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Court of Appeals
Division III
State of Washington

NO. 33344-2-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL CURTIS COLLEY,

Appellant.

DIRECT APPEAL FROM THE SUPERIOR COURT OF
FRANKLIN COUNTY

BRIEF OF RESPONDENT

Respectfully submitted
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I. IDENTITY OF RESPONDENT

The State of Washington, represented by the Franklin County Prosecutor, is the Respondent herein.

II. RELIEF REQUESTED

Respondent asserts no error of constitutional magnitude occurred in the trial of the Defendant, and asks this Court to affirm his convictions.

III. ISSUES FOR REVIEW

- A. DID THE TRIAL COURT ABUSE ITS DISCRETION IN ADMITTING EVIDENCE DURING THE TRIAL: A WALGREENS RECEIPT, INFORMATION ABOUT A BLACK HYUNDAI AND ITEMS LOCATED THEREIN, AND A BLACK SKI MASK?
- B. WAS THE PROVINCE OF THE JURY INVADED WHEN DEPUTY CLIFTON CONNER TESTIFIED THAT DEFENSE WITNESS ADEL ESTRADA WAS NOT HONEST ABOUT HER NAME?

IV. STATEMENT OF THE CASE

Deputy Clifton Conner of the Franklin County Sheriff's Office was on routine patrol on New Year's Eve of 2013 when he saw a gold-colored Chevrolet Silverado with a defective headlight. (RP 69-71). The deputy was assigned to traffic detail that evening and was working overtime during the holiday weekend. (RP 69). Deputy Conner noticed that the headlight in the truck was not illuminated as it was during the hours of darkness, occurring roughly around ten in the evening. (*Id.*). The deputy pulled behind the vehicle and initiated a traffic stop. (RP 70). The vehicle did not pull over right away, passing multiple safe places to do so. (RP

71-72). Deputy Conner testified that he even had to activate his emergency siren before the vehicle pulled over. (RP 72). The Defendant was driving. (RP 72-73, 169).

Adel Estrada was in the front passenger seat. (RP 76, 169-170). Ms. Estrada provided a driver's license belonging to Miriam Osorio-Ramirez. (RP 74-76). It was clear to Deputy Conner that Ms. Estrada did not match the license she provided. (RP 75). Not only was Ms. Estrada substantially older than Ms. Osorio-Ramirez, the facial features did not match. (RP 75-76). In presenting a driver's license that was not hers, Ms. Estrada attempted to conceal her identity. Indeed, she lied about her name. (RP 76). Ms. Estrada, long before the Defendant's trial, had pleaded guilty to Identity Theft in the Second Degree as a result of her actions on December 31, 2013. (RP 176, 297).

When asked to provide his driver's license, the Defendant reached into a backpack located on the back seat. (RP 78, 175). The Defendant presented a driver's license with the name Christopher Jacob Brunetti as his own. (RP 79-80). The Defendant did not match Mr. Brunetti's driver's license picture (RP 79), and told the deputy his name was "Carlos." (RP 80). Unfortunately for the Defendant, Deputy Conner recognized him as he had given him a courtesy ride approximately six months prior. (RP 81-82). The deputy asked the Defendant to step out of the vehicle and requested additional units. (RP 82-83). Deputy Conner had to ask the Defendant multiple times to exit the vehicle and multiple times to put out a

cigarette he was smoking. (RP 83). The Defendant ultimately acknowledged that his true name was Michael Colley. (RP 83-84).

The pickup truck at issue in this case was towed to a secure location in Franklin County. (RP 86, 116). Deputy Conner obtained a warrant and executed a vehicle search on January 4, 2014 (RP 117-118). He located a receipt from Walgreens on Court Street. (RP 149). The receipt was for December 31, 2013 with a transaction time of 9:57 p.m. (*Id.*). Items from the receipt were found in the vehicle—a Camel crush cigarette box, a New Year's Eve hat, and a headband. (RP 125-126, 150).

A SKS rifle was located on the floorboard of the back seat. (RP 127, 129, 171). A handgun was located on the passenger side floorboard. (RP 128-129). Both firearms were operational. (RP 136-138). The backpack the Defendant reached into to obtain Brunetti's driver's license also contained a lighter, loose firearm ammunition, three loaded handgun magazines, and four fake mustaches. (RP 131-133). Ammunition that matched the rifle was located within the backpack. (RP 140-141). A black ski mask was located in the backseat of the vehicle (RP 164), along with a crowbar and a large set of bolt cutters. (RP 164, 166).

