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Supreme Court No. 91747-7  
Court of Appeals No. 70903-8-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

LEONARD WHITFIELD BURGESS III,

Petitioner.

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PETITION FOR REVIEW

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A. IDENTITY OF MOVING PARTY AND RELIEF SOUGHT

Petitioner Leonard Whitfield Burgess III, the appellant below, asks this Court to accept review of the Court of Appeals opinion, No. 70903-8-I, filed April 27, 2015. A copy of the slip opinion is attached as Appendix A.

B. DECISION BELOW

Paul Sarkowsky willingly handed over his cell phone to Leonard Burgess to borrow, but Burgess ran away with it. Sarkowsky chased Burgess down, demanding his phone back. In the scuffle that followed, Sarkowsky was cut with a knife. Burgess did not have the phone when arrested, and argued it disappeared during the chase, before the scuffle.

The Court of Appeals rejected Burgess' well-taken challenges to his robbery in the first degree conviction. This case presents an important and substantial constitutional issue regarding the law of the case doctrine. Washington courts have adopted a "transactional" view of robbery, but in this case, in the prosecution's "to convict" instruction, the State assumed the burden of proving "[t]hat 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 the owner. The instruction below called for proof that the initial removal – not ultimate retention – of Sarkowsky's phone was done with violence or threat of violence. The evidence was to the contrary.

In addition, this Court should grant review 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.

C. ISSUES PRESENTED FOR REVIEW

1. Whether the State failed to prove additional elements assumed in the “to convict” instructions for robbery in the first degree, contrary to the due process clause of the Fourteenth Amendment and the law of the case doctrine. RAP 13.4(b)(1); RAP 13.4(b)(3); RAP 13.4(b)(4).

2. Whether the trial court erred in failing to instruct on the lesser-included offense of theft in the third degree. RAP 13.4(b)(1); RAP 13.4(b)(3); RAP 13.4(b)(4).

3. Whether the inclusion of language equating “an abiding belief in the truth of the charge” with proof beyond a reasonable doubt in the instruction on the State’s burden impermissibly diluted the State’s burden of proof, contrary to the Fourteenth Amendment due process clause. RAP 13.4(b)(3); RAP 13.4(b)(4).

D. STATEMENT OF THE CASE

The record is clear that Sarkowsky, a shuttle van driver, willingly gave Burgess his cell phone to use. 7/25/13 RP 44-47, 49, 51-53. Burgess ran-off with it, Sarkowsky chased, but lost sight of Burgess. 7/25/13 RP

52-55, 89-90, 92-93. When Sarkowsky caught-up to Burgess, he asked for his phone back. 7/25/13 RP 55. Burgess told Sarkowsky several times to back off because he had a knife, and when a struggle ensued Sarkowsky was cut. 7/25/13 RP 55-56, 59-60, 68-71, 84. No one saw the phone while in the yard. 7/25/13 RP 37-38, 60-62.

The police arrested Burgess several blocks away from where the scuffle took place, without Sarkowsky's phone. 7/24/13 RP 38-48, 50, 82-88, 93-95, 105-09. The police searched for, but did not find a cell phone or a weapon. 7/24/13 RP 88, 95-96; 7/25/13 RP 121-22, 141-48, 154-56, 158-59. Sarkowsky found the phone later, nearby. 7/25/13 RP 77-83. In a "show-up," Sarkowsky identified Burgess as the man to whom he had given his cell phone. 7/25/13 RP 77-78, 86-87, 127-28.

The State charged Burgess with robbery in the first degree with a deadly weapon enhancement. CP 1-2. The trial court denied his 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 Burgess guilty of robbery in the first degree. CP 42-43.

E. ARGUMENT

1. **Under the law of the case doctrine, the State failed to prove first degree robbery as the crime was charged in the “to convict” instruction, contrary to the Fourteenth Amendment requirement that the State prove the essential elements of a criminal charge beyond a reasonable doubt, and meriting review by this Court.**

In the to-convict instruction on the first-degree robbery charge, the trial court instructed the jury that they had to find, *inter alia*, “[t]hat 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 or the property of another” and that “force or fear was used . . . to obtain or retain possession of the property or to prevent or overcome resistance to the taking.” CP 56-57. (Appendix B) (Emphasis added.) The State proposed, and did not object to, this language. 7/26/13 RP 3-14. Under the law of the case doctrine, the State specifically assumed the burden of proving that the taking itself was accompanied by the use of force or fear. State v. Witherspoon, 180 Wn.2d 875, 329 P.3d 888 (2014). This the State did not do. Division One’s decision to the contrary merits review.

