

FILED
DEC 19, 2012
Court of Appeals
Division III
State of Washington

30901-1-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ROGER THEODORE HEMORE,

Appellant.

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

The Honorable John Antosz

RESPONDENT'S BRIEF

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I. IDENTITY OF RESPONDENT

The State of Washington, represented by the Grant County Prosecutor, is the Respondent herein.

II. RELIEF REQUESTED

Mr. Hemore's convictions should be upheld. There was more than sufficient evidence of his identity at trial to uphold the convictions for Arson in the First Degree and Assault in the Fourth Degree.

III. ISSUE

Whether there was sufficient evidence of identity to uphold Mr. Hemore's convictions for Arson in the First Degree and Assault in the Fourth Degree.

IV. STATEMENT OF THE CASE

In his brief to this Court, Mr. Hemore¹ accurately relates the evidence presented at trial. The State adopts Mr. Hemore's fact section with some additions for clarification.

Approximately five months before trial, Mike Hemore was in a serious motorcycle accident. 3/16/12 RP at 101. He spent six weeks in a coma, followed by extensive therapy at Harborview Medical Center. *Id.*

¹ The State will refer to the Appellant, Roger Hemore, as "Mr. Hemore" and to his brother as "Mike Hemore" throughout the brief.

He was released and returned to Grant County the night before he testified. *Id.*

Near the beginning of the direct examination of Mike Hemore, the Prosecutor asked him if he had a brother. *Id.* at 103. Mike Hemore responded that he did. *Id.* at 103. The following exchange then took place:

Prosecutor: That's fine. Is he in the courtroom today?

M. Hemore: I don't see him.

Prosecutor: Who are you thinking of as your brother?

M. Hemore: Roger.

Prosecutor: And you don't see Roger Hemore in the courtroom today?

M. Hemore: No, I don't. He looks way different if that's Roger.²

Prosecutor: Okay. Well, let me ask—let me direct you over to counsel table. Is the person in the white shirt—

M. Hemore: Oh.

Defense Counsel: Your Honor, I object.

M. Hemore: I didn't even—

Defense Counsel: I object, Your Honor.

M. Hemore: I'm sorry. I did not even recognize him.

Id. at 103.

² The court later made a record that when Mike Hemore made this comment he was looking throughout the entire courtroom, including the jury box. *Id.* at 104.

After a brief discussion, the Court requested that the Prosecutor ask Mike Hemore if he recognized the defendant. *Id.* at 104.

Prosecutor: [Mike] Hemore, do you recognize the defendant seated at counsel table?

Mike Hemore: Yes, after looking more closely. If I may, when I had seen him—

Defense Counsel: Objection, Your Honor. Nonresponsive. Goes beyond—

Mike Hemore: Okay.

Defense Counsel: --the question.

Mike Hemore: That's fine.

The Court: Okay. You can ask the next question.

Prosecutor: Why is it that you weren't able to identify him initially?

Mike Hemore: Because when I last seen him his hair was ratty and like this and he wasn't—was not well kept and he was not keeping himself carried.

Prosecutor: Is there—is there any uncertainty at this point—

Mike Hemore: No, there—

Prosecutor: --as to whether—

Mike Hemore: —is not.

Prosecutor: --that this is your brother?

Mike Hemore: No, there is not. Without a doubt.

Id. at 104-05.

After the State rested its case, the Defense made a motion to dismiss for failure of the State to identify Mr. Hemore in court as the same one who committed the crime. *Id.* at 134. The Defense referenced the strange exchange where Mike Hemore initially couldn't find his brother in the courtroom. *Id.* The trial court denied the motion, noting that although the prosecutor suggested to Mike Hemore where to look to locate his brother, it was clear to the court that Mike Hemore recognized his brother when he saw him and was not in any way coerced or led to answer a certain way. *Id.* at 138.

V. ARGUMENT

Mr. Hemore challenges the sufficiency of the evidence against him at trial. However, he limited his sufficiency challenge to only one element: identity. Despite the somewhat comical moment at trial when Mike Hemore searched the courtroom and initially could not locate his

own brother, there was more than sufficient evidence of the identity of Mr. Hemore to uphold his conviction.

