

NO. 40986-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

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STATE OF WASHINGTON, Respondent

v.

ADAM DEAN HORD, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
THE HONORABLE BARBARA JOHNSON
CLARK COUNTY SUPERIOR COURT CAUSE NO.10-1-00457-2

BRIEF OF RESPONDENT

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A. STATEMENT OF FACTS

The State alleged that between March 27 and March 28, 2010 the defendant knowingly threatened to kill Abigail Mitchell. The allegation is that these words or conduct placed her in reasonable fear that the threat to kill would be carried out.

At the time of trial, Ms. Mitchell indicated that she and the defendant got into an argument. He didn't want her to leave and he was angry because of a threat to break off their relationship. (RP 54). The police were called out to an altercation between the parties. The complaining witness ultimately prepared a Smith affidavit, which she signed and submitted to law enforcement. (Smith Affidavit, Exhibit No. 4).

The complaining witness acknowledged that statements to kill were made but at the time of trial, in opposition to the information in the Smith affidavit, she minimized the intent of the words by the defendant. (RP 59, 61, 63). She did indicate that others were present during the time that some of the threats were made. (RP 63).

Even while she was minimizing the activity, she did tell the jury that some of the comments did frighten her.

QUESTION (Deputy Prosecutor): Okay. And, in your statement that he responded by saying, "Why? You think I'll chop you up into pieces?" Is that – is that accurate?

ANSWER (Abigail Mitchell): Yeah. That's what I said.

QUESTION: Okay. And, when you say you responded, "I don't know." Did you know what the defendant was capable of on that evening?

ANSWER: Well, I mean, I just thought that was sort of far out there so that was not really a fear of mine that – I did not fear that he was going to chop me up into little pieces. I just – well, again, it was just sort of ridiculous. I mean, that's not the reason I did not go for a walk with him, I mean, to talk. I don't – it's just sort of out there, I guess, for a statement.

QUESTION: Okay. Were you put in fear of any sort of harm during this incident?

ANSWER: I was really – I mean, I – I felt fear but I was more really afraid of like what was happening with us and to us. So, it wasn't like – I mean, I know Adam. He has a wonderful heart and he would never hurt me. I – I believe that. And, I just think we were both – we were just both passionate and emotional and I – I did not feel like he would actually physically harm me.

-(RP 67, L1-25)

QUESTION (Deputy Prosecutor): Had the defendant been acting differently recently?

ANSWER (Abigail Mitchell): Uh – well, we weren't really getting along very well. We were both probably – yeah, I mean, yeah. I'd say, I guess. Yeah.

QUESTION: Okay. Did he appear to be acting differently than you were used to?

ANSWER: Um – well, not – I mean, not really. I mean, I guess the whole situation was different so it was a – it was different period, I mean, really. But, I don't know. I don't really know how to answer that. You know.

QUESTION: All right. And, after – after the defendant made that comment about the chopping you into pieces thing, what did he do at that point in time?

ANSWER: I believe he left. I went back into the room. So, that was the only interaction I had with him.

QUESTION: Okay. Did you go back in your room before he actually left the house?

ANSWER: I – he probably walked out the sliding glass door and that's probably when I turned around and walked back into my room. I mean it is hard to say specifically because obviously I don't really know. I thought he left, yes. I thought he left.

-(RP 69, L13 – 70, L11)

She testified that she met with law enforcement the next day, March 28, chose to talk to the officers about what had happened and agreed to provide a written statement. (RP 77). She also indicated that the document that she signed was under penalty of perjury. (RP 78, L13-20).

Prosecution also called Misha Condon to testify. She testified that she knew the parties involved and, in particular, had known the defendant since he was approximately 12. (RP 92). Ms. Condon testified that she received a message from the complaining witness wanting to know if she

was going to be coming home pretty soon. Ms. Condon indicated that the complaining witness appeared to be nervous and upset. (RP 106).

Ultimately the defendant came over to talk to the complaining witness.

Ms. Condon testified that he appeared to be aggressive and angry. (RP 109-110).

QUESTION (Deputy Prosecutor): Okay. And, what happened at that point in time, once the defendant chose to go sit down?

ANSWER (Misha Condon): Abby came out to talk to him.

QUESTION: And, what happened at that point, once Abby came out?

ANSWER: Basically, he just wanted to know if we would babysit so that they could leave. And, she said, "I'm not going with you."

QUESTION: Okay. Do you remember any statements the defendant made at that point in time?

ANSWER: He said, "What do you think I'm going to do, cut you up into little pieces?"

QUESTION: Did the defendant appear to be joking at that point in time?

ANSWER: No.

QUESTION: What was his demeanor like when he made that statement?

ANSWER: He still just looked mad that he couldn't talk to her, maybe. I don't really know exactly why.

QUESTION: Okay. Do you recall what Abby's reaction was?

