

**FILED**

JUL 11 2012

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

30464-7-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JONATHAN R. CRISLER, APPELLANT

---

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

---

BRIEF OF RESPONDENT

---

STEVEN J. TUCKER  
Prosecuting Attorney

Larry D. Steinmetz  
Deputy Prosecuting Attorney  
Attorneys for Respondent

County-City Public Safety Building  
West 1100 Mallon  
Spokane, Washington 99260  
(509) 477-3662

**FILED**

JUL 11 2012

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

30464-7-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JONATHAN R. CRISLER, APPELLANT

---

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

---

BRIEF OF RESPONDENT

---

STEVEN J. TUCKER  
Prosecuting Attorney

Larry D. Steinmetz  
Deputy Prosecuting Attorney  
Attorneys for Respondent

County-City Public Safety Building  
West 1100 Mallon  
Spokane, Washington 99260  
(509) 477-3662

**INDEX**

APPELLANT’S ASSIGNMENTS OF ERROR.....1

ISSUES PRESENTED.....1

STATEMENT OF THE CASE.....2

ARGUMENT .....6

    A.    THE DEFENDANT’S PROFFERED INSTRUCTION  
          WAS AN INCORRECT STATEMENT OF THE LAW  
          OF ROBBERY.....6

        1.    There Are Several Different Methods Of  
              Committing Robbery .....8

    B.    THE DEFENDANT’S PROPOSED INSTRUCTION  
          IS A COMMENT ON THE EVIDENCE IN VIOLATION  
          OF ARTICLE IV, § 16 OF THE WASHINGTON STATE  
          CONSTITUTION .....12

    C.    THE TRIAL COURT DID NOT ERR BY REFUSING  
          TO GIVE THE DEFENSE PROPOSED JURY  
          INSTRUCTION BECAUSE IT WAS PHRASED IN  
          THE NEGATIVE AND IT WAS INCOMPLETE.....15

        1.    Even If The Evidence Supported Giving The  
              Defendant’s Proposed Instruction, The Defendant  
              Cannot Establish He Was Prejudiced By The  
              Trial Court’s Refusal To Give The Proposed  
              Instruction .....16

CONCLUSION.....19

## TABLE OF AUTHORITIES

### WASHINGTON CASES

STATE EX REL. CARROLL V. JUNKER, 79 Wn.2d 12, 482 P.2d 775 (1971).....	7
STATE V. AUSTIN, 60 Wn.2d 227, 373 P.2d 137 (1962).....	6, 7
STATE V. BARNES, 153 Wn.2d 378, 103 P.3d 1219 (2005).....	17
STATE V. BECKER, 132 Wn.2d 54, 935 P.2d 1321 (1997).....	12
STATE V. BELL, 83 Wn.2d 383, 518 P.2d 696 (1974).....	15
STATE V. BROOKS, 73 Wn.2d 653, 440 P.2d 199 (1968).....	15
STATE V. BUZZELL, 148 Wn. App. 592, 200 P.3d 287, <i>review denied</i> , 166 Wn.2d 1036 (2009).....	17
STATE V. CARTER, 127 Wn. App. 713, 112 P.3d 561 (2005).....	13
STATE V. COLLINSWORTH, 90 Wn. App. 546, 966 P.2d 905 (1997), <i>review denied</i> , 135 Wn.2d 1002 (1998).....	9, 10
STATE V. DEJARLAIS, 88 Wn. App. 297, 944 P.2d 1110 (1997), <i>review denied</i> , 134 Wn.2d 1024 (1998).....	15
STATE V. DuPONT, 14 Wn. App. 22, 538 P.2d 823 (1975).....	15
STATE V. HANDBURGH, 119 Wn.2d 284, 830 P.2d 641 (1992).....	8, 9, 10, 11

