

FILED
DEC 13, 2016
Court of Appeals
Division III
State of Washington

No. 34078-3-III

IN THE COURT OF THE APPEALS
OF THE STATE OF WASHINGTON

DIVISION III

THE STATE OF WASHINGTON, Respondent

v.

ZACHARY R. ROY, Appellant.

AMENDED BRIEF OF RESPONDENT

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I. ISSUES

1. WAS THE STATEMENT MADE BY MS. ROY HEARSAY REQUIRING AN OBJECTION BY THE RESPONDENT?
2. DID THE COURT CORRECTLY CONCLUDE THAT THE ONLY LOGICAL SOURCE OF THE MONEY WAS FROM MS. ROY'S BANK ENVELOPE WHEN THE COURT FOUND THE RESPONDENT'S TESTIMONY TO NOT BE CREDIBLE?
3. DID THE COURT ABUSE ITS DISCRETION BY FAILING TO CONSIDER AN OPTION B SUSPENDED SENTENCE ALTERNATIVE?

II. ARGUMENT

1. THE STATEMENT MADE BY MS. ROY WAS NOT HEARSAY, THEREFORE NO OBJECTION WAS WARRANTED.
2. THE COURT CORRECTLY CONCLUDED THAT EVIDENCE SHOWED BEYOND A REASONABLE DOUBT THAT THE EIGHT HUNDRED DOLLARS BELONGED TO MS. ROY BECAUSE THE COURT DID NOT FIND ZACHARY R. ROY'S EXPLANATION CREDIBLE.

3. THE COURT'S ERROR IN BELIEVING IT DID NOT HAVE DISCRETION TO CONSIDER AN OPTION B SUSPENDED SENTENCE WAS HARMLESS BECAUSE THE COURT SUBSEQUENTLY FOUND A STANDARD RANGE SENTENCE TO BE APPROPRIATE AND THE COURT WOULD NOT HAVE GRANTED AN OPTION B SUSPENDED SENTENCE.

III. STATEMENT OF THE CASE

Factual History

On October 9, 2016, Zachary R. Roy was living with his maternal grandmother, Teresa Roy, at her home in Clarkston, Asotin County, Washington. 1RP at 17.¹ After Zachary R. Roy went to school that day, Ms. Roy smelled marijuana from Zachary R. Roy's room and entered it to investigate. 1RP at 18-19. While investigating the source of the smell, Ms. Roy noticed the wallet she gave Zachary R. Roy sticking out from his pillow. 1RP at 19. Ms. Roy opened Zachary R. Roy's wallet and found eight hundred and eighty two dollars inside. 1RP at 20.

¹The Appellant has chosen to refer to the verbatim report of proceedings as 1RP for the Fact Finding on February 5, 2016 and 2RP for the Disposition on February 10, 2016. The Respondent will use the same reference for clarity.

Ms. Roy became concerned because Zachary R. Roy should not have that much money in his wallet. Id. She thought he might have stolen the money. 1RP at 20-21 She proceeded to her home office to check her bank envelope. Id. Ms. Roy found that her bank envelope had been moved from where she had hid it and that a number of hundred dollar bills were missing. 1RP at 21. Ms. Roy had previously spoken with Zachary R. Roy about him not taking money from her after she has previously caught him taking money from her office. Id.

Ms. Roy investigated her office and found several objects moved around and a window that appeared to be locked but in fact was not. 1RP at 24. Based upon what she had observed, Ms. Roy contact Zachary R. Roy's Probation Officer, Vonda Campbell², and then called the police. 1RP at 24.

When Zachary R. Roy came home from school he came out of his room upset. 1RP at 25. Ms. Roy told Zachary R. Roy that she knew he took her money. 1RP at 26. Zachary R. Roy denied taking Ms. Roy's money. Id. Zachary R. Roy never inquired with Ms. Roy why she took his money from his wallet. 1RP at 36-37.

²Ms. Roy stated in her testimony that Zachary R. Roy's Juvenile Probation Officer was Vonda Kelly. This is a misstatement by Ms. Roy. The Asotin County Juvenile Probation Officers are Vonda Campbell and Kelly Ryan.

Procedural History

1. Fact Finding

Zachary R. Roy was charged with one count of Residential Burglary and one count of Theft in the Second Degree. CP at 8-9. Ms. Roy testified at trial. During Ms. Roy's direct examination the following testimony was given regarding how Ms. Roy determined her money was stolen:

Q: And when you went in – when you went in there after you were in [Zachary R. Roy]'s room where was the envelopes you had your money in?

