

No. 31802-8-III

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MAY 26, 2015
Court of Appeals
Division III
State of Washington

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

JON JASON KING, Appellant.

BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

1. The State's evidence was insufficient to support the findings of guilt.

2. The court erred by not entering findings of fact and conclusions of law supporting the exceptional sentence.

Issues Pertaining to Assignments of Error

A. Was the State's evidence insufficient to support the findings of guilt because it failed to prove intent beyond a reasonable doubt? (Assignment of Error 1).

B. Did the court err by not entering findings of fact and conclusions of law supporting the exceptional sentence? (Assignment of Error 2).

II. STATEMENT OF THE CASE

Jon Jason King was charged by amended information with three counts of residential burglary, two of which alleged the aggravating circumstance that the victim was inside the dwelling. (CP 29).

Although represented by counsel, Mr. King pro se made several pretrial motions to dismiss based on, among other things, selective prosecution, prosecutorial vindictiveness, and

prosecutorial misconduct. (CP 48, 53). The motions were denied. (See 6/3/13 RP 19).

A CrR 3.5 hearing was held on the admissibility of Mr. King's statements to police. (6/3/13 RP 20). The court found certain statements made to Officer Jory Parish were admissible because they were not made in response to any questions and were voluntary. (6/3/13 RP 54; CP 331-35). Statements made to Corporal Hiram Stohel, however, were not admitted. (*Id.*).

With regard to the State's intent to seek an exceptional sentence based on the multiple offense policy, Mr. King agreed to the court determining the issue, not the jury. (6/3/13 RP 59).

Samantha Norris lived with her roommate, Rachelle Williams, at 289 Gage Blvd. in Richland. (6/3/13 RP 73). Ms. Norris came home around 8:40 p.m. after working and went to her room. Ms. Williams was not home. (*Id.*). Hearing footsteps coming down the tile hallway, Ms. Norris asked who was there but there was no answer and the footsteps kept coming. (*Id.* at 75). A person opened the door; she yelled; he ran back out toward the living room. (*Id.*). She did not see his face, but saw he had on a

jacket and tennis shoes. (*Id.* at 75, 77). Ms. Norris grabbed her keys and phone and ran out the front door. (*Id.* at 78). She knew it was a man. After calling both, her mother arrived first, then the police. (*Id.*). Ms. Norris had been home about an hour before she heard the footsteps. (*Id.* at 79). Ms. Williams' Camel menthol cigarettes were gone. (*Id.* at 80). The slider was wide open when the police checked her home. (*Id.* at 86).

Jean Smith had lived for 28 years at 371 Quailwood Drive in Richland. (6/3/13 RP 88). On the evening of March 27, 2013, she was home alone. (*Id.* at 92). She watched TV until 8:30 and went upstairs to read in bed. (*Id.* at 93). About one hour later, she heard rattling noises, but was not alarmed so she did not get out of bed to check things out. (*Id.* at 94). Ms. Smith had forgotten to lock the front door. (*Id.*). She heard shouting downstairs and got out of the house. (*Id.* at 97). The police took her across the street and searched the house. (*Id.*). No one was inside. (*Id.*). \$100 in Ms. Smith's purse and some medications were gone along with coins her husband had in a second bedroom. (*Id.* at 100, 102). Half of a bottle of Canadian whiskey was gone. (*Id.* at 102). Ms. Smith did not know a Jon King and, in any event, he had no permission to be

in her home. (*Id.* at 106).

Peter Smith lived at 371 Quailwood Place in Richland. On March 27, 2013, he had gone to play bridge and came back around 11:15 p.m. (6/3/13 RP 110-11). Police were all over the neighborhood. (*Id.* at 11). There had been a burglary at his house. (*Id.* at 112). Mr. Smith noticed coins, including a silver dollar, missing from a spare bedroom. (*Id.* at 112-13). He did not know a Jon King, who had no permission to be in his home. (*Id.* at 121).

