

FILED

FEB 14, 2017

Court of Appeals
Division III
State of Washington

34536-0-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

SKYLER K. TODD, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

LAWRENCE H. HASKELL
Prosecuting Attorney

Gretchen E. Verhoef
Deputy Prosecuting Attorney
Attorneys for Respondent

County-City Public Safety Building
West 1100 Mallon
Spokane, Washington 99260
(509) 477-3662

INDEX

I. APPELLANT’S ASSIGNMENTS OF ERROR 1

II. ISSUES PRESENTED 1

III. STATEMENT OF THE CASE 2

Factual History 2

Procedural History 4

IV. ARGUMENT 8

A. THE DEFENDANT FAILED TO OBJECT TO THE JURY INSTRUCTIONS GIVEN BY THE TRIAL COURT IN HIS CASE; IT WAS NOT A MANIFEST CONSTITUTIONAL ERROR FOR THE COURT TO GIVE THESE INSTRUCTIONS; ABSENT ANY CONTEMPORANEOUS OBJECTION, ANY ERROR WAS WAIVED. 9

B. THE TO-CONVICT INSTRUCTION CORRECTLY SET FORTH THE LAW, WAS NOT MISLEADING, AND ALLOWED THE PARTIES TO ARGUE THEIR THEORIES OF THE CASE..... 12

C. THE DEFENDANT’S ARGUMENTS THAT A UNANIMITY INSTRUCTION WAS REQUIRED FOR THE CHARGE OF SECOND DEGREE ROBBERY FAILS, AS IT IS NOT AN ALTERNATIVE MEANS CRIME, AND THE EVIDENCE MAKES CLEAR THAT THE VERDICT WAS UNANIMOUS..... 19

1. The language “to obtain, retain, or prevent or overcome resistance to the taking” does not render second degree robbery an alternative means crime based on that language. 20

2.	No evidence or argument was made that the Leatherman tool was taken from the victim’s person; thus, the court can be certain that the jury unanimously decided that the State proved the property was taken in the victim’s presence.....	24
D.	UNLESS THE DEFENDANT’S FINANCIAL CIRCUMSTANCES HAVE IMPROVED SINCE THE TRIAL COURT’S ORDER OF INDIGENCY WAS ENTERED, RAP 14.2 PROVIDES THAT THE PRESUMPTION OF INDIGENCY REMAINS IN EFFECT THROUGHOUT HIS APPEAL.....	29
V.	CONCLUSION.....	30

TABLE OF AUTHORITIES

WASHINGTON CASES

Hue v. Farmboy Spray Co., 127 Wn.2d 67,
896 P.2d 682 (1995)..... 12

In re Pers. Restraint of Jeffries, 110 Wn.2d 326,
752 P.2d 1338 (1988)..... 24

State v. Al-Hamdani, 109 Wn. App. 599,
36 P.3d 1103 (2001)..... 21

State v. Bland, 71 Wn. App. 345, 860 P.2d 1046 (1993)..... 21, 27, 28

State v. Bobenhouse, 166 Wn.2d 881,
214 P.3d 907 (2009)..... 27

State v. Davis, 182 Wn.2d 222, 340 P.3d 820 (2014)..... 16

State v. Garvin, 28 Wn. App. 82, 621 P.2d 215 (1980)..... 22

State v. Handburgh, 119 Wn.2d 284, 830 P.2d 641 (1992)..... 13

State v. Hayes, 162 Wn. App. 459, 262 P.3d 538 (2011) 25

State v. Imhoff, 78 Wn. App. 349, 898 P.2d 852 (1995)..... 19

State v. Johnson, 155 Wn.2d 609, 121 P.3d 91 (2005)..... 13, 14, 17

State v. Lindsey, 177 Wn. App. 233, 311 P.3d 61 (2013)..... 22, 25

State v. Lord, 117 Wn.2d 829, 822 P.2d 177 (1991) 20

State v. Makekau, 194 Wn. App. 407,
378 P.3d 577 (2016)..... 21, 25, 26

State v. Manchester, 57 Wn. App. 765,
790 P.2d 217 (1990)..... 13

State v. Marko, 107 Wn. App. 215, 27 P.3d 228 (2001)..... 22

State v. Nam, 136 Wn. App. 698, 150 P.3d 617 (2007)..... 25

<i>State v. Ng</i> , 110 Wn.2d 32, 750 P.2d 632 (1988)	19
<i>State v. O'Donnell</i> , 142 Wn. App. 314, 174 P.3d 1205 (2007).....	12, 25
<i>State v. O'Hara</i> , 167 Wn.2d 91, 217 P.3d 756 (2009).....	11
<i>State v. Owens</i> , 180 Wn.2d 90, 323 P.3d 1030 (2014)	20, 21
<i>State v. Peterson</i> , 168 Wn.2d 763, 230 P.3d 588 (2010).....	passim
<i>State v. Pirtle</i> , 127 Wn.2d 628, 904 P.2d 245 (1995).....	12
<i>State v. Rivas</i> , 97 Wn. App. 349, 984 P.2d 432 (1999), <i>review denied</i> , 140 Wn.2d 1013, 5 P.3d 9 (2000).....	27, 28
<i>State v. Roche</i> , 75 Wn. App. 500, 878 P.2d 497 (1994)	25
<i>State v. Salinas</i> , 119 Wn.2d 192, 829 P.2d 1068 (1992)	15, 16
<i>State v. Sandholm</i> , 184 Wn.2d 726, 364 P.3d 87 (2015)	23
<i>State v. Scott</i> , 110 Wn.2d 682, 757 P.2d 492 (1988)	10
<i>State v. Smith</i> , 131 Wn.2d 258, 930 P.2d 917 (1997).....	12
<i>State v. Smith</i> , 159 Wn.2d 778, 154 P.3d 873 (2007).....	20, 21
<i>State v. Strine</i> , 176 Wn.2d 742, 293 P.3d 1177 (2013).....	9, 10
<i>State v. Strohm</i> , 75 Wn. App. 301, 879 P.2d 962 (1984).....	25
<i>State v. Thomas</i> , 150 Wn.2d 821, 83 P.3d 970 (2004)	16
<i>State v. Walton</i> , 64 Wn. App. 410, 824 P.2d 533, <i>review denied</i> , 119 Wn.2d 1011 (1992).....	16
<i>State v. Williams</i> , 96 Wn.2d 215, 634 P.2d 868 (1981).....	16

