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COURT OF APPEALS

DIVISION III
STATE OF WASHINGTON

COA No. 29886-8-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

MARTY JAMES CHRISTMAN, Appellant.

BRIEF OF APPELLANT

Kenneth H. Kato, WSBA # 6400
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Spokane, WA 99201
(509) 220-2237

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I. ASSIGNMENTS OF ERROR

A. The court erred by admitting Marty James Christman's statements to police while he was in custody.

B. The State's evidence was insufficient to support the conviction for attempted second degree burglary.

Issues Pertaining to Assignment of Error

1. In CrR 3.5 finding 6, did the court err by making that portion of the finding stating "Deputy Petersen . . . did not feel the defendant was intoxicated . . ."? (Assignment of Error A).

2. Did the court err by admitting Mr. Christman's custodial statements to police after being given his *Miranda* rights when he did not voluntarily, knowingly, and intelligently waive them? (Assignment of Error A).

3. When the State failed to show Mr. Christman had the intent to commit a crime in the building, was the State's evidence insufficient to prove his guilt beyond a reasonable doubt? (Assignment of Error B).

II. STATEMENT OF THE CASE

Mr. Christman was charged by information on February 15, 2011, with one count of attempted second degree burglary. (CP 9). The court held a CrR 3.5 hearing to determine the admissibility of

statements made by Mr. Christman to police while he was in custody. It determined the statements were admissible:

The undisputed evidence before the court indicates that the defendant was in custody at that time; that he was asked questions of an interrogative nature; that he was read his *Miranda* warnings and appeared to understand them and waived those rights and freely and voluntarily made statements accordingly. Therefore, the statements will be allowed in the State's case in chief. (Vol. I RP 17).

The court entered written findings and conclusions on the CrR 3.5 hearing. (CP 23-25).

Deputy Lamand Petersen testified he was on duty February 12, 2011. (Vol. II RP 47). He responded at 4:30 a.m. to a burglary in progress call at GTX Truck Stop in Spokane Valley. (*Id.* at 49). He saw Mr. Christman had been detained and cuffed by another deputy. (*Id.*). Deputy Petersen gave him his *Miranda* rights. Mr. Christman said he understood his rights and agreed to talk. (*Id.* at 49-50). He said he was a Sysco driver there to drop off a load. (*Id.* at 51). If no one answered, he was told to break into the business to make sure the load got delivered safely. (*Id.* at 50). Another Sysco driver was actually there making a delivery. (*Id.* at 51). Mr. Christman said his truck had been driven away by someone else. (*Id.*). He told the deputy he used a hammer to break both locks to the building. (*Id.* at 52).

Deputy Powers testified he responded to a burglary call on February 12, 2011, and contacted Mr. Christman at the northeast side of GTX Truck Stop. (Vol. II RP 40-41). He was sitting on the ground with Balbir Singh, the cook at GTX, in the doorway, keeping him where he was. (*Id.* at 41-42). After Mr. Christman was cuffed, Deputy Petersen arrived and placed him in his patrol car. (*Id.* at 45).

Mr. Singh arrived at the truck stop around 4:25 a.m. on February 12, 2011. (Vol. II RP 24-25). A waitress was there and said somebody tried to break the back door. (*Id.* at 25). Mr. Singh opened that door, whereupon Mr. Christman almost fell in. (*Id.* at 26). The waitress called police. (*Id.* at 30). Mr. Christman pushed Mr. Singh, who pushed him back onto the floor. (*Id.*). Mr. Christman tried to get up a couple of times. (*Id.* at 31). He had a slurred voice. (*Id.* at 32).

Gregory Seek was the Sysco driver making a delivery at GTX around 4:15 a.m. on February 12, 2011. (*Id.* at 34-35). He saw Mr. Christman hammering away on the back door. (*Id.* at 36). Mr. Seek saw the cook and waitress pull up. (*Id.*). As he pulled his truck around, he saw Mr. Christman on the ground. (*Id.*).

Mr. Christman testified he did not remember what happened and woke up in jail. (Vol. II RP 62). He suffered a seizure on February 10 and went to the hospital. (*Id.* at 67). After getting out, he took Librium at 1 p.m. and dilantin at 6 p.m. on February 11, 2011. (*Id.* at 70). He also began drinking at 6 p.m. even though he had been told to avoid excessive alcohol use while taking the drugs. (*Id.* at 68-70).

No exceptions or objections were taken to the court's instructions. (Vol. II RP 91). The jury convicted Mr. Christman as charged. (*Id.* at 124). He received a standard range sentence. (CP 60-70). This appeal follows. (CP 72-73).

III. ARGUMENT

A. The court erred by admitting Mr. Christman's custodial statements to police after being given his *Miranda* rights when he did not voluntarily, knowingly, and intelligently waive them.

Statements made by the defendant are voluntary if they are made after the police advise him of his rights and the defendant knowingly, voluntarily, and intelligently waives them. *State v. Aten*, 130 Wn.2d 640, 663, 927 P.2d 210 (1996). The trial court's determination of voluntariness will not be disturbed so long as it found by a preponderance of the evidence the statement was

voluntary and substantial evidence in the record supports that conclusion. *State v. Burkins*, 94 Wn. App. 677, 694, 973 P.2d 15, *rev. denied*, 138 Wn.2d 1014 (1999).

