

FILED
Court of Appeals
Division III
State of Washington
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No. 37067-4-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON,

Respondent

v.

ROGELIO DELGADO RODRIGUES,

Appellant

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR BENTON COUNTY

NO. 19-1-00766-03

BRIEF OF RESPONDENT

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I. RESPONSE TO ASSIGNMENTS OF ERROR

- A. The State disagrees that the trial court erred in admitting evidence suggesting the defendant was in a gang: the defendant did not object in trial and there was no insinuation that the defendant was in a gang.

II. STATEMENT OF FACTS

Facts regarding charge of Eluding and State's proof the defendant was the perpetrator:

On June 26, 2019, Officer Jeff Muai with the Richland Police Department, learned that the defendant had an outstanding warrant and he had been staying at a Motel 6 in Richland, WA. RP at 167, 169. Muai conducted surveillance that day at the Motel 6, and while he did not see the defendant, he spotted the defendant's vehicle, a black Toyota Camry. RP at 169.

The next evening, June 27, 2019, Officer Muai returned to the area at about 10:00 P.M. to conduct surveillance at the Motel 6. *Id.* He saw the defendant about a half hour later arrive in a red Hyundai Tiburon. RP at 169-70, 172. The defendant was wearing a flannel shirt and a cowboy hat. RP at 174. The Tiburon was registered to a Melissa Smith and Muai also saw her at the Motel 6 that evening. RP at 181.

Muai saw the defendant leave the Motel 6 driving the Tiburon and then return about 15 minutes later. RP at 176-77. Later Muai saw the

defendant again got in the Tiburon and drove away. RP at 178. This time Muai let other police officers in vehicles know. RP at 179.

Officer McCauley saw the car pull onto Columbia Center Boulevard (CCB) and attempted to stop it. RP at 133. The car initially yielded to his emergency lights and pulled into a tire store on the street. RP at 134. Other police vehicles also had their lights flashing. *Id.* McCauley was about 30-40 feet away from the driver and told him to shut off the vehicle and put the keys outside. RP at 136. However, after 15-20 seconds the driver rapidly accelerated and went back onto CCB, going southbound in a northbound lane. RP at 105-06. The Tiburon continued going the wrong way in a lane of travel at about 60 miles per hour; the speed limit on that street is 35 MPH. RP at 110, 122.

The Tiburon turned onto Quinault and went into a gravel parking lot behind a Lowe's. RP at 109, 113. From there, the driver reversed direction, jumped a curb and drove back onto Quinault. RP at 210. Various officers lost sight of the Tiburon at this point. RP at 118, 140, 209, 229. Officer Schneider found the vehicle behind a Carl's Jr. about 1-2 minutes later. RP at 212. This was at 11:28 P.M. RP at 76. About four minutes later, Officer Lawrence saw the defendant suddenly appear around Porter's restaurant. RP at 79-80. The defendant was wearing a white sweater, not a flannel shirt, but Officer Lawrence found both a

flannel shirt and a cowboy hat in the area. RP at 80, 83. Officer Muai stated that the flannel shirt found by Lawrence was consistent with that worn by the defendant and the cowboy hat found was the hat worn by the defendant at the Motel 6. RP at 174-75.

The defendant did not testify and argued in closing that the “heart” of the issue was identity. RP at 266. The defendant was convicted of Attempting to Elude a Pursuing Police Vehicle. CP 59.

Facts regarding issue raised by defendant concerning a “regional gang intelligence meeting.”

The sole reference to such a meeting was during Officer Muai’s testimony:

Q: On June 26th, did you become aware of Mr. Rogelio Rodrigues?

A: Yes.

Q: How so?

A: I was in a regional gang intelligence meeting. We meet once a month.

RP at 167.

At that point the defense attorney objected and asked for a sidebar.

The Court: What’s your concern Mr. DiPeso?

DiPeso: I’m very concerned about where this is going as far as his gang membership.

Id.

Clark: Oh, no. This is just that meeting he mentioned he did last week of where he learned and saw the photos of Mr. Rodrigues and about the two warrants, and I can even use

my questioning to confirm that this was not a discussion about gang activity but just a meeting

DiPeso: Okay. Never mind. I'm sorry.

The Court: All right. Go ahead and ask a leading question so we can get over this hump.

RP at 167-68.

The testimony resumed with the prosecutor asking:

Q: Now you indicated that was-- the name of the group is just that's the type of the--the name of the meeting?

A: That's the name.

Q: The regional gang investigation meeting, just a meeting about various ongoing investigations, topics, correct?

A: Yes.

Q: Was one of those topics the warrants that Mr. Rodrigues had?

A: Yes.

RP at 168.

Several times various police officers in addition to Officer Muai said that they were attempting to stop the defendant because he had outstanding warrants. From Officer Koe, "I responded to assist them (the SWAT team) in the apprehension of the suspect they were looking for." RP at 96. From Officer McCauley, "(We were looking for the defendant because) he had a warrant out for his arrest." RP at 131. From Officer Matheny when asked why they were in the area of the Motel 6, "We'd received information that an individual may be at the Motel 6 that had some warrants." RP at 189. From Jarin Whitby, the sergeant of the street crimes unit, "occasionally we will get information on individuals—wanted

individuals. My guys work those types of crimes and work with those types of people” and they were there to serve two outstanding warrants on the defendant. RP at 218.

