SUMMARY
October 5, 2023

2023COA92

No. 21CA1364, *People v Mortenson* — Crimes — Aggravated Robbery — Theft; Criminal Law — Appeals — Entry of Conviction on Remand — Lesser Included Offenses

A division of the court of appeals decides two issues of first impression: (1) there is insufficient evidence to support a defendant's conviction of aggravated robbery where the theft taking was not from the person or presence of another with the use of force; and (2) it is an appropriate exercise of a division's discretion to decline to direct the district court, on remand from such a vacated aggravated robbery conviction, to enter a judgment of conviction for the lesser included offense of attempted aggravated robbery, applying *Halaseh v. People*, 2020 CO 35M, ¶ 9.

The partial dissent concludes that when a defendant's conviction on a greater offense is vacated for insufficient evidence,

and even if the jury was not instructed on the lesser included offense, the district court on remand should enter a judgment of conviction on the lesser included offense.

COLORADO COURT OF APPEALS **2023COA92**

Court of Appeals No. 21CA1364
Arapahoe County District Court No. 19CR1181
Honorable Shay K. Whitaker, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Cedar L. Mortenson,

Defendant-Appellant.

JUDGMENT VACATED AND CASE
REMANDED WITH DIRECTIONS

Division I
Opinion by JUDGE JOHNSON
Lum, J., concurs
Dailey, J., concurs in part and dissents in part

Announced October 5, 2023

Philip J. Weiser, Attorney General, Josiah Beamish, Assistant Attorney General, Denver, Colorado, for Plaintiff-Appellee

Megan A. Ring, Colorado State Public Defender, Katherine Brien, Deputy State Public Defender, Denver, Colorado, for Defendant-Appellant

¶ 1 Defendant, Cedar L. Mortenson (Mortenson), appeals the judgment of conviction entered on a jury verdict finding her guilty of aggravated robbery. Because the prosecution did not present evidence of a taking under the robbery statute — a taking that must be from the person or presence of another by force — we vacate her aggravated robbery conviction and remand with directions. In doing so, we confront an issue that has percolated for many years in Colorado case law with mixed results: When we vacate a conviction on a greater offense for insufficient evidence, but the evidence is sufficient to support a conviction for a lesser included offense, should we remand the case to the district court with instructions to enter a judgment of conviction on the lesser included offense (in this case, attempted aggravated robbery)?

¶ 2 Our supreme court has never mandated appellate courts to enter a judgment of conviction on a lesser included offense that is necessarily implied in a jury verdict vacated due to insufficient evidence. *See Halaseh v. People*, 2020 CO 35M, ¶ 9. Instead, the appellate court may exercise its discretion to determine whether entry of conviction on the lesser included offense would be

appropriate under the given circumstances. *Id.* Based on the facts of this case, in which the jury was not instructed on the lesser offense and the record supports an "all-or-nothing" strategy chosen by both the prosecution and defense, we exercise our discretion and decline to direct the district court to enter judgment of conviction on the lesser included offense on remand. Because Mortenson's aggravated robbery conviction was her most serious offense, the court may reconsider the sentences for her remaining convictions.

I. Background

¶ 3 At trial, the prosecution's evidence would have allowed the jury to find the following facts. Mortenson placed about ninety dollars' worth of Target items in her purse and proceeded to the store exit without paying for them. As she stepped through the first of two sets of sliding glass doors, she was confronted by the victim, Keith Williams (Williams), an undercover Target "asset protection specialist." When Williams stepped toward her, Mortenson backed into a corner of the exit vestibule and reached inside her shirt. In the same moment that Mortenson pulled out a gun, Williams closed the gap between them. He quickly wrestled Mortenson to the ground, face down, and a uniformed security guard arrived to

assist. After a two-minute struggle, the two Target employees were able to disarm and handcuff Mortenson in the vestibule. They recovered the Target items from her purse, and the police were called.

¶ 4 Mortenson was tried on charges of (1) aggravated robbery of merchandise from the person or presence of Williams with a deadly weapon, *see* § 18-4-302(1)(d), C.R.S. 2023; (2) felony menacing; (3) false reporting to authorities; and (4) theft from Target. The jury found Mortenson guilty as charged.

¶ 5 Mortenson did not testify at trial. Her two theories of defense were that she pulled a gun to defend herself against an unidentified person blocking her path, and that the prosecution had not proved a taking by the use of force. On appeal, Mortenson challenges only her aggravated robbery conviction. She contends that (1) there was insufficient evidence to support that conviction because there was no evidence showing that a robbery taking occurred, and (2) prosecutorial misconduct in closing argument mandates reversal. Because we agree with her first contention, we do not need to address the second.

II. Insufficient Evidence of Aggravated Robbery

A. Standard of Review and Applicable Law

¶ 6 In evaluating an insufficient evidence claim, we review the evidence de novo. *Clark v. People*, 232 P.3d 1287, 1291 (Colo. 2010). We view the evidence as a whole and in the light most favorable to the prosecution to determine whether "a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* We do not serve as the thirteenth juror and do not determine what specific weight should be given to one piece of evidence over another. *People v. Gonzales*, 666 P.2d 123, 128 (Colo. 1983). Rather, we consider whether the prosecution put forward sufficient evidence to meet its burden of proof with respect to each element of the crime charged. *Martinez v. People*, 2015 CO 16, ¶ 22; *see People v. Espinoza*, 195 P.3d 1122, 1127-28 (Colo. App. 2008) (this burden is required by the Due Process Clauses of the Colorado and United States Constitutions).

