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JUL 20 PM 2:00

NO. 34290-1-II

BY *[Signature]*

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

STATE OF WASHINGTON,
Appellant/
*Cross-*Respondent,

v.

SCOTT MICHAEL LIDEN,
*Cross-*Appellant.

APPEAL FROM THE SUPERIOR COURT
FOR THURSTON COUNTY
CAUSE NO. 04-1-00279-0

HONORABLE PAULA CASEY, Judge

REPLY BRIEF OF APPELLANT/CROSS-RESPONDENT

EDWARD G. HOLM
Prosecuting Attorney
in and for Thurston County

JAMES C. POWERS
Deputy Prosecuting Attorney
WSBA #12791

Thurston County Courthouse
2000 Lakeridge Drive, SW
Olympia, WA 98502
Telephone: (206) 786-5540

pm 10-19-06

TABLE OF CONTENTS

	<u>Page</u>
STATEMENT OF THE ISSUE	1
STATEMENT OF THE CASE	1
ARGUMENT	3
1. <u>Because the defendant, at trial, proposed instructing the jury as to the inferior degree offense of second-degree robbery, and the court so instructed the jury in response to this defense request, the defendant is foreclosed by the doctrine of invited error from challenging those instructions on appeal, and in any event, the instructions were properly given because the defendant argued at trial that the State had not proven the location of the alleged robbery was a financial institution.</u>	3
CONCLUSION	8

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
<u>State v. Fernandez-Medina</u> , 141 Wn.2d 448, 6 P.3d 1150 (2000)	6
<u>State v. Henderson</u> , 114 Wn.2d 867, 792 P.2d 514 (1990)	5
 <u>STATUTES</u>	 <u>PAGE</u>
RCW 9A.56.190	4
RCW 9A.56.200 (1) (b)	4
RCW 10.61.003	6

A. STATEMENT OF THE ISSUE

1. Whether the defendant is foreclosed on appeal from objecting to the jury having been instructed as to the inferior degree offense of second-degree robbery, and whether, even if the defendant was not so foreclosed, instructions regarding second-degree robbery were properly given to the jury.

B. STATEMENT OF THE CASE

At the trial of this cause, the jury found the defendant guilty of robbery in the first degree as charged. Thereafter, the trial court ruled that the evidence in this trial was insufficient to prove first-degree robbery because there were insufficient facts to prove beyond a reasonable doubt that the robbery was against a financial institution. However, the court found that there was a sufficient basis in the evidence to find the defendant guilty of the inferior degree offense of second-degree robbery, and so amended the conviction to one of robbery in the second degree in an Order on Motion for Arrest of Judgment. CP 185. A standard-range sentence was imposed for the second-degree robbery conviction.

The State filed a timely Notice of Appeal.

The State then argued in Appellant's Brief that the trial court had erred in finding that the evidence was insufficient to prove first-degree robbery. In Respondent's Brief, the defendant asked that the trial court's determination of insufficient evidence be affirmed. However, the defendant cross-appealed the defendant's conviction for second-degree robbery, arguing that there was no provision in Washington law for second-degree robbery to be a lesser-included offense in this case, and asked that the defendant's original conviction be dismissed with prejudice.

In filing the present brief, the Appellant is acting as cross-respondent on the issue concerning whether second-degree robbery is an available inferior degree offense in this case. The facts of this case have been fully set forth in Appellant's Brief, and that Statement of the Case is incorporated herein by reference.

C. ARGUMENT

1. Because the defendant, at trial, proposed instructing the jury as to the inferior degree offense of second-degree robbery, and the court so instructed the jury in response to this defense request, the defendant is foreclosed by the doctrine of invited error from challenging those instructions on appeal, and in any event, the instructions were properly given because the defendant argued at trial that the State had not proven the location of the alleged robbery was a financial institution.

The jury in this case was properly instructed that the following elements of robbery in the first degree must be proved beyond a reasonable doubt: (1) that on or about the 5th day of February, 2004, the defendant unlawfully took personal property from the person or in the presence of another; (2) that the defendant intended to commit theft of the property; (3) that the theft was within and against a financial institution; (4) that the taking was against the person's will by the defendant's use or threatened use of immediate force, violence or fear of injury to that person or to the person or property of another; (5) that the force or fear was used by the defendant to obtain or retain possession of

the property or to prevent or overcome resistance to the taking; and (6) that the acts occurred in the State of Washington. RCW 9A.56.190, RCW 9A.56.200(1)(b); Jury Instruction No. 7 in CP 101-120.

The jury was also instructed that if the crime of robbery in the first degree was not proved, the jury could consider the lesser crime of robbery in the second degree.

If you are not satisfied beyond a reasonable doubt that the defendant is guilty of the crime charged, the defendant may be found guilty of any lesser crime, the commission of which is necessarily included in the crime charged, if the evidence is sufficient to establish the defendant's guilt of such lesser crime beyond a reasonable doubt.

The crime of Robbery in the First Degree necessarily includes the lesser crime of Robbery in the Second Degree.

