70903-8

70903-8

NO. 70903-8-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,
Respondent

v.

LEONARD W. BURGESS, III,
Appellant

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

APPELLANT'S OPENING BRIEF

Marla L. Zink
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

Washington Court of Appeals Decisions

United States Supreme Court Decisions

Decisions of Other Courts

Constitutional Provisions

Statutes

Other Authorities

A. SUMMARY OF ARGUMENT

After Leonard Burgess was lent a cell phone, he ran away with it. He used no force, fear, or threats in taking the cell phone that was voluntarily handed to him. The State assumed the burden of proving Mr. Burgess used force, fear or threats in taking the phone. Because the State's evidence was insufficient, the conviction should be reversed and the charge dismissed. Alternatively, because the defense was improperly denied an instruction on the lesser included offense of third degree theft, and because the reasonable doubt instruction diluted and misstated the burden of proof, the matter should be remanded for a new trial.

B. ASSIGNMENTS OF ERROR

1. Under the law of the case, as established in the jury instructions, insufficient evidence supported the conviction.

2. The trial court erroneously denied the requested third degree theft instruction.

3. The court's instruction misstated the definition of proof beyond a reasonable doubt and diluted the State's burden of proof.

4. The judgment and sentence contains a scrivener's error, citing to a statutory subsection not found by the jury, that should be corrected.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The State is required to prove the elements as set forth in the to convict instruction, unless it objects to those elements. The State proposed and did not object to the robbery in the first degree instruction that provided the jury must find beyond a reasonable doubt that the taking itself was accomplished by the use or threatened use of force, violence or fear of injury. Must the robbery conviction be reversed where there was no evidence that Mr. Burgess used or threatened force, fear, or violence in the taking of the cell phone?

2. Upon request, an accused is entitled to have the jury instructed on a lesser included offense if affirmative evidence, viewing the evidence in the light most favorable to the accused, creates a reasonable inference that only the lesser crime occurred. Where third degree theft is a lesser included offense of robbery in the first degree and affirmative evidence created a reasonable inference that only theft occurred because Mr. Burgess abandoned the stolen property before

any force or threat of force was used, should the trial court have provided the requested lesser offense instruction?

3. In a criminal trial, the jury's role is to decide whether the prosecution met its burden of proof. The jury's duty is not to search for the truth. Over Mr. Burgess's objection, the court instructed the jury that it could find the State met its burden of proof if it had an "abiding belief in the truth of the charge." Did the court misstate and dilute the burden of proof in violation of due process by focusing the jury on whether it believed the charge was true?

4. Should the judgment and sentence be corrected to reflect accurately the offense for which Mr. Burgess was convicted?

D. STATEMENT OF THE CASE

Paul Sarkowsky, a shuttle van driver, was waiting for his next passenger in a parking lot at three in the morning when a man approached and asked to borrow his cell phone. 7/25/13 RP 44-47, 49-50. At first, Mr. Sarkowsky denied having a phone, but after speaking with the man briefly, he decided to lend the man his cell phone. 7/25/13 RP 51, 53. Mr. Sarkowsky dialed the number the man provided and handed him the phone. 7/25/13 RP 51-52. After hearing the man talking, Mr. Sarkowsky turned his attention away and the man

ran off with the phone. 7/25/13 RP 52-53, 89-90. Mr. Sarkowsky chased him but was about 25 yards behind and did not maintain the man in his line of sight the entire time. 7/25/13 RP 53-55, 90, 92-93. Mr. Sarkowsky ended up in the yard of a nearby residence where a woman heard him scuffling with another man and called 9-1-1. 7/24/13 RP 90; 7/25/13 RP 22-27, 34. Mr. Sarkowsky told the man he just wanted his phone. 7/25/13 RP 55. The man told Sarkowsky several times to back off, and also said he had a knife. 7/25/13 RP 55-56, 59-60. The man ran off as soon as he had a clear pathway to exit the yard. 7/25/13 RP 32, 37, 59-60, 65, 94. Mr. Sarkowsky sustained two lacerations. 7/25/13 RP 56, 68-71, 84. No one saw the phone while in the yard. 7/25/13 RP 37-38, 60-62.

