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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

Case No. 94712-1

On review from:

Court of Appeals No. 34032-5-III

STATE OF WASHINGTON, Respondent,

v.

EDWARD LEON NELSON, Petitioner.

SUPPLEMENTAL BRIEF OF PETITIONER

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I. INTRODUCTION

Edward Nelson threatened to shoot a pharmacy tech and demanded narcotics while armed with a gun. The pharmacy tech had no physical or legal access to the drugs he asked for, and directed him to the pharmacist. Nelson renewed his demand for the drugs to the pharmacist but did not repeat the threat or display the gun, and the pharmacist was unaware he had it. The State charged Nelson with attempted first degree robbery based upon his actions toward both the pharmacist and the pharmacy tech. At trial, the court dismissed the charge as to the pharmacist because he did not see the firearm. As to the pharmacy tech, Nelson contended that she lacked a sufficient representative interest in the medications to support an attempted robbery charge under *State v. Richie*, 191 Wn. App. 916, 365 P.3d 770 (2015) and requested corresponding instructions. The trial court denied the instructions, concluding that the pharmacy tech had a sufficient interest as a matter of law. The Court of Appeals concluded the failure to give the *Richie* instructions was error, but held it was harmless because to prove the attempt, the State was only required to show a substantial step toward the commission of the crime and Nelson's actions toward the pharmacy tech constituted a substantial step. This Court granted review of the *Richie* instruction issue, presented in the petition as “[w]hether the trial

court's 'to convict' instruction harmfully eliminated an essential element of the charge, relieving the State of its burden of proof."

II. ASSIGNMENTS OF ERROR

1. The Court of Appeals erred in holding that the trial court's refusal to instruct the jury on the requirements of a victim's possessory or representative interest in the subject property was harmless, when the refusal prevented Nelson from arguing in his defense that his actions toward the pharmacy tech did not constitute an attempted robbery.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Is *Richie* correctly decided?
2. Is the question of a pharmacy tech's representative interest in controlled substances to which she has no access an essential element of a charge of attempted robbery of those substances when the State includes the elements of the completed crime in the "to convict" instruction?
3. Does doctrine of factual impossibility eliminate any harm from the failure to accurately inform the jury of all the essential elements of the completed crime?

4. Did the deficient “to convict” instruction harmfully prevent the defendant from arguing he was not guilty of attempted first degree robbery?

IV. STATEMENT OF THE CASE

One afternoon in August, a middle-aged African American man came into Rite-Aid and approached the pharmacy counter. III RP 48, 54. A pharmacy tech approached and asked if he needed help. The man held up a piece of paper with some writing on it, and gestured towards a gun in his other hand. III RP 50. He told her, “[Y]ou’re going to get this for me or I’m going to shoot you in ten seconds.” III RP 52.

The pharmacy tech had no access to the medications he wanted and told the man so, saying she would have to get the pharmacist. III RP 52. The pharmacy’s controlled substances are stored in a locked location and only the pharmacist has access; not even the store manager can obtain them. V RP 335.

The pharmacist was on the phone when the pharmacy tech approached, persistently trying to get his attention. III RP 77. The man asked the pharmacist why he couldn’t get Oxy 30’s and the pharmacist said he was all out and would have to double check. III RP 78. Assuming the man was trying to pass a false prescription, he asked the man if he

needed any other help, and the man said, “[Y]ou can give me all your money.” III RP 79. Realizing that the man was not proposing an ordinary transaction, the pharmacist told him he had to call the manager to access the cash. III RP 79-80. As he picked up the phone to call, the man turned and left the store. III RP 81. The pharmacist did not see the gun at any point and only learned later that one had been displayed. III RP 81, 97.

Police later identified Nelson as the perpetrator and charged him with attempted first degree robbery. III RP 54, 84, 291, 299-300; CP 31. The information alleged that on the date in question, with intent to commit the crime of first degree robbery and theft, he took a substantial step towards unlawfully taking the property of another, from the person or in the presence of the pharmacy tech and the pharmacist, “a person or persons who had ownership, representative, or possessory interest in the property.” CP 31.

