No. 38769-7-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

WAYNE R. KNAPP
Appellant.

09 OCT 15 PM 3:53
STATE OF WASHINGTON
BY
DEPUTY
COURT OF APPEALS
DIVISION II

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

The Honorable F. Christopher Wickham, Judge
Cause No.
08-1-01755-2

BRIEF OF RESPONDENT

David H. Bruneau
Senior Deputy Prosecuting Attorney,
Thurston County, Washington

2000 Lakeridge Drive S.W.
Olympia, Washington 98502
(360) 786-5540

TABLE OF CONTENTS

I. STATEMENT OF THE CASE AND PROCEEDINGS 1

II. ARGUMENT 4

A. The Information in this case gave clear notice of the crime charged – Conspiracy To Commit Robbery in the First Degree – and contained allegations that expressed the crime that was charged 4

B. Double Jeopardy Principles were not violated in the Instant case 8

III. CONCLUSION 8

TABLE OF AUTHORITIES

U.S. Supreme Court Decisions

Hagner v. United States,
285 U.S. 427, 76 L. Ed 861, 52 S. Ct. 417 (1932) 4

Washington Supreme Court Decisions

State v. Hopper,
118 Wn.2d 151, 822 P.2d 775 (1992) 5

State v. Kjovsvik,
117 Wn.2d 93, 812 P.2d 86 (1991) 4, 5, 7

State v. McCarty,
140 Wn.2d 420, 998 P.2d 296 (2000) 6, 7

Decisions Of The Court Of Appeals

State v. Kelly,
146 Wn. App. 370, 189 P.3d 853 (2008) 8

State v. Nguyen,
134 Wn. App. 863, 142 P.3d 1117 (2006), review denied,
163 Wn.2d 1053 (2008) 8

Statutes and Rules

RCW 9A.28.040 5

Other Authorities

Webster's New College Dictionary, Houghton-Mifflin, 1995 6

I. STATEMENT OF THE CASE AND PROCEEDINGS.

Wayne Knapp and William Derouen planned to commit a robbery at the Pellegrino's restaurant in Tumwater. RP 222-223, 233. Derouen had been employed at the eatery, and was familiar with its operations, including the dearth of employees at closing time when the days' receipts were counted. RP 14-15, 233.

According to Derouen, he and Knapp planned to commit the robbery the day before their capture. RP 227. Knapp had acquired a pistol, and the pair retired to Pellegrinos to execute the robbery. RP 227. Their plans for that evening were aborted because there were "...too may people in the restaurant." RP 228.

The next evening – September 26, 2008 – the pair returned to the vicinity to commit the robbery. RP 222,233. Knapp and Derouen arrived in separate vehicles and parked in a lot approximately a block west of the target restaurant. Later, Derouen explained that two vehicles were used to enhance their ability to flee the scene undetected. RP 224. Besides the double getaway cars, the would-be robbers were equipped with masks, gloves, and Knapp's revolver. RP 134, 173-175, 225.

The arrival of the two vehicles in the parking lot at about 9:45 p.m. attracted the interest of two ladies at a beauty salon nearby. RP 26, 39.

A hairdresser, Carmen Berg, went out to the lot for a smoke and was startled by the man behind the wheel of the pick up truck (Knapp). RP 40-42, 44. The defendant was wearing a mask, and as Berg "stared at him," Knapp "leaned" and ripped off the mask to avoid detection. RP 40, 44, 45. Berg retreated back inside and contacted 911. RP 42.

Two Tumwater police officers were dispatched to the scene at 10:03 p.m. RP 64. Derouen was contacted first: he was walking in the alley away from Pellegrinos and was engaged in conversation by one of the officers. PR 71-72.

Later, the police learned that Derouen had been spotted outside Pellegrino's and recognized by employees there. RP 164, 234.

Derouen engaged in some dissembling when Officer Ty Hollinger made his routine inquiries. RP 73, 150. The other officer, Lieutenant Carlos Quiles, walked down the dark alley towards Pellegrinos and encountered "a dark shadow that ducked out of my

view." RP 151. The "dark shadow" turned out to be the other suspect, defendant Wayne Knapp. RP 152-153.

