

327591-III  
COURT OF APPEALS

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MAY 22, 2015  
Court of Appeals  
Division III  
State of Washington

DIVISION III  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, RESPONDENT

v.

TREVOR W. MYERS, APPELLANT

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APPEAL FROM THE SUPERIOR COURT  
OF SPOKANE COUNTY

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**BRIEF OF RESPONDENT**

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### **I. APPELLANT'S ASSIGNMENTS OF ERROR**

1. There was insufficient evidence to convict Trevor Myers of first degree robbery.
2. The trial court erred in imposing certain conditions of community custody as part of the sentence.

### **II. ISSUES PRESENTED**

1. After viewing the evidence in the light most favorable to the prosecution, could any rational trier of fact have found the essential elements of robbery in the first degree beyond a reasonable doubt?
2. Should this court remand to the trial court to enter an order clarifying the community custody condition that the defendant not possess or ingest a controlled substance during his term of community custody unless he has a lawfully issued prescription?

### **III. STATEMENT OF THE CASE**

The appellant/defendant, Trevor Myers, was charged by Information with one count of robbery in the first degree and one count of attempt to elude a pursuing police vehicle<sup>1</sup>. CP 5. Both charges were tried

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<sup>1</sup> The appellant does not contest his attempt to elude a pursuing police vehicle conviction.

at the same time in front of a jury. The appellant was convicted of both offenses.

Shortly after midnight, on July 1, 2013, Kari Cooper, assistant store manager of the Shadle Walmart, heard the store security sensor alarm<sup>2</sup> activate at the exit doors and observed a woman running out of the store. RP 41; RP 43. The defendant followed the female out of the store. RP 84. Ms. Cooper made contact with this woman outside of the store and asked her for a receipt. RP 44. Ms. Cooper was dressed in black pants; a collared shirt; and she had a name tag on identifying her as a Walmart employee. RP 44-45.

During this same time period, a male ran in between Ms. Cooper and the female. RP 47. He was approximately 20 to 30 feet from Ms. Cooper and he pointed, what she believed to be, a pistol at her face. RP 45-47. He held the weapon straight out from his body. RP 47. The male, later identified as the defendant, Mr. Myers, verbally threatened Ms. Cooper. RP 45. She did not recall exactly what he said. RP 45. Ms. Cooper had familiarity with firearms and she believed the weapon was a pistol. RP 47; RP 49. Ms. Cooper raised her hands in the air and ran

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<sup>2</sup> The alarm beeps and a light flashes at the exit door if a piece of merchandise is not deactivated at the register because either a person did not pay for the merchandise or the clerk did not deactivate the merchandise after purchase. RP 42-43; RP 61.

back into the store. RP 48. She was scared and shaken after the event. RP 48; RP 125. The defendant entered the driver's side of a vehicle and the female entered the passenger side after the event. RP 85. Ms. Cooper positively identified the defendant and female as the perpetrators. RP 59; RP 252-53. Officer Adam Potter also positively identified the defendant and the female as the perpetrators after observing the store video and his contact with them at the crash scene.<sup>3</sup> RP 254.

During the incident, witness Rebekah Curtis observed the defendant running backwards pointing a little black handgun at the store. RP 98; RP 104. He was yelling "Back the f[]k up, back the f[]k up." RP 98. He entered the driver's side of a little tan car and the car sped off. RP 98. The female also entered the car at the same time. RP 99.

Shortly thereafter, Ms. Curtis was taken to an area on the South Hill where police believed they had located the suspects. RP 57. Ms. Curtis also identified the defendant at the showup. RP 101.

Krystal Castles, who worked as asset management at the Shadle Walmart at the time, reviewed the store's video footage of the incident.<sup>4</sup>

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<sup>3</sup> As discussed *infra*, the appellant was apprehended by police within a short period time after the robbery following crashing his vehicle.

<sup>4</sup> In addition to her testimony, Ms. Castles prepared a written summary and timeline of her observations after viewing the store security

Prior to the event, she observed the defendant and his female companion on the video enter the Walmart shortly after midnight on July 1, 2013. EX. 54. Together, the pair entered the electronics isle in the store where two-way radios were located. RP 85; EX 54. These items had security tags on them which would have alerted the security sensor if the item was not paid for. RP 86; RP 90. After entering the isle, the defendant squatted down, reached into his pocket, and removed the security tag from a walkie-talkie. RP 86-88. The defendant carried the item in his hand as the pair exited that department and walked toward men's apparel department. RP 86-88; EX 54. The defendant again squatted down and concealed the unpurchased store item down the front of his pants. RP 89-90; EX 54. He also placed something into his right pocket. RP 89.

Thereafter, the defendant and female walked through the front registers and toward the exit doors. EX. 54. The female exited the store approximately ten feet ahead of the defendant. EX. 54.

