

Thomas' App. Brief

NO. 35546-9-II
Consolidated No. 35544-~~3~~-II

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BY dn
DATE

COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON,

Respondent

vs.

JOHNNIE L. THOMAS,

Appellant.

BRIEF OF APPELLANT

APPEAL FROM THE SUPERIOR COURT FOR
THURSTON COUNTY

The Honorable Richard A. Strophy, Judge
Cause No. 06-1-01533-2

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in allowing the State to present Stabley-Cate's statement to police on the day of the incident after she had testified as a prior consistent statement.
2. The trial court erred in failing to take the case from the jury for lack of sufficient evidence.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court erred in allowing the State to present Stabley-Cate's statement to police on the day of the incident after she had testified as a prior consistent statement? [Assignments of Error No. 1].
2. Whether there was sufficient evidence elicited at trial to prove beyond a reasonable doubt that Thomas was guilty of robbery in the second degree? [Assignments of Error No. 2].

C. STATEMENT OF THE CASE

1. Procedure

Johnnie L. Thomas (Thomas) was charged along with co-defendants Billot Miller (Miller) and Nicholas McCabe (McCabe) by information filed in Thurston County Superior Court with one count of robbery in the second degree. [CP 3].

No pretrial motions regarding CrR 3.5 or 3.6 were made or heard. Thomas was tried along with his co-defendants by a jury, the Honorable Richard A. Strophy presiding. Over objection, the State was allowed to present Amy Stabley-Cate's statement made to the police on the day of the

incident after she had testified and was cross-examined as a prior consistent statement. [Vol. III RP 369-370, 379-383, 394; Vol. IV RP 427-431, 433-444]. Thomas had no objections and took no exceptions to the Court's Instructions to the Jury. [Vol. IV RP 531]. The jury found Thomas guilty as charged. [CP 34].

The court sentenced Thomas to a standard range sentence of 20-months based on an offender score of 4. [CP 35-36, 37-47; 11-9-06 RP 10-11].

Timely notice of appeal was filed on November 9, 2006. [CP 48]. This appeal follows.

2. Facts

On August 23, 2006, Randall Moore (Moore) was in Olympia and had withdrawn \$100 from a US Bank cash machine to purchase pills. [Vol. I RP 17-18; Vol. II RP 68, 70]. Moore returned to the cash machine and withdrew another \$100 to purchase additional drugs even though he was already intoxicated. [Vol. I RP 19-21, 34]. He then got into a car with people he didn't know in order to purchase drugs—those people were Thomas, Miller, and McCabe with the car being driven by Amy Stabley-Cate (Stabley-Cate). [Vol. I RP 21-22, 34]. They went to Priest Point Park to conduct the deal. [Vol. I RP 22]. Moore testified that the three men demanded his money and took his money by force. [Vol. I RP 25,

38]. He ran across the park for help and the police were called. [Vol. I RP 28].

The police obtained a description of two cars suspected of containing the people involved in the incident. [Vol. II RP 96-97; Vol. III RP 185]. The cars were swiftly located and the occupants, including Thomas, were contacted by the police. [Vol. II RP 99, 104, 107, 167; Vol. III RP 195]. Thomas initially denied any knowledge of the incident, but then told the police that Miller and McCabe had robbed Moore while he watched. [Vol. III RP 204-206, 221-234]. Police found a US Bank ATM receipt in the car in which Thomas was a passenger and a second US Bank ATM receipt on Thomas. [Vol. III RP 218-220]. The police also found methamphetamine in a black pouch in the car driven by Stabley-Cate in which Thomas was a passenger. [Vol. III RP 241-242]. Miller and McCabe were found nearby. [Vol. II 146]. All three were detained so a show-up identification by Moore could be made. [Vol. II RP 112, 155]. Moore did in fact identify Thomas, Miller, and McCabe as the persons who took his money during the show-up. [Vol. I RP 28; Vol. II RP 120-121]. However, Moore could not identify Thomas, Miller, or McCabe at trial as being involved in the incident. [Vol. I RP 26-29; Vol. II RP 77-80].

Stabley-Cate testified after being given a grant of immunity that Thomas, Miller, and McCabe had seen Moore who appeared impaired and decided to rob him. [Vol. III RP 332-334, 369]. Moore was picked up and she drove them all to Priest Point Park where the three men “working as a team” took Moore’s money by force. [Vol. III RP 336-337, 345, 351-352]. She testified both that Thomas did and did not physically take Moore’s money by going through his pockets and wallet. [Vol. III RP 344-346]. Stabley-Cate admitted that from where she was sitting in the car it was difficult to see exactly what was happening. [Vol. III RP 344-346].

Thomas testified that the incident involving Moore was not a robbery, but rather a drug deal where Moore became agitated and didn’t want to pay then became upset and threw the money at Thomas. [Vol. IV RP 453-459]. Miller testified similar to Thomas insisting that the incident involving Moore was a drug deal not a robbery. [Vol. IV RP 498-500]. McCabe did not testify at trial.

D. ARGUMENT

- (1) THE TRIAL COURT ERRED IN ALLOWING THE STATE TO PRESENT STABLEY-CATE'S OUT-OF-COURT STATEMENT AS A PRIOR CONSISTENT STATEMENT.

