FILED

April 12, 2012

In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 29543-5-III**
Respondent,	)	
	)	**Division Three**
v.	)	
	)	
SHAUN LEON ROCKSTROM,	)	
	)	**UNPUBLISHED OPINION**
Appellant.	)	
	)	

Siddoway, J. — Shaun Rockstrom was convicted of second degree robbery for shoplifting. He complains on appeal that the prosecutor committed misconduct in arguing legal rights of the shopkeeper that were not part of the court's instructions to the jury and that the court improperly imposed an exceptional sentence. He raises additional arguments in a pro se submission of additional grounds. The State rightly concedes that the trial court erred in imposing an exceptional sentence. We find no other merit in the appeal. We affirm the conviction and remand for resentencing within the standard range.

FACTS AND PROCEDURAL BACKGROUND

In April 2010, Shaun Rockstrom was noticed by employees of a video rental store

to be behaving suspiciously as he browsed the store's movie inventory. Upon leaving the store he was followed into the parking lot by Jason Haynes, the shift manager, who believed Mr. Rockstrom had shoplifted several Blu-ray movie discs and hidden them in his clothing.

Mr. Haynes approached Mr. Rockstrom in the parking lot. Upon seeing him approach, Mr. Rockstrom belligerently asked what he wanted; Mr. Haynes stated, "'There are some movies missing in the store, and I think you have got them. I want them back.'" Report of Proceedings (RP) (Oct. 25, 2010) at 75. Mr. Rockstrom swore, clenched his fists, and approached Mr. Haynes as if to fight. As Mr. Rockstrom approached, Mr. Haynes could plainly see movie disc cases tucked into the waistband of Mr. Rockstrom's pants. Mr. Haynes made no move to engage in a fight, so Mr. Rockstrom dropped his hands and tried to get around Mr. Haynes and into his truck. But as Mr. Rockstrom passed, Mr. Haynes grabbed at the movie disc cases that were sticking out of Mr. Rockstrom's pants and then followed alongside as Mr. Rockstrom moved toward the truck, continuing to retrieve movie disc cases tucked into his waistband. Even after Mr. Rockstrom reached his truck and stepped into the driver's seat, Mr. Haynes reached through the open driver-side window in an effort to grab the last of the cases.

In this last effort to recover the cases, Mr. Haynes came up with Mr. Rockstrom's wallet instead. At that point, Mr. Haynes claims that Mr. Rockstrom hit him "with an

open fist across the bridge of [his] nose," knocking Mr. Haynes back, his eyeglasses flying off onto the pavement, and his arm striking the frame of the window. *Id.* at 78. Mr. Haynes' eyes stung and were watering and swelling from the blow; according to him, "After that, I had had enough. I was done. I got what I could. I backed away." *Id.* at 79. Mr. Rockstrom "peeled out," according to Mr. Haynes, missing him by a "matter of inches" and running over his eyeglasses. *Id.*

Mr. Haynes called police and provided responding officer Rustin Olson with the wallet he had seized, which contained Mr. Rockstrom's identification. Using the information, Deputy Olson created a six-person photomontage that included Mr. Rockstrom, whom Mr. Haynes identified as the individual who stole the movie discs.

The State charged Mr. Rockstrom with first degree robbery. It also charged, as an aggravating factor, that a standard range term would be "clearly too lenient" due to the trial court's inability to count prior offenses by Mr. Rockstrom that had washed out, citing RCW 9.94A.535(2)(d).

Mr. Rockstrom testified at trial, admitting that he had shoplifted several movie discs from the store but denying that he ever threatened or struck Mr. Haynes. His lawyer asked the jury to find him guilty of only third degree theft.

In closing argument to the jury the prosecuting attorney stated that "Jason Haynes followed [Mr. Rockstrom] out, *as he has a legal right to do* if he sees someone stealing

his property from the store"; that Mr. Haynes "went up to Mr. Rockstrom and started grabbing DVDs[1] off his person, *which he has a right to do*"; and that Mr. Haynes "*had a legal right* to take that property back." RP (Oct. 26, 2010) at 172, 173, 178 (emphasis added). He also argued that Mr. Rockstrom used force to overcome Jason Haynes' "legal resistance to the defendant's taking of that property." *Id.* at 179. He continued the theme in rebuttal, arguing that Mr. Haynes "*did what the law entitled him to do.* If you are a store employee and someone is stealing in your presence, *you have a right to physically stop them and detain them and take back your property. That is your right. That is lawful. So Jason Haynes was acting lawfully.*" *Id.* at 193-94 (emphasis added).

The jury found Mr. Rockstrom guilty of second degree robbery. The standard range based on his offender score of 18 was 63 to 84 months. The court accepted the State's argument that a standard range sentence would be clearly too lenient and imposed an exceptional sentence of 120 months, the statutory maximum for second degree robbery.

Mr. Rockstrom appeals, arguing prosecutorial misconduct in closing argument and legal error in imposing the exceptional sentence.

