IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JOHNNY CASSANOVA TWITTY, Appellant.	No. 38539-2-II UNPUBLISHED OPINION

Quinn-Brintnall, J. — A jury found Johnny Cassanova Twitty[1] guilty of first degree assault, first degree unlawful possession of a firearm, and attempted first degree murder. Twitty appeals, arguing that the trial court engaged in an ex parte communication with a witness and that it improperly excluded evidence relevant to his self-defense claim. In a statement of additional grounds for review (SAG),[2] Twitty further argues that the trial court improperly excluded evidence of the victim's violent behavior that would have supported his claim of self-defense. Because the trial court did not engage in an ex parte communication, Twitty failed to preserve his evidentiary challenges for review, and his SAG issue lacks merit, we affirm.

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[1] Twitty has several aliases including Johnny Taylor, Troy Dieon Hardin, and Omar Twitty.

[2] RAP 10.10.

FACTS

This case concerns a shooting that occurred in the early morning hours on October 3, 2007, outside of Oh! Gallagher's, a bar located near Lakewood, Washington. Larry Mahone was shot approximately five to seven times. As a result, he lost function in both hands and part of his intestine had to be removed.

The facts of the shooting were heavily controverted at trial. Twitty and Mahone disputed which of them had provoked the shooting, who had initially pulled the gun, and whether the two had struggled for control of the gun. They did not dispute that a single gun was used during the shooting. In addition, Twitty testified that, at one point, he had control of the gun and that he fired the gun several times at the pavement to scare Mahone. Twitty also admitted during his trial testimony that, after the shooting, he and a friend drove off in Twitty's girl friend's car and that one of them placed the gun in the back of the car.

Around 2:50 am on October 3, Trooper Ryan Durbin of the Washington State Patrol spotted Twitty's girl friend's car with its hazard lights on partially blocking westbound State Route 16 near the Sprague Avenue exit. Durbin arrested Twitty and his friend and then impounded the car. On October 4, police executed a search warrant for the vehicle and found a Hi-Point 9 mm pistol with an empty magazine in the car's backseat/hatchback area. Ballistics testing later confirmed that seven shell casings found in the parking lot outside Oh! Gallagher's were fired from this 9 mm pistol.

Procedural Facts

On October 4, the State charged Twitty with one count of first degree assault and one count of first degree unlawful possession of a firearm. A nine-day jury trial commenced on

September 15, 2008. On September 16, the State presented to the court an amended information adding one count of attempted first degree murder, which the court accepted. The State filed multiple motions to exclude evidence, but only a few motions in limine are relevant to this appeal.

The State moved to exclude evidence of a backpack seized during the execution of a search warrant for Mahone's car containing (1) Adrian Serrano's identification, (2) drugs, (3) drug paraphernalia, and (4) a .45 caliber pistol. The trial court granted the State's motion to suppress the backpack and its contents, finding the evidence irrelevant to Twitty's self-defense claim.

Because the State did not intend to try the case as a gang-related incident, it also moved to suppress evidence of Mahone's alleged membership in the Lakewood Hustlers gang. Specifically, the State moved to suppress (1) items seized during the execution of a search warrant for Mahone's personal storage unit, including pictures of people flashing gang signs; (2) references to Mahone's alleged gang nicknames of "Little Lakewood" and "C-Money" (1 Report of Proceedings (RP) at 170); and (3) hearsay statements of an Oh! Gallagher's employee claiming Mahone talked about a conflict between the Lakewood Hustlers and the Hilltop Crips and that the Hilltop Crips were looking for Mahone in retaliation for an "earlier incident." 1 RP at 170. Although Twitty did not object to the exclusion of the hearsay statements, he argued that the other evidence was relevant and should be admitted. The trial court excluded the gang evidence but indicated that it would revisit its ruling if Twitty testified and the evidence became relevant to whether Twitty had a reasonable fear or apprehension of Mahone necessary to establish Twitty's self-defense claim.

On Monday, September 22, to the surprise of the State, defense counsel, and the trial

court, Twitty arrived at court in a wheelchair wearing jail-issued pants. The jury had been sworn and opening statements were scheduled to begin that morning. On the preceding Friday, Twitty had undergone surgery for an abdominal hernia and had been prescribed Vicodin for pain. Twitty had taken some Vicodin just before coming to court. The State called the jail clinic to try to learn more about Twitty's surgery, but it could not obtain information without a medical release from Twitty. To get more information about Twitty's medical status and his capacity to stand trial, the trial judge recessed the court, saying, "Well, we need to get some calls over to the jail and see which medical staff is over there and available to come over, address these issues. I'll send an e-mail to folks over there and see if we can get a response." 2 RP at 204-05.

