

05003-7

05003-7

No. 65063-7-I

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

**STATE OF WASHINGTON,
Appellant,**

v.

**MOSES PUGA
Respondent.**

BRIEF OF RESPONDENT

**DAVID S. McEACHRAN,
Whatcom County Prosecuting Attorney
By HILARY A. THOMAS
Appellate Deputy Prosecutor
Attorney for Appellant/Cross-Respondent
WSBA #22007**

**Whatcom County Prosecutor's Office
311 Grand Avenue, Second Floor
Bellingham, WA 98225
(360) 676-6784**

**FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2010 AUG 27 AM 10:09**

TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR 1

B. ISSUES PERTAINING TO APPELLANT’S ASSIGNMENTS OF ERROR..... 1

C. STATEMENT OF THE CASE..... 1

1. Procedural Facts 1

2. Substantive Facts 2

D. ARGUMENT 5

1. The information alleged all the essential elements of robbery in the first degree and under the liberal, post-verdict, standard of review the information sufficiently alleged that the property did not belong to Puga, and any other ambiguity could have been resolved with a bill of particulars which was never requested..... 7

2. Puga wasn’t entitled to instructions on any of the lesser offenses because the evidence didn’t factually support that only the lesser offenses had been committed. 15

E. CONCLUSION 21

TABLE OF AUTHORITIES

Washington State Court of Appeals

City of Seattle v. Termain, 124 Wn. App. 798, 103 P.3d 209 (2004) 10

State v. Graham, 64 Wn. App. 305, 824 P.2d (1992) 12, 13

State v. Greathouse, 113 Wn. App. 889, 56 P.3d 569 (2002), *rev. den.*, 149
Wn.2d 1014 (2003) 9, 10

State v. Marker, 4 Wn. App. 681, 483 P.2d 853 (1971) 9

State v. McReynolds, 117 Wn. App. 309, 71 P.3d 663 (2003)..... 10

State v. Phillips, 98 Wn. App. 936, 991 P.2d 1195 (2000)..... 8, 12

State v. Plano, 67 Wn. App. 674, 838 P.2d 1145 (1992)..... 11

State v. Schneider, 36 Wn. App. 237, 673 P.2d 200 (1983) 12

State v. Tresenriter, 101 Wn. App. 486, 4 P.3d 145 (2000), *rev. den.*, 143
Wn.2d 1010 (2001) 11

State v. Winings, 126 Wn. App. 75, 107 P.3d 141 (2005) 8, 10

Washington State Supreme Court

State v. Berlin, 133 Wn.2d 541, 947 P.2d 700 (1997)..... 17

State v. Brightman, 155 Wn.2d 506, 122 P.3d 150 (2005)..... 17

State v. Easton, 69 Wn.2d 965, 422 P.2d 7 (1966)..... 10

State v. Fernandez-Medina, 141 Wn.2d 448, 6 P.3d 1150 (2000)..... 16, 17

State v. Handburgh. 119 Wn.2d 284, 830 P.2d 641 (1992)..... 19

State v. Kjorsvik, 117 Wn.2d 93, 812 P.2d 86 (1991)..... 7, 8, 9

State v. Leach, 113 Wn.2d 679, 782 P.2d 552 (1989) 8

<u>State v. Long</u> , 65 Wn.2d 303, 396 P.2d 990 (1964)	12
<u>State v. McCarty</u> , 140 Wn.2d 420, 998 P.2d 296 (2000).....	8
<u>State v. Nonog</u> , ___ Wn.2d ___ (2010), 2010 WL 2853913 ¶10	10
<u>State v. Pacheco</u> , 107 Wn.2d 59, 726 P.2d 981 (1986).....	18
<u>State v. Peterson</u> , 133 Wn.2d 885, 948 P.2d 381 (1997)	16
<u>State v. Taylor</u> 140 Wn.2d 229, 996 P.2d 571 (2000)	8
<u>State v. Tvedt</u> , 153 Wn.2d 705, 107 P.3d 728 (2005).....	14
<u>State v. Ward</u> , 148 Wn.2d 803, 64 P.3d 640 (2003).....	9

Rules and Statutes

RCW 9A.56.190.....	11
RCW 9A.56.200.....	1, 11
RCW 10.61.006, .003	16

A. ASSIGNMENTS OF ERROR

None.

B. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Whether under a liberal construction of the information all the essential facts and elements of robbery in the first degree were included where the information alleged that the property belonged to another and was unlawfully taken, but omitted the name of the owner of the property and a description of the property taken.
2. Whether the defendant was entitled to a lesser offense instruction on robbery in the second degree, theft in the third degree, and assault in the fourth degree where there was no factual basis that defendant had committed *only* the lesser offenses and defendant essentially admitted to all the elements for robbery in the first degree on cross examination.

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Moses Puga was charged on November 18, 2009 with Robbery in the First Degree, in violation of RCW 9A.56.200, for his actions on November 15, 2009. CP 65-66. He was tried by a jury and found guilty as charged on February 9, 2010. CP 76. At sentencing, the State requested the middle of the standard range, 36 months on a standard range of 31-41 months, while defense recommended 31 months. The

judge imposed 31 months, in part because the judge believed Puga told the truth during his testimony. CP 18, 21, SRP 6.¹

2. Substantive Facts

On Nov. 15, 2009 around 2 a.m. Puga along with two other persons, a male and a female, approached the Sehome Haggen grocery store in Bellingham. As they approached the store they came across a newspaper delivery guy, Rocky Gist, folding his newspapers in the courtesy pick-up area² of the store, between the Haggen store and the Rite Aid store next door. RP 120-23. One of them asked for a cigarette and Gist gave one to Puga. RP 123. They then went into the store, empty-handed. RP 124.

About 5-10 minutes later, they came out of the store, walking very fast towards Gist. RP 124-26. In the store, the grocery clerk, Andrew Thompson, saw the three exiting the store carrying a 24 pack of Corona beer and broadcast a "Service 6" to the rest of the store's crew, alerting them to an emergency and to come to the front of the store. RP 26-29. The male, who was carrying the beer, and the female were in front of Puga

¹ RP refers to the verbatim report of proceedings for the trial, Feb, 18th & 19th, 2009. SRP refers to the sentencing proceedings on Feb. 18th, 2009.

² This is an area where customers can drive up and have their groceries loaded into their cars. RP 38.

as they left the store. RP 61. Thompson ran out after the group to see which way they were headed, and shortly thereafter the rest of the store crew ran out the entrance, first Rory Sprague, followed by Craig Stamm and Dave Talbert. RP 30-34, 104. Thompson pointed out to the crew the direction in which the group had gone, towards the courtesy pick-up area, and Rory ran past him. RP 40, 61-62, 107-08.

As the group approached Gist's car, they noticed they were being chased, and the male and the female took off with the beer, running away towards the Rite Aid store. RP 38-40, 127-28, 140. Rory went to chase after the persons running away with the beer, but Puga turned around, took an empty Corona beer bottle out of his front pocket, and as Rory came within a couple feet of him, swung the beer bottle hard in a windmill motion at Rory's head, missing his head only by inches as Rory dodged the bottle and ducked away from the swing. RP 62-67, 89, 109-10, 127-29, 140. It appeared to Rory that Puga was attempting to intercept him, to prevent him from going after the other two. RP 66, 97. As the bottle came around, it appeared to slip out of Puga's hand and smashed on the ground. RP 67.

Rory then turned to confront Puga and Puga started punching him in the face and neck. RP 67-68, 129. After the first punch landed, Rory tried to defend himself, trying to block the punches and grabbing for

Puga's right arm. RP 68, 111, 130, 143. Rory was hit on the left side of the forehead, on the bridge of the nose and under his right eye, causing an abrasion on his forehead and bruising under his eye. RP 68, 75-76.

Stamm ran to assist Rory, grabbed Puga's left arm and pulled Puga's sweatshirt over his face so he couldn't see. RP 69, 111-13. Gist asked if they needed help, and with his assistance, they were able to get Puga to the ground where Gist sat on top of him to help restrain him. RP 70, 113-14, 131-32. Not realizing that Puga had been with the ones who had run away with the beer, Rory yelled at Puga wanting to know why Puga had swung at him. Puga said "because you were after me." RP 69, 77, 96.

