

COURT OF APPEALS

NO. 34074-7-II

FILED
APR 11 2004
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

RITHY TEM,

Appellant.

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

The Honorable Brian Tollefson, Judge

BRIEF OF APPELLANT

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pm 5-4-06

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A. ASSIGNMENTS OF ERROR

1. The state failed to prove beyond a reasonable doubt the identity of the shooter in an attempted first degree assault charge.

2. The state failed to prove beyond a reasonable doubt that the shooter intended to cause great bodily injury in an attempted first degree assault charge.

3. The state failed to prove beyond a reasonable doubt that appellant was in possession of a firearm during the commission of the assault

Issues Presented on Appeal

1. Did the state fail to prove beyond a reasonable doubt the identity of the shooter in an attempted first degree assault charge requiring reversal of the conviction and dismissal of the charges where there were no eyewitnesses and no scientific evidence connecting the defendant to the assault charge?

2. Did the state fail to prove beyond a reasonable doubt that the shooter intended to cause great bodily injury in an attempted first degree assault charge where the window shades were drawn and the shooter could not have known for certain that the apartment was occupied where he aimed his shots?

3. Did the state fail to prove beyond a reasonable doubt that appellant was in possession of a firearm during the commission of the assault?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

On June 22, 2005 Rithy Tem was charged with one count of indecent liberties contrary to RCW 9A.44.100(1)(b) and two counts of attempted assault in the first degree contrary to RCW 9A.28.020 and RCW 9A.36.011(1)(a). CP 1-4. The state amended the information on September 22, 2005 to change the language in the charging document regarding the indecent liberties charge to conform to the facts of the case. CP 5-7. Mr. Tem was convicted as charged following a jury trial, the honorable judge Brian Tollefson presiding. CP 15, 17, 18. The jury also returned two special verdicts for possession of a firearm during the assault in counts two and three. CP 16, 18. This timely appeal follows. CP 46-59.

2. SUBSTANTIVE FACTS

Sara Bunting, the complainant in the indecent liberties charge alleged that a man unknown to her entered Jason Russell's bed where she was sleeping and had uninvited sexual contact with her. RP 32-34. At the time of

the incident Sara Bunting lived in Pennsylvania but was visiting her then fiancé, Jason Russell. RP 26-28. The incident occurred at night after 11:00PM. RP 30-31. Jason Russell invited several friends over to play dominoes. RP 80-81. The friends brought a co-worker, Rithy Tem to Russell's house. RP 64,81, 103-04. While the men were playing dominoes, Tem asked to use the bathroom and left toward that direction. RP 83. He did not emerge until after Ms. Bunting emerged crying and upset alleging that Tem touched her in a sexual manner. RP 35-36, 84 Tem, retreated to the bathroom where he hid until coaxed out. RP 85. Russell confronted him about the incident and a fight ensued. RP 86. No one saw Tem commit the offense, but Ms. Bunting could see that the man was wearing a blue hooded sweatshirt. RP37.

During this entire time, Jason Hatfield, Jason Russell's roommate was asleep in the apartment and unaware of what transpired until the fight started. RP 59, 60. Hatfield helped break up the fight and move Tem outside. After the fight, Tem threw a grill through a window and threatened to shoot everyone. RP 38-39. Hatfield also heard Tem threaten to come back with his "nine" and shoot them. RP 62. Tem left after making the threats. He left behind his wallet and hat. RP 88. Hatfield drove the friends home because they had arrived with Tem in Tem's car. RP 66-67. The neighbor's called the

police because of the noise. RP 66, 89. Bunting did not report the sexual misconduct at that time or call the police herself. RP 41-42, 90-91.

While Hatfield was gone, Russell and Bunting sat down on the couch to discuss what had happened. 43, 91. During this time four shots came through the window. RP 92. Russell and Bunting dropped to the ground afraid. RP 42, 91-93. The window shades were drawn and no one saw the shooter but Russell heard a car drive off after the shooting. RP 68, 93-94.

Hatfield called the police after the shooting. RP 68. The police recovered four shell casings on the ground near the apartment that were capable of being used in a nine millimeter gun, but were unable to match any DNA evidence from the casings to Tem. RP 126, 148, 157-58, 177.

C. ARGUMENT

1. THE STATE FAILED TO PROVE BEYOND A RESASONABLE DOUBT TWO ESSENTIAL ELEMENTS OF ATTEMPTED FIRST DEGREE ASSAULT: THE IDENTITY OF THE SHOOTER.; AND INTENT TO CAUSE GREAT BODILY INJURY.

