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APR 28, 2014
Court of Appeals
Division III
State of Washington

NO. 31720-0-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

GILBERTO MACIAS, Appellant.

BRIEF OF RESPONDENT

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TREATISES

ROBERT H. ARONSON, THE LAW OF EVIDENCE IN WASHINGTON (4th ed. 2008)2

I. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR

A. Were statements of identification properly admitted by the trial court?

B. Was the evidence sufficient to support the convictions beyond a reasonable doubt?

II. STATEMENT OF THE CASE

The facts of this trial have been sufficiently set forth in Appellant's brief. Therefore, pursuant to RAP 10.3(b), the State shall not set forth a specific facts section. The State will refer to specific areas or shall cite specific sections of the records as needed.

III. ARGUMENT

A. The statements of identification were properly admitted by the trial court.

A trial court's interpretation of a rule of evidence is reviewed de novo. State v. Fisher, 165 Wn.2d 727, 745, 202 P.3d 937 (2009). The standard for review of a court's decision to admit evidence is abuse of discretion. Id. Courts rely on and give effect to an evidence rule's plain language and meaning if its text is clear on its face. City of Bellevue v. Hellenthal, 144 Wn.2d 425, 431, 28 P.3d 744 (2001).

Rule 801(d)(1) reads in pertinent part:

Statements Which Are Not Hearsay. A statement is not hearsay if --

(1) *Prior Statement by Witness.* The declarant testifies at the trial or hearing and is subject to cross examination

concerning the statement, and the statement is . . . (iii) one of identification of a person made after perceiving him; . . .

“This rule, read literally, is dispositive. It excepts from hearsay treatment any statement identifying an accused made by a perceiving witness who testifies at trial and is subject to cross examination.” State v. Grover, 55 Wn. App. 252, 256, 777 P.2d 22 (1989). 801(d)(1)(iii) provides that all statements of identification of a person made after perceiving the person are not hearsay, period. State v. Stratton, 139 Wn. App. 511, 517, 161 P.3d 448 (2007) (allowing statements identifying physical characteristics of a person perceived by a testifying witness); Grover, 55 Wn. App. at 256 (admitting victim’s statement identifying assailant by name made minutes after crime occurred and without any type of lineup). It does not matter whether the witness makes the statement of identification after seeing the person commit the crime at the crime scene or after seeing the person at a lineup or showup. A statement identifying the culprit is a statement identifying the culprit. ROBERT H. ARONSON, THE LAW OF EVIDENCE IN WASHINGTON 801-28, 801-29 (4th ed. 2008).

Appellant argues that “The officers’ statements identifying Mr. Macias as having a gun were inadmissible **because Mr. Alires made no such identification.**” (Opening brief, p. 8) (emphasis added). He then points to the record of Mr. Alires’s trial testimony. (Id.). However, the statements at issue were not made at trial, but rather, *prior* to trial. As such, there is no expectation or requirement that the statements be in the record of Mr. Alires’s trial testimony. Statements of identification can be

made at any time, not just during a trial. Here, there was ample evidence that statements of identification were in fact made **before** the trial.

Regarding out-of-court statements of identification made in this case by Mr. Alires, Deputy Shepard testified as follows

PROSECUTOR: And did you talk to Mr. Alires concerning a person by the name of Gilberto Macias?

SHEPARD: Yes, we did.

PROSECUTOR: Did you ask Mr. Alires if he knew was driving the SUV that was stopped?

SHEPARD: Yes. We did.

PROSECUTOR: And did he tell you who was driving the vehicle?

SHEPARD: Yes. He did.

PROSECUTOR: What name did he give you?

SHEPARD: Gilberto Macias.

PROSECUTOR: Now did you happen to ask Mr. Alires about a firearm that was located in the area of the investigation where the SUV was stopped?

SHEPARD: Yes.

PROSECUTOR: And did Mr. Alires tell you if he knew who had possession of that firearm?

SHEPARD: Yes, he did.

PROSECUTOR: And did he give you a name?

SHEPARD: Gilberto Macias.

