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COURT OF APPEALS

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Court of Appeals
Division III
State of Washington

DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

RONDALE H. PLEASANT, APPELLANT

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY

BRIEF OF RESPONDENT

LAWRENCE H. HASKELL
Prosecuting Attorney

Larry Steinmetz
Deputy Prosecuting Attorney

Attorneys for Respondent

County-City Public Safety Building
West 1100 Mallon
Spokane, Washington 99260
(509) 477-3662

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I. APPELLANT’S ASSIGNMENTS OF ERROR

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

II. ISSUES PRESENTED

1. Is there substantial evidence which supports the trial court’s reasonable inference that the defendant unlawfully took merchandise from the Safeway store?
2. Is there sufficient evidence to support the conviction for the charge of robbery in the first degree?

III. STATEMENT OF THE CASE

Defendant/Appellant, Rondale Pleasant, was charged by information with one count of first degree robbery and one count of violation of a no contact order. CP 7. The no contact order charge was dismissed before trial. CP 24.

The defendant was found guilty of the first degree robbery after a bench trial in the superior court before the Honorable Annette Plese, and he was sentenced within the standard range. CP 35; CP 36.¹ This appeal timely followed.

¹ The trial court entered written findings of fact and conclusions of law as to the first degree robbery conviction at the end of the case. CP 40.

In the present case, on March 1, 2014, Jeremy Smith,² loss prevention specialist for Safeway, was working at the store when he observed two males in the liquor area of the store. RP 21. One of the males (later identified as the defendant) selected two bottles of liquor – a bottle of Tanqueray gin and a bottle of Remy Martin cognac.³ RP 21-22; RP 49; RP 86; RP 97. The defendant departed the alcohol aisle and walked around the store. RP 21. During this time frame, he concealed the two liquor bottles down the front of his pants. RP 21. Jeremy was standing directly behind the defendant when he concealed a bottle. RP 51.

The defendant approached Jeremy inside the store, spoke with him briefly, and the defendant returned to the liquor aisle. RP 22. The defendant placed something back on the shelf, but it was not the alcohol previously selected by the defendant. RP 22-23. The defendant was only out of Jeremy's sight for two to five seconds during the incident which, in

² Witnesses' Jeremy Smith and Tyler Smith were both unrelated witnesses in this case. For clarity, they will be referred to by first name.

³ During cross-examination, the defendant remarked he selected expensive bottles of liquor at the store. RP 99. He explained: "I just figured if I'm going to go shoplifting, I might as well get the good stuff." RP 99.

his opinion, was not sufficient time to remove a bottle and place it back onto the shelf. RP 45.⁴

Tyler Smith, another loss prevention employee, was off-duty and shopping at the store at the time of the incident. RP 58. Tyler was standing in the deli area of the store when he observed the defendant walk to the liquor aisle. RP 61. He observed the defendant take two bottles from the liquor shelf. RP 60; RP 79-80. After leaving the liquor aisle, the defendant concealed a bottle in his jacket. RP 62; RP 80.

The defendant exited the store without purchasing the alcohol. RP 23. Jeremy stated there was a large bulge (similar to a Tanqueray liquor bottle imprint) in the defendant's left front pant pocket after the defendant left the store. RP 29-30; EX. 6.⁵ Outside the store, Jeremy and Tyler approached the defendant. Jeremy identified himself to the defendant as loss prevention. RP 63. The defendant produced a can of bear mace and he threatened to spray the employees, pointing the can at the employees. RP 24; RP 26; RP 46; RP 63; RP 78. The employees were approximately fifteen feet from the defendant at that time. RP 24.

⁴ The Safeway store security surveillance video of the incident was also admitted into evidence for the trial court's review. RP 26-27; RP 28-29; RP 34.

⁵ Exhibit six is a still shot of the defendant leaving the store. It was taken from the store surveillance tape admitted at the time of trial.

Thereafter, both employees observed the defendant open his jacket and display a kitchen butcher knife with an exposed blade. RP 24-25; RP 46-47; RP 63. Tyler then retrieved his pistol and asked the defendant to give them the stolen merchandise. RP 64. The defendant subsequently ran away from the store. RP 26. Tyler later identified the defendant by a photographic montage. RP 65-66; RP 86.

