

64709-1

64709-1

NO. 64709-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

GABRIEL BURNS,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MARY YU

BRIEF OF RESPONDENT

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A. ISSUES

1. A suspect must unequivocally invoke the right to silence in order to end questioning by the police. A suspect may selectively choose not to answer questions during an interview. Did Burns unequivocally invoke his right to silence when he waived his rights, agreed to speak to the detectives, engaged in an extended conversation about the case, but responded to a specific question by saying "Well, I don't want to talk about it, man," and continued to discuss other aspects of the investigation?

2. Whether the State must concede, in accordance with settled law, that Count II, Robbery in the First Degree, should be dismissed without prejudice because the charging language in the Information lacked the required element that Burns had taken property.

3. Whether the State must concede the trial court erred by imposing a term of community custody for a serious violent offense, when Burns was convicted for only violent offenses.

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The defendant, Gabriel Burns, was charged by Information with two counts of robbery in the first degree, burglary in the first degree, three counts of felony harassment, assault in the second degree, and malicious mischief in the second degree. CP 13-16. The State alleged that on December 19, 2008, Burns, along with several unknown accomplices, committed a home invasion robbery in retaliation for a failed drug deal. Burns was arrested on December 23, 2008. 2 RP 16¹. The trial commenced on August 6, 2009. 1 RP 1. The jury convicted Burns of all charges except assault in the second degree. CP 69-76. Burns received a standard range sentence that included community custody for a period of 24-36 months. CP 87-98.

2. SUBSTANTIVE FACTS

The defendant, Gabriel Burns, along with several unknown accomplices, committed a home invasion robbery in retaliation for a

¹ The verbatim report of proceedings consists of fourteen volumes, which will be referred to in this brief as follows: 1 RP (8/6/09), 2 RP (8/10/09), 3 RP (8/13/09), 4 RP (8/17/09), 5 RP (8/26/09), 6 RP (8/31/09 [1]), 7 RP (8/31/09 [2]), 8 RP (9/1/09), 9 RP (9/2/09), 10 RP (9/3/09), 11 RP (9/8/09), 12 RP (9/9/09), 13 RP (12/16/09), 14 RP (12/23/09).

drug transaction that went badly. The robbery happened on December 19, 2008. 7 RP 23. Burns had known one of the victims, Hani Elgiandi, for approximately one year. 10 RP 179-80. Before the robbery, Burns asked Elgiandi to purchase a large quantity of marijuana from eastern Washington for him. However, the transaction did not occur as planned and Burns was very upset with Elgiandi². 10 RP 229.

On December 19, 2008, when Elgiandi returned to his home, he saw Burns' car parked one block from his house and began to worry. 10 RP 190. He approached his home and saw footprints in the snow leading to the back door, and heard voices whispering. 10 RP 197. He saw two men at the back door dressed in black and holding guns. 10 RP 204. One man had a ski mask covering his face, the other he recognized as Gabriel Burns. 10 RP 211.

Elgiandi knew his friends and roommates were in the home and tried to call them to warn them. 10 RP 214. As he made the call masked gunmen burst through the door of the home.

² The reasons for the dispute were contested. Elgiandi contended he purchased \$23,000 worth of marijuana for Burns, but Burns was angry because the quality was very poor. 10 RP 225-27. According to Burns' statement, he gave Elgiandi \$30,000 to purchase marijuana but received nothing because Elgiandi claimed he was robbed. CP 110.

10 RP 214. Elgiandi then called 911 and gave the license plate number of Burns' car to the operator. 10 RP 214, 266.

Inside the home, friends of Elgiandi were drinking and playing cards. 8 RP 30, 32. Present inside the home were Mia Velasco, Janet Yeilding, Braden McRae, Lamar Kumangai-McGee, Zach McCarthy, and Timothy Kilgren. 8 RP 27. Several men in ski masks burst into the home. 8 RP 34, 192. Witnesses reported the men were armed. 8 RP 112. The masked men ordered the others to get on the floor and they were restrained with zip ties. 8 RP 35, 39. The intruders demanded money and marijuana. 8 RP 201. One of the gunmen was standing at the door giving the other men orders. 8 RP 41. The gunmen threatened to "shoot the guy in the green shirt (Kilgren)." 8 RP 38. Kilgren was knocked unconscious early in the robbery. 8 RP 44. One of the assailants suggested they "shoot one of the bitches." 8 RP 42. The victims could hear guns being cocked. 8 RP 43.

