

NO. 64854-3-I

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

STATE OF WASHINGTON,

Respondent,

v.

LELAND E. O'BRIEN,

Appellant.

2010 AUG -2 AM 10:47
COURT OF APPEALS
DIVISION I

BRIEF OF RESPONDENT

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I. ISSUES

1. Has Appellant shown actual prejudice necessary to establish a manifest error affecting a constitutional right for the court to consider an issue raised for the first time on appeal?

2. Has Appellant shown that Defense counsel's advice regarding the consequences of entering the Stipulation for Bench Trial on Agreed Documentary Evidence fell below an objective standard of reasonableness and resulted in prejudice?

3. Was the Prosecutor's argument that a case cited by Defense counsel did not stand for the principle Defense counsel claimed it stood for misconduct?

II. STATEMENT OF THE CASE

Following a Bench Trial on Stipulated Documentary Evidence the court found that on August 29, 2009, at approximately 4:00 a.m., the Lynnwood police responded to a 911 call reporting that Defendant was engaged in aberrant behavior on the street waiving a gun around and pointing the gun at the reporting neighbor. The police obtained a search warrant for Defendant's house. Prior to serving the warrant the police called Defendant and spoke to him on the phone. Defendant claimed that he had been in Montana at the time of the incident. When police arrested

Defendant he gave a statement claiming that he had a newspaper in his hand at the time of the incident. Defendant also told the police that no guns or ammunition would be found in his home. Police served the search warrant on August 31, 2009, and found sixteen firearms, including the four firearms listed in counts 1 through 4 of the Information. RP 38-40.¹

Additionally, the court found that the certified copies of South District Court records established that a Leland Eugene O'Brien was convicted of 4th Degree Assault Domestic Violence on November 7, 2001, by entry of a guilty plea before Judge Carol McCrae, while represented by an attorney. Defendant was fingerprinted when he was arrested on August 31, 2009, and booked in the Snohomish County Jail. Defendant's fingerprints were sent to the Washington State Patrol. Those fingerprints match the fingerprints of the Leland Eugene O'Brien who was convicted of 4th Degree Assault Domestic Violence on November 7, 2001, in South District Court. The court found that this evidence established beyond a reasonable doubt that Defendant was the

¹ The Verbatim Report of Proceedings for the January 4, 2010, Stipulated Bench Trial on Documentary Evidence and January 6, 2010, Sentencing hearing are referenced herein as RP.

Leland Eugene O'Brien convicted of 4th Degree Assault Domestic Violence in South District Court on November 7, 2001. RP 40-41.

The court found the appellant, Defendant Leland Eugene O'Brien, guilty on four counts of unlawful possession of a firearm in the second degree. RP 44.

Prior to trial the parties discussed entering an agreed order for a bench trial on stipulated documentary evidence. There was some uncertainty between the parties regarding the scope of the stipulation. Defense counsel told the court that she agreed to the stipulation, but believed that she could still argue the admissibility of the stipulated documents. Defense counsel gave as examples the arguments that as a matter of law the court docket was not the best evidence for proof of a conviction and that the evidence was not sufficient. RP 2-4.

The court engaged counsel in a colloquy regarding various reasons for a trial on stipulated evidence. The Prosecutor clarified that he was not proposing a stipulation that allowed defense to argue that certain documents submitted to the court were not admissible. Defense counsel clarified that her position was the State would still be required to prove the constitutional validity of Defendant's prior conviction and she would be arguing the

evidence was insufficient to meet the State's burden of proof of the prior conviction beyond a reasonable doubt. The court took a recess and gave the parties time to see if they could reach an agreement on how they wanted to proceed. RP 4-9.

Following the recess the parties presented the court with a signed agreed stipulation. The parties had added language to paragraph 2.3 of the stipulation indicating that Defendant was not stipulating that he was the same defendant referenced in the South District Court docket. Defense counsel re-characterized her previous objection to admissibility as factors the court should consider in determining the sufficiency of the evidence. The court clarified that the parties were in agreement that the documents submitted to the court were admissible and constituted the evidence that the court would rely on in making its determination as to whether or not the State carried its burden of proof beyond a reasonable doubt. The court then asked if Defense was abandoning the argument that the prior guilty plea was constitutionally defective. Defense counsel replied that it was the Defense position that the constitutionality of the prior guilty plea was a preliminary question for the court and the State must prove the predicate conviction beyond a reasonable doubt. RP 9-11.

