NO. 44870-0-II

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

STATE OF WASHINGTON,

Respondent,

v.

JOSE GERMAN,

Appellant.

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

The Honorable John R. Hickman, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Evidence seized pursuant to the unlawful entry of appellant's home should have been excluded.

2. The trial court's reasonable doubt instruction undercut the burden of proof and confused the jury's roll in the judicial process.

Issues pertaining to assignments of error

1. Where the State failed to establish that exigent circumstances justified the warrantless entry of appellant's home or that a warrant would have been sought absent the unlawful entry, must the evidence subsequently seized from the home be excluded?

2. The jury's roll is to determine whether the State has proved the charged offense beyond a reasonable doubt, not to divine "the truth" of the allegation. Nonetheless, the jury was instructed to return a guilty verdict if it had "an abiding belief in the truth of the charge." Did this instruction confuse the jury's constitutional function and the prosecutor's burden so as to require reversal?

B. STATEMENT OF THE CASE

1. Procedural History

The Pierce County Prosecuting Attorney charged appellant Jose German by amended information with two counts of first degree assault,

one count of second degree vehicle prowl, and one count of first degree unlawful possession of a firearm. CP 59-61; RCW 9A.36.021(1)(c); RCW 9A.52.100; RCW 9.41.040(1)(a). The State further alleged that German or an accomplice was armed with a firearm during the assaults. CP 59. The case proceeded to jury trial before the Honorable John R. Hickman, and the jury returned guilty verdicts and affirmative special verdicts regarding the firearm allegation. CP 95-101. The court imposed the statutory maximum sentence of 120 months. CP 143-44. German filed this timely appeal. CP 158.

2. Substantive Facts

On April 22, 2012, Noah Frampton and Frank James were working security at Charley's Pub in Fircrest. RP 167, 293-94. While patrolling the parking lot, they noticed a Chevy Malibu with its dome light on. They checked the doors and found they were unlocked, then went inside to tell the DJ so he could make an announcement in the bar. RP 192, 298.

A short time later, Frampton and James saw two men standing next to the Malibu. RP 193. The dome light was still on, and one or more of the doors was open. RP 197. James thought both men were leaning inside the car. RP 197. Frampton only saw one man open one of the doors. RP 301. According to Frampton, neither man entered the car or reached inside. RP 332.

James thought both men were Hispanic, 5'5" to 5'6" tall, wearing white shirts, and one was wearing cargo shorts and a beanie. RP 193-94. Frampton thought they were both wearing white t-shirts and baggy jeans, and one was wearing a black baseball hat. RP 307.

James and Frampton got the men's attention, asking what they were doing, and the men started to walk away. RP 198-99, 301. One of the guards called out to the men, telling them not to come back. RP 200, 302. The men turned around, and the one wearing the hat pulled a semiautomatic handgun from his waistband, cocked it, waved it in the air, and said "what did you say?" RP 200-01, 209, 302-05, 308, 334. Frampton and James backed away, and the men left. RP 202-03, 305. Frampton then called 911. RP 202, 306.

Two Fircrest police officers were dispatched to the scene. While en route to Charley's they started driving the area looking for the suspects, thinking they might still be on foot. RP 227. The officers had a description of one white male and one Hispanic male wearing white t-shirts and blue jeans. They had no approximate age and no other particulars. RP 228. Since neither of the officers had seen the suspects, Officer Norling headed to Charley's to contact the reporting party, while Officer Roberts continued his search. RP 228-29.

Roberts drove into the parking lot of the Fircrest Family Townhomes, a few blocks away from Charley's. RP 229-30. He saw two men, Jose German and Manuel Urrieta, wearing white shirts and blue jeans. One was standing in front of the car looking under the hood, and the other was leaning into the passenger side of the car. RP 230, 253. Roberts stopped his car and stepped out, drawing his gun. RP 232, 241. He called out something like, "what's up fellas?" RP 233. German and Urrieta immediately ran toward their apartment. RP 233. Roberts chased them, shouting "police, stop." RP 234. German and Urrieta entered their apartment and slammed the door. RP 239. Roberts kicked the door in and entered as well. RP 239. Using his flashlight Roberts saw German and Urrieta standing by the sliding glass door and told them to show him their hands. RP 242-43. When they did not comply, he fired three rounds, wounding both men. RP 245-46, 250.

