

NO. 46921-9-II

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

STATE OF WASHINGTON,

Respondent,

v.

BRANDON ENGLISH,

Appellant.

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

The Honorable Barbara Johnson, Judge

SUPPLEMENTAL BRIEF OF APPELLANT

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A. SUPPLEMENTAL ASSIGNMENT OF ERROR

The to-convict instructions for the robbery charges in this case omitted an essential element of the crime, and the error was not harmless.

Issue Pertaining to Supplemental Assignment of Error

For a robbery to occur, the person from whom or from whose presence the property is taken must have an ownership, representative, or possessory interest in the property. This is s an essential, implied element of robbery. State v. Richie, __ Wn. App. ___, ___ P 3d ___, 2015 WL 9295604, at *4 (Dec. 22, 2015).

Where the to-convict instructions in this case omitted this essential element, and the error was not harmless, should the appellant's robbery convictions, and the corresponding sentence enhancements, be reversed?

B. SUPPLEMENTAL STATEMENT OF THE CASE¹

The State charged appellant Brandon English and co-defendant Calvin Quichocho with two counts of first degree robbery (counts 1 and

¹ This brief refers to the verbatim reports as follows: 1RP – 10/8, 10/10, and 10/17/14; 2RP – 10/13/14; 3RP – 10/14/14 (morning); 4RP – 10/14/14 (afternoon); 5RP – 10/15/14 (morning); 6RP – 10/15/14 (afternoon); 7RP – 10/16/14 (morning); 8RP – 10/16/14 (afternoon); 9RP – 10/20/14 (morning); 10RP – 10/20/14 (afternoon); 11RP – 10/21/14 (morning); 12RP – 10/21/14 (afternoon); and 13RP – 10/22, 10/23, and 11/20/14. The volumes are consecutively and chronologically paginated with the exception of 1RP, which contains two dates.

2),² two counts of first degree kidnapping (counts 3 and 4), and two counts of second degree assault with a deadly weapon (counts 5 and 6). The State also alleged firearm enhancements as to each count. The identified complainants as to each pair of charges were Austin Bondy and Brittany Horn, who were at the apartment of their friend Colby Haugen at the time of the charged incident. CP 9-11 (charging document). Bondy and Horn were identified as the complainants in the to-convict instructions. CP 116-17 (Instructions 13 and 14, attached as Appendix A).

In addition to items belonging to Bondy and Horn,³ some of Haugen's personal property, unrelated to Bondy and Horn, was also taken in the robbery. 3RP 366-67; 4RP 447. Haugen was not home at the time of the robbery. 3RP 365.

C. SUPPLEMENTAL ARGUMENT

THE ROBBERY TO-CONVICT INSTRUCTIONS OMITTED AN ESSENTIAL ELEMENT OF THE CRIME, AND THE ERROR WAS NOT HARMLESS.

Essential elements of a crime are those that the prosecution must prove to sustain a conviction. State v. Peterson, 168 Wn.2d 763, 772, 230 P.3d 588 (2010). In determining the essential elements, this Court first

² The robbery charge was elevated to the first degree by an allegation the robber displayed what appeared to be a firearm or other deadly weapon. CP 9-10; RCW 9A.56.200(1)(a)(ii).

³ 4RP 447; 5RP 562.

looks to the relevant statute. State v. Mason, 170 Wn. App. 375, 379, 285 P.3d 154 (2012). RCW 9A.56.190 defines robbery in the following manner:

A person commits robbery when [he] 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.

With regard to taking property from a person's *presence*, the language of the statute does not require that the person have an ownership, representative, or possessory interest in the property. However, a criminal statute is not always conclusive regarding all the elements of a crime. Courts may find non-statutory, implied elements. State v. Miller, 156 Wn.2d 23, 28, 123 P.3d 827 (2005). Robbery is an example of a crime with non-statutory elements that are implied by "a near eternity of common law and the common understanding of robbery." Id.

In 1909, the state Supreme Court established that robbery includes an element that "the property must be taken from the person of the owner, or from his immediate presence, or from some person, or from the immediate presence of some person, having control and dominion over it." State v. Hall, 54 Wash. 142, 143-44, 102 P. 888 (1909). The Court held

that an information alleging robbery was defective because it alleged the taking of property belonging to an entity from the immediate presence of a particular person, without alleging any connection between the person and the property. Id. at 143-44.

Division One adopted the requirement of ownership, representative capacity, or possession in State v. Latham, 35 Wn. App. 862, 670 P.2d 689 (1983). There, the Court stated that in order for the taking of property in the presence of a person to constitute a robbery under RCW 9A.56.190, that person must have (1) an ownership interest in the property taken, or (2) some representative capacity with respect to the owner of the property taken, or (3) actual possession of the property taken. Latham, 35 Wn. App. at 864-65.

