

NO. 36182-5
(Consolidated with 36210-4)

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

ANTONIO RICHARD CROSS, APPELLANT
TIKI TARU McCOLLUM, APPELLANT



Appeal from the Superior Court of Pierce County
The Honorable Lisa Worswick, Judge

Nos. 06-1-04524-8 and 06-1-04525-6

BRIEF RESPONDENT

GERALD A. HORNE
Prosecuting Attorney

By
ALICIA BURTON
Deputy Prosecuting Attorney
WSB # 29285

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Is defendant Cross entitled to correction of his misdemeanor judgment where the current judgment: (a) erroneously indicates that defendant is serving a suspended sentence, which he is not, and (b) the judgment fails to credit defendant with time served on his misdemeanor conviction?

(Defendant Cross's Assignment of Error Nos. 1 and 2)

2. Did the State present sufficient evidence to prove beyond a reasonable doubt that defendant McCollum committed the crime of second degree robbery?

(Defendant McCollum's Assignment of Error No. 1)

B. STATEMENT OF THE CASE.

1. Procedure

On March 12, 2007, the State filed an Amended Information charging TIKI TARU McCOLLUM (hereinafter defendant McCollum) and ANTONIO RICARDO CROSS (hereinafter defendant Cross) with one count of first degree robbery, and one count of second degree assault.¹

¹ The victim of the robbery was listed as V.Z. Lemus and/or Felipe Zuniga. The victim of the assault was listed as F.Z. Zuniga.

1CP² 10-12; 2CP 8-9. The State charged defendant McCollum with an additional four counts of second degree possession of stolen property (PSP). 1CP 10-12.

The case proceeded to bench trial before the Honorable Lisa Worswick. At the conclusion of evidence, the court found both defendants guilty of second degree robbery against V.Z. Lemus and fourth degree assault against F.Z. Zuniga. 2CP 11-16. The court also found defendant McCollum guilty of four counts of second degree possession of stolen property.³ 2CP 11-16. The court sentenced both defendants to 75 months.⁴ 1CP 29-33; 2CP 33-37.

Both defendants timely appealed. 1CP 34; 2CP 10. This Court subsequently consolidated the appeals under COA No. 36182-5.

2. Facts

The following facts are taken from the Findings of Fact and Conclusions of Law Re: Bench Trial, with citations to the trial record where appropriate:

² The Clerk's Papers from each case were designated separately. As such, the State will refer to the Clerk's Papers from defendant McCollum's appeal as "1CP" and the Clerk's Papers from defendant Cross's appeal as "2CP."

³ The defendant does not challenge on appeal his convictions for PSP.

⁴ The court sentenced defendant McCollum to 22 months on the PSP charges, concurrent. The court sentenced both defendants to one year on the misdemeanor assaults charges, concurrent to the 75 months.

On September 22, 2006, shortly before 11:00 p.m., Vecete Lemus⁵, Felipe Zuniga, and Ciro Castillo were parked in a car at the AM/PM convenience store located at 8247 Pacific Avenue, in Tacoma. 2CP 11-16 (FOF III(1)). Vcete, the owner of the car, was seated in the driver's seat; Castillo in the front passenger seat; and Felipe in the rear seat. RP 158. While seated in the driver's seat, Vcete spoke with Raechal Evans, a prostitute, who approached the car and inquired about purchasing acts of sex. 2CP 11-16 (FOF III(3)). No agreement was reached and Evans left the area. 2CP 11-16 (FOF III(4)). Evans phoned defendant McCollum, who was hanging around near the AM/PM with defendant Cross. Id.; RP 470. Shortly after the phone call, both defendants approached Vcete's car and jumped into the back seat. 2CP 11-16 (FOF III(5)). Prior to this event, neither the defendants nor the victims knew each other. 2CP 11-16 (FOF III(6)). Both defendants were acting in a threatening and aggressive manner when they got into the car. 2CP 11-16 (FOF III(7)); RP 221, 227-28. Defendant McCollum was talking low and showing Felipe what appeared to be a weapon. 2CP 11-16 (FOF III(7)); RP 227-28. Defendant

⁵ The victim's name is misspelled in the Findings as "Vicente Lumus". The correct spelling is Vcete Lemus.

Cross appeared agitated. 2CP 11-16 (FOF III(7)); RP 221. Once in the car, defendant McCollum told Vcete to either “start the car” or “drive away”, which caused Vcete to reasonably fear that harm may come to him or his passengers.⁶ 2CP 11-16 (FOF III(8)); RP 161-62. This fear induced Vcete to get out of the car, and Vcete told his friends to do the same. 2CP 11-16 (FOF III(9), (10)); RP 161-62. Once everyone got out, the defendants drove off in the vehicle. 2CP 11-16 (FOF III(11)); RP 165. Vcete immediately called 911 from the AM/PM. RP 166. While waiting for police, Felipe told Vcete that the defendants had “something” with them. RP 172, 182. Police arrived and took a report. Shortly thereafter, the defendants were arrested outside of a nearby fast-food restaurant. 2CP 11-16 (FOF III(13)). Vcete and Felipe were transported to the scene of the arrest and both positively identified the defendants as the men who had stolen the vehicle. RP 339.

