IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JEFFREY DOUGLAS PECK, Appellant.	No. 38519-8-II UNPUBLISHED OPINION

Hunt, J. — Jeffrey Peck appeals his conviction for possession of a stolen motor vehicle, RCW 9A.56.068. He argues that (1) the trial court erred in denying his request for expert witness funds to present a diminished capacity defense, (2) defense counsel rendered ineffective assistance in failing to argue a diminished capacity defense, (3) the trial court erred in refusing to give a missing witness instruction to the jury, (4) defense counsel rendered ineffective assistance by failing to provide the trial court with a proposed missing witness instruction, and (5) the trial court erred in failing to take the case from the jury based on insufficient evidence. Peck presents two statements of additional grounds for review (SAG): (1) The trial court erred in denying Peck's last-minute request to represent himself pro se and (2) defense counsel rendered ineffective assistance in failing to call Peck's private investigators as defense witnesses. We affirm.

FACTS

I. Possession of a Stolen Motor Vehicle

On March 17, 2008, Jerry Hansen discovered that someone had stolen his white Harley Davidson motorcycle from his workplace. Hansen had not given anyone permission to use his motorcycle.

Later that day, Steven Mendelson drove Hansen's motorcycle to the home of an acquaintance, Peter Valentine, where another acquaintance, Michael Skoczen, was also present. Fearing that the motorcycle had been stolen, Valentine and Skoczen asked Mendelson to leave with it, which he did. Five minutes later Skoczen saw Mendelson return with Jeffrey Peck, a man he had met only a "couple times." 1 Report of Proceedings (RP) at 68. Skoczen then saw the two leave together on the motorcycle.

Later that day, Tumwater police officers responded to a 911 call reporting that two men, later identified as Peck and Mendelson, had been riding a motorcycle without helmets and in a reckless manner. The caller described the passenger, Mendelson, as a man with a black ponytail and a blue jacket and the driver, Peck, as wearing a red bandana. Arriving at the scene, the officers saw a Harley Davidson motorcycle parked in a driveway and two men matching the reported descriptions.

One officer asked Peck for identification. Peck said he could not find his, but he gave his name. The officers also identified the passenger as Steven Mendelson. Peck told the officers that he owned the motorcycle and that he had been "giving his friend [Mendelson] a ride at the time." 1 RP at 33. Checking the motorcycle license plate, the officers learned that it had been reported stolen. They then arrested Peck and Mendelson. In searching Peck incident to his arrest, the officers found the key to the motorcycle.

II. Procedural History

The State charged Peck with one count of possession of a stolen motor vehicle under RCW 9A.56.068.

A. Pretrial

Before trial, Peck submitted to a psychological evaluation, which found him competent to stand trial. The trial court granted Peck's request to represent himself pro se but also appointed a public defender as standby counsel. Peck stipulated that his defense to the charge would be general denial and diminished capacity. He also told the trial court that he had been hospitalized and put on suicide watch the evening before his arrest and that he suffered from bipolar disorder and schizophrenia. On multiple occasions Peck told the trial court his defense was that Mendelson had stolen the motorcycle but had not explicitly told him (Peck) the motorcycle was stolen. The trial court ordered the State to produce Mendelson, but the State could not locate him.[1] The trial court then precluded any testimony from Mendelson unless the State first provided Peck with an opportunity to interview him.[2]

Serving as Peck's standby counsel, the office of public defense could provide only $800 of the $2,000 Peck needed to secure another psychological evaluation to support his diminished capacity defense. Peck requested the additional $1,200 from the trial court to procure the expert testimony. The trial court denied the request because Peck failed to provide a legal basis for admitting such evidence. Before the trial court ruled, Peck's standby counsel noted, "[M]y understanding is that [diminished capacity] would not be

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[1] Mendelson had signed a plea agreement with the State, agreeing to testify against Peck. Mendelson was to have reported to a treatment program in Spokane and then return to testify at Peck's trial.

