

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

DERRICK HUNTER

Appellant.

3
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SUPERIOR COURT
PIERCE COUNTY
WA

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

The Honorable James R. Orlando, Judge

APPELLANT'S REPLY BRIEF

RITA GRIFFITH
MARK LARRAÑAGA
JACQUELINE WALSH
Attorneys for Petitioner

RITA J. GRIFFITH, PLLC
4616 25th Avenue NE, #453
Seattle, WA 98105
(206) 547-1742

WALSH & LARRAÑAGA
705 Second Avenue, #405
Seattle, WA 98104-1781
(206) 325-7900

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A. RESTATEMENT OF THE CASE

Facts

Respondent State of Washington, in its “Facts” portion of the “Statement of the Case,” represented that Keith Brown, who lived at 4704 101st Street SW, along with his two minor children, his ex-wife Althea Faison and Mr. Hunter (RP 228-230), testified that he “saw the police take a brief case and personal bags out of the defendant’s bedroom, and search the trunk of *his* car.” Brief of Respondent (BOR) at 6 (citing 2 RP 230) (emphasis added).

In fact, Mr. Brown never testified that the police searched *Mr. Hunter’s car*.

Mr. Brown testified:

Q. Did Derrick have a separate room he stayed in?

A. Yes.

Q. Were you aware of whether or not the police, or did you observe the police taking materials from Derrick’s bedroom?

A. Yes, they took it out of his briefcase and personal bags, everything, yeah.

Q. The briefcase that the police were searching, was that your brief case or was that Mr. Hunter’s?

A. That’s Mr. Hunter’s.

Q. Did Mr. Hunter have a backpack?

A. Yes.

Q. And were the police searching the backpack as well?

A. They searched everything. They searched the trunk of *the* car and everything. They searched.

RP 230. Mr. Brown went on to testify that the police did not take any material belonging to him and testified that the specific evidentiary exhibits were not his. RP 230-242.

Mr. Brown provided no other testimony about “the car” and no testimony about whether any of the evidentiary exhibits belonged to Althea Faison. RP 227-242.

Similarly, Detective Sale never testified that he executed a warrant on Mr. Hunter’s car. He testified only that he served a search warrant “on a home related to the defendant Derrick Hunter,” and that “we also served an additional search warrant on *a* vehicle. RP 120, 122 (emphasis added).

B. ARGUMENT IN REPLY

1. THE TRIAL COURT, IN A SEPARATE CAUSE, ERRED IN DENYING MR. HUNTER’S MOTION TO SUPPRESS EVIDENCE.

The Appellant argued in its Opening Brief that the trial court in the separate cause (Pierce County No. 07-1-0406-5) erred in denying Mr.

Hunter's motion to suppress the evidence seized pursuant to the warrant issued in that matter. AOB at 13 – 21. Appellant's Opening Brief was filed on or about July 17, 2010. Subsequent to the filing of Appellant's Opening Brief, this Court issued an unpublished opinion rejecting this challenge. State v. Hunter, 2010 WL 3064972 (August 6, 2010).

The remaining issues set forth in Appellant's Opening Brief are not impacted by the unpublished opinion.

2. MR. HUNTER WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED BY THE STATE AND FEDERAL CONSTITUTIONS BY HIS TRIAL COUNSEL'S FAILURE TO CHALLENGE THE LEGITIMACY OF THE SEARCH WARRANT TO SEIZE ITEMS RELATED TO IDENTITY THEFT.

The state argues that Mr. Hunter was not denied effective assistance of counsel when his trial counsel failed to challenge the evidence of identity theft seized pursuant to a search warrant issued in an unrelated case and based on completely different set of facts and charges. BOR at 27 – 30. To support this claim, the state does not suggest trial counsel's decision was strategic, but rather the state asserts that counsel was not deficient since trial counsel notified the court of the previous ruling, there were no new facts or law to present that would alter the previous ruling, and because trial counsel made other motions to suppress the evidence. These arguments are meritless.