The law of the case doctrine dates back to the earliest days of statehood. State v. Hickman, 135 Wn.2d 97, 101-02, 954 P.2d 900 (1998) (citing Pepperall v. City Park Transit Co., 15 Wash. 176, 180, 45 P. 743, 46 P. 407 (1896) and Peters v. Union Gap Irr. District, 98 Wash. 412, 413,



167 P. 1085 (1917)).<sup>1</sup> The doctrine holds that jury instructions not objected to become the law of the case. Id.

The State bears the burden of proving the essential elements of every criminal charge beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 490, 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); U.S. Const amend. XIV; Const. art. I, § 3. Under the “law of the case doctrine”, the State assumes the burden of proving even otherwise unnecessary elements when such additions are included without objection in the “to convict” instruction. Hickman, 135 Wn.2d at 102, 105. (citations omitted).

A defendant may assign error to such added “elements” and the court may consider whether the State has met its burden of proving them. Id., at 102. See also 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).

The undisputed facts establish that (1) Burgess asked to borrow Sarkowsky’s phone, (2) that Sarkowsky gave it to him voluntarily, (3) that Burgess neither used, nor threatened to use, force, violence, or injury to

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<sup>1</sup> In Peters, this Court declared the doctrine to be so well-established “that the assembling of the cases is unnecessary.” Id. at 413.

Sarkowsky when he asked for the phone, and (4) that Burgess then ran away, in an attempt to steal the phone. See Slip Op. at 2. There is no evidence that Burgess used force or violence or fear *to take* the phone. Even viewed in the light most favorable to the State, force was used only to retain possession or overcome resistance.

Division One rejected petitioner's sufficiency challenge on the basis that "Washington follows a transactional approach to robbery." Slip Op. at 6-7 (citing State v. Handburgh, 119 Wn.2d 284, 290, 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. Id.; See RCW 9A.56.190.

But Washington's transactional approach is a non sequitur to the question of how this jury was instructed, thus Handburgh is not on point. Specifically, whether the evidence was sufficient to satisfy the statutory elements of robbery is not the issue.<sup>2</sup> The Court's sufficiency analysis under a law of the case instruction compares the evidence *to the instruction provided* rather than to the generic elements of the offense.

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<sup>2</sup> Handburgh does not deal with the law of the case argument made here. Moreover, unlike Sarkowsky, that complainant did not voluntarily turn over her property. Id., 119 Wn.2d at 286.

Reversal and dismissal are required if the evidence is insufficient to support the verdict. Hickman, 135 Wn.2d at 103.

The State effectively chose to divide the “transaction” into (1) a “taking” and (2) obtaining or retaining possession, and to require the jury to find *both* were accompanied by force or fear. This the State could not, and did not, prove. 7/25/13 RP 49-53 (Sarkowsky testimony that he gave the cell phone to Burgess voluntarily, and that no force, threatened force, violence or fear of injury was present in this taking.)

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, this Court should grant review and Burgess’s conviction should be reversed and the charge dismissed.

**2. This Court should review the important constitutional question of whether the trial court's failure to instruct on the lesser-included offense of theft in the third degree in violation of the Sixth and Fourteenth Amendment.**

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.

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. The Court of Appeals agreed. Slip op. at 9-10. This ruling was incorrect.

In the case at bar, there was affirmative evidence that Burgess did not have the phone when he and Sarkowsky scuffled. Sarkowsky did not see the phone on Burgess while in the yard. 7/25/13 RP 60. He had lost sight of Burgess between when he saw him with the phone and when they scuffled in the yard. 7/25/13 RP 92-93. Sarkowsky did not see 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 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 Burgess and no force or fear or threat was used prior to

the yard, then only theft occurred. State v. Johnson, 155 Wn.2d 609, 609-11, 121 P.3d 91 (2005) (Force used “to escape after peaceably-taken property has been abandoned” is insufficient to support a robbery.); RCW 9A.56.200; RCW 9A.56.050.