ANSWER: She just said, "I'm not going with you", you know.

QUESTION: Okay. And, what did the defendant do at that point in time?

ANSWER: He basically just said he didn't like this and he left.

QUESTION: And, did you watch him leave?

ANSWER: Yes. I tried to talk to him outside but he didn't want to talk.

QUESTION: Did he take anything as he left?

ANSWER: Not that time.

QUESTION: Okay. I'm going to hand you what has been marked – do you recall providing a written statement to law enforcement?

ANSWER: Yes.

QUESTION: Did you make that when this incident was fresh in your memory?

ANSWER: Yes, it was the day after.

QUESTION: I'm going to hand you what has been marked State's Identification 3. Do you recognize that?

ANSWER: Yup.

QUESTION: If you would go ahead and read the last few sentences on that first page to refresh your recollection.

ANSWER: On the first page?

QUESTION: Yeah.

ANSWER: Okay. Yes, he said, "Are you scared I'll cut you up –

MS. STAUFFER (Defense Counsel): Objection, Your Honor. She is reading it. She's supposed –

JUDGE JOHNSON: I think –

MS. CONDON: Oh, to myself.

JUDGE JOHNSON: I think you are supposed to read it to yourself.

MR. HOLMES: Go ahead and read it to yourself and then I'll ask you a question when you are done.

MS. CONDON: Okay.

BY MR. HOLMES: (Continued).

QUESTION: Okay. When he left that first time, do you recall him taking anything?

ANSWER: I do remember him taking the shears off the back porch.

QUESTION: Okay. And, when you say the shears, what are you referring to?

ANSWER: They are like pruning shears. The kind that cut the bigger branches.

QUESTION: Who did those belong to?

ANSWER: Me.

QUESTION: Okay. And, what did the defendant do once he had those pruning shears with him?

ANSWER: Well, he left and walked up the road and then he came back. And, he – there was a knock on the front door. I didn't see him come back. I saw him leave with them. And then, there was a knock on my front door. And, I went to answer it. Nobody answered. I don't have a peep hole so I didn't open it. And so then, y brother looked out the back window – the back door in time to see Adam coming in the back gate and trying to get in the back door, which we stopped. He didn't get in at that point, you know.

QUESTION: Okay. And, how did you stop him from coming in, if you recall?

ANSWER: My brother just grabbed the door from opening. It's a sliding glass door and he stopped it and I went over. I've known Adam a long time so I went to talk to him. And, he just said, "Let me in." I said, "No."

QUESTION: About what time was that that he came back, if you recall?

ANSWER: That was probably about two o'clock.

QUESTION: Okay.

ANSWER: In the morning.

QUESTION: Was it dark out at that point in time?

ANSWER: Yeah.

QUESTION: Do you recall about how long after he had left the first time – how much time has elapsed?

ANSWER: It was – I don't really know exactly. Probably about an hour or so. Something like that because my Uncle Bill had gone home by that point. So, that was just us home.

QUESTION: How far away does the defendant live from you, if you know?

ANSWER: A couple of miles He was living in Camas like so it was a ways away.

QUESTION: When he arrived back that second time, did he still have your pruning shears?

ANSWER: Yes.

QUESTION: Okay. Did you have any further conversation with the defendant at that point in time?

ANSWER: Yes. He came to my front window and knocked on it and I went to talk to him there. And, he was just leaning on her truck. He had the shears still and I don't really know why but – and, he just basically said, "Do you think you can keep me out of your house?" I said, "No. I'm trusting you to stay out." And, he said, "You're lucky I'm not burning your house down." And, I said, "I know." And, that was it, pretty much.

QUESTION: And, what – what was going through your mind when you heard that?

ANSWER: Just to be aware really. I don't really know.

QUESTION: Okay. Where was Abby during this point in time?

ANSWER: When that was going on, she had been in the bedroom. I think she came out at the very end, maybe. She was probably in her room still.

QUESTION: Did you tell her what had happened at that point in time?

ANSWER: Uh-huh.

QUESTION: And, how was Abby's demeanor throughout that evening?

ANSWER: Scared. We were all really -- it's the first time I've ever been scared of Adam. (Witness cries).

QUESTION: And, were you concerned for your safety at that point in time?

ANSWER: You know, I didn't really know what he would do -- we actually --

MS. STAUFFER: Your Honor, I would be objecting. This is speculation.

JUDGE JOHNSON: Could you repeat your question?

MR. HOLMES: Yes, the question was, I guess, how did you feel on that evening. I guess, were you concerned for your safety, I believe, was my exact question at that point in time.

MS. CONDON: Yes, I did feel a little bit concerned. Enough to hide weapons around the house, if that matters. (Witness laughs nervously).

BY MR. HOLMES (Continued).

QUESTION: Were you also concerned for Abby's safety?

