

NO. 65172-2-1

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

COURT OF APPEALS
STATE OF WASHINGTON
2012 FEB -3 AM 10:10

STATE OF WASHINGTON

Respondent

v.

TERRY L. GRANT,

Appellant

BRIEF OF RESPONDENT

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I. ISSUES

1. Where the defendant was charged with robbery and kidnapping was there sufficient evidence to convict the defendant of kidnapping as a separate and distinct crime?

2. Was the trial court permitted to impose an exceptional sentence on both counts on the basis that the defendant had a high offender score and as a result of multiple current convictions he would go unpunished on some offenses?

3. Did the trial attorney provide deficient performance which prejudiced the defendant when counsel did not propose certain jury instructions, and withdrew or did not except to the court's failure to give other proposed jury instructions?

II. STATEMENT OF THE CASE

On December 4, 2008 Joanne Bigelow had been a widow for about six months. She lived at her Monroe home with her daughter, Carmen Bigelow, Carmen's daughter, and Carmen's boyfriend¹. At around 10:00 a.m. Mrs. Bigelow was home alone when the defendant, Terry Grant, and Paul Cast came to her door. Mrs. Bigelow answered the door when they rang the bell. As she

¹ In order to differentiate between mother and daughter Joanne Bigelow will be referred to as Mrs. Bigelow, and Carmen Bigelow will be referred to as Carmen. No disrespect is meant.

opened the door the defendant and Cast brandished guns and pushed their way into her home. 1 RP 20-23, 28.

Once inside the defendant told Mrs. Bigelow that if she did everything she was told to do she would not get hurt. The defendant told Cast to tie up Mrs. Bigelow. While still in the foyer Cast tied Mrs. Bigelow's hands behind her back and tied her feet together with plastic tie wraps. The defendant and Cast then each grabbed one side of Mrs. Bigelow and dragged her down into the downstairs bathroom. Approximately 2 to 3 minutes elapsed between the time the defendant and Cast barged into Mrs. Bigelow's home and the time they drug her to the bathroom. 1 RP 23-25.

Mrs. Bigelow sat in her bathroom with her back against the wall facing the sink. Cast pointed his gun at Mrs. Bigelow and demanded to know where the safe was. Mrs. Bigelow told him that she did not have a safe. The defendant and Cast both admonished Mrs. Bigelow that she had better not be lying to them. The defendant and Cast then ransacked Mrs. Bigelow's home. Periodically over the next three hours Cast returned to the bathroom to check on Mrs. Bigelow. 1 RP 25, 29-30, 64.

At one point while the defendant and Cast were ransacking Mrs. Bigelow's home the phone rang. The defendant and Cast asked Mrs. Bigelow if she was expecting anyone. She told them that she was not. Neither man made any further mention of the caller to Mrs. Bigelow. 1 RP 29-30.

Just before leaving the defendant came back to Mrs. Bigelow and took her wedding ring and another ring from her fingers. The defendant said "and I'll take these and I'll take this." The defendant and Cast then left Mrs. Bigelow's home taking property including televisions, cameras, purses, jewelry, clothing, and approximately 10 guns. They also took checkbooks, credit cards, and Mrs. Bigelow's identification as well as identification for Mrs. Bigelow's two daughters, Carmen and Gina. 1 RP 21, 30-31; 2 RP 96-99.

About 30 minutes later Mrs. Bigelow was able to escape. She fled to her neighbor's home where she called the police. 1 RP 30. When police arrived they noticed Mrs. Bigelow was distraught. She had zip ties still around her wrists. There were imprints on her ankles where she had been tied. 2 RP 164, 177-178.

Police went to the Bigelow home and found every room had been ransacked. Dressers were overturned and the drawers were

pulled out and emptied. Shelves were emptied and things were piled all over the floor. Police found zip ties that resembled the ones on Ms. Bigelow's wrists on the bathroom floor. Police worked with Mrs. Bigelow to prepare a composite drawing of the two robbers. 2 RP 69, 166, 179-180; 3 RP 257-264.

