NO. 42989-6-II

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

STATE OF WASHINGTON,

Respondent,

v.

DANIEL WILSON,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 11-1-00744-6

BRIEF OF RESPONDENT

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DATED April 14, 2013, Port Orchard, WA
Original e-filed at the Court of Appeals; Copy to counsel listed at left.

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2. Whether the trial court abused its discretion in denying the Defendant's motion for a new trial when: (1) the evidence was clearly available to the Defendant prior to trial; and (2) the Defendant had failed to show that the "new" evidence would have changed the result of the trial?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The Defendant, Daniel Wilson, was charged by information filed in Kitsap County Superior Court with one count of possession of a stolen vehicle. CP 1. A jury found the Defendant guilty of the charged offense. CP 60. The trial court then imposed a standard range sentence. CP 206. This appeal followed.

B. FACTS

On August 23, 2011 the Defendant was arrested after he was found driving a Cadillac that had been stolen from a Spokane used car dealer. CP 5. The Defendant admitted taking the car, but claimed it was a misunderstanding. CP 5. The Defendant also admitted that he had a

marijuana pipe in the car, and a pipe was recovered from the car. CP 5. A number of syringes and a spoon with burn marks were found in two purses belonging to the female passenger. CP 5.[1] The Defendant was transported to the jail, and once there he told officers that he had swallowed approximately one gram of heroin before the arrest. CP 6. The Defendant was then transported to Harrison Hospital. CP 6.

The State charged the Defendant with one count of possession of a stolen vehicle. CP 1.[2] On the day of trial (November 2, 2011) defense counsel made an oral motion to continue the trial RP 3. Counsel first indicated that the Defendant had just disclosed a potential witness the day before and that the defense had tried to contact this witness but had been unable to do so. RP 4. Counsel did not name this potential witness, but indicated that she believed the witness was in Spokane. RP 4. Counsel also indicated that the Defendant had, just that morning, disclosed the existence of another possible witness. RP 4.

The State opposed the continuance as it had a witness coming from Spokane to testify and because the Defendant had ample opportunity to disclose these witnesses to his counsel prior to trial but failed to do so. RP 5-6. The State also argued that because defense counsel hadn't spoken to the

[1] The female, however, blamed the Defendant for the syringes. CP 5

witnesses it was not even possible to determine if the could even offer any relevant testimony. RP 6.

The trial court then inquired how long defense counsel had been on the case and whether she had had opportunities to meet with the Defendant prior to trial. RP 6-7. Defense counsel indicated that she had been on the case since the Defendant's first appearance on August 24th and that she had met with the Defendant from time to time. RP 7. The court also confirmed that defense counsel had filed a witness list that named two other potential witnesses (Betty and Dennis Jimerson). RP 8-9.

Defense counsel also stated that she was not certain what the testimony of the newly disclosed witnesses would be. RP 9. The trial court thus noted that counsel was thus unable to explain how the testimony from the new witnesses might be different from the testimony of the previously disclosed witnesses or how it might add to the defense case in a material way. RP 9.[3] The trial court then ruled that the Defendant's disclosure of the new witnesses was "just too late" as and his counsel had had since August to

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[2] The Information listed the date of offense as August 23, 2011. CP 1.

[3] Defense counsel also told that court that she had contacted the two witnesses that had previously been listed on the witness list and that they were available to testify. RP 9. Counsel further noted, however, that sometime after she had contacted them the Defendant had apparently talked to the witnesses and told that were not going to be needed. RP 9-10. Counsel indicated that this was contrary to what she had told the witnesses and that she was having her defense investigator contact the witnesses to confirm that they would be available to testify. RP 9-10.

prepare the case. RP 11.