After the recess, the judge informed the parties that he had spoken with someone at the jail who indicated that Dr. Miguel Balderrama, the medical director of the Pierce County jail, would review Twitty's chart and contact the trial court regarding Twitty's ability to stand trial. The judge told the parties that he had asked for answers to several questions, including "whether or not there was another medication that could be given to Mr. Twitty in lieu of Vicodin that potentially would have a lesser effect, whether or not they could change the time that he's given his drugs, et cetera." 2 RP at 205.

After another recess, the judge told the parties,

> I had a conversation with Doctor Balderrama, who has indicated that the procedure that Mr. Twitty had was a minor procedure to drain some fluid, that he's on a low dosage of Vicodin, this shouldn't affect his ability to participate in the trial at all.
>
> But I have asked that Mr. Twitty be returned to the jail now. Doctor Balderrama will meet with him and make sure he's not suffering any effects from the drug or other conditions that would prevent him from participating in trial. And Doctor Balderrama indicated he would be available at 1:30 to address those concerns, make a record of it. So, he's there ready to see Mr. Twitty at this time.
>
> Okay?

> . . . .
> . . . I anticipate going forward at 1:30. [Dr. Balderrama] indicated he could also change the medication such that [Twitty's] taking it nighttime only, wouldn't be under the effect of any of the drugs during the day and may look at a non-narcotic pain reliever, if needed.

2 RP at 206-07.

Dr. Balderrama subsequently testified, corroborating the judge's description of their conversation. Balderamma also testified that after he examined Twitty, Twitty agreed to use a non-narcotic pain medication during daytime hours. Balderrama concluded that, given the change in the daytime medications and that the low dose of Vicodin from that morning had already worn off, Twitty could immediately and fully participate in his trial. Opening statements and the State's case in chief began shortly thereafter. The trial court noted at the end of the first day of trial, September 22, that it had no concerns about Twitty's ability to fully participate in his trial as evidenced by his reviewing documents, taking notes, and conversing with his attorney during the trial that day.

The jury found Twitty guilty of all three counts as charged. It also entered special verdicts finding that Twitty committed first degree assault and attempted first degree murder while armed with a firearm. The trial court sentenced Twitty to 376 months confinement and 24 to 48 months of community custody on the attempted first degree murder conviction with a firearm enhancement. The trial court imposed a 75-month concurrent sentence on the unlawful possession of a firearm conviction. Twitty timely appeals.[3]

[3] Twitty raises no sentencing issues in this appeal.

ANALYSIS

Ex Parte Communication

Twitty first contends that Judge Orlando violated the Code of Judicial Conduct (CJC)[4] by engaging in an ex parte communication with Dr. Balderrama and creating an appearance of unfairness in the proceeding. The State argues that the judge's conversation with Balderrama does not qualify as an ex parte communication because the parties had notice of the conversation before it occurred. The State also argues that the conversation did not prejudice Twitty's case and that the judge engaged in the conversation for the benefit of both parties. We agree with the State.

Ex parte communications are communications to or from a judge "'[d]one or made at the instance and for the benefit of one party only, and without notice to, or argument by, any person adversely interested.'" *State v. Watson*, 155 Wn.2d 574, 579, 122 P.3d 903 (2005) (quoting Black's Law Dictionary 616 (8th ed. 2004)). Ex parte communications generally occur "during a proceeding, regarding that proceeding, [and] without notice to a party." *Watson*, 155 Wn.2d at 579.

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[4] The CJC provides,

> Judges should accord to every person who is legally interested in a proceeding, or that person's lawyer, full right to be heard according to law, and, except as authorized by law, neither initiate nor consider ex parte or other communications concerning a pending or impending proceeding. Judges, however, may obtain the advice of a disinterested expert on the law applicable to a proceeding before them, by amicus curiae only, if they afford the parties reasonable opportunity to respond.

CJC 3(A)(4).

The power to discipline a judge is conferred by the State's constitution on the Supreme Court alone, which reviews findings and recommendations made by the state Judicial Conduct Commission. *In re Kaiser*, 111 Wn.2d 275, 279, 759 P.2d 392 (1988) (citing Const. art. 4, § 31 (amend. 71)). Accordingly, although we acknowledge Twitty's stated issue, we address it as an alleged violation of the right to due process and confrontation.

