

No. 32871-6-III

FILED
JULY 16, 2015
Court of Appeals
Division III
State of Washington

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

RONDALE HAZE PLEASANT, Appellant.

BRIEF OF APPELLANT

Kenneth H. Kato, WSBA # 6400
Attorney for Appellant
1020 N. Washington St.
Spokane, WA 99201
(509) 220-2237

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I. ASSIGNMENT OF ERROR

The evidence was insufficient to support the conviction for first degree robbery.

Issue Pertaining to Assignment of Error

Was the State's evidence insufficient to support the conviction for first degree robbery when the State failed to prove beyond a reasonable doubt that Mr. Pleasant took alcohol from the store?

II. STATEMENT OF THE CASE

Mr. Pleasant was charged by information with count 1: first degree robbery and count 2: violation of a no contact order. (CP 12). Count 2 was dismissed. (CP 36-37). The case proceeded to bench trial.

The facts, viewed in a light most favorable to the State as they must be, are reflected in the court's findings:

1. Jeremy Smith was a loss prevention officer assigned to a Safeway store located at Mission and Hamilton in Spokane, Washington, on March 1, 2014.
2. He was talking to Tyler Smith while at the store and observed the defendant in the liquor aisle.
3. He saw the defendant select two bottles of liquor: a bottle of Tanqueray and a bottle of Remy Martin.

4. He noticed the defendant put the first bottle in his pants and the second bottle in his coat.
5. Tyler Smith was another loss prevention officer, but was off duty at that time, and also witnessed the defendant conceal a bottle of alcohol.
6. Both Jeremy and Tyler Smith kept surveillance over the defendant, and were in cell phone contact with each other.
7. The defendant walked around the store looking at several other items, picking them up and putting them back down. The defendant while walking around the store asked Mr. Jeremy Smith for a lighter.
8. Jeremy Smith testified that if the defendant was out of his sight, it was only for two to five seconds, not long enough to take any bottle out of his clothes and place it back on a shelf.
9. Jeremy Smith believed that based on the concealment of the liquor bottles, the defendant intended to steal those items from the store.
10. Jeremy Smith had seen a large bulge in the defendant's front left pocket, which he believed was the bottle of alcohol from the store.
11. Jeremy Smith witnessed the defendant put a bottle back into the liquor aisle, which can be seen on video, but he did not believe it was one of the two bottles concealed earlier.
12. Tyler Smith left the store first and waited just outside the doors. The defendant walked passed him and Jeremy Smith followed behind. Tyler did not identify himself as loss prevention. He indicated

that the defendant would have to come back into the store with him. This was also witnessed by Tyler Smith.

13. Jeremy Smith watched as the defendant left the store, walking past all points of sale, and while directly behind him, Mr. Smith called out to the defendant and identified himself as loss prevention. He indicated that the defendant would have to come back into the store with him. This was also witnessed by Tyler Smith.

14. Jeremy Smith testified that as he made the initial comments to the defendant, the defendant turned around and had a can of bear spray or pepper spray in his hand. Mr. Smith backed off his distance as he believed he was within range of the spray. The defendant stated that if Mr. Jeremy Smith came closer, he would spray him. This was also witnessed by Tyler Smith.

15. The defendant then opened his jacket and displayed a large knife, with the blade up. The defendant then ran off.

16. Jeremy Smith and Tyler Smith later positively identified the defendant as the suspect from a photo montage.

17. The defendant testified that he went to the store with the intent to steal liquor.

18. The defendant testified that he went straight to the liquor aisle and took a bottle of Tanqueray and a bottle of Remy Martin and concealed them in his clothing.

19. The defendant testified that he was aware of the store security and he put the items back on the shelf

and did not leave the store with any of Safeway's merchandise.

20. The defendant testified that after Jeremy Smith tried to stop him, he pulled out bear mace and a knife because he was aware he had a DOC warrant and didn't want to go to jail. He didn't want to be detained.

21. The defendant admitted that when he pulled his coat back the blade of the knife could be seen, though it was not his intention to use it. He just carries it for protection. (CP 88-90).

From these findings, the court made these conclusions of

law:

1. The State has to prove beyond a reasonable doubt, number one, that on or about March 1, 2014, the defendant unlawfully took personal property from the person or in the presence of another.

2. There was testimony that the defendant concealed the bottles in his clothing, and then left the store. The video shows the defendant leaving the store and his front left pants pocket clearly contains what looks to be a bottle of alcohol similar to the one first selected in the liquor aisle. Both loss prevention officers testified that they did not see the defendant put those two bottles back, and had him under constant surveillance. The court found he only put one bottle back and retained possession of the other.

