

NO. 71612-3-I

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

STATE OF WASHINGTON,

Respondent,

v.

DANIEL C. FISCHER,

Appellant.

2015 JAN -7 AM 11:09
COURT OF APPEALS
STATE OF WASHINGTON


BRIEF OF RESPONDENT

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I. ISSUES

1. Was there sufficient evidence to convict the defendant of first degree burglary?

2. Was there sufficient evidence to convict the defendant of third degree assault?

3. Was there sufficient evidence to convict the defendant of third degree malicious mischief?

II. STATEMENT OF THE CASE

On April 10, 2013, the defendant kicked in the back door of Adam Kronbeck's house while Mr. Kronbeck was at home, causing substantial damage to the door. The defendant pushed Mr. Kronbeck backward with both hands and asked if anyone else was there. The defendant then checked the one bedroom and returned to the kitchen, where Mr. Kronbeck was still standing. The defendant put one arm around Mr. Kronbeck's neck and began punching him in the face. The defendant punched Mr. Kronbeck in the face numerous times causing injury to his eye, nose, cheek, and lip. The jury saw photographs of the injuries. The physical pain Mr. Kronbeck sustained due to the assault still existed at the trial, almost a year later. He was no longer able to sleep on his right side due to the pain. The defendant did not take anything from the

home and he did not inquire about the whereabouts of any possession while he was in the home. 2/10/14 RP 54-61; 66-67.

At the time of this incident, Adam Kronbeck was living in a one bedroom house that was approximately 600 square feet. Just before Easter 2013, the defendant's wife, Rebecca Fischer, called Mr. Kronbeck in a panic looking for a place for her, the defendant, and their one-and-a-half year-old daughter to stay. Mrs. Fischer explained to Mr. Kronbeck that they were being kicked out of the residence where they had been staying and had nowhere to go. Easter was on March 31st. The defendant's family was only going to stay for a short time, until they found somewhere else to stay. Mr. Kronbeck is living in Section 8 housing. Mr. Kronbeck explained that under no circumstances could the Fischers stay at his house longer than 2 weeks. 2/10/14 RP 34, 35-36, 41, 43, 2/11/14 9:30 a.m. RP 31, 43, 46.

Within a very short time, the defendant and his family had worn out their welcome. Mr. Kronbeck made a comment, and the defendant and his wife packed up their child and their valuables and left. They left behind some clothes, canned food, the child's pack and play, some toys, and their cat. Mr. Kronbeck repeatedly attempted to call them to find out what to do with their possessions.

They sent his calls directly to voice mail and did not respond to his inquiries about the possessions they left behind. 2/11/14 9:30 a.m. RP 35, 43-44, 45-46, 47, 2/11/14 9:30 a.m. RP 34-35, 44, 45-46.

Mr. Kronbeck estimated the defendant and his family had been gone for about a week before the incident happened. Mr. Kronbeck and some friends were drinking the evening of April 9-10. They decided to move the defendant's possession out of the tiny house. Mr. Kronbeck called Mrs. Fischer as he was moving the items out to let them know their stuff was in his front yard. The call was at about 3:00 a.m. on April 10th. Since Mrs. Fischer was not taking calls from Mr. Kronbeck, she didn't listen to the voicemail until about 7:00 a.m. Mrs. Fischer told the defendant. Mrs. Fischer testified the defendant was very angry and left immediately to go to Mr. Kronbeck's house. 2/10/14 RP 47-51, 2/11/14 9:30 a.m. RP 37, 39, 46.

The defendant arrived and began yelling and throwing items around the yard. The defendant's stereo and some toys were missing. The defendant came to the front door, but Mr. Kronbeck refused to open the door. The defendant then went around to the back door. Mr. Kronbeck opened the door briefly to tell the defendant he was sorry if things were missing but that he had move

all the defendant's stuff out in the yard. Mr. Kronbeck then closed the door and locked it. 2/10/14 RP 51-53, 78, 81-82.

