72331-6

FILED
October 12, 2015
Court of Appeals
Division I
State of Washington

NO. 72331-6-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

DENNIS ARMSTRONG,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JIM ROGERS

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Where an alternative means crime is charged and there is sufficient evidence supporting each means, is unanimity required?

2. Where police did not collect surveillance video from a nearby convenience store, has Armstrong failed to establish the bad faith necessary for a due process violation?

B. STATEMENT OF THE CASE

Dennis Armstrong was charged by information with one count of felony domestic violence violation of a court order. The State alleged that Armstrong was subject to an order prohibiting him from having contact with Nadia Karavan and that he willfully violated its conditions by assaulting Karavan and had contact with her after having been previously convicted for violating court orders on at least two occasions. CP 1-4.

At trial, Karavan testified Armstrong struck her in the face with his hand during a verbal argument at a bus stop. 1RP 41-44.[1] Responding Officer Quindelia Martin testified that she observed an

[1] Verbatim report of proceedings dated July 29, 2014, examination of Nadia Karavan as "1RP"; verbatim report of proceedings dated July 30, 2014, examination of Milton Rodrigue, Todd Hawkins, Quindelia Martin and Rande Christiansen as "2RP."

injury just below Karavan's eye. 2RP 62-63. A convenience store clerk testified that Armstrong followed Karavan into the store and continued to walk behind her. 2RP 40-42. Armstrong's two prior convictions were admitted through investigating Detective Rande Christiansen. 2RP 87-97.

The jury was instructed that it need not be unanimous as to which alternative means it relied on in finding Armstrong guilty. CP 28. The jury found Armstrong guilty, and he was later sentenced on August 8, 2014. CP 35-52. He now appeals.

C. ARGUMENT

1. JUROR UNANIMITY IS NOT REQUIRED FOR ALTERNATIVE MEANS CRIMES WHEN THERE IS SUFFICIENT EVIDENCE SUPPORTING EACH MEANS PRESENTED TO THE JURY.

Armstrong first contends that a jury must always unanimously agree as to the alternative means of committing a single offense. Br. of App. at 4, 6-7. The Washington State Supreme Court has repeatedly held otherwise. A jury in a criminal case must unanimously agree as to the guilt of the defendant to the crime charged, *not* the particular means of commission, when sufficient evidence supports each alternative presented to the jury.

An alternative means crime is one "that provide[s] that the proscribed criminal conduct may be proved in a variety of ways." State v. Smith, 159 Wn.2d 778, 784, 154 P.3d 873 (2007); see also State v. Owens, 180 Wn.2d 90, 323 P.3d 1030 (2014). When a single offense can be committed in more than one way, Washington requires a unanimous jury verdict as to the single crime charged. State v. Arndt, 87 Wn.2d 374, 377, 553 P.2d 1328 (1976); Wash. Const. art. I, § 21. See also Owens, 180 Wn.2d at 95. When the evidence is sufficient to support each of the alternative means submitted to a jury, a particularized expression of unanimity as to the means by which the defendant committed the crime is unnecessary to affirm a conviction.

Armstrong was convicted of a single count of felony domestic violence violation of a court order when he violated a no contact order with Nadia Karavan. In enacting the violation of a court order statute, RCW 26.50.110, the legislature provided for two distinct methods of committing a felony offense:

> "... a violation of any of the following provisions of the order is a gross misdemeanor, except as provided in subsections (4) and (5) of this section: (4) Any assault that is a violation of an order issued under this chapter, chapter 7.92, 7.90, 9A.46, 9.94A, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or of a valid foreign protection order as defined in RCW 26.52.020,

> and that does not amount to assault in the first or second degree under RCW 9A.36.011 or 9A.36.021 is a class C felony, and any conduct in violation of such an order that is reckless and creates a substantial risk of death or serious physical injury to another person is a class C felony; (5) A violation of a court order issued under this chapter, chapter 7.92, 7.90, 9A.46, 9.94A, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or of a valid foreign protection order as defined in RCW 26.52.020, is a class C felony if the offender has at least two previous convictions for violating the provisions of an order issued under this chapter, chapter 7.90, 9A.46, 9.94A, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or a valid foreign protection order as defined in RCW 26.52.020. The previous convictions may involve the same victim or other victims specifically protected by the orders the offender violated."

