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NO. 49793-0-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

NICHOLAS J. CUMMINGS, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Frank Cuthbertson

No. 16-1-01469-2

Brief of Respondent

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Was hearsay testimony relating to defendant's date of birth erroneously admitted?

2. Was the erroneous admission of defendant's birthday harmless?

3. Are appellant's claims of error at the pretrial release hearing moot?

4. Does RAP 2.5(a) preclude appellant from raising pretrial release issues for the first time on appeal, after conviction?

B. STATEMENT OF THE CASE.

Nicholas Cummings, hereinafter defendant, was tried on one count of unlawful possession of a firearm in the first degree. CP 1. The State agrees with defendant that defendant was held on bail pending his trial.

Carl Murrell is a Puyallup police officer. 2 VRP 208. On April, 2016 he was on patrol at about 1:00 p.m. 2 VRP 209. Along with Officer Leppell and Sergeant Young, he responded to the 700 block of 2nd Ave. NE, a location in Puyallup, Pierce County, Washington. 2 VRP 209-10.

There, Officer Murrell found a person who was identified as Nicholas Cummings, the defendant. 2 VRP 211-12.

Defendant told Officer Murrell that he had a .25 caliber pistol in his backpack, and that it was wrapped in a beanie. 2 VRP 213. Defendant described the pistol and said that there wasn't a round in the chamber, but the pistol was loaded with five rounds. Officer Murrell searched the backpack and found the .25 caliber pistol inside the beanie. 2 VRP 214-15. The pistol had five rounds in the magazine. 2 VRP 216. Defendant admitted obtaining the pistol from another person. 2 VRP 219.

In the same backpack as the pistol, Officer Murrell found mail addressed to "Nicholas Cummings." 2 VRP 221.

Officer Murrell testified that defendant's date of birth was obtained from defendant by Officer Leppell. 2 VRP 222. Officer Murrell testified that he included that information in his report. *Id.* Officer Murrell, over hearsay objection, testified that the date of birth was "12/27 of 1980." *Id.*

Lloyd Leppell is a Puyallup police officer. 2 VRP 247. On April 9, 2016, Officer Leppell was out on patrol. 2 VRP 247-48. On that day, he saw defendant going into a convenience store. 2 VRP 249-50. Defendant was wearing a backpack. 2 VRP 250. Officer Leppell contacted defendant inside the store. 2 VRP 250. Officer Leppell obtained defendant's name from defendant: "Nicholas Cummings." 2

VRP 251-52. Defendant voluntarily walked out of the store with Officer Leppell. 2 VRP 251. When the two walked out of the store, Officer Leppell advised defendant of his constitutional rights. 2 VRP 258. At that time, defendant asked Officer Leppell if Officer Leppell would place him in the back of his patrol car. *Id.* Officer Leppell testified why defendant asked to be placed in the back of the patrol car: "He told me he was a felon with a firearm." 2 VRP 259.

Officer Leppell watched as Officer Murrell retrieved the .25 auto firearm from the backpack. 2 VRP 260.[1]

Defendant's statement of defendant on plea of guilty (Exhibit 8) and judgment and sentence (Exhibit 9) in cause number 07-1-01375-1 admitted to prove defendant's prior conviction for burglary in the second degree.

Defendant was convicted of unlawful possession of a firearm in the first degree. CP 86-98.

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[1] The .25 automatic was a functional firearm. Sherry Theuerkauf is an evidence technician for the Puyallup Police Department. 2 VRP 273. She testified that she watched as Puyallup Police Detective Miniken successfully test fired the pistol three times. 2 VRP 273-79. Det. Miniken also testified to the test firing. 2 VRP 282-92.

C. ARGUMENT.

1. DEFENSE COUNSEL'S HEARSAY OBJECTION WAS APPROPRIATE AND SHOULD HAVE BEEN SUSTAINED.

Officer Murrell testified that Officer Leppell told him that defendant said that his date of birth was December 27, 1980. 2 VRP 222. This statement was introduced to prove that defendant's date of birth was December 27, 1980—the same date of birth contained on Exhibits 8 and 9.

This is a two-layer hearsay problem. The first layer, defendant's statement to Officer Leppell, is not hearsay. ER 80d(2)(d)(i). However, the second layer, Officer Leppell's statement to Officer Mundell, is hearsay because Officer Leppell asserted to Officer Mundell that defendant provided him that non-hearsay information, introduced to prove that defendant provided Officer Leppell that non hearsay information. ER 801(a).

