70903-8

70903-8

NO. 70903-8-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

LEONARD W. BURGESS, III,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MONICA J. BENTON

BRIEF OF RESPONDENT

2014 OCT 23 PM 3:04

DANIEL T. SATTERBERG
King County Prosecuting Attorney

ERIN H. BECKER
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 296-9650

TABLE OF CONTENTS

Page

A. ISSUES PRESENTED 1

B. STATEMENT OF THE CASE 2

1. PROCEDURAL FACTS 2

2. SUBSTANTIVE FACTS 3

C. ARGUMENT 5

1. THE JURY'S VERDICT WAS SUPPORTED BY SUFFICIENT EVIDENCE 5

2. THE TRIAL COURT PROPERLY DECLINED TO INSTRUCT THE JURY ON THE INCLUDED OFFENSE OF THEFT IN THE THIRD DEGREE 10

3. THE JURY WAS PROPERLY INSTRUCTED REGARDING THE MEANING OF REASONABLE DOUBT 15

4. THE REFERENCE TO RCW 9A.56.200(1)(a)(i) IN THE JUDGMENT AND SENTENCE IS CORRECT 18

D. CONCLUSION 21

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

In re Winship, 397 U.S. 358,
90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970) 16

Jackson v. Virginia, 443 U.S. 307,
99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979) 6

Sullivan v. Louisiana, 508 U.S. 275,
113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993) 16

Victor v. Nebraska, 511 U.S. 1,
114 S. Ct. 1239, 127 L. Ed. 2d 583 (1994) 16

Washington State:

State v. Bennett, 161 Wn.2d 303,
165 P.3d 1241 (2007) 16, 17

State v. Brett, 126 Wn.2d 136,
892 P.2d 29 (1995) 16

State v. Emery, 174 Wn.2d 741,
278 P.3d 653 (2012) 17

State v. Fedorov, 181 Wn. App. 187,
324 P.3d 784 (2014) 17, 18

State v. Fernandez-Medina, 141 Wn.2d 448,
6 P.3d 1150 (2000) 12, 13

State v. Goins, 151 Wn.2d 728,
92 P.3d 181 (2004) 20

State v. Green, 94 Wn.2d 216,
616 P.2d 628 (1980) 6

State v. Handburgh, 119 Wn.2d 284,
830 P.2d 641 (1992).....9

State v. Hickman, 135 Wn.2d 97,
954 P.2d 900 (1998).....6

State v. Hunter, 152 Wn. App. 30,
216 P.3d 421 (2009).....13

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

State v. Lane, 56 Wn. App. 286,
786 P.2d 277 (1989).....17

State v. Mabry, 51 Wn. App. 24,
751 P.2d 882 (1988).....17

State v. Manchester, 57 Wn. App. 765,
790 P.2d 217 (1990).....9

State v. Mills, 154 Wn.2d 1,
109 P.3d 415 (2005).....6

State v. Moten, 95 Wn. App. 927,
976 P.2d 1286 (1999).....18

State v. Nguyen, 165 Wn.2d 428,
197 P.3d 673 (2008).....11

State v. Peterson, 35 Wn. App. 481,
667 P.2d 645 (1983).....17

State v. Pirtle, 127 Wn.2d 628,
904 P.2d 245 (1995).....17

State v. Price, 33 Wn. App. 472,
655 P.2d 1191 (1982).....17

State v. Salinas, 119 Wn.2d 192,
829 P.2d 1068 (1992).....6

State v. Shcherenkov, 146 Wn. App. 619,
191 P.3d 99 (2008).....12

State v. Tamalini, 134 Wn.2d 725,
953 P.2d 450 (1998).....11

State v. Tanzymore, 54 Wn.2d 290,
340 P.2d 178 (1959).....17

State v. Tinker, 155 Wn.2d 219,
118 P.3d 885 (2005).....12

State v. Walker, 19 Wn. App. 881,
578 P.2d 83 (1978).....17

State v. Workman, 90 Wn.2d 443,
584 P.2d 382 (1978).....11, 12, 13

Statutes

Washington State:

RCW 9.94A.825.....19, 20

RCW 9A.04.110.....20

RCW 9A.56.010.....12

RCW 9A.56.020.....12

RCW 9A.56.050.....12

RCW 9A.56.190.....8, 12

RCW 9A.56.200.....12, 18, 19, 21

RCW 10.61.006.....11

Other Authorities

WPIC 4.01.....15, 17

A. ISSUES PRESENTED

1. Evidence is sufficient if, taken in the light most favorable to the State, any rational factfinder could have found all of the elements of the crime beyond a reasonable doubt. For the purposes of robbery, "taking" includes both the initial acquisition of property and its retention. Here, the evidence demonstrated that Burgess borrowed a phone from Sarkowsky, ran off with it and, when confronted, slashed Sarkowsky with a knife in order to retain the property. Did the State produce sufficient evidence to prove that Burgess used force or violence to take Sarkowsky's phone?

2. A defendant is entitled to an instruction on an uncharged offense if every element of the offense is necessarily included in the charged offense, and the evidence affirmatively supports an inference that only the included offense was committed. Here, although Theft in the Third Degree is included in Robbery in the First Degree, all of the evidence demonstrated that Burgess was still in control of the phone he stole when he used force against Sarkowsky to retain it. Did the trial court act within its discretion when it declined to instruct the jury on the included offense of third-degree theft?

3. The court's instructions must inform the jury about the meaning of the State's burden to prove all the elements of a crime

"beyond a reasonable doubt." Washington courts have uniformly approved an instruction that includes the language, "If . . . you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt." The jury here was so instructed. Was Burgess's jury correctly instructed?

4. The jury returned a general verdict convicting Burgess of Robbery in the First Degree committed by using a deadly weapon or inflicting bodily injury. The jury rejected a separate deadly weapon enhancement. The definition of "deadly weapon" is different for the purposes of first-degree robbery than it is for the enhancement. Also, a jury may return inconsistent verdicts. Does the Judgment and Sentence properly include the statutory citation to the deadly weapon prong of Robbery in the First Degree when naming Burgess's offense of conviction?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

On February 21, 2013, the State of Washington charged the appellant, Leonard Whitfield Burgess, III, with one count of Robbery in the First Degree, along with a deadly weapon enhancement. CP 1. The

matter proceeded to trial before the Honorable Monica J. Benton. 1RP 1.[1] The jury convicted Burgess of Robbery in the First Degree, but concluded that the State did not prove beyond a reasonable doubt that he was armed with a deadly weapon at the time of the crime, for purposes of the deadly weapon enhancement. CP 42-43. The court sentenced Burgess to 87 months of incarceration, a standard-range sentence. CP 75-83. This appeal timely followed. CP 96.

2. SUBSTANTIVE FACTS

On February 18, 2013, at about 3:00 a.m., Paul Sarkowsky was seated in his van in the parking lot of a Safeway located at 15th Avenue NW and NW 85th Street in Seattle. 4RP 46-47. Sarkowsky worked as a driver for Shuttle Express, a rideshare company that provides service to the airport, and he was in the parking lot waiting to pick up a customer. 4RP 44-47.

While Sarkowsky waited in his van, Burgess approached him and asked to use his phone. 4RP 49, 63. Sarkowsky declined. 4RP 50. Burgess explained he had been looking for a pay phone, and that he knew that shuttle drivers carried phones. 4RP 49-50. After some further conversation, Burgess asked again. 4RP 50-51. This time, Sarkowsky

[1] This brief refers to the seven volumes of the Verbatim Report of Proceedings as follows: 1RP is July 22, 2013; 2RP is July 23, 2013; 3RP is July 24, 2013; 4RP is July 25, 2013; 5RP is July 26, 2013; 6RP is September 13, 2013; and 7RP is March 13, 2014.

agreed. 4RP 51. He dialed the number Burgess provided, handed him the phone, and tried to give him some privacy as he spoke. 4RP 51-52. When Sarkowsky turned his attention away from Burgess, however, Burgess suddenly ran away towards the back of the Safeway parking lot. 4RP 53. Sarkowsky chased after him. 4RP 53.

