71632-8

NO. 71632-8-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

WILLIAM SANCOMB,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Douglass North, Judge

REPLY BRIEF OF APPELLANT

JENNIFER J. SWEIGERT
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A. ARGUMENT IN REPLY

SANCOMB HAD A RIGHT TO JURY INSTRUCTIONS ON THE LESSER OFFENSE OF THEFT BECAUSE HIS STATEMENT THAT HE "JUST WALKED OUT THE DOOR" RAISES A REASONABLE INFERENCE THAT HE DID SO WITHOUT A THREAT OF FORCE.

"[A] requested jury instruction on a lesser included or inferior degree offense should be administered '[i]f the evidence would permit a jury to rationally find a defendant guilty of the lesser offense and acquit him of the greater.'" State v. Fernandez-Medina, 141 Wn.2d 448, 456, 6 P.3d 1150 (2000) (quoting State v. Warden, 133 Wn.2d 559, 563, 947 P.2d 708 (1997)). A rational jury could find Sancomb was guilty only of theft, not robbery because his statement that he "just walked out the door" implied he did so without any threat of force.

The evidence is sufficient to warrant instruction on a lesser-included offense when there is any evidence that could raise an inference that the lesser offense was committed instead of the greater. Fernandez-Medina, 141 Wn.2d at 455; State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978). It is not necessary that the evidence come from a particular party. Fernandez-Medina, 141 Wn.2d at 455-56. Nor is it not necessary that the evidence directly contradict the State's evidence. See id. at 449-52.

As the State points out, the evidence that was held sufficient to warrant instruction on the lesser offense in Fernandez-Medina was expert

testimony that a gun could make a clicking sound without the trigger being pulled. Id. at 451-52. This did not directly contradict the other witness' testimony that she heard a click as if the trigger had been pulled. See id. at 449-52. It merely provided another possible explanation. It did not disprove the State's case; it merely provided a possible inference that only the lesser offense of second-degree assault was committed:

> If the requested instruction had been given, the jury might reasonably have inferred from all of the evidence that Fernandez–Medina did not intend to do great bodily injury to Perkins, an element of first degree assault as charged in count II. Rather, it could have rationally concluded that as Fernandez–Medina pointed a gun at Perkins' head, it made a clicking sound that was not caused by the pulling of the trigger.

Id. at 457.

Sancomb's statement here likewise raises a possible inference that, as he told the officer, he "just walked out the door." RP 75. A reasonable inference from this statement is that he did not do anything threatening as he "just walked out the door." That reasonable inference is sufficient to require instruction on the lesser included offense of theft.

It is correct that the law requires affirmative evidence, rather than reliance solely on the possibility that a jury might disbelieve a State's witness. Fernandez-Medina, 141 Wn.2d at 456 (emphasis added). But Sancomb does not rely solely on the possibility that a jury might disbelieve

Lockett. The affirmative evidence is Sancomb's statement to the officer that he "just walked out the door." RP 75. That statement that supports an alternative view of the events, one in which he committed only theft. The fact that this view conflicts with Lockett's and would require the jury to reject her testimony as untrue, is immaterial in the analysis.

The rule requiring affirmative evidence, rather than mere reliance on the possibility the jury might disbelieve the State's witnesses is generally cited as originating in State v. Fowler, 114 Wn.2d 59, 67, 785 P.2d 808, (1990) disapproved of by State v. Blair, 117 Wn.2d 479, 816 P.2d 718 (1991). In that case, Fowler's testimony did not address any offense at all and provided no support for the lesser offense of unlawful display of a weapon:

> Fowler did not offer evidence at trial which would support a theory he intended to intimidate the Verbons with his gun or that he displayed his gun in a manner which would cause the Verbons alarm. Instead, his testimony only addressed whether he had a gun at all, and if he did, whether it would have been visible as he began to remove his shirt.

Fowler, 114 Wn.2d at 67. The court concluded this was not affirmative evidence that he unlawfully displayed a weapon. Id. By contrast, Sancomb's statement essentially admits he committed at least theft but denies the force that would make that theft a robbery. RP 75. That is affirmative evidence warranting instruction on the lesser offense.

An accused person has an unqualified right to submit a lesser offense to the jury if there is "'even the slightest evidence'" he may have committed only that offense. State v. Parker, 102 Wn.2d 161, 163 64, 683 P.2d 189 (1984) (quoting State v. Young, 22 Wn. 273, 276 77, 60 P. 650 (1900)). Sancomb's statements indicated he committed only theft. RP 75. The court committed reversible error in refusing his proposed jury instructions on that offense.

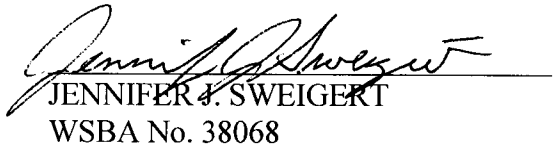
B. CONCLUSION

For the foregoing reasons and for the reasons stated in the opening Brief of Appellant, Sancomb requests this Court reverse his conviction or, at a minimum, remand to correct the scrivener's errors discussed in the Brief of Appellant and conceded by the State.

DATED this 20th day of November, 2014.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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Respondent,	)	
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vs.	)	COA NO. 71632-8-I
	)	
WILLIAM SANCOMB,	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 20TH DAY OF NOVEMBER 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] WILLIAM SANCOMB
DOC NO. 339753
WASHINGTON STATE PENITENTIARY
1313 N. 13TH AVENUE
WALLA WALLA, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 20TH DAY OF NOVEMBER 2014.

X Patrick Mayovsky