

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)
) No. 67373-4-I
 Respondent,)
) DIVISION ONE
 v.)
)
 JEREMY JACOBS,) UNPUBLISHED OPINION
)
 Appellant.) FILED: January 22, 2013
)
 _____)

Appelwick, J. — Jacobs appeals from his convictions for second degree assault with a deadly weapon, felony harassment, and witness tampering. He contends the trial court lacked statutory authority to impose an exceptional sentence, because the State’s notice was untimely. He also argues that his jury trial waiver was invalid and that a breakdown in communication with defense counsel violated his right to counsel. Because the record fails to support his arguments, we affirm.

FACTS

The State charged Jeremy Jacobs with one count of felony harassment (domestic violence) after he allegedly threatened to kill his girlfriend Terri Crow. On August 10, 2010, prior to trial, Jacobs moved to dismiss his court-appointed counsel John Ostermann. Jacobs told the court that he was “not gonna work with” Ostermann any longer and reiterated his objection to a series of prior continuances.

The court indicated it would grant Jacobs’ motion, but warned him that it would likely result in further delay and that he might not be satisfied with the new attorney. In response, Jacobs reconsidered his motion and decided to continue with

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current counsel. The court later denied Jacobs' pro se motion to dismiss for a speedy trial violation.

On September 9, 2010, Ostermann moved to withdraw, citing his belief that communications with Jacobs had broken down. Counsel noted that Jacobs had filed a bar complaint and accused him of dishonesty. Jacobs objected to the withdrawal, claiming that he had filed the complaint only "for my purposes" and that he did not want Ostermann "off my case at this time." Jacobs insisted his primary goal was to go to trial. The court denied counsel's motion.

On September 28, 2010, Ostermann advised the court that he had discussed the matter several times with Jacobs and that Jacobs had decided to waive a jury trial. The court conducted a lengthy colloquy, confirming that Jacobs understood his jury trial rights. At the end of the colloquy, Jacobs again discussed the matter with counsel and decided to continue with a jury trial. Without objection, the State filed an amended information, charging Jacobs with first degree assault (count I), second degree assault (count II), felony harassment (count III), witness tampering (count IV), and deadly weapon enhancements in conjunction with counts I and II.

Trial then began and the court heard testimony on several pretrial matters, including a CrR 3.5 motion and the admissibility of a cell phone video that Jacobs had taken during part of the incident. At the conclusion of the hearing on September 29, 2010, the court ruled that the cell phone video was admissible. At this point, Jacobs informed the court that he was now sure he wanted to waive a jury trial. The

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court granted the motion, and Jacobs executed a written waiver.

The State then moved to compel the defense to provide a copy of its recorded interview with Crow. Up to this point, the State had been unable to find Crow and compel her presence at trial. The defense agreed that the State was entitled to a copy of the interview. After hearing testimony from two more witnesses, the court recessed for the weekend on September 30, 2010.

When trial resumed on October 4, 2010, the deputy prosecutor informed the court that police officers had apprehended Crow and were bringing her to the courtroom to testify. Based on information he had learned from the defense interview of Crow, the deputy prosecutor also moved to amend the information to include a domestic violence “pattern of abuse” aggravating circumstance. See RCW 9.94A.535(3)(h)(i). The defense objected solely on the ground that the aggravating circumstance was too vague. The trial court rejected the objection and granted the motion to amend.

During trial, the State presented evidence that Crow and Jacobs had a long and contentious relationship, including frequent arguments and a history of domestic violence. The charged offenses arose from an incident that occurred during the early morning hours of May 15, 2010.

When Crow returned to the couple’s apartment after work, she found Jacobs intoxicated and upset about an earlier altercation with neighbors. At one point, he grabbed a large butcher knife and poked a hole in a sofa. Jacobs later followed

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Crow into the bedroom and opened the window. He pushed and attempted to lift Crow, threatening to push her out the window. During the altercation, Jacobs began video recording with his cell phone “while yelling at [Crow], berating her, and threatening to kill her and to kill the children.” Jacobs later retrieved what Crow believed to be the butcher knife and began tapping on various pieces of furniture as he threatened to cut her.

The police eventually arrived at the apartment and arrested Jacobs. As they escorted him to the patrol car, he yelled at Crow, “Terri, you’d better not say anything!”

At the conclusion of the evidence, the court found Jacobs guilty of second degree assault – domestic violence (count II), felony harassment – domestic violence (count III), and witness tampering (count IV). The court also found that the State had proved the deadly weapon allegation for count II and the pattern of abuse aggravating circumstance. The court acquitted Jacobs of first degree assault and the associated deadly weapon allegation.

Prior to sentencing, Jacobs moved for a new trial. The court permitted Ostermann to withdraw and appointed new counsel to represent Jacobs for the motion. Jacobs alleged (1) that defense counsel’s representation was constitutionally deficient because of a complete breakdown in communication; (2) that the late notice of the aggravating circumstance violated his right to a fair trial; (3) that his jury trial waiver was not knowing and voluntary; (4) that his waiver of his

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right to testify was not knowing and voluntary; and (5) that the trial court should have suppressed the cell phone video and the butcher knife.

