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STATE OF WASHINGTON
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NO. 94712-1

THE SUPREME COURT

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

EDWARD LEON NELSON,

Appellant.

SUPPLEMENTAL BRIEF OF RESPONDENT

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A. INTRODUCTION

Nelson was found guilty by a jury on January 12, 2016. He was convicted on one count of Attempted First Degree Robbery, RCW 9A.56.190, 9A.56.200(1)(a), 9A.28.020, 9.94A.533(3) and 9.94A.825 and one count of Attempting to Elude a Pursuing Police Officer, RCW 46.61.024, 9.94A.533(11) and 9.94A.834.

Nelson filed a direct appeal alleging numerous issues, the one before this court pertained to the Nelson's allegation that the trial court had not set forth all of the elements of the crime of robbery in the to convict/elements instruction. Specifically, that the court had not followed the edicts of State v. Ritchie, 191 Wn.App. 916, 365 P.3d 770 (2015) failing to include as an element of the robbery "to convict" instruction language that would require the State to prove that the Ms. Meinhold, "…the victim (had) an ownership, representative or possessory interest in the stolen property." Id at 930

The Court of Appeals Division III upheld the conviction, with all three judges agreeing that the conviction should be affirmed. Judges Lawrence-Berry and Fearing concurring with Judge Pennell writing a separate concurring opinion distinguishing Nelson's case from Richie because Nelson was charged with Attempted Robbery not "first degree robbery." (Slip at 22).

Nelson move the court for reconsideration of its opinion, which motion was denied. He subsequently filed a timely motion in this court requesting discretionary review of the issues he raised in the court of appeals.

This court granted review "only on the *State of Washington v. Richie* jury instruction issue."

B. ISSUE PRESENTED BY PETITION

The one issue before this court raised by Nelson's petition alleges;

1. Evaluating the requirements of Richie in the case of an attempt crime, and the interplay between the Richie requirements and the impossibility doctrine, present constitutional questions as to the State's burden of proof and the ability to present a defense.

ANSWER TO ISSUES PRESENTED BY PETITION

1. The Court of Appeals decision is consistent with Richie; its harmless error determination has also been found by the other two divisions of the court of appeals when the Richie instruction issue is raised.

   Further, as the State has consistently argued Nelson was charged under the attempt statute, RCW 92.28.020, a legislative enactment, and "Impossibility is not a defense to an attempt. RCW 9A.28.020(2)." (Slip, concurrence at 4)

   The State also maintains that the verbiage set forth in the "to convict" elements instruction was sufficient, as reflected by the 2016 revision of the robbery jury instruction.

   Even if the instruction was erroneous any error was harmless.

C. STATEMENT OF THE CASE

The facts of this case are of little need to address the issue before this court, they will be set forth in the body of this brief as needed. The

issue before this court is whether the procedure used by the trial court with regard to the elements instruction and the Court of Appeals resolution of that issue were correct given the statutes and case law applicable to this issue.

It is very important to note that the instruction that was submitted to the jury was crafted after the court literally had discussion with the pattern jury instruction committee, the trial court began the discussion regarding the use of the language from Richie as follows:

> THE COURT**: This kind of derives somewhat from the meeting with the pattern jury instructions committee on Saturday.** The term that's used in the Ritchie case, which is had an ownership, representative or possessory interest in the property is really very lawyerlike and not something that a jury is going to be able to get their minds around. The addition of the last sentence in my proposed, which is a person with a representative interest includes an agent, employee or other representative of the owner of the property, I think, is a clarification of that otherwise ambiguous, I guess, or a very lawyerlike statement. I assume the state is not agreeing that the defense proposed should be used. RP 415 (Emphasis added)

The trial court judge discussed Richie as follows:

> THE COURT: It's almost to the point of saying that she was a bailee and letting the jury figure out what that means.
> MR. DALAN: Well, I understand that, your Honor. I think representative is a little easier for them to figure out. I think the best solution is to put in the language

