IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,		
Respondent	)	No. 61895-4-I
v.	)	UNPUBLISHED OPINION
ANTHONY FINKLEA,	)	
Appellant.	)	
_____	)	FILED: November 23, 2009

Schindler, C.J. — Anthony Finklea appeals his conviction for second degree assault. Finklea argues that the trial court denied his motion to reopen his case to allow him to present testimony impeaching the victim in violation of his constitutional right to present a defense. Because the trial court's ruling was not an abuse of discretion, we affirm.

On July 8, 2007, Larry Proctor, a homeless person, was assaulted, resulting in multiple fractures to Proctor's jaw and dental injuries. At trial, Steve Kostelick, known as "Big Steve," testified that he was with Proctor and another person named Kyle when Proctor was assaulted. The three were walking together, when Finklea, whom Kostelick knew by the name of "Juice," came up from behind and called to Proctor, "I got something for you." Kostelick said that Proctor looked over his shoulder, but did not stop. Finklea caught up to them

and hit Proctor in the face. Kostelick said that in addition to himself, Kyle, Proctor, and Juice, a person called "Little Steven" also witnessed the incident.

Because the State was unable to locate Proctor at the time of trial, the court issued a material witness warrant. Proctor was arrested pursuant to the warrant and testified at trial. Consistent with Big Steve's testimony, Proctor said he was walking with Big Steve and Kyle when Finklea called out to him from behind and then caught up to him, hit him, and knocked him down. Proctor said another person, who went by the nickname "Station Wagon Steve" saw the assault.

After Proctor was examined by both the State and the defense, the court permitted the defense to reopen cross examination to question Proctor about a voice mail message he left for Finklea's former counsel indicating that he did not think Finklea was the person who assaulted him. The voice mail message was played for the jury.

At first, Proctor said he did not remember making the phone call. But then he admitted that he did, in fact, do so. Proctor explained that he was given the defense attorney's phone number by a "drug dealer" called "Dado," whom "Juice had been call[ing]" and who was with him when he made the phone call. When Proctor testified that he made the call because he had been threatened, the trial court sustained the defense's objection and instructed the jury to disregard the remark about a threat. Proctor then went on to explain that he lied when he left

the voice mail message because he was "advised" to do so. When asked what he believed would happen if he did not make the phone call, Proctor responded "no drugs, beat up." At the conclusion of Proctor's testimony, both parties agreed to excuse Proctor and to entry of the order releasing him from custody. Both the State and the defense rested the following day.

The defense sought to reopen its case to call Delgado Herrera, the person Proctor referred to as "Dado."[1] The defense stated that Herrera would testify that he "is not a drug dealer, [and] there were no threats, implied or otherwise." The defense informed the court that Herrera would also testify that Proctor told him that "Juice, being Mr. Finklea, was the only person he saw when he got up after he got hit. There was someone else there, but he has no idea who it was." The defense asserted that this testimony was admissible as a present sense impression that Proctor did not believe Finklea committed the assault.

The trial court denied the motion to reopen. The court ruled that the extrinsic evidence of an alleged prior inconsistent statement was inadmissible under Evidence Rule 613, because Proctor would not have the opportunity to explain or deny the prior inconsistent statement. The court concluded that because Proctor had already been brought in twice on material witness warrants and had been released, there was no "realistic opportunity in a timely way to

[1] The defense stated that Herrera had been on warrant status and Finklea's attorney had just learned that Herrera had been arrested.

produce him." With respect to the evidence about whether Herrera was a drug dealer and whether he threatened Proctor, the court concluded that it was impeachment evidence regarding a collateral matter, and that the defense did not establish that the evidence was "allowable in some fashion substantively under the rules of evidence." The court also ruled that the evidence was not admissible as a present sense impression.

On appeal, Finklea challenges the court's ER 613 ruling with respect to Herrera's proposed testimony about a "prior inconsistent statement [Proctor] made to Delgado Herrera that Mr. Finklea did not assault him." [2] We review a trial court's evidentiary rulings for an abuse of discretion. State v. Johnson, 90 Wn. App. 54, 69, 950 P.2d 981 (1998). A trial court abuses its discretion by making a decision based on untenable grounds or for untenable reasons. Johnson, 90 Wn. App. at 69.

Extrinsic evidence of prior inconsistent statements is admissible as long as the witness is afforded an opportunity to explain or deny the statement and opposing counsel is allowed to question the witness. ER 613(b). Although generally a witnesses should first be asked about a prior inconsistent statement, it is permissible under ER 613 for a declarant to be given an opportunity to explain or deny the prior inconsistent statement after the introduction of extrinsic

[2] Finklea does not challenge the court's exclusion of the rebuttal testimony regarding the circumstances of the telephone call to Finklea's former attorney. Nor does he challenge the court's ruling that the testimony was not admissible as a present sense impression. We, therefore, do not address these aspects of the court's ruling.

evidence. State v. Horton, 116 Wn. App. 909, 916, 68 P.3d 1145 (2003). But in order for counsel to admit extrinsic evidence of a prior inconsistent statement without first affording the witness a chance to explain or deny, counsel must arrange for the witness to remain in attendance after testifying. See Horton, 116 Wn. App. at 916. While Finklea sought to reopen his case to present Herrera's testimony, he did not make arrangements for Proctor's attendance. To the contrary, Finklea did not object to excusing Proctor and to his release from custody on the material witness warrant. On this record, the extrinsic evidence Finklea sought to present was not admissible under ER 613.

Even if Finklea had specifically requested that the court issue another material witness warrant for Proctor for the purpose of asking him about his prior statements to Hererra, the court would have been within its discretion in denying the motion. The court acknowledged the possibility of recalling Proctor, but rejected the option, finding it unlikely that he could be produced in a timely manner. While emphasizing that its decision was based on the evidence rules, rather than timing, the court determined that postponing the case for the purpose of presenting Hererra's additional testimony would be a "waste of time." In essence, the trial court found that the probative value of the proposed testimony was minimal and did not justify delaying the case. See ER 403 (trial court may exclude relevant evidence if the probative value is outweighed by considerations of undue delay, waste of time, or needless presentation of cumulative evidence).

Finklea's reliance on State v. Dickenson, 48 Wn. App. 457, 740 P.2d 312 (1987), is misplaced. In Dickenson, the defendant's former girlfriend's trial testimony implicated him in a murder. On cross examination, the former girlfriend denied a prior inconsistent statement, in which she suggested that the police, rather than the defendant, were responsible for the killing. The defense sought to impeach the witness with the police report in which she made the prior inconsistent statement and the trial court erroneously excluded the extrinsic evidence. Dickenson, 48 Wn. App. at 470.

Here, unlike in Dickenson, the defense did not ask Proctor about any prior statements he allegedly made about another person's presence. Also unlike in Dickenson, Proctor's alleged statement to Herrera that there was another unknown person at the scene, does not conflict with Proctor's testimony that Finklea hit him.

Affirmed.

Schindler, C.J.

WE CONCUR:

Becker, J.

Grosse, J.