

SUPREME COURT OF WYOMING

Kevin K. Callen, Sr. v. State of Wyoming

2008 WY 107 (Wyo. 2008) · No. S-07-0026 · Decided September 12, 2008

SUMMARY

The Supreme Court of Wyoming affirmed Kevin K. Callen Sr.'s conviction as an accessory before the fact to arson. The court rejected challenges concerning co-conspirator hearsay, expert testimony about methamphetamine manufacturing, and alleged prosecutorial misconduct.

CASE DETAILS

COURT	Supreme Court of Wyoming
WRITING FOR THE COURT	Golden, Justice; Voigt, C.J.; Golden, J.; Hill, J.; Kite, J.; Burke, J.
JURISDICTION	Wyoming
DECIDED	September 12, 2008
DOCKET	S-07-0026
DISPOSITION	affirmed
PROCEDURAL POSTURE	Callen appealed his jury conviction for being an accessory before the fact to first-degree arson, challenging evidentiary rulings and alleged prosecutorial misconduct.
STANDARD OF REVIEW	Evidentiary rulings are reviewed for abuse of discretion and upheld when they have a legitimate basis and are reasonable. If evidence was admitted erroneously, the court determines whether the error was prejudicial or harmless. Unpreserved prosecutorial-misconduct claims are reviewed for plain error, requiring a record that clearly reflects the alleged error, violation of a clear and unequivocal rule of law in a clear and obvious manner, and material prejudice to a substantial right.
PRECEDENTIAL VALUE	Published Wyoming Supreme Court opinion
PARTIES	Kevin K. Callen, Sr. v. State of Wyoming

TOPICS

- hearsay
- expert testimony
- prosecutorial misconduct
- preservation of error
- standard of review

PRACTICE AREAS

QUESTIONS PRESENTED

1. Whether testimony concerning statements by Sherley and Rosenberger was admissible as co-conspirator statements under W.R.E. 801(d)(2)(E), including whether the trial court was required to make express on-the-record findings.
2. Whether expert testimony describing the chemical and physical process of manufacturing methamphetamine was relevant and probative of Callen's motive and intent in the arson prosecution.
3. Whether two alleged acts of prosecutorial misconduct—asking a witness whether other witnesses were lying and commenting on reasonable doubt during closing argument—constituted plain error and materially prejudiced Callen.

HOLDINGS

1. The challenged statements by Rosenberger were admissible under W.R.E. 801(d)(2)(E) because the record contained prima facie evidence of a conspiracy involving Callen, Sherley, and Rosenberger and the statements were made during and in furtherance of that conspiracy. A witness need not be a member of the conspiracy to testify about statements made by its participants.
2. The trial court was not required to make express findings on the record that the requirements of W.R.E. 801(d)(2)(E) were satisfied absent a specific request from a party.
3. The trial court properly admitted the expert's description of the chemical and physical process of manufacturing methamphetamine because it helped establish the value of the seized items and connected Callen's drug prosecution to his motive and intent to have the items and the DCI building destroyed.
4. The prosecutor's questioning of Rosenberger about whether other witnesses were lying was improper misconduct, but Callen failed to demonstrate material prejudice under plain-error review. The prosecutor's closing argument concerning reasonable doubt did not violate a clear and unequivocal rule because, viewed in context, it did not define reasonable doubt for the jury.

KEY QUOTATIONS

“Three elements must be demonstrated before a statement can be admitted as non hearsay under Rule 801(d)(2)(E), W.R.E.. There must be evidence of a conspiracy; evidence that the declarant and the defendant both were involved in the conspiracy; and a showing that the proffered statements were made during the course of, and in furtherance of, the conspiracy.” (¶ 7)

“However, this Court does not require a trial court to make express findings absent a specific request from one of the parties.” (¶ 13)

“We have found no reversible error in any of the issues raised by Callen. Affirmed.” (¶ 25)

FACTUAL BACKGROUND

Callen managed and lived at the Park Motel, where officers previously discovered a methamphetamine laboratory and related materials. After Callen's son was arrested for distribution of methamphetamine, evidence

from both investigations was stored in the Powell Division of Criminal Investigation building. The building was later burned, and witnesses testified that Callen directed Levi Sherley and Josh Rosenberger regarding the target, accelerant, method, and timing of the fire. A jury convicted Callen of being an accessory before the fact to first-degree arson.

