IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. DEVIN ANDREW WINTCH Appellant.	)	DIVISION ONE No. 66354-2-I UNPUBLISHED OPINION FILED: April 16, 2012

Dwyer, J. — Devin Wintch appeals from his conviction of second degree robbery, asserting, first, that the trial court's instructions wrongly permitted the jury to convict Wintch of an uncharged crime and, second, that Wintch's constitutional rights were violated by his conviction of a crime that was not named in the charging document. With respect to the first claim, because the instruction proposed by Wintch at trial contains the same purported error as the instruction ultimately given by the trial court, the doctrine of invited error precludes Wintch's challenge to this instruction on appeal. As to the second claim, because Wintch did not raise an objection to the information at trial, we must liberally construe this document in favor of validity. Because the necessary facts may be found on the face of the document, and because the record clearly indicates that Wintch had actual notice of the charges against him, we determine that the information was constitutionally sufficient. Accordingly, we affirm.

On the night of June 26, 2010, Scott Tomkins was participating in a volunteer neighborhood patrol in the Gleneagle area of Arlington. Tomkins carried within his vehicle a portable spotlight that he used to illuminate parks and other dark areas while looking for indications of burglary, vandalism, drug dealing, and other crimes. The spotlight, which was approximately four inches wide and could be held by hand, was powered by the vehicle's cigarette lighter, producing a very bright light of one million candlepower.

At approximately 10:00 p.m., Tomkins observed Wintch, a resident in the neighborhood, approaching his vehicle.[1] Tomkins rolled down his window to talk to Wintch. The two men exchanged words and an argument ensued. When the confrontation escalated, Wintch reached through the open window of Tomkins' vehicle and pulled the portable spotlight out of the cigarette lighter. Wintch then returned to his home, still carrying the light. He placed the spotlight in his bedroom.

Thereafter, Tomkins drove to the home of John Branthoover—the organizer of the patrol—and reported these events. The two men called the police. They then drove to a location near where the confrontation had occurred to wait for officers to arrive. Branthoover—who was licensed to carry a concealed weapon—was armed with a holstered handgun.

Approximately 15 to 20 minutes later, Wintch emerged from his home and

[1] At trial, Wintch testified that Tomkins had twice pointed the portable light at Wintch as he smoked a cigarette in front of his home. Tomkins denied this allegation.

approached the vehicle where Tomkins and Branthoover were seated. Words were again exchanged, and a physical altercation began. Wintch hit Branthoover and knocked him down. He then grabbed a battery-powered flashlight from Tomkins and struck Tomkins with the flashlight. Branthoover drew his gun from its holster and pointed it at the sky.

Moments later, the police arrived. Wintch was ordered to drop the flashlight, which he did. Wintch was then arrested and taken into custody. Wintch's mother retrieved the portable spotlight from Wintch's room and delivered it to the officers.

Wintch was thereafter charged with one count of second degree robbery, one count of harassment, and two counts of fourth degree assault. The information alleged that the robbery was committed as follows:

> That the defendant, on or about the 26th day of June, 2010, with intent to commit theft, did unlawfully take personal property of another, *to-wit: a flashlight*, from the person or in the presence of Scott Tomkins, against such person's will, by use or threatened use of immediate force, violence, and fear of injury to Scott Tomkins; proscribed by RCW 9A.56.210, a felony.

Clerk's Papers (CP) at 70 (emphasis added).

At the trial that followed, the trial court instructed the jury as to the following elements for second degree robbery:

> (1) That on or about June 26, 2010, the defendant unlawfully took personal property from the person of another;
> (2) That the defendant intended to commit theft of the property;
> (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;

> (4) That force or fear was used by the defendant to obtain or retain possession of the property or to prevent or overcome resistance to the taking; and
> (5) That any of these acts occurred in the State of Washington.

CP at 44 (Instruction 6).

During closing arguments, both the prosecution and the defense made clear that they viewed the robbery charge as predicated upon Wintch's taking of the portable spotlight—admitted into evidence at trial as exhibit 11—during Wintch's first confrontation with Tomkins. In closing argument, the prosecutor argued that Wintch committed second degree robbery when he "ripped [exhibit 11] out of the lighter, and took it inside the house." Report of Proceeding (RP) (Nov. 9, 2010) at 12. Similarly, defense counsel argued during closing that, because Wintch had not acted with the intent to deprive Tomkins of the item admitted as exhibit 11, the prosecution had failed to prove the elements of second degree robbery. At no point during trial did the prosecution contend that Wintch committed robbery by taking the battery-powered flashlight—admitted into evidence as exhibit 12—during the second confrontation. At the conclusion of its deliberations, the jury convicted Wintch as charged.

Wintch appeals

II

At the outset, we note that Wintch has not set forth with precision his claim in this appeal. In his sole assignment of error, Wintch contends that his "due process rights were violated when the jury was permitted to convict

[Wintch] of an uncharged crime." Br. of Appellant at 1. The trial court set forth the elements necessary to convict Wintch of second degree robbery in a written instruction to the jury. Accordingly, although Wintch does not expressly so assert, Wintch's claim of error appears premised upon a challenge to this instruction.

