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Division II
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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JAMES E. HARRIS, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Kathryn J. Nelson

No. 16-1-01409-9

Brief of Respondent

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

1. Did the trial court abuse its discretion in admitting Exhibits 6 and 7 where the State presented sufficient evidence showing the revolver and bullets were in the substantially same condition as the night of defendant's arrest?

B. STATEMENT OF THE CASE.

1. FACTS

In the early hours of April 5, 2016, Tacoma Police Officer Scott Campbell was patrolling the area of South 17th and M Street in his fully marked uniform and vehicle. RP 10. He observed a white sedan traveling southbound on M Street. RP 10. A license plate check indicated the vehicle was stolen. RP 10. Campbell initiated a traffic stop on the vehicle. RP 10. He called for backup and he got out of the car. RP 11. At that time, a man, later identified as James E. Harris ("defendant"), exited the front passenger seat of the vehicle. RP 11. Campbell ordered him back in the car and defendant complied. RP 11.

Sergeant Jepson arrived on the scene. RP 12. The female driver of the vehicle was detained and secured in the back of Campbell's patrol car. RP 12. Campbell called defendant out of the passenger side of the vehicle. RP 12. Defendant stepped out of the vehicle and fled from the officers. RP 13. Campbell chased him, repeatedly yelling "Police, stop!" RP 13. Defendant continued running. RP 13. He fled into an alley off of M Street

and ran into the backyard at 1818 South L Street. RP 13. Campbell lost sight of him as he exited the alley into the backyard. RP 13. He did, however, hear crashing and yelling. RP 14.

Officers Chell and Taing arrived on the scene. RP 14. The officers entered the backyard through a picket fence. RP 14. They found defendant lying on his back hiding on the residential side of the fence. RP 14. Defendant was compliant at this point. RP 15. The officers detained and arrested him. RP 15.

As they walked defendant out of the yard, Officer Campbell saw a firearm about five feet from where defendant was. RP 42. The firearm was on the alley side of the fence, in the path of flight from where defendant ran from the alley to the backyard in which he was found. RP 42, 82. He described the firearm as a small frame, .32 auto caliber silver revolver with black electrical tape wrapped around it. RP 14-15. That was the first time Campbell came across a .32 auto caliber revolver throughout his 9 years as a police officer. RP 16. Campbell noted the firearm to the other officers and maintained custody of defendant. RP 8, 16.

Campbell advised defendant of his Miranda rights and conducted a search incident to arrest. RP 18-20. He found three white pills, later determined to be methadone, and a .32 automatic round in defendant's

pockets. RP 20, 22. The bullet appeared worn. RP 45. Defendant told the officers he found the round on the ground and picked it up. RP 20.

Officer Campbell collected the items as evidence – he secured them in a baggy, marked it with his initials, case number, and date of the incident, sealed the bag with evidence tape, and booked them into TPD property. RP 22-23. Campbell recognized the round as the one he recovered from defendant's pocket and testified that it was in the same condition as when it was recovered from defendant. RP 25.

Officer Peter Taing took hold of the firearm. RP 63. Taing described the firearm as a .32 caliber "silver revolver style, top-break handgun." RP 63. The handle and barrel were wrapped in black electrical tape. RP 63. Officer Eric Chell, a police patrol specialist and firearms instructor, rendered the revolver safe by opening the cylinder and removing the ammunition. RP 63. The officers placed the revolver on back on the ground and contacted forensics to process it. RP 66. Officer Taing monitored the firearm until forensics arrived. RP 66. When forensic specialist Lisa Rossi arrived, she photographed and processed the firearm into police custody. RP 66, 74, 96.

2. PROCEDURE

Defendant was charged with Unlawful Possession of a Firearm in the First Degree (Count I), Unlawful Possession of a Controlled Substance

(Count II), Obstructing a Law Enforcement Officer (Count III), and Making a False or Misleading Statement to a Public Servant (Count IV). CP 1-2. He waived his right to a jury trial and the case proceeded to bench trial. RP 6.

At trial, Officer Taing, Officer Chell, and Detective Vold testified for the State. When asked if he recognized the contents of Exhibit 7, Officer Taing responded that “[i]t appears to be the same firearm” he picked up on April 5, 2016. RP 65. He also testified that, although the black electrical tape was removed, the revolver appeared to be in the same condition as when he found it. RP 65.

Officer Chell also testified that Exhibit 7 was consistent with the revolver he rendered safe on April 5, 2016:

Mr. Wasankari: This is the revolver you rendered safe at the scene?

