

No. 48229-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

JAMEZ E. BROWN

Appellant.

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

The Honorable Erik Price, Judge
Cause No. 15-1-00292-2

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR..... 1

B. STATEMENT OF THE CASE 1

C. ARGUMENT 1

 1. The jury instruction included an uncharged means of committing the crime of robbery in the first degree..... 1

 2. The trial court imposed a sentence that exceeded that statutory maximum for the crime of assault in the third degree..... 3

D. CONCLUSION..... 4

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

State v. Boyd,
174 Wn.2d 470, 472, 275 P.3d 321 (2012) 4

In re Brockie,
178 Wn.2d 532, 536, 309 P.3d 498 (2013) 1

State v. Brown,
147 Wn.2d 330, 342, 58 P.3d 889 (2002) 3

Decisions Of The Court Of Appeals

State v. Chino,
117 Wn. App. 531, 540, 72 P.3d 256 (2003)..... 1

In re Sentences of Jones,
129 Wn. App. 626, 627-28, 120 P.3d 84 (2005)..... 4

State v. Severns,
13 Wn.2d 542, 548, 125 P.2d 659 (1942) 1

State v. Winborne,
167 Wn. App. 320, 330, 273 P.3d 454 (2012)..... 4

Statutes and Rules

RCW 9.94A.701(9)..... 4

RCW 9A.20.021(1)(c)..... 3

RCW 9A.36.031(1)(g) 3

RCW 9A.36.031(2)..... 3

A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether the jury instruction for robbery in the first degree included an uncharged alternative.
2. Whether the trial court imposed a sentence that exceeded the statutory maximum for assault in the third degree.

B. STATEMENT OF THE CASE.

The State accepts the appellant's statement of the procedural and substantive facts.

C. ARGUMENT.

1. The jury instruction included an uncharged means of committing the crime of robbery in the first degree.

Defendants must be informed of the charges against them, including the manner of committing the crime. In re Brockie, 178 Wn.2d 532, 536, 309 P.3d 498 (2013). Where the information alleges solely one statutory alternative means of committing a crime, it is error for the trial court to instruct the jury on uncharged alternatives, regardless of the strength of the trial evidence. State v. Chino, 117 Wn. App. 531, 540, 72 P.3d 256 (2003); State v. Severns, 13 Wn.2d 542, 548, 125 P.2d 659 (1942).

In the present case, Brown was charged by a third amended information with, among other charges, one count of robbery in the first degree:

In that the defendant, JAMEZ EDWARD BROWN in the State of Washington, on or about February 24, 2015, did unlawfully take personal property from a person, against such person's will, by use or threatened use of immediate force, violence, or fear of injury to such person or their property, or the property of another, with the intent to commit theft of the property, and such force or fear having been used to obtain or retain such property or to prevent or overcome resistance to the taking, and in the commission of or immediate flight therefrom the accused displayed what appeared to be a firearm or other deadly weapon.

CP 45.

The third amended information included only one statutory means of committing robbery in the first degree. However, the trial court instructed the jury on two alternative means of committing robbery in the first degree. In the definitional instruction of robbery, the court instructed the jury:

A person commits the crime of robbery when he or she unlawfully and with intent to commit theft thereof takes personal property from the person or *in the presence of another* against that person's will by the use or threatened use of immediate force, violence, or fear of injury to that person or the person or property of anyone...

Court's Instruction No. 10; CP 102, emphasis added.

Further, the court gave an improper to-convict instruction when it included two alternative means for robbery, "That on or about February 24, 2015, the defendant unlawfully took personal

property from the person or in the presence of another[.]” Court’s Instruction No. 15; CP 107. The court’s instructions included alternative means for committing the crime uncharged in the third amended information. Thus, it was error for the court to include the alternative means.

Where the jury is instructed on an element that is not charged, the proper remedy is to reverse and remand for a new trial. State v. Brown, 147 Wn.2d 330, 342, 58 P.3d 889 (2002). Thus, this charge should be reversed and remanded for a new trial.

2. The trial court imposed a sentence that exceeded that statutory maximum for the crime of assault in the third degree.

Brown was found guilty on August 28, 2015, on one count of assault in the third degree under RCW 9A.36.031(1)(g). CP 126. Assault in the third degree is a Class C felony, RCW 9A.36.031(2), and the statutory maximum sentence for this crime is five years (60 months). RCW 9A.20.021(1)(c). The trial court sentenced Brown to 60 months for the assault which would run concurrently with his longer sentence for the robbery charge. CP 140. However, the trial court also ordered 12 months of community custody on the assault charge. CP 141. Thus, Brown was sentenced to a total of 72 months.

Pursuant to RCW 9.94A.701(9), a term of community custody must be reduced by the court whenever an offender's standard range term of confinement "in combination with the term of community custody exceeds the statutory maximum for the crime[.]" State v. Boyd, 174 Wn.2d 470, 472, 275 P.3d 321 (2012). "A court commits reversible error when it exceeds its sentencing authority under the SRA." State v. Winborne, 167 Wn. App. 320, 330, 273 P.3d 454 (2012).

The appropriate remedy when a court exceeds its sentencing authority is to remand for resentencing or amend the community custody term. Boyd, 174 Wn.2d at 473; Winborne, 167 Wn. App. at 330; In re Sentences of Jones, 129 Wn. App. 626, 627-28, 120 P.3d 84 (2005).

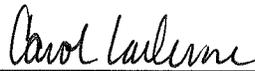
In this case, Brown's sentence for the assault exceeded the statutory maximum sentence of 60 months. This case should be remanded to either amend the community custody term or to resentence on the conviction of assault in the third degree.

D. CONCLUSION.

The trial court included an uncharged alternative for robbery in the first degree. The proper remedy is to reverse and remand for new trial on this count.

The trial court imposed a sentence that exceeded the statutory maximum for assault in the third degree. This sentence should be remanded to the trial court to either amend the community custody term or resentence on the assault conviction.

Respectfully submitted this 26th day of July, 2016.



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CERTIFICATE OF SERVICE

I certify that I served a copy of Brief of Respondent on the date below as follows:

Electronically filed at Division II

TO: DAVID C. PONZOHA, CLERK
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I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 26th day of July, 2016, at Olympia, Washington.



CYNTHIA WRIGHT, PARALEGAL

THURSTON COUNTY PROSECUTOR

July 26, 2016 - 2:19 PM

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