

67926-1

67926-1

NO. 67926-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

KRISTOPHER PEDERSON,

Appellant.

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STATE OF WASHINGTON
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE CAROL A. SCHAPIRA

**RESPONDENT'S RESPONSE TO APPELLANT'S
STATEMENT OF ADDITIONAL GROUNDS**

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A. ISSUES PRESENTED

1. The State is generally barred from introducing evidence that a defendant invoked a constitutional right, as it could lead to an impermissible inference of guilt. To preserve an issue for appeal, a defendant should first raise the issue before the trial court; a defense attorney's failure to object for reasons of trial strategy does not create an ineffective assistance claim. Here, the prosecutor may have not played the final moments of Pederson's statement to police where Pederson asked for an attorney. Pederson's attorney did not object or otherwise attempt to introduce the fact that Pederson had asked for an attorney. Did the stopping of the audio prior to Pederson's invocation serve to protect Pederson's constitutional rights and was his attorney's failure to object to this omission proper? Did Pederson waive the issue by failing to object?

2. An issue that relies on matters outside of the record may not be considered on direct appeal. Practical experience is sufficient to qualify a witness as an expert for the purposes of offering an opinion to the jury. Here, the court released the gun used by Pederson to a detective for testing during trial. Pederson's attorney did not object when the detective testified about the gun,

nor did the attorney hire an independent firearms expert. Where the detective had used the same make and model of gun as Pederson's for several years as a police officer and had test-fired the very same gun the night before, was she qualified to render an opinion about it? Is Pederson unable to show any prejudice created by his attorney's failure to call his own firearm expert? Where Pederson did not object to the detective's testimony, is the issue waived?

3. Strategic trial decisions made for plausible reasons are virtually unchallengeable. An issue not raised in the trial court may generally not be raised for the first time on appeal. Here, Pederson raised a voluntary intoxication defense at trial and raised a diminished capacity defense that relied partly on the effects of alcohol on Pederson's depression and judgment. Where Pederson used evidence of his drinking as part of his defense, was the admission of evidence of his intoxication during a DUI stop one day after he threatened to shoot his brother part of a legitimate trial strategy supporting his affirmative defenses? Was the issue waived because Pederson did not object at trial?

4. Pederson makes other arguments that are unsupported in the record and made without any relevant legal authority or were already addressed in the Brief of Respondent. Should they be rejected?

B. SUBSTANTIVE FACTS

The State relies on its Substantive Facts from its Brief of Respondent.

C. PROCEDURAL FACTS

Kristopher Pederson was charged with numerous crimes for shooting at his brother, Don Pederson, and threatening to kill Don and his girlfriend, including attempted murder and felony harassment. CP 33-34. Following a jury trial, Pederson was convicted of only two crimes, assault in the second degree with a firearm and felony harassment, and was given a standard range sentence totaling 43 months in custody. CP 118.

D. ARGUMENT

1. ANY FAILURE TO ADMIT PEDERSON'S REQUEST FOR COUNSEL SERVED TO PROTECT PEDERSON; HIS COUNSEL PERMITTED THE OMISSION AS TRIAL STRATEGY, WAIVING THE ISSUE ON REVIEW.

Pederson contends that by not playing the audio of his request for an attorney before the jury, the prosecutor acted improperly, his attorney was ineffective, and the trial judge gave "free reign" of the courtroom to the State. But if this portion was not played by the State it was because it would have violated Pederson's due process rights, and his attorney clearly had strategic reasons for not insisting that the end of the audio be played before the jury.

a. Relevant Facts.

