

FILED

JUN 21 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

COA No. 28677-1-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ANTHONY ROBERT COVERT,

Appellant.

BRIEF OF APPELLANT

Kenneth H. Kato, WSBA #6400
Attorney for Appellant
1020 N. Washington St.
Spokane, WA 99201
(509) 220-2237

FILED

JUN 21 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

COA No. 28677-1-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ANTHONY ROBERT COVERT,

Appellant.

BRIEF OF APPELLANT

Kenneth H. Kato, WSBA #6400
Attorney for Appellant
1020 N. Washington St.
Spokane, WA 99201
(509) 220-2237

TABLE OF CONTENTS

I. ASSIGNMENTS OF ERROR

A.....1

B.....1

C.....2

D.....2

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1.....2

2.....3

3.....3

4.....3

III. STATEMENT OF THE CASE..... 3

IV. ARGUMENT.....9

A. The court erred by denying Covert’s CrR 3.5 and CrR 3.6 motions to suppress physical evidence and incriminating statements when there was no probable cause to detain him and any evidence obtained thereafter was the result of that unlawful detention.....9

B. The court erred by failing to specify in the to-convict instructions for second degree assault, instructions nos. 25 and 26, the acts relied on by the State as the basis for the charges..... 12

C. The court erred by admitting hearsay evidence that Covert was the shooter..... 13

V. CONCLUSION.....15

TABLE OF AUTHORITIES

Table of Cases

State v. Kitchen, 110 Wn.2d 403, 756 P.2d 105 (1988).....13

State v. Mendez, 137 Wn.2d 208, 970 P.2d 722 (1999).....9

State v. O’Bremski, 70 Wn.2d 425, 423 P.2d 530 (1967).....11

State v. Rankin, 151 Wn.2d 689, 92 P.3d 202 (2004).....9

State v. Thomas, 91 Wn. App. 195, 955 P.2d 420,
rev. denied, 136 Wn.2d 1030 (1998).....12

State v. Thorn, 129 Wn.2d 347, 917 P.2d 108 (1996).....11

State v. Whitney, 108 Wn.2d 506, 739 P.2d 1150 (1987).....13

State v. Williams, 102 Wn.2d 733, 689 P.2d 1065 (1984).....10

Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868,
20 L. Ed.2d 889 (1968).....9, 10

Wong Sun v. United States, 371 U.S. 471, 83 S. Ct 407,
9 L. Ed.2d 441 (1963).....11, 12

Rules

CrR 3.5.....1, 2, 9

CrR 3.6.....1, 2, 9

ER 801(c).....15

ER 802.....15

ER 803.....15

I. ASSIGNMENTS OF ERROR

A. The court erred by denying Covert's CrR 3.5 and 3.6 motions to suppress physical evidence and incriminating statements.

B. The court erred by failing to specify in the to-convict instruction for second degree assault on Shane L. Hagedorn, instruction no. 25, the acts relied on by the State as the basis for the charge:

To convict the defendant of the crime of assault in the second degree as charged in Count IV, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 7th day of November, 2008, the defendant assaulted Shane L. Hagedorn with a deadly weapon, and

(2) That this occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty. (RP 786-787, CP 201).

C. The court erred by failing to specify in the to-convict instruction for second degree assault on Joseph Leon Castagna, instruction no. 26, the acts relied on as the basis for the charge:

To convict the defendant of the crime of assault in the second degree as charged in Count V, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 7th day of November, 2008, the defendant assaulted Joseph Leon Castagna with a deadly weapon, and

(2) That this act occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty. (RP 787; CP 202).

D. The court erred by admitting hearsay evidence that Covert was the shooter.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the court err by denying Covert's CrR 3.5 and 3.6 motions to suppress when there was no probable cause to detain Covert and any evidence obtained thereafter was the result of that unlawful detention and inadmissible? (Assignment of Error A).

