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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY _____
DEPUTY

No. 37591-5-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

COREY JEROME IRISH,

Appellant.

On Appeal from the Pierce County Superior Court
Cause No. 07-1-02193-2
The Honorable Kitty-Ann Van Doorninck, Judge

OPENING BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

A. Assignments of Error

1. The trial court erred when it failed to vacate Appellant's unlawful possession of a controlled substance conviction.

2. The State failed to present sufficient evidence to prove that Appellant was an accomplice to the specific crime of second degree assault with a deadly weapon against two Walgreens store employees.

3. The trial court exceeded its statutory sentencing authority when it imposed a term of confinement that exceeds Appellant's standard range for his unlawful possession of a firearm conviction.

B. Issues Pertaining to the Assignments of Error

1. Where Appellant's robbery conviction and possession of a controlled substance conviction arose from the same act, and where the robbery involved the taking of the controlled substance, did the trial court err when it allowed judgment to be entered for both convictions? (Assignment of Error 1)

2. Where the evidence showed that Appellant separated from a second suspect before any crimes were committed, did the State present sufficient evidence to prove beyond a

reasonable doubt that Appellant knowingly aided or encouraged the commission of the specific crime of second degree assault with a deadly weapon against two Walgreens store employees? (Assignment of Error 2)

3. Did the trial court exceed its statutory sentencing authority when it imposed a sentence for Appellant's unlawful possession of a firearm conviction that was above Appellant's standard range for that conviction? (Assignment of Error 3)

II. STATEMENT OF THE CASE

A. Substantive Facts

In April of 2007, Jeanelle O'Dell and Walter Staten worked at a Walgreens store on Sixth Avenue in Tacoma. (TRP 26-27, 79)[1] Daniel Garibay worked as a pharmacist at the same store. (TRP 96) In the early morning hours of April 23, 2007, two men entered the store together, and immediately separated. (TRP 81; Exh. 1) One man, later identified as Corey Irish, walked towards the pharmacy. (TRP 81, 172-73; Exh. 1)

The second man, who was never identified, approached

[1] Citations to the transcripts containing the trial proceedings will be to "TRP," and citations to the transcript containing the sentencing hearing will be to "SRP."

Staten as he stocked shelves in the front part of the store. (TRP 81) He showed Staten a gun, and told him not to panic. (TRP 81) He asked Staten where the other employees were. (TRP 81) Staten replied that O'Dell was in the stockroom, and the man told Staten to take him to her. (TRP 81) As they walked towards the stockroom, they encountered O'Dell. (TRP 28-29, 82)

O'Dell testified that the man showed her his gun, apologized, and told O'Dell and Staten to go into the stockroom. (TRP 29) Once in the stockroom, the man apologized again, and told O'Dell and Staten to kneel down, keep their heads down and stay quiet. (TRP 31, 83)

At the same time, Garibay was working in the pharmacy when he heard a loud thump. (TRP 98) He turned and saw that Irish had jumped over the counter into the enclosed pharmacy area. (TRP 98) Irish moved toward Garibay, and ordered him to open the cabinets and give him certain specific prescription pills. (TRP 99) Garibay complied because he was frightened. (TRP 99-100, 106) He did not see that Irish had a gun in his hand. (TRP 106, 155; Exh. 1) Garabay and Irish filled three garbage bags with various pills. (TRP 100-02) While this was going on, Garibay pressed a silent alarm button hidden inside one of the cabinets. (TRP 105-06)

O'Dell and Staten stayed in the stockroom with the second man for about ten minutes, then the man told them to walk to the pharmacy. (TRP 32, 83) O'Dell saw Irish behind the counter in the pharmacy area. (TRP 32-33) The second man asked Irish if he was finished yet, and Irish answered "I'll be done in a minute." (TRP 32) The second man then escorted O'Dell and Staten back to the stockroom. (TRP 34, 84) A few minutes later, Irish escorted Garibay to the stockroom. (TRP 35, 85, 86-87) The second man told all three employees to sit with their heads down, and to stay in the stockroom for ten minutes. (TRP 35) Shortly after, the employees heard the sounds of a scuffle, and then police officers entered the stockroom. (TRP 36, 85-86)

Tacoma Police were alerted to the incident by the silent alarm, and several units immediately responded to the store. (TRP 40, 61, 111-13) As the officers approached the front door, they saw Irish exit, carrying several plastic garbage bags over his shoulder. (TRP 43-44, 63, 115) The officers ordered Irish to show his hands, and Irish immediately dropped the bags and ran back into the store. (TRP 44, 64, 116)

