

COA No. 30901-1-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

ROGER THEODORE HEMORE, Appellant.

BRIEF OF APPELLANT

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I. ASSIGNMENT OF ERROR

A. The State's evidence was insufficient to support Roger Theodore Hemore's convictions of first degree arson and fourth degree assault.

Issue Pertaining to Assignment of Error

1. Was the evidence sufficient to support the convictions when the State failed to prove identity beyond a reasonable doubt? (Assignment of Error A).

II. STATEMENT OF THE CASE

Mr. Hemore was charged by amended information with count 1 – first degree arson and count 2 – second degree assault while armed with a deadly weapon. (CP 283). The case plodded along with numerous continuances, agreed and for good cause, waivers of speedy trial; and stays. (See, e.g., CP 270, 279, 280, 285, 288, 289, 300, 324, 327). The court held a CrR 3.5 hearing and determined certain statements he made were admissible. (7/7/11 RP 60-115). Although it appears no findings or conclusions were entered as required by CrR 3.5(c), the failure to do so was harmless in light of the oral decision of the court. *State v. Thompson*, 73 Wn. App. 122, 130, 867 P.2d 691 (1994). The case proceeded to jury trial.

Grant County Deputy Sheriff Greg Hutchison was called out on a domestic incident at Rainier Road in Moses Lake. (3/14/12 RP 17). He met Sergeant Jones at the intersection of Rainier and Valley Road. (*Id.*). The sergeant contacted the reporting party, Mike Hemore, who indicated Roger Hemore was still at 7807 Rainer Rd. (*Id.* at 18). Deputy Hutchison went there. (*Id.*).

Corporal Gary Mansford arrived at about the same time. (3/14/21 RP 18). They went into the front yard and saw what looked like a roll of shop towels on fire and burning off to the right towards the door. (*Id.*). Corporal Mansford put the fire out. (*Id.*).

Deputy Hutchison had been to the home before and went into the main entrance. (*Id.*). Inside were a haze of smoke and the smell of something burning. (*Id.*). Identifying himself as from the sheriff's office, he yelled inside the residence. (*Id.*). Entering, he saw blood drops on the living room carpet and a sword blank against the couch. (*Id.* at 18-19). No one was inside. (*Id.* at 19).

Corporal Mansford, Sergeant Jones, and Deputy Hutchison found Roger Hemore outside. (3/14/12 RP 20). He was at the side of the house, lying against the side with his arms tucked underneath him. (*Id.*). Upon contact, Mr. Hemore was unresponsive to commands. (*Id.*). Deputy Hutchison grabbed his

arms and cuffed and detained him. (*Id.*). Seeing obvious injuries to Mr. Hemore's head, the deputy took him out front and called an ambulance. (*Id.* at 24).

Deputy Hutchison also talked to Mike Hemore, whose demeanor was consistent with one in distress. (3/14/12 RP 32). The deputy took a statement from him regarding what occurred. (*Id.*). He gave the statement to Detective Kim Cook. (*Id.* at 32-33). Roger was outside the bedroom door when the fire was set, while Mike was locked inside his bedroom. (*Id.* at 37-38). Mike hit Roger in the head with a large crescent wrench. (*Id.* at 38).

Detective Cook was off duty on March 17, 2011, when he was called out. (3/14/21 RP 42). He met up with Deputies Hutchison and Jason Bull at 7807 Rainer. (*Id.*). Deputy Hutchison had contacted Mike Hemore, who had come home from work to find Roger in his home where he was not supposed to be. (*Id.* at 42-43). An argument ensued with Roger taking a swing at Mike. (*Id.* at 43). Detective Cook saw a scorch mark on the inside of the bedroom door. (*Id.* at 47). On the floor were soot and burnt ashes. (*Id.* at 46, 47, 69). There were also holes on both sides of the bedroom door that did not come from the sword blank, but rather a metal bar that was found near the crescent wrench in Mike's

bedroom. (*Id.* at 71-72). The charred materials were either shop towels or thick paper towels. (*Id.* at 75).