Officer Drew Florence responded to the call from Ms. Norris. (6/3/13 RP 124-25). No one was inside her home, but the back slider was open. (*Id.* at 126-27). A little while later, another incident about a block away was called in. (*Id.* at 128). From 289 Gage Blvd., the officer walked on the golf course to 371 Quailwood. (*Id.* at 129). He saw a male coming out the front door. (*Id.* at 130). He found a backpack on the ground by the house while other officers were with the subject. (*Id.* at 131). The man, Mr. King, resisted while being searched. (*Id.* at 135, 146). He was screaming and yelling. (*Id.* at 147).

Officer Doug Doss went to 371 Quailwood on March 27, 2013. (6/3/13 RP 154). He was one of the last officers to arrive

and saw Mr. King detained at the back of a patrol car. (*Id.*). He went to help Officers Parish and Florence. (*Id.*). Two backpacks were located. (*Id.* at 157).

Officer Parish was on duty March 27, 2013, and was called to 371 Quailwood. (6/3/13 RP 186-87). He was set up on the front side of the house and got a visual on someone. (*Id.* at 188). The officer saw Mr. King carrying stuff in his hands – a bottle of alcohol in one and a box-looking object in the other. (*Id.* at 189). After verbal commands to him, Mr. King turned around and started to walk away back into the home. (*Id.* at 189-90). Officer Parish grabbed his left arm and tried to cuff him. (*Id.* at 190). Mr. King asked why he was being arrested and said he was there at a friend's home with permission. (*Id.* at 191). He was escorted to a patrol car. (*Id.*). Mr. King was searched and pill bottles with prescriptions for Ron Riley and Jean Smith, several pairs of sunglasses, a flash drive, and money were found. (*Id.* at 192-93). Mr. King appeared to be under the obvious influence of alcohol. (*Id.* at 196). He was taken for examination to the hospital, where he was cleared for booking. (*Id.* at 202).

Mr. Riley was a dialysis nurse. (6/4/13 RP 227). His condo

was on the golf course and the slider was regularly unlocked. (*Id.* at 228). On March 27, 2013, he was out of town when he got a call from the police that someone had broken into his home and a backpack had been taken. (*Id.*) His ID tags and some medication were gone. (*Id.* at 229). Mr. Riley did not know Mr. King, who did not have permission to be in his condo. (*Id.* at 230). His backpack was found by a police officer and his hospital ID badges recovered. (*Id.* at 240).

Ruth LaBouy lived at 365 Quailwood with Gary Faust. (6/4/13 RP 245). They were home on March 27, 2013, when she saw a man with a backpack walking by. (*Id.*) She had seen a flashlight in the kitchen and room of the Smiths' home next door. (*Id.*) Mr. Faust called 911. (*Id.* at 249). He had seen a man with a backpack standing by the sliding door to the Smiths' condo. (*Id.* at 253). The man had on dark clothes with a backpack. (*Id.*) Mr. Faust asked him what he was doing and to get out. (*Id.* at 253). The man walked off the patio, down the steps, and back down to the Smiths. (*Id.* at 254). Mr. Faust checked again later and saw a flashlight in their kitchen and living room. (*Id.* at 257).

Officer Jason Crouch also responded to a suspicious circumstances call around 10 p.m. on March 27, 2013. (6/4/13 RP 273). At 371 Quailwood, he saw a flashlight on the upper floor. A male came out the front door with numerous items, including a bottle of alcohol and coins, in his hands. (*Id.* at 274-75). Mr. King was detained at the gate by other officers. (*Id.*). Officer Crouch testified Mr. King was not grossly intoxicated and understood what was going on. (*Id.* at 281-83, 287).

Corporal Stohel observed lights at 371 Quailwood. (6/3/13 RP 295). He then saw Mr. King with a flashlight, gloved hands, and a bottle of Canadian whiskey, outside the residence. (6/4/13 RP 297-98). He also had a pack of menthol cigarettes. (*Id.* at 302). The police recovered stolen coins, including a silver dollar. (*Id.* at 309-10). Corporal Stohel did not feel Mr. King was significantly impaired by alcohol and knew what was going on. (*Id.* at 317, 289-29).

There were no exceptions to the instructions. (6/4/13 RP 344). The jury returned guilty verdicts to three counts of residential burglary and found the aggravating circumstances as alleged in two of the counts. (*Id.* at 397-98).

