

No. 31720-0-III

FILED
JAN 27, 2014
Court of Appeals
Division III
State of Washington

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

GILBERTO MACIAS, Appellant.

BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

1. The court erred by allowing hearsay evidence that Gilberto Macias possessed a firearm.

2. The State's evidence was insufficient to support the convictions.

Issues Pertaining to Assignments of Error

A. Did the court err by allowing hearsay evidence that Mr. Macias possessed a firearm? (Assignment of Error 1).

B. Was the evidence insufficient to support the convictions because the State failed to prove identity beyond a reasonable doubt? (Assignment of Error 2).

II. STATEMENT OF THE CASE

Mr. Macias was charged with first degree burglary with a firearm enhancement, attempting to elude with an endangerment enhancement, possession of a stolen firearm, and second degree unlawful possession of a firearm. (CP 1, 30). Another count of residential burglary was dismissed. (CP 171). The case proceeded to jury trial.

John Verbrugge, a Wapato resident, testified his Glock .40 pistol and holster were taken from his home when it was burglarized on March 21, 2012. (5/21/13 RP 159-60, 162). No one

had permission to have his Glock. (*Id.* at 168). Mr. Verbrugge 's basement had a strong smell of cat urine as his cat had a tendency to miss the litter box. (*Id.* at 167-68). His pistol was found the next night. (*Id.* at 170).

Francisca VanderMeulen lives in Mabton at 151 S. Fischer Road. (5/21/13 RP 171). On March 22, 2012, she was going to pull into her driveway after work when she saw a black SUV backed into it with all the doors open. (*Id.* at 172). Ms. VanderMeulen saw five people run out of her house carrying a safe, laptop, and TV. (*Id.* at 173-74). They got into the SUV and took off past her. (*Id.* at 173). She chased after it for some 15 minutes at speeds close to 90 mph. (*Id.* at 175-77).

They headed into Mabton and a police car pulled out in front of Ms. VanderMeulen to take over the pursuit. (5/21/13 RP 177). She did not recognize anyone in the SUV and could not see into the vehicle. (*Id.* at 188). Ms. VanderMeulen did not see any gun. (*Id.*). She later recovered her safe, TV, laptop, and other items taken from her home. (*Id.* at 183).

Christopher Alires testified Mr. Macias was in the vehicle when caught for residential burglary. (5/21/13 RP 205). Mr. Alires was in the back seat during the high speed chase. (*Id.* at 207). He

acknowledged pointing out Mr. Macias as the driver after the arrest, but he was not really sure. (*Id.* at 209, 216). Mr. Aires also testified a firearm was thrown out the window, but he did not know who threw it. (*Id.* at 211, 216). He did not see Mr. Macias with the firearm. (*Id.* at 217). Mr. Aires also did not see a gun during the burglary. (*Id.*),

Deputy Ron Shepard was working graveyard on March 22, 2012. (5/21/13 RP 219). He received information about a pursuit on Highway 22. (*Id.* at 220). He was not involved in the chase, but helped coordinate the scene when it was over. (*Id.*). Over defense objection as hearsay, the court permitted the deputy to testify that Mr. Aires told him the driver was Mr. Macias and he had a firearm. (*Id.* at 227-33).

Deputy Shepard investigated the Verbrugge burglary. (5/21/13 RP 233). He remembered well the smell of cat urine in the home. (*Id.* at 234). He noticed that same cat urine smell coming from Mr. Macias's shoes. (*Id.* at 236).

Sergeant Mike Russell learned about the pursuit about 10 minutes before 6 p.m. on March 22, 2012. (5/21/13 RP 238). He arrived at the scene off Highway 22 after the chase was over. (*Id.* at 240). Pursuant to the court's earlier ruling, Sergeant Russell

testified he talked to Mr. Aires, who pointed out Mr. Macias as the driver and he had a firearm. (*Id.* at 246). Deputy Curtis Thaxton handed the sergeant a recovered firearm, which turned out to have been reported stolen the day before. (*Id.* at 246).

