

NO. 66354-2-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

DEVIN A, WINTCH,

Appellant.

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STATE OF WASHINGTON
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BRIEF OF RESPONDENT

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I. ISSUES

(1) The defendant requested an instruction that allowed him to be convicted for taking any item of property, if such taking satisfied the other elements of robbery. The trial court gave an instruction that used identical language with regard to the “taking” element. Can the defendant claim on appeal that this language was erroneous?

(2) If the issue can be raised, was the defendant convicted of a crime different from the one with which he was charged, where the defendant was charged with taking a “flashlight,” and the evidence showed that he took an object that he and other witnesses described as a “flashlight”?

II. STATEMENT OF THE CASE

The defendant (appellant), Devin Wintch, was convicted of second degree robbery, harassment, and two counts of fourth degree assault. CP 17-31. Only the robbery conviction is at issue in this appeal.

The events in this case arose from the activities of a volunteer neighborhood patrol in the Gleneagle area of Arlington. Members of the patrol would drive around the neighborhood looking for indications of burglary, vandalism, drug dealing, or other crimes.

If they saw anything unusual, they would report it to police. When on patrol, they would identify themselves with a hat and badge. The carried a light that they used to illuminate parks and other dark areas. John Branthoover was the organizer of the patrol. 2 RP 4-7. Scott Tomkins was a participant. 1 RP 73.

The issues in this appeal center on the proper description of the portable lights used by Mr. Tomkins in his patrol activities. Two such lights are involved, exhibits 11 and 12. Exhibit 11 is four inches in diameter and two to three inches deep. It has a small handle. For power, it plugs into a car cigarette lighter. It produces a very bright light of a million candlepower. 1 RP 76; 2 RP 7. Witnesses referred to it as both a "spotlight" and a "flashlight." *E.g.*, 1 RP 76 ("spotlight"); 1 RP 92; 4 RP 8 ("spotlight" and "flashlight"); 4 RP 37, 87 ("flashlight"). The appellant's brief refers to it as a "spotlight." Brief of Appellant at 2.

Exhibit 12 is a metal object powered by three C cells. Witnesses generally referred to it as a "flashlight." 1 RP 97-98; 2 RP 8. The defendant, however, once called it a "spotlight." 4 RP 23. The appellant's brief refers to it as a "flashlight." Brief of Appellant at 3-4.

On the night of June 26, 2010, Mr. Tomkins was participating in the neighborhood patrol. He was wearing the hat and badge and carrying exhibit 11. 1 RP 81, 92. He saw the defendant walking towards his car. Mr. Tomkins thought that the defendant was looking for help. 1 RP 89.

Mr. Tomkins stopped his car and rolled down the window. The defendant asked what he was doing. Mr. Tomkins said that he was part of the security patrol. The defendant told him, "Don't fuck with me. I'll kick your fucking ass." Mr. Tomkins again said that he was part of the security patrol. The defendant repeated his threat. The defendant then reached into the car and ripped exhibit 11 out of the cigarette lighter. Mr. Tomkins tried to open the car door, but the defendant slammed it shut. He said, "If you get out of that car, I'll kick your fucking ass." He took exhibit 11 and walked away with it to the house where he was staying. 1 RP 89-93.

Mr. Tomkins drove to Mr. Branthoover's house and reported these events. They called the police. They then drove to a location near where the confrontation had occurred, to wait for police to arrive. Mr. Branthoover had a holstered gun. He had been wearing it earlier in the day and had not removed it. 1 RP 94-95; 2 RP 14-17.

Around 20 minutes later, the defendant came out of his house and walked over to Mr. Tomkins and Mr. Branthoover. The defendant asked what they were doing. Mr. Branthoover said that they were with the neighborhood watch. The defendant responded that they were the KKK. Mr. Branthoover then said that they had called the police and would let them sort it out. The defendant said, "you called the po-po." He hit Mr. Branthoover and knocked him down. 2 RP 22-25; 1 RP 99-104.

Mr. Tomkins was carrying exhibit 12. The defendant grabbed it from him. When Mr. Tomkins tried to help Mr. Branthoover, the defendant hit him with exhibit 12. Holding exhibit 12, the defendant threatened to cave Mr. Branthoover's skull in. Mr. Branthoover drew his gun and pointed it at the sky. The defendant said, "Oh, you have a gun. Are you going to use that on me? Come on, shoot me." 2 RP 25-27; 1 RP 104-06.

At this point, police arrived. They told the defendant to put down the flashlight, which he did. On learning that Mr. Branthoover had a gun, they frisked him and took the gun. They verified that Mr. Branthoover had a concealed weapons permit. The defendant continued to yell. 2 RP 104-07, 169-72. When questioned about

the events, he said that Mr. Tomkins and Mr. Branthoover were KKK. 2 RP 111.

The defendant testified that Mr. Tomkins had pulled his car into the defendant's driveway. Mr. Tomkins motioned the defendant over. He started asking the defendant "personal questions" about who he was and where he lived. While he was doing this, he was blinding the defendant with exhibit 11. The defendant "felt a little uncomfortable" and thought that Mr. Tomkins was being "aggressive." He approached the car. Mr. Tomkins turned the light off and threw it on the dash. The defendant reached in, unplugged the cord, and took exhibit 11. To avoid further confrontation, he returned to his house, still carrying exhibit 11. 4 RP 7-11.

