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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON  
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**Court of Appeals No. 39062-1-II**

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

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**STATE OF WASHINGTON**

**Plaintiff/Respondent,**

**v.**

**DOMINIQUE SHAVIES,**

**Defendant/Appellant.**

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**OPENING BRIEF OF APPELLANT**

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**Appeal from the Superior Court of Pierce County,  
Cause No. 08-1-02897-8  
The Honorable Beverly G. Grant, Presiding Judge**

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## **I. ASSIGNMENTS OF ERROR**

1. There was insufficient evidence to convict Mr. Shavies of first degree robbery.
2. Mr. Shavies' sentence is disproportionate to the facts of this case.

## **II. ISSUES PRESENTED**

1. Does the State present sufficient evidence to convict a defendant of first degree robbery where the State presents insufficient evidence to establish that property was taken or retained through the use or threatened use of force? (Assignment of Error No. 1)
2. Is a sentence of 145 months disproportionate to the facts of this case? (Assignment of Error No. 2)

## **III. STATEMENT OF THE CASE**

### *A. Factual Background*

On June 17, 2008, Mr. Dominique Shavies was released from incarceration by the Department of Corrections. RP 180-181, 10-08-08.<sup>1</sup>

On June 18, 2008, Ms. Sarah Nix was working at the Stadium Thriftway in Tacoma. RP 51, 9-30-08. When Ms. Nix took her evening break, she went out to some steps next to the store, sat down, placed her purse beside her on the steps, and smoked a cigarette. RP 53-55, 9-30-08.

The stairs were roughly six feet wide with a railing in the middle. RP 54-

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<sup>1</sup> Not all volumes of the Report of Proceedings are numbered continuously. Reference to the record will be made by giving the RP cite, followed by the date of the hearing being referenced.

56, 9-30-08. Ms. Nix put her purse on the stairs next to her, within a foot of her body. RP 55-56, 9-30-08.

As Ms. Nix smoked her cigarette and spoke on the phone with her boss, Mr. Shavies walked up the stairs, bent over, snatched Ms. Nix's purse, and ran up the stairs. RP 56, 58, 9-30-08. Mr. Shavies had his right hand in his shirt as he grabbed Ms. Nix's purse and ran up the stairs. RP 57, 9-30-08. Ms. Nix told her boss that someone had just stole her purse, then hung up her phone and chased Mr. Shavies. RP 58, 9-30-08.

As Ms. Nix chased Mr. Shavies, two men yelled out to Ms. Nix and asked her what was going on and she told them that Mr. Shavies had just stolen her purse. RP 59, 9-30-08. The two men responded by running towards Mr. Shavies. RP 59, 9-30-08.

As Ms. Nix and the men chased Mr. Shavies, Mr. Shavies looked back at Ms. Nix then looked into Ms. Nix's purse and threw the purse over his head back at Ms. Nix. RP 59-61, 9-30-08. Ms. Nix stopped, picked up her purse, then collapsed from the exertion of chasing Mr. Shavies. RP 61, 9-30-08. Ms. Nix, Mr. Shavies, and the two men were all standing within four or five feet of each other. RP 61, 9-30-08. One of the men came over and was helping Ms. Nix. RP 61, 9-30-08.

Ms. Nix began dialing 911 but her hands were shaking and she kept messing up. RP 62, 9-30-08. As Ms. Nix called 911, Mr. Shavies

said, "Bitch, I gave you your shit back." RP 62, 9-30-08. Ms. Nix responded, "Bitch?! I work 40 hours a week for this shit. You are the one stealing purses. You are the bitch. Your fat ass better keep on running because I am calling the cops." RP 62, 9-30-08. As Ms. Nix called the police, Mr. Shavies began backing up as the two men stayed with Ms. Nix. RP 62, 9-30-08.

As Mr. Shavies backed away from Ms. Nix, Ms. Nix and Mr. Shavies continued to yell at and argue with each other. RP 63-64, 9-30-08. As Mr. Shavies backed up, he crouched down and pulled a screwdriver from his waistband. RP 63, 9-30-08. Mr. Shavies was within four or five feet of Ms. Nix and the other men, but was not very close to any of them. RP 63, 9-30-08. Mr. Shavies pulled the screwdriver out and showed it to Ms. Nix and the two men. RP 64, 9-30-08. Ms. Nix was not worried about the screwdriver and continued to call 911. RP 65, 9-30-08. Mr. Shavies did not attack anyone with the screwdriver and Ms. Nix did not know what Mr. Shavies did with the screwdriver. RP 80-81, 9-30-08.

