

NO. 34141-7

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**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

CORNELL SHEGOG, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable Frederick W. Fleming

No. 05-1-00152-8

---

**BRIEF OF RESPONDENT**

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*[Handwritten Signature]*  
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CORNELL SHEGOG

STATE OF WASHINGTON  
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COURT APPEALS

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. May a defendant challenge the discretion a prosecutor used in the filing of charges under RCW 9.94A.411 where the statute expressly states it may not be used for that purpose? (Appellant's Assignment of Error No. One).
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B. STATEMENT OF THE CASE.

1. Procedure

On January 10, 2005, CORNELL SHEGOG, hereinafter defendant, was charged with one count of robbery in the second degree and making a false or misleading statement to a public servant, under Pierce County Cause Number 05-1-00152-8, contrary to RCW 9A.56.190, 9A.56.210, 9A.76.175. CP 1-3. The State also filed a Persistent Offender Notification, notifying defendant he was facing the possibility of a life sentence without parole under RCW 9.94A.030(32) and 9.94A.570. CP 10.

The prosecution tried to negotiate the case short of a third strike but was unsuccessful. RP 10, 7/14/05, CP 426-27. On July 5, 2005, the

State filed an amended information, elevating the robbery charge to robbery in the first degree. CP 6-7.

On July 19, 2005, a trial commenced before the Honorable Frederick Fleming. RP 3. Both the State and defense proposed instructions. Vol. 4 RP 240-41, CP 14-43, 44-60. The State objected to the giving of the lesser included of theft in the third degree. Vol. 4 RP 241. Defense counsel objected to the failure to give defense instruction No. 8 defining bodily injury and defense proposed No. 13 on public servant. Vol. 4 RP 245.

The jury returned a verdict of guilty to robbery in the second degree and making a false or misleading statement to a public servant. CP 95-96.

## 2. Sentencing

On October 21, 2005, the matter reconvened for an evidentiary hearing for sentencing. RP 4, 10/21/05. Fingerprint technician Alan Johnson compared fingerprints from the certified copies of defendant's two prior robbery cases, together with defendant's booking fingerprints and fingerprints taken at the hearing and concluded that they were a match. 10/21/05 RP 9, 11, 12.

A sentencing hearing commenced before the Honorable Frederick Fleming on November 18, 2005. 11/18/05 RP 3. The prosecutor clarified that the prior four robbery convictions which the State was relying on for

strike offenses stemmed from two incidents, each involving two robberies. 11/18/05 RP 3-4. The defense asked the court to find that a life sentence is unconstitutional as applied to him. 11/18/05 RP 6. The State filed a response to defendant's opposition to a life sentence as cruel and unusual. CP 224-379. The State included in its memorandum a detailed history of defendant's five felony convictions and 34 misdemeanor and gross misdemeanor convictions, including seven total assaults, three of which involved domestic violence. CP 226-227. The memorandum also included appendices with the police reports from defendant's prior strike offenses detailing the threatened use of a gun and actual use of a knife during the robberies. CP 240-379, Appendices A & B.

The court considered argument from both parties, including the Fain, *infra*, factors, and decided that based on the history of the legislation, defendant's criminal history and the decision of the jury the sentence of life is not cruel. 11/18/05 RP 20.

Defendant received a life sentence without the possibility of parole. CP 380-391.

### 3. Facts

While Kathy Cox was working as store director of the Spanaway Albertson's on January 8, 2005, she observed defendant in the meat

section of the store examining packages of meat. RP 97, 101, 145.<sup>1</sup> A few minutes later she observed defendant at the self-checkout. RP 102. Ms. Cox noticed defendant had a black leather coat on with two big pockets and she could see a partially visible package of meat coming out of the right pocket. RP 102. Defendant had bath tissue that he scanned and placed in a plastic bag and walked away without paying for the meat. RP 103.

Ms. Cox stationed herself by the front door, waiting to confront the defendant about the meat. RP 103. Also present were employees Gary Dains, Eric Visser, and Dustin Cooper. RP 103. As defendant walked towards her she asked for the meat that was in his pocket and asked defendant to step into the main office. RP 107, 171. Defendant denied stealing anything or doing anything wrong and faced off with Ms. Cox. RP 233. Defendant became very aggressive and gave her a full body push with his arms with enough force to cause her to fall if employee Dains had not broken her fall. RP 108, 131, 172. At one point defendant pulled a meat package out of his pocket and threw it at Cox. RP 109, 110. Visser called 911. RP 172.

