

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

DELBERT GOBLE,

Appellant.

No. 38517-1-II

UNPUBLISHED OPINION

Armstrong, J. — Delbert Goble appeals his conviction of residential burglary and third degree theft, arguing that the trial court violated his right to a jury trial by accepting a waiver that he had not entered into knowingly, intelligently, and voluntarily. Goble further argues that the trial court deprived him of his constitutional right to confrontation by limiting his cross-examination of a key witness. We find no reversible error and, thus, affirm.

FACTS

Early in the morning of March 21, 2006, Jessica Pakar awoke to noises in her garage. She grabbed a pistol and walked into the kitchen where she saw a man in the garage. He fled with her chainsaw, and Pakar gave chase. When she was 15 yards from him, she recognized Goble, whom she had known for years. Goble again fled, dropping the chainsaw along the way.

Deputy Gabriel Frase contacted Pakar in response to her 911 call. Pakar identified Goble as the burglar. Deputy Frase then presented Pakar with a photo montage that included Goble and other men, all of whom had some facial hair. Pakar again identified Goble as the burglar. The State charged Goble with residential burglary and third degree theft.

In a pretrial hearing, Goble's counsel offered the court a written jury trial waiver, stating

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that he had “talked with Mr. Goble about this case. And he has signed in my presence a waiver of jury trial. We discussed the nuance of such and perils and this kind of thing. We’re prepared to go on with a bench trial.” Report of Proceedings (RP) (July 10, 2008) at 2. Judge James Lawler then spoke directly with Goble:

THE COURT: All right. Mr. Goble, do you agree with what your attorney just told me?
MR. GOBLE: Yes.
THE COURT: You understand by waiving your right to jury [sic], a judge will decide this on his own?
MR. GOBLE: Yeah.
THE COURT: All right. I will approve the jury waiver. It’s going to be subject to --
[COUNSEL]: I understand.
THE COURT: -- Judge Brosey’s approval.

RP (July 10, 2008) at 2-3. Goble also signed a waiver of jury trial that stated:

“I, Delbert Goble, the above-named Defendant, having been advised of my constitutional right to a jury trial, do hereby waive, give up, and relinquish my right to a jury trial in the above-entitled matter.” Clerk’s Papers (CP) at 27. The court signed the waiver of jury trial, adding by hand, “subject to trial court approval.”¹ CP at 27.

Defense counsel cross-examined Pakar about an interview she gave the defense investigator; counsel apparently intended to show that Pakar had made an inconsistent statement to the investigator about Goble’s facial hair at the time of the crime. Counsel asked her about Goble’s physical appearance three days after the burglary when Goble came to Pakar’s home and tried to convince her that he did not commit the burglary. Pakar testified that Goble was clean shaven during that visit. The following questioning, objection, and ruling occurred:

¹ The waiver of jury trial has a handwritten note of approval in addition to Judge Lawler’s signature, but the signature under the note is illegible. The approval is dated July 10, 2008.

[COUNSEL]: Do you remember an interview that you had with Paula Howell, an investigator?

[PAKAR]: Slightly.

[COUNSEL]: And is it your testimony today that when you saw him when he came to your house that he was clean shaven then?

[PAKAR]: He did not have a beard.

[COUNSEL]: Did you have a discussion with Ms. Howell about Mr. Goble and a beard?

[PROSECUTOR]: I'm going to object to this testimony.

[THE COURT]: What is the basis for what your--state your objection and the basis.

[PROSECUTOR]: Well, I'm objecting to the testimony. This is information that has not been disclosed to the state.

...

PROSECUTOR: The state doesn't--I think this is unfair surprise, it is a discovery violation. If there were notes taken of the interview, that should have been provided to me prior to trial.

COUNSEL: I haven't introduced that yet.

THE COURT: Aren't you supposed to provide the statements of the prospective witnesses?

COUNSEL: She's not a prospective witness.

THE COURT: She is, though.

COUNSEL: She is, but Ms. Howell is not. I'm just asking her questions about that timeframe.

THE COURT: Why wasn't this conversation that she had -- if you're going to be asking this witness about a conversation she had with your investigator, why hasn't that transcript been disclosed to the state?

COUNSEL: Didn't intend to ask Paula Howell to be a witness, that would be my answer.

THE COURT: I'm going to sustain the objection.

RP (Oct. 23, 2008) at 28-29. Goble and his wife both testified that Goble had a bushy, red beard at the time of the burglary, including when Goble contacted Pakar three days after the chainsaw was stolen.

The trial court found Goble guilty as charged. The court imposed a standard range sentence of 75 days' confinement for the burglary conviction and a one-year suspended sentence for the theft conviction.

ANALYSIS

I. Waiver of the Right to a Jury Trial

Goble argues that the trial court's colloquy did not demonstrate that he knowingly, intelligently, and voluntarily waived his right to a jury trial. While Goble concedes that he was aware of his right to a jury trial, he argues that the trial court did not sufficiently explain the specific constitutional rights he was waiving.

