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DECEMBER 9, 2014
Court of Appeals
Division III
State of Washington

32017-1-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

FRANK J. UHYREK, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

AMENDED BRIEF OF RESPONDENT

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I. ASSIGNMENTS OF ERROR

1. The crime of unlawfully displaying a weapon merges with the robbery convictions.
2. The four robbery convictions encompass the same criminal conduct.
3. The trial court erred in finding CT I-IV involved separate and distinct courses of conduct. Finding of Fact No. 4, CP 483.
4. The trial court erred in finding an offender score of 16. Finding of Fact No. 5, Conclusion of Law No. 2, CP 483.
5. The trial court erred in imposing consecutive sentences on CT I-IV for an exceptional sentence of 628 months. Conclusion of Law No. 1-6, CP 483-84
6. The trial court erred by imposing a variable term of community custody.
7. The trial court erred by imposing a DNA collection fee.

II. ISSUES PRESENTED

1. Does the gross misdemeanor conviction for unlawful display of a weapon merge with the convictions for First Degree Robbery?
2. Are the four Robbery charges (two First Degree Robbery and two Attempted First Degree Robbery) the “same criminal conduct?”

3. Did the lower court err when it ordered the defendant to submit and pay for a DNA sample?
4. Can the defendant be sentenced to a variable term of community custody?

III. STATEMENT OF THE CASE

For the purposes of this appeal, the State accepts the defendant's version of the Statement of the Case.

IV. ARGUMENT

A. THE CONVICTION OF THE CHARGE DISPLAY OF A WEAPON SHOULD MERGE INTO THE CHARGE OF FIRST DEGREE ROBBERY

The defendant argues that the charge of Unlawful Displaying of a Weapon should merge with the charge of First Degree Robbery. The State agrees that the case law supports the defendant's arguments. "It is clear that the element of carrying a weapon under RCW 9.41.270, the gross misdemeanor, is a necessary element of the greater crime of first degree robbery." *State v. Workman*, 90 Wn.2d 443, 448, 584 P.2d 382, 385 (1978).

However, removing the Display of a Weapon charge does not lead to the remedies sought by the defendant. The defendant shows no prejudice resulting from his conviction of the charge of Unlawful Displaying of a Weapon. This charge was Count V, a gross misdemeanor

conviction. This count did not contribute to the defendant's "score" and the conviction was sentenced to run concurrently with the remaining counts. CP 501. The defendant asks that the Unlawful Display of a Weapon charge should merge with the First Degree Robbery convictions. The defendant further asks that his offender score and sentence be reduced. A gross misdemeanor conviction does not count on the defendant's "score," and since it is running concurrent with the robbery convictions, the defendant is asking for something to which he is not entitled.

Merging the Display of a Weapon charge into the First Degree Robbery charge would seem appropriate. Merging the Display of a Weapon charge does not change the defendant's score because gross misdemeanors are not counted in calculating the defendant's score. The State maintains that the defendant's criminal history score will not change.

B. THE ROBBERY CONVICTIONS ARE NOT THE "SAME CRIMINAL CONDUCT"

The defendant argues that CT I-IV constitute the same criminal conduct. The defendant reaches this conclusion by arguing that the robberies involve the taking of money from multiple clerks, but that the money actually belonged to Safeway. The Washington State Supreme Court does not agree with the defendant.

In *State v. Rupe*, 101 Wn.2d 664, 683 P.2d 571 (1984) the Court addressed a robbery case involving two clerks, but one bank.

As to the first contention, we believe defendant's multiple convictions for robbery are valid. RCW 9A.56.190 defines robbery as the unlawful taking of personal property from the person of another, or in his presence against his will by the use or threatened use of immediate force, violence or fear of injury to that person or his property or the person or property of anyone.

Defendant argues that since the money was owned by the bank, only one robbery occurred, even though the money was taken from the possession of two different individuals. We disagree. The robbery has several distinct elements: the taking of the personal property and the use or threat to use force on an individual. The statute does not require that the person from whom the property is taken own that property. Possession or custody will suffice. Here, each teller was individually responsible for money in her till. Each had control and possession of that money and each had the money taken by the use of force. These facts constitute two separate robberies and the double convictions do not place defendant in double jeopardy.

