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Supreme Court No. ________

(Court of Appeals No. 74927-7-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DARIN GATSON,

Petitioner.

PETITION FOR REVIEW

LILA J. SILVERSTEIN
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711
lila@washapp.org

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A. <u>IDENTITY OF PETITIONER AND DECISION BELOW</u>

Darin Gatson, through his attorney, Lila J. Silverstein, asks this Court to review the opinion of the Court of Appeals in *State v. Gatson*, No. 74927-7-I (Slip Op. filed October 30, 2017). A copy of the opinion is attached as Appendix A.

The Court of Appeals affirmed the denial of a jury instruction on a lesser-included offense, construing the word "inflict" in the relevant statute to have the same meaning as the phrase "proximately cause" used in another statute. The court agreed with Mr. Gatson that the prosecutor repeatedly committed misconduct, but held the misconduct was harmless even though the evidence on the disputed element was weak.

B. <u>ISSUES PRESENTED FOR REVIEW</u>

1. Did the trial court err in refusing to instruct the jury on the lesser-included offense of theft, where the evidence viewed in the light most favorable to Mr. Gatson showed Mr. Gatson did not inflict bodily injury and instead Mr. Asheim scraped himself by falling down the stairs? And did the Court of Appeals err in affirming on the basis that Mr. Gatson was a "proximate cause" of the injury, where the relevant statute uses the word "inflict?" RAP 13.4(b)(4).

2. The Court of Appeals held the prosecutor committed misconduct in closing argument when he repeatedly made the false statement that a

bystander saw Mr. Gatson strike Mr. Asheim with a weapon. Was this misconduct prejudicial, where the evidence on the disputed element ("inflict injury") was weak, and where the trial court improperly overruled Mr. Gatson's objection to the misconduct in front of the jury? RAP 13.4(b)(4).

3. Did the prosecutor also commit misconduct when he discussed a hypothetical victim lying on the ground with a knife wound to the neck, and trivialized the burden of proof by saying it was satisfied all the time in courtrooms everywhere? RAP 13.4(b)(4).

4. Did the trial court err in giving the "expert witness" jury instruction where no expert opinion testimony was admitted? RAP 13.4(b)(4).

C. STATEMENT OF THE CASE

Darin Gatson went into the Macy's store in Bellevue Square Mall, picked up some shirts, put them in a bag, and walked out without paying. RP 476-80. Store security guard Alexander Asheim, who was wearing a badge and radio on his belt, followed Mr. Gatson outside. RP 534-36, 550-51, 638, 643; ex. 19. As Mr. Gatson went up some steps, Mr. Asheim ran up behind him and yelled at him to turn over the merchandise. Mr. Gatson refused. RP 551-54.

Mr. Asheim grabbed Mr. Gatson. RP 551. Mr. Gatson made a "thrusting" motion toward Mr. Asheim. RP 554. Mr. Asheim pushed Mr. Gatson, and as he was pushing off he fell down the stairs against a knobbed railing. RP 554, 588-89; exs. 13, 14. At first Mr. Asheim thought he had been stabbed with a knife, but he later admitted he did not see a weapon and that his abdomen had only been scraped and bruised. RP 486, 554, 563-64; ex. 19.

The State charged Mr. Gatson with robbery in the first degree, alleging that he committed robbery with a deadly weapon or what appeared to be a deadly weapon, and inflicted bodily injury. CP 1. After the close of evidence at trial, the State withdrew the deadly weapon alternatives for insufficient evidence, and alleged only that Mr. Gatson committed first degree robbery by infliction of bodily injury. RP 856; CP 111.

Mr. Gatson asked the court to instruct the jury on the lesser-included offense of third-degree theft, but the court denied the motion. RP 874-92. Although no expert opinion testimony had been admitted, the court gave the expert witness jury instruction over Mr. Gatson's objection. RP 895-96; CP 109. During the prosecutor's closing argument, the court overruled all three of Mr. Gatson's objections to prosecutorial misconduct. RP 923, 950-52.

The jury found Mr. Gatson guilty, and the court imposed a sentence of 129 months in prison. CP 120, 253.

The Court of Appeals held the trial court properly declined to instruct the jury on the lesser-included offense of theft. It acknowledged that the first-degree robbery statute requires proof that the defendant "inflicts bodily injury," RCW 9A.56.200(1)(a)(iii), and that the security guard "was injured by falling down stairs as he was pursuing appellant for shoplifting from a department store." Slip Op. at 1. But it held an instruction on a lesser-included offense was inappropriate because "appellant's conduct was a *proximate cause* of the guard's fall …." *Id.* (emphasis added). Because it assumed proof of proximate cause was enough for first-degree robbery, the Court of Appeals held "a jury could not find theft to the exclusion of [first-degree] robbery." *Id.*

The Court of Appeals agreed with Mr. Gatson that the prosecutor repeatedly committed misconduct by falsely claiming a bystander saw Mr. Gatson strike the guard with a weapon. Slip Op. at 9-10. But it held the misconduct was harmless because the State had withdrawn the deadly weapon allegation. The court did not analyze the effect on the "inflict injury" element and did not address the prejudice caused by the trial court's improper overruling of Mr. Gatson's objection in front of the jury. Slip Op. at 9-10.

