

35129-7-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

THOMAS JOSEPH CORKERY, 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

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I. APPELLANT'S ASSIGNMENTS OF ERROR

1. There was insufficient evidence to prove beyond a reasonable doubt that Corkery committed attempted robbery in the second degree.
2. In the event that the State substantially prevails on appeal, this Court should deny any request for costs.

II. ISSUES PRESENTED

1. Whether any rational trier of fact could determine that, beyond a reasonable doubt, the defendant committed attempted second degree robbery?
2. Whether this Court should impose any appellate costs if the State substantially prevails on appeal?

III. STATEMENT OF THE CASE

Annette McEachren worked as general manager for Plato's Closet, a second-hand clothing store, located at 5628 North Division Street, in Spokane, Washington. RP 47-49. On July 24, 2016, Ms. McEachren observed the defendant, Thomas Corkery, exit the store with merchandise in hand, and heard the store security alarm activate. RP 36, 52, 60, 62. She followed the defendant out of the store to obtain his vehicle license plate number. RP 52. She observed the defendant throw the stolen jeans onto the passenger seat of his vehicle, and, noticing the window was down, she

reached through the window to retrieve the jeans.¹ RP 52. As she reached into the vehicle, the defendant, who was in the driver's seat, told her "no, [she] couldn't have them." RP 52.

Mr. Corkery started the vehicle and began to drive off, with Ms. McEachren still reaching through the vehicle window. RP 54. Ms. McEachren, who had to stand on her tip-toes to reach into the vehicle because of her small size, was lifted off the ground when Mr. Corkery put the car in drive. RP 54, 56. Mr. Corkery held onto the jeans as he put the car in drive. RP 55-56.

Ms. McEachren, whose upper torso was inside the vehicle, told Mr. Corkery to stop repeatedly, but he continued driving² even though she was caught in the vehicle window, and told her to get out of the car. RP 56, 67, 93. Ms. McEachren, who did not want to step back and risk "hit[ting] another parked car, or get[ting] ran [sic] over since [she] didn't have footing on the ground,"³ grabbed the passenger seat and pulled herself into Mr. Corkery's car. RP 56, 67.

¹ Ms. McEachren agreed that her actions violated Plato's Closet's internal policy regarding dealing with shoplifters. RP 52.

² Ms. McEachren estimated the defendant's speed to be under 25 or 30 miles per hour. RP 85.

³ Ms. McEachren did not want to get run over or hit something in the parking lot, like the cement posts outside of the Burlington Coat Factory or the stop sign adjacent to the curb. RP 71.

Ms. McEachren attempted to stop the car by pushing the gear shift to park and by reaching for the keys, as she thought she could pull them from the ignition and toss them out the window. RP 56, 69-70. Mr. Corkery batted Ms. McEachren's hands away as she reached for the keys.⁴ RP 57. The two continued to argue about the jeans; Mr. Corkery told Ms. McEachren that she could not have the jeans and needed to get out of the car. RP 57, 67-68. Ultimately, after driving through a portion of the mall parking lot, the defendant stopped the car; Ms. McEachren grabbed the jeans and exited the vehicle. RP 57, 67-68.⁵

Ms. McEachren testified that the situation escalated quickly. RP 68. She was concerned for her physical safety while she was hanging from the vehicle window, and felt that Mr. Corkery might attempt to "run [her] against the side of one of the objects along the walkway," because he would not stop the car so she could safely exit. RP 71, 94. She was nervous and panicked while in Mr. Corkery's vehicle, and was relieved once she got out. RP 69. She also believed that defendant's failure to stop the vehicle left her

⁴ A. "As I was reaching for the keys, there was just hand slapping."
Q. I mean, was he – was there an attempt to interfere with your grabbing for the keys?
A. Yes.

RP 70.

⁵ The jury viewed video footage of the incident. Ex. 3-4.

with two options: put the car in park or jump out of the moving vehicle. RP 95. However, she told defense counsel in an interview that she felt “mostly annoyed” that someone would not stop and return the goods when asked. RP 90.

Another witness obtained the vehicle’s license plate number, and law enforcement later determined the vehicle had been recently sold to Mr. Corkery. Ms. McEachren identified Mr. Corkery’s photograph in a photo lineup. RP 103-105. The State charged the defendant with one count of second degree robbery. CP 1.

Defense counsel moved to dismiss the State’s case after the State rested, arguing that the State had failed to demonstrate any “showing of force, violence or fear of injury by Mr. Corkery upon Ms. McEachren.”

