

NO. 35129-7-III

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

STATE OF WASHINGTON,

Respondent,

v.

THOMAS JOSEPH CORKERY,

Appellant.

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

The Honorable John O. Cooney

BRIEF OF APPELLANT

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A. INTRODUCTION

“It is a fundamental precept of criminal law that the prosecution must prove every element of the crime charged beyond a reasonable doubt.” *State v. Brown*, 147 Wn.2d 330, 339, 58 P.3d 889 (2002).

Appellant, Thomas Joseph Corkery, went into Plato’s Closet and walked out with several pairs of jeans without paying for them. The manager followed him out of the store to his car, in violation of company policy. When she saw that the window on the passenger side was open, she reached in to retrieve the jeans. Corkery started driving away which lifted her feet off the ground so she decided to hop into the car. Corkery was driving straight at normal parking lot speed without swerving.

While in the car for a short time, the store manager and Corkery slapped each other’s hands when she tried to grab the keys to stop the car. There was no struggle over the jeans and he did not threaten her in any way, but he said she could not have the jeans back. When she persisted, Corkery gave up and let her out of the car with the jeans.

Corkery’s conviction for attempted robbery in the second degree must be reversed and dismissed because there was insufficient evidence to prove beyond a reasonable doubt that he made a substantial step toward retaining the jeans by use or threatened use of immediate force, violence, or fear of injury to the store manager.

B. ASSIGNMENTS OF ERROR

1. There was insufficient evidence to prove beyond a reasonable doubt that Corkery committed attempted robbery in the second degree.

2. In the event the State substantially prevails on appeal, this Court should deny any request for costs.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Is reversal and dismissal required where the State failed to prove beyond a reasonable doubt that Corkery made a substantial toward retaining the jeans by use or threatened use of immediate force, violence, or fear of injury to the store manager while he was driving the car before he stopped and let her out of the car with the jeans?

2. If the State substantially prevails on appeal, should this Court exercise its discretion and deny costs because Corkery remains indigent?

D. STATEMENT OF THE CASE¹

1. Procedure

On September 7, 2016, the State charged appellant, Thomas Joseph Corkery, with one count of second degree robbery. CP 1. Following a trial

¹ There are two volumes of verbatim report of proceedings: 1RP - 01/20/17, 01/27/17; 2RP - 02/06/17, 02/07/17, 02/08/17, 02/14/17.

before the Honorable John O. Cooney on February 8, 2017, a jury found Corkery guilty of attempt to commit robbery in the second degree.² CP 46-48; 2RP 159-62. On February 14, 2017, the court imposed a DOSA sentence of 14.25 months in confinement and 14.25 months in community custody and ordered legal financial obligations. CP 57-59; 2RP 175-80.

Corkery filed a timely notice of appeal. CP 74-90.

2. Facts

Annette McEachren is the general manager of Plato's Closet, a resale store in Spokane. 2RP 47-49. On July 24, 2016, McEachren saw a man, later identified as Corkery, walk out of the store with merchandise. In violation of store policy, she followed Corkery to his car in the parking lot. 2RP 52-53, 81-82, 103-05. She yelled at him to stop but did not identify

² The trial court instructed the jury on attempted robbery in the second degree:

To convict the defendant of the crime of attempted robbery in the second degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about July 24, 2016, the defendant did an act that was a substantial step toward the commission of robbery in the second degree;
- (2) That the act was done with the intent to commit robbery in the second degree;
- (3) That the act occurred in the State of Washington.

If you find from the evidence that each of these elements has 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 these elements, then it will be your duty to return a verdict of not guilty.

CP 40 (Instruction No. 12).

herself. 2RP 85. Corkery opened the driver's door of the car and tossed jeans onto the passenger seat. 2RP 85-86. She reached in through a broken out window and grabbed the jeans. 2RP 54-55.

As McEachren grabbed the jeans, Corkery started driving away which lifted her feet off the ground. She told him to stop but he kept going so she "hopped" into the car, which surprised him. 2RP 54-56, 88. When she tried to push the gear shift into park and grab the keys, they batted and slapped each other's hands. 2RP 56-57, 70. While she was in the car, Corkery said she could not leave with the jeans and she told him he was going to let her out of the car. There was no struggle over the jeans and he did not resort to violence. 2RP 57, 87-88. Corkery kept saying she could not have the jeans until he gave up and let her leave. "[O]nce I was in the car, I pretty much gathered up what was ours, had it, and then I exited the car with our items." 2RP 69.

McEachren described two surveillance videos which showed Corkey in the store and then driving through the parking lot. 2RP 58-62; 65-72; Ex. 3, 4. Corkery was driving straight at normal parking lot speed and not swerving, but she was concerned for her safety and felt he might run her up against obstacles in the parking lot. 2RP 67, 71, 84-85, 89-90, 94. Corkery did not make any threats. 2RP 90. McEachren was "mostly annoyed" that he would not just give up and stop the car. 2RP 90.

