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COURT OF APPEALS DIV. I
STATE OF WASHINGTON

2018 FEB 17 PM 3:20

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NO. 63598-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

JOSE STRIDIRON,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MICHAEL J. FOX

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

WILLIAM L. DOYLE
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000

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A. ISSUES PRESENTED

1. A defendant is entitled to a jury instruction on a lesser-included offense when there is affirmative proof that the defendant committed *only* the lesser offense. Here, the defendant was charged with second-degree robbery. The State presented evidence that the defendant tugged a purse out of a victim's hands, causing the victim's body and right foot to lunge forward and her arm to become fully extended. Based on this evidence and no affirmative evidence that the defendant did not use force to steal the purse, the trial court rejected the defendant's request for a lesser-included instruction of first-degree theft. By rejecting this instruction, did the court properly exercise its discretion?

2. Evidence is sufficient to support a conviction if, when viewed in a light most favorable to the prosecution, any rational trier of fact could find the essential elements of the crime proved beyond a reasonable doubt. The defendant was charged with second-degree robbery. The evidence established that the defendant tugged a purse out of a victim's hands, causing her body and right foot to lunge forward and her arm to become fully extended. Did the State produce sufficient evidence to support the defendant's conviction?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Defendant Jose Stridiron was charged by information with robbery in the second degree. CP 1-3. The information alleged the following:

That the defendant JOSE ANTONIO STRIDIRON, in King County, Washington, on or about February 9, 2009, did unlawfully and with intent to commit theft, take personal property of another, to-wit: a purse, from the person and in the presence of Kathryn Steidel, against her will, by the use or threatened use of immediate force, violence and fear of injury to such person or her property.

CP 1.

Before trial, Stridiron moved to dismiss the case, arguing that the alleged facts did not constitute second-degree robbery. 2RP 22.¹ The trial court found this argument "totally without merit." 2RP 23. The court concluded that the allegations sufficiently constituted second-degree robbery because there was a forceful removal of property from the victim's person while she was conscious of it. 2RP 23-25, 28-29.

¹ The Verbatim Report of Proceedings consists of six volumes, referred to in this brief as follows: 1RP (April 20, 2009); 2RP (April 21, 2009); 3RP (April 22, 2009); 4RP (April 27, 2009); 5RP (April 28, 2009); and 6RP (May 22, 2009).

At trial, after the conclusion of the State's case, Stridiron moved to dismiss the robbery charge for insufficient evidence. 5RP 3-5. The court denied the motion, finding that there was sufficient evidence that Stridiron took the purse by force. 5RP 4-5. After the motion to dismiss was denied, Stridiron himself prematurely asked that the court provide an instruction on a lesser-included offense of first-degree theft. 5RP 5-6. The court rejected this argument, emphasizing that a robbery does not mean that a victim "has to be knocked to the ground, that there has to be a tug of war, that it has to be pulled from her hands by an extended struggle." 5RP 7.

Stridiron did not testify at trial, nor did he present any witnesses. See 4RP - 5RP. After the parties rested, Stridiron's counsel submitted a packet of jury instructions. CP 6-15. These instructions contained proposed lesser-included instructions for first-degree theft. CP 8-15. In court, defense counsel asked that the judge provide these first-degree theft instructions. 5RP 14-15. The court denied this request and provided only the instructions for second-degree robbery. 5RP 5-7, 10, 13-15; CP 16-30.

After jury deliberations, Stridiron was convicted of second-degree robbery as charged. CP 31. The court sentenced Stridiron

to a standard range sentence. CP 51-59; 6RP 6-7. Stridiron now appeals his conviction. CP 60-71.

2. SUBSTANTIVE FACTS

On February 9, 2009, around 7:30 a.m., Kathryn Steidel was leaving her apartment and walking down First Avenue in the Belltown neighborhood of Seattle. 4RP 11. In Steidel's hands was a large white purse, which she was carrying at her side. 4RP 12-13. As Steidel was walking, she sensed that someone was walking too closely behind her. 4RP 14. Suddenly, Stridiron came up behind her and pulled at her purse. 4RP 13-14.

Before the purse was pulled, Steidel's arm swayed only a little bit as she walked. 4RP 15. But when Steidel felt a tug at her purse and the purse was being grabbed, Steidel's arm and hand got pulled forward. 4RP 14-15. Steidel described the pulling as a "natural extension of somebody pulling on your arm," and that her arm got to full extension. 4RP 15. Asked if she had a reflex or instinctive reaction when she felt the pull, Steidel initially said that "it kind of all happened at once. There was no back and forth. It just came right out of my hand." 4RP 15. Steidel also initially said that

she did not think that she had time to tighten up her grasp of the purse. 4RP 15.

