IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. KENNETH ANDREW SORTLAND, Appellant.	No. 41287-0-II UNPUBLISHED OPINION

Armstrong, J. – Kenneth Andrew Sortland appeals his convictions of residential burglary, second degree malicious mischief, and second degree theft, arguing that the trial court erred in denying his motion to dismiss and that insufficient evidence supports his convictions. Sortland raises additional issues in a pro se statement of additional grounds.[1] Finding no reversible error, we affirm.

Facts

Susan Woodstock owned a rental home in Tacoma that former tenants had severely damaged. After she evicted them, she did extensive repair work on the house. By June 2009, the

[1] RAP 10.10.

house was ready to rent and Woodstock showed it to approximately 10 people. Each time, she toured the entire house and found it in order.

Professional photographer Dan McCormack lived next door to Woodstock's rental house. Early in the morning of June 15, 2009, he heard someone in the gravel alley between the two houses, and he looked out his bathroom window to see who it was. McCormack saw a man loading doors into a red truck parked beside the rental house. He also saw a Shop-Vac in the bed of the truck.

McCormack did not recognize the man as any of the workers he had seen, and because those workers usually came later in the day, he suspected that something might be wrong. He took several photographs of the man and the truck. After watching for 5 to 10 minutes, McCormack did not see anyone else. When the man got into the truck and drove away, the passenger seat was empty. McCormack called the police and Woodstock later that day, after noticing that the back door of the rental house had been broken in. He gave copies of his photographs to the police.

After receiving McCormack's call, Woodstock drove over and saw that the back door of the house had been kicked open. Once inside, she discovered that the tools stored in the basement, including a Shop-Vac, were gone. When she went upstairs, she found that two interior doors were missing. The doors were vintage solid wood doors with crystal knobs and brass hardware. Woodstock denied giving the man in McCormack's photographs permission to enter or remove anything from the house.

Detective Al Calitis produced a bulletin using McCormack's photographs of the man and his truck. The bulletin went to various law enforcement agencies, including Crime Stoppers.

On March 13, 2010, Pierce County Deputy Sheriff Jerome Duray saw a booking photograph of Sortland taken that day. He thought that Sortland looked like a man he had seen on the Crime Stoppers web site, and he searched until he found the bulletin with McCormack's photograph. He put the booking photograph and the Crime Stoppers photograph side-by-side on his computer screen and noticed many similar features. Deputy Arthur Centoni agreed that the photographs contained several similarities. The deputies then referred Sortland's name to Detective Calitis, who again compared Sortland's photograph to the Crime Stoppers bulletin.

The State charged Sortland with residential burglary, second degree malicious mischief, and first degree theft in connection with the rental house break-in. Before trial, the State asked the court to admit evidence that would explain how it identified Sortland as a suspect. This evidence would show that when Sortland was booked into custody for unrelated offenses in 2010, corrections officers compared his booking photograph to the Crime Stoppers bulletin. The defense objected and argued that the officers could not testify that Sortland matched the person in the Crime Stoppers photograph. The State responded that the photograph comparison was part of the res gestae of the crime and that the jury was entitled to know the whole story. The trial court ruled that the officers could explain how they went about identifying Sortland as the suspect but that they could not testify that he matched the Crime Stoppers photograph. The trial court agreed with the defense that all references to Sortland being in jail should be avoided.

The defense then moved to exclude the Crime Stoppers bulletin on hearsay grounds, but

the court admitted a version that redacted the narrative of the alleged crimes. The defense also moved to exclude Sortland's booking photograph; the trial court admitted a redacted version showing his face but not his jail clothing.

At trial, Woodstock testified about the damage to the rental home and the cost of replacing the basement and interior doors. When asked if she recognized the person in Exhibit 23, a photograph showing a clear frontal view of the man McCormack saw, she replied, "Yes. It's the person sitting at the table." Report of Proceedings (RP) at 57. The trial court overruled defense counsel's foundation objection.

McCormack then testified about what he saw and photographed at the rental house. After he testified, the trial court redacted the Crime Stoppers bulletin further to remove references to the burglary investigation, and the State sought clarification about the pretrial ruling concerning the officers' identification testimony. The prosecutor already had told her witnesses not to testify that, in their expert opinion, Sortland's booking photograph matched the Crime Stoppers photograph, which was a copy of the photograph in Exhibit 23. The trial court reconfirmed that the officers could testify about why they identified Sortland as the suspect in the Crime Stoppers photograph, but that they could not say Sortland was the man pictured.