Officer Chell: Yes.

Mr. Wasankari: Does it seem to be in the same condition as when you did so?

Officer Chell: No, in that the electrical tape which I had spoken of, which I was examining, appears to have been -- all been removed from that.

Mr. Wasankari: Where is the electrical tape now for the purposes of the record?

Officer Chell: Yes. The electrical tape was in the same box, and it's contained within a clear plastic Ziploc-type bag.

Mr. Wasankari: Aside from that, is that revolver in the same condition?

Officer Chell: It appears to be so, yes.

RP 88-89. Chell also confirmed that the two rounds (Exhibit 6) were in the same condition as when he found them in the revolver:

Mr. Wasankari: I'm giving you again Plaintiff's 6 for identification purposes – which you previously identified as the two rounds that were removed from the revolver.

Officer Chell: Yes, sir.

Mr. Wasankari: Are those in the same condition today as when you removed them?

Officer Chell: They appear to be so, yes.

RP 98. He described them as unfired, but worn, .32 caliber rounds inscribed with "W&W." RP 85, 98.

Defendant objected to the admission of Exhibit 6, based on lack of foundation, where Officer Chell himself did not enter the rounds into evidence. RP 99. The State responded that the defense could make a chain of custody argument during closing, but that proper foundation – relevance and identification – was established where Chell removed the rounds from the revolver and testified that they appeared to be in the same condition. RP 100. The court agreed with the State and admitted the rounds. RP 100.

Detective Brian Vold testified at trial. RP 102. Vold is assigned to test fire weapons in the Tacoma Police Department's homicide unit. RP 103.

The process of test firing weapons involves: looking at the case, evaluating the type of weapon, contacting the property room to obtain and check out the weapon, transporting it to the police range and examining the weapon to ensure it applies to the proper case number. RP 103-4. After conducting a safety check he test fires the weapon. RP 104. Vold test fired the .32 caliber Smith & Wesson revolver recovered in this case. RP 104. Based on his examination, Vold determined that this particular revolver was an operable firearm. RP 109. After he finished his examination, Vold secured the revolver in the box, marked it with the date he test fired the weapon, his personnel number, and his initials, and returned it to the evidence room. RP 105, 110.

Vold identified Exhibit 7 as the same revolver he pulled from the evidence locker and test fired on September 20, 2016. RP 105-6. He also testified that the revolver appeared in the same condition as it was on the day he test fired it – it did not have electrical tape on it at the time. RP 105. Vold noted that this particular firearm is distinctive in that revolvers are commonly recovered by the department and was an older firearm. RP 106. Defendant objected to admission of Exhibit 7 on the basis of foundation.

The court found that, similar to Exhibit 6, Exhibit 7 was admissible.
RP 111.

The trial court found defendant guilty as charged. RP 150-51. As to Count I, the court found sufficient circumstantial evidence of actual possession existed based on the defendant's guilty flight, his possession of a .32 caliber automatic round in his pocket, along with automatic .32 caliber rounds in the gun that are not commonly used in a revolver, and the gun itself being adapted by wrapping tape around the barrel and handle as if to strengthen it for use with the automatic bullets. RP 151; CP 33-38.

Defendant was sentenced to the Drug Offender Sentencing Alternative (DOSA) program and payment of the following mandatory legal financial obligations: \$200 filing fee and \$500 crime victim penalty assessment. 08-04-17 RP 9. Defendant filed a timely notice of appeal. CP 63.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING EXHIBITS 6 AND 7 WHERE THE EVIDENCE SHOWS THAT THE REVOLVER AND AMMUNITION WERE IN SUBSTANTIALLY THE SAME CONDITION AS THE NIGHT OF DEFENDANT'S ARREST.

The trial court is vested with a wide latitude of discretion in determining the admissibility of evidence, which will not be disturbed absent clear abuse. *Kiessling v. Northwest Greyhound Lines, Inc.*, 28

Wn.2d 289, 295, 229 P.2d 335 (1951). A court abuses its discretion where the decision was manifestly unreasonable or based on untenable grounds or reasons. *Moreman v. Butcher*, 126 Wn.2d 36, 40, 891 P.2d 725 (1995).

The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims. ER 901(a). This requirement is met if the statement introduces sufficient proof to permit a reasonable juror to find in favor of authenticity or identification. *State v. Williams*, 136 Wn. App. 486, 150 P.3d 111 (2007). The trial court is not bound by rules of evidence when making a determination as to authenticity. *Id.* at 500.

