

**NO. 46223-1**

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

STATE OF WASHINGTON, RESPONDENT

v.

MICHAEL WILLIAM RICHIE, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable John Hickman

No. 13-1-03881-3

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**BRIEF OF RESPONDENT**

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Has defendant raised an unpreserved claim which incorrectly contends a victim's name should appear in the instruction on robbery's elements when present in the Information since the victim's name is not an essential element of that offense?

2. Does the evidence support defendant's robbery conviction when it established he viciously beat a Walgreens clerk over the head with the full liquor bottle he just stole from her store and pulled a second stolen bottle from her hands as she bravely attempted to stop him?

3. Did the trial court properly refuse to give an under inclusive defense instruction that would have wrongly precluded a robbery conviction based on legally adequate proof the stolen property was taken from the constructive possession of a victim with a special connection to the property?

4. Should defendant's undeserved accusation of prosecutorial misconduct be rejected since the prosecutor properly argued the evidence from the court's instructions in closing and rebutted defense argument that invited the jurors to deviate from them?

B. STATEMENT OF THE CASE

1. Procedure

The State charged defendant with first degree robbery and second degree assault for repeatedly bludgeoning a Walgreens' clerk with one of two 750 ml liquor bottles he was attempting to steal from the store despite her brave effort to stop him. CP 1-4. The State called six witnesses. CP 131.<sup>1</sup> Defendant testified to his impeached version of the incident. CP 131; *e.g.*, 5RP 406, 449. Fifteen exhibits, including a security video of the robbery, were admitted. CP 28-29 (Ex. 1-13, 19, 21, 23). An accurately instructed jury convicted defendant as charged. CP 42-70, 72. The court imposed a mandatory life sentence on the first degree robbery count as it was defendant's third strike offense. CP 95-107. His long criminal career included convictions for two second degree robberies, first degree reckless burning, unlawful firearm possession, two forgeries, attempt to elude, and three controlled substance violations. *Id.* The other current second degree assault conviction merged. *Id.*; 9RP 625. Defendant's notice of appeal was timely filed. CP 112.

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<sup>1</sup> Citation to clerk's papers above CP 130 are based on the State's estimate of how its supplemental designation(s) will be numbered.

## 2. Facts

Kersten Gouveia was a 35 year woman who had been working at Walgreens for 11 years as she walked to begin her graveyard shift at the Spanaway store sometime around 11:00 p.m. September 22, 2013. 4RP 285-86. To avoid being late, she customarily arrived 20 or 30 minutes early; whereupon, she purchased something to drink in the office or employee break room while waiting for her shift to begin. 4RP 286. As she approached the Walgreens parking lot on the night of the 22<sup>nd</sup>, she noticed two people acting suspiciously in a car, which just backed into a parking stall nearest the front doors. 4RP 287-88, 291-92; 5RP 369.

Gouveia immediately went inside to alert her manager. 4RP 292. She was wearing a Walgreens shirt bearing the store's logo under a coat with a neck-lanyard bearing an employee name tag. 4RP 286-87, 294; 5RP 387-88. Gouveia resumed her pre-shift routine when a manager could not be found. 4RP 292. Defendant entered the store, then proceeded directly to the liquor wall where he grabbed two 750 ml "E & J" liquor bottles from the shelf, disregarding the sign directing all customers to "Ask For Assistance." 4RP 292, 295, 301, 325, 327, 333. Gouveia recognized him to be one of the people acting suspiciously in the parking lot. 4RP 294. At trial the driver (James Beeson) admitted to waiting outside in the car with the motor running while defendant was inside the store. 5RP 393-94.

Gouveia quickly instructed a cashier who had only been on the job for two weeks to call in a "code 80," which alerted employees to active thefts. 4RP 292, 295, 326. She then apprised the cashier of the need to watch defendant based in part on his act of "looking back and forth, side to side" as he took the bottles, which gave her the impression he did not intend to pay. 4RP 296, 311, 322, 324. The cashier also perceived defendant was preparing to "bolt with the alcohol." 4RP 338. Gouveia feigned small talk with the cashier so she could remain poised to intercept defendant at the register. 4RP 324-25. She stepped back to position herself in his likely escape route. 4RP 296. When he walked past the point of sale, passing between Gouveia and the register with the liquor bottles, she addressed him by stating: "sir, you need to pay for that here. Let me help you," as did the cashier, consistent with Walgreens loss prevention protocol. 4RP 296, 304, 311, 326-27, 332-33.

Defendant pressed on without stopping or making any effort to pay while holding a bottle neck in each hand. 4RP 303-04, 311, 328, 333-34, 352. Gouveia reached for them in an effort to "giv[e] him good customer service." 4RP 296, 302, 328. Defendant responded to the service by clubbing her in the head with the heel of one of the full liquor bottles, leaving a moon-shaped gash on her head. 4RP 296, 301-02, 333; 5RP 372. Gouveia "grabb[ed]" the other bottle, so defendant dragged her out of the store by it as she hung onto it "for dear life." 4RP 296, 315, 327, 339, 352.

Once they were outside defendant swung a bottle down on her head four or five more times in rapid succession. 4RP 303.