After Puga had swung at Rory, Thompson had run back inside to call the police. RP 40, 45. After officers arrived, Puga was put in the back of Bellingham police officer Josh Danke's patrol car. RP 150, 158. During his contact with Puga, Danke noticed that Puga smelled of alcohol and that his speech was slurred. RP 164, 168.

Puga took the stand and testified that his friends and he did talk to the newspaper guy before walking in and taking the beer without paying, although he claimed the newspaper guy gave them all a cigarette when his friend asked for one. RP 172. He testified that when he saw the guy running toward him, he threw down the bottle and bent to pick up the

cigarette he had dropped. RP 173. He claimed that as he stood up the guy was coming at him and started hitting him and he hit back, before he was wrestled to the ground. RP 173. He testified that he was trying to get away when the scuffle happened, so that he could go drink some more beer. RP 174.

The cross examination was as follows:

Q: The reason the three of you went to the store was to get the beer, right?

A: Yes.

Q: And the reason that you used force was to try to get away to drink the beer; is that right?

A: Yes.

Q: And the three of you were stealing the beer, right?

A: Yeah.

Q: And you knew that the people from Haggen were coming to stop you from stealing the beer, right?

A: Yes.

Q: You used force to try to keep the beer so you could drink it later on that night; isn't that right?

A: Yes.

RP 175. On redirect, Puga then testified that he threw the beer bottle because "he got scared because they came after us, you know, which never happens." RP 175-76.

D. ARGUMENT

On appeal Puga alleges the information is fatally defective for failure to state the name of the property owner and to describe the property taken. Under the applicable liberal standard of review, the information

sufficiently alleges all the necessary statutory and non-statutory elements of the offense. It sufficiently alleged that the owner of the property was someone other than the defendant, all that is required by caselaw.

Puga also asserts that he was entitled to jury instructions on the lesser included offenses of third degree theft and fourth degree assault, as well as the inferior degree offense of robbery in the second degree. While the test for lesser included offenses and inferior degree offenses differ somewhat, none of the lesser offenses were warranted because they failed the factual prong of the test that is common to both. Under the factual prong, the evidence did not support a finding that *only* the lesser offenses were committed because the element of bodily injury was not disputed and Puga admitted on cross examination that his friends and he went to the store to steal the beer, that he used force in order to get away so that he could go drink the beer with his friends and that he used force to keep the beer so they could drink it later. As Puga admitted the element that the force used was to retain the beer and there was no factual dispute as to the element of bodily injury, the trial court did not abuse its discretion in determining that the evidence did not merit an instruction on robbery in the second degree, theft in third degree or assault in the fourth degree.

- 1. The information alleged all the essential elements of robbery in the first degree and under the liberal, post-verdict, standard of review the information sufficiently alleged that the property did not belong to Puga, and any other ambiguity could have been resolved with a bill of particulars which was never requested.**

Puga asserts that the information charging robbery in the first degree was defective because it failed to state the name of the owner of the property that was forcibly taken and because it failed to specify what type of property was forcibly taken. Puga does not otherwise assert that he was prejudiced by the information. The information contained all the essential statutory and non-statutory elements, thus under the applicable liberal construction standard of review, Puga was adequately informed of the offense with which he was charged. Any vagueness could have been cured by a request for a bill of particulars which Puga failed to make.

A charging document is constitutionally adequate only if all of the essential elements, statutory and non-statutory, are included in the document so as to place the defendant on notice of the charges and allow the defendant to prepare a defense. State v. Kjorsvik, 117 Wn.2d 93, 97, 812 P.2d 86 (1991). A constitutional challenge to the sufficiency of an information may be asserted for the first time on appeal. *Id.* at 102. On the other hand, “[t]echnical defects not affecting the substance of the charged offense do not prejudice the defendant and thus do not require

dismissal.” State v. Leach, 113 Wn.2d 679, 696, 782 P.2d 552 (1989). An information stating the statutory elements of a crime, but vague as to some other significant matter, is subject to correction via a bill of particulars, but a defendant may not challenge an information for vagueness on appeal if he didn’t make a request for a bill of particulars. Leach, 113 Wn.2d at 687; *accord*, State v. Winings, 126 Wn. App. 75, 84, 107 P.3d 141 (2005).

