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NO. 35960-3-III

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

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL R. MINGS,

Appellant.

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

The Honorable Timothy B. Fennessy, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The trial court erred when it refused to instruct jurors on a lesser included offense.

Issue Pertaining to Assignment of Error

Appellant was charged with Robbery in the Second Degree in connection with his failed attempt to obtain oxycodone from a drug store pharmacist. In the light most favorable to appellant, jurors could have concluded that he never threatened force against the pharmacist. Therefore, did the trial court err when it refused to give appellant's proposed instruction on Theft in the Third Degree?

B. STATEMENT OF THE CASE

The Spokane County Prosecutor's Office charged Michael Mings with Robbery in the Second Degree, which included a 12-month sentencing enhancement under RCW 9.94A.832 because the crime involved a pharmacy. CP 5.

Evidence at trial revealed that on Sunday, June 11, 2017, at about 4:00 a.m., Michael Mings entered a Spokane Rite-Aid near Franklin Park and, after exchanging greetings with a cashier, walked directly back to the pharmacy. RP 151, 160. Mings was a homeless addict, camping in the park, and sick from the lack of opiates in his system. RP 227-228. He entered the store hoping to obtain

oxycodone. RP 228.

Mings asked pharmacist Thomas Keefe if he had oxycodone and the color of the pills, hoping he had blue, which deliver the highest dose. RP 116, 128, 230-231. Keefe – who was covering the shift as a contract pharmacist -- checked the safe, determined the store had the blue pills, and informed Mings. RP 116, 121, 124, 230. Mings then handed Keefe a note that reads, “Give me the bottles for oxycodone, 30 milligram, and boxes of Fentanyl patches. I don’t want to hurt you or myself. Make it less than a minute, nothing funny.” RP 116, 129-131, 231, 269; exhibit S-6.

Following store policy, Keefe returned to the safe, grabbed three “tracker bottles,” which do not contain a controlled substance and have a tracking device, placed them in a bag, and handed them to Mings. RP 117-119, 131, 232-233. Mings thanked Keefe and started to walk away, but he quickly looked inside one of the bottles and decided the pills didn’t look right. RP 119, 233. He returned briefly to the pharmacy counter and told Keefe he had given him the wrong pills. Keefe responded those were the only pills he had, Mings said “okay, have a good day,” and left the store without incident. RP 118, 233. The interactions were captured by the store’s security video system. RP 120-122; exhibit S-13.

Keefe immediately alerted the night manager to what had just occurred, and the manager alerted the cashier at the front of the store. RP 118, 151, 190. Tracker bottles are stored on a pressure plate, and their removal had triggered a silent alarm. RP 117-118. Both the manager and the cashier dialed 911, and the cashier followed Mings outside. RP 152, 190. The cashier watched as Mings removed and discarded a sweatshirt he had been wearing, but the cashier stopped following Mings and returned to the store at the direction of the 911 dispatcher just as police were responding to the area. RP 152-154. Mings ran across Division Street and into Franklin Park, quickly trying to eat as many pills as possible. RP 233-234.

Dispatch informed officers that Mings was running south through the park, and he was quickly located. RP 101. As officers illuminated him with their car spotlights, Mings was running, looking over his shoulder, and still trying to swallow pills from one of the bottles. RP 102-103, 108-109. Officers parked, commanded Mings to stop, and chased him a short distance before Mings slowed down and was arrested. RP 103, 112-113. Mings was submissive and did not fight. RP 110. Two of the bottles were still in the Rite-Aid bag. RP 103. The third was found later on the floor of a police car used to

transport Mings to jail. RP 176-177. Officers also recovered the sweatshirt he had been wearing in Rite-Aid. RP 165-170.

At trial, pharmacist Keefe testified that he was frightened, anxious, and feared for his safety when he received Mings' note, which he found threatening. RP 116-117, 148. But Keefe conceded Mings had not been aggressive when they spoke and had made no aggressive gestures towards him. RP 129, 134. He also testified that store policy requires compliance with a request for pills whether someone resorts to force or not. RP 133.

Mings took the stand in his own defense and denied making any threats. RP 232. He testified that he chose the language in the note so that Keefe would *not* feel threatened and to make it clear he was just there for oxycodone. RP 232. He made no verbal threats and was not intentionally physically threatening. RP 235, 241. It was never his intent to hurt Keefe. RP 235. He merely wanted to obtain the pills. RP 242.

