

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY  _____
DEPUTY

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

NO. 38517-1

STATE OF WASHINGTON,

Respondent.

vs.

DELBERT E. GOBLE,

Appellant.

On Appeal from the Superior Court of Lewis County

STATE'S RESPONSE BRIEF

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STATEMENT OF THE CASE

Except for the following, Appellant's statement of the case is adequate for purposes of responding to this appeal.

At the end of the bench trial in this case, the Judge made the following oral ruling on the record:

COURT: [T]he decision is [Goble] is guilty of Residential Burglary as charged in Count I, not guilty of Theft in the Second Degree, but guilty of Theft in the Third Degree on Count II. I reach this decision as the main issue, only issue, really, is I D. We have a positive face-to-face ID by someone who knows the defendant, has known the defendant for a long time, whether she has seen him twice a week for 20 years or . . . twice a week up until 1999 or 2000, something of that nature, to me is of little consequence.

The suggestion here is that, well, he's not ID'd in the taped statement and the montage ID was the result of suggestion, and I reject both of those contentions. We have a clear ID by name prior to the taped statement. There is no reason that I can see to doubt Mrs. Pakar and the sheriff, Deputy Frase, that there was a pretaped interview during which Mr. Goble was identified by name. Furthermore, that's corroborated by the fact that the defendant was included in the montage. To conclude anything else would be to conclude there was an incredible coincidence here that he just happened to appear in the montage. . . . Since he had already been identified by name before the montage and before any suggestion had been made about his involvement in there, I really reject that the montage identification was affected by any suggestion.

But, frankly, under these circumstances, the montage identification is significant only because she didn't

pick somebody else. If she had picked somebody else, there obviously would be a problem here. But the fact that she picked someone that she knows, and had previously identified, really lessens the impact of the montage, and by somewhat of an odd way of looking at it, lessens the issue of suggestion.

Finally . . . I heard nothing to suggest that Ms. Pakar would make any of her story up in order to get Mr. Goble. That is something that does come up, but didn't in this case. And so for those reasons I reject the idea that somehow this identification was either wrong or conceived through some sort of –hard to say misconduct, but some sort of problem with the identification process.

The other suggestion is that the identification is wrong because of a beard and a coat. As far as the beard goes, I share the same concerns [the prosecutor] does. . . . [W]e have two people who say he had a beard, they're husband and wife, you would expect that kind of testimony. Knowing it is that significant, it would seem to me that perhaps we could have had someone independent come in and say, yeah, I saw him the day after the burglary and he had a huge beard, perhaps not. In addition, even if he had a beard, it is important to remember that Ms. Pakar was looking from the top down and a beard is not necessarily prominent from that aspect. In addition, she knows him and she may have said that he had a beard or may have recognized a beard, she doesn't know. That does not raise a reasonable doubt.

The same sort of analysis leads to the same conclusion on the leather coat. It is hard to tell whether it is leather in artificial light. Both Mr. and Mrs. Goble were specific to say he has never owned a leather coat, but I have been fooled by plastic coats that look like leather. There is no testimony that not only does he not own a leather coat but doesn't own a coat that could even look like leather. . . .

With respect to the field, he was running away from someone who was armed and had fired a weapon. I don't find it too difficult to think that someone would try awfully hard and be successful in running away. No identification in the house. And, again, that was brief, momentary, and under the circumstances where an ID would be certainly questionable. So I wouldn't even expect an ID under those situations or under that situation.

Finally, the suggestion that, well, the defendant said, I didn't know how to get to the house. Well, that's actually not the way I recall the testimony. Mr. Goble testified he got the location of the house from the deputy. And so it wasn't like, oh, I don't know how to get there so I went to her mother's house in order to find out where she lives. Again, that does not raise to a reasonable doubt.

So my conclusion is, after dealing with most, if not all the suggestions by the defense are that none of them are significant enough to overcome what was a positive identification shortly after the crime was committed.

RP Trial 83-87.

The Court also entered findings of fact and conclusions of law. CP 16-18.

