

67149-9

67149-9

No. 67149-9-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

REAVY DORDY WASHINGTON,

Appellant.

2011 NOV 29 PM 4: 56

~~RECEIVED
COURT OF APPEALS
NOV 29 2011~~

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

APPELLANT'S OPENING BRIEF

MAUREEN M. CYR
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

A. ASSIGNMENT OF ERROR 1

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR 1

C. STATEMENT OF THE CASE 1

D. ARGUMENT 6

THE EVIDENCE WAS INSUFFICIENT TO PROVE BEYOND A
REASONABLE DOUBT THAT MR. WASHINGTON INTENDED
TO STEAL MONEY FROM MS. NAIRN AND TOOK A
SUBSTANTIAL STEP TOWARD COMMISSION OF THE
ACT 6

1. Due process requires the State to prove every element of
the crime beyond a reasonable doubt..... 6

2. The evidence is insufficient because the State did not prove
beyond a reasonable doubt that Mr. Washington intended to
steal money against Ms. Nairn's will or took a substantial
step toward commission of the act..... 7

3. The charge must be dismissed 9

E. CONCLUSION 10

TABLE OF AUTHORITIES

Constitutional Provisions

Const. art. I, § 3.....	6
U.S. Const. amend. XIV	6

Washington Courts

<u>State v. Cook</u> , 69 Wn. App. 412, 848 P.2d 1325 (1993).....	7
<u>State v. Decker</u> , 127 Wn. App. 427, 111 P.3d 286 (2005).....	7
<u>State v. Green</u> , 94 Wn.2d 216, 616 P.2d 628 (1980)	6
<u>State v. Hardesty</u> , 129 Wn.2d 303, 915 P.2d 1080 (1996)	10
<u>State v. Jones</u> , 34 Wn. App. 848, 664 P.2d 12 (1983)	7
<u>State v. Lee</u> , 128 Wn.2d 151, 904 P.2d 1143 (1995)	9
<u>State v. White</u> , 4 Wn. App. 668, 483 P.2d 867 (1971).....	7, 8, 9

United States Supreme Court

<u>Apprendi v. New Jersey</u> , 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).....	6
<u>In re Winship</u> , 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).....	6
<u>Jackson v. Virginia</u> , 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979).....	6
<u>North Carolina v. Pearce</u> , 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969).....	10

Statutes

RCW 9A.28.020	1
---------------------	---

RCW 9A.56.190	1
RCW 9A.56.200(1)(a)(iii).....	1

A. ASSIGNMENT OF ERROR

The evidence was insufficient to sustain the conviction, in violation of constitutional due process.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Constitutional due process requires the State to prove every element of the charged crime beyond a reasonable doubt. In Reavy Washington's trial on a charge of attempted robbery in the first degree, the State was required to prove he intended to steal property and took a substantial step toward commission of the act. Did the State fail to sustain its burden where the evidence did not show beyond a reasonable doubt that Mr. Washington intended to steal money or took a substantial step toward commission of the act?

C. STATEMENT OF THE CASE

The State charged Mr. Washington with one count of attempted robbery in the first degree, RCW 9A.28.020, RCW 9A.56.200(1)(a)(iii),¹ RCW 9A.56.190. CP 6.

At the jury trial, Julie Nairn testified she works at Season's Nursery in the Fremont neighborhood of Seattle. 12/02/10RP 50. It is a small store and she is usually the only person working there.

¹ Under RCW 9A.56.200(1)(a)(iii), a person commits the crime of first degree robbery if, in the commission of a robbery or in immediate flight therefrom, he or she inflicts bodily injury.

12/02/10RP 50. On May 25, 2010, at around 1 or 2 p.m., she was alone in the store when a man walked in and said something like, "I'm embarrassed, do you have any change you can spare."

12/02/10RP 55; 12/06/10RP 53. He may have asked for change for the bus. 12/06/10RP 53.

Ms. Nairn was standing behind the counter about two and a half feet away from the cash register. 12/02/10RP 57. The man was standing on the other side of the counter with his hands on the counter. 12/02/10RP 58. His hands were shaking. 12/06/10RP 51. When Ms. Nairn said she did not have any money, the man said, "Are you sure about that." 12/02/10RP 55-56. According to Ms. Nairn, when the man said "Are you sure about that," he was looking at the cash register behind her. 12/02/10RP 56; 12/06/10RP 14. This made Ms. Nairn angry and she responded, "Yes, I'm sure." 12/02/10RP 56; 12/06/10RP 14.