The defendant and his sister Kristina Grant had been living with their brother Sean Grant near Granite Falls on the day of the robbery and kidnapping. That afternoon Ms. Grant noticed the defendant appeared to be in a hurry when he came home. The defendant opened the garage door and Cast backed a truck into the garage. The defendant and Cast then unloaded several duffle bags, guns, and a big screen T.V. from the bed of the truck. The defendant and Cast then started bringing the items taken from the truck into the defendant's bedroom. Ms. Grant noted that there was jewelry, camera equipment, identification, check books and credit cards bearing the names of Joanne, Gina, and Carmen Bigelow. 2 RP 88-99.

After a while Sean Grant called home and talked to the defendant. The defendant then told Ms. Grant that their brother wanted them to take out everything they brought into the house. Ms. Grant helped the defendant and Cast load the stolen property

into the defendant's car and another car. They then drove to the Village Inn Motel in Marysville where they unloaded the property in to a room. 2 RP 100-104.

After they checked in Ms. Grant heard the defendant talking to Cast about how they got the stolen property. Ms. Grant heard the defendant referring to zip-tying Ms. Bigelow. The defendant also talked about taking jewelry right off of Ms. Bigelow's person. Then next day Ms. Grant read about the Bigelow robbery in the newspaper. The paper included two sketches of the suspects. One of the sketches bore a "striking resemblance" to the defendant. 2 RP 108, 111-112.

The day after the robbery Carmen found a beanie in her room that she did not recognize. She gave it to the police. Police had the crime lab compare samples from the beanie and the clothing Mrs. Bigelow had worn with DNA samples collected from the defendant after he was arrested. The lab determined that there were mixed DNA samples on both items. The defendant could have been one of the contributors on both items. There was a 1 in 69 chance that a random person would match the DNA on the beanie, and a 1 in 4 chance a random person would match the

DNA on on Mrs. Bigelow's shirt. 2 RP 78-80, 181-182, 223-224; 3 RP 284-288, 303-304.

The defendant was arrested on or about December 9, 2008. Police served a search warrant on the defendant's car. They found plastic zip ties securing the seatbelt and in a bundle on the back seat floorboards. The ties found in Ms. Bigelow's bathroom were compared to those found in the defendant's car by the State crime lab. The lab determined the ties were similar in all properties. 2 RP 139-140, 189-190, 213-223; 3 RP 326-247.

The defendant was charged with first degree robbery and first degree kidnapping. 2 CP 367-368. At trial Mrs. Bigelow testified that at some point on the day that the defendant and Cast broke into her home she saw a small green-blue Ford Escort in her driveway that she did not recognize. She identified a picture of that car. 1 RP 36-37. The defendant testified that he owns a green Ford Escort. The defendant confirmed the car that Mrs. Bigelow identified was his car. 4 RP 405.

The defendant was convicted of both counts. 1 CP 136-137. At sentencing the defense moved to merge the kidnapping count with the robbery count. 1 CP 112-119. The trial court denied the motion. The court ruled the robbery and kidnapping were separate

and distinct offenses. 3-18-10 RP 8. The court then followed the State's recommendation and declared an exceptional sentence on the basis that the defendant had a high offender score and that his multiple convictions would result in some of his offenses going unpunished. 1 CP 120-134; 3 CP 369-436.

III. ARGUMENT

A. THE EVIDENCE WAS SUFFICIENT TO FIND THE DEFNDANT GUILTY OF KIDNAPPING FIRST DEGREE

The defendant challenges the sufficiency of the evidence to convict him of first degree kidnapping. Evidence is sufficient if, after considering the evidence in a light most favorable to the State, a reviewing court determines that any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). The reviewing court itself need not be convinced beyond a reasonable doubt. Id.

To convict the defendant of first degree kidnapping the State was required to prove that the defendant (1) intentionally abducted a person (2) with the intent to facilitate commission of any felony or flight thereafter. RCW 9A.40.020(1) "Abduct" means to restrain a person by either (a) secreting or holding her in a place where she is not likely to be found, or (b) using or threatening to use deadly

force. RCW 9A.40.101(2) "Restrain" means to restrict a person's movements without consent and without legal authority in a manner which interferes substantially with her liberty. RCW 9A.40.010(1).

To convict the defendant of first degree robbery the State was required to prove the defendant (1) with intent to commit a theft, (2) unlawfully took personal property from the person of another or in her presence against her will by the use or threatened use of immediate force, violence, or fear of injury to that person (3) and in the commission of the robbery or immediate flight therefrom, displayed what appeared to be a firearm or other deadly weapon. RCW 9A.56.190, RCW 9A.56.200, State v. Kjorsvik, 117 Wn.2d 93, 98, 812 P.2d 86 (1991).

