

62976-0

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NO. 62976-0-1

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON,
Respondent,
v.
DENNIS WAYNE JACKSON,
Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY
THE HONORABLE CHRIS WASHINGTON

BRIEF OF RESPONDENT

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A. ISSUE PRESENTED

Evidence is sufficient to support a conviction if, when viewed in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. Here, in a prosecution for Robbery in the First Degree, the evidence showed that after the defendant shoplifted a drill from Home Depot, he punched a security guard in the face with a closed fist before fleeing on foot. The jury was instructed in pertinent part that "bodily injury" means "physical pain or injury, illness, or an impairment of physical condition." Did the State present sufficient evidence to support the conviction?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Defendant Dennis Wayne Jackson was charged by Amended Information with one count of Robbery in the First Degree. CP 6. He proceeded to a jury trial before the Honorable Chris Washington,¹ and was convicted as charged. CP 54. The

¹ Four volumes of verbatim reports of proceedings will be referred to as follows:

1RP: December 1, 2008
2RP: December 2, 2008
3RP: December 3, 2008
4RP: December 4, 2008

court imposed a 77-month sentence consecutive to case 08-1-00824-6. CP 58-66. Mr. Jackson timely appealed. CP 67.

2. SUBSTANTIVE FACTS

Tyler Emond is an asset protection specialist and has been working for Home Depot for approximately four years. 2RP 39. The Home Depot store where Mr. Emond works is located at 1335 North 205th Street, with a cross street of Aurora Avenue in Shoreline, Washington. 2RP 45. On May 3, 2008, Mr. Emond was training another asset protection specialist named Russell Yokum, and toward the end of their shift they split up, where Yokum watched the South entrance and Emond watched the North entrance. They were there to watch people "come in and observe them, observe behaviors and things like that." 2RP 49. During that time, Emond got a call from Yokum on his cell that Yokum had observed a suspicious subject and wanted to follow him. Yokum told Emond in what direction the subject was going, and Emond looked down an aisle and saw the subject walking across the aisle, and recognized the subject to be the defendant, Dennis Jackson. 2RP 49-50. Emond has had at least 7 or 8 prior contacts with Jackson. 2RP 65. Jackson was seen walking toward the tool

corral, select a drill, then go back to the drill corral. 2RP 22.

Yokum, who was also observing Jackson, observed the drill to be a Dewalt drill in a container. After Jackson left the area, Yokum observed the drill container that Jackson had with him to be empty. 2RP 22-25. Emond observed Jackson appear to place the drill in his pants, readjusting his pants, and putting his shirt over the drill. Jackson then walked toward the back of the store, to the garden area. 2RP 70-71. Jackson then walked toward the front entrance past the self-checkout registers, set off the ESA pedestals, and left the building. 2RP 72. He made no attempt to pay for the merchandise. 2RP 74.

Emond approached Jackson and identified himself and asked him to accompany him back into the store. 2RP 76.

Jackson did not follow Emond's request and told him he was not going back in. Jackson continued to physically walk through Emond. 2RP 76. Emond put his left hand on Jackson's shoulder and his right hand on Jackson's stomach. Emond could feel the drill in Jackson's pants and again told Jackson to come back to the store with him. At that point, Emond removed his right hand off of Jackson's stomach and onto Jackson's right arm to try to put Jackson in an arm bar lock, which failed. Emond stated that

Jackson was able to "swing across with his left arm and punch me in the face and we were wrestling around." 2RP 76-77. Jackson brought his arm up, then back a little before striking Emond. 2RP 78. Jackson hit Emond with a "closed fist" with "kind of a grazing blow." 2RP 77-78. The blow made Emond stumble back a few feet and release Jackson. 2RP 78. Emond stated that it did not feel good, and that "it hurt." 2RP 78.

Also present during the struggle was Robert Elder, a supervisor at Home Depot. 3RP 161. He did not see Emond get hit by Jackson, but saw Emond's body react as if he were. 3RP 169-70. Elder stated that he heard Emond state that he needed "help," and Elder stated that the only time you can ask for help is if "they're in real big trouble or hurt." 3RP 177. Judi Manzoni, an assistant manager for Home Depot, was also present and observed Jackson hit Emond. 3RP 181, 184. Jackson was then observed to run away from them in the Northwest direction. 3RP 179. King County Sheriff's Deputy Mitchell Wright took photos of Emond and observed injury on his left eye and described it as a "light red, puffy mark on his eye." Ex. 11-12; 3RP 206. Emond did not need medical attention. 3RP 206. When shown the photos taken of Emond's face he stated that Exhibit 11 was a photo of the left side

of his face and said it showed "a little bit of redness and swelling on my cheek where Dennis had struck me..." 2RP 98. When describing Exhibit 12, Emond stated it showed the swelling a little bit better. Emond stated that the swelling right below his left eye was tender for about a day or so. 2RP 100. Emond described where on the video Jackson appeared to have hit him, and them struggling with one another. Ex. 3; 3RP 84. Jackson was later arrested at a nearby bus stop. 2RP 92.

