IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. SAMUEL A. BELDEN, Appellant.	No. 39190-2-II UNPUBLISHED OPINION

Worswick, A.C.J. — Samuel A. Belden appeals his second degree assault conviction, arguing that the State's failure to turn over a 911 tape in discovery violated his right to effective assistance of counsel. He also asks this court to correct the judgment and sentence, which contains a clerical error erroneously specifying that he was convicted by plea. We affirm Belden's conviction, but remand for correction of the scrivener's error.

FACTS

On April 27, 2008, Samuel Belden assaulted Janice Graves. At the time, Graves was living with Belden's girl friend, Angela Hohnsbehn. Belden lived in a trailer nearby. On the date of the crime, Graves intervened in an argument between Belden and Hohnsbehn. Graves's intervention led to an argument between Belden and Graves. Belden then shoved Graves causing her to fall down. In the fall Graves fractured her wrist, which required two surgeries to repair.

On August 14, the State charged Belden with second degree assault. On November 17, defense counsel filed a discovery demand pursuant to CrR 4.7. This demand included a request

for any 911 tapes. The State did not respond to the demand for 911 tapes, as defense counsel did not follow the usual practice of providing the State with a blank CD or tape. At trial, on March 31, 2009, the State attempted to introduce into evidence a 911 tape, which was a recording of Graves's report of Belden's assault. Defense counsel objected because the State had not delivered a copy of the tape as requested in the discovery demand. Defense counsel also objected on hearsay grounds. Outside the presence of the jury, the State admitted that it had not responded, but asserted that it is standard practice for defense counsel to include a blank tape or CD whenever defense counsel requests a copy of a 911 tape. Defense counsel countered that the State normally responds to 911 tape requests by specifying whether they want a tape or CD. Defense counsel did not believe it was his responsibility to follow up when the State failed to respond.

Still outside the presence of the jury, the trial court noted that Denise Severson of the Law Enforcement Support Agency appeared on the State's witness list. The trial court asked whether Severson's presence on the witness list should have given defense counsel notice that the State planned to introduce a 911 tape. Defense counsel responded that the State often does not call all the witnesses on the witness list. Because the State had not responded to the demand for the 911 tape, defense counsel assumed that the State did not plan to introduce the 911 tape, despite Severson's inclusion on the witness list. The State, following the same line of reasoning, argued that defense counsel's initial discovery demand often contains irrelevant items. The trial court pointed out that Belden's discovery demand included such an irrelevant item, a spurious request for the State to "produce . . . [the] criminalist who performed the drug and/or chemical analysis."

Verbatim Report of Proceedings (VRP) (Mar. 31, 2009) at 105.

Based on these arguments, the trial court found that the State had technically violated the discovery rules. However, the trial court found that the violation itself did not create any prejudice. The trial court noted that any prejudice could have been cured by defense counsel following up with a blank tape, or asking to listen to the original tape without making a copy. As such, the trial court overruled Belden's objection based on the discovery violation. Before recalling the jury, the trial court played the tape to determine if it was admissible hearsay. Defense counsel did not argue that the tape's contents were an unfair surprise, and did not request a continuance or any other remedy after hearing the tape. The trial court ruled that the tape was admissible as an excited utterance. The trial court recalled the jury, and the State played the 911 tape in the jury's presence.

At the end of the day on March 31, the trial court asked whether Belden would recall Graves to testify about the 911 tape. Defense counsel replied that he would not recall Graves because he had only two more questions for her. Defense counsel decided that it was not worth the difficulty of bringing Graves to the court by taxi or bus for just two questions. The next day, the jury found Belden guilty of second degree assault. At a sentencing hearing on April 10, the court sentenced Belden to 13 months. The trial court's judgment and sentence, however, had a box checked showing that the defendant was found guilty by plea, not jury verdict. Belden appeals.

ANALYSIS

I. Discovery Violation—Preservation for Review

First, as a threshold matter, this court must determine whether Belden preserved the State's discovery violation for review. The State argues that Belden did not properly preserve the issue. The State cites *State v. Boot*, 40 Wn. App. 215, 220, 697 P.2d 1034 (1985), for the proposition that "[f]ailure to raise the issue below waives the right to assign error to the violation on appeal." In *Boot*, the trial court ordered the State to hold a lineup pursuant to CrR 4.7, and the State did not do so. 40 Wn. App. at 218-19. However, the defendant "did not attempt to enforce the lineup order before or during trial." 40 Wn. App. at 219. The *Boot* court held that parties "should raise noncompliance with the discovery rules 'during the course of the proceedings.'" 40 Wn. App. at 220 (quoting CrR 4.7(h)(7)(i)). Because the defendant did not raise the discovery violation before or during trial, the *Boot* court found that the defendant had waived the issue. 40 Wn. App. at 220. Here, in contrast, Belden raised the issue at trial, when the State sought to admit the 911 tape into evidence. As such, Belden has not waived the issue under *Boot*.

"[T]o preserve an error for appeal, counsel must call it to the trial court's attention so the trial court has an opportunity to correct it." *In re Detention of Strand*, 139 Wn. App. 904, 910, 162 P.3d 1195 (2007), *aff'd*, *Strand*, 167 Wn.2d 180, 217 P.3d 1159 (2009). Belden met this standard at trial by objecting to the State's discovery violation when the State sought to admit the 911 tape. This gave the trial court the opportunity to correct the violation. As such, Belden properly preserved the discovery violation issue for trial.