After running out of the parking lot and up a street, Burgess dashed between a house and an apartment located at 8522 NW Mary Avenue, and into the backyard of a home occupied by Maria Litvinenko. 4RP 19-21, 54-55. When Sarkowsky followed him, apparently trapping him in the backyard, Burgess pulled out a knife and told him to back off. 4RP 55. Sarkowsky told Burgess he just wanted his phone. 4RP 55. Burgess thrashed around, ultimately slashing Sarkowsky's hand and torso. 4RP 55-57, 68-71; Ex. 14, 15, 16.

At that point, Litvinenko, awakened by all the noise, came out onto her porch and saw the two men. 4RP 22-26, 57. Sarkowsky told her to call the police. 4RP 26, 36, 57. She did. 4RP 26-27. As she called, Sarkowsky backed out of her yard with Burgess following. 4RP 27-28, 30-31, 36-37, 58-60. Once Burgess got out of the backyard, he ran off north. 4RP 32, 66. Sarkowsky waited for the police, who arrived almost immediately. 4RP 39-40, 66-67, 123-25.

The police used a dog track to attempt to locate Burgess. 3RP 24-26, 38-47, 83-86, 103-08; Ex. 1. They eventually found him lying under a truck in the back yard of a home at 8528 NW 14th Avenue. 3RP 48, 65, 86-87, 109; 4RP 115-16, 139-40, 146. His hands had blood on them. 3RP 49, 87; 4RP 119. Sarkowsky identified Burgess in a showup. 4RP 77, 127-28. Police were unable to find either Sarkowsky's phone or the knife that Burgess used. 3RP 50-51, 88, 95-96; 4RP 121, 141, 143, 158-59.

Sarkowsky was taken to a hospital and treated for his injuries, which required six stiches in his finger and eleven in his chest. 4RP 78. Several hours later, Sarkowsky returned to the area with his wife and used an app on her phone to look for his. 4RP 79-83. He found it between the tire of a parked car and the curb on the east side of Mary Avenue, close to NW 87th Street—north of Litvinenko's home. 4RP 81-83; Ex. 6.

C. ARGUMENT

1. THE JURY'S VERDICT WAS SUPPORTED BY SUFFICIENT EVIDENCE.

Burgess claims that the State's evidence was insufficient to support a guilty verdict for Robbery in the First Degree. Specifically, he argues that the evidence was insufficient to show that he took Sarkowsky's phone against his will by the use or threatened use of force, violence, or fear of injury. But Burgess construes the meaning of a "taking" too narrowly, to

include only the moment at which the phone transferred from Sarkowsky's hand to his. Because "taking" has a much broader legal meaning in the context of robbery, the evidence amply demonstrated that Burgess used force to take Sarkowsky's phone. Burgess's claim should be rejected.

Evidence is sufficient if, taken in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980) (citing Jackson v. Virginia, 443 U.S. 307, 318, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)). A claim of insufficiency of the evidence admits the truth of the State's evidence. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "[A]ll reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." Id. (citation omitted).

The "to convict" instruction is a yardstick by which the jury measures a defendant's guilt. State v. Mills, 154 Wn.2d 1, 6, 109 P.3d 415 (2005). Therefore, it must be a complete statement of the crime and contain every element of the crime charged. Id. at 8. Unless objected to, jury instructions become the law of the case. State v. Hickman, 135 Wn.2d 97, 102, 954 P.2d 900 (1998). If an element is included without objection in the "to convict" instruction, the State assumes the burden of proving that element, even if it is an extraneous one. Id.

