

NO. 41665-4-II

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

DYLAN THOMAS NYLAND, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Frank E. Cuthbertson

No. 10-1-00117-6

Brief of Respondent

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Table of Contents

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR. 1

1. Whether the trial court properly refused to give the defendant's proposed instruction to the jury defining threat in the context of second degree robbery where that instruction included in its definition threats of harm that could take place subsequent to the robbery. 1

2. Whether the trial court violated the defendant's right to be present by responding to questions from the jury in the defendant's absence, where the defendant did not have a right to be present at the time the court and counsel considered and responded to those questions. 1

3. Whether the defendant's convictions should be affirmed where there was no error committed and therefore, the cumulative error doctrine is inapplicable 1

4. Whether, viewing the evidence in the light most favorable to the State, there was sufficient evidence from which a rational fact finder could have found the essential elements of the crime of second degree robbery beyond a reasonable doubt 1

B. STATEMENT OF THE CASE. 2

1. Procedure 2

2. Facts 4

C. ARGUMENT. 13

1. THE TRIAL COURT PROPERLY REFUSED TO GIVE THE DEFENDANT'S PROPOSED INSTRUCTION DEFINING "THREAT" IN THE CONTEXT OF SECOND DEGREE ROBBERY BECAUSE THAT INSTRUCTION WAS ERRONEOUS IN THAT IT INCLUDED IN ITS DEFINITION THREATS OF HARM THAT COULD TAKE PLACE SUBSEQUENT TO THE ROBBERY 13

2.	THE COURT DID NOT VIOLATE THE DEFENDANT’S RIGHT TO BE PRESENT BY RESPONDING TO QUESTIONS FROM THE JURY IN THE DEFENDANT’S ABSENCE BECAUSE THE DEFENDANT DID NOT HAVE A RIGHT TO BE PRESENT AT THE TIME THE COURT AND COUNSEL CONSIDERED AND ANSWERED THOSE QUESTIONS	17
3.	THE DEFENDANT’S CONVICTIONS SHOULD BE AFFIRMED BECAUSE THERE WAS NO ERROR COMMITTED AND THEREFORE, THE CUMMULATIVE ERROR DOCTRINE IS INAPPLICABLE.....	24
4.	VIEWING THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE STATE, THERE WAS SUFFICIENT EVIDENCE FROM WHICH A RATIONAL FACT FINDER COULD HAVE FOUND THE ESSENTIAL ELEMENTS OF THE CRIME OF SECOND-DEGREE ROBBERY BEYOND A REASONABLE DOUBT.....	25
D.	<u>CONCLUSION</u>	31-32

Table of Authorities

State Cases

<i>Matter of Personal Restraint of Lord</i> , 123 Wn.2d 296, 306, 868 P.2d 835 (1994).....	18, 19, 22
<i>State v. Allen</i> , 50 Wn. App. 412, 419, 749 P.2d 702 (1988)	19, 20, 23
<i>State v. Bashaw</i> , 169 Wn.2d 133, 140, 234 P.3d 195 (2010).....	14
<i>State v. Benn</i> , 120 Wn.2d 631, 654-55, 845 P.2d 289 (1993).....	14
<i>State v. Brockob</i> , 159 Wn.2d 311, 336, P.3d 59 (2006).....	25, 26
<i>State v. Byrd</i> , 125 Wn.2d 707, 713, 887 P.2d 396 (1995).....	14
<i>State v. Caliguri</i> , 99 Wn.2d 501, 508, 664 P.2d 466 (1983)	19
<i>State v. Cannon</i> , 120 Wn. App. 86, 90, 84 P.3d 283 (2004).....	25
<i>State v. Clausing</i> , 147 Wn.2d 620, 626, 56 P.3d 550 (2002).....	13
<i>State v. Collinsworth</i> , 90 Wn. App. 546, 551, 966 P.2d 905 (1997).....	27, 29, 30, 31
<i>State v. Fleming</i> , 155 Wn. App. 489, 228 P.3d 804 (2010).....	13, 14
<i>State v. Gallaher</i> , 24 Wn. App. 819, 604 P.2d 185 (1979).....	3, 14, 15, 16, 17
<i>State v. Green</i> , 94 Wn.2d 216, 221, 616 P.2d 628 (1980).....	25
<i>State v. Greiff</i> , 141 Wn. 2d 910, 929, 10 P.3d 390 (2000).....	24
<i>State v. Handburgh</i> , 119 Wn.2d 284, 293, 830 P.2d 641 (1992)	27, 29
<i>State v. Hickman</i> , 135 Wn.2d 97, 101, 954 P.2d 900 (1997).....	26
<i>State v. Irby</i> , 170 Wn.2d 874, 885 fn6, 246 P.3d 796 (2011).....	18
<i>State v. Jasper</i> , 158 Wn. App. 518, 245 P.3d 228 (2010).....	17, 18, 19

<i>State v. Jennings</i> , 111 Wn. App. 54, 62, 44 P.3d 1 (2002).....	14
<i>State v. Koss</i> , 158 Wn. App. 8, 17, 241 P.3d 415 (2010).....	19
<i>State v. Lopez</i> , 107 Wn. App. 270, 276, 27 P.3d 237 (2001).....	25
<i>State v. Lucky</i> , 128 Wn.2d 727, 731, 912 P.2d 483 (1996), <i>overruled on other grounds by State v. Berlin</i> , 133 Wn.2d 541, 544, 947 P.2d 700 (1997).....	13
<i>State v. Martin</i> , 151 Wn. App. 98, 107-17, 210 P.3d 345 (2009), <i>review granted</i> , 168 Wn.2d 1006, 226 P.3d 781 (2010).....	18
<i>State v. Mills</i> , 154 Wn.2d 1, 109 P.3d 415 (2005).....	13
<i>State v. Myers</i> , 133 Wn.2d 26, 37, 941 P.2d 1102 (1997).....	25
<i>State v. Parra</i> , 96 Wn. App. 95, 977 P.2d 1272 (1999).....	30, 31
<i>State v. Pirtle</i> , 127 Wn.2d 628, 656, 904 P.2d 245 (1995).....	14
<i>State v. Pruitt</i> , 145 Wn. App. 784, 798, 187 P.3d 326 (2008).....	17
<i>State v. Redmond</i> , 122 W. 392, 393, 210 P. 772 (1922).....	27
<i>State v. Riley</i> , 137 Wn.2d 904, 909, 976 P.2d 624 (1999).....	13
<i>State v. Russell</i> , 25 Wn. App. 933, 948, 611 P.2d 1320 (1980).....	20, 23
<i>State v. Salinas</i> , 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).....	26, 29
<i>State v. Shcherenkov</i> , 146 Wn. App. 619, 191 P.3d 99 (2008).....	14, 27
<i>State v. Sublett</i> , 156 Wn. App. 160, 182, 231 P.3d 231 (2010), <i>review granted by</i> 170 Wn.2d 1016, 245 P.3d 775 (2010).....	17, 18, 19, 22
<i>State v. Venegas</i> , 155 Wn. App. 507, 520, 228 P.3d 813 (2010).....	24
<i>State v. Walker</i> , 136 Wn.2d 767, 771, 966 P.2d 883 (1998).....	13
<i>State v. Woods</i> , 143 Wn.2d 561, 590, 23 P.3d 1046 (2001).....	14

Federal and Other Jurisdictions

In re Winship, 397 U.S 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).... 14

Neder v. United States, 527 U.S. 1, 119 S. Ct. 1827,
144 L. Ed. 2d 35 (1999)..... 14

Rogers v. United States, 422 U.S. 35, 39, 95 S.Ct. 2091,
45 L.Ed.2d 1 (1975)..... 19

United States v. Gagnon, 470 U.S. 522, 526 105 S.Ct. 1482,
84 L.Ed.2d 486 (1985)..... 18

Constitutional Provisions

Article I, Section 22 of the Washington Constitution..... 17

Fourteenth Amendment 17

Sixth Amendment 17

Rules and Regulations

(CrR) 6.15(f) 19

CrR 6.15(f)(1) 20, 23

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

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2. Whether the trial court violated the defendant's right to be present by responding to questions from the jury in the defendant's absence, where the defendant did not have a right to be present at the time the court and counsel considered and responded to those questions.

