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WASHINGTON STATE
SUPREME COURT

Supreme Court No.: 93355-3
Court of Appeals No.: 72803-2-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

BRANDON PAMON,

Petitioner.

FILED
Jul 01, 2016
Court of Appeals
Division I
State of Washington



PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND THE DECISION BELOW

Brandon Pamon requests this Court grant review pursuant to RAP 13.4(b) of the decision of the Court of Appeals, Division One, in *State v. Brandon Pamon*, No. 72803-2-1, filed April 18, 2016. A copy of the opinion is attached as Appendix A. Mr. Pamon's motion for reconsideration was denied June 1, 2016. A copy of the court's order is attached as Appendix B.

B. ISSUE PRESENTED FOR REVIEW

First degree robbery is an alternative means crime, but the Court of Appeals held that attempted first degree robbery is not. The court's decision permits the State to obtain a conviction for attempted first degree robbery based upon a unanimous verdict only as to the elements of attempted second degree robbery. Where the State did not present sufficient evidence at Mr. Pamon's trial of both of the alternative means alleged, should this Court grant review in the substantial public interest? RAP 13.4(b)(4).

C. STATEMENT OF THE CASE

Geoffrey Vincent was walking home early one morning when he was grabbed from behind and thrown to the ground. 10/9/14 RP 32. A juvenile, K.M., had attacked Mr. Vincent and was hitting him.

10/9/14 RP 32. Although Mr. Vincent could see very little while being struck, he felt that there were two people hitting him and going through his pockets once he was on the ground. 10/9/14 RP 33.

Mr. Vincent quickly realized that K.M. was holding a knife, and pulled a pocketknife out of his pocket to fight back. 10/9/14 RP 34.

Mr. Vincent stuck the pocketknife in K.M.'s thigh, causing both individuals to back away from him and allowing Mr. Vincent to return to his feet. 10/9/14 RP 34, 37.

Mr. Vincent saw two young men about ten feet from him, and a young woman a little further away. 10/9/14 RP 37-38. K.M. began to approach Mr. Vincent, while the other young man, later identified as Brandon Pamon, started backing away. 10/9/14 RP 39, 45.

K.M. moved his knife in Mr. Vincent's direction, and although Mr. Vincent attempted to block it with his own knife, K.M. stabbed Mr. Vincent in the chest, injuring his heart. 10/9/14 RP 40; 10/13/14 RP 109. At that point, Mr. Pamon, K.M., and the young woman ran away. 10/9/14 RP 47. Mr. Vincent was taken to the hospital and recovered after undergoing surgery. 10/9/14 RP 55; 10/13/14 RP 114.

The State charged Mr. Pamon with assault in the first degree and attempted robbery in the first degree, and alleged a deadly weapon

enhancement as to both counts. CP 11-12. A jury acquitted Mr. Pamon of the first degree assault charge but convicted him of the first degree attempted robbery charge. CP 49-50. It also found that Mr. Pamon was not armed with a deadly weapon during the commission of the attempted robbery. CP 51. The trial court sentenced Mr. Pamon to the high end of the standard range, 76.5 months of imprisonment, with 18 months of community custody. CP 59-60. The Court of Appeals affirmed Mr. Pamon's conviction. Slip Op. at 10.

D. ARGUMENT IN FAVOR OF GRANTING REVIEW

This Court should grant review in the substantial public interest because in order to convict a defendant of attempted first degree robbery, the State must present sufficient evidence of each of the alleged means of first degree robbery.

A jury convicted Mr. Pamon of attempted robbery in the first degree. CP 50. First degree robbery is an alternative means crime. *In re Pers. Restraint of Brockie*, 178 Wn.2d 532, 534, 309 P.3d 498 (2013) (discussing first degree robbery as an alternative means crime). When a defendant is charged with an alternative means crime, sufficient evidence must support each of the means presented. *Ortega-Martinez*, 124 Wn.2d 702, 707-08, 881 P.2d 231 (1994). Here, the State did not meet that burden.

The State argued it was not required to meet this burden, claiming attempted first degree robbery is not an alternative means crime, and the Court of Appeals agreed. Slip Op. at 7. The court found Mr. Pamon had provided no analysis addressing the relevance of the alternative means of first degree robbery to the elements of attempted first degree robbery. Slip Op. at 6. However, as Mr. Pamon explained in his motion to reconsider, that is incorrect.

As Mr. Pamon explained in his reply brief, unless the jurors were required to find he attempted to commit robbery by one of the means of first degree robbery, the jury's verdict would only satisfy a conviction for attempted second degree robbery. Reply Br. at 2-4.

