July 20, Silva-Gonzales was talking to another person about the substance of a conversation he had had with Mr. Alford, his newly-appointed counsel, less than an hour earlier.

It was my vehicle. I knew I shouldn't have put that fucking car in my name. Anyway, um, the only thing just looking back the car was in your name. I said yeah, but I said that we both know that the reason that it's locked up with something, it's not in the - - it's not the same thing as it being in a common area.

3/28/13 RP 266; CP 69.

Over defense objection, the court ruled the jail phone call excerpts admissible. 3/28/13 RP 192–93. Later that morning, the State began direct examination of the last witness in its case-in-chief, Sergeant Jeremy Welch. His duties included monitoring the jail phone calls. 3/28/13 RP 256.

Defense counsel requested a sidebar, disclosing a conflict of interest due to his becoming a necessary witness. Although defense counsel offered to put more on the record, the court denied the motion to withdraw and substitute counsel, stating “You’re not a witness ... [y]ou can’t

withdraw in the middle of a trial.” 3/28/13 RP 256–57. Examination of the witness continued, and the jail phone call excerpts were admitted and played for the jury. 3/28/13 RP 257–66. The State then rested. 3/28/13 RP 269.

After the noon recess, defense counsel represented he’d been appointed to represent Silva-Gonzales on July 18, first met with him on July 20 at 1:30 p.m., conveyed certain facts to his client that he’d just learned from the prosecutor, and in the second call played to the jury shortly thereafter at 2:30 p.m., the client relayed those facts to a third party. In the short amount of time between that morning’s ruling on admissibility of both phone calls and the State’s final witness before the noon recess, defense counsel and his client discussed and concluded he was a necessary witness to establish a defense context for the two calls, evidence germane to Silva-Gonzales’ defense. 3/28/13 RP 270–72. The court reaffirmed its denial of the request to withdraw, and stated the excerpts were innocuous and implied there was no necessity the jury be given any context for the calls, and that the motion to withdraw was plainly something “hid[den] in the weeds and then sprung ... at the last moment”. 3/28/13 RP 271–72.

In light of the court's rulings, during the defense case-in-chief counsel unsuccessfully attempted to submit evidence in the form of certified copies of three court records to refute the jail phone call evidence. The documents generally establish dates relevant to portions of Silva-Gonzales' defense: Mr. Alford's appointment as counsel and the date of arraignment when he would have had contact with his client. 3/28/13 RP 315–18. The court did not allow the admission of these documents apparently because it had found the disclosure of a conflict of interest was untimely. 3/28/13 RP 317–18. It offered no evidentiary basis for its ruling.

Defense counsel filed a motion for new trial based on the court's refusal to allow him to withdraw due to a conflict of interest and refusal to allow submission of self-authenticating documents to help prove Silva-Gonzales' case. CP 68–72, 101–102. After argument, the motion was denied. 4/11/13 RP 402–09. The court restated its position that the motion to withdraw was untimely. It concluded that if there was any prejudice, it was “mitigated or eliminated through Mr. Alford's final argument and [the State's] agreement in final argument that in fact [] Mr. Alford could have been the source of the information.” 4/11/13 RP 409.

In part, the jury was instructed that “The lawyers' remarks, statements, and arguments are intended to help you understand the

evidence and apply the law. *It is important, however; for you to remember that the lawyers' statements are not evidence.* The evidence is the testimony and the exhibits. The law is contained in my instructions to you. *You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.*” Instruction No. 1 (emphasis added), CP 32.

This appeal followed. CP 67.

C. ARGUMENT

Mr. Silva-Gonzales’ Sixth Amendment and Article 1, § 22 rights to present a defense were violated, and the trial court abused its discretion in denying his motion for a new trial.

Defendant is entitled to a new trial due to irregularities in the proceedings of the court and abuse of discretion by which Silva-Gonzales was prevented from having a fair trial. When a conflict of interest was disclosed, defense counsel should have been allowed to withdraw in order to provide necessary testimony and new counsel appointed. In light of the ruling, Silva-Gonzales should have been permitted to submit documents intended to refute jail phone call evidence. He was denied his right to present a complete defense. The court’s errors of law resulted in substantial justice not being done.

A motion for a new trial may be granted for “[i]rregularity in the proceedings of the court, jury or prosecution, or any order of court, or abuse of discretion, by which the defendant was prevented from having a fair trial”, or for “[e]rror of law occurring at the trial and objected to at the time by the defendant”, or when “substantial justice has not been done.” CrR 7.5(a)(5), (6) and (8). A trial court's decision regarding a motion for new trial is reviewed for abuse of discretion. *State v. Swan*, 114 Wn.2d 613, 642, 790 P.2d 610 (1990). A court abuses its discretion where the decision was manifestly unreasonable, or based on untenable grounds or reasons. *Moreman v. Butcher*, 126 Wn.2d 36, 40, 891 P.2d 725 (1995).

RPC 3.7(a) provides: “A lawyer shall not act as advocate at a trial in which the lawyer ... is likely to be a necessary witness.” An attorney must withdraw when it is likely he or she will present testimony related to substantive contested matters. *See Wilkins v. Lasater*, 46 Wn. App. 766, 781–82, 733 P.2d 221 (1987); *Wagner v. Wagner*, 1 Wn. App. 328, 333, 461 P.2d 577 (1969). A defendant is entitled to a new trial if, as a matter of law, a breach of a professional canon prevented a fair trial. *See State v. Sullivan*, 60 Wn.2d 214, 373 P.2d 474 (1962); *Ryan v. Ryan*, 48 Wn.2d 593, 600, 295 P.2d 1111 (1956); *Wagner*, 1 Wn. App. at 333.