The intruders were clearly familiar with the home and the residents. They called Kumangai-McGee by his name, and they asked for Elgiandi by name. 8 RP 43, 45. They seemed to know where Elgiandi's room was, and they demanded to know where Elgiandi and the marijuana was. 8 RP 41, 43, 200. They directed

their questions to Elgiandi's roommates Kumangai-McGee and McRae. 8 RP 45-46, 200. They assaulted Kumangai-McGee and McRae when they were unable to tell the assailants where the marijuana was. 8 RP 46. The assailants did not ask Velasco, Yeilding, or McCarthy any questions. 8 RP 46.

Some of the victims heard one assailant refer to another as "Gabe." 8 RP 203. Velasco, Kumangai-McGee, and McRae had met Burns several times before the robbery and recognized his voice. 8 RP 204, 205; 9 RP 168; 10 RP 110. The assailants took cell phones from the victims. 8 RP 53, 141. They searched the home, destroyed property, and spray painted the apartment. 8 RP 45, 51. They left the victims tied up on the floor and police arrived soon after.

Burns was arrested on December 23, 2008 by Detective Mike Magan. 2 RP 16. Magan advised Burns of his constitutional rights at the time of arrest. 2 RP 14. Burns acknowledged understanding his rights and agreed to speak to the police. 2 RP 18, 54. Burns denied any involvement in the home invasion robbery at Elgiandi's residence. 2 RP 41. Burns acknowledged that he had previously participated in a drug transaction with Elgiandi that went badly. 2 RP 36. He told the police that he had

given Elgiandi \$30,000 to buy ten pounds of marijuana in Spokane, but said Elgiandi had "jacked him." 2 RP 36.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY ADMITTED BURNS' STATEMENT TO THE POLICE BECAUSE BURNS WAS PROPERLY ADVISED OF HIS RIGHTS AND DID NOT UNEQUIVOCALLY INVOKE HIS RIGHTS.

Burns argues the trial court should have excluded a portion of his statement to police after he made an equivocal remark that could be interpreted as a request to stop speaking to the detectives. Burns was properly advised of his constitutional rights and agreed to speak with the police. He did not unequivocally invoke his right to remain silent. Moreover, admissions of statements made after his equivocal remarks, if error, were harmless. Burns did not make any further admissions that would require his conviction be reversed. See CP 118-73.

Appellate courts apply de novo review to legal conclusions regarding Miranda.³ State v. Solomon, 114 Wn. App. 781, 789, 60 P.3d 1215, 1221 (2002). The court must determine de novo

³ Miranda v. Arizona, 384 U.S. 436, 444, 86 S. Ct. 1602, 16 L. Ed. 2d 694, 10 A.L.R.3d 974 (1966).

whether the trial court “derived proper conclusions of law” from its findings of fact. State v. Armenta, 134 Wn.2d 1, 9, 948 P.2d 1280 (1997) (citing State v. Hill, 123 Wn.2d 641, 647, 870 P.2d 313 (1994)). Unchallenged findings are verities on appeal. State v. Broadaway, 133 Wn.2d 118, 131, 942 P.2d 363 (1997). The substantial evidence standard of review applies to the trial court's challenged findings. Id. “Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the finding.” Solomon, 114 Wn. App. at 789.

The State may not use statements stemming from the custodial interrogation of a defendant unless the defendant is first informed of his constitutional rights and waives them. Miranda v. Arizona, 384 U.S. 436, 444, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). If the defendant's statements were made in response to custodial questioning, the State must show by a preponderance of the evidence that the defendant knowingly, voluntarily, and intelligently waived his Miranda rights. State v. Gross, 23 Wn. App. 319, 597 P.2d 894 (1979).

This Court has held that “where a suspect has received Miranda warnings the invocation of the right to remain silent must be clear and unequivocal (whether through silence or articulation)

in order to be effectual; if the invocation is not clear and unequivocal, the authorities are under no obligation to stop and ask clarifying questions, but may continue with the interview." State v. Walker, 129 Wn. App. 258, 276, 118 P.3d 935, 943-44 (2005). In Walker, the court concluded that the suspect's statement that he did not want to say anything incriminating, coupled with his willingness to continue speaking with the police for several hours, was not a clear and unequivocal invocation of his right to remain silent. Id. at 43-44.

When determining whether an accused has made an equivocal request for an attorney, the court uses an objective standard, i.e., whether "a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." Davis v. United States, 512 U.S. 452, 459, 114 S. Ct. 2350, 129 L. Ed. 2d 362 (1994). In the present case, the Court noted, "as the detective testified, he interpreted the defendant's response as the defendant having indicated that he did not want to talk about that particular topic." CP 26.