Dains grabbed the defendant and they fell to the concrete floor in a struggle. RP 110, 149, 174. Dain kept hold of him the entire time as

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<sup>1</sup> Unless otherwise indicated, reference to the verbatim report of proceedings pertains to the trial proceedings transcripts, which are numerically numbered pages 1-296, Vol. 1-5.

defendant tried to get away. RP 149-150. At one point Dain looked up to Visser and asked for help because the defendant was lifting up out of a pinned position. RP 176. Both Visser and two paramedics, who happened to be at the store at the time, helped to restrain defendant. RP 110, 177, 185, 189. Defendant continued to struggle until police arrived. RP 186, 192. Dain sustained a fairly large bump on his head and a swollen hand as a result of the fall. RP 149, 151. Visser received a shin injury during his attempt to restrain defendant's legs and Cooper had a cut on his right hand after trying to grab defendant's arm. RP 179-180, 236.

Officers and store clerks recovered from defendant's person four rib eye steaks, two lunch meats and one pepperoni totaling \$46.52. RP 130, 215. There was at least more than one meat package left on defendant's person after her threw a package at Cox. RP 131.

Defendant gave Deputy Smith the name of Deaedrea Burr. RP 215. Deputies later confirmed that his true name was Cornell Shegog. RP 218.

Defendant's attempted exit from the store following the robbery was caught on store videotape. Plaintiff's Ex. 1, RP 114-127.

C. ARGUMENT.

1. A DEFENDANT MAY NOT CHALLENGE A PROSECUTOR'S EXERCISE OF DISCRETION IN THE FILING OF CHARGES UNDER RCW 9.94A.411.

The prosecutor standards outlined in RCW 9.94A.411 do not create a substantive right and a prosecutorial charging decision is “not subject to judicial review.” State v. Lee, 69 Wn. App. 31, 32, 847 P.2d 25 (1993), review denied, 122 Wn.2d 1003, 859 P.2d 602 (1993). Instead the statute expressly prohibits the use of the standards by defendants, against the state:

These standards are intended solely for the guidance or prosecutors in the state of Washington. They are not intended to, do not and may not be relied upon to create a right or benefit, substantive or procedural, enforceable at law by a party in litigation with the state.

RCW 9.94A.401.

In Lee defendant complained that his conviction for first degree robbery must be overturned because, “given the evidence against him, the prosecutor charged him with too severe a crime.” 69 Wn. App. at 33. The court rejected the argument finding that a defendant may not challenge a prosecutor’s charging decisions based on RCW 9.94A.440. Id. at 35. Here, defendant also argues “directives under RCW 9.94A.411(1) and (2) directed against the filing of a Robbery charge,” and that “[s]uch overcharging clearly contradicts a prosecutor’s duty to act impartially.” (Opening Brief of Respondent at 26). However, defendant uses RCW

9.94A.411 for the very thing the legislature said it is not intended for – to challenge a prosecutor’s charging decision.

Moreover, defendant does not seek any remedy under this claimed statutory violation. Instead defendant only suggests that “[t]his court should not condone the prosecutor’s overzealous conduct.” Because RCW 9.94A.411 provides no rights or remedies for defendant this court should reject this argument and affirm defendant’s conviction.

2. CHARGING DEFENDANT WITH FIRST DEGREE ROBBERY DID NOT DENY DEFENDANT HIS RIGHT TO DUE PROCESS.

Defendant makes the novel argument that a defendant may be denied due process if the filing decision of the prosecutor prevents available defenses. This argument must fail on two grounds. First, defendant cites no authority for this proposition. Second, even if this were a sound legal theory, defendant fails to establish the factual viability of this claim.

While RCW 9.94A.411 may not create any substantive rights for defendants to challenge the charging decisions of prosecutors, constitutional rights may be implicated if the charging decision is based on an illegal or unconstitutional motive. Lee, 69 Wn. App. at 35, f.n. 5, (citing State v. Judge, 100 Wn.2d 706, 713, 675 P.2d 219 (1984)).

There is no requirement that prosecutor’s make charging decisions that allow defendants defense to the charges. Instead, a prosecutor must

decide what charge most accurately reflects defendant's conduct, bearing in mind whether defendant may have a complete defense to the charge. For example, a prosecutor may choose to forgo a charge of second degree intentional murder under RCW 9A.32.050(a), where the State may be unable to prove intent to kill, instead choosing second degree felony murder, under RCW 9A.32.050(b). Either way it is charged the defendant may be found guilty of second degree murder, but the latter prevents the defense of unintentional murder. Also by charging felony murder the State removes the possibility of the giving of the lesser included instruction on manslaughter because manslaughter may legally be a lesser of intentional murder but not felony murder. See, State v. Tamalini, 134 Wn.2d 725, 728, 953 P.2d 450 (1998) (Rejecting the claim that manslaughter in the first or second degree is a lesser included offense or inferior degree of second degree felony murder).

