11-29-2011

State v. Dixey Respondent's Brief Dckt. 38482

IN THE SUPREME COURT OF THE STATE OF IDAHO

COPY

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	NO. 38482
	)	
vs.	)	
	)	
CLYDE OWEN DIXEY, JR.,	)	
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BINGHAM

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District Judge

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STATEMENT OF THE CASE

Nature Of The Case

Clyde Owen Dixey, Jr. appeals from the judgment entered upon his convictions for two counts of burglary.

Statement Of Facts And Course Of Proceedings

The state charged Dixey with two counts of burglary for burglarizing a tire store on two separate occasions. (R., pp. 67-68.) Specifically, in Count I the state alleged that Dixey entered Ogden's Tire Shop on November 17, 2006, with the intent to commit a theft. (R., p. 67.) In Count II the state alleged that Dixey entered Ogden's Tire Shop on September 29, 2006, with the intent to commit a theft. (R., p. 68.)

The evidence presented a trial showed that on September 26, 2006, an employee of Ogden's Tires, Scott Wilson, witnessed an older Native American man (later identified as Dixey) throwing tires into the back of a truck that was painted primer grey. (Tr., p. 73, L. 13 – p. 74, L. 3.) The truck was parked next to the warehouse where the tires are stored, which is located behind the main shop. (Tr., p. 73, Ls. 13-18; p. 74, Ls. 15-24.) He explained that the truck parked with the tailgate of the truck pointed towards the warehouse door. (Tr., p. 80, Ls. 8-15.) Mr. Wilson testified that he saw the man throw a tire into the back of the truck. (Tr., p. 88, Ls. 13-20.) He explained that he yelled at the man and asked him what he was doing. (Tr., p. 89, Ls. 6-8.) Mr. Wilson testified that the man gave him a blank stare, dropped a tire, got into his truck and left in a "quick hurry." (Tr., p. 89, L. 9 – p. 91, L. 2.) He was able to give law enforcement the

license plate number of the truck. (Tr., p. 89, Ls. 15-23.) Mr. Wilson also explained that customers "very seldom" go to the warehouse and that most of the labor takes place at the main shop. (Tr., p. 84, Ls. 15-22.) He also stated that it was "very unusual" for anybody but an employee to go to the warehouse. (Tr., p. 86, Ls. 17-22.)

Mr. Wilson testified that two months later he saw the same man again. He explained that he and another employee were walking out the back of the main shop to take a break, and he saw Dixey walking out of the warehouse towards the same primer grey pickup truck. (Tr., p. 76, Ls. 1 – 19; p. 83, Ls. 10-13.) After he saw Dixey exiting the warehouse, he went back inside the main shop and notified the store's owner, Roland Ogden. (Tr., p. 76, L. 25 – p. 77, L. 2.) Mr. Wilson testified that Mr. Ogden confronted Dixey, who then jumped in his truck and left. (Tr., p. 77, Ls. 3-10.)

Leslie Cunningham, another employee of Ogden's Tires, also testified. He explained that in November he went out the back door of the main shop and saw Dixey coming out of the warehouse. (Tr., p. 94, Ls. 7-17.) He asked Dixey what he was doing and Dixey told him that he wanted to sell the tires that he had in the back of his truck. (Tr., p. 94, L. 18 – p. 95, L. 21.) Shortly thereafter, Mr. Ogden came out of the main building and asked Mr. Wilson if it was the same guy. (Tr., p. 98, L. 12 – p. 99, L. 16.) Mr. Wilson replied yes and Dixey "jumped in his truck and left." (Tr., p. 99, Ls. 17-20.) Mr. Cunningham described Dixey as "in a hurry" and that he was driving "like he was fleeing." (Tr., p. 99, Ls. 21-25.)

Mr. Ogden explained that he was inside the store when Mr. Wilson came into the store and told him that the person who took the tires was back. (Tr., p. 105, Ls. 17-23.) He went outside and watched Mr. Cunningham speaking with Dixey. (Tr., p. 106, Ls. 4-6.) After Mr. Cunningham finished speaking with Dixey, Dixey drove over to Mr. Ogden and got out of his pickup. (Tr., p. 106, Ls. 7-24.) Mr. Ogden looked in the back of the pickup and saw four or five new tires. (Tr., p. 106, Ls. 10-15.) He testified that none of them belonged to the shop. (Tr., p. 106, Ls. 16-20.) After Dixey got out of his vehicle, he asked Mr. Ogden if he wanted to purchase any tires. (Tr., p. 107, Ls. 5-7.) Mr. Ogden turned to Mr. Wilson and asked him if it was the same gentleman, and he said yes. (Tr., p. 107, Ls. 9-10.) He explained that Dixey then "rushed to get in his pickup in a hurry and drove off." (Tr., p. 107, Ls. 10-25.)

