

NO. 68269-5-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

DAVID SOLOMONA,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE CHERYL CAREY, JUDGE

FILED
SUPERIOR COURT
KING COUNTY
JAN 12 2012

BRIEF OF RESPONDENT

DAN SATTERBERG
King County Prosecuting Attorney

E. BRADFORD BALES
SENIOR Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
Regional Justice Center
401 Fourth Avenue North, 2A
Kent, Washington 98032
(206) 205-7427

TABLE OF CONTENTS

| | Page |
|--|------|
| A. <u>ISSUE PRESENTED</u> | 1 |
| B. <u>STATEMENT OF THE CASE</u> | 1 |
| 1. PROCEDURAL FACTS | 1 |
| 2. SUBSTANTIVE FACTS | 2 |
| C. <u>ARGUMENT</u> | 5 |
| 1. THE PARTIES AGREED TO THE INTRODUCTION OF THE REDACTED JUDGEMENT AND SENTENCE AND THE COURT WAS NOT REQUIRED TO SUA SPONTE ENTER A GENERAL STIPULATION | 5 |
| 2. THE STATE NOT ONLY FOCUSED THE PROSECUTION FOR TAMPERING ON THE DEFENDANT’S ACTIONS TOWARD CASSANDRA NUEZCA, IT ALSO ELECTED WHICH ACTS CONSTITUTED THE CRIME CHARGED..... | 8 |
| D. <u>CONCLUSION</u> | 11 |

TABLE OF AUTHORITIES

Page

Table of Cases

Washington State:

State v. Bobenhouse, 166 Wash.2d 881, 214 P.3d 907 (2009)..... 6,8

State v. Borsheim, 140 Wash.App. 357, 165 P.3d 417 (2007) 9

State v. Gladden, 116 Wn.App. 561, 565-66, 66 P.3d 1095 (2003)..... 6

State v. Johnson, 90 Wn.App. 54, 950 P.2d 981 (1998)..... 6,8

State v. Noltie, 116 Wash.2d 831, 809 P.2d 190 (1991)..... 9,10

State v. Petrich, 101 Wash.2d 566, 683 P.2d 173 9,10

Federal Cases:

Old Chief v. United States, 519 U.S. 172, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997)..... 6

United States v. Jones, 159 F.3d 969, 979 (6th Cir.1998).....8

Statutes, Rules and Regulations

Washington State:

RCW 9.41.040(1)..... 1

RCW 9A.56.190..... 1

RCW 9A.56.200(1)(i)..... 1

RCW 9A.72.120..... 1

RCW 69.50.401 2

A. ISSUES PRESENTED

1. If the defendant's proffered stipulation does not establish the element the State must prove, the trial court may admit evidence of the specific prior conviction to prove that element. When the parties agreed to submit a redacted copy of the judgment and sentence regarding a conviction for a prior offense, which was required to prove a necessary element of a crime charged, did the trial court error by failing to sua sponte require a stipulation to the felony conviction?

2. If the State's evidence focuses on the acts of tampering directed at one individual and the State elects those acts in closing, is the court required to give a Petrich instruction?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

David Solomona was charged by amended Information with Robbery in the First Degree¹ in violation of RCW 9A.56.200(1)(a)(i) and RCW 9A.56.190 with a Firearm Enhancement; two counts of Unlawful Possession of a Firearm in First Degree in violation of RCW 9.41.040(1); Tampering with a Witness in violation of RCW 9A.72.120; and Violation

¹ The Appellate incorrectly states that Mr. Solomona was charged with "first degree burglary." AB 2.

of the Uniform Controlled Substances Act, distribution of methamphetamine, in violation of RCW 69.50.401(1)(2) (b). CP 63-67.

Solomona was tried by a jury and found guilty as charged. CP 91-96. Solomona was sentenced to a standard range sentence of 189 months, including a Firearm Enhancement. CP 168-179. Solomona appealed. CP 191-206.

