NO. 44588-3-II

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

STATE OF WASHINGTON,

Respondent,

v.

DRAKE MCDANIEL,

Appellant.

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

The Honorable Kathryn J. Nelson, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The court erred in failing to instruct the jury on third degree theft as a lesser included offense of first degree robbery.

Issue Pertaining to Assignment of Error

Did the trial court err in failing to instruct the jury on third degree theft as a lesser included offense of first degree robbery when, looking at the evidence in the light most favorable to appellant, a rational trier of fact could find that appellant committed only theft?

B. STATEMENT OF THE CASE

1. Trial Testimony

Early one April evening, Jazmyne Montgomery drove Donteise Mosley to a Walgreens parking lot. Mosley told Montgomery they were there to meet someone named "Budha" and buy $10 worth of marijuana. RP 63-65, 86, 138-39, 159. In fact, Mosley was there to sell one-quarter of a pound of marijuana for about $550. RP 143-44, 216, 220, 229-30, 236, 242, 272.

At the Walgreens, Montgomery parked next to a navy blue Cadillac Mosley recognized. RP 66-67, 233. The owner of the Cadillac was appellant Drake McDaniel's girlfriend, Michele Andrews. RP 365, 519-20, 617-18. The driver of the Cadillac got into the rear passenger seat of Montgomery's car. RP 69-70, 234. Mosley did not recognize the

driver, who identified himself as "YB." RP 78, 234, 239. Nonetheless, Mosley shared a marijuana cigarette with YB. RP 141, 189, 235-36.

Conversation shifted to the marijuana Mosley intended to sell. Mosley showed YB some marijuana and mentioned there was more in a Winnie the Pooh box in the car trunk. RP 236. YB said he needed change, which Moseley said he could get at Walgreens. RP 127, 142, 240-41, 292. According to Mosley, YB then asked Montgomery to open her child-locked car door so he could get out of the car. RP 73-75, 243. Instead of getting out of the car, YB put a chrome gun to Mosley's hip and said it was a robbery. Mosley gave YB the marijuana he had and "popped" the car trunk. RP 72, 198, 243-44, 292, 309.

Around the same time, another person got out from the Cadillac and stood next to Montgomery's driver's side door. RP 79-80, 83, 247. The person wore a black glove and held something that looked like a "remote" to Montgomery's hip. RP 197. Montgomery assumed it was a gun. RP 198. The person told Montgomery not to look at him. RP 80-81, 199.

Mosley saw something black in the hand of the person standing next to Montgomery. RP 269-70, 283. He was uncertain whether the black object was a gun. RP 296. Mosley saw the person push

Montgomery against the car door frame. RP 284, 295. He did not see the person hit Montgomery. RP 247, 268, 283-84.

Mosley said YB got out of the car and went to the trunk before getting back inside Montgomery's car. RP 244-45, 291-92. Montgomery saw YB reach over the front seat and pull the car keys from the ignition. RP 75-77, 80-81, 87-90, 150-52, 181-82. YB also said "I gotta grab this," before pulling Montgomery's purse out of her hand. RP 152. Meanwhile, the person with the black object continued to stand outside the driver's door. RP 152-54. Mosley saw YB take the keys from the ignition but denied there was a "tug of war" for Montgomery's purse. RP 245-46, 284-85. Mosley's wallet was not taken. RP 282.

Mosley memorized the Cadillac's license plate as it drove away. RP 249. After the Cadillac left, Montgomery called 911 and reported the incident and the plate number. RP 93, 132, 248.

Shortly thereafter police headed toward Andrews' house. RP 393. As police neared Andrews' home, they spotted the Cadillac, which accelerated when police tried to pull it over. RP 394, 414. The car eventually stopped at Andrews' house. RP 395. The driver ran into the house. RP 396-97, 407, 414. The passenger of the Cadillac was identified as Jonathan Williams. RP 401, 420. As Williams got out of the car, a wallet containing Montgomery's Bank of America card fell out. RP 401,

415-16, 419. The wallet contained 16 fake $100 bills. RP 367, 382, 432, 435.

Police searched the Cadillac and found car keys, a purse, marijuana, and envelopes addressed to McDaniel. RP 353-55, 361, 363-64. A nickel plated handgun was found in the backseat. RP 445-48, 450, 454. No fingerprints were found on the gun. RP 466, 471. Police did not find a Winnie the Pooh box in the car. RP 437-38.