Mike Hemore has lived at 7807 Rainer Road since 1991. (3/16/12 RP 102). He was a shop superintendent and diesel mechanic. (*Id.*). Mike had a rocky relationship with his brother, Roger, whom he felt did not want to help himself. (*Id.* at 106). Mike let Roger stay with him in what he characterized as an outbuilding. his house. (*Id.* at 106-07). Mike allowed him in the house only when he was there. (*Id.* at 107). Around 6:30 p.m. on March 17, 2011, Mike was coming home from work. (*Id.* at 107-08). He was on his motorcycle and saw the front door open with Roger standing in the doorway. (*Id.* at 108). Roger ducked back into the house. (*Id.*). Mike confronted him about why Roger was in the house after he had locked it. (*Id.*). Roger said he was leaving and getting out of there. (*Id.*). Mike told him he would never keep his stuff and asked why he could not wait until he got home. (*Id.* at 108-09).

Roger threw a punch at Mike, who was in the living room four or five feet away from the hallway to his bedroom. (3/16/12 RP at 108-09). The punch did not connect. (*Id.* at 109). Mike turned and pushed Roger into a chair, backed away, and walked off. (*Id.* at 110). Roger came at him again with what Mike called a

machete. (*Id.*). Mike did not want to beat him up. (*Id.*). The machete was a home-made thing that Roger was in the process of making. (*Id.*). He charged Mike with the machete aimed at his chest. (*Id.* at 112).

Mike pulled the machete by him, put Roger down to the living room floor, and took the unfinished knife away. (3/16/12 RP 112). He let Roger up again. (*Id.* at 112-13). Mike walked toward his bedroom. (*Id.*). Roger got another metal bar and came at Mike again. (*Id.* at 113). Mike ran into the bedroom, locked the door, and put his foot at the bottom of the door. (*Id.*). Although Mike said he was going to call 911, Roger knew the phone did not work. (*Id.* at 113-14). He rammed the bar through the door. (*Id.* at 114).

Mike felt his foot getting warm. (3/16/12 RP 114). He saw smoke coming out from under the door. (*Id.* at 114, 129). He heard Roger saying things as if he were talking into a radio. (*Id.* at 116). Mike opened the door, grabbed the bar and Roger, and pulled him through. (*Id.*). Roger said, "I'll kill you." (*Id.* at 117). He kept coming and coming. (*Id.*). Mike got a big crescent wrench from a box by his bed and hit Roger with it 5-10 times. (*Id.* at 118). Mike tried to choke him and put out the fire. (*Id.*). He grabbed the bar again and threw it by the bed. (*Id.*). Mike pushed off, ran out

the door, grabbed the burning paper towels, and carried them outside the house. (*Id.*). He ran down the street, hollering for help. (*Id.*). Police arrived and handcuffed Mike. (*Id.* at 119). Mike talked to the police and told them what happened. (3/16/12 RP 119).

Roger Hemore testified. He was able to go into Mike's house and shower even when he was not there. (3/16/12 RP 148). He had been living with Mike for about 14 months. (*Id.* at 156). The outbuilding where he stayed was actually another house on the property. (*Id.* at 157). But it did not have running water. (*Id.*). Roger did not attack Mike and was just in the house to get his stuff and leave. (*Id.* at 161).

Roger figured the cigarette he was smoking flipped from the coffee table when it was tipped over during the ruckus and landed by the area by the bedroom door. (*Id.* at 151). Roger never swung at Mike, who started beating him with a crescent wrench. (*Id.* at 151, 159). Roger held up the metal bar to block the hits. (*Id.* at 152). He had no idea where the machete blank came from and he did not touch it. (*Id.*). He was assaulted twice by Mike before he went into his bedroom. (*Id.* at 154). Roger said he did not get hit by the wrench until he was bent over trying to put the fire that

inadvertently started from the smoldering cigarette. (*Id.*). He did not ram any metal bar through the door. (*Id.*).

After getting hit, Roger apparently crawled through the window out of the house because he thought it was on fire. (3/16/12 RP 155). He did not know where Mike went. (*Id.*). Roger was at the emergency room until around 10 p.m. (3/16/12 RP 154).

