SUPREME COURT NO. 97444-6

NO. 77008-0-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

WILLIAM BROADY,

Petitioner.

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

The Honorable Millie Judge, Judge

PETITION FOR REVIEW

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RULES, STATUTES AND OTHER AUTHORITIES

A. IDENTITY OF PETITIONER/COURT OF APPEALS OPINION

Petitioner William James Broady, the appellant below, seeks review of the Court of Appeals decision in State v. Broady, noted at ___ Wn. App. 2d ___, 2019 WL 2501487 (Jun. 17, 2019).

B. ISSUE PRESENTED FOR REVIEW

The to-convict instruction required the State to prove Broady "unlawfully took personal property from the person or in the presence of another" and "the taking was against that person's will by the defendant's use or threatened use of immediate force, violence, or fear of injury to that person." Where the State failed to offer evidence supporting that Broady "took" bottles of liquor by lifting them from the shelves of a store outside the presence of any person other than his alleged accomplice, should Broady's conviction be reserved and dismissed?

C. STATEMENT OF THE CASE

On June 27, 2014, a Safeway store manager glanced a video surveillance screen and "saw two gentleman concealing liquor on their person." RP 35. One man shoved a bottle down his pants and the other man concealed two bottles in his clothing; then they both proceeded to the exit. RP 35.

The manager left his office, "ran across the store, waited at the Starbucks and waited for them to exit past the point of sale." RP 36. The

manager stated, "hey, guys, I need those bottles back." RP 36. The shorter of the gentleman, Broady, "shoved me and pushed his way past and said, 'don't make me shoot you, fool.'" RP 36. The other man stated "[s]omething explicit." RP 36.

When the men exited the store, the taller of the men ran off; the shorter man gestured at the manager, spun around, tripped, and then the manager "saw a pistol hit the ground and a magazine fall out." RP 36-37. The manager initially froze in his tracks, "afraid I was going to get shot." RP 37. The manager tried to gain control of the pistol, but only got hold of the magazine. RP 37. The manager flagged down police in the parking lot and later identified both men in a show up identification. RP 37, 45, 79. Nothing related to the pistol was caught on store surveillance video and the manager acknowledged that the man never pointed the pistol at the manager, even though he told police the gun was pointed at him. RP 38, 48, 59. The pistol was in actuality a pellet gun, but witnesses stated it looked real to them until they examined it further. RP 48-49, 63, 76.

The jury received instructions on first degree robbery and the lesser included second degree robbery. CP 55-57. The to-convict instruction for first degree robbery read as follows:

> To convict the defendant of the crime of robbery in the first degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

> (1) That on or about the 27th day of June, 2014, the defendant unlawfully took personal property from the person or in the presence of another;
>
> (2) That the defendant intended to commit theft of the property;
>
> (3) That the taking was against that person's will by the defendant's use or threatened use of immediate force, violence, or fear of injury to that person;
>
> (4) That force or fear was used by the defendant to obtain or retain possession of the property or to prevent or overcome resistance to the taking;
>
> (5) That in the commission of these acts or in the immediate flight therefrom the defendant displayed what appeared to be a firearm or other deadly weapon; and
>
> (6) That any of these acts occurred in the State of Washington.

CP 57.

The jury found Broady guilty of first degree robbery. CP 27; RP 139-41.

Broady appealed. CP 10. He argued that there was insufficient evidence to sustain his conviction. Under the jury instructions, the State was required to prove that the taking of the property occurred from the person or in the presence of another and that such taking was effected by use of force or threats. Broady contended the State did not prove these elements, given that Broady lifted bottles off a store shelf when no one was present and without any force whatsoever. Although he might have used force to retain what he

had already taken, the jury instructions themselves distinguish between obtaining property by force and retaining already taken property by force, and the manner in which the jury instructions were written required proof that the taking—which is a synonym for obtaining but not for retaining—was effectuated by force.

