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September 13, 2011
Court of Appeals
Division III
State of Washington

29886-8-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

MARTY J. CHRISTMAN, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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I.

APPELLANT'S ASSIGNMENTS OF ERROR

1. The trial court erred in finding that the defendant's custodial statements to officers were given voluntarily, knowingly, and intelligently following a valid waiver of his *Miranda* rights.
2. Insufficient evidence supported the conviction for attempted second degree burglary.

II.

ISSUES PRESENTED

1. Did the trial court erroneously enter factual finding that, "Deputy...did not feel defendant was intoxicated"?
2. Did trial court erroneously admit defendant's statements to officers as being given after a voluntary, knowing, and intelligent waiver of defendant's *Miranda* rights?
3. Did sufficient evidence exist to support a conviction for the crime of attempted second degree burglary?

III.

STATEMENT OF THE CASE

The State accepts the Appellant's statement of the case for purposes of this appeal only.

IV.

ARGUMENT

- A. THE RECORD REFLECTS THAT THE DEFENDANT VOLUNTARILY, KNOWINGLY AND INTELLIGENTLY WAIVED HIS CONSTITUTIONAL RIGHTS PRIOR TO MAKING STATEMENTS TO LAW ENFORCEMENT.

The first claim presented is a contention that the trial court erred in admitting defendant's statements to the police because of his alleged "incompetence" to understand and waive his rights. The record amply supports the trial court's determination that defendant was not significantly impaired when he spoke to the law enforcement officer.

The warnings required by *Miranda v. Arizona*, 384 U.S. 435, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), apply when a suspect is subject to (1) custodial (2) interrogation (3) by an agent of the state. *State v. Warner*, 125 Wn.2d 876, 884, 889 P.2d 479 (1995). Here, the trial court noted that the defendant was in custody as contemplated by the *Miranda* court. CP 23-25. The trial court reviewed the evidence developed during the

CrR 3.5 hearing and then entered its factual findings and legal conclusions. CP 23-25.

“When a trial court determines a confession is voluntary, that determination is not disturbed on appeal if there is substantial evidence in the record from which the trial court could have found the confession was voluntary by a preponderance of the evidence.” *State v. Aten*, 130 Wn.2d 640, 664, 927 P.2d 210 (1996). Evidence of intoxication is simply a factor to be considered in determining whether a *Miranda* waiver is voluntary. *State v. Cuzetto*, 76 Wn.2d 378, 457 P.2d 204 (1969); *State v. Gardner*, 28 Wn. App. 721, 626 P.2d 56, review denied 95 Wn.2d 1027 (1981); *State v. Collins*, 30 Wn. App. 1, 11, 632 P.2d 68, review denied 96 Wn.2d 1020 (1981); *State v. Reuben*, 62 Wn. App. 620, 625-626, 814 P.2d 1177, review denied 118 Wn.2d 1006 (1991); *State v. Saunders*, 120 Wn. App. 800, 810, 86 P.3d 232 (2004).

Defendant claims that his statements to law enforcement were involuntary because of his alleged drug and alcohol impairment. However, there is no evidence that defendant did not understand his actions. The record reflects that defendant was oriented as to time and place, acknowledged his understanding of his rights, and gave coherent answers to Deputy Petersen’s inquiries. There simply was no reason to believe defendant was impaired so substantially that he could not

knowingly waive his constitutional rights and make voluntary statements to law enforcement. There was ample evidence for the trial court to find that defendant voluntarily and knowingly waived his rights. *State v. Aten, supra*. The trial court did not err in admitting defendant's statements to law enforcement officers.

At the CrR 3.5 hearing, the State presented the testimony of Spokane County Sheriff Deputy Petersen regarding defendant's condition and responses when he was advised of his rights. RP 6-14. Defendant did not testify at the hearing. Hence, Deputy Petersen's testimony regarding the advisement of rights, defendant's acknowledgement and waiver thereof was uncontested at the CrR 3.5 hearing. The undisputed evidence before the trial court was that: defendant was in custody at the time Deputy Petersen asked him questions; defendant was advised of his constitutional rights prior to being questioned; defendant appeared to understand his rights as advised as evidenced by his responses; and defendant thereafter waived his rights and made statements regarding the incident. RP 6-14. Based upon the undisputed evidence, the trial court found that defendant's statements to Deputy Petersen regarding the incident were freely and voluntarily given. CP 23-25. Accordingly, the trial court concluded that defendant's statements to Deputy Petersen were admissible at trial. RP 14; CP 23-25.