Christopher Brunetti testified that in December of 2013 he was living with his parents at 838 South Garza Road in Othello, and that they shared a mailbox. (RP 49). He was honeymooning in the Dominican

Republic from approximately December 29, 2013 through January 5th or 6th of 2014. (RP 49-50). Before he left, he had ordered a driver's license from the Department of Licensing. (RP 50). He never received that license (RP 50-51), but identified it in court as the one Deputy Conner had seized from the Defendant. (RP 51, 79, CP 36 (Exhibit 2)). Aside from his license, Mr. Brunetti had two checks stolen from him that were supposed to have arrived in the mail. (RP 53-55). No one had permission to use Mr. Brunetti's driver's license; he did not know the Defendant. (RP 55).

Daniel Eilers testified that in December of 2013 he lived in Royal City, Washington. (RP 57). In late November or early December of 2013 he noticed that three of his firearms were stolen from his home (RP 57-58), one of them being a SKS rifle (7.62 x 39 round). (RP 58). He identified his handgun during the trial (RP 59, CP 36 (Exhibit 12)) as well as his rifle (RP 62-63, CP 36 (Exhibit 15)). No one had permission to have either of Mr. Eilers' firearms; he did not know the Defendant. (RP 63, 65).

Emiliano Martinez testified that he owned a 2006 silver Chevrolet Silverado. (RP 39-40). He was contacted by law enforcement on January 1, 2014 inquiring whether his truck was stolen. (RP 40-41). He provided the license plates on his truck to the police, at their request. (RP 41-42). The license plates that had been put on his truck were B1351W. (RP 43). Those plates did not belong to his vehicle (RP 43), and were

switched to his truck without his permission. (RP 46). In court he identified his actual license plates—B24611Z. (RP 43-44). No one had permission to take Mr. Martinez's license plates; he did not know the Defendant. (RP 44).

Jose Gaciola testified that he owned a 2004 gold Chevy Silverado. (RP 100). He indicated that on December 30, 2013 he left his truck running outside his daughter's house in Othello. (RP 100-101). He went inside the residence, and when he came back out, his truck was gone. (*Id.*). He reported his stolen vehicle to police. (RP 101). He identified his vehicle from photographs (RP 101, CP 36 (Exhibit 3)), but indicated that the license plates on the vehicle were not his. (RP 101, CP 36 (Exhibit 5)). No one had permission to take his truck, and Mr. Gaciola did not know the Defendant. (RP 102-103).

Deputy Darryl Barnes from the Adams County Sheriff's Office testified that on January 3, 2014 he was dispatched to a suspicious vehicle. (RP 208). The black-colored Hyundai had a window smashed out of the driver's side front door. (RP 209). It was missing a front license plate. (*Id.*). The owner granted permission to search the vehicle. (RP 215). Dominion for Ms. Estrada was found inside (RP 219), as was a Camel crush cigarette box (RP 228), and mail addressed to 31 separate businesses or individuals (RP 229-230), including Christopher J. Brunetti at an address of 838 Garza Road in Othello. (RP 230).

The Defendant was charged by Information with Possessing a Stolen Motor Vehicle, RCW 9A.56.068, Identity Theft in the Second Degree, RCW 9.35.020(1) AND (3), Making a False or Misleading Statement to a Public Servant, RCW 9A.76.175, and Possessing Stolen Property in the Third Degree, RCW 9A.56.170. (CP 101-102). A Count of Unlawful Possession of a Firearm in the Second Degree was also joined for trial. (RP 368). The trial court, Hon. Alexander Ekstrom, dismissed a count of Possession of a Stolen Firearm on the Defendant's motion prior to the jury considering it.¹ (RP 280, 368-369). The Defendant was convicted of the remaining five counts. (CP 31-35). It is from this decision that he appeals, challenging his convictions for Possessing a Stolen Motor Vehicle and Possession of Stolen Property in the Third Degree (for the license plates). (Brief of Appellant, (BOA) at 15).