Even if we assume that the State must charge to allow viable defenses to the crime, defendant is incorrect that he would have a valid claim of self-defense to an assault in the third degree charge.<sup>2</sup> (Opening Brief of Appellant at 28). Self defense may be raised for the charge of

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<sup>2</sup> RCW 9A.36.031 provides that a person is guilty of assault in the third degree if he or she, under circumstances not amounting to assault in the first or second degree; (a) With intent to prevent or resist the execution of any lawful process or mandate of any court officer or the lawful apprehension or detention of himself or another person, assault another.

This statute applies to resisting the a citizen's arrest by store personnel during a shoplift. See State v. Miller, 103 Wn.2d 792, 698 P.2d 554 (1985).

third degree assault, but a trial court may also deny the giving of such an instruction based on the facts of the case. State v. Jones, 63 Wn. App. 703, 821 P.2d 543, review denied, 118 Wn.2d 1028, 828 P.2d 563 (1992). The use of self-defense generally depends upon a showing that the defendant was resisting an *unlawful* arrest. Id. at 706. Even then a person may only use the amount of force to resist that is “reasonable and proportioned to the injury” about to be received and force may not be used to resist an unlawful arrest “which threatens only a loss of freedom.” Id. at 707 (quoting State v. Rousseau, 40 Wn.2d 92, 95, 241 P.2d 447 (1952); State v. Goree, 36 Wn. App. 205, 209, 673 P.2d 194 (1983), review denied, 101 Wn.2d 1003 (1984)).

Here, defendant conceded below and on appeal that he committed the crime of third degree theft. Because he concedes that the arrest was lawful there is no claim of self-defense. Nor could defendant raise a claim that the force used was excessive. First, one cannot create a need for self-defense. Defendant was the initial aggressor, trying to push through Ms. Clark. While defendant’s brief is true that it took a total of six people to detain defendant, this was based on his size, strength, and continual resistance, and not based on excessive force.

3. UNDER KORUM THERE IS NO SHOWING OF PROSECUTORIAL VINDICTIVENESS.

A prosecutor has great discretion in determining how and when to file criminal charges. State v. Korum, - Wn.2d -, 141 P.3d - (2006) (citing State v. Lewis, 115 Wn.2d 294, 299, 797 P.2d 1141 (1990)). RCW 9.94A.441(2) provides that “[c]rimes against persons will be filed if sufficient admissible evidence exists.” Robbery in the first degree is a crime against persons. RCW 9.94A.441(2).

In looking to claims of prosecutorial vindictiveness in the pretrial setting, court’s apply the actual vindictiveness standard, rather than a presumption of vindictiveness. State v. McDowell, 102 Wn.2d 341, 685 P.2d 595 (1984).

Here, defendant cannot make a showing of *actual vindictiveness*. “Plea bargaining is a legitimate process, so long as it is carried out openly and above the table.” State v. Lee, 69 Wn. App. 31, 847 P.2d 25, review denied, 122 Wn.2d 1003, 859 P.2d 602 (1993). This process includes the adding of charges where a defendant refuses to enter a plea as originally charged:

In declining to apply a presumption of vindictiveness, the Court [in Bordenkircher] recognized that “additional” charges obtained by a prosecutor could not necessarily be characterized as an impermissible “penalty.” Since charges brought in an original indictment may be abandoned by the prosecutor in the course of plea negotiation -- in often what is clearly a “benefit” to the defendant -- changes in the charging decision that occur in the context of plea negotiation are an inaccurate measure of improper

prosecutorial "vindictiveness." An initial indictment -- from which the prosecutor embarks on a course of plea negotiation -- does not necessarily define the extent of the legitimate interest in prosecution. For just as a prosecutor may forgo legitimate charges already brought in an effort to save the time and expense of trial, a prosecutor may file additional charges if an initial expectation that a defendant would plead guilty to lesser charges proves unfounded.

United States v. Goodwin, 457 U.S. 368, 379-90, 102 S. Ct. 2485, 73 L. Ed. 2d 74 (1982) (citing Bordenkircher v. Hayes, 434 U.S. 357, 98 S. Ct. 663, 54 L. Ed. 2d 604 (1977)). Furthermore, “[i]f a prosecutor could not threaten to bring additional charges during plea negotiations, and then obtain those charges when plea negotiations failed, an equally compelling argument could be made that a prosecutor's initial charging decision could never be influenced by what he hoped to gain in the course of plea negotiation.” Bordenkircher, 434 U.S. at 364-365.