(RP 232-33). Under the rules of evidence, this is a classic statement of identification of a person “after perceiving the person.” ER 801(d)(1)(iii). The rule requires that Mr. Alires also testify at trial, and he did so. The trial court, then, properly interpreted the rule and did not abuse its discretion by admitting Deputy Shepard’s testimony as a prior statement of identification by a witness.

Mr. Alires also made statements to Sergeant Russell that fall under this rule. The pertinent parts of his testimony are as follows:

PROSECUTOR: Now I wanted to just ask you Sergeant Russell. In talking to Mr. Alires did you ask him about who was driving the vehicle that was being pursued?

RUSSELL: I did.

PROSECUTOR: And the vehicle that was being pursued. Was he able to tell you who the person was that was driving that vehicle?

...

RUSSELL: He was able to point him out to me.

PROSECUTOR: And did he give you a name?

RUSSELL: He did not know the name of the individual that was driving. But when he saw him he pointed him out to me.

PROSECUTOR: And when he pointed this individual out to you, your saying that he did not recall the individual's name.

RUSSELL: That's correct.

PROSECUTOR: And the individual that he pointed out. Did you see that person? On that day that you say you guys were both at the Sheriff's office.

RUSSELL: Yes I did.

PROSECUTOR: Do you see that person here in the courtroom this afternoon?

RUSSELL: Yes. I do.

PROSECUTOR: And where is he at? Is it the gentleman sitting here in front of you?

RUSSELL: It's Gilberto Macias. Seated at the defense counsel table.

...

PROSECUTOR: And in talking with Mr. Alires did you ask him any questions about who was in possession of that firearm on March 22nd?

RUSSELL: I did.

PROSECUTOR: And did he tell you if he knew who was in possession of that firearm?

RUSSELL: Yes. He said he knew.

PROSECUTOR: Did he give you a name?

...

RUSSELL: He again could not give me a name but pointed the individual out when he saw him.

PROSECUTOR: And what individual was that?

RUSSELL: That was Mr. Gilberto Macias.

(RP 244-246).

Like the statements made to Deputy Shephard, the statements made to Sergeant Russell fall clearly within the scope of ER 801(d)(1).

The Appellant alludes to the fact that Mr. Alires has credibility issues, since he was uncooperative at the time of trial. However, that is not a sufficient basis to find that the statements of identification were erroneously admitted.

The Supreme Court has held that statements of identification are admissible even if the witness cannot make identification at the time of trial. In a federal case, United States v. Owens, 484 U.S. 554, 98 L. Ed. 2d 951, 108 S. Ct. 838 (1988), the Supreme Court construed the federal equivalent of ER 801(d)(1)(iii). In Owens, a correctional counselor at a federal prison was brutally beaten by an inmate with a metal pipe. 484 U.S. at 556. As a result of his injuries, the counselor's memory was severely impaired. Id. A week after the attack, he couldn't name his attacker when interviewed by an FBI agent. Id. In an interview a few weeks later, however, the victim named his attacker and identified him from a photomontage. Id. At trial, the victim remembered making an identification when he was in the hospital but testified that he did not remember seeing his assailant. Id. The Supreme Court held that the victim's prior statements of identification to the FBI agent were not hearsay under Fed. R. Evid. 801(d)(1)(C) and that his memory loss did not violate the cross examination requirement contained in the rule. 484 U.S. at 564.

The Supreme Court also held there was no violation of the defendant's right of confrontation since the declarant was in court and

subject to cross examination. Id. The defendant claimed his right to cross examination was frustrated by the witness's memory loss. In response, the Court stated that the confrontation clause guarantees only an opportunity for effective cross examination, not cross examination effective in whatever way and to whatever extent the defense might wish. Id. at 559. The Court explicitly rejected the view of the court of appeals that such testimony must be examined for indicia of reliability, or particularized guarantees of trustworthiness, writing "[w]e do not think such an inquiry is called for when a hearsay declarant is present at trial and subject to unrestricted cross-examination." Id. at 560.

Washington cases have taken a similar view. See, e.g., State v. Simmons, 63 Wn.2d 17, 385 P.2d 389 (1963); State v. Guloy, 104 Wn.2d 412, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020 (1986); Grover, 55 Wn. App. at 258, State v. Cooley, 48 Wn. App. 286, 738 P.2d 705 (1987) (no additional indicia of reliability required to be shown under the confrontation clause when the child declarant testified at trial and was subject to cross examination).

