

NO. 66354-2-1

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

2011 JUN 22 PM 3:41
COURT CLERK
JENNIFER L. DOBSON

STATE OF WASHINGTON,

Respondent,

v.

DEVIN WINTCH,

Appellant.

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

The Honorable Anita L. Farris, Judge

BRIEF OF APPELLANT

JENNIFER L. DOBSON
DANA M. LIND
Attorneys for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENT OF ERROR</u>	1
<u>Issue Pertainig to Assignment of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
C. <u>ARGUMENT</u>	6
WINTCH WAS DENIED DUE PROCESS WHEN THE TRIAL COURT PERMITTED THE JURY TO CONVICT HIM OF AN UNCHARGED CRIME.....	6
D. <u>CONCLUSION</u>	10

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

State v. Doogan
82 Wn. App. 185, 917 P.2d 155 (1996) 8

State v. Olds
39 Wn.2d 258, 235 P.2d 165 (1951) 8

State v. Pelkey
109 Wn.2d 484, 745 P.2d 854 (1987) 8

State v. Thompson
68 Wn.2d 536, 413 P.2d 951 (1966) 8, 9

FEDERAL CASES

Cole v. Arkansas
333 U.S. 196, 68 S.Ct. 514, 92 L.Ed. 644 (1948) 6, 7, 8, 9

DeJonge v. Oregon
299 U.S. 353, 57 S.Ct. 255, 81 L.Ed. 278 (1937) 6

Henderson v. Morgan
426 U.S. 637, 96 S.Ct. 2253, 49 L.Ed.2d 108 (1976) 7

Smith v. O'Grady
312 U.S. 329, 61 S.Ct. 572, 85 L.Ed. 859 (1941) 7

Stirone v. United States
361 U.S. 212, 80 S.Ct. 270, 4 L.Ed.2d 252 (1960) 6, 9

Von Atkinson v. Smith
575 F.2d 819 (10th Cir. 1978) 7

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>RULES, STATUTES AND OTHER AUTHORITIES</u>	
RCW 9A.56.210	5
Wash. Const. art. 1, sec. 22	8

A. ASSIGNMENT OF ERROR

Appellant's procedural due process rights were violated when the jury was permitted to convict appellant of an uncharged crime.

Issue Pertaining to Assignment of Error

The State charged appellant with one count of second degree robbery for taking the property of another, "to-wit: a flashlight." The evidence presented at trial indicated that appellant took a spotlight from the victim and, in a separate incident approximately 30 minutes later, took a flashlight from the same person. In the State's closing argument, the prosecutor argued the jury should convict appellant based on the taking of the spotlight. The jury instructions did not clarify whether the verdict had to be predicated upon the taking of the flashlight or the spotlight. Consequently, it is reasonably conceivable that t the jury convicted appellant for an uncharged robbery. Was appellant denied due process?

B. STATEMENT OF THE CASE

On the night of June 26, 2010, appellant Devin Wintch was smoking in front of his home in the Gleneagle neighborhood of

Arlington. 3RP 107, 133, 148.¹ A car drove by slowly and the driver shined a spotlight on Wintch. 4RP 3. The car then turned around and the driver shined the spotlight on him a second time.² 4RP 5, 7. The car was driven by Scott Tomkins, a neighborhood watch volunteer who was on patrol that night. 2RP 81, 87.

As the car slowed down, Winch approached Tomkins and they exchanged words. 2RP 90-91; 4RP 7. Winch testified Tomkins demanded information from him. 4RP 7, 67, 83. Tomkins testified Winch was belligerent and threatened him. 2RP 90-91.

During the conversation, Tomkins remained in his car. 4RP 9. He turned off the spotlight but kept it plugged in the cigarette lighter. 4RP 9. Wintch wanted to get rid of the spotlight because he felt Tomkins was harassing him with it. 4RP 78, 81. So he reached in the car, grabbed the spotlight, and yanked it and the cord out. 2RP 92; 4RP 84. Winch took the spotlight to his house. 4RP 10. Tomkins claimed he did not follow because Wintch had threatened him. 2RP 93-94.

Tomkins went to the home of his neighbor John Branthoover

¹ The transcripts are referred to as follows: 1RP (10-21-10); 2RP (11-2-10 and 11-3-10); 3RP (11-4-10 and 11-5-10); 4RP (11-8-10); 5RP (11-9-10); 6RP (11-19-10).