The defendant admitted on the stand his intent at the time of the incident was to steal some liquor bottles from the Safeway store. RP 89. He also admitted to grabbing the same specific type of liquor bottles previously identified by the loss prevention officers. RP 90. He left the liquor aisle and moved to another area of the store in an attempt to conceal the bottles. RP 91. The defendant testified that after he briefly spoke with Jeremy inside the store, he believed Jeremy was store security and claimed he put the bottle back. RP 93-94.⁶ He maintained he did not leave the store with any merchandise. RP 95.

Outside the store, the defendant asserted he took out his bear mace when confronted by store security because he had a DOC warrant and he did not want to risk going to jail. RP 95; RP 100-101. The defendant also

⁶ After attempting to conceal both items inside the store and before contact with Jeremy inside the store, the defendant had determined both employees were loss prevention for the store based upon their demeanor and actions in the store. RP 93-94.

maintained he took his coat off during the encounter which exposed the knife. RP 101. He professed he did not intend on showing the knife to the employees. RP 101.

Based upon the foregoing testimony, the trial court entered findings of fact and conclusions of law. Specific to the defendant's assignment of error, the court entered the following findings of fact and conclusions of law:

Findings of fact

3. [Jeremy Smith] 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.
8. Jeremy Smith testified that if the defendant was out of sight, it was only for two to five seconds, not long enough to take any bottle out of his clothes and place it back onto the shelf.
10. Jeremy Smith had seen a large bulge in the defendant's left front 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.

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.

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 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.⁷
3. The court finds that this first element was met.

CP 40.

⁷ Although this finding might be mislabeled by the trial court as a conclusion of law rather than a finding of fact, a finding of fact designated as a conclusion of law will be treated as a finding of fact. *State v. Luther*, 157 Wn.2d 63, 78, 134 P.3d 205 (2006); *Valentine v. Dep't of Licensing*, 77 Wn. App. 838, 846, 894 P.2d 1352 (1995).

IV. ARGUMENT

A. THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE CONVICTION FOR ROBBERY IN THE FIRST DEGREE.

The defendant specifically claims there was insufficient evidence to establish he unlawfully took store merchandise from the Safeway store on March 1, 2014.

Standard of review regarding the sufficiency of evidence after a bench trial.

The defendant does not assign error to any finding of fact entered by the trial court; thus, the findings of fact are verities on appeal. *State v. Lohr*, 164 Wn. App. 414, 418, 263 P.3d 1287 (2011). An appellate court reviews a trial court's conclusions of law de novo. *State v. Homan*, 181 Wn.2d 102, 106, 330 P.3d 182 (2014); *State v. Gatewood*, 163 Wn.2d 534, 539, 182 P.3d 426 (2008).

When considering whether sufficient evidence presented at a bench trial supports a criminal conviction, appellate courts determine whether substantial evidence supports the findings of fact, and, if so, whether those findings support the conclusions of law. *Homan*, 181 Wn.2d at 105–06. “‘Substantial evidence’ is evidence sufficient to persuade a fair-minded person of the truth of the asserted premise.” *Homan*, 182 Wn.2d at 106. The reviewing court should consider “whether the totality of the evidence

is sufficient to prove all the required elements.” *State v. Ceglowski*, 103 Wn. App. 346, 350, 12 P.3d 160 (2000).

In addition, “[a]ppellate courts do not hear or weigh evidence, find facts, or substitute their opinions for those of the trier-of-fact. Instead, they must defer to the factual findings made by the trier-of-fact.” *Quinn v. Cherry Lane Auto Plaza, Inc.*, 153 Wn. App. 710, 717, 225 P.3d 266 (2009). *See, State v. Thomas*, 150 Wn.2d 821, 874–75, 83 P.3d 970 (2004), *abrogated in part on other grounds, Crawford v. Washington*, 541 U.S. 36, 124 S.Ct 1354 (2004) (appellate courts must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and, the persuasiveness of the evidence).

The State does not have to disprove all conceivable defense theories consistent with innocence, so long as the record contains sufficient probative facts from which the trier of fact could reasonably find guilt beyond a reasonable doubt. *State v. Bridge*, 91 Wn. App. 98, 100, 955 P.2d 418 (1998).

