69328-0

69328-0

NO. 69328-0-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

CARL TOBIN,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE BARBARA LINDE

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Whether sufficient evidence supports the jury's verdict that Tobin committed robbery in the first degree where the evidence establishes that Tobin and an accomplice beat the victim severely and then forcibly removed the victim's jacket and stole it.

2. Whether Tobin has demonstrated that a courtroom closure occurred where every aspect of jury selection took place in an open courtroom and the form that the trial court used to record the parties' peremptory challenges was filed in the public court record.

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The State charged the defendant, Carl Tobin, and his co-defendant, Antonio Gomez, with robbery in the first degree and malicious harassment for their attack on Daniel Lusko, Jr. on December 23, 2011. CP 1-6. Tobin's jury trial on these charges took place in August 2012 before the Honorable Barbara Linde.

Before jury selection was completed, the trial court explained to the parties its procedure for peremptory challenges. The trial court explained that the parties would take turns writing their

challenges on a form that the court would provide, and that after both parties had finished exercising their peremptory challenges, the parties would sign the form and the trial court would seat the jury accordingly. RP (8/14/12) 128. The trial court further explained that the parties should alert the court orally as to any challenges for cause as they arose. RP (8/14/12) 129. At the conclusion of voir dire, the parties exercised their peremptory challenges by writing them on the trial court's form and then signing it as instructed. RP (8/14/12) 138-39. The form was then filed in the public court record. CP 95.

At the conclusion of the trial, the jury found Tobin guilty of both counts as charged. CP 69-70; RP (8/17/12) 546. The trial court imposed a standard-range sentence totaling 156 months in prison. RP (9/14/12) 17; CP 83-92. Tobin now appeals. CP 93-94.

2. SUBSTANTIVE FACTS

Ernesto Rios owns Inay's Asian Pacific Cuisine, a restaurant in the Beacon Hill neighborhood of Seattle. RP (8/14/12) 145. Rios is active in Seattle's gay community, and every Friday night at Inay's, two of the waiters dress in "drag" for the customers. RP (8/14/12) 146-47. December 23, 2011 was a Friday, and the

waiters at Inay's were dressed in drag as usual. RP (8/14/12) 147-48.

Daniel Lusko, Jr. came into Inay's that night shortly before closing time. Rios knew Lusko from the neighborhood. RP (8/14/12) 149-50. Lusko was dressed garishly in what he described as "entertainment clothing," because he wanted to help entertain the crowd at Inay's for "drag queen night." RP (8/15/12) 260-62. Lusko's outfit included a vintage faux fur jacket. RP (8/15/12) 261-62. Lusko danced with one of the waiters and was having a good time. RP (8/15/12) 264. During the evening, Ernesto Rios noticed that Tobin was "hanging around" in front of the restaurant with another male. RP (8/14/12) 152-53. Rios recognized Tobin, who had tried to sell Rios an electric wheelchair a few days before. RP (8/14/12) 151-52.

When closing time came, Lusko left the restaurant with a group of people, but left his fur jacket inside. RP (8/14/12) 154-55. Rios walked outside to give Lusko his jacket, and Lusko asked Rios to give him a ride home. Rios agreed to give Lusko a ride after he finished closing the restaurant, and he asked Lusko to wait for him at the side door. RP (8/14/12) 155-56. Rios noticed that Tobin and the other male were still loitering nearby. RP (8/14/12) 163. When

Rios came back outside, Lusko was gone, so he gave an employee a ride home and then returned to his residence, which is located behind the restaurant. RP (8/14/12) 163-66.

After Rios went back inside the restaurant, Tobin and his companion, Antonio Gomez, grabbed Lusko by the arms and dragged him toward a set of stairs. RP (8/15/12) 271. Tobin and Gomez started "dry humping" each other, and then they began assaulting Lusko. RP (8/15/12) 272, 275-76. Lusko crawled on the ground to try to get away; Tobin and Gomez were kicking him and calling him a "faggot." RP (8/15/12) 277-78. A third man, John Austin, joined in the assault, but he ran away when Lusko managed to kick him. RP (8/15/12) 275-76. While Tobin and Gomez continued to beat and kick Lusko, Lusko heard Tobin instruct Gomez to "smother the faggot" and "cut off his finger" in order to steal Lusko's ring. RP (8/15/12) 279-80. Tobin and Gomez shoved Lusko's face into the ground, and Lusko eventually lost consciousness. RP (8/15/12) 280. When Lusko regained consciousness, his fur jacket was gone. RP (8/15/12) 280.

Ernesto Rios heard the commotion and looked out of his bedroom window. RP (8/14/12) 174-75. He saw Tobin and Gomez "beating [Lusko] and jumping on top of him." RP (8/14/12) 179.