The court rejected Mr. Gatson's arguments that the State also committed misconduct by invoking inflammatory imagery outside the evidence and by trivializing the beyond-a-reasonable-doubt standard as a standard that is satisfied in courtrooms all the time everywhere. Slip Op. at 10-12. Finally, the court rejected Mr. Gatson's argument that the trial court improperly gave the "expert witness" instruction where no expert testified. Slip Op. at 8-9.

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. This Court should grant review because, in denying the lesser-included offense instruction, the lower courts wrongly read the word "inflict" out of the first-degree robbery statute.

a. A defendant is entitled to have the jury instructed on a lesser-included offense if the evidence supports an inference that only the lesser crime was committed.

At common law, a jury was permitted to find a defendant guilty of a lesser offense necessarily included in the offense charged. *State v. Berlin*, 133 Wn.2d 541, 544, 947 P.2d 700 (1997) (citing *Beck v. Alabama,* 447 U.S. 625, 633, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980)). This rule benefitted defendants and prosecutors alike. *Id.* Washington codified the common-law rule at RCW 10.61.006, which provides, "In all other cases 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."

A trial court must grant a request to instruct the jury on a lesser-included offense if: (1) each of the elements of the lesser offense is a necessary element of the offense charged; and (2) the evidence in the case supports an inference that only the lesser crime was committed. *Berlin*, 133 Wn.2d at 546 (citing *State v. Workman*, 90 Wn.2d 443, 584 P.2d 382 (1978)). "When determining if the evidence at trial was sufficient to support the giving of an instruction, the appellate court is to view the supporting evidence in the light most favorable to the party that requested the instruction." *State v. Fernandez-Medina*, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000).

Giving juries the option of convicting a defendant of a lesser offense "is crucial to the integrity of our criminal justice system because when defendants are charged with only one crime, juries must either convict them of that crime or let them go free." *State v. Henderson*, 182 Wn.2d 734, 736, 344 P.3d 1207 (2015). The failure to instruct on a lesser-included offense creates a risk that the jury will find the defendant guilty despite having reasonable doubts. *Id.*

> As Justice William Brennan explained, "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.*" *Keeble v. United States,* 412 U.S. 205, 212–13, 93 S.Ct. 1993, 36 L.Ed.2d 844 (1973) (second emphasis added). To minimize that risk, we err on the side of instructing juries on lesser included offenses.

Henderson, 182 Wn.2d at 736 (emphases in original).

b. The evidence supports an inference that Mr. Gatson did not inflict injury, but the lower courts denied the instruction on the grounds that Mr. Gatson was a "proximate cause" of the injury.

Here, the trial court did not follow the rule that "we err on the side of instructing juries on lesser included offenses." *Henderson*, 182 Wn.2d at 736. It acknowledged that the issue was "a close call," yet declined to give the instruction. RP 889-91.

The parties and court agreed that the legal prong of the *Workman* test was satisfied, because each of the elements of theft is a necessary element of robbery. RP 857; *see State v. Herrera*, 95 Wn. App. 328, 330 n.1, 977 P.2d 12, 13 (1999) ("third degree theft is a lesser included offense of first degree robbery."); *see also* RCW 9A.56.190 (robbery definition); RCW 9A.56.200(1)(a)(iii) (first-degree robbery); RCW 9A.56.020(1)(a) (theft definition) RCW 9A.56.050 (third-degree theft). But the court ruled the factual prong was not satisfied.

Mr. Gatson argued that viewing the evidence in the light most favorable to the defense, a rational juror could find he did not inflict

bodily injury and therefore was not guilty of first-degree robbery. RP 875-78. The evidence showed Mr. Asheim was not cut but was only scraped and bruised. RP 558, 563, 638; ex. 19. The scrape was on his abdomen in the area where his radio hung on his belt, and the bruise was behind his badge. RP 563, 638; ex. 19. He fell down stairs against a railing with bolts protruding from it. RP 554, 588-89; Exs. 13, 14. Thus, he may well have sustained these injuries falling down the stairs against the knobbed railing, with the pressure of the radio and the badge against his skin. RP 875-78; *see* RP 554 (Mr. Asheim testifies on direct examination, "I pushed back as hard as I could and basically fell down the stairs"); exs. 5 (bs14-673-1.avi), 13, 14 15, 19. Indeed, the Court of Appeals concluded that Mr. Asheim "was injured by falling down stairs as he was pursuing appellant for shoplifting from a department store." Slip Op. at 1.

The trial court initially agreed that the evidence warranted the instruction on the lesser-included offense. RP 883. But the State protested and the court reversed itself. RP 884-92. The court claimed that even if Mr. Gatson did not inflict the scrape and bruise, Mr. Asheim fell down the stairs as a result of their scuffle and therefore any injuries he obtained were caused by Mr. Gatson. RP 890. The Court of Appeals endorsed this rationale, stating, "[the] uncontroverted evidence establishes a direct

causal link between Gatson's conduct and the guard's injuries; without Gatson's conduct, the guard would not have been injured." Slip Op. at 5.

c. The lower courts violated principles of statutory construction by reading the word "inflict" out of the statute and replacing it with "proximately cause" .