A sufficient foundation for the admission of evidence may be established without proof of an unbroken chain of custody. A physical object connected with the commission of a crime may properly be admitted into evidence where it is satisfactorily identified and shown to be in substantially the same condition as when the crime was committed. *State v. Campbell*, 103 Wn.2d 1, 21, 691 P.2d 929 (1984). The court considers the nature of the article, the circumstances surrounding the preservation and custody of it, and the likelihood of intermeddlers tampering with it. *Campbell*, 103 Wn.2d at 21.

Here, the trial court properly admitted exhibits 6 and 7. Both exhibits were identified as the same items found on the night of defendant's arrest and in substantially the same condition as when they were found that night. RP 89, 98. Analyzing the factors announced in *Campbell*, it is clear that the revolver and ammunition are unique and readily identifiable items, the officers properly preserved the evidence, and the chance of tampering was slight.

- a. The revolver and ammunition are unique and readily identifiable by a witness who stated the items were what they were purported to be.

First, the court considers the nature of the article. *Campbell*, 103 Wn.2d at 21. Evidence that is unique and readily identifiable may be identified by a witness who can state that the item is what it purports to be. *State v. Roche*, 114 Wn. App. 424, 436, 59 P.3d 682 (2002). The proponent need not identify the evidence with absolute certainty nor eliminate every possibility of alteration or substitution. *Campbell*, 103 Wn.2d at 21. Minor discrepancies or uncertainty on the part of the witness affect only the weight of the evidence, not its admissibility. *Id.* Where evidence is not unique or readily identifiable, a chain of custody must be established with sufficient completeness to render it improbable that the original item has either been exchanged with another or been contaminated or tampered with. *Roche*, 114 Wn. App. at 436.

Here, the State sought to admit a .32 caliber silver break-top revolver and .32 automatic ammunition. RP 100, 111. Detective Vold testified that both a .32 caliber revolver and .32 caliber ammunition are unusual to recover. RP 105-106. At most, he may test fire four to five of these types of weapons a year. RP 106. While the officers found it unusual that the revolver was partially wrapped in black electrical tape, the unique nature of the evidence was based on the caliber and rarity of the evidence itself, rather than the tape. RP 82, 105. Such evidence is unique and readily identifiable by a witness who can state the items are what they purport to be. The State's witnesses testified that both the revolver and ammunition were in substantially the same condition as when found at the scene. RP 89, 98.

b. The ammunition and revolver were properly preserved and taken into custody.

Second, courts consider the circumstances surrounding the preservation and custody of the evidence. *Campbell*, 103 Wn.2d at 21. The chain of custody is not broken when evidence is stored in a locked and secured area. *State v. Wilson*, 83 Wn. App. 546 555, 922 P.2d 188 (1996). Evidence is adequately preserved where it is marked and secured at the scene and in the same condition as when it was discovered. *Campbell*, 103 Wn.2d at 21 (finding evidence adequately preserved despite initial custodian's failure to testify where officer testified to whereabouts and security of evidence in chain of custody); *State v. Saunders*, 30 Wn. App.

919, 922, 639 P.2d 222 (1982) (finding sufficient foundation for admission of evidence where evidence was packaged and tagged at scene and officers testified items were in same condition as when found at the scene). Where no evidence indicating otherwise is produced, the presumption of regularity supports the official acts of public officers, and courts presume they properly discharged their official duties. *Gallego v. United States*, 276 F.2d 914, 917 (9th Cir. 1960).

Here, the record shows the officers properly preserved the ammunition and revolver at issue. From the time of acquisition to trial, the items' whereabouts and security in the chain of custody are accounted for. *Campbell*, 103 Wn.2d at 21. When the revolver and ammunition were found, they were immediately secured by the officers. RP 66, 74, 84. The ammunition loaded into the revolver was unloaded, placed in a Ziploc plastic bag, and secured into evidence by Forensic Tech Rossi. RP 84. The revolver was placed back on the ground and watched over by Officer Taing until Rossi arrived to photograph and process it. RP 66, 74. The revolver was then placed into a cardboard box for evidence. RP 84.

On September 20, 2016, Detective Vold retrieved the cardboard box, which contained the revolver and a plastic bag containing black electrical tape, from a secure area in which only property room employees are allowed. RP 104, 110. He test fired the weapon, marked the box with

his personnel number, initials, and date of retrieval, and returned it to the secure room. RP 110. Both exhibits were identified at trial as being in substantially the same condition as the day they were discovered and booked into evidence. RP 65, 85, 88-89, 105-106.

