

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,) No. 64033-0-I
)
 Respondent,) DIVISION ONE
)
 v.) UNPUBLISHED OPINION
)
 ANDRE LUIS FRANKLIN,)
)
 Appellant.) FILED: March 5, 2012

Grosse, J. — Evidence offered by the defense in a cyberstalking case showing that another person had harassed the victim via e-mail in the past, had access to the computer from which the harassing e-mails were sent, and had used the defendant’s home and work e-mail accounts lacks sufficient foundation to be admissible as “other suspect” evidence because it does not establish that the other suspect took a step indicating an intent to actually commit the crime. Here, the defendant also admitted to committing the crime and there was no admissible evidence showing that this other suspect used the defendant’s account to send e-mails to the victim or had access to the e-mail account from which the harassing e-mails and Internet postings were sent. Accordingly, we affirm.

FACTS

Andre Franklin and Nanette Fuerte both worked for the City of Seattle Department of Parks and Recreation. They met early in 2005 and began having an intimate relationship, which was “on and off” from 2005 onward. During this

time, Franklin was living with his girlfriend, Rasheena Hibbler.

In October 2008, Fuerte borrowed \$3,000 from Franklin and promised to pay him back by November 26, 2008. On November 6, Fuerte was at her home watching a movie with a male friend when Franklin came over unannounced. According to Fuerte, Franklin was angry and wanted the friend to leave, and she had to sit outside with Franklin for several hours before he finally left.

The next evening, on November 7, 2008, Fuerte began receiving e-mails and phone calls from accounts and phone numbers she did not recognize. She finally answered one of the calls and the caller told her he was responding to a posting on Craigslist offering oral sex. She then discovered that the calls and e-mails she had been receiving were all requests for her to perform sexual acts. Fuerte estimated that she received 75 to 100 calls responding to the Craigslist ads. She stayed in a hotel that night because she was scared and changed her phone number the next day.

The following evening, on November 8, 2008, Fuerte was at a restaurant with family and friends when Franklin arrived and came to her table. He was angry at Fuerte because she had changed her phone number and he told her he was "going to let the superintendent and [her] manager know exactly what type of person" she was. He also demanded that Fuerte pay him the money she owed, and Fuerte told him she would pay him on Monday.

On that Monday, November 10, 2008, Fuerte began receiving e-mails from Franklin, asking her to meet him so she could pay him back the money she

owed. The e-mails were sent from the address, "time4gamez@yahoo.com." Fuerte sent an e-mail back stating that she was borrowing the money from a friend and was meeting that friend at 1:00 p.m. She then received a response stating:

communication is key... u friday then u said monday @ noon. u asked me 2 b patient I no longer have any patients for u and Ur games. the way i c it is that u are using my money 2 go out and have fun while i am working hard 2 save money... u have till 1 pm then u know what will happen[.]

Fuerte replied, asking whether Franklin wanted a cashier's check or cash, and she received a response back that he wanted cash. She also sent an e-mail asking where she should drop off the money and received the response, "bring it to me [at] home." Fuerte then went to her friend's bank to cash a cashier's check and drove to Franklin's home to pay him back. When she gave him the money, Franklin laughed at her and said, "[D]o you think this is the end of it? This is just the beginning."

Later that day, Fuerte received another e-mail from the "time4gamez" address. The subject line was "I love 2 suck dick for free!" and stated:

Call me at 206-386-1921 and ask for Nanette and tell me what u would do to me. If you get no answer, leave a long message telling me what u would like to do to me and what u want me to do to u.

The phone number listed was Fuerte's work number. Attached to the e-mail were two pictures of a sexual nature, one of Fuerte and one of Fuerte and Franklin, that had been taken sometime earlier that year. Fuerte had seen these pictures attached to the other Craigslist postings about her. That same day she received additional e-mails from the "time4gamez" address stating:

so r u going to play my game or not?

.....

You have been makeing the rules for the game for the past few years. Now it is my turn to make the rules. If u play by them all will b ok but if u choice to not play by ALL of them well I think u can think of some things that could happen.