First, the state suggests that trial counsel was not deficient since he notified the trial court of the previous ruling on the validity of the search warrant, and further that trial counsel was ethically-bound to provide such notice. BOR at 28. The state cites to no case law, court rule or ethical opinion to support this argument. Regardless, the issue is not one of notice; but whether trial counsel should have challenged evidence of identity theft seized pursuant to a search warrant issued under a different cause number, based on probable cause to find evidence of a different crime. The obligation was a legal one: to provide effective assistance of counsel. And since trial counsel failed to challenge the search warrant based on the erroneous belief that he was bound by the previous ruling – issued under completely different facts and criminal allegations – counsel was deficient.

Next, the state suggests that trial counsel was not deficient because he “properly and fully litigated the search warrant and evidence obtained from it” under the prior cause number, and because there were “no new law of [sic] facts to present which might alter the outcome of a new hearing.” BOR at 28. The state confuses the issue. It is not whether there were “new facts or law” that might alter the previous ruling, but rather the facts and law were different than those addressed at the previous hearing. And indeed there were.

The only search warrant issued and executed was based on the criminal allegations in the unrelated matter, and not part of the case at hand. (Pierce County No. 07-1-0406-5). As such, the search warrant was issued pursuant to an affidavit setting forth facts probable cause to search for evidence of unrelated criminal allegations, (i.e., photographs, computers, video tapes, indicia of occupancy, etc.).¹

Here, the alleged criminal activity was identity theft. The affidavit submitted for the search warrant, and the search warrant itself, did not include any reference to the crime of identity theft. In fact, no affidavit or search warrant was ever sought based on probable cause for this specific allegation. Therefore, the question is not whether there were new facts or law that would alter the previous ruling, but whether the relevant facts and law of this case dictated a different result than the prior ruling. And as noted in the Appellant's Opening brief the search warrant issued in an unrelated case, based on unrelated facts and criminal allegations, but used to seize items for a completely different matter was never litigated.

The state also argues that trial counsel was not ineffective, but professional, because he was "bound" by the previous court's ruling. BOR at 29. This Court, however, need not consider this assertion on

¹ A copy of the search warrant and affidavit were attached as Appendix B to the Appellant's Opening Brief.

appeal since it is unsupported by citation to relevant legal authority or adequate logical argument. RAP 10.3(a)(6); State v. Hoffman, 116 Wn.2d 51, 71, 804 P.2d 577 (1991).²

Finally, the state suggests that since trial counsel sought to suppress the seized items via other motions and numerous objections, then counsel's performance was not deficient. BOR at 29. According to the state, the fact that trial counsel sought, pretrial, to exclude evidence under Evidence Rule 404(b), objected to hearsay testimony, and cross-examined witnesses somehow negates his legal obligation to challenge evidence wrongly seized based on a warrant and facts from an unrelated matter. Id.

Again, the state does not provide any legal support for the proposition that evidence rule challenges somehow negate; trial counsel's deficient performance for failure to raise a proper constitutional challenge to unlawfully seized item; and, again, this Court need not consider this assertion on appeal. Hoffman, supra.

Ironically, however, the state's argument establishes the prejudice of trial counsel's failure to challenge the search warrant and evidence seized. The lengths that trial counsel went to exclude or suppress the evidence, albeit unsuccessfully, demonstrates the evidences' detrimental

² The state does not raise the issue of collateral estoppel or res judicata to suggest that trial counsel was estopped from challenging the search warrant in the subsequent trial. Trial counsel believed, falsely, that he was collaterally estopped from raising the issue. The defense addressed this false premise in its opening brief. AOB at 22 – 24.

impact on the case. This illustrates even more the importance of seeking to exclude the evidence based on an unlawful search and seizure.

