

FILED
Court of Appeals
Division III
State of Washington
11/30/2018 9:30 AM
35960-3-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

MICHAEL ROBERT MINGS, APPELLANT

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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I. APPELLANT'S ASSIGNMENT OF ERROR

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

II. ISSUE PRESENTED

Did the trial court err by denying Mr. Ming's request for a jury instruction on a lesser included offense of third degree theft, when the evidence does not affirmatively establish third degree theft occurred to the exclusion of second degree robbery?

III. STATEMENT OF THE CASE

Background facts.

On June 11, 2017, Thomas Keefe was working as a pharmacist at the Franklin Park Rite-Aid store in Spokane, Washington. RP 115-16. At roughly 4:00 a.m., a customer, later identified as Michael Robert Mings, walked up to the pharmacy counter. RP 116. Mr. Keefe was the only employee working in the pharmacy at that late hour. RP 127. Mr. Keefe immediately felt apprehensive about the situation. RP 129.

Mr. Mings asked Mr. Keefe if he had blue oxycodone pills. RP 128, 230. Mr. Keefe checked the safe and responded that he did. RP 128-29. Mr. Mings then handed Mr. Keefe a note that read:

[G]ive 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.

Ex. 6; RP 231. When Mr. Keefe received the note he immediately felt frightened and anxious, fearing for both his safety and the safety of

Mr. Mings. RP 116. Mr. Keefe later testified that he felt threatened when he read the note. RP 117.

Mr. Keefe returned to the safe and grabbed a bottle of tracker pills from a pressure plate. RP 117. The tracker pills contain tracker devices rather than oxycodone, and the pressure plate they rest on automatically sets off a silent alarm when the pills are removed. RP 118. He handed the pills to Mr. Mings, who began to leave. RP 118. Mr. Mings noticed that the pills he received looked like the wrong pills so he returned to the counter. RP 233. Mr. Mings told Mr. Keefe that he handed over the wrong pills, but Mr. Keefe replied that these pills were the only ones in the safe. RP 233. Mr. Mings then left the store. RP 233.

Law enforcement responded to the report of the robbery. RP 100. Officers quickly located and apprehended Mr. Mings a short distance away in Franklin Park. RP 100-03.

Procedure.

The State charged Mr. Mings with second degree robbery. CP 5. Mr. Mings requested jury instructions on lesser included offenses of first degree theft and third degree theft. RP 215-17. The State opposed the requests and provided the court briefing.¹ RP 213-14. The court heard

¹ The briefing was not designated as part of the record on appeal.

argument from both parties and concluded neither instruction was appropriate. RP 215-222. The court specifically cited the note that Mr. Mings handed to Mr. Keefe as the reason that third degree theft was not appropriate factually. RP 222.

During deliberations, the jury sent an inquiry to the court asking for clarification on whether the court was “asking for [a]ll (immediate force, violence, fear) to be present – or just one of them.” CP 32. The court instructed the jury to review the instructions previously provided.² CP 32. The jury returned a guilty verdict for second degree robbery, with an affirmative special verdict that Mr. Mings had robbed a pharmacy. CP 30-31. The court sentenced Mr. Mings within the standard range to 75 months confinement, based on his 9+ offender score and the pharmacy sentencing enhancement special verdict. CP 40-41. Mr. Mings now appeals. CP 57.

IV. STANDARD OF REVIEW

“When determining if the evidence at trial was sufficient to support the giving of an instruction, the appellate court is to view the supporting evidence in the light most favorable to the party that requested the instruction.” *State v. Fernandez-Medina*, 141 Wn.2d 448, 455-56,

² The to-convict instruction informed the jury to find whether the State had proved beyond a reasonable doubt that the taking of property was “against that person’s will by the defendant’s use or threatened use of immediate force, violence or fear of injury to that person.” CP 21.

3 P.3d 1150 (2000). The standard of review applicable to jury instructions depends on the trial court decision under review. *State v. Condon*, 182 Wn.2d 307, 315-16, 343 P.3d 357 (2015). When the decision is based on a factual determination as in this case, the abuse of discretion standard applies. *Id.*

V. ARGUMENT

THE EVIDENCE DOES NOT AFFIRMATIVELY SUPPORT A CONCLUSION THAT THIRD DEGREE THEFT HAPPENED TO THE EXCLUSION OF SECOND DEGREE ROBBERY.