Mabton Police Sergeant Casamedo Cedillo was on duty on March 22, 2012, when he overheard dispatch that a reporting party was following a suspect vehicle. (5/21/13 RP 250). He saw the vehicle heading right at him. (*Id.* at 253). The sergeant described the SUV weaving past several cars already in an intersection at about 50 mph, hitting about 100 mph on Highway 22 westbound, blowing past stop signs at intersections, disregarding traffic flow, going on the shoulder, and passing semis causing oncoming traffic to veer to the shoulder. (*Id.* at 254-61). After the SUV finally veered off into a field, Sergeant Cedillo saw no one in the driver's seat. (*Id.* at 262). The SUV was a Chevy Tahoe with tinted windows. (5/22/13 RP 270). He did not see anything thrown from the vehicle. (*Id.* at 273). Sergeant Cedillo later learned a gun was recovered down the road.

Deputy Flaviano Miranda set up spike strips on Highway 22. (5/22/13 RP 298). The spikes blew out a tire on the SUV, stopping

it after several miles. (*Id.* at 299, 303). The deputy did not see the driver or anything thrown from the vehicle. (*Id.* at 300, 307).

Officer Kris Johnson was involved in the vehicle pursuit on March 22, 2012. (5/22/13 RP 280). She tried to block the SUV, but it went around the front of her patrol car, up and onto the curb. (*Id.* at 283). From about a half-block away, Officer Johnson made direct eye contact with the driver. (*Id.* at 284). She testified Mr. Macias was the driver. (*Id.* at 292). During the pursuit, she did not see anything thrown from the vehicle. (*Id.* at 290).

Detective David Johnson executed a warrant on the SUV on March 23, 2012. (5/22/13 RP 334). He found a brown holster in the front center console. (*Id.* at 335). The SUV was bought by Mr. Aires for his mother. (*Id.*).

Mr. Macias testified that on March 22, 2012, he was walking and got picked up to go to the Tri-Cities mall. (5/22/13 RP 355). Mr. Aires was driving. (*Id.*). Mr. Macias was in the back seat. (*Id.*). The vehicle stopped at 151 S. Fischer Road where everyone got out except him. (*Id.* at 356). He saw a lady pull up and everybody else got back into the SUV. (*Id.* at 356-57). Mr. Macias neither went into the house nor assisted the others. (*Id.* at 356).

Mr. Alires took off and the lady chased them. (*Id.* at 357). The police took up the pursuit and the SUV got spiked. (*Id.*).

Mr. Macias did not have a gun and did not see one. (5/22/13 RP 357). There were five guys in the SUV, but he only knew one of them. (*Id.* at 359). Mr. Macias was the right side passenger in the back. (*Id.* at 361). He saw the others with stuff in their hands when they came back from the Fischer Road house. (*Id.* at 362, 364). He disagreed with Officer Kris Johnson's testimony that she saw him driving the SUV. (*Id.* at 369). Mr. Macias had no gun; he was not the driver; and he did not get out of the vehicle at the burgled house. (*Id.* at 377).

There were no exceptions to the court's instructions. (5/23/13 RP 395-403). The jury found Mr. Macias guilty of first degree burglary with the firearm enhancement, attempting to elude with the endangerment enhancement, possession of a stolen firearm, and second degree unlawful possession of a firearm. (CP 161-67).

The court sentenced Mr. Macias to 36 months on the first degree burglary, 6 months on the eluding, 18 months on the possession of a stolen firearm, and 12 months on the second degree unlawful possession of a firearm. (CP 171-79). The court

ran the firearm counts consecutive to each other for 30 months, but concurrent with the others for a total base range sentence of 36 months. (CP 173). The court also ran the 60-month firearm enhancement and the 12-month endangerment enhancement consecutive to each other for 72 months. The total term of confinement was thus 108 months. (*Id.*).

The court later amended the judgment and sentence to have the endangerment enhancement run concurrently with the firearm enhancement, thus reducing the total term of confinement from 102 to 96 months. (CP 197). This appeal follows.

III. ARGUMENT

A. The court erred by allowing hearsay evidence that Mr. Macias possessed a firearm.

Relying on *State v. Grover*, 55 Wn. App. 252, 777 P.2d 22, review denied, 113 Wn.2d 1032 (1989), the court allowed testimony from two officers that Mr. Alires told them Gilberto Macias was the driver and he had a gun. *Grover* held that ER 801(d)(1)(iii) “excepts from hearsay treatment any statement identifying an accused made by a perceiving witness who testifies at trial and is subject to cross examination.” 55 Wn. App. at 256.

