IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. KEVIN VINSONHALER, Defendant, And DARQUISE CLOUTIER, Appellant.	No. 39395-6-II UNPUBLISHED OPINION

Armstrong, J. – Darquise Cloutier appeals contempt sanctions imposed for her conduct while representing Kevin Vinsonhaler on burglary and theft charges. We affirm.

Facts

The State charged Vinsonhaler with residential burglary and third degree theft, based on allegations that he stole a water heater from an uninhabitable mobile home. At trial, the State moved to exclude any evidence that Timothy Grace, a maintenance man at the mobile home park, gave Vinsonhaler permission to enter the home and take the water heater. Grace was found dead in a nearby mobile home shortly after Vinsonhaler's arrest; it was unknown how long he had been deceased. In its written motion, the State asked the court to prohibit the defense

> from making any reference to Tim Grace, any statements made by Tim Grace, or any general argument that permission may have been given by someone who is now deceased, during defendant's voir dire, defendant's opening and closing statements, cross-examination of State's witnesses, or direct/re-direct examination of defendant's witnesses.

Clerk's Papers (CP) at 9.

During the hearing on the motion, the State acknowledged that the evidence regarding Grace's alleged permission might be admissible through Vinsonhaler to show his state of mind if he testified. The State argued that the evidence would be hearsay from any other witness and asked the court to prohibit "any mention of this defense whatsoever during Voir Dire, during opening Statements, during questioning of any other witness besides the Defendant." CP at 72. The court granted the State's motion over defense counsel Cloutier's strenuous objections.

During opening argument, the State asserted that Vinsonhaler had no permission to take the water heater from Harold Lee, the mobile home's owner. Cloutier opened her statement by saying that Vinsonhaler believed he had permission to take the heater. When she added that Grace was the maintenance man, the State objected, but the court noted that opening argument was not evidence and instructed Cloutier to move on. Without objection, Cloutier stated that Grace collected rent from tenants at the mobile home park and that Vinsonhaler knocked on Grace's door before taking the water heater. She then stated that Vinsonhaler tried to explain to the police that he had permission to take the heater but that the officers could not verify this information because Grace was found dead the next day. The court sustained the State's objection to this statement.

Lee testified that no one had permission to either take the water heater or give others permission to take it. He stated on cross examination that Grace did some work for him but explained on redirect that there was no manager at the time of the alleged theft because Grace had died. He added that Grace did not have permission to let anyone into the mobile home. On

recross, Lee stated that he found out about Grace's death after the heater was taken and after he tried to contact Grace to see what had happened to the heater. The court overruled the State's objection to this line of questioning.

The arresting officer testified that Vinsonhaler said he had permission from the owner to take the heater. A witness who lived at the mobile home park stated on cross examination that he knew Grace, that Grace got tools from Lee's mobile home, that Grace had the key to unoccupied mobile homes, and that Lee's unit was unoccupied.

At the beginning of the second day of trial, the State asked the court to prohibit Vinsonhaler's codefendant from testifying about any alleged permission. After further argument on the issue, the court ruled that any mention of permission or Grace from any witness, including Vinsonhaler, was improper and would be prohibited.

When the codefendant started to testify that he had helped take the heater that Vinsonhaler was permitted to take, the State stopped him. On cross examination, the codefendant referred to Vinsonhaler talking to the manager; the court sustained the State's objection. The codefendant then said he never talked to the manager. In the jury's absence, the State asked whether Cloutier could keep asking witnesses about the manager, and the court ruled that there would be no further discussion of the manager per its earlier ruling. On redirect, the State asked the codefendant whether he had permission from the owner of the mobile home to enter, and Cloutier then asked on recross whether he thought he had permission from anyone to enter. After the State objected, the court stated that Cloutier would not be allowed to ask further questions about obtaining permission from someone other than the owner. The witness added on recross

that Vinsonhaler knocked on Grace's door before taking the heater.

The defense then opened its case. The State cross examined a woman who helped Vinsonhaler take the heater about whether she had permission to enter the mobile home. On redirect, Cloutier was allowed to ask, over the State's objection, whether the woman knew Grace and whether she tried to contact him about the heater. Cloutier was not allowed to ask whether the witness had permission to enter.

Before Vinsonhaler testified, the court reiterated that Cloutier could not ask whether he thought he had permission to enter the mobile home. The court overruled the State's objection when Vinsonhaler testified that he tried to contact Grace before taking the heater, but it sustained the State's objection when Vinsonhaler tried to explain what Grace told him. Cloutier then asked whether the arresting officer had checked with the maintenance man, and the court again sustained the State's objection.

