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DIVISION II

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

STATE OF WASHINGTON, RESPONDENT

v.

DANIEL DAY, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Thomas Felnagle, and Ronald Culpepper

No. 08-1-00180-8

BRIEF OF RESPONDENT

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

1. Whether the State proved that defendant used force to obtain Ms. Day's purse or to prevent or overcome resistance to the taking or to prevent knowledge of the taking when it showed that defendant stunned Ms. Day by hitting her head and face and then took her purse without her noticing. (Appellant's Assignments of Error 1 and 2).

2. Whether the court erred in entering a judgment and sentence on both convictions when the second degree assault should have merged with the first degree burglary. (Appellant's Assignment of Error 3).

B. STATEMENT OF THE CASE.

1. Procedure

The State charged Daniel Day, hereafter defendant, with robbery in the first degree, and assault in the second degree; both crimes were alleged to be crimes of violence. CP 1-2. The case proceeded to a jury trial in front of the Honorable Thomas Feltnagle. RP1 1.

After the State rested its case in chief, defense counsel moved to dismiss the robbery charge, arguing that the State did not prove all of its elements. RP2 119-121. Upon considering the arguments of the parties, the court denied defense's motion. RP2 122.

The jury found defendant guilty on both counts. RP3 176; CP 49, 75, 76. The court sentenced defendant to a mid standard range of 36 months for the robbery, and to 6 months for the assault, to run concurrently. RP (06/06/07) 7; CP 77-90.

Defendant filed a notice of appeal. CP 97-111.

2. Facts

Shelley Day and defendant divorced a few years prior to the incident in question. RP1 47. However, Ms. Day would see defendant and talk to him on the phone from time to time because he was the father of her children. RP1 48, 49.

On the morning of New Year's Eve 2007, Ms. Day received a phone call from defendant. RP1 49. Defendant had a check that he needed cashed, and he asked Ms. Day to help him cash it by depositing the check into her account and withdrawing the same amount of cash to give to him. RP1 50. She agreed to help him. RP1 50.

Ms. Day met defendant shortly thereafter at the Sumner Fred Meyer, on her way to work. RP1 51-52. She locked her van and walked with him to the ATM. RP1 53. Ms. Day deposited the check and took some money out to give to defendant. RP1 58. After the transaction was

completed, defendant asked Ms. Day for a ride to his home, located about half a mile away. RP1 58-59. She agreed to drive him there. RP1 60.

When she drove up to the apartments where defendant lived, he asked her to come up to his apartment. RP1 60. She refused. RP1 60.

According to Ms. Day, after she refused to go up to his apartment, defendant grabbed her hair, pulled her head toward him, said “yes, you are going.” RP1 61. He then repeatedly struck her face and head. RP1 61. Only after Ms. Day managed to get her hand on the horn and started honking, he stopped, opened the car door, and ran. RP1 62.

After defendant got out of the car, Ms. Day noticed that her purse, with the wallet inside, was missing. RP1 63. It had been sitting on the floor between the two front seats before. RP1 63-64. Stunned by the attack, Ms. Day did not notice when defendant grabbed it. RP1 64; RP2 92. Ms. Day called 911. RP 64.

Ms. Day had to seek medical treatment two days after the attack because she could not move her cheeks or make facial expressions. RP2 85. The pain in her face persisted for about a month. RP2 85. For a month, a corner of her right eye and most of the surface of her left eye were red. RP2 84. She had bruises under her eyes, and it took a month and a half for them to clear. RP2 84, 86.

Ms. Day never recovered her purse. RP2 87. In it, she had her wallet with over two hundred dollars, a few gift cards, credit cards, and her driver’s license. RP2 87-88. After the attack, defendant called Ms.

Day numerous times. RP2 87. He told her that he had her purse and wanted to meet to give it back to her. RP2 87.

Deputy McDonald, who responded to the scene, described Ms. Day's demeanor and story consistent with Ms. Day's testimony. RP2 101-107, 111-112. Defendant did not testify at trial.

C. ARGUMENT.

1. THE EVIDENCE, TAKEN IN THE LIGHT MOST FAVORABLE TO THE PROSECUTION, SHOWS THAT DEFENDANT USED FORCE TO OBTAIN MS. DAY'S PURSE OR TO PREVENT OR OVERCOME RESISTANCE TO THE TAKING OR TO PREVENT KNOWLEDGE OF THE TAKING

The evidence is sufficient when, viewed in the light most favorable to the prosecution, it allows a rational trier of fact to find, beyond a reasonable doubt, the essential elements of the crime. *See State v. Gentry*, 125 Wn.2d 570, 596-597, 888 P.2d 1105 (1995); *State v. Amenzola*, 49 Wn. App. 78, 85, 741 P.2d 1024 (1987). However, when this Court reviews the sufficiency of the evidence, it "does not need to be convinced of the defendant's guilt beyond a reasonable doubt, but must only determine whether substantial evidence supports the State's case." *State v. Potts*, 93 Wn. App. 82, 86, 969 P.2d 494 (1998).

