CA-07-004

Pascua Yaqui Tribe Court of Appeals

Pascua Yaqui Tribe, Plaintiff/Appellee

v.

Kelly Alvarez, Defendant/Appellant.

ORDER

Appeal of a decision of the Pascua Yaqui Tribal Court in Case No. CR-06-264, the Honorable Cornelia Cruz, presiding.

Allen Osburn, Esq., Pascua Yaqui Tribe Office of the Prosecutor, Tucson, **AZ,** for the Plaintiff/Appellant.

Stephanie Lucero, Esq., Tucson, for the Defendant/Appellee.

****

Appellant's Opening Brief was filed Dec 18, 2006, followed by a Response Brief from the Tribe on January 17, 2007.

Appellant filed a Reply Brief and Motion for Immediate Review on Aug 21, 2008.

Sentencing in Trial Court was stayed pending resolution of this appeal.

Statement of the case.

Defendant Kelly Alvarez was charged with automotive theft after a traffic stop, on June 13, 2006, revealed her to be the passenger in a stolen car. She was given a bench trial on November 7, 2006, unrepresented by counsel, and convicted.

Alvarez was convicted under 4 PYTC § 1-490, which reads,

> Any Indian who shall knowingly possess, conceal or convert for his own use property which belongs to another and without permission of the owner, or property which he or she knows is stolen, shall be deemed guilty of an offense.

Two witnesses testified at Ms. Alvarez's trial: the police officer who conducted the traffic stop; and Jason Parsons, the owner of the vehicle.

Argument.

Between the opening and reply briefs Appellant alleges that the Tribe failed to offer sufficient admissible evidence at Trial to overcome her presumption of innocence. She claims the Tribe obtained its conviction using inadmissible hearsay evidence and, further, failed to prove the *mens rea* element of the crime for which she was charged beyond a reasonable doubt.

The Court of Appeals generally reviews findings of fact by the trial judge for clear error based on the record available on appeal. In the present case, the record is sparse; there is no trial transcript, no statement in lieu of transcript, and nothing to explain the absence of either. We do have evidence that Appellant followed the appropriate procedures to request this transcript; she should not be penalized for its failure to appear. The responsibility to create an Agreed Statement in Lieu of Transcript fell squarely on the Tribe in this case, the Tribe did not do so, placing in serious question the adequacy of the Tribe's efforts to prosecute this appeal.

Despite the missing transcript, the facts that are available in the record and in the parties' briefs, lead this Court to question certain conclusions reached at Trial. Specifically, the Tribe does not appear to have met its burden to prove, beyond a reasonable doubt, the actual knowledge by Defendant/Appellant Kelly Alvarez of the theft in question. The statutory *mens rea* requirement of the crime cannot be met without demonstrating such knowledge.

While the key statutory term under examination, "knowingly," is not defined in the PYT criminal code, Arizona's code contains the following definition:

> "Knowingly" means, with respect to conduct or to a circumstance described by a statute defining an offense, that a person is aware or believes that the person's conduct is of that nature or that the circumstance exists. (A.R.S. § 13-105(10)(b))

Using this definition, the Tribe would have had to prove, in this case, (1) that Defendant Alvarez was aware that the vehicle she was sitting in could only be started with a screwdriver, and (2) that Defendant Alvarez had personal knowledge that such circumstances meant the car was stolen.

Considering that Kelly Alvarez was a passenger when Tribal Police stopped the vehicle, it is hard to say whether she would have known anything about the car's ignition. The Tribe further never demonstrated Alvarez's familiarity with car ignitions, with the methods used to bypass them, or that she would have otherwise known, from general circumstances, that the car was stolen.

Furthermore, the Tribe would like this Court to believe that it cannot review challenges to the admissibility of evidence whenever a pro se defendant has waived the right to exclude evidence by failing to object at trial. Such a view runs counter to established Court precedent giving *pro se* defendants procedural latitude [*PYT v. Ramirez*, CA-02-003, 2006], and would be unduly prejudicial to these defendants, who by their nature lack sufficient expertise to have mastered the full panoply of procedural formalities expected of licensed counsel at trial.