STATE V. HANNIGAN, 3 Wn. App. 529, 475 P.2d 886 (1970).....	15
STATE V. HARVEY, 57 Wn.2d 295, 356 P.2d 726 (1960).....	15
STATE V. JACKMAN, 156 Wn.2d 736, 132 P.3d 136 (2006).....	12, 13
STATE V. KJORSVIK, 117 Wn.2d 93, 812 P.2d 86 (1991).....	8
STATE V. MONTGOMERY, 163 Wn.2d 577, 183 P.3d 267 (2008).....	7
STATE V. PIRTLE, 127 Wn.2d 628, 904 P.2d 245 (1995), <i>cert. denied</i> , 518 U.S. 1026 (1996).....	7
STATE V. REDMOND, 122 Wash. 392, 210 P. 772 (1922).....	10
STATE V. SHCHERENKOV, 146 Wn. App. 619, 191 P.3d 99 (2008), <i>review denied</i> , 165 Wn.2d 1037 (2009).....	9, 10
STATE V. SIVINS, 138 Wn. App. 52, 155 P.3d 982 (2007).....	12
STATE V. SMITH, 131 Wn.2d 258, 930 P.2d 917 (1997).....	14
STATE V. STALEY, 123 Wn.2d 794, 872 P.2d 502 (1994).....	7, 16
STATE V. VAN AUKEN, 77 Wn.2d 136, 460 P.2d 277 (1969).....	15
STATE V. WALKER, 136 Wn.2d 767, 966 P.2d 883 (1998).....	7
STATE V. WERNER, 170 Wn.2d 333, 241 P.3d 410 (2010).....	17

STATE V. WHITNEY, 96 Wn.2d 578,  
637 P.2d 956 (1981)..... 19

STEVENS V. GORDON, 118 Wn. App. 43,  
74 P.3d 653 (2003)..... 7

**CONSTITUTIONAL PROVISIONS**

ARTICLE IV, § 16 ..... 12

**STATUTES**

LAWS OF 1975, 1<sup>st</sup> Ex. Sess. § 260..... 8

RCW 9.75.010 ..... 6

RCW 9A.56.030(1)(b) ..... 11

RCW 9A.56.190..... 8, 9, 10, 11

I.

APPELLANT'S ASSIGNMENTS OF ERROR

1. The trial court erred in refusing to give [Mr.] Crisler's requested jury instruction on "snatching" that was taken from *State v. Austin*, 60 Wn.2d 227, 232-33, 373 P.2d 137 (1962). RP 478.
2. The trial court erred in failing to find that the requested jury instruction on "snatching" was a correct statement of the law. RP 479.
3. The trial court erred in finding that the evidence presented at trial did not factually support giving [Mr.] Crisler's proposed jury instruction on "snatching." RP 478.

II.

ISSUES PRESENTED

1. Did the trial court err by finding defendant's proffered instruction was an incorrect statement of the law under the circumstances of the case?
2. Is the defendant's proffered instruction a comment on the evidence in violation of Art. IV, § 16 of the Washington State Constitution?

3. Did the trial court err by refusing to give the defendant's proffered instruction which was phrased in the negative and which was incomplete?

### III.

#### STATEMENT OF THE CASE

The Appellant/Defendant was charged by third amended Information filed in Spokane County Superior Court under Counts I, II, and V with second degree robbery with aggravating circumstances. CP 54. In the alternative to Counts I, II, and V, he was charged with first degree theft with aggravating circumstances. CP 54.

He was also charged under Count III with attempted second degree robbery with aggravating circumstances. CP 54. In the alternative, he was charged with attempted first degree theft with aggravating circumstances under Count III. CP 54.

Lastly, he was charged under Count IV with first degree robbery with aggravating circumstances. CP 54.

The aggravating circumstance alleged for each count was for a vulnerable victim. CP 54.

Under Count I, seventy-one-year-old Nina Syropyatova was walking alone from the grocery store to her home on March 11, 2011, in the afternoon hours.

RP 132; RP 134; RP 136. She had her purse and groceries held by one hand. RP 134. A male ran up to her from behind and tore or knocked the grocery bag from her hand and he also grabbed her purse. RP 135; RP 144. The male ran with her purse toward an awaiting car in which he fled the area. RP 135.

Ms. Syropyatova screamed and she began crying. RP 135-36. She then ran to her home. RP 136. She had difficulty sleeping for several days after the incident and she was afraid to return to the store. RP 136. Within a short time after the incident, Ms. Syropyatova's granddaughter observed her grandmother crying and her grandmother was hysterical. RP 143.

