

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	NO. 65518-3-I
)	
Respondent,)	DIVISION ONE
)	
v.)	
)	
dwight lonell miles, jr.)	UNPUBLISHED OPINION
)	
Appellant.)	FILED: May 31, 2011
)	

Lau, J. — A motion to reopen a proceeding for the purpose of introducing additional evidence is addressed to the sound discretion of the trial court. A defendant challenging such a ruling demonstrates no abuse of discretion without showing prejudice from the manner in which the evidence was introduced. Because Dwight Miles demonstrates no prejudice from the court’s ruling allowing the State to reopen its case to present certified copies of his previous convictions, we affirm his conviction for one count of first degree unlawful possession of a firearm.

FACTS

On December 23, 2009, Officers John Marion and Lloyd Harris responded to a

disturbance in South Seattle. The officers observed a large group of teens in the Saar's Market parking lot. As the officers arrived, the group began to disperse. Officer Marion identified one male in particular because he was leaving the area more rapidly than the other teens. Police later identified this suspect as Dwight Miles. Officer Marion drove toward Miles. Miles was walking away from the patrol car, and "in doing so [police] observed the suspect attempt to stuff something into the front of his waistband." Finding of Fact (FF) 5. "The suspect fumbled the object as he was walking away from the officer. This caused the object to fall through his pant leg and onto the ground." FF 6. Officer Marion identified the object as a firearm. Miles picked the firearm up off the ground and threw it in the trash can. Police arrested Miles and retrieved the handgun.

The State charged Miles in juvenile court with one count of first degree unlawful possession of a firearm, in violation of RCW 9.41.040.¹ At a fact-finding hearing, the State introduced testimony from three officers and then rested its case. The defense promptly rested its case as well after presenting no testimony or evidence. The court then took a 10-minute recess. The State then moved to reopen its case after realizing it "overlooked a minor procedural issue in failing to pass forward the respondent's prior conviction for serious offenses." Report of Proceedings (May 3, 2010) (RP) at 65. The

¹ RCW 9.41.040(1)(a) states, "A person, whether an adult or juvenile, is guilty of the crime of unlawful possession of a firearm in the first degree, if the person owns, has in his or her possession, or has in his or her control any firearm after having previously been convicted or found not guilty by reason of insanity in this state or elsewhere of any serious offense as defined in this chapter."

defense objected, arguing that both sides had rested their case. The defense argued that because the State presented no evidence of a prior conviction, the State could prove only a second degree charge. The court ruled,

I will allow the State to reopen its case to offer the additional exhibit. I guess it's a question if you say that there's no prejudice. Certainly, it works to his advantage perhaps to Mr. Miles in this particular case, but I don't think there is anything that—I would certainly grant it, you know, if there was any reason, grant the defense more time to reopen its case, to take more time, even, if necessary, to recess and present other evidence, but I think the way things have happened here that it was an oversight and that I will allow it, but it's certainly the burden of the defense if they believe that it was necessary to need any additional time for anything.

RP at 67-68.

The defense stated it needed no more time but maintained its objection for the record. The defense did not seek to reopen its case or introduce other evidence. The court found Miles guilty of first degree unlawful possession of a firearm.

ANALYSIS

Miles argues that the court abused its discretion by permitting the State to reopen its case. The State responds that the court acted within its discretion and that Miles demonstrates no prejudice. We agree with the State.

“A motion to reopen a proceeding for the purpose of introducing additional evidence is addressed to the sound discretion of the trial court. The manner of exercising that discretion will not be disturbed on appeal absent manifest abuse. Abuse of discretion is discretion exercised on untenable grounds for untenable reasons.” State v. Sanchez, 60 Wn. App. 687, 696, 806 P.2d 782 (1991) (citation

omitted).

