

No. 361314

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Respondent,

v.

JEFFERY WAYNE GERARD,

Appellant.

APPEAL FROM THE SUPERIOR COURT
OF KLICKITAT COUNTY, STATE OF WASHINGTON
Superior Court No. 17-1-00123-20

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Was the defendant in custody when he was interrogated by Deputy Gunnyon?
2. Was there sufficient evidence to support the defendant's conviction of Burglary in the Second Degree?

B. STATEMENT OF THE CASE

On the evening of October 27, 2017, Craig Overdorf, a mechanic with a business on his property, was at home. RP 66-73. A cabin and other outbuildings sat on his property along with a dilapidated boat. RP 69. While Mr. Overdorf's property was not posted with "No Trespassing" signs, no signage welcomed others onto the property – Mr. Overdorf did not have signage indicating he operated a business on his property or performed mechanical work for the public. RP 66-73.

That evening Mr. Overdorf noticed "a glow in the cabin... and a light in the window." RP 74. Concerned why a light was on in the cabin, Mr. Overdorf took his rifle and went to investigate. RP 74. Upon approaching the cabin Mr. Overdorf discovered a vehicle parked behind the building. RP 75, 82. Concerned, Mr. Overdorf dialed 911 before walking up to the cabin. RP 75-76. As he walked up, the defendant exited the cabin. RP 76. Mr. Overdorf raised his rifle and ordered the defendant to stay where he was while continuing his phone call with the 911 operator. RP 76. After taunting Mr. Overdorf to shoot him the defendant ran for his car. RP 77. At

no point prior had Mr. Overdorf invited the defendant to be on his property or look through his cabin. RP 79.

As the defendant absconded down the driveway law enforcement arrived and followed the defendant. RP 78, 87. Trooper Pont made contact with the defendant shortly thereafter, identified himself, and explained he was responding to reports of a burglary. RP 105. The defendant, still sitting in his vehicle, responded to Trooper Pont that “he didn’t know that the property was owned by anybody and he was just looking at an abandoned boat.” RP 105. The interaction between Trooper Pont and the defendant lasted five to ten minutes – during the conversation with Trooper Pont the defendant remained in his vehicle, no arrest was made, and Trooper Pont did not search the vehicle, only seeing tools in the back seat as he stood next to the defendant’s door. RP 106-08. After the brief exchange Sheriff Deputy Edward Gunnyon arrived on scene and Trooper Pont left. RP 105-06.

Once Deputy Gunnyon arrived on scene he approached the defendant, introduced himself, and asked why the defendant was on Mr. Overdorf’s property. RP 113. During the exchange the defendant volunteered that Mr. Overdorf had pulled a gun on him, and that he had been out at the property “checking on a boat that a buddy of his had told him that it had been abandoned.” RP 6. During this exchange with Deputy Gunnyon the defendant was not placed in handcuffs and remained in his own vehicle. RP 7. After this initial exchange Deputy Gunnyon, seeking to

go discuss the matter with Mr. Overdorf, then informed the defendant that he was being detained for further investigation. RP 114. Once Deputy Gunnyon returned from discussing the matter with Mr. Overdorf he placed the defendant in custody and read him his Miranda rights. RP 7. From the time he left and returned to place him under arrest approximately 30 minutes had elapsed. RP 9.

The vehicle of the defendant was taken into possession and later searched. RP 114, 124. During the search illegal drugs, determined to be methamphetamine, were discovered. RP 97-98, 116.

Prior to the trial the court conducted a CrR 3.5 hearing. VRP 1-23. During the hearing Deputy Gunnyon testified as to the initial brief conversation he had with the defendant, summarized above, and explained he left to discuss the matter with Mr. Overdorf before returning and arresting the defendant. VRP 18. Approximately 40 minutes had elapsed from the time Trooper Pont made contact with the defendant to when Deputy Gunnyon placed the defendant under arrest. RP 18.

Following a jury trial the defendant was convicted of Burglary in the Second Degree, Unlawful Possession of Methamphetamine and Bail Jumping. CP 147-50. The defendant is seeking relief from these convictions by disputing the facts found by the Court in the Cr.R 3.5 hearing, and claiming the jury's verdict of guilt as to the burglary charge was based upon insufficient evidence. Both of these claims are without merit and should be

rejected.

C. ARGUMENT

1. **THE DEFENDANT WAS NOT IN CUSTODY AT THE TIME HE WAS INTERROGATED BY DEPUTY GUNNYON.**

The defendant argues he was in custody at the time he was interrogated by Deputy Gunnyon. But as the trial court found, the defendant was not questioned under circumstances where Miranda Warnings were necessary. This is reflected in the court's ruling at the Cr.R. 3.5 hearing, where the court stated the following:

So what we have here are essentially two different statements the court finds. There's the first statement that was an unsolicited statement by Mr. Gerard when he was initially contacted by Deputy Gunnyon.

