09CA2304 Peo v. Webster 04-12-2012

COLORADO COURT OF APPEALS

Court of Appeals No. 09CA2304
City and County of Denver District Court No. 07CR6091
Honorable William W. Hood, III, Judge
Honorable Shelley I. Gilman, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

William Dion Webster,

Defendant-Appellant.

JUDGMENT AFFIRMED

Division IV
Opinion by JUDGE RUSSEL
Webb and Furman, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(f)
Announced April 12, 2012

John W. Suthers, Attorney General, John D. Seidel, Senior Assistant Attorney General, Denver, Colorado, for Plaintiff-Appellee

Samler & Whitson, P.C., Eric A. Samler, Hollis A. Whitson, Denver, Colorado, for Defendant-Appellant

William Dion Webster appeals the trial court's judgment of conviction in a criminal case. We affirm.

I. Background

J.O. was found in his great-grandparents' home, stabbed and beaten. He survived his injuries and was able to assist in the police investigation.

J.O. told police that, a day earlier, he had been on a crack cocaine binge with S.S. and a drug dealer known as "Mike." J.O. explained that he had run out of cash and had offered to give Mike a shotgun that was stored at the home of J.O.'s great-grandparents. According to J.O., Mike drove to the home and forced J.O. and S.S. inside. After tying J.O.'s hands and feet, Mike woke J.O.'s great-grandparents, telling them that he was a police officer who needed to search the house. Mike locked the couple in a bathroom and then assaulted and suffocated J.O. When J.O. came to, he had a plastic bag around his head.

The police soon determined that "Mike" was actually William Webster.

Webster was charged with several offenses. He defended at trial on a theory of alibi. He admitted selling crack cocaine to J.O.

and S.S., but he argued that he had parted ways with them and had never entered the great-grandparents' home.

The jury convicted Webster of kidnapping, assault, burglary, and impersonating a peace officer.

II. Admission of Statements

Webster contends that the court should have suppressed statements made during a custodial interrogation. We disagree.

A. Additional Facts

The police found Webster at his girlfriend's house. There they arrested him for a parole violation. They then took him to the police station, where he was met by Peter Palombi, the investigating detective. Palombi asked Webster if he wanted to talk about the case. Webster said that he did.

Palombi and Webster then went to an interview room, where their conversation was recorded on DVD. Palombi advised Webster of his *Miranda* rights, and Webster waived those rights. During the interview, Palombi said that J.O. had identified Webster from a photo line-up. (That statement was a lie.) Webster admitted selling crack cocaine to J.O. and S.S., and he admitted driving to J.O.'s great-grandparents' home. But he denied entering the home.

Before trial, Webster moved to suppress his statements on grounds that (1) he did not execute a valid waiver of his *Miranda* rights, and (2) his statements were involuntary. After considering the evidence — including the recording and Palombi's testimony — the court denied Webster's motion.

B. *Miranda* Waiver

Webster argues that the court erred in finding a valid waiver of *Miranda* rights. According to Webster, the waiver was invalid because he was misled about the subject and scope of the interview. We see no error.

A waiver of rights under *Miranda v. Arizona*, 384 U.S. 436 (1966), is valid only if it is voluntary, knowing, and intelligent. *People v. Humphrey*, 132 P.3d 352, 356 (Colo. 2006). A waiver is voluntary if it is the product of a free and deliberate choice, rather than police intimidation, coercion, or deception. *Id.* It is knowing and intelligent if made with full awareness of the right being abandoned and the consequences of the decision to abandon it. *Id.*

The trial court considers the totality of the circumstances when assessing whether a defendant was sufficiently aware of his rights. *Id.* The court is concerned, not with the wisdom of a

defendant's decision to speak to police, but with his comprehension of the waiver itself. *Id.*

When reviewing a *Miranda* issue, we defer to the trial court's factual determinations and review de novo the court's application of the governing legal standards. *Id.*

Here, the record supports the trial court's ruling:

1. Palombi did not recall precisely what he said before the interview. But the DVD shows that Webster understood that the interview would concern, not a parole violation, but the incident in question. The DVD also shows that Webster understood and voluntarily waived his *Miranda* rights.
2. Palombi did not advise Webster of the potential charges that he faced. But such an advisement was not required. *See People v. Vickery*, 229 P.3d 278, 282 (Colo. 2010) (defendant's lack of awareness of all subjects of the interrogation did not undermine the validity of his *Miranda* waiver); *Humphrey*, 132 P.3d at 358 (defendant's waiver is valid even though the detective did not disclose the victim's death or the nature of the charges that defendant faced); *People v. Pease*, 934 P.2d 1374, 1378 (Colo. 1997) ("[P]olice need not inform a suspect of

information which is beyond the scope of *Miranda*, even if the information might affect the suspect's decision to talk to police.").