There were no exceptions to the instructions. (3/15/12 RP 82, 83). The jury found Roger Hemore guilty of first degree arson and fourth degree assault. (CP 462-64). The court sentenced Mr. Hemore to a standard range sentence of 24 months on the felony arson and a consecutive term of 15 days on the gross misdemeanor assault, as it can do, for total confinement of 24 months and 15 days. (CP 487-503). This appeal follows.

III. ARGUMENT

A. The evidence was insufficient to support the convictions because the State failed to prove identity beyond a reasonable doubt.

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 Roger Hemore was the person who committed the crimes. *State v. Stevenson*, 128 Wn. App. 179, 192, 114 P.3d 699 (2005). Indeed, the victim, Mike Hemore, could not identify the person who had assaulted him and started the fire. (3/16/12 RP 103).

The issue here was the identity of the person who committed the alleged crimes. No one but Roger and Mike Hemore were present when the assault took place. No one saw who started the fire, but the Hemore brothers were there. This unusual exchange took place when the State asked Mike if he had a brother:

Q. Do you have a brother?

A. Oh, yes. I'm sorry. Yes, I do.

Q. that's fine. Is he in the courtroom today?

A. I don't see him.

Q. Who are you thinking of as your brother?

A. Roger.

Q. And you don't see Roger Hemore in the courtroom today?

A. No, I don't. He looks way different if that's Roger.

Q. Okay. Well, let me ask – let me direct you over to counsel table. Is the person in the white shirt –

A. Oh.

(3/16/12 RP 103).

At this point, defense counsel objected:

The witness has testified under oath after two separate questions and looking thoroughly about the courtroom that he didn't – couldn't see Roger Hemore in the courtroom. Counsel then proceeded with a leading question, which I object to. This is direct. This isn't refreshing recollection. So I – I would request that counsel move on and that the answer that he could not see Roger Hemore in the courtroom remain on the record and that anything contrary to that at this time be stricken. (3/16/12 RP 103-04).

The court ruled that Mike could answer and directed the State to ask if he recognized the defendant, Roger. (3/16/12 RP 104). The State then asked if Mike recognized the defendant seated at counsel table. (*Id.*). After finally directing Mike to where Roger was seated and thus pointing him out, the State inquired whether there was any uncertainty about Roger being Roger. (*Id.* at 105). Not surprisingly, the answer was no. (*Id.*). Clearly, Mike was unable to identify the defendant as the perpetrator, much less as his brother. Only by asking Mike improper leading questions and actually pointing out to him where Roger Hemore sat was the State able to steer Mike into "identifying" him. The State's prompted questioning from the court did not rehabilitate Mike Hemore's inability to identify

the defendant, Roger. Indeed, the record is clear that Mike could not identify the perpetrator.

The State must establish beyond a reasonable doubt the identity of the accused as the person who committed the offense. *State v. Hill*, 83 Wn.2d 558, 560, 520 P.2d 618 (1974). Identity of the accused is a question for the jury. *Id.*

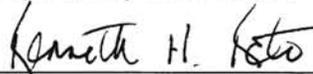
Although credibility issues are for the finder of fact to decide, the existence of facts cannot be based on guess, speculation, or conjecture. *State v. Hutton*, 7 Wn. App. 726, 728, 502 P.2d 1037 (1972). This case is the rarity where the victim cannot identify the accused, thus requiring dismissal of the case. Mike could not even identify his brother, so his identity could not have been based on anything but guess, speculation, or conjecture. Moreover, the identification was so tainted by the State's leading questions specifically indicating to Mike where Roger sat in the courtroom and in essence telling him he was his brother, that there can be no confidence in the jury's finding Roger was the culprit. The State's evidence was simply insufficient to prove the accused's identity, an essential element, beyond a reasonable doubt. Mr. Hemore's convictions must be reversed and the charges dismissed. *Hill, supra.*

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Hemore respectfully urges this court to reverse his convictions and dismiss the charges.

DATED this 14th day of December, 2012.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that on December 14, 2012, I served a copy of the brief of appellant by first class mail, postage prepaid, on Roger Theodore Hemore, # 357741, Washington C. C., PO Box 900, Shelton, WA 98584; and by email, as agreed by counsel, on D. Angus Lee, Grant County Prosecutor, at kburns@co.grant.wa.us.