Around 15 minutes later, the defendant went outside to smoke a cigarette. He saw Mr. Tomkins and Mr. Branthoover talking. He thought they were talking to him, so he came over. Mr. Branthoover had his hand in his pocket. It appeared that he was pointing a gun at the defendant. The defendant "kind of threw my arm up and it managed to land on his jaw." Mr. Branthoover "stepped back a couple steps and he tripped on the curb and fell down." 4 RP 13-19.

As Mr. Branthoover fell, he pulled the gun out. The defendant grabbed exhibit 12 from Mr. Tomkins, so he could use it to defend himself. He told Mr. Branthoover that if he put the gun in the defendant's face, the defendant would hit him with the flashlight. Meanwhile, Mr. Tomkins was trying to grab exhibit 12 back from the defendant, so the defendant held him off with his hand. At that point, the police arrived. 4 RP 19-22.

III. ARGUMENT

A. SINCE THE DEFENDANT REQUESTED AN INSTRUCTION THAT ALLOWED HIM TO BE CONVICTED FOR TAKING ANY ITEM OF PROPERTY, HE CANNOT COMPLAIN ON APPEAL THAT THE TRIAL COURT GAVE SUCH AN INSTRUCTION.

In his sole assignment of error, the defendant claims that his "due process rights were violated when the jury was permitted to convict [him] of an uncharged crime." Brief of Appellant at 1. The facts on which the jury was "permitted to convict" were set out by the trial court in instruction no. 6. CP 44. The defendant's assignment of error is essentially a challenge to this instruction.

Under RAP 10.3(g), a brief must contain a separate assignment of error for each instruction that the party contends was improperly given, with reference to the instruction by number. The defendant's brief in this case does not comply with the rule. It does not specifically assign error to instruction no. 6. It does, however,

set out the pertinent portions of the instruction. Brief of Appellant at 5. When findings of fact are involved, appellate courts have been willing to consider challenges notwithstanding lack of a proper assignment of error, if the nature of the challenge is clear and the finding is quoted in the brief. State v. Estrella, 115 Wn.2d 350, 355, 798 P.2d 289 (1990). Applying this principle by analogy, this court may be willing to overlook the defendant's failure to comply with RAP 10.3(g).

Nevertheless, the issue cannot be considered for a more fundamental reason: any error was invited. Even when constitutional issues are involved, invited error precludes review. State v. Henderson, 114 Wn.2d 867, 792 P.2d 514 (1990). For this doctrine to apply, the instruction requested by the defendant need not be identical to the one given by the court. Rather, the invited error doctrine applies if the defendant proposed an instruction that contains the same error as the court's instruction. State v. Fields, 87 Wn. App. 57, 63, 940 P.2d 665 (1997).

Here, the defendant requested the following instruction:

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

- (1) That on or about June 26, 2010, the defendant unlawfully took personal property from the person of another;
- (2) That the defendant intended to steal the property;
- (3) That the taking was against the 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; and
- (5) That any of these acts occurred in the State of Washington.

CP 61. (A copy of this proposed instruction is set out in the appendix.)

The elements set out in this instruction differ from those in the court's instruction in three respects. First, in element (2), the court's instruction said "commit theft" instead of "steal." Second, in element (3), the court's instruction said "*that* person's will" instead of "*the* person's will." Third, in element (4), the court's instruction added "or to prevent or overcome resistance to the taking." CP 44, inst. no. 6.

None of these differences, however, have anything to do with the issue raised on appeal: *which* item the defendant took. With regard to that issue, the only relevant portion of the instruction is element (1). For that element, the defendant's proposed

instruction is identical to the one given by the court. Both instructions allow the defendant to be convicted for taking *any* item of property on or about the day of the crime

The defendant's proposed instruction thus contains the same purported error as the court's instruction. The defendant claims that the court's instructions were erroneous because they "did not clarify whether the verdict had to be predicated upon the taking of the flashlight or the spotlight." Brief of Appellant at 1. The defendant's proposed instructions similarly allowed him to be convicted for taking a flashlight, a spotlight, or any other item of property. If the defendant's own instructions contain erroneous language, he cannot complain on appeal that the court's instructions included identical language. The defendant's sole issue should not be considered.

B. IF THE ISSUE CAN BE RAISED, THE DEFENDANT WAS NOT CONVICTED OF A DIFFERENT CRIME THAN THE ONE CHARGED, SINCE WITNESSES AND THE DEFENDANT HIMSELF DESCRIBED THE ITEM THAT HE TOOK AS A "FLASHLIGHT."

If the issue can be raised, this court should hold that the instruction was proper. Although most of the cases that the

defendant cites are inapposite¹, the principle that he states is correct: a defendant who is charged with stealing one item of property cannot be convicted for stealing some other item. State v. Rhinehart, 92 Wn.2d 923, 602 P.2d 1188 (1979).

