

COA No. 34637-4-III

FILED
Mar 13, 2017
Court of Appeals
Division III
State of Washington

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

WILLIE CHARLES RITCHEY,

Appellant.

BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

1. The court erred by refusing to give a limiting instruction after a police officer testified Willie C. Ritchey was being “truthful” when he stated during custodial interrogation he had taken the car key off a friend’s key ring and took the car without having permission to do so.

2. The court erred by not giving a jury instruction on the lesser included offense of second degree taking a motor vehicle without permission.

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A. Did the court err by refusing to give a limiting jury instruction when a police officer testified Mr. Ritchey was being “truthful” when he stated during custodial interrogation he had taken the car key off a friend’s key ring and took the car without having permission to do so? (Assignment of Error 1).

B. A. Did the court err by refusing to give a defense-requested jury instruction on the lesser included offense of second degree taking a motor vehicle without permission when there was sufficient evidence to give it? (Assignment of Error 2).

II. STATEMENT OF THE CASE

Mr. Ritchey was charged by information with one count of

theft of a motor vehicle in violation of RCW 9A.56.065. (CP 11). He filed a pretrial motion asking the court to give a lesser included offense instruction on second degree taking a motor vehicle without permission. (CP 51). The court did not decide the motion before trial, but heard extensive argument in the instructions conference. (5/25/16 RP356-69).

Andrew Hood lived with fiancé Jennifer Reed, a long-time friend of Mr. Ritchey's. (5/24/16 RP 221, 222). In November 2015, he owned a green 1996 Subaru Legacy. (*Id.*). He knew Mr. Ritchey through Ms. Reed. (*Id.* at 222). Mr. Hood and she moved in together around October 2015. (*Id.* at 224). On November 27, 2015, they were at their apartment hanging out with Mr. Ritchey and his friend Amanda Stahl. (*Id.* at 225).

Mr. Hood had driven the Subaru that day and parked it in a corner by the smoking section around 9 p.m. (5/24/16 226). He went to bed about 10:30. (*Id.* at 227-28). He had given Mr. Ritchey rides before. (*Id.*). Mr. Hood got up at 5:15 a.m. on November 28, 2015, to go to work, but his Subaru was gone. (*Id.* at 228). Ms. Reed's key was not on her key ring. (*Id.* at 230). Mr. Hood figured the only place the key could be was with Mr. Ritchey, who did not have permission from him to use his car. (*Id.* at 231). When the

car did not arrive back at the apartment, Mr. Hood called the police at 10 a.m. (*Id.*). He learned about 4 p.m. the car had been recovered. (*Id.* at 233). He got his car and the key back. (*Id.*).

Ms. Reed had known Mr. Ritchey for around nine years. (5/24/16 RP 242). They had once dated and were still friends. (*Id.* at 243). In November 2015, she was dating Mr. Hood, who owned a green Subaru. (*Id.* at 245). She had driven it only two times as she did not have her license. (*Id.* at 245-46).

On November 27, 2015, she and Mr. Hood were hanging out at their place with Mr. Ritchey and Ms. Stahl. (5/24/16 RP 246). Mr. Ritchey was very good with Ms. Reed's son, who had special needs. (*Id.*). He and Ms. Stahl were going to stay the night. (*Id.* at 247). Ms. Reed left her key to the Subaru on a ring hanging by the door. (*Id.* at 248). She never gave Mr. Ritchey permission to drive the car. (*Id.* at 247). Ms. Reed was outside the apartment talking to one of her neighbors; Mr. Ritchey and Ms. Stahl came out and left. (*Id.* at 248). With Mr. Hood asleep, they were alone in the apartment while she was outside. (*Id.* at 250). Ms. Reed came back into the apartment and went to bed. (*Id.* at 251).

The next morning, November 28, 2015, Mr. Hood woke her up asking where the car was. (5/24/16 RP 251). The key was

missing and Ms. Reed thought Mr. Ritchey's girl friend had taken it. (*Id.* at 253). Ms. Reed called him and Mr. Ritchey did not say he had the car, but he would be back soon. (*Id.*). He had not returned the car by 7 a.m. (*Id.* at 254).