The defendant was convicted as charged under Count I of second degree robbery. CP 66. The jury also found the aggravating circumstance of victim vulnerability. CP 68.

In Count II, eighty-one-year-old Alice McKay arrived home on March 17, 2011, in the afternoon hours from shopping at several stores. RP 150; RP 156. When she exited her car, she was approached by a young male. RP 153. The male asked to use her cellular telephone. RP 153. Ultimately, the male pulled the purse from her hand and ran to an awaiting car. RP 154. After the incident she felt "shook up." RP 154.

The defendant was convicted under Count II of the alternative offense of first degree theft. CP 70. The jury also found the aggravating circumstance of victim vulnerability. CP 71.

Under Count III, eighty-one-year-old Genevieve Voss arrived at the Fred Meyer store on March 18, 2011, in the later morning hours. RP 171-72; RP 175. As she approached the store, she had a purse over her arm and close to her body. RP 172. A male approached her. She looked down and the male's hand was around the handles of her purse. RP 174. She grabbed the purse and held it close to her body. RP 174. Witnesses heard screaming and they observed the defendant trying to "yank" or "tug" the purse away from Ms. Voss. RP 184-85; RP 190; RP 195. Witnesses also heard the male yell something similar to "hah, hah." RP 194. One witness described her as "struggling in walking, walking slow." RP 249. The male was unable to get the purse and he ran to an awaiting car. RP 195. The event made Ms. Voss "startled" and "confused." RP 176.

The defendant was convicted under Count III of attempted second degree robbery. CP 72. The jury also found the aggravating circumstance of victim vulnerability. CP 74.

In Count IV, eighty-seven-year-old Pearl Graham arrived home from shopping on March 18, 2011, during the noon hour. RP 201; RP 207. As she exited her vehicle and as she approached the trunk of her car, she observed a young male peeking at her behind a dumpster. RP 202. She had her purse in her hand and opened the trunk. RP 203. Her purse was "wrenched" out of her hand and she was shoved into the trunk of her car. RP 203. The male had one hand on the top of her shoulder and the other on her purse. RP 204. The male ran with

her purse to an awaiting car. RP 205. Although she had occasional back pain from arthritis prior to the event, she experienced back pain a few days after the incident. RP 207-08.

The jury was unable to reach a verdict under Count IV. CP 75; CP 76. The defendant ultimately pleaded guilty to first degree theft after the trial under Count IV. CP 96; CP 100.

Under Count V, eighty-nine-year-old Mildred Stoesser pulled into her garage and parked her car on March 19, 2011. RP 224; RP 230; RP 262. She advised an officer she had her purse taken from her while she was unloading and bringing groceries into her home. RP 230. The defendant testified that he approached Ms. Stoesser from behind. RP 460. She had the purse tucked under her arm and her grocery bags in her hand. RP 460. The defendant took her purse and ran to an awaiting car. RP 215-16; RP 460. She was described by a neighbor and a police officer as frantic; she was physically shaking and had a hard time focusing. RP 216; RP 225-226.

The defendant was convicted under Count V of second degree robbery. CP 77. The jury also found the aggravating circumstance of victim vulnerability. CP 79.

At the time of trial, the defendant admitted his participation under each count, but he denied force was used to take any of the purses. RP 398-432.

The defendant was sentenced to a standard range sentence on all counts.

CP 100.

#### IV.

#### ARGUMENT

##### A. THE DEFENDANT'S PROFFERED INSTRUCTION WAS AN INCORRECT STATEMENT OF THE LAW OF ROBBERY.

The defendant proffered the following instruction at the time of trial:

If you find from the evidence that the defendant snatched or suddenly took property from the person of \_\_\_\_\_ and said snatching or sudden taking was accomplished without force or violence or the putting of \_\_\_\_\_ in fear of injury, you will return a verdict of Not Guilty as to the charge of Robbery in the \_\_\_\_\_ degree.

*State v. Austin*, 60 Wn.2d 227, 232-33, 373 P.2d 137 (1962).<sup>1</sup> CP 61.

