72803-2

FILED
November 9, 2015
Court of Appeals
Division I
State of Washington

NO. 72803-2-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

BRANDON PAMON,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE LAURA INVEEN

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. The elements of an attempted offense consist of (1) that the person acted with intent to commit the specific crime and (2) took a substantial step to accomplish the result. Pamon was convicted of attempted robbery in the first degree after he assaulted and attempted to rob a Seattle University student. Was the jury properly advised to return a unanimous verdict as to these elements?

2. A trial court has discretion to impose prohibitions so long as they are crime related. Evidence was presented that shortly prior to the attempted robbery Pamon had been smoking marijuana and spoke of "getting money." Was the trial court's prohibition on marijuana supported by the evidence?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Brandon Pamon was charged by amended information with assault in the first degree and attempted robbery in the first degree. CP 11-12. The State further alleged that Pamon had been armed with a deadly weapon. Id. A jury convicted Pamon of attempted robbery but acquitted him of the assault. CP 49, 50. The jury did

not find that Pamon was armed with a deadly weapon during the attempted robbery. CP 51.

Pamon was sentenced to 76.5 months of confinement and 18 months of community custody. The trial court, finding that the defendant's "greed for money to get marijuana" led to his conduct, imposed a prohibition that he not possess or consume non-prescribed drugs, specifically marijuana. CP 74. Pamon now appeals.

2. SUBSTANTIVE FACTS

Geoffrey Vincent, a student at Seattle University, was walking home from a local bar where he'd been with friends. 1RP 20.[1] He noticed Pamon, K.M. and C.H. walking ahead. 1RP 21-24. Pamon and his group stopped and Vincent walked past them. 1RP 25. Shortly after entering campus at 10th Avenue and E. Madison Street, he heard someone quickly approaching. 1RP 31. Vincent was grabbed from behind, knocked to the ground, and repeatedly hit by Pamon and K.M. 1RP 31-32. Pamon and K.M. rifled through Vincent's pockets while asking him if he had anything. 1RP 35-39. Vincent noticed K.M. was holding a knife. 1RP 32.

[1] The report of proceedings is referenced as follows: 1RP – 10/9/14; 2RP 10/13/14; 3RP 11/7/14.

Attempting to defend himself, Vincent pulled a knife from his back pocket and stabbed K.M. in his thigh. 1RP 34. K.M. and Pamon both stepped back. 1RP 34. As Pamon stood by, K.M. walked up to Vincent and stabbed him in the chest. 1RP 39-40. K.M. and Pamon then fled and Vincent managed to contact campus security. 1RP 48-50. Vincent was later transported to Harborview Hospital where he underwent surgery to repair a severed artery, a collapsed lung, and a punctured right atrium. 2RP 104-19.

C. ARGUMENT

1. PAMON'S RIGHT TO JURY UNANIMITY WAS NOT VIOLATED.

Pamon contends that attempted robbery in the first degree is an alternative means offense. He argues that the State did not produce sufficient evidence of bodily injury. This claim should be rejected. Attempted robbery in the first degree is not an alternative means offense and the jury was properly instructed to return a unanimous verdict of guilt. In any event, there was sufficient evidence of bodily injury.

a. Attempted Robbery In The First Degree Is Not An Alternative Means Offense.

An alternative means crime is one "that provide[s] that the proscribed criminal conduct may be proved in a variety of ways." State v. Smith, 159 Wn.2d 778, 784, 154 P.3d 873 (2007); State v. Owens, 180 Wn.2d 90, 96, 323 P.3d 1030 (2014). When a single offense can be committed in more than one way, Washington requires a unanimous jury verdict as to the crime charged. State v. Arndt, 87 Wn.2d 374, 377, 553 P.2d 1328 (1976); Wash. Const. art. I, § 21.

RCW 9A.28.020(1) provides that 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." An attempted crime contains two elements: intent to commit a specific crime and taking a substantial step toward the commission of that crime. State v. Johnson, 173 Wn.2d 895, 905, 270 P.3d 591 (2012). The intent required is the intent to accomplish the criminal result of the base crime. Id. at 899; see State v. DeRyke, 149 Wn.2d 906, 913-14, 73 P.3d 1000 (2003) (intent element of first degree rape is intent to have forcible sexual intercourse). A "substantial step" for purposes of an

attempted crime is conduct that is strongly corroborative of the actor's criminal purpose. In re Pers. Restraint of Borrero, 161 Wn.2d 532, 167 P.3d 1106 (2007).

