

FILED

NOV 02 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 288706-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent

v.

ROGELIO MENDOZA HERNANDEZ, Appellant

APPEAL FROM THE SUPERIOR COURT
FOR BENTON COUNTY

NO. 09-1-01183-8

BRIEF OF RESPONDENT

ANDY MILLER
Prosecuting Attorney
for Benton County

TERRY J. BLOOR, Chief Deputy
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ISSUES

1. Did the State fail to sufficiently identify the defendant as the perpetrator?
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 - B. In the light most favorable to the State, could a reasonable jury have concluded that the defendant was the perpetrator?
2. Did the State prove that Corporal Ball's fear of the defendant's threat was reasonable?
 - A. What is the standard on review?
 - B. Was Corporal Ball's fear of a *future* threat on his life "reasonable"?
 - C. Given the circumstances at the crime scene, was Corporal Ball's fear of an *immediate* injury reasonable?
3. Regarding the aggravated factor:
 - A. Should this Court consider the argument since the defendant did not raise it in trial?
 - B. Is there any way a reasonable jury could conclude the victim was not present when the burglary occurred?

STATEMENT OF FACTS

The Burglary:

In the early morning hours of December 15, 2009, Benjamin St. Hilaire was sleeping at his residence at 814 W. Albany in Kennewick, Washington. (RP 22, 43-43). He awoke and saw the figure of a person leaving his bedroom. (RP 42-43). Mr. St. Hilaire stayed inside the bedroom for several minutes until hearing the sliding glass door open and shut. (RP 44). Believing that the perpetrator had left his residence, Mr. St. Hilaire got up, searched the residence, and called the police. (RP 44-45). The police were dispatched to the residence at 2:09 a.m. (RP 19). A laptop had been stolen from the St. Hilaire's bedroom. (RP 45).

Footprints in the snow lead the police to the defendant:

December 15, 2009, was a snowy night and police saw fresh footprints at the scene. (RP 21). Footprints were leading to and from the St.

Hilaire's sliding glass door. (RP 67). The footprints headed toward a motor home on the St. Hilaire property. (RP 22). Officer Kuhn heard a noise coming from the motor home, and the suspect ran out of it. (RP 23-24).

The defendant punches, threatens and spits:

The defendant jumped over a fence; Officer Kuhn sent his police dog, Vego, in pursuit. (RP 25). Vego cornered the defendant on a patio, but the defendant began punching the dog. (RP 30). In fact, the defendant went three or four rounds of assaulting Vego, which resulted in Vego sustaining a limp. (RP 36, 38). The defendant was also aggressive with the police at the scene, cursing at them, attempting to fight with the police, threatening them, and grabbing one officer's gun. (RP 32, 51, 80). (The defendant's tenacity is described in more detail in the argument section of this brief.) Even after being taken to a hospital for treatment of a dog bite, the defendant spit at Officer Noble. (RP 77).

The defendant was convicted of Residential Burglary, with an aggravating factor that the victim was present, Assault in the Third Degree (for spitting at Officer Noble), Felony Harassment, and Harming a Police Dog. (CP 43-47, 48).

ARGUMENT

1. The State proved that the defendant was the perpetrator.

A. The standard on review is whether the evidence was sufficient, after viewing it in the light most favorable to the State, that any rational trier of fact could have found the defendant was identified as the perpetrator.

The usual standard on review for sufficiency of the evidence challenges has been often stated: "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 could have found guilt beyond a reasonable doubt." *State v. Salinas*, 119

Wn.2d 192, 201, 829 P.2d 1068 (1992). When the sufficiency of evidence is challenged in a criminal case, we must draw all reasonable inferences from the evidence in favor of the State and interpret the evidence most strongly against the defendant. *Id.* "Circumstantial evidence and direct evidence are equally reliable." *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). "We defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence." *Thomas*, 150 Wn.2d at 874-75.

As stated in *State v. Hill*, 83 Wn.2d 558, 560, 520 P.2d 618 (1974):

Identity involves a question of fact for the jury and any relevant fact, either direct or circumstantial, which would convince or tend to convince a person of ordinary judgment, in carrying on his everyday affairs, of the identity of a person should be received and evaluated.

As shown below, the State easily met this burden.

B. The State proved through numerous witnesses that the defendant was the person apprehended at the crime scene.

Direct to Officer Kuhn by Ms. Petra:

Q: How did the defendant react to the taser?

A: He groaned and slowed down but continued to move toward me. (RP 33).

Direct to Officer Valdez by Ms. Petra:

Q: And did you come into contact with the defendant[on December 15, 2009]?

A: Yes I did. (RP 50)

.

Q: And did the defendant say anything to you?

A: When I first arrived or while was at that--

Q: Well, let's start with when you first arrived did the defendant say anything to you?

A: When I first arrived the defendant was in a physical struggle with the other officers and the canine. (RP 50-51).

.

Q: Ok. Now at that point what happened next with the defendant?

A: At that point I told him, "It's not a good idea to make threats like that to police officers." (RP 51).

