IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. DENNIS WAYNE JACKSON, Appellant.	No. 62976-0-I DIVISION ONE UNPUBLISHED OPINION FILED: November 22, 2010

Leach, A.C.J. — Dennis Wayne Jackson appeals his conviction, arguing that the State failed to prove beyond a reasonable doubt that he was guilty of robbery in the first degree under the bodily injury prong. The court instructed the jury that "bodily injury" meant "physical pain or injury, illness, or an impairment of physical condition."[1] The evidence was sufficient to support Jackson's conviction. The evidence showed that Jackson stole a drill at Home Depot and then, as he attempted to leave, punched a security guard, causing pain and swelling. We affirm.

Background

On May 3, 2008, Tyler Emond, an asset protection specialist at the Shoreline Home Depot, was training another employee, Russell Yokum. Toward the end of the shift, Emond and Yokum split up to observe customers. Yokum

[1] 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 2.03, at 25 (3d ed. 2008).

called Emond on his cellular phone to report a suspicious person that he saw enter the store. With Yokum's directions, Emond tracked down the "subject," whom he recognized as Dennis Jackson.[2] Emond then followed Jackson to the tool corral. There, Emond saw Jackson take a drill out of its plastic case and put it in the elastic waistband of his pants. Jackson walked through the self-checkout stations without paying and out the front doors, setting off the store's merchandise sensors.

Emond waited to approach until Jackson was completely outside. Emond identified himself and asked Jackson to come back into the store with him. Jackson refused and tried to walk past Emond. Emond put his left hand on Jackson's shoulder and his right hand on Jackson's stomach. Emond again requested that Jackson return to the store, and Jackson continued to push past him. Emond unsuccessfully tried to put Jackson in an armlock. While Emond and Jackson wrestled, Jackson swung with his left arm and punched Emond in the face with a closed fist. Emond testified that when Jackson hit him, it "[did] not [feel] good. It hurt." Emond stumbled backward a few feet and was not able to regain control of Jackson.

Two other Home Depot employees, Judy Manzoni and Robert Elder, were present. Elder testified that although he did not see Jackson punch Emond, he saw Jackson's arm come back and move forward toward Emond's face. He then

[2] Emond knew Jackson from working at the Everett Home Depot, where Jackson had been arrested for shoplifting.

saw Emond move as if in reaction to being hit. Elder heard Emond ask for help, which, according to company policy, meant that Emond either needed assistance or was hurt. Manzoni testified that Jackson hit Emond with his fist. After that, she saw Emond bend down and heard him "yell" for help.

Jackson ran from the store parking lot. King County Deputy Mitchell Joseph Wright responded to Home Depot's call for assistance. Emond and Wright located Jackson. Wright arrested him. Emond told Wright that Jackson punched him in the eye, and Wright took photographs of Emond's face. Wright noticed that Emond had "a light red, puffy mark on his eye, beginning stages of what I'd guess would be a bruise."

Detective Brett Davis was present when Deputy Wright took Jackson into custody. After processing, Davis placed Jackson in a van to be transported to jail. Davis overheard Jackson say to another person in custody, "I took a drill from Home Depot. The security guard grabbed me. I swung and hit him."

Emond's face was "tender for a day or so." He did not seek medical attention.

The State charged Jackson with one count of robbery in the first degree. At trial, Jackson testified that he "never threw a punch at Mr. Emond." The State introduced Deputy Wright's photographs and a surveillance video taken from the Home Depot parking lot. During his testimony, Emond designated for the jury the point in the video where Jackson punched him. Jackson denied that the video showed him punching Emond.

The court instructed the jury on robbery in the first degree and the lesser included offenses of robbery in the second degree and theft in the third degree. The jury convicted Jackson as charged. The court sentenced him to 77 months. Jackson appeals, arguing that the evidence of bodily injury was insufficient to support his conviction for robbery in the first degree.

Standard of Review

In reviewing a challenge to the sufficiency of the evidence, we view all facts and reasonable inferences in the light most favorable to the State to determine whether any rational trier of fact could find the elements of the crime beyond a reasonable doubt.[3] A crime's elements may be established by either direct or circumstantial evidence, one being no more or less valuable than the other.[4] A challenge to the sufficiency of the evidence admits the truth of the State's evidence.[5]

Analysis

We must determine whether the record contains sufficient evidence for the jury to find that Jackson inflicted bodily injury upon Emond. Jackson argues there was no proof that he injured Emond. He asks us to remand for resentencing on robbery in the second degree. We hold that the evidence was sufficient and affirm.

