

COURT OF APPEALS
PIERCE COUNTY

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NO. 41665-4-II

STATE OF WASHINGTON
BY *Or*

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

STATE OF WASHINGTON,

Respondent,

v.

DYLAN THOMAS NYLAND,

Appellant.

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

The Honorable Frank E. Cuthbertson

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. THE ROBBERY IN THE SECOND DEGREE CONVICTION MUST BE REVERSED BECAUSE THE TRIAL COURT ERRED IN REFUSING TO GIVE A JURY INSTRUCTION ON THE DEFINITION OF THREAT THEREBY RELIEVING THE STATE OF ITS BURDEN TO PROVE EVERY ELEMENT OF THE CRIME BEYOND A REASONABLE DOUBT.

The State argues that the trial court properly refused to give the defendant's proposed instruction because it was erroneous and asserts that "the court did not conclude that *any* definition of threat would be inappropriate in a robbery case." Brief of Respondent at 13-17. To the contrary, in refusing to give the proposed instruction, the court stated, "Yeah. State v. Gallaher basically says that you don't give an instruction on a definition of threat which would be Defense's 1 and 2 in a robbery case." 5RP 80. When defense counsel objected, the court reiterated, "as I indicated under Gallaher, the threat definition is not appropriate in a robbery case." 5RP 86. The trial court clearly misapprehended the law because the Gallaher Court did not hold that "you don't give an instruction on a definition of threat" in a robbery case. The Court held that "[i]nsofar as the instruction includes threats of harm to take place subsequent to the robbery, it is error." State v. Gallaher, 24 Wn. App. 819, 822, 604 P.2d 185 (1979). Logically, if the court had understood Gallaher correctly as

the State claims, it would have noted that the term “immediate” should be included in the instruction instead of refusing to give an instruction on the definition of threat. Unlike the erroneous jury instruction given in Gallaher, the alternative instructions proposed here did not state that threat means to communicate, directly or indirectly the intent to cause bodily injury “in the future.” 24 Wn. App. at 821. In any event, although the proposed instructions did not contain the term “immediate,” the instructions were adequate in light of the other instructions given by the court which required “use or threatened use of immediate force.” CP 52-53. As the Gallaher Court recognized, “It is well established that jurors are presumed to follow the court’s instructions, which are to be considered as a whole. If the instructions as a whole fairly state the law, then there is no prejudicial error although certain portions, standing alone, might otherwise mislead the jurors.” 24 Wn. App. at 822.

Reversal is required because the trial court erred in refusing to give a jury instruction on the definition of threat based on its misapprehension of the law and the record substantiates that the error was not harmless beyond a reasonable doubt. See Brief of Appellant at 8-15.

2. REVERSAL IS REQUIRED BECAUSE THE TRIAL COURT VIOLATED NYLAND’S CONSTITUTIONAL RIGHT TO BE PRESENT AT ALL CRITICAL STAGES OF TRIAL BY

RESPONDING TO JURY QUESTIONS DURING
DELIBERATIONS IN HIS ABSENCE.

The State argues that the trial court did not violate Nyland's right to be present by responding to questions from the jury in his absence because he "did not have a right to be present at the time the court and counsel considered and answered those questions." Brief of Respondent at 17-23. The State primarily relies on this Court's decision in State v. Sublett, 156 Wn. App. 160, 231 P.3d 231 (2010), review granted, 170 Wn.2d 1016, 245 P.3d 775 (2010), which is distinguishable. In Sublett, the record reflected that the trial court held an in-chambers conference with both counsel in response to a jury question. 156 Wn. App. at 182-83. There is nothing in the record here that explains what occurred aside from the jury question forms that contain discrepancies. CP 36-38. The jury question asking about the definition of robbery has the judge's signature, defense counsel's signature, and "telephonic approval" written on the signature line for the prosecutor. CP 37. The jury question asking about an instruction for robbery in the 3rd degree has the prosecutor's signature, "telephonic" written on the signature line for the judge, and "telephonic" written on the signature line for defense counsel with his name crossed out and replaced with the name of another attorney. CP 38. Apparently, some form of communication took place by phone.

A defendant's constitutional right to be present at all critical stages of his trial entitles the defendant to be present at every stage of his trial for which "his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge." In re Personal Restraint of Benn, 134 Wn.2d 868, 920, 952 P.2d 116 (1998)(quoting United States v. Gagnon, 470 U.S. 522, 526, 105 S. Ct. 1482, 84 L. Ed. 2d 486 (1985)). Furthermore, the Sixth Amendment and article I, section 22 of the Washington Constitution guarantee a defendant the right to a public trial. State v. Russell, 141 Wn. App. 733, 737-38, 172 P.3d 361 (2007). Additionally, article I, section 10 states, "Justice in all cases shall be administered openly," which provides the public a right to open proceedings. Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 36, 640 P.2d 716 (1982).

Accordingly, reversal is required because the record here is constitutionally deficient and trial proceedings that violate critically important rights should not be condoned by this Court.

3. REVERSAL AND DISMISSAL OF NYLAND'S CONVICTION OF ROBBERY IN THE SECOND DEGREE IS REQUIRED BECAUSE THE EVIDENCE WAS INSUFFICIENT TO PROVE ALL THE ELEMENTS OF THE CRIME BEYOND A REASONABLE DOUBT.

The State argues that the testimony of pharmacy technician Brittany Lyon proves that the taking was against her will by the defendant's threatened use of immediate force. Brief of Respondent at 25-31. The record belies the State's argument. Importantly, the State only cites to a portion of her testimony. Brief of Respondent at 28. A review of her complete testimony reveals that Lyon repeatedly stated that she would have given the man the OxyContin pills that he asked for under any circumstances because it is store policy. 5RP 9-13. Additionally, pharmacist Sandra Roberts testified that the company policy was to "just try to get a good description of the thief and give them what they want." 5RP 19. Contrary to the State's assertion, the record substantiates that the taking was not against Lyon's will due to the threatened use of immediate force.

The State also relies on State v. Collinsworth, 90 Wn. App. 546, 966 P.2d 905 (1997) and State v. Parra, 96 Wn. App. 95, 977 P.2d 1271 (1999), which are distinguishable because the cases involve the proverbial "bank robbery." The State's argument should be rejected because otherwise there would be no meaningful distinction between the crimes of robbery and theft.

Reversal and dismissal of the robbery in the second degree conviction is required because the evidence was insufficient to prove all

the elements of the crime where there was no evidence that the taking was against a person's will by Nyland's use or threatened use of immediate force, violence, or fear of injury to that person. State v. DeVries, 149 Wn.2d 842, 849, 72 P.3d 748 (2003).

B. CONCLUSION

For the reasons stated here and in appellant's opening brief, this Court should reverse and dismiss Mr. Nyland's conviction of robbery in the second degree or in the alternative, reverse under the doctrine of cumulative error.

DATED this 27th day of January, 2012.

Respectfully submitted,



VALERIE MARUSHIGE

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Attorney for Appellant, Dylan Thomas Nyland

DECLARATION OF SERVICE

On this day, the undersigned sent by U.S. Mail, in a properly stamped and addressed envelope, a copy of the document to which this declaration is attached to Brian Wasankari, Pierce County Prosecutor's Office, 930 Tacoma Avenue South, Tacoma, Washington 98402.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 27th day of January 2012 in Kent, Washington.


VALERIE MARUSHIGE
Attorney at Law
WSBA No. 25851

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STATE OF WASHINGTON
BY _____
DEPUTY