The prosecutor then asked Steidel to demonstrate for the court and jury how Stridiron took her purse. 4RP 15-16. She did so. 4RP 15-16. After Steidel's demonstration, the prosecutor asked Steidel several questions to clarify for the record what her demonstration showed. 4RP 16. Steidel agreed that before the pull, she had been standing upright, but as a result of the pull, she had to lean forward a bit and put her right foot forward a little bit. 3RP 16. Steidel agreed that her demonstration showed that, as a result of the tug or pull, her arm became fully extended. 3RP 16. On cross-examination, defense counsel asked Steidel, "You also testified on direct using the words, natural extension of the arm. That's also how it felt when you let go of the purse?" Steidel responded, "Yeah, but once it got to the point where it won't go up anymore and somebody is pulling, that's when I couldn't hold on to it anymore." 4RP 36-37.

When asked whether it was a gentle pull out of her hand or something else, Steidel responded, "Well, it was definitely a tug out of my hand. I mean, to get something out of your hand, you have to pull it hard enough to get it out, even if your hand wasn't at a full

grip. My hand wasn't at a super loose grip. It was a regular grasp." 4RP 17. When asked if she lost balance as a result of the taking of the purse, Steidel responded that the pull caused her to "lunge[] forward." 4RP 36.

After Stridiron pulled the purse out of Steidel's hands, he sprinted away. 4RP 18-19. Steidel yelled for help and began to chase Stridiron, but he swiftly gained distance on her. 4RP 18-19. Other bystanders were around to assist. 4RP 18-22, 132. One of those bystanders was Assfaw Gebremeskel, a parking lot attendant. 4RP 132-36. Gebremeskel heard Steidel's screams and saw Stridiron running away, carrying Steidel's purse. 4RP 135-37. Gebremeskel chased Stridiron. 4RP 137-39. Also witnessing the robbery's aftermath were Marc Swenson and David Steffenson, who both called 911. 3RP 44-45, 50. Witnesses described Stridiron as wearing a black and red checkered jacket, with a dark hat and dark pants. See 3RP 51; 4RP 15, 18, 39.

Kevin Durdle was walking down First Avenue when he saw Stridiron running towards him, carrying a large white purse, with Gebremeskel not far behind. 4RP 68-73. Durdle thought of tackling Stridiron, but Stridiron swung his fist and yelled that he had a gun. 4RP 73-75, 106, 109. Durdle backed off. 4RP 109. Once Stridiron

passed him, Durdle also began chasing Stridiron. 4RP 77-83. An avid long-distance runner, Durdle kept pace with Stridiron. 4RP 67, 77-85. Gebremeskel, however, soon tired and stopped the pursuit. 4RP 77, 139-40.

While in pursuit, Durdle noticed that Stridiron was wearing clothes ill-equipped for running; Stridiron had baggy jeans on and non-running shoes. 4RP 88-89. While following Stridiron, Durdle pulled out his phone and called 911. 4RP 95-97. Stridiron led Durdle through the streets of Belltown, heading west towards the Art Institute, near Elliott Avenue and Alaskan Way. 4RP 77-82. As Durdle got closer, Stridiron tried to hide in a row of trees by the train tracks and again warned that he had a gun. 4RP 81.

Gebremeskel went to a parking garage near the Art Institute and happened to see Stridiron near Western Avenue and Clay Street; Stridiron was checking through the white purse. 4RP 144-45, 168-69. Gebremeskel then saw Stridiron run towards a flight of stairs descending to Elliott Avenue. 4RP 149-51, 172.

Seattle Police Officer Norman Vales responded to the area near the Art Institute and saw Stridiron running out of the alley on Elliott Avenue. 3RP 14. Vales stopped Stridiron and took him into custody. 4RP 49-50. The police officers captured some of their

pursuit and detention of Stridiron on their in-car video cameras.

3RP 23-24; 4RP 55-60.

When he was arrested, Stridiron was sweating and breathing heavily. 4RP 30-32, 51. Steidel was taken to the scene for a possible identification. Steidel believed that Stridiron resembled the robber "pretty close[ly]," but because she saw the robber only from behind, she could not positively identify Stridiron as the robber. 4RP 34, 37. Both Gebremeskel and Durdle, however, identified Stridiron as the robber they chased, and both were certain of their identification. 4RP 88-91, 151-54. Near the alley above Elliott Avenue, Steidel's purse was recovered with all of its contents and given back to her. 3RP 15; 4RP 34. Officers also recovered a red-plaid checkered vest, a hat, and gloves. 3RP 30.

