

62976-0

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No. 62976-0-1

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

STATE OF WASHINGTON,
Respondent,

v.

DENNIS WAYNE JACKSON,
Appellant.

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

The Honorable Christopher Washington

BRIEF OF APPELLANT

ELAINE L. WINTERS
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A. ASSIGNMENT OF ERROR

The State did not prove beyond a reasonable doubt that Dennis Jackson inflicted bodily harm, an essential element of the crime of robbery in the first degree.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

A defendant may not be convicted of a crime unless the State proves every element of that crime beyond a reasonable doubt. Dennis Jackson was convicted of first degree robbery based upon infliction of bodily injury, but the store loss prevention officer who tried to prevent Jackson from leaving was not injured. While he claimed Jackson struck him in the face with a grazing blow, the photographs of his face do not show any injury. Viewing the evidence in the light most favorable to the State, must Jackson's conviction for robbery in the first degree be dismissed in the absence of proof beyond a reasonable doubt that Jackson inflicted bodily injury?

C. STATEMENT OF THE CASE

Dennis Jackson was convicted by a jury of first degree robbery under the prong that he inflicted bodily injury, RCW 9A.56.200(1)(a)(iii). CP 6, 54. He appeals. CP 67.

When Jackson entered the Home Depot Store on Aurora Avenue North in Shoreline on May 3, 2008, asset protection specialist Tyler Emond was training another employee, Russell Yocum. 2RP 19-20, 39, 45, 49.¹ Yocum was stationed by the front door looking for “behaviors,” and he noticed Jackson because he was wearing a long puffy black coat. 2RP 20, 29. Yocum followed Jackson as he walked to the “tool corral” in the middle of the store, and he called Emond on the telephone to tell him what he was doing. 2RP 20-21 29-30, 63.

Emond joined Yocum in watching Jackson, whom he recognized from prior contacts related to trespassing or shoplifting at Home Depot stores. RP 32-33, 64-65. Jackson regularly shoplifted from the Home Depot and “fenced” the tools, as he was unemployed and addicted to drugs. 3RP 236-41. Jackson was so well known that one time when Emond spotted him in the store, he suggested Jackson try Lowe’s. 3RP 241.

¹ The verbatim report of Jackson’s jury trial is found in four consecutively numbered volumes and will be referred to by the volume number marked on the cover. Separate transcripts for pre-trial motions, the discussion of jury instructions, and the sentencing hearing are not referred to here.

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Yocum saw Jackson select a drill, but he backed off after engaging Jackson in conversation. RP 22-25. Emond then observed Jackson take the drill out of a plastic case while in the tool corral area, and Jackson's motions led Emond to conclude Jackson hid the drill in his pants. RP 68, 70-71. Yocum later noticed an empty case for a Dewalt drill in the tool area. 2RP 25-26.

Emond watched Jackson leave the store without paying for anything, setting off the sensors at the door. 2RP 73-74. Emond came up to Jackson outside the door, identified himself, and asked Jackson to return to the store. 2RP 74, 76. When Jackson did not do as he requested, the asset protection specialist placed his left hand on Jackson's shoulder and his right hand on Jackson's stomach, where he could feel a drill under Jackson's clothing. 2RP 76-77.

According to Emond, Jackson tried to "walk through" him, so Emond tried unsuccessfully to place Jackson in an "arm bar lock." 2RP 76, 77. Emond claimed Jackson was able to swing and punch him in the face with a closed fist. 2RP 77. "It was kind of a grazing blow as he came across." 2RP 78.

A police officer took two photographs Emond's face but they do not show any injury. Ex. 11-12; 3RP 205. The officer said Emond had a light red puffy mark on his eye and did not need medical attention. 3RP 206.