When the sufficiency of a charging document is challenged for the first time after the verdict, courts liberally construe the information in favor of validity. State v. Phillips, 98 Wn. App. 936, 940, 991 P.2d 1195 (2000). A different standard of review is employed post verdict in order to “encourage defendants to make timely challenges to defective charging documents and to discourage ‘sandbagging,’ *i.e.*, waiting to assert a defect in the charging document because asserting it in a timely manner would only result in an amendment of the information. Kjorsvik, 117 Wn.2d at 103; State v. Taylor 140 Wn.2d 229, 237 n.32, 996 P.2d 571 (2000).

Under the liberal construction rule, the court inquires: (1) do the necessary elements or facts appear in any form, or can the alleged missing element or fact be fairly implied from the language within the information; and (2) can the defendant show that he or she was actually prejudiced by the inartful language. State v. McCarty, 140 Wn.2d 420, 425, 998 P.2d 296 (2000); Kjorsvik, 117 Wn.2d at 105-06. The prejudice prong is only

addressed if the information is determined to have set forth the essential elements of the crime charged. State v. Greathouse, 113 Wn. App. 889, 900, 56 P.3d 569 (2002), *rev. den.*, 149 Wn.2d 1014 (2003). If the information failed to allege the essential elements, the charge is dismissed without prejudice to refile. McCarty, 140 Wn.2d at 428.

An essential element is one whose specification is necessary to establish the very illegality of the behavior charged. State v. Ward, 148 Wn.2d 803, 811, 64 P.3d 640 (2003). “Words in a charging document are read as a whole, construed according to common sense, and include facts which are necessarily implied.” Kjorsvik, 117 Wn.2d at 109.

It is generally sufficient that an indictment set forth the offense in the words of the statute itself, as long as ‘those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished.’

Kjorsvik, 117 Wn.2d at 100; *see also*, State v. Marker, 4 Wn. App. 681, 682-83, 483 P.2d 853 (1971) (information charging burglary in the language of the statute is sufficient to apprise a defendant of the charge of burglary). On the other hand, “It is not ... fatal to an information ... that the exact words of a case law element are not used; the question in such situations is whether all the words used would reasonably apprise an accused of the elements of the crime charged.” Kjorsvik, 117 Wn.2d at

109. Under the essential elements rule, the charging document must also allege facts supporting the elements of the offense in order to “apprise an accused person with reasonable certainty of the nature of the accusation.” State v. Nonog, ___ Wn.2d ___ (2010), 2010 WL 2853913 ¶10.

Informations alleging crimes involving an act against another person, as opposed to a specific person, do not need to state the name of the victim to be constitutionally sufficient. City of Seattle v. Termain, 124 Wn. App. 798, 805, 103 P.3d 209 (2004). The identity of the owner of the property taken is not an element of theft. State v. McReynolds, 117 Wn. App. 309, 335-36, 71 P.3d 663 (2003). “It is not necessary ... to allege in the indictment for larceny in whose possession the property is, but it is sufficient to allege and prove that the property stolen was the property of another.” State v. Easton, 69 Wn.2d 965, 967, 422 P.2d 7 (1966); *see also*, State v. Greathouse, 113 Wn. App. at 904-05 (information was not constitutionally insufficient where it failed to name the victim/owner of property in theft by embezzlement charge). It is also not necessary to include the name of the victim of an assault for an information charging assault to be constitutionally adequate. *See*, State v. Winings, 126 Wn. App. 75, 86, 107 P.3d 141 (2005) (information charging second degree assault with deadly weapon constitutionally sufficient although it did not state the name of the victim); State v. Plano, 67 Wn. App. 674, 838

P.2d1145 (1992) (not necessary to allege name of victim in fourth degree assault charge for information to be constitutionally adequate). The specific property taken is not an element of theft crimes. *See, State v. Tresenriter*, 101 Wn. App. 486, 494-95, 4 P.3d 145 (2000), *rev. den.*, 143 Wn.2d 1010 (2001) (information charging possession of stolen property was not constitutionally insufficient for failure to describe the property taken, remedy for lack of specificity was bill of particulars).

