72564-5

FILED
September 14, 2015
Court of Appeals
Division I
State of Washington

NO. 72564-5-I

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

STATE OF WASHINGTON,

Respondent,

v.

AL-PENYO BROOKS,

Appellant.

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

The Honorable John H. Chun, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

I. THE TRIAL COURT ERRED WHEN IT RULED APPELLANT FORFEITED HIS RIGHT TO CONFRONT THE COMPLAINING WITNESS.

In his opening brief, appellant Al-Penyo Brooks asserts the trial court erred in finding appellant "caused" Alexis Wilturner to be unavailable to testify at trial. Brief of Appellant (BOA) at 5-8. In response, the State conflates the elements of intent and causation, essentially arguing that evidence of Brooks' intent to procure Wilturner's absence proves that he in fact caused her absence. BOR 13-20. As shown below, such conflation is not supported by Washington case law.

A criminal defendant may forfeit his Sixth Amendment right to confront the complaining witness – but only if the State proves he intends and in fact causes that witness to be unavailable. State v. Dobbs, 180 Wn. 2d 1, 11, 16, 320 P.3d 705, 712 (2014). In Washington, both those elements must be proved by clear, cogent, and convincing evidence. Id.; State v. Mason, 160 Wn. 2d 910, 926, 162 P.3d 396, 404 (2007). When adopting this demanding standard, the Washington Supreme Court specifically chose to follow the minority view, opting to hold the State to a higher standard when it seeks to override a defendant's constitutional right

to confront his accuser. Id. In keeping with this, our Supreme Court also specifically required the State prove causation as a separate element. Dobbs, 180 Wn.2d at 11, 16.

Here, the State cites numerous non-binding cases to establish what is required of it in order to prove Brooks' intent or motivation. BOR at 17-18. However, cases discussing the parameters of the intent element are irrelevant to Brooks' argument that the State failed to sufficiently prove his intended acts in fact caused Wilturner's absence. Assuming arguendo Brooks had acted intentionally to procure Wilturner's unavailability, this does not necessarily prove (especially under the clear, cogent, and convincing standard) that his actions indeed caused her unavailability.

Cause in fact concerns the "but for" consequences of an act: those events an act produced in a direct, unbroken sequence, and which would not have resulted had the act not occurred. Hartley v. State, 103 Wn.2d 768, 778, 698 P.2d 77 (1985). Here, there was evidence Wilturner was independently motivated to make herself unavailable even before Brooks' contacts, indicating she would have made herself unavailable even if Brooks had never acted. See, BOA at 7 (discussing this evidence). A witness' own

aversions to seeing a defendant prosecuted or to testifying for the State are relevant to the question of forfeiture. See, Carlson v. Attorney Gen. of California, 791 F.3d 1003, 1012 (9th Cir. 2015) (considering that fact as one weighing against a finding of forfeiture). Based on this record and Washington's high standard of proof, this fact carries significant weight as it pertains to the causation element. Consequently, it cannot be said the State met its burden under Mason and Dobbs.

Arguing to the contrary, the State cites a Massachusetts case for the proposition that, even where there is evidence of a witness' independent reluctance to testify, forfeiture is still properly found. BOR at 18-19 (citing Com. v. Edwards, 444 Mass. 526, 830 N.E.2d 158, 170 (2005). However, that case is distinguishable because it applies a different legal standard.

First, the Edwards Court determined that the State need only prove forfeiture by preponderance of the evidence. Id. at 543. Hence, the evidence of the witness' independent aversion for testifying did not carry as much weight in Edwards as it does under Washington's clear, cogent, and convincing standard.

Second, the Edwards Court was applying legal elements that are markedly different than those to be applied here. That court

determined the State need only prove the following elements to establish forfeiture: (1) the witness is unavailable; (2) the defendant was involved in, or responsible for, procuring the unavailability of the witness; and (3) the defendant acted with the intent to procure the witness's unavailability. Id. at 540 (emphasis added). And if collusion is involved, the State need prove only that the defendant "facilitated" the carrying out of the witness' independent intent not to testify. Id. at 541. Being "involved in" or "facilitating[1]" a witness' unavailability is not the same as proving the defendant in fact caused such unavailability, however. Hence, Edwards is distinguishable because it applies a lower standard of proof and did not contemplate Washington's causation element.

In sum, Washington requires the State must prove by clear, cogent, and convincing evidence that the defendant in fact caused the complaining witness to be unavailable before the trial court may properly find he forfeited his right to confront his accuser. This requires more than a mere showing that the defendant intended to procure the witness' unavailability. Whether the State proved

[1] Facilitate means: "to make easier; assist the progress of." Dictionary.com. Collins English Dictionary - Complete & Unabridged 10th Edition. HarperCollins Publishers. http://dictionary.reference.com/browse/facilitate (accessed: September 07, 2015).

Brooks intended to procure Wilturner's unavailability, it did not prove Brooks did in fact cause Wilturner to be unavailable. As such, the trial court erred in ruling Brooks had forfeited his right to confrontation.

B. CONCLUSION

For the reasons stated herein and in appellant's opening brief, this Court should reverse appellant's conviction.

DATED this 14th day of September, 2015.

Respectfully submitted,

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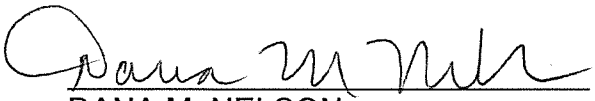

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AL-PENYO BROOKS,	)	
	)	
Appellant.	)	

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 14TH DAY OF SEPTEMBER, 2015, 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] AL-PENYO BROOKS
DOC NO. 377878
WASHINGTON STATE PENITENTIARY
1313 N. 13TH AVENUE
WALLA WALLA, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 14TH DAY OF SEPTEMBER, 2015.

X Patrick Mayovsky