

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

KIM SANDEN TARAPE,

Appellant.

No. 40990-9-II

UNPUBLISHED OPINION

Hunt, J. – Kim Sanden Tarape appeals his residential burglary jury conviction. He argues that the trial court erred by denying his motion to substitute counsel when his court-appointed attorney refused to call a witness the attorney believed would commit perjury. We affirm.

FACTS

Nita Fields rented one unit of a duplex; Kelly Saris, Kim Sanden Tarape's girlfriend, rented the other. Both units contained a garage, which connected to one another through an attic access hatch. On March 4, 2010, Fields noticed that several tools were missing from her garage, the garage attic access was damaged, and the drywall that supported the attic opening was broken. Fields had not left her garage open or unattended.

Fields reported the burglary to Lacey Police Officer Julie Mullen and her landlord,

Hiep Tran. After inspecting the premises, Tran told Mullen that the attic access was open to Saris's garage and that Saris's boyfriend, Tarape, had been staying with her. Mullen knocked on Saris's door and spoke with Saris and her son. Saris consented to a search of her garage. To Saris's surprise, Mullen found the missing tools in the garage. Saris acknowledged that it was possible Tarape had stolen the tools.

Tarape initially denied taking the tools, saying that "he did have a friend over there and the friend could have done it." Report of Proceedings (RP) at 30. Later, Tarape admitted to having entered Fields' garage and taking the tools, that he "needed money," and that he was sorry. RP at 69.

The State charged Tarape with residential burglary. Before voir dire on the first day of trial, Tarape's attorney (1) informed the court Tarape had recently stated his father would confess to having taken the tools and (2) asked for permission to call Tarape's father as a witness or, in the alternative, to grant a continuance. The court denied the request for a continuance but ruled that Tarape's father could testify.

The next morning, Tarape's attorney told the court that he had spoken with Tarape's father and would no longer be calling him as a witness because doing so would put forward untruthful testimony in violation of Rule of Professional Conduct (RPC) 3.3. Tarape disagreed and asked the court to grant him an opportunity to obtain a new attorney who would call his father as a witness. The trial court denied Tarape's request, ruled that Tarape's counsel could not legally call Tarape's father as a witness under RPC 3.3, and allowed Tarape to testify that it was his father or someone else who had burglarized Fields' garage.

At trial, however, although Tarape denied that he had stolen the tools from Fields' garage, he did not name his father or the "someone else" he maintained had committed the burglary. RP at 84. Instead, Tarape testified that his previous admission to the burglary had been a lie and that he wished to "protect" this other person until he was "willing to come forward." RP at 85. The jury found Tarape guilty of residential burglary. Tarape appeals.¹

ANALYSIS

Tarape argues that the trial court violated his due process right to present relevant evidence in his defense by denying his request for an opportunity to obtain new counsel who would call his father as a witness. We disagree.

Whether to allow appointment of new counsel is a matter within the trial court's discretion. *State v. Stenson*, 132 Wn.2d 668, 733, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). We will not disturb the trial court's decision absent a showing of abuse of discretion. *State v. DeWeese*, 117 Wn.2d 369, 376, 816 P.2d 1 (1991). Abuse of discretion occurs when the trial court's discretion is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *State ex rel Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). The appellant bears the burden of proving abuse of discretion. *State v. Hentz*, 32 Wn. App. 186, 190, 647 P.2d 39 (1982), *reversed on other grounds*, 99 Wn.2d 538 (1983). We find no such abuse here.

Criminal defendants have a constitutional right to present relevant evidence in their

¹ A commissioner of this court initially considered Tarape's appeal as a motion on the merits under RAP 18.14 and then transferred it to a panel of judges.

defense, as long as that evidence is not otherwise inadmissible. *State v. Rehak*, 67 Wn. App. 157, 162, 834 P.2d 651 (1992), *review denied*, 120 Wn.2d 1022, *cert. denied*, 508 U.S. 953 (1993). The right to present relevant evidence is not, however, absolute. A trial court may exclude relevant evidence where other considerations outweigh its value, such as misleading the jury. *State v. Hawkins*, 157 Wn. App. 739, 750, 238 P.3d 1226 (2010). A defendant has no constitutional right to present perjured evidence; nor does he have a constitutional right to “a lawyer who would cooperate with planned perjury.” *State v. Berrysmith*, 87 Wn. App. 268, 276, 944 P.2d 397 (1997).

Because Tarape’s lawyer reasonably believed that Tarape’s father would offer false testimony, he (counsel) was not ethically or legally entitled to present such evidence. A defendant has no right to force his lawyer to present evidence, even if helpful for his defense, that would cause the attorney to violate his ethical obligations under the Rules of Professional Conduct.² *Berrysmith*, 87 Wn. App. at 276-77.

The trial court was entitled to rely on defense counsel’s assertion that Tarape’s father would offer perjured testimony, as a basis for ruling the testimony inadmissible. The trial court was not obliged to grant Tarape time to find substitute counsel who would

² RPC 3.3 provides, in pertinent part:

(a) A lawyer shall not knowingly:

....

(4) Offer evidence that the lawyer knows to be false.

....

(e) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false. Section [8] of the Comment to RPC 3.3 states that the lawyer may offer evidence unless he knows for a certainty it is false, but section [10] cautions that the lawyer is not required to do so, and the lawyer must be careful not to “cooperate in deceiving the court.” RPC 3.3 § 8, 10.

present testimony the court had reason to believe was perjured. *See Berrysmith*, 87 Wn. App. at 276-77. Tarape does not show that the trial court’s denial of his motion to substitute counsel was “manifestly unreasonable” or “based on untenable grounds.” Rather, the trial court denied Tarape’s motion based on (1) the inadmissibility of Tarape’s father’s likely perjured testimony, and (2) respect for Tarape’s attorney’s ethical obligations under RPC 3.3. We hold, therefore, that the trial court did not abuse its discretion in denying Tarape’s motion for a continuance to obtain substitute counsel to present such evidence.

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.

Hunt, J.

We concur:

Penoyar, C.J.

Armstrong, J.