Officer Stephanie Kennedy was on the patrol anti-crime team in November 2015. (5/24/16 RP 271). On November 28, 2015, she was looking for stolen cars around Spokane's Emerson Park area, which was notorious for dumping stolen cars. (*Id.* at 273). She was driving an undercover minivan, disguised as a soccer mom. (*Id.* at 274). Officer Kennedy was wearing regular clothes, a ballistic vest with "police" written on it, and a gun belt. (*Id.* at 275). At 2:30 p.m. she spotted a Subaru occupied by a male and female. (*Id.*). There was no reason for them to be there and she knew Subarus were commonly stolen. (*Id.*). Mr. Ritchey was the driver. (*Id.* at 276). The officer checked the license and the car came back stolen. (*Id.* at 277). She called for backup. (*Id.* at 278).

When they arrived, Sergeant Kurt Vigessa blocked the Subaru in back and Officer Kennedy blocked the front. (5/24/16 RP 278). After the stop, Mr. Ritchey was detained and Officer Kennedy took him out of the car. (*Id.* at 278-79). He was taken into custody and he blurted out he would tell her all about the car and Ms. Stahl

had nothing to do with it. (*Id.* at 279). She took his comment to mean that he took responsibility for the car. (*Id.*) Mr. Ritchey was cuffed and sitting on the curb when he was placed in the back of a patrol car to keep warm since it was cold outside. (*Id.*)

He told Officer Kennedy he had permission to use the car. (5/24/16 RP 280). But she knew his story was not consistent with the car having been reported stolen and told him so. (*Id.* at 280-82). Mr. Ritchey then said he had a good relationship with Ms. Reed and he had stolen the key off her key ring and took the car without permission. (*Id.* at 282). He asked Officer Kennedy to call Ms. Reed and tell her he was sorry. (*Id.* at 284). He told her he knew he was in trouble. (*Id.*) When asked by the State about Mr. Ritchey's demeanor, Officer Kennedy said, "He appeared truthful." (5/25/16 RP 305). The defense objected, whereupon the court sustained the objection, struck the answer, but refused to give a limiting instruction. (*Id.* at 305-06).

Mr. Ritchey testified in his own defense. While hanging out with Mr. Hood and Ms. Reed, he told her he was going to visit his roommate. (5/25/16 RP 321). Ms. Reed said OK and Mr. Ritchey told her he was going to take the car. (*Id.*) He took her car keys and he and Ms. Stahl left in the car. (*Id.* at 322). During the night,

they went to Mr. Ritchey's roommate's house, took and dropped her off somewhere around Monroe and Maxwell, went to his uncle's house east of Spokane, and to his aunt's house about a mile down the road from his uncle. (*Id.* at 322-27). Mr. Ritchey knew Mr. Hood had to work at 5:30 a.m. so he should have returned a little before that, but it was already too late. (*Id.* at 325). He went to the Emerson Park area where he got stopped in the Subaru. (*Id.* at 327-28). When they got blocked in, he figured those were the cops and they were going to jail. (*Id.* at 328).

Mr. Ritchey was taken into custody and he told the police he would tell them about the car and Ms. Stahl had nothing to do with it. (5/25/16 RP 329). He told Officer Kennedy that Ms. Reed gave him permission to use the car. (*Id.*). The officer said he was lying and he admitted taking the car without having any permission. (*Id.* at 329-30). He explained he said that because he was nervous, did not want Ms. Stahl to go to jail, and was not in a right state of mind. (*Id.* at 330). Mr. Ritchey testified he intended to return the vehicle to Ms. Reed and was actually heading back in that direction. (*Id.*). He admitted lying to Officer Kennedy about taking the car without permission because he was just telling her what she wanted to hear. (*Id.* at 339).

The jury instruction conference was held and argument heard about whether a lesser included offense instruction for second degree taking a motor vehicle without permission was appropriate. (5/25/16 RP 356-69). The judge made his decision not to give the instruction, but it was apparently not reported. The reason nevertheless appears later and it was that the evidence did not support giving the lesser included offense instruction. (6/30/16 RP 449).

The jury found Mr. Ritchey guilty as charged. (CP 97). Although the defense requested an exceptional sentence below the standard range, the court declined and imposed a standard range sentence of 57 months. (CP 118). This appeal follows. (CP 139).

III. ARGUMENT

A. The court erred by refusing to give a limiting instruction after a police officer testified Mr. Ritchey was being “truthful” when he stated during custodial interrogation he had taken the car key off a friend’s key ring and took the car without having permission to do so.

