

COURT OF APPEALS

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STATE OF WASHINGTON
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NO. 35650-3-II

COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON,

Respondent

vs.

FLOYD R. DAHMAN, JR.,

Appellant.

BRIEF OF APPELLANT

APPEAL FROM THE SUPERIOR COURT FOR
MASON COUNTY

The Honorable Toni A. Sheldon, Judge

Cause No. 06-1-00374-8

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in not taking the case from the jury for lack of sufficient evidence on Counts I, and III.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether there was sufficient evidence to uphold Dahman's convictions for two counts of burglary in the second degree (Count I and III)? [Assignment of Error No. 1].

C. STATEMENT OF THE CASE

1. Procedure

Floyd R. Dahman, Jr. (Dahman) was charged by information filed in Mason County Superior Court with two counts of burglary in the second degree (Counts I and III), one count of theft in the first degree (Count II), and one count of theft in the second degree (Count IV). [CP 58-60]. The information included notice on all four counts that the State would be seeking an exceptional sentence should Dahman be found guilty. [CP 58-60].

No pretrial motions regarding CrR 3.5 or 3.6 were made or heard. Dahman was tried by a jury, the Honorable Toni A. Sheldon presiding. Dahman had no objections and took no exceptions to the court's instructions. [CP 31-56; RP 132]. The jury found Dahman guilty as charged on all counts. [CP 25, 26, 27, 28; RP 164-165]. Thereafter based on the State having presented additional evidence, the court submitted a special verdict to the jury pertaining to an exceptional sentence asking the

jury to find beyond a reasonable doubt Dahman's prior convictions. [CP 29-30; RP 169-192]. The jury returned a special verdict finding Dahman's prior convictions. [CP 22-23; RP 192-194].

The court sentenced Dahman to 68-months on Count I, 43-months on Count II, 68-months on Count III, and 22-months on Count IV; and entered an exceptional sentence thereby running the sentences on Counts I and III consecutively and the remaining two counts running concurrently for a total sentence of 136-months. [CP 4-17; RP 203-206]. The court entered the following findings and conclusions in support of the exceptional sentence:

Findings of Fact

1. The exceptional sentence is justified by the following aggravating circumstances:
 - a. Special verdict returned by jury as to defendant's felony history.
 - b. The defendant's felony history results in "a free crime" as to counts I and III as neither results in punishment as to the other absent an exceptional sentence.

Conclusions of Law

1. There are substantial and compelling reasons to impose and exceptional sentence pursuant to RCW 9.94A.535.

[CP 15].

Timely notice of appeal was filed on December 1, 2006. [CP 18].

This appeal follows.

2. Facts

On Sunday September 3, 2006 at approximately 5:47 AM, Shelton Police Officer Tasesa Maiva noticed a small blue pick up truck with its hood open parked legally on the side of the 700 or 800 block of Grant Street. [RP 36-38, 51]. Maiva recognized the truck as belonging to Dahman from prior contacts and went to investigate. [RP 37]. Maiva didn't see Dahman even though the engine was still warm, but noticed several items in the bed of the truck including a computer, a modem with a flat-panel screen, and items from an espresso stand. [RP 38-40]. Maiva called dispatch to report a "suspicious complaint" and asked if there had been any reports of a burglary the previous night. [RP 40]. None had been reported. [RP 40]. Maiva left and began checking around town. [RP 40-42]. Approximately 20 minutes later at 6:10 AM, Maiva saw Dahman and an unidentified woman in Dahman's truck driving down Railroad Avenue. [RP 42-43].

Thereafter, Mason County Sheriff Deputy Jeffrey Rhoades, who had received Maiva's "suspicious complaint" from dispatch, discovered that Coffee Creek Espresso on Highway 101 just outside the Shelton city limits appeared to have been burglarized. [RP 43, 79-82].

The officers discovered that the Prudential Realty office (Coffee Creek Espresso sits in the parking lot in front of the realty office) also appeared to have been burglarized after contacting the cleaning lady. [RP 24, 83-84]. “Pry marks” had been found on the windows of both establishments. [RP 101-108, 112-116, 118-120, 122-124]. No fingerprints were recovered from either establishment. [CP 57; RP 106].

The police then went to Dahman’s residence. [RP 93]. Upon arriving, the police saw Dahman sitting in the driver’s seat of his truck. [RP 93-95]. Dahman attempted to run after the being immediately placed in handcuffs, but was stopped, and placed in a police vehicle. [RP 96-97]. In the bed of Dahman’s pick up truck, the police found among other things a computer, a modem and flat screen, milk, coffee syrups, other items related to an espresso stand, and a tire iron. [RP 96-97, 101]. The tire iron was compared to the “pry marks” made at the burglary scenes and appeared capable of having made the marks. [RP 101-108, 112-116, 118-120, 122-124].

Kevin Cronquist, the branch manager of Prudential Realty, testified that his office stays open on Saturdays until approximately 5:30 PM and that his cleaning lady came in on Sunday morning (September 3rd) and discovered the burglary. [RP 24-25]. Items missing included a

computer, modem, and flat screen. [RP 27-32]. Cronquist valued the items as \$1928. [RP 32].