The defense requested lesser included offense instructions for Theft in the First and Third Degrees, which the prosecution opposed. RP 213-222. The Honorable Timothy Fennessy denied the request, ruling that Theft in the First Degree did not satisfy the legal test for a lesser included offense and Theft in the Third Degree

failed for lack of evidentiary support. RP 222-223, 246-250. Mings excepted to their exclusion. RP 244-247.

During closing arguments, the prosecutor noted that a threat can be implied and argued the note contained a threat to use force if Mings did not get pills. RP 264-267, 278-281. Defense counsel similarly focused on whether there had been a threat, arguing the note was merely a request and, in light of Mings' nonviolent and nonaggressive demeanor, there was no threat of force and therefore no robbery. RP 269-276. Counsel conceded Mings might be guilty of some crime, but not the crime of robbery. RP 277.

Jurors struggled with the issue of a threat, asking for clarification on that element, before ultimately convicting Mings of robbery and entering a special verdict indicating the crime involved a pharmacy. RP 285-287; CP 30-32. Judge Fennessy imposed a low-end standard range sentence of 63 months, plus 12-months for the pharmacy enhancement, for a total sentence of 75 months. RP 309; CP 40-41. Mings timely filed his Notice of Appeal. CP 57.

C. ARGUMENT

THE SUPERIOR COURT'S FAILURE TO INSTRUCT JURORS ON A LESSER INCLUDED CRIME REQUIRES A NEW TRIAL.

A criminal defendant in Washington has an “unqualified right” to have his jury consider a lesser included offense if there is “even the slightest evidence” that he may have committed only that offense. State v. Parker, 102 Wn.2d 161, 163-164, 683 P.2d 189 (1984) (quoting State v. Young, 22 Wash. 273, 276-277, 60 P. 650 (1900)).

When determining whether a lesser included instruction is appropriate, Washington courts apply the two-prong test in State v. Workman, 90 Wn.2d 443, 584 P.2d 382 (1978):

Under the Washington rule, a defendant is entitled to an instruction on a lesser-included offense if two conditions are met. First, each of the elements of the lesser offense must be a necessary element of the offense charged. Second, the evidence in the case must support an inference that the lesser crime was committed.

Workman, 90 Wn.2d at 447-48 (citations omitted). The analysis is applied to “offenses as charged and prosecuted, rather than to the offenses as they broadly appear in statute.” State v. Berlin, 133 Wn.2d 541, 548, 947 P.2d 700 (1997).

The rule for lesser included crimes serves many purposes. First, it ensures the defendant receives constitutionally adequate notice of all possible charges at trial. Berlin, 133 Wn.2d at 545, 548. Second, it allows the defendant to present his or her theories of the case to the jury. Id. at 545, 548. Third, it affords the jury the benefit of a third option, in addition to conviction or acquittal on the charged offense. By doing so, “it accord[s] the defendant the full benefit of the reasonable-doubt standard.” Beck v. Alabama, 447 U.S. 625, 633-34, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980). The Beck Court noted the potential unfairness that arises “[w]here one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of *some* offense, [and] the jury is likely to resolve its doubts in favor of conviction.” Beck, 447 U.S. at 634 (emphasis in original). A lesser included instruction tends to eliminate this problem.

Workman’s first prong (the legal prong) is satisfied if it is impossible to commit the greater offense without also committing the lesser. State v. Porter, 150 Wn.2d 732, 736-737, 82 P.3d 234 (2004). This issue is reviewed de novo. State v. Condon, 182 Wn.2d 307, 316, 343 P.3d 357 (2015) (citing State v. Walker, 136 Wn.2d 767, 771-772, 966 P.2d 883 (1998)).

A person commits Robbery in the Second Degree when he (1) unlawfully takes personal property from the person of another or his presence; (2) against his or her will; (3) by the use or threatened use of force, violence, or fear of injury; and (4) such force or fear was used to obtain or retain possession of the property or to prevent or overcome resistance to the taking. RCW 9A.56.190; RCW 9A.56.210.