2. When the to-convict instructions for second degree assault failed to specify the acts relied on by the State as the basis for those charges, did the court erred by giving instructions nos. 25 and 26? (Assignments of Error B and C).

4. Did the court err by admitting hearsay evidence that Covert was the shooter? (Assignment of Error D).

III. STATEMENT OF THE CASE

On November 7, 2008, Shane Hagedorn and Joe Castagna, who lived in room 231 at the West Wynn Motel, were hanging out drinking beer and playing video games. (RP 441). Daja Varnell, a friend, was also in the room. (RP 441). Varnell received several phone calls. She appeared upset and was arguing with the person on the phone. (RP 443). The other person was Ricky Grubb. (RP 101). Hagedorn took the phone and talked to Grubb. (RP 445). Hagedorn was going to Rosauer's to confront Grubb and fight. (RP 445). He drove there with Castagna. (RP 446).

Hagedorn saw a group of people in the parking lot. They started chasing the car. (RP 446). As they left, Castagna saw one person with a gun. (RP 447). He parked at the Shangri-La, nearby the West Wynn. (RP 447-448). Castagna and Hagedorn walked back toward the West Wynn and went to get beer at the gas station

next-door. (RP 448). Hagedorn saw the men from Rosauer's coming across the bridge toward the West Wynn. (RP 449). He could tell they were them because of their clothes. (RP 449).

Hagedorn and Castagna walked to the gas station parking lot and saw 5-6 people. (RP 450). Hagedorn took off his coat, expecting to fight. (RP 450). Castagna said gun and turned to run. (RP 450). Hagedorn was shot in the arm and wrist. (RP 451). He was in the hospital for 2 weeks with serious wounds. (RP 454-455).

On November 7, 2008, around midnight, Officer Cory Lyons responded to a shooting call at the West Wynn Motel in Spokane. (RP 368). The victim, Hagedorn, was on the floor in room 231. (RP 370). Castagna and Varnell were over him with towels. (RP 375). The Spokane Fire Department responded within a minute of two of Officer Lyons' arrival. (RP 376). The officer talked to Castagna and took him to major crimes downtown to be interviewed by detectives. (RP 377).

Officer Shawn Kendall of the K-9 unit was on duty and also responded to the shooting call at about the same time. He and his K-9 partner, Stryder, arrived at the West Wynn, where he assembled a tactical track team. (RP 384-385). They started

tracking eastbound and soon came upon Covert about 4-5 minutes after starting the track. (RP 46). Covert made himself known when the officer got into view. Covert was frantic, screaming and crying. (RP 34-36, 386). He was handcuffed. (RP 48, 387, 401). Stryder alerted on a belt, sweatshirt, and a handgun near where Covert came out by a bridge support. (RP 58, 387).

Deputy Darrell Rohde placed Covert in his patrol car. (RP74, 414-415). The deputy said he was detained in handcuffs. (P 414). Covert told him someone shot at him, so he hid in the bushes. (RP 74). Deputy Rohde asked him if he was involved in the West Wynn shooting; he said he was a bystander. (RP 75-76, 417). Covert said he was shot at by a Mexican male as he was walking through the area on the way to his girlfriend's house. (RP 76, 417). When the deputy got information that Covert may be associated with a suspect, he stopped asking questions. (RP 78, 79, 418). Deputy Rohde believed Covert was a victim. (RP 80, 416). He was with Covert for about 45 minutes. (RP 79, 419).

Detective Marvin Hill arrived on the scene and contacted Covert. (RP 97, 424). Covert agreed to talk to the detective at the Public Safety Building. (RP 97, 425). Officer Matthew Rose drove

the hand-cuffed Covert there. (RP 83). They arrived at 0104. (RP 85). Covert was not free to go. (RP 89).

Detective Hill interviewed Varnell and Castagna first. (RP 99-108). He then talked with Covert. (RP 110). The detective gave him his *Miranda* rights. Covert signed the *Miranda* card and agreed to talk. (RP 111-112).