Ms. Nairn testified the man then said, "What if I just do this," and came around the counter toward her. 12/02/10RP 56. He pushed her against the cash register and began hitting her with his fists. 12/02/10RP 56; 12/06/10RP 16. He knocked her onto the floor and started punching her head. 12/02/10RP 56; 12/06/10RP 16. He then grabbed a nearby folding metal chair and started

hitting her with it. 12/06/10RP 16, 18. Ms. Nairn was able to grab the chair and hit the man with it. 12/06/10RP 16-17. The man stopped hitting her and ran out of the store and across the street to his bicycle. 12/06/10RP 17-19. Ms. Nairn ran after him with the chair and tried to hit him again with it. 12/06/10RP 19. The man rode away on his bicycle. 12/06/10RP 19.

Ms. Nairn testified the man never tried to get into the cash register. 12/06/10RP 59, 64. He did not threaten her or demand money. 12/06/10RP 62-63. He did not raise his voice at any time. 12/02/10RP 58.

Ms. Nairn identified Mr. Washington as the man who entered the store. 12/06/10RP 18. He was apprehended by police a short time after the incident while sitting at a bus shelter with his bicycle. 12/06/10RP 84. Ms. Nairn did not know Mr. Washington and had never met him before that day. 12/06/10RP 51.

Ms. Nairn sustained some bruises but did not need to go to the hospital. 12/06/10RP 23, 31-39.

Mr. Washington testified he is 49 years old. 12/06/10RP 122. He is usually employed in the construction industry but at the time of the incident, he was unemployed and collecting unemployment. 12/06/10RP 124. That day, he had taken the bus

from Edmonds to downtown Seattle to check his mail and visit WorkSource.² 12/06/10RP 128. When he left home, he had only one bus ticket and two or three dollars in change. 12/06/10RP 130-31. He used his bus ticket getting to Seattle and spent all of his money on snacks. 12/06/10RP 135, 138. After running errands downtown, he went to Fremont to visit his friend Anthony and ask him for money or a bus ticket so that he could get back home. 12/06/10RP 133, 135. But Anthony was not at home. 12/06/10RP 133, 139. As Mr. Washington rode his bicycle down the street away from Anthony's house, he saw Season's Nursery and decided to stop and ask someone inside for change. 12/06/10RP 142.

Mr. Washington entered the store and leaned on the counter. 12/06/10RP 146. Addressing Ms. Nairn, he said, "excuse me, Miss. This is embarrassing to me, but would you happen to have any change you could spare so I could catch the bus." 12/06/10RP 147. Ms. Nairn looked at him as though he did not belong there. 12/06/10RP 146. According to Mr. Washington, she said, "No, I don't give money to bums." 12/06/10RP 148. Mr. Washington was shocked and embarrassed and did not know what to do. 12/06/10RP 148-49. He "snapped" and said, "Well, what if I

² WorkSource is a state agency that, among other things, assists individuals who are looking for a job. See <http://www.worksourceskc.org/main/about.asp>.

do this." 12/06/10RP 149. He then walked around the counter. 12/06/10RP 149. When Ms. Nairn walked toward him, he pushed her. 12/06/10RP 150. He began punching her, she fell to the floor, and he grabbed a chair and pushed it at her. 12/06/10RP 152, 165. At that point, he caught himself, stopped, and walked out of the store. 12/06/10RP 153.

Mr. Washington pushed Ms. Nairn because he felt embarrassed, angry and insulted. 12/06/10RP 150. He did not intend to take money from her. 12/06/10RP 156-57. He intended only to ask her for change. 12/06/10RP 160. He did not try to get into the cash register or take anything from Ms. Nairn. 12/06/10RP 156. He did not even remember seeing a cash register. 12/06/10RP 151. Mr. Washington was ashamed of his behavior and recognized it was wrong. 12/06/10RP 152.

The defense requested a jury instruction on the lesser crime of fourth degree assault and the court provided the instruction. CP 43-46.

The jury found Mr. Washington guilty as charged of attempted robbery in the first degree. CP 49.

D. ARGUMENT

THE EVIDENCE WAS INSUFFICIENT TO PROVE BEYOND A REASONABLE DOUBT THAT MR. WASHINGTON INTENDED TO STEAL MONEY FROM MS. NAIRN AND TOOK A SUBSTANTIAL STEP TOWARD COMMISSION OF THE ACT

1. Due process requires the State to prove every element of the crime beyond a reasonable doubt. It is a fundamental principle of constitutional due process that the State must prove every element of a charged offense beyond a reasonable doubt.

Apprendi v. New Jersey, 530 U.S. 466, 477, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. Const. amend. XIV; Const. art. I, § 3.

