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September 16, 2016
Court of Appeals
Division I NO. 74261-2-1
State of Washington

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ISRAEL ESPINOZA-REYES

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE VERONICA GALVÁN

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Whether the charging document was sufficient where it stated or fairly implied all the essential elements of the crime.

2. Whether the trial court properly exercised its discretion in denying a motion for a mistrial where no ruling was violated, where the very limited evidence of motive was admissible, and where there is no reasonable likelihood that even, if improper, that evidence affected the verdict.

3. Whether this court should obtain additional evidence about the defendant's financial condition before ruling on appellate costs.

B. STATEMENT OF CASE

1. PROCEDURAL FACTS.

Israel Espinoza-Reyes was charged with the crime of robbery in the first degree. CP 28. A jury found him guilty of that crime. CP 78. He was sentenced to 31 months of confinement. CP 108.

2. FACTS OF THE CRIME.

On August 21, 2014, Damaris Amaya was near the end of her evening shift as the front desk clerk at a motel called the Sandstone Inn when two masked people entered the lobby and robbed her at gunpoint. RP 422, 426-27, 428-29. At first, she thought it was a joke. RP 428. Then she realized that the robbers closely resembled two co-workers: the defendant, Israel Espinoza-Reyes and his girlfriend, Tara Hasme. RP 423-24, 442-43. The robbers appeared to be a man and a woman, with the woman being short and very slight and the man being average height with a heavy build. RP 425-26, 442. Amaya testified at trial that she eventually recognized the robbers as Hasme and Espinoza-Reyes based not only on their builds, but because she recognized their voices as well. RP 441, 444. When she reported the robbery to the police, she told them that she thought she knew who they were. RP 443.

During the robbery, the woman robber kept a gun pointed at Amaya while the man demanded her cell phone and snatched it from her hand. RP 429. The man attempted to get money from the safe in the office, but was unsuccessful because he did not have the two keys necessary to open the safe. RP 429. The man

punched Amaya twice in the head during the robbery. RP 429.

She was later treated for a concussion, a cervical sprain, depression and memory deficits. RP 449-52.

When sheriff's deputies arrived at the motel they found Amaya frightened, shaking and crying. RP 321, 376. They determined that over \$150 was missing from the motel's till. RP 405, 423, 470. Other deputies searched the area and found Espinoza-Reyes and Hasme at a nearby bus stop approximately 25 minutes after the robbery. RP 309-12, 336-37. The couple matched the description given by Amaya, particularly Hasme's distinctive reddish-pink hair. RP 337, 424. The deputies asked for Espinoza-Reyes's and Hasme's identification and confirmed that they lived on a property adjacent to the motel. RP 340, 353, 445-47. The deputies searched Hasme's purse, with her consent, and found a wad of money totaling \$181 and a fake gun, along with a heroin kit. RP 313-16, 342. Deputies transported Amaya to the bus stop and she identified Hasme and Espinoza-Reyes as the people who had just robbed the motel. RP 324, 341, 445. The jury watched a surveillance video of the robbery. RP 405-08, 419; Ex. 12.

The sheriff's deputies placed Espinoza-Reyes under arrest and questioned him about the robbery. RP 368. He said that he had found the money and gun that was in Hasme's purse on the sidewalk. RP 369-70. He protested his innocence, stating "I'm not an idiot. Why would I rob the place I work at?" RP 371.

The defense presented the clothes that Espinoza-Reyes was wearing when he was arrested, and argued that they did not match the clothes worn by the robber in the video. RP 489, 540. However, Espinoza-Reyes's residence was very close—less than a five-minute walk—from the motel. RP 445-47.¹

C. ARGUMENT

1. THE CHARGING DOCUMENT INCLUDED, OR FAIRLY IMPLIED, ALL ESSENTIAL ELEMENTS OF THE CRIME.

For the first time on appeal, Espinoza-Reyes challenges the sufficiency of the charging document. His claim should be rejected. The charging document included all essential elements of the crime of robbery. It was not defective for failing to include language

¹ Although the transcript reflects the deputy's testimony as stating the address as "19228 20th Avenue South" in Seatac, it is likely that the transcriptionist misheard the testimony, as Espinoza-Reyes's address is listed as 19228 28th Avenue South on court documents. CP 7, 98. The motel is located at 19225 International Boulevard South. CP 3.

regarding possession that defines the element of taking. Moreover, even if the missing language was a new element to the crime only recently identified in State v. Richie, 191 Wn. App. 916, 365 P.3d 770 (2015), this new element can be fairly implied from the language of the charging document.