Meanwhile, police interviewed Mosley and Montgomery. RP 250-51, 260. Both denied Mosley had a gun during the incident. RP 106, 200, 250, 311. Officer Tim Deccio said Montgomery and Mosley were "evasive" when questioned. RP 324, 332, 339. Mosley and Montgomery told Deccio they went to Walgreen's to purchase marijuana. RP 333, 340, 377. Montgomery reported that McDaniel pointed a gun at Mosley's head while Williams pointed a gun at Montgomery, covered her mouth, and demanded money. RP 87, 334-35, 377. Montgomery identified McDaniel from a photo montage as the Cadillac driver. RP 102-03, 138, 166. She also identified Williams' as the passenger after he was arrested. RP 95-97, 137, 352. Mosley refused to identify people associated with the incident. RP 252, 346, 386, 459.

Police also seized surveillance video from the Walgreens parking lot. RP 345; Ex. 21. The video showed Williams, not McDaniel, going to the trunk of Montgomery's car. RP 195.

McDaniel was arrested several weeks after the alleged incident. RP 652. Based on this evidence, the State charged McDaniel with two counts of first degree robbery and one count of first degree unlawful possession of a firearm. CP 1-3, 6-8.

McDaniel's testimony differed from the allegations made by Montgomery and Mosley. McDaniel knew Mosley and bought marijuana from him about twice a month. RP 618-20. McDaniel called Mosley the day of the incident to buy marijuana and they arranged to meet at the Walgreens. RP 622-23. Williams accompanied McDaniel to the Walgreens. RP 624, 673. At the Walgreens, McDaniel got into the rear passenger seat of Montgomery's car and smoked marijuana with her and Mosley. RP 626-27. Williams went to Montgomery's car trunk. RP 630. When the conversation turned to purchasing marijuana, McDaniel gave Mosley eight fake $100 bills. RP 632-33, 666, 674. McDaniel had obtained the fake money from Williams. RP 632.

McDaniel said Mosley became very angry when given the fake money. RP 634. He pulled out a gun and threatened to kill McDaniel if

he did not give Mosley all the money he had. RP 634-35, 639-40. McDaniel gave Mosley $1,200. RP 635, 639-40, 678.

At some point, Williams came to the driver's side window of Montgomery's car and asked what was happening. Williams reached toward his pocket or waistband. RP 636, 675. McDaniel thought Williams might have a gun but did not see Williams take anything from his pocket. RP 636-37, 675-77. McDaniel did not ask Williams whether he had a gun. RP 638. Williams did not tell McDaniel he had a gun. RP 637.

McDaniel explained Williams' gesture caused Mosley to put his gun away. RP 638, 676-77. At that point Williams told McDaniel, "let's go." RP 639. Williams walked away and started getting into the Cadillac. RP 640.

McDaniel took Montgomery's purse from the center console as he left the car. RP 639-40. He denied taking Montgomery's keys from the ignition because they were in the purse. RP 641. McDaniel hoped there was money in the purse to mitigate his loss to Mosley. RP 639.

Williams looked through the purse as McDaniel drove back to Andrews' home. RP 642. McDaniel explained he did not stop when pursued by the police because he had marijuana and Montgomery's purse in the car. RP 646-47. When he got to Andrews' house, McDaniel

jumped out of the car, ran through the house, and hid in his neighbor's sauna to avoid being arrested. RP 647-48. The police found and arrested Williams. RP 647. McDaniel later denied to police that he knew Williams or was at the Walgreens during the incident. RP 649, 653.

McDaniel acknowledged he intended to steal marijuana from Mosley. RP 674. However, he denied using a gun or force to get the marijuana or Montgomery's purse. RP 650. He said he did not have a gun during the incident, and never saw Williams with a gun. RP 636-38, 651, 654-55, 683. McDaniel did not know how a gun ended up in his car. RP 650-51, 683.

After hearing the above, a Pierce County jury found McDaniel guilty of first degree robbery of Montgomery's purse as charged in count one and first degree unlawful possession of a firearm. CP 35, 39; RP 862-63. The jury found McDaniel not guilty of first degree robbery of marijuana as charged in count two. CP 37; RP 862-63. The jury declined to find McDaniel was armed with a firearm during either alleged robbery. CP 36, 38. The trial court sentenced McDaniel to standard range, concurrent prison sentences of 171 months for the robbery and 89 months for the unlawful possession. CP 80-94, 104-05; RP 877. McDaniel timely appeals. CP 95-106.

2. Theft Instruction

McDaniel's theory of the case was that he committed theft, not robbery, of Montgomery's purse because he did not use or threaten force to obtain the purse. RP 756, 791, 793-94, 797, 799. Accordingly, defense counsel proposed a third degree theft instruction as a lesser offense to the charged first degree robbery. CP 11-15; RP 530, 696.