It is not enough that the additional evidence itself was harmful or prejudicial to the defendant. State v. Brinkley, 66 Wn. App. 844, 850, 837 P.2d 20 (1992). Rather, the defendant must show prejudice from the manner in which the evidence was introduced. See Brinkley, 66 Wn. App. at 850-51. Relevant factors may include: (1) whether the defendant excluded witnesses who could have rebutted the new evidence, (2) whether the State deliberately withheld the evidence for tactical reasons, (3) whether the defendant suffered greater damage than if the evidence had been offered at the proper time, (4) whether the defense had an opportunity for a continuance to interview additional witnesses or put on rebuttal witnesses, (5) whether the State's additional evidence was discovered after it rested and was not highly technical, and (6) whether the stage of the trial may have placed undue emphasis on the evidence. See Brinkley, 66 Wn. App. at 850-51.

Miles fails to assert how the court's decision to reopen the case prejudiced him, other than to argue that the State could not have proved first degree unlawful possession of a firearm without the new evidence. But Miles fails to demonstrate how the timing of the evidence's admission prejudiced him.

First, Miles dismissed no witnesses who could rebut the new evidence because he called no witnesses. Second, nothing in the record indicates that the State intentionally withheld the evidence. Third, because the new evidence merely

constituted public records, no witnesses unfairly highlighted the evidence. And because a judge, rather than jury, acted as fact finder, any impact was likely minimal. Fourth, the court gave the defense an open invitation to reopen its case or continue the matter. The defense declined. Fifth, the records were not highly technical. Sixth, because the case was a bench trial and the documents were public records, their evidence received no undue emphasis. Applying these factors, we conclude Miles demonstrates no prejudice from the court's ruling reopening the prosecution's case.

In a statement of additional grounds, Miles argues ineffective assistance by trial counsel. Miles argues that counsel failed to adequately cross-examine State witnesses, object to certain testimony, and introduce defense witnesses. To establish ineffective assistance of counsel, a defendant must show both deficient performance and resulting prejudice. State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Our review of the record shows that trial counsel provided Miles a vigorous defense. And decisions whether to call witnesses are generally tactical and will not support an ineffective assistance claim. State v. Jones, 33 Wn. App. 865, 872, 658 P.2d 1252 (1983). We conclude Miles received effective assistance of counsel.

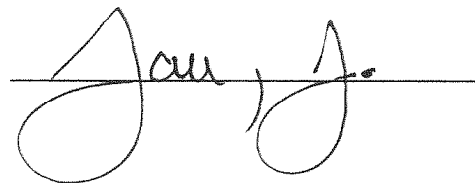
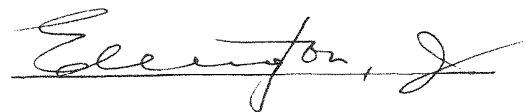
Miles also argues that misstatements by the prosecutor prejudiced him. To prove prosecutorial misconduct, the defendant bears the burden of proving that the prosecuting attorney's conduct was both improper and prejudicial. State v. Korum, 157 Wn.2d 614, 650, 141 P.3d 13 (2006). Our review of the record reveals none of the statements Miles cites, nor did we find any misconduct. This claim is without merit.

Miles also argues that guns introduced into evidence at trial were obtained through a warrantless search of his car and home and that this search also violated the second amendment to the United States Constitution. But this is factually incorrect. The only firearm admitted at trial was obtained by Officer Harris from a trash can after Miles discarded it while fleeing. Accordingly, we reject Miles' claims.

In his final additional ground, Miles states that his attorney requested a mistrial, and Miles requests more time "so that [his] attorney can review these issues and explain their importance, or lack there of, to me." Statement of Additional Grounds at 3. Our review of the record reveals no mistrial request. Miles fails to inform the court of "the nature and occurrence of [the] alleged error[]." RAP 10.10(c). Accordingly, we decline to review this claim of error.

For the reasons above, we affirm Miles' conviction for one count of first degree unlawful possession of a firearm.

WE CONCUR:

A handwritten signature in cursive script, appearing to read "J. J. Jones", written over a horizontal line.A handwritten signature in cursive script, appearing to read "Schineller, J.", written over a horizontal line.A handwritten signature in cursive script, appearing to read "Eberly, J.", written over a horizontal line.

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