Dixey testified in his defense. (Tr., p. 117, L. 11 – p. 124, L. 8.) He testified that in November he went to Ogden's Tire Shop with his brother-in-law's tires and hoped to trade them. (Tr., p. 118, L. 9 – p. 119, L. 2.) He testified that he did not go into the warehouse but just looked in it. (Tr., p .119, Ls. 9-21.) He explained that he saw Mr. Cunningham coming out of the main building and asked him if he would be interested in purchasing his tires. (Tr., p. 119, L. 19 – p. 120, L. 1.) He testified that Mr. Cunningham asked him to pull around by the big door. (Tr., p. 120, Ls. 4-6.) While he was pulling up to the big door, he saw a man running up to his truck. (Tr., p. 120, Ls. 6-17.) Dixey identified the man as Mr. Ogden. (Tr., p. 120, Ls. 9-11.) He testified that he got out of his truck and began to ask Mr. Ogden if he wanted to trade tires. (Tr., p. 120, Ls. 21-25.)

According to Dixey, Mr. Ogden started screaming at him about where Dixey got his tires. (Tr., p. 121, Ls. 1-7.) Dixey explained that he then "jumped in [his] pickup, and ... stepped on the gas, and it got stuck. And it revved it up, and [he] stopped at a stop sign, and it was still revved up." (Tr., p. 121, Ls. 9-14.) He further explained that he did not own the truck in September nor did he go to Ogden's Tire Shop in September. (Tr., p. 121, L. 18 – p. 122, L. 18.)

At the conclusion of the evidence, the jury found Dixey guilty of both counts of burglary. (R., pp. 110-11.) The court sentenced Dixey to eight years with four years fixed on each count, to run concurrently. (R., pp. 134-35.) The court suspended the sentence and placed Dixey on probation for five years. (R., p. 135.) After an unsuccessful attempt at probation (R., pp. 154-55), and after an unsuccessful retained jurisdiction, the court relinquished jurisdiction and ordered Dixey's sentence executed (R., pp. 175-76). The court entered an amended order of judgment and commitment after Dixey prevailed on his post-conviction relief petition. (R., pp. 199-202.) Dixey timely appealed from the amended judgment. (R., pp. 203-04.)

ISSUE

Dixey states the issue on appeal as:

> Did the State present insufficient evidence to support the jury's verdict finding Mr. Dixey guilty of burglary, Count I?

(Appellant's brief, p. 6.)

The State rephrases the issue as:

Was there substantial evidence presented at trial from which the jury found beyond a reasonable doubt that Dixey was guilty of the burglary alleged in Count I?

ARGUMENT

Substantial Evidence Supports The Jury's Finding That Dixey Burglarized Ogden'sTire Store As Alleged In Count I

A. Introduction

Dixey challenges his conviction for burglary in Count I, arguing the state failed to present sufficient evidence to prove beyond a reasonable doubt that he entered the warehouse with the intent to commit the crime of theft on November 17, 2006. (Appellant's brief, p. 8.) Specifically, he argues that the evidence presented at trial in support of Count II cannot be used as evidence of intent in Count I because such evidence only goes to his propensity to commit the crime and is, therefore, inadmissible. (R., pp. 8-10.) Because Dixey did not object to the jury considering all of the trial evidence, he must demonstrate fundamental error; a burden he has failed to carry. Even if this Court considers the issue as presented by Dixey, the evidence presented in support of Count II was properly used to support Count I to show Dixey's intent in entering the warehouse.