Here, the parties had notice of the trial court's intent to communicate with Dr. Balderrama *before* the conversation took place. First, the judge informed the parties of his intent to contact the jail's medical facility *before* he made that contact. After a recess during which the judge called and spoke to jail facility staff, the trial court came back on the record and in open court the judge told both parties of an *upcoming* conversation he intended to have with Balderrama. Neither party objected to the judge contacting Balderrama. After the conversation, the judge, on the record, informed the parties of the content of his phone call conversation with Balderrama. Balderrama ultimately testified in open court and his description of his conversation with the judge was consistent with the judge's earlier description of their communication. Twitty challenges the trial court's communication only with Balderrama. The record clearly shows that the judge notified both parties that he intended to discuss Twitty's medical condition and his capacity to stand trial with Balderrama *before* the conversation occurred and that neither party objected.

In addition, the judge's communication was not "'for the benefit of one party only.'" *Watson*, 155 Wn.2d at 579 (quoting Black's, *supra*, at 616). The judge inquired into Twitty's capacity to participate in the trial to benefit Twitty by ensuring his constitutional right to a fair trial. Moreover, the communication benefited the State by ensuring judicial resources were not wasted on a mistrial should a reason to doubt Twitty's competence be revealed.[5]

Because both parties had notice before the communication occurred and because the

[5] RCW 10.77.050 states, "No incompetent person shall be tried, convicted, or sentenced for the commission of an offense so long as such incapacity continues." RCW 10.77.060 allows a trial court to sua sponte request medical evaluations of a defendant when there is a reason to doubt his or her competency to stand trial.

communication was not conducted for the benefit of one party but to ensure the integrity of the court's proceedings, the judge's communication with Dr. Balderrama does not qualify as an ex parte communication. Accordingly, the trial court did not deprive Twitty of the right to confront Balderrama nor did it demonstrate an appearance of bias or unfairness against any party.

Under the appearance of fairness doctrine, a judicial proceeding is valid only if a reasonable person, who knows and understands all the relevant facts, would conclude that the parties received a fair, impartial, and neutral hearing. *State v. Gamble*, 168 Wn.2d 161, 187, 225 P.3d 973 (2010); *Sherman v. State*, 128 Wn.2d 164, 206, 905 P.2d 355 (1995). One claiming an appearance of fairness violation has the burden to provide evidence of a judge's actual or potential bias. *Gamble*, 168 Wn.2d at 187-88; *State v. Post*, 118 Wn.2d 596, 619, 826 P.2d 172, 837 P.2d 599 (1992); *State v. Perala*, 132 Wn. App. 98, 113, 130 P.3d 852, *review denied*, 158 Wn.2d 1018 (2006).

Twitty has failed to show actual or potential judicial bias. In this case, the judge communicated with Dr. Balderamma to garner accurate information regarding any impact Twitty's medication may have had on his ability to assist his attorney in presenting his defense. Viewed in this light, it is clear that the trial court's communication protected Twitty's constitutional rights to participate fully in his defense. Moreover, the challenged communication did not implicate the merits of Twitty's defense or his case. Thus, the communication did not, nor could it have, prejudiced Twitty. Even if the judge's contact with Balderrama could be characterized as ex parte, a characterization that we do not adopt, nonprejudicial ex parte communications do not warrant a reversal. *Rice v. Janovich*, 109 Wn.2d 48, 63, 742 P.2d 1230 (1987); *State v. Caliguri*, 99 Wn.2d 501, 508, 664 P.2d 466 (1983).

Excluded Evidence

Twitty next argues that the trial court erred by excluding evidence of (1) the gun found in a backpack in Mahone's car after the shooting and (2) Mahone's alleged gang affiliation with the Lakewood Hustlers.[6] Twitty argues that this evidence would have supported his self-defense jury instruction and that its exclusion deprived him of his constitutional right to a fair trial. These assigned errors are not properly preserved for our review.

