

NO. 40457-5-II

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

STATE OF WASHINGTON,

Respondent,

v.

KEVIN BOWEN,

Appellant.

FILED
COURT OF APPEALS
DIVISION II
11 JAN 26 AM 11:33
STATE OF WASHINGTON
BY
DEPUTY

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 08-1-01329-2

BRIEF OF RESPONDENT

RUSSELL D. HAUGE
Prosecuting Attorney

RANDALL AVERY SUTTON
Deputy Prosecuting Attorney

614 Division Street
Port Orchard, WA 98366
(360) 337-7174

PM 1-25-11

SERVICE

Thomas Weaver
P.O. Box 1056
Bremerton, WA 98337

This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.
DATED January 25, 2011, Port Orchard, WA
Original **AND ONE COPY** filed at the Court of Appeals, Ste. 300, 950 Broadway, Tacoma WA 98402; Copy to counsel listed at left.

TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES ii

I. COUNTERSTATEMENT OF THE ISSUES1

II. STATEMENT OF THE CASE1

 A. PROCEDURAL HISTORY1

 B. FACTS1

III. ARGUMENT4

 THE TRIAL COURT PROPERLY EXCLUDED EVIDENCE
 THAT A BYSTANDER AT THE SCENE WHERE BOWEN
 WAS ARRESTED HAD HAD A GUN IN HIS
 POSSESSION THE DAY BEFORE WHERE THERE WAS
 NO EVIDENCE THAT THE BYSTANDER HAD PLACED
 THE GUN ON THE DRIVEWAY UNDER BOWEN’S
 STOMACH WHERE IT WAS FOUND AT THE TIME OF
 HIS ARREST4

IV. CONCLUSION.....7

TABLE OF AUTHORITIES

State v. Downs, 168 Wash. 664, 13 P.2d 1 (1932).....5

State v. Hudlow, 99 Wn.2d 1, 659 P.2d 514 (1983)6

State v. Lord, 128 Wn. App. 216, 114 P.3d 1241 (2005)4, 5

State v. Mak, 105 Wn.2d 692, 718 P.2d 407 (1986).....5

State v. Maupin, 128 Wn.2d 918, 913 P.2d 808 (1996).....5

State v. Rehak, 67 Wn. App. 157, 163, 834 P.2d 651 (1992).....5, 6

State v. Thomas, 150 Wn.2d 821, 856, 83 P.3d 970 (2004)4

I. COUNTERSTATEMENT OF THE ISSUES

Whether the trial court properly excluded evidence that a bystander at the scene where Bowen was arrested had had a gun in his possession the day before where there was no evidence that the bystander had placed the gun on the driveway under Bowen's stomach where it was found at the time of his arrest?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Kevin Bowen was charged by information filed in Kitsap County Superior Court with first-degree unlawful possession of a firearm. CP 17. The jury convicted him as charged. CP 37.

B. FACTS

Kitsap County Sheriff's Deputies Paul Woodrum and Ronald Zude and Bremerton Police Officer Dale Roessel assisted a DOC officer serve an arrest warrant on Kevin Bowen (a.k.a. Kevin Kropp) at a mobile home park in Bremerton. 1RP 2, 36, 73, 95. They drove into the park and the DOC officer pointed out Bowen. 1RP 37. Bowen was standing in the back of a pickup truck. 1RP 38, 75. There were others standing near the truck. 1RP 38, 105. The officers exited with weapons drawn and ordered them all to the ground. 1RP 38. Woodrum and Roessel instructed Bowen to show his hands and exit the truck. 1RP 39, 75, 97. Bowen did not immediately respond.

1RP 39, 75, 97. Zude then tased him. 1RP 39, 75, 97.

Woodrum and Roessel caught Bowen as he fell forward toward the back of the truck and placed him on the ground and handcuffed him. 1RP 39-40, 76, 88, 98. They rolled him over to pat him down and Roessel spotted a gun. 1RP 40, 56. Roessel and Zude had heard the gun hit the ground at the same time Bowen did. 1RP 77, 90, 100. Roessel immediately realized what it was. 1RP 77. Woodrum and Zude both saw it on the ground just below Bowen's waist. 1RP 41, 77, 99, 116. It was a black H&K USP .45 handgun. 1RP 41, 77. None of the officers saw the gun on the ground before Bowen was taken from the truck. 1RP 70, 77. Woodrum was "positive" there was no gun on the ground. 1RP 71. Zude had checked under the back of the truck to make sure no one was under it as they approached. 1RP 110.

Michael Ghianuly was also at the scene. 1RP 57.

Bowen testified that he was trying to sell some tools to Ghianuly. 1RP 143. They were going through stuff in the back of the truck when the police first drove by. 1RP 146. He denied that the gun was in his waistband. 1RP 152. When they picked him up one of the officers said there was a gun. 1RP 153. He told them it was not his. 1RP 153.

Bowen testified that he saw the gun a half hour earlier. 1RP 156. Ghianuly had it when he got there and was showing it off. 1RP 156. He told

him not to let Caskey see it, because she would not want it in the house. 1RP 156. That was why they went outside. 1RP 156. When they went outside he told Ghianuly to go look through the truck and see what he wanted to buy. 1RP 156.

Bowen assumed that Ghianuly threw the gun on the ground: “Yeah, or he had it on his bag or whatever. I didn’t see where he put it” 1RP 159. The officers laid him on top of the gun. 1RP 159. He saw the gun when they were laying him down. 1RP 161.