A suspect can selectively refuse to answer questions. This does not require the police to end the interview. State v. Cross, 156 Wn.2d 580, 620-21, 132 P.3d 80, 99 (2006); State v. Wheeler,

108 Wn.2d 230, 238, 737 P.2d 1005, 1009 (1987). In Cross, the suspect responded to some questions by saying "You're asking me too much," and "Quit asking me some of the fuckin' things, man, will ya?" Cross, 156 Wn.2d at 621. The Supreme Court held Cross' protests had not effectively asserted his right to remain silent. Id. In the present case, Burns at no point unequivocally invoked his right to remain silent.

Burns was arrested on December 23, 2008, by Detective Magan. 2 RP 16. He was placed in handcuffs and taken to a police car. He was transported to the police station and placed in an interview room with recording capabilities. 2 RP 20. Burns was in custody. He was properly advised of his constitutional rights twice. First, he was advised at the scene of the arrest by Detective Magan. 2 RP 14. Burns acknowledged that he understood his rights and agreed to speak to the detective. 2 RP 18, 54. Second, Burns was properly advised of his constitutional rights at the police station and again acknowledged his rights. 2 RP 20-21. Burns did not request a lawyer or indicate that he did not wish to speak to the police. 2 RP 28. Detective Magan described Burns as very responsive. 2 RP 29. The interview was recorded and a transcript of the interview was filed with the court. See CP 99-173.

During the interview Burns acknowledged that he was a marijuana dealer. CP 106. He told police that he knew one of the victims, Elgiandi, and arranged a large transaction with him. 2 RP 36. He gave Elgiandi \$30,000 to buy ten pounds of marijuana in eastern Washington. Id. He told police that Elgiandi had "jacked" him. Id. Elgiandi took the \$30,000 but never gave him the marijuana. Id. Elgiandi claimed to have been ripped off while in eastern Washington. Id. Burns made all of these admissions early in the interview (all in the first 19 pages of the transcript). Burns never admitted to any participation in the home invasion robbery on December 19, 2008.

On page nineteen of the transcript, the detective asked Burns what really happened, and asked if it had to do with retaliation or getting his money back. Burns replied, "Well, I don't want to talk about it, man." CP 118. Burns did not request an attorney, nor did he request that the interview end. He continued to engage the detectives in conversation; however, he added no further admissions or information about the home invasion robbery on December 19, 2008.

The trial court ruled Burns' statement was admissible.⁴ The trial court made the following factual findings:

18. At no point in time did the defendant invoke his right to silence.

25. At one point in time, as captured on page 19 line 18, of the transcribed statement the defendant noted "Well, I don't want to talk about it, man" in response to a question by the detective about the underlying motive of the alleged robbery.

26. As the detective testified he interpreted the defendant's response as the defendant having indicated he did not want to talk about that particular topic, and proceeded to ask another question because of the defendant's answer.

27. The detective then asked a different question which the defendant was responsive to. Despite the statement that he did not want to talk, the defendant continued to talk with the officers for another forty five plus minutes after the exchange.

CP 26. The Court found that Burns' statement that "Well, I don't want to talk about it, man" was in response to the detective's specific question and not an unequivocal invocation of his right to remain silent. The State offered Burns' statement as evidence that he had a motive to commit the home invasion robbery.

Burns argues that his response to a specific question that "Well, I don't want to talk about it, man" was a clear invocation of

⁴ The court did redact specific statements on relevancy and other grounds. Those redactions appear in the filed version of the transcript. See CP 99-173.

the right to remain silent. Burns is incorrect. A suspect declining to answer a specific question in the context of a continued dialog, after a proper advisement and waiver of his rights, is not an unequivocal invocation of the right to remain silent.

Burns relies heavily upon State v. Gutierrez, 50 Wn. App. 583, 749 P.2d 213 (1988). In Gutierrez, the suspect was advised of his rights, and never waived those rights. Id. at 586. The police asked if he wished to comment on the drugs they found and he immediately responded by saying he did not want to talk about that. Id. Very little conversation followed.⁵ Id. Burns, in contrast, agreed to speak to the police, waived his rights and engaged in a lengthy conversation about the investigation. When asked a specific question he said "Well, I don't want to talk about it, man" but continued to discuss other aspects of the case (the drug transaction with Elgiandi). Substantial evidence supported the trial court's conclusion that Burns did not unequivocally invoke his right to remain silent, but rather selectively chose not to answer a specific question. The trial court did not err in admitting the statements.

⁵ The holding in Gutierrez focused on a due process violation from the prosecutor commenting on the right to remain silent, not the Miranda violation. Gutierrez, 50 Wn. App. at 584.

