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WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 29010-7-III**
Respondent,	)	
	)	**Division Three**
v.	)	
	)	
DANIEL ALFRED POSEY,	)	
	)	**UNPUBLISHED OPINION**
Appellant.	)	
	)	

Siddoway, J. — Daniel Alfred Posey Jr.[1] appeals his conviction of attempted first degree robbery and the exceptional sentence, 2½ years above the standard range, imposed by the court, arguing that (1) his exceptional sentence should be vacated, (2) the to-convict instruction relieved the State of its burden of proof, and (3) the State failed to prove beyond a reasonable doubt that he inflicted bodily injury on a woman whose purse he attempted to snatch in a store parking lot. We find no error and affirm.

[1] We refer to the defendant, as the parties do, by his correct name, Daniel Alfred Posey Jr., notwithstanding the omission of "Jr." in the caption throughout the proceedings.

FACTS AND PROCEDURAL BACKGROUND

In 2003, Mr. Posey, then 16 years old, was arrested and charged in juvenile court with several crimes, one being a "serious violent offense," which resulted in the case being automatically declined and transferred to superior court. A jury found Mr. Posey guilty on most of the counts, but he was acquitted of the automatic-decline offense. He was nonetheless sentenced as an adult. He appealed, and in September 2007 the Washington Supreme Court agreed that having been acquitted of the serious violent offense, he should not have been sentenced as an adult. *State v. Posey*, 161 Wn.2d 638, 167 P.3d 560 (2007). Mr. Posey was released from confinement.

In December 2009, Mr. Posey was arrested for failing to meet his registration requirements as a sex offender the prior month.[2] He pleaded guilty to the charge and was sentenced to 16 days' confinement after serving 38 days in custody. He was released on January 22, 2010.

Two days later, at around 8 or 8:30 in the evening, Mr. Posey attempted to steal Susan Maltos's purse from the child seat of a shopping cart as she and her husband Ray walked with purchases toward their car parked outside a retail superstore in West Valley, Washington. Mr. Posey reached into the cart, which was being pushed by Ms. Maltos, and grabbed one handle of her purse. Ms. Maltos responded by grabbing her purse with

[2] Mr. Posey had been convicted of two second degree rape charges in 2003.

both hands, one on the second handle and one on the body of the purse, and pulling back. Ms. Maltos later testified that Mr. Posey then struck her on the forehead above her right eye with his free hand. Mr. Maltos later testified that he, too, saw Mr. Posey swing and hit his wife. Ms. Maltos testified that the blow snapped her head back, but she still held onto her purse, although both handles broke in the course of the struggle. Mr. Maltos came to his wife's defense, squared off as if to fight with Mr. Posey, and yelled "security" or "Susan, call security" to his wife. Report of Proceedings (RP) (Apr. 7, 2010) at 32. At that point, Mr. Posey ran toward a waiting car, parked nearby, and jumped into the front passenger seat. The car backed up briefly and then sped out of the parking lot.

Ms. Maltos reported the incident to store personnel, who provided her with a cold press for her head. A police officer arrived within about 10 minutes and shortly thereafter drove the Maltoses to a park where officers were holding two suspects. Both Ms. and Mr. Maltos identified one of the suspects, Mr. Posey, as the man who tried to steal the purse.

Mr. Posey was charged with attempted first degree robbery and given notice that the State would seek a sentence above the standard range in light of Mr. Posey's committing the offense shortly after being released from incarceration. An exceptional sentence based on a jury finding of this factor, commonly referred to as the "rapid

recidivism" factor, is authorized by RCW 9.94A.535(3)(t).

At trial, both Ms. and Mr. Maltos narrated for the jury store surveillance videos that recorded events in the parking lot from two locations. They both identified Mr. Posey as the thief in the video.

The defense also relied on the videos, which it contended showed that Mr. Posey was not in a position from which he could strike Ms. Maltos. Defense counsel suggested to the jury that Ms. Maltos might have been hit in the face, but it was by the purse strap ricocheting back at her after it broke. RP (Apr. 8, 2010) at 131-32.