At trial, Burgess's jury was instructed that, to convict him of the crime of Robbery in the First Degree, the State had to prove beyond a reasonable doubt:

> (1) That on or about February 18, 2013, the defendant unlawfully took personal property from the person or in the presence of another;
> (2) That the defendant intended to commit theft of the property;
> (3) That the taking was against the person's will by the defendant's use or threatened use of immediate force, violence or fear of injury to that person;
> (4) 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;
> (5)(a) That in the commission of these acts or in immediate flight therefrom the defendant was armed with a deadly weapon or (b) That in the commission of these acts or in immediate flight therefrom the defendant inflicted bodily injury; and
> (6) That any of these acts occurred in the State of Washington.

CP 56.

Burgess argues that there was insufficient evidence that he took Sarkowsky's phone by force (element 3). Implicit in his argument is the assumption that a "taking" is completed at the moment that the stolen property comes into the robber's hands. If this limited sense of taking were that term's only meaning, then Burgess would be correct. It was uncontested at trial that Sarkowsky initially provided his phone to Burgess willingly, so that he could make a phone call. 4RP 50-52.

But such a narrow reading of the term "taking" in the context of the crime of robbery is inconsistent with Washington law.[2] First, the definition of robbery itself makes plain that a taking is more than the initial transfer of property into the robber's hands. The crime of robbery is defined by statute:

> A person commits 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. By its plain terms, the taking referenced in the first sentence, which must be accomplished by force, includes at least obtaining possession of the property <u>and</u> retaining possession of the property. Thus, taking has a broader meaning than just initial acquisition.

Second, Washington courts have construed the robbery statute in just this way. In observing that the legislature has adopted a "transactional" view of robbery—such that the crime is not complete until the robber has escaped with the stolen property—this Court has

[2] Burgess's jury was also not provided with such a cramped definition of the term.

determined that the robbery statute "broaden[ed] the scope of taking." State v. Manchester, 57 Wn. App. 765, 770, 790 P.2d 217 (1990).

The Supreme Court explicitly agreed. In a case where the defendant took a girl's bicycle while she was not present, refused to surrender it to her when she returned, then threw rocks at her and assaulted her until she abandoned the bicycle to him, the court affirmed a conviction for robbery. State v. Handburgh, 119 Wn.2d 284, 830 P.2d 641 (1992). In so doing, the court adopted the reasoning of Manchester, describing it as holding that "a taking can be accomplished either by forcibly acquiring the property from the owner's person or in his presence or by acquiring possession of property in the owner's absence and using force, violence, or threats to retain possession." Id. at 288 (first emphasis added); see also id. at 290 ("Implicit in the Manchester holding is the assumption a taking can be ongoing or continuing so that the later use of force to retain the property taken renders the actions a robbery. Stated differently, a forceful retention of stolen property in the owner's presence is the type of 'taking' contemplated by the robbery statute even where the initial appropriation ensued outside the owner's presence."). The Handburgh court also observed that the language "[s]uch taking" in the third sentence of the robbery statute referred back to the second sentence, discussing obtaining

or retaining, and inferred that the definition of taking thus includes retention.

With this broader understanding of the definition of "taking," there is ample evidence in the record to support the jury's finding that Burgess used force to take Sarkowsky's phone. The uncontradicted evidence was that—after borrowing Sarkowsky's phone and then fleeing with it—Burgess successfully fought off Sarkowsky's attempt to recover his phone by slashing him with a knife. 4RP 50-57. Any rational trier of fact could have found that the State's evidence met this definition of taking. The evidence was sufficient, and Burgess's conviction should be affirmed.

2. THE TRIAL COURT PROPERLY DECLINED TO INSTRUCT THE JURY ON THE INCLUDED OFFENSE OF THEFT IN THE THIRD DEGREE.

Burgess contends that the trial court erred by refusing to instruct the jury on the included offense of Theft in the Third Degree. But the evidence did not show that only the included offense was committed to the exclusion of the charged offense. The evidence overwhelmingly demonstrated that Burgess was still in possession of the stolen property at the time that he assaulted Sarkowsky. The trial court did not abuse its discretion.