In addition, appellate courts draw all reasonable inferences⁸ from the evidence in favor of the State and interpret the evidence most strongly

⁸ A reasonable inference is “[a] logical *a priori* conclusion drawn by reason from proven or admitted facts. It is more than, and cannot be predicated on, mere surmise or conjecture. It is not a possibility that a thing could have happened or an idea founded on the probability that a

against the defendant on a claim of insufficiency. *State v. Brown*, 162 Wn.2d 422, 428, 173 P.3d 245 (2007).

Circumstantial evidence and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). Facts may be inferred where “plainly indicated as a matter of logical probability” and the finder of fact “determine[s] what conclusions reasonably flow” from the circumstantial evidence in a case. *State v. Delmarter*, 94 Wn.2d at 638; *State v. Bencivenga*, 137 Wn.2d 703, 711, 974 P.2d 832 (1999). Circumstantial evidence is sufficient to sustain a robbery conviction. *State v. Ammlung*, 31 Wn. App. 696, 703, 644 P.2d 717 (1982).

A defendant commits second degree robbery by statute when he or she:

[u]nlawfully takes personal property from the person of another or in his presence against his will by the use or threatened use of immediate force, violence, or fear of injury to that person or his property or the person or property of anyone. Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking; in either of which cases the degree of force is immaterial. Such taking constitutes robbery whenever it appears that, although the taking was fully completed without the knowledge of the person from

thing may have occurred.” *Bond v. Cal. Comp. & Fire Co.*, 963 S.W.2d 692, 698 (Mo. App. 1998).

whom taken, such knowledge was prevented by the use of force or fear.

RCW 9A.56.190.

Intent to steal is also an essential element of robbery. *State v. Kjorsvik*, 117 Wn.2d 93, 98, 812 P.2d 86 (1991).

Any force or threatened force, however slight, is sufficient to sustain a robbery conviction. *State v. O'Connell*, 137 Wn. App. 81, 95, 152 P.3d 349 (2007). Moreover, a perpetrator who peacefully obtains the stolen property but uses violence during flight commits robbery. *See, State v. Manchester*, 57 Wn. App. 765, 770, 790 P.2d 217 (1990).

A second degree robbery is elevated to first degree robbery, if in the commission of a robbery or of immediate flight therefrom, the defendant is armed with a deadly weapon or displays what appears to be a firearm or other deadly weapon. RCW 9A.56.200(a)(i)(ii).

Washington courts have adopted the “transactional view” of robbery. *State v. Handburgh*, 119 Wn.2d 284, 830 P.2d 641 (1992). As amended,

“[T]he plain language of the robbery statute says the force used may be either to obtain or retain possession of the property. We hold the force necessary to support a robbery conviction need not be used in the initial acquisition of the property. Rather, the retention, via force

against the property owner,⁹ of property initially taken peaceably or outside the presence of the property owner, is robbery.”

State v. Handburgh, 119 Wn.2d at 293.

Contrary to the defendant’s assertion, the trial court did enter a finding of fact that the defendant stole Safeway store merchandise.

The defendant complains the trial court did not enter a written finding of fact specifically stating the defendant unlawfully took store merchandise from the store.

Where no inconsistency exists between the trial court’s oral ruling and the findings of fact, an appellate court may use the trial court's oral ruling to interpret written findings and conclusions. *State v. Moon*, 48 Wn. App. 647, 653, 739 P.2d 1157 (1987), *review denied*, 108 Wn.2d 1029 (1987); *see, State v. Mallory*, 69 Wn.2d 532, 533–34, 419 P.2d 324 (1966) (an appellate court may consider a trial court's oral opinion or memorandum opinion when *interpreting* written findings of fact and conclusions of law but cannot consider them as the basis for the trial court's decision because they have no final or binding effect unless formally incorporated into the written findings) (citations omitted).

⁹ To satisfy the elements of robbery of a business, “[t]he defendant must take the property from the owner or someone who has dominion or control over it.” *State v. Molina*, 83 Wn. App. 144, 147, 920 P.2d 1228 (1996) (footnote omitted). Employees can exercise dominion and control over the property of an employer. *Molina*, 83 Wn. App. at 147–48.

