

9-10-2015

State v. Yermola Respondent's Brief Dckt. 43285

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	
Plaintiff-Respondent,)	NO. 43285
)	
vs.)	RESPONDENT'S BRIEF
)	ON REVIEW
ANDREY SERGEYEVICH,)	
YERMOLA,)	
)	
Defendant-Appellant.)	
_____)	

Nature Of The Case

This matter comes before this Court on Yermola's petition for review of the unpublished decision of the Idaho Court of Appeals, State v. Andrey Sergeyevich Yermola, Docket No. 41435, 2015 Unpublished Opinion No. 348 (Idaho App., February 12, 2015) (hereinafter "Opinion").

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Supreme Court _____ Court of Appeals _____
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Statement Of The Facts And Course Of The Proceedings

The facts and procedural history of this case are set forth in the Opinion of the Court of Appeals (Opinion, pp.1-2) and the state's prior briefing (Respondent's Brief, pp.1-3), both of which are incorporated here in full by reference, and attached hereto as Appendices A and B, respectively.

Course Of Proceedings On Appeal

On appeal to the Court of Appeals, Yermola argued that, contrary to second requirement set forth in State v. Peteja, 139 Idaho 607, 83 P.3d 781 (Ct. App. 2003),¹ "there is no evidence in the record that demonstrates that the items concealed would have tended to demonstrate the commission of a *felony*." (Appellant's Brief, p.8 (emphasis added).) Adopting a literal approach to Peteja's reference to "felony," Yermola contended that the evidence at trial was insufficient to convict him of felony concealment because no evidence was presented to prove that the crime related to the concealment – grand theft by possession of stolen property – is classified as a felony. (See generally Appellant's Brief.)

The Idaho Court of Appeals rejected Yermola's argument, initially explaining that "the jury was specifically instructed that it must find that the evidence was concealed in regard to a 'felony trial or inquiry or investigation' which substantively mirrors the elements set forth in Peteja." Opinion, p.5. The

¹ In Peteja, 139 Idaho at 612, 83 P.3d at 786, the Court of Appeals stated, "we conclude that the district court's instructions should have informed the jury that it must find whether the officer's investigation was 'criminal in nature' and whether the bag and its contents that Peteja concealed would have tended to demonstrate the commission of a felony."

Court of Appeals concluded: (1) “there was substantial evidence presented to the jury that the gun at issue in the concealment charge would have tended to demonstrate the commission of another crime that Yermola was charged with, grand theft by possession of stolen property, which is, in fact, a felony[,]” and (2) “there was sufficient evidence for the jury to have found that the gun tended to demonstrate the commission of grand theft by possession of stolen property and thus, *inherently*, that it involved a felony offense.” Opinion p.5 (emphasis added). The Idaho Court of Appeals affirmed Yermola’s conviction for felony concealment of evidence. (Id.)

ISSUE ON REVIEW

Yermola states the issue on review as:

Is the Idaho Court of Appeals’ Opinion affirming Mr. Yermola’s Judgment of Conviction in conflict with prior decisions of the Court of Appeals?

(Brief in Support, p.6.)

The state phrases the issue on review as follows:

Has Yermola failed to show that the evidence supporting his conviction for felony concealment of evidence was insufficient to prove his guilt?

ARGUMENT

Yermola Has Failed To Show That The Evidence Supporting His Conviction For Felony Concealment Of Evidence Was Insufficient To Prove His Guilt

A. Introduction

On review, Yermola argues “there is insufficient evidence to support his conviction for felony concealment of evidence because the jury was not presented with any evidence that the evidence at issue tended to demonstrate the commission of a felony offense,” as required by Peteja, 139 Idaho 607, 83 P.3d 781. (Appellant’s Brief on Review, p.7.) Yermola further contends “the jury in this case was presented no evidence that any crime committed was a felony” (id. at 8), and “there is no evidence in the record that the items [he] was accused of concealing – the gun and the cell phone, tended to demonstrate the commission of a felony” (id. at 11).

