

FILED
Oct 18, 2016
Court of Appeals
Division III
State of Washington

NO. 34055-4-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

JUSTIN R. GRAHAM,

Appellant.

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

The Honorable James Triplet, Judge

BRIEF OF APPELLANT

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ASSIGNMENTS OF ERROR

1. The evidence was insufficient to prove Justin Graham committed the crime of intimidating a witness.
2. The trial court erred in entering Finding of Fact 8 that there was sufficient evidence that “another motivation [of Justin Graham] was to attempt to influence Mr. Maupin’s testimony in the assault case.”
3. The trial court erred in entering judgment against Mr. Graham.
4. If the State substantially prevails on appeal, any request for appellate costs should be denied.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Don Maupin told the police he saw Justin Graham assault April Fagan. After being charged with the assault and while being held in jail, Justin told his brother Brandon Graham he knew Maupin and Maupin’s girlfriend were witnesses against him and needed “to have their faces smashed in.” Brandon subsequently struck Maupin in the face with brass knuckles. Do these facts provide sufficient proof to sustain the trial court’s bench trial finding that Justin Graham was guilty of intimidating a witness by using a threat to attempt to influence Maupin’s testimony?
2. Whether Justin Graham should have to pay appellate costs if he does not substantially prevail on appeal and the state requests costs?

STATEMENT OF THE CASE

Procedural History

The Spokane County prosecutor charged Justin Graham with a single count of intimidating a witness in that he used a threat against Don Maupin, a current or prospective witness, to attempt to influence Maupin's testimony. CP 1. RCW 9A.72.110(1)(a). Justin¹ waived his right to a jury. CP 2; RPI² 5-7. The court found Justin Graham guilty as charged and sentenced him within his standard range. RP III 465; CP 22-23.

The trial court, in finding Justin guilty, made a lengthy oral ruling. RP III 453-65. In essence, the judge read into the record all of its trial notes. *Id.* The ruling was transcribed, blocked into numbered paragraphs, divided into Findings of Fact and Conclusions of Law, and filed as 17 single-spaced pages of Findings of Fact and Conclusions of Law on the court's verdict. See Supplemental Designation of Clerk's Papers;³ RP IV 521-30.

Court-appointed counsel represented Mr. Graham. Supplemental Clerk's Index, Notice of Appearance (sub. nom. 11). The court found Mr.

¹ Justin Graham is commonly referred to as only "Justin." The use of his first name is meant for clarification and to distinguish him from his brother Brandon Graham. No disrespect is intended.

² "RP I" refers to volume I of the verbatim report of proceedings. There are 4 volumes of verbatim for this appeal and they are all similarly cited in the record.

³ Clerk's Index for Supplemental Designation of Clerk's Papers due October 21, 2016

Graham indigent for purposes of his appeal. Supp. DCP Motion for Indigency (sub. nom. 31) and Order of Indigency (sub. nom. 33).

Trial Testimony

Justin Graham and his girlfriend, Amy Fagan, lived with Fagan's mother, Momma Dee, at Spokane's notorious West Sinto apartments. RP I 73. Calls for service brought officers to the apartments frequently. RP I 59. RP II 242. Complex residents were reluctant to talk to the police or provide information about their neighbors. RP I 62.

Donald "Don" Maupin thought of Amy Fagan as a "little sister." RP I 133. He knew Justin merely as an acquaintance. RP I 133.

Maupin lived at the complex with his girlfriend, Tekeisha Horn. RP I 133-34. Horn believed Fagan's relationship with Justin deteriorated over time and that they just spent a lot of time yelling and arguing. RP I 74. Horn called the police on September 28, 2015, after seeing Justin "choke" Fagan on an upstairs balcony. RP I 86, 134. Maupin and another unidentified man tried to confront Justin afterwards but Justin remained behind a closed door and did not respond. RP I 160-61.