The defendant responded by kicking in the door, and damaging the door frame. He pushed Mr. Kronbeck backwards with his two hands. The defendant asked if anyone else was at the house. The defendant did not ask if any of his possessions were in the house. The defendant did not ask about the cat. Mr. Kronbeck indicated another friend was asleep in the bedroom. The defendant checked the room and came back out to Mr. Kronbeck. He placed him in a one arm hold and began repeatedly striking him in the face with his other fist. The defendant did not remove or attempt to remove anything from the interior of the home. After striking Mr. Kronbeck numerous times, the defendant left. As Mr. Kronbeck testified, it all happened so fast he didn't have time to react. Mr. Kronbeck was bleeding. He called 9-1-1. 2/10/14 RP 54-57, 59-61, 67, 70.

The police officers that responded testified they could easily see Mr. Kronbeck had been assaulted recently. He was bleeding from his face. There was fresh blood on the wall and the floor. The back door had clearly been kicked in causing damage to the door and the door frame; there was even a shoeprint on the door. The

officers took photographs of Mr. Kronbeck's injuries and then questioned him further about the incident. Officer Raby testified that while he was speaking to Mr. Kronbeck he could see the swelling increasing on Mr. Kronbeck's face, especially around his eye. Officer Raby testified the photographs were taken before the injuries had become fully swollen. 2/10/14 RP 86-87, 96, 2/11/14 9:30 a.m. RP 8-10.

Later that day, the police contacted the defendant. After being advised of his constitutional rights, the defendant told the police he and his family had moved out of Mr. Kronbeck's residence about a week ago. He said he had gone to Mr. Kronbeck's residence that day and found his remaining property in the front yard. The defendant denied going inside. The police noted swelling to the defendant's left hand. The defendant admitted to being left handed. Neither the defendant nor his wife told the police anything about their possessions or a cat being inside Mr. Kronbeck's house. 2/11/14 9:30 a.m. RP 11-13.

The state charged the defendant with count one: third degree assault; count two: third degree malicious mischief; and, count three: first degree burglary. The jury was instructed on these offenses and the lesser included offense to count one of fourth

degree assault. The jury convicted the defendant as charged. CP 81-83, 86-114, 182-183.

III. ARGUMENT

Under the applicable standard of review, there will be sufficient evidence to affirm a criminal conviction if any rational trier of fact, viewing the evidence most favorably toward the State, could have found the essential elements of the charged crime were proved beyond a reasonable doubt. State v. Kintz, 169 Wn.2d 537, 551, 238 P.3d 470 (2010). A challenge to the sufficiency of the evidence admits the truth of the States' evidence. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. State v. Hosier, 157 Wn.2d 1, 8, 133 P.3d 936 (2006).

In testing the sufficiency of the evidence, the reviewing court does not weigh the persuasiveness of the evidence. Rather, it defers to the trier of fact on issues involving conflicting testimony, credibility of witnesses, and the weight of the evidence. State v. Stewart, 141 Wn. App. 791, 795, 174 P.3d 111 (2007). Evidence favoring the defendant is not considered. State v. Randecker, 79 Wn.2d 512, 521, 487 P.2d 1295 (1971) (negative effect of

defendant's explanation on State's case not considered), State v. Jackson, 62 Wn. App. 53, 58 n.2, 813 P.2d 156 (1991) (defense evidentiary inference cannot be used to attack sufficiency of evidence to convict). Credibility determinations are for the trier of fact and are not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990); State v. Cantu, 156 Wn.2d 819, 831, 132 P.3d 725 (2006).

A. THERE WAS SUFFICIENT EVIDENCE FOR A RATIONAL TRIER OF FACT TO CONVICT THE DEFENDANT OF FIRST DEGREE BURGLARY.

A person commits first degree burglary if, with intent to commit a crime against a person or property therein, he enters or remains unlawfully in a building and if, in entering or while in the building or in immediate flight therefrom, he assaults any person. RCW 9A.52.020.

In the present case there is sufficient evidence to prove the defendant unlawfully entered or remained in Mr. Kronbeck's residence; that he entered or remained with the intent to commit the crime of assault; and that he in fact did assault Mr. Kronbeck while he was in his residence.

