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25597-2-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

RYAN J. O'HARA, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

HONORABLE

BRIEF OF RESPONDENT

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I.

APPELLANT'S ASSIGNMENTS OF ERROR

1. The trial was irretrievably contaminated by evidence that violated the Confrontation Clause of the Sixth Amendment of the Constitution of the United States as explained in *Crawford v. Washington*, 541 U.S. 36, 43, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).
2. There was no evidence untainted by the *Crawford* violation. Therefore, the evidence was insufficient as a matter of law to defeat the presumption of innocence.
3. The jury instructions did not inform the jury of the applicable law of self-defense. Instr. 10, RP 158.

II.

ISSUES PRESENTED

- A. WAS ANY "BACKDOOR" HEARSAY ADMITTED THROUGH THE POLICE OFFICERS' TESTIMONY?
- B. WAS THERE SUFFICIENT EVIDENCE PRESENTED TO SUPPORT THE FINDING OF GUILT?
- C. DID THE TRIAL COURT ERR IN GIVING PART OF THE "MALICE" DEFINITIONAL INSTRUCTION?

III.

STATEMENT OF THE CASE

Mr. Jeffrey Loree testified that on January 3, 2006, he was at Mike Nevin's residence. RP 30. Several others were present at the residence in the early morning hours. RP 31. Mr. Loree heard arguing between the defendant and another guest, Tina Gumm. RP 34. Mr. Loree ignored the argument for a time, but then items in the residence were broken. RP 35. The only part of the argument that Mr. Loree could understand was "keys." RP 35. Mr. Loree did not know the defendant. RP 44.

The argument seemed to be escalating, with the parties falling to the floor. RP 36. Mr. Loree got in the middle of the argument in an attempt to calm down the situation. RP 36. Mr. Loree asked the arguing pair to have respect for the residence. RP 36. Mr. Loree was given the keys in question and he started to give the keys to the defendant. RP 37. Ms. Gumm told Mr. Loree not to give the keys back to the defendant until she got her clothes (or possibly baby clothing) from the trunk. RP 37.

Mr. Loree asked if it was OK to go outside and get the clothes. RP 37-38. Mr. Loree thanked the defendant for being cooperative. RP 38. Mr. Loree and the defendant proceeded out to the car with Mr. Loree in the lead. RP 38-39. The defendant did not seem hostile. RP 39.

When Mr. Loree attempted to open the trunk, the defendant hit him on the head with a Mag-Lite flashlight. RP 41, 46. Mr. Loree responded by picking up a rock and chasing the defendant to keep him from running away. RP 42. During the chase, Mr. Loree lost the rock and the defendant hit him again with the flashlight. RP 43. Mr. Loree was struck after he tripped. RP 44. Mr. Loree testified that he was hit four or five times. RP 44.

One of the strikes to the victim required 16 to 18 stitches to repair. RP 45.

Spokane Police Officer Isamu Yamada testified that the police received a call that a person was being chased by another person with a stick. RP 69. The police initially contacted the defendant who told them that he had been hit by Tina Gumm and another male subject. RP 70. The defendant stated that he had been struck in the head. RP 71.

Ofc. Yamada checked the defendant's head and did not see any injuries. RP 71.

Ofc. Yamada continued his investigation and found numerous people at the location. RP 72. Ofc. Yamada found an individual at the residence in question with blood all over his face. After completing his investigation, the defendant was arrested for second degree assault and transported to the jail. RP 72.

Spokane Police Officer Rob Boothe testified that he also responded to the scene. RP 79. Ofc. Boothe stated that the police initially contacted the defendant because the defendant made the 911 call. When the police responded to the residence, the person answering the door was bleeding heavily from his head and his clothing was drenched in his own blood. RP 80. Ofc. Boothe also noticed some slight bruising. RP 80.

After the officers talked with Mr. Loree, they reinterviewed the defendant. RP 81. The officers also found blood spatters on the ground near the car. RP 81-82.