Direct to Officer Meiners by Ms. Petra:

Q: And did you come into contact with the defendant [while on duty on December 15, 2009]?

A: Yes, I did. (RP 71).

.

Q: Officer Meiners, I'm going to hand you what's marked as State's ID 15. Can you tell me what that is?

A: This is a picture of the defendant.

Q: And what is this a picture of?

A: Two small scratches: One to his abdomen and one to his side.

Q: Now did he have any injuries to his arms?

A: No, not that I saw.

Q: And if he had would you have taken pictures of them?

A: Yes. (RP 74).

Cross Examination by Mr. Zeigler to Officer Meiners:

Q: Officer Meiners, you actually did the search of the defendant?

A: Yes, sir.

Q: And that was after he was handcuffed?

A: Yes. (RP 74-75).

Direct to Officer Noble by Ms. Petra:

Q: Now I want to take you back to December 15th, 2009. Did you come into contact with the defendant?

A: Yes, I did." (RP 76).

.

Q: Now at some point did the defendant spit on you?

A: As I went to grab the defendant to escort him off the gurney I grabbed him by the right arm. He pulled away. I explained to him, 'No, just relax. Let's just get out of here and get you to the jail.' He worked uop a big roll of spit in his mouth, and before I knew I turned my head, and he spit past my head. (RP 76-77).

Direct to Corporal Ball by Ms. Petra:

Q: And I'm going to take you back to the date of December 15th, 2009. Did you come into contact with the defendant?

A: Yes, I did. (RP 79).

.

Q: And was the defendant saying anything to you during this time?

A: Yes, ma'am, he was.

Q: And what was he saying to you?

A: He was threatening to kill me, um, told me he was going to shoot me, going to put a bullet in my head, going to kill. (RP 79-80).

This is very similar to the type of identification approved in *Hill*, supra. That Court noted:

[T]here were numerous references in the testimony to "the defendant" and to "Jimmy Hill." The arresting officer testified that it was "the defendant" whom he observed at the scene of the arrest, that he had ordered "the defendant" to halt, and that it was "the location where the defendant was finally stopped that the Kleenex was found."

State v. Hill, 83 Wn.2d at 560.

There is no real doubt that the defendant is the individual whom was in the vicinity of the St. Hilaire residence, was hiding in a RV, tried to escape the location, battled with a police dog, and assaulted and threatened the police.

2. Corporal Ball's fear of the defendant's threat was reasonable.

A. The standard on review is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. *Salinas*, supra.

B. Corporal Ball could have reasonably feared that the defendant would attempt to kill him in the future.

The defendant's sole argument is that Corporal Ball's fear was not *reasonable*, because the defendant could not do any harm while handcuffed and surrounded by police officers. (App. Brief at 12). However, the statute refers to a threat, "to cause bodily injury immediately or in the future..." (emphasis added). RCW 9A.46.020 (1)(a)(i). Corporal Ball could reasonably believe that the defendant intended to serve his sentence, and then hunt down the officers involved in his arrest and "put a bullet in your brain." (RP 51). In other words, the defendant has ignored the possibility the jury could believe that Corporal Ball could reasonably fear the defendant would carry out his threat in the future.

C. Corporal Ball could have reasonably feared that the defendant's threat was immediate.

Corporal Ball was in reasonable fear that the defendant could "put a bullet in his head" at the crime scene. Corporal Ball testified he was in such fear. (RP 80-81). That fear was reasonable given the defendant's actions. Consider the following:

- The defendant was hit twice with a taser, and he was still attempting to assault the police. (RP 33).
- A police dog went "three or four" rounds with the defendant, and the defendant still attempted to assault Officer Kuhn.¹ (RP 36).
- The police dog clamped onto the defendant's arm and was hanging on while the defendant kept advancing toward Officer Kuhn with his free arm. (RP 33).
- Officer Kuhn delivered a right cross to the defendant, which knocked the defendant down.

¹Some police dogs are trained to use a stern bark to encourage compliance with an officer. Not Vego, the police dog in this case. Vego bites first and hangs on to the culprit. (RP 29). Questions can be asked later.

Officer Kuhn got on top of the defendant. (RP 34). The defendant still was aggressive and stood up. (RP 36).

- Corporal Ball delivered a number of knee strikes to the defendant. (RP 36).
- Several other officers arrived at the scene, in addition to Corporal Ball and Officer Kuhn. (RP 36). The defendant continued to swear profusely and scream at the officers. (RP 50).
- With numerous officers present, the defendant said, "I'll put a bullet in your brain." (RP 51). When told, "It's not a good idea to make threats like that to police officers," the defendant repeated the threat. (RP 51).
- After being handcuffed, the defendant was able to get hold of Corporal Ball's service pistol and tried to actively get it out of the holster. (RP 80).

The defendant argues on appeal that he would have had difficulty getting the gun from the holster, and therefore, Corporal Ball should not have been concerned with his threats. (App. Brief at 12). However, the jury could easily conclude that given the defendant's near action-figure attempts to assault the police, Corporal Ball did, and needed to feel threatened.

