

No. 47931-1-11

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

STATE OF WASHINGTON,

Respondent,

v.

Daniel Terry,

Appellant.

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

The Honorable Erik Price, Judge
Cause No. 15-1-00577-8

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether the court properly instructed the jury on the “to convict” instruction.
2. Whether the court admitted illegally obtained evidence.
3. Whether the court properly calculated Mr. Terry’s offender score.

B. STATEMENT OF THE CASE.

On April 27, 2015 Daniel Terry was outside the Burger King in West Olympia panhandling. Trial RP 158,159.¹ Around 1:30 pm that day, Darren Sylvester was waiting for his wife to get off of work at the same Burger King. Trial RP 62. Sylvester noticed Terry and Charlotte Allen acting suspiciously. Id. Sylvester testified that he observed Terry and Allen taking turns walking back and forth to the liquor store located in the same parking lot as the Burger King. Trial RP 58. He observed this behavior along with the pair socializing for about twenty minutes. Trial RP 66.

Officer Noel with the Olympia Police Department responded to the call of an unwanted person and/or panhandlers harassing customers. Trial RP 149,150; Motion RP 6, 8, 25. When Officer

¹ References to the Verbatim Report of Proceedings of the trial will be designated “Trial RP”, references to the transcript of the motion hearing held July 6, 2015 on will be designated “Motion RP” and references to the transcript of the sentencing hearing will be designated “Sentencing RP.”

Noel pulled into the parking lot, he observed a female who, upon noticing his vehicle, started walking away from a male, later identified as Terry, located at the bus stop. Trial RP 145. The female, later identified as Allen, appeared to be talking and making hand gestures at Terry. *Id.*

Officer Noel contact Sylvester who was waiting outside the Burger King for the police and stated he was the reason the call was placed. Trial RP 139; Motion RP 9. Sylvester pointed out Terry and Allen as the people the call was referring to. Trial RP 141. By this time, Officer Leavitt arrived and contacted Allen per Officer Noel's request. Trial RP 139. Officer Noel went to speak with Terry at the bus stop to investigate Sylvester's concerns. Motion RP 9; Trial RP 143.

While speaking with Terry, Officer Noel heard Officer Leavitt run Allen's name through dispatch. Trial RP 144. Dispatch returned information that Allen was the protected party in an active no contact order. *Id.* Terry matched the physical description of Terry. Motion RP 48. Right after learning of the no contact order, Officer Noel was in the process of identifying Terry when the bus Terry was trying to catch arrived. Trial RP 158; Motion RP 12. Terry testified that this bus runs every thirty minutes. Trial RP 169. Terry

let the bus go and finished speaking with Officer Noel. Trial RP 179. Terry was then identified by the last four digits of his Social Security number because he did not have any identification on him at the time. Motion RP 19. Terry was confirmed as the male named in the no contact order involving Allen. Motion RP 12. Terry was then detained for violating the no contact order. Motion RP 13.

On July 6, 2015 a hearing was held to address the defense's motion to suppress. Motion RP 35. Terry's motion argued that there was no probable cause to stop Terry. After hearing testimony from the arresting officer the trial court denied the defense motion.

The trial court held that Terry was not seized prior to being detained. Motion RP 47. Terry was having a conversation with Officer Noel, willingly exchanging information. Motion RP 47,48. Prior to the bus arriving, Officer Noel learned that Allen was a protected party and that the respondent matched the physical description of Terry. Motion RP 48. At this point, the trial court found Officer Noel had an obligation to confirm or dispel any suspicion regarding a violation of the no contact order. Motion RP 49. Therefore, when Terry was seized it was supported by reasonable articulable suspicion, that Terry had in fact violated the no contact order involving Allen. Motion RP 50.

On July 15, 2015 Terry's two-day jury trial began. During the discussion of jury instructions, the trial court addressed both the State's and defense's proposed "to convict" instructions. Trial RP 193-199. Defense counsel cited to State v. Clowes, 104 Wn. App. 935, 944, 18 P.3d 596, 601 (2001) and State v. Sisemore, 114 Wn. App. 75, 78, 55 P.3d 1178, 1180 (2002) to support changing the word knowingly to willfully. Trial RP 193-199. The trial court ruled that Clowes and Sisemore did not actually require that the word willful be substituted for the word knowingly. Trial RP 193-199. The trial court believed the appropriate supplemental instruction was needed. Trial RP 193. Therefore, the trial court used the pattern jury instruction as written and provided by the state. Trial RP 199. At the end of the trial the jury returned a guilty verdict. Trial RP 277.

On August 5, 2015 Terry's sentencing hearing was held. The State asked for a continuance, as it did not have copies of Terry's out of state prior convictions for the court. Sentencing RP 13. After taking a few moments to speak with Terry, Defense Counsel stated that Terry was willing to review the State's summary of his criminal history. Sentencing RP 4. After review, Terry stipulated that this was a true and complete statement of his criminal history. Sentencing RP 4. The trial court asked Terry to again speak to his

attorney to make sure he wanted to stipulate to his criminal history. Sentencing RP 5. Defense counsel stated Terry was prepared to stipulate and sign the State's stipulation on prior record and offender score. Sentencing RP 5. There was no objection to Terry's sentencing score. Sentencing RP 5. A sentencing score of nine placed Terry in the range of just sixty months. Sentencing RP 7. The trial court sentenced Terry to sixty months in the Department of Corrections, plus the standard fees of, \$500 for the crime victims assessment, \$200 filing fee, \$100 felony DNA fee, a \$115 domestic violence fee and no criminal law violations. Sentencing RP 21.

C. ARGUMENT.

1. The trial court properly instructed the jury on the "to convict" instruction.

A challenged jury instruction is reviewed de novo. The instructions are read as a whole and the challenged portion is considered in the context of all the instructions given. State v. Pirtle, 127 Wn.2d 628, 656, 904 P.2d 245 (1995). In a criminal trial, the jury must be instructed that the State has the burden of proving each essential element of the crime beyond a reasonable doubt. Id. at 656. An appellate court may refuse to review a claim of error not raised in the trial court, but a party may raise a "manifest issue

affecting a constitutional right” for the first time on appeal. RAP 2.5(a)(3); State v. Schaler, 169 Wn.2d 274, 282, 236 P.3d 858 (2010). An instruction omitting an element of the charged crime can be of constitutional magnitude. State v. Stein, 144 Wn.2d 236, 241, 27 P.3d 184 (2001). A manifest error of constitutional magnitude requires a showing of actual prejudice. State v. O’Hara, 167 Wn.2d 91, 99, 217 P.3d 756 (2009). To demonstrate actual prejudice, there must be a “plausible showing by the [appellant] that the asserted error had practical and identifiable consequences in the trial of the case.” Id., at 99 (quoting State v. Kirkman, 159 Wn.2d 918, 935, 155 P.3d 125 (2007)).

“An instruction that relieves the State of its burden to prove every element of a crime requires automatic reversal.” State v. Brown, 147 Wn.2d 330, 339, 58 P.3d 889 (2002). However, not every omission in an instruction does relieve the State of that burden.

Unlike such defects as the complete deprivation of counsel or trial before a biased judge, an instruction that omits an element of the offense does not *necessarily* render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence.

Neder v. United States, 527 U.S. 1, 9, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999). The Washington Supreme Court in Brown adopted this holding. Brown, 147 Wn.2d at 340. "When applied to an element omitted from, or misstated in, a jury instruction, the error is harmless if that element is supported by uncontroverted evidence." Id. at 341 (citing to Neder, 527 U.S. at 18).

Terry maintains that the trial court's use of "knowingly" instead of "willfully" relieved the state of its burden to prove a felony violation of a domestic violence. Both parties submitted Washington Pattern Jury Instructions (hereinafter "WPIC") 36.51.02 as their "to convict" instruction. The State submitted the instruction as written, while the defense changed the word knowingly to willfully in subsection 3. WPIC 36.51.02 in part states:

To convict the defendant of the crime of [felony] violation of a court order, each of the following five elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about (date), there existed [a] [an] [protection order] [..] applicable to the defendant;
- (2) That the defendant knew of the existence of this order;

(3) That on or about said date, the defendant **knowingly** violated a provision of this order; [...]

(Emphasis added)

Defense supported this change with case law from State v. Clowes, 104 Wn. App. 935, 944, 18 P.3d 596, 601 (2001) and State v. Sisemore, 114 Wn. App. 75, 78, 55 P.3d 1178, 1180 (2002). Clowes held that the single instruction stating "the defendant knowingly violated the provisions of a no contact order" was inadequate because it does not tell the jury the defendant must have intended the contact. Clowes, 104 Wn. App. at 944. Without the element of willful contact, a jury could convict based upon evidence that a defendant accidentally or inadvertently contacted the victim. Id., at 945. Sisemore echoes the Clowes holding by stating that a defendant must act in a manner that indicates the contact was purposeful. Sisemore, 114 Wn. App. at 78. Furthermore, Sisemore goes on to clarify that a defendant violates the statute if he knowingly and intentionally maintained contact that started accidentally or by happenstance. Id.

Terry argues that the trial court made the same mistake as the Clowes trial court did and that this instruction constitutes a reversible error. Clowes does not apply in Terry's case for two

reasons. First, the Clowes court ruled on an instruction that simply said "the defendant knowingly violated the provisions of a no contact order" and that is all. Terry element instruction clearly laid out that the jury needed to find that an order existed, that the defendant knew about the order then that the defendant violated that order. This complies with the court's ruling in Clowes.

Secondly, in Terry's case, clarifying instructions were provided in the jury instruction packet. Clowes adopted the Holt holding "that clarifying definitions of elements may be contained in separate instructions, the use of 'knowingly' without further definition in instruction 8 is not a manifest constitutional error." See State v. Holt, 56 Wn. App. 99, 106, 783 P.2d 87 (1989); Clowes, 104 Wn. App. at 944.

The trial court here provided two additional jury instructions addressing the willfulness of the contact required to find a defendant guilty of a violation of a protection order. Trial RP 234.

Jury Instruction No. 8 stated:

It is not a defense to a charge of violation of a court order that a person protected by the order invited or consented to the contact. It is, however, a defense to the charge of violation of a court order that the contact was not willful.

Trial RP 234.

Jury Instruction No. 9 goes on to state that:

For purposes of violation of a court order, a person acts willfully with respect to a circumstance or event when he or she acts knowingly and intentionally with respect to that circumstance or event. A person does not act willfully if that person does not knowingly or intentionally maintain contact that started accidentally or by happenstance.

Trial RP 234.

The trial court properly instructed the jury on the type of conduct needed to convict Terry. The State's burden was not changed or lessened by the use of the word knowingly. Terry has not shown a practical or identifiable consequence for using knowingly verses willful or the use of the additional jury instructions. Therefore, the trial court did not commit an error in using the standard to convict jury instruction in this case.

2. The trial court properly admitted evidence seized from Terry.

Generally, warrantless searches and seizures are per se unreasonable, in violation of the Fourth Amendment and article I, § 7 of the Washington State Constitution. State v. Duncan, 146 Wn.2d 166, 171, 43 P.3d 513 (2002). When an unconstitutional search or seizure occurs, all subsequently uncovered evidence becomes fruit of the poisonous tree and must be suppressed.

State v. Kinzy, 141 Wn.2d 373, 393, 5 P.3d 688 (2000). But it is generally recognized that crime prevention and crime detection are legitimate purposes for investigative stops or detentions. See Terry v. Ohio, 392 U.S. 1, 20 L.Ed 2d 889, 88 S.Ct. 1868 (1968).

Not every citizen encounter with police, however, rises to the level of a seizure. State v. Mennegar, 114 Wn.2d 304, 310, 787 P.2d 1347 (1990). A police contact constitutes a seizure only if, under the totality of the circumstances, a reasonable person would not have felt free to leave, "terminate the encounter, refuse to answer the officer's question, or otherwise go about his business." State v. Thorn, 129 Wn.2d 347, 352-53, 917 P.2d 108 (1996).

"Police may conduct an investigatory stop if the officer has a reasonable and articulable suspicion that the individual is involved in criminal activity." State v. Walker, 66 Wn. App. 622, 626, 834 P.2d 41 (1992). A reasonable suspicion is the "substantial possibility that criminal conduct has occurred or is about to occur." State v. Kennedy, 107 Wn.2d 1, 6, 726 P.2d 445 (1986).

For over 25 years, when determining whether police have a reasonable suspicion sufficient to justify an investigatory detention, or Terry stop, under the Fourth Amendment of the United States Constitution and article I, § 7 of our state constitution, courts have

applied the totality of the circumstances test, rather than the *Aguilar-Spinelli*² test. See *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983); *State v. Randall*, 73 Wn. App. 228, 228-29, 868 P.2d 207 (1994). As such, "[w]ith the Supreme Court's adoption of the 'totality of the circumstances' approach to probable cause in *Illinois v. Gates*, the veracity element does not have the independent significance it once had." 2 Wayne R. LaFare, *Search and Seizure: A Treatise On The Fourth Amendment* § 3.4(a), at 223 (3d ed. 1996) (footnote omitted). In fact, a reasonable suspicion can arise from information that is less reliable than that required to establish probable cause. *Alabama v. White*, 496 U.S. 325, 330, 110 S. Ct. 2412, 110 L. Ed. 2d 301 (1990). Specifically, "[t]he reasonableness of the officer's suspicion is determined by the totality of the circumstances known to the officer at the inception of the stop." *State v. Rowe*, 63 Wn. App. 750, 753, 822 P.2d 290 (1991).

Terry maintains that police did not have a well-founded and reasonable suspicion that he was involved in criminal activity. Appellant's Opening Brief at 14. Terry relies on the fact that the police did not speak to the person who placed the 911 call. *Id.* Terry

² *Aguilar v. Texas*, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964); *Spinelli v. United States*, 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969).

fails to mention the information received from Sylvester or the fact that Sylvester was waiting and contacted Officer Noel directly. Trial RP 139; Motion RP 9.

The totality of the circumstances test allows the court and police officers to consider several factors when deciding whether a Terry stop based on an informant's tip is allowable, such as the nature of the crime, the officer's experience, and whether the officer's own observations corroborate information from the informant. Kennedy, 107 Wn.2d at 8; State v. Sieler, 95 Wn.2d 43, 47, 621 P.2d 1272 (1980); State v. Lesnick, 84 Wn.2d 940, 944, 530 P.2d 243 (1975). Moreover, "the determination of reasonable suspicion must be based on commonsense judgments and inferences about human behavior." Illinois v. Wardlow, 528 U.S. 119, 125, 120 S. Ct. 673, 145 L. Ed. 2d 570 (2000).

Reasonable suspicion, like probable cause, is dependent upon both the content of information possessed by police and its degree of reliability. Both factors -- quantity and quality -- are considered in the "totality of the circumstances -- the whole picture," that must be taken into account when evaluating whether there is reasonable suspicion. 73 Wn. App. at 229 (citation omitted) (quoting Alabama v. White, 496 U.S. at 330).

Moreover,

[N]o single rule can be fashioned to meet every conceivable confrontation between the police and citizen. Evaluating the reasonableness of the police action and the extent of the intrusion, each case must be considered in light of the particular circumstances facing the law enforcement officer.

Lesnick, 84 Wn.2d at 944.

It is well established that, "[i]n allowing such detentions, Terry accepts the risk that officers may stop innocent people." Wardlow, 528 U.S. at 126. However, despite this risk, "[t]he courts have repeatedly encouraged law enforcement officers to investigate suspicious situations." State v. Mercer, 45 Wn. App. 769, 775, 727 P.2d 676 (1986).

Three Washington Supreme Court cases have discussed investigatory stops based on an informant's tip: Kennedy, 107 Wn.2d 1, Sieler, 95 Wn.2d 43, and Lesnick, 84 Wn.2d 940. All three rely on Adams v. Williams, 407 U.S. 143, 92 S. Ct. 1921, 32 L. Ed. 2d 612 (1972). The Adams court did not apply the two-pronged *Aguilar-Spinelli* test. Instead, it emphasized how the application of a single, inflexible test would not work for Terry stops based on an informant's tip.

Informants' tips, like all other clues and evidence coming to a policeman on the scene, may vary greatly in their value and reliability. One simple rule will not cover every situation. Some tips, completely lacking

in indicia of reliability, would either warrant no police response or require further investigation before a forcible stop of a suspect would be authorized. But in some situations -- for example, when the victim of a street crime seeks immediate police aid and gives a description of his assailant, or when a credible informant warns of a specific impending crime -- the subtleties of the hearsay rule should not thwart an appropriate police response.

Adams, 407 U.S. at 147.

In sum, the trial court in this case properly considered the totality of the circumstances known to the officers at the time of the investigatory detention. Those circumstances, as established by evidence, were as follows: A call was placed for an unwanted person and/or panhandlers harassing customers. Trial RP 149,150; Motion RP 6, 8, 25. Sylvester, the informant, pointed out Terry and Allen as the reason for the call. Trial RP 141. Officer Noel went to speak with Terry while Officer Leavitt spoke with Allen. Trial RP 141. Dispatch returned information that Allen was the protected party of a no contact order. Trial RP 144. Terry matched the description of the respondent listed on the no contact order. Motion RP 48. Officer Noel corroborated that the two were interacting and that interaction ended when the female saw Officer Noel pull up. Trial RP 145.

These facts support the trial court's conclusion that the Terry stop was justified by the informant's statements and the circumstances corroborated by the officer's own observations.

3. The trial court properly calculated Mr. Terry's offender score.

The State does not dispute that Terry may challenge his offender score for the first time on appeal. State v. Mendoza, 165 Wn.2d 913, 919-20, 205 P.3d 113 (2009). He argues that two of his out of state convictions were improperly included in his offender score because they are not comparable to Washington crimes. Appellant's Opening Brief at 17-19. However, at sentencing, Terry stipulated to his prior convictions. CP 3, 90-92.

A defendant does not waive a challenge to his offender score merely by failing to object to the inclusion of out-of-state convictions. Mendoza, 165 Wn.2d at 928-29. Here, however, defense counsel affirmatively agreed to the State's list of prior convictions. If a defendant affirmatively acknowledges his criminal history, the State is not required to produce the evidence to support it. Mendoza, 165 Wn.2d at 920.

Although the State generally bears the burden of proving the existence and comparability of a defendant's prior out-of-state and/or federal

convictions, we have stated a defendant's *affirmative acknowledgment* that his prior out-of-state and/or federal convictions are properly included in his offender score satisfies SRA requirements.

State v. Ross, 152 Wn.2d 220, 230, 95 P.3d 1225 (2004), citing to State v. Ford, 137 Wn.2d 472, 483 n.5, 973 P.2d 452 (1999). Mere failure to object to the State's summary of criminal history does not constitute an acknowledgment, even if the defendant agrees with the State's standard range calculation. Mendoza, 165 Wn.2d. at 928.

Terry's stipulation is unquestionably an "affirmative acknowledgment" and not merely a failure to object. "[S]ince [the defendant] affirmatively acknowledged at sentencing that his prior out-of-state convictions were properly included in his offender score, we hold the sentencing court did not violate the SRA nor deny him due process." State v. Ross, 152 Wn.2d 220, 233, 95 P.3d 1225 (2004). Terry has waived a challenge to the comparability of his foreign convictions.

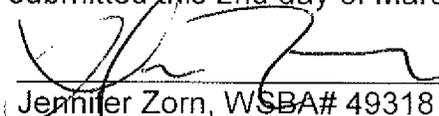
A defendant cannot, however, waive a challenge to a miscalculated offender score. State v. Goodwin, 146 Wn.2d 861, 874, 50 P.3d 618 (2002). He can waive factual errors, or errors involving the trial court's discretion, but he cannot waive a legal

error. Id. It is apparent, however, that Terry's offender score was correctly calculated—six prior felonies and three current repetitive domestic violence offense. No comparability analysis was required regarding the Florida and Oregon felony convictions because he stipulated to their comparability and has thus waived any challenge on that basis. There was no error and this matter should not be remanded for resentencing.

D. CONCLUSION.

The court properly instructed the jury on the "to convict" instruction, and properly allowed evidence to be used at trial. Terry offender score was also properly calculated. The State respectfully asks this court to affirm his convictions.

Respectfully submitted this 2nd day of March, 2016.



Jennifer Zorn, WSBA# 49318
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that I served a copy of the State's Brief of Respondent 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 2nd day of March, 2016, at Olympia, Washington.


Nancy Jones-Hegg

THURSTON COUNTY PROSECUTOR

March 02, 2016 - 11:52 AM

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