¶ 7 To prove aggravated robbery, the prosecution must prove every element of robbery, plus additional elements. *See People v. Borghesi*, 66 P.3d 93, 97 (Colo. 2003); *People v. Liebler*, 2022 COA 21, ¶ 17. A person commits robbery if she knowingly takes

anything of value from the person or presence of another by the use of force, threats, or intimidation. § 18-4-301(1), C.R.S. 2023. The elements of robbery involve (1) conduct — the use of force, threats, or intimidation; (2) circumstances — the thing must have value and must be taken from the person or presence of another; and (3) a result — the taking. *People v. Derrera*, 667 P.2d 1363, 1368 (Colo. 1983).

¶ 8 For property to be in a victim's "presence," the victim must be exercising, or have the right to exercise, control over the item taken. *People v. Ridenour*, 878 P.2d 23, 27 (Colo. App. 1994). The property must also "be within the victim's reach, inspection or observation *so that the victim would be able to retain control over the property but for the force or threat of force* directed by the perpetrator against the victim." *Borghesi*, 66 P.3d at 103 (emphasis added). A loss prevention officer has the right to exercise control over a store's property. *See People v. Foster*, 971 P.2d 1082, 1085 (Colo. App. 1998).

¶ 9 In Colorado, a person may be found guilty of robbery if she takes items from a human victim's person or presence and use force, simultaneously or in any sequence. *See Borghesi*, 66 P.3d at

97-103 (because Colorado's robbery statutes are primarily intended to protect people, not property, a robbery victim is a person). *People v. Bartowsheski*, 661 P.2d 235, 244 (Colo. 1983), articulates this course of transaction rule as follows: "The gravamen of robbery is the application of physical force or intimidation against the victim at any time during the course of a transaction *culminating in the taking of property from the victim's person or presence*." (Emphasis added.)

¶ 10 As relevant here, "[a] person who commits robbery is guilty of aggravated robbery if during the act of robbery or the immediate flight therefrom," the person possesses a deadly weapon. § 18-4-302(1)(d).

B. No Evidence Supports the Taking Element for Robbery and Aggravated Robbery

¶ 11 The Attorney General does not dispute that Mortenson failed to take anything from Williams's person or presence, instead asserting that the taking element in the robbery statute is satisfied by other evidence when applying the course of transaction rule from *Bartowsheski*, 661 P.2d at 244. Specifically, the Attorney General argues that (1) robbery does not require a *successful* taking from a

person; (2) the theft of Target merchandise establishes the necessary taking for a robbery conviction; (3) the use of force after property theft establishes a robbery under the course of transaction rule as interpreted by *People v. Buell*, 2017 COA 148, ¶ 24, *aff'd*, 2019 CO 27: "when a defendant uses force or intimidation to *retain* control over property he has already taken, he commits robbery"; and (4) the use of force in the immediate flight after a theft is sufficient to sustain a robbery conviction. We are not persuaded that the taking element of robbery may be satisfied by any facts other than those defined in the robbery statute. *See People v. Hopkins*, 2013 COA 74, ¶ 8 ("The only 'facts' necessary to constitute a crime are said to be those that appear on the face of the statute as a part of the definition of the crime." (quoting *Patterson v. New York*, 432 U.S. 197, 221 (1977))).

¶ 12 As we discussed above, an element of robbery is that property must be taken from a victim's person or presence, and every element of robbery is an element of aggravated robbery. *See Borghesi*, 66 P.3d at 97, 103; *see also* § 18-4-301(1). Robbery victims are people, not businesses, so Williams, not Target, is the

named victim of Mortenson's aggravated robbery charge. *See Borghesi*, 66 P.3d at 103.

¶ 13 The prosecution presented surveillance video evidence from the Target exit vestibule showing that Williams was only two steps away from Mortenson and her purse when she reached inside her shirt for the gun. The surveillance video shows that the unpaid-for Target property was not on Williams' "person," but it was in his "presence." It also shows that Mortenson ostensibly intended to use force to take the property from his presence.

¶ 14 But was the merchandise *taken* from Williams' presence? We perceive no evidence to support that finding. The surveillance video shows that Mortenson had no chance to take property from Williams' presence because he did not allow her to create space between them, and as soon as she pulled the gun from her shirt, he tackled her. In other words, Williams *was* "able to retain control over the property" in his presence despite Mortenson's use of "force or threat of force directed" at him. *Id.*

¶ 15 In *Foster*, 971 P.2d at 1085, the defendant used force to take merchandise by slamming a security guard's hand in a van door before driving away. A division of this court initially noted, "We do

not suggest, of course, that every act of shoplifting constitutes an act of robbery, even if there is a security guard on the premises." But the *Foster* division upheld that defendant's robbery conviction because there was sufficient evidence to show that "the guard had authority to retrieve the articles from the defendant, that he took actions to effect such retrieval, that defendant used force to continue his unlawful possession of those articles, *and that, in doing so, defendant removed the articles from the 'presence' of the guard*." *Id.* (emphasis added).