The State bears the burden of proving that a defendant waived his constitutional right to a jury trial knowingly, intentionally, and voluntarily. *State v. Stegall*, 124 Wn.2d 719, 730, 881 P.2d 979 (1994). The waiver of a right to a jury trial must either be in writing or done orally on the record. *State v. Ramirez-Dominguez*, 140 Wn. App. 233, 240, 165 P.3d 391 (2007). A written waiver is not determinative but is strong evidence that the defendant validly waived his jury trial right. *State v. Pierce*, 134 Wn. App. 763, 771, 142 P.3d 610 (2006); *State v. Ashue*, 145 Wn. App. 492, 503, 188 P.3d 522 (2008) (“[t]o date, no Washington case has required more than a written waiver”) (quoting *State v. Brand*, 55 Wn. App. 780, 785, 780 P.2d 894 (1989)). Defense counsel's representation that his client knowingly, intelligently, and voluntarily relinquished jury trial rights is also relevant. *Ramirez-Dominguez*, 140 Wn. App. at 240. We do not require the trial court to engage the defendant in a colloquy on the record as to the consequences of a waiver of a jury trial; the defendant's personal expression of waiver is sufficient. *Stegall*, 124 Wn.2d at 725; *Pierce*, 134 Wn. App. at 771-72. We review a defendant's waiver of his right to a jury trial de novo. *Ramirez-Dominguez*, 140 Wn. App. at 239.

In *Pierce*, the defendant claimed that his jury waiver was invalid because the trial court did

not specifically explain his right to participate in juror selection. *Pierce*, 134 Wn. App. at 773. We found a valid waiver based on a record showing that Pierce's counsel consulted with his client, that the waiver was submitted in writing, and that the trial court explained to Pierce the essence of his jury trial right. *Pierce*, 134 Wn. App. at 772-73.

Here, Goble signed a written waiver explicitly stating that he was giving up his right to a jury trial. Goble's counsel also represented in open court that he had discussed the waiver with his client. Additionally, the trial court explained to Goble that he would be giving up his jury trial rights and Goble responded that he understood. Because Goble unequivocally expressed his wish to waive his jury trial right both orally and in writing, the trial court did not err in accepting his waiver.

II. Cross Examination of Witness

Goble argues that the trial court deprived him of his constitutional right to confrontation by limiting his cross-examination of a key witness. Defense counsel attempted to cross-examine Pakar about her conversation with a defense investigator concerning Goble's beard. The State objected to the questioning and the trial court sustained the objection because the defense had not previously disclosed the conversation to the State.

Defendants are guaranteed the right to confront and cross-examine an adverse witness. U.S. Const. amend. VI; Wash. Const. art. I, § 22; *State v. Darden*, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002). But the right to cross-examine adverse witnesses is not absolute. *Darden*, 145 Wn.2d at 620. The trial court has discretion to determine the scope of cross-examination and we review a trial court's decision for an abuse of discretion. *State v. Dixon*, 159 Wn.2d 65, 75, 147

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P.3d 991 (2006). We also review a trial court's decision regarding discovery violations for an abuse of discretion, and we will not disturb such rulings absent a showing of prejudice or a material effect on the outcome of the trial. *State v. Woods*, 143 Wn.2d 561, 582, 23 P.3d 1046 (2001); *State v. Linden*, 89 Wn. App. 184, 190, 947 P.2d 1284 (1997).

The parties dispute whether this is a discovery issue or a witness confrontation issue. It could have been a discovery issue if the court had allowed the witness to answer the question and then defense counsel had attempted to call his investigator to impeach the witness with a contradictory statement. If the witness had admitted making an inconsistent statement, however, the impeachment would have been complete and the defense would not have had to call the investigator. ER 613; 5A K. Tegland, *Washington Practice: Evidence*, § 613.10 at 593 (5th Ed. 2007). But the court sustained the State's objection to the question defense counsel posed to Pakar because of a perceived discovery violation. The question to Pakar did not violate discovery rules; rather, the discovery violation, if any, would occur only if defense counsel called his investigator to impeach Pakar. The trial court erred in sustaining the objection to counsel's question to Pakar.

Regardless of how we characterize the issue, we are satisfied the error was harmless. The victim testified on cross-examination that she did not recall whether Goble had a beard at the time of the burglary. The defendant and his wife testified that he had a full beard at that time. But the court clearly did not place much weight on their testimony, commenting that it "would expect that kind of testimony," and that Goble's beard or lack of one during the burglary was not critical to the victim's identification. RP (Oct. 23, 2008) at 86. The court also commented that, "[i]n

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addition, she knows him and she may have said that he had a beard or may have recognized a beard, she doesn't know. That does not raise a reasonable doubt." RP (Oct. 23, 2008) at 85-86. Finally, the court found that "[e]ven if the defendant did have a beard, Mrs. Pakar was higher in elevation when she observed him, and could quite possibly not have noticed whether the defendant had a beard." CP at 17. We are satisfied beyond a reasonable doubt that the trial court would have convicted Goble even if the witness had answered the question.

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.

Armstrong, J.

We concur:

Quinn-Brintnall, J.

Van Deren, C.J.