Following an extensive hearing, the court rejected these claims and entered detailed findings of fact and conclusions of law. The court then imposed an exceptional sentence totaling 22 months, based on the pattern of abuse aggravating circumstance.

DECISION

I. Notice

Jacobs contends the trial court exceeded its statutory authority when it imposed an exceptional sentence. He argues the State's failure to provide notice of the domestic violence pattern of abuse aggravating circumstance before trial, in strict compliance with RCW 9.94A.537(1), divested the court of authority to impose an exceptional sentence.

RCW 9.94A.537(1), which the legislature enacted in 2005 as part of a response to Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), provides:

At any time prior to trial or entry of the guilty plea if substantial rights of the defendant are not prejudiced, the state may give notice that it is seeking a sentence above the standard sentencing range. The notice shall state aggravating circumstances upon which the requested sentence will be based.

RCW 9.4A.537(1) directs the State to provide pretrial notice of its intent to prove aggravating circumstances, but does not specify the manner in which that notice

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must be given. State v. Siers, 174 Wn.2d 269, 277, 274 P.3d 358 (2012); see also State v. Womac, 160 Wn.2d 643, 663, 160 P.3d 40 (2007); State v. Edvalds, 157 Wn. App. 517, 532, 237 P.3d 368 (2010), review denied, 171 Wn.2d 1021, 257 P.3d 663 (2011).

Our Supreme Court recently reiterated that

“notice of aggravating circumstances is required as a matter of due process. Due process is satisfied when the defendant receives sufficient notice from the State to prepare a defense against the aggravating circumstances that the State will seek to prove in order to support an exceptional sentence.”

State v. Siers, 174 Wn.2d at 278 (quoting State v. Powell, 167 Wn.2d 672, 682, 223 P.3d 492 (2009), overruled on other grounds by Siers, 174 Wn.2d at 282)). Due process will generally require pretrial notice of aggravating circumstances to allow the defense a sufficient opportunity to plan and prepare an adequate defense. See Siers, 174 Wn.2d at 277. But, Jacobs has not cited relevant authority supporting his claim that any failure to comply with the notice provision of RCW 9.94A.537(1) automatically divests the trial court of authority to impose an exceptional sentence.

Jacobs’ arguments rest solely on the State’s failure to comply strictly with the notice provision of RCW 9.94A.537(1). He does not claim the notice in his case violated due process. And, even if he had raised such a claim, we would reject it.

Defense counsel acknowledged that he was well aware—prior to trial—of the evidence in the defense interview that would support an exceptional sentence. Counsel also expected the State to seek an exceptional sentence once it obtained

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the interview. When the defense provided a copy of the interview to the State after trial had begun, the deputy prosecutor promptly sought to amend the information. Defense counsel then objected only on the basis that the aggravating circumstance was too vague. He did not challenge the timing of the amendment, request a continuance, or allege any prejudice. See State v. Schaffer, 63 Wn. App. 761, 767, 822 P.2d 292 (1991) (defendant's failure to ask for a continuance in response to amended charge during trial creates a presumption of the lack of surprise and prejudice), aff'd, 120 Wn.2d 616, 845 P.2d 281 (1993). The State's notice here satisfied due process.

On the record before us, Jacobs has failed to demonstrate any statutory or constitutional deficiency requiring reversal of his exceptional sentence.¹

II. Jury Trial Waiver

Jacobs also contends his exceptional sentence must be reversed, because the record fails to demonstrate a constitutionally valid waiver of his right to a jury trial on the aggravating factor. He argues his waiver was not knowing and voluntary, because the State had not yet filed the amended information at the time of his waiver and he did not know he had such a right. Jacobs maintains the court erred in concluding that no new waiver was necessary after the State alleged the aggravating factor.

¹ The State claims that Jacobs' challenge to the aggravating circumstance and exceptional sentence is moot, because he has completed the confinement portion of his sentence. Given our decision, we need not address this contention.

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A defendant may waive the right to a jury trial if the waiver is knowing, intelligent, voluntary, and free from improper influences. State v. Stegall, 124 Wn.2d 719, 725, 881 P.2d 979 (1994). The State bears the burden of demonstrating a valid waiver, and absent a record to the contrary, we will not presume the defendant waived the jury trial right. State v. Pierce, 134 Wn. App. 763, 771, 142 P.3d 610 (2006); CrR 6.1(a). Although not determinative, a written waiver is strong evidence that a defendant validly waived a jury trial. Pierce, 134 Wn. App. at 771. The trial court need not engage in an extended colloquy; the only requirement is a personal expression of waiver by the defendant. Stegall, 124 Wn.2d at 725. We review the trial court's decision to accept the defendant's jury trial waiver de novo. State v. Ramirez-Dominguez, 140 Wn. App. 233, 239, 165 P.3d 391 (2007).