3. This Court should not reverse the sentence based on the jury instruction regarding the aggravating factor.

A. The jury should have been advised that they did not have to be unanimous to respond "no--the victim was not present during the Residential Burglary." However, there is no question that Mr. and Mrs. St. Hilaire were present when the burglary was committed.

The State filed an aggravating factor based on RCW 9.94A.535 (3)(u): "The current offense is a burglary and the victim of the burglary was present in the building or residence when the crime was committed." The jury was presented with a special verdict form stating:

We, the jury, having found the defendant guilty of Residential Burglary, return a special verdict by answering as follows:

Question: Was the victim of the burglary present in the building or residence when the crime was committed?
(CP 47).

The jury answered this question, "Yes." (CP 47). The defendant complains now that the jury should have been instructed that they did not have to be unanimous to answer this question, "No." See jury instruction number 31. (CP 40).

The defendant is correct in citing the holding in *State v. Bashaw*, 169 Wn.2d 133, 147, 34 P.3d 195 (2010).² However, *Bashaw* also held:

In order to hold that a jury instruction error was harmless, "we must 'conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error.'" *State v. Brown*, 147 Wash.2d 330, 341, 58 P.3d 889 (2002).

Id.

²The trial herein was held before the *Bashaw* ruling.

In this case, there is no issue that Mr. and Mrs. St. Hilaire were present when the burglary occurred. The only issue was whether the defendant was the culprit. Consider the following:

- The victim, Benjamin St. Hilaire states that he saw the perpetrator in his bedroom. (RP 42-43).
- Mr. St. Hilaire and his wife were present at that time. (RP 43).
- The time of the Residential Burglary was about 2:00 a.m., a time when an occupant would be at his residence.(RP 19).
- Mr. St. Hilaire states that the perpetrator stayed in his residence for several minutes after he first saw him (the perpetrator) in his bedroom. (RP 44).
- Mr. St. Hilaire heard the back-sliding door slide open and then shut when the perpetrator left the residence. (RP 44).

- Police officers saw shoeprints in fresh snow leading to Mr. St. Hilaire's back slider, and then away from that slider. (RP 21; 67).
- The St. Hilaire's laptop, which was in their bedroom where Mr. St. Hilaire had seen the perpetrator, was stolen. (RP 45).

None of this evidence was disputed. The reason that Mr. St. Hilaire called the police was that he saw someone in his bedroom. He saw that person leaving the bedroom, then heard the perpetrator leave through a back sliding door. It is no coincidence that police saw shoeprints going to and from that slider. There is no doubt that Mr. St. Hilaire and his wife were where they should have been at 2:00 a.m., in their house, asleep in the bed, when Residential Burglary occurred.

It does not matter whether the jury was instructed that it could be less than unanimous in answering the question "Was the victim present when the burglary was committed?" because there

is no issue. Beyond any doubt, the victims were present when the burglary was committed.

B. The Court need not deal with this issue because it was not raised in the trial court.

While mindful of the holding in *Bashaw*, the State asks if there is any issue which cannot be raised for the first time on appeal? Are there any issues which cannot be stretched to be considered "affecting a constitutional right" under RAP 2.5?

Here, the defendant at trial did not object to instruction number 31. (RP 90). There is certainly no reason that the error in this instruction was a "manifest error" which caused the defendant any prejudice.

The State suggests that the Court should at least discuss RAP 2.5 before ruling on the propriety of the aggravating factor jury instruction. The defendant should be required under RAP 2.5 to raise this issue with the trial court.

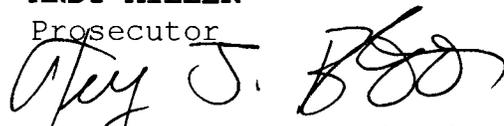
CONCLUSION

The defendant received a fair trial. Many police officers whom apprehended the suspect at the crime scene referred to the defendant as that individual. The defendant's tenacity in trying to assault the police would alarm anyone, especially a police officer whose gun the defendant had just grabbed. The defendant is right concerning the aggravating factor jury instruction; however, in this case, no reasonable jury could conclude that the victim was not present when the burglary occurred. The conviction and sentence should be affirmed.

RESPECTFULLY SUBMITTED this 1st day of
November 2010.

ANDY MILLER

Prosecutor



TERRY J. BLOOR, Chief Deputy

Prosecuting Attorney

Bar No. 9044

OFC ID NO. 91004

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

NO. 288706

Respondent,

vs.

DECLARATION OF SERVICE

ROGELIO MENDOZA HERNANDEZ,

Appellant.

I, PAMELA BRADSHAW, declare as follows:

That I am over the age of eighteen (18) years, not a party to this action, and competent to be a witness herein. That I, as a Legal Assistant in the office of the Benton County Prosecuting Attorney, served in the manner indicated below, a true and correct copy of the *Brief of Respondent* and this *Declaration of Service*, on November 1, 2010.

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

EXECUTED at Kennewick, Washington, on November 1, 2010.


PAMELA BRADSHAW