

30946-1-III  
2017

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COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

SHAWN M. EVERETT, APPELLANT

---

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

---

BRIEF OF RESPONDENT

---

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I.

APPELLANT'S 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 here 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.

## II.

### ISSUES PRESENTED

- A. WAS EYEWITNESS TESTIMONY SUFFICIENT TO SUPPORT  
A FINDING OF GUILT BY THE TRIER OF FACT?

## III.

### STATEMENT OF THE CASE

In the early morning hours of November 12, 2011, Ms. Kathleen Powell was awake because her son had come home from the movies. RP 8-11. Ms. Powell's residence is across the street from the crime scene. Ms. Powell heard a crash, like glass. RP 12. The owner of the truck checked the truck the next day and found that the windows in the victim's mini-truck had been shattered with landscaping bricks. RP 49-50.

Ms. Powell identified the defendant in court as the person she saw running across her front yard on the date in question. RP 15-16. She noted that the person she saw appeared to be laughing or yelling. RP 16. Ms. Powell was shown pictures from a school "year book" by the owner of the damaged truck. RP 23. Ms. Powell was concerned that her memory might be confused so she only looked at pages in the year book with no pointing or emphasis by the victim. RP 24.

The defendant was convicted in Spokane County Juvenile Court of Second Degree Malicious Mischief. RP 100. This appeal followed. CP 14.

#### IV.

#### ARGUMENT

When stripped of excess verbiage, the main issue being promoted by the defendant is that the State presented insufficient proof to justify the trial court's conviction of the defendant. The issue of "insufficient evidence" is well examined in Washington law. The basic theory of the defendant's arguments is that the eyewitness in this case was mistaken. Phrased differently, the defendant wishes this court to retry this case.

When analyzing a sufficiency of the evidence claim, the court will draw all inferences from the evidence in favor of the State and against the defendant. *State v. Joy*, 121 Wn.2d 333, 339, 851 P.2d 654 (1993). The reviewing court will defer to the jury on the credibility of witnesses and the weight of the evidence. *State v. Bonisisio*, 92 Wn. App. 783, 794, 964 P.2d 1222 (1998), *review denied*, 137 Wn.2d 1024 (1999).

Even if an appellate court is convinced that a verdict is incorrect, that court will not overturn the verdict of the jury. *Burke v. Pepsi-Cola Bottling Co.*, 64 Wn.2d 244, 391 P.2d 194 (1964).

"There is sufficient proof of an element of a crime to support a jury's verdict when, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found that element beyond a reasonable doubt." *State v. Bright*, 129 Wn.2d 257, 266 n.30, 916 P.2d 922

(1996). “A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.” *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). The relevant question is whether, 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 doubt. *State v. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980); *State v. Smith*, 106 Wn.2d 772, 725 P.2d 951 (1988); *State v. Myles*, 127 Wn.2d 807, 816, 903 P.2d 979 (1995). The defendant admits to the truth of the State’s evidence and the viewing of the State’s evidence in a light most favorable to the prosecution.

The ultimate question is the identity of the individual who smashed the truck windows.

Ms. Powell identified the defendant in court as the person she saw running across her front yard on the date in question. RP 15-16. She noted that the person she saw appeared to be laughing or yelling. RP 16. Ms. Powell was shown pictures from a school “year book” by the owner of the damaged truck. RP 23. Ms. Powell was concerned that her memory might be confused so she only looked at pages in the year book with no pointing or emphasis by the victim. RP 24.

The defendant argues that eyewitnesses are unreliable. It makes no difference whether that assertion is true or not. The finder of fact, in this case the trial judge, is the one who was present in court to view Ms. Powell’s demeanor

and it was the finder of fact's job to determine the facts of this case. The defendant is mistaken if he believes he can try this case again. The defendant argues that the eyewitness did not see the defendant very well due to a number of conditions including the viewing angles, darkness, etc. Despite the defendant's attacks, the challenge to the sufficiency of the evidence begins with the defendant accepting the accuracy of the State's evidence. The defendant presented no defense at trial. Therefore, the defendant has no actual and substantive defense to the finding of guilt.

The fact that a trial or appellate court may conclude the evidence is not convincing, or may find the evidence hard to reconcile in some of its aspects, or may think some evidence appears to refute or negate guilt, or to cast doubt thereon, does not justify the court's setting aside the jury's verdict. *State v. Randecker*, 79 Wn.2d 512, 517-18, 487 P.2d 1295 (1971). The jury is the sole and exclusive judge of the weight of evidence, and of the credibility of witnesses. *State v. Basford*, 76 Wn.2d 522, 457 P.2d 1010 (1969).

The trier of fact concluded that the eyewitness saw what she saw: The defendant running across her yard moments after the neighbor's truck was damaged. Circumstantial evidence operates in this case to support the finding of guilt.

Regarding the contested Findings of Fact and Conclusions of Law:

Finding of Fact 3. The trial court did not err in finding that the eyewitness identified the defendant as the person who she saw running across her front yard shortly after she heard a “crash.”

Finding of Fact 4. The trial court did not err in finding that the eyewitness selected the defendant’s picture from a “yearbook.”

Finding of Fact 5. The trial court did not err in finding that the eyewitness saw the defendant running across her yard.

Finding of Fact 10. The defendant does not present cogent argument showing another person in her front yard.

Conclusions of Law 1-3. The trial court did not err in finding the defendant guilty as charged.

CP 10-13.

V.

### CONCLUSION

For the reasons stated, the conviction of the defendant should be affirmed.

Dated this 7<sup>th</sup> day of December, 2012.

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