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Court of Appeals
Division III
State of Washington

No. 30017-0-III

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,
Plaintiff/Respondent,

vs.

DAVID LEE HICKAM,
Defendant/Appellant.

APPEAL FROM THE SPOKANE COUNTY SUPERIOR COURT
Honorable Salvatore F. Cozza

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in denying appellant's request to instruct the jury regarding self-defense.

2. The trial court erred in denying appellant's request to instruct the jury that the amount of force used to detain a suspected shoplifter must be reasonable.

3. The trial court erred in denying appellant's request to instruct the jury on a lesser included offense.

4. Cumulative error violated appellant's due process right to a fair trial.

Issues Pertaining to Assignments of Error

1. Whether self-defense may be asserted in a robbery case when the amount of force used to detain a suspect is claimed to be unreasonable?

2. The defense theory was that Hickam acted not to retain stolen property but in self-defense to prevent choking by the loss prevention agent. Was appellant denied a fair trial when the trial court refused to instruct the jury that the amount of force used to detain a suspected shoplifter must be reasonable?

3. Is reversal required because the court refused to give an instruction on third degree theft as a lesser offense of first degree robbery,

even though the jury could infer the appellant only committed the crime of third degree theft?

4. Did cumulative error deprive Hickam of a fair trial as guaranteed by Wash. Const. art. I, §§ 21 and 22?

B. STATEMENT OF THE CASE

The defendant, David Lee Hickam, walked out of a Franklin Park Rite-Aid store in Spokane County, Washington without paying for a \$0.05 piece of aluminum foil he'd torn off from a box selling for \$5.29. He'd put the bit of foil in his pocket or tucked it under the arm of his coat.

6/7/11 RP 65–67, 88–89; 6/8/10 RP 237; CP 2.¹ Within 20 seconds Walter Bullock, the loss prevention agent, had met up with Hickam in the glass-walled entrance foyer of the adjoining Ross Dress for Less store. Bullock, wearing civilian clothes, identified himself as security. 6/7/11 RP 61, 67–69. Hickam didn't respond to Bullock or his requests to remove his hands slowly, and Hickam kept digging his hands around in his pockets. 6/7/11 RP 70–71.

With his left hand Hickam suddenly took out what Bullock believed was a piece of rock cocaine and popped it into his mouth. 6/7/11 RP 71. Bullock immediately grabbed Hickam's throat with one hand in a

choke-hold so that Hickam couldn't swallow, and yelled at him to "spit it out, spit it out". 6/7/11 RP 72–73. The force of grabbing his throat popped Hickam's sunglasses off. 6/7/11 RP 85–86. As Hickam wrestled away, Bullock yelled "hey, stop" and Hickam turned around and sprayed pepper spray into the air around Bullock's eyes. 6/7/11 RP 74, 98–99. Bullock intentionally dropped to the ground. He said the spray blinded him, made opening and closing his eyes excruciatingly painful, and the effects lasted three hours. 6/7/11 RP 75–77, 80. Hickam got away, but was eventually identified as the shoplifter. 6/7/11 RP 77, 85, 117–21.

Hickam was charged with first degree robbery (CP 1), based in part on infliction of bodily injury through the use of force to retain possession of the piece of foil. CP 120, Instruction No.5.

By answer to omnibus application, counsel disclosed the general nature of its defense as self-defense. CP 27. In a defense interview six months after the incident, Bullock told the investigator that he had grabbed Hickam by the larynx in a choke hold ("C-hold") in order to get him to spit what he thought was a controlled substance out; telling him to spit it out. CP 32–33; 6/7/11 RP 208–09. At trial Bullock testified he had told investigating officers initially of his choking Hickam for trying to swallow

¹ CP 2, Affidavit of Facts. One foot of a 100 foot roll of aluminum foil would be worth \$0.0529; one foot of a 200 foot roll would be worth \$0.02645.

a controlled substance, but police testified he had not told them of placing his hands on Hickam. 6/7/11 RP 97–98; 6/7/11 RP 160, 166–67, 169–71, 188–89.

