10CA2453 People v. Oslund 04-11-2013

COLORADO COURT OF APPEALS

Court of Appeals No. 10CA2453
Pueblo County District Court No. 09CR1656
Honorable Victor I. Reyes, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Kelly Ray Oslund,

Defendant-Appellant.

JUDGMENT AFFIRMED, SENTENCE AFFIRMED IN PART,
VACATED IN PART, AND CASE REMANDED WITH DIRECTONS

Division IV
Opinion by JUDGE WEBB
Hawthorne and Fox, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(f)
Announced April 11, 2013

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Defendant, Kelly Ray Oslund, challenges the judgment entered on a jury verdict convicting him of aggravated robbery, alleging erroneous jury instructions. He also challenges both the sentence imposed for his aggravated robbery conviction and the sentence imposed after he pled guilty to reckless manslaughter. We vacate and remand for resentencing on the reckless manslaughter charge and otherwise affirm.

I. Background

Defendant and his brother attended a party at the house of a mutual acquaintance. During the party, the host went outside, approached defendant's car, and saw a man who she could not identify leaving the car through the window. This man ran into the host, knocking them both down, and dropped a few items taken from the car as he fled. After being alerted by the host, defendant and his brother ran in the direction indicated by the host to find the thief.

After running down the street and into a field, defendant and his brother encountered one of the other guests from the party. According to the host's trial testimony, defendant said that he had

"reached into [the guest's] pockets and grabbed what was his" after discovering the guest in possession of items taken from the car. The host also testified that defendant's brother had admitted to hitting the guest, who later died from blunt force injuries to the head. Testimony established that defendant's brother returned to the party carrying a stick or small log.

As relevant to this appeal, defendant and his brother were each charged with first degree felony murder and aggravated robbery, but were tried separately.[1] Defendant's theory of the case was that because he was defending his property, he could not be criminally liable. However, the trial court refused to instruct the jury on this affirmative defense, reasoning that the statute establishing the defense applied only to prevent an attempted theft, while here the theft had been completed. The court also instructed the jury, over defendant's objection, that ownership of the property taken from the victim was irrelevant to defendant's liability,

[1] Defendant's brother was convicted of first degree felony murder, aggravated robbery, and reckless manslaughter, which was affirmed by a division of this court. *People v. Jayson Michael Oslund*, 2012 COA 62, ¶¶ 6, 27.

provided that the victim had "sufficient control" over the property when it was taken.

The jury returned a guilty verdict on the aggravated robbery count, but could not reach a verdict on the felony murder count. In return for dismissal of this count, defendant pled guilty to reckless manslaughter. He was sentenced to twenty-eight years in prison for aggravated robbery and sixteen years for reckless manslaughter, which would be served concurrently.

II. Defense of Property Instructions

Defendant first challenges the trial court's rejection of his affirmative defense instructions on defense of property. A division of this court rejected such a defense in *People v. Jayson Michael Oslund*, 2012 COA 62, ¶ 26 (*J. Oslund*), which involved defendant's brother and the same set of operative facts. While "one panel [of this court] is not obligated to follow the precedent established by another," *In re Estate of Becker*, 32 P.3d 557, 563 (Colo. App. 2000) *aff'd sub nom. In re Estate of DeWitt*, 54 P.3d 849 (Colo. 2002), we reach the same conclusion.

A. Standard of Review

In Colorado, "all affirmative defenses to crimes must be defined by the General Assembly in the Colorado Revised Statutes." *Oram v. People*, 255 P.3d 1032, 1036 (Colo. 2011), *as modified on denial of reh'g* (Aug. 1, 2011). This court reviews the construction of such statutes de novo. *See People v. Houser*, 2013 COA 11, ¶ 15.