A: It was in the back of the file cabinet. I – It has a thing you bring up to put your file folders and then a little empty space in the back. It was – in the empty space.

Q: And, did you notice anything else about the condition of your room?

A: Yeah. I checked – I went around and tried to figure out – because my mother had said he'd been going around the outside of the house, to figure out how he would have got in. And, that's when I found that the window looked locked but it wasn't. So, – I have since put a stick in that window, too.

Q: Did you note anything else about the objects in your room?

A: Well they'd been moved around. I mean, I could tell that my money'd been moved around, but – Other than that I could tell somebody had been in the window.

1RP at 24. No objection was raised to this line of questioning.

On cross-examination, Ms. Roy testified that she did give Zachary R. Roy an allowance of five dollars a week if he kept his

room clean and other small amounts of money for doing chores around the house. 1RP at 31-33. Ms. Roy also testified that she usually gave him the five dollars even if his room wasn't clean, but that he usually owed her his allowance for borrowing it the week before. 1RP at 33.

Zachary R. Roy also testified at Fact Finding. He testified that the money in his wallet belonged to him not Ms. Roy and that he had been saving it for months. 1RP 41-46. He testified that he received five to ten dollars a week in allowance while he lived with Ms. Roy. 1RP at 41. He claimed that he had sold his X-box and games for one hundred and fifty dollars. 1RP at 42. He spent five to ten dollars a month on soda. 1RP at 42. He also testified that he converted the money into one hundred dollar bills to make it harder to lose. 1RP at 43. On cross-examination Zachary R. Roy testified that he believed Ms. Roy stole his money, but that he did not call the police to report the theft. 1RP at 51.

After the conclusion of the Fact Finding the Court found Zachary R. Roy guilty as charged. 1RP at 67-69. The Court found Zachary R. Roy's testimony that he had been saving all his money to not be credible. 1RP at 68. The Court further found that Zachary R. Roy's testimony that if the money was stolen from him that he would not report it to law enforcement to not be credible. 1RP at 69. The

Court found based upon the evidence that the money found in Zachary R. Roy's wallet belonged to Ms. Roy. 1RP at 68-69. The Court entered written Findings of Fact. CP 10-13.

2. Disposition

At Disposition the Court heard arguments from both sides. The State argued for a standard range disposition of fifty-two to sixty-five weeks for the Residential Burglary and fifteen to thirty-six weeks for the Theft in the Second Degree. The State further argued that the offenses do not merge because one of the offenses was a burglary. 2RP at 3-5. The State also argued that a standard range disposition was appropriate as a finding of manifest injustice upward or downward was not appropriate. 2RP at 5. The State finally argued that based upon Zachary R. Roy's lengthy criminal history that an Option B Suspended Sentence was not be appropriate.

Zachary R. Roy argued that the State was correct in its calculation of the standard range, but that the Court should grant Zachary R. Roy an Option B Suspended Sentence. 2RP at 5-6. Zachary R. Roy argued that an Option B Suspended Sentence would be a huge weight to ensure that Zachary R. Roy does not commit other offenses. 2RP at 7.

In response, the State argued that Zachary R. Roy was not eligible for an Option B Suspended Sentence due to his conviction of

Residential Burglary. 2RP at 8. The Court reviewed the applicable statutes and agreed with the State's position. 2RP at 9.

The Court after hearing all arguments imposed the standard range sentence for both offenses. 2RP at 10. The Court specifically found that:

the Option B Alternative does not apply to this case because [Zachary R. Roy] was convicted of residential burglary, and specifically under the statute, 13.40.0357(c)(b)(iii) residential burglary would make him ineligible for the Option B Alternative.

2RP at 10. The Court went on further to find that the standard range was appropriate and that the Court saw no reason to go above or below the standard range. "Thus I will impose the standard range upon [Zachary R. Roy]. I see no reason to go above or below. And that will be my order." 2RP at 11.

IV. DISCUSSION

1. THE STATEMENT MADE BY MS. ROY WAS NOT HEARSAY, THEREFORE NO OBJECTION WAS WARRANTED.

Zachary R. Roy contends that his trial counsel was ineffective for failing to object to a statement made by Ms. Roy during her direct examination. The argument is that this statement was inadmissible hearsay and Zachary R. Roy's trial counsel's failure to object constituted ineffective assistance of counsel and requires reversal of his conviction.

