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No. 33678-2-II

81626-3

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IN THE  
COURT OF APPEALS, DIVISION II,  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,  
Respondent,

v.

GUY DANIEL TURNER,  
Appellant.

FILED  
COURT OF APPEALS  
DIVISION II  
06 MAY 30 AM 11:24  
STATE OF WASHINGTON  
BY *DMW*  
DEPUTY

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**APPELLANT'S REPLY BRIEF**

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## ARGUMENT

### **The State Failed to Prove Mr. Turner Committed the Crime of First Degree Robbery as that Crime was Charged in the "To Convict" Instruction to the Jury**

The State agrees that it was required to prove that Mr. Turner took property "from the person or in the presence" of the owner or a person entrusted by the owner with dominion and control over the property. Brief of Respondent at 12. While Mr. Turner believes that, given the transaction view of robbery in this State, it was the jury instruction that imposed this requirement, see Appellant's Brief at 17-21, the parties agree on this essential point. But the State fails to explain how it proved this element. As it failed to prove a taking "from the person or in the presence," Mr. Turner's conviction must be reversed.

Once the State was required to prove that the taking itself was from the person or in the presence of the owner, the legal analysis shifted. No longer did the current, transactional view of robbery apply. Under the transactional view, a peaceful taking outside the presence of the victim can be a robbery if force is

later used to retain the property. *State v. Handburgh*, 119 Wn.2d 284, 830 P.2d 641 (1992). But once the State assumed the burden of proving that the taking itself was "from the person," it also assumed the burden of proving the earlier, now-rejected view of robbery. Under that view, if the taking were completed outside the presence of the victim and without the use of force, no robbery could be said to have occurred. *State v. Handburgh*, 61 Wn. App. 763, 812 P.2d 131 (1991) (holding when bike was peaceably taken outside victim's presence, it did not matter that force was used to retain it), *reversed*, 119 Wn.2d 284, 830 P.2d 641 (1992). While that view has since been rejected, the unobjected-to jury instructions in this case imposed this burden upon the State. See Appellant's Brief at 17-21. For these reasons, when the State failed to prove the taking itself was in the victim's presence, it failed to prove Mr. Turner committed robbery.

In this case, Mr. Turner completed the shoplifting outside of the presence of any store employee when he

exited the store. He did not come into "the presence" of a store employee until he fought to effect his escape. As set forth more fully in Appellant's Brief, Mr. Turner took drill bits from a Home Depot and left the store without paying. The store's loss prevention officer watched Mr. Turner take the two items on a video surveillance monitor. RP at 38-39, 43-46. He viewed the monitor from his office in the back of the store, behind a locked door. RP at 41.

When he selected the items, Mr. Turner was in the store's "tool corral." RP at 45-46. While the officer left his office and followed Mr. Turner as he headed out of the store, he did not make his presence known until Mr. Turner left the store without paying. Until Mr. Turner left the store, the officer stayed at least five to ten paces behind him. RP at 265. He did not alert Mr. Turner to his presence until Mr. Turner went through the store doors. RP at 50. Thus, Mr. Turner legally completed the entire taking - from choosing the items to leaving the store without paying - outside of the presence of an owner or controller of the property.

Accordingly, the State failed to prove Mr. Turner "took personal property from the person or in the presence of the owner or a person entrusted by the owner with dominion and control over the property," as required by Jury Instruction No. 23, and law of the case doctrine requires Mr. Turner's conviction to be reversed.

Mr. Turner rests on Appellant's Brief for the remainder of his arguments.

#### **CONCLUSION**

For all of these reasons and the reasons set forth in Appellant's Brief, Guy Daniel Turner respectfully requests this Court to reverse his conviction for Robbery in the First Degree and vacate the portion of the trial court's order attempting to preserve the assault conviction.

Dated this 26th day of May, 2006.

Respectfully submitted,

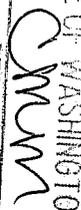


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**CERTIFICATE OF SERVICE**

I certify that on this 26th day of May, 2006, I mailed one copy of the attached brief, postage prepaid, to the attorney for the Respondent, Todd A. Campbell, Deputy Prosecuting Attorney, 930 Tacoma Avenue S, Tacoma, Washington, 98402-2102, and one copy of the brief, postage prepaid, to Mr. Guy Daniel Turner, DOC No. 866562, B-610-2, Monroe Corrections Complex, Twin River Unit, P.O. Box 888, Monroe, WA 98272-0888.

  
Carol Elewski, WSBA # 33647

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