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DEC 17 2009

KING County Prosecutors  
Appellate Unit

NO. 63598-1-I

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

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STATE OF WASHINGTON,

Respondent,

v.

JOSE STRIDIRON,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Michael J. Fox, Judge

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BRIEF OF APPELLANT

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2009 DEC 17 PM 4:28  
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A. ASSIGNMENTS OF ERROR

1. The court erred when it refused to instruct the jury on the lesser-included offense of first degree theft.

2. There was insufficient evidence to support appellant's second degree robbery conviction.

Issues Pertaining to Assignments of Error

1. Appellant was charged with second degree robbery for allegedly snatching a purse from the victim's hand. Where the evidence shows there was no struggle over the purse, the purse was undamaged, the victim unharmed and the purse came out of the victim's hand in seconds as the thief ran away with the purse, did the court err when it failed to instruct the jury on the lesser included offense of first degree theft under the taking property from the person of another alternative of committing first degree theft?

2. Where the victim's purse was taken from her but there was no evidence of immediate force in addition to the physical effort used to grab the purse from her hand and run away with it, was there sufficient evidence to support the second degree robbery conviction?

B. STATEMENT OF THE CASE

1. Procedural Facts

On February 11, 2009, Jose Stridiron was charged in King County Superior Court with second degree robbery. CP 1-3. Stridiron was charged with taking a purse from Kathryn Steidel. Id.

A jury found Stridiron guilty as charged. RP 31. Stridiron was given a 38-month standard range sentence based on an offender score of 6. CP 51-59.

2. Substantive Facts

At about 7:30 a.m., Kathryn Steidel was walking to work carrying her large white purse in her right hand. As she neared the corner of 1<sup>st</sup> and Bell streets in downtown Seattle, a man came from behind and pulled her purse out of her hand. RP 11-14 (4/27/2009). The man was African-American and wearing a black and red plaid coat or jacket, a black hat and black gloves. RP 15, 39 (4/27/2009).

Steidel had what she described as a “regular” grip on the purse. RP 17 (4/27/2009). When the thief grabbed the purse and ran, Steidel’s arm and right foot moved forward with the purse until the purse came out of her hand. RP 15-16 (4/27/2009). On direct examination and in response to the question if she had a reflex or instinctive reaction when she felt the purse pull away, Steidel responded: “Well, it kind of all

happened at once. There was no back and forth. It just came right out of my hand.” RP 15 (4/27/2009). When asked to describe the purse leaving her hand, Steidel said it was “just a quick tug out of my hand. It’s hard to describe because it happened so quickly, there was just -- it was a second, if that.” RP 17 (4/27/2009). The purse was taken from Steidel’s hand so fast that Steidel had no time to tighten her grip on the purse. RP 15 (4/27/2009). The purse was not damaged and Steidel was unharmed. RP 36 (4/27/2009).

Steidel ran after the thief while screaming for help and asking onlookers to “call 911.” RP 18 (4/27/2009). Assfaw Gebremeskek, a parking lot attendant, was working in a parking lot when heard Steidel yell “my purse, my purse” and saw a man running holding a purse. RP 133-135 (4/27/2009). Gebremeskek ran towards the man and tried to block him but the thief ran from Gebremeskek and Gebremeskek chased him. RP 136-138 (4/27/2009).

Kevin Durdle, who was also walking to work that morning, saw Gebremeskek chasing the man. The man approached Durdle, who contemplated tackling the man, and told Durdle he had a gun and to get out of his way. RP 71-73 (4/27/2009). Gebremeskek then told Durdle the man stole a purse. Gebremeskek asked Durdle for help because by then Gebremeskek was exhausted, so Durdle, a long distance runner, began

chasing after the thief. RP 67, 76-80 (4/27/2009). The thief eventually ran into a treed area. Durdle ran around the area hoping to catch up with the thief when he emerged. RP 81-82 (4/27/2009).