In State v. Simmons, two eyewitnesses to a robbery could not identify the defendant at trial, but had identified him in a police lineup. 63 Wn.2d at 17. The trial court admitted into evidence three photos of the lineup in which the identifications were made. Id. at 18. On appeal, the court held that the photos were properly admitted as proof that Simmons participated in the robbery. Id. at 19. Since the witnesses were available

for cross examination, the common hearsay dangers were not present and confrontation rights were not violated. Id. at 22.

In this case, the State subpoenaed Mr. Alires for trial without a cooperation agreement and Mr. Alires was not a cooperative witness. (RP 198-99, 201). He testified that he was not in court on his own free will. (RP 198). He said that he did not want to testify and was not going to answer any questions. (RP 198). When asked why, Mr. Alires said that he didn't really remember and didn't want to talk about it. (RP 199). He said that he knew the defendant but not his name. (RP 199). He testified that 5 males were in the car, but when asked at trial if the defendant was one of the other 5 males involved, Mr. Alires said: "I don't know. I'm telling you I don't want to answer any questions." (RP 200-1). He later admitted that Macias was one of the other 5 males. (RP 205, 207).

For obvious reasons, the prosecutor was granted permission to treat Mr. Alires as a hostile witness. (RP 206). Mr. Alires admitted that he did point out Macias as the driver of the car to law enforcement. (RP 209). Mr. Alires testified, however, that he did not know *who* the driver was and denied saying that he believed the driver had the firearm in his possession. (RP 209-10, 212). And at trial, Mr. Alires claimed he did not remember talking to officers about a firearm. (RP 210).

These facts do not change the admissibility of the prior statements of identification. As indicated by case law, despite Mr. Alires's uncooperative nature on the stand, there was no violation of the

defendant's right of confrontation since Mr. Alires was in court and subject to cross examination by Macias's trial counsel.

B. The evidence was sufficient to support the convictions beyond a reasonable doubt.

A challenge to the sufficiency of the evidence is ordinarily reviewed for substantial evidence. State v. Fiser, 99 Wn. App. 714, 718, 995 P.2d 107 (2000). "Substantial evidence" is evidence sufficient to persuade a fair-minded, rational person that a finding is true. State v. Stevenson, 128 Wn. App. 179, 193, 114 P.3d 699 (2005). In a review for substantial evidence, the court views all evidence and reasonable inferences in a light most favorable to the State. State v. Thomas, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). In addition, credibility determinations are not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). The appellate court defers to the trier of fact on issues of conflicting testimony, witness credibility, and overall weight of the evidence. Id. at 874-75.

As indicated in State v. Salinas, evidence is sufficient to support a conviction if, when viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." Id. An appellate court need not be convinced of guilt beyond a reasonable doubt, but must determine only whether substantial evidence supports the State's

case. State v. Galisia, 63 Wn. App. 833, 838, 822 P.2d 303, review denied, 119 Wn.2d 1003, 832 P.2d 487 (1992).

Here, there was substantial evidence to support all of the elements of the crimes charged. The elements of Attempting to Elude were correctly set out in Jury Instruction No. 20. (CP 141). At trial, Appellant claimed that he was not the driver of the fleeing car, but was a mere passenger. However, there was substantial evidence that he was the driver. Despite being a hostile witness, Mr. Aires admitted at trial that he pointed Macias out as the driver. (RP 209). Two officers testified that Mr. Aires made statements identifying the driver as Macias. (RP 227-33, 246).

And on top of that, Macias was identified by Officer Johnson as the driver who was attempting to elude the police. (RP 284, 292). She testified that she had direct eye contact with the driver. (RP 285). When asked how long she got a view of the driver, she indicated, “[i]nside the vehicle, I’d say approximately a half a block.” (RP 285-6). When the 5 males were arrested, she identified Macias as the driver with absolute certainty. (RP 291). In court, she identified Macias again by his photo and also through an in-court identification. (RP 292). When asked to indicate her certainty of her identification, she testified as follows:

PROSECUTOR: And Officer Johnson just for the record, how sure are you that the person that you’ve identified this morning and the person you saw on the scene are the same person that was driving the SUV on March 22, 2012?