Nine Spokane police officers responded to Horn's 911 call. RP II 305. It took the police about an hour to locate Justin and Fagan at the apartment complex. RP II 290-91. Using information provided by Maupin and Horn, the police arrested Justin for misdemeanor assault and took him

into custody and ultimately to the Spokane jail. Justin was also booked on a Department of Corrections (DOC) warrant. RP II 297.

Justin's younger brother, Brandon Graham, arrived at the apartments after Justin was under arrest but before police took him to jail. RP I 140. Maupin and Horn were standing nearby as the police took Justin to a police car. RP I 141. As Justin walked past, he told Brandon, "It was them that told on me." RP I 97. This made Horn fearful for her safety. RP I 98. Maupin testified Graham said "you're dead" to him as he passed by under police escort. RP I 141.

Detective Nick Geren was assigned to listen to recorded jail phone calls and search conversations for violations of no contact orders. RP 1 199. Because the court had issued a domestic violence no contact order between Justin and Amy Fagan, he researched and listened for calls between Justin and Fagan in violation of the court order. RP 1 200. He found several such calls. RP II 204-11. Most notable were calls on July 2 and 16. RP II 211; Supp. DCP, Exhibits D103 and D104 (transcripts from phone calls). During the July 2 call, Justin spoke to both Fagan and Brandon. He said,

Well, I just talked to DOC today, and I got – I got 20 days violation; that's it. But I'm trying to figure out what's up on the – on the DV assault charge because fuckin', uh fuckin' Don and his girlfriend, fuckin' are – are my witnesses, our witness saying that

they are fuckin' – that I, uh, they – they said all kinds of shit on my shit dude. They need to get their faces smashed in, both them.

Supp. DCP, Ex. D103. (See Finding and Conclusion on the Verdict, Finding of Fact 27.)

After Justin's arrest for assaulting Fagan, Maupin had had several encounters with Brandon. Once, Brandon drove rapidly up to a group of people including Maupin and just missed hitting the group. Brandon got out of the car wearing brass knuckles and took a swing at Maupin but missed. RP I 145-46. On July 9, Maupin was again outside hanging out with friends at the apartments when Brandon drove up and confronted Chris, an older man known to Maupin. RP I 6. Brandon again wore brass knuckles. When Maupin intervened, Brandon turned on him and with the brass knuckles, inflicted a cut above Maupin's eye. RP 147-49.

Maupin went to the hospital for treatment. RP I 109. A few stitches closed the wound. RP I 151. Spokane Police Officer Beau Brannan spoke to Maupin at the hospital. RP I 57. Thereafter, both Justin and Brandon Graham were charged with intimidating a witness. CP 1.

ARGUMENT

1. **The evidence failed to prove Justin Graham attempted to influence Don Maupin's testimony.**

a. The state is burdened with proving a criminal charge beyond a reasonable doubt.

The due process clauses of the federal and state constitutions require that the government prove every element of a crime beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 476-77, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); U.S. Const. amend. XIV; Wash. Const. art. I, § 3. “[T]he critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be ... to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 318, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). “[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson*, 443 U.S. at 319. “The purpose of this standard of review is to ensure that the trial court fact finder ‘rationally appl[ied]’ the constitutional standard required by the due process clause of the Fourteenth Amendment, which allows for conviction of a criminal offense only upon proof beyond a reasonable doubt.” *State v. Rattana Keo*

Phuong, 174 Wn. App. 494, 502, 299 P.3d 37 (2013) (alteration in original) (*quoting Jackson*, 443 U.S. at 317–18), *review denied*, 182 Wn.2d. 1022 (2015).