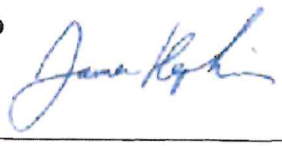
Decision.

Much time has passed since this case was first appealed, and what little record we have of the facts is sparse. A number of procedural mistakes appear to have been made at both trial and appeal; these errors, compounded by the time the case has been on docket and the Tribe's failure to produce either a transcript of the record, or a Statement in Lieu of Transcript, combine to form an unbearable burden of prosecution which equity demands be borne by the party most

responsible for having created it, as well as most capable of sustaining it, in this case the Tribe. The Court thus rules that the Tribe failed to meet its burden of proof at trial that the Defendant/Appellant Kelly Alvarez had the requisite *mens rea* to commit the offense for which she was charged, as the slim evidence which it appears to have offered to demonstrate the Defendant's state of mind was improperly admitted, and no other evidence admitted could have established the Defendant's knowledge, beyond a reasonable doubt, that the car she was traveling in was stolen.

Accordingly, the Trial Court is instructed to dismiss this case, with prejudice, and release the Defendant from all penalties imposed in this matter.

So ORDERED this 26 day of January, 2010



James C. Hopkins, Chief Justice

No. CA-07-004
Pascua Yaqui Court of Appeals

Pascua Yaqui Tribe, Plaintiff/Appellee,

vs.

Kelly Alvarez, Defendant/Appellant.

ORDER

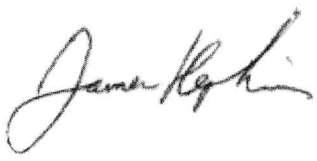
Appeal of a decision of the Pascua Yaqui Trial Court in Case No. CR-06-264, the Honorable Cornelia Cruz presiding.

Yancy A. Jencsok, Esq., Pascua Yaqui Tribe Office of Prosecutor, Tucson, AZ, for the Plaintiff/Appellee.

Tobias R. Schneider, Lay Advocate, Tucson, AZ, for the Defendant/Appellant.

The Defendant/Appellant's Motion for Extension of Time to File and Leave of Court to File a Reply Brief—the Tribe having filed notice that it does not object to said motion—is granted. Appellant has thirty days from May 21st to file a Reply Brief.

So ORDERED this 21st day of May, 2008.



James C. Hopkins, Chief Judge

IN THE PASCUA YAQUI TRIBE COURT OF APPEALS

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

PASCUA YAQUI TRIBE,	Trial Court case no.: CR-06-264
Plaintiff/Appellee,	Appeals Court case no: CA-06-
vs.	
ALVAREZ, Kelly,	
Defendant/Appellant,	

ON APPEAL FROM THE PASCUA YAQUI TRIBAL COURT

APPELLEE'S BRIEF

MICAH SCHMIT
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COUNSEL FOR APPELLEE

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STATUTES

STATEMENT OF THE CASE

This is an appeal from an order finding Defendant/Appellant guilty of Possession or Concealment Stolen Property. The Defendant was found guilty after bench trial presided over by Judge Cornelia Cruz. The trial took place on November 9, 2006 and Judge Cruz made her ruling from the bench, and the order was issued the same day.

STATEMENT OF FACTS AND PROCEEDINGS

Appellant/Defendant is Kelly Alvarez, an enrolled member of the Pascua Yaqui Tribe. On June 14, 2006, Defendant was charged with Possession or Concealment Stolen Property.[1] The charge resulted from a traffic stop that had occurred the day before wherein Defendant was the passenger in a stolen car.