As a pre-trial motion in limine, defense counsel asked to exclude evidence or argument that choking a person for suspected ingestion of drugs is within the lawful scope of the force permitted a shopkeeper in the detention of a suspected shoplifter. 6/6/11 RP 18–24; CP 51–52. The court declined to restrict evidence or argument, ruling that it appeared there were disputed issues of fact. 6/6/11 RP 24–25. Over defense objection, the court ruled that Bullock’s opinion that Hickam had ingested a controlled substance and any testimony that Hickam presumably intended to use the shoplifted tinfoil as drug paraphernalia would be admissible. 6/6/11 RP 30–36; CP 57–60.

Prior to opening statements, counsel discussed the issue of self-defense in a robbery case. The court concluded that it was bound by the decision in State v. Lewis² and would not allow a self-defense instruction at the end of the case. 6/7/11 RP 48–56.

Hickam admitted stealing the piece of aluminum foil and eating pills for which he had no prescription. When Bullock grabbed him,

² 146 Wn. App. 230, 233 P.3d 891 (2010).

Hickam knew he was caught and intended to go back with him to the store. As soon as Hickam took the pills, he was slammed face first into the glass window and his tooth was chipped. 6/8/10 RP 237–44, 250, 257, 268. Bullock put his hand around Hickam’s throat, squeezing hard enough that he could not breathe or speak. 6/8/10 RP 242–44. Hickam was scared, and didn’t know why the guy was hurting his neck. 6/8/10 RP 244. Panicking, Hickam began to run away and saw Bullock coming at him as if to mow him down, with a look to kill. Hickam thought the guy was going to choke him again, hit him, tackle him or slam his face into the concrete or something else. 6/8/10 RP 245–46, 250, 261. Hickam pulled his car keys out with the pepper spray container on it, and sprayed into the air at Bullock to keep him away. 6/8/10 RP 246–47, 261–63.

Bullock testified his duties as a loss prevention officer for Rite-Aid were to protect customers and employees, as well as to help reduce shoplifting or theft in the store. 6/7/11 RP 59. As part of his job responsibilities, Bullock is not supposed to look for drugs or prevent people from swallowing drugs. 6/7/11 RP 91. Bullock acknowledged that choking or cutting off Hickam’s windpipe because of suspected swallowing of drugs was outside of his responsibility as a security officer. 6/7/11 RP 92.

Bullock also received training as a limited commission police officer at the Spokane Police Department academy. 6/7/11 RP 60. His only exposure to drugs was an hour-long class on drugs, where he was shown a chart with pictures of controlled substances on it. 6/7/11 RP 60, 71, 90. Holding him to the store window, Bullock grabbed Hickam's throat because Hickam was trying to swallow the cocaine and Bullock didn't want to get in trouble if he suffered an overdose. 6/7/11 RP 73, 92–96. Bullock held Hickam's throat for three to five seconds. 6/7/11 RP 73, 95. Bullock had not been trained to make throat holds at the academy, and just did it on his own. 6/7/11 RP 95.

As a limited commission police officer, Bullock said he was allowed to detain people who commit a theft or other crime in his presence. 6/7/11 RP 107. When asked if in his training or experience he had come across the legal limitations on the manner and force which may be used in detaining a shoplifter [and the Court interjected, “How far can you go?”], Bullock replied, “Well, if you have to, you can go as far as you have to protect yourself. Can I go jump on somebody for no reason? No.” 6/7/11 RP 109. When asked about the force used to detain Hickam, Bullock said he was not detaining Hickam because he was swallowing drugs but that he was being detained for theft. 6/7/11 RP 110. During an

earlier defense interview, Bullock answered a similar question defensively, saying that his intention was that he thought he was making a drug arrest, a seizure. 6/7/11 RP 214.

During the jury instruction conference, defense counsel excepted to the court's refusal to give proposed instructions regarding self-defense (CP 96, lawful force; CP 97, defining necessary; CP 98, entitled to act on appearances), third-degree theft as a lesser included (CP 100–103, 107–09), and scope of authority of a shopkeeper to detain (CP 110). 6/8/10 RP 279–82, 284–89. The court ruled again that the self-defense instructions were precluded by the Lewis case, and simply remarked that the shopkeeper's authority instruction would therefore be confusing and the factual prong of Workman³ was not met for inclusion of third-degree theft instructions. 6/8/10 RP 282–83, 289.