CONSTITUTIONAL PROVISIONS

Const. art. 1, § 22	12
U.S. Const. amend. VI	12

STATUTES

RCW 9A.56.030..... 26
RCW 9A.56.190..... passim

RULES

RAP 2.5..... 9, 10
RAP 10.3..... 20
RAP 14.2..... 29, 30

OTHER

WPIC 37.04..... 14, 15

I. APPELLANT’S ASSIGNMENTS OF ERROR

1. The court erred by purporting to include a complete to-convict instruction on the pertinent law by which the jury could convict, but then failing to include the pertinent language on the “force” element and instead instructing on language that did not apply in this case.

2. The court erred by failing to provide the jury a unanimity instruction for the alternative means of committing second degree robbery.

3. The court erred by failing to ensure Mr. Todd received his constitutional right to a unanimous jury verdict.

II. ISSUES PRESENTED

1. Whether the to-convict instruction for the crime of second degree robbery accurately stated the law, and whether the State presented sufficient evidence to convict the defendant of second degree robbery based on this instruction?

2. Whether the crime of second degree robbery is an alternative means offense requiring that a unanimity instruction be given?

a. Whether the “to obtain, retain or to prevent or overcome resistance to the taking” language of RCW 9A.56.190 provides alternative means for committing the crime of second degree robbery based on a defendant’s subjective motivation for using force against another?

b. Whether the “from the person” or “in his presence” language of RCW 9A.56.190 provides alternative means for committing the crime of second degree robbery when this language simply describes different facets of the same criminal conduct and distinguishes the crime of robbery from the crime of theft?

3. Assuming RCW 9A.56.190 is an alternative means offense, may the court be satisfied that the jury unanimously found that the jury's verdict was based solely on one of the alternative means of committing the offense?
4. Whether appellate costs should be imposed pursuant to RAP 14.2 as amended effective January 31, 2017?

III. STATEMENT OF THE CASE

On September 9, 2015, Skyler Todd was charged in the Spokane County Superior Court with one count of second degree robbery, occurring on or about September 6, 2015. CP 7, 37. His case proceeded to a jury trial.

Factual History

On September 6, 2015, loss prevention officers Brent Doan and Nathaniel Terrell were working at Home Depot on the Newport Highway in Spokane, Washington. RP 143. As "asset protection specialists," Mr. Doan and Mr. Terrell were responsible for protecting Home Depot's assets from loss due to internal theft, external theft, or other policy violations. RP 143.

Mr. Doan observed Mr. Todd enter Home Depot "at a fast pace" "wearing noticeably baggy clothes," and walk directly to the "high theft" area of the store, where the Leatherman tools were kept. RP 153. Mr. Doan observed Mr. Todd select a Leatherman tool valued at \$89.00; Mr. Todd then tore open the package, put the tool in his pants' pocket, and tossed the packaging back on the shelf. RP 153, 199. While this was occurring,

Mr. Doan was approximately 10 to 15 feet away from Mr. Todd; Mr. Terrell was farther away, at the back of the aisle, also observing the defendant. RP 154, 199-200.

Both Mr. Doan and Mr. Terrell followed Mr. Todd as he walked past all points of purchase and began to exit the store. RP 155, 199. As soon as the defendant entered the vestibule of the store, Mr. Doan positioned himself in front of Mr. Todd, and said “excuse me.” RP 157. Simultaneously, the defendant turned, and looked at Mr. Terrell, who was holding his store badge up for identification. RP 204.

Immediately, Mr. Todd “took off running,” physically pushing Mr. Doan. RP 159, 205. Because he immediately ran, the loss prevention officers were unable to verbally identify themselves as store security. RP 157-158. The security officers attempted to detain Mr. Todd, but Mr. Todd went “crazy.” RP 160. He jumped on a pallet of concrete¹ outside the store, and tried to break away from the security officers. RP 206. During the scuffle, Mr. Todd knocked off Mr. Doan’s glasses, and grabbed Mr. Doan’s jacket and shirt, ripping the shirt, and scratching his hand. RP 158-159, 161-162. During the fight, Mr. Terrell saw and heard the

¹ Mr. Todd’s behavior was described as “Parkour kind of stuff.” RP 178. Parkour is “the sport of moving along a route, typically in a city, trying to get around or through various obstacles in the quickest and most efficient manner possible, as by jumping, climbing, or running.” *See* Dictionary.com; available at: <http://www.dictionary.com/browse/parkour?s=t> (last accessed 2/13/2017).

Leatherman tool fall out of Mr. Todd's sweatpants' pocket. RP 208-209, 215, 217.

After Mr. Doan and Mr. Terrell gained control of Mr. Todd, Officer Joseph Matt of the Spokane Police Department arrived and read him his *Miranda* rights. RP 79, 81. Mr. Todd admitted to Officer Matt that he decided shortly after entering Home Depot that he would attempt to steal a Leatherman tool. RP 81. When Officer Matt told Mr. Todd that he was under arrest for second degree robbery, the defendant pleaded with the officer to charge him only with simple theft. RP 91.