[2] Apparently, Mendelson was not arrested on his outstanding warrants and, thus, no one was able to produce him to testify at trial.

an appropriate defense." RP (Sept. 18, 2008) at 18.

Peck pursued much of his own discovery, including "working with two separate investigators . . . [for a total of] 16 hours' worth of investigative time." 1 RP at 7. According to Peck, these investigators took statements from people who had seen Mendelson steal the motorcycle. RP at 8. Before trial, Peck moved to relinquish his pro se status and to reappoint standby counsel as his defense counsel. The trial court granted this request.

B. Trial

The morning of trial, Peck expressed discontent with defense counsel's representation and again sought to proceed pro se. Peck disagreed with his counsel's decision not to subpoena Peck's investigators, who, according to Peck, could "clearly prove that [Mendelson] was the one that stole [the motorcycle]." 1 RP at 8. The trial court denied Peck's request as untimely because the trial had already begun.[3]

Hansen and the two police officers involved in Peck's arrest testified for the State. Mendelson did not testify. There was no direct evidence that Mendelson, or anyone else, had told Peck the motorcycle was stolen.

Valentine and Skoczen testified for the defense that Mendelson had driven Hansen's motorcycle to Valentine's home, where Skoczen also had been present. Fearing that the motorcycle had been stolen, Valentine and Skoczen asked Mendelson to leave with it, which he did. Five minutes later, Skoczen saw Mendelson return with Peck, a man he had met only "a couple times." 1 RP at 68. Skoczen then saw Peck and Mendelson leave together on the motorcycle. Peck did not testify.

After the parties rested, Peck objected to the trial court's failure to give a missing witness

[3] The trial court noted: "[Defense counsel] is going to continue to represent you because we've already started this trial. This would be an improper time to have a change in that regard." RP at 10.

instruction, Washington Pattern Jury Instruction (WPIC) 5.20, based on the State's failure to call Mendelson as a witness. 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 5.20, at 177 (3d ed. 2008). The trial court denied the requested instruction as inappropriate because Mendelson was a fugitive at the time and, therefore, not available to the State. Neither party objected to the trial court's characterization of Mendelson's fugitive status.

The trial court instructed the jury that the "knowing" requirement of the charged offense could be met if the jury found Peck had "information which would lead a reasonable person in the same situation to believe" that the motorcycle was stolen. 1 RP at 81. Peck did not object to this instruction.

The jury found Peck guilty of possession of a stolen motor vehicle. The trial court imposed a standard range sentence. Peck appeals.

ANALYSIS

I. Diminished Capacity Defense

Peck first argues that the trial court erred in denying his request for $1,200 to hire the expert witness he needed to obtain a psychological evaluation to support a diminished capacity defense. Because Peck fails to show that the testimony of an expert witness regarding his mental capacity was necessary for his defense, this argument fails.

A. Standard of Review

CrR 3.1(f)[4] provides for court funding for expert witnesses in support of indigent defense. But

[4] CrR 3.1(f) provides in part:

> (1) A lawyer for a defendant who is financially unable to obtain investigative, expert, or other services necessary to an adequate defense in the case may request them by a motion to the court. (2) *Upon finding the services are necessary* and that the defendant is financially unable to obtain them, the court, or a person or agency to whom the administration of the program may have been delegated by local court rule, shall authorize the services.

distribution any public funds toward this end requires a court finding that such services are "necessary." The record here contains no such finding.

The trial court exercises its discretion in determining whether particular services are necessary for the defendant to present an adequate defense. The trial court does not err in denying funds to secure expert testimony when the expenditure is unnecessary. *State v. Kelly*, 102 Wn.2d 188, 200-01, 685 P.2d 564 (1984) ("[D]enial of funds is proper where the witness's testimony is not a *necessity*."). We will not reverse a trial court's determination on appeal unless the defendant "clearly establishes substantial prejudice" from the failure to approve the requested expenditure. *State v. Mines*, 35 Wn. App. 932, 935, 671 P.2d 273 (1983) *review denied*, 101 Wn.2d 1010 (1984). Peck fails to meet this standard.