3. The Court finds that this first element was met.

4. Element two is that the defendant intended

to commit the theft of property.

5. The defendant admitted in his own testimony that he intended to steal the bottles of alcohol, which was supported by the observations of Jeremy and Tyler Smith.

6. Element two was met.

7. All of the events occurred within the State of Washington, based on the testimony that the Safeway where this occurred was at Mission and Hamilton, in Spokane. That element is met.

8. The third element is that the taking of the items was against the person's will by the defendant's use or threatened use of force, violence, or fear of injury to that person.

9. Jeremy Smith testified, which was also supported by the testimony of Tyler Smith, that he identified himself as loss prevention and tried to get the property back. He was met by the defendant pulling out bear spray and displaying a knife in order to retain the property.

10. That element is met based upon the taking of the property against Jeremy Smith's will while he was trying to get the property back.

11. The next element is that the force or fear was used by the defendant to take or retain the possession of the property.

12. Clearly, the defendant was not going to allow Jeremy or Tyler Smith to look at what he had in his front pocket and used both the mace and the knife to retain possession of the liquor. That element is met.

13. The next element is that in the commission of these acts or in the immediate flight therefrom, the defendant was armed with a deadly weapon, or displayed what appeared to be a deadly weapon.

14. Clearly a knife would be a deadly weapon and the court finds that from the testimony, the intent was to display the knife in a fashion to retain possession of the property taken and to instill fear. That element is met.

15. The Court finds that beyond a reasonable doubt, that on or about March 1, 2014, the defendant did commit the crime of First Degree Robbery and finds the defendant guilty of that charge.

The court sentenced Mr. Pleasant to a standard range sentence of 87 months. (CP 57-58). This appeal follows. (CP 71).

III. ARGUMENT

A. The evidence was insufficient to support the conviction for first degree burglary because the State failed to prove beyond a reasonable doubt that Mr. Pleasant took alcohol from the store.

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).

Mr. Pleasant does not assign error to the court's findings of fact as substantial evidence supports them. *State v. Halstien*, 122 Wn.2d 109, 128-29, 857 P.2d 270 (1993). They are thus verities on appeal. *State v. Hill*, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). But even in light of those findings, the State's evidence fell short of proving beyond a reasonable doubt that Mr. Pleasant took alcohol from the store and thus unlawfully took personal property from the person of another or in his or her presence, an essential element of first degree robbery. RCW 9A.56.190; RCW 9A.56.200.

Although the court made detailed findings of fact, it did not make an express finding that Mr. Pleasant actually left the Safeway with any bottles of liquor, concealed or otherwise. Rather, the court mentioned in its conclusion of law 1 that (a) there was testimony he concealed the bottles in his clothing; (b) the video showed him leaving the store "and his front left pants pocket clearly contains what looks to be a bottle of alcohol similar to the one first selected in the liquor aisle;" and (c) he only put one bottle back and retained possession of the other." (CP 90). Properly viewed as a finding of fact, the court necessarily resorted to guess, speculation, or

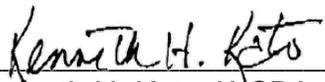
conjecture to find Mr. Pleasant had left the Safeway with alcohol.

Although questions of credibility are determined by the trier of fact, 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). But this is what happened here. The entire defense theory of the case was Mr. Pleasant did not take alcohol out of the store and accordingly did not unlawfully take the property of another. (9/10/14 RP 8, 19). The court speculated that a lone bottle of alcohol was in Mr. Pleasant's left pants pocket when he left the store. This is improper. *Hutton, supra*. The existence of this fact, an essential element of the crime, was not proven beyond a reasonable doubt by the State. *Green, supra*.

IV. CONCLUSION

Based on the foregoing, Mr. Pleasant respectfully urges this court to reverse his conviction and dismiss the charge.

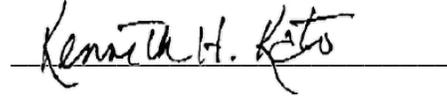
DATED this 16th day of July, 2015.



Kenneth H. Kato, WSBA # 6400
Attorney for Appellant
1020 N. Washington St.
Spokane, WA 99201
(509) 220-2237

CERTIFICATE OF SERVICE

I certify that on July 16, 2015, I served a copy of the brief of appellant by first class mail, postage prepaid, on Rondale H. Pleasant, # 341494, 1313 N. 13th Ave., Walla Walla, WA 99362; and by email, as agreed, on Brian O'Brien at SCPAAppeals@spokanecounty.org.

A handwritten signature in black ink, reading "Kenneth H. Kato", is written over a horizontal line.