

61895-4

61895-4

NO. 61895-4-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ANTHONY FINKLEA,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE DEBORAH FLECK

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Did the trial court abuse its discretion when it denied a defense request to reopen its case and call a witness to offer purported impeachment testimony when they did not lay the proper foundation for its admission under the rules of evidence?

2. Was any error that the trial court made in excluding the testimony of the defense witness harmless when it has been shown beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The appellant was charged by information with Assault in the Second Degree for intentionally assaulting Larry Proctor and thereby recklessly inflicting substantial bodily harm by punching him in the face and breaking his jaw. CP 1. A jury trial on those charges took place before the Honorable Deborah Fleck between March 31, 2008 and April 8, 2008.

When the trial convened in Judge Fleck's court, the State asked that a material witness warrant be issued for the victim, Larry Proctor, who was homeless and unable to be located. 3/31/08

RP 3-21. The court, after hearing argument from counsel, signed the warrant for Mr. Proctor's arrest. Mr. Proctor was located and booked into the King County Jail on April 4, 2008. CP 74. After Mr. Proctor testified at trial and was cross-examined by defense counsel for the appellant he was released as a witness and the court signed an order releasing him from the King County Jail. 4/7/08 RP 118-19; CP 75. After deliberations, the jury returned a verdict of guilty. CP 78.

2. SUBSTANTIVE FACTS

At trial, the State presented the testimony of several witnesses to prove that the appellant committed the crime for which he was charged. Steven Kostelick testified as a witness at trial. 4/7/08 RP 7-51. Mr. Kostelick identified himself as going by the street name "Big Steve." Big Steve testified that he knew the victim Larry Proctor and that they have known each other on and off from the street for probably ten years. Big Steve said that he knew Mr. Proctor by his street name "Boodroe." 4/7/08 RP 8-9. Big Steve testified that during the time frame when this crime occurred he would see Mr. Proctor "on a daily basis and they would panhandle,

smoke crack, drink alcohol, whatever you know, just whatever we did to pass time basically.” 4/7/08 RP 10.

Big Steve testified that he was with Mr. Proctor and another person named “Kyle” on the day that Mr. Proctor was attacked by the appellant who he knew as “Juice.” They decided to go to the nearby Walmart to try to make some money to “get high.” 4/7/08 RP 11-13. Big Steve said that as they were walking back from Walmart he noticed that the appellant was about a half a block behind them. Big Steve heard the appellant yell out, “Hey Boodroe I got something for you.” Big Steve said that Mr. Proctor turned and looked but that they just kept walking. 4/7/08 RP 14-15.

Big Steve went on to testify that as they continued walking, the appellant “ran up behind [Mr. Proctor] and hit him with his left hand” striking “the left side of his jaw.” Mr. Proctor fell to the ground, and then he jumped back up and looked back at the appellant. Big Steve said he turned to the appellant and asked him why he had punched Mr. Proctor. The appellant just looked at Big Steve, said nothing, and then walked off. 4/7/08 RP 16-17.

When Big Steve was asked by the prosecutor who else was in the immediate vicinity at the time that Mr. Proctor was assaulted by the appellant, the appellant’s attorney objected to relevance.

This objection was overruled and Big Steve said that in addition to himself, Kyle, Mr. Proctor and the appellant, a person named "Little Steve" was about three-quarters of a block away. 4/7/08 RP 47.

Larry Proctor, the named victim in this case, also testified at trial. 4/7/08 RP 55-118. He told the jury that he is considered homeless and is a drug user. 4/7/08 RP 56. When asked to identify who had punched him in the face and broken his jaw on July 7, 2007, Mr. Proctor identified that it was the appellant, Anthony Finklea. He said that he knew the appellant by his nickname, "Juice." 4/7/08 RP 59.