Rios called 911 to report the attack, and when he saw a police car driving by, he went outside to flag it down. RP (8/14/12) 178, 181. When he came outside, Rios saw Lusko lying on the ground, bleeding. RP (8/14/12) 182. He also saw Tobin and Gomez walking away from the scene; Tobin was wearing Lusko's fur jacket. RP (8/14/12) 184. Rios followed Tobin and Gomez while still on the phone with the 911 operator. RP (8/14/12) 184. Austin rejoined Tobin and Gomez while they were walking down the street. RP (8/14/12) 185. At some point as Rios was following the three men, Tobin got into the electric wheelchair and started riding in it. RP (8/14/12) 187-88.

Officer Aaron Johnson was driving in the area in response to Rios's 911 call. RP (8/15/12) 320. Rios came up to Officer Johnson's patrol car, pointed, and said something to the effect of "those are the guys." RP (8/15/12) 323. Johnson used the PA system on his patrol car to address the three suspects, and he instructed them to put their hands on the hood. RP (8/15/12) 327. Gomez and Austin complied, but Tobin did not. RP (8/15/12) 323. When Tobin did not comply, Johnson shined a spotlight on Tobin and told him he would "beat the crap out of" him if he tried to run

away.[1] RP (8/15/12) 333-34. Tobin said "[w]hatever," and finally complied. RP (8/15/12) 336.

Officer Johnson kept the three suspects detained with their hands on the hood of the patrol car until another officer arrived. RP (8/15/12) 337-38. The two of them then placed the suspects in handcuffs; before handcuffing Tobin, Officer Johnson removed the fur jacket because he knew it had potential evidentiary value. RP (8/15/12) 344. The jacket had been ripped in half. RP (8/14/12) 237. Officer Johnson also noticed what appeared to be blood on Tobin's shoes. RP (8/15/12) 232-34.

Officer Azrielle Johnson transported Lusko to where Tobin and Gomez[2] were being detained for a show-up identification procedure. RP (8/14/12) 226. Lusko positively identified both Tobin and Gomez. RP (8/14/12) 228. Officer Aaron Johnson then placed Tobin and Gomez under arrest and put them in the back seat of his patrol car. RP (8/15/12) 348-49. Johnson, who had activated his in-car audio/video recording system, told Tobin and

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[1] Officer Johnson recognized Tobin from the neighborhood, and he knew that Tobin did not need a wheelchair. RP (8/15/12) 332-33.

[2] Ernest Rios told Officer Aaron Johnson that Austin was not involved in the crime, so Johnson released him prior to the show-up. RP (8/15/12) 340.

Gomez that anything they said while inside the patrol car would be recorded.[3] RP (8/15/12) 354.

Despite Officer Johnson's warning, Tobin made many incriminating statements in the patrol car. He referred to Lusko as an "[o]ld faggot," a "[g]ay ass queer" and a "[q]ueer ass motherfucker" who was unlikely to appear in court. Ex. 23, pg. 1, 4. Tobin theorized, "Matter of fact he probably liked it. Look, he liked it. That's why he's not gonna show – because he liked it." Ex. 23, pg. 4. Tobin instructed Gomez to "[s]tick to the script" if questioned by the police. Ex. 23, pg. 4. Part of this "script" included an explanation for the jacket: "That's my jacket. I had it since I left your house this morning. Yeah. Anything else is less than civilized. That's my jacket. It's mine. I've had it ever since you've known me. Period." Ex. 23, pg. 3. Tobin also told Gomez that "robbery" could mean "twenty to life." Ex. 23, pg. 3.

Tobin testified at trial that he had actually stopped Austin and Gomez from assaulting Lusko. RP (8/15/12) 427-28. Tobin testified that Austin dropped Lusko's jacket after going through the pockets, and Tobin claimed that he picked it up and put it on because he was cold and had the flu. RP (8/15/12) 434. Tobin

[3] Johnson had advised Tobin and Gomez of their rights prior to the show-up. RP (8/15/12) 241.

also testified that he did not dislike gay people, and that the gay slurs he was spewing in the back of the patrol car were just "excited utterance [sic]." RP (8/15/12) 436, 439.

C. ARGUMENT

1. AMPLE EVIDENCE SUPPORTS TOBIN'S CONVICTION FOR ROBBERY IN THE FIRST DEGREE.

Tobin first claims that the evidence produced at trial is insufficient to sustain his conviction for robbery in the first degree. More specifically, Tobin argues that he and Gomez assaulted Daniel Lusko and then took his jacket merely as an "afterthought," and that this does not constitute a robbery. Brief of Appellant, at 19-23. This argument should be rejected. The evidence is more than sufficient to sustain the jury's verdict, and Tobin's argument that beating Lusko and forcibly taking his jacket was not a robbery is supported by neither the facts nor the law. Tobin's conviction should be affirmed.

