70862-7

70862-7

NO. 70862-7-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

NATHANIEL SHANE CLARK,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MICHAEL HAYDEN

AMENDED BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Evidence of a threat is sufficient to sustain a conviction for robbery if an ordinary person in the victim's position would reasonably infer that the defendant threatened the use of immediate force or injury. Clark's accomplice, Reynolds, entered one bank dressed all in black with his face concealed by a partial mask and sunglasses. He demanded that a bank employee go to the teller counter. Employees and customers were frightened, crying, and shaking. Reynolds went to another bank, while similarly disguised, and gave the teller a note reading, "Put the money in the bag. No dye packs or transmitters." He also ordered employees not to press any alarm buttons. The employee who received the note was very scared, shaking, and could hardly open her drawer. Could a reasonable jury find that Reynolds's conduct in both banks constituted an implied threat of immediate force or injury?

2. In order to preserve a claim that the trial court erred by failing to give an instruction limiting the jury's use of his prior convictions, a defendant must request such an instruction at trial and object if the court refuses to so instruct the jury. Here, Clark did not request a limiting instruction regarding the jury's consideration of his convictions for crimes other than crimes of dishonesty, nor did he object to the trial court's failure to give one. Does RAP 2.5(a) preclude this Court from considering

whether the trial court erred in failing to instruct the jury about the limits of how it could use properly admitted evidence, where Clark has failed to show either constitutional error or practical and identifiable consequences for his trial? Did the trial court properly instruct the jury, when Clark did not seek a limiting instruction that might have highlighted Clark's other prior convictions? If the trial court did err, was any error harmless when the evidence of guilt was overwhelming?

3. A prosecutor may comment on the demeanor of a defendant while testifying if it relates to the defendant's credibility as a witness. Here, Clark cried while testifying, and the prosecutor urged the jury to consider whether Clark's tears were genuine. The jury was instructed that it could consider the manner of a witness while testifying in determining credibility. Was the prosecutor's argument proper?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

Appellant Nathaniel Clark was initially charged, along with co-defendant John Reynolds, with Robbery in the First Degree and Attempting to Elude a Pursuing Police Vehicle. CP 1-2. Reynolds

pleaded guilty to first-degree robbery, among other crimes. 13RP 45.[1] Clark proceeded to jury trial on charges of Robbery in the First Degree, Attempted Robbery in the First Degree, Attempting to Elude a Pursuing Police Vehicle, and Felony Hit and Run.[2] CP 22-24. The jury convicted Clark on all four counts. CP 78-81; 16RP 2-5.

The trial court sentenced Clark to 171 months of incarceration, the high end of the standard range sentence. CP 86-88.

This appeal timely followed. CP 102.

2. SUBSTANTIVE FACTS.

In early February of 2012, Clark and Reynolds were in custody at the Snohomish County Jail. 13RP 48-49, 157. The two men agreed that after he was released, Clark would bail Reynolds out of jail. 13RP 51, 158-62.

Clark was released and paid a bonding company to post bail for Reynolds. 13RP 51-52; 14RP 12-13. Meanwhile, Reynolds told multiple inmates that he would rob a bank if they agreed to pay his bail. 13RP 55.

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[1] The verbatim report of proceedings in this appeal is divided into 17 volumes. The State refers to these volumes in chronological order, as follows. Descriptions are given where there is more than one volume per date: 1RP is Nov. 1, 2012; 2RP is Jul. 22, 2013; 3RP is Jul. 23, 2013 (Pre-Trial Motions); 4RP is Jul. 23, 2013 (Jury Selection); 5RP is Jul. 24, 2013 (Pre-Trial Motions); 6RP is also Jul. 24, 2013 (Jury Selection); 7RP is Jul. 25, 2013 (Opening Statement); 8RP is Jul. 25, 2013 (Jury Trial); 9RP is Jul. 29, 2013; 10RP is Jul. 30, 2013; 11RP is Jul. 31, 2013; 12RP is Aug. 5, 2013; 13RP is Aug. 6, 2013; 14RP is Aug. 7, 2013; 15RP is Aug. 8, 2013; 16RP is Aug. 12, 2013; 17RP is Sep. 6, 2013.

[2] Clark's culpability for the robbery and attempted robbery charges was premised on an accomplice liability theory. CP 58, 64, 69. In essence, the State alleged that Clark drove Reynolds to and from those crimes, and otherwise participated in their planning and execution. CP 103, 106-11.

Reynolds was released on the bond arranged by Clark on the night of Tuesday, February 7. 14RP 13.

Clark met Reynolds the next day, Wednesday, February 8. 14RP 13. He drove Reynolds to a motel, paid for part of his room, and gave him a black beanie hat. 14RP 13-14, 18. Between the $500 that Clark paid for Reynolds's bail and the additional money for the motel room, Reynolds owed Clark between $650 and $750. 14RP 15-18.

On Thursday, February 9, Clark drove Reynolds to a T-Mobile store in Everett, where he watched Reynolds steal a cellular telephone. 13RP 90, 173; 14RP 13, 19. Clark then drove Reynolds to an apartment complex elsewhere in Snohomish County. 13RP 97. Reynolds walked down the street and robbed a bank.[3] 13RP 95-97. He entered the bank wearing the black beanie hat given to him by Clark, sunglasses, a black jacket, black pants, and a face covering. 13RP 96. He gave the teller a note demanding money. 13RP 96. The teller provided him with approximately $1,600 dollars. 13RP 96. Reynolds then walked back to Clark's car. 13RP 97. Later that evening, Reynolds gave Clark $1,200 in cash from the money that he took from the bank. 13RP 99; 14RP 20-21.

On Friday, February 10, Clark drove Reynolds to a Banner Bank branch in Kirkland. 13RP 57, 86-87. Clark drove a blue Chevy

[3] Reynolds separately pleaded guilty to that robbery in Snohomish County. 13RP 95-96. Clark was not charged with it. CP 106.

Trailblazer and parked down the street, instead of at the bank. 9RP 152-56, 162; 14RP 27, 30. Reynolds wanted Clark to take him to a Banner Bank because he knew them to be staffed by a small number of employees, usually women. 13RP 73. However, when he approached the bank, Reynolds saw a male employee inside. 13RP 73. He decided not to rob that bank because he thought that a man was more likely to resist. 13RP 73-74.

Instead, Reynolds walked across the street to the Kirkland Union Bank. 13RP 74. He entered the lobby dressed all in black, including a black jacket, black pants, black gloves, and black shoes, and carrying a black bag. 9RP 39; Ex. 10 (screenshot attached at App. A). Most of his face was concealed by a partial mask and hat. 9RP 39; Ex. 10 (App. A). He was also wearing sunglasses, even though it was dark outside. 11RP 14; Ex. 10 (App. A). On his ear was a Bluetooth device, connected to a cell phone in his pocket. 13RP 71.