2. SUBSTANTIVE FACTS

In October of 2010, Michael Burns was introduced to Solomona. RP 185. Solomona separated from his wife and in December of 2010, he moved in with Mr. Burns. RP 186. On a number of occasions, Mr. Burns purchased methamphetamine from Solomona. RP187-188. Mr. Burns told Solomona when he moved in that he was not allowed to have firearms in the residence. RP188. Solomona agreed that he would not bring firearms into the home. Shortly after moving in, Solomona was in his room with his girlfriend, Cassandra Nuezca. Mr. Burns heard a loud boom off of his deck, so he ran downstairs. He saw Solomona with a camouflage shotgun. RP189-192, 353-356. Mr. Burns told Solomona that he had to leave and that he could no longer live in his house. RP193.

On January 9, 2011, Solomona called Mr. Burns and arranged to pick up some of his belongings. Solomona made it a point to make sure that Mr. Burns' daughter was not going to be home. RP195. Solomona

stated that his cousin and two other people were going to help him move and that he would be there shortly. The individuals arrived and Mr. Burns showed them what needed to be moved as they waited for Solomona. One of the suspects pulled a handgun and threatened to kill Mr. Burns. Mr. Burns ran, but was tackled and severely beaten by the two males. The female closed the door to the house, so Mr. Burns could not escape. RP196-200. The three individuals proceeded to steal Mr. Burns' flat screen television sets. RP200-201.

Solomona had told Ms. Nuezca that he was going to take Mr. Burns' televisions, so he could pay her the money that he owed her. Ms. Nuezca did not think he was serious. RP358. On the day of the robbery, Solomona told Ms. Nuezca "they're almost here, the people that are going to help me get your money." RP358-360. Ms. Nuezca was also with Solomona after the robbery when he discarded the firearm used in the robbery by throwing it into a wooded area. RP365-356. Ms. Nuezca later showed police where to find the handgun. RP365-366.

During the actual robbery, Solomona was in a car with Gregory Potter. Solomona had asked Mr. Potter to help him with the move, but then instead of assisting, Solomona just had Mr. Potter drive around. RP390-392. After he returned to his home with Solomona, the other three individuals arrived with Mr. Burns' televisions. Solomona asked Mr.

Potter to store one of the flat screen televisions for him. RP 393-396.

Sometime later, Solomona called Mr. Potter and told him to tell the police that the television came from the street. RP396. Mr. Potter was a witness endorsed by the defense and the State. RP24.

While Solomona was in confinement, he called Ms. Nuezca on almost a daily basis. The State focused on the calls from January 5, 2011 through January 18, 2011. RP353. The State requested a copy of the recorded jail calls and they were introduced into evidence. RP339-346. In establishing the charge of tampering, the State introduced several jail calls where Solomona attempted to convince Ms. Nuezca not to cooperate with the police. He would say such things as, “keep you fucking mouth shut,” “if somebody tries to talk to you, you should say fuck you, fuck you, fuck you, suck my dick,” “the number one rule is not to be a snitch,” and “I want you not to go to court.” RP353, 369-371, 559. The State then played the calls for the jury. RP373-375. During its closing argument, the State addressed the charge of Tampering with a Witness. The State only played the calls the defendant made to Ms. Nuezca. The state also quoted several of the defendant’s statements to Ms. Nuezca where he attempted to convince her not to cooperate with the police. RP558-559. After playing the calls to Ms. Nuezca, the State ended its discussion of the charge with, “The defendant said it all.” RP559.

During the trial, the State introduced without objection, Solomona's judgment and sentence for his prior Assault in the Second Degree conviction. RP462. The parties agreed to remove everything but the first and last page of the judgment and sentence. Significant redactions were also made to remove a second felony and any reference to punishment. Defense counsel reviewed the document and was satisfied with its content before it was presented to the jury. RP526-530.

C. ARGUMENT

1. THE PARTIES AGREED TO THE INTRODUCTION OF THE REDACTED JUDGEMENT AND SENTENCE AND THE COURT WAS NOT REQUIRED TO SUA SPONTE ENTER A GENERAL STIPULATION.

