IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. DOMINIQUE SHAVIES, Appellant.	No. 39062-1-II UNPUBLISHED OPINION

Penoyar, C.J. — Dominique Shavies appeals his first degree robbery conviction. Shavies argues that there was insufficient evidence to support his conviction. Additionally, he contends that the trial court's imposition of 145 months' confinement constitutes cruel and unusual punishment. He also raises numerous claims in his statement of additional grounds (SAG).[1] We affirm.

FACTS

Shavies was released from prison on June 17, 2008. On the evening of June 18, Sara Nix took a break from her job at Stadium Thriftway in Tacoma to smoke a cigarette on the outside stairs. Nix observed a man, later identified as Shavies, approaching the stairs. She assumed that he would walk past her; however, he grabbed her purse and then darted up the stairs.

Nix ran after Shavies, and two men, who were working at a nearby church, joined the chase. Shavies opened Nix's purse, looked inside it, and then threw it at her. Nix picked up her purse, assuming that she had all of her belongings. Shavies stood within four or five feet of Nix. Nix tried to dial 911, but she failed because she was shaking.

[1] RAP 10.10.

Shavies yelled at Nix, ". . . I gave you your [things] back." Report of Proceedings (RP) (Sept. 30, 2008) at 62. Nix yelled back, "I work 40 hours a week for this. . . . You are the one stealing purses. . . . [You] better keep on running because I am calling the cops." RP (Sept. 30, 2008) at 62.

Shavies then backed up. He crouched down, reached into his pants, and pulled out a screwdriver. Nix testified that when Shavies reached into his pants, "[m]y first initial thought was . . . does he have a gun and once I seen it was a [screwdriver], it kind of like didn't matter any more." RP (Sept. 30, 2008) at 64. She testified that "[h]e just pulled it out and like showed it to us, kind of like this is what I have." RP (Sept. 30, 2008) at 64. She also testified, "[O]nce I seen it was a [screwdriver], I wasn't worried about it." RP (Sept. 30, 2008) at 65.

Nix told Shavies that she was still going to call the police and started to walk back to the store. She believed Shavies would follow her to the store. He followed her and the two men for three or four feet and then ran away. Shavies ran up to a car, yelled to be let in, jumped in, and the car then drove away. Nix went back to work, looked into her purse, and noticed that her wallet was missing. She panicked because she was "going to have to cancel [her] cards." RP (Sept. 30, 2008) at 67. Nix called the police and gave the car's license plate number.

The police located the car in question and detained its four occupants, including Shavies. Tacoma Police Officer Darren Reda found Nix's wallet lying on the ground below the right hand passenger side door. Shavies was seated in the right rear passenger seat of the vehicle. Tacoma Police Officer Ryan Hovey also responded to the scene and spoke with Shavies.[2] Shavies

[2] Hovey advised Shavies of his rights, Shavies responded that he understood his rights, and Shavies expressed a willingness to speak with Hovey.

admitted to taking Nix's purse. Shavies told Hovey that he did not display a weapon. Shavies denied being involved until Hovey asked Shavies whether he had committed robbery or "purse snatching." RP (Oct. 1, 2008) at 24. On June 19, 2008, the State charged Shavies with first degree robbery.[3]

At trial, Shavies admitted that he grabbed Nix's purse, but he also testified that on the night of the incident he did not have a screwdriver on him. He testified that he only had a crack pipe made out of an aluminum beer can. He testified that he never showed the crack pipe to or threatened Nix. He also stated that he never removed Nix's wallet from her purse and never had Nix's wallet on his person.

The jury found Shavies guilty of first degree robbery. The jury also found, by special verdict, that Shavies committed first degree robbery shortly after being released from incarceration. The jury found that Shavies was not armed with a deadly weapon at the time of the commission of the crime. At sentencing, Shavies's offender score was calculated at 12. The trial court sentenced Shavies to 145 months' confinement. Shavies appeals.

ANALYSIS

I. Sufficiency of the Evidence

Shavies argues that insufficient evidence supports his first degree robbery conviction. Specifically, he argues that the State presented insufficient evidence that he used or threatened to use force to obtain or retain Nix's purse and wallet. The State asserts that the jury could have found that Shavies used force to obtain Nix's purse when he suddenly snatched it or to retain her wallet when he displayed what appeared to be a deadly weapon. We agree with the State.

[3] RCW 9A.56.190, .20(1)(a)(ii).