When McEachren returned to the store, she called the police who arrived to investigate a possible robbery. 2RP 36. McEachren gave the police a description of Corkery and the car and provided a license plate number. 2RP 39. Department of Licensing records reflected that the car was sold to Corkery. McEachren identified Corkery out of a photo montage. 2RP 103.

E. ARGUMENT

1. REVERSAL AND DISMISSAL IS REQUIRED BECAUSE THERE WAS INSUFFICIENT EVIDENCE TO PROVE BEYOND A REASONABLE DOUBT THAT CORKERY MADE A SUBSTANTIAL STEP TOWARD RETAINING PROPERTY BY THE USE OR THREATENED USE OF IMMEDIATE FORCE, VIOLENCE, OR FEAR OF INJURY.

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. *State v. McCullum*, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); *In re Winship*, 397 U.S. 358, 362-63, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). Evidence is sufficient if, after reviewing the evidence in the light most favorable to the prosecution, any rational juror could have found the essential elements of the crime beyond a reasonable doubt. *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993).

A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. *State v. Salinas*, 119

Wn.2d 192, 201, 829 P.2d 1068 (1992). If the evidence is insufficient, the conviction must be reversed and the case dismissed with prejudice. *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998). Whether evidence is sufficient is a question of constitutional law reviewed de novo. *State v. Rich*, 184 Wn.2d 897, 903, 365 P.3d 746 (2016).

Pursuant to RCW 9A.56.190:

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 or 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 is immaterial.³

Under RCW 9A.28.020, a person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he or she does any act which is a substantial step toward the commission of that crime. The intent required is the intent to accomplish the criminal result of the base crime.

³ The trial court instructed the jury on the definition of robbery:

A person commits the crime of robbery in the second degree when he or she unlawfully and with intent to commit theft thereof takes personal property from the person or in the presence of another who is acting as a representative of the owner of the property and the taking was 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 35 (Instruction No. 7).

State v. Johnson, 173 Wn.2d 895, 899, 270 P.3d 591 (2012)(citing *State v. DeRyke*, 149 Wn.2d 906, 913, 73 P.3d 1000 (2003)). A substantial step is an act that is “strongly corroborative” of the actor’s criminal purpose. *Johnson*, 173 Wn.2d at 899 (citing *State v. Luther*, 157 Wn.2d 63, 78, 134 P.3d 205 (2006)).

Here, Corkery committed no act that strongly corroborates an intent to retain possession of the jeans by use or threatened use of immediate force, violence, or fear of injury. McEachren testified that when she reached in the window and grabbed the jeans, Corkery started driving the car away which lifted her feet off the ground. He kept going while telling her to get out of the car but she decided to hop in the car to avoid injury. 2RP 54-56,

94. Once she was in the car, she tried to grab the keys:

Q. Okay. You -- you did testify, I believe, that there was some batting of the hands when you were trying to grab the car keys, correct?

A. Yes.

Q. Okay. But you don’t remember any struggle over the jeans themselves, correct?

A. No.

Q. Okay. And -- you testified that you told Mr. Corkery to stop at least once?

A. Yes.

Q. Probably more than once, correct?

A. (Nods head).

Q. Okay. Did he act surprised once you leaned in the car to grab the jeans?

A. He acted surprised when I fully got into the car.

Q. Okay. Did he ever strike you, punch you, hit you?

A. No.

2RP 88.

McEachen described the batting back and forth with hands as “just hand slapping.” 2RP 70.

RCW 9A.04.110(28) defines “threat” as to communicate directly or indirectly the intent to take certain action. *State v. Farnsworth*, 185 Wn.2d 768, 776, 374 P.3d 1152 (2016). Not only did Corkery refrain from using force or violence, he did not threaten McEachren directly or indirectly. 2RP 89-90. Corkery was not swerving or speeding. He was driving straight at normal parking lot speed. 2RP 85, 89-90. After a short distance, he let her leave with the jeans. “[O]nce I was in the car, I pretty much gathered up what was ours, had it, and then I exited the car with our items.” 2RP 69. Corkery and McEachren “agreed” to let her out of the car with the jeans and he drove off. 2RP 70.

Robbery encompasses any “taking of . . . property [that is] attended with *such circumstances of terror*, or such threatening by *menace, word or gesture* as in common experience is likely to create an apprehension of danger and induce a man to part with property for the safety of his person.” *State v. Shcherenkov*, 146 Wn. App. 619, 624-25, 191 P.3d 99 (2008) (emphasis added by the court)(quoting *State v. Redmond*, 122 Wn.2d 392, 393, 210 P. 772 (1922)). The record substantiates that Corkery had no intent

to use immediate force, violence, or fear of injury to McEachren. The retention of the jeans was not attended with such circumstances of terror likely to create an apprehension of danger. McEachren acknowledged that when she was asked during an interview if she was afraid, she replied “no, mostly annoyed.” 2RP 90.