Based on lack of evidence of scope of authority, defense counsel asked the court to prohibit the State from arguing that choking or placing hands on Hickam's throat was within the authority of either a limited commission officer or a shopkeeper's agent. 6/8/10 RP 245. 264–95. The court ruled it went to weight, not legal admissibility. 6/8/10 RP 295.

³ State v. Workman, 90 Wn.2d 443, 584 P.2d 382 (1978).

Defense counsel asked the court to note his standing objection on this basis during the State's closing. 6/8/10 RP 295.

During closing, the State argued in part:

Walter Bullock testified he was doing his job and he has special authority. He went through a training course at the Spokane Police academy specifically to give him additional authority above and beyond other security officers. It gives him authority to make arrests and to detain people. ... [Hickam] continues not to follow the commands of that security officer, who was lawfully detaining him at that point in time. ... [Bullock] had concerns that [] he is detaining him and now [Hickam] is his responsibility and he is ingesting drugs, and he was concerned, as he stated, that [Hickam] was going to overdose. ...

The testimony from Officer Bullock was that his position on the defendant's neck was ... for the purpose of preventing him from swallowing illegal substances. That part of the detention, that was lawful. ...

[Hickam] knew who [Bullock] was. [Hickam] knew why the commissioned officer placed his hands on his neck; so that he wouldn't swallow the drugs. ... He knew he was being arrested. ... For example, to illustrate, if you steal tin foil and you don't pay for it, that is theft. If you, for example, shoved a clerk to get away and then ran, that is robbery. If you shoved the clerk, sprayed him with Mace and injured him, that is robbery first degree. All three of those are present here. ...

When [Hickam] was stopped in that Rite-Aid foyer, he had an obligation under to law to give up. He did not have the legal right to resist the detention and use force to get away. ... He had an obligation to give up and not fight with that lawful security officer who was enforcing the law. ... {Bullock had the right to detain [Hickam] under the law. The defendant wanted to get away with what he had done and was willing to use Mace to hurt another human being in order to get away with this crime.

6/8/10 RP 310–12, 317, 320, 322.

... This is a situation where someone had just committed a theft ... and they were being contacted for the purpose of stopping them from stealing. They began immediately resisting. That person started popping what that officer believed was an illegal substance, substances in that officer's presence. ... As the defendant continued to dig through his pocket, [Bullock] was concerned that [Hickam] was pulling out a weapon, and he let go because he wanted to create some distance because he was in fear [for] his own safety [by] the defendant pulling out a weapon. ... We have a jury system because all of you have unique experiences. You get to be the judge of who is credible and who is not, who has motives to be maybe less than honest and who doesn't. You get to be the judge of what is credible in this case. ...

6/8/10 RP 341–42.

The jury convicted Hickam of first degree robbery. 6/8/10 RP 352.

The court imposed a mid-standard range sentence of 47 months and a period of community custody. CP 171–73. This appeal followed. CP 166–67.

C. ARGUMENT

Due process (U.S. Const. amend. XIV) requires that jury instructions (1) allow the parties to argue all theories of their respective cases supported by sufficient evidence, (2) fully instruct the jury on the defense theory, (3) inform the jury of the applicable law, and (4) give the jury discretion to decide questions of fact. State v. Barnes, 153 Wn.2d 378, 382, 103 P.3d 1219 (2005) (citing Blaney v. Intern'l Ass'n of Machinists & Aerospace Workers, 151 Wn.2d 203, 210-211, 87 P.3d 757

(2004)). The State must prove every element of the offense beyond a reasonable doubt. If the State does not meet this burden, the jury cannot convict the defendant. U.S. Const. amend. XIV; Wash. Const. art. I, § 22; Jackson v. Virginia, 443 U.S. 307, 316, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); State v. Brown, 147 Wn.2d 330, 339, 58 P.3d 889 (2002).

To guard against false convictions, a structural commitment of our criminal justice system, the trial court should deny a requested jury instruction that presents a theory of the defendant's case only where the theory is completely unsupported by evidence. Barnes, 153 Wn.2d at 382, 103 P.3d 1219. At the very least, the instructions must reflect a defense arguably supported by the evidence. Id.

