

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2011-135197-001 DT

05/20/2013

THE HON. CRANE MCCLENNEN

CLERK OF THE COURT
J. Eaton
Deputy

STATE OF ARIZONA

JEFF W TRUDGIAN

v.

JUDY BURTNER HYDE (001)

THEODORE A AGNICK

HASSAYAMPA JUSTICE COURT
REMAND DESK-LCA-CCC

RECORD APPEAL RULING / REMAND

Lower Court Case Number JC 2011–135197.

Defendant-Appellant Judy Burtner Hyde (Defendant) was convicted in the Hassayampa Justice Court of dogs chasing and killing livestock. Defendant contends the trial court erred in precluding her witnesses and exhibits. For the following reasons, this Court reverses the judgment of guilt and vacates the sentence imposed.

I. FACTUAL BACKGROUND.

On June 8, 2011, Defendant was cited for two counts of dogs chasing and killing livestock, A.R.S. § 3–1311. Defendant represented herself at trial. (R.T. of Dec. 1, 2011, at 3.) The prosecutor invoked the rule for exclusion of witnesses, so Defendant said she would have her daughter, Lana Burtner, and her neighbor, Shanna Adams, testify. (*Id.* at 3–4.) The trial court asked Defendant if she had given her witness list to the prosecutor, and the prosecutor said he had not received anything from her. (*Id.* at 4–5.) The trial court explained to Defendant that both sides had to disclose to the other side certain things, such as witnesses. (*Id.* at 5.) When Defendant asked when the State had made disclosure to her, the prosecutor said he filed it on November 8, 2011, although the Disclosure Statement shows it was mailed to Defendant on November 8, 2011. The prosecutor then asked the trial court to preclude all of Defendant’s proposed witnesses:

[THE PROSECUTOR]: Well, Judge, again, [Defendant’s daughter] is not listed in any of the reports from the Department of Agriculture that was part of our report. I’m not going to agree to a continuance. I’m not going to agree to allow witnesses that weren’t disclosed in compliance with Rule 15.2.

(R.T. of Dec. 1, 2011, at 6.)

[THE PROSECUTOR]: . . . I’m demanding that the Court and the defense follow the Rules of Criminal Procedure. Rule 15.2 required her to file disclosure of witnesses and she didn’t do it. I’m opposing a continuance and I opposing having them appear and doing a trial by ambush.

(R.T. of Dec. 1, 2011, at 7–8.) The trial court then told Defendant she would have to follow the Rules of Criminal Procedure the same as everyone else:

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THE COURT: Ms. Hyde, one of the things that may sound like it's counterintuitive, you are in justice court, which many people refer to the people's court, and it's absolutely that. You don't have to necessarily hire counsel to represent you. But if you choose to represent yourself, you do have to follow the same rules as an attorney would follow if he were representing you.

The Court simply doesn't have the ability to kind of relax everything because you are representing yourself. That's not within our jurisdiction to do that.

(R.T. of Dec. 1, 2011, at 8.) When the trial court asked Defendant who was going to testify for her, she said, "I guess I can't have anybody because you said I can't," to which the trial court said, "Okay." (*Id.* at 9.)

The prosecutor then asked to have a *Donald* hearing. (R.T. of Dec. 1, 2011, at 9.) The prosecutor asked the Livestock Inspector if these charges were class 1 misdemeanors, and the Livestock Inspector said they were class 3 misdemeanors. (*Id.* at 10.) The prosecutor advised Defendant the potential punishment she would face for class 3 misdemeanors. (*Id.* at 10–11.) The trial court then discussed the plea offer with Defendant. (*Id.* at 11.) The prosecutor then informed the trial court that the Livestock Inspector had just told him the charges were actually class 1 misdemeanors and advised Defendant the potential punishment she would face for class 1 misdemeanors. (*Id.* at 11–12.) Defendant continued to express that she was not guilty. (*Id.* at 12.)

The trial court then discussed with Defendant that she was not represented by an attorney. (R.T. of Dec. 1, 2011, at 13.) She said she tried to get an attorney, but the one she tried was out of town. (*Id.* at 14.) The trial court noted the matter had been going on for almost 7 months, so the trial court found Defendant had waived her right to be represented by an attorney. (*Id.*)

The State presented four witnesses: Carol Davis, Denise Kraun, John Lindsay, and Pamela O'Meara. (R.T. of Dec. 1, 2011, at 17, 32, 37, 40.) After the State rested, Defendant testified. (*Id.* at 47.) When Defendant offered some photographs in evidence, the trial court noted Defendant had not revealed them to the prosecutor, and so the photographs were not admitted. (*Id.* at 52.)