Contrary to Yermola’s argument, the jury was presented with substantial evidence that he concealed evidence related to the crime of grand theft by possession of stolen property (a firearm). Because that crime is, as a matter of law, a felony, there is sufficient evidence to support Yermola’s conviction for felony concealment of evidence.

B. Standard Of Review

When considering a case on review from the Idaho Court of Appeals, “this Court gives serious consideration to the views of the Court of Appeals” but “reviews the district court’s decision directly.” State v. Lampien, 148 Idaho 367,

371, 223 P.3d 750, 754 (2009) (citing State v. Doe, 144 Idaho 819, 821, 172 P.3d 1094, 1096 (2007)).

“Appellate review of the sufficiency of evidence is limited in scope.” State v. Marsh, 153 Idaho 360, 365, 283 P.3d 107, 112 (Ct. App. 2011). An appellate court will not set aside a judgment of conviction entered upon a jury verdict if there is substantial evidence upon which a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Reyes, 121 Idaho 570, 826 P.2d 919 (Ct. App. 1992); State v. Hart, 112 Idaho 759, 761, 735 P.2d 1070, 1072 (Ct. App. 1987). In conducting this review the appellate court will not substitute its view for that of the jury as to the credibility of witnesses, the weight to be given to the testimony, or the reasonable inferences to be drawn from the evidence. State v. Knutson, 121 Idaho 101, 822 P.2d 998 (Ct. App. 1991); Hart, 112 Idaho at 761, 735 P.2d at 1072. Moreover, the facts, and inferences to be drawn from those facts, are construed in favor of upholding the jury’s verdict. State v. Hughes, 130 Idaho 698, 701, 946 P.2d 1338, 1341 (Ct. App. 1997); Hart, 112 Idaho at 761, 735 P.2d at 1072.

C. The Jury Was Presented With Sufficient Evidence That Yermola Concealed Evidence Regarding A Felony Offense

Yermola argues that the evidence was insufficient to convict him because the state did not prove that the offense related to the concealed evidence -- grand theft by possession of stolen property (a firearm) -- is a “felony.” He states:

[T]here is insufficient evidence in the record to support his conviction because there is no evidence in the record that

demonstrates that the items concealed would have tended to demonstrate the commission of a *felony*. In this case, while there is evidence that a criminal investigation began when the officers responded to the casino, *there is no evidence in the record that the items Mr. Yermola was accused of concealing – the gun and the cell phone, tended to demonstrate the commission of a felony*. Neither of the two law enforcement officers who testified, Deputy Shaw and Deputy Hunt, testified that the items concealed would tend to demonstrate the commission of a *felony*.

(Appellant's Brief on Review, p.11 (emphasis added).)

It is unclear whether the highlighted portion of Yermola's statement merely repeats his view that Peteja requires testimony that the crime related to the concealment of evidence is specifically classified as a "felony" (vis-à-vis the named offense), or if he is further arguing that evidence that he concealed the pistol was not shown to be related to any crime, including grand theft by possession of stolen property (a firearm) as alleged in Count II. Regardless, both arguments are meritless.

A conviction for felony concealment of evidence requires the state to prove, beyond a reasonable doubt, that the defendant had the specific intent to prevent the evidence from being "produced, used or discovered as evidence upon any trial, proceeding, inquiry, or investigation." I.C. § 18-2603. Concealment of evidence is a misdemeanor offense unless "[t]he defendant knew that an object was about to be produced, used, or discovered as evidence in any legally authorized trial, proceeding, inquiry, or investigation involving a felony offense." Peteja, 139 Idaho at 610, 83 P.3d at 784; see I.C. § 18-2603 ("unless the trial, proceeding, inquiry or investigation is criminal in nature and involves a felony offense"). Whether an investigation "involves a felony offense"

depends upon whether the evidence that was destroyed, altered, or concealed would have tended to demonstrate the commission of a felony. Peteja, 139 Idaho at 612, 83 P.3d at 786 ("[W]e conclude that the district court's instructions should have informed the jury that it must find whether the officer's investigation was 'criminal in nature' and whether the bag and its contents that Peteja concealed would have tended to demonstrate the commission of a felony.").