B. No Showing Defense Required Expert Testimony

As the State notes, Peck failed to establish that his defense required expert testimony about his mental capacity. On the contrary, Peck's own assertions about his defense demonstrate that such testimony would have been irrelevant. For example, Peck told the trial court his defense was that Mendelson never told him the motorcycle was stolen and, therefore, he (Peck) had no knowledge that it was stolen:

> The only stone left unturned is whether or not Steven Mendelson told me this motorcycle was stolen. That's in a nutshell what this case is about. I'm trying to prove beyond a reasonable doubt that Steven Mendelson did not let me know this motorcycle was stolen.

RP (Sept. 18, 2008) at 8.

> Steven Mendelson never told me that this motorcycle was stolen. That's what my entire case is all about, the knowledge aspect and whether I knew this motorcycle was stolen.

RP (Sept. 22, 2008) at 83.

(Emphasis added.)

> My whole case rests, Your honor, on whether or not Steve Mendelson told me this motorcycle was stolen. I can clearly prove that he was the one that stole it.

RP at 8.

Peck's mental condition had no bearing on the issue of whether Mendelson told him that the motorcycle was stolen—Peck's purported defense. Accordingly, Peck was not entitled to spend taxpayers' money to obtain an expert whose testimony would not have been relevant to his defense. Because the testimony was unnecessary, the trial court did not err by denying Peck funds to secure an expert witness.

II. Missing Witness Instruction

Peck also argues the trial court erred in denying his request for a missing witness instruction, under WPIC 5.20,[5] because the State failed to call Mendelson as a witness. This instruction would have permitted the jury "to infer that [Mendelson's] testimony would have been unfavorable to [the State]." WPIC 5.20. This argument fails.

A. Standard of Review

We review a trial court's denial of a defendant's request for a jury instruction for abuse of discretion. *State v. Winings,* 126 Wn. App. 75, 86, 107 P.3d 141 (2005). A trial court abuses its

[5] WPIC 5.20, "failure to produce witness," reads in part:

> If a person who could have been a witness at the trial is not called to testify, you may be able to infer that the person's testimony would have been unfavorable to a party in the case. You may draw this inference only if you find that:
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> (1) The witness is within the control of, or peculiarly available to, that party;
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> (2) The issue on which the person could have testified is an issue of fundamental importance, rather than one that is trivial or insignificant;
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> (3) As a matter of reasonable probability, it appears naturally in the interest of that party to call the person as a witness;
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> (4) There is no satisfactory explanation of why the party did not call the person as a witness; and
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> (5) The inference is reasonable in light of all the circumstances.

discretion when it exercises that discretion on untenable grounds or for untenable reasons, such as an error of law. *See State v. Lord*, 161 Wn.2d 276, 283-84, 165 P.3d 1251 (2007). We review de novo alleged errors of law involved in jury instructions, including errors of omission. *Winings,* 126 Wn. App. at 86. "Jury instructions are proper when they permit the parties to argue their theories of the case, do not mislead the jury, and properly inform the jury of the applicable law"; conversely, jury instructions that do not meet these objectives are generally error. *Winings,* 126 Wn. App. at 86.

If a witness's absence can be satisfactorily explained, a missing witness instruction is not permitted. *State v. Blair*, 117 Wn.2d 479, 489, 816 P.2d 718 (1991). *See also State v. Lopez*, 29 Wn. App. 836, 839, 631 P.2d 420 (1981) (Division One of this court upheld a trial court's refusal to give a missing witness instruction where the potential witnesses in question were "known transients whose whereabouts could not have been discovered.").

