

No. 38012-9-II

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

STATE OF WASHINGTON,

Respondent,

v.

JEROME C. PENDER,

Appellant.

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

The Honorable Christine A. Pomeroy, Judge
Cause No. 07-1-00886-5

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STATE OF WASHINGTON
BY

COURT OF APPEALS
PROCEEDING

BRIEF OF RESPONDENT

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A. ISSUE PERTAINING TO ASSIGNMENT OF ERROR.

1. Whether the court may exclude a defense witness who will directly contradict the testimony of another defense witness, and whom the defendant will argue is mistaken.

B. STATEMENT OF THE CASE.

The State accepts the appellant's statement of the case, with a few exceptions. Pender states, on page 6 of his opening brief, that Alisha Butler and Jodi Lorenz testified to seeing the shooter running away, and described the person as a white male. In fact, it is unlikely that the person these women saw was involved at all in the shooting. Ms. Butler, who testified that she was nauseous, [Trial RP 240] dizzy, having hot flashes and a headache, [Trial RP 244] was sitting on a bench in front of Building One [Trial RP 240, 244], which was a considerable distance from the location of the shooting. She was sitting looking towards the street [Trial RP 241] and saw someone running into the bushes behind her. [Trial RP 242, 245] She thought it was a Caucasian male, but there may have been something light on his hood. [Trial RP 245] She saw this person for a split second. [Trial RP 256]

Jodi Lorenz testified that she was driving past the courthouse, heard shots, and saw a male run behind her car and jump over some bushes by the bus stop that is in front of the

courthouse. [Trial RP 251] The person was white or Hispanic and had longish, wavy hair. [Trial RP 250] It is not easily apparent from the transcript, but the two women were talking about an area different from the one where the shooting took place. The prosecutor, in his rebuttal argument, pointed out that they were referring to the bus stop in front of the courthouse, whereas the shooter had been at the one on the side street behind and beside the courthouse. [Trial RP 302]

C. ARGUMENT.

1. The court correctly excluded the testimony of Pender's proposed witness. The State agrees that the court's basis for doing so was incorrect; it should have relied on ER 401 and 403.

Pender proposed to present the testimony of two witnesses. The court ruled that he could present one but not the other; it did not make the choice of which one he could call. [Trial RP 88] He chose to call Brianna Barker.

Brianna Barker testified that she was a supervisor at the Boys and Girls Club daycare in Tacoma where Pender's girlfriend brought her child. [Trial RP 139, 144-45] Pender had picked up the child and signed her out of daycare at 5:45 p.m. on the day of the shooting. Ms. Barker had signed the daycare log verifying that he had done so. [Trial RP 142-43] Detective Haller of the Thurston

County Sheriff's Office testified that it took approximately five minutes to drive from the daycare to the house Pender shared with his girlfriend and another 35 minutes to drive from that house to the courthouse in Olympia. [Trial RP 75] The shooting occurred shortly before 7:00 p.m. [Trial RP 18, 58]

Pender also wanted to present the testimony of Brandon Franklin, who had testified at Pender's first trial, which resulted in a hung jury. His offer of proof to the court in the instant case, made partly through statements by the prosecutor, was that Franklin would testify that he had seen Pender at the courthouse at 6:00 p.m. that day, and had picked his photo from a photo montage. [Trial RP 86-87] The court, relying on State v. Hancock, 109 Wn.2d 760, 748 P.2d 611 (1988), excluded Franklin's testimony. [Trial RP 88, 205-06, 253] The court found that Pender was impermissibly setting up a dichotomy for the purpose of impeaching his own witness. Pender's attorney argued that it was not impeachment but contradictory evidence. [Trial RP 87, 205] It appears that he intended to use it to cast doubt on the testimony of the State witness Lauri Nolan, who also picked Pender's photograph from a montage, i.e., Franklin was obviously mistaken, and therefore the

jury should not give any weight to Nolan's identification of Pender.

[Trial RP 87]

In short, Pender wanted to present two witnesses whose testimony was directly contradictory. Barker testified that Pender was in Tacoma at 5:45 p.m. Franklin would have testified that Pender was in Olympia at 6:00 p.m. Since it is physically impossible to cover that distance in fifteen minutes, one of the witnesses was wrong. Whatever his purpose was in offering both witnesses, the result would have been that each one impeached the other.