Evidence is sufficient to support a conviction if, after viewing all of the evidence in the light most favorable to the State, any rational jury could have found the elements of the crime proved beyond a reasonable doubt. State v. Joy, 121 Wn.2d 333, 338, 851

P.2d 654 (1993). A defendant who challenges the sufficiency of the evidence admits the truth of the evidence and all rational inferences that may be drawn from it. State v. Thomas, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). All reasonable inferences must be drawn in favor of the State and against the defendant. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Furthermore, the reviewing court defers to the jury's determination as to the weight and credibility of the evidence and its resolution of any conflicts in the testimony. Thomas, 150 Wn.2d at 874-75.

Circumstantial evidence is not to be considered any less reliable or probative than direct evidence in reviewing the sufficiency of the evidence. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). To the contrary, a defendant's criminal intent "may be inferred from circumstantial evidence, or from conduct, where the intent is plainly indicated as a matter of logical probability." State v. Billups, 62 Wn. App. 122, 126, 813 P.2d 149 (1991) (citations omitted). In sum, under these deferential standards, any question as to the meaning of the evidence should be resolved in favor of the jury's verdict whenever such an interpretation is reasonable.

A person commits robbery by unlawfully taking property from another person against that person's will by the use or threatened use of force, violence, or fear of injury. "Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking[.]" RCW 9A.56.190. A person commits robbery in the first degree when he or she inflicts bodily injury in the course of committing a robbery. RCW 9A.56.200(1)(c).

In this case, the evidence established that Tobin and Gomez beat and kicked Daniel Lusko until he lost consciousness. RP (8/15/12) 275-80. During the beating, Lusko heard Tobin tell Gomez to "smother the faggot" and "cut off his finger" in order to steal Lusko's ring. RP (8/15/12) 279-80. When Lusko regained consciousness, his jacket was gone and he was bleeding from his face and mouth. RP (8/14/12) 217; RP (8/15/12) 280, 284. When Tobin was detained by Officer Aaron Johnson almost immediately after the crime, he was wearing Lusko's jacket, which had been torn in half. RP (8/14/12) 237; RP (8/15/12) 327. As Tobin was sitting in the back seat of the patrol car with Gomez after they were arrested, Tobin told Gomez to "[s]tick to the script," and said "[t]hat's my jacket. It's mine. I've had it ever since you've known me. Period." Ex. 23. Tobin also apparently realized at that point

that he could be charged with robbery, and "that's twenty to life." Ex. 23.

Based on the evidence, the jury properly convicted Tobin of robbery in the first degree. There is no question that the evidence proved that Tobin and Gomez used force against Lusko, that they inflicted bodily injury on Lusko, and that they took Lusko's jacket unlawfully. The evidence also established that force was used to obtain the jacket or to overcome resistance to its taking, because the reason that Tobin and Gomez were able to take the jacket from Lusko was because they had beaten Lusko into temporary unconsciousness. Moreover, additional force was used to accomplish the taking, as circumstantial evidence demonstrates that the jacket was torn from Lusko's body as he lay on the ground. Tobin's statements in the back of the patrol car demonstrate his guilty knowledge that he had committed a robbery. And perhaps most tellingly, during the beating, Tobin told Gomez to "smother the faggot" and "cut off his finger" in order to steal Lusko's ring. These statements constitute evidence of Tobin's intent to steal property from Lusko in conjunction with the use of force. In sum, the evidence produced at trial is more than sufficient to sustain the jury's verdict for robbery in the first degree.

Nonetheless, Tobin argues that he is guilty only of an assault and a theft because taking the jacket was merely an "afterthought" to the assault, and that the evidence does not establish that force was used specifically to accomplish the taking. In support of this theory, Tobin mainly relies upon the dissenting opinion in State v. Allen, 159 Wn.2d 1, 147 P.3d 581 (2006). *See* Brief of Appellant, at 20-22. In that dissenting opinion, four justices were of the opinion that the evidence was insufficient to prove aggravated murder (premeditated murder in the course of or in furtherance of a robbery) where the defendant had killed his mother before taking a cash box from her nightstand. Allen, 159 Wn.2d at 11 (Alexander, C.J., dissenting). The dissenting justices would have held that the theft of the cashbox was merely an "afterthought" in the wake of the murder, because those four justices believed that there was insufficient evidence showing that the purpose of the murder was to accomplish the theft of the cash box. Id. at 14-16.