The Court of Appeals rejected Broady's sufficiency claim, asserting that the jury would have understand "taking" to mean the entire transaction, including any efforts to retain the property once the property has already been obtained. Slip op. at 3-4.

D. ARGUMENT IN SUPPORT OF REVIEW

REVIEW SHOULD BE GRANTED TO ADDRESS WHETHER ROBBERY TO-CONVICT INSTRUCTIONS MAKE WASHINGTON'S TRANSACTIONAL APPROACH CLEAR, GIVEN THAT THEY REQUIRE SPECIFIC PROOF THAT THE TAKING—THE OBTAINING OF PROPERTY AS OPPOSED TO THE RETAINING OF PROPERTY—OCCUR FROM THE PERSON OR IN THE PRESENCE OF ANOTHER

The due process clause of the Fourteenth Amendment requires the State to prove every element of an offense beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 316, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); State v. Green, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). Whenever an allegation is included in the to-convict instruction, it becomes the law of the case and must be proved by the State beyond a reasonable doubt, just like any other element. State v. Hickman, 135 Wn.2d 97, 101-02, 954

P.2d 900 (1998); State v. Nam, 136 Wn. App. 698, 706-07, 150 P.3d 617 (2007) (applying Hickman to robbery to-convict instruction). On review, the appellate court views the evidence in the light most favorable to the prosecution, asking whether a rational trier of fact could find all elements of the charged crime beyond a reasonable doubt. State v. Vasquez, 178 Wn.2d 1, 6, 309 P.3d 318 (2013).

Hickman controls in this case. Hickman was charged with insurance fraud for presenting a false insurance claim regarding the theft of his car. 135 Wn.2d at 100. Although there was no legal requirement that the State prove the county in which the crime occurred, the to-convict instruction required to prove that a false or fraudulent claim "occurred in Snohomish County Washington." Id. at 101. Hickman challenged the sufficiency of this element on appeal, arguing the evidence showed he was in Hawaii when he filed his claim and the insurer was located in King County, not Snohomish. Based on the lack of evidence that the crime occurred in Snohomish County, the Washington Supreme Court reversed and dismissed Hickman's conviction. Id. at 105.

The result here should be the same. Even viewed in the light most favorable to the prosecution, the evidence presented did not satisfy the first or third elements in the to-convict instruction, which, respectively, required proof that "the defendant unlawfully took personal property from the person

or in the presence of another" and "the taking was against that person's will by the defendant's use or threatened use of immediate force, violence, or fear of injury to that person[.]" CP 57 (emphasis added). These elements mirror the statutory definition of the crime of robbery:

> A person commits robbery when he or she unlawfully takes personal property from the person of another or in his or her presence against his or her will by the use or threatened use of immediate force, violence, or fear of injury to that person or his or her property or the person or property of anyone. Such 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. Such taking constitutes robbery whenever it appears that, although the taking was fully completed without the knowledge of the person from whom taken, such knowledge was prevented by the use of force or fear.

RCW 9A.56.190.

The Washington courts have interpreted this statute to criminalize any transaction of obtaining property by force, even when force is used only to retain property that has already been taken. Thus, where a shoplifter initially takes property without the use of force, moves to the exit, and then uses force to retain the property when confronted, the crime committed is still robbery despite the absence of force used to take the property at the outset. State v. McIntyre, 112 Wn. App. 478, 481-82, 49 P.3d 151 (2002) (discussing State v. Handburgh, 119 Wn.2d 284, 830 P.2d 641 (1992), and State v. Manchester, 57 Wn. App. 765, 790 P.2d 217 (1990)).

This interpretation is supported by legislative history. When the legislature adopted the current definition of robbery, it deleted a phrase indicating that the use of force '"merely as a means of escape . . . does not constitute robbery."' McIntyre, 112 Wn. App. at 482 (alteration in original) (quoting Manchester, 57 Wn. App. at 770). "'This change indicates the Legislature's intent to broaden the scope of taking, for purposes of robbery, by including violence during flight immediately following the taking.'" Id.

