

NO. 42310-3-II

COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

KIRT D. JONES,

Appellant.

APPEAL FROM THE SUPERIOR COURT
FOR THURSTON COURT
The Honorable Paula Casey, Judge
Cause No. 11-1-00608-9

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

01. The trial court erred in failing to dismiss count I, burglary in the second degree, for insufficient evidence.
02. In finding Jones guilty of burglary in the second degree, the trial court erred in entering conclusions of law 1 and 2, as fully set forth herein at pages 6-7.
03. The trial court erred in failing to dismiss count II, theft in the second degree, for insufficient evidence.
04. In finding Jones guilty of theft in the second degree, the trial court erred in entering conclusions of law 1 and 2, as fully set forth herein at pages 6-7.
05. The trial court erred by employing an impermissible mandatory presumption and thereby shifting the burden of persuasion to Jones to show lack of criminal intent.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

01. Whether there was sufficient evidence to support Jones's conviction for burglary in the second degree as charged in count I? [Assignments of Error Nos. 1-2].
02. Whether there was sufficient evidence to support Jones's conviction for theft in the second degree as charged in count II? [Assignment of Error Nos. 3-4].

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03. Whether the trial court's employment of of an impermissible mandatory presumption shifted the burden of persuasion to Jones to show lack of criminal intent?
[Assignment of Error No. 5].

C. STATEMENT OF THE CASE

Kirt D. Jones (Jones) was charged by information filed in Thurston County Superior Court on April 20, 2011, with burglary in the second degree, count I, and theft in the second degree, count II, contrary to RCWs 9A.52.030 and 9A.56.020(1)(a), respectively. [CP 4].

No motions were filed nor heard regarding either a CrR 3.5 or CrR 3.6 hearing. [CP 13]. Following a bench trial before the Honorable Paula Casey, Jones was found guilty as charged, and the court entered the following Findings of Fact and Conclusions Re Bench Trial:

FINDINGS OF FACT

1. As of June 24, 2010, Douglas Dyjack and his wife were co-owners of a business, Professional Temp Staffing Agency, located at 2608 Pacific Avenue, Olympia, in Thurston County, State of Washington.
2. As of June 24, 2011, the business had an alarm system which, when operational during hours the business was closed, triggered an alarm by the opening of one of the doors to the business or by motion detection within the business interior. When triggered, an alert went to the alarm company and also an audible signal was activated inside the business.

3. On the early morning of June 24, 2010, at approximately 2:30 a.m., the alarm inside Professional Temp Staffing Agency was activated and owner Douglas Dyjack received a call at home from the alarm company informing him of this. Dyjack instructed the alarm company to notify the police. He then drove to the business.
4. At approximately 2:32 a.m., Olympia Police were dispatched to Professional Temp Staffing Agency in response to the alarm. Officer Mike Hovda was the first officer on scene and arrived a few minutes after being dispatched. He went to the back of the building, saw a back door to the business was ajar, and called for other officers to assist. Initially officers formed a perimeter around the business and a tracking dog was used to try and track the path of an intruder, but without success. A check of the interior of the business by officers determined that no one was inside.
5. Officer Mike Hovda observed the interior of the business, searched the outside area for evidence, and took pictures of the interior and exterior areas. However, Officer Cori Schumacher had primary responsibility for investigating the apparent break in.
6. The rear entrance to the business was composed of two French doors which were always kept locked. A window above one of the French doors had been broken. There were three rocks on the floor inside the business which appeared to have been thrown through that window to break in. A garbage can which normally was kept at another location had been moved to a point directly below the broken window. There was a shoe impression found on the garbage can lid. A person standing on top of the garbage can could have lifted himself up

and through the broken window to gain entry into the business without opening or damaging either of the rear doors.

7. Douglas Dyjack and his wife entered the business with Officer Schumacher to determine if anything was missing. They found that a computer and monitor which had been located at the reception desk near the front door were both missing. That computer had been purchased by the Dyjacks at Costco on May 21, 2010 at a cost of \$1,368.99. Additional software costing \$499.99 had been purchased and loaded onto that computer. The value of this computer and monitor together, as of June 24, 2010, was greater than seven hundred and fifty dollars.
8. While looking over the damage in the area of the rear doorway with Dyjacks, Officer Schumacher observed a glass shard on the floor inside the business, close to one of the French doors, which appeared to have a small amount of blood on it. The blood appeared to still be wet. Officer Schumacher then noticed drops of blood on the inside of one of the rear doors and drops of blood on the rug inside the business near the rear doors. Douglas Dyjack also observed the glass shard with apparent blood as well as the apparent blood on the door and on the floor. Officer Schumacher collected the glass shard with apparent blood for evidence purposes. She kept it in her personal custody, either on her person or locked in her vehicle, until she turned the evidence into a secure evidence box on June 25, 2010.
9. Officers Hovda and Schmacher located a path in the glass leading from the back area of the business to a nearby bank parking lot. Along that path, several cords were found on the ground, which were consistent with having been previously used to attach the missing computer to other components.