A manager responded to the "code 80" alarm sounded at Gouveia's request. 4RP 291-92; 5RP 364. Defendant's driver pulled the car out and opened the passenger door. 5RP 395, 407. Defendant panicked, jumped in, and acknowledged: he "could be arrested for this." 5RP 408. He actually said: "he was going to get arrested for this and ... already has two strikes against him," which explained the panic in terms of awareness he just committed a third strike offense; however, the latter portion of the remark was excluded based on the court's assessment of its prejudicial effect. 5RP 440-42, 454-65. Gouveia's manager was able to get a partial plate number just before the driver "hit the gas;" causing the tires to spin as the car accelerated away. 5RP 369-71, 396. Defendant unexpectedly tumbled out with the liquor bottles, causing them to shatter on the pavement. 4RP 297; 5RP 486. Defendant jumped back into the car as it sped out the drive-through exit. 4RP 297.

The manager had never seen an employee injured like Gouveia. 5RP 371. "She was just covered in blood." 5RP 371. Her dripping wounds left a bloody trail through the store when she was rushed to the bathroom. 4RP 298-99, 328, 330; 5RP 372. The bleeding continued until paramedics arrived. 5RP 374. Surveillance video of the incident was recovered and shown to the jury at trial. 4RP 279-80, 307, 361; 5RP 376-78, 412; Ex. 2,

5-13. Defendant's driver was identified through investigation of the getaway car, which in turn led to defendant's arrest. 5RP 414-17.

Gouveia was transported to the hospital by ambulance. 4RP 280, 298. It took approximately five hours to treat her injuries, which included a cut forehead, concussion, and a gash that required 13 staples to seal—all inflicted so defendant could make off with less than \$30.00 worth of alcohol. 4RP 298-99, 303; 5RP 478. The manager picked Gouveia up from the hospital around three o'clock in the morning. 5RP 374. She was bandaged, but still wearing her blood covered shirt. 5RP 374-75.

Defendant testified at trial. 5RP 447. He admitted to his forgery and false statement convictions, then claimed he went into the Walgreens to purchase the liquor he took without payment. 5RP 448-49, 453. He said the driver was paid \$7.00 to take him to the store, which was impeached by the driver's testimony. 5RP 406, 449. Defendant admitted to "snatch[ing]" one of the liquor bottles from Gouveia, explaining her injuries as the inadvertent consequence of his effort to get away. 5RP 451-53, 468-69, 472-73, 482-83. According to defendant he got into the car not realizing the bottles were in his hands, and did not return to pay for them because they broke when he fled. 5RP 453, 486. During cross examination defendant said the incident involving Gouveia was nothing more than "an event that happened," which only "became an important event when [he] was charged." 5RP 471.

By the time of trial Gouveia was still experiencing the long-term effects of what defendant perceived to be an event without importance beyond its impact on his life. 4RP 300-01. Her comprehension and memory appreciably decreased following the head trauma she sustained. 4RP 300-01. The bottle-shaped gash defendant cut into her hairline had become a scar visible to her whenever she looked in a mirror. 4RP 276-77, 301. And she was rewarded for the uncommon courage displayed by her selfless effort to prevent defendant's theft by being ignominiously discharged two weeks later—after eleven years of service—for violating a corporate policy requiring physical submission to thieves. 4RP 375-76.

C. ARGUMENT

1. DEFENDANT'S UNPRESERVED CHALLENGE TO THE OMISSION OF THE VICTIM'S NAME FROM THE "TO CONVICT" INSTRUCTION IS MERITLESS SINCE THE VICTIM'S NAME IS NOT AN ESSENTIAL ELEMENT OF THAT OFFENSE REGARDLESS OF WHETHER IT APPEARS IN THE INFORMATION.

As charged in defendant's case, first degree robbery has five statutory elements<sup>2</sup>:

- (1) That the defendant unlawfully took personal property from the person [or in the presence] **of another**;

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<sup>2</sup> The sixth element in the "to convict" instruction, like the one given in defendant's case is jurisdictional, *i.e.*, that at least one element of the crime occurred in the State of Washington, and not at issue in defendant's appeal. CP 50; WPIC 37.02.

(2) That the defendant intended to commit theft of the property;

(3) That the taking was against the person's will by the defendant's use or threatened use of immediate force, violence, or fear of injury to that person, or the person or property **of another**;

(4) That the force or fear was used by the defendant to obtain or retain possession of the property or to prevent or overcome resistance to the taking;

(5) That in the commission of these acts or in immediate flight therefrom the defendant inflicted bodily injury.

RCW 9A.56.200 (first degree robbery); CP 50 (Inst.6—WPIC 37.02);

RCW 9A.56.190<sup>3</sup> (robbery defined); CP 51 (Inst.7—WPIC 37.50); RCW

9A.56.020(a) (theft defined); CP 52 (Inst. 8—WPIC 79.01, modified by

*State v. Graham*, 64 Wn. App. 305, 308, 824 P.2d 502 (1992)); CP 1-2.

Statutes are reviewed *de novo* according the statutory language's ordinary

usage, the statute's context, and the statutory scheme's related provisions

while avoiding interpretations that lead to constitutional deficiencies or

absurd results. See *State v. Eaton*, 168 Wn.2d 476, 480, 229 P.3d 704

(2010); *State v. Jacobs*, 154 Wn.2d 596, 600, 115 P.3d 281 (2005); *State*

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<sup>3</sup> RCW 9A.56.190 "A person commits robbery when he or she unlawfully takes personal property from the person **of another** or in his or her presence against his or her will by the use or threatened use of immediate force, violence, or fear of injury **to that person** or his or her 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." (Emphasis added).

v. *J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003) (quoting *State v. Delgado*, 148 Wn.2d 723, 733, 63 P.3d 792 (2003); *Dep't of Ecology v. Campbell & Gwinn*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002)).