Shortly after the robbery, Officers' Jeremy McVay and James Erickson were on patrol occupying the same patrol vehicle. RP 167. They obtained information, via police radio, regarding the incident at Walmart. RP 168. They observed a vehicle matching the description drive by their

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camera footage of the incident. RP 79. It was admitted as substantive evidence without objection. RP 79-80; EX 54.

vehicle. RP 171. The suspect vehicle sped through a red light. RP 171. The vehicle was driven by a male. RP 171-72. The officers began to pursue the vehicle with lights and siren activated in a marked patrol vehicle. RP 173; RP 218. The suspect vehicle was traveling between 70 mph and 80 mph from northwest Spokane into the downtown area. RP 173; RP 207-208. The chase continued through downtown Spokane into a South Hill neighborhood. RP 176. Ultimately, officers performed a PIT maneuver causing the suspect vehicle to crash into the backyard of 1324 West 16<sup>th</sup> avenue. RP 176; RP 208-09 . The driver exited the vehicle and ran. RP 177; RP 212-13. After a short foot pursuit, he was captured within 20 to 25 yards from the crash. RP 178. During a search incident to arrest, a gun holster was found in the defendant's front pants pocket. RP 213. The driver was identified as the defendant. RP 178.

After the incident, Detective Martin Hill obtained a search warrant for the vehicle. RP 261. He located two new walkie-talkies on the driver's side floorboard of the vehicle consistent with the walkie-talkies taken from the store during the incident. RP 261; RP 269. In addition, Detective Hill found ammunition near the suspect vehicle in the yard of the residence where the suspect vehicle crashed. RP 270; RP 284. Ammunition was also found in some bushes and a flowerbed in the same general area in the yard and in a backpack located in the backseat of the suspect vehicle.

RP 270-76; 284. The ammunition found in the car and yard was the same make and caliber. RP 285-86.

#### IV. ARGUMENT

##### Standard of review.

The standard of review for a sufficiency of the evidence challenge in a criminal case is “[w]hether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *State v. Bingham*, 105 Wn.2d 820, 823, 719 P.2d 109 (1986) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)). (Emphasis added). The defendant must admit the truth of the State's evidence and all reasonable inferences that can be drawn from such evidence. *State v. Witherspoon*, 180 Wn.2d 875, 883, 329 P.3d 888 (2014). Moreover, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant.” *State v. Bucknell*, 144 Wn. App. 524, 528, 183 P.3d 1078 (2008).

This court must also defer to the jury on issues of witness credibility; the weight and credibility of the evidence; and the jury's resolution of any conflicts in the testimony. *State v. Witherspoon*, 180

Wn.2d at 883; *State v. Thomas*, 150 Wn.2d 821, 874–75, 83 P.3d 970 (2004).

Just as important, given the nature of the State's evidence in a case, “[i]n determining the sufficiency of the evidence, circumstantial evidence is not to be considered any less reliable than direct evidence.” *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). Accordingly, the reviewing court should consider “whether the totality of the evidence is sufficient to prove all the required elements.” *State v. Ceglowski*, 103 Wn. App. 346, 350, 12 P.3d 160 (2000).

“The relevant question is ‘whether any rational fact finder could have found the essential elements of the crime beyond a reasonable doubt.’” *State v. Wentz*, 149 Wn.2d 342, 347, 68 P.3d 282 (2003).

A. THERE WAS SUFFICEINT EVIDENCE TO CONVICT THE DEFENDANT OF ROBBERY IN THE FIRST DEGREE AS A PRINCIPAL.

In a criminal prosecution, the Fourteenth Amendment's due process clause requires the State to prove each essential element of the crime charged beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); *State v. Berg*, 181 Wn.2d 857, 867, 337 P.3d 310 (2014).

Here, without objection from either party, the court instructed the jury regarding the charge of robbery in the first degree. The “to convict” instruction 11, stated:

To convict the defendant of the crime of robbery in the first degree, each of the following 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 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 displayed what appeared to be a firearm or other deadly weapon; and

(6) that these acts occurred in the state of Washington.

RP 328-329; CP 74-96.

Washington has rejected the common law view of robbery that force used during a robbery must be contemporaneous with the taking in favor of the modern transactional view of robbery. *State v. Handburgh*,

119 Wn.2d 284, 830 P.2d 641 (1992). Under the transactional view, a taking can occur outside the presence of the victim, and the necessary force to constitute robbery can be found in the forceful retention of stolen property that was peaceably taken. *Id.* Washington's robbery statute simply requires that the force be used either to obtain or retain property or to overcome resistance to the taking. *State v. Johnson*, 155 Wn.2d 609, 611, 121 P.3d 91 (2005).

A threat of force exists where the threatened person reasonably interprets the language or actions of another to be threatening. *See, State v. Shcherenkov*, 146 Wn. App. 619, 628-29, 191 P.3d 99 (2008), *review denied*, 165 Wn.2d 1037 (2009).

Taken in light most favorable to the jury's verdict, the evidence established the defendant, accompanied by a female companion, entered the Walmart store shortly after midnight, on July 1, 2013. He removed a security device from a two-way radio and he ultimately concealed the store item in his clothing. Eventually, he walked out of the store without purchasing the merchandise. When confronted by the assistant store manager, he pointed what appeared to be a pistol at her face. She became frightened and ran back into the store.

