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Court of Appeals
Division I
State of Washington

NO. 73593-4-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ADAN MANUEL CORTES-GONZALEZ,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY
THE HONORABLE JOHN H. CHUN

BRIEF OF RESPONDENT

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A. ISSUE PRESENTED

Relevant evidence is evidence that has any tendency to make the existence of a fact of consequence more or less probable. ER 403 provides that relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. The trial court found the photograph of Cortes-Gonzalez standing by an ambulance with his hands behind his back near the river's edge probative on the issue of identity. Any prejudice was minimal because of the photograph's composition. Did the trial court properly admit the photograph?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

On November 3, 2014, the State charged Adan Cortes-Gonzalez with one count of second degree assault and one count of fourth degree assault for events alleged to have occurred on August 24, 2014. CP 1-2. On May 11, 2015, Cortes-Gonzalez's trial commenced before the Honorable John H. Chun. 2RP 3¹. The

¹ Reports of Verbatim Report of Proceedings consist of nine volumes from nine separate dates. The volumes are not consecutively paginated. In this brief, the 03/13/15 report of proceedings before the Honorable Jim Rogers is cited as 1RP; the 05/11/15 report of proceedings before the Honorable John Chun is cited as 2RP; the 05/12/15 report of proceedings before the Honorable John Chun is cited as 3RP; the 05/13/15 report of proceedings before the Honorable John Chun is cited as 4RP; the 05/14/15 report of proceedings before the Honorable John Chun is cited as 5RP; the 05/18/15 report of proceedings before the Honorable

jury found the defendant guilty as charged of second degree assault and fourth degree assault. 8RP 57-8.

2. SUBSTANTIVE FACTS

On August 24, 2014, Michael Noonan and his adult granddaughter Maeva Nolan went to the Snoqualmie River to hike and kayak. 4RP 25-6. Noonan and Nolan were accompanied by two children. 4RP 25. Noonan and Nolan spent the morning teaching the two children techniques of paddling in a pool area off the river proper. 4RP 27; 6RP 76.

Eventually, Noonan and Nolan set off toward the river proper carrying a kayak that Noonan planned on paddling down the river. 4RP 28-29. As Noonan and Nolan walked to the river's edge carrying the kayak, Nolan heard a man screaming. 4RP 32. The man approached them and repeatedly asked, "Don't you see my wife sitting there?" 4RP 34, 36-7.² The man feigned a punch at Noonan. 6RP 87, 123-25. The man eventually punched Noonan. 4RP 43; 6RP 87, 124. Noonan ended up on his back. 6RP 87, 127. While Noonan was on his back, the man pushed Noonan's

John Chun is cited as 6RP; the 05/19/15 report of proceedings before the Honorable John Chun is cited as 7RP; the 05/20/15 report of proceedings before the Honorable John Chun is cited as 8RP; and the 06/05/15 report of proceedings before the Honorable John Chun is cited as 9RP.

² Cortes-Gonzalez's wife was sitting on a large boulder Noonan and Nolan walked near while carrying the kayak to the river proper.

head underwater and struck him with his fists. 4RP 43; 6RP 89. Nolan attempted to aid her grandfather by striking the man herself. 4RP 44. The man turned and punched Nolan in the face. 4RP 45; 5RP 13. As Noonan tried to stand up, the man kicked him in the face. 4RP 47. At trial, neither Noonan nor Nolan were able to identify Cortes-Gonzalez as the man who struck them.

Jon Halk was at the Snoqualmie River with his wife. 5RP 25. Halk saw the interaction between the man and Noonan and recorded the incident with a video camera after the first punch was thrown. 5RP 40. The court admitted Halk's video as an exhibit. Sup CP __ (ex. 4). The video shows a man with dark hair in a maroon short-sleeved shirt with a logo on the left breast wearing shorts striking Noonan. The video shows the man in the maroon shirt from some distance away. At trial, Halk was unable to identify Cortes-Gonzalez as the man in the video.

Joel Egberg was also at the Snoqualmie River on August 24, 2014, and witnessed the assault. 6RP 115. At trial, Egberg first identified Cortes-Gonzalez in court as the man who struck Noonan and Nolan. 6RP 115. Egberg recognized Cortes-Gonzalez because Egberg assisted Noonan by attempting to pull Cortes-

Gonzalez off of Noonan while Cortes-Gonzalez repeatedly struck Noonan. 6RP 130-31.

