

COA No. 34231-0-III

FILED
NOV 01, 2016
Court of Appeals
Division III
State of Washington

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DENNY ALBERT DARE,

Appellant.

BRIEF OF APPELLANT

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TABLE OF CONTENTS

I. ASSIGNMENT OF ERROR.....1

 1. The State’s evidence was insufficient to support
 Denny Dare’s conviction of residential burglary.....1

Issues Pertaining to Assignments of Error

 A. Was the State’s evidence insufficient to prove Mr.
 Dare guilty beyond a reasonable doubt of residential
 burglary? (Assignment of Error).....1

II. STATEMENT OF THE CASE.....1

III. ARGUMENT.....4

 A. The State’s evidence was insufficient to support
 guilt beyond a reasonable doubt.....4

IV. CONCLUSION.....8

TABLE OF AUTHORITIES

Table of Cases

In re Winship, 397 U.S. 358, 90 S. Ct. 1068,
25 L. Ed.2d 368 (1970).....4, 6

State v. Cantu, 156 Wn.2d 819, 132 P.3d 725 (2006).....7

State v. Devitt, 152 Wn. App. 907, 218 P.3d 647 (2009).....8

State v. Drum, 168 Wn.2d 23, 225 P.3d 237 (2010).....4

State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980).....4, 7

State v. Hutton, 7 Wn. App. 726, 502 P.3d 1037 (1972).....4, 5, 8

I. ASSIGNMENT OF ERROR

1. The State's evidence was insufficient to support Denny Dare's conviction of residential burglary.

Issue Pertaining to Assignment of Error

A. Was the State's evidence insufficient to prove Mr. Dare guilty beyond a reasonable doubt of residential burglary?

(Assignment of Error 1).

II. STATEMENT OF THE CASE

Mr. Dare was charged with count 1: residential burglary, count 2: felony harassment – threats to kill, and count 3: fourth degree assault. (CP 142). In a stipulation to waive a 3.5 hearing, he acknowledged that statements he made, as reflected in police reports, were admissible. (CP 122). The case proceeded to jury trial.

Mr. Dare loaned \$90 to Denise Johnson, an acquaintance of some 20 years. (3/1/16 RP 90, 94, 95, 106). She borrowed the money on September 12, 2014, and was supposed to pay it back the next day. (*Id.* at 95). On September 13, Ms. Johnson was sitting in her apartment when she heard Mr. Dare screaming and hollering as he pushed her door open, coming in through the sun

porch screen door. (*Id.* at 95-96). He did not knock, but just came right in. (*Id.*).

She got up, met him at the doorway, and told Mr. Dare to calm down. (3/1/16 RP 96). He was mad about the \$90 not being paid back and went “ballistic.” (*Id.* at 96-97). Ms. Johnson said he picked up a laundry basket of clothes and threw it all over. (*Id.* at 97). She said she was going to be evicted because of this. (*Id.*). Ms. Johnson testified she was pushed and fell down while her upstairs neighbor was there. (*Id.* at 98). She asked Mr. Dare to leave at least five times, but he did not leave right away. (*Id.* at 99). She said he threatened to kill her and her cat. (*Id.* at 97, 100). The police came. (*Id.* at 98).

Joe Collom, the neighbor, heard arguing below and went down to check on things. (3/1/16 RP 111-12). Ms. Johnson’s door was propped open. (*Id.*). He saw Mr. Dare yelling in her apartment. (*Id.* at 112-13). The neighbor testified Mr. Dare was angry and threatening. (*Id.* at 114). He wanted his money back. (*Id.* at 115). Ms. Johnson asked Mr. Dare to leave more than once and he eventually left after 15-20 minutes. (*Id.* at 115-17).

Mr. Dare testified in his own defense. He knew Ms. Johnson from his drinking days. (3/21/16 RP 121). He loaned her \$90 in

September 2014. (*Id.* at 122). Mr. Dare wanted to just get \$20 back from Ms. Johnson so he could get some cans of paint to do the undercarriage of his car. (*Id.* at 122-23). He was upset because she did not even have the \$20. (*Id.* at 123). He had knocked on her apartment door and went in at her invitation. (*Id.* at 123, 131). Ms. Johnson was drinking and she did not have the money. (*Id.* at 123). They got into an argument. (*Id.* at 124). Mr. Dare told Mr. Collom to stay out of it as it was none of his business. (*Id.* at 125).

On cross examination, Mr. Dare said he loaned \$90 to Ms. Johnson to buy an ounce of marijuana. (3/1/6 RP 126). She came to his house on Saturday morning, September 13, to pick up the money. (*Id.* at 128). That afternoon, he went to her apartment to get it back. (*Id.*). Mr. Dare gave her until noon Sunday to pay him \$20 for the car paint. (*Id.*). She invited him into her apartment, where she was at a table drinking. (*Id.* at 131). In their argument, Mr. Dare told her he ought to strangle her and her cat. (*Id.* at 124). That is what he said and that was it. (*Id.*).

