

COURT OF APPEALS
DIVISION II

NO. 36855-2-II

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

STATE OF WASHINGTON
81
DEPUTY

STATE OF WASHINGTON, Respondent

v.

JAMES JOSEPH GRUBBS, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
THE HONORABLE ROBERT A. LEWIS
CLARK COUNTY SUPERIOR COURT CAUSE NO. 06-1-01351-4

BRIEF OF RESPONDENT

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I. STATEMENT OF THE FACTS

The State accepts the statement of facts as set forth by the defendant.

II. RESPONSE TO ASSAIGNMENT OF ERROR

The assignment of error raised in this matter is a claim by the defendant that there was insufficient evidence to support the proposition that it was the defendant who committed the crimes because there was no identification of the defendant. The record makes it clear that the defendant's approach to this case was an acknowledgment of his identity, the fact that he had a no contact order between him and the victim and that a "shoving match" had occurred at the home. This was never disputed at the trial court level either with the Judge, or with the Jury.

When Coral Frazer testified for the Jury she was continually asked questions about the "defendant" (CP 11 – 19). Among the questions were questions about whether or not there was a no contact order between her and the defendant and she indicated that there was and that he was aware of it. (RP 12). The reason that this was not contested by the defense was it was not the approach that they were taking to the evidence. On cross examination of Ms. Frazer, the defense attorney was asking her about her

contacts with the defendant and she indicated that they were quite common (RP 25) and that she had written a letter to the Prosecutor and to the Defense Attorney indicating, among other things, that her statements that led to the charges were taken out of context and that one of the areas of assault was actually done by somebody else and not by the defendant.

For example, there was a question about a black eye that had been observed. In initial statements to officers she had accredited that to an assault by the defendant. However, in the letter that she sent, she apologized in the letter for the inconvenience that this had caused Mr. Grubbs (the defendant) and that it was a false complaint. (RP 28 – 29). In fact, she indicated that Mr. Grubbs (the defendant) had a right to be where he was and that she had filed a false complaint with the police which she was sorry about and the letter she had sent to explain this she had notarized. (RP 29).

At no time during her questioning was there any issue raised about her not being able to identify the defendant or that there was confusion raised at the trial court level or in the minds of the jurors concerning whether or not the defendant was the same person who had allegedly committed crimes against this woman. It simply was not the issue being argued or raised at the trial court level.

This is again indicated during the questioning of Clark County Sheriff's Office Deputy Thomas Yoder. He indicated that he came in contact with the defendant and that the defendant was hiding in Ms. Frazer's residence. (RP 50 – 54). In fact, there is a form of identification of the defendant as being in the court room which occurs on RP 54.

The subject of cross examination then of Deputy Yoder dealt with whether or not it appeared that Ms. Frazer, the complainant, was afraid or just angry when she was reporting what was occurring. This would be in line with earlier questioning concerning that she was angry at the defendant and when she had an opportunity to cool off she then prepared the notarized letter that the jury had. The letter in question was marked and admitted as exhibit number 6. The defense attorney talked to Deputy Yoder about the letter;

Q. (Defense Attorney) Mr. Bennett: Deputy Yoder, you saw the letter that Coral Frazer wrote to the prosecutor and to myself?

A. (Deputy Yoder): I just saw it. I did not read it.

Q. You didn't read it? And you've heard it discussed, though?

A. Yes.

Q. Would that letter be consistent with what Coral Frazer told you on the 9th of July?

A. No.

-(RP 57, L. 20 – 58, L. 3).

During a long discussion with the Court outside the presence of the Jury concerning the admissibility of the Smith Affidavit, the defense attorney discussed with the Court the fact that they have never disputed the existence of the restraining order or the identity of the parties involved.

The Court: Okay. Now, I guess the second question as you - - and I'll be hearing from you with legal authority. A no-contact order is established by the court. She cannot permissively grant permission countervailing the court order.

Mr. Bennett: We're not disputing that. That's never been disputed.

The Court: Okay. So I'm just wondering how you're going to argue. Probably, if you argue he was there with a commission in her presence, I'd probably say that's a violation of a court order.

Mr. Bennett: And we would agree with that. We've already said that. We already said there was a restraining order.

The Court: Okay.

Mr. Bennett: But see, it goes to the burglary.

The Court: It may very well go - - Count 2, however, is not the burglary.

Mr. Bennett: Count 2, I think, is the assault - -

The Court: Violation of the no-contact order.

Mr. Bennett: And the assault.

The Court: Right.

Mr. Bennett: So we're not disputing part one of Count 2. Yeah, there was clearly a restraining order. 2 is felony domestic violence court order violation. We agree with the first part that there clearly was a restraining order. It's the assault, though, that's disputed.

-(RP 68, L. 16 – 69, L. 19).