A trial was held on November 9, 2006. The tribe presented testimony from Officer Andres Gastelum and the owner of the car, Jason Parsons. Defendant represented herself. She did not testify nor did she have witnesses testify or present evidence. Judge Cruz found that the Tribe met its burden of proof and found the Defendant guilty of the charge. Sentencing was held on November 29, 2006. At the sentencing hearing, Defendant was represented by counsel, who asked for a stay of the sentencing while Defendant appealed her conviction. Defendant then filed an appeal.

DISPOSITION

The trial court found the Defendant guilty on November 9, 2006.

ISSUES

Was the opinion testimony of witness Jason Parsons admissible? Yes.

Would exclusion of the opinion testimony have made any difference in the result? No.

///

[1] 4 PYTC § 1-490 (formerly 1 PYTC § 3.77).

ARGUMENT

A. The opinion testimony of witness Jason Parsons was admissible.

(1) The opinion was not based on hearsay.

Defendant complains that witness Jason Parsons' opinion testimony was based on inadmissible hearsay. That is incorrect. Mr. Parsons testified that he examined his vehicle closely when he took possession of it. His testimony was based on his own observations rather than the statements of another person. Therefore, no hearsay was involved.

(2) Lay witness opinion testimony is admissible.

Defendant also complains that because Mr. Parsons is not an "expert," his opinion testimony should not have been allowed. However, the Tribe made no claim that Mr. Parsons was an expert witness, nor was his opinion presented as an expert witness testimony. He was presented purely as a witness with actual knowledge, and his opinion was therefore a lay opinion.

The Tribal Code does allow for the opinion testimony of lay witnesses. 3 PYT R.Evid. Rule 43 allows non expert opinion testimony that is "rationally based on the perception of the witness, and ... [h]elpful to a clear understanding of the witness' testimony or a determination of a fact in issue."[2] Both of these requirements are met.

The opinion in question is that Mr. Parson believed that anyone in his car would have realized that it was a stolen car. But he did not simply give his opinion and nothing else. He described the condition of the car, specifically the ignition switch, based on his observations when he recovered the car. Thus, his opinion was rationally based on his perceptions. And, because an important factor in the case was whether or not Defendant knew that the car was stolen, Mr. Parsons' opinion was helpful to understanding his testimony regarding the appearance of the ignition switch.

There are no Pascua Yaqui Appellate Court decisions addressing opinion testimony. However, Rule 701 of the Arizona Rules of Evidence is identical to 3 PYT

[2] Defendant cites as authority Rule 701 of the Federal Rules of Evidence. That rule is not authority, nor should it be used as comparison as it is not identical to the Pascua Yaqui Rules of Evidence.

R.Evid. Rule 43. Therefore, it would be helpful to examine how the Arizona courts have addressed lay witness opinion testimony.

Arizona courts have ruled that lay witnesses can give their opinion: that based on a vehicle's speed, it did not stop at a stop sign;[3] or, regarding the age of a defendant based on his voice and manner of speaking (when the witness did not see the defendant).[4]

Lay witnesses can also testify regarding their opinion as to the mental state of a defendant. In ***State v. Ayala***,[5] a rape victim was allowed to testify as to her opinion that two defendants knew she was trying to get away from them while she was being raped because she was struggling with them and kicking them while they held her down. This is similar to the case at bar because Mr. Parsons testified as to whether a person would have known that the car was stolen based on the appearance of the ignition switch.

(3) Defendant waived any challenge to the admissibility of the testimony.

Defendant did not objection to Mr. Parsons' opinion testimony. Arizona courts have held that failure to object results in a waiver. In ***State v. DePiano***,[6] the Defendant was deemed to have waived objection to the admission of lay opinion testimony. This was so even though Defendant had made a general objection based on relevance. The court stated that "defendant's expressed basis for her objection-that the subject of the question posed was 'irrelevant'-was insufficient to preserve the separate issue of whether the evidence was admissible" on other grounds. Id at 513.

(4) Admissibility is within the discretion of the trial court judge.