Ms. Nix told Mr. Shavies that she was calling the police and Mr. Shavies responded by saying, "Okay, all right then. Let's go back to the store." RP 65, 9-30-08. The group began walking back towards the Thriftway, but after they had traveled three or four feet Mr. Shavies ran towards a Shell gas station. RP 65-66, 9-30-08. Ms. Nix chased Mr.

Shavies while talking to the 911 operator and saw Mr. Shavies get into a car. RP 66, 9-30-08. Observers were able to get a description of the car and the license plate of the car. RP 67, 9-30-08. Ms. Nix relayed the information about the car to the 911 operator. RP 67-68, 9-30-08.

Ms. Nix returned to the Thriftway, looked through her purse, and noticed that her wallet was missing. RP 67-68, 9-30-08.

Tacoma Police Officer Dannen Reda was dispatched to the Thriftway. RP 4-5, 10-01-08. Officer Reda had been given a license plate number and told Officer Reda that Mr. Shavies had been seen getting into a silver Dodge Intrepid. RP 5-6, 10-01-08. En route to the Thriftway, Officer Reda input the license plate the 911 operator had been given into his computer. RP 5-6, 10-01-08. The license plate turned out not to be an actual plate, but the computer provided a very similar license number which corresponded to a silver Dodge Intrepid. RP 5-6, 10-01-08.

As Officer Reda was traveling to the Thriftway, he saw a silver Dodge Intrepid with the license plate given by the computer traveling in the opposite direction. RP 6, 10-01-08. Officer Reda turned his car around, called for backup, and, once other units had arrived, executed a high-risk traffic stop on the Dodge Intrepid. RP 6, 10-01-08.

Four occupants were removed from the Intrepid and were placed in the back of patrol vehicles. RP 6, 10-01-08. One of the occupants was

identified as Mr. Shavies. RP 6-7, 10-01-08. Mr. Shavies had been sitting in the rear passenger seat of the Intrepid. RP 6-7, 10-01-08. On the ground under the passenger side of the Intrepid, police located Ms. Nix's wallet. RP 9, 10-01-08.

Ms. Nix was called by the 911 dispatcher and was asked if she could identify the man who took her purse. RP 68,9-30-08. A female police officer then picked Ms. Nix up from the store and took her to a location where a car had been pulled over. RP 68-69, 9-30-08. The car looked like the one Ms. Nix had seen Mr. Shavies get into. RP 69, 9-30-08. The police pulled Mr. Shavies out of a patrol vehicle and Ms. Nix identified him as the man who had taken her purse. RP 69-70, 86-89, 9-30-08; RP 10-11, 10-01-08.

Tacoma Police officer Ryan Hovey responded to the scene of the Intrepid. RP 12-14, 10-01-08. When Mr. Shavies was removed from the Intrepid, Officer Hovey informed Mr. Shavies of his constitutional rights. RP 15-16, 10-01-08. Mr. Shavies indicated that he understood his rights and that he was willing to speak with police. RP 17, 10-01-08. Initially, Mr. Shavies said he had no idea of what was going on. RP 18, 10-01-08. Eventually, Mr. Shavies admitted to taking Ms. Nix's purse. RP 22-23, 10-01-08. Mr. Shavies said he did not know anything about a weapon being used. RP 22-24, 10-01-08. Officer Hovey then transported Mr.

Shavies to the Pierce County Jail and booked him. RP 24, 10-01-08.

*B. Procedural Background*

On June 19, 2008, Mr. Shavies was charged with one count of first degree robberies while armed with a deadly weapon and with the aggravating factor that the crime was committed shortly after Mr. Shavies was released from incarceration. CP 1-2.

Pretrial, a 3.5 hearing was held and the statements Mr. Shavies made to police were ruled to be admissible. RP 4-33, 9-29-08; CP 107-112.

The jury found Mr. Shavies guilty of first degree robbery, but found that Mr. Shavies was not armed with a deadly weapon at the time of the robbery. RP 145, 10-07-08; CP 89, 94.

After a separate hearing, the jury found that Mr. Shavies had committed the crime shortly after being released from incarceration. RP 162-189, 10-08-08; CP 102.

On March 13, 2008, counsel for Mr. Shavies signed a stipulation with the State as to Mr. Shavies' prior convictions and that Mr. Shavies had an offender score of 12. CP 104-106. Mr. Shavies refused to sign the stipulation. CP 104-106.

Mr. Shavies received a standard range sentence of 145 months. CP 113-125.

Notice of appeal was filed on March 18, 2009. CP 134-147.