Procedural History

The defendant's jury trial commenced on May 2, 2016. RP 4. On that date, the State amended the information to include language alleging that the defendant had committed robbery against a person who had an ownership, representative, or possessory interest in the property, in accordance with recent developments in case law. RP 4.

During trial, the two loss prevention officers testified, as well as Officer Matt. The State also called Jeremy Proctor to testify; Mr. Proctor was a bystander who witnessed the incident at the Home Depot and assisted the loss prevention officers² in gaining control over Mr. Todd as he was

² Mr. Proctor testified that during the struggle, the loss prevention officers identified themselves to him as security officers, and told him to back away from the scene. RP 99. Mr. Proctor eventually stepped in to assist the loss prevention

resisting detention. RP 96-101. Mr. Todd's mother, Julie Gibson, testified on her son's behalf. She testified that she did not go with her son into the store and did not see the scuffle, but that after the fight was over, she heard the loss prevention officers asking Mr. Todd, "Where is it? Where is it?" RP 243, which supported defendant's argument that the loss prevention officers made a "bad stop" of the defendant.³ RP 286.

The trial court prepared jury instructions based on proffered instructions from the State and the defendant. RP 248-249. The to-convict instruction for second degree robbery specified:

To convict the defendant of the crime of robbery in the second degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about September 6, 2015, the defendant unlawfully took personally [sic] property from the person or in the presence of another;

officers when it became apparent to him that they were struggling to maintain control over Mr. Todd. RP 100.

³ In closing, the defendant argued:

Skyler was then seen on the ground by his mother while cuffed. His mother testified that she overheard Mr. Doan yelling, "Where is it? Where is it?" And again, from the testimony we heard yesterday, we know that if merchandise is not found on the suspect, that equates to a bad stop. A bad stop equates to a dismissal from Home Depot. Both Jeremy Proctor and Julie Gibson testified that loss prevention were aggressive and acting hot, in Jeremy Proctor's words.

RP 286.

(2) That the defendant intended to commit theft of the property;

(3) That the person from whom the property was taken had an ownership, representative, or possessory interest in the property taken;

(4) That the taking was against that 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 force or fear was used by the defendant to obtain or retain possession of the property; and

(6) That any of these acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP 47.

The court's definitional instruction for the crime of second degree robbery indicated:

A person commits the crime of robbery in the second degree when he or she unlawfully and with intent to commit theft thereof takes personal property from the person or in the presence of another against that person's will by the use or threatened use of immediate force, violence, or fear of injury to that person. The person from whom the property is taken must have an ownership, representative, or possessory interest in the property taken.

A threat to use immediate force or violence may be either expressed or implied. The 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 case the degree of force is immaterial.

CP 46.

Neither party objected to the instructions as prepared by the court.

RP 256-257. The jury convicted the defendant of second degree robbery as charged.⁴ CP 57.

After the court received the verdict, it ordered the defendant to remain released pending sentencing. RP 315-317, 340. The defendant was ordered to refrain from going to any Home Depot store, and to remain in Spokane and Stevens County. CP 61; RP 318. That same night, the defendant was again stopped by Mr. Terrell at the Home Depot in North Spokane. CP 73-78; RP 341. The State requested a warrant for his failure to comply with the conditions of release. CP 73-78. The defendant was subsequently arrested in Grant County. RP 341-343.

The trial court sentenced Mr. Todd, who had an offender score of “7,” to a mid-point, standard-range sentence of 50 months, with 18 months of community custody, and mandatory legal financial obligations. CP 100-112; RP 348. This appeal timely followed.

⁴ The court also instructed the jury on the lesser included offense of third degree theft. CP 52-54.

IV. ARGUMENT

Defendant makes two claims on appeal. First, the defendant claims the to-convict instruction for the crime of second degree robbery was insufficient because it omitted language that was included in the definitional instruction for second degree robbery. Specifically, defendant alleges an essential element to prove *this* robbery was that the force used was “to prevent or overcome resistance to the taking,” necessitating the inclusion of that language in the to-convict instruction. Appellant’s Br. at 12.

Second, the defendant claims the court should have utilized a unanimity instruction in his case. He alleges that taking from “the person,” and taking “in the person’s presence” are alternate means of committing the crime of second degree robbery, and that the different motivations for the use of force (to obtain, retain or prevent or overcome resistance to the taking) also constitute alternative means of committing the crime of second degree burglary. Therefore, he claims the court, sua sponte, should have instructed the jury that it must be unanimous as to the means the defendant used to commit the crime. The defendant’s arguments fail.

A. THE DEFENDANT FAILED TO OBJECT TO THE JURY INSTRUCTIONS GIVEN BY THE TRIAL COURT IN HIS CASE; IT WAS NOT A MANIFEST CONSTITUTIONAL ERROR FOR THE COURT TO GIVE THESE INSTRUCTIONS; ABSENT ANY CONTEMPORANEOUS OBJECTION, ANY ERROR WAS WAIVED.

A criminal defendant may not raise a challenge to a jury instruction for the first time on appeal, unless the alleged error is a manifest error affecting a constitutional right. RAP 2.5(a). It is a fundamental principle of appellate jurisprudence in that a party may not assert on appeal a claim that was not first raised at trial. *State v. Strine*, 176 Wn.2d 742, 749, 293 P.3d 1177 (2013).

