

FILED
Mar 31, 2016
Court of Appeals
Division I
State of Washington

NO. 72734-6-I

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

STATE OF WASHINGTON,

Respondent,

v.

YUSUF SHIRE,

Appellant.

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

The Honorable Jeffrey Ramsdell, Judge
The Honorable William L. Downing, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. THE TRIAL COURT ERRED IN DENYING SHIRE'S REQUEST FOR A MATERIAL WITNESS WARRANT

The right to the compulsory attendance of material witnesses is a fundamental element of due process, and goes directly to the right to present a defense. 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, 180-81, 550 P.2d 507 (1976). 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).

Shire contends, for reasons set forth more fully in the opening brief, that the trial court's denial of Shire's request for a material witness warrant for Berket Kebede violated his rights to the compulsory process and to present a defense. Brief of Appellant (BOA) at 18-31.

The State does not dispute that Kebede's anticipated testimony was material to Shire's defense. Brief of Respondent (BOR) at 25. Nor does the State dispute that Kebede was subject to a material witness warrant. BOR at 26-27. Instead, the State first argues the trial court properly denied the material witness warrant because issuance of a warrant would have unnecessarily delayed trial. BOR at 24. Although acknowledging Shire did not request a contemporaneous continuance, the State nonetheless asserts, without citing authority, that Shire's request for a

material witness warrant “necessarily included an implicit request for a continuance.” BOR at 25. This is not proof but post hoc conjecture. The State’s argument does not change the fact that Shire did not actually ask for a continuance at the time of the material witness warrant request. In any event, the State did not argue, and the trial court did not find, that granting Shire’s request for a material witness warrant would have unnecessarily delayed trial. Rather, the trial court denied Shire’s request for a material witness as untimely, but noted it likely would have granted a material witness warrant for Kebede had counsel requested one a week earlier. RP 2715-16.

The State also argues that Kebede’s anticipated testimony would have been cumulative. BOR at 25. The State points to Mardillo Barnes’s testimony that he did not see or talk Shire before the shooting, and did not actually know who shot him. BOR at 25026; RP 1969-72, 1987, 1992-93. In contrast, Kebede would have testified that he was present at the shooting and that Shire was *not* the shooter. CP 179-256; RP 1449, 1479-81. This is an important distinction. Whereas Barnes’ testimony was ambiguous about the identity of the shooter, Kebede’s anticipated testimony would have provided exculpatory evidence that Shire was not the shooter. Moreover, the State’s cumulative argument ignores its recognition below, that Kebede was “ostensibly” the “*only* person” who

would have testified Shire was not the shooter. CP 142 (emphasis in original).

Finally, the State suggests that denial of the material witness warrant was not prejudicial because Kebede would have been an “impeachable witness.” BOR at 28-29. This argument misses the mark. While the State could have attempted to impeach Kebede’s trial testimony, the appellate court’s role does not include substituting its judgment for the jury’s by reweighing the credibility of witnesses or importance of the evidence. Parrott-Harojes v. Rice, 168 Wn. App. 438, 445-46, 276 P.3d 376, rev. denied, 176 Wn.2d 1008 (2012); State v. Israel, 113 Wn. App. 243, 269, 54 P.3d 1218 (2002) (citing State v. Farmer, 116 Wn.2d 414, 425, 805 P.2d 200 (1991)), rev. denied, 149 Wn.2d 1013 (2003).

The jury should have been permitted to hear Kebede’s testimony and allowed to draw its own conclusions. Had the jury heard Kebede’s testimony, they may have doubted Thomas English and Vincent Williams’s identification of Shire as the shooter. Kebede’s testimony could easily have been the difference between a verdict of guilty or an acquittal. Given the importance of Kebede’s anticipated testimony the trial court’s denial of a material witness warrant was error.

2. DEFENSE COUNSEL'S FAILURE TO TIMELY REQUEST A MATERIAL WITNESS WARRANT CONSTITUTED INEFFECTIVE ASSISTANCE.

Despite difficulty securing Kebede's presence at trial via subpoena, defense counsel did not request a material witness warrant for Kebede until the final day of trial. RP 2715. The trial court denied counsel's request as untimely, but noted it likely would have granted a material witness warrant for Kebede had counsel requested one a week earlier. RP 2715-16. As set forth in the opening brief, counsel's failure to timely request a material witness warrant for Kebede constituted ineffective assistance of counsel. BOA at 31-37.

The State argues that defense counsel's failure to timely request a material witness warrant for Kebede was a strategic decision. BOR at 31-32. The State points to defense counsel's remarks to the trial court that "I think I would be obliged to ask," and "that's not a surprise," to suggest the request for a material witness warrant was "half hearted." BOR at 31-32. On the contrary, defense counsel's statements to the court reflect counsel's awareness that a material witness warrant was necessary, but likely would be denied given the late hour at which it was being requested for the first time.