- a. Defendant failed to preserve his challenge to the omission of the victim's name from the "to convict" instruction when he failed to object to the instruction below.

Criminal defendants generally cannot object to a jury instruction for the first time on appeal absent "manifest error affecting a constitutional right." RAP 2.5(a)(3); *State v. Kronich*, 160 Wn.2d 893, 899, 161 P.3d 982 (2007). Appellate courts first review unpreserved claims of constitutional error to determine whether the "error is truly of constitutional magnitude." *State v. Scott*, 110 Wn.2d 682, 688, 757 P.2d 492 (1988). Only if the claim is found to be constitutional, will the court examine the effect of the error on the trial under a harmless error standard. *Id.*; *State v. Kirkpatrick*, 160 Wn.2d 873, 880, 161 P.3d 990 (2007). A proven omission of an essential element from the jury instructions falls within the narrow category of unpreserved claims capable of appellate review because every essential element must be proved. *State v. Mills*, 154 Wn.2d 1, 6, 109 P.3d 415 (2005).

Defendant did not object to the instruction on robbery's elements at trial or ask for the victim's name to be included. 6RP 510-11. Since the

victim's name is not an element of first degree robbery, its omission is not of constitutional magnitude, making it beyond appellate review. *See State v. Levy*, 156 Wn.2d 709, 722, 132 P.3d 1076 (2006); *State v. Lee*, 128 Wn.2d 151, 158-161, 904 P.2d 1143 (1995); *State v. Donald*, 178 Wn. App. 250, 271, 316 P.3d 1081 (2013); *State v. Hickman*, 138 Wn.2d 97, 104-05, 954 P.2d 900 (1998)).

- b. Presence of the victim's name in an Information charging robbery does not necessitate its inclusion in the "to convict" instruction.

An Information must state all the essential elements of the crimes charged. *State v. Tvedt*, 153 Wn.2d 705, 718, 107 P.3d 728 (2005)(citing U.S. Const., amend. 6; Const. art. I, § 22; CrR 2.1(a)(1); *State v. McCarty*, 140 Wn.2d 420, 424–25, 998 P.2d 296 (2000)). Surplus language in a document charging robbery, like the victim's name, does not become an element of the crime *unless* it is included in the "to convict" instruction. *See Id.*; *Levy*, 156 Wn.2d at 722; *Lee*, 128 Wn.2d at 158-161.

Defendant is not the first to incorrectly contend the name of a person from whom property is unlawfully taken must be included in the "to convict" instruction if referenced in the charging document. The argument was squarely rejected by *Lee* in an analogous theft case. 128 Wn.2d at 158. The theft statute at issue there, like the robbery statute at

issue here, only required taking of property from "another"—a term both statutes identically apply to the victim. RCW 9A.56.190, .020. Names of the owners or possessors of stolen property are typically only included in the Information for identification and to show ownership in someone other than the accused, but constitute no part of either offense. *See Lee*, 128 Wn.2d at 159-60.

- c. Omission of the victim's name did not create a unanimity problem or result in defendant being convicted of a different crime than charged.

There is no unanimity problem inherent in the highly unlikely possibility defendant's jury split regarding the identity of his victim since he was only accused of committing a single act of robbery. *See Lee*, 128 Wn.2d 160. Likewise, the fact a defendant could perpetrate one robbery in multiple ways does not turn a single robbery into a multiple crimes case capable of division over which of several robberies was committed. *Id.* Nor do statutes limited to defining offenses like robbery create divisible alternative means that must be independently supported by sufficient evidence. *See State v. Linehan*, 147 Wn.2d 638, 646, 56 P.3d 542 (2002); *State v. Tvedt*, 153 Wn.2d at 719 ("[S]tate did not need to name every person who was present and placed in fear where only a single taking of property occurred.").

Defendant was charged with committing one act that satisfied the definition of robbery by:

"feloniously tak[ing] personal property belonging to another with intent to seal from the person or in the presence of K. Gouveia, the owner there of or a person having dominion and control over said property, against such person's will by use ... of immediate force ... or fear of injury to K. Gouveia ...." CP 1.

Accordingly, the challenged "to convict" instruction only asked the jurors to decide whether defendant was guilty of one robbery count. It is therefore legally impossible for them to have been split as to which of several acts of robbery was committed or to have convicted him of a different robbery than the one charged. *See Lee*, 128 Wn.2d 160.

Defendant's claim to the contrary is largely dependent on his erroneous comparison of his case to *State v. Brown*, 45 Wn. App. 571, 726 P.2d 60 (1986); however, this Court already recognized *Brown's* application is likely restricted to conspiracy cases. *In re Hegney*, 138 Wn. App. 511, 522, 158 P.3d 1193 (2007). The concern driving the decision was "a conspiracy charge allow[ed] the State to cast a wide net in order to prosecute those involved in criminal activity", so permitting "a conspiracy instruction [to be] more far-reaching than the charge" made it too likely a defendant could be convicted for entering into any number of uncharged criminal agreements (or conspiracies) without the notice needed to prepare

a defense. *See* 45 Wn. App. at 575-76. Whatever the case's intended reach it cannot control the issue defendant raises given the Supreme Court's resolution of it in *Lee*.

