IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. DYLAN THOMAS NYLAND, Appellant.	No. 41665-4-II UNPUBLISHED OPINION

Van Deren, J. — Dylan Nyland appeals his second degree robbery conviction[1] asserting that (1) the trial court erred by refusing to instruct the jury on the definition of threat, (2) the trial court violated his constitutional right to be present by responding to a jury question in his absence, (3) sufficient evidence did not support his conviction, and (4) cumulative error denied his right to a fair trial. We affirm.

FACTS

On November 30, 2008, a man entered a Walgreens drugstore and handed the pharmacy technician a note written on a paper towel that read, "'Please give me all your OxyContin.'"[2]

[1] Nyland was also convicted of unlawful delivery of a controlled substance but he does not appeal that conviction.

[2] OxyContin is a narcotic pain medication.

Report of Proceedings (RP) (Dec. 14, 2010) at 6. The man wore all black clothing, gloves, and something similar to a "ski mask that was covering his face." RP (Dec. 14, 2010) at 7. Although his face was obscured, the technician could see that the person was a white male with brown eyes. When asked whether the man had implied that he had a weapon, the technician responded, "He didn't say it, but his hand was in his pocket." RP (Dec. 14, 2010) at 9.

The technician gave the note to the pharmacist, who then "went back to the narcotic cabinet and pushed the alarm button." RP (Dec. 14, 2010) at 18-19. The pharmacist then placed 10 to 12 bottles, each containing 100 pills of OxyContin, into a plastic bin and handed it to the man. The man said, "'[T]hanks,'" and ran off. RP (Dec. 14, 2010) at 10. Someone called 911 and police arrived at the pharmacy 5 to 10 minutes later.

That same day, Scott Bennett and his wife had gone to the same Walgreens. Bennett stayed in the car with his children while his wife went inside. Bennett noticed a person walking toward the Walgreens who wore a hooded sweatshirt and something covering his face. A few minutes later Bennett saw the same man run out of the store carrying a plastic Walgreens bag that appeared to contain several pill bottles. Bennett followed the man in his car and saw him enter the passenger side of a light blue Volkswagen Golf. Bennett slowed down and wrote down the license plate number of the car. Bennett then drove past the car and saw the driver of the vehicle. When the driver noticed Bennett, he sped off. Bennett supplied this information to the police.

Pierce County Deputy Sheriff Tara Simmelink-Lovely responded to the scene and ran the license plate number provided by Bennett. Simmelink-Lovely discovered that the vehicle belonged to Joseph Schaffer. The following day, Tacoma Police Officer Jared Tiffany received

information that Shaffer was staying at the Silver Cloud Hotel in Tacoma, Washington. Tiffany was also informed that Shaffer had been driving a tan Plymouth Voyager van and that Shaffer would be returning to the hotel soon. Tiffany waited near the hotel and initiated a traffic stop when he saw the van drive into the hotel parking lot. When Tiffany pulled the van over, he saw Shaffer, the driver of the van, switch seats with the passenger. When Tiffany asked him to identify himself, Shaffer gave his brother's name and date of birth. Shaffer later admitted his true identity to Tiffany. Police searched the van and found pills, prescription bottles, $3,246, and a wallet containing Shaffer's identification.

Deputies arrested Shaffer and the State charged him with second degree robbery. Later, in an interview with Pierce County Sheriff Detective Denny Wood, Shaffer stated that Nyland had committed the Walgreens robbery with him. The State charged Nyland with second degree robbery and unlawful delivery of a controlled substance. Shaffer pleaded guilty to first degree rendering criminal assistance, trafficking in stolen property, and unlawful possession of a controlled substance and agreed to testify against Nyland.

At trial, Shaffer testified that he was addicted to OxyContin and that he would spend up to $100 a day to satisfy this addiction. Shaffer stated that he and Nyland discussed robbing a pharmacy so Shaffer could obtain pills and Nyland could make money to pay off a debt. On the morning of the Walgreens robbery, Shaffer awoke to Nyland knocking on his door. Nyland was dressed in a black hooded sweatshirt, black sweatpants, black gloves, aviator glasses, and had a bandana covering his face.

