

COA No. 33770-7-III

FILED
Dec 05, 2016
Court of Appeals
Division III
State of Washington

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

VENIAMIN GLUSHCHENKO,

Appellant.

BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

1. The State's evidence was insufficient to support the conviction for first degree assault.

2. The court abused its discretion by finding the first degree burglary involving Ugur Erol was not the same criminal conduct as the first degree assault and first degree robbery.

3. The court erred by failing to adequately address the *Blazina* factors before imposing LFOs.

Issues Pertaining to Assignments of Error

A. Was the State's evidence insufficient to prove beyond a reasonable doubt that Veniamin Glushchenko was guilty of first degree assault? (Assignment of Error 1).

B. Did the court abuse its discretion by finding the first degree burglary involving Mr. Erol was not the same criminal conduct as the first degree assault and first degree robbery? (Assignment of Error 2).

C. Did the court err by failing to adequately address the *Blazina* factors before imposing LFOs? (Assignment of Error 3).

II. STATEMENT OF THE CASE

Mr. Glushchenko was charged by amended information with count 1: first degree burglary with a deadly weapon enhancement

involving Mr. Erol; count 2: first degree assault with a deadly weapon enhancement involving Mr. Erol; count 3: residential burglary involving Brenda Eberhart; and count 4: first degree robbery with a deadly weapon enhancement involving Mr. Erol. (CP 102).

On December 3, 2014, Ms. Eberhart was taking a nap in her residence before going to work. (8/11/15 RP 60-61). She worked from 10 p.m. to 6 a.m. (*Id.* at 61). Waking up from her nap to the sound of breaking glass, she went to the kitchen and turned on the light. (*Id.*). Mr. Glushchenko was standing at the kitchen window where the glass was broken out. (*Id.* at 62). He was outside, standing right up against the window. (*Id.*). Mr. Glushchenko was getting into the house, reached to grab Ms. Eberhart, and said, "Give me your money, bitch." (*Id.*). She told him she had no money. (*Id.*). He stood there for a second and she started screaming. (*Id.*). Mr. Glushchenko left. (*Id.*).

The police responded and were just up the street. (8/11/15 RP 63). They showed up about 10 minutes after Mr. Glushchenko took off. (*Id.*). Ms. Eberhart told the police what had happened and gave a description of the perpetrator. (*Id.* at 63-64). After Mr. Glushchenko was found, the police came back to her residence

and asked her if she would know him if she saw him again. She said yes and was taken to where he was. (*Id.* at 64-65). Ms. Eberhart identified Mr. Glushchenko as the person who broke into and was in her house. (*Id.* at 65, 69).

In December 2014, Mr. Erol worked at Hugo's on the South Hill. (8/11/15 RP 71). In his residence on December 3, 2014, he was attacked by an intruder. (*Id.* at 72). Mr. Erol was sleeping when he was woken up. (*Id.* at 72-73). Someone was picking up his laptop on the corner of the coffee table very close to him and his TV was gone. (*Id.* at 73). Next thing he knew, Mr. Glushchenko had two knives and was on the other side of the room about 3' to 4' away. Mr. Glushchenko told him to turn around, but Mr. Erol did not want to have his back to him and was afraid of being stabbed in the kidneys. (*Id.* at 75). Mr. Erol told him to take what he wanted. (*Id.*).

Mr. Glushchenko kept telling him, "Turn around, bitch." (8/11/15 RP 76). Mr. Erol was just trying to get him out of there. (*Id.*). Mr. Glushchenko recognized his Middle Eastern accent. (*Id.*). He swung the knives at Mr. Erol, who eventually realized he was hurt and bleeding. (*Id.* at 77). Mr. Erol was on the couch with Mr. Glushchenko standing above and pinning him to the couch. (*Id.*).

The knives were kitchen knives with serrated edges and were probably Mr. Erol's. (*Id.*).