Burgess sought to have the jury instructed on the included offense of Theft in the Third Degree. CP 31, 33-35; 5RP 3-5. The trial court

refused the proposed instructions. 5RP 11-12. The jury convicted Burgess of Robbery in the First Degree, although it rejected the deadly weapon enhancement. CP 42-43.

Washington law permits a defendant charged with one offense to be convicted of another if commission of the second offense is necessarily included within the offense charged in the Information.[3] RCW 10.61.006. A defendant has a statutory right to have the jury instructed on an included offense when each element of the included offense is a necessary element of the charged offense (the legal prong) and the evidence supports an inference that only the included crime was committed (the factual prong). State v. Nguyen, 165 Wn.2d 428, 434, 197 P.3d 673 (2008) (citing State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978)); State v. Tamalini, 134 Wn.2d 725, 728-29, 953 P.2d 450 (1998). The included offense also must arise from the same act or transaction supporting the greater offense. Nguyen, 165 Wn.2d at 435.

The State concedes that the legal prong has been met. A person commits the crime of Robbery in the First Degree, as charged here, if he "unlawfully and with intent to commit theft take[s] personal property of another" from that person or in his presence, "against his will, by the use or threatened use of immediate force, violence and fear of injury" to that

[3] Such offenses are routinely referred to as "lesser included offenses," even though the word "lesser" does not appear in the statute.

person, and was either armed with a deadly weapon or inflicted bodily injury on the person. CP 1; RCW 9A.56.190, .200(1)(a)(i), (iii). A person commits the crime of Theft in the Third Degree when he commits theft of property or services.[4] RCW 9A.56.050(1). "Theft," in turn, means "[t]o wrongfully obtain or exert unauthorized control over the property or services of another or the value thereof, with intent to deprive." RCW 9A.56.020(1)(a). And, "wrongfully obtains" or "exerts unauthorized control" means, among other things, "[t]o take the property or services of another." RCW 9A.56.010(22)(a). The primary difference between theft and robbery is the use of force. State v. Shcherenkov, 146 Wn. App. 619, 630, 191 P.3d 99 (2008). Thus, Theft in the Third Degree is included in the offense of Robbery.

The State also concedes that the purported included offense of theft is based on the same acts as the charged offense of robbery.

The second prong of the Workman test, however, has not been satisfied. In determining whether the factual prong has been met, the evidence must be construed in the light most favorable to the defendant, it must be substantial, and it must raise an inference that only the included offense was committed. State v. Fernandez-Medina, 141 Wn.2d 448,

[4] Although the statute states that third-degree theft requires that the value of the property or services stolen not exceed $750, value is not an essential element of Theft in the Third Degree. State v. Tinker, 155 Wn.2d 219, 222-23, 118 P.3d 885 (2005).

455-56, 461, 6 P.3d 1150 (2000). "[T]he evidence must affirmatively establish the defendant's theory of the case—it is not enough that the jury might disbelieve the evidence pointing to guilt." Id. at 456 (citation omitted). When the trial court declines to instruct the jury on an included offense because the evidence does not meet the factual prong of the Workman test, this Court reviews for abuse of discretion. State v. Hunter, 152 Wn. App. 30, 43, 216 P.3d 421 (2009).

Here, Burgess contends that he abandoned the phone before he used force, so no robbery occurred. Brief of Appellant at 13. Burgess is correct that, if he had abandoned the stolen phone before he used force, such that the force was used to escape rather than to obtain or retain the stolen property, he would be guilty of theft instead of robbery. State v. Johnson, 155 Wn.2d 609, 609-10, 121 P.3d 91 (2005). But there is no affirmative evidence that Burgess abandoned the phone before the physical confrontation with Sarkowsky. Instead, all of the evidence is to the contrary.