The intent required to prove robbery in the first degree is the intent to deprive the victim of property. State v. Decker, 127 Wn. App. 427, 431, 111 P.3d 286 (2005) (citing State v. Byers, 136 Wash. 620, 622, 241 P. 9 (1925)). Intent to cause bodily injury is not an element of robbery in the first degree. Id. (citing State v. McCorkle, 88 Wn. App. 485, 501, 945 P.2d 736 (1997), affirmed, 137 Wn.2d 490, 973 P.2d 461 (1999)).

Using WPIC 100.02,[2] the trial court instructed the jury that to find Pamon guilty of attempted robbery in the first degree they must find;

a. That on or about January 15, 2014 the defendant did an act that was a substantial step toward the commission of Robbery in the First Degree;

b. That the act was done with intent to commit Robbery in the First Degree; and

[2] WPIC 100.02 states: "To convict the defendant of the crime of attempted (fill in crime), each of the following elements of the crime must be proved beyond a reasonable doubt: (1) That on or about (date), the defendant did an act that was a substantial step toward the commission of (fill in crime); (2) That the act was done with the intent to commit (fill in crime); and (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."

(1) That the act occurred in the State of Washington.

CP 39.

The definition of robbery in the first degree was also provided to the jury:

> A person commits the crime of robbery in the first degree when in the commission of a robbery or in immediate flight therefrom he or she is armed with a deadly weapon or inflicts bodily injury.

CP 37; WPIC 37.01.

Pamon relies on this definition to argue that *attempted* robbery in the first degree is an alternative means offense. By doing so, Pamon conflates the elements of the criminal attempt and the elements of the base crime, which Johnson recognized as erroneous when examining the elements of an attempted offense. Johnson, 173 Wn.2d at 905. Similarly, in State v. Boswell, 185 Wn. App. 321, 340 P.3d 971 (2014), a defendant's argument that assault in the third degree was a lesser included offense of attempted murder in the first degree failed because an attempted offense is not an alternative means crime. Id. at 334-35.

The only question for the jury was whether Pamon acted with intent to commit theft of personal property and whether he took a substantial step toward accomplishing that result, not the means

by which he attempted to do so. Using WPIC 100.02, the jury was properly advised of the elements necessary to establish a finding of guilt.

Pamon cites State v. Whitney[3] which commented that an instruction on juror unanimity is preferable. Whitney recognized that an instruction regarding jury unanimity as to the alternative method of an alternative means crime is "...preferable because it eliminated potential problems which may arise *when* one of the alternatives is not supported by substantial evidence." Whitney, at 511 (emphasis added). He also argues State v. Owens[4] establishes that a defendant has a right to a unanimous jury verdict as to alternative means. Owens, however, relying on State v. Ortega-Martinez[5], supports the proposition that *where* there is insufficient evidence to support any means, a particularized expression of jury unanimity is required. Owens, at 100 (emphasis added).

In light of the cases establishing the elements of an attempted offense, it cannot be said that the jury was required to

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[3] State v. Whitney, 108 Wn.2d 506, 511, 739 P.3d 1150 (1987).

[4] State v. Owens, 180 Wn.2d 90, 323 P.3d 1030 (2014).

[5] State v. Ortega-Martinez, 124 Wn.2d 702, 881 P.2d 231 (1994).

return a unanimous verdict as the means by which Pamon attempted to rob the victim – deadly weapon or bodily injury. The jury was properly instructed to be unanimous as to Pamon's guilt. His constitutional right to unanimity was not violated.

b. There Was Sufficient Evidence To Support Bodily Injury.

Evidence is sufficient if, viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Owens, 180 Wn.2d at 99. Where there is sufficient evidence to support each of the alternative means of committing the crime, express jury unanimity as to which means is not required. Owens, at 95. A challenge to the sufficiency of the evidence admits the truth of the State's evidence and inferences therefrom will be viewed most favorably to the State. State v. Luther, 157 Wn.2d 63, 77, 134 P.3d 206 (2006).