Defense counsel then asked for an in camera hearing, as the Defendant wanted to address the court regarding his dissatisfaction with his counsel. RP 12. In the in camera hearing the Defendant expressed his dissatisfaction with defense counsel on the witness issue and on an issue regarding his clothing. RP (Nov 2-In camera) 2-3. The trial court asked the Defendant to specifically name the three witnesses that he wished his attorney to call as witnesses. The Defendant then indicated that were only two witnesses: his sister (Andrea Robertson) and a friend named Tara Kenar. RP (Nov 2-In camera) 3-4. The court then asked defense counsel who the third witness was and counsel responded that it was the Defendant's niece named "Queenie." RP (Nov 2-In camera) 4. Defense counsel explained that the Defendant had mentioned "Queenie" the day before, but that this was the first time that the Defendant had mentioned Ms. Robertson or Ms. Kanar. RP (Nov 2-In camera) 5. The trial court then concluded a continuance was not warranted. RP (Nov 2-In camera) 6.

The court next addressed the motions in limine. Specifically, Defense counsel brought a motion in limine seeking to preclude any mention of the drug paraphernalia or the Defendant's statement regarding the swallowed heroin. CP 34-35. The State had no objection to the Defendant's motion in limine and the drugs were not mentioned in front of the jury. RP 15.

At trial, Ryan Steele testified that he is the sales manager at "Affordable Motors" in Spokane. RP 53-54. On August 20 Affordable Motors had a 1998 Cadillac Eldorado Coupe for sale on its lot. RP 58-59.[4] On that date the Defendant came to the car lot and indicated that he was interested in purchasing the Cadillac. RP 59-60. The Defendant wanted to test drive the car, so Mr. Steele got a copy of Mr. Steele's ID and then allowed the Defendant to test drive the car. RP 62. The copy of the Defendant's ID was admitted at trial as exhibit 2. RP 62. After the test drive the Defendant returned with the car and said that he really liked the car and that he needed to go get money for the down payment. RP 63. Mr. Steele gave the Defendant permission to drive the Cadillac to the bank to obtain the money, as the Defendant did not have another car with him that day. RP 64-65. Mr. Steele, however, specifically told the Defendant that he needed to return to the car lot by 5:45 because the lot was closing at 6:00. RP 63, 66.[5]

Mr. Steele further explained that August 20th was a busy day at the car lot and that customers were taking test drives throughout the entire day.

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[4] Mr. Steele also reviewed the photographs of the car recovered in Bremerton on August 23rd and testified that it was the same car that was owned by Affordable Motors and that was for sale on their lot on August 20th. RP 59.

[5] Mr. Steele explained that anytime a person purchases a car from his lot there is a variety of paperwork that is completed and that the purchaser will be given copies of the paperwork. RP 55-56. Mr. Steele never completed any paperwork nor did he ever receive any money from the Defendant for the Cadillac. RP 72. Rather, Mr. Steele was waiting fro the Defendant to return with the full down payment amount before he actually drafted the paperwork, and as the Defendant never returned the paperwork was never drafted. RP 64,

RP 64.[6] At the end of the day Mr. Steele closed up the car lot and left to go pick up his daughter. RP 63, 67. Mr. Steele explained that because it had been such a "stressful" and "crazy" day at the car lot he initially did not realize that the Defendant had failed to return the Cadillac. RP 66-67. About and hour after he had left the lot, however, Mr. Steele remembered that the Defendant had failed to return the Cadillac. RP 67. Mr. Steele then began calling a cell phone number that he had obtained from the Defendant before allowing him to test drive the Cadillac and left messages for the Defendant. RP 67-68. The Defendant, however, never responded and Mr. Steele was never able to speak with the Defendant. RP 68.

Mr. Steele then made several attempts to contact the owner of the car lot, but he was unable to do so as the owner was on vacation. RP 68. On the following Monday, Mr. Steele informed the owner about the missing Cadillac. RP 68. The owner then checked a GPS tracker that had been placed on the Cadillac and saw that the car was in Bremerton. RP 69. The Spokane Police were then contacted and the car was reported as stolen. RP 68-69.

Officer Lawrence Green of the Bremerton Police Department testified that he was on duty on August 23 when he received a report that a stolen

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72.