Employees seeing Reynolds immediately feared that they were about to be robbed. 9RP 45; 11RP 15-16. Bank customers began shaking and crying, repeating, "I don't want to die, I don't want to die." 11RP 16.

Holly Jacobson, the customer service manager, hurried over to prevent Reynolds from reaching the teller counter. 9RP 43-45. She told him that she could help him at her desk. 9RP 43. Reynolds told her to go

to the teller station. 9RP 43. Jacobson assured Reynolds that she could help him at her desk. 9RP 43. Reynolds raised his voice and told her again to go to the teller station. 9RP 44. He then raised his voice even louder, pointed to the teller station, and told Jacobson a third time to go there. 9RP 44. When Jacobson—alarmed and shaking—still refused, Reynolds turned around and left the bank. 9RP 44-45, 54, 71-72.

Witnesses standing outside of the Union Bank saw the doors fly open and Reynolds run out, still dressed all in black and wearing sunglasses. 9RP 147. Reynolds jumped over a dog and a shrub, then broke into a "full-blown run" down the sidewalk. 9RP 148, 153, 178-79. He hopped into Clark's car, which was still parked down the street with the engine running, and told Clark that "it didn't work." 9RP 152, 154-55; Ex. 63, Track 1 at 10:16-10:39.[4] As soon as Reynolds got in the car, Clark sped away with tires squealing. 9RP 158-59, 164.

Clark then drove Reynolds to a Banner Bank branch in Bellevue. 13RP 74-75, 186. Despite multiple open parking spots at the Banner

[4] Exhibit 63 is an audio CD that contains portions of Clark's recorded interview with detectives, as well as phone calls recorded at the King County Jail. 12RP 51-58. The recorded interview is located in a directory on the CD titled "Transcript Nathaniel Clark redacted." That directory contains four separate audio files, referred to herein as Track 1, Track 2, Track 3, and Track 4—the order in which they were played for the jury. 12RP 56-58. Track 1 is titled "beginning to 21.30.wav." Track 2 is titled "22.53 to 54.44.wav." Track 3 is titled "55.03 to 1.09.31.wav." Track 4 is titled "1.10.10 to end.wav."

Bank, Clark did not park in the lot. 9RP 85, 91-92, 103-04. Reynolds got out of the car and walked into the bank. 13RP 188.

Banner Bank employees Jillian Clark[5] and Brenda Curtis saw Reynolds enter the bank, wearing a ski mask and gloves. 9RP 84, 94; 10RP 28; Ex. 19 (screenshot attached at App. B). He was also carrying a black bag. 10RP 30. Jillian immediately felt scared and started shaking. 9RP 95. Curtis pressed a button to set off a silent alarm. 10RP 31. When another employee, Nicolene Buchanan, also pressed her silent alarm, Reynolds commanded her "don't press that button." 10RP 32-34, 55. He repeated, loud enough for everyone to hear, "don't press any buttons." 9RP 102. Buchanan was scared when Reynolds ordered her not to press the silent alarm. 10RP 34-35. It was frightening that he tried to prevent them from summoning help, because the tellers didn't "know at that point how far it could go." 10RP 34-35.

Reynolds gave Jillian a note which read, "Put the money in the bag. No dye packs or transmitter."[6] 9RP 99, 109. Jillian was very scared and was shaking, and could hardly open her bank drawer.[7] 9RP 101. Because of the training that she had received from the bank, she knew not

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[5] Because Jillian Clark and the appellant have the same last name, she is referred to hereafter as Jillian. No disrespect is intended.

[6] Reynolds used the same note to rob the bank in Everett, the day before. 13RP 96.

[7] She clarified that Reynolds appeared calm and that she was not concerned for her personal safety based on any express threat by him. 9RP 101.

to question Reynolds but just to give him the money. 9RP 101. After she only gave him part of what was in her drawer, Reynolds asked her, "[I]s that all?" 9RP 101. Jillian handed Reynolds the rest of the money in her drawer. 9RP 101. Reynolds then left the bank with approximately $978. 10RP 58.

Reynolds returned to Clark's car, still wearing the hat and gloves. 14RP 28. He got into the back of the car and told Clark that he "got the money." 13RP 113, 185; Ex. 63, Track 1 at 14:40-14:46, Track 2 at 18:34-18:38. As Clark drove away, a police officer activated his emergency lights and siren in an attempt to stop Clark's vehicle. 8RP 34-37. Instead of stopping, Clark continued through downtown and then onto the freeway on-ramp at a high speed. 8RP 37-40. Pursued by multiple police vehicles, Clark sped between the lanes of rush-hour traffic, splitting the lines of cars on the on-ramp. 8RP 39-41, 83-84. He collided with the back of a silver hatchback at more than 50 miles per hour, injuring the driver. 8RP 43-44; 9RP 121-23, 127-33. After hitting that car, Clark still did not stop, but continued to drive before losing control and crashing into a concrete barrier, finally coming to a stop after rotating toward oncoming traffic. 8RP 44-47, 129. Multiple officers ordered Clark and Reynolds out of the vehicle at gunpoint. 8RP 49-51, 86-87.

Officers located $897 in cash on Reynolds's person. 9RP 191, 199-200. In the Trailblazer, officers found five cell phones, a Bluetooth earpiece, a black bag, additional cash, black gloves, a black sharpie marker that was consistent with the writing on the bank robbery note used by Reynolds, and other clothing that matched what Reynolds wore in the banks. 12RP 49, 60-69.

One of the cell phones, recovered from the driver's floorboard, was a T-Mobile HTC cell phone with the number (425) 301-3327; it was registered to Clark. 11RP 30, 101-02, 135; 12RP 62-63; 13RP 7-9. Another phone, located on the rear passenger floorboard (where Reynolds was sitting) was a T-Mobile Samsung cell phone with the number (425) 737-9443; it was registered to a retail store. 11RP 31; 13RP 8-9, 113.

Subsequent forensic analysis confirmed that five calls were placed between these two phones, from the approximate area of the Union Bank in Kirkland and the Banner Bank in Bellevue, during the approximate times of the robberies. 11RP 137-55. Two of those calls resulted in open voice connections, which corresponded with the times of the attempted robbery in Kirkland and the robbery in Bellevue. 11RP 158.