¶ 16 The Attorney General appears to concede that Mortenson did not successfully remove property from Williams' presence. Because we agree, we conclude that the prosecution failed to meet its burden of proof with respect to the taking element of robbery. And because all the elements of robbery must be proved to obtain a conviction of aggravated robbery, we conclude that there is insufficient evidence in the record to prove that Mortenson committed aggravated robbery. *See Martinez*, ¶ 22.

¶ 17 Nonetheless, the Attorney General presents four arguments, listed above, to explain why the taking element for robbery was satisfied. We address and reject each argument in turn.

C. Course of Transaction and "Successful" Taking

¶ 18 First, we reject the Attorney General's argument that Colorado law does not require a *successful* taking to support an aggravated robbery conviction.

¶ 19 Because Mortenson never left Williams' presence with the property, the evidence fails the "but for" test set forth by the course of transaction rule. *See People v. Davis*, 935 P.2d 79, 85 (Colo. App. 1996) (interpreting the rule to mean that a robbery occurs when *but for* the force used by the perpetrator, the victim would have retained control over the property). In other words, the evidence is insufficient because *despite* Mortenson's use of force, Williams retained control of the property.

¶ 20 In this respect, Mortenson's case is elementally unlike the course of transaction cases cited by the Attorney General. For example, there was sufficient evidence of robbery in *Bartowsheski*, in which the defendant killed an occupant of a home before taking cash and other items from the home. 661 P.2d at 239. And there was sufficient evidence of a robbery in multiple cases in which the defendant took items and later applied force against a person to remove the stolen items from the victim's presence. *See, e.g.*,

People v. Fox, 928 P.2d 820, 821 (Colo. App. 1996) (the defendant took a purse from a shopping cart and later shoved the victim's husband before driving away with the purse); *Foster*, 971 P.2d at 1084. In other words, the "but for" test was satisfied in these cases because the defendants used force and the victims were unable to retain control of the property.

¶ 21 Indeed, in *every* Colorado case we have found that upholds non-attempt robbery convictions using *Bartowsheski*'s course of transaction rule, there was a taking of property away from a victim's person or presence. *See Borghesi*, 66 P.3d at 95; *Davis*, 935 P.2d at 82; *Buell*, ¶¶ 3-4; *People v. Jompp*, 2018 COA 128, ¶ 40; *People v. Leyba*, 2019 COA 144, ¶ 2, *aff'd*, 2021 CO 54; *People v. Williams*, 2012 COA 165, ¶ 44; *People v. Clemons*, 89 P.3d 479, 482 (Colo. App. 2003); *Anderson-Bey v. Zavaras*, 641 F.3d 445, 451-53 (10th Cir. 2011); *People v. Villalobos*, 159 P.3d 624, 626-27 (Colo. App. 2006). The Attorney General does not cite, and we are not aware of, any cases supporting the proposition that the course of transaction rule obviates the need to prove an actual or "successful" taking from the person or presence of a victim.

¶ 22 *Bartowsheski* itself states that the robbery course of transaction rule applies to the defendant's use of force "culminating in the taking of property from the victim's person or presence." 661 P.2d at 244. *Derrera*, 667 P.2d at 1368, and *People v. Krovarz*, 697 P.2d 378, 381 (Colo. 1985), are also instructive. Read together, these cases hold that a required statutory element of robbery that must be proved beyond a reasonable doubt by the prosecution is its result — a taking. When a person is unsuccessful in a taking by force, she could, at most, be guilty of attempted robbery. *See People v. Renaud*, 942 P.2d 1253, 1257 (Colo. App. 1996) (The failure to complete a robbery "makes the requisite acts an attempt."); *see also Buell*, ¶¶ 4-5; *Krovarz*, 697 P.2d at 379; *People v. Allen*, 185 Colo. 190, 191, 523 P.2d 131, 132 (1974).

D. The Theft Taking Here Was Not a Robbery Taking

¶ 23 Second, we reject the Attorney General's argument that Mortenson's successful taking of merchandise from Target supports convictions for both theft and robbery. We assume, for purposes of this opinion, that the prosecution presented sufficient evidence to prove that Mortenson completed a theft from Target. Mortenson was convicted of that crime, and she does not appeal that

conviction. But evidence that she completed a theft from Target cannot alone prove a successful taking under the robbery statute.

¶ 24 A taking under the theft statute, as relevant to Mortenson's taking from Target, occurs when a person "knowingly obtains, retains, or exercises control over anything of value of another without authorization or by . . . deception." § 18-4-401(1), C.R.S. 2023. Applying these elements here, there was sufficient evidence for a jury to find a "successful" taking for purposes of theft when Mortenson passed the cash registers without paying for the Target items she had placed in her purse.

¶ 25 By contrast, a taking for robbery purposes, as we have discussed, requires different elements: that the taking of property was *from the person or presence of a victim* by the use of force, threats, or intimidation. § 18-4-301(1). Because Mortenson's taking for purposes of theft was not a taking from the person or presence of another with force, it does not constitute a taking under the robbery statute.

