Filed
Washington State
Court of Appeals
Division Two

December 18, 2018

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. GERMAN ROSAS-ARENAS, Appellant.	No. 50721-8-II UNPUBLISHED OPINION

MAXA, C.J. – German Rosas-Arenas appeals his conviction of second degree taking a motor vehicle without permission. The conviction arose out of an incident in which officers pursued a stolen vehicle, the vehicle crashed, and the passenger ran toward a nearby casino. An officer who pursued the passenger testified that a tribal officer told him that a camera showed a man running into the casino, and the pursuing officer testified that he recognized Rosas-Arenas as the person in the photograph.

We hold that (1) the trial court erred in admitting testimony about the casino photograph, but the error was harmless; (2) we decline to consider Rosas-Arenas's claim that the trial court's admission of the tribal officer's hearsay statement violated the confrontation clause because he did not object in the trial court and the claim does not involve a manifest error; (3) the trial court did not abuse its discretion in denying Rosas-Arenas's motion for a continuance based on the unavailability of a rebuttal witness; and (4) there was no cumulative error. However, we remand

for the trial court to strike two mandatory legal financial obligations (LFOs) imposed on Rosas-Arenas: the $200 criminal filing fee and the $100 deoxyribonucleic acid (DNA) collection fee.

Accordingly, we affirm Rosas-Arenas's conviction, but we remand for the trial court to amend the judgment and sentence and strike the criminal filing fee and the DNA collection fee.

FACTS

On February 7, 2017, Pierce County Sheriff's deputy, Isaac Finch, began a high-speed chase after observing a vehicle fail to stop at a stop sign and identifying the vehicle's license plate as stolen. The chase ended when the driver crashed the vehicle near the Emerald Queen Casino in Tacoma. Finch observed the passenger, who he later identified as Rosas-Arenas, flee from the vehicle toward the casino.

Pierce County Sheriff's deputy Justin Watts responded to the scene shortly after the crash. He saw a man matching Finch's description of the passenger jump the fence next to the road and run toward the casino. Casino security and tribal police later detained Rosas-Arenas.

The State charged Rosas-Arenas with second degree taking a motor vehicle without permission for riding in a vehicle that had been stolen.

At trial, Finch and Watts testified to facts stated above. Watts further testified that tribal police approached him at the scene and showed him a "picture of a male that they had said that they had caught on camera running into the casino." Report of Proceedings (RP) at 164. Watts recognized Rosas-Arenas as the person in the photograph based on a previous encounter with him. Rosas-Arenas objected to Watts' description of the photograph on the basis of ER 1002, the best evidence rule. The trial court overruled his objection, concluding that ER 1002 was not applicable because the photograph was not being admitted into evidence. Rosas-Arenas did not

object to Watts' testimony about the tribal officer's statement to him on confrontation clause grounds.

Finch testified that he was able to see the passenger as he exited the vehicle and in open court identified Rosas-Arenas as the vehicle's passenger. During cross-examination, Rosas-Arenas asked if Finch remembered stating during a defense interview that he was not able to identify Rosas-Arenas from his exiting the vehicle and that he only recognized Rosas-Arenas from booking photographs. Finch testified that he did not recall making those statements.

At the close of the State's evidence, Rosas-Arenas informed the trial court that he wanted to call his investigator to testify about the statements Finch allegedly made during the defense interview. Rosas-Arenas moved for a continuance because the investigator was not available to testify. Rosas-Arenas argued that the investigator's testimony was relevant because Finch's testimony was inconsistent with the interview, but he did not provide an offer of proof. The trial court reminded Rosas-Arenas that because of juror and court scheduling conflicts, which the parties were aware of when the jury was selected, the trial could not be continued into the following week. The court denied Rosas-Arenas' motion for a continuance because of the scheduling conflicts.

The jury found Rosas-Arenas guilty of second degree taking a motor vehicle without permission. Rosas-Arenas appeals his conviction.

ANALYSIS

A. ADMISSIBILITY OF PHOTOGRAPH EVIDENCE

Rosas-Arenas argues that the trial court erred by allowing Watts to testify about the casino photograph without complying with ER 1002 and to testify about the tribal officer's statement regarding the photograph in violation of the confrontation clause. We hold that the

trial court erred in allowing Watts to testify about the photograph, but that the error was harmless. And we decline to address the confrontation clause argument because Rosas-Arenas did not raise that issue in the trial court and he does not show a manifest error.

1. Casino Photograph – ER 1002

Rosas-Arenas argues that the trial court erred in allowing Watts to testify about the casino photograph without requiring that the photograph itself be admitted into evidence.

a. Legal Principles

We review a trial court's decision to admit evidence for abuse of discretion. *State v. Clark*, 187 Wn.2d 641, 648, 389 P.3d 462 (2017). A trial court abuses its discretion when its decision is based on untenable grounds or reasons. *State v. Bessey*, 191 Wn. App. 1, 6, 361 P.3d 763 (2015). We will defer to the trial court's evidentiary rulings unless no reasonable person would adopt the trial court's view. *Clark*, 187 Wn.2d at 648.