Because, as set forth in Mr. Hunter's Opening Brief at 21 - 29, the evidence of identity theft seized under the warrant issued in an unrelated cause should have been suppressed, and trial counsel was ineffective for erroneously agreeing that the court was bound by the prior decision. This Court should now reverse Mr. Hunter's convictions and remand with instructions to suppress the evidence.

3. THE TRIAL COURT ERRED IN DENYING MR. HUNTER'S MOTION FOR ARREST OF JUDGMENT BECAUSE RCW 9.35.020 FAILS TO INCLUDE, AND THE PROSECUTION FAILED TO PROVE BEYOND A REASONABLE DOUBT AN ESSENTIAL ELEMENT.

The state concedes that RCW 9.35.020 does not include the element that the defendant knows the identification documents belonged to a real person. BOR at 42. As a result, the state must also acknowledge the jury instructions did not include this element.

Instead the state argues that an analysis of the federal statute is not controlling over the interpretation of the state statute which the defendant was convicted. BOR at 43. The state cites no legal authority for this sweeping proposition.

Washington courts have concluded, in fact, that Supreme Court's

construction of a similarly worded federal statute may not be controlling, but can be persuasive authority. State v. Catlett, 133 Wn.2d 355, 373, 945 P.2d 700, 709 (1997), Hoffer v. State, 113 Wn.2d 148, 151, 776 P.2d 963 (1989); see also State v. J.M., 144 Wn.2d 472, 479-481, 28 P.3d 720, 723 - 724 (2001) (Washington courts look at federal appellate decisions to assist in determining Washington's harassment statute).

In United States v. Flores-Figueroa, 129 S.Ct. 1886 (2009), the United States Supreme Court reasoned that "as a matter of ordinary English grammar, 'knowingly' is naturally read as applying to all the subsequently listed elements of the crime." Washington Courts have similarly held. State v. J.M., 144 Wn.2d at 725 (the word "knowingly" is an adverb, and, as a grammatical matter, an adverb generally modifies the verb or verb phrase with which it is associated). See, e.g., State v. Myles, 127 Wn.2d 807, 813, 903 P.2d 979 (1995) (the word "furtively" is an adverb modifying "carry" in RCW 9.41.250 ["furtively carries"], thus describing the manner in which a dangerous weapon is carried); State v. Warfield, 103 Wn.App. 152, 157, 5 P.3d 1280 (2000) ("knowingly" in "knowingly restrain" in RCW 9A.40.040 is an adverb which modifies the verb "restrain"; "restrain" as defined has four components, thus all four components are modified by "knowingly").

Here RCW 9.35.020(1) requires:

No person may knowingly obtain, possess, use, or transfer a means of identification or financial information of another person, living or dead, with the intent to commit, or to aid or abet, any crime. (Emphasis added).

RCW 9.35.020 must be read to mean that “knowingly” applies to all subsequent elements of the crime of identity theft. Consequently, not only must the prosecution establish beyond a reasonable doubt that the identification documents belong to a real person; the prosecution must also prove - as an essential element - that the offender knew the identification documents belonged to a real person.

4. THE TRIAL COURT ERRED IN ADMITTING EVIDENCE OF UNCHARGED CRIMES.

The state concedes, implicitly, that without the evidence of other uncharged misconduct, there would be insufficient proof of the intent element of at least three of the six charged crimes for which Mr. Hunter was convicted. First the state concedes generally:

Had the prosecutor shown only that defendant possessed personal and financial information belonging to others, the jury may have concluded that defendant was guilty only of possessing stolen property. That some information had been cataloged, used to apply for credit cards, and to alter authorized users on open accounts shows the added element of possession with intent to commit a further crime.

BOR at 18. Then for Counts III, IV and VII, the state concedes that the evidence related specifically to that count is “sufficient evidence for a jury

to infer he possessed her [or his] information with intent to commit a crime” if “coupled with evidence regarding defendant’s use of other victim’s personal and financial information.” BOR at 37-40. The other “victims” must be those in the uncharged conduct because for the charged conduct the jury was instructed that “[a] separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count.” CP 84-113. In other words, the jurors were instructed that they could not return a guilty verdict on a count with insufficient evidence of intent to commit a crime based on their finding intent to commit a crime on another count.