While McIntyre and Manchester might make it clear that the legislature intended to criminalize Broady's conduct as robbery, this intent does not control under the law of this case. The to-convict instruction given to Broady's jury required greater proof than the statute requires, as in Hickman.

Jurors are presumed to interpret instructions in a normal, commonsense manner rather than in a strained or hypertechnical one. State v. Moultrie, 143 Wn. App. 387, 394, 177 P.3d 776 (2008). Jurors were not made aware of the history of the robbery statute, the legislature's intent in criminalizing robbery, or case law interpreting the statute in light of such history and intent. On the contrary, the jury's only guide was the instructions given in this case. Read in a normal, commonsense fashion, elements 1 and 3, required a taking of property from the person or in the presence of another and force used at the time this taking of property occurred.

The first element in the to-convict required proof that Broady "unlawfully took personal property from the person or in the presence of another." CP 57. The third element likewise required that the taking be against the person's will by use of force or threats of force. CP 57. Jurors would have interpreted the verb "take" as used in these provisions in a commonsense fashion as referring to the initial taking in the Safeway store when Broady and his accomplice took liquor bottles off the shelf and hid them in their clothes. RP 35 (store manager testifying he saw via video surveillance two men taking and concealing liquor in clothes).

The Court of Appeals disagreed, contending that "a rational juror could have interpreted Broady's 'taking' of the liquor not to have occurred until Broady exited the store, i.e., after his in-store encounter" with the store manager. Slip op. at 4. The Court of Appeals claimed that Broady's interpretation was too hypertechnical because it "assumes that jurors would fixate on the initial removal of the liquor from the store shelf . . . ." Slip op. at 5. The Court of Appeals is incorrect and its definition of "taking" is much broader than the verb is used in common English parlance.

Definitions of the verb "take" include "to get into one's hands or into one's possession, power, or control by force or stratagem," "to lay or get hold of which arms, hand, or fingers or with a hand or an instrument : GRASP, GRIP," and "to get into one's hand or one's hold or possession by a physical act of

simple transference." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2329-30 (1993). These definitions reflect the normal, everyday use of the verb "take" and show that "taking" of property means the act of physically obtaining control of it.

There are several definitions of the verb "take" recorded in the dictionary, but none is synonymous with retaining property. The verb "retain" generally means "to hold or continue to hold in possession or use : continue to have, use, recognize, or accept : maintain in one's keeping." WEBSTER'S, supra, at 1938. Under a commonsense interpretation, taking means getting hold of property. Retaining means keeping property that has already been taken. The Court of Appeals decision incorrectly broadens and confuses the interpretation of these common and easily understood words.

It is also telling that the Court of Appeals failed to address element 4 of the to-convict instruction in its analysis, which draws a distinction between using force to obtain property and using force to retain property. CP 57. Given this contrast in terms, a taking of property could only refer to the initial obtaining of the property, rather than continuing to retain the property, under a commonsense reading. The Court of Appeals' failure to address element 4's language shows that its interpretation of "taking" to include "retaining" is the strained one.

It is highly improbable that jurors would have adopted or applied the Court of Appeals' interpretation that "taking" or "took" in the jury instructions refers to both obtaining and retaining property. The Court of Appeals decision conflicts with appellate case law requiring that jury instructions be interpreted in a commonsense fashion, meriting RAP 13.4(b)(2) review.

Here, there was no proof that Broady took the liquor from another's person; nor was there proof that Broady took the liquor bottles in another's presence. No one was around when Broady took the liquor bottles, so no one was present; the store manager merely observed the taking from a video surveillance system. RP 35; Manchester, 57 Wn. App. 768-69 (taking that occurs in person's presence requires being within "reach, inspection, observation or control"). Because no one was around and Broady removed items from a store shelf, the taking was not from the person of another, either. Nam, 136 Wn. App. at 705-06 (relying on definition in 3 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 20.3 at 179 (2d ed. 2003) to hold that "'person' in our robbery statute means something on or attached to a person's body or clothing"). When Broady took the liquor bottles, he did not do so from the person of another or in the presence of another. He did not use force, fear, or threats to take property, either. Accordingly, there was insufficient evidence of elements 1 and 3 in the to-convict instruction.