Bodily injury is defined as "physical pain or injury, illness or an impairment of physical condition." RCW 9A.04.110; WPIC 2.03. As the attack began, Pamon and K.M. ran toward Vincent and knocked him to the ground. 2RP 28. Vincent testified that both Pamon and K.M. repeatedly hit him in the head, face, and chest.

2RP 31-33, 36. According to the testimony of Dr. McIntyre, who reviewed the emergency notes, Vincent had abrasions on his face. 2RP 106. Photos showing blood on Vincent's face were admitted at trial. 2RP 104-19; Exhibits 21 and 27.

There was not only direct testimony of the assault and photos of injury, but even Pamon acknowledges that two Seattle University officers noticed Vincent appeared "roughed up," "pale," and with bruising on his face. Br. of App. at 6; 2RP 6, 88. Accepting the truth of the evidence and viewing the facts in a light most favorable to the State, there did exist sufficient evidence to support a finding of bodily injury in connection with the robbery. In light of Owens, because there was sufficient evidence presented for both means, jury unanimity was not required.

2. THE TRIAL COURT PROPERLY IMPOSED A CRIME-RELATED PROHIBITION ON MARIJUANA.

Pamon contends that the trial court acted without statutory authority when it imposed a condition of community custody prohibiting possession or consumption of marijuana. A trial court may impose such a prohibition if it is related to the underlying circumstances of the crime. Given the trial testimony and evidence presented, the trial court's prohibition on marijuana was proper.

Pursuant to RCW 9.94A.703(3), a trial court is given discretionary authority to impose conditions of community custody, including "crime-related prohibitions." A "crime-related prohibition" is further defined as an "order of a court prohibiting conduct that directly relates to the circumstances of the crime for which an offender has been convicted..." RCW 9.94A.030(10)[6]; State v. Llamas-Villa, 67 Wn. App. 448, 456, 836 P.2d 239 (1992).

Findings supporting a crime-related condition must be substantially supported by the evidence. State v. Motter, 139 Wn. App. 797, 801, 162 P.3d 1190 (2007). Whether a community custody prohibition is crime-related is reviewed for abuse of discretion. State v. Riley, 121 Wn.2d 22, 37, 846 P.2d 1356 (1993).

C.H. testified that she had first met with K.M. before the assault and attempted robbery. The pair later met with Pamon and together smoked "weed, marijuana." 2RP 25. When they were done, C.H. overheard Pamon and K.M. talking "about getting money." 2RP 26. C.H. denied discussion of a robbery, but recalled

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[6] RCW 9.94A.030(10) states: "Crime-related prohibition" means an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted, and shall not be construed to mean orders directing an offender affirmatively to participate in rehabilitative programs or to otherwise perform affirmative conduct. However, affirmative acts necessary to monitor compliance with the order of a court may be required by the department.

K.M. saying that he needed money to get weed. 2RP 26. The trial court made a finding that the defendant's "...selfish greed for money to get marijuana" led to his conduct, and imposed a prohibition on marijuana. 3RP 11.

The threshold question here is whether the trial court abused its discretion when it made its finding based on the evidence presented. Trial testimony established that Pamon, K.M., and C.H. were smoking marijuana just prior to the assault and attempted robbery of the victim. C.H. overheard a discussion of money between Pamon and K.M., that they were going to do something, and that K.M. needed money to get more weed. 2RP 25-27. Moments later, both Pamon and K.M. attacked the victim.

Pamon argues that the use of marijuana is legal pursuant to RCW 69.40.4013. The same can be said of alcohol. Pamon is of legal age to consume alcohol, but even alcohol may be prohibited regardless of whether it contributed to the offense. RCW 9.94A.703(3)(e). The trial court did not abuse its discretion when it imposed a condition prohibiting the possession or consumption of marijuana. The trial court's findings were related to the circumstances of the crime and supported by substantial evidence.

D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this court to affirm Pamon's conviction and the trial court's condition prohibiting the use of marijuana.

DATED this 9TH day of November, 2015.

Respectfully submitted,

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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to the attorneys for the appellant, Kathleen A. Shea, containing a copy of the Respondent's Brief, in STATE V. BRANDON PAMON Cause No. 72803-2-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.

U Brame
Name

11/9/15
Date

Done in Seattle, Washington