A. Standard of Review

We review a claim of insufficient evidence in the light most favorable to the State in order to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Brockob*, 159 Wn.2d 311, 336, 150 P.3d 59 (2006). All reasonable inferences must be drawn in the State's favor and interpreted most strongly against the defendant. *State v. Hosier*, 157 Wn.2d 1, 8, 133 P.3d 936 (2006). Circumstantial evidence is not any less reliable than direct evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). We defer to the factfinder on issues that involve conflicting testimony, witness credibility, and the persuasiveness of the evidence. *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004).

B. First Degree Robbery

RCW 9A.56.190 defines robbery:

> 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.

A person commits first degree robbery if in commission of a robbery or of immediate flight therefrom, he displays what appears to be a firearm or other deadly weapon. RCW 9A.56.200(1)(a)(ii).

Washington has adopted the "transactional view" of robbery. *State v. Robinson*, 73 Wn. App. 851, 856, 872 P.2d 43 (1994). Accordingly, force used to retain stolen property or to effect an escape can satisfy the force element of robbery. *Robinson*, 73 Wn. App. at 856. Additionally,

any 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 284, 293, 830 P.2d 641 (1992).

Shavies argues that "[t]he conclusion that Mr. Shavies did not use force is bolstered by the fact that the jury found that [he] was not armed with a deadly weapon during the commission of the robbery. Appellant's Br. at 10. However, the elements of first degree robbery do not require the jury to find that Shavies was armed with a deadly weapon. The State only needed to prove that Shavies displayed what appeared to be a deadly weapon. RCW 9A.56.200(1)(a)(ii). Nix testified at trial that Shavies crouched down, reached into his pants, and pulled out a screwdriver. The jury could have concluded that Shavies displayed what appeared to be a deadly weapon but was not convinced beyond a reasonable doubt that the object was a deadly weapon. Further, the jury could have concluded that Shavies's display of what appeared to be a deadly weapon constituted a threatened use of immediate force and was used to retain Nix's wallet. It is irrelevant that Nix "wasn't worried" by Shavies's display of the screwdriver, because threatened use of force or fear must be used by the defendant to obtain or retain possession of the property or to prevent or overcome resistance to the taking. RP (Sept. 30, 2008) at 65. Moreover, the degree of force is immaterial.[4] We hold that the evidence taken in the light most favorable to the State was sufficient to establish that Shavies committed first degree robbery.

[4] Shavies argues that "the fact that the jury found that [Shavies] was not armed with a deadly weapon means that the jury also found that [he] did not display a deadly weapon in the commission or immediate flight from the robbery." Appellant's Br. at 11. Again, the State only needed to prove that Shavies displayed what appeared to be a deadly weapon in the commission or immediate flight from the robbery. Nix testified that Shavies displayed a screwdriver. This element is also met.

II. Cruel and Unusual Punishment

Next, Shavies argues that his 145 months sentence is disproportionate to his first degree robbery conviction. We disagree.

The Eighth Amendment to the United States Constitution prohibits the infliction of "cruel and unusual punishments," and article I, section 14 of the Washington State Constitution prohibits the infliction of "cruel punishment." A sentence violates article I, section 14 of the Washington State Constitution when it is grossly disproportionate to the crime for which it is imposed. *State v. Morin*, 100 Wn. App. 25, 29, 995 P.2d 113 (2000). The state constitution provides greater protection than the federal constitution; thus, if the state provision is not violated, the statute violates neither constitution. *Morin*, 100 Wn. App. at 29. A punishment is grossly disproportionate "if the punishment is clearly arbitrary and shocking to the sense of justice." *State v. Smith*, 93 Wn.2d 329, 344-45, 610 P.2d 869 (1980). To determine whether a sentence is grossly disproportionate, we consider the following factors: (1) the nature of the offense; (2) the legislative purpose behind the statute; (3) the punishment the defendant would have received in other jurisdictions; and (4) the punishment imposed for other offenses in the same jurisdiction. *State v. Fain*, 94 Wn.2d 387, 397, 617 P.2d 720 (1980); *Morin*, 100 Wn. App. at 29. No one factor is dispositive. *State v. Gimarelli*, 105 Wn. App. 370, 381, 20 P.3d 430 (2001).

At the time of his sentencing, Shavies had an offender score of 12, with 12 nonviolent felony convictions since 1993. He committed first degree robbery one day after being released from incarceration. Shavies received 145 months' confinement instead of the maximum sentence of 171 months. *See* RCW 9.94A.510. He fails to show how this sentence is so grossly disproportionate to the gravity of his offense that it constitutes cruel and unusual punishment.