An individual is guilty of second degree robbery when he "commits robbery," which is the unlawful taking of personal property from another by the use of force or threat. RCW 9A.56.210(1); RCW 9A.56.190. In contrast, first degree robbery is a more serious crime than second degree robbery because in addition to committing the robbery, the individual (1) is armed with a deadly weapon, (2) displays what appears to be a firearm or other deadly weapon, (3) inflicts bodily injury, or (4) commits the robbery within and against a financial institution. RCW 9A.56.200. While second degree robbery is a class B

felony, the legislature found first degree robbery deserved a more severe punishment and accordingly made it a class A felony. RCW 9A.56.210(2); RCW 9A.56.200(2).

If, as the State suggested, it need only prove “whether Pamon acted with intent to commit theft of personal property and whether he took a substantial step toward accomplishing that result” and “not the means by which he attempted to do so,” the State could obtain a conviction of attempted first degree robbery by proving nothing more than attempted second degree robbery. Resp. Br. at 6. Thus, the means by which an individual commits first degree robbery are relevant to a charge of attempt because the jury’s unanimous agreement as to the means of first degree robbery are what allows for a conviction on the greater charge.

This Court of Appeals’ reliance on *State v. DeRyke* was misplaced. 149 Wn.2d 906, 73 P.3d 1000 (2003); Slip Op. at 5, n.7. In *DeRyke*, this Court found reversal was not required where the elements of first degree rape were not included in the attempt to convict instruction, but instead included in a separate instruction. *Id.* at 910-11. The court held it was error for the to convict instruction not to specify the degree of rape allegedly attempted, but that this error was harmless

because the jurors were only instructed on first degree rape and therefore “had no occasion to confuse the various degrees of rape.” *Id.* at 913-14.

This Court held, “[i]t is elementary that a person cannot be convicted of rape per se, but only of a specific degree of rape” and determined the conviction demonstrated “DeRyke committed an act that could have constituted a substantial step toward the commission of attempted first degree rape, i.e. kidnapping.” *Id.* at 913. Thus, just as the jury was required to find DeRyke took a substantial step toward committing first degree rape by a particular method (kidnapping), the jury in Mr. Pamon’s case was required to find he took a substantial step toward committing robbery in the first degree, either because he was armed with a deadly weapon or because bodily injury was inflicted.

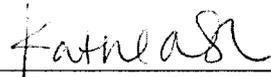
Because there was insufficient evidence of bodily injury, Mr. Pamon’s right to a unanimous jury was violated. The Court of Appeals decision raises an issue of substantial public interest and this Court should accept review. RAP 13.4(b)(4).

E. CONCLUSION

This Court should grant review of the Court of Appeals opinion affirming Mr. Pamon's conviction for attempted first degree robbery.

DATED this 1st day of July, 2016.

Respectfully submitted,



Kathleen A. Shea – WSBA 42634
Washington Appellate Project
Attorney for Petitioner

APPENDIX A

COURT OF APPEALS, DIVISION I OPINION

April 18, 2016

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	No. 72803-2-I
Respondent,)	
)	DIVISION ONE
v.)	
)	
BRANDON CHRISTOPHER PAMON,)	UNPUBLISHED OPINION
)	
Appellant.)	FILED: April 18, 2016
)	

LEACH, J. — Brandon Pamon appeals from his conviction for attempted robbery in the first degree. He contends that the State violated his constitutional right to jury unanimity by failing to prove both alternative means of attempted robbery in the first degree. But Pamon fails to persuade the court that attempted robbery in the first degree is an alternative means offense. Nor has Pamon shown that the trial court abused its discretion in prohibiting him from consuming or possessing marijuana as a condition of community custody. Pamon's statement of additional grounds for review raises no meritorious issues. We affirm.

FACTS

Geoffrey Vincent, a student at Seattle University, attended a band concert at a bar near the campus. Vincent left the bar at about 1:00 a.m. and started walking back to his apartment. As he approached 10th and Pike, Vincent walked past two young males and one female who were standing on the corner.

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A short time after entering the Seattle University campus near 10th and Madison, Vincent heard "some quick steps coming up behind me, like someone running." Before Vincent could react, someone grabbed him from behind and started hitting him in the head and chest.

Vincent eventually fell to the ground, and the assault continued. Vincent noticed a second person was also hitting him. Someone asked Vincent what he had on him and started rifling through his pockets.

Vincent saw one of the assailants, later identified as K.M., a juvenile, holding a knife. Vincent discreetly reached into his pocket and pulled out a pocketknife. After opening the knife, Vincent jabbed K.M. in the thigh. At this point, K.M. and the other male, later identified as Brandon Pamon, backed away. Vincent recognized the two males as the ones he passed earlier on the corner; the same young female stood about 30 feet away.

After Vincent struggled to his feet, K.M. walked up and stabbed him in the chest. K.M., Pamon, and the young woman then ran away.