² At trial, the driver denied spotlighting Wintch. 2RP 84.

who was the organizer of the neighborhood watch patrol. 2RP 94; 3RP 1-2, 15, 33-34. He told Branthoover what had happened. 2RP 94. Branthoover advised Tomkins to call the police. 2RP 94. Tomkins did. 2RP 95. After calling the police, Tomkins and Branthoover drove their cars back to Wintch's house and parked nearby to wait for the police. 2RP 95. Branthoover was armed with a concealed gun. 3RP 16. Wintch had a flashlight in hand. 4RP 14. They waited outside their cars talking.

A few minutes later, Wintch went back outside to smoke another cigarette. 4RP 13. He spotted Branthoover and Tomkins. 4RP 15. He walked over to them calmly. 2RP 166; 4RP 15. Tomkins testified Wintch became aggressive after they informed him the police had been called. 2RP 101. However, Wintch testified he remained calm until he saw what he believed to be a gun in Branthoover's pocket – then he was scared.³ 2RP 104; 4RP 17-18. Reflexively, Wintch punched Branthoover in the jaw, sending him to the ground. 3RP 24; 4RP 18.

As Branthoover got up, he took out his gun and cocked it. 3RP 65; 4RP 20-21, 123. Meanwhile, Wintch snatched Tomkins'

³ Branthoover claimed the gun was holstered and hidden by his shirt at this time. 3RP 16, 60, 63.

flashlight from his hands and held it up as a weapon against the two men. 2RP 104, 171; 3RP 61; 4RP 20. Branthoover and Tomkins testified Wintch then threatened to bash Branthoover's skull in with the flashlight and at some point he hit Tomkins with the flashlight. 2RP 105; 3RP 26. Wintch denied this. 4RP 52.

Shortly thereafter, police arrived. 2RP 106. Wintch was ordered to drop the flashlight. 3RP 104; 4RP 22. He complied. 3RP 104; 4RP 23. Eventually, Wintch was arrested. 3RP 108-09. Before leaving the scene, officers awoke Wintch's mother and asked her to retrieve the spotlight from his bedroom. 3RP 173; 4RP 112, 118. She did. 4RP 120.

On July 16, 2010, the Snohomish County prosecutor charged Wintch with one count of second degree robbery and one count of felony harassment.⁴ CP 70. The robbery was charged as follows:

That the defendant, on or about the 26th day of June, 2010, with intent to commit theft, did unlawfully take

⁴ The information was later amended to add two counts of assault. 2RP 68-69. Apparently, the amended information was never filed and was never read into the record. Counsel has emailed both the prosecutor and defense counsel in an attempt to obtain a copy, but has been unable to review one. It appears from the record, however, that the only change made from the original information was the addition of the two new assault counts. 1RP 4; 2RP 68-69.

personal property of another, to-wit: a flashlight, from the person or in the presence of Scott Tomkins, against such person's will, by use or threatened use of immediate force, violence, and fear of injury to Scott Tomkins; proscribed by RCW 9A.56.210, a felony.

The case proceeded to trial. The trial court instructed the jury as to the following elements for second degree robbery:

- (1) That on or about June 26, 2010, the defendant unlawfully took personal property from the person of another;
- (2) That the defendant intended to commit theft of the property;
- (3) That the taking 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;
- (4) That force or fear was used by the defendant to obtain or retain possession of the property to prevent or overcome resistance to the taking; and
- (5) That these acts occurred in the State of Washington.

CP 44.

During the State's closing argument, the prosecutor specifically argued that the robbery charge was predicated upon the taking of the spotlight rather the taking of the flashlight. 5RP 12-15, 29. The jury returned a guilty verdict. CP 35. Appellant appeals. CP 1-16.

C. ARGUMENT

WINTCH WAS DENIED DUE PROCESS WHEN THE TRIAL COURT PERMITTED THE JURY TO CONVICT HIM OF AN UNCHARGED CRIME.

Based on this record, it is reasonably conceivable the jury convicted Wintch of an uncharged robbery offense based on the taking of a spotlight.⁵ This is a violation of due process. See, Stirone v. United States, 361 U.S. 212, 217-19, 80 S.Ct. 270, 4 L.Ed.2d 252 (1960) (finding “fatal error” when the evidence and the court's jury instructions permitted defendant to be convicted of an uncharged crime).

A safely guarded embodiment of the right to due process under the Sixth and Fourteenth Amendments is the right of a criminal defendant to have notice of the charges pending against him. Cole v. Arkansas, 333 U.S. 196, 68 S.Ct. 514, 92 L.Ed. 644 (1948); DeJonge v. Oregon, 299 U.S. 353, 362, 57 S.Ct. 255, 81 L.Ed. 278 (1937). Hence, “it is axiomatic that due process does not permit one to be tried, convicted or sentenced for a crime with which he has not been charged or about which he has not been properly notified.” Von Atkinson v. Smith, 575 F.2d 819 (10th Cir.

