

No. 72247-6-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

SCOTT VISNICH,

Appellant.

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

The Honorable Roger Rogoff
The Honorable Dean S. Lum

BRIEF OF APPELLANT

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A. SUMMARY OF ARGUMENT

Scott Visnich presented a check made out to him to the Bank of America intending to cash the check. When the teller attempted to contact the account holder of the check, Mr. Visnich waited approximately 10-15 minutes before leaving. The State was allowed to admit this act of leaving the bank prior to the completion of the transaction as evidence of flight, thus inferring Mr. Visnich's knowledge that the check, and another check from the same day he cashed at a different branch, was forged. Mr. Visnich submits his convictions for forgery must be reversed because of the error by the trial court in admitting this evidence despite the lack of a foundation for its admission.

B. ASSIGNMENT OF ERROR

The trial court erred in admitting evidence of Mr. Visnich's act of leaving the bank as evidence of flight showing a consciousness of guilt.

C. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Evidence a person fled from the scene may be admissible at trial to show consciousness of guilt provided the evidence of flight is not based on speculation and/or conjecture, but instead on substantial and

real evidence. Here, Mr. Visnich proffered a forged check to a teller and patiently waited while the teller attempted to contact the account holder, before walking out of the bank and into a waiting truck. The evidence Mr. Visnich left the bank, leaving behind his driver's license, was offered by the State to show his consciousness of guilt. Was the evidence of Mr. Visnich's flight based on conjecture and speculation, thus requiring this Court to reverse Mr. Visnich's convictions?

D. STATEMENT OF THE CASE

On October 15, 2013, at about 3:15 p.m., Scott Visnich cashed a check for \$850 at the Bank of America branch in Lynnwood.

6/16/2014RP 42-43. Since Mr. Visnich had a Bank of America account, he credited \$100 to his account and received \$750 in cash back.

6/16/2014RP 42.

Later that same day, Mr. Visnich attempted to cash a \$600 check at the Bank of America branch in Shoreline. 6/16/2014RP 10. The account on which the check was drawn had a stop-payment notice on it. 6/16/2014RP 12. In light of this notice, the teller handed Mr. Visnich's transaction off to her supervisor, Shawna Eden. 6/16/2014RP 13. Ms. Eden obtained Mr. Visnich's driver's license from him, asked him some questions about the check which Mr. Visnich answered, and

had him take a seat while she contacted the account holder.

6/16/2014RP 13-14, 17. Mr. Visnich waited patiently for “quite a while,” “like 10 to 15 minutes.” 6/16/2014RP 20. While still on the telephone, Ms. Eden saw Mr. Visnich walk out of the bank and get into a red truck, which then drove away. 6/16/2014RP 19-20. Ms. Eden contacted the police. 6/16/2014RP 20. The account holder stated the signatures on the checks were not his. 6/12/2014RP 37-38.

Mr. Visnich was charged with two counts of forgery. CP 25-26. Prior to trial, Mr. Visnich moved to bar the State from arguing that Mr. Visnich’s act of leaving the bank was evidence of a consciousness of guilt, thus inferring he knew the checks were forged. CP 21-24; 5/5/2014 11-13. The trial court denied the motion and allowed the State to argue the issue of flight to the jury:

What we don’t have here – this is alleged flight not from police officers, but prior to the time that an officer is trying to place the defendant in custody. Freeburg itself is kind of an exception and is easily factually distinguishable from our situation. What strikes me about this argument is this is an argument going to weight. These are jury or trier of fact arguments to convince a trier of fact why flight doesn’t mean anything in this particular circumstance and that’s always something that’s available.

It may be that the trier of fact will determine that it’s not meaningful for a whole host of different reasons. But that doesn’t mean the State is not entitled to argue it’s [sic]

theory of the case or has not established a basis for linking – for there being a linkage of a consciousness of guilt to – for the act, to the consciousness of guilt and to the consciousness of guilt to the crime charged.

So the Court will deny the motion to suppress and will allow the State to argue this matter and it's for the jury to decide what weight to place on it.

5/5/2014RP 18-19.

Mr. Visnich subsequently waived his right to a jury. CP 27.

Following a bench trial, Mr. Visnich was convicted as charged. CP 28-32.

E. ARGUMENT

Lacking A Sufficient Foundation For Its Admission, The Trial Court Erred In Admitting Evidence Of Mr. Visnich's Alleged Flight

1. Evidence of flight is of limited probative value and requires either a deliberate effort to evade arrest or an impulsive reaction.

“Analytically, flight is an admission by conduct. Evidence of flight is admissible if it creates ‘a reasonable and substantive inference that defendant’s departure from the scene was an instinctive or impulsive reaction to a consciousness of guilt or was a deliberate effort to evade arrest and prosecution.’” *State v. Freeburg*, 105 Wn.App. 492, 497, 20 P.3d 984 (2001) (footnote omitted), *quoting State v. Nichols*, 5 Wn.App. 657, 660, 491 P.2d 677 (1971). When evidence of flight is

admissible, it tends to be only marginally probative to the ultimate issue of guilt or innocence. *Freeburg*, 105 Wn.App. at 498. “Therefore, while the range of circumstances that may be shown as evidence of flight is broad, the circumstance or inference of consciousness of guilt must be substantial and real, not speculative, conjectural, or fanciful.”

Ibid.

The probative value of evidence of flight as circumstantial evidence of guilt depends on the degree of confidence with which four inferences can be drawn: (1) from the defendant’s behavior to flight; (2) from flight to consciousness of guilt; (3) from consciousness of guilt to consciousness of guilt concerning the crime charged; and (4) from consciousness of guilt concerning the crime charged to actual guilt of the crime charged. *Ibid.* The evidence must be sufficient to create a reasonable and substantive inference that the defendant’s departure from the scene was an instinctive or impulsive reaction to a consciousness of guilt or was a deliberate effort to evade arrest and prosecution.” *State v. Price*, 126 Wn.App. 617, 645, 109 P.3d 27 (2005).