The court again engaged counsel in a colloquy regarding various reasons for a trial on stipulated evidence. As one reason the court gave the following example:

Sometimes it's done because it's all the evidence that's ever going to exist, and everybody knows that it's all the evidence that's ever going to exist. But in this particular case, it appears that the State has filed what they could perceive as a limited number of charges as opposed to what they might file if it went to a full-blown trial, which is a pretty traditional plea negotiation posture; and there may well be other evidence out there that the State would seek to go find if this wasn't a stipulated trial.

The court then asked the parties if they had an agreed stipulation.

RP 11-12.

The Prosecutor stated that he believed that they had an agreed stipulation that the documents were admissible and the parties would argue the legal conclusions that should follow. The Prosecutor stated that he was willing to proceed on that basis "because frankly, that's all the evidence that is ever going to be. As to your statement, that's what it is in this case, yes. I could add more charges; I could add more counts." Defense counsel clarified with the court that she was agreeing to the admissibility of the stipulated documents, but she was not giving up the argument that

the State needed to prove the constitutional validity beyond a reasonable doubt. The Prosecutor agreed. RP 13-16.

The court then went over the agreed stipulation with Defendant, who had been present in court during the all of the above discussions, and accepted the stipulation. RP 16-18, 23.

During closing argument regarding the sufficiency of the evidence to prove the predicate conviction, Defense counsel stated:

All that the State is relying on as proof of conviction is a District Court docket. There is no explanation in the record why they are not relying on more credible information or information more comparable to a certified Judgment & Sentence. There is no explanation whatsoever. There is no explanation from the State on how the docket in and of itself is comparable to a Judgment & Sentence, which is considered to be the best evidence of proof of a prior conviction.

Defense counsel argued that according to State v. Rivers, 130 Wn. App. 689, 128 P.3d 608 (2005), the State may only rely upon other comparable evidence if it shows that the writing is unavailable for some reason other than the serious fault of the proponent. RP 33.

The court asked the Prosecutor the following question:

One of the things that [Defense counsel] argued was that the Best Evidence Rule suggest that you can't even use a docket to support conviction unless you can show there's some reason why you don't have a Judgment & Sentence or some other better evidence.

I'm curious as to what your response to that is.

The Prosecutor replied:

Well, there's no caselaw that establishes that at all. She did cite some caselaw pursuant to this Rivers and other caselaw talking about that State Patrol records and so forth should be used for identification purposes; but that's what they are being used for in this case. The issue that was contained in some of those cases is the fact that there's no court approval seal; but on page 50, you see this is a court-certified record, which was the issue in these other cases. So the fact of conviction is being supported by a self-authenticating document on page 50.

The Prosecutor pointed out to the trial court that the court docket was being used to establish the underlying conviction and the State Patrol documents were being used to identify Defendant. RP 37-38.

III. ARGUMENT

A. DEFENDANT HAS NOT SHOWN ACTUAL PREJUDICE TO ESTABLISH MANIFEST ERROR.

Defendant raises two challenges for the first time on appeal. First, Defendant claims that he was denied effective assistance of counsel by entering the Stipulation for Bench Trial on Agreed Documentary Evidence. Defendant argues that Defense counsel did not understand that by entering into the stipulation, the best evidence challenge was no longer applicable, leaving Defendant unable to make a knowing and intelligent waiver of his rights. However, the record shows that after a lengthy colloquy with

Defendant the court found “that Mr. O’Brien does in fact know exactly what we’re doing, he knows what choices he faces, he knows what rights he has, and he is making a knowing, voluntary and intelligent decision to proceed in this fashion.” RP 16-18, 23. Defendant did not object to the trial court’s finding.

Second, Defendant also raises for the first time on appeal that the Prosecutor committed misconduct when he argued that a case cited by Defense counsel did not stand for the principle Defense counsel claimed it stood for. Defendant did not object to the Prosecutor’s argument at trial.

“As a general rule, appellate courts will not consider issues raised for the first time on appeal. RAP 2.5(a). However, a claim of error may be raised for the first time on appeal if it is a ‘manifest error affecting a constitutional right’”. RAP 2.5(a)(3); State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995); State v. Scott, 110 Wn.2d 682, 686-87, 757 P.2d 492 (1988); State v. Lynn, 67 Wn. App. 339, 342, 835 P.2d 251 (1992); State v. Contreras, 92 Wn. App. 307, 311, 966 P.2d 915 (1998).

An appellant must show actual prejudice in order to establish that the error is “manifest.” Contreras, 92 Wn. App. at 311. “If the facts necessary to adjudicate the claimed error are not in the record

on appeal, no actual prejudice is shown and the error is not manifest.” McFarland, 127 Wn.2d at 333.

