

NO. 69851-6-1

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

STATE OF WASHINGTON

Respondent

v.

JEFFREY L. BRINKLEY,

Appellant

BRIEF OF RESPONDENT

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I. ISSUES

1. The trial court instructed the jury on an uncharged alternative means of committing first degree robbery.

a. Does the invited error doctrine preclude the defendant from challenging this error on appeal?

b. If the defendant is entitled to challenge this error, is the error harmless?

2. Do the robbery and assault conviction merge when the evidence demonstrated an independent purpose for the assault?

II. STATEMENT OF THE CASE

On December 1, 2011 the defendant, Jeffrey Brinkley, and his girlfriend Katie, were staying with Louis “Chuck” Munson and his wife Susan Munson, at their home in Tulalip, Washington. Ethan Mattox and his girlfriend Carrie Kerrs lived in a trailer behind the Munson home. The defendant and Mattox were friends who engaged in drug dealing together. 1 RP 39-40, 44, 48; 2 RP 182; 3 RP 335-336.¹

The defendant and Mattox got their drugs from Kenny Easley who went by the street name “Dirty”. Easley in turn got his

¹ The report of proceedings for the trial is included in three volumes; Vol. 1 - January 14, 2013, Vol. 2 - January 15, 2013, and Vol. 3 – January 16 and 17, 2013.

drugs from Ron Brown who went by the street name "Mountain." Easley fronted the defendant and Mattox drugs, which they were to pay for when the drugs were sold. The defendant and Mattox had previously discussed robbing Easley, because they both needed money, but they had decided not to do so. 1 RP 57-58; 2 RP 226, 228, 257.

On December 1 the defendant and Mattox owed Easley a total of \$1,600 for drugs that he had fronted them. The defendant called Easley on the morning of December 1 to let him know that they had money to pay him. Easley planned to go to Warm Beach to bring Neptina Dick some flu medication that date. Before going to Ms. Dick's home Easley went to the Munson's in order to collect on the debt the defendant and Mattox owed him. 2 RP 211, 228-232.

Easley had been to the Munson's house about two months before December 1. On that occasion Easley was looking for Mattox in order to be paid for the drugs he had fronted Mattox. Mr. Munson told Easley that he did not want Easley showing up on his property. Easley got Mr. Munson's phone number and agreed to call before coming in the future. On December 1 Easley first tried to call the defendant and Mattox, but neither would answer their

phones. Easley then decided to call Mr. Munson but he was unsure what the correct phone number was because he had several different people named "Chuck" in his address book. In order to determine what the correct number was Easley showed up on the Munson's doorstep. Easley spoke to Ms. Munson and verified what Mr. Munson's number was. Easley declined Ms. Munson's offer to tell Mr. Munson that he was there. After confirming Mr. Munson's number Easley left. 1 RP 54; 2 RP 185-186, 232-234.

Easley drove a few blocks away and tried calling Mr. Munson, but got no response. He continued to try to call the defendant and Mattox, but again received no answer. As a result Easley decided to return to the Munson residence. 2 RP 234-235.

Ms. Munson told Mr. Munson that Easley had been at their home after Easley left. Mr. Munson was upset to learn that Easley had shown up without calling first. Mr. Munson was in the basement with the defendant and Mattox, but went out into the yard when Easley showed up the second time. There Mr. Munson and Easley had a verbal confrontation. The defendant brought a chain saw up from the basement, and was trying to start it while Mr. Munson and Easley were arguing. Easley believed that was

intended to intimidate him. Suddenly the defendant and Mattox grabbed Easley and threw him to the ground. Mattox knew that Ms. Munson did not want any problems in their yard, so they took Easley into the basement. 1 RP 46, 60-67; 2 RP 187-193, 236-237, 250.