E. Language in *Buell*

¶ 26 Third, to sidestep the taking element for robbery, the Attorney General relies heavily on language from *Buell*, ¶ 24: "[W]hen a

defendant uses force or intimidation to *retain* control over property he has already taken, he commits robbery." But this language, standing alone, is not persuasive.

¶ 27 When read in context, this phrase in *Buell* is merely an imprecise restatement of the course of transaction rule. It is true that, according to the rule, a perpetrator may be guilty of robbery if she uses force to maintain possession of property already in hand. But a central point of *Bartowsheski*'s rule is that the use of force must "culminat[e] in the taking of property from the victim's person or presence." *Bartowsheski*, 661 P.2d at 244. *Buell* does not suggest otherwise. And *Borghesi*'s but for test does not ask whether the *defendant* retained the property, as the Attorney General contends, but whether the *victim* maintained control or possession in the face of any force, threats, or intimidation used by the defendant. *See Borghesi*, 66 P.3d at 103; *Davis*, 935 P.2d at 85.

¶ 28 Neither the language nor the facts in *Buell* concern whether robbery requires a successful taking. Indeed, Buell was convicted of both aggravated robbery and attempted aggravated robbery, and the only relevant factual difference between those two crimes is that, according to Buell's opening brief on appeal, the store retained

the merchandise that Buell attempted to take in the attempted aggravated robbery incident.

¶ 29 And to the extent *Buell*'s language suggests that a successful taking (as discussed in Part II.C) is not an element of robbery, we disagree. *See People v. Smoots*, 2013 COA 152, ¶ 20 ("We are not obligated to follow the precedent established by another division, even though we give such decisions considerable deference."), *aff'd sub nom. Reyna-Abarca v. People*, 2017 CO 15.

F. Immediate Flight

¶ 30 Fourth, we reject the Attorney General's argument that the taking element for robbery was proved by a showing that Mortenson was in immediate flight from her Target theft when she used force against Williams.

¶ 31 The concept of "immediate flight" appears only in the aggravated robbery statute. *Compare* § 18-4-301, *with* § 18-4-302(1). And we do not reach the question whether the evidence was sufficient to show that Mortenson's robbery was aggravated because to reach that question, we must first conclude that a reasonable juror could find that she committed robbery, and we do not. *See Liebler*, ¶ 17.

III. Relief

¶ 32 Generally, an appellate court vacates a conviction when there is insufficient evidence. *See, e.g.*, *People v. McCoy*, 2015 COA 76M, ¶ 29 ("[W]hen there is insufficient evidence, the conviction is vacated, and the charge is not subject to retrial."), *aff'd on other grounds*, 2019 CO 44. And as discussed above, there was insufficient evidence to support Mortenson's aggravated robbery conviction. But should we direct the district court to enter judgment on the lesser included offense of attempted aggravated robbery? For the reasons discussed below, and under the circumstances of this case, we conclude that a conviction on the lesser offense should not be entered against Mortenson. On remand, the district court should simply update the mittimus to reflect that Mortenson's aggravated robbery conviction is vacated.[1]

A. Additional Facts

¶ 33 Following the prosecution's case-in-chief, defense counsel moved for a judgment of acquittal on the aggravated robbery

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[1] We *nostra sponte* ordered supplemental briefing on the issue of whether a conviction on the lesser included offense should be entered on remand if we were to vacate Mortenson's aggravated robbery conviction for insufficient evidence.

charge. He argued that the evidence was insufficient to send that charge to the jury because "the element of taking, the 'use of force' kinds of taking, I think the evidence would — would be purely speculative that the force was in furtherance of a taking — that any taking was by the use of force." He clarified that "Ms. Mortenson was backing away, backed into a corner, and never made any attempts to leave that vestibule." In conclusion, defense counsel asserted, "Frankly, I think, if there's anything, there is enough to go on attempt but not on a completed aggravated robbery; so that we would ask the court to not submit aggravated robbery to the jury," and he asked the court to enter a judgment of acquittal on that charge. The court was unpersuaded.

¶ 34 After the court's ruling, defense counsel submitted an attempted aggravated robbery instruction. But during the jury instruction conference, defense counsel remarked that the defense had not made a final decision as to whether to ask for that instruction. The next day, defense counsel removed the instruction from the packet and informed the prosecution and the court that Mortenson was not seeking an instruction on the lesser included

offense. The prosecution did not ask for an attempt instruction, and the court did not submit one to the jury.

B. Relief for Insufficient Evidence

¶ 35 Crim. P. 29(a) provides that "[t]he court on motion of a defendant or of its own motion *shall* order the entry of a judgment of acquittal of one or more offenses charged . . . after the evidence on either side is closed, if the evidence is insufficient to sustain a conviction of such offense or offenses." (Emphasis added.) A judgment of acquittal is "as much of an acquittal as a not guilty verdict," *People v. Waggoner*, 196 Colo. 578, 580, 595 P.2d 217, 219 (1979), and jeopardy attaches to a judgment of acquittal, *see People v. Paulsen*, 198 Colo. 458, 460, 601 P.2d 634, 636 (1979).