After a Criminal Rule (CrR) 3.5 hearing, the trial court found that Pederson's recorded statement to Detective Bartlett after his arrest was made freely, intelligently, and voluntarily. 6RP 122.¹ Following the trial court's ruling, Pederson conceded that the

¹ This brief will refer to the Verbatim Report of Proceedings as follows: 1RP (2/22/11); 2RP (3/14, 5/24, 6/28, 7/25, 8/9/11); 3RP (3/24, 4/15, 4/25, 5/5, 5/16, 9/1/11); 4RP (4/1/11); 5RP (9/6/11); 6RP (9/7/11); 7RP (9/8, 9/21-22, 1/4/11); 8RP (9/12/11); 9RP (9/13/11 AM); 10RP (9/13/11 PM); 11RP (9/14/11); 12RP (9/15/11); 13RP (9/19/11); 14RP (9/20/11).

statement was admissible at trial. 6RP 125. During Bartlett's testimony before the jury, the prosecutor played the audio of Pederson's statement.² 10RP 49-51. After playing the audio, the prosecutor asked Bartlett what she did "next," and she said that she "requested a sample of ... Pederson's DNA for comparison." 10RP 51.

During Pederson's cross examination, the prosecutor asked him if his statements on the audio recording to Bartlett were accurate, and Pederson told the prosecutor to "[m]ake sure, when you play that, they end it where it says about a DNA [sic], and if when I said I want an attorney, you didn't play that last time." 14RP 96. The prosecutor asked Pederson why that was so important to him and he replied as follows:

Because it shows that I was finally coming out of ... seizure that I had earlier, and finally realizing the importance of the situation and all that. I was blubbering through and said all that, and she says ... 'I want to do a DNA,' then I'm thinking, you know,

² Because the Verbatim Report of Proceedings does not capture the actual audio of Pederson's statement as it was played to the jury, Pederson's allegation that the audio omitted his request for an attorney is not rooted in the record. Given his statement at trial, however, that the State did not play that portion, and the case law that would ordinarily have prohibited the State from eliciting Pederson's invocation of his right to counsel, it is likely that Pederson is correct, and that the final audio portion of his statement was not played for the jury. To the extent that Pederson relies on matters outside the record, the issue may not be considered on direct appeal but rather may be the subject of a properly supported personal restraint petition. State v. McFarland, 127 Wn.2d 322, 338 n.5, 899 P.2d 1251 (1995).

'What's going on,' you know, 'Maybe I should get an attorney.'

14RP 96.

When the prosecutor began to play sections of the audio, Pederson's attorney voiced her reservations, saying, "Your Honor, I guess I'm curious how much of the statement the State is going to play... Do we have a question and impeachment, or are we just going to listen to the statement again?" 14RP 98. While the prosecutor did continue to play portions of the audio, there was no further discussion regarding Pederson's invocation of his right to counsel. 14RP 98-100.

b. Pederson's Rights Were Protected And The Issue Was Waived.

Due process prohibits the State from drawing adverse inferences from a defendant's exercise of a constitutional right, and a prosecutor's elicitation of such evidence could readily be interpreted as creating that inference. State v. Hancock, 109 Wn.2d 760, 767, 748 P.2d 611 (1988). Strategic trial decisions made for plausible reasons are virtually unchallengeable. Strickland v. Washington, 466 U.S. 668, 690-91, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Whether to object is a classic example of

trial tactics. State v. Madison, 53 Wn. App. 754, 763, 770 P.2d 662, review denied, 113 Wn.2d 1002 (1989). Legitimate tactics are within defense counsel's complete discretion. State v. Lord, 117 Wn.2d 829, 883, 822 P.2d 177 (1991), cert. denied, 506 U.S. 856 (1992).

In order to show ineffective assistance of counsel for failing to object, a defendant needs to rebut the presumption that the failure to object was part of a "legitimate trial strategy or tactic." In re Davis, 152 Wn.2d 647, 716, 101 P.3d.1 (2004). An issue not raised before the trial court may generally not be raised for the first time on appeal. See RAP 2.5(a)³; State v. Moen, 129 Wn.2d 535, 543, 919 P.2d 69 (1996).