Solomona argues that the trial court erred when it allowed the state to admit evidence of the Solomona's prior conviction for Assault in the Second Degree. Solomona is incorrect. Not only does he misstate the facts as they occurred during trial, the law does not require the court to enter a stipulation when the parties are in agreement.²

The rules of evidence prohibit admission of relevant evidence when its 'probative value is substantially outweighed by the danger of unfair prejudice.' ER 403. When the State is required to prove that the

² Solomona's paragraph D1b appears to have been erroneously added. The caption does not match the paragraph's content. It should be part of his second argument.

defendant has a prior felony conviction and when the defendant stipulates to an unnamed felony conviction of the required type, refusing the defendant's stipulation is error. Old Chief v. United States, 519 U.S. 172, 183 n. 7, 185-86, 190-92, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997); State v. Johnson, 90 Wn.App. 54, 62-63, 950 P.2d 981 (1998). If the defendant agrees to adequately stipulate, the name of the felony and the court records proving the conviction become primarily propensity evidence and admitting them violates ER 404(b) and 403. Old Chief, 519 U.S. at 180-83, 185. If, however, the defendant's proffered stipulation does not establish the element the State must prove, the trial court may admit evidence of the specific prior conviction to prove that element. State v. Gladden, 116 Wn.App. 561, 565-66, 66 P.3d 1095 (2003).

Here, the State needed to prove Solomona had been convicted of a particular felony or a particular class of felony. Specifically, the State had to prove that Solomona had a prior conviction for a "serious offense." RCW 9.41.010 and 9.41.040(1); CP 64-65. From the beginning, counsel for the defendant was contemplating agreeing to the jury hearing that Solomona had a conviction for assault in the second degree.³ RP524. The

³ At no time did the defense ever submit or even propose a particular stipulation regarding the prior conviction.

concern was that the judgment and sentence had additional information that was not relevant and could be considered prejudicial. RP429. The State was in agreement that the addition items, such as Solomona's criminal history, should be redacted. RP429. The defense counsel's concern was simply that the redactions may leave the jury questioning what was underneath the redactions. RP510-511. Multiple pages were removed from the judgment and sentence and only the first page and the final signature page remained. The additional count was also removed, so that only the single count of assault in the second degree remained. RP523-524. After reviewing the redacted copy of the two page judgment and sentence, all parties were satisfied with its content. RP526-529.

Solomona would have had to stipulate to a particular offense or a "serious offense" in order to satisfy the element of Unlawful Possession of a Firearm in the First Degree. Defense counsel's decision not to submit a stipulation to an unnamed "serious offense" is also a tactical one. Stipulating simply to a "serious offense" could leave the jury thinking that Solomona's prior offense is something more serious than a second degree assault.

Moreover, unlike the prior rape conviction in Johnson, an assault conviction is unlikely to provoke an emotional response rather than a rational decision. is unfairly prejudicial

Finally, even if there were some kind of error in failing to stipulate to a serious offense, the trial court's error was harmless.⁴ In determining if a non-constitutional error of this type is harmless, the court must determine whether it is more probable than not that the error (using “assault in the second degree” v. “serious offense”) materially affected the outcome of trial. Johnson, 90 Wash.App. at 74, 950 P.2d 981; United States v. Jones, 159 F.3d 969, 979 (6th Cir.1998). Here, the evidence included the testimony of eyewitnesses, photographs, jail calls, and text messages from the defendant. Using the actual name of the defendant’s prior conviction instead of a “serious offense” would not have materially affected the outcome at trial.

2. THE STATE NOT ONLY FOCUSED THE PROSECUTION FOR TAMPERING ON THE DEFENDANT’S ACTIONS TOWARD CASSANDRA NUEZCA, IT ALSO ELECTED WHICH ACTS CONSTITUTED THE CRIME CHARGED.

Next, Solomona claims that the jury was not required to be unanimous regarding the charge of Tampering with a witness. Solomona is incorrect. Not only did the State’s entire case focus on the efforts of Solomona to convince Ms. Nuezca to not cooperate with the police, the State elected which conduct it was relying on during its closing.

⁴ Again, Solomona never submitted a stipulation or discussed the details of a proposed stipulation.

