IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,	)	No. 30464-7-III
Respondent,	)	
v.	)	UNPUBLISHED OPINION
JONATHAN R. CRISLER,	)	
Appellant.	)	

Kulik, J. — Jonathan Crisler appeals his convictions for two counts of second degree robbery, one count of attempted second degree robbery, and two counts of first degree theft. Mr. Crisler stole purses from five women, ages 71 to 87. He argues that his actions did not involve the use of force and, thus, did not constitute robbery but the less serious crime of theft. The trial court refused Mr. Crisler's proposed jury instruction on several grounds.

We agree with the trial court's refusal to give Mr. Crisler's proposed jury instruction because it was an incorrect statement of the law. And the proper instruction given by the court allowed Mr. Crisler to argue his theory of the case.

We affirm the convictions for two counts of second degree robbery, one count of attempted second degree robbery, and two counts of first degree theft, each with the aggravating circumstance of victim vulnerability.

FACTS

In the Spring of 2011, Mr. Crisler, age 19, was unemployed and living with his parents. Mr. Crisler often used Oxycodone or Oxycontin, with three of his friends, Jakob VanDyke, Isaac Murphy, and Andre Murray. One day, Mr. Crisler and Mr. Murphy came up with a plan to get money for Oxycontin. This plan involved taking purses from women.

Mr. Crisler was charged with multiple counts of second degree robbery or attempted second degree robbery, and one count of first degree robbery. At trial, Mr. Crisler admitted his participation under each count, but he denied using force to take any of the purses.

Count I: N.S. On the afternoon of March 17, 2011, 71-year-old N.S. was walking home alone from the grocery store. She had her purse and groceries held in one hand. While Mr. Murphy waited in the car, Mr. Crisler ran up to N.S. from behind, tore or knocked the grocery bag from her hand, and grabbed her purse. Mr. Crisler ran to the waiting car with the purse and fled the area.

N.S. screamed and began crying. She ran to her home. For the next few days, N.S. had difficulty sleeping and she was afraid to go to the store. Shortly after the incident, N.S.'s granddaughter observed N.S. hysterical and crying.

The jury convicted Mr. Crisler under count I of second degree robbery with the aggravating circumstance of victim vulnerability.

Count II: A.M. The same day, 81-year-old A.M. arrived home in the afternoon after shopping at several stores. When she exited her car, she was approached by Mr. Crisler who asked if he could use her cell phone. Ultimately, Mr. Crisler pulled her purse from her hand and ran to an awaiting car. After the incident, A.M. felt "shook up." Report of Proceedings (RP) at 154.

Mr. Crisler was convicted under count II of the alternative offense of first degree theft. The jury also found the aggravating circumstance of victim vulnerability.

Count III: G.V. Eighty-one-year-old G.V. arrived at the Fred Meyer store in the late morning of March 18, 2011. As she approached the store, she had her purse over her arm and close to her body. Mr. Crisler approached G.V. G.V. looked down and Mr. Crisler's hand was around the handles of her purse. She grabbed the purse and held it close to her body. Witnesses heard screaming, and they observed Mr. Crisler trying to "yank" or "tug[]" the purse away from G.V. RP at 184, 195. Witnesses heard the male

yell something similar to "hah, hah." RP at 194. One witness described G.V. as "struggling in walking, walking slow." RP at 249. Mr. Crisler was unable to get the purse and he ran to a waiting car. The event made G.V. "startled and confused." RP at 176.

Mr. Crisler was convicted under count III of attempted second degree robbery. The jury also found the aggravating circumstance of victim vulnerability.

Count IV: P.G. Eighty-seven-year-old P.G. arrived home from shopping sometime around noon on March 18, 2011. As she exited her car and approached the trunk, she observed Mr. Crisler peeking at her from behind a dumpster. She had her purse in her hand while she opened the trunk of her car. P.G.'s purse was "wrenched" out of her hand and she was shoved into the trunk of her car. RP at 203. Mr. Crisler had one hand on the top of her shoulder and the other on her purse. Mr. Crisler ran with her purse to a waiting car. Although P.G. had occasional back pain from arthritis, she experienced a few days of back pain after this incident.

The jury was unable to reach a verdict under count IV. Ultimately, Mr. Crisler pleaded guilty to first degree theft under count IV.

Count V: M.S. On March 19, 2011, 89-year-old M.S. pulled her car into her garage and parked. She later advised an officer that she had her purse taken while she

was unloading groceries and bringing them into her home. Mr. Crisler testified that he approached M.S. from behind. She had her purse tucked under her arm and her grocery bags in her hand. Mr. Crisler took M.S.'s purse and ran to a waiting car. The police officer and a neighbor described M.S. as frantic; she was physically shaking, and had a hard time focusing.