The defendant argues the evidence was insufficient to prove the kidnapping charge because the kidnapping was merely incidental to the robbery. Sufficiency of the evidence on that basis originated from merger doctrine case law. State v. Saunders, 120 Wn. App. 800, 816-817, 86 P.3d 1194 (2004) citing State v. Johnson, 92 Wn.2d 671, 600 P.2d 1249 (1979). At sentencing the defendant argued the kidnapping charge merged with the robbery charge. 1 CP 112-115. The trial court rejected the argument stating in part that it was clear that the robbery was separate and distinct

from each other. The court reasoned the kidnapping “was entirely different in terms of removing the victim to the bathroom, tying her up, keeping her hostage for a number of hours.” 3-18-10 RP 8.

“[W]hether the kidnapping is incidental to the commission of other crimes is a fact-specific determination.” State v. Elmore, 154 Wn. App. 885, 901, 228 P.3d 760, review denied, 169 Wn.2d 1018, 238 P.3d 502 (2010). Facts which bear on whether kidnapping was incidental to, or distinct from, some other crime include whether the offenses occurred contemporaneously, or began or ended at different times. Elmore, 154 Wn. App. at 902, State v. Korum, 120 Wn. App. 686, 707, 86 P.3d 166 (2004), affirmed in part, reversed in part, 157 Wn.2d 614, 141 P.3d 13 (2006). Another fact which bears on the question is whether the restraint used was more than required or typical in the commission of the other offense. Saunders, 120 Wn. App. at 818. The Court has also considered the distance the victim was transported, the length of restraint, and the whether the victim was transported to a place where she was not likely to be found. State v. Harris, 36 Wn. App. 746, 752-754, 677 P.3d 202 (1984).

Here a rational trier of fact could conclude that there was sufficient evidence to convict the defendant of kidnapping

independently of the robbery. The defendant and Cast used considerably more restraint than necessary to accomplish the robbery. The defendant and Cast pushed their way into Mrs. Bigelow's home and displayed their guns to her, telling her that if she cooperated she would not be hurt. Mrs. Bigelow was "frightened to death" and believed that the defendant and Cast would kill her. 1 RP 22-23, 27. Displaying their weapons was sufficient force to have completed the robbery. However the defendant and Cast did much more than that. Securing Mrs. Bigelow's hands behind her back and hobbling her feet with zip ties was additional restraint which set the kidnapping apart from the force necessary for the robbery.

Moving Mrs. Bigelow from the foyer near the front door and concealing her in the downstairs bathroom was an additional act that was not necessary for the robbery. Putting Mrs. Bigelow in the bathroom accomplished two purposes. First it got her out of the way so that they could freely roam about her home searching for whatever they decided to take without concern that she may escape. Second it made it less likely a casual visitor or caller would discover that Mrs. Bigelow was being threatened in the course of the robbery. She was in a place that she would not likely be seen

by someone who stopped by, and it prevented her from answering the telephone when it rang. It also made it less likely that if Mrs. Bigelow's daughter or her boyfriend came home they would discover Mrs. Bigelow was in the home right away. Like the evidence in Harris and Saunders, concealing Mrs. Bigelow is an additional fact that sets the kidnapping apart from the robbery.

Finally, the robbery was finished for a considerable amount of time before Mrs. Bigelow was freed. Mrs. Bigelow testified that the defendants were in her home for three hours before leaving. She said that they arrived at 10:00 a.m. It was 1:30 p.m. when she arrived at her neighbors' house. The jury could reasonably infer from this testimony that Mrs. Bigelow was restrained in her lower floor bathroom for about 30 minutes before she freed herself. The kidnapping continued even after the robbery was complete.

The defendant argues the holding in Korum is dispositive of the issue here. That argument ignores the Court's directive that sufficiency of the evidence must be made on a case by case basis. The Court in Korum acknowledged that rule when it stated "[a]ccordingly, we hold as a matter of law that the kidnappings here were incidental to the robberies..." Korum, 120 Wn. App. at 727 (emphasis added). The Court confirmed the analysis is made

according to the unique facts of each case when it rejected a collateral attack by Korum's co-defendant's brought in part on the basis of the Court's decision in Korum. "[W]e cannot presume that the same insufficient evidence would have been presented against them at a hypothetical trial if they had similarly elected not to plead guilty." In re Bybee, 142 Wn. App. 260, 263 n. 4, 175 P.3d 589 (2007).