Jackson stated that he went to the Home Depot on May 3, 2008 with the intention of taking a drill and not paying for it. 3RP 247-48. He stated that he intended to sell it or pawn it. 3RP 250-51. Jackson said he tried to get out through the garden section but could not, so he walked to the front of the store. 3RP 249. He stated that Emond confronted him and tried to get him to stop by grabbing him. 3RP 252-53. He stated that Emond did not identify himself and grabbed him from behind, which made him jump and pull away. Jackson denied punching Emond. 3RP 243. Jackson also denied pushing Emond, but claimed he only spun around and ran. 3RP 243-44. King County Sheriff's Detective Davis stated that he overheard Jackson and another person talking in the jail van after he was arrested. He heard Jackson say "I took a drill from

Home Depot. The security guard grabbed me. I swung and hit him." 3RP 228. Davis also overheard Jackson say, "that mother-fucker got up on me, and I spun on him." 3RP 228. Jackson denied saying to the other person in the jail van that he hit the security guard. 3RP 245.

C. ARGUMENT

1. THE EVIDENCE WAS MORE THAN SUFFICIENT TO ESTABLISH THE ELEMENT OF BODILY INJURY.

The defendant asserts that the evidence of bodily injury was not sufficient to support his conviction for Robbery in the First Degree. He is incorrect. The evidence was more than sufficient to support the conviction of Robbery in the First Degree.

Evidence is sufficient when, "after viewing the evidence in the 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); State v. Green, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980). 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." State v. Salinas, 119 Wn.2d at 201. The appellate

court must “defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence.” State v. Fiser, 99 Wn. App. 714, 719, 995 P.2d 107 (2000). Moreover, the appellate court need not be convinced itself beyond a reasonable doubt that the defendant is guilty in order to find that sufficient evidence supports the conviction. State v. Gerber, 28 Wn. App. 214, 216, 622 P.2d 888 (1981), citing State v. Green, 94 Wn.2d at 221.

To be convicted of Robbery in the First Degree, the State must prove that in the commission of a robbery (as defined in RCW 9A.56.190), or of immediate flight therefrom, the defendant inflicts bodily injury. RCW 9A.56.190; RCW 9A.56.200(1). Bodily injury is defined as “physical pain or injury, illness or an impairment of physical condition.” RCW 9A.04.110(4)(a). The defendant only argues that the State has not met its burden to show bodily injury suffered by the victim.

The defendant argues that because the victim did not receive medical attention, and that according to the defendant that the photos do not show injury, that there are insufficient facts to support the physical injury element of the crime. The defendant appropriately cites O'Donnell, Decker, Anderson, and Sparling to

guide the court in its determination as to this issue. State v. O'Donnell, 142 Wn. App. 314, 174 P.3d 1205 (2007); State v. Decker, 127 Wn. App. 427, 111 P.3d 286 (2005); State v. Anderson, 153 Wn. App. 417, 220 P.3d 1273 (2009); State v. Sparling, 141 Wn. App. 542, 170 P.3d 83 (2007). Lastly, the defendant further argues that the amount of force used is sufficient for a Robbery in the Second Degree conviction only, and therefore seeks a reversal of his Robbery in the First Degree conviction.

For assault crimes, the level of injury determines the level of assault charged—the higher the level of injury the higher the level of assault charged. Assault in the First Degree, in terms of the injury element, requires “great bodily harm.” RCW 9A.36.011(1). Assault in the Second Degree requires “substantial bodily harm.” RCW 9A.36.021(1)(a). Assault in the Third Degree, however, requires only “bodily injury,” but that injury must be accompanied by “substantial pain that extends for a period sufficient to cause considerable suffering.” RCW 9A.36.031(1)(f). Because the elements for Robbery in the First Degree only require bodily injury with no other requirement, the threshold for bodily injury is fairly low.

Because the Revised Code of Washington does not go into specific detail of what "physical pain or injury" is, its common or ordinary meaning should be given. State ex rel. Graham v. Northshore Sch. Dist. 417, 99 Wn.2d 232, 244, 662 P.2d 38 (1983). Common or ordinary meanings of words or phrases are found in dictionaries, which courts often look to for guidance. Id. at 244. The court should apply its common meaning and look to the facts specifically in this case to make its determination.