Furthermore, nothing that Corkery did can be construed as an implied threat. In *State v. Witherspoon*, 180 Wn.2d 875, 329 P.3d 888 (2014), the robbery victim testified that she noticed an unknown car in her driveway when she arrived home. As she got out of her car, Witherspoon came around the side of her home with one hand behind his back. When she asked him what he had behind his back, he said he had a pistol. The Washington Supreme Court concluded that a rational jury could have found that he made an implied threat that he would use force if necessary to retain her property. 180 Wn.2d at 885. Unlike in *Witherspoon*, Corkery never told McEachren that he had a gun or that he could drive her into a pylon. He was driving slowly and merely told her that she could not have the jeans back and they engaged in hand slapping.

Even when admitting the evidence as true and drawing all reasonable inferences therefrom while viewing the evidence in the light most favorable to the State, no rational juror could have found that Corkery made a substantial step toward retaining the jeans by the use or threatened

use of immediate force, violence, or fear of injury. Reversal and dismissal is required because there was insufficient evidence to prove attempted second degree robbery beyond a reasonable doubt.

2. IF THE STATE SUBSTANTIALLY PREVAILS ON APPEAL, THIS COURT SHOULD EXERCISE ITS DISCRETION AND NOT AWARD COSTS BECAUSE CORKERY REMAINS INDIGENT.

Under RCW 10.73.160 and RAP Title 14, this Court may award costs to a substantially prevailing party on appeal. RAP 14.2 provides in relevant part:

A commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, unless the appellate court directs otherwise in its decision terminating review, or unless the commissioner or clerk determines an adult offender does not have the current or likely future ability to pay such costs.

Corkery requests that this Court exercise its discretion and not award costs in the event the State substantially prevails on appeal because he remains indigent.

National organizations have chronicled problems associated with legal financial obligations (LFOs) imposed against indigent defendants. These problems include increased difficulty in reentering into society, the doubtful recoupment of money by the government, and inequity in administration. *State v. Blazina*, 182 Wn.2d 827, 835, 344 P.3d 680 (2015)(citing, et al., AM. CIVIL LIBERTIES UNION, IN FOR A PENNY: THE RISE OF AMERICA'S NEW DEBTOR'S PRISONS (2010)). In

2008, The Washington State Minority and Justice Commission issued a report that assessed the problems with the LFO system in Washington. The report points out that many indigent defendants cannot afford to pay their LFOs and therefore the courts retain jurisdiction over impoverished offenders long after they are released. Legal or background checks show an active court record for those who have not paid their LFOs, which can have negative consequences on employment, on housing, and on finances. *Blazina*, 182 Wn.2d at 836-37.

In *State v. Nolan*, 141 Wn.2d 620, 8 P.3d 300 (2000), the Washington Supreme Court concluded that an award of costs “is a matter of discretion for the appellate court, consistent with the appellate court’s authority under RAP 14.2 to decline to award costs at all.” The Court emphasized that the authority “is permissive” as RCW 10.73.160 specifically indicates. *Nolan*, 141 Wn.2d at 628. The statute states that the “court of appeals, supreme court, and superior courts *may* require an adult offender convicted of an offense to pay appellate costs.” RCW 10.73.160(1)(emphasis added).

Should the State substantially prevail Corkery’s case, this Court should exercise its discretion and not award costs where the trial court found that Corkery is entitled to appellate review at public expense due to his

indigency and entered an Order of Indigency. CP 68-73. Accordingly, the trial court's finding remains in effect throughout review:

A party and counsel for the party who has been granted an order of indigency must bring to the attention of the trial court any significant improvement during review in the financial condition of the party. The appellate court will give a party the benefit of an order of indigency throughout the review unless the trial court finds the party's financial condition has improved to the extent that the party is no longer indigent.

RAP 15.2(f).

In *State v. Sinclair*, 192 Wn. App. 380, 367 P.3d 612 (2016), the Court exercised its discretion and ruled that an award of appellate costs was not appropriate, noting that the procedure for obtaining an order of indigency is set forth in RAP Title 15 and the trial court is entrusted to determine indigency. "Here, the trial court made findings that support the order of indigency. . . . We have before us no trial court order finding that Sinclair's financial condition has improved or is likely to improve. . . . We therefore presume Sinclair remains indigent." *Sinclair*, 192 Wn. App. at 393.

Furthermore, pursuant to this Court's General Order, Corkery has filed a Report as to Continued Indigency. This Court should therefore exercise its discretion to not award costs.

F. CONCLUSION

For the reasons stated, this Court should reverse and dismiss Corkery's conviction for attempted robbery in the second degree.

DATED this 28th day of August, 2017.

Respectfully submitted,

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DECLARATION OF SERVICE

On this day, the undersigned sent by email, a copy of the document to which this declaration is attached to the Spokane County Prosecutor's Office at SCPAAppeals@spokanecounty.org by agreement of the parties and to Thomas Joseph Corkery, 1108 North Hamilton, Spokane, Washington 99202.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 28th day of August, 2017.

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