No. 74027-0-I

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

STATE OF WASHINGTON,

Respondent,

v.

BRIAN MICHAEL JERUE,

Appellant.

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

APPELLANT'S OPENING BRIEF

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1. The evidence was insufficient to prove an element of the crime beyond a reasonable doubt.

2. The trial court abused its discretion and violated Brian Jerue's constitutional rights to confront the witnesses and present evidence in his defense by precluding him from cross-examining the complaining witness with evidence showing he had a motive to lie.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. An essential element of second degree robbery is that the accused took property through the use of actual or threatened force, violence or fear of injury. Here, the evidence showed only that Mr. Jerue held up a bottle and asked the complaining witness if he had ever been hit with a bottle, and stated he was not afraid to do it. But Mr. Jerue used no actual force and uttered no direct threat. Did the State fail to prove the essential force element beyond a reasonable doubt?

2. An accused in a criminal trial has a fundamental constitutional right to confront his accusers and present evidence in his defense. This includes the right to cross-examine prosecution witnesses with evidence of their possible biases and motives. Here, the State's principal witness was a loss prevention officer who alleged Mr.

Jerue threatened him with a stolen liquor bottle when the officer confronted him outside the store. The defense sought to cross-examine the loss prevention officer with evidence that he violated store policy when he grabbed Mr. Jerue by the shoulders as he exited the store. The evidence was relevant to show the officer had a motive to downplay his own role in the confrontation and exaggerate Mr. Jerue's threatening behavior. Did the trial court violate Mr. Jerue's constitutional rights to present evidence in his defense and confront his accusers when it prevented him from cross-examining the loss prevention officer with evidence that he violated store policy?

C. STATEMENT OF THE CASE

On the afternoon of April 15, 2015, Mitchell Irons was working as a loss prevention officer at the Safeway in Marysville. 8/18/15RP 12-15. He observed Brian Jerue enter the store, walk to the liquor aisle, take two bottles of liquor from the shelf, and then walk out of the store without paying for the items. 8/18/15RP 23-25.

Mr. Irons followed Mr. Jerue, who was walking at a normal pace. 8/18/15RP 25, 51. He caught up to Mr. Jerue outside the door, put his hands on his shoulders, and swung him around forcefully to face him. 8/18/15RP 25, 53. Mr. Irons identified himself as a loss

prevention officer. 8/18/15RP 26. According to him, the two then somehow ended up on the ground, although he does not recall what happened or why they fell to the ground. 8/18/15RP 26, 56. Mr. Irons took Mr. Jerue back inside the store. 8/18/15RP 28, 32. He had his hand on Mr. Jerue's shoulder as he led him inside. 8/18/15RP 28, 32.

Mr. Irons admitted he violated store policy when he grabbed Mr. Jerue by the shoulders. 8/17/15RP 11. The store prohibited its loss prevention officers from placing their hands on shoplifting suspects. 8/17/15RP 9.

Soon after Mr. Irons and Mr. Jerue re-entered the store, Mr. Jerue managed to slip out of his jacket and break free of Mr. Irons's grasp. 8/18/15RP 31, 62. He ran out the other door and into the parking lot. 8/18/15RP 31. He dropped the bottles but picked one of them up again. 8/18/15RP 34. Mr. Irons ran after him and caught up to him at the corner of the parking lot. 8/18/15RP 36. According to Mr. Irons, Mr. Jerue turned around, held up the bottle by the neck and asked Mr. Irons if he had "ever been hit with a bottle," and said he was "a convicted felon" and was "not scared to do it." 8/18/15RP 36.

Mr. Irons stopped following Mr. Jerue and called 911. 8/18/15RP 40, 80. Mr. Jerue took off running. 8/18/15RP 40. Mr.

Irons told the 911 operator there had been a theft but did not mention any supposed threat. 8/18/15RP 40.

A police officer stopped Mr. Jerue a short distance away. 8/18/15RP 136, 139. Mr. Jerue was relaxed and cooperative. 8/18/15RP 148-49. He had fresh scratches on his arm. 8/18/15RP 105.

Mr. Jerue was charged with one count of second degree robbery.[1] CP 72.