> from the case law and then let the state argue what they think it means and let us argue what we think it means.
> THE COURT: Well, I don't think that's a solution.
> I define what the law is. Then the attorneys argue what the facts are. They don't argue what the law is.
> That's part of the problem. The term that's used in Ritchie is really not readily adaptable to a jury instruction, but it clearly is the case that Ms. Meinhold is an employee of the owner of the property. As an employee of the owner of the property, she would have sufficient interest to satisfy the rule in Ritchie.
> I will also in that, in paragraph four of the elements instruction, eliminate or that person's property or the personal property of another. I'll take that out.
> MR. DALAN: Thank you, your Honor.
> THE COURT: You have, a person has a representative interest in the property when that person has authority from the owner of the property to act regarding the property.
> MR. DALAN: Yes, your Honor. That's directly from the language from State vs.(sic) Lathem .
> THE COURT: Mr. Ramm.
> MR. RAMM: I would oppose that instruction, too.
> I don't think that's necessary in this case.
> THE COURT: I agree, and it is confusing. It's circular, and I think it would confuse the jury and not enlighten them. So I'm going to decline to use that instruction. (RP 417-8)

D. ARGUMENT

The State has stated steadfastly asserted throughout the pendency of this appeal that the instruction as given by the trial court clearly addressed the State's burden to prove the Richie requirements.

Instruction was proper as given.

While not identical to the most recent revision of the challenged

instruction the terminology used is synonymous. "Synonyms for employee, noun person being paid for working for another or a corporation; "agent…clerk…member...operator…representative…staff member…worker." *http://www.thesaurus.com/browse/employee*

The most recent revision the Richie portion of the robbery elements instruction reads as follows "(2) That the person [owned] [was acting as a **representative** of the owner of] [was in possession of] the property taken;" *Washington Practice Series TMWashington Pattern Jury Instructions—Criminal,* 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 37.02 (4th Ed), Westlaw. © 2016 Thomson Reuters. (Emphasis added.)

The newly revised instruction is very similar to the one given by the trail court "(2) That Myung B. Meinhold was an *employee* of the owner of the property;" CP 67.

The trial court's instruction was not erroneous.

Attempt

The State has also maintained throughout the trial and appeal that because the State charged this criminal act as an *attempt* that there really was no requirement for the State to prove the Richie factors even though the State proved those at trial. At the trial deputy prosecuting attorney stated when Nelson argued that the court needed to include the Richie factors in the to convict instruction; "That might be a good argument if he

had been charged with a completed crime, but he's been charged with the attempt. The legal and factual impossibility is not a defense." RP at 404.

This court has held that this impossibility of fact or law even applies when the object of the criminal act literally does not exist, State v. Townsend, 147 Wn.2d 666, 679, 57 P.3d 255 (2002);

> "…we must determine if there is sufficient evidence in the record that Townsend took a substantial step toward commission of the crime of second degree rape. In making that decision, we must view the evidence in the light most favorable to the State and decide whether any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. State v. Green, 94 Wash.2d 216, 220-22, 616 P.2d 628 (1980).
>
> In order to be found guilty of an attempt to commit a crime, the defendant must take a substantial step toward commission of that crime. RCW 9A.28.020(1). A person does not take a substantial step unless his conduct is "strongly corroborative of the actor's criminal purpose." State v. Aumick, 126 Wash.2d 422, 427, 894 P.2d 1325 (1995); State v. Workman, 90 Wash.2d 443, 451, 584 P.2d 382 (1978) (citation omitted). Mere preparation to commit a crime is not a substantial step. Workman, 90 Wash.2d at 449-50, 584 P.2d 382.
>
> The gist of Townsend's argument on this point is that "[h]e could never take a 'substantial step' toward completing the crime with 'Amber' because 'Amber' was in reality Detective Keller." Pet. for Review at 4. The Court of Appeals properly rejected this argument noting that "RCW 9A.28.020(2) expressly provides that factual impossibility is not a defense to a crime of attempt." Townsend, 105 Wn.App. at 631, 20 P.3d 1027. The attempt statute focuses on the actor's criminal intent, rather than the impossibility of convicting the defendant of the completed crime. We

> agree with the Court of Appeals that "[i]t thus makes no difference that Mr. Townsend could not have completed the crime because 'Amber' did not exist. He is guilty ... if he intended to have sexual intercourse with her." Townsend, 105 Wn.App. at 631, 20 P.3d 1027.