A charging document that fails to set forth the elements of the crime is constitutionally defective and requires dismissal. State v. Kjorsvik, 117 Wn.2d 93, 102, 822 P.2d 775 (1992). However, when the adequacy of a charging document is challenged for the first time on appeal and no prejudice is alleged the appellate court will “examine the document to determine if there is any fair construction by which the elements are all contained in the document.” State v. Hopper, 118 Wn.2d 151, 155-56, 822 P.2d 775 (1992). This stricter standard that is applied to challenges raised initially on appeal allows the reviewing court to construe the charging document “quite liberally” and the court should be “guided by common sense and practicality.” Id. at 156. The charging document need not include all of the statutory language defining the crime. Id.

The constitutional requirement of notice only applies to the elements of the crime, not to definitions of elements.

State v. Porter, ___ Wn.2d ___, 375 P.3d 664, 667 (2016). Thus, in charging the crime of possession of a stolen vehicle, it is sufficient to allege that the defendant possessed the stolen vehicle; the statutory definition of “possess” does not need to be included in the charging language. Id. Likewise, in charging the crime on unlawful imprisonment, the State need only allege restraint, and need not also allege the statutory definition of restraint. State v. Johnson, 180 Wn.2d 295, 307-08, 325 P.3d 135 (2014). When a concept merely defines and limits the scope of an essential element, it is not itself an essential element that must be alleged. Id. at 302 (citing State v. Allen, 176 Wn.2d 611, 630, 294 P.3d 679 (2013) (holding that the “true threat” requirement need not be alleged in the charging document)).

Missing elements may be implied from the language in the charging document. Hopper, 118 Wn.2d at 156. For example, in Hopper, the Washington Supreme Court held that the term “assault” contains within it the concept of knowing conduct, such that the failure to include the word “knowingly” when charging assault in the second degree did not require reversal. Id. at 158. Similarly, in State v. Tunney, 129 Wn.2d 336, 341, 917 P.2d 95 (1996), the court held that the element of the defendant’s

knowledge that the victim is a police officer could be “fairly implied” from language charging assault in the third degree that specifically referred to the victim’s status as a police officer. See also State v. Davis, 119 Wn.2d 657, 662, 835 P.2d 1039 (1992) (term “assault” fairly implies intent element of fourth degree assault).

The elements of robbery are set forth in RCW 9A.56.190 as follows:

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.

The additional elements that constitute robbery in the first degree are set forth in RCW 9A.56.200 as follows:

A person is guilty of robbery in the first degree if in the commission of a robbery or of immediate flight therefrom he or she inflicts bodily injury.

The amended information in this case alleged as follows:

That the defendant Israel Espinoza-Reyes in King County, Washington, on or about August 21, 2014,

did unlawfully and with intent to commit theft take personal property of another, to-wit: money, from the person and in the presence of Damaris Amaya, against her will, by the use or threatened use of immediate force, violence and fear of injury to such person or her property and to the person or property of another, and in the commission of and in immediate flight therefrom, the defendant inflicted bodily injury on Damaris Amaya.

CP 28. The charging document contains the essential elements set forth in RCW 9A.56.190 and RCW 9A.56.200.

Espinoza-Reyes relies on State v. Richie, supra, to argue that there is an additional nonstatutory element to robbery that must be specifically alleged in the charging document: that the victim had an ownership, representative or possessory interest in the property taken. The State respectfully disagrees with Division Two's characterization of this as an additional element. Properly understood, prior cases illustrate that this concept defines and limits the element of taking, and is not itself an essential element. Simply put, you cannot *take* property from someone who does not, in some way, *possess* the property.

In Richie, the primary issue was whether there was sufficient evidence of the crime of robbery in the first degree. 191 Wn. App. at 919. Richie assaulted a Walgreens employee who was present in the store but not working in the course of stealing liquor from the

store. Id. at 920. He was charged with first degree robbery. Id. Richie argued that the evidence was insufficient to convict him because the employee had no ownership, possession or representative interest in the liquor stolen because she was not working when she was assaulted. Id. The appellate court rejected this claim, finding that the victim employee was acting in her capacity as an employee of the store at the time of the robbery, and thus had a representative interest in the liquor. Id. at 926. However, in reaching this result Division Two concluded that because “a defendant cannot be convicted of robbery unless the victim has an ownership, representative or possessory interest in the property taken,” that this was “an essential, implied element of robbery.” Id. at 924. However, the facts illustrate that this concept is not a separate element, but a definition of taking. If the employee did not possess the liquor, the defendant could not have taken the liquor from her.