B. Standard Of Review

An appellate court will not set aside a judgment of conviction entered upon a jury verdict if there is substantial evidence upon which a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Sheahan, 139 Idaho 267, 285-86, 77 P.3d 956, 974-75 (2003); State v. Reyes, 121 Idaho 570, 572, 826 P.2d 919, 921 (Ct. App. 1992). The evidence is sufficient where there is substantial, even if conflicting, evidence from which a reasonable juror could find all the elements of the crime proven beyond a

reasonable doubt. State v. Thomas, 133 Idaho 172, 174, 983 P.2d 245, 247 (Ct. App. 1999). Moreover, the facts and inferences to be drawn from those facts are construed in favor of upholding the jury's verdict. State v. Hughes, 130 Idaho 698, 701, 946 P.2d 1338, 1341 (Ct. App. 1997).

C. Dixey Has Failed To Show Fundamental Error In The State's Use Of Its Evidence To Prove The Essential Elements Of Burglary

On appeal, Dixey argues:

> Propensity evidence cannot be used to infer that if Mr. Dixey was guilty of Count II if [sic] he is guilty of Count I. The State is required to prove guilt on every count charged, not provide proof of potential guilt on one count and let the jury assume guilt on the remaining charges [sic] under the assumption that if he did it before he must have done it this time too.

(Appellant's brief, p. 10.) Dixey failed to object to the admission of evidence that Dixey previously burglarized the tire store on September 26, 2006. Nor did he request an instruction that the jury not consider such evidence as showing Dixey's intent in entering the tire store in November. Dixey is therefore raising this argument for the first time on appeal.

"It is a fundamental tenet of appellate law that a proper and timely objection must be made in the trial court before an issue is preserved for appeal." State v. Carlson, 134 Idaho 389, 398, 3 P.3d 67, 76 (Ct. App. 2000). Whether the issue was preserved is a "threshold" inquiry. State v. Stevens, 115 Idaho 457, 459, 767 P.2d 832, 834 (Ct. App. 1989).

An unpreserved issue may only be considered on appeal if it "constitutes fundamental error." State v. Johnson, 149 Idaho 259, 265, 233 P.3d 190, 196 (Ct. App. 2010). In the absence of an objection "the appellate court's authority to

remedy that error is strictly circumscribed to cases where the error is so fundamental that it results in the defendant being deprived of his or her Fourteenth Amendment due process right to a fair trial in a fair tribunal." State v. Perry, 150 Idaho 209, --, 245 P.3d 961, 976 (2010). Review without objection will not lie unless (1) the defendant demonstrates that "one or more of the defendant's unwaived constitutional rights were violated;" (2) the error is "clear and obvious" on the record, "without the need for any additional information" including information "as to whether the failure to object was a tactical decision;" and (3) the "defendant must demonstrate that the error affected the defendant's substantial rights," generally by showing that the error must have "affected the outcome of the trial proceedings." Id. at 978. Application of this three prong test shows that Dixey has failed to show fundamental error.

The first element of a claim of fundamental error is that the alleged error is constitutional. Id. The allegedly erroneous admission of evidence, however, "is a trial error and does not go to the foundation of the case or take from the defendant a right which was essential to his defense." State v. Cannady, 137 Idaho 67, 72-73, 44 P.3d 1122, 1127-28 (2002) (citing State v. Johnson, 126 Idaho 892, 894 P.2d 125 (1995); State v. Bingham, 116 Idaho 415, 776 P.2d 424 (1989)). Dixey's argument that evidence of Count II should not have been considered by the jury in relation to Count I is merely an evidentiary claim under I.R.E. 404(b) and not a claim of constitutional dimension.

Dixey attempts to recast his I.R.E. 404(b) issue as a question of sufficiency of the evidence. This attempt is contrary to existing precedent. In

reviewing a sufficiency of the evidence claim, the appellate court reviews all of the evidence admitted – even erroneously admitted evidence. State v. Moore, 148 Idaho 887, 894, 231 P.3d 532, 539 (Ct. App. 2010). Dixey may not pick and choose which evidence he wants this Court to review. A review of *all* of the evidence admitted shows it is more than sufficient to support the jury's finding that Dixey intended on committing a theft when he entered an outbuilding at Ogden's Tire Store in November, as alleged in Count II.