After hearing arguments from the parties, the trial court found Defendant guilty. (R.T. of Dec. 1, 2011, at 60.) The trial court then imposed sentence. (*Id.* at 60–61.) On December 1, 2011, Defendant filed a timely notice of appeal. This Court has jurisdiction pursuant to ARIZONA CONSTITUTION Art. 6, § 16, and A.R.S. § 12–124(A).

II. ISSUES.

A. *Did the trial court err in considering the State's motion to preclude Defendant's witnesses and exhibits when the prosecutor did not file a written motion and did not attach an separate statement certifying good faith efforts.*

Defendant contends the trial court erred in considering the State's motion to preclude Defendant's witnesses and exhibits when the prosecutor did not file a written motion and did not attach a separate statement certifying good faith efforts to resolve the matter. The applicable rule provides as follows:

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b. Motion for sanctions. No motion brought under Rule 15.7(a) will be *considered* or *scheduled* unless a separate statement of moving counsel is attached certifying that, after personal consultation and good faith efforts to do so, counsel have been unable to satisfactorily resolve the matter.

Rule 15.7(b), ARIZ. R. CRIM. P. (emphasis added). This rule presumes a written motion because it provides that “[n]o motion brought under Rule 15.7(a) will be considered or scheduled unless a separate statement of moving counsel is attached” *State ex rel. Thomas v. Newell (Milegro)*, 221 Ariz. 112, 210 P.3d 1283, ¶ 9 n.1 (Ct. App. 2009) (at initial pretrial conference, defendant’s attorney indicated he had not received analysis of print lifts; trial court *sua sponte* ordered state to disclose analysis within 21 days; court noted sanction did not comply with Rule 15.7 because there was no written or oral motion and no separate statement of counsel, and trial court did not consider factors in the rule).

Although the trial court may “have the ability to kind of relax everything” to the extent of forgoing a written motion, the trial court does not “have the ability to kind of relax everything” to the extent of forgoing the requirement of a separate statement of moving counsel certifying that, after personal consultation and good faith efforts to do so, counsel have been unable to satisfactorily resolve the matter. This is because that rule provides no motion brought under Rule 15.7(a) will be *considered* or *scheduled* without that separate statement. The purpose of this rule is to require the parties to get together and attempt to resolve discovery disputes before asking the trial court to impose sanctions. It is clear from the record the prosecutor had made no effort to resolve the disclosure issue. Instead, the prosecutor “demand[ed] that the Court and the defense follow the Rules of Criminal Procedure.” Because following the Rules of Criminal Procedure would have meant requiring the prosecutor to provide that separate statement, and because the trial court considered the prosecutor’s request for sanctions under Rule 15.7(a) without that separate statement, the trial court erred in precluding Defendant’s witnesses and exhibits.

B. *Assuming the trial court had discretion to impose sanctions on Defendant, did the trial court abuse its discretion in imposing preclusion as the sanction.*

Defendant contends, if the trial court had the discretion to impose sanctions on her, the trial court abused its discretion in imposing preclusion as the sanction. Preclusion is a sanction of last resort, thus a trial court may not impose preclusion as a sanction unless it determines no lesser sanction will remedy the discovery violation. *State v. Cota*, 229 Ariz. 136, 272 P.3d 1027, ¶¶ 59–61 (2012) (court found discovery violation, but held trial court properly exercised discretion in providing remedy other than precluding testimony). In determining whether to impose sanctions, the trial court should consider (1) how vital the witness is to the case, (2) whether the opposing party will be surprised, (3) whether the discovery violation was motivated by bad faith, and (4) any other relevant circumstances. *Cota* at ¶ 59; *State v. Armstrong*, 208 Ariz. 345, 93 P.3d 1061, ¶¶ 40–43 (2004) (court stated that, assuming there was discovery violation, trial court did not abuse discretion in refusing to preclude codefendant’s testimony because (1) testimony was important to state’s case, (2) there was no bad faith in timing of disclosure, (3) defendant was not

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surprised by testimony and defendant's ability to prepare was not prejudiced, and (4) court granted 2-week continuance). In the present matter, the trial court appears to have adopted a policy that it would automatically preclude any witness or exhibit not disclosed. Because the trial court did not consider the four factors described in *Cota* and *Armstrong* and instead went directly to preclusion as the sanction, the trial court abused its discretion in precluding Defendant's witnesses and exhibits.