The defendant points out that the information alleged that he committed robbery by taking a “flashlight.” CP 70. He claims that exhibit 11 was a “spotlight,” rather than a “flashlight.” Consequently, he argues that it was improper to allow the jury to convict him for taking exhibit 11. The flaw in this argument is the assumption that exhibit 11 cannot be described as a “flashlight.” The record does not support this assumption.

¹Most of the cited cases involve defendants who were convicted of different crimes than they were charged with – not different means of committing the same crime. Cole v. Arkansas, 333 U.S. 196, 68 S. Ct. 514, 92 L. Ed. 644 (1948) (since defendant was charged with violating § 2 of particular statute, court could not uphold conviction based on § 1); Von Atkinson v. Smith, 575 F.2d 819 (10th Cir. 1978) (defendant charged with simple sodomy could not be sentenced for forcible sodomy); State v. Pelkey, 109 Wn.2d 484, 745 P.2d 854 (1987) (information charging bribery could not be amended mid-trial to charge trading in special influence); State v. Thompson, 68 Wn.2d 536, 413 P.2d 951 (1966) (defendant charged with receiving stolen property could not be convicted of embezzlement); State v. Olds, 39 Wn.2d 258, 235 P.2d 165 (1951) (defendant charged with theft could not be convicted of distinct crime of misappropriating property received by mistake). One other cited case deals not with due process, but with the right to grand jury indictment. Stirone v. United States, 361 U.S. 212, 80 S. Ct. 270, 4 L. Ed. 2d 252 (1960).

Under a dictionary definition, the word “flashlight” can have two meanings. It can mean “a small portable electric lamp powered by dry batteries or a tiny generator.” It can also mean “a light that flashes, as a lighthouse beacon.” dictionary.reference.com/browse/flashlight (as visited 8/23/11). Under the first definition, exhibit 11 is not precisely a “flashlight.” Although it is a “small portable electric lamp,” it is designed to be powered by a car battery, not dry batteries or a generator. Under the second definition, however, it is a “flashlight”: it is a light that can be flashed by using its power switch.

There is no indication that the participants in this trial viewed the word “flashlight” in its narrower sense. To the contrary, both the defendant himself and his lawyer repeatedly referred to exhibit 11 as a “flashlight.” On direct examination, the defendant testified:

I got blinded a couple times by the *spotlight* and I couldn't see. . . [He] was being somewhat aggressive with the *flashlight*, so I reached in and grabbed the *flashlight*.

Q [by defense counsel]. Let me ask you this: When you reached in and grabbed this *flashlight*, is it turned on or off?

A. [It] was on. It was on when he first was shining it at me. . .

Q. Mr. Wintch, here's my question: When you reached it and grabbed the *flashlight*, was it on or off?

A. Oh. Well, I was standing just like maybe a step or two back from the vehicle, and so as I approached the vehicle he threw it on the dash is what he did and he got into a defensive stance. . .

Q. Was the *spotlight* on or was it off?

A. It was off.

4 RP 8-9.

On cross-examination, the defendant continued to refer to exhibit 11 as a "flashlight":

At that point I kind of shut him out because I was getting blinded by the *flashlight*. . .

4 RP 37.

I had kind of a situation going on, which is the *flashlight*. . .

4 RP 77.

Q [by prosecutor]. Explain to me how he was being aggressive.

A. With the *flashlight*. . . I wouldn't approach someone and ... start harassing them with a *flashlight* and asking him questions.

4 RP 78.

[I] took two steps, it happened, and I grabbed the *flashlight*.

4 RP 84.

It was if the police come, what are they going to think, is what I was thinking. Because now I've got

somebody's *flashlight* and what am I going to tell them.

4 RP 87.

The evidence thus indicates that exhibit 11 could properly be described as either a "spotlight" or a "flashlight." The defendant himself repeatedly referred to it as a "flashlight." He clearly understood that the charge against him encompassed the taking of exhibit 11. Even if there was a technical error in the information, it did not interfere with notice to the defendant of the crime for which he was convicted. Consequently, any error in this regard does not justify reversal. State v. Garcia, 65 Wn. App. 681, 686-87, 829 P.2d 241, review denied, 120 Wn.2d 1003 (1992).

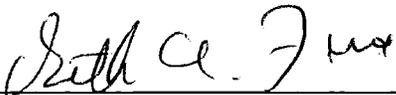
IV. CONCLUSION

For the reasons set out above, the defendant's conviction for second degree robbery should be affirmed. Since the defendant has not challenged his convictions for harassment and fourth

degree assault, those convictions should be affirmed in any event.

Respectfully submitted on August 26, 2011.

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INSTRUCTION NO. ____

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

- (1) That on or about June 26, 2010, the defendant unlawfully took personal property from the person of another;
- (2) That the defendant intended to steal the property;
- (3) That the taking was against the 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; and
- (5) That any of these acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

WPIC 37.04

State v. S.S.Y., 150 Wn.App. 325, 334, 207 P. 3d 1273 (Div. 2, 2009)

State v. Kjorsvik, 117 Wn.2d 93, 98, 812 P.2d 86 (1991)