A person is guilty of Theft in the Third Degree if he commits theft of property with a value of \$750 or less. RCW 9A.56.050(1). “Theft” means “[t]o wrongfully obtain or exert unauthorized control over the property or services of another . . . with intent to deprive him or her of such property or services.” RCW 9A.56.020(1)(a). “Wrongfully obtains” means “[t]o take the property or services of another.” RCW 9A.56.010(23)(a).

It has long been recognized that robbery includes the legal elements of larceny. See Application of Salter, 50 Wn.2d 603, 605, 313 P.2d 700 (1957); State v. Byers, 136 Wash. 620, 622, 241 P. 9 (1925); see also State v. Farnsworth, 185 Wn.2d 768, 775, 374 P.3d 1152 (2016) (“the distinguishing element between robbery and theft is the use or threatened use of force”). Because it was impossible to commit Robbery as charged in this case without also

committing Theft in the Third Degree, Theft in the Third Degree satisfies the legal prong for a lesser included offense. See State v. Herrera, 95 Wn. App. 328, 330 n.1, 977 P.2d 12 (1999) (parties agree Theft in the Third Degree a lesser included offense of Robbery). The State properly conceded this point below. RP 219.

Under Workman's second prong (the factual prong), "the evidence must raise an inference that *only* the lesser included/inferior degree offense was committed to the exclusion of the charged offense." State v. Fernandez-Medina, 141 Wn.2d 448, 455, 6 P.3d 1150 (2000) (citing cases). "[T]he evidence must affirmatively establish the defendant's theory of the case – it is not enough that the jury might disbelieve the evidence pointing to guilt." Id. at 456 (citing State v. Fowler, 114 Wn.2d 59, 67, 785 P.2d 808 (1990)). The evidence is to be viewed in the light most favorable to the party requesting the instruction, and the instruction should be given "[i]f the evidence would permit a jury to rationally find a defendant guilty of the lesser and acquit him of the greater." Id. at 455-456 (quoting State v. Warden, 133 Wn.2d 559, 563, 947 P.2d 708 (1997) (citing Beck, 447 U.S. at 635)). The lower court's decision in this regard is reviewed for abuse of discretion. Condon, 182 Wn.2d at 316 (citing Walker, 136 136 Wn.2d at 771-772).

Had the only evidence concerning the issue of threatened force been the note Mings handed to Keefe, it would be difficult to satisfy Workman's factual prong for Theft in the Third Degree. Although Mings never acted aggressively toward Keefe (by physical gesture, spoken words, or tone), without additional affirmative defense evidence, the note's language likely would have sufficed (under an abuse of discretion standard) to uphold Judge Fennessy's decision refusing an instruction on theft. Compare State v. Shcherenkov, 146 Wn. App. 619, 628-620, 191 P.3d 99 (2008) (in context of bank robberies, no affirmative evidence supporting theft instruction where notes used by defendant explicitly told bank tellers he was robbing them), review denied, 165 Wn.2d 1037, 205 P.3d 131 (2009).

At Mings' trial, however, the defense provided additional affirmative evidence. As discussed above, Mings took the stand in his own defense and denied making any threats. RP 232. He testified that he chose the language in the note so that Keefe would *not* feel threatened and to make it clear he was just there for oxycodone. RP 232. He made no verbal threats, was not intentionally physically threatening, and he told jurors it was never his intent to hurt Keefe. RP 235, 241. He merely wanted to obtain the

pills. RP 242. Moreover, Keefe testified that store policy requires compliance with a request for pills whether that request is accompanied by force or not. RP 133. In the light most favorable to Mings, this testimony provided the factual basis on which jurors could have found Mings guilty only of theft to the exclusion of robbery. Therefore, he was entitled to have his jury consider Theft in the Third Degree.

The improper denial of a lesser included instruction requires remand for a new trial. Parker, 102 Wn.2d at 163-164. That is the proper remedy in this case.

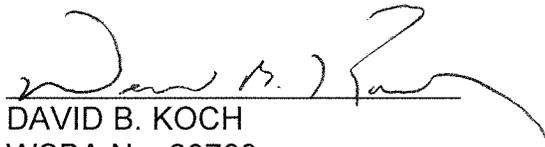
D. CONCLUSION

Mings respectfully asks this Court to reverse his conviction, remanding for a new trial and a jury's consideration of the lesser included crime of Theft in the Third Degree.

DATED this 30th day of August, 2018.

Respectfully submitted,

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