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Court of Appeals
Division III
State of Washington

No. 32759-1-III

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,
Plaintiff/Respondent,

vs.

TREVOR WAYNE MYERS,
Defendant/Appellant.

APPEAL FROM THE SPOKANE COUNTY SUPERIOR COURT
Honorable John O. Cooney, Judge

BRIEF OF APPELLANT

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TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR.....1

B. STATEMENT OF THE CASE.....2

C. ARGUMENT.....5

 1. In the absence of evidence Myers used force to obtain or retain possession or to prevent or overcome resistance to his taking of property, the State failed to prove Myers committed robbery....5

 2. The sentencing court violated due process and exceeded its statutory authority by imposing certain conditions of community custody that are overbroad and/or are not crime-related.....11

D. CONCLUSION.....14

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>In re Winship</i> , 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).....	5
<i>Jackson v. Virginia</i> , 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).....	6
<i>United States v. Nevils</i> , 598 F.3d 1158 (9 th Cir. 2010).....	6
<i>Seeley v. State</i> , 132 Wn. 2d 776, 940 P.2d 604 (1997).....	12

<i>State v. Ancira</i> , 107 Wn. App. 650, 27 P.3d 1246 (2001).....	11
<i>State v. Armendariz</i> , 160 Wn.2d 106, 156 P.3d 201 (2007).....	11
<i>State v. Atterton</i> , 81 Wn. App. 470, 915 P.2d 535 (1996).....	11
<i>State v. Bahl</i> , 164 Wn.2d 739, 193 P.3d 678 (2008).....	11
<i>State v. Davenport</i> , 100 Wn.2d 757, 675 P.2d 1213 (1984).....	7
<i>State v. Green</i> , 94 Wn.2d 216, 616 P.2d 628 (1980).....	6
<i>State v. Hames</i> , 74 Wn.2d 721, 446 P.2d 344 (1968).....	7
<i>State v. Hickman</i> , 135 Wn.2d 97, 954 P.2d 900 (1998).....	7, 11
<i>State v. Hundley</i> , 126 Wn.2d 418, 895 P.2d 403 (1995).....	11
<i>State v. Jackson</i> , 137 Wn.2d 712, 976 P.2d 1229 (1999).....	7
<i>State v. Jones</i> , 118 Wn. App. 199, 76 P.3d 258 (2003).....	11
<i>State v. Nam</i> , 136 Wn. App. 698, 150 P.3d 617 (2007).....	7, 10
<i>State v. Netling</i> , 46 Wn. App., 461, 731 P.2d 11, rev. denied, 108 Wn.2d 1011 (1987).....	11
<i>State v. Teal</i> , 152 Wn.2d 333, 96 P.3d 974 (2004).....	6
<i>Tonkovich v. Dep't of Labor & Indus.</i> , 31 Wn. App. 220, 195 P.2d 638 (1948).....	7
<i>State v. Willis</i> , 153 Wn.2d 366, 103 P.3d 1213 (2005).....	7, 9

Statutes

U.S. CONST, amend. 14.....5

CONST, art. 1 sec. 3.....5

RCW 9.94A.030(10).....13

RCW 9.94A.505(8).....13

RCW 9.94A.703(2)(c).....12

RCW 9.94A.703(3).....13

RCW 9.94A.703(3)(f).....13

RCW 9A.08.020(1).....6

RCW 9A.08.020(2)(c).....6

RCW 9A.08.020(3).....7

RCW 9A.56.190.....9

RCW 69.50.204(c)(22).....12

Other Resources

<http://www.merriam-webster.com/dictionary/retain> (last accessed March 20, 2015, 2:40 PM).....9

A. ASSIGNMENTS OF ERROR

1. There was insufficient evidence to convict Myers of first degree robbery.

2. The trial court erred in imposing certain conditions of community custody as part of the sentence.

Issues Pertaining to Assignments of Error

1. Robbery requires that the requisite force or fear involved in the unlawful taking of property from a person be used to obtain or retain possession or to prevent or overcome resistance to the taking of the property. Myers did not use force to obtain or retain the item he removed from the store display and someone else removed the item from the store without purchasing it. The jury was not asked to find Myers culpable for the conduct of another person as an accomplice. As defined by the jury instructions, was there insufficient evidence that the prosecution proved the essential elements of robbery against Myers as a principal?

2. Does a sentencing court violate due process and exceed its statutory authority by imposing conditions of community custody that are overbroad or not crime-related?

