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NO. 53654-4-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,

Respondent,

v.

JAMES S. ROCHA,

Appellant.

BRIEF OF APPELLANT,
JAMES S. ROCHA

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY
THE HONORABLE CAROL MURPHY, JUDGE

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I. INTRODUCTION

On March 20, 2019, James S. Rocha was required to appear in Thurston County Superior Court for an omnibus hearing. His case was called at 11:48AM. The clerk notes reflect that he was not present in the courtroom at that time. The superior court judge entered an order for a bench warrant on March 20, 2019, and a warrant was issued on April 2, 2019. Mr. Rocha reappeared two days later, on April 4, 2019.

That same morning, on March 20, 2019, Mr. Rocha was also required to appear in Thurston County District Court. He presented to the counter at district court at 11:53AM. District court and superior court are located in different buildings in the same complex in Thurston County.

The state charged Mr. Rocha with bail jumping for failing to appear at the superior court omnibus hearing. At trial, Mr. Rocha sought to introduce evidence from district court about his whereabouts on the morning of March 20, 2019. However, the trial court excluded this evidence pursuant to ER 403, finding that it would confuse the jury. This Court should reverse because the trial court violated Mr. Rocha's constitutional right to present a defense.

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II. ASSIGNMENT OF ERROR

The trial court erred by excluding evidence from Thurston County District Court about Mr. Rocha's whereabouts on the morning of March 20, 2019.

III. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Did the trial court violate Mr. Rocha's constitutional right to present a defense to the charge of bail jumping by excluding evidence of his whereabouts on the morning in question?

IV. STATEMENT OF THE CASE

On September 28, 2018, James S. Rocha was charged with residential burglary and violation of a no-contact order in Thurston County, Washington. Ex. 2-A. He was arraigned on November 13, 2018 and pled not guilty. CP 9.

Mr. Rocha returned to court for a hearing on February 21, 2019. 2/21/19 RP at 3. At that time, the superior court set a date for an omnibus hearing on March 6, 2019. *Id.* at 7. The court entered an order on conditions of release for Mr. Rocha. Ex. 3. On March 6, 2019, the omnibus hearing was continued to March 20, 2019 at 10:30AM. 3/6/19 RP at 5; Ex. 4.

On March 20, 2019, Mr. Rocha's omnibus hearing was called at 11:48AM, at Thurston County Superior Court. Ex. 5. Mr. Rocha was not present at that time. 3/20/19 RP at 3. The superior court entered an order

for a bench warrant. Ex. 6. A bench warrant was issued nearly two weeks later, on April 2, 2019. Ex. 7. Mr. Rocha returned to custody shortly thereafter, on April 4, 2019. Ex. 8.

Mr. Rocha had another court hearing on March 20, 2019, at Thurston County District Court. Ex. 15. The district court hearing was scheduled for 8AM. *Id.* Mr. Rocha appeared at district court at 11:53AM.¹ *Id.* In Thurston County, district court and superior court are located in different buildings within the same complex. 5/29/19 RP at 178.

On April 2, 2019, the state filed an amended information, adding a charge of bail jumping.² CP 46-47. Trial was held on May 28, 29, and 30, 2019. CP 141-44. Mr. Rocha was acquitted of the burglary and no-contact order violation charges but convicted of bail jumping. 5/31/19 RP at 409-10.

Only one witness testified about the bail jumping charge. Lindsey Millar, a deputy prosecuting attorney in Thurston County, was present in superior court on March 20, 2019. 5/29/19 RP at 152, 166-67. She handled Mr. Rocha's hearing but did not have an independent recollection about the

¹ The case docket note says that Mr. Rocha appeared "at counter" at district court. Ex. 15.

² The state also amended the information to add additional counts of violation of a no-contact order. CP 70-72, 86-87.

events of that morning. *Id.* at 183-84. She testified about the clerk's minutes and the orders entered on March 20, 2019. *Id.* at 166-68.

Ms. Millar testified about her usual practice at an omnibus calendar in Thurston County. *Id.* at 163-65. The docket begins at 10:30AM. *Id.* at 164. At that time, the superior court judge usually addresses all persons present and tells them not to leave the courthouse until their case is called. *Id.* at 185. Some dockets have more than 100 cases calendared, and the courtroom typically has numerous defendants, attorneys, and interested parties present. *Id.* at 178. Ms. Millar testified that it is her practice to wait until defense counsel is prepared to proceed with an omnibus hearing. *Id.* at 168. This could result in the hearing being called later in the calendar, closer to noon. *Id.* at 168, 175.