Wintch appears to assert that, because the trial court's instruction regarding the elements of second degree robbery failed to clarify whether this charge was predicated upon the taking of exhibit 11 or exhibit 12, the trial court erred by permitting the jury to potentially convict Wintch of an uncharged crime. If this is, in fact, Wintch's claim, he does not establish an entitlement to appellate relief.

It is, of course, true that a defendant who is charged with stealing one item of property cannot be convicted of stealing some other item. State v. Rhinehart, 92 Wn.2d 923, 928, 602 P.2d 1188 (1979). An instruction that so allows is potentially erroneous. See State v. Garcia, 65 Wn. App. 681, 687-88, 829 P.2d 241 (1992). However, "a defendant may not challenge an instruction on appeal when he or she requested the instruction at trial." State v. Fields, 87 Wn. App. 57, 63, 940 P.2d 665 (1997) (citing State v. Henderson, 114 Wn.2d 867, 868, 792 P.2d 514 (1990)). Pursuant to the doctrine of invited error, where the trial court's instruction contains the same error as the defendant's proposed instruction, review is precluded. Fields, 87 Wn. App. at 63; see also State v.

Neher, 112 Wn.2d 347, 352-53, 771 P.2d 330 (1989). The invited error doctrine applies even when the instructional error is of constitutional magnitude. Henderson, 114 Wn.2d at 871.

Here, Wintch requested the following instruction:

> 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:
>
> (1) That on or about June 26, 2010, the defendant unlawfully took personal property from the person of another;
> (2) That the defendant intended to steal the property;
> (3) That the taking was against the person's will by the defendant's use or threatened use of immediate force, violence, or fear of injury to that person;
> (4) That force or fear was used by the defendant to obtain or retain possession of the property; and
> (5) That any of these acts occurred in the State of Washington.

CP at 62.

The elements set forth in this proposed instruction varied from those ultimately given by the trial court in only three respects. First, in element (2), the trial court substituted the phrase "commit theft of" for the term "steal." Second, in element (3), the court replaced the phrase "*the* person's will" with the phrase "*that* person's will." Finally, in element (4), the court's instruction added the phrase "or to prevent or overcome resistance to the taking." CP at 44 (Instruction 6) (emphasis added). None of these differences, however, pertain to the issue of whether Wintch took exhibit 11 or exhibit 12—the only issue that Wintch raises on appeal.

Instead, only element (1) is relevant to the issue of which item Wintch took during the robbery. With regard to this element, Wintch's proposed instruction is identical to the instruction ultimately given by the court. Accordingly, because Wintch's proposed instruction contains the same purported error as the court's instruction, the doctrine of invited error precludes a challenge to this instruction on appeal.

III

Portions of Wintch's brief suggest that he does not perceive his appeal as limited to a challenge to the trial court's instructions to the jury. Wintch notes that a criminal defendant also has the right "to have notice of the charges pending against him." Br. of Appellant at 6. Thus, Wintch's appeal can be construed as a challenge to the sufficiency of the document by which he was charged. Pursuant to this characterization of Wintch's claim, we address the question of whether, because the information specified that the robbery charge was predicated upon Wintch's taking of a "flashlight" and not a "spotlight," this charging document failed to adequately apprise Wintch of the charges pending against him.[2] Insofar as this is Wintch's contention, he again does not establish an entitlement to appellate relief.

An accused person has a constitutional right to be informed of the charge he is to meet at trial. State v. Pelkey, 109 Wn.2d 484, 487, 745 P.2d 854 (1987). A defendant must be apprised with reasonable certainty of the nature of the accusation in order to prepare an adequate defense. State v. Grant, 89 Wn.2d 678, 686, 575 P.2d 210 (1978). Accordingly, due process requires that the charging document contain "'a plain, concise and definite written statement

[2] There can be no reasonable dispute that Wintch's second degree robbery conviction was based upon his taking of the portable spotlight (exhibit 11) during the first confrontation with Tomkins. Although Wintch does not explicitly so argue, the evidence adduced at trial was clearly insufficient to support a conviction of second degree robbery for the taking of the battery-powered flashlight (exhibit 12) during the second confrontation. Indeed, the prosecution made no attempt to prove robbery with regard to this item. Accordingly, Wintch's claim on appeal is properly characterized as a challenge to the sufficiency of the charging document in apprising him of the charge for which he was ultimately convicted.

of the essential facts constituting the offense charged.'" State v. Cozza, 71 Wn. App. 252, 255, 858 P.2d 270 (1993) (quoting CrR 2.1). Such a factual description is adequate where it apprises a person of ordinary understanding as to the nature of the charge. State v. Primeau, 70 Wn.2d 109, 113, 422 P.2d 302 (1966).

