IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 28163-9-III**
Respondent,	)	
	)	**Division Three**
v.	)	
	)	
DAVID MICHAEL JONKER,	)	**UNPUBLISHED OPINION**
	)	
Appellant.	)	
	)	

Kulik, C.J. — In 1998, David Jonker took a pack of cigarettes from The Neighborhood Market in Richland, Washington. The manager, Frank Hall, followed Mr. Jonker out of the store and asked about the cigarettes. As Mr. Hall was escorting Mr. Jonker back into the store, the two started fighting. A jury found Mr. Jonker guilty of first degree robbery. Mr. Jonker appeals, asserting he received ineffective assistance of counsel when his attorney failed to request a self-defense instruction as well as a lesser-included offense instruction. But a self-defense instruction is not available in a robbery charge. And defense counsel's decision to use an "all or nothing" strategy was not objectively unreasonable. We affirm the conviction.

FACTS

On May 21, 1998, David Jonker entered The Neighborhood Market carrying a coffee mug. The cashier observed Mr. Jonker walk by the cigarettes. The cashier noticed that when Mr. Jonker walked by again, he was carrying a pack of cigarettes under his mug. Mr. Jonker walked toward the bathroom at the back of the store and the cashier did not see him for a while.

The cashier told Mr. Hall that she had observed Mr. Jonker carrying cigarettes. The cashier and Mr. Hall watched Mr. Jonker come back to the front of the store and leave without buying anything. Mr. Hall followed Mr. Jonker out of the store. Mr. Hall testified that he put his hand on Mr. Jonker's shoulder and asked him what he did with the cigarettes. Mr. Hall told Mr. Jonker to come back to the store. Mr. Hall grabbed Mr. Jonker's elbow to lead him back to the store.

Mr. Hall testified that they took approximately two steps when Mr. Jonker broke away and hit Mr. Hall in the face with the coffee mug, breaking the mug. Mr. Hall grabbed Mr. Jonker, put him in a headlock, and pulled him to the ground, where the two wrestled for a while. When they got up, Mr. Hall took two swings at Mr. Jonker to keep him at bay. At this point, the police arrived and the fight ended. As a result of the fight,

Mr. Hall received two lacerations on his face, one long laceration from his mid-upper arm to below his elbow, and a cut on the ear.

Mr. Jonker admitted at trial that he took cigarettes from The Neighborhood Market. Mr. Jonker testified that when Mr. Hall was leading him back to the store, he decided to give the pack of cigarettes back to Mr. Hall. Mr. Jonker stated he did not have time to retrieve the cigarettes from his fanny pack before Mr. Hall started choking him. Mr. Jonker turned and hit Mr. Hall in an attempt to defend himself. According to Mr. Jonker, he repeatedly asked bystanders to help him contain Mr. Hall and to keep Mr. Hall from hitting him. Mr. Jonker stated that when he had Mr. Hall on the ground, he said he would let Mr. Hall up because he was through fighting. When Mr. Hall got up, he indicated he wanted to continue fighting and took two swings at Mr. Jonker. The police arrived, and the fight ended.

Mr. Hall denied using any force beyond putting his hands on Mr. Jonker's shoulder and elbow before Mr. Jonker hit him. Mr. Jonker denied resisting Mr. Hall until Mr. Hall started choking him.

In the amended information, the State charged Mr. Jonker with first degree

robbery. The jury found Mr. Jonker guilty as charged. Mr. Jonker failed to appear at the sentencing hearing on September 4, 1998, and the court issued a bench warrant. Mr. Jonker was arrested on April 22, 2009, and was sentenced to 45 months on the 1998 robbery charge.

Mr. Jonker appeals, asserting he received ineffective assistance of counsel because defense counsel failed to request jury instructions on self-defense and on the lesser-included offense of theft.