In hypothesizing that Burgess had the phone and moved it to another neighbor’s backyard after the scuffle, the Court of Appeals, like the trial court, incorrectly weighed the evidence. Slip Op. at 9; 7/26/13 RP 6-12; Fernandez-Medina, 141 Wn.2d at 455-56. Taken in the light most favorable to Burgess, there was affirmative evidence that only theft occurred.

It was for the jury to weigh the evidence and determine whether Burgess was guilty of robbery, or the lesser-included. Id. at 460. Review should be granted, the conviction must be reversed and remanded for a new trial. Id. at 462.

**3. This Court should review the important constitutional question whether the jury instruction equating proof beyond a reasonable doubt with “an abiding belief in the truth of the charges” impermissibly diluted the State’s burden, contrary to the Fourteenth Amendment’s due process clause.**

The due process clause mandates that conviction may only follow where the State meets its burden of proof beyond a reasonable doubt. Sullivan v. Louisiana, 508 U.S. 275, 278, 113 S.Ct. 2078, 124 L.Ed.2d

182 (1993); U.S. Const. amend. XIV. “It is reversible error to instruct the jury in a manner relieving the State of its burden to prove every element of a crime beyond a reasonable doubt.” State v. Bennett, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007) (citing Sullivan, 508 U.S. at 280). “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) (citations omitted). 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, 180 Wn.2d 423, 437, 326 P.3d 125 (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)).

The trial court instructed 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 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)).

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. By equating proof beyond a reasonable doubt with “belief in the truth” of the State’s charge, the court undermined Burgess’s right to be presumed innocent and diluted the State’s burden of proof.

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.

In ruling against Burgess, the Court of Appeals relied on State v. Federov, 181 Wn.App. 187, 324 P.3d 784 (2014) (holding “abiding belief” language is an accurate statement of the law. Slip. Op. at 10-11. Review should be granted and Federov overruled. Because the State was not held to the standard of proof beyond a reasonable doubt, 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.

F. CONCLUSION

For the foregoing reasons, and pursuant to RAP 13.4(b)(1), RAP 13.4(b)(3), and RAP 13.4(b)(4), this Court should grant review.

DATED this 27<sup>th</sup> day of May, 2015.

Respectfully submitted:

*/s/ Mick Woynarowski*

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STATE V. BURGESS

APPENDIX A – SLIP. OP. DATED APRIL 27, 2015

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**IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON**

STATE OF WASHINGTON,

Respondent,

v.

LEONARD WHITFIELD BURGESS III,

Appellant.

No. 70903-8-1

DIVISION ONE

UNPUBLISHED OPINION

FILED: April 27, 2015

LEACH, J. — Leonard Burgess appeals his conviction for robbery in the first degree. He argues that because he did not use force in his initial taking of a cell phone, the State failed to prove an essential element of the charged offense. He also contends that the trial court committed instructional errors and requests correction of a scrivener's error in his judgment and sentence. We remand for correction of the judgment and sentence with instructions to add the second alternative means of committing robbery in the first degree. But sufficient evidence supports the conviction, no evidence supports Burgess's proposed lesser included instruction, and the pattern reasonable doubt instruction did not dilute the State's burden or mischaracterize the jury's role. We affirm Burgess's conviction.

### Background

In February 2013 at about 3:00 a.m., airport shuttle van driver Paul Sarkowsky sat in his van in a Safeway parking lot, waiting for a passenger. A man, later identified as Burgess, approached him and asked to use his cell phone. At first, Sarkowsky refused, but after further conversation, he agreed to let him use the phone. Sarkowsky dialed the number Burgess wished to call, handed him the phone, and turned his attention away to allow Burgess privacy. At that point, Burgess ran away with the phone. Sarkowsky chased him.

Burgess ran from the parking lot onto a street and ended up in the backyard of a house occupied by Maria Litvinenko. Sarkowsky followed Burgess into the yard. Burgess pulled out a knife and told Sarkowsky to back off. Sarkowsky told him he just wanted his phone back. The two scuffled, and Sarkowsky sustained slash wounds on his finger and chest.

Awakened by the scuffle, Litvinenko came out onto her porch and saw the two men. Sarkowsky told her to call the police, then backed out of the yard, followed by Burgess. Once Burgess left Litvinenko's yard, he ran north. Sarkowsky waited for the police.

