No. 46771-2-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

NATHANIEL WILSON,

Appellant.

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

The Honorable Anne Hirsch, Judge
The Honorable Gary R. Tabor, Judge
Cause No. 14-1-00401-3

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether the identification of the defendant, resulting in his picture being used in photo montages shown to the burglary victims, was the fruit of an illegal seizure.

2. Whether the trial court erred by refusing to give the defendant's proposed jury instruction regarding eyewitness identification.

B. STATEMENT OF THE CASE.

1. Procedural Facts.

Nathaniel Wilson was charged on March 7, 2014, with one count of residential burglary. CP 6. A first amended information filed on May 27, 2014, added one count of attempted residential burglary and another count of residential burglary. CP 7. Wilson brought a motion to suppress the evidence of his identification by the police. That identification resulted in the police including Wilson's picture in a photo montage that was shown to the victims of one of the burglaries and the attempted burglary, and from which those victims identified Wilson as a person who entered their residences. CP 8-10, Trial RP 30, 127, 142-43. The motion to suppress was denied. CP 75-77.

Wilson was tried by a jury on September 16 and 17, 2014. He was convicted of one count of residential burglary and

attempted residential burglary, and acquitted of the second count of residential burglary. Trial RP 197.

2. Substantive facts.

On February 3, 2014, Sarah Roney returned to her home in Olympia shortly after noon. Trial RP 18-19. She drove to the back of the house, where she left her six-year-old daughter at the back door while she went to the front of the house to get the mail. Trial RP 19-20. There was no one home; the back door had been left unlocked. Trial RP 19-20. While Roney was at or near the mailbox, her daughter told her that someone was in the house. Trial RP 23. Roney looked toward the front door but did not see anything unusual. When her daughter came running toward her, Roney looked again at the front of the house and saw two pairs of legs on the porch. Trial RP 24-25. Thinking the girl had seen people standing outside the house, Roney waited for them to walk away from the front door, but when they did so they cut across the lawn away from the gate that leads to the driveway, where Roney was waiting. Trial RP 25-26.

Roney then called to the people, a man and a woman, and they approached her with a story about looking for their lost dog. Trial RP 26-27. As they walked off down the road, Roney saw that

her back door was open. She looked toward the departing couple; they were running around the corner. Trial RP 27-28. She called the police and looked through her house. Among property missing were two iPods, an electronic reader, an electronic game, and a camera/camcorder. Trial RP 28-29.

At a later date, Roney was shown photo montages. She identified Wilson as the male she had seen but was unable to positively identify the female. Trial RP 30-31, 36-37. She identified Wilson in the courtroom as the man she saw. Trial RP 31.

Early on the morning of February 19, 2014, Stephanie Cameron was home alone and in bed at her home in Olympia. She heard a knock on the door and dogs barking. She went to the door and looked through the peep hole; she saw a male and a female who she did not recognize. Cameron made no response and returned to bed. There were two or three more knocks on the door, so Cameron got up and began to dress. While she was doing so she heard the back door open. Trial RP 115-16. She was in the hallway and could not see the back door, which she had left unlocked. Trial RP 117. A male voice yelled "Steven?" in a questioning tone of voice. Cameron did not recognize the voice;

she could tell the person was inside the house. She said, "No," and ran toward the back door. Trial RP 118-19.

When Cameron reached the back door, it was closed and there was no one there. She ran through the house to the front, where she could see the gate was open but did not see anyone. After checking the back yard again, she once more looked out the front and saw two people about two houses away. Trial RP 119-22. Cameron got into her car and chased after them, contacting them in an area between a church and a middle school. She recognized them as the same people she had just seen through the peep hole in her door. She asked them why they had opened her back door, and the man replied they had not been at her house but were dropping off their child at the middle school. Both of the individuals looked much too young to have a child old enough to attend middle school. Cameron responded that she knew they were lying and the man then said they were looking for their lost dog. Trial RP 122-23.

At a later date, Cameron looked at photo montages and picked Wilson's picture as the male she saw. She also identified him in the courtroom. Trial RP 124-25.

On March 4, after Wilson's girlfriend, Haley Legendre, was arrested for pedestrian interference, which will be discussed below,

the police began to suspect she was involved in a series of burglaries. When she was released from jail, Detective Lindros and two other officers followed her to an apartment complex in West Olympia. Trial RP 109. A search warrant was obtained and served on the apartment to which Legendre returned. Trial RP 109, 135. The resident of that apartment had allowed Wilson and Legendre to stay in a bedroom. RP 55-56. During the search, the officers seized, in addition to other items, a Kindle e-reader and a Sony camcorder. Trial RP 110-11. Roney later identified the camera as hers. Trial RP 32, 113-14.

Because Wilson was found not guilty of the second count of residential burglary, the facts regarding that incident are not relevant here.

C. ARGUMENT.

1. Wilson's contact with a police officer, where the officer learned his name and observed his physical appearance, did not constitute a seizure.

Wilson argues, as he did in the trial court, that had a police officer not detained him unlawfully, the police would not have known his name or been able to obtain a photo of him, and thus the victims of the burglary and attempted burglary would not have been able to identify him as the perpetrator. He relies on the Fourth

Amendment to the United States Constitution and the Washington Constitution, article I, § 7, both of which prohibit unreasonable searches and seizures.

a. Suppression hearing.

At the suppression hearing, the State presented the following evidence: On March 4, 2014, at about 1:30 in the afternoon, Olympia Police Officer Jeff Jordan was driving his patrol vehicle eastbound on Garfield Avenue. 08/25/14/RP 8, Trial RP 43. At the intersection with Sherman, Garfield Avenue is a one-way street. There is a sudden and severe downgrade, so that a driver cannot see the road ahead until he or she crests the hill. 08/25/14 RP 8. As Jordan drove into the downgrade, he observed a female, later identified as Haley Legendre, walking in the center of Garfield, which is a narrow street with a curb line but without a sidewalk. She was wearing headphones and by walking in the center of the roadway, obstructed Jordan's passage down the street. 08/25/14 RP 9-10. In front of Legendre and on the south side of the street, not blocking traffic, was a male later identified as Wilson. He appeared to be talking to Legendre, who eventually moved off the roadway. 08/25/14 RP 11. Jordan drove past the two, found a safe place to park that did not block their way, and contacted Legendre.

He did not activate the emergency lights on his patrol car. 08/25/14 RP 11-12, 17.

Jordan advised Legendre of the reason he was stopping to speak with her. Wilson was standing with Legendre, but he was not told to remain at the scene. He was told not to smoke, but never told not to make phone calls and neither individual was instructed to sit on the bumper of the patrol car. 08/25/14 RP 11-13, 18-19, 37. Jordan wrote Legendre a citation for pedestrian interference. 06/25/14 RP 9-10, 13. As he was doing so, he asked Wilson for his name as a witness, and Wilson voluntarily gave it. Jordan did not ask for any other information. He did not ask for identification or any documentation. Jordan testified that had Wilson refused to give his name, he would have been allowed to leave. 08/25/14 RP 13-14, 20, 36.

After obtaining Wilson's name, Jordan used the radio on his person to call dispatch and ask for a records check on Wilson. When he received the information that there was a warrant, he had dispatch check further for additional information, because Wilson's name is fairly common. Once the warrant was confirmed, Wilson was arrested, and at that point he was no longer free to leave. 08/25/14 RP 14-15. Wilson was carrying a backpack, which was

not seized until he was arrested on the warrant. The backpack went with Wilson after he was arrested, and there is nothing in the record that suggests it was searched. 08/25/14 RP 21.

Wilson testified at the suppression hearing. He said that Jordan had ordered him and Legendre to sit on the rear bumper of the patrol car, falsely accused Legendre of committing pedestrian interference, and asked why they were walking down that road. 08/25/14 RP 26. Wilson said that Jordan had asked for his identification, but not until after his arrest. 08/25/14 RP 27, 29. He felt that he was not free to leave at any time after the officer told them to sit on the bumper of the patrol car. 08/25/14 RP 30.

The trial court entered Findings of Fact and Conclusions of Law, and denied the motion to suppress. 08/25/14 RP 48-54, CP 75-77. The court found Officer Jordan more credible than Wilson. 08/25/14 RP 51-52, CP 77. Wilson assigns error only to Finding of Fact No. 8 and Conclusion of Law No. 3.

Finding of Fact No. 8:

> Officer Jordan testified that he did not order the defendant to stop walking but instead, the defendant [w]as free to leave whereas the defendant testified he was ordered by Officer Jordan to stop walking.

CP 76.

Conclusion of Law No. 3:

> The initial contact between Officer Jordan and the defendant [w]as a social contact.

CP 77.

b. The trial court correctly found that Wilson was not detained until he was arrested on the warrant. Where there is no unlawful detention, there is no "poisonous tree" to bear fruit.

An appellate court reviews the trial court's ruling on a motion to suppress to determine if substantial evidence supports the court's findings of fact. State v. Hill, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). Where the trial court considers differing accounts regarding the circumstances of the alleged detention, its factual findings are entitled to great deference. State v. Harrington, 167 Wn.2d 656, 662, 222 P.3d 92 (2009). It is the role of the trial court to resolve questions of credibility and to weigh the evidence. State v. Crane, 105 Wn. App. 301, 306, 19 P.3d 1100 (2001), *overruled on other grounds*, State v. O'Neill, 148 Wn.2d 564, 62 P.3d 489 (2003). The ultimate determination of whether the facts as determined by the court constitute a seizure is one of law and is reviewed de novo. Harrington, 167 Wn.2d at 662; State v. Beito, 147 Wn. App. 504, 508-09, 195 P.3d 1023 (2008).

Whether a person has been seized by law enforcement is a mixed question of law and fact. State v. Armenta, 134 Wn.2d 1, 9, 948 P.2d 1280 (1997). What was said and done are questions of fact. State v. Bailey, 154 Wn. App. 295, 299, 224 P.3d 852 (2010). The legal consequences that follow from those facts are questions of law. State v. Lee, 147 Wn. App. 912, 916, 199 P.3d 445 (2008).

Article I, § 7 of the Washington Constitution gives greater privacy protections than does the Fourth Amendment. State v. Young, 135 Wn.2d 498, 509, 957 P.2d 681 (1998). The defendant has the burden of proving that his privacy rights were violated. Id. at 510. Under both the federal and state constitutions, a seizure occurs when, considering all of the circumstances surrounding the incident, a reasonable person would have believed that he or she was not free to leave due to a law enforcement officer's use of force or display of authority. Id. at 510. The standard is "a purely objective one, looking to the actions of the law enforcement officer." Id. at 501.

Not every encounter between a police officer and a citizen constitutes a seizure. Armenta, 134 Wn.2d at 10 (quoting State v. Aranguren, 42 Wn. App. 452, 455, 711 P.2d 1096 (1985). Officers may request identification, including date of birth, and check for

outstanding warrants during a social contact. Armenta, 134 Wn.2d at 11. "Police questioning relating to one's identity, or a request for identification by the police, without more, is unlikely to result in a seizure." State v. Hansen, 99 Wn. App. 575, 578, 994 P.2d 855 (2000).

> Citizens of this state expect police officers to do more than react to crimes that have already occurred. They also expect the police to investigate when circumstances are suspicious, to interact with citizens to keep informed about what is happening in a neighborhood, and to be available for citizen's questions, comments, and information citizens may offer.

O'Neill, 148 Wn.2d at 576-77.

A police officer has not seized a person by merely approaching him in a public place and asking him questions as long as the individual need not answer and feels free to walk away. State v. Mennegar, 114 Wn.2d 304, 310, 787 P.2d 1347 (1990). Circumstances that can indicate a seizure include "the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." United States v. Mendenhall, 446 U.S. 544, 554-55, 100 S. Ct. 1870, 64 L. Ed. 2d

497 (1980). Washington courts have adopted this nonexclusive list. Young, 135 Wn.2d at 512. However, the fact that an officer is armed and in uniform does not turn an encounter into a seizure. State v. Belanger, 36 Wn. App. 818, 820, 677 P.2d 781 (1984).

Wilson maintains that he was detained because Officer Jordan told him he could not smoke and because a second officer arrived after Legendre had been arrested, although the officer could not recall if Wilson had been arrested at that point. 08/25/14 RP 22; Appellant's Opening Brief at 8-9. But the standard is whether a reasonable person would have believed that he was not free to leave. Young, 135 Wn.2d at 510; State v. Harrington, 167 Wn.2d 656, 663, 222 P.3d 92 (2009).

It is not reasonable that Wilson would have thought that because the officer told him not to smoke that he could not have simply left. Even a request by an officer to keep hands out of pockets does not by itself result in a seizure. Harrington, 167 Wn.2d at 666-67. By the time the second officer arrived, the incident was virtually over. Further, the mere presence of a second officer is insufficient to show the kind of display of force that would make a person believe he was detained. The number of officers required to constitute a threatening presence depends on the

circumstances. Harrington, 167 Wn.2d at 666. There was no evidence that the second officer did anything at all to make a reasonable person feel he was detained.

Wilson cites to State v.Rankin, 151 Wn.2d 689, 92 P.3d 202 (2004), for the proposition that checking a person's name and driver's license to see if it is valid is a detention. Appellant's Opening Brief at 9. In Rankin, however, the court was addressing a case where the police had requested identification from the passenger in a vehicle that was stopped because the driver had committed a traffic infraction. Id. at 692-93. The court distinguished between the privacy rights of passengers in a vehicle as opposed to those of pedestrians. Id. at 697. Passengers have no realistic option of walking away, whereas pedestrians do. Id. Wilson was a pedestrian, not a passenger in a vehicle. The officer testified he did not request to see any identification, only asked Wilson's name because he was a witness to Legendre's offense. 08/25/14 RP 13, 36.

Wilson and Jordan told very different accounts of the contact between them. The trial court found the officer more credible than the defendant. CP 77. A reviewing court will sustain a trial court's credibility determinations at a suppression hearing if they are

supported by substantial evidence. State v. Ellwood, 52 Wn. App. 70, 71 n. 1, 757 P.2d 547 (1988) (citing to State v. Tocki, 32 Wn. App. 457, 463, 648 P.2d 99, *review denied*, 98 Wn.2d 1004 (1982).

If the trial court had accepted Wilson's story as the truth, it would most likely have found that he was detained. But the circumstances as determined by the trial court do not support a conclusion that the officer acted in a manner that would cause a reasonable person to believe he was not free to leave. There was substantial evidence to support the court's findings of fact and credibility determinations. There was no seizure until the moment Officer Jordan confirmed the warrant and took Wilson into custody.

Because there was no violation of Wilson's constitutional rights, there was no "poisonous tree" and the evidence of his identity, including a photograph, were properly admitted into evidence at trial.

2. The court correctly refused to give the defendant's proposed jury instruction regarding eyewitness identification.

Wilson maintains that the court abused its discretion by refusing to give the jury his proposed instruction regarding eyewitness identification. That proposed instruction said:

> Although nothing may appear more convincing than a witness's categorical identification of a perpetrator, you must critically analyze such testimony. Such identification, even if made in good faith, may be mistaken. Therefore, when analyzing such testimony, be advised that a witness's level of confidence, standing alone, may not be an indication of the reliability of the identification.

CP 51.

Alleged errors in jury instructions are reviewed de novo. State v. Barnes, 153 Wn.2d 378, 382, 103 P.3d 1219 (2005). "Instructions must properly inform the jury of the applicable law, may not be misleading, and must permit each defendant to argue its theory of the case." State v. Embry, 171 Wn. App. 714, 756, 287 P.3d 648 (2012).

Wilson relies heavily on State v. Allen, 176 Wn.2d 611, 294 P.3d 679 (2013), to support his argument that the court should have given his proposed jury instruction. He points out that Allen was decided before his trial and the court should have been aware of it. Appellant's Opening Brief at 20-21. He did not, however, cite Allen to the trial court. Instead, he cited to a case from New Jersey. Trial RP 143-44. He faults the trial court for rejecting his proposed instruction as a comment on the evidence. Appellant's Opening Brief at 13. What the court actually said was:

> First of all, it appears to this court that *the last sentence is a comment on the evidence* when it says that a witness's level of confidence standing alone may not be an indication of the reliability of the identification. I don't think that's the law.

Trial RP 146, emphasis added. Wilson maintains that the court simply refused to even consider giving this instruction, thus abusing its discretion by refusing to exercise it, but that is not the case. The court refused to give the instruction because it found that a portion of it was a comment on the evidence.

Wilson also points to WPIC 6.52, which was added to the pattern jury instructions after his trial was over. That instruction reads:

> WPIC 6.52 Eyewitness Identification Testimony
>
> Eyewitness testimony has been received in this trial on the subject of the identity of the perpetrator of the crime charged. In determining the weight to be given to eyewitness identification testimony, in addition to the factors already given you for evaluating any witness's testimony, you may consider other factors that bear on the accuracy of the identification. These may include:
>
> • The witness's capacity for observation, recall, and identification;
>
> • The opportunity of the witness to observe the alleged criminal act and the perpetrator of that act;
>
> • The emotional state of the witness at the time of the observation;

- The witness's ability, following the observation, to provide a description of the perpetrator of the act;

- [The witness's familiarity or lack of familiarity with people of the [perceived] race or ethnicity of the perpetrator of the act;]

- The period of time between the alleged criminal act and the witness's identification;

- The extent to which any outside influences or circumstances may have affected the witness's impressions or recollection; and

- Any other factor relevant to this question.

The difference between this instruction and Wilson's proposed instruction is obvious. Whereas WPIC 6.52 lists the factors the jury is to consider when evaluating eyewitness identification testimony, Wilson's proposed instruction essentially instructs the jury that such testimony is not reliable. "Such identifications, even if made in good faith, may be mistaken. Therefore, when analyzing such testimony, be advised that a witness's level of confidence, standing alone, may not be an indication of the reliability of the identification" *is* a comment on the evidence.

The trial court did not in any way preclude Wilson from arguing that the eyewitness identification was unreliable, and

Wilson did so. Trial RP 176-78, 181-82. It further pointed out that Instruction No. 1, which was given to the jury, included language that permitted Wilson to argue his theory of the case. Trial RP 147. The language the court referred to says:

> You are the sole judges of the credibility of each witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things he or she testifies about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome of the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all of the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

CP 36. With the exception of the bracketed language regarding race or ethnicity, this is very similar to WPIC 6.52. Race was not an issue in Wilson's trial.

The court in Allen, as Wilson correctly notes, declined to require a court to give a specific instruction regarding eyewitness identification where cross-racial identification is at issue. Allen, 176 Wn.2d at 626. That court concluded that such an instruction was no more effective in avoiding convictions based upon inaccurate

eyewitness identification than safeguards already built into the adversary system, such as "a right to effective assistance of counsel, who can expose the unreliability in witness' testimony during cross-examination and focus the jury's attention on the fallibility of eyewitness identification during opening and closing arguments." Id. at 622.

The Allen court did say that it had, in State v. Carothers, 84 Wn.2d 256, 267-68, 525 P.2d 731 (1974), rejected the argument that a cross-racial identification instruction is an unconstitutional comment on the evidence. Allen, 176 Wn.2d at 624. That is hardly the same as saying that any instruction a defendant offers, as long as it deals with cross-racial identification, cannot be a comment on the evidence. Had Wilson offered an instruction similar to WPIC 6.52, the trial court might have allowed it. But it is not an abuse of discretion for the court to reject a proffered instruction that does comment on the evidence, even if it talks about eyewitness identification. The court in Allen commented that the instruction Allen had offered in the trial court would have been "misleading and counterproductive." Id. at 625.

The Allen court did not require that an eyewitness identification instruction be given, and thus a court does not

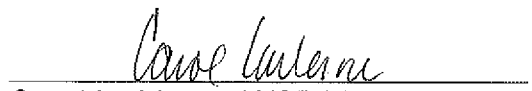
necessarily abuse its discretion by declining to give one. The court here did, contrary to Wilsons's argument, consider his proposed instruction and declined to give it because it was a comment on the evidence. While Wilson is correct that each side is entitled to have the jury instructed on his theory of the case, provided it is supported by the evidence, the instruction must be a correct statement of the law. State v. Williams, 132 Wn.2d 248, 259-60, 937 P.2d 1052 (1997); State v. Hughes, 106 Wn.2d 176, 193, 721 P.2d 902 (1986).

The trial court did not err by refusing Wilson's proposed jury instruction.

D. CONCLUSION.

The trial court correctly denied Wilson's motion to suppress evidence of his identity. The court was also correct in denying Wilson's proposed jury instruction regarding eyewitness identification. The State respectfully asks this court to affirm his convictions.

Respectfully submitted this 6th day of April, 2015.



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CERTIFICATE OF SERVICE

I certify that I served a copy of Brief of Respondent of time for filing Respondent's Brief on the date below as follows:

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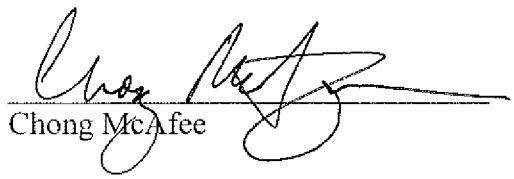
I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 6th day of April, 2015, at Olympia, Washington.



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THURSTON COUNTY PROSECUTOR

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