---

<sup>1</sup> In 1962, robbery was defined in RCW 9.75.010 as:

Robbery is the unlawful taking of personal property from the person of another, or in his presence, against his will, by means of force or violence or fear of injury, immediate or future, to his person or property, or the person or property of a member of his family, or of anyone in his company at the time of the robbery. 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. If used merely as a means of escape, it does not constitute robbery. 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. Every person who shall commit robbery shall be punished by imprisonment in the state penitentiary for not less than five years.

RCW 9.75.010.

The trial court provided several reasons for not permitting the defendant's proffered instruction. First, the court ruled the facts did not support giving the instruction. RP 478. Second, the court found the proposed instruction was not a standard instruction. RP 478-79. Lastly, the court found the robbery statute had been amended in 1975 after the *Austin* decision. *State v. Austin, supra*. RP 479.

### STANDARD OF REVIEW

A trial court's refusal to give an instruction to a jury, if based on a factual dispute, is reviewed for abuse of discretion. *State v. Walker*, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998). Discretion is abused if it is exercised without tenable grounds or reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

This court reviews errors of law in jury instructions de novo, *State v. Montgomery*, 163 Wn.2d 577, 597, 183 P.3d 267 (2008), and it evaluates the challenged instruction "in the context of the instructions as a whole." *State v. Pirtle*, 127 Wn.2d 628, 656, 904 P.2d 245 (1995), *cert. denied*, 518 U.S. 1026 (1996). The court asks first whether an instruction is erroneous, and second whether the error prejudiced a party. *Stevens v. Gordon*, 118 Wn. App. 43, 53-54, 74 P.3d 653 (2003).

A defendant is not entitled to an instruction which inaccurately represents the law or for which there is no evidentiary support. *State v. Staley*, 123 Wn.2d 794, 803, 872 P.2d 502 (1994).

1. There Are Several Different Methods Of Committing Robbery.

The current robbery statute, RCW 9A.56.190 states:

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. 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.

Intent to steal is also an essential element of robbery. *State v. Kjorsvik*, 117 Wn.2d 93, 98, 812 P.2d 86 (1991).

Washington courts have adopted the “transactional view” of robbery. *State v. Handburgh*, 119 Wn.2d 284, 830 P.2d 641 (1992). As amended<sup>2</sup>,

[T]he plain language of the robbery statute says the force used may be either to obtain or retain possession of the property. We hold the force necessary to support a robbery conviction need not be used in the initial acquisition of the property. Rather, the retention, via force against the property owner, of property initially taken peaceably or outside the presence of the property owner, is robbery.

*State v. Handburgh*, 119 Wn.2d at 293.

---

<sup>2</sup> In 1975, the legislature amended the statute and deleted the language which said, force or fear used “merely as a means of escape ... does not constitute robbery.” Laws of 1975, 1<sup>st</sup> Ex. Sess. § 260; *State v. Handburgh*, 119 Wn.2d at 291.

In accordance, “[a]ny force or threat, no matter how slight, which induces an owner to part with his property is sufficient to sustain a robbery conviction.” *State v. Handburgh*, 119 Wn.2d at 294; *See also*, RCW 9A.56.190. In *Handburgh*, a defendant took the victim’s bicycle in her absence. Later on, the victim demanded that Handburgh return her bicycle. Handburgh refused and rode away. *State v. Handburgh*, 119 Wn.2d at 285-86. When the victim tried to retrieve her bicycle, Handburgh threw rocks at her and he hit her. The victim fled and Handburgh abandoned the bicycle. *Id.* at 286.

A threat of force exists where the threatened person reasonably interprets the language or actions of another to be threatening. *See, State v. Shcherenkov*, 146 Wn. App. 619, 628-29, 191 P.3d 99 (2008), *review denied*, 165 Wn.2d 1037 (2009).

Another method of robbery is taking by intimidation which is also sufficient to establish a threat of force. *See, State v. Collinsworth*, 90 Wn. App. 546, 552, 966 P.2d 905 (1997), *review denied*, 135 Wn.2d 1002 (1998). Taking by “intimidation” is “the willful taking in such a way as would place an ordinary person in fear of bodily harm.” *State v. Collinsworth*, 90 Wn. App. at 552.

In addition, it has long been the rule in Washington that:

[I]f the taking of the property be attended with such circumstances of terror, or such threatening by menace, word, or gesture as in common experience is likely to create an apprehension of danger

and induce a man to part with property for the safety of his person, it is robbery.

