

NO. 41944-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

DESHONE V. HERBIN,

Appellant.

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

The Honorable Paula Casey, Judge

**APPELLATE COUNSEL'S REPLY TO APPELLANT'S
RAP 10.10 STATEMENT OF ADDITIONAL GROUNDS
FOR REVIEW**

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A. RESPONSE TO APPELLANT'S ADDITIONAL GROUND FOR REVIEW NUMBER ONE¹

THE EVIDENCE DOES NOT SUPPORT COUNTS VI, VII, AND VIII.

1. Pertinent Procedural Facts. Mr. Herbin was tried on the Third Amended Information. Counts VI, VII, and VIII charged Mr. Herbin with first degree robbery as follows:

In that the Defendant, DESHONE VERELL HERBIN in the State of Washington, on or about December 27, 2009, as a principal or as an accomplice, with intent to commit theft, did unlawfully take personal property from the person or in the presence of [COUNT VI, NICHOLAS THOMAS OATFIELD] [COUNT VII, AARON FRANCIS ORMROD] [COUNT VIII, NICHOLAS GEORGE ORMROD] against such person's will, by use or threatened use of immediate force, violence, or fear of injury to said person or the property of said person or the person property of another, and in the commission of said crime or in the immediate flight therefrom, the defendant was armed with a deadly weapon or displayed what appeared to be a deadly weapon. It is further alleged that during the commission of this offense, the defendant or an accomplice was armed with a deadly weapon, to wit: a firearm.

CP 14-15.

At trial, the State elected not to pursue the theory that Mr. Herbin, as a principal or accomplice, intended to commit the theft element by taking personal property *in the presence of* Nicholas Oatfield or Aaron or Nicholas Ormrod. CP 41-43 (Instructions 23-25). Instead, by its proposed instructions, the State asked the court to only instruct the jury on the

¹ Appellant's counsel's reply to only two of Mr. Herbin's nine Statement of Additional Grounds for Review should not in any way be taken as a negative comment on the merit of Mr. Herbin's seven other Additional Grounds.

theory that Mr. Herbin or an accomplice committed the theft element by taking personal property *from the person of another*. See Supplemental Designation of Clerk's Papers (State's Proposed Jury Instructions, sub. nom. 196). The court gave the State's proposed "to-convict" robbery instructions as follows:

- (1) That on or about December 27, 2009, the defendant or an accomplice unlawfully *took person property from the person of another*, [NICHOLAS THOMAS OATFIELD] [AARON FRANCIS ORMROD] [NICHOLAS GEORGE ORMROD];
- (2) That the defendant or an accomplice intended to commit theft of the property;
- (3) That the taking was against the person's will by the defendant's or accomplice's use or threatened use of immediate force, violence, or fear of injury to that person or to that person's property or to the person or property of another;
- (4) That force or fear was used by the defendant or an accomplice to obtain or retain possession of the property;
- (5)(a) That the commission of these acts or in immediate flight therefrom the defendant or an accomplice was armed with a deadly weapon; or
- (5)(b) That in the commission of these acts or in the immediate flight therefrom the defendant or an accomplice displayed what appeared to be a firearm or other deadly weapon; and
- (6) That any of these acts occurred in the State of Washington.

CP 41, 42, 43 (Instructions 23, 24, 25); See also WPIC 37.02.

2. Nicholas Oatfield's pertinent testimony. Oatfield got out of bed after hearing three knocks on the front door. RP 02/23/11 at 108.

He was headed down the hall to open the door when he heard a loud crash followed by yelling to call 911. Id. at 109. Oatfield ran into Aaron Ormrod's room and sat behind the door. Id. at 109-10. The door was kicked open. Id. at 110. One of three intruders who entered the home pointed a shotgun and directed Oatfield to crawl down the hall to the kitchen area where the home's occupants and their guests were collected. Id. at 110-13. One of the intruders said, "Where's the money? Where's the weed. We can smell the weed." Id. at 116. Oatfield volunteered he had weed² in his room. Id. He was grabbed by the hair, shoved down the hallway with a shotgun, and taken into his room which was completely torn apart. Id. Apparently, the intruders already found the weed, which had been stashed in a vase. Id. After denying that he had any more weed, he was told to crawl back to the kitchen. Id. It was only after the intruders left that Oatfield discovered money missing from under his mattress. RP 116-17. Neither the marijuana nor the money was taken *from the person of* Nicholas Oatfield. RP 02/23/11 at 108-17.