This case is also analogous to *Saunders* where the items were marked and secured into custody at the scene. 30 Wn. App. at 922. At trial, the cardboard box which contained the revolver, Exhibit 7, was marked with the incident number and the date it was transferred into police custody – April 5, 2016. RP 65. It also had Vold’s markings from the day he test fired the weapon. RP 105. Similarly, Exhibit 6, the two .32 caliber auto ammunition rounds removed from the revolver, were secured in a plastic bag marked with the case number and the initials “L.R.” – standing for Lisa Rossi. RP 95-96.

c. The likelihood of intermeddlers tampering with the ammunition and revolver is nil.

Last, the court considers the likelihood of intermeddlers tampering with the evidence. *Campbell*, 103 Wn.2d at 21. Tampering with physical evidence occurs where, having reason to believe an official proceeding is pending, a person destroys, mutilates, conceals, removes, or alters physical evidence with intent to impair its appearance, character, or availability in such a prospective proceeding. RCW 9A.72.150(1). Improper evidence handling that does not alter the evidence in any material way does not

constitute tampering. *Wilson*, 83 Wn. App. at 555 (finding officer did not tamper with the evidence where he broke off a piece of the crack cocaine). However, a sufficient chain of custody may need to be established where a custodian's credibility is devastated, rendering the likelihood of tampering significant. *Roche*, 114 Wn. App. at 436-37.

In *Roche*, the court granted James Roche a new trial after uncovered evidence showed that the Washington State Patrol chemist who testified in his case divested and ingested the heroin samples he tested at the crime lab. *Id.* at 437. The court held that a rational trier of fact could reasonably doubt the chemist's credibility, and thus the State needed to lay the foundation for admitting the test results against Roche at a new trial. The court found that "one cannot ascertain whether a baggie filled with a chunky powdery substance has been tampered with or properly tested from looking at a photograph," requiring a chain of custody to be laid as a condition precedent to admission. *Roche*, 114 Wn. App. at 438.

Defendant places particular emphasis on the removal of the black electrical tape from the gun, claiming that it is no longer in substantially the same condition as when it was found at the scene. Appellant's Brief at 11-12. Here, there is no evidence to suggest the evidence was tampered with. This case is distinguishable from *Roche*, where the chance of tampering

was high where a custodian's credibility was devastated. *Id.* at 438. No such credibility issues are raised here.

Moreover, the item at hand is not a generic looking baggie filled with a powdery substance. It is a rather unique and uncommonly-seen firearm: a .32 caliber Smith & Wesson break-top revolver loaded with automatic ammunition. RP 85, 106. The revolver was test-fired and determined to be a functioning firearm. RP 110. At trial, the State introduced testimony that, despite the removal of the tape, the revolver was in the substantially same condition as when the officers first discovered it on April 5, 2016. RP 89. Officer Chell testified as much:

Mr. Wasankari: Aside from [the removed electrical tape], is that revolver in the same condition?

Officer Chell: It appears to be so, yes.

RP 89.

Defendant was convicted of unlawful possession of a firearm, not unlawful possession of black electrical tape. The revolver itself is the crucial evidence at issue. Although the black electrical tape was removed, this does not alter the integrity, functioning, or character of the revolver in a material way. As such, the removal of the tape does not constitute tampering nor reversal of the defendant's sentence. *See Wilson*, 83 Wn. App. at 555; RCW 9A.72.150(1). Such a minor discrepancy merely affects the weight of the

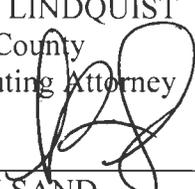
evidence, not its admissibility. *Campbell*, 103 Wn.2d at 21. No legal authority suggests otherwise.

D. CONCLUSION.

Defendant fails to show the trial court abused its discretion in admitting Exhibits 6 and 7. The court properly admitted the items where the .32 caliber revolver and automatic ammunition were unique and readily identifiable, properly preserved by the officers in the chain of custody, and the chance of tampering with the items is low. As such, once the two items were identified as in substantially the same condition as when they were discovered, no further chain of custody evidence was required and the exhibits were properly admitted. For the foregoing reasons, defendant's conviction should be affirmed.

DATED: June 5, 2018.

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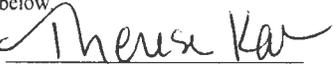


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PIERCE COUNTY PROSECUTING ATTORNEY

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