1. Hickam was denied a fair trial when the court refused to give his requested self-defense instructions.

RCW 9A.16.020 provides that “The use, attempt, or offer to use force upon or toward the person of another is not unlawful ... [w]henever used by a party about to be injured, or by another lawfully aiding him or her, in preventing or attempting to prevent an offense against his or her person, or a malicious trespass, or other malicious interference with real or

personal property lawfully in his or her possession, in case the force is not more than is necessary ...”. RCW 9A.16.020.⁴

Where self-defense is raised a trial, the absence of self-defense becomes another element of the offense that the state must prove beyond a reasonable doubt. State v. Woods, 138 Wn. App. 191, 156 P.3d 309 (2007). An accused person is entitled to instructions on self-defense when she or he presents “some evidence” that the use of force was lawful. Id. at 199.

State v. Lewis is inapplicable to the facts of this case. In State v. Lewis, the defendant was convicted of first degree robbery. State v. Lewis, 146 Wn. App. 230, 233 P.3d 891 (2010). The victim testified that he had been beaten up and robbed, and told police that his money and his wallet and his checkbook had been rifled through, and his money had been taken. Lewis, 146 Wn. App. at 234. Lewis testified to a quite different version of events, that he’d been asked to invite the victim to leave because he was unwanted and that he hit the victim only when the victim lunged at him. Id. at 235–36. Lewis did not raise the issue of self-defense at trial (Id. at 239), and did not bring up any issue regarding lawfulness or

⁴ In addition, RCW 9A.16.110(1) provides: “No person in the state shall be placed in legal jeopardy of any kind whatsoever for protecting by any reasonable means necessary, himself or herself, his or her family, or his or her real or personal property, or for coming to the aid of another who is in imminent danger of or the victim of assault ...”.

not of either party's use of force at his trial or on appeal.

In rejecting the argument that self-defense instructions should have been given *sua sponte*, Division II addressed only the first degree robbery element of "infliction of bodily injury":

The crime of robbery, on the other hand, includes no element of *intent* to inflict bodily injury; rather, it includes actual infliction of bodily injury as an element. RCW 9A.56.200(1)(a)(iii). Proof of self-defense, therefore, fails to negate a corresponding intent element of the crime of robbery. Accordingly, despite Lewis's testimony that he hit Crocker in self-defense, Washington law does not impose on the State a burden to prove the absence of self-defense under the facts here.

Lewis, 233 Wn. App. at 239 (foot note omitted, emphasis original).

The limiting phrase in the above-quotation is "under the facts here". Unlike in Lewis, the issue in this case involves the robbery element of "use of force" to "retain property" and the corresponding obligation of a shopkeeper to use only reasonable force when detaining a suspected shoplifter. Lewis does not address this issue, and provides no authority for use in analyzing the issue raised by the facts of this case.

RCW 9A.16.020 should be interpreted to apply to the crime of robbery. Statutes must be interpreted according to their plain meaning to give effect to legislative intent. Gallo v. Dep't of Labor & Indus., 119 Wn. App. 49, 81 P.3d 869 (2003). The plain language of RCW 9A.16.020 does not limit self-defense to crimes of assault or homicide. The statute states:

The use, attempt, or offer to use force *upon or toward* the person of another is not unlawful in the following case[]:

...

(3) *Whenever* used by a party about to be injured, or by another lawfully aiding him or her, in preventing or attempting to prevent an offense against his or her person, or a malicious trespass, or other malicious interference with real or personal property lawfully in his or her possession, in case the force is not more than is necessary.

RCW 9A.16.020(3)(emphasis added).

Thus, in State v. Arth, 121 Wn. App. 205, 87 P.3d 1206 (2004), the court held that self-defense applies in a prosecution for malicious mischief, a property crime.

In fact, the statute's language appears to permit application of the defense *whenever* a person (Arth) uses force toward another person (Savelli) in an attempt to prevent an offense against him (Arth). And the mere fact that the “use of force” in a particular case does not actually reach the aggressor, but rather damages the weapon, is not relevant as long as the force is used *toward* the person of another. Because the statute suggests the use of force in this situation may be lawful, a defendant must be allowed to defend against criminal liability for the results of the force—whether it is damage to property or to a person.

Arth, 121 Wn. App. at 210 (emphasis original). In this case, the instruction regarding self-defense should be available where the defense theory was that Hickam used force toward Bullock not to retain the \$0.05 piece of tinfoil but in an attempt to prevent the unreasonable use of force (choking) by the shopkeeper’s agent.