The rule reflects a policy of encouraging the efficient use of judicial resources. The appellate courts will not sanction a party's failure to point out at trial an error which the trial court, if given the opportunity, might have been able to correct to avoid an appeal and a consequent new trial.

Scott, 110 Wn.2d at 685.

Defendant's challenge squarely confronts these procedural barriers. Defendant stipulated to the admissibility of the court-certified docket after a lengthy discussion on the record in open court regarding what challenges, including a challenge that the docket was not the best evidence, defense would make at trial. Nor did Defendant raise an objection at trial to the Prosecutor's argument that the case law cited by Defense counsel did not stand for the principle Defense counsel claimed it stood for.

1. Adequacy Of The Record.

It is not enough for Defendant to allege prejudice; actual prejudice must appear in the record. McFarland, 127 Wn.2d at 334. To show that he was prejudiced by counsel's advice regarding waiving any best evidence challenge to the court-certified docket by stipulating to the admissibility of the court-certified

docket, Defendant must show that the trial court would likely have ruled that the court-certified docket was not admissible under a best evidence challenge. Id.

Because the admissibility of the court-certified docket was stipulated, there exists no record of the trial court's determination of the issue in this case. Without an affirmative showing of actual prejudice, the asserted error is not "manifest" and thus is not reviewable under RAP 2.5(a)(3). McFarland, 127 Wn.2d at 334.

Additionally, to be granted relief for the Prosecutor's alleged misstatement of law, Defendant must show that the misconduct was so flagrant and ill intentioned that no curative instruction could have obviated the prejudice. State v. Kendrick, 47 Wn. App. 620, 638, 736 P.2d 1079, review denied, 108 Wn.2d 1024 (1987). Because Defendant did not object at trial there is no record of the trial court's determination of the issue in this case.

2. Ineffective Assistance Of Counsel.

Defendant argues that he was denied effective assistance of counsel by entering the Stipulation for Bench Trial on Agreed Documentary Evidence, thereby waiving the opportunity to challenge the admissibility of the South District Court docket under the best evidence rule.

In order to establish ineffective assistance of counsel, Defendant must demonstrate both (1) that defense counsel's representation fell below an objective standard of reasonableness and (2) resulting prejudice. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 743 P.2d 816 (1987)(the right to effective assistance of counsel is constitutionally guaranteed by the Sixth Amendment and the Washington Const. art. 1, § 22 (amend. 10)). Defendant also bears the burden of rebutting the strong presumption that counsel's representation was not deficient. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Because of this presumption, Defendant must show there were no legitimate strategic or tactical reasons for the challenged conduct. Id. at 336.

a. Defense counsel's representation did not fall below an objective standard of reasonableness.

In the present case, the record shows that considerations other than the Best Evidence Rule went into the decision to enter the Stipulation for Bench Trial on Agreed Documentary Evidence; Specifically, that the State could add more charges. During the colloquy the court speculated that one reason for a stipulated trial

was the State might add more counts if the matter went to a full-blown trial. The Prosecutor acknowledged that was the case and that while he was willing to proceed on the basis of the stipulation the State could add more charges. RP 12-13.

Defense counsel has an ethical obligation to discuss the potential consequences of both entering and not entering a stipulation for bench trial on agreed documentary evidence with the defendant. State v. James, 48 Wn. App. 353, 362, 739 P.2d 1161 (1987). Defendant does not claim that Defense counsel failed to discuss the potential consequences; rather, Defendant acknowledges that he relied on the advice of counsel when he entered the Stipulation for Bench Trial on Agreed Documentary Evidence. Brief of Appellant at 7. Defense counsel's representation did not fall below an objective standard of reasonableness. Defendant has not met his burden of rebutting the strong presumption that counsel's representation was not deficient.

b. Defense counsel's representation did not cause prejudice.

Contrary to causing him prejudice, Defendant benefited by entering the Stipulation for Bench Trial on Agreed Documentary Evidence. By arranging for Defendant to enter the stipulation for a bench trial, Defense counsel allowed him to argue the

constitutionally validity of South District Court plea and the sufficiency of the evidence that he had a prior 4th Degree Assault Domestic Violence conviction while simultaneously providing Defendant the opportunity to go to trial on only four counts of Unlawful Possession of a Firearm in the 2nd Degree. This reduced the standard sentencing range Defendant would face if convicted.

Defendant has not show that he was prejudiced by Defense counsel's advice regarding entering the Stipulation for Bench Trial on Agreed Documentary Evidence.

B. DEFENDANT'S RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WAS NOT VIOLATED BECAUSE THE COURT-CERTIFIED DOCKET SATISFIED THE BEST EVIDENCE RULE.