Richie relied heavily on State v. Tvedt, 153 Wn.2d 705, 714-15, 107 P.3d 728 (2005). In that case, the Washington Supreme Court held that the unit of prosecution for robbery is “each separate forcible taking of property from or from the presence of a person having an ownership, representative, or possessory interest

in the property against that person's will." The court noted that robbery has a dual nature; it is both a property crime and a crime against a person. Id. at 711. The unit of prosecution therefore must include both characteristics. Id. As a result, a person who is threatened during a robbery is not a victim of the robbery unless the person also has property taken from her. "Forcible taking must occur." Id. at 712. Thus, property from one cash register taken in the presence of two employees constitutes one robbery, because there is "only one taking." Id. at 716. Tvedt's holding focuses on the meaning of the word "taking." The victim's ownership, representative, or possessory interest in the property helps define what constitutes a taking.²

Richie also relied on State v. Latham, 35 Wn. App. 862, 670 P.2d 689 (1983). In Latham, the defendant stole a car from the car's owner after assaulting him. Id. at 863-64. A friend of the owner's was standing outside the car when it was taken, and was also assaulted. Id. The defendant was charged with robbing both the owner and the friend, based on the taking of the car. Id. at 864.

² Significantly, perhaps, the Tvedt court found that the charging document in that case was not defective. Id. at 719. The court held that identifying the person robbed was sufficient. Id. However, the exact charging language is not set forth in the opinion.

On appeal, the court held that Latham could not be convicted of robbing the friend of the car because the friend had no dominion or control over the car at the time of the robbery. Id. The court explained, "A person must have an ownership interest in the property taken, or some representative capacity with respect to the owner of the property taken, or actual possession of the property taken, *for the taking of the property to constitute a robbery.*" Id. at 864-65 (emphasis added). In this sentence the court is using the concept of possession to clarify what constitutes a taking.

Interestingly, the court further clarified that a taking occurs whenever the victim has a superior right to possession:

A robbery may also occur when a person is in possession of property without any legally recognizable claim thereto. Anyone having a right to possession superior to that of the robbery defendant is deemed to be the owner as against that defendant. A thief in possession may be a robbery victim, as may be a visitor in a business when ordered to remove money from a cash register, who thereby exercises dominion over the money.

Id. at 865-66 (citations omitted). This discussion of possession operates to define and limit the scope of the element of taking. Latham was not guilty of robbing the friend of the car because the car was not *taken* from him.

Finally, Richie traced the origins of its holding to State v. Hall, 54 Wash. 142, 102 P. 888 (1909), a case that predates the current statutes. In Hall, the State alleged that Hall robbed the victim of twenty dollars. Id. at 142. A comparison of the charging document in that case with the charging language in this case reveals a number of differences. The charging document in Hall did not allege an intent to commit theft, nor did it allege that the taking was against the victim's will. Id. at 142. Most importantly, the document did not allege that the money was taken from the victim, but only alleged that the money was taken from the victim's presence. Id. The court explained, "The information simply charged that the property of the Spokane Merchants' Association of Spokane was taken by the appellant from the immediate presence of G.E. Parsons." Id. at 143. The court held that the information was defective because it did not allege that Parsons had dominion or control over the money. Id. at 144. In contrast, in the present case, the State alleged that the money was taken *from* Amaya, not just from her presence, and thus the State alleged that Amaya had possession of the money at the time of the robbery.

Even if this concept of possession is an additional nonstatutory element of the crime of robbery rather than a concept

defining taking, a liberal construction guided by common sense and practicality leads to the conclusion that an allegation that the defendant *took* personal property *from* a person fairly implies that that the person had possession of the property. Using liberal construction, all of the essential elements of the crime can be fairly implied from the language of the charging document.

Espinoza-Reyes does not allege prejudice, and none can be found. There was no question that Amaya, as the front desk clerk on duty at the time of the robbery, was in possession of the money stolen from the motel's front desk. The defense was not whether a robbery occurred, primarily because the robbery was caught on tape, but who committed the robbery.³ Espinoza-Reyes's claim that charging document was prejudicially defective should be rejected.

2. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN DENYING THE MOTION FOR A MISTRIAL, WHERE THERE WAS NO VIOLATION OF A PRETRIAL RULING AND NO IMPROPER ER 404(b) EVIDENCE ADMITTED.

