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NO. 62462-8-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

DEVIN HILL,

Appellant.

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STATE OF WASHINGTON
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE CHRIS WASHINGTON

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Defense counsel made a hearsay objection to the admission of statements made by Grant. The parties agreed and the court ruled that the statements would not be admitted based on potential unfair prejudice. Defense counsel made an objection to evidence of Grant's conduct without stating the grounds. Was defense counsel's objection too general to preserve the issue of Grant's conduct as hearsay on appeal?

2. Officer Tovar asked Grant "What up dog, you got work?" Grant said "yeah. . . . I need to see if anyone knows you out here" and led Tovar to the Defendant. Grant asked the Defendant if he knew Tovar, and a conversation about purchasing narcotics followed. The Defendant and Grant sold Tovar cocaine. Was the fact that Grant led Tovar to the Defendant nonassertive conduct?

3. Officer Tovar inquired of Grant about purchasing narcotics. Grant said he needs to see if anyone around knows him. Grant led Tovar to the Defendant. The Defendant and Tovar engaged in a conversation about purchasing narcotics. Grant and the Defendant then sold narcotics to Tovar. Was the fact that Grant led Tovar to the Defendant offered to prove how Tovar came to

Speak with the Defendant, explain their roles in the transaction, and to give context to that conversation?

4. Grant said he was working and led Tovar to the Defendant. Grant took the money from Tovar while the Defendant supplied the drugs. The Defendant became upset with Grant about how quickly he took the money from Tovar. Grant had a large amount of cash on him while the Defendant had none. Was there sufficient information for the trial court to find that Grant and the Defendant were engaged in a conspiracy when Grant led Tovar to the Defendant?

5. Tovar testified that Grant led him to the Defendant. Tovar testified he asked the Defendant for crack cocaine. Tovar testified that the Defendant sold cocaine to him. Counsel argued that the evidence was that Grant led Tovar to a group of people that included the Defendant. Even if error, was admission of evidence explaining how Tovar came to speak with the Defendant harmless?

B. STATEMENT OF THE CASE

1. SUBSTANTIVE FACTS

On March 27, 2008, Officer Tovar of the Seattle Police Department, along with other officers, conducted a buy/bust

operation in downtown Seattle. RP (9/25/08) 42. Tovar approached Grant and inquired about purchasing narcotics. Id. at 42-43. Grant said to Tovar, "What up dog, you got work?" Id. at 4; CP 2. In response, Grant said, "yeah." CP 2. Tovar then told Grant, "let me get seventy." Id. Grant said, "oh, seventy. Do you hang out here?" Id. Tovar said, "yeah, all the time." Id. Grant said, "I need to see if anyone knows you out here." Id. Grant then led Tovar to a group of individuals including the Defendant. Id. RP (9/30/08) 23. The testimony at trial did not include any of these statements or the fact that the Defendant was standing near other individuals. See RP (9/25/08) 42-44.

When Tovar and Grant approached the Defendant, Grant asked the Defendant if he knew Tovar. Id. at 44. The Defendant said, "hold on" and he looked at Tovar. Id. Tovar said, "stop trippin' dog." Id. The Defendant then said something about someone popping everybody. Id. at 45. The Defendant then said "let him hit the pipe." Id. Tovar said he would hit the pipe right there after the Defendant sold him crack. Id. The Defendant said, "no" and indicated that he wanted Tovar to go somewhere with him where he would watch Tovar smoke crack. Id. Tovar showed the

Defendant his pipe and the two walked a few blocks away. Id. at 45-46.

As they walked Grant walked with them, but on the other side of the street. Id. at 46. Tovar expressed concern over smoking crack out in the open because of the police. Id. at 47. Tovar and the Defendant crossed the street to a planter box near where Grant was standing. Id. at 47-48. Tovar handed Grant his money. Id. at 48. As Tovar gave Grant his money, he heard the Defendant say something about knowing he put his crack cocaine somewhere in the planter box. Id. As the Defendant said this, he was looking through the planter box. Id. at 49. The Defendant said, "It's right here" and then Tovar saw a few pieces of crack cocaine sitting on the ledge of the planter box. Id. The Defendant looked up and down the street as if to see if anyone was watching. Id. at 89. Tovar started picking up a few of the cocaine rocks, and the Defendant said, "don't touch it." Id. at 49. Tovar said, "I already gave you my money." Id. Grant confirmed, "he already gave me the money." Id. at 50. The Defendant permitted Tovar to keep the cocaine and turned his attention to Grant. Id. The Defendant became upset with Grant and said to him that he had moved to quickly because Tovar had not hit the pipe yet. Id. The Defendant

then said, “come on, you’re hitting the pipe.” Id. Tovar presented the “good buy” sign to the other officers who then arrested Grant and the Defendant. Id. 50-52. As the police moved in to make the arrest, the Defendant said, “I knew it” and put the remaining rocks of cocaine in his mouth. Id. at 51.