Even if *Brown* were applicable to defendant's case, the Information charging defendant with robbery was not limited in the way at issue in *Brown*, where the 12 conspirators specifically listed in the Information were not listed in the "to convict" instruction, and other unnamed individuals were proven to be party to the conspiracy at trial. *Id.* at 575. In reversing the conviction, the Court explained the error could be avoided through charging language indicating the existence of unnamed conspirators. *Id.* at 577. Defendant's Information provided him analogous notice by disjunctively listing two possible victims, *i.e.*, Gouveia, or "another" who owned the property. CP 1.

d. The omission of Gouveia's name was harmless if error.

Instructional error is harmless where there is no possibility it caused an unfair conviction. *See State v. Nicholas*, 55 Wn. App. 261, 273, 776 P.2d 1385 (1989) (citing *State v. Severns*, 13 Wn.2d 542, 549, 125 P.2d 659 (1942)), *review denied*, 113 Wn.2d 1030 (1989); *see State v. Moton*, 51 Wn. App. 455, 459, 754 P.2d 687 (1988)(citing *State v. Stephens*, 93 Wn.2d 186, 190, 607 P.2d 304 (1980)(assault instruction

phrased in the disjunctive harmless despite suggesting assault on either of two victims could support conviction)).

Overwhelming evidence proved defendant mercilessly beat Gouveia with a bottle to retain liquor he stole from her employer. At the same time Gouveia's conduct in attempting to stop him established her constructive possession of it while even defendant impliedly recognized her actual possession of one bottle through his description of having to "snatch" it back from her. The absence of Gouveia's name in the "to convict" instruction was at most a technical error incapable of justifying the reversal defendant demands.

2. THE EVIDENCE AMPLY SUPPORTS DEFENDANT'S ROBBERY CONVICTION AS IT ESTABLISHED HE VICIOUSLY BEAT A WALGREENS CLERK OVER THE HEAD WITH THE FULL LIQUOR BOTTLE HE JUST STOLE FROM HER STORE AND PULLED A SECOND STOLEN BOTTLE FROM HER HANDS AS SHE BRAVELY ATTEMPTED TO STOP HIM.

The State bears the burden of proving all the elements of the charged offense. *State v. Teal*, 152 Wn.2d 333, 337, 96 P.3d 974 (2004); *State v. McCullum*, 98 Wn.2d 484, 489, 656 P.2d 1064 (1983)). Challenges to evidentiary sufficiency accept the truth of the State's evidence with all reasonable inferences, and will fail if any rational trial of fact could have found the defendant guilty. *State v. Hermann*, 138 Wn.

App. 596, 602, 158 P.3d 96 (2007) (citing *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). At the same time the impact of any differences among testifying witnesses is a credibility determination for the trier of fact. See *State v. Cord*, 103 Wn.2d 361, 367, 693 P.2d 81 (1985); *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

Defendant's challenge to the sufficiency of the evidence is limited to the claim Gouveia was not a robbery victim because she was not on the clock when he savagely beat her with one of the full liquor bottles he stole from her store.

- a. The record establishes Gouveia had actual possession of one of the two stolen liquor bottles contrary to defendant's allegation.

A person may be a victim of robbery if property is forcefully taken from the person's actual possession even if the person lacks any legally recognizable claim to the property. *State v. Graham*, 64 Wn. App. 305, 308, 824 P.2d 502 (1992); *State v. Latham*, 35 Wn. App. 862, 865-66, 6709 P.2d 689 (1983)).

Defendant rightly recognizes proof of Gouveia's actual possession of the stolen liquor would support his conviction, then unjustifiably dismisses actual possession as a basis for the jury's verdict, stating:

"Clearly she did not have actual possession." App. 13. The record contradicts that contention. At trial defendant admitted he "snatched" one of the liquor bottle's "back" from Gouveia, which establishes actual possession. SRP 451-52, 468-69, 482-83. Actual possession was further established through Gouveia's description of defendant dragging her out of the store by that bottle. 4RP 296, 315, 327, 339, 352. The timing of Gouveia's actual possession in relation to the theft has no bearing on its ability to support the robbery conviction, for the robbery statutes contemplate unlawful force applied to retain property peaceably taken outside the victim's presence. *State v. Truong*, 168 Wn. App. 529, 538, 277 P.3d 74 (2012).

- b. The record also establishes Gouveia had a special connection to the liquor bottles defendant forcibly stole in her presence.

One's interest in and constructive possession of stolen property is a question of fact answered according to the totality of the circumstances. See *Graham*, 64 Wn. App. at 308-09; *State v. Blewitt*, 37 Wn. App. 397, 399, 680 P.2d 457 (1984). Business's employees have implied responsibility to exercise control over the business property as against all others. *Id.* As a class they are custodians entitled to oppose the violence offered by the robber even in the absence of any specific responsibility

over the stolen property. *E.g.*, ***People v. Gibeaux***, 111 Cal.App.4<sup>th</sup> 515, 520-21, 3 Cal.Rptr.3d 835 (2003). A special connection to a business or its property may similarly vest nonemployees with a possessory interest capable of supporting a robbery conviction. *Id.*; ***Latham***, 35 Wn. App. at 865-66. Such an interest may exist by virtue of bailment, agency, or other representative capacity, or by any right of possession superior to the robber's claim. ***Latham***, 35 Wn. App. at 865-66.

