NO. 45132-8

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

STATE OF WASHINGTON,

Respondent,

v.

DAVID PECK,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLARK COUNTY

The Honorable Suzan L. Clark, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The court erred in finding that appellant voluntarily consented to providing a DNA reference sample. Finding of Fact 22.

2. The court erred in denying the motion to suppress the DNA reference sample and the evidence obtained from it.

3. The trial court denied appellant his right to present a defense by excluding relevant, admissible other suspect evidence.

Issues pertaining to assignments of error

1. A law enforcement officer contacted appellant while he was in custody, for the purpose of obtaining a DNA sample. The officer testified that he gave appellant Miranda warnings, but appellant was not informed he could refuse his consent to a search for DNA evidence, and appellant did not sign a consent form. The officer suggested appellant needed to provide a DNA sample to prove his innocence and that he would obtain the sample with a warrant if appellant did not consent. Appellant felt coerced into providing a sample. Under these circumstances, did the State fail to establish that appellant voluntarily consented to the DNA search?

2. Appellant was charged with robbery and theft on largely circumstantial evidence. Where similar circumstantial evidence tended to

connect another suspect to the crime, did exclusion of that evidence deny appellant his right to present a defense?

B. STATEMENT OF THE CASE

1. Procedural History

On September 11, 2012, the Clark County Prosecuting Attorney charged appellant David Peck with one count of first degree robbery and one count of third degree theft. CP 1-2; RCW 9A.56.200(1)(a)(ii); RCW 9A.56.050(1)(a). Peck filed a Knapstad[1] motion to dismiss and a motion to suppress evidence. CP 4-33, 34-41. The motions were denied, and the case proceeded to jury trial before the Honorable Suzan L. Clark. CP 122-25. The jury returned guilty verdicts, and the court imposed a standard range sentence. CP 120-21, 144. At the sentencing hearing Peck, pro se, filed a declaration regarding trial counsel's representation, stating that counsel failed to present his alibi defense. CP 126-41.

2. Substantive Facts

At around 1:25 a.m. on March 11, 2012, Pizza Hut shift manager Moe Jones closed the restaurant and prepared to make the nightly bank

[1] State v. Knapstad, 107 Wn.2d 346, 729 P.2d 48 (1986).

deposit. 3RP[2] 37-38. Jones was carrying the plastic deposit envelope containing $614 when she and driver Elisabeth McMurray walked out the back door to their cars. 3RP 37-38. As Jones unlocked her car door, she saw a man coming out of the storage area in the parking lot. She asked the man what he was doing and received no response. Instead, the man walked swiftly toward her. 3RP 40. Jones tried to get in her car as quickly as possible, but before she could shut the door, the man grabbed it. He stuck a gun in her face and told her to give him the money. 3RP 40. Jones turned away from the gun, pulled the bank deposit out of her pocket, and handed it to the man. 3RP 40.

Jones did not look directly at the robber once she saw the gun. Before that she noticed that he was wearing a hood, ball cap, sunglasses, and what appeared to be a long stringy wig. The only part of his face she could see was below the sunglasses, but she could tell he was white. 3RP 41. He was about five feet eight inches tall, skinny, and wearing bulky clothing and a dark jacket. 3RP 41-42. Jones could not tell how old he was but believed he was not over 50 years old. 3RP 42.

After Jones handed the man the money, she heard a loud crack, and she turned her head his direction. 3RP 42. McMurray had hit the man

[2] The Verbatim Report of Proceedings is contained in six volumes, designated as follows: 1RP—6/21/13; 2RP—6/28/13; 3RP—7/1/13; 4RP—7/2/13; 5RP—7/2/13 (deposition only); 6RP—7/17/13.

over the head with the Pizza Hut sign from the top of her car. 3RP 42, 68. Jones yelled to McMurray that the man had a gun, and McMurray immediately backed off. 3RP 42, 68. The man ran away through the woods toward an apartment complex behind the parking lot. 4RP 42, 68.