In Latham, two defendants assaulted a car owner and a passenger as they stood beside the car, and then the defendants stole the car. Id. at 863-64. The defendants were charged with and convicted of two counts of robbery, one relating to the owner and one relating to the passenger. Id. The Court held that the passenger could not be the victim of robbery because he was not the owner of the car, had no authority from the owner to act regarding the car, and was not in possession of the car at the time of the robbery. Id. at 866. Accordingly, the Court reversed each defendant's robbery conviction relating to the passenger. Id.

In State v. Tvedt, 153 Wn.2d 705, 107 P.3d 728 (2005), the Supreme Court approved of the characterization of the robbery element adopted in Hall and Latham. The Court stated:

Nearly a century ago this court held that a conviction for robbery requires that the person from whom or in whose presence the property is taken have an ownership or representative interest in the property or have dominion and control over it. [Hall, 54 Wash. at 143-44]. The court rejected the argument that a conviction could be upheld where “title was not alleged in the person robbed, nor is any connection shown or alleged between the person robbed and the property taken.” [Id. at 143]. . . . Thus, in order for a robbery to occur, the person from whom or from whose presence the property is taken must have an ownership, representative, or possessory interest in the property. [Id. at 143-44]; see also [Latham, 35 Wn. App. at 864-66].

Tvedt, 153 Wn.2d at 714.

As this Court recently held in Richie, “Hall, Latham, and Tvedt all make it clear that a defendant cannot be convicted of robbery unless the victim has an ownership, representative, or possessory interest in the property taken. *Accordingly, we hold that this requirement is an essential, implied element of robbery.* Richie, 2015 WL 9295604, at *4 (emphasis added).

In Richie, Richie entered a Walgreen’s store, removed two bottles of brandy from the shelves, and walked toward the front of the store, holding one bottle by the neck in each hand. As Richie approached,

Gouveia—a store employee in line at a register, not yet on the clock, and who still wore a coat covering her uniform—took a few steps back from the checkout counter. Richie walked between the checkout counter and Gouveia. Gouveia told Richie he needed to pay and reached for the bottles. Richie hit Gouveia on the head with one of the bottles. Gouveia then grabbed for the other bottle, and Richie ran out of the front door dragging Gouveia, who was still holding on to the bottle in Richie's hand. Richie eventually broke away from Gouveia and drove off. Based on these events, the State charged Richie with first degree robbery and second degree assault. Richie, 2015 WL 9295604, at *1.

On appeal, Richie argued there was insufficient evidence to prove all essential elements of first degree robbery because the State did not prove that Gouveia had an ownership, representative, or possessory interest in the liquor bottles that Richie stole. Id. at *4. This Court disagreed as to the sufficiency claim. The State had presented evidence that Gouveia was a Walgreens employee and she was acting in that role when she tried to stop the theft. Id. Viewing the evidence in light most favorable to the State, the jury could have found beyond a reasonable doubt that, at the time of the robbery, Gouveia was acting in a representative capacity on behalf of Walgreens. Id. at *5.

This Court found, however, that the jury instruction, despite corresponding to the pattern instruction, omitted the essential element of the crime.

A jury instruction is erroneous if it relieves the State of its burden to prove every element of a crime. State v. DeRyke, 149 Wn.2d 906, 912, 73 P.3d 1000 (2003). A to-convict instruction must contain all essential elements of a crime because it serves as a yardstick by which the jury measures the evidence to determine the defendant's guilt or innocence. Id. at 910. The fact that another instruction contains the missing essential element will not cure the error caused by the element's absence from the to-convict instruction. Id.

Under certain circumstances, the omission of an essential element of a crime from the to-convict jury instructions may, nonetheless, be subject to a harmless error analysis. State v. Schaler, 169 Wn.2d 274, 288, 236 P.3d 858 (2010). An instruction omitting an essential element may be harmless beyond a reasonable doubt if the omitted "element is supported by uncontroverted evidence." State v. Brown, 147 Wn.2d 330, 339, 58 P.3d 889 (2002) (citing Neder v. United States, 527 U.S. 1, 18, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)). However, "error is not harmless when the evidence and instructions leave it ambiguous as to whether the jury could have convicted on improper grounds." Schaler, 169 Wn.2d at 288.

In Richie, the trial court's to-convict instruction for first degree robbery tracked the language of the pattern instruction, WPIC 37.02.⁴ The instruction stated that:

To convict the defendant of the crime of Robbery in the First Degree, each of the following six elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 22nd day of September, 2013, 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 the 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 or property of another;

(4) That the force or fear was used by the defendant to obtain or retain possession of the property or to prevent or overcome resistance to the taking;

(5) That in the commission of these acts or in the immediate flight therefrom the defendant inflicted bodily injury;

(6) That any of these acts occurred in the State of Washington.