ANSWER: Yes.

MS. STAUFFER: Objection, Your Honor.

JUDGE JOHNSON: Overruled.

BY MR. HOLMES (Continued).

QUESTION: What did you do after the defendant left the second time?

ANSWER: After he left the second time? I didn't really do too much. Just I was home. I slept in the living room with the doors locked. (Witness cries).

QUESTION: Okay. And when the defendant made the comment about being – you being lucky that he is not burning your house down, did he appear to be joking at that point in time?

ANSWER: Oh, I wouldn't say joking. It was like a statement.

-(RP 111, L3 – 117, L13)

The State called Corporal Tyson Ferguson from the Vancouver Police Department. He had responded to the scene of the allegations. He testified that when he met with the complaining witness, the statements made to her by the defendant scared her. Further, that he had made comments similar to “Do you think that I’m going to chop you into little pieces”. (RP 131). He further testified that he prepared with her the Smith affidavit and explained to the jury that that was a domestic violence victim’s statement form. (RP 132). This document was marked as Exhibit No. 4 and admitted into evidence. She further told him that she was willing to prepare this statement. (RP 132).

Corporal Ferguson testified that he witnessed the complaining witness filling out and signing the form. He indicated too that “We witness them fill the statement out and then we actually read the perjury clause

underneath after they have completed it. Then they sign it after that – after we read the clause.” (RP 133, L16-19). He recalls that she did that in this case. (RP 133).

Corporal Ferguson testified that he made contact with the defendant concerning these allegations. The defendant responded as follows:

QUESTION (Deputy Prosecutor): And, did he agree to speak to with you at that point in time?

ANSWER: Yes, he did.

QUESTION: And, what did you ask him at that point in time?

ANSWER: I asked if he had – can I refer to my report again, so I get it accurate?

QUESTION: If it will help refresh your recollection?

ANSWER: Yes. I asked Adam if he had talked to Abby at approximately 10 PM that night. Or, excuse me, the night before.

QUESTION: Okay. And, how did the defendant respond?

ANSWER: He said that he did.

QUESTION: And, what did you ask the defendant, at that point in time?

ANSWER: I asked him if he had made a threat over the phone.

QUESTION: And, how did the defendant respond?

ANSWER: He thought about it for a second. He acknowledged that he did and then, I asked him what he said.

QUESTION: Okay. After he acknowledged making a threat and you asked him specifically what he said, how did he respond?

ANSWER: He hesitated for a few seconds and so I prompted him by saying, "Did you say that you were going to 'Break her fucking neck?'"

QUESTION: Okay. And, how did the defendant respond to that?

ANSWER: He nodded his head and said, "Yeah, yeah. It was something like that."

QUESTION: Okay. Did he say anything further at that point in time?

ANSWER: And then he said, "But I told her I was joking and hung."

QUESTION: Okay. Did you ask him why he had made that threat to Abby?

ANSWER: Yes, I did.

QUESTION: And, what specifically did you ask him, if you recall?

ANSWER: I said – I asked him just that question. I said, "Why – why did you make that statement to her?"

QUESTION: Okay. And, how did he respond?

ANSWER: He said he just wanted to get a reaction out of her.

QUESTION: Okay. Did you ask the defendant any further questions at that point in time?

ANSWER: Uh – yes, I did.

QUESTION: And, what did you ask him next.

ANSWER: I asked him if he had showed up at Misha's apartment and also made some statements there.

QUESTION: Okay. And, - and, how did the defendant respond to that?

ANSWER: If I could refer to my report again?

QUESTION: Sure, if it will assist?

ANSWER: Yes. I asked Adam if he had asked Abigail if he would – if he was going to chop her up into – if she was afraid that he was going to chop her up into little pieces.

QUESTION: And, how did the defendant respond to that question?

ANSWER: He said, - he acknowledged that he did say that.

QUESTION: Okay. And, did he indicate why?

ANSWER: He said that he wanted to see who was influencing Abigail.

-(RP 136, L9 – 138, L19)

B. RESPONSE TO ASSIGNMENT OF ERROR

The assignment of error raised by the defendant is a claim that the trial court erred in admitting the Smith affidavit as substantive evidence pursuant to ER 801(d)(1)(i).