Before trial, the defense moved to admit evidence that Mr. Irons violated store policy when he placed his hands on Mr. Jerue. 8/17/15RP 10. The defense theory was that Mr. Irons lied when he claimed Mr. Jerue threatened him with the bottle because he did not want to get in trouble for violating store policy. 8/17/15RP 10-11. Mr. Irons admitted he had violated the policy at least five to ten times and that he probably did so due to adrenaline. 8/18/15RP 4-5. He tended to get so excited that he could not always control his actions. 8/18/15RP 4-5. The evidence that Mr. Irons violated store policy by grabbing Mr. Jerue supported the defense theory that Mr. Irons was the aggressor and that Mr. Jerue ran away because Mr. Irons was hurting him. 8/18/15RP

[1] Mr. Jerue was also charged with one count of third degree assault and the jury found him guilty. CP 35, 72. At sentencing, the court vacated the third degree assault charge on double jeopardy grounds and did not enter judgment on that charge. 8/21/15RP 6.

4-6. Mr. Irons was motivated to lie about Mr. Jerue's threat so that he would not appear to be the aggressor. 8/17/15RP 10; 8/18/15RP 4-5.

The court denied the motion, finding the evidence that Mr. Irons violated store policy was not relevant. 8/17/15RP 11-12; 8/18/15RP 7-8.

The jury found Mr. Jerue guilty of second degree robbery as charged. CP 37.

D. ARGUMENT

1. The State did not prove beyond a reasonable doubt that Mr. Jerue used force or the threat of force to retain possession of the property.

The essential element that distinguishes a robbery from a theft is that the accused took personal property "from the person of another or in his or her presence against his or her will *by the use or threatened use of immediate force, violence, or fear of injury to that person*." RCW 9A.56.190 (emphasis added); see CP 47-48 (jury instructions). Here, the State did not prove Mr. Jerue committed a robbery as opposed to a theft because it did not prove he used or threatened to use force or violence in committing the theft.

The State was required to prove this essential element beyond a reasonable doubt. See 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. The question on review is whether a rational fact finder could have found the State proved the element beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980); Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). Although the Court considers the evidence and all reasonable inferences from the evidence in the light most favorable to the State, the State may not rely upon evidence that is "patently equivocal." State v. Vasquez, 178 Wn.2d 1, 8, 309 P.3d 318 (2013); State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

"Robbery encompasses any 'taking of . . . property [that is] attended with such *circumstances of terror,* or such threatening by *menace, word or gesture* as in common experience is likely to create an apprehension of danger and induce a man to part with property for the safety of his person.'" State v. Witherspoon, 180 Wn.2d 875, 884, 329 P.3d 888 (2014) (quoting State v. Shcherenkov, 146 Wn. App. 619, 624-25, 191 P.3d 99 (2008) (alterations in Shcherenkov)). The Court applies an objective test to determine whether "the defendant used intimidation" and "an ordinary person in the victim's position could

reasonably infer a threat of bodily harm from the defendant's acts." Witherspoon, 180 Wn.2d at 884. A threat can be communicated "directly or indirectly." RCW 9A.04.110(28); Shcherenkov, 146 Wn. App. at 624.

Although a threat of immediate force may be implied, the evidence must show the threat was sufficiently serious and forceful to induce a reasonable person to part with his property. State v. Clark, 190 Wn. App. 736, 756-57, 361 P.3d 168 (2015).

Here, the State did not prove Mr. Jerue uttered a threat that was sufficiently serious or forceful to induce a reasonable person to part with his property. Mr. Jerue did not utter a direct threat. According to Mr. Irons, Mr. Jerue merely held up a bottle and asked if Mr. Irons had ever been hit with a bottle. 8/18/15RP 36. He did not actually threaten to hit Mr. Irons with the bottle.

Moreover, there was no *implied* threat that was sufficient to induce a reasonable person to part with his property. It was *Mr. Irons* who used force when he grabbed Mr. Jerue by the shoulders and swung him around to face him as he was exiting the store. 8/18/15RP 25, 53. Mr. Irons continued to maintain a hold on Mr. Jerue as he led him back into the store. 8/18/15RP 28, 32. Mr. Jerue was merely trying to get

away. 8/18/15RP 31, 62. Although he held up the bottle and asked Mr. Irons if he had ever been hit with a bottle, he did not lunge toward him or otherwise act as if he was going to hit him. 8/18/15RP 36. He then ran away. 8/18/15RP 40. He never touched Mr. Irons.