Shaffer testified that he drove Nyland in his blue Volkswagen Golf and parked down the

road from Walgreens. Nyland entered the Walgreens and came running out a few minutes later. The two men then drove to Shaffer's house and Shaffer immediately got high on OxyContin. At some point, they left for Nyland's house in Nyland's car. While at Nyland's house, Shaffer received a call from his parents telling him that the police were looking for him. Shaffer and Nyland then sold some of the pills for approximately $10,000 and split the money, and Nyland dropped off Shaffer at a gas station. Shaffer met some friends at the gas station and the group rented a room at the Silver Cloud Hotel in Tacoma.

Both the Walgreens pharmacy technician and the pharmacist testified at trial. The pharmacy technician testified that she was frightened when Nyland handed her a note demanding OxyContin and that it was Walgreens's policy to act on a robber's demands regardless of whether she feared for her safety. The pharmacist similarly testified that she was frightened even though she did not see Nyland carrying a weapon; she also testified that it was Walgreens's policy to "try to get a good description of the thief and give them what they want. No heroics." RP (Dec. 15, 2010) at 19.

Defense counsel proposed two alternate jury instructions defining "threat":

> Threat means to communicate, directly or indirectly, the intent to cause bodily injury to the person threatened or to any other person or to do any act that is intended to harm substantially the person threatened or another with respect to that person's health or safety.

Clerk's Papers (CP) at 30.

> Threat means to communicate, directly or indirectly, the intent to cause bodily injury to the person threatened or to any other person to do any other act that is intended to harm the person threatened or another with respect to that person's health or safety.
>
> To be a threat, a statement or act must occur in a context or under such circumstances where a reasonable person, in the position of the speaker, would

> foresee that the statement or act would be interpreted as a serious expression of intention to carry out the threat.

CP at 31. The trial court declined both proposed threat definitional instructions, reasoning, "[A]s I indicated under [*State v. Gallaher*, 24 Wn. App. 819, 604 P.2d 185 (1979)], the threat definition is not appropriate in a robbery case. . . . It's a 1979 case, and reasonable fear is for malicious harassment, those type of cases, so I don't believe it's appropriate in this case." RP (Dec. 20, 2010) at 86.

During deliberations, the jury submitted three written questions to the trial court. The jury's first question asked to see the security video that had been played during trial. After discussing the jury's request with the State and defense counsel, the trial court played the video for the jury. The jury's second written question asked, "What is the instruction/definition for Robbery in the 3rd degree?" CP at 37. The record does not contain any discussion regarding the jury's question, but the trial court's written response stated, "Please consider only the charges in the instructions." CP at 37. The jury's final written question asked, "Is the definition of robbery based on the intent of the defendant to threaten or is it based on the perception of the victim." CP at 38. Again, the record does not contain any discussion of the jury's question, but the trial court's written response stated, "Please refer to your instructions." CP at 38. The jury returned verdicts finding Nyland guilty of second degree robbery and unlawful delivery of a controlled substance. Nyland timely appeals his second degree robbery conviction.

ANALYSIS

I. Jury Instruction

Nyland first contends that the trial court erred by refusing to give one of his proposed jury

instructions defining the word "threat." Nyland asserts that the trial court's refusal to give this proposed instruction relieved the State of its burden to prove every element of second degree robbery beyond a reasonable doubt. We disagree.

We review de novo alleged errors of law in jury instructions. *State v. Barnes*, 153 Wn.2d 378, 382, 103 P.3d 1219 (2005). "Jury instructions are proper when they permit the parties to argue their theories of the case, do not mislead the jury, and properly inform the jury of the applicable law." *Barnes*, 153 Wn.2d at 382. "It is reversible error to instruct the jury in a manner that would relieve the State of [its] burden" to prove "every essential element of a criminal offense beyond a reasonable doubt." *State v. Pirtle*, 127 Wn.2d 628, 656, 904 P.2d 245 (1995).

Although we generally review claimed errors in jury instructions de novo, "it is within the sound discretion of the trial court to determine the appropriateness of granting a request to define words of common understanding." *State v. Cross*, 156 Wn.2d 580, 617, 132 P.3d 80 (2006). "Trial courts must define technical words and expressions used in jury instructions, but need not define words and expressions that are of ordinary understanding or self-explanatory." *State v. Brown*, 132 Wn.2d 529, 611-12, 940 P.2d 546 (1997).

