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No. 53953-5-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

JOSHUA KIMBROUGH,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Chris Lanese, Judge
Cause No. 19-1-00727-34

BRIEF OF RESPONDENT

Joseph J.A. Jackson
Attorney for Respondent

2000 Lakeridge Drive S.W.
Olympia, Washington 98502
(360) 786-5540

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether sufficient evidence supported a conviction for taking a motor vehicle without permission when Kimbrough's father testified that the vehicle belonged to Kimbrough's mother and father, the father specifically told Kimbrough that he could not take the vehicle, and the evidence demonstrated that Kimbrough took the vehicle.

2. Whether sufficient evidence supported a conviction for bail jumping when the evidence demonstrated that the trial court had authorized bail and Kimbrough failed to appear for a subsequent required hearing that he was provided notice for.

3. Whether the trial court properly denied motions at the close of the State's case and prior to sentencing for arrest of judgment based on sufficiency of the evidence.

B. STATEMENT OF THE CASE.

The appellant, Joshua Kimbrough, was charged with taking a motor vehicle without permission and attempting to elude a pursuing police vehicle. CP 6. The charges were based on a series of events that began when he asked to use a white Toyota Camry that belonged to his parents, Wilbert Kimbrough, Sr. (Wilbert) and Maria Kimbrough (Maria). RP 147-149. The vehicle was registered

to Maria, however, Wilbert testified that it was “our vehicle,” and described it as community property, owned “half and half.” RP 148-149.

Wilbert testified that Kimbrough asked if could get the vehicle, but Wilbert told him no. RP 149. After Wilbert told Kimbrough he could not have the vehicle, Kimbrough left, however, the following morning, the car was gone. RP 150. When he noticed the vehicle was missing, Wilbert reported it stolen to the Lacey Police Department and advised his wife about it. RP 150. Later that day, Kimbrough came back to Wilbert and Maria’s residence and stated “oh, you turned me in,” and left again in the white Toyota Camry. RP 151. Wilbert indicated that he and his wife had previously planned on selling the vehicle to Kimbrough but had not done so. RP 156.

Law enforcement responded to a report of a suspicious vehicle at the Mobile Gas Station on Trosper Road in Thurston County. RP 161. City of Tumwater Police Officer James Moran, who was on duty and wearing his duty uniform, identified the vehicle as the white Toyota Camry that Kimbrough was driving. RP 224-225. Dispatch advised Officer Moran that the vehicle had been reported as stolen prompting Officer Moran to request additional

units to respond. RP 225. Once additional units responded, Officer Moran approached the vehicle from behind and activated the emergency lights of his marked police vehicle. RP 225.

When Officer Moran activated his emergency lights, Officer Moran exited his vehicle and the Camry “started and took off at a high rate of speed.” RP 226. Several police officers pursued including Tumwater Officer Russ Mize, who had his K9 partner James with him. RP 160, 165, 226. Kimbrough made a right turn on Troser Road right in front of Mize. RP 164. Mize pursued Kimbrough onto the I-5 northbound freeway. RP 166.

Kimbrough exited the freeway at Exit 109 and made a hard left back onto the northbound I-5 onramp. RP 169. Mize observed two passengers in the white Camry “frantically waving their hands.” RP 170. Kimbrough got in front of a commercial vehicle and quickly exited the freeway at Exit 111 and then avoided two sets of spikes that the Lacey Police Department had set up by “quick turns.” RP 170. Kimbrough then accelerated through a roundabout and struck a center guard. RP 171.

Kimbrough slowed on Galaxy Road and Officer Mize employed a Pursuit Intervention Technique (PIT) maneuver, and Kimbrough’s vehicle struck the curb, almost hit a tree, and ran into

a vehicle that was coming at him. RP 173-174. When the Camry stopped, Kimbrough exited the driver door of the vehicle and began to run, at which time K9 Officer James was deployed and apprehended Kimbrough. RP 174-175.