*State v. Redmond*, 122 Wash. 392, 393, 210 P. 772 (1922); *State v. Shcherenkov*, 146 Wn. App. at 624-625; *State v. Collinsworth*, 90 Wn. App. at 551.

In the present case, the defendant's proffered instruction is an inaccurate statement of the robbery statute, RCW 9A.56.190, and the cases interpreting it.

As stated above, the Supreme Court in *State v. Handburgh, supra*, rejected the common law view of robbery that the force used during a robbery be contemporaneous with the taking. The plain language of the robbery statute states the force used may be either to obtain *or retain* possession of the property. RCW 9A.56.190; *State v. Handburgh*, 119 Wn.2d at 293. Therefore, the force necessary to support a robbery conviction need not be used in the initial acquisition of the property. *State v. Handburgh*, 119 Wn.2d at 293.

Here, the defendant's proposed instruction requires the jury find a robbery only where the force used is *contemporaneous* with the taking of the property from the victim. More specifically, it restricts the jury's consideration of the defendant's use of violence, force, fear or intimidation against the victim to the specific time in which the property is taken. As a result, it neglects to instruct the jury that the violence, force, or fear may be ongoing or continuing and can be used to *retain* the property. It additionally prohibits the jury from considering the

violence, force, fear or intimidation experienced by the victims immediately after the taking of the purses was a reason the defendant was able to retain the property.

Accordingly, the trial court did not err in refusing to give the instruction because it is in conflict with RCW 9A.56.190 and the *Handburgh* decision.

As instructed by the trial court, the jury was able to determine whether force was used to obtain or retain possession of the victims' purses considering all of the evidence, not just a specific moment in time as offered by the defendant in his proposed instruction.

Under Counts I, III, and V, the jury found the defendant used violence, force, fear, or intimidation placing the victims in fear of injury and he was able to retain the property in doing so. CP 66; CP 72; CP 77. The jury also found the State had not established violence, force, fear, or intimidation in taking the property under Counts II and IV. CP 70; CP 75.

Consequently, the jury was able to determine whether force was used by the defendant and differentiate between robbery and first degree theft.<sup>3</sup> The trial court did not err in refusing to give the defendant's proffered instruction.

---

<sup>3</sup> A person is guilty of first degree theft if the person commits theft of "[p]roperty of any value ... taken from the person of another." RCW 9A.56.030(1)(b).

B. THE DEFENDANT’S PROPOSED INSTRUCTION IS A COMMENT ON THE EVIDENCE IN VIOLATION OF ARTICLE IV, § 16 OF THE WASHINGTON STATE CONSTITUTION.

Article IV, § 16 of the Washington State Constitution states: “Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.”

A trial court is prohibited by article IV, § 16 from “conveying to the jury his or her personal attitudes toward the merits of the case” or instructing a jury that “matters of fact have been established as a matter of law.” *State v. Becker*, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997). A judge need not expressly communicate “[h]is or her personal feelings on an element of the offense; it is sufficient if they are merely implied.” *State v. Jackman*, 156 Wn.2d 736, 743-744, 132 P.3d 136 (2006). Stated differently, “The purpose of article IV, section 16 is to prevent the jury from being unduly influenced by the court’s opinion regarding the credibility, weight, or sufficiency of the evidence.” *State v. Sivins*, 138 Wn. App. 52, 59, 155 P.3d 982 (2007).

For example, in *State v. Jackman*, *supra*, a jury found the defendant guilty of multiple counts of sexual exploitation of a minor, communication with a minor for immoral purposes, furnishing liquor to a minor, and patronizing a juvenile prostitute. In each case, the State was required to prove that the victim was under age 18 at the time of the offense. *State v. Jackman*, 156 Wn.2d at 742. The trial

court included the victims' birth dates in the "to convict" elements instructions. *State v. Jackman*, 156 Wn.2d at 742.

The Supreme Court reversed the conviction because the State had to prove the victims were minors. Absent that fact, the defendant could not have been convicted. "By stating the victims' birth dates in the instructions, the court conveyed the impression that those dates had been proved to be true." *State v. Jackman*, 156 Wn.2d at 744.