Both the State and Mr. Posey proposed to-convict and related jury instructions that were based on Washington Pattern Instructions. The State's proposed instructions, for example, included the following:

> A person commits the crime of Attempted First Degree Robbery when, with intent to commit that crime, he does any act which is a substantial step toward the commission of that crime.

Clerk's Papers (CP) at 114 (11 Washington Practice: Washington Pattern Jury Instructions: Criminal 100.01 (3d ed. 2008) (WPIC)), and

> To convict the defendant of the crime of First Degree Robbery, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about January 24, 2010, the defendant unlawfully took personal property of another from the person of another;
> (2) That the defendant intended to commit theft of the property;
> (3) That the taking was against the person's will by the defendant's use or threatened use of immediate force, violence or fear of injury

> to that person;
> (4) That force or fear was used by the defendant to obtain or retain possession of the property or to prevent or overcome resistance to the taking;
> (5) That in the commission of these acts the defendant inflicted bodily injury; and
> (6) That the acts occurred in The State of Washington.

CP at 119 (based on WPIC 37.02), and most importantly:

> To convict the defendant of the crime of Attempted First Degree Robbery, each of the following elements of the crime must be proved beyond a reasonable doubt:
> (1) That on or about January 24, 2010, the defendant did an act which was a substantial step toward the commission of First Degree Robbery;
> (2) That the act was done with the intent to commit First Degree Robbery; and
> (3) That the acts occurred in the State of Washington.

CP at 120 (based on WPIC 100.02).

The trial court rejected the parties' proposed instructions in favor of its own, explaining that it believed its instruction was "less confusing and adequately and directly and appropriately defines the elements of the crime of attempted first degree robbery as alleged in this particular case." RP (Apr. 8, 2010) at 110. Both counsel objected to the trial court's to-convict instruction because it did not instruct the jury of the requirement that the defendant specifically intended to commit the crime of first degree robbery. As expressed by defense counsel:

> We believe that the WPIC's properly set out the law that when an attempt is charged, the State has to prove the actor intended to commit the specific

> crime. That becomes particularly troublesome when you consider the fact that we had also offered lesser includeds which would give the jury an option of choosing a lesser crime.[3] Under the instructions provided by the Court, the intent language becomes somewhat diluted and spread out. The State is given a substantial benefit when they charge attempt, the cost is that it reduces the crime from a B to a C felony but it does—or an A to a B felony in this case, but it does require that they prove intent to commit that specific crime.

Id. at 109.

The jury found Mr. Posey guilty of attempted first degree robbery. After the verdict was returned, the State presented additional evidence in support of the rapid recidivism aggravating factor and the jury returned a special verdict finding the factor had been proved. Given Mr. Posey's offender score, the standard range for the offense was 57.75 to 76.5 months. The trial court imposed a sentence at the high end of the standard range, together with 30 months of additional time in light of the aggravating factor, making Mr. Posey's total sentence 106.5 months. The court made the following finding in support of its decision to impose the exceptional sentence:

> The jury in this matter found beyond a reasonable doubt that the defendant committed this crime shortly after being released from incarceration. The rapidity of re-offense reflected a disdain for the law which renders the defendant particularly culpable in committing the current offense.

CP at 15.

[3] Mr. Posey asked that the jury be instructed on the lesser included crimes of attempted robbery in the second degree and attempted theft, but the court declined to instruct on those crimes.

Mr. Posey appeals, challenging (1) the imposition of an exceptional sentence upward, (2) the allegedly deficient jury instructions, and (3) the sufficiency of the evidence supporting the conviction.

ANALYSIS

I

A court may sentence a defendant to an exceptional sentence above the standard range if the jury finds, beyond a reasonable doubt, one or more aggravating factors alleged by the State, RCW 9.94A.535, and if the court determines that "the facts found are substantial and compelling reasons justifying an exceptional sentence." RCW 9.94A.537(6). Mr. Posey challenges both the sufficiency of the evidence to support the jury's special verdict and the court's determination that the jury's finding was a substantial and compelling reason justifying an exceptional sentence.

