IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 28677-1-III**
Respondent,	)	
	)	**Division Three**
v.	)	
	)	
ANTHONY ROBERT COVERT,	)	
	)	**UNPUBLISHED OPINION**
Appellant.	)	
	)	

Siddoway, J. — Anthony Covert appeals his convictions of attempted first degree murder, first degree assault, two counts of second degree assault, possession of a stolen firearm, and unlawful possession of a firearm imposed for his use of a handgun during two distinct confrontations with the victims in this case. He argues that officers exceeded the scope of a valid *Terry*[1] stop during his initial detention, the jury instructions lacked necessary unanimity instructions for the two second degree assault charges, and the trial court improperly admitted hearsay evidence identifying Mr. Covert as the shooter.

[1] *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

Because we find that these arguments lack merit, we affirm the convictions.

FACTS AND PROCEDURAL BACKGROUND

On November 7, 2008, a group of individuals including Mr. Covert arranged to fight Shane Hagedorn and Joe Castagna at a Rosauers Supermarket parking lot in Browne's Addition to settle a dispute. As Mr. Castagna and Mr. Hagedorn drove by the store, Mr. Covert pointed and attempted to fire a gun at their car. The gun did not fire because the safety was still engaged. Mr. Covert and the group he was with then returned to his apartment and arranged with Mr. Hagedorn and Mr. Castagna via phone to meet at the West Wynn Motel. This confrontation occurred shortly thereafter at a gas station near the motel. Mr. Covert fired several shots at Mr. Hagedorn and Mr. Castagna, leaving Mr. Castagna unscathed but severely wounding Mr. Hagedorn. Mr. Covert fled from the scene on foot.

At the combined CrR 3.5 and 3.6 hearing, officers testified that they arrived at the West Wynn Motel shortly before midnight on November 7, 2008 in response to a report of multiple gunshots and a badly bleeding victim. Responding Officers Cory Lyons and Jeremy McVay followed a blood trail from the parking lot upstairs to room 231, where they found Mr. Hagedorn on the floor bleeding severely from multiple gunshot wounds.

Around 12 a.m., K-9 Officer Shawn Kendall arrived on scene with his K-9 partner, Stryder. K-9 Stryder picked up a scent at the last known location of the suspects and

began tracking toward a bridge. Around 12:04 a.m., the tracking team found Mr. Covert when he came out from under the bridge screaming and crying. He was stopped by officers with guns drawn, secured with handcuffs, and secluded in a patrol car while the K-9 continued tracking the scent. Around 12:10 a.m., K-9 Stryder tracked Mr. Covert's scent to a Smith & Wesson .40 caliber handgun, a white pullover, and a belt in the same general area.

Mr. Covert was then taken to the Public Safety Building and questioned by Detective Marvin Hill. He told the detective that the shooter was a white male named Zach and that his friend Ricky Grubb had been at the scene. Mr. Covert then complied with the detective's request that he call Mr. Grubb. At 4:50 a.m., Mr. Grubb arrived at the Public Safety Building and identified Mr. Covert as the shooter. Mr. Grubb advised that Michael Davis was also present during the shooting and provided detectives with his contact number. Mr. Davis also appeared and identified Mr. Covert as the shooter. These two witnesses again identified Mr. Covert as the shooter at trial.

At 6:12 a.m., Detective Hill contacted Mr. Covert for a second time. Mr. Covert then admitted that he had been lying, that he tried to shoot Mr. Hagedorn and Mr. Castagna with a stolen handgun when they drove through the parking lot at Rosauers, and that he brought a firearm to the encounter at the motel. He also admitted that he fled the scene and hid under a bridge after discarding some clothing and a handgun. Mr. Covert

was charged with one count of attempted first degree murder, two counts of first degree assault, two counts of second degree assault, possession of a stolen firearm, and second degree unlawful possession of a firearm.

At trial, Detective Hill testified that Mr. Grubb and Mr. Davis informed him that Mr. Covert was the shooter prior to interviewing Mr. Covert for the second time. Defense counsel objected on hearsay grounds and moved for a mistrial. The objection was overruled and the motion denied. In overruling the objection the court noted that the testimony was admissible because it provided context and background for the detective's decision to reinterview Mr. Covert. It also invited defense counsel to submit a limiting instruction, but no instruction was submitted.