Additionally, because the sentence was within the guidelines provided by law, it is not arbitrary and shocking to the sense of justice. *See State v. Farmer*, 116 Wn.2d 414, 434, 805 P.2d 200, 812 P.2d 858 (1991).

Additionally, under the four *Fain* factors, Shavies's sentence is not grossly disproportionate. The first *Fain* factor, the nature of the offense, supports Shavies's sentence. He committed a crime against a person one day after being released from incarceration, and he had an offender score of 12. The second factor, the legislative purpose behind the statute, is applied with caution because "[l]egislative judgments as to punishments for criminal offenses are entitled to the greatest possible deference." *Fain*, 94 Wn.2d at 402 n.7. The purpose of the Sentencing Reform Act of 1981 is to:

> (1) Ensure that the punishment for a criminal offense is proportionate to the seriousness of the offense and the offender's criminal history;
> (2) Promote respect for the law by providing punishment which is just;
> (3) Be commensurate with the punishment imposed on others committing similar offenses;
> (4) Protect the public;
> (5) Offer the offender an opportunity to improve him or herself;
> (6) Make frugal use of the state's and local governments' resources; and
> (7) Reduce the risk of reoffending by offenders in the community.

RCW 9.94A.010. Shavies's sentence reflects this legislative purpose. Shavies committed 12 felonies prior to his first degree robbery conviction; accordingly, his punishment is proportionate to the serious nature of the offense and his criminal history. His punishment promotes respect for the law by providing just punishment, as it takes into account Shavies's extensive criminal history, the fact that he committed first degree robbery a day after being released from prison, and the serious nature of the offense. His sentence is commensurate with the punishment imposed on others who commit similar crimes and have a similar criminal history, and it protects the public

from Shavies. While his sentence uses State resources, it is not a waste of State resources to incarcerate Shavies for an extensive period of time. Shavies's lengthy sentence reduces his risk of reoffending and offers him an opportunity to improve himself. Thus, the second *Fain* factor also supports Shavies's sentence.

Shavies's sentence is comparable to the punishment he would have received in other jurisdictions. Because Shavies's sentence was within sentencing guidelines, we do not belabor this point. It appears that Shavies would have received a similar or longer sentence in other jurisdictions, including Alabama, Colorado, and Delaware; however, he may have received a shorter sentence in Oregon. *See* Ala. Code §§ 13A-5-6, -9; Ala. Code §§ 13A-8-41, -43; Colo. Rev. Stat. §§ 18-1.3-401(1)(a)(V)(A), -801; Colo. Rev. Stat. §§ 18-4-301, -302; Del. Code Ann. tit. 11, §§ 831, 832, 4214; Or. Rev. Stat. §161.605; Or. Rev. Stat. §§ 164.405, .415. Finally, Shavies presents no evidence of how punishment for other offenses compare in Washington. In fact, Shavies concedes that "numerous other crimes potentially carry the same sentence as does first degree robbery when the offender has an offender score of 12." Appellant's Br. at 29. Shavies's sentence is not disproportionate in light of the offense he committed and his criminal history and is not cruel and unusual punishment.

III. Statement of Additional Grounds

A. Insufficient Evidence

Shavies argues that there was insufficient evidence to support his first degree robbery conviction because (1) he never threatened Nix, (2) he never took anything from her person, and (3) he never used a weapon. We disagree.

First, Shavies appears to contest that he used or threatened use of immediate force to

obtain or retain possession of Nix's wallet. We decline to address SAG arguments that simply repeat or paraphrase arguments presented in the appellate counsel's brief. *State v. Johnston*, 100 Wn. App. 126, 132, 996 P.2d 629 (2000). Appellant's counsel raised this argument, and we disposed of it.

Next, Shavies cites *State v. Nam*, 136 Wn. App. 698, 150 P.3d 617 (2007), asserting that he did not commit first degree robbery because he never took anything from Nix's person. Under RCW 9A.56.190, a defendant may be found guilty of robbery where the State proves he "[took] personal property from the person of another or in his presence." In *Nam*, the State omitted the "presence" language in the instructions. 136 Wn. App. at 703-04. This court held that sufficient evidence did not support a jury verdict that Nam took personal property that was on or attached to the victim's person; thus, this court reversed the robbery conviction. *Nam*, 136 Wn. App. at 707. This court noted that "this will only matter where the State voluntarily elects to omit the 'presence' language in the charging document or instructions." *Nam*, 136 Wn. App. at 706. Accordingly, *Nam* does not apply to Shavies because the charging document and jury instructions contain the presence language.

