STATE OF CONNECTICUT *v.* TERRELL WILLIAMS POND
(AC 32468)

Beach, Alvord and Borden, Js.

Argued March 20—officially released September 25, 2012

(Appeal from Superior Court, judicial district of New Haven, geographical area number seven, Matasavage, J.)

Kate MacLeman, certified legal intern, with whom were *Timothy H. Everett*, special public defender, *Sabrina Copp* and *Andrew Veale*, certified legal interns, and, on the brief, *Matthew Bristol*, *Irene Kim* and *Louisa Lindberg*, certified legal interns, for the appellant (defendant).

Leonard C. Boyle, deputy chief state's attorney, with whom, on the brief, were *Michael Dearington*, state's attorney, and *John Lion*, senior assistant state's attorney, for the appellee (state).

Opinion

ALVORD, J. The crime of robbery in the second degree in violation of General Statutes § 53a-135 (a) (2)[1] provides that a person is guilty of that crime when he commits robbery[2] and "in the course of the commission of the crime . . . he or another participant in the crime displays or threatens the use of what he represents by his words or conduct to be a deadly weapon or a dangerous instrument." The inchoate crime of conspiracy in violation of General Statutes § 53a-48 (a)[3] provides that "[a] person is guilty of conspiracy when, with intent that conduct constituting a crime be performed, he agrees with one or more persons to engage in or cause the performance of such conduct, and any of them commits an overt act in pursuance of such conspiracy."[4] The two related issues in this appeal present the question of whether, in order to convict a defendant of conspiracy to commit robbery in the second degree in violation of §§ 53a-48 (a) and 53a-135 (a) (2), the state must prove that the defendant conspirator had the specific intent that there would be a display or threat of the use of what was represented to be a deadly weapon or dangerous instrument, even if that specific intent is not required for proof of the underlying crime of robbery in the second degree. We conclude that our Supreme Court authority requires the state to prove such specific intent.

On appeal, the defendant, Terrell Williams Pond, claims that (1) there was insufficient evidence of his specific intent that, in the course of the robbery, another participant in the robbery would display or threaten the use of what that participant represented to be a deadly weapon or dangerous instrument and (2) the trial court improperly failed to instruct the jury that the state had to prove that the defendant had such specific intent. We agree with the defendant's second claim and, accordingly, reverse the judgment of conviction.

The jury reasonably could have found the following facts. On October 27, 2008, Stanislaw Grzadko, the victim, returned home from work at approximately 5:45 p.m. Grzadko's home is located on Church Street in Hamden. Upon returning home, he ate dinner and then went for his evening walk. At approximately 6:45 p.m., while he was walking on the Dixwell Avenue sidewalk, he was approached from behind by the defendant and Montel Harris, both of whom were riding bicycles on the sidewalk. Harris approached the victim on his left, the defendant approached on his right, each wearing a dark hooded sweatshirt and dark pants. Harris asked the victim where he was going and then demanded that he stop, repeating the order "two [or] three times . . . ." When the victim continued to walk, the defendant pushed his bicycle in front of the victim, forcing him to stop. With the victim now unable to move forward, Harris raised his jacket and lifted the handle of

what appeared to be a gun, later determined to be a CO_2 pistol, from his waistband, asking the victim, "do you know what it is?" When the victim responded, "yes, yes, I know," and as the defendant continued to block the victim from moving, Harris ordered the victim to remove everything from his pockets. Rather than turn his belongings over to the two young men, the victim turned to the side and ran into traffic on Dixwell Avenue in order to escape. The defendant and Harris rode off on their bicycles. Shortly thereafter, the victim called the Hamden police and reported the incident. Later that evening, the Hamden police detained the defendant and Harris, and the victim later identified them as the two young men who had accosted him.