Ms. Millar testified about the clerk's minutes and the order for a bench warrant entered on March 20, 2019. *Id.* at 166-68, 173-76. She said that these documents established that Mr. Rocha was not present in the superior court courtroom at 11:48AM on March 20, 2019. *Id.* at 168, 175-76. However, Ms. Millar testified that she had never met Mr. Rocha and would not have recognized him. *Id.* at 184. She admitted that it was possible Mr. Rocha was present in court that morning without her knowledge. *Id.* That morning, there were about 57 matters on the omnibus docket. *Id.*

At trial, Mr. Rocha attempted to introduce evidence about his whereabouts on the morning of March 20, 2019. *Id.* at 200. According to clerk's notes, he was at the counter at Thurston County District Court at 11:53AM. Ex. 15. Mr. Rocha attempted to call a district court employee as a witness to authenticate this clerk's note. 5/28/19 RP at 7; 5/29/19 RP at 190, 200; CP 67.

The trial court found that this evidence was "very minimally relevant" to show that Mr. Rocha was "in the vicinity of Superior Court" on the morning of March 20, 2019. 5/29/19 RP at 206. However, the court ultimately excluded this evidence pursuant to ER 403. *Id.* at 206-07. The court expressed concern about the usefulness of the evidence to the jury:

I'm concerned that defense counsel may be indirectly arguing for the jury to speculate that appearance in District Court means appearance in Superior Court or that [Mr. Rocha's] appearance in District Court excused somehow the requirement to appear in Superior Court, or that it meant, by itself, that he was in Superior Court prior to going to District Court, and we have no evidence of that.

Id. at 207. The court found the potential for "prejudice," "speculation," and "confusion" outweighed the "minimal relevance of the evidence, including the exhibit [15] and the testimony." *Id.*

On May 31, 2019, the jury convicted Mr. Rocha of bail jumping. 5/31/19 RP at 409. The trial court sentenced him on June 5, 2019. 6/5/19 RP at 4. Given Mr. Rocha's criminal history, his standard sentence range

was 51 to 60 months. *Id.* at 5. The state argued for a sentence at the high end of that range. *Id.* at 6. Mr. Rocha argued for an exceptional downward sentence of 12 months and a day. *Id.* at 11. In the alternative, he argued for a drug offender sentencing alternative (DOSA) or a sentence at the low end of the range, 51 months. *Id.* at 17-18.

Relying on *State v. Akin*, 77 Wn. App. 575, 892 P.2d 774 (1995), Mr. Rocha argued that the relatively short length of his absence—from March 20 to April 4, 2019—was a mitigating factor in this case. *Id.* at 11-13; CP 198-205. He argued that his absence did not significantly delay the case or result in the state being unable to prosecute him for his original charges. 6/5/19 RP at 12. Mr. Rocha also argued that the standard sentence range was clearly excessive in light of his acquittal on all other charges. *Id.* at 14, 17. Mr. Rocha argued that the facts of this case, including his short absence and his presence at district court that same morning, showed that his failure to appear was due to poor time-management skills and not a sophisticated plan to evade authorities. *Id.* at 14-16.

The trial court declined to impose an exceptional downward sentence. *Id.* at 26. The court disagreed with Mr. Rocha’s characterization of the facts, noting that this was not a “unique situation.” *Id.* The court concluded that Mr. Rocha did not immediately turn himself in after missing court. *Id.* at 26-27. Finally, the court found no basis for a DOSA. *Id.* at

28. The court sentenced Mr. Rocha to the low end of the standard range, 51 months incarceration. *Id.* at 29; CP 211. Mr. Rocha appeals. CP 229.

V. ARGUMENT

Mr. Rocha was charged with bail jumping for failing to appear at a superior court hearing on March 20, 2019. At trial, he attempted to introduce evidence showing his whereabouts that morning, but the trial court excluded this evidence.

The court erred because this evidence was relevant, not unduly prejudicial, and crucial to Mr. Rocha's defense. Mr. Rocha had a due process right to present evidence in his defense, guaranteed by both the United States and the Washington Constitutions. U.S. Const. amend. VI; Wash. Const. art. I, § 22; *State v. Hudlow*, 99 Wn.2d 1, 14, 659 P.2d 514 (1983); *Rock v. Arkansas*, 483 U.S. 44, 51, 107 S.Ct. 2704 (1987). Courts review Sixth Amendment claims de novo. *State v. Jones*, 168 Wn.2d 713, 719, 230 P.3d 576 (2010) (citing *State v. Iniguez*, 167 Wn.2d 273, 280-81, 217 P.3d 768 (2009)). This Court should reverse because the trial court violated Mr. Rocha's right to present a defense.