The cases that the defendant cite all have varying level of injury which the courts were able to find sufficient facts to support the conviction. The elements of Robbery in the First Degree do not require substantial or great bodily injury, but rather only require bodily injury. This court can find in this case sufficient facts to also support the element of physical pain or injury. Here, the victim, Tyler Emond, stated that Jackson punched him in the face with a closed fist with a grazing blow. 2RP 76-78. Emond stated that the punch did not feel good, and that "it hurt." 2RP 78. Furthermore, Emond stated that after he was punched, he stumbled back a few feet and released Jackson. 2RP 78. Below his right eye was swollen from the punch, which Emond stated was tender for about a day or so. 2RP 100. The victim explained that although he did

not receive medical attention, he suffered pain for a period of time, which is sufficient to show he had physical injury. The defendant additionally argues that the photos do not show injury, but Emond, the person who would be in the best position to notice any change in his appearance, stated that the photos depicted redness and swelling below his eye. 2RP 99-100. This case is similar to O'Donnell in that the photos of Emond's face do depict injury and corroborate his testimony regarding feelings of pain and tenderness. The victim in the O'Donnell case was choked by the defendant while he took her car keys from her belt loop. The choking left red marks and bruises, which was photographed and admitted at trial. O'Donnell, 142 Wn. App. at 314, 318-19 (2007).

Moreover, as in the O'Donnell case, witnesses in this case corroborate the victim's story. In the O'Donnell case, witnesses saw the defendant choking the victim and resulting fingerprints, and they saw bruising and redness around her neck consistent with being choked in the photos. Id. at 319. Similarly, witnesses in this case said they saw the punch by Jackson, made observations regarding Emond's physical reaction to the punch, and also observed the physical injury to Emond. Robert Elder stated that when Emond yelled for "help," it meant that he was in "trouble or

hurt.” 3RP 177. Though he didn’t see the punch, he saw how Emond’s body reacted to Jackson as if he were punched. 3RP 169-70. Judy Manzoni saw Jackson punch Emond. 3RP 181, 184. It is reasonable for a person to react the way Emond did and move backward after being punched. Furthermore, King County Sheriff’s Deputy Mitchell Wright stated that he observed injury on Emond’s left eye and described it as a “light red puffy mark on his eye,” and testified about the injuries being shown in the photos. Ex. 11-12; 3RP 206. With the victim’s statements of pain, the corroborating witness testimony and photos, the resulting redness and swelling, and a tenderness that lasted over a day, there is sufficient evidence to show bodily injury.

What is also clear is that even if the defendant did not intend to injure another person in the commission of or the flight therefrom the underlying robbery, so long as bodily injury results, the person is guilty of Robbery in the First Degree. Intent to injure is not an element of the crime of Robbery in the First Degree. State v. Decker, 127 Wn. App. at 427, 431 (2005); State v. McCorkle, 88 Wn. App. 485, 501, 945 P.2d 736 (1997). In Decker, the victim was injured by flailing around in order to free himself from the grasp of the defendant. Decker, 127 Wn. App. at 428-30. The court held

that the defendant's acts were the actual and proximate cause of the victim's injuries and therefore there was sufficient evidence to support the Robbery in the First Degree conviction. Id. at 431-32. In this case, Jackson stated that his only intent was to take the drill and sell or pawn it. 3RP 247-51. Jackson stated that he never punched or pushed Emond, but only spun around and ran. 3RP 243-44. Emond stated that Jackson actually punched him with a closed fist by pulling back a little before striking him. 2RP 77-78. Therefore, it is not a question of proximate cause, as Emond's injuries were the actual result of Jackson's actions. It is irrelevant if Jackson intended to injure Emond.

2. BECAUSE THE COURT CAN FIND BODILY INJURY, REVERSAL AND RESENTENCING ON ROBBERY IN THE SECOND DEGREE IS INAPPROPRIATE.

Robbery in the Second Degree requires a use or threatened use of immediate force, but does not require bodily injury. RCW 9A.56.190. The defendant would like this court to believe that the level of force used is sufficient for a conviction of Robbery in the Second Degree because the victim was not injured. However, the record is clear that Emond suffered pain from Jackson punching

him in the face—even if it was only from a grazing blow. Had Jackson continued to just “walk through” Emond or even just pushed Emond and fled, then Emond would not have been injured, but that is not the case here. Jackson’s punch to Emond’s face caused pain and injury. The court should not reverse the defendant’s conviction as the elements require a showing of bodily injury, and based on the facts and arguments above, there are sufficient facts to support a finding of bodily injury and therefore support a conviction of Robbery in the First Degree.

D. CONCLUSION

The defendant’s conviction for Robbery in the First Degree should be affirmed.

DATED this 7th day of July, 2010.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to ELAINE WINTERS, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of Brief of the Respondent, in STATE V. DENNIS WAYNE JACKSON, Cause No. 62976-0-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Janice Schwarz
Name Janice Schwarz
Done in Kent, Washington

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