3. Aaron Ormrod's pertinent testimony. Aaron Ormrod woke up when Nicholas Oatfield suddenly ran into his room, turned the light on, told him to call 911, turned the light off, and sat with his back against the bedroom door. RP 02/23/11 at 188. Aaron called 911 and

² "Weed" means "marijuana."

thereafter his bedroom door was kicked in and Nicholas Oatfield screamed. *Id.* at 189. Aaron Ormrod complied when an intruder told him to crawl down the hall and into the kitchen area. *Id.* at 190. Aaron Ormrod left his wallet, keys and cell phone in his bedroom. *Id.* at 193. Immediately after the intruders left the home, the police arrived. *Id.* at 193-94. Aaron Ormrod checked his wallet and discovered \$50 was missing. *Id.* at 194. He also discovered some of his paint all equipment was gone. *Id.* at 194. None of the missing property was taken *from the person of* Aaron Ormrod. RP 02/23/11 at 188-194.

4. Nicholas Ormrod's pertinent trial testimony. Nicholas Ormrod was asleep in his bedroom when a “really, really loud crash” woke him up. RP 02/23/11 at 197. He heard house guest Casey Jones yell, “call 911,” and someone else yell “get on the ground.” *Id.* at 197. He shut and locked his bedroom door and then called 911. *Id.* at 194, 199. While Nicholas Ormrod was on the phone with 911, his door was kicked in. *Id.* at 199. A person holding a shotgun told him to crawl into the kitchen. *Id.* at 199. He did so. *Id.* at 200. From his kitchen view, Nicholas Ormrod saw two of the intruders leave the home. *Id.* at 202. But a third intruder went back down the hallway towards the bedrooms. *Id.* The third intruder came out of the hallway with what Nicholas would only later learn was his flat screen TV. *Id.* at 202. It was only after intruders

left and the police arrived that Nicholas Ormrod discovered his paint ball gun missing. *Id.* at 203. Last time he'd seen the gun, it was in the living room. *Id.* at 203. Neither the television nor the paint ball gun was taken *from the person of* Nicholas Ormrod. RP 02/23/11 at 197-203.

5. The evidence is insufficient. Evidence is only sufficient to support a conviction if, viewed in the light most favorable to the State, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A claim of insufficiency admits the truth of the State's evidence and all reasonable inferences that a trier of fact can draw from that evidence. *Salinas*, 119 Wn.2d at 201. Circumstantial evidence and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

Applying these standards, the evidence of the alleged robberies in Counts VI, VII and VIII, is insufficient and requires reversal.

The pertinent facts are not in dispute. It was only after the intruders left the home that Nicholas Oatfield and Aaron and Nicholas Ormrod discovered their cash (Nicholas Oatfield, Aaron Ormrod, marijuana (Aaron Oatfield), flat screen TV (Nicholas Ormrod), and paint ball equipment (Aaron Ormrod, Nicholas Ormrod) missing from their

respective bedrooms and the living room. The State conceded this scenario during closing argument:

The four victims of robbery, ladies and gentlemen, the people who in the case of Zachary Dodge, who was present when his property was stolen, or Nicholas Oatfield, Nicholas Ormrod and Aaron Ormrod, who were removed from their rooms so that their property could be stolen, are the victims of the robbery.

RP 02/24/11 at 427.

Because the robbery “to convict” instructions omitted the phrase “or in the presence of another,” the State bore the burden of proving Mr. Herbin or an accomplice took property “from the person” of the named victim. See *State v. Hickman*, 135 Wn.2d 97, 954 P.2d 900 (1998) (discussing well-established “law of the case” rule). Under the law of the case doctrine, jury instructions not objected to become the “law of the case.” *Id.* Neither the prosecutor nor Mr. Herbin objected to the instructions. RP 02/24/11 at 372-73.

