Supreme Court No. 93036-8

(Court of Appeals No. 72639-1-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent

v.

EDWARD WARNER,

Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Edward Warner, appellant below, seeks review of the Court of Appeals decision designated in Part B.

B. COURT OF APPEALS DECISION

Mr. Warner appealed from his Whatcom County Superior Court convictions. This motion is based upon RAP 13.3(e) and 13.5A.

C. ISSUE PRESENTED FOR REVIEW

An accused person has a constitutional right to appear in person and to be present in court, and to assist in his defense. Where Mr. Warner's hearing loss was not adequately accommodated, were his convictions entered in violation of his rights under the Sixth and Fourteenth Amendments, as well as Article I, Section 22, and should review be granted pursuant to RAP 13.4(b)(1), (2)?

D. STATEMENT OF THE CASE

Edward Warner is a senior citizen with chronic health issues, including diabetes, kidney failure, and a hearing disability; he requires dialysis several times per week. CP 48, RP 30, 185-87. Following the amputation of one of his toes due to advanced diabetes, he was released from a long-term care facility in early October 2013 and was taken in by Wendy Christiansen. RP 30.

Ms. Christiansen had been introduced to Mr. Warner by an old boyfriend, Wayne Chin; Ms. Christiansen permitted Mr. Warner to stay at her Bellingham home after his discharge from the hospital facility, since he "didn't have any place to go." Id. Mr. Warner slept in a La-Z-Boy recliner in Ms. Christiansen's living room, located in the front part of the three-bedroom house. RP 32-33, 133. Ms. Christiansen said that there was no space for him to stay in any of the bedrooms, as most of the rooms were used for storage. RP 33.

At some point in early October 2013, Ms. Christiansen stated that Mr. Warner and their mutual friend Mr. Chin asked if they could store some firearms in the closet in the back bedroom of her home. RP 31, 36-38. Ms. Christiansen said after the firearms were placed in her closet, she never saw Mr. Warner with them again – not holding them, firing them, cleaning them, or taking care of them. RP 40 ("No … absolutely not.").

During the same time period, Detective Jana Bouzek performed a welfare check on Ms. Christiansen, in response to a call that the older woman was being exploited for her prescription medications by her former boyfriend, Mr. Chin. RP 13-14, 18.[1] Detective Bouzek also looked into the allegation that Mr. Warner and Mr. Chin were storing firearms at the home –

[1] Ms. Christiansen denied her previous relationship with Mr. Chin at trial, but Detective Bouzek confirmed the nature of the complaint. RP 18.

something that Ms. Christiansen had told her adult children. RP 16-18, 34. The detective asked Mr. Warner whether he had any guns in the house, and he said there was a .22 target shooting gun, as well as other firearms in another room. RP 15. Because the detective did not have the correct spelling of Mr. Warner's name, however, his criminal record was not immediately apparent; Bouzek therefore took no law enforcement action, despite Mr. Warner's statements regarding the firearms. RP 16.

Approximately two weeks later, pursuant to a continuing police investigation, a search of Mr. Warner's criminal history revealed that he had a prior felony record. RP 54.[2] A search warrant for Ms. Christiansen's home was obtained and executed on October 22, 2013, and five firearms were seized from the closet in the back bedroom. RP 56-62, 83.

No fingerprints were recovered from the firearms and no DNA analysis was conducted. RP 62-63, 96-97. Mr. Warner stipulated that he was previously convicted of a felony offense, and that the items seized from Ms. Christiansen's home were firearms as defined in the court's jury instructions. CP 14-15.

On the first day of trial -- on the first page of the transcript -- Mr. Warner told the trial judge that he could not hear the proceedings. RP 3. In

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[2] At trial, Mr. Warner stipulated to a prior felony conviction from April 26, 2012. CP 14-15.

response to the judge's question about whether Mr. Warner understood the amended information, Mr. Warner said, "I'm sorry, Your Honor, but my hearing is very bad." RP 3-4. The judge repeated the same question, to which Mr. Warner replied that he understood, and his counsel replied, "Still not guilty." RP 4. Mr. Warner then echoed his counsel's words: "Not guilty, Your Honor." RP 4. It was obvious that Mr. Warner was having difficulty hearing the proceedings. RP 77, 80, 82. 142.

