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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 35547-1-III

STATE OF WASHINGTON, Respondent,

v.

NORMAN JAMES BESSETT, Appellant.

APPELLANT'S BRIEF

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I. INTRODUCTION

Norman Bessett resided in Cindy McClure's home for nine months. When their relationship soured, McClure asked him to leave. Bessett began staying in another location, but all of his property remained in McClure's house and garage. About a month after Bessett left, McClure came home from work to find him inside her home. He attempted to hug her and to reconcile with her, but she refused his advances and claimed he threw her onto the bed and pressed her face hard to the side, hurting her. McClure eventually went to a neighbor's house and told her Bessett was attempting to commit suicide in her garage. The neighbor called police, who found Bessett unconscious in the master bathroom, where he had cut both wrists, his elbow, and his neck in a nearly successful attempt to end his life.

The State tried Bessett to the court on charges of first degree burglary, unlawful imprisonment, and fourth degree assault, and the court convicted him as charged. On appeal, Bessett contends the evidence was insufficient to support the conviction for first degree burglary because the State failed to prove Bessett remained in the home with intent to commit a crime, and that substantial evidence does not support the trial court's finding that Bessett remained in the home intending to unlawfully restrain McClure.

II. ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR NO. 1: Insufficient evidence supports the conviction for first degree burglary.

ASSIGNMENT OF ERROR NO. 2: Finding of fact no. 8 is unsupported by substantial evidence.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

ISSUE NO. 1: When the evidence tended to show that Bessett entered the residence where he lived with his former girlfriend until a month earlier and remained there to try to reconcile with her, is there sufficient proof that he intended to commit a crime inside?

ISSUE NO. 2: When Bessett's former girlfriend did not tell him to leave or to stop touching her when Bessett held her during a conversation about reconciling, but only made oblique references to her nurse calling the police when she arrived because Bessett was not supposed to be there, was the evidence sufficient to persuade a fair-minded, rational person that Bessett intended to unlawfully restrain her?

IV. STATEMENT OF THE CASE

Norman Bessett and Cindy McClure had known each other 40 years earlier in high school when their paths crossed again in March 2016.

I RP (Trial)¹ 97-99, 185, 190. Their relationship quickly became romantic, and within a few weeks, they decided to marry and Bessett began moving into McClure's home. I RP (Trial) 99-100, 190. Unfortunately, the relationship broke down, and by December, McClure asked Bessett to leave. I RP (Trial) 109, 191.

Bessett had moved a great quantity of personal items to McClure's home, including some furniture items in the home, some possessions in the garage, and two large tarped areas outside. I RP (Trial) 69, 100. Bessett moved out on January 1, but his possessions remained there. I RP (Trial) 114-15. McClure told him he could come into the garage to get the stuff out as he needed to, but he was not welcome in the house. I RP (Trial) 115-16. She also changed the locks to the house after Bessett moved out. I RP (Trial) 117.

¹ The Verbatim Reports of Proceeding in this case consist of the following: Two consecutively paginated volumes of trial proceedings prepared by court reporter Charlene Beck; one volume of sentencing proceedings prepared by court reporter Tom Bartunek; and one volume of restitution hearing proceedings prepared by transcriptionist Ken Beck. For clarity, the two volumes containing trial proceedings shall be referenced by volume number and (Trial), followed by the page number; the single volume of sentencing proceedings shall be referenced as (Sentencing). The restitution proceedings are not referenced in this brief.

After that point, Bessett and McClure communicated only through text or messaging. I RP (Trial) 194. McClure saw Bessett at the house on occasion afterward, but he was always in the garage. I RP (Trial) 117-18.

On February 8, McClure left early for work. I RP (Trial) 120. She was expecting the housekeeper to come, so she left the front door unlocked. I RP (Trial) 119. Due to inclement weather, she left work early and arrived home earlier than usual. I RP (Trial) 121-22. She parked in the garage, unlocked the door into the house, went into her room to change clothes, and saw Bessett standing in her closet. I RP (Trial) 123-24. He burst out, knocking over some boxes as he did so, and grabbed her, saying he just wanted a hug and a kiss. I RP (Trial) 124-26.

Over the course of the next two and a half hours or so, Bessett continued to hold McClure while he told her he just wanted to work things out and talked about going to counseling. I RP (Trial) 127-29. McClure did not ask him to leave, but she described Bessett tightening his arms around her when she tried to wiggle loose and telling Bessett untruthfully that her nurse was coming, in the hope that he would leave. I RP (Trial) 129-30. At one point, McClure said that Bessett threw her onto her bed on her back and turning her head, pushed it into the bed. I RP (Trial) 133. This hurt and scared her. I RP (Trial) 134.

At some point, Bessett said he had enough and stepped away, allowing her to get up. I RP (Trial) 137. McClure then walked into the kitchen and retrieved her cell phone. I RP (Trial) 138. Bessett said something McClure did not understand and walked into the garage. I RP (Trial) 139. Following him, she asked him what he said. I RP (Trial) 139. Bessett said that it just didn't matter anymore. I RP (Trial) 139-40.