The first degree robbery statute states under the alternative relevant to this case:

A person is guilty of robbery in the first degree if:
(a) In the commission of a robbery or of immediate flight therefrom, he or she:
...
(iii) Inflicts bodily injury.

RCW 9A.56.200. "Robbery" is defined as:

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
...

RCW 9A.56.190. "The statutory elements of robbery are: (1) a taking of personal property; (2) from the person or in one's presence; (3) by the use or threatened use of such force, or violence, or fear of injury; (4) such

force or fear being used to obtain or retain the property.” State v. Phillips, 98 Wn. App. 936, 943, 991 P.2d 1195 (2000). Robbery also includes the nonstatutory element that the property taken belonged to someone other than the defendant. Id. at 944; *see also*, State v. Graham, 64 Wn. App. 305, 308, 824 P.2d (1992) (one of the elements of robbery is that the ownership of the property is in someone other than the defendant.). However, “[p]roof of ownership of stolen property is not required-it being necessary only to prove that the property did not belong to the thief.” State v. Long, 65 Wn.2d 303, 316, 396 P.2d 990 (1964); *see also*, State v. Schneider, 36 Wn. App. 237, 240-241, 673 P.2d 200 (1983) (ownership of a building is only relevant under the current burglary statutes as it relates to whether the defendant entered or remained unlawfully in the building). “Anyone having a right to possession superior to that of the robbery defendant is deemed to be the owner as against that defendant.” State v. Latham, 35 Wn.App. 862, 866, 670 P.2d 689 (1983), *rev. den.*, 100 Wn.2d 1035, 102 Wn.2d 1018 (2004).

In this case, the information stated:

That on or about the 15th day of November, 2009, the said defendant, MOSES PUGA, then and there being in said county and state, did unlawfully take personal property from the person of another or in his or her presence against his or her will by the use of force or threatened use of immediate force, violence or fear of injury to that person or his or her property or the property of anyone, such force and fear being used to obtain or retain

possession of the property, or to prevent or overcome resistance to the taking, and in the commission of the robbery or in immediate flight therefrom, he inflicted bodily injury ...

CP 65-66.

Here the information tracked the statutory language from robbery in the first degree and the definition of robbery, and therefore contained all the statutory elements for robbery in the first degree. Identification of the specific property taken was not required to provide Puga notice of the changes.³ To the extent that Puga asserts the information was defective for failing to name the victim, the person from whom the property was forcibly taken, the statute does not require a specific victim in order to identify the crime charged. Under a liberal construction of an information the ownership of the property element is satisfied if the information alleges that the property belonged to someone other than the defendant. *See, Graham*, 64 Wn. App. at 308 (information alleging that defendant “unlawfully” took personal property “from the person” of the victim

³ Puga references the lime that was found in his pocket at the time he was arrested. The State’s charges clearly did not rest upon this item. Evidence of the existence of the lime was solicited mainly because of the widely known association between Corona beer and limes, making it circumstantial evidence that the defendant and his friends went to the store to steal the Corona beer. RP 217. While there was testimony that the limes were set out in a display next to the Corona beer at Haggen and that the lime found on Puga was consistent with the limes in the store, the defendant admitted he brought the lime to the store and confirmed that he had the lime because they were drinking Corona beer. RP 79-81, 149, 173-74.

sufficiently alleged that the property was owned by someone other than the defendant). The information here alleged that the property was taken, unlawfully, from the person of another, *i.e.*, someone other than the defendant and therefore was sufficient.

Puga appears to argue that the clause “or the property of anyone” means that the information alleged that the property could have belonged to anyone. Puga misreads this language which comes directly from the statutory definition for robbery: ... “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.” See definition of robbery *infra* at 11. The clause “or the property of anyone” does not pertain to the property taken, but to the property that is threatened in the clause “by the ... fear of injury to the ... the person or property of anyone.” The threat of force against a person or the property need not be to the person from whom the property is taken, and need not be to the property taken, but relates to the threat of force against someone else or some other property, which render the taking of the property against the person’s will.