3. Whether the defendant's convictions should be affirmed where there was no error committed and therefore, the cumulative error doctrine is inapplicable.

4. Whether, viewing the evidence in the light most favorable to the State, there was sufficient evidence from which a rational fact finder could have found the essential elements of the crime of second degree robbery beyond a reasonable doubt.

B. STATEMENT OF THE CASE.

1. Procedure

On January 11, 2010, Dylan Thomas Nyland, hereinafter referred to as the “defendant,” was charged, by information, with second degree robbery in count I, and unlawful delivery of a controlled substance, to wit: oxycontin, in count II. CP 1-2.

On December 13, 2010, the case was called for trial and the court considered motions in limine. 12/13/10 RP 2-5¹.

The parties selected a jury on December 14, 2010, and the State gave its opening statement. 12/14/10 RP 3-4.

The State then called Brittany Lyon, 12/14/10 RP 4-14, Sandra Roberts, 12/14/10 RP 15-28, Scott Bennett, 12/14/10 RP 29-38, Officer Jared Tiffany, 12/15/10 RP 49-60, Deputy Joanna Nicholson, 12/15/10 RP 60-69, Deputy Tara Simmelink-Lovely, 12/15/10 RP 69-77, Samantha Carter, 12/16/10 RP 3-47, Dustin LaBounty, 12/16/10 RP 47-79, Joseph Shaffer, 12/16/10 RP 79-161, Steven Mell, 12/20/10 RP 5-28, and Detective Denny Wood, 12/20/10 RP 28-54.

Plaintiff’s exhibit 20 was admitted and read to the jury by stipulation. 12/20/10 RP 55; CP 34-35. The State then rested. 12/20/10 RP 56-62.

¹ References to the verbatim report of proceedings follow the following format: [Date of Proceeding] RP [Page Number].

The defendant moved to dismiss for insufficient evidence, but that motion was denied. 12/20/10 RP 56-61.

The defendant then gave his opening statement and called Karl Phillips. 12/20/10 RP 62-75.

The parties discussed jury instructions, 12/16/10 RP 162, 12/20/10 RP 76-77, 79-86. The defendant took exception to the court's refusal to give his proposed instructions defining "threat," *see* CP 30-31, but admitted that these instruction were "almost identical" to that found to be erroneous in *State v. Gallaher*, 24 Wn. App. 819, 604 P.2d 185. 12/20/10 RP 79-85. The court then read the instructions to the jury 12/21/10 RP 3. *See* CP 39-60.

The parties gave their closing arguments. 12/21/10 RP 4-24 (State's closing argument), 24-43 (Defendant's closing argument), 43-49 (State's rebuttal argument).

The jury began deliberations before asking to again view the CD recording of the security camera previously admitted into evidence. 12/21/10 RP 49-52; CP 36. Neither party had an objection to this request, and the jury was allowed to again view the video in open court. 12/21/10 RP 52-53; CP 36. The jury had two additional questions during its deliberations to which the court, after consulting the parties, responded in writing. *See* CP 37-38.

On December 22, 2010, the jury returned verdicts of guilty to second degree robbery as charged in count I, and guilty to unlawful

delivery of a controlled substance as charged in count II. 12/22/10 RP 3-5; CP 61-62.

On January 7, 2011, the court sentenced the defendant to 9 months in total confinement on count I, and 16 months in total confinement on count II, with 18 months in community custody on count I, and 12 months in community custody on count II, and legal financial obligations totaling \$2,300.00. CP 66-78; 01/07/11 RP 6-7.

The defendant filed a timely notice of appeal on January 11, 2011. CP 79-90. *See* 01/07/11 RP 8-9.

2. Facts

On November 30, 2008, Brittany Lyon was working at the Walgreen's Pharmacy, located at 144th and Meridian in Puyallup, Washington, as a pharmacy technician. 12/14/10 RP 5, 12/20/10 RP 30. A man came to the counter and handed her a note written on a paper towel, which read, "Please give me all your OxyContin." 12/14/10 RP 5-6. The man was white with brown eyes, and dressed entirely in black. 12/14/10 RP 7-9, 11-12, 21. He wore a turtle neck pulled up to his nose, had glasses on, and kept one hand in his pocket the entire time. 12/14/10 RP 7, 12.

Lyon testified that she was frightened when the man handed her the note, and that she was concerned that he had a weapon because he kept his hand in his pocket. 12/14/10 RP 9. *See* 12/14/10 RP 13-14.

Lyon went to pharmacist Sandra Roberts and told her that there was someone there who wanted their OxyContin. 12/14/10 RP 6-7, 18. Roberts pushed the alarm button, took all the brand-name OxyContin to the man, and pushed a second alarm button at the counter. 12/14/10 RP 6-7, 18-19. Roberts estimated that she handed the man between ten and twelve bottles of pills. 12/14/10 RP 20. *See* 12/15/10 RP 63. The total number of pills taken was in excess of 1,200. 12/15/10 RP 65.

Lyon testified that she helped give the man the pills because of the way the man was dressed, the fact that he kept his hand in his pocket, and the fact that Wallgreen's maintains a policy by which, when being robbed, employees are to give the robber what he or she demands. 12/14/10 RP 9-10. *See* 12/14/10 RP 19.

The man said, "thanks," and ran off. 12/14/10 RP 10. Someone called 911 and police arrived five to ten minutes after that. 12/14/10 RP 11, 22-23.

Scott Bennett testified that he went to the Wallgreen's pharmacy with his wife around noon that day. 12/14/10 RP 30. While waiting in the car for her to get something in the store, he saw a person enter the store wearing a hooded sweatshirt, with "paper covering his face so all you could see was eyes." 12/14/10 RP 30. After a couple minutes, the person came out of the store running and holding a bag. 12/14/10 RP 30-31. The bag was plastic and contained pill bottles. 12/14/10 RP 32. Bennett followed the person until he got into a parked vehicle, and then recorded

the license plate number of that vehicle. 12/14/10 RP 30-31. He described the driver as a white man in his mid-20s with “scruffy hair” and a “scruffy beard,” and the car as “an early 20ish” Volkswagen Golf. 12/14/10 RP 34.

Pierce County Sheriff’s Deputy Joanna Nicholson was dispatched to the Walgreen’s store on Meridian and 144th on November 30, 2008, to investigate an armed robbery that had just occurred. 12/15/10 RP 62. She recovered a security tape from the store and took written statements from the witnesses. 12/15/10 RP 65-66.