"A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385, 622

P.2d 1240 (1980). Circumstantial evidence is as reliable as direct evidence. See *State v. Turner*, 103 Wn. App. 515, 520, 13 P.3d 234 (2000). 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) (internal citation omitted).

To convict defendant of the crime of robbery in the first degree, the State had to prove that: (1) on December 31, 2007, defendant unlawfully took personal property, not belonging to him, from the person or in the presence of another; (2) defendant intended to commit theft of the property; (3) the taking was against the person’s will by defendant’s use or threatened use of immediate force, violence or fear of injury to that person; (4) the force or fear was used by defendant to obtain or retain possession of the property or to prevent or overcome resistance to the taking or to prevent knowledge of the taking; (5) in the commission of these acts or in immediate flight therefrom defendant inflicted bodily injury; and (6) any of these acts occurred in the State of Washington. CP 50-74 (Instruction 10).

On appeal, defendant only challenges the fourth element of the crime, arguing that the State did not present sufficient evidence that the force or fear was used by defendant to obtain or retain possession of the property or to prevent or overcome resistance to the taking or to prevent knowledge of the taking. Appellant’s Brief, p. 1. Defendant’s argument, however, does not have any merit.

In this case, the State presented substantial evidence that defendant used force to obtain possession of Ms. Day's purse or to prevent resistance to the taking or to prevent knowledge of the taking. The State showed that defendant stunned Ms. Day by hitting her in the head and face with his fists. RP1 64; RP2 92. By attacking Ms. Day, defendant overwhelmed her to the point that she was unable to resist the taking of her purse or even notice it. That evidence was sufficient to prove the fourth element of robbery in the first degree.

Defendant argues that the State had to show that he attacked Ms. Day with specific intent to steal her purse. *See* Appellant's Brief, p. 6-7. However, intent to attack to further the theft is not an element of first degree robbery or of robbery in general.

The crime of robbery is defined as follows:

A person commits the crime of robbery in the first degree when in the commission of a robbery he or she inflicts bodily injury.

A person commits the crime of robbery when he or she willfully and with intent to commit theft takes personal property, not belonging to the defendant, from the person or in the presence of another against that person's will by the use or threatened use of immediate force, violence, or fear of injury to that person. The 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. The 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.

CP 50-74 (Instruction 6).

The only *mens rea* element of robbery in the first degree is intent to commit theft, and defendant does not deny that he intended to steal the purse. CP 50-74 (Instruction 10); see *State v. Decker*, 127 Wn. App. 427, 111 P.3d 286 (2005) (“[t]he intent required to prove robbery in the first degree is intent to deprive the victim of property”) (internal citations omitted). The plain language of “to convict” and the definition of robbery show that the State did not have to prove that defendant attacked Ms. Day to steal her purse; defendant could form the intent to commit theft during the attack, and that would still be robbery as long as his use of force helped him obtain or retain the purse. See *State v. Stearns*, 61 Wn. App. 224, 810 P.2d 41 (1991).

For example, in *State v. Stearns*, Stearns, like defendant in this case, argued that the State did not present sufficient evidence of robbery in the first degree because it failed to prove that Stearns had used force against the victim with the intent of obtaining her property, overcoming her resistance to the taking of her property, or preventing her knowledge of the taking. 61 Wn. App. 224, 227, 228.

In that case, Stearns attacked Hoyt, who was walking home alone after dark, with intent to rape her. *Stearns*, 61 Wn. App. 224, 226. During the struggle, Hoyt dropped her briefcase and purse, and Stearns did not attempt to take them. *Stearns*, 61 Wn. App. at 226. As they

struggled, the two moved a block and a half. *Id.* Eventually Hoyt got away and ran to a nearby convenience store. *Id.* When Stearns was arrested shortly thereafter, he had Hoyt's address book and business card, but the rest of her property was scattered near the location of the original attack. *Id.*

The court rejected Stearns's argument and held that the State proved that he had used force to obtain the victim's property, overcome her resistance to the taking, or prevent her knowledge of the taking. *Id.* at 229, 230. The court reasoned that "a rational trier of fact could have found that the force Stearns was using caused his victim to abandon her property..."; and that "*although his primary intent was rape, he had formed a secondary intent to take property from her at some point before the assault terminated.*" *Stearns*, 61 Wn. App. at 229 (emphasis added). Finally, the court concluded that even "[i]f Stearns had ceased his attempt to rape in the immediate vicinity of the dislodged property, and taken some of it after the victim fled from the scene, he would certainly be guilty of robbery." *Id.* at 230.