[6] The Cadillac had a "dealer plate" on the car, and Mr. Steele explained that affordable motors has three dealer plates and that these plates are placed on a car that is being taken out for a test drive if that car does not otherwise have a valid license plate on it. RP 64.

vehicle (which was being tracked by a GPS unit on the car) was in a Safeway parking lot. RP 37-38. Officer Green and several other officers arrived at the scene and stopped the gold and black Cadillac in question. RP 38. The Defendant was driving the Cadillac and there was also a female passenger present. RP 38-39. The Defendant was arrested and advised of his rights, and he then agreed to speak with Officer Green. RP 39-41. The Defendant claimed that he had purchased the car in Spokane and that he had paid some money for the car but that he supposed to go back at a later time to pay the tax, title, and license fees and complete the paperwork for the sale, but that he had not returned to Spokane to do those things. RP 41-42. Officer Green asked the Defendant if he had a bill of sale or any paperwork to support his claim and the Defendant said that he didn't have anything. RP 42.[7]

The jury ultimately found the Defendant guilty of possession of a stolen vehicle. CP 60. After the trial the Defendant filed a motion for new trial. CP 199. Defense counsel argued that there was new evidence warranting a new trial because sometime "after the verdict was rendered" the Defendant had "recalled" that he had been involved in a traffic stop on August 18 in Spokane. CP 199. Defense counsel also filed an affidavit noting that there was an incident report from August 18 that indicated there

[7] The Cadillac was impounded and photographed and the license plate and VIN numbers were noted as part of the impound. RP 48-49. The impound form and photographs of the car

was a traffic stop involving the Defendant and that the Defendant was driving a car with the same dealer license plate as was later found on the Cadillac. CP 235-36. The incident report, however, did not list the type of car involved, and the officer involved in the stop did not recall the vehicle. CP 235-36. Defense counsel argued that this was "new evidence" because the Defendant did not remember the traffic stop until his memory was "jogged" after the trial, and that this evidence would serve to impeach Mr. Steele's trial testimony that the Defendant took the car from the dealer on Saturday, August 20. CP 199, 201.

The State opposed the motion for a new trial and argued that as the Defendant himself was involved in the stop the evidence was not newly discovered nor could it be argued that the evidence could not have been discovered before trial by the exercise of due diligence. CP 204-05. In addition, the "new" evidence was merely impeachment evidence that did not dispute the central issue at trial: whether the Defendant was in possession of a stolen vehicle on August 23. CP 205.

At the hearing on the motion for a new trial, the trial court first cited the case of *State v. Savaria*, 82 Wn.App. 832, 919 P.2d (1996) and noted that a defendant seeking anew trial must establish that all five of the factors

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were admitted at trial. RP 48-49.

outlined in *Savaria* must be met. RP (12/23) 12. The court, however, noted that Defendant could not establish four of the five factors. RP (12/23) 12. Specifically, the trial ruled that, "The first and fundamental reason that the elements are not established is that the defendant needs to show this new evidence could not be discovered before trial by the exercise of due diligence." RP (12/23) 12-13. The fact of the traffic stop, however, was "certainly within the defendant's knowledge" and was "obviously something that was discoverable prior to the presentation at trial through due diligence." RP (12/23) 13. The trial court also noted that the information regarding the traffic stop did not indicate what kind of car was involved and showed no connection to the issue of whether the defendant had permission to possess the car on the date of the charged offense. RP (12/23) 13. "So, on its face, it's not material and it's also not likely to be dispositive concerning the results in the trial. RP (12/23) 13-14. The trial court similarly questioned the impeachment value of the "new" evidence. RP (12/23) 14. The trial court, therefore, denied the motion. RP (12/23) 14.

The matter then proceeded to sentencing, and the trial court imposed a standard range sentence. RP (12/23) 21; CP 206. This appeal followed.

III. ARGUMENT

A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE MOTION FOR A CONTINUANCE WHEN THE DEFENDANT HAD FAILED TO EXERCISE DUE DILIGENCE BY WAITING UNTIL THE DAY BEFORE TRIAL TO INFORM HIS COUNSEL ABOUT THE EXISTENCE OF POTENTIAL WITNESSES.

