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

STATE OF WASHINGTON,	)	No. 30017-0-III
Respondent,	)	
	)	
v.	)	
	)	
DAVID L. HICKAM,	)	
	)	UNPUBLISHED OPINION
Appellant.	)	
	)	

Siddoway, A.C.J. — David Lee Hickam stole a strip of aluminum foil from a Spokane pharmacy and was followed out of the pharmacy and confronted by a store security officer. Mr. Hickam claims he was cooperative and was resigned to being arrested for the theft but attempted to swallow two unprescribed pain pills in his pocket before following the officer back into the store. Both the security officer and Mr. Hickam agree that upon seeing Mr. Hickam swallow the pills—or what the security officer testified looked like rock cocaine—the officer put Mr. Hickam in a choke hold in an effort to prevent him from swallowing. Mr. Hickam presented evidence that the aluminum foil, which Mr. Hickam had folded and tucked under his arm, fell at that point

and was abandoned.

Mr. Hickam broke loose, ran, and responded to the security officer's continued pursuit by deploying pepper spray carried on his key chain. On the basis of his use of force and the admitted theft, he was convicted of first degree robbery. At issue on appeal is whether the court wrongly refused to instruct the jury on self-defense, the limits of a shopkeeper's right to use force to detain a shoplifter, and the lesser included crime of third degree theft.

We conclude that while Mr. Hickam was not entitled to instruction on self-defense or limits on a shopkeeper's authority, he was entitled to have the jury instructed on the lesser included crime of third degree theft. We reverse and remand for a new trial.

FACTS AND PROCEDURAL BACKGROUND

Mr. Hickam walked out of a Spokane pharmacy without paying for a strip of aluminum foil he had torn from its container. Walter Bullock, a loss prevention agent for the pharmacy, followed him out of the store and approached him in the foyer of an adjoining retail store. Mr. Bullock, who was dressed in civilian clothes, identified himself as store security and as a Spokane limited police officer. Mr. Hickam said nothing in reply, and instead dug into his pocket, took out what Mr. Bullock believed to be a piece of rock cocaine, and put it into his mouth, presumably to swallow it.

Mr. Bullock responded by putting Mr. Hickam in a one-armed choke in an effort

to prevent him from swallowing, and yelled "'spit it out, spit it out.'" Report of Proceedings (RP) at 72. He would later testify that he held Mr. Hickam in the choke hold for only several seconds, concerned that Mr. Hickam had thrust his hand back into his pocket and might have a weapon. Once released, Mr. Hickam ran for the exit of the foyer and Mr. Bullock followed, yelling for him to stop. As Mr. Bullock chased him out of the foyer, Mr. Hickam pulled a pepper spray canister from his pocket, turned, and sprayed it toward Mr. Bullock's eyes. Temporarily blinded by the spray, Mr. Bullock dropped to the ground. Mr. Hickam fled but was later identified and arrested.

The State charged Mr. Hickam with first degree robbery. Mr. Hickam notified the State that he would rely, in part, on a claim of self-defense. Before trial commenced, the court heard from the lawyers on whether Mr. Hickam could claim self-defense to a robbery charge and ruled that he could not, and should not suggest the defense in his opening statement.

At trial, Mr. Hickam's account of the incident differed markedly from Mr. Bullock's. He admitted to shoplifting the piece of aluminum foil and that he had intended to use it to smoke two pills—one OxyContin and oxycodone—that he was carrying in his pocket. He claimed he was initially cooperative when stopped by Mr. Bullock, was resigned to going back into the store, and expected to be arrested. He had no prescription for the pain pills and admitted to attempting to swallow them.

According to Mr. Hickam, the instant he put the pills into his mouth and before he could swallow, Mr. Bullock slammed him face-first into a glass panel hard enough to chip his tooth, held him against the wall with one hand and, with the other hand, began choking him. By this time, according to Mr. Hickam, he no longer had the foil strip. He testified that when he tore the strip off in the store, he folded it up and tucked it under his arm. According to him, it must have fallen to the ground when Mr. Bullock grabbed him in the chokehold.[1] No evidence was presented that Mr. Hickam had the aluminum foil in his possession when arrested, but he was not arrested until several days after the crime.