On the day that the appellant attacked him, Mr. Proctor testified that he was with two other friends he knew from the street, "Big Steve" and "Kyle." They had been up at Walmart panhandling for money so that they could buy some crack cocaine. 4/7/08 RP 60-61. Mr. Proctor testified that as they were walking up the street towards Big Steve's house he heard someone hollering his name. He turned around and he saw that it was the appellant. The appellant said, "hold on, wait up, I got somethin' for you." Mr. Proctor said he responded, "well, come on" and kept walking up the street. Mr. Proctor went on to say that the appellant, "got comin' up to me on my shoulder, I turned and got hit." 4/7/08 RP 62.

Mr. Proctor testified that the force of the blow felt like “a horse had kicked” him. 4/7/08 RP 65.

Mr. Proctor testified that he got knocked to the ground by the blow, and when he looked up he saw the appellant “jogging or backtracking” in the opposite direction he had come from. He also remembers seeing a guy he knew as “Station Wagon Steve” sitting on his bicycle “laughin” at the whole situation. 4/7/08 RP 62-63.

Mr. Proctor watched as “Station Wagon Steve” and the appellant left the scene together. 4/7/08 RP 67. Mr. Proctor was subsequently taken to the hospital where a steel plate was affixed to both sides of his jaw and his mouth was wired shut to treat the injuries suffered by the blow from the appellant’s punch to his face. 4/7/08 RP 68.

Dr. Amaya Ormazabel, a radiologist working at St Francis Hospital, testified that Mr. Proctor was seen at St. Francis for his injuries on April 8, 2007. 4/3/08 RP 7-18. These injuries included ‘bilatereral mandibular fractures, bilateral jaw bone fractures and a fracture of the left lateral pterygoid plate, which is a deeper facial fracture of the face.’ 4/3/08 RP 22.

Mr. Proctor also testified that he subsequently identified the appellant as his attacker to the police some four days after the incident when the appellant was arrested at Walmart. 4/7/08 RP 71.

Mr. Proctor was then questioned by the State as to whether he ever left a message for an attorney representing the appellant that the appellant "may not be the person who assaulted" him. Mr. Proctor testified that he had not. 4/7/08 RP 72-73. When the State attempted to ask additional questions about the voice mail message, defense counsel for the appellant made numerous objections on the grounds that the questions called for hearsay. The court sustained these objections. 4/7/08 RP 73-75.

Then, during cross examination of Mr. Proctor, defense counsel for the appellant played a recording of a voice mail that Mr. Proctor ultimately admitted he may have left with the appellant's prior defense counsel. In that voice mail Mr. Proctor indicated that the appellant may not have been the person who attacked him. Exhibit #7. When asked on redirect examination the reason why he left the voice mail, Mr. Proctor said that he left it either because he was being threatened or because he was "chasin' drugs." The court struck from the record the phrase "about being threatened" and admonished the jury not to consider it for any purpose. 4/7/08

RP 113-14. When asked how he got the number for the attorney Mr. Proctor said that he obtained it through a guy named "Dado." When asked why he called the attorney, when he attempted to give his answer the court again sustained a defense objection to hearsay. 4/7/08 RP 115.

Mr. Proctor was then directly asked whether he was being honest when he said in the voice mail that he did not think that his attacker was the appellant. Mr. Proctor said he was not being honest. When asked why he was not being honest, Mr. Proctor responded, "drugs." Mr. Proctor further explained that a drug dealer had given him the phone to make the call and that he felt that if he did not make the call that he would get no drugs and get beat up. 4/7/08 RP 116-17. After Mr. Proctor's testimony, both the State and the defense rested. 4/7/08 RP 126. Defense counsel for the appellant never questioned Mr. Proctor about whether he had ever told anyone else that he did not think that the appellant had attacked him. After testifying, Mr. Proctor was released from his obligations as a witness and the trial judge also signed an order releasing him from the custody of the King County Jail. 4/7/08 RP 118-19; CP 75.