ARGUMENT

A. GOBLE KNOWINGLY, INTELLIGENTLY AND VOLUNTARILY WAIVED HIS RIGHT TO A JURY TRIAL WHEN HE SUBMITTED A WRITTEN WAIVER WITH THE ASSISTANCE OF HIS COUNSEL.

Goble claims that he did not knowingly, voluntarily and intelligently waive his right to a jury trial. Goble is mistaken.

The right to a jury trial is constitutional, and because it implicates the waiver of an important constitutional right, the standard of review is *de novo*. State v. Vasquez, 109 Wn.App. 310, 319, 34 P.3d 1255 (2001)(citations omitted). A defendant may waive the right to a jury trial as long as the defendant acts knowingly intelligently, voluntarily, and free from improper influences. State v. Pierce, 134 Wn.App. 763, 770, 142 P.3d 610 (2006), citing State v. Stegall, 124 Wn.2d 719, 724-25, 881 P.2d 979 (1994). “A written waiver, as CrR 6.1(a) requires, is not determinative but is strong evidence that the defendant validly waived the jury trial right.” Pierce, 134 Wn.App. at 771.

“No colloquy is required for a waiver of the right to a jury; all that is required is a personal expression of waiver by the defendant.” State v. Ramirez-Dominguez, 140 Wn.App. 233, 240, 165 P.3d 391 (2007), citing Stegall, 124 Wn.2d at 725. Furthermore, “[d]efense counsel’s representation that the defendant knowingly, intelligently, and voluntarily relinquished his jury trial rights is also relevant.” Ramirez-Dominguez at 240, citing Downs, 36 Wn. App. at 146, 672 P.2d 416. However, “Washington’s rule on jury trial waiver contrasts with the rules for waiving other rights. . . [t]he right to jury trial, like the right to remain silent and the right

to confront witnesses, is treated differently and is easier to waive.”

Pierce at 771.

In the present case, Goble signed a written waiver of his right to a jury trial. CP 27. Goble was also represented by counsel throughout this case, including the day he signed the written waiver with the advice of his counsel. 7/10/08 RP 2. Goble’s counsel further stated:

I’ve previously spoken with [the prosecutor], also talked with Mr. Goble about this case. And he has signed in my presence a waiver of jury trial. We discussed the nuance of such and perils and this kind of thing. We’re prepared to go on with a bench trial.

07/10/08 RP 2. The trial court then inquired:

THE COURT: Mr. Goble, do you agree with what your attorney just told me?

GOBLE: “yes.”

THE COURT: You understand by waiving your right to jury, a judge will decide this on his own?

GOBLE: “yeah.”

THE COURT: All right. I will approve the jury waiver. It’s going to be subject to - -Judge Brosey’s approval.

7/10/08 RP 2,3.

Thus, Goble signed a valid written waiver of his right to a jury trial, his counsel noted on the record that he had gone over the waiver with Goble, and the trial court asked

Goble if he understood that he was waiving his right to a jury trial and explained that meant the case would be tried a judge. To these inquired Goble said, “yes” and “yeah.”
7/10/08 RP 2.

These facts show that Goble knowingly and voluntarily waived his right to a jury trial. And while “[n]o colloquy is required for a waiver of the right to a jury” Goble nonetheless was asked if he understood that by waiving his right to a jury trial that his case would be tried by a judge and Goble said, “yes.” Accordingly, not only did Goble file a written waiver, his answers to the court’s questions showed “a personal expression of waiver by the defendant.” State v. Ramirez-Dominguez, 140 Wn.App. at 240. Goble’s waiver of his right to a jury trial was knowingly, voluntarily and intelligently entered and Goble’s argument to the contrary is not supported by the record.

B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT RULED THAT GOBLE COULD NOT PUT ON TESTIMONY BY A DEFENSE WITNESS BECAUSE NEITHER THE WITNESS NOR THE SUBJECT OF HER TESTIMONY WAS DISCLOSED TO THE STATE UNTIL DURING THE TRIAL.