Sarkowsky testified that as he ran after Burgess, he saw that Burgess had the stolen phone in his hand. 4RP 55, 62. He kept Burgess in view while he was chasing him, taking his eyes off of him only for the brief moments that he took to pick up a gym bag and flashlight that Burgess threw down as he fled. 4RP 54-55, 90-93. Although Sarkowsky

saw Burgess drop the gym bag and flashlight, he did not see him drop the phone. 4RP 63.

During the confrontation in Litvinenko's backyard, Sarkowsky told Burgess that he just wanted the phone back, and asked Burgess why he wanted it. 4RP 55, 60, 62. Instead of claiming he had discarded it, Burgess said he wanted the phone for money. 4RP 55, 94. Sarkowsky believed that Burgess still had the phone while they were in Litvinenko's backyard. 4RP 109. No evidence was presented to the contrary.

Further, Burgess must have still had the phone as a matter of logic. Sarkowsky testified that Burgess first contacted him at the front of the Safeway parking lot located at 15th Avenue Northwest and Northwest 85th Street. 4RP 47-49; Ex. 6, 11. When Burgess ran off with the phone, he ran east towards the back of the parking lot, north on Mary Avenue Northwest across 85th, then east between a house and apartment into Litvinenko's backyard. 4RP 53-54; Ex. 6; see also 4RP 19-21 (Litvinenko placed a yellow sticker on exhibit 6 to identify her home). After stabbing Sarkowsky, Burgess left the backyard, then turned right and ran north on Mary—away from the Safeway. 4RP 32, 65-66; Ex. 6.

Several hours later, Sarkowsky used an app to find his phone. 4RP 79. He located it at the intersection of Mary and Northwest 87th Street—north of Litvinenko's home. 4RP 79-83. In other words, the

phone was found beyond the areas where Burgess ran from and interacted with Sarkowsky. Thus, Burgess could not have discarded the phone where it was found until after he used force against Sarkowsky.

There was no affirmative evidence in the record that would support a finding that Burgess discarded the stolen phone before he stabbed Sarkowsky. The uncontroverted evidence was to the contrary. Although the jury might have disbelieved the evidence, that is insufficient as a matter of law to support an included-offense instruction. The trial court thus did not abuse its discretion in concluding that the evidence did not show that Burgess committed only the included offense of third-degree theft to the exclusion of first-degree robbery. Burgess's conviction must be affirmed.

3. THE JURY WAS PROPERLY INSTRUCTED REGARDING THE MEANING OF REASONABLE DOUBT.

Burgess argues that the court improperly instructed the jury on the burden of proof where the court used the traditional "abiding belief" language in Washington Pattern Jury Instruction 4.01. This argument should be rejected. The use of the challenged language was correct, and has consistently been upheld as a proper statement of the law.

Due process requires the State to prove all of the essential elements of a crime beyond a reasonable doubt before a defendant may be

charged offenses beyond a reasonable doubt." Id. at 760. The Emery court did not address the propriety of using the "abiding belief" language in the jury instructions or otherwise.

Here, the challenged instruction did not misadvise the jury about the nature of its role or encourage it to determine the truth. Instead, the language elucidates—in language repeatedly approved by Washington courts—what it means to be satisfied beyond a reasonable doubt. Indeed, this Court has already rejected—in a case Burgess fails to acknowledge—the exact argument advanced here. Fedorov, 181 Wn. App. 199-200. It must reject it again.

4. THE REFERENCE TO RCW 9A.56.200(1)(a)(i) IN THE JUDGMENT AND SENTENCE IS CORRECT.

Burgess lastly claims that this Court should remand his case to correct a scrivener's error in the Judgment and Sentence relating to the statute under which he was convicted. But the error he complains of is not an error.

Where a Judgment and Sentence contains a scrivener's error that does not prejudice the defendant, this Court may direct that it be corrected on remand. E.g., State v. Moten, 95 Wn. App. 927, 929, 976 P.2d 1286 (1999). Burgess contends that his Judgment and Sentence contains such an error. Specifically, he claims that the reference to RCW

9A.56.200(1)(a)(i) should be deleted because the jury found that he did not use a deadly weapon in committing the crime. Brief of Appellant at 21. Burgess is wrong.