Defendant’s prosecutorial misconduct largely rests on State v. Korum, 120 Wn. App. 686, 86 P.3d 166 (2004), which was recently overturned at – Wn.2d –, 141 P.3d 13 (2006). The court in Korum followed the United State’s Supreme Court’s reasoning in Goodwin and Bordenkircher, supra, finding that filing additional charges after a defendant refuses a guilty plea does not give rise to a presumption of vindictiveness. 141 P.3d at 17 (citing Goodwin, 457 U.S. at 377-85; Bordenkircher, 434 U.S. at 360-65). The court also rejected the Court of Appeals finding that the magnitude of the increase in punishment (from 15 counts and a 135 month sentence to 32 counts and a 1,208 month

sentence) suggests vindictive retaliation. 141 P.3d at 25-26 (citing Korum, 120 Wn. App. at 714).

The facts in this case are a far cry from Korum and do not establish vindictiveness, either actual or a presumption of vindictiveness. Here, the defendant was originally charged with robbery in the second degree, a strike offense, and making a false or misleading statement. When plea bargaining failed the State gave notice to the defendant that it would file amended charges to elevate the robbery to robbery in the first degree. CP 426-427. The State also filed a supplemental designation of probable cause to support the filing of the charges and detailing the alleged injury suffered to sustain the first degree robbery charges. CP 5.

Based on the supplemental facts there was probable cause to support the charge of first degree robbery.<sup>3</sup> The State documented the victim Dan Dain, believed he lost consciousness momentarily after defendant pushed him. Also when he hit the ground Dain reported that he

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<sup>3</sup> 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 or property of anyone. Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking; in either of which cases the degree of force is immaterial. RCW 9A.56.190.

A person is guilty of robbery in the first degree if (a) in the commission of a robbery or in immediate flight therefrom, he or she: (iii) inflicts bodily injury. RCW 9A.56.200(1)(a)(iii).

Bodily injury is defined as “physical pain or injury, illness, or an impairment of physical condition.” RCW 9A.04.110(4)(a).

suffered a large lump on his head. The defendant also kicked Mr. Visser in the shin, which left a bruise. CP 5. These injuries alone are enough to establish “bodily injury” in order to sustain the robbery conviction.

Whether or not the trial testimony was consistent with the declaration of probable cause has no bearing on whether there was sufficient evidence at the time of filing to support a finding of probable cause and the State probably exercised its discretion.

Finally, defendant makes one last attempt to minimize his conduct into a theft by arguing that applying the robbery statute to him leads to absurd results. (Opening Brief of Appellant at 33-34).

The court’s analysis in this case should end with whether there is sufficient evidence to support the robbery charge. (See Sufficiency of the Evidence Argument at 15-21). If this court were to entertain whether it is absurd to apply the robbery statute in this case, then the analysis should begin with the plain language of the statute. A court must always begin with the plain meaning of the statute and when the plain language is unambiguous a court will not construe the statute otherwise. State v. Wilson, 125 Wn.2d 212, 217, 883 P.2d 320 (1994). Looking to whether construction leads to “absurd results” asks the court to look beyond the plain language. See State v. J.P. 149 Wn.2d 444, 450, 69 P.3d 318 (2003) (citing State v. Delgado, 148 Wn.2d 723, 727, 63 P.3d 792 (2003)).

Here, the plain language of the robbery statute applies to defendant. He (1) took personal property, (2) from or in the presence of

another, (3) with force. RCW 9A.56.190. The “degree of force used is immaterial.” Id. Defendant seems to argue that because this was not a robbery at gunpoint from a bank, it was not a robbery at all. This argument belies the plain language of robbery in the second degree.

4. THERE WAS OVERWHELMING EVIDENCE TO SUPPORT EACH ELEMENT OF ROBBERY IN THE SECOND DEGREE BEYOND A REASONABLE DOUBT.

The applicable standard of review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Joy, 121 Wn.2d 333, 338, 851 P.2d 654 (1993); State v. Rempel, 114 Wn.2d 77, 82-83, 785 P.2d 1134 (1990) (citing State v. Green, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980) and Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)). Also, a challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. State v. Barrington, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), review denied, 111 Wn.2d 923, 1033, 767 P.2d 572 (1988) (citing State v. Holbrook, 66 Wn.2d 278, 401 P.2d 971 (1965)); State v. Turner, 29 Wn. App. 282, 290, 627 P.2d 1323 (1981). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against defendant. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Circumstantial and direct evidence are considered equally reliable. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In considering this evidence, "[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal." State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990)(citing State v. Casbeer, 48 Wn. App. 539, 542, 740 P.2d 335, review denied, 109 Wn.2d 1008 (1987)).

The written record of a proceeding is an inadequate basis on which to decide issues based on witness credibility. The differences in the testimony of witnesses create the need for such credibility determinations; these should be made by the trier of fact, who is best able to observe the witnesses and evaluate their testimony as it is given. On this issue, the Supreme Court of Washington said: great deference . . . is to be given to the trial court's factual findings. In re Sego, 82 Wn.2d 736, 513 P.2d 831 (1973); Nissen v. Obde, 55 Wn.2d 527, 348 P.2d 421 (1960). It, alone, has had the opportunity to view the witnesses' demeanor and to judge his veracity. State v. Cord, 103 Wn.2d 361, 367, 693 P.2d 81 (1985). Therefore, when the State has produced evidence of all the elements of a crime, the decision of the trier of fact should be upheld.