After 15 to 20 minutes searching the area with the aid of a police dog, officers found Burgess several blocks away, under a truck in the backyard of a home. Burgess did not have either the cell phone or a knife, and officers did not find either item during their search. Sarkowsky identified Burgess as the man

who took his phone. Sarkowsky was taken to a hospital, where he received stitches in his finger and chest.

Several hours later, Sarkowsky returned to the area with his wife and used her cell phone to locate his phone. They found it between the tire of a car and the curb on the street north of Litvinenko's home.

The State charged Burgess with robbery in the first degree with a deadly weapon enhancement. The trial court rejected the defense's proposed jury instruction on the lesser included offense of theft in the third degree. The court also rejected defense's proposed reasonable doubt instruction, which omitted the optional sentence in the pattern instruction that describes "beyond a reasonable doubt" as having "an abiding belief in the truth of the charge."

The jury convicted Burgess of robbery in the first degree but did not find that he was armed with a deadly weapon. Burgess appeals.

#### Analysis

First, Burgess contends that his conviction violated his due process rights because the State failed to prove an essential element of the crime as charged: that his taking of Sarkowsky's cell phone was by the use or the threat of force.

The State must prove every element of a charged crime beyond a reasonable doubt.<sup>1</sup> Jury instructions "must make the relevant legal standard

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<sup>1</sup> In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).

manifestly apparent to the average juror.”<sup>2</sup> A jury instruction not objected to becomes the law of the case.<sup>3</sup> And the State assumes the burden of proving each element in a to-convict instruction, even where an element increases the State’s burden.<sup>4</sup> The presentation of evidence and argument at trial, together with the totality of the court’s instructions, may reduce the possibility that the jury misconstrued its instructions.<sup>5</sup>

When reviewing a challenge to the sufficiency of the evidence, we view the evidence in the light most favorable to the prosecution and ask whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.<sup>6</sup> We draw all reasonable inferences from the evidence in favor of the State.<sup>7</sup> A defendant challenging the sufficiency of the evidence “admits the truth of the State’s evidence.”<sup>8</sup> We do not review credibility determinations, which are for the trier of fact.<sup>9</sup> Thus, we defer to the jury on

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<sup>2</sup> State v. Borsheim, 140 Wn. App. 357, 366, 165 P.3d 417 (2007) (internal quotation marks omitted) (quoting State v. Watkins, 136 Wn. App. 240, 241, 148 P.3d 1112 (2006)).

<sup>3</sup> State v. Witherspoon, 180 Wn.2d 875, 884, 329 P.3d 888 (2014) (citing State v. Willis, 153 Wn.2d 366, 374, 103 P.3d 1213 (2005)).

<sup>4</sup> Witherspoon, 180 Wn.2d at 884.

<sup>5</sup> See State v. Corbett, 158 Wn. App. 576, 592-93, 242 P.3d 52 (2010) (totality of instructions, evidence, and arguments made it clear that jury had to find separate and distinct acts for each of the guilty verdicts).

<sup>6</sup> State v. Hosier, 157 Wn.2d 1, 8, 133 P.3d 936 (2006).

<sup>7</sup> Hosier, 157 Wn.2d at 8.

<sup>8</sup> State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

<sup>9</sup> State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

issues of conflicting testimony, witness credibility, and persuasiveness of the evidence.<sup>10</sup>

The to-convict instruction required the State to prove six elements of robbery in the first degree 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.

This instruction incorporated the terms of RCW 9A.56.190, which defines the crime of robbery:

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.<sup>11</sup>

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<sup>10</sup> In re Pers. Restraint of Martinez, 171 Wn.2d 354, 364, 256 P.3d 277 (2011).

<sup>11</sup> The final sentence of this provision, not at issue here, reads, "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."

Burgess argues that because it is undisputed that Sarkowsky willingly handed him his phone, the State did not prove the third element of the to-convict instruction: 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.”

We disagree. Washington courts have adopted a “transactional” view of robbery “that does not consider the robbery complete until the assailant has effected his escape.”<sup>12</sup> RCW 9A.56.190’s definition of robbery reflects this transactional view. The taking described in the statute’s first sentence, which must be accomplished by force, extends to obtaining and to retaining possession of another person’s property as well as to preventing or overcoming resistance to the taking.