At his preliminary hearing, the trial court authorized Kimbrough's release upon the posting of \$3500 bail. RP 266, Ex. 6A. At his arraignment, Kimbrough was ordered to appear at an Omnibus hearing on May 15, 2019, a trial confirmation hearing on June 13, 2019, and a jury trial on June 24, 2019. RP 277, Ex. 7. Senior Deputy Prosecuting Attorney for Thurston County, James Powers, testified that when a case is called for trial confirmation the "judge gives notice to everyone in the courtroom as to what the next case is going to be, and the defendant either comes forward or doesn't." RP 283. He indicated that if a case is called and the defendant does not respond, "then the court addresses the attorneys as to whether either side has any requests of the court or information about the fact that no one has responded when the case was called as regards to the defendant." RP 283.

Powers was present in the courtroom when Kimbrough's June 13, 2019, trial confirmation hearing was called before the trial court. RP 287, 301. Kimbrough failed to appear for the hearing and

the trial court entered an order authorizing a bench warrant. RP 287, Ex. 9. A bench warrant was later issued by the trial court. RP 287, Ex. 11. Powers described the process by which a defendant who is in custody can appear via video from the jail. RP 294-295. Powers was asked, “at trial confirmation hearings, do people appear via video if they’re in custody,” and responded, “Trial confirmation, yes, they do.” RP 302.

Based on his failure to appear for the June 13, 2019, trial confirmation hearing, an additional charge of bail jumping was added prior to trial. CP 24-25. When the State rested its case during trial, Kimbrough moved for dismissal on the charges of taking a motor vehicle without permission and bail jumping, arguing that the State had not presented sufficient evidence to support the offenses. RP 322. Kimbrough argued that the evidence was insufficient on count 1 because Maria Kimbrough had not testified and that the evidence did not show that Kimbrough was “admitted to bail” for purposes of the bail jumping statute in count 3. RP 323-324.

The trial court denied the motion to dismiss counts 1 and 3 stating:

The Court recognizes that it is the State's obligation, in order to prove a case to a jury, that it present evidence of every element of every charge that goes before the jury. However, there are authorities that strongly suggest that the best practice for a trial judge is to defer ruling on a motion until the jury has reached its verdict.

RP 333. The motions were denied at that point without prejudice.

RP 333. Kimbrough offered no witnesses in his case in chief. RP 336.

The jury convicted Kimbrough as charged in all three counts. RP 444, CP 66-68. Prior to sentencing, the defense filed a motion to arrest judgment, re-raising the issues that had been raised at the close of the State's case. 2 RP 4-5, RP 69-144. The State responded. CP 145-150. The trial court noted that it was "not in a position of deciding what evidence would have been better or would have been more appropriate." 2 RP 23. The trial court then ruled, "Based upon the standard that does apply, the court believes that the transcript of the trial supports both verdicts that are challenged here." 2 RP 23-24. The trial court noted that Wilbert Kimbrough "testified that the vehicle that was stolen is 'our' vehicle, meaning that he was one of the two people that was authorized to possess it." 2 RP 24.

With regard to the bail jumping count, the trial court stated, “I believe the testimony of Mr. Powers allows inferences in order for the jury to make a finding of guilt for each element of bail jumping.” 2 RP 24. After ruling on the motion, the trial court sentenced Kimbrough to a total term of confinement of 22 months. RP 31-32, CP 163-174. This appeal follows.

C. ARGUMENT.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 p.2d 1068 (1992). “A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” Id. Circumstantial evidence and direct evidence are equally reliable. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In determining whether the necessary quantum of proof exists, the reviewing court need not be convinced of the defendant’s guilt beyond a reasonable doubt, but only that substantial evidence supports the State’s case. State v. Galisia, 63 Wn. App. 833, 838, 822 P.2d 303 (1992). Credibility determinations are for the trier of fact and are not subject to review. State v.

Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). A reviewing court defers to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992).

1. Sufficient evidence supported the jury's conclusion that Kimbrough was guilty of taking a motor vehicle without permission.

The crime of taking a motor vehicle without permission in the second degree, as charged in count 1 of the third amended information, required that the State prove that Kimbrough “intentionally and without permission of the owner or person entitled to the possession thereof,” did take or drive a motor vehicle or did voluntarily ride in or upon said motor vehicle with knowledge of the fact that the automobile or motor vehicle was unlawfully taken. CP 24, RCW 9A.56.075(1). When all credibility determinations of the jury are accepted and all evidence is taken in a light most favorable to the State, it is clear that sufficient evidence supported the jury’s finding of guilt.

