

FILED
Oct 06, 2015
Court of Appeals
Division I
State of Washington

NO. 73205-6-I

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

STATE OF WASHINGTON,

Respondent,

v.

JOSHUA TANOAI

Appellant.

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

The Honorable Michael T. Downes, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The trial court erred in admitting prejudicial “flight” evidence.

Issue Pertaining to Assignment of Error

Evidence that the accused concealed himself from police after committing a crime may be admissible if it reasonably shows consciousness of guilt. The prosecution introduced evidence that Joshua Tautua Tanoai was hiding in an attic when he was arrested to show consciousness of guilt. However, Tanoai’s arrest occurred seven weeks after the alleged crimes, evidence adduced at trial indicated Tanoai was sought under multiple felony warrants and for multiple charges, and there was no indication Tanoai knew he was being arrested for the charged offenses. The trial court assumed flight evidence was automatically admissible contrary to case law requiring the court to determine whether the facts and circumstances allow for a reasonable inference between flight and consciousness of guilt for the charged crimes. Does the erroneous admission of the flight evidence at Tanoai’s trial require reversal and remand for a new trial?

B. STATEMENT OF THE CASE

The State charged Tanoai with first degree robbery, first degree unlawful possession of a firearm, and second degree assault for allegedly stealing Laurene Boushee’s Subaru station wagon on November 20, 2013.

CP 194-95, 200-01. The robbery and assault charges alleged Tanoai was armed with a firearm and was serving community custody when he committed the crimes. CP 194. The State made the community custody allegation with respect to the unlawful possession of a firearm charge as well. CP 194.

Boushee testified she had loaned Tanoai and his girlfriend, Tia Vaughn, her car on November 19, 2013 so they could move generators, lanterns, and other supplies for a power outage at their home. 2RP¹ 24-25. Boushee had loaned Vaughn and Tanoai her vehicle a few times, most recently when they kept the car while Boushee was “taking care of” an outstanding arrest warrant. 1RP 101-02.

Boushee sent a friend to pick the car up on November 19, 2015 and received communications via her friend’s phone that Tanoai would not give the car back because Boushee owed him money. 2RP 26-27, 33. Boushee went to Tanoai’s house on November 19, 2013 but her car was not there. 2RP 33. Boushee exchanged text messages with Tanoai, who stated Boushee owed him \$600. 2RP 34-35.

On the morning of November 20, 2013, Boushee got a ride to Tanoai’s house and saw her car under a tarp. 2RP 37-38. Boushee testified

¹ This brief refers to the verbatim reports of proceedings as follows: 1RP—February 9, 2015; 2RP—February 10, 2015; 3RP—consecutively paginated two-volume February 11, 2015 transcripts; 4RP—February 12, 2015; 5RP—March 4, 2015.

she knocked on the door and Tanoai "answered the door with a shotgun to" her. 2RP 38. Boushee said she was there for her car and she and Tanoai proceeded to yell at each other. 2RP 39-40. Boushee said that he pointed the shotgun at her as she was backing away and then turned and shot the car, blowing out a side window and putting "a bunch of holes" in the door. 2RP 40-41.

After two shotgun blasts were fired, Boushee said Tanoai went back into the house, came back out without the shotgun, got into Boushee's car, and started driving away. 2RP 42-43. Boushee said she dialed 911 when she realized Tanoai was going to take the car. 2RP 43. Boushee testified she jumped on the hood of the car as Tanoai began driving away. 2RP 44. Boushee said Tanoi "floored it" and drove up to the road; when Boushee had the opportunity, she threw herself off the car out of fear and sustained minor injuries. 2RP 45-46.

Police arrived shortly thereafter. Shotgun pellets, shotgun shell wadding, broken glass, and chips of paint were found around a tarp where Boushee said the car was parked. 2RP 75-79. Police also searched the house and found a pistol grip shotgun, Winchester rifle, and ammunition in the same room they found a casino club card and state identification belonging to Tanoai and an identification card belonging to Tia Vaughn. 2RP 76-90, 99-102, 106-07. Police also submitted the shotgun, rifle, and

shotgun cartridges for fingerprint and DNA testing. 2RP 167, 172. There were no fingerprints or DNA capable of comparison. 3RP 19, 29-30, 32.

