

FILED
Oct 15, 2012
Court of Appeals
Division III
State of Washington

No. 30946-1-III

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

SHAWN M. EVERETT,

Defendant/Appellant.

Appellant's Brief

DAVID N. GASCH
WSBA No. 18270
P.O. Box 30339
Spokane, WA 99223-3005
(509) 443-9149
Attorney for Appellant

TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR.....4

B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR.....5

C. STATEMENT OF THE CASE.....5

D. ARGUMENT.....6

Mr. Everett’s right to due process under Washington Constitution,
Article 1, § 3 and United States Constitution, Fourteenth
Amendment was violated where the State failed to prove the
essential elements of the crime of second degree malicious
mischief.....6

E. CONCLUSION.....11

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>In re Winship</i> , 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).....	7
<i>State v. Baeza</i> , 100 Wn.2d 487, 670 P.2d 646 (1983).....	7, 8
<i>State v. Collins</i> , 2 Wn. App. 757, 470 P.2d 227, 228 (1970).....	7
<i>State v. Green</i> , 94 Wn.2d 216, 616 P.2d 628 (1980).....	8
<i>State v. Moore</i> , 7 Wn. App. 1, 499 P.2d 16 (1972).....	7

<i>State v. Myers</i> , 133 Wn.2d 26, 941 P.2d 1102 (1997).....	8
<i>State v. Partin</i> , 88 Wn.2d 899, 567 P.2d 1136 (1977).....	8
<i>State v. Riofta</i> , 166 Wn.2d 358, 209 P.3d 467 (2009).....	9
<i>State v. Salinas</i> , 119 Wn.2d 192, 829 P.2d 1068 (1992).....	7, 8
<i>State v. Taplin</i> , 9 Wn. App. 545, 513 P.2d 549 (1973).....	7
<i>State v. Theroff</i> , 25 Wn. App. 590, 608 P.2d 1254, aff'd, 95 Wn.2d 385, 622 P.2d 1240 (1980).....	8
<i>State v. Zamora</i> , 63 Wn. App. 220, 817 P.2d 880 (1991).....	8
<i>Bernal v. People</i> , 44 P.3d 184, (Colo.2002).....	9

Constitutional Provisions

United States Constitution, Fourteenth Amendment.....	6
Washington Constitution, Article 1, § 3.....	6

Other Sources

Brandon L. Garrett, <i>Judging Innocence</i> , 108 Colum. L.Rev. 55, 60 (2008).....	9
Jacqueline McMurtrie, <i>The Role of the Social Sciences in Preventing Wrongful Convictions</i> , 42 AM.CRIM. L.REV. 1271, 1275 (2005).....	9

A. ASSIGNMENTS OF ERROR

1. The trial court erred in finding that the State's witness, Kathleen Powell, identified Mr. Everett as the person she saw in her front yard.

Finding of Fact No. 3, CP 11.

2. The trial court erred in finding that the State's witness, Kathleen Powell, identified Mr. Everett in a high school yearbook as the person she saw in her front yard. Finding of Fact No. 4, CP 11.

3. The trial court erred in finding that the State's witness, Kathleen Powell, saw Mr. Everett running across her front yard. Finding of Fact No. 5, CP 11.

4. The trial court erred in finding that Kathleen Powell did not see anyone else in her front yard. Finding of Fact No. 10, CP 12.

5. The trial court erred in finding that Mr. Everett knowingly and maliciously caused the damage and was guilty of second degree malicious mischief. Conclusions of Law 1-3, CP 13.

6. The evidence was insufficient to support the conviction for second degree malicious mischief.

B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

Was Mr. Everett's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment violated where the State failed to prove the essential elements of the crime of second degree malicious mischief?

C. STATEMENT OF THE CASE

Shortly after one a.m. on 11/12/11, Kathleen Powell heard a loud crash outside her upstairs bedroom window. She looked out her window into her well-lit front yard and saw two men run across her front yard. She only got a brief glance at the first person but was able to identify some features of the second man, even though she only saw the top of his head and part of the side of his face for about one second. RP 11-15, 27-32. The man did not look up at her. RP 30. She testified the second man looked like Mr. Everett but was not 100% certain. RP 15, 37.

Later it was determined that windows had been smashed out in the pickup parked at the house across the street. RP 18-19. Ms. Powell did not see anyone break out the windows. RP 40. Cody Mayou (Cody) was the primary driver of the pickup and a high school classmate of Mr. Everett. RP 45, 53. The two of them did not get along. RP 55.

Cody showed Ms. Powell some photos of individual boys in his high school yearbook. RP 21. The third photo he showed her was of Mr. Everett. RP 59. Ms. Powell thought the photo of Mr. Everett looked like the person she saw in her yard. RP 22. However, she admitted on cross examination that the person in her yard could have been someone else not in Cody's yearbook. RP 42. Ms. Powell was not shown any photo montage or lineup. RP 42.

Mr. Everett was convicted in juvenile court of second degree malicious mischief. RP 100. The Court concluded that although there was no direct evidence that Mr. Everett was the perpetrator of this crime, the circumstantial evidence was sufficient to support the conviction. CP 12-13. This appeal followed. CP 14.

D. ARGUMENT

Mr. Everett's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment was violated where the State failed to prove the essential elements of the crime of second degree malicious mischief.