Tobin's arguments based on Allen should be rejected for two reasons. First, a dissenting opinion does not have precedential value. Second, even if the Allen dissent had precedential value, it is readily distinguishable from this case. Tobin's intent to take

property from Lusko by force is supported by Tobin's statements both during the crime ("smother the faggot" and "cut off his finger") and after the crime (referencing robbery and "twenty to life"), as well as by the circumstantial evidence showing that Lusko's jacket was ripped because it was forcibly removed from his body. In short, the evidence establishes that taking Lusko's property was not merely an "afterthought," but was one of the purposes behind the beating that he suffered from Tobin and Gomez.

The jury's verdict is amply supported by the evidence. Tobin's arguments to the contrary are without merit, and the conviction should be affirmed.

2. NO COURTROOM CLOSURE OCCURRED; THUS, TOBIN'S RIGHT TO A PUBLIC TRIAL WAS NOT VIOLATED.

Tobin also claims that his right to a public trial was violated because he contends that a portion of voir dire was closed to the public. More specifically, Tobin argues that because the parties exercised their peremptory challenges by writing them on a form rather than announcing them verbally, a courtroom closure occurred and Tobin is entitled to a new trial. Brief of Appellant, at

23-27. This claim is wholly without merit. The parties exercised their peremptory challenges in an open courtroom, and the form reflecting those challenges was filed in the public court record. No closure occurred, and Tobin's arguments to the contrary should be rejected.

A defendant has the right to a public trial under article I, section 22 of the Washington Constitution, and article I, section 10 of the Washington Constitution dictates that the public has the right to open court proceedings. However, the decisions of the Washington Supreme Court establish that reversal is required only upon a showing that the trial court actually issued an order closing the courtroom, or where it is clear from the record that people were in fact excluded from the proceedings. *See, e.g.,* State v. Marsh, 126 Wash. 142, 142-43, 217 P. 705 (1923) (defendant's trial in juvenile court was closed to the public by order of the court); State v. Bone-Club, 128 Wn.2d 254, 256-57, 906 P.2d 325 (1995) (courtroom was closed during pretrial suppression hearing by order of the court); In re Personal Restraint of Orange, 152 Wn.2d 795, 801-03, 100 P.3d 291 (2004) (court ordered that defendant's family

members be excluded from the courtroom during voir dire); State v. Brightman, 155 Wn.2d 506, 511, 122 P.3d 150 (2005) (court ordered that spectators be excluded from the courtroom during voir dire); State v. Easterling, 157 Wn.2d 167, 171-73, 137 P.3d 825 (2006) (defendant and the public excluded from the courtroom during co-defendant's motion to sever by order of the court); State v. Wise, 176 Wn.2d 1, 11-12, 288 P.3d 1113 (2012) (court conducted private questioning of prospective jurors in chambers); State v. Paumier, 176 Wn.2d 29, 34-35, 288 P.3d 1126 (2012) (same).

In this case, the record does not establish that voir dire was conducted in any location other than in an open courtroom, and the record does not indicate that anyone was excluded from the courtroom during voir dire. Accordingly, Tobin has failed to show that a public trial violation occurred.

Nonetheless, Tobin argues that the fact that the parties wrote their peremptory challenges on a form rather than announcing them verbally means that the public was excluded from voir dire. Tobin refers to this method of exercising peremptory

challenges as a "private procedure." Brief of Appellant, at 23. This argument is not well-taken. The form upon which the parties wrote their peremptory challenges was filed in the public court record. CP 95. Accordingly, if any member of the public wanted to know which prospective jurors each party had excused, the form was (and still is) available for public inspection. To characterize this procedure as "private" strains the bounds of reason.[4] Indeed, if conducting any court business on paper rather than verbally constitutes a courtroom closure, then every pleading filed in the public court record would need to be read aloud in the courtroom in order to avoid committing a public trial violation. For obvious reasons, this is not the law.

In sum, no aspect of voir dire was conducted privately in this case, and thus, Tobin's claim of a violation of the right to a public trial must be rejected.

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[4] Tobin cites cases standing for the proposition that excusing jurors during an in-chambers conference violates the public trial right. *See* Brief of Appellant, at 26. But that in no way resembles what occurred in this case, and thus, these cases are not analogous. Moreover, it is worth noting that the Washington case Tobin cites for this proposition has recently been accepted for review by the Washington Supreme Court. State v. Slert, 169 Wn. App. 766, 282 P.3d 101 (2012), rev. granted, ___ Wn.2d ___ (April 8, 2012).

D. CONCLUSION

For the reasons set forth above, this Court should affirm.

DATED this 10th day of May, 2013.

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 Dana M. Nelson, 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 Brief of Respondent, in STATE V. CARL TOBIN, Cause No. 69328-0-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.

U Brame
Name

5/10/13
Date

Done in Seattle, Washington