Here, if Pederson is correct and the prosecutor failed to play the last sentence of his audio statement where he requested an attorney, the prosecutor's actions in omitting the invocation were

³ RAP 2.5 (a) reads as follows:

Errors Raised for First Time on Review. The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right. A party or the court may raise at any time the question of appellate court jurisdiction. A party may present a ground for affirming a trial court decision which was not presented to the trial court if the record has been sufficiently developed to fairly consider the ground. A party may raise a claim of error which was not raised by the party in the trial court if another party on the same side of the case has raised the claim of error in the trial court.

consistent with the case law prohibiting such evidence. In United States v. Daoud, 741 F.2d 478, 480-82 (1st Cir.1984), the court found that the trial court erred in refusing to give a curative instruction where the prosecutor's questioning elicited the testimony that the defendant asked for an attorney, holding that "it is at least possible that some jurors would have misconstrued her request as tending to admit guilt." Id. at 481. Similarly, should the prosecutor here have admitted evidence that Pederson requested an attorney during police questioning, a negative inference could have been drawn, warranting at minimum a curative instruction and endangering the conviction. Id. By omitting Pederson's invocation of his rights, the State was merely acting in accord with case law to protect Pederson's own constitutional rights.

Pederson claims that his attorney was ineffective by not insisting that the audio be played, but in order to show ineffective assistance of counsel on these grounds, he would first have to "rebut the presumption that counsel's failure to object can be characterized as *legitimate* trial strategy or tactics." In re Davis, 152 Wn.2d at 714 (internal quotations omitted, emphasis in original). Given that case law interprets admission of a defendant's invocation of a constitutional right as creating an inference of guilt,

it is likely that Pederson's attorney would not have wanted the jury to draw inferences from his request as much as the State did not want to create the issue on appeal. Pederson cannot, therefore, rebut the presumption that his attorney's failure to introduce his client's request for counsel at trial was part of a legitimate trial strategy.

Any harm that Pederson perceives was caused by the omission of the audio capturing him asking for counsel was remedied when he testified from the stand that he did, indeed, request a lawyer while speaking with the detective. 14RP 96. Lastly, because Pederson's attorney never objected, the issue is waived on appeal. This issue is meritless.

2. TESTIMONY REGARDING TESTING OF THE GUN WAS APPROPRIATE REBUTTAL TESTIMONY AND BARTLETT WAS QUALIFIED TO TESTIFY; PEDERSON'S CLAIMS ARE UNSUPPORTED BY LAW OR THE RECORD AND HE NEVER OBJECTED TO THE TESTIMONY, WAIVING THE ISSUE.

Pederson argues that the trial court abused its discretion in releasing the gun for testing and in permitting Detective Bartlett's rebuttal testimony. He also argues that his counsel was ineffective in not securing a firearms expert to testify on his behalf to counter

Bartlett's testimony. But Pederson fails to cite to any authority to support his arguments, Bartlett's experience qualified her as an expert, and any challenge to her testimony is waived by Pederson's failure to object at trial.

a. Relevant Facts.

At trial, Pederson testified that his gun went off accidentally on the night of the shooting as he was cocking it to commit suicide in front of his brother, Don:

And as I [sic] getting it up and cocking it, [Don] is taking off, and I don't know if it was when I was putting it back down, or taking it up, but the – I was cocking it with my thumb, and the thumb came off the trigger, and then I actually – I think I was – he was walking, he was running away, walking, or running ...And that's when I kind of pulled the gun off, and that's when the trigger fell off, or the trigger came off and shot. It's kind of – it blew up right in my face. So it was kind of – I mean, the gun is loud, if you hold it away, like this, but if you're shooting it and it goes off in front of your face, it was -- I think my ears are still ringing.

14RP 69.

Following Pederson's testimony, the prosecutor told the court that she was surprised by Pederson's testimony that the gun had misfired, and asked the court to release Pederson's gun to Detective Bartlett for a test-fire to gauge the credibility of his new

defense. 14RP 128. In response, Pederson's attorney said that she had "multiple concerns" about the release of the gun because it was "highly irregular" to release evidence once it is in the clerk's custody. 14RP 130. The trial court permitted release of the gun to Bartlett. 14RP 131.