3. Relying on *Missouri v. Seibert*, 542 U.S. 600 (2004), Webster suggests that his waiver was invalid because he had already been tricked into making incriminating statements. This argument fails for two reasons. First, it was not presented to the trial court. Second, it has no evidentiary support. Palombi did not employ the "question first" technique disapproved of in *Seibert*, and the record does not indicate that Webster was otherwise tricked into letting the "cat out of the bag." *See Seibert*, 542 U.S. at 612-16.

C. Voluntariness

Webster also argues that his statements were involuntary and should have been suppressed. We reject this argument too.

Involuntary statements cannot be admitted at trial. *Humphrey*, 132 P.3d at 360. This is true regardless of whether the statements are made in response to custodial interrogation and regardless of whether they are inculpatory. *Id.*; *see also People v. Miranda-Olivas*, 41 P.3d 658, 660 n.3 (Colo. 2001) (whether a

defendant's statement was made voluntarily is an issue distinct from whether his *Miranda* rights were validly waived).

Here, the court determined that Webster's statements were voluntary. And we conclude that the record supports that ruling:

1. The DVD shows that Webster's statements were voluntary under the factors identified in *People v. Gennings*, 808 P.2d 839, 844 (Colo. 1991): Webster was properly advised of his *Miranda* rights; he validly waived those rights; he was not drugged or intoxicated; he was not responding to any threats or promises; he had prior experience with the criminal justice system; he was not intimidated by Palombi's voice or demeanor; and the interview was only an hour long.
2. Webster argues that his statements were coerced because Palombi lied about J.O.'s identification. We disagree. Although we do not condone Palombi's behavior, we agree with the trial court that the fabrication did not play a significant role in inducing Webster's statements. *See Lucero v. Kerby*, 133 F.3d 1299, 1311 (10th Cir. 1998) (although the officer lied about fingerprint evidence, "such misrepresentations, without more, do not render an otherwise voluntary confession

involuntary"); *People v. Speer*, 216 P.3d 18, 22-23 (Colo. App. 2007) (two lies told by officers — that a security tape placed defendant at the crime scene, and that a witness had positively identified him — did not render defendant's statements involuntary), *rev'd on other grounds*, 255 P.3d 1115 (Colo. 2011); *People v. Klausner*, 74 P.3d 421, 425 (Colo. App. 2003) (officer's lie about DNA evidence did not render the defendant's confession involuntary).

Under these circumstances, we are satisfied that Webster spoke deliberately and freely. *See Miranda-Olivas*, 41 P.3d at 661 ("Ultimately, the test of voluntariness is whether the individual's will has been overborne.").

We therefore affirm the court's ruling on Webster's motion to suppress statements.

III. Admission of DNA Evidence

Webster contends that the court erred in admitting DNA evidence. We see no error.

A. Additional Facts

Detectives found part of a surgical glove at the scene, and they submitted it to the crime lab. The glove was first tested by Susan

Berdine, who confirmed that it contained cellular material. It was then tested by Shawn O'Toole, who was able to extract DNA from the cellular material. Upon further analysis, O'Toole determined that two persons had contributed DNA, and that Webster was the major contributor. Both Berdine and O'Toole prepared lab reports.

At a pretrial hearing, the prosecutor moved to admit the DNA evidence obtained from the glove. Defense counsel objected that the evidence had not been timely disclosed.[1] As a sanction for the late disclosure, counsel asked the court to exclude the DNA evidence, or alternatively, to dismiss the first degree kidnapping charge.

The court refused to impose the requested sanctions. But it offered to continue the trial if defense counsel wanted more time to prepare. The court explained that, although it had a full trial calendar for the remainder of Webster's speedy trial period, it would "double set" Webster's trial with another case, at the prosecution's risk.

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[1] O'Toole's final report, which identified the DNA match, was prepared and given to the parties twenty-five days before the scheduled trial. But the rules require this sort of evidence to be available no later than thirty days before trial. *See* Crim. P. 16(I)(b)(3).

Defense counsel accepted the court's offer of a continuance. However, counsel's schedule precluded a trial date within the existing speedy trial window. Consequently, Webster agreed to waive his statutory speedy trial rights, and the trial was reset within a new six-month period.

B. Discovery Sanction

Webster argues that the court should have excluded the DNA evidence as a sanction for the discovery violation. We disagree.