After they were shot German and Urrieta managed to move outside, but they fell to the ground in the grass just off the patio. RP 249-50, 278. Roberts followed and stood between them until backup arrived, yelling that he would kill them if they moved. RP 251. A fire department medic unit arrived and took German and Urrieta to the hospital. RP 636.

Several law enforcement officers responded to the scene of the shooting. RP 692. At least one of them walked through the entire

apartment to make sure no one else was inside. RP 633. The scene was then secured, and the officers waited outside several hours while a search warrant was obtained. RP 488, 695.

In searching the apartment, police located a 9 mm semiautomatic handgun in a corner of the living room on the side of a sofa, two body armor panels under a loveseat, four boxes of 9 mm ammunition and a gun cleaning kit in the cabinet above the refrigerator, a hammer in the kitchen sink, and letters addressed to German. RP 502, 504, 534, 537, 541-42, 543, 564. Police found a black baseball hat on the ground in front of the car where German had been standing when Roberts arrived, and they found some tax documents in German's name inside the car. RP 493, 499. A forensics technician lifted one latent fingerprint from the gun but later determined it was not of comparison value. RP 580, 583.

Several officers also responded to Charley's. Frampton reported that he and James had caught two Hispanic males in their 20s breaking into vehicles in the parking lot. When they approached, one of the men pulled out a handgun, racked it, held it in the air, and said, "I got something for you." The men then walked away, heading south. RP 668. Frampton said the man with the gun was wearing a white t-shirt and a black hat. RP 675. James gave a consistent description. RP 679.

While James declined to give a written statement, Frampton gave a written statement and a recorded statement. RP 206, 359, 372. He and his boss also looked at a surveillance video from inside Charley's. RP 323. Frampton saw German inside the bar during the evening wearing a black baseball hat. RP 327. The video showed German playing pool and drinking beer with another man in a white t-shirt. RP 337-38. Frampton believed German was the man he later saw in the parking lot. RP 327. Five days later Frampton picked German's photograph from a montage, identifying him as the man with the hat and gun. RP 313, 318, 320.

At trial the State presented testimony from Frampton and James, Roberts, and the officers involved in the investigation. The parties also stipulated that German had previously been convicted of a serious offense and was not permitted to possess a firearm. RP 163.

German's girlfriend testified that German and Urrieta lived with her at the apartment where the shooting occurred. RP 709-10. The car parked in front of the apartment, where Roberts first saw German, belonged to German. RP 714.

C. ARGUMENT

1. EVIDENCE SEIZED FOLLOWING THE UNLAWFUL ENTRY OF GERMAN'S APARTMENT SHOULD HAVE BEEN EXCLUDED.

Prior to trial German moved to suppress evidence discovered inside his apartment. RP 93. He argued that Roberts' warrantless entry was unlawful, and the evidence subsequently seized from the apartment should be excluded as fruit of the poisonous tree. RP 117. The State argued that the entry was justified by exigent circumstances. It submitted police reports and a transcript of an interview Roberts gave after the shooting. Supp. CP (State's Response to Defendants' CrR 3.6 Motions to Suppress, filed 2/12/13). The court decided the motion based on these documents. RP 118-19.

The police reports indicate that the initial dispatch regarding the suspects stated that either a white male and a Hispanic male or two Hispanic males had been seen prowling cars near the parking lot of Charley's pub, located at 6520 19th Street. Supp. CP at 7, 9. The men were wearing white t-shirts and blue jeans, and one of them waved a handgun at security staff. Supp. CP at 7, 9. They were last seen walking southbound away from Charley's. Supp. CP at 9. A short time later dispatch advised that shots had been fired at 6468 19th Street. Supp. CP at 7.

In his interview after the shooting, Roberts stated that he was driving a marked patrol car and wearing a uniform. Supp. CP at 34, 46. He and Officer Norling were dispatched to a reported intimidation with a weapon at the parking lot of Charley's Bar. The suspects were described as a white male and a Hispanic male wearing white shirts and blue jeans. They had been interrupted during a vehicle prowl, and one of them waved a firearm around. They left on foot heading southbound away from Charley's. Id. at 37.

Roberts said he arrived in the area relatively quickly and started driving around looking for the suspects. When Norling went to contact the reporting party, Roberts proceeded to the Fircrest Family Townhomes in the 6400 block of 19th Street, about one block over and one block back from Charley's. After driving around the entire apartment complex, he saw two Hispanic males in the parking area of building 6468. Supp. CP at 37-38. The men were wearing white shirts and blue jeans. Neither was wearing a hat. Supp. CP at 41.