The next day, on November 11, 2008, Fuerte received another e-mail from the "time4gamez" address entitled, "I love 2 suck dick for free!" that contained the same posting. That same day she received another e-mail from the "time4gamez" address that stated, "[W]hat goes around comes around. (Game recognize Game) U work 4 me now." She replied, "[W]hat do U want from me?" and received the response, "u will do what ever i tell u 2 do....when ever i want...I want u 2 fill what it fills like 2 have some 1 play games with them...."

On November 12, there were a few more e-mail exchanges between Fuerte and the "time4gamez" address in which Fuerte asked why Franklin was trying to ruin her life. One of the e-mails sent by the "time4gamez" address stated, "[N]ow u may lose it all B-cuz u wanted 2 play games....I told u a # of time I am not the 1 2 play with...but u still thought it was OK." On November 14, 2008, Franklin called Fuerte at work and she told him that "this needed to end." She called him back later that day and told him that she wanted to handle this "at the lowest level possible," and that she just wanted it to be over. She told him that she did not want to involve the police or her employer.

The next day, on November 15, Franklin called again and Fuerte told him

she wanted everything to stop, but he told her that he was not going to stop. Franklin then told her that the Craigslist postings were “just the tip of the iceberg” and that she “should start looking over [her] shoulder.” He also said he knew people who would “do dirt” for him.

Shortly after that phone call, Fuerte began receiving e-mails responding to yet another sexually explicit posting on Craigslist. She then contacted both the police and the human resources department for the City of Seattle. She also obtained a temporary protection order and Franklin was placed on administrative leave.

After Franklin was placed on leave, Christopher Williams, who was Deputy Superintendent for Parks and Recreation, spoke with Franklin and asked him if he posted the Craigslist ads. Franklin admitted that he did and also admitted this to Timothy Gallagher, the superintendent. On December 2, 2008, Franklin appeared for a court hearing on Fuerte’s petition for a permanent protection order. He testified under oath and denied posting the Craigslist ads or having any embarrassing pictures of Fuerte.

The State charged Franklin with one count of stalking, one count of cyberstalking, and one count of perjury based on his testimony at the protection order hearing. Before trial, the State moved to exclude evidence that Hibbler committed the cyberstalking crime, contending that there was insufficient foundation for this “other suspect” evidence. The evidence was based on the prosecutor’s interview of Hibbler in which she admitted that her laptop was the

only home computer, that she confronted Fuerte in the past via e-mail about her relationship with Franklin, and that she had access to both Franklin's work and personal e-mail accounts. When asked if she knew anything about the Craigslist ads before or when they were posted, if she posted them herself, and if she knew where the sexually explicit photo attached to the Craigslist ads came from, Hibbler asserted the Fifth Amendment privilege.

The court ruled that the other suspect evidence was not admissible, stating:

In this case the other suspect is [sic] proffered is the girlfriend of Mr. Franklin who lives with him. Whose name is on the bill. And the question is -- there's two questions. First question is whether Ms. Hibbler is someone argued to be another suspect in the case. And second question is if not, to what degree can she be referred to in the case. Having looked at the case law, and the other suspect bar, quite frankly, is high, and it requires, I think, more than mere opportunity. More than motive. And so far in this case I don't see the evidence to support that foundation. I do think the defense can argue about Ms. Hibbler having the opportunity [sic] to the IP address. So I think that the defense cannot argue that she is the one who did it because there is not sufficient foundation. But they can argue to [sic] the State has failed in its burden of proof by showing that there are other people who have the access to the IP address. Perhaps someone considering [sic] that's a decision without a difference, but I think analytically that's why [sic] it goes. I don't think there is enough for you to argue, Mr. Garrett [(defense counsel)], that she did it because I don't think you have met that foundation. But I think that in other cases involving a computer, of which there are many in this courthouse, the defense is often in the position of saying more than one person had the opportunity to be at that computer, and that means the State has not been able to meet its burden to prove that this person charges [sic] the defendant is actually the person who got on the computer and did it.

As to the other arguments you have made, Mr. Garrett, that you can prove that Mr. Franklin was somewhere else, clearly that plays into alibi defense, but I think that's different than the foundation or other suspect evidence which requires specific facts to show that another person actually committed the crime.