Mr. Hickam claimed he was able to pry Mr. Bullock's hand from his throat and ran, panicked. When he looked back and saw Mr. Bullock continuing after him, he deployed the pepper spray that he kept on his keychain. Mr. Hickam claimed that he

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[1] In cross-examining Mr. Bullock, defense counsel reviewed a videotape of Mr. Hickam's movements in the pharmacy taken by security cameras, stopping twice to ask him about the portion of the tape in which—according to defense counsel's description—Mr. Hickam appeared to fold the foil, place it under his arm, and proceed out of the store with his arm close against his body. Mr. Bullock would not agree, standing by his report that Mr. Hickam had placed the foil in his pocket. In redirect examination, Mr. Bullock testified that even if Mr. Hickam had tucked the aluminum foil under his arm, he would have had the opportunity, after the period captured by the store's security cameras, to "re-situate" the foil in his pocket. RP at 101. In closing, the prosecutor argued:

> [Mr. Hickam] is committing a theft before this robbery occurs because the theft starts when he places the tin foil in his pocket or under his arm. It doesn't matter where he placed the tin foil. He was obviously trying to conceal the tin foil.

RP at 343.

struggled from Mr. Bullock's grasp and used the pepper spray not to get away with the aluminum foil but to escape further attack by Mr. Bullock:

> Q. Mr. Hickam, your purpose in wrestling Mr. Bullock's hands from choking your throat, your purpose in doing that was that to get away with stealing the tin foil or was it to get away from Mr. Bullock's attack on you?
>
> A. I mean, it was just my throat was hurting. I did it, you know, to get away from, you know, getting choked.
>
> Q. Did you do it to get away with taking the tin foil?
>
> A. I wasn't even thinking about the tin foil.
>
> Q. Your purpose in spraying the pepper spray as Mr. Bullock was chasing you, was that to get away with taking the tin foil? Or was that to get away from Mr. Bullock's attack on you?
>
> A. Just him coming at me again.

RP at 267-68.

Defense counsel submitted proposed instructions on self-defense, the limited scope of authority afforded a shopkeeper to detain a shoplifting suspect, and a lesser included offense instruction on third degree theft. The trial court refused to give any of the instructions; in ruling, it adhered to its earlier ruling that self-defense could not be raised as a defense to robbery, concluded that the proposed scope of authority instruction would be "superfluous and confusing" without a self-defense instruction, and concluded that Mr. Hickam was not entitled to a lesser included instruction on third degree theft because the factual prong of the *Workman*[2] test had not been met, citing *State v. O'Connell*, 137 Wn.

[2] *State v. Workman*, 90 Wn.2d 443, 584 P.2d 382 (1978).

App. 81, 152 P.3d 349 (2007). RP at 282. There is no dispute that Mr. Hickam preserved any error with timely and sufficient objections.

The jury convicted Mr. Hickam of first degree robbery. The court imposed a standard range sentence of 47 months and 18 months of community custody. This appeal followed.

ANALYSIS

Mr. Hickam assigns error to the trial court's refusal to give the three instructions. We conclude that the trial court erred, but only in refusing to instruct on third degree theft.

I

We first address the requested instruction as to which the court erred. "A defendant in a criminal case is entitled to have the jury fully instructed on the defense theory of the case." *State v. Staley*, 123 Wn.2d 794, 803, 872 P.2d 502 (1994). Both a defendant and the State have a statutory right to have a lesser included offense presented to the jury if certain criteria are satisfied. *State v. Stevens*, 158 Wn.2d 304, 310, 143 P.3d 817 (2006); RCW 10.61.006. A lesser included offense instruction must be given if (1) each of the elements of the lesser offense is a necessary element of the offense charged (the "legal prong") and (2) the evidence in the case supports an inference that only the lesser crime was committed (the "factual prong"). *State v. Workman*, 90 Wn.2d 443, 447-

48, 584 P.2d 382 (1978). Since robbery includes the elements of larceny, third degree theft is always an included offense of robbery under the legal prong. *State v. Satterlee*, 58 Wn.2d 92, 361 P.2d 168 (1961).