Dixey has also failed to show clear error or prejudice in the jury's consideration of the evidence that Dixey previously burglarized the tire store on September 29, 2006, as alleged in Count II, because that evidence was admissible to show Dixey's intent in entering the outbuilding on the second occasion in November, which intent was squarely at issue. In closing, Dixey's attorney argued:

> Now, let's talk about the November incident. You've got an entry into the building, but what do you have for intent? How do you tell what someone's intent is? Well, unless you're a mind reader, it's kind of hard to do that so you have to look at the facts and circumstances surrounding the event.
>
> You also have in the case the benefit of Mr. Dixey, himself, testifying to you about what his intent was that day. His intent was he was trying to find someone to discuss the trade of tires. He doesn't take anything from the building. He comes out. He makes contact with Mr. Cunningham. He then makes contact with Mr. Ogden, then he leaves.
>
> I'm not sure from that circumstantial evidence that there is an intent to commit theft there.... He's testified today about what his intent is – what his intent was.
>
> And he's the only one who knows what his intent is. And there is certainly nothing there in his behavior that would contradict that conclusion that he was simply looking for someone to talk to

about trading tires. So, the intent element, I'm arguing that November 1 is not there either.

(Tr., p. 142, L. 8 – p. 143, L. 8.)

Dixey's closing argument demonstrates precisely why evidence relating to his conduct underlying Count II was admissible to prove Count I – because jurors are not "mind reader[s]," the state was required to offer evidence to show Dixey's intent when entering the outbuilding, i.e. "the facts and circumstances surrounding the event." Evidence that Dixey previously entered Ogden's Tire Store in September with the intent to commit theft was relevant to prove Dixey entered Ogden's Tire Store with that same intent in November. This evidence was more than sufficient to support the jury's finding the Dixey intended on committing a theft when he entered an outbuilding at Ogden's Tire Store in Novernber.

A claim indistinguishable from Dixey's argument was rejected in State v. Brummett, 150 Idaho 339, 247 P.3d 204 (Ct. App. 2010). Brummett was charged with burglary of a Shopko store. Brummett, 150 Idaho at --, 247 P.3d at 206. At trial, the court admitted evidence of prior thefts from other Shopko stores, ruling that the evidence was relevant and admissible to show Brummett's intent to commit the theft upon entering the store on the day in question. Id. On appeal, Brummett claimed that the evidence was inadmissible because it could not show Brummett's intent without making the implied conclusion that, because he stole before, he was guilty of the crime in the current case. Id. at 208. The Court of Appeals ruled:

> [T]he logical inference is not that, because Brummett committed the act before, he committed it in this case. Rather, the inference is that, because Brummett has committed the act with the requisite criminal intent on previous occasions, it is less likely that he entered the store with innocent intent on the present occasion.

Id. The Court continued:

> We can accept the defense that an accused car thief had a good faith belief that he had permission to take an automobile on one occasion but when the evidence shows that he has made similar "mistakes" before, our doubts grow. *It is the improbability of these fortuities rather than any inference as to the character of the accused that supports the belief of guilt.*

Id. (quoting 22 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5242 (1978) (footnotes omitted) (emphasis in original)).

Similarly, the "logical inference" is not that because Dixey burglarized the tire store in September (Count II), he burglarized it again in November (Count I). "Rather, the inference is that, because [Dixey] ... committed the act with the requisite criminal intent on [a] previous occasion, it is less likely that he entered the [warehouse] with innocent intent on the [subsequent] occasion."

Consideration of evidence of the prior burglary in relation to the subsequent burglary was not clear error and did not prejudice Dixey. Dixey has failed to show fundamental error. His claim that he could not be convicted on the basis of "propensity" evidence did not state of claim of constitutional error. Likewise, because the evidence would have been properly admitted under I.R.E. 404(b) there is neither clear error nor prejudice.

Because substantial competent evidence supports the jury's determination that Dixey burglarized the tire store in November, as alleged in Count II, this

Court should affirm Dixey's judgment and sentence entered upon his convictions for burglary.

CONCLUSION

The state respectfully requests this Court to affirm Dixey's judgment and sentence entered upon his convictions for burglary.

DATED this 29th day of November, 2011.

ELIZABETH A. KOECKERITZ
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 29th day of November, 2011 served a true and correct copy of the attached BRIEF OF RESPONDENT by causing a copy addressed to:

ELIZABETH ANN ALLRED
DEPUTY STATE APPELLATE PUBLIC DEFENDER

to be placed in The State Appellate Public Defender's basket located in the Idaho Supreme Court Clerk's office.

ELIZABETH A. KOECKERITZ
Deputy Attorney General

EAK/pm