If there is any question about what the defense was doing, it was clearly spelled out in the closing statement to the jury. Part of the defendant's closing argument was as follow:

(Defense Attorney)...

Once you read Ms. Frazer's letter, you will see as she indicated on the witness stand, that she and Mr. Grubbs had an arrangement that he could come by there and pick up his mail. That wasn't disputed. He's there. You can assume he's there a lot. They had an arrangement for him to do that. She also indicated that apparently there was a mix-up on July the 9th when he was there. He didn't intend to be there to contact her. He was in there getting his mail and they had a contact.

Now, the prosecutor went over in some detail the fact that there was a violation of the restraining order. If you recall my opening statement, I said that there was no dispute about it. Obviously, there was a violation of the restraining order. They violated it - - he violated it. We're not - - we never disputed that. What is disputed is that there was an assault by him on her on those two days, July the 5th and July the 9th.

The prosecutor obviously doesn't want you to consider the letter - - the notarized letter - - it's not done properly, obviously. But this statement she made was after the fact when she had time to think about what she said earlier, is signed in front of a notary and a notary stamp is on there. Also has a date on it. This is - - you heard something about substantive evidence. You can consider this as substantive evidence also. This is the letter from the victim. This is what she said when she had time to cool off and think about it. This is what really happened.

Now, obviously, Ms. Frazer's a person that's very hard to get focused when you talk to her, but - - and she kind of waffled somewhat over her letter. But she said yes, she read it. She signed it in front of a notary. This was a

statement that she wanted people to read. Sent a copy of the prosecutor, sent a copy to me, the defense attorney.

Now, I would submit to you that no one should be convicted on evidence this flaky and this flimsy. These are serious charges. The prosecutor mentioned what kind of charges these are. Normally that's not done. Very, very serious charges. And I would submit to you other than the contact, which we're not denying, we've never denied, you should be extremely careful here. I think it would be a travesty of justice for anyone to be convicted on this type of evidence. It's just too flaky.

Could you go out of her and say, "Yes. I had proof beyond a reasonable doubt"? I would submit there's no way you could do that.

The alleged assault on the 5th of July, which is the black eye, the victim - - alleged victim - - came to you and she said, "No, that didn't happen. That came from someone else." It wasn't her. She said she was having a bad day. Obviously, she was. That was not Mr. Grubbs.

On the 9th, read her letter, please. Again, her testimony was rambling, but it was my understanding she said he came in, they then engaged in a pushing contest. She pushed him, he pushed her back. That, I would submit, is not an assault. That's also not a burglary.

-(RP 111, L. 2 – 113, L. 11).

Evidence Rule 103 requires all evidentiary objections to be timely and specific. Failure to raise an objection at the trial court precludes a party from raising it on appeal. DeHaven v. Gant, 42 Wn. App. 666, 669, 713 P. 2d 149 (1986). Even if an objection is made at trial, a party may assign error in the Appellate Court only on the specific ground made at trial. State v. Guloy, 104 Wn. 2d 412, 422, 705 P. 2d 1182 (1985); State v. Boast, 87 Wn. 2d 447, 451, 553 P. 2d 1322 (1976). The trial court must

be informed of the parties contentions and theories concerning evidence offered, so that the court may rule on such contentions, consider such theories, and thus avoid committing error. State v. Garrison, 71 Wn. 2d 312, 315, 427 P. 2d 1012 (1967). The State submits that by failing to object to any of this or even raising it at the trial court level, the defendant has waived any claim of error. State v. Trout, 125 Wn. App. 313, 317, 103 P. 3d 1278 (2005); State v. Warren, 134 Wn. App. 44, 57 – 58, 138 P. 3d 1081 (2006).

If a party does not object at trial, the defendant cannot challenge the testimony or alleged error for the first time on appeal. RAP 2.5 (a). The exception under RAP 2.5 (a) for manifest error affecting a constitutional right is a narrow one. State v. Scott, 110 Wn. 2d 682, 687, 757 P. 2d 492 (1988). Requiring defendants' to meet a high threshold to raise issues for the first time on appeal ensure that parties give the trial court an opportunity to obviate error and prevent prejudice to the defendant. City of Seattle v. Heatley, 70 Wn. App. 573, 584 – 585, 854 P. 2d 658 (1993). The exception "is not intended to swallow the rule, so that all asserted constitutional errors may be raised for the first time on appeal. Indeed, criminal law has become so largely constitutionalized that any error can easily be phrased in constitutional terms." State v. Trout, 125 Wn. App. at 317.