ANALYSIS

Ineffective Assistance of Counsel—Self-Defense Instruction. To prove a claim of ineffective assistance of counsel, the claimant must show: (1) that counsel's performance "fell below an objective standard of reasonableness" and (2) that the defendant was prejudiced by counsel's performance. *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). There is a strong presumption that trial counsel's performance was reasonable. *State v. Prado*, 144 Wn. App. 227, 248, 181 P.3d 901 (2008). Trial counsel's conduct, based on legitimate trial strategy or tactics, cannot be the basis for a claim of ineffective assistance of counsel. *Id.*

Mr. Jonker asserts he received ineffective assistance of counsel because defense counsel failed to request a self-defense jury instruction. But the crime of first degree

robbery[1] includes "no element of *intent* to inflict bodily injury; rather, it includes actual infliction of bodily injury as an element." *State v. Lewis*, No. 38523-6-II, 2010 WL 2195706, at *4 (Wash. Ct. App. Mar. 2, 2010) (citing RCW 9A.56.200(1)(a)(iii)). Therefore, despite Mr. Jonker's testimony that he hit Mr. Hall in self-defense, the State has no burden to prove the absence of self-defense to prove the crime of robbery. Nor was it ineffective assistance of counsel to fail to request an instruction not available to Mr. Jonker.

Ineffective Assistance of Counsel—Lesser-Included Theft Instruction. Mr. Jonker asserts he received ineffective assistance of counsel when defense counsel failed to request a lesser-included offense instruction. The Supreme Court in *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978) held that a defendant is entitled to a lesser-included offense instruction if the following two conditions are met: (1) the elements of the lesser offense must be necessary elements of the charged offense (legal prong) and (2) the evidence must support the inference that only the lesser crime was committed (factual prong).

Mr. Jonker asserts the jury should have been instructed on the lesser-included

[1] "A person is guilty of robbery in the first degree if in the commission of a robbery or of immediate flight therefrom, he . . . [i]nflicts bodily injury." Former RCW 9A.56.200(1) (1975).

offense of third degree theft. A person commits theft if he or she "wrongfully obtain[s] or exert[s] unauthorized control over the property or services of another or the value thereof, with intent to deprive him of such property or services." Former RCW 9A.56.020(1)(a) (1975). To commit robbery, a person must unlawfully take personal property by the use of force. The use of force can be to retain the property once it is taken. RCW 9A.56.190. The elements of theft must necessarily be proved to establish robbery; thus, the legal prong of the *Workman* test is satisfied.

Reviewing the factual prong, the court considers the evidence in the light most favorable to the party requesting the instruction. *State v. Ward*, 125 Wn. App. 243, 248, 104 P.3d 670 (2004). Mr. Jonker admitted to taking the cigarettes from the store, but stated that he did not use force to retain them; he only used force to defend himself. Mr. Jonker's testimony provides evidence that only the lesser crime of theft was committed. Hence, he could have requested a lesser-included offense instruction.

However, because Mr. Jonker admitted to taking the cigarettes from the store, if defense counsel had requested a lesser-included offense instruction, it would have been highly likely that Mr. Jonker would have been convicted of some crime. Here, the most contentious issue at trial was whether Mr. Jonker used force to retain the cigarettes. Therefore, the defense's theory of the case was that Mr. Jonker committed theft, and

perhaps even assault, but he did not commit robbery because he did not use force to retain the cigarettes.

This "all or nothing" strategy, as it is commonly known, has been recognized as a legitimate trial tactic by Washington courts. The strategy cannot be the basis of an ineffective assistance of counsel claim unless the tactical decision to not request the lesser-included instruction was objectively unreasonable. *State v. Breitung*, 155 Wn. App. 606, 618, 230 P.3d 614 (2010). Here, defense counsel could have requested a lesser-included instruction and virtually guaranteed that the jury would convict Mr. Jonker of one of the offenses, or defense counsel could decline to request the instruction and force the jury to either convict on the robbery charge or acquit. If the jury believed the defense's theory of the case, Mr. Jonker could have been acquitted.

Washington courts look to three factors to determine whether the all or nothing tactic was objectively reasonable: (1) the difference between the sentences for the greater and lesser offenses, (2) whether the defendant's defense is the same for both the greater and lesser offenses, and (3) the overall risk to the defendant, given the circumstances at trial. *Id*. at 619 (quoting *State v. Grier*, 150 Wn. App. 619, 640-41, 208 P.3d 1221 (2009), *review granted*, 167 Wn.2d 1017, 224 P.3d 773 (2010)).