McClure then came back into the house, grabbed her purse, and ran across the street to her neighbor's house. I RP (Trial) 140. She told the neighbor that Bessett was in her garage trying to commit suicide, and the neighbor called the police. I RP (Trial) 142. On arrival, police found Bessett in McClure's bathroom leaning up against a tub that held bloody water. I RP (Trial) 34-36, 43-44. They retrieved two knives from the bathroom counter. I RP (Trial) 53. Bessett was not responsive and was transported to the hospital, where he recovered. I RP (Trial) 60.

The State charged Bessett with first degree burglary, unlawful imprisonment, and fourth degree assault, all domestic violence offenses, and the case proceeded to a bench trial. CP 1, 9. Testifying on his own behalf, Bessett said that on February 8, he had been applying for a job that required a resume and he went to McClure's house to retrieve his resumes. I RP (Trial) 198. He found the resumes quickly and did not initially

intend to stay long, but decided to use the time to box and sort his things in preparation to move them. I RP (Trial) 201-02. He was expecting to receive a check on February 15 that would permit him to rent a storage unit for his things. I RP (Trial) 192-93. Toward the end of the day, he came into the house because he believed he might have left some clothes in the closets. I RP (Trial) 202. Beginning in the spare bedroom, where he laid his coat and the envelope containing his resumes on the bed, he began checking the closets. I RP (Trial) 203. He was in the master closet when McClure came home unexpectedly. I RP (Trial) 203, II RP (Trial) 209.

Bessett reported that he came out of the closet and said hello, and McClure was surprised, but not unpleasantly, to see him. II RP (Trial) 211. She accepted a hug from him but refused a kiss, and they sat on the bed and talked for a long time about reconciliation and going to counseling. II RP (Trial) 212. Eventually he followed her into the kitchen and when McClure took out her cell phone, he asked who she was calling. McClure said first his mother and then the police because he was going to tell them he assaulted her. II RP (Trial) 215. Devastated, Bessett retrieved a utility knife from the garage and attempted to cut his wrists, but the knife was too dull so he took a bread knife from the kitchen. II RP (Trial) 216-17. He then went into the bathroom, filled the tub partially

with water, and cut both his wrists, the left side of his neck and inside of his left elbow. II RP (Trial) 217-18.

The trial court found Bessett guilty of all three charges and entered findings of fact and conclusions of law supporting its decision. II RP (Trial) 292-93, CP 37-42. Generally finding McClure to be more credible than Bassett, the trial court found that Bessett remained in the house with the intent to forcibly restrain McClure. CP 41-42. Calculating Bessett's offender score as "0," the court imposed the high end term of 20 months' incarceration. RP (Sentencing) 80-81; CP 96. Bessett appeals, and has been found indigent for that purpose. CP 114, 118.

V. ARGUMENT

On appeal, Bessett contends that insufficient evidence supports his conviction for first degree burglary. Following a bench trial, the reviewing court evaluates whether substantial evidence supports the trial court's factual findings. *State v. Mewes*, 84 Wn. App. 620, 622, 929 P.2d 505 (1997). Evidence is "substantial" when it is sufficient to convince a rational, fair-minded person of the truth of the finding. *Blackburn v. State*, 186 Wn.2d 250, 256, 375 P.3d 1076 (2016). So long as substantial evidence supports the finding, the reviewing court does not substitute its judgment for the trial court's, even if it would have resolved the factual

dispute differently. *Id.* Unchallenged findings are verities on appeal. *State v. Carlson*, 143 Wn. App. 507, 519, 178 P.3d 371, *review denied*, 164 Wn.2d 1026 (2008). If the findings are adequately supported in the record, or are unchallenged, then the court evaluates whether the findings support the trial court's conclusions of law. *Id.*

The findings and conclusions must set forth each element of the crime separately, and each conclusion of law must be supported by a factual basis, expressly indicating that the element has been proven. *State v. Banks*, 149 Wn.2d 38, 43, 65 P.3d 1198 (2003). However, insufficient findings and conclusions are reviewed for harmless error. *Id.* An error is harmless if it appears beyond a reasonable doubt that the error did not contribute to the verdict. *State v. Brown*, 147 Wn.2d 330, 641, 58 P.3d 889 (2002) (*quoting Neder v. U.S.*, 527 U.S. 1, 15, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)).

The Due Process clause prohibits a conviction without proof of all essential elements of a charged crime beyond a reasonable doubt. U.S. Const. Amend. XIV, § 1; *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L.Ed.2d 368 (1970). If the State fails to present sufficient evidence to support a conviction at trial, double jeopardy prohibits retrial. *Burks v. U.S.*, 437 U.S. 1, 11, 98 S. Ct. 2141, 57 L.Ed.2d 1 (1978).

