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Court of Appeals
Division III
State of Washington
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NO. 36632-4-III

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

STATE OF WASHINGTON,

Respondent,

v.

SIEGFRIED SCHEELER,

Appellant.

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

The Honorable Michael McCarthy, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT

The State has conceded the trial court violated principles of Double Jeopardy by failing to vacate count I for first degree assault. Br. Resp. at 15-16. This Court should accept the concession.

The State has also conceded that three LFOs (costs of community custody, collections, and non-restitution interest) must be stricken. Br. Resp. at 16. This Court should accept the concession.

The State argues, however, Scheeler's Due Process rights were not violated when the trial court refused to continue the sentencing hearing. Br. Resp. at 8. For the reasons discussed below, and based upon the arguments in Scheeler's opening brief, incorporated here, this Court should reject the State's argument and remand for a new sentencing hearing. See Br. App. at 11-18.

THE TRIAL COURT VIOLATED DUE PROCESS WHEN IT DENIED SCHEELER'S MOTION TO CONTINUE THE SENTENCING HEARING.

In summary, the State argues (a) trial counsel did not have precise details regarding why witnesses failed to appear at the sentencing hearing, (b) the case of State v. Edwards, 68 Wn.2d 246, 412 P.2d 747 (1966), is factually distinguishable, and (c) CrR 7.1 is irrelevant because Scheeler's case did not involve a Pre-Sentencing Report (PSI). See Br. Resp. at 8, 14. Each of these arguments is discussed, and refuted, below.

The State repeatedly argues Scheeler’s trial counsel “could provide no reason” why the anticipated defense witnesses were not present at the sentencing hearing. Br. Resp. at 8; see also Br. Resp. at 9 (arguing defense counsel “had no idea where the ex-girlfriend was.”), 10 (arguing “absolutely no record that the weather was the reason individuals did not attend”). First, this argument is factually inaccurate. Although defense counsel did not know where the witnesses were, he did provide two very likely possibilities for why they were not present: travel delays and the reasonable belief that the court might close as a result. Br. Resp. at 7 (RP 478-79).

More importantly, a close review of State v. Edwards shows that defense counsel is not required to know the precise whereabouts of witnesses, or the specific reasons for their failure to appear, in order to be entitled to a continuance. 68 Wn.2d 246, 258-59, 412 P.2d 747 (1966).

The State argues, “the *Edwards* case is completely distinguishable on its facts.” Br. Resp. at 14 (emphasis in original). This is incorrect. Edwards involved three trial witnesses. 68 Wn.2d at 251. Edwards’ defense counsel had made reasonably diligent efforts to obtain their presence (in that case via civil subpoenas) and had expected them to appear at trial, but none of them did. Id. at 258. Our Supreme Court did not require defense counsel to account for the specific whereabouts of the

absent witnesses, or to provide an explanation as to why they failed to appear. Rather, the Court found it sufficient that based upon his prior efforts to obtain their presence, defense counsel had “reasonable grounds to claim surprise at their failure to attend.” Id. at 258.

Thus, Edwards is not distinguishable in any meaningful way, and instead supports the proposition that here, where Scheeler’s defense counsel had been in contact with witnesses, had made reasonable arrangements to obtain their presence, and was surprised by their unexpected absence, there was a good faith basis for and entitlement to, a continuance.

The State also argues, “[a]bsolutely nothing in CrR 7.1 pertains to Scheeler’s case because the court did not order a PSI [presentence investigation] in this case.” Br. Resp. at 14. This statement misconstrues Scheeler’s argument. Scheeler cites to CrR 7.1 not because his case has anything to do with a PSI, but rather to show the relevance of the anticipated testimony by the witnesses who had failed to attend the hearing. Scheeler’s trial counsel made an offer of proof regarding what topics these witnesses would testify to, and those topics included “Scheeler’s background, character in the community, employment history, and other matters.” Br. App. at 17 (citing RP 478). Scheeler cites to CrR 7.1, and additional authorities, because they indicate the scope of topics to

be considered at a sentencing hearing. Br. App. at 17 (citing CrR 7.1; State v. Ramirez, 191 Wn.2d 732, 746, 426 P.3d 714 (2018); State v. Alltus, 447 P.3d 572 (Div. III.2019) (pub. in part)¹). The list of topics contained within CrR 7.1 includes factors related to a defendant's character and financial status, and thus supports the proposition that the content of the testimony Scheeler hoped to present through these witnesses was relevant and material, and would have had an impact on the ultimate sentence imposed.

For the reasons discuss above, and in Scheeler's opening brief, this Court should conclude the trial court violated Scheeler's Due Process rights when it denied his motion to continue the sentencing hearing.

B. CONCLUSION

Scheeler respectfully requests that this Court remand for resentencing to allow defense character witnesses to speak on his behalf, to vacate count 1, and to strike the costs of community custody, collections, and non-restitution interest, and to waive or refund any non-restitution interest that has been wrongfully collected or accrued.

¹ In accordance with GR 14.1, this brief cites only the published portion of the opinion.

DATED this 9th day of March, 2020.

Respectfully submitted,

NIELSEN KOCH, PLLC

A handwritten signature in cursive script, reading "E. Rania Rampersad".

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