The courts' reasoning was wrong as a matter of statutory construction. As Mr. Gatson noted in the trial court, whether the encounter was a "cause" of Mr. Asheim's injuries was not the issue. RP 879-80, 891. The first-degree robbery statute requires the State to prove the defendant *inflicted* the injury. RCW 9A.56.200(1)(a)(iii) ("(1) A person is guilty of robbery in the first degree if: (a) In the commission of a robbery or of immediate flight therefrom, he or she … (iii) Inflicts bodily injury").

In rejecting the instruction, the trial court and Court of Appeals relied on *State v. Decker*, 127 Wn. App. 427, 111 P.3d 286 (2005). Slip Op. at 4-5; RP 882-83. There, the court held sufficient evidence supported the "inflicts injury" element of a first-degree robbery conviction, but in so doing the court imported the "proximate cause" standard from a case interpreting the *vehicular homicide* statute. *See Decker*, 127 Wn. App. at 432 (citing *State v. Rivas*, 126 Wn.2d 443, 453, 896 P.2d 57 (1995)). That statute makes a driver criminally liable for "injury *proximately caused* by the driving of any vehicle by any person." *Id.* at 451 (citing RCW 46.61.520 (1991)) (emphasis added). But as Mr. Gatson noted, the

legislature's decision to use the word "inflict" in the robbery statute instead of "proximately caused" must be given effect. RP 881; *see State v. Conover,* 183 Wn.2d 706, 711, 355 P.3d 1093 (2015) (giving effect to difference in language between drug zone enhancement statute and firearm enhancement statute); *State v. Delgado,* 148 Wn.2d 723, 728, 63 P.3d 792 (2003) (giving effect to difference in language between two-strike statute and three-strike statute). "Clearly, the legislature's choice of different language indicates a different legislative intent." *Conover*,183 Wn.2d at 713 (citing *State v. Roberts*, 117 Wn.2d 576, 586, 817 P.2d 855 (1991)).

"Inflict" means "to impose as something that must be borne or suffered." http://www.dictionary.com/browse/inflict. "Cause" means "to be the cause of; bring about." http://www.dictionary.com/browse/cause. A cause is "the producer of an effect." *Id.* Thus, "inflict" is a narrower, more active verb, while "cause" is broader and more passive. Viewing the evidence in the light most favorable to Mr. Gatson, he did not *inflict* bodily injury even if he was a *proximate cause* of the injury. *See* RP 554 (Mr. Asheim testifies, "I pushed back as hard as I could and basically fell down the stairs"). The Court of Appeals thus erred in affirming on the basis that Mr. Gatson's conduct "was a proximate cause of the guard's fall." Slip Op. at 1.

Finally, even if the legislature had used the word "cause," this Court recently clarified that "proximate cause" in the criminal context is narrower than in tort law. *See State v. Bauer*, 180 Wn.2d 929, 329 P.3d 67 (2014); RP 880 (citing *Bauer*). Because the consequences of a criminal conviction are "more drastic" than civil liability, "a closer relationship between the result achieved and that intended or hazarded should be required." *Id.* at 936-37 (citing 1 Wayne R. LaFave, Substantive Criminal Law § 6.4(c), at 472 (2d ed. 2003)). *Decker* relied on the definition applicable for civil liability, and for that reason, too, it is inapposite. *See Decker*, 127 Wn. App. at 432-33 (citing, inter alia, W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 44, at 301 (5th ed. 1984)).

In light of *Bauer*'s narrowing of the definition of "cause," the trial court erred in denying the instruction on the basis that although Mr. Asheim "could have injured himself by falling down," the injury "did follow the encounter with Mr. Gatson making some type of a motion." RP 889-90.

More importantly, the trial court and Court of Appeals erred in reading the word "inflicts" out of the first-degree robbery statute and replacing it with the phrase "proximately caused." Slip Op. at 1, 4-5. This Court should grant review. RAP 13.4(b)(4).

2. This Court should grant review because prosecutorial misconduct deprived Mr. Gatson of a fair trial.

This Court should also grant review of the prosecutorial misconduct issue. Unlike in many cases, defense counsel in this case objected to every instance of misconduct in the trial court. But instead of curing the errors, the trial court exacerbated the problem by overruling the objections and lending "an aura of legitimacy to what was otherwise improper argument." *State v. Allen*, 182 Wn.2d 364, 341 P.3d 268, 275 (2015).

a. The prosecutor falsely claimed – repeatedly and over objection – that a neutral eyewitness saw Mr. Gatson strike Mr. Asheim with a weapon.

The prosecutor first committed misconduct by claiming bystander Melissa Thompson "saw the defendant striking Alexander Asheim with a weapon." RP 923. Defense counsel immediately objected on the basis that the claim misstated the evidence, but the court overruled the objection. The prosecutor then repeated the false statement: "We now know what she saw. What she was seeing was the defendant striking Alexander Asheim with a weapon. So, corroboration matters because it's not just what Alexander Asheim is saying, it's that it's backed up by other people, which means that his testimony is credible." RP 923.