The defendant and his family were Mr. Kronbeck's houseguests for a limited amount of time. They were looking for a

new place to live. They were never given a key or allowed to enter the house without Mr. Kronbeck being there. After an exchange of words, they decided to leave. They loaded up their possessions and left. It is true they left a number of things behind, but that did not create license for them to enter the house at will. Their failure to respond to Mr. Kronbeck's phone calls regarding the property implied they were abandoning the property. In fact, Mrs. Fischer testified, they left the cat with the expectation that Mr. Kronbeck would give the cat away. She explained that they couldn't have the cat where they were going. The cat was an outdoor cat. 2/11/14 RP 44-45.

In addition to the change in living arrangements, the fact that the defendant kicked open the door after he knew Mr. Kronbeck had locked it is evidence that he entered the residence unlawfully.

Furthermore, even if [the defendant] had permission to enter, he clearly did not have permission to kick down the door. Under all these circumstances, including the amount of force used, there was sufficient evidence from which the court could find beyond a reasonable doubt that [the defendant] entered unlawfully, i.e., without permission.

State v. Woods, 63 Wn. App. 588, 591, 821 P.2d 1235, 1237 (1991).

The defendant argues there was insufficient evidence to prove the intent to commit a crime inside the residence as the defendant could lawfully obtain any of his belongings that were in there. The defendant relies on State v. Woods, supra. Appellant's Brief 7. However, unlike Woods, this is not a case where the jury had to infer the intended crime from the fact of entry. In this case the defendant did not run away as soon as he saw the homeowner inside the residence. The defendant completed the crime inside the residence. The defendant was angry when he went to Mr. Kronbeck's house. He was more angry when he found items missing and he was told they were not in the house. Mr. Kronbeck told him his belongings were no longer in the house, closed the door and locked it. The defendant broke down the door and assaulted Mr. Kronbeck. The state's theory of the case from charging through closing argument was not that the defendant intended to take property from the house, but that the defendant entered and remained in the house with the intent to assault Mr. Kronbeck. This was borne out by the defendant actually assaulting Mr. Kronbeck once he had kicked through the locked door and entered the house. The defendant does not contest that he

assaulted Mr. Kronbeck, only the degree of the assault. 2/11/14
RP (Closing Arguments) 33; Appellant's Brief 12-14.

Viewing the evidence here in a light most favorable to the
State, any rational juror could have found the defendant intended to
commit a crime after unlawfully entering Mr. Kronbeck's home.

**B. THERE WAS SUFFICIENT EVIDENCE FOR A RATIONAL
TRIER OF FACT TO CONVICT THE DEFENDANT OF THIRD
DEGREE ASSAULT.**

The defendant contends there was not sufficient evidence
for the jury to find the bodily harm inflicted in this case was
accompanied by substantial pain that extends for a period sufficient
to cause considerable suffering. Appellants Brief 13-14.

(1) A person is guilty of assault in the third degree if
he or she, under circumstances not amounting to
assault in the first or second degree:...

(f) With criminal negligence, causes bodily harm
accompanied by substantial pain that extends for a
period sufficient to cause considerable suffering...

RCW 9A.36.031.

Here, Mr. Kronbeck testified that the physical pain caused by
the assault was still present at the time of the trial, approximately
10 months after the assault. He testified that the swelling and
discoloration to his face lasted about three weeks. He took
antibiotics to help reduce the swelling, so he wouldn't lose his eye.

Mr. Kronbeck also testified that his eye continued to itch and he had to use a prescription cream for a few months for that symptom. 2/10/14 RP 68-69. Mr. Kronbeck also testified that he used to sleep on his right side but does not do so any longer due to the sensitivity of his cheekbone and that it is hard on his eye. 2/10/14 RP 69-70.

This is more than ample evidence supporting the jury's verdict as to this charge. "Here, [the victim's] swollen eye and the pain in her face lasted throughout the morning of July 3. This is ample support for the jury's conclusion that [the victim] experienced pain for a period of time sufficient to cause suffering." State v. Fry, 153 Wn. App. 235, 241, 220 P.3d 1245, 1247 (2009), review denied 168 Wn.2d 1025 (2010).

The defendant relies on the minimum level of injury as that represented in State v. Robertson, 88 Wn. App. 836, 947 P.2d 765 (1997). The testimony shows that Mr. Kronbeck's injuries were more substantial and the pain longer lasting than that in Robertson. Furthermore, this court has previously declined to set the injuries in Robertson as the standard.