Following his arrest, Reynolds was interviewed by the police, first at the hospital and then at the police station. 13RP 77-79, 103-04. He admitted to robbing the banks. 13RP 77-78. He also told detectives that

he had known Clark for about a year and a half before this incident, when they met in prison. 13RP 105-06. He admitted to being with Clark at the time of the bank robberies and also told police that Clark "knew everything." 13RP 79. Finally, Reynolds intimated that he was scared to fully disclose Clark's involvement, because "if I do, then there's certain situations, right, that individuals that I talk to you about would not like that much." 13RP 137-38. One such "certain individual" was Clark. 13RP 138.

Clark was interviewed separately at the police station. 12RP 43-44; Ex. 63. He claimed to have only met Reynolds a few days prior, "for the first time ever," in the Snohomish County Jail. Ex. 63, at Track 1, 02:13-02:36. He admitted to bailing Reynolds out of custody. *Id.* at Track 1, 05:03-05:06. He admitted taking Reynolds to Everett on February 9, *id.* at Track 1, 08:42-08:46, Track 2 at 05:20-05:24, and to watching him steal a cellular telephone there. *Id.* at Track 2, 22:12-22:30.

Clark also admitted taking Reynolds to the banks in Kirkland and Bellevue on February 10. *Id.* at Track 1, 10:16-10:58, 14:04-14:14. Clark minimized his involvement, however, and claimed to be unaware of what Reynolds was doing. *Id.* at Track 3, 08:42-09:09.

Clark also told the police that there would be consequences for Reynolds if Reynolds did not absolve Clark.

> [H]e better fucking tell you that I know nothing about this shit, you know what I mean? He better. I mean, or else he, he better go to fucking Federal Prison, and he better fuckin' watch his ass because if I get cracked over this shit, he's gonna be on, like Donkey Kong. He's gonna get fucked up in the County Jail and in prison, I promise you that.

Id. at Track 2, 14:46-15:05.

While in custody at the King County Jail, Clark placed several telephone calls to his fiancée, Estrellita Matias. 12RP 69-70, 82-83, 88-89, 104-05, 107-09. Those phone calls were recorded. 12RP 16-17. In one call, Clark complained that Reynolds was cooperating with the police and had told them everything. Ex. 63, call 1330126171_280\5.16 to 6.59.wav (played at 12RP 70). He also repeatedly threatened Reynolds, if he didn't recant. 12RP 108-09.

Matias spoke with Reynolds, who promised to "make it right." 12RP 101. Reynolds then recanted his earlier statement that Clark knew everything. 13RP 79, 81-82, 154-55. At trial, Reynolds also admitted that he was previously assaulted for testifying against a defendant in a criminal case. 13RP 148-51.

Additional facts and procedural history are set forth below as appropriate.

C. ARGUMENT

1. THE EVIDENCE WAS SUFFICIENT FOR A REASONABLE JURY TO FIND THAT REYNOLDS'S ACTIONS AMOUNTED TO AN IMPLIED THREAT OF IMMEDIATE FORCE OR INJURY.

Clark asserts that the evidence of Reynolds's conduct in Union Bank and Banner Bank was insufficient for a jury to find that Reynolds threatened the immediate use of force or injury, necessary to sustain a conviction for robbery, or that Reynolds took a substantial step toward the same. But the evidence, viewed objectively and in the light most favorable to the State, was sufficient for a reasonable jury to conclude that Reynolds made an implied threat. Clark's argument should be rejected.

Evidence is sufficient to support a criminal conviction if, after viewing the evidence in the light most favorable to the State, a rational fact finder could have found the elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A claim of insufficiency admits the truth of the State's evidence, as well as all reasonable inferences derived therefrom, which must be drawn in favor of the State and against the defendant. *Id.* Finally, an appellate court defers to the trier of fact on all "issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence." *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004),

abrogated in part on other grounds by Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354 (2004).

Here, to convict Clark of Robbery in the First Degree, the jury had to find beyond a reasonable doubt:

> (1) That on or about February 10, 2012, the defendant or an accomplice unlawfully took personal property from the person or in the presence of another;
>
> (2) That the defendant or an accomplice intended to commit theft of property;
>
> (3) That the taking was against the person's will by the defendant's or an accomplice's use or threatened use of immediate force, violence or fear of injury to that person or to that person's property or to the person or property of another;
>
> (4) That the force or fear was used by the defendant or an accomplice to obtain or retain possession of the property or to prevent or overcome resistance to the taking;
>
> (5) That the defendant or an accomplice committed the robbery within and against a financial institution; and
>
> (6) That any of these acts occurred in the State of Washington.

CP 58 (Instruction 11); *see* RCW 9A.08.020 (defining accomplice liability), RCW 9A.56.190 (defining robbery), RCW 9A.56.200(1)(b) (defining first-degree robbery).

To convict him of Attempted Robbery in the First Degree, the jury had to find that he, or an accomplice, "did an act that was a substantial step toward the commission of Robbery in the First Degree." CP 69

(Instruction 21); *see* RCW 9A.28.020 (defining criminal attempt).

Clark challenges the sufficiency of the evidence with respect to whether his accomplice, Reynolds, used or threatened to use immediate force, violence or fear of injury. Washington employs an objective test to determine whether a defendant makes a threat in order to accomplish robbery. *State v. Witherspoon*, 180 Wn.2d 875, 884, 329 P.3d 888 (2014). The test is whether an ordinary person in the victim's position could reasonably infer a threat of force or injury from the defendant's acts. *Id.* A "threat" is any direct or indirect communication of the intent to use immediate force. *State v. Shcherenkov*, 146 Wn. App. 619, 625, 191 P.3d 99 (2008). The threat may be implied and need not be expressly made. *Id.* at 624-26; *State v. Collinsworth*, 90 Wn. App. 546, 552-54, 966 P.2d 905 (1997). Any threat—"no matter how slight"—that induces a person to part with her property is sufficient. *State v. Handburgh*, 119 Wn.2d 284, 293, 830 P.2d 641 (1992).

In *Collinsworth*, this Court affirmed multiple robbery convictions where the defendant entered several banks, demanded money from the tellers, and ordered that the tellers not include any bait money or dye packs. 90 Wn. App. at 553-54. Even though the defendant did not display a weapon or make any express threats toward the tellers, this Court found that the circumstances were sufficient to support an implied threat:

> No matter how calmly expressed, an unequivocal demand for the immediate surrender of the bank's money, unsupported by even the pretext of any lawful entitlement to the funds, is fraught with the implicit threat to use force.

Id. at 553; *see also State v. Parra*, 96 Wn. App. 95, 103, 977 P.2d 1272 (1999) ("Case law is clear that a demand upon a bank teller to surrender the bank's funds carries with it an implicit threat of force." (citing *Collinsworth, supra*)).