¶ 36 Double jeopardy principles prohibit retrial when a defendant's conviction has been overturned on appeal solely due to a failure of proof at trial. *See People v. Brassfield*, 652 P.2d 588, 594 n.5 (Colo. 1982); *Burks v. United States*, 437 U.S. 1, 16 (1978) ("[T]he prosecution cannot complain of prejudice, for it has been given one fair opportunity to offer whatever proof it could assemble."). Under such circumstances, the Supreme Court suggests that "the only

'just' remedy available for [the reviewing] court is the direction of a judgment of acquittal." *Burks*, 437 U.S. at 18.

¶ 37 But acquittal is not the only "just" relief. Under certain circumstances, both federal and Colorado law permit an appellate court to remand a case for entry of judgment on a lesser offense when the lesser offense "is necessarily implied in a jury verdict reversed on appeal." *Halaseh*, ¶ 9; *see Rutledge v. United States*, 517 U.S. 292, 306 (1996); *see also* C.A.R. 35(a) ("The appellate court may . . . modify . . . . a lower court judgment . . . .").

C. Relief When the Jury Was Not Instructed on a Lesser Included Offense

¶ 38 There is a split of authority among federal and state courts, and even amongst opinions issued by our supreme court, as to whether, when a conviction is overturned for insufficient evidence, an appellate court should remand the case for entry of judgment of conviction on a lesser included offense when the jury was not instructed on the lesser offense.[2]

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[2] *See, e.g.*, *United States v. Cortez-Nieto*, 43 F.4th 1034, 1050 (10th Cir. 2022) (describing how circuits have disagreed on whether a lesser-included-offense instruction is a prerequisite to imposing a conviction on a lesser included offense; collecting cases); *see also*

¶ 39 In Colorado, for example, the Colorado Supreme Court in *People v. Patterson*, 187 Colo. 431, 437, 532 P.2d 342, 345 (1975), remanded the case for entry of judgment on a lesser included offense despite the fact that the jury had not been instructed on that offense. The court held that "[e]ven though the jury was not instructed as to the lesser included offense, the defendant has been given his day in court." *Id.* It concluded that "[a]ll the elements of the lesser included offense are included in the more serious offense which the defendant faced before the jury. His guilt of the lesser included offense is implicit and part of the jury's verdict." *Id.*

¶ 40 A few years later, however, the supreme court conditioned remand for entry of judgment on a lesser included offense on giving

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Keeble v. United States, 412 U.S. 205, 212 (1973) ("[I]f the prosecution has not established beyond a reasonable doubt every element of the offense charged, and if no lesser offense instruction is offered, the jury must, as a theoretical matter, return a verdict of acquittal."). *Compare State v. LaFleur*, 51 A.3d 1048, 1067-68 & n.27 (Conn. 2012); *In re Heidari*, 274 P.3d 366, 369 (Wash. 2012); *State v. Brown*, 602 S.E.2d 392, 399 (S.C. 2004); *State v. Villa*, 98 P.3d 1017, 1020 (N.M. 2004); *Ex parte Roberts*, 662 So. 2d 229, 232 (Ala. 1995); *State v. Holley*, 604 A.2d 772, 775-76 (R.I. 1992); *and State v. Myers*, 461 N.W.2d 777, 778 (Wis. 1990), *with Robinson v. United States*, 100 A.3d 95, 111-12 (D.C. 2014); *Bowen v. State*, 374 S.W.3d 427, 432 (Tex. Crim. App. 2012); *State v. Farrad*, 753 A.2d 648, 659 (N.J. 2000); *and Shields v. State*, 772 So. 2d 584, 587 (Miss. 1998).

of the relevant jury instruction. "*Because the trial court instructed the jury on* [the lesser included offense] *and* there is sufficient evidence to support a conviction for [the lesser offense], we remand the case to the trial court to enter judgment and sentence for the lesser included offense . . . ." *People v. Naranjo*, 200 Colo. 1, 5, 612 P.2d 1099, 1102 (1980) (emphasis added).

¶ 41 The supreme court has relied on *Patterson* to direct district courts to enter judgment on a lesser included offense after the greater offense was vacated due to insufficient evidence both when the jury had been instructed on the lesser offense and when it had not. *See, e.g.*, *Lucero v. People*, 2012 CO 7, ¶ 29 (a jury need not be instructed on the lesser included offense to have the offense entered against the defendant on remand); *Montez v. People*, 2012 CO 6, ¶ 22 (where the jury was instructed on the lesser included offense, the proper relief on appeal was entry of the lesser included offense).

¶ 42 But in 2020, the supreme court clarified that it has "never . . . suggested that an appellate court *must* enter judgment of conviction of a lesser offense that is necessarily implied in a jury verdict reversed on appeal," nor has it directed that an appellate court "must 'maximize' the jury's verdict by entering judgment of

conviction for as many such lesser offenses as possible." *Halaseh*, ¶ 9. Indeed, the court has only indicated that an appellate court is "authorized" to do so, or that it would be "proper" or "appropriate" to enter judgment on the lesser included offense "under some circumstances." *Id.* Finally, it noted that it has never "attempted to define or circumscribe the scope of an *appellate court's discretion* in this regard." *Id.* (emphasis added). We thus conclude that, in Colorado, an appellate court is *permitted* to order entry of judgment on a lesser offense, but it is not mandated to do so.