The court then addressed whether Hibbler's testimony was subject to the Fifth Amendment privilege. Before ruling, the court heard testimony from Hibbler in open court in which she admitted that she used Franklin's e-mail accounts to send messages to others, but asserted the Fifth Amendment privilege when asked if she ever used them to send e-mails to Fuerte and if she ever used the "time4gamez" account. She also admitted that she knew Franklin had loaned Fuerte money and that she saw sexually explicit photos of Fuerte when she accessed Franklin's e-mail account. But she denied conspiring with Franklin to post the Craigslist ads and that Franklin asked her to create an e-mail address for him.

The court determined that it would hold a closed in camera hearing for the limited purpose of determining whether the Fifth Amendment privilege applied to Hibbler's testimony and to protect Hibbler's right to assert the privilege. The court then questioned Hibbler in chambers in the presence of her attorney only. Hibbler admitted that she participated in creating the "time4gamez" e-mail account, that she sent e-mails to Fuerte from that address, that the content of those e-mails related to the money Franklin loaned her, and that she posted at least three or four of the Craigslist ads.

Following the in camera questioning, the court ruled that Hibbler had a Fifth Amendment right to not testify at the trial and could not be called as a witness. Defense counsel then asked the court to reconsider its "other suspect" ruling in light of its determination that Hibbler had a Fifth Amendment right to not

testify. The court declined, explaining that it could not consider any of the privileged testimony in making its ruling on the other suspect evidence because it was not admissible.

During trial, Franklin sought to introduce e-mails Hibbler sent to Fuerte in 2005, 2006, 2007, and 2008, to show that there was animosity between the two and that Hibbler had a motive to send the e-mails that he was accused of sending. The court ruled that the e-mails were inadmissible as “other suspect” evidence, explaining:

The question is whether Ms. Hibbler -- has defense met the foundation to have Ms. Hibbler as another suspect in the case. In doing that I not only look at the foundation for other suspect evidence, but I also look at the evidence against the defendant. If this is a circumstantial case that weighs more in favor of admitting other suspect evidence. If it's only circumstantial evidence. Here the evidence against Ms. Hibbler includes evidence of motive, three years old, arguably connected to 2008 e-mails, but I think frankly that's pretty -- pretty weak evidence when it comes down to it, the connection between the two.

Also the evidence against Mr. Franklin is more than circumstance. There are three witnesses who testified that he told them that he did it. Two directly and one by inference. That's Mickey Fern. And I think that other suspect standard, which is frankly high, requires more than mere motive, more than mere opportunity. Defense has simply not met that in this case. That does not preclude the defense from arguing that the State has not met its burden of proof, as I have said many times. But I'm not going to allow the introduction of these e-mails.

Franklin testified on his own behalf, denying that he sent any of the e-mails from the “time4gamez” address or posted any of the Craigslist ads. He also denied that he had any conversations with Fuerte on November 10 about repayment of the loaned money, that she came to his house and paid him back the money she owed, or that he sent her e-mails with the Craigslist ads on that

day, testifying that instead, he was with his younger brother Ramon. He also called Ramon as a witness, who testified that on that day he and Franklin had worked on his car and watched football at Ramon's house and Franklin spent the night there. Because the State had no prior notice of Ramon's testimony, the State moved to strike the testimony as a discovery sanction and the court granted the motion.¹ The jury found Franklin guilty as charged on all three counts. Franklin appeals.

ANALYSIS

I. Other Suspect Evidence

Franklin contends that the trial court denied him his right to compulsory process and to present witnesses in his defense by excluding "other suspect" evidence showing that Hibbler actually committed the crime. The federal and state constitutions provide a criminal defendant the right to present a defense, which includes the right to offer testimony of witnesses and to compel witness attendance, if necessary.² But the right to present a defense is not absolute and does not extend to irrelevant or inadmissible evidence.³

A criminal defendant seeking to admit evidence suggesting that another person committed the charged offense bears the burden of establishing its admissibility and must lay a sufficient foundation for such evidence.⁴ That foundation requires proof of the alleged other suspect's connection with the

¹ In fact, before trial the State specifically requested that the defense disclose the substance of Ramon's testimony, but it was never disclosed until Ramon actually testified on direct examination.