Cortes-Gonzalez objected to the State's attempt to have Egberg identify Cortes-Gonzalez in the photograph designated as exhibit 8. 6RP 136. During argument, outside the presence of the jury, when the State argued that the photograph was relevant due to the passage of time and changes in Cortes-Gonzalez's appearance, Cortes-Gonzalez himself informed the court that his Honor Judge Chun could see his identification card to see changes. 6RP 140. The State informed the court that it would not be offering evidence of Cortes-Gonzalez's arrest through the testimony of the sole officer to be called at trial. 6RP 142-43.

The court admitted exhibit 8 for the purpose of identification. 6RP 144. Egberg identified the man depicted in State's exhibit 8 as being the man who struck Noonan on August 24, 2014. 6RP 144.

Cortes-Gonzalez called his wife Rosa Cecilia Murillo Del Gadillo to testify. 7RP 7. On direct examination, Murillo Del Gadillo testified she took photographs of Cortes-Gonzalez the day after he was released from jail. 7RP 22. Murillo Del Gadillo also testified that on the day of the incident police "took [Cortes-Gonzalez] to

jail.” Later, while still on direct examination, Murillo Del Gadillo testified that police “cuffed” Cortes-Gonzalez. 7RP 23.

C. ARGUMENT

THE TRIAL COURT PROPERLY ADMITTED THE PHOTOGRAPH OF CORTES-GONZALEZ.

Cortes-Gonzalez contends the trial court abused its discretion in admitting the photograph of him at the river a short time after the crime. This claim should be rejected. The trial court properly admitted the photograph. Even if it was error to admit the photograph, any error was harmless in the context of the other admissible evidence.

1. The Trial Court Did Not Abuse Its Discretion Because The Photograph Was Relevant To Prove The Element Of Identity And The Content Of The Photograph Was Not Unfairly Prejudicial.

Appellate courts review a trial court’s evidentiary rulings for an abuse of discretion. State v. Finch, 137 Wn.2d 792, 810, 975 P.2d 967 (1999). A court abuses its discretion when its evidentiary ruling is “manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.” State v. Downing, 151 Wn.2d 265, 272, 87 P.3d 1169 (2004) (quoting State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)). The burden is on

the appellant to prove an abuse of discretion. State v. Hentz, 32 Wn. App. 186, 190, 647 P.2d 39 (1982), reversed on other grounds, 99 Wn.2d 538, 663 P.2d 476 (1983). An appellate court may uphold a trial court's evidentiary ruling on the grounds the trial court used, or on other proper grounds the record supports. State v. Powell, 126 Wn.2d 244, 259, 893 P.2d 615 (1995).

Relevant evidence is evidence that has any tendency to make the existence of any fact of consequence to the determination of the action more or less probable than it would be without the evidence. ER 401. ER 403 states that 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.

Here, the trial court did not abuse its discretion in admitting the photograph of Cortes-Gonzalez because it was relevant to the element of identity, an essential element of the crimes charged, and its probative value was not substantially outweighed by the danger of unfair prejudice. The photograph shows Cortes-Gonzalez at the crime scene immediately after the crime. The photograph shows Cortes-Gonzalez wearing the same maroon shirt and shorts he was

wearing in Halk's video of the attack. Ex. 8. While admission of the photograph may not have been absolutely necessary, its relevance to establishing Cortes-Gonzalez as the person who struck Noonan and Nolan is undeniable.

Furthermore, the photograph is relevant to the identity of the assailant when considering the timing of the trial and the testimony leading up to the admission of the photograph. Nearly nine months passed from the date of the incident before trial commenced, and with the passage of time neither victim was able to identify Cortes-Gonzalez as the man who struck them. In addition, Halk did not identify Cortes-Gonzalez as the man in maroon he filmed with his video recorder. Egberg did identify Cortes-Gonzalez in court, but with the passage of time Cortes-Gonzalez's appearance changed, which Cortes-Gonzalez tacitly acknowledged by telling the trial court that he could view his identification card to see his changes. Egberg's identification of Cortes-Gonzalez in the photograph, taken immediately after the crime, was relevant to prove identity beyond a reasonable doubt.

