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| STATE V. HERRERA |
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**STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
ANGELO HERRERA,
Defendant-Appellant.**

NO. 34,913

COURT OF APPEALS OF NEW MEXICO

December 21, 2016

APPEAL FROM THE DISTRICT COURT OF TAOS COUNTY, Jeff F. McElroy, District
Judge

COUNSEL

Hector H. Balderas, Attorney General, Santa Fe, NM, Jane A. Bernstein, Assistant
Attorney General, Albuquerque, NM, for Appellee

Bennett J. Baur, Chief Public Defender, Santa Fe, NM, Sergio J. Viscoli, Appellate
Defender, Albuquerque, NM, for Appellant

JUDGES

JAMES J. WECHSLER, Judge. WE CONCUR: JONATHAN B. SUTIN, Judge, J. MILES
HANISEE, Judge

AUTHOR: JAMES J. WECHSLER

MEMORANDUM OPINION

WECHSLER, Judge.

{1} Defendant appeals his conviction for armed robbery. We issued a calendar notice proposing to reverse. The State has responded with a memorandum in opposition. We reverse.

{2} Defendant has claimed that the jury should have been instructed on the lesser-included offense of larceny. “In order to obtain an instruction on a lesser-included offense, ‘[t]here must be some view of the evidence pursuant to which the lesser offense is the highest degree of crime committed, and that view must be reasonable.’” *State v. Brown*, 1998-NMSC-037, ¶ 12, 126 N.M. 338, 969 P.2d 313 (quoting *State v. Curley*, 1997-NMCA-038, ¶ 5, 123 N.M. 295, 939 P.2d 1103).

{3} The State’s evidence showed that the female victim was robbed at gunpoint by Defendant as she was on her way to make a bank deposit for her employer. [RP 783-84] Defendant requested a lesser-included instruction on larceny [RP 834], based on his claim that he and the alleged victim staged the incident to make it appear like a robbery. Defendant refers to evidence that would support a reasonable inference that the robbery had been staged. [DS 8-9] Specifically, Defendant relies on statements from an individual (Padilla) who was with him before, during, and after the robbery. There was evidence that Defendant spoke to someone by telephone just prior to the robbery and that after the phone call Defendant told Padilla that they were going to get some money. [DS 6; RP 803] In its memorandum in opposition, the State claims that the docketing statement incorrectly asserted that the other individual on the phone was the victim. [MIO 3-4] However, the timing of the phone call (its proximity to the victim’s money run), and Defendant’s statement thereafter that he needed to go get money, would support Defendant’s claim that he colluded with the victim. There was additional evidence that would support a reasonable inference that Defendant and the alleged victim coordinated the timing of the incident. [DS 8-9] Although much of this evidence does not seem to be credible, and Padilla recanted these statements in his trial testimony [RP 804, 2:19:50], it was the jury’s role to resolve credibility and conflicts in evidence. *See State v. Salas*, 1999-NMCA-099, ¶ 13, 127 N.M. 686, 986 P.2d 482 (recognizing that it is for the factfinder to resolve any conflict in the testimony of the witnesses and to determine where the weight and credibility lie). With respect to the State’s contention that the undisputed use of a gun removed larceny as the possible highest degree of crime [MIO 5-6], if the jury believed Defendant’s evidence that the robbery was staged, there would not be the requisite threat of force to convict for robbery. As such, we conclude that Defendant was entitled to have the jury instructed on larceny.

{4} For the reasons set forth above, we reverse.

{5} **IT IS SO ORDERED.**

JAMES J. WECHSLER, Judge

WE CONCUR:

JONATHAN B. SUTIN, Judge

J. MILES HANISEE, Judge