² State v. Maupin, 128 Wn.2d 918, 924, 913 P.2d 808 (1996).

³ Maupin, 128 Wn.2d at 924; State v. Jones, 168 Wn.2d 713, 720, 230 P.2d 576 (2010).

⁴ State v. Pacheco, 107 Wn.2d 59, 67, 726 P.2d 981 (1986).

crime and the defendant must establish a train of facts or circumstances that tend to clearly point to someone other than the defendant as the guilty party.⁵ A foundational showing that it was *possible* for a third party to have committed the crime is insufficient.⁶ Thus, mere motive, ability, and opportunity to commit the crime alone do not establish sufficient foundation.⁷ “Not only must there be a showing that the third party had the ability to place him- or herself at the scene of the crime, there also must be some step taken by the third party that indicates an intention to act on that ability.”⁸

In State v. Rehak, there was insufficient foundation for “other suspect” evidence when it showed that the defendant’s son had quarrels with the victim, might benefit financially if the defendant were convicted, knew where the murder weapon was kept, and was absent from his work without explanation during the time of the murder, but there was no evidence placing the son near the murder scene.⁹ In State v. Strizheus, this court recently held there was insufficient foundation to admit “other suspect” evidence when the defendant’s son stated while intoxicated, “[I]t’s my fault, arrest me. I should be in jail,” but later recanted, and also later assaulted the victim (his mother).¹⁰ This court concluded that there was no evidence of any step taken by the son indicating an intent to act on his alleged motive, noting that there was no physical or

⁵ State v. Downs, 168 Wash. 664, 667, 13 P.2d 1 (1932).

⁶ State v. Rehak, 67 Wn. App. 157, 163, 834 P.2d 651(1992).

⁷ Maupin, 128 Wn.2d at 927.

⁸ Rehak, 67 Wn. App. at 163.

⁹ 67 Wn. App. 157, 160-61, 834 P.2d 651 (1992).

¹⁰ 163 Wn. App. 820, 825, 262 P.3d 100 (2011).

eyewitness evidence placing him at the scene and the victim did not identify him as her attacker.¹¹

Likewise here, there was no evidence indicating Hibbler's intent to act on her alleged motive. The proffered "other suspect" evidence pointing to Hibbler consisted of her statements that she had access to Franklin's work and personal e-mail accounts, used his "squareone" personal account to send e-mails to unnamed "others," had harassed Fuerte by e-mail from her own account in the past, was aware of the money dispute between Franklin and Fuerte, and had seen the sexually explicit photographs of Fuerte that were attached to the Craigslist ads. At most, this shows she had access to some of Franklin's e-mail accounts and the computer from which the e-mails were sent, and was aware of some of the content of the harassing e-mails (the loan dispute and sexually explicit photographs). While this establishes that she had motive and possibly the ability to commit the crime, it does not establish the "direct connection" required -- that she in fact took some step indicating an intention to act on that ability. The evidence does not establish that Hibbler used Franklin's e-mail accounts to contact Fuerte, sent Fuerte e-mails pretending to be Franklin, used or was even aware of the "time4gamez" account involved in the crime, or posted

¹¹ Strizheus, 163 Wn. App. at 832; see also State v. Mezquia, 129 Wn. App. 118, 125-26, 118 P.3d 378 (2005) (no evidence that other suspect had contact with victim during time of murder or that had opportunity or motive to commit the crime, and DNA evidence ruled out other suspect as donor of sample collected from victim's body); State Hilton, 164 Wn. App. 81, 102, 261 P.3d 683 (2011) (insufficient foundation where victims' daughter was proffered as an other suspect based on motive of inheritance from the victims; no showing that daughter had access to or knew how to use murder weapon and no evidence placing her at murder scene).

the Craigslist ads and sexually explicit photographs.

