

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,
Respondent,

v.

VICTOR ALBERT LYLE WHALEN,
Appellant.

No. 40482-6-II

UNPUBLISHED OPINION

Van Deren, J. — Victor Albert Lyle Whalen appeals his conviction for possession of a controlled substance (heroin). He argues that he was denied a fair trial because the trial court denied (1) his continuance motion based on his desire to secure the presence of a witness and (2) his request to show his arms to the jury to refute the arresting officer’s testimony. We affirm.

FACTS

At 12:30 am on August 23, 2009, Washington State Patrol Trooper Sherri Murphy was searching for three suspects in an attempted robbery in Chehalis. Murphy observed a man watching her from a black Ford pickup truck’s driver’s seat parked on the road’s shoulder. As Murphy drove by, the man exited the truck and waved and shouted to attract her attention. He approached her, asked Murphy if she was “looking for three guys,” and informed her that they were in the nearby bushes. Report of Proceedings (RP) at 37. Although the man told Murphy his

No. 40482-6-II

name was Rusty, Murphy recognized him as Whalen and informed him that she knew that he had an outstanding arrest warrant. Murphy detained Whalen, confirmed the outstanding warrant, and placed him under arrest. Murphy searched Whalen incident to his arrest and found a plastic bag in his wallet that she believed contained heroin residue. Murphy looked inside the truck's window and observed a belt used for heroin injections. She also recovered a hypodermic needle from inside the truck.

The State charged Whalen with one count of possession of a controlled substance: to wit, heroin. The day Whalen's jury trial was scheduled to begin, Whalen's attorney informed the trial court that Whalen had told him only the day before that Whalen had received from his aunt the bag Murphy found in his wallet with a silver coin¹ in it. Whalen wanted his aunt to testify to support his unwitting possession defense regarding the heroin residue in the bag.

The trial court and Whalen's defense attorney discussed on the record that, if the aunt were to testify, she could plead the Fifth Amendment² or deny Whalen's version of events and that, without a trial continuance, any subpoena would be untimely. The trial court denied Whalen's continuance motion but granted Whalen a short recess to give his attorney time to go to the aunt's residence a few blocks from the courthouse. When Whalen's attorney returned, he indicated that he could not locate the aunt and that he learned the woman was not really Whalen's aunt.³

Whalen again requested a continuance and argued that (1) the State would not be

¹ The denomination of the coin is not clear from the record. Defense counsel referred to the coin as a silver half dollar, and Whalen referred to it as a silver dollar.

² U.S. Const. amend. V.

³ Nevertheless, we refer to this potential witness as Whalen's aunt for consistency.

prejudiced because its two witnesses were law enforcement professionals, (2) Whalen understood the trial court might impose sanctions—such as a jury fee based on the motion’s untimeliness—and (3) Whalen would be prejudiced if the continuance motion was denied. The trial court denied the continuance request because

[t]he case was assigned this trial date on the 15th of October. An Omnibus Hearing was scheduled for November 5th and confirmation on the 31st, which was last week. Due diligence also I think on the part of the defendant requires that the defendant make some effort to notify his counsel of potential witnesses sometime other than the day before trial.

Again, there’s no showing that this witness has in fact acted the way your client reports that she acted i.e. that she supposedly sold this container that supposedly contained the heroin to him. Secondly, there’s no showing that if she were in fact subpoenaed that she would come and testify consistent with his story. Under the circumstances, I’m denying the request for a continuance and we’ll proceed today.

RP at 12.

At trial, Murphy testified as described above. Dunn testified that the bag found in Whalen’s wallet contained heroin residue. Whalen testified that (1) his nickname was Rusty; (2) the needle and belt found in his truck belonged to someone who had borrowed his truck; (3) he did not have track marks on his arms; (4) his aunt gave him the bag with a silver dollar in it because he collected coins; (5) although his aunt was not technically his aunt any longer, she was his aunt by marriage at one time; and (6) he did not know the bag contained heroin. Whalen asked to “publish his arms to the jury,” the State objected, and the trial court sustained the objection. RP at 52.

The jury found Whalen guilty as charged and the trial court sentenced Whalen to 16 months’ confinement.

ANALYSIS

I. Continuance Motion

Whalen first argues that the trial court erred in denying his continuance motion. We review the trial court's denial of a continuance motion for abuse of discretion. *State v. Hurd*, 127 Wn.2d 592, 594, 902 P.2d 651 (1995). A trial court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds. *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995).

The trial court's decision on a continuance request will "be disturbed only upon a showing that the accused has been prejudiced and/or that the result of the trial would likely have been different had the continuance not been denied." *State v. Eller*, 84 Wn.2d 90, 95, 524 P.2d 242 (1974). The trial court must consider the totality of the circumstances, including diligence, materiality, due process, the possible impact on the trial, and the need for orderly procedure. *State v. Early*, 70 Wn. App. 452, 458, 853 P.2d 964 (1993). "[T]here are no mechanical tests for deciding when the denial of a continuance violates due process, inhibits a defense, or conceivably projects a different result; and, that the answer must be found in the circumstances present in the particular case." *Eller*, 84 Wn.2d at 96.