⁵ This may be raised for the first time on appeal because it raises a constitutional issue. RAP 2.5.

1978) (citing Henderson v. Morgan, 426 U.S. 637, 96 S.Ct. 2253, 49 L.Ed.2d 108 (1976); Smith v. O'Grady, 312 U.S. 329, 334, 61 S.Ct. 572, 85 L.Ed. 859 (1941); DeJonge, 299 U.S. at 362.

When it is conceivable a defendant's conviction has been founded upon evidence of an uncharged crime, the conviction cannot stand. In Cole v. Arkansas, the United States Supreme Court held the defendant's due process rights were violated when his conviction was affirmed under a criminal statute violation for which he had not been charged. Cole, 333 U.S. at 197, 202. There, the defendant was charged with violating one section of a statute, but after the defense raised several constitutional challenges to that section of the statute on appeal, the Arkansas Supreme Court upheld his conviction citing a different section of the statute which described a separate and distinct offense. Id. 198-99.

The United States Supreme Court reversed, explaining:

No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal. ... It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made.

Cole, 333 U.S. at 201 (citation omitted). The Supreme Court, thus, held the defendant's procedural due process rights under the federal constitution were violated when the Arkansas Supreme Court affirmed his conviction based on an uncharged crime. Id.

Washington law similarly prohibits the conviction of an accused for an uncharged crime. Wash. Const. art. 1, sec. 22; State v. Pelkey, 109 Wn.2d 484, 487, 745 P.2d 854 (1987); State v. Thompson, 68 Wn.2d 536, 541, 413 P.2d 951, 541 (1966); State v. Olds, 39 Wn.2d 258, 261, 235 P.2d 165 (1951). Under the Washington Constitution, it is reversible constitutional error when information alleges one crime, but the trial court's instruction permit the jury to convict on a different, uncharged crime. State v. Doogan, 82 Wn. App. 185, 188-89, 917 P.2d 155 (1996).

Wintch was denied due process under both the Washington and federal constitutions. Here, the statement of probable cause very clearly delineated between the taking of the spotlight and the taking of the flashlight. CP 68-69. The State specifically chose to charge Wintch with one count of second degree robbery based on the taking of Tomkins' flashlight. CP 70. It did not charge Wintch based on the taking of the spotlight.

Despite this, the prosecutor argued to the jury that it could convict Winch based on his taking of the spotlight, rather than the taking of Tomkins' flashlight 5RP 12-15. Moreover, the to-convict instruction did not distinguish between the two acts, merely referring to the taking of "personal property." Consequently, as instructed, the jury was free to convict Wintch for stealing the spotlight – an act for which he was not charged.

Because it is reasonably conceivable the jury found Wintch guilty of an uncharged crime of second degree robbery, Wintch's due process rights were violated and, therefore, his conviction should be reversed. See, Thompson, 68 Wn.2d at 541; Cole, 333 U.S. at 202; Stirone, 361 U.S. at 217-19.

D. CONCLUSION

For the foregoing reasons, this Court should reverse Wintch's conviction for second degree robbery.

DATED this 22nd day of June, 2011.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



JENNIFER L. DOBSON
WSBA No. 30487



DANA M. LIND
WSBA No. 28239

Office ID No. 91051
Attorneys for Appellant

ERIC J. NIELSEN
ERIC BROMAN
DAVID B. KOCH
CHRISTOPHER H. GIBSON

OFFICE MANAGER
JOHN SLOANE

LAW OFFICES OF
NIELSEN, BROMAN & KOCH, P.L.L.C.
1908 E MADISON ST.
SEATTLE, WASHINGTON 98122
Voice (206) 623-2373 · Fax (206) 623-2488
WWW.NWATTORNEY.NET

LEGAL ASSISTANT
JAMILAH BAKER

DANA M. LIND
JENNIFER M. WINKLER
ANDREW P. ZINNER
CASEY GRANNIS
JENNIFER J. SWEIGERT
OF COUNSEL
K. CAROLYN RAMAMURTI
JARED B. STEED

State V. Devin Wintch

No. 66354-2-I

Certificate of Service by Mail

On June 22, 2011, I deposited in the mails of the United States of America,
A properly stamped and addressed envelope directed to:

Seth Fine
Snohomish Co Pros Ofc
3000 Rockefeller Ave
Everett WA 98201-4060

Devin Wintch,
18006 Oxford Drive
Arlington, WA 98223

Containing a copy of the opening brief, re Devin Wintch
Cause No. 66354-2-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.



John Sloane
Office Manager
Nielsen, Broman & Koch

6-22-11

Date
Done in Seattle, Washington