

Response to Thomas

Yes

No. 35546-9-II

JOHNSON TO 35544-2

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

JOHNNIE L. THOMAS,

Appellant

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

The Honorable Richard A. Strophy, Judge
Cause No. 06-1-01533-2

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO THOMAS'S ASSIGNMENT OF ERROR

1. Whether the trial court erred in allowing the State to present Stabley-Cate's statement to police on the day of the incident after she had testified as a prior consistent statement.
2. Whether there was sufficient evidence elicited at trial to prove beyond a reasonable doubt that Thomas was guilty of second-degree robbery.

B. STATEMENT OF THE CASE

For the purposes of this appeal, the State accepts Thomas's Statement of the Case.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY ALLOWED THE STATE TO PRESENT STABLEY-CATE'S OUT-OF-COURT STATEMENT AS A PRIOR CONSISTENT STATEMENT.

Decisions regarding the admission or exclusion of evidence "lie largely within the sound discretion of the trial court." State v. Castellanos, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997). Such evidentiary rulings "will not be reversed on appeal absent a showing of abuse of discretion." Id. Abuse of discretion occurs "only when no reasonable person would take the view adopted by the trial court." Id.

Hearsay is a "statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the

truth of the matter asserted.” ER 801(c). ER 801(d)(1)(ii) provides that a statement is *not* hearsay if:

The declarant testifies at the trial or hearing and is subject to cross examination concerning the statement, and the statement is . . . (ii) consistent with the declarant’s testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive

“Evidence which counteracts a suggestion that the witness changed his story in response to some threat or scheme or bribe by showing that his story was the same prior to the external pressure is highly relevant in shedding light on the witness’s credibility.” State v. Harper, 35 Wn.App. 855, 858, 670 P.2d 296 (1983), *review denied*, 100 Wn.2d 1035 (1984).

Thus, unless there is an express or implied charge of recent fabrication or improper influence or motive, “a witness’s testimony cannot be corroborated or bolstered by presenting to the fact finder evidence that the witness made the same or similar statements out-of-court. . . .” Id. at 857. “The proponent of the testimony must show that the witness’s prior consistent statement was made *before* the witness’s motive to fabricate arose in order to show the testimony’s veracity and for ER 801(d)(1)(ii) to apply.” State v. Thomas, 150 Wn.2d 821, 865, 83 P.3d 970 (2004) (emphasis in original). While “mere cross examination of the witness cannot alone justify admission of prior consistent statements,” a vigorous

cross-examination may trigger ER 801(d)(1)(ii). State v. Dictado, 102 Wn.2d 277, 290, 687 P.2d 172 (1984); *see* 5B K. Tegland, Wash. Prac. § 801.25 (5th ed. 2007).

In Thomas, defense counsel implied on cross-examination that a crucial witness for the State had a motive to fabricate testimony due to a favorable plea agreement. Thomas, *supra*, at 865-66. Defense counsel also pointed out inconsistencies in the witness's testimony and the fact that she had divorced the defendant in order to testify against him at trial. Id. at 866. The Court held that this inquiry by defense counsel was sufficient to trigger ER 801(d)(1)(ii) and allowed the State to introduce the witness's prior consistent statements to rebut the attacks on the witness's credibility which arose from the suggestive implication of recent fabrication. Id. at 867.

In the present case, the cross-examination of Stabley-Cate was more penetrating and accusatory than that in Thomas. Stabley-Cate testified on direct examination that she had driven McCabe, Mr. Moore, Miller, and Thomas to Priest Point Park. [Vol. III RP at 336-37]. She also testified on direct that, prior to driving to Priest Point Park, McCabe, Miller, and Thomas intended to steal Mr. Moore's money. [Vol. III RP at 334-35]. Stabley-Cate testified that the three defendants "were working as a team" in committing the robbery and that two of the defendants had

physically held Mr. Moore down on the ground and riffled through his pockets during the robbery. [Vol. III RP at 351-52].

Counsel for McCabe referred to Stabley-Cate's grant of immunity during cross-examination. [Vol. III RP at 369]. McCabe then asked Stabley-Cate *four times* whether she would "say anything" to avoid being charged with robbery or going to jail. [Vol. III RP at 369, 370, & 394]. Through these four questions, McCabe strongly implied that Stabley-Cate's in-court testimony was influenced by the State's grant of immunity, and that she had capitulated to the State solely to avoid prosecution. Additionally, counsel for Miller referenced Stabley-Cate's grant of immunity while simultaneously asking her two times whether she was testifying truthfully at trial. [Vol. III RP at 382].

Through his vigorous cross-examination, McCabe (as well as counsel for Miller) impliedly charged Stabley-Cate with recent fabrication of testimony and/or that she was improperly influenced by the State's grant of immunity. Stabley-Cate's prior statement to Officer Anderson was not hearsay, and was properly admitted as a prior consistent statement under ER 801(d)(1)(ii).