He lived with Ricky Grubb in an apartment on Pacific. On November 7, 2008, he was with Grubb, Mike Davis, and two women. (RP 114). Grubb talked on the phone with Varnell, who wanted to hang out and party. (RP 115). Grubb got into an argument with an unknown male on the other end. (RP 115). They were going to meet and fight at Rosauer's. (RP 116). Covert went off to help. (RP 116). As Castagna and Hagedorn drove by near Rosauer's, someone named Zach pulled out a gun and aimed it at their car. The safety was on, so the gun did not fire. (RP 117-118). The gun was a .40 caliber Smith and Wesson. (RP 119).

They went back to the apartment, but were to meet Castagna and Hagedorn again at the gas station near the West Wynn. (RP 118-120). At the gas station lot, Zach pulled out the gun and fired 7-8 shots. (RP 121). Covert, Davis, and Grubb ran

toward the bridge. (RP 121). Zach threw the gun on the ground. (RP 121). Covert hid under the bridge. (RP 122).

Detective Hill asked for Covert's consent to search the Pacific apartment. He told the detective to get a warrant. (RP 122). Covert called Grubb, who came to the Public Safety Building. (RP 123). Grubb waived his *Miranda* rights and said Covert was the shooter. (RP 129).

Michael Davis also came down to the Public Safety Building. (RP 132). He waived his *Miranda* rights and identified Covert as the shooter. (RP 135).

Detective Hill recontacted Covert, who confessed to being the shooter. (RP 139, 623). He also said he stole the gun that was used. (RP 628). A video was subsequently made documenting the confession. (RP 142, 145, 629). The first interview with Covert was at 0306. (RP 161). The second contact followed Detective Hill's interviews with Grubb and Davis. (RP 622). Covert then gave permission to search the apartment. (RP 685). Over defense objection, the detective testified that Grubb and Davis identified Covert as the shooter. (RP 622-623). The defense made an oral motion for mistrial, which was denied. (RP 708-718). The court

determined the hearsay evidence was admissible for providing context. (RP 708).

A burglary victim, the registered owner of the .40 caliber Smith and Wesson handgun used in the shooting, testified it was stolen from his home. (RP 602-605). He knew Covert, who was introduced to him as a cousin by his daughter's ex-boyfriend. (RP 605). Detective Paul Lebsock interviewed Covert on November 11 and 13, 2008. (RP 723). After being read his rights, Covert said he stole the gun. (RP 724).

Although Covert is black, Castagna and Hagedorn said the shooter was white. (RP 739, 748-755, 756, 761).

No exceptions were taken to the court's jury instructions. (RP 769). The jury convicted Covert of count I: attempted first degree murder of Hagedorn; count II: first degree assault of Hagedorn; count IV: second degree assault of Hagedorn; count V: second degree assault of Castagna; count VI: possession of a stolen firearm; and count VII: second degree unlawful possession of a firearm. He was acquitted of count III: first degree assault of Castagna. (CP 276-288). With enhancements, the court sentenced Covert to a standard range sentence of 432 months. This appeal follows.

IV. ARGUMENT

A. The court erred by denying Covert's CrR 3.5 and 3.6 motions to suppress physical evidence and incriminating statements when there was no probable cause to detain him and any evidence obtained thereafter was the result of that unlawful detention.

Covert does not challenge the trial court's findings of fact on the CrR 3.5 and 3.6 hearings. (CP 261-266, 267-272). What he does challenge, however, are the court's conclusions from those findings of fact. (CP 272-273). Those conclusions are reviewed de novo. *State v. Mendez*, 137 Wn.2d 208, 214, 970 P.2d 722 (1999).