The final instructions given to the jury did not contain any language regarding juror unanimity or the election of a particular criminal act on which the jury was to evaluate the second degree assault charges, although the State did elect a particular act for these charges during its closing. Mr. Covert was convicted on all charges and sentenced to 432 months of confinement.

ANALYSIS

I. Validity of the *Terry* Stop

Mr. Covert first argues that his initial detention exceeded the limits of a valid *Terry* stop. He does not challenge any of the trial court's factual findings made during

the consolidated CrR 3.5 and 3.6 hearing, instead assigning error only to the court's legal conclusions that a lawful *Terry* stop occurred and that police had probable cause to arrest him six minutes after his initial detention.

Standard of Review

We review a trial court's denial of a suppression motion to determine whether substantial evidence supports the challenged findings of fact and whether these findings support the trial court's conclusions of law. *State v. Mendez*, 137 Wn.2d 208, 214, 970 P.2d 722 (1999), *overruled on other grounds by Brendlin v. California*, 551 U.S. 249, 127 S. Ct. 2400, 168 L. Ed. 2d 132 (2007). When the defendant does not challenge any of the trial court's findings of fact, we consider them verities on appeal. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). We review the trial court's legal conclusions resulting from a suppression hearing de novo. *State v. Johnson*, 128 Wn.2d 431, 443, 909 P.2d 293 (1996).

Officers Conducted a Lawful Terry Stop

As a general rule, a warrantless search is per se unreasonable under both the Fourth Amendment to the United States Constitution and article I, section 7 of the Washington Constitution unless the search falls within one or more specific exceptions to the warrant requirement. *State v. Ross*, 141 Wn.2d 304, 312, 4 P.3d 130 (2000). One exception to the warrant requirement occurs in a situation where a police officer makes a

brief investigatory *Terry* stop with reasonable suspicion, based on objective facts, that an individual is involved in criminal activity. *Brown v. Texas*, 443 U.S. 47, 51, 99 S. Ct. 2637, 61 L. Ed. 2d 357 (1979); *Terry*, 392 U.S. at 21-22; *State v. Sieler*, 95 Wn.2d 43, 46, 621 P.2d 1272 (1980).

When evaluating a *Terry* stop, we must inquire whether the initial stop was justifiable at its inception and whether the stop was reasonably related in scope to the circumstances that justified the interference. *State v. Williams*, 102 Wn.2d 733, 739, 689 P.2d 1065 (1984); *State v. Wheeler*, 108 Wn.2d 230, 737 P.2d 1005 (1987). Mr. Covert challenges only the scope of the stop.

As to this second inquiry, the *Williams* court set out three factors to be considered when determining whether an intrusion on an individual is permissible under *Terry* or must instead be supported by probable cause: (1) the purpose of the stop, (2) the amount of physical intrusion upon the suspect's liberty, and (3) the length of time the suspect is detained. *Williams*, 102 Wn.2d at 740. We consider each in turn.

Purpose of the Stop. The purpose of a *Terry* stop must be related to an investigation focused on the defendant. *Id*. at 741 (recognizing that "[v]ery few, if any, exigent circumstances justify police intrusion on a citizen's privacy without the police immediately ascertaining the suspect's identity, purpose for being in the area, and possible involvement in a crime" (footnote omitted)).

Officers tracked Mr. Covert from the crime scene with a K-9 and stopped him with guns drawn once he emerged from his hiding spot on the hillside. The stop was clearly motivated by the officers' desire to investigate Mr. Covert's involvement in the crime, as well as officer safety concerns. Once he was detained, officers immediately asked Mr. Covert to identify himself and explain his reasons for being in the area. Officers also asked him several questions regarding whether he was involved in the shooting and if he knew of potential suspects.