This case is indistinguishable from *Collinsworth*. Reynolds entered the Kirkland Union Bank dressed all in black, wearing black gloves and carrying a black bag, with his face concealed by a low black hat, partial mask, and sunglasses, even though it was dark outside. 9RP 39; 11RP 14; Ex. 10 (App. A). Bank patrons immediately understood the implied threat, began shaking, crying, and repeating "I don't want to die, I don't want to die." 11RP 16. When an employee attempted to stop him from reaching the teller counter, Reynolds repeatedly raised his voice, pointed at the counter, and demanded that she go to the teller counter. 9RP 43-45. On these facts, a reasonable jury could have concluded that the teller and bank customers reasonably understood Reynolds's acts to pose a threat of immediate force or injury. The evidence was sufficient to support a conviction for Attempted Robbery in the First Degree.[8]

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[8] Contrary to Clark's assertion, *United States v. Thornton*, 539 F.3d 741 (7th Cir. 2008) does not control. The evidence in that case was insufficient to constitute attempted bank

Reynolds's actions at the Bellevue Banner Bank paralleled those in *Collinsworth*. He entered wearing a ski mask and gloves, and carrying a black bag. 9RP 84, 94; 10RP 28, 30; Ex. 19 (App. B). His appearance made Jillian feel scared and start shaking. 9RP 95. When another teller pressed a silent alarm, Reynolds commanded her "don't press that button," and then repeated more loudly to other employees, "don't press any buttons." 9RP 101-02; 10RP 32-34, 55. Reynolds's demand that the tellers not summon help was particularly threatening, because the tellers didn't "know at that point how far it could go." 10RP 34-35. He then gave Jillian a note, reading "Put the money in the bag. No dye packs or transmitter." 9RP 99, 109. When she received the note, Jillian was very scared, shaking, and could hardly open her bank drawer. 9RP 101. She complied with her training, did not question Reynolds, and gave him the money. 9RP 101. When he asked her, "is that all," she gave him additional money. 9RP 101. A reasonable juror could have concluded that the tellers reasonably understood Reynolds's actions to carry an

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robbery because the "would be" bank robber was interrupted by a passerby outside of the bank, never interacted with any bank personnel, and therefore never had a chance to attempt to use intimidation. *Id.* at 750. In contrast, Reynolds did attempt to induce an employee to go to the teller counter, by the implied threat inherent in his verbal demands, aggressive manner, and menacing appearance. Similarly, *United States v. Wagstaff*, 865 F.2d 626 (4th Cir. 1989) is inapposite, because, in that case, the defendant never had any interaction with a bank teller at all. *Id.* at 627. An employee saw the defendant steal money from the bank, but being a mere "spectator" to that act did not give rise to robbery. *Id.* at 629.

implied threat of immediate force or injury. The evidence was sufficient to support a conviction for Robbery in the First Degree.

Recently, in *State v. Farnsworth*, __ Wn. App. __, No. 43167-0-II (Oct. 28, 2014), Division II of this Court held that a defendant's actions inside a bank were insufficient to constitute robbery when he entered the bank wearing a wig and sunglasses, and gave the teller a note demanding money. No. 43167-0, slip. op. at 1-6. The defendant did not make any other demands, movements, or comments, and said "thank you" when he left. *Id.* at 1-2. Division II did not disapprove of *Collinsworth*, but merely found it to be distinguishable on the facts. *Id.* at 5-6. For example, the *Farnsworth* court noted that, unlike the individual in *Farnsworth*, the robber in *Collinsworth* used a "'direct,' 'demanding,' or 'serious' voice," and repeated his demands after the teller failed to immediately comply. *Id.* at 6 (quoting *Collinsworth*, 90 Wn. App. at 548-50, 550). In the case at bar, like *Collinsworth* and unlike *Farnsworth*, Reynolds made repeated demands, raised his voice, and pointed at the counter of Union Bank. 9RP 43-45, 11RP 16. In Banner Bank, he twice ordered the frightened tellers not to press any alarm buttons and demanded additional money, after initially receiving a small amount. 9RP 101-02, 10RP 32-35, 55. Because the instant case falls squarely under *Collinsworth*, and not *Farnsworth*, Clark's convictions should be affirmed.

Clark asserts that *Collinsworth* was misguided, because it relied on federal cases interpreting the federal bank robbery statute, which, he argues, is "broader" than the Washington statute. Brief of Appellant, at 13. As a threshold matter, this Court need not determine whether *Collinsworth* announced too broad a rule for robbery, because the facts of the instant case are sufficient to establish—under any standard—an implied threat of immediate force or injury. Even when considered on the merits, however, Clark's argument should be rejected.

Clark relies on *In re Pers. Restraint of Lavery*, 154 Wn.2d 249, 111 P.3d 837 (2005), for the principle that the Washington and federal statutes are not legally comparable. But *Lavery* found the statutes incomparable only insofar as the federal crime is a general intent crime, whereas the Washington statute requires the specific intent to steal. *Id.* at 255-56. *Lavery* does not support Clark's contention that the term "intimidation," as used in the federal bank robbery statute, 18 U.S.C. § 2113(a), means something other than the "threatened use of immediate force, violence, or fear of injury" required by RCW 9A.56.190. Nor has Clark provided any authority to support his contention. To the contrary, the Washington Supreme Court uses the term "intimidation" to describe the type of implied threat sufficient to constitute robbery. *See Witherspoon*, 180 Wn.2d at 884 ("To determine whether the defendant

used intimidation, we use an objective test."). And in *Shcherenkov*, when describing the elements of robbery, this Court cited with approval sources providing that "'[t]he determination of whether intimidation was used is based on an objective test of whether an ordinary person in the bank employee's position could reasonably infer a threat of bodily harm from the defendant's acts.'" 146 Wn. App. at 625 (quoting 67 Am. Jur. 2d Robbery § 89, at 114 (2003)).

Even assuming for the sake of argument that *Collinsworth* relied incorrectly on federal cases, Clark has not shown that the result reached in *Collinsworth* is both "incorrect and harmful." *In re Stranger Creek & Tributaries in Stevens Cnty.*, 77 Wn.2d 649, 653, 466 P.2d 508 (1970). The burden is upon him to do so. *Id.* To the contrary, many states' courts have affirmed convictions for robbery under facts similar to the instant case, and under statutes that, like Washington's, require a threat of immediate force or injury.

In Oregon, for example, where the definition of robbery is functionally identical to that in Washington, the Oregon Supreme Court affirmed a conviction for third-degree robbery under facts similar to both *Collinsworth* and the instant case. *State v. Hall*, 327 Or. 568, 966 P.2d

208 (1998).[9] In *Hall*, the defendant entered a fast food restaurant soon before closing, wearing a bandana covering his hair, and sunglasses, even though it was dark outside, and told an employee to put "the money" in a paper bag; when the employee only put some money in the paper bag, he demanded additional money. 966 P.2d at 209. The court held that "a jury reasonably could infer that, if [the victim] did not comply with defendant's demands to give him all the money, he would reach across the counter and take the money that he had demanded and that he immediately would use physical force against [the victim] if she tried to stop him from doing so." *Id.* at 211. The same inference could reasonably be reached in the instant case, where Clark demanded additional money after Jillian first gave him a small amount. 9RP 101.