The defendant was charged with attempt to commit robbery in the second degree in violation of General Statutes §§ 53a-49 and 53a-135 (a) (2), and conspiracy to commit robbery in the second degree in violation of §§ 53a-48 and 53a-135 (a) (2). Following a jury trial, the defendant was convicted of the conspiracy count and acquitted of the attempt count. The court sentenced the defendant to five years incarceration, suspended after fifteen months, and three years probation. This appeal followed. Additional facts will be set forth as necessary.

I

The defendant first claims that there was insufficient evidence to support the jury's verdict on the conspiracy charge. Specifically, he claims that the charge of conspiracy to commit robbery in the second degree required the state to prove that (1) he and Harris specifically "had an agreement to display a deadly weapon or dangerous instrument" and (2) he had the specific intent that such a weapon or instrument would be displayed by Harris. The defendant argues further that the evidence was insufficient to prove that he and Harris had such a specific agreement and that he had such a specific intent.

The state responds that, as a legal matter, in order to prove a conspiracy to commit robbery in the second degree under § 53a-135 (a) (2), "the state is not required to offer independent proof that the defendant specifically intended that a dangerous instrument or deadly weapon would be displayed." The state further contends, however, that as a factual matter, if there is such a requirement, it produced sufficient evidence thereof. While we disagree with the state's legal contention, we agree that, nevertheless, the state produced sufficient evidence for the jury reasonably to conclude that the defendant specifically intended that a dangerous instrument or deadly weapon would be displayed.

We begin with the pertinent language of the conspiracy statute. Section 53a-48 (a) provides in relevant part that a "person is guilty of conspiracy when, *with intent*

that conduct constituting a crime be performed, he agrees with one or more persons to engage in or cause the performance of such conduct . . . ." (Emphasis added.) Although the language of the conspiracy statute does not, by its terms, establish whether the specific intent provided by the statute—the "intent that conduct constituting a crime be performed"—requires proof of a specific intent to perform all of the elements of the crime conspired, including any aggravating elements, our Supreme Court addressed this issue in *State* v. *Padua*, 273 Conn. 138, 869 A.2d 192 (2005).

In *Padua*, the defendants were convicted of conspiracy to sell marijuana within 1500 feet of a public housing project. Id., 145. The court stated that it was an essential element of the conspiracy charge that the conspirators agreed to sell marijuana specifically within 1500 feet of a public housing project. Id., 166. Our Supreme Court held, in accord with the state's concession, that the trial court's instruction, which had omitted this element, was improper but that the impropriety was harmless beyond a reasonable doubt. Id. In doing so, the court stated that "[p]roof of a conspiracy to commit a specific offense requires proof that the conspirators intended to bring about the elements of the conspired offense." (Internal quotation marks omitted.) Id., 167. This means that the specific intent required by the conspiracy statute requires specific intent to bring about *all* of the elements of the conspired offense, even those that do not by themselves carry a specific intent with them. We must reach this conclusion because, when *Padua* was decided, it was already settled law that in a prosecution for sale of drugs within 1000 feet of a school, the state was not required to prove that the defendant knew that his sale was within 1000 feet of a school. See *State* v. *Denby*, 235 Conn. 477, 482, 668 A.2d 682 (1995) ("[T]he plain language of [General Statutes] § 21a-278a (b) requires as an element of the offense an intent to sell or dispense the narcotics at a location that is within 1000 feet of a school. The state is not, however, required to prove that the defendant knew that this location was within the zone.").

In the present case, we are bound by the holding in *Padua* to conclude that, in order to prove the defendant guilty of conspiracy to commit robbery in the second degree in violation of § 53a-135 (a) (2), the state needed to prove that he and his coconspirator specifically had an agreement to display a deadly weapon or dangerous instrument and that the defendant had the specific intent that such a weapon or instrument would be displayed. We agree with the state that there was sufficient evidence of both an agreement and the defendant's specific intent that such a weapon or instrument would be displayed.