Here, the trial court's oral ruling includes findings on all of the essential elements of first degree robbery. Also, the trial court found in its written findings of fact that the State had proved beyond a reasonable doubt that the defendant stole at least one bottle of liquor from the store based upon the defendant's admitted statements that he went into the store to steal and that he concealed the liquor bottles inside the store with the intent to steal them. Moreover, the trial court found that the defendant put only one of the bottles back onto the shelf while in the store.

During the court's oral ruling with respect to whether the defendant stole store property, it found:

[T]here was testimony that [the defendant] concealed the bottles in his clothing and then left the store. The video does show that he's leaving the store. In his front left pocket, it clearly shows what looks to be a bottle of alcohol similar to the one that he had selected first in the liquor aisle. Both loss prevention officers stated they never saw him put the bottle back, and there was only about two to five seconds where they didn't have him under watch. ”

2RP 31-32.¹⁰

So the Court does find, though, if you look at the video under Plaintiff's Exhibit" P6, which is the blowup of the surveillance shot, there appears to be what would be concealed a bottle, and it matches the bottle in the first frame where you pick up a darker, smaller bottle. The Court does find this element is met.

¹⁰ The second day of proceedings (September 10, 2014) were not transcribed in successive page numbers with the first day of proceedings - they are identified as "2RP."

2RP 32.

So when the Court evaluated the testimony of the witnesses, it's based on their opportunity to observe, the ability of the witnesses to observe accurately, the personal interest the witnesses might have to the outcome of the issues and any bias or prejudice they may have shown and the reasonableness in the context of all the other evidence.

From the video, it's clear Mr. Pleasant had two bottles of alcohol. Even if the video clipped out, it picks you up with a second bottle. The first is the smaller, darker bottle that you have in your hand. However, when you come back through the liquor aisle later, you do put the bigger bottle back.

The Court believes that that was the bigger bottle that he had picked up. The reason why is as Mr. Pleasant testified, he said it wouldn't fit up his sleeve. You already knew security was following you, and you admitted that you couldn't fit that bigger bottle, the lighter bottle, up your sleeve. At that time, the Court believes that the smaller bottle, which is clearly in Exhibit 6, is the same shape in your pocket.

So when the Court looks at circumstantial evidence, it's evidence which the Court can use common sense to infer certain facts.

Looking at the video, seeing that bulge and seeing your reaction and based on the officer's observation of having you under surveillance and only about two to five seconds not in your sight, the Court would have to believe beyond a reasonable doubt that on March 1, 2014, you did commit the crime of first degree robbery....

2RP 34-35.

As stated previously, the trial court did enter written conclusion of law number two which can be viewed as a finding of fact:

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 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.

CP 40.

Opposite to the defendant's claim, the trial court did make a written finding that the defendant took property from the store. Moreover, the trial judge made detailed oral findings and expressly stated in her oral ruling that the defendant concealed a bottle of alcohol and left the store.

The fact that the defendant denied taking any liquor bottles out of the store is inconsequential. With regard to conflicting testimony, this court defers to the trial court. The trial court placed the greater weight of the evidence on the State's witnesses and documentary evidence finding, at least circumstantially, that the defendant stole Safeway store merchandise.

Viewing the evidence and the reasonable inferences in the light most favorable to the State, there was sufficient evidence for the trial court to

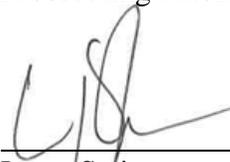
find the defendant guilty beyond a reasonable doubt of robbery in the first degree.

V. CONCLUSION

For the reasons stated above the defendant's conviction for robbery in the first degree and sentence should be affirmed.

Dated this 14th day of September, 2015.

LAWRENCE H. HASKELL
Prosecuting Attorney



Larry Steinmetz #20635
Deputy Prosecuting Attorney
Attorney for Respondent

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CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on September 14, 2015, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Kenneth H. Kato
khkato@comcast.net

9/14/2015

(Date)

Spokane, WA

(Place)

Crystal McNees

(Signature)