Though the vehicle was registered to Maria, Wilbert testified that it was “our vehicle,” and described it as community property, owned “half and half.” RP 148-149. Wilbert testified that Kimbrough asked if could get the vehicle, but Wilbert told him no. RP 149.

After Wilbert told Kimbrough he could not have the vehicle, Kimbrough left, however, the following morning, the car was gone. RP 150. When he noticed the vehicle was missing, Wilbert reported it stolen to the Lacey Police Department and advised his wife about it. RP 150. Later that day, Kimbrough came back to Wilbert and Maria's residence and stated "oh, you turned me in," and left again in the white Toyota Camry. RP 151. Both Officer Mize and Officer Duran testified that Kimbrough was driving the vehicle. RP 160, 176, 221, 223.

Officer Mize also testified to the system that a vehicle is recorded in when it is reported stolen and Officer Moran confirmed that the vehicle returned as stolen when he first contacted it. RP 217-218, 225. When contacted by law enforcement, Kimbrough not only attempted to elude their vehicles, but also fled from the vehicle when it was stopped. RP 174-175, 226. Evidence of flight may create a reasonable and substantive inference that a defendant's departure from the scene was an instinctive and impulsive reaction to a consciousness of guilt or was a deliberate effort to evade arrest and prosecution. State v. Freeburg, 105 Wn. App. 492, 497, 20 P.3d 984 (2001). Here, the evidence presented at trial supported a

rational inference that Kimbrough knew that he was not supposed to have the vehicle.

The evidence was sufficient to support the jury's verdict. The fact that Maria did not testify did not negate Wilbert's testimony that the vehicle belonged to both of them and that Kimbrough did not have permission to have the vehicle.

2. Sufficient evidence supported the jury's conclusion that Kimbrough was guilty of bail jumping.

The crime of bail jumping required that the State prove that having been charged with a class b or c felony and having been released by court order or admitted to bail with knowledge of the requirement of a personal appearance before any court of the State of Washington, Kimbrough did fail to appear as required. CP 25, RCW 9A.76.170(3)(c).¹ The evidence clearly demonstrated that Kimbrough failed to appear at his required trial confirmation hearing on June 13, 2019.

At his preliminary hearing, the trial court authorized Kimbrough's release upon the posting of \$3500 bail. RP 266, Ex. 6A. At his arraignment, Kimbrough was ordered to appear at an Omnibus hearing on May 15, 2019, a trial confirmation hearing on

¹ The State acknowledges that the statute has been modified in 2020, however for this brief the reference is to the statute as it applied in 2019.

June 13, 2019, and a jury trial on June 24, 2019. RP 277, Ex. 7. Senior Deputy Prosecuting Attorney for Thurston County, James Powers, testified that when a case is called for trial confirmation, the “judge gives notice to everyone in the courtroom as to what the next case is going to be, and the defendant either comes forward or doesn’t.” RP 283. He indicated that if a case is called and the defendant does not respond, “then the court addresses the attorneys as to whether either side has any requests of the court or information about the fact that no one has responded when the case was called as regards to the defendant.” RP 283.

Powers was present in the courtroom when Kimbrough’s June 13, 2019 trial confirmation hearing was called before the trial court. RP 287, 301. Kimbrough failed to appear for the hearing and the trial court entered an order authorizing a bench warrant. RP 287, Ex. 9. A bench warrant was later issued by the trial court. RP 287, Ex. 11. Powers described the process by which a defendant, who is in custody, can appear via video from the jail. RP 294-295. Powers was asked, “at trial confirmation hearings, do people appear via video if they’re in custody,” and responded, “Trial confirmation, yes, they do.” RP 302.

At the preliminary hearing, the trial court authorized release upon the posting of \$3500 bail. Ex. 6A. The order on release conditions “admitted” Kimbrough to bail for purposes of RCW 9A.76.170(3)(c). Kimbrough’s argument that the phrase “admitted to bail” is the equivalent of posting bail is without authority. As noted in Kimbrough’s opening brief, “admit” is defined as “permit,” and “admission to bail” is defined by Black’s Law dictionary as “an order to release an accused person from custody after payment of bail.” Brief of Appellant at 11; *Admission to bail*, Black’s Law Dictionary (11th ed 2019).