"The standard of review we apply to a claim of insufficient evidence is well established. In reviewing the suffi-

ciency of the evidence to support a criminal conviction, we apply a two-part test. First, we construe the evidence in the light most favorable to sustaining the verdict. Second, we determine whether upon the facts so construed and the inferences reasonably drawn therefrom the [finder of fact] reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt." (Internal quotation marks omitted.) *State* v. *Martin*, 285 Conn. 135, 147, 939 A.2d 524, cert. denied, 555 U.S. 859, 129 S. Ct. 133, 172 L. Ed. 2d 101, after remand, 110 Conn. App. 171, 954 A.2d 256 (2008), appeal dismissed, 295 Conn. 192, 989 A.2d 1072 (2010). "On appeal, we do not ask whether there is a reasonable view of the evidence that would support a reasonable hypothesis of innocence. We ask, instead, whether there is a reasonable view of the evidence that supports the [finder of fact's] verdict of guilty." (Internal quotation marks omitted.) *State* v. *Ledbetter*, 275 Conn. 534, 543, 881 A.2d 290 (2005), cert. denied, 547 U.S. 1082, 126 S. Ct. 1798, 164 L. Ed. 2d 537 (2006).

The law in this regard is well established. There need not be evidence of a formal agreement; it is sufficient to show that the alleged conspirators were knowingly engaged in a mutual plan to do a forbidden act. *State* v. *Millan*, 290 Conn. 816, 825–26, 966 A.2d 699 (2009). The requisite agreement may be inferred from the separate acts of the individuals accused as coconspirators, the circumstances surrounding their commission and from the activities of the accused. Id., 826. Furthermore, a "coconspirator's conduct at the scene can provide the requisite evidence of an agreement." Id., 828.

In the present case, as the state points out, the jury reasonably could have found that the defendant and Harris intended to rob the victim by the display of what was represented to be a deadly weapon or dangerous instrument. As they approached the victim, neither struck nor touched him; thus, it was inferable that this was not intended to be simply "a strong-arm robbery." When the victim ignored Harris' demand to stop, neither the defendant nor Harris restrained him. Instead, it was only after the defendant had positioned himself to block the victim's path and both the defendant and Harris were less than an arm's length away from him that Harris displayed the pistol in his waistband and demanded the victim's money. Therefore, there was ample evidence that they intended to stop the victim and display the gun in such a way that would threaten the victim into giving up his money without, at the same time, attracting the attention of anyone else who might be in the area. Furthermore, "[t]he fact that the defendant stood by silently when a gun was displayed in order to [force the victim to give up his property] . . . is evidence from which the jury might reasonably have inferred the defendant's acquiescence in [an] enlarged criminal enterprise." *State* v. *Crosswell*, 223 Conn. 243,

256, 612 A.2d 1174 (1992). Accordingly, we conclude that there is a reasonable view of the evidence that supports the jury's verdict of guilty.

II

The defendant's second claim is that the trial court improperly "failed to instruct the jury that the agreement element of the conspiracy charge required that the state prove . . . the defendant had an agreement with . . . Harris to commit a robbery in which one of them would display" what was represented to be a deadly weapon or dangerous instrument. In this regard, the defendant seeks to prevail under *State* v. *Golding*, 213 Conn. 233, 567 A.2d 823 (1989),[5] because, although he did not raise this claim at trial, the omitted part of the instruction involves an essential element of the crime, and, therefore, its omission from the jury instruction is a constitutional violation. We agree.

The following additional facts are necessary for the resolution of this claim. At the close of evidence, the court offered both parties the opportunity to submit proposed jury instructions. The defendant's proposed instruction set forth the applicable language from §§ 53a-48 and 53a-135 (a) (2). The proposed instructions asked the court to instruct the jury that "the [s]tate must prove the following elements beyond a reasonable doubt: (1) that the [d]efendant and Montel Harris agreed to commit a robbery, (2) that the [d]efendant committed a robbery;[6] and (3) that in the course of the commission of the robbery or of immediate flight [therefrom] the [d]efendant or another participant in the crime displayed or threatened the use of what he represented by his words or conduct to be a deadly weapon or a dangerous instrument." The court received the defendant's proposed instructions, and they were discussed in a charging conference that was held off the record. The state did not submit a formal request to charge.

