

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

AARON C. GERMAN,

Appellant.

No. 39240-2-II

UNPUBLISHED OPINION

Penoyar, C.J.—Aaron C. German appeals his convictions of first degree robbery with a firearm enhancement and second degree unlawful firearm possession. He contends that (1) he should have received credit for time served on electronic home monitoring before sentencing, (2) juror misconduct denied him a fair trial, (3) his counsel provided ineffective assistance by failing to (a) support German’s motion for time served on electronic home monitoring with legal authority and (b) make a timely motion for mistrial for juror misconduct, (4) the firearm enhancement violates equal protection and double jeopardy, and (5) the evidence was insufficient to support either conviction because the State failed to prove identity or firearm possession. The State concedes that German is entitled to a credit for time served on electronic home monitoring, and we remand for resentencing on that ground. In all other respects, we affirm the judgment and sentence.

FACTS

On the night of October 19, 2007, two men entered Bob’s Grocery in Tacoma and ordered cashier Jim Campbell to “get on the ground.” Report of Proceedings (RP) at 141. According to Campbell, one man carried a shotgun, which he pointed at Campbell, and the other also carried a

firearm. Campbell observed that both men wore dark clothing; one man's face was "pretty covered up." RP at 140. A surveillance video revealed that both men wore gloves. The men grabbed about \$100 from the cash register and several cigarette packs.

After an investigation, the State charged German with first degree robbery¹ with a firearm enhancement² and second degree unlawful firearm possession.³

At German's trial, Gino DePaul testified that, on the afternoon of October 19, Elliott Morrison concocted the plan to rob Bob's Grocery. Morrison asked DePaul to be the driver. DePaul went home, picked up his 12-gauge shotgun and shotgun shells and placed the shotgun in the trunk of his car.

DePaul testified that he drove German and Morrison to Bob's Grocery in his car later that evening. German and Morrison sat in the backseat and could access DePaul's trunk by folding down the seats. At some point, DePaul handed the shotgun shells to either German or Morrison. DePaul saw German put on a pair of gloves before they arrived at Bob's Grocery.

At Bob's Grocery, German and Morrison got out of the car and walked toward the store. DePaul testified that they wore gloves and "beanies" that covered most of their heads. RP at 60.

¹ A violation of RCW 9A.56.190, .200. The State's amended information alleged that German committed first degree robbery by "display[ing] what appeared to be a firearm or other deadly weapon" in violation of RCW 9A.56.200(1)(a)(ii). Clerk's Papers (CP) at 22. The to-convict robbery instruction is consistent with the amended information. The judgment and sentence states, apparently erroneously, that the jury convicted German of first degree robbery under RCW 9A.56.200(1)(a)(iii), a different subsection of the first degree robbery statute.

² A violation of RCW 9.94A.533(3). German notes that the information cites a different subsection of chapter 9.94A RCW to support the firearm enhancement, but he does not challenge the information's sufficiency.

³ A violation of RCW 9.41.040(2)(a)(iii).

Later, German and Morrison entered the car, yelling, “Go, go, go.” RP at 65. German’s and Morrison’s faces were covered and one of them carried DePaul’s shotgun. After the robbery, DePaul dropped off Morrison at an acquaintance’s house and then dropped off German at a different location. DePaul testified that German had the shotgun when DePaul dropped off Morrison.

Morrison testified that he confessed to the robbery after police apprehended him. He told police that German carried the shotgun during the robbery. Morrison testified that he was intoxicated the night of the robbery.

When police searched DePaul’s vehicle, they found shotgun shells in the backseat, a BB gun with the orange safety tip painted silver under the driver’s seat, gloves, and two ski masks.

The jury convicted German as charged. He appeals.

ANALYSIS

I. Credit for Time Served

German spent about four months on electronic home monitoring before sentencing. The State concedes that German is entitled to credit for this time under RCW 9.94A.505(6); *State v. Swiger*, 159 Wn.2d 224, 149 P.3d 372 (2006); and *State v. Anderson*, 132 Wn.2d 203, 937 P.2d 581 (1997). We have reviewed these authorities and accept the State’s concession.

