IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,	)	No. 65127-7-I
Respondent,	)	
v.	)	
PEPPER NICOLE PRIGGER,	)	UNPUBLISHED OPINION
Appellant.	)	FILED: August 1, 2011

Ellington, J. — In her efforts to retain custody of her son, Pepper Prigger submitted perjured statements describing an alleged assault by her son's father during a visitation exchange. She was convicted of three counts of perjury and one count of bribery. She contends she was denied counsel of her choice, denied effective assistance of counsel, and that the State's evidence was insufficient as a matter of law. We disagree and affirm.

BACKGROUND

Pepper Prigger and Kelly Gregerson have a child, Hunter, born in May 2007. Prigger and Gregerson separated in September 2007 and a custody battle ensued in Thurston County. Under the temporary parenting plan, Gregerson had custody of Hunter with visitation for Prigger. Their relationship was acrimonious and they used a service for peaceful exchanges of the child. After a hearing on the final parenting

plan, the court orally announced its ruling adverse to Prigger on February 9, 2009. Final orders were pending. Prigger sought reconsideration.[1]

On March 9, 2009, because of a snowstorm, Gregerson and his wife, Christin, drove their four-wheel drive from Olympia to the Smokey Point AM/PM in Arlington to collect Hunter after a visit with Prigger. During the exchange at the AM/PM, Prigger attempted to use a handheld recorder, to which Gregerson objected. Prigger insisted that Gregerson inspect a scratch on Hunter's arm and state into her handheld recorder that the scratch was not infected. Prigger asked the clerk in the AM/PM to do the same.

Two days later, Prigger met Riannah Rammage in the Snohomish County courthouse and helped her as she filed papers in her own parenting case. Prigger told Rammage about the AM/PM incident. According to Rammage, Prigger said she needed someone to claim to be a witness to the events. Prigger prepared a typed statement, directed to the Thurston County Superior Court, in which Rammage attested under penalty of perjury that she was at the AM/PM on March 9 and observed a man grab an object from a woman's hand and smash it with his foot. When the woman bent down to pick it up, the man shoved her to the ground. Prigger and Rammage went to a Kinko's and had the statement notarized on April 9. Prigger later testified the statement (which she claimed to be true) was "a necessity" in her effort to convince the court to reconsider its decision on the final parenting plan.[2]

---

[1] We do not have the record of the Thurston County file. We rely on the parties' testimony.

[2] Report of Proceedings (Mar. 5, 2010) at 17–19.

On April 19, Prigger gave Rammage's statement to Arlington police and submitted her own typed statement, under penalty of perjury, claiming that Gregerson threw her recorder on the ground and broke it with his foot and that when she tried to pick it up, he pushed her to the ground. She was requested to and did submit a five-page handwritten statement on a police department form, which she also signed under penalty of perjury.

Rammage submitted another statement to police on April 30. According to Rammage, Prigger drove her to the police department and dictated as she drove. Rammage wrote the statement in the car and took it inside. This statement repeated the earlier allegations. It was signed under penalty of perjury.

Arlington police opened an investigation of Gregerson for domestic violence assault and began interviews. They obtained a contemporaneous photograph of the parking lot and established that the slot Rammage and Prigger claimed had been occupied by Rammage's red car was actually occupied all day by a white car belonging to an employee of the AM/PM. On April 20, police showed the photograph to Prigger.

Rammage was living with Heather Moseley and her family. Prigger had helped her move there and was a frequent visitor. On May 21, Prigger arrived and asked Moseley and her son each to write a statement saying she had not done anything wrong. Heather understood the statements would be used in the custody case and the criminal investigation. In exchange for the written statements, Prigger offered $2,500 per month and said they would be taken care of. Moseley and her son

refused.

Rammage confessed to police that her statements were not true and wrote a new statement to that effect.

Prigger was charged with three counts of perjury (one for her own statement and one as an accomplice for each of Rammage's two statements) and one count of bribing a witness (Moseley). Rammage was granted immunity and testified. A jury convicted Prigger as charged.

DISCUSSION

Right to Counsel of Choice at Trial

Prigger was represented by appointed counsel. Both parties were ready for trial on February 19, but there were no courtrooms available and the court continued the matter until February 26. Both parties said they would be ready. When the case was called, however, Prigger's counsel asked for a week's continuance in order for Prigger to see if she could hire a private attorney. The State objected, noting that Rammage had been arrested on a material witness warrant and was present, and appointed counsel was not available the following week. The court conducted an in camera review of a statement from Prigger describing her disagreement with counsel, which related to the use of an exhibit at trial.

The exhibit in question was an unsigned letter Prigger allegedly found on her doorstep. The letter implied the Gregersons were bribing Rammage to change her testimony. A previous continuance had been granted to permit the defense to compare fingerprints on the document and to permit the State to do an independent

examination. Initial results of the fingerprint comparisons were inconclusive, and Prigger wanted Rammage to provide another set. Appointed counsel planned to argue that Rammage changed her testimony to avoid being charged with a crime, not because of influence of the Gregersons, and declined to further pursue the letter.[3]

The court declined to continue the trial, finding that the disagreement concerned trial strategy, did not justify a change of counsel, and the motion was untimely. Prigger raised the same issue again on the first day of trial and asked for a mistrial on the third day. The court did not change its ruling.