Jackson admitted shoplifting the drill. 3RP 247-50. As he walked out, Emond grabbed him and told him to return to the store. 3RP 242. The two tussled and Emond grabbed Jackson from behind, pulling his jacket. Jackson explained he swung around but never hit or pushed Emond. 3RP 243-44, 246,

Home Depot employees Robert Elder and Judy Manzoni joined Emond when he tried to stop Jackson, as shoplifters are more likely to cooperate if they are approached by several store employees. 3RP 166-68, 182. Elder and Manzoni saw Emond grab Jackson and saw Jackson try to wriggle out of Emond's grasp. 3RP 168, 175, 190. Manzoni said she saw Jackson hit Emond in the face. 3RP 186. Elder did not see Jackson strike Emond, but saw Emond's body react as if he were and heard Emond ask for help. 3RP 169-70, 177. Footage from the Home Depot video camera did not show Jackson strike anyone. Ex. 3; 3RP 243

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video, however, shows him knocking Jackson into a pillar. 2RP 113; Ex. 3. Emond grabbed Jackson's jacket, destroying it, but Jackson ran away. 2RP 80; 3RP 171, 179, 186. Elder also tried to grab Jackson's jacket. 3RP 179.

Jackson was later arrested at a nearby bus stop. 2RP 92-93; 3RP 203-04, 222. When a police officer recovered a drill from inside Jackson's clothing, he said, "You got me." 3RP 204-05. When Jackson was seated in a van prior to transport from the police precinct to the jail, a detective overheard his conversation with another arrestee. 3RP 226-27. Jackson told the other man he was arrested for taking a drill from Home Depot and that he swung and hit a security guard who tried to grab him. 3RP 227-28. At trial, Jackson explained he said he "spun around" and got away, not that he "swung" at Emond. 3RP 245.

D. ARGUMENT

THE STATE DID NOT PROVE BEYOND A
REASONABLE DOUBT THAT JACKSON COMMITTED
ROBBERY IN THE FIRST DEGREE BECAUSE THERE
WAS NO EVIDENCE OF BODILY INJURY

1. The State was required to prove every element of robbery in the first degree beyond a reasonable doubt. The due process clauses of the federal and state constitutions require the State prove every element of a crime beyond a reasonable doubt.² Apprendi v. New Jersey, 530 U.S. 466, 476-77, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); U.S. Const. amends. VI, XIV; Const. art. I, §§ 3, 22. The inquiry on appellate review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 334, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); State v. Green, 94

² The Fourteenth Amendment states in part, "nor shall any State deprive any person of life, liberty, or property, without due process of law."

The Sixth Amendment provides in part, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed."

Article I Section 3 of the Washington Constitution states, "No person shall be deprived of life, liberty, or property, without due process of law."

Article I, Section 22 provides specific rights in criminal cases. "In all criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel . . . to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury . . ."

Wn.2d 216, 220-22, 616 P.2d 628 (1980). The appellate court draws any reasonable inferences in favor of the State. State v. O'Donnell, 142 Wn.App. 314, 325, 174 P.3d 1205 (2007).

Jackson was convicted of robbery in the first degree under RCW 9A.56.200(1)(a)(iii). CP 6, 54. Robbery is defined as taking personal property from another person by the use or threatened use of force:

A person commits robbery when he unlawfully takes personal property from the person of another or in his presence against his will by the use or threatened use of immediate force, violence, or fear of injury to that person or his property or the person of anyone. Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking; in either of which cases the degree of force is immaterial. Such taking constitutes robbery whenever it appears that, although the taking was fully completed without the knowledge of the person from whom it was taken, such knowledge was prevented by the use of force or fear.

RCW 9A.56.190. Robbery may be elevated to first degree based upon an additional element, in this case the infliction of bodily injury. RCW 9A.56.200(1) reads:

- (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:
 - (i) Is armed with a deadly weapon; or
 - (ii) Displays what appears to be a firearm or other deadly weapon; or

(iii) Inflicts bodily injury; or

(b) He or she commits a robbery within and against a financial institution as defined in RCW 7.88.010 or 35.38.060.

RCW 9A.56.200. The elements of first degree robbery in Jackson's case thus are: (1) the defendant unlawfully took personal property from another person or in his presence, (2) the defendant intended to commit theft of the property, (3) the taking was against the person's will by the defendant's use or threatened use of immediate force, (4) the force was used to obtain or retain possession of the property, and (5) the defendant inflicted bodily injury, RCW 9A.56.190; RCW 9A.56.200(1)(a)(iii); CP 26 (Jury Instruction 9).

The issue here is whether Jackson inflicted bodily injury on Emond.