RAP 2.5 is principled as it “affords the trial court an opportunity to rule correctly upon a matter before it can be presented on appeal.” *State v. Strine*, 176 Wn.2d at 749, quoting *New Meadows Holding Co. v. Wash. Water Power Co.*, 102 Wn.2d 495, 498, 687 P.2d 212 (1984). This rule supports a basic sense of fairness, perhaps best expressed in *Strine*, where the court noted the rule requiring objections helps prevent abuse of the appellate process:

[I]t serves the goal of judicial economy by enabling trial courts to correct mistakes and thereby obviate the needless expense of appellate review and further trials, facilitates appellate review by ensuring that a complete record of the issues will be available, ensures that attorneys will act in good faith by discouraging them from “riding the verdict” by purposefully refraining from objecting and saving the issue for appeal in the

event of an adverse verdict, and prevents adversarial unfairness by ensuring that the prevailing party is not deprived of victory by claimed errors that he had no opportunity to address.

BENNETT L. GERSHMAN, TRIAL ERROR AND MISCONDUCT § 6-2(b), at 472-73 (2d ed. 2007) (footnotes omitted).

Strine, 176 Wn.2d at 749-50.

Under RAP 2.5(a), a party may not raise a claim of error on appeal that was not first raised at trial unless the claim involves a manifest error affecting a constitutional right.⁵ Specifically regarding RAP 2.5(a)(3), our courts have indicated that “the constitutional error exception is not intended to afford criminal defendants a means for obtaining new trials whenever they can ‘identify a constitutional issue not litigated below.’” *State v. Scott*, 110 Wn.2d 682, 687, 757 P.2d 492 (1988).

Thus, to establish that the alleged constitutional error is reviewable, the defendant must establish that the error is “manifest.”

In order to ensure the actual prejudice and harmless error analyses are separate, the focus of the actual prejudice must be on whether the error is *so obvious on the record* that the error warrants appellate review. See *Harclaon*, 56 Wn.2d at 597, 354 P.2d 928; *McFarland*, 127 Wn.2d at 333, 899 P.2d 1251. It is not the role of an appellate court on direct appeal to address claims where the trial court could not have foreseen the potential error or where the prosecutor

⁵ An issue may also be raised for the first time on appeal if it involves trial court jurisdiction or failure to establish facts upon which relief can be granted. RAP 2.5(a)(1) and (2).

or trial counsel could have been justified in their actions or failure to object. Thus, to determine whether an error is practical and identifiable, the appellate court must place itself in the shoes of the trial court to ascertain whether, given what the trial court knew at that time, the court could have corrected the error.

State v. O'Hara, 167 Wn.2d 91, 99-100, 217 P.3d 756 (2009), *as corrected* (Jan. 21, 2010) (footnote omitted) (emphasis added).

There is nothing in defendant's claim of error that is plain and indisputable, or so apparent on review that it amounts to a complete disregard of the controlling law or the credible evidence in the record, such that the judge trying the case should have recognized that, in the absence of an objection to the instructions as prepared, (1) the to-convict instruction was inadequate, as it was a correct statement of the law, and instructed the jury as to every essential element of the crime of second degree robbery, and (2) that a unanimity instruction was required to ensure the jury unanimously found the defendant took property from a person, or in the alternative, from another's presence, or that the jury also must be unanimous as to *why* the defendant used force during the commission of the robbery. Therefore, as further detailed below, the defendant's claims here are not manifest, and therefore, may not be raised for the first time on appeal.

B. THE TO-CONVICT INSTRUCTION CORRECTLY SET FORTH THE LAW, WAS NOT MISLEADING, AND ALLOWED THE PARTIES TO ARGUE THEIR THEORIES OF THE CASE.

On appeal, challenges to jury instructions are reviewed de novo. *State v. Pirtle*, 127 Wn.2d 628, 656, 904 P.2d 245 (1995). “Jury instructions are sufficient if they allow the parties to argue their theories of the case, do not mislead the jury and, when taken as a whole, properly inform the jury of the law to be applied. *Hue v. Farmboy Spray Co.*, 127 Wn.2d 67, 92, 896 P.2d 682 (1995).

Both the United States’ constitution and the Washington State Constitution require that a jury be instructed on all essential elements of the crime charged. U.S. Const. amend. VI; Const. art. 1, § 22. A jury instruction which omits an *essential element* of a crime relieves the State of proving each element of the crime charged beyond a reasonable doubt and is a violation of due process. *State v. O’Donnell*, 142 Wn. App. 314, 322, 174 P.3d 1205 (2007). Therefore, “a ‘to convict’ [jury] instruction must contain all of the elements of the crime because it serves as a ‘yardstick’ by which the jury measures the evidence to determine guilt or innocence.” *State v. Smith*, 131 Wn.2d 258, 263, 930 P.2d 917 (1997) (quoting *State v. Emmanuel*, 42 Wn.2d 799, 819, 259 P.2d 845 (1953)). The court does not look to other jury instructions to supply a missing element from a “to convict” jury instruction. *Id.* at 262-63, 930 P.2d 917.

RCW 9A.56.190 provides:

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.

Washington courts take a transactional view of robbery that does not consider the robbery complete until the assailant has made his escape. *State v. Manchester*, 57 Wn. App. 765, 770, 790 P.2d 217 (1990). Therefore, “a taking can be ongoing or continuing so that the later use of force to retain the property taken renders the actions a robbery.” *State v. Handburgh*, 119 Wn.2d 284, 290, 830 P.2d 641 (1992). For the purposes of the robbery statute, a “taking” includes “violence during flight immediately following the taking.” *Manchester*, 57 Wn. App. at 770. In other words, “a forceful retention of stolen property in the owner’s presence is the type of ‘taking’ contemplated by the robbery statute.” *Handburgh*, 119 Wn.2d at 290. The force used during a robbery “must relate to the taking or retention of the property, either as force used directly in the taking or retention or as force used to prevent or overcome resistance to the taking.” *State v. Johnson*, 155 Wn.2d 609, 611, 121 P.3d 91 (2005). Where a defendant abandons property before the use of force occurs, no robbery occurs because the force

is not used to obtain, retain or prevent or overcome resistance to the taking.

