

No. 43091-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Vasiliy Slobodyanyuk,

Appellant.

Clark County Superior Court Cause No. 11-1-00690-5

The Honorable Judge Barbara Johnson

Appellant's Opening Brief

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ASSIGNMENTS OF ERROR

1. Mr. Slobodyanyuk's convictions infringed his Fourteenth Amendment right to due process because the evidence was insufficient to prove the elements of each offense.
2. The prosecution failed to introduce evidence establishing that Mr. Slobodyanyuk acted with intent to prevent or resist a lawful detention.
3. The prosecution failed to introduce evidence establishing that Kilian acted lawfully when attempting to detain Mr. Slobodyanyuk.
4. The prosecution failed to prove that Mr. Slobodyanyuk knew that he was in possession of another person's identifying or financial information.
5. The prosecution failed to prove that Mr. Slobodyanyuk possessed another person's identifying or financial information with intent to commit a crime.
6. The prosecution failed to prove that Mr. Slobodyanyuk intended to deprive Kilian of his radio.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. To convict Mr. Slobodyanyuk of third-degree assault, the prosecution was required to prove that he acted with intent to prevent or resist a lawful detention. Here, the evidence showed that a private security guard attempted to detain him in the absence of probable cause, for a misdemeanor that was not a breach of the peace. Did the assault conviction infringe Mr. Slobodyanyuk's Fourteenth Amendment right to due process because it was based on insufficient evidence?
2. To convict Mr. Slobodyanyuk of second-degree identity theft, the prosecution was required to prove that he knowingly possessed identifying or financial information with intent to commit a crime. Here, the evidence showed that there were credit cards and ID mixed in among the other property in his

car, but nothing proved he knew these items were present or that he intended to use them to commit additional crimes. Did the convictions for identity theft infringe Mr. Slobodyanyuk's Fourteenth Amendment right to due process because they were based on insufficient evidence?

3. To obtain a conviction for theft, the prosecution was required to prove that Mr. Slobodyanyuk wrongfully obtained or exerted unauthorized control over another's property, with intent to deprive. Here, the evidence showed that he accidentally ended up with Kilian's radio after the two men struggled, and that he did not have an opportunity to return it during the few minutes between when he left Kilian and when he was arrested. Did the theft conviction infringe Mr. Slobodyanyuk's Fourteenth Amendment right to due process because it was based on insufficient evidence?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Vasiliy Slobodyanyuk received a call in the middle of the night to help an acquaintance move some things. He wasn't friends with this person, but he felt obligated since this person had helped him when his car had broken down. RP 335, 337, 353. He got up and drove to an apartment building around 3 am. RP 335-336. Two men loaded Mr. Slobodyanyuk's car while Mr. Slobodyanyuk sat in the driver's seat. RP 335-338. At some point, one of the two men shouted "run!" and they ran away. RP 338.

A private security guard named Brandon Kilian approached Mr. Slobodyanyuk, who had gotten out of the car to shut the trunk. RP 133-134, 339. Kilian asked for his name, and Mr. Slobodyanyuk said it was "William Brown". RP 139, 161. The guard asked more questions, and Mr. Slobodyanyuk said that he was waiting for a friend but didn't know his friend's name or which apartment he lived in. RP 139-140. Noting electronics in the passenger compartment of the car, Kilian asked Mr. Slobodyanyuk to open his trunk. RP 140-141, 339. Mr. Slobodyanyuk complied, and Kilian saw latex gloves and a tool box in the trunk. RP 141.

Kilian called the police and reported that he was with a person he suspected of vehicle prowling. He did not claim that he'd seen anyone actually trying to get into vehicles, but did say that the person had tools in his trunk. RP 86, 141.

Once he heard Kilian was contacting police, Mr. Slobodyanyuk wanted to leave the area. RP 143, 165, 341. Kilian asked him to empty his pockets, and he did so. RP 143. Kilian told him to sit down, but Mr. Slobodyanyuk did not. RP 87.

