

No. 33930-7-II

ks

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent

vs.

MILO SHAWN THORNE, Appellant.

THURSTON COUNTY SUPERIOR COURT
The Honorable Chris Wickham, Judge
Cause No. 04-1-01435-6

BRIEF OF RESPONDENT

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I. STATEMENT OF THE CASE

On the morning of July 6, 2004, three commercial burglaries were discovered within the City of Tumwater. RP 30-32, 91, 128. Two of these were businesses adjacent to one another (“Tammy’s Ceramics,” and “Cosa Bella,” a gift boutique, RP 57). The third burglary was a little over a mile and a half away, at the “Bonsai Teriyaki,” RP 88-91, 173. Forced entry to each mercantile was similar. The locks had been removed in what was described as a “spin-lock” method by utilizing a tool such as vice-grips. RP 30, 91, 98, 129-130. Cash or coins were taken from each victim business. RP 48, 58, 92.

Fortuitously, shortly after four a.m. that morning, the defendant (nearly literally) ran into a Tumwater Police Officer nearby the Bonsai Teriyaki. RP 75, 88, 91. Subsequent investigation would lead to the conclusion that at that moment the defendant was scurrying away from the crime scene. RP 276. However, at the time the patrolman, Officer Carlos Quiles, was unaware of the burglary, and happened to be in the vicinity only because he was checking out a “suspicious vehicle” complaint. RP 68-69.

Quiles’ inquiries of the defendant about any “suspicious vehicles” he might have seen led to further colloquy between the two, and ultimately

to the discovery of an outstanding warrant for the defendant. RP 76-80.

The ensuing search incident to arrest revealed that the defendant was packing burglar tools as well as pockets full of loot. RP 82-86.

A few hours later Officer Quiles was dispatched to the Bonsai Teriyaki when that burglary was discovered. RP 90-91. Later on, he discussed his findings with another officer who had been dispatched to the burglaries at “Tammy’s Ceramics” and “Cosa Bella.” RP 97-98. The similarities were compelling, and led to the comparison of the screwdriver carried by the defendant and the pry marks on the cash register from “Tammy’s Ceramics.” RP 164-165. The “match” between the two was part of the defendant’s ultimate undoing. RP 165, 238-240.

The implements utilized by the defendant were characterized as “sophisticated” and as further proof of his “identity” as the perpetrator of the instant burglaries, evidence of his nocturnal activities before and after the local burglaries was introduced. RP 189-190, 192, 194, 214.

Police officers from King County and Puyallup testified about interrupting the defendant’s attempted break-in and burglary at strip mall businesses. RP 195, 211. In each instance the defendant was wearing gloves and packing a flashlight, vice-grips, and a screwdriver. RP 201, 214. The locks from each business had been removed in similar fashion,

and similar to the method in the Tumwater burglaries. RP 195-196, 202, 212, 214, 98, 100-101. The defendant was convicted as charged. RP 308.

II. RESPONSE TO ASSIGNMENTS OF ERROR.

1. THE DEFENDANT WAS NOT “SEIZED” BY POLICE OFFICER QUILES. THE CONTACT BETWEEN THE DEFENDANT AND THE POLICE OFFICER NEVER ROSE TO THE LEVEL OF INTRUSION.

(a) The evidence produced at the hearing proved there was no seizure.

Officer Quiles testified that his initial encounter with the defendant was to discover if he had seen anything related to the “suspicious” vehicle complaint. RP 08/15/05 p. 13. Up to the discovery of the arrest warrant the defendant was free to go his own way. RP 08/15/05 pp. 18-21.

Police officers may engage citizens in conversation in order to gain information they may have without raising constitutional concerns. Such innocuous contacts between police and citizens do not constitute a “seizure” nor do they implicate privacy interests. Florida v. Bostick, 501 U.S. 429, 115 L. Ed .2d, 389, 111 S. Ct. 2382, 2386 (1991); State v. Mennegar, 114 W. 2d 304, 310, 787 P.2d 1347 (1990).

Neither did seeking the defendant’s identification raise constitutional issues. Merely requesting identification—without more—does not constitute a “seizure.” State v. Mennegar, supra, at 310; State v. Armenta, 134 W. 2d 1,10, 948, P. 2d 128 (1997). All the officer did was

ask for identification; and when he received it, he made some notes and promptly returned the card to the defendant. RP 08/15/05 at 17-18. The evidence produced at the hearing established that the circumstances of the contact between Officer Quiles and the defendant up to the discovery of the warrant did not carry any of the coercive aspects that constitute a “seizure.”

(b) The Trial Court’s findings were based upon the evidence including an assessment of the credibility of witnesses.

The Trial Court entered Findings that concluded in part:

The officer’s testimony is credible-and more credible than that of the defendant. The defendant was not ordered to remain anywhere, and until the warrant information was relayed to the officer, the defendant was not “seized.

CP 67, lines 12 – 14. This succinct paragraph was predicated on the court’s oral ruling which was more expansive:

THE COURT: I deny the defendant’s motion to suppress this evidence. In doing so, I make the following finding and conclusions. First as regards the credibility of the witnesses testifying, I find that the officer’s testimony is credible. His testimony is consistent internally, and it is based upon what seems to be a reasonable recollection of the events that occurred that night.”