State v. Handburgh,<sup>13</sup> in which our Supreme Court analyzed and adopted this transactional view, involved a juvenile defendant who took the victim’s bicycle in her absence. The defendant argued that because he did not take the victim’s bicycle “in her presence,” the State could not prove every element of robbery.<sup>14</sup> Our Supreme Court concluded, however, that evidence of the defendant’s subsequent use of force to retain possession and overcome the victim’s resistance to the taking was sufficient to support a conviction for robbery. The court held that “the force necessary to support a robbery conviction need not

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<sup>12</sup> State v. Handburgh, 119 Wn.2d 284, 290, 830 P.2d 641 (1992) (quoting State v. Manchester, 57 Wn. App. 765, 770, 790 P.2d 217 (1990)).

<sup>13</sup> 119 Wn.2d 284, 285-86, 830 P.2d 641 (1992).

<sup>14</sup> Handburgh, 119 Wn.2d at 287.



be used in the initial acquisition of the property. Rather, the retention, via force against the property owner, of property initially taken peaceably or outside the presence of the property owner, is robbery.”<sup>15</sup>

Here, after fleeing with Sarkowsky's phone, Burgess overcame Sarkowsky's resistance to the taking by slashing him with a knife. The court's instructions informed the jury that to convict Burgess of robbery in the first degree, jurors needed to find that Burgess used or threatened to use “immediate force, violence or fear of injury” and that this force or fear could be “used by the defendant to obtain or retain possession of the property [or] to prevent or overcome resistance to the taking.” Under Washington law, “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.”<sup>16</sup> Under this transactional view, the State did not assume the separate burden of proving that Burgess used force in the initial taking. Here, as in Handburgh, in light of the evidence, argument, and the instructions as a whole, the State presented sufficient evidence for the jury to find that Burgess used force to retain possession of Sarkowsky's property.

Next, Burgess contends that the trial court erred by rejecting his proposed instruction on the lesser included offense of theft in the third degree. He argues

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<sup>15</sup> Handburgh, 119 Wn.2d at 293.

<sup>16</sup> Handburgh, 119 Wn.2d at 288 (citing Manchester, 57 Wn. App. at 769).

that “affirmative evidence showed Mr. Burgess no longer had the stolen phone when force or fear was used.”

A defendant “may be found guilty of an offense the commission of which is necessarily included within that with which he or she is charged in the indictment or information.”<sup>17</sup> We review de novo a challenge to jury instructions based on an error of law.<sup>18</sup> But where the trial court rejects an instruction based on the facts of the case, we review the court’s decision for abuse of discretion.<sup>19</sup>

A defendant is entitled to an instruction on a lesser included offense where (1) each element of the lesser offense is a necessary element of the charged offense (the legal prong) and (2) the evidence in the case supports an inference that only the lesser crime was committed (the factual prong).<sup>20</sup> The included offense must arise from the same act or transaction alleged in the charged offense.<sup>21</sup> When applying the factual prong of the two-part test, we view the evidence in the light most favorable to the party requesting the instruction.<sup>22</sup> But 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.”<sup>23</sup>

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<sup>17</sup> RCW 10.61.006.

<sup>18</sup> State v. Clausing, 147 Wn.2d 620, 626-27, 56 P.3d 550 (2002); State v. Hunter, 152 Wn. App. 30, 43, 216 P.3d 421 (2009).

<sup>19</sup> Hunter, 152 Wn. App. at 43.

<sup>20</sup> State v. Huyen Bich 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. Fernandez-Medina, 141 Wn.2d 448, 455, 6 P.3d 1150 (2000).

<sup>21</sup> Huyen Bich Nguyen, 165 Wn.2d at 435 (citing State v. Porter, 150 Wn.2d 732, 738-40, 82 P.3d 234 (2004)).

<sup>22</sup> Fernandez-Medina, 141 Wn.2d at 455-56.

<sup>23</sup> Fernandez-Medina, 141 Wn.2d at 456.

Here, the parties agree that theft is necessarily included in the crime of robbery, satisfying the legal prong of the test. Both the charged offense and the proposed lesser included offense instruction involve the same act or transaction. Burgess contends that his case also satisfies the factual prong because "there was affirmative evidence that Mr. Burgess had abandoned the phone before he reached the yard in which he and Mr. Sarkowsky scuffled."