What the state omits in its statement of the law regarding the admissibility of evidence of “other crimes, wrongs or acts,” was the crucial limitation of ER 404(b), applicable in Mr. Hunter’s case, that other alleged, uncharged misconduct is never admissible to show that the defendant had the propensity to commit the charged crime. State v. Lough, 125 Wn.2d 847, 853, 889 P.2d 487, 489 (1995); State v. Saltarelli, 98 Wn.2d 358, 362, 655 P.2d 697 (1982); State v. Robtoy, 98 Wn.2d 30, 42, 653 P.2d 284 (1982). While evidence of prior bad acts may be admissible to prove intent, as the state argues, the proof of intent to commit one crime cannot be shown by proof that the accused intended to commit a similar crime: “Once a thief, always a thief, is not a valid basis to admit evidence,” State v. Holmes, 43

Wn.App. 397, 400, 171 P.2d 766 (1986).

Here, the only way in which intent to commit the charged crime can be inferred from the uncharged conduct is the impermissible “once a thief, always a thief” inference.

The state seeks to get around this conclusion by arguing, without any citation to authority, (1) that Mr. Hunter’s case is different because identity theft “involve[s] a series of lesser crimes,” and (2) that specific and unique features are not necessary to establish the common scheme or plan exception for admitting ER 404(b) evidence because the evidence in Mr. Hunter’s case “concerns the admission of a complete body of evidence discovered pursuant to the service of a single search warrant” and the evidence as a whole “showed the various stages of an overarching plan or scheme.” BOR at 20-21.

This argument is contrary to the decisions in State v. Leyda, 157 Wn.2d 335, 337-338, 345, 138 P.3d 610 (2006), that the unit of prosecution for identity theft is any one act of either knowingly obtaining, possessing or using the identity or financial information of another person, not a series of crimes of a series of stages. It is contrary to the decision in State v. Fisher, 139 Wn. App. 578, 161 P.3d 1054 (2007), that the unit of prosecution for identity theft is the use of the identity or financial information of each single victim. If all of the unrelated documents were part and parcel of the identity

theft charge for each victim, then the unit of prosecution would be much broader and Mr. Hunter would have faced fewer counts at trial.

Finally, in State v. Trickler, 106 Wn. App. 727, 25 P.3d 445 (2001), the court rejected specific the argument that items of personal property owner by someone other than the owner of the stolen credit card the defendant was tried for possessing was an essential part of the res gestae of the possession of the stolen credit card charge.³

Here, the introduction of the ER 404(b) evidence was overwhelmingly and unfairly prejudicial; it was concededly necessary to establish at least three of the six crimes of which Mr. Hunter was convicted. All of his convictions should be reversed and those three convictions should be dismissed for insufficiency of proof of any intent to commit a crime with the identity or financial information of another person.

5. THE TRIAL COURT ERRED IN ADMITTING THE HEARSAY TESTIMONY OF THE WITNESS FROM THE SOCIAL SECURITY ADMINISTRATION.

Mr. Hunter challenged the admission of the testimony of the witness from the Social Security Administration, Joseph Rogers, on

³ In Count 1, involving Moses Thomas; Count 7, involving Demetrius Sanders, and Count 13, involving Claudia Longpre, the state introduced exhibits – sheets of paper and documents -- containing the names and financial information of the named victim intermingled with the names and information of others. The admissibility of these documents is not challenged here.

hearsay and confrontation grounds. In its Brief of Respondent, the state argued that this issue was not preserved for appeal because defense counsel made only one hearsay objection about Mr. Hunter's social security number. BOR at 22-23.