To convict Nyland of second degree robbery, the State had to prove beyond a reasonable doubt that he

> unlawfully t[ook] personal property from the person of another or in his presence against his will by the use or threatened use of immediate force, violence, or fear of injury to that person or his property or the person or property of anyone. Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking.

Former RCW 9A.56.190 (1975); former RCW 9A.56.210 (1975). Here, the trial court's second

degree robbery "to convict" instruction required the jury to find all of the above statutory elements to convict Nyland for second degree robbery.[3]

Nyland does not elaborate in his brief how the trial court's refusal to give a definitional instruction for threat relieved the State of its burden to prove each essential element of second degree robbery. And, as our Supreme Court has recognized, "[the] failure to give a definitional instruction is not failure to instruct on an essential element." *Brown*, 132 Wn.2d at 612 (citing *State v. Scott*, 110 Wn.2d 682, 690, 757 P.2d 492 (1988)). Accordingly, Nyland's assertion that the trial court's refusal to instruct the jury on the definition of "threat" relieved the State of its burden to prove beyond a reasonable doubt each essential element of second degree robbery is without merit.

Nyland also argues that the trial court's refusal to instruct the jury on the definition of

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[3] The trial court's second degree "to convict" jury instruction stated:

> To convict the defendant of the crime of robbery in the second degree, each of the following elements of the crime must be proved beyond a reasonable doubt:
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> (1) That on or about the 30th day of November, 2008, the defendant unlawfully took personal property from the person or in the presence of another;
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> (2) That the defendant intended to commit theft of the property;
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> (3) That the taking was against that person's will by the defendant's use or threatened use of immediate force, violence or fear of injury to that person or to the person of another;
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> (4) That force or fear was used by the defendant to obtain or retain possession of the property; and
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> (5) That any of these acts occurred in the State of Washington.
>
> If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.
>
> On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP at 53.

"threat" prevented him from arguing his theory of the case. But regardless of whether the trial court instructed the jury on the definition of "threat," Nyland's theory of the case remained the same: that his dress and demeanor—including keeping a hand in his pocket while handing the pharmacy technician a note demanding narcotic pain medication—was not sufficient to constitute a threat for purposes of a second degree robbery conviction. Nyland argued this theory at length to the jury, stating in part:

> [Jury instruction number] 11, that's the definition of Robbery in the Second Degree. I think the key part of that was that you take property from the person or another by the use of force. We know there is no force used here. Use of force would be if I walked up and grabbed somebody by the collar and said, "Hey, give it to me or I'm gonna punch you[.]" . . . We don't have that here.
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> Or threatened use of force. What was the threatened use of force in this case? [The State] said the fact that he had his hand in his pocket. Both [the pharmacy technician] and [the pharmacist] testified that there was no indication by this person at the counter that he was gonna use force. They give up the pills. That's company policy. . . .
>
> Does a hand in a pocket constitute use of force or threat of use of force? That's something you need to decide.

RP (Dec. 21, 2010) at 40-41. Accordingly, the trial court's jury instructions allowed Nyland to fully argue his theory of the case.

Finally, Nyland appears to argue that the trial court abused its discretion by relying on *State v. Gallaher*, 24 Wn. App. 819, 604 P.2d 185 (1979), when it refused to instruct the jury on his proposed instruction defining "threat." Again, we disagree.

In *Gallaher*, the State charged the defendant with second degree robbery. 24 Wn. App. at 820. The *Gallaher* trial court's jury instructions included a definition of "threat" taken from former RCW 9A.04.110(25)(a) (1975),[4] which jury instruction provided:

[4] This definition of "threat" remains substantially the same under the statute applicable at the time

> Threat means to communicate, directly or indirectly the intent: to cause bodily injury *in the future* to the person threatened or to any other person; or, to do any other act which is intended to harm substantially the person threatened or another with respect to his health, safety, business, financial condition, or personal relationship.