Defendant's assertion Gouveia did not have a requisite connection to the liquor he stole to be a victim of his robbery is predicated on an untenable characterization of her as a disinterested customer. Whatever her obligation to act on Walgreen's behalf before her time card was punched, it could not be more apparent she assumed the responsibilities of her employment the moment she observed defendant staging a theft in her employer's parking lot. 4RP 287-88, 291-92; 5RP 369. She immediately attempted to alert one of her managers, apprised a junior cashier of defendant's activities, directed the sounding of the "code 80" theft alarm, feigned conversation with the cashier to observe defendant's movements, positioned herself to slow his escape, prompted him to place the liquor on the counter, then grabbed one of the bottles only to be dragged out of the store by it right around the time defendant clubbed her in the head with the other one. 4RP 292, 295-96, 301-02, 311, 315, 324-28, 332-33, 339, 352;

SRP 372. Defendant's meritless contention she lacked the requisite connection to the liquor to be his robbery victim is neither supported by law nor the facts as they actually unfolded the night he bludgeoned an innocent woman to steal a couple of inexpensive bottles of brandy.

3. THE TRIAL COURT PROPERLY REFUSED TO GIVE AN UNDER INCLUSIVE DEFENSE INSTRUCTION THAT WOULD HAVE WRONGLY PRECLUDED A ROBBERY CONVICTION BASED ON LEGALLY ADEQUATE PROOF THE STOLEN PROPERTY WAS TAKEN FROM THE CONSTRUCTIVE POSSESSION OF A VICTIM WITH SPECIAL CONNECTION TO IT.

The constitutional requires a jury to be instructed on each element of the offense charged. *State v. Ng*, 110 Wn.2d 32, 750 P.2d 632 (1988)(citing *State v. Emmanuel*, 42 Wn.2d 799, 259 P.2d 845 (1953). As discussed above, the elements of robbery are: (1) the unlawful taking (2) of personal property (3) from the person or presence of another (4) against the person's will and (5) by the use or threatened use of immediate force. *Truong*, 168 Wn. App. at 537 (citing RCW 9A.56.190; *State v. Handburgh*, 61 Wn. App. 763, 765, 812 P.2d 131 (1991) (*rev'd on other grounds*, 119 Wn.2d 284, 830 P.2d 641(1992))). "[I]n order for a robbery to occur, the person from whom or from whose presence the property is taken must have an ownership, representative,

or possessory interest in the property." *Tvedt*, 153 Wn.2d at 714. (Emphasis added).

Defendant proposed an instruction consisting of a one sentence excerpt from *Latham's* survey of the case law defining the diverse array of possessory interests capable of supporting a robbery conviction:

"A person must have an ownership interest in the property taken, or some representative capacity with respect to the owner of the property taken, or actual possession of the property taken, for the taking of the property to constitute a robbery." (emphasis added).

CP 31(citing 35 Wn. App. 864-65); 6RP 509-10, 520-22. The State objected to the instruction as an inaccurate statement of the law, directing the court to *Latham's* complete treatment of the relevant relationships. 6RP 516-18 (citing *Latham*, 35 Wn. App. 865-66).

The State proposed addressing defendant's stated concern in clarifying the possessory interest at issue by giving a definitional instruction of "theft" grounded in *Graham*, 64 Wn. App. at 308-09, which was ultimately adopted by the court:

"Theft means to wrongfully obtain or exert unauthorized control over the property of another, or the value thereof, with intent to deprive that person of such property or services. Ownership of the property taken must be in some person other than the person or persons who commit the theft."

6RP 518-24; CP 52 (Inst. 8).

- a. The trial court properly exercised its discretion when it rejected an instruction that excluded many of the possessory interests capable of supporting a robbery conviction.

Although alleged instructional errors are typically reviewed *de novo*, it is generally within the trial court's sound discretion to determine the appropriateness of granting a request for definitional instructions. *See State v. Cross*, 156 Wn.2d 580, 617, 132 P.3d 80 (2006); *State v. Scott*, 110 Wn.2d 682, 692, 757 P.2d 492 (1988); *Bodin v. City of Stanwood*, 130 Wn.2d 726, 732, 927 P.2d 240 (1996). Trial courts have no duty to rewrite inaccurate statements of law contained in proposed instructions which are not constitutionally required. If the instructions are incorrect in any material particular, it is not error for the trial court to refuse them. *State v. Robinson*, 92 Wn.2d 361, 597 P.2d 892 (1979).

Defendant's one sentence excerpt from *Latham* was an inaccurate statement of the law in the context of this case because it incorrectly excluded several pertinent connections to property capable of creating the possessory interest at issue in the robbery statute, *i.e.*:

"[T]o constitute the crime of robbery the property must be taken from the person of the owner, or from his immediate presence, or from some person, or from the immediate presence of some person, having control and dominion over it... Also, [a] taking from one having the care, custody, control, management, or possession of the property is sufficient. Thus, the taking may be robbery where it is from

the lawful possession of a bailee, agent, employee, or other representative of the owner ... A robbery may also occur when a person is in possession of property without any legally recognizable claim thereto. Anyone having a right to possession superior to that of the robbery defendant is deemed to be the owner as against that defendant .... A thief in possession may be a robbery victim, ... as may be a visitor in a business when ordered to remove money from a cash register, who thereby exercises dominion over the money." *Latham*, 35 Wn.App. at 865-66 (emphasis added).