Tanoai presented an alibi defense. Tia Vaughn testified she was not there when Boushee showed up on November 20, 2013 and that she and Tanoai were not living at the house. 2RP 128-29. Her statement to police, Vaughn explained, was falsely given because police told Vaughn that Tanoai had threatened to kill her and her family. 2RP 138-39. Tia Vaughn's brother, Jeffrey Vaughn, testified he was at the house when Boushee showed up but never saw Tanoai there. 2RP 153-55. Tanoai's mother and sister testified they had picked Tanoai up in Lynnwood on November 19, 2013 and that Tanoai was at the family's Camano Island residence from November 19 to November 22 or 23 assisting with preparations for the upcoming Thanksgiving holiday. 3RP 43-47, 55, 58. Heather Mathis and Jeremain Moore both testified they lived at the Lynnwood house and were home during the November 20, 2013 incident. 3RP 63-65, 73. Mathis testified Boushee had an altercation with a Mexican man, not Tanoai. 3RP 64. Moore testified a group of four Mexican men pulled up in a Cutlass, one of the men had a shotgun. 3RP 76-78. Moore said he heard shotgun blasts and saw the Cutlass and Boushee's Subaru as they drove away. 3RP 78-81. Moore also confirmed that Tanoai was not there that day. 3RP 94.

Before trial, Tanoai moved in limine to exclude any references to Tanoai's arrest or other wrongful conduct under ER 404. CP 147; 1RP 36-37. The State indicated it intended "to offer testimony of when and where the defendant was arrested . . . because I think it will be relevant, and testimony that he was found hiding in the attic of this home where this crime occurred when he was arrested." 1RP 37. The State asserted such evidence went to Tanoai's consciousness of guilt: "that when the police came to arrest him, he was hiding in an upstairs attic weeks after the crime occurred." 1RP 37. Defense counsel asserted this would force Tanoai to "take the stand to rebut the fact he wasn't hiding because of this charge but because of" other outstanding warrants. 1RP 37-38. Defense counsel also pointed out the attenuated timeline between the date of the charged crimes and the date of Tanoai's arrest. 1RP 37-38.

The trial court admitted the evidence stating it was "certainly relevant evidence." 1RP 38. The trial court indicated it was "not aware of any constitutional issue or any rule or statute that would prohibit the State from getting into evidence that a person who was being sought for the commission of a crime was found hiding in a particular place." 1RP 38-39. The trial court also determined that the probative value of the hiding evidence was "not substantially outweighed by the danger of unfair prejudice" under ER 403. 1RP 39.

The State presented the testimony of Snohomish County sheriff's deputy Marcus Dill who testified he was "currently assigned to the U.S. Marshal's Fugitive Task Force." 2RP 162. Dill testified that in January 2014 he was looking for Tanoai in connection to a robbery-assault incident that occurred in Lynnwood in November 2013. 2RP 162-63. Sheriff's deputy Ryan Phillips had testified that as of December 27, 2013, Tanoai "had some felony warrants and was wanted on multiple probable cause charges," but did not specify to which crimes these warrants and multiple charges related. 2RP 143. On January 7, 2014, Dill said he came into contact with Tanoai at the Lynnwood house and stated Tanoai "had crawled up into the crawl space and was in the rafters, essentially" when he was found by police. 2RP 163.

The jury returned guilty verdicts on first degree unlawful possession of a firearm and second degree assault but hung on the first degree robbery charge. CP 105-06, 108; 4RP 30-35, 38-40. The jury also returned a special verdict indicating Tanoai was armed with a firearm when he committed the second degree assault. CP 104; 4RP 35.

Prior to sentencing, the State submitted a second amended information charging Tanoai with theft of a motor vehicle instead of first degree robbery. CP 96-97; 5RP 2-4. Tanoai pleaded guilty to this amended charge. CP 7-23; 5RP 4-8. Also prior to sentencing, the trial court heard the

testimony of Jeremy Brown, a Department of Corrections community corrections officer, and found beyond a reasonable doubt that Tanoai was on community custody on November 20, 2013.² 5RP 10-12, 14-15.

The trial court sentenced Tanoai to a total of 152 months of incarceration, imposing concurrent top-of-the-standard-range terms for all three counts and a 36-month firearm enhancement. CP 25-26; 5RP 28-30. Tanoai timely appeals.³ CP 6.