Melissa Thompson did not see Mr. Gatson strike Alexander Asheim with a weapon, and the prosecutor's mischaracterization of her testimony was unethical. *See* RP 626-44.[1] The Court of Appeals agreed that the prosecutor's mischaracterizations of the evidence constituted misconduct and that "[t]he defense objection was well taken." Slip Op. at 9.

The Court of Appeals ruled the misconduct was "not prejudicial" because the State had withdrawn the deadly-weapon alternative and "[t]he trial court gave the jury the usual instruction that argument is not evidence." Slip Op. at 10. But as to the first claim, it is irrelevant that the deadly-weapon alternative was withdrawn. The evidence on the "inflicts injury" element was weak, so the prosecutor's false assertions that a bystander saw Mr. Gatson strike Mr. Asheim with a weapon were prejudicial as to *that* element.

And as to the second claim, the standard instruction does not diminish the prejudice. In *every* case in which a court reverses for prosecutorial misconduct, the trial court has provided the standard jury instructions. *See* WPIC 1.02. These instructions cannot cure the prejudice

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[1] Ms. Thompson said, "I didn't know exactly what was going on, but it just seemed like a crowd had kind of gathered together, and I couldn't tell if it were friends goofing off or if something more serious had happened." RP 628-29. When the prosecutor followed up she said, "Yeah. It was like a crowd of people kinda gathered around – people spectating I guess. And I couldn't see from where I was what was happening." RP 629.

that accrues when an officer of the State – whom juries find presumptively credible – mischaracterizes the evidence and the law. *E.g. State v. Walker,* 182 Wn.2d 463, 480-81, 341 P.3d 976 (2015) (reversing for misconduct even though standard instructions given); *State v. Lindsay,* 180 Wn.2d 423, 443, 326 P.3d 125 (2014) (same); *In re the Personal Restraint of Glasmann*, 175 Wn.2d 696, 699, 286 P.3d 673 (2012) (same). As these cases demonstrate, the State cannot commit misconduct and then hide behind a single sentence roughly two-thirds of the way through a 13-paragraph introductory instruction.

Furthermore, the prejudice in this case is even worse than in the typical case, because the trial court wrongly overruled defense counsel's objections to the misconduct. Thus, the court essentially instructed the jury that the prosecutor's statements were *proper*, thereby exacerbating the harm. *Allen*, 182 Wn.2d at 378. The Court of Appeals wrongly dismissed this serious misconduct as harmless.

b. <u>The prosecutor invoked inflammatory imagery by discussing hypothetical injuries not sustained in this case, and he trivialized the burden of proof by dismissing it as a burden that is satisfied all the time in courtrooms everywhere</u>.

The prosecutor also committed misconduct in rebuttal, and Mr. Gatson again objected to these instances of misconduct but the trial court overruled the objections. The Court of Appeals disagreed that the

prosecutor's statements in rebuttal were improper, but this Court should review that ruling. The manner in which the prosecutor trivialized the burden of proof is likely to be repeated absent this court's intervention.

The first instance of misconduct in rebuttal was less serious, but should still be reviewed because it was part of a pattern of misconduct. The prosecutor inflamed the passions of the jury by stating, "Defense counsel said, 'It wasn't much of an injury.' And she's right, there wasn't a knife wound in his throat as he's laying there bleeding out." RP 950. The Court of Appeals ruled this statement "was within the bounds of a proper response to the defense argument." Slip Op. at 10. But the prosecutor could have responded to the defense argument by explaining that the "inflict injury" element does not require a particular level of harm. There was no need to invoke inflammatory imagery, and doing so merely served to "distract the jury from its proper function as a rational decision-maker." *Walker*, 182 Wn.2d at 479.

The prosecutor's more significant violation in rebuttal closing argument was his trivialization of the burden of proof and the jury's role. He said:

> Defense counsel stood up here and talked at length about the burden of proof, beyond a reasonable doubt. **That burden of proof is the exact same burden of proof that is used across the hall, down the hall, in every courtroom on this floor, on every courtroom on the**

> **lower floors, the upper floors, in every courtroom in the state of Washington, in every courtroom across the nation; and it's the exact same standard that has been used since the time our country began**. It's the same standard.

RP 952 (emphasis added). As with the other misconduct, the trial court overruled Mr. Gatson's objections. RP 952.

The Court of Appeals held the prosecutor's statement was a proper "response to defense counsel's explanation of the reasonable doubt standard as 'the highest burden of proof in our legal system' and the State's 'awesome burden of proof.'" Slip Op. at 12-13.

This Court should review this ruling and reverse. The clear message the prosecutor conveyed was that the burden of proof is not that big a deal because people find criminal defendants guilty under this standard all the time all over the country. The implication was, "Don't worry, everyone does it, and you can, too." This message improperly trivialized the burden of proof and the jury's role. *See Lindsay*, 180 Wn.2d at 436.