Nelson has never challenged or taken exception to instruction 4 the instruction defining the crime of attempted first degree robbery. (RP 511) This instruction included the specific language for an **attempted** first degree robbery;

> A person commits the crime of Attempted First Degree Robbery when, with intent to commit that crime, he does any act that is a substantial step toward the commission of that crime., (CP 63) (Emphasis added)

Nor has Nelson ever objected to instruction 5;

> A substantial step is conduct that strongly indicates a criminal purpose and that is more than mere preparation. (CP 64) (Emphasis added)

Because this was charged as an *attempt* the State did not have a duty to prove that employee had possessory status mandated by Richie. This court has upheld RCW 9.28.020(2) in numerous cases. Therefore, in this case the State would have and did meet its burden without the necessity of proving the Richie factors.

Testimony given was that:

Ms. Meinhold positively identified Appellant in a photomontage after the robbery and in court during trial, two other witnesses/employees of Rite Aid also positively identified Nelson, one both in a montage and in

court; Nelson attempted to rob the pharmacy of a specific narcotic and that but for the refusal of the employees and denial that drugs were present he would have completed that criminal act; that Nelson robbed the store of one roll of paper towels; that a car matching the description of the car that Nelson was positively identified as having been purchased and driven by Nelson on the same day of the robbery, a car which was seen leaving the scene of the robbery; seized during the investigation was a hat that was thrown from the car driven by Nelson contained a DNA sample that had a correlation to Nelson's DNA in excess of 1 in 100 billion, this hat was identified as being the same hat that was worn by the person who attempted to rob the Rite Aid; Ms. Meinhold identified the gun that was displayed to her at the time of the robbery and stated that she knew about firearms from a firearm training class this weapon was also viewable from the surveillance videos shown to the jury and identified as accurate by the victims of this crime.

The testimony was more than sufficient to support the State's charge that Nelson *attempted* to commit the robbery and took substantial steps towards completing that criminal act.

"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." RCW 9A.28.020(1). A

substantial step is "conduct strongly corroborative of the actor's criminal purpose." State v. Aumick, 126 Wn.2d 422, 427, 894 P.2d 1325 (1995); A person is guilty of an attempt to commit a crime if, "with intent to commit a specific crime, he does any act which is a substantial step toward the commission of that crime." RCW 9A.28.020(1); State v. Falco, 59 Wn.App. 354, 358, 796 P.2d 796 (1990).

Harmless error.

"'Jury instructions are sufficient when they allow counsel to argue their theory of the case, are not misleading, and when read as a whole properly inform the trier of fact of the applicable law.'" Keller v. City of Spokane, 146 Wash.2d 237, 249, 44 P.3d 845 (2002)

State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996). "We find a constitutional error harmless only if convinced beyond a reasonable doubt any reasonable jury would reach the same result absent the error", citing Aumick, supra. State v. Linehan, 147 Wn.2d 638, 653, 56 P.3d 542 (2002). A jury instruction that relieves the State of its burden to prove all of the elements of the crime is reversible error. *Id*. at 653-54, 56 P.3d 542. A constitutional error is harmless only if we are convinced beyond a reasonable doubt that any reasonable jury would reach the same result absent the error. *Id*.

All three divisions of the Court of Appeals have now addressed

this issue. In all of the cases set forth below the court ruled that the trial court failed to properly instruct the jury regarding the Richie requirements. After that determination all of the courts, in all three divisions, have determined that based on the facts of the case that the harmless error standard was applicable and ruled that each and every case should be affirmed on that basis.