A person is guilty of robbery in the second degree if the person:

[U]nlawfully 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 or property of anyone. Such force or fear must be used to obtain or retain possession of the property, or to prevent or

overcome resistance to the taking; in either of which cases the degree of force is immaterial. Such taking constitutes robbery whenever it appears that, although the taking was fully completed without the knowledge of the person from whom taken, such knowledge was prevented by the use of force or fear.

RCW 9A.56.190, RCW 9A.56.210.

a. An employee has implied dominion or control.

Defendant argues that he is not guilty of robbery because the property taken was not the “employees.” This argument has repeatedly been rejected. See State v. Molina, 83 Wn. App. 144, 148, 920 P.2d 1228 (1996); State v. Blewitt, 37 Wn. App. 397, 680 P.2d 457 (1984), review denied, 103 Wn.2d 1017 (1985); State v. Tvedt, 116 Wn. App. 316, 324-35, 65 P.3d 682 (2003), over’d on other grounds, 153 Wn.2d 705, 107 P.3d 728 (2005). An employee has “implied responsibility of exercising control over the employer’s property as against all others.” Blewitt, at 399.

b. In the presence of the person.

Defendant contends that because no one actually saw defendant take the meat it was not committed in a person’s presence. Defendant looks at the “taking” as only the moment it was taken from the meat counter. But a “taking” is an ongoing act that continues as the person walks through the store and attempts to leave while in another’s presence. See State v. Handburgh, 119 Wn.2d 284, 830 P.2d 641 (1992). The court

in Handburgh considered and rejected the very issue defendant raises here, e.g. “what constitutes in the presence of.”

In Handburgh, defendant took a bicycle left unattended at a recreation center. The victim appeared from inside and saw the defendant riding off on her bicycle. 119 Wn.2d at 285. The victim demanded the return of her bicycle but defendant refused and rode it into an alleyway where it dropped it into a ditch. When the victim went to retrieve her bicycle the defendant threw rocks at her. She continued to try to get her bicycle and pushed the defendant to try to get him from throwing rocks at her. The victim left and the defendant eventually abandoned the bicycle. 119 Wn.2d at 285-86. The defendant was charged and convicted of second degree robbery. Id.

On appeal defendant argued that he did not take the bicycle in the victim’s “presence” because he initially acquired the bicycle while she was in the recreation center. 119 Wn.2d at 287. The court rejected this argument and adopted a transactional view of robbery, finding “a forceful *retention* of stolen property in the owner’s presence is the type of “taking” contemplated by the robbery statute even where the initial appropriation ensued outside the owner’s presence.” 119 Wn.2d at 290. The court in Handburgh posed the following hypothetical:

A person takes money from the cash register of a seemingly unattended convenience store, thereby committing theft. Before the thief flees, the owner comes out of the back

room and confronts him. Seeing the owner, the thief points a gun at him.

119 Wn.2d at 290-91. The court posed the question of whether this was simply theft, or robbery and concluded that that the act constitutes robbery, “even if no additional property is taken; the retention of cash, by the use or threatened use of force in the presence of the store owner, is more than theft.” Id. at 291.

The Handburgh court relied on the reasoning laid out in State v. Manchester, 57 Wn. App. 765, 790 P.2d 217, review denied, 115 Wn.2d 1019 (1990), where Division One adopted the transactional view of robbery. In Manchester, the defendant was charged with two counts of second degree robbery for two separate incidents. In both incidents he was observed shoplifting by store security guards who were standing at a distance. Manchester, 57 Wn. App. at 766. Both times the defendant left the store and was confronted by a security guard, at which time he displayed a weapon. 57 Wn. App. at 766. While the court of appeals concluded that the initial taking probably did not occur within the “presence” of the guards based on the distance, a robbery conviction could still stand because the defendant’s use of “force to *retain* possession of the stolen goods in th[e] owner’s presence,” was sufficient to constitute a taking. 57 Wn. App. at 769-770.

Here the taking took place in front of several store employees and defendant used force to attempt to retain possession of the goods or

escape. Like Handburgh and Manchester, the defendant used force when confronted by store employees. Whether the initial taking took place in the presence of employees is immaterial.

c. Use of force.

Defendant also argues that the amount of force used was not to “achieve any of the purposes listed in RCW 9A.56.190 but rather his primary purpose was to attempt to prevent physical harm to himself.” (Opening Brief of Appellant at 48).