B. STATEMENT OF THE CASE

Just after midnight on July 1, 2013, Assistant Manager Kari Cooper heard the security sensor go off near the front exit of the Shadle Walmart store in Spokane, Washington. RP¹ 39, 41–43. She saw a female leaving the store and begin to run. Thinking it was a typical cashier’s error of not deactivating a security tag, Cooper followed the woman out to the vestibule and asked if she could please see her receipt. The woman, later identified as Jennifer Kiperash², continued walking outside toward the parking lot. RP 42–45, 58–59, 101. A man suddenly appeared near an outside wall and pointed a gun at Cooper from a distance of 20 to 30 feet away, saying something like “don’t do it” or “back the f*** up” or “stop, don’t move, don’t’ move”. RP 45–47, 98–99, 104, 109–11. The man was later identified as the defendant, Trevor W. Myers. RP 45, 59–60, 101, 130, 217–18. Cooper immediately retreated into the store and called 911. RP 46–48. Myers and Kiperash got into a car and drove away. RP 84–85, 99–100, 124.

¹ The report of proceedings is contained in two consecutively numbered volumes and will be cited to by page number, e.g. “RP ____”.

² At the time of the incident Jennifer Renee Myers was married to Myers and she is also known as Jennifer Kiperash. RP 270–271; CP 5. For clarity, she will be referred to herein as Kiperash.

On surveillance video footage, Myers and Kiperash were seen entering the electronics aisle earlier that evening. Myers squatted near an area where walkie-talkie sets were displayed on pegs locked for security reasons and appeared to remove one of the items. Myers had something in his hand as they walked out of the aisle to another department. RP 72–73, 85, 88–90.

Police eventually arrested Myers and Kiperash near where their car had crashed on the lower South Hill, following a high speed chase southbound on Ash Street. RP 135–37, 150–51, 167–78, 203–14. Police found .357 cartridges and spent casings and a holster that could hold a gun of that size. RP 139, 143–47, 213–16, 270–80, 284–90, 300. The gun was never found. RP 283, 291–92. In the car officers found two walkie-talkies and partially opened battery packages that were consistent with the brand and model of radio sets sold by Walmart. RP 179, 261–63, 268–70, 282.

The State charged Myers and Kiperash with first degree robbery committed while displaying what appeared to be a firearm or other deadly weapon and also charged Myers with attempt to elude a police vehicle. The State did not allege accomplice liability. CP 5–6. The cases were severed prior to trial. CP 18–19. No amended information was filed.

At the close of the testimony, both parties submitted instructions.
CP 40–47, 48–73.

The “to convict” instruction for first degree robbery (Instruction 11) is set forth in the argument section below. The jury was also instructed in part:

INSTRUCTION NO. 7. A person commits the crime of robbery 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. A threat to use immediate force or violence may be either expressed or implied. 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 case the degree of force is immaterial.

CP 83.

INSTRUCTION NO. 8. Theft means to wrongfully obtain or exert unauthorized control over the property of another with intent to deprive that person of such property.

CP 85.

The prosecution did not submit an instruction on accomplice liability. During rebuttal closing argument the court denied the State’s request to supplement the jury instructions with an accomplice liability instruction: “At this point I’m not going to allow you to argue something that hasn’t been instructed and I’m not going to supplement. If you find

some authority after the jury begins deliberating, maybe you can supplement it at that time, but not at this point.” RP 371–73. The State did not appeal the decision.

Myers was convicted as charged. CP 99, 101. The court imposed a condition of sentence prohibiting Myers from “us[ing] or possess[ing] [] Marijuana and/or products containing Tetrahydrocannabi[nol] (THC).” CP 126. In boilerplate language, the court also ordered Myers to “(4) not consume controlled substances except pursuant to lawfully issued prescriptions” and “(5) not unlawfully possess controlled substances while on community custody.” CP 126. This appeal followed. CP 135–36.

C. ARGUMENT

1. In the absence of evidence Myers used force to obtain or retain possession or to prevent or overcome resistance to his taking of property, the State failed to prove Myers committed robbery.

The burden of proving the essential elements of a crime unequivocally rests upon the prosecution. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); U.S. Const. amend. 14; Const. art I, sec 3. Proof beyond a reasonable doubt of all essential elements is an “indispensable” threshold of evidence that the State must establish to garner a conviction. *Winship*, 397 U.S. at 364. To determine whether there

is sufficient evidence for a conviction, reasonable inferences are construed in favor of the prosecution, but they may not rest on speculation. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *State v. Green*, 94 Wn.2d 216, 221–22, 616 P.2d 628 (1980). “[E]vidence is insufficient to support a verdict where mere speculation, rather than reasonable inference, supports the government’s case.” *United States v. Nevils*, 598 F.3d 1158, 1167 (9th Cir. 2010).

