NO. 45132-8-II

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

STATE OF WASHINGTON, Respondent

v.

DAVID TALYNN PECK, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.12-1-01633-0

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

A. RESPONSE TO ASSIGNMENTS OF ERROR

I. THE DEFENDANT VOLUNTARILY PROVIDED A DNA SAMPLE AND THE TRIAL COURT CORRECTLY DENIED THE MOTION TO SUPPRESS.

II. THE TRIAL COURT PROPERLY DISALLOWED THE DEFENDANT FROM ACCUSING ANOTHER SUSPECT OF COMMITTING THE CRIME.

B. STATEMENT OF THE CASE

Moe Jones was the shift manager at the Pizza Hut on Highway 99 in Vancouver, Washington, on March 11, 2012. Trial RP 37. At the end of her shift. she was responsible for cleaning, closing and locking the restaurant, and taking the deposit to the bank. Id. The deposit typically consisted of the money made between 8:00 p.m. and closing time. Id. On that particular night, the deposit contained about $614. Id. The deposit was contained in a U.S. Bank sealed envelope. Ms. Jones was accompanied by the delivery driver, Elizabeth McMurray, when they left the restaurant. Trial RP 38, 55. They left the restaurant at 1:25 a.m. Id. As they left the back door, they set the alarm and made sure the door was locked, and then walked to their cars. Id. Their cars were about three spaces from each other. Trial RP 65. There is an apartment complex behind the back parking lot, behind a fence and a row of arborvitae trees. Trial RP 39. On one corner of the back parking lot there is an area where you can walk through

the arborvitae and go through the fence into the apartment complex. Trial RP 40, 64. There is a makeshift storage shed in the back parking lot as well. Trial RP 39. As Ms. Jones was opening her car door to get in she saw someone coming out of the makeshift wood shed. RP 40. She yelled at him, asking him what he was doing back there? Trial RP 40. The man was coming in her direction and she tried to quickly get into the car and get the door shut. Id. However, the man got to her first and grabbed the door. Id. He stuck a gun in her face and said "Give me the money." Id. She said "okay," retrieved the deposit bag from her pants pocket and handed it to him. Id.

The man was wearing a hood, a ball cap, sunglasses, and what appeared to be wig with long, stringy hair. Trial RP 41. She saw that he was white but could not determine how tall he was as she was seated in her car when he got to her. Id. She guessed that he was about five feet eight inches tall, and he was skinny. Id. He was wearing a dark jacket and was younger than age 50, in her approximation. Trial RP 42. Ms. McMurray, not aware that the man had a gun, hit the man with the delivery topper on her[1] car and briefly struggled with him until Ms. Jones called out "No, he's got a gun." Trial RP 42, 68. At that point McMurray backed off and the man took off running through the arborvitae toward the

[1] The topper is a delivery sign with magnetic strips that enable it to stick to the top of the delivery driver's car. Trial RP 62.

apartment complex. Id. After the robber fled, the women got in their cars, with McMurray following Jones, and drove to a nearby, well-lit McDonald's, where they called the police. Trial RP 43.

Ms. McMurray testified the robber was short[2] and thin with "a very prominent" straight nose. Trial RP 70. She also observed that he was white and wearing sunglasses, a black wig, and a black coat with a hood pulled over. Trial RP 70-71. McMurray was shown a picture of Exhibit 3, the wig that was recovered in a dumpster near the crime scene and admitted into evidence, and testified it looked similar to the wig the robber was wearing. Trial RP 72, 158-60. Ms. McMurray testified that upon observing the defendant in court, his nose appeared "almost exactly" like the robber's nose. Trial RP 96. There was nothing about the defendant's appearance that stood out as being different from the robber. Id.

Deputy Jared Stevens of the Clark County Sheriff's Office responded to the robbery call from Jones and McMurray. Trial RP 157. Based on the statements of the women, he looked for evidence in the direction the suspect was last seen running. Trial RP 157. He followed a commonly-used path in the direction the suspect was seen running and came across several recycle bins near the apartment complex. Trial RP 158-59. In one of the bins he found a black wig. Trial RP 158. The wig

[2] Ms. McMurray is five feet, ten inches tall. "Short," to her meant the robber was between five foot, five inches and five foot, seven inches tall. Trial RP 71.

matched the description of the wig the victims gave. Trial RP 159. He placed it in an evidence bag and sealed it. Id. The wig was admitted as Exhibit 2. Trial RP 160. A photograph of the wig was admitted as Exhibit 3. Id.