Jury finding of rapid recidivism. To the extent that Mr. Posey's challenge goes to the evidence supporting the jury's special verdict, we review its finding for substantial evidence just as we do when evaluating the sufficiency of the evidence supporting the elements of a crime. *State v. Webb*, 162 Wn. App. 195, 205-06, 252 P.3d 424 (2011). Accordingly, we review the evidence in the light most favorable to the State and determine whether any rational trier of fact could have found the aggravating factor beyond a reasonable doubt. *See State v. Brown*, 162 Wn.2d 422, 428, 173 P.3d 245

(2007). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

The amount of time that constitutes "shortly after being released" is a factual determination that can vary depending upon the circumstances of the case. *State v. Combs*, 156 Wn. App. 502, 506-07, 232 P.3d 1179 (2010) (explaining that "[s]ome offenses require a lengthy period of time to plan or come to fruition"). The evidence is undisputed that Mr. Posey's current offense was committed just two days after he was released from incarceration.

As summed up by the State, Mr. Posey appears to argue that because he lost his job, his last felony was victimless and he was homeless when he robbed Ms. Maltos, the fact that less than 48 hours had passed since he was released from jail falls short of the culpability required to find the rapid recidivism factor. *See* Br. of Resp't at 4. We agree with the State that the type of circumstances relied upon by Mr. Posey bear minimally, if at all, on the question that was presented to the jury.[4] The statutory requirement is that the current offense be committed "shortly after being released from incarceration," and the jury was permitted to find as it did. RCW 9.94A.535(3)(t); *see State v. Butler*, 75 Wn. App. 47, 54, 876 P.2d 481 (1994) (finding rapid recidivism where the defendant committed a new offense on the same day he was released from custody), *review denied*,

125 Wn.2d 1021 (1995).

Trial court determination of substantial and compelling reason. In reviewing the court's determination to impose an exceptional sentence in light of the aggravating factor found by the jury, we use a three-pronged test: (1) Are the reasons supported by the record under the clearly erroneous standard of review? (2) Do those reasons justify a departure from the standard range as a matter of law? And (3) was the sentence imposed clearly too excessive or lenient under the abuse of discretion standard of review? RCW 9.94A.585(4); *State v. Allert*, 117 Wn.2d 156, 815 P.2d 752 (1991). Mr. Posey's challenge appears to go to the second and third prongs of the test.

Justification for the departure. Whether the court's stated reason is a substantial and compelling reason to justify an exceptional sentence is a question of law that we review de novo. *State v. Jeannotte*, 133 Wn.2d 847, 857, 947 P.2d 1192 (1997). The mere fact that a defendant reoffends may not be relied upon as the basis for an exceptional sentence, because prior crimes are already part of the offender score

[4] We can imagine circumstances in which evidence that a defendant refrained from reoffending for weeks or a few months under difficult circumstances (e.g., suffering from addiction, or dire necessity) might affect a jury's understanding and application of "shortly." But not where a defendant reoffends within a matter of a few days. The matters argued by Mr. Posey are more likely to bear on the trial court's determination whether the aggravating factor presents a substantial and compelling reason for imposing an exceptional sentence. *State v. Williams*, 159 Wn. App. 298, 313-14, 244 P.3d 1018, *review denied*, 171 Wn.2d 1025 (2011).

component of the standard range. *Butler*, 75 Wn. App. at 53-54. An exceptional sentence is justified if the circumstances of the crime indicate a greater disregard for the law than would otherwise be the case, however, including an offense taking place so soon after release as to indicate a disdain for the law beyond that normally associated with the current offense. *Id.* at 54; *Combs*, 156 Wn. App. at 506 (noting "the gravamen of the offense is disdain for the law"); *State v. Saltz*, 137 Wn. App. 576, 585, 154 P.3d 282 (2007) (basing reliance on the factor on whether the short time period shows a "'greater disregard for the law than otherwise would be the case'" (quoting *Butler*, 75 Wn. App. at 54)).