The morning after Pederson's testimony, the State recalled Bartlett as a rebuttal witness. 7RP 55. Bartlett testified that she had checked out Pederson's gun from the court clerk and test-fired it prior to her rebuttal testimony. 7RP 55-56. Bartlett testified that she was familiar with that model of a revolver because it was the same make and model of firearm she was issued in 1987 when she began her career as a police officer, and she had used it for over three years. 7RP 57. Bartlett testified that she went through a certification process to fire that type of gun at least twice per year while it was her assigned firearm, and that she visited the firing range about once per month to practice her shooting. 7RP 57-58. The detective also testified that she performed the maintenance on her gun and was familiar with its upkeep. 7RP 59.

After she checked out Pederson's gun from the court clerk, Bartlett test-fired the gun herself. 7RP 58. She checked the "trigger pull, the timing on the barrel... and then tried to replicate

any misfires.” 7RP 56. Bartlett testified that the trigger pull on Pederson’s revolver was not especially light or heavy, like lifting a gallon of milk with one finger. 7RP 61. She explained that the gun had a “trigger lock” preventing it from firing unless the trigger was completely pulled. 7RP 61. This revolver, she explained, also had a “recoil slide,” preventing it from firing when “bumped.” 7RP 65. Bartlett concluded her testimony by saying that she was not able to get the gun to fire “any other way” than by pulling the trigger. 7RP 65.

On cross-examination, the detective agreed with Pederson’s attorney that one could accidentally fire the gun without necessarily “misfiring” it. 7RP 68. Bartlett also agreed that she was not a “firearms expert.” 7RP 69.

b. Pederson’s Arguments Are Unsupported And Bartlett’s Experience With That Make Of Gun Qualified Her As An Expert.

An issue that relies on matters outside the record may not be considered on direct appeal. State v. McFarland, 127 Wn.2d at 338 n.5.

Under Evidence Rule (ER) 702, a witness “qualified as an expert by knowledge, skill, experience, training, or education, may

testify thereto in the form of an opinion or otherwise.” A witness testifying in this manner must show that she has sufficient expertise to state a helpful and meaningful opinion. Sehlin v. Chicago, Milwaukee, St. Paul and Pacific R. Co., 38 Wn. App. 125, 686 P.2d 492 (1984). Practical experience may suffice to qualify someone as an expert by virtue of knowledge, skill, experience, training or education. State v. Lass, 55 Wn. App. 300, 777 P.2d 539 (1989).

Pederson claims that his own attorney should have hired an expert witness to counter Bartlett’s claims regarding his gun, but he fails to provide any indication that this failure created any prejudice, undermining any ineffective assistance of counsel argument.

Pederson cites no legal authority for his complaint that the trial judge should not have released the gun from evidence for testing by the detective. The testing of the gun was appropriate rebuttal evidence given Pederson’s new contention at trial that the gun itself had misfired when he had shot at his brother, and the testing itself did not create any harm or prejudice to Pederson other than providing a factual challenge to his newly-adopted defense. 14RP 69.

Pederson also argues that Bartlett should not have been permitted to testify in rebuttal because she admitted that she was

not an “expert on firearms.” 7RP 69. But in order to testify under ER 702, the State had to establish only that Bartlett had significant expertise to offer a meaningful opinion; practical experience, such as the fact that she was assigned the same gun for several years and used it routinely, is “sufficient to qualify a witness as an expert.” State v. Ortiz, 119 Wn.2d 294, 831 P.2d 1060 (1992).