Stabbed more than twice, Mr. Erol felt his life was in danger. (8/11/15 RP 78). He was hoping to make a break for it. (*Id.*). The intruder said he had three daughters to take care of. (*Id.*). Mr. Erol rushed to the front door and was bleeding from the neck, knee, and shoulder. (*Id.* at 78-79). Mr. Glushchenko took off out the back door. (*Id.* at 78). Mr. Erol went to his neighbor, whom he asked to call 9-1-1. (*Id.* at 79). The police showed up and they realized he was hurt. (*Id.* at 80). He went to Sacred Heart and the police returned. (*Id.*). Mr. Erol picked out Mr. Glushchenko from photos the police showed him. (*Id.* at 81-82). He had a Nokia windows phone that was found by Detective Marty Hill upon Mr. Glushchenko's booking into jail. (*Id.* at 83-84).

Officer John Yen was on duty December 3, 2014, when he was dispatched to 2708 E. 32nd on the south side of Spokane. (8/11/15 RP 97-98). He heard a voice calling for help and saw Mr. Erol holding his neck and bleeding everywhere. (*Id.* at 99). The suspect was not there. (*Id.* at 100-01). Officer Yen was sent to Sacred Heart to show Mr. Erol a photo lineup of possible suspects. (*Id.* at 102). Mr. Erol picked out Mr. Glushchenko. (*Id.* at 105-06).

Corporal Joseph Denton was on duty December 3, 2014. He responded to 2708 E. 32nd around 1653 hours. (8/11/15 RP 112). He took photos of the scene. (*Id.* at 116). Corporal Denton also went to 2728 E. 32nd where there was another incident and he saw a broken-out window. (*Id.* at 120-21).

Dr. Rana Ahmad, a trauma surgeon at Sacred Heart, testified Mr. Erol had multiple lacerations with the two most prominent being at the neck and thigh. (8/11/15 RP 128-31). The neck wound was the most significant injury as it went through the platysma, the last layer of protection in the neck, below which are “very important life-threatening structures.” (*Id.* at 131). Without any treatment, the neck wound was life-threatening. (*Id.* at 132). Doctor Ahmad said the leg wound could be life-threatening as well. (*Id.*). When a neck wound is past the platysma, it is more than a superficial wound. (*Id.* at 135-36). The doctor said Mr. Erol was very lucky. (*Id.* at 135).

Officer Nathan Gobble was on duty December 3, 2014, and responded to a possible burglary. (8/11/15 RP 144-45). Then another call came from 2708 E. 32nd that someone was attacked. (*Id.* at 146). He turned his focus to this call. A male covered in blood was calling for help. (*Id.* at 146-47). His neck was cut open

“pretty significantly.” (*Id.* at 147). The victim gave a physical description of the attacker and noted he had a slight Russian accent. (*Id.*). The medics came and Mr. Erol was still significantly and actively bleeding. (*Id.* at 148). He was taken to the hospital with Officer Gobble following the ambulance. (*Id.* at 149). Mr. Erol gave the officer consent to search his home, where he found two steak knives and a third with the blade broken in half, a TV, and a backpack. (*Id.* at 151).

Officer Paul Buchmann was called out to do a canine track at 2708 E. 32nd. (8/11/15 RP 162). He figured the suspect most likely went west down 32nd and a perimeter was set up. Officer Buchmann started tracking at the suspect’s last known location. (*Id.* at 164-65). His dog picked up the scent and went down 30th to Mt. Vernon. (*Id.* at 165). Other officers already had a possible suspect in custody. (*Id.* at 168).

Lieutenant Rex Olson helped out on the December 3, 2014 call. (8/11/15 RP 173). He went to the Off Regal Bar and saw the suspect hiding between two cars. (*Id.* at 176-77). Lieutenant Olson watched him get up, go across the lot, and approach the back door of the bar. (*Id.* at 177). He stopped and detained the suspect, Mr. Glushchenko. (*Id.*). After handcuffing and putting him on the

ground, the lieutenant saw blood on the back of Mr. Glushchenko's hands. (*Id.* at 179).

Officer Glenn Bartlett was on duty December 3, 2014, when Mr. Glushchenko was arrested. (8/11/15 RP 181). The officer photographed the suspect's hands and believed he saw blood on them. (*Id.* at 181-82). He took four swabs from Mr. Glushchenko. (*Id.* at 184).

