

Court of Appeals No. 42798-2-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON

Plaintiff/Respondent,

v.

ERIC BARUCH CAMPOS ORTIZ,

Defendant/Appellant.

BRIEF OF APPELLANT

Appeal from the Superior Court of Pierce County,
Cause No. 11-1-02794-7
The Honorable Beverly G. Grant, Presiding Judge

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I. ASSIGNMENTS OF ERROR

1. Mr. Campos Ortiz was denied a fair trial by the trial court's erroneous exclusion of exculpatory evidence.
2. The trial court erred in excluding evidence that Mr. Campos Ortiz had told the police at the time he was arrested that the pants he was wearing were not his as self-serving hearsay.

II. ISSUES PRESENTED

1. Did the trial court err in excluding evidence of Mr. Campos Ortiz's statements that the pants were not his as self-serving hearsay? (Assignments of Error Nos. 1 and 2)
2. Was Mr. Campos Ortiz's right to present a defense and call witnesses on his behalf violated by the trial court's ruling excluding evidence regarding his statement that the pants weren't his? (Assignments of Error Nos. 1 and 2)

III. STATEMENT OF THE CASE

Factual and Procedural Background

James Fowler is the manager of the Tacoma Center Motel. RP 64-65. The building is shaped like a "U" and there is a gate across the front entrance that is kept closed as much as possible. RP 66-67. The gate is never locked and can be manually opened. RP 67.

On either July 3 or July 4, 2011, Mr. Fowler woke up at 1 a.m. and saw a man later identified as Mr. Eric Campos Ortiz in a vehicle parked in front of unit #3 at the hotel. RP 65-66, 70. Mr. Fowler contacted Mr. Campos Ortiz to find out what was going on since the motel had a policy

that all visitors have to check in with the front office before entering the premises and Mr. Campos Ortiz had not checked in. RP 66.

Mr. Campos Ortiz was on the passenger side of the vehicle. He told Mr. Fowler that he had dropped the key to the ignition of the vehicle and it had fallen underneath a metal bracket between the seats. RP 66. Mr. Fowler got a flashlight and shone it between the seats to assist Mr. Campos Ortiz in looking for the key. RP 67. Mr. Fowler sat in the driver's seat of the vehicle while he shone the light between the seats. RP 67. Mr. Fowler noticed that there was no ignition in the steering column. RP 67.

Mr. Campos Ortiz was unable to find the key. RP 68. Mr. Fowler told Mr. Campos Ortiz that he needed to show Mr. Fowler his ID and/or get his vehicle off the motel property. RP 68. Fifteen to twenty minutes later Mr. Campos Ortiz pushed his vehicle off the property. RP 68.

Mr. Fowler observed Mr. Campos Ortiz go into unit #3 while he was working on his car. RP 71. Unit #3 was being rented by Mr. Michael Hepburn. RP 71. While Mr. Campos Ortiz was working on his vehicle, the door to unit #3 was open, Mr. Hepburn was standing outside the door, and Mr. Campos Ortiz was talking to Mr. Hepburn. RP 86-87.

On July 8, 2011, Mr. Fowler was in the process of checking a woman into the motel when he saw Mr. Campos Ortiz drive up and begin

to open the gate to the property. RP 68. Mr. Fowler opened a window and told Mr. Campos Ortiz that he needed to come into the office to show Mr. Fowler his identification before he went on the property. RP 68. Mr. Campos Ortiz got out of his car and went into the front office of the motel. He attempted to interrupt the transaction between Mr. Fowler and the woman. RP 68. Mr. Fowler told Mr. Campos Ortiz that he had to sit down and wait. RP 68. A few minutes later another man entered the office and Mr. Campos Ortiz got up and walked back out towards the gate. RP 69.

Mr. Fowler opened the window again and told Mr. Campos Ortiz that he needed to either show Mr. Fowler his ID or get in his vehicle and drive away. RP 69. Mr. Campos Ortiz responded by coming at Mr. Fowler, cussing and yelling that he was going to kick Mr. Fowler. RP 69. Mr. Campos Ortiz grabbed the window and one of Mr. Fowler's hands but Mr. Fowler jerked the window closed and called 911. RP 69. Mr. Campos Ortiz got back into his car and drove away before the police arrived. RP 70.