There were no objections or exceptions to the jury instructions. (3/21/16 RP 139-40). The jury found Mr. Dare guilty of count 1: residential burglary, but acquitted him of count 2: felony

harassment – threats to kill and count 3: fourth degree assault. (*Id.* at 159; CP 59-61). The court sentenced him to four months on electronic home monitoring. (3/23/16 RP 176-77; CP 23). This appeal follows. (CP 9).

III. ARGUMENT

A. The State’s evidence was insufficient to support guilt beyond a reasonable doubt.

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).

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

6 for the residential burglary charge stated:

To convict the defendant of the crime of residential burglary, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about 13th day of September, 2014, the defendant entered or remained unlawfully in a dwelling;

(2) That the entering or remaining was with intent to commit a crime against a person or property therein;

(3) That this act occurred in the Okanogan County, State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty. (CP 42).

Instruction 8 defined the crime of residential burglary:

A person commits the crime of residential burglary when he or she enters or remains unlawfully in a building with intent to commit a crime against a person or property therein. (CP 41).

Although the testimony was conflicting as to whether Mr. Dare entered or remained unlawfully in Ms. Johnson's apartment, the jury made the determination on credibility and it

will not be disturbed on appeal. *Hutton, supra*. What is at issue, however, is whether the second element requiring an intent to commit a crime against a person or property therein was proven beyond a reasonable doubt. *Winship, supra*. It was not.

As reflected in its closing argument, the State relied on the threat to kill as satisfying the “intent to crime against a person.” The Stated argued:

What did [Mr. Dare] intend to do? That’s an element if you look at jury instruction number seven. It’s element number two. He intended to commit a crime.

Well, what do we have? He loaned her money. She said she would pay him back. She hadn’t paid him back apparently by the time he thought that she had agreed to, he thought they had agreed to. So, he went over there. Why did he go over? To get twenty dollars? No. The State submits there was more to it than that and again, you need to think about what you saw in the courtroom, what you saw when the witnesses testified, not only the words they said, but their demeanors, their actions, and that sort of thing.

He went over there to threaten her if she didn’t pay him. That’s the State’s contention. He went over there to put the fear of God in her for not paying him back like he thought they had agreed.

That constitutes a crime. Especially when you threaten to kill a person and we will get to that

in a minute. Therefore, the State believes that the elements for residential burglary are met in this case and we're asking that you return a verdict of guilty on that charge. (3/1/16 RP 143-44).

The State further confirmed in argument that the crime it was relying on was the harassment:

From the State's perspective, Mr. Dare has committed three crimes. He committed residential burglary by entering her residence with the intent to harass her and intimidate her. (3/1/16 RP at 146).

But the jury acquitted Mr. Dare of felony harassment – threats to kill and fourth degree assault. He testified he simply wanted to get the money he had loaned to Ms. Johnson. (3/21/16 RP 123, 128). That is no crime and he had no intent to commit one. The acquittals serve to underscore that critical point. See *State v. Cantu*, 156 Wn.2d 819, 828, 132 P.3d 725 (2006). Because Mr. Dare had no intent and was found not guilty of the very crime the State relied on to satisfy the “intent to commit a crime” element for residential burglary, it did not prove his guilt of that offense beyond a reasonable doubt. *Green, supra*. Indeed, he did not intend to commit a crime by going into her, but rather tried to collect on a loan she admittedly asked for and agreed to pay back.

Moreover, the State presented no evidence of any other crime to satisfy the essential element of “intent to commit a crime.” In the absence of such evidence, the jury necessarily had to resort to guess, speculation, or conjecture to find the crime he intended to commit. The jury cannot do so. *Hutton*, 7 Wn. App. at 728.

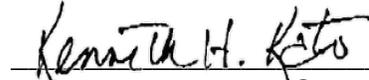
In these circumstances, the State failed to prove an essential element of the crime of residential burglary. *State v. Devitt*, 152 Wn. App. 907, 912-13, 218 P.3d 647 (2009). The evidence was thus insufficient to prove Mr. Dare’s guilt beyond a reasonable doubt, so the charge must be dismissed. *Id.*

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Dare respectfully urges this Court to reverse his conviction and dismiss the charge.

DATED this day of November, 2016.

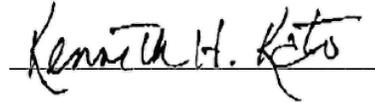
Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that on November 1, 2016, I served a copy of the Brief of Appellant by USPS on Denny Dare, 319 Whitcomb Ave., Tonasket, WA 98855; and by email, as agreed, on Joe Caldwell at jcaldwell@co.okanogan.wa.us.

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