Mr. Sarkowsky found his phone on the ground about seven hours later by tracking its location through his wife's cell phone. 7/25/13 RP 77-83. The phone was located away from the parking lot from which it was taken and away from the yard in which the scuffle took place. *Id.*

After searching the vicinity with a canine for 15 or 20 minutes, the police located Leonard Burgess under a vehicle several blocks away from the yard in which the scuffle took place. 7/24/13 RP 38-48, 50,

82-87, 93-95, 105-09. He had neither a weapon nor a cell phone on him. 7/24/13 RP 50, 88. The police also did not find a cell phone and did not find a weapon, despite searching themselves and with the canine. 7/24/13 RP 88, 95-96; 7/25/13 RP 121-22, 141-48, 154-56, 158-59. The police brought Mr. Sarkowsky to the scene where Mr. Burgess was surrounded by law enforcement officers. 7/25/13 RP 77. Mr. Sarkowsky identified Mr. Burgess although it was dark when the incident occurred and Mr. Sarkowsky did not pay attention to the appearance of the man to whom he lent his phone. 7/25/13 RP 78, 86-87, 127-28; *see* 7/25/13 RP 103-04 (Sarkowsky does not typically pay attention to personal details).

The State charged Mr. Burgess with robbery in the first degree with a deadly weapon enhancement. CP 1-2. The trial court denied Mr. Burgess's request that the jury be instructed on the lesser included offense of theft in the third degree. CP 30-35; 7/26/13 RP 3-12. The jury answered no to the deadly weapon special verdict but found Mr. Burgess guilty of the underlying crime. CP 42-43.

E. ARGUMENT

1. **Mr. Burgess's robbery in the first degree conviction violates due process because the State failed to prove that the taking was by the use or threatened use of force, as required by the law of the case.**

a. The State assumed the burden of proving the elements set forth in the to convict instruction.

An accused may only be convicted if the State proves every element of the crime beyond a reasonable doubt. *Blakely v. Washington*, 542 U.S. 296, 300-01, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004); *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). On a challenge to the sufficiency of the evidence, this Court must reverse a conviction when, after viewing the evidence in the light most favorable to the prosecution, no rational trier of fact could have found all the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); *State v. Drum*, 168 Wn.2d 23, 34-35, 225 P.3d 237 (2010).

The State assumes the burden of proving the elements set forth in the to convict instruction, even if it increases the State's burden. *State v. Witherspoon*, No. 88118–9, __ Wn.2d __, 2014 WL 3537948,

*2 (July 17, 2014). Jury instructions not objected to become the law of the case. *Id.*; *State v. Hickman*, 135 Wn.2d 97, 101-02, 954 P.2d 900 (1998). Where the State fails to object to an instruction on an element of the offense, the State must submit sufficient evidence to prove that element as delineated by the instructions. *See, e.g.*, *id.* at 105; *City of Spokane v. White*, 102 Wn. App. 955, 964-65, 10 P.3d 1095 (2000); *State v. Nam*, 136 Wn. App. 698, 706-07, 150 P.3d 617 (2007); *State v. Price*, 33 Wn. App. 472, 474-75, 655 P.2d 1191 (1982). This holds true because, regardless of whether the instruction was rightfully given, once given it became binding and conclusive upon the jury. *Hickman*, 135 Wn.2d at 101 n.2.

This law of the case doctrine is sensible. A to convict instruction, like the one used here, serves as a yardstick by which the jury measures the evidence to determine guilt or innocence. *State v. Smith*, 131 Wn.2d 258, 263, 930 P.2d 917 (1997). Jurors cannot be required to supply an element omitted from the to-convict instruction by referring to other jury instructions. *Id.* at 262-63. It is also critical that jury instructions make the law "'manifestly apparent to the average juror.'" *State v. LeFaber*, 128 Wn.2d 896, 900, 913 P.2d 369 (1996) (quoting *State v. Allery*, 101 Wn.2d 591, 595, 682 P.2d 312 (1984)).

"It cannot be said that a defendant has had a fair trial if the jury must guess at the meaning of an essential element of a crime or if the jury might assume that an essential element need not be proved." *Smith*, 131 Wn.2d at 263.

The Court's sufficiency analysis under a law of the case instruction applies the typical sufficiency analysis but compares the evidence to the instruction provided rather than to the generic elements of the offense. Reversal and dismissal are required if the evidence is insufficient to support the verdict. *Hickman*, 135 Wn.2d at 103.

b. The State failed to prove beyond a reasonable doubt that the taking was by Mr. Burgess's use or threatened use of immediate force, violence or fear of injury, where Mr. Burgess simply ran from the van with the cell phone he had been given.