Mr. Mings gave Mr. Keefe a threatening note when making his demand for drugs. Because Mr. Mings threatened the use of force, he is not entitled to a jury instruction on the lesser included offense of third degree theft.

A defendant is entitled to an instruction on a lesser included offense if two prongs are established. *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978). The first prong is the legal prong; that prong requires that each element of the lesser offense be a necessary element of the offense charged. *Id.* Under the legal prong, third degree theft is a lesser included offense of second degree robbery. *See e.g., 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”); *State v. Herrera*, 95 Wn. App. 328, 330 n. 1, 977 P.2d 12 (1999).

The second prong is the factual prong, which requires that the evidence in the case supports an inference that only the lesser crime was committed, to the exclusion of the greater. *Workman*, 90 Wn.2d at 448; *Fernandez-Medina*, 141 Wn.2d at 455. The “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.” *Fernandez-Medina*, 141 Wn.2d at 456. A trial court must consider all the evidence that is presented at trial when it is deciding whether or not an instruction should be given. *Id.* at 456.

A threat is to “communicate, directly or indirectly the intent” to take one of the actions defined by statute. RCW 9A.04.110(28). In the context of a challenge to sufficiency of the evidence, the Washington Supreme Court has formulated an objective standard to determine whether the use of intimidation to take property constitutes an implied threat for the purposes of robbery. *See Farnsworth*, 185 Wn.2d at 775-76. The inquiry is whether “an ordinary person in the victim’s position could reasonably infer a threat of bodily harm from the defendant’s acts.” *Id.* at 776 (quoting *State v. Witherspoon*, 180 Wn.2d 875, 884, 329 P.3d 888 (2014)). A demand note for property can constitute an implied threat of the use of force, depending on the evidence presented at the particular trial. *See, e.g., Farnsworth*, 185 Wn.2d at 776-79; *State v. Collinsworth*, 90 Wn. App. 546, 551,

966 P.2d 905 (1997) (defendant's demand of money from a bank teller without even a pretext of lawful entitlement to money implied threat to teller to fear harm under the circumstances).

In this case, Mr. Mings handed Mr. Keefe a note demanding drugs from the pharmacy. The note contained an implied threat that Mr. Mings would harm either Mr. Keefe or himself if Mr. Keefe did not return with the drugs. The note also warned Mr. Keefe against any other action. Mr. Keefe testified that the event was very late at night, the store was empty, and he immediately felt threatened and fearful. The implied threat here is plain from the face of the note: Mr. Mings indirectly communicated that he would harm Mr. Keefe or himself if Mr. Keefe either did not comply with the demand for drugs or attempted to do anything else that made Mr. Mings uncomfortable. Again, Mr. Keefe testified that he immediately felt threatened after reading the note.

Under the objective standard articulated by the Washington Supreme Court, a reasonable person in Mr. Keefe's position would infer a threat of bodily harm from the note and circumstances under which Mr. Mings demanded property to which he had no lawful entitlement. Mr. Mings asserts that his testimony shows he never intended the note as a threat. He argues he affirmatively established third degree theft to the exclusion of robbery, which required the trial court to give his requested

instruction. He also implies the jury could not make a finding on the force element of robbery because it sent an inquiry regarding whether all forms of force must be present.

The State disagrees; under the applicable law, the trial court must consider all of the evidence presented at trial, not simply Mr. Mings' version of events. The note contained several threats: Mr. Mings would hurt either Mr. Keefe or himself if Mr. Keefe did not hand over drugs or did anything out of the ordinary. Because Mr. Mings threatened the use of force, the crime does not meet the factual prong of the *Workman* test. This is because the evidence does not affirmatively establish Mr. Mings' theory of the case that he never intended his note as a threat, to the exclusion of State's theory that he took the property by force. The jury inquiry does not suggest the jury struggled with the force component of robbery; the inquiry asks whether Mr. Mings must have threatened the use of immediate force *and* violence *and* fear of injury instead of *or* as written in the to-convict instruction.

The trial court considered the evidence and arguments of the parties, and determined the threatening note precluded third degree theft. The trial court did not abuse its discretion by refusing to instruct the jury on third degree theft.

VI. CONCLUSION

The State respectfully requests this Court affirm.

Dated this 28 day of November, 2018.

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November 30, 2018 - 9:30 AM

Transmittal Information

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Superior Court Case Number: 17-1-02239-1

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