“The decision to admit evidence lies within the sound discretion of the trial court and should not be overturned on appeal

absent a manifest abuse of discretion.” State v. Bourgeois, 133 Wn.2d 389, 399, 945 P.2d 1120 (1997). The right to confront and cross-examine adverse witnesses is guaranteed by both the federal and state constitutions. State v. Darden, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002)(citations omitted). But the right to cross-examine adverse witnesses is not absolute. Id. Where the right to cross examination has not been all together denied, the scope or extent of cross-examination for the purpose of showing bias rests in the sound discretion of the trial court. State v. Robbins, 35 Wn.2d 389, 396, 213 P.2d 310 (1950)(citations omitted). But, “[t]he trial court . . . may reject cross-examination, where the circumstances sought to be shown only remotely tend to show bias. State v. Harmon, 21 Wn.2d 581, 152 P.2d 314 (1944).

Goble claims that the trial court denied him the right to confrontation when the trial court ruled that a defense investigator could not testify for purposes of impeachment because it was a violation of the discovery rules. The trial court’s ruling was correct. The remedies for discovery violations are set forth in CrR 4.7(h)(7)(i), which states that if a party fails to comply with an applicable discovery rule, the court may “order such party to permit the discovery of material and information not previously disclosed,

grant a continuance, dismiss the action or enter such other order as it deems just under the circumstances.” “[D]ismissal for violation of discovery procedures is an extraordinary remedy.” State v. Smith, 67 Wn.App. 847, 852, 841 P.2d 65 (1992). The reviewing court will not disturb on appeal a trial court's discovery decision absent a manifest abuse of discretion. State v. Blackwell, 120 Wn.2d 822, 826, 845 P.2d 1017 (1993).

In the present case the omnibus order filed December 10, 2007, paragraph 4 states:

4. **MUTUAL DISCOVERY DEADLINE**: 10 days before trial, **both** parties shall complete discovery, including names, and all required information pertaining to witnesses (including conviction data), by this deadline date.

CP 5 (bold and emphasis added). Thus, Goble's attempting to bring in a new witness in the middle of the trial, without any notice to the State was a violation of the mutual discovery rule set out above. You can bet that if the State had done this on the day of trial, the trial court would have made the same ruling against the State. The trial court did not abuse its discretion in ruling that the defense witness could not testify on an impeached matter at trial. It is also noted that Goble also argues that when the trial court ruled that the evidence would not be allowed because of a discovery violation, that such evidence could not be considered a discovery

violation—he does not cite any authority for such a proposition.

Brief of Appellant 17.

Be that as it may, as further explained below, Goble got the issue about the alleged inconsistent statement in front of the court anyway—despite the trial court’s ruling—by repeatedly asking the State’s witness about the subject matter that the alleged defense witness would have testified about, which was whether Ms. Pakar had told anyone that Goble had a beard on the date of the incident.

For example, Defense counsel asked Ms. Pakar, “do you remember an interview that you had with Paula Howell, an investigator?” Ms. Pakar said, “slightly.” Defense counsel then asked, “[a]nd is it your testimony today that when you saw him when he came to your house that he was clean shaven then?” Ms. Pakar said, “[h]e did not have a beard.” RP trial 28. Defense counsel again asked her, “[d]id you have a discussion with Ms. Howell about Mr. Goble and a beard?” The State then objected because the State had not been given any notice of the witness nor had the State been told about the content of the witnesses’ statement. RP trial 28, 29. The objection was sustained, but Defense counsel *again* asked Ms. Pakar, “[s]o once again, would it be your testimony that at the time in question of the burglary that

you're saying Mr. Goble did not have a beard?" Ms. Pakar answered, "I do not recall." RP 29, 30. There was another objection which was sustained, but this did not stop Defense counsel from asking the witness yet again, "anything in that statement that you remember that stated whether he [Goble] did or did not have a beard, do you remember saying anything to the officer about that?" Ms. Pakar answered, "no." RP trial 31, 32. Thus, it was obvious to everyone in the courtroom that-- even though the defense witness did not testify at trial about "the beard" issue-- Goble got the issue squarely before the Judge by asking Ms. Pakar repeatedly about whether Goble had a beard at the time of the burglary. And this did not go unnoticed by the Judge when he addressed this issue in his ruling, stating, in pertinent part:

As far as the beard goes, I share the same concerns [the prosecutor] does. . . . [W]e have two people who say he had a beard, they're husband and wife, you would expect that kind of testimony. Knowing it is that significant, it would seem to me that perhaps we could have had someone independent come in and say, yeah, I saw him the day after the burglary and he had a huge beard, perhaps not. In addition, even if he had a beard, it is important to remember that Ms. Pakar was looking from the top down and a beard is not necessarily prominent from that aspect. In addition, she knows him and she may have said that he had a beard or may have recognized a beard, she doesn't know. That does not raise a reasonable doubt.

RP trial 85, 86. The Court also made a finding regarding the beard issue when it noted in Finding of Fact 1.11 which states, “[e]ven if the defendant did have a beard, Mrs. Pakar was higher in elevation when she observed him, and could quite possibly not have noticed whether the defendant had a beard.” CP 17. Obviously, the Judge’s decision would not have changed, even if the private investigator had been put on the stand to say that Ms. Pakar told her that Goble either did or did not have a beard on the day in question. This is because the Judge noted that the only way his finding regarding the “beard issue” could have been changed was if some independent witness came in and had seen Goble after the burglary and testified that Goble had a beard (or not). RP trial 85, 86.

Given these facts, the trial court did not abuse its discretion when it held Goble to the same standard that the State is held to in regards to timely discovery, and further because Goble managed to get the question of “the beard” before the Court regardless of the ruling, and furthermore because the Judge’s decision would not likely have changed even with the proposed testimony, this Court

should uphold the trial court's ruling, and should affirm Goble's convictions.

CONCLUSION

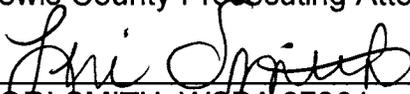
Goble signed a written waiver of his right to a jury trial after consulting with his counsel and after the trial court asked Goble if he understood what the waiver meant. Accordingly, the jury waiver was knowingly, voluntarily and intelligently entered and this court should so find. Likewise, the trial court did not abuse its discretion when it ruled that Goble could not bring in a defense witness which was disclosed to the State in the middle of the trial. This was a direct violation of the omnibus order and the trial court's ruling was correct. Besides, despite the trial court's ruling that the defense witness could not testify, the subject matter that she allegedly would have testified about –that Ms. Pakar had told the investigator that Goble did or did not have a beard—was put before the court anyway. This was accomplished by defense counsel's repeated questions of Ms. Pakar about the "beard issue."

For all of the foregoing reasons, Goble's convictions should be affirmed in all respects.

RESPECTFULLY SUBMITTED THIS 22 day of June, 2009.

MICHAEL GOLDEN
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by:



LORI SMITH, WSBA 27961
Deputy Prosecuting Attorney

COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

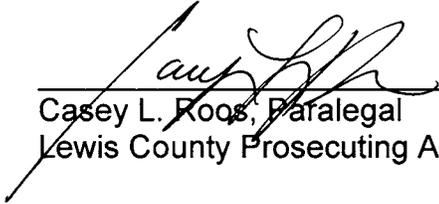
STATE OF WASHINGTON,) NO. 38517-1 II
Respondent,)
vs.)
DELBERT E. GOBLE,)
Appellant.)
DECLARATION OF)
MAILING)

STATE OF WASHINGTON
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DIVISION II
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Ms. Casey Roos, paralegal for Lori Smith, Deputy Prosecuting Attorney, declares under penalty of perjury under the laws of the State of Washington that the following is true and correct: On June 22, 2009, the appellant was served with a copy of the **Respondent's Brief** by depositing same in the United States Mail, postage pre-paid, to the attorney for Appellant at the name and address indicated below:

John A. Hays
Attorney at Law
1402 Broadway Suite 103
Longview WA 98632

DATED this 22nd day of June 2009, at Chehalis, Washington.



Casey L. Roos, Paralegal
Lewis County Prosecuting Attorney Office