Other states' courts have also affirmed convictions for robbery under statutes requiring a threat of immediate force, when a disguised person enters a bank and demands money, because of the threat of force implied by such conduct. *See Tunstull v. Commonwealth*, 337 S.W.3d 576, 583 (Ky. 2011) ("An individual, particularly when masked or otherwise disguised, coming into a bank aggressively demanding money is

[9] Third-degree robbery in Oregon arises when the defendant "threatens the immediate use of physical force . . . ." Or. Rev. Stat. Ann. § 164.395(1) (West). This statute has the same elements as second-degree robbery in Washington. *State v. McIntyre*, 112 Wn. App. 478, 483, 49 P.3d 151 (2002). Because first-degree robbery in Washington is distinguished from second-degree robbery only by the location and nature of the victim, the decision of the Oregon Supreme Court in *Hall* is persuasive in the case at bar.

a threat in and of itself—the implication clearly being that if the employees or customers do not comply, that physical force will follow."); *see also Welch v. State*, 880 S.W.2d 225, 227 (Tex. App. 1994); *Commonwealth v. Swartz*, 484 A.2d 793, 793-95 (Pa. Super. 1984).

Clark further contends that, because Jillian testified that her fear was not based on any express threat by Reynolds, and that she gave money to him in order to comply with her professional training, the evidence was insufficient to constitute robbery. Clark has provided no authority establishing that a bank teller's compliance with her training somehow negates the threat element of robbery. To the contrary, "[h]aving the forethought and training to calmly give [defendant] the bait money and call 911 does not negate an objective finding of fear." *State v. Pasek*, 2004 S.D. 132, 691 N.W.2d 301, 306-07 n.4 (S. D. 2004); *see also Ross v. State*, 31 Okla. Crim. 143, 237 P. 469, 471 (Okla. 1925) (fear element of robbery not negated because bank teller maintained composure).

Other states have even held that a jury is actually free to disregard a robbery victim's testimony that she was unafraid, so long as the circumstances of the robbery are objectively fearful. *See Commonwealth v. Joyner*, 467 Mass. 176, 4 N.E.3d 282, 293-94 (Mass. 2014); *Baker v. State*, 273 Ind. 64, 402 N.E.2d 951, 952-53 (Ind. 1980); *People v.*

Renteria, 61 Cal.2d 497, 499, 39 Cal. Rptr. 213, 393 P.2d 413 (Cal. 1964); *Delgado v. State*, 105 So.3d 612, 613-14 (Fla. Dist. Ct. App. 2013).

Nevertheless, Clark asserts that the evidence was insufficient to support a conviction for robbery because Reynolds chose Banner Bank, thinking it to be staffed by a small number of women, who, in his mind, would be unlikely to resist. In other words, as Clark puts it, Reynolds "was not interested in using force." Brief of Appellant, at 15. But this argument misses the point. Reynolds selected his victims because he thought they would be less likely to resist—in other words, they would be *more likely to submit to the implied threat of force* inherent in his conduct. The fact that he chose victims he assumed would be submissive only reinforces the existence of an implied threat.

Finally, to the extent that this Court is inclined to be influenced by Division II's decision in *Farnsworth*, this Court should decide whether that case is correct. Because it leads to results the legislature could never have intended, and because it is contrary to the great weight of authority above, this Court should hold that *Farnsworth* is incorrectly decided. The majority in *Farnsworth* misapplied the standard of review for a challenge to the sufficiency of the evidence on appeal. By reweighing the evidence, it failed to give appropriate deference to the jury's finding of an implied threat. No. 43167-0-II, slip. op. at 25 (Worswick, J., dissenting in part).

The majority's decision also leads to an absurd conclusion: because the bank apparently gave money to the defendant out of policy rather than in response to an implied threat, the taking is neither robbery nor theft. Theft requires that a defendant "wrongfully obtain or exert unauthorized control over the property or services of another." RCW 9A.56.020(1)(a). No such act arises when a bank voluntarily gives money to a person who has simply asked for it, uninduced by any coercion, express or implied. Because the reasoning in *Farnsworth* effectively legalizes a clearly illegal act, it must be rejected.

In this case, the record establishes that the employees at Union Bank and Banner Bank felt threatened by the use of immediate force. Even if their testimony was equivocal, because Washington employs an objective test to determine whether a robbery defendant threatens force or instills fear, the Kirkland Union Bank and Bellevue Banner Bank tellers' and customers' subjective mental states are not dispositive. Under the standard articulated in *Collinsworth*—or any standard—a jury could reasonably have found that Reynolds's actions carried an implied threat of immediate force or injury. Clark's convictions should be affirmed.

2. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON THE USAGE OF CLARK'S CONVICTIONS.

Clark argues that the trial court erred by giving an incomplete

limiting instruction. Specifically, while he acknowledges that the trial court instructed the jury that it could consider his convictions for crimes of dishonesty, for the proper purpose of determining his credibility as a witness, he argues that the lack of a limiting instruction regarding evidence of his other prior convictions was error. Clark's argument should be rejected for several reasons. First, because he did not request an additional instruction, Clark failed to preserve this claim for review. Second, Clark has not shown that the absence of an additional instruction was a manifest constitutional error that can be raised for the first time on appeal. Third, even if the trial court erred, the error was harmless.

a. Additional Facts.

During a hearing on motions in limine, the prosecutor announced his intention to impeach Clark—should he choose to testify—by offering evidence of Clark's prior convictions for crimes of dishonesty. 3RP 14-15. These included a 2005 conviction for Theft in the Third Degree and a 2005 conviction for Forgery. 3RP 15. The defense conceded that these convictions would be "per se" admissible. 3RP 15.

Prior to Clark testifying, the parties held lengthy discussions about the content of Clark's recorded interview with detectives. 11RP 168-85. The parties agreed to certain redactions. 9RP 205-07; 11RP 168-85. The defense objected to some portions of the recordings that included some

references to Clark being a gang member and to having spent time in multiple prisons. 11RP 168-85. However, the defense indicated that it was specifically not objecting to some evidence of Clark's criminal history for tactical reasons, such as references to Clark's convictions for drugs. 11RP 179. The State agreed to make redactions based upon Clark's objections. 11RP 176.