24 Wn. App. at 821 (emphasis added). Division Three of this court held that the trial court erred by giving this instruction, "[i]nsofar as the instruction include[d] threats of harm to take place subsequent to the robbery." *Gallaher*, 24 Wn. App. at 822. Although the *Gallaher* court held that the trial court erred by giving the threat instruction, it determined that the error was harmless in light of the trial court's other instructions. 24 Wn. App. at 823.

Here, the parties dispute whether Nyland's proposed definitional instruction was limited to threats of harm taking place before the robbery and, thus, whether the trial court would have erred by giving the instruction. But we need not decide that dispute here, as the relevant question on appeal is whether the trial court erred in refusing to give any definitional instruction. And "upholding an instruction given is different from requiring an instruction [to] be given." *Cross*, 156 Wn.2d at 617.

Our Supreme Court has held that a trial court must define technical words or expressions used in jury instructions but need not define words and phrases that have an ordinary understanding or are self-explanatory. *Brown*, 132 Wn.2d at 611-12. "For example, upon request, the trial court must give instructions on the statutory meaning of 'intent.' But jury instructions need not define terms such as 'common scheme or plan,' 'single act,' 'leniency,' or 'mitigating circumstances.'" *Brown*, 132 Wn.2d at 612 (citations omitted). We hold that the

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of Nyland's offenses. *See* former RCW 9A.04.110(27)(a), (j) (2007).

word "threat" has an ordinary understanding such that a trial court is not required to provide a jury instruction defining it. Accordingly, the trial court did not abuse its discretion in refusing Nyland's proposed instructions asking that the trial court define "threat."

II. Right to Be Present

Next, Nyland contends that the trial court violated his right to be present at all critical stages of his trial by responding to jury questions during deliberations in his absence.[5] Even assuming that the trial court improperly responded to jury questions in Nyland's absence, the trial court's responses conveyed no affirmative information and were thus harmless beyond a reasonable doubt.

We review allegations of constitution violations de novo. *State v. Vance*, 168 Wn.2d 754, 759, 230 P.3d 1055 (2010). A trial court's error in answering jury instructions in the defendant's absence may be harmless if the State can show the harmlessness beyond a reasonable doubt. *State v. Caliguri*, 99 Wn.2d 501, 509, 664 P.2d 466 (1983); *State v. Allen*, 50 Wn. App. 412, 419, 749 P.2d 702 (1988). Under the confrontation clause of the Sixth Amendment[6] and the due process clause of the Fourteenth Amendment,[7] a criminal defendant has a constitutional right to be present

[5] We address the trial court's responses to all three of the jury's questions because it is unclear from Nyland's brief which of the trial court's responses to the jury's questions he is challenging in his appeal. For the first time in his reply brief, Nyland also asserts that the trial court's response to jury questions in his absence violated his and the public's right to a public trial. But an issue raised for the first time in a reply brief is too late to warrant consideration. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). Accordingly, we decline to address that issue.

[6] U.S. Const. amend. VI.

[7] U.S. Const. amend. XIV.

during all critical stages of criminal proceedings. *United States v. Gagnon*, 470 U.S. 522, 526, 105 S. Ct. 1482, 84 L. Ed. 2d 486 (1985). Article I, section 22 of our state constitution provides that an "accused shall have the right to appear and defend in person."[8]

In addition to Nyland's constitutional right to be present at all critical stages of his criminal proceedings, CrR 6.15(f)(1) provides:

> The jury shall be instructed that any question it wishes to ask the court about the instructions or evidence should be signed, dated and submitted in writing to the bailiff. The court shall notify the parties of the contents of the questions and provide them an opportunity to comment upon an appropriate response. Written questions from the jury, the court's response and any objections thereto shall be made a part of the record. The court shall respond to all questions from a deliberating jury in open court or in writing. In its decision, the court may grant a jury's request to rehear or replay evidence, but should do so in a way that is least likely to be seen as a comment on the evidence, in a way that is not unfairly prejudicial and in a way that minimizes the possibility that jurors will give undue weight to such evidence. Any additional instruction upon any point of law shall be given in writing.

Here, the trial court provided written responses to three questions the jury submitted during deliberations:

> QUESTION: May we see the video after our break.
> RESPONSE: Yes.
> . . . .
> QUESTION: What is the instruction/definition for Robbery in the 3rd degree?
> RESPONSE: Please consider only the charges in the instructions.
> . . . .
> QUESTION: Is the definition of Robbery based on the intent of the defendant to threaten or is it based on the perception of the victim.