Prigger asserts this denied her right to counsel of her choice and that the trial court applied the wrong analysis. We disagree.

The right to counsel of choice is not a right to cause undue delay in the proceedings.[4] "In the absence of substantial reasons, a late request should generally be denied, especially if the granting of such a request may result in delay of the trial."[5] Here, a material witness was in custody, appointed counsel was competent and prepared but unavailable thereafter, and arrangements for private counsel to represent Prigger had not been finalized. Prigger had not actually retained counsel and wanted a week's continuance to try to do so. Had she failed, her appointed attorney would no longer be available to start trial. Had she succeeded, new counsel

---

[3] The exhibit had been delivered to the State by Prigger in a condition that prevented forensic analysis. The court ultimately ruled the exhibit inadmissible.

[4] State v. Price, 126 Wn. App. 617, 633, 109 P.3d 27 (2005); State v. Roth, 75 Wn. App. 808, 824, 881 P.2d 268 (1994).

[5] State v. Chase, 59 Wn. App. 501, 506, 799 P.2d 272 (1990) (quoting State v. Garcia, 92 Wn.2d 647, 655-56, 600 P.2d 1010 (1979)).

would necessarily have needed time to prepare.

Defendants who can afford to retain counsel have a qualified right to counsel of their choice.[6] But the aim of the Sixth Amendment is to guarantee an effective advocate, not to ensure that each defendant will have counsel of choice.[7] A request for counsel of choice must be timely asserted; a request made on the day of trial is not timely.[8]

Prigger contends her conflict with her appointed attorney as to the defense theory was a substantial reason.[9] The trial court characterized it as a disagreement about trial strategy, while Prigger asserts it was her right to determine her defense, citing United States v. Gonzalez-Lopez.[10] But Gonzalez-Lopez did not involve or discuss substitute counsel of choice, and certainly did not involve an untimely motion for substitution. Rather, the issue there was whether the district court's erroneous disqualification of chosen counsel was harmless.

The trial court did not abuse its discretion in denying Prigger's untimely motion for a continuance to attempt to arrange for mew counsel.

Right to Counsel of Choice at Sentencing

On the day of sentencing, Prigger again sought to continue the proceedings

---

[6] Roth, 75 Wn. App. at 824.

[7] Price, 126 Wn. App. at 631.

[8] Chase, 59 Wn. App. at 506.

[9] See id. at 506.

[10] 548 U.S. 140, 144, 126 Sup. Ct. 2557, 165 L. Ed. 2d. 409 (2006) (government had conceded erroneous disqualification of chosen counsel; court rejects government's argument that defendant must show nonchosen counsel was ineffective and affirms circuit court's holding that error not harmless).

because she had retained a private attorney who could appear in approximately two

weeks. The court denied the motion, noting its untimeliness, that Prigger was represented by skilled counsel, that she had requested an early sentencing date, and that witnesses had come from Thurston County.

The same analysis applies here. Prigger did not have the right to delay the proceedings by waiting until the last moment to seek counsel of her choice.

Perjury

Prigger contends the evidence was not sufficient to support her perjury convictions. A person is guilty of perjury in the second degree if, "with intent to mislead a public servant in the performance of his or her duty, he or she makes a materially false statement, which he or she knows to be false under an oath required or authorized by law."[11]

Prigger submitted her own statement and persuaded Rammage to submit two statements about the March 9 AM/PM incident. All the statements were certified or declared to be true under penalty of perjury. All the statements were materially false. Prigger argues only that the documents did not qualify as statements under oath because they did not include the date and/or place of execution.

Prigger's handwritten statement was submitted on an Arlington Police Department form bearing the department address, and recites it was signed April 19, 2009 in Arlington. Rammage's first statement recites it was signed on April 9, 2009 in Snohomish County, Washington. Rammage's handwritten statement, also on an Arlington Police Department form bearing the department address, recites it was

[11] RCW 9A.72.030.

signed April 30, 2009 at the Arlington Police Department. The statements satisfy the statute.

Bribery

Prigger also contends the State failed to present sufficient evidence of the crime of bribing a witness, thus violating due process.[12] The question for this court is whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.[13]

RCW 9A.72.090 provides:

> (1) A person is guilty of bribing a witness if he or she offers, confers, or agrees to confer any benefit upon a witness or a person he or she has reason to believe is about to be called as a witness in any official proceeding[14] or upon a person whom he or she has reason to believe may have information relevant to a criminal investigation or the abuse or neglect of a minor child, with intent to:
>
> (a) Influence the testimony of that person. . . .

The court instructed the jury on both alternative means. Each required the jury to find beyond a reasonable doubt that Prigger (1) offered, conferred, or agreed to confer a benefit on Moseley; (2) acted with intent to influence Moseley's testimony; and (3) the acts occurred in the state of Washington. Under one alternative, the jury also had to find beyond a reasonable doubt that Prigger had reason to believe Moseley was about to be called as a witness in an official proceeding. For the other,

---

[12] State v. Smith, 155 Wn.2d 496, 502, 120 P.3d 559 (2005).

