68443-4

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NO. 68443-4-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ELIJAH HALL,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MARIANE C. SPEARMAN

BRIEF OF RESPONDENT

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A. ISSUE PRESENTED

Evidence is sufficient if, considered in a light most favorable to the State, any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. Here, Hall donned a disguise and entered a convenience store armed with a revolver. Inside, he tried to open the unattended cash register before being interrupted by the shop clerk. Hall shot the clerk. After arrest, Hall said that his plan from the start was to enter the store, point the gun at the clerk, scare him, and take the money. In the light most favorable to the State, was there sufficient evidence for a reasonable jury to convict Hall of Felony Murder in the First Degree based on robbery?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

In the Third Amended Information, the State charged Elijah Hall in Count I with Murder in the First Degree, alleging that "while committing and attempting to commit the crime of Robbery in the First Degree," Hall did "cause the death of Manish Melwani." CP 40. In that same count, the State also alleged that Hall was armed with a firearm. CP 40. In Count II, Hall was accused of

Unlawful Possession of a Firearm in the Second Degree, for possessing a firearm while under the age of 18. CP 41. Following trial, a jury convicted Hall of all counts. CP 72-74.

2. SUBSTANTIVE FACTS.

On July 26, 2009, Elijah Hall wanted to "get some money" because he was tired of being broke. 2RP[1] 564-65. He formed a plan to enter the Pit Stop Express convenience store with his snub nosed revolver, show the clerk the gun, and tell him to "hand the money over." 2RP 565. The Pit Stop was just a few blocks from Hall's home, and he had been inside many times to purchase items from the clerk, Manish Melwani, whom he recognized. 2RP 553. In preparation for the robbery, Hall put together a disguise: dark sunglasses, a hat, a bandana, a jacket and a backpack. CP 575. The sunglasses and the bandana were taken from his housemate and his housemate's mother. 2RP 410-13.

[1] This brief will refer to the Report of Proceedings from September 28-29, 2011, October 6, 21, 24, 2011 and February 2, 2012, pages 1-123, as 1RP. It will refer to the Report of Proceedings from October 12-13, 17-20, 2011, pages 1-690, as 2RP.

Most of Hall's actions inside the store are captured on color surveillance video. Ex. 5.[2] On the video, Hall can be seen perusing items in the store at 06:28 AM, before he approaches the cash register; from the first moment he is captured on film he is wearing his disguise, with the bandana and sunglasses covering his entire face. Exhibit 5 at 06:28. For several minutes, Hall fumbles with the buttons and keys, attempting to open it, and searches around the vicinity of the cash register, apparently looking for a way to open it. Ex. 5 at 06:29 – 06:33:20. Hall uses only his left hand as he struggles to open the register; his right hand is pressed against his right pocket or waistband, apparently holding an object. Id. At 06:30:11 AM, a customer enters, sees Hall in his disguise, and hurriedly exits. Ex. 5. At 06:32:20, Hall moves from the camera's view and returns with gloves on; Detective Cooper testified that the area where Hall moved toward is the section of the store that sold household items, including gloves. 2RP 173-74.

At 06:33:20, Melwani, the Pit Stop clerk, can be seen arriving from the back of the shop and addressing Hall from across the counter; the camera captures Hall as he immediately pulls his

[2] Exhibit 5, the surveillance video capturing the robbery and murder, was admitted into evidence and has been designated by the State for this appeal.

gun out, and handles it with both of his gloved hands. Ex. 5. At 06:33:40, as Melwani walks around the counter toward Hall, a muzzle flash flares from Hall's gun on camera, indicating Hall's first shot. Ex. 5. The camera's eye then captures Melwani, even after being shot, nearing Hall and grabbing for the gun. Ex. 5 at 06:33:41. Both Hall and his victim struggle over the gun until 06:35:06, when Hall fires another shot, hitting Melwani in the stomach. Hall flees the store and Melwani tries to give chase, but gives up at the door of his store. Ex. 5 at 6:35:38. Melwani died from his injuries. 2RP 563.

The sunglasses Hall wore during the robbery were left behind and recovered by police, and the rest of his disguise was found behind a fence a short distance away. 2RP 173-74, 294. Hall and his girlfriend watched from across the street as detectives investigated the scene, and remained for hours until a K-9 dog was brought. 2RP 214-15. Hall's DNA was found on the disguise. 2RP 371-86.

After his arrest, Hall spoke with the police, and after denying his involvement, finally confessed to the robbery and the shooting. 2RP 582. He testified at trial, and admitted telling the police that he had not planned on killing Melwani, just scaring him:

> I thought that the plan was going to be, okay, I planned, he would be behind the counter, it was going to be easier, I could just scare him with the gun.