The next day, the defense attorney for the appellant moved to re-open its case, indicating that they had located one of their previously endorsed witnesses, Delgado Herrera, who they said was the person known as “Dado” whom Mr. Proctor had referred to the day before in his testimony.

a. Appellant's Attorney's Offer Of Proof At Trial Regarding Defense Witness Delgado Herrera.

When asked by the court what defense witness Delgado Herrera would testify to if called as a witness, defense counsel replied, “With regards to Mr. Delgado Herrera is not a drug dealer, there were no threats, implied or otherwise, by Mr. Delgado, and that there wasn't a favor given to Mr. Delgado, or given to [the victim] to make a statement to....” 4/8/08 RP 3.¹

Defense counsel then referred to an interview that was conducted prior to trial that was said to have taken place between a defense investigator and Mr. Herrera. It was defense counsel's offer of proof that, “allegedly [Mr. Proctor] said to [Herrera] that he doesn't think [the appellant] is the one who hit him.” 4/8/08

¹ While calling Mr. Herrera as a witness to impeach Mr. Proctor for these reasons was also not allowed by the trial court (4/8/08 RP 18-20), appellant is not contesting the court's rulings in this regard.

RP 9-10. When pressed on this issue, defense counsel responded, "The defense would attempt to get into evidence statements specifically of what [Mr. Proctor told Herrera] that [the appellant] was the only person he saw when he got up after he got hit. There was someone else there, but he has no idea who it was. The defense would attempt to get a statement such as that into evidence. By way of offer of proof, I would on [the appellant's] behalf submit that the impression that [Herrera] got from Mr. Proctor was that he didn't believe that [the appellant hit him]... it would be offered to go to the impression that [Herrera] got, and that being a present sense impression, at that time that he was talking with Mr. Proctor." 4/8/08 RP 14-15.

b. Trial Court's Ruling Regarding The Admissibility Of Delgado Herrera's Testimony.

The trial ruled the defense could not call Mr. Herrera as a witness. The trial court held that any alleged prior inconsistent statements that Mr. Proctor may have made to Herrera were excluded under ER 613, indicating in part that the trial court did not believe there was a realistic opportunity in a timely way to produce Mr. Proctor after the fact so that he could be questioned on this

issue. 4/8/08 RP 17-18. The court also indicated in its oral ruling that the statements that Mr. Proctor purportedly made to Herrera that “there was another person there” does not come in as defense requested as a present sense impression and that “at this point in time, in addition we would be facing a waste of time.” The court went on to rule that, “I don’t see how we could bring this witness in without assigning counsel and so on... I am not making a decision based on timing per se, but rather on the evidence rules.” 4/8/08 RP 20.

C. ARGUMENT

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED THE DEFENSE REQUEST TO REOPEN ITS CASE AND CALL A WITNESS WITH THE INTENTION OF IMPEACHING A STATE’S WITNESS’ TESTIMONY.

Even though the appellant has a constitutional right of compulsory process to compel the attendance of witnesses in his own behalf, the admission of evidence lies within the trial court’s sound discretion. State v. Rehak, 67 Wn. App 157, 162, 834 P.2d 651 (1992), review denied, 120 Wn.2d 1022 (1993). An appellate court review’s a trial court’s evidentiary rulings for an abuse of discretion. State v. Ortiz, 119 Wn.2d 294, 308, 831 P.2d 1060

(1992). Discretion is abused if it is based on untenable grounds or for untenable reasons. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

a. The Trial Court Properly Excluded The Witness' Testimony Under ER 613.

Here, the trial court did not abuse its discretion in denying the appellant the opportunity to reopen his case and call Mr. Herrera as a witness. The trial court was correct that under ER 613(b) this testimony should properly be excluded. As a requirement of its admission, "extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same...." ER 613.

First, defense counsel at trial did not attempt to cross examine Mr. Proctor while he was present and testifying in court as to whether he ever made any statements to Herrera contrary to what he had testified about in court. Second, Mr. Proctor was released as a witness by the court after he had completed testifying without objection from the appellant's defense counsel. 4/7/08 RP 118-19. Third, after the witness was released without objection

and was no longer available as a witness, defense counsel never asked that a material witness warrant be issued for his arrest, nor did they even request a delay in the proceedings so that his presence could be procured.