A trial court may impose sanctions for a party's failure to comply with the discovery rules. *See* Crim. P. 16(III)(g); *People v. Lee*, 18 P.3d 192, 196 (Colo. 2001) (sanctions serve "the dual purposes of protecting the integrity of the truth-finding process and deterring discovery-related misconduct"). In fashioning the sanction, the court should consider (1) the reason for the delay, (2) the degree of resulting prejudice, and (3) the feasibility of curing such prejudice with a continuance. *Lee*, 18 P.3d at 196. The court should impose "the least severe sanction that will ensure that there is full compliance with the court's discovery orders." *People v. District Court*, 793 P.2d 163, 168 (Colo. 1990).

Because the decision to impose a discovery sanction is committed to the trial court's discretion, we will disturb that decision only if it is manifestly arbitrary, unreasonable, or unfair. *Lee*, 18 P.3d at 196.

Here, the trial court found "no showing of bad faith or willful misconduct or a pattern of negligence on behalf of the prosecution." In light of that finding, and because the delay did not alter the evidence, we think the court's choice of remedy was appropriate. *See id.* at 197 (a court should avoid excluding evidence because the attendant windfall to the defendant does not further the objectives of discovery); *People v. Moore*, 226 P.3d 1076, 1093 (Colo. App. 2009) (where the record shows an inadvertent discovery violation and no pattern of misconduct, the court should have imposed a less severe sanction instead of ordering the dismissal of two counts). A continuance was ample to remedy any prejudice caused by the disclosure of evidence twenty-five days, instead of thirty, before trial.

Webster asserts that the court's choice of discovery sanctions forced him to waive his right to a speedy trial. The record belies this assertion. Once the court admitted the DNA evidence, defense

counsel was informed that she could have a continuance *and* a new trial date within the remaining speedy trial period. (As noted, the court was willing to double set Webster's trial with another trial, and the prosecution would bear the risk of a last minute dismissal.) Therefore, the court's handling of the discovery violation was not the proximate cause of Webster's speedy trial waiver. Rather it was defense counsel's own calendar that triggered the waiver. *Cf. People v. Duncan*, 31 P.3d 874, 877 (Colo. 2001) ("[I]n the absence of a showing of bad faith on the part of the prosecutor, such as a last minute ploy to circumvent the requirements of the speedy trial provisions, a defendant's tactical decision to seek a continuance is chargeable to him.").

We therefore conclude that the court did not abuse its discretion when it refused to exclude the DNA evidence.

C. Confrontation Clause

At trial, the prosecutor called Shawn O'Toole as an expert in DNA analysis. The prosecutor questioned O'Toole about DNA testing in general and about the techniques employed here. The prosecutor then asked the court to admit the lab reports. The court admitted the reports, including Berdine's. Webster did not object.

On appeal, Webster challenges this evidentiary ruling. He argues that, because Berdine never testified, the admission of her lab report violated his rights under the confrontation clause, section 16-3-309, C.R.S. 2011, and the Colorado Rules of Evidence.

Because Webster did not make this argument at trial, we review only for plain error. *People v. Vigil*, 127 P.3d 916, 929 (Colo. 2006) (reviewing Confrontation Clause issue for plain error). We will reverse only if we see obvious and substantial error that so undermined the fundamental fairness of the trial as to cast serious doubt on the reliability of the judgment. *People v. Miller*, 113 P.3d 743, 750 (Colo. 2005).

We see no plain error. Berdine's report was merely a preliminary document that noted the presence of cellular material. O'Toole's report, in contrast, contained the results of tests performed on that cellular material. Because O'Toole's report contained the incriminating evidence, there is no obvious error.[2]

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[2] In *Bullcoming v. New Mexico*, ___ U.S. ___, 131 S.Ct. 2705 (2011), the Court addressed a Confrontation Clause problem that was caused by the unavailability of a testing expert. In so doing, the Court noted that the problem could have been avoided if the testifying expert had simply retested the sample. *Id.* at ___, 131 S.Ct. at 2718. Here, O'Toole's report can fairly be regarded as a

And in light of O'Toole's report, Webster's admissions, and the testimony of J.O. and S.S., we conclude that any error did not undermine fundamental fairness.

IV. Pretrial Conference

Webster argues that the court should have required his personal presence at a conference that took place on the morning of trial. At the conference, the court addressed the prosecutor's request to modify the language of the charges.

We reject this argument for two independent reasons:

1. The argument is waived because defense counsel affirmatively waived Webster's presence at the conference.
2. Even if we assume that the argument is not waived, *see People v. Mumford*, ___ P.3d ___, ___ (Colo. App. No. 08CA0974, Mar. 18, 2010), *aff'd*, 2012 CO 2, we see no plain error:
   - A defendant has a due process right to be present at trial, to the extent that his presence "has a relation, reasonably substantial, to the [fullness] of his opportunity to defend against the charge," or where his presence would otherwise

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"retesting" of Berdine's conclusion that the glove contained cellular material. (O'Toole's conclusions confirm, among other things, that there was cellular material to test.)