A seizure occurs when, considering all the circumstances, an individual's freedom of movement is restrained and the individual would not believe he is free to leave or decline a request due to an officer's use of fear or display of authority. *State v. Rankin*, 151 Wn.2d 689, 695, 92 P.3d 202 (2004). There is no question here that Covert was seized from the moment he was handcuffed. All the police officers involved acknowledged Covert was detained and not free to leave.

The court concluded the initial detention of Covert when he came out from under the bridge was a valid *Terry* stop. *Terry v.*

Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed.2d 889 (1968). The seizure must be based on “specific and articulable facts” that the person stopped “is, or is about to be, engaged in criminal activity.” 392 U.S. at 21-22. The court, however, did not find there was a reasonable articulable suspicion to believe Covert had committed a crime. (RP 202). Rather, the court justified the *Terry* stop by noting he had come out of the buses and “was involved somehow.” This is insufficient for a detention under *Terry*. 392 U.S. at 21-22.

Moreover, Deputy Rohde detained Covert, handcuffed and in the patrol car, for 45 minutes in the *Terry* stop. (RP 419). The length of the stop was far longer than required to confirm or dispel the deputy’s suspicions. *State v. Williams*, 102 Wn.2d 733, 736, 689 P.2d 1065 (1984). This was not a *Terry* stop, but a seizure for which there was no probable cause. Indeed, Deputy Rohde thought Covert was a victim. (RP 80, 416).

The court then found there was probable cause to arrest Covert when the sweatshirt, belt, and gun were found some 6 minutes after he emerged from the bushes. (RP 200, 309). Whether an arrest is supported by probable cause must be determined by looking at the objective circumstances, not what the

police were thinking. See *State v. Thorn*, 129 Wn.2d 347, 917 P2d 108 (1996).

The facts do not support a lawful basis for arresting Covert. Even if a lawful basis for the detention ultimately develops afterwards, it does not justify the unlawful detention at the inception. *State v. Gatewood*, 163 Wn.2d 534, 539, 182 P.3d 426 (2008). Here, there was no valid *Terry* stop. Rather, Covert was detained, handcuffed, and arrested. At 1204, he emerged from the bushes. The gun was found at 1210, whereupon Covert was placed into custody. But there was no probable cause to arrest him at that time. The court erred by finding probable cause and the detention was unlawful.

The United States and Washington Constitutions require the exclusion of direct and indirect products of illegal police conduct. *Wong Sun v. United States.*, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed.2d 441 (1963), *State v. O'Bremski*, 70 Wn.2d 425, 423 P.2d 530 (1967). There being no probable cause to arrest Covert, his confessions must be suppressed as "fruit of the poisonous tree." *Wong Sun*, 371 U.S. at 485-486.

Furthermore, any evidence obtained from the search of Covert's apartment was also "fruit of the poisonous tree" and must

be suppressed. Covert denied permission to search the apartment during his initial interview with Detective Hill. (RP 122). He later gave consent to search. (RP 150). But Covert gave that consent, while he was unlawfully detained. The evidence obtained from the search must therefore be suppressed. *Wong Sun*, 392 U.S. at 485-486.

Since the physical evidence and incriminating statements were the product of illegal police activity and should have been excluded, he should be granted a new trial and/or the charges dismissed. *State v. Thomas*, 91 Wn. App. 195, 201, 955 P.2d 420, *rev. denied*, 136 Wn.2d 1030 (1998).

B. The court erred by failing to specify in the to-convict instructions for second degree assault, instructions nos. 25 and 26, the acts relied on by the State as the basis for the charges.

The erroneous instructions stated in relevant part that “on or about the 7th day of November, 2008, the defendant assaulted [Hagedorn/Castagna] with a deadly weapon.” (CP 201, 202). The to-convict instructions for first degree assault, instructions 21 and 22, stated in part that “(1) on or about the 7th day of November, 2008, the defendant assaulted [Hagedorn/Castagna]; (2) the

assault was committed with a firearm; (3) the defendant acted with intent to inflict great bodily harm. . .” (CP 197, 198).