The cases cited by Franklin are distinguishable. In those cases, there was sufficient foundation for admitting other suspect evidence because the other suspect's actions established either a direct involvement in the crime or an intent to commit the crime, which was not the case here. In State v. Maupin, an eyewitness saw the victim being carried by the other suspect the day after the victim was allegedly kidnapped, and as the court concluded, this evidence points directly to someone else as the guilty party and "at least would have brought into question the State's version of the events of the kidnapping."¹² In State v. Clark, the defendant was charged with arson involving a fire occurring on his property and the other suspect believed the defendant had an affair with his wife and molested his daughter, had warned the defendant's girlfriend to "watch it" because he knew how to start fires without detection, and told her it was "too bad" that the defendant was in jail for something he did not do.¹³ But here, the evidence simply established the other suspect's motive and opportunity without an affirmative act establishing either direct involvement in the charged crime, as in Maupin, or an intent to commit the crime, as in Clark.

Thus, while we acknowledge that whether Hibbler's testimony amounts to admissible "other suspect" evidence is a close call, we cannot say that the trial court abused its discretion by ruling that this testimony lacked sufficient evidentiary foundation.¹⁴ In any event, we also recognize that any error in its

¹² 128 Wn.2d 918, 928, 913 P.2d 808 (1996).

¹³ 78 Wn. App. 471, 474-76, 898 P.2d 854 (1995).

¹⁴ It is unclear whether Franklin also challenges the court's ruling that the e-mails

exclusion would amount to harmless error because it would have been subject to the Fifth Amendment privilege and inadmissible on that basis. As discussed below, if such testimony was in fact admissible as “other suspect” evidence, it would furnish a link in the chain of evidence needed to prosecute Hibbler and would therefore be protected by the Fifth Amendment privilege.

Hibbler sent to Fuerte in the past were also inadmissible as “other suspect” evidence. In any event, he fails to show that this ruling was error because as the court concluded, this evidence was too attenuated to establish a direct connection between Hibbler and the charged crimes. The e-mails were all sent directly from Hibbler from her own e-mail account, were not sent around the time of the charged offense, and related only to Fuerte’s relationship with Franklin, not the dispute over the loaned money.

II. Fifth Amendment Privilege

Franklin next contends that the trial court violated his constitutional right to compulsory process by ruling that Hibbler had a Fifth Amendment privilege not to testify at all. Hibbler did not assert the privilege when asked if she used Franklin's e-mail account to send e-mails to unnamed "others," if she used his "squareone" account, if she was angry with Fuerte, if she confronted Fuerte via e-mail about her relationship with Franklin, if she saw sexually explicit photos of Fuerte when accessing Franklin's e-mail, and if she knew about Franklin and Fuerte's dispute over the loaned money. Franklin contends that her answers to these questions were therefore not privileged and the trial court should have permitted that testimony.

"[A] valid assertion of the witness' Fifth Amendment rights justifies a refusal to testify despite the defendant's Sixth Amendment rights."¹⁵ But a witness cannot establish the privilege by simply making a blanket declaration that he cannot testify for fear of self-incrimination. Rather, the court must determine whether the privilege applies and inquire into the legitimacy of the assertion.¹⁶

The Fifth Amendment privilege applies when the defendant has "reasonable cause to apprehend danger from a direct answer."¹⁷ This privilege not only extends to answers that would in themselves support a criminal

¹⁵ State v. Levy, 156 Wn.2d 709, 731, 132 P.3d 1076 (2006) (internal quotation marks omitted) (citation omitted).

¹⁶ Levy, 156 Wn.2d at 732; United States v. Hoffman, 341 U.S. 479, 486, 71 S. Ct. 814, 95 L. Ed. 1118 (1951) ("It is for the court to say whether his silence is justified.")