A. Evidence About Mr. Rocha's Whereabouts on the Morning of March 20, 2019 was Crucial to his Defense.

Evidence about Mr. Rocha's whereabouts was necessary to his defense to the charge of bail jumping. The trial court excluded this evidence pursuant to ER 403. However, "ER 403 cannot be used to exclude 'crucial

evidence relevant to the central contention of a valid defense.” *State v. Duarte Vela*, 200 Wn. App. 306, 320, 402 P.3d 281 (2017) (quoting *State v. Young*, 48 Wn. App. 406, 413, 739 P.2d 1170 (1987)).

The accused’s right to due process “is, in essence, the right to a fair opportunity to defend against the State’s accusations.” *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S.Ct. 1038 (1973). The right “to call witnesses in one’s own behalf [has] long been recognized as essential to due process.” *Id.* “Just as an accused has the right to confront the prosecution’s witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process.” *Washington v. Texas*, 388 U.S. 14, 19, 87 S.Ct. 1920 (1967).

A criminal defendant’s right to present witnesses has limits. A defendant must “at least make some plausible showing of how [a witness’s] testimony would have been both material and favorable to his defense.” *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867, 102 S.Ct. 3440 (1982). Additionally, the defendant’s right must yield to “established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.” *State v. Finch*, 137 Wn.2d 792, 825, 975 P.2d 967 (1999) (citing *Chambers*, 410 U.S. at 302).

The Court of Appeals examined the trial court's ability to exclude a defendant's evidence in *Duarte Vela*. 200 Wn. App. 306. In that case, the accused faced charges of second-degree murder but claimed self-defense. *Id.* at 310. The trial court excluded evidence showing why Mr. Duarte Vela was fearful of the victim, including threats made by the victim. *Id.* The state argued that this evidence was properly excluded pursuant to ER 403. *Id.* at 320. The Court of Appeals disagreed and reversed, holding that the evidence "was highly probative of [Mr. Duarte Vela's] defense, and the Sixth Amendment right to present a defense thus requires admitting such highly probative evidence." *Id.* at 320-21.

The state in *Duarte Vela* argued that the evidence in question was weak and thus not probative. *Id.* at 321. The Court rejected this argument, stating that "if the evidence is weak or false, cross-examination will reveal this, and any sting caused by the admission of false evidence not only will be removed, but will invite prejudice to the defendant who introduced such evidence." *Id.* The Court held that the question should be left to the jury: "the trial court should admit probative evidence, *even if suspect*, and allow it to be tested by cross-examination. In this manner, the jury will retain its role as the trier of fact, and *it* will determine whether the evidence is weak or false." *Id.* (emphasis added)

In this case, the state charged Mr. Rocha with bail jumping pursuant to RCW 9A.76.170. At trial, the state had the burden of proving that Mr. Rocha: (1) was charged with a crime; (2) was released by court order with the requirement of a subsequent personal appearance; and, (3) knowingly failed to appear as required. *State v. Pope*, 100 Wn. App. 624, 627, 999 P.2d 51 (2000). A person “acts knowingly” when he is “aware of a fact, facts, or circumstances” or “has information which would lead a reasonable person in the same situation to believe that facts exist.” RCW 9A.08.010(1)(b).

Mr. Rocha sought to introduce evidence that, at the time of the superior court hearing on March 20, 2019, he was in a neighboring building, at Thurston County District Court. This evidence was crucial to his defense, in two ways.

First, the evidence of Mr. Rocha’s whereabouts countered the state’s contention that he failed to appear in superior court. Only one witness testified that Mr. Rocha failed to appear: Ms. Millar, a deputy prosecutor. Ms. Millar admitted that she had not met Mr. Rocha and would not recognize him if she saw him in court. 5/29/19 RP at 184. She also acknowledged that omnibus dockets are busy and can last much of the morning, with numerous defendants, attorneys, and interested parties in the courtroom all at once. *Id.* at 178. Ms. Millar testified that it was possible

Mr. Rocha appeared at superior court sometime between 10:30AM and when his case was called at 11:48AM without her knowledge. *Id.* at 184.

Ms. Millar's testimony, coupled with the district court evidence showing that Mr. Rocha was in the neighboring building that same morning, could lead a jury to reasonably conclude that Mr. Rocha appeared at superior court that morning. At the very least, the district court evidence raises reasonable doubt about whether he appeared. The trial court should have let jurors hear the evidence and decide for themselves.

Second, the district court evidence was crucial to Mr. Rocha's defense because it countered the state's allegation that he "knowingly failed to appear" at superior court. *Pope*, 100 Wn. App. at 627. Reasonable people can make mistakes. A jury could conclude that Mr. Rocha mistakenly appeared at district court instead of superior court on March 20, 2019, especially considering he had hearings in both courts on the same morning.