#### IV. ARGUMENT

1. **The State presented insufficient evidence to convict Mr. Shavies of first degree robbery where the State presented insufficient evidence to establish that force or threatened use of force was use to take or retain possession of Ms. Nix's purse.**

The standard of review on a challenge to the sufficiency of the evidence is whether, after viewing the evidence most favorably to the State, any rational trier of fact could have found the essential elements of the crimes charged beyond a reasonable doubt. *State v. Prestegard*, 108 Wn.App. 14, 22, 28 P.3d 817 (2001), *citing State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

In determining whether the “necessary quantum of proof exists,” the reviewing court must be convinced that “substantial evidence” supports the State’s case. *Prestegard*, 108 Wn. App. at 22-23, 28 P.3d 817, *citing State v. Fiser*, 99 Wn. App. 714, 718, 995 P.2d 107, *review denied*, 141 Wn.2d 1023, 10 P.3d 1074 (2000). “Substantial evidence is evidence that ‘would convince an unprejudiced, thinking mind of the truth of the fact to which the evidence is directed.’” *Prestegard*, 108 Wn. App. at 23, 28 P.3d 817, *quoting State v. Hutton*, 7 Wn. App. 726, 728, 502 P.2d 1037 (1972). “Substantial evidence” cannot be based upon “guess, speculation, or conjecture.” *Prestegard*, 108 Wn. App. at 23, 28 P.3d 817.

It is the jury's function to weigh evidence, determine witness credibility, and decide disputed questions of fact; however, the jury's findings must be supported by substantial evidence in the record. *State v. Snider*, 70 Wn.2d 326, 327, 422 P.2d 816 (1967). Substantial evidence is evidence that “would convince an unprejudiced, thinking mind of the truth of the fact to which the evidence is directed.” *State v. Hutton*, 7 Wn.App. 726, 728, 502 P.2d 1037 (1972). The existence of a fact cannot rest upon guess, speculation or conjecture. *State v. Carter*, 5 Wn.App. 802, 807, 490 P.2d 1346 (1971), *review denied*, 80 Wn.2d 1004 (1972), *cited in Hutton*, 7 Wn.App. at 728, 502 P.2d 1037.

Retrial following reversal for insufficient evidence is “unequivocally prohibited” and dismissal is the remedy. *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998).

Mr. Shavies was charged with committing first degree robbery in violation of RCW 9A.56.190 and RCW 9A.56.200(1)(a)(ii). CP 1-2.

Under RCW 9A.56.190,

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.

Under RCW 9A.56.200(1)(a)(ii), “A person is guilty of robbery in the first degree if [i]n the commission of a robbery or of immediate flight therefrom, he [d]isplays what appears to be a firearm or other deadly weapon.”

At trial, no evidence was introduced regarding the use or display of a firearm. Further, no evidence was introduced that Ms. Shavies purse was removed from her person. Thus, in order to convict Mr. Shavies of first degree robbery, the State had the burden of proving beyond a reasonable doubt that Mr. Shavies took Ms. Nix’s purse in Ms. Nix’s presence by the use or threatened use of a deadly weapon, and that the deadly weapon was used or was threatened to be used to obtain or retain possession of Ms. Nix’s purse.

*a. The State presented insufficient evidence to establish that Mr. Shavies used or threatened to use force to obtain Ms. Nix’s purse and wallet.*

The facts introduced at trial were that Mr. Shavies walked up and took Ms. Nix’s purse without speaking to her or displaying any sort of weapon. RP 58, 9-30-08. Thus, Ms. Nix’s purse and wallet were taken from her presence, against her will, but without the use or threatened use of force or a deadly weapon.

b. *The State presented insufficient evidence to establish that Mr. Shavies used or threatened to use force to retain possession of Ms. Nix's wallet.*

The only act by Mr. Shavies which might possibly be interpreted to be the display, use, or threat to use force or a deadly weapon is Mr. Shavies act of pulling the screwdriver out of his pants after Ms. Nix and the two men had stopped Mr. Shavies.

After Ms. Nix had recovered her purse and had stopped Mr. Shavies, Mr. Shavies did withdraw a screwdriver from his pants while speaking to Ms. Nix. RP 64-65, 9-30-08. However, Ms. Nix testified that she was not threatened by the screwdriver and did not see what Mr. Shavies did with the screwdriver after he took it out of his pants. RP 80-81, 83, 9-30-08. Thus, even though Mr. Shavies did retain possession of Ms. Nix's wallet, the screwdriver was not used for the purpose of retaining the wallet.

The State failed to present sufficient evidence to support the conclusion that Mr. Shavies used force either to obtain or retain possession of Ms. Nix's purse or wallet.