After Durdle took over the chase, Gebremeskek ended his pursuit and went to another nearby parking lot to continue his work. RP 140 (2/27/2009). Gebremeskek claimed that while in the parking lot he looked across the street and at the end of an alley he saw the same man he chased. RP 142, 164-165 (4/27/2009). Gebremeskek saw the man pick up Steidel's purse from under a plant and remove items from the purse and drop the items in the street. RP 145, 165, 169 (4/27/2009). The man then dropped the purse and started walking. RP 168-170 (4/27/2009). Gebremeskek recovered the purse and it was returned to Steidel. RP 34, 149 (4/27/2009). Contrary to Gebremeskek's testimony, Steidel said there was nothing missing from her purse. RP 34 (4/27/2009).

In response to Steidel's initial call for help, a number of people called police. RP 45, 50, 96, 143 (4/27/2009). When Seattle Police Officer Bruce Godsole arrived, several people pointed at some stairs at the back of a parking lot. RP 9-15 (4/22/2009). Godsole looked and saw a black man running from the stairs and across the street below. Other officers immediately pulled up and detained the man Godsole saw run from the stairs. RP 15 (4/22/2009). The man was Stridiron.

Police later found a pair of black gloves, a black cap and a red and black checkered vest in an alley where the thief ran while chased by Gebremeskek. RP 16, 42 (4/22/2009). Godsole said he encountered Stridiron on the day before on an unrelated matter and noticed Stridiron was wearing a black and red checkered vest similar to the one found in the alley. RP 21-22 (4/22/2009).

After detaining Stridiron, police conducted a show-up. Steidel told police she could not identify Stridiron as the thief. RP 33-34 (4/27/2009). Durdle identified Stridiron as the man he chased primarily based on the black and red shoes Stridiron was wearing. RP 89, 127 (4/27/2009). Gebremeskek identified Stridiron as the man he chased, however, he did not notice Stridiron wearing gloves or a hat. RP 158-159 (4/27/2009). Durdle and Gebremeskek both identified Stridiron in court as the man they chased. RP 91,152-153 (4/27/2009).

### 3. Facts Pertaining to Assignments of Error

After the State rested its case, Stridiron moved to dismiss on the grounds there was insufficient evidence to support a second degree robbery conviction. RP 3-5 (4/28/2009). The motion was denied. RP 5 (4/28/2009). Stridiron also proposed lesser included instructions on first degree theft, which the court refused. CP 8-10; RP 5-7,10,13-15 (4/28/2009).

C. ARGUMENTS

1. THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY ON FIRST DEGREE THEFT AS A LESSER INCLUDED OFFENSE OF SECOND DEGREE ROBBERY.

In Washington defendants are entitled to have the jury instructed not only on the charged offense but also on all lesser included offenses. RCW 10.61.006. Under what is termed the Workman test, a defendant is entitled to an instruction on a lesser included offense if each element of the lesser offense is a necessary element of the offense charged and if the evidence supports an inference the lesser crime was committed. State v. Workman, 90 Wn.2d 443, 584 P.2d 382 (1978); State v Nguyen, 165 Wn. 2d 428, 434, 197 P.3d 673 (2008) (citing Workman); State v. Grier, 150 Wn. App. 619, 635, 208 P.3d 1221(2009). The first requirement under the Workman test is referred to as the "legal prong"; the second requirement the "factual prong." State v. Pittman, 134 Wn. App. 384, 166 P.3d 720 (2006).

The rule entitling a defendant to have juries instructed on lesser included offenses serves to ensure a defendant's constitutional right to adequate notice and protects the constitutional right to present a defense. State v. Berlin, 133 Wn.2d 541, 548, 947 P.2d 700 (1997). It also affords juries the benefit of a third option, in addition to conviction or acquittal, which "accord[s] the defendant the full benefit of the reasonable-doubt

standard." Beck v. Alabama, 447 U.S. 625, 633-34, 65 L. Ed. 2d 392, 100 S. Ct. 2382 (1980). In other words, "[w]here one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of some offense, the jury is likely to resolve its doubts in favor of conviction." Beck, 447 U. S. at 634. This result is avoided with the option to convict of the lesser included offense.

On appeal, the legal prong of the Workman test is reviewed de novo. State v. Walker, 136 Wn.2d 767, 772, 966 P.2d 883 (1998). The factual prong is reviewed under an abuse of discretion standard. State v. Hunter, 152 Wn. App. 30, 43-44, 216 P.3d 421 (2009).