II. Juror Misconduct

German argues that the presiding juror’s comments to other jurors about her online research during deliberations prejudiced the jury and denied him a fair trial. We disagree.

We review a trial court’s investigation into jury misconduct to determine whether the trial court’s decision is based on untenable grounds. *See State v. Earl*, 142 Wn. App. 768, 774, 177

P.3d 132 (2008), *review denied*, 164 Wn.2d 1027 (2008). We grant a new trial only where juror misconduct has prejudiced the defendant. *Earl*, 142 Wn. App. at 774.

During jury deliberations, the presiding juror unfortunately went online to research the prosecutor's and defense counsel's trial duties. When the presiding juror began to tell other jurors about her research, several jurors stopped her and called the judicial assistant. The court questioned each juror individually about the presiding juror's comments.⁴ Each juror affirmed that he or she could overlook the presiding juror's comments and follow the court's instructions. Juror number 6 was initially hesitant, but after further inquiry, confirmed that she could continue to perform her juror duties.⁵

The trial court concluded that the presiding juror had committed misconduct and replaced her with an alternate. The trial court did not dismiss any other juror, noting that the jury made a "group effort" to inform the presiding juror about her misconduct "almost immediately upon her making some comments." RP at 526.

Defense counsel did not move for juror 6's dismissal, noting that her response involved "some hesitation" but was "very similar to the remaining jurors." RP at 528. The trial court

⁴ According to individual jurors, the presiding juror told them what she had learned online about court procedures, the prosecutor's duties, the defense counsel's duties, "alternative schools," and "why certain things did not come up" at trial. RP at 496, 504. One juror recalled that the presiding juror described defense counsel's role as "[t]o rebut, prove [the prosecutor] wrong." RP at 502.

⁵ When the trial court initially asked juror 6 if she could put the presiding juror's comments out of her mind, she replied, "It's been said. I think I can, but you know, you never can totally put it out of your mind." RP at 511. She stated that the comments "did influence my thinking a bit, but it wasn't anything that was like a revelation to me." RP at 512. The trial court then asked, "And would you be able to continue to follow the Court's instructions on the law?" RP at 512. Juror 6 responded, "Yes, I have been trying to follow the Court's instructions the whole time." RP at 512.

agreed and declined to dismiss juror 6, concluding that she was still able to deliberate because her comments were no “different than the rest of the jurors.” RP at 526.

We conclude that the trial court properly investigated the allegations of juror misconduct and also properly excused the presiding juror for her actions. Most jurors could only vaguely recall the presiding juror’s comments, and all ultimately confirmed they could continue to deliberate without considering outside information. The trial court did not err by determining that the remaining jurors, including juror 6, were able to follow the court’s instructions and deliberate. Thus, we reject German’s claim that he suffered prejudice as a result of the presiding juror’s misconduct.

III. Ineffective Assistance of Counsel

German argues that he received ineffective assistance when his counsel failed to move for a mistrial based on juror misconduct before the jury returned a verdict.⁶ We disagree. As we explained above, the trial court properly concluded that the remaining jurors were able to follow the court’s instructions and continue to deliberate without considering outside information. Thus, because defense counsel did not perform deficiently by failing to move for mistrial before the sentencing hearing, German’s ineffective assistance claim fails.⁷

IV. Imposition of Firearm Enhancement

A. Equal Protection

German contends that RCW 9.94A.533(3), the basis for the firearm enhancement to his

⁶ Defense counsel moved for a mistrial at the sentencing hearing.

⁷ We do not address German’s ineffective assistance claim related to his electronic home monitoring credit because we accept the State’s concession on that issue.

first degree robbery conviction, violates state and federal guarantees of equal protection. Specifically, he argues that no rational basis exists for RCW 9.94A.533(3)(f), a provision that exempts some felony crimes—but not first degree robbery—from the reach of the firearm enhancement statute.