Following a jury trial, Mr. Warner was found guilty as charged. RP 179-81; CP 30-31.

Mr. Warner appealed, arguing the evidence was insufficient to show constructive possession, and that his due process rights were violated due to court's failure to accommodate his hearing disability.

On October 21, 2015, a hearing was held to settle the record concerning whether Mr. Warner was provided an assistive listening device at trial. 10/21/15 RP 3-10.[3] Although Mr. Warner's trial counsel declined to testify, Judge Charles R. Snyder, who presided at the original trial, conducted the hearing and spoke about the trial. Id. Judge Snyder stated he recalled Mr. Warner's hearing loss, and "I do remember Mr. Warner expressing his difficulty." 10/21/15 RP 7. The court's recollection

[3] Mr. Warner, by undersigned counsel, agreed to the State's motion to supplement the record pursuant to RAP 9.10.

concerning the court-provided device was that "[Mr. Warner] at times didn't use it and found it difficult to use, but I believe it was made available to him." Id. at 8.

On February 29, 2016, the Court of Appeals affirmed Mr. Warner's convictions. Slip Op. at 8-9.

He seeks review of the hearing disability accommodation issue. RAP 13.4(b)(1), (2), (3).

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

THIS COURT SHOULD GRANT REVIEW, AS THE COURT OF APPEALS DECISION REGARDING THE COURT'S ACCOMMODATION OF MR. WARNER'S DISABILITY IS IN CONFLICT WITH DECISIONS OF THIS COURT, WITH OTHER DECISIONS OF THE COURT OF APPEALS, AND INVOLVES AN ISSUE OF CONSTITUTIONAL LAW. RAP 13.4(b)(1), (2), (3).

a. An accommodation must adequately protect the constitutional right to appear and be present.

"No defendant should face the Kafkaesque spectre of an incomprehensible ritual which may terminate in punishment." In re Pers. Restraint of Khan, 184 Wn.2d 679, 694, 363 P.3d 577 (2015) (quoting United States v. Carrion, 488 F.2d 12, 14 (1st Cir. 1973).

In Khan, this Court recently reiterated that criminal defendants have both a constitutional and a statutory right to an interpreter in court,

when needed. 184 Wn.2d 694; (citing Carrion, 488 F.2d at 14; State v. Gonzales–Morales, 138 Wn.2d 374, 379, 979 P.2d 826 (1999).

The right to a foreign language interpreter is frequently analogized to the right to accommodation for a hearing impairment.[4] In People v. Doe, the appellate court directly compared the hearing-disabled litigant before the court to one proceeding without a foreign language interpreter: "Clearly, a non-English speaking defendant could not meaningfully assist in his/her own defense without the aid of an interpreter." 602 N.Y.S.2d 507, 510, 158 Misc.2d 863 (1993).

Because a hearing disability affects the ability of the accused to "sufficiently understand the proceedings against him such that he is able to assist in his own defense," adequate accommodation is of paramount importance. Linton v. State, 275 S.W.3d 493, 503-04 (Tex., 2009); see also United States v. McMillan, 600 F.3d 434, 453-54 (5th Circ. 2010); State v. Barber, 617 So.2d 974, 976 (La., 1993).

This Court has recognized the right to an interpreter as fundamental, reminding us that to proceed without an interpreter renders a trial "a meaningless ceremony, and the prisoner [would be] tried in violation of the laws and constitution of the land." Khan, 184 Wn.2d at

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[4] The right to appear, to defend, and to be present are guaranteed under the Washington and the United States Constitutions. Article I, Section 22; U.S. Const. Amends. VI, XIV.

694 (Yu, J., concurring) (quoting Elick v. Wn. Territory, 1 Wn. Terr. 137, 140 (1861)).[5]

b. The lack of sufficient accommodation denied Mr. Warner his constitutional right to appear and be present.

In Washington, an accused person has the constitutional right to "appear and defend in person..." Article I, Section 22. The federal constitution guarantees the right to be present at all critical stages of trial. U.S. Const. Amends. VI, XIV; State v. Irby, 170 Wn.2d 874, 880-81, 246 P.3d 796 (2011); see also State v. Ramirez-Dominguez, 140 Wn. App. 233, 243, 165 P.3d 391 (2007).