A trial court must instruct the jury on applicable affirmative defenses. *Lybarger v. People*, 807 P.2d 570, 579 (Colo. 1991). While evidence must be viewed in the light most favorable to a defendant, *Mata-Medina v. People*, 71 P.3d 973, 979 (Colo. 2003), the defendant bears the burden of offering "some credible evidence" that an affirmative defense applies to a particular case. *People v. Garcia*, 113 P.3d 775, 783 (Colo. 2005). Therefore, if the trial court correctly determines, as a matter of law subject to de novo review, that the defendant has not met this burden, the requested instruction need not be given. *O'Shaughnessy v. People*, 2012 CO 9, ¶ 13.

B. Law

The Colorado Constitution recognizes the "inalienable right[]" to "protect[] property." Colo. Const. art. II, § 3. Yet, "the law does

not justify the shedding of human blood to prevent slight injuries to the property of others." *Bush v. People*, 10 Colo. 566, 579, 16 P. 290, 296 (1888); *see also Stulp v. Schuman*, 2012 COA 144, ¶ 31 ("Property rights are not absolute."). Consistent with this view, our criminal statutes generally "endorse the basic public policy that even rightful owners should not be permitted to . . . use force to regain their property, once it has been taken." *People v. Scearce*, 87 P.3d 228, 231 (Colo. App. 2003) (internal quotations omitted).

As relevant here, section 18-1-706, C.R.S. 2012, permits a criminal defendant to use "reasonable and appropriate physical force" to defend his property. However, such force is only justified "to prevent what he reasonably believes to be an attempt by the other person to commit theft." *Id.*

When construing a statute, courts look to the plain and ordinary meaning of the statutory language. *People v. Madden*, 111 P.3d 452, 457 (Colo. 2005). "If the statute is unambiguous, we look no further." *People v. Kovacs*, 2012 COA 111, ¶ 11. Also, courts should "give effect to every word and are not to adopt a construction that renders any term superfluous." *Madden*, 111 P.3d at 457.

C. Facts

As relevant here, defendant tendered to the trial court two instructions: one on the affirmative defense of defense of property, and another presenting the elements of theft, to aid the jury in applying the tendered defense of property instruction. Defendant argued that, because the victim was fleeing from the scene, the attempted theft was still in progress and, thus, the affirmative defense applied.

The trial court rejected both instructions. It reasoned that because defendant did not see the victim either take the items from the car or flee the scene, the theft was already completed when defendant contacted the victim.

D. Analysis

The General Assembly has limited a defendant's use of force in defense of property to the "prevent[ion of] what he reasonably believes to be an attempt by the [victim] to commit theft." § 18-1-706. Thus, our analysis is limited to whether any evidence at trial suggested that defendant used force to prevent an attempted theft. We conclude that it did not because the victim had already committed theft before he encountered defendant.

"Theft is knowingly obtaining or exercising control over anything of value of another without authorization and with the requisite intent." *J. Oslund*, ¶ 23. Here, the parties agree that the victim was not authorized to have the items that he had taken from defendant's car, nor is there any question about the victim's intent to deprive defendant of these items. Thus, once the victim took possession of defendant's property, which occurred before he was even seen by defendant, he had committed theft. *See Hucal v. People*, 176 Colo. 529, 534, 493 P.2d 23, 26 (1971) (concluding that a theft occurred once there was a "wrongful appropriation" with intent, even if the owner was not "permanent[ly] depriv[ed] of property"); *People v. Contreras*, 195 Colo. 80, 83, 575 P.2d 433, 435 (1978) ("[T]he crime of theft was completed when the defendant removed the shirts from the rack and concealed them in the sack he was carrying, if at the time he had the intent to permanently deprive the owner of its use or possession. As of that moment, there was a completed taking.").

Yet, the plain language of the statute only allows the use of force to prevent *attempted* theft. "Attempt contemplates the lack of completion of the underlying predicate offense. . . . It is, therefore,

the failure to complete the [crime] that makes the requisite acts an attempt." *People v. Renaud*, 942 P.2d 1253, 1257 (Colo. App. 1996). Hence, once the victim had taken the items from defendant's car, he was no longer committing attempted theft. *See People v. Buerge*, 240 P.3d 363, 367 (Colo. App. 2009) (noting that in criminal attempt, "the perpetrator has only taken a substantial step toward, but has not completed, the [underlying] crime"). Therefore, because the attempt had ended, defendant's conduct was not protected by section 18-1-706.