Heather Pyles is a forensic scientist with the Washington State Patrol Crime Laboratory. Trial RP 115. Her primary duty is performing DNA analysis. Trial RP 116. She has performed over 500 DNA tests. Trial RP 117. Ms. Pyle received the wig in this case for testing. Trial RP 129. She began her analysis by determining where on the wig she was likely to find the largest deposit of DNA. Trial RP 129. She determined that the largest deposit would be found on a large inside cap on the wig that contained a band and netting. Trial RP 129-30. She swabbed the area to collect skin cells that would have transferred to the inside cap. Trial RP 130. She obtained a mixed profile, with a major component and a trace component. Trial RP 131-32. She described "trace" DNA:

> It is--the DNA that does not belong to the major is at a level that is insufficient to get above our statistical threshold. Meaning I cannot apply a statistic to it. Additionally there's just not enough of it there to consider it to be a minor person because there's just not enough to even call it a person. It's just--it's a remnant of DNA that's at a low trace level.
>
> ...
>
> [B]ecause of the limited amount of information from that individual and the limited height or level, there was not

> enough there to make any kind of sound scientific conclusions.

Trial RP 132.

Ms. Pyle testified that it would be unlikely that someone would only leave trace DNA if they were wearing the wig with a hood on top of it and were running and having a lot of motion, potentially getting warm and sweating. Trial RP 133. In that scenario, there would be a lot of contact between the wig and the person's head, so it is unlikely only trace DNA would be left behind. Trial RP 133. The profile of the major component of DNA matched the defendant, David Peck. Trial RP 136. Her next step was to determine the strength of the match, and she determined that only one person in 2.2 quintillion would have this DNA, meaning it is a "very, very rare" profile and "the fact that it matched somebody is significant." Trial RP 137.

Deputy Stevens interviewed the defendant on September 6, 2012. Trial RP 161. The defendant denied having anything to do with the robbery. Id. He also denied having ever had a black wig. Id. When confronted with the fact that his DNA was found on the black wig recovered in this case, the defendant said that "sometimes he has too much to drink and does crazy stuff." Trial RP 162. Then he said that the year before he had dressed up like a woman for Halloween and worn a wig, but

he did not recall what it looked like. Id. The defendant was in jail, however, for both of the two Halloweens preceding the robbery. Trial RP 173-74.

The defendant was convicted of robbery in the first degree and theft in the third degree. CP 120-21.

Prior to trial, the trial court heard motions to suppress the defendant's statements under CrR 3.5 and to suppress the DNA reference sample that Peck provided at the jail under CrR 3.6. In his motion to suppress the DNA reference sample under CrR 3.6, the defendant asserted that he did not voluntarily consent to the collection of his DNA through a cheek swab. CP 34-41. The trial court heard testimony from Deputy Stevens. Deputy Stevens testified that he went to the Clark County Jail where David Peck was being held on an unrelated matter to interview him about this robbery and to ask if he would provide a DNA sample. RP (June 21, 2013), p. 5-8. Specifically, he asked for Peck's "permission" to take a sample. Id. at 19. Deputy Stevens told Peck about the initial result of the DNA test on the wig, which matched Peck, and told him that another sample would either confirm those results or rule him out. Id. at 8. Stevens told Peck that if he was innocent, a control DNA sample from him could prove that. Id. Stevens did not tell Peck he was required to give a sample, and he made no threats or promises to induce him to give a

sample. Id. At the time he requested the sample, Stevens had already given Peck his *Miranda* warnings, and Peck waived them. Id. at 7-8, 24. Peck expressed no reluctance and merely asked how the swab would be done. Id. at 8-9. Peck agreed to give a DNA sample. Id. at 8-9. On cross examination, Stevens was asked whether he gave the *Ferrier* warning prior to asking for the DNA sample and he replied that he did not. Id. at 14-15. Stevens testified that had Peck declined to give the sample, he would have applied for a search warrant. Id. at 22.

Peck testified that he believed that if he refused the DNA swab, that Stevens would take it from him physically without his consent. Id. at 30. He testified that where he "comes from," DOC, that's what they do. Id. Peck testified that Stevens told him that if he did not provide a DNA sample, he (Stevens) would obtain a warrant for the sample. Id. at 31. Deputy Stevens, as noted above, testified only that if Peck had declined to give a sample, he would have "applied for a search warrant." Id. at 22. He did not testify that if Peck declined, he would have obtained a search warrant (as though it were fait accompli). Id.

The trial court entered findings of fact and conclusions of law. CP 122-25. The trial court found, inter alia, that Deputy Stevens administered the *Miranda* warnings and that Peck voluntarily waived them. CP 123. The court found that Deputy Stevens asked Peck to provide a DNA sample

and Peck agreed. CP 124. The court found, based on the totality of circumstances, that Peck voluntarily provided a DNA sample. CP 124. The court also found that Peck testified that Deputy Stevens told him that if he did not provide the sample, Stevens "would get a search warrant." CP 124. The court did not, however, find that Deputy Stevens actually said that--only that Peck testified to that. CP 124.