Counsel argued the evidence supported the proposed theft instruction. RP 696-99. Counsel noted McDaniel's testimony established that at the time he took Montgomery's purse no gun was displayed and no force was used. RP 697-99, 702-04, 711. Mosley did not dispute the purse was taken without force. RP 699. In addition, the surveillance video supported McDaniel's testimony that Williams was getting back into the Cadillac – not standing outside Montgomery's door – at the time the purse was taken. RP 698, 702, 711; Ex. 21. Based on this evidence, counsel argued there was a reasonable inference only the lesser crime of theft was committed. RP 699.

The State did not dispute third degree theft was a lesser offense of first degree robbery. RP 532. However, the prosecutor contended there was no factual basis to support an instruction in McDaniel's case. RP 530-32, 701. The prosecutor argued Williams' possession of a gun was a threat of force that allowed McDaniel to take the purse. RP 701, 708, 713.

After argument, the court denied McDaniel's request for the third degree theft instruction. RP 713. The Court explained, "[T]he purse was taken under the threat of force of Mr. Williams, which was what the defendant testified to, so it would not be appropriate under Workman[1] for me to include the lesser counts." RP 713-14.

C. ARGUMENT

MCDANIEL WAS ENTITLED TO A LESSER INCLUDED OFFENSE INSTRUCTION OF THIRD DEGREE THEFT.

The trial court erred in failing to instruct the jury on third degree theft. Based on the evidence presented at trial, the jury was entitled to find no force was used against Montgomery to part with her purse and thus McDaniel was guilty of only third degree theft.

An accused is entitled to jury instructions on all lesser included offenses. RCW 10.61.006.[2] A defendant is entitled to a lesser offense instruction if (1) each of the elements of the lesser offense is a necessary element of the charged offense and (2) the evidence supports an inference that the defendant committed the lesser offense. Workman, 90 Wn.2d at 447-48. The first requirement is the "legal prong;" the second requirement

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[1] State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978).

[2] RCW 10.61.006 provides: "The defendant may be found guilty of an offense the commission of which is necessarily included within that with which he is charged in the indictment or information."

is the "factual prong." State v. Berlin, 133 Wn.2d 541, 546, 947 P.2d 700 (1997).

The lesser offense rule allows an accused to effectively argue his or her theory of the case to the jury. Berlin, 133 Wn.2d at 545, 548. The rule also "affords the jury a less drastic alternative than the choice between conviction of the offense charged and acquittal." Beck v. Alabama, 447 U.S. 625, 633, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980). "Where 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 when the jury is given the option of finding a defendant guilty of lesser included offense, thereby giving him the full benefit of the reasonable doubt standard. Beck, 447 U.S. at 634.

The refusal to give lesser included offense instructions in the face of supporting evidence therefore not only violates the statutory right but also the right to due process under the Fourteenth Amendment. Beck, 447 U.S. at 637, 638 n.14 (1980).

A trial court's refusal to give a jury instruction based on the evidence is generally reviewed for abuse of discretion, whereas the refusal to give a jury instruction based on the law is reviewed de novo. State v. Walker, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998); see State v.

LaPlant, 157 Wn. App. 685, 687, 239 P.3d 366 (2010) (de novo review of legal prong of a request for a jury instruction on a lesser included offense; factual prong of a request for a jury instruction on a lesser included offense reviewed for abuse of discretion).

a. Third Degree Theft is A Lesser Offense of First Degree Robbery.

"Theft" means "[t]o wrongfully obtain or exert unauthorized control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services." RCW 9A.56.020(1)(a). A person is guilty of third degree theft if he commits theft of property that does not exceed $750 in value. RCW 9A.56.050(1)(a).

A person commits robbery when he (1) unlawfully takes personal property from another; (2) with intent to commit theft; (3) against the person's will by 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; and (4) such force for 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 58 (instruction 8); RCW 9A.56.190; State v. Kjorsvik, 117 Wn.2d 93, 98, 812 P.2d 86 (1991). First degree robbery occurs when, "in the commission of a robbery, or in

immediate flight therefrom," a person displays what appears to be a firearm or other deadly weapon. RCW 9A.56.200(1)(a)(iii); CP 57 (instruction 7).

Since robbery includes the elements of larceny, third degree theft is always an included offense of robbery under the legal prong. Application of Salter, 50 Wn.2d 603, 605, 313 P.2d 700 (1957); State v. Byers, 136 Wash. 620, 622, 241 P. 9, 10 (1925). The "to convict" instruction for first degree robbery required the State to prove "the defendant or an accomplice unlawfully took personal property" and that "the defendant or an accomplice intended to commit theft of the property." CP 62 (instruction 12). The legal prong of the Workman test is satisfied because theft is a necessary element of first degree robbery. There was no dispute below that the legal prong was satisfied. RP 532, 697.

b. A Rational Trier Of Fact Could Find McDaniel Committed Theft Rather Than Robbery Based On The Evidence Produced At Trial.