2. The State did not prove beyond a reasonable doubt that Emond suffered bodily injury. Some degree of force is required for every robbery, so the defendant must actually injure another person in order to be guilty of first degree robbery under the prong charged here. RCW 9A.56.190; RCW 9A.56.200(1)(a)(iii). Bodily injury is "physical pain or injury or an impairment of physical condition." RCW 9A.04.110(4)(a).

This Court addressed the sufficiency of the evidence of a first degree robbery conviction based upon infliction of bodily injury

in O'Donnell, supra, where the defendant argued he only committed first degree theft. O'Donnell, 142 Wn.App. at 320, 325-26. There, the defendant was angry because a friend had not returned his property, and he grabbed her by the throat, pushed her against her car, and choked her so hard she was unable to breathe and was afraid the defendant would kill her. Id. at 318-19. Her testimony was corroborated by photographs showing red marks and bruises on her neck, and a witness even observed fingerprint marks there. Id. at 319.

Here, in contrast, Emond testified Jackson hit him with only a grazing blow. 2RP 78. He did not seek medical attention and testified only that his face was tender for a day or so. 2RP 100. The police photographs of Emond's face do not show any red marks or bruises. Ex. 11-12. Under these facts, this Court cannot conclude that Jackson injured Emond.

The evidence that a defendant injured the victim in the course of a robbery was also at issue in Decker, where the defendant argued his actions were not the proximate cause of the victim's injuries. State v. Decker, 127 Wn.App. 427, 111 P.3d 286 (2005), rev. denied, 156 Wn.2d 1012 (2006). Decker stole cigarettes from a convenience store, and the store owners' son,

Judd, talked to Decker as he sat in the front passenger seat of a car. When the car drove off, Judd tried to free himself so as to avoid being dragged, but Decker held onto his arm. In his flailing attempt to free himself, Judd broke the car's window, cutting his own arm. He also broke his toe, probably from kicking the car, although the car may also have run over his toe. Decker, 127 Wn.App. at 428-30. This Court rejected the defendant's argument that he was not responsible for these injuries, which were sufficient to support the infliction of injury element of first degree robbery. Id. at 430-33. See State v. Anderson, 153 Wn.App. 417, 422, 220 P.3d 1273 (2009) (sufficiency of evidence for first degree robbery not addressed in published opinion; evidence of bodily injury based upon employee's dislocated should and cuts on his arm he suffered trying to detain shoplifter).

A case where this Court addressed the sufficiency of evidence of a first degree robbery based upon a different prong of the statute also demonstrates that the force used by Jackson is the force necessary for a robbery. In State v. Sparling, 141 Wn.App. 542, 545, 170 P.3d 83 (2007), the defendant had tried to pay for gasoline with a stolen check, and when the manager would not authorize use of the check, she drove away, hitting a store

employee in the leg with her vehicle's bumper. Sparling, 141 Wn.App. at 545. This Court found the defendant used her vehicle as a deadly weapon. Id. at 547-48. Hitting the employee with the vehicle was thus the force necessary for the robbery, even though the employee was not hurt. Similarly here, Jackson's struggle with Emond establishes the force necessary for second degree robbery but not the infliction of bodily injury that would elevate the crime to first degree robbery.

3. Jackson's conviction must be reversed. The State did not prove Emond suffered any injury as a result of his unsuccessful attempts to detain Jackson at the Home Depot. Emond's struggle with Jackson thus constituted only the force required for a robbery, not the infliction of injury required for first degree robbery. Viewing the evidence in the light most favorable to the State, the State did not prove every element of the crime beyond a reasonable doubt.

When appropriate, this Court may reverse a conviction and remand for sentencing on a lesser-included offense. State v. Hutchins, 73 Wn.App. 211, 218, 868 P.2d 196 (1994). Second degree robbery is committed if a person commits a robbery. RCW 9A.56.210. Jackson's conviction must be reversed and his case remanded for sentencing for robbery in the second degree.

E. CONCLUSION

Dennis Jackson's conviction for first degree robbery must be reversed and his case remanded for sentencing on the lesser offense of second degree robbery.

DATED this 11th day of May 2010.