Mr. Munson followed the defendant, Mattox, and Easley into the basement. There the defendant head butted Easley. The three men made it clear to Easley that he should not have come to Munson's home to conduct his drug business. After a short time Mr. Munson left the basement, but returned when he found Easley's wallet outside. The defendant directed Munson to give Easley his wallet back. The defendant and Mattox then told Mr. Munson to go back upstairs. 1 RP 67-69; 2 RP 237, 241.

After Mr. Munson left, the defendant and Mattox ordered Easley to strip down to his boxer shorts. They accused Easley of being a cop, and they wanted to see if he was wearing a wire. Mattox was armed with a firearm and pointed it at Easley. The defendant and Mattox took Easley's wallet, watch, and necklace. They found Easley's identification with his address in his wallet, and discussed not letting Easley go. The Munson's could hear what was going on in the basement. Mr. Munson went back to the

basement to tell the defendant and Mattox to leave. Before they left Easley was allowed to get his clothes back on. Mattox had taken Easley's car keys and obtained a safe from Easley's car trunk. Mattox brought the safe to the basement where it was opened. The defendant and Mattox then took drugs, money, and a gun from Easley's safe. They also took the money from Easley's wallet. The defendant and Mattox then gave Easley the choice of getting shot or getting high to prove he was not working with the police. Easley chose the latter, and they then consumed some of the drugs from Easley's safe. 1 RP 70-71; 2 RP 239-247.

When the defendant and Mattox did not leave after Mr. Munson told them to he started banging on the floor with a broom and yelled at them to leave. Mattox came upstairs and told the Munsons that they were putting it to a vote, whether to rob Easley or not. The Munsons voted "no." Mattox then went back downstairs. 1 RP 71-73.

While in the Monson's basement Easley's phone continued to ring repeatedly. On one occasion the defendant accidentally answered the phone when Neptina Dick answered. Ms. Dick asked where Easley was, and the defendant told her he was busy. Ms. Dick recognized the defendant's voice, and told him Easley was

supposed to bring her some medication that day. 2 RP 212-214, 247-249.

Shortly after Ms. Dick called they left the basement. The defendant drove Easley's car, while Easley sat in the front passenger seat, and Mattox sat in the back. They stopped at a store where Mattox got some flu medication for Ms. Dick before going to Ms. Dick's home. On the way to Ms. Dick's home Easley promised that he would not tell his supplier that the defendant and Mattox had robbed him and thereby start a war. Once they got to Ms. Dick's home the defendant and Mattox stayed for a short period of time. They gave Ms. Dick the medication, and gave Easley back a small amount of drugs they had taken from him as well as his watch and his phone. They then drove off in Easley's car, promising to return it if he did not call his supplier. 2 RP 214-219, 251-256.

After the defendant and Mattox left Easley called his wife, Megan Easley. While waiting for her Easley called some friends and Ron Brown and told him what happened. Brown agreed to bring some of his friends with guns and bullet proof vests to get back the things that had been taken from Easley. The all met at Easley's father's home in Marysville. There Brown talked to either

the defendant or Mattox on the phone. Easley's father talked to Mr. Munson, telling him that they were looking for the defendant and Mattox because the two had robbed Easley. 2 RP 94-96, 256-259.

After leaving Easley at Ms. Dick's home the defendant and Mattox returned to the Munson's home. There they told the Munson's that they had robbed Easley of his money and drugs, and left him in the woods. They assured the Munson's that Easley would not be back for a long time. Ms. Munson had plans to go out that night, but was reluctant to do so upon hearing this news. Eventually she was reassured, and she left. The defendant then gave Mr. Munson Easley's gun, and they left, telling Mr. Munson that they would be back later. Mr. Munson tucked the gun under the corner of the couch. 1 RP 75-78; 2 RP 90-93, 95-97, 196-198.

After hearing from Easley's father Mr. Munson called his wife and asked her to come back and get him and their dog. Before she came home Brown, Easley, Megan Easley, Jonathan Frohs, and Danny Fordham arrived at the Munson's home. They entered the home and went from room to room looking for people. Brown pointed a gun at Mr. Munson telling him that if he had a gun to turn it over or Brown would kill Mr. Munson. Brown eventually gave the gun to Frohs. At that point Mr. Munson admitted he had a gun.