He also testified that Ghianuly had a green backpack that was located at the end of the truck by the back bumper. 1RP 160. It was a foot and a half away from the gun. 1RP 161.

Christina Caskey testified that Bowen was staying with her at the mobile home. 2RP 175. Ghianuly came over that morning. 2RP 176. He had a green backpack. 2RP 176. She did not see Ghianuly with a gun. 2RP 176. She did not see Bowen with a gun that day. 2RP 176. She heard a commotion and went outside. 2RP 177. Bowen was already on the ground. 2RP 177.

III. ARGUMENT

THE TRIAL COURT PROPERLY EXCLUDED EVIDENCE THAT A BYSTANDER AT THE SCENE WHERE BOWEN WAS ARRESTED HAD HAD A GUN IN HIS POSSESSION THE DAY BEFORE WHERE THERE WAS NO EVIDENCE THAT THE BYSTANDER HAD PLACED THE GUN ON THE DRIVEWAY UNDER BOWEN'S STOMACH WHERE IT WAS FOUND AT THE TIME OF HIS ARREST.

Bowen argues that the trial court erred in excluding the testimony of Vicki Kropp that Mike Ghianuly was in possession of a similar gun and had been delivering marijuana the night before Bowen's arrest. This claim is without merit because Bowen failed to meet the foundational requirements for admitting "other suspect" evidence.

The admission and exclusion of evidence are within the sound discretion of the trial court and, thus, are reviewed for abuse of discretion. *State v. Thomas*, 150 Wn.2d 821, 856, 83 P.3d 970 (2004). A decision to admit or exclude evidence, therefore, will be upheld absent an abuse of discretion, which may be found only when no reasonable person would have decided the same way. *Thomas*, 150 Wn.2d at 869.

The cases that consider other-suspect evidence require a train of facts or circumstances that tend clearly to point to someone besides the one charged as the guilty party. *State v. Lord*, 128 Wn. App. 216, ¶ 128, 114 P.3d 1241 (2005), *aff'd*, 161 Wn.2d 276 (2007). The reason for requiring such a

connection is to avoid situations where a defendant points to other suspects simply to divert suspicion from himself, where there is no real evidence to support the inference. *Id.*, (citing *State v. Mak*, 105 Wn.2d 692, 716-17, 718 P.2d 407, *cert. denied*, 479 U.S. 995 (1986)). “[A] great many trial days might be consumed in the pursuit of inquiries which could not be expected to lead to any satisfactory conclusion.” *Id.* (quoting *Mak*, 105 Wn.2d at 717). Thus, the evidence must establish a clear nexus between the other suspect and the crime; mere motive, ability, and opportunity to commit a crime alone are not sufficient. *State v. Maupin*, 128 Wn.2d 918, 927, 913 P.2d 808 (1996); *State v. Rehak*, 67 Wn. App. 157, 163, 834 P.2d 651 (1992), *review denied*, 120 Wn.2d 1022, *cert. denied*, 508 U.S. 953 (1993). Evidence of mere opportunity is speculative and irrelevant to exculpate the accused. *State v. Downs*, 168 Wash. 664, 667-68, 13 P.2d 1 (1932). Only when the offered testimony would evidence a “step taken by the third party that indicates an intention to act” on the motive or opportunity does the trial court abuse its discretion in refusing to allow the evidence. *Rehak*, 67 Wn. App. at 163. Bowen’s proposed evidence did not meet these standards. At best, Kropp’s testimony would have shown that Ghianuly had motive and opportunity to have been in possession of the gun. Neither she nor even Bowen himself could testify that Ghianuly placed the gun where the police found it. Clearly the prerequisites for other suspect evidence were not met, and the trial court

did not abuse its discretion.

Finally, with regard to the constitutional aspect of Bowen's claim, the defendant's right to present evidence in support of his case is limited by the requirement that the proffered evidence not be "otherwise inadmissible." *Rehak*, 67 Wn. App. at 162. This is because "a criminal defendant has no constitutional right to have irrelevant evidence admitted." *State v. Hudlow*, 99 Wn.2d 1, 15, 659 P.2d 514 (1983). Since the evidence Bowen proffered was not relevant, the trial court's ruling did not violate his constitutional right to present a defense.

Even if it were error to exclude this evidence, the error would be harmless. Bowen was able to present evidence, without contradiction, that the backpack was Ghianuly's and that it was found near the gun. He was also permitted to testify that Ghianuly had the gun shortly before they were arrested. None of the excluded testimony explained how the gun ended up on the ground under Bowen. In contrast, three police officers testified that the gun was not there before Bowen was placed on the ground. Two of them recalled hearing the sound of the gun striking the gravel as Bowen was lowered to the ground. The idea that three officers rapidly approached a scene and somehow Ghianuly threw the gun (and a backpack) to the ground in front of them without them seeing it is simply preposterous. This claim should be rejected.

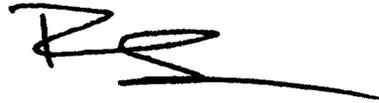
IV. CONCLUSION

For the foregoing reasons, Bowen's conviction and sentence should be affirmed.

DATED January 25, 2011.

Respectfully submitted,

RUSSELL D. HAUGE
Prosecuting Attorney

A handwritten signature in black ink, appearing to read 'RAS', with a long horizontal flourish extending to the right.

RANDALL AVERY SUTTON
WSBA No. 27858
Deputy Prosecuting Attorney