Puga also relies heavily upon State v. Tvedt, 153 Wn.2d 705, 714-15, 107 P.3d 728 (2005) and its holding that “to charge robbery the State had to allege, among other things, that property was taken from or from the presence of a person having an ownership, representative, or

possessory interest in the property.” Tvedt, 153 Wn.2d at 718. However, Tvedt was addressing the elements of robbery in the context of a unit of prosecution issue, not a sufficiency of charging language claim. The issue there was whether the State could charge *multiple* counts of robbery based on takings occurring in the presence of two separate persons at two different gas stations. Here, only one count was alleged, so the issue as to which specific person the property was taken from is not as crucial. The fact that it was owned or possessed by someone other than the defendant was sufficiently alleged by the reference to the unlawful taking of the property in the presence of the person from whom it was forcibly taken. While the information may have been vague, it was not constitutionally deficient, and Puga never requested a bill of particulars to address any vagueness in the charging language.

2. Puga wasn't entitled to instructions on any of the lesser offenses because the evidence didn't factually support that only the lesser offenses had been committed.

Puga next contends that the court erred in denying his request for an instruction on the inferior degree offense of robbery in the second degree and the lesser included offenses of theft in the third degree and assault in the fourth degree. He also contends that because he was not given those instructions, his ability to argue his defense theory was

impaired in violation of his constitutional right to present a defense. Puga has failed to demonstrate that the facts of this case meet the factual test for providing lesser offense instructions, *i.e.*, the evidence supports a finding that *only* the inferior degree offenses were committed. The trial court did not abuse its discretion in determining that the evidence did not merit an instruction on robbery in the second degree because the fact of bodily injury was not disputed, the only difference between robbery in the first degree and robbery in the second degree. Moreover, Puga admitted to all the necessary elements for robbery so the facts did not support that only the lesser offenses of third degree theft and fourth degree assault were committed. As Puga was not entitled to instructions on any lesser offenses, he was not entitled to argue that only the lesser offenses were committed. Therefore he was not denied his right to present a defense.

A defendant is entitled by statute to an instruction for a lesser included offense or an inferior degree offense if the lesser offenses meet both the factual and legal prongs of the tests. RCW 10.61.006, .003; State v. Peterson, 133 Wn.2d 885, 889, 948 P.2d 381 (1997). While the tests for inferior degree and lesser included offenses differ with respect to the legal tests, they are the same for the factual test. State v. Fernandez-Medina, 141 Wn.2d 448, 455, 6 P.3d 1150 (2000). To be entitled to an inferior degree instruction, (1) the statutes for the charged offense and the inferior

degree offense must proscribe one offense, (2) the instruction charges an offense that is divided into degrees and the lesser offense is an inferior degree of the charged offense; and (3) there is evidence that only the inferior degree offense was committed. Fernandez-Medina, 141 Wn.2d at 454. A defendant is entitled to an instruction on a lesser included offense if (1) each of the elements of the lesser offense are a necessary element of the charged offense, and (2) the evidence supports an inference that only the lesser crime was committed. *Id.* at 454-55. The lesser included offense analysis applies to the offenses as charged, not as broadly proscribed by statute. State v. Berlin, 133 Wn.2d 541, 548, 947 P.2d 700 (1997).

A court reviews a denial of an instruction on the factual prong of a lesser degree offense for abuse of discretion. State v. Brightman, 155 Wn.2d 506, 519, 122 P.3d 150 (2005). The evidence is reviewed in the light most favorable to the party that sought the instruction. Fernandez-Medina, 141 Wn.2d at 455-56. Under the factual test the factual showing required is more particularized than that required for other jury instructions, and the evidence must show that *only* the lesser offense was committed, to the exclusion of the greater offense. *Id.* at 455. In addition, “the evidence must affirmatively establish the defendant’s theory of the case -- it is not enough that the jury might disbelieve the evidence pointing

to guilt in the case.” Id. at 456. A defendant is not entitled to instructions on the inferior degree offense of robbery in the second degree where there is no factual dispute as to the element distinguishing first degree robbery from second degree robbery. See, State v. Pacheco, 107 Wn.2d 59, 69-70, 726 P.2d 981 (1986) (where there was no question as to whether a knife was used the evidence supported “an instruction on robbery in the first degree or nothing”).

