 72247-6

FILED
March 20, 2015
Court of Appeals
Division I
State of Washington

NO. 72247-6-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

SCOTT T. VISNICH,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE DEAN LUM AND
THE HONORABLE ROGER ROGOFF

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

Page

A. ISSUES PRESENTED 1

B. STATEMENT OF THE CASE 1

1. PROCEDURAL FACTS 1

2. SUBSTANTIVE FACTS 2

C. ARGUMENT 6

1. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION TO ADMIT EVIDENCE THAT VISNICH LEFT THE BANK ABANDONING A $600 CHECK AND HIS DRIVER'S LICENSE WITH BANK EMPLOYEES 6

D. CONCLUSION 12

TABLE OF AUTHORITIES

Page

Table of Cases

Washington State:

Carson v. Fine, 123 Wn.2d 206,
867 P.2d 610 (1994) 7, 8

State v. Bourgeois, 133 Wn.2d 389,
945 P.2d 1120 (1997) 11

State v. Cohen, 125 Wn. App. 220,
104 P.3d 70 (2005) 7

State v. Freeburg, 105 Wn. App. 492,
20 P.3d 984 (2001) 8

State v. Gatalski, 40 Wn. App. 601,
699 P.2d 804, review denied,
104 Wn.2d 1019 (1985) 7

State v. Gould, 58 Wn. App. 175,
791 P.2d 569 (1990) 8

State v. Grier, 158 Wn. App. 635,
278 P.3d 225 (2012) 8

State v. Lane, 125 Wn.2d 825,
889 P.2d 929 (1995) 8

State v. Nicholas, 5 Wn. App. 657,
491 P.2d 677 (1971) 8

State v. Rice, 48 Wn. App. 7,
737 P.2d 726 (1987) 7

State v. Tharp, 96 Wn.2d 591,
637 P.2d 961 (1981) 11

Rules and Regulations

Washington State:

ER 403 ..... 1, 7, 8

A. ISSUES PRESENTED

1. Under ER 403, a trial court may exclude evidence if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of needless presentation of cumulative evidence. Visnich moved to exclude evidence of flight: the fact that upon presenting a $600 check, Visnich fled a Bank of America, abandoning both the check and his driver's license at the bank while a bank employee was calling the check's account owner and 911. The State argued the evidence was admissible both as evidence of flight and as *res gestae*, and the trial court admitted the evidence. Has Visnich failed to establish that the trial court abused its discretion in admitting the evidence, where the evidence showed Visnich's intent to suddenly leave the bank and it was necessary for the jury to understand the complete context of the crime?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

Defendant Scott Visnich was charged with two counts of forgery. Supplemental Designation of Clerk's Papers (Second Amended Information). During motions in limine, Visnich moved to exclude testimony that he had fled from the Bank of America after

presenting the second forged check. 1RP[1] 13. The prosecutor argued that the evidence was admissible as evidence of flight showing consciousness of guilt and also as *res gestae* evidence as "part of the crime that is as intertwined as any other factor." 1RP 16. The Court ruled that the evidence was admissible. 1RP 18-19.

Visnich later waived his right to a jury trial. 2RP 4-5. Following a bench trial, Visnich was found guilty of both counts of forgery and was sentenced to credit for time served. 3RP 90; 5RP 18.

2. SUBSTANTIVE FACTS.

Aleksander Ivanov is the business owner of Avanti Pizza and Pasta in Lynnwood, Washington. 2RP 33. On the evening of October 14, 2013, Ivanov's car was broken into while it was parked outside of Ivanov's home in Everett, Washington. 2RP 32, 35. Several blank business checks were stolen from Ivanov's glove box along with documents containing his signature. 2RP 34-35.

The following day, on October 15, 2013, at approximately 3:35 p.m., Visnich presented one of the stolen Avanti Pizza and

[1] There are 5 volumes of verbatim report of proceedings. They will be referred to as follows: 1RP (May 5, 2014); 2RP (June 12, 2014); 3RP (June 16, 2014); 4RP (June 16, 2014 – supplemental closing arguments); and 5RP (July 24, 2014).

Pasta checks at a Bank of America in Lynnwood, Washington. 2RP 37-38; 3RP 40-41, 72. For the check, Visnich requested that he receive $750 in cash and the remaining $100 be deposited into his Bank of America account. 3RP 42.

The check was written to "Scott Visnich" for $850. 3RP 44; Ex. 7. The check was dated October 15, 2013, the "memo line" indicated that the check was for "LAPTOP ON LINE," and the check was endorsed. 3RP 44; Ex. 7. The number "eight" is misspelled on the check as "EIGT."[2] The transaction was completed, and the defendant was captured on surveillance images wearing a black Calvin Klein shirt. 3RP 42, 72; Ex. 15.