The officers spoke to the defendant who said that Mr. Loree had struck him in the face (with his hand) for no reason. RP 84. The defendant told the police that he hit the victim once with the Mag-Lite. RP 84. The defendant initially said he swung the flashlight while being chased by Mr. Loree, but then changed his story to be that he had flung the flashlight and did not know its location. RP 84. Police searched the area where the defendant said the flashlight might be and located the Mag-Lite. RP 87. There was hair and blood on the flashlight. RP 88.

Ofc. Boothe also did not see any injuries to the defendant's head or face. RP 85.

Ofc. Boothe testified that police have been unable to locate Mr. Nevin or Ms. Gumm since the night in question. RP 93.

The defendant testified that he had loaned his car to Ms. Gumm and was concerned that she had not returned. RP 103-104. The defendant denied most of Mr. Loree's testimony regarding the events in the residence. RP 108-09, 122. The defendant testified that Ms. Gumm struck him in the face with her fist. RP 110. According to the defendant, Ms. Gumm gave the car keys to Mr. Loree. RP 109.

The defendant stated that he walked out to the car behind Mr. Loree. The defendant denied striking the victim from behind. The defendant testified that he asked for his keys and tried to grab them from Mr. Loree. RP 113. The defendant claimed that Mr. Loree struck him in the forehead with a closed fist. RP 113. The defendant stated that approximately one to one and one half minutes after he was struck in the forehead, the defendant hit Mr. Loree with the Mag-Lite. RP 114.

The defendant claimed he struck the victim to prevent the opening of the trunk. RP 115-16.

According to the defendant, during the chase that ensued, Mr. Loree threw a rock at him. RP 117. The defendant stated that Mr. Loree then picked up a length of wood. RP 117.

The defendant denied striking the victim more than once. RP 119. The defendant claimed that the victim's head injury was self-inflicted. RP 119.

During jury instruction conference, the defense counsel objected to the “401” instruction and the “to convict” instruction. RP 148-150.

The defendant was convicted of second degree assault. CP 41. This appeal followed. CP 46.

IV.

ARGUMENT

A. THERE WAS NO HEARSAY OF ANY TYPE ADMITTED THROUGH THE POLICE OFFICERS.

The defendant claims that “backdoor” hearsay was admitted at trial. The defendant assigns error to the testimony of the police officers.

The defendant does not elaborate on exactly to which statements he is assigning error. The defendant’s arguments only mention RP 72 as the page containing the alleged offending statements. Ofc. Yamada testifies that:

A: There were numerous people at the location. There was an individual at the house that had blood all over his face.

Q: Okay. All right. And what happened next, sir?

A: I started contacting people at the location to find out what exactly happened.

Q: Okay. And was there any other officer on scene?

A: Yeah. Officer Robb Boothe.

Q: Okay. And after your investigation, what happened, sir?

A: Mr. O'Hara was arrested for assault second degree, and I transported him to jail and booked him for that charge.

Q: Thank you.

RP 72.

Officer Boothe's testimony (pointed to by the defendant) is even less relevant. The defendant's brief states that Ofc. Boothe contacted additional persons at the residence. Brf. of App. at 8. Ofc. Boothe testified that he contacted Mr. Nevin and Ms. Gumm. He does not say that he took any statements from either person.

Additionally, the defendant's briefing is simply incorrect when it claims that "Both officers testified that, based on the statements of these witnesses, they arrested Mr. O'Hara for second degree assault and took him to jail." In fact, *neither* officer testified to anything of the sort in front of the jury. Neither officer testified that they did *anything* based on the statements of other persons at the residence.

It can be inferred that after they discovered no injuries on the defendant and blood all over the victim, that perhaps the defendant was

not the innocent victim of an unprovoked attack as he had originally claimed.

No doubt, the investigation turned up information from the victim that, in fact, the defendant had been the unprovoked attacker.