Broady certainly concedes that element 4 of the to-convict instruction was satisfied. Element 4 required proof that "force or fear was used by the defendant to obtain or retain possession of the property or to prevent or overcome resistance to the taking." CP 57 (emphasis added). Broady concedes that the evidence was sufficient to show he used force to retain the property he had already taken when he allegedly shoved the manager and threatened, "don't make me shoot you, fool," and when the gun fell to the ground causing the store manager to experience fear of being shot. RP 36-37. But there simply was no evidence he used the force or fear to obtain the property at the outset, at the time the property was taken.

Although case law makes it clear that a robbery may be accomplished by using actual or threatened force to retain property and although case law might collapse the fourth element into the first and third under the transactional approach to the crime of robbery, the jury instructions in this case did not make this clear. Read in a straightforward and commonsense manner, the instructions required proof that Broady initially took the liquor bottles from the person or in the presence of another and used actual or threatened force or fear to do so. There was no proof of these elements. The State's evidence was insufficient under the law of this case. Accordingly, Broady's robbery conviction must be reversed and dismissed. Hickman, 135 Wn.2d at 103.

Because the Court of Appeals decision conflicts with Hickman and its progeny on constitutional due process questions pertaining to the sufficiency of the evidence, review should be granted pursuant to RAP 13.4(b)(1), (2), and (3).

E. CONCLUSION

For the reasons stated, Broady's petition for review should be granted.

DATED this 17th day of July, 2018.

Respectfully submitted,

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APPENDIX

FILED
6/17/2019
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. WILLIAM JAMES BROADY, Appellant.	)	No. 77008-0-I DIVISION ONE UNPUBLISHED OPINION FILED: June 17, 2019

SMITH, J. — William Broady and Malachi Morrissey were alone in the liquor aisle of a Safeway store when they removed bottles of liquor from the shelf and concealed them in their clothing. The store manager, who saw Broady and Morrissey on the store's security system, intercepted them near the store exit and requested they return the liquor. Broady pushed past the manager, saying, "'[D]on't . . . make me shoot you, fool.'"

Broady was later convicted of first degree robbery. He appeals, arguing that because he and Morrissey were alone in the liquor aisle when they removed the liquor from the shelf, there was insufficient evidence to prove that Broady's "taking" of the liquor occurred in the presence of another, or that Broady used or threatened force to effectuate the taking. But because a rational juror could have concluded that Broady did not finish "taking" the liquor until he exited the store, i.e., after his encounter with the store manager, we disagree and affirm.

FACTS

The State charged Broady with first degree robbery following a June 27, 2014, incident at an Everett Safeway store. Tom Warden, the store manager, testified at trial that he was in his office when he glanced at the store's security system and saw two men in the liquor aisle concealing bottles of liquor in their clothing. Warden left his office, ran across the store, and waited for the men, later identified as Broady and Morrissey, to exit past the point of sale. When they did so, Warden approached them and said, "I need those bottles back." Warden testified that Broady responded by shoving him, pushing his way past him, and saying, "'[D]on't . . . make me shoot you, fool.'"

Warden followed Broady and Morrissey out of the store, and Morrissey ran off. Broady walked toward a car in the parking lot and began to spin around toward Warden. As he did so, Warden saw a gun hit the ground. Warden believed Broady was attempting to point the gun at him. Warden testified that he froze, afraid that he was going to get shot. When the gun hit the ground, the magazine fell out. Warden ran up to it and grabbed the magazine, while Broady ran off with the gun. The gun turned out to be a pellet gun, but it did not have an orange tip to indicate that it was not an actual firearm, and an officer testified that "[i]t looked very realistic."

The jury convicted Broady of first degree robbery. Broady appeals.