Miranda warnings apply if there is a custodial interrogation by a law enforcement officer. And so the first thing you have to do is whether or not this was interrogation. The court does not find that the initial unsolicited statement was an interrogation.

It wasn't pursuant to any kind of questioning or pursuant to any kind of statement that's likely to elicit a response. So the initial statement that a guy had pulled a gun on him is admissible at time of trial.

The second question – second set – statement or – statements made or series of statements were made were in response to questions being asked by Deputy Gunnyon including what were you doing up there. And the court would find that that is interrogation and is a statement – or a question that's likely to – a question or statement that's likely to elicit a response.

The next question then is whether or not Mr. Gerard was in custody at that point in time when he was being interrogated by a law enforcement officer. Custody is defined as a person restrained to a degree associated with formal arrest.

In this incident Mr. Gerard was seated behind his – in his driver’s seat of his vehicle pursuant to a traffic stop. None like – not unlike a tarry stop where Miranda warnings do not apply in those types of situations.

A person can be restrained for a period of time as long as they are not restrained to a degree associated with formal arrest.

In this case Mr. Gerard was seated in his vehicle still in hin – in the driver’s seat of his vehicle – had not been placed under arrest but had been detained to allow the officer to do a bit of follow-up work akin to a tarry stop. Which a tarry stop does not require that Miranda warnings be applied or be advised of before they can be questioned any further.

So the court cannot find that Mr. Gerard was in custody at the time when he was being questioned by Deputy Gunnyon and therefore Miranda warnings were not necessary at that point in time.

He was advised of his Miranda warnings but there were no statements that were made after that. So the two statements – the one unsolicited statement – the guy pulled a gun on him is admissible because there was no sta – no interrogation.

And the second question – response to what was he doing is admissible as I find that Mr. Gerard was not in custody at the time when that statement was made for purposes of a 3.5 hearing.

RP 20-22.

Courts review challenged CrR 3.5 findings for substantial evidence. *State v. Broadaway*, 133 Wn.2d 118, 131, 942 P.2d 363 (1997). Substantial evidence is that sufficient to persuade a fair-minded, rational person of the finding's truth. *State v. Solomon*, 114 Wn. App. 781, 789, 60 P.3d 1215 (2002), review denied, 149 Wn.2d 1025, 72 P.3d 763 (2003). Credibility and conflicting testimony resolution are left to the fact finder. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). Unchallenged findings

of fact are verities on appeal. *Perry v. Costco Wholesale, Inc.*, 123 Wn. App. 783, 792, 98 P.3d 1264 (2004). Conclusions of law are reviewed to determine whether the findings of fact support them. *State v. Graffius*, 74 Wn. App. 23, 29, 871 P.2d 1115 (1994). Finally, conclusions of law are reviewed de novo. *Alpental Community Club, Inc., v. Seattle Gymnastics Soc'y*, 121 Wn. App. 491, 496-97, 86 P.3d 784, review denied, 152 Wn.2d 1029, 103 P.3d 200 (2004).

The defendant claims his statements to Deputy Gunnyon were made while he was in custody and claims error because he disagrees with the court's decision during the CrR 3.5 hearing. Moreover, the defendant makes this claim without any analysis. Simply claiming a person is in custody is not enough, the relevant inquiry to determine whether a person is in custody is "whether a reasonable person in the suspect's position at the time would have thought so." *State v. Rivard*, 131 Wn.2d 63, 75, 929 P.2d 413 (1997). The test is objective. *State v. Reichenbach*, 153 Wn.2d 126, 135, 101 P.3d 80 (2004). It is not dependent on the subjective intent of the officer making the detention. *State v. Radka*, 120 Wn. App. 43, 49, 83 P.3d 1038 (2004). Rather, it hinges upon the manifestation of the arresting officer's intent. *Id.*

"Typical manifestations of intent indicating custodial arrest are the handcuffing of the suspect and placement of the suspect in a patrol vehicle, presumably for transport." *Id.*; see also *Rivard*, 131 Wn.2d at 76. "Whether an officer informs the defendant he is under arrest is only one of all of the

surrounding circumstances, albeit an important one." *State v. Patton*, 167 Wn.2d 379, 387 n.6., 219 P.3d 651 (2009).

As the trial court found, the defendant was not in custody at the time of his statements to law enforcement. His first statement to the effect of "someone pointed a gun at me" was voluntary, not in response to any questioning, and was made contemporaneously with being pulled over. RP 6. His second statement regarding why the defendant was on the property was in response to questioning but the circumstances were such that no reasonable person would have believed they were in custody – it was a general question of the nature an officer asks when stopping anyone and inquiring about a crime. RP 6.