Kilian then grabbed Mr. Slobodyanyuk's wrist. RP 87, 163-164, 342. Mr. Slobodyanyuk swung, grazing Kilian's eyebrow, and ran away. RP 87, 146, 167. Kilian reported that he had been assaulted, and read out the license plate of Mr. Slobodyanyuk's car. RP 150. After providing the license plate, Kilian pursued Mr. Slobodyanyuk on foot and tried to catch him. At one point, Kilian grabbed Mr. Slobodyanyuk's arms, and the two fell to the ground. RP 88, 147, 342. At some point during their scuffles, Kilian's radio fell off his body and into Mr. Slobodyanyuk's car. RP 89.

Kilian again chased Mr. Slobodyanyuk, caught him, and lost his hold. Eventually, Mr. Slobodyanyuk was able to get into his car and leave. RP 147-150, 168-170.

Officer Schwartz responded to Kilian's call. He saw a car similar to that Kilian had described, but was unable to read the license plate. He

followed the car until it pulled into a driveway. RP 10-20, 177-184. At that point, he was able to read the license plate, so he turned on his overhead lights. RP 17-21, 29.

Mr. Slobodyanyuk, opened the door, and identified himself. RP 20-22. Schwartz told him that he was being detained, had him step out, and handcuffed him as they waited for additional officers to arrive. RP 22-23. Mr. Slobodyanyuk cooperated. RP 23, 192-193. Schwartz heard the sound of a radio in the car. He looked inside, and saw it in the crack of the driver's seat, under where Mr. Slobodyanyuk had been sitting. RP 24.

Mr. Slobodyanyuk denied stealing Kilian's radio, and declined to give the names of the people he had been with. RP 64. Kilian was brought to the scene, and identified him as the person he'd attempted to detain. RP 51-52, 75, 152, 223-224.

Police obtained a search warrant for the car, and found stolen property, including computers, jewelry, purses, wallets, credit cards, and identification. RP 234-256, 266, 270, 280-281, 288, 291, 302-303. It was also determined that two cars parked near Mr. Slobodyanyuk's (back at the apartment building) were stolen vehicles, which also contained items of stolen property.¹ RP 250-260.

¹ The Carduccis's apartment had been broken into on April 18, 2011 early in the morning. RP 264-265, 272-273. The Overhulser apartment was broken into that same night.

None of the IDs, credit cards, or checks found in Mr. Slobodyanyuk's car had been used without authorization. The owners of the stolen property reported that of all such items taken, only one debit card had been used to buy gas. RP 274, 282-283, 292, 325.

The state charged Mr. Slobodyanyuk with Theft in the Second Degree, Assault in the Third Degree, Possession of Stolen Property in the Second Degree, and three counts of Identity Theft in the Second Degree. CP 1-2.

At trial, the theft charge—which involved Kilian's radio—was reduced to theft in the third degree. Mr. Slobodyanyuk testified that he did not know the property being loaded into his car was stolen, but that he became suspicious when the two men he was helping ran from the scene. RP 343.

The jury convicted Mr. Slobodyanyuk on all counts. After sentencing, he timely appealed. CP 3-14, 15.

RP 284-285. The condominium owned by Lowne and Conzatti was burgled on April 24, 2011. RP 300. Mr. Slobodyanyuk was not charged with any of these burglaries. CP 1-2.

ARGUMENT

MR. SLOBODYANYUK’S CONVICTIONS VIOLATED HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BECAUSE THE EVIDENCE WAS INSUFFICIENT TO PROVE THE ELEMENTS OF EACH OFFENSE.

A. Standard of Review

Constitutional questions are reviewed de novo. *Bellevue School Dist. v. E.S.*, 171 Wash.2d 695, 702, 257 P.3d 570 (2011). The application of law to a particular set of facts is reviewed de novo. *In re Detention of Anderson*, 166 Wash.2d 543, 555, 211 P.3d 994 (2009).