Rosas-Arenas objected to Watt's testimony about the casino photograph based on ER 1002. ER 1002 states, "To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required," unless other rules or statutes provide otherwise. This rule, known as the best evidence rule, plainly applies when a party is attempting to prove the contents of a writing or photograph. *See In re Pers. Restraint of Adolph*, 170 Wn.2d 556, 567, 243 P.3d 540 (2010).

ER 1002 does not apply when a party seeks to prove an act or event because "proving the existence of an event is different than proving the contents of a writing." *Id.* at 568 (holding that the best evidence rule does not apply to proving the existence of a conviction through a judgment); s*ee also* 5C KARL B. TEGLAND, WASHINGTON PRACTICE: EVIDENCE LAW AND PRACTICE § 1002.2, at 363 (6th ed. 2016) ("The best evidence rule applies only when it is the

content of the record—*not the actual event*—that is sought to be proved."). As Tegland explains, "when a party is seeking to prove an act or event, the best evidence rule does not require production of a record of the act or event. Under most circumstances, other evidence, including the testimony of witnesses, is equally acceptable." TEGLAND, § 1002.2, at 363.

b. ER 1002 Analysis

Here, there would have been no issue if Watts, casino security, or tribal officers had testified that they observed Rosas-Arenas running into the casino. An original photograph would not be needed to prove that event.

However, nobody testified about Rosas-Arenas running into the casino. Instead, Watts' testimony was that the *photograph* showed an individual he identified as Rosas-Arenas run into the casino. The only purpose of this evidence was to prove the content of the photograph – that Rosas-Arenas was the person in the photograph. Therefore, ER 1002 was applicable and the trial court erred in admitting Watts' testimony about what the photograph showed instead of requiring the State to admit the actual photograph.

c. Harmless Error

The State argues that even if the trial court erred by overruling Rosas-Arenas's ER 1002 objection, the error was harmless. We agree.

Erroneous admission of evidence is harmless unless there is a reasonable probability that, but for the error, the verdict would have been materially different. *State v. Ashley*, 186 Wn.2d 32, 47, 375 P.3d 673 (2016).

To convict Rosas-Arenas, the jury had to find beyond a reasonable doubt that he voluntarily rode in a stolen vehicle. RCW 9A.56.075(1). Finch testified that he saw the vehicle passenger and later identified that person as Rosas-Arenas. Finch also saw Rosas-Arenas run in

the direction of the casino. Watts testified that he saw a person jump over a fence next to the road where the vehicle crashed and run toward the casino. And casino security and tribal officers detained Rosas-Arenas in the casino.

Finch provided unrefuted, eyewitness testimony that Rosas-Arenas was the stolen vehicle's passenger and that he ran toward the casino. Watts' observation of the person running from the crash scene toward the casino and the detention of Rosas-Arenas in the casino corroborated Finch's testimony. Therefore, there is no reasonable probability that the verdict would have been materially different without Watts' testimony about the casino photograph.

Accordingly, we hold that even though the trial court erred in admitting Watts' testimony about the casino photograph, the error was harmless.

2. Tribal Officer Statement – Confrontation Clause

Rosas-Arenas argues that the trial court erred by admitting Watts' testimony about the tribal officer's hearsay statement about what the photograph depicted. Rosas-Arenas claims that admitting this hearsay statement violated his confrontation clause rights.

However, Rosas-Arenas did not object in the trial court based on the confrontation clause. There is a dispute between the divisions of this court as to whether a person can raise an alleged confrontation clause violation for the first time on appeal. Division One has held that a defendant cannot raise a confrontation clause challenge for the first time on appeal. *State v. Sage*, 1 Wn. App. 2d 685, 701-02, 407 P.3d 359, *review denied*, 191 Wn.2d 1007 (2018); *State v. O'Cain*, 169 Wn. App. 228, 240, 279 P.3d 926 (2012). In *O'Cain*, the court relied heavily on *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009).

Division Two in a footnote has declined to follow *O'Cain* and has stated that a confrontation clause claim raised for the first time on appeal must be evaluated under RAP

2.5(a)(3), at least until the Washington Supreme Court overrules cases decided before *Melendez-Diaz* dictating that result. *State v. Hart*, 195 Wn. App. 449, 458-59 n.3, 381 P.3d 142 (2016), *review denied*, 187 Wn.2d 1011 (2017). Under RAP 2.5(a)(3), a party can raise an issue for the first time on appeal if the issue involves a manifest constitutional error. *State v. Kalebaugh*, 183 Wn.2d 578, 583, 355 P.3d 253 (2015).