V. ARGUMENT

A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING EVIDENCE DURING THE TRIAL.

i. The Walgreens receipt

The Defendant challenges the admission of the Walgreens receipt, Exhibit 17 (CP 36), at trial on hearsay and relevance grounds. (BOA at 7-10). Relevant evidence is "evidence having any tendency to

¹ The dismissed count related to the handgun. The Unlawful Possession of a Firearm Count that remained related to the SKS rifle.

make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” ER 401. The receipt is relevant in that it showed a purchase of camel crush cigarettes which were the exact same brand located in the black Hyundai (Exhibit 44, CP 36); the same Hyundai that contained mail from thirty one separate businesses or individuals—*none of which were the Defendant.* (RP 229-230).

A piece of mail located in the black Hyundai was addressed to a Christopher J. Brunetti (RP 230). The driver’s license the Defendant provided when he was stopped was of Christopher (Jacob) Brunetti. (RP 79-80). Not only did the receipt help link the Defendant to both the suspicious black Hyundai and the stolen Chevy Silverado by his choice of cigarette brand, the stolen mail in the black Hyundai and the stolen driver’s license the Defendant presented stood for the proposition that this case was not just some “mere coincidence” but that the Defendant acted knowingly and with criminal intent. (RP 228-229). The receipt was relevant on the issue of Identity Theft in the Second Degree. This was a circumstantial case, albeit a strong one.

Hearsay is defined by ER 801(c) 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.” Arguably this Court could determine that the receipt was hearsay even though the State offered it principally to show a time and location-based relationship

between the Defendant and the area of Pasco that he was stopped by Deputy Conner, as well as a relationship to him and the specific camel crush brand of cigarettes. (RP 149-150).

In admitting the exhibit, the trial court was assured of the Walgreens receipt's authenticity. (RP 226). Indeed:

[i]n this case the document lists an address in the City of Pasco. It lists the purchase of an item found in the vehicle, the Camel Crush king box. The timing of the theft of the vehicle and the finding of the vehicle, combined with the presence of an item purchased I believe establishes sufficient foundation for the admission of the document, and I will allow its admission.

(RP 148-149). The receipt corroborates physical items found in the stolen truck. It is undisputed that items on the receipt—namely a New Years' Eve hat, a flashing headband, and the camel crush cigarettes were all located in the vehicle during the search warrant's execution (RP 150), and were observable in a series of photographs that were admitted (without objection) collectively as Exhibit 6. (CP 36, RP 124-125).

The Walmart receipt that was excluded from evidence was “generated at law enforcement request” which caused the court to draw a distinction between the Walgreens receipt that was found pursuant to a search warrant and the Walmart receipt that was prepared in anticipation of litigation. (RP 226-227). The State likened the receipt to a photograph or a notebook with writing on it (RP 148). It was a document that was left by the occupants and found in the vehicle.

The receipt could also be viewed as an admission of a party opponent, therefore excluded from the hearsay rule. ER 801(d)(2)(ii) allows admission of “a statement of which the party has manifested an adoption or belief in its truth.” The Defendant’s decision to retain the receipt so that it was in the stolen Silverado at the time of his arrest manifests his adoption of its contents. In *United States v. Marino*, 658 F.2d 1120, 1124-25 (6th Cir. 1981), the defendant was deemed to have adopted the contents of airline tickets and motel receipts that were found in his possession. “Just as silence in the face of an accusation may constitute an admission to its truth, possession of a written statement becomes an adoption of its contents.” *Id.* at 1125. See also *United States v. Caniesco*, 470 F.2d 1224, 1232 n. 8 (2nd Cir. 1972).

The principal aim of admitting the receipt to show the circumstantial relationship between Walgreens and the area of Pasco the Defendant was stopped in was already proven when Deputy Conner testified that it was “reasonable” that someone could travel from the Walgreens at 20th [Avenue] and Court [Street] to the area of the traffic stop in a matter of minutes. (RP 149-150). The jury was apprised that the Defendant was the driver of the Silverado (RP 72-73, 169), and that he eventually admitted that his true name was Michael Colley (RP 83-84). The receipt also went to show the relationship of the Defendant to Ms. Estrada being that they reasonably shared the items they bought. Ms. Estrada

“The decision to admit evidence lies within the sound discretion of the trial court and should not be overturned on appeal absent a manifest abuse of discretion.” *State v. Bourgeois*, 133 Wash.2d 389, 399, 945 P.2d 1120 (1997) (citing *State v. Crenshaw*, 98 Wash.2d 789, 806, 659 P.2d 488 (1983)). Similarly, non-constitutional error is harmless “unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred.” *State v. Anderson*, 112 Wn. App. 828, 837, 51 P.2d 179 (2002) (quoting *State v. Bourgeois*, *Supra* at 403, 945 P.2d 1120 (1997)).