When a defendant challenges the sufficiency of the evidence in light of an incomplete or incorrect jury instruction, the reviewing court must determine whether sufficient evidence exists to sustain the convictions based on the given instruction. *Tonkovich v. Dep’t of Labor and Indus.*, 31 Wn.2d 220, 225, 195 P.2d 638 (1948) (“It is the approved rule in this state that the parties are bound by the law laid down by the court in its instructions....In such case, the sufficiency of the evidence to

sustain the verdict is to be determined by the application of the instructions and rules of law laid down the charge.”).

Because the trial court did not include the optional “or in the presence of another” language in its defendant-specific “to convict” robbery instructions, the State was required to prove that either Mr. Herbin or an accomplice took property *from the person* rather than *in the presence of* the named robbery victim.

In Mr. Herbin’s case, the State presented no evidence that Nicholas Oatfield, Aaron Nicholas Ormrod, or Nicholas Ormrod had property stolen from their persons by anyone. Instead, the property was stolen while they were huddled in the kitchen and otherwise unaware of the thefts.

In a criminal trial, the law of the case doctrine requires that every element contained in the “to-convict” instruction be proved by the State beyond a reasonable doubt. *State v. Ng*, 110 Wn.2d 32, 39, 750 P.2d 632 (1988). Because the State failed to prove the elements as stated in its instructions – that each victim had property taken from his person – insufficient evidence supports the three robbery convictions related to Nicholas Oatfield and the two Ormrods.

Accordingly, counts VI, VII, and VII and their attendant firearm enhancements must be reversed and dismissed with prejudice. “Retrial

following reversal for insufficient evidence is ‘unequivocally prohibited’ and dismissal is the remedy.” *Hickman*, 135 Wn.2d at 103.

B. RESPONSE TO APPELLANT’S ADDITIONAL GROUND FOR REVIEW NUMBER SEVEN.

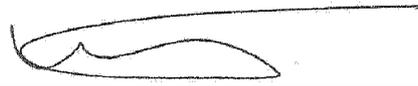
Mr. Herbin complains that he has been denied the record necessary for appellate review. He argues specifically that the State’s Power-Point presentation [contains] highly inflammatory evidence of blatant prosecutor misconduct that denied Herbin a fair trial.” Statement of Additional Grounds for Review at 36.

The best – and really the only - way to address Additional Ground Number Seven is to order the prosecutor to file the Power Point presentation so it can be made part of the appellate record. See Appellant’s Motion to Compel Filing of Prosecutor Bruneau’s Power Point presentation.

C. CONCLUSION

As to Additional Ground Number One, counts VI, VII, VIII, should be reversed and dismissed. As to Additional Ground Number Seven, the State should be ordered to file the Prosecutor Bruneau’s Power Point presentation.

Respectfully submitted this 1st day of June.

A handwritten signature in black ink, appearing to read "L. Tabbut", is written above a solid horizontal line.

LISA E. TABBUT/WSBA #21344
Attorney for Deshone V. Herbin

Certificate of Service

Lisa E. Tabbut declares as follows:

On today's date, I efiled Appellate Counsel's Reply to Appellant's RAP 10.10 Statement of Additional Grounds for Review to (1) Carol LaVerne, Thurston County Prosecutor's Office at paoappeals@co.thurston.wa.us, (2) the Court of Appeals, Division II, and that I (3) mailed it to Deshone V. Herbin/DOC#348158, Stafford Creek Corrections Center, 191 Constantine Way, Aberdeen, WA 98520.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed June 1, 2012, in Longview, Washington.

A handwritten signature in black ink, appearing to read 'Lisa E. Tabbut', with a long horizontal line extending to the right.

Lisa E. Tabbut, WSBA No. 21344
Attorney for Deshone V. Herbin

COWLITZ COUNTY ASSIGNED COUNSEL

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