Rupe, supra, at 693.

A person commits robbery when he or she unlawfully takes personal property from the person of another or in his or her presence against his or her will by the use or threatened use of immediate force, violence, or fear of injury to that person or his or her property or the person or property of anyone. Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking; in either of which cases the degree of force is immaterial.

RCW 9A.56.190 (in part).

[T]he unit of prosecution under RCW 9A.56.190 is each forcible taking of property from the person or presence of the owner of that property or from the person or presence of a person who possesses the property or is charged, by some representative capacity, with care, custody, or control of the property.

State v. Tvedt, 116 Wn.App. 316, 321, 65 P.3d 682 (2003) (emphasis added).

Since there were four different victims, the defendant committed four units of prosecution and the robberies cannot constitute as “same criminal conduct.”

No individual acts of robbery furthered any other. The facts show that the defendant physically went from till to till to collect his sums of money. “[W]hile the cases make clear that the test [for intent] is an objective one.” *State v. Huff*, 45 Wn.App. 474, 478-79, 726 P.2d 41 (1986); *State v. Edwards*, 45 Wn.App. 378, 382, 725 P.2d 442 (1986); *State v. Calloway*, 42 Wn.App. 420, 424, 711 P.2d 382 (1985); *State v. Dunaway*, 109 Wn.2d 207, 216-17, 743 P.2d 1237 (1987).

C. SINCE THE DEFENDANT DID NOT SHOW THAT A DNA SAMPLE WAS OBTAINED IN A PRIOR CONVICTION, COLLECTION OF A DNA SAMPLE WAS APPROPRIATE IN THIS CASE.

The defendant asserts that there was no need to collect a DNA sample and impose a \$100 fee for the collection of the sample as a DNA sample had been procured in a prior Third Degree Assault conviction.

RCW 43.43.754(2) reads: “If the Washington State Patrol Crime Laboratory already has a DNA sample from an individual for a qualifying offense, a subsequent submission is not required to be submitted.” RCW 43.43.754(2). The defendant is correct that if the Washington State Patrol (WSP) already has a DNA sample from a particular defendant, another sample is not needed.

The defendant's logic breaks down when he uses the fact of a prior felony conviction to show that no additional samples are needed. Nowhere in the defendant's argument does he explain how he knows that a DNA sample was previously obtained. The defendant is correct that the prior Third Degree Assault, being a felony, *should* have included a DNA sampling in its sentencing. The problem is that the bare fact of a conviction says nothing about the presence of a valid sample at the WSP. The prior sentencing court was required under the statute to obtain a sample, but the defendant has presented nothing to show that the sample actually exists with the WSP. Without some proof that the defendant's DNA sample already existed at the WSP, this sentencing court would be remiss in failing to order the collection of a DNA sample.

D. THE COURT DID NOT SENTENCE THE DEFENDANT TO A VARIABLE TERM OF COMMUNITY CUSTODY.

The defendant claims that the court exceeded its authority by imposing a “variable term of community custody.”

The defendant's community custody sentence is on page 6 of the Judgment and Sentence, Section 4.2 (A)(1), that contains language that might result in a variable term of community custody. CP 492. However there is an “or” at the end of subsection (1) and (2) that reads: “the period imposed by the court, as follows.” The court noted 18 months of community custody for all of the counts. Reading the plain language of the document shows that either (1) or (2) can be used, but not both. Since the court noted 18 months of community custody for all counts, part (1) is ignored and part (2) becomes the operative section. There is no variability in the community custody sentence. The defendant's claims are without merit.

V. CONCLUSION

For the reasons stated previously, the State respectfully requests that this case should be remanded with specific instructions to address

only the merging of Count V with the First Degree Robbery charge. The State respectfully requests that all other convictions be affirmed.

Dated this 9 day of December, 2014.

STEVEN J. TUCKER
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A handwritten signature in black ink, appearing to read "Andrew J. Metts", written over a horizontal line.

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FRANK LEE JAMES UHYREK.,

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CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on December 9, 2014, I e-mailed a copy of the Amended Brief of Respondent in this matter, pursuant to the parties' agreement, to:

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12/09/2014

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(Place)

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