⁶ There was a significant language barrier that prevented the victims from understanding a lot of what the defendants were saying and/or demanding.

C. ARGUMENT.

1. THE STATE CONCEDES THAT DEFENDANT CROSS'S MISDEMEANOR JUDGMENT IS INCORRECT AND THAT REMAND IS APPROPRIATE FOR CORRECTION OF THE JUDGMENT.

Defendant asks this court to remand this case for resentencing because the court did not specify the length of defendant's misdemeanor probationary term, and did not acknowledge his credit for time served on that charge. The State agrees that the judgment is incorrect and that this case should be remanded for entry of a corrected judgment.

- a. Probationary Term

RCW 3.66.067 governs the imposition of sentences in misdemeanor cases. The statute provides, in pertinent part:

After a conviction, the court may impose sentence by suspending all or a portion of the defendant's sentence or by deferring the sentence of the defendant and may place the defendant on probation for a period of no longer than two years and prescribe the conditions thereof . . .

RCW 3.66.067. According to the plain language of the statute, a prerequisite to imposing probation time is the suspension or deferment of jail time. In this case, the court did not suspend or defer *any* jail time on the misdemeanor. Rather, the court imposed the maximum 365 days. Because there was no jail time suspended and no conditions imposed, there is no probation. The court erred when it filled out a "Conditions on

Suspended Sentence” because there was no suspended sentence in this case. The judgment and sentence is also wrong because it incorrectly refers to a “suspended” sentence. The sentencing documents that were filed on the assault charge are wholly inconsistent with the court’s actual sentence. The State has no objection to remanding this case for correction of the judgment and sentence. On remand, the court should vacate the “Conditions on Suspended Sentence” and enter a corrected judgment that accurately reflects that the sentence is *not* a suspended sentence and that there are *no* conditions on suspended sentence and no probationary period.

b. Credit for Time Served

The State also agrees that the defendant is entitled to have his misdemeanor judgment reflect that he has 202 days credit for time served. The court here imposed a *concurrent* sentence on his felony and misdemeanor. The felony judgment accurately reflects that defendant is entitled to 202 days credit, but the misdemeanor judgment does not reflect credit. On remand, the court should indicate that petitioner is entitled to 202 days credit on the misdemeanor charge as well. While defendant suffers no prejudice currently from the court’s failure to acknowledge credit on the misdemeanor, he would if the robbery conviction was ever vacated. As a result, the misdemeanor judgment should also reflect the credit for time served.

2. THE STATE PRESENTED SUFFICIENT EVIDENCE TO ESTABLISH THAT DEFENDANT MCCOLLUM COMMITTED THE CRIME OF ROBBERY IN THE SECOND DEGREE.

Defendant McCollum claims that the State failed to prove that he took Vcete's vehicle "by the use or threatened use of immediate force, violence or fear of injury."⁷

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. State v. McCullum, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); see also Seattle v. Gellein, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); State v. Mabry, 51 Wn. App. 24, 25, 751 P.2d 882 (1988). The applicable standard of review is, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime charged beyond a reasonable doubt. State v. Joy, 121 Wn.2d 333, 338,

⁷ Specifically, appellant challenges the court's findings of fact nos. 7, 8, and 12, which provide as follows:

(7) The defendants were acting in a threatening and aggressive manner when they got into Vicente Lumus's car; defendant McCullom was talking low and showing what appeared to be a weapon and defendant Cross was acting agitated.

(8) Once in the car, defendant McCullom immediately told Vicente Lumus to drive off, which caused Vicente Lumus to reasonably fear that harm may come to him or his passengers;

(12) Although the defendants' acts in taking the car were forceful, threatening and against the will of Vicente Lumus and his passengers, the State did not prove that either defendant possessed a gun or knife during the incident.

851 P.2d 654 (1993); State v. Green, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980). Also, a challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. State v. Barrington, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), review denied, 111 Wn.2d 1033 (1988) (citing State v. Holbrook, 66 Wn.2d 278, 401 P.2d 971 (1965)). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. State v. Anderson, 72 Wn. App. 453, 458, 864 P.2d 1001, review denied, 124 Wn.2d 1013 (1994).

Following a bench trial, an appellate court determines whether substantial evidence supports the trial court's findings of fact and whether the findings support the conclusions of law. State v. Stevenson, 128 Wn. App. 179, 193, 114 P.3d 699 (2005). Substantial evidence is "evidence sufficient to persuade a fair-minded, rational person of the finding's truth." Stevenson, 128 Wn. App. at 193. Where the findings of fact and conclusions of law are supported by substantial but disputed evidence, a reviewing court will not disturb the trial court's ruling. State v. Aase, 121 Wn. App. 558, 564, 89 P.3d 721 (2004).