With respect to force, all the State had to show was:

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.

RCW 9A.56.190 (emphasis added).

But defendant reviews the evidence in the light most favorable to him. The act of pushing through store employee Ms. Cox as she confronted him about the theft proves either an attempt to retain possession or overcome her resistance to the taking. RP 103, 171, 172. Ms. Cox reported that when she asked for return of the meat the defendant became very aggressive and gave her a “full body push.” RP 108, 131, 172. Defendant also threw a package of meat at her. RP 109-110. Defendant then continued to resist any kind of detention and it took three persons to restrain defendant. RP 11, 177, 185, 189. Seven more items

were recovered from defendant's person after this resistance. RP 130, 215, 131.

When defendant argues that it was the store employees, and not the defendant who made this situation a robbery as opposed to a theft, defendant looks at the facts with rose colored glasses. When Ms. Cox confronted defendant he had the opportunity to peacefully empty his pockets and surrender the stolen merchandise. Defendant also could have chose to remain still once restrained and not attempt to flee. Instead defendant chose to use force to overcome any resistance from employees. When he did, he committed the crime of robbery rather than theft.

5. THE COURT HAS NO DUTY TO SUA SPONTE PROVIDE INSTRUCTIONS ON SELF-DEFENSE AND DEFENDANT HAS FAILED TO PRESERVE THIS ISSUE FOR REVIEW.

Generally, an issue cannot be raised for the first time on appeal unless it is a "manifest error affecting a constitutional right." RAP 2.5(a).

Self-defense is not an issue unless the defendant raises the defense and presents some credible evidence to support it. In re Montoya, 109 Wn.2d 270, 744 P.2d 340 (1987). "If a party is dissatisfied with an instruction, it is that party's duty to propose an appropriate instruction and, if the court fails to give the instruction, take exception to that failure. If a party does not propose an appropriate instruction, it cannot complain

about the court's failure to give it." State v. Jacobson, 74 Wn. App. 715, 723, 876 P.2d 916 (1994), *citations omitted*.

Here, defendant neither raised self-defense or proposed an instruction pertaining to that defense. CP 429-430, 44-60. The court had no duty to instruct the jury *sua sponte* on a defense that was never raised. Nor does defendant argue ineffective assistance of counsel, without such argument this issue is not preserved.

Even if the court had a duty to raise defendant's defenses for him, the evidence does not support an instruction on self-defense. "Jury instructions are sufficient if they permit each party to argue his theory of the case and properly inform the jury of the applicable law." State v. Bowerman, 115 Wn.2d 794, 809, 802 P.2d 116 (1990) (quoting State v. Rice, 110 Wn.2d 577, 603, 757 P.2d 889 (1988)). To raise self-defense before a jury, a defendant bears the initial burden of producing some evidence that his or her actions occurred in circumstances amounting to self-defense, i.e., the statutory elements of reasonable apprehension of injury. State v. Janes, 121 Wn.2d 220, 237, 850 P.2d 495, 22 A.L.R.5th 921 (1993); WPIC 17.02. In order to establish self-defense, a finding of actual danger is not necessary. The jury instead must find only that the defendant reasonably believed that he or she was in danger of imminent harm. State v. LeFaber, 128 Wn.2d 896, 899, 913 P.2d 369 (1996).

Here, there is no evidence that the store manager came after him in an aggressive manner. Thus there was absolutely no evidence that prior to

his assaultive behavior (the push) he was placed in reasonable fear of injury. Defendant cannot create the need to act in self-defense by stealing a property owner's property and then complaining that the property owner used reasonable force to retrieve the property. Whether the trier of fact examined the assault against Ms. Cox, or against the store employees who detained him, there was no evidence to support self-defense.

6. A TRIAL COURT DOES NOT ERROR IN FAILURE TO GIVE A LESSER INCLUDED INSTRUCTION WHERE SUCH A LESSER INCLUDED WAS NOT PROPOSED BELOW.

Generally, an issue cannot be raised for the first time on appeal unless it is a "manifest error affecting a constitutional right." RAP 2.5(a).

“[I]t is not error to fail to instruct on a lesser included offense when no request for such an instruction is made. State v. Alferez, 37 Wn. App. 508, 681 P.2d 859 (1984) (citing State v. Walker, 13 Wn. App. 545, 536 P.2d 675 (1975); State v. Mayer, 4 Wn. App. 549, 483 P.2d 151 (1971)). If a party does not propose an appropriate instruction, it cannot complain about the court's failure to give it. Jacobson, 74 Wn. App. at 723.