Jury Instruction No. 12 in CP 101-120. The jury was then instructed on the elements of robbery in the second degree. Jury Instruction No. 14 in CP 101-120. That instruction included all the elements also set forth for robbery in the first degree, but minus the requirement that the theft was within and against a financial institution.

The defendant did not take exception to the court instructing the jury as to robbery in the second degree as a lesser offense. 12-7-05 PM Trial RP 15-16. In fact, the defendant proposed jury instructions to the court in order to have the court instruct the jury on second-degree robbery as a lesser-included offense. CP 52-57. At the end of the trial, the court entered an Order which stated in part:

. . . AND FURTHER ADJUDGE AND DECREE that the Defense request that the Jury Instructions include the lesser included crime of Robbery in the Second Degree is granted.

CP 100.

The defendant now argues on appeal that the court erred in instructing the jury that robbery in the second degree was a lesser included crime of robbery in the first degree. However, under the doctrine of invited error, having requested at trial the very instructions which are now objected to, the defendant is foreclosed from claiming on appeal that the instructions were in error. State v. Henderson, 114 Wn.2d 867, 870-871, 792 P.2d 514 (1990). Therefore, the defendant's argument

should be rejected on this basis.

Even if the defendant could raise this claim, it would be without merit. Robbery in the second degree is an inferior degree of robbery in the first degree. RCW 10.61.003.

Upon an indictment or information for an offense consisting of different degrees, the jury may find the defendant not guilty of the degree charged in the indictment or information, and guilty of any degree inferior thereto, or an attempt to commit the offense.

RCW 10.61.003. The jury is properly instructed with regard to an inferior degree offense when:

(1) the statutes for both the charged offense and the proposed inferior degree offense proscribe but one offense; (2) the information charges an offense that is divided into degrees, and the proposed offense is an inferior degree of the charged offense; and (3) there is evidence that the defendant committed only the inferior offense. State v. Fernandez-Medina, 141 Wn.2d 448, 454, 6 P.3d 1150 (2000).

Robbery in the first degree and robbery in the second degree both proscribe the one offense

of robbery. As noted above, second-degree robbery is an inferior degree of first-degree robbery. At trial, the defendant argued that there was insufficient evidence for the jury to find it proved that the robbery committed by the defendant was against a financial institution, and that the jury should consider the lesser crime of robbery in the second degree. 12-7-05 PM Trial RP 65-66. Thus, while the defendant sought to have the jury find him not guilty of both degrees of robbery, he acknowledged there was evidence that the defendant committed only the lesser offense.

The defendant's argument to the contrary on appeal is a circular one. He claims that the jury could not find the defendant guilty of robbery in the first degree because there was insufficient evidence that the robbery occurred at a financial institution. At the same time, the defendant argues that the jury could not find the defendant guilty of robbery in the second degree because the robbery occurred at a financial institution. This is not a tenable argument.

In Appellant's Brief, the State identified the evidence which a reasonable juror could have relied on to find the defendant guilty of first-degree robbery. That discussion will not be repeated here.

At the same time, it was proper for the jury to weigh this evidence, and if the jury found that the State had failed to prove the robbery was against a financial institution as the defendant argued, to consider the lesser offense of second-degree robbery. Thus, the jury was properly instructed as to that lesser offense in response to the defendant's request.

D. CONCLUSION

The jury properly was instructed it could consider the crime of robbery in the second degree if jurors found the State had failed to prove first-degree robbery. However, the jury found otherwise, and the jury's verdict finding the defendant guilty of first-degree robbery was based upon sufficient evidence. The trial court erred

in reducing the conviction to second-degree robbery. The State asks that the court reinstate the jury's guilty verdict for first-degree robbery.

DATED this 19th day of October, 2006

Respectfully submitted,



JAMES C. POWERS/WSBA #12791
DEPUTY PROSECUTING ATTORNEY

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STATE OF WASHINGTON,)	
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SCOTT MICHAEL LIDEN,)	
Appellant)	

STATE OF WASHINGTON)	
)	ss.
COUNTY OF THURSTON)	

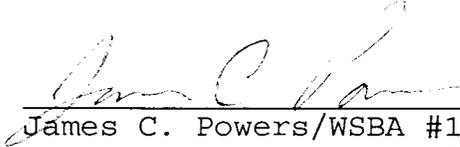
James C. Powers declares and affirms:

I am a Senior Deputy Prosecuting Attorney in the Office of Prosecuting Attorney of Thurston County; that on the 19th day of October, 2006, I caused to be mailed to Respondent/Cross-Appellant's attorney, SHARONDA THOMPSON AMAMILO, a copy of the Reply Brief of Appellant/Cross-Respondent, addressing said envelope as follows:

Sharonda Thompson Amamilo,
Law Office of Amamilo and Associates
1570 Wilmington Drive, Suite 200
Dupont, WA 98327-8773

I certify (or declare) under penalty of perjury
under the laws of the State of Washington that the
foregoing is true and correct to the best of my
knowledge.

DATED this 19~~th~~ day of October, 2006 at Olympia,
WA.



James C. Powers/WSBA #12791
Senior Deputy Prosecuting Attorney