When he pulled it out from under the couch Easley identified the gun as his. Shortly thereafter Ms. Munson arrived and was escorted inside. 2 RP 97-104, 199-200, 260-261.

Easley's group of people stayed at the Munson's for about five hours. During that time Mr. Munson attempted to negotiate with the defendant and Mattox to come back. One member of Easley's party kept pointing a gun at the Munson's and threatening to kill them. Fordham grabbed the Munson's address book and family photos on the walls. He made threats to the Munson's regarding the welfare of their family should the Munsons call the police. Eventually another of Easley's friends, Patrick Buckmaster, showed up. Buckmaster was shot and killed at the Munson's. At that point everyone but the Munson's fled. 2 RP 105-110, 201-202, 262-263.

On December 28, 2011 the defendant was pulled over as he was driving in Stanwood. Michael Woodruff, a DOC Community Corrections Specialist assigned to the Snohomish County Sheriff's Office Directed Patrol, contacted the defendant. The defendant asked to talk to Mr. Woodruff because he had some information about a homicide that happened on the Tulalip reservation. 3 RP 311-312.

The defendant was transported to the Sheriff's Office where he met with Sgt. Geoghagan and Detective Pince. There he gave the officers the details of the homicide. He was reluctant to talk about what led up to the homicide, but ultimately agreed to talk "hypothetically." The defendant admitted he and Mattox had assaulted Easley and taken a gun, money, methamphetamine, and a car from him. He also admitted that they then took Easley up to a home on Warm Beach where they left him. 3 RP 316, 328-29, 335-338.

III. ARGUMENT

A. THE COURT ERRED WHEN IT INSTRUCTED THE JURY ON AN UNCHARGED ALTERNATIVE MEANS OF COMMITTING ROBBERY. THE ERROR WAS INVITED. THE ERROR WAS ALSO HARMLESS UNDER THE FACTS OF THIS CASE.

1. The To Convict Instruction Included An Uncharged Alternative Means Of Committing First Degree Robbery.

When a statute sets out alternative means by which a crime can be committed, the Information may charge one or more of the alternative provided they are not repugnant to each other. State v. Chino, 117 Wn. App. 531, 539, 72 P.3d 256 (2003). First Degree Robbery may be committed by three alternative means. State v. Nicholas, 55 Wn. App. 261, 272-273, 776 P.2d 1385, review denied, 113 Wn.2d 1030 (1989). If the Information alleges only one

alternative means of committing the offense, then it is error to instruct the jury on alternative means that have not been charged in the Information. State v. Brewczynski, 173 Wn. App. 541, 549, 294 P.3d 825 (2013).

The defendant was charged in count I with First Degree Robbery alleged to have been committed as follows:

That the defendant, on or about the 1st day of December, 2011, with intent to commit theft, did unlawfully take personal property of another, to-wit: U.S. currency, vehicle, phone, drugs, and other personal property, from the person or in the presence of K.E., against such person's will, by use or threatened use of immediate force, violence, and fear of injury to K.E., and in the commission of said crime an in immediate flight therefrom, the defendant displayed what appeared to be a firearm or other deadly weapon and inflicted bodily injury upon K.E.; proscribed by RCW 9A.56.200, a felony

1 CP 113 (emphasis added)

At trial the court instructed the jury in part that in order to convict the defendant of first degree robbery it must find that during the commission of the robbery (a) the defendant or an accomplice was armed with a deadly weapon, (b) that the defendant or an accomplice displayed what appeared to be a firearm or other deadly weapon, or (c) that the defendant or an accomplice inflicted bodily injury. 1 CP 53. Thus the jury was instructed on an

uncharged alternative means of committing robbery; i.e., the defendant or an accomplice was armed with a deadly weapon.