McMurray noticed that the robber was short and thin with a very straight and prominent nose. 3RP 70. He was wearing sunglasses, a black wig, and a coat with the hood pulled over the wig. 3RP 70. She could not tell the man's age, and she could not have picked the man out of a lineup because of the disguise. 3RP 71.

Jones told McMurray to follow her, and she drove to a parking lot with better lighting. From there she called her manager while McMurray called the police. 3RP 42-43, 81. When police responded, both women described the suspect as a white male, five feet seven inches tall, approximately 140 pounds, wearing black sunglasses, a dark blue jacket with a hood, black pants, and a black wig, carrying a black semi-automatic handgun. 4RP 109.

Deputy Jared Stevens looked for evidence around the scene of the robbery and in the direction the robber was seen running. 4RP 157. Stevens followed a path from the Pizza Hut parking lot to an apartment complex, where he found some recycling containers. Inside one of the

containers he found a black wig. He removed the wig wearing rubber gloves and placed it into evidence. 4RP 157-59.

Minutes after the robbery, police saw Ryan Stallman walking in the area with his girlfriend. CP 10-11. He was wearing dark clothing similar to the description given by Jones, and he matched the physical description of the robbery suspect. CP 10, 15. Stallman was detained as a possible suspect. CP 10, 11. When Stallman did not comply with the officer's orders to remove his hands from his pockets, the detaining officer had to draw his shotgun. CP 12. Stallman was placed in handcuffs, and officers found a black airsoft semi-automatic replica handgun in his jacket pocket. CP 12. Officers drove Jones and McMurray to Stallman's location to see if they could identify him as a suspect, but they could not. CP 10. Stallman was then taken to the sheriff's office for questioning. CP 14. He was read his rights, and he agreed to answer questions. CP 15. Stallman said he had been visiting his uncle, who was staying at a motel near the Pizza Hut. He denied any knowledge of the robbery, and he agreed to give a DNA sample. CP 15. Police checked with the uncle who confirmed Stallman's story, and Stallman was returned to the motel and released. CP 10.

The wig and the reference DNA sample from Stallman were sent to the crime lab for testing. 4RP 122-23, 126. A mixed DNA profile was

found in the wig, with a major component and trace component. 4RP 131-32. Stallman was ruled out as contributor of major component, but there was not enough DNA from the second profile for comparison purposes, and Stallman could not be ruled out as a contributor of that profile. CP 27; 1RP 19.

The profile from the major component was run through a law enforcement database and returned a match to Peck's DNA profile. CP 25, 27; 1RP 19, 24. The lab requested a reference sample from Peck for further testing. 4RP 161. Deputy Stevens then interviewed Peck and obtained a DNA sample. 4RP 161-62. The crime lab scientist tested the DNA sample obtained from Peck and concluded it matched the major DNA component found in the wig. 4RP 136.

Peck denied being present at the robbery or knowing anything about it. 4RP 161. When told that his DNA was found in a black wig located near the crime scene, Peck said he had never had a black wig. 4RP 161. He then said he sometimes has too much to drink and does crazy things, but he consistently denied participating in a robbery. Peck told Stevens that the year before he had dressed up like a woman for Halloween and worn a wig, but he did not remember what the wig looked like. 4RP 162.

A custodian of the Clark County Jail records testified that Peck was in custody on the two Halloweens preceding Stevens' interview with Peck. 4RP 173-74. An officer from the identification unit testified that booking records indicate Peck was five feet eight inches tall and weighed 165 to 170 pounds. 4RP 183, 185.

At trial, neither Jones nor McMurray identified Peck as the robber, and neither had picked him out of a photographic montage prior to trial. 3RP 48-49, 71, 101; 4RP 169. McMurray testified that she thought Peck's nose looked like the robber's, but she admitted that she had said in an earlier interview that she would not recognize the robber's nose if she saw it again. 4RP 96, 100.

The crime lab forensic scientist testified that Peck was one of the contributors of the mixed DNA profile found in the wig. 4RP 136. She could not say how long his DNA had been in the wig or under what circumstances it was deposited, however. 4RP 144-46. She could not say that Peck was the robber based on the presence of his DNA, and she could not say whether the source of the trace DNA component was the robber. 4RP 146-50.