Similarly, in *State v. Carter*, 127 Wn. App. 713, 718, 112 P.3d 561 (2005), this Court held that an instruction was erroneous as a matter of law because it shifted the burden of proof to the defendant to prove that possession of a *firearm* was unwitting.

The Court in *Carter* found the flawed instruction proffered by defense counsel created an inconsistency in the stated burdens of proof. If the inconsistency results from a clear misstatement of the law, the misstatement is presumed to have misled the jury in a manner prejudicial to the defendant. *State v. Carter*, 127 Wn. App. At 718. The defendant was granted a new trial because the instruction placed the burden on the defendant to prove unwitting possession and he was entitled to a new trial. *State v. Carter*, 127 Wn. App. at 718.

"[A] trial court errs by failing to accurately instruct the jury as to each element of a charged crime if an instruction relieves the State of its burden of

proving every essential element of the crime beyond a reasonable doubt.”

*State v. Smith*, 131 Wn.2d 258, 263, 930 P.2d 917 (1997).

In the present case and as previously indicated, the defense proffered instruction stated:

If you find from the evidence that the defendant snatched or suddenly took property from the person of \_\_\_\_\_ and \_\_\_\_\_ said snatching or sudden taking was accomplished without force or violence or the putting of \_\_\_\_\_ in fear of injury, you will return a verdict of Not Guilty as to the charge of Robbery in the \_\_\_\_\_ degree.

CP 61.

Here, the trial court properly rejected the defendant’s proposed instruction because it relieved the State of its burden to prove beyond a reasonable doubt every element of the crimes charged. More specifically, the defendant’s proposed instruction identified “the defendant” as the person who committed the crimes charged in the amended Information relieving the State of its burden to prove the defendant committed the crimes charged beyond a reasonable doubt.

The defendant’s proffered instruction would have also created an inconsistency in the instructions because it is the only instruction which identifies the defendant as the person who committed the crimes charged by the State. The remaining instructions do not identify the defendant as that person. The trial court did not err by refusing to give the proposed instruction.

C. THE TRIAL COURT DID NOT ERR BY REFUSING TO GIVE THE DEFENSE PROPOSED JURY INSTRUCTION BECAUSE IT WAS PHRASED IN THE NEGATIVE AND IT WAS INCOMPLETE.

The defendant's proposed instruction is phrased in the form of a negative instruction. CP 61. A trial court is not required to give a negative instruction as to facts that will not support a conviction in a criminal case, *State v. Bell*, 83 Wn.2d 383, 389, 518 P.2d 696 (1974); *State v. Van Auken*, 77 Wn.2d 136, 460 P.2d 277 (1969); *State v. Brooks*, 73 Wn.2d 653, 440 P.2d 199 (1968); *State v. Harvey*, 57 Wn.2d 295, 356 P.2d 726 (1960); *State v. Hannigan*, 3 Wn. App. 529, 475 P.2d 886 (1970), and the failure to do so does not constitute error. *State v. DuPont*, 14 Wn. App. 22, 26, 538 P.2d 823 (1975).

It is unnecessary to explain those things which will not constitute a crime, although a court may do so in the interest of clarity. *State v. Bell*, 83 Wn.2d at 389. In addition, a trial court does not err in rejecting a proposed instruction if that instruction does not correctly convey the law. *State v. Dejarlais*, 88 Wn. App. 297, 301, 944 P.2d 1110 (1997), *review denied*, 134 Wn.2d 1024 (1998).

Further, the defendant's proffered instruction is drafted in the form of an apparent "elements" instruction which is incomplete. It fails to inform the jury that if it does find the "snatching or sudden taking" was accomplished with force or violence or putting the victim in fear of injury it should return a verdict of

guilty. There is no right to an instruction that misstates the law. *State v. Staley*, 123 Wn.2d at 803.

1. Even If The Evidence Supported Giving The Defendant's Proposed Instruction, The Defendant Cannot Establish He Was Prejudiced By The Trial Court's Refusal To Give The Proposed Instruction.

The defendant complains he was not allowed to effectively argue his theory of the case. Brief of Appellant at 14. This claim is without merit.