One man was standing in front of a car with the hood up, the other was standing in the doorway of the car. When Roberts pulled up the two men looked at him with a "deer in the headlight look." Supp. CP at 38. As soon as Roberts opened his car door, the men took off running. They ran to the end apartment, and Roberts followed, yelling for them to stop.

Roberts explained that he thought these men matched the description of the suspects from Charley's, and he knew that one of the suspects was reported to have a handgun. When he saw the men enter the apartment and slam the door, he did not know if it was their apartment. Roberts believed that people in Fircrest leave their doors open all the time, and he was concerned that people inside the apartment could be in danger. Supp. CP at 38-39. So he kicked the door in and entered the apartment. He saw the men standing at the back door, and he yelled at them to show their hands. When they did not comply, Roberts fired three rounds at them. The men went through the back door, and Roberts followed. Supp. CP at 39. Roberts did not see either of the men with a gun after the shooting. Supp. CP at 46. Roberts reported on his radio that shots were fired and two suspects were down. Supp. CP at 50. Other officers arrived within a minute or two. They checked the apartment and did not find anyone else inside. Supp. CP at 49.

After reviewing these facts, the court concluded that exigent circumstances justified the warrantless entry, and it denied German's motion to suppress evidence subsequently found in the apartment. RP 128-31.

With very few exceptions, both the state and federal constitutions prohibit nonconsensual entry and search of property without a warrant.

State v. Cardenas, 146 Wn.2d 400, 405, 47 P.3d 127 (2002); U.S. Const. amend. IV; Wash. Const. art. I, § 7. A warrantless entry is unreasonable as a matter of law unless the State establishes that one of a very narrow set of exceptions to the warrant requirement applies. State v. Smith, 165 Wn.2d 511, 517, 199 P.3d 386 (2009); Cardenas, 146 Wn.2d at 405. Exigent circumstances may excuse the warrant requirement if the demand for immediate investigatory action makes it impracticable for the police to obtain a warrant. Cardenas, 146 Wn.2d at 405. The Washington Supreme Court has identified six factors to consider in determining whether exigent circumstances exist:

> (1) the gravity or violent nature of the offense with which the suspect is to be charged; (2) whether the suspect is reasonably believed to be armed; (3) whether there is reasonably trustworthy information that the suspect is guilty; (4) there is strong reason to believe that the suspect is on the premises; (5) a likelihood that the suspect will escape if not swiftly apprehended; and (6) the entry [can be] made peaceably.

Cardenas, 146 Wn.2d at 406. Not all factors need be present, but the totality of the circumstances must establish the need to act quickly. Smith, 165 Wn.2d at 518; Cardenas, 146 Wn.2d at 408.

In ruling that exigent circumstances existed, the court below noted that the crime being investigated was a grave offense and that the witnesses at the bar had seen a gun. RP 128. It noted that the descriptions of the suspects given to the responding officers and provided by dispatch

were consistent. RP 129. When Roberts got out of his patrol car to talk to German and Urrieta, they fled into the apartment, and since they were at the back door when they were shot, there was a real likelihood they would escape if not swiftly apprehended. RP 129. Although the entry was not peaceable, the court found the circumstances justified the type of entry. RP 130. The court further noted that the entry occurred at night and was not part of a planned operation but rather an ongoing investigation. RP 130.

These circumstances do not justify the warrantless entry of German's home. While it is true that the officer was investigating an offense involving a weapon and that one the suspects in that offense was armed, Roberts did not have strong reason to believe that the suspects were on the premises. Roberts certainly had reason to believe that German and Urrieta entered the apartment. The problem is that the circumstances did not support his assumption that German and Urrieta were the suspects. Roberts never saw a gun, and he had not seen the suspects at the scene of the crime. He had only a general description of white or Hispanic males in white t-shirts. No age or other identifying characteristics were provided. Roberts' assumption that these men were involved based on their race and nondescript clothing was unreasonable and did not justify the warrantless entry into their apartment.

The State also argued that the entry was justified because there was a potential that people inside the apartment might be at risk. Danger to the arresting officer or to the public can be exigent circumstances justifying a warrantless entry. State v. Counts, 99 Wn.2d 54, 60, 659 P.2d 1087 (1983). The facts here do not establish such a danger, however.