Mr. Crisler was convicted under count V of second degree robbery and the jury found the aggravating circumstance of victim vulnerability.

ANALYSIS

A trial court's refusal to give an instruction to a jury, if based on a factual dispute, is reviewed for an abuse of discretion. *State v. Walker*, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998). Discretion is abused if it is exercised on untenable 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).

The challenged instructions are evaluated "in the context of the instructions as a whole." *State v. Pirtle*, 127 Wn.2d 628, 656, 904 P.2d 245 (1995). The court asks, first, whether the instruction is erroneous and, second, whether the error prejudiced a party. *Stevens v. Gordon*, 118 Wn. App. 43, 53, 74 P.3d 653 (2003).

Jury instructions are sufficient if substantial evidence supports them, they allow the parties to argue their theories of the case and, when read as a whole, they properly inform the jury of the applicable law. *State v. Clausing*, 147 Wn.2d 620, 626, 56 P.3d 550 (2002). Simply stated, a defendant is not entitled to an instruction that 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).

Mr. Crisler proffered the following instruction at the time of trial. This instruction is based on an instruction given in *State v. Austin*, 60 Wn.2d 227, 373 P.2d 137 (1962):

> 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.

Clerk's Papers (CP) at 167.

In *Austin*, the court explained that the defendant's proposed instruction "in the abstract, is a correct statement of the law in regard to robbery;" however, the proposition was not supported by evidence given at trial. *Id.* at 232.

When *Austin* was decided, "robbery" was defined in former RCW 9.75.010 (1909) 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.

(Emphasis added.)

In 1975, the legislature recodified and renumbered former RCW 9.75.010. Laws of 1975, 1st Ex. Sess., ch. 260, *recodified as* RCW 9A.56.190. The new statute deleted the language that said force or fear used "'merely as a means of escape . . . does not constitute robbery.'" *State v. Handburgh*, 119 Wn.2d 284, 291, 830 P.2d 641 (1992) (quoting *State v. Manchester*, 57 Wn. App. 765, 770, 790 P.2d 217 (1990)).

The applicable robbery statute, RCW 9A.56.190,[1] states:

> A person commits robbery when he or she unlawful 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

[1] We quote the current version of RCW 9A.56.190, which was amended by Laws of 2011, chapter 336, section 379 to make the language gender neutral.

> robbery whenever it appears that, although the taking was fully completed without knowledge of the person from whom taken, such knowledge was prevented by the use of force or fear.

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. *Handburgh*, 119 Wn.2d at 290 (citing *Manchester*, 57 Wn. App. at 769). In *Handburgh*, Mr. Handburgh took the victim's bicycle in her absence. Later, the victim demanded that Mr. Handburgh return her bicycle. Mr. Handburgh refused and rode away. When the victim tried to retrieve her bicycle, Mr. Handburgh threw rocks at her and hit her. The victim fled and Mr. Handburgh abandoned the bicycle. *Id.* at 285-86.

Significantly, *Handburgh* concluded that "[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." *Id.* at 293. Thus, force may be proved by intimidation. There is sufficient evidence of force to support a robbery conviction if the taking of property is attended by a threatening menace, word, or gesture that would, in common experience, create an apprehension of danger and induce a person to part with his or her property. *State v. Shcherenkov*, 146 Wn. App. 619, 624-25, 191 P.3d 99 (2008) (quoting *State v. Redmond*, 122 Wash. 392, 393, 210 P. 772 (1922)).

Mr. Crisler's proposed instruction requires the jury to find a robbery only where the force used by the defendant is contemporaneous with the taking of the property. His proposed instruction restricts the jury's consideration of the defendant's use of force, fear, and violence or intimidation against the victim to the specific time when the property was taken. This is not the law. *Handburgh* rejected the common law view that the force used during a robbery must be contemporaneous with the taking. *Handburgh*, 119 Wn.2d at 293. The plain language of the statute states that the force may be used either to obtain or retain possession of the property. The jury must be instructed to consider the force or fear used to obtain or retain the property. The court did not err by refusing to give Mr. Crisler's proffered instruction.

Mr. Crisler does not contend that there was insufficient evidence to support a conviction under the robbery instruction that was actually given by the court. Instead, Mr. Crisler argues that (1) the proposed jury instruction was supported by the evidence presented at trial, and (2) the proposed jury instruction would have allowed the defense to more effectively argue Mr. Crisler's theory of the case. This court need not discuss these assignments of error because Mr. Crisler's proposed instruction does not correctly state the law.

We affirm the convictions.

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

_____
Kulik, J.

WE CONCUR:

_____ _____
Sweeney, J. Korsmo, C.J.