Washington generally follows a transactional approach to robbery. *State v. Johnson*, 155 Wn.2d 609, 610-11, 121 P.3d 91 (2005) (discussing *State v. Handburgh*, 119 Wn.2d 284, 830 P.2d 641 (1992)). Under the transactional approach, the actual or threatened use of force may occur during the taking or retention of the property so long as it is not too attenuated from the taking. *Id.*; *see* RCW 9A.56.190. However, here the State assumed a higher burden. The to-convict instruction provided the following element: "(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." CP 56.[1] The State proposed, and did not object to, this language. CP __ (Sub # 39); 7/26/13 RP 3-14.[2]

Thus, the State assumed the burden of proving that Mr. Burgess used or threatened to use immediate force, violence or fear of injury in the taking of the cell phone. *See Hickman*, 135 Wn.2d at 101-02, 105. It is correct that the jury was provided with a definitional instruction for robbery, which provided that the "force or fear must be used to obtain or retain possession of the property or to prevent or overcome resistance to the taking." CP 58 (instruction 10) (emphasis added). But the to convict instruction obliterated this distinction by requiring that the taking was by the defendant's use or threatened use of force, violence or fear of injury. CP 56. The to convict instruction set forth each element that the jury had to find beyond a reasonable doubt and limited the manner in which the State could prove robbery. *Smith*, 131 Wn.2d at 262-63. The jury is presumed to have followed the court's

---

[1] A complete copy of instruction 8, the to convict instruction on robbery in the first degree, is attached as an Appendix.

[2] A supplemental designation of clerk's papers has been filed requesting the Superior Court forward the State's proposed jury instructions and other documents designated in this brief by subfolder number to this Court for inclusion in the clerk's papers.

instructions. *State v. Kirkman*, 159 Wn.2d 918, 928, 155 P.3d 125 (2007). The broader definitional instruction did not reduce the State's burden assumed in the to convict instruction.

Looking at all the evidence in the light most favorable to the State, there is no support for this element. Mr. Sarkowsky testified that he handed his cell phone to Mr. Burgess willingly. 7/25/13 RP 49-53. Mr. Burgess appeared to use the cell phone. 7/25/13 RP 52. Mr. Sarkowsky took his attention away from Mr. Burgess and "next thing I knew, he was running towards the back of the parking lot." 7/25/13 RP 53, 89-90. Mr. Sarkowsky got out of his van and chased Mr. Burgess, who was already about 25 yards away from Mr. Sarkowsky. *Id.* No force, threatened force, violence or fear of injury was present in this taking.

In short, the State failed to prove beyond a reasonable doubt that Mr. Burgess took the property by use or threatened use of force, violence or fear of injury, an element assumed in the to convict instruction.

c. Because there was no evidence Mr. Burgess used force or fear in the taking of the cell phone, as the instructions required, the conviction must be reversed and the charge dismissed.

If the State fails to prove an element beyond a reasonable doubt, the conviction must be reversed and the charge dismissed with prejudice against refiling. *E.g.*, *Jackson*, 443 U.S. at 319; *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980); *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969), *reversed on other grounds by Alabama v. Smith*, 490 U.S. 794, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989). Because the State failed to satisfy the burden it assumed, Mr. Burgess's conviction should be reversed and the charge dismissed.

2. The trial court should have instructed the jury on the lesser included third degree theft because affirmative evidence showed Mr. Burgess no longer had the stolen phone when force or fear was used.

An accused may only be convicted of those offenses charged in the information or those offenses which are either lesser included offenses or inferior degrees of the charged offense. U.S. Const. amend. VI; Const. art. I, § 22; *Schmuck v. United States*, 489 U.S. 705, 717-18, 109 S. Ct. 2091, 103 L. Ed. 734 (1989); *State v. Tamalini*, 134 Wn.2d

725, 731, 953 P.2d 450 (1998) (citing *State v. Irizarry*, 111 Wn.2d 591, 592, 763 P.2d 432 (1998); RCW 10.61.003).