Espinoza-Reyes argues that the trial court erred in not granting the defense motion for a mistrial after the jury heard

³ In opening statement, defense counsel explained to the jury, "the only question in this case you are going to face is who is the one who committed this robbery." RP 299-300.

allegedly prejudicial motive evidence in violation of the trial court's order. However, a careful review of the record reveals that this claim is based on a misunderstanding of the trial court's ruling and a misapplication of the evidence rules. The trial court did not exclude motive evidence based on Amaya's personal knowledge and the trial court did not abuse its discretion in denying the motion for a mistrial.

During pretrial motions, the defense moved to exclude evidence that the defendant and Hasme were suspected of stealing money from the motel two days prior to the robbery, and that their paychecks had been withheld as a result. RP 28-29. The State argued that this evidence was admissible to show their motive for robbing the motel: they were angry and felt the motel owed them money. RP 29. The trial court agreed with the State, and explained "if those facts are elicited, it shows motive—may show intent—plan, preparation and knowledge as well." RP 30. When defense counsel argued that "you don't need a motive," the trial court responded, "But if you have one, I think the State is entitled to argue it." RP 126. Defense counsel then argued that the evidence was speculative and based on hearsay. RP 127. The trial court reserved ruling pending an offer of proof as to how the evidence

would be presented. RP 32, 132. The parties agreed that the transcript of the defense interview with Amaya could be used as the offer of proof. RP 133-34.

In that interview, Amaya explained that she found money missing from the motel's till during her shift two days before the robbery, on Tuesday, and management suspected Espinoza-Reyes of taking the money while Hasme had distracted Amaya in the bathroom. Pretrial Ex. 2 at 9-13. On the day of the robbery, Thursday, Amaya recounted:

[Hasme] was there briefly. She came in, she wanted her check. I looked in the drawer, there was no check under her name. I told her, you know, there's no check under your name. Um. She said she wanted to speak to Jean. Jean was there at the time. I brought Jean out. You know, Jean explained to her that they were suspicious of them doing it. They have, you know, and, ah, I can't remember every detail of our conversation. But then she didn't get a paycheck. She left mad.

Pretrial Ex. 2 at 21. Amaya explained that she checked for "both their paychecks" and "there was nothing under their name."

Pretrial Ex. 2 at 22. Then "Israel called the hotel, I calmed him down." Pretrial Ex. 2 at 22. After reviewing the interview, the trial court made its ruling:

"So the court finds that the—talking about the incident of Tuesday and the speculation of Ms. Amaya is more

prejudicial than probative to the issue of motive in this particular instance. If the State seeks to introduce any evidence, and assuming it is admissible under other prongs as to the fact that payment was withheld from the couple for purposes of motive, *it may do so.*”

RP 153 (emphasis added). Thus, the record reflects that the trial court allowed the State to offer evidence that the defendant had a motive to commit robbery because their paychecks had been withheld earlier that day, facts which were based on Amaya's personal knowledge, but the State could not offer any evidence as to why the paychecks were withheld. Espinoza-Reyes is wrong when he claims that the trial court excluded the motive evidence as too speculative. BOA at 24.

Deputy Conner testified without objection that they received a report that the motel had been robbed by “disgruntled employees.” RP 332, 340. When Amaya testified, she recounted that Hasme had come to the motel several hours before the robbery to pick up her paycheck:

Q: So on that Thursday, August 21, 1994, what happened?

A: I had come into work like normal, my shift from two until 10, and Tara had come in to pick up her paycheck I think around 4 o'clock. They—Tara was not—whatever management had resolved with them about not getting a paycheck—

Ms. Samuel: Objection.

The Court: Sustained.

RP 427. Defense counsel did not move to strike the testimony, which was in fact proper given the trial court's ruling. RP 427.

Later, when Amaya testified that she knew that Espinoza-Reyes and Hasme were the robbers "when they entered the door," the prosecutor asked:

Q: Okay, how did you know?

A: Because they had a motive.

RP 441. There was no testimony that they were suspected of stealing from the motel earlier in the week. When defense counsel moved for a mistrial outside the presence of the jury, the court denied the motion, noting "she did not give any specifics, so none of the specific abouts [sic] the motion, there was a mention of a motive and that she observed Tara speaking with the management." RP 474.

The trial court properly ruled that evidence that the paychecks had been withheld that day was admissible to prove motive. ER 404(b) provides that evidence of "other crimes, wrongs, or acts" is not admissible to prove the character of a person, but may be admissible for a nonpropensity purpose such as motive. For example, evidence of a hostile relationship between the victim and the defendant can be admissible to show motive.

State v. Powell, 126 Wn.2d 244, 260, 893 P.2d 615 (1995).

Establishing motive is often necessary when only circumstantial proof of guilt exists. Id.

