

66526-0

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NO. 66526-0-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

DAVID BRYNER,

Appellant.

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

Reply BRIEF OF APPELLANT

2011 DEC 29 PM 4: 52

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON

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A. ARGUMENT

The trial court's refusal to instruct the jury that it could convict of a lesser offense denied Mr. Bryner due process

Mr. Bryner requested the trial court instruct the jury on the lesser included offense of first degree theft. CP 175-177; 12/2/10 RP 8-11. The trial court refused to provide the instruction to the jury concluding there was no factual basis on which the jury could find Mr. Bryner guilty of only the lesser offense. 12/2/10 RP 11.

An instruction on a lesser offense is warranted where: (1) each element of the lesser offense must necessarily be proved to establish the greater offense as charged (legal prong); and (2) the evidence in the case supports an inference that the lesser offense was committed (factual prong). State v. Berlin, 133 Wn.2d 541, 548, 947 P.2d 700 (1997); State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978).

In its response brief the State relies on a briefly employed standard which Berlin rejected. Specifically the State contends that one offense is not a lesser of another unless each alternative of the greater offense, whether charged or not, includes the lesser offense. Brief of Respondent at 6-7 (citing State v. Curran, 116 Wn.2d 174, 183, 804 P.2d 558 (1991) and State v. Roche, 74 Wn.App. 500, 878 P.2d 497 (1994)). While many

cases, Roche among them, interpreted Curran as requiring such an analysis, Berlin expressly rejected that standard. Berlin, 133 Wn.2d at 548. Berlin clarified that the legal prong required a determination only of whether “each of the elements of the lesser offense must be a necessary element of the offense charged.” Id. at 550 (Emphasis in original.)

Thus it does not matter whether there are alternatives of robbery for which first degree theft is not an included offense. Instead the only inquiry is whether first degree theft is a lesser offense of robbery as charged here.

A robbery is in essence a theft of property from the person of another by force. RCW 9A.56.190; CP 191 (Instruction 7). The State charged Mr. Bryner with first degree robbery in this case because it alleged the robbery occurred in a financial institution. RCW 9A.56.200; CP 192 (Instruction 8). Theft means “[t]o wrongfully obtain or exert unauthorized control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services.” RCW 9A.56.020(1)(a). A person commits first degree theft when he commits theft of any property “taken from the person of another.” RCW 9A.56.030(1)(b). Each element of the “from the person of another” prong

of first degree theft is a necessary element of first degree robbery as charged in this case. Thus, the legal prong was satisfied.

B. CONCLUSION

For the reasons above, this Court must reverse Mr. Bryner's conviction.

Respectfully submitted this 29th day of December, 2011.



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DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 66526-0-I
v.)	
)	
DAVID BRYNER,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 29TH DAY OF DECEMBER, 2011, I CAUSED THE ORIGINAL **REPLY 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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SIGNED IN SEATTLE, WASHINGTON THIS 29TH DAY OF DECEMBER, 2011.

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