ANALYSIS

I

[1] Digital video discs.

Mr. Rockstrom argues that the prosecuting attorney committed misconduct by repeatedly arguing to the jury that, as a matter of law, Mr. Haynes' effort to recover the movie discs was lawful. The trial court was not asked to and did not instruct the jury on the right of a shopkeeper to use force against a shoplifter or to detain or retrieve property from him or her. According to Mr. Rockstrom, proper instruction would have been that, by statute, a shopkeeper may lawfully use force only if a felony has been committed. RCW 9A.16.020(2). There was no evidence that Mr. Rockstrom carried more than $750 in merchandise (the felony threshold for theft) out of the store. RCW 9A.56.050. He argues that while common law permits a shopkeeper to use "reasonable" force to effect a citizen's arrest, the issue of what force is reasonable is a question of fact, not something that the State can fairly argue as a matter of law. *State v. Miller*, 103 Wn.2d 792, 795, 698 P.2d 554 (1985).

A defendant claiming prosecutorial misconduct must establish the impropriety of the prosecution's comments and their prejudicial effect. *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006). Comments are prejudicial only where "there is a substantial likelihood the misconduct affected the jury's verdict." *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). A reviewing court does not assess the prejudicial effect of a prosecutor's improper comments by looking at the comments in isolation but by placing the remarks "in the context of the total argument, the issues in the case, the evidence

addressed in the argument, and the instructions given to the jury." *Id.*

In arguing to the jury, counsel is "confined to the law as set forth in the instructions to the jury." *State v. Perez-Cervantes*, 141 Wn.2d 468, 475, 6 P.3d 1160 (2000). Because the jury had not been instructed on the rights of a shopkeeper, an objection to the prosecutor's argument would presumably have been sustained. But no objection was made to the prosecutor's comments at the time of argument. A defendant ordinarily cannot sit silently through objectionable argument, holding his objection in reserve as a basis for appeal in the event he is convicted. By failing to object, a defendant waives the error unless the comment is "so flagrant and ill-intentioned that it causes an enduring and resulting prejudice" that a curative instruction could not have neutralized. *Brown*, 132 Wn.2d at 561.

To begin with, Mr. Rockstrom's argument that the prosecutor misstated the law presumes the State was arguing that Mr. Haynes had a right to use force to detain Mr. Rockstrom. But no one testified that Mr. Haynes used force or even tried to use force to detain Mr. Rockstrom. Both Mr. Haynes and Mr. Rockstrom testified that Mr. Haynes only grabbed movie disc cases tucked into Mr. Rockstrom's clothing in an effort to recover the store's merchandise. Even Mr. Rockstrom minimized the effort required by Mr. Haynes to retrieve the cases, describing Mr. Haynes as having grabbed several from under his armpit and the balance from the back of his pants. He denied that Mr. Haynes

even had to reach inside the truck, concluding "[h]e got the movies off me as simply as I said he did." RP (Oct. 26, 2010) at 127. Where the prosecutor was emphasizing only that Mr. Haynes had a right to grab the stolen merchandise, Mr. Rockstrom does not persuade us that the argument was flagrant or ill-intentioned.

Moreover, this oversight—arguing a legal principle that counsel feels confident is true but failed to request as a jury instruction—is a type that could have been promptly corrected by timely objection and a curative instruction. The jury had already been instructed that it was to "disregard any remark, statement, or argument that is not supported by the evidence or the law in [the court's] instructions." Clerk's Papers at 41.

Finally, Mr. Rockstrom argues he was prejudiced because the jury could have concluded that any threat or use of force by him "was in order to avoid or avert Mr. Haynes's unreasonable and inappropriate conduct" had it not been led to believe that Mr. Haynes' conduct was lawful. Br. of Appellant at 9. But the key point in contention—the difference between third degree theft and robbery—was Mr. Rockstrom's claim that he never resisted Mr. Haynes' effort to retrieve the movie disc cases at all. Mr. Haynes' rights in the matter were not relevant to the State's charge. A defense argument that Mr. Rockstrom used force to avoid or avert Mr. Haynes' efforts to recover store merchandise would have undermined his defense.[2]

[2] Robbery is characterized by the use of force or fear "to obtain or retain possession of the property," and "in either of which cases the degree of force is

Mr. Rockstrom has not demonstrated either flagrant misconduct or prejudice.

II

Mr. Rockstrom next argues that he is entitled to be resentenced within the standard range for his offense because the State's alleged aggravating factor was inapplicable to his case.

During sentencing the State made no argument that any of Mr. Rockstrom's convictions had washed out and, on that basis, that a standard range sentence was too lenient. Indeed, there appears to have been a consensus that none of Mr. Rockstrom's prior offenses washed. The State argued only that substantial and compelling reasons for an exceptional sentence existed because Mr. Rockstrom's offender score of 18 was twice that of the highest offender score included on the sentencing grid. The trial court adopted that rationale in sentencing Mr. Rockstrom to the statutory maximum. It thereby erred. A high offender score is not a basis for imposing an exceptional sentence under RCW 9.94A.535(2)(d). The State rightly concedes that resentencing is necessary. Br. of Resp't at 5-6. Remand for resentencing within the standard range is appropriate.