Amount of Physical Intrusion. The degree of physical intrusion must be appropriate to the type of crime under investigation and to the probable dangerousness of the suspect. *Id.* at 740; *State v. Duncan*, 146 Wn.2d 166, 177, 43 P.3d 513 (2002) (recognizing that a higher level of police intrusion is allowed for a greater risk and a more violent crime than would be acceptable for a lesser crime). Under certain circumstances, measures such as drawing guns, handcuffing, and secluding the suspect may be appropriate to accomplish a *Terry* stop. *Williams*, 102 Wn.2d at 740; *c.f. State v. Knighten*, 109 Wn.2d 896, 909-10, 748 P.2d 1118 (1988) (recognizing that police went beyond a valid *Terry* stop by handcuffing and secluding the defendant when the defendant was thought to be unarmed and not involved in a violent crime). The investigative methods used by the police must be the least intrusive means reasonably available to verify or dispel the officers' suspicions in a short period of time. *Williams*,

102 Wn.2d at 738 (citing *Florida v. Royer*, 460 U.S. 491, 500, 103 S. Ct. 1319, 75 L. Ed. 2d 229 (1983)).

Here, officers were investigating a potential homicide committed with a firearm. Witnesses had advised them that multiple individuals might have been involved in the shooting. Officers had every reason to suspect that Mr. Covert was armed and dangerous when they discovered him. While not part of a typical *Terry* stop, the drawing of firearms, the use of handcuffs, and the seclusion of Mr. Covert in a patrol car was not excessive in light of the facts known to the officers at the time of his detention.

Length of Detention. An investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop. *State v. Wheeler*, 43 Wn. App. 191, 195-96, 716 P.2d 902 (1986) (quoting *Royer*, 460 U.S. at 500), *aff'd*, 108 Wn.2d 230; *Williams*, 102 Wn.2d at 741 (recognizing that a 35-minute detention of the defendant to investigate a burglary "approach[ed] excessiveness"); *c.f. State v. Cunningham*, 116 Wn. App. 219, 229, 65 P.3d 325 (2003) (upholding a 45-minute *Terry* stop where the defendant was uncooperative and officers had reasonable suspicion he had committed vehicle theft).

Mr. Covert complains that he incurred a 45-minute *Terry* stop. However, officers had probable cause to arrest Mr. Covert six minutes after his initial detention, as discussed below. The length of the actual *Terry* stop here was reasonable in duration and

lasted no longer than necessary to accomplish the purpose of that stop. The scope of the stop was reasonable under the facts of this case.

Probable Cause

"Probable cause exists when an officer has reasonable grounds to believe a suspect has committed or is committing a crime based on circumstances sufficiently strong to warrant that conclusion." *State v. Gonzales*, 46 Wn. App. 388, 395, 731 P.2d 1101 (1986). This determination rests "on the totality of facts and circumstances within the officer's knowledge at the time of the arrest." *State v. Fricks*, 91 Wn.2d 391, 398, 588 P.2d 1328 (1979). Officers may detain and arrest a suspect even though the arresting officers did not subjectively believe they had probable cause, so long as probable cause in fact existed to do so. *State v. Moore*, 161 Wn.2d 880, 888, 169 P.3d 469 (2007) (citing *Knighten*, 109 Wn.2d at 898-900).

In circumstances where police officers act together as a unit, the "fellow officer" rule provides that the collective knowledge of all the officers involved in the arrest may be considered in determining whether probable cause existed. *State v. Nall*, 117 Wn. App. 647, 650, 72 P.3d 200 (2003). The fellow officer rule does not require a finding of probable cause to be based solely upon the personal or subjective knowledge of the arresting officer. *State v. Maesse*, 29 Wn. App. 642, 647, 629 P.2d 1349 (agreeing that "in those circumstances where police officers are acting together as a unit, cumulative

knowledge of all the officers involved in the arrest may be considered in deciding whether there was probable cause to apprehend a particular suspect"), *review denied*, 96 Wn.2d 1009 (1981).

In the instant case, the trial court properly concluded that probable cause existed six minutes after Mr. Covert's initial detention, once the K-9 track clearly linked him to the gun and clothing found a short distance from where he was discovered. Under the fellow officer rule, this knowledge may be imputed to the officers responsible for Mr. Covert's detention since the officers were acting together as a unit. Mr. Covert's point that the detaining officer thought he was the victim of the crime is irrelevant, since the subjective beliefs of the officers do not come into play when determining whether a detention and arrest are supported by probable cause. The officers' reasonable suspicion ripened into probable cause six minutes after Mr. Covert's initial detention, justifying his extended detention and ultimate arrest.