Id.

Washington Pattern Jury Instruction (WPIC) 37.04 sets forth a pattern instruction for the crime of second degree robbery. It provides:

To convict the defendant of the crime of robbery in the second degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

...

(4) That the taking was against that person's will by the defendant's use or threatened use of immediate force, violence, or fear of injury to that person [or to that person's property] [or to the person or property of another];

(5) That 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] [or] [to prevent knowledge of the taking];

...

(Emphasis added).

Subsection 5 of WPIC 37.04 provides for three options to describe the motivation for a defendant's use of force during a robbery. These options are consistent with the plain language of RCW 9A.56.190. The bracketed material in a WPIC should be used only as applicable to any particular case. *See*, Note on Use, WPIC 37.04.

The to-convict instruction given in this case omitted the language in the second and third brackets of subsection 5, and read: “[t]hat force or fear

was used by the defendant to obtain or retain possession of the property.” CP 47. This language is also consistent with the plain language of RCW 9A.56.190. The omission of the “to prevent or overcome resistance to the taking” language did not render the jury instruction deficient, as defendant claims, but merely required that the State prove that the purpose of the force or threatened force was to obtain or retain the property.

Boiled down to its essential form, Defendant’s argument amounts to a sufficiency of the evidence argument, guised as a claim of instructional error. He claims that there was no evidence that force was used to obtain or retain the Leatherman tool; therefore, it was instructional error for the trial court to omit the optional bracketed text from WPIC 37.04 which allows the trial court to instruct the jury that the force may be used “to prevent or overcome resistance to the taking.”

Thus, the question the court should review is whether the evidence presented at trial was sufficient to convict the defendant as the jury was instructed by the to-convict instruction *actually used* at trial. “The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt.” *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). When the sufficiency of the evidence is challenged in a criminal case, *all* reasonable inferences from the

evidence must be drawn in favor of the state and interpreted most strongly against the defendant. *Id.* A claim of insufficiency admits the truth of the state's evidence and all inferences that reasonably can be drawn therefrom. *Id.* In a sufficiency of the evidence challenge, the court is highly deferential to the decision of the jury. *State v. Davis*, 182 Wn.2d 222, 227, 340 P.3d 820 (2014).

Credibility determinations are for the trier of fact and are not subject to review on appeal. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). The appellate court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *Id.*

Our Supreme Court has stated:

It is the province of the jury to weigh the evidence, under proper instructions, and determine the facts. It is the province of the jury to believe, or disbelieve, any witness whose testimony it is called upon to consider. If there is substantial evidence (as distinguished from a scintilla) on both sides of an issue, what the trial court believes after hearing the testimony, and what this court believes after reading the record, is immaterial. The finding of the jury, upon substantial, conflicting evidence properly submitted to it, is final.

State v. Williams, 96 Wn.2d 215, 222, 634 P.2d 868 (1981); *see, also, State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533, *review denied*, 119 Wn.2d 1011 (1992) (the court defers to the jury's determination

regarding conflicting testimony, evaluation of witness credibility, and decisions regarding the persuasiveness of evidence).

Here, the evidence was sufficient for the jury to determine that Mr. Todd used force in order to retain the Leatherman tool. At the time that Mr. Todd “took off running,” pushing past Mr. Doan, he was still in possession of the Leatherman tool. RP 159, 205. A fight ensued during which Mr. Todd knocked off Mr. Doan’s glasses, and grabbed Mr. Doan’s jacket and shirt, ripping the shirt, and scratching his hand. RP 158-159, 161-162. It was not until the fight was underway that Mr. Todd lost possession of the Leatherman tool. RP 208-209, 215. Mr. Todd lost possession of the tool because it fell out of his pocket, not because he voluntarily abandoned it.

The defendant has not proffered any authority that requires a defendant *actually retain* the property taken in order for him or her to commit a robbery. This case is distinguishable from *Johnson, supra*, because in *Johnson*, the defendant voluntarily relinquished control of the stolen property, and then subsequently used force *only* to effectuate his escape.

In this case, the evidence demonstrated that the defendant used force prior to losing possession of the Leatherman tool, as it fell out of his pocket *after* the altercation began. Mr. Doan was apparently unaware that the

defendant lost possession of the tool; however, Mr. Terrell saw and heard the tool drop out of the defendant's pants' pocket. It is unknown whether the defendant was aware that he lost possession of the tool during the altercation, and ultimately, that fact is irrelevant because there was no evidence that the defendant attempted to abandon or discard the stolen property before assaulting Mr. Doan.

The jury was free to believe that Mr. Todd actually saw Mr. Terrell's Home Depot badge, as Mr. Terrell held it up to identify himself immediately before Mr. Todd attempted to run away. RP 204. Had the jury believed that Mr. Todd fled from Mr. Doan and Mr. Terrell knowing they were loss prevention officers, it was reasonable for them to believe that he then engaged in a fight with the officers to retain the Leatherman tool while effectuating an escape. The jury's judgment should not be disturbed.

Defendant claims that the jury's question to the trial court inquiring whether it should consider the additional language included in the definitional instruction ("to prevent or overcome resistance to the taking"), CP 59, demonstrates jury confusion, or that the jury's verdict rested upon an element not included in the to-convict instruction. However, the jury's question is of no import to whether the trial court properly instructed the jury in its to-convict instruction or whether the State presented sufficient

evidence at trial. The individual or collective thought processes leading to a verdict “inhere in the verdict” and cannot be used to impeach a jury verdict. *State v. Ng*, 110 Wn.2d 32, 43, 750 P.2d 632 (1988). A “jury’s question does not create an inference that the entire jury was confused, or that any confusion was not clarified before a final verdict was reached.” *Id.* And, the jury is presumed to have followed the court’s instructions. *State v. Imhoff*, 78 Wn. App. 349, 351, 898 P.2d 852 (1995). This court should decline to speculate as to the meaning of the jury’s question as the jury’s verdict was clear, and was based on a correct to-convict instruction and sufficient evidence.