The prosecutor asked Officer Kennedy what Mr. Ritchey’s demeanor was while telling her he stole the keys to the car and took the Subaru without permission. (5/25/16 RP 282). Her

answer was of particular concern because she had just got done testifying that Mr. Ritchey first told her he had permission from Ms. Reed to use the car. (*Id.* at 280). Rather than answering the question as to his demeanor, Officer Kennedy said that he appeared truthful. (*Id.* at 305). On defense objection, the court struck the answer but refused to give a limiting instruction. (*Id.*). No reason was given for the court's refusal.

A witness's expression of her personal belief about the veracity of another witness is inappropriate opinion testimony in criminal trials. *State v. Perez-Valdez*, 172 Wn.2d 808, 817, 265 P.3d 853 (2011). The admission of such testimony may be reversible error. *Id.* The officer's testimony here was not admitted upon objection by the defense, but it was certainly heard by the jurors. The court merely struck the answer and refused, without explanation, to give a limiting instruction. The bell had already been rung. A limiting instruction was thus necessary to avoid the undue prejudice to Mr. Ritchey.

In determining whether the error is reversible, the court must look to several factors: the severity of the irregularity, whether the statement was cumulative of other properly admitted evidence, and whether the irregularity could be cured by a limiting instruction.

Perez-Valdez, 172 Wn.2d at 818. The error was severe as Officer Kennedy vouched for Mr. Ritchey's credibility as to which of his two stories was true. *Id.* The statement was also cumulative because Mr. Hood and Ms. Reed had already testified Mr. Ritchey took the key and car without permission. There was no need to ask Officer Kennedy about his demeanor in the off chance she would answer he was truthful. Finally, this was a situation where the irregularity's prejudicial effect could have been mitigated by an instruction, one the trial court refused to give.

Striking the answer served no useful purpose. The testimony had already been heard by the jury and the court should have at least tried to stifle the echo from the bell already rung. *State v. Holmes*, 122 Wn. App. 438, 446, 93 P.3d 212 (2004). It did not. Indeed, it was incumbent on the court to give a limiting instruction to cure the irregularity as juries are presumed to follow the instructions of the court. It did not. This failure was an abuse of discretion as the court did not exercise any at all in refusing to give the instruction. Discretion unexercised is discretion abused and no reason is no tenable ground for a decision. *Bowcutt v. Delta N. Star Corp.*, 95 Wn. App. 311, 976 P.2d 643 (1999). The irregularity

was severe and was not cured by the court so a new trial is required. See *Perez-Valdez, supra*.

B. The court erred by not giving a jury instruction on the lesser included offense of second degree taking a motor vehicle without permission when the evidence was sufficient to give it.

The court declined to give a lesser included offense instruction on second degree taking a motor vehicle without permission because the evidence was insufficient to give it.

(6/30/16 RP 449). RCW 9A.56.075 provides in relevant part:

A person is guilty of taking a motor vehicle without permission in the second degree if he or she, without the permission of the owner or person entitled to possession, intentionally takes or drives away any automobile or motor vehicle . . .

The State presented evidence that Mr. Ritchey took the Subaru and drove away without permission of the owner, Mr. Hood, or a person entitled to possession, Ms. Reed. This was certainly sufficient evidence (the factual test) for the court to give the lesser included offense instruction on second degree taking a motor vehicle without permission. *State v. Crittenden*, 146 Wn. App. 361, 366, 189 P.3d 849 (2008), *review denied*, 165 Wn.2d 1042 (2009).

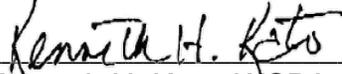
The trial court's failure to give an instruction based on a factual dispute, as here, is reviewed for an abuse of discretion. *State v. Walker*, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998). Because the court made its decision for an untenable reason, *i.e.*, insufficiency of the evidence to support giving the instruction, it abused its discretion. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 28, 482 P.2d 775 (1971).

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Ritchey respectfully urges this Court to reverse his conviction and remand for new trial.

DATED this 13th day of March, 2017.

Respectfully submitted,


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CERTIFICATE OF SERVICE

I certify that on March 13, 2017, I served a copy of the Brief of Appellant by USPS on Willie C. Ritchey, # 884271, 1313 N. 13th Ave., Walla Walla, WA 99362; and by email, as agreed, on Brian O'Brien at scpaappeals@spokanecounty.org.