As a part of the due process rights guaranteed under both the Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment the state must prove every element of a crime

charged beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). As the United States Supreme Court explained in *Winship*: “[T]he use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law.” *In re Winship*, 397 U.S. at 364.

Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. *State v. Moore*, 7 Wn. App. 1, 499 P.2d 16 (1972). As a result, any conviction not supported by substantial evidence may be attacked for the first time on appeal as a due process violation. *Id.* “Substantial evidence” in the context of a criminal case, means evidence sufficient to persuade “an unprejudiced thinking mind of the truth of the fact to which the evidence is directed.” *State v. Taplin*, 9 Wn. App. 545, 513 P.2d 549 (1973) (quoting *State v. Collins*, 2 Wn. App. 757, 759, 470 P.2d 227, 228 (1970)).

In determining the sufficiency of the evidence, the test is "whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. Salinas*, 119 Wn.2d 192, 201, 829

P.2d 1068 (1992) (citing *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980)). "When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." *Salinas*, 119 Wn.2d at 201, 829 P.2d 1068 (citing *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977)). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Salinas*, 119 Wn.2d at 201, 829 P.2d 1068 (citing *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254, aff'd, 95 Wn.2d 385, 622 P.2d 1240 (1980)).

While circumstantial evidence is no less reliable than direct evidence, *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997), evidence is insufficient if the inferences drawn from it do not establish the requisite facts beyond a reasonable doubt. *Baeza*, 100 Wn.2d at 491, 670 P.2d 646. Specific criminal intent may be inferred from circumstances as a matter of logical probability." *State v. Zamora*, 63 Wn. App. 220, 223, 817 P.2d 880 (1991).

There is insufficient evidence to support Mr. Everett's conviction for two reasons. First, the State's witness, Kathleen Powell, did not unequivocally identify Mr. Everett as the person she saw in her front yard,

contrary to the trial court's written findings of fact. See Assignments of Error Nos. 1-3. Based on that lack of evidence, the trial court should not have relied on her testimony as a basis for conviction.

Mistaken eyewitness identification is a leading cause of wrongful conviction. *State v. Riofta*, 166 Wn.2d 358, 371, 209 P.3d 467 (2009) (citing Brandon L. Garrett, *Judging Innocence*, 108 Colum. L.Rev. 55, 60 (2008) ("The vast majority of [studied] exonerees (79%) were convicted based on eyewitness testimony; we now know that all of these eyewitnesses were incorrect")); *Bernal v. People*, 44 P.3d 184, 190 (Colo.2002) (discussing fallibility of eyewitness testimony); see also Jacqueline McMurtrie, *The Role of the Social Sciences in Preventing Wrongful Convictions*, 42 AM.CRIM. L.REV. 1271, 1275 (2005) ("Mistaken eyewitness identification has long been recognized as a leading cause of wrongful convictions.").

Here, Ms. Powell only got a brief glance at the person she identified in her yard. She only saw the top of his head and part of the side of his face for about one second. RP 11-15, 27-32. Since the man did not look up at her, she never saw his face from the front. RP 30. She testified the man looked like Mr. Everett but was not 100% certain. RP 15, 37. Ms. Powell testified she thought the photo of Mr. Everett from Cody's

high school yearbook looked like the person she saw in her yard. RP 22. However, she admitted on cross examination that the person in her yard could have been someone else not in Cody's yearbook. RP 42. Ms. Powell was also not shown any photo montage or lineup during the follow-up police investigation. RP 42. For all these reasons the trial court should not have relied on her testimony as a basis for conviction

Second, assuming *arguendo* that Mr. Everett was the person Ms. Powell saw running across her front yard, there was no evidence that Mr. Everett was the person who smashed out the windows. Ms. Powell did not see anyone break out the windows, nor did any other witness. RP 40. Contrary to the trial court's written findings (Assignment of Error No. 4), Ms. Powell also observed an unidentified second person in her yard who may very well have been the true perpetrator of this crime. RP 13-14. Or it may have been yet another person that Ms. Powell did not see. There is simply insufficient evidence, direct or circumstantial, that Mr. Everett was the person who smashed the windows in the pickup. The fact that he and Cody do not get along in school might provide a possible motive but cannot substitute as evidence that he actually committed this crime.

In summary, the State failed to prove beyond a reasonable doubt that Mr. Everett was the person who committed this offense. Therefore,

because this essential element was not satisfied, the evidence was insufficient to support the conviction for second degree malicious mischief.

E. CONCLUSION

For the reasons stated, the conviction should be reversed.

Respectfully submitted October 15, 2012,

s/David N. Gasch
Attorney for Appellant

PROOF OF SERVICE (RAP 18.5(b))

I, David N. Gasch, do hereby certify under penalty of perjury that on October 15, 2012, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or e-mailed by prior agreement (as indicated), a true and correct copy of brief of appellant:

Shawn Everett
11709 E Lancelot Dr.
Spokane WA 99218

E-mail: kowens@spokanecounty.org
Mark E. Lindsey/Andrew Metts
Deputy Prosecuting Attorney
1100 West Mallon Avenue
Spokane WA 99260-2043

s/David N. Gasch, WSBA #18270
Gasch Law Office
P.O. Box 30339
Spokane, WA 99223-3005
(509) 443-9149
FAX: None
gaschlaw@msn.com