Before the close of evidence, *sua sponte*, the trial court advised the parties that based on a discussion with the pattern jury instructions committee, it intended to instruct the jury only that it had to find the pharmacy tech was an employee of the owner of the drugs, not that she had the requisite possessory or representative interest in it. IV RP 343-44. At the close of the State’s case, Nelson moved to dismiss the attempted

robbery charge, arguing that (1) no threat of force was directed to the pharmacist, who did not see the gun; and (2) the pharmacy tech, who was threatened, did not have the requisite possessory or representative interest in the narcotics. V RP 401-02. The State contended that because Nelson had been charged with an attempt crime, the threat toward the pharmacy tech was sufficient even though she could not access the drugs, because “legal and factual impossibility is not a defense.” V RP 404.

The court concluded that the pharmacy tech’s status as an employee of Rite-Aid was sufficient as a matter of law to establish the requisite relationship under *Richie*. V RP 405. Agreeing that there was only sufficient evidence to show an attempted second degree burglary as to the pharmacist, the court advised it would strike his name from the instructions as a possible victim of attempted first degree robbery. V RP 406. But when the State requested that the court instruct the defense that it could not argue it was impossible for the pharmacy tech to turn over any drugs, the court agreed, stating that because the State only had to prove that she was an employee, it would be improper argument to say she did not have the requisite interest in the drugs under *Richie*. V RP 411.

Subsequently, Nelson proposed definitional and “to convict” instructions incorporating the terms of *Richie*. CP 42-45. The court

rejected his instructions and instead included in its definitional instruction an advisement that “[a] person with a representative interest includes an agent, employee, or other representative of the owner of the property.” VI RP 415-18, 421-24; CP 66. And the court’s “to convict” instruction included no language about establishing a sufficient representative interest in the property, but merely required the State to prove that the pharmacy tech was an employee. CP 67. The trial court also orally admonished Nelson’s attorney against arguing that the pharmacy tech lacked a sufficient possessory interest in the drugs, repeatedly stating that all the State had to prove was that the pharmacy tech was an employee of Rite-Aid. VI RP 421-22. Lastly, the trial court instructed the jury:

If the conduct in which a person engages otherwise constitutes an attempt to commit a crime, it is no defense to a prosecution of such attempt that the crime charged to have been attempted was, under the attendant circumstances, factually or legally impossible of commission.

CP 72.

The jury convicted Nelson of attempted first degree burglary. CP 84. As a result of the conviction and his prior history, the trial court sentenced Nelson as a persistent offender to life imprisonment without the possibility of parole. CP 151-53. He appealed and the Court of Appeals affirmed his conviction, holding that while it was error for the trial court

not to instruct the jury that the person threatened must have the requisite interest in the property, the error was harmless because his “armed threat to kill [the pharmacy tech] was a substantial step toward committing theft of the oxycodone.” *Opinion*, at 11 (Appendix A to Petition for Review). One judge concurred only in the result, denying that the instructional error concerned an essential element of the charge because the robbery was charged as an attempt. *Concurring Opinion* (Pennell, J., authoring), at 1.

Nelson timely petitioned for review by this Court of the question: Whether the trial court’s “to convict” instruction harmfully eliminated an essential element of the charge, relieving the State of its burden of proof. *Petition for Review*, at 2. By order dated November 8, 2017, this Court granted review as to the *Richie* instructional issue only.

V. ARGUMENT

At issue in this case is the State’s burden of proof in an attempted robbery case. Because the crime of robbery requires the State to prove that the person threatened had a sufficient relationship with the property, the jury ordinarily must be informed of that element and asked to decide whether the requisite relationship has been proven. In essence, the State contends that it may jettison this requirement under the impossibility doctrine when it charges only an attempt to commit a robbery. But

because the jury must be advised of the elements of the completed crime to properly assess the defendant's intent to commit it, the omission of the relationship element here was erroneous and harmful.