In reviewing the sufficiency of the evidence to uphold a conviction, the question is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

2. The evidence is insufficient because the State did not prove beyond a reasonable doubt that Mr. Washington intended to steal money against Ms. Nairn's will or took a substantial step toward commission of the act. Intent to steal is a necessary element of attempted robbery in the first degree in Washington. State v. Decker, 127 Wn. App. 427, 431, 111 P.3d 286 (2005); State v. Jones, 34 Wn. App. 848, 850, 664 P.2d 12 (1983); see also CP 36-37, 40 (jury instructions). The State must prove the defendant intended to take personal property against the victim's will and took a substantial step toward commission of the act. State v. Cook, 69 Wn. App. 412, 415, 848 P.2d 1325 (1993).

In State v. White, 4 Wn. App. 668, 669, 483 P.2d 867 (1971), White and his brother entered a market, purchased a box of potato chips and paid for it, but left the item on the counter. When the cashier called after the brothers to remind them of their purchase, White pulled out a gun and pointed it at the cashier's neck. Id. The store manager standing nearby grabbed the barrel of the gun and pushed White and the two men fell to the floor. Id. White's brother then fired two shots into the manager and the brothers fled to a car parked in the street around the corner which was waiting with two doors open and the motor running. Id. Two other people were in

the car. Id. In addition, evidence of three prior completed robberies was admitted to establish identity and common scheme or design. Id. at 670.

This Court held that, although no demand was made for money or anything of value, the evidence was sufficient to sustain a conviction for attempted robbery. Id. The Court explained, "[t]he timing of the struggle for possession of the weapon, the presence of the car outside and the conditions under which it was parked along with the evidence of the three prior robberies showing identity and common scheme and design," together amounted to substantial evidence to support the jury finding. Id.

The facts of this case are much less compelling than in White. Mr. Washington entered the store and asked Ms. Nairn for spare change. 12/02/10RP 55; 12/06/10RP 53, 147. Mr. Washington testified he did not intend to take money from Ms. Nairn by force and intended only to ask for change. 12/06/10RP 156-57, 160. Ms. Nairn agreed Mr. Washington did not threaten her or demand money. 12/06/10RP 62. He did raise his voice. 12/06/10RP 58. He never tried to get into the cash register or take anything from Ms. Nairn. 12/06/10RP 59, 64, 156.

Unlike White, there was no evidence Mr. Washington was planning a robbery. He carried no weapon. He rode to and from the store on a bicycle. In addition, there was no evidence he had ever participated in any prior completed robbery.

Mr. Washington testified he assaulted Ms. Nairn out of anger and frustration, not in an attempt to take money by force.

12/06/10RP 149-52. He was ashamed of his behavior and recognized it was wrong. 12/06/10RP 152. The lack of evidence of pre-planning, as well as Ms. Nairn's testimony that Mr. Washington never demanded money or attempted to get into the cash register or take anything from her person supports his testimony that he had no intent to steal. See 12/06/10RP 58-59, 62, 64.

In light of the testimony presented, the State did not prove beyond a reasonable doubt Mr. Washington intended to take money by force or took a substantial step toward commission of the act.

3. The charge must be dismissed. If the reviewing court finds insufficient evidence to prove an element of the crime, reversal is required. State v. Lee, 128 Wn.2d 151, 164, 904 P.2d 1143 (1995). Retrial following reversal for insufficient evidence is "unequivocally prohibited" and dismissal is the remedy. State v.

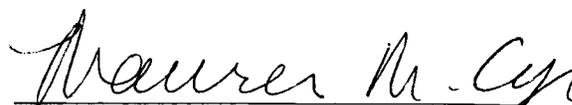
Hardesty, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996) ("The double jeopardy clause of the Fifth Amendment to the U.S. Constitution protects against a second prosecution for the same offense, after acquittal, conviction, or a reversal for lack of sufficient evidence.") (citing North Carolina v. Pearce, 395 U.S. 711, 717, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969), overruled in part on other grounds by Alabama v. Smith, 490 U.S. 794, 109 S. Ct. 2201, 104 L. Ed. d 865 (1989)).

Because the State did not prove all of the elements of attempted first degree robbery, the conviction must be reversed and the charge dismissed.

E. CONCLUSION

The evidence is insufficient to sustain the conviction, in violation of due process, and the conviction must be reversed and the charge dismissed.

Respectfully submitted this 29th day of November 2011.



MAUREEN M. CYR (WSBA 28724)
Washington Appellate Project - 91052
Attorneys for Appellant