The trial court decided that this evidence would "invite the jury to confuse District Court with Superior Court." 5/29/19 RP at 201. However, jurors can understand the difference between these two courts and still conclude that a person did not "knowingly" fail to appear and instead made a mistake. The trial court improperly removed this factual decision from the jury, negating Mr. Rocha's ability to raise a defense to the knowledge

element of bail jumping. As explained below, ER 403 does not justify the trial court's decision.

B. The Trial Court Erred by Excluding the District Court Evidence Pursuant to ER 403.

The right to present a defense is subject to the rules of evidence. *Finch*, 137 Wn.2d at 825. However, due process places the burden of proving exclusion on the state: "if relevant, the burden is on the State to show the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial." *State v. Darden*, 145 Wn.2d 612, 622, 41 P.3d 1189 (2002).

The state's interest in excluding prejudicial evidence must "be balanced against the defendant's need for the information sought." *Id.* Relevant information can only be excluded "if the State's interest outweighs the defendant's need." *Id.* This is due to the importance of "the integrity of the truthfinding process and [a] defendant's right to a fair trial." *Hudlow*, 99 Wn.2d at 14. For evidence of high probative value "it appears no state interest can be compelling enough to preclude its introduction consistent with the Sixth Amendment and Const. art. 1, § 22." *Id.* at 16.

Here, the court excluded Mr. Rocha's district court evidence pursuant to ER 403, which states:

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.

ER 403. The court found the evidence to be “minimally relevant” but excluded it due to the potential for “prejudice,” “speculation,” and “confusion.” 5/29/19 RP at 207.

The trial court erred because, as explained above, the district court evidence was necessary for Mr. Rocha to defend against the charge of bail jumping. Additionally, the court erred because there was a low potential for prejudice, speculation, or confusion.

At trial, the state argued that Mr. Rocha’s evidence actually prejudiced him by making the jury aware of his pending district court charges. 5/29/19 RP at 199. However, Mr. Rocha weighed that consideration and still sought to introduce evidence about his whereabouts. Mr. Rocha’s attorney acknowledged that “under different circumstances, there would be more concern from the defense about prejudice to Mr. Rocha” from introducing the district court evidence, but “due to the nature of the [pending charges], there already is information before the jury that suggests very strongly that at one point there was a different criminal pending against Mr. Rocha in District Court.” *Id.* at 204-05. The trial court should have accepted Mr. Rocha’s assessment of potential prejudice and allowed him to present his defense.

“Speculation” and “confusion” also do not justify suppressing Mr. Rocha’s evidence in this case. The trial court expressed concern that the jury might “confuse District Court with Superior Court” or might “speculate that appearance in District Court means appearance in Superior Court.” *Id.* at 201, 207. The court’s concerns were unfounded. Laypeople routinely navigate the difference between district court and superior court, as jurors, pro se litigants, and witnesses. The parties could also emphasize the difference between these courts when examining witnesses and in closing arguments.³ The distinction between district and superior court is a fact of the Washington legal system and not a basis for excluding evidence.

The trial court also expressed concern that the jury might speculate that Mr. Rocha’s “appearance in District Court excused somehow the requirement that he appear in Superior Court.” *Id.* at 207. Alternatively, the court was worried that the jury may infer that Mr. Rocha “was in Superior Court prior to going to District Court, and we have no evidence of that.” *Id.*

The trial court erred because, as explained above, these were reasonable inferences for the jury to make based on the evidence. Had Mr.

³ In fact, one witness, Ms. Millar, already testified about district and superior court, explaining that they were located in different buildings in the same complex. 5/29/19 RP at 178.

Rocha presented evidence that he was in the neighboring building on the morning of March 20, 2019, the jury could reasonably conclude that he was confused about where he needed to be and did not knowingly fail to appear. Alternatively, the jury heard testimony from Ms. Millar that it was possible Mr. Rocha appeared at superior court that morning and she did not realize it. 5/29/19 RP at 184. That evidence, combined with evidence that he was close by that same morning, could create reasonable doubt that Mr. Rocha failed to appear at the superior court hearing.

Either way, these were factual determinations that should have been left to the jury. The trial court erred and violated Mr. Rocha's constitutional right to present a defense by excluding this relevant evidence. This Court must reverse.

VI. CONCLUSION

For the foregoing reasons, Mr. Rocha respectfully requests that this Court reverse his conviction for bail jumping and remand for a new trial.

RESPECTFULLY SUBMITTED this 18th day of November, 2019.



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