Evidence is insufficient to support a conviction unless, when viewed in the light most favorable to the state, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *State v. Engel*, 166 Wash.2d 572, 576, 210 P.3d 1007 (2009).

B. Due process requires the prosecution to prove every element of an offense beyond a reasonable doubt.

The due process clause of the Fourteenth Amendment requires the state to prove every element of an offense beyond a reasonable doubt. U.S. Const. Amend. XIV; *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). The remedy for a conviction based on insufficient evidence is reversal and dismissal with prejudice. *Smalis v. Pennsylvania*, 476 U.S. 140, 144, 106 S. Ct. 1745, 90 L. Ed. 2d 116 (1986).

C. The evidence was insufficient to prove that Mr. Slobodyanyuk committed third-degree assault.

To obtain a conviction for third-degree assault as charged, the prosecution was required to prove that Mr. Slobodyanyuk assaulted another, acting “[w]ith intent to prevent or resist... the lawful apprehension or detention of himself.” RCW 9A.36.031(a). The apprehension or detention here was attempted by Kilian, a private security guard. RP 12, 69-71, 84-89.

A private party’s apprehension or detention of another is unlawful unless performed pursuant to the common law right of citizen’s arrest.² A person may make a misdemeanor citizen’s arrest only if the crime “(1) constitutes a breach of the peace and (2) is committed in that person’s presence.” *State v. Garcia*, 146 Wash. App. 821, 829, 193 P.3d 181 (2008); see also Instruction No. 14, Supp. CP.

1. Kilian did not have probable cause to believe that Mr. Slobodyanyuk had committed any crime in his presence.

A citizen’s arrest must be based on probable cause. *State v. Jack*, 63 Wash. 2d 632, 637, 388 P.2d 566 (1964). Probable cause “is not knowledge of evidence sufficient to establish guilt beyond a reasonable doubt but, rather, is ‘reasonable grounds for suspicion coupled with

² This includes the shopkeeper’s privilege to detain suspected shoplifters. See, e.g., *State v. Miller*, 103 Wash. 2d 792, 794-96, 698 P.2d 554 (1985).

evidence of circumstances to convince a cautious or disinterested person that the accused is guilty.” State v. Chesley, 158 Wash. App. 36, 41, 239 P.3d 1160 (2010) review granted, cause remanded, 174 Wash. 2d 1012, 281 P.3d 288 (2012) (quoting State v. Bellows, 72 Wash.2d 264, 266, 432 P.2d 654 (1967)).

When the security guard approached, Mr. Slobodyanyuk was standing near his car. Kilian suspected that Mr. Slobodyanyuk had been involved in car prowls, or that he was in possession of stolen property. Kilian did not, however, have anything more than suspicion. Even if his suspicion was reasonable, he was not entitled to detain Mr. Slobodyanyuk for further investigation, because there is no common law tradition of citizen’s Terry³ stops; the common law only allows for citizen’s arrests, based on probable cause.

Absent probable cause to believe Mr. Slobodyanyuk had committed a crime in his presence, Kilian was not entitled to detain him. Because the prosecution failed to prove that Kilian had probable cause to arrest Mr. Slobodyanyuk, any assault was not committed with intent to prevent or resist a lawful detention. Accordingly, the evidence was

³ Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968) (allowing investigatory detentions on less than probable cause).

insufficient for conviction, and the charge must be dismissed with prejudice. Smalis, at 144.

2. Mr. Slobodyanyuk did not commit a breach of the peace in Kilian's presence.

The phrase "breach of the peace" has no precise definition,⁴ but by general agreement includes "not only violent acts but acts and words likely to produce violence in others." *Cantwell v. State of Connecticut*, 310 U.S. 296, 308, 60 S. Ct. 900, 84 L. Ed. 1213 (1940); see also *State v. Walker*, 157 Wash. 2d 307, 326, 138 P.3d 113 (2006) (Chambers, Sanders, and J.M. Johnson, JJ., concurring) ("A breach of the peace includes at the very least a 'threat of violence'") (citation omitted).