In Washington, a criminal defendant may be convicted by a jury only if the members of the jury unanimously agree that he committed the criminal act with which he charged. State v. Petrich, 101 Wash.2d 566, 569, 683 P.2d 173 (citing State v. Stephens, 93 Wash.2d 186, 190, 607 P.2d 304 (1980)). Where the evidence indicates that more than one distinct criminal act has been committed but the defendant is charged with only one count of criminal conduct, the jury must be unanimous as to which act or incident constitutes the charged crime. State v. Noltie, 116 Wash.2d 831, 842–43, 809 P.2d 190 (1991); Petrich, 101 Wash.2d at 572, 683 P.2d 173. That is, the “jury must be unanimous as to which act or incident constitutes a particular charged count of criminal conduct.” State v. Borsheim, 140 Wash.App. 357, 365, 165 P.3d 417 (2007) (citing Noltie, 116 Wash.2d at 842–43, 809 P.2d 190; Petrich, 101 Wash.2d at 572, 683 P.2d 173).

The issue of whether a unanimity instruction is required turns on whether the prosecution constituted a “multiple acts case.” State v. Bobenhouse, 166 Wash.2d 881, 892, 214 P.3d 907 (2009). Thus, in multiple acts cases, one of two things must occur: either (1) the State must elect a specific act on which it will rely for conviction or (2) the trial court must instruct the jury that it must unanimously agree that a specific criminal act has been proved beyond a reasonable doubt. Bobenhouse,

166 Wash.2d at 893, 214 P.3d 907; Noltie, 116 Wash.2d at 843, 809 P.2d 190; Petrich, 101 Wash.2d at 572, 683 P.2d 173.

Here, Solomona contends that a single statement made by a witness endorsed by both Solomona and the State required the use of a Petrich instruction or election by the State. Specifically, witness Gregory Potter stated that at one point, Solomona told him to tell the police the television “came from the street.” RP396.

The State’s argument is two-fold. First, the State introduced the statement made to Gregory Potter as evidence of consciousness of guilt. By telling Potter to get rid of the TV, or in the alternative, to tell the police it came from the street, Solomona was admitting that he was responsible for the taking. It also shows that the taking was wrongful. It was not introduced for the purpose of establishing that Solomona attempted to tamper with Gregory Potter as a witness.

Second, the State did elect which acts it was relying on to establish the charge of Tampering with a Witness. In closing, that State said, “...in this particular offense, it’s just the defendant who speaks for himself.” The State went on to play only the calls to Ms. Nuezca. These calls focused on Solomona’s efforts to get Ms. Nuezca to stop talking to the police and to refuse to come to court. After playing the calls, the prosecutor quoted some of Solomona’s statements to Ms. Nuezca. RP

345, 558-559. By only playing the calls to Ms. Nuezca and by informing the jury that these calls form the basis for the charge of tamping with a witness, the State did in fact elect which acts it was relying on in establishing the elements of the crime.⁵

In light of the fact that it was clear from the record which acts the State was relying on to establish the charge of tamping with a witness, the jury was unanimous in finding Solomona guilty as charged. Solomona's claim should be rejected.

D. CONCLUSION

For the reasons argued above, Lynch's convictions and sentences should be affirmed.

DATED this 22nd day of October, 2012.

RESPECTFULLY submitted,

NORM MALENG
King County Prosecuting Attorney

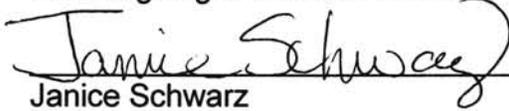
By: 
E. BRADFORD BALES, WSBA 28791
Deputy Prosecuting Attorney
Attorneys for the Respondent

⁵ The calls also correspond to the CD prepared by the jail involving Ms. Nuezca. The State also noted the dates during the closing argument. RP 345, 558.

Certificate of Service by Mail

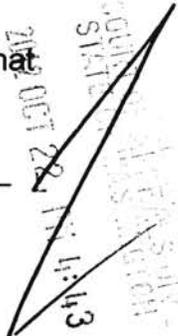
Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Thomas Kummerow, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Respondent's Brief, in STATE V. DAVID SOLOMONA, Cause No. 68269-5-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.



Janice Schwarz
Done in Kent, Washington

10/22/12
Date


2012 OCT 22 PM 11:43
CLERK OF COURT
STATE OF WASHINGTON
COURT OF APPEALS
DIVISION I