2RP 582[3]. Hall told the police what was going through his head after Melwani confronted him: "A rage came over me, like, you know, I can't get caught." 2RP 582. Hall also admitted, on cross examination, that he "planned to do this theft using [his] firearm and things... went horribly wrong." 2RP 580.

3. JURY INSTRUCTIONS AND ARGUMENT.

The jury received a definitional instruction for the crime of Murder in the First Degree that tracked with the WPIC[4] and the statute:

> A person commits the crime of Murder in the First Degree when he she commits or attempts to commit Robbery in the First Degree and in the course or in furtherance of such crime or in immediate flight from such crime he or she causes the death of a person other than one of the participants.

WPIC 26.03; RCW.9A.32.030(1)(c); CP 53. The definition of Robbery in the First Degree provided to the jury also followed the WPIC and the statute:

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[3] While Hall said at one point during trial that he did not intend to commit a robbery, he also said that he planned on using his gun to scare the store clerk into giving him money. 2RP 565.

[4] Washington Pattern Instructions Criminal.

> A person commits the crime of robbery in the first degree when in the commission of a robbery or in immediate flight therefrom he or she is armed with a deadly weapon or displays what appears to be a firearm or other deadly weapon or inflicts bodily injury.

WPIC 37.01; RCW 9A.56.200; CP 55. The general definition of robbery was also submitted, and also followed the WPIC and the statute:

> A person commits the crime of robbery when he or she unlawfully and with intent to commit theft thereof takes personal property from the person or in the presence of another against that person's will by the use or threatened use of immediate force, violence, or fear of injury to that person or to that person's property or to the person or property of anyone. The force or fear must be used to obtain or retain possession of the property or to prevent or overcome resistance to the taking, in either of which cases the degree of force is immaterial. The taking constitutes robbery, even if death precedes the taking, whenever the taking and a homicide are part of the same transaction.

WPIC 37.50; CP 56. This definition mirrors RCW 9A.56.190.

Attempted Robbery in the First Degree was defined as follows:

> A person commits the crime of Attempted Robbery in the First Degree when, with the intent to commit that crime, he or she does any act that is a substantial step toward the commission of that crime.

WPIC 100.01; CP 57.

During closing argument, both parties focused on whether or not the elements of robbery had been proven beyond a reasonable doubt. The prosecutor reminded the jury that Hall had selected his target, a store he could walk to, and his victim, someone he had dealt with before. 2RP 646. She argued that Hall had planned ahead, selecting his disguise and bringing with him a loaded gun. 2RP 646-47. She told the jury that the State had to "prove that the defendant caused that death, either in the course of, or in flight from, the crime of attempted robbery in the first degree," adding that "this is where [the jury] has to" put their "thinking caps on." 2RP 650-51. Then the prosecutor re-read the definition of robbery to the jury and began to apply the instructions to the facts presented. 2RP 651-53.

In his own closing argument, Hall's defense counsel rebutted the State's assertion that Hall's acts inside the Pit Stop amounted to attempted robbery:

> He didn't take or attempt to take the personal property from the person or in the presence against a person's will. Mr. Manish Melwani is not out there during the whole course of the encounter with the cash register. We don't see my client trying to take anything or take anything in his presence. He certainly doesn't do anything to take anything from Mr. Manish Melwani's person.

2RP 664. The defense attorney went on to argue that the only crime that was being committed prior to an assault on Melwani was an "attempted theft." 2RP 671.

In her rebuttal, the prosecutor argued that Hall's actions, particularly his entering the Pit Stop in a full disguise with a loaded gun, were not consistent with a "simple theft." 2RP 674. Then she reminded the jury that the defendant had told police, "My plan was... I was going to show the clerk the gun and he would give me the money." 2RP 676. She then posed a rhetorical question for the jury, asking if they "honestly believe that he went in there just to steal." 2RP 677. "You can't," she argued, "ignore all of those steps up to that point." 2RP 677. The prosecutor then addressed the defense attorney's theft argument head on:

> When he tells you it is not from the person, or in the presence of, really we can never have a rob I that occurs, if the clerk has their back turned, or if the clerk is in the back room and the clerk interrupts.
>
> ....
>
> Importantly, when you think about attempted robbery first degree, what did this young man plan for? He planned for an encounter with someone when he formed his intent. That's what he prepared and planned for.

2RP 684-85.

C. ARGUMENT

IN THE LIGHT MOST FAVORABLE TO THE STATE, A RATIONAL TRIER OF FACT APPLYING THESE JURY INSTRUCTIONS COULD FIND THAT HALL WAS ENGAGED IN AN ATTEMPTED ROBBERY IN THE FIRST DEGREE WHEN HE KILLED MELWANI.

Hall contends that the definition of robbery provided to the jury, when read in a "commonsense manner," required the State to prove that Hall actually attempted to take an item in Melwani's presence and either used, or threatened to use, force during that attempted taking. While he concedes that case law does not require that force be used at the onset of the taking, Hall argues that the definition of robbery submitted to the jury created this requirement here. The cases that interpret the robbery statute, however, all counter Hall's position, holding that the plain language of the statute does not require that force be used in the initial acquisition of the property.