The decision of whether or not to admit testimony is obviously in hands of the trial court judge. When admissibility is raised on appeal, the question then becomes what standard to use when reviewing the trial court judge's decision. By way of example, we will again look to how Arizona courts have ruled regarding the admission of opinion testimony.

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[3] ***Boomer v. Frank***, 993 P.2d 456, 462 (Ariz.App. 1999), review dismissed.
[4] ***State v. Conn***, 669 P. 2d 581, 588 (Ariz. App. 1982), affirmed in part, remanded in part.
[5] 873 P.2d 1307, 1310 (Ariz.App. 1994).
[6] 926 P.2d 508 (Ariz.App. 1995), review granted, vacated in part, certiorari denied, 519 U.S. 1098 (1997).

In ***State v. King***,[7] the Arizona Supreme Court held that a trial judge did not abuse discretion by admitting testimony of defendant's acquaintances, identifying the person depicted in surveillance videotape pictures taken during robbery and murders as defendant (i.e., their opinion as to the defendant's identity). This case actually involved a second trial on the case, where the first trial court judge had excluded the testimony, and the second trial court judge had initially ruled the testimony inadmissible, but after rehearing ruled it admissible. These contrasting decisions only underscore the importance of discretion in evidentiary rulings.

B. <u>Excluding the opinion testimony would not have changed the result</u>.

Defendant argues that had the opinion testimony of Mr. Parsons been excluded, she would not have been found guilty. But that conclusion does not follow. Defendant has not shown that Judge Cruz relied upon Mr. Parsons' opinion at all in reaching her decision. Since Judge Cruz heard Mr. Parsons' description of the condition of the ignition switch, she could have easily formed her own opinion as to whether the Defendant should have known that the car was stolen.

Lastly, Defendant briefly argues that her presence in the car does not indicate guilt. Defendant speculates that there were a myriad of reasons that she could have been in the car. However, Judge Cruz heard all the evidence presented and specifically found that "the defendant was aware that the vehicle she was voluntarily riding in as a passenger was stolen" and found her guilty of the offense. Absent a more cogent argument by Defendant, the decision should not be changed.

CONCLUSION

Defendant has not shown that the trial court judge's decision was based on inadmissible evidence or that a different result would have been reached had the opinion testimony been excluded. The decision should be affirmed.

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[7] 883 P.2d 1024, 1035 (Ariz.1994), certiorari denied, 516 U.S. 880 (1995).

RESPECTFULLY SUBMITTED this 17th day of January, 2007.

MICAH SCHMIT
CHIEF PROSECUTOR

YANCY A. JENCSOK
Deputy Prosecutor
Counsel for Appellee

Original of foregoing and 5 copies delivered to:

Clerk, Pascua Yaqui Tribe Court of Appeals

Copy mailed/delivered to:

John Crow, attorney for appellant

On January 17, 2007 by:

JOHN CROW
ATTORNEY AT LAW
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Arizona State Bar No: 017981

Attorney for Defendent

IN THE PASCUA YAQUI TRIBE COURT OF APPEALS

FOR THE PASCUA YAQUI NATON

In the Matter of

Kelly Alvarez
Defendant

File No. CR 06 264

Appeal Brief of decision in Pascua Yaqui Tribal Court entered 11.29.06

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COMES NOW Kelly Alvarez ("Defendant"), by and through her undersigned counsel, who hereby appeals the decision of the Trial Judge entered after trial in the Pascua Yaqui Tribal Court November 29 2006. Notice of Intent to Appeal was filed with this honorable Court November 29 2006. Defendant appeared at trial on November 7 2006 without legal counsel. Defendant sought a continuance in order to obtain counsel but the Court determined enough time had been permitted the Defendant to enlist legal counsel and that no further delay was justified. Pursuant to 3 PYTRAP Rule 12. The November 29 2006 hearing was to enter sentence for her conviction.