In sum, the prosecutor committed misconduct by repeatedly mischaracterizing critical facts, invoking inflammatory imagery, and trivializing the burden of proof and the jury's role. The trial court wrongly overruled the objections in front of the jury, and the Court of Appeals erroneously dismissed serious misconduct as harmless and failed to

recognize other improper comments. Mr. Gatson was deprived of his right to a fair trial, and this Court should grant review. RAP 13.4(b)(4).

3. This Court should grant review because the trial court gave the "expert witness" instruction but no expert opinion testimony was admitted.

Finally, this Court should grant review because the trial court improperly gave the jury the "expert witness" instruction (WPIC 16.51).

No expert opinion testimony was admitted. *See* RP 690-701 (court refuses to qualify Sergeant Riener as an expert). Yet the court provided this instruction over Mr. Gatson's objection. RP 860-61, 895-96; CP 109.

The court hypothesized that because Detective Robinson and the other police officers have special training, the instruction was appropriate. RP 861. Defense counsel objected:

> Given that the only witnesses with special training were police officers who were fact witnesses and not actually utilized as experts, I think this instruction risks giving their roles undue importance. They simply did not testify as experts, and I think that police officers already enjoy a status that civilian witnesses do not, and I'm afraid that this instruction adds more to that status.

RP 895-96.

In the trial court, the prosecutor stated he would not object to the removal of the instruction from the packet. RP 896. And on appeal, the State appeared to agree that the giving of the instruction was error because

there was no expert opinion testimony. Br. of Respondent at 25-29. The State's only argument was that the error was not prejudicial. *Id.*

Contrary to the State's implicit concession and Mr. Gatson's argument, the Court of Appeals held that it was not error to give the expert witness instruction even where no witnesses were qualified as experts. Slip Op. at 8-9. This ruling makes little sense, and this Court's guidance on the issue would be helpful in future cases. RAP 13.4(b)(4).

E. CONCLUSION

This Court should grant review because the trial court and Court of Appeals violated settled principles of statutory construction by replacing the word "inflicts" in the relevant statute with the phrase "proximately causes" from another statute. This Court should also grant review of the prosecutorial misconduct and instructional issues.

Respectfully submitted this 27th day of November, 2017.

/s Lila J. Silverstein
Lila J. Silverstein
WSBA #38394
Attorney for Petitioner

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	No. 74927-7-I
Respondent,	)	DIVISION ONE
v.	)	
DARIN JEROME GATSON,	)	UNPUBLISHED OPINION
Appellant.	)	FILED: October 30, 2017

BECKER, J. — A security guard was injured by falling down stairs as he was pursuing appellant for shoplifting from a department store. Appellant was convicted of first degree robbery by inflicting bodily injury. He contends he was entitled to an instruction on theft as a lesser included offense. Given the uncontroverted evidence that appellant's conduct was a proximate cause of the guard's fall, the trial court properly concluded a jury could not find theft to the exclusion of robbery. We reject other assignments of error and affirm the conviction.

FACTS

Gatson stole clothing from a department store on October 4, 2014. A security guard who observed the theft followed Gatson as he left the store. Gatson started running, and the guard gave chase. The guard caught up to

Gatson on a staircase and grabbed him. The guard testified that at the top of the staircase, Gatson "spun around real quick" and "made a thrusting motion real hard" toward the guard's stomach. The guard felt something strike him. He "pushed back" at Gatson and then fell down the stairs. Gatson ran away. The guard sustained a cut and bruise on his stomach and an ankle injury. He told police he had been stabbed with a knife.

Gatson was arrested and charged with first degree robbery. First degree robbery requires a showing that the defendant used a deadly weapon, was armed with a deadly weapon, or inflicted bodily injury. RCW 9A.56.200. The information alleged that Gatson was armed with a deadly weapon—"a sharp, bladed instrument"—and that he inflicted bodily injury.

The defense position at trial was that Gatson committed theft, not robbery. Gatson did not testify. The guard testified that although he originally believed Gatson stabbed him with a knife, he did not actually see whether Gatson was holding anything when he made the thrusting motion. Accordingly, the prosecutor announced that the State would seek conviction only on the "inflicted bodily injury" prong of first degree robbery.

The jury returned a guilty verdict. Gatson received a 129-month sentence. He appeals from the judgment and sentence.

THEFT AS A LESSER INCLUDED OFFENSE

Gatson requested an instruction on third degree theft as a lesser included offense. He assigns error to the trial court's refusal of this request.

An instruction on a lesser offense is warranted when (1) each of the elements of the lesser offense are necessary elements of the offense charged (the legal prong) and (2) the record, viewed in the defendant's favor, supports an inference that the lesser crime was committed (the factual prong). State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978); see also RCW 10.61.006. If a jury could rationally find a defendant guilty of the lesser offense and not the greater offense, the jury must be instructed on the lesser offense. State v. Henderson, 182 Wn.2d 734, 736, 344 P.3d 1207 (2015).

Here, as in the trial court, the parties agree that the legal prong is satisfied. The elements of third degree theft are necessary elements of first degree robbery. State v. Herrera, 95 Wn. App. 328, 330 n.1, 977 P.2d 12 (1999). Gatson contends the factual prong of the Workman test was also satisfied.