The court imposed an exceptional sentence of 108 months, 24 months above the top end of the standard range of 84 months. (CP 232). This appeal follows. (CP 322).

III. ARGUMENT

A. The State's evidence was insufficient to support the findings of guilt because the State failed to prove intent beyond a reasonable doubt.

The State must prove beyond a reasonable doubt every element of a charged crime. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed.2d 368 (1970). As reflected in the to-convict instructions, the State had to prove Mr. King had the intent to commit a crime against a person or property in the dwellings. (Instructions 16, 17, 18; CP 197-99). The defense was voluntary intoxication negating intent and instruction 15 was given by the court:

No act committed by a person while in a state of voluntary intoxication is less criminal by reason of that condition. However, evidence of intoxication may be considered in determining whether the defendant acted with intent or knowledge. (CP 175).

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). A claim of insufficient evidence admits the truth of the State's evidence and all reasonable inferences from it. *State v. Drum*, 168 Wn.2d 23, 35, 225 P.3d 237 (2010).

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).

Here, the evidence, direct and circumstantial, was very strong that Mr. King was so intoxicated he could not form the requisite intent for residential burglary. The nature of the items stolen, his lack of fear of being caught, and his erratic, belligerent, and nonsensical behavior toward the police bely the testimony of Officer Crouch and Corporal Stohel, both of whom had minimal or no contact with Mr. King. Interestingly enough, it was the corporal's improper questioning of Mr. King that led to the suppression of statements he purportedly made to him. In these circumstances, the jury necessarily had to resort to guess, speculation, and conjecture to determine Mr. King had the requisite intent to commit

the crimes of residential burglary. This, it cannot do. His convictions must be reversed and the charges dismissed.

B. The court erred by not entering findings of fact and conclusions of law supporting the exceptional sentence.

In the judgment and sentence, Paragraph 2.4 stated aggravating factors were found by the jury by special interrogatory. It further indicated “[f]indings of fact and conclusions of law are attached in Appendix 2.4.” (CP 235). There is neither any such attachment nor an appendix 2.4.

Although the jury found the aggravating factor that the victim was in the dwelling on two of the three counts of residential burglary, the court did not make the required findings of fact or conclusions of law supporting the exceptional sentence. RCW 9.94A.535. This is error requiring remand. *State v. Friedlund*, 182 Wn.2d 388, 341 P.3d 280 (2015).

RCW 9.94A.535 provides:

Whenever a sentence outside the standard sentence range is imposed, the court shall set forth the reasons for its decision in written findings of fact and conclusions of law.

This was not done. The written findings and conclusions it

did enter was in reference to the CrR 3.5 hearing. (CP 331). As explained by the *Friedlund* court, the statutory procedure must be followed:

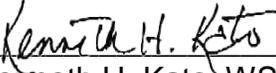
The SRA permits a court to impose sentences that deviate from the standard sentence range “if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence.” RCW 9.94A.535. When a trial court imposes an exceptional sentence, the SRA requires the court to “set forth its decision in *written findings of fact and conclusions of law.*” *Id.* (emphasis added). This requirement, word for word, has been part of the SRA from its inception. See LAWS OF 1981, ch. 137, § 12(3). The written findings must then be sent to the Washington State Sentencing Guidelines Commission along with the trial court’s judgment and sentence. CrR 7.2(d) (“If the sentence imposed departs from the applicable standard sentence range, the court’s written findings of fact and conclusions of law shall be supplied to the Commission.”). 182 Wn.2d at 394.

Friedlund requires remand for entry of written findings and conclusions comports with RCW 9.94A.535.

IV. CONCLUSION

Mr. King respectfully asks this court to reverse his convictions and dismiss the charges or, in the alternative, to reverse his exceptional sentence and remand for further proceedings.

DATED this 24th day of May, 2015.



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CERTIFICATE OF SERVICE

I certify that on May 24, 2015, I served a copy of the brief of appellant by USPS on Jon King, # 775517, PO Box 769, Connell, WA 99326; and Andrew K. Miller at prosecuting@ co.benton.wa.us.