A BRIEF STATEMENT OF THE CASE

Defendant was charged with automotive theft and convicted November 7 2006. The Tribe called two witnesses, the owner of a vehicle stolen in Maricopa County, Arizona months before and an officer of the Pascua Yaqui Tribe who arrested the defendant who was sitting in a vehicle in the parking lot of a convenience store located off the Pascua Yaqui Reservation. The officer testified he had not interviewed the defendant at that time or subsequently. The owner of the vehicle testified and there is no indication he had seen the Defendant at any time or talked with her at any time.

At the conclusion of the trial, the Court heard from the Prosecutor on sentencing recommendations and continued the hearing until November 29 2006 when sentence would be entered. Since the Tribe indicated detention would be requested in its recommendations to the Court, the Court in the interest of justice allowed the Defendant time to secure temporary care for her three children in the event detention was ordered. Undersigned Counsel entered the case on November 29 2006. Before the sentence was imposed November 29 2006, upon notice of Counsel that the conviction would be appealed, the Court continued the matter so that the Appeal could be prepared in a timely and reasonable fashion and file with the Court of Appeals.

LEGAL ANALYSIS

Two issues are presented in the record: the presumption of innocence which must be overcome by the presentation of admissible evidence that overcomes the presumption of innocence and secondly the role of the judge in assuring the process is not contaminated by the introduction of hearsay evidence that is excludable under the rules of evidence

I.

The accused is entitled to the presumption of not guilty, of innocence beyond a reasonable doubt. Evidence must be sufficient to support a finding of guilty and even if the defendant is without counsel, the judge must assure himself/herself that hearsay evidence must be justified by facts known the accusing witness and recognized as exceptions to the general prohibition if it is used in evidence to convict. Even stronger, if such is the only evidence offered by the prosecution, the judge is constrained to not base a conviction solely on evidence that should

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and would have been excluded on motion of defense counsel or the defendant were he/she knowledgeable about the rules of evidence.

Hearsay is "evidence not proceeding from the personal knowledge the witness, but from the mere repetition of what he has heard others say" Blacks Law Dictionary @722. Its value rests upon the credibility of the out-of-court asserter and therefore is unreliable as the basis of proving guilt.

The victim Parsons testified he could not identify the Defendant as the person or among the persons that had absconded with his automobile from his home in Maricopa County. In answering a question from the Prosecutor, he continued with his opinion, not in an answer responsive to the question the Government had posed, the Defendant must have known the car was stolen because it was at the point the officer took control of it, the car could only be operated with a screwdriver in the ignition. He testified that because of this she "must have known" the car was stolen. This was not objected to by the Defendant though the statement constitutes mere opinion without foundation and a conclusion for which there was no foundation.

The accuser had no basis in his own experience for what he was saying – if he were told of this by the arresting officer or by someone in authority privy to the facts and circumstances found by the arresting officer at the point of his taking control of the scene or by persons simply unknown. The victim's assertions of guilt were founded on pure hearsay.

"Must have known" is a conclusion and an opinion, not a fact. The understandably distressed car owner victim had no knowledge of a relationship between the Defendant and another person in the vehicle, the putative driver of the car.

The complaining witness had no status as an expert on the behavior of people riding in cars stolen or in the rightful possession of authorized operators. What the witness thought he knew in this factual situation was that the arresting officer (or someone in the law enforcement offices) had told him sometime prior to the trial but after the arrest of the defendant. Presumably someone connected to the office of the Prosecutor or the Pascua Yaqui Police Department told him that the Defendant was in the car when the officer approached the car. His actual experience was confined and limited to ownership of the vehicle and so far as is known, the

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first contact with the Defendant was at trial.

The complaining witness could not have known what he professed of his own experience or observation but only after being told this by an unknown or unidentified official of the PYTPD. Thus his observation was based only on hearsay. The trial judge would have excluded it from his testimony had the defendant the assistance of counsel who would have objected pursuant to Rule 701, Federal Rules of Evidence:

"If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of fact in issue."