The officers followed and, after a brief chase, took Irish into custody. (TRP 45-46, 116-17) The officers located a firearm on a

shelf next to where they caught Irish. (TRP 51, 125) The officers did not locate or identify the second man. (TRP 50, 120)

B. Procedural History

The State charged Irish by Amended Information with one count of first degree robbery (RCW 9A.56.190, .200); three counts of second degree assault (RCW 9A.36.021); one count of attempted unlawful possession of a controlled substance with intent to deliver (RCW 69.50.401, .407); and one count of first degree unlawful possession of a firearm (UPFA) (RCW 9.41.010). (CP 68-71) The State also alleged that Irish was armed with a firearm during the commission of the crimes (excluding UPFA). (CP 68-71)

At the close of the evidentiary portion of trial, Irish objected to the jury being instructed on accomplice liability for the assaults against O'Dell and Staten, arguing that the evidence did not establish that Irish knowingly agreed with the second man to commit assault with a deadly weapon against those two individuals. The trial court disagreed. (TRP 132, 146-47)

The jury convicted Irish on all counts, and entered five special verdicts finding that Irish was armed with a firearm. (TRP 184-86; CP 168-78) Irish subsequently moved to arrest judgment on the O'Dell and Staten assault convictions and the attempted

unlawful possession of a controlled substance with intent to deliver. (SRP 4-7) The trial court denied the motion as to the assault convictions. (SRP 5) The trial court agreed that the State did not establish a substantial step towards the delivery of a controlled substance, and reduced that charge to simple unlawful possession of a controlled substance (UPCS). (SCP 12)

The State and the trial court agreed that the Garibay assault conviction merged with the robbery conviction. (SRP 6) But the court disagreed with Irish's contention that the new UPCS conviction also merged with the robbery conviction. (SRP 17)

The trial court sentenced Irish to serve concurrent maximum terms on all counts, followed by four consecutive firearm enhancements, for a term of confinement totaling 321 months. (SRP 34; CP 210, 215) This appeal timely follows. (CP 224)

III. ARGUMENT & AUTHORITIES

A. Irish's unlawful possession of a controlled substance conviction must be vacated because a defendant cannot be convicted of both the taking of property and the possession of the same property.

The trial court entered judgment against Irish for both robbery and unlawful possession of a controlled substance. (CP 209) But convictions for both the taking and the possessing of a

controlled substance is improper in this case.

In *State v. Hancock,* the defendant worked with an accomplice to steal cases of cheese from a local government agency. 44 Wn. App. 297, 299, 721 P.2d 1006 (1986). He was convicted of first degree theft and first degree possession of stolen property. 44 Wn. App. at 300. On appeal, Hancock argued that the trial court should have dismissed the possession charge. 44 Wn. App. at 300. The court reversed the possession conviction, holding that "one cannot be both the principal thief and the receiver of stolen goods." 44 Wn. App. at 301. """And this is so for the commonsensical, if not obvious, reason that a man who takes property does not at the same time give himself the property he has taken."""" 44 Wn. App. at 301 (quoting *State v. Flint*, 4 Wn. App. 545, 547, 483 P.2d 170 (1971) (quoting *Milanovich v. United States,* 365 U.S. 551, 558, 5 L. Ed. 2d 773, 81 S. Ct. 728 (1961) (Frankfurter, J., dissenting))).

In *State v. Melick*, the defendant was charged with and convicted of two crimes: taking a motor vehicle and possession of stolen property (the motor vehicle). 131 Wn. App. 835, 838, 129 P.3d 816 (2006). Both convictions arose out of the same act. 131 Wn. App. at 838. On appeal, the court applied the *Hancock* rule,

and found that both convictions could not stand. 131 Wn. App. at 840-841 (citing *Hancock*, 44 Wn. App. at 301). The *Melick* court noted that "when the evidence does not support a possession separate in time or by actor from the original theft, only the theft conviction may stand." 131 Wn. App. at 843.[2]

This rule has also been applied in the bank robbery context. See *United States v. Gaddis*, 424 U.S. 544, 547, 96 S. Ct. 1023, 47 L. Ed. 2d 222 (1976), wherein the Court held that a person convicted of robbing a bank cannot also be convicted of receiving or possessing the proceeds of that robbery.

In this case, in order to convict Irish of first degree robbery, the State had to prove that Irish took property from Walgreens. RCW 9A.56.190. The State established that the property taken was a controlled substance. (TRP 63, 67, 100-02) Irish was apprehended before he left the Walgreens property. (TRP 43-44, 46, 63-64, 67, 115-17) There was no possession "separate in time or by actor from the original" taking, and only the robbery conviction

[2] The court noted that the State may charge both theft or robbery and possession arising out of the same act, but that the jury must be instructed that if it finds that the defendant committed the taking crime, it must stop and not reach the possession charge. Only if the fact finder does not find sufficient evidence of the taking can it go on to consider the possession charge. *Melick*, 131 Wn. App. at 841. If the jury is not properly instructed, as in this case, then the remedy is to vacate the possession charge. *Melick*, 131 Wn. App. at 842, 844.

may stand. *Melick*, 131 Wn. App. at 843.