Contrary to defendant's instruction the forcible taking of property from the immediate presence of another is only incapable of constituting robbery if the person "did not own the property and had no connection with the stolen property...." *Id.* By singling out "actual possession" as the only condition other than ownership or representative capacity capable of satisfying the definition of robbery the instruction wrongly excluded from consideration constructive possession by a person without any legally recognizable claim to the property who nevertheless has a "possessory interest" by virtue of some direct or indirect connection to it. *See Latham*, 35 Wn. App. 865-66; *see also Truong*, 168 Wn. App. at 537 (first degree robbery does not have possession as an essential element)(citing *State v. Hayden*, 28 Wn. App. 935, 939, 627 P.2d 973 (1981)<sup>4</sup>. The trial court properly exercised its discretion in refusing to instruct the jury on

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<sup>4</sup> *But see State v. White*, 40 Wn. App. 490, 495, 699 P.2d 239 (1985) (suggesting whether first degree robbery includes possession "may be subject to some argument"). However, this suggestion was grounded in a *dictum* directed to the issue of standing to challenge a search not an analysis of robbery's elements.

defendant's under inclusive abridgement of the interests capable of being illegally severed through robbery.

b. The trial court's refusal to give defendant's instruction was harmless if error.

Instructions are sufficient when they accurately state the law, do not mislead the jury, and permit each party to argue its theory of the case. *State v. Teal*, 152 Wn.2d 333, 339, 96 P.3d 974 (2004). Instructional error is harmless where there is no possibility the defendant was unfairly convicted. *See Nicholas*, 55 Wn. App. at 273; *Moton*, 51 Wn. App. at 459. Even missing or misstated elements are harmless when proved by uncontroverted evidence. *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002) (citing *Neder v. United States*, 527 U.S. 1, 18-19, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)).

Defendant's jury was accurately instructed on the elements of first degree robbery clarified through the approved definition of "robbery." CP 47-48; 6RP 510-11. A robbery allegation necessarily implies the defendant had no legal claim to the stolen property, and ownership resided with another. The requirement that the property be unlawfully taken from another's person or presence against his or her will, equally implies the person's connection to property stolen from her actual or constructive

possession. See RCW 9A.56.190, .200; **Graham**, 64 Wn. App. at 308-09; **Latham**, 35 Wn. App. 865-66.

Defendant is incapable of showing any prejudice resulting from the denial of his inadequately drafted instruction. The contested component of his conviction is supported by uncontroverted evidence in the form of his own admission he took one of the bottle's from Gouveia's person. Meanwhile the given instructions enabled him to argue his theory of the case—as duly noted by the trial court. 6RP 579-80. The requisite possessory interest he endeavored to define through his erroneous instruction was adequately addressed through the robbery instructions augmented by the definition of "theft," which was textually linked to the robbery instructions through the *mens rea* element of intent to commit theft. When the instructions are appropriately considered together as a whole they do not permit a person without any possessory interest in the stolen property to be considered a victim of robbery, so defendant's claim the jury was inadequately instructed to his detriment is without merit.

4. DEFENDANT'S UNDESERVED ACCUSATION OF PROSECUTORIAL MISCONDUCT SHOULD BE REJECTED BECAUSE THE PROSECUTOR PROPERLY ARGUED THE EVIDENCE FROM THE COURT'S INSTRUCTIONS IN CLOSING AND REBUTTED DEFENSE ARGUMENT THAT INVITED THE JURORS TO DEVIATE FROM THEM.

A defendant bears the burden of establishing both the impropriety of the prosecutor's argument and its prejudicial effect. *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995)(citing *State v. Furman*, 122 Wn.2d 440, 455, 858 P.2d 1092 (1993)); see also *State v. Hoffman*, 116 Wn.2d 51, 93-95, 804 P.2d 577 (1991). Challenged arguments should be reviewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the given instructions. *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994) (citing *State v. Graham*, 59 Wn. App. 418, 428, 798 P.2d 314 (1990); *State v. Green*, 46 Wn. App. 92, 96, 730 P.2d 1350 (1986); *State v. Warren*, 165 Wn.2d 17, 26-28, 195 P.3d 940 (2008)).

- a. The prosecutor properly argued the evidence from the trial court's instructions in closing argument.

Prosecutors are afforded wide latitude to draw, and express, reasonable inferences and deductions from the evidence during closing argument, including inferences as to the credibility of witnesses. *State v. Gregory*, 158 Wn.2d 759, 841, 147 P.3d 1201 (2006). But a prosecutor may not misstate the

law. *Warren*, 165 Wn.2d at 28. "Absent a proper objection and a request for a curative instruction," a defendant cannot prevail on a claim of erroneous argument unless it is so flagrant and ill-intentioned resulting prejudice could not have been cured through timely instruction. *State v. Corbett*, 158 Wn. App. 576, 594, 242 P.3d 52 (2010)(citing *Russell*, 125 Wn.2d at 86; *State v. Edvalds*, 157 Wn. App. 517, 237 P.3d 368 (2010)(citing *State v. Belgrade*, 110 Wn.2d 504, 507, 755 P.2d 174 (1988)). *State v. McChristian*, 158 Wn. App. 392, 400, 241 P.3d 468 (2010)(citing *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007, 118 S. Ct. 1192, 140 L. Ed. 2d 322 (1998); *State v. Reed*, 102 Wn.2d 140, 145, 684 P.2d 699 (1984)).