The prosecution charged Myers with committing first degree robbery. The court instructed the jury that to convict Myers of first degree robbery, the prosecution needed to prove beyond a reasonable doubt that Myers unlawfully took property from another while displaying what appeared to be a firearm and used “force or fear ... to obtain or retain possession of the property or to prevent or overcome resistance to the taking.” CP 87. The court’s instruction did not permit the jury to hold Myers liable based on actions of another person.

Criminal liability is the same whether one acts as a principal or as an accomplice. RCW 9A.08.020(1), (2)(c). Accomplice liability is not an element or alternative means of a crime. *State v. Teal*, 152 Wn.2d 333, 338, 96 P.3d 974 (2004). Principal and accomplice are, however, alternative theories of liability requiring different considerations, and

although the State need not charge the defendant as an accomplice in order to pursue liability on that basis, the court must instruct the jury on accomplice liability. *State v. Davenport*, 100 Wn.2d 757, 764–65, 675 P.2d 1213 (1984); *State v. Jackson*, 137 Wn.2d 712, 726–27, 976 P.2d 1229 (1999); RCW 9A.08.020(3). If the jury is not properly instructed on accomplice liability, the State assumes the burden of proving principal liability. *State v. Willis*, 153 Wn.2d 366, 374–75, 103 P.3d 1213 (2005).

Whether the evidence is sufficient to sustain a verdict under the jury instructions issued by the court is determined by the law as set forth in the instructions. *State v. Nam*, 136 Wn. App. 698, 705–06, 150 P.3d 617 (2007); *State v. Hickman*, 135 Wn.2d 97, 102–03, 954 P.2d 900 (1998).

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 in the charge.

Tonkovich v. Dep't of Labor & Indus., 31 Wn.2d 220, 225, 195 P.2d 638 (1948). Because the trial court's "to convict" instructions were provided without objection, they become the law of the case. *State v. Hames*, 74 Wn.2d 721, 724–25, 446 P.2d 344 (1968).

Here, the court, without objection from either party, instructed the

jury that to convict Myers, it must find he used force to obtain or retain possession or to prevent or overcome resistance to his taking of property.

The “to convict” instruction stated:

Instruction 11. 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 July 1, 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 of another;
- (4) That 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 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 87.

By failing to include accomplice language in Instruction 11 or otherwise instruct the jury on accomplice liability, the State was required to prove Myers used force or fear to obtain or retain possession or to prevent or overcome resistance to *his* taking of property. RCW

9A.56.190³; *Willis*, 153 Wn.2d at 375.

Viewing the evidence in the light most favorable to the State, it fails to carry its burden. It is undisputed Myers did not use force or fear to unlawfully obtain the walkie-talkie set by removing its packaging from the locked peg used to secure it.

“Retain” means “*verb*: to continue to have or use (something); *transitive verb*: to keep in possession or use.”⁴ Myers did not retain the radio set when he left the store because it was not in his possession as evidenced by the sensor alarm not going off. However, the alarm did sound when Kiperash subsequently left the store, showing she had possession of the radio set. Because he did not retain possession of the walkie-talkie set he’d removed from the peg, Myers could not have used force or fear to “retain possession” as required by RCW 9A.56.190, as

³ RCW 9A.56.190 provides:

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. Such taking constitutes robbery whenever it appears that, although the taking was fully completed without the knowledge of the person from whom taken, such knowledge was prevented by the use of force or fear.

⁴ <http://www.merriam-webster.com/dictionary/retain> (last accessed March 20, 2015, 2:40 PM).

well as the “to convict” instruction (Instruction 11) and the definitional instruction (Instruction 7).

Nor did Myers use force or fear to “prevent or overcome resistance to *the taking*”. Myers’ taking or theft of the walkie-talkie set was complete when he removed the packaging from the locking peg where it had been secured by Walmart personnel. Kiperash’s own shoplifting or theft of the radio set was at issue once she set off the sensor and refused to comply with Ms. Cooper’s requests to stop and show a purchase receipt. Myers’ pointing the gun at Cooper while making threatening comments was an effort to overcome her resistance to the shoplifting being carried out by Kiperash. Indeed, Ms. Cooper and Walmart had no knowledge Myers had removed a radio set from its locked peg until well after the entire incident occurred. At most, Myers committed a theft followed by an assault, not one continuous robbery.