Here, Mr. Slobodyanyuk was not violent and did not threaten violence. Even if he had broken into a car just prior to Kilian's arrival, the crime was not committed in Kilian's presence, and did not qualify as a breach of the peace. Nor would possession of stolen property justify

⁴ In this context, where the scope of criminal liability is at issue, principles of lenity and due process require that the phrase be defined as narrowly as possible. See, e.g., *State v. Chouap*, ___ Wash. App. ___, ___, ___ P.3d ___ (2012) (principles of lenity require that ambiguities be resolved in favor of an accused person).

arrest, even if committed in Kilian's presence, because possession of stolen property is not a breach of the peace.⁵

Under these circumstances, the prosecution failed to establish that Mr. Slobodyanyuk intended to prevent or resist a lawful detention. Accordingly, the evidence was insufficient for conviction. The assault charge must be reversed and the case dismissed with prejudice. Smalis, at 144.

D. The evidence was insufficient to prove that Mr. Slobodyanyuk committed identity theft.

A person commits second-degree identity theft when s/he “knowingly obtain[s], possess[es], use[s], or transfer[s] 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.” RCW 9.35.020. The intent-to-commit-a-crime element is critical in distinguishing the offense from innocent behavior such as possession of commonly shared information (like names, phone numbers, and addresses). See RCW 9.35.050.

In this case, the prosecution relied on Mr. Slobodyanyuk's possession of credit cards and IDs found in his car. RP 407-413. The state

⁵ There is no indication that Kilian made—or could have made—an estimate of the value of any suspected stolen property; thus, the prosecution failed to prove Kilian had probable cause to believe Mr. Slobodyanyuk had committed a felony.

presented no evidence proving he knew what items were present in the jumble of property found in the vehicle. Nor did the state produce evidence proving that Mr. Slobodyanyuk intended to use identifying or financial information to commit any additional crimes (other than the concurrent possessory crimes, such as possession of stolen property.⁶) RP 129-329.

Because the prosecution failed to prove either knowledge or intent to commit a crime, the evidence was insufficient to convict Mr. Slobodyanyuk of identity theft. His convictions must be reversed and the charges dismissed with prejudice. Smalis, at 144.

E. The evidence was insufficient to prove that Mr. Slobodyanyuk stole Kilian's radio.

To prove theft, the prosecution was required to prove that Mr. Slobodyanyuk wrongfully obtained or exerted unauthorized control over another's property with intent to deprive. Instruction No. 8, Supp. CP. The evidence showed that Kilian's radio ended up in Mr. Slobodyanyuk's car, likely because it fell in as the two men struggled. RP 89. When Mr. Slobodyanyuk was detained by police (shortly after he left Kilian), the radio was discovered in the crack of his car's front seat, under where he'd

⁶ RCW 9A.56.140 et seq.

been sitting. RP 47. He made no effort to silence the radio or conceal it from the officer who removed him from his car. Nothing established that he intended to deprive Kilian of the radio; instead, even when taken in a light most favorable to the prosecution, the testimony proved only that Mr. Slobodyanyuk ended up with the radio by accident, and had no opportunity to return it before he was stopped by police. RP 149-194.

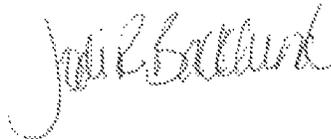
Under these circumstances, the evidence was insufficient to prove that he committed theft. Accordingly, the theft conviction must be reversed and the charge dismissed with prejudice. Smalis, at 144.

CONCLUSION

For the foregoing reasons, Mr. Slobodyanyuk's convictions for assault, identity theft, and theft must be reversed and the charges dismissed with prejudice.

Respectfully submitted on August 27, 2012,

BACKLUND AND MISTRY

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CERTIFICATE OF SERVICE

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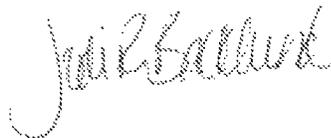
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I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on August 27, 2012.



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