Further, Pederson never objected to the detective’s testimony at trial, so any challenge is waived on appeal pursuant to RAP 2.5(a). In State v. Newbern, 95 Wn. App. 277, 290-91, 975 P.2d 1041, review denied, 138 Wn.2d 1018 (1999), the defendant, upon review, challenged the trial court’s admission of a police officer’s measurements on the grounds that the officer was not an “expert.” Id. The appellate court found that the defendant had waived the challenge by failing to object at trial. Id. at 291. Similarly, while Pederson’s attorney expressed “multiple concerns” about the release of the gun (but never formally objected), there was never an objection, or even a “concern” raised to the detective’s actual rebuttal testimony. 14RP 130. This issue, then, is also waived on appeal.

The record is insufficient to support Pederson’s claim that his attorney was ineffective in not calling a firearms expert, Pederson

fails to cite any authority in support of his argument, the release of the gun by the trial judge was appropriate, Bartlett's testimony was permissible, and Pederson waived any appeal by failing to object during trial. This court should reject this claim.

3. EVIDENCE ABOUT PEDERSON'S DUI STOP SERVED HIS TRIAL STRATEGY AND WAS NOT OBJECTED TO; THE EVIDENCE WAS THEREFORE ADMISSIBLE AND ANY CHALLENGE IS WAIVED.

Pederson argues that the admission of testimony regarding his driving under the influence (DUI) stop was unduly prejudicial, but Pederson sought its admission at trial, never objected to it, and relied on it for his defense. Any challenge now is waived.

a. Relevant Facts.

In Pederson's trial memorandum, he made a motion to exclude evidence of the guns found in his car pursuant to being stopped for DUI. CP 23-24. This memorandum never moved to suppress the actual DUI stop or evidence that Pederson was under the influence of alcohol at the time. CP 23-24.

During trial, Trooper Carroll testified that on November 8, 2010, he was dispatched by Trooper Hauser to join him at mile post

116 on Interstate 90, where Hauser had just pulled Pederson over for suspicion of DUI. 11RP 7-8. Carroll testified that Pederson provided him with a breath sample at the scene and his reading was “.126.” 11RP 10. Pederson’s lawyer did not object to this testimony, and asked Carroll in cross examination if, in his experience, the portable breath test reading was reliable, to which the trooper responded, “yes,” if done “properly.” 11RP 33.

Trooper Carroll then described the signs of intoxication Pederson exhibited on November 8, 2010: “I observed bloodshot, watery eyes, which can be an indication of intoxication or alcohol use... and he had the odor of intoxicants on his breath.” 11RP 23. There was no objection to this testimony. After asking specifically about Pederson, the prosecutor asked generally about the visible signs of intoxication the trooper had witnessed “in the course of [his] career,” and Pederson’s lawyer objected to the relevance of such a general question, saying that general observations do not specifically “apply to Mr. Pederson.” 11RP 23. The trial court sustained the objection and directed the trooper to testify only regarding what he “observed that day.” 11RP 24.

During Trooper Hauser’s testimony, the trooper testified that he pulled Pederson over at 8:40 AM on November 8, 2010 and

immediately smelled the odor of intoxicants coming from Pederson's car and saw an open beer can inside. 12RP 25. Hauser testified that Pederson had told him that he had a few sips of a beer "up in the hills" earlier. 12RP 25-26. Hauser described Pederson's performance on the field sobriety tests and the State, at one point, asked him to refer to the DUI form from Pederson's arrest; Pederson objected: "Your Honor, I'm happy to stipulate to the admission of the form... This is not a DUI case and I don't really s[ee] relevance of any of this." 12RP 32. The trial judge agreed, but said, "I don't mind your asking a few more questions." 12RP 32. Then the prosecutor continued to ask questions regarding the tests and the trooper's opinion of Pederson's sobriety; no further objections were made to this line of questioning. 12RP 32.

At trial, Pederson called Dr. Milner to testify to Pederson's defense of diminished capacity. 14RP 137. Dr. Milner testified that Pederson had a "seizure disorder" and depression, and that "the level of the depression and the level of intoxication adversely affected his ability to think and function and come to some judgments..." 14RP 137. Later, Milner testified that "It's probable that the symptoms of depression, the symptoms – the intoxication,

the alcohol intoxication at the time, did adversely impact his ability to make decisions to think clearly, too.” 14RP 142.