¹⁷ Levy, 156 Wn.2d at 731-32 (internal quotation marks omitted) (citations omitted).

conviction but also embraces those that would “furnish a link in the chain of evidence needed to prosecute the claimant” for the crime.¹⁸ As the Supreme Court has explained:

To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result.^[19]

Generally, “a claim of privilege may be raised only against specific questions, and not as blanket foreclosure of testimony.”²⁰ But there is a narrow exception when, based on its knowledge of the case and the anticipated testimony, the court concludes that the witness may legitimately refuse to answer all questions.²¹

Because the court here did have specific knowledge of Hibbler’s anticipated testimony after conducting the in camera inquiry, the court was in a position to determine whether a blanket privilege was proper. Thus, the question is whether the court properly determined that the testimony to which she did not claim the privilege was nonetheless subject to the privilege. Because it did not amount to “other suspect” evidence as the trial court concluded, it was not subject to the Fifth Amendment privilege and the trial court’s ruling to the contrary was in error. Nonetheless it was still inadmissible as irrelevant, precisely because it does not amount to other suspect evidence. Indeed, it was

¹⁸ Hoffman, 341 U.S. at 486.

¹⁹ Hoffman, 341 U.S. at 486-87.

²⁰ State v. Delgado, 105 Wn. App. 839, 845, 18 P.3d 1141 (2001).

²¹ Delgado, 105 Wn. App. at 845; United States v. Moore, 682 F.2d 853, 856 (9th Cir. 1982); see also Levy, 156 Wn.2d at 732 (citing Moore, 682 F.2d at 856).

unnecessary for the trial court to even determine applicability of the Fifth Amendment once it had already determined that such evidence was irrelevant and not admissible as “other suspect” evidence. Thus, at most, the trial court’s ruling amounts to harmless error because Hibbler’s testimony was already inadmissible under the “other suspect” analysis.²²

III. Discovery Violation

Franklin also contends that the trial court abused its discretion by striking Ramon’s testimony as a sanction for a discovery violation because this violated his constitutional right to present witnesses in his own defense. Discovery obligations are set forth in CrR 4.7(b), which provides:

(1) Except as is otherwise provided as to matters not subject to disclosure and protective orders, the defendant shall disclose to the prosecuting attorney the following material and information within the defendant’s control no later than the omnibus hearing: the names and addresses of persons whom the defendant intends to call as witnesses at the hearing or trial, together with any written or recorded statements and the substance of any oral statements of such witness.

(2) Notwithstanding the initiation of judicial proceedings, and subject to constitutional limitations, the court on motion of the prosecuting attorney or the defendant, may require or allow the defendant to:

...

(xii) state whether or not the defendant will rely on an alibi and, if so, furnish a list of alibi witnesses and their addresses[.]

The rule also provides for sanctions for discovery violations as follows:

(i) [I]f at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with an

²² Even if this testimony formed the basis for the “other suspect” testimony as Franklin contends, it would still be inadmissible as subject to the privilege because it necessarily serves to “furnish a link in the chain of evidence needed to prosecute” Hibbler for the crime. Hoffman, 341 U.S. at 486.

applicable discovery rule or an order issued pursuant thereto, the court may order such party to permit the discovery of material and information not previously disclosed, grant a continuance, dismiss the action or enter such other order as it deems just under the circumstances.

(ii) [W]illful violation by counsel of an applicable discovery rule or an order issued pursuant thereto may subject counsel to appropriate sanctions by the court.^[23]

Rulings on discovery violations under CrR 4.7 lie within the sound discretion of the trial court.²⁴ “Exclusion or suppression of evidence is an extraordinary remedy and should be applied narrowly.”²⁵ Washington courts consider the following factors in determining whether exclusion of evidence is an appropriate sanction: (1) the effectiveness of less severe sanctions; (2) the impact of witness preclusion on the evidence at trial and the outcome of the case; (3) the extent to which the prosecution will be surprised or prejudiced by the witness’s testimony, and (4) whether the violation was willful or in bad faith.²⁶

The requirement that the State be given sufficient notice of an alibi witness exists to prevent unfair gamesmanship. As the Supreme Court has recognized:

Given the ease with which an alibi can be fabricated, the State’s interest in protecting itself against an eleventh-hour defense is both obvious and legitimate. . . . The adversary system of trial hardly an end in itself; it is not yet a poker game in which players enjoy an absolute right always to conceal their cards until played. We find ample room in that system, at least as far as “due process” is concerned, for [such a] rule, which is designed to enhance the search for truth in the criminal trial by insuring both the defendant and the State ample opportunity to investigate certain

²³ CrR 4.7(7).