Rithy Tem was charged with attempted first degree assault. The standard of review for a sufficiency of the evidence claim is whether, after viewing evidence in the light most favorable to the State, any rational trier of

fact could have found essential elements of crime beyond a reasonable doubt. State v. Smith, 155 Wn.2d 496, 501, 120 P.3d 559 (2005); State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. Smith, 155 Wn.2d at 501; Salinas, 119 Wn.2d at 201. A reviewing court will reverse a conviction for insufficient evidence where no rational trier of fact could find that all elements of the crime were proved beyond a reasonable doubt. Smith, 155 Wn.2d at 501; Salinas, 119 Wn.2d at 201. The reviewing court "may infer criminal intent from conduct, and circumstantial evidence as well as direct evidence carries equal weight." State v. Varga, 151 Wn.2d 179, 201, 86 P.3d 139 (2004) (citing State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980)). Credibility determinations are for the trier of fact and are not subject to review. State v. Jackson, 129 Wn. App. 95, 109, 117 P.3d 1182 (2005); State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

RCW § 9A.36.011 Assault in the first degree is defined as follows:

(1) A person is guilty of assault in the first degree if he or she, with intent to inflict great bodily harm:

(a) Assaults another with a firearm or any deadly weapon or by any force or means

likely to produce great bodily harm or death;
or

(b) Administers, exposes, or transmits to or causes to be taken by another, poison, the human immunodeficiency virus as defined in chapter 70.24 RCW, or any other destructive or noxious substance; or

(c) Assaults another and inflicts great bodily harm.

(2) Assault in the first degree is a class A felony.

RCW§ 9A.28.020 Criminal attempt is defined as follows:

(1) A person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he or she does any act which is a substantial step toward the commission of that crime.

An attempt to commit a crime consists of an overt act coupled with a criminal intent. State v. Cass, 146 Wash. 585, 264 P. 7 (1928). To find Tem guilty of attempted first degree assault as charged in the instant case, the state was required to prove beyond a reasonable doubt that: (1) Tem was the person shooting; (2) that Tem intended to inflict great bodily injury; and (3) that he took a substantial step toward committing assault by using a firearm. RCW § 9A.36.011; RCW§ 9A.28.020. The elements of identity and intent to inflict great bodily harm are at issue in the instant case.

(i) Identity

The identity of a criminal defendant and his presence at the scene of the crime charged must be proved beyond a reasonable doubt.” State v. Thomas, 70 Wn. App. 200, 211, 852 P.2d 1104 (1993), 123 Wn.2d 877, 872 P.2d 1097(1994). Identity is a question of fact for the jury to determine. State v. Hill, 83 Wn.2d 558, 560, 520 P.2d 619 (1974). There is insufficient evidence that Tem was present during the shooting or that he was the shooter. Although circumstantial evidence is sufficient to establish an element of a crime, it must meet the rigorous proof beyond a reasonable doubt standard. Assumptions and guess work do not satisfy this standard. State v. Hennessey, 80 Wn. App. 190, 195 907 P.2d 331 (1995)(“guesstimate” of distances for school zone enhancement insufficient to meet beyond a reasonable doubt standard).

In Thomas, the officers were able to identify Thomas as being present during a drug transaction. In the instant case, there was no identification of Tem, just a guess that Tem was the shooter because he made threats to shoot an hour before several shots appeared through the complainants’ window. Tem was never identified as the shooter at trial through any eyewitness testimony and Tem’s fingerprints and DNA were not located on any of the state’s evidence. Moreover a gun was never found and no one was injured by the shots. The state’s evidence of identity was limited to a threat to shoot with

a nine millimeter gun about an hour before shots were fired with bullets capable of being used by a nine millimeter gun.

State v. Huber, 129 Wn. App. 499, 119 P.3d 388 (2005) is a helpful and somewhat analogous case. In Huber, the state charged Huber with bail jumping but failed to identify him in court as the person who committed the crime. The Court of Appeals reversed on this ground. State v. Huber, 129 Wn. App at 502. The Court reiterated that the state must “show beyond a reasonable doubt ‘that the person named therein [charging document] is the same person on trial.’”. State v. Huber, 129 Wn. App at 502 quoting , State v. Kelly, 52 Wn.2d 676, 678, 328 P.2d 362 (1958).

In the instant case, the state identified Tem as the person in court but failed to introduce sufficient evidence that he was the shooter. In the instant case, there was simply an insufficient record to connect Tem to the shooting. His convictions for attempted first degree assault should be reversed and the charges dismissed.

(ii) Intent to Cause Great Bodily Injury.

State v. Ferreira, 69 Wn. App. 465, 468-69, 850 P.2d 541 (1993) provides authority for dismissal of the assault charges on grounds that Tem did not intent to cause great bodily injury. In Ferreira, there was insufficient

evidence to support a juvenile adjudication of first degree assault where the juvenile fired into a house that was only "likely apparent" to be occupied. Ferreira, 69 Wn. App. at 469. The trial court found Ferreira guilty of second degree assault because he "intended to create apprehension or fear to the likely occupants of the house." Ferreira, 69 Wn. App. at 469-70.