II. Discovery Violation—Infringement of Constitutional Rights

Belden asserts that the State's failure to provide a copy of the 911 tape violated his right

to effective representation and a fair trial. This court reviews a claim of denial of constitutional rights de novo. *State v. Iniguez*, 167 Wn.2d 273, 280, 217 P.3d 768, (2009). In *State v. Boyd*, 160 Wn.2d 424, 434, 158 P.3d 54 (2007), our Supreme Court recognized that "effective assistance of counsel [and] access to evidence . . . are crucial elements of due process and the right to a fair trial." The *Boyd* court also noted that the Fifth Amendment to the United States Constitution requires the State to disclose all evidence material to guilt or punishment. 160 Wn.2d at 434 (citing *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963)). The *Boyd* court further recognized that the right to effective assistance of counsel under the Sixth Amendment requires a reasonable investigation by defense counsel. 160 Wn.2d at 434 (citing *Strickland v. Washington,* 466 U.S. 668, 684, 691, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). But most pertinently to this case, the *Boyd* court held that "[w]here the nature of the case is such that copies are necessary in order that defense counsel can fulfill [its] critical role, CrR 4.7(a) obliges the prosecutor to provide copies of the evidence as a necessary consequence of the right to effective representation and a fair trial." 160 Wn.2d at 435.

Although *Boyd*'s broad holdings support Belden's position, its facts are distinguishable. *Boyd* involved child pornography charges. 160 Wn.2d at 429. At issue was the trial court's ruling that the defendant was not entitled to a copy of a seized hard drive storing incriminating images. 160 Wn.2d at 429-30. The *Boyd* court held that the nature of this evidence required a copy because the defendant's experts might need their own copy to run adequate forensic tests. 160 Wn.2d. at 436. Here, in contrast, the evidence at issue is an audio tape, approximately two minutes long. Belden's defense did not require expert analysis of this tape. In fact, given defense

counsel's decision not to recall Graves, Belden's defense may not have required the tape at all. As such, "the nature of the case" here was not "such that copies [were] necessary" for effective assistance of counsel and a fair trial under *Boyd.* 160 Wn.2d at 435.

Belden also cites *State v. Dingman*, 149 Wn. App. 648, 664, 202 P.3d 388 (2009), *review denied*, *State v. Dingman,* 166 Wn.2d, 1037 (2009), for the proposition that the State may not refuse to convert evidence into a format that the defendant can use. In *Dingman*, sheriffs seized computers from the defendant's house and made mirror image copies of the hard drives using a computer program that the defendant's experts did not have access to. 149 Wn. App. at 654-56. The State refused to convert the hard drive images into a format that the experts could use, arguing in part that converting the drives would take time. 149 Wn. App. at 664. The *Dingman* court rejected the State's arguments, finding that the time-consuming nature of converting the drives was insufficient to justify withholding the evidence in the proper format. 149 Wn. App. at 664. Implicitly finding that the evidence was sufficiently central to the case, the court reversed based on the State's failure to provide appropriately formatted copies. 149 Wn. App. at 664-65.

Here, unlike in *Dingman*, the State did not refuse to copy the evidence. The State simply failed to make a copy when defense counsel did not provide blank media as expected. The instant case is therefore distinguishable from *Dingman*. In further contrast with *Dingman*, the evidence withheld here was not central to Belden's case. As such, *Dingman* does not support the argument that the State's failure to copy the tape violated Belden's right to effective assistance or a fair trial.

Neither *Boyd* nor *Dingman* hold that all discovery violations impact a defendant's right to

effective assistance and a fair trial. Rather, these cases hold that a discovery violation has the *potential* to infringe those rights. Whether a discovery violation actually infringes the defendant's constitutional rights is a question that turns on "the nature of the case," including the type of evidence at issue and its importance to the defendant's case. *Boyd*, 160 Wn.2d at 435. Here, because the evidence withheld did not need to be analyzed by experts, and was not central to Belden's case, the nature of this case is not such that the discovery violation deprived Belden of his right to effective assistance of counsel or a fair trial. As such, Belden's constitutional argument fails.[1]

III. Scrivener's Error

Belden asks this court to correct a scrivener's error in the judgment and sentence. On the first page of the judgment and sentence order, a box is checked showing that Belden was found guilty by plea. Belden asks this court to correct the error. The State concurs. The judgment and sentence order is clearly in error, because Belden was convicted by a jury, not by plea. A trial court has the authority to correct a clerical mistake in a judgment at any time. CrR 7.8(a). The remedy for such a mistake on appeal is remand for the trial court to correct it. *In re Personal Restraint of Mayer*, 128 Wn. App. 694, 701-02, 117 P.3d 353 (2005). As such, although we affirm the conviction, we remand for the trial court to correct the error in the judgment and sentence.

[1] Belden also cites *State v. Dunivin*, 65 Wn. App. 728, 731, 829 P.2d 799 (1992), for the proposition that the State's discovery violation can deprive a defendant of the right to confront his accusers. *Dunivin*, however, turned on the fact that the State's discovery violation prejudiced the defendant's case. *Dunivin,* 65 Wn. App. at 732-34. Because the violation here did not prejudice Belden's case, *Dunivin* does not support Belden's argument.

We affirm, but remand for correction of scrivener's error.

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.

Worswick, A.C.J.

We concur:

Armstrong, J.

Taylor, J.