The Supreme Court upheld a warrantless search under this theory in Smith. There, police responded to information that a stolen tanker truck containing 1000 gallons of anhydrous ammonia, an extremely toxic chemical, could be found on an abandoned property. Smith, 165 Wn.2d at 514. The truck was located within 75 feet of a house. Police surrounded the house, knocked on the door, and announced their presence. While securing the house, one of the officers looked through a window and saw a rifle in the living room. About ten minutes after the police knocked, two people came out of the house and were detained. The officers looked into the open door of the house and saw that the rifle was no longer in the living room. The detectives were concerned that a person with the missing gun would shoot the tank of anhydrous ammonia, causing a grave health risk, or that such person could fire directly at the officers. Thus, officers entered the house to perform a safety sweep. Smith, 165 Wn.2d at 515, 518. The Supreme Court concluded that the presence of the stolen tanker truck filled with an extremely dangerous chemical and the missing

firearm presented a legitimate safety threat to officer and public safety to constitute an exigent circumstance justifying the warrantless search. Smith, 165 Wn.2d at 518.

Unlike in Smith, where the officers had seen a gun but could no longer account for it and there was tanker full of anhydrous ammonia within firing range of the house, here there was no basis to fear for public safety. Roberts had not seen German or Urrieta with a firearm, and his conclusion that they were the suspects he was looking for was based on a very general physical description. His only explanation for believing there was a threat was his assumption that German entered someone else's apartment because people in Fircrest do not lock their doors at night, ignoring the obvious, and correct, conclusion that German was able to enter the apartment because he lived there. Roberts' string of illogical assumptions did not justify breaking the door down and entering the apartment.

"'[T]he exigent circumstances doctrine is applicable only within the narrow range of circumstances that present a real danger to the police or the public or a real danger that evidence ... might be lost.'" Counts, 99 Wn.2d at 62 (quoting United States v. Bulman, 667 F.2d 1374, 1384 (11th Cir.1982)) (finding no exigent circumstances justified entering house to arrest suspect where police could have maintained surveillance while

obtaining warrant). No such danger existed here, and the warrantless entry was unlawful.

Evidence obtained in violation of the privacy protections of the Fourth Amendment or article I, section 7 must be excluded. State v. Ruem, ___ Wn.2d ___, 313 P.3d 1156 (2013) (citing State v. Afana, 169 Wn.2d 169, 179–80, 233 P.3d 879 (2010)). This exclusionary rule applies "up to the point at which the connection with the unlawful search becomes so attenuated as to dissipate the taint." Murray v. United States, 487 U.S. 533, 536-37, 108 S.Ct. 2529, 101 L.Ed.2d 472 (1988). Thus, evidence is excluded unless the State establishes that the evidence was obtained by lawful means wholly independent of the unlawful action. State v. Gaines, 154 Wn.2d 711, 718, 116 P.3d 993 (2005). Because the State has not demonstrated that the police would have sought a warrant for German's apartment absent Roberts' unlawful entry, the independent source doctrine does not apply. See Murray, 487 U.S. at 543. The remedy for the unlawful entry is exclusion of the evidence seized from German's apartment.

2. THE "ABIDING BELIEF" INSTRUCTION UNDERCUTS THE STATE'S BURDEN OF PROOF BY ERRONEOUSLY EQUATING THE JURY'S JOB WITH A SEARCH FOR THE "TRUTH" RATHER THAN A TEST OF THE PROSECUTION'S CASE.

German specifically objected to the court's use of the reasonable doubt instruction informing the jury that, "If, from such consideration [of the evidence or lack of evidence], you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt." RP 731. Defense counsel argued that this language diluted the State's burden of proof and gave the jury an incorrect understanding of how to weigh the evidence. RP 733-34. He proposed giving the instruction without the problematic language. CP 82. The court noted counsel's objection and gave the offending instruction. RP 735-36; CP 107 (Instruction. No. 3).

A jury's role is to test the substance of the prosecutor's allegations, not to simply search for the truth. State v. Emery, 174 Wn.2d 741, 760, 278 P.3d 653 (2012); see also State v. Berube, 171 Wn. App. 103, 120, 286 P.3d 402 (2012) ("...truth is not the jury's job. And arguing that the jury should search for truth and not for reasonable doubt misstates the jury's duty and sweeps aside the State's burden."). In fact, it is the jury's job "to determine whether the State has proved the charged offenses beyond a reasonable doubt." Emery, 174 Wn.2d at 760.