Furthermore, the statute's location in the criminal code suggests the

Legislature did not intend to limit its application to crimes of assault or homicide.⁵ If the Legislature intended that interpretation, it could have placed the self-defense statute in the assault and homicide portions of the code. But it did not; rather, it placed the statute in chapter 9A.16 RCW, which provides all the statutory defenses available to a person charged with a crime.

Hickam presented “some evidence” to warrant the giving of the self-defense instructions. In this case, there is enough evidence in the record supporting self-defense to require the trial court to give the instruction. Under his theory, Hickam committed simple theft of a piece of aluminum foil and responded to the unlawful force of a choke-hold by spraying pepper spray in Bullock’s direction. *See State v. Williams*, 132 Wn.2d 248, 259, 937 P.2d 1052 (1997) (a party is entitled to an instruction on his theory of the case when there is evidence in the record to support the theory); *see also* RCW 9.91.160 (there are no prohibitions for uses of personal protection spray devices (including pepper spray) consistent with RCW 9A.16.020, use of lawful force).

Both Hickam and Bullock testified that Hickam sprayed the pepper spray only after Bullock grabbed his throat. Bullock testified his job was

⁵ *In re Percer*, 150 Wn.2d 41, 50, 75 P.3d 488 (2003) (a court may look to a statute's location in the criminal code as one indication of the Legislature's intent).

to protect store employees and store property, and he had no authority to prevent a suspected shoplifter from swallowing drugs. There was no evidence that Bullock's authority to "detain" a suspected shoplifter included employing choke-holds on someone who was not physically threatening him. Bullock testified he sprayed pepper spray only in an effort to prevent Bullock from grabbing and hitting him again. Only when the record contains no credible supporting evidence will the trial court be justified in denying a request for a jury instruction. State v. McCullum, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983). A reasonable jury could conclude that Hickam used force not to retain the small piece of tinfoil but only in an effort to prevent Bullock from hitting him again or injuring him.

The failure to give self-defense instructions was not harmless. In addition, the self-defense instruction was necessary to inform the jury that the State has the burden of proving the *absence* of self-defense. Washington cases clearly require that self-defense instructions tell the jury the State has the burden of proving the elements of the crime charged *and* the absence of self-defense. McCullum, 98 Wn.2d at 497. The proper instruction here would change the way the jury evaluated the evidence, placing the burden on the State. The error is not harmless beyond a reasonable doubt

2. Hickam was denied a fair trial when the trial court refused to instruct the jury that the amount of force used to detain a suspected shoplifter must be reasonable.

Store personnel may detain a suspected shoplifter without force even absent a breach of the peace, consistent with the grant of civil and criminal immunity from liability to owners and authorized employees of mercantile establishments. RCW 9A.16.080 and RCW 4.24.220. However, no statutory authority to use force at the initial detention is granted unless a felony has been committed. See RCW 9A.16.020(2). Nevertheless, under common law such authority is found. State v. Miller, 103 Wn.2d 792, 795, 698 P.2d 554 (1985). "Since relatively few arrests are with the consent of the criminal, the authority to make the arrest, whether it be with or without a warrant, must necessarily carry with it the privilege of using all reasonable force to effect it. Whether the force used is reasonable is a question of fact, to be determined in the light of the circumstances of each particular case." Id. (citing W. Prosser, Torts § 26, at 137 (3d ed. 1964). Accord, R. Perkins & R. Boyce, Criminal Law 1156 (3d ed. 1982); W. LaFave & A. Scott, Criminal Law 399-400 (1972)).

Similarly, under civil law, RCW 4.24.220 ("shopkeeper's privilege statute") creates a "reasonable grounds" defense for retailers in an action

for unlawful detention, arising from a shoplifting investigation for shoplifting taking place at their retail establishment. Guijosa v. Wal-Mart Stores, Inc., 101 Wn.App. 777, 788-89, 6 P.3d 583 (2000). The statute provides in pertinent part:

In any civil action brought by reason of any person having been detained on or in the immediate vicinity of the premises of a mercantile establishment for the purpose of investigation or questioning as to the ownership of any merchandise, it shall be a defense of such action that the person was detained *in a reasonable manner* and for not more than a reasonable time to permit such investigation or questioning by a peace officer or by the owner of the mercantile establishment, his authorized employee or agent, and that such peace officer, owner, employee or agent had reasonable grounds to believe that the person so detained was committing or attempting to commit larceny or shoplifting on such premises of such merchandise. . . .