C. THE DEFENDANT’S ARGUMENTS THAT A UNANIMITY INSTRUCTION WAS REQUIRED FOR THE CHARGE OF SECOND DEGREE ROBBERY FAILS, AS IT IS NOT AN ALTERNATIVE MEANS CRIME, AND THE EVIDENCE MAKES CLEAR THAT THE VERDICT WAS UNANIMOUS.

Defendant argues for the first time on appeal that the trial court should have given a unanimity instruction requiring the jury to be unanimous as to the alternative means of committing the crime of second degree robbery. He alleges that a unanimity instruction was required for the jury to determine (1) whether he took the property “from the person” or “in the presence of another” and (2) whether he used force to obtain, to retain or to overcome resistance to the taking of the property. Appellant’s Br. at 27. Thus, he contends that second degree robbery is an alternative means

crime based on not only whether the property was taken from a person or in the person's presence, but also is an alternative means crime dependent on the motivation of the force used in effectuating the robbery.

1. The language "to obtain, retain, or prevent or overcome resistance to the taking" does not render second degree robbery an alternative means crime based on that language.

Addressing the defendant's second contention first, the language "to obtain, retain or prevent or overcome resistance to the taking" does not create alternative means of committing the crime of robbery, and the defendant has failed to provide any authority, whatsoever, in support of this contention. Arguments that are not supported by pertinent authority need not be considered. RAP 10.3(a)(5); *State v. Lord*, 117 Wn.2d 829, 822 P.2d 177 (1991).

Criminal defendants are afforded the fundamental guarantee of a unanimous jury verdict of guilt. *State v. Smith*, 159 Wn.2d 778, 783, 154 P.3d 873 (2007). "An alternative means crime is one 'that provide[s] that the proscribed criminal conduct may be proved in a variety of ways.'" *State v. Peterson*, 168 Wn.2d 763, 769, 230 P.3d 588 (2010) (alteration in original) (quoting *Smith*, 159 Wn.2d at 784). For an alternative means crime, a defendant is entitled to a unanimous jury determination as to the particular means by which he or she committed the crime. *State v. Owens*, 180 Wn.2d 90, 96, 323 P.3d 1030 (2014). If there is no express statement

of jury unanimity, i.e., no special verdict, the State must present sufficient evidence to support each of the alternative means. *Id.* Where one of the alternative means upon which a charge is based fails and there is only a general verdict, the court may still affirm that verdict where it “can determine that the verdict was founded upon one of the methods with regard to which substantial evidence was introduced.” *State v. Bland*, 71 Wn. App. 345, 354, 860 P.2d 1046 (1993) *overruled on other grounds by State v. Smith*, 159 Wn.2d 778. Where the statute identifies only a single means of committing a crime, unanimity is not required even if there are different ways of establishing that means. *See Smith*, 159 Wn.2d at 783.

There is no bright-line rule for a court to determine which crimes are alternative means offenses; each case must be evaluated on its own merits by the court. *Peterson*, 168 Wn.2d at 769.

Simply because the legislature states methods of committing a crime in the disjunctive does not create alternative means. *Peterson*, 168 Wn.2d at 770. Additionally, definitional statutes do not create additional alternative means for a crime. *Smith*, 159 Wn.2d at 785; *see also, State v. Makekau*, 194 Wn. App. 407, 378 P.3d 577 (2016) (possession of stolen vehicle is a single means crime despite statutory language including five definitional terms); *State v. Al-Hamdani*, 109 Wn. App. 599, 607, 36 P.3d 1103 (2001) (definition of “mental incapacity does not create alternative means by which

rape can occur); *State v. Marko*, 107 Wn. App. 215, 220, 27 P.3d 228 (2001) (definitions of “threat” do not create alternative means of the crime of intimidating a witness); *State v. Garvin*, 28 Wn. App. 82, 621 P.2d 215 (1980) (definition of “threat” did not create alternative means to commit the crime of second degree extortion).

In *State v. Lindsey*, 177 Wn. App. 233, 311 P.3d 61 (2013), the court of appeals analyzed the trafficking in stolen property statute, RCW 9A.82.050(1),⁶ and determined, although the statute included a list of terms, that list did not create alternative means of committing the crime; rather, the terms “relate[d] to different aspects of a single category of criminal conduct” and were definitional. *Id.* at 241-242.

Similarly, in *Peterson*, *supra*, the Supreme Court held, that despite the list of “various deadlines and entities with which a sex offender must register,” RCW 9A.44.130(1) does not present an alternative means crime.

[Defendant’s argument] is too simplistic a depiction of an alternative means crime, as a comparison between theft and failure to register makes plain. The alternative means available to accomplish theft describe *distinct acts* that amount to the same crime. That is, one can accomplish theft by wrongfully exerting control over someone’s property or by deceiving someone to give up their property. In each alternative, the offender takes something that does not belong to him, but his *conduct* varies significantly. In

⁶ “A person who knowingly initiates, organizes, plans, finances, directs, manages, or supervises the theft of property for sale to others, or who knowingly traffics in stolen property, is guilty of trafficking in stolen property in the first degree.”

contrast, the failure to register statute contemplates *a single act* that amounts to failure to register: the offender moves without alerting the appropriate authority. His conduct is the same—he either moves without notice or he does not. The fact that different deadlines may apply, depending on the offender's residential status, does not change the nature of the criminal act: moving without registering.

Id. at 769-770 (emphasis in original).