Third degree theft is a gross misdemeanor and carries a sentence of up to

one year. RCW 9A.56.050; RCW 9.92.020. First degree robbery is a class A felony. RCW 9A.56.200(2). First degree robbery has a seriousness level of 9. Former RCW 9.94A.320 (1998), *recodified* as RCW 9.94A.515 (Laws of 2001, ch. 10, § 6). Mr. Jonker, at the time of trial, had an offender score of 1, which would make the standard range 36 to 48 months. Former RCW 9.94A.310 (1998), *recodified* as RCW 9.94A.510 (Laws of 2001, ch. 10, § 6). By the time of sentencing, Mr. Jonker had an offender score of 2. However, because defense counsel would have been making strategic decisions based on an offender score of 1, the sentencing considerations will be considered as though Mr. Jonker had an offender score of 1. Here, the difference between 12 months and 36 to 48 months is not a large discrepancy, particularly given the possibility the jury would acquit and Mr. Jonker would not serve any time.

Mr. Jonker's defense for robbery was that he did not use force to retain the cigarettes. Force is not an element of theft and, in fact, Mr. Jonker admitted to committing theft. Therefore, Mr. Jonker's defenses for the greater and lesser offenses were not the same.

Lastly, the decision to use the all or nothing tactic did not expose Mr. Jonker to great risk at trial. The worst case scenario was that he would be convicted of robbery and sentenced to the high end of the standard range, which is 48 months. The best case

scenario was that the jury would believe Mr. Jonker and acquit. If defense counsel asked for a theft instruction, the jury would almost certainly have convicted Mr. Jonker of theft or robbery.

Considering the difference in sentencing between the greater and lesser offenses, the fact that Mr. Jonker did not have the same defense for both the greater and lesser offenses, and that the all or nothing tactic did not expose Mr. Jonker to a great risk at trial, defense counsel's decision to use the all or nothing tactic was not objectively unreasonable.

STATEMENT OF ADDITIONAL GROUNDS

In his statement of additional grounds, Mr. Jonker appears to assert an insufficient evidence claim, a speedy trial right violation, and a double jeopardy argument.

Sufficiency of the Evidence. The test for sufficiency of the evidence is whether, when all reasonable inferences are drawn in favor of the State, any rational trier of fact could find guilt beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). When an appellant asserts insufficient evidence, he or she admits the truth of the State's evidence, as well as all reasonable inferences that can be drawn from that evidence. *Id.* Credibility determinations are for the trier of fact and are not subject to review. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

To convict a person of robbery, the person must, with the intent to commit robbery, unlawfully take personal property, in the presence of another by the use of force. Force must be used to obtain or retain possession of the property. RCW 9A.56.190. To convict a person of first degree robbery, the person must inflict bodily injury. RCW 9A.56.200(1). Here, Mr. Jonker admitted he took the cigarettes from the store. Mr. Hall testified that when he attempted to detain Mr. Jonker, Mr. Jonker hit him multiple times with a coffee mug, causing bodily injury. A reasonable juror could believe that Mr. Jonker was using force to retain the cigarettes and, therefore, the State presented sufficient evidence to support Mr. Jonker's robbery conviction.

Speedy Trial. Mr. Jonker asserts his speedy trial rights were violated, but he fails to explain how. Trial must start 60 days after arraignment if the defendant is in jail, or 90 days after arraignment if the defendant is not in jail. CrR 3.3(b). Here, Mr. Jonker was arraigned on May 29, 1998, and his trial started 52 days later on July 20, 1998.

Double Jeopardy. Mr. Jonker asserts he has already been sentenced to an 18-month term for this case and, therefore, his double jeopardy rights have been violated. Mr. Jonker cites to no authority, and the record on appeal does not support his claim of a prior 18-month sentence on this conviction.

We affirm the conviction for first degree robbery.

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.

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Kulik, C.J.

WE CONCUR:

_____ _____
Korsmo, J. Siddoway, J.