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CLERK OF COURT OF APPEALS DIV II
STATE OF WASHINGTON

NO. 34835-7-II

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

STATE OF WASHINGTON,

Respondent,

v.

TED JENSEN,

Appellant.

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

The Honorable James Warme

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. REVERSAL IS REQUIRED BECAUSE THE STATE FAILED TO PROVIDE A RECORD OF SUFFICIENT COMPLETENESS IN VIOLATION OF JENSEN'S CONSTITUTIONAL RIGHTS TO APPEAL, EFFECTIVE ASSISTANCE OF COUNSEL ON APPEAL, AND TO DUE PROCESS.

The state argues that Jensen cannot demonstrate prejudice warranting a reversal of his conviction, citing State v. Miller, 40 Wn. App. 483, 488, 698 P.2d 1123, review denied, 104 Wn.2d 1010 (1985). Brief of Respondent (BOR) at 14-15. The state's reliance on Miller is misplaced because only the trial court's response to a jury inquiry was absent from the record in Miller. Id. at 489. Moreover, this Court held that Miller waived his right to a complete record by not attempting to obtain affidavits from the trial court and counsel concerning the missing portion of the record. Id. at 488. Unlike in Miller, the record here lacks the testimony of a material witness and Jensen made a good faith effort to obtain a complete record. See Brief of Appellant (BOA) at 13-16.

The state attempts to distinguish State v. Larson, 62 Wn.2d 64, 381 P.2d 120 (1963) and State v. Tilton, 149 Wn.2d 775, 72 P.3d 735 (2003). BOR at 14-15. The state, however, overlooks the Washington Supreme Court's conclusion in both cases that reversal is required without a verbatim report of proceedings because as is the case here, appellate

counsel was not present at trial and therefore unable to judge the completeness of the reconstructed record. Larson, 62 Wn.2d at 67, Tilton, 149 Wn.2d at 783-85.

The state also argues that Jensen has not demonstrated the necessary prejudice “[e]specially given the trial court’s supplementation of the record with the narrative report of Ed Nelson’s testimony.” BOR at 14. The state’s argument fails because the trial court may supplement the report of proceedings “at any time prior to the transmission of the report to the appellate court.” RAP 9.9. Here, the Cowlitz County Superior Court Clerk transmitted the verbatim report of proceedings to this Court on September 21, 2006. The trial court subsequently supplemented the record at proceedings held on January 26, 2007: ¹

THE COURT: 9.9 or 10 -- Correcting or Supplementing Record After Transmittal. Additional clerk’s papers or exhibits or corrected -- order of proceedings.

MS. SHAFFER: And if the court is fine with it we can just add that to the record and if it becomes a problem on appeal, we can still go that avenue from the appellate level.

THE COURT: I’m happy with that.

MS. SHAFFER: So, I have -- I don’t know -- it’s not in order -- it’s just a --

THE COURT: It’s just a narrative.

¹ There are two volumes of supplemental report of proceedings: 1SRP - 6/13/06; 2SRP - 7/14/06, 8/4/06, 8/18/06, 1/26/07.

MS. SHAFFER: And, that should be -- and I don't -- I have no idea how this works.

THE COURT: We are going to file it and send it to the Court of -- they're the appellant, we should advise -- the appointed -- the lawyer --

THE CLERK: This is something that was missing from the record?

MS. SHAFFER: Missing from the record, basically. Basically, we didn't have a transcript of this guy's testimony so that's probably verbally what he said -- so it's part of the record -- it's like a transcript.

THE CLERK: So if we treat it like we would any other verbatim, we would clock it in, hold it for ten days and transmit to the Court of Appeals. It would never end up in the file.

MS. SHAFFER: Okay.

THE COURT: That's good.

2SRP 23-24.

Contrary to the court's erroneous ruling, the court had no authority to supplement the record with the state's narrative report. The court's error, notwithstanding, the narrative report of proceedings is insufficient. See BOA at 10-16.

The state cites State v. Jackson, 87 Wn.2d 562, 554 P. 2d 1347 (1976), asserting that alternative methods of reporting trial proceedings are

permissible,² but here the state failed to provide an alternative method approved in Jackson. The Washington Supreme Court concluded, “A statement of facts agreed to by both sides, a full narrative statement based perhaps on the trial judge’s minutes taken during trial or on the court reporter’s untranscribed notes, or a bystander’s bill of exceptions might all be adequate substitutes, equally as good as a transcript. Jackson, 87 Wn.2d at 565.

Reversal is required because the state failed to provide a record of sufficient completeness in violation of Jensen’s constitutional rights to appeal, effective assistance of counsel on appeal, and to due process.

2. REVERSAL IS REQUIRED BECAUSE THE TRIAL COURT ERRED IN ADMITTING INADMISSIBLE HEARSAY PREJUDICIAL TO JENSEN’S DEFENSE.

The state argues that Officer Buchholz’s testimony was not hearsay relying on State v. Gillespie, 18 Wn.App. 313, 569 P.2d 1174 (1977), review denied, 89 Wn.2d 1019 (1978). The state misapprehends this Court’s holding in Gillespie that a detective’s testimony that he was given verbal consent to search two residences in a rape investigation was not hearsay. This Court held that the “statements were simply ‘verbal acts’; their significance lay not in the truth of any matter asserted therein but in the fact they were made.” Id. at 315. Accordingly, the verbal

² BOR at 15.

statements giving consent were relevant and admissible to show that the detective lawfully searched the residences. Unlike in Gillespie, here, Buchholz testified, “Someone had said during the time that I was there that the front door to the motor home had been ripped open, so I went over and tested the lock on the door, this lock right here. . . .” 2RP 305-06. The statement was not a verbal act of consent and irrelevant because whether Buchholz lawfully inspected the motor home was not in question. The statement was therefore inadmissible hearsay.