Mr. Fowler told the police what had happened when they arrived. RP 70. Mr. Fowler also told the police officers about his contact with Mr. Campos Ortiz on the night of July 3 or July 4. RP 71. The officers asked Mr. Fowler for the name of the occupant of unit #3 and Mr. Fowler told

them it was rented by Mr. Hepburn. RP 70-71. The police determined that Mr. Hepburn had warrants for his arrest and arrested him. RP 71, 132. Police found drugs and drug paraphernalia on Mr. Hepburn's person when he was searched incident to his arrest. RP 71-72, 132.

Because Mr. Hepburn's arrest meant that he would be evicted from the motel, Mr. Fowler went into unit #3 to secure it and see what items he would have to bag up. RP 72, 133. When Mr. Fowler entered the unit he saw Mr. Campos Ortiz squatting in the kitchen. RP 72. Mr. Fowler exited the unit, locked the door, and told a police officer that the man whom he had originally called the police about was in the unit. RP 72, 133-134.

The officer and Mr. Fowler returned to unit # 3 where Mr. Fowler unlocked and opened the door for the officers. The officers yelled for Mr. Campos Ortiz to exit the unit. RP 73. Mr. Campos Ortiz exited the unit and was arrested for criminal trespass, handcuffed, and searched. RP 73, 156. Police found several loose white rocks of what appeared to be cocaine in Mr. Campos Ortiz's pockets. RP 74, 134, 149-150.

Mr. Fowler later returned to the unit to bag up Mr. Hepburn's belongings. RP 74. In the area of the kitchen where Mr. Campos Ortiz had been crouching, Mr. Fowler found a plastic Safeway bag that contained porno CDs, an apparent crack pipe, and Mr. Campos Ortiz's passport. RP 74-76. Mr. Fowler never told law enforcement about the

Safeway bag or its contents and, instead, gave the bag and its contents to Mr. Kevin Moultrie, a man who had been staying in unit #3 with Mr. Hepburn. RP 85.

The substance that fell out of Mr. Campos Ortiz's pants pockets was tested and determined to contain cocaine. RP 144, 150, 162-163.

On July 11, 2011, Mr. Campos Ortiz was charged with one count of unlawful possession of cocaine. CP 1.

On October 10, 2011, Mr. Campos Ortiz presented an oral motion to suppress the evidence discovered by police. The basis for the motion was that the *Terry* stop of Mr. Hepburn by the police was unlawful. RP 8-9, 26. A suppression hearing was held, after which the trial court denied the motion to suppress, on the basis that there was no seizure. RP 27-57.

Mr. Fowler testified at the suppression hearing. He testified that when the officers questioned Mr. Campos Ortiz about the drugs found in his pants Mr. Campos Ortiz told the officers that the pants were not his. RP 34. After the court denied Mr. Campos Ortiz's motion to suppress, counsel for Mr. Campos Ortiz informed the court that he had been unaware of Mr. Campos Ortiz's statement that the pants he was arrested in did not belong to him, until Mr. Fowler testified at the suppression hearing. RP 58-59. While acknowledging that the statement had been made, and documented in the police report, the State objected to the jury

hearing evidence of Mr. Campos Ortiz's statement that the pants weren't his on the grounds that it was self-serving hearsay. RP 59. The State informed the court that, because the State did not intend to introduce evidence of Mr. Campos Ortiz's statement that the pants were not his, the only way the statement would be admissible is if Mr. Campos Ortiz took the stand and introduced the statement himself. RP 59. The trial court held that the statement was admissible only if one of the State's witnesses opened the door. RP 59.