RCW 4.24.220 (emphasis added).

Thus, there is ample authority that any force used by store personnel to detain suspected shoplifters must be reasonable.

Here, the evidence revealed that Bullock grabbed Hickam's throat over an incident that was only a misdemeanor. Bullock provided contradictory reasons for making the choke-hold, at one point stating it was part of his "detention" for the theft, but more often insisting that he wanted to prevent Hickam's swallowing of drugs. The jury heard from Bullock and in the State's closing that he was both a loss prevention agent and a limited commission police officer, who thereby had some undefined

authority to “detain” a suspected shoplifter. Yet the scope of such authority to detain was never presented to the jury. Was Bullock authorized to deal with a shoplifter’s ingestion of suspected drugs? Was Bullock authorized to grab the throat of any shoplifter during a detention? Under the facts of this case, there was a significant jury issue whether the force used by Bullock in his detention of Hickam was reasonable. The court erred in refusing to instruct the jury that the amount of force used to detain a suspected shoplifter must be reasonable.

Failure to give the instruction was not harmless error. Under harmless error analysis, “[a]n instructional error is presumed to [be] prejudicial unless it affirmatively appears that it was harmless.” State v. Smith, 131 Wn.2d 258, 263-64, 930 P.2d 917 (1997) (citing State v. Wanrow, 88 Wn.2d 221, 237, 559 P.2d 548 (1977)). In order to hold the error harmless, an appellate court must “conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error.” State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002) (quoting Neder v. United States, 527 U.S. 1, 19, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999), abrogated in part on other grounds, Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004)).

Here, it is impossible to conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error. The trial court rejected inclusion of the instruction on whether Bullock used reasonable force, saying that it would be “confusing” where the court had already rejected the requested self-defense instructions. But under the defense theory here, it could only be more confusing *not* to define the scope of permissible detention.

As an element of robbery, the “force used to retain possession” refers to force used by Hickam, that is, the pepper spray. Hickam’s defense was that he used pepper spray not to retain stolen tinfoil but as a self-protective move in light of Bullock’s excessive method of detention. Without an instruction on the shopkeeper’s obligation to use only reasonable force, the jury had no choice but to conclude that because Hickam used pepper spray, the robbery element of “force” was satisfied beyond a reasonable doubt. But had the jury found Bullock’s use of force unreasonable in making the detention, it may well have determined that Hickam’s use of pepper spray was warranted and that he should be acquitted. Therefore, the error was not harmless.

3. Hickam was entitled to a lesser degree instruction of third degree theft.

“An instruction on the close relative of an inferior degree offense, a lesser included offense, is warranted when two conditions are met: ‘[f]irst, each of the elements of the lesser offense must be a necessary element of the offense charged[, and] [s]econd, the evidence in the case must support an inference that the lesser crime was committed.’” State v. Fernandez-Medina, 141 Wn.2d 448, 454, 6 P.3d 1150 (2000) (quoting State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978)). The two conditions, the legal prong and factual prong, are based on the tests set forth in State v. Peterson⁶ and State v. Workman.⁷ As for the factual prong of the test, its purpose “is to ensure that there is evidence to support the giving of the requested instruction.” Fernandez-Medina, 141 Wn.2d at 455, 6 P.3d 1150. This factual test requires a showing more particularized than that required for other jury instructions. Id. Specifically, the “evidence must raise an inference that *only* the lesser included/inferior degree offense was committed to the exclusion of the charged offense.”

⁶ 133 Wn.2d 885, 948 P.2d 381 (1997).

⁷ 90 Wn.2d 443, 548 P.2d 382 (1978); Fernandez-Medina, 141 Wn.2d at 455, 6 P.3d 1150. In Fernandez-Medina, the supreme court states that “the test for determining if a party is entitled to an instruction on an inferior degree offense differs from the test for entitlement to an instruction on a lesser included offense only with respect to the *legal* component of the test.” Id. (emphasis added).

Id. (citing State v. Bowerman, 115 Wn.2d 794, 805, 802 P.2d 116 (1990)

(lesser included offense instruction)) (additional emphasis added).