II. Lack of Unanimity Instructions

Mr. Covert argues for the first time on appeal that he was entitled to unanimity instructions on his two charges of second degree assault because he was involved in two distinct encounters with the victims on November 7, 2008. The State responds that Mr. Covert is barred from raising the issue under RAP 2.5(a) because he never requested these instructions at trial, and that in any event the instructions were unnecessary because

the prosecutor elected the encounter on which the jury was to evaluate these two charges.

RAP 2.5(a)

This issue may be raised for the first time on appeal because failure to provide a unanimity instruction in a multiple acts case amounts to manifest constitutional error. *State v. Kiser*, 87 Wn. App. 126, 129, 940 P.2d 308 (1997), *review denied*, 134 Wn.2d 1002 (1998); *State v. Fiallo-Lopez*, 78 Wn. App. 717, 725, 899 P.2d 1294 (1995) (concluding that "we are required to consider the [unanimity instruction] argument on appeal because of its constitutional implications").

Unanimity Instructions Were Not Required

A jury must unanimously agree on the act that supports a conviction. *State v. Petrich*, 101 Wn.2d 566, 569, 683 P.2d 173 (1984); *State v. Kitchen*, 110 Wn.2d 403, 411, 756 P.2d 105 (1988). Where multiple acts could constitute the crime charged, the State must either elect which particular criminal act it will rely on for conviction, or the trial court must give a unanimity, or *Petrich*, instruction informing the jury that it must agree on the same underlying criminal act. *State v. Vander Houwen*, 163 Wn.2d 25, 38, 177 P.3d 93 (2008); *Kitchen*, 110 Wn.2d at 409.

Here, a *Petrich* instruction was not required because, as Mr. Covert concedes, the State elected the particular criminal act it relied on for these charges. During closing, the prosecutor stated the event on which the jury was to evaluate each second degree assault

charge with ample clarity:

> So ladies and gentlemen, as to the second-degree assault counts, on Count IV, second-degree assault on Mr. Hagedorn, Count V, second-degree assault count on Mr. Castagna, these are all based on what Mr. Covert admitted to doing backed up by other witnesses in front of that Rosauers. He pulled a loaded gun out. He chased the car. He tried to fire the gun at the loaded car. Mr. Castagna saw this. He was afraid and he ducked down. Second-degree assault on Count IV and V.

Report of Proceedings (RP) at 803-04. Other statements made during closing reiterated his election. The prosecutor closed by saying "I would ask you find [Mr. Covert] guilty of Count IV and V, second-degree assault when he chased them at the Rosauers with a loaded gun and squeezed the trigger while pointing it at the car." RP at 840.

The trial court therefore did not err by not giving unanimity instructions on the second degree assault charges since the State clearly specified that the two counts of second degree assault were to be based on the incident occurring in front of the Rosauers, not on the shooting that occurred later that night.

III. Admissibility of Detective Hill's Testimony

Mr. Covert last argues that the trial court committed reversible error when it admitted hearsay testimony given at trial by Detective Hill indicating that two witnesses identified Mr. Covert as the shooter, and that no hearsay exception is applicable. The State responds that an investigating officer may discuss the substance of an investigation without violating the prohibition against hearsay testimony, and that any error in

admitting this testimony was harmless. We agree with the State's position.

Standard of Review

The decision to admit evidence lies within the sound discretion of the trial court and should not be overturned on appeal absent a manifest abuse of discretion. *State v. Magers*, 164 Wn.2d 174, 188, 189 P.3d 126 (2008). Abuse of discretion means that "the trial court exercised its discretion on untenable grounds or for untenable reasons, or that the discretionary act was manifestly unreasonable." *In re Estate of Stevens*, 94 Wn. App. 20, 29, 971 P.2d 58 (1999). Whether a statement is hearsay is a question of law to be reviewed de novo. *E.g.*, *State v. Edwards*, 131 Wn. App. 611, 614, 128 P.3d 631 (2006) (citing *State v. Neal*, 144 Wn.2d 600, 607, 30 P.3d 1255 (2001)).

A party who objects to evidence on one ground does not preserve unraised grounds for review. *See State v. Mason*, 160 Wn.2d 910, 933, 162 P.3d 396 (2007) (concluding that the defendant's objection at trial solely on relevancy grounds did not preserve an ER 404(b) challenge on appeal), *cert. denied*, 553 U.S. 1035 (2008).