The judge was not asked to exclude this and did nothing and must have credited this testimony in order to conclude the defendant was guilty as charged. A lawyer would have objected on the grounds of hearsay and not part of the witnesses' own experience or observation. The witness-owner of the vehicle concluded the Defendant must have known the vehicle was stolen because the car could only be operated with a screwdriver and ipso facto, had guilty knowledge. But he could only cite what someone, unknown, told him about the condition of his vehicle. What the witness did testify to was that when the vehicle was subsequently returned to his control, the vehicle could only be operated with a screwdriver in the ignition. That it was so disabled at the time of the arrest of this accused he had no direct knowledge.

Nor is it self-evident that anyone would know a car was stolen merely from seeing it was operable only with this screwdriver. Yet this contention is the basis of the prosecution's case.

No objective testimony linked the Defendant to the driver of the car beyond the fact the responding Pascua Yaqui law officer testified she was sitting in the car as he approached the parked vehicle. He did not interview her though he did interview the driver. The officer presumably did not know nor did he testify as to how long she was in the car – seconds, a minute, an hour, whatever.

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That the Defendant was in the car is uncontested. It is also no indication of guilt of anything, even of bad judgment. There is no evidence of any relationship of the Defendant to the driver. The responding officer made no effort to interview her on the record. She did not talk to the officer then or at any later time.

There are numerous possibilities to explain why the Defendant was sitting in the car at the time the officer approached the vehicle. She could have been in the car in order to complain of something the driver had done to her or her children back on the reservation. In the alternative she could have been offered a ride from the store back to the reservation, having reached the store on her own, and was thinking about the offer when the officer arrived. She may have got in the car to complain about the driver's past conduct, etc. Nor does this exhaust the possible circumstances that would, on proper cross examination by counsel, what the officer had observed could have been mere innocent presence and not confirmation of a guilty mind.

Mere presence in the vehicle does not support the conclusion she must have perceived the screwdriver in the ignition, then realized its significance and therefore should have known the vehicle was stolen. She is entitled to reasonable doubt, that is, to be found guilty only on evidence beyond reasonable doubt. No such evidence was presented.

The inference that she had ***mens rea***, the guilty mind as an element of criminal responsibility is not supported by any credible and reliable evidence.

CONCLUSION

Due Process of law is a constitutional right of any member of the Pascua Yaqui Tribe. The instant conviction is not based on due process of law and should now be overturned by this appellate authority. The conviction ought to be reversed and returned to the trial court for further proceedings, pursuant to the Criminal Code of the Pascua Yaqui Nation.

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RESPECTFULLY SUBMITTED this 18th day of December 2006.

John Crow
Attorney for Defendant

CERTIFICATE OF SERVICE

I, John Crow, hereby certify that a copy of the foregoing document was hand delivered on this 18th day of December 2006 to:

Office of the Prosecutor
Pascua Yaqui Tribal Government

John Crow

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Attorney for Respondent

IN THE PASCUA YAQUI TRIBE COURT OF APPEALS

FOR THE PASCUA YAQUI NATION

PASCUA YAQUI TRIBE **VS** **Kelly Alvarez** Defendant	File No. CR 06 - 264 **Notice of Entry of Appearance**

COMES NOW Kelly Alvarez ("Appellant"), by and through her undersigned counsel, who hereby gives notice to the PYTRAP, pursuant to Rule 4, of her appeal of the conviction entered by the Pascqu Yaqui Court November 7, 2006.

RESPECTFULLY SUBMITTED this 29th day of November 2006.

John Crow, Attorney for Appellant

CERTIFICATE OF SERVICE

This to certify that undersigned counsel has furnished a copy of the foregoing document to: PYTCAP with five copies on November 29 2006

Trial Court Judge (1)

Office of the Prosecutor, Pascua Yaqui Tribal Government (1)

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