This distinction between attempt and completion is consistent with the statutory authorization of the use of force only to *prevent* the taking of a defendant's property. It does not authorize force to reclaim property once taken. *See People v. Goedecke*, 730 P.2d 900, 901 (Colo. App. 1986) ("[Because] the assault took place *after* the alleged theft of the food stamps had already occurred . . . ., there were no grounds upon which the jury could find that defendant reasonably believed that force was necessary to *prevent* an attempted theft, and the trial court did not err in refusing the tendered instruction." (emphasis in original)).

Here, as noted in *J. Oslund*, ¶ 24, defendant's altercation with the victim did not occur until after defendant's property was in the victim's possession and he had fled the scene. "Thus, defendant could no longer *prevent* the theft. Rather, defendant was trying to apprehend the thief and recover the property." *Id.* at ¶ 25 (emphasis in original) (internal citations omitted).

"Just as important as what the statute says is what the statute does not say." *Auman v. People*, 109 P.3d 647, 656 (Colo. 2005). The plain language of the statute does not extend the affirmative defense beyond the prevention of attempted theft, nor has any case read the statute so expansively. If the General Assembly intended the defense to apply more broadly, it could have so specified, as it has done in multiple other criminal statutes. *See, e.g., id.* (noting that the General Assembly added the words "immediate flight therefrom" to the felony murder statute and interpreting this addition as significant); *cf. People v. Prieto*, 124 P.3d 842, 847 (Colo. App. 2005) (recognizing that "[t]he General Assembly may prescribe a more severe penalty for felony first degree murder than for immediate flight vehicular homicide"). Yet, the defense of property statute does not include "immediate flight

therefrom" or similar language. And "[w]e should not construe these omissions by the General Assembly as unintentional." *Auman*, 109 P.3d at 657.

For these reasons, the plain language of section 18-1-706 makes the affirmative defense inapplicable here. Therefore, we need not resort to the rule of lenity or other tools of statutory construction. *See People v. Gonzales*, 973 P.2d 732, 734 (Colo. App. 1999) (The rule of lenity "is to be applied only to resolve an 'unyielding statutory ambiguity,' not to create an ambiguity justifying a construction in favor of the defendant."). Nor do we consider the trial court's conclusion so "unexpected and indefensible" that it deprived defendant of due process, as it followed both the plain meaning of the statute and applicable case law. *See People v. Robb*, 215 P.3d 1253, 1262 (Colo. App. 2009) ("We conclude it was neither unexpected nor indefensible . . . to follow the majority view articulated in [a leading case]. This is particularly true in light of the absence of any prior Colorado appellate decision adopting the contrary view.").

Thus, the trial court did not err by denying defendant's instructions on this defense.

III. Ownership of Property Instruction

Defendant next contends the trial court erred by instructing the jury that ownership of the property involved in the aggravated robbery charge was immaterial to the jury's considerations. We discern no error.

A. Standard of Review

"The trial court has a duty to instruct the jury on all matters of law applicable to the case. An appellate court will review jury instructions de novo to determine whether the instructions accurately informed the jury of the governing law." *Riley v. People*, 266 P.3d 1089, 1092 (Colo. 2011) (citation omitted). However, if the instructions as a whole correctly state the applicable law, the trial court has substantial discretion in the wording of a particular instruction. *People v. Vecellio*, 2012 COA 40, ¶ 30.

In addition, a defendant must object to instructions with enough specificity to allow the trial court to rule on the objection. *People v. Shearer*, 650 P.2d 1293, 1296 (Colo. App. 1982); *see* Crim. P. 30. For this reason, we will reverse a jury instruction on a ground that was not presented to the trial court only if the court committed plain error. *People v. Richards*, 23 P.3d 1223, 1225

(Colo. App. 2000). An error is plain only when so "obvious and substantial" as to cast serious doubt on the reliability of the judgment of conviction. *People v. Rogers*, 2012 COA 192, ¶ 26.