Furthermore, without the declarant, Jensen was denied the opportunity to subject the out-of-court statement to the rigorous proof of cross-examination. See BOA at 20-21. The state does not dispute that the court violated Jensen’s constitutional right to confrontation.

The state argues that Trudi Wade’s testimony was not hearsay because “[r]ather than being offered to prove that Jensen had unrequited feelings for Susan Meyer, the testimony was offered to show Trudi Wade’s viewpoint of the events that followed.” BOR at 22. Under the state’s overly strained reading of ER 803(a)(19), Wade’s testimony was an exception to hearsay. BOR at 22-23. Clearly, ER 803(a)(19) has no application here because Wade’s testimony did not constitute reputation testimony concerning personal or family history. 2RP 147. The record

substantiates that Wade's testimony was offered for the truth of the matter asserted and inadmissible hearsay. See BOA at 23-24.

The state argues that Officer Rabideau's testimony was not hearsay because Jensen's statements were admissible as a statement of the declarant's then existing state of mind, relying on ER 803(a)(3). BOR 20 21. Significantly, the state does not dispute that under State v. Stubsjoen, 48 Wn. App. 139, 738 P.2d 306 (1987), Jensen's state of mind well over two and a half hours after the alleged stabbing was not relevant and therefore inadmissible hearsay. See BOA at 21-23.

Instead, the state argues that "even if the statements were not admissible as evidencing his then existing state of mind, Jensen's statements to Officer Rabideau were admissions of a party opponent." BOR at 20 citing ER 801(d)(2). Likewise, the state concedes that statements Jensen made to William White were not statements against interest but argues that they were admissible as admissions of a party opponent. BOR at 23-24. However, as with any evidence, the offered testimony must be relevant to an issue in controversy. State v. Edwards, 131 Wn. App. 611, 614, 128 P.3d 631 (2006); ER 401, 402. The record substantiates that Jensen's statements to Rabideau and White were irrelevant as to whether he stabbed Snapp. Consequently the statements were inadmissible. See BOA at 21-25.

Reversal is required because the trial court erred in admitting inadmissible hearsay and in light of the numerous statements erroneously admitted, the court's error was not harmless. Edwards, 131 Wn. App. at 615-16 (citing State v. Guloy, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985)).

3. REVERSAL IS REQUIRED BECAUSE THE TRIAL COURT FAILED TO ENTER REQUIRED WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW FOLLOWING A CrR 3.5 HEARING AND ITS ORAL FINDINGS ARE INSUFFICIENT FOR EFFECTIVE APPELLATE REVIEW.

The state concedes that the trial court erred in failing to enter findings and conclusions regarding the CrR 3.5 hearing but asserts that the error was harmless because the court's oral findings and conclusions are sufficient for appellate review. BOR at 29-30. The state's argument is unsubstantiated by the record. A careful review of the record reveals that the court's oral findings are not sufficiently detailed nor comprehensive and the court summarily found that Jensen's statements were voluntary and therefore admissible. See BOA at 25 - 29.

Furthermore, In State v. Cunningham, 116 Wn. App. 219, 227, 65 P.3d 325 (2003), this Court emphasized that the timely filing of findings and conclusions after a suppression hearing is "not an empty formality" but required by court rule. This Court noted that the written findings were promptly filed once the state was notified of the error. Id. at 226. Here,

the trial court never filed written findings and conclusions. The court's patent disregard of a mandatory court rule should not be excused by this Court.

Reversal is required because Jensen was prejudiced by the court's failure to file written findings and conclusions and its oral findings are insufficient for effective appellate review. State v. Thompson, 73 Wn. App. 122, 130, 867 P.2d 691 (1994).

4. IF NOT REVERSED, JENSEN'S CASE SHOULD BE REMANDED FOR RESENTENCING BUT THE TRIAL COURT CAN IMPOSE ANY SENTENCE IT DEEMS APPROPRIATE.

Since Jensen's sentencing, the Washington Supreme Court has held that whether a defendant was on community custody at the time of his offense is a determination properly made by the trial court. State v. Jones, 159 Wn.2d 231, 234, 149 P.3d 636 (2006).

The record reflects that Jensen was on community custody at the time he committed the offenses but the trial court ruled that before it could add a point to Jensen's offender score the state was required to prove his community custody status to a jury. RP 396-398, 420-426, 432-33. However, the court stated that if it had added a point to raise Jensen's offender score, it would still impose a mid-range sentence:

MS. SHAFFER: Your Honor, just in case this does come back on a sentencing issue on appeal, would the Court also

have sentenced the Defendant in the middle of the range if there had been an extra point for community custody?

THE COURT: I think --

MS. SHAFFER: -- middle of 226 to 284?

THE COURT: Yes.

RP 446.

In light of Jones, Jensen's case should be remanded for resentencing. Contrary to the state's argument that the court should sentence Jensen to 279 months,³ the court may impose any sentence it deems appropriate. In re Call, 144 Wn.2d 315, 333-34, 28 P.3d 709 (2001)(the trial court should be afforded an opportunity to determine the appropriate sentence based on the correct offender score); Matter of Johnson, 131 Wn.2d 558, 569, 933 P.2d 1019 (1997)(the trial court is not foreclosed from imposing any lawful sentence predicated on an accurate offender score).

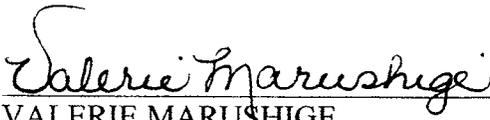
³ BOR at 35.

B. CONCLUSION

For the reasons stated here, and in appellant's opening brief, this Court should reverse Mr. Jensen's convictions.

DATED this 3rd day of July, 2007.

Respectfully submitted,



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