The conclusion that Mr. Shavies did not use force is bolstered by the fact that the jury found that Mr. Shavies was not armed with a deadly weapon during the commission of the robbery. CP 94.

Under RCW 9A.04.110(6), a deadly weapon is "any other...device,

instrument, [or] article...which, under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily harm.” RCW 9A.56.190 requires that force be used either to obtain or retain the property in order for the taking of the property to be considered a robbery, and RCW 9A.56.200(1)(a)(ii) requires that Mr. Shavies display what appears to be a deadly weapon. Had the jury found that Mr. Shavies brandished the screwdriver in an attempt to threaten or attack Ms. Nix or the two men, the jury would have found that Mr. Shavies was armed with a deadly weapon during the robbery since the only way a display of a screwdriver could be considered to be a use of force is if the screwdriver is brandished in a manner consistent with causing death or serious bodily harm. Thus, because the jury found that the screwdriver was not used in a manner in which it could be considered a deadly weapon, the jury necessarily also found that the display of the screwdriver was not done for purposes of retention of Ms. Nix’s wallet. Finally, the fact that the jury found that Mr. Shavies was not armed with a deadly weapon means that the jury also found that Mr. Shavies did not display a deadly weapon in the commission or immediate flight from the robbery.

Even viewed in the light most favorable to the State, the facts introduced at trial do not support the conclusion that Mr. Shavies used or

threatened to use force in the taking and/or retaining of Ms. Nix's purse and wallet. Any conclusion by the jury that Mr. Shavies used force to obtain or retain Ms. Nix's purse and/or wallet would be based on guess, speculation and conjecture since the facts introduced at trial clearly show that no force was used or threatened to be used by Mr. Shavies either to obtain or retain Ms. Nix's property.

This court should vacate Mr. Shavies conviction for robbery and remand for dismissal.

**2. Mr. Shavies' sentence of 145 months is disproportionate to the crime he allegedly committed.**

The Eighth Amendment to the United States Constitution provides a right to be free from cruel and unusual punishment, while article I, section 14 of the Washington Constitution prohibits the imposition of cruel punishment. *State v. Morin*, 100 Wn.App. 25, 29, 995 P.2d 113, *review denied* 142 Wn.2d 1010, 16 P.3d 1264 (2000). "Punishment is cruel and unusual if it is of such disproportionate character to the offense as to shock the general conscience and violate principles of fundamental fairness." *State v. Grenning*, 142 Wn.App. 518, 545, 174 P.3d 706, *review denied* 164 Wn.2d 1026, 196 P.3d 137 (2008).

The Washington Constitution provides greater protection than its federal counterpart. *Morin*, 100 Wn.App. at 29, 995 P.2d 113. (*citing*

*State v. Manussier*, 129 Wn.2d 652, 674, 921 P.2d 473 (1996)). It follows that if the state provision is not violated, a sentence violates neither constitution. *Morin*, 100 Wn.App. at 29, 995 P.2d 113.

“A sentence violates article I, section 14 of the Washington State constitution when it is grossly disproportionate to the crime for which it is imposed.” *Morin*, 100 Wn.App. at 29, 995 P.2d 113. In determining whether a sentence is disproportionate, we consider “(1) the nature of the offense; (2) the legislative purpose behind the statute; (3) the punishment the defendant would have received in other jurisdictions; and (4) the punishment imposed for other offenses in the same jurisdiction.” *Morin*, 100 Wn.App. at 29, 995 P.2d 113; *see also State v. Fain*, 94 Wn.2d 387, 397, 617 P.2d 720 (1980) (setting forth these factors). These are only factors to consider and no one factor is dispositive. *State v. Gimarelli*, 105 Wn.App. 370, 380-81, 20 P.3d 430, *review denied* 144 Wn.2d 1014, 31 P.3d 1185 (2001).

“Fixing of penalties or punishments for criminal offenses is a legislative function, and the power of the legislature in that respect is plenary and subject only to constitutional provisions against excessive fines and cruel and inhuman punishment.” *State v. Thorne*, 129 Wn.2d 736, 767, 921 P.2d 514 (1996) (quoting *State v. Mulcare*, 189 Wn. 625, 628, 66 P.2d 360 (1937)). Only punishment that is grossly

disproportionate to the gravity of the offense violates constitutional protections against cruel and unusual punishment. *State v. Farmer*, 116 Wn.2d 414, 433, 805 P.2d 200, 812 P.2d 858 (1991). Punishment is grossly disproportionate only if it is “clearly arbitrary and shocking to the sense of justice.” *State v. Smith*, 93 Wn.2d 329, 344-45, 610 P.2d 869, *cert. denied*, 449 U.S. 873, 101 S.Ct. 213, 66 L.Ed.2d 93 (1980).

