

NO. 36111-6-II

COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

TRAVIS L. WEIGHALL,

Appellant,

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COURT OF APPEALS
DIVISION II
STATE OF WASHINGTON
BY
DOYLE

APPEAL FROM THE SUPERIOR COURT
FOR THURSTON COUNTY
The Honorable Gary R. Tabor, Judge
Cause No. 06-1-02001-8

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

01. The trial court erred in finding Fowler available and in admitting his out-of-court testimonial statement to Detective Haller in violation of Weighall's confrontation rights.
02. The trial court erred in permitting Weighall to be represented by counsel who provided ineffective assistance by failing to object to the admission of Fowler's out-of-court testimonial statement to Detective Haller because it violated Weighall's confrontation rights.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

01. Where Fowler's was never asked and did not answer any question relating to the events alleged in his testimonial statement to Detective Haller, whether his inability to remember the events or giving a statement to Detective Haller rendered him unavailable for purposes of the confrontation clause, and thus, admission of his prior testimonial statement to Detective Haller improper because Weighall had no prior opportunity to cross-examine Fowler about the statement? [Assignment of Error No. 1].
02. Whether Weighall was prejudiced as a result of his counsel's failure to object to the admission of Fowler's out-of-court testimonial statement to Detective Haller because it violated Weighall's confrontation rights? [Assignment of Error No. 2].

C. STATEMENT OF THE CASE

01. Procedural Facts

Travis L. Weighall (Weighall) was charged by first amended information filed in Thurston County Superior Court on March 19, 2007, with attempted robbery in the first degree while armed with a firearm, contrary to RCWs 9A.28.020 and 9A.56.200. [CP 32].

No motions were filed nor heard regarding either a CrR 3.5 or CrR 3.6 hearing. [CP 7-11]. Trial to a jury commenced on March 20, the Honorable Gary R. Tabor presiding. Neither exceptions nor objections were taken to the jury instructions. [RP Vol. III 513].

The jury returned a verdict of guilty as charged, Weighall was sentence to the maximum of 120 months, including enhancement, and timely notice of this appeal followed. [CP 41, 55, 59-69].

02. Substantive Facts

On August 19, 2005, at approximately 2:30 a.m., Deputy Clary Worthy arrived at the Farm Boy restaurant in Thurston County in response to a reported shooting. [RP Vol. I 11-14, 16].

I found a subject standing in the phone booth at the Farm Boy. He was covered with blood ... I believed that he had been shot. He stepped out of the phone booth and couldn't talk....

[RP Vol. I 14].

The person was identified as Ron Nelson. [RP Vol. I 15].

Sometime between 12:30 and 1:00 that morning, Nelson was driven to Case Road by his friend Dawn Mower to assist Aaron Fowler and Weighall who had called to say they were having car problems and were broken down on the side of the road. [RP Vol. I 34-42, 65]. While in route, Nelson spoke with Weighall on his cell phone and received directions to where he and Fowler were. [RP Vol. I 42]. Nelson got out of Mower's car, saw Weighall sitting outside the other vehicle, and stated walking "towards them at an angle, and that's when I got shot." [RP Vol. I 45, 64].

After Nelson was hit, Mower took off in her car and Nelson "ran down the road and jumped in the ditch." [RP Vol. I 47]. "I thought I was dead." [RP Vol. I 48]. "(T)hey take off, and then I just got on the road and ... just started walking." [RP Vol. I 49]. When he got to the Farm Boy restaurant, he used the pay phone to call 911. [RP Vol. I 50].

As a result of the shooting, Nelson suffered a collapsed lung and his right arm is partially paralyzed. [RP Vol. I 64-65]. He did not know why he had been shot and did not know if anyone other than Fowler and Weighall was at the scene. [RP Vol. I 73-74].