Thus, the *Stearns* case stands for a proposition that a defendant's use of force that makes a victim abandon her property or be incapable of resisting the taking is sufficient proof that the defendant used force "to

obtain or retain possession of the property or to prevent or overcome resistance to the taking or to prevent knowledge of the taking.” CP 50-74 (Instruction 10). More importantly, the *Stearns* court confirmed that even if defendant forms the intent to commit theft during the attack, and not before it, he still commits robbery.

Further, defendant’s reliance on *State v. Allen*, *State v. Johnson*, and *State v. Larson* is misplaced. 159 Wn.2d 1, 147 P.3d 581 (2006); 155 Wn.2d 609, 121 P.3d 91 (2005); 60 Wn.2d 833, 376 P.2d 537 (1962). In *Allen*, the issue for the court was the aggravating factor, specifically whether defendant committed first degree murder “in the course of, *in furtherance of*, or in immediate flight from” the robbery in the first or second degree. 159 Wn.2d 1, 9 (emphasis added). “In furtherance” is, of course, the language from the aggravating factor for the aggravated first degree murder and is *not* in the elements of robbery in the first degree. So, in that case, unlike this case, the issue was whether defendant killed his mother in order to rob her. In contrast, the inquiry for the crime of robbery is *whether defendant intended to commit theft of the property and obtained the property by use of force or violence*. See CP 50-74 (Instruction 6).

Additionally, while the *Allen* majority “largely agree[d] with the dissent” that “[m]erely demonstrating that the use of force preceded the theft does not amount to robbery,” it affirmed Allen’s robbery conviction because “Allen used force, at least in part, to obtain [his mother’s] cash

box.” *Id.* at 9-10. Therefore, *Allen* is not contrary but similar to the case at bar because, while defendant primarily attacked Ms. Day to assault her, “in part,” he used that force to obtain her purse.

Johnson is completely distinguishable from the case at bar. There, defendant first abandoned the stolen property and then punched one of the people who were trying to apprehend him during his attempt to flee. 155 Wn.2d 609, 611. The court reversed the robbery conviction because defendant “was not attempting to retain the property when he punched the guard but was attempting to escape after abandoning it.” *Johnson*, 155 Wn.2d at 611. Unlike *Johnson*, this defendant never abandoned Ms. Day’s purse, and he hit Ms. Day before or during the taking of her purse.

The *Johnson* court also emphasized that the “force must *relate* to the taking or retention of the property, either as force used directly in the taking or retention or as force used to prevent or overcome resistance to the taking.” *Id.* (emphasis added). Unlike Johnson’s use of force, this defendant’s use of force *related* to preventing or overcoming Ms. Day’s resistance to the taking. In fact, Ms. Day was so stunned by the attack that for a minute she did not even realize that defendant had taken her purse. RP1 64; RP2 92.

Defendant also misreads the significance of *Larson*. In *Larson*, defendant knocked his drinking buddy down and kicked him. 60 Wn.2d

833. Then he took the helpless victim's wallet. *Id.* The victim did not remember the event. *Id.* at 834. Larson argued that the jury could conclude that the victim was unconscious, and therefore, the taking of the wallet was not against the victim's will. *Id.*

The court *affirmed* defendant's conviction of robbery, holding that "[t]here was no evidence which would have supported a finding that the property was taken without force and violence; and thus the jury rendered the only verdict which the evidence would support." *Id.* at 835. *See also* RCW 9A.56.190; CP 50-74 (Instruction 6) ("[t]he 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 use of force or fear").

Defendant bases his use of *Larson* on a single internal quote that "the mere taking [of] goods from an unconscious person, without force or the intent to use force, is not robbery, unless such unconsciousness was produced expressly for the purpose of taking the property..." *Id.* at 835. However, in the context of the court's entire reasoning, it becomes clear that the quote pertains to a very narrowly-defined situation, when a defendant finds a victim unconscious and furtively takes the victim's property. In other words, the court emphasized that the unconsciousness must be caused by a defendant and not be fortuitous. This inference is supported by the fact that the *Larson* court believed its holding was "in accord with these rules." *Id.*

In sum, that defendant self-servingly asserts that he had taken the purse as an afterthought is irrelevant. What is relevant is that defendant was able to take the purse because Ms. Day was distracted and stunned by his attack. The evidence, viewed in the light most favorable to the prosecution, shows that defendant formed a secondary intent to steal Ms. Day's purse during the attack, and he was able to accomplish the stealing because Ms. Day's knowledge was prevented by defendant's use of force against her.