Pender argues in his opening brief at page 9-10 that he wanted to establish that the shooting may have occurred at 6:00 p.m., proving that he could not have committed the crime because he was in Tacoma fifteen minutes earlier. However, his offer of proof made it clear that he also wanted Franklin to testify that he picked Pender's photo from a montage, claiming to have seen him near the scene of the shooting moments before it occurred. [Trial RP 87; see also Franklin's earlier testimony, 11/27/07 Trial RP 144-152]

A party may impeach any witness, even his or her own. ER 607. A party may not, however, call a witness for the primary

purpose of impeaching that witness with otherwise inadmissible hearsay. Hancock, *supra*, at 763; State v. Barber, 38 Wn. App. 758, 770, 689 P.2d 1099 (1984). Pender argued correctly at the trial court that he did not intend to elicit any hearsay at all, and thus the court's reliance on Hancock was misplaced.

The trial court could, however, have properly excluded the testimony of one or the other witness on the basis of ER 401 and 403. ER 401 reads:

“Relevant evidence” means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable that it would be without the evidence.

ER 403 reads:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

In Pender's case, it would be confusing and misleading to call a witness for the sole purpose of proving him wrong, besides being of doubtful relevance. If his argument would have been the same as he made to the jury in his first trial, it was that because Franklin must have been mistaken in picking Pender's photo from the

montage, then the State's witness who also picked his photo from a montage was probably mistaken also. [11/28/07 Trial RP 333]

This precise issue appears to be one of first impression in Washington: may a defendant call a witness he knows is lying or mistaken, and whose testimony directly contradicts another defense witness, for the purpose of casting doubt on the identification evidence of a State witness? The State maintains that it would be confusing and misleading to allow such evidence, particularly in this case where Pender was allowed to present the testimony of Dr. Geoffrey Loftus, who testified about human perception and memory and specifically that the montages used, as well as the procedure of showing them to witnesses, were flawed. [Trial RP 195-96] While it may be relevant that Franklin identified Pender as being in Olympia at 6:00 p.m., the probative value is virtually nil, since everyone apparently agreed that he must have been wrong. If that were not Pender's position, he would not have wanted the testimony of Barker, who put him in Tacoma at 5:45. In addition, all the other witnesses placed the shooting at 7:00 p.m., or just moments before.

A trial judge has considerable discretion in balancing the probative value of evidence against its potential impact.

State v. Coe, 101 Wn.2d 772, 782, 684 P.2d 668 (1984). The court is not required to do an on-the-record balancing except in the context of ER 404(b) and 609. State v. Gould, 58 Wn. App. 175, 184, 791 P.2d 569 (1990). An appellate court may affirm a trial court on any correct ground, even if it was not considered by the lower court. State v. Fritz, 21 Wn. App. 354, 364, 585 P.2d 173 (1978). Here the court was correct in precluding Pender from presenting the testimony of Franklin, although not on the basis of Hancock. "The ultimate purpose of the trial court's discretion in admitting or excluding evidence is to assure 'that the truth may be ascertained and proceedings justly determined.'" ER 102; State v. Clark, 78 Wn. App. 471, 480, 898 P.2d 854 (1995).

D. CONCLUSION.

ER 401 and 403 provide a basis for the trial court's exclusion of the defense witness Brandon Franklin, and the court's ruling should be affirmed even though it did not consider that basis. The State respectfully asks this court to affirm Pender's conviction.

Respectfully submitted this 14th day of April, 2009.



Carol La Verne, WSBA# 19229
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CERTIFICATE OF SERVICE

I certify that I served a copy of the State's Brief of Respondent, on all parties or their counsel of record on the date below as follows:

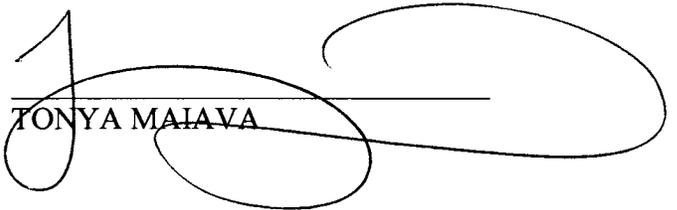
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STATE OF WASHINGTON
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DIVISION II

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

Dated this 14th day of April, 2009, at Olympia, Washington.



TONYA MAIAVA