Here the trial court committed error when it instructed the jury on the alternative means of committing first degree robbery that the defendant or an accomplice was armed with a deadly weapon. Unless the error was invited or it was harmless the remedy is to remand the case for a new trial. State v. Doogan, 82 Wn. App. 185, 187, 917 P.2d 155 (1996).

2. The Error In The First Degree Robbery Instruction Was Invited.

The invited error doctrine precludes a party from setting up an error and then challenging that error on appeal. State v. Henderson, 114 Wn.2d 867, 868, 792 P.2d 514 (1990). "To hold otherwise would put a premium on defendants misleading trial courts" which the Court declined to encourage. Id. The doctrine applies where the defendant knowingly and voluntarily takes affirmative action that contributes to the error challenged on appeal. In re Call, 144 Wn.2d 315, 328, 28 P.3d 709 (2001), In re Thompson, 141 Wn.2d 712, 724, 10 P.3d 380 (2000).

Here the State proposed the defective jury instruction. 2 CP _____. (sub. 44). Defense counsel did not propose any jury

instructions. Instead he initially told the court “I reviewed the plaintiff’s jury instructions and I’m comfortable that they are sufficient.” 3 RP 352. Later he raised an objection to the “to convict” instruction on the robbery count.

Your Honor, my only concern is that (5)(c) may not reflect the Information as charged. I agree with (a) and (b) accurately reflect the Information. So I would note an exception to (c). I think it otherwise correctly states the law, but I believe the State has elected to go under the deadly weapon element of robbery in the first degree and that (c) is a separate and distinct mode of committing robbery in the first degree, that being bodily injury.

3 RP 362.

Element (5)(a) instructed the jury on the uncharged alternative that the defendant or an accomplice was armed with a deadly weapon. Element (5)(b) instructed the jury on the charged alternative that the defendant or an accomplice displayed what appeared to be a firearm or other deadly weapon. 1 CP 53.

Thereafter the court read the information including the bodily injury alternative means of committing the crime listed as element (5)(c) in the instruction. Defense counsel then acknowledged that had been a charged alternative means, but made no comment regarding the first alternative, alleging the defendant or an

accomplice had been armed with a deadly weapon. 3 RP 362-363; 1 CP 53.

Here the defense took affirmative action to set up an error by asserting that the instruction was correct by including the armed with a deadly weapon alternative to committing first degree robbery. It was knowing and voluntary because defense counsel had reviewed the instructions and affirmatively told the court that the displayed a deadly weapon alternative was charged in the Information. Even after the trial judge read the Information counsel agreed that instruction was proper. Having misled the court in this regard, the defendant should be held to the doctrine of invited error, and denied relief on the basis of instructional error.

The defendant attempts to side step this obvious problem with his argument by suggesting defense counsel merely objected to the wrong alternative. BOA at 11, n. 4. Defense counsel did object to the wrong alternative, but it was more than a mere misstatement. Defense counsel affirmatively told the court that the instruction properly included the first alternative because it included the deadly weapon language. Under these circumstances the defense took an affirmative act which misled the court into instructing the jury on an uncharged alternative.

3. Error In the First Degree Robbery Instruction Was Harmless.

Error in instructing the jury on an uncharged alternative is subject to harmless error analysis. State v. Bray, 52 Wn. App. 30, 35, 756 P.2d 1332 (1988). Prejudicial error occurs if it is possible that the jury may have convicted the defendant under the uncharged alternative. Doogan, 82 Wn. App. at 189. But where the jury would have necessarily found the defendant guilty of the charged alternative even if it also relied on the uncharged alternative, the error is harmless. State v. Perez, 130 Wn. App. 505, 509, 123 P.3d 135 (2005), review denied, 157 Wn.2d 1018 (2006).