Martin Deubert explained that that he and Farrar had met up with Fowler and Weighall on August 18, at which time Fowler explained to

Deubert that he was going to rob Nelson because he owed him some “money and a car title.” [RP Vol. I 107]. Fowler had a shotgun in his car. [RP Vol. I 105]. Deubert and Farra joined Weighall and Fowler in the latter’s car and drove to the area where the shooting eventually took place, arriving 15 to 20 minutes before Nelson. [RP Vol. II 227].

Well we were talking - - well, Aaron was saying when the car pulls up with Ron that Travis - - he’s going to get the car that Aaron (sic) pulls up in. He also asked me if I would jump out to get the stuff off of Ron.

[RP Vol. I 118].

There was no discussion about shooting anyone. [RP Vol. II 230-31].

(Fowler) was mostly concerned about his title. (Deubert) was suppose to collect the belongings off of Ron, and (Weighall) was supposed to take the vehicle that Ron showed up in.

[RP Vol. II 226].

Fowler and Weighall then talked to Nelson by telephone. [RP Vol. I 120-21; RP Vol. II 227-28]. Fowler never said there was going to be a shooting. [RP Vol. I 124-25]. Fowler and Weighall appeared to be high and both were dressed in black. [RP Vol. I 125, 158; RP Vol. II 268, 295].

When Ron started walking up toward the Suburban, Travis opens up his driver’s door and I don’t recall if he got out or not. I don’t believe so. He just said hi to him, and he shut the door again and that’s

when the shots were fired, when he got closer to the suburban.

[RP Vol. I 130].

According to Deubert, who did not expect a gun to be fired, Fowler fired three shots. [RP Vol. I 131-33]. "It went too far." [RP Vol. I 134]. They then took off with Weighall driving and then stopped so Fowler and Weighall could switch seats. [RP Vol. I 134; RP Vol. II 262]. Deubert eventually told Fowler to stop the car, and when he did, Deubert, Amanda and Weighall got out and Fowler drove off. [RP Vol. I 135; RP Vol. II 265]. The three then walked back to Deubert's car. [RP Vol. I 136].

Aaron Fowler testified that he had no recollection of the events or of giving a statement to Detective Haller. [RP Vol. II 337-340]. "I can't remember any of it." [RP Vol. II 340].

Detective David Haller read into the record Fowler's November 18 statement to him, which included Fowler's assertions that he got the loaded shotgun to threaten Nelson in order to get his title back to a car that Nelson had never paid him for, that Weighall knew he had the shotgun and why they were going to see Nelson, that the plan included Weighall taking Nelson's car, and that Weighall was angry that Nelson was seeing a woman who had dumped him for Nelson. [RP Vol. II 348-368].

Haller interviewed Weighall several days after the incident. [RP Vol. III 435]. During the interview, Weighall indicated that during the course of events, he was concerned for his safety, that he thought Fowler was trying to set him up for something, and that's why he took the golf club. [RP Vol. III 441-48]. Weighall also said that he didn't see the shotgun until after they got to the scene on Case Road, and that when Fowler pulled it out he told Weighall that "Ron's dead." [RP Vol. III 452]. "Alls I could do was watch." [RP Vol. III 456].

Weighall testified that he was not involved in the planning or execution of the robbery of Nelson. [RP Vol. III 541-42]. "I seen a friend shot." [RP Vol. III 489]. He explained that his relationship with the people involved in the incident centered on methamphetamine. [RP Vol. III 490-92]. He denied there was any discussion about a plan. [RP Vol. III 505, 540]. "There was never a plan." [RP Vol. III 578]. He had grabbed the golf club because Fowler was "acting weird [RP Vol. III 47](,)" and did not see the shotgun until Fowler pulled it out from "(u)nderneath his seat" after they had parked at the scene. [RP Vol. III 503].

The only time I seen the shotgun on Case Road is when he pulled it out from underneath the seat. That's when I seen it.

[RP Vol. III 582-83].

“I didn’t know what it was for.” [RP Vol. III 504]. Although after seeing the gun Weighall thought it was obvious Fowler was going to shoot Nelson, he had no way to warn Nelson on the phone. [RP Vol. III 506-07].