An instruction on a lesser offense is warranted where: (1) each element of the lesser offense must necessarily be proved to establish the greater offense as charged (legal prong); and (2) the evidence in the case supports an inference that the lesser offense was committed (factual prong). *State v. Fernandez-Medina*, 141 Wn.2d 448, 454, 6 P.3d 1150 (2000); *State v. Berlin*, 133 Wn.2d 541, 548, 947 P.2d 700 (1997); *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978). In applying the factual prong, a court must view the supporting evidence in the light most favorable to the party requesting the instruction. *Fernandez-Medina*, 141 Wn.2d at 455-56. Additionally, affirmative evidence must support the inference that only the lesser offense was committed. *Id.* at 456.

Here, Mr. Burgess requested a lesser included instruction on theft in the third degree. CP 30-35. There was no dispute that theft in the third degree satisfied the legal prong on the first degree robbery charge. CP __ (Sub #45, p.5 (State's brief on requested lesser included offense)); 7/26/13 RP 3-5. Nonetheless, the trial court denied the

instruction at the State's request because it found the factual prong lacking. 7/26/13 RP 5-12. This ruling was incorrect.

Affirmative evidence supported the occurrence of only theft in the third degree. The distinction between theft and robbery in this case was whether Mr. Burgess used force or fear or threat to retain the phone. *See* RCW 9A.56.200; RCW 9A.56.050; CP __ (Sub #45, p.5). The force necessary for a robbery conviction "must be used to obtain or retain property, or to prevent or overcome resistance to the taking." *Johnson*, 155 Wn.2d at 610-11; RCW 9A.56.190. Force used "to escape after peaceably-taken property has been abandoned" is insufficient to support a robbery. *Johnson*, 155 Wn.2d at 609-10. Thus, in the *Johnson* case, our Supreme Court reversed a robbery conviction where the defendant left the store with merchandise without paying but abandoned the merchandise and began to run away when two security guards approached him in the parking lot. *Id.* at 610-11. Because it was only after the defendant ran away from the merchandise that any force was used, the robbery conviction could not stand. *Id.*

In the case at bar, there was affirmative evidence that Mr. Burgess had abandoned the phone before he reached the yard in which he and Mr. Sarkowsky scuffled. Mr. Sarkowsky testified that he did

not see the phone on Mr. Burgess while in the yard. 7/25/13 RP 60. He also testified there were a few moments when he could not see Mr. Burgess between when he saw Mr. Burgess with the phone and when they scuffled in the yard. 7/25/13 RP 92-93. Mr. Sarkowsky did not see Mr. Burgess after he left the yard. 7/25/13 RP 65-66. Further, the resident in whose yard the men scuffled did not see a phone on Mr. Burgess. 7/25/13 RP 37-38. Indeed, the phone was found hours later in a street away from the yard. 7/25/13 RP 79-83. If the phone was not in the yard with Mr. Burgess and no force or fear or threat was used prior to the yard, then only theft occurred. *See Johnson*, 155 Wn.2d at 609-11; RCW 9A.56.200; RCW 9A.56.050. This constitutes affirmative evidence in the light most favorable to Mr. Burgess that only theft occurred.

While the State elicited testimony that Mr. Sarkowsky "believed" Mr. Burgess had the phone in the yard, that testimony does not even rise to the level of circumstantial evidence. 7/25/13 RP 109. Moreover the basis for the court's denial of the instruction is legally incorrect. The court denied the lesser instruction because it improperly weighed the affirmative evidence that only the lesser occurred against evidence that the greater occurred (robbery in the first degree). 7/26/13

RP 6-12. However, the evidence must be viewed in the light most favorable to Mr. Burgess because he requested the instruction. *Fernandez-Medina*, 141 Wn.2d at 455-56. Thus, the court is not to weigh and evaluate the evidence or search for affirmative proof of the greater offense. *Id.* at 460-61. Rather, if there is affirmative evidence that only the lesser occurred the instruction should be provided. It is then the jury's job to weigh the evidence and determine whether Mr. Burgess was guilty of either offense. *Id.* at 460.

The trial court erred in failing to provide a jury instruction on the lesser included offense of third degree theft. The conviction must be reversed and remanded for a new trial. *Fernandez-Medina*, 141 Wn.2d at 462 (reversing conviction where court failed to give inferior degree instruction of assault 2).

3. The court's instruction equating the reasonable doubt standard with an abiding belief in the truth of the charge diluted the State's burden of proof in violation of Mr. Burgess's due process right to a fair trial.