Here, defense proposed the lesser included offense of theft in the third degree, rather than theft in the first degree, and the trial court so instructed. CP 53, 54, 58, 72. The defendant cannot claim error where he failed to propose the first degree theft instruction. It is clear defendant

made a tactical choice to try to obtain a conviction for a simple misdemeanor, rather than another felony, and this decision cannot be second guessed on appeal. The only arguable claim defendant could have on appeal, that of ineffective assistance of counsel, is not raised.

7. DEFENDANT'S LIFE SENTENCE FOR HIS  
THIRD MOST SERIOUS VIOLENT OFFENSE  
DOES NOT VIOLATE THE PROHIBITION  
AGAINST CRUEL AND UNUSUAL  
PUNISHMENT.

The Eighth Amendment to the U.S. Constitution prohibits the infliction of "cruel and unusual punishments;" art. I, § 14 of the Washington Constitution prohibits "cruel punishment." The prohibition in the Washington Constitution affords greater protection than its federal counterpart. State v. Manussier, 129 Wn.2d 652, 674, 921 P.2d 473 (1996), cert. denied, 520 U.S. 1201, 117 S. Ct. 1563, 137 L. Ed. 2d 709 (1997).

Defendant argues that the Persistent Offender Accountability Act,<sup>4</sup> as applied to him, violates the constitutional guarantee against cruel and unusual punishment. But the Supreme Court has already answered this claim in the negative under similar circumstances. See, State v. Manussier, supra, (upholding a life sentence where prior convictions were for second degree robbery and first degree robbery, and present current conviction was for second degree robbery); State v. Rivers, 129 Wn.2d 697, 705, 713-714, 921 P.2d 495 (1996) (sentence withstood proportionality review where current conviction was for second degree robbery and prior offenses for attempted robbery in the second degree, robbery in the second degree and second degree assault). Given the similarity of offenses involved in this case (current offense second degree robbery and four prior convictions for second degree robbery), it is not

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<sup>4</sup> RCW 9.94A.570 (33)(a)(i) provides in pertinent part, "Persistent offender" is an offender who:

(a) (i) Has been convicted in this state of any felony considered a most serious offense; and

(ii) Has, before the commission of the offense under (a) of this subsection, been convicted as an offender on at least two separate occasions, whether in this state or elsewhere, of felonies that under the laws of this state would be considered most serious offenses and would be included in the offender score under RCW 9.94A.525; provided that of the two or more previous convictions, at least one conviction must have occurred before the commission of any of the other most serious offenses for which the offender was previously convicted; or

RCW 9.94A.570 provides in pertinent part:

Notwithstanding the statutory maximum sentence or any other provision of this chapter, a persistent offender shall be sentenced to a term of total confinement for life without the possibility of release . . .

necessary to engage in any further analysis and this court should follow Manussier and Rivers in this case and conclude that defendant's sentence is not violative of defendant's right to be free from cruel punishment.

If this court chooses to perform a proportionality review, the analysis leads to the same conclusion as Manussier and Rivers. The court looks to four factors, known as the Fain<sup>5</sup> factors, to determine whether a sentence constitutes cruel punishment: (1) the nature of the offense, (2) the legislative purpose behind the statute, (3) the punishment the defendant would have received in other jurisdictions, and (4) the punishment meted out for other offenses in the same jurisdiction. State v. Rivers, 129 Wn.2d at 712-713.

a. Nature of the offense.

The offense committed by defendant is classified as a "most serious offense." RCW 9.94A.030(28)(a). The crime of robbery includes use of force. RCW 9A.56.210. Compared with the Fain case, where the defendant was convicted of second degree theft and priors included fraudulent use of credit card, passing a forged check and obtaining money by false pretenses, defendant's second degree robbery convictions are far more serious. In concluding that Fain's crimes did not warrant status as a

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<sup>5</sup> State v. Fain, 94 Wn.2d 387, 617 P.2d 720 (1980).

habitual offender, the court agreed with the rationale by Justice Powell in

Rummel v. Estelle:

None of the crimes involved injury to one's person, threat of injury to one's person, violence, the threat of violence, or the use of a weapon. Nor does the commission of any such crimes ordinarily involve a threat of violence action against another person or his property.

Fain, at 398 (quoting Rummel v. Estelle, 445 U.S. 263, 100 S. Ct. 1133, 63 L. Ed. 2d 382 (1980)), at 295 (Powell, J., dissenting).

The same characterization of defendant's convictions cannot be made. Robbery in the second degree does involve the use or threat of violence and it is exactly that which elevates it from a simple theft to the crime of robbery.

b. Legislative Purpose Behind Statute.

This factor was already analyzed in Thorne, *supra*, where the court concluded that the purpose of the persistent offender law is to deter those criminals who commit three "most serious offenses" and the segregation of those criminal from the rest of society. State v. Thorne, 129 Wn.2d 736, 775, 921 P.2d 514, 526 (1996).

c. Punishment defendant would receive in other jurisdictions.