The trial court concluded that Mr. Hickam had not satisfied the factual prong. The purpose of the factual prong is "to ensure that there is evidence to support the giving of the requested instruction." *State v. Fernandez-Medina*, 141 Wn.2d 448, 455, 6 P.3d 1150 (2000). The factual prong of the test is satisfied when, viewing all of 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 charged offense. *Id*. Some evidence must affirmatively establish the defendant's theory of the case to support the giving of the instruction; it is not enough that the jury might merely disbelieve the evidence pointing toward guilt of the charged crime. *Id.* at 456. Where the trial court determines that the factual prong of the test is not satisfied, we generally review for abuse of discretion. *State v. LaPlant*, 157 Wn. App. 685, 687, 239 P.3d 366 (2010); *State v. Walker*, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998).

> 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.

RCW 9A.56.190.[3] The force or fear "must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking." *Id.* Third degree theft occurs when a person "wrongfully obtain[s] or exert[s] unauthorized control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services" and the value of the property or services taken is less than $750. RCW 9A.56.020(1)(a), .050(1).

The evidence, when viewed in the light most favorable to Mr. Hickam, supports a rational inference that he committed only the lesser crime. Mr. Hickam admitted to facts constituting theft of the tin foil. When it comes to the threats or force required for the crime of robbery, however, Mr. Hickam testified that he was prepared to return to the store with Mr. Bullock when confronted. By all accounts, the first person to employ physical force was Mr. Bullock—not to detain Mr. Hickam as a shoplifter, but in an effort to prevent Mr. Hickam from swallowing whatever he had placed in his mouth. From this evidence, the jury could have agreed with Mr. Hickam that the only force he used, after having dropped and abandoned the tin foil, was to defend himself from further attack by Mr. Bullock. His theory depends on disputed evidence and a jury may or may not believe it. But he was entitled to have the jury instructed on the lesser crime.

[3] 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.

The State argues that in order to satisfy the factual prong of *Workman*, Mr. Hickam would have "needed to present evidence that all the later events [after Mr. Hickam left the store] did not occur" and that "[o]nce [Mr. Hickam] struggled with [Mr. Bullock] and ultimately sprayed [him] with MACE, the existence of facts for third degree theft were obliterated." Br. of Resp't at 8-9. The State would be correct if Washington's transactional view of robbery was satisfied by *any* use of force in the aftermath of a theft, even force used only in an effort to escape an abandoned theft. But our Supreme Court rejected the State's position in *State v. Johnson*, 155 Wn.2d 609, 121 P.3d 91 (2005), in which it reversed the conviction for first degree robbery of a defendant who shoplifted a television set, abandoned it when confronted by security guards, and used force against the guards only in an effort to escape. The court held:

> The trial court's unchallenged findings of fact state that Johnson was trying to escape when he punched the security guard in the nose. And the trial court concluded that even though Johnson did not use force to obtain or retain the property, he was guilty of the crime because the transactional view of robbery includes force used during an escape. But as noted above, the force must relate to the taking or retention of the property, either as force used directly in the taking or retention or as force used to prevent or overcome resistance "to the taking." Johnson was not attempting to retain the property when he punched the guard but was attempting to escape after abandoning it.

155 Wn.2d at 611.

The trial court also cited *O'Connell*, 137 Wn. App. at 81, in ruling that the factual

prong of third degree theft was not satisfied. In *O'Connell*, the jury had been presented with the victim's testimony that the defendant stole her car by force and threat, fought with her, pushed her out of her car, and drove off with her purse. The investigating officer testified to the victim's obvious injuries. Implicit in the opinion is that the defendant presented no evidence supporting a different explanation of the relationship between the defendant's theft of the victim's car and the injuries she sustained in the process. This case is distinguishable, given the evidence presented by Mr. Hickam.