The Sixth Amendment to the United States Constitution provides: “In all criminal prosecutions, the accused shall enjoy the right ... to have compulsory process for obtaining witnesses in his favor... .” This right applies to the states through the Fourteenth Amendment. *Washington v. Texas*, 388 U.S. 14, 17-19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967); *accord*, Washington Constitution, Article 1 § 22. The right to compel attendance of witnesses “is in plain terms the right to present a defense.” *Id.* at 19, 87 S.Ct. 1920. A claim of a denial of Sixth Amendment rights is reviewed de novo. *State v. Jones*, 168 Wn. 2d 713, 719, 230 P.3d 576 (2010), citing *State v. Iniguez*, 167 Wn.2d 273, 280–81, 217 P.3d 768 (2009).

An error impacting a defendant's Sixth Amendment right to compel attendance of witnesses is of constitutional magnitude and will be considered harmless only if the state can show beyond a reasonable doubt that the jury would have reached the same result in the absence of the error. *State v. Maupin*, 128 Wn.2d 918, 928-29, 913 P.2d 808 (1996). But the right applies only to witnesses who are material to the defense. *State v. Smith*, 101 Wn.2d 36, 41, 677 P.2d 100 (1984) (citing *Washington*, 388 U.S. at 23, 87 S.Ct. 1920); *State v. Wimbish*, 100 Wn. App. 78, 82, 995 P.2d 626, *rev. denied*, 141 Wn.2d 1022, 10 P.3d 1075

(2000). It is the defendant's burden to establish materiality. *Wimbish*, 100 Wn. App. at 82.

Here, the court committed reversible error by denying his counsel's motion to withdraw due to conflict because with the admission of jail phone call evidence Mr. Alford became a witness who Silva-Gonzales was entitled under the constitutional right of compulsory process to call at trial. The prosecution used the jail phone call statements to prove knowledge on the part of Silva-Gonzales as to the possession of the sawed-off rifle found in the trunk of the car he was driving. Silva-Gonzales was not constitutionally obligated to testify. The error was prejudicial because Mr. Alford was the only person other than Silva-Gonzales who could put the jail phone calls evidence in context. These circumstances may be critical to the jury's determination of whether he knew the rifle was in the trunk.

The court's conclusion that any prejudice was "mitigated or eliminated through Mr. Alford's final argument and [the State's] agreement in final argument that in fact [] Mr. Alford could have been the source of the information" (4/11/13 RP 409) was erroneous, because the jury was instructed that "the lawyers' statements are not evidence" and they must "disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions." Instruction No. 1 (emphasis

added), CP 32. Silva-Gonzales was entitled to present Mr. Alford's live testimony.

If a trial court knows of a potential conflict of interest, the court should inquire into the nature and extent of the conflict. *State v. Terry*, 173 Wn. App. 1004, *rev. denied*, 177 Wn. 2d 1017, 304 P.3d 114 (2013), citing *State v. McDonald*, 143 Wn.2d 506, 513, 22 P.3d 791 (2001). Here, Mr. Alford identified the conflict but the court failed to examine and determine whether a conflict existed. Instead the court simply stated the motion to withdraw was untimely. But counsel could not have acted more quickly. The court disregarded that the State had only identified the excerpts it wished to use on the first day of trial, the court found the excerpts admissible on the morning of the third day of trial, and counsel identified the conflict and brought it to the court's attention *before* the noon recess. The court's failure to address the matter of conflict and right to present a complete defense and its denial of the motion denied Silva-Gonzales a fair trial.

After the noon recess and in light of the court's denial, counsel attempted to submit alternative evidence in the form of self-authenticating copies of court records to refute the jail phone call evidence. Through the documents counsel could establish a chronology of events supporting the

defense positions that Silva-Gonzales had innocent reasons to want to see the police reports and had no personal knowledge of the sawed-off rifle found in the trunk. The documents were relevant and necessary to present his defense. The court abused its discretion in summarily denying the request without identifying an evidentiary basis for the denial. The court's decision was in error and denied Silva-Gonzales a fair trial.

Counsel was forced to continue representing Silva-Gonzales despite the fact he was a needed witness and was not allowed to submit evidence germane to his client's defense. The jury found Silva-Gonzales guilty of the possession of the rifle located in the trunk of the car. There was no evidence presented, other than the misconstrued statements made in the jail phone calls, about the requests for police reports or that Silva-Gonzales knew of the rifle's existence. The error was not harmless. The state cannot show beyond a reasonable doubt that the jury would have reached the same result in the absence of the error. *Maupin*, 128 Wn.2d at 928-29. The trial court's decisions constitute irregularity in the proceedings and mistakes of law, with the end result that Silva-Gonzales was denied his right to present a defense and was not afforded a fair trial and substantial justice was not done. The trial court based its decision on untenable

grounds and abused its discretion in denying the motion for new trial.

Moreman, 126 Wn.2d at 40; *Swan*, 114 Wn.2d at 642.

D. CONCLUSION

For the reasons stated, the conviction for first degree unlawful possession of a firearm should be reversed.

Respectfully submitted on March 27, 2014.

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PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on March 27, 2014, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of brief of appellant:

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