“[W]hen substantial evidence in the record supports a rational inference that the defendant committed only the lesser included or inferior degree offense to the exclusion of the greater offense, the factual component of the test ... is satisfied.” The remedy for failure to give a lesser included instruction when one is warranted is reversal.

Fernandez-Medina, 141 Wn.2d at 461-62, 6 P.3d 1150. A trial court's refusal to give an instruction, based on the sufficiency of evidence to give that instruction, is reviewed for abuse of discretion. State v. Walker, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998).

RCW 9A.56.020 defines theft as follows:

To 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; ...

RCW 9A.56.020(1)(a).

RCW 9A.56.050 defines third degree theft as follows:

[T]heft of property or services which (a) does not exceed seven hundred and fifty dollars in value, ...

RCW 9A.56.050(1)(a).

A person commits robbery when he (1) unlawfully takes personal property from the person of another or in his presence; (2) with intent to commit theft; (3) against the person's will by the use or threatened use of immediate force, violence, or fear of injury to that person; and (4) 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. RCW 9A.56.190; Instruction 3, CP 118. First degree robbery occurs when a person inflicts bodily injury "in the commission of a robbery or in immediate flight therefrom. RCW 9A.56.200(1)(a)(iii); CP 119, Instruction 4.

Since robbery includes the elements of larceny, third degree theft is always an included offense of robbery under the legal prong. State v. Satterlee, 58 Wn.2d 92, 361 P.2d 168 (1961); Application of Salter, 50 Wn.2d 603, 605, 313 P.2d 700 (1957). Thus, the legal prong of the Workman test is satisfied.

To satisfy the factual prong of the Workman test, the evidence must raise an inference that only the lesser offense [third degree theft] was committed to the exclusion of the charged offense [first degree robbery]. Fernandez-Medina, 141 Wn.2d at 455, 6 P.3d 1150. In other words, "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.” Id. at 456.

When determining if the evidence at trial was sufficient to support the giving of a lesser instruction, the appellate court must view the supporting evidence in the light most favorable to the party that requested the instruction. Id. at 455–56. The court must consider all evidence presented at trial, regardless of its source, when deciding whether a lesser offense instruction should be given. Id. at 456.

As discussed in the preceding argument, if jurors accepted Hickam’s defense theory in relation to his act of spraying pepper spray at Bullock, they could not convict him for first degree robbery because use of the pepper spray would have been legally justified and no criminal liability could attach to that act. The trial court did not elaborate on why it declined to give the lesser offense instruction on third degree theft. It is undisputed that Hickam committed third degree theft. Had the jury been properly instructed as argued in the preceding two sections, the jury could easily have considered that Hickam was only guilty of third degree theft.

Hickam’s conviction for first degree robbery must be reversed because he was entitled to an instruction for third degree theft and the court declined to give it. There was substantial evidence to give such an

instruction. The failure to give the instruction requires reversal and remand for a new trial. Fernandez-Medina, 141 Wn.2d at 462, 6 P.3d 1150.

4. Cumulative error deprived Hickam of a fair trial as guaranteed by Wash. Const. art. I, §§ 21 and 22.

Reversal may be required due to the cumulative effects of trial court errors, even if each error examined on its own would otherwise be considered harmless. State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); State v. Badda, 63 Wn.2d 176, 183, 385 P.2d 859 (1963); State v. Alexander, 64 Wn. App. 147, 154, 822 P.2d 1250 (1992). Reversal is required whenever cumulative errors “deny a defendant a fair trial.” State v. Perrett, 86 Wn. App. 312, 322, 936 P.2d 426, *rev. denied*, 133 Wn.2d 1019 (1997).

Here, Hickam did not receive a fair trial. The evidence was scant and/or contradictory as to the amount of force Bullock was authorized to use as the shopkeeper’s agent in detaining Hickam as a suspected shoplifter. The defense was hampered in the presentation of its theory of the case by the court’s refusal to instruct as to self-defense and/or the scope of a shopkeeper’s authority to use force and/or the lesser included third degree theft. There is reasonable doubt that a jury would have

reached the same result in absence of all of these errors. Reversal is required.

D. CONCLUSION

For the reasons stated, the conviction should be reversed and the matter remanded for a new trial.

Respectfully submitted on December 16, 2011.

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PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on December 16, 2011, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of brief of appellant:

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