PROCEDURAL HISTORY

A jury found Callen guilty after a trial in which the State introduced alleged co-conspirator statements, testimony concerning methamphetamine manufacturing, and evidence of the underlying drug investigation. The district court sentenced him to twelve to fifteen years of imprisonment. The Wyoming Supreme Court reviewed the conviction and affirmed.

DISPOSITION

affirmed

CASES CITED

- Law v. State, 2004 WY 111, ¶ 14, 98 P.3d 181, 187 (Wyo. 2004)
- Martin v. State, 2007 WY 76, ¶ 20, 157 P.3d 923, 928 (Wyo. 2007)
- Wilde v. State, 2003 WY 93, ¶ 13, 74 P.3d 699, 707 (Wyo. 2003)
- Skinner v. State, 2001 WY 102, ¶ 25, 33 P.3d 758, 766-67 (Wyo. 2001)
- Solis v. State, 981 P.2d 34, 36 (Wyo. 1999)
- Gilliam v. State, 890 P.2d 1104, 1107-08 (Wyo. 1995)
- Jandro v. State, 781 P.2d 512, 521-22 (Wyo. 1989)
- Jasch v. State, 563 P.2d 1327, 1333 (Wyo. 1977)
- Burke v. State, 746 P.2d 852, 855 (Wyo. 1987)
- Vlahos v. State, 2003 WY 103, ¶¶ 27-30, 75 P.3d 628, 636-37 (Wyo. 2003)
- Bigelow v. State, 768 P.2d 558, 564 (Wyo. 1989)
- United States v. Molina, 75 F.3d 600, 603 (10th Cir. 1996)
- United States v. Williamson, 53 F.3d 1500, 1519 (10th Cir. 1995)
- United States v. Radeker, 664 F.2d 242, 243-44 (10th Cir. 1981)
- United States v. Perez, 989 F.2d 1574, 1581 (10th Cir. 1993)
- Gomez v. State, 2003 WY 58, ¶ 6, 68 P.3d 1177, 1179 (Wyo. 2003)
- Whitney v. State, 2004 WY 118, ¶ 80, 99 P.3d 457, 484 (Wyo. 2004)
- Evenson v. State, 2008 WY 24, ¶ 7, 177 P.3d 819, 823 (Wyo. 2008)
- Lessard v. State, 2007 WY 89, ¶ 14, 158 P.3d 698, 702 (Wyo. 2007)
- Talley v. State, 2007 WY 37, ¶¶ 9-12, 153 P.3d 256, 260-61 (Wyo. 2007)
- Beaugureau v. State, 2002 WY 160, ¶¶ 17-18, 56 P.3d 626, 636 (Wyo. 2002)
- Jensen v. State, 2005 WY 85, ¶ 20, 116 P.3d 1088, 1095-96 (Wyo. 2005)

- Doherty v. State, 2006 WY 39, ¶ 23, 131 P.3d 963, 971 (Wyo. 2006)
- Bhutto v. State, 2005 WY 78, ¶ 44, 114 P.3d 1252, 1268 (Wyo. 2005)
- Earll v. State, 2001 WY 66, ¶ 9, 29 P.3d 787, 789 (Wyo. 2001)
- Collins v. State, 854 P.2d 688, 699 (Wyo. 1993)
- Cosco v. State, 521 P.2d 1345, 1346 (Wyo. 1974)
- Bentley v. State, 502 P.2d 203, 207 (Wyo. 1972)
- Martin v. State, 2007 WY 76, ¶ 34, 157 P.3d 923, 930-31 (Wyo. 2007)
- Proffit v. State, 2008 WY 103, ¶ 36 (Wyo. 2008)
- Pendleton v. State, 2008 WY 36, ¶ 17, 180 P.3d 212, 218 (Wyo. 2008)
- Rion v. State, 2007 WY 197, ¶ 3, 172 P.3d 734, 736 (Wyo. 2007)
- Gabbert v. State, 2006 WY 108, ¶ 22, 141 P.3d 690, 697 (Wyo. 2006)