The factual prong of the Workman test is satisfied when evidence raises an inference that 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 other words, if the evidence would permit a jury to rationally find a defendant guilty of the lesser offense and not guilty of the greater, a lesser offense instruction should be given. Berlin, 133 Wn.2d at 551.

In making this determination, the court must view the supporting evidence in the light most favorable to the party seeking the instruction and must consider all evidence presented at trial, regardless of its source. Fernandez-Medina, 141 Wn.2d at 455-56. The sole qualification is that "the evidence must affirmatively establish the defendant's theory of the case — it is not enough that the jury might disbelieve the evidence pointing to guilt." Fernandez-Medina, 141 Wn.2d at 456. In keeping with these principles, sufficient evidence to give a proposed instruction exists if a rational trier of fact could find the facts necessary to support the instruction. State v. Vinson, 74 Wn. App. 32, 37, 871 P.2d 1120 (1994).

McDaniel's theory was that he committed theft, not robbery, because he did not use or threaten force to obtain or retain Montgomery's purse. The evidence supported this argument.

McDaniel explained he took Montgomery's purse from the center console as he left the car. RP 639-40. Montgomery's car keys were in the purse. RP 641. When McDaniel took the purse Mosley had put away his gun and Williams "was already getting back in my [McDaniel's] car." RP 640. McDaniel did not see a gun in Williams' possession during the earlier encounter or as Williams got back into his car. RP 636-38, 640-41, 650-51, 675-76, 683.

McDaniel denied having a gun or other weapon at any point during the incident. RP 654-55. Nor did he use force to get the purse. McDaniel explained there was no struggle between him and Montgomery over the purse because he grabbed it so quickly "I don't even believe that she knew I took it[.]" RP 641. Indeed, Mosley acknowledged there was no "tug of war" for the purse and that Montgomery was not hit during the incident. RP 284-85.

In short, the evidence, when viewed in the light most favorable to McDaniel, supports a rational inference he committed only theft. The jury could have agreed that McDaniel used no force in taking Montgomery's purse and that any threat of force ceased when Williams went back inside McDaniel's car.

That McDaniel's theory depends on disputed evidence is of no consequence. A jury must be instructed on a lesser offense if there is even "'the slightest evidence'" that the defendant may have committed the lesser offense. State v. Parker, 102 Wn.2d 161, 164, 683 P.2d 189 (1984) (quoting State v. Young, 22 Wn. 273, 276-77, 60 P. 650 (1900)). Here, a rational juror could find the State failed to prove beyond a reasonable doubt that McDaniel committed robbery. Significantly, the jury questioned the credibility of Montgomery and Mosley as evidenced by its not guilty verdict on the alleged marijuana robbery.

The factual prong is satisfied in this case because evidence, viewed in the light most favorable to McDaniel, allowed for the inference he did not use force or threat of force to take Montgomery's purse. It is the province of the jury to determine the facts. State v. Williams, 96 Wn.2d 215, 221-22, 634 P.2d 868 (1981). The trial judge here, in refusing to give the jury an opportunity to decide whether McDaniel committed theft as opposed to robbery, usurped the fact-finding province of the jury.

Reversal is required when a trial court refuses to give a justifiable lesser included offense instruction. Parker, 102 Wn.2d at 163-64, 166; Fernandez-Medina, 141 Wn.2d 462. McDaniel's conviction for first degree robbery must therefore be reversed and the case remanded for a new trial.

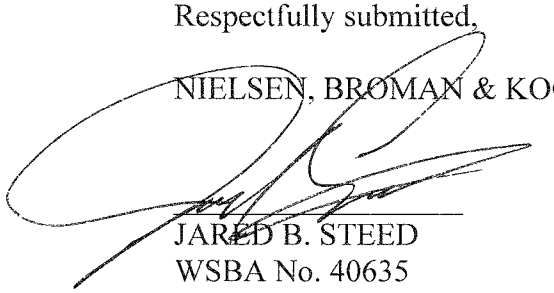
D. CONCLUSION

For the reasons discussed above, this Court should reverse McDaniel's convictions and remand for a new trial.

DATED this 31st day of October, 2013.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



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DIVISION TWO

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	)	
Appellant.	)	

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 31ST DAY OF OCTOBER 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] DRAKE MCDANIEL
DOC NO. 326127
COYOTE RIDGE CORRECTIONS CENTER
P.O BOX 769
CONNELL, WA 99326

SIGNED IN SEATTLE WASHINGTON, THIS 31ST DAY OF OCTOBER 2013.

X Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

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