¶ 43 The partial dissent focuses on different language in *Halaseh*, in which the court stated that "a lesser offense can be considered necessarily implied in a jury verdict finding a criminal defendant guilty of a greater offense *only* to the extent that it can be determined from the jury's verdict alone" and noted that "a lesser included offense in this jurisdiction is always implied in the conviction of its greater offense." *Id.* at ¶ 8. Here, because the lesser offense was already proved beyond a reasonable doubt when the jury convicted Mortenson on the greater, why not enter the lesser offense on remand?

D. Analysis

¶ 44 To analyze why an appellate court might decline to direct the district court to enter judgment on the lesser included offense on remand, we first look to *State v. Brown*, 602 S.E.2d 392, 399 (S.C. 2004). That case identifies a nonexhaustive list of six reasons why South Carolina authorizes entry of judgment on a lesser included offense only if the jury was instructed on it. Those six reasons identified in *Brown* are relevant to the circumstances in this case.

¶ 45 First, the court in *Brown* concluded that an appellate court is not a fact finder and should review evidence "only to determine whether it was sufficient to submit a charge to the jury, or whether a directed verdict of acquittal should have been granted due its insufficiency." *Id.* Here, the defense moved for a judgment of acquittal for the reasons articulated in this opinion, and the district court should have granted it.

¶ 46 Second, and related to the first point, *Brown* concluded that an appellate court's role should remain distinct from the role of a jury, whose function is to determine whether the prosecution proved its case beyond a reasonable doubt. *Id.* at 400. The prosecution did not prove its case here.

¶ 47 Third, when the lesser included offense has been submitted to the jury with the greater offense, the presumption is that the jury weighed the evidence with the lesser in mind but instead reached a verdict on the greater charge. *Id.* In such a circumstance, because the jury had the choice to convict on either the lesser or greater offense, a remand to enter judgment on the lesser simply effectuates the will of the jury. *Id.* But when the jury is not instructed on the lesser offense, as is the case here, "second guessing the jury becomes far more speculative." *Id.* (quoting *Shields v. State*, 722 So. 2d 584, 588 (Miss. 1998) (Sullivan, J., dissenting)).

¶ 48 Fourth, when the jury is instructed on the lesser included offense, the defendant is aware of her potential liability and will usually not be prejudiced by a modification of the judgment. *Id.*; *see also State v. Villa*, 98 P.3d 1017, 1020 (N.M. 2004) ("[G]iving Defendant notice of the lesser-included offenses *after conviction* hardly provides Defendant with adequate notice of those charges."). Here, when her counsel specifically withdrew the jury instruction, Mortenson likely considered an attempt conviction off the table.

¶ 49 Fifth, allowing for entry of judgment on the lesser offense incentivizes the prosecution not to seek a lesser instruction. *Brown*, 602 S.E.2d at 401. And, as *Brown* noted, when a defendant is entitled to an instruction on the lesser included offense and the jury believes the defendant is "plainly" guilty of some offense, the lesser instruction prevents the jury "from finding the defendant guilty of the greater offense because the only alternative is to let him walk free." *Id.* (citing *Keeble v. United States*, 412 U.S. 205, 212-13 (1973)); *see also State v. Myers*, 461 N.W.2d 777, 782 (Wis. 1990) (by not requesting an instruction on the lesser included offense, the state's strategic goal is that the jury will convict on the greater offense because the jurors believe the defendant is "apparently guilty of some offense" and they do not want to see him go "scot-free"). Here, the prosecution was alerted to the insufficiency of the evidence and still chose not to offer an instruction on attempted aggravated robbery.

¶ 50 Finally, allowing entry of judgment on a lesser included offense when the jury was not instructed on it would grant the prosecution an unfair strategic advantage. *Brown*, 602 S.E.2d at 401. The prosecution could prevent the jury from considering a

lesser included offense at trial with an "all or nothing" strategy; then, on appeal, it could "essentially concede" that the evidence was insufficient and ask for entry of the lesser included offense. *Id.*; *see also Villa*, 98 P.3d at 1021 (because both parties pursued an all-or-nothing strategy by not requesting lesser included offense instructions, the appellate court would not "second-guess" the litigants' tactical decisions). The prosecution asks for that resolution here.

¶ 51 Related to this point, entering judgment for a lesser included offense after appeal grants the prosecution the "benefit of jury instructions it failed to request at trial" and "rescue[s] it from a trial strategy that went awry." *Myers*, 461 N.W.2d at 782. By contrast, because a defendant's strategy simply relies "on the jury to comply with the instructions that the state's burden is to prove guilt beyond a reasonable doubt," a defendant could expect no benefit from this trial strategy on appeal. *Id.* In other words, exemplified by the circumstances here, "the state would have all the benefits and none of the risks of its trial strategy, while the accused would have all the risks and none of the protections." *Id.*

¶ 52 *Halaseh*, ¶ 9, says that we are not *required* to direct the district court to enter judgment on a lesser included offense. Under the circumstances of this case, in which the record supports many of the *Brown* considerations, we exercise the discretion afforded to us and decline to direct the district court on remand to enter judgment on the lesser included offense of attempted aggravated robbery. *See id.* (The supreme court has never "attempted to define or circumscribe the scope of an appellate court's discretion in this regard."). We reach this conclusion for two reasons.