Mr. Campos Ortiz also moved to suppress evidence of the contact between himself and Mr. Fowler during the early morning of July 3 or 4, when Mr. Fowler noticed that Mr. Campos Ortiz was driving a vehicle that had no ignition switch, under ER 404(b) and on the basis that such evidence was more prejudicial to Mr. Campos Ortiz than it was probative of any issue before the jury. RP 59-61. The trial court denied the motion, apparently holding that the evidence was admissible as *res gestae* of the crime charged. RP 62.

Trial began on October 10, 2011. RP 64. When Mr. Fowler testified about his interaction with Mr. Campos Ortiz on the morning of July 3 or 4, Mr. Campos Ortiz again objected to the testimony under ER 404(b), but the trial court overruled the objection. RP 67. Mr. Campos Ortiz also objected to the evidence that police found drugs on Mr.

Hepburn, on the grounds that such evidence was irrelevant and violated ER 404(b). RP 72. The trial court overruled the objections. RP 72. Mr. Campos Ortiz renewed his objection to evidence about the vehicle ignition, and also objected to introduction of evidence regarding Mr. Campos Ortiz's passport, on the basis that it was irrelevant and more prejudicial than probative. RP 77, 80. The court overruled both objections. RP 80, 83.

Mr. Campos Ortiz testified that on the night he was arrested he had gone to Mr. Hepburn's room to use the bathroom, and that he had changed his pants while in the bathroom. RP 175. The trial court sustained the State's objection to Mr. Campos Ortiz's testimony that he told the police that the pants were not his. RP 177. Mr. Campos Ortiz testified that the cocaine was not his, and that he had never seen the drugs before the officers removed them from the pockets of the pants. RP 177-178.

Post trial, Mr. Campos Ortiz proposed a missing witness instruction and an unwitting possession instruction. CP 62-65, 185-186. Counsel for Mr. Campos Ortiz argued that the State could have called Mr. Fowler to testify that he had heard Mr. Campos Ortiz tell the police that the pants were not his. RP 186. The court asked Mr. Campos Ortiz's attorney why he had not elicited such testimony from Mr. Fowler on cross-examination. Counsel for Mr. Campos Ortiz responded that it was

because the court had ruled Mr. Campos Ortiz could not introduce such evidence since it was self-serving hearsay. RP 186. Further, Mr. Campos Ortiz's lawyer stated that Mr. Fowler and the arresting officer could both have testified that Mr. Campos Ortiz said the pants were not his, he did not elicit such testimony because the trial court had granted the State's motion to exclude such evidence as self-serving hearsay. RP 187. The State acknowledged that Mr. Campos Ortiz made such a statement, but the trial court refused to give the missing witness instruction. RP 188.

During his closing argument, counsel for Mr. Campos Ortiz argued that the State's burden was to show that Mr. Campos Ortiz knowingly had drugs in his pocket. RP 203-204. During the State's rebuttal closing argument, the State argued that Mr. Campos Ortiz did not have to knowingly possess the cocaine to be guilty of unlawful possession of a controlled substance, and that for counsel for Mr. Campos Ortiz to suggest that the possession had to be knowing was wrong. RP 205-206.

The jury found Mr. Campos Ortiz guilty of unlawful possession of cocaine. RP 212.

Notice of Appeal was filed on November 10, 2011. CP 87.

IV. ARGUMENT

Mr. Campos Ortiz was denied a fair trial where the trial court erroneously excluded as self-serving hearsay evidence that Mr.

Campos Ortiz had told the police at the time of his arrest that the pants he was wearing were not his.

Both the United States Constitution and the Washington State Constitution article I, section 22, guarantee the criminal defendant a fair trial by an impartial jury. *State v. Latham*, 100 Wn.2d 59, 62-63, 667 P.2d 56 (1983).

Where a defendant is denied the right to a fair trial, the proper remedy is reversal of the conviction and remand for a new trial. *State v. McDonald*, 96 Wn.App. 311, 979 P.2d 857 (1999), *affirmed* 143 Wn.2d 506, 22 P.3d 791 (2001).