Even if we apply RAP 2.5(a)(3), Rosas-Arenas cannot assert a confrontation clause challenge for the first time on appeal. A constitutional error is "manifest" when the appellant shows actual prejudice. *Id.* at 584. The asserted error must have practical and identifiable consequences in the trial court. *Id.* Here, the tribal officer's statement that the photograph depicted someone running into the casino did not have identifiable prejudicial consequences for Rosas-Arenas. Both Finch and Watts saw the suspect running toward the casino. Finch identified Rosas-Arenas as that person. Rosas-Arenas cannot show that the tribal officer's comment caused actual prejudice.

Accordingly, we decline to address Rosas-Arenas's argument that the trial court violated the confrontation clause by admitting Watts' testimony.

B. MOTION FOR CONTINUANCE

Rosas-Arenas argues that the trial court deprived him of his right to present a defense by denying his motion for a trial continuance. We disagree.

The decision to grant or deny a motion for a trial continuance rests within the sound discretion of the trial court. *State v. Downing*, 151 Wn.2d 265, 272, 87 P.3d 1169 (2004). We review a trial court's continuance decision for an abuse of discretion. *Id.* A trial court's decision is an abuse of discretion if it is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. *Id.*

"In exercising discretion to grant or deny a continuance, trial courts may consider many factors, including surprise, diligence, redundancy, due process, materiality, and maintenance of orderly procedure." *Id.* at 273. Further, where the appellant alleges that the trial court's denial of a motion for continuance deprived him or her of the constitutional right to compulsory process, we will reverse only upon a showing that the accused was prejudiced by the denial or that the result of the trial would likely have been different if the trial court had granted the continuance. *State v. Tatum*, 74 Wn. App. 81, 86, 871 P.2d 1123 (1994). This determination must be based on the particular circumstances of the case. *Id.*

Where the defendant had ample time to arrange for a witness's presence, and the witness's testimony is solely impeaching in nature, the trial court generally does not abuse its discretion in denying a recess to secure the witness's presence. *State v. Mays*, 65 Wn.2d 58, 61-62, 395 P.2d 758 (1964). "Denying or admitting evidence in rebuttal . . . rests largely within the discretion of the trial court. *Id.* at 62.

Here, the maintenance of orderly procedure supported the trial court's denial of a continuance because neither the trial court nor certain members of the jury would have been available if the trial had been continued. In addition, defense counsel had anticipated the possibility of calling his investigator as a rebuttal witness, and he knew the limited availability of his investigator and the scheduling limitations of the trial court and the jurors when he agreed to begin the trial.

Finally, Rosas-Arenas has not demonstrated that the investigator's testimony would have been material, that the failure to grant a continuance prejudiced him, or that the trial outcome likely would have been different if it had been granted. He did not make a formal offer of proof or explain in the trial court or on appeal what testimony his investigator would provide. The

defense interview was not transcribed, so it is unclear whether Finch's testimony actually was inconsistent with his interview.

We hold that Rosas-Arenas has failed to demonstrate that the trial court abused its discretion by denying his motion for a continuance.

C. CUMULATIVE ERROR

Rosas-Arenas argues that cumulative errors denied him a fair trial. Under the cumulative error doctrine, the defendant must show that the combined effect of multiple errors requires a new trial. *Clark*, 187 Wn.2d at 649. Here, Rosas-Arenas has not demonstrated multiple errors. Therefore, we hold that the cumulative error doctrine is inapplicable.

D. IMPOSITION OF LFOS

Rosas-Arenas argues in a supplemental brief that under recently enacted legislation, we should strike the criminal filing fee and DNA collection fee the trial court imposed on him. The State concedes that these LFOs should be stricken. We agree.

The trial court imposed as mandatory LFOs a $200 criminal filing fee and a $100 DNA collection fee. In 2018, the legislature enacted House Bill 1783, Laws of 2018, chapter 269. HB 1783 amended (1) RCW 36.18.020(2)(h), which now prohibits imposition of the criminal filing fee on an indigent defendant; and (2) RCW 43.43.7541, which established that the DNA collection fee no longer is mandatory if the offender's DNA previously had been collected because of a prior conviction. The Supreme Court in *State v. Ramirez* held that HB 1783 applies prospectively to cases pending on direct appeal. 191 Wn.2d 732, 749-50, 426 P.3d 714 (2018).

Here, the trial court found that Rosas-Arenas was indigent at the time of sentencing. Therefore, under the current version of RCW 36.18.020(2)(h), the criminal filing fee imposed upon Rosas-Arenas must be stricken. In addition, the State's records show that Rosas-Arenas's

DNA was previously collected. Therefore, under the current version of RCW 43.43.7541, the DNA collection fee imposed upon Rosas-Arenas must be stricken.

CONCLUSION

We affirm Rosas-Arenas's conviction, but we remand for the trial court to amend the judgment and sentence and strike the criminal filing fee and the DNA collection fee.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Maxa, C.J.
MAXA, C.J.

We concur:

J.
LEE, J.

Melnick, J.
MELNICK, J.