Even if the trial court incorrectly concluded that Burns' statement was equivocal, there was no prejudice from admitting the latter portion of Burns' statement. He made no further admissions. He continued to deny any involvement in the home invasion robbery, and merely repeated information about his drug transaction with Elgiandi that was clearly admissible from the earlier portions of the interview⁶.

It is well established that even a constitutional error may be harmless. See, e.g., State v. Guloy, 104 Wn.2d 412, 425-26, 705 P.2d 1182, 1191 (1985); State v. Wheeler, 108 Wn.2d 230, 239-40, 737 P.2d 1005, 1010 (1987). The admission of a statement in violation of Miranda can be harmless error. Wheeler, 108 Wn.2d at 239-40. A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error. Constitutional error is presumed to be prejudicial and the State bears the burden of proving that the error was harmless. State v. Stephens, 93 Wn.2d 186, 190-91, 607 P.2d 304 (1980).

⁶ Burns offers no argument to suppress the initial nineteen pages of the interview. During this initial phase of the interview, Burns discussed in detail that Elgiandi stole \$30,000 in a drug deal. See CP 99-118.

Pursuant to the “overwhelming untainted evidence” test, the appellate court looks only at the untainted evidence to determine if the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt. Guloy, 104 Wn.2d at 425-26, citing Parker v. Randolph, 442 U.S. 62, 70-71, 99 S. Ct. 2132, 2137-38, 60 L. Ed. 2d 713 (1979); Brown v. United States, 411 U.S. 223, 231, 93 S. Ct. 1565, 1570, 36 L. Ed. 2d 208 (1973). The “overwhelming untainted evidence” test allows the appellate court to avoid reversal on merely technical grounds while insuring that a conviction will be reversed where there is any reasonable possibility that the use of inadmissible evidence was necessary to reach a guilty verdict. Guloy, 104 Wn.2d at 425-26.

The untainted evidence that Burns participated in the home invasion robbery was overwhelming. Elgiandi saw Burns' face outside before he pulled the ski mask on and identified Burns in court. 10 RP 211. Three witnesses inside the house recognized Burns' voice and identified him in court. 8 RP 204-05; 9 RP 168; 10 RP 110. Witnesses heard the assailants refer to Burns by his first name "Gabe." 8 RP 203. Burns' car was identified at the scene by Elgiandi. 10 RP 214, 266. The masked intruders clearly were familiar with the home and the residents and knew what they

were looking for: money, marijuana or Elgiandi. 8 RP 41, 43, 200. Burns had a motive to commit the robbery because he believed Elgiandi had stolen from him. Elgiandi testified about the motive, and Burns admitted the motive in the early portions of the interview. 10 RP 225-27; CP 99-118. The only additional evidence in the latter portion of the interview that Burns argues should have been suppressed was a repetition of the admissions that he had a motive to commit the robbery. Under these facts, the Court can readily find that the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt.

2. THE STATE CONCEDES THE CHARGING LANGUAGE FOR COUNT II, ROBBERY IN THE FIRST DEGREE, WAS DEFICIENT, AND THE APPROPRIATE REMEDY IS DISMISSAL OF COUNT II WITHOUT PREJUDICE.

Burns challenges the charging language in Count II of the Third Amended Information as insufficient because it lacked the essential element of robbery in the first degree requiring the accused to take property. Accordingly, he argues that the appropriate remedy is dismissal without prejudice. Brief of Appellant, at 15. Burns is correct.

Washington courts require that charging documents contain the essential elements of the crime. State v. Kjorsvik, 117 Wn.2d 93, 101, 812 P.2d 86 (1991). The primary goal of the “essential elements” rule is to give notice to an accused of the nature of the crime. Id. In State v. Leach, 113 Wn.2d 679, 695, 782 P.2d 552 (1989), the Supreme Court noted that defendants are entitled to be fully informed of the nature of the accusations against them so that they can prepare an adequate defense.

Charging documents that are not challenged until after the verdict are liberally construed. In State v. Kjorsvik, 117 Wn.2d 93, 812 P.2d 86 (1991), the Supreme Court held that when the sufficiency of a charging document is first raised on appeal, then it is more liberally construed in favor of validity than if raised before verdict. Because Burns did not challenge the charging language before the verdict, this liberal standard of review applies. When the issue is first raised on appeal, the test is: (1) do the necessary facts appear in any form, or by fair construction can they be found, in the charging document; and, if so, (2) can the defendant show that he or she was nonetheless actually prejudiced by the inartful language

which caused a lack of notice.⁷ Id. at 105-06. The first prong of the test looks to the face of the charging document itself and there must be some language in the document giving at least some indication of the missing element.