There was not a manifest abuse of discretion as it relates to the admission of the Walgreens receipt. Because the admission of the receipt could not have affected the outcome of the trial, there was no prejudice to the Defendant especially where the items on the receipt were independently depicted in photographs that were admitted as exhibits and where Ms. Estrada admitted to going to Walgreens with the Defendant. (RP 309).

ii. Testimony regarding the black Hyundai

Ms. Estrada testified that she “used to” smoke Marlboro cigarettes but denied smoking camel crush cigarettes. (RP 310; 319). There were only two people in the Silverado when it was stopped, and Deputy Conner had to tell the Defendant multiple times to put out the cigarette he was smoking. (RP 83). If Ms. Estrada is to be believed, the specific kind of cigarettes located in both vehicles (the Silverado and the Hyundai)

belonged to the Defendant. The relevance of the linking the two vehicles as they relate to the stolen mail and stolen driver's license of Mr. Brunetti is fully discussed above.

The Defendant argues that "the clear implication was that the State had some information implicating Mr. Colley in an uncharged crime which suggested he was a thief and had acted in conformity with such a character trait." (BOA at 11). The State did nothing of the sort and though the Defendant is indeed a thief and most likely (with Ms. Estrada's help) stole mail from Mr. Brunetti's mailbox (including his license), stole Mr. Gaciola's Silverado, stole and switched Mr. Martinez's license plates, and burglarized Mr. Eilers' home, stealing three firearms in the process, the State never argued those things because they cannot be proven in court beyond a reasonable doubt.² The State was extremely careful in closing argument not to insinuate anything that was not proven; though the Defendant was linked to the Hyundai there was never an invitation made by the State inviting the jurors to speculate that the Defendant had stolen the Hyundai, or the mail, or the driver's license, or the truck, or the plates, or the firearms. (RP 332-347; 359-361) It is not error to argue that this is not all some grand coincidence. (RP 361).

The Defendant's hesitancy to pull over quickly combined with lying about his name, presenting a stolen driver's license, and failing to follow

² Though not admitted in court, the black Hyundai was also stolen out of Adams County. One license plate was missing and the plate that remained on the vehicle had been switched as it did not belong on the vehicle.

law enforcement commands was surely enough that a rational fact finder could infer both that he knew the truck was stolen and that the plates had been switched in an effort to conceal the truck's true identity. (RP 340-341). Again, because the testimony about the black Hyundai did not involve a constitutional issue, the standard is whether there was a manifest abuse of discretion. There was not. Because the testimony about the black Hyundai could not have affected the outcome of the trial, there was no prejudice to the Defendant.

iii. The black ski mask

The Defendant challenges the admission of the black ski mask as irrelevant. (BOA at 10). The mask was admitted into evidence, over defense objection, as Exhibit 21. (RP 163-164; CP 36). The mask itself was not ER 404(b) evidence as there were no "crimes, wrongs, or acts" that the rule requires. ER 404(b). Having a ski mask, in and of itself, is not criminal and it bears repeating that this traffic stop and investigation occurred on December 31 of 2013. It is also not criminal to have fake mustaches, or a crowbar, or large bolt cutters—all of which were admitted into evidence. (Exhibit 9, 20, and 19, respectively. CP 36). The mustaches were admitted without objection. (RP 132). Though defense counsel had an issue with the terms "safekeeping," the crowbar and bolt cutters themselves were similarly admitted without objection. (RP 165-166).

The adept Jury independently analyzed an admitted exhibit (Exhibit 6) and discovered pliers and a bolt that could be used to remove or install license plates; something neither attorney brought up during the trial. (CP 36, 39). As juries go, this one was both intelligent and critical; they understood the importance of analyzing and examining everything since this was a circumstantial case. There were over thirty pieces of evidence admitted during this trial, the ski mask being no more prejudicial than the firearms and ammunition, for example. The Defendant is unable to show a manifest abuse of discretion. Because the admission of the ski mask could not have affected the outcome of the trial, there was no prejudice to the Defendant.