In closing, the State argued the two counts of second degree assault involved the acts at Rosauer’s. (RP 802, 804, 840). But argument is just that and nothing more; it is not evidence. (RP 772, CP 176). The court’s failure to specify in instructions nos. 25 and 26 that the acts relied on to form the basis for those charges was the incident at Rosauer’s, the jury was permitted to find that the first degree assault charges arising from the shooting at the West Wynn could also be the acts charged as second degree assault. That result and the instructions are not supported by the evidence as to the means of committing the crimes. *See State v. Whitney*, 108 Wn.2d 506, 739 P.2d 1150 (1987); *State v. Kitchen*, 110 Wn.2d 403, 410, 756 P.2d 105 (1988). Thus, the instructions were improper and prejudiced Covert’s rights. He should be granted a new trial.

C. The court erred by admitting hearsay evidence that Covert was the shooter.

Over defense objection, Detective Hill was permitted to testify that Grubb and Davis said Covert was the shooter. (RP 622-623). Contending the court improperly permitted hearsay evidence

that Covert was the shooter, the defense later made an oral motion for mistrial. (RP 700). The court stated the hearsay was admissible for showing context and denied the motion. (RP 708-709). Moreover, it decided not to give a limiting instruction. (RP 709).

There is no dispute that Detective Hill's statement was hearsay. The court stated, "Number one, it was hearsay." (RP 707). It further noted the issue was whether it was proper to admit the statement "under an exception that provides context and background." (RP 708). The court went on to say:

In this case, this court believes it does provide context in this way. It provides context for other evidence in this case for why Detective Hill went back in to reinterview defendant Covert without. Without the testimony that both Mr. Grubb and Mr. Davis said Mr. Covert was the shooter, it would or could appear to the jury, the jury could make the inference that the Detective was reinterviewing the defendant without reason except perhaps to wear him down by reinterviewing. To understand that he is going back in to clarify based on new information, it's helpful to the jury to understand that at this point in time Detective Hill had now been told by two people that Covert was the shooter. (RP 709-709).

The court was incorrect. There is no such hearsay exception for context and background.

ER 801(c) defines hearsay as a “statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” Hearsay is inadmissible except as provided by the evidence rules, other court rules, or statute. ER 802. Detective Hill’s statement was obviously hearsay and the court so found. (RP 707). But contrary to its ruling, there is no hearsay exception in ER 803, “Hearsay Exceptions; Availability of Declarant Immaterial,” for context and background. Accordingly, the court erred by admitting the hearsay statement.

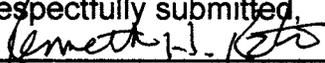
The court noted that Grubb and Davis had already testified Covert was the shooter. (RP 707). But the fact they had said so makes the admission of Detective Hill’s hearsay statement to the same effect even more egregious and puzzling. There was no need for the hearsay evidence. The court erred by admitting the statement, thereby prejudicing Covert’s right to a fair trial. The motion for mistrial should have been granted.

IV. CONCLUSION

Based on the foregoing facts and authorities, appellant Covert respectfully urges this Court to reverse his convictions and dismiss the charges or remand for new trial.

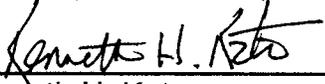
DATED this 21st day of June, 2010.

Respectfully submitted,


Kenneth H. Kato, WSBA # 6400
Attorney for Appellant
1020 N. Washington St.
Spokane, WA 99201
(509) 220-2237

CERTIFICATE OF SERVICE

I, Kenneth H. Kato, certify that on June 21, 2010, I served a copy of the Brief of Appellant by first class mail, postage prepaid, on Mark E. Lindsey, Spokane County Prosecutor's Office, 1100 W. Mallon, Spokane, WA 99260, and Anthony R. Covert, #335988, Washington State Penitentiary, 1313 N. 13th Aye., Walla Walla, WA 99362.


Kenneth H. Kato