B. Mendelson Not Available

Peck correctly notes that a missing witness instruction is appropriate only when a witness is available to a party, but not called by that party. Br. of Appellant at 13 (citing *State v. Davis*, 73 Wn.2d 271, 279-80, 438 P.2d 185 (1968)).[6] But Mendelson was not available to the State because he was a fugitive with outstanding arrest warrants.[7] We hold, therefore, that the trial court did not abuse its

[6] "The inference that witnesses available to a party and not called would have testified adversely to such party arises only where, under all the circumstances of the case, such unexplained failure to call the witnesses creates a suspicion that there has been a willful attempt to withhold competent testimony." *Davis*, 73 Wn.2d at 279. Such is not the case here.

[7] Following the trial court's conference with counsel in chambers to discuss the proposed jury instructions, the trial court noted on the record:

> [B]ased upon representations by the State and also what Mr. Peck pointed out yesterday, there is a warrant out for Mr. Mendelson both by the State and by Department of Corrections, I understand. In any event, that does not make him unusually available to any

discretion in denying Peck's request for a missing witness instruction.[8]

III. Effective Assistance of Counsel

Peck next argues that his standby counsel rendered ineffective assistance at a pretrial hearing by stating, "[M]y understanding is that [diminished capacity] would not be an appropriate defense," as well as by failing to argue diminished capacity defense once stand-by counsel was reinstated as Peck's trial counsel. RP (Sept. 18, 2008) at 18. Despite conceding that his defense counsel adequately objected to the trial court's refusal to give a missing witness instruction, Peck argues that his defense counsel denied him effective assistance by failing to provide the court with a proposed missing witness instruction. And in his SAG, Peck argues that his defense counsel rendered ineffective assistance in failing to call the investigators to testify that Mendelson stole the motorcycle, that Peck was not present when Mendelson stole the motorcycle, and that Mendelson had not told Peck that he had done so. These arguments fail.

To prove ineffective assistance of counsel, Peck must show that (1) counsel's performance was deficient and (2) that this deficient performance prejudiced the outcome of his case. *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). As we note above, because Peck's mental condition had no bearing on whether Mendelson told him that the motorcycle was stolen (Peck's purported defense),

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> party and so the State would not be held liable for having him amenable to process and choosing not to call him. So I've denied [Peck's] request for a missing witness instruction.

RP at 72.

[8] Even assuming, but not deciding, that Peck was entitled to a missing witness instruction, the trial court's refusal to give such instruction did not prejudice him and was, therefore, harmless error. *Brown v. Spokane County Fire Prot. Dist. No. 1*, 100 Wn.2d 188, 196, 668 P.2d 571 (1983). The jury heard no evidence about anyone having said anything to Peck about whether the motorcycle was stolen. Thus, the jury convicted Peck for having "information which would lead a reasonable person in the same situation to believe" that the motorcycle was stolen. 1 RP at 81 (Jury Instruction No. 9). Therefore, the missing witness instruction would not likely have had any effect on the jury's verdict.

defense counsel's failure to argue diminished capacity was neither deficient performance nor prejudicial to Peck. Similarly, as we note above, defense counsel's failure to propose a missing witness instruction was neither deficient performance nor prejudicial to Peck, especially in light of the trial court's express indication it was denying the request to give such an instruction.

As the trial court correctly noted during Peck's motions in limine, the investigators' testimonies about what their interviewees had told them would have been inadmissible hearsay.[9] ER 801. Thus, defense counsel's failure to call them as witnesses was not deficient. Nor did this alleged failure prejudice Peck. We hold that Peck fails to establish ineffective assistance of counsel on any of the three grounds that he asserts.

IV. Sufficiency of Evidence

Peck also argues that sufficient evidence fails to support his conviction.[10] This argument fails.

A. Standard of Review

In determining whether the evidence is sufficient to support a conviction, we view it in the light most favorable to the State, asking whether any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Roth*, 131 Wn. App. 556, 561, 128 P.3d 114 (2006). We draw all reasonable inferences from the evidence in favor of the State and interpret it most strongly against Peck. *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977).