Deputy Tara Simmelink-Lovely also responded to the store and ran the license plate number provided by Bennett. 12/15/10 RP 71-72. She obtained a street address of the registered owner and went to that address. 12/15/10 RP 72. Once there, she contacted Richard Schaffer, who said he sold the vehicle to his son, Joseph Shaffer. *See* 12/15/10 RP 72.

Tacoma Police Officer Tiffany was dispatched to contact Shane Mack, who told him that Joseph Shaffer, one of the suspects from the robbery, was staying at the Silver Cloud Hotel on Ruston Way in Tacoma. 12/15/10 RP 51-52. Officer Tiffany checked with hotel staff, but no Joseph Schaffer was registered as a guest. 12/15/10 RP 52. Tiffany also searched the hotel parking lot, but did not find Plymouth Voyager van that Shaffer was supposed to be driving. 12/15/10 RP 52. When Mack called 911 again to say that he had spoken to Shaffer and that Shaffer was returning to the hotel after doing “another drug deal,” Officer Tiffany

waited in the intersection through which the van would have to approach the hotel. 12/15/10 RP 53. A few minutes later, Tiffany saw the van and stopped it, at which time it appeared the driver and passenger switched seats. 12/15/10 RP 53. When Tiffany approached the vehicle, Brandon Churchill was in the driver's seat and Joseph Shaffer in the passenger seat. 12/15/10 RP 54. Shaffer initially provided the officer a false name. 12/15/10 RP 54. Tiffany ultimately arrested Churchill for a traffic violation and informed the Pierce County Sheriff's Department that he had detained Shaffer. 12/15/10 RP 55.

Samantha Carter testified that Joseph Shaffer was a "pretty good friend," and that she had known him for about four years. 12/16/10 RP 4-5. Carter had also known the defendant for about three years. 12/16/10 RP 5. Carter testified that Shaffer had a slight problem with drugs and that he would smoke "Oxy." 12/16/10 RP 5. Carter testified that she got a call from Shaffer, who asked her if she wanted to hang-out. 12/16/10 RP 6. She agreed and met him at a Chevron gas station on Portland Avenue. 12/16/10 RP 6. Shaffer arrived in the defendant's vehicle, which the defendant was driving. 12/16/10 RP. He got out and got into Carter's vehicle, a Plymouth Voyager van. 12/16/10 RP 9-10. Shaffer told Carter that he had some money and the two decided to go to the Silver Cloud Hotel to hang out. 12/16/10 RP 9. Once there, Shaffer gave Carter money to rent a room. 12/16/10 RP 12-13.

Carter testified that Shaffer was sweating and “freaking out.” 12/16/10 RP 12. Shaffer later told her that he had been involved in a robbery and showed her a big bag of pills. 12/16/10 RP 16. Shaffer told her that he had a gun. 12/16/10 RP 43. Carter testified that she also thought the defendant was involved in the robbery. 12/16/10 RP 42.

Once they got to the room, they were joined by other people, at least some of whom started using drugs. 12/16/10 RP 13. At some point, they walked down “underneath this bridge,” and smoked marijuana. 12/16/10 RP 14. During this time Shaffer and Churchill left the group. 12/16/10 RP 14. Carter then got a call from Shaffer indicating that “the cops got him and [her] car.” 12/16/10 RP 15. One of the occupants of the room then flushed the pills from the bag down the toilet. 12/16/10 RP 18.

Dustin LaBounty knew and was a good friend of Shaffer, and knew the defendant. 12/16/10 RP 48-49. He got a call from Shaffer in which Shaffer told him that he was going to be “going away,” and asked him if he wanted to hang out with him. 12/16/10 RP 50-51. LaBounty testified that he paid for the room at the Silver Cloud Hotel with a credit card. 12/16/10 RP 51. Once in the room, people took pills and used marijuana. 12/16/10 RP 54. LaBounty testified that he might have overheard Shaffer tell someone that he had been involved in a robbery, and that he saw Shaffer in possession of a lot of pills. 12/16/10 RP 55, 59.

Joseph Shaffer testified that he was addicted to Oxycotin, 12/16/10 RP 83. He testified that the defendant, who was his friend, knew about his

addiction, and had used Oxycotin with him. 12/16/10 RP 82-83. Shaffer testified that he was spending between \$20 and \$100 per day on pills. 12/16/10 RP 84-85.

Shaffer and the defendant discussed a robbery as a way for Shaffer to get the pills he needed, and a way for the defendant to earn money to pay off credit card debt. 12/16/10 RP 84.

On the day of the robbery, the defendant knocked on his door and said he was dressed and ready to do the robbery. 12/16/10 RP 86. Shaffer testified that the defendant was wearing a beanie, aviator glasses, a bandana over his face, a black “hoody,” black sweats, and black gloves. 12/16/10 RP 86. The plan was to go to Wallgreen’s to rob the pharmacy. 12/16/10 RP 87. Shaffer was going to be the driver, and the defendant would go into the store. 12/16/10 RP 87.

Shaffer testified that he drove a 1986 Volkswagen Golf to the store, and parked down the road. 12/16/10 RP 87. The defendant got out and walked to the Walgreen’s. 12/16/10 RP 88. About five minutes later, the defendant came running back with a car chasing him. 12/16/10 RP 88. Shaffer testified that after the defendant got in the car, he “hit the gas and took off.” 12/16/10 RP 88. The car stopped chasing them and Shaffer drove back to his house on 144th. 12/16/10 RP 88-89.

Shaffer testified that he “got high” as soon as he got back to the house. 12/16/10 RP 89. They then got into the defendant’s car and went to the defendant’s house, where they counted the pills. 12/16/10 RP 89-90. According to Shaffer, there were close to a thousand pills. 12/16/10 RP 90.

While at the defendant’s house, Shaffer’s father called Shaffer and told him that the police had been to his house and were looking for him to question him about a pharmacy robbery. 12/16/10 RP 90.

Shaffer testified that he and the defendant then sold some of the pills and divided the money from their sale. 12/16/10 RP 92. They made between nine and ten thousand dollars. 12/16/10 RP 92.

Shaffer then went to the Chevron / McDonald’s off of Portland Avenue where he met Carter and LaBounty. 12/16/10 RP 93-94. Shaffer testified that the defendant dropped him off and he got into Carter’s vehicle. 12/16/10 RP94. They went to the hotel, where people smoked the Oxycotin. 12/16/10 RP 95-96. Shaffer later left the room with Brandon Churchhill to sell more of the pills. 12/16/10 RP96-98. On the way back to the room, they were stopped by police. 12/16/10 RP 99.

Shaffer testified that he was driving, but that he switched seats with Churchhill to avoid having to give his name to the police. 12/16/10 RP 99, 146. When the officer asked him his name, Shaffer gave his brother’s name and date of birth. 12/16/10 RP 99-100, 146-47.

Shaffer was later charged with second degree robbery, and eventually gave a statement to the police which was consistent with his trial testimony, in exchange for a reduction of charges to three less serious felonies. 12/16/10 RP 102.

Karl Phillips, who was in a relationship with the defendant's mother for many years, testified that the defendant moved to and lives on a property owned by Phillips' family on Vashon Island. 12/20/10 RP 65. Phillips testified that he bought a motor home for the defendant to live in on that property. 12/20/10 RP 65. He testified that he and the defendant went to the Vashon Island property at about 8:00 in the morning on November 30, 2008, and stayed on the island until around midnight. 12/20/10 RP 66-67.