10. The glass shard taken into evidence was stored at a secure evidence vault at the Olympia Police Department until it was sent to the Washington State Patrol Laboratory in September, 2010 for DNA testing. At the Crime Laboratory, forensic scientist William Dean, tested the red stain on the glass shard and it reacted positively for the presence of blood. He then obtained a DNA profile for the source of this biologic stain. He compared that DNA profile to those on record in the Washington State and National DNA data bases and a match was reported with the DNA profile of defendant Kirt Jones.
11. The glass shard was received back into evidence custody at the Olympia Police Department on March 28, 2011, and kept in secure custody in that department's evidence vault until brought to court for this trial.
12. Olympia Police Detective Johnstone obtained DNA samples from Kirt Jones on May 5, 2011 by swabbing the inside cheek with three swabs. These swabs were placed into a secure temporary evidence locker to air dry. They were then placed into evidence storage. On May 11, 2011, these swabs were taken to the Washington State Patrol Laboratory for DNA testing.
13. Forensic Scientist William Dean obtained a DNA profile using one of the three swabs. He then compared that DNA profile to the one obtained from the stain on the glass shard and determined they were a match. Dean determined that the estimated probability of selecting an unrelated individual at random from the U.S. population with a DNA profile matching that from the stain on the glass shard was 1 in 8.2 quintillion.

14. The swabs were returned to evidence custody at the Olympia Police Department on June 22, 2011. They were kept in secure storage at that location until brought to court for trial.

Based on the above Findings of Fact, and the applicable legal principles, the Court makes the following:

CONCLUSIONS OF LAW

1. The evidence in this case proves beyond a reasonable doubt that defendant Kirt Douglas Jones is guilty of having committed the crime of Burglary in the Second Degree on June 24, 2010 at the Professional Temp Staffing Agency business located in Olympia, Thurston County, State of Washington, in that he entered the professional Temp Staffing Agency building with the intent to commit, either as a principal or accomplice, a crime against property therein.
2. The evidence in this case proves beyond a reasonable doubt that defendant Kirt Douglas Jones is guilty of having committed the crime of Theft in the Second Degree on June 24, 2010 at the Professional Temp Staffing Agency business located in Olympia, Thurston County, State of Washington, by either wrongfully obtaining the property of Professional Temp Staffing Agency which exceeded seven hundred and fifty dollars in value with the intent to deprive the owners of such property or, with knowledge that his actions would promote or facilitate the crime of theft, aided another to wrongfully obtain the property of Professional Temp Staffing Agency which exceeded seven hundred and fifty dollars in value with the intent to deprive the owners of such property.

[CP 13-17].

Jones was sentenced within his standard range and timely notice of this appeal followed. [CP 26-36].

D. ARGUMENT

01. INSUFFICIENT EVIDENCE SUPPORTS
JONES'S CONVICTIONS FOR BURGLARY
IN THE SECOND DEGREE AND THEFT
IN THE SECOND DEGREE.¹

Due Process requires the State to prove beyond a reasonable doubt all the necessary facts of the crime charged. U.S. Const. Amend. 14; Const. art. 1, § 3; In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). The test for determining the sufficiency of the evidence is whether, after viewing the evidence in light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. 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. Salinas, at 201; State v. Craven, 67 Wn. App. 921, 928, 841 P.2d 774 (1992). Circumstantial evidence is no less reliable than direct evidence, and criminal intent may be inferred from conduct where “plainly indicated as a matter of logical probability.” State v. Delmarter, 94 Wn.2d 634, 638,

¹ As the basic test to determine the sufficiency of the evidence is the same for each count, the counts are addressed collectively herein for the purpose of avoiding needless duplication.

618 P.2d 99 (1980). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. Salinas, at 201; Craven, at 928.

Under RCW 9A.52.030(1), "(a) person is guilty of burglary in the second degree if, with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building other than a vehicle or a dwelling." As charged in this case, theft means "(t)o wrongfully obtain or exert unauthorized control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services...." RCW 9A.56.020(1)(a).

The Professional Temp Staffing Agency was burglarized during the early morning of June 24, 2010 [RP 48-50, 48-50],² and items collectively exceeding \$750 in value were reported missing. [RP 82, 87, 118-123]. None of it was ever recovered. A blood sample taken from a glass shard found inside the building near the point of illegal entry matched a DNA profile of a reference sample provided by Jones, who rested without presenting evidence. [RP 83-84, 88-89, 156-57].