In the vicinity where Knapp first had been spotted (by Quiles) the Lieutenant found a pair of gloves, two masks, and a revolver. RP 173-175. the masks were fashioned as "ski masks" and the gloves inside out, as if they had just been removed. RP 175, 176.

When contacted by the police, Knapp was "sweating profusely", was "fidgety," and "twitching." RP 86, 130. Lieutenant Quiles thought he might "take off". RP 154. Knapp acknowledged that he was with Derouen – "his friend" – who he claimed to have accompanied in the gray car. RP 88, 154.

Before trial, Derouen pleaded guilty to Conspiracy to Commit Robbery in the First Degree, and testified against his fellow conspirator, Mr. Knapp. RP 236, 221. As indicated, Derouen provided evidence about the "plan" to rob the restaurant. RP 233-234.

Mr. Knapp was found guilty of Conspiracy to Commit Robbery in the First Degree While Armed With a Firearm and Unlawful Possession of a Firearm in the First Degree. RP 321, CP 87.

II. ARGUMENT.

A. The Information in this case gave clear notice of the crime charged – Conspiracy To Commit Robbery in the First Degree – and contained allegations that expressed the crime that was charged.

On appeal the defendant challenges the adequacy of the Information (Count I) which omitted the phrase "did agree with one or more persons to commit robbery..." CP 46. Charging documents which are not challenged until after a verdict are more liberally construed in favor of validity than those challenged before or during trial. State v. Kjovsvik, 117 Wn.2d 93, 102, 812 P.2d 86 (1991).

The Supreme Court in Kjorsvik, at page 104 amplified what is meant by "liberal construction":

> Under this rule of liberal construction, even if there is an apparently missing element, it may be able to be fairly implied from language within the charging document. Many cases utilize the *Hagner* standard and hold that if the necessary facts appear in any form, or by a fair construction can be found within the terms of the charge, then the charging document will be upheld on appeal. Thus, when an objection to an indictment is not timely made the reviewing court has considerable leeway to imply the necessary allegations from the language of the charging document. (emphasis added).[1]

[1] Hagner v. United States, 285 U.S. 427, 76 L. Ed 861, 52 S. Ct. 417 (1932).

Kjorsvik set forth a two-prong test at p. 105-106, 117 Wn.2d:

> (1) do the necessary facts appear in any form, or by fair construction can they be found, in the charging document; and, if so, (2) can the defendant show that he or she was nonetheless actually prejudiced by the inartful language which caused a lack of notice?

In a later case, the Supreme Court reiterated the Kjorsvik ruling. In State v. Hopper, 118 Wn.2d 151, 155-156; 822 P.2d 775 (1992), the court allowed that when a deficiency is raised for the first time on appeal, the court:

> "... should examine the document to determine if there is a any fair construction by which the elements are all contained in the document ... This ... standard ... permits a court to construe a charging document quite liberally. If the information contains allegations that express the crime which was meant to be charged, it is sufficient even though it does not contain the statutory language ... A court should be guided by common sense and practicability in constructing the language ... Even missing elements may be implied if the language supports such a result." (citations omitted, emphasis added)

Here, the language of the Information did not include the entirety of the statute defining conspiracy (RCW 9A.28.040) namely, that a defendant "agree with one or more persons to commit (robbery)".

However, the defendant was informed that he was charged with "CONSPIRACY TO COMMIT ROBBERY ..." (emphasis

added) CP 46. "Conspiracy" itself is defined as an "agreement between two or more persons." [2] The instant information further alleges that the defendant was acting with intent that the object crime – Robbery In the First Degree – be committed, set forth the elements of that object, that the defendant took a "substantial step", and that he or an accomplice was armed with a firearm.