The court concluded that even if Deputy Stevens had told Peck that he would get a search warrant if Peck did not provide a sample, that statement did not vitiate Peck's consent. CP 125. The court further concluded that the DNA evidence was admissible and would not be suppressed. CP 124.

This timely appeal followed.

C. ARGUMENT

I. THE DEFENDANT VOLUNTARILY PROVIDED A DNA SAMPLE AND THE TRIAL COURT CORRECTLY DENIED THE MOTION TO SUPPRESS.

"In reviewing the denial of a motion to suppress, we determine whether substantial evidence supports the trial court's findings of fact and whether those findings support the trial court's conclusions of law. We review conclusions of law de novo. Unchallenged findings of fact are

verities on appeal." *State v. MacDicken*, 171 Wn.App. 169, 173, 286 P.3d 413, 415 (2012).

Peck assigns error to only one finding of fact. He assigns error to finding of fact 22, in which the trial court found: "Based on the totality of the circumstances the court finds that the DNA reference sample was provided voluntarily by the Defendant." CP 124. Whereas there are two conclusions of law pertaining to the admissibility of the DNA reference sample, Peck does not state which of the two conclusions (or both) he assigns error to. He merely assigns error to the trial court's decision to deny the motion to suppress.

Peck premises his claim that his consent to the DNA swab was involuntary on two principle claims: That Deputy Stevens told him that he "would" get a warrant if Peck declined to provide a sample, and that Deputy Stevens did not advise Peck that he could refuse the request.

The trial court found that Deputy Stevens asked Peck if he would provide a DNA sample and that Peck "agreed." CP 124. Peck does not assign error to this finding. Substantial evidence in the record supports the trial court's finding that Peck voluntarily submitted a DNA sample.

The State bears the burden of demonstrating that consent to search was voluntarily given. *State v. Bustamante-Davila*, 138 Wn. 2d 964, 981-82, 983 P.2d 590, 599 (1999).

> To be valid, the consent must be voluntary and the search must not have exceeded the scope of consent. Whether consent is freely given is a question of fact dependent upon the totality of the circumstances which includes "(1) whether *Miranda* warnings had been given prior to obtaining consent; (2) the degree of education and intelligence of the consenting person; and (3) whether the consenting person had been advised of his right to consent." No one factor is dispositive.

Bustamante-Davila at 981-82 (internal citations omitted).

"Other factors may be relevant depending on the totality of the circumstances." *State v. Garcia*, 140 Wn.App. 609, 626, 166 P.3d 848 (2007), citing *State v. O'Neill*, 148 Wn.2d 564, 588-59, 62 P.3d 489 (2003).

Peck is experienced in the criminal justice system as evidenced by his stated history in the Department of Corrections and his numerous prior convictions. Although he claimed that in his view, the Deputy could have forcibly extracted his DNA because, according to him, that is what happens in DOC, the trial court found this claim not credible. Peck was given his *Miranda* warnings prior to being asked for his DNA and he voluntarily waived them. Moreover, Peck did not specifically assign error to the trial court's conclusion of law that even if Deputy Stevens had told Peck that he "would get" a search warrant for Peck's DNA if he declined a sample, it would not vitiate the consent Peck gave to taking the sample. Finally, Peck cites no case which holds that if an officer tells a defendant

that he *will* obtain a warrant should a defendant refuse to provide consent to a search, it vitiates the defendant's consent as a matter of law. Indeed, valid consent may be given following a threat to obtain a warrant. *State v. Smith,* 115 Wn.2d 774, 790, 801 P.2d 975 (2000). Peck relies almost entirely on *Garcia*, supra, to support his claim that his consent was not voluntarily given. But the facts in *Garcia* bear no resemblance to the facts in this case. In *Garcia,* the defendant was not given *Miranda* warnings prior to the request for consent to search. Further, the trial court in *Garcia* relied almost entirely on the fact that the defendant signed a consent to search form. *Garcia* at 626. The Court of Appeals, in finding that the State had not met its burden of demonstrating voluntary consent, reiterated that "no single factor is dispositive in the analysis of the voluntariness of consent." *Garcia* at 626.

Here, although the defendant made a self-serving claim that he was coerced, the trial court rejected this claim as not credible. Moreover, Deputy Stevens, on this record, did have probable cause to get a search warrant, unlike in *State v. Apodoca*, 67 Wn.App, 736, 839 P.2d 352 (1992), *overruled on other grounds, State v. Mierz*, 127 Wn.2d 460, 901 P.2d 286 (1995), in which the officers' threat to obtain a search warrant was groundless because they did not have probable cause to obtain one.

Peck voluntarily consented to giving his DNA and the trial court should be affirmed.