B. Law

To determine whether a defendant committed aggravated robbery, as defined in section 18-4-302, C.R.S. 2012, a jury must first determine whether he committed a robbery, as defined in section 18-4-301, C.R.S. 2012. *See People v. Borghesi*, 66 P.3d 93, 97 (Colo. 2003) ("Aggravated robbery includes all of the elements of the crime of robbery, but also requires additional elements."). A defendant commits robbery if he "knowingly takes anything of value from the person or presence of another by the use of force, threats, or intimidation." § 18-4-301(1).

As our supreme court has noted, "[i]t is quite obvious what the term 'from the person of another' means within the context of the robbery statute. The limits of the term 'from the presence of another,' however, are not so clear." *People v. Bartowsheski*, 661 P.2d 235, 243-44 (Colo. 1983). The supreme court consistently has held that property is taken from the "presence of another" "when it is so within the victim's reach, inspection or observation that he or

she would be able to retain control over the property." *Id.* at 244; *accord Borghesi*, 66 P.3d at 103.

Thus, whether the victim was in control of the property at the time of taking is an important consideration when deciding whether the property was in the "presence" of the victim under section 18-4-301. *See People v. Benton*, 829 P.2d 451, 452 (Colo. App. 1991) (emphasizing "retain[ing] control" of the property when quoting the supreme court's definition of "presence" in the robbery statute).

In addition, section 18-4-301 defines robbery without reference to ownership of the property in question. This definition contrasts with the theft statute, section 18-4-401, which specifies that the taking must be "anything of value of another." Because of this difference, as well as underlying common law principles, Colorado courts have concluded that "[p]roof of ownership of the property taken is immaterial [to robbery] so long as the victim had sufficient control over it at the time of the taking." *Scearce*, 87 P.3d at 231 (quoting *Borghesi*, 66 P.3d at 101).

C. Facts

The prosecution proposed instructing the jury that it "shall not consider whether the victim or defendant was the rightful owner of

any property found on the victim," and to "consider whether the victim had sufficient control of any property at the time of taking." Defendant objected to this instruction, arguing that ownership was relevant to defendant's affirmative defense of defense of property.

While the trial court rejected the prosecution's instruction, it gave a substantially similar instruction, labeled Instruction 15. This instruction read, "Proof of ownership of the property taken from the person or presence of the victim is immaterial so long as the victim had sufficient control over it at the time of the taking."

D. Analysis

On appeal, defendant argues that Instruction 15 constitutes reversible error in three ways:

- That "sufficient control" is irrelevant to the robbery statute;
- That the term "sufficient control" is impermissibly vague and threatened to confuse the jury; and
- That the proof of ownership part of the instruction misstated the law as it applied to defense of property.

Because defendant's first two arguments were not raised before the trial court, we review them only for plain error.

As discussed above, whether the victim of a robbery is in "control" of property at the time of taking is critical to whether property was in the "presence of another" under the robbery statute. Thus, while the word "control" does not appear in the robbery statute, instructing the jury about the victim's control over the property was not plain error in light of the trial court's "duty to instruct the jury on all matters of law applicable to the case." *Riley*, 266 P.3d at 1092.

In addition, defendant presents no argument, nor can we discern one, why "sufficient control" is a phrase "so technical or mysterious as to create confusion in jurors' minds," requiring a definitional instruction. *People v. Thoro Products Co.*, 45 P.3d 737, 745 (Colo. App. 2001), *aff'd*, 70 P.3d 1188 (Colo. 2003). And because the instruction was a correct statement of law, the particular wording of the instruction remained in the trial court's discretion. *Townsend v. People*, 252 P.3d 1108, 1111 (Colo. 2011); *see Mendez v. Pavich*, 159 Colo. 409, 411, 412 P.2d 223, 224 (1966) ("[I]t should be remembered that in passing upon instruction number eight, we are not sitting as literary critics."). Thus, we

further conclude that use of the phrase "sufficient control" in the instruction was not plain error.