The Defendant first argues that the trial court abused its discretion in denying his motion for a continuance. App.'s Br. at 5. This claim is without merit because the trial court did not abuse its considerable discretion in this regard as the Defendant failed to exercise due diligence when he waited until the day before trial to inform his counsel about the existence of potential witnesses. In addition, as the record does not establish what possible evidence these additional witnesses would have to offer, and thus the Defendant cannot show prejudice.

The denial of a motion for continuance is within the sound discretion of the trial court. *In re Detention of G.V.*, 124 Wn.2d 288, 295, 877 P.2d 680 (1994). A trial court's decision as to whether to grant a continuance is thus reviewed under the abuse of discretion standard. *State v. Campbell*, 103 Wn.2d 1, 14, 691 P.2d 929 (1984); *State v. Purdom*, 106 Wn.2d 745, 748, 725 P.2d 622 (1986). An abuse of discretion occurs when a court's decision is based on untenable grounds or is made for untenable reasons. *State v.*

Angulo, 69 Wn.App. 337, 341-42, 848 P.2d 1276 (1993).

The trial court's ruling may be reversed "only upon a showing that the accused has been prejudiced or that the result of the trial would likely have been different had the continuance been granted." *State v. Picard*, 90 Wn.App. 890, 898, 954 P.2d 336, *review denied*, 136 Wn.2d 1021, 969 P.2d 1065 (1998). Even if denial of a continuance allegedly deprived a criminal defendant of due process, the decision will be reversed only if the defendant shows he was prejudiced and/or that the outcome of the trial would likely have been different if the trial had been continued. *State v. Tatum*, 74 Wn.App. 81, 86, 871 P.2d 1123(1994), *citing Eller*, 84 Wn.2d at 95-96. Whether the defense was prejudiced or the outcome of the trial would likely have been different is determined based upon the circumstances in each particular case. *Tatum*, 74 Wn.App. at 86.

In exercising its discretion, the court may consider the party has exercised due diligence. *State v. Early*, 70 Wn.App. 452, 457-58, 853 P.2d 964 (1993), *review denied*, 123 Wn.2d 1004, 868 P.2d 872 (1994). Whether a party has exercised due diligence depends upon the circumstances in each case. *See Allen v. State*, 118 Wn.2d 753, 758, 826 P.2d 200 (1992). Similarly, it is not error to deny a continuance to secure the attendance of an alibi witness where the moving party has not shown due diligence in obtaining the witness's presence. *State v. Eller*, 84 Wn.2d 90, 95-96, 524

P.2d 242 (1974); *State v. Fortson*, 75 Wn.2d 57, 59, 448 P.2d 505 (1968) (citing RCW 10.46.080).[8] A continuance need not be granted simply to secure impeachment testimony. *State v. Harris*, 12 Wn.App. 481, 496-97, 530 P.2d 646 (1975). Moreover, it is not error to deny a continuance when the witness will give cumulative testimony. *Eller*, 84 Wn.2d at 96-99; *Tatum*, 74 Wn.App. at 86-87.

In the present case the Defendant has failed to show that the trial court abused its discretion. The record demonstrates that the Defendant failed to exercise due diligence when he waited until the day before, and the day of, trial to inform his counsel about the existence of potential witnesses. In addition, as the record does not establish what possible evidence these additional witnesses would have to offer, the Defendant cannot show prejudice.

The Defendant did have a witness testify at trial that he was in Tacoma on the morning of the 20th, yet the jury still found the Defendant guilty. RP 101-02. The issue at trial, of course, was not when the Defendant obtained the car. Rather, the question was whether the Defendant knowingly possessed the stolen car on August 23. As the record does demonstrate that

[8] Furthermore, pursuant to RCW 10.46.080, a continuance may be granted on the ground of the absence of evidence, but the defendant must support the motion by an affidavit showing the materiality and substance of the evidence expected to be obtained, that due diligence has been used to procure it, and the name and address of the witness.

any of the Defendant's late-disclosed witnesses could have offered anything to refute this fact, the Defendant has failed to show prejudiced and has failed to show that the outcome of the trial would likely have been different had the trial court granted a continuance.[9]

In short, as the Defendant waited until the last possible moment to inform his trial counsel of the existence of potential witnesses, and when no specific offer of proof was made regarding what specific testimony these witnesses might have to offer, the Defendant has failed to show that the trial abused its discretion or that there was any prejudice. The Defendant's argument, therefore, is without merit.