[13] State v. Brockob, 159 Wn.2d 311, 336, 150 P.3d 59 (2006) (quoting State v. Hughes, 154 Wn.2d 118, 152, 110 P.3d 192 (2005)).

[14] An "official proceeding" includes a court proceeding. RCW 9A.72.010(4).

the jury had to find that Prigger had reason to believe Moseley might have information relevant to a criminal investigation and intended to influence her testimony.

Moseley testified that on May 21, 2009, Prigger asked her to sign a statement that would show Prigger had not done anything wrong and would help Prigger regain custody of her son. Prigger offered Moseley $2,500 per month if she would sign such a statement. Moseley refused because she knew nothing about the AM/PM incident.

Prigger emphasizes that Moseley was not a witness to the AM/PM incident, and argues the State did not present evidence from which the jury could find that Prigger had reason to believe Moseley was about to be called as a witness in an official proceeding, or had reason to believe Moseley had information relevant to a criminal investigation, or acted to influence Moseley's testimony.

The fact Moseley was not a witness to the incident is the point of the State's case. As with Rammage, Prigger wanted Moseley to become a witness on her behalf by making false statements. Moseley testified Prigger offered her $2,500 per month indefinitely in exchange for a statement that would help Prigger in her custody proceedings, which meets the statutory definition for "official proceedings," and would allege Prigger had done nothing wrong. Such a statement would also support Prigger's claims of assault, which resulted in a criminal investigation of Gregerson. The jury could certainly find that Prigger intended to influence any testimony Moseley might give, since Prigger apparently intended to write the statement herself. The jury could also find Prigger expected Moseley's statement to influence the custody case, bolster her assault claims,[15] and help her avoid a perjury prosecution, which it could

have done only if Moseley became a witness in an official proceeding and claimed to have information, true or false, relevant to a criminal investigation. The inferences available from the evidence were sufficient to support both alternative means.

Right to Effective Assistance of Counsel

Effective assistance of counsel is guaranteed under the federal and state constitutions.[16] To establish a claim of ineffective assistance, a defendant must show deficient performance and prejudice. Prejudice is demonstrated when the defendant proves there is a substantial likelihood the jury's verdict would have been different absent the error.[17]

Prigger's claim arises out of testimony elicited by the prosecutor from Riannah Rammage. On direct examination, Rammage stated she had received a letter from the prosecutor advising her she would not be prosecuted for perjury if she testified truthfully, but would be if she testified falsely. She also stated the court had granted her immunity, and that one of the police officers had told her it was important that she tell him the truth. The point of these questions was the sequence of events—that Rammage's recantation of her original statement was not induced by any promises from police or the prosecutor. Prigger contends this constituted improper vouching and that her counsel was ineffective in failing to object.

---

[15] In the written statement she gave police, Prigger referred to the possibility of criminal charges against her son's father, stating "if he weren't a [law enforcement officer] he would be in jail [without] any question." Ex. 2 at 5.

[16] See In re Pers. Restraint of Woods, 154 Wn.2d 400, 420, 114 P.3d 607 (2005).

[17] Id.; State v. Ish, 170 Wn.2d 189, 200, 241 P.3d 389 (2010).

As Prigger points out, evidence of a promise to testify truthfully is ordinarily irrelevant and constitutes vouching.[18] Prigger suggests the testimony that the court granted Rammage immunity could be interpreted as announcing the court's view of credibility. But assuming the failure to object was deficient, Prigger does not establish that the verdict would likely have been different absent the error. The jury was properly instructed as to its duty to determine credibility and of the court's duty to make no comment on evidence.[19] Rammage's testimony was strongly corroborated, while Prigger's version of events was shown to be inconsistent with the other evidence. Prigger does not show the verdict would likely have been different had counsel objected.

Prigger also claims her counsel should have impeached Moseley with her prior third degree theft conviction. The prosecutor acknowledged the conviction and the court ruled it admissible. Defense counsel did not, however, mention it in examining the witness. Instead, cross-examination focused on prior inconsistent statements related to the case.

Counsel is presumed competent, and Prigger must show there was no legitimate strategic or tactical reason for failing to use the conviction to impeach. But counsel may have reasonably decided that Moseley's inconsistent statements in this case were more valuable for impeachment than a third degree theft conviction, and Prigger does not show that counsel was deficient. In any event, Prigger's claim fails

---

[18] See Ish, 170 Wn.2d at 196; State v. Green, 119 Wn. App. 15, 24, 79 P.3d 460 (2003).

[19] See Clerk's Papers at 45-47.

because she shows no prejudice resulting from the omission.

Statement of Additional Grounds

In her statement of additional grounds, Prigger makes one additional argument: that she was ordered to pay the costs of her appointed attorney. She contends she did not have counsel of her choice and should not be required to pay those costs. The costs are allowed by RCW 9.94A.760.

Affirmed.

Ellington, J.

WE CONCUR:

Dwyer, C.J.

Schindler, J.