As noted, a trial court's conclusion regarding the admissibility of a confession will not be set aside on appeal if there is substantial evidence in the record from which the trial court could have found by a preponderance of the evidence that the confession was voluntary. *State v. L.U.*, 137 Wn. App. 410, 414, 153 P.3d 894 (2007).

The trial court entered written findings of fact that the defendant did not challenge, so the court's findings are verities on appeal. *State v. Broadaway*, 133 Wn.2d 118, 131, 942 P.2d 363 (1997). The trial court properly exercised its discretion finding that the defendant's statements were admissible. CP 23-25. There was no error.

B. SUFFICIENT EVIDENCE EXISTED TO SUPPORT THE ATTEMPTED SECOND DEGREE BURGLARY CONVICTION.

When analyzing a sufficiency of the evidence claim, the reviewing court will defer to the trier of fact on the credibility of witnesses and the weight of the evidence. *State v. Bonisisio*, 92 Wn. App. 783, 794, 964 P.2d 1222 (1998), *review denied*, 137 Wn.2d 1024 (1999).

“There is sufficient proof of an element of a crime to support a jury's verdict when, after viewing the evidence in the light most favorable to the prosecution, any rational Trier of fact could have found that element beyond a reasonable doubt.” *State v. Bright*, 129 Wn.2d 257, 266 n.30,

916 P.2d 922 (1996). “A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). The relevant question is whether, after 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. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980); *State v. Smith*, 106 Wn.2d 772, 725 P.2d 951 (1988); *State v. Myles*, 127 Wn.2d 807, 816, 903 P.2d 979 (1995). Circumstantial evidence and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

An appellate court also does not retry factual issues, *State v. Mewes*, 84 Wn. App. 620, 622, 929 P.2d 505 (1997), nor does it weigh the facts. “The fact that a trial or appellate court may conclude the evidence is not convincing, or may find the evidence hard to reconcile in some of its aspects, or may think some evidence appears to refute or negate guilt, or to cast doubt thereon, does not justify the court’s setting aside the jury’s verdict.” *State v. Randecker*, 79 Wn.2d 512, 517-18, 487 P.2d 1295 (1971).

In this case, defendant was charged with attempted second degree burglary pursuant to RCW 9A.52.030 as follows:

. . . that on or about February 12, 2011, the defendant, . . . , with the intent to commit the crime of Second Degree Burglary, as set out in RCW 9A.52.030, 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, located at 18724 E. Cataldo, Spokane Valley, Washington,

CP 9.

The trier of fact was presented with more than sufficient evidence to support the verdict rendered.

The evidence before the jury was uncontroverted because defendant testified that he could not remember any details of the incident due to his having combined prescribed medications with alcohol. RP 62-65, 68-71, 75, 77-82.

The evidence before the jury included that defendant was on the premises of the GTX Truck Stop. RP 26-32, 34-38, 40-42, 48-52, and 54-55. Defendant was examining the inside of the business, casing the premises. RP 35. Defendant made consistent and forceful efforts to gain entry into the building. RP 24-32, 35-36, 42-43, 52-54. Defendant offered an implausible explanation for his actions when viewed in light of the circumstances. RP 24-82. The photographic evidence of the extent of defendant's efforts to gain entry to the GTX Truck Stop substantially corroborated the reasonable inference that defendant intended to gain

entry. RP 42-43. It was uncontroverted that the record provides proof beyond a reasonable doubt that defendant is guilty of the attempted second degree burglary of the GTX Truck Stop on February 12, 2011. Accordingly, the State respectfully requests that this Court affirm the jury's verdict, the conviction and dismiss the defendant's appeal.

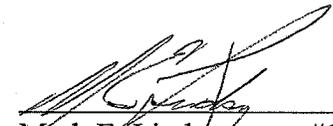
V.

CONCLUSION

For the reasons stated, the conviction of the defendant should be affirmed.

Dated this 15th day of September, 2011.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,)
)
 Respondent,) NO. 29886-8-III
 v.)
)
MARTY J. CHRISTMAN,)
)
 Appellant,)

I certify under penalty of perjury under the laws of the State of Washington, that on September 13, 2011, I e-mailed a copy of the Respondent's Brief in this matter, pursuant to the parties' agreement, to:

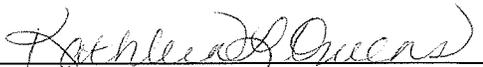
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