Because the actions constituting the crime notably vary, a felony domestic violence violation of a no contact order is properly considered an alternative means offense. See Owens, 180 Wn.2d at 97 ("alternative means should be distinguished based on how varied the actions are that could constitute the crime.").

Armstrong concedes that the evidence is sufficient to support both alternative means. Br. of App. at 9. This concession is appropriate. In addition to the store clerk testimony that Armstrong was arguing with Karavan, Karavan herself testified that she spoke with Armstrong and that struck her face twice during their argument with his hand. 1RP 41-44; 2RP 36-41. Officer

Martin testified that she observed a red abrasion on the side of Karavan's face, a couple of inches below her eye that appeared to be fresh. 2RP 62-63. Given this evidence establishing an assault, as well as the evidence of Armstrong's prior convictions, there was more than sufficient evidence to support each alternative means. Exhibits 6 and 8.

However, Armstrong argues that the jury was required to unanimously agree as to means regardless of the sufficiency of the evidence. In support of this argument he cites language in State v. Whitney that states that where an alternative means crime is alleged, "...the preferred practice is to provide a special verdict form and instruct that the jury unanimously agree as to which alternative means the State proved." 108 Wn.2d 506, 511, 739 P.2d 1150 (1987). However, he takes this language out of context. Whitney recognized that an instruction regarding jury unanimity as to the alternative method found is "...preferable because it eliminated potential problems which may arise *when* one of the alternatives is not supported by substantial evidence." Id. at 511 (emphasis added). Like Armstrong, the defendant in Whitney did not dispute the sufficiency of the evidence against him, and the Court concluded that unanimity as to means was not required. Id.

Moreover, although Armstrong cites to dicta in State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980),[2] there the jury was instructed that aggravated first degree murder could be established by either rape or kidnapping and *insufficient evidence* existed as to one of the alternative means. The Green court carefully distinguished Arndt and the situation where sufficient evidence supported each means submitted to the jury. Id. at 232. Indeed, the Supreme Court has recently reaffirmed decades of decision law holding that "when there is sufficient evidence to support each of the alternative means committing the crime, express jury unanimity as to which means is not required." Owens, 180 Wn.2d at 95.

Owens is controlling and binding on this court. There was sufficient evidence for the trier of fact to find beyond a reasonable doubt that Armstrong assaulted Karavan. There was also sufficient evidence for the trier of fact to conclude that he had contact with her and had previously been convicted on at least two prior occasions of violating court orders. The jury was properly

[2] Armstrong cites Green for the proposition that unanimity is required "on the mean by which the defendant committed the crime, when they are so distinct by legislative sectioning, or by diversity of the conduct that they are not simply factual examples of committing a single statutory crime." Br. of App. at 6. To the extent that dicta in Green might imply that unanimity is required as to means when the means are themselves distinct offenses, such an implication was later explicitly rejected in Whitney. 180 Wn.2d at 511.

instructed to be unanimous as to guilt, and unanimity as to the alternative means was unnecessary.

The doctrine of stare decisis was "...developed by courts to accomplish the requisite element of stability in court-made law, but is not an absolute impediment to change." In re Stranger Creek, 77 Wn.2d 649, 653, 466 P.2d 508 (1970). There must be a "clear showing that an established rule is incorrect and harmful" before precedent is abandoned. Id. Armstrong has failed to make such a showing here.

2. LAW ENFORCEMENT'S FAILURE TO COLLECT POTENTIALLY HELPFUL SURVEILLANCE VIDEO IN THE POSSESSION OF A CONVENIENCE STORE WAS NOT DONE IN "BAD FAITH" AND DID NOT VIOLATE DUE PROCESS.

Armstrong also seeks relief by asserting a violation of due process when law enforcement failed to collect surveillance video captured by a convenience store near where the assault occurred. Br. of App. at 12. He contends that the police acted in bad faith by suggesting to Armstrong that the video would be collected and then failing to collect it.

The prosecution has a duty to disclose material that is exculpatory, and has a related duty to preserve such evidence for

use by the defense. Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). A defendant must do more than show the evidence might have been exonerable. California v. Trombetta, 467 U.S. 479, 489, 104 S. Ct. 2528, 81 L. Ed. 2d 413 (1984). Failure to preserve mere *potentially* useful evidence does constitute a violation of due process unless the defendant can show bad faith on the part of the police. Arizona v. Youngblood, 488 U.S. 51, 58, 102 L. Ed. 2d. 281 (1988) (emphasis added); State v. Wittenbarger, 124 Wn.2d 467, 477, 880 P.2d 517 (1994).