Respectfully submitted,



Elaine L. Winters – WSBA # 7780
Washington Appellate Project
Attorneys for Appellant

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Respondent,)	
)	NO. 62976-0-I
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DENNIS JACKSON,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 11TH DAY OF MAY, 2010, 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:

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D. ARGUMENT

THE STATE DID NOT PROVE BEYOND A REASONABLE DOUBT THAT JACKSON COMMITTED ROBBERY IN THE FIRST DEGREE BECAUSE THERE WAS NO EVIDENCE OF BODILY INJURY

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in O'Donnell, supra, where the defendant argued he only committed first degree theft. O'Donnell, 142 Wn.App. at 320, 325-26. There, the defendant was angry because a friend had not returned his property, and he grabbed her by the throat, pushed her against her car, and choked her so hard she was unable to breathe and was afraid the defendant would kill her. Id. at 318-19. Her testimony was corroborated by photographs showing red marks and bruises on her neck, and a witness even observed fingerprint marks there. Id. at 319.

Here, in contrast, Emond testified Jackson hit him with only a grazing blow. 2RP 78. He did not seek medical attention and testified only that his face was tender for a day or so. 2RP 100. The police photographs of Emond's face do not show any red marks or bruises. Ex. 11-12. Under these facts, this Court cannot conclude that Jackson injured Emond.

The evidence that a defendant injured the victim in the course of a robbery was also at issue in Decker, where the defendant argued his actions were not the proximate cause of the victim's injuries. State v. Decker, 127 Wn.App. 427, 111 P.3d 286 (2005), rev. denied, 156 Wn.2d 1012 (2006). Decker stole cigarettes from a convenience store, and the store owners' son,

Judd, talked to Decker as he sat in the front passenger seat of a car. When the car drove off, Judd tried to free himself so as to avoid being dragged, but Decker held onto his arm. In his flailing attempt to free himself, Judd broke the car's window, cutting his own arm. He also broke his toe, probably from kicking the car, although the car may also have run over his toe. Decker, 127 Wn.App. at 428-30. This Court rejected the defendant's argument that he was not responsible for these injuries, which were sufficient to support the infliction of injury element of first degree robbery. Id. at 430-33. See State v. Anderson, 153 Wn.App. 417, 422, 220 P.3d 1273 (2009) (sufficiency of evidence for first degree robbery not addressed in published opinion; evidence of bodily injury based upon employee's dislocated should and cuts on his arm he suffered trying to detain shoplifter).

A case where this Court addressed the sufficiency of evidence of a first degree robbery based upon a different prong of the statute also demonstrates that the force used by Jackson is the force necessary for a robbery. In State v. Sparling, 141 Wn.App. 542, 545, 170 P.3d 83 (2007), the defendant had tried to pay for gasoline with a stolen check, and when the manager would not authorize use of the check, she drove away, hitting a store

employee in the leg with her vehicle's bumper. Sparling, 141 Wn.App. at 545. This Court found the defendant used her vehicle as a deadly weapon. Id. at 547-48. Hitting the employee with the vehicle was thus the force necessary for the robbery, even though the employee was not hurt. Similarly here, Jackson's struggle with Emond establishes the force necessary for second degree robbery but not the infliction of bodily injury that would elevate the crime to first degree robbery.

3. Jackson's conviction must be reversed. The State did not prove Emond suffered any injury as a result of his unsuccessful attempts to detain Jackson at the Home Depot. Emond's struggle with Jackson thus constituted only the force required for a robbery, not the infliction of injury required for first degree robbery. Viewing the evidence in the light most favorable to the State, the State did not prove every element of the crime beyond a reasonable doubt.

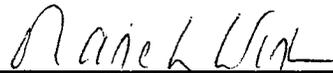
When appropriate, this Court may reverse a conviction and remand for sentencing on a lesser-included offense. State v. Hutchins, 73 Wn.App. 211, 218, 868 P.2d 196 (1994). Second degree robbery is committed if a person commits a robbery. RCW 9A.56.210. Jackson's conviction must be reversed and his case remanded for sentencing for robbery in the second degree.

E. CONCLUSION

Dennis Jackson's conviction for first degree robbery must be reversed and his case remanded for sentencing on the lesser offense of second degree robbery.

DATED this 11th day of May 2010.

Respectfully submitted,



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Washington Appellate Project
Attorneys for Appellant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 62976-0-I
v.)	
)	
DENNIS JACKSON,)	
)	
Appellant.)	

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DIVISION ONE**

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