The parties also discussed the content of Clark's recorded phone calls to his fiancée, from the jail. 11RP 4, 185-93; 12RP 3-14. The State agreed to redact portions of the calls to which the defense objected. 11RP 192-93.

The State played the redacted version of Clark's recorded interview during its case in chief. 12RP 56-58. In pertinent part, the following statements by Clark were played:

> . . . I'm a convict, you know. I mean locked up my whole life and shit.

State's Ex. 63, Track 1 at 15:43-15:47.

> I never robbed nothing. I've never—I mean, I might have had a lot of damn felonies in my, you know, for drugs and fighting and all kinds of shit when I was younger but I've never, I never robbed nothing.

Id. at Track 1, 19:10-19:20.

> But I'm not a stupid guy. I'm, I'm not gonna go to prison for—yeah, I've got like nine felony points, you know what I mean? If I do anything, if I piss on the sidewalk, I'm going to prison for five

> years. I'm not a stupid fucking guy, you know what I mean? There's a lot of shit that I can do. I would never rob a bank.

Id. at Track 2, 05:43-06:01.

> But uh, I don't want to go to prison no more, man. I don't want to go to pri . . . That's the first time I went to prison. I don't want to go to prison no more.

Id. at Track 2, 31:40-31:48.

> But then, man, I got this, you know, I got this family that I'm trying to put together but I just got out of prison for four months ago, and five months ago . . . . I don't want to go to prison, man, because I want to do the right thing.

Id. at Track 3, 01:15-01:48.

> . . . you know, I can either be this hardass gangster, fucking go to prison and do this convict shit I've been doing my whole fucking life, or else I can get real, real, real with you guys right now and tell you about what's going on with me and what happened, and that's what I'm doing.[10]

Id. at Track 3, 07:30-07:43. The defense did not object to any of these statements. 12RP 56-58.

The State also played the agreed-upon excerpts from Clark's recorded jail phone calls. This included the statement by Clark, "Guess what I went to my DOC hearing today." Ex. 63, call1330398251_208\6.39 to 7.56.wav (played at 12RP 71).

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[10] The transcript of this statement incorrectly transcribes Clark's phrase as "do this comic shit my whole life," rather than "this convict shit." Ex. 144 at 34. The audio confirms that Clark said "convict." Ex. 63, Track 3 at 07:30-07:43. Additional corrections to Clark's phrasing are also made here, based on the audio.

After the State rested, the defense called Reynolds as a witness, who testified that he met Clark for the first time in the Snohomish County Jail, a few days prior to the robberies. 13RP 48-52. The State impeached Reynolds with his prior statement to detectives—that he had actually met Clark a year and a half previously, while in prison together. 13RP 106.

Clark then testified. 13RP 156. He claimed that he previously went to prison for selling drugs, and that he met Reynolds for the first time in the Snohomish County Jail, after being confined there for violating a condition of probation on his drug conviction. 13RP 157.

Prior to cross-examination, the prosecutor moved to impeach Clark with evidence of his other convictions, explaining that Clark had given the impression that he was only in custody for a drug offense, when in fact, he was in the Snohomish County Jail for violating conditions of probation on convictions for Assault in the Third Degree, Unlawful Possession of a Firearm in the Second Degree, Possession of Stolen Property in the Second Degree, and Possession with Intent to Deliver a Controlled Substance. 14RP 3-6. The trial court ruled that the State could cross-examine Clark regarding these other convictions, because, among other things, Clark's criminal history was already significantly in evidence. 14RP 6-7. The trial court also admitted evidence of Clark's convictions under ER 404(b), for purposes of establishing Clark's

knowledge of Reynolds's activities, the *res gestae* of the crime, and other purposes:

> . . . Evidence was introduced at trial that the Defendant was a convicted felon who had previously served time in prison and was supervised by DOC. The court finds that the purpose of introducing this evidence is to explain how the defendant and Mr. Reynolds came to be acquainted shortly before the charged crimes. The court also finds the purpose of introducing this evidence is to provide the immediate context for events close in time to the charged crimes. In addition, the Defendant either introduced this evidence himself, or did not object to the introduction of this evidence.
>
> . . . The court finds that the evidence is relevant to proving the charged crimes because it explains the Defendant's role in the robbery plan, offers evidence supporting the Defendant's knowledge of Mr. Reynolds's actions over the course of the days they spent together, and explains the sequence of events over the course of the days leading up to the charged crimes.
>
> . . . The court finds that the probative value of this evidence outweighs any prejudicial effect.

CP 100-01 (ER 404(b) Written Findings of Fact and Conclusions of Law) (attached at App. C). Clark did not object to the admission of his prior convictions or ask for a limiting instruction. 14RP 4.[11]

On cross examination, Clark verified his 2005 convictions for Theft in the Third Degree and Forgery. 14RP 9. Clark also verified that

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[11] Clark is incorrect that his attorney objected to the admission of this evidence. Brief of Appellant, at 28-29. Counsel's exact words were, "I don't really object. I think he was going to explain that he's only been in prison once, and it was on all the things that he had been convicted of one time. I don't care." 14RP 4. Counsel only qualified her lack of objection, saying, "As long as the State doesn't argue propensity at the end of it." 14RP 6-7.

he had earlier testified that he went to prison for selling drugs. 14RP 11. He then admitted that he was actually imprisoned, in addition to his narcotics conviction, for Assault in the Third Degree, Possession of Stolen Property in the Second Degree, and for Unlawful Possession of a Firearm in the Second Degree. 14RP 11. Once again, the defense did not object or ask for a limiting instruction. 14RP 11.

After the close of testimony, the parties litigated jury instructions. 14RP 58-68. The State proposed that the jury be instructed that it could consider evidence that Clark was convicted of Forgery, Possession of Stolen Property in the Second Degree, and Theft in the Third Degree only in deciding what weight or credibility to give to Clark's testimony and for no other purpose. 14RP 60.

Defense counsel proposed that those crimes not be specifically listed, and asked instead that the jury be instructed simply that it could consider "crimes of dishonesty" for that purpose. 14RP 61. Defense counsel was concerned that listing specific crimes would be "prejudicial" and "ring[] a bell." 14RP 61. The trial court replied that it was concerned that the jury would not be able to determine which crimes were crimes of dishonesty, especially when there were "a lot of crimes out there." 14RP 61. "Some crimes have come in for one purpose, some crimes have come in for other purposes," reasoned the trial court, adding "[the jury]

can certainly consider the fact that he was at Snohomish County Jail. That's all over. They can consider a lot of things. I think it's appropriate to do it this way." 14RP 61-62. Defense counsel apparently withdrew her objection to the crimes of dishonesty instruction, stating "that's fine." 14RP 62. Defense counsel did not request a limiting instruction for evidence of Clark's other convictions. 14RP 62.