At Jackson's trial, the State was required to prove that (1) Jackson

[3] State v. Lord, 117 Wn.2d 829, 881, 822 P.2d 177 (1991).
[4] State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).
[5] State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

unlawfully took personal property from another person or in his presence, (2) Jackson intended to commit the theft of property, (3) Jackson took the property against the person's will by his use or threatened use of immediate force, (4) the force was used to obtain or retain possession of the property, and (5) Jackson inflicted bodily injury.[6] The court instructed the jury that "bodily injury" meant "physical pain or injury, illness, or an impairment of physical condition."

This instruction required, at a minimum, that the State prove that Jackson caused Emond pain. Here, a reasonable jury could have found this requirement was met. Several witnesses testified that Jackson punched Emond. Emond testified that the punch hurt and the area was tender for a few days. Deputy Wright described the swelling underneath Emond's eye. The State introduced photographs of the swelling and a surveillance video that allowed Emond to show the jury the exact moment the punch occurred. From this evidence, it was reasonable to conclude that Jackson inflicted bodily injury on Emond.

Jackson testified that he did not punch Emond. But the court instructed the jury on both first and second degree robbery, which does not include the bodily injury element, and the jury found Jackson guilty of the more serious offense. The jury did not believe Jackson. Because sufficient evidence supports this decision, we will not disturb the jury's credibility determination on appeal.[7]

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[6] RCW 9A.56.190; RCW 9A.56.200(1)(a)(iii).

[7] See State v. Myers, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997).

In a statement of additional grounds, Jackson asserts that the court should have declared a mistrial once it learned about improper statements one of the jurors made in the presence of the other jurors. We disagree. A trial court has broad discretion in deciding whether to grant a mistrial.[8] We will find that discretion abused if no reasonable trial judge would have reached the same conclusion.[9] A trial court should grant a mistrial when the defendant has been so prejudiced that nothing short of a new trial can ensure a fair trial. An error is prejudicial if it affects the outcome of the trial.[10]

Under RCW 2.36.110, a judge has a duty "to excuse from further jury service any juror, who in the opinion of the judge, has manifested unfitness as a juror by reason of bias, prejudice, indifference, . . . or by reason of conduct or practices incompatible with proper and efficient jury service." Further, CrR 6.5 states, "If at any time before submission of the case to the jury a juror is found unable to perform the duties the court shall order the juror discharged." "RCW 2.36.110 and CrR 6.5 place a continuous obligation on the trial court to excuse any juror who is unfit and unable to perform the duties of a juror."[11]

Here, juror 7 submitted a note to the bailiff, alerting the judge that she overheard two disconcerting comments in the jury room. First, she heard a juror state, "Let's call the judge and tell him we are done. We have his card. Let's

[8] State v. Hopson, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989).
[9] Hopson, 113 Wn.2d at 284.
[10] State v. Gamble, 168 Wn.2d 161, 177, 225 P.3d 973 (2010) (citing Hopson, 113 Wn.2d at 284).
[11] State v. Jorden, 103 Wn. App. 221, 227, 11 P.3d 866 (2000).

ask him to let us go or let us out." The second statement was, "Now we know how taxpayer money is wasted . . . this, the trial."

The court, prosecutor, and defense counsel discussed the proper procedure. Defense counsel asked the court to declare a mistrial. Instead, the court decided to question juror 7, who identified the juror who made the statements as juror 1. Juror 7 told the court that she was the only one who responded to juror 1's comments and "it's very likely that half the room didn't hear it." The court decided to dismiss juror 1.

Because the court properly exercised its obligations under RCW 2.36.110 and CrR 6.5 by immediately questioning juror 7 and dismissing juror 1, we find no abuse of discretion. Further, Jackson cannot demonstrate prejudice. There was no evidence that any juror other than juror 7 heard the statements, and she thought they were inappropriate. This record does not establish that juror 1's statements may have affected the outcome of the trial.

Jackson makes additional pro se arguments. First, he argues that there was insufficient evidence to convict him of robbery in the first degree. As the appellant brief filed by Jackson's counsel adequately discusses this matter, we find no compelling reason to alter our holding that the evidence was sufficient.[12] Second, he baldly alleges "ineffective assistance of counsel." Although the appellant is not required to provide citation to the record and legal authority in his statement, he must "inform the court of the nature and occurrence of alleged

[12] See RAP 10.10(a).

errors."[13] Because we are unable to determine the basis for Jackson's ineffective assistance claim, we do not consider it.

Conclusion

Affirmed.

Leach, A.C.J.

WE CONCUR:

Dwyer, J.

Spearman, J.

[13] RAP 10.10(c).