No cocaine or money was found on the Defendant’s person after his arrest. RP (9/30/08) 9. Grant sloughed the buy money in the planter box as the police approached. Id. at 13-14. Grant had an additional \$161 in his pocket. Id. at 17.

The white rocks that Officer Tover purchased from Grant and the Defendant contained cocaine. RP (9/25/108) 101-02.

2. PROCEDURAL FACTS

The State charged the Defendant with Delivery of a Controlled Substance on April 1, 2008. CP 1. The trial commenced on September 24, 2008, and the State moved to admit Grant’s out-of-court statements as statements of a co-conspirator under ER 801(d)(2). Supp. CP ___ Sub 43, page 4. RP (9/24/08) 3. The Defendant objected arguing that the State could not lay the foundation required for admission of a statement of a co-conspirator statement. RP (9/24/08) 4-6. the following day, the

court readdressed the admission of the statements indicating that in the court's opinion the statements were not offered to prove the truth of the matters asserted, but rather to give context to how Tovar came to speak with the Defendant. RP (9/25/08) 3-4. The Defendant objected to admission of the statements arguing that the statements show that Grant is selling drugs and there is insufficient evidence of a conspiracy at that point. Id. at 4. Defendant also argues that he received insufficient notice of the State's intention to introduce the statements. Id. at 5.

The court then excused the parties to see if they could reach an agreement about what evidence would be presented. Id. at 5-6. The court expressed some concern with admitting the actual statements, but indicated that it is relevant and appropriate for the State to present evidence to explain how Tovar came to speak with the Defendant. Id. at 6. The court clarified that its concern about admitting the statements was not related to the hearsay rule, but to the balance of probative value versus prejudicial effect. Id. at 7.

The parties returned and reached an agreement that Tover would not testify about any statements made by Grant, but would only testify that he inquired of Grant about purchasing narcotics and Grant led him to the Defendant. Id. at 8. Despite the apparent

agreement, the Defendant then made a general objection without directing the court to any specific grounds to support it:

It's my belief that anything that occurred prior to my client's presence should not be heard at all by the jury. My understanding of the – I guess I object to any of that material coming in.

Id. at 9. At trial, Tovar testified that he inquired of Grant about purchasing narcotics. Id. at 42-43. Grant was not able to give Tovar narcotics right away, but rather took him to the Defendant. Id. at 43-44. The Defendant did not object to this testimony. See Id. at 42-44. The only objection made by the Defendant was a foundational objection as to Grant when Tovar was asked to make an in-court identification. Id. at 43.

The jury found the Defendant guilty as charged on September 30, 2008. CP 9. The court sentenced the Defendant to 20 months and one day on October 10, 2008. CP 28-36. The Defendant filed a notice of appeal on the same day. CP 37.

C. STANDARD OF REVIEW

When a trial court's decision to admit or exclude evidence is reviewed on appeal, the standard of review is abuse of discretion. State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). The issue before this Court is the trial court's decision to admit evidence

of Mr. Grant's actions. Accordingly, the appropriate standard of review is abuse of discretion.

D. ARGUMENT

1. THE DEFENDANT'S OBJECTION WAS NOT SUFFICIENTLY SPECIFIC TO PRESERVE THE ISSUE OF HEARSAY ON APPEAL.

The Defendant assigns error to the admission of Grant's conduct. He argues that Grant's conduct in leading Officer Tovar to the Defendant was an assertion that is barred by the hearsay rule. The grounds of this objection were not raised at trial, and this Court should find that the error was not preserved for appeal.

A party may not raise an objection on appeal not properly preserved at trial absent manifest constitutional error. RAP 2.5(a). State v. Powell, No. 80535-1, *12, 206 P.3d 321, 327 (Wash. Sup. Ct. Apr. 30, 2009). Defendant does not raise any constitutional challenges in this appeal. Washington courts adopt a strict approach because the trial court can only correct errors if given the opportunity to do so. Id. The trial court only has the opportunity to address issues when it has notice of the specific grounds for the objection. Accordingly, an objection only preserves the issue for appeal when the specific grounds are stated in the objection or if

the grounds are obvious from the context. ER 103(a)(1). See Powell, 206 P.3d at 327. As a general rule, an objection that does not state the grounds does not preserve the question for appellate review. State v. Pittman, 54 Wn. App. 58, 66, 772 P.2d 516 (1989) (citing State v. Guloy, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985)).

In Pittman, there was more than one possible grounds under which counsel may have objected, leading and relevance. Id. As a consequence, the grounds of the objection was not obvious from the context. Id. This Court should consider whether there is more than one logical basis for the objection to determine if the grounds were obvious.