The trial court concluded from the evidence presented at trial that Mr. Posey had "cased the Maltoses in the store" and that "there was some planning involved here, maybe not a lot, but there was some. It wasn't a spur of the moment thing that Mr. Posey decided to do as he walked through the parking lot. There was some thought beforehand." RP (Apr. 23, 2010) at 13-14. It also expressed its view that Ms. Maltos, a middle-aged woman, was selected by Mr. Posey as a "good victim from the criminal standpoint," contrasting her with a victim who would not have been as vulnerable to a robbery. *Id.* at 13. Those factors, and the fact that the crime was committed within two days of Mr. Posey's release from jail—with the complicity of another, with whom the crime had to have been conceived and was executed—amounted to a sufficient reason,

supported by the record, for the trial court to impose an exceptional sentence.

Discretion exercised in extending sentence. If it is determined that substantial and compelling reasons exist, we then review whether the length of the sentence is clearly excessive under an abuse of discretion standard. *State v. Oxborrow*, 106 Wn.2d 525, 529-31, 723 P.2d 1123 (1986). A "clearly excessive" sentence is one that is clearly unreasonable, "'i.e., exercised on untenable grounds or for untenable reasons, or an action that no reasonable person would have taken.'" *State v. Ritchie*, 126 Wn.2d 388, 393, 894 P.2d 1308 (1995) (quoting *Oxborrow*, 106 Wn.2d at 531). When a sentencing court does not base its sentence on improper reasons, we will find a sentence excessive only if its length, in light of the record, "'shocks the conscience.'" *State v. Vaughn*, 83 Wn. App. 669, 681, 924 P.2d 27 (1996) (internal quotation marks omitted) (quoting *Ritchie*, 126 Wn.2d at 396), *review denied*, 131 Wn.2d 1018 (1997).

We cannot say that the trial court abused its discretion by imposing an exceptional sentence 2½ years above the standard range in light of the record here. *See, e.g.*, *Oxborrow*, 106 Wn.2d at 532-33 (an exceptional sentence for theft and violation of a cease and desist order 14 years beyond the 1-year standard range was not "clearly excessive" under the circumstances of the case).

II

Mr. Posey next assigns error to the court's instructions on the elements of

attempted robbery in the first degree. While the State agrees that the to-convict instruction was problematic, it argues that the instructions, when viewed as a whole, adequately set forth the required elements and that any error was harmless. Whether the jury instructions adequately set out the elements of the crime charged is a question of law, making our review de novo. *State v. Walker*, 136 Wn.2d 767, 772, 966 P.2d 883 (1998); *State v. Brooks*, 142 Wn. App. 842, 848, 176 P.3d 549 (2008).

"[A] 'to convict' instruction must contain all of the elements of the crime because it serves as a 'yardstick' by which the jury measures the evidence to determine guilt or innocence." *State v. Smith*, 131 Wn.2d 258, 263, 930 P.2d 917 (1997). All crimes of attempt contain two elements: intent to commit a specific crime and the taking of a substantial step toward the commission of that crime. RCW 9A.28.020(1); *State v. DeRyke*, 149 Wn.2d 906, 910, 73 P.3d 1000 (2003). Failure to set out both of these elements amounts to an error of constitutional magnitude. *DeRyke*, 149 Wn.2d at 911; *State v. Jackson*, 62 Wn. App. 53, 59, 813 P.2d 156 (1991).

Where a crime is defined in terms of acts causing a particular result, a defendant charged with attempt must have specifically intended to accomplish that criminal result. *State v. Dunbar*, 117 Wn.2d 587, 590, 817 P.2d 1360 (1991) (citing W. LaFave & A. Scott, Criminal Law § 6.2(c), at 500 (2d ed. 1986)); 2 Wayne R. LaFave, Substantive Criminal Law § 11.3(a), at 212 (2d ed. 2003); *see accord DeRyke*, 149 Wn.2d at 913

(while first degree rape contains no mens rea element, attempt to commit first degree rape requires that the State prove the defendant's intent to have forcible sexual intercourse).