The officers' statements that Mr. Aires identified Mr. Macias as the driver were thus admissible under *Grover*. But the officers' statements identifying Mr. Macias as having a gun were inadmissible because Mr. Aires made no such identification. Because there was no statement of identification by Mr. Aires regarding the gun as required by ER 801(d)(1)(iii) and *Grover*, the officers' statements were hearsay and inadmissible on who possessed the firearm.

Mr. Aires acknowledged identifying Mr. Macias as the driver. (5/21/13 RP 209). But nowhere in his testimony does the record reflect that he identified Mr. Macias as having a gun. (*Id.* at 194-215). Mr. Aires testified he did not talk to officers about who had the gun. (*Id.* at 209-10). He did tell the officers that he saw a gun being tossed out of the SUV, but he did not know who threw it. (*Id.* at 210-11). Moreover, he did not see anyone with a gun during the burglary. (*Id.* at 211). Indeed, there is no statement identifying Mr. Macias as having a gun. ER 801(d)(1)(iii) therefore does not apply because Mr. Aires made no statement of identification. *Grover*, *supra*. The court erred by admitting the hearsay statements of Deputy Shepard and Sergeant Russell that Mr. Aires identified Mr. Macias as having a gun.

B. The evidence was insufficient to support the convictions because the State failed to prove identity beyond a reasonable doubt.

In a challenge to the sufficiency of the evidence, the test is whether, viewing it in a light most favorable to the State, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). So viewed, the State's evidence still fell short of showing by the requisite quantum of proof that Mr. Macias was the person driving the car, possessed the firearm, and participated in the burglary. *State v. Stevenson*, 128 Wn. App. 179, 192, 114 P.3d 699 (2005).

Although the finder of fact determines credibility questions, the existence of a fact cannot be based on guess, speculation, or conjecture. *State v. Hutton*, 7 Wn. App. 726, 728, 502 P.2d 1037 (1972). Here, there was no credible evidence that Mr. Macias was the driver. Mr. Aires acknowledged identifying him as driving the SUV. He also testified, "But, honestly I didn't know who it was." (5/21/13 RP 209). Officer Johnson purportedly identified Mr. Macias as the driver from a half-block away. (5/22/13 RP 295). In these circumstances, the State did not prove beyond a reasonable

doubt that Mr. Macias as the driver on the attempting to elude. If he was not the driver, there cannot be any endangerment enhancement.

With respect to the two possession of a firearm charges, there was no evidence, absent the hearsay statements of the officers, that Mr. Macias possessed a firearm at all. Indeed, except for the two inadmissible statements of Sergeant Russell and Deputy Shepard that Mr. Aires told them Mr. Macias had a gun, nothing in the record establishes he had a firearm. *Grover, supra*. Without any other evidence independent from the inadmissible hearsay, the State failed to prove beyond a reasonable doubt that Mr. Macias was guilty of possession of a stolen firearm and second degree unlawful possession of a firearm. *Green, 94 Wn.2d at 220-21*.

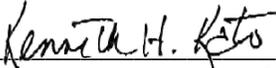
As for the first degree burglary, no one testified Mr. Macias was a participant either as a principal, an accomplice, or in any other capacity. Ms. VanderMeulen did not identify Mr. Macias as one of the people she saw. Furthermore, no one testified there was any gun used or displayed in the burglary. The State thus failed to prove beyond a reasonable doubt that Mr. Macias participated in

the burglary or that he had a firearm during the burglary. *Green*, 94 Wn.2d at 220-21. The convictions cannot stand.

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Macias respectfully urges this court to reverse his convictions and dismiss the charges.

DATED this 25th day of January, 2014.



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CERTIFICATE OF SERVICE

I certify that on January 25, 2014, I served a copy of the brief of appellant by first class mail, postage prepaid, on Gilberto Macias, Green Hill School, 375 SW 11th St., Chehalis, WA 98532; and by email, as agreed by counsel, on Tamara Hanlon at tamara.hanlon@co.yakima.wa.us.