Washington's "three strikes" law is similar to state and federal legislation throughout much of the United States. Rivers, 129 Wn.2d at 714 (citations omitted). As the court in Rivers already concluded, a

defendant with a criminal history like defendant Rivers and this defendant would likely receive a similar sentence for his third serious offense in most jurisdictions in this country. Id. Defendant argues that in California a third time offender is sentenced to “an indeterminate term of life imprisonment with a maximum term of the indeterminate sentence calculated as the great of [three times the term otherwise provided; 25 years; or the term that would have been imposed with certain enhancement],” and that this is a “less severe sentence than the true life.” (Opening Brief of Appellant at 68, citing Cal. Penal Code § 667 (e)(2)(A)). Defendant asks this court to discount the Supreme Court’s determination in Rivers that there is no significant distinction between life sentences with and without parole. 129 Wn.2d at 714 (citing In re Grisby, 121 Wn.2d 419, 427 P.2d 901 (1993)).

d. Punishment for other offenses in the same jurisdiction.

Defendant would face a life sentence for any third “most serious offense” under the Persistent Offender Accountability Act. Thus his sentence here does not differ simply because it is robbery in the second degree. As noted in Rivers, the Supreme Court has previously held that a life sentence imposed upon a defendant convicted of robbery and subject to the habitual criminal statute does not constitute cruel and unusual

punishment. 129 Wn.2d at 714 (citing State v. Lee, 87 Wn.2d 932, 558 P.2d 236 (1976)).

Defendant's argument largely focuses on the harshness of a life sentence for one robbery conviction. But this is not the focal point for proportionality analysis; instead a court must consider the other convictions which support life imprisonment, here, four other robbery convictions. "The repetition of criminal conduct aggravates the guilt of the last conviction and justifies a heavier penalty for the crime." Rivers, 129 Wn.2d at 714 (quoting Lee, at 937). This defendant is the reason the three strikes initiative was pushed through as law by the people. His repetition of taking property from an individual's person with the use of force increased the chances of an even more undesirable outcome. (See criminal history as outlined in State's sentencing opposition brief at CP 226-227). As stated by the United States Supreme Court, the purpose of recidivism statutes is:

To deter repeat offenders and, at some point in the life of one who repeatedly commits criminal offenses serious enough to be punished as felonies, as to segregate that person from the rest of society for an extended period of time. This segregation and its duration are based *not merely on that person's most recent offense* but also on the propensities he has demonstrated over a period of time during which he has been convicted of and sentenced for other crimes.

Rummel v. Estelle, 445 U.S. at 284-85 (emphasis added).

Defendant also argues that the sentencing judge erred when he failed to consider the constitutional limitations of sentencing. (Opening Brief of Appellant at 59, issue No. 8). First, defendant overlooks that the court did in fact consider the constitutional argument and ruled against defendant finding that based on the history of the legislation and the defendant's criminal history, the sentence is not cruel. 11/18/05 RP 20.

It is also immaterial to the determination of proportionality whether the sentencing court took such matters into consideration as proportionality review is conducted at the appellate level. See State v. Elmore, 139 Wn.2d 250, 310, 985 P.2d 289, cert. denied, 531 U.S. 837, 121 S. Ct. 98, 148 L. Ed. 2d 57 (2000) (It is the Supreme Court, not the trial court, that conducts a proportionality review in death penalty cases); State v. Ritchie, 126 Wn.2d 388, 397, 894 P.2d 1308 (1995) (Rejecting that it is the duty of the trial court to conduct proportionality review in an exceptional sentence case where such review would be overly burdensome and cause delay).

A trial court is required to impose a life sentence and the persistent offender statute does not grant any discretion to the trial court. State v. Morley, 134 Wn.2d 588, 952 P.2d 167 (1998); RCW 9.94A.570. The Supreme Court rejected a similar argument in Thorne where the defendant argued the three strikes law unlawfully removed the right of the sentencing court to exercise discretion at sentencing. 129 Wn.2d at 767. The court rejected this argument holding that sentencing is a legislative

function and there is “no *constitutional right* on the part of a trial judge to make that determination [punishment].” Id.

This court should join the trial court in concluding that based on the defendant’s prior strike offenses, his current offense, and purpose of the Persistent Offender Statute the sentence is not cruel.

D. CONCLUSION.

The defendant was properly charged, tried and convicted of robbery in the second degree. With defendant’s four prior violent offense convictions the court also properly imposed a life sentence without parole and this court should affirm.

DATED: October 20, 2006.

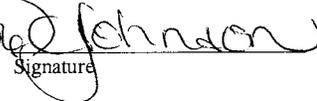
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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

10/23/06   
Date Signature

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