In a challenge to the sufficiency of the evidence, the reviewing court considers all of the evidence in the light most favorable to the State and determines whether any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Roth*, 131 Wn. App. 556, 561, 128 P.3d 114 (2006). Circumstantial evidence is as reliable as direct evidence and the reviewing court defers to the trier of fact on questions of credibility, resolving conflicting evidence, and persuasiveness. *State v. A.T.P.-R.*, 132 Wn. App. 181, 184-85, 130 P.3d 877 (2006). Substantial evidence is evidence sufficient to persuade a fair-minded person of the truth or correctness of the matter. *ZDI Gaming, Inc. v. State ex rel. Wash. State Gambling Comm'n*, 151 Wn. App. 788, 807, 214 P.3d 938 (2009), *affirmed*, 173 Wn.2d 608 (2012).

To convict Bessett of the charge of first degree burglary, the State was required to prove that Bessett, with intent to commit a crime against a person or property inside, entered or remained unlawfully in a building and, while inside, assaulted any person. RCW 9A.52.020. Here, Bessett contends that the State's evidence failed to establish the essential element of the charge of intent to commit a crime inside, and that its finding that he remained in the property with the intent to commit the crime of unlawful imprisonment is unsupported by substantial evidence.

“Evidence of intent ... is to be gathered from all of the circumstances of the case.” *State v. Ferreira*, 69 Wn. App. 465, 468-69, 850 P.2d 541, 543 (1993) (citing *State v. Woo Won Choi*, 55 Wn. App. 895, 906, 781 P.2d 505 (1989), *review denied*, 114 Wn.2d 1002, 788 P.2d 1077 (1990)). A person acts with intent when acting with the objective or purpose to accomplish a result constituting a crime. RCW 9A.08.010(1)(a). To prove a burglary, the State need not show that the defendant intended to commit a specific crime, but only an intent to commit any crime. *State v. Bergeron*, 105 Wn.2d 1, 4, 711 P.2d 1000 (1985).

Here, even viewing the evidence in the light most favorable to the State, it cannot support a conclusion that Bessett remained in the home with the intent to knowingly restrain McClure’s movements without her consent. Although the accounts of the parties differed in some respects, both of them agreed that Bessett sought physical affection from McClure, accepted her limitations, and talked about going to counseling. I RP (Trial) 126, 129, II RP (Trial) 212. They also both agreed that McClure did not tell Bessett to leave or to release her. I RP (Trial) 153, II RP (Trial) 218. Although McClure reported hinting at her lack of consent by lying about the nurse showing up and attempting to move around while Bessett held her, these oblique efforts do not persuade a fair-minded

person that Bessett knew she did not consent and deliberately restrained her anyway.

Because the total circumstances indicate Bessett's intent in remaining in the home was to reconcile with McClure, not to commit a crime against her, the evidence is insufficient to support the burglary conviction. Furthermore, because the evidence was insufficient to persuade a fair-minded person that Bessett intended to restrain McClure against her consent, substantial evidence does not support the trial court's finding of fact number 8. Absent that finding, the conclusion that Bessett committed the crime of first degree burglary cannot stand.

Pursuant to the General Court Order dated June 10, 2016 and Title 17 of the Rules on Appeal, Bessett respectfully requests that due to his continued indigency, the court should decline to impose appellate costs in the event he does not prevail. His report as to continued indigency is filed contemporaneously with this brief and shows that he has only a small amount of personal property, no income, and cannot afford to pay costs. Further, Bessett is 63 years old, has held no jobs in the last three years, and suffers from both physical and mental ailments that are likely to affect his ability to secure gainful employment upon release.

Bessett was found indigent for purposes of appeal. CP 118. The presumption of indigence continues throughout review. RAP 15.2(f). The Court of Appeals has recognized that in the absence of information from the State showing a change in the appellant's financial circumstances, an award of appellate costs on an indigent appellant may not be appropriate. *State v. Sinclair*, 192 Wn. App. 380, 393, 367 P.3d 612, *review denied*, 185 Wn.2d 1034 (2016). The Supreme Court has additionally recognized that application of RAP 14.2 should "allocate appellate costs in a fair and equitable manner depending on the realities of the case." *State v. Stump*, 185 Wn.2d 454, 461, 374 P.3d 89 (2016).

Finally, in recognition of the hardships imposed by large appellate cost awards, the Supreme Court has revised RAP 14.2 to provide that unless the Commissioner receives evidence of a substantial change in the appellant's financial circumstances, the original determination that the appellant lacks the ability to pay should control and costs should not be imposed on indigent appellants.

Under these circumstances, this court should exercise its discretion under RAP 14.2 to decline to impose appellate costs. Bessett has been found indigent for appeal and has complied with this court's General

Order. Under the *Sinclair* standard as well as revised RAP 14.2, an appellate cost award is inappropriate in this case.

VI. CONCLUSION

For the foregoing reasons, Bessett respectfully requests that the court REVERSE his conviction for first degree burglary and REMAND the case for resentencing.

RESPECTFULLY SUBMITTED this 19 day of June, 2018.

A handwritten signature in blue ink, appearing to read "Andrea Burkhart", written over a horizontal line.

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CERTIFICATE OF SERVICE

I, the undersigned, hereby declare that on this date, I caused to be served a true and correct copy of Appellant's Brief upon the following parties in interest by depositing them in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed this 19 day of June, 2018 in Walla Walla, Washington.



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