¶ 53 First, to remand for entry of judgment on the lesser included offense would deprive Mortenson of the benefit of her chosen trial strategy. In Colorado, "the decision to request [or not request] a lesser offense instruction is strategic and tactical in nature." *Arko v. People*, 183 P.3d 555, 558 (Colo. 2008). Absent a request by the defendant, "it may reasonably be assumed that [s]he has elected . . . to take [her] chance on an outright acquittal or conviction of the principal charge rather than to provide the jury with an opportunity to convict of a lesser offense." *People v. Rock*, 2017 CO 84, ¶ 9.

¶ 54 Here, the record demonstrates a deliberate trial strategy by Mortenson's counsel: he asked for a judgment of acquittal, then

sought an instruction on attempted aggravated robbery when the judgment of acquittal request was denied, and finally withdrew the attempt instruction the next day before the case was submitted to the jury. As part of his judgment of acquittal argument, counsel argued that the aggravated robbery charge should not be submitted to the jury for the same reason that we vacate Mortenson's conviction for insufficient evidence. Therefore, this is not a situation in which the record is unclear or silent as to why the jury was not instructed on the lesser included offense.

¶ 55 Second, to remand for entry of judgment on the lesser included offense would disincentivize legally accurate prosecutorial decisions in two phases of criminal proceedings: the filing of criminal charges and the submission of instructions for the jury. Here, the prosecution charged Mortenson with a completed crime and did not request an attempt instruction even after the defense withdrew its proposed attempt instruction. If the prosecution had requested an attempt instruction, the court would have been obligated to give it, even over Mortenson's objection. *See* § 18-1-408(6), C.R.S. 2023 (requiring the lesser included jury instruction when there is "a rational basis for a verdict acquitting the defendant

of the offense charged and convicting him of the included offense"); *see also People v. Abdulla*, 2020 COA 109M, ¶¶ 13-18, 37-38. But even when alerted to the weakness in the case, the prosecution chose to pursue an all-or-nothing strategy.

¶ 56 In other words, when the parties decide not to submit a lesser included offense instruction to the jury, they elect to give the jury a simple choice between guilty or not guilty. This is an accepted strategy in Colorado. *See, e.g.*, *Rock*, ¶¶ 9-10; *see also* Patrick D. Pflaum, Note, *Justice Is Not All or Nothing: Preserving the Integrity of Criminal Trials Through the Statutory Abolition of the All-or-Nothing Doctrine*, 73 U. Colo. L. Rev. 289, 317 (2002). And it is likely, given the surveillance video of Mortenson's encounter with Williams, that the jury believed she did something wrong. Without the option of the lesser included offense instruction, however, the jury could have been influenced to find Mortenson guilty of the greater offense rather than letting her walk free. *See Brown*, 602 S.E.2d at 401.

¶ 57 Based on the foregoing, we conclude that the parties should receive the benefits or consequences of their strategic choices, and we are unpersuaded by the countervailing considerations presented in the partial dissent.

¶ 58 In summary, to allow entry of judgment on attempted aggravated robbery would simultaneously deprive Mortenson of the benefit of her chosen trial strategy and bestow an unfair strategic advantage upon the state because (1) the prosecution did not present sufficient evidence to support the charged conviction; (2) the prosecution was alerted to the deficiency in its evidence during trial and before the case was submitted to the jury; (3) the defense strategically opted not to submit an attempt instruction to the jury; and (4) the jury was not instructed on the lesser included offense. And directing the district court to enter judgment on the lesser included offense under these circumstances disincentivizes legally accurate prosecutorial decisions on filing charges and instructing the jury. Thus, we vacate Mortenson's aggravated robbery conviction.

IV. Conclusion

¶ 59 The judgment of conviction for aggravated robbery is vacated. Because we are vacating only one of Mortenson's convictions — her most serious offense — the district court may, in its discretion, resentence Mortenson on her remaining convictions on remand. *See People v. Johnson*, 2016 COA 15, ¶ 25 ("In multicount cases,

judges typically craft sentences on the various counts as part of an overall sentencing scheme, but when a count is vacated and that scheme unravels, they should have the discretion to reevaluate the underlying facts and sentences on the remaining counts.").

¶ 60 Those portions of the judgment not challenged on appeal — Mortenson's convictions for felony menacing, false reporting to authorities, and theft — are unaffected by this opinion.

JUDGE LUM concurs.

JUDGE DAILEY concurs in part and dissents in part.

JUDGE DAILEY, concurring in part and dissenting in part.

¶ 61 I concur in all but one part of the majority's opinion. In the last section of its opinion, the majority vacates Mortenson's conviction for aggravated robbery and elects, in its discretion, not to remand for entry of judgment on the lesser included offense of attempted aggravated robbery. I would have made a different election.

¶ 62 As I read the majority's opinion, a remand for entry of judgment on the lesser included offense is not warranted because (1) the jury was not explicitly asked to determine whether the evidence was sufficient to sustain a conviction for the lesser included offense; (2) the jury was not instructed on the elements of the lesser included offense; and (3) it would be unfair to impose such a judgment when both parties took an all-or-nothing approach to instructing the jury.