Alternative means analysis also focuses on whether the statute describes the crime in terms of distinct acts or closely related acts that are aspects of one type of conduct. *State v. Sandholm*, 184 Wn.2d 726, 734, 364 P.3d 87 (2015).

The more varied the conduct, the more likely the statute describes alternative means. But when the statute describes minor nuances inhering in the same act, the more likely the various “alternatives” are merely facets of the same criminal conduct.”

Id.

RCW 9A.56.190's list of the motivations for the force used during the commission of a robbery (to obtain, retain or prevent or overcome resistance to the taking) does not create alternative means of committing the crime of robbery. The statute's provision that “such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking” is merely definitional. It provides a list of the motivation or purpose for the force used by the defendant during the commission of the crime. These “minor nuances” in the purpose of the force

used to effectuate a robbery do not describe “varied conduct” but are mere descriptors of the same act – the use of force.

Another way of describing this language is that it provides for a “means within a means” of the use of force – the force may be to obtain, to retain or to prevent or overcome resistance to the taking. *See In re Pers. Restraint of Jeffries*, 110 Wn.2d 326, 339, 752 P.2d 1338 (1988) (defendant’s “‘means within means’ argument raises the spectre of a myriad of instructions and verdict forms whenever a criminal statute contains several instances of use of the word ‘or’”).

That this definitional portion of RCW 9A.56.190 merely describes the element of force required to effectuate the robbery is consistent with the “transactional view” of robbery discussed above; that is, the robbery is not complete until the suspect has effectuated his escape, and that if force (or threat of force) is used at any time during the incident, the suspect has committed a robbery, as opposed to a theft.

2. No evidence or argument was made that the Leatherman tool was taken from the victim’s person; thus, the court can be certain that the jury unanimously decided that the State proved the property was taken in the victim’s presence.

A person may be found guilty of robbery where the State proves that he took “personal property from the person of another or in [his] presence against [his] will by the use or threatened use of immediate force.”

RCW 9A.56.190. In *State v. Nam*, 136 Wn. App. 698, 704-705, 150 P.3d 617 (2007), the Court of Appeals stated that this statute, therefore, defines the crime of robbery to include *two* alternative means – taking property from a victim’s person, or taking property in a victim’s presence. *See also, O’Donnell*, 142 Wn. App. 314; *State v. Roche*, 75 Wn. App. 500, 878 P.2d 497 (1994).

It is of note, that in none of these cases did the court engage in a thorough analysis of whether second degree robbery is an alternative means offense based on whether the property was taken from the person or in his presence. Rather, in each case, the court assumed this to be true without any analysis of the issue. As discussed in *Lindsey* and *Makekau*, *supra*, Washington cases have suggested guidelines for analyzing whether a statute presents an alternative means crime. But it appears in *Nam*, *O’Donnell*, and *Roche*, the court has “repeated without analysis”⁷ that “the statute defines robbery to include two alternatives: taking from a victim’s person or taking property in a victim’s presence.” Simply because the statute includes two alternatives, does not mean that they are “alternative means” for which a

⁷ *See Lindsey*, 177 Wn. App. at 243 (noting the *Strom* and *Hayes* courts concluded that the trafficking in stolen property statute contains eight alternative means without fully analyzing the issue, and declining to follow the dicta in those cases, holding, instead that the statute provides only two means of committing the crime); *see also, State v. Strohm*, 75 Wn. App. 301, 879 P.2d 962 (1984); *State v. Hayes*, 162 Wn. App. 459, 262 P.3d 538 (2011).

unanimity instruction need be given. The State is unable to find any authority that confirms this requirement. Before this Court assumes that the robbery statute presents alternative means requiring unanimity, as defendant would have it do, it should undertake an alternative means analysis as to this statute.

RCW 9A.56.190 provides that a robbery occurs by a taking from the victim's person or in his presence. The mere fact that the statute is worded in the disjunctive does not create two different means of committing robbery. *See, Peterson*, 168 Wn.2d at 770. Rather, the legislature has indicated that a robbery occurs by a taking from a person or in their presence (with force or threatened force) in order to distinguish robberies from thefts. Thefts, of course, do not need to occur by a taking from the person or in their presence.⁸ And, thefts do not occur by the use of force. This statutory language is designed to indicate closely related acts that are "merely facets of the same criminal conduct," *Makekau*, 194 Wn. App. at 414 (citing *Sandholm*, 184 Wn.2d at 734), and to distinguish the crime of robbery from other criminal offenses.

Assuming, however, that the court disagrees and finds that this language does, in fact, render RCW 9A.56.190 an alternative means crime,

⁸ Although, first degree theft may occur by a taking from the person of another, absent the use of any force. RCW 9A.56.030(1)(b).

the defendant's argument also fails because this court can be assured that the jury's verdict was based solely on the "in the presence" means of committing robbery. Constitutional errors that occur when a unanimity instruction should have been given, but were not, are subject to harmless error analysis. *State v. Bobenhouse*, 166 Wn.2d 881, 893, 214 P.3d 907 (2009).

In *Bland, supra*, the only facts elicited and argued during an assault trial were that the defendant used a gun to threaten the victim; there was no evidence whatsoever that the defendant had committed the crime of assault by "touching, striking, or cutting" the victim. The court held that the first alternative means of committing assault, i.e., by common law battery, clearly could not apply to the facts of the case. *Id.* The court stated:

As there is substantial evidence to support a finding that Bland assaulted Jefferson *in a manner fitting clearly within the second alternative means of committing assault, and only within that means*, the verdict need not be reversed.

Id., see also, *State v. Rivas*, 97 Wn. App. 349, 984 P.2d 432 (1999), review denied, 140 Wn.2d 1013, 5 P.3d 9 (2000) ("Because there was no danger that the jury's verdict rested on an unsupported alternative means, we affirm the judgment and sentence").