In this case, Mr. Warner suffers from a hearing impediment that affected his ability to hear the trial proceedings; he alerted the court to this fact no less than five times during the trial. RP 3-4, 77, 80, 82, 142. Although the court assured Mr. Warner that the court would "do everything that we can to make sure that [he] can hear us," the court did not adequately ensure that Mr. Warner could hear the proceedings. RP 82.

At the record hearing on October 21, 2015, Judge Snyder stated that he recalled Mr. Warner's trial, and "I do remember Mr. Warner

[5] Washington has protected the due process right of the accused to have an interpreter for court proceedings since before statehood. See Elick, supra.

expressing his difficulty." 10/21/15 RP 7.[6] The court recalled that Mr. Warner was provided with a listening device, but that it did not work properly ("he at times didn't use it and found it difficult to use, but I believe it was made available to him"). Id. at 8. The court further stated that Mr. Warner seemed to have access to the device throughout the trial, "unless at some point he might have said this isn't doing me any good. I don't recall that, but I do recall he had it." Id. The court also noted that Mr. Warner was adjusting the listening device during voir dire and "attempting to make it work better for him." Id.

As discussed below, it cannot be said that the presence of the assistive device was dispositive of the due process issue. The trial court specifically recalls that Mr. Warner had "difficulty" and found the device "difficult to use." 10/21/15 RP 7-8. The court also recalls that Mr. Warner did not use the device consistently during the trial. Id. at 8. The court-provided accommodation was thus inadequate to ensure that Mr. Warner could hear "100% of the proceedings," as due process demands. See Doe, 600 N.Y.S.2d at 510; see also Khan, 184 Wn.2d at 694.

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[6] The parties agree that no reference to a listening device appears in the original trial record.

c. To the degree defense counsel neglected to ensure Mr. Warner's disability was sufficiently accommodated, defense counsel was ineffective.

To the degree defense counsel failed to request sufficient accommodation, Mr. Warner was denied the effective assistance of counsel to which he was entitled. U.S. Const. Amends. VI, XIV. Despite the fact that Mr. Warner complained within the first moments of not being able to hear the judge, counsel never stated that the provided listening device was inadequate or was not functioning properly for his client. RP 3-4, 77, 80, 82, 142.

Mr. Warner's early statement that "my hearing is very bad," RP 3, together with counsel's four additional reminders to the court that Mr. Warner could not hear the proceedings, indicate that counsel should have sought further accommodation from the court to assist Mr. Warner with his hearing disability.

To the degree that trial counsel failed to protect Mr. Warner's fundamental due process rights, counsel did not function as the effective advocate to which Mr. Warner was constitutionally entitled. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); In re Hubert, 138 Wn. App. 924, 929, 158 P.3d 1252 (2007).

Accordingly, because the Court of Appeals decision is in conflict with decisions of this Court, with other decisions of the Court of Appeals,

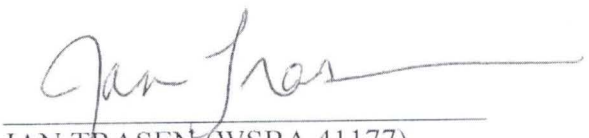
and because it involves an issue of constitutional importance, review should be granted. RAP 13.4(b)(1), (2), (3).

F. CONCLUSION

For the above reasons, the Court of Appeals decision should be reviewed, as it is in conflict with decisions of this Court, and with other decisions of the Court of Appeals. It also raises an issue of constitutional law. RAP 13.4(b)(1), (2), (3).

DATED this 25th day of March, 2016.

Respectfully submitted,



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APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	No. 72639-1-I
Respondent,	)	DIVISION ONE
v.	)	
EDWARD BERNARD WARNER,	)	UNPUBLISHED OPINION
Appellant.	)	FILED: February 29, 2016

LEACH, J. — A jury convicted Edward Warner of four counts of second degree unlawful possession of a firearm. He appeals, challenging the sufficiency of the evidence to prove that he actually or constructively possessed the firearms, the adequacy of the trial court's efforts to accommodate his hearing impairment, and the effectiveness of his trial counsel in ensuring that he had an adequate accommodation. Finding no error, we affirm.

FACTS

In the fall of 2013, Adult Protective Services informed Bellingham police that a man residing with an elderly woman named Wendy Christiansen possessed guns and that Christiansen was afraid.