The State would agree that under ER 613(b), it is sufficient for the examiner to give the declarant an opportunity to explain or deny the statement, either on cross-examination *or after the introduction of the extrinsic evidence.* State v. Johnson, 90 Wn. App 54, 70, 950 P.2d 981 (1998) (*emphasis added*). This could mean that Mr. Proctor could have been recalled after Herrera testified. However, as was just stated, defense never made any effort to comply with ER 613(b) in this regard. Accordingly, based upon the appellant's failure to meet the foundational requirements of ER 613(b) it can not be said that the trial court abused its discretion in excluding this witness from testifying at trial.

b. The Trial Court Properly Excluded The Witness' Testimony Under ER 403.

The trial court also ruled that it did not believe there was a realistic opportunity in a timely way to produce Mr. Proctor after the fact so that he could be questioned on this issue. 4/8/08 RP 17-18.

This in essence is a finding by the court under ER 403 that although this evidence may be relevant it may be excluded by considerations of undue delay or waste of time or needless presentation of cumulative evidence. ER 403.

ER 403 permits the court in its discretion to exclude otherwise relevant evidence if its probative value is outweighed by the danger of confusion of issues and misleading the jury. State v. Brenner, 53 Wn. App 367, 379-80, 768 P.2d 509 (1989); review denied, 112 Wn.2d 1020 (1989). The trial court's ruling [to exclude relevant evidence if the probative value is outweighed by the dangers of confusion of the issues or misleading the jury or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence] is afforded great deference and is reviewed under an abuse of discretion standard. State v. French, 157 Wn.2d 593, 605, 141 P.3d 54 (2006); State v. Luvene, 127 Wn.2d 690, 706-07, 903 P.2d 960 (1995).

Here, the trial court denied the defense request to reopen its case and call a witness to testify that it was his opinion that he believed that Mr. Proctor did not think that the appellant was the one who assaulted him. However, the defense was allowed to play for the jury a voice mail message left by Mr. Proctor where he

stated that he did not think that the appellant was the person who attacked him. Defense was also given the opportunity to cross-examine Mr. Proctor on his reasons for now claiming that he only left that message because he would “get no drugs and get beat up.” 4/7/08 RP 116-17. This could have included asking Mr. Proctor questions about whether he made any statements to defense witness Herrera. Defense chose not to do so.

Regardless, the playing of the tape recorded message of Mr. Proctor gave defense the opportunity to argue their theory of the case, that it was someone other than the appellant who assaulted Mr. Proctor. As was the case in French, the trial court’s ruling excluding the evidence as misleading, confusing and a waste of time was not an abuse of discretion, especially given there was already sufficient evidence to allow defense to argue their theory to the jury. See generally State v. French, 157 Wn.2d 593, 605, 141 P.3d 54 (2006).

c. The Trial Court Properly Excluded The Defense Witness From Testifying Because His Testimony Would Be Otherwise Inadmissible Under The Rules Of Evidence.

The trial judge also denied defense counsel's request to admit Herrera's opinions as a "present sense impression." 4/8/08 RP 20. ER 803(a)(1) states in relevant part: The following are not excluded by the hearsay rule, even though the declarant is available as a witness: (1) A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter. ER 803(a)(1). Obviously, any statements made by Mr. Proctor to Herrera at some unknown time well after the assault incident does not qualify as a statement describing an event made while Mr. Proctor was perceiving the event of being assaulted.

This evidence should also be properly excluded as inadmissible opinion evidence about the veracity of a witness. Opinion testimony is evidence given at trial, under oath, based upon one's belief or idea, rather than on direct knowledge of facts at issue. State v. Demery, 144 Wn.2d 753, 759-60, 30 P.3d 1278 (2001). Generally, witnesses may not opine about the guilt or veracity of the defendant or the credibility of a witness; such

testimony is unfairly prejudicial because it invades the province of the jury. State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987).