When a defendant moves to continue a proceeding he must show that he has exercised due diligence to assure the witness's attendance, that the witness would offer material evidence, and that the witness can probably be found if the trial court grants the continuance. *State v. Lane*, 56 Wn. App. 286, 296, 786 P.2d 277 (1989). A defendant's mere expectation that a witness would testify favorably to him "does not satisfy the materiality requirement; [the defendant] must present specific facts to which the witnesses would testify." *State v. Wimbish*, 100 Wn. App. 78, 85, 995 P.2d 626 (2000). "The unavailability of a material state witness is a valid ground for continuing a

No. 40482-6-II

criminal trial where [(1)] there is a valid reason for the unavailability, [(2)] the witness will become available within a reasonable time, and [(3)] there is no substantial prejudice to the defendant.” *State v. Nguyen*, 68 Wn. App. 906, 914, 847 P.2d 936 (1993).

Here, Whalen requested a continuance on January 8, 2010, the day trial was scheduled to begin. The State was available and ready to proceed. The State filed the information charging Whalen with heroin possession on August 24, 2009; thus, Whalen had over four months to locate his aunt between the filing of the information and the trial date.

Whalen did not inform his attorney of his aunt’s existence until the day before trial. But Whalen either knew or should have known at the time the information was filed that his aunt had given him the bag containing the coin and the heroin and he should have further known whether she would testify on his behalf. He did not, however, inform his attorney about the aunt so she could be located or subpoenaed to trial. Furthermore, Whalen produced no evidence that his aunt would be willing to testify against her penal interest in admitting that she had possessed the bag with the heroin and that it had heroin in it before she gave it to Whalen. Without presenting the trial court with specific facts to which his aunt would testify, he did not meet the materiality requirement for continuing his trial to attempt to secure her presence. And, as Whalen’s attorney noted, unless the court continued the trial and issued a subpoena to compel Whalen’s aunt to testify, a subpoena would be untimely.

The trial court noted the tardiness of the motion and commented that Whalen should have made an “effort to notify his counsel of potential witnesses sometime other than the day before trial.” RP at 12. Moreover, the trial court noted that Whalen had not demonstrated that his aunt had actually given or sold the bag to him and there was no showing that his aunt would testify

consistent with Whalen's version of events.

The transcript of the discussion on the record between the trial court and Whalen's counsel supports the trial court's decision. Whalen's counsel informed the trial court that "[Whalen] attempted to contact [his aunt] and she would not come to Court. It [was his counsel's] understanding at th[at] moment that they [we]re not getting along." RP at 6. There was also no reason to believe Whalen's aunt would testify against her penal interest if she were compelled to attend trial.

The trial court did not abuse its discretion by denying the continuance request because Whalen failed to demonstrate that he exercised due diligence to obtain his aunt's testimony, there was no showing that his aunt would have testified if located, and, even if she did testify, it was unclear whether she would support Whalen's version of events.

II. Whalen's Request To Show His Arms to the Jury

Next, Whalen argues that the trial court erred in denying his request to show the jury that his arms contained no track marks attributable to heroin usage. Whalen contends that the evidence was relevant to rebut Murphy's testimony that she saw fresh track marks on his arms and that the error was not harmless. We review a trial court's decision to admit or refuse evidence under an abuse of discretion standard. *Powell*, 126 Wn.2d at 258.

A. Relevance

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). "Evidence is relevant and necessary if the purpose of admitting the evidence is of consequence to the action and makes the existence of the identified fact more probable." *Powell*, 126 Wn.2d at 259; ER 401. The right

of a criminal defendant to present evidence is not unfettered and the refusal to admit evidence lies largely within the sound discretion of the trial court. *Rehak*, 67 Wn. App. at 162.

Here, when Whalen asked to show his arms to the jury so the jury members could determine whether he had track marks on his arms, the State objected but provided no reason for its objection. The trial court sustained the objection, also without stating a reason.

Whalen argues that showing the jury his arms would have rebutted Murphy's testimony that she saw fresh track marks consistent with intravenous heroin injection. We agree that whether Whalen's arms had track marks on them at the time of trial may have been relevant to his defense because it may have supported his testimony that he did not have track marks on his arms in January 2010, during his trial, but any error was harmless.

B. Harmless Error

A reviewing court will not reverse a conviction due to an error in admitting evidence where the error does not prejudice the defendant. *State v. Thomas*, 150 Wn.2d 821, 871, 83 P.3d 970, *abrogated in part on other grounds by Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). Prejudice is not presumed. *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). Rather, error is not prejudicial unless, within reasonable probabilities, the trial court's determination would have differed had the error not occurred. *Thomas*, 150 Wn.2d at 871. The question is whether the untainted evidence is sufficient to support, overwhelmingly, the jury's finding of guilt. *State v. Guloy*, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985); *see State v. Halstien*, 122 Wn.2d 109, 127, 857 P.2d 270 (1993).

Murphy testified that on August 23, 2009, she saw "fresh track marks on [Whalen's] arms." RP at 44. When the trial took place in January 2010, Whalen testified that his arms did

No. 40482-6-II

not have track marks. Four months elapsed between arrest and trial. Without expert evidence regarding how long track marks remain visible, the jury could consider and believe both Murphy's testimony relating to what she saw at the time of arrest and Whalen's testimony that he had no track marks in January and weigh their testimony in light of all the evidence.

Here, there was a hypodermic needle, heroin, and a belt found in Whalen's truck or on his person, all of which were related to heroin use. Given the evidence that Whalen possessed heroin, including his own testimony admitting that the bag with heroin was recovered from his wallet, his inability to show the jury his arms after testifying that he did not have track marks was not prejudicial and, thus, it was harmless. 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.

Van Deren, J.

We concur:

Penoyar, C.J.

Johanson, J.