Detective Hill was assigned Mr. Glushchenko's case on December 4, 2014. (8/11/15 RP 189-91). He got a search warrant for buccal swabs of blood evidence from Mr. Glushchenko and Mr. Erol. (*Id.* at 192). Swabs were also taken from a big-screen TV that had blood stains on it. (*Id.* at 193). Detective Hill did not recover the laptop, but did find Mr. Erol's phone. (*Id.* at 193-94). Mr. Glushchenko had the phone among his property at the jail. (*Id.* at 194). The phone was a Nokia, the brand of phone taken from Mr. Erol's residence. (*Id.* at 195). Detective Hill testified two of the steak knives had blades 4.5" long and the third had a blade 5" long. (*Id.* at 238).

Brittany Noll was a DNA forensic scientist with the WSP Crime Lab. (8/12/15 RP 222). She testified the DNA on the steak knives matched Mr. Erol on two of them and the other both Mr. Erol

and Mr. Glushchenko. (*Id.* at 227). DNA was also tested from Mr. Glushchenko's sweatpants with two stains matching Mr. Erol, but excluding Mr. Glushchenko; another stain matched both Mr. Erol and Mr. Glushchenko. (*Id.* at 227, 231-32).

The State rested and Mr. Glushchenko presented no witnesses. (8/12/15 RP 240, 241, 243). The defense had no objections or exceptions to the court's jury instructions. (*Id.* at 247).

The jury returned guilty verdicts on count I: first degree burglary; count 2: first degree assault; count 3: residential burglary; and (4) first degree robbery. (CP 184, 185, 187, 188). Deadly weapon verdicts were returned on counts I, II, and IV. (CP 190-92).

Mr. Glushchenko agreed with the understanding of defendant's criminal history. (CP 220). There was also no dispute as to his offender score coming into sentencing. (CP 211). The court determined Mr. Glushchenko's offender score for sentencing purposes was 8 for counts I, II, and IV and 7 for count III. (CP 225). The court also found counts II and IV were the same criminal conduct as well as the deadly weapon enhancements on those counts. (CP 227, 240). Mr. Glushchenko was sentenced to 291 months total confinement, including two deadly weapon enhancements adding 48 months. The court sentenced him to 243

months on count II: first degree assault, with lesser sentences on the other counts running concurrently. (CP 227). An amended judgment and sentence was later entered with the court sentencing Mr. Glushchenko to a concurrent 126 months on count IV: robbery, which merged with the assault, and consecutive to the deadly weapon enhancements. (CP 239-40). LFOs were also assessed. (CP 229, 237). This appeal follows. (CP 295).

III. ARGUMENT

A. The State's evidence was insufficient to support guilt beyond a reasonable doubt for first degree assault.

In a challenge to the sufficiency of the evidence, the test is whether 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).

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). To-convict instruction 13 for the first degree assault of Mr. Erol provided that an essential element of the crime was that “the defendant acted with intent to inflict great bodily harm.” (CP 163). The definition of great bodily harm was given in instruction 14:

Great bodily harm means bodily injury that creates a probability of death, or that causes significant serious permanent disfigurement, or that causes a significant permanent loss or impairment of the function of any bodily part or organ. (CP 164).

The testimony as to the severity of Mr. Erol’s wounds came from Doctor Ahmad. The worst case scenario was that the neck wound and leg wound would have been life-threatening if they had not been treated. (8/11/15 RP 132). They were not life-threatening, however, as they were indeed treated. Initially, the surgeon who actually closed the neck wound felt it was superficial. (*Id.* at 135-36). As it turned out, the neck wound was the most significant injury. (*Id.* at 131).

But there was no testimony elicited by the State that Mr. Erol’s wounds created a probability of death. (CP 164). And there was no testimony that Mr. Erol’s injuries caused significant serious permanent disfigurement or significant

permanent loss or impairment of the function of any bodily part or organ. (*Id.*). With no evidence of “great bodily harm” suffered by Mr. Erol for purposes of first degree assault, Mr. Glushchenko could not then have intended to inflict “great bodily harm.” RCW 9A.36.011(1).

Moreover, a person acts with intent when he acts with the objective or purpose to accomplish a result constituting a crime. RCW 9A.08.010(1)(a). Evidence of intent is gathered from all the circumstances of the case. *State v. Woo Won Choi*, 55 Wn. App. 895, 906, 781 P.2d 505 (1989), *review denied*, 114 Wn.2d 1002 (1990). The intent was to steal things from Mr. Erol and then to escape, not to inflict great bodily harm. The evidence was thus insufficient to support the conviction for first degree assault because the State failed to prove this essential element of the crime. *See State v. Ferreira*, 69 Wn. App. 465, 469-70, 850 P.2d 541 (1993).