A person commits theft when he wrongfully obtains or exerts unauthorized control over another's property or services, or the value thereof, with intent to deprive the victim of the property or services. RCW 9A.56.020(1)(a); see also RCW 9A.56.050. A person commits robbery when he "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." RCW 9A.56.190. First degree robbery, unlike theft, requires proof that the defendant inflicted bodily injury (among other alternatives). RCW 9A.56.200.

The trial court determined that the record lacked evidence from which a jury could rationally find Gatson committed theft to the exclusion of robbery. We

review a trial court's decision regarding the factual prong of the Workman rule for an abuse of discretion. Henderson, 182 Wn.2d at 743.

The staircase had a knobbed railing, and the cut and bruise on the guard's stomach were located near where his badge and radio would have been. Gatson contends a jury did not necessarily have to find that the guard sustained his injuries when Gatson made the thrusting motion; they could find instead that the guard incurred the injuries when he fell down the staircase with his radio and badge pressed against his stomach. In Gatson's view, the possibility of that scenario supports an inference that he did not "inflict" the guard's injuries.

A defendant inflicts bodily injury when his conduct is a proximate cause of the injury. State v. Decker, 127 Wn. App. 427, 429, 111 P.3d 286 (2005), review denied, 156 Wn.2d 1012 (2006). In Decker, a clerk chased after the defendant who had just stolen some items inside a convenience store. The defendant was in the passenger seat of a getaway car. When the clerk leaned in to the open window on the driver side, the defendant grabbed his arm. The clerk flailed about, trying to free himself as the car rolled forward, and was injured. Decker, 127 Wn. App. at 429. This court applied the rule that "criminal liability attaches where the conduct is the actual and proximate cause of the result." Decker, 127 Wn. App. at 432. The evidence was sufficient to support a finding that the defendant inflicted the injury because there was a "direct causal link" between his conduct and the clerk's injuries: If Decker had not grabbed the clerk's arm, the clerk would not have been injured. Decker, 127 Wn. App. at 432.

Here, the record establishes that Gatson's conduct—stealing merchandise, running from the guard—led to the encounter on the stairs. Gatson made a thrusting motion towards the guard, causing the guard to push back and then fall down the stairs. When asked what caused him to fall, the guard testified, "Getting struck and trying to push away." This uncontroverted evidence establishes a direct causal link between Gatson's conduct and the guard's injuries; without Gatson's conduct, the guard would not have been injured.

Gatson observes that Decker involved a sufficiency of the evidence claim, for which the record is viewed in the light most favorable to the State. By contrast, we review claims for a lesser instruction in the light most favorable to the defendant. Henderson, 182 Wn.2d at 736. Nevertheless, Gatson's argument that the word "inflict" requires a more precise causal connection than the word "cause" is analogous to the argument this court rejected in Decker. The encounter at the top of the stairs was undisputed. Under Decker, a jury hearing the evidence in this record could not rationally find that Gatson committed theft without also finding that he inflicted bodily injury.

Decker employed the familiar definition of proximate cause as "'a cause which in direct sequence, unbroken by any new, independent cause, produces the event complained of and without which the injury would not have happened.'" Decker, 127 Wn. App. at 432, quoting State v. Gantt, 38 Wn. App. 357, 359, 684 P.2d 1385 (1984). Gatson claims that the analysis of proximate cause in Decker

has been substantially undermined by a later Supreme Court decision, State v. Bauer, 180 Wn.2d 929, 329 P.3d 67 (2014).

The defendant in Bauer left his gun on a bedroom dresser in his girlfriend's house. Bauer, 180 Wn.2d at 933. Her son took the gun to his elementary school, where it accidentally discharged and injured another child. Bauer, 180 Wn.2d at 932. The State charged Bauer with assault in the third degree, alleging that, with criminal negligence, he "'cause[d] bodily harm to another person by means of a weapon or other instrument or thing likely to produce bodily harm.'" Bauer, 180 Wn.2d at 932 (alteration in original), quoting RCW 9A.36.031(1)(d). On discretionary review of the trial court's denial of a motion to dismiss, the Supreme Court did not alter the well established rule that tort and criminal situations are exactly alike as to *cause in fact* or, as it is sometimes called, "but for" causation. Bauer, 180 Wn.2d at 936. But the court determined that *legal* cause in criminal cases differs from, and is narrower than, legal cause in tort cases. Bauer, 180 Wn.2d at 940. Analyzed in terms of legal causation, the connection between Bauer's conduct and the child's injuries was too attenuated to support criminal liability. Bauer, 180 Wn.2d at 942.

Bauer's stricter standard for legal causation in criminal cases applies when a defendant's negligent acts were "incapable of causing injury directly." Bauer, 180 Wn.2d at 939. Bauer does not call into question older cases imposing criminal liability when the defendant actively participated in the "immediate physical impetus of harm" and the "initial act was not only intentional,

but felonious, and capable of causing harm in and of itself." Bauer, 180 Wn.2d at 939-40.