Every element of a crime must be proven beyond a reasonable doubt. State v. A.M., 163 Wn. App. 414, 419, 260 P.3d 229 (2011). When an appellant challenges the sufficiency of the evidence, the reviewing court views the evidence in the light most favorable to the State, drawing all reasonable inferences from the evidence in the State's favor and interpreting them "most strongly

against the defendant." State v. Engel, 166 Wn.2d 572, 576, 210 P.3d 1007 (2009).

In order to prove robbery, the State must prove that a defendant took property from a person or in the presence of a person by force or threatened use of force and the force must be used to obtain or retain possession of the property or "overcome resistance to the taking." RCW 9A.56.190.

Washington courts have adopted a transactional approach to the robbery statute, where the use or threatened use of force may occur at any point during the theft. State v. Manchester, 57 Wn. App. 765, 769-70, 790 P.2d 217 (1990). In State v. Handburgh, 119 Wn.2d 284, 830 P.2d 641 (1992), the juvenile defendant was seen riding the victim's bicycle. When the 12-year-old victim confronted him, he threw rocks at her and beat her up. Id. at 285-86. He was convicted of Robbery in the Second Degree and, on appeal, the defendant argued that he did not take the property in the victim's "presence" because she was not there when he took it; the Court of Appeals agreed. Id. at 286. The Washington Supreme Court, however, agreed with the State's argument on appeal, that regardless of when the bicycle was initially taken, it was retained by the defendant via the use of force,

and therefore satisfied the requirements of robbery under the statute. Id. at 287.

The court in Handburgh addressed a hypothetical that is remarkably similar to the facts at hand, positing a scenario where a person enters a store and takes cash from the apparently unattended cash register. Before fleeing, however, the owner confronts him, and the thief points a gun at him. Id. at 290-91. The court pointed out that, even if no additional property was taken, the retention of the cash by the use of the gun is more than theft – it is a robbery. Id. at 291. The court added, "The robbery statute was intended to punish this very combination of crimes." Id. The facts of our case, on their face, satisfy the statutory definition of, at a minimum, an attempted robbery.

While Hall concedes that the statute, as interpreted by case law, was intended to address the very acts committed by Hall, he focuses his argument on the jury instructions, arguing that the "instruction defining 'robbery' required greater proof than that required" under the statute. Brief of Appellant at 12. Hall contends that the taking was not "made in the presence of another," because Melwani was in a back room when Hall first attempted to open the cash register, and there was "no evidence... that [Hall] used force

or fear during his attempts to steal." Brief of Appellant at 13-14. Because of this, Hall contends, no rational trier of fact could have found the elements presented in the WPIC's definition of robbery.

But under the "plain language" of the robbery statute, using force to retain the property taken falls squarely within the definition of robbery. Manchester, 57 Wn. App. at 769. There is nothing in the WPIC definition used by the jury, then, that requires further definition or that can be construed as a technical term.

The conduct described in Handburgh's robbery hypothetical falls squarely under the plain language of the statute. If the plain language of the statute does not require any additional definition to encompass the actions here, then certainly WPIC 37.50, which mirrors the statute, is sufficient to encompass these facts. The instructional language relied upon the jury accurately provided the elements of robbery for the jury, elements that are readily met under these facts.

Hall narrowly interprets the facts to argue that "there was no evidence... that he used force or fear during his attempts to steal." Brief of Appellant at 14. But any viewing of Exhibit 5, the

surveillance video capturing the robbery and murder in living color, reveals that this crime was a fluid act, not readily separated into tidy little moments of time. As the prosecutor argued in her closing, Hall entered the Pit Stop ready to commit a robbery – he not only donned a disguise, but his right hand remained gripping the gun even while his left hand struggled to open the cash register until he raised it to shoot Melwani.

The video in Exhibit 5 makes it clear that Melwani and Hall begin to struggle precisely because Hall is attempting to steal the money and Melwani tries to stop him. Hall thus used force to "overcome resistance to the taking." The attempted taking is inextricably connected to the assault, and provides the very basis for it. To argue that Hall's shooting of Melwani is somehow separate from his attempt to steal the money defies logic, and contradicts the visual evidence provided in State's Exhibit 5, evidence that should be viewed in a light most favorable to the State.

D. CONCLUSION

For the foregoing reasons, the defendant's conviction should be affirmed.

DATED this 6 day of November, 2012.

Respectfully submitted,

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By: _____
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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 Andrew P. Zinner, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Respondent's Brief, in STATE V.ELIJAH HALL, Cause No. 68443-4-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.

Name

11-08-12

Date

Done in Seattle, Washington