

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

DARRIS STOKES,

Appellant.

No. 38570-8-II

UNPUBLISHED OPINION

Penoyar, C.J. — Darris Stokes appeals his first degree robbery and two counts of attempted second degree assault convictions. He argues that insufficient evidence supports his attempted second degree assault convictions. He also claims prosecutorial misconduct. We reverse and remand with directions to dismiss with prejudice his attempted second degree assault convictions for insufficient evidence, and we affirm his first degree robbery conviction.

FACTS

I. Background

On the afternoon of April 15, 2006, Misty Martinez heard a knock on her Tacoma apartment door. She looked through the peephole on her door and saw a man whom she did not recognize. She opened the door, believing he was a solicitor. The man said, “Excuse me, ma’am.” 1 Report of Proceedings (RP) at 34. Two men then appeared and pushed on her door. She pushed against the door, but the men pushed their way into her apartment.

The men yelled “B[****], get on the floor.” 1 RP at 42. Martinez knelt onto the floor and, worried for her children, yelled, “My children are here. My children are here.” 1 RP at 42.

Her eight-year-old son, TB, and five-year-old son, NB, sat on the couch in her living room. One of the men, later identified as Stokes, held a gun to Martinez's head.¹ He hit her temple with the end of the gun's barrel, asking Martinez, "Where's the money? Where's the money?" 1 RP at 45-46. One of the men threw a cape, which was hanging on Martinez's coat rack, onto TB and NB and told the two boys to cover their faces.

Once the men entered Martinez's apartment, Stokes pulled a bandanna, which he wore around his neck, over his face.² The two other men covered their faces with "ski mask-type thing[s]."³ 1 RP at 52. The three men wore white, latex gloves. One of the men took "a couple hundred dollars" from her purse but Stokes continued to ask Martinez, "Where is the money? Where is the money?" 1 RP at 53, 55. Martinez replied that she did not have any more money.

At this point, Martinez's sons had removed the cape and were standing up; they were instructed by one of the men to go into the bathroom. Martinez observed that the children looked scared and in shock. She told them to listen to the man and to go into the bathroom; the children complied. Martinez testified that her oldest son, TB, paused before going into the bathroom and stood by her. Martinez testified that Stokes grabbed TB's shirt and asked him, "Where is the money at?" 1 RP at 54. Martinez testified that TB ignored Stokes and walked into the bathroom.

Stokes told the other men to check Martinez's bedroom. They rummaged through the bedroom; flipped her mattress; took Martinez's camcorder, cell phone, and cigarettes; and then left. After the men left, Martinez went to check on her sons and found them upset. Martinez

¹ At trial, Martinez identified Stokes as the man with the gun.

² Martinez described the bandanna as dark blue. TB testified that the bandanna was black.

³ Martinez testified that she saw the three men's faces when they first entered her apartment.

testified that her sons said they thought she was dead. She then ran outside to see if she could see the men's car. Unable to see a vehicle, she returned to her apartment and used her house phone to call the police.

That day, Pierce County Deputy Michael Rawlins showed Martinez a photo montage, and she picked Stokes's picture. She told Rawlins that she was 95 percent certain that the man in the picture was the man who had brought a gun into her apartment during the robbery.⁴

On February 21, 2007, Pierce County Deputy Patrick Davidson responded to an unrelated incident at a Tacoma apartment. This incident was approximately 28 blocks from Martinez's apartment. Stokes and Charles Tynes were in the apartment; both had black bandannas on their persons.

On February 28, 2007, the State charged Stokes with first degree robbery⁵ and two counts of second degree assault⁶ for the alleged assaults of TB and NB.

II. Trial

Stokes and Tynes were tried in a joint trial.. After the State presented its case, Stokes and Tynes moved to dismiss the second-degree assault charges for insufficient evidence. The trial

⁴ Several days later, Deputy Rawlins showed Martinez a second photo montage. She picked Charles Tynes, Stokes's codefendant, from the montage. She told Rawlins that she was sure both men were in her apartment, but she was unsure which of the two men had the gun.

⁵ RCW 9A.56.190, .200(1)(a)(ii).

⁶ RCW 9A.36.021(1)(c).

court granted the motion. The State then moved to instruct the jury on attempted second degree assault. The trial court granted the State's motion.⁷

The jury found Stokes guilty of first degree robbery and two counts of attempted second degree assault. The jury acquitted Tynes of all charges. Stokes appeals.

ANALYSIS

I. Sufficiency of the Evidence

Stokes first contends that the evidence is insufficient to support his attempted second degree assault convictions. We agree.

A. Standard of Review

When reviewing a claim of insufficient evidence, we view the evidence in the light most

⁷ The trial court reasoned:

[T]he circumstantial evidence to me is that when you enter a house with a gun and with masks with the intent to rob, you are prepared to force compliance out of anybody in there, and your intent is to do just that. When you find people in there, you are prepared and ready. You have the intent to force compliance.