Detective Sergeant Denny Wood responded to the Silver Cloud Inn for follow-up investigation of the Wallgreen's robbery in the early morning of December 1, 2008. 12/20/10 RP 30. He obtained a search warrant and served it on room 336. 12/20/10 RP 31.

Forensics Investigator Steven Mell responded to the Silver Cloud Inn in the morning of December 1, 2008, to photograph the scene and assist in serving the search warrant on the room. 12/20/10 RP 7. Although drug paraphernalia was recovered, no drugs were found in the room. 12/20/10 RP10-11.

Dustin LaBounty, Samantha Carter, Gary Jones, and Adam Banes were found inside. 12/20/10 RP 31-32. Each person submitted to a recorded interview, and the room was searched. 12/20/10 RP 32-33.

Detective Wood got suspect information from the interviews and prepared photo montages which he showed to Bennett, Roberts, and Lyon after admonishment. 12/20/10 RP 35-37. Bennett identified Shaffer. 12/20/10 RP 35-36. Neither Roberts nor Lyon could make an identification. 12/20/10 RP 37.

Detective Wood interviewed Shaffer on February 4, 2009, and Shaffer indicated that the defendant was his accomplice in the robbery. 12/20/10 RP 42.

Mell also assisted in searching the van which Shaffer was driving when he was arrested, and found some pills, prescription bottles, and \$3,246.00 in cash inside that van. 12/20/10 RP 13-15.

The parties stipulated that

[t]wo pills in State's Exhibit 28 A were determined beyond a reasonable doubt to be Oxycodone after being tested by the Washington State Patrol Crime Lab. It is uncontested by the State and the defendant that the Washington State Patrol Crime Lab's testing of this exhibit produced an accurate result.

12/20/10 RP 55; CP 34-35.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY REFUSED TO GIVE THE DEFENDANT'S PROPOSED INSTRUCTION DEFINING "THREAT" IN THE CONTEXT OF SECOND DEGREE ROBBERY BECAUSE THAT INSTRUCTION WAS ERRONEOUS IN THAT IT INCLUDED IN ITS DEFINITION THREATS OF HARM THAT COULD TAKE PLACE SUBSEQUENT TO THE ROBBERY.

"Jury instructions are sufficient if they are supported by substantial evidence, allow the parties to argue their theories of the case and, when read as a whole, properly inform the jury of the applicable law." *State v. Fleming*, 155 Wn. App. 489, 503-04, 228 P.3d 804 (2010) (citing *State v. Clausing*, 147 Wn.2d 620, 626, 56 P.3d 550 (2002)); *State v. Mills*, 154 Wn.2d 1, 109 P.3d 415 (2005); *State v. Riley*, 137 Wn.2d 904, 909, 976 P.2d 624 (1999).

The standard for review applied to a challenge to a trial court's instructions depends on whether the trial court's decision is based upon a matter of law or of fact. *State v. Walker*, 136 Wn.2d 767, 771, 966 P.2d 883 (1998). "[A] trial court's choice of jury instructions," is reviewable only "for abuse of discretion." *Fleming*, 155 Wn. App. at 503; *State v. Lucky*, 128 Wn.2d 727, 731, 912 P.2d 483 (1996), *overruled on other grounds by State v. Berlin*, 133 Wn.2d 541, 544, 947 P.2d 700 (1997). However, "an alleged error of law in jury instructions" is reviewed *de*

novo, *Fleming*, 155 Wn. App. at 503; *State v. Bashaw*, 169 Wn.2d 133, 140, 234 P.3d 195 (2010), and in the context of the instructions as a whole. *State v. Woods*, 143 Wn.2d 561, 590, 23 P.3d 1046 (2001) (quoting *State v. Benn*, 120 Wn.2d 631, 654-55, 845 P.2d 289 (1993)).

In a criminal case, “[j]ury instructions, taken in their entirety, must inform the jury that the State bears the burden of proving every element of a criminal offense beyond a reasonable doubt.” *State v. Pirtle*, 127 Wn.2d 628, 656, 904 P.2d 245 (1995). See *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); *State v. Byrd*, 125 Wn.2d 707, 713, 887 P.2d 396 (1995). “[A] jury instruction that relieves the prosecution of its burden of proof is subject to harmless error analysis.” *State v. Jennings*, 111 Wn. App. 54, 62, 44 P.3d 1 (2002); *Neder v. United States*, 527 U.S. 1, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999).

With respect to second degree robbery, “the definition of ‘robbery’ requires that the threatened harm be in the Immediate future, i.e., while the robbery is taking place.” *State v. Gallaher*, 24 Wn. App. 819, 821-22, 604 P.2d 185 (1979); *State v. Shcherenkov*, 146 Wn. App. 619, 625, 191 P.3d 99 (2008)(“In the robbery context... the ‘threatened use of immediate force, violence, or fear of injury’ means a direct *or indirect* communication of the intent to use immediate force, violence, or cause injury.”). Consequently, a jury instruction defining threat in the context of second degree robbery that “includes threats to harm to take place

subsequent to the robbery” is error. *Gallaher*, 24 Wn. App. at 822, 604 P.2d 185 (1979). Thus, even where “the challenged instruction is broad enough to cover a threat of harm in the immediate future, but is not limited to such a threat,” it is erroneous. *Id.*

In the present case, defendant proposed the following two instructions defining “threat” in the context of second degree robbery:

Threat means to communicate, directly or indirectly, the intent to cause bodily injury to the person threatened or to any other person or to do any act that is intended to harm substantially the person threatened or another with respect to that person’s health or safety.

CP 30 (defendant’s proposed jury instruction no. 1).

Threat means to communicate, directly or indirectly, the intent to cause bodily injury to the person threatened or to any other person to do any act that is intended to harm the person threatened or another with respect to that person’s health or safety.

To be a threat, a statement or act must occur in a context or under such circumstances where a reasonable person, in the position of the speaker, would foresee that the statement or act would be interpreted as a serious expression of intention to carry out the threat.

CP 31 (defendant’s proposed jury instruction no. 2).

The following exchange took place regarding these instructions:

THE COURT: Anything on the jury instructions before I offer instructions? I think there was some research that was going on over the lunch hour.

[DEFENSE ATTORNEY]: She [i.e., the deputy prosecutor] did give me a case, Your Honor, State v. Gallaher. It deals with one of the instructions I proposed on a definition of threat, and I think in looking at it, the

instruction I proposed is almost identical to the one that's addressed in this case.

THE COURT: 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. Let me go ahead. It's my – I looked at – I'm prepared to give Defense's 4. I'm not prepared to give Defense's 1 or 2 based on *Gallaher*, and I'm not prepared to give Defense's 3, which is the definition of reasonable fear.

12/20/10 RP 79-80 (emphasis added). The defendant subsequently took formal exception to the court's refusal to give its proposed instructions 1 and 2. 12/20/10 RP 84-86. The court responded, "Okay. The objection is noted, and as I indicated under *Gallaher*, the threat definition is not appropriate in a robbery case." 12/20/10 RP 86.

Thus, contrary to the defendant's contention, the court did not conclude that *any* definition of threat would be inappropriate in a robbery case, *see* Brief of Appellant, p. 10-12, but simply that the defendant's proposed definitions were erroneous.