Defense here filed instructions proposing the lesser offenses of third degree theft and fourth degree assault. CP 48-62. At the time objections and exceptions to the instructions were taken, defense also verbally requested an instruction on the inferior degree offense of second degree robbery. RP 183. While defense counsel argued that the court should give such an instruction, he admitted that there was no dispute that bodily injury had occurred, the only difference between first degree and second degree robbery. RP 183-84. The evidence did not support a finding that *only* the lesser offense of robbery in the second degree occurred, therefore the trial court did not abuse its discretion in denying that requested instruction.

While the reason the court denied the defense request for instructions on the proposed lesser included offenses of third degree theft and fourth degree assault is not explicit in the record, it appears from the

motions in limine that it was due to the evidence that was produced at trial. During the motions in limine the State requested that the defense be precluded from arguing that Puga's conduct violated other statutes not charged, unless lesser included instructions were sought and given. Defense indicated it would seek lesser included instructions, but the court indicated it would reserve its decision until the evidence had been presented. RP 3. When defense counsel started to argue in closing that Puga was only guilty of third degree theft and assault, the State's objection that it violated the in limine ruling was sustained. RP 216-17. That would indicate the court refused the lesser included instructions due to the evidence that was produced at trial.

The trial court did not abuse its discretion in denying the defense proposed lesser included instructions. The evidence didn't support giving the lessers because Puga admitted to the elements regarding use of force to retain the property or to overcome the resistance to the taking on cross examination. Puga's argument that all he committed was a theft and a separate, unrelated assault, amounts to an argument that since the initial taking was peaceable or occurred outside the presence of the person, that the force he used to retain the property didn't constitute robbery. This is directly contravened in State v. Handburgh. 119 Wn.2d 284, 830 P.2d 641 (1992). The court there held that "the force necessary to support a robbery

conviction need not be used in the initial acquisition of the property. Rather, the retention, via force, against the property owner, of property initially taken peacefully or outside the presence of the property owner, is robbery.” Id. at 293.

Puga argues as well that the court’s refusal of the lesser offense instructions violated his constitutional right to present his defense. However, this right is not violated when the court properly rejects a defense-proposed instruction on an alleged lesser included offense. Puga was not entitled to any instructions on the lesser offenses. As he was not entitled to such instructions, he was not entitled to make an argument that he had committed only those offenses. Therefore, his right to present a defense was not denied. Even defense counsel acknowledged that Puga was the one that had created “a problem” for counsel’s argument:

But, of course, I have a problem and you all know what that is. You heard me ask Moses on the stand why he struck him and he said because I wanted to drink beer. I’m going to ask you to keep a few things in mind when you evaluate that. People get nervous when sitting on the stand. We have been here for a day-and-a half and Moses is hearing all the testimony about why he did what he did. I submit he likely fed into that.⁴ But he told Rory at the scene that he struggled and he hit him because they were chasing him.

⁴ The State countered in rebuttal: “Sometimes, despite your intentions, despite what you want to have happen in the trial, you get in that chair, you get in front of 12 people and the trial dynamic is a problem and the truth finding function of the trial takes over and you admit that you went there to steal the beer, that you knew the people were after you and that’s why you used force, so you could get away and steal the beer.”

RP 214. Defense knew that his client had essentially admitted all the elements of robbery. Puga's ability to argue his defense theory, that he was just trying to escape when he used force, was not impaired by the court or the State, but by his own testimony.

E. CONCLUSION

Based on the foregoing, the State respectfully requests that Puga's conviction for robbery in the first degree be affirmed.

Respectfully submitted this 25th day of August, 2010.

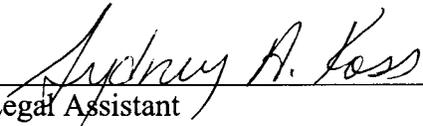


HILARY A. THOMAS, WSBA#22007
Appellate Deputy Prosecuting Attorney
Attorney for Respondent

CERTIFICATE

I certify that on this date I placed in the mail a properly stamped and addressed envelope, or caused to be delivered, a copy of the document to which this Certificate is attached to this Court and Respondent/ Cross-Appellant's attorney, Nancy Collins, addressed as follows:

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, WA 98102



Legal Assistant



Date