By equating proof beyond a reasonable doubt with a "belief in the truth of the charge," the jury instruction blurs the critical role of the jury. The "belief in the truth" language encourages the jury to undertake an impermissible search for the truth and invites the error identified in Emery. The presumption of innocence may, in turn, be diluted or even "washed away" by such confusing jury instructions. State v. Bennett, 161 Wn.2d 303, 315-16, 165 P.3d 1241 (2007). It is the court's obligation to vigilantly protect the presumption of innocence. Id.

In Bennett, the Supreme Court found the reasonable doubt instruction derived from State v. Castle, 86 Wn. App. 48, 53, 935 P.2d 656 (1997), to be "problematic" as it was inaccurate and misleading. Bennett, 161 Wn.2d at 317-18. Exercising its "inherent supervisory powers," the Supreme Court directed trial courts to use WPIC 4.01 in all future cases. Id. at 318. The pattern instruction reads as follows:

> *[The] [Each]* defendant has entered a plea of not guilty. That plea puts in issue every element of *[the] [each]* crime charged. The *[State] [City] [County]* is the plaintiff and has the burden of proving each element of *[the] [each]* crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists *[as to these elements]*.
>
> A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.
>
> A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully

considering all of the evidence or lack of evidence. *[If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.]*

WPIC 4.01.

The Bennett Court did not comment on the "belief in the truth" language. More recent cases demonstrate the problem with such language, however. In Emery, the prosecutor told the jury that "your verdict should speak the truth," and "the truth of the matter is, the truth of these charges" is that the defendants are guilty. Emery, 174 Wn.2d at 751. The Court noted that these remarks misstated the jury's role, but because they were not part of the court's instructions, and the evidence was overwhelming, the error was harmless. Id. at 764 n.14.

In Pirtle, the Court held that the "abiding belief" language did not "diminish" the pattern instruction defining reasonable doubt. State v. Pirtle, 127 Wn.2d 628, 657-58, 904 P.2d 245 (1995), cert. denied, 518 U.S. 1026 (1996). The Court ruled that "[a]ddition of the last sentence [regarding an abiding belief in the truth] was unnecessary but not an error." Id. at 658. The Pirtle Court did not address, however, whether this language encouraged the jury to view its role as a search for the truth. Instead, it looked at whether the phrase "abiding belief" differed from proof beyond a reasonable doubt. Id. at 657-58.

Pirtle concluded that this language was unnecessary but not necessarily erroneous. Emery now demonstrates the danger of injecting a search for the truth into the definition of the State's burden of proof. This language fosters confusion about the jury's role and serves as a platform for improper arguments about the jury's role in looking for the truth. Emery, 174 Wn.2d at 760.

German objected to addition of this last sentence in the court's instruction defining the prosecution's burden of proof and proposed an instruction without the improper language. RP 731-34; CP 82. This "belief in the truth" language inevitably minimizes the State's burden and suggests that the jury should decide the case based on what they think is true rather than whether the State proved its case beyond a reasonable doubt.

Improperly instructing the jury on the meaning of proof beyond a reasonable doubt is structural error. Sullivan v. Louisiana, 508 U.S. 274, 281-82, 113 S. Ct. 2078, 124 L.Ed.2d 182 (1993). "[A] jury instruction misstating the reasonable doubt standard is subject to automatic reversal without any showing of prejudice." Emery, 174 Wn.2d at 757 (quoting Sullivan, 508 U.S. at 281-82). Moreover, appellate courts have a supervisory role in ensuring the jury's instructions fairly and accurately convey the law. Bennett, 161 Wn.2d at 318. This Court should find that

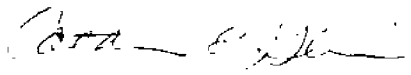
instructing the jury to treat proof beyond a reasonable doubt as the equivalent of having an "abiding belief in the truth of the charge" misstates the State's burden of proof, confuses the jury's role, and denies the accused the right to a fair trial by jury as protected by the state and federal constitutions. U.S. Const. amend. VI; Wash. Const. art. I, §§ 21, 22.

D. CONCLUSION

For the reasons discussed above, this Court should reverse German's convictions and remand for a new trial, from which evidence seized as a result of the unlawful entry is excluded.

DATED February 10, 2014.

Respectfully submitted,



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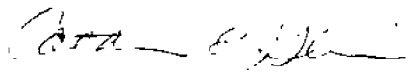

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