3. THE TRIAL COURT ERRED BY ADMITTING STATEMENTS MADE BY SHIRE IN RESPONSE TO CUSTODIAL INTERROGATION

The psychological ploy of “posit[ing] the guilt” of the subject is a technique for eliciting statements from the suspect and amounts to interrogation in a custodial setting. Rhode Island v. Innis, 446 U.S. 291, 299, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980). As argued in the opening brief, officer Shelley San Miguel’s posited Shire’s guilt when he told Shire, the car he was riding in was suspected as being involved in an incident a few blocks away. BOA at 38-46.

Relying on State v. Sadler¹ and In re Personal Restraint of Pirtle,² the State contends no interrogation occurs when an officer merely describes the “status of the investigation[.]” BOR at 38-40. The State’s reliance on these cases is misplaced, as both are factually distinguishable.

Following his arrest on suspicion of sexual exploitation of a minor, Sadler voluntarily answered several questions posed by police. Sadler, 147 Wn. App. at 105, 127-28. Later, when police asked Sadler if they could search his house, he requested an attorney. Id. at 128.

In the meantime, police viewed the inside of Sadler’s residence. One detective approached Sadler and told him he would be requesting a

¹ 147 Wn. App. 97, 193 P.3d 1108 (2008), rev. denied, 176 Wn.2d 1032 (2013).

² 136 Wn.2d 467, 965 P.2d 593 (1998).

search warrant in order to look for evidence. The detective told Sadler “that he was just informing him of the status of the investigation.” In response, Sadler twice told the detective, “she told me she was 19.” Sadler, 147 Wn. App. at 128-29.

On appeal, Sadler argued the trial court erred when it concluded Sadler’s statements to the detective were made spontaneously and not the result of custodial interrogation. Sadler contended the detective’s statements to him were reasonably likely to elicit an incriminating response. Sadler, 147 Wn. App. at 130-31.

Division Two concluded that the detective’s advisement to Sadler that he intended to apply for a search warrant was merely an advisement “about the status of the investigation.” Sadler, 147 Wn. App. at 131. The Court did not believe the detective’s statement qualified as interrogation because declaratory descriptions of the status of an investigation do not invariably elicit a response, and Sadler’s response that “she told me she was 19,” was not related to the information the detective gave Sadler at that time. Sadler, 147 Wn. App. at 131-32.

In Pirtle, the officer asked at the time of arrest, if Pirtle knew why he was being arrested. Pirtle, 136 Wn.2d at 486. The Court concluded this question fell into the category of “background” questioning for which no warning was needed because the expected response was ‘yes’ or ‘no.’

Id. (citing State v. Bradley, 105 Wn.2d 898, 904, 719 P.2d 546 (1986); State v. Walton, 64 Wn. App. 410, 824 P.2d 533 (1992); State v. Franklin, 48 Wn. App. 61, 737 P.2d 1047 (1987)).

Unlike Sadler and Pirtle, here San Miguel did not simply present Shire with background information or a mere advisement “about the status of the investigation.” Rather, San Miguel made a much more direct statement that Shire was being arrested because the car in which he was a passenger was believed to be involved in a nearby incident. Thus, San Miguel expressed his belief that by being associated with the car, Shire was also involved in the incident. It is easy to see from Shire’s perspective, under the circumstances of this case, that being advised the car was involved in an incident was the functional equivalent of a law enforcement officer positing guilt, which Innis plainly recognizes as a known interrogation technique. Innis, 446 U.S. at 299. Moreover, unlike Sadler, here Shire’s response was directly related to the information San Miguel had just provided Shire. By its very nature, San Miguel’s open-ended statement invited Shire to deny guilt and explain why he was in the car, which only served to implicate Shire in the crime.

As argued, the record in this case shows San Miguel’s statement to Shire went beyond mere background information or advisement about the status of the investigation. And the particular circumstances of Shire’s

case show San Miguel's statement to Shire were the product of interrogation and were therefore inadmissible.

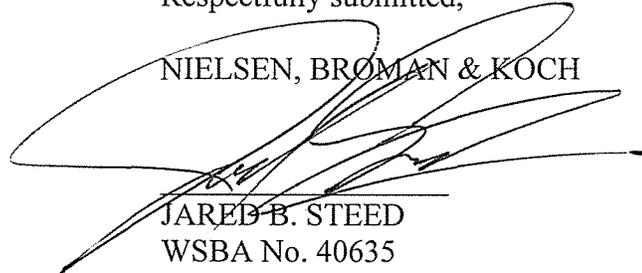
B. CONCLUSION

For the reasons discussed above and in the opening brief, this court should reverse Shire's convictions and remand for a new trial.

DATED this 31st day of March, 2016.

Respectfully submitted,

NIELSEN, BROMAN & KOCH

A large, stylized handwritten signature in black ink, appearing to read 'Jared B. Steed', is written over a horizontal line. The signature is highly cursive and loops around the line.

JARED B. STEED

WSBA No. 40635

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Attorney for Appellant

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DIVISION ONE

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 72734-6-I
)	
YUSUF SHIRE,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 31ST DAY OF MARCH, 2016, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] YUSUF SHIRE
DOC NO. 378274
WASHINGTON PENITENTIARY
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SIGNED IN SEATTLE WASHINGTON, THIS 31ST DAY OF MARCH, 2016.

x *Patrick Mayovsky*