The trial court was correct. Neither of the defendant's proposed instructions defining threat required "that the threatened harm be in the Immediate future, i.e., while the robbery is taking place." *Gallaher*, 24 Wn. App. at 821-22. Rather, in defining "threat" as a communication of "the intent to cause bodily injury to the person threatened or to any other person or to do any [other] act that is intended to harm [substantially] the person threatened or another," CP 30-31, the defendant left out any time

restraint whatsoever. Thus, the proposed jury instructions were, as in *Gallaher*, “broad enough to cover a threat of harm in the immediate future, but not limited to such a threat.” *Gallaher*, 24 Wn. App. at 822. Thus, as in *Gallaher*, insofar as these proposed instructions “include[d] threats of harm to take place subsequent to the robbery,” they were erroneous, and the court below properly refused to give them.

Therefore, the defendant’s convictions should be affirmed.

2. THE COURT DID NOT VIOLATE THE DEFENDANT’S RIGHT TO BE PRESENT BY RESPONDING TO QUESTIONS FROM THE JURY IN THE DEFENDANT’S ABSENCE BECAUSE THE DEFENDANT DID NOT HAVE A RIGHT TO BE PRESENT AT THE TIME THE COURT AND COUNSEL CONSIDERED AND ANSWERED THOSE QUESTIONS.

“Pursuant to the confrontation clause of the Sixth Amendment, the due process clause of the Fourteenth Amendment, and article I, section 22 of the Washington Constitution, a criminal defendant has the right to be present during all critical stages of a criminal proceeding.” *State v. Jasper*, 158 Wn. App. 518, 538-39, 245 P.3d 228 (2010). *State v. Sublett*, 156 Wn. App. 160, 182, 231 P.3d 231 (2010), review granted by 170 Wn.2d 1016, 245 P.3d 775 (2010)(citing *State v. Pruitt*, 145 Wn. App. 784, 798, 187 P.3d 326 (2008)) (“A criminal defendant has a constitutional right to be present at every critical stage of the criminal proceedings

against him.”). Though somewhat unclear, *see State v. Irby*, 170 Wn.2d 874, 885 fn6, 246 P.3d 796 (2011), the current state of the law seems to be that “the state constitution does not protect a criminal defendant’s right to be present during trial more broadly or more stringently than does the United States Constitution.” *Jasper*, 158 Wn. App. at 539, fn 12 (*citing State v. Martin*, 151 Wn. App. 98, 107-17, 210 P.3d 345 (2009), *review granted*, 168 Wn.2d 1006, 226 P.3d 781 (2010)).

Moreover, “[t]he core of the constitutional right to be present is the right to be present when evidence is being presented.” *Matter of Personal Restraint of Lord*, 123 Wn.2d 296, 306, 868 P.2d 835 (1994)(*citing United States v. Gagnon*, 470 U.S. 522, 526 105 S.Ct. 1482, 84 L.Ed.2d 486 (1985)). “Beyond that, the defendant has a ‘right to be present at a proceeding ‘whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge.’” *Lord*, 123 Wn. at 306. Thus, “[a] critical stage is one where the defendant’s presence has a reasonably substantial relationship to the fullness of his opportunity to defend against the charge.” *Sublett*, 156 Wn. App. at 182.

“[I]n general, in-chambers conferences between the court and counsel on legal matters are not critical stages of the proceedings except when the issues involve disputed facts.” *Id*; *Jasper*, 158 Wn. App. at 539. “The defendant therefore does not have a right to be present during in-chambers or bench conferences between the court and counsel on legal

matters... at least where those matters do not require a resolution of disputed facts.” *Lord*, 123 Wn.2d at 306 (citations omitted).

“Communications between judge and jury in absence of the defendant *or* defense counsel are clearly prohibited and therefore constitute error.” *State v. Allen*, 50 Wn. App. 412, 419, 749 P.2d 702 (1988)(citing *State v. Caliguri*, 99 Wn.2d 501, 508, 664 P.2d 466 (1983))(emphasis added); *Rogers v. United States*, 422 U.S. 35, 39, 95 S.Ct. 2091, 45 L.Ed.2d 1 (1975). However, this Court has found that a conference between the court and counsel was not a critical stage of the proceedings where “it involved only the purely legal issue of how to respond to the jury’s request for a clarification in one of the trial court’s instructions.” *Sublett*, 156 Wn. App. at 183. *Accord State v. Koss*, 158 Wn. App. 8, 17, 241 P.3d 415 (2010)(a meeting between court and counsel off the record to discuss a jury instruction was not a critical stage that required the defendant’s presence); *Matter of Personal Restraint of Lord*, 123 Wn.2d 296, 868 P.2d 835 (1994).

Similarly, but independently of the constitutional right to be present, *see Jasper*, 158 Wn. App. at 538-41, Criminal Rule (CrR) 6.15(f) provides that

(1) The jury shall be instructed that any question it wishes to ask the court about the instructions or evidence should be signed, dated and submitted in writing to the bailiff. The court shall notify the parties of the contents of the questions and provide them an opportunity to comment upon an appropriate response. Written questions from the

jury, the court's response and any objections thereto shall be made a part of the record. The court shall respond to all questions from a deliberating jury in open court *or* in writing. In its discretion, the court may grant a jury's request to rehear or replay evidence, but should do so in a way that is least likely to be seen as a comment on the evidence, in a way that is not unfairly prejudicial and in a way that minimizes the possibility that jurors will give undue weight to such evidence. Any additional instruction upon any point of law shall be in writing.

CrR 6.15(f)(1)(emphasis added).

However, even where the judge has erroneously communicated with the jury in the absence of the defendant or defense counsel, "the State may prove beyond a reasonable doubt that the error was harmless." *Allen*, 50 Wn. App. at 419. "Where the trial court's response to a jury is 'negative in nature and conveys no affirmative information', no prejudice results." *Id.* (citing *State v. Russell*, 25 Wn. App. 933, 948, 611 P.2d 1320 (1980)). The Court in *Allen* found that, where the court responded to a jury question by writing, "[r]ead your instructions and continue your deliberations," "[t]he court's instruction was neutral and conveyed no affirmative information, merely directing the jury to refer to previous instructions." *Allen*, 50 Wn. App. at 419-20.

In the present case, although the defendant claims that the trial court "violated [his] right to be present at all critical stages of trial by responding to jury questions during deliberations in his absence," Brief of

Appellant, p. 15-20, the record demonstrates no violation of his constitutional rights to be present.

The trial court responded to three questions from the jury during deliberations in this case:

QUESTION: May we see the video after our break

RESPONSE: Yes.

CP 36.

QUESTION: What is the instruction/definition for Robbery in the 3rd degree?

RESPONSE: Please consider only the charges in the instructions.

CP 37.

QUESTION: Is the definition of Robbery based on the intent of the defendant to threaten or is it based on the perception of the victim.

RESPONSE: Please refer to your instructions.

CP 38.

Each of these responses was in writing, was signed by the trial judge, and was either signed by the parties or contained a notation that indicated the parties had been consulted and approved of the court's response via telephone. CP 36-38. Each response was filed with the court. CP 36-38. The court's response to the first question was discussed by the parties in open court on the record, 12/21/10 RP 51-53. Both the deputy prosecutor and the defendant's attorney were present at the time.