RP 107. The State rebutted this claim by arguing that:

There most certainly was immediate force utilized by Mr. Corkery. He chose to start up his vehicle after seeing that this woman was caught up in the vehicle, to continue driving with her hanging out of the vehicle leaving her no other option but to continue to either hold on or to risk serious injury...

And, quite frankly, I think the fact pattern and, again, the – the evidence certainly supports this was in an effort to retain possession of the jeans and to prevent or overcome resistance to the taking of the jeans. The testimony was pretty clear that she was trying to get the jeans back; that she’d told him to stop; that she repeatedly told him to stop the car; that he told her no; that he basically was telling her to jump out of a moving vehicle rather than give in and stop

and pull over, and that the only reason why the vehicle ultimately stopped was that she was trying to grab the keys and then ended up at some point putting the car in park and that that point, somewhat simultaneously, the vehicle came to a stop. She wasn't clear as to why exactly it came to a stop at that point...

So the fact that he didn't actually get away with the items for purposes of the robbery statute is not relevant. I certainly think that there is a prima facie showing and more of the force that he utilized to try to keep these items when he was – when she was trying to retain them.

RP 109-110.

The court denied the motion to dismiss, finding that Ms. McEachren, who stood five-feet-tall, had to stand on her “tippy-toes” to reach into the vehicle, and “when the vehicle took off she was afraid to put her feet down because she could get caught up in the tire and possibly run over, which could constitute a fear of injury to that person.” RP 111-112; CP 52.

The jury found the defendant not guilty of second degree robbery, but guilty of the lesser included offense of attempted second degree robbery. CP 46-47. Finding the defendant suffered from a chemical dependency that contributed to the offense, the trial court followed the agreed sentencing recommendation and imposed a prison-based DOSA (Drug Offender Sentencing Alternative). CP 54, 56-57; RP 168, 176. The court ordered the defendant serve 14.25 months in prison, and 14.25 months on community

custody, with all terms and conditions required of a DOSA sentence. CP 57-59; RP 176-178. The defendant timely appealed.

IV. ARGUMENT

A. THE STATE PRESENTED SUFFICIENT EVIDENCE THAT MR. CORKERY COMMITTED THE OFFENSE OF ATTEMPTED SECOND DEGREE ROBBERY.

Mr. Corkery challenges the sufficiency of the evidence supporting his conviction for attempted second degree robbery. “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).

The appellate court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses and the persuasiveness of the evidence. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004).

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).

Under RCW 9A.56.190 and .210, a person commits the crime of second degree robbery:

when he or she unlawfully takes personal property from the person of another or in his or her presence against his or her will by the use or threatened use of immediate force, violence, or fear of injury to that person or his or her 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. Such taking constitutes robbery whenever it appears that, although the taking was fully completed without the knowledge of the person from whom taken, such knowledge was prevented by the use of force or fear.

RCW 9A.56.190.

Any force or threat, no matter how slight, which induces an owner (or representative of the owner)⁶ to part with his property is sufficient to sustain a robbery conviction. *State v. Handburgh*, 119 Wn.2d 284, 293, 830 P.2d 641 (1992); CP 35. The force or threat does not need to be overt or involve the display of a weapon. *See, e.g., State v. Ammlung*, 31 Wn. App. 696, 704, 644 P.2d 717 (1982); CP 35. “If the taking of the property [is] attended with such circumstances of terror, or such threatening by menace, word, or gesture as in common experience is likely to create an apprehension of danger and induce a [person] to part with property for the safety of his [or her] person, it is robbery.” *State v. Collinsworth*, 90 Wn. App. 546, 551, 966 P.2d 905 (1997) (quoting *State v. Redmond*, 122 Wash. 392, 393, 210 P. 772 (1922)). The “force or fear” element is adjudged by the reasonable person standard. *State v. Witherspoon*, 180 Wn.2d 875, 884, 329 P.3d 888 (2014).

Therefore, a person is guilty of attempted second degree robbery if, with intent to commit robbery in the second degree, he takes a “substantial step” toward taking personal property against a person’s will by the use or threatened use of immediate force, and the force must be used to obtain

⁶ *State v. Ritchie*, 191 Wn. App. 916, 365 P.3d 770 (2015) (a non-statutory, essential element of the crime of robbery requires that the victim have an ownership interest in, a representative interest in, or possession of the property stolen).

possession of the property or to prevent or overcome resistance to the taking. RCW 9A.28.020(1); RCW 9A.56.190; CP 40. What constitutes a substantial step is a factual question; conduct is a “substantial step” when it is strongly corroborative of the criminal’s purpose, and is more than mere preparation. *State v. Bencivenga*, 137 Wn.2d 703, 708, 974 P.2d 832 (1999); *State v. Workman*, 90 Wn.2d 443, 451, 584 P.2d 382 (1978); CP 41.