By producing a gun, you have the implement to create the fear and apprehension that you will need to force compliance. And the facts further reveal that the assailants did force compliance with the kids, which indicated that if they had to, they would have been ready to take stronger steps to force compliance and would have, had they needed to, been ready to create a reasonable apprehension of imminent fear.

....

But it does seem to me that when you demonstrated your intent by acting against the mother directly with the gun to her head and then move the kids around in compliance, that all of that is a substantial step to what would be a completed crime, if they had to do so.

favorable to the State in order to determine whether 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). We draw all reasonable inferences in the State's favor and interpret the evidence most strongly against the defendant. *State v. Hosier*, 157 Wn.2d 1, 8, 133 P.3d 936 (2006). We do not consider circumstantial evidence any less reliable than direct evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). We defer to the factfinder on issues that involve conflicting testimony, witness credibility, and the persuasiveness of the evidence. *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004).

B. Attempted Second Degree Assault

Stokes argues that the evidence is insufficient to establish that he had the specific intent to cause TB and NB reasonable apprehension of fear or bodily injury with the firearm. He argues that there was no evidence that the gun was ever pointed at the children. The State argues that Stokes took a substantial step toward the commission of second degree assault by bursting into Martinez's apartment, wielding a gun, and pointing the gun at Martinez when her children were in close proximity. The State argues that Stokes's conduct "clearly intended to use fear to control the actions of the boys, and carried criminal purpose to create an apprehension and imminent fear of bodily injury." Resp't's Br. at 11.

Under RCW 9A.36.021(1)(c), an individual commits second degree assault by assaulting another with a deadly weapon under circumstances not amounting to first degree assault. The trial court instructed the jury that an "assault is an act done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to

inflict bodily injury.” Clerk’s Papers at 187; Instr. 17.

The State certainly presented evidence of Stokes’s willingness to assault the children but this willingness is not the same as criminal intent. Under RCW 9A.28.020(1), a person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he or she does any act that is a substantial step toward the commission of that crime. Thus, the crime of attempt contains two elements: (1) the intent to commit the substantive crime, and (2) taking a substantial step toward the commission of that crime. *State v. Chhom*, 128 Wn.2d 739, 742, 911 P.2d 1014 (1996). Criminal intent “may be inferred from all the facts and circumstances.” *State v. Bencivenga*, 137 Wn.2d 703, 709, 974 P.2d 832 (1999). A substantial step is conduct strongly corroborative of the actor’s criminal purpose. *State v. Aumick*, 126 Wn.2d 422, 428, 894 P.2d 1325 (1995). “Any slight act done in furtherance of a crime constitutes an attempt if it clearly shows the design of the individual to commit the crime.” *State v. Price*, 103 Wn. App. 845, 852, 14 P.3d 841 (2000). “[A]n attempt conviction does not depend on the ultimate harm that results or on whether the crime was actually completed.” *State v. Luther*, 157 Wn.2d 63, 73, 134 P.3d 205 (2006).

The intent to create reasonable fear and apprehension of bodily injury may be inferred from pointing a gun, but not from merely displaying a gun. *State v. Ward*, 125 Wn. App. 243, 248, 104 P.3d 670 (2004). Here, there is no evidence in the record that Stokes pointed the gun at the children. Martinez testified that Stokes pointed the gun at her and repeatedly hit it against her temple. She also testified that her sons appeared scared and in shock. One of the men threw a cape onto TB and NB and told them to cover their faces; later, one of the men told the two boys to go into the bathroom. While this evidence demonstrates an intent to frighten the children and

even a willingness to assault them, it does not show that Stokes actually attempted to commit second degree assault against the children. Accordingly, we must reverse Stokes's attempted second degree assault convictions and remand with directions to dismiss the charges with prejudice.

II. Prosecutorial Misconduct

Finally, Stokes argues that the prosecutor committed multiple acts of misconduct in his closing and rebuttal arguments.⁸ We have carefully reviewed the record and find no misconduct. Taken out of context, individual phrases in an attorney's arguments may be incomplete or improper statements of the law. In this case, taken in the context of the instructions and the prosecutor's entire argument, we find no improper argument on deliberations, the burden of proof, or the role of the jury.

Because we reverse and remand with directions to dismiss Stokes's attempted second degree assault convictions with prejudice, we need not address Stokes's other contentions on appeal as they relate only to those convictions.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Penoyar, C.J.

We concur:

⁸ Specifically, Stokes relies on portions of the closing and rebuttal arguments made on RP 477-79, 481-83, 495, 534, 544, 546-48.

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Armstrong, J.

Worswick, J.