STATEMENT OF ADDITIONAL GROUNDS (SAG)

In a pro se statement of additional grounds, Mr. Rockstrom raises four matters he suggests were not adequately addressed by his counsel: (1) substantial evidence does not

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immaterial." RCW 9A.56.190.

support the conviction, (2) further prosecutorial misconduct occurred during closing, (3) evidentiary error, and (4) cumulative error.

He first challenges the sufficiency of the evidence to support several elements of the crime charged. When reviewing such a challenge, we view the evidence in the light most favorable to the State and determine whether any rational trier of fact could have found the elements of the crime charged beyond a reasonable doubt. *State v. Brown*, 162 Wn.2d 422, 428, 173 P.3d 245 (2007). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Substantial evidence means evidence in the record of a sufficient quantity to persuade a fair-minded, rational person of the truth of the finding. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). Credibility determinations are for the trier of fact and are not subject to review. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

Mr. Rockstrom's challenge to the sufficiency of the evidence primarily relies on his contention that Mr. Haynes lied about what happened during their encounter. He strenuously insists that he has always pleaded to crimes when he was guilty and admitted his shoplifting in this case; we should therefore accept his adamant denial that he ever threatened force or struck Mr. Haynes. But no matter how strongly Mr. Rockstrom feels about that factual determination, it was for the jury to make. The jury had the

opportunity to watch and listen to testimony of the witnesses, which we recognize as critical to making credibility determinations and do not review. Mr. Haynes' testimony was sufficient if believed (as it evidently was) for the jury to find that Mr. Rockstrom threatened the use of force. *See State v. O'Connell*, 137 Wn. App. 81, 95, 152 P.3d 349 (2007) (recognizing that "[a]ny force or threat, even slight, is sufficient to sustain a robbery conviction"). Mr. Rockstrom also argues that the State never connected his show of force to an effort on his part to retain the property, but it was for the jury to assess why he threatened force. Based upon the evidence presented, a reasonable jury could have concluded that he threatened force in an effort to escape the scene with the movie discs and without being apprehended.

He also contests the sufficiency of the evidence supporting the jury's finding that he took the property in the presence of another. Personal property is within a victim's presence when it is "within [the victim's] reach, inspection, observation or control." *State v. Manchester*, 57 Wn. App. 765, 768-69, 790 P.2d 217 (1990) (alteration in original) (quoting 4 Charles E. Torcia, Wharton's Criminal Law § 473, at 52 (14th ed. 1981)). The evidence was sufficient for the jury to find that Mr. Rockstrom took the movie discs in the presence of Mr. Haynes, since Mr. Haynes testified that he saw Mr. Rockstrom holding the movies and then observed that the movies had disappeared.

Next, Mr. Rockstrom raises issues of alleged prosecutorial misconduct distinct

from that alleged by his appellate counsel. He complains that the following remarks made by the prosecutor during closing improperly informed the jury that his act of balling his fists converted his theft into a robbery as a matter of law:

> And he balled his fists, as Jason Haynes testified to. In that moment in time, what would otherwise have been a theft turned into a robbery, because, at that point, it was implied the defendant was going to keep that property under the threat of force.

RP (Oct. 26, 2010) at 172. The prosecutor did no more here than argue an inference from the evidence, as lawyers are permitted and expected to do in argument. *See State v. Belgarde*, 110 Wn.2d 504, 516, 755 P.2d 174 (1988) (finding that a prosecutor "has wide latitude to argue the facts in evidence and reasonable inferences therefrom"). He did not tell the jury that it was legally required to draw the inference. Defense counsel could have argued a contrary inference; instead he argued (understandably, given Mr. Rockstrom's defense) that Mr. Rockstrom never balled his fists at all. The prosecutor's argument was not improper. Mr. Rockstrom's additional allegations of prosecutorial misconduct are similarly without merit.

Mr. Rockstrom also complains that the trial court erred "by allowing information about my E-bay account into the trial as evidence." Amendment to SAG at 1. No objection to this evidence was made during trial, and we therefore need not consider it. RAP 2.5(a); *State v. Robinson*, 171 Wn.2d 292, 304, 253 P.3d 84 (2011). Additionally,

"the appellate court will not consider a defendant/appellant's statement of additional grounds for review if it does not inform the court of the nature and occurrence of alleged errors." RAP 10.10(c). Mr. Rockstrom has failed to adequately inform us of the nature of his challenge here.

Finally, Mr. Rockstrom argues that reversal is required under the cumulative error doctrine. Because we find no error other than the discrete and correctable sentencing error, the doctrine is inapplicable.

We affirm the conviction and reverse and remand for resentencing within the standard range.

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

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Siddoway, J.

WE CONCUR:

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Korsmo, C.J.

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Brown, J.