Here the video was at best *only* potentially helpful. The convenience store clerk testified that there were sixteen cameras, two covering the cash register, one in each corner of the store, one covering the doorway, and two to three cameras covering the gas pumps. The cameras covering the gas pumps "basically cover just the gas pumps. You may see a slight view, low view shot, of *maybe* the bus stop, a small piece of the sidewalk. But that's it." 2RP 47 (emphasis added). The store clerk reviewed only the surveillance video of the interior of the store because he was unaware of what had occurred at the bus stop. 2RP 48. Armstrong cannot demonstrate a likelihood that the video contained any exculpatory value.

Additionally, Armstrong has not established bad faith on the part of police. "The presence or absence of bad faith by the police for purposes of the Due Process Clause must necessarily turn on the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed." State v. Groth, 163 Wn. App. 548, 558, 261 P.3d 183 (2011). Officer Martin testified she had recently transferred from Wilmington, North Carolina, and began field training at the end of March or beginning of April 2014. 2RP 56-57. On the evening of April 20, 2014, when Armstrong was arrested, Officer Elliot was Martin's field training instructor and was riding in her patrol car. Martin arrived at the convenience store and found Karavan injured. 2RP 59-61. After speaking to Karavan, Martin and Elliot then responded to a second location where Armstrong had been detained. Martin left Elliot with Armstrong and returned to the convenience store to speak with Karavan. 3RP 64-66. Martin testified that she was unware of whether there existed video footage and assumed it was the responsibility of another officer at the scene. 2RP 73.

Officer Rodrigue who contacted and detained Armstrong testified that he told Armstrong that there was video only after Officer Elliot had made the assertion. During cross examination he

admitted he was not really sure whether a video of the assault existed because he did not go to the store. 2RP 31. He did not attempt to collect or view surveillance video because he was a back-up officer. 2RP 33. Detective Christiansen testified that he also did not investigate whether there was any video surveillance at the store because he did not know it existed. 2RP 86-87.

Although Officers Elliot and Rodrigue used a ruse, claiming that they had video of the assault, their failure to later follow up and investigate whether such video existed does not constitute bad faith. Armstrong cannot demonstrate that the officers had any reason to believe that any existing video surveillance would be exculpatory. Armstrong cannot establish that their failure to collect it was motivated by improper intentions or an effort to destroy material evidence. In the absence of improper motive, Armstrong cannot demonstrate bad faith. Groth, 163 Wn. App. at 559 (quoting Wittenbarger, at 478).

In Youngblood, the Court did not find "bad faith" on the part of officers when they negligently failed to properly preserve DNA swabs taken from a sexual assault victim and that fact was not concealed from the defendant. Youngblood, 488 U.S. at 58. More recently in Groth, evidence of a homicide had been destroyed due

to a lack of evidence storage space. Where there was no indication that the police knew of any exculpatory aspect of evidence and where destruction of the evidence was not improperly motivated but merely negligent, bad faith was not found. Groth, 163 Wn. App. at 559.

Much like Groth, the officer's failure to make inquiry about the existence of surveillance footage was a result of mere oversight or negligence. There was no testimony that any of the officers reviewed the surveillance video before its destruction by store management. Officer Martin, who was being trained, assumed it was the responsibility of another officer on scene. The officers did not testify that they routinely requested surveillance footage from store management and that any stored video, according to the store clerk, was the property of the convenience store management and subject to their policies. 2RP 46. Most significantly, the video surveillance evidence was never in the possession of officers nor destroyed or tampered with by their own doing. Armstrong fails to establish any "bad faith" on the part of officers and thus cannot establish a violation of due process.

D. CONCLUSION

The trial court properly instructed the jury to be unanimous as to the crime charged. The jury was also properly instructed that they need not be unanimous as to the alternative means given that sufficient evidence supporting each means. Armstrong's right to due process was not violated because he cannot demonstrate bad faith on the part of law enforcement for failing to collect a video that was only potentially useful to him.

DATED this 12th day of October, 2015.

Respectfully submitted,

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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to the attorneys for the appellant, Oliver R. Davis, containing a copy of the Respondent's Brief, in STATE V. DENNIS ARMSTRONG, Cause No. 72331-6-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Name
Done in Seattle, Washington

10-12-15
Date