1. *Richie* correctly holds that a relationship between the property and the person threatened is an essential element of robbery that must be included in the jury instructions and should be ratified by this Court.

Division II of the Court of Appeals held in *Richie* that an ownership, representative, or possessory interest in the property is an essential element of first degree robbery that must be included in the “to convict” instruction. 191 Wn. App. at 919-20. In reaching this conclusion, the Court of Appeals observed that nonstatutory, implied elements of a charge may arise from common law and common understanding of the nature of a crime. *Id.* at 922. For example, the intent to commit theft is an implied element of first degree robbery, even though the statutory definition does not include it as an essential element. *Id.* With respect to the relationship to the property, the Court of Appeals reviewed the cases that considered the elements of robbery and found substantial support for inferring an unstated element.

First, in *State v. Hall*, 44 Wash. 142, 102 P. 888 (1909), the Supreme Court considered the sufficiency of an information charging the defendant with taking property belonging to the Spokane Merchant's Association from the immediate presence of a named victim. The information did not allege that the property was in the possession of the victim at the time. *Id.* at 143. Observing that no connection was alleged between the person robbed and the property taken, the *Hall* Court pronounced:

[T]o constitute the crime of robbery, the property must be taken from the person of the owner, or from his immediate presence, or from some person, or from the immediate presence of some person, having control and dominion over it.

Id. at 143-44. Noting that cases in California and Missouri reached similar results, the *Hall* Court held that the information was defective because “control and dominion over the property taken in the person from whom or from whose presence the property is actually taken are necessarily implied” in the robbery statute. *Id.* at 144. As such, the Court concluded that the information was deficient because the element was excluded. *Id.*

The Court of Appeals next considered the sufficiency of evidence to prove the implied element in *State v. Latham*, 35 Wn. App. 862, 670 P.2d 689 (1983). The *Latham* court, relying on *Hall*, reiterated:

A person must have an ownership interest in the property taken, or some representative capacity with respect to the owner of the property taken, or actual possession of the property taken, for the taking of the property to constitute a robbery.

Id. at 864-65. Reviewing cases from other jurisdictions, the *Latham* court evaluated the nature of the required interest, observing that even if the victim has no legally recognized claim to the property, such as a thief, so long as the victim has possession of the property at the time of the taking, a robbery has occurred. *Id.* at 865-66. In *Latham*, because the victim did not own the stolen car and was not in possession of it at the time of the taking, the defendants did not commit a robbery when they beat the victim unconscious and drove off in another person's car – although, presumably, their conduct did constitute other crimes that could have been charged. *Id.* at 863-64, 866.

Next, the Washington Supreme Court revisited the elements of robbery in considering the unit of prosecution in *State v. Tvedt*, 153 Wn.2d 705, 107 P.3d 728 (2005). There, the defendant went into a gas station, physically assaulted the owner and an employee who were present, and stole money and a truck belonging to the owner. Two days later, he went to another gas station, assaulted two managers, and stole money from the gas station and the manager's cell phone. *Id.* at 708-09. He was charged and convicted with four counts of first degree robbery. *Id.* at 709. On

appeal, the defendant contended that his actions at each gas station constituted a single course of conduct and that double jeopardy precluded his convictions for more than two counts of first degree robbery. The State argued that a separate conviction was allowed for each person placed in fear and from whom or in whose presence property was taken. *Id.* at 709.

Rejecting both approaches, the *Tvedt* Court observed that the crime of robbery has a dual nature as both a property crime and a crime against a person. *Id.* at 711. Thus, the Court disagreed with the defendant's argument that each course of conduct defined the unit of prosecution, because the legislature defined the offense to provide for a conviction for each forcible taking from a separate person. *Id.* at 713. But the Court also disagreed with the State's argument that each person threatened could support a separate robbery charge, noting that the person from whom the property is taken must have an ownership or representative interest in the property, or dominion and control over it. *Id.* at 714. Based on this reasoning, the *Tvedt* Court concluded:

Thus, in order for a robbery to occur, the person from whom or from whose presence the property is taken must have an ownership, representative, or possessory interest in the property . . . Accordingly, the unit of prosecution for robbery is each separate forcible taking of property from or from the presence of a person having an ownership,

representative, or possessory interest in the property,
against that person's will.