As such, the trial court properly exercised its discretion in denying the motion for a mistrial, where there had been no violation of the trial court's ruling and the brief mention of Hasme not receiving her paycheck was relevant to motive.

Even if the testimony was improper, a mistrial was not warranted. The appellate court reviews a trial court's denial of a mistrial for abuse of discretion. State v. Emery, 174 Wn.2d 741, 765, 278 P.3d 653 (2012). A trial court's denial of a mistrial motion will be overturned only when there is a substantial likelihood that the error affected the jury's verdict. State v. Rodriguez, 146 Wn.2d 260, 269-70, 45 P.3d 541 (2002). A mistrial should be ordered "only when the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly." Id. at 270 (quoting State v. Mak, 105 Wn.2d 692, 701, 718 P.2d 407 (1986)).

The evidence of Espinoza-Reyes's guilt was quite strong. There was no issue as to what happened, as the entire robbery, which was violent, was recorded and played for the jury. The only

question was who robbed the motel. Amaya was confident that the robbers were Espinoza-Reyes and Hasme based primarily on their builds and her recognition of their voices, and she can be heard telling police on the surveillance tape that she thinks she knows who the robbers are. And indeed, Espinoza-Reyes and Hasme were found close by with a large wad of cash in approximately the same amount that was taken, and a fake gun. Even defense counsel conceded in closing that Espinoza-Reyes's claim that they had just found the money and gun on the sidewalk was not believable. RP 530. In light of the strength of this evidence, there is not a substantial likelihood that testimony about the paycheck being withheld affected the verdict, especially in light of the defense-requested instruction which told the jury not to consider evidence of motive. CP 60.⁴

3. APPELLATE COSTS SHOULD NOT BE FORECLOSED.

Espinoza-Reyes asks this Court to rule that he should not be required to repay appellate costs if the State prevails. This Court should defer ruling until more information is provided. It is a

⁴ The State has no explanation for why this instruction was given, in light of the court's ruling that the paycheck evidence was admissible to prove motive.

defendant's future ability to pay costs, rather than his present ability, that is most relevant in determining whether it would be unconstitutional to require him to pay appellate costs. Because the record contains no information from which this Court could reasonably conclude that he has no likely future ability to pay, this Court should not forbid the imposition of appellate costs.

As in most cases, Espinoza-Reyes's ability to pay was not litigated in the trial court because it was not relevant to the issues at trial. As such, the record contains almost no information about his financial status and the State did not have the right to obtain information about his financial situation.

Espinoza-Reyes's declaration to obtain an Order Authorizing Appeal In Forma Pauperis is not part of the record. This Court has no information about his employment history, potential for future employment, or likely future income. It is a defendant's future ability to pay, rather than simply his current ability, that is most relevant in determining whether the imposition of financial obligations is appropriate. See State v. Blank, 131 Wn.2d 230, 241, 930 P.2d 1213 (1997) (indigence is a constitutional bar to the collection of monetary assessments only if the defendant is unable

to pay at the time the government seeks to enforce collection of the assessments).

In State v. Sinclair, 192 Wn. App. 380, 393, 367 P.3d 612, review denied, 185 Wn.2d 1034 (2016), this court held that costs should not be awarded because the defendant was 66 years-old and was facing a 24-year sentence, meaning there was “no realistic possibility” that he could pay appellate costs in the future. This Court also recognized, however, that “[t]o decide that appellate costs should never be imposed as a matter of policy no more comports with a responsible exercise of discretion than to decide that they should always be imposed as a matter of policy.” Sinclair, 192 Wn. App. at 391.

In this case, the record is devoid of any information that would support a finding that there is “no realistic possibility” Espinoza-Reyes will be able in the future to pay appellate costs. He is only 29 years old and was sentenced to less than three years in prison. He was gainfully employed at the time of the crime. The State agrees that the \$15,000 restitution award is an appropriate consideration, and will take precedence over any appellate costs, but more information is needed. This Court should require Espinoza-Reyes to meet the requirements of Division Three’s

recently published general order, which would provide some additional factual basis on which to decide his ability to pay costs.

See

http://www.courts.wa.gov/appellate_trial_courts/?fa=atc.genorders_orddisp&ordnumber=021&div=III.

D. CONCLUSION

The conviction should be affirmed.

DATED this 16th day of September, 2016.

Respectfully submitted,

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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Jennifer Winkler, the attorney for the appellant, at Winklerj@nwattorney.net, containing a copy of the Brief of Respondent, in State v. Israel Espinoza-Reyes, Cause No. 74261-2, 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.

Dated this 16 day of September, 2016.



Name:
Done in Seattle, Washington