...There are very few conflicts in the testimony of the witnesses, only two that are significant, and only one of those is material...and that difference is that the officer stated he did not require the defendant to remain in his presence or give him any other similar type of direction. The defendant testified that the officer directed him to stand by the side of the car while the inquiry about the warrant was made. In this regard, I find that the

officer's testimony is more credible, and I have adopted that version of events. RP 08/15/05 71-72.

Thus, the trial court first made an assessment of the respective credibility of the witnesses, and determined that Officer Quiles was more credible, and that no seizure occurred.

Such a finding by the trial judge who – as fact finder – had the opportunity to observe the witnesses' manner and demeanor is entitled great weight. In State v. Wilson, 9 Wn. App. 909, 915, 515, P. 2d 832 (1973), the Court of Appeals pointed out that the “assessment of credibility” was one for which the trial judge is “uniquely qualified.”

The view of the Supreme Court is similar: “The resolution by a trial court of differing accounts of the circumstances surrounding the encounter are factual findings entitled to great deference.” State v. Armenta, supra, p. 9. Here, the trial judge's opinion rested on his assessment of the credibility of the witnesses, and should be accorded deference.

2. EVIDENCE RULE 404(b) EVIDENCE OF IDENTITY WAS PROPERLY ADMITTED.

On the morning of trial a hearing was held to determine the admissibility of ER 404(b) evidence. RP 4. The trial court decided that the misconduct occurred, identified the purpose for which it was offered,

decided it was relevant, and engaged in balancing the probative value against the prejudicial effect of the evidence. RP 21-24. The trial judge was painstaking in his analysis, and ruled that the evidence would be admitted, and that the jury would be instructed about the manner in which it would be considered. RP 24-25, 192, 263. The trial court based its decision on solid legal authority.

Evidence of modus operandi to corroborate the identity of the accused as the person who likely committed the act charged may be admissible when the method employed was unique. State v. Coe, 101 W. 2d 772, 684 P. 2d 668 (1984). Put another way, the evidence should indicate that the method employed in the prior crime was so unique that the mere proof that the accused committed the prior crime creates a higher probability that the accused was the one who committed the act charged. State v. Burgess, 43 Wn. App. 253, 265, 716 P. 2d 948 (1986). In approving the admission of evidence of a prior burglary in a second degree burglary prosecution, the Court of Appeals noted:

The judge determined that the prior crimes were probative because identity was an issue. This appears reasonable considering the fact that the defendant had denied any wrong doing and that there were no eyewitnesses to the actual burglary.

State v. Burgess, supra p. 266.

In State v. Vy Thang, 145 W. 2d 630, 41 P.3d 1159 (2002), the

Supreme Court reiterated the holding in Coe, supra, that the “unique” characteristics of the prior wrong and the crime charged must be like a “signature... The greater the distinctiveness, the higher the probability that the defendant committed the crime, and thus the greater the relevance.”

The court in Vy Thang, supra p. 643-644, inventoried various factors that were “relevant to similarity.” Some of these were geographical proximity and/or similar clothing. The court concluded its review, at page 644:

Even when features are not individually unique, appearance of several features in the cases to be compared, especially when combined with a lack of dissimilarities, can create sufficient inference that they are not coincidental, thereby justifying the trial court's finding of relevancy.

The Supreme Court in State v. Lough, 125 W. 2d 847, 889 P. 2d 487 (1995), addressed the particulars of “common scheme or plan” evidence under ER 404(b). The Court pointed out that a “plan” can take one of two forms: (1) a larger plan of which several crimes constitute constituent parts; or (2) a plan devised and used repeatedly to perpetuate separate but very similar crimes. Lough, supra, page 854-855. As to the latter, the court opined, at page 860:

“When a defendant’s previous conduct bears such similarity in significant respects to his conduct in connection with the crime charged as naturally to be explained as caused by a general plan,

the similarity is not merely coincidental, but indicates that the conduct was directed by design... To establish common design or plan... the evidence of prior conduct must demonstrate not merely similarity in results, but such occurrence of common features that the various acts are naturally to be explained as caused by a general plan of which the charged crime and the prior misconduct are the individual manifestations.”

(emphasis added)

More recently the Supreme Court addressed “common scheme or plan” evidence in State v. Devincentis, 150 W. 2d 11, 21 74 P. 3d 119 (2003), holding that the admission of such evidence requires:

“...substantial similarity between the prior bad acts and the charged crime. Such evidence is relevant when the existence of the crime is at issue. Sufficient similarity is reached only when the trial court determines that the various acts are naturally to be explained as caused by a general plan...”

The “bad acts” in the instant case were strikingly similar to the charged offenses – in choice of victim/business, time of day, clothing, and equipment – that the incidents were “...naturally explained as individual manifestation of a general plan (Devincentis, supra, page 21).

The offered evidence was essential to prove the fact of burglaries (denied by the defendant) where there were no eyewitnesses to the crimes, and where the identity of the accused as the perpetrator is at issue. In State v. Lough, supra, at page 859, the Court pointed out:

“The purpose of ER 404(b) is to prohibit admission of evidence designed simply to prove bad character; it is not intended to deprive the State of relevant evidence necessary to establish an essential element of its case.”

The offered evidence was necessary to establish the identity of the accused as the perpetrator of the charged burglaries.

III. CONCLUSION.

The pretrial evidentiary rulings by the trial court were appropriate in all respects. The trial court should be affirmed.

RESPECTFULLY SUBMITTED this 7 day of July, 2006.

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