¶ 63 Colorado's supreme court and divisions of this court have held that

- a jury that returned a verdict of guilty on a greater offense has implicitly determined that the evidence was sufficient to sustain a conviction on a lesser included offense, *Halaseh v.*

People, 2020 CO 35M, ¶¶ 6-8; *People v. Patterson*, 187 Colo. 431, 437, 532 P.2d 342, 345 (1975); *People v. Morris*, 190 Colo. 215, 218, 545 P.2d 151, 153 (1976); *People v. Reed*, 2013 COA 113, ¶ 66; *People v. Freda*, 817 P.2d 588, 592 (Colo. App. 1991); *People in Interest of R.G.*, 630 P.2d 89, 92 (Colo. App. 1981); and

- a remand for entry of judgment on the lesser included offense is appropriate, even where the jury was not specifically instructed on just the elements of the lesser included offense, *Lucero v. People*, 2012 CO 7, ¶ 29; *Patterson*, 187 Colo. at 437, 532 P.2d at 345; *People v. Emerterio*, 819 P.2d 516, 519 (Colo. App. 1991), *rev'd on other grounds* sub nom. *People v. San Emerterio*, 839 P.2d 1161 (Colo. 1992); *People in Interest of R.G.*, 630 P.2d at 92.[1]

[1] Unlike the majority, I do not read the decision in *People v. Naranjo*, 200 Colo. 1, 612 P.2d 1099 (1980), as "condition[ing]" a remand for entry of judgment on the existence of an instruction on the lesser included offense. *Supra* ¶ . The supreme court's statement otherwise in *Lucero v. People*, 2012 CO 7, ¶ 29, makes this evident.

¶ 64 The majority correctly notes that the supreme court does not require a remand for entry of judgment on a lesser included offense but leaves to the appellate court's discretion the decision whether to do so. *See Halaseh*, ¶¶ 9-10.

¶ 65 The majority exercises its discretion not to remand for entry of such a judgment because, in its view, it would be unfair to do so where, as here, the prosecution, like the defense, did not request a jury instruction on the lesser included offense. *See, e.g.*, *Haynes v. State*, 273 S.W.3d 183, 191 (Tex. Crim. App. 2008) (Johnson, J., concurring) ("In this case, both sides went for the big win, and inevitably one side — here the state — got the big loss instead. Regardless of which side chooses to 'go for broke,' it may be a valid strategic choice from which neither side should be rescued."), *overruled by Bowen v. State*, 374 S.W.3d 427 (Tex. Crim. App. 2012).

¶ 66 Unlike the majority, I perceive no unfairness in remanding the matter for entry of judgment on the lesser included offense. Why is that? Because

> [i]f one takes into account only the jury verdict, the risks and potential benefits pursued by both sides are equal.

> [But i]f one takes into account a defendant's ability to appeal, the playing field becomes unequal, . . . [and] it is the defendant who benefits disproportionately, not the State. The State cannot appeal an acquittal, but the defendant can appeal a conviction. If the State's strategy fails before the jury, the loss is irrevocable, but if the defendant's strategy fails before the jury, there is still the possibility of succeeding on appeal (as happened in this case). Allowing reformation instead of a full-blown acquittal simply serves to mitigate somewhat the imbalance in favor of the defendant.

Id. at 195 (Keller, P.J., dissenting) (footnote omitted).

¶ 67 A defendant's liberty interest is not "the only substantial interest at stake in a criminal trial . . . . The state also has a substantial interest, namely, its interest in securing a conviction on the most serious charge that the evidence will reasonably support." *State v. Sawyer*, 630 A.2d 1064, 1071 (Conn. 1993).

¶ 68 Under the majority's approach, where the prosecution does not request to have the jury instructed on a lesser included offense, and the defendant's conviction is overturned for lack of evidence on appeal, the jury's verdict on the greater offense is vacated, and

> [t]he defendant is simply acquitted. The citizens suffer because the State was not prescient enough to anticipate a successful

> appellate legal-sufficiency challenge. And the defendant receives an undeserved windfall of total acquittal instead of conviction on an offense for which the jury necessarily found him guilty and for which the evidence is clearly sufficient. This result does not comport with common sense or justice. And this case shows why.
>
> . . . .
>
> . . . We do a disservice to common sense and Texas citizens by ordering [the defendant's] acquittal of all charges when the evidence is legally sufficient to support a conviction for [the lesser included offense], and the jury necessarily found him guilty of [that offense].

Haynes, 273 S.W.3d at 197-200 (Cochran, J., dissenting).[2]

¶ 69 Pulling a gun on a store security officer in an attempt to take store property is a serious matter. It may not be aggravated robbery; but in my view, substantial justice requires that it be punished as severely as the jury's verdict warrants, i.e., as attempted aggravated robbery.

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[2] The dissenting opinions in *Haynes* should not be cavalierly dismissed, seeing that the position they favored was subsequently adopted in *Bowen v. State*, 374 S.W.3d 427 (Tex. Crim. App. 2012) (holding that reformation of conviction to lesser included offense, rather than reversal and rendering of judgment of acquittal, was proper, regardless of whether instruction on lesser included offense was requested).