It further appears Defendant was prejudiced by the trial court's preclusion of Defendant's witnesses and exhibits. The two witnesses would have been able to testify about the event both before and after the attack on the horses. The pictures of the bulldog would have explained how the dog got wet and muddy from conditions in Defendant's yard and not from being in the victim's yard. The trial court's ruling precluding this evidence thus prejudices Defendant.

C. Did the trial court's ruling deprive Defendant of her right to counsel.

Defendant contends the trial court erred in finding she waived her right to be represented by an attorney and therefore deprived her of her right to be represented by an attorney. This Court has reversed Defendant's conviction, thus Defendant will receive a new trial. Defendant is currently represented by an attorney. The attorney thus will be able to do one of the following: (1) represent her at the new trial; (2) arrange for another attorney to represent her; (3) advise her how she could obtain a new attorney on her own; or (4) advise her about representing herself. This issue therefore should not arise at the new trial.

D. Did the trial court abuse its discretion in sustaining certain State's objections.

Defendant contends the trial court abused its discretion in sustaining certain of the State's objections. Because this Court has already determined this case must be reversed and remanded for further proceedings, this Court need not address whether these alleged errors would require reversal. Because there may be another trial in this matter, this Court makes certain observations.

In the present matter, when Defendant was cross-examining a witness, the prosecutor objected "because she is testifying" and "[a]gain, Judge, she is testifying." (R.T. of Dec. 1, 2011, at 35.) Rule 611(c)(1) of the Arizona Rules of Evidence provides, "Ordinarily, the court should allow leading questions: (1) on cross-examination . . ." A leading question is one that suggests the desired answer. *State v. McKinney*, 185 Ariz. 567, 575, 917 P.2d 1214, 1222 (1996). The reason why leading questions are not allowed on direct examination is, "What is desired is that the trier of fact hear what the witness perceived, not the acquiescence of the witness in counsel's interpretation of what the witness perceived." LAW OF EVIDENCE § 611:4 (D. McAuliffe & S. Wahl, eds., Rev. 4th ed. 2008). Because leading questions are permitted on cross-examination, the proceedings will be counsel's interpretation of what the witness perceived and the witness's acquiescence or not in counsel's interpretation. The practical effect of using leading questions on cross-examination is counsel (or the party) will testify about a certain event and then ask the witness whether the witness agrees or disagrees with that testimony. Thus, the trial court erred to the extent it sustained the prosecutor's objection that Defendant was testifying when she was asking leading questions on cross-examination.

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One example of this is when Defendant was cross-examining Denise Kraun. When Defendant tried to ask her if she said she had been half asleep when Defendant called, the prosecutor objected on the basis that Defendant was testifying:

[DEFENDANT]: When I called you, you answered the phone and you said that you were half asleep—

[THE PROSECUTOR]: Again, Judge, she is testifying. I object to that.

(R.T. of Dec. 1, 2011, at 35.) The trial court sustained the objection. (*Id.* at 36.) When Defendant then testified herself on direct examination and tried to testify that Denise Kraun said she was half asleep when Defendant called, the prosecutor objected on the basis that Defendant should have asked that question of Denise on cross-examination:

[THE PROSECUTOR]: Objection, she is going into the testimony of a witness already on the stand. She had an opportunity to cross-examine then.

(R.T. of Dec. 1, 2011, at 53.) Again, the trial court sustained the objection. (*Id.* at 53–54.) Although the trial court has the discretion to see that matters are resolved in an expeditious manner, the trial court should not do that at the expense of precluding the Defendant from seeking to develop and introduce admissible evidence.

III. CONCLUSION.

Based on the foregoing, this Court concludes the trial court erred in precluding Defendant's witnesses and exhibits.

IT IS THEREFORE ORDERED reversing the judgment and vacating the sentence of the Hassayampa Justice Court.

IT IS FURTHER ORDERED remanding this matter to the Hassayampa Justice Court for all further appropriate proceedings.

IT IS FURTHER ORDERED signing this minute entry as a formal Order of the Court.

/s/ Crane McClennen

THE HON. CRANE MCCLENNEN
JUDGE OF THE SUPERIOR COURT

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