In the present case, Burns was charged with two counts of robbery in the first degree. The first count of robbery properly alleged that Burns "did unlawfully and with intent to commit theft take personal property of another . . . from the person and in the presence of Lamar Kumangai-McGee." CP 13. However, the second count of robbery inserted the word "attempt" and alleged Burns "did unlawfully and with intent to commit theft attempt to take personal property of another . . . from the person and in the presence of Braden McRae." CP 14.

Robbery requires the defendant take personal property. RCW 9A.56.200. By inserting the word "attempt" the charging language no longer required the taking of personal property, only an effort to do so. Although the Court has considerable leeway to imply the necessary allegations from the language of the charging document when an objection to a charging document is not timely,

⁷ The court does not reach the issues of prejudice unless the missing element can be found in some form in the charging document. Kjorsvik, 117 Wn.2d at 105-06.

this language is not sufficient. Inserting the word "attempt" explicitly removed an essential element from the robbery charge that the taking be completed. The language used in Count II would be sufficient to charge attempted robbery in the first degree, but that was clearly not the intent in this case. The charge is captioned as robbery in the first degree. CP 13-14. The Court instructed the jury on Robbery in the First Degree. CP 40.

Burns correctly points out the remedy for the deficient information is to dismiss without prejudice. Brief of Appellant, at 15. Dismissal without prejudice is the only remedy available in these circumstances. State v. Vangerpen, 125 Wn.2d 782, 791, 888 P.2d 1177 (1995); see also State v. Quismundo, 164 Wn.2d 499, 505 n.3, 192 P.3d 342 (2008) (noting that there are no double jeopardy issues when a defective charging document is dismissed without prejudice, quoting Vangerpen). While the charging language and the proof at trial would support a conviction for attempted robbery in the first degree, the Supreme Court has explicitly rejected proposed remedies of remanding to enter judgment on lesser offenses. See Vangerpen, 125 Wn.2d at 792-23.

Based on this record, the State concedes that the charging language in Count II was defective and the remedy is dismissal

without prejudice. Therefore, the State agrees that Burns' conviction must be dismissed without prejudice and the case remanded, whereupon the State may re-file one count of Robbery in the First Degree.

3. THE STATE CONCEDES BURNS WAS IMPROPERLY SENTENCED TO 24-36 MONTHS OF COMMUNITY CUSTODY.

Burns argues that the trial court improperly ordered 24-36 months of confinement for his convictions for robbery in the first degree and burglary in the first degree. Burns is correct. Burglary and Robbery in the first degree are categorized as violent offenses under the SRA. Violent offenses are subject to 18 months of community custody. RCW 9.94A.702(2).

At the sentencing hearing, the prosecutor asked for a range of community custody of 18-36 months. 14 RP 6. The trial court initially imposed 18-36 months of community custody in her oral ruling.⁸ 14 RP 22. Burns' lawyer sought clarification at the end of the hearing and advised the court that robbery in the first degree

⁸ This range is also incorrect. It appears the prosecutor and the court correctly categorized the Robbery and Burglary as violent offenses, but applied a community custody period that was outdated.

was a serious violent offense requiring 24-36 months community custody. 14 RP 27. The court agreed and the Judgment and Sentence reflects the 24-36 months of community custody. CP 90.

Under the SRA, only serious violent offenses are subject to 24-36 months of community custody. RCW 9.94A.702(1). Violent offenses require 18 months of community custody. RCW 9.94A.702(2). Robbery in the first degree and burglary in the first degree are categorized as violent offenses, hence, the correct term of community custody is 18 months. RCW 9.94A.030(44) (definition of serious violent offense), RCW 9.94A.030(53) (definition of violent offense), RCW 9A.56.200 (robbery statute), RCW 9A.52.020 (burglary statute). The State agrees that the trial court imposed a term of community custody beyond its authority and that remand for correction of the community custody term is appropriate.

D. CONCLUSION

For the foregoing reasons, the State concedes this court should dismiss Count II, Robbery in the First Degree, without

prejudice and remand to correct the community custody term. The remainder of Burns' convictions should be affirmed.

DATED this 11th day of January, 2011.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Maureen M. Cyr, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the State's Response Brief, in STATE V. GABRIEL JORDAN BURNS, Cause No. 64709-1-I, in the Court of Appeals, Division I, for the State of Washington.

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



Name
Done in Seattle Washington

1-14-11
Date 1/14/11