In sum, the evidence is not sufficient to prove beyond a reasonable doubt that Mr. Jerue used "such *circumstances of terror,* or such threatening by *menace, word or gesture* as in common experience is likely to create an apprehension of danger and induce a man to part with property for the safety of his person.'" Witherspoon, 180 Wn.2d at 884. Thus, the State did not prove the elements of second degree robbery beyond a reasonable doubt and the conviction must be reversed.

2. The court abused its discretion and violated Mr. Jerue's constitutional rights to present a defense and confront his accusers by precluding him from cross-examining the complaining witness with evidence that he violated store policy by placing his hands on Mr. Jerue.

Mr. Irons's testimony was the only evidence presented by the State to prove the essential force element that allegedly transformed this simple shoplifting incident into a robbery. No other witnesses observed the interaction between Mr. Jerue and Mr. Irons in the parking

lot. The State did not present any videotape evidence from the surveillance cameras at the store. Thus, it was crucial that Mr. Jerue be given a full and fair opportunity to challenge Mr. Irons's testimony and explore his possible biases and motives.

The trial court unfairly and unreasonably limited Mr. Jerue's right to confront Mr. Irons by precluding him from presenting evidence that Mr. Irons had a motive to lie. It was undisputed that Mr. Irons violated store policy when he placed his hands on Mr. Jerue and forcefully led him back into the store. 8/17/15RP 9, 11. The fact that the store had a policy precluding its loss prevention officers from touching shoplifting suspects supports the defense theory that Mr. Irons was overly aggressive and confrontational. Mr. Irons's violation of the policy created a motive for him to underplay his role in the encounter and overplay Mr. Jerue's supposed dangerousness. Mr. Jerue should have been given an opportunity to cross-examine Mr. Irons with evidence showing he had a motive to exaggerate his testimony.

A defendant's right to impeach a prosecution witness with evidence of bias is guaranteed by the constitutional right to confront witnesses. Davis v. Alaska, 415 U.S. 308, 316-18, 94 S. Ct. 1105, 39

L. Ed. 2d 347 (1974); State v. Johnson, 90 Wn. App. 54, 69, 950 P.2d 981 (1998); U.S. Const. amend. VI; Const. art. I, § 22.

In addition, "[t]he right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." Chambers v. Mississippi, 410 U.S. 284, 294, 90 S. Ct. 1038, 35 L. Ed. 2d 297 (1973); U.S. Const. amend. XIV; Const. art. I, § 3. A defendant's right to present a defense includes the rights to examine witnesses against him, which is "basic in our system of jurisprudence." State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010) (citing Chambers, 410 U.S. at 294).

The constitutional right to confrontation encompasses the right to reveal the witness's possible biases, prejudices, or ulterior motives. Davis, 415 U.S. at 316-18. "The partiality of a witness is subject to exploration at trial, and is always relevant as discrediting the witness and affecting the weight of his testimony." Id. (internal quotation marks and citation omitted).

Moreover, "[w]here a case stands or falls on the jury's belief or disbelief of essentially one witness, that witness' credibility or motive must be subject to close scrutiny." State v. Roberts, 25 Wn. App. 830, 834, 611 P.2d 1297 (1980).

The accused has "great latitude" to present evidence showing the possible motives or biases of prosecution witnesses. State v. Spencer, 111 Wn. App. 401, 410, 45 P.3d 209 (2002). The evidence need be only "minimally relevant" to the witness's bias. State v. Hudlow, 99 Wn.2d 1, 16, 659 P.2d 514 (1983). The court may exclude "minimally relevant" evidence of a witness's bias only if the State's countervailing interest is "compelling." Id.

Here, the evidence that Mr. Irons violated store policy by placing his hands on Mr. Jerue was at least "minimally relevant" to Mr. Irons's possible bias and motive to lie. The store's policy prohibiting employees from physical contact with shoplifting suspects demonstrates the store's judgment that such physical contact can exacerbate an already volatile situation. Mr. Irons's violation of the policy shows his actions were improper and overly aggressive. It gave him a motive to exaggerate Mr. Jerue's dangerousness and downplay his own culpability.

Whether or not Mr. Jerue uttered a threat was the central issue in the case. The case turned on the jury's belief or disbelief of essentially one witness—Mr. Irons. Thus, Mr. Irons's "credibility or motive [was] subject to close scrutiny." Roberts, 25 Wn. App. at 834.