On cross examination, Vinsonhaler admitted that the notice on the mobile home door did not signify that he had permission to enter. He added that he did not ask the owner for permission to enter but told the arresting officer that "Tim" gave him that permission. CP at 424, 427-28. On recross, Vinsonhaler explained that Grace had said the heater was old and would not be used. The State then recalled the arresting officer, who testified that Vinsonhaler never said Grace gave him permission to take the heater.

Cloutier complained that it was unfair to allow the State to explore the permission issue while barring the defense from doing so, and she requested a mistrial. The State responded that once Vinsonhaler testified that Grace gave him permission, "the cat was out of the bag." CP at

442. The court instructed the jury to disregard the last two questions to the officer, but this ruling did not affect Vinsonhaler's testimony or the officer's statement that Vinsonhaler never said Grace gave him permission to take the heater.

The State began its closing argument by talking about permission and argued that only Lee, the owner of the mobile home, could give permission to enter. Cloutier responded that it made no sense that Vinsonhaler would take a used water heater without permission, and she added that he told the arresting officer he had permission and gave the officer a name to check on. Cloutier then added:

> Now it--this is a trial and I don't remember which ones of you have ever been at trial--in a trial before. But we all like to think that in a trial there's an inherent search for the truth--what truly happened--ahh--on the date in question--in this case on May 12th, 2008. And--and I'd like to think that the jury's job is to find out what the truth is and it is. It truly is.
>
> Umm--the problem is that you might say a lot of trial attorneys can look like this--this is called the Courtroom Handbook on Washington Evidence. So this basically tells us lawyers what kind of testimony--what kind of evidence we can bring in before the jury and what kind is not admitted. Quite a bit is not admitted. So you're probably still kind of puzzled about what actually went on on Ma[y] 12th 2008 and I don't blame you because there is some stuff that the Rules of Evidence prohibited us from discussing about.
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> You probably heard--you heard the hearsay rule. Hearsay is essentially statements made by somebody else that the witness wants to talk about. That's always an issue at trial. There's also certain rules that apply to people who are dead at the time of the trial. And in some cases we just can't talk about them. And when you have a case where the most important witness is dead--

CP at 477. The court sustained the State's objection and instructed the jury to disregard. Cloutier then argued:

> Okay. When one of the possible witnesses is dead--a defense case can be very constrained. So I think that would explain probably some of the puzzlement you pro--you probably all are facing right now and I--I can definitely--umm--sympathize with that.

CP at 478. Cloutier argued that the conflict to resolve was whether Vinsonhaler had permission to take the heater and stated that he tried to contact Grace, who may then have been dead, before taking the heater. During its rebuttal argument, the State reiterated that Vinsonhaler never gave the name of any person who gave him permission to enter the mobile home and that its owner did not give such permission.

After the jury informed the court that it could not reach a verdict, the State announced that it would seek sanctions in the case. The court declared a mistrial and the State moved for contempt sanctions based on Cloutier's opening and closing arguments. During the sanctions hearing, the court informed Cloutier that her closing argument "was totally inappropriate and absolutely lacked respect and was in violation of my court orders." Report of Proceedings at 3. When defense counsel argued that the State had waived the benefit of the court's pretrial ruling and had opened the door to evidence about Grace and any alleged permission in cross examining Vinsonhaler, the State responded that it was never appropriate to tell the jury there was evidence it could not hear because of the court rules. The court imposed sanctions of $500 that Cloutier could cure by attending seminars in evidence and trial practice. Cloutier appeals, arguing that the trial court abused its discretion in finding her conduct sanctionable as contempt.

Analysis

We review a trial court finding of contempt for an abuse of discretion. *Moreman v. Butcher*, 126 Wn.2d 36, 40, 891 P.2d 725 (1995). A trial court abuses its discretion when it exercises it in a manifestly unreasonable manner or bases its decision on untenable grounds or reasons. *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995).

We will uphold a contempt finding if the trial court had a proper basis for the finding. *State v. Hobble*, 126 Wn.2d 283, 292, 892 P.2d 85 (1995). The authority to impose contempt sanctions can be statutory or under the inherent power of constitutional courts. *Hobble*, 126 Wn.2d at 292. Courts can not exercise their inherent contempt power unless they specifically find the statutory proceedings and remedies inadequate. *In re Dependency of A.K.*, 162 Wn.2d 632, 647, 174 P.3d 11 (2007).