The instructions given by the trial court allowed the defendant to argue his theory of the case: namely; that he did not use force to take the purses. The trial court's instruction number eight and WPIC 37.50, regarding the elements of second degree robbery, stated as follows:

A person commits the crime of robbery in the second degree when he or she unlawfully and with intent to commit theft thereof takes personal property from the person of another against that person's will by the use or threatened use of immediate force, violence, or fear of injury to that person or to that person's property. A threat to use immediate force or violence may be either expressed or implied. 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 case 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 64; RP 493.

Jury instructions are sufficient if they are supported by substantial evidence, allow the parties to argue their theories of the case, and when read as a

whole properly inform the jury of the applicable law. *State v. Barnes*, 153 Wn.2d 378, 382, 103 P.3d 1219 (2005).

The refusal to give instructions on a party's theory of the case where there is supporting evidence is reversible error when it prejudices a party. *State v. Werner*, 170 Wn.2d 333, 337, 241 P.3d 410 (2010). Stated alternatively, "A refusal to give a requested jury instruction constitutes reversible error where the absence of the instruction prevents the defendant from presenting his theory of the case." *State v. Buzzell*, 148 Wn. App. 592, 598, 200 P.3d 287, *review denied*, 166 Wn.2d 1036 (2009).

Here, the defendant was allowed to argue his theory of the case and he has not presented any prejudice. He essentially argued to the jury that force was not used to obtain the purses during the commission of the five separate counts and that the defendant should be convicted of the lesser crime of first degree theft.

Defense counsel argued:

And I submit to you that what this instruction is telling you, what these instructions are telling you together is the manner in which the force is used has to be something more than simply taking the object, otherwise first degree theft would not exist. .... So what I ask you to do is look at each of these incidents and ask yourselves does the evidence prove that Mr. Crisler beyond a reasonable doubt did anything more, used any force in any manner

other than to obtain, take the object, to take the object from the person.

RP 539-540.

Defense counsel then provided several different examples to the jury of various scenarios of how varying degrees of force could be used to take personal property and he then argued force was not used during the commission of the five charged offenses. RP 540–551.

In sum, the defendant has not demonstrated how he was prejudiced and prevented from arguing his theory of the case to the jury by the trial court's refusal to permit his proposed instruction.

Indeed, the jury followed his argument as it found the defendant not guilty of second degree robbery under Count II, but, in the alternative, found the defendant guilty of first degree theft. CP 70-71. The jury was also unable to reach a verdict on Count IV. CP 75.

Finally, he has not demonstrated how, when read as a whole, the trial court's instructions did not properly inform the jury of the applicable law and his theory of the case. He had every opportunity to present his version of the facts to the jury and how the law applied to those facts.

The defendant attempts to support his argument by claiming the jury was confused about the application of the term "force" because it submitted a question

during deliberations asking for a definition of “force.” Brief of Appellant at 14. This argument cannot bear the weight of authority to the opposite.<sup>4</sup>

The defendant also makes the claim the jury was required to speculate regarding the definition of force. Brief of Appellant at 14-15. The defendant does so without any citation to the record or any authority. This claim is without merit.

V.

#### CONCLUSION

For the reasons stated, the convictions and sentences should be affirmed.

Respectfully submitted this 11 day of July, 2012.

STEVEN J. TUCKER  
Prosecuting Attorney



---

Larry Steinmetz #20635  
Deputy Prosecuting Attorney  
Attorney for Respondent

---

<sup>4</sup> In *State v. Whitney*, 96 Wn.2d 578, 637 P.2d 956 (1981), in the context of juror misconduct and wherein the court’s reasoning is applicable here, the Supreme Court stated:

[T]he mental processes by which individual jurors reached their respective conclusions, their motives in arriving at their verdicts, the effect the evidence may have had upon the jurors or the weight particular jurors may have given to particular evidence, or the jurors’ intentions and beliefs, are all factors inhering in the jury’s processes in arriving at its verdict, and, therefore, inhere in the verdict itself, and averments concerning them are inadmissible to impeach the verdict.

*State v. Whitney*, 96 Wn.2d at 581.

The defendant cannot use the jury’s question to impeach the verdicts nor use it to support his claim that he was prejudiced by the trial court’s denial in giving his proposed instruction.