As an initial matter, we note that Wintch did not object to the form or substance of the charging document in the trial court. Although a constitutional challenge to the sufficiency of the information may be raised for the first time on appeal, in such circumstances, we liberally construe the document in favor of validity. State v. Kjorsvik, 117 Wn.2d 93, 102, 812 P.2d 86 (1991). As our Supreme Court has explained, liberal construction on appeal is required to discourage "sandbagging"—a "potential defense practice wherein the defendant recognizes a defect in the charging document but foregoes raising it before trial when a successful objection would usually result only in an amendment of the pleading." Kjorsvik, 117 Wn.2d at 103. Accordingly, where a defendant has failed to object to the charging document prior to the verdict, we will find the information constitutionally sufficient where: (1) "the necessary facts appear in any form, or by fair construction can . . . be found" on the face of the charging document, and (2) the defendant cannot "show that he or she was nonetheless actually prejudiced by the inartful language which caused a lack of notice." Kjorsvik, 117 Wn.2d at 105-06; see also State v. Sanders, 65 Wn. App. 28, 30-

31, 827 P.2d 354 (1992). Wintch's claim does not survive review pursuant to this standard.

Here, we have no difficulty discerning the necessary facts from the face of the charging document. Wintch contends that, because the information alleged that he committed robbery by taking a "flashlight," the trial court erred by permitting the jury to convict him for taking exhibit 11, which, he now asserts on appeal, can only be described as a "spotlight." However, pursuant to a fair construction of this term, we can see no reason that exhibit 11 cannot be described as a "flashlight." A "flashlight" is defined as "a small, battery-operated portable electric light." Webster's Third New International Dictionary 865 (2002). Exhibit 11 is four inches wide, two to three inches deep, and is designed to be held by hand during operation. It is electric and powered by a car battery. Accordingly, exhibit 11 plainly fits within the common meaning of the term "flashlight."

Indeed, both Wintch and defense counsel used the terms "flashlight" and "spotlight" interchangeably when referring to exhibit 11 at trial. During defense counsel's direct examination of Wintch regarding the taking of exhibit 11, the following exchange took place:

> [DEFENDANT]: I got blinded a couple times by the *spotlight* and I couldn't see. . . . [He] was being somewhat aggressive with the *flashlight,* so I reached in and grabbed the *flashlight.*
> [DEFENSE COUNSEL]: Let me ask you this: When you reached in and grabbed this *flashlight,* is it turned on or off?
> [DEFENDANT]: [I]t was on. It was on when he first was shining it at me. . . .

> [DEFENSE COUNSEL]: Mr. Wintch, here's my question: When you reached in and grabbed the *flashlight,* was it on or off?
> [DEFENDANT]: Oh. Well, I was standing just like maybe a step or two back from the vehicle, and so as I approached the vehicle he threw it on the dash is what he did and he got into a defensive stance. . . .
> [DEFENSE COUNSEL]: Was the *spotlight* on or was it off?
> [DEFENDANT]: It was off.

RP (Nov. 8, 2010) at 8-9 (emphasis added).

Later, on cross-examination, the defendant continued to refer to exhibit 11 as a "flashlight":

> [DEFENDANT]: At that point I kind of shut him out because I was getting blinded by the *flashlight* . . . .

RP (Nov. 8, 2010) at 37 (emphasis added).

> [PROSECUTOR]: Explain to me how he was being aggressive.
> [DEFENDANT]: With the *flashlight.* . . . I wouldn't approach someone and . . . start harassing them with a *flashlight* and asking him questions.

RP (Nov. 8, 2010) at 78 (emphasis added).

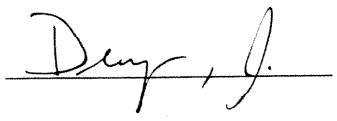
> [DEFENDANT]: I took two steps, it happened, and I grabbed the *flashlight*.

RP (Nov. 8, 2010) at 84 (emphasis added).

Accordingly, because it is clear that exhibit 11 could properly be described as a "flashlight," the essential facts constituting the offense charged are present on the face of the information. Kjorsvik, 117 Wn.2d at 105-06. Particularly given Wintch's own use of the term "flashlight" to describe exhibit 11, his assertion on appeal that exhibit 11 cannot be so described is unavailing.

Nor can Wintch demonstrate that he was prejudiced by the use of the term "flashlight" in the charging document. As discussed above, both prosecution and defense tried the case as though the second degree robbery charge was predicated upon Wintch's taking of exhibit 11 during his first confrontation with Tomkins. Indeed, *prior* to trial, defense counsel made clear that Wintch would defend the second degree robbery charge by demonstrating that Wintch did not have the requisite intent to deprive Tomkins of exhibit 11. Referencing exhibit 11, counsel explained to the court that the defense would show "that there's no intent present on Devin Wintch's part which satisfies the elements of robbery in the second degree because the removal of this item had nothing to do with theft or stealing property." RP (Nov. 3, 2010) at 37. Accordingly, it is clear that Wintch had actual notice that the second degree robbery charge was based on his taking of exhibit 11 and not some other item. Because this notice was sufficient for Wintch to prepare an adequate defense, Grant, 89 Wn.2d at 686, he cannot now claim prejudice on appeal.

Affirmed.



We concur:

Schindler, J.

Cox, J.