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Court of Appeals Division I  
State of Washington

Opinion Information Sheet

Docket Number: 56833-7

Title of Case: State Of Washington, Respondent V. Daniel Patrick McGill, Appellant

File Date: 02/12/2007

SOURCE OF APPEAL

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Appeal from King County Superior Court

Docket No: 05-1-06803-1

Judgment or order under review

Date filed: 08/19/2005

Judge signing: Honorable Palmer Robinson

JUDGES

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Authored by Stephen J Dwyer

Concurring: C. Kenneth Grosse

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	No. 56833-7-I
Respondent,	)	
	)	DIVISION ONE
v.	)	
	)	
DANIEL MCGILL,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: February 12, 2007

PER CURIAM. Following an unsuccessful motion to dismiss a second degree robbery charge at the close of the State's case, Daniel McGill requested a jury instruction on the lesser offense of second degree theft. A jury acquitted McGill of robbery but convicted him of second degree theft. On appeal, McGill correctly argues, and the State concedes, that the trial court should have granted his motion to dismiss the robbery charge at the close of the State's case.<sup>1</sup> The State also concedes that second degree theft is not a lesser included offense of second degree robbery. It argues, however, that third degree theft is a lesser included offense and that we must remand for entry of a conviction on that offense. McGill, on the other hand, contends the State waived any right to charge the lesser offense and that this court cannot require imposition of a conviction for the lesser on remand. We agree with the State.

McGill contends the theft conviction must be reversed and dismissed because neither party pursued a lesser included offense at the time of the

<sup>1</sup> See State v. Johnson, 155 Wn.2d 609, 121 P.3d 91 (2005) (holding that no robbery occurred where defendant abandoned stolen property before he used force to effect escape). We note that the trial court did not have the benefit of Johnson at the time of its ruling.

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motion to dismiss, and the State's inaction amounts to a waiver of its right to pursue one now. But the principal case cited by McGill in support of that contention -- State v. Rhinehart, 92 Wn.2d 923, 927, 602 P.2d 1188 (1979) -- involved the State's failure to request a lesser when the court dismissed the prosecution at the close of the State's case. Here, by contrast, the trial court denied the defendant's motion to dismiss at the close of the State's case.

Furthermore, McGill's analysis overlooks the fact that the trial court had

authority to add a lesser included offense sua sponte, and could have done so had it dismissed the robbery charge.<sup>2</sup> McGill also ignores the rule that this court may remand for entry of a conviction on a lesser offense even when a lesser was never submitted to the jury, so long as the jury necessarily found all the elements of the lesser offense.<sup>3</sup> It is undisputed that third degree theft was a lesser included offense of second degree robbery under the facts in this case. It is also undisputed that by finding McGill guilty of second degree theft, the jury necessarily found all the elements of third degree theft. In these circumstances, the proper remedy is to reverse and remand for entry of a conviction for the lesser included offense of third degree theft.

Reversed and remanded for proceedings consistent with this opinion.

For the court:

<sup>2</sup> State v. Herrera, 95 Wn. App. 328, 330, 977 P.2d 12 (1999).

<sup>3</sup> See State v. Gilbert, 68 Wn. App. 379, 384-88, 842 P.2d 1029 (1993).

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