B. TRIAL COURT DID NOT ABUSE ITS DISCRETION BY DENYING THE DEFENDANT'S MOTION FOR A NEW TRIAL WHEN: (1) THE EVIDENCE WAS CLEARLY AVAILABLE TO THE DEFENDANT PRIOR TO TRIAL; AND (2) THE DEFENDANT HAD FAILED TO SHOW THAT THE "NEW" EVIDENCE WOULD HAVE CHANGED THE RESULT OF THE TRIAL.

The Defendant next claims that the trial court erred in denying his motion for a new trial. App.'s Br. at 9. This claim is without merit because

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[9] Even if the record had demonstrated that the potential witnesses could have impeached the trial testimony of Mr. Steele, the Defendant would have still been unable to show that the trial court abused its discretion, as the testimony would have been cumulative and impeachment testimony; neither of which would be sufficient to demonstrate an abuse of discretion. *Harris*, 12 Wn.App. at 496-97; *Eller*, 84 Wn.2d at 96-99; *Tatum*, 74 Wn.App. at 86-87.

the Defendant failed to show that his "new" evidence could not have been discovered before trial by the exercise of due diligence or that the "new" evidence would probably change the result of the trial.

The Washington Supreme Court has repeatedly stated that "the granting or denial of a new trial is a matter primarily within the discretion of the trial court and that the reviewing court will not disturb its ruling unless there is a clear abuse of discretion." *State v. McKenzie*, 157 Wn.2d 44, 51-42, 134 P.3d 221 (2006), *quoting State v. Wilson*, 71 Wn.2d 895, 899, 431 P.2d 221 (1967); *State v. Bourgeois*, 133 Wn.2d 389, 406, 945 P.2d 1120 (1997). Furthermore, a defendant seeking a new trial on that ground must prove that the new evidence: "(1) will probably change the result of the trial; (2) was discovered after the trial; (3) could not have been discovered before trial by the exercise of due diligence; (4) is material; and (5) is not merely cumulative or impeaching. A new trial may be denied if any one of these factors is absent." *State v. Mullen*, 171 Wn.2d 881, 906, 259 P.3d 158 (2011); *quoting State v.* Macon, 128 Wn.2d 784, 800, 911 P.2d 1004 (1996). The first prong of the analysis for newly discovered evidence requires the defendant to show that the new evidence "will *probably* change the result of the trial." *Mullen*, 171 Wn.2d at 906. (emphasis in original).

In the present case the Defendant has failed to show an abuse of discretion. Rather, as the trial court noted, the existence of the traffic stop

was "certainly within the defendant's knowledge" and was "obviously something that was discoverable prior to the presentation at trial through due diligence." RP (12/23) 13. The trial court also appropriately questioned the materiality and the impeachment value of the "new" evidence since the information regarding the traffic stop did not indicate what kind of car was involved and showed no connection to the issue of whether the defendant had permission to possess the car on the date of the charged offense. RP (12/23) 13-14. Given these issues, the trial court appropriately concluded that "on its face, it's not material and it's also not likely to be dispositive concerning the results in the trial." RP (12/23) 13-14.

As the Defendant failed to show that he had exercised due diligence or that the evidence was material or that it would have probably changed the outcome of the trial, the trial court acted well within its considerable discretion in denying the motion for a new trial. The Defendant's claim that the trial court abused its discretion, therefore, is without merit.

IV. CONCLUSION

For the foregoing reasons, the Defendant's conviction and sentence should be affirmed.

DATED April 14, 2013.

Respectfully submitted,

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