The State charged Burgess with committing Robbery in the First Degree under two alternative theories—using a deadly weapon and inflicting bodily injury. CP 1; RCW 9A.56.200(1)(a)(i) (defining first-degree robbery committed with a deadly weapon), (iii) (defining first-degree robbery committed by inflicting bodily injury). The State also alleged an enhancement: that Burgess committed the crime while armed with a deadly weapon. CP 1; RCW 9.94A.825. The jury returned a general verdict finding Burgess guilty of Robbery in the First Degree; it rejected the enhancement. CP 42-43. The jury was not asked whether the State had proven the crime under the "deadly weapon" prong or the "bodily injury" prong. The Judgment and Sentence thus correctly includes the statutory citation to RCW 9A.56.200(1)(a)(i).[5] CP 75.

Burgess suggests that the jury's rejection of the deadly weapon enhancement means that it found that he did not commit the crime with a deadly weapon for purposes of the definition of Robbery in the First Degree. Brief of Appellant at 21. This is incorrect for two reasons.

---

[5] Burgess's Judgment and Sentence fails to include a reference to RCW 9A.56.200(1)(a)(iii), the other prong of Robbery in the First Degree with which he was charged and convicted. The State does not object to remand to correct this omission.

First, the term "deadly weapon" has a different meaning in the context of the enhancement than it does for the underlying offense. For purposes of the enhancement, "deadly weapon" generally means "an implement or instrument which has the capacity to inflict death and from the manner in which it is used, is likely to produce or may easily and readily produce death." RCW 9.94A.825 (emphasis added). For purposes of the underlying offense, however, the definition of "deadly weapon" is much broader. It generally means a "weapon, device, instrument, article, or substance, . . . which, under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily harm." RCW 9A.04.110(6) (emphasis added). Burgess's jury was instructed on both definitions. CP 64-65. Thus, the jury could readily have concluded that the knife at issue—described alternately as a box knife or a knife with a blade of three to four inches—was capable of causing substantial bodily harm but not death. Had it so concluded, it would have rejected the deadly weapon enhancement but convicted Burgess of robbery committed with a deadly weapon.

Second, a jury may return inconsistent verdicts. State v. Goins, 151 Wn.2d 728, 92 P.3d 181 (2004). A jury could reach inconsistent verdicts for a number of reasons, including "mistake, compromise, and

lenity." Id. at 733. As long as there is sufficient evidence to uphold the guilty verdict, it may stand, even if the jury acquitted on another count or a special verdict and that acquittal is inconsistent with the guilty verdict. Id. at 734. Here, even if the jury's guilty verdict on first-degree robbery under a deadly weapon theory is inconsistent with its acquittal of Burgess on the deadly weapon enhancement, the conviction on that prong is not infirm.

There is no basis to strike the reference to RCW 9A.56.200(1)(a)(i) from the Judgment and Sentence. Remand is unnecessary.

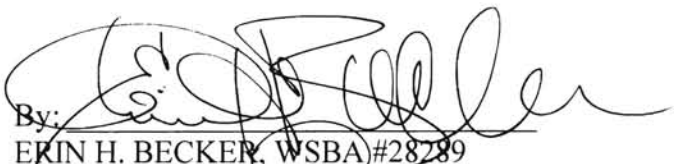
D. CONCLUSION

For all of the foregoing reasons, Burgess's conviction and sentence should be affirmed.

DATED this 23rd day of October, 2014.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney



By: _____
ERIN H. BECKER, WSBA #28289
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Mick Woynarowski, the attorney for the appellant, at Mick.Woynarowski@kingcounty.gov, containing a copy of the Brief of Respondent, in State v. Leonard Whitfield Burgess, III, Cause No. 70903-8, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 23rd day of October, 2014.

UBrame

Name:
Done in Seattle, Washington