A. The nature of Mr. Shavies’ offense.

Mr. Shavies was convicted of first degree robbery, a class A felony. CP 1-2, 89, RCW 9A.56.190, RCW 9A.56.200. Under RCW 9A.56.190,

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.

Under RCW 9A.56.200(1)(a)(ii), “A person is guilty of robbery in the first degree if [i]n the commission of a robbery or of immediate flight therefrom, he [d]isplays what appears to be a firearm or other deadly weapon.”

As discussed above, Mr. Shavies never used force or threatened to use for in either taking or retaining any property belonging to Ms. Nix.

Mr. Shavies did grab Ms. Nix's purse and keep her wallet after returning her purse, but this was all accomplished without Mr. Shavies ever using or threatening to use force, or displaying a deadly weapon.

In the universe of first degree robberies or class A felonies, Mr. Shavies' actions clearly rank low on any scale of measurement of the seriousness of the crime. At worst, Mr. Shavies actions can be interpreted as having snatched Ms. Nix's purse without her permission, keeping her wallet after discarding her purse, and removing a screwdriver in a non-threatening manner while being confronted by Ms. Nix and two men. This is far from the fact pattern of violent robberies typical of first degree robberies.

B. The legislative purpose behind the statute.

The legislative purpose behind the statute defining and criminalizing robbery was to deter robbery. However, RCW 9A.56.190 and RCW 9A.56.200, the statutes defining first degree robbery, are not at issue here. The statutes at issue in this case are the statutes contained in RCW Chapter 9.94A, the Sentencing Reform Act of 1981 (SRA), which set the standard ranges sentence for crimes committed in Washington. Specifically, RCW 9.94A.510, the sentencing grid, and RCW 9.94A.515, the crimes included within each seriousness level.

Mr. Shavies was convicted of first degree robbery, a crime which has a seriousness level of 9 under RCW 9.94A.515. Mr. Shavies' attorney also stipulated that Mr. Shavies' offender score was 12 (CP 104-106), resulting in a sentencing range of 129-171 months under RCW 9.94A.510. Mr. Shavies received a standard range sentence of 145 months. CP 113-125. It is this sentence that is cruel and unusual considering the facts of this case, thus, it is the legislative purpose behind the SRA which is at issue in this case.

The purposes of the SRA include:

- (1) Ensure that the punishment for a criminal offense is proportionate to the seriousness of the offense and the offender's criminal history;
- (2) Promote respect for the law by providing punishment which is just;
- (3) Be commensurate with the punishment imposed on others committing similar offenses;
- (4) Protect the public;
- (5) Offer the offender an opportunity to improve him or herself;
- (6) Make frugal use of the state's and local governments' resources; and
- (7) Reduce the risk of reoffending by offenders in the community.

RCW 9.94A.010.

Imposing a sentence of 145 months on Mr. Shavies for taking Ms. Nix's purse in a manner that neither caused nor threatened to cause harm to any person serves none of the purposes of the SRA.

- i. Proportionality of Mr. Shavies' punishment to the seriousness of the offense and his criminal history.*

As stated above, the facts of this case do not support a finding that Mr. Shavies' actions constituted a robbery since no force or threat of force was used to obtain or retain Ms. Nix's property. Even if the facts of this case are interpreted to meet the legal definition of a first degree robbery, this robbery is as de minimis a robbery as is imaginable. The revealing of the screwdriver did not threaten or frighten Ms. Nix.

A sentence of 145 months is not proportionate to Mr. Shavies' crime, given the lack of any evidence that force was used to obtain or retain Ms. Nix's property.

- ii. Mr. Shavies' sentence does not promote respect for the law as a just sentence.*

"Imposing a penalty which is within the standard range but unduly harsh, considering the circumstances of a case, does not '[p]romote respect for the law by providing punishment which is just.'" *State v. Nelson*, 108 Wn.2d 491, 502, 740 P.2d 835 (1987), *citing* RCW 9.94A.010(2).

A sentence of 145 months for the taking of a purse and wallet without the use of force would strike all but the most vindictively-minded persons as absurd, excessive, and contrary to any system of justice which provides a just sentence for the crime committed. Such sentences do not promote respect for the law and, in fact, promote disrespect for the law as arbitrary and unnecessarily punitive. This is precisely the sort of sentence that has led to beliefs such as “you get as much justice as you can afford” and that lower income individuals can’t get fair treatment in a court of law.

