

No. 66451-4-I

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

STATE OF WASHINGTON,

Respondent,

v.

WELI MOHAMMED GULED,

Appellant.

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

The Honorable Regina S. Cahan

BRIEF OF APPELLANT

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DIVISION ONE
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REGINA S. CAHAN

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A. ASSIGNMENT OF ERROR

The State failed to prove an essential element of first degree robbery; that Mr. Guled inflicted bodily injury.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

The State is required to prove each essential element of the charged offense beyond a reasonable doubt. First degree robbery, as charged here, required the State to prove beyond a reasonable doubt that Mr. Guled inflicted bodily injury. Two police officers the victim contacted immediately following the alleged robbery did not see any injuries, despite the victim's claim he had been assaulted. Is Mr. Guled entitled to reversal of his conviction for the State's failure to prove all essential elements of the charged offense?

C. STATEMENT OF THE CASE

Seattle Police Officers Matthew Chase and Jeremy Pinkerton were standing at the corner of Third Avenue and Pike Street as part of their foot patrol when they approached by Dallas Dzedzic. 10/25/2010RP 14-17, 10/26/2010RP 35-36. Mr. Dzedzic claimed that while he was seated in front of Benaroya Hall on Second Avenue a few minutes before contacting the police, Weli Guled and Abdi Hilow, two men he had not previously met, sat down next to him. 10/25/2010RP 105, 132.

According to Mr. Dziedzic, he was taking a break from skateboarding listening to music on his Apple iPhone.

10/25/2010RP 103. Mr. Guled asked Mr. Dziedzic for a lighter, and when provided one, lit a marijuana cigarette. 10/25/2010RP 132.

Mr. Guled offered the cigarette to Mr. Dziedzic, who declined.

10/25/2010RP 132. Mr. Guled asked to see the iPhone, promising to return it, and Mr. Dziedzic complied. 10/25/2010RP 110. When

Mr. Guled failed to return the iPhone, Mr. Dziedzic pleaded with him for its return. 10/25/2010RP 116. Mr. Dziedzic claimed Mr.

Guled "head-butted" him twice, shoved him in the chest with his hands, then Mr. Guled and Mr. Hilow fled.¹ 10/25/2010RP 116-18.

Mr. Dziedzic claimed he suffered a headache from the head-butts.

10/25/2010RP 119.

While Mr. Dziedzic related his story to the officers, neither observed any sign of injury on Mr. Dziedzic. 10/25/2010RP 47, 74;

10/26/2010RP 61. Nevertheless, Mr. Guled and Mr. Hilow were subsequently arrested and charged with first degree robbery based

¹ Mr. Dziedzic claimed Mr. Guled also showed him the barrel of a gun from underneath Mr. Guled's shirt. 10/25/2010RP 115-16. A gun was never found and the State did not charge Mr. Guled or Mr. Hilow with robbery based upon either displaying a firearm or deadly weapon, or being armed with a deadly weapon. CP 1.

solely upon the infliction of bodily injury. CP 1.² Following a jury trial, Mr. Guled was convicted as charged while a mistrial was declared as to Mr. Hilow when the jury was unable to reach a verdict. CP 27; 10/27/2010RP 13.

D. ARGUMENT

THE STATE FAILED TO PROVE THAT MR. GULED
INFLICTED BODILY INJURY AS REQUIRED TO
PROVE FIRST DEGREE ROBBERY

1. The State bears the burden of proving each of the essential elements of the charged offense beyond a reasonable doubt. In a criminal prosecution, the State is required to prove each element of the crime charged beyond a reasonable doubt. U.S. Const. amend XIV; *Apprendi v. New Jersey*, 530 U.S. 466, 471, 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); *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). The standard the reviewing court uses in analyzing a claim of insufficiency of the evidence is “[w]hether, 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

² Mr. Dziedzic’s iPhone was discovered in the rear of the Seattle Police Department car that had transported Mr. Guled to the West Precinct. 10/26/2010RP 102-04.

doubt.” *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *Green*, 94 Wn.2d at 221. A challenge to the sufficiency of evidence admits the truth of the State's evidence and all reasonable inferences that can be drawn therefrom. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

To prove first degree robbery as charged in this case, the State was required to prove beyond a reasonable doubt that Mr. Guled (1) unlawfully took property of another, (2) intended to do so (3) by use of force (4) in order to obtain the property, and (5) in the commission of the robbery or flight, inflicted a bodily injury. RCW 9A.56.190, RCW 9A.56.200(1)(a)(iii). “Bodily injury” means “physical pain or injury, illness, or an impairment of physical condition.” RCW 9A.04.110(4)(a). Mr. Guled submits the State proffered insufficient evidence to prove that he inflicted bodily injury on Mr. Dzedzic.