"A person commits robbery when he or she unlawfully 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." RCW 9A.56.190. The Washington criminal code recognizes two degrees of robbery. RCW 9A.56.200, .201. As relevant here, a person is guilty of first degree robbery if, "[i]n the commission of a robbery or of immediate flight therefrom, he or she [i]nflicts bodily injury." RCW 9A.56.200(1)(a)(iii).

The Washington Pattern Instructions on the crime of attempt inform the jury of the State's burden to prove intent to commit and a substantial step toward committing the attempted crime by saying so simply and explicitly, and were proposed by the parties below. WPIC 100.02; CP at 120 (State's proposed instruction, requiring it to prove that the defendant "did an act which was a substantial step toward the commission of First Degree Robbery" and "with the intent to commit First Degree Robbery"). Notes on use to WPIC 100.02 provide that where the basic charge is attempt, a separate elements

instruction must be given delineating the elements of the attempted crime.

Here, however, the to-convict instruction given by the trial court identified the required elements as follows:

> To convict the defendant of the crime of Attempted First Degree Robbery, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about January 24, 2010, the defendant attempted to unlawfully take personal property from the person or in the presence of another;
> (2) That the defendant intended to commit theft of the property;
> (3) That the attempted taking was against the person's will by the defendant's use or threatened use of immediate force, violence or fear of injury to that person;
> (4) That force or fear was used by the defendant to attempt to obtain or retain possession of the property or to attempt to prevent or overcome resistance to the taking;
> (5) That in the commission of these acts the defendant inflicted bodily injury; and
> (6) That the acts occurred in The State of Washington.

CP at 53. The jury was therefore told that the only intent the State must prove was that "the defendant intended to commit theft of [personal] property [from the person or in the presence of another]."

The to-convict instruction used in this case was deficient because it failed to instruct the jury on both elements of attempt. First, the instruction failed to specify that Mr. Posey must have intended to commit first degree robbery. *See DeRyke*, 149 Wn.2d at 911-12 (by failing to specify the degree of crime allegedly attempted, an instruction failed

to inform the jury that the State must prove intent to commit the specified crime); *Jackson*, 62 Wn. App. at 59 (finding a similar to-convict instruction omitting the intent element constitutionally deficient). It was also deficient because it failed to include the substantial step element; its inclusion in a definitional instruction rather than in the to-convict instruction itself is insufficient. *Smith*, 131 Wn.2d at 262-63 (recognizing that a reviewing court may not rely on other instructions to supply the element missing from the to-convict instruction); *State v. O'Donnell*, 142 Wn. App. 314, 322, 174 P.3d 1205 (2007) (same proposition).

Having determined that the court erred, we must determine whether the error requires automatic reversal. Automatic reversal of a conviction is required when an omission or misstatement in a jury instruction "relieves the State of its burden to prove every element of a crime." *State v. Brown*, 147 Wn.2d 330, 339, 58 P.3d 889 (2002). "However, not every omission or misstatement in a jury instruction relieves the State of its burden." *Id.* If automatic reversal is not required, Mr. Posey's claim of error is subject to harmless error analysis. *State v. Sibert*, 168 Wn.2d 306, 320, 230 P.3d 142 (2010).