II. THE TRIAL COURT PROPERLY DISALLOWED THE DEFENDANT FROM ACCUSING ANOTHER SUSPECT OF COMMITTING THE CRIME.

Peck sought to introduce evidence that another suspect may have committed the crime. Following the robbery, officers searched the area near the Pizza Hut for suspects. They came across a man and a woman who were walking in the opposite direction of where the wig was found. RP (June 28, 2013), p. 13, CP 10. The man was detained and found to be Ryan Stallman. CP 10. Stallman had a flashlight and an airsoft pistol on him when he was stopped. CP 10, 12. Stallman did not have any money on him to the extent that would have been stolen in the robbery just minutes before he was stopped. RP 13. Stallman had a confirmed alibi for the time of the robbery. Id., CP 10. Finally, Ms. Jones and Ms. McMurray were driven to the location where Stallman was being detained and both said he was *not* the person who robbed them. CP 10, RP 13. Based on these facts, the trial court ruled that Peck had not presented a sufficient factual chain to accuse Stallman of being the perpetrator. The court held:

> It is a circumstantial case to some extent, but there's also some direct evidence in terms of the DNA and the hat found very close to the scene--or excuse me, the wig. That, coupled with some of the statements that Mr. Peck made and then looking at the evidence of the alibi, the show-up,

> the fact that the clothing was different, the Court is just finding at this point that there is not the train of evidence that necessary to meet the threshold for admissibility and that this would simply be misleading to the jury. So I am excluding the evidence related to Mr. Stallman at this time.

RP 13-14.

The appellate court reviews a trial court's decisions as to the admissibility of evidence under an abuse of discretion standard. *State v. Stenson*, 132 Wn. 2d 668, 701, 940 P.2d 1239 (1997). E.g., *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995) (this court will not disturb a trial court's rulings on a motion in limine or the admissibility of evidence absent an abuse of the court's discretion); *State v. Swan*, 114 Wn.2d 613, 658, 790 P.2d 610 (1990) (the admission and exclusion of relevant evidence is within the sound discretion of the trial court and the court's decision will not be reversed absent a manifest abuse of discretion).

Here, the trial court did not abuse its considerable discretion in denying the motion to admit "other suspect" evidence. The trial court was very familiar with the controlling case law on this subject, including *State v. Rehak*, 67 Wn.App. 157, 834 P.2d 651 (1992), and *State v. Mak*, 105 Wn.2d 692, 718 P.2d 407, *cert. denied*, 479 U.S. 955 (1986).

The rule regarding the admission of evidence accusing another suspect of committing the crime is outlined in *State v. Downs*, 168 Wash. 664, 667, 13 P.2d 1 (1932): "Before such testimony can be received, there

must be such proof of connection with the crime, such a train of facts or circumstances as tend clearly to point out someone besides the accused as the guilty party." *Mak*, supra, at 716. A defendant may not claim or imply another's involvement in the crime without admissible evidence linking that person to the crime charged. *Rehak*, supra, at 162. Before a defendant seeks to introduce evidence connecting another person with the crime charged, a proper foundation must be laid. *Id.*

In this case, the evidence pointed away from Stallman in every key respect. At the time he was stopped, Stallman did not have sunglasses (the police reports make no mention of finding sunglasses--see CP 10-26), and he had no money. Why would the perpetrator take the time to run from the crime scene and yet be near it in the opposite direction several minutes later? How and where did Stallman discard the roughly $600 he stole in the robbery? It makes no sense to suggest that Stallman committed the robbery, ran in the direction of the apartments, discarded the wig, hat, sunglasses and money (in, presumably, a safe place, or else what was the point of stealing it?), and then walked or ran in the opposite direction (hooking up with a female companion somewhere along the way) for the purpose of being seen near the crime scene but acting nonchalantly. One would think it easier just to run and hide.

As if that were not enough, Stallman had a confirmed alibi. He was with his aunt and uncle in their hotel room, several minutes before being stopped, during the time of the robbery. CP 10. Finally, both Jones and McMurray affirmatively stated that Stallman was not the man who robbed them. As the trial court noted, they weren't merely unsure. They wholly denied that he was the subject. RP 13. The trial court correctly observed that "this is really pretty close to just having a person on the side of the road, blaming them for the crime." RP 14. Peck did not lay a sufficient foundation for this admission of this evidence and the trial court correctly exercised its discretion in denying admission of this evidence. Peck's convictions should be affirmed.

D. CONCLUSION

The judgment and sentence should be affirmed.

DATED this 8th day of April, 2014.

Respectfully submitted:

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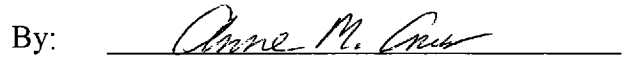
By: 
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