Detective Hill's Testimony Was Not Offered for Its Truth

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. ER 801(c). Testimony that would otherwise be considered hearsay may be admissible when offered for the limited, nonhearsay purpose of providing background or context to a police investigation because the testimony is not offered to prove the truth of

the matter asserted. *State v. Moses*, 129 Wn. App. 718, 732, 119 P.3d 906 (2005) (concluding that witness testimony indicating she contacted child protective services (CPS) because the child told her that his dad kicked his mom "was not introduced for the truth of the matter asserted, but to show why [the witness] contacted CPS"), *review denied*, 157 Wn.2d 1006 (2006); *State v. Mason*, 127 Wn. App. 554, 565-66, 126 P.3d 34 (2005) (concluding that an officer's testimony regarding the victim's description of the criminal incident was not being admitted to prove the truth of the matter asserted, but was being offered to explain why the police officer later searched the defendant's home and seized certain items in the defendant's home), *aff'd on other grounds*, 160 Wn.2d 910.

However, other cases have concluded that such testimony is inadmissible on relevancy grounds, despite the fact that the testimony is not being offered for the truth of the matter asserted. *Edwards*, 131 Wn. App. at 614 (rejecting the State's argument that the detective's testimony that his informant told him the defendant was dealing cocaine was admissible to explain the context of the police investigation because the detective's reason for beginning the investigation "was not an issue in controversy" and therefore hearsay); *State v. Johnson*, 61 Wn. App. 539, 545, 811 P.2d 687 (1991) (concluding that "[o]ut-of-court declarations made to a law enforcement officer may be admitted to demonstrate the officer's or the declarant's state of mind only if their state of mind is relevant to a material issue in the case; otherwise, such declarations are hearsay").

The following testimony given by Detective Hill is called into question:

> Q Did Mr. Grubb and Mr. Davis identify who the shooter was?
> A Yes, they did.
> Q Who was that, sir?
> [DEFENSE COUNSEL]: Your Honor, I'm going to object. That's hearsay.
> THE COURT: Overruled. Go ahead.
> A They both identified Anthony Covert as the shooter.
> [DEFENSE COUNSEL]: Please note an objection.
> THE COURT: I do. It's preserved.

RP at 622-23. The trial court overruled Mr. Covert's objection because it "provides context for other evidence in this case for why Detective Hill went back in to reinterview defendant Covert." RP at 708. During his initial interview with Detective Hill, Mr. Covert had denied any wrongdoing. No limiting instruction was ever offered by defense counsel despite being given the opportunity by the court to submit one.

The trial court clearly admitted Detective Hill's testimony for the nonhearsay purpose of providing context to the investigation. This was permissible and within its discretion. Defense counsel never objected to the testimony for lack of relevance, which precludes us from considering the cited cases rejecting such testimony on relevancy grounds. *See Mason*, 160 Wn.2d at 933.

Harmless Error

Nonconstitutional error in admitting hearsay evidence requires reversal only if it is reasonably probable that the error materially affected the trial's outcome. *Neal*, 144

Wn.2d at 611. Any error here would not have been of constitutional dimension because the hearsay declarants and the hearsay recipient all testified at trial and were subject to cross-examination. *See State v. Luckett*, 73 Wn. App. 182, 184, 869 P.2d 75, *review denied*, 124 Wn.2d 1015 (1994).

The evidence supporting Mr. Covert's guilt is overwhelming in this case. Mr. Covert was tracked from the scene of the crime shortly after it occurred by a K-9 track team. The K-9 linked him to a handgun found in the same general area. Forensics determined that this firearm fired the shots at the scene of the crime. The same two witnesses that Detective Hill referred to in his testimony also testified that Mr. Covert was the shooter, and Mr. Covert himself confessed to the crimes. We are convinced that the alleged error did not affect the outcome of the trial.

IV. Disposition

We conclude that Mr. Covert's initial detention by law enforcement was within the bounds of a proper *Terry* stop. We also find that unanimity instructions on the two second degree assault charges were not required because the State clearly elected the event on which the jury was to consider these charges during its closing argument and that the disputed testimony was properly admitted for nonhearsay purposes. Accordingly, Mr. Covert's convictions are affirmed.

A majority of the panel has determined that this opinion will not be printed in the

Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

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Siddoway, J.

WE CONCUR:

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Kulik, C.J.

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Brown, J.