> No appellate criminal case in Washington has found legal causation based on negligent acts similar to those in the civil cases above that were incapable of causing injury directly. This is apparent in the facts of the cases cited by the State in support of its argument that it may charge Bauer with third degree assault. For example, in State v. Leech, this court held that an arsonist "caused" the death of a firefighter who responded to the arson fire, despite the fact that the firefighter may have been negligent in his firefighting. 114 Wn.2d 700, 705, 790 P.2d 160 (1990). The arsonist, however, intentionally started the fire—clearly an intentional criminal act capable of causing harm in and of itself. In State v. Perez-Cervantes, we held that a person who stabs another may be liable for the other's death even if drug abuse also contributed to the death. 141 Wn.2d 468, 6 P.3d 1160 (2000). In contrast to this case, that defendant performed an intentional criminal act—stabbing—that directly caused harm. And in State v. Christman, the Court of Appeals applied causation principles to determine that a person who gives illicit drugs to another may be liable for the other's death from overdose even if other drugs from another source also contributed to the death. 160 Wn. App. 741, 249 P.3d 680[, review denied, 172 Wn.2d 1002] (2011). Once again, the initial act was not only intentional, but felonious, and capable of causing harm in and of itself.
>
> Bauer's act of gun ownership, in contrast, is not felonious or criminal. His decision to keep loaded weapons around the house is not, in itself, a crime in this state, either.

Bauer, 180 Wn.2d at 938-39.

Unlike the defendant in Bauer, Gatson committed intentional and felonious acts. He stole merchandise and struck the guard. His conduct was not attenuated from the guard's injuries; it was the immediate physical impetus of harm, like the defendant's conduct in Decker. Accordingly, we conclude nothing in Bauer diminishes the force of the Decker analysis in the circumstances of this case. The trial court correctly denied Gatson's request for a lesser included offense instruction.

EXPERT WITNESS INSTRUCTION

Gatson contends the trial court erred by giving an expert witness instruction. The instruction provided as follows:

> A witness who has special training, education, or experience may be allowed to express an opinion in addition to giving testimony as to facts.
>
> You are not, however, required to accept his or her opinion. To determine the credibility and weight to be given to this type of evidence, you may consider, among other things, the education, training, experience, knowledge, and ability of the witness. You may also consider the reasons given for the opinion and the sources of his or her information, as well as considering the factors already given to you for evaluating the testimony of any other witness.

The instruction tracked the pattern instruction in 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 6.51 at 211 (4th ed. 2016). The note on use says, "Use this instruction if requested in a case in which expert testimony has been admitted."

Gatson contends that providing the instruction was error because none of the witnesses were qualified as experts. He argues that because the only witnesses who testified to having special training were police officers, the instruction amounted to an unconstitutional comment on the evidence conveying the judge's opinion "that the police officers were experts *notwithstanding* the fact that they had not been endorsed as such at trial."

We disagree. "A jury instruction that does no more than accurately state the law pertaining to an issue" is not an impermissible comment on the evidence by the judge. State v. Woods, 143 Wn.2d 561, 591, 23 P.3d 1046, cert. denied, 534 U.S. 964 (2001). Gatson does not claim the instruction misstated the law.

There is no reason to believe the jurors understood it as an endorsement of the veracity of the officers. Gatson has not demonstrated it was error to provide the instruction.

PROSECUTORIAL MISCONDUCT

Gatson alleges three instances of prosecutorial misconduct. He must demonstrate that the conduct was both improper and prejudicial. State v. Lindsay, 180 Wn.2d 423, 431, 326 P.3d 125 (2014).

First, Gatson contends the prosecutor mischaracterized the testimony of a bystander witness. The witness testified that on the day of the crime, she observed a crowd gathered outside the store and saw some kind of commotion, but she "didn't know exactly what was going on." She testified that once she got closer, "a man had stood up and said, 'I've been stabbed.'" The prosecutor argued in closing that the woman saw Gatson strike the guard "with a weapon":

> [She] saw something going on when she was about to cross the street . . . . She saw, and she thought it was goofing off or maybe it was more serious, but she saw that there was something going on. Well, we know what that something was now. She saw the defendant striking [the guard] with a weapon.

The court overruled a defense objection that the prosecutor was arguing facts not in evidence.

The defense objection was well taken. The guard had retreated from his initial impression that he had been stabbed, and the jury heard no other evidence that Gatson had a weapon. On appeal, the State contends the prosecutor's argument should be understood, in context, as merely summarizing the woman's testimony that she did witness the event but she did not realize what was actually

happening. The State misses the point. The witness heard the guard say that he had been stabbed, but she did not say she saw a weapon. The prosecutor should not have used language suggesting that the existence of a weapon was a fact. Nevertheless, because the State was by this time proceeding only on the "inflicts bodily injury" prong of first degree robbery, the reference to a weapon had less sting than if the existence of a weapon was a matter to be proved. The trial court gave the jury the usual instruction that argument is not evidence. We conclude the reference to a weapon, though improper, was not prejudicial.

Second, Gatson contends the prosecutor used facts not in evidence to inflame jurors' passion and prejudices. In defense closing argument, counsel for Gatson said that the guard did not suffer "much of an injury." The prosecutor's rebuttal was "Defense counsel said, 'It wasn't much of an injury.' And she's right, there wasn't a knife wound in his throat as he's laying there bleeding out." The court overruled a defense objection to this comment.