The jury was instructed, in relevant part, that the state must prove:

3. the defendant, . . . knowing that a Beretta .40 caliber pistol and/or a cell phone were *about to be produced or used or discovered as evidence in a felony trial or inquiry or investigation*;
4. did willfully conceal the same with the intent to prevent it from being produced or used or discovered.

(R., p.333 (emphasis added); see Tr., p.298, Ls.1-12.)² The Court of Appeals correctly noted that the instruction "substantively mirrors the elements set forth in Peteja." Opinion, p.5; Peteja, 139 Idaho at 612, 83 P.3d at 786 ("criminal in nature" and "would have tended to demonstrate the commission of a felony"). By convicting Yermola of felony concealment of evidence, the jury necessarily found, in accordance with the instruction, that he concealed the Beretta .40 caliber pistol knowing it was "about to be produced or used or discovered as evidence in a *felony* trial or inquiry or investigation." (R., p.333 (emphasis added); see I.C. § 18-2603.) Nothing more was required.

² Idaho does not have a pattern jury instruction for a felony offense under I.C. § 18-2603. Peteja, 139 Idaho at 609 n.2, 83 P.3d at 783 n.2.

The Court of Appeals determined the state presented substantial evidence that the Beretta .40 caliber pistol Yermola concealed would have tended to demonstrate the commission of a felony -- grand theft by possession of stolen property (a firearm).³ Opinion, p.5; see Peteja, 139 Idaho at 612, 83 P.3d at 786. Yermola's estranged wife, Margarita, testified that Yermola texted her that he wanted to talk to her for a minute, so she agreed to meet with him during her lunch break outside her workplace. (Tr., p.220, L.6 - p.222, L.7.) After picking Margarita up from her work, Yermola drove to an open area on the side of the road near the Coeur d'Alene Tribal Casino, where he pulled a gun out from behind the back seat of the car, wiped it off with a sweater, and "stepped outside and tossed it" into the snow. (Tr., p.226, L.22 - p.227, L.18; p.242, Ls.5-23; p.243, Ls.17-18.) Deputy Sheriff Hunt testified that after she arrived at the scene and spoke to Margarita (Trial Tr., p.136, L.22 - p.138, L.4), the two drove together to "recover some evidence," and went to a location off the highway where, through the assistance of a K-9 unit, they found a Beretta .40 caliber pistol. (Trial Tr., p.113, L.16 - p.114, L.24; p.137, L.21 - p.139, L.10.)

Travis Woodruff testified that he purchased a black Beretta PX4 Storm .40 caliber semiautomatic pistol from Cabela's, which had been stolen from his vehicle in November 2012, and it remained missing until Deputy Hunt discovered it where Yermola tossed it in the snow. Mr. Woodruff identified the pistol shown

³ I.C. § 18-2403(4) states in relevant part: "A person commits theft when he knowingly receives, retains, conceals, obtains control over, possesses, or disposes of stolen property, knowing the property to have been stolen" I.C. § 18-2403(1)(b) states in relevant part: "A person is guilty of grand theft when he commits a theft as defined in this chapter and when: . . . (6) The property consists of one (1) or more firearms, rifles or shotguns."

in court (Plaintiff's Exhibit 2), visually and by serial number, as the same pistol he had purchased and which was stolen from his vehicle in November 2012. (Trial Tr., p.98, L.22 - p.103, L.11; p.139, L.11 - p.140, L.13.)

In sum, the state provided the jury with substantial evidence that, on January 8, 2013, Yermola concealed evidence that would have tended to demonstrate the commission of a felony -- grand theft by possession of stolen property (a firearm). Not only was the jury presented with evidence that Mr. Woodruff's Beretta pistol was stolen property which Yermola possessed and concealed on January 8, 2013, the jury's job was to determine whether, based on that evidence, Yermola was guilty of that very crime as charged in Count II. The stolen Beretta pistol Yermola threw into the snow "would have tended to demonstrate the commission of a felony" -- grand theft by possession of stolen property (a firearm). Peteja, 139 Idaho at 612, 83 P.3d at 786. Therefore, the state presented substantial evidence tending to demonstrate that Yermola committed the crime of felony concealment of evidence (and, all the more, that the evidence was subject to being produced, used, or discovered in regard to a felony trial, proceeding, investigation, or inquiry concerning such felony). See Miller, 131 Idaho at 292, 955 P.2d at 607; Reyes, 121 Idaho 570, 826 P.2d 919.