12/21/10 RP 51-53. There is nothing in the record to suggest that the defendant was not present when the responses at issue were written.

However, assuming that the defendant was not present when the court and counsel considered and responded to the jury's questions, his right to be present was not violated because it did not apply in this context.

As described above, the Supreme Court has held that a "defendant... does not have a right to be present during in-chambers or bench conferences between the court and counsel on legal matters... at least where those matters do not require a resolution of disputed facts." *Lord*, 123 Wn.2d at 306 (citations omitted). Moreover, this Court has quite recently held that a conference between the court and counsel that "involved only the purely legal issue of how to respond to the jury's request for a clarification in one of the trial court's instructions" was not a critical stage of the proceedings at which the defendant has a right to be present. *Sublett*, 156 Wn. App. at 183. The questions posed by the jury during its deliberations in this case raised the issues of whether to allow the jury to view a video previously admitted into evidence, and whether to give additional instructions on the definition of robbery. CP 36-38. Each of these is a "purely legal issue" that does "not require the resolution of disputed facts." Hence, under *Lord* and *Sublett*, the defendant did not have a right to be present when the court and counsel considered and responded to these questions. Therefore, the court could not have violated

the defendant's right to be present by responding to such questions in his absence, and the defendant's convictions should be affirmed.

Moreover, even assuming that the court improperly communicated with the jury in the absence of the defendant or defense counsel, the State can "prove beyond a reasonable doubt that the error was harmless." *Allen*, 50 Wn. App. at 419. "Where the trial court's response to a jury is 'negative in nature and conveys no affirmative information', no prejudice results." *Id.* (citing *State v. Russell*, 25 Wn. App. 933, 948, 611 P.2d 1320 (1980)). The court's responses to the second and third questions were "[p]lease consider only the charges in the instructions," CP 37, and "please refer to your instructions." CP 38. Both of these responses are negative and neither conveyed affirmative information because neither gave the jury the additional instruction it requested. *See Allen*, 50 Wn. App. at 419-20. Thus, neither could have been prejudicial.

With respect to the first response, although it was affirmative, it did no more than allow the jury to view a video it had already seen, the recording of which had already been admitted into evidence. 12/15/10 RP 65-66. This is something the court rules explicitly allow the court to do, and which could not have prejudiced the defendant. *See CrR 6.15(f)(1)*.

Therefore, even assuming the court erred in communicating these responses to the jury in the defendant's absence, those errors must be considered harmless and the defendant's convictions affirmed.

3. THE DEFENDANT’S CONVICTIONS SHOULD BE AFFIRMED BECAUSE THERE WAS NO ERROR COMMITTED AND THEREFORE, THE CUMMULATIVE ERROR DOCTRINE IS INAPPLICABLE.

Under the cumulative error doctrine a court “may reverse a defendant’s conviction when the combined effect of errors during trial effectively denied the defendant her [or his] right to a fair trial, even if each error standing alone would be harmless.” *State v. Venegas*, 155 Wn. App. 507, 520, 228 P.3d 813 (2010). The “cumulative error doctrine” is “limited to instances when there have been several trial errors that standing alone may not be sufficient to justify reversal but when combined may deny a defendant a fair trial.” *State v. Greiff*, 141 Wn. 2d 910, 929, 10 P.3d 390 (2000). However, the doctrine does not apply where the errors are few and have little or no effect on the trial’s outcome.” *Venegas*, 155 Wn. App. at 520.

As explained in the argument above, there was no error committed in the present case. Because there was no error, there can be no cumulative error. Therefore, the cumulative error doctrine is inapplicable and the defendant’s convictions should be affirmed.

4. VIEWING THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE STATE, THERE WAS SUFFICIENT EVIDENCE FROM WHICH A RATIONAL FACT FINDER COULD HAVE FOUND THE ESSENTIAL ELEMENTS OF THE CRIME OF SECOND-DEGREE ROBBERY BEYOND A REASONABLE DOUBT.

In a criminal case, a defendant may challenge the sufficiency of the evidence before trial, at the end of the State's case in chief, at the end of all of the evidence, after the verdict, and on appeal. *State v. Lopez*, 107 Wn. App. 270, 276, 27 P.3d 237 (2001). "In a claim of insufficient evidence, a reviewing court examines whether 'any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt,' 'viewing the evidence in the light most favorable to the State.'" *State v. Brockob*, 159 Wn.2d 311, 336, P.3d 59 (2006) (quoting *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980)). Thus, "[s]ufficient evidence supports a conviction when, viewing it in the light most favorable to the State, a rational fact finder could find the essential elements of the crime beyond a reasonable doubt." *State v. Cannon*, 120 Wn. App. 86, 90, 84 P.3d 283 (2004). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Id.* (quoting *State v. Myers*, 133 Wn.2d 26, 37, 941 P.2d 1102 (1997)). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the

defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

“Determinations of credibility are for the fact finder and are not reviewable on appeal.” *Brockob*, 159 Wn.2d at 336.

In the present case, the trial court instructed the jury that

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 the 30th day of November, 2008, 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 or to the person of another;***

(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 of these elements, then it will be your duty to return a verdict of not guilty.

CP 39-60 (instruction no. 12)(emphasis added). *See* Appendix A.

Under the law of the case doctrine, where, as here, no party objected to this instruction, *see* 12/20/10 RP 76-77, 79-86, it became the law of the case. *State v. Hickman*, 135 Wn.2d 97, 101, 954 P.2d 900 (1997).

“If the taking of the property be attended with such circumstances of terror, or such threatening by menace, word, or gesture as in common experience is likely to create an apprehension of danger and induce a man to part with property for the safety of his person, it is robbery.” *State v. Collinsworth*, 90 Wn. App. 546, 551, 966 P.2d 905 (1997)(quoting *State v. Redmond*, 122 W. 392, 393, 210 P. 772 (1922)). Indeed, “[a]ny force or threat, no matter how slight, which induces an owner to part with his property is sufficient to sustain a robbery conviction.” *State v. Handburgh*, 119 Wn.2d 284, 293, 830 P.2d 641 (1992). Moreover, a threat of immediate force may be explicit or implied. *State v. Shcherenkov*, 146 Wn. App. 619, 624-25, 191 P.3d 99 (2008). Thus, the fact that a defendant does not display a weapon or overtly threaten his victim, does not preclude a conviction for robbery. *State v. Collinsworth*, 90 Wn. App. 546, 966 P.2d 905 (1997).

In the present case, viewing the evidence in the light most favorable to the State, a rational fact finder could have found the essential elements of second-degree robbery beyond a reasonable doubt. Although the defendant argues “that there was no force or threat that induced [the Wallgreen’s employees] to hand over the OxyContin,” and therefore, that there was “no evidence” of element (3) above, Brief of Appellant, p. 21-26, the record demonstrates otherwise.

Pharmacy Technician Brittany Lyon testified that it was not only Walgreen's policy that caused her to give the robber the pills, but the way the robber was dressed and the fact that he kept his hand in his pocket. 12/14/10 RP 9-10. *See* 12/14/10 RP 19. Lyon testified that, because the robber kept his hand in his pocket, she was concerned that he had a weapon. 12/14/10 RP 9. *See* 12/14/10 RP 13-14. Indeed, she made this clear in the following exchange, which took place during her direct examination:

Q Were you frightened when the man handed you the note?

A Yes.