"contribute to the fairness of the procedure." *Kentucky v. Stincer*, 482 U.S. 730, 745 (1987) (quoting in part *Snyder v. Massachusetts*, 291 U.S. 97, 105-06 (1934)); *Luu v. People*, 841 P.2d 271, 275 (Colo. 1992).

- Here, defendant was not present when the court considered the prosecution's motion to amend the language of the existing charges. Webster does not explain, and the record does not otherwise suggest, how his personal presence would have assisted defense counsel in responding to the prosecutor's request. *See* Crim. P. 43(c)(2) (a defendant's presence is not required for a conference or argument on a question of law); *People v. Garcia*, 251 P.3d 1152, 1156 (Colo. App. 2010) (a defendant's presence is not required if it would be useless or only slightly beneficial); *see also Larson v. Tansy*, 911 F.2d 392, 395 (10th Cir. 1990) (defendant's absence at a jury instruction conference did not violate due process because such conferences encompass purely legal issues and are typically attended only by the judge and counsel).

V. Modified-*Allen* Instruction

Webster contends that the judgment should be reversed because the court coerced a guilty verdict. We reject this contention.

A. Pertinent Events

On the second full day of deliberations, the jurors informed the court that they could not agree on three of the six charges. Over Webster's objection, the court gave this modified-*Allen* instruction:

> Since it appears to the Court that your deliberations have been somewhat lengthy without a verdict being reached, the Court wishes to suggest a few thoughts which you should consider in your deliberations, along with the evidence in the case and all of the instructions previously given.
>
> It is your duty, as jurors, to consult with one another and to deliberate with a view to reaching a verdict, if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberation, do not hesitate to reexamine your own views and change your opinion if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of

> the opinion of your fellow jurors, or for the mere purpose of returning a verdict.
>
> You are not partisans. You are judges – judges of the facts. Your sole interest is to ascertain the truth from the evidence in the case.[3]

After receiving the instruction, the jury resumed its deliberations. However, later that day, the jury again informed the court that it was at an impasse. The court then told the jury to return verdicts for any counts on which it had reached unanimous agreement. The jury returned guilty verdicts on four of the six counts (kidnapping, assault, burglary, and impersonating a peace officer), and court declared a mistrial on the remaining charges.

B. Discussion

Webster argues that the court erred in giving the modified-*Allen* instruction. His reasoning proceeds as follows:

1. Before giving a modified-*Allen* instruction, a trial court should "inquire of the jurors whether further deliberations would be productive." *People v. Watson*, 53 P.3d 707, 713 (Colo. App. 2001). The purpose of this inquiry is to ensure that the jurors

[3] This is the standard version of the instruction. *See* CJI-Crim. 38:14 (1983); *People v. Ragland*, 747 P.2d 4, 5 (Colo. App. 1987).

believe that further deliberations would be helpful. In the absence of such assurance, a modified-*Allen* instruction may have the effect of coercing agreement.

2. Here, the court gave the instruction without first being assured that the further deliberations would be helpful. Thus, the instruction had a coercive effect: before receiving the instruction, the jury indicated that it could agree on only three of the six charges; after the instruction, the jury returned guilty verdicts on four of the six charges.
3. Because we cannot know which count was coerced, we must reverse all counts and remand for a new trial.

We perceive several flaws in Webster's argument. But we think it sufficient to mention only two:

1. Webster misunderstands the purpose of inquiring about the utility of further deliberations. The purpose is not to ensure that further progress is likely. It is precisely the opposite – that is, to ensure that the jurors have reached an impasse. *See Ragland*, 747 P.2d at 5 (before giving the instruction, the court must "first determine that there is little likelihood of progress towards a unanimous verdict upon further

deliberation"). Here, the circumstances suggest that the jurors were at an impasse. Thus, although we agree that the court should have inquired, we conclude that the court did not abuse its discretion in giving the modified-*Allen* instruction.

2. Webster has misgauged the instruction's likely effect. Courts have recognized that the standard modified-*Allen* instruction is not coercive. *See id.* at 6 (although the court failed to inquire of the jury, reversal was not required because the standard modified-*Allen* instruction "had little if any coercive effect" but instead reminded the jury "of the method of arriving at a deliberative verdict"); *see also People v. Gibbons*, ___ P.3d ___, ___ (Colo. App. No. 09CA1184, Sept. 15, 2011); *People v. McNeely*, 222 P.3d 370, 375 (Colo. App. 2009). And the record shows that the jury was not coerced into reaching a unanimous verdict on all charges.

The judgment is affirmed.

JUDGE WEBB and JUDGE FURMAN concur.