Yermola's argument that the state had to additionally prove, and the jury was required to find, that the specific offense relating to the concealment of evidence -- grand theft by possession of stolen property -- is a "felony" is not supported in law or logic.

That the jury was not instructed, and the state did not present evidence, that grand theft by possession of stolen property (a firearm) constitutes a "felony" offense is irrelevant, because it is not the province of the jury to classify a specific offense. The Court of Appeals accurately explained, "if a jury finds that a defendant engaged in concealment of evidence as to a crime that is classified as a felony, it *inherently* finds that the defendant engaged in concealment of evidence in the context of a criminal, felony investigation as required by the statute." Opinion, p.5 (emphasis added).

Not only is the crime of grand theft by possession of stolen property inherently a felony, it is so as a matter of law. This Court recently considered a similar issue in State v. Lemmons, 2015 WL 4940646 (Idaho), and held it is a matter of law -- not an "adjudicatory fact" subject to either a jury finding or "judicial notice" -- that one ounce is 28 grams or more. See id. at *3 (noting that judicial notice only applies to adjudicative facts). Applying the same reasoning here, grand theft by possession of stolen property is a felony as a matter of law. It would be ludicrous to ask a jury to determine whether such a crime is a felony -- especially given the possibility a jury might determine it is not. See id. ("The conversion rate was not an issue for the jury to decide. It is a matter established by law. The conversion rate is no more an adjudicatory fact than are the provisions of a statute.").

It is the Idaho Legislature's role to decide which criminal offenses are felonies, and which are not. See I.C. § 18-111 (defining felony, misdemeanor, and infraction). The determination of whether a criminal offense is a felony or

misdemeanor is, therefore, purely a question of law outside the jury's domain. See Helgeson v. Powell, 54 Idaho 667, 34 P.2d 957, 962 (1934) ("the existence of probable cause or the want of it is a pure question of law; and not only is the intervention of the jury not required, but it is erroneous to submit any phase of the question of probable cause to their determination"). Because the state presented substantial evidence that Yermola concealed evidence relating to the investigation, proceeding, or trial of an offense (grand theft by possession of stolen property) which *is* a felony as a matter of law, Yermola has failed to demonstrate error.⁴

The state presented evidence at trial that the Beretta .40 caliber pistol Yermola concealed would have tended to demonstrate the commission of the felony of grand theft by possession of stolen property (the same firearm). Inasmuch as that offense is a felony as a matter of law, the jury's verdict finding Yermola guilty of felony concealment of evidence is supported by substantial evidence. Yermola has failed to establish that the state presented insufficient evidence to support the jury's verdict finding him guilty of felony concealment of evidence. This Court should affirm the conviction.

⁴ Nor does it matter that the state's witnesses did not testify that the concealed evidence (the pistol) was sought in regard to a "felony" trial, investigation, or inquiry. As explained in Lemmons, "[a] witness need not testify in the wording of a criminal statute in order to prove a violation of that statute as long as the witness's testimony shows a violation of the statute. It is the substance of the testimony, not the particular words used, that is material." Lemmons, 2015 WL 4940646 at *5.

CONCLUSION

The state respectfully requests that this Court affirm Yermola's conviction for felony concealment of evidence.

DATED this 10th day of September, 2015.



JOHN C. MCKINNEY
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 10th day of September, 2015, served a true and correct copy of the attached RESPONDENT'S BRIEF ON REVIEW by causing a copy addressed to:

JUSTIN M. CURTIS
DEPUTY STATE APPELLATE PUBLIC DEFENDER

to be placed in The State Appellate Public Defender's basket located in the Idaho Supreme Court Clerk's office.


John C. McKinney
Deputy Attorney General

JCM/dd