A criminal defendant has a constitutional right to present relevant, admissible evidence in his defense. *State v. Rehak*, 67 Wn. App. 157, 162, 834 P.2d 651 (1992), *review denied*, 120 Wn.2d 1022, *cert. denied*, 508 U.S. 953 (1993). "'[A] criminal defendant has no constitutional right to have irrelevant evidence admitted in his or her defense. *State v. Maupin*, 128 Wn.2d 918, 925, 913 P.2d 808 (1996) (quoting *State v. Hudlow*, 99 Wn.2d 1, 15, 659 P.2d 514 (1983)). Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. ER 402 provides, "All relevant evidence is admissible, except as limited by constitutional requirements or as otherwise provided by statute, by these rules, or by other rules or regulations applicable in the courts of this state. Evidence which is not relevant is not admissible." The right of a criminal defendant to present evidence is not unfettered and the refusal to admit evidence lies largely within the trial court's sound discretion. *Rehak*, 67 Wn.

[6] Twitty also claims that the trial court erred by excluding evidence that "(1) Mr. Mahone approached Mr. Twitty with information regarding a gang dispute; [and] (2) that Mr. Mahone wanted to know if Mr. Twitty had a gun because Mr. Mahone anticipated a gun battle with the Crips." Br. of Appellant at 18. However, the record reflects that the jury heard and considered this evidence as part of Twitty's testimony during the State's cross-examination and impeachment of him. Although the trial court struck some of Twitty's testimony, the instruction to the jury did not preclude its consideration of these two portions of Twitty's testimony.

App. at 162.

We review a trial court's decision to admit or exclude evidence under an abuse of discretion standard. *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds or reasons. *Powell*, 126 Wn.2d at 258. When a trial court makes an expressly tentative evidentiary ruling on a motion in limine and a defendant fails to seek a final ruling later at trial, the defendant waives any error in the admission or exclusion of the evidence. *State v. Carlson*, 61 Wn. App. 865, 875, 812 P.2d 536 (1991), *review denied*, 120 Wn.2d 1022 (1993); *see State v. Riker*, 123 Wn.2d 351, 369, 869 P.2d 43 (1994).

As an initial matter, we note that none of the trial court's decisions prevented Twitty from presenting his self-defense claim. Twitty presented his own testimony regarding the facts of the incident and called a witness whose testimony corroborated some of Twitty's testimony. This evidence offered in Twitty's defense sufficiently supported a self-defense jury instruction which the trial court gave.

Moreover, Twitty did not preserve his challenge to the exclusion of the gun recovered from the backpack found in Mahone's car. The trial court made a preliminary ruling excluding this evidence but explicitly stated that it would revisit its decision following Twitty's testimony if it became relevant to Twitty's self-defense claim. Twitty did not renew his request to admit the evidence and, thus, he failed to preserve his objection to the trial court's ruling excluding it. *Carlson*, 61 Wn. App. at 875; *see Riker*, 123 Wn.2d at 369. At trial, Twitty never made an offer of proof nor requested that the gun found in Mahone's car be admitted into evidence. Moreover, all the testimony about the incident, including Twitty's, established that only one gun—the one

found in Twitty's girl friend's car—was used. There was no testimony that Twitty was aware of another gun during the incident and the gun was not found in Serrano's backpack in Mahone's car until *after* the shooting. Clearly, evidence of a gun that was neither seen nor used during the incident in question would be more prejudicial than probative and the trial court properly excluded it.

Twitty also failed to preserve any error related to the trial court's decision to exclude evidence of Mahone's alleged affiliation with the Lakewood Hustlers. The trial court issued a preliminary pretrial ruling excluding evidence of Mahone's gang affiliation but reserved the right to revisit the issue in light of self-defense evidence, including Twitty's testimony admitted during trial. At trial, Twitty did not make an offer of proof or renew his request to admit additional evidence of Mahone's alleged gang monikers or the belt buckle with an "L" on it that Twitty initially had argued was gang-related. 1 RP at 169. In light of the preliminary nature of the trial court's rulings, Twitty waived the right to raise this issue when he did not accept the trial court's offer to renew his evidentiary requests. *Carlson*, 61 Wn. App. at 875; *see Riker*, 123 Wn.2d at 369.

SAG Argument

In his SAG, Twitty argues that the trial court erred by preventing him from presenting testimony of Mahone's alleged quarrelsome or violent behavior that would have supported his self-defense jury instruction. Our review of the record reveals that Twitty never attempted to present such evidence at trial. Accordingly, Twitty's argument fails.

The trial court's review of Twitty's medical condition safeguarded Twitty's right to assist his counsel and participate fully in his defense during trial and its evidentiary rulings were correct or not preserved for our review. Accordingly, we affirm.

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 pursuant to RCW 2.06.040, it is so ordered.

QUINN-BRINTNALL, J.

We concur:

BRIDGEWATER, P.J.

ARMSTRONG, J.