Evidence is sufficient to support a conviction if, when viewed in the light most favorable to the State, any rational trier of fact could have found the crime's essential elements beyond a reasonable doubt. State v. Luther, 157 Wn.2d 63, 77, 134 P.3d 205 (*quoting State v. Townsend*, 147 Wn.2d 666, 679, 57 P.3d 255 (2002)), cert. denied, 127 S. Ct. 440 (2006). A defendant claiming insufficiency of the evidence admits the truth of the State's evidence and all reasonable inferences that can be drawn from it. Luther, 157 Wn.2d at 77-78 (*citing State v. Alvarez*, 105 Wn. App. 215, 223, 19 P.3d 485 (2001)). The Court defers to the trier of fact on issues of conflicting testimony, witness credibility, and the persuasiveness of the evidence. State v. Thomas, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004) (*citing State v. Cord*, 103 Wn.2d 361, 367, 693 P.2d 81 (1985)). It does not substitute its judgment for that of the jury on factual issues. State v. Israel, 113 Wn. App. 243, 269, 54 P.3d 1218 (2002) (*citing State v. Farmer*, 116 Wn.2d 414, 425, 805 P.2d 200, 812 P.2d 858 (1991)), review denied, 149 Wn.2d 1013 (2003).

In State v. Smith, 97 Wn.2d 856, 863, 651 P.2d 207 (1982), the Supreme Court held that if a prior inconsistent statement satisfies the elements of ER 801(d)(1)(i), the statement is admissible as substantive evidence. To determine whether a statement is admissible, the trial court considers the Smith factors. State v. Nelson, 74 Wn. App. 380, 387, 874 P.2d 170, review denied, 125 Wn.2d 1002, 886 P.2d 1134 (1994); State v. Binh Thach, 126 Wn. App. 297, 106 P.3d 782 (2005). Those factors are: (1) whether the witness voluntarily made the statement; (2) whether there were minimal guaranties of truthfulness; (3) whether the statement was taken as standard procedure in one of the four legally permissible methods for determining the existence of probable cause; and (4) whether the witness was subject to cross examination when giving the subsequent inconsistent statement. Smith, 97 Wn.2d at 861-63. All four factors are met in the present case.

The first factor to consider is **whether the witness voluntarily made the statement**. Smith, 97 Wn.2d at 861-63. Officer Ferguson provided the domestic violence form to Ms. Mitchell. She then filled out the form. At trial, Ms. Mitchell testified that she wrote and signed her statement voluntarily.

The second factor to consider is **whether there were minimal guaranties of truthfulness**. Smith, 97 Wn.2d at 861-62. In Smith, the

police took the victim to a notary and had the victim's statement notarized. Smith, 97 Wn.2d at 858. In Nelson, the victim's affidavit included the following language: "I have read the attached statement or it has been read to me and I know the contents of the statement." Nelson, 74 Wn. App. at 390.

The Nelson court also held that a witness' statement during a police investigation, or a Smith affidavit, satisfies the oath requirements of ER 801(d)(1)(i) if the statement complies with the requirements of RCW 9A.72.085. Nelson, 74 Wn. App. at 389. Under that statute, an unsworn, written statement may be treated as a sworn statement where the statement: (1) recites that it is certified or declared by the person to be true under penalty of perjury; (2) is subscribed by the person; (3) states the date and place of its execution; and (4) states that it is so certified or declared under the laws of the State of Washington. RCW 9A.72.085. Here, Exhibit 4, the written statement plainly satisfies these requirements.

In the present case, Ms. Mitchell testified that she signed her statement under penalty of perjury. The officer witnessed her sign the statement. From this evidence a reasonable person could find that Ms. Mitchell's statement carried minimal guarantees of truthfulness.

The third factor is **whether the statement was taken as a standard procedure in one of the legally permissible methods for**

determining the existence of probable cause. Smith, 97 Wn.2d at 862.

The Smith court listed those four methods as: "(1) filing of an information by the prosecutor in superior court; (2) grand jury indictment; (3) inquest proceedings; and (4) filing a criminal complaint before a magistrate."

Smith, 97 Wn.2d at 862 (citations omitted) (*quoting State v. Jefferson*, 79 Wn.2d 345, 347, 485 P.2d 77 (1971)).

The State submits that Officer Ferguson took Ms. Mitchell's statement as part of a standard procedure for determining probable cause. He testified that obtaining a signed, written victim statement in a domestic violence case was standard procedure. (RP 132-133).

The final factor a court considers in determining admissibility is **whether the witness was subject to cross-examination when giving the subsequent statement.** Smith, 97 Wn.2d at 862. Here, the defendant had the opportunity to cross-examine the complaining witness.

The State submits that all of the factors to allow a Smith affidavit to be used as substantive evidence were present and demonstrated to the jury in this case. The complaining witness voluntarily gave her statement to the police, she was subject to cross-examination as to the statements, whether consistent or inconsistent. Additionally, her statement was taken as standard procedure in one of the four legally permissible methods in determining probable cause, thus allowing charges to be filed against the

defendant. Finally, the statement contained minimal guarantees of trustworthiness, together with the overall concept that not only were statements being made by the defendant witnessed by others, but the defendant himself testified that he had made the statements. There is nothing in this record to indicate that the trial court improperly admitted the statements.

C. CONCLUSION

The trial court should be affirmed in all respects.

DATED this 19 day of April, 2011.

Respectfully submitted:

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