Zachary R. Roy's argument lacks merit. The statement made by Ms. Roy was not hearsay and, therefore, Zachary R. Roy's trial counsel had no grounds to object. With Zachary R. Roy's trial counsel having no grounds to object, his failure to object was not ineffective assistance.

For a statement to be considered hearsay it must be "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." ER 801(c). Statements that are not made to provide the truth of the matter asserted are non-hearsay and generally admissible. "A statement is not hearsay if it is used only to show the effect on the listener, without regard to the truth of the statement." State v. Edwards, 131 Wn. App. 611, 614, 128 P.3d 631 (2006) (Div. III) (*citing* State v. Roberts, 80 Wn. App. 342, 352-53, 908 P.2d 892 (1996) (Div. I); State v. Jessup, 31 Wn. App. 304, 314-15, 641 P.2d 1185 (1982) (Div. I)). While hearsay is inadmissible unless an exception applies, non-hearsay statements are admissible, so long the statement is relevant and not excluded on other grounds. See ER 802; ER 402; ER 403. Non-hearsay statements are further admissible under Crawford. "[T]he Crawford Court explicitly excluded testimonial statements that were not introduced for the truth of the matter asserted from a Confrontation Clause analysis." State v.

Moses, 129 Wn. App. 718, 732, 119 P.3d 906 (2005) (Div. I) (*citing* Crawford v. Washington, 541 U.S. 36, 59, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004)).

The Statement made by Ms. Roy during direct examination was not hearsay. It was given to show the effect of the statement on Ms. Roy. Ms. Roy stated:

I went around and tried to figure out – because my mother has said he'd been going around the outside of the house, to figure out how he would have got in. And, that's when I found that the window looked locked but it wasn't.

1PR at 24. This statement was not admitted for the truth of the matter asserted, being that Ms. Roy's mother actually saw Zachary R. Roy going around the outside of the house, but for the statement's effect on Ms. Roy - to cause her to check the window in her office. The analysis in Jessup is illustrative of this point. In Jessup, a witness was allowed to testify that she was told "[Mr. Jessup] has struck another woman when he became angry at her." Jessup, 31 Wn. App. at 314. The statement was admitted to show why the witness "compl[ie]d with [Mr. Jessup's] request to commit prostitution" once it appeared that he was angry with her. *Id.* at 314-15. The hearsay statement was not offered to prove that Mr. Jessup actually struck another woman. *Id.* at 315. In this case, like Jessup, the statement

was admitted to show how the statement effected Ms. Roy's actions, not that Ms. Roy's mother's statement was in fact true.

Zachary R. Roy asserts that his counsel was ineffective in failing to raise an hearsay objection to the statement made by Ms. Roy. The statement made by Ms. Roy was not hearsay. It was admitted to show the effect on the listener. There was no basis for Zachary R. Roy's trial counsel to object under inadmissible hearsay, because the statement was not hearsay. Zachary R. Roy's trial counsel was effective in his assistance of Zachary R. Roy during Fact Finding. Zachary R. Roy was not prejudiced by trial counsel not objecting.

Because the statement was not hearsay there was no prejudice caused against Zachary R. Roy in trial counsel's failure to object. Since there was no basis for trial counsel to object Zachary R. Roy cannot show that the outcome of the trial would have been different had counsel objected. Since the statement by Ms. Roy was not hearsay the trial court was fully entitled to consider the statement in rendering its decision. The statement was admissible and the court was properly allowed to rely on the statement. There was no evidentiary error to challenge the trial court's findings.

2. THE COURT CORRECTLY CONCLUDED THAT EVIDENCE SHOWED BEYOND A REASONABLE DOUBT THAT THE EIGHT HUNDRED DOLLARS BELONGED TO MS. ROY BECAUSE THE COURT DID NOT FIND Zachary R. Roy'S EXPLANATION CREDIBLE.

