

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

**DIVISION II**

STATE OF WASHINGTON,  
Respondent,

v.

DAVID NIKOLAYEVSEH TRACHUK,  
Appellant.

No. 40698-5-II

UNPUBLISHED OPINION

Van Deren, J. — David Trachuk appeals from his convictions for second degree robbery and second degree burglary, arguing that the trial court erred in denying his request to instruct the jury that attempted theft was a lesser crime included in second degree robbery. Finding no error, we affirm.<sup>1</sup>

On November 4, 2009, Joeb Wallin was working at a Vancouver Walmart as an asset protection officer. Using video surveillance, he saw Trachuk take items, including energy drinks, and place them in a bag that he had taken from the luggage department. Trachuk went to the in-store McDonald's and stayed for about an hour, during which time he drank three of the energy drinks and went through paperwork that he had brought into the store. Trachuk started toward

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<sup>1</sup> A commissioner of this court initially considered Trachuk's appeal as a motion on the merits under RAP 18.14 and then transferred it to a panel of judges.

the exit of the Walmart, carrying the bag of items he had taken. When he passed the last point of sale without paying for the items, Wallin and his partners, Jerome McJunkin and Eric Piekkola, stopped him, identified themselves, and asked him to come back to the office. According to all three, Trachuk said nothing, grasped the bag and continued toward the store exit, pulling the officers along with him. The officers took Trachuk to the ground. With difficulty, they pried the bag of merchandise from Trachuk's hands.

The State charged Trachuk with second degree robbery and second degree burglary. Trachuk asked the court to instruct the jury on lesser included crimes of second degree criminal trespass<sup>2</sup> and attempted theft. The trial court declined, ruling that the evidence did not support the requested instructions. Trachuk testified that his father had kicked him out of the house and that he had gone to Walmart to take personal items he would need. He denied that the officers asked him to go back to the store office after they contacted him. He said he "just froze" and did not move. Report of Proceedings at 143-44. He denied trying to leave or trying to resist. The jury convicted him as charged.

Trachuk argues that the trial court erred in declining to instruct the jury that attempted theft was a lesser included offense to the charge of second degree robbery. A defendant is entitled to a lesser included offense instruction when each element of the lesser crime is an element of the charged crime (the legal prong) and where the evidence would support a verdict that the lesser crime was committed but the charged crime was not (the factual prong). *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978); *State v. Fernandez-Medina*, 141 Wn.2d

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<sup>2</sup> The week before, Trachuk had received a notification of restriction from property from a different Walmart. He does not challenge the trial court's refusal to instruct the jury on criminal trespass.

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448, 455-56, 6 P.3d 1150 (2000). While attempted theft, as an offense included in second degree burglary, may satisfy the legal prong, Trachuk fails to show that the evidence satisfies the factual prong. He admitted taking the items from the Walmart without intending to pay for them. He drank three energy drinks before leaving the store. And he walked past the store's points of sale without making any attempt to pay for the items. These acts constitute a completed theft, not an attempted theft, even though he had not reached the store exit. And, as such, there was no evidence of attempted theft that would have satisfied the factual prong of the *Workman* test.

We affirm the trial court's refusal to instruct the jury on attempted theft as a lesser offense included of the charged crime of second degree robbery.

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.

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Van Deren, J.

We concur:

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Armstrong, J.

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Worswick, J.