We reject this argument. As Division One observed in *State v. Pedro*, 148 Wn. App. 932, 946-47, 201 P.3d 398 (2009), *review denied*, 169 Wn.2d 1007 (2010), when it rejected a similar equal protection challenge, “[t]he clear distinction between the exempt and nonexempt crimes is . . . [that] all of the exempt crimes involve use or possession of a firearm as the underlying crime.” Under Washington law, a person may commit first degree robbery without using a firearm. *See* RCW 9A.56.190, 200. Thus, because German is not similarly situated to individuals who commit crimes where possession or use of a firearm is a necessary element, his equal protection claim fails.⁸ *See Pedro*, 148 Wn. App. at 947.

B. Double Jeopardy

German contends that the firearm enhancement constituted double jeopardy because firearm use was an element of the underlying robbery offense. Our Supreme Court recently rejected this reasoning in a unanimous decision in *State v. Kelley*, 168 Wn.2d 72, 84, 226 P.3d 773 (2010).

V. Sufficiency

German claims that the evidence was insufficient to convict him of first degree robbery because no eyewitness identified him as one of the robbers or testified to seeing him enter or leave

⁸ We also reject German’s suggestion that RCW 9.94A.533(3) violates the Washington constitution’s privileges and immunities clause. *See* Wash. Const. art. I, § 12. We agree with the *Pedro* court’s observation that, “[T]he firearm enhancement statute is not a regulation of the right to bear arms. Instead, it punishes those who commit felony offenses while armed with a firearm.” 148 Wn. App. at 950.

the store. German also contends that we should reverse his second degree unlawful firearm possession because the State presented insufficient evidence that he possessed a firearm. We reject these arguments.

We review sufficiency challenges in the light most favorable to the State to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Brockob*, 159 Wn.2d 311, 336, 150 P.3d 59 (2006). Circumstantial and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). We do not review credibility determinations, which are for the fact finder. *Brockob*, 159 Wn.2d at 336.

A. Robbery

The State must establish beyond a reasonable doubt the identity of the accused as the person who committed the offense. *State v. Hill*, 83 Wn.2d 558, 560, 520 P.2d 618 (1974). Identity is a question of fact for the jury. *Hill*, 83 Wn.2d at 560.

Here, the State presented sufficient circumstantial evidence that German was one of the robbers. DePaul testified that (1) he drove German and Morrison to the store with an agreed intent to commit a robbery, (2) German and Morrison got out of the car wearing gloves and beanies, (3) either German or Morrison carried a shotgun, and (4) German and Morrison returned to the car running and yelled “Go, go, go!” RP at 65. Morrison told police that German carried the shotgun during the robbery. Campbell, the store clerk, testified that two individuals wearing dark clothing entered the store and that one carried a shotgun and the other a firearm. Taken together, this evidence, though not overwhelming, is sufficient for a rational trier of fact to determine that German was one of the robbers.

B. Unlawful Possession of a Firearm

To prove that German committed second degree unlawful firearm possession, the State had to prove that German knowingly had a firearm in his possession or control. *See* RCW 9.41.040(2). Possession may be actual or constructive. *State v. Jones*, 146 Wn.2d 328, 333, 45 P.3d 1062 (2002). A defendant has actual possession when he or she has physical custody of an item and constructive possession if he or she has dominion and control over the item. *Jones*, 146 Wn.2d at 333.

Once again, the evidence is sufficient to uphold German's conviction. DePaul testified that he placed a shotgun in his car's trunk, which German and Morrison could access as backseat passengers. Morrison told police after his arrest that German carried the shotgun during the robbery. Furthermore, according to DePaul, German had actual possession of the shotgun after the robbery around the time that DePaul dropped off Morrison. Viewed in the light most favorable to the State, this testimony is sufficient to conclude that German knowingly possessed the shotgun.

We affirm German's convictions, but we remand for entry of an amended judgment and sentence to reflect German's credit for time served on electronic home monitoring.

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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.

Penoyar, C.J.

We concur:

Armstrong, J.

Quinn-Brintnall, J.