The difference between the “armed with a firearm” alternative and the “displays what appeared to be a deadly weapon” alternative is that under the second alternative the State need only prove the defendant by his conduct created apprehension that the defendant had a deadly weapon. The State need not actually prove that a deadly weapon was used. State v. Kennard, 101 Wn. App. 533, 537-538, 6 P.3d 38, review denied, 142 Wn.2d 1011 (2000), State v. Webb, 162 Wn. App. 195, 204-205, 252 P.3d 424 (2011). Under the facts of this case if the jury

relied on alternative (5)(a)(armed with a deadly weapon) it would have necessarily also found the charged alternative in (5)(b)(displayed what appeared to be a firearm or other deadly weapon). 1 CP 53.

In each alternative the jury was instructed that the defendant was liable for the acts of his accomplice. Accomplice liability was defined as “with knowledge that it will promote or facilitate the commission of a crime” he “aids or agrees to aid another person in the planning or committing of the crime.” 1 CP 64. “Aid” included words or actions ld.

The evidence showed that Mattox worked in concert with the defendant to rob Easley. Before the offense date Mattox and the defendant had discussed robbing Easley. 1 RP 57. When Easley arrived at Munson’s in response to a call from Mattox and the defendant. 2 RP 230-232. Each of them had a role in pulling Easley down into the basement. 2 RP 239-240. Both Mattox took Easley’s wallet, jewelry, money, drugs, gun, and his car. 2 RP 218, 239-246, 255. The defendant admitted that he and Mattox worked in concert to rob Easley of his “drugs and money and gun and beat him up pretty good.” 3 RP 336. Thus the evidence showed that

Mattox was acting as the defendant's accomplice when they robbed Easley.

At some point either before or during the robbery, in the defendant's presence, Mattox pointed a gun at Easley. 2 RP 240-241. A firearm was defined as a deadly weapon. 1 CP 62. The defense did not argue that either Mattox or the defendant were only armed with a deadly weapon, and did not display it. Rather the defense was that Easley made up the robbery, assault, and kidnapping allegations to avoid trouble from Brown for failing to collect the drug debt from the defendant and Mattox. 3 CP 379-386. Thus if the jury did not believe Easley it would have acquitted. In finding the defendant guilty it necessarily found that an accomplice, Mattox, displayed was appeared to be a deadly weapon, which was a firearm. The error was therefore harmless.

B. CONVICTIONS FOR BOTH FIRST DEGREE ROBBERY AND SECOND DEGREE ASSAULT DO NOT VIOLATE DOUBLE JEOPARDY UNDER THE FACTS OF THIS CASE.

If the Court concludes that the defendant is not entitled to a new trial on the first degree robbery count, the defendant alternatively argues that his convictions for first degree robbery and second degree assault violate the proscription against double

jeopardy. He asserts that the two counts merge, and the conviction for second degree assault should be vacated.

The Court has articulated a four part test to analyze when two offenses arising out of the same transaction should be punished as a single offense in State v. Freeman, 153 Wn.2d 765, 108 P.3d 753 (2005). First the Court looks to whether there is express or implicit legislative intent to punish the crimes separately. Id. at 771-772. Second, if there is no clear legislative intent then the Court employs the “same evidence” test to the charged offenses. Id. at 772. Third, the court may use the merger doctrine to discern legislative intent. Id. at 772-73. Fourth, if the two offenses appear to be the same but each one has an independent purpose or effect, then the two offenses may be punished separately. Id. at 773.

Freeman considered whether second degree assault and first degree robbery could be punished separately. The Court concluded that the legislature had not explicitly authorized separate punishments for those offenses. Id. at 775. Rather it should continue to take a “hard look” at each case. Id. at 774. The Court accepted the parties’ agreement that the two offenses were not the

same in law, and did not conduct further analysis under the same evidence test. Id. at 777.

“[T]he merger doctrine is a rule of statutory construction which only applies where the Legislature has clearly indicated that in order to prove a particular degree of crime (e.g. first degree rape) the State must prove not only that a defendant committed that crime (e.g. rape) but that the crime was accompanied by an act which is defined as a crime elsewhere in the criminal statutes.” State v. Vladovic, 99 Wn.2d 413, 420-21, 662 P.2d 853 (1983). The Court applied this rule when second degree assault and first degree robbery were committed and found the two offenses merged. Freeman, 153 Wn.2d at 760.