At the point these questions took place the defendant had been detained only long enough for the deputy to arrive on scene. The defendant was still sitting in his car and had not been formally placed under arrest - only a couple minutes had passed, he had not been told he was under arrest, nor had he been handcuffed. Only after Deputy Gunnyon had performed additional investigation was the defendant placed under arrest and advised of his Miranda rights. RP 20.

As the trial court found, the statements made by the defendant, while in response to questioning, were not the result of a custodial interrogation, did not violate the defendant's rights, and were admissible at trial.

2. THERE WAS MORE THAN SUFFICIENT EVIDENCE TO SUPPORT THE DEFENDANT’S CONVICTION OF BURGLARY IN THE SECOND DEGREE.

The defendant argues that insufficient evidence supports his conviction of Burglary in the Second Degree. The defendant’s position is without merit. Sufficient evidence supports 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. *State v. Salinas*, 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.* Reviewing courts leave credibility determinations, issues of conflicting testimony, and persuasiveness of the evidence to the fact finder. *Camarillo*, 115 Wash.2d at 71; *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533, review denied, 119 Wn.2d 1011, 833 P.2d 386 (1992).

The evidence necessary to support the defendant’s conviction of Burglary in the Second Degree are, as the defendant points out, that he entered or remained unlawfully in a building on October 27, 2017 and that the entering or remaining was with the intent to commit a crime against a person or property therein. CP 74, 126; RCW 9A.52.030. The defendant claims there was “simply no evidence that the defendant entered the building, let alone whether he had an intent to commit a crime against a person or property therein.” Brief of Appellant at p. 11. This claim is simply

made of whole cloth.

In 1763 by the British Prime Minister, William Pitt, the first Earl of Chatham, also known as Pitt the Elder, stated a version of the oft repeated legal maxim that a “man’s home is his castle”:

The poorest man may in his cottage bid defiance to all the forces of the crown. It may be frail - its roof may shake - the wind may blow through it - the storm may enter - the rain may enter - but the King of England cannot enter.

RCW 9A.52.030 makes clear that this legal maxim is still with us and, in this case, applies to the defendant and buildings owned by others.

On the evening of October 27, 2017, Mr. Overdorf observed a light in his building that should not have been there. RP 74. After arming himself he returned to his building and observed the defendant walking from the building. RP 76. The defendant himself admitted having been inside the building, which he referred to as a cabin. RP 191,197. There can be no question that the defendant, through his own testimony and the testimony of the victim, was inside the building.

The next question becomes whether the defendant intended to commit a crime against persons or property when he entered the building. While the defendant’s testified he was just looking around, based on the testimony from the defendant, officers, and victim concerning what occurred, it was reasonable for the jury to find the defendant intended to commit a crime. During the trial the contents of the defendant’s vehicle

were discussed, with it being revealed that the car contained a variety of large and small tools, flashlights, and extension cords. RP 126-27. The defendant had clearly been inside the cabin of the victim at night without invitation. RP 74, 191,197. A reasonable jury could certainly find there was an intent to commit a crime based on either of these facts alone.

Further, in claiming insufficiency of the evidence to convict the defendant has ignored number 14 of the court's jury instructions. This instruction provides:

A person who enters or remains unlawfully in a building may be inferred to have acted with intent to commit a crime against a person or property therein. This inference is not binding upon you and it is for you to determine what weight, if any, such inference is to be given.

Washington Pattern Jury Instruction Criminal 4th WPIC 60.05 *Inference of Intent—Entering or Remaining Unlawfully.*

The defendant claims without any authority that the lack of “No Trespassing” signs, lack of personal notice to passerbys not to enter the property, lack of barriers to prevent entry into the property, and the failure to ask the defendant why he was on the property, along with the fact that the defendant did not have anything in his hands when confronted by the homeowner and complied with the armed property owner all constitute some type of defense to the crime of Burglary in the Second Degree. This could not be further from the truth. In fact, none of these arguments constitute a defense to the crime of Burglary in the Second Degree and,

despite being argued during the trial, were soundly rejected by the jury. Again, the jury made the determination that these were not valid defenses when it heard the evidence, including that there was nothing indicating the property was open to passerbys to stop and enter a dark, unoccupied cabin, late in the evening.

The jury reached their verdict based on sufficient evidence that the defendant had entered the cabin absent permission and intended to commit a crime therein. The defendant's position is without merit and should be rejected.

D. CONCLUSION

The defendant simply disagrees with the factual findings of the trial court and those of the jury. The trial court correctly found the defendant's statements were admissible and the jury, after being properly instructed by the trial court, correctly found the defendant entered the building of Mr. Overdorf with the intent to commit a crime therein. For the forgoing reasons the defendant's convictions should be affirmed.

Respectfully submitted this 30th day of January, 2019.

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