Here, the State acknowledged that Mr. Campos Ortiz had told the police that the pants were not his, but the trial court upheld the State's characterization of this statement as "self-serving hearsay" and ruled that evidence of the statement was inadmissible unless the State's witnesses opened the door. RP 58-59.

- 1. The trial court abused its discretion in ruling that Mr. Campos Ortiz's statement that the pants weren't his was "self-serving hearsay" and, therefore, only admissible if the State's witnesses opened the door to the statement.*

A trial court's rulings on the admissibility of evidence is reviewed under an abuse of discretion standard. *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). An abuse of discretion exists when the trial

court's exercise of discretion is manifestly unreasonable or is based upon untenable grounds. *Powell*, 126 Wn.2d at 258, 893 P.2d 615; *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

A court's decision is manifestly unreasonable

if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard.

Grandmaster Sheng-Yen Lu v. King County, 110 Wn.App. 92, 99, 38 P.3d 1040 (2002).

- a. There is no "self-serving hearsay" bar that excludes otherwise admissible evidence.

Without any analysis or explanation, the State claimed that Mr. Campos Ortiz's statement that the pants weren't his was inadmissible because it was "self-serving hearsay." RP 58. The trial court apparently agreed with the State since it ruled that the statement would only be admissible if the State's witnesses opened the door. RP 59. Both the State and the trial court were incorrect in their argument and assumption that a statement is inadmissible if it is "self-serving hearsay."

"[T]here is no 'self-serving hearsay' rule that excludes otherwise admissible evidence." *State v. Pavlik*, 165 Wn.App. 645, 651, 268 P.3d 986 (2011). As discussed in *Pavlik*, the use of the phrase "self-serving

hearsay” by prosecutors as an objection to the admissibility of statements made by a defendant comes from a misunderstanding by prosecutors of the “statement by a party-opponent” exception to the hearsay rule under ER 801(d)(2) and a misinterpretation by prosecutors of the holding of *State v. Finch*, 137 Wn.2d 792, 824–825, 975 P.2d 967, *cert. denied*, 528 U.S. 922, 120 S.Ct. 285, 145 L.Ed.2d 239 (1999). *Pavlik*, 165 Wn.App. at 651-654, 268 P.3d 986. As recognized by the *Pavlik* court, the correct understanding of Washington law is that a statement is not inadmissible simply because it would be beneficial to the defendant and is offered by the defendant; rather “‘self-serving’ seems to be a shorthand way of saying that it was hearsay and did not fit into any of the recognized exceptions to the hearsay rule.” *Pavlik*, 165 Wn.App. at 653-654, 268 P.3d 986, *citing State v. King*, 71 Wn.2d 573, 577, 429 P.2d 914 (1967). In sum, “there is no “self-serving hearsay” bar that excludes an otherwise admissible statement.” *Pavlik*, 165 Wn.App. at 653, 268 P.3d 986. Even though the statement may be beneficial to the defense, a defendant may offer in his or her case in chief a hearsay statement made by the defendant if it is admissible under some exception to the hearsay rule. *Pavlik*, 165 Wn.App. at 651-654, 268 P.3d 986.

- b. The trial court abused its discretion in this case by excluding Mr. Campos Ortiz’s

statement as “self-serving hearsay”

In the instant case, the State objected to Mr. Campos Ortiz introducing the statement as follows: “The State is not offering that testimony. It’s self-serving hearsay. None of my witnesses will be testifying to that statement. If that gets in, the only way it gets in is if his client takes the stand and says that himself.” RP 59. The trial court apparently agreed with the State’s and held, “Well, if one of [the State’s] witnesses opens the door it’s fair game.” RP 59.

The State’s objection to Mr. Campos Ortiz’s statement in this case that Mr. Campos Ortiz’s statement was not admissible as “self-serving hearsay” was clearly based on the incorrect understanding of Washington law discussed in *Pavlik*. The prosecutor, and by extension the court since the court ruled in the State’s favor, believed that Mr. Campos Ortiz could not offer the statement in his case in chief because it was an exculpatory hearsay statement made by the defendant. The State and trial court were both legally incorrect since there exists no “self-serving hearsay” bar to otherwise admissible evidence.