The reason why I couldn’t warn him is because (Fowler) was standing right there and I was too scared thinking if I warned him that he would shoot me.

[RP Vol. III 507].

Weighall got out of the car when Nelson arrived because Fowler told him to distract him. [RP Vol. III 508]. Then “(Fowler) shot him.” [RP Vol. III 508]. Two days later Weighall turned himself in to the police. [RP Vol. III 532]. “I didn’t know what to do. I was scared for my life.” [RP Vol. III 533].

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D. ARGUMENT

01. WHERE FOWLER WAS NEVER ASKED AND DID NOT ANSWER ANY QUESTION RELATING TO THE EVENTS ALLEGED IN HIS TESTIMONIAL STATEMENT TO DETECTIVE HALLER, HIS INABILITY TO REMEMBER THE EVENTS OR GIVING A STATEMENT TO DETECTIVE HALLER RENDERED HIM UNAVAILABLE FOR PURPOSES OF THE CONFRONTATION CLAUSE, AND THUS, ADMISSION OF HIS PRIOR TESTIMONIAL STATEMENT TO DETECTIVE HALLER WAS IMPROPER BECAUSE WEIGHALL HAD NO PRIOR OPPORTUNITY TO CROSS EXAMINE FOWLER ABOUT THE STATEMENT.

In response to Fowler's testimony that he had no recollection of the events or of giving a statement to Detective Haller, the trial court reasoned that Fowler was both available and unavailable. Finding the former, the court ruled that Fowler's statement to Haller could be read into the record as a recorded recollection under ER 803(a)(5). [RP Vol. II 329]. Recognizing that it could be "mistaken," the court went on to opine that had it ruled otherwise, Fowler's statement to Haller "could then have come in as a statement against penal interest" under ER 804(a)(3), allowing for hearsay exceptions where the declarant (Fowler) is unavailable for purposes of the hearsay rule. [RP Vol. II 330].

Although Weighall did not raise this issue below, the right to confront adverse witnesses is an issue of constitutional magnitude, which

may be considered for the first time on appeal. RAP 2.5(a); State v. Clark, 139 Wn.2d 152, 156, 985 P.2d 377 (1999). And even if an out-of-court statement satisfies the requirements of the Rules of Evidence, it is only admissible against a defendant if it also satisfies the confrontation clause. State v. Whisler, 61 Wn. App. 126, 132, 810 P.2d 540 (1991) (citing State v. Palomo, 113 Wn.2d 789, 794, 783 P.2d 575 (1989), cert. denied, 111 S. Ct. 80 (1990)).

The Sixth Amendment provides that a person accused of a crime has the right “to be confronted with witnesses against him.” Similarly, article I, section 22 of the Washington State Constitution states that “[i]n criminal prosecutions the accused shall have the right to ... meet the witnesses against him face to face.” Const. art. I, § 22 (amend. 10).

In United States v. Owens, 484 U.S. 554, 98 L. Ed. 2d 951, 108 S. Ct. 838 (1988), the court determined the witness, who was unable to identify his assailant, was available for cross-examination since he could describe the details of his assault. In this context, the Supreme Court held that the witness’s lack of memory as to the identity of his assailant did not make him “unavailable” in the constitutional sense, reasoning that the defendant could still “vigorously cross-examine the witness, call into question his memory and credibility, and argue the weakness of his

testimony to the jury.” State v. Bishop, 63 Wn. App. 15, 22, 816 P.2d 738 (1991) (citing United States v. Owens, 484 U.S. at 557-60).

In State v. Rohrich, 132 Wn.2d 472, 939 P.2d 697 (1997), our Supreme Court determined that the Confrontation Clause is violated if hearsay statements of a child are admitted in cases where the child does not “testify.” At trial in Rohrich, the child victim took the witness stand but did not testify to the alleged sexual contact, being asked only innocuous questions. In affirming the Court of Appeals’ reversal of the trial court’s admission of the hearsay statements, the court determined that a witness must actively testify in order to satisfy the Confrontation Clause, emphasizing that “testifies” means the witness takes the stand “and describes the acts of sexual contact alleged in the hearsay.” Rohrich, 132 Wn.2d at 481. Because only innocuous questions were asked in Rohrich, the court held that Rohrich’s opportunity to cross-examine was effectively denied and the Confrontation Clause thus violated.