ANALYSIS

Broady argues that the evidence presented at trial was insufficient to support his conviction. We disagree.

To satisfy the Fourteenth Amendment's due process guarantee, the State "bears the burden of proving every element of every crime beyond a reasonable doubt." State v. Chacon, 192 Wn.2d 545, 549, 431 P.3d 477 (2018). When a defendant challenges the sufficiency of the evidence presented to meet this burden, "he or she admits the truth of all of the State's evidence." State v. Cardenas-Flores, 189 Wn.2d 243, 265, 401 P.3d 19 (2017). "In such cases, [we] view the evidence in the light most favorable to the State, drawing reasonable inferences in the State's favor." Cardenas-Flores, 189 Wn.2d at 265-66. "Evidence is sufficient to support a guilty verdict if any rational trier of fact, viewing the evidence in the light most favorable to the State, could find the elements of the charged crime beyond a reasonable doubt." Cardenas-Flores, 189 Wn.2d at 265.

Washington follows the "transactional" approach to robbery. State v. Manchester, 57 Wn. App. 765, 770, 790 P.2d 217 (1990). Under the transactional approach, a person who initially takes property peacefully and outside of anyone's presence is nonetheless guilty of robbery if he uses force or fear to retain possession of the property immediately after the initial taking. State v. Handburgh, 119 Wn.2d 284, 293, 830 P.2d 641 (1992); see also Manchester, 57 Wn. App. at 770 (scope of "taking" for purposes of robbery includes "violence during flight immediately following the taking"). In other words, under the transactional approach, the State need not prove that force or fear was used to effectuate an *initial* taking of property if force or fear was used to *retain* the property immediately thereafter.

Broady concedes that Washington follows the transactional approach to robbery. But he points out that here, the court's to-convict instruction required the State to prove that (1) Broady took the liquor "from the person or in the presence of another"; (2) "the taking was against the person's will by [Broady's] use or threatened use of immediate force, violence, or fear of injury to that person"; and (3) "force or fear was used by [Broady] to obtain or retain possession of the property or to prevent or overcome resistance to the taking."[1] He then argues that although not required under Washington's transactional approach to robbery, this instruction required the State to prove not only that Broady used force or fear to obtain or retain possession of the liquor, but also that Broady's *initial* taking of the liquor occurred in the presence of another and was effectuated by Broady's use or threat of force. He contends that because he and Morrissey were alone when they initially removed the liquor from the store shelf, the State failed to prove its case.

Broady's argument is fatally flawed because it assumes that no rational juror would have interpreted the "taking" described in the court's to-convict instruction to refer to anything but Broady's initial removal of the liquor from the store shelf. But even without knowing anything about the transactional approach to robbery, a rational juror could have interpreted Broady's "taking" of the liquor not to have occurred until Broady exited the store, i.e., after his in-store encounter with Warden. Broady contends that such an interpretation would be

[1] The to-convict instruction included additional elements that are not relevant to our analysis.

"strained or hypertechnical," but it is *his* interpretation, which assumes that jurors would fixate on the initial removal of the liquor from the store shelf, that is the strained and hypertechnical one.

In short, a rational juror could have concluded that when Warden confronted Broady near the store exit and Broady responded by shoving him, saying, "'[D]on't . . . make me shoot you, fool,'" and pushing past him toward the store exit, Broady took the liquor both (1) in Warden's presence and (2) by threatened use of force against Warden's will. A rational juror could also have concluded that when Broady spun around in the parking lot, revealing to Warden what appeared to be a firearm, Broady used force or fear to retain possession of the liquor. Therefore, even if we accept for purposes of our analysis that the court's to-convict instruction required the State to prove elements not required under the transactional approach to robbery, the evidence presented at trial, viewed in the light most favorable to the State, was sufficient to prove those elements beyond a reasonable doubt.

We affirm.

WE CONCUR:

NIELSEN, BROMAN & KOCH P.L.L.C.

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