The phrase admitted to bail is also used in another portion of the Revised Code of Washington. RCW 10.88.350 states, “unless the offense with which the prisoner is charged is shown to be an offense punishable by death or life imprisonment under the laws of the state in which it was committed, a judge in this state may admit the person arrested to bail or bond.” While that statute deals with extradition, it clearly indicates that admitting a person to bail is the act of authorizing bail, as was done with the order on conditions of release in this case. Federal jurisprudence also supports the conclusion that the phrase “admitted to bail” means the judicial authorization to have the ability to post bail. See United States v.

Salerno, 481 U.S. 739, 754, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987) (discussing Congress' power to define classes of criminal arrestees who shall be admitted to bail and stating "bail must be set by a court at a sum designed to ensure [the goal or preventing flight], and no more.").

Ex. 6A admitted Kimbrough to bail by authorizing him to post bail. Kimbrough argues that this interpretation could lead to an absurd result because a person could be authorized bail, but not post bail and then have the jail not bring them to Court. Kimbrough's contention ignores that RCW 9A.76.170(2) safeguards against such an absurd result by providing an "affirmative defense" if "uncontrollable circumstances prevented the person from appearing or surrendering, and that person did not contribute to the creation of such circumstances in reckless disregard of the requirement to appear or surrender." Surely, the situation described by Kimbrough as a possible absurd result would be negated by the affirmative defense.

Kimbrough did not raise such an affirmative defense. In fact, Kimbrough's trial summary listed the anticipated defense as "general denial." CP 13. A defendant bears the burden of proving an affirmative defense by a preponderance of the evidence. State

v. Deer, 175 Wn.2d 725, 734, 287 P.3d 539 (2012). An unraised affirmative defense does not diminish the sufficiency of the State's evidence. The evidence clearly demonstrated that Kimbrough was admitted to bail by the trial court in Ex. 6A and failed to appear after having been provided notice of a subsequent hearing.

Even if this Court were to agree with Kimbrough and find that the phrase "admit to bail" is the act of posting bail, the evidence presented created a reasonable inference that Kimbrough was not in custody. Senior Deputy Prosecutor Powers described the procedure for an in-custody defendant to appear via video and described how a case is called for out of custody defendants. RP 283, 302. When Kimbrough's case was called, Kimbrough did not respond, and the trial court authorized a bench warrant. In a light most favorable to the State, the evidence infers that Kimbrough was not in custody at the time of the trial confirmation hearing. RP 287, 301. Substantial evidence supported the conviction even if this Court were to accept Kimbrough's definition of "admitted to bail."

3. The trial court did not err when it denied Kimbrough's motions for directed verdict and for arrest of judgment.

At the end of the State's case, the trial court may consider if

sufficient evidence supported all of the elements of the offenses. State v. Jackson, 82 Wn. App. 594, 608, 918 P.2d 975 (1996). In Jackson, this Court noted that “a defendant may challenge the sufficiency of the evidence (a) before trial, (b) at the end of the State’s case in chief, (c) at the end of all of the evidence, (d) after verdict, and (e) on appeal.” Id. at 607-608. A motion for arrest of judgment must be denied when “viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” State v. Delmarter, 94 Wn.2d 634, 637, 618 P.2d 99 (1980).

For all of the reasons set forth in the previous sections, sufficient evidence supported all of the elements of the crimes charged. The trial court correctly denied Kimbrough’s motions at all stages of the proceedings.

D. CONCLUSION.

Kimbrough’s convictions for taking a motor vehicle without permission and bail jumping were supported by substantial evidence when all of the evidence and reasonable inferences therefrom are viewed in a light most favorable to the State. The

State respectfully requests that this Court affirm the convictions and sentence.

Respectfully submitted this 11th day of May, 2020.



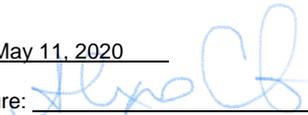
Joseph J.A. Jackson, WSBA# 37306
Attorney for Respondent

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