This standard of review is also designed to ensure the fact finder at trial reached the “subjective state of near certitude of the guilt of the accused,” as required by the Fourteenth Amendment's proof beyond a reasonable doubt standard. *Jackson*, 443 U.S. at 315. “A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.” *State v. Salinas*, 119 Wn.2d. 192, 201, 829 P.2d 1068 (1992). Circumstantial evidence and direct evidence carry equal weight when reviewed by an appellate court. *State v. Goodman*, 150 Wn.2d 774, 781, 83 P.3d 410 (2004). The appellate court defers to the fact finder on issues of conflicting testimony, witness credibility, and persuasiveness of the evidence. *State v. Kohonen*, 192 Wn. App. 567, 573–74, 370 P.3d 16 (2016); *State v. Rodriguez*, 187 Wn. App. 922, 930, 352 P.3d 200, *review denied*, 184 Wn.2d 1011 (2015).

b. The State failed in its burden to prove each element of intimidating a witness.

As charged, Justin Graham could only be convicted if the state proved that between July 2 and July 9, 2015, by use of a threat against Don Maupin, a current or prospective witness, Justin attempted to

influence the testimony of Maupin. RCW 9A.72.110(1)(a). But no evidence established that Justin attempted to influence the testimony of Maupin.

In the July 2 phone call, Justin expressed anger at Maupin and Horn and wanted their faces “smashed in” because he was mad they talked to the police about his assault on Fagan. Justin said nothing in the call suggesting he was attempting to influence Maupin’s testimony. The court, in both its oral ruling and its findings and conclusions in support of the verdict, offers no facts to support the threat was directed at influencing testimony. Indeed, no facts support the allegation.

The purpose of findings of fact and conclusions of law is to aid an appellate court on review. *State v. Agee*, 89 Wn.2d 416, 573 P.2d 355 (1977). The court of appeals reviews these findings under the substantial evidence rule. *State v. Nelson*, 89 Wn. App. 179, 948 P.2d 1314 (1997). Under the substantial evidence rule, the reviewing court will sustain the trier of facts’ finding “if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise.” *State v. Ford*, 110 Wn.2d 827, 755 P.2d 806 (1988). In making this determination, the reviewing court will not revisit issues of credibility, which lie within the unique province of the trier of fact. *Id.* Findings of fact are considered verities on appeal absent a specific

assignment of error. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994).

In addition, the placement of a finding of fact in the section marked “Conclusions of Law,” or the placement of a conclusion of law in a section marked “Findings of Fact,” is not dispositive on which standard of review applies to an assignment of error to that “finding” or “conclusion.” *State v. Hutsell*, 120 Wn.2d 913, 845 P.2d 1325 (1993). Rather, if the term or phrase describes factual issues or determines credibility between two witnesses, it is a finding of fact and will be reviewed under the substantial evidence rule even if it included in a section marked “Conclusion of Law.” *Id.* By the same token, a term of phrase carrying legal implication is a conclusion of law and will be review de novo even if included in a section marked “Findings of Fact.” *Willener v. Sweeting*, 107 Wn.2d 388, 394, 730 P.2d 45 (1986).

Two cases of intimidating a witness with more substantial factual records have been reversed on appeal for insufficient evidence.

In *State v. Brown*, 162 Wn. 2d. 422, 173 P.3d 245 (2007), the defendant was charged with burglary and intimidation of a witness for having attempted to influence the witness’s testimony. *Id.* at 430. Melissa Hill lived with Brown. After the burglary, she heard Brown talk in detail about having committed the burglary. The intimidation charge was based

on Brown having told Hill she “would pay” if she talked to the police about the burglary. On appeal, the court reversed the intimidation charge for insufficient evidence finding, at most, the threat was an attempt to prevent Hill from providing information to the police rather than an attempt to influence Hill’s testimony as required by the charging document. *Id.* at 430.

In State v Jensen, 57 Wn. App. 501, 789 P.2d 772 (1990), the court similarly reversed an intimidating a witness conviction for insufficient facts. Jensen became enraged after receiving notice in the mail of being charged with burglary for unlawful entry into his parents’ home. Jensen got worked up and offered his mother \$150 if she would “drop the charge or make it a lesser charge.” *Id.* at 509. When she declined his request, he threatened to tear up the house and steal anything of value. *Id.* The state charged Jensen with intimidating a witness by using a threat to induce his mother to absent herself from official proceedings on the pending burglary. On appeal, the court found in viewing the evidence in the light most favorable to the state, the evidence failed to prove Jensen’s intent that his mother absent herself from any such proceedings. Rather, the evidence reflected a layperson’s perception that a complaining witness can cause a prosecution to be discontinued. *Id.* at 510.