Defense counsel's objection was reasonably specific. The birthday statement was erroneously admitted through Officer Mundell.[2]

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[2] Respondent agrees with defendant that ER 801(d)(1)(iii) did not authorize the admission of the birthday statement as a statement of identification.

2. THE ERRONEOUS ADMISSION OF DEFENDANT'S BIRTHDAY WAS HARMLESS ERROR.

The State was required to prove at trial that defendant had been convicted of a "serious offense." CP 73, 74. The State elected to prove that defendant had been convicted of burglary in the second degree. Exhibits 8, 9. The jury was instructed that burglary in the second degree is a serious offense. CP 78. Three pieces of evidence were submitted to prove that defendant was the "Nicholas Cummings" convicted of burglary in the second degree in Exhibit 9: (1) defendant's name (2 VRP 251-52); (2) defendant's date of birth (2 VRP 222); and (3) defendant's confession (2 VRP 259). As conceded above, the evidence of defendant's date of birth should not have been admitted.

The State agrees that identity of name alone is insufficient to prove defendant is the Nicholas Cummings convicted of the burglary in the second degree convictions memorialized in Exhibits 8 and 9.[3] But in this case, the State had substantially more. Before he was even taken into custody, and before the firearm was even discovered, defendant asked to be placed in the back of the police car—and he stated why: "He told me

[3] ***State v. Harkness***, 1 Wn.2d 530, 542-44, 96 P.2d 460 (1939).

he was a felon with a firearm."[4] 2 VRP 259. This confession, plus the judgment and sentence and statement on plea of guilty in defendant's name, renders the erroneous admission of defendant's birthday harmless.[5]

In ***State v. Hunter,*** 29 Wn.App. 218, 221–22, 627 P.2d 1339 (1981) the testimony of a work release supervisor was sufficient to link the named defendant to his prior conviction. In ***State v. Brezillac,*** 19 Wn. App. 11, 13–14, 573 P.2d 1343 (1978) and ***State v. Wofford***, 148 Wn. App. 870, 884, 201 P.3d 389, 395 (2009) certified copies of prison records were sufficient. In ***State v. Clark,*** 18 Wn. App. 831, 833, 572 P.2d 734 (1977) a fingerprint card and photograph attached to the judgment and sentence were sufficient. In ***State v. Huber***, 129 Wn. App. 499, 504, 119 P.3d 388, 391 (2005) this Court held:

> The State can meet this burden in a variety of specific ways. Depending on the circumstances, these may include otherwise-admissible booking photographs, booking

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[4] Exhibits 8 and 9 provided the jury with a ready explanation how defendant knew he was subject to arrest as a felon with a firearm. Exhibit 9 (the judgment and sentence), at page 9, states "**FIREARMS**: You must immediately surrender any concealed pistol license and you may not own, use or possess any firearm unless your right to do so is restored by a court of record. ..." Exhibit 8 (the statement of defendant on plea of guilty), at page 2 states "I understand that I may not possess, own, or have under my control any firearm unless my right to do so is restored by a court of record and that I must immediately surrender any concealed pistol license. RCW 9.41.040."

[5] "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.... 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 a person should be received and evaluated." ***State v. Hill,*** 83 Wn.2d 558, 520 P.2d 618 (1974).

> fingerprints, eyewitness identification, or, arguably, distinctive personal information.

Id. In this case, defendant's own confession sufficiently links him to the prior conviction.

The harmless error standard is well settled:

> Where the error is *not* of constitutional magnitude, we apply the rule that 'error is not prejudicial unless, within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected. Under this nonconstitutional harmless error standard, an accused cannot avail himself of error as a ground for reversal unless it has been prejudicial. In assessing whether the error was harmless, we must measure the admissible evidence of the defendant's guilt against the prejudice, if any, caused by the inadmissible evidence.

(quotation marks and citations omitted) ***State v. Barry***, 183 Wn.2d 297, 303, 352 P.3d 161, 165 (2015). Defendant's unprompted confession should assure the court that within reasonable probabilities defendant would still have been found guilty even if defendant's birthday was erroneously admitted into evidence.

