72803-2

FILED
Jan 06, 2016
Court of Appeals
Division I
State of Washington

No. 72803-2-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

BRANDON PAMON,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

1. Mr. Pamon was denied his right to a unanimous jury.

a. A jury must unanimously find the defendant committed one of the alternative means of first degree robbery; to hold otherwise eliminates the necessary distinction between attempted first degree robbery and attempted second degree robbery.

A jury convicted Mr. Pamon of attempted robbery in the first degree. CP 50. However, because first degree robbery is an alternative means crime and substantial evidence did not support one of the means presented by the State, he was denied his right to a unanimous jury. *In re Pers. Restraint of Brockie*, 178 Wn.2d 532, 534, 309 P.3d 498 (2013) (discussing first degree robbery as an alternative means crime); *State v. Lobe*, 140 Wn. App. 897, 905, 167 P.3d 627 (2007) (holding substantial evidence must support each of the means presented).

In response, the State argues that while robbery is an alternative means crime, *attempted* robbery is not. Resp. Br. at 6. It claims "[t]he only question for the jury was whether Pamon acted with intent to commit theft of personal property and whether he took a substantial step toward accomplishing that result, not the means by which he attempted to do so." Resp. Br. at 6. This cannot be correct. By its own

words, the State eliminates the necessary distinction between first degree robbery and second degree robbery.

An individual is guilty of second degree robbery when he "commits robbery," which is the unlawful taking of personal property from another by the use of force or threat. RCW 9A.56.210(1); RCW 9A.56.190. First degree robbery is a more serious crime than second degree robbery because in addition to committing the robbery, the individual (1) is armed with a deadly weapon, (2) displays what appears to be a firearm or other deadly weapon, (3) inflicts bodily injury, or (4) commits the robbery within and against a financial institution. RCW 9A.56.200. While second degree robbery is a class B felony, the legislature found first degree robbery deserved a more severe punishment and accordingly made it a class A felony. RCW 9A.56.210(2); RCW 9A.56.200(2).

The State relies on *State v. Johnson*, 173 Wn.2d 895, 270 P.3d 591 (2012), and *State v. Boswell*, 185 Wn. App. 321, 340 P.3d 971 (2014), for its claim that attempt is not an alternative means crime. Resp. Br. at 6. Neither case addressed the issue raised here. In *Johnson*, the defendant argued the State presented insufficient evidence to convict him of attempted promotion of commercial sexual abuse of a

minor where the "minors" were actually undercover police officers posing as 17-year-olds. 173 Wn.2d at 898. The court found the defendant was wrong to conflate the elements of the base crime (which required the victim be underage) with the elements of attempt (which required the defendant *believe* the victim was underage). *Id*. at 904. Because the defendant intended to profit from the commercial sexual abuse of a minor and took a substantial step toward doing so, sufficient evidence supported his conviction for attempt. *Id*. at 899-900.

In *Boswell*, this Court held the trial court properly refused to instruct the jury on third degree assault where he was convicted of two counts of attempted first degree murder after the evidence showed he poisoned his girlfriend's tea and shot her in the head. 185 Wn. App. at 335. When discussing why *State v. Berlin*, 133 Wn.2d 541, 947 P.2d 700 (1997), did not apply, the Court stated attempt is not an alternative means crime. 185 Wn. App. at 335. Under *Berlin*, a court must determine "whether a lesser included offense instruction is appropriate based on the alternative means charged, not the statute as a whole." 185 Wn.2d at 334. However, the Court found *Berlin* did not require it

to analyze the facts underlying a charge of attempted first degree murder when examining the legal prong of the *Workman*[1] test.

These cases do not support the State's assertion that to convict Mr. Pamon of attempted first degree robbery it only needed to prove his actions satisfied the elements of attempted second degree robbery. If this Court were to accept the State's claim, then Mr. Pamon could only be convicted of the lesser degree offense when charged with attempted robbery, as the distinction between the two crimes is lost.

b. Reversal is required because the State did not present substantial evidence of bodily injury.

This Court should find Mr. Pamon was entitled to a unanimous jury as to the means of the attempted first degree robbery. As explained in the opening brief, because the State did not present substantial evidence of bodily injury, this Court should find Mr. Pamon's right to a unanimous jury was violated and reverse. Op. Br. at 6-7.

[1] *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978) (holding a defendant is entitled to an instruction on a lesser included offense if: (1) each of the elements of the lesser offense are a necessary element of the offense charged and (2) the evidence presented supports an inference the lesser crime was committed.)

2. The trial court erred when it prohibited Mr. Pamon from possessing or consuming marijuana as a condition of community custody, where marijuana did not contribute to the offense.

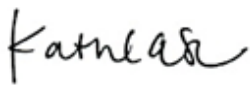
As fully addressed in the opening brief, the trial court acted without statutory authority when it imposed a community custody condition that prohibited Mr. Pamon from possessing or consuming marijuana, and the condition should be stricken from the judgment and sentence. *See* Op. Br. at 7-10.

B. CONCLUSION

For the reasons stated above and in his opening brief, this Court should reverse.

DATED this 6th day of January, 2016.

Respectfully submitted,



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	)	
BRANDON PAMON,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 6TH DAY OF JANUARY, 2016, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 6TH DAY OF JANUARY, 2016.

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