In determining whether instructional error has relieved the State of its burden to prove every element of first degree robbery, the term "every" means "each and every"; the error requires automatic reversal only when the State fails to instruct the jury on *all*

the essential elements. *See, e.g.*, *DeRyke*, 149 Wn.2d at 912 ("DeRyke would be eligible for an automatic reversal only if the trial court failed to instruct the jurors on all the elements"); *Sibert*, 168 Wn.2d at 320 (Alexander, J., dissenting) (automatic reversal is not required, "[a]s the 'to convict' instructions included some elements of the crimes charged"); *Sibert*, 168 Wn.2d at 328 (Sanders, J., dissenting) (taking issue with this construction of "every"). This is consistent with the United States Supreme Court's decision in *Neder v. United States*, 527 U.S. 1, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999), which held that a jury instruction that improperly omitted an essential element is subject to harmless error review rather than automatic reversal. *See* 527 U.S. at 33 (Scalia, J., concurring in part and dissenting in part) (expressing disagreement with court majority's willingness to recognize structural error only when *all* the elements are taken away from the jury). The Washington Supreme Court elected to follow the high court's *Neder* opinion in *Brown*, 147 Wn.2d at 340.

In this case, the trial court's to-convict instruction for the crime of attempt was flawed. But other instructions included the required element of intent as mutually understood by the parties[5] and the required substantial step.[6] Most of the elements of first

[5] CP at 52 (Instruction 4, providing in part that "[a] person commits the crime of attempted first degree robbery when he unlawfully and with intent to commit theft thereof, attempts to take personal property from the person or in the presence of another, against that person's will by the use or threatened use of immediate force, violence, or fear of injury to that person and inflicts bodily injury upon that person").

degree robbery, the crime attempted, were delineated in the court's instructions. Applying the direction provided by *Brown*, *DeRyke*, and *Sibert*, Mr. Posey's conviction is subject to harmless error review.

When engaging in harmless error review, "[a]n instructional error is presumed to [be] prejudicial unless it affirmatively appears that it was harmless." *Smith*, 131 Wn.2d at 263. "In order to hold the error harmless, we must 'conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error.'" *Brown*, 147 Wn.2d at 341 (quoting *Neder*, 527 U.S. at 19); *O'Donnell*, 142 Wn. App. at 322-23. "When applied to an element omitted from, or misstated in, a jury instruction, the error is harmless if that element is supported by uncontroverted evidence." *Brown*, 147 Wn.2d at 341. When there has been a failure to instruct the jury as to the *intent* element of a crime, the error "can be harmless . . . only if the defense theory of the case does not involve the element of intent." *Jackson*, 62 Wn. App. at 60.

The State argues that although omitted from the to-convict instruction, both the required substantial step and intent to commit first degree robbery were supported by uncontroverted evidence. Its argument that evidence of intent was uncontroverted proceeds from the assumption that the only intent the State was required to prove was

[6] CP at 54 (Instruction 6, providing that "[a]n attempt to commit a crime requires a substantial step that strongly indicates a criminal purpose and that is more than mere preparation").

intent to commit robbery. Mr. Posey does not disagree. We assume, without deciding, that this is correct.[7]

Review of the evidence supports the State's position. A defendant's criminal intent may be inferred from all the facts and circumstances. *State v. Bencivenga*, 137 Wn.2d 703, 709, 974 P.2d 832 (1999). The State's evidence bearing on the issue of intent—that Mr. Posey watched the Maltoses and followed them to their car, grabbed Ms. Maltos's purse and, after giving up the fight for the purse, fled in a waiting car—was almost entirely undisputed. On these matters, defense counsel challenged only the reliability of evidence suggesting that Mr. Posey had been positioning himself to commit the robbery for some time before the attempt occurred. And Mr. Posey did not defend on the basis that he had not intended to rob Ms. Maltos. Even defense counsel argued to the

[7] *Cf. State v. Delmarter*, 94 Wn.2d 634, 637, 618 P.2d 99 (1980) (for attempted first degree theft, State need prove only intent to commit theft, not intent to steal property meeting the statutory value threshold); *State v. Chhom*, 128 Wn.2d 739, 743, 911 P.2d 1014 (1996) (for attempted rape of a child, State need prove only intent to have sexual intercourse, not intent to have intercourse with a minor); *In re Pers. Restraint of Francis*, 170 Wn.2d 517, 526, 242 P.3d 866 (2010) (conviction of second degree assault and attempted first degree robbery violated double jeopardy where State's charging document relied upon actual bodily injury to elevate attempted robbery to the first degree; rejecting State's argument that it need not prove bodily injury but only intent, in light of its charging language to which defendant pleaded guilty); *but cf. State v. Beals*, 100 Wn. App. 189, 194, 997 P.2d 941 (accepting State's position that attempted first degree robbery required proof of intent to commit bodily injury, not bodily injury, but finding merger since charging document relied upon bodily injury as the substantial step required for attempt), *review denied*, 141 Wn.2d 1006 (2000). These cases, and this issue, have not been argued by either party.