[The defendant] argues that the standard we should use to measure whether injuries are severe enough to warrant a conviction under RCW 9A.36.031 comes

from this court's opinion in [Robertson]. Although Robertson provides guidance on this issue, it does not purport to set limits on what types of injuries are sufficient to sustain a conviction. Here, a rational trier of fact could conclude that [the defendant] caused [the victim] substantial pain and considerable suffering because there was evidence that she complained of neck pain lasting for more than three hours, and that she had swelling on her cheek and an abrasion on her forehead...

State v. Saunders, 132 Wn. App. 592, 600, 132 P.3d 743, 747 (2006), review denied 159 Wn.2d 1017 (2007).

Viewing the evidence here in a light most favorable to the State, there is substantial evidence that any rational juror could have found the defendant negligently caused Mr. Kronbeck bodily harm accompanied by substantial pain that extends for a period sufficient to cause considerable suffering.

C. THERE WAS SUFFICIENT EVIDENCE FOR A RATIONAL TRIER OF FACT TO CONVICT THE DEFENDANT OF THIRD DEGREE MALICIOUS MISCHIEF.

(1) A person is guilty of malicious mischief in the third degree if he or she:

(a) Knowingly and maliciously causes physical damage to the property of another, under circumstances not amounting to malicious mischief in the first or second degree...

RCW 9A.48.090.

The defendant asserts there was not sufficient evidence for a rational trier of fact to find beyond a reasonable doubt that he

kicked in the back door of Mr. Kronbeck's home with malice. Appellant's Brief 15-16. The defendant attempts to analogize the facts in this case with the facts in City of Bellevue v. Kinsman, 34 Wn. App. 786, 664 P.2d 1253 (1983). In Kinsman, the defendant had returned to retrieve her young child from being watched for the evening. She found the house dark and no one responded to her knocking. Kinsman grew increasingly concerned for the safety of her child. Eventually, Kinsman was able to exert sufficient force on the door to cause it to open. Kinsman, 34 Wn. App. at 787-88.

However, the facts are quite different in present case. In this case, Mr. Kronbeck had just told the defendant through the open door that he had moved all of the defendant's belongings out into the yard. Mr. Kronbeck then closed and locked the door. There was no testimony that the defendant attempted to knock on the door or otherwise request admittance. The testimony was that the defendant was very angry and he kicked the door in and confronted Mr. Kronbeck, and within a very short time assaulted him and left.

Viewing the evidence here in a light most favorable to the State, there is substantial evidence that any rational juror could have found the defendant acted with malice when he kicked in Mr. Kronbeck's door to assault him.

IV. CONCLUSION

The judgment and sentence should be affirmed.

Respectfully submitted on January 6, 2015.

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January 6, 2015

2015 JAN -7 AM 11:08
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**Re: STATE v. DANIEL C. FISCHER
COURT OF APPEALS NO. 71612-3-1**

Dear Mr. Johnson:

The respondent's brief does not contain any counter-assignments of error. Accordingly, the State is withdrawing its cross-appeal.

Sincerely yours,

Mara J. Rozzano #10937
[Signature]

MARA J. ROZZANO, #22248
Deputy Prosecuting Attorney

cc: Washington Appellate Project
Appellant's attorney

6th Jan
[Signature]

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THE STATE OF WASHINGTON,

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No. 71612-3-I

AFFIDAVIT OF MAILING

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 6th day of January, 2015, affiant deposited in the mail of the United States of America a properly stamped and addressed envelope directed to:

THE COURT OF APPEALS - DIVISION I
ONE UNION SQUARE BUILDING
600 UNIVERSITY STREET
SEATTLE, WA 98101-4170

WASHINGTON APPELLATE PROJECT
1511 THIRD AVENUE, SUITE 701
SEATTLE, WA 98101

containing an original and one copy to the Court of Appeals, and one copy to the attorney for the appellant of the following documents in the above-referenced cause:

BRIEF OF RESPONDENT

I certify under penalty of perjury under the laws of the State of Washington that this is true.

Signed at the Snohomish County Prosecutor's Office this 6th day of January, 2015

A handwritten signature in black ink, appearing to read "Diane K. Kremenich", written over a horizontal line.

DIANE K. KREMENICH
Legal Assistant/Appeals Unit