"When the defendant is convicted of both taking and possession, the proper remedy is to dismiss the possession charge[.]" *Melick*, 131 Wn. App. at 842. Accordingly, Irish's conviction for UPCS, and his consequent firearm enhancement, should be vacated. *Melick*, 131 Wn. App. at 844.

B. The State failed to present sufficient evidence to prove that Irish was an accomplice to the specific crimes of second degree assault with a deadly weapon.

"Due process requires that the State provide sufficient evidence to prove each element of its criminal case beyond a reasonable doubt." *City of Tacoma v. Luvene*, 118 Wn.2d 826, 849, 827 P.2d 1374 (1992) (citing *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)). Evidence is sufficient to support a conviction only if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Salinas*, 119 Wn.2d at 201.

The State alleged that Irish acted as an accomplice to the second degree assaults of O'Dell and Staten. (CP 68-69, 125, 135, 141; TRP 177-78) For accomplice liability to attach, the defendant must not merely aid in any crime, but must knowingly aid in the commission of the specific crime charged. *State v. Roberts*, 142 Wn.2d 471, 509-13, 14 P.3d 713 (2000); *State v. Cronin*, 142 Wn.2d 568, 578-80, 14 P.3d 752 (2000).

Accordingly, the State was required to prove that Irish knowingly aided, solicited, commanded, encouraged, or requested that the second man commit second degree assault against O'Dell and Staten. RCW 9A.08.020(3). As charged and instructed in this case, a person commits second degree assault when he assaults another person with a deadly weapon. RCW 9A.36.021(1)(c). (CP 68-69, 125, 135, 141)

The State's evidence showed that Irish and the second man entered the store together, then immediately separated. (Exh. 1; TRP 172-73) There is no evidence to prove that Irish knew that the second man intended to commit an assault or that the second man was armed. There are no facts in the record to prove that Irish knew that the second man would do anything more than distract or detain the Walgreens employees. The State therefore failed to

prove that Irish acted as an accomplice to the two crimes of second degree assault, and these convictions must be reversed.

C. The trial court exceeded its statutory sentencing authority when it imposed a term of confinement that exceeds Irish's standard range for his unlawful possession of a firearm conviction.

A trial court only possesses the power to impose sentences provided by law. *In re Pers. Restraint of Carle*, 93 Wn.2d 31, 33, 604 P.2d 1293 (1980). A trial court must impose a sentence within an offender's standard range. RCW 9.94A.505(2)(a)(i).

The offender score for Irish's unlawful possession of a firearm conviction is eight points, and his standard range is therefore 77-102 months. RCW 9.94A.510, .515, .525. (SRP 21-22; CP 210) But the Judgment & Sentence lists the standard range as 87-116 months, and the trial court imposed a sentence of 116 months for this conviction. (CP 210, 215) The trial court therefore exceeded its statutory authority when it imposed its sentence for this conviction. The sentence for this conviction is void and must be corrected. *See State v. Loux*, 69 Wn.2d 855, 857, 420 P.2d 693 (1966) (citing *Williams v. McCauley*, 7 Wn.2d 1, 7, 108 P.2d 822 (1940))

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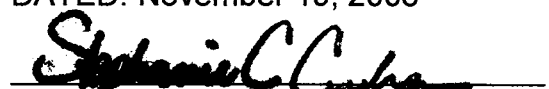
IV. CONCLUSION

Irish's convictions for both the taking and the possession of the controlled substances cannot stand, and his unlawful possession of a controlled substance and firearm enhancement must be vacated. The State failed to prove that Irish knowingly aided or encouraged the deadly weapon assaults against O'Dell and Staten, and those two convictions and firearm enhancements must also be reversed and dismissed. Finally, the sentence imposed for Irish's unlawful possession of a firearm must be corrected so that it does not exceed his standard range for that offense. This case should be remanded for reversal and dismissal of the challenged convictions, and for resentencing.

DATED: November 19, 2008



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CERTIFICATE OF MAILING

I certify that on 11/19/2008, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: (1) Kathleen Proctor, DPA, Prosecuting Attorney's Office, 930 Tacoma Ave. S., Rm. 946, Tacoma, WA 98402; and (2) Corey J. Irish, DOC#778787, Washington State Penitentiary, 1313 N 13th Ave., Walla Walla, WA 99362.

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