The jury instructions included a “voluntary intoxication” instruction approved by Pederson that read, in part:

No act committed by a person while in a state of voluntary intoxication is less criminal by reason of that condition. However, evidence of intoxication may be considered in determining whether the defendant acted or failed to act:

...

- to knowingly threaten to cause bodily injury in count IV
- to knowingly threaten to cause bodily injury in count V.

CP 76; 14RP 185.

In support of the voluntary intoxication instruction relating to the threat charges on November 7, 2010, Pederson argued for its admission over the State’s objection: “I do think that there’s testimony with regards to Mr. Pederson being up in the hills and drinking at that point in time.”⁴ 7RP 74.

⁴ While the testimony from the troopers was that Pederson appeared under the influence on November 8, 2010, a day *after* the charged threats, Pederson apparently wanted to rely on his intoxication on November 8 to support his argument that he was affected by alcohol on November 7 as well.

b. Evidence About Pederson's DUI Was Part Of His Trial Strategy And Was Not Objected To.

Strategic trial decisions made for plausible reasons are virtually unchallengeable. Strickland v. Washington, 466 U.S. 668, 690-91, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). An issue not raised in the trial court may generally not be raised for the first time on appeal. See RAP 2.5(a); State v. Moen, 129 Wn.2d at 543.

Here, Pederson not only failed to object to the evidence that he appeared intoxicated on November 8, 2010, one day after he made his threats, but Pederson used that same evidence to bolster his voluntary intoxication defense to the felony harassment charges from the same day, and his overall diminished capacity defense for his attempted murder, burglary and assault charges. CP 76. While Pederson points out that his attorney did object to a question regarding Pederson's performance on the field sobriety tests and a question regarding DUI stops in general, most of the prosecutor's inquiries regarding Pederson's state of intoxication were introduced without objection, and Pederson advocated for the voluntary intoxication instruction for the November 7, 2010 crimes.

14RP 185.

The fact that Pederson was drunk on November 8, 2010, also contributed to the general diminished capacity defense, raised via Pederson's expert, Dr. Milner, because Dr. Milner testified that Pederson's drinking played a role in his overall loss of "judgment," undermining the mens rea elements of each charge. 14RP 137, 142.

The admission of the DUI evidence was part of Pederson's trial strategy, a strategy that ultimately yielded winning results for Pederson: he was found not guilty of one of the two harassment crimes, and found guilty of only assault in the second degree on the attempted murder charge. CP 118. Because Pederson relied on the evidence and failed to object to it, he can hardly convincingly argue now that the issue was preserved for appeal or that the evidence was somehow overly prejudicial. This Court should reject this claim.

4. PEDERSON'S REMAINING ARGUMENTS ARE
ADDRESSED IN THE BRIEF OF RESPONDENT OR
ARE UNSUPPORTED BY THE RECORD AND LAW.

Pederson contends that his time for trial right under CrR 3.3 was violated and that the trial court did not enforce the law. The CrR 3.3 issue was addressed in the Brief of Appellant and

Pederson's remaining complaints are unsupported by the record or the law and are made without any relevant legal authority; they should be rejected here.

E. CONCLUSION

For the foregoing reasons, Pederson's convictions should be affirmed.

DATED this 20 day of May, 2013.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

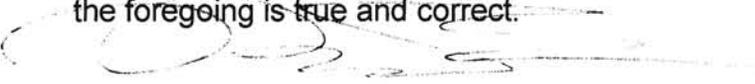
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Nancy Collins, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the RESPONDENT'S RESPONSE TO PEDERSON'S STATEMENT OF ADDITIONAL GROUNDS, in STATE V. KRIS PEDERSEN, Cause No. 67926-1-1, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Name
Done in Seattle, Washington

05-20-13
Date