C. ARGUMENT

THE TRIAL COURT ERRONEOUSLY ADMITTED FLIGHT EVIDENCE NOT PROBATIVE OF GUILT AND SUBSTANTIALLY OUTWEIGHED BY UNFAIR PREJUDICE

The United States Supreme Court has “consistently doubted the probative value in criminal trials of evidence that the accused fled the scene of an actual or supposed crime.” Wong Sun v. United States, 371 U.S. 471, 484, n.10, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963) (collecting cases). The Court has recognized that

² The parties agreed to judicial fact-finding with respect to whether Tanoai was on community custody. IRP 45-46.

³ Following notice of appeal, Tanoai moved to withdraw his standard guilty plea to theft of a motor vehicle and substitute it with an Alford plea. CP 3-5; see generally North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970). The trial court did not rule on this motion and instead transferred it to this court “for consideration as a personal restraint petition” pursuant to CrR 7.8(c)(2). CP 1-2. It does not appear that this court has opened a case for Tanoai’s personal restraint petition to date, and Nielsen, Broman & Koch, PLLC has been appointed to represent Tanoai solely on his direct appeal.

it is not universally true that a man who is conscious that he has done a wrong will pursue a certain course not in harmony with the conduct of a man who is conscious of having done an act which is innocent, right, and proper, since it is a matter of common knowledge that men who are entirely innocent do sometimes fly from the scene of a crime through fear of being apprehended as the guilty parties, or from an unwillingness to appear as witnesses.

Alberty v. United States, 162 U.S. 499, 511, 16 S. Ct. 864, 40 L. Ed. 1051 (1896) (internal quotations marks omitted).

“When evidence of flight is admissible, it tends to be only marginally probative as to the ultimate issue of guilt or innocence.”⁴ State v. Freeburg, 105 Wn. App. 492, 498, 20 P.3d 984 (2001). “[W]hile the range of circumstances that may be shown as evidence of flight is broad, the circumstance or inference of consciousness of guilt must be substantial and real, not speculative, conjectural, or fanciful.” Id. The probative value of flight evidence as circumstantial evidence of guilt

depends upon the degree of confidence with which four inferences can be drawn: (1) from the defendant’s behavior to flight; (2) from flight to consciousness of guilt; (3) from consciousness of guilt to consciousness of guilt concerning the crime charged; and (4) from consciousness of guilt concerning the crime charged to actual guilt of the crime charged.

⁴ “Flight” evidence includes any “evidence of resistance to arrest, concealment, assumption of a false name, and related conduct” State v. McDaniel, 155 Wn. App. 829, 854, 230 P.3d 245 (2010) (quoting State v. Freeburg, 105 Wn. App. 492, 497-98, 20 P.3d 984 (2001)). Here, the “flight” evidence consisted of Tanoai hiding in the attic of a house seven weeks after the alleged crimes occurred. 2RP 162-63

Id. (citing United States v. Myers, 550 F.2d 1036, 1049 (5th Cir. 1977)). Courts “will not accept ‘[p]yramiding vague inference upon vague inference [to] supplant the absence of basic facts or circumstances from which the essential inference of an actual flight must be drawn.’” State v. McDaniel, 155 Wn. App. 829, 854, 230 P.3d 245 (2010) (alterations in original) (quoting State v. Bruton, 66 Wn.2d 111, 113, 401 P.2d 340 (1965)). Instead, “the government must make certain that each link in the chain of inferences that concludes with a consciousness of guilt of the crime charged is sturdily supported.” United States v. Wright, 392 F.3d 1269, 1278 (11th Cir. 2004) (citing Myers, 550 F.2d at 1049). Moreover, immediate flight from a crime scene is markedly more probative than flight or concealment from law enforcement after the crime. E.g., United States v. Howze, 668 F.2d 322, 325 (7th Cir. 1982) (without immediacy between flight and crime, court must find flight conduct was specifically related to the charged crime).