C. ARGUMENT

- 1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY REFUSING TO GIVE A LESSER-INCLUDED INSTRUCTION FOR FIRST-DEGREE THEFT BECAUSE THERE WAS NO AFFIRMATIVE EVIDENCE THAT STRIDIRON COMMITTED ONLY THIS CRIME.**

Stridiron claims that the trial court erred in refusing to give an instruction concerning whether he committed a lesser-included

offense of first-degree theft. His claim fails. Stridiron was not entitled to a lesser-included instruction because there was no affirmative evidence that he committed *only* first-degree theft. Rather, the affirmative evidence showed that Stridiron used force in taking property from the victim. Thus, the trial court did not abuse its discretion by rejecting Stridiron's request for a lesser-included instruction, and this Court should affirm Stridiron's conviction.

The right to an instruction on a lesser-included offense is statutory. See RCW 10.61.006 ("the defendant may be found guilty of an offense the commission of which is necessarily included within that with which he is charged"). A defendant is entitled to an instruction for a lesser-included offense when: (1) each of the elements of the lesser offense is necessarily an element of the charged offense (the legal prong); and (2) the evidence supports an inference that only the lesser crime was committed (the factual prong). State v. Berlin, 133 Wn.2d 541, 545-46, 947 P.2d 700 (1997); State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978). Before a lesser-included instruction is given, however, there must be some affirmative proof that the defendant committed only the lesser crime. State v. Brown, 127 Wn.2d 749, 754, 903 P.2d 459 (1995); State v. Fowler, 114 Wn.2d 59, 67, 785 P.2d

808 (1990). Affirmative proof requires something more than the possibility that the jury could disbelieve some of the State's evidence. Brown, 127 Wn.2d at 755; Fowler, 114 Wn.2d at 67; see also State v. Speece, 115 Wn.2d 360, 363, 798 P.2d 294 (1990). If the factual prong is not met, this Court need not address the legal prong. State v. Rogers, 70 Wn. App. 626, 634, 855 P.2d 294 (1993). Importantly, a trial court's refusal to give a lesser-included offense instruction, when based on a case's facts, will not be reversed absent a manifest abuse of discretion. State v. Lucky, 128 Wn.2d 727, 731, 912 P.2d 483 (1996), overruled on other grounds by Berlin, 133 Wn.2d at 548-49.

In this case, at trial, the prosecutor incorrectly argued that first-degree theft was not a legal lesser-included offense of second-degree robbery. See 5RP 10-11. But the trial court never addressed the prosecutor's argument on the law. Rather, the court rejected Stridiron's arguments that force was not used, and found that a first-degree theft instruction was not appropriate, based on the case's facts. See 2RP 22-25, 28-29; 5RP 4-7, 10, 13-15.²

² Moreover, even if a stated basis of a trial court's ruling is incorrect, this Court may affirm on any ground supported by the record. State v. Huynh, 107 Wn. App. 68, 74, 26 P.3d 290 (2001).

Thus, the trial court's ruling should not be reversed absent a manifest abuse of discretion. See Lucky, 128 Wn.2d at 731.

Here, although first-degree theft was a legal lesser-included offense of second-degree robbery, there was no factual basis for a first-degree theft instruction. A defendant commits theft if, among other things, he wrongfully obtains another's property with the intent to deprive. RCW 9A.56.020.³ A defendant commits theft in the first-degree if he commits theft of property of any value taken from another's person. RCW 9A.56.030(1)(b). By contrast, a defendant commits robbery if he uses *force* to obtain or retain possession of another's property. See RCW 9A.56.190.⁴ Thus, robbery differs from theft in that robbery involves the use of force to accomplish the taking or the retaining of property, while theft does not involve

³ Under RCW 9A.56.020(1)(a), theft means "[t]o wrongfully obtain or exert unauthorized control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services[.]"

⁴ Under RCW 9A.56.190, robbery is defined as the following:

A person commits robbery when he unlawfully takes personal property from the person of another or in his presence against his will by the use or threatened use of immediate force, violence, or fear of injury to that person or his property or the person or property of anyone. Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking; in either of which cases the degree of force is immaterial. Such taking constitutes robbery whenever it appears that, although the taking was fully completed without the knowledge of the person from whom taken, such knowledge was prevented by the use of force or fear.

the use of force. *Compare* RCWs 9A.56.190, .200 (robbery) *with* RCW 9A.56.020 (theft).

The robbery statute specifically states that the degree of force used to obtain property is "immaterial." RCW 9A.56.190. Thus, "any force or threat, *no matter how slight*, that induces an owner to part with his property is sufficient to sustain a robbery conviction." State v. Handburgh, 119 Wn.2d 284, 293, 830 P.2d 641 (1992) (emphasis added) (citing State v. Ammlung, 31 Wn. App. 696, 704, 644 P.2d 717 (1982); State v. Redmond, 122 Wn. 392, 210 P. 772 (1922)); *see also* State v. O'Connell, 137 Wn. App. 81, 95, 152 P.3d 349, review denied, 162 Wn.2d 1007, 175 P.3d 1094 (2007).