Deputy Centoni testified that during his shift at the Pierce County Jail, he was asked to look at a computer screen with a photograph of Sortland beside the Crime Stoppers bulletin. The deputy described the similar facial features reflected in the photographs. Detective Calitis then

testified about his investigation and how he received information in March 2010 suggesting Sortland as a possible suspect. The prosecutor asked him to compare Sortland's booking photograph (referred to as a photograph obtained through Tacoma/Pierce County records) with the Crime Stoppers photograph, and to determine whether any resemblances or similarities stood out. The detective replied, "To me, it looked like it was the same person." RP at 123. When the defense objected and moved to strike, the trial court sustained the objection. The detective then described the similarities between the two photographs.

After two additional witnesses testified and the State ended its case-in-chief, the defense moved to dismiss based on Detective Calitis's violation of the motion in limine. Counsel argued that dismissal was required because the detective had "blurted out" his opinion that the person in the Crime Stoppers photograph was Sortland. RP at 147-48. The trial court denied the motion, stating that the detective's misstatement did not rise to the level of error that warranted dismissal.

The defense then presented three witnesses. Sortland's girlfriend testified that he had a full time job in Edgewood in June 2009 to which she drove him every day, and that she never saw him drive a red truck. Sortland's friend and co-worker testified that some of Sortland's work involved removing vintage interior doors and that Sortland had door-related materials in the storage space he rented. This witness added that the man in Exhibit 23 looked a lot like Sortland. Another friend also testified that the man in Exhibit 23 looked a great deal like Sortland.

Before closing, defense counsel informed the trial court that Sortland wanted to give his own closing argument and to represent himself. Sortland explained that he had no complaints about his attorney's representation but wanted to emphasize his alibi defense. The trial court

rejected his request, reasoning that Sortland now wanted to testify without being subject to cross-examination that would reveal his multiple prior crimes of dishonesty.

During closing argument, defense counsel conceded that the person McCormack had photographed looked a lot like Sortland. The jury found him guilty of residential burglary, second degree malicious mischief, and the lesser included offense of second degree theft. The trial court imposed standard range sentences.

Analysis

I. Motion to Dismiss

Sortland claims on appeal that the trial court abused its discretion in denying his motion for a mistrial. Sortland never sought a mistrial below, however, moving instead for dismissal after the State presented its case-in-chief. Consequently, we discuss whether the trial court erred in denying the motion to dismiss.

We review a trial court's denial of a motion to dismiss for a manifest abuse of discretion. CrR 8.3(b); *State v. Warner*, 125 Wn.2d 876, 882, 889 P.2d 479 (1995). A trial court may dismiss charges if the defendant shows by a preponderance of the evidence (1) arbitrary action or governmental misconduct and (2) prejudice affecting his right to a fair trial. CrR 8.3(b); *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P. 3d 638 (2003). Governmental misconduct need not be of an evil or dishonest nature; simple mismanagement is sufficient. *State v. Wilson*, 149 Wn.2d 1, 9, 65 P.3d 657 (2003). Dismissal is an extraordinary remedy, however, and is appropriate only in "'truly egregious cases of mismanagement or misconduct.'" *Wilson*, 149 Wn.2d at 9 (quoting *State v. Duggins*, 68 Wn. App. 396, 401, 844 P.2d 441, *aff'd*, 121 Wn.2d 524 (1993)).

Here, the trial court's pretrial ruling provided that the State's law enforcement witnesses could describe the similarities between Sortland's booking photograph and the Crime Stoppers photograph, but that they could not opine that Sortland was the suspect in the latter photograph. Before these witnesses testified, the State sought clarification of this ruling, and the trial court stated that the witnesses could explain their thought processes and why they identified Sortland as the suspect. They could not testify, however, that Sortland was the person in the Crime Stoppers photograph.

Deputy Centoni adhered to this ruling and described the similarities without objection. When asked about such similarities, however, Detective Calitis stated, "To me, it looked like it was the same person." RP at 123. It was this response that prompted defense counsel's motion to dismiss.