Finally, Shavies argues that he never used a weapon. First, the law only requires that "in the commission of these acts or of immediate flight therefrom [Shavies] . . . display[ed] what appear[ed] to be a . . . deadly weapon." RCW 9A.56.200(1)(a)(ii). Nix testified that Shavies displayed a screwdriver. We defer to the factfinder on issues that involve witness credibility. *Thomas*, 150 Wn.2d at 874-75. Viewed in the light most favorable to the State, substantial evidence supports the finding that Shavies displayed what appeared to be a deadly weapon.

B. Ineffective Assistance of Counsel

Shavies also contends that his counsel was ineffective for failing to request a lesser included offense instruction on third degree theft. He argues that he is entitled to the lesser included offense instruction, because the wallet was valued at twenty dollars and he was unarmed at the time of his arrest. We disagree.

To prevail on a claim of ineffective assistance of counsel, Shavies must show both ineffective representation and resulting prejudice. *See State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002). To establish ineffective representation, Shavies must show that counsel's performance fell below an objective standard of reasonableness. *See McNeal*, 145 Wn.2d at 362. In order to prove prejudice, Shavies must show that there is a reasonable probability that the result would have been different but for counsel's performance. *See McNeal*, 145 Wn.2d at 362. There is a strong presumption that trial counsel was effective. *McNeal*, 145 Wn.2d at 362. We will not find ineffective assistance of counsel if the action complained of is a legitimate trial tactic. *State v. Varga*, 151 Wn.2d 179, 199, 86 P.3d 139 (2004).

A defendant is entitled to a lesser included offense instruction if (1) each of the elements of the lesser offense is a necessary element of the offense charged (legal prong) and (2) the evidence in the case supports an inference that only the lesser crime was committed (factual prong). *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978). The factual prong of *Workman* is satisfied when, viewing the evidence in the light most favorable to the party requesting the instruction, substantial evidence supports a rational inference that the defendant committed only the lesser included offense to the exclusion of the greater one. *State v. Fernandez-Medina*, 141 Wn.2d 448, 461, 6 P.3d 1150 (2000).

Here, the trial court provided the jury with the lesser included instructions of second

degree robbery and second degree theft. The jury instruction for second degree theft read as follows:

> To convict the defendant of the second lesser included crime of theft in the second degree as charged in Count I, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about the 18th day of June, 2008, the defendant wrongfully obtained or exerted unauthorized control over the property of another;
>
> (2) That the property was an access device;
>
> (3) That the defendant intended to deprive the other person of the property; and
>
> (4) That the acts occurred in the State of Washington.

CP at 80; Instr. 16. The jury also received an instruction on access devices:

> Access device means any card, plate, code, account number, or other means of account access that can be used alone or in conjunction with another access device to obtain money, goods, services, or anything else of value, or that can be used to initiate a transfer of funds, other than a transfer originated solely by paper instruments.

CP at 79; Instr. 15. A person is guilty of third degree theft "if he commits theft of property or services which . . . does not exceed two hundred and fifty dollars in value. . . ." Former RCW 9A.56.050 (1998). At trial, Nix testified that she panicked when she discovered that her wallet was missing, because "I am going to have to cancel my cards." RP (Sept. 30, 2008) at 67. Substantial evidence does not support a reasonable inference that the defendant committed only third degree theft. Theft of an access device is second degree theft and not third degree theft. *See* former RCW 9A.56.040 (2007); former RCW 9A.56.050. Accordingly, Shavies fails to establish the factual prong of the *Workman* test. Because the evidence did not support a lesser included instruction, Shavies's claim of ineffective assistance of counsel for failing to request the instruction is without merit.

C. Lesser Included Offense Instruction

Next, Shavies appears to assert that the trial court erred in refusing to instruct the jury on the lesser included offense of third degree theft. It is not error for a trial court to fail to instruct on a lesser included offense when no request for such an instruction is made. *State v. Alferez*, 37 Wn. App 508, 512, 681 P.2d 859 (1984). We hold that Shavies's claim is without merit.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Penoyar, C.J.

We concur:

Armstrong, J.

Worswick, J.