The testimony of the officers was in no way “backdoor,” “front door,” or any other sort of hearsay. The officers simply testified as to their observations, the fact that there were several people at the residence and what they did with the defendant (arrested him) after they completed their investigation.

Since there were no hearsay statements made by the officers, it follows that there can be no *Crawford* issues. *Crawford v. Washington*, 541 U.S. 36, 43, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

This argument is without merit.

B. THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE CONVICTION.

The defendant claims that there was insufficient evidence and that only the victim’s testimony was available to the jury. This is incorrect.

“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).

Examining the defendant’s argument regarding the victim’s testimony, even with only the victim’s testimony, the State would prevail on this argument. The defendant cites several reasons why the testimony of the defendant was not to be believed. However, all of the reasons cited by the defendant apply equally well to the *defendant’s* testimony. The defendant had more of a motive to lie than did the victim. Certainly the defendant had a role in the “fracas.” The defendant’s story was uncorroborated.

In any event, the testimony of the victim is taken as absolutely true during a sufficiency of the evidence analysis.

The defendant is somewhat incorrect that the victim’s testimony was “uncorroborated.” True, the testimony was uncorroborated in the

sense that no one else testified for the State. However, the facts do not lie. The victim had a gash on his head that required approximately 18 stitches to repair. It is unlikely that the victim struck himself on the head with a Mag-Lite flashlight to make his story more believable. It is also difficult for the defendant to explain (rationally) how the victim got the gash on the back of his head while the defendant was engaged in self-defense. That the victim was struck by the flashlight is not in doubt – there was blood and hair on the end of the flashlight.

The police testified that they saw no injuries on the defendant.

Viewing the testimony and the evidence in the light most favorable to the State, there was ample evidence to support the jury's verdict.

C. THERE WAS NO ERROR AS THE DEFENDANT DID NOT REQUEST A DIFFERENT INSTRUCTION THAN THE ONE GIVEN AND DID NOT OBJECT TO THE GIVING OF SAID INSTRUCTION.

The defendant raises a challenge to the jury instruction on self-defense, claiming it is incomplete as given.

The defendant did not object to the instruction about which he now complains. The defendant questioned the "401" instruction and made an objection to the language in the "to convict" instruction. RP 148-151.

Unchallenged jury instructions become the law of the case. *State v. Ng*, 110 Wn.2d 32, 39, 750 P.2d 632 (1988). The defendant cannot complain about the wording of the instruction.

Additionally, there is nothing in the record indicating that the defendant requested either the “malice” definition or the complete language of the “malice” definition from the statutes. Since the defendant did not ask the court for the complete “malice” instruction, he cannot now complain. *State v. Hoffman*, 116 Wn.2d 51, 111-112, 804 P.2d 577 (1991) (“Generally, the failure to give a particular instruction is not error when no request was made for such an instruction...”); *State v. Scherer*, 77 Wn.2d 345, 351-52, 462 P.2d 549 (1969) (error cannot be predicated on a non-requested instruction.)

Additionally, the defendant’s argument does not explain how the defense was hampered by the alleged “truncation” of the “malice” instruction. The defendant misapprehends the alleged portion of RCW 9A.04.110(12). The relevant section for a criminal action is the language: “‘Malice’ and ‘maliciously’ shall import an evil intent, wish, or design to vex, annoy, or injure another person.” RCW 9A.04.110(12). The second part of the statute allows for the inference of malice if the act is done in “willful disregard of the rights of another....” The defendant claims that the victim violated the defendant’s rights, but does not explain

exactly how that occurred. The State is unaware of any caselaw (and none is cited by the defendant) that permits a person to strike someone with a weapon because they are trying to open the person's trunk.

The defendant has simply latched onto an inapplicable piece of statutory language and is trying to make an issue out of it. There was no error.

V.

CONCLUSION

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

Dated this 13 day of April, 2007.

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