Monte Hicks, who owns the Coffee Creek espresso stand with his wife, testified that the espresso stand stays open on Saturdays until approximately 5 PM and that he discovered the burglary upon contact by the police on Sunday morning (September 3rd). [RP 63-64]. He also outlined a number of items that had been taken from the espresso stand, and testified that the value of the items exceed \$250 but never a specific value. [RP 65-67, 72-75].

Dahman did not testify at trial.

D. ARGUMENT

- (1) THERE WAS INSUFFICIENT EVIDENCE ELICITED AT TRIAL TO PROVE BEYOND A REASONABLE DOUBT THAT DAHMAN WAS GUILTY OF TWO COUNTS OF BURGLARY IN THE SECOND DEGREE (COUNT I AND III).

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. In cases involving only circumstantial evidence and a series of inferences, the essential proof of guilt cannot be supplied solely by a pyramiding of inferences where the inferences and underlying evidence are not strong enough to permit a rationale trier of fact to find guilt beyond a reasonable doubt. State v. Bencivinga, 137 Wn.2d 703, 711, 974 P.2d 832 (1999) (*citing* State v. Weaver, 60 Wn.2d 87, 89, 371 P.2d 1006 (1962)).

Here, Dahman was charged and convicted of two counts of burglary in the second degree (Counts I and III). In order to sustain these charges and convictions, the State bore the burden of proving beyond a reasonable doubt that Dahman was in fact the person who entered Prudential Realty and Coffee Creek Espresso. There is no direct evidence that Dahman committed these burglaries. Based on the evidence elicited at trial, the sum of the State’s evidence to establish beyond a reasonable doubt that it was Dahman who had burglarized Prudential Realty and Coffee Creek Espresso (Counts I and III) consisted of the fact that,

approximately 12 hours after both businesses had closed on Saturday, Dahman's truck was found legally parked on the side of the road and in the bed of the truck were items from an espresso stand and a computer, and modem with a flat screen and he was seen approximately 20 minutes later driving the truck with an unidentified woman. In other words, Dahman had in his possession or control stolen items after the businesses were burglarized.

It has long been the law that proof of possession of recently stolen property is not prima facie evidence of burglary unless accompanied by other evidence of guilt. State v. Mace, 97 Wn.2d 840, 845, 650 P.2d 217 (1982); *see also* State v. Q.D., 102 Wn.2d 19, 685 P.2d 557 (1984). Other evidence of guilt may include a false or improbable explanation of possession, flight, use of a fictitious name, or the presence of the accused near the scene of the crime. State v. Mace, *supra*. Here, there is a lack of corroborating evidence that would support Dahman having been the person burglarizing Prudential Realty and Coffee Creek Espresso. No fingerprints were found at either scene linking Dahman to the burglaries as stipulated by the State and Dahman. [CP 57; RP 106]. There was no testimony that Dahman gave a false or improbable explanation for the stolen items being in his possession. Dahman did not give a false name in fact the officers involved knew Dahman from prior contacts. And finally,

Dahman was not seen near the scene of the crime (outside Shelton city limits); he was found at his home. Moreover he and his truck had been seen earlier within the city limits. Dahman's mere possession of stolen items does not support a finding beyond a reasonable doubt that Dahman was guilty as the person who burglarized Prudential Realty and Coffee Creek Espresso. Any finding to the contrary constitutes the improper pyramiding of circumstantial evidence and inferences therefrom. This court should reverse Dahman's convictions for burglary in the second degree (Counts I and III).

While the State may argue that Dahman ran when the police went to his residence showing a consciousness of guilt, *see e.g. State v. Hebert*, 33 Wn. App. 512, 515, 656 P.2d 1106 (1982); the question remains and it was the State's burden to answer and prove beyond a reasonable doubt the consciousness of guilt as to what crime. Dahman could have simply fled because he was in possession of stolen property not because had in fact committed the alleged burglaries.

Nor can the State rely on the fact that a tire iron was found in the bed of Dahman's truck at the time of his arrest that was capable of making the "pry marks" found at the point of entry on the windows of both businesses. The tire iron, a common tool found in almost every if not all vehicles, was never submitted for analysis to determine if in fact it had

made the “pry marks.” The photographs showing the tire iron, Exhibits Nos. 19 and 36, showing a supposed incriminating “paint chip” could merely have been a reflection of light particularly where, as here, when the tire iron was submitted into evidence no “paint chip” was on its tip or in the evidence packaging. [RP 113-114, 119-120]. This does not constitute corroborative evidence supporting a finding of burglary where the only real evidence consists of Dahman’s possession of recently stolen property.

The State has failed to prove beyond a reasonable doubt that Dahman was guilty of two counts of burglary in the second degree (Counts I and III). This court should reverse and dismiss Dahman’s convictions.

E. CONCLUSION

Based on the above, Dahman respectfully requests this court to reverse and dismiss his convictions for burglary in the second degree(Counts I and III).

DATED this 11th day of July 2007.

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CERTIFICATE OF SERVICE

Patricia A. Pethick hereby certifies under penalty of perjury under the laws of the State of Washington that on the 11th day of July 2007, I delivered a true and correct copy of the Brief of Appellant to which this certificate is attached by United States Mail, to the following:

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Signed at Tacoma, Washington this 11th day of July 2007.

Patricia A. Pethick
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07 JUL 12 PM 12:50
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BY [Signature]
DEPUTY
COURT OF APPEALS
DIVISION II