Sidney Banker testified via video deposition that he has known Peck for a few years. 5RP 8. Banker described Peck as about 50 years old, muscular but small, with a nose that looked like he had been kicked in

the face once or twice. 5RP 13. In the early spring of 2012, Banker had a drinking party with a bunch of friends. 5RP 9, 16. Peck showed up dressed in sandals, shorts, and a tie-dyed shirt. Banker thought he looked like a hippie except that he had very short hair, so he picked up a long shaggy wig he had lying around the house and made Peck wear it. 5RP 9. About a month or so after the party, the wig was thrown away. 5RP 9-10.

In closing, defense counsel pointed out that neither witness could identify Peck as the robber. 4RP 228. He argued that the only evidence the State was relying on was the DNA in the wig. But that evidence did not connect Peck to the crime; it connected him to the wig, and Banker explained how Peck's DNA came to be in the wig. 4RP 227, 235. There were also inconsistencies between Peck's appearance and the description of the robber. 4RP 231-34. Counsel argued this was a case of mistaken identity, and the jury should acquit Peck. 4RP 236.

C. ARGUMENT

1. PECK DID NOT VOLUNTARILY CONSENT TO THE DNA SEARCH, AND THE EVIDENCE OBTAINED FROM THAT UNLAWFUL SEARCH SHOULD HAVE BEEN SUPPRESSED.

Deputy Jared Stevens interviewed Peck at the Clark County Jail, where he was in custody on another matter. 1RP 5. Stevens's purpose in interviewing Peck was to obtain a DNA sample, although he did not have

a warrant to do so. 1RP 19. According to Stevens, he read Peck his Miranda warnings and told Peck he wanted to talk about a robbery investigation. Peck did not invoke his right to remain silent or ask to speak to an attorney. 1RP 7. Peck testified that Stevens never read him his rights. 1RP 27.

Peck told Stevens that he was not involved in the robbery and that he knew nothing about it. 1RP 21. Stevens told Peck that there was a lab result that showed his DNA was found in the wig, which tied him to the robbery. He also told Peck that if he was innocent, giving a DNA sample was his chance to prove it. 1RP 8. Stevens did not tell Peck he was not required to give a DNA sample, and he did not ask Peck to sign a consent form. 1RP 14, 20, 30. Instead, he asked Peck's permission and told Peck that if he did not cooperate, he would obtain a warrant. 1RP 19, 22, 42. Stevens collected two oral swabs for DNA testing. 1RP 9. Peck testified that he felt coerced into giving the DNA sample. 1RP 30.

Swabbing a cheek to procure a DNA sample constitutes a search under the Fourth Amendment to the United States Constitution and article I, section 7, of the Washington Constitution. State v. Garcia-Salgado, 170 Wn.2d 176, 184, 240 P.3d 153 (2010). Thus, the DNA swab must be authorized by a warrant unless one of the "'jealously and carefully

drawn'" exceptions to the warrant requirement applies. Id., (quoting State v. Winterstein, 167 Wn.2d 620, 628, 220 P.3d 1226 (2009)).

Consent is a recognized exception to the warrant requirement. State v. Thompson, 151 Wn.2d 793, 803, 92 P.3d 228 (2004). The State bears the burden of proving that consent was lawfully given. Id.; State v. Bustamante–Davila, 138 Wn.2d 964, 981, 983 P.2d 590 (1999); State v. Garcia, 140 Wn. App. 609, 626, 166 P.3d 848 (2007). To meet this burden, the State must show (1) that the consent was voluntary, (2) that the person consenting had authority to consent, and (3) that the search did not exceed the scope of the consent. Thompson, 151 Wn.2d at 803. The issue here is whether Peck voluntarily consented to the DNA search.