"A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably

[9] The trial court noted: "[A]n investigator cannot testify as to what other people told him. That would be hearsay. And so, normally, investigators don't testify." 1 RP at 11.

[10] The record on appeal shows no instance where Peck challenged the legal sufficiency of the evidence below. Nonetheless, "the question of substantial evidence may be raised for the first time on appeal as a manifest constitutional error." *State v. McNeal*, 98 Wn. App. 585, 592, 991 P.2d 649 (1999).

can be drawn therefrom." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "Credibility determinations are for the trier of fact and are not subject to review." *State v. Thomas*, 150 Wn.2d 821, 875, 83 P.3d 970 (2004). We defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *Thomas*, 150 Wn.2d at 875.

B. Sufficient Evidence to Support Conviction

Peck asserts that "[a]bsent evidence specifically establishing that [he] knew the motorcycle he drove was stolen, [his] conviction . . . cannot stand." Br. of Appellant at 19-20. This assertion is incorrect.

As the trial court accurately instructed the jury, a finding that Peck merely had "information which would lead a reasonable person in the same situation to believe" the motorcycle was stolen, even if Peck himself denied having such knowledge, would sufficiently support a conviction.[11] 1 RP at 81. Peck told police that Mendelson was his friend. Mendelson's acquaintances who also came in contact with him and the motorcycle—Peter Valentine and Michael Skoczen—immediately suspected that the motorcycle was stolen. This evidence adequately supports a finding that Peck had sufficient information to lead a reasonable person in the same situation to believe the motorcycle was stolen.

Viewing the evidence in the light most favorable to the State, and drawing all reasonable inferences from this evidence in favor of the State and interpreted most strongly against Peck, we hold that the evidence is sufficient to support his conviction for possessing the stolen motorcycle.

V. Request to Proceed Pro Se

In his SAG, Peck argues that the trial court erred in denying his last-minute request to represent

[11] Jury Instruction No. 9, based on WPIC 10.02.

himself pro se. Peck represented himself pro se through much of pretrial proceedings, moved to reappoint his standby counsel eight days before trial began, and again asked to represent himself pro se the morning of trial. Peck also argues that his defense counsel "tricked" him into giving up his pro se status before trial. SAG at 1. Both arguments fail.[12]

We review a trial court's disposition of a request to proceed pro se for abuse of discretion. *State v. Breedlove*, 79 Wn. App. 101, 106, 900 P.2d 586 (1995). Criminal defendants have a constitutional right to waive assistance of counsel and to represent themselves. *Faretta v. California*, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975). But "a defendant's request to proceed pro se must be *both* timely made and stated unequivocally." *State v. Stenson*, 132 Wn.2d 668, 737, 940 P.2d 1239 (1997). Peck's request was not timely. If asserted well before trial, the right of self-representation exists as a matter of law.

But when a defendant makes such a request as the trial is about to commence, or shortly before, "the trial court must exercise its discretion by balancing the important interests implicated by the decision: the defendant's interest in self-representation and society's interest in the orderly administration of justice." *Breedlove*, 79 Wn. App. at 107. A trial court may deny a request to proceed pro se, made shortly before the trial, if "granting the request would obstruct the orderly administration of justice." *Breedlove*, 79 Wn. App at 108.

Peck made his request to proceed pro se the morning trial was to begin, immediately after jury selection, only eight days after having moved to reappoint his standby counsel as his trial counsel. The trial court denied Peck's request as untimely. We hold that the trial court did not abuse its discretion.

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[12] The record contains no information supporting Peck's contention that he was "tricked" into abandoning his pro se status. And we do not consider matters outside the record. RAP 9.2(b). Accordingly, this argument fails.

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.

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Hunt, J.

We concur:

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Bridgewater, P.J.

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Quinn-Brintnall, J.