The Washington statutes distinguish between punitive and remedial sanctions for contempt. *State v. Berty*, 136 Wn. App. 74, 84, 147 P.3d 1004 (2006). A punitive sanction is "imposed to punish a past contempt of court for the purpose of upholding the authority of the court." RCW 7.21.010(2). A remedial sanction is "imposed for the purpose of coercing performance when the contempt consists of the omission or refusal to perform an act that is yet in the person's power to perform." RCW 7.21.010(3). The remedial sanctions provision requires a contemnor to be able to purge the contempt, and the punitive sanctions statute contemplates a trial of the contemnor. *Hobble*, 126 Wn.2d at 292-93.

Both sanctions contain an exception to compliance with their provisions, however, if the contempt falls within the provisions of RCW 7.21.050. *Berty*, 136 Wn. App. at 84. RCW 7.21.050 authorizes summary imposition of both punitive and remedial sanctions for a direct contempt, or one committed in the courtroom. *Hobble*, 126 Wn.2d at 293. The judge may impose such contempt sanctions at the end of the proceeding, and sanctions are permitted "only for the purpose of preserving order in the court and protecting the authority and dignity of the court." RCW 7.21.050(1); *Berty*, 136 Wn. App. at 85.

The trial court specifically found that it was proceeding under its inherent authority because the summary contempt statute was inadequate. Apparently, the court so found because it did not respond to each sanctionable offense as it occurred. RCW 7.21.050(1) states, however, that sanctions may be imposed at the end of a proceeding. The statute does not require notice, but it does generally require a contemnor to have the opportunity to speak in mitigation. RCW 7.21.050(1). Consequently, the summary contempt statute authorized the sanctions imposed here if the conduct in question was sanctionable. *See Berty*, 136 Wn. App. at 81, 85 (RCW 7.21.050 authorized contempt sanctions imposed two months after defense counsel's improper closing argument).[1]

Cloutier argues on appeal that the findings and conclusions entered after the contempt hearing do not specify what conduct the court found sanctionable. The findings note that the State filed memoranda detailing statements Cloutier made during opening and closing argument, and one finding contains an excerpt of her closing argument. The findings also state that Cloutier "repeatedly violated the Court's ruling," but they do not further delineate the objectionable conduct. CP at 59. The trial court concluded that "Attorney Cloutier's conduct was willful and intentional and affected the outcome of the trial by her improper argument." CP at 60-61. The State argues that its memoranda show the specific factual instances of misconduct that concerned the trial court. Given that argument and the trial court's reliance on the State's memoranda, we will consider only Cloutier's opening and closing argument in assessing whether her conduct was sanctionable.

[1] We may sustain a trial court on a ground that the court did not consider. *Berty*, 136 Wn. App. at 85.

After the trial court granted the State's motion barring Cloutier from eliciting any evidence regarding Tim Grace or the permission he allegedly gave Vinsonhaler, defense counsel mentioned the theory of permission as well as Grace in her opening statement. The State did not object to the reference to permission, and the trial court overruled its first objection to the reference to Grace. The court sustained the State's objection, however, when Cloutier argued that Vinsonhaler had tried to explain he had permission to take the water heater but that officers could not verify that information because Grace had died.

It is no defense to a charge of contempt that the underlying ruling was erroneous. 15 Karl Tegland, Washington Practice: Civil Procedure § 43:3, at 203 (2nd ed. 2009). Here, the court's pretrial ruling was arguably erroneous insofar as it prohibited any reference to Vinsonhaler's belief that he did not steal the heater because he thought he had permission to take it. *See State v. Hamilton*, 58 Wn. App. 229, 231-32, 792 P.2d 176 (1990) (evidence that defendant thought he had permission from now-deceased client to borrow funds was admissible to show his state of mind and lack of criminal intent in theft prosecution). Be that as it may, the court ruled that the mention of Grace and the defense theory of permission was inadmissible during opening argument, and Cloutier clearly violated that ruling.

We find the statements she made during closing argument, however, far more egregious. It is true that the court's pretrial ruling had little viability by the end of trial, given the extent to which both prosecution and defense witnesses testified about Grace and the alleged permission he gave. Had Cloutier simply referred to this testimony, such references would have been drawn from the evidence and clearly permissible. *See State v. Hale*, 26 Wn. App. 211, 216, 611 P.2d

1370 (1980) (during closing argument, counsel may draw and express reasonable inferences from the evidence). Cloutier went a step further, however, and implied that there was additional evidence that the jury could not consider, and that the missing evidence was key. The trial court did not abuse its discretion in concluding that this argument was an affront to its authority and dignity and sanctionable as contempt. *See Berty*, 136 Wn. App. at 80-83 (defense counsel's argument that he wished he could tell the jury all of the complaining witness's motives implied that he knew something the jury did not and was sanctionable).

Affirmed.

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.

Armstrong, J.

We concur:

Worswick, A.C.J.

Dwyer, J.P.T.