The State agrees that it presented no evidence whatsoever that the Leatherman tool was taken from Mr. Doan's person. No evidence was

elicited to demonstrate that Mr. Doan ever had actual possession of the tool at any time prior to, or during the robbery. In fact, he never possessed the tool until after the robbery was complete and the defendant had been apprehended.

As in *Bland* and *Rivas*, the utter lack of any evidence that would support an argument that the defendant took the tool from Mr. Doan's person allows this court to determine that the jury's verdict was based *solely* on the second means of committing robbery – that the property was taken in another's presence. The State presented evidence that the defendant took the Leatherman tool from the store shelf while the loss prevention officers watched. Mr. Todd never made any physical contact with the loss prevention officers, nor did he threaten them at any time, until after he possessed the tool and was attempting to leave the store. As in *Bland*, there is substantial evidence supporting the jury's finding that the defendant took the Leatherman tool from the *presence* of another, and *only* by that means.

Defendant concedes that “no rational juror could have found from the evidence in this case that Mr. Todd took personal property from the person of another.” Appellant's Br. at 30. Therefore, because no evidence was presented whatsoever that Mr. Todd took personal property from the person of another, under *Bland*, this court is able to determine that the jury must have relied on the other means of committing the crime of robbery –

that it was committed in the person's presence. Any error in this regard was harmless and the defendant's argument fails.

D. UNLESS THE DEFENDANT'S FINANCIAL CIRCUMSTANCES HAVE IMPROVED SINCE THE TRIAL COURT'S ORDER OF INDIGENCY WAS ENTERED, RAP 14.2 PROVIDES THAT THE PRESUMPTION OF INDIGENCY REMAINS IN EFFECT THROUGHOUT HIS APPEAL.

Effective January 31, 2017, RAP 14.2 reads:

A commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, unless the appellate court directs otherwise in its decision terminating review, or unless the commissioner or clerk determines an adult offender does not have the current or likely future ability to pay such costs. *When the trial court has entered an order that an offender is indigent for purposes of appeal, that finding of indigency remains in effect, pursuant to RAP 15.2(f) unless the commissioner or clerk determines by a preponderance of the evidence that the offender's financial circumstances have significantly improved since the last determination of indigency.* The commissioner or clerk may consider any evidence offered to determine the individual's current or future ability to pay. If there is no substantially prevailing party on review, the commissioner or clerk will not award costs to any party. An award of costs will specify the party who must pay the award. In a criminal case involving an indigent juvenile or adult offender, an award of costs will apportion the money owed between the county and the State. A party who is a nominal party only will not be awarded costs and will not be required to pay costs. A "nominal party" is one who is named but has no real interest in the controversy.

(Emphasis Added).

The trial court determined the defendant to be indigent for purposes of his appeal on June 23, 2016, based on a declaration provided by the defendant. CP 122-128. The State is unaware of any change in the defendant's circumstances. Should the defendant's appeal be unsuccessful, the Court should only impose appellate costs in conformity with RAP 14.2 as amended.

V. CONCLUSION

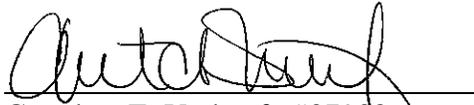
The to-convict instruction given by the court was a correct statement of the law, and the State provided sufficient evidence to prove that the defendant used force against the Home Depot Loss Prevention Officers in order to retain the Leatherman tool he attempted to steal. No instructional error occurred in this regard.

Second degree robbery is not an alternative means offense requiring a unanimity instruction; any precedent to the contrary has been made without analysis. Assuming however, that the "from the person" or "in the person's presence" does render second degree robbery an alternative offense crime, the court can be satisfied that, beyond a reasonable doubt, the jury convicted the defendant for "taking from the presence" of another person, as the loss prevention officers never had actual possession of the Leatherman tool until after the robbery was complete.

The State respectfully requests the court affirm the jury's verdict and the trial court's judgment in this case.

Dated this 14 day of February, 2017.

LAWRENCE H. HASKELL
Prosecuting Attorney

A handwritten signature in black ink, appearing to read "Gretchen E. Verhoef", written over a horizontal line.

Gretchen E. Verhoef #37938
Deputy Prosecuting Attorney
Attorney for Respondent

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

STATE OF WASHINGTON,

Respondent,

v.

SKYLER K. TODD,

Appellant.

NO. 34536-0-III

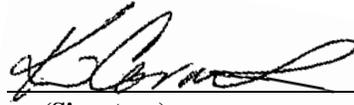
CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on February 14, 2017, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Kristina M. Nichols
Wa.appeals@gmail.com

2/14/2017
(Date)

Spokane, WA
(Place)


(Signature)

SPOKANE COUNTY PROSECUTOR

February 14, 2017 - 1:58 PM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 34536-0
Appellate Court Case Title: State of Washington v. Skyler Keneth Todd

The following documents have been uploaded:

- 345360_20170214135628D3787847_6610_Briefs.pdf
This File Contains:
Briefs - Respondents
The Original File Name was Todd Skyler 345360 Resp Br GEV.pdf

A copy of the uploaded files will be sent to:

- Wa.Appeals@gmail.com
- scpaappeals@spokanecounty.org

Comments:

Sender Name: Kim Cornelius - Email: kcornelius@spokanecounty.org

Filing on Behalf of: Gretchen Eileen Verhoef - Email: gverhoef@spokanecounty.org (Alternate Email: scpaappeals@spokanecounty.org)

Address:

1100 W Mallon Ave
Spokane, WA, 99260-0270
Phone: (509) 477-2873

Note: The Filing Id is 20170214135628D3787847