The State bears the burden of proving each element of the crime charged beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980). As part of this burden, the state must prove the identity of the accused person as the one who committed the offense. *State v. Hill*, 83 Wn.2d 558, 560, 520 P.2d 618 (1974). Identity is a question of fact for the jury and may be determined by direct or circumstantial evidence. *Id.*

In order to determine whether there was sufficient evidence, this Court will “view the evidence in the light most favorable to the prosecution and determine whether any rational fact finder could have found the essential elements of the crime beyond a reasonable doubt. *State v. Mitchell*, 169 Wn.2d 437, 443-44, 237 P.3d 282 (2010) (citing *State v. Engel*, 166 Wn.2d 572, 576, 210 P.3d 1007 (2009) (citing *State v. Wentz*, 149 Wn.2d 342, 347, 68 P.3d 282 (2003))). A claim of insufficiency of the evidence not only requires that the Appellant admit the truth of the State’s evidence, but also grants the State the benefit of all inferences that can reasonably be drawn from it. *State v. DeVries*, 149 Wn.2d 842, 849, 72 P.3d 748 (2003) (citing *State v. Green*, 94 Wn.2d 216, 222, 616 P.2d 628 (1980)). Additionally, appellate courts defer to the

finder of fact (in this case, the jury) on issues of witness credibility. *State v. Drum*, 168 Wn.2d 23, 35, 225 P.3d 237 (2010) (citing *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990)).

There was easily enough evidence presented in this case regarding the identity of Mr. Hemore as the person involved in the arson and assault. Although Mike Hemore initially struggled to find his brother in the courtroom, he eventually identified him and explained his reason for not identifying him in court. Additionally, Mike Hemore testified that prior to the incident in question he had seen Mr. Hemore daily and had an ongoing relationship with him. *Id.* at 106. He had no doubt it was Mr. Hemore who was at his house during the altercation. *Id.* at 108.

Mike Hemore's initial difficulties at identifying Mr. Hemore in court would only affect the weight of his identification. Additionally, there was other evidence identifying Mr. Hemore in court as the same person who was at the residence that day including testimony by Deputy Greg Hutchison that he located Mr. Hemore outside the house when he arrived. *Id.* at 3/14/12 RP at 20.

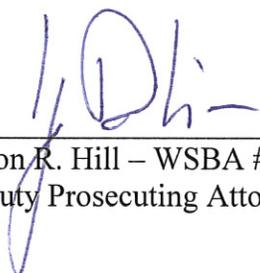
Therefore, in the light most favorable to the State, there was clearly enough evidence identifying Mr. Hemore in court as the same person who committed the crimes charged. Accordingly, this Court should uphold his convictions.

VI. CONCLUSION

Mike Hemore and Deputy Hutchison both identified the defendant in court as the same person who committed the crimes charged. Although there was a somewhat awkward and comical moment when Mike Hemore could not locate his own brother in the courtroom, this initial failure would only go to the weight of the evidence. There was more than sufficient evidence, therefore, of identification to uphold the convictions.

Dated this 19th day of December, 2012.

D. ANGUS LEE
Prosecuting Attorney

By: 

Tyson R. Hill – WSBA # 40685
Deputy Prosecuting Attorney

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,)	
)	
Respondent,)	No. 30901-1-III
)	
vs.)	
)	
ROGER THEODORE HEMORE,)	DECLARATION OF SERVICE
)	
Appellant.)	
_____)	

Under penalty of perjury of the laws of the State of Washington, the undersigned declares:

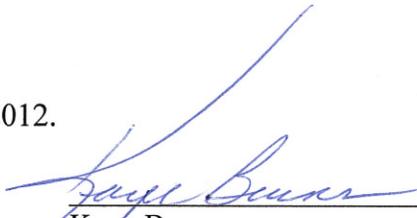
That on this day I served a copy of the Respondent's Brief in this matter by e-mail on the following party, receipt confirmed, pursuant to the parties' agreement:

Kenneth H. Kato
khkato@comcast.net

That on this day I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to Appellant containing a copy of the Respondent's Brief in the above-entitled matter.

Roger Theodore Hemore - #357741
PO Box 900
Shelton WA 98584

Dated: December 19, 2012.



Kaye Burns