The State would direct this court, pursuant to GR 14.19(a) to consider as nonbinding authority and accord such persuasive value as this court deems appropriate the following cases; State v. English, Unpublished Opinion, 46921-9-II, 47001-2-II (WACA), March 21, 2017, In re Personal Restraint Petition of Everette, Unpublished Opinion 49883-9-II (WACA) November 21, 2017, State v. Moretti, Unpublished Opinion 47868-4-II (WACA) October 31, 2017, State v. Gatson, Unpublished Opinion 74927-7-I (WACA) October 30, 2017, State v. Rusev, Unpublished Opinion 47762-9-II (WACA) April 18, 2017, State v. Ollison, Unpublished Opinion 47351-8-II (WACA) September 20, 2016 (Addressing Richie with regard to the information that was filed.)

The State could not find any case that did not determine that the error was harmless when the jury instructions were found to be erroneous regarding the inclusion of the Richie factors.

This court has upheld the harmless error standard in cases were

jury instructions are found to have omitted an element. The court of appeals cited this court's previous rulings regarding this type of error in its opinion:

> "[A]n erroneous jury instruction that omits an element of the charged offense or misstates the law is subject to harmless error analysis." *State v. Thomas*, 150 Wn.2d 821, 844, 83 P.3d 970 (2004). "[A]n instruction that omits an element of the offense does not *necessarily* render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." *Neder v. United States*, 527 U.S. 1, 9, 119 S. Ct. 1827, 144 L. Ed. 2d 3 5 (1999). "The *Neder* test for determining the harmlessness of a constitutional error is 'whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *Thomas*, 150 Wn.2d at 845 (internal quotation marks omitted). (Slip at 9)

Even misleading instructions do not require reversal unless the complaining party can show prejudice. State v. Aguirre, 168 Wn.2d 350, 364, 229 P.3d 669 (2010).

The court of appeals then addressed the very important distinction between Nelson's case and Richie, this was charged as an attempt:

> The State also argues Mr. Nelson was charged and convicted of attempted first degree robbery. The trial court defined the State's burden for proving an anticipatory offense: "A person commits the crime of Attempted First Degree Robbery when, with intent to commit that crime, he does any act that is a substantial step toward the commission of that crime." CP at 63. A substantial step is an act that is "strongly corroborative" of the actor's criminal purpose. *State v. Luther*, 157 Wn.2d 63, 78, 134 P.3d 205 (2006) (citing

> *State v. Townsend*, 147 Wn.2d 666, 679, 57 P.3d 255 (2002)). (Slip at 10)

Judge Pennell address in more detail the State's argument that because this was an ***attempt*** the proof of the substantial step necessary to prove Nelson committed this criminal act:

> While the trial court's to-convict instruction was legally inaccurate, reversal is unwarranted. The only instructional error raised by Mr. Nelson pertains to the trial court's substitution of Ms. Meinhold's employee status for the requirement of proof of representative capacity. Because this case only involved an attempt, Ms. Meinhold's lack of actual capacity over the property sought by Mr. Nelson had no bearing on the State's case. Impossibility is not a defense to an attempt. RCW 9A.28.020(2). Regardless of whether Ms. Meinhold actually could have obtained the drugs for Mr. Nelson, the State's evidence showed Mr. Nelson thought she could. By demanding drugs from Ms. Meinhold under threat of deadly force, Mr. Nelson evinced an intent to commit the crime of first degree robbery and took a substantial step toward doing so. The trial court's instructional error was harmless.

E. CONCLUSION

The decision of the Court of Appeals was well reasoned and based upon both statute and case law that has been upheld by this court on numerous occasions over decades.

The actions of the trial court and the Court of Appeals should not be disturbed.

Respectfully submitted this 8th day of January 2018.

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DECLARATION OF SERVICE

I, David B. Trefry, state that on January 8, 2018, I emailed a copy, by agreement of the parties, of the Respondent's Supplemental Brief to:

Andrea Burkhart at andrea@burkhartandburkhart.com

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 8th day of January, 2018, Spokane, Washington.

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