In In re Grasso, 151 Wn.2d 1, 84 P.3d. 859 (2004), a plurality opinion, the court found the child victim available for Confrontation Clause purposes, reasoning that Grasso had the opportunity to fully cross-examine the witness where she had been (1) questioned about the abuse (“who it was that touched her in a bad way”); (2) had been questioned about her hearsay statements (“Do you remember telling the doctor that

your dad touched you in a bad way?”); and (3) had responded that she had been telling the truth when she made her hearsay statements. In re Grasso, 151 Wn.2d at 9, 16.

In Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), the United States Supreme Court held that out-of-court testimonial statements by witnesses are inadmissible under the Sixth Amendment’s Confrontation Clause if the witness fails to testify at trial, unless the witness is unavailable and the defendant has had a prior opportunity to cross examine the witness. Crawford, 541 U.S. at 59.

Following a review and acknowledgment that the above cases “are all distinguishable from this case in some way(,)” the Washington State Supreme Court, in State v. Price, 158 Wn.2d 630, 647, 146 P.3d 1183 (2006), held there was sufficient testimony to satisfy the confrontation clause based on the questions the prosecutor asked the witness on direct examination and the witness’s answers. Holding that the witness must be asked about both the underlying events and about his or her prior statement, the court found that is what the prosecutor did:

Here, the prosecutor asked whether Price had touched R.T. anywhere else besides hugs, and she specifically asked R.T. what she told her mom and Detective Bergt about Price.

State v. Price, 158 Wn.2d at 648.

The prosecutor asked R.T. directly if Price had touched her (other than hugging), and she asked R.T. to tell the jury what she had said to her mother and to Detective Bergt.

State v. Price, 158 Wn.2d at 648.

The court concluded:

Thus, we hold that when a witness is asked questions about the events at issue and about his or her prior statements, but answers that he or she is unable to remember the charged events or the prior statements, this provides the defendant sufficient opportunity for cross-examination to satisfy the confrontation clause. [Emphasis added].

State v. Price, 158 Wn.2d at 650.

Here, Fowler took the stand at trial but was never asked and did not answer any questions relating to the events alleged in his testimonial statement to Detective Haller, either during the offer of proof or the trial. [RP Vol. II 307-310, 336-340]. The prosecutor entirely neglected to ask “about the alleged occurrence or the hearsay statement(,)” State v. Rohrich, 132 Wn. 2d at 161, with the result that Fowler was unavailable for purposes of the Confrontation Clause.

In Crawford, the court held that the State may introduce statements only from unavailable witnesses who had previously been subject to cross-examination by the defense, which did not occur in this case. Weighall’s

Confrontation Clause rights were violated and the trial court erred in admitting Fowler's testimonial statement to Detective Haller.

A violation of a defendant's constitutional right of confrontation may be harmless error if the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt. State v. Guloy, 104 Wn.2d 412, 426, 705 P.2d 575 (1989), cert. denied, 475 U.S. 1020, 89 L. Ed. 2d 321, 106 S. Ct. 1208 (1986). The error argued here was not harmless.

The prejudice here is self-evident, which precluded the jury from making a fair determination of Weighall's guilt or innocence. Fowler's statement to Detective Haller clearly alleged that Weighall had agreed to participate in a plan to rob Nelson, which Weighall adamantly denied in his sworn testimony at trial: "There was never a plan." [RP Vol. III 578]. Under the facts of this case, credibility was a crucial factor. And it is on this point that the admission of Fowler's statement to Haller cuts the deepest, causing prejudice, causing interference with the jury's duty to make relevant credibility determinations, and, in the process, precluding it from making a fair determination of Weighall's guilt or innocence. In the end, this case essentially turned on the answer to whom the jury was to believe, and the likelihood that the effect of the admission of the statement at issue having a practical and identifiable consequence on the jury's determination of this issue is substantial, with the result that the outcome

of the trial would have been materially affected absent the statement at issue, particularly since the untainted evidence was not so overwhelming that it necessarily leads to a finding of guilt.