"The jury's job is not to determine the truth of what happened; a jury therefore does not 'speak the truth' or 'declare the truth.'" *State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012) (emphasis added) (quoting *State v. Anderson*, 153 Wn. App. 417, 431, 220 P.3d 1273

(2009)); *accord State v. Berube*, 171 Wn. App. 103, 286 P.3d 402 (2012); *State v. McCreven*, 170 Wn. App. 444, 472-73, 284 P.3d 793 (2012). "[A] jury's job is to determine whether the State has proved the charged offenses beyond a reasonable doubt." *Emery*, 174 Wn.2d at 760. Therefore, "[t]elling the jury that its job is to 'speak the truth,' or some variation thereof, misstates the burden of proof and is improper." *State v. Lindsay*, __ Wn.2d __, 326 P.3d 125, 132 (2014).

Confusing jury instructions raise a due process concern because they may wash away or dilute the presumption of innocence. *State v. Bennett*, 161 Wn.2d 303, 315-16, 165 P.3d 1241 (2007). The court bears the obligation to vigilantly protect the presumption of innocence. *Id.* "[A] jury instruction misstating the reasonable doubt standard is subject to automatic reversal without any showing of prejudice." *Emery*, 174 Wn.2d at 757 (quoting *Sullivan v. Louisiana,* 508 U.S. 275, 281-82, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993)).

Although the "beyond a reasonable doubt" standard may be a complicated one to explain, it is not beyond explanation. For example, the United States Court of Appeal for the Ninth Circuit recommends the following model language:

> Proof beyond a reasonable doubt is proof that leaves you firmly convinced the defendant is guilty. It is not

> required that the government prove guilt beyond all possible doubt.
>
> A reasonable doubt is a doubt based upon reason and common sense and is not based purely on speculation. It may arise from a careful and impartial consideration of all the evidence, or from lack of evidence.
>
> If after a careful and impartial consideration of all the evidence, you are not convinced beyond a reasonable doubt that the defendant is guilty, it is your duty to find the defendant not guilty. On the other hand, if after a careful and impartial consideration of all the evidence, you are convinced beyond a reasonable doubt that the defendant is guilty, it is your duty to find the defendant guilty.

Ninth Circuit Court of Appeals, *Manual of Model Criminal Jury Instructions* § 3.5 (2014); *see United States v. Ruiz*, 462 F.3d 1082, 1087 (9th Cir. 2006) (upholding use of model instruction).

Washington has also adopted a model instruction. It provides, in relevant part:

> A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.
>
> A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. [*If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.*]

Washington Pattern Instruction: Criminal 4.01. The final sentence is optional; that is, it is not necessary to defining the beyond a reasonable doubt standard. *Id.* (Comment).

The trial court here included this language, instructing the jury that proof beyond a reasonable doubt means that, after considering the evidence, the jurors had "an abiding belief in the truth of the charge." CP 49 (instruction # 2). This language was proposed by the State and objected to by Mr. Burgess, who proposed an instruction without reference to the abiding belief in the truth language. 7/26/13 RP 19; CP 21 (Burgess's proposed instruction); CP __ (Sub # 39 (State's proposed instruction)).

By equating proof beyond a reasonable doubt with a "belief in the truth" of the charge, the court confused the critical role of the jury. The "belief in the truth" language encourages the jury to undertake an impermissible search for the truth and invites the error identified in *Emery*, 174 Wn.2d at 741.

In *Bennett*, the Supreme Court found the reasonable doubt instruction derived from *State v. Castle*, 86 Wn. App. 48, 53, 935 P.2d 656 (1997), to be "problematic" because it was inaccurate and misleading. 161 Wn.2d at 317-18. Exercising its "inherent supervisory

powers," the Supreme Court directed trial courts to use WPIC 4.01 in future cases. *Id.* at 318. As discussed, WPIC 4.01 includes the "belief in the truth" language only as a potential option by including it in brackets. *See* WPIC 4.01 & Comment. The *Bennett* Court did not comment on the bracketed "belief in the truth" language. Notably, this bracketed language was not a mandatory part of the pattern instruction the Court approved.

Recent cases demonstrate the problematic nature of such language. In *Emery*, the prosecution told the jury that "your verdict should speak the truth," and "the truth of the matter is, the truth of these charges, are that" the defendants are guilty. 174 Wn.2d at 751. Our Supreme Court clearly held these remarks misstated the jury's role. *Id.* at 764. However, the error was harmless because the "belief in the truth" theme was not part of the court's instructions and because the evidence was overwhelming. *Id.* at 764 n.14.