The trial court should have allowed Mr. Jerue to cross-examine Mr. Irons with evidence that he had a motive to exaggerate the alleged threat. Denying Mr. Jerue that opportunity violated his fundamental constitutional rights.

Because a defendant has a constitutional right to impeach a prosecution witness with evidence of bias, any error in excluding such evidence is presumed prejudicial. Spencer, 111 Wn. App. at 408. The State must prove the error was harmless beyond a reasonable doubt. Jones, 168 Wn.2d at 724; Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967).

In assessing harmlessness, the Court may not "speculate as to whether the jury, as sole judge of the credibility of a witness, would have accepted this line of reasoning had counsel been permitted to fully present it." Davis, 415 U.S. at 317. Instead, the Court must conclude "the jurors were entitled to have the benefit of the defense theory before them so that they could make an informed judgment as to the weight to place on [the witness's] testimony." Id.

Here, the jury should have been permitted to consider the defense theory that Mr. Irons had a motive to exaggerate Mr. Jerue's supposedly threatening behavior. Mr. Irons was the key prosecution

witness and his testimony about Mr. Jerue's alleged threat was the only evidence of an essential element of the crime. The State cannot prove beyond a reasonable doubt that precluding the jury from considering whether Mr. Irons had a motive to exaggerate his testimony was harmless. The conviction must be reversed.

3. Any request that costs be imposed on Mr. Jerue for this appeal should be denied because the trial court found he does not have the ability to pay legal financial obligations.

This Court has discretion to disallow an award of appellate costs if the State substantially prevails on appeal. RCW 10.73.160(1); State v. Nolan, 141 Wn.2d 620, 626, 8 P.3d 300 (2000); State v. Sinclair, 192 Wn. App. 380, 367 P.3d 612 (2016); RCW 10.73.160(1).

The imposition of costs against indigent defendants raises problems that are well documented. Sinclair, 192 Wn. App. at 391. Such problems include "'increased difficulty in reentering society, the doubtful recoupment of money by the government, and inequities in administration.'" Id. (quoting State v. Blazina, 182 Wn.2d 827, 835, 344 P.3d 680 (2015)). The Court should be mindful of these concerns. Sinclair, 192 Wn. App. at 391.

A defendant's inability to pay appellate costs is an important consideration to take into account in deciding whether to disallow

costs. Sinclair, 192 Wn. App. at 391-92. Here, the trial court found Mr. Jerue does not have the ability to pay legal financial obligations. At sentencing, the court imposed only what it deemed to be mandatory legal financial obligations. CP 29. The court specifically found Mr. Jerue is "absolutely buried under financial obligations given his criminal history and I would waive all the non mandatory LFO's." 8/21/15RP 8. The court also found Mr. Jerue is indigent for the purposes of appeal and is entitled to court-appointed appellate counsel and other costs of appeal at public expense. Sub #43.

The record supports the court's finding that Mr. Jerue is unable to pay appellate costs. He has no income, assets or cash on hand; he is unemployed; and he has significant debt from prior court actions and medical bills totaling approximately $10,000. Sub #42. He received a prison sentence of 38 months and will be unable to earn a significant income during that time. CP 27. In addition, he has a chemical dependency that may hinder his ability to find steady employment. CP 25; 8/21/15RP 8.

Mr. Jerue's indigency is presumed to continue throughout review absent a contrary order by the trial court. Sinclair, 192 Wn. App. at 393; RAP 15.2(f).

Given Mr. Jerue's indigency, and the information in the record showing he does have the present or likely future ability to pay appellate costs, this Court should exercise its discretion and disallow appellate costs should the State substantially prevail. Sinclair, 192 Wn. App. at 392-93.

E. CONCLUSION

The State did not prove all of the essential elements of the crime, requiring the conviction be reversed and the charge dismissed. In the alternative, the trial court abused its discretion and violated Mr. Jerue's constitutional rights to confront his accusers and present evidence in his defense, requiring the conviction be reversed and remanded for a new trial. This Court should not award appellate costs if the State substantially prevails.

Respectfully submitted this 29th day of April, 2016.

/s/ Maureen M. Cyr

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

STATE OF WASHINGTON, Respondent, BRIAN JERUE, Appellant.	)))))))))	NO. 74027-0-I

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 29TH DAY OF APRIL, 2016, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON, THIS 29TH DAY OF APRIL, 2016.

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