Not surprisingly, Defendant seeks to avoid the consequences of his failure to comply with the settled procedural requirements by attempting to elevate his challenge into the constitutional realm. However, even a *de novo* review of the records (which would relieve Defendant of his burden to show the alleged error was manifest) does not reveal actual prejudice accruing to Defendant from the asserted constitutional error. McFarland, 127 Wn.2d at 334, fn 2.

1. Best Evidence Rule.

The best evidence rule states that generally the original writing, recording, or photograph is required to prove its contents. State v. Clapp, 67 Wn. App. 263, 272, 834 P.2d 1101 (1992), review denied, 121 Wn.2d 1020 (1993); ER 1002. Evidence Rule 1002 states:

To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by rules adopted by the Supreme Court of this state or by statute.

Evidence Rule 1005 addresses the contents of an official record and states in pertinent part that it “may be proved by copy, certified as correct in accordance with rule 902”

Evidence Rule 902 states in pertinent parts:

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

* * *

(d) **Certified Copies of Public Records.** A copy of an official record . . . including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification

The court-certified docket, part of the stipulated agreed documentary evidence in the present case, complied with the Rules of Evidence and was, therefore, admissible.

Defendant's reliance on State v. Rivers, 130 Wn. App. 689, 128 P.3d 608 (2005) is misplaced. Authenticity of the admitted documents was not the issue in Rivers. Id., at 698. In Rivers the State, at sentencing, offered an *uncertified* copy of a judgment and sentence and a certified copy of Washington State Patrol records containing two *uncertified* copies of the judgment and sentence as proof that Rivers was a persistent offender. The State did not offer an explanation of why a certified copy of the judgment and sentence was not offered, even though the State had offered a *certified* copy of another conviction. Id., at 699.

The court in Rivers held that the *uncertified* copies of the judgment and sentence were insufficient to prove the prior conviction. However, the court in Rivers also stated:

Although a certified copy of a judgment and sentence is the best evidence of a prior conviction, the State may introduce other documents of record or transcripts of prior proceedings to establish a defendant's criminal history. (Citations omitted.) Typically, these will be other court-certified records. (Citing State v. Vickers, 148 Wn.2d 91, 59 P.3d 58 (2002); State v. Morley, 134 Wn.2d 588, 952 P.2d 167 (1998)(copy of entire court martial record); State v. Winings, 126 Wn. App. 75, 107 P.3d 141 (2005) (certified copy of minute order and information showing prior convictions).

Rivers, 130 Wn. App. at 701.

In the present case, the *certified* copy of the South District Court docket offered by the State complied with the Rules of Evidence and was admissible. The trial court did not err by admitting the court-certified document.

2. Misstatement Of The Law.

Defendant further argues that the prosecutor's comments during closing argument were improper because he misstated the law and denied Defendant of a fair trial. As indicated by the cases cited below, Stenson, Brown and Finch and the Davenport case cited by Defendant, the court's concern with a misstatement of the law in closing argument is the impact it may have upon the jury. The misstatement of law analysis does not apply to Bench Trials. Had the court in the present case misapplied the law, questions of law are reviewed *de novo* by the appellate court. See Veach v. Culp, 92 Wn.2d 570, 573, 599 P.2d 526 (1979), Sunnyside Valley Irrigation Dist. v. Dickie, 149 Wn.2d 873, 879-80, 73 P.3d 369 (2003).

Defendant did not object to the Prosecutor's argument at trial. "A defendant's failure to object to a prosecuting attorney's improper remark constitutes a waiver of such error, unless the remark is deemed so flagrant and ill-intentioned that it evinces an

enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." State v. Stenson, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997). A prosecutor's allegedly improper remarks must be reviewed in "the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury." State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), cert. denied, 523 U.S. 1007, 118 S.Ct. 1192, 140 L.Ed.2d 322 (1998). Improper conduct by the prosecutor constitutes prejudicial error only where the court determines that there is a substantial likelihood that the misconduct affected the jury verdict. State v. Finch, 137 Wn.2d 792, 839, 975 P.2d 967, cert. denied, 528 U.S. 922, 120 S.Ct. 285, 145 L.Ed.2d 239 (1999).

In support of his argument Defendant cites State v. Davenport, 100 Wn.2d 757, 675 P.2d 1213 (1984). Davenport addressed a Prosecutor's argument that the jury could find the defendant guilty as an accomplice when the jury instructions did not include an accomplice liability instruction. Since the present case was a bench trial, and there were no jury instructions, the reasoning in Davenport does not apply.

