In the Missouri Court of Appeals

Eastern District

DIVISION TWO

STATE OF MISSOURI,	)	No. ED105355
	)	
Respondent,	)	Appeal from the Circuit Court of
	)	Warren County
vs.	)	15BB-CR00628-01
	)	
DANIELLE ANN ZUROWESTE,	)	Honorable Wesley Dalton
	)	
Appellant.	)	Filed: April 24, 2018

OPINION

Danielle Zuroweste appeals the trial court's judgment entered upon a jury verdict convicting her of possession of a controlled substance pursuant to Section 195.202 RSMo (2016). We affirm.

BACKGROUND

In September 2015, Sergeant John Beeckman ("Sgt. Beeckman") responded to a child custody issue at Wright City East Elementary School. After speaking with several people at the school, the officer began searching for Zuroweste based upon a description of her car and a photograph from the Department of Revenue database. Sgt. Beeckman received a second call to the school. He spotted Zuroweste's car in the school parking lot and initiated a traffic stop when she left the premises.

As he approached the vehicle, Sgt. Beeckman observed Zuroweste reaching into the passenger side of the vehicle. He noted her "head was moving a lot" and Zuroweste seemed nervous as he began speaking to her. He noticed a small, orange baggie containing a white, powdery residue lying on the floor of the driver's side of the vehicle, within Zuroweste's reach. Sgt. Beeckman testified he recognized the baggie as one "usually used" to contain narcotics and it appeared someone had tried to conceal the baggie. Zuroweste began crying after she was arrested and placed in the police car.

Sgt. Beeckman then searched the vehicle and seized the orange baggie along with two glass pipes containing "burnt marijuana." Zuroweste was transported to the Warren County jail. She was charged with felony possession of a controlled substance and unlawful use of drug paraphernalia.

During her approximately two week incarceration in the Warren County jail, Zuroweste made a phone call to a friend on September 26, 2015. At the beginning of the call, a pre-recorded message unequivocally notified her the call would be recorded and subject to monitoring. During the call Zuroweste stated "I've learned my lesson," "I know it's wrong, and I shouldn't be doing it," "I am never going to do it again," and "I don't want to do this shit no more."

Zuroweste pleaded guilty to unlawful use of drug paraphernalia and not guilty to felony possession of a controlled substance. Trial was set for Monday, November 14, 2016. Prior to trial Zuroweste submitted a request for discovery seeking, in part, "[a]ny written or recorded statements and the substance of any oral statements made by defendant . . . ." On Thursday afternoon prior to the Monday when the trial was set to begin, the State provided notice to Zuroweste of its intent to introduce the recording of her September 26, 2015 phone call ("Exhibit

8"). Defense counsel's office closed shortly thereafter and, due to the intervening Veteran's Day legal holiday on Friday, did not reopen until the day of trial. However, the State made diligent efforts via email, text, and a personal conversation with defense counsel to ensure she received notification prior to the start of trial.

Zuroweste filed a motion to exclude Exhibit 8, claiming the State's disclosure of the exhibit four days prior to trial prevented her from "fully investigating her case and developing a defense." The trial court denied the motion to exclude and allowed the State to introduce Exhibit 8 at trial. The jury found Zuroweste guilty of possession of a controlled substance and the court entered judgment and sentence. This appeal follows.

DISCUSSION

In her sole point on appeal, Zuroweste argues the trial court erred in admitting Exhibit 8 and the related testimony at trial because the State failed to disclose the evidence until the evening of the last business day before trial began on Monday. Zuroweste argues the State's late disclosure of Exhibit 8 violated Missouri Supreme Court Rule 25.03. According to Zuroweste, the late disclosure resulted in her inability to fully investigate her case and develop a defense. We disagree.

Standard of Review

Our review of an alleged discovery violation consists of two questions. *State v. Pitchford*, 514 S.W.3d 693, 698 (Mo.App. E.D. 2017). First, we review whether the State violated Rule 25.03. *Id.* If so, we next consider the appropriate sanction for such a violation. *Id.* Each of these decisions is within the sound discretion of the trial court, and we will not reverse the court's decision absent an abuse of discretion. *State v. Johnson*, 513 S.W.3d 360, 364-65 (Mo.App. E.D. 2016). The trial court abuses its discretion if fundamental unfairness resulted to

the defendant. *Id. at* 365. Fundamental unfairness arises if there is a reasonable likelihood earlier disclosure of the evidence at issue would have affected the result of trial. *Id.* "For example, fundamental unfairness may be found where the State's failure to disclose resulted in the defendant's genuine surprise at learning of unexpected evidence and there was at least a reasonable likelihood that the surprise prevented meaningful efforts by the defendant to consider and prepare a strategy for addressing the State's evidence." *Id.* (internal citation omitted).