The court's accurate instructions on the law were read to the jury immediately before closing argument began. 6RP 532-33. At the outset the prosecutor detailed Gouveia's connection to Walgreens. 6RP 534-36. He quickly transitioned to arguing the evidence according to robbery's elements. 6RP 536-39, 541-43. Defendant's challenges the following unobjected to portion of that argument as a misstatement of law pursuant to the same misunderstanding of the requisite possessory interest that pervades the previously addressed claims:

"Now, one of the issues -- again, going back to reasonable doubt. **What about Kersten Gouveia not being on duty that night? How does that play with the elements of the**

**crime? Well, let's go back through the elements and see -- let's change it from person or presence or another customer, say, or bystander, say, or just good Samaritan, say. Has the defendant not committed each element of this crime even if that describes who Kersten Gouveia is?** The answer's yes. What's more, if you turn to Instruction No. 8, it further gives you some law concerning the theft. The theft doesn't have to be from the owner. **Who's the owner of the bottles of liquor in this case? Well, it's Walgreens Corporation.** Can the defendant use force or fear against the Walgreens Corporation? It's a corporation. **You can't really use fear or force against a corporation, but you can against human beings, which is what Kersten Gouveia is.** And that last sentence makes it abundantly clear that **ownership of the property taken must be in some person other than the person or persons who commit the theft.** In other words, the owner has to be someone other than the defendant, and it was. **So again, you can look at those elements from that standpoint and from the evidence that you've seen, from the law that you apply in this case, it makes no difference whether Kersten was on duty or not.** No. 6RP 544-45 (emphasis added).

The prosecutor then resumed arguing facts from the instructions. 6RP 545.

There is no flagrant or ill-intentioned statement of the law in this argument when considered in the context of the evidence at trial—as plainly intended—and not in the context of defendant's irrelevant-abstract of a "bystander" or "good Samaritan" without the connection Gouveia had to Walgreens as an off duty employee about to start her shift. The clear point, which bookends the prosecutor's argument, was regardless of whether the jury thought Gouveia's off-duty status made her a bystander or Good Samaritan because she was not obliged to act, she nevertheless qualified as a victim of

the robbery defendant committed on account of her conduct and connection to the store.

Isolated from the facts of the case, the challenged argument could only be subject to criticism for connecting the "presence of another" component to "bystanders,"<sup>5</sup> for bystanders are robbery victims when property is taken from their person. But to find error in the former application one must assume the prosecutor meant people without any connection to the stolen property, which differ from bystanders who create an otherwise non-existent connection to property through some affirmative act to safeguard it for the owner or are conscripted into the connection through a robber's conduct. *E.g.*, *Latham*, 35 Wn. App. at 866. Had the prosecutor wrongly included the disinterested variety of bystander in his analogy, it is precisely the type of error a timely objection coupled with a clarifying instruction would have cured. Even without an instruction there is no potential for the inapt version of the analogy to have prejudiced defendant, for it described a circumstance far removed from the facts actually at issue in his case.

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<sup>5</sup> "Bystander": "One present but not taking part: a chance spectator...." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, p. 307 (2002).

Conversely, if by "good Samaritan"<sup>6</sup> the prosecutor meant one who took actual or constructive possession of the property to safeguard it for the owner, there is no error in the remark. In the invoked parable a Samaritan took custody of a half-dead robbery victim, bandaged his wounds, carried him on a donkey to the safety of an inn where the Samaritan briefly cared for the victim until the Samaritan arranged for the innkeeper to do so in his absence. *See* Luke 10:30-37. Substituting the living robbery victim in the parable for a piece of property targeted by robbers, custody becomes actual or constructive possession and the safekeeping becomes bailment—both recognized to create the possessory interest at issue in robbery. In this context Gouveia acts like the Samaritan by creating a connection to her employer's property through her proactive efforts to protect it. Thus, one acting like the good Samaritan with respect to a forcefully taken item of property creates the connection required to make the person its owner as against the robbery defendant despite the absence of a legally recognizable right to the property. *Latham*, 35 Wn. App. at 865-66 (emphasis added). If this were not so the law would very strangely allow one who obtains property by graft to be a robbery victim but not a good Samaritan who obtains it by grace.

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<sup>6</sup> "Good Samaritan": "[after the good Samaritan in the Biblical parable (Lk 10:30-37)]: one who compassionately renders personal assistance to the unfortunate." *Id.* 979.

The prosecutor's argument was accordingly either accurate in its entirety, or only erroneous in including "bystander" in an otherwise appropriate analogy. Either way, the comment was not incurable flagrant and ill-intentioned misconduct in the context of argument aimed at explaining why Gouveia's off-duty status was immaterial to her status as defendant's robbery victim. For the same reason any error in the argument is harmless. Particularly given the prosecutor's repeated references to the court's instructions, which explicitly superseded any argument not supported by them. CP 44 (Inst. 1).

b. The prosecutor's challenged rebuttal remarks were neither improper nor prejudicial.

The burden of proof does not insulate a defendant's exculpatory theory from attack; "[o]n the contrary, the evidence supporting a defendant's theory of the case is subject to the same searching examination as the State's evidence." *State v. Contreras*, 57 Wn. App. 471, 476, 788 P.2d 1114 (1990). "A prosecutor is entitled to argue inferences from the evidence and to point out improbabilities or a lack of evidentiary support for the defense's theory of the case." *State v. Killingsworth*, 166 Wn. App. 290-92, 269 P.3d 1064, review denied, 174 Wn.2d 1007, 278 P.3d 1112 (2012)(citing *Russell*, 125 Wn.2d at 87; *State v. Boehning*, 127 Wn. App. 511, 519, 111 P.3d 899 (2005)). Prosecutors have especially wide latitude when rebutting an issue the

defendant raised in closing argument or in making a fair response to the arguments of defense counsel. *State v. Lewis*, 156 Wn. App. 230, 240, 233 P.3d 891 (2010); *Russell*, 125 Wn.2d at 87.