The trial court abused its discretion in refusing to instruct on the lesser included crime of third degree theft. The remedy for failure to give a lesser included instruction when one is warranted is to set aside the conviction and remand for a new trial. *State v. Ginn*, 128 Wn. App. 872, 878, 117 P.3d 1155 (2005); *State v. Parker*, 102 Wn.2d 161, 166, 683 P.2d 189 (1984). Reversal and remand is necessary here.

II

Because disputes over the other claimed instructional errors might arise in the retrial, we address Mr. Hickam's arguments that he was entitled to instructions on the defense of self-defense and on the limits of a shopkeeper's authority to detain a shoplifter.

Self-defense. The trial court based its decision not to allow a self-defense instruction on *State v. Lewis*, 156 Wn. App. 230, 233 P.3d 891 (2010), a decision of

Division Two of our court, which held that the defense was unavailable as a matter of law in robbery cases. Our review is de novo. *Walker*, 136 Wn.2d at 772; *State v. George*, 161 Wn. App. 86, 94-95, 249 P.3d 202, *review denied*, 172 Wn.2d 1007 (2011).

The legislature has defined the circumstances in which the use or threatened use of force on another person is not unlawful. Pertinent here, force is not unlawful when

> used by a party about to be injured . . . in preventing or attempting to prevent an offense against his or her person, or a malicious trespass, or other malicious interference with real or personal property lawfully in his or her possession, in case the force is not more than is necessary.

RCW 9A.16.020(3). It is undisputed that self-defense may be asserted as a complete defense to assault, murder, or manslaughter charges where some evidence supports the theory. *State v. Camara*, 113 Wn.2d 631, 639, 781 P.2d 483 (1989).

In *Lewis*, 156 Wn. App. at 238-39, the court reasoned that the State was required to disprove self-defense in assault cases but not robbery cases, due to the absence of an intent to use force as an element of the latter offense:

> Because the crime of assault involves an element of intent, "proof of self-defense may negate an element of the crime," namely this intent element. *State v. Acosta*, 101 Wn.2d 612, 615, 683 P.2d 1069 (1984).
>
> The crime of robbery, on the other hand, includes no element of *intent* to inflict bodily injury; rather, it includes actual infliction of bodily injury as an element. Proof of self-defense, therefore, fails to negate a corresponding intent element of the crime of robbery. Accordingly, despite Lewis's testimony that he hit Crocker in self-defense, Washington law does not impose on the State a burden to prove the absence of self-defense under the facts here.

(Footnotes and citation omitted.) Other cases recognize that the defense is applicable in instances where it negates the intent element of the offense. *State v. Dyson*, 90 Wn. App. 433, 438, 952 P.2d 1097 (1997) (recognizing the defense's applicability to third degree assault because it "negates the 'unlawfulness' element of criminal negligence"); *State v. Dennison*, 54 Wn. App. 577, 581, 774 P.2d 1237 (1989) (recognizing that self-defense is not available as a matter of law in felony murder prosecutions because intent is not an element of that offense), *aff'd*, 115 Wn.2d 609, 801 P.2d 193 (1990); *State v. Arth*, 121 Wn. App. 205, 212 n.15, 87 P.3d 1206 (2004) (defense may be available to defendant charged with malicious mischief if it negates the mens rea of knowingly and maliciously causing physical damage to the property of another).

We agree with *Lewis* and the other Washington decisions that the availability of the defense turns on whether evidence of the lawful use of force could negate a mens rea element of a crime—in this case, robbery. In order to convict a defendant of robbery in Washington, the State must prove the nonstatutory element of a specific intent to steal. *State v. Kjorsvik*, 117 Wn.2d 93, 98, 812 P.2d 86 (1991). However, the State is not obliged to prove that the defendant intended to inflict bodily injury. *State v. Decker*, 127 Wn. App. 427, 431, 111 P.3d 286 (2005) ("Intent to cause bodily injury is not an element of [first degree] robbery."). There is no relevant mens rea element associated with the crime of robbery that a self-defense instruction could negate. With robbery, the element

of force used to take or retain the property is an actus reus, rather than a mens rea, element. *See State v. Deer*, 158 Wn. App. 854, 862, 244 P.3d 965 (2010) (recognizing that the "'actus reus' is [t]he wrongful deed that comprises the physical components of a crime,' while the 'mens rea' is '[t]he state of mind that the prosecution . . . must prove that a defendant had when committing a crime'" (alterations in original) (quoting Black's Law Dictionary 41, 1075 (9th ed. 2009))), *review granted*, 171 Wn.2d 1012 (2011).