Zachary R. Roy argues that the trial court was in error for finding that the only logical source of money was from Ms. Roy. Zachary R. Roy ignores the fact that the trial court did not find the alternatives Zachary R. Roy postulated to be credible. The reviewing court should defer to the fact-finder on issues of determining credibility of witnesses, conflicting testimony, and the persuasiveness of the evidence. State v. Thomas, 150 Wn.2d 821, 874-75, 83 P.2d 970 (2004) (*citing* State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990); State v. Cord, 130 Wn.2d 361, 367, 693 P.2d 81 (1985)). Circumstantial evidence is no less credible than that based upon direct evidence. State v. Gosby, 85 Wn.2d 758, 766, 539 P.2d 680 (1975):

[W]hether direct evidence or circumstantial evidence is more trustworthy and probative depends upon the particular facts of the case and no generalizations realistically can be made that one class of evidence is per se more reliable than the other class of evidence.

Id. “[M]any times circumstantial evidence may be more probative or reliable.” *Id.* The Court concluded that the evidence presented at trial showed that the money came from Ms. Roy.

Zachary R. Roy contends that there were other sources of where he obtained the money from and other alternatives as to what happened to Ms. Roy's money. However, this argument would require the Court to speculate that Zachary R. Roy obtained nearly the same amount of money that was missing from Ms. Roy's bank envelope on the same day that someone else, that no one saw around the outside of the house, broke into her office and stole her money. Only minimal testimony was presented that Zachary R. Roy obtained the money from selling pot³ and no evidence was presented to raise a possibility that someone else broke into Ms. Roy's office.⁴ The statement by Ms. Roy was admissible and an objection by trial counsel would not have changed the outcome of trial. The Court properly reviewed the evidence that was presented at Fact-Finding, considered all the proper inferences the evidence showed, and found that it was convinced beyond a reasonable doubt that Zachary R. Roy committed the charged offenses. The Court should deny Zachary R.

³During cross examination Ms. Roy testified that she heard rumors that Zachary R. Roy was selling pot. 1RP at 32. On direct, Zachary R. Roy denied selling marijuana. 1RP at 42. Zachary R. Roy asserts in his appeal that it is understandable that he did not admit to selling on the stand. This argument leads to the conclusion that either Zachary R. Roy committed perjury on the stand in denying selling marijuana or that he was being truthful and his argument on appeal fails.

⁴Zachary R. Roy asserts on appeal that one of his friends might have stolen Ms. Roy's money. Other than a statement that Ms. Roy had concerns about an undisclosed friend of Zachary R. Roy being a thief, no evidence was presented that any other person stole Ms. Roy's money. 1RP at 34.

Roy's claim of ineffective assistance of counsel and uphold the findings of the trial court.

3. THE COURT'S ERROR IN BELIEVING IT DID NOT HAVE DISCRETION TO CONSIDER AN OPTION B SUSPENDED SENTENCE WAS HARMLESS BECAUSE THE COURT SUBSEQUENTLY FOUND A STANDARD RANGE SENTENCE TO BE APPROPRIATE AND THE COURT WOULD NOT HAVE GRANTED AN OPTION B SUSPENDED SENTENCE.

Zachary R. Roy argues that the trial court abused its discretion in concluding that it lacked discretion by statute to consider a Suspended Disposition Alternative. Zachary R. Roy contends that he was entitled to have the trial court consider a Suspended Disposition Alternative under RCW 13.40.0357. The State concedes that, considering the last antecedent rule, that Zachary R. Roy was entitled for the trial court to consider a Suspended Disposition Alternative and that the trial court's conclusion that it did not have discretion was in error.

Such error was harmless. Based upon the record it is clear that regardless of the error the trial court would not have granted an Option B suspended sentence for Zachary R. Roy, but would have imposed the standard range sentence already in place. "Remand is not mandated when the reviewing court is confident that the trial court would impose the same sentence when it considers only valid

factors.” State v. McGill⁵, 112 Wn. App. 95, 100, 47 P.3d 173 (2002) (Div. I) (*citing* State v. Pryor, 115 Wn.2d 445, 799 P.2d 244 (1990)). In this case, it is clear from the record that the trial court would have imposed the same standard range sentence, it would not have imposed an Option B Suspended Sentence.

After the trial court erroneously concluded it did not have discretion to consider an Option B Suspended Sentence, the trial court found that a standard range sentence was appropriate and that there was no reason to go above or below the standard range. The trial court specifically found no basis to reduce Zachary R. Roy’s sentence below the standard range. While an Option B Suspended Sentence is not in fact a reduction in the sentence, by suspending all of a sentence that may never be imposed, it is in effect a substantial reduction in the imposed sentence. The trial court found no basis to even reduce slightly a sentence of sixty-seven to one hundred and one weeks of detention, let alone suspend the entire sentence. “Thus I will impose the standard range upon [Zachary R. Roy]. I see no reason to go above or below.” 2RP at 11.