A reviewing court accords a trial court's factual findings great deference because it alone has had the opportunity to view the witness's demeanor and to judge veracity. State v. Cord, 103 Wn.2d 361, 367, 693 P.2d 81 (1985). It is the fact finder whose role is to resolve conflicting testimony, evaluate the credibility of witnesses, and weigh the

persuasiveness of the evidence. State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992). Therefore, when the State has produced evidence of all elements of a crime, the decision of the trier of fact should be upheld.

A person commits robbery in the second degree if he commits “robbery”, as defined below:

[H]e unlawfully takes personal property from the person of another or in his presence against his will by the use or threatened use of immediate force, violence, or fear of injury to that person or his property or the person or property of anyone. Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking; in either of which cases the degree of force is immaterial. Such taking constitutes robbery whenever it appears that, although the taking was fully completed without the knowledge of the person from whom taken, such knowledge was prevented by the use of force or fear.

RCW 9A.56.190, .210. An overt threat is not needed to support a robbery conviction. State v. Collinworth, 90 Wn. App. 546, 966 P.2d 905 (1997), review denied, 135 Wn.2d 1002, 959 P.2d 127 (1998). Threats can be implied from the defendant’s actions and statements in the context of the situation. Id. at 553-54. “Any force or threat, no matter how slight, which induces an owner to part with his property is sufficient to sustain a robbery conviction.” State v. Handburgh, 119 Wn.2d 284, 293, 830 P.2d 641 (1992)(citing State v. Ammlung, 31 Wn. App. 696, 704, 644 P.2d 717 (1982)(citing State v. Redmond, 122 Wash. 392, 210 P. 772 (1922)).

In Collinsworth, the court was asked to determine the evidence necessary to establish robbery when the defendant does not utilize overt physical or verbal threats or display a weapon. Collinsworth, 90 Wn. App. at 551-52. The court cited the long-standing rule that if the taking of property is attended with “such threatening by menace, word, or gesture as in common experience is likely to create an apprehension of danger and induce a man to part with property for the safety of his person, it is robbery.” Id. at 551 (citing State v. Redmond, 122 Wash. 392, 393, 210 P. 772 (1922)). In Collinsworth, the defendant had made a clear, concise and unequivocal demand for money, and either reiterated the demand or underscored the seriousness of his intent by telling the teller not to include “bait” money or “dye packs.” Collinsworth, 90 Wn. App. 553. The court concluded: “No matter how calmly expressed, an unequivocal demand for the immediate surrender of the bank’s money, unsupported by even the pretext of any lawful entitlement to the funds, is fraught with the implicit threat to use force.” Collinsworth, 90 Wn. App. at 553 (citing United States v. Henson, 945 F.2d 430, 439-40 (1st Cir. 1991)); see also Ammlung, 31 Wn. App. at 704 (court determined that the female robber’s act of blocking the victim’s path to the vehicle at the time her keys were taken was sufficient threat of force to support defendant’s conviction).

Here, the evidence presented at trial established that on September 22, 2006, in the late evening, victims Vcete, Ciro, and Felipe were parked outside the AM/PM when defendants McCollum and Cross jumped into

their vehicle through the rear doors.⁸ RP 159, 214-218. Vcete and Felipe had never seen the defendants before and had not invited the defendants into the vehicle. RP 159. Defendant McCollum began speaking in a very low tone, while defendant Cross was talking in a very aggressive manner. RP 221. The defendants made several statements and/or demands, but due to a severe language barrier, Vcete and Felipe were unable to understand the majority of what was said. RP 162, 175. Vcete was able to understand that one of the defendants ordered him to start his car or move his car. RP 162. The defendant's behavior frightened Vcete so he exited the vehicle and told his passengers to do the same. RP 165, 197. After they exited, Felipe appeared very scared and told Vcete that the defendants had "something" with them. RP 169, 172. Felipe testified at trial that McCollum acted as if he had some kind of weapon, but Felipe was not sure what kind. RP 228. Once the victims were out of the car, defendant Cross jumped into the driver's seat and immediately drove off in the vehicle. This evidence, taken in a light most favorable to the State, establishes that the defendants' manner, appearance and tone of voice were threatening. Two victims expressed fear and Vcete testified that this fear induced him to give up his vehicle. RP 169, 172. Viewed in the light

⁸ Vcete was in the driver's seat, Ciro in the passenger seat, and Felipe in the rear seat. RP 158.

most favorable to the State, there was sufficient evidence to support the element of force and/or fear and to support the findings of fact that defendant now challenges.

D. CONCLUSION.

For the foregoing reasons, the State respectfully requests this court affirm both defendants' convictions, but remand defendant Cross's case for entry of a corrected misdemeanor judgment.

DATED: November 5, 2007.

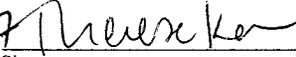
GERALD A. HORNE
Pierce County
Prosecuting Attorney

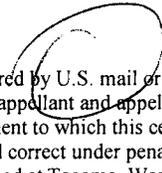


ALICIA BURTON
Deputy Prosecuting Attorney
WSB # 29285

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

11.5.07 
Date Signature


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