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**DISTRICT I/IV**

October 17, 2014

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You are hereby notified that the Court has entered the following opinion and order:

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2013AP2873-CR State of Wisconsin v. Joseph T. Benson (L.C. # 2009CF4357)
2013AP2874-CR State of Wisconsin v. Joseph T. Benson (L.C. # 2009CF4466)

Before Lundsten, Sherman and Kloppenburg, JJ.

Joseph Benson appeals judgments of conviction and orders denying his postconviction motions. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2011-12).[1] We affirm.

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

Benson was convicted of one count of armed robbery with threat of force and two counts of robbery of a financial institution. His postconviction motions alleged that the plea colloquies were deficient as to several elements for each of the three counts.

On appeal, Benson appears to imply that the circuit court found the plea colloquies were deficient on multiple elements of all three counts and, as a result, Benson does not attempt to explain in his opening brief how they were deficient. Instead, he confines his argument to whether the State then failed to meet its burden to prove that he understood those elements.

The State first responds that Benson made a prima facie showing of a defective plea colloquy only as to the take-and-carry-away element of the three counts. The State argues that there were no other plea colloquy defects. However, this argument fails, at least as to two counts, because it is incomplete. In its argument, the State discusses only the plea colloquy as it relates to the armed robbery, and makes no attempt to explain how the plea colloquy sufficiently explained the challenged elements relating to the robbery of a financial institution counts. Therefore, we are given no basis to conclude that the plea colloquy was adequate as to the financial institution counts.

Nonetheless, we conclude that the only arguments properly before us are those that relate to the take-and-carry-away element of all three counts because Benson failed to preserve his other arguments at the hearing. At the start of the hearing on Benson's motions, the court stated that there was one element "arguably that was not involved in the plea colloquy, that being specifically that he took and carried away property." A bit later, the court noted that, "because of that one aspect, the plea colloquy was probably questionable at least." The court asked if it had

correctly stated "where we are on this thing," and Benson's attorney stated that he believed it was correct.

Benson asserts on appeal that the circuit court "took the position that Benson had established a prima facie case … and that the State therefore had the burden to show … that Benson knew and understood the elements." Benson's description of the circuit court's conclusion exceeds what the court actually said. While Benson describes the court as having required the State to prove his understanding of the "elements," in the plural, the court's conclusion was plainly limited to a determination that Benson made a prima facie case of a defective colloquy with respect to just the one element, albeit an element of all three counts. The circuit court's oral decision after the hearing further shows that the court was focused only on the take-and-carry-away element of the three counts.

If Benson believed the court was incorrectly reading or otherwise incorrectly limiting his motions to that element, the time to say that was then, before the evidentiary portion of the hearing. Benson cannot first agree that the hearing is focused on the take-and-carry-away element, and then argue on appeal that the State failed to carry its burden as to other elements. A showing of a prima facie case as to one element does not require the State to submit proof on all elements. By agreeing with the circuit court's limited description of the hearing's purpose, Benson forfeited his other arguments.

Accordingly, we turn our attention to the "take and carry away" element, starting with the armed robbery count and whether the State met its burden to show that Benson understood the element. Benson argues that the State failed to do that because the State relied mainly on trial counsel's testimony that counsel reviewed with Benson the charging portion of the complaint,

rather than the jury instructions, and the charging portion of the complaint does not sufficiently state the take-and-carry-away element.

In describing this element, the charging portion of the complaint states only that Benson "did take property," and does not include the "and carry away" language. However, the dispositive question is not whether Benson was expressly *told* about the "carry away" (asportation) component, but whether he *understood* that this was a part of the charged crime.

We are satisfied that Benson's understanding was sufficiently shown by clear and convincing evidence. We read the complaint's description of this element in the context of a description that also included the elements of "intent to steal," which informed Benson that his threat of force must have been made "with intent thereby to compel the said owner to acquiesce in the taking or carrying away" of the property. In normal usage, a robber completes the act of "stealing" by removing the property from the control of the owner to a degree that gives the robber full control of the property. This normally means the robber must carry the property some distance away from the owner. With Benson having seen the complaint in that context, we are satisfied that he understood that the State would have to prove that he carried the property away from the immediate site of the taking.

We turn next to the robbery of a financial institution counts. The parties agree that "taking and carrying away" is a necessary element of these counts. The State again relies on the charging portion of the criminal complaint, as used by trial counsel to discuss the counts with Benson. For each count, the complaint stated that Benson "did take money from the presence of" a named person. Again, the complaint does not include the "and carry away" language.

We again conclude that Benson understood that carrying the property away from the immediate site of the taking is a necessary component of the crime. Here, the phrase "take money from the presence of" a person has essentially the same meaning as "take and carry away." If the property is being removed from the presence of a person, this conveys that the property has been carried some distance away from the person.

IT IS ORDERED that the judgments and orders appealed are summarily affirmed under WIS. STAT. RULE 809.21.

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*Diane M. Fremgen*
*Clerk of Court of Appeals*