On October 2, 2013, Bellingham Police Detective Jana Bouzek went to Christiansen's residence "for a welfare check." During her visit, Detective Bouzek spoke to resident Edward Warner and asked if he had any guns in the

house. Warner said "yes, he had a .22 target shooting gun" as well as some other guns "in another room in the house." Unaware that Warner had a criminal record, Bouzek did not arrest Warner. Police later learned that Warner was a convicted felon and ineligible to possess firearms.

On October 22, 2013, police executed a search warrant at Christiansen's residence. They found a .44 Magnum pistol, a .357 Smith and Wesson pistol, a .22 Unique pistol, a Winchester rifle, and a 12-gauge Browning shotgun in a back bedroom closet. They also found a "St. Francis" reusable bag and a prescription pill bottle bearing Warner's name next to the guns. The State charged Warner with five counts of second degree unlawful possession of a firearm.

At trial, Bellingham police officers Jana Bouzek, Kyle Nelson, and Josh Danke testified to the facts surrounding the welfare check and the search that produced the firearms.

Christiansen testified that she met Warner through a mutual friend. In the fall of 2013, while recovering from a surgery at St. Francis Recovery House, Warner asked her if he could stay at her house temporarily. Christiansen agreed, and Warner moved in. Although his stay was supposed to be temporary, Warner continued to live with Christiansen a year later.

Christiansen testified that Warner "had some [guns] in his truck that he wanted to put in my house so they wouldn't rust." Although she did not like guns

and had never owned any, Christiansen allowed Warner to put the guns in a back bedroom used for storage. When asked if she actually saw Warner "in possession of the guns" when he and his friend brought them into the house, Christiansen said, "Yes." Christiansen also testified that she told a girlfriend she was concerned about Warner's guns.

Defense investigator Seth Parent testified that Christiansen told him Warner put the guns in the back room to keep them from rusting. She also told Parent she could not remember whether Warner ever possessed or brought any guns into her house, but Warner was present during that interview.

At the close of the evidence, the parties stipulated that Warner had a 2012 felony conviction and was ineligible to possess firearms. They further stipulated that four of the guns found at Christiansen's residence met the definition of "firearm" in the jury instructions.

The court dismissed one count, and the jury convicted Warner of the other four. He appeals.

DECISION

Warner first contends the record contains insufficient evidence for the jury to find, beyond a reasonable doubt, that he actually or constructively possessed the firearms. He claims the State "did not offer evidence based on anything more than an assumption that Mr. Warner's presence in the same house as the seized

firearms demonstrated that he exercised dominion and control over them." We disagree.

Sufficient evidence supports a conviction if, viewing the evidence and reasonable inferences therefrom in a light most favorable to the State, any rational trier of fact could find the crime's essential elements beyond a reasonable doubt.[1] To convict Warner of second degree unlawful possession of a firearm, the jury had to find beyond a reasonable doubt that he knowingly had a firearm in his possession or control and had previously been convicted of a felony. The court's instructions defined possession and control as follows:

> Possession means having a firearm in one's custody or control. It may be either actual or constructive. Actual possession occurs when the item is in the actual physical custody of the person charged with possession. Constructive possession occurs when there is no actual physical possession but there is dominion and control over the item.
>
> Proximity alone without proof of dominion and control is insufficient to establish constructive possession. Dominion and control need not be exclusive to support a finding of constructive possession.
>
> In deciding whether the defendant had dominion and control over an item, you are to consider all the relevant circumstances in the case. Factors that you may consider, among others, include whether the defendant had the immediate ability to take actual possession of the item, whether the defendant had the capacity to exclude others from possession of the item, and whether the defendant had dominion and control over the premises where the item was located. No single one of these factors necessarily controls your decision.

[1] State v. Condon, 182 Wn.2d 307, 314, 343 P.3d 357 (2015).

(Emphasis added.)

Viewed in a light most favorable to the State, the record includes sufficient evidence for the jury to find that Warner actually possessed the firearms. Christiansen saw Warner physically move the guns from his truck to the storage location in the back of her house. Warner did this after asking for permission to move guns "he had . . . in his truck." (Emphasis added.) Warner later admitted to Officer Bouzek that the guns in the back bedroom were his. Contrary to Warner's assertions, this evidence demonstrated more than an innocent momentary handling of the guns. Warner's movement of the guns from his truck in order to properly maintain them, together with his admission of ownership, demonstrated that his possession was more than innocent momentary handling. A reasonable juror could find that his handling of the guns amounted to actual possession.