3. DEFENDANT'S PRETRIAL RELEASE CLAIM IS RAISED FOR THE FIRST TIME ON APPEAL AND IS MOOT.

Defendant challenges the pretrial release conditions imposed in this case. For relief, defendant requests the "sound condemnation" of the Pierce County Superior Court's procedure and a declaration that the pretrial release conditions imposed in this case "violated fundamental

constitutional rights." Appellant's Brief at 42. This challenge and request for relief is presented without contemporaneous objection in the trial court by a defendant who is no longer on pretrial release.

Defendant's pretrial release argument is moot because this court cannot provide effective relief. ***State v. Gentry***, 125 Wn.2d 570, 616-17, 888 P.2d 1105 (1995). In ***Gentry***, the State attempted to persuade the Supreme Court to disapprove of the trial court's pretrial practices. The Court declined:

> Essentially the State asks us to answer questions that are no longer in controversy and to undo what the trial court accomplished some years ago. It is too late for an effective remedy in this case, and any expression of disapproval or approval of the action challenged would be "purely academic" and thus inappropriate.

State v. Gentry, 125 Wn.2d at 616–17. This is the general rule. *Id.*

The "sound condemnation" and declaration requested by defendant is not "effective relief." This case is not the exception to the general rule of mootness. Defendant tries to argue error based upon his arraignment hearing, where the lawyer appearing for him at arraignment explicitly reserved bail argument, the prosecutor noted that defendant had "12 cases with bench warrant activity," and the court imposed $50,000 bail. 4/11/16 VRP at 4. Out of this unobjected-to proceeding defendant cannot demonstrate manifest constitutional error. Manifest constitutional error requires "a plausible showing by the appellant that the asserted error had

practical and identifiable consequences in the trial of the case." (braces and internal quotation omitted) ***State v. O'Hara***, 167 Wn.2d 91, 99, 217 P.3d 756, 761 (2009) (quoting ***State v. Kirkman***, 159 Wn.2d 918, 155 P.3d 125 (2007)). Defendant has not even demonstrated that the arraignment court's informal procedure had practical and identifiable consequences *in the fixing of the bail amount.*

Defendant conflates CrR 3.2 and the Constitution. Appellant's Brief at 40. The fixing of bail is an interactive process that requires advocacy to work effectively. The process is often very informal, but can always be ramped up by defense counsel into a fact finding hearing, complete with findings of fact, conclusions of law, and (if an appropriate issue is raised) interlocutory appellate review.[6] In this case, the proceedings remained informal because defense counsel never raised any procedural issues. Defendant should not be permitted to raise new issues for the first time on appeal in this moot case. RAP 2.5(a). It would not be fair to issue a "sound condemnation" to a trial court which never had the

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[6] A pretrial detainee whose constitutional rights have been violated may seek discretionary review pursuant to RAP 2.3. *See* e.g., ***State v. Blilie***, 132 Wn.2d 484, 939 P.2d 691 (1997) where the State was granted discretionary review to challenge post-trial / pre-sentencing release conditions. Constitutional challenges to pretrial release procedure are an accepted use of the writ of review. *See* ***Westerman v. Cary***, 125 Wn.2d 277, 286-87, 892 P.2d 1067 (1994) and ***Blomstrom v. Tripp***, 189 Wn.2d 379, 384, 402 P.3d 831, 834 (2017). So is the writ of habeas corpus. ***Butler v. Kato***, 137 Wn. App. 515, 519, 154 P.3d 259, 260 (2007). An appeal of a pretrial release conditions order apparently has also been allowed. ***State v. Rose***, 146 Wn.App. 439, 191 P.3d 83 (2008).

opportunity to consider (or remedy) issues which are presented for the first time on appellate review.

D. CONCLUSION.

Defendant, unprompted, asked to be placed into the police car because he was a felon with a firearm. That, plus the burglary in the second degree judgment in defendant's name, is sufficient to prove that defendant was previously convicted of burglary in the second degree. The erroneous admission of defendant's birthday in this trial should not undermine this Court's confidence in the outcome because within reasonable probabilities the erroneous admission of that birthday was not outcome determinative.

Defendant's pretrial release argument should not be addressed because it is (a) moot; (b) raised for the first time on appeal; and (c) factually undeveloped.

The judgment in this case should be affirmed.

DATED: June 6, 2018.

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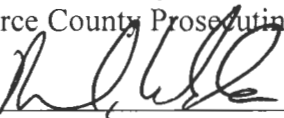
Pierce County Prosecuting Attorney



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