JOHNSON: 100% sure.

(RP 292).

Appellant argues that the identification was made from a half-block away. That is incorrect, however. Officer Johnson had her vehicle maneuvered in an attempt to block him—he was traveling the opposite direction, coming right at her. (RP 295). The testimony was that she *first* identified him when he was about a half-block away but she continued to look at him as he went right past her. (RP 295). On cross-examination, she testified that she had a direct view as the driver passed her going about 30 miles per hour. (RP 295). She was going north bound and he was coming south bound. (RP 295). She testified “so I had a direct view as he passed.” (RP 295).

Appellant also claims that there is insufficient evidence that he possessed a firearm. Jury instructions 23 and 28 properly instructed the jury of the elements of unlawful possession of a firearm by a minor and possessing a stolen firearm. (CP 144, 149). Here, there was substantial evidence that he was in possession of a firearm. First of all, Macias is one of 5 males seen fleeing a home where property was stolen, including a firearm. (RP 173-4). Macias then leads police on a 16-mile vehicle pursuit reaching speeds of over 100 miles per hour during which a stolen firearm is thrown out of the vehicle. (RP 211, 286). An empty gun holster is then found in the center console, right next to where Macias was seated in the driver’s seat. (RP 335). On top of that, shortly after his arrest, Mr. Alires identified Macias as the person with the gun and he told this to two

officers, Deputy Shepard and Sergeant Russell. (RP 232, 246). This is substantial evidence to support both of the firearm charges.

Finally, Appellant argues the evidence was insufficient to find that he committed burglary in the first degree. Jury Instruction No. 7 accurately listed the elements of that offense. (CP 128). Macias denied being in the home at all. However, the homeowner, Ms. VanderMeulen, testified that 5 individuals ran out of her home with her property. (RP 173-4). She said she was certain that there were 5 of them. (RP 173). She said that they took off fast in a bigger SUV after they came out of the house. (RP 174). She didn't know any of the 5 individuals. (RP 177-78). 5 individuals were then apprehended shortly thereafter, including Macias, and he was positively identified as the driver of the SUV that fled the crime scene. (RP 285). In addition, Macias was in possession of the firearm that was stolen from inside the home. (RP 232, 246).

Furthermore, there was circumstantial evidence he was in the house –the strong odor of cat urine on his shoes. (RP 198, 234-6). The victim testified that they had a cat that would urinate outside the litter box in the basement. (RP 167). It resulted in a very strong smell. (RP 168). The smell was so strong it would stay on one's shoes after walking through the basement. (RP 198). Deputy Shepard noted the cat urine odor at the victim's home. (RP 234). He noticed that same distinct odor coming from Macias's shoes when Macias was caught. (RP 236).

His attempt to elude police is further evidence of consciousness of guilt with respect to the burglary charge. As indicated in State v. Bruton, “It is an accepted rule that evidence of the flight of a person, following the commission of a crime, is admissible and may be considered by the jury as a circumstance, along with other circumstances of the case, in determining guilt or innocence. The rationale of the principle is that flight is an instinctive or impulsive reaction to a consciousness of guilt or is a deliberate attempt to avoid arrest and prosecution.” 66 Wn.2d 111, 112, 401 P.2d 340 (1965). Here, Macias led police on a long, high-speed pursuit shortly after the burglary in order to avoid being arrested for the burglary. He then threw the gun out of the SUV in order to not get caught with stolen property from the burglary.

In sum, the State’s evidence was strong and compelling. There was overwhelming evidence of the Appellant’s guilt as to all the charges. The convictions should, accordingly, be upheld.

IV. CONCLUSION

The statements of identification were properly admitted by the trial court under ER 801(d)(1)(iii). In addition, the State proved all of the elements of each crime beyond a reasonable doubt. The conviction should be affirmed and this appeal dismissed.

Respectfully submitted this 28th day of April, 2014,



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DECLARATION OF SERVICE

I, Tamara A. Hanlon, state that on April 28, 2014, by agreement of the parties, I emailed a copy of Respondent's Brief to Mr. Kenneth Kato at khkato@comcast.net.

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 28th day of April, 2014 at Yakima, Washington.

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