When trial began on September 28, 2010, defense counsel informed the court that he had discussed the matter with Jacobs several times and that Jacobs had decided to waive a jury trial. The court then engaged in a lengthy colloquy with Jacobs about the consequences of a jury trial waiver, repeatedly referring to Jacobs' right to have a jury determine "this case." Jacobs repeatedly acknowledged his understanding of his rights, and then asked for more time to discuss the matter with counsel. After a recess, Jacobs informed the court that he wanted to proceed with a jury trial. The State then amended the information to allege three additional counts and two deadly weapon enhancements, and the court heard testimony on pretrial motions.

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On the following day, after the court made several rulings, Jacobs advised the court that that he wanted to waive his right to a jury trial. Jacobs acknowledged that he was “really sure” and that he wanted to proceed to trial “just in front of the bench.” Defense counsel then informed the court that he was “quite confident” that Jacobs’ waiver was knowing and voluntary. Jacobs also signed a written waiver.

Jacobs maintains that his waiver was not knowing and voluntary, because nothing in the record establishes that he was expressly advised of his right to a jury trial on aggravating circumstances. He cites no relevant authority to support this proposition under the circumstances present here.

Defense counsel testified extensively at the time of Jacobs’ motion for a new trial, both as a witness in the courtroom and by means of a transcribed interview. He acknowledged that he did not discuss the potential aggravating circumstance in great detail with Jacobs or expressly advise him of the right to a jury trial on the aggravating factor. Counsel testified, however, that he expected the State to pursue the pattern of abuse aggravating circumstances once it reviewed the allegations that Crow made during the defense interview. Counsel also discussed the basis and likelihood of the State’s amendment with Jacobs weeks before trial when he played the defense interview with Crow for Jacobs. Counsel indicated that Jacobs understood the State would have to prove any aggravating circumstance in order to permit the trial court to impose an exceptional sentence.

Under the circumstances, including Jacobs’ understanding of all of the facts

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the State would have to prove at trial and his right to have a jury decide whether the State had proved those facts, the record establishes that Jacobs made a knowing and voluntary jury trial waiver. That waiver necessarily encompassed the entire case. Jacobs fails to demonstrate any error.

III. Breakdown in Communication with Counsel

Jacobs contends that he was unable to participate in the preparation of his defense, because of a breakdown in communication. He argues that the conflict with defense counsel was so severe that it effectively violated his Sixth Amendment right to counsel. He maintains the trial court therefore erred in denying his motion for a new trial.

Generally, when determining whether there are irreconcilable differences between a defendant and counsel that require substitution of counsel, this court considers (1) the extent of the conflict, (2) the adequacy of the trial court's inquiry, and (3) the timeliness of the motion. In re Pers. Restraint of Stenson, 142 Wn.2d 710, 724, 16 P.3d 1 (2001). Here, however, we consider the allegations of a breakdown in communications that Jacobs raised in support of his motion for a new trial. We review the trial court's denial of that motion for an abuse of discretion. State v. Pete, 152 Wn.2d 546, 552, 98 P.3d 803 (2004).

There is no dispute that Jacobs and Ostermann experienced difficulty in communicating prior to trial, in part because of Jacobs' refusal to consider any plea agreement and his objection to any trial continuances. But, Jacobs withdrew his

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motion to dismiss Ostermann and strenuously objected to Ostermann's motion to withdraw.

When assessing the alleged conflict, the trial court considered extensive testimony from both Jacobs and Ostermann, as well as its own observations in the courtroom. Jacobs flatly denied that Ostermann discussed the nature of the additional charges, the potential punishment, or any meaningful aspects of trial strategy. He further claimed that counsel ignored his request to file a motion to suppress and his request to testify. Jacobs also contradicted some of the representations that he had made to the trial court in conjunction with the jury trial waiver.

Ostermann's testimony indicated that despite the strained relationship, he and Jacobs had communicated effectively during trial about strategy, the likelihood of conviction, and the potential charges and punishment, including the deadly weapon enhancements and the aggravating circumstance. The trial court found Ostermann's testimony on these issues "considerably more credible than Jacobs' testimony." We necessarily defer to the trier of fact on questions of conflicting testimony, witness credibility, and the persuasiveness of the evidence. State v. Thomas, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004).

Substantial evidence supports the trial court's findings that

[b]y the time the case was assigned out for trial before the undersigned, the relationship between Jacobs and Osterman[n] had improved considerably. Jacobs and his attorney were able to, and did,

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communicate effectively, and Jacobs commented to his mother over the telephone that he believed that Osterman[n] was indeed acting effectively on Jacobs' behalf during pretrial motions and at trial. The undersigned also observed that the interactions between Jacobs and Osterman[n] during the pretrial hearings and during the course of the ultimate bench trial appeared to be uniformly cordial, positive, and cooperative. There was no indication in the undersigned's presence that there was hostility or conflict of any sort between Jacobs and Osterman[n]. Jacobs never brought any perceived conflict to the attention of the trial judge. Osterman[n] also testified that he felt he had a good working relationship with his client during the course of the trial.

The court's findings, in turn, support the conclusion that the relationship between Jacobs and Ostermann did not deny Jacobs his right to counsel. The trial court did not abuse its discretion in denying Jacobs' motion for a new trial.

Affirmed.

WE CONCUR:

Cox, J.

Appelwick, J.
Becker, J.