The State acknowledged that the detective had violated the pretrial ruling with his statement, but it characterized the violation as inadvertent and correctly observed that there had been no erroneous follow-up questions or testimony. The State had no objection to a limiting instruction. The trial court denied the motion to dismiss, stating that it had sustained the objection and adding, erroneously, that it had instructed the jury to disregard the answer. The court also offered to give the jury a limiting instruction.

Although the State made every effort to question its witnesses appropriately, the detective's response clearly exceeded the scope of the trial court's ruling and arguably constituted mismanagement of trial testimony. *See State v. George*, 150 Wn. App. 110, 119, 206

P.3d 697 (2009) (trial court abused its discretion in allowing detective to identify defendants as men in surveillance video). We do not view this mismanagement as sufficiently egregious, however, to warrant the "extraordinary remedy" of dismissal. *See Wilson*, 149 Wn.2d at 9.

Nor do we see that the detective's comment resulted in actual prejudice. *See State v. Kone*, 165 Wn. App. 420, 266 P.3d 916, 922 (2011) (defendant must show that actual prejudice, not merely speculative prejudice, affected his right to a fair trial). Sortland does not assign error to Woodstock's testimony that the man in Exhibit 23, which was the McCormack photograph included in the Crime Stopper's bulletin, was "the person sitting at the table." RP at 57. Two defense witnesses testified that the man in McCormack's photograph looked like Sortland, and his own attorney conceded as much during closing argument. The jury was able to view Sortland as well as the photographs and assess for itself whether he was the man pictured. Under these facts, we cannot conclude that the detective's testimony resulted in actual prejudice to Sortland's right to a fair trial. Consequently, the trial court did not abuse its discretion in denying the motion to dismiss.

II. Sufficiency of the Evidence

Sortland next challenges the sufficiency of the State's evidence, arguing that the State failed to prove that he was the man in McCormack's photographs and thus never established his identity as the man who committed the crimes at the rental house. Sortland also argues that even if he was the man pictured, the evidence does not show that he entered or remained inside the house, as required to prove residential burglary; that he kicked in the basement door, as required to prove malicious mischief; or that he took Woodstock's property, as required to prove theft.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Salinas*, 119 Wn.2d at 201. Circumstantial and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). We defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992).

The prosecution bears the burden of establishing beyond a reasonable doubt the identity of the accused as the person who committed the offense. *State v. Hill*, 83 Wn.2d 558, 560, 520 P.2d 618 (1974). Identity involves a question of fact for the jury and any relevant fact, "either direct or circumstantial, which would convince or tend to convince a person of ordinary judgment, in carrying on his everyday affairs, of the identity of a person should be received and evaluated." *Hill*, 83 Wn.2d at 560.

McCormack took a clear photograph of the man he saw putting doors into a truck. Although there was no direct evidence that Sortland was the man in McCormack's photograph, there was considerable testimony that he strongly resembled that man. The jury was able to view Sortland and compare him to the photograph. Furthermore, there was evidence that Sortland worked on remodeling homes and knew how to remove doors, and that he had a collection of door-related materials. This was sufficient evidence to establish Sortland's identity as the man shown in McCormack's photograph.

To prove residential burglary, the State had to establish that Sortland entered or remained in the rental home unlawfully with the intent to commit a crime against a person or property therein. RCW 9A.52.025(1). There was evidence that the basement door of the house had been kicked in, and Woodstock testified that the man in the photograph, whom she identified as Sortland, had never received permission to enter her home. McCormack saw him loading doors onto his truck, and two doors from the house's interior were found missing that day. McCormack also saw a Shop-Vac in the truck, and Woodstock testified that the Shop-Vac in her basement was missing. The evidence is sufficient to prove that Sortland entered or remained in the rental home unlawfully and with criminal intent.

To prove second degree malicious mischief, the State had to prove that Sortland knowingly and maliciously caused damage to the property of another in an amount exceeding $250. Former RCW 9A.48.080(1)(a) (1994).[2] The evidence showed that the basement door and its deadbolt lock were destroyed, and Woodstock spent over $600 to replace them. RP 42, 63-64. McCormack testified that he heard noise and looked out to see a man loading doors into his truck. There was no testimony about any other means of access into the house. RP 37. Consequently, the evidence is sufficient to show that Sortland kicked in the door with malicious intent.