The parties then discussed instructing the jury as to the purposes for which it could consider evidence that any witness had been convicted of a crime. 14RP 62-64. After acknowledging that Reynolds's prior conviction for robbery was in evidence, the trial court decided to instruct the jury on this issue. 14RP 62-64.

The trial court then instructed the jury as follows:

> You may consider evidence that the defendant has been convicted of Forgery, Possession of Stolen Property in the Second Degree and Theft in the Third Degree only in deciding what weight or credibility to give to the defendant's testimony, and for no other purpose.

CP 53 (Instruction 6).

> You may consider evidence that a witness has been convicted of a crime only in deciding what weight or credibility to give to the testimony of the witness, and for no other purpose.

CP 54 (Instruction 7).

In closing argument, the prosecutor correctly explained these instructions. He cautioned the jury that "you should not judge someone

based on the fact that they have felony convictions," except that the jury could consider "Mr. Clark's convictions for possession of stolen property, for theft, and for forgery . . . in assessing his credibility[.]" 14RP 142.

Defense counsel also discussed the credibility instructions in closing argument, telling the jury that Clark's criminal history could only be considered for purposes of weighing his credibility:

> Your job is to weigh the facts of this case aside from the idea of propensity, aside from the idea of if he did it before, he probably did it again. That's improper. You can consider that history as is he telling me the truth now because he's getting convicted of a crime of dishonesty, but that's a different issue than saying, once a criminal, always a criminal. We don't do that in this world, not in this society, not in this courthouse.

14RP 114-15.

b. RAP 2.5(a) Precludes Review.

Clark failed to object and request a limiting instruction regarding the purposes for which the jury could consider evidence of his convictions for crimes other than crimes of dishonesty. Thus, any error stemming from the absence of such an instruction is not reviewable on appeal unless he demonstrates an error of constitutional magnitude and prejudice to his trial rights. He has not shown either.

Generally, an appellate court will not consider an issue raised for the first time on appeal. RAP 2.5(a); *State v. Kirkman*, 159 Wn.2d 918, 926, 155 P.3d 125 (2007). The policy underlying the rule is to encourage

the efficient use of judicial resources: where an objection would have given the trial court an opportunity to correct any error and avoid an appeal, the appellate court should not sanction a party's failure to timely object. *State v. O'Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2009).

RAP 2.5(a)(3), however, permits the defendant to raise a claim of error for the first time on appeal if it is a manifest error affecting a constitutional right. *Kirkman*, 159 Wn.2d at 926. The purposes of this exception are to correct any "serious injustice to the accused" and to preserve the fairness and integrity of the judicial proceedings. *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). To warrant review, however, any alleged error must be truly of constitutional magnitude. *Id.*; *Kirkman*, 159 Wn.2d at 926. Moreover, the constitutional error must be manifest, meaning that the defendant must demonstrate actual prejudice to his rights at trial, and that prejudice must appear in the record. *Kirkman*, 159 Wn.2d at 926-27; *McFarland*, 127 Wn.2d at 334. Actual prejudice, in turn, means that the alleged error had practical and identifiable consequences in the trial. *O'Hara*, 167 Wn.2d at 99. This exception to the ordinary requirement that an error be preserved by a timely objection—and, in this case, a request for a limiting instruction—must be construed narrowly. *Kirkman*, 159 Wn.2d at 935. The failure to request a limiting instruction has been held to preclude review of a claim

that a trial court failed to give an instruction limiting the jury's consideration of a defendant's prior convictions. *See State v. Dow*, 162 Wn. App. 324, 335, 253 P.3d 476 (2011) (failure to request ER 609 instruction precludes review); *State v. Williams*, 156 Wn. App. 482, 492, 234 P.3d 1174 (2010) (failure to request ER 404(b) instruction precludes review).

Here, Clark initially objected to the State's proposed ER 609 instruction. 14RP 61. This instruction named his convictions for crimes of dishonesty. 14RP 60. He agreed with the State that the jury should be instructed that it could consider these convictions for the limited purpose of weighing his credibility—but he asked that the trial court omit the names of these crimes, so as to avoid "prejudice" and "ringing a bell." 14RP 61. When the trial court explained that it wanted to name the crimes in order to help the jury differentiate between the crimes of dishonesty and those that were admitted "for other purposes," Clark apparently withdrew his objection, stating "that's fine." 14RP 61-62. Clark did not ask for a limiting instruction regarding his remaining convictions that were in evidence. 14RP 61-62. Given the reasons that Clark's attorney articulated for her initial objection, it is apparent that counsel made a legitimate tactical decision not to request a limiting instruction that would have named Clark's other convictions—or worse, from his perspective, one that

would have explained that the jury could consider those crimes for other purposes, such as his knowledge of Reynolds's activities.[12]

Regardless, by failing to object to this alleged error, and by failing to request a limiting instruction regarding his remaining convictions, Clark failed to preserve the issue for review. RAP 2.5(a); *Dow*, 162 Wn. App. at 335; *Williams*, 156 Wn. App. at 492. Thus, he bears the burden of demonstrating that the lack of an additional instruction constituted an error of constitutional magnitude and that it had practical and identifiable consequences in the trial. He can do neither.

First, there was no error, let alone one of constitutional magnitude.[13] As will be discussed in greater detail below, the trial court's limiting instruction was correct, and the trial court had no duty to give an instruction regarding Clark's other convictions, when no such instruction

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[12] Clark incorrectly asserts that the trial court's instruction was improper because it "named certain convictions for assessing Mr. Clark's credibility and failed to instruct the jury that other convictions were also elicited for the *same limited purpose*." Brief of Appellant, at 2 (emphasis added). As the trial court's written ER 404(b) ruling confirms, evidence of Clark's other convictions was not admitted solely on the subject of credibility. If anything, the instruction was more favorable to Clark because it did not emphasize the substantive purposes for which the jury could consider evidence of his other convictions—the result of a reasonable tactical decision on the part of his trial attorney, one can reasonably infer.

[13] Clark does not even allege that the trial court's instructions were constitutional error. The only discussion of constitutional principles in this section of Clark's brief relates to the underlying admission of evidence. Brief of Appellant, at 26-27. But Clark does not argue that the trial court improperly admitted evidence of his prior convictions; nor could he make this argument, because he expressly declined to object and has therefore failed to preserve this issue for appeal. *See Kirkman*, 159 Wn.2d at 926 ("A party may assign evidentiary error on appeal only on a specific ground made at trial."); *see also* 14RP 4 (declining to object).

was requested. *State v. McGhee*, 57 Wn. App. 457, 462, 788 P.2d 603 (1990) (a trial court's failure to give an ER 404(b) limiting instruction is not manifest constitutional error when none is requested); *see State v. Russell*, 171 Wn.2d 118, 124, 249 P.3d 604 (2011) (a trial court has no duty to *sua sponte* instruct the jury on the limitations of evidence admitted under ER 404(b)). Clark does not explain how the trial court had a duty to instruct the jury regarding the use of his other convictions, when he did not even ask the court to do so.