In fact, defense counsel objected generally to testimony about the spreadsheet with the names and social security numbers and dates of birth of twenty-four people which Mr. Rogers purported to compare to Social Security Administration records. RP 191-192

Q. (By Ms. Fitzer [prosecutor] Did you personally do the inquiries?

A. I did, yes.

Q. And are these public records that are maintained by the Social Security Administration during the course of its business?

A. They are the records that Social Security maintains in their own course of business.

MS. FITZER: Your Honor, we would move for admission of Exhibit No. 10.

MR. SEPE (defense counsel): I am going to object. It's hearsay. These aren't business records. They're his interpretations of looking at a computer screen, but they are not the actual business records. They can't be admitted under the business record exception.

THE COURT: Overruled. Data compilation, which is an exception to hearsay and certainly kept in the – foundation has been indicated as to the manner which they are derived and also maintained.

RP 191-193. At the close of the direct examination, defense counsel again objected: “I have a legal issue I need to raise before I cross-examine him.”

RP 207-208.

MR. SEPE: You Honor, my client’s entitled to. Obviously, to confront witnesses and to effective cross-examination.

Here’s a gentleman who somehow looked at a database, wrote some things down, some of them are correct [sic], and yet I’m suppose to cross-examine him when I have never seen what it is – I don’t have these records. They were never introduced as any kind of business records, government records, nothing. All I have here is a summary that he made and, you know, one instance of Shannon Brown, it was wrong. I can’t effectively cross-examine him or confront him with these documents, they weren’t admissible.

I see this chart for the first time this morning. It’s a summary of what he claims he looked up on the computer and wrote down, but we don’t have the actual records that I can confront him with.

I am left with, you know, cross-examining this, running the risk that, you know, I am not doing it effectively.

RP 208-209.

In response, the prosecutor argued that “the witness’s testimony is, in fact, based on public records. And he is simply indicating what is and is not contained in the public records, and public records are a well-known exception to the hearsay rule.” RP 209.

In reply, Mr. Sepe again indicated that the problem was that the

records were not admitted and that “This is all hearsay. It is not public records because we don’t have the records.” And “And it’s why I’m objecting.” RP 209.

The court ruled that “in terms of confrontation, you certainly have the ability to confront this witness as to the examination he conducted, the information he looked at, the conclusions he gathered from it. “ RP 210.

As this record demonstrates, defense counsel objected and made it very clear that he objected on hearsay and confrontation grounds and the trial court ruled on these objections. The error was preserved.

Mr. Roger’s testimony was not admissible under the business records exception as asserted at trial because no business records were introduced, only his testimony as to what he claimed the records showed. The state does not address this issue, but merely asserts that Mr. Rogers:

testified that he had reviewed the social security numbers which were affiliated with the exhibits, and that he then used the SSA computerized database to compare the information on those cards or other documents to numbers issued by the SSA. 2 RP 191-207. By this method, Mr. Rogers was able to establish that the personal information defendant possessed, social security numbers, belonged to an actual person.

BOR at 22-25. The state then concluded that the “question to which defendant objected did not call for hearsay. BOR at 24.

The only discussion of relevant authority by the state on the issue

was the claim that State v. Hendrickson, 138 Wn. App. 827, 158 P.3d 1257 (2007), holds only that Mr. Roger's testimony about what a victim had told him about the loss of his social security card was hearsay and that such testimony was not presented in Mr. Hunter's case. BOR at 24. This overlooks that Mr. Roger's testimony was rationalized as a business record in Hendrickson and the court held that the state did not introduce any business or public record, but instead Mr. Roger's memory of a conversation. Hendrickson, 138 Wn. App. at 832-833. Mr. Hunter's argument is precisely that, the state did not introduce any business records, but only Mr. Roger's memory.

6. THERE WAS INSUFFICIENT EVIDENCE THAT MR. HUNTER POSSESSED THE IDENTIFICATION OR FINANCIAL INFORMATION OF ANOTHER AND HIS CONVICTIONS SHOULD BE REVERSED AND DISMISSED.