Id. at 714-15.

Accordingly, these authorities have consistently recognized the principle that robbery implicitly requires proof that the victim has some relationship to the property beyond proximity. This Court has never expressly held that the jury instructions must, therefore, include the victim's relationship to the property as an essential element of the charge. But the *Richie* court considered this acknowledgment of the nature of a robbery charge throughout the case law and appropriately concluded that such an instruction is required. As such, this court should ratify that conclusion and confirm that the victim's ownership, possessory, or representative interest in the property is an essential element that must be included in the "to convict" instruction.

The due process guarantees of the Fourteenth Amendment obligate the State to present proof of each and every element of a criminal charge beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L.Ed.2d 368 (1970). As a result, the trial court is constitutionally required to instruct the jury as to each element of the offence. *State v. Pawling*, 23 Wn. App. 226, 232, 597 P.2d 1367, review denied, 92 Wn.2d 1065 (1979) (citing *State v. Emmanuel*, 42 Wn.2d 799, 259 P.2d 845

(1953)). The “to convict” instruction “serves as a yardstick by which the jury measures the evidence to determine the defendant’s guilt or innocence,” and therefore must include all of the essential elements; this obligation is not alleviated by including the required element in a separate instruction. *Richie*, 191 Wn. App. at 927 (citing *State v. DeRyke*, 149 Wn.2d 906, 910, 73 P.3d 1000 (2003)). Instructions that relieve the State of its burden of proof violate due process because they permit the jury to convict without adequate evidence. *State v. Hanson*, 59 Wn. App. 651, 660, 800 P.2d 1124 (1990). If the State is relieved its burden to prove fewer than all of the essential elements, the error is presumed to be prejudicial unless it is affirmatively shown to be harmless. *State v. Smith*, 131 Wn.2d 258, 263-64, 930 P.2d 917 (1997).

Because Washington courts have repeatedly found the victim’s relationship to the property to be an implied element of the offense that the State is obligated to prove beyond a reasonable doubt, it necessarily follows that the jury must be instructed as to the element. For purposes of adequately informing the jury of the State’s burden of proof, there is no distinction between statutory elements and those that are implied. *See State v. Kjorsvik*, 117 Wn.2d 93, 97-98, 812 P.2d 86 (1991) (holding that non-statutory elements must be included in the charging document and holding that the implied essential element of “intent to steal” must be

included in an information charging robbery). In order for the State to be held to its full burden, the essential element of the victim's relationship to the property must be included in the "to convict" instruction or the jury will not know that the State is required to prove it. The *Richie* court thus correctly concluded that an instruction omitting this element is insufficient and relieves the State of its burden of proof of the crime. 191 Wn. App. at 928-29.

In the present case, the trial court's instructions omitted this essential element, requiring instead that the State only prove that the pharmacy tech was an employee of Rite-Aid. But the fact of an employee relationship does not itself establish that the employee has an ownership, possessory, or representative interest in the property taken. Indeed, *Richie* itself involved a Walgreen's employee, but there was disputed evidence as to whether she was on duty at the time of the incident. *Id.* at 929-30. Thus, *Richie* acknowledges that an employee's relationship to the employer's property may be limited depending on the scope of her authority at the time of the taking.

Here, the undisputed evidence presented at trial established that the pharmacy tech had no legal or physical access to the controlled substances

Nelson sought, and was not authorized to dispense them. As such, the case falls squarely within the formulation first posited in *Hall*:

[I]f A takes the property of B from the immediate presence of C, by force or putting in fear, A is not guilty of the crime of robbery unless C had control and dominion over B's property at the time of the taking.

54 Wash. at 144. The narcotics did not belong to the pharmacy tech, and she lacked dominion and control over them at the time Nelson tried to obtain them. As such, requiring the jury to find only that the pharmacy tech was an employee of Rite-Aid was inadequate to meet the State's burden of proof that she had a possessory or representative interest in the property.