At the Disposition hearing the State argued that a suspended sentence would not be appropriate due to Zachary R. Roy’s lengthy

⁵Appellant relies on In re Pers. Restraint of Mullholland, 161 Wn.2d 322, 166 P.3d 677 (2007) in their argument that remand is proper. Mullholland basis its holding on the analysis in McGill.

criminal history. 2RP at 5. The trial court based its decision to impose a standard range sentence upon Zachary R. Roy's criminal history. An Option B Suspended Sentence allows the trial court to "suspend the disposition on the condition that the offender comply with one or more local sanctions and any education or treatment requirement." RCW 13.40.0357(1). Zachary R. Roy was already on local sanction juvenile probation at the time he committed this offense. 1RP at 24-25. Prior to his conviction in this matter, Zachary R. Roy's juvenile offender score was four. CP 18. Juvenile offender scoring only goes to four points and Zachary R. Roy is "maxed" on points. RCW 13.40.0357. The imposition of local sanctions did not prevent Zachary R. Roy from committing this offense. The trial court would not have imposed local sanctions. Local sanctions have already failed to prevent Zachary R. Roy from committing crimes. The trial court would not have imposed an Option B Suspended Sentence as it would not have been in the interest of justice. Any error of the trial court in believing it did not have discretion to impose an Option B Suspended Sentence was harmless. It is clear that the trial court would not have granted an Option B Suspended Sentence. The trial court's abuse of discretion was harmless. Remand for re-sentencing is not mandated.

V. CONCLUSION

Zachary R. Roy's trial counsel was not ineffective for failing to object during the direct testimony of Ms. Roy. The statement made by Ms. Roy was not hearsay. The statement was non-hearsay admitted to show the statement's effect on the listener, Ms. Roy. There was no grounds for Zachary R. Roy's trial counsel to object to the statement. Zachary R. Roy was not prejudiced by his trial counsel. The Court should uphold Zachary R. Roy's disposition.

The statement made by Ms. Roy was non-hearsay. The statement was admissible. The trial court was fully entitled to consider the statement in reaching its finding that Zachary R. Roy was guilty beyond a reasonable doubt. No error was created in the trial court relying on admissible evidence. Zachary R. Roy's argument that the state's case was not based on substantial evidence also fails. The only evidence that someone else could have stolen the money was that an unidentified friend of Zachary R. Roy was said to be a thief. The Court did not find Zachary R. Roy credible and his testimony about alternative explanation of where the money came from fails. There is no basis to challenge the trial court's findings of fact.

The State does concede that the trial court's belief that it did not have discretion to grant an Option B Suspended Sentence was in

error. This was harmless error. It is clear from the record that the trial court was not going to grant an Option B Suspended Sentence. Zachary R. Roy already had four points on his juvenile offender score. He was already on local sanctions when he committed the offense. The trial court specifically found that a standard range sentence was appropriate and that there was no basis to go outside of the standard range. The trial court's failure to exercise its discretion that it would not exercise is harmless error because the court was going to impose the same sentence. This case does not require re-sentencing.

The State respectfully requests that the Court uphold Zachary R. Roy's convictions for Residential Burglary and Theft in the Second Degree.

Dated this 12 day of December, 2016.

Respectfully submitted,


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**COURT OF APPEALS OF THE STATE OF
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DECLARATION OF SERVICE

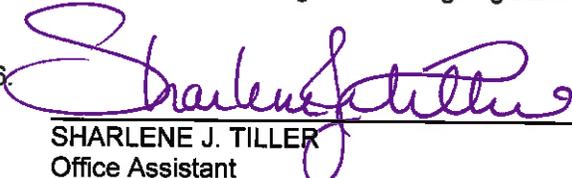
DECLARATION

On December 12, 2016 I electronically mailed, with prior approval from Mr. Grannis, a copy of the AMENDED BRIEF OF RESPONDENT in this matter to:

John P. Sloane
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I declare under penalty of perjury under the laws of the State of Washington the foregoing statement is true and correct.

Signed at Asotin, Washington on December 12, 2016.


SHARLENE J. TILLER
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