[8] Although Nyland states in his brief that "[t]he right under the state constitution to 'appear and defend' is arguably broader that the federal due process right to be present," he has not asked us to apply a broader application of this state constitutional right than that afforded by its federal counterpart. Br. of Appellant at 15 (citing *State v. Irby*, 170 Wn.2d 874, 885 n. 6, 246 P.3d 796 (2011)). Accordingly, we interpret the protections under our state constitution and federal constitution coextensively for purposes of this appeal. *State v. Lee*, 135 Wn.2d 369, 387, 957 P.2d 741 (1998).

RESPONSE: Please refer to your instructions.

CP at 36-38.

The trial court's response to the jury's first question was discussed on the record in open court. There is no record of any discussion between the trial court and counsel regarding the jury's second and third questions, but the trial court's written responses to those questions contain either a signature from the State and defense counsel or a notation that counsel were notified of the jury's question by telephone. Therefore, the record is not clear about whether Nyland was present during the trial court's response to the jury's questions.

But "[w]here the trial court's response to a jury inquiry is 'negative in nature and conveys no affirmative information', no prejudice results." *Allen*, 50 Wn. App. at 419 (quoting *State v. Russell*, 25 Wn. App. 933, 948, 611 P.2d 1320 (1980)). Thus, even assuming that Nyland was not present and that he had a constitutional right to be present when the trial court responded to the jury's questions, any error was harmless beyond a reasonable doubt. Accordingly, Nyland's claim fails.

III. Sufficiency of the Evidence

Nyland also contends that sufficient evidence does not support his second degree robbery conviction. Specifically, Nyland contends that the State did not present any evidence that he used or threatened to use immediate force, violence, or fear of injury to obtain the OxyContin from the Walgreens pharmacy employees. We disagree.

Sufficient evidence exists to support a conviction if any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt when viewing the evidence in the light

most favorable to the State. *State v. Hosier*, 157 Wn.2d 1, 8, 133 P.3d 936 (2006). A defendant claiming insufficiency of the evidence admits the truth of the State's evidence and all inferences that reasonably can be drawn from the evidence. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial evidence and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). We defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992).

To convict Nyland of second degree robbery, the State had to prove beyond a reasonable doubt that Nyland

> unlawfully t[ook] personal property from the person of another or in his presence against his will by the use or threatened use of immediate force, violence, or fear of injury to that person or his property or the person or property of anyone. Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking.

Former RCW 9A.56.190; former RCW 9A.56.210.

"Any force or threat, no matter how slight, which induces an owner to part with his property is sufficient to sustain a robbery conviction." *State v. Handburgh*, 119 Wn.2d 284, 293, 830 P.2d 641 (1992). Moreover, "the threat need not be explicit if the defendant indirectly communicates his intent." *State v. Shcherenkov*, 146 Wn. App. 619, 627, 191 P.3d 99 (2008). Here, although the State did not present evidence that Nyland displayed a weapon or made an explicit threat to harm the pharmacy employees if they refused his demands, his dress and conduct—particularly his conduct in keeping a hand in his pocket during the encounter—was sufficient evidence for a jury to find that he indirectly communicated a threat to use immediate

force, violence, or fear of injury to obtain the Oxycontin. Additionally, although the Walgreens pharmacy employees testified that it was Walgreens's policy to adhere to a robber's demands regardless of whether the employees fear for their safety, both testified that they were frightened by Nyland's appearance and conduct. Accordingly, sufficient evidence supports Nyland's second degree robbery conviction.

IV. Cumulative Error

Finally, Nyland asserts that he is entitled to a new trial under the cumulative error doctrine. We disagree.

Application of the cumulative error doctrine is limited to instances when there have been several trial errors that standing alone may not be sufficient to justify reversal but when combined may deny a defendant a fair trial. *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). Having identified no error, we reject Nyland's claim that the cumulative error doctrine entitles him to relief.

We affirm his second degree robbery conviction.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Van Deren, J.

We concur:

Hunt, J.

Worswick, C.J.