In both *Brown* and *Jensen*, the appellate courts dismissed witness intimidation convictions for lack of sufficient evidence even though the records contained some factual basis on which the trial court relied to find a basis for conviction. Under our facts, the trial court merely finds by a bald assertion unsupported by any stated fact that “another motivation was to attempt to influence Mr. Maupin’s testimony in the assault case.” Conclusion of Law 8. Just as in *Brown* and *Jensen*, the evidence is insufficient to support the intimidation conviction against accused Justin Graham.

c. The intimidating a witness conviction must be reversed and dismissed.

When evidence is insufficient, reversal and dismissal of the prosecution is required. *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998). The prohibition against double jeopardy forbids retrial after a conviction is reversed for insufficient evidence. *State v. Anderson*, 96 Wn.2d 739, 742, 638 P.2d 1205 (1982).

2. If the State substantially prevails on appeal, any request for appellate costs should be denied.

If Mr. Graham does not prevail on appeal, he requests that no costs of appeal be authorized under Title 14 of the Rules of Appellate Procedure. The Court of Appeals has discretion to deny a cost bill even where the State is the substantially prevailing party on appeal. *State v.*

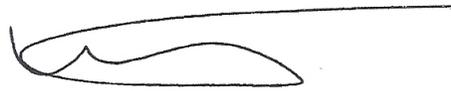
Sinclair, 192 Wn. App. 380, 391, 367 P.3d 612, *review denied*, 185 Wn.2d 1034 (2016); RCW 10.73.160(1) (the “court of appeals . . . may require an adult . . . to pay appellate costs.”). Imposing costs against indigent defendants raises problems well documented in *Blazina*: “increased difficulty in reentering society, the doubtful recoupment of money by the government, and inequities in administration.” *State v. Blazina*, 182 Wn.2d 827, 835, 344 P.3d 680 (2015). *Sinclair* recognized the concerns expressed in *Blazina* applied to appellate costs and it is appropriate for appellate courts to be mindful of them in exercising discretion. *Sinclair*, 192 Wn. App. at 391.

The trial court found Justin qualified for indigent defense on appeal. Supp. DCP, Motion for Indigency and Order of Indigency. Importantly, there is a presumption of continued indigency through the review process. *Sinclair*, 192 Wn. App. at 393; RAP 15.2(f). As in *Sinclair*, there is no trial court order finding Justin’s financial condition has improved or is likely to improve. *Sinclair*, 192 Wn. App. at 393. Given the serious concerns recognized in *Blazina* and *Sinclair*, this court should soundly exercise its discretion by denying the State’s request for appellate costs in this appeal involving an indigent appellant.

CONCLUSION

Justin Graham's intimidating a witness conviction should be remanded for dismissal with prejudice. Alternatively, this court should not impose any appellate costs on Justin if the State substantially prevails on appeal.

Respectfully submitted October 18, 2016.



LISA E. TABBUT/WSBA 21344
Attorney for Justin R. Graham

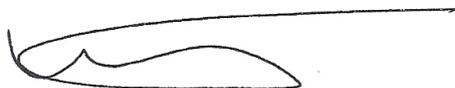
CERTIFICATE OF SERVICE

Lisa E. Tabbut declares as follows:

On today's date, I efiled the Brief of Appellant to (1) Spokane County Prosecutor's Office, at SCPAappeals@spokanecounty.org; (2) the Court of Appeals, Division III; and (3) I mailed it to Justin R. Graham, 1108 N. Hamilton, Spokane, WA 99207

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed October 18, 2016, in Winthrop, Washington.



Lisa E. Tabbut, WSBA No. 21344
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