Richie, 2015 WL 9295604, at *6.

This Court held the pattern instruction omitted the essential element identified above. The instructional error could be raised for the first time on appeal. Id. at 5. Moreover, this Court found there error was

⁴ 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 37.02, at 667 (3d ed. 2008).

not harmless beyond a reasonable doubt, observing that “the evidence was ambiguous” on the issue of whether Gouveia had an ownership, representative or possessory interest in the stolen property. While the evidence was sufficient to find Gouveia was acting as a representative of Walgreens, there also was evidence that Gouveia was not on duty and should be treated like a customer rather than an employee. As a result, the instructional error was not harmless. Id. at 6.

The result is no different here. The to-convict instructions in this case, also modeled upon the pattern instruction, were similarly deficient in their omission of the essential element. See Appendix A (to-convict instructions). And the evidence was similarly ambiguous. As the State argued in closing, Horn and Bondy each had their own property taken by the robbers. But, as the State also argued, items over which the named victims had no ownership, representative, or possessory interest—such as Haugen’s Xbox and change jar—were also taken from their presence. 4RP 447. The State relied on these legally inapplicable items in arguing English was guilty of robbery. 13RP 1553 (attached as Appendix B).

As in Richie, the evidence, closing argument, and instructions rendered it ambiguous as to whether the jury could have convicted on legally improper grounds. There error was not harmless beyond a reasonable doubt. Reversal is therefore required.

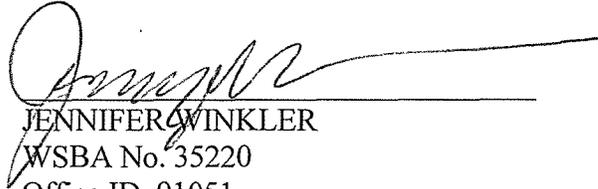
D. CONCLUSION

For the foregoing reasons, this Court should reverse the robbery convictions and the accompanying sentence enhancements.

DATED this 30TH day of December, 2015.

Respectfully submitted,

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APPENDIX A

INSTRUCTION NO. 13

To convict the defendant of the crime of robbery in the first degree as to count 1, each of the following six elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about December 4, 2013, the defendant or an accomplice unlawfully took personal property from the person or in the presence of Austin T. Bondy;
- (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 an accomplice's use or threatened use of immediate force, violence, or fear of injury to that person or to that person's property;
- (4) That force or fear was used by the defendant or an accomplice to obtain or retain possession of the property or to prevent or overcome resistance to the taking;
- (5) 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.

If you find from the evidence that elements (1), (2), (3), (4), (5), and (6), have 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 elements (1), (2), (3), (4), (5), or (6), then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 14

To convict the defendant of the crime of robbery in the first degree as to count 2, each of the following six elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about December 4, 2013, the defendant or an accomplice unlawfully took personal property from the person or in the presence of Brittany M. Horn;

(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 an accomplice's use or threatened use of immediate force, violence, or fear of injury to that person or to that person's property;

(4) That force or fear was used by the defendant or an accomplice to obtain or retain possession of the property or to prevent or overcome resistance to the taking;

(5) 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.

If you find from the evidence that elements (1), (2), (3), (4), (5), and (6), have 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 elements (1), (2), (3), (4), (5), or (6), then it will be your duty to return a verdict of not guilty.

APPENDIX B

1 not? They know that these kids know Mr. Lujan. These kids
2 don't know them. And they know that. So that's why the
3 plan was changed. Bring Mr. Quichocho in. That's when the
4 plan changes.

5 Now, a separate crime is charged in each count. Remember
6 that. So your decision on one does not necessarily affect
7 your decision on the other.

8 There's the definition of robbery. Commits a robbery when
9 he or she unlawfully and with intent to commit theft. Takes
10 personal property from the person of another or against that
11 person's will by the use or threatened use of immediate
12 force, violence or fear of injury to that person.

13 So that's what we have. We had Austin Bondy and Brittany
14 Horn describing that. They both had items taken personally
15 from me, as did -- there were items taken from the house.
16 So we had Brittany Horn's purse and cell phone. We had
17 Austin Bondy's wallet, backpack and other things. Then
18 Colby Haugen's Xbox and some change.

19 So there's what I call the 'to convict instruction' for
20 that Robbery in the First Degree. There's a -- there's a
21 similar one for both victims. So you're going to see the
22 exact same language in both the 'to convict instructions',
23 the difference just being Austin Bondy or Brittany Horn.

24 Again, we have on or about December 4th, 2013, that the
25 defendant or an accomplice unlawfully took personal

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