Before admitting the prior consistent statement of Stabley-Cate through the testimony of Officer Anderson, the trial court made a thorough and complete exposition of its reasons on the record. [Vol. IV RP 427-

432]. The trial court based its decision on its reading of ER 801(d)(1), pertinent case law, and the comments of Professor Tegland. [Vol. IV RP at 430]. The trial court held that Stabley-Cate's credibility had been sufficiently attacked through inferences cast vis-à-vis her grant of immunity. [Vol. IV RP at 430]. The trial court's ruling was logical and well-supported by the cross-examination of Stabley-Cate. It cannot be plausibly asserted that "*no* reasonable person would take the view adopted by the trial court." Castellanos, *supra*, at 97 (emphasis added). An implied charge against the Stabley-Cate of recent fabrication or improper influence or motive occurred during cross-examination.

The trial court properly admitted Officer Anderson's testimony concerning the statement that Stabley-Cate made to Officer Anderson on August, 23, 2006, as a prior consistent statement under ER 801(d)(1)(ii). Stabley-Cate's statement was not hearsay because it was her prior consistent statement made to police offered by the State to rebut McCabe's (and Miller's) implied charge that she was fabricating her in-court testimony or was improperly influenced by the grant of immunity. The trial court's ruling was not an abuse of discretion.

"An error in admitting evidence that does not result in prejudice to the defendant is not grounds for reversal." State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). "The improper admission of evidence

constitutes harmless error if the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole.” Id.

Here, the admission of Stabley-Cate’s prior consistent statement was not improper “bolstering” of her in-court testimony as Thomas suggests in his brief. [Thomas’s Brief at 6]. Rather, the prior consistent statement was admitted to rebut an implied charge of recent fabrication and/or improper influence or motive. Stabley-Cate testified to Thomas’s involvement of the robbery of Mr. Moore on direct examination. [Vol. III RP at 334-52]. The prior consistent statement was admitted only after Stabley-Cate’s direct testimony and after the implied charge of recent fabrication by the defendants. [Vol. IV RP at 430-31]. The trial court properly admitted Stabley-Cate’s prior consistent statement, and the ruling was not an abuse of discretion. Even if the admission of Stabley-Cate’s prior consistent statement was erroneous, the error was harmless given the totality of the evidence presented at trial.

2. THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THOMAS’S CONVICTION FOR SECOND-DEGREE ROBBERY.

The evidence is sufficient to support a conviction if, viewed in the light most favorable to the State, it is enough to permit a rational trier of fact to find the essential elements of the crime beyond a reasonable doubt.

State v. Joy, 121 Wn.2d 333, 338, 851 P.2d 654 (1993); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

A claim of insufficiency requires that all reasonable inferences from the evidence be drawn in favor of the State and interpreted most strongly against the respondent. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Credibility determinations are for the trier of fact and are not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). It is also the function of the fact finder, and not the appellate court, to discount theories which are determined to be unreasonable in the light of the evidence. State v. Bencivenga, 137 Wn.2d 703, 709, 974 P.2d 832 (1999). Circumstantial evidence is accorded equal weight with direct evidence. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

“A person commits robbery when he unlawfully takes personal property from the person of another or in his presence against his will by the use or threatened use of immediate force, violence, or fear of injury to that person or his property or the person or property of anyone.” RCW 9A.56.190 (2007). “A person is guilty of robbery in the second degree if he commits robbery.” RCW 9A.56.210(1) (2007).

In the present case, there was ample evidence to allow a rational juror to find that Thomas committed the elements of second-degree

robbery beyond a reasonable doubt. First, Stabley-Cate testified that Thomas, McCabe, and Miller were “obviously working as a team” in robbing Mr. Moore. [Vol. III RP at 351-52]. Officer Anderson testified that Stabley-Cate told police that Thomas was “punching” or “kicking” Mr. Moore and that Thomas and Miller were “grabbing the money out of [Mr. Moore’s] pockets.” [Vol. IV RP at 442].

Second, Mr. Moore testified that Thomas, McCabe, and Miller took \$140 and his wallet from his person by force at Priest Point Park. [Vol. I RP at 25]. Mr. Moore also positively identified Thomas as being involved in the robbery during a show-up identification on the night of the incident. [Vol. II RP at 167-68].

Although Thomas and Miller testified that the incident was an unsuccessful drug deal rather than a robbery [Vol. IV RP at 453-59 & 498-500], the jury was free to believe the testimony of Stabley-Cate and Mr. Moore over that of Thomas and Miller. The credibility determinations by the jury favored Stabley-Cate and Mr. Moore, and are not subject to review. Camarillo, *supra*, at 71. Drawing all reasonable inferences from the evidence in favor of the State and interpreting them most strongly against Thomas, the jury properly found Thomas guilty of second-degree robbery.

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D. CONCLUSION.

For the reasons stated above, the conviction of Thomas should be
AFFIRMED.

Respectfully submitted this 10th of September, 2007.

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