A 145 month sentence, while within the standard range, is unduly harsh given the facts of this case and is not a just sentence.

*iii. Mr. Shavies’ sentence is not commensurate with the punishment imposed on others committing similar offenses.*

It is not disputed that Mr. Shavies received a sentence that is in the middle of the standard sentencing range for first degree robbery. However, as stated above, the facts of this case do not support a conviction for first degree robbery. Mr. Sandholm’s actions are more accurately characterized as a third degree theft. Under RCW 9A.56.020(1)(a), “‘Theft’ means [t]o wrongfully obtain or exert unauthorized control over the property...of another...with intent to deprive...her of such property.” A theft is a theft in the third degree if the property stolen is worth less than

\$750. RCW 9A.56.050(1). Third degree theft is a gross misdemeanor. RCW 9A.56.050(2).

Had Mr. Shavies been charged and convicted of committing a third degree theft, as he should have been, he would have been convicted of a gross misdemeanor which may not be punished by a period of confinement of more than one year. RCW 3.66.060; RCW 9A.20.021(2); RCW 9.92.020; RCW 9.95.210(2).

It is clear that the screwdriver was not used as a deadly weapon and, therefore, was also not used to obtain or retain Ms. Nix's property. Ms. Nix was not harmed nor was she threatened in any way. Mr. Shavies' actions do not differ in any material way than those of someone who steals a purse sitting next to the owner and then runs off. The difference comes in the result- a sentence over twelve times longer for Mr. Shavies as opposed to the purse-snatcher. For this reason, Mr. Shavies' sentence is not commensurate with the punishment imposed on others who commit similar offenses.

*iv. Mr. Shavies' sentence will not protect the public.*

Incarcerating Mr. Shavies for 145 months will not serve to protect the public in any way. In fact, incarcerating Mr. Shavies for 145 months will actually endanger the community since the money spent incarcerating

Mr. Shavies will be drawn from the budget spent on providing police services and on incarcerating other, more violent criminals, who pose a real threat to society.

v. *Mr. Shavies' sentence will not offer Mr. Shavies the opportunity to improve himself.*

Mr. Shavies committed this crime one day after having been released from jail. RP 180-181, 10-08-08; RP 51-56, 58, 9-30-08. Mr. Shavies had been serving a sentence for unlawful possession of a controlled substance. CP 113-125. Mr. Shavies had been sentenced on February 14, 2008, and had been released on June 17, 2008. CP 113-125, RP 180-181, 10-08-08. Mr. Shavies' criminal history indicates that he has had an ongoing problem with drug addiction since at least 1995. CP 113-125. Mr. Shavies has been incarcerated almost continually since May 1993. CP 113-125. Confining Mr. Shavies to a further 145 months in prison will not help Mr. Shavies deal with his addictions or establish the positive and supporting connections in the community that he so obviously needs to break the cycle of drug use and criminal behavior. If anything, incarcerating Mr. Shavies for 145 more months will only serve to strengthen his bad habits and educate him in ways to commit more crimes.

vi. *Mr. Shavies' sentence does not make frugal use of the State's resources.*

As this court is undoubtedly aware, the State of Washington is experiencing a serious budget shortfall while at the same time suffering from an overburdened criminal justice system. Sentencing Mr. Shavies to 145 months in prison for such a relatively minor and harmless act is antithetical to a frugal use of the State's resources. Mr. Shavies is not a violent criminal and has not committed any heinous crime. It simply does not make fiscal, legal, or moral, sense for the taxpayers of this State to be forced to pay the costs of incarcerating Mr. Shavies for 145 months for his actions.

vii. *Mr. Shavies' sentence will not reduce the risk of his reoffending in the community.*

As stated above, it is clear from Mr. Shavies' criminal history that his criminal behavior is directly linked to his drug addiction. Thus, sentencing him to over twelve years in prison actually increases the likelihood Mr. Shavies will reoffend since he will be unable to receive treatment and experience living drug free in an uncontrolled environment while he is in prison. When Mr. Shavies is released from prison, he will be just as likely, or even likelier, to commit drug crimes or other petty crimes. Further, he will have increased difficulty in obtaining

employment, raising the likelihood that he will resort to criminal activity to support himself.

Thus, Mr. Shavies' sentence does not serve any of the legislative purposes of the SRA.

C. The punishment Mr. Shavies would receive in other jurisdictions.

i. *Oregon.*

a. Robbery.