The State may argue, as it did below, under the holding in State v. Roche, 75 Wn. App. 500, 878 P.2d 497 (1994), as a matter of law first degree theft is not a lesser included offense of second degree robbery because legal prong of the Workman test is not met. RP 10-11 (4/28/2009). That argument is unsupported.

In Roche, this Court analyzed whether first degree theft met the legal prong as a lesser offense of first degree robbery. The Roche court relied on the holding in State v. Davis, 121 Wn.2d 1, 846 P.2d 527 (1993), that "a lesser included instruction is inappropriate when alternative means exist by which the charged crime can be committed, one of which would not result in the commission of the alleged lesser included offense."

Roche, 75 Wn. App. at 510 (citing Davis, 121 Wn. 2d at 5-6). Based on that holding the Roche court concluded that because one alternative means of committing robbery is taking property in the presence of another, which is not an element of first degree theft and one alternative means of committing first degree theft is taking property in excess of \$1,500, which is not an element of robbery, the legal prong of the Workman test was not met. Id. at 511.

The Washington Supreme Court in Berlin, however, expressly rejected the Davis analysis on which Roche relied. The Berlin Court ruled the Workman analysis properly focuses on how the offense was charged and proved and not every alternative means of committing the offense. Berlin, 133 Wn.2d at 548. It also noted under the Workman test the analysis does not include the statutory alternatives of committing the requested lesser offense either. Berlin, 133 Wn.2d at 548, n. 2.

Under a proper Workman analysis, here, each element of first degree theft is a necessary element of second degree robbery. First degree theft occurs when the property taken is valued at \$1,500 or more, or, alternatively, when property of any value is taken from the person of another. Former RCW 9A.56.030(1)(b).<sup>1</sup> Theft means "[t]o wrongfully

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<sup>1</sup> The statute was amended after Stridiron's trial to increase the value of the property taken under the first alternative to five thousand dollars. Laws of 2009, ch. 431, § 7.

obtain or exert unauthorized control over the property or services of another or the value thereof, with intent to deprive him of such property or services[.]" RCW 9A.56.020.

The elements of first degree theft, as proposed by Stridiron in his requested lesser included instruction, are: (1) wrongfully obtain or exert unauthorized control over property of another; (2) the property was taken from the person of another and; (3) there was intent to deprive the other person of the property. CP 9. The proposed instruction was a correct statement of the law of first degree theft under the taking property of any value from the person of another alternative of committing the offense.<sup>2</sup> WPIC 70.02.

As charged in this case, the elements of second degree robbery are: (1) the unlawful taking of personal property belonging to another; (2) the intent to commit theft of the property; (3) the taking was against the person's will by the use or threatened use of immediate force, violence or fear of injury to that person; (4) force or fear was used to obtain or retain possession of the property or to prevent or overcome resistance to the taking. CP 26 ( Instruction 7). The jury was also instructed on the following definition of robbery.<sup>3</sup>

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<sup>2</sup> Stridiron also proposed a related instruction defining theft. CP 8.

<sup>3</sup> Second degree robbery is defined in RCW 9A.56.190. RCW 9A.56.210.

A person commits robbery in the second degree when he or she unlawfully and with intent to commit theft thereof takes personal property from the person of another against his will by the use or threatened use of immediate force, violence, or fear of injury to that person. 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 cases the degree of force is immaterial.

CP 25 (Instruction 6); RCW 9A.56.190.

The elements of first degree theft under the taking property from another person alternative are necessarily included elements of second degree robbery where it is alleged the property was taken from a person by force. Both robbery and first degree theft include the element of taking property from another person. RCW 9A.56.190; RCW 9A.56.030(1)(b). Robbery also includes the elements of larceny. Application of Salter, 50 Wn.2d 603, 605, 313 P.2d 700 (1957); see, State v. Byers, 136 Wn. 620, 622, 241 P. 9, 10 (1925) ("Robbery includes the elements of the crime of larceny, one of which is an intent to deprive the owner or other persons of the things taken."); see also, State v. Kjorsvik, 117 Wn.2d 93, 98, 812 P.2d 86 (1991) (intent to steal is an element of robbery). A person who "unlawfully and with the intent to commit theft takes personal property from the person of another" (robbery) necessarily "wrongfully obtain[s] ... the property ... of another" when the property is "taken from the person of

another” with the “intent to deprive the other person of the property” (first degree theft). Accordingly, the legal prong of the Workman test is satisfied.