ER 801(d) provides in pertinent part that an out-of-court statement is not hearsay and admissible under the following circumstances:

- (1) Prior Statement by Witness. The declarant testifies at the trial or hearing and is subject to cross examination concerning the statement, and the statement is...(ii) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive....

Under this rule, if there is an inference raised in cross examination that the witness changed their story in response to external pressure, then whether that witness gave the same account of the story prior to the onset of the external pressure becomes highly probative of the veracity of the witness's story given while testifying. State v. Thomas, 150 Wn.2d 821, 865, 83 P.3d 970 (2004).

However, a witness's prior consistent statement is not admissible to prove that the in court testimony is true. State v. Bargas, 52 Wn. App. 700, 702, 763 P.2d 410 (1988). Nor are prior consistent statements admissible merely because the witness's credibility has been attacked. State v. Harper, 35 Wn. App. 844, 858, 670 P.2d 296 (1983); *see also*

State v. Smith, 82 Wn. App. 327, 332, 917 P.2d 1108 (1996); State v. Purdom, 106 Wn.2d 745, 749-50, 725 P.2d 622 (1986).

Here, Stabley-Cate testified regarding the events involving Moore, Thomas, Miller, and McCabe occurring on August 23, 2006. [Vol. III RP 323-357]. She was cross-examined about the fact that she was testifying under a grant of immunity, about her own involvement in the incident, about the methamphetamine found in her car, and the fact that she could not really see what was going on given where she was parked—all of which were proper cross-examination going to her credibility and her ability to recount what actually occurred not what she thought occurred. [Vol. III RP 360-384, 392-395]. This cross-examination did not raise, even by inference, a question of whether Stabley-Cate was fabricating her in court testimony. Thus, her prior statement as testified to by Officer Anderson was not admissible under ER 801(d)(1)(ii) as a prior consistent statement. [Vol. IV RP 433-444]. The trial court erred in allowing the admission of this statement.

The erroneous admission of evidence of non-constitutional error is prejudicial only if within reasonable probability the outcome of the trial would have been materially affected. State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). The improper admission of Stabley-Cate's prior statement was not harmless at it improperly "bolstered" her in court

testimony and likely improperly influenced the jury's decision on the guilt or innocence of Thomas, Miller, and McCabe because without Stabley-Cate the only evidence of a robbery even occurring would have been Moore's questionable testimony. The trial court improperly allowed Stabley-Cate's statement to the police to be admitted as a prior consistent statement. This court should reverse Thomas's conviction given the impact such an admission in all likelihood had on the outcome of the trial.

(2) THERE WAS INSUFFICIENT EVIDENCE ELICITED AT TRIAL TO PROVE BEYOND A REASONABLE DOUBT THAT THOMAS WAS GUILTY OF ROBBERY IN THE SECOND DEGREE.

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact would have found the essential elements of a crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. Salinas, at 201; State v. Craven, 67 Wn. App. 921, 928, 841 P.2d 774 (1992). Circumstantial evidence is no less reliable than direct evidence, and criminal intent may be inferred from conduct where "plainly indicated as a matter of logical probability." State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). A claim of insufficiency admits the truth of the State's evidence and

all inferences that reasonably can be drawn therefrom. Salinas, at 201; Craven, at 928.

Here, Thomas was charged and convicted of robbery in the second degree either as a principal or an accomplice with his two co-defendants (Miller and McCabe). The State bore the burden of establishing beyond a reasonable doubt that a robbery in fact occurred. This is a burden the State cannot sustain.

The sum of the State's evidence to sustain this charge and conviction consists of the fact that Moore testified that he had been robbed and Stabley-Cate's testimony that Thomas, Miller, and McCabe planned to take Moore's money from him and she saw a confrontation between the three men and Moore in Priest Point Park.

However, Moore admitted that he was quite intoxicated at the time of the incident and had been seeking to purchase drugs from Thomas, Miller, and McCabe. With regard to Stabley-Cate's testimony, she admitted that Moore did want to purchase drugs from the three men, that she was involved by driving them all to the park where the transaction could take place, and that she couldn't really see what took place between the men given the angle where she was parked. Couple these facts with the testimony of Thomas and Miller that what actually occurred was in fact a drug deal where Moore, given his state of intoxication, became

belligerent culminating in Moore throwing the money at the men. There was no robbery only a contentious drug deal.

Given the totality of the evidence, it cannot be said that Thomas, Miller, and McCabe acting as principles or accomplices committed robbery in the second degree. This court should reverse and dismiss Thomas's conviction for this crime.

E. CONCLUSION

Based on the above, Thomas respectfully requests this court to reverse and dismiss his conviction.

DATED this 20th day of June 2007.

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07 JUN 2007 10:00 AM

CERTIFICATE OF SERVICE

STATE OF WASHINGTON
BY ym

Patricia A. Pethick hereby certifies under penalty of perjury under

the laws of the State of Washington that on the 20th day of June 2007, I delivered a true and correct copy of the Petition for Review to which this certificate is attached by United States Mail, to the following:

Johnnie L. Thomas
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Jim Powers
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(and the transcript)

Signed at Tacoma, Washington this 20th day of June 2007.

Patricia A. Pethick
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