In a robbery case such as this one, the question is not whether the wrongful use of force, if proved by the State, can be negated. It is instead whether the State can prove the requisite wrongful use of force at all. The jury's instructions defining the crime of robbery and setting forth the elements required to convict provide the guidance needed by the jury to answer that question.

Reasonable force. Mr. Hickam next argues that the court erred by failing to give the jury an instruction on the scope of authority afforded to a shopkeeper to detain a shoplifting suspect. His proposed instruction was a nonpattern instruction based on RCW 9A.16.010(1) and RCW 9A.16.080. It provided in part that

> [a] peace officer, owner of a mercantile establishment, or the owner's authorized employee or agent may detain a person on or in the immediate vicinity of the premises of a mercantile, for the purpose of investigation or questioning as to the ownership of any merchandise. . . . The detention must . . . be conducted in a reasonable manner; using no more force than is necessary and; for not more than a reasonable time to permit such investigation or questioning.
>
> For purposes of this instruction only, "necessary" means that (1) no

> reasonably effective alternative to the use of force appeared to exist and (2) the amount of force used was reasonable to effect the lawful purpose intended.

Clerk's Papers at 110. Mr. Hickam argues that the instruction was needed because Mr. Bullock testified and the State argued that Mr. Bullock had some undefined authority to "'detain'" a shoplifter, leading the jury to conclude that any force used by Mr. Hickam that interfered with Mr. Bullock's self-described scope of his authority would satisfy the use of force element of robbery. Br. of Appellant at 17-18.

The test for sufficiency of instructions is whether the instructions, read as a whole, allow counsel to argue their theory of the case, are not misleading, and properly inform the trier of fact of the applicable law. *State ex rel. Taylor v. Reay*, 61 Wn. App. 141, 146, 810 P.2d 512 (1991). The trial court has considerable discretion as to how its instructions will be worded and as to how many instructions are necessary to fairly present each litigant's theories. *Id.*

The trial court refused to give the proposed instruction because it would have been "superfluous and confusing" to the jury in the absence of a self-defense instruction. RP at 282. Unless based upon a ruling of law, we review a trial court's refusal to give jury instructions for abuse of discretion. *State v. Buzzell*, 148 Wn. App. 592, 602, 200 P.3d 287 (2009). The abuse of discretion standard applies here.

RCW 9A.16.080 creates a defense against criminal liability for shopkeepers and

their agents in cases where they have exercised their right to detain a suspected shoplifter. *State v. Garcia*, 146 Wn. App. 821, 828, 193 P.3d 181 (2008). It has no application to this criminal case nor, for that matter, does Mr. Bullock's perceived scope of his authority. Whether Mr. Hickam failed to comply with all of Mr. Bullock's legally-sanctioned requests or directives is not an element of the crime charged and it would not be a defense to robbery if Mr. Bullock exceeded his legally-sanctioned authority by using unreasonable force. The trial court was correct in concluding that Mr. Hickam's proposed instruction was confusing; it provided no guidance to the jury on how a determination that the detention was reasonable or unreasonable would bear on the jury's verdict.

The solution here, assuming there is a problem, is for Mr. Hickam to object preemptively or during trial to any argument that conflicts with *Johnson*'s holding and RCW 9A.56.190's requirement that only force used by Mr. Hickam to take the foil, prevent or overcome the pharmacy's resistance to his taking the foil, or to retain the foil, satisfies the use of force requirement of first degree robbery. The solution is not to present the jury with confusing instruction or argument about law relating to shopkeeper authority that has nothing to do with what constitutes the crime of robbery. The trial court did not abuse its discretion in refusing to give the instruction.

We reverse the judgment and sentence and remand for proceedings consistent with

this opinion.

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, A.C.J.

WE CONCUR:

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Brown, J.

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Kulik, J.