²⁴ State v. Hutchinson, 135 Wn.2d 863, 882, 959 P.2d 1061 (1998).

²⁵ Hutchinson, 135 Wn.2d at 882.

²⁶ 135 Wn.2d at 882-83 (citing Taylor v. Illinois, 484 U.S. 400, 415 n.19, 108 S. Ct. 646, 98 L. Ed. 2d 798 (1988)).

facts crucial to the determination of guilt or innocence.^[27]

While the Court has also recognized that the constitutional right to compulsory process may be compromised by a discovery sanction of excluding defense witness testimony, when there is no justification for the late withholding of such evidence, exclusion may be the most appropriate remedy, as the Court concluded in Taylor v. Illinois:

If a pattern of discovery violations is explicable only on the assumption that the violations were designed to conceal a plan to present fabricated testimony, it would be entirely appropriate to exclude the tainted evidence regardless of whether other sanctions would also be merited.

....

A trial judge may certainly insist on an explanation for a party's failure to comply with a request to identify his or her witnesses in advance of trial. If that explanation reveals that the omission was willful and motivated by a desire to obtain a tactical advantage that would minimize the effectiveness of cross-examination and the ability to adduce rebuttal evidence, it would be entirely consistent with the purposes of the Compulsory Process Clause simply to exclude the witness' testimony.^[28]

Here, the trial court ruled as follows:

The defense admits they knew of Ms. Fuerte's allegations that she paid the defendant a visit on November 10, 2008, and visited his home. Ramon Franklin is essentially providing an alibi for that day. He has testified that Mr. Franklin -- the defendant in this case, Mr. Andre Franklin -- was with Ramon Franklin all day at Ramon Franklin's house.

The defense had access to Mr. Ramon Franklin for months. Mr. Ramon Franklin, in fact, testified that he talked to his brother daily, and he sees him three times a week.

At the omnibus hearing, the defense noted a general denial. On the first day of trial, Mr. Garrett stated that he may have an alibi defense based on time records for November 8, 2008. The prosecutor did not specifically object.

....

... At no time before his testimony did the defense notify the State or the Court that Ramon Franklin provided an alibi defense for November

²⁷ Williams v. Florida, 399 U.S. 78, 81-82, 90 S. Ct. 1893, 26 L. Ed. 2d 466 (1970) (footnotes omitted) (citations omitted).

²⁸ 484 U.S. 400, 414-17, 108 S. Ct. 646, 98 L. Ed. 2d 798 (1988).

10th. In fact, the State by its cross-examination questions seemed confused and thought that Ramon Franklin was testifying that he was actually at Mr. Andre Franklin's house, and only after asking that question at the sidebar noted that that was not in fact the case.

[As] to Mr. Ramon Franklin, this testimony is not related to the earlier request for continuance in front of Judge Robinson, not related to anything stated in front of me for the trial, not a question of preparation or knowledge. The defense knew about it, could have disclosed it. It's a simple withholding of evidence. The testimony is stricken.

Franklin contends that this was not actually alibi evidence, but simply refuted Fuerte's claim that she paid back the loan. We disagree. Viewed in context, it can be fairly characterized as alibi evidence. Franklin denied that he had any conversations with Fuerte about the loaned money on November 10, despite the State's allegations that on that day, he sent her e-mails from the "time4gamez" account asking her to meet him and repay the loan, threatened her that "this [was] just the beginning" when she repaid him, and later sent her e-mails with the Craigslist ads. Franklin called Ramon as a witness to corroborate this denial and to show that he was someplace else during the time the State alleged he committed these acts.

Nor does Franklin show that, considering the relevant factors, the trial court abused its discretion by ruling that exclusion of Ramon's testimony was an appropriate sanction for the late disclosure. As in Taylor, the court focused primarily on the willfulness of the violation, but balancing all the factors weighs in favor of exclusion of the evidence. Unfair surprise and disadvantage to the State was obvious, given that the evidence was not disclosed until after the State put on its case and until the witness testified. Indeed, as the court pointed

out, the prosecutor's questions of Ramon on cross-examination showed that he was confused and thought he was testifying that he was at Franklin's house at the time.