Thus, defendant used force against Ms. Day to obtain possession of her purse or to prevent or overcome resistance to the taking or to prevent knowledge of the taking. Defendant's argument that the State had to prove intent to assault to further theft is misplaced both from the legal and policy perspectives.

2. THE COURT ERRED IN ENTERING JUDGMENT AND SENTENCE ON BOTH CONVICTIONS

This Court reviews the issue of whether defendant's separate convictions of assault and robbery violate double jeopardy de novo. *State v. Freeman*, 153 Wn.2d 765, 770, 108 P.3d 753 (2005).

The State may bring multiple charges arising from the same criminal conduct in a single proceeding. *Freeman*, 153 Wn.2d 765, 770 (citing *State v. Michielli*, 132 Wn.2d 229, 238-39, 937 P.2d 587 (1997)). The federal double jeopardy and the Washington double jeopardy prohibit a second prosecution for the same offense after acquittal; a second

prosecution for the same offense after conviction; and multiple *punishments* for the same offense imposed in the same proceeding.

U.S.C.A. Const. Amend. 5; RCW Const. Art. 1, §9 (emphasis added).

The Washington courts use a case-by-case approach to determine whether first degree robbery and second degree assault are the same for double jeopardy purposes. *Freeman*, 153 Wn.2d at 774, 779-780. The two crimes will merge when the assault facilitates the robbery. *Freeman*, 153 Wn.2d at 776.

The robbery and assault convictions may be separate “when there is a separate injury to the person or property of the victim or others, which is separate and distinct from and not merely incidental to the crime of which it forms an element.” *Id.* at 778 (internal citations omitted). “The test is whether the unnecessary force had a purpose or effect independent of the crime.” *Freeman*, 153 Wn.2d at 779. In other words, double jeopardy would not preclude two convictions only if *separate acts of force* in committing first degree robbery and second degree assault are established.

In *State v. Freeman*, the court analyzed two separate cases and distinguished the combination of robbery in the first degree and assault in the first degree (*Freeman*), from robbery in the first degree and assault in the second degree (*Zumwalt*). *Id.* at 776, 778. The court concluded that

the legislature intended to punish first degree assault and robbery separately, but found no evidence that the legislature intended separate punishments for second degree assault and first degree robbery when the assault facilitates the robbery. *Id.* at 776.

In *Zumwalt*, defendant met a woman at a casino and offered to sell her drugs. *Freeman*, 153 Wn.2d 765, 770. When they met in the parking lot to conclude the transaction, defendant “apparently had second thoughts”; so, he punched the woman in the face and then robbed her. *Id.* at 770. *Zumwalt* was convicted of both assault in the second degree and robbery in the first degree. *Id.* On those facts, the Supreme Court held that the merger doctrine applied to merge *Zumwalt*’s first degree robbery and second degree assault convictions. *Id.* at 778.

In this case, the State erred when it allowed both convictions to be entered at sentencing. CP 77-90. As indicated in Part I of this brief, defendant’s assault on Ms. Day facilitated the robbery; and therefore, the two crimes should have merged for judgment and sentence purposes. *See Freeman*, 153 Wn.2d at 776.

Similarly, defendant’s act of hitting Ms. Day in the face and head was the basis for both the assault and the robbery. At no point, did the State assert that separate acts of force were used for the two crimes.

Therefore, the exception to double jeopardy did not apply and entering judgment and sentence on both convictions violated double jeopardy.

For the foregoing reasons, the State concedes that it had made an error and respectfully requests that this Court remand the case for resentencing. *See State v. Faagata*, 147 Wn. App. 236, 244, 193 P.3d 1132 (2008) (*examining State v. Womac*, 160 Wn.2d 643, 160 P.3d 40 (2007)); *State v. Turner*, 144 Wn. App. 279, 182 P.3d 478 (2008).

D. CONCLUSION.

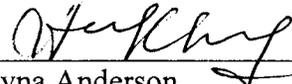
The State respectfully requests that this Court affirm defendant's conviction of robbery in the first degree, and remand the case for resentencing solely on that conviction. Should this Court decide that the evidence of robbery in the first degree was insufficient, the State

respectfully requests that it dismiss the robbery conviction, affirm defendant's conviction of assault in the second degree, and remand for resentencing.

DATED: May 20, 2009.

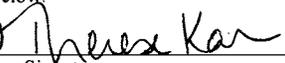
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Certificate of Service:

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.

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