Although Korum involved a series of home invasion robberies where the Court found the kidnappings were incidental to the robberies, the facts in those robberies are different from the fact here. In both of the robberies detailed in Korum the defendants did not attempt to conceal the victims after restraining them. In at least one case the defendant's demonstrated intent to untie the victims after they were done robbing them. The victims were not restrained any longer than necessary to complete the robberies. The Court noted that the restraints did not create a significant danger independent of that posed by the armed robberies themselves.

Concealing Mrs. Bigelow in a downstairs bathroom, and leaving her tied up so that it took a long time for her to free herself sets the facts of this Case apart from those in Korum. Those facts

establish the kidnapping was not just incidental to the robbery, but in fact constituted a separate crime.

B. THE EXCEPTIONAL SENTENCE WAS APPROPRIATELY IMPOSED.

The State calculated the defendant's offender score as 18 for both the robbery and kidnapping counts. 3 CP 370. The score calculated by counting 8 points for 4 prior violent offenses, 7 points for 7 prior non-violent offenses, 1 point for two prior juvenile court offenses, and two points for each current offense.² The standard range for the robbery was 129-171 months and the standard range for the kidnapping was 149-196 months. The State argued for an exceptional sentence of 252 months on the basis that the defendant had committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished. RCW 9.94A.535(2)(c), 3 CP 371-372. The Court entered a finding that "the defendant has committed multiple current offenses and defendant's high offender score (18) results in the current offense of 1st Degree Robbery goes (sic) unpunished." 1 CP 131. The court concluded "pursuant to RCW

² The juvenile court offenses are not reflected in the prosecutor's sentencing memorandum. 3 CP 369-436. Even without the point for the juvenile offenses the defendant had 17 points, more than enough to bring him within the parameters of RCW 9.94A.535(2)(c).

9.94A.535(2)(c) an exceptional sentence is warranted & does not violate Blakely v. Washington, 542 U.S. 296.” Accordingly the court sentenced the defendant to 252 months on each count.

A defendant’s presumptive sentence is based on the seriousness level of the offense and the defendant’s offender score. RCW 9.94A.530. The offender score tops out at “9”. RCW 9.94A.510. A defendant whose prior criminal history scores more than 9 before calculating in the current history will go unpunished for some offenses when he has been convicted of multiple current offenses. State v. Alvarado, 164 Wn.2d 556, 563, 192 P.3d 345 (2008). In that case the court may properly impose an exceptional sentence pursuant to RCW 9.94A.535(2)(c). Id.

The defendant argues that the exceptional sentence was unlawfully imposed in this case because there was insufficient evidence to convict the defendant of kidnapping. The statute specifically applies when a defendant has been convicted of multiple current offenses. He argues that since judgment should have entered only on the robbery this basis for an exceptional sentence is unfounded.

As discussed above the kidnapping was not merely incidental to the robbery. The evidence was sufficient to support

two distinct convictions. It was therefore permissible for the court to impose an exceptional sentence where the defendant had in fact committed multiple offenses and the defendant would not receive any additional punishment for those multiple current offenses due to his previously earned high offender score.

The defendant also objects to the exceptional sentence because it was imposed on both the robbery and kidnapping charges. He argues that when an offender score exceeds 9 points and there are multiple convictions only one of those convictions goes unpunished.

An offender score is the sum of points assigned to both current and prior offenses. RCW 9.94A.525, RCW 9.94A.589(1)(a). Both Robbery and Kidnapping are violent offenses. RCW 9.94A.030(53)(a)(i), RCW 9A.40.020(2), RCW 9A.56.200(2). As such they are counted two points against each other when calculating each individual offender score. RCW 9.94A.525(8). Thus when calculating the offender score for the robbery count the kidnapping count would have no effect on the defendant's offender score because the defendant's prior criminal history adds up to more than 9 points. Similarly when the score for the kidnapping charge is calculated the robbery count has no effect because the

defendant's prior criminal history counts as more than 9 points as to that charge as well. Thus, as to each count, there is no additional punishment resulting from his conviction for multiple current offenses. RCW 9.94A.535(2)(c) was designed to avoid this result by permitting the court to give a sentence above the standard range when the offender has a score above 9 based on prior criminal history and the offender is convicted of multiple current offenses. That circumstance is presented here. Thus there was no error in sentencing the defendant to an exceptional sentence on both counts.