In the instant case, when shots were fired into the apartment, the curtains were drawn and the shooter could not see in the house to determine if the house was occupied. If for the sake of argument alone, Tem was the shooter, he would not have known that the apartment was occupied at the time of the shooting. Earlier in the evening he knew that the apartment was occupied but he also knew that he had been the driver for the guests and thus knew that the guests needed to be driven home which would indicate that the apartment might not be occupied. This lack of knowledge regarding the occupancy of the apartment is the same as the "likely apparent" to be occupied finding held insufficient in the assault in the first degree charge in Ferreira. If the Court does not remand for reversal of the assault in the first degree charges for insufficient evidence of identity, it should remand for dismissal on grounds that Tem's lack of knowledge regarding occupancy renders insufficient the evidence of intent to cause great bodily injury. Ferreira, 69 Wn. App. at 469-70.

2. THERE IS INSUFFICIENT EVIDENCE THAT TEM WAS ARMED WITH A DEADLY WEAPON TO SUPPORT THE SPECIAL VERDICTS FINDING TEM ARMED WITH A DEADLY WEAPON

Under RCW 9.94A.310 the deadly weapon enhancement statute, in order to have the presumptive sentencing range increased for possession of a firearm during commission of the crime, the state must charge and prove possession of the firearm beyond a reasonable doubt, rather than merely seeking a departure from the presumptive sentencing range. State v. Gunther, 45 Wn. App. 755, 727 P.2d 258 (1986), review denied, 108 Wn.2d 1013 (1987). The state must also prove that the weapon had capacity to cause death rather than just serious bodily injury. State v. Cook, 69 Wn. App. 412, 848 P.2d 1325 (1993).

In the instant case, Tem was charged with a deadly weapon enhancement for the assault charges.

Under RCW 9.94A.310:

In a criminal case wherein there has been a special allegation and evidence establishing that the accused or an accomplice was armed with a deadly weapon at the time of the commission of the crime, . . . if a jury trial is had, the jury shall, if it find[s] the defendant guilty, also find a special verdict as to whether or not the defendant or an accomplice was

armed with a deadly weapon at the time of the commission of the crime.

Id. When a defendant is charged with being armed with a deadly weapon during the commission of the crime, the state must prove beyond a reasonable doubt that the defendant was in fact armed at the time of the commission of the crime. A jury makes this finding based on the evidence presented and the defendant's sentence is increased pursuant to RCW 9.94A.310; State v. Barnes, 153 Wn.2d 378, 383, 103 P.3d 1219 (2005). "A person is 'armed' for the purpose of a deadly weapon enhancement if a weapon is easily accessible and readily available for use, either for offensive or defensive purposes." State v. Barnes, 153 Wn.2d at 383. citing, State v. Valdobinos, 122 Wn.2d 270, 282, 858 P.2d 199 (1993). "There must be a nexus between the defendant, the crime, and the deadly weapon in order to find that the defendant was "armed" under the deadly weapon enhancement statute." Barnes, 153 Wn.2d at 383; citing, State v. Schelin, 147 Wn.2d 562, 563-64, 576-70, 575, 55 P.3d 632 (2002).

The evidence produced in the instant case does not establish a nexus between the defendant and the crime or the defendant and the weapon. No one saw Tem at the scene of the crime and no one saw Tem in possession of a firearm and no weapon was ever located. The evidence consisted of Tem

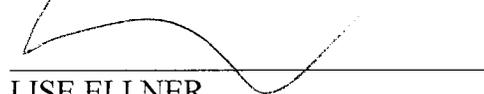
threatening to come back and shoot and someone shooting into the apartment about one hour after the threats were made. It is possible that Tem was the shooter, but possible or even probable is not sufficient to meet the proof beyond a reasonable doubt standard. Barnes, 153 Wn.2d at 383, citing, Schelin, 147 Wn.2d at 576-70, 575.

D. CONCLUSION

Mr. Tem respectfully requests this Court reverse his convictions for attempted first degree assault because the state failed to prove all of the essential elements beyond a reasonable doubt. Mr. Tem also requests reversal and dismissal of the deadly weapons enhancements for the same reasons.

DATED this 7th day of May 2006.

Respectfully submitted,



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I, Lise Ellner, a person over the age of 18 years of age, served the Pierce C County Prosecutor's office, appeals department 930 Tacoma Ave. S. County-City Building Rm 946, Tacoma WA 98402 and Rithy Tem Washington Corrections Center P. O. Box 900 Shelton, WA 98584 a true copy of the document to which this certificate is affixed, on 5/27, 2006. Service was made by depositing in the mails of the United States of America, properly stamped and addressed. #887313

Signature