Accordingly, this Court should hold the "to convict" instruction must include the victim's ownership, possessory, or representative interest in the property as an essential element of a robbery charge.

2. The doctrine of legal impossibility does not obviate the responsibility to correctly instruct the jury.

Because Nelson was unsuccessful in his effort to obtain the narcotics, the State charged him with attempted robbery rather than the completed crime. Accordingly, the State argued, and the Court of Appeals agreed, that because factual and legal impossibility are not defenses to an

attempt crime, it did not matter that the pharmacy tech did not have the requisite relationship to the narcotics that would be required for the completed crime. While this argument may be correct if the challenge brought concerned the sufficiency of the evidence, the impossibility doctrine does not relieve the trial court of its duty to correctly apprise the jury of the essential elements of the charge.

A criminal attempt occurs if, with intent to commit a specific crime, the defendant does any act which is a substantial step toward the commission of that crime. RCW 9A.28.020(1). Proving intent requires proving that the defendant had the specific intent to commit the crime in question. *State v. Luther*, 157 Wn.2d 63, 78, 134 P.3d 205 (2006). Moreover, a “substantial step” must be conduct that is strongly corroborative of the actor’s criminal purpose. *Id.* The substantial step must be more than mere preparation. *State v. Workman*, 90 Wn.2d 443, 449, 584 P.2d 382 (1978). “Where preparation ends and an attempt begins . . . always depends on the facts of the particular case.” *Id.* at 449-50 (citing *State v. Nicholson*, 77 Wn.2d 415, 463 P.2d 633 (1969)).

The attempt statute further states:

If the conduct in which a person engages otherwise constitutes an attempt to commit a crime, it is no defense to a prosecution of such attempt that the crime charged to

have been attempted was, under the attendant circumstances, factually or legally impossible of commission.

RCW 9A.28.020(2). Courts have repeatedly applied this statute to crimes in which the victim's status is an essential element of the completed charge, such as sex offenses against minors.

In *State v. Townsend*, 147 Wn.2d 666, 670-71, 57 P.3d 255 (2002), the defendant arranged a sexual liaison with an undercover detective whom he believed to be a 13-year-old girl and was arrested when he arrived at the prearranged meeting place at the prearranged time. There, the fact that the crime could not have been completed because the child victim did not exist did not preclude a conviction for attempted second degree rape. *Id.* at 679. Similarly, in *State v. Johnson*, 173 Wn.2d 895, 897-98, 173 Wn.2d 895 (2012), the defendant's conviction for attempted promotion of commercial sexual abuse of a minor was affirmed when he approached two undercover police officers in a mall, believing they were 17-year-old girls, and sought to teach them how to solicit sexual transactions and how much to charge. And in *Luther*, the defendant's conviction for attempting to possess depictions of minors engaged in sexually explicit conduct was upheld when there was no proof of the victims' ages, but the evidence plainly supported the trial court's finding

that the defendant was trying to obtain sexually explicit photographs of underage boys. 157 Wn.2d at 69-70, 73-74.

Collectively, these cases stand for the proposition that a defendant who intends to commit a crime that requires a certain type of victim can be convicted of attempting the crime even if there is no such victim, so long as he takes a substantial step toward committing the completed crime. This conclusion is consistent with the general rule that proving an attempt requires only proof that the defendant intended the completed crime and took a substantial step towards its commission. *DeRyke*, 149 Wn.2d at 910.

It is true that the trial court is not required to include all of the elements of the completed crime in its “to convict” instruction; instead, a separate instruction will suffice. *Id.* at 911. But here, the State chose to include all of the elements of the completed offense in the “to convict” instruction rather than proffering a separate instruction setting out the elements of the completed charge. Having made that election, the State undertook the obligation to do so correctly and to prove the elements beyond a reasonable doubt. *See State v. Hickman*, 135 Wn.2d 97, 102, 954 P.2d 900 (1998) (under law of the case doctrine, State assumes burden

to prove otherwise unnecessary elements by including them in the “to convict” instruction).