The voluntariness of consent is a question of fact based on the totality of the circumstances. State v. Reichenbach, 153 Wn.2d 126, 132, 101 P.3d 80 (2004); Garcia, 140 Wn. App. at 626. The court below found that, "Based on the totality of the circumstances…the DNA reference sample was provided voluntarily by [Peck]." CP 124 (Finding of Fact 22). Factors the court considers in determining whether consent was voluntarily given include whether Miranda warnings were given, the education and intelligence of the person giving consent, and whether the consenting person was informed of his right not to consent. Reichenbach, 153 Wn.2d at 132; Garcia, 140 Wn. App. at 626. The court may also

consider conduct of the police, such as any express or implied claims of police authority to search and any police deception as to identity or purpose. Id. Any restraint on the individual giving consent may be considered, as may whether a consent form was signed. Garcia, 140 Wn. App. at 626.

In Garcia, the defendant was taken into custody on drug and stolen property charges, and police decided to impound his vehicle. Without informing Garcia of his rights, the police asked his permission to search the car. Garcia had had no sleep the night before the police contact. He agreed to allow the search, and he signed a consent form. Garcia, 140 Wn. App. at 617. The Court of Appeals held that the lack of information about Garcia's education or intelligence, the failure of the police to provide Miranda warnings, Garcia's claim that he was sleep deprived, and the fact that he was in custody called the voluntariness of the consent into question. Even though Garcia had signed a consent to search form, that factor was not dispositive. Under the totality of the circumstances, the State had not met its burden of proving by clear and convincing evidence that the consent was voluntary, and evidence seized as a result of the search should have been suppressed. Garcia, 140 Wn. App. at 626.

The circumstances in this case similarly bring the voluntariness of Peck's consent into doubt. Although the trial court found that Miranda

warnings were given, that factor alone is not dispositive. 1RP 41; see Garcia, 140 Wn. App. at 626. Like Garcia, Peck was not informed he had a right not to consent to the search, he was in custody, and there was no evidence as to his degree of education or intelligence. Deputy Stevens implied that he had authority to search, telling Peck that he would get a warrant if Peck did not consent, and he suggested that Peck needed to prove his innocence by submitting to the search. 1RP 8, 30, 42. Peck felt coerced. 1RP 30. Moreover, although Stevens had consent forms available, he chose not to have Peck sign one. 1RP 20. Under these circumstances, the State has not met its burden of proving that Peck's consent was voluntary, and the evidence obtained from the DNA search should have been suppressed. See Garcia, 140 Wn. App. at 626.

2. EXCLUSION OF RELEVANT AND ADMISSIBLE OTHER SUSPECT EVIDENCE DENIED PECK HIS RIGHT TO PRESENT A DEFENSE.

A few minutes after the robbery, police detained Ryan Stallman because he matched the description of the robber provided by the witnesses. He was handcuffed at gunpoint when he refused to follow orders to keep his hands in the air, and a black airsoft gun designed to look like a 9 mm semi-automatic handgun was found in his jacket. Even though the witnesses were unable to identify him during a showup, Stallman was taken to the precinct for questioning. He was read his

Miranda rights, denied any knowledge of the robbery, and provided a DNA sample. He said he had been at a motel with his uncle and girlfriend at the time of the robbery, and when his uncle confirmed his story, Stallman was released. CP 10-15.

Prior to trial, the court granted the State's motion to exclude evidence that tended to identify Stallman as another suspect in this case. The court stated that because the wig was found in an area the opposite direction from where Stallman was contacted by police, he did not have the cash stolen in the robbery in his possession, he had an alibi, and the witnesses did not identify him, the defense did not meet the threshold for presenting other suspect evidence. 2RP 13-14. The court also excluded, over defense objection, all evidence that a reference DNA sample from Stallman was collected and tested. 4RP 122-25.

Both the state and federal constitutions guarantee a criminal defendant "a meaningful opportunity to present a complete defense." California v. Trombetta, 467 U.S. 479, 485, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984); U.S. Const. Amend. VI, XIV; Const. art. I, § 22. This right to present a defense guarantees the defendant the opportunity to put his version of the facts as well as the State's before the jury, so that the jury may determine the truth. State v. Maupin, 128 Wn.2d 918, 924, 913 P.2d 808 (1996) (citing Washington v. Texas, 388 U.S. 14, 19, 87 S. Ct. 1920,

18 L. Ed. 2d 1019 (1967)). Thus, a criminal defendant has a constitutional right to present all relevant and admissible evidence in his defense. State v. Clark, 78 Wn. App. 471, 477, 898 P.2d 854, review denied, 128 Wn.2d 1004 (1995). While the trial court has discretion to determine whether evidence is admissible, a decision which is manifestly unreasonable or based on untenable grounds must be reversed on appeal. See State v. Crowder, 103 Wn. App. 20, 25-26, 11 P.3d 828 (2000), review denied, 142 Wn.2d 1024, (2001).