Because the trial court’s ruling preventing Mr. Campos Ortiz from eliciting testimony about his statement that the pants weren’t his was based on an incorrect understanding of the law, the trial court’s ruling excluding such evidence was based on “untenable reasons.”

Grandmaster Sheng-Yen Lu, 110 Wn.App. at 99, 38 P.3d 1040.

Accordingly, the trial court abused its discretion in ruling that evidence of Mr. Campos Ortiz's exculpatory statement that the pants weren't his was inadmissible unless one of the State's witnesses opened the door.

2. *The trial court's ruling excluding evidence that Mr. Campos Ortiz told police the pants were not his violated Mr. Campos Ortiz's due process right to a fair trial.*

Due process requires that a defendant have a meaningful opportunity to present a complete defense. *State v. Lord*, 117 Wn.2d 829, 867, 822 P.2d 177 (1991), *cert. denied* 506 U.S. 856, 113 S.Ct. 164, 121 L.Ed.2d 112. The right to present a defense includes the right to offer the testimony of witnesses and to compel their attendance, if necessary. *State v. Maupin*, 128 Wn.2d 918, 924, 913 P.2d 808 (1996), *citing Washington v. Texas*, 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967).

"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 Wash.2d 412, 425, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020, 106 S.Ct. 1208, 89 L.Ed.2d 321 (1986). Violation of the defendant's constitutional right to compulsory process is assumed to be prejudicial, and the State has the burden of showing the error was harmless. *State v. Burri*, 87 Wash.2d 175, 181-82, 550 P.2d 507 (1976).

In this case, it was not disputed that the police found rocks of cocaine in the pockets of the pants Mr. Campos Ortiz was wearing at the time he was arrested. Mr. Campos Ortiz's defense was that he did not know the drugs were in the pants. RP 177-178. Mr. Campos Ortiz's testimony was the only evidence introduced at trial that he had no knowledge that the drugs were present in the pants he was wearing. Because Mr. Campos Ortiz was the sole source of this evidence, Mr. Campos Ortiz's defense relied largely on the jury's determination of how credible Mr. Campos Ortiz was. Post-trial, counsel for Mr. Campos Ortiz informed the court that he had not questioned the police officers or Mr. Fowler about Mr. Campos Ortiz's statement that the pants he was wearing weren't his because the trial court had specifically ruled that the statement was inadmissible as self-serving hearsay. RP 186-187.

The trial court's erroneous ruling excluding Mr. Campos Ortiz's statement about the pants violated his due process right to call witnesses and to present a defense. Had Mr. Campos Ortiz been able to question the officers and Mr. Fowler about Mr. Campos Ortiz's statement about the pants, such testimony would have given strong corroboration to Mr. Campos Ortiz's defense that he was unaware the drugs were in the pockets of the pants. Such testimony from the officers and Mr. Fowler would have strongly corroborated Mr. Campos Ortiz's version of events and

would have significantly bolstered his credibility in the eyes of the jury. Mr. Campos Ortiz's inability to present this exculpatory evidence that corroborated his defense seriously prejudiced his defense at trial.

The violation of Mr. Campos Ortiz's right to call witnesses in his defense is presumed to be prejudicial. This court should vacate Mr. Campos Ortiz's conviction and remand for a new trial.

VI. CONCLUSION

For the reasons stated above, this court should vacate Mr. Campos Ortiz's conviction and remand for a new trial.

DATED this 30th day of March, 2012.

Respectfully submitted,

Sheri Arnold, WSBA No. 18760
Attorney for Appellant

CERTIFICATE OF SERVICE

The undersigned certifies that on March 30, 2012, she delivered via email to pcpatccf@co.pierce.wa.us Pierce County Prosecutor, Tacoma, Washington 98402, and by United States Mail to appellant, Eric Campos-Ortiz, 1623 East J Street, Suite 5, Tacoma, Washington 98421, true and correct copies of this Brief. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington on March 30, 2012

Norma Kinter

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