Were Nelson challenging the sufficiency of the State’s evidence of the attempted robbery, as in *Townsend*, *Luther*, and *Johnson*, the argument that the pharmacy tech’s status is irrelevant so long as Nelson intended the completed crime and took a substantial step toward its commission would have merit. But Nelson’s challenge is not to the sufficiency of the State’s evidence, it is to the accuracy of the “to convict” instruction and his ability to argue his defense from it. Although the State need not include the elements of the completed crime in the “to convict” instruction, in order to evaluate the defendant’s intent, it is necessary to inform the jury of the elements of the completed crime in some fashion. *See DeRyke*, 149 Wn.2d at 911-12. The instruction here did not do so. Accordingly, unless the error was harmless, the conviction should be reversed.

3. Under the facts presented here, the instructional error was not harmless.

As discussed above, to prove Nelson committed an attempted first degree robbery, the State was required to prove both that he intended to commit a first degree robbery and that his conduct constituted a substantial step, more than mere preparation, toward completing the crime.

Because the jury could have had reasonable doubt as to these requirements had it understood that a robbery is not merely a forcible taking of property, but a forcible taking of property from somebody with a specific relationship to it, the conviction should be reversed.

Because the jury was not adequately informed of the nature of the completed crime, it was unable to evaluate Nelson's intent towards the pharmacy tech to achieve a forcible taking of property in her possession or control. Notably, when presented with the person who actually had authority over and access to the controlled substances – the pharmacist - Nelson did not employ any force or threats of force to achieve his ends. This fact would support an argument that his conduct toward the pharmacy tech was merely preparatory – he employed the threat to extract information about how to access the narcotics rather than to actually accomplish a taking from the pharmacy tech.

Moreover, his intent to commit a first degree robbery is belied by the fact that when he had the opportunity to threaten the pharmacist with the gun to obtain the narcotics, he did not do so. While his actions are certainly corroborative of an intent to commit theft, intent to commit *some* crime is insufficient; the State must prove the specific intent to commit the crime charged as the attempt. *DeRyke*, 149 Wn.2d at 911-12. A jury

could have rationally concluded that a person who had the opportunity to commit the completed crime and did not lack the intent to commit the completed crime, even if he plainly intended to commit some other crime.

As the instructions were given in this case, Nelson was precluded from arguing that he did not intend a first degree robbery against the pharmacy tech or that his conduct was preparatory, not a substantial step toward the completed offense. The jury needed to know that a robbery requires using force to obtain property from somebody that has dominion and control over it, not just property that happens to be in the vicinity, to properly evaluate Nelson's intent and conduct in light of his actions toward both the pharmacy tech and the pharmacist. As such, the error was not harmless, and the conviction should be reversed.

VI. CONCLUSION

For the foregoing reasons, this Court should REVERSE Nelson's conviction for attempted first degree robbery on the grounds that the "to convict" instruction erroneously and harmfully omitted an essential element of the charge, that prevented Nelson from arguing that the State did not meet its burden of proof.

RESPECTFULLY SUBMITTED this 8 day of January, 2018.

TWO ARROWS, PLLC

A handwritten signature in blue ink, appearing to read "Andrea Burkhart", written over a horizontal line.

ANDREA BURKHART, WSBA #38519
Attorney for Petitioner

CERTIFICATE OF SERVICE

I, the Undersigned, hereby declare that on this date, I caused to be served a true and correct copy of the foregoing Supplemental Brief upon the following parties in interest by depositing them in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

Edward Leon Nelson, DOC # 939164
Washington State Penitentiary
1313 N. 13th Ave.
Walla Walla, WA 99362

And, pursuant to prior agreement of the parties, by e-mailing a copy to:

David Trefry
David.Trefry@co.yakima.wa.us

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed this 8 day of January, 2018 in Walla Walla, Washington.



Andrea Burkhardt

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