B. THE PROVINCE OF THE JURY WAS NOT
INVADED WHEN DEPUTY CONNER
COMMENTED ON ADEL ESTRADA'S LACK OF
HONESTY.

The Defendant alleges prosecutorial misconduct due to the Prosecutor asking Deputy Conner whether Ms. Estrada was honest about her name. (BOA at 12-13). As a practical matter, the crime of Making a False or Misleading Statement to Law Enforcement is a crime of dishonesty. It requires a person to "knowingly [make] a false or misleading material statement to a public servant." RCW 9A.76.175. Just as it was true for the Defendant, Ms. Estrada's underlying crime for Identity Theft in the Second Degree was Making a False or Misleading Statement to Law Enforcement by not only lying about her name, but

presenting another's means of identification to conceal her identity. And to be clear, Ms. Estrada absolutely did attempt to obstruct Deputy Conner's investigation by presenting a driver's license of Miriam Osorio Ramirez. (RP 169; 176; 310).

Though it is correct that the defense attorney objected twice initially (RP 74-75), after foundational questions establishing that the driver's license she presented clearly did not match her (either in age or physical appearance) (RP 75-76), defense counsel did not ultimately object to the question "Was Miss Estrada honest about her name?" (RP 76). Counsel for the State never outright called her a liar or a thief, *even though she is both*; her criminal record speaks for itself.

In this case, as in all criminal cases, the Jury was instructed on the applicable law. (CP 40-63). Washington Pattern Instruction 1.02 provides a guide for how a Jury can weigh credibility of witnesses:

You are the sole judges of the credibility of each witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things he or she testifies about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witnesses's statements in the context of all the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

(CP 42). The jury heard testimony that Ms. Estrada pleaded guilty to Identity Theft in the Second Degree for this incident, a fact that she admitted. (RP 297). She similarly admitted that she gave law enforcement a driver's license that was not her own. (RP 295-296). Defense counsel put in the record that she has "a fairly lengthy criminal history," to which *the State* objected. (RP 297-298). If it was the State's intention to commit purposeful misconduct, the prosecutor would not have attempted to preserve Ms. Estrada's rights as a witness. Regardless, the jury heard that she'd previously been convicted of unlawful collection of a debt (RP 299), theft in the second degree (*Id.*), and aiding and abetting bank fraud (RP 299-300).

She took the Fifth *twenty separate times* while testifying, both to questions of the prosecutor and to defense counsel. (RP 309-318). As previously stated, this was an intelligent jury; they were no doubt able to form their own opinion of Ms. Estrada's testimony independent of the one question the Defendant complains of now. As previously stated, defense counsel did not ultimately object to the question. The issue of prosecutorial misconduct, therefore, is waived unless the misconduct was "so flagrant and ill-intentioned as to create prejudice incurable by instruction." *State v. Klok*, 99 Wash.App. 81, 84, 992 P.2d 1039 (2000) (*citing State v. Belgarde*, 110 Wash.2d 504, 507, 755 P.2d 174 (1988)). The Defendant cannot meet that very high burden. Any resulting prejudice from the single solitary question the Defendant has an issue

with would be prejudice against Ms. Estrada and not in any way against the Defendant himself. Perhaps he should have considered his former co-defendant's complete lack of credibility before choosing to call her as a witness on his behalf.

VI. CONCLUSION

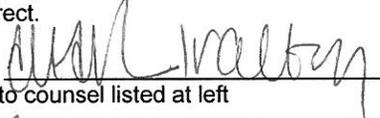
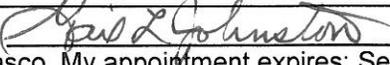
Based on the foregoing, the State respectfully requests that this Court affirm all of the Defendant's convictions: Possessing a Stolen Motor Vehicle, Identity Theft in the Second Degree, Making a False or Misleading Statement to Law Enforcement, Possession of Stolen Property in the Third Degree, and Unlawful Possession of a Firearm in the Second Degree.

Dated this 25th day of March, 2016.

Respectfully submitted,
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 Prosecuting Attorney



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 Deputy Prosecuting Attorney

Affidavit of Service	Janet Gemberling admin@gemberlaw.com jan@gemberlaw.com	A Legal Secretary by the Prosecuting Attorney's Office in and for Franklin County and makes this affidavit in that capacity. I hereby certify that a copy of the foregoing was delivered to opposing counsel by email per agreement of the parties pursuant to GR30(b)(4). I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Dated 25th day of March 2016, Pasco WA  Original e-filed at the Court of Appeals; Copy to counsel listed at left
Signed and sworn to before me this 25th day of March 2016  Notary Public and for the State of Washington residing at Pasco My appointment expires: September 9, 2018		