Approximately two hours later, at a Shoreline Bank of America, Visnich presented another stolen check belonging to Avanti Pizza and Pasta. 2RP 19; 3RP 12-13, 51. The check is written to "Scott Visnich" for $600. 2RP 24-25. The check is dated October 14, 2013, written in the "memo line" is "CAMERA ON LINE," and the check is endorsed. 2RP 25; Ex. 1. Visnich gave the forged check and his Washington driver's license to the teller. 3RP 13; Exs. 1, 2. When the teller attempted to cash the check,

[2] During his testimony, Visnich stated that he is not a very good speller and "can barely spell [his] own last name." 3RP 74.

the bank's computer system notified the teller of a "stop payment alert" for the check. 3RP 12.

The teller asked bank supervisor Shawna Eden to assist with Visnich's transaction. 3RP 12. Eden asked Visnich what the check was for and how he obtained it. 3RP 14-15. Visnich told Eden he received the check from someone he met in a parking lot upon selling an item on Craigslist. 3RP 14-15. Eden asked Visnich to have a seat in the lobby; she then called the check's account holder to verify the check. 3RP 13. Eden took the check and Visnich's driver's license to her desk where she called the account holder and then called 911 to summon the police. 3RP 13, 16.

Visnich was aware there was an issue with the check because bank employees took the check away from the teller window and several employees were looking at the check. 3RP 67. Eden's desk was located approximately ten feet away from where Visnich was seated in the lobby. 3RP 16. While Eden was on the phone calling either Ivanov or 911, Visnich exited the bank and left the parking lot in a small red truck. 3RP 17, 19-20. Visnich left his driver's license and the $600 check he had presented at the bank. 3RP 20. Visnich was captured in surveillance images presenting the check and wearing a white shirt. 3RP 72; Ex. 9.

Visnich testified at trial. 3RP 55. Visnich said he received the checks from a man whose name he could not remember. 3RP 59. Visnich stated he received the first check for selling the man a computer in a Lynnwood parking lot. 3RP 59-62. Although Visnich claimed that he and computers are "not friends," he testified that he purchased the 2010 Apple laptop from a man he knows only as "Computer Jay" for $1,000. 3RP 76. Visnich said he went directly to the Bank of America in Lynnwood to cash the first check. 3RP 63.

Visnich testified that when purchasing the laptop, the man inquired about purchasing a camera from Visnich. 3RP 62. Visnich said he went to get the camera in Magnolia and met the man in Shoreline, where the man gave Visnich the second check for the camera. 3RP 64-66. Visnich explained that the camera was a Canon digital camera, which Visnich could not operate because it was "too high tech." 3RP 64-66.

While waiting to cash the second check at the Bank of America in Shoreline, Visnich admitted he was aware there was an issue with the check, but he denied being concerned. 3RP 67. Visnich said he decided to leave the bank because his business partner in the truck was ready to go, "So I left." 3RP 67.

The trial court found Visnich's testimony to not be credible. 3RP 86. Among the reasons cited by the court for finding the defendant not credible, the court noted that Visnich's descriptions of the transactions were unreasonable, the timeline for the transactions was "too tight" for legitimate transactions, and Visnich's explanation for why he left the bank "made no sense" since Visnich abandoned his driver's license and $600 "supposedly legitimate dollars" with the bank teller. 3RP 88.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION TO ADMIT EVIDENCE THAT VISNICH LEFT THE BANK ABANDONING A $600 CHECK AND HIS DRIVER'S LICENSE WITH BANK EMPLOYEES.

Visnich argues that the trial court erred when it admitted evidence that he left Bank of America after presenting a forged check as improper evidence of flight. However, the evidence was properly admitted both as evidence of flight and as *res gestae*. The fact that Visnich left the bank, abandoning the check and his driver's license, was properly admitted as evidence of flight, necessary to complete the story of the crime, and was not unduly prejudicial. Visnich has failed to establish that the trial court abused its discretion in allowing the evidence.

Evidence Rule 403 states:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Exclusion of evidence under ER 403 is considered an extraordinary remedy, and the burden is on the party seeking to exclude the evidence to show that the probative value is substantially outweighed by the undesirable characteristics. Carson v. Fine, 123 Wn.2d 206, 867 P.2d 610 (1994). Under ER 403, there is a presumption favoring the admissibility of evidence. Id. at 225. Because of the trial court's considerable discretion in administering ER 403, reversible error is found only in the exceptional circumstance of a manifest abuse of discretion. State v. Gatalski, 40 Wn. App. 601, 610, 699 P.2d 804, review denied, 104 Wn.2d 1019 (1985). A court acts unreasonably "if its decision is outside the range of acceptable choices given the facts and the legal standard." State v. Cohen, 125 Wn. App. 220, 223, 104 P.3d 70 (2005).

In determining prejudice under ER 403, the linchpin word is "unfair." State v. Rice, 48 Wn. App. 7, 13, 737 P.2d 726 (1987).