Sufficient evidence also supports a finding that Warner exercised dominion and control over, and therefore constructive possession of, the guns. Only Warner and Christiansen lived in her home during the period in question. Christiansen had never owned or possessed a gun. As previously noted, Warner asked Christiansen for permission to move the guns from his truck to her house to keep them from rusting. Warner then moved the guns from his truck to the back bedroom of Christiansen's home. Officer Bouzek testified that during the

welfare check Warner told him he had a ".22 target shooting gun" and other guns in another room. Officers executing the search warrant found Warner's prescription bottle and hospital bag next to the guns. Viewed in a light most favorable to the State, this evidence supports a finding that Warner constructively possessed the guns.

Warner next contends that the trial court denied him due process and his right to appear and defend because "no accommodation was provided . . . to ensure that [he] could hear '100% of the proceedings,' as due process demands." After Warner filed his opening brief, the parties appeared in superior court to settle the record. The trial court found that contrary to Warner's assertions in his opening brief, the court provided him a hearing device throughout the trial. In his reply brief, Warner acknowledges the court's finding but points to other findings indicating that he still had some difficulty hearing and did not use the device consistently. Warner concludes, "The court-provided accommodation was therefore inadequate to ensure that [he] could hear '100% of the proceedings,' as due process demands." This claim fails for several reasons.

First, Warner raises his claim that the hearing accommodation was constitutionally inadequate for the first time on appeal. Although Warner's counsel stated several times that Warner needed witnesses to speak directly into

the microphone "so it's probably a little bit clearer," Warner concedes his counsel "never stated that the provided listening device was inadequate or was not functioning properly for his client." Despite this concession and despite the State's argument that the issue cannot be raised for the first time on appeal under RAP 2.5(a), Warner fails to offer any basis for reviewing this claim for the first time on appeal. He has the burden to do so, and that burden includes demonstrating that the alleged error had practical and identifiable consequences in his trial.[2] Warner has not met that burden.

Second, our review of the record indicates that any problems with the hearing device did not have practical and identifiable consequences in Warner's trial. Except for occasional problems with witnesses or the court not speaking directly into the microphone, the record indicates that Warner had no trouble hearing. For example, when the court addressed him, Warner responded immediately and appropriately. On the few occasions when defense counsel asked a witness or the court to speak more directly into the microphone, the absence of further complaints from Warner indicates that the problem was

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[2] State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995) ("The defendant must identify a constitutional error and show how, in the context of the trial, the alleged error actually affected the defendant's rights; it is this showing of actual prejudice that makes the error 'manifest', allowing appellate review."); State v. Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (1992) ("Essential to this determination is a plausible showing by the defendant that the asserted error had practical and identifiable consequences in the trial of the case.").

resolved.[3] And while the court recalled that Warner "at times didn't use [the court-provided hearing device] and found it difficult to use," nothing in the record supports an inference that any intermittent use of or difficulties operating the device resulted in Warner being unable to hear the proceedings. Warner fails to demonstrate the inadequacy of his hearing accommodation or that any inadequacy prejudiced his defense.

Alternatively, Warner argues that his counsel provided ineffective assistance by failing to request a more effective accommodation for his hearing impairment. But to prevail on that claim, Warner must demonstrate both deficient performance and prejudice, i.e., a reasonable probability that but for counsel's omission, the outcome of the proceeding would have been different.[4] For the reasons discussed above, he has not met that burden.

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[3] See In re Marriage of Olson, 69 Wn. App. 621, 624, 850 P.2d 527 (1993) ("Following his requests for the witness to speak louder, Mr. Olson was silent, suggesting that the witness' modified voice level allowed Mr. Olson to hear. Never did Mr. Olson indicate a need for additional help in hearing the proceedings, nor did he state that although the witness was speaking louder, he still could not hear.").

[4] McFarland, 127 Wn.2d at 334-35.

Affirmed.

Leach, J.

Spearman, C.J.

Appelwick J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 72639-1-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

☒ respondent Hilary Thomas
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Date: March 25, 2016