Analysis

Zuroweste contends the State failed to timely disclose Exhibit 8. She alleges the State's late disclosure of the evidence violated Rule 25.03, leaving her unable to fully investigate her case and develop a defense. Thus, Zuroweste claims the trial court abused its discretion admitting Exhibit 8 and the related testimony at trial.

Pursuant to Rule 25.03, upon written request of a defendant, the State is required to disclose certain material and information in the State's possession or control, including written or recorded statements and the substance of any oral statements made by the defendant. Rule 25.08 establishes an ongoing duty requiring the State to supplement its response if it receives or learns of the existence of additional responsive material. "The purpose of Rule 25.03 is to prevent surprise and give the defendant the opportunity to prepare his case in advance of trial." *Pitchford,* 514 S.W.3d at 699 (internal citation omitted).

Zuroweste argues this court's opinion in *Johnson* requires reversal in the present case. We disagree. In that case, when defense counsel's office was closed for a state holiday on the Friday prior to the Monday trial setting, the State produced more than twenty-four hours of Johnson's recorded phone calls, spanning approximately two years of incarceration. *Johnson*, 513 S.W.3d at 365. On the record, the State admitted it had intentionally withheld the recordings

from the defense to gain a strategic advantage. *Id*. Our court held the State's violation of Rule 25.03 was part of a "trial-by-ambush" strategy which Rule 25.03 is specifically designed to prevent. *Id*. at 365-66. The State's *intentional* failure to timely disclose Johnson's inculpatory statements, which exposed him to unique prejudice, was inexcusable. *Id*. at 368. We held the trial court abused its discretion by admitting excerpts of the recordings to impeach Johnson's testimony. *Id.* at 369. The State's flagrant violation of Rule 25.03 surprised the defendant and prevented him from preparing a meaningful defense. *Id.*

This case is clearly distinguishable from *Johnson*. Here, the State disclosed one five-minute recording of a phone call made during a two week period of incarceration and further offered to provide recordings of all calls made by the Zuroweste while she was in the Warren County jail as soon as possible. The State did not deliberately wait until defense counsel's office closed for the holiday weekend. Instead, the State made diligent attempts through email, text message, and in a personal conversation to defense counsel to ensure defense counsel had proper notification prior to the close of business on Thursday. As a result, Zuroweste had four days to review Exhibit 8 and determine how to address the evidence. In contrast, the defendant's statements in *Johnson* were voluminous, spanning a two year period of incarceration. The evidence was intentionally produced for nefarious reasons when defense counsel's office was closed.

The facts of the present case are more similar to those in *State v. Pitchford*. 514 S.W.3d 693 (Mo.App. E.D. 2017). In *Pitchford,* the State subpoenaed recordings from the St. Louis City Justice Center, received them on the Friday before a Monday trial, and spent the weekend listening to them. *Id.* at 699. The State found a relevant statement at 11:00 p.m. the Sunday evening before trial. *Id.* The State provided Pitchford with four disks containing hundreds of

hours of recordings on the morning of trial, and Pitchford objected to the admission of a specific incriminating statement because of the late disclosure. *Id.* at 696. The court found the State's delay in disclosing the recordings was not intentional and allowed a single twenty-minute call to be admitted at trial, noting the defendant had adequate time to review the twenty-minute recording. *Id.* at 699-700. The court declined "to impose a bright- line rule upon the trial court that it must continue the trial upon the late discovery by the State of relevant evidence within a certain number of days before the start of trial, where, as here, there was no evidence of the State attempting to intentionally surprise the defendant." *Id.* at 700.

Here, the State discovered Exhibit 8 within days of trial, disclosed it as soon as possible, and made diligent efforts to ensure defense counsel knew about it. Nothing in the record shows the State intended to withhold Exhibit 8 to surprise Zuroweste and gain an advantage at trial. In light of the particular circumstances in this case, the State did not violate Rule 25.03. Thus, the trial court did not abuse its discretion admitting Exhibit 8 and the related testimony at trial.

We do not reach the issue of whether Zuroweste suffered fundamental unfairness resulting from the late disclosure because we find the State did not commit a discovery violation.

CONCLUSION

The State's late disclosure of Exhibit 8 did not constitute a discovery violation. Therefore, the trial court did not abuse its discretion admitting Exhibit 8 and the related testimony at trial. Zuroweste's sole point on appeal is denied.

The judgment of the motion court is affirmed.

Lisa P. Page, Presiding Judge

Roy L. Richter, J., and
Philip M. Hess, J., concur.