We disagree. The evidence supports exactly the opposite inference: that Burgess did not abandon the phone until after his confrontation with Sarkowsky. Sarkowsky testified that he saw the phone in Burgess's hand as he fled the Safeway parking lot and that although he saw Burgess drop other items, he did not see him drop the phone during the chase. Sarkowsky also testified that when he asked Burgess why he wanted the phone, Burgess said he wanted it for money. Sarkowsky stated that Burgess told him to "back off" but did not tell him he no longer had the phone. Finally, Sarkowsky and his wife found the phone later that morning in a location north of Maria Litvinenko's backyard, in the direction Burgess fled after his confrontation with Sarkowsky. This strongly suggests that Burgess did not abandon the phone until after he used force against Sarkowsky to retain possession of it.

The evidence does not support an inference that Burgess committed only the lesser included offense of theft in the third degree. The trial court did not abuse its discretion by rejecting Burgess's proposed instruction.

Burgess also challenges the trial court's reasonable doubt instruction. He contends that the court erred by instructing the jury that "[i]f, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt."<sup>24</sup> Burgess argues, "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." Burgess analogizes to State v. Emery,<sup>25</sup> in which our Supreme Court held that the prosecutor's statement during closing argument that the jury's job was to "speak the truth" mischaracterized the jury's role. Burgess argues, "The 'belief in the truth' language encourages the jury to undertake an impermissible search for the truth and invites the error identified in Emery."

In State v. Federoy,<sup>26</sup> however, we recently rejected exactly this argument. Unlike the prosecutor's improper argument in Emery, the "abiding belief" language in the pattern instruction did not tell the jury that its job was to "speak the truth" or otherwise misadvise the jury about its role. Nor did it dilute the State's burden of proof. "Here, read in context, the 'belief in the truth' phrase accurately informs the jury its "job is to determine whether the State has proved the charged offenses beyond a reasonable doubt."<sup>27</sup> The instruction accurately

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<sup>24</sup> The trial court used 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 4.01, at 85 (3d ed. 2008), which includes the optional "abiding belief" language.

<sup>25</sup> 174 Wn.2d 741, 760, 278 P.3d 653 (2012).

<sup>26</sup> 181 Wn. App. 187, 199-200, 324 P.3d 784, review denied, 181 Wn.2d 1009 (2014).

<sup>27</sup> Federoy, 181 Wn. App. at 200 (quoting Emery, 174 Wn.2d at 760).

stated the law, and the trial court did not err in rejecting Burgess's proposed instruction that would have omitted the "abiding belief" language.

Finally, Burgess requests the correction of a scrivener's error in his judgment and sentence. The State charged Burgess with robbery in the first degree based on two alternative means. The jury could find Burgess committed the crime "when in the commission of a robbery or in immediate flight therefrom he or she is armed with a deadly weapon or inflicts bodily injury." The court's verdict form did not require that the jury specify under which alternative means it convicted Burgess. The judgment and sentence, however, includes only the deadly weapon alternative, RCW 9A.56.200(1)(a)(i). It does not include any reference to RCW 9A.56.200(1)(a)(iii), the bodily injury alternative.

To remedy a scrivener's error in a judgment and sentence that did not prejudice the defendant, we remand to the trial court for correction.<sup>28</sup> Although the State contends that "the error [Burgess] complains of is not an error," it "does not object to remand to correct this omission." We remand to the trial court with instructions to correct the judgment and sentence by adding RCW 9A.56.200(1)(a)(iii), the second alternative means of conviction for robbery in the first degree.

#### Conclusion

Because the evidence supports Burgess's conviction, but not Burgess's proposed lesser included offense instruction, and the court's reasonable doubt

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<sup>28</sup> State v. Moten, 95 Wn. App. 927, 929, 934-35, 976 P.2d 1286 (1999).

instruction did not misadvise the jury or dilute the State's burden of proof, we affirm. We remand to the trial court with instructions to correct a scrivener's error in Burgess's judgment and sentence by adding RCW 9A.56.200(1)(a)(iii), the "bodily injury" means of conviction for robbery in the first degree.

Seach, J.

WE CONCUR:

Appelwick, J.

Cox, J.

STATE V. BURGESS

APPENDIX B – “TO CONVICT” INSTRUCTION, CP 56-57.

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



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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.

### DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 70903-8-1**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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Date: May 27, 2015