The Supreme Court reviewed the "belief in the truth" language almost 20 years ago in *State v. Pirtle*, 127 Wn.2d 628, 656, 904 P.2d 245 (1995). However, in *Pirtle,* the issue before the Court was whether the phrase "abiding belief" differed from proof beyond a reasonable doubt. 127 Wn.2d at 657-58. Thus the Court did not determine

whether the "belief in the truth" phrase minimizes the State's burden and suggests to the jury that they should decide the case based on what they think is true rather than whether the State proved its case beyond a reasonable doubt.

Emery demonstrates the danger of injecting a search for the truth into the definition of the State's burden of proof. Improperly instructing the jury on the meaning of proof beyond a reasonable doubt is structural error. *Sullivan*, 508 U.S. at 281-82. This Court should find that directing the jury to treat proof beyond a reasonable doubt as the equivalent of having an "abiding belief in the truth of the charge," misstates the prosecution's burden of proof, confuses the jury's role, and denies an accused person his right to a fair trial by jury as protected by the state and federal constitutions. U.S. amends. VI, XIV; Const. art. I, §§ 21, 22.

The erroneous instruction diluted the burden of proof. *Emery*, 174 Wn.2d at 741 (error where jury told its job is to search for the truth). Because the State was not held to the standard of proof beyond a reasonable doubt, Mr. Burgess was denied his constitutional right to a fair trial. If his conviction is not reversed on insufficiency, it should be reversed and the matter remanded on this ground.

4. The scrivener's error in the judgment and sentence should be corrected.

The State charged Mr. Burgess with robbery in the first degree predicated on either the bodily injury or deadly weapon alternatives. CP 1-2 (information (citing RCW 9A.56.200(1)(a)(i) and (iii)); CP 56 (to convict instruction). The jury was not asked to specify under which alternative means it convicted Mr. Burgess. *See generally* CP 42-43 (verdict forms). Yet, the judgment and sentence reflects that Mr. Burgess was convicted of robbery in the first degree under subsection (i) for a deadly weapon. The jury did not find a deadly weapon for purposes of the special verdict. CP 43. It should not be reflected in the judgment and sentence. The scrivener's error should be corrected.

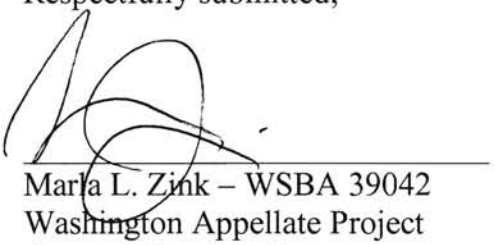
F. CONCLUSION

Mr. Burgess's conviction should be reversed and the charge dismissed because the State failed to meet the burden it assumed. There was no evidence, let alone sufficient evidence, that Mr. Burgess took the cell phone by force, fear, threatened force or violence. In the alternative, a new trial should be ordered because the court denied Mr. Burgess an instruction on third degree theft and the court's instruction diluted the State's burden and misstated the law on the beyond a reasonable doubt standard. If the conviction is affirmed, however, the

judgment and sentence should be remanded to correct the scrivener's error.

DATED this 29th day of July, 2014.

Respectfully submitted,



Marla L. Zink – WSBA 39042
Washington Appellate Project
Attorney for Appellant

APPENDIX

No. 3

To convict the defendant of the crime of robbery in the first degree, each of the following six elements of the crime must be proved 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 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.

If you find from the evidence that elements (1), (2), (3), (4), and (6), and any of the alternative elements (5)(a), or (5)(b), has been proved beyond a reasonable doubt, then it will be

your duty to return a verdict of guilty. To return a verdict of guilty, the jury need not be unanimous as to which of alternatives (5)(a) or (5)(b) has been proved beyond a reasonable doubt, as long as each juror finds that at least one alternative has been proved beyond a reasonable doubt.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of elements (1), (2), (3), (4), (5), or (6), then it will be your duty to return a verdict of not guilty.

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 70903-8-I
v.	)	
	)	
LEONARD BURGESS III,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 29TH DAY OF JULY, 2014, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X] LEONARD BURGESS III 789923 MONROE CORRECTIONAL COMPLEX PO BOX 777 MONROE, WA 98272	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 29TH DAY OF JULY, 2014.

X_____

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710