At the CrR 3.5 hearing, the State presented testimony from Deputy Petersen, who responded to a burglary in progress call on February 12, 2011. (Vol. I RP 7). Outside the GTX Truck Stop, he read *Miranda* rights to Mr. Christman while he was detained and handcuffed. (*Id.* at 7-8). Mr. Christman said he understood his rights and would talk. (*Id.* at 8). He said he was there to drop off a load at the truck stop. (*Id.* at 10). An unknown female on the phone told him that if no one answered, he was supposed to break into the business to make sure the load got inside. (*Id.*). Mr. Christman said he used a hammer to break the dead bolt and doorknob. (*Id.*).

Mr. Singh then confronted Mr. Christman at the door. (Vol. I RP 10). He tried to explain to Mr. Singh why he was there. (*Id.*). At that time, Deputy Darrin Powers showed up and detained Mr. Christman. (*Id.* at 11). He told Deputy Petersen he worked for Sysco. (*Id.*). It so happened that a Sysco truck and driver were backed up to another side of the truck stop to make a delivery. (*Id.*).

The court inquired as to Mr. Christman's sobriety. (Vol. I RP 14). Deputy Petersen could tell he had been drinking. (*Id.*). Mr. Christman could walk and did not seem overly intoxicated as he was answering the deputy's questions and "seemed to understand at least" what was being asked. (*Id.*).

In its oral decision, the court determined Mr. Christman's statements were admissible. (Vol. I RP 17). It subsequently entered written findings and conclusions. (CP 23-25).

Mr. Christman does not challenge the findings except as to that portion of finding 6 stating "Deputy Petersen . . . did not feel the defendant was intoxicated." Substantial evidence does not support that finding because Deputy Petersen's testimony was Mr. Christman "didn't seem that intoxicated to [him]" and "did not seem overly intoxicated." The deputy's testimony is undisputed and does not support the court's finding that Mr. Christman was not intoxicated. Rather, Deputy Petersen felt Mr. Christman was intoxicated, but not overly so. The court thus erred in making this finding. *Burkins*, 94 Wn. App. at 694. The next inquiry is whether the findings support the conclusion the waiver was voluntary, knowing, and intelligent. *Id.* They do not.

In determining whether a defendant's statements during custodial interrogation are admissible and not coerced in violation of the Fifth Amendment to the United States Constitution, the court considers the totality of the circumstances, including, among other things, the crucial element of police coercion, the defendant's physical condition, and mental health. *State v. Unga*, 165 Wn.2d 95, 101, 196 P.3d 645 (2008). A defendant's intoxication at the time the statements were made is also a consideration, but does not necessarily make them involuntary. *State v. Smith*, 15 Wn. App. 103, 107, 547 P.2d 299 (1976), *cert. denied*, 429 U.S. 1065 (1977); *State v. Lewis*, 19 Wn. App. 35, 573 P.2d 1347 (1978).

Here, however, Mr. Christman was so intoxicated that he could not have known what he was saying or the import of it. Indeed, defense counsel advised the court that his client "will be testifying that he didn't remember anything." (Vol. I RP 17). No other explanation could account for the story he told Deputy Petersen about why he was there at GTX. Just as a jury does not leave common sense at the courthouse steps, neither should this court. In such a drunken condition, Mr. Christman could not have given voluntary statements to the deputy, whose very presence prompted coerced statements from him in an attempt to explain his

actions. In the totality of the circumstances, the court erred by finding the statements admissible. *Unga*, 165 Wn.2d at 101.

B. The State's evidence was insufficient to support a finding of guilt because it failed to show Mr. Christman intended to commit a crime in the building.

In a challenge to the sufficiency of the evidence, the test is whether, viewing it in a light most favorable to the State, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). So viewed, the State's evidence still fell short of showing by the requisite quantum of proof that Mr. Christman had the intent to commit a crime in the building. *State v. Stevenson*, 128 Wn. App. 179, 192, 114 P.3d 699 (2005).

The information charging Mr. Christman with attempted second degree burglary alleged:

[T]he defendant . . . with intent to commit the crime of Second Degree Burglary . . . committed an act which was a substantial step toward that Burglary, by attempting, with intent to commit a crime against a person or property therein, to enter and remain unlawfully in the building of GTX TRUCK STOP . . . (CP 9).

Jury instruction 6 instructed the jury about the element of intent to commit a crime against a person or property in the building. (CP 33).

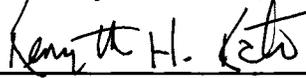
The State presented no evidence showing Mr. Christman had some intent to commit a crime in the truck stop. In his own mind, he was there to make a delivery and to break in if need be to drop off the load. As implausible as his belief may have been, the only evidence is he had no intent to commit a crime in the building and the reasonable inferences from that evidence also do not point to any such intent. In these circumstances, the State's evidence was thus insufficient to support a finding of guilt as no rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *Green*, 94 Wn.2d at 221.

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Christman respectfully urges this Court to reverse his conviction and dismiss the charge.

DATED this 21st day of July, 2011.

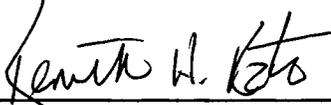
Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that on July 21, 2011, I served a copy of the Brief of Appellant by first class mail, postage prepaid, on Marty James Christman, 4168 Paxson Dr. NE, Moses Lake, WA 98837, and by email, as agreed between counsel, on Mark E. Lindsey, Spokane County Prosecutor's Office, at KOWens@spokanecounty.org



Kenneth H. Kato