2. The State failed to prove the essential element that Mr. Guled inflicted bodily injury. Mr. Guled contends that, although he arguably struck Mr. Dzedzic, the State failed to prove Mr. Dzedzic suffered any bodily injury.

While fear of injury is included in the statutory definition of robbery, the statutory definition of robbery in the first degree

requires infliction of bodily injury during the commission of the robbery if there is no deadly weapon charged. *State v. Mahoney*, 40 Wn.App. 514, 518, 699 P.2d 254 (1985), *citing* RCW 9A.56.190. No deadly weapon was charged here even though the State introduced evidence that Mr. Dziezic may have seen what he believed to be a deadly weapon. Thus, the State was still required to prove Mr. Guled in fact inflicted bodily injury. Mr. Dziezic did testify Mr. Guled "head-butted" him, but there was no credible evidence that this blow inflicted bodily injury. Neither of the police officers who Mr. Dziezic contacted immediately after the alleged robbery observed anything approaching an injury: no redness, no swelling, no bruising, or no bleeding. This is in startling contrast with several of the reported cases where courts have upheld a jury verdict on a bodily injury prong. While not inclusive, these cases nevertheless provide guidance in this case.

In *State v. Johnson*, Mr. Johnson walked into Wal-Mart, loaded a \$179 television-video cassette recorder combo into a shopping cart, removed the security tag, and pushed the cart out the front door. Two security guards observed him, followed him into the parking lot, and confronted him. Mr. Johnson abandoned the shopping cart and started to run away, but suddenly turned

back. One of the guards grabbed Mr. Johnson's arm, and he punched the guard in the nose and ran away. The Supreme Court agreed that there was sufficient evidence of bodily injury. 155 Wn.2d 609, 610, 121 P.3d 91 (2005).

Similarly, *State v. Decker*, Corey Judd, who was working at his parents' store, attempted to retrieve cigarettes taken by Mr. Decker from the store. He tried to get free from Decker's grip and hit the passenger window with his fist to try to startle Mr. Decker into releasing him. Mr. Decker broke the window with a single punch but lacerated his arm in the process. He also broke his toe either because the car ran over it or because he kicked the car. Mr. Judd's injuries were initially treated by some customers and paramedics, and then he drove himself to the hospital for further treatment. 127 Wn.App. 427, 429-30, 111 P.3d 286 (2005).

Here, in contrast, there were no injuries observed by either of the independent witnesses, let alone an injury similar to those observed in the *Johnson* and *Decker* cases noted *supra*. As a consequence, the State failed to prove the essential element that Mr. Guled inflicted bodily injury on Mr. Dziedzic.

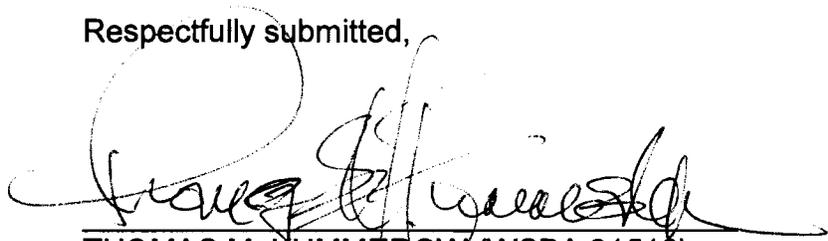
3. This Court must reverse and remand with instructions to dismiss the conviction. Since there was insufficient evidence to support the conviction, this Court must reverse the conviction with instructions to dismiss. To do otherwise would violate double jeopardy. *State v. Crediford*, 130 Wn.2d 747, 760-61, 927 P.2d 1129 (1996) (the Double Jeopardy Clause of the United States Constitution “forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding.”), *quoting Burks v. United States*, 437 U.S. 1, 9, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978).

E. CONCLUSION

For the reasons stated, Mr. Guled submits his conviction for first degree robbery must be reversed.

DATED this 22nd day of June 2011.

Respectfully submitted,



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DIVISION ONE**

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