To prove second degree theft, the State had to prove that Sortland wrongfully exerted control over the property of another with the intent to deprive the other person of the property, and that the property was between $250 and $1500 in value. Former RCW 9A.56.040(1)(a)

[2] In an amendment that took effect on July 29, 2009, the legislature increased the damage threshold from $250 to $750. Laws of 2009, ch. 431, § 5.

(2007).[3] The evidence showed that McCormack saw a man loading doors into his truck, and Woodstock later found two interior doors missing. She spent more than $500 to replace these doors and said that the man in McCormack's photographs did not have permission to remove them. RP 45, 58. The red truck had a Shop-Vac in its bed, and Woodstock testified that her Shop-Vac was missing. The evidence is sufficient to prove that Sortland took the doors and Shop-Vac, and that the property he took was between $250 and $1500 in value.

We conclude that the evidence was sufficient to support each of Sortland's convictions.

III. Pro Se Issues

Sortland raises two issues in his pro se statement of additional grounds. He argues first that the trial court erred in denying him permission to give his own closing argument and to thereby represent himself.

Criminal defendants have the right to self-representation under the state and federal constitutions. *State v. Madsen*, 168 Wn.2d 496, 503, 229 P.3d 714 (2010) (citing Wash. Const. art I, § 22; *Faretta v. California*, 422 U.S. 806, 819, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975)). This right is so fundamental that it is afforded despite its potentially detrimental impact on both the defendant and the administration of justice. *Madsen*, 168 Wn.2d at 503.

The right to proceed pro se, however, is neither absolute nor self-executing. *State v. Woods*, 143 Wn.2d 561, 586, 23 P.3d 1046 (2001). When a defendant requests pro se status, the trial court must determine whether the request is unequivocal and timely. *State v. Stenson*, 132

[3] In an amendment that took effect on July 29, 2009, the legislature increased the damage range from $250 - $1,000 to $750 - $5,000. Laws of 2009, ch. 431, § 8.

Wn.2d 668, 737, 940 P.2d 1239 (1997). If the defendant asks to represent himself during trial, the right to proceed pro se rests largely in the informed discretion of the trial court. *State v. Barker*, 75 Wn. App. 236, 241, 881 P.2d 1051 (1994). In the absence of substantial reasons, a late request should generally be denied. *State v. Garcia*, 92 Wn.2d 647, 656, 600 P.2d 1010 (1979).

Here, Sortland asked to present his own closing argument and thus to represent himself because he wanted to emphasize his alibi defense. The trial court denied his request, reasoning that Sortland was actually seeking to testify in a manner that would not expose him to cross examination concerning his criminal history. Sortland's request was untimely, and we see no abuse of discretion in its denial.

Sortland also argues that the trial court erred in admitting his booking photograph and the Crime Stoppers photograph because the prejudicial effect of this evidence exceeded its probative value. ER 403. He argues further that the booking photograph constitutes inadmissible "bad act" evidence under ER 404(b). The trial court rejected similar arguments below, agreeing with the State that these photographs were part of the investigation and highly relevant to determining Sortland's identity as the suspect. The trial court was careful to redact extraneous evidence, including Sortland's clothing in the booking photograph, references to him being in jail, and the reference to a burglary investigation in the Crime Stoppers bulletin. Moreover, witnesses referred to the booking photograph only as a photograph from Tacoma/Pierce County records.[4] Evidence of out-of-court identifications is admissible where the identity of the accused is at issue. *State v.*

[4] Defense counsel argued below that the booking photograph would trigger ER 404(b) issues if a viewer could tell it was a jail photograph. Because the trial court redacted all evidence that it was a jail photograph, the court did not need to go through the ER 404(b) factors before admitting it.

Newton, 42 Wn. App. 718, 726, 714 P.2d 684 (1985), *reversed on other grounds*, 109 Wn.2d 69 (1987). Here, the identity of the accused was the key issue, and the trial court did not abuse its discretion in admitting the booking and Crime Stoppers photographs.

Affirmed.

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.

Armstrong, J.

We concur:

Worswick, J.

Penoyar, C.J.