The trial court's instructions were to the effect that the specific intent required for the conspiracy charge was that as for a charge of larceny. After reading the conspiracy statute to the jury, giving general instructions on what was and was not required to prove an agreement and instructing on the necessity of an overt act, the court stated: "The third element is that the defendant had the intent to commit robbery in the second degree. The intent for that crime is that at the time of the agreement he intended to commit larceny. The defendant may not be found guilty unless the state has proved beyond a reasonable doubt that he specifically intended to commit a larceny when he entered into the agreement. In summary, the state must prove beyond a reasonable doubt that the defendant had an agreement with one or more other persons to commit robbery in the second degree, at least one of the coconspirators did an overt act in furtherance of the conspiracy, and the

defendant specifically intended to deprive the owner of his property."

We first consider the state's argument that the defendant induced the instructional error of which he now complains.[7] Specifically, the state points out that the defendant submitted a request to charge that had *no* specific intent requirement in it. Thus, the state contends that, because the trial court instructed on the specific intent requirement as it did—namely, the specific intent to commit a larceny—the defendant "received a jury instruction that imposed a higher burden on the state than the defendant himself proposed . . . ." We reject this contention and see no justification for the application of the induced error doctrine where the defendant has simply requested one erroneous instruction and received another. See *State* v. *Kitchens*, 299 Conn. 447, 469, 10 A.3d 942 (2011) ("[t]his court has found induced error undeserving of appellate review in the context of a jury instruction claim when the defense has affirmatively requested the challenged jury instruction . . . or has encouraged or prompted the court to refrain from giving an instruction that arguably should have been given" [citations omitted]).

In light of our discussion in part I of this opinion, it is clear to us that the court's instruction on the specific intent required for the charge of conspiracy to commit robbery in the second degree in violation of § 53a-135 (a) (2) was constitutionally defective and was likely to have misled the jury in arriving at its verdict. The court did not tell the jury that the state was required to prove that the defendant specifically intended that, in the course of the robbery, what was represented to be a deadly weapon or dangerous instrument would be used or displayed. Contrary to the state's argument, there is nothing in the rest of the language of the jury instructions that would render this omission in the instruction harmless.

The judgment is reversed and the case is remanded for a new trial.

In this opinion BEACH, J., concurred.

[1] General Statutes § 53a-135 (a) provides in relevant part: "A person is guilty of robbery in the second degree when he commits robbery . . . [and] (2) in the course of the commission of the crime or of immediate flight therefrom he or another participant in the crime displays or threatens the use of what he represents by his words or conduct to be a deadly weapon or a dangerous instrument."

[2] Robbery is defined by General Statutes § 53a-133 as, in general terms, committing a larceny, defined by General Statutes § 53a-119, by the use or immediate threat of physical force for the purpose of compelling the giving up of property. Neither the definition nor the application of those particular statutes is pertinent to this appeal.

[3] General Statutes § 53a-48 (a) provides: "A person is guilty of conspiracy when, with intent that conduct constituting a crime be performed, he agrees with one or more persons to engage in or cause the performance of such conduct, and any one of them commits an overt act in pursuance of such conspiracy."

[4] This appeal does not involve any question about the "overt act" element of the crime of conspiracy.

[5] "[A] defendant can prevail on a claim of constitutional error not preserved

at trial only if all of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation clearly exists and clearly deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt." *State* v. *Golding*, supra, 213 Conn. 239–40.

[6] This was obviously incorrect, as there is no requirement, in a conspiracy charge, that the defendant have committed the completed crime.

[7] The state does not appear to rely on the waiver doctrine of *State* v. *Kitchens*, 299 Conn. 447, 10 A.3d 942 (2011). The state acknowledges that the trial court neither held a charging conference on the record nor provided the defendant with a copy of its charge in advance.