The defendant further argues the court's findings of fact do not support the exceptional sentence on count II, kidnapping, because it only references count I robbery. The findings are sufficiently clear to establish that both counts result in no additional punishment as a result of the prior criminal history and multiple current offenses. If the Court believes that the findings are insufficient however, then the trial court should be given the opportunity to clarify those findings to reflect the sentence the court imposed.

C. THE DEFENDANT HAS NOT SHOWN THAT HE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL FOR WITHDRAWING A PROPOSED JURY INSTRUCTION.

At trial defense counsel initially proposed instructions for lesser included offenses of first and second degree possession of stolen property. 2 CP 246-249. Defense counsel then proposed supplemental jury instructions for third degree theft. 1 CP 163-164³. The trial court gave a preliminary ruling that it would not include possession of stolen property in either the first or second degree as a lesser included instruction. The court did state it was willing to hear argument whether either should be included. 4 RP 409-410. After lunch the court invited discussion on the question. Defense counsel stated that he would withdraw his request for any lesser included instruction. 4 RP 411-412. The theft instruction was not specifically discussed, nor was it included in the court's instructions to the jury. Defense counsel did not object or except to any of the court's instructions. 4RP 412.

The defendant mistakenly identifies the third degree theft instructions as instructions for third degree possession of stolen property. BOA at 21. Based on that mistake he argues that counsel was ineffective for withdrawing third degree possession of

stolen property instructions because he would have been entitled to that instruction as a lesser included offense of robbery, and that the outcome of the case was affected when the jury was not instructed on that lesser included offense.

A defendant asserting that he is entitled to a new trial on the basis that his counsel was ineffective bears the burden to prove (1) defense counsel's representation fell below an objective standard of reasonableness based on a consideration of all the facts and circumstances and (2) that as a result of defense counsel's deficient performance there is a reasonable probability that the result of the proceeding would have been different. State v. McFarland, 127 Wn.2d 322, 334-335, 899 P.2d 1251 (1995). The defendant must show both deficient performance and resulting prejudice in order to sustain his burden of proof. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). There is a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. Id. at 689. Conduct which can be reasonably characterized as trial strategy or tactics will not sustain the defendant's burden of proof.

³ A copy of those supplemental instructions are appended to the State's response.

State v. Johnston, 143 Wn. App. 1, 16, 177 P.3d 1273 (2007). If the defendant's argument is really that counsel was ineffective for failing to propose a lesser included instruction for possession of stolen property third degree he does not satisfy his burden of proof.

A defendant may be found guilty of any lesser offense that is necessarily included in the offense that he was charged with. RCW 10.61.006. In order to constitute a lesser included offense two criteria must be met. First, every element of the lesser offense must be included in the greater offense. Second, the evidence in the case must support an inference that only the lesser crime was committed. State v. Berlin, 133 Wn.2d 541, 947 P.2d 700 (1997), State v. Fernandez-Medina, 141 Wn.2d 448, 455, 6 P.3d 1150 (2000).

Defense counsel's performance is not deficient for failing to assert a position that would not be successful. In McFarland the Court stated that a defendant claiming his attorney was ineffective for failing to raise a suppression motion must show that the trial court would likely have granted the motion in order to prove counsel's performance was deficient. McFarland, 127 Wn.2d at 334. The trial court made clear that it was not going to instruct the jury on either of the proposed instructions for possession of stolen

property. The court cited Herrera as a basis for its reasoning. 4 RP 412. State v. Herrera, 95 Wn. App. 328, 977 P.2d 12 (1999). Herrera held that third degree assault was not a lesser included of first degree robbery. It is not clear from the record why the trial court found Herrera controlled its decision. It could have been because the court found the monetary element for possession of stolen property in the first or second degree was not an element of robbery. Alternatively the court could have reasoned that the other elements shared by all degrees of possession of stolen property were not necessarily elements of robbery.

Since the record does not reflect what the trial court's basis for rejecting the other two instructions was, the defendant cannot show that the trial court would not have also rejected a possession of stolen property in the third degree instruction. Thus the defendant fails to show counsel would have been successful in persuading the court to instruct the jury on third degree possession of stolen property. Consequently the defendant does not prove counsel provided deficient performance when he did not propose that instruction.