Vincent sought help at a nearby campus emergency call box. Campus personnel responded and called for paramedics. The paramedics took Vincent to Harborview Medical Center, where surgeons repaired a collapsed lung and punctured artery and right atrium.

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The State charged Pamon with assault in the first degree and attempted robbery in the first degree and asserted a deadly weapon enhancement for each count. The court also instructed the jury on accomplice liability.

At trial, C.H., a juvenile, testified that she had been with K.M. and Pamon before the assault. She overheard a conversation between K.M. and Pamon indicating that they might be planning a robbery. At some point, C.H. saw K.M. and Pamon running after a man near the Seattle University campus. The man then ended up on the ground, with K.M. and Pamon punching him. After the man on the ground got up and pulled a knife, C.H. saw K.M. stab him. Pamon, K.M., and C.H. then ran off.

The jury found Pamon guilty as charged of attempted robbery in the first degree. The jury acquitted Pamon of assault in the first degree and found that he was not armed with a deadly weapon during the attempted robbery.

The trial court imposed a high-end standard range sentence of 76.5 months of confinement and 18.0 months of community custody. As a condition of community custody, the court prohibited Pamon from possessing or consuming marijuana.

ANALYSIS

Alternative Means

Pamon contends that the State violated his right to jury unanimity by failing to present sufficient evidence of both alternative means of committing attempted robbery in the first degree. Pamon provides no relevant legal argument to support this claim.

Article I, section 21 of the Washington Constitution guarantees a criminal defendant the right to a unanimous jury verdict. "This right may also include the right to a unanimous jury determination as to the means by which the defendant committed the crime when the defendant is charged with (and the jury is instructed on) an alternative means crime."¹ Generally, an alternative means crime "is one by which the criminal conduct may be proved in a variety of ways."² But "a defendant may not simply point to an instruction or statute that is phrased in the disjunctive in order to trigger a substantial evidence review of [his] conviction."³

"When a crime can be committed by alternative means, express jury unanimity as to the means is not required where each of the means is supported by substantial

¹ State v. Owens, 180 Wn.2d 90, 95, 323 P.3d 1030 (2014).

² Owens, 180 Wn.2d at 96.

³ State v. Smith, 159 Wn.2d 778, 783, 154 P.3d 873 (2007).

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evidence.”⁴ In this circumstance, “we infer that the jury rested its decision on a unanimous finding as to the means.”⁵ If there is insufficient evidence to support any of the alternative means, “a particularized expression of jury unanimity is required.”⁶

Pamon's arguments rely primarily on the assertion that “[f]irst degree robbery is an alternative means crime.” But the State charged Pamon with attempted first degree robbery.

“An attempt crime contains two elements: intent to commit a specific crime and taking a substantial step toward the commission of that crime.”⁷ Thus, the trial court's “to convict” instruction correctly required the State to prove (1) that Pamon “did an act that was a substantial step toward the commission of Robbery in the First Degree” and (2) that “the act was done with the intent to commit Robbery in the First Degree.” (Emphasis added.)

Pamon notes that the trial court also instructed the jury: “A person commits the crime of robbery in the first degree when in the commission of a robbery or in immediate flight therefrom he or she is armed with a deadly weapon or inflicts bodily injury.” He argues that because the evidence was insufficient to establish one of the

⁴ State v. Gonzales, 133 Wn. App. 236, 243, 148 P.3d 1046 (2006).

⁵ State v. Ortega-Martinez, 124 Wn.2d 702, 708, 881 P.2d 231 (1994).

⁶ Owens, 180 Wn.2d at 95.

⁷ State v. DeRyke, 149 Wn.2d 906, 910, 73 P.3d 1000 (2003); see also RCW 9A.28.020(1).

alternative means—that Vincent “sustained bodily injury during the commission of the attempted robbery”—the State violated his right to jury unanimity.

In order to establish attempted robbery in the first degree, the State was required to prove that Pamon took a substantial step with the intent to commit robbery in the first degree. The relevant intent for an attempt offense “is the intent to accomplish the criminal result of the base crime.”⁸ The definition of the base crime provides the requisite criminal result.⁹ “A substantial step is an act that is ‘strongly corroborative’ of the actor’s criminal purpose.”¹⁰ Given the elements of an attempt offense, Pamon fails to demonstrate the relevance of the State’s alleged failure to prove beyond a reasonable doubt that Vincent sustained bodily injury during the attempted robbery.

In summary, Pamon has provided no authority or legal analysis addressing the application of alternative means to the elements of attempt crimes in general. Nor has he addressed the relevance of the alternative means of committing robbery in the first degree to the elements of the charged offense of attempted robbery in the first

⁸ State v. Johnson, 173 Wn.2d 895, 899, 270 P.3d 591 (2012).