Moreover, the jury instructions concerning conspiracy were accurate and complete statements of the law. RP 269.
The information thus apprised Knapp of the essentials of the object crime (Robbery), that he was acting with an accomplice, and that he was alleged to have engaged in a conspiracy. CP 46.

Appellant's brief argues that "an agreement by the required number of persons" is an essential element of conspiracy. Brief of Appellant, p.9, citing State v. McCarty, 140 Wn.2d 420, 426, 998 P.2d 296 (2000). Reliance is misplaced, for McCarty involved an information alleging conspiracy to deliver a controlled substance.

The crux of the holding in McCarty was that conspiracy to deliver a controlled substance – unlike conspiracy in general[3] -- necessarily requires the involvement of at least three people because the crime of delivery itself necessarily involves two people.

---

[2] Webster's New College Dictionary, Houghton-Mifflin, 1995
[3] i.e., conspiracy as applied to crimes like Robbery

McCarty, supra, at page 426. McCarty was a ruling specific to delivery conspiracies, not "conspiracy in general," as with robbery.

The Information herein, tested in a liberal, common sense, fashion meets the test of adequacy of notice as well as the essentials of the crime.

It is significant that Knapp can show no prejudice accruing to him by virtue of the missing language of the information; and argues that Kjorsvik calls for review of prejudice "only if" the liberal interpretation upholds the validity of the information. Appellant's Brief, p. 10.

At page 106 the Kjorsvik court points out that:

> This 2-prong standard of review strikes a balance: on the one hand it discourages the defense from postponing a challenge to the charge knowing the charging document is flawed; on the other hand, it insures that the State will have given fair notice of the charge to the defendant.

It appears that the prongs should be considered in conjunction with one another. The defendant cannot complain – nor does he – that he was not given fair notice of the charge. This lends credence to the fact that a "liberal construction" of the Information adequately set out the essentials of the charge.

B. Double Jeopardy Principles were not violated in the instant case.

It is well settled law that sentence enhancements for offenses committed with weapons do not violate double jeopardy even where the use of a weapon is the element of the crime. State v. Nguyen, 134 Wn. App. 863, 866; 142 P.3d 1117 (2006), review denied, 163 Wn.2d 1053 (2008). Appellant calls upon this court to overrule settled law for the reason that the Supreme Court has accepted review of State v. Kelly, 146 Wn. App. 370, 189 P.3d 853 (2008).

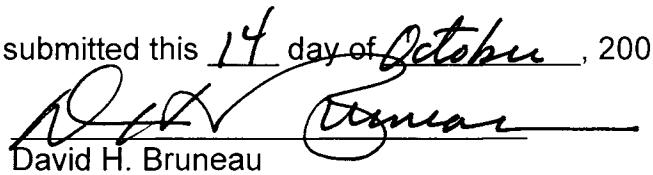
Brief of Appellant, p. 11. Knapp urges this court to overrule precedent "out of abundance of caution." Appellant's brief, p. 11. "Abundance of caution" would lead the prudent to wait and see what the Supreme Court decides.

III. CONCLUSION.

The Information, at least as to Count I, by its omission of "agreement with one or more persons ..." may be deemed unartful. Assuming a missing element (of conspiracy) the missing element may be implied by the common sense

reading of the entire charging document. No reversible error occurred. The convictions should be affirmed.

Respectfully submitted this 14 day of October, 2009.



David H. Bruneau
Senior Deputy Prosecuting Attorney,
Thurston County, Washington

CERTIFICATE OF SERVICE

I certify that I served a copy of the Brief of Respondent, on all parties or their counsel of record on the date below as follows:

- [x] US Mail Postage Prepaid
- [ ] ABC/Legal Messenger
- [ ] Hand delivered by

_____

TO: PATRICIA A. PETHICK
ATTORNEY FOR APPELLANT
P.O. BOX 7269
TACOMA, WA 98417

COURT OF APPEALS
DIVISION II
09 OCT 15 PM 2:53
STATE OF WASHINGTON
BY _____
DEPUTY

I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 14 day of October, 2009, at Olympia, Washington.

CAROLINE JONES