Even if defense counsel could have successfully argued that possession of stolen property met the legal prong of the test for

lesser included offenses, under the facts in this case the factual prong could not be met. In order to be a lesser included offense the lesser crime must be based on the same criminal transaction supporting the charged offense. State v. Porter, 150 Wn.2d 732, 739, 82 P.3d 234 (2004).

Here the defendant's evidence supporting possession of stolen property established a completely different transaction than the robbery. The defendant testified that he left his brother's home in the morning and came home in the afternoon to find his sister and Paul Cast smoking methamphetamine and sorting through items he deduced were stolen. He then took some of the items into his room to determine if he wanted to keep them to sell. When his brother Sean Grant told them to leave the defendant he took the stolen property to the Village Inn Motel. 4 RP 394-396, 403-404. Because the evidence the defendant points to in order to support a possession of stolen property charge occurred at a different time and place than the robbery, the two offenses did not arise out of the same criminal transaction. Had defense counsel proposed third degree possession of stolen property as a lesser included instruction it would have properly been rejected. The defendant

therefore does not show that he was prejudiced when counsel did not proposed that instruction.

The defendant also fails to show that he was prejudiced because the jury was not instructed on third degree possession of stolen property because the verdict demonstrates the jury would not have considered that charge had they been so instructed. In Washington jurors are told to deliberate on the greater offense before moving on to a lesser included offense. WPIC 155.00. In an ineffectiveness claim the Court presumes that the judge and jury acted according to law. Strickland 466 U.S. at 694. Since the jury was instructed that all 12 jurors must agree in order to render a verdict of guilty, and the jury returned a unanimous verdict of guilty on the robbery charge, then they would not have deliberated on third degree possession of stolen property.

The defendant anticipated this argument, and counters with citation to Keeble v. United States, 412 U.S. 205, 93 S.Ct. 1993, 36 L.Ed.2d 844 (1973). There the Court considered whether under the Major Crimes Act of 1885, 18 U.S.C. § 1153, 3242, the federal court had jurisdiction to instruct the jury on a lesser included offense not named in the Act. The language of the opinion quoted by the defendant was dicta, explaining why in that case the trial

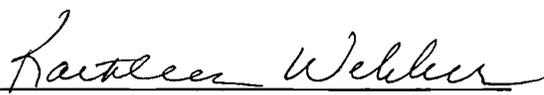
court should have granted the defendant's request for a lesser included instruction. The Court did not consider the specific instruction here, or the standard for prejudice articulated by the Court in Strickland which presumes juries follow the court's instructions.

IV. CONCLUSION

For the forgoing reasons the State asks the Court to affirm the defendant's convictions and sentences for first degree robbery and first degree kidnapping.

Respectfully submitted on February 2, 2011.

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Filed in Open Court

2-24, 20 10

SONYA KRASKI
COUNTY CLERK

By *[Signature]*
Deputy Clerk

**SUPERIOR COURT OF WASHINGTON
IN AND FOR SNOHOMISH COUNTY**

State of WA
Petitioner/Plaintiff(s)

NO. 09-1-01007-7

VS.

SUPPLEMENTAL PROPOSED
JURY INSTRUCTIONS

Terry L. Grant
Respondent/Defendant(s)

 Plaintiff's Supplemental Proposed Jury Instruction(s)

Defendant's Supplemental Proposed Jury Instruction(s)

(3 cited; 1 uncited)

DEF.

INSTRUCTION NO. ____

Stolen means obtained by theft or robbery

WPIC 79.08

DEF.

INSTRUCTION NO. ____

Stolen means obtained by theft or robbery

PLTF. _____

INSTRUCTION NO. _____

A person commits the crime of theft in the third degree when he or she commits theft of property or services not exceeding \$250 in value.

PLTF. _____

INSTRUCTION NO. _____

To convict the defendant of the crime of theft in the third degree, each of the following three elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about December 4, 2008, the defendant wrongfully obtained or exerted unauthorized control over property of another not exceeding \$250 in value;
- (2) That the defendant intended to deprive the other person of the property; and
- (3) That this act occurred in Snohomish County.

If you find from the evidence that elements (1), (2) and (3) have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

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