B. The court abused its discretion by finding the first degree burglary was not the same criminal conduct as the first degree assault and first degree robbery.

At sentencing, the court determined that the first degree assault and first degree robbery were the same criminal

conduct so there was only one deadly weapon enhancement that would be imposed. (8/27/15 RP 317-18). Thus, there were two deadly weapon enhancements – one for the first degree burglary and one for the same criminal conduct as to the first degree assault and first degree robbery. (*Id.* at 318). The offender score for the first degree burglary, first degree assault, and first degree robbery was 8 and the offender score was 7 for the residential burglary. (CP 225).

With respect to Mr. Glushchenko's offender score coming in, there was no dispute that he was a 4 for the residential burglary and a 5 for the first degree burglary, first degree assault and first degree robbery. (CP 211). He argued that all three offenses were the same criminal conduct under RCW 9A.52.050, *i.e.*, two or more crimes that require the same criminal intent, committed at the same time and place, and involve the same victim. The court agreed that the first degree assault and first degree robbery merged and were the same criminal conduct so they counted as one on his score. (8/27/15 RP 317-18). It did not agree as to the first degree burglary count. (*Id.*). The court did not consider the burglary anti-merger statute, RCW 9A.52.050.

There can be no dispute that all three offenses were committed at the same time and place and involved the same victim, Mr. Erol. The only issue is whether there was the same criminal intent. To make that determination, the court must decide whether the defendant's criminal intent, viewed objectively, changed from one crime to the next. *State v. Grantham*, 84 Wn. App. 854, 858, 932 P.2d 657 (1997). The standard focuses on whether the defendant's objective intent remained the same for multiple offenses. *State v. Dunaway*, 109 Wn.2d 207, 214-15, 743 P.2d 1237, 749 P.2d 160 (1988). Intent does not mean a particular mens rea element of a crime, but rather means the offender's objective purpose in committing the crimes. *In re Pers. Restraint of Holmes*, 69 Wn. App. 282, 290, 848 P.2d 754 (1993), *overruled on other grounds by State v. Calle*, 125 Wn.2d 769, 888 P.2d 155 (1995). The inquiry rests on whether one crime furthered another. *State v. Lessley*, 118 Wn.2d 773, 778, 827 P.2d 996 (1992).

The testimony at trial, even when viewed in a light most favorable to the State, clearly showed that Mr. Glushchenko's objective purpose in committing the crimes did not change

from one to another and each crime did in fact further another. *In re Pers. Restraint of Holmes*, 69 Wn. App. at 290; *Lessley*, 118 Wn.2d at 778. There was no break in time from the initial burglary to the assault to the robbery. In fact, the burglary was ongoing as Mr. Erol awoke to see Mr. Glushchenko taking his laptop. The intent was to acquire Mr. Erol's property and that intent did not change as the incident was ongoing and escalated into a robbery and assault with his own knives in an attempt to control him. This is the same criminal conduct and the three offenses count as one. RCW 9.94A.589. In these circumstances, the court misapplied the law and thus erred by determining the first degree burglary counted as a separate offense from the robbery and assault. *State v. Tili*, 139 Wn.2d 107, 122, 985 P.2d 365 (1999). Accordingly, the case should be remanded for resentencing.

C. The court erred by failing to adequately address the *Blazina* factors before imposing LFOs.

The court imposed \$800 of LFOs and \$4848.60 in restitution. (8/27/15 RP 321; CP 229, 237). But the court made no individualized inquiry as to Mr. Glushchenko's current and future ability to pay or any of the other factors required by *State v.*

Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015). The remedy is remand for a new sentencing for consideration of these factors as to Mr. Glushchenko's ability to pay.

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Glushchenko respectfully urges this court to reverse his conviction for first degree assault with a deadly weapon and dismiss the charge and remand for resentencing.

DATED this 5th day of December, 2016.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on December 5, 2016, I served a copy of the Brief of Appellant by USPS on Veniamin Glushchenko, # 346348, 1830 Eagle Crest Way, Clallam Bay, WA 98326; and by email, as agreed, on Brian O'Brien at scpaappeals@spokanecounty.org.