Based on this evidence and the inferences taken reasonably from it, any rational trier of fact could find beyond a reasonable doubt that

Mr. Myers took the two-way radios from the store without purchasing them; he threatened use of immediate force when he pointed what appeared be a pistol at Ms. Cooper; and he used force or fear to retain the merchandise after he exited the store. Accordingly, the State presented sufficient evidence that Mr. Myers committed first degree robbery and his sufficiency of the evidence challenge fails.

**B. THE TRIAL COURT HAD THE STATUTORY AUTHORITY TO ORDER THE APPELLANT TO REFRAIN FROM POSSESSING OR CONSUMING CONTROLLED SUBSTANCES EXCEPT PURSUANT TO A LAWFULLY ISSUED PERSCRIPTION.**

This court reviews crime-related community custody conditions for an abuse of discretion. *State v. Sanchez Valencia*, 169 Wn.2d 782, 791–92, 239 P.3d 1059 (2010); *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007). A court abuses its discretion when it adopts a view that no reasonable judge would take. *State v. Rodriguez*, 146 Wn.2d 260, 269, 45 P.3d 541 (2002). Stated differently, a trial court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

Appellant argues the trial court exceeded its authority when imposing a community custody condition that the defendant not possess or

consume controlled substances during the pendency of his community custody.

The State agrees the matter should be remanded to the trial court to modify the condition to allow the appellant to possess or consume a controlled substance with a lawfully issued prescription.

However, this prohibition is not crime dependent and it may be ordered notwithstanding any use or possession of a controlled substance during commission of the crime.

RCW 9.94A.703(2)(c) states:

(2) **Waivable conditions.** Unless waived by the court, as part of any term of community custody, the court shall order an offender to:

(c) Refrain from possessing or consuming controlled substances except pursuant to lawfully issued prescriptions;

A sentencing court may impose sentencing conditions that are required or allowed by law. *In re Pers. Restraint of Carle*, 93 Wn.2d 31, 33, 604 P.2d 1293 (1980). The community custody condition prohibiting the appellant from possessing or consuming controlled substances is statutorily authorized, regardless of whether the controlled substance was crime related.

In *State v. Jones*, 118 Wn. App. 199, 206–07, 76 P.3d 258 (2003),

the defendant pleaded guilty to first degree burglary and “other crimes,” and the court imposed a prison sentence and conditions of community custody relating to alcohol consumption and treatment. *Jones*, 118 Wn. App. at 202–03. There was no evidence that alcohol contributed to the defendant's offenses. *Id.* at 207–08. On appeal, the court found the trial court had authority to prohibit alcohol consumption under former RCW 9.94A.700(5)<sup>5</sup> but that it could not order the defendant to participate in alcohol counseling because the counseling was not related to the crime. *Jones*, 118 Wn. App. at 206–08. As the court explained, because the legislature listed the prohibition on alcohol separately from the crime-related prohibitions, it manifested its intent that the courts be permitted to impose the alcohol prohibition regardless of whether alcohol had contributed to the offense. *Id.*, at 206.

The same is true in the present case as the legislature listed the controlled substances prohibition separately from the crime-related prohibitions.

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<sup>5</sup> Former RCW 9.94A.700(5) provided for the imposition of various conditions of community placement. Those conditions included crime-related treatment and counseling services, the prohibition against alcohol consumption, and crime-related prohibitions.

Accordingly, the trial court did not abuse its discretion by imposing the condition. Since the condition was required by statute, there was a tenable basis for imposing it. Moreover, there was no request to waive the condition at the time of sentencing. RP 395-96. A trial court cannot abuse discretion it was never asked to exercise.

However, the trial court did not authorize the possession or consumption of controlled substances pursuant to a lawfully issued prescription per RCW 9.94A.703(2)(c).

When a sentencing court imposes an unauthorized condition of community custody, appellate courts remedy the error by remanding the matter with instructions to strike the unauthorized condition. *State v. O'Cain*, 144 Wn. App. 772, 775, 184 P.3d 1262 (2008).

The State requests this court remand to the sentencing court with an order requiring the trial court to amend the judgment and sentence to allow the possession or consumption of controlled substances pursuant to a lawfully issued prescription.

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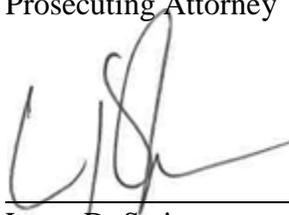
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## V. CONCLUSION

For the reasons stated above, the defendant's conviction and sentence should be affirmed by this court.

Dated this 22<sup>nd</sup> day of May, 2015.

LAWRENCE H. HASKELL  
Prosecuting Attorney

A handwritten signature in black ink, appearing to read 'LDS', written over a horizontal line.

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CERTIFICATE OF MAILING

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I certify under penalty of perjury under the laws of the State of Washington, that on May 22, 2015, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

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5/22/2015

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*Crystal McNees*

(Signature)