Evidence is relevant if it has any tendency to make the existence of a fact more or less probable. ER 401. But relevant evidence may still

be excluded “if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” ER 403.

Mr. Visnich submits the evidence of flight was erroneously admitted, thus it was irrelevant and what little probative value it possessed was vastly outweighed by its prejudice. As a result, Mr. Visnich asks this Court to reverse his convictions.

2. The evidence was speculative and/or conjectural at best regarding whether Mr. Visnich left the bank because he knew the check was forged.

Here, the State failed to establish the prerequisite for admission of the evidence of flight; namely that Mr. Visnich acted intentionally to evade arrest, thus inferring he knew the check was forged. As a result, this Court must reverse his convictions in light of the prejudice he suffered as a result.

Similar to this case, in *State v. Bruton*, it was unclear whether the defendants freely walked away from the scene or fled out of a sense of guilt and/or fear of prosecution. 66 Wn.2d 111, 113, 401 P.2d 340 (1965). In finding the trial court erred in admitting the evidence of flight, the Supreme Court held:

In the instant case, there is naught but speculation that at the time the two women were stopped by the store detective and his assistant they were possessed of the suits in question. In fact, the evidence adduced would indicate the contrary. The store detective testified he did not take them into custody or restrain them because of the gathering crowd and the unfavorable implications that might flow from such action. Instead, the store detective reentered the store to call the police, leaving his assistant on the scene. Thereafter, the two women walked up the street. Whether their gait was fast or slow, or whether the assistant detective ignored them, followed them, or tried to stop them is shrouded in mystery for the state did not call him as a witness, although the record indicates he was available. When the women were apprehended by the police several blocks away and approximately an hour later, they offered no resistance to arrest, although they again denied participation in any shoplifting incident.

We cannot agree with the state that upon such a slender showing the jury should be instructed, and the state be permitted to argue, that the jury could premise a finding of flight and consider such a finding as a circumstance bearing upon guilt or innocence of appellant. If the state believed the actions of appellant, under the circumstances, constituted flight, it was incumbent upon the state to support that theory with the available evidence bearing thereupon, rather than leave it to the jury to speculate as to whether the appellant simply and freely walked away from a disagreeable scene or actually fled out of a sense of guilt and/or fear of prosecution.

Id. at 113.

The same can be said about Mr. Visnich. Mr. Visnich waited “quite a while” in the bank until he too left the bank. No one tried to stop him and he left at a leisurely gait. The State called the supervisor

of the teller who was initially contacted by Mr. Visnich, but did not call the teller, who surely could have testified about Mr. Visnich's demeanor when he first presented the check. Thus, as in *Bruton*, it was left "to the jury to speculate as to whether the appellant simply and freely walked away from a disagreeable scene or actually fled out of a sense of guilt and/or fear of prosecution." *Ibid*. The admission of the evidence of flight was in error.

3. Mr. Visnich suffered substantial prejudice from the admission of the flight evidence requiring reversal of his convictions.

An error in admitting evidence that results in prejudice to the defendant is grounds for reversal. *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). Because a violation of an evidentiary rule is not of constitutional magnitude, the more stringent "'harmless error beyond a reasonable doubt'" standard does not apply. *Ibid*, quoting *State v. Cunningham*, 93 Wn.2d 823, 831, 613 P.2d 1139 (1980). "Instead, [courts] apply 'the rule that error is not prejudicial unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred.'" *Bourgeois*, 133 Wn.2d at 403, quoting *State v. Tharp*, 96 Wn.2d 591, 599, 637 P.2d 961 (1981). A trial court improperly admitting evidence is harmless

error if the evidence is of minor significance compared with the overwhelming evidence as a whole. *Bourgeois*, 133 Wn.2d at 403.

The State's evidence was not overwhelming, especially on the issue of Mr. Visnich's knowledge the checks were forgeries. In fact, the court relied almost exclusively on Mr. Visnich's flight as evidence of his knowledge in finding him guilty of the charged offenses. In its written findings of fact and conclusions of law, the court identified two facts that it concluded proved Mr. Visnich's knowledge, the primary one of which was the evidence of flight:

20. The court finds that the defendant's explanation of his flight from the Shoreline Bank is not reasonable, especially when the defendant claims he was negotiating what he claimed to be a legitimate transaction. The court finds the defendant's flight from the Bank of America demonstrates the defendant's knowledge the check was forged.

21. The court finds that the defendant's change in clothing between transactions shows the defendant's knowledge that he was participating in criminal activity.

CP 30-31.

In in light of the State's less than overwhelming evidence and the court's substantial reliance on the evidence of flight, it cannot be said that admitting this evidence of flight, for the element of knowledge, did not materially affect the trial outcome. Further, since

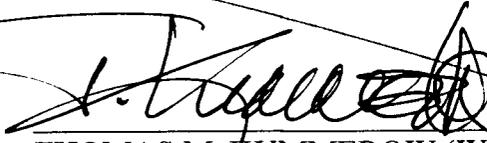
the element of knowledge on both counts was proven by this evidence of flight, both convictions suffer from the same infirmity. The error was not harmless and Mr. Visnich is entitled to reversal of his convictions.

F. CONCLUSION

For the reasons stated, Mr. Visnich asks this Court to reverse his convictions and remand for a new trial.

DATED this 26th day of January 2015

Respectfully submitted,



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