Under the factual prong of the Workman test the evidence “must raise an inference that only the lesser included ... offense was committed to the exclusion of the charged offense.” State v. Fernandez-Medina, 141 Wn. 2d 448, 455, 6 P.3d 1150 (2000). In determining whether the facts support the lesser included offense, courts are required to “view the supporting evidence in the light most favorable to the party that requested the instruction.” Id. at 455. The party requesting the lesser included instruction is not required to produce the evidence supporting the instruction. State v. Pacheco, 107 Wn.2d 59, 726 P.2d 981 (1986).

In addition to the element that property be taken from another person, to constitute a robbery the taking or obtaining must be by force. The degree of force, however, is “immaterial.” RCW 9A.56.190. See, State v. Handburgh, 119 Wn.2d 284, 294, 830 P.2d 641 (1992) (“...defendant's threats and physical violence supplied the element of force or intimidation essential to make the offense a robbery.”).

First degree theft, which like robbery also requires the property be taken from another person, does not require the property be taken by force. RCW 9A.56.030(1); see, State v. Netling, 46 Wn. App. 461, 465, 731 P.2d

11 (1987) (if a pickpocket steals from another person's pocket, he commits theft in the first degree). To take something from a person, such as stealing money or a wallet from a person's pocket or snatching something from a person's hand, however, necessarily requires some physical effort. Because the degree of force for a robbery is immaterial, whether the offense is a theft or robbery depends on whether the force was in addition to the inherent physical effort necessary to take the item.

The weight of authority supports the view that there is not sufficient force to constitute robbery when a thief snatches property from the owner's grasp so suddenly that the owner cannot offer any resistance to the taking. W. LaFave & A. Scott, *Criminal Law* § 8.11(d), at 781 (2d ed.1986). "A simple snatching or sudden taking of property from the person of another does not of itself involve sufficient force to constitute robbery, though the act may be robbery where a struggle ensues, the victim is injured in the taking, or the property is so attached to the victim's person or clothing as to create resistance to the taking." People v. Patton, 76 Ill.2d 45, 49, 27 Ill. Dec. 766, 767, 389 N.E.2d 1174, 1175 (1979).

The State's sole theory was that Stridiron used immediate force when he grabbed Steidel's purse from her hand. RP 21 (4/28/2009). Steidel testified the purse snatcher came up behind her grabbed the purse and ran. As the thief ran away with her purse in his hand it caused

Steidel's hand to move forward as the purse was pulled away from her. At the point where her arm was extended the purse came right out of her hand. RP 15, 36 (4/27/2009). The purse was taken from Steidel within a second, "if that." RP 17 (4/27/2009). It happened so fast Steidel did not even have time to tighten her grip to offer any resistance. There was no tugging back and forth over the purse. There was no damage to the purse, which would infer the purse was taken by force, and Steidel was injured, which would also infer the purse was taken by force. The evidence supported an inference that only a first degree theft was committed because there was no evidence immediate force was used in addition to the physical activity of taking the purse. Thus, the factual prong of the Workman test is met.

In closing argument, Stridiron argued in the alternative the State failed to prove the element of immediate force. RP 47-48 (4/28/2009). Based on Steidel's testimony, a rational juror could have believed there was no immediate force used to take the purse. The jury, however, had only two choices. It could acquit or find Stridiron guilty of robbery. Because the jury believed the evidence indicating Stridiron took Steidel's purse, it likely resolved any doubts it had on whether immediate force was used in favor of conviction.

Stridiron was entitled to the requested lesser included first degree theft instruction. Without the requested instruction, Stridiron was unable to have the jury effectively consider his alternative defense that the purse was not taken by immediate force. Thus, the court's failure to give the lesser included first degree theft instruction requires reversal. State v. Parker, 102 Wn.2d 161, 164, 683 P.2d 189 (1984).

2. THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT STRIDIRON'S CONVICTION FOR SECOND DEGREE ROBBERY.

In every criminal prosecution, due process requires that the State prove every fact necessary to constitute the charged crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970). Where a defendant challenges the sufficiency of the evidence, the proper inquiry is, when viewing the evidence in the light most favorable to the prosecution, whether there was sufficient evidence for a rational trier of fact to find guilt beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979); State v. Green, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980).

Any force or threat, no matter how slight, which induces an owner to part with his property is sufficient to sustain a robbery conviction. State v. Ammlung, 31 Wn. App. 696, 704, 644 P.2d 717 (1982). For example, the Ammlung court held that in addition to the actual taking of the

property from the victim, blocking the victim's path was sufficient force to prove robbery. Id.

When the evidence is viewed in the light most favorable to the defense, it supports a finding only that the purse was taken from Steidel, which entitled Stridiron to have the jury instructed on the lesser included offense of first degree theft. When viewed in the light most favorable to the prosecution, the evidence fails to show the purse was taken by the immediate force necessary to support a robbery conviction.

The distinction between second degree robbery and first degree theft can become blurry because taking something from a person will always require some physical effort -- like the pickpocket forcing his hand into the person's pocket or the purse snatcher pulling the purse out of the person's hand. Thus, the nature of the force, however slight, necessary to support a robbery conviction, must be in addition to the physical effort required to take something from someone. See, W. LaFave & A. Scott, Criminal Law § 8.11(d), at 781 (2d ed.1986) (there is not sufficient force to constitute robbery when a thief snatches property from the owner's grasp so suddenly that the owner cannot offer any resistance to the taking). Otherwise, there is no logical distinction between first degree theft committed by taking property from the person of another and robbery. See, In re Recall of Pearsall-Stipek, 141 Wash.2d 756, 769, 10 P.3d 1034

(2000) (quoting John H. Sellen Constr. Co. v. Dep't of Revenue, 87 Wash.2d 878, 883, 558 P.2d 1342 (1976)) (the Legislature “does not engage in unnecessary or meaningless acts” and courts “presume some significant purpose or objective in every legislative enactment”).

And, the distinction between first degree theft and second degree robbery is critical. Second degree robbery is defined as a “most serious offense” for sentencing purposes. RCW 9.94A.030(29)(o). An offender convicted of a “most serious offense” must be sentenced to life imprisonment without early release if he has at least two prior convictions for most serious offenses. RCW 9.94A.030(34)(a)(i)-(ii). First degree theft, on the other hand, is a class B felony. RCW 9A.56.030(2).

This purse snatching is a theft. It is not a robbery. Steidel was holding her purse in her hand when the thief came from behind, grabbed the purse and ran away with the purse in his hand. The transaction took a second and the purse came out of Steidel’s hand without any tugging, pulling, struggle or resistance. There was only the inherent physical activity of taking the purse from Steidel’s hand. These facts do not support the immediate use of force element of second degree robbery. Thus, Stridiron’s conviction should be reversed and the second degree robbery charge dismissed. State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998).

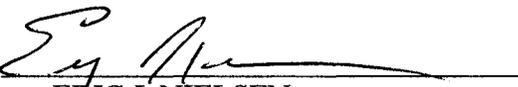
D. CONCLUSION

For the above reasons, this Court should reverse Stridiron's second degree robbery conviction.

DATED this 17 day of December, 2009.

Respectfully submitted,

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WSBA No. 12773  
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Attorney for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION I**

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STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 63598-1-I
	)	
JOSE STRIDIRON,	)	
	)	
Appellant.	)	

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 17<sup>TH</sup> DAY OF DECEMBER 2009, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] JOSE STRIDIRON  
DOC NO. 312731  
CLALLAM BAY CORRECTIONS CENTER  
1830 EAGLE CREST WAY  
CLALLAM BAY, WA 98326

**SIGNED** IN SEATTLE WASHINGTON, THIS 17<sup>TH</sup> DAY OF DECEMBER 2009.

x *Patrick Mayovsky*

2009 DEC 17 PM 4:28  
STATE OF WASHINGTON  
COURT OF APPEALS