During closing, the State recognized that the line from Jones's charges to his convictions was not a straight one: "(W)e have no direct evidence of who it was who committed this break-in [RP 157]," in

² All references to the Report of Proceedings are to the transcript dated June 27, 2011.

addition to not knowing how many people it took to commit the crimes. [RP 159]. Even so, the prosecutor argued, “Mr. Jones’ (sic) involvement is shown, the State believes, beyond a reasonable doubt by the DNA evidence we have submitted too....” [RP 162].

Here, the State proved Jones’s presence but provided no evidence that he took the missing property or that he had the requisite intent to commit either crime. Jones’s presence in a building does not establish that he took or ever possessed the stolen property. There was no eyewitness testimony and the property was never recovered or in any manner connected to Jones. Evidence that Jones committed the offenses cannot be satisfied by a pyramiding of inferences. See State v. Weaver, 60 Wn.2d 87, 88, 371 P.2d 1006 (1962) (burglary conviction reversed where only proof of defendants’ connection to offense was the discovery of a tool that may or may not have been used in the commission of a burglary in a spot where the defendants had been). Without more, the State’s evidence is insufficient to support Jones’s convictions for burglary in the second degree and theft in the second degree, with the result that these convictions should be reversed and remanded for dismissal.

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02. THE TRIAL COURT IMPERMISSIBILITY
APPLIED A MANDATORY PRESUMPTION
AND THEREBY SHIFTED THE BURDEN
OF PERSUASION TO JONES TO SHOW
LACK OF CRIMINAL INTENT.

Due process requires the State to prove every essential element of an offense beyond a reasonable doubt. State v. Hanna, 123 Wn.2d 704, 710, 871 P.2d 135, cert. denied, 513 U.S. 919, 115 S. Ct. 299, 130 L. Ed. 2d 212 (1994). However,

(t)he burden of persuasion is deemed to be shifted if the trier of fact is required to draw a certain inference upon the failure of the defendant to prove by some quantum of evidence that the inference should not be drawn.

State v. Deal, 128 Wn.2d 693, 701, 911 P.2d 996 (1996) (citing Sanstrom v. Montana, 442 U.S. 510, 517, 99 S. Ct. 2450, 61 L. Ed. 2d 39 (1979)).

“When an inference is only part of the prosecution’s proof supporting an element of the crime, due process requires the presumed fact to flow ‘more likely than not’ from proof of the basic fact.” State v. Hanna, 123 Wn.2d at 710 (quoting Ulster County Court v. Allen, 442 U.S. 140, 165, 99 S. Ct. 2213, 60 L. Ed. 2d 777 (1979)). But if the inference is the only basis for finding an element of the charged offense, then the standard of proof is “reasonable doubt,” rather than “more likely than not.” Id. at 108-09 (citing State v. Delmarter, 68 Wn. App. at 784); see Ulster County Court v. Allen, 442 U.S. at 167.

On the other hand, mandatory presumptions, where the trier of fact is required to find a presumed fact from a proven fact, see Hanna, 123 Wn.2d at 710, are more problematic since they run afoul of a defendant's due process rights if they relieve the State of its obligation to prove all of the elements of the crime charged. Sandstrom v. Montana, 442 U.S. at 523-24.

Based on the record in this case, it appears that the trial court applied a mandatory presumption to find Jones's intent was criminal vis-à-vis the charged offenses.

The DNA evidence clearly establishes that Mr. Jones' (sic) blood was found on shards of broken glass inside this business on Pacific Avenue on June 24th, 2010. The only reasonable inference that can be drawn is that Mr. Jones himself was inside that business at 2:30 a.m., and the only purpose that could be arrived at would be for purposes of stealing something. (emphasis added).

[RP 167-68].

A fair reading of this statement validates the conclusion that the trial court impermissibly employed a mandatory presumption of criminal intent, making it incumbent upon Jones to prove his intent was innocent, with the result that his convictions must be reversed and remanded. State v. Cantu, 156 Wn.2d 819, 826-27, 132 P.3d 725 (2006) (an inference becomes an impermissible mandatory presumption when it requires the defendant to submit evidence to rebut the inference of his criminal intent).

E. CONCLUSION

Based on the above, Jones respectfully requests this court to reverse and dismiss his convictions consistent with the arguments presented herein.

DATED this 28th day December 2011.

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CERTIFICATE

I certify that I mailed a copy of the above brief by depositing it in the United States Mail, first class postage pre-paid, to the following people at the addresses indicated:

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DATED this 28th day of December 2011.

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