⁹ DeRyke, 149 Wn.2d at 913.

¹⁰ Johnson, 173 Wn.2d at 899 (quoting State v. Luther, 157 Wn.2d 63, 78, 134 P.3d 205 (2006)).

degree. We therefore reject Pamon's claim that the trial court denied his right to jury unanimity.¹¹

Community Custody Condition

Pamon challenges a community custody condition that prohibits him from possessing or consuming marijuana. He claims no evidence established that his use of marijuana was crime related or that it contributed to the offense. When imposing the condition, the trial court commented that "there was testimony that that was part of the issue, just the selfish greed for money to get marijuana."

RCW 9.94A.703 authorizes the sentencing court to impose certain conditions of community custody, including ordering the defendant to comply "with any crime-related prohibitions."¹² A crime-related prohibition means "an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted."¹³ We review a trial court's imposition of crime-related prohibitions for an abuse of discretion.¹⁴

¹¹ See RAP 10.3(a)(4), (6); Norcon Builders, LLC v. GMP Homes VG, LLC, 161 Wn. App. 474, 486, 254 P.3d 835 (2011) (declining to consider an inadequately briefed argument).

¹² RCW 9.94A.703(3)(f).

¹³ RCW 9.94A.030(10).

¹⁴ State v. Warren, 165 Wn.2d 17, 32, 195 P.3d 940 (2008).

C.H. testified that when she met up with Pamon and K.M. before the assault, the three of them “decided to smoke . . . [w]eed, marijuana.” K.M. and Pamon later said “something about, ‘We’re going to go do something.’” C.H. acknowledged that the two were possibly talking about a robbery. K.M. also “said something about him needing money to get weed.”

Although C.H.’s testimony was relatively vague and did not attribute specific words to Pamon, she indicated the conversations she overheard were between K.M. and Pamon. Viewed together, Pamon’s smoking of marijuana and his apparent participation in conversations about committing a possible robbery and the need to get money for marijuana, followed by his participation in an attempted robbery, support a reasonable inference that possession or consumption of marijuana had a direct relation to the charged offense. Pamon fails to demonstrate that the trial court abused its discretion in imposing this community custody condition.

Statement of Additional Grounds for Review

In his statement of additional grounds for review, Pamon contends that insufficient evidence supports his conviction because the jury found him not guilty of assault in the first degree and not armed with a deadly weapon. He argues that the evidence was “therefore minus two elements of the charge of robbery in the first degree and [there was] no jury instruction of lesser charges.”

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But as already indicated, the State charged Pamon with attempted robbery in the first degree, not first degree robbery. The court also instructed the jury on accomplice liability. Consequently, the jury's verdicts on assault in the first degree and the deadly weapon enhancement did not undermine the sufficiency of the evidence to support Pamon's conviction.

Pamon also claims that the trial court's reasonable doubt instruction, which was based on Washington Pattern Jury Instruction: Criminal 4.01,¹⁵ was constitutionally deficient. Pamon concedes, however, that our Supreme Court has repeatedly directed trial courts to use WPIC 4.01 to instruct juries on the burden of proof and the definition of reasonable doubt.¹⁶ In State v. Kalebaugh, the Supreme Court recently reaffirmed that WPIC 4.01 was "the correct legal instruction on reasonable doubt."¹⁷ Pamon's challenge to WPIC 4.01 must therefore be directed to our Supreme Court.

¹⁵ 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 4.01, at 85 (3d ed. 2008) (WPIC).

¹⁶ See State v. Bennett, 161 Wn.2d 303, 318, 165 P.3d 1241 (2007); see also State v. Castillo, 150 Wn. App. 466, 469, 208 P.3d 1201 (2009).

¹⁷ 183 Wn.2d 578, 586, 355 P.3d 253 (2015).

No. 72803-2-1/10

Affirmed.

Leach, J.

WE CONCUR:

Dyer, J.

Appelwick, J.

APPENDIX B

ORDER DENYING MOTION FOR RECONSIDERATION

June 1, 2016

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)
) No. 72803-2-1
 Respondent,)
) ORDER DENYING MOTION
 v.) FOR RECONSIDERATION
)
 BRANDON CHRISTOPHER PAMON,)
)
 Appellant.)

The appellant, Brandon Pamon, having filed a motion for reconsideration herein, and the hearing panel having determined that the motion should be denied; now, therefore, it is hereby

ORDERED that the motion for reconsideration be, and the same is, hereby denied.

Dated this 1st day of June, 2016.

FOR THE COURT:

Leach, J.
Judge

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COURT OF APPEALS
STATE OF WASHINGTON

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 72803-2-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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Date: July 1, 2016