When the defendant seeks to introduce evidence connecting another person to the charged crime, the proper foundation must be laid: "Before such testimony can be received, there must be such proof of connection with the crime, such a train of facts or circumstances as tend clearly to point out someone besides the accused as the guilty party." Clark, 78 Wn. App. at 477 (quoting State v. Mak, 105 Wn.2d 692, 716, 718 P.2d 407, cert. denied, 479 U.S. 995 (1986)). If the prosecution's case is largely circumstantial, the defendant may rebut that evidence with evidence of the same character tending to identify some other person as the perpetrator of the crime. Clark, 78 Wn. App. at 479 (citing Leonard v. The Territory of Washington, 2 Wash.Terr. 381, 396, 7 P. 872 (1885)); Jones v. Wood, 207 F.3d 557, 562-63 (9th Cir. 2000).

In Clark, the defendant was charged with arson based solely on circumstantial evidence. The prosecution identified a motive and opportunity, but no evidence linked Clark directly to the fire. Clark, 78 Wn. App. at 479. The defense identified another person with similar motive, opportunity, and ability, but the trial court excluded the offered other suspect evidence. Because the circumstantial evidence offered by the defense provided a sufficient trail to link the other person to the crime, the jury should have been permitted to consider the evidence and ascertain the truth. Clark, 78 Wn. App. at 480. This Court reversed Clark's conviction and remanded for a new trial. Id.

Here, as in Clark, the State's case against Peck was largely circumstantial. No witness identified him, and no evidence tied him directly to the scene. While a wig similar to one worn by the robber was found to contain Peck's DNA, Peck offered evidence explaining that detail, and no evidence connecting Peck to the robbery was ever found in his possession.

In his defense, Peck offered evidence circumstantially connecting Stallman to the robbery. Unlike Peck, Stallman was found in the area near the robbery within minutes of it occurring. He matched the general description given by the witnesses, and he was carrying a firearm replica matching the gun Jones described. His behavior upon being contacted by

police was alarming enough that the detaining officer drew his weapon, and Stallman was taken to the precinct where he was Mirandized and questioned. Given the circumstantial case against Peck, this trail of evidence sufficiently connected Stallman to the crime to allow its admission at trial. See Clark, 78 Wn. App. at 480.

The court excluded all reference to Stallman, however, finding it significant that the witnesses did not identify him as the robber. 2RP 13. But they did not identify Peck either when given the opportunity, from a photographic montage or in court. 3RP 48-49, 71, 101; 4RP 169. Both Peck and Stallman agreed to be interviewed after Miranda warnings, both denied any knowledge of the robbery, and both provided DNA samples. The major difference between these two individuals was that Peck's DNA matched one of the DNA profiles in the wig, while Stallman could not be identified or ruled out as the source of the other DNA profile. Stallman's uncle provided an alibi, while Peck's friend provided an innocent explanation for the presence of Peck's DNA. The jury should have been presented with evidence regarding Stallman and permitted to weigh the circumstances. Peck's convictions must be reversed and the case remanded for a new trial.

D. CONCLUSION

Because the State did not prove Peck voluntarily consented to the DNA search, all evidence obtained as a result of that search must be suppressed. Additionally, the court's exclusion of admissible other suspect evidence denied Peck his right to present a defense. Peck's convictions must be reversed and the case remanded for a new trial without the unlawfully obtained DNA evidence.

DATED December 19, 2013

Respectfully submitted,

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Today I mailed a copy of the Brief of Appellant in *State v. David Peck,* Cause No. 45132-8 as follows:

David Peck, #326808
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I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Catherine E. Glinski
Done in Port Orchard, WA
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