02. WEIGHALL WAS PREJUDICED AS A RESULT OF HIS COUNSEL'S FAILURE TO OBJECT THE ADMISSION OF FOWLER'S OUT-OF-COURT TESTIMONIAL STATEMENT TO DETECTIVE HALLER BECAUSE IT VIOLATED WEIGHALL'S CONFRONTATION RIGHTS.¹

A criminal defendant claiming ineffective assistance must prove (1) that the attorney's performance was deficient, i.e., that the representation fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that prejudice resulted from the deficient performance, i.e., that there is a reasonable probability that, but for the attorney's unprofessional errors, the results of the proceedings would have been different. State v. Early, 70 Wn. App. 452, 460, 853 P.2d 964 (1993), review denied, 123 Wn.2d 1004 (1994); State v. Graham, 78 Wn. App. 44, 56, 896 P.2d 704 (1995). Competency of counsel is determined based on the entire record below. State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972) (citing State v. Gilmore, 76 Wn.2d 293, 456 P.2d 344 (1969)). A reviewing court is not

¹ While it is submitted that the error presented herein may be raised for the first time on appeal for the reasons previously argued in this brief, this portion of the brief is presented out of an abundance of caution should this court disagree with this assessment.

required to address both prongs of the test if the defendant makes an insufficient showing on one prong. State v. Tarica, 59 Wn. App. 368, 374, 798 P.2d 296 (1990).

While the invited error doctrine precludes review of any instructional error where the instruction is proposed by the defendant, State v. Henderson, 114 Wn.2d 867, 870, 792 P.2d 514 (1990), the same doctrine does not act as a bar to review a claim of ineffective assistance of counsel. State v. Doogan, 82 Wn. App. 185, 188, 917 P.2d 155 (1996) (citing State v. Gentry, 125 Wn.2d 570, 646, 888 P.2d 1105, cert. denied, 116 S. Ct. 131 (1995)).

Should this court determine that trial counsel waived the issue relating to the admission of Fowler's statement by failing to argue that it violated Weighall's confrontation rights or by inviting the error by acquiescing to the trial court's ruling, then both elements of ineffective assistance of counsel have been established.

First, the record does not reveal any tactical or strategic reason why trial counsel would have failed to object to this testimony as a violation of Weighall's confrontation rights for the reasons previously argued herein, and had counsel so objected, the trial court would have granted the objection under the law set forth in the preceding section of this brief.

To establish prejudice a defendant must show a reasonable probability that but for counsel's deficient performance, the result would have been different. State v. Leavitt, 49 Wn. App. 348, 359, 743 P.2d 270 (1987), aff'd, 111 Wn.2d 66, 758 P.2d 982 (1988). A "reasonable probability" means a probability "sufficient to undermine confidence in the outcome." Leavitt, 49 Wn. App. at 359. The prejudice here is self-evident. Again, for the reasons previously argued, since the State's case against Weighall was not overwhelming, the admission of Fowler's statement undoubtedly undermined his defense as argued in the preceding section of this brief.

Counsel's performance was deficient, which was highly prejudicial to Weighall, with the result that he was deprived of his constitutional right to effective assistance of counsel, and is entitled to reversal of his conviction.

E. CONCLUSION

Based on the above, Weighall respectfully requests this court to reverse and dismiss his conviction.

DATED this 21st day of September 2007.

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CERTIFICATE

I certify that I mailed a copy of the above brief by depositing it in the United States Mail, first class postage pre-paid, to the following people at the addresses indicated:

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