Oregon Revised Statute (ORS) 164.415 defines the crime of robbery in the first degree. Under ORS 164.415,

A person commits the crime of robbery in the first degree if the person violates ORS 164.395 and the person:

- (a) Is armed with a deadly weapon;
  - (b) Uses or attempts to use a dangerous weapon; or
  - (c) Causes or attempts to cause serious physical injury to any person.
- (2) Robbery in the first degree is a Class A felony.

ORS 164.395 defines third degree burglary and reads as follows,

- (1) A person commits the crime of robbery in the third degree if in the course of committing or attempting to commit theft or unauthorized use of a vehicle as defined in ORS 164.135 the person uses or threatens the immediate use of physical force upon another person with the intent of:

(a) Preventing or overcoming resistance to the taking of the property or to retention thereof immediately after the taking; or

(b) Compelling the owner of such property or another person to deliver the property or to engage in other conduct which might aid in the commission of the theft or unauthorized use of a vehicle.

(2) Robbery in the third degree is a Class C felony.

Under ORS 161.605, the maximum term of punishment for a class A felony is 20 years and the maximum punishment for a class C felony is 5 years. However, the sentencing scheme in Oregon is indeterminate sentencing. ORS 137.700 provides for mandatory minimum sentences of certain crimes, including robbery. Under ORS 137.700, the mandatory minimum sentence for a first degree robbery conviction is 90 months.

b. Theft.

Under ORS 164.015(1), “A person commits theft when, with intent to deprive another of property or to appropriate property to the person or to a third person, the person [t]akes, appropriates, obtains or withholds such property from an owner thereof.” Second degree theft in Oregon is theft of property valued between \$50 and \$200 and is a class A misdemeanor. ORS 164.045. Third degree theft is theft of property valued at less than \$50 and is a class C misdemeanor. ORS 164.043.

There is no presumptive sentence for theft in Oregon. Class A misdemeanors are punishable by up to one year of imprisonment and class C misdemeanors are punishable by up to 30 days imprisonment.

Thus, as in Washington, the main difference between robbery and theft is that in a robbery the property is taken by force or threat of force. Also as in Washington, in Oregon Mr. Shavies' action would more appropriately be classified as second or third degree theft.

Had Mr. Shavies been tried and found guilty of any of the potentially applicable crimes in Oregon (first degree robbery or second or third degree theft), his sentence would have been significantly shorter than the comparable sentence in Washington. First degree robbery would carry a maximum sentence of 20 years (240 months), but has a mandatory minimum sentence of 90 months. Second degree theft carries a maximum sentence of one year. Third degree theft carries a maximum sentence of 30 days. Given the non-violent nature of Mr. Shavies acts and the minimal value of the property taken, it is highly likely that Mr. Shavies would be sentenced towards the low end of the sentence for any offense.

*ii. Idaho.*

a. Robbery.

Idaho Code (IC) § 18-6501 defines robbery as, “the felonious taking of personal property in the possession of another, from his person

or immediate presence, and against his will, accomplished by means of force or fear.

Under IC § 18-6502,

The fear which constitutes robbery may be either:

1. The fear of an unlawful injury to the person or property of the person robbed, or of any relative of his, or member of his family; or,
2. The fear of an immediate and unlawful injury to the person or property of any one in the company of the person robbed at the time of the robbery.

Under IC § 18-6503, robbery is punishable by not less than five years imprisonment but can be punished up to life imprisonment.

Give the relatively nonviolent nature of his, had Mr. Shavies been convicted in Idaho of robbery, his sentence would likely have been five years, a term almost one third as long as his 145 month sentence.

b. Theft.

Under IC § 18-2403, “A person steals property and commits theft when, with intent to deprive another of property or to appropriate the same to himself or to a third person, he wrongfully takes, obtains or withholds such property from an owner thereof.”

IC § 18-2407 divides theft into two classes applicable in this case: grand theft, where the property stolen is valued at more than \$1,000 or the property is stolen from the person of another; and petit theft, where the

property stolen is valued at less than \$1,000 and was not taken from the person of another.

Under IC § 18-2408, the applicable means of committing grand theft would be punishable by 1-14 years of imprisonment, while petit theft is punishable by imprisonment for not more than one year.

Again, had these events occurred in Idaho, Mr. Shavies would most likely have been charged and convicted of petit theft since Ms. Nix's purse was not on her person and the property stolen from her was not worth more than \$1,000. Accordingly, Mr. Shavies would likely have received a sentence of less than one year imprisonment.

*iii. California.*

a. Robbery.

California Penal Code (CPC) § 211 defines robbery as, "the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear."

CPC § 212 defines the fear necessary for a robbery conviction as either,

1. The fear of an unlawful injury to the person or property of the person robbed, or of any relative of his or member of his family; or,

2. The fear of an immediate and unlawful injury to the person or property of anyone in the company of the person robbed at the time of the robbery.