Franklin also fails to show that alternative sanctions were necessarily more appropriate. The court considered declaring a mistrial, but as the State pointed out, this would have actually resulted in a punishment to the State and its witnesses that had already appeared in court and testified. The court might have also allowed a continuance for the State to investigate the alibi evidence, but given the timing of the disclosure, it would have prejudiced the State because the State had already rested its case in chief and had little time to investigate the alibi evidence and effectively rebut it. Additionally, as the State notes, several jurors had scheduling issues toward the end of the trial and Franklin refused to proceed with fewer than 12 jurors. Thus, if the trial were further delayed by an unanticipated continuance, it was likely that not all 12 jurors would be available for the rest of the trial, resulting in a mistrial. Finally, the impact of excluding the testimony does not clearly weigh against exclusion. Franklin already testified to this fact and while Ramon's testimony would have served as corroboration, it would not have been any more credible than Franklin's, given his obvious bias as his brother.

IV. Public Trial Right

Finally, Franklin contends that the trial court err by closing the courtroom during its questioning of Hibbler because it failed to adequately consider the

factors set forth in State v. Bone-Club²⁹ before ordering the closure. The Bone-Club factors that a trial court must consider on the record before ordering a courtroom closure are as follows:

1. The proponent of closure or sealing must make some showing [of a compelling interest], and where that need is based on a right other than an accused's right to a fair trial, the proponent must show a "serious and imminent threat" to that right.
2. Anyone present when the closure motion is made must be given an opportunity to object to the closure.
3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests.
4. The court must weigh the competing interests of the proponent of closure and the public.
5. The order must be no broader in its application or duration than necessary to serve its purpose.^[30]

Failure to conduct the Bone-Club inquiry before closing a courtroom violates the right to a public trial and results in reversal for a new trial.³¹

Here, the court reiterated the Bone-Club factors on the record and then ruled:

Here the State, and actually, I think, the defense is not objecting to this either, are not objecting to the in camera questioning of Ms. Hibbler, which would be limited to me questioning her about whether or not certainly the questions posed by the State, and by the defense about whether or not she is, in fact, the person who created, participated in e-mailing under Time4gamez@Yahoo.com. Sent the e-mails to Nanette Fuerte, and posted the explicit photos that were discussed. And so for those reasons -- and she does have a Fifth Amendment privilege as any citizen does. Actually any noncitizen as well. She has that privilege, and I believe that closure is proper for this limited purpose simply to ask her these questions for me to make the determination of whether or not the Fifth Amendment applies in this particular case. So having considered the factors under State v. Bone-Club, I will close that limited proceeding, which will only be a few minutes long.

²⁹ 128 Wn.2d 254, 906 P.2d 325 (1995).

³⁰ 128 Wn.2d at 258-59 (alteration in original) (citations omitted).

³¹ State v. Brightman, 155 Wn.2d 506, 518, 122 P.3d 150 (2005).

While Franklin is correct that the trial court has the affirmative duty to consider the factors, the court here did not simply give “lip service” to the Bone-Club factors, as he contends. Rather, the court made a determination that Hibbler’s Fifth Amendment right justified the closure. The court also acknowledged that there was no objection to the closure, that the closure would be brief, and that the scope of the inquiry would be restricted to only those specific questions posed by both parties. Finally, while the closed in camera hearing was restrictive, it was necessary to protect Hibbler’s assertion of the privilege. In fact, as the State points out, the case law recognizes that such in camera hearings are the appropriate method to determine whether there is a factual basis for an assertion of the Fifth Amendment privilege.³² Additionally, as this court has recognized, when a trial court conducts a routine in camera review of a witness’s claimed Fifth Amendment privilege, “[n]o public trial right is being abridged by conducting these proceedings. Applying the five factors before an in camera review would serve little purpose, because proper in camera proceedings would always satisfy them.”³³ Franklin fails to show the trial court erred in its consideration of the Bone-Club factors.

We affirm.

³² State v. White, 152 Wn. App. 173, 182, 215 P.3d 251 (2009).

³³ White, 152 Wn. App. at 182.

Grosse, J

WE CONCUR:

Schiveller, J

Becker, J.