Q *Did he ever imply he had a weapon?*

A *He didn't say it, but his hand was in his pocket.*

Q *Were you concerned about that?*

A *Yes.*

Q *Was it the fact that he had the note, was dressed the way he was, and had his hand in his pocket the reason why you helped the pharmacist give him the OxyContin?*

A *That, and also the policy with Walgreen's is to just do what they say.*

12/14/10 RP 9-10 (emphasis added).

Thus, Lyon testified that it was not only Walgreen's policy that induced her to give the pills to the defendant, but his manner of dress and the fact that he implied that he had a weapon by keeping his hand in his pocket. Moreover, it is reasonable to infer from the fact that the defendant implied he had a weapon while demanding the pills, that he was implying he would use that weapon if his demand was not met. Because, for purposes of this analysis, all reasonable inferences from the evidence must

be drawn in favor of the State, *State v. Salinas*, 119 Wn.2d 192, 201, this inference must drawn. When it is, it becomes clear that the defendant took the pills against Lyon's will by the implied threat of using immediate force or violence against Lyon. The fact that the store maintained a policy to give robbers what they demanded does not diminish the testimony of Lyon that she was frightened, and that she assisted in giving the defendant the pills in part because of the implied threat that he had a weapon. Because "[a]ny force or threat, no matter how slight, which induces an owner to part with his property is sufficient to sustain a robbery conviction", *Handburgh*, 119 Wn.2d 284, 293, 830 P.2d 641 (1992), the defendant's conviction should be affirmed.

Indeed, this result seems to be dictated by *Collinsworth*, 90 Wn. App. at 553. Although the defendant argues that *Collinsworth* should be distinguished from the present case because it "involved circumstances unique to bank robberies," Brief of Appellant, p. 26, n. 9, there is nothing in its holding that demands this. Indeed, the facts of *Collinsworth* are, in all material respects, virtually identical to those in this case.

In *Collinsworth*, the defendant was convicted of five counts of second degree robbery and one count of attempted second degree robbery. *Id.* at 547. In each of these instances, the defendant walked up to a bank's teller and asked that he or she give him money. *Id.* at 548-50. In none of

these instances did the defendant mention or display a weapon or make any explicit threat. *Id.* at 548-50. In fact, with respect to the first count, the Court noted that the defendant did not even “put his hands in his pocket or otherwise indicate that he had a weapon.” *Id.* at 548. In each of the robberies, the tellers testified that it was bank policy to comply with any demand or request for money, and in each of the completed counts of robbery, the tellers complied with the defendant’s demand. *Id.* at 548-50. Nonetheless, the Court found that “[u]nder the circumstances of this case, the fact that [the defendant] did not display a weapon or overtly threaten the bank tellers does not preclude a conviction for robbery,” because “[n]o matter how calmly expressed, an unequivocal demand for the immediate surrender of the bank’s money, unsupported by even the pretext of any lawful entitlement to the funds, is fraught with the implicit threat to use force.” *Id.* at 553.

The same result was reached in *State v. Parra*, 96 Wn. App. 95, 977 P.2d 1272 (1999), and the same holds true here. Here, as in *Collinsworth*, the defendant walked up to an employee and demanded property to which he had no legal claim. Although he did not mention or display a weapon or make an overt threat, the “unequivocal demand for the immediate surrender of the [store’s property], unsupported by even the pretext of any lawful entitlement to [such property], is fraught with the

implicit threat to use force.” *Id.* at 553. Therefore, under *Collinsworth* and *Parra*, and given the testimony of Lyon, there was sufficient evidence from which a rational fact finder could have found “[t]hat the taking was against [Lyon’s] will by the defendant’s... threatened use of immediate force,” and hence, that there was sufficient evidence of element (3) of the crime of second degree robbery.

Because the defendant does not challenge the sufficiency of the evidence with respect to the remaining elements, *see* Brief of Appellant, p. 1-26, viewing the evidence in the light most favorable to the State, there was sufficient evidence from which a rational fact finder could have found all the essential elements of the crime of second degree robbery beyond a reasonable doubt. Therefore, the defendant’s conviction thereof should be affirmed.

D. CONCLUSION.

The trial court properly refused to give the defendant’s proposed instruction to the jury defining threat in the context of second degree robbery because that instruction was erroneous in that it included in its definition threats of harm that could take place subsequent to the robbery.

The court did not violate the defendant's right to be present by responding to questions from the jury in his absence, because the defendant did not have a right to be present when the court and counsel considered and responded to those questions. Even if he did, the court's responses to those questions were harmless error.

The defendant's convictions should be affirmed because there was no error committed and therefore, the cumulative error doctrine is inapplicable.

Finally, viewing the evidence in the light most favorable to the State, there was sufficient evidence from which a rational fact finder could have found the essential elements of the crime of second degree robbery beyond a reasonable doubt.

Therefore, the defendant's convictions should be affirmed.

DATED: December 6, 2011.

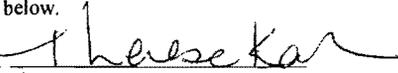
MARK LINDQUIST
Pierce County
Prosecuting Attorney



Brian Wasankari
Deputy Prosecuting Attorney
WSB # 28945

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

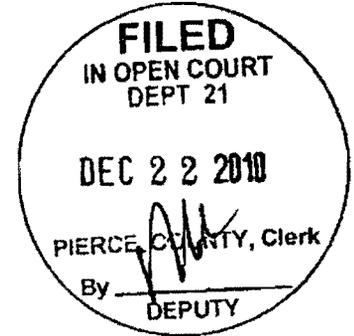
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Date Signature

APPENDIX “A”

CERTIFIED COPY



10-1-00117-6 35594639 CTINJY 12-23-10



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 10-1-00117-6

vs.

DYLAN THOMAS NYLAND

Defendant.

COURT'S INSTRUCTIONS TO THE JURY

DATED this 21st day of December, 2010.

JUDGE

INSTRUCTION NO. 1

It is your duty to decide the facts in this case based upon the evidence presented to you during this trial. It also is your duty to accept the law from my instructions, regardless of what you personally believe the law is or what you personally think it should be. You must apply the law from my instructions to the facts that you decide have been proved, and in this way decide the case.

Keep in mind that a charge is only an accusation. The filing of a charge is not evidence that the charge is true. Your decisions as jurors must be made solely upon the evidence presented during these proceedings.

The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses, and the exhibits that I have admitted, during the trial. If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict.

Exhibits may have been marked by the court clerk and given a number, but they do not go with you to the jury room during your deliberations unless they have been admitted into evidence. The exhibits that have been admitted will be available to you in the jury room.

One of my duties has been to rule on the admissibility of evidence. Do not be concerned during your deliberations about the reasons for my rulings on the evidence. If I have ruled that any evidence is inadmissible, or if I have asked you to disregard any evidence, then you must not discuss that evidence during your deliberations or consider it in reaching your verdict. Do not speculate whether the evidence would have favored one party or the other.

In order to decide whether any proposition has been proved, you must consider all of the evidence that I have admitted that relates to the proposition. Each party is entitled to the benefit of all of the evidence, whether or not that party introduced it.

You are the sole judges of the credibility of each witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things he or she testifies about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all of the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.

You may have heard objections made by the lawyers during trial. Each party has the right to object to questions asked by another lawyer, and may have a duty to do so. These objections should not influence you. Do not make any assumptions or draw any conclusions based on a lawyer's objections.