Evidence may be unfairly prejudicial if it "appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish, or triggers other mainsprings of human action." Carson, 123 Wn.2d at 223. The likelihood of unfair prejudice substantially outweighing the probative force of evidence is "quite slim" where the evidence is undeniably probative of a central issue in the case. Id. at 224. ER 403 does not provide a basis for objecting simply because the evidence is "too good" or "too powerful." State v. Gould, 58 Wn. App. 175, 791 P.2d 569 (1990).

Flight is an admission by conduct. State v. Freeburg, 105 Wn. App. 492, 497, 20 P.3d 984 (2001). "Evidence of flight is admissible if it creates 'a reasonable and substantive inference that the defendant's departure from the scene was an instinctive or impulsive reaction to a consciousness of guilt or was a deliberate effort to evade arrest and prosecution.'" Id. (quoting State v. Nicholas, 5 Wn. App. 657, 660, 491 P.2d 677 (1971)).

Evidence that completes the story of the crime "by proving its immediate context of happenings near in time and place," is relevant as *res gestae* evidence and is admissible if not unduly prejudicial. State v. Grier, 158 Wn. App. 635, 278 P.3d 225 (2012) (quoting State v. Lane, 125 Wn.2d 825, 831, 889 P.2d 929 (1995)).

Visnich moved to exclude the fact that he left the bank as improper evidence of flight. 1RP 13. The State argued that the evidence was admissible both as evidence of flight and also as *res gestae* as "part of the crime that is as intertwined as any other." 1RP 14-16. The court concluded that the evidence was admissible and that "it's for the jury to decide what weight to place on [this evidence]." 1RP 17-19. Visnich has failed to establish that this decision was manifestly unreasonable.

Visnich argues that the evidence that he left the bank was improperly admitted because the State did not establish a foundation for evidence of flight. Visnich is wrong. The State offered evidence that: 1) Visnich presented a forged check for $600 along with his driver's license to a bank teller; 2) the teller contacted her supervisor, Shawna Eden, to assist Visnich after noticing a "stop payment" alert for the check; 3) when asked how he obtained the check, Visnich claimed the check was given to him when he sold a camera through Craigslist; 4) Eden told Visnich to wait in the bank lobby, approximately ten feet from her desk; 5) Eden went to her desk where she called the account holder and then 911 to summon police; 6) while Eden was on the phone and after waiting approximately 10-15 minutes, Visnich walked out of the bank and

left in a red trunk; and 7) Visnich abandoned his driver's license and the $600 check with Eden. 3RP 12-20. In the context of these facts, Visnich's flight from the bank creates a reasonable and substantive inference that his departure from the scene was an instinctive or impulsive reaction to a consciousness of guilt or was a deliberate effort to evade arrest and prosecution. As such, the proper foundation was established to present evidence of Visnich's flight.

The full context of the sequence of events while Visnich was in the bank was also crucial to complete the picture of the crime. It would have been impossible to exclude evidence of the defendant's flight from the trial, and yet still have the sequence of events make sense to the trier of fact. Visnich's flight from the bank was *res gestae* of the forgery offense. The trial court did not abuse its discretion in admitting this evidence.

Visnich has failed to establish that the trial court's decision to admit evidence that he left the bank was manifestly unreasonable. Because the proper foundation was established for evidence of flight, the evidence was necessary to complete the picture of the

crime, and the evidence was not unduly prejudicial, the trial court did not err in admitting it.

Finally, even if the evidence was improperly admitted, the erroneous admission of evidence is only reversible if, within reasonable probabilities, the outcome of the trial was materially affected by the evidence. State v. Tharp, 96 Wn.2d 591, 599, 637 P.2d 961 (1981). An error in the admission of evidence is harmless when the evidence is of minor significance to the evidence as a whole. State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997).

There is no reasonable probability that the court's finding of guilt was materially affected by the evidence. While Visnich attempts to cast the trial court's decision on the forgery charge as a close one, as shown above, the evidence of forgery was strong. Evidence that Visnich left the bank during one of the two transactions was minor to the case as a whole. Visnich has failed to establish a reasonable probability that the challenged evidence materially affected the verdict.

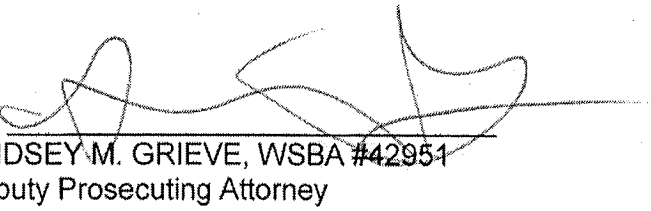
D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Visnich's convictions for two counts of forgery.

DATED this 20 day of March, 2015.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney



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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to the attorneys for the appellant, Thomas Kummerow, containing a copy of the Brief of Respondent, in STATE v. SCOTT VISNICH, Cause No. 72247-6-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Name

Date 03-20-15

Done in Seattle, Washington