However, had this been a jury trial, the jurors would have been instructed that they were to apply the law as given by the court and to disregard any remarks by the attorneys not supported by the law. State v. Southern, 100 Wn. App. 701, 715, 998 P.2d 350 (2000). Since jurors are presumed to follow the court's instruction (State v. Cerny, 78 Wn.2d 845, 850, 480 P.2d 199 (1971)) it follows that the court would also disregard any remarks by the attorneys not supported by the law.

Defendant claims that the Prosecutor misrepresented the law when answering the court's question regarding the argument by Defense counsel that the Best Evidence Rule suggested the State could not use a court docket without showing some reason why the State did not have a Judgment & Sentence or other better evidence. The Prosecutor responded, "Well, there's no case law that establishes that at all." Defendant now argues that the above was a misstatement of the law dispute the fact that the Prosecutor immediately followed that statement with a discussion of Rivers and other case law cited by Defense counsel, pointing out that those cases addressed the issue of the *absence of a court-certified copy* of the judgment and sentence not the use of a *court-certified docket* in lieu of judgment and sentence.

Defendant also cites State v. Coppin, 57 Wn. App. 866, 791 P.2d 228 (1990). In Coppin the issue before the court was whether the Prosecutor had a duty to advocate a sentence recommendation agreed upon under a plea agreement. In the present case the parties agreed that the documentary evidence was admissible, but that the parties would argue about the constitutional validity of the prior conviction and the sufficiency of the evidence to prove guilt beyond a reasonable doubt. The Prosecutor's comments were not contrary to that agreement. Defendant has not demonstrated that the Prosecutor's comments were improper.

Even if the court were to find that the Prosecutor's comments were improper, it was not so flagrant and ill intentioned that the trial court would not have remedied any prejudicial effect. "In making such a challenge the defendant bears the burden of establishing that the prosecutor's conduct was both improper and prejudicial." State v. Finch, 137 Wn.2d 792, 839, 975 P.2d 967, cert. denied, 528 U.S. 922, 120 S.Ct. 285, 145 L.Ed.2d 239 (1999). An appellate court will only grant relief if a misstatement of law constitutes "misconduct so flagrant and ill intentioned that no curative instruction could have obviated the prejudice." State v. Kendrick, 47 Wn. App. 620, 638, 736 P.2d 1079, review denied,

108 Wn.2d 1024 (1987). Defendant has not shown how he was prejudiced by any remarks made during closing argument.

C. THE PROSECUTOR'S ARGUMENT THAT A CASE CITED BY DEFENSE COUNSEL DID NOT STAND FOR THE PRINCIPLE DEFENSE COUNSEL CLAIMED IT STOOD FOR WAS NOT MISCONDUCT.

Defendant mischaracterizes the record to support an accusation that the Prosecutor committed misconduct. In responding to the court's question the Prosecutor specifically discussed State v. Rivers, 130 Wn. App 689, the very case that Defendant now claims the Prosecutor should have cited.

The court in Rivers held that the State failed prove a prior conviction at sentencing by offering an *uncertified* copy of the conviction and not offering an explanation of why it failed to offer a *certified* copy, even though the State had offered a *certified* copy of another conviction. Id., at 705. Rivers also addressed the issue of the use of Washington State Patrol records to prove identity. The court ruled that Washington State Patrol records are admissible to prove identity of the defendant under RCW 10.98.030 and RCW 43.43.700. Id., at 705.

In response to the court's question in the present case, the Prosecutor stated that there was no case law for the rule Defense

counsel suggested; that the State cannot use a docket to support a conviction without first showing why it does not have some better evidence. The Prosecutor continued by arguing that Rivers and the other case law cited by Defense counsel required certified copies of the records offered as evidence. The Prosecutor pointed out that the South District Court docket was a self-authenticating certified court record. The Prosecutor also addressed the issue of using Washington State Patrol records for identification purposes. Washington State Patrol records were part of the stipulated agreed documentary evidence in the present case that the State offered to prove Defendant's identity.

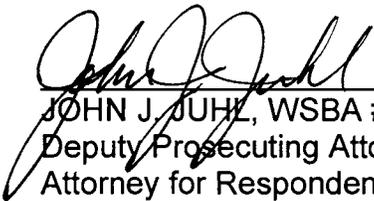
Here Defendant accuses the Prosecutor of misrepresenting relevant case law by taking one sentence of the Prosecutor's argument out of context, ignoring the fact that the Prosecutor's total argument addressed the issues and evidence in the case and the cases cited by Defense counsel. Defendant's allegation of prosecutorial misconduct is not well grounded in fact or law and should be given short shrift by the court.

IV. CONCLUSION

For the reasons stated above, the appeal should be denied.

Respectfully submitted on July 29, 2010.

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