Our state constitution prohibits a trial judge from making a comment on the evidence. It would be improper for me to express, by words or conduct, my personal opinion about the value

of testimony or other evidence. I have not intentionally done this. If it appeared to you that I have indicated my personal opinion in any way, either during trial or in giving these instructions, you must disregard this entirely

You have nothing whatever to do with any punishment that may be imposed in case of a violation of the law. You may not consider the fact that punishment may follow conviction except insofar as it may tend to make you careful.

The order of these instructions has no significance as to their relative importance. They are all important. In closing arguments, the lawyers may properly discuss specific instructions. During your deliberations, you must consider the instructions as a whole.

As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, prejudice, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

of testimony or other evidence. I have not intentionally done this. If it appeared to you that I have indicated my personal opinion in any way, either during trial or in giving these instructions, you must disregard this entirely

You have nothing whatever to do with any punishment that may be imposed in case of a violation of the law. You may not consider the fact that punishment may follow conviction except insofar as it may tend to make you careful.

The order of these instructions has no significance as to their relative importance. They are all important. In closing arguments, the lawyers may properly discuss specific instructions. During your deliberations, you must consider the instructions as a whole.

As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, prejudice, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

INSTRUCTION NO. 2

The defendant has entered a plea of not guilty. That plea puts in issue every element of each crime charged. The State is the plaintiff and has the burden of proving each element of each crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists as to these elements.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt

INSTRUCTION NO. 3

The evidence that has been presented to you may be either direct or circumstantial. The term "direct evidence" refers to evidence that is given by a witness who has directly perceived something at issue in this case. The term "circumstantial evidence" refers to evidence from which, based on your common sense and experience, you may reasonably infer something that is at issue in this case.

The law does not distinguish between direct and circumstantial evidence in terms of their weight or value in finding the facts in this case. One is not necessarily more or less valuable than the other.

INSTRUCTION NO. 4

As jurors, you have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict. Each of you must decide the case for yourself, but only after you consider the evidence impartially with your fellow jurors. During your deliberations, you should not hesitate to re-examine your own views and to change your opinion based upon further review of the evidence and these instructions. You should not, however, surrender your honest belief about the value or significance of evidence solely because of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of reaching a verdict.

INSTRUCTION NO. 5

A witness who has special training, education, or experience may be allowed to express an opinion in addition to giving testimony as to facts.

You are not, however, required to accept his or her opinion. To determine the credibility and weight to be given to this type of evidence, you may consider, among other things, the education, training, experience, knowledge, and ability of the witness. You may also consider the reasons given for the opinion and the sources of his or her information, as well as considering the factors already given to you for evaluating the testimony of any other witness.

INSTRUCTION NO. 6

A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on the other count.

INSTRUCTION NO. 7

A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result that constitutes a crime.

INSTRUCTION NO. 8

A person knows or acts knowingly or with knowledge with respect to a fact, circumstance, or result when he or she is aware of that fact, circumstance, or result. It is not necessary that the person know that the fact, circumstance, or result is defined by law as being *unlawful or an element of a crime*.

If a person has information that would lead a reasonable person in the same situation to believe that a fact exists, the jury is permitted but not required to find that he or she acted with knowledge of that fact.

When acting knowingly as to a particular fact is required to establish an element of a crime, the element is also established if a person acts intentionally as to that fact.

INSTRUCTION NO. 9

Property means anything of value.

INSTRUCTION NO. 10

A person is guilty of a crime if it is committed by the conduct of another person for which he or she is legally accountable. A person is legally accountable for the conduct of another person when he or she is an accomplice of such other person in the commission of the crime.

A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she either:

- (1) solicits, commands, encourages, or requests another person to commit the crime; or
- (2) aids or agrees to aid another person in planning or committing the crime.

The word "aid" means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.

A person who is an accomplice in the commission of a crime is guilty of that crime whether present at the scene or not.

INSTRUCTION NO. 11

A person commits the crime of robbery in the second degree when he or she unlawfully and with intent to commit theft thereof takes personal property from the person or in the presence of another against that person's will by the use or threatened use of immediate force, violence, or fear of injury to that person or to the person of anyone. The 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.

INSTRUCTION NO. 12

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 the 30th day of November, 2008, 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 or to the person of another;
- (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.

INSTRUCTION NO. 13

To convict the defendant of the crime of delivery of a controlled substance, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 30th day of November, 2008, the defendant delivered a controlled substance;

(2) That the defendant knew that the substance delivered was a controlled substance; Oxycodone; and

(3) That this act 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 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.

INSTRUCTION NO. 14

It is a crime for any person to deliver a controlled substance that the person knows to be a controlled substance except as authorized by law.

INSTRUCTION NO 15

Deliver or delivery means the actual or constructive transfer of a controlled substance from one person to another.

INSTRUCTION NO. 16

Oxycodone is a controlled substance.

INSTRUCTION NO. 17

The defendant is not required to testify. You may not use the fact that the defendant has not testified to infer guilt or to prejudice him in any way.

INSTRUCTION NO. 18

When you begin deliberating, you should first select a presiding juror. The presiding juror's duty is to see that you discuss the issues in this case in an orderly and reasonable manner, that you discuss each issue submitted for your decision fully and fairly, and that each one of you has a chance to be heard on every question before you.

During your deliberations, you may discuss any notes that you have taken during the trial, if you wish. You have been allowed to take notes to assist you in remembering clearly, not to substitute for your memory or the memories or notes of other jurors. Do not assume, however, that your notes are more or less accurate than your memory.

You will need to rely on your notes and memory as to the testimony presented in this case. Testimony will rarely, if ever, be repeated for you during your deliberations.

If, after carefully reviewing the evidence and instructions, you feel a need to ask the court a legal or procedural question that you have been unable to answer, write the question out simply and clearly. In your question, do not state how the jury has voted. The presiding juror should sign and date the question and give it to the judicial assistant. I will confer with the lawyers to determine what response, if any, can be given.

You will be given the exhibits admitted in evidence, these instructions, and two verdict forms for recording your verdict. Some exhibits and visual aids may have been used in court but will not go with you to the jury room. The exhibits that have been admitted into evidence will be available to you in the jury room.

You must fill in the blank provided in each verdict form the words "not guilty" or the word "guilty", according to the decision you reach.

Because this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the verdict forms to express your decision. The presiding juror must sign the verdict forms and notify the judicial assistant. The judicial assistant will bring you into court to declare your verdict.



STATE OF WASHINGTON, County of Pierce
I, Kevin Stock, Clerk of the above
entitled Court, do hereby certify that this
forgoing instrument is a true and correct
copy of the original now on file in my office.
IN WITNESS WHEREOF, I hereunto set my
hand and the Seal of said Court this
5th day of Dec, 20 11
by Kevin Stock, Clerk

PIERCE COUNTY PROSECUTOR

December 06, 2011 - 1:36 PM

Transmittal Letter

Document Uploaded: 416654-Respondent's Brief.pdf

Case Name: ST. v. Nyland

Court of Appeals Case Number: 41665-4

Designation of Clerk's Papers

Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

 Brief: Respondent's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Other: _____

Sender Name: Therese M Kahn - Email: tnichol@co.pierce.wa.us

A copy of this document has been emailed to the following addresses:
ddvburns@aol.com