jury that "the only reason we're here" is over the contested issue of whether Mr. Posey punched Ms. Maltos in the face, and that "[t]his is a case about a purse snatch and that's where it should have stopped." RP (Apr. 8, 2010) at 124, 140.

The same uncontroverted evidence supports the "substantial step" element. For conduct to constitute a "substantial step," it must be strongly corroborative of the actor's criminal purpose. *State v. Luther*, 157 Wn.2d 63, 78, 134 P.3d 205, *cert. denied*, 549 U.S. 978 (2006). Even lying in wait and/or following a victim is conduct sufficient to constitute a substantial step. *In re Pers. Restraint of Francis*, 170 Wn.2d 517, 526, 242 P.3d 866 (2010) (lying in wait for a robbery victim as substantial step); *State v. Newbern*, 95 Wn. App. 277, 287, 975 P.2d 1041 (searching for or following the victim), *review denied*, 138 Wn.2d 1018 (1999). Snatching a purse from a shopping cart and struggling with its owner for possession unquestionably suffices.

III

Finally, Mr. Posey argues that "[a]s charged in this case, the State was . . . required to prove 'bodily injury,' which is defined as 'physical pain or injury, illness, or an impairment of physical condition.'" Br. of Appellant at 18-19 (quoting RCW 9A.04.110(4)). He argues that the State failed to present sufficient evidence to prove that Ms. Maltos suffered bodily injury. Because the State concedes its burden of proving bodily injury, we again assume, without deciding, that this is true.[8]

We again view the evidence in the light most favorable to the State and determine whether any rational trier of fact could have found the elements of the charged crime beyond a reasonable doubt. *Brown*, 162 Wn.2d at 428. "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Salinas*, 119 Wn.2d at 201.

"Bodily injury" is defined as "physical pain or injury, illness, or an impairment of physical condition." RCW 9A.04.110(4)(a). The jury was presented with Ms. Maltos's testimony that the blow snapped her head back, that she had never been hit like that before, and that immediately after the attempted robbery she was provided with a cold press that she held over her head because it hurt from being punched. She did not seek medical attention that night but did go to the emergency room the next morning. When asked at the emergency room, many hours after the blow to her head, to rank her pain on a scale of 1 to 10—with 10 being the most serious pain and 1 being an itch on her hand—she still ranked her pain at about a 4. She also testified that the blow caused her neck to "stiffen[ ] up more than usual." RP (Apr. 7, 2010) at 52. This evidence was unrefuted.

Mr. Posey argues that this evidence falls short of the "bodily injury" discussed in

[8] See *supra* note 6 and related discussion of whether, when a defendant is charged with first degree armed robbery relying on the "bodily injury" alternative, the proof required is of bodily injury or the *intent to inflict* bodily injury.

some reported cases; he offers as examples *State v. Handburgh*, 119 Wn.2d 284, 293, 830 P.2d 641 (1992), in which the victim suffered a split lip, bloody nose and black eye, and *O'Donnell*, 142 Wn. App. at 326, where the defendant choked a victim, leaving red marks and bruising. Even if we grant that the evidence of Ms. Maltos's pain, injury, and impairment falls short of that suffered by the victims in *Handburgh* and *O'Donnell*, it still meets the statutory definition of "bodily injury" provided to the jury and supports the jury's verdict.

We affirm.

A majority of the panel has determined that 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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Siddoway, J.

WE CONCUR:

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Korsmo, A.C.J.

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Brown, J.