Under RAP 2.5(a)(3), a defendant must also show how an alleged constitutional error actually affected his right to trial. It is this showing of actual prejudice that makes the error “manifest”. State v. McFarland, 127 Wn. 2d 322, 333 – 334, 899 P. 2d 1251 (1995). A “manifest” error is “unmistakable, evident, or undisputable, as distinct from obscure, hidden or concealed.” State v. Lynn, 67 Wn. App. 339, 345, 835 P. 2d 251 (1992). An appellant who claims manifest constitutional error must show that the outcome likely would have been different, but for the error. State v. Jones, 117 Wn. App. 221, 232, 70 P. 3d 171 (2003).

The State submits that the defendant cannot in this case show any type of prejudice to his position nor is there anything that would indicate that there was any misunderstanding concerning identity. With that in mind, it is impossible to see how any type of error would have made the outcome of this any different. This is especially true when the record clearly indicates that this issue was deliberately not litigated at the trial court level. State v. Scott, 110 Wn. 2d 682, 687, 757 P. 2d 492 (1988). The primary question was whether or not the State had proven all of the elements of the offenses beyond a reasonable doubt. Clearly, there is no reason to doubt the identity of the defendant. The defense, in a sense, stipulated and agreed to all of that. It did so with the court and it also did so repeatedly with the jury. Because of the nature of the defense, identity

was simply not a major concern or issue to the defense and they proceeded to go after the areas that they considered to be of most concern to the defense.

The question of in court identification was raised in State v. Hill, 83 Wn. 2d 558, 520 P. 2d 618 (1974). The Supreme Court phrased the issue as follows:

The first assignment of error relates to the failure of the State to provide a specific in court identification of the defendant. Thus, defendant contends the trial court improperly entered Judgment and Sentence, although he concedes that during trial “neither the prosecution nor the defense considered the matter of identification one of particular significance.”

It is axiomatic in criminal trials that the prosecution bears the burden of establishing beyond a reasonable doubt the identity of the accused as the person who committed the offense. (cite omitted) Identity involves a question of fact for the jury and any relevant fact, either direct or circumstantial, which would convince or tend to convince a person of ordinary judgment, in carrying on his everyday affairs, of the identity of the person should be received and evaluated. (cite omitted).

In the case at bench, the defendant was present in the court room at all pertinent times throughout the course of the trial, during which there were numerous references in the testimony to “the defendant” and to “Jimmy Hill.” The arresting officer testified that it was “the defendant” whom he observed at the scene of the arrest, that he had ordered “the defendant” to halt, and that it was “the location where the defendant was finally stopped that the Kleenex was found.” The jury verdict was in the form:

“We, the jury..., find the defendant [Jimmy Hill] guilty...”

Although we do not recommend the omission of specific in court identification where feasible, we are satisfied that the evidence as it developed in the instant case was adequate to establish the defendant's identity in connection with the offense for which he stood accused."

-(State v. Hill, 83 Wn. 2d at 560).

The State submits that because identity evidence is for the trier of fact, the evidence should not be weighed again on appeal to determine if the State has proven beyond a reasonable doubt that the defendant was the person who committed the offense. State v. Johnson, 12 Wn. App. 40, 45, 527 P. 2d 1324 (1974). Rather, the function of the appellate court is only to assess that there was substantial evidence from which the trier of fact could infer that the burden of proof had been met and that the defendant was the one who perpetrated the crime.

This challenge on appeal is a challenge to the sufficiency of the evidence. A defendant's challenge to the sufficiency of the evidence admits the truth of the State's evidence admits the truth of the State's evidence, from which the court draws all possible inferences. The court defers to the trier of fact on any issue that involves "conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence." State v. Thomas, 150 Wn. 2d 821, 874 – 875, 83 P. 3d 970 (2004). Issues of credibility and conflicting testimony are for the finder of fact. Clearly, there is no conflicting testimony here concerning the identity of the

defendant and that the complaining witness knew who the defendant was. Whether the State has established the identity of the accused, for example is a question of fact for the jury. State v. Hill, 83 Wn. 2d at 560.

Finally, the State would also submit that, in a way, this would be invited error by the defense to now try to argue on appeal what it did not argue or contest at the trial court level. The doctrine of invited error prohibits a party from setting up an error at trial and then complaining of it on appeal. In Re Personal Restraint of Breedlove, 138 Wn. 2d 298, 312, 979 P. 2d 417 (1999). If this were an issue and area of concern for the defense at the trial court level it should have been on the record and preserved. Further, it would give the trial court the opportunity to cure the problem. Instead, to wait for appeal invites the error and thus the doctrine should apply.

The nature of the defense in this case was not a question of identity but was a question of what crimes were committed, if any, and the fact that the complaining witness was recanting at the time of trial. This was clearly a decision made by the defense as part of their tactics and, the State submits, there has been no showing that the defendant did not receive a fair trial.

III. CONCLUSION

The trial court should be affirmed in all respects.

DATED this 26 day of June, 2008.

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