Here, Stridiron cannot clearly show that the trial court abused its discretion by finding no factual basis to give a first-degree theft instruction. There was no affirmative evidence that Stridiron did not use force to obtain Steidel's property. Rather, through Steidel's testimony, there was evidence that Stridiron pulled at her purse with force, causing her to lean or lunge forward, causing her right foot to go forward, and causing her arm to become fully extended. 4RP 15-17, 36-37. In fact, Steidel testified that the pull caused her arm to get "to the point where it won't go up

anymore and somebody is pulling, that's when I couldn't hold on to it anymore." 4RP 36-37.

Moreover, Steidel physically demonstrated for the jury and the court how Stridiron took her purse. 4RP 15-16. By actually seeing this demonstration, the trial court was in a better position than a reviewing court in assessing whether force was used and whether this evidence supported giving a lesser-included instruction. Lastly, Stridiron did not testify, nor did he present any affirmative evidence that he did not use force to take Steidel's property.

Nevertheless, Stridiron argues that the evidence establishes that only a theft was committed, focusing on the speed of the taking of the purse, the lack of injury to Steidel, and the lack of damage to her purse. Appellant Brief at 13. But none of these factors are required to prove that Stridiron used force in taking the property.

In addition, Stridiron cannot simply pluck parts of Steidel's testimony to support his argument and ignore the parts that hurt him. When looking at Steidel's testimony as a whole, there is no affirmative evidence that Stridiron committed only a first-degree theft, that is, that he took and retained Steidel's purse without using force. Thus, Stridiron did not satisfy the Workman factual test, and

the trial court did not manifestly abuse its discretion in refusing to give the first-degree theft instruction. Stridiron's claim fails.

2. THERE WAS SUFFICIENT EVIDENCE TO CONVICT STRIDIRON OF SECOND-DEGREE ROBBERY.

Stridiron also argues that there was insufficient evidence to prove that he committed second-degree robbery. His argument should be rejected. As the State argued above, a rational trier of fact easily could have found that Stridiron took Steidel's property by force. This is particularly true when viewing the evidence in the light most favorable to the State. Thus, this Court should affirm the jury's verdict.

Evidence is sufficient to support a conviction if, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt. State v. Hendrickson, 129 Wn.2d 61, 81, 917 P.2d 563 (1996). A crime's elements may be established by either direct or circumstantial evidence, one being no more or less valuable than the other. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). A challenge to the sufficiency of the evidence admits the truth of the State's evidence.

State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Therefore, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. Id.

Credibility determinations are for the finder of fact and cannot be reviewed on appeal. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). Thus, an appellate court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992).

Here, Stridiron argues that the evidence fails to show that Steidel's purse was taken by immediate force necessary to support a robbery conviction. Stridiron's argument fails. As argued above, the State presented testimony that Stridiron forcefully took Steidel's purse. Steidel testified that Stridiron's pulling of the purse caused her to lean or lunge forward, caused her right foot to go forward, and caused her arm to become fully extended to the point where it would not go up any more. 4RP 15-17, 36-37. It was only at that moment that Steidel could no longer hold on to her purse. 4RP 36-37.

Nevertheless, in support for his argument, Stridiron cites criminal treatises for the proposition that a victim needs to offer resistance to the taking in order for there to be sufficient force for a robbery. But under Washington law, there is no such requirement. Rather, the degree of force used is immaterial. RCW 9A.56.190.

Stridiron also argues that the degree of force necessary to support a robbery conviction must be in addition to the physical effort required to take something from someone. But here, Stridiron used force more than the physical effort required to take something from Steidel. Stridiron did not pickpocket Steidel nor did he slyly slip the purse off of her shoulder. Rather, he wrenched the purse out of Steidel's hands to the point where her arm would not go up anymore and she could no longer hold on to the purse. 4RP 36-37. This is force.

Viewing the evidence in a light most favorable to the State, a jury easily could have concluded that Stridiron took Steidel's purse by his use of force. Thus, this Court should reject Stridiron's challenge to the sufficiency of his second-degree robbery conviction.

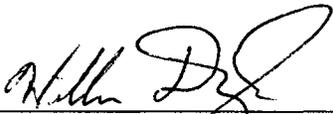
D. **CONCLUSION**

For the foregoing reasons, this Court should affirm Stridiron's conviction for robbery in the second degree.

DATED this 16th day of February, 2010.

Respectfully submitted,

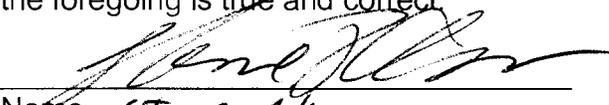
DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
WILLIAM L. DOYLE, WSBA #30687
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Eric Nielsen, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. JOSE ANTONIO STRIDIRON, Cause No. 63598-1-1, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.


Name Steve Alerme
Done in Seattle, Washington

2-16-10
Date