Defendant repeatedly argued in closing without any objection from the State that a robbery conviction required proof Gouveia had a proprietary interest in the stolen liquor, or a superior interest in it than defendant could claim. 6RP 557-64. Repeatedly interwoven in those remarks was the patently erroneous claim the robbery conviction turned on whether defendant knew Gouveia was a Walgreens employee, *e.g.*:

"How is it that he would know that she has a proprietary interest or a superior interest in the property than [sic] Ms. Gouveia? He wouldn't. Now, did he respond appropriately? No, he did not. He panicked and ran. He shouldn't have done that, but we don't have a robbery here. There is nothing to indicate that Ms. Gouveia had a superior or propriety interest." 6RP 558; see also 561, 653.

"Ladies and gentlemen, that's doubt, okay? So there was no reason for [defendant] to know that Ms. Gouveia was an employee at the store. As a matter of fact, there's lots of reasons to the contrary, right?" 6RP 564.

Thus the two arguments subtly merged into the inaccurate contention that defendant's *knowledge of* Gouveia's proprietary or superior interest in the stolen liquor was an element of robbery. Defendant then told the jury the State had to prove the elements, which by then included defendant's created *mens rea* element. 6RP 563. Even absent the error inherent in defendant's created

element, his "proprietary or superior interest" dichotomy is at least an imperfect if not an inaccurate description of the array of "possessory interest[s]" capable supporting a robbery conviction, for it is the fact of an ownership, representative capacity, or "possessory interest" that the law—not the jury—deems "superior" to the robbery defendant's possessory interest. *Latham*, 35 Wn. App. 865-66; *Tvedt*, 153 Wn.2d at 714.

The prosecutor began rebuttal by explaining it to the jurors as his chance to respond to defendant's remarks. 6RP 568. He then correctly called their attention to the fact neither the word "proprietary" nor the word "superior" appeared in their instructions, then argued defendant was necessarily asking them to deviate from their instructions by requesting a verdict based on the element he created with those words. 6RP 568-69. Defendant's objections to these remarks were overruled; however, in making its ruling the court restated the difference between argument and instructions on the law. 6RP 569. The prosecutor also reiterated that the attorney's arguments are not law, stressing the admonition applied equally to the defense. *Id.* He then corrected defendant's "proprietary or superior interest" rule by accurately explaining the connection to Walgreens that made Gouveia a robbery victim even though she had yet to clock in when the robbery occurred:

"[L]ook at these instructions from this standpoint. If Kersten Gouveia had no connection to Walgreens whatsoever - - I mean, she was an off-duty employee. She was there in the store in the same way many employees go to many employers either before or after their shift and do something in the store. You know, sweep something up or put away something or whatever it is. You know, employees, good employees, do things inside the store. It doesn't mean they have no connection to the store whatsoever just because they've clocked out or haven't clocked in yet. There's nothing in the instruction that tells you that matters one way or the other, except the defense attorney would just like you to go up there and write it in for him. Don't do that. Use the law that's given to you." 6RP 569-70.

The prosecutor again returned to the bystander-good Samaritan analogy over a defense objection, only this time it was clear he meant a bystander who acts like the good Samaritan by physically intervening in a robbery, which under certain circumstances could transform such a person into a robbery victim for the reasons detailed above. 6RP 569-71; *Latham*, 35 Wn. App. 865-66; *Tvedt*, 153 Wn.2d at 714. None of the prosecutor's remarks were inaccurate, nor did the prosecutor denigrate counsel by fairly calling his rhetoric to the jury's attention in the same way counsel endeavored to critique the prosecutor's remarks. *E.g.*, 6RP 557. At no point did the prosecutor disparage or impugn counsel's role as occurred in *State v. Gonzales*, 11 Wn. App. 276, 283, 45 P.3d 205 (2002). Nor did the prosecutor impugn counsel's integrity as occurred *State v. Thorgerson*, where the Supreme court determined the prosecutor illegitimately accused counsel of engaging in "bogus,"

"desperate[e]," "sl[e]ight of hand tactics." 172 Wn.2d 438, 451, 258 P.3d 43 (2011)(harmless error). Reminding a jury it is not bound to follow defense counsel's inaccurate paraphrase of the law is sound practice not prosecutorial misconduct.

To the extent the prosecutor's clarification of counsel's error carried the possibility of momentarily confusing the jury about the need for there to be a connection between a robbery victim and the stolen property, the prosecutor neutralized it by rapidly explaining how it was Gouveia's connection to the store as a conscientious employee going beyond the call of duty that made her legally eligible to be a robbery victim. Defendant's conviction was fairly obtained.

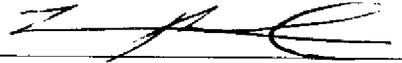
D. CONCLUSION

Defendant's robbery conviction was decided by an accurately instructed jury on properly argued evidence that defendant viciously bludgeoned a Walgreens employee over the head with a full liquor bottle

so he could steal it from her employer within moments of tearing a another  
stolen liquor bottle from her hand.

RESPECTFULLY SUBMITTED: March 13, 2015.

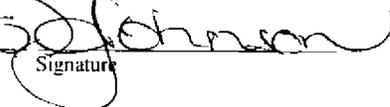
MARK LINDQUIST  
Pierce County  
Prosecuting Attorney



JASON RUYF  
Deputy Prosecuting Attorney  
WSB # 38725

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.

3/13/15   
Date Signature

**PIERCE COUNTY PROSECUTOR**

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