In his Opening Brief of Appellant (AOB), Mr. Hunter challenged the sufficiency of the evidence to prove that he possessed the identification or financial information of another on the grounds that the state failed to establish the possession element of crime. It is undisputed that there was no evidence of actual possession presented to the jury. The state's case was built on evidence found in Mr. Hunter's room or in a car that was searched pursuant to a warrant. RP 120, 122, 230. Because, however, there was no

evidence that the car belonged to Mr. Hunter and the detective who testified about recovering the documents from either the house or car was unable to testify specifically which document was found in which location, there was insufficient evidence that Mr. Hunter had dominion and control over the documents. The state presented no evidence that Mr. Hunter had immediate ability to take actual possession of the items in the car, the capacity to exclude others from possession of the items in the car or that he had dominion or control over the car where items were located. See CP 84-113, Court's Instruction No. 10. The record is silent on the car other than that the police searched it and some unspecified items which formed the basis of the charges were locate in it.

On appeal, the state nonetheless attempted to establish that the car was Mr. Hunter's by citations to the record which do not support this conclusion. The state alleged both in its statement of facts and argument on the issue that Detective Sale testified that he served warrants on "defendant's car and on his bedroom" citing 2RP 120, 2 RP 227-230. BOR at 6, 34. When Detective Sale testified at page 120 of the verbatim report of proceedings, he agreed only that he served a warrant "on a home related to the defendant Derrick Hunter." There is no reference to a car on this page. At page 122 of the verbatim report of proceedings, not cited by the state, Detective Sale testified only that the police "served an additional search

warrant on *a* vehicle.” In the argument on the issue, the state also alleged that Mr. Brown testified that the officers “took bags and a briefcase from defendant’s room and car.” BOR at 34. Again, in the actual transcript at the cited pages, 229 and 230, Mr. Brown testifies only that the police searched “the trunk of *the* car.” Mr. Brown does not identify the car as Mr. Hunter’s .

Given the absence of testimony or other evidence showing which identification or financial information was found by the police in the residence rather than the car, there is no way that a reasonable juror could have properly found beyond a reasonable doubt that Mr. Hunter constructively possessed that any particular document. While the jury might have speculated that the car was Mr. Hunter’s, the state provided no evidence to support such speculation. Presumably, such proof would have been easy to establish if it was available, but it was not offered to the jury.

The evidence was insufficient for a reasonable juror to find beyond a reasonable doubt that Mr. Hunter constructively possessed the identification or financial information of another and, for that reason Mr. Hunter’s convictions should be reversed and dismissed.

7. CUMULATIVE ERROR DENIED MR. HUNTER A FAIR TRIAL.

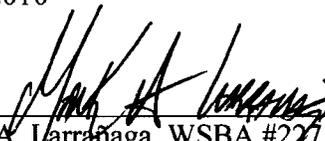
Mr. Hunter’s convictions should be reversed and dismissed because the evidence supporting the charges should have been suppressed and

because there was insufficient evidence to support the convictions. There were also trial errors which individually and certainly cumulatively denied Mr. Hunter a fair trial: the introduction of evidence in violation of ER 404(b) and the hearsay rules. If Mr. Hunter's charges are not reversed and dismissed, they should nonetheless be reversed and his case remanded for retrial because of the cumulative error which denied him a fair trial.

C. CONCLUSION

For all of the reason set forth above in Mr. Hunter's Opening Brief of Appellant, Mr. Hunter respectfully submits that his convictions should be reversed and dismissed. At the least they should be reversed and remanded for retrial.

DATED this 3rd day of November, 2010

/s/ 
Mark A. Larranaga, WSBA #22715
Attorney for Appellant

Fe /s/ 
Rita Griffith, WSBA # 14360
Attorney for Appellant