In the appellant's brief, Cortez-Gonzalez argues identity was not an issue because in opening statement his attorney claimed self-defense. However, Cortes-Gonzalez did not stipulate to the

element of identity and his attorney was not legally committed to arguing only self-defense to the jury, had the element of identity not been proved beyond a reasonable doubt. See State v. Frost, 160 Wn.2d 765, 161 P.3d 361 (2007) (it is permissible for defendants to argue inconsistent defenses so long as they are supported by the evidence).

Regarding the prejudicial effect of the photograph, although Cortes-Gonzalez refers to the photograph as the "arrest photograph," its composition does not have any of the expected hallmarks of a photograph showing a person under arrest. Unlike photographs of an arrestee, which show him in the back of a patrol car with his hands behind his back in handcuffs, the photograph here shows Cortes-Gonzalez standing under his own power near an ambulance. While a viewer can see the leg of an individual nearby who may be a police officer, this individual is not wearing a police uniform and could be an emergency medical technician associated with the ambulance. Furthermore, the object on this individual's belt is not clearly a firearm. Additionally, this unidentified individual is not holding up Cortes-Gonzalez or restraining him in a manner consistent with arrest. Moreover, no handcuffs or other indicia of arrest are present. As such, the

photograph's probative value was not substantially outweighed by the danger of unfair prejudice.

2. Any Error In Admitting The Photograph Was Harmless When Considering The Evidence As A Whole And The Fact That Cortes-Gonzalez's Wife Testified That He Was Arrested And Taken To Jail After The Incident.

If this Court finds that the trial court did abuse its discretion in admitting the photograph, any error was harmless. An evidentiary error not of constitutional magnitude is subject to the non-constitutional harmless error standard. State v. Everybodytalksabout, 145 Wn.2d 456, 468-69, 39 P.3d 294 (2002). "The error is harmless if the evidence is of minor significance compared to the overall evidence as a whole." Id.

The photograph Cortes-Gonzalez contends requires reversal is a single photograph showing him standing on his own accord near an ambulance. Any error in admitting the photograph was harmless considering all of the testimony and Halk's video.

Moreover, the significance of the photograph decreased to near zero when Cortes-Gonzalez's wife testified that he had been arrested. Murillo Del Gadillo testified that the police "cuffed" him and "took him to jail." Based on her testimony, the jury knew he had been arrested at the scene.

Cortes-Gonzalez cites to State v. Rivers, 129 Wn.2d 697, 921 P.2d 496 (1996), as authority for his argument for reversal of his two convictions. Rivers is factually distinguishable from this case; however, it is helpful in showing when evidence is not prejudicial. Unlike Rivers, which involved the admission of an inherently prejudicial booking photograph, the photograph here shows Cortes-Gonzalez standing near the river adjacent to an ambulance while under his own power.

Even if the Court found the photograph to clearly show Cortes-Gonzalez's arrest, pursuant to Rivers, such a photograph would not be unfairly prejudicial. In Rivers, the Washington Supreme Court held that a booking photograph was not prejudicial because the jury knew Rivers was arrested for the crime for which he was being tried. 129 Wn.2d at 712. Like in Rivers, the jury here knew Cortes-Gonzalez was arrested for the crimes charged because Murillo Del Gadillo testified to as much.

As such, Cortes-Gonzalez sustained no prejudice by the admission of the photograph taken at the crime scene let alone prejudice warranting reversal of his two convictions.

D. CONCLUSION

The trial court properly admitted the photograph of Cortes-Gonzalez at trial for the purpose of establishing his identity because the photograph showed Cortes-Gonzalez at the scene in the same clothing as can be seen in Halk's video of the assault and because neither victim was able to identify Cortes-Gonzalez at trial as the man who assaulted them. The trial court's decision was not unreasonable, or exercised on untenable grounds, or for untenable reasons in the context of the trial and facts of the case. Even if this Court finds the trial court abused its discretion, any error is harmless when considering the evidence at trial including testimony from Cortes-Gonzalez's witness that Cortes-Gonzalez had been arrested for the crime.

DATED this 21ST day of March, 2016.

Respectfully submitted,

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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Jared Steed, the attorney for the respondent, at Steedj@nwattorney.net, containing a copy of the Brief of Respondent, in State v. Adan Manuel Cortes-Gonzalez, Cause No. 73593-4, 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.

Dated this 21 day of March, 2016.

Name:
Done in Seattle, Washington