This purpose was restated by the prosecutor in closing argument: “We heard from Officer Muai. June 26th he first became aware of the defendant’s outstanding warrants in a meeting he was having with other law enforcement over in Pasco.” RP at 254. This was the only mention of the meeting in either the closing argument or the rebuttal closing argument.

III. ARGUMENT

A. The conviction should not be reversed because Officer Muai mentioned that he learned the defendant had outstanding warrants at a regional drug in meeting.

1. The defendant did not object to the testimony.

After Officer Muai stated that he learned about the defendant’s warrants at a regional gang intelligence meeting, the defendant objected and asked for a sidebar. However, the defense attorney said he was concerned about the possible additional testimony about gang membership, not about the mention of the police meeting about gangs. RP at 167. When the prosecutor clarified that he was not seeking testimony about gang membership, the defendant withdrew any objection.

The defendant did not raise the issue about the regional gang intelligence meeting in a motion in limine. The issues the defendant asked the court to rule pretrial are the following: (1) exclude witnesses; (2) exclude evidence of the defendant's prior arrests; (3) exclude testimony that defendant was the subject of a robbery investigation; (4) exclude testimony that a warrant was issued by the Department of Corrections and the reasons for the warrants; (5) exclude testimony regarding a knife found at the scene; and (6) exclude testimony about lookouts at Motel 6. CP 26-28. Only the last motion in limine was contested. RP at 11. The defendant pointed out that "most ordinary citizens don't have lookouts and I think there's a pretty strong inference that you have a criminal-like organization helping you out, maybe gangs, drug activity." RP at 12. However, at no point did the defendant object, in either pretrial or at trial, to the mention of the regional gang intelligence meeting.

ER 103 states:

(a) Effect of Erroneous Ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and (1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike is made, stating the specific ground of objection, if the specific ground was not apparent from the context.

The defendant should not be permitted at this point to claim the trial court made any error. Unless the defendant objects, evidentiary error

is not preserved for appeal. *State v. Finch*, 137 Wn.2d 792, 819, 975 P.2d 967 (1999). The issue also should not be reviewed under RAP 2.5 (a) on Errors Raised for First Time on Review.

2. Even if the court considers the merits of the argument, Officer Muai's testimony that he learned the defendant had outstanding warrants at a regional gang intelligence meeting was not objectionable.

The State did not attempt to present any evidence that the defendant was in a gang. There was no nexus between the Eluding charge and any possible gang activity, and such evidence would not have been allowed under cases such as *State v. Scott*, 151 Wn. App. 520, 526, 213 P.3d 71 (2009).

Further, the evidence was that the regional gang intelligence meeting was not limited to gang topics. Other investigations, including individuals with warrants, were discussed. RP at 168. Evidentiary issues are reviewed for abuse of discretion. *Finch*, 137 Wn.2d at 810. If the defendant had objected to Officer Muai's statement that he learned of the warrants at a regional gang intelligence meeting, the trial court would not have abused its discretion in allowing that testimony because that meeting was not limited to gang members.

3. Even if the defendant had objected and even if this Court believes the objection would have been sustained, any error is harmless.

It is clear what happened. The defendant had warrants for his arrest. Officer Muai was surveilling him and alerted a number of police officers when he saw the defendant leaving a Motel 6 in a red Hyundai Tiburon. Numerous police cars tried to stop him. The defendant momentarily stopped when signaled, but then accelerated onto Columbia Center Boulevard going the wrong way and travelling almost twice the speed limit. He briefly lost the pursuing police, ditched the car, and got rid of a distinctive flannel shirt and cowboy hat. The jury was not confused and convicted him of driving the red Tiburon and attempting to elude the police.

Police officer after police officer stated that they were stopping the defendant because he had warrants. The fact that Officer Muai learned of those warrants at a regional gang intelligence meeting had nothing to do with the conviction.

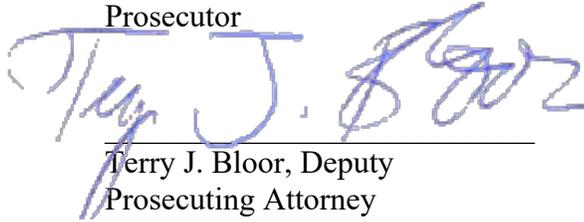
IV. CONCLUSION

The conviction should be affirmed.

RESPECTFULLY SUBMITTED on August 17, 2020.

ANDY MILLER

Prosecutor

A handwritten signature in blue ink, appearing to read "Terry J. Bloor", is written over a horizontal line. The signature is stylized and cursive.

Terry J. Bloor, Deputy

Prosecuting Attorney

Bar No. 9044

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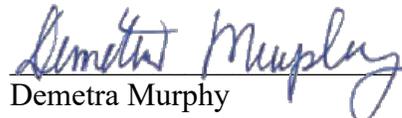
CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

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Signed at Kennewick, Washington on August 17, 2020.


Demetra Murphy
Appellate Secretary

BENTON COUNTY PROSECUTOR'S OFFICE

August 17, 2020 - 1:05 PM

Transmittal Information

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