Under CPC § 212.5, because Mr. Shavies did not take the property of the operator of a public transport vehicle or in an inhabited dwelling, or from the person of someone who had just used an ATM machine, Mr. Shavies actions, were they to be characterized as a robbery at all, would be characterized as a robbery in the second degree.

Under CPC § 213, second degree robbery is punishable by incarceration for two, three, or five years, presumably based on the egregiousness of the events surrounding the robbery.

Thus, had Mr. Shavies been convicted of second degree robbery in California, the maximum sentence he would have received is five years, less than half of the sentence he received in Washington.

b. Theft.

CPC § 484(a) provides, in pertinent part, “Every person who shall feloniously steal, take, carry, lead, or drive away the personal property of another...is guilty of theft. In determining the value of the property obtained, for the purposes of this section, the reasonable and fair market value shall be the test.”

Under CPC § 486, “theft is divided into two degrees, the first of which is termed grand theft; the second, petty theft.”

Under CPC § 487,

Grand theft is theft committed in any of the following cases:

(a) When the money, labor, or real or personal property taken is of a value exceeding four hundred dollars (\$400), except as provided in subdivision (b).

(b) Notwithstanding subdivision (a), grand theft is committed in any of the following cases:

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(c) When the property is taken from the person of another

Under CPC § 488, all other thefts are petty thefts.

Under CPC § 489,

Grand theft is punishable as follows:

(a) When the grand theft involves the theft of a firearm, by imprisonment in the state prison for 16 months, 2, or 3 years.

(b) In all other cases, by imprisonment in a county jail not exceeding one year or in the state prison.

Under CPC § 490, "Petty theft is punishable by fine not exceeding one thousand dollars (\$1,000), or by imprisonment in the county jail not exceeding six months, or both."

Here, Mr. Shavies' actions would likely have been characterized as a theft since no force or threat of force was used in the taking of Ms. Nix's property. Further, the theft would likely have been characterized as a

petty theft since the value of the property was less than \$400 and the property was not taken from Ms. Nix's person. Thus, Mr. Shavies' likely sentence in California would have been imprisonment for six months or less in the county jail. However, even if he had been convicted of grand theft his sentence would not have exceeded one year since no firearm was used during the theft.

Thus, at least in Oregon, Idaho, and California, Mr. Shavies would have received a considerably shorter sentence, even if he had been convicted of robbery.

D. The punishment for other crimes in Washington.

Because of the manner in which sentence ranges are calculated in Washington, numerous other crimes potentially carry the same sentence as does first degree robbery when the offender has an offender score of 12. However, of all the crimes in Washington, the crime which most closely matches the facts of this case is third degree theft. As stated above, the criminal charge which most closely fits the facts of this case is third degree theft since Mr. Shavies neither used nor threatened to use force in taking Ms. Nix's property. Had Mr. Shavies been properly charged and found guilty of third degree theft, a gross misdemeanor, and would have received a sentence no longer than one year.

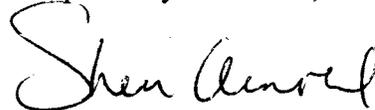
**VI. CONCLUSION**

The State failed to present any evidence that force was used in the taking or obtaining of Ms. Nix's property. The evidence indicated that Mr. Shavies did remove a screwdriver from his pants after he had returned Ms. Nix's purse and was stopped by Ms. Nix and the two men, but the record indicates that the screwdriver was not used in a threatening manner and was not used to retain Ms. Nix's wallet. In fact, after Mr. Shavies removed the screwdriver from his pants, Ms. Nix did not even know what Mr. Shavies did with it. This court should vacate Mr. Shavies conviction for first degree robbery and remand for dismissal with prejudice.

Alternatively, Mr. Shavies punishment is disproportionate to his actions in this case. This court should vacate his sentence and remand for resentencing.

DATED this 5<sup>th</sup> day of October, 2009.

Respectfully submitted,



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Sheri Arnold, WSBA No. 18760  
Attorney for Appellant

**CERTIFICATE OF SERVICE**

The undersigned certifies that on October 9, she delivered in person to the Pierce County Prosecutor's Office, County-City Building, 930 Tacoma Avenue South, Tacoma, Washington 98402, and by United States Mail to appellant, Dominique Shavies, DOC # 709312, Clallam Bay Corrections Center, 1830 Eagle Crest Way, Clallam, Bay, Washington 98326 true and correct copies of this Opening Brief. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington on October 5, 2009.

  
Norma Kinter

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