Forty-eight days had elapsed between the time Tanoai allegedly committed the crimes on November 20, 2013 and the time Tanoai was arrested on January 7, 2014. 2RP 162-63. The jury heard evidence that, as of December 27, 2013, Tanoai “had some felony warrants and was wanted on multiple probable cause charges.” 2RP 143. However, no evidence linked these warrants and “multiple probable cause charges” to the charged crimes for which Tanoai was standing trial. Indeed, the State presented no

evidence that Tanoai knew or would have known that police were trying to arrest him for the November 20, 2013 incident. The State's evidence therefore "did not allow a direct inference as to [Tanoai]'s consciousness of guilt" for robbing or assaulting Boushee or for unlawfully possessing a firearm some seven weeks prior. McDaniel, 155 Wn. App. at 855. Thus, the fact that Tanoai was hiding in an attic at the time of arrest was nothing more than the State's attempt at a "speculative, conjectural, or fanciful" inference that his concealment was a result of consciousness of guilt for the charged crimes. Freeburg, 105 Wn. App. at 498. Because the State did not and could not provide "substantial and real" inferences of consciousness of guilt, evidence Tanoai was hiding in an attic when he was arrested was admitted in error. Id.

Not only was this evidence insufficiently probative, it was extremely prejudicial. The evidence describing the circumstances of the arrest, including the deputy's testimony that he was "assigned to the U.S. Marshal's Fugitive Task Force," allowed jurors to surmise Tanoai was a fugitive from justice who was evading police. 1RP 162. This permitted jurors to conclude, without the necessary foundation, that Tanoai was a criminal type person who hid from law enforcement and therefore was consciously guilty of the charged crimes. Indeed, this is the precise reason the State gave for offering this evidence. 1RP 37. Given that the flight evidence was at best

weakly probative of guilt with the attenuated timeline and the lack of nexus between several outstanding warrants and the robbery, assault, and unlawful possession of a firearm, any probative value was substantially outweighed by unfair prejudice. The flight evidence should have been excluded under ER 403.

The trial court did not engage in any real analysis of the hiding-in-the-attic evidence and instead treated such evidence as automatically admissible. IRP 38-39. Even though defense counsel pointed out that Tanoai might have been hiding because of unrelated warrants and mentioned the passage of time between the crimes and the arrest, the trial court determined that the “fact that he defendant was hiding in an attic, if, in fact, the State can prove that, when the police came to arrest him on this charge, is certainly relevant evidence.” IRP 37-38. The trial court acknowledged it was unaware of “any constitutional issue or any rule or statute that would prohibit the State from getting into evidence that a person who was being sought for the commission of a crime was found hiding in a particular place.” IRP 38-39. In the trial court’s own words, it was unfamiliar with Washington case law requiring flight evidence to provide a direct inference between such evidence and consciousness of guilt. The trial court’s misunderstanding and misapplication of the law was an abuse of discretion.

State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003) (trial court abuses discretion when its decision is reached by applying incorrect legal standard).

When, as here, a trial court errs in admitting evidence, reversal is required when the admission of the evidence affected the outcome of trial within a reasonable probability. State v. Ashurst, 45 Wn. App. 48, 54, 723 P.2d 1189 (1986). This case came down to a credibility contest among the various witnesses who gave conflicting accounts of the events and testified inconsistently about whether Tanoai was even present at the Lynnwood house on November 20, 2013. Given this conflicting evidence, the State's presentation of one witness whose sole role was to tell the jury Tanoai was found hiding in an attic at the time he was arrested was extremely damaging and succeeded in painting Tanoai as a guilty fugitive. Dill's focused testimony—not only that he found Tanoai hiding but also that he was a member of a fugitive task force—lent an aura of reliability to otherwise inadmissible and prejudicial evidence. State v. Montgomery, 163 Wn.2d 577, 595, 183 P.3d 267 (2008); State v. Demery, 144 Wn.2d 753, 759, 765, 30 P.3d 1278 (2001). Within a reasonable probability, this flight evidence affected the outcome of Tanoai's trial. This error is grounds for reversal and a new trial.

D. CONCLUSION

Because the trial court erroneously admitted flight evidence, Tanoai asks this court to reverse his convictions and remand for a new and fair trial.

DATED this 6th day of October, 2015.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

A handwritten signature in black ink, appearing to read "Kevin A. March", written over a horizontal line.

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
vs.)	COA NO. 73205-6-I
)	
JOSHUA TANOAI,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 6TH DAY OF OCTOBER, 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] JOSHUA TANOAI
DOC NO. 987353
COYOTE RIDGE CORRECTIONS CENTER
P.O. BOX 769
CONNELL, WA 99326

SIGNED IN SEATTLE WASHINGTON, THIS 6TH DAY OF OCTOBER 2015.

X *Patrick Mayovsky*