The Court left open the possibility that those charges would not merge in all cases under the fourth part of the analysis articulated in Freeman. Id. at 779. The Court stated that the charges would not merge if the unnecessary force had a purpose or effect independent of the crime. Id.

The defendant argues the merger doctrine dictates that the second degree assault charge merges into the first degree robbery charge based on the Court’s analysis in State v. Kier, 164 Wn.2d 798, 194 P.3d 212 (2008). There, like here, the defendant was

charged with first degree robbery and second degree assault. The charges arose out of a carjacking in which the defendant first pointed a gun at the driver of the car, who was able to escape. Then he pointed the gun at the passenger of the car who got out when the defendant demanded that he do so. Id. at 802-03. The Court rejected the State's argument that there were independent crimes because the State elected in closing argument to assign the driver as the victim of the robbery and the passenger as the victim of the assault. As charged and presented both victims appeared to have been robbed and assaulted. Given the ambiguity, the rule of lenity required application of the merger doctrine. Id. at 812-14.

The Court did not rule out the possibility that in the course of a robbery a separate assault may occur. Id. at 814. However because the State did not offer any facts to support that conclusion, it rejected the argument that the assault on the driver had a separate and distinct purpose from the robbery. Id.

Here there is evidence that would support the conclusion that the assault on Easley, whether by displaying the firearm or by causing bodily injury, had a separate purpose from the robbery. The evidence indicates that the intent to assault Easley was formed before the intent to rob him. The defendant and Mattox had talked

about robbing Easley some time before the offense date, but at the point that they drug him into the Munson's basement they had not decided to do so. 1 RP 57-58. When Mr. Munson first left the basement and found Easley's wallet, the defendant and Mattox instructed Mr. Munson to give the wallet back to Easley. 1 RP 69. Giving the wallet back initially would be inconsistent with the forming the intent to commit a robbery at that point in time. While he was in the basement Mattox came upstairs to include the Munson's in their "vote" to decide whether they were going to rob Easley or not. 1 RP 73. That further supports the conclusion that the robbery occurred separately from the assault.

There was also evidence that showed the purpose of the assault was in part different from the robbery. Mr. Munson was very upset when Easley showed up at his house without calling first as he had previously instructed Easley to do. 1 RP 54-55; 2 RP 187-191, 232, 236. Easley had asked for Mr. Munson's telephone number which he already had. 2 RP 186, 233. That act made the Munsons, the defendant, and Mattox suspicious of Easley. Easley was taken to the basement because Mattox believed Ms. Munson would not want a confrontation in her front yard. 2 RP 193. The defendant and Mattox first assaulted Easley to get him to strip to

his boxers to demonstrate that he was not wearing a wire and thereby working with the police. Even after beating up Easley and pointing a gun at him, the defendant and Mattox were suspicious of Easley, and made him use drugs to prove that he was not working with the police. During the assault in the basement the defendant told Easley that he was being "southsided" meaning he was being disciplined. Although the defendant and Mattox also took Easley's jewelry, they also told him there were several reasons why they were assaulting him. 1 RP 68; 2 RP 239-240, 246.

Under these facts the assault had a purpose independent from a means of facilitating the robbery. That purpose was to ensure Easley was not working against the defendant and Mattox as a possible police informer, and also to reinforce that Easley was not welcome at the Munson's unless he had called and cleared it with Mr. Munson first. Thus, under the fourth part of the Freeman test, this Court should find the assault and robbery do not merge for double jeopardy purposes.

IV. CONCLUSION

For the foregoing reasons the State asks the Court to uphold the conviction for first degree robbery, and sentence for second

degree assault.

Respectfully submitted on August 29, 2013.

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