Defendant's third argument, while preserved, is unpersuasive. As discussed in Part II, *supra*, the evidence at trial did not warrant an instruction on defense of property. Hence, the trial court did not need to consider whether Instruction 15 would have been appropriate in light of a defense of property instruction. And because "the trial court may instruct the jury concerning a principle of law that is related to an issue in controversy," *People v. Hayward*, 55 P.3d 803, 805 (Colo. App. 2002), the instruction was proper, as it related to the jury's understanding of the crime of robbery.

For these reasons, we discern no error in the jury instructions given at trial. Therefore, we affirm the trial court's judgment.

IV. Sentencing

Finally, defendant challenges both his sentence of twenty-eight years for aggravated robbery and his sentence of sixteen years for reckless manslaughter, which he pled to after trial. While we affirm the aggravated robbery sentence, we vacate the reckless manslaughter sentence and remand for resentencing.

A. Standard of Review

"Because sentencing requires familiarity with the circumstances of a case, a trial court's sentencing decision will not be disturbed absent a clear abuse of discretion." *People v. Leske*, 957 P.2d 1030, 1042 (Colo. 1998). "If the sentence is within the range required by law, is based on appropriate considerations as reflected in the record, and is factually supported by the circumstances of the case, we must uphold it." *People v. Destro*, 215 P.3d 1147, 1155 (Colo. App. 2008).

B. Aggravated Robbery Sentence

When sentencing, a court must consider "the nature of the offense, the character and rehabilitative potential of the offender, the development of respect for the law and the deterrence of crime, and the protection of the public." *People v. Fuller*, 791 P.2d 702, 708 (Colo. 1990). However, a trial court need not "engage in a point-by-point discussion of each and every one of these factors when it explains the sentence to be imposed." *People v. Walker*, 724 P.2d 666, 669 (Colo. 1986).

Here both parties agree, as do we, that the statutory sentencing range authorized for defendant's aggravated robbery

conviction is ten to thirty-two years. Yet, defendant argues that his twenty-eight-year sentence was an abuse of discretion because "the court improperly balanced the relevant sentencing criteria."

The trial court both imposed a sentence within the statutory range and considered a variety of factors relevant to the nature of the offense, including:

- That the incident "started with the amount of drinking that was being done" by the parties involved;
- That defendant and his brother were much larger than the victim;
- That defendant did not think that the altercation with the victim was "that big of a deal" at the time;
- That everyone involved bore some responsibility; and
- That the crime was avoidable.

"[O]nly in truly exceptional circumstances will an appellate court substitute its judgment for the judgment of the trial court as to the appropriate sentence." *People v. Cole*, 926 P.2d 164, 169 (Colo. App. 1996). Because the trial court "state[d] on the record the basic reasons for the imposition of sentence. . . . [and] include[d] the primary factual considerations bearing on the

[court's] sentencing decision," *People v. Watkins*, 200 Colo. 163, 168, 613 P.2d 633, 637 (1980), defendant's aggravated robbery sentence was not an abuse of discretion.

C. Reckless Manslaughter Sentence

"A sentence that is beyond the statutory authority of the court is illegal. Courts are limited to imposing sentences within the statutory range authorized by the General Assembly and have no jurisdiction to enter sentences that are inconsistent with their sentencing authority as statutorily defined." *People v. Anaya*, 894 P.2d 28, 31 (Colo. App. 1994).

Defendant argues, the Attorney General concedes, and we agree, that the statutory maximum for defendant's reckless manslaughter sentence was twelve years. However, the trial court imposed a sentence of sixteen years. Thus, we vacate defendant's sentence for reckless manslaughter and remand to the trial court for resentencing, consistent with the applicable statutory range. *See People v. Linares-Guzman*, 195 P.3d 1130, 1138 (Colo. App. 2008).

V. Conclusion

We affirm defendant's aggravated robbery conviction and the sentence imposed for this conviction. We vacate defendant's sentence for reckless manslaughter and remand for resentencing.

JUDGE HAWTHORNE and JUDGE FOX concur.