In this case, it is impossible to characterize Herrera's testimony as anything more than this type of inadmissible opinion evidence. As defense counsel stated to the trial court: "By way of offer of proof, I would on [the appellant's] behalf submit that the impression that [Herrera] got from Mr. Proctor was that he didn't believe that [the appellant hit him]... it would be offered to go to the impression that [Herrera] got, and that being a present sense impression, at that time that he was talking with Mr. Proctor." 4/8/08 RP 14-15. Contrary to appellant's argument in his opening brief, Mr. Herrera would not have testified that Mr. Proctor told him that the appellant did not assault him. Mr. Herrera only would have testified that based upon a conversation he had with Mr. Proctor it was his opinion that Mr. Proctor felt he was not assaulted by the appellant. As such, this is a direct opinion about the credibility of a witness, it invades the province of the jury, and therefore was properly excluded by the trial court.

2. IF THE TRIAL COURT WAS IN ERROR WHEN IT DID NOT ALLOW A DEFENSE WITNESS TO TESTIFY, THIS ERROR WAS HARMLESS BEYOND A REASONABLE DOUBT.

A defendant's right to impeach a prosecution witness with a prior inconsistent statement is guaranteed by the constitutional right to confront witnesses. Davis v. Alaska, 415 U.S. 308, 316-18, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974); State v. Dickenson, 48 Wn. App. 457, 469, 740 P.2d 312 (1987).

However, it is well established law of this State that even constitutional errors may be so insignificant as to be harmless. State v. Hoffman, 116 Wn.2d 51, 96-97, 804 P.2d 577 (1991). A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error. State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020, 106 S. Ct. 1208, 89 L. Ed. 2d 321 (1986).

Here, based upon the evidence produced at trial, any reasonable jury would have reached the same result even had this witness been allowed to testify.

Mr. Proctor testified that it was the appellant who had punched him, breaking his jaw; Big Steve, another witness called

by the State also testified to this fact. Additionally, Big Steve testified that there was no one in the immediate vicinity other than the appellant who could have assaulted Mr. Proctor. 4/7/08 RP 47.

Additionally, the jury heard the tape recorded voice mail left by Mr. Proctor in which he stated that he may not know who assaulted him. Defense Exhibit #7. From this evidence the defense could have argued that Mr. Proctor can not be believed when he testified that it was the defendant who assaulted him. Allowing another witness to testify that it is his opinion that Mr. Proctor does not know who hit him, even if admissible, would not have swayed a reasonable jury to decide that the State did not meet its burden in proving its case beyond a reasonable doubt. Accordingly, even if the trial court abused its discretion by not allowing this witness to testify, the jury still would have reached the same result beyond a reasonable doubt.

D. CONCLUSION

For the foregoing reasons, the State respectfully requests that this court find that there was no abuse of discretion when the trial court did not allow the defense to present a witness who would have purportedly impeached a State's witness when defense failed

to meet the foundational requirements set out in the applicable
rules of evidence.

DATED this 17 day of July, 2009.

Respectfully submitted,

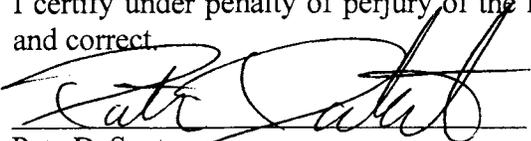
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Certificate of Service by Mail

Today I deposited in the mails of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Carolyn Morikawa, attorney for the appellant, of the Washington Appellate Project, at the following address: 701 Melbourne Tower, 1511 3rd Ave., Seattle, WA 98101 containing a copy of BRIEF OF RESPONDENT, in State v. Anthony Finklea, Cause No. 61895-4-I, in the Court of Appeals for the State of Washington, Division I.

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


Pete DeSanto
Done in Kent, Washington

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