Gatson asserts that the comment invoked inflammatory imagery that distracted the jury from its proper function as a rational decision-maker. We disagree. The comment was within the bounds of a proper response to the defense argument.

Third, Gatson contends the prosecutor trivialized the State's burden of proof by describing the reasonable doubt standard as the "exact same" standard used in all criminal trials:

> Defense counsel stood up here and talked at length about the burden of proof, beyond a reasonable doubt. That burden of proof is the exact same burden of proof that is used across the hall, down the hall, in every courtroom on this floor, on every courtroom

> on the lower floors, the upper floors, in every courtroom in the state of Washington, in every courtroom across the nation; and it's the exact same standard that has been used since the time our country began. It's the same standard.

Defense counsel objected on the basis that the prosecutor was misstating the law. The objection was overruled, and the prosecutor continued along the same line of argument:

> In any criminal case, it is the exact same standard. So, let me be clear on that. What I'm saying is, the standard in a criminal case of beyond a reasonable doubt is the exact same standard in every criminal case, here, Idaho, North Dakota, New York; it's the same one. And that standard, that burden, it's absolutely satisfied by the evidence in this particular case.

Gatson contends the prosecutor's argument compared the reasonable doubt standard to everyday decision making, an approach disapproved in Lindsay. In that case, the prosecutor explained the reasonable doubt standard with a narrative about approaching a crosswalk and seeing a car coming: "'He has the red light, you've got a walk sign, you look at him, he sees you, he's slowing down, he nods and you start walking. You're walking because beyond a reasonable doubt you're confident you can walk across that crosswalk without getting run over.'" Lindsay, 180 Wn.2d at 436. The challenged comments here are not analogous to the crosswalk narrative in Lindsay.

Gatson contends the prosecutor was arguing that the jury should not hesitate to bring in a guilty verdict because other defendants have been routinely convicted under this standard all over the country. We do not find that message conveyed in the challenged comments. They are reasonably viewed as a response to defense counsel's explanation of the reasonable doubt standard as

"the highest burden of proof in our legal system" and the State's "awesome burden of proof."

In summary, none of the instances of alleged prosecutorial misconduct provide a basis for reversal.

STATEMENT OF ADDITIONAL GROUNDS

Gatson filed a statement of additional grounds as allowed by RAP 10.10. One ground relates to an implied element of the charge. An essential, implied element of first degree robbery is that the victim had an ownership, representative, or possessory interest in the property taken. State v. Richie, 191 Wn. App. 916, 919, 924, 365 P.3d 770 (2015). Gatson questions whether the State proved this element.

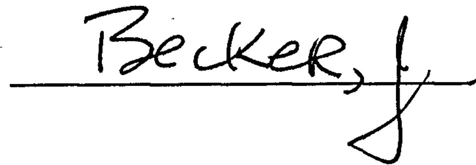
The evidence provided no basis for the jury to find that the victim, the security guard, was acting in any other capacity than as an employee of the department store when the crime occurred. The guard was conducting routine video surveillance when he observed Gatson take the merchandise; he then followed Gatson while staying in radio contact with his supervisor; he identified himself outside the store as a loss prevention officer. This is sufficient evidence of a connection between the guard and the stolen property to sustain the robbery conviction. Richie, 191 Wn. App. at 926.

The implied element was not included in the to-convict instruction. But omission of an essential element from a to-convict instruction is harmless if uncontroverted evidence supports the omitted element. State v. Brown, 147 Wn.2d 330, 340-41, 58 P.3d 889 (2002). Here, the uncontroverted evidence

summarized above established the guard's representative interest in the stolen property and rendered the error harmless. Further review is not warranted.

Gatson's statement of additional grounds also alleges that by withholding or failing to preserve a radio, badge, belt, and sweatshirt worn by the guard when the robbery occurred, the State violated Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). Gatson derives this allegation from trial counsel's argument that the State's failure to keep these items demonstrated weakness in the State's proof. The State violates due process by suppressing evidence favorable to an accused upon request when the evidence is material either to guilt or punishment. Brady, 373 U.S. at 87. Because the record does not show that evidence was "suppressed" within the meaning of Brady, further review is not warranted.

Affirmed.



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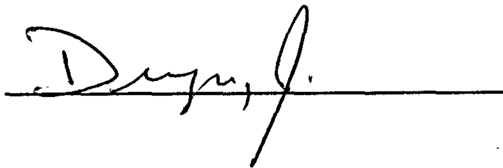

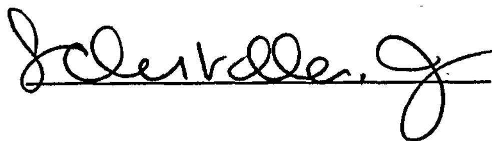

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☒ respondent Dennis McCurdy, DPA
[PAOAppellateUnitMail@kingcounty.gov]
[dennis.mccurdy@kingcounty.gov]
King County Prosecutor's Office-Appellate Unit

☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: November 27, 2017

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