Defendant claims insufficient evidence exists to sustain his conviction for attempted second degree robbery because (1) the defendant “committed no act that strongly corroborates an intent to retain possession of the jeans by use or threatened use of immediate force, violence, or fear of injury,” Br. at 7-8; and (2) the defendant did not threaten Ms. McEachren directly or indirectly, Br. at 8-9. Defendant’s arguments are flawed.

Keeping in mind that in sufficiency of the evidence review, the court must look at the evidence in the light most favorable to the State, a reasonable jury could find that a number of the defendant’s actions evidence an intent to use or threaten use of force or fear of injury to retain the jeans.

The defendant’s conduct of driving the vehicle posed a threat to Ms. McEachren’s safety if she did not abandon the jeans, and allow him to leave with the merchandise. As Ms. McEachren reached into the vehicle, the defendant told her to get out, and put the vehicle in drive, which caused her feet to lift off the ground, and additionally caused to her to be stuck

within the passenger side window frame. She feared if she let go, she would be injured, and also feared, in holding on that the defendant would knock her against the cement pylons on the sidewalk. Thus, she was faced with the Hobson's choice of letting go of the vehicle and risking injury, or otherwise, climbing into the vehicle with a stranger who had just stolen jeans from her store. At trial, she testified that she was afraid of injury.

Once Ms. McEachren was inside the vehicle, the defendant refused to stop the car, despite her repeated requests. Again, she was left with a Hobson's choice; either attempt to convince the driver to stop the car, or else jump out of a moving vehicle. RP 95. The defendant slapped the victim's hands away as she attempted to reach for his car keys to prevent him from leaving the parking lot with the Plato's Closet jeans, and to enable her escape from the car. RP 69-70. Hand slapping may be slight force, but it is force, nonetheless. Defendant's action of holding onto the jeans and his repeated statement that Ms. McEachren could not have them back evidenced his desire and intent to retain the jeans, and a reasonable jury could infer that his conduct (driving with Ms. McEachren hanging out his window while telling her to get out of the car) was for the purpose of retaining the jeans or overcoming Ms. McEachren's resistance to the taking.

From any of these facts, the jury could find that the defendant used force to retain the jeans, or to overcome Ms. McEachren's resistance to the

taking. Force, or threat of force, no matter how slight, is sufficient to sustain a conviction for second degree burglary. This court should defer to the jury as to the significance and persuasiveness of the evidence at trial.

Furthermore, because the jury acquitted the defendant of second degree robbery, but convicted him of attempted second degree robbery, all the jury needed to find to convict on the lesser crime was that the defendant took a substantial step toward accomplishing the crime of second degree robbery. Perhaps the jury acquitted the defendant of the completed crime because he ultimately returned the jeans to Ms. McEachren; perhaps it acquitted him because it was not truly convinced that Ms. McEachren was afraid for her safety. But Ms. McEachren's subjective fear is not important in this case – rather, the jury needed only to find that a reasonable person in the victim's position could reasonably infer a threat of bodily harm from the defendant's acts. *Witherspoon*, 180 Wn.2d at 884. Taking the facts presented at trial in the light most favorable to the State, a rational jury could find that Mr. Corkery used force or threatened to use force in this case by continuing to drive while the victim clung to his car for fear that letting go would cause her to be run over. Therefore, the defendant's claim fails.

B. UNLESS DEFENDANT’S FINANCIAL CIRCUMSTANCES HAVE IMPROVED SINCE THE TRIAL COURT ENTERED THE ORDER OF INDIGENCY, THE PRESUMPTION OF INDIGENCY REMAINS IN EFFECT THROUGHOUT THE 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 February 24, 2017, based on a declaration provided by the defendant. CP 68-71; 72-73. The State is unaware of any change in the defendant’s circumstances. Should the defendant be unsuccessful on appeal,

the Court should only impose appellate costs in conformity with RAP 14.2, as amended.

V. CONCLUSION

The State presented sufficient evidence that Mr. Corkery committed the offense of attempted second degree robbery. The State respectfully requests that the court affirm the judgment and jury verdict.

Dated this 26 day of October, 2017.

LAWRENCE H. HASKELL
Prosecuting Attorney



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

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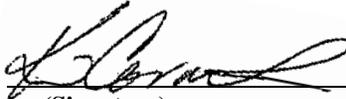
CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on October 26, 2017, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Valerie Marushige
ddvburns@aol.com

10/26/2017
(Date)

Spokane, WA
(Place)


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SPOKANE COUNTY PROSECUTOR

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