Second, even if the lack of an additional instruction was constitutional error, review is not appropriate because it had no practical or identifiable consequences in this case. Here, Clark only speculates that the jury may have considered his remaining convictions for improper purposes. He identifies nothing in the record to support this claim. While he makes the diffuse claim that the jury's hypothetical consideration of his (properly-admitted) prior convictions caused him prejudice, he does not explain how his right to a fair trial was actually violated. It is Clark's burden to establish actual prejudice. *O'Hara*, 167 Wn.2d at 99. Clark has not met this burden. Pursuant to RAP 2.5(a), this Court should not consider his claim.

i. The trial court did not err by failing to give an unrequested instruction.

As discussed briefly above, the trial court did not err when it failed to give an instruction that Clark did not request. A trial court does have a duty to instruct the jury that a conviction admitted under ER 609(a)(2)—a crime of dishonesty—is admissible only on the issue of the witness's credibility.[14] *Dow*, 162 Wn. App. at 333. But a trial court has no duty to *sua sponte* instruct the jury regarding evidence of other crimes, wrongs, or acts admitted for other purposes under ER 404(b).[15] *Russell*, 171 Wn.2d at 124; *McGhee*, 57 Wn. App. at 462. A trial court does not err when it fails to give an ER 404(b) limiting instruction, when none is requested. *Id.*

In this case, the trial court admitted evidence of Clark's crimes of dishonesty, and properly instructed the jury that they were admissible only on the issue of his credibility. 14RP 9-10; CP 53 (Instruction 6). The trial court also admitted evidence of Clark's other convictions, under ER 404(b), for other purposes. 14RP 3-7, 11, 61-62; CP 99-101 (App. C). While the prosecutor initially offered evidence of those convictions to

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[14] This rule provides that "[f]or the purpose of attacking the credibility of a witness in a criminal or civil case, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record during examination of the witness but only if the crime . . . (2) involved dishonesty or false statement, regardless of the punishment." ER 609(a)(2).

[15] This rule provides that "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." ER 404(b).

impeach Clark's testimony that he was in prison for selling drugs, that does not control the trial court's reasons for admitting the evidence. *See State v. Goebel*, 36 Wn.2d 367, 378-79, 218 P.2d 300 (1950) ("The court, in arriving at its decision as to the admissibility of the evidence, is of course not limited to the reasons given by the state.").[16] Ultimately, the trial court admitted evidence of Clark's other crimes because his criminal history was already largely in evidence, and because it was probative of his knowledge of Reynolds's activities, among other things. CP 100-01 (App. C). Clark did not object to the admission of the evidence for this purpose or ask for an ER 404(b) limiting instruction—for example, one that would have informed the jury that it could consider evidence of his prior convictions for purposes of determining whether he had knowledge of Reynolds's activities, but not for purposes of determining his character or propensity.[17] It is apparent that his attorney made a legitimate tactical decision not to request one. Because the trial court had no duty to

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[16] To the extent that *Goebel* suggests a duty to *sua sponte* instruct the jury on the limitations of ER 404(b) evidence, the Washington Supreme Court has disavowed that notion. *Russell*, 171 Wn.2d at 123-24 (citing *Goebel*, *supra*).

[17] Clark does not assign error to the trial court's ER 404(b) ruling. Even if he did, review of the trial court's evidentiary ruling is precluded because Clark did not object. *Kirkman*, 159 Wn.2d at 926.

sua sponte instruct the jury on the usage of Clark's other convictions, the trial court did not err.[18]

ii. Any error in the lack of a limiting instruction was harmless.

Even if the trial court erred by not giving an additional limiting instruction, any error was harmless. Clark has not established a constitutional error and therefore, under the appropriate non-constitutional harmless error standard, reversal is not required unless there is a reasonable probability that the error materially affected the outcome of the trial. *State v. Demery*, 144 Wn.2d 753, 766, 30 P.3d 1278 (2001). Under the more stringent manifest constitutional error standard, an error is harmless when the untainted evidence is so overwhelming that it necessarily supports a guilty verdict. *State v. Florczak*, 76 Wn. App. 55, 75, 882 P.2d 199 (1994). Here, under any standard, the asserted error was undoubtedly harmless.

Clark's prior convictions aside, the evidence in this case overwhelmingly established his guilt. Reynolds told multiple inmates that he would rob a bank if someone bailed him out of jail. 13RP 55. Clark risked $35,000 to bail Reynolds out of jail. 14RP 16-17. He drove

[18] Even if this Court agrees with Clark that evidence of his other crimes was admitted under ER 609—not ER 404(b)—his failure to request an ER 609 limiting instruction regarding those additional convictions precludes review. *Dow*, 162 Wn. App. at 335.

Reynolds to Everett, where he observed him steal a cell phone. 13RP 90, 173; 14RP 13, 19. He then drove Reynolds to another location, where Reynolds walked to a bank and robbed it, and gave Clark $1,200 in cash. 13 RP 95-99, 181; 14RP 21.

The next day, Clark drove Reynolds to Banner Bank in Kirkland. 13RP 57-58, 179-82. He did not park at the bank, but parked down the street instead, with the engine running. 9RP 152, 154-55; 13RP 57-58, 183. Reynolds entered the bank dressed all in black with most of his face concealed by a partial mask and sunglasses. 9RP 39; Ex. 10 (App. A). He attempted to rob it by repeatedly demanding, while pointing and raising his voice, that an employee go to the teller counter. 9RP 43-45. Reynolds left after the employee resisted his implied threat, by refusing three times to go to the counter. 9RP 44-45. Clark drove away immediately after Reynolds ran back to the rear seat of the car, with tires squealing. 9RP 152, 154-55; 13RP 185.

He then drove Reynolds to Banner Bank in Bellevue, where Reynolds, dressed similarly, robbed that bank as well. 9RP 84, 94, 99-102, 109; 10RP 28, 30-35, 55; 13RP 74-75, 186; Ex. 19 (App. B). Cell phone records showed that Clark's phone had open voice connections with another phone that was recovered from where Reynolds was sitting, and that these calls were placed from the approximate location of both

robberies, during the times that they occurred. 11RP 30-31, 101-02, 135, 137-55, 158; 12RP 62-63; 13RP 7-9. Clark also fled from the police through rush-hour traffic. 8RP 26-40, 79-84, 93, 98; Ex. 63, Track 3 at 9:