The prosecution did not ask the jury to convict Myers based on another person’s conduct, as was its choice. See *Nam*, 136 Wn. App. at 704. The court did not explain the law of accomplice liability to the jury. RP 322–34, 371–73. In the absence of instruction on accomplice liability, the State failed to carry its burden of proving beyond a reasonable doubt all elements of first degree robbery as instructed. Absent proof of every

element, the conviction must be reversed and dismissed. *Hickman*, 135 Wn.2d at 103; *State v. Hundley*, 126 Wn.2d 418, 421–22, 895 P.2d 403 (1995).⁵

2. The sentencing court violated due process and exceeded its statutory authority by imposing certain conditions of community custody that are overbroad and/or are not crime-related.

A defendant may challenge an illegal or erroneous sentence for the first time on appeal. *State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008); *State v. Jones*, 118 Wn. App. 199, 204, 76 P.3d 258 (2003).

Whether the trial court had statutory authority to impose community custody conditions is reviewed de novo. *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007). If the condition was statutorily authorized, crime-related prohibitions are reviewed for abuse of discretion.

Armendariz, 160 Wn.2d at 110 (citing *State v. Ancira*, 107 Wn. App. 650, 653, 27 P.3d 1246 (2001)). But conditions that do not reasonably relate to the circumstances of the crime, the risk of reoffense, or public safety are unlawful, unless explicitly permitted by statute. *See Jones*, 118 Wn. App.

⁵ The jury was also instructed regarding second degree robbery as a lesser included/lesser degree offense. Instruction 14 at CP 90; *State v. Netling*, 46 Wn. App., 461, 464, 731 P.2d 11, rev. denied, 108 Wn.2d 1011 (1987). For the same reasons argued *supra*, the evidence is insufficient to support conviction for second degree robbery and remand for entry of judgment and sentence on the lesser degree is not warranted. *See State v. Atterton*, 81 Wn. App. 470, 473, 915 P.2d 535 (1996).

at 207–08.

Blanket prohibition exceeds statutory authority. Unless waived by the court, a court shall order an offender to “refrain from possessing or consuming controlled substances *except pursuant to lawfully issued prescriptions.*” RCW 9.94A.703(2)(c) (emphasis added). Marijuana and its tetrahydrocannabinols (THC) are Schedule I controlled substances. RCW 69.50.204(c)(22); *Seeley v. State*, 132 Wn. 2d 776, 784, 940 P.2d 604 (1997).

Here, the offending condition prohibits Myers from “us[ing] or possess[ing] [] Marijuana and/or products containing Tetrahydrocannabi[nol] (THC).” CP 126. The exception required by the legislature, “except pursuant to lawfully issued prescriptions”, is missing. The blanket prohibition exceeds the sentencing court’s authority. The absolute prohibition also conflicts with boilerplate language purporting to recognize the legislative exception:

- [T]he defendant shall: ... (4) not consume controlled substances except pursuant to lawfully issued prescriptions;
- (5) not unlawfully possess controlled substances while on community custody.”

CP 126. The offending condition must be modified to comply with the authorizing statute.

Prohibition is not crime-related. Alternatively, RCW 9.94A.505(8) permits a court to impose “crime-related” prohibitions as part of a sentence and RCW 9.94A.703(3)(f) permits a court to order compliance with those prohibitions as a condition of community custody. A “crime-related” prohibition is “an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted.” RCW 9.94A.030(10). Thus, discretionary, or non-mandatory, conditions imposed by the trial court must be either crime-related prohibitions under RCW 9.94A.505(8) or authorized under RCW 9.94A.703(3).

The use or possession of marijuana is not related to the circumstances of Myer’s crimes of first degree robbery and/or attempt to elude a police vehicle and is therefore not crime-related as required under RCW 9.94A.505(8) or RCW 9.94A.703(3)(f). The offending condition prohibits conduct and is therefore not authorized under RCW 9.94A.703(3). The prohibition is not authorized by statute and must be stricken in its entirety if not modified as set forth above.

D. CONCLUSION

For the reasons stated, this Court should reverse the robbery conviction and remand for dismissal of the charge with prejudice and for resentencing. Alternatively, the offending sentencing condition must be modified or stricken.

Respectfully submitted on March 22, 2015.

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PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on March 22 2015, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of brief of appellant:

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