In this case, the circumstances changed dramatically when the parties agreed that Grant's statements would not be offered. That change coupled with the fact that the court identified its concerns with the balance of probative value and unfair prejudice, indicate that the objection may have been under ER 403. Nothing in the record put the trial court on notice that the objection related to an argument that Grant's conduct was an assertion of fact offered to prove its truth. As a result, this Court should find that the Defendant did not adequately preserve this novel issue now raised on appeal. This Court should affirm the Defendant's conviction.

2. THE DEFENDANT DID NOT MEET HIS BURDEN TO SHOW THAT GRANT'S CONDUCT WAS INTENDED BY GRANT TO BE AN ASSERTION OF FACT.

If this Court finds that the Defendant preserved the issue on appeal, the Court should consider whether Grant's conduct was intended by Grant as an assertion of fact. The Defendant claims that when Grant led Tovar to the Defendant he intended to assert that the Defendant was selling cocaine. The Defendant is wrong. When Grant led Tovar to the Defendant he did so to determine if the Defendant knew Tovar, and there was nothing in his conduct to suggest that he attempted to assert a fact through his conduct.

Under the hearsay rule, a "statement" includes "nonverbal conduct of a person, if it is intended by the person as an assertion. ER 801(a)(2). When a party opposes the admission of evidence on the theory that a person's conduct is an assertion offered to prove the truth of the matter asserted, a preliminary hearing under ER 104 may be required. In re Penelope B., 104 Wn.2d 643, 654, 709 P.2d 1185 (1985). "The burden is on the party claiming that an assertion is intended; doubtful cases are to be resolved against that party and in favor of admissibility." Id. Thus, the burden is on the

Defendant to show that Grant actually intended to assert a fact through his conduct.

Whether conduct is assertive or nonassertive is often not obvious. While it is true that involuntary acts are non-assertive conduct, not all voluntary acts are assertive conduct. The inquiry is fact specific and depends on the intent of the actor. It is only when the objecting party proves that the actor actually intended to assert the fact through his or her conduct that the court may find it is an assertion under ER 801(a)(2). Id.

In this case, the Defendant has not met his burden to show that the conduct of Grant was intended by Grant to be an assertion. Indeed, had the trial court been asked to make a determination on this issue, it would have considered Grant's statements to Tovar to determine what his actual intent was at the time. Grant told Tovar that he "needed to see if anyone knows you out here" just before he led Tovar to the Defendant. CP 2. As soon as Grant and Tovar met with the Defendant, Grant asked if the Defendant knew Tovar. Id. From Grant's statements, it is apparent that the reason for leading Tovar to the Defendant was not to make an assertion that the Defendant was selling drugs, but simply to see if the Defendant knew Tovar. However, there is nothing in the record to support a

finding that Tovar intended some information to be conveyed simply by the fact that he walked with Tovar to meet with the Defendant. Rather this was nothing more than an action observed by Officer Tovar. As a result, the trial court's decision should be affirmed.

3. THE FACT THAT GRANT LED TOVAR TO THE DEFENDANT WAS NOT OFFERED TO PROVE THE TRUTH OF THE MATTER ASSERTED, BUT WAS OFFERED TO SHOW HOW TOVAR CAME INTO CONTACT WITH THE DEFENDANT, TO EXPLAIN EACH PERSON'S ROLE IN THE TRANSACTION, AND TO GIVE CONTEXT TO THE CONVERSATIONS THAT FOLLOWED.

The Defendant argues that when Grant led Tovar to the Defendant he was intending to assert the fact that the Defendant was selling drugs. As discussed above, Grant's actual intent was to determine if anyone in the area knew Tovar. Regardless, even if Grant intended to make an assertion through his actions, the evidence that he led Tovar to a place where the Defendant was standing was not offered for the truth of the matter asserted. The evidence was offered to show how Officer Tovar came into contact with the Defendant, to explain each person's role in the transaction, and to give context to the conversation between Tovar and the Defendant.

“Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” ER 801(c). Evidence offered to describe the context and background of an investigation is appropriate when the testimony does not incorporate out-of-court statements. State v. O'Hara, 141 Wn. App. 900, 910, 174 P.3d 114 (2007); State v. Post, 59 Wn. App. 389, 394-95, 797 P.2d 1160 (1990). In contrast, evidence of actual out-of-court statements that, if true, provides incriminating evidence against a defendant cannot be offered to show the officer's state of mind if the officer's state of mind is not relevant. State v. Aaron, 57 Wn. App. 277, 279-80, 787 P.2d 949 (1990). However, when historical facts are necessary, it is appropriate to exclude the actual statements and indicate that the officer acted on “information received.” Id. at 281. In a case such as this one, the officer's state of mind is relevant, unlike in Aaron, because the officer was engaged in the transaction in an undercover capacity. Additionally, where two individuals were both actively engaged in the transaction and each had specific roles, it is necessary to present evidence to explain those roles.

Not only is the evidence that Grant led Tovar to Hill relevant to show how Tovar came into contact with Hill, it also gives context

to the conversation between Tovar and Hill. Without an indication that Tovar contacted Hill in connection with his request to Grant to purchase narcotics, Hill's comments about "some fool down here that been poppin' everybody" would not make any sense. See RP (9/25/08) 45. Similarly, the ensuing conversation about Hill wanting Tovar to "hit the pipe" only makes sense in the context of a narcotics transaction. Id.

The evidence that Grant led Tovar to Hill after inquiring about purchasing narcotics was not offered for the truth of any alleged assertive conduct, but offered to explain how Tovar came to speak with Hill, to explain Grant and Hill's roles in the transaction, and to give context to the conversation between Hill and Tovar. Because the evidence is not hearsay, the trial court's conviction should be affirmed.

4. GRANT AND THE DEFENDANT WERE ENGAGED IN AN ONGOING CONSPIRACY TO SELL COCAINE AS A TWO-PERSON TEAM, AND GRANT'S STATEMENTS WERE MADE IN FURTHERANCE OF THAT CONSPIRACY.

If this Court determines that the objection preserved the issue on appeal, that Grant's conduct was an assertion of fact, and that it was offered to prove the truth of that fact, this Court should

still find that the conduct is admissible as a statement of a co-conspirator.

Statements made by a co-conspirator made during the course of a conspiracy and in furtherance of the conspiracy is not hearsay. ER 801(d)(2)(v). Prior to admitting statements of a co-conspirator there must be proof by a preponderance of the evidence that (1) a conspiracy existed, (2) the declarant and the defendant were members of the conspiracy, and (3) the statements were made in furtherance of the conspiracy. State v. Guloy, 104 Wn.2d 412, 420, 705 P.2d 1182 (1985); State v. Whitaker, 133 Wn. App. 199, 223, 135 P.3d 923 (2006); State v. Halley, 77 Wn. App. 149, 152, 890 P.2d 511 (1995). A conspiracy may be shown by circumstantial evidence; proof of a formal agreement is not required. Whitaker, 133 Wn. App. at 223. "A concert of action, all the parties working together understandingly with a single design for the accomplishment of a common purpose, will suffice." Id. The inquiry is fact specific.

In this case, an ongoing conspiracy existed between the Defendant and Grant to sell narcotics. Each had a specific role. Grant handled the money, and Hill delivered the drugs. This arrangement was apparent from Grant's response when Tovar

asked him if he was working. He said he was and led Tovar to Hill, who would deliver the drugs. The two took Tovar to the drugs where Grant took his money and Hill provided the drugs. The fact that they were working in concert was evident from Hill's frustration at Grant for taking Tovar's money before he "hit the pipe." See RP (9/25/08) 50. We also know this was an ongoing arrangement because Hill had no property on him, while Grant had a large amount of cash on him. The evidence is sufficient here to establish by a preponderance of the evidence that both Hill and Grant were working together as part of a conspiracy to sell cocaine. Grant's action in leading Tovar to Hill was done in furtherance of that conspiracy. As a result, the "statement" is admissible as a statement by a co-conspirator. This Court should affirm the Defendant's conviction.

5. ANY POSSIBLE PREJUDICE FROM THE EVIDENCE OF GRANT LEADING TOVAR TO THE DEFENDANT IS HARMLESS IN LIGHT OF THE OVERWHELMING EVIDENCE OF THE DEFENDANT'S INVOLVEMENT IN THE DRUG TRANSACTION.

Even if admission of the evidence that Grant led Tovar to Hill was improper, it was harmless. An error in the admission of

evidence, is harmlessly affected the verdict. Aaron, 57 Wn. App. at 282-83. The constitutional s unless the Defendant can show that the evidence material harmless error analysis does not apply here because out-of-court statements to an undercover officer when the declarant does not know he is speaking to an officer are not testimonial. See State v. Chambers, 134 Wn. App. 853, 862, 142 P.3d 668 (2006). In this case, the only error raised by the Defendant is evidentiary. As a result, the non-constitutional harmless error analysis applies.

If it was error to admit the evidence, it did not materially affect the verdict. The evidence after Grant led Tovar to Hill is that Hill took several pieces of crack cocaine out of the planter box and displayed them for Tovar. RP (9/25/08) 49. He initially objected to Tovar taking them, but then acquiesced when he learned that Tovar had paid Grant for the drugs. Id. at 49-50. The evidence that Tovar delivered the cocaine was overwhelming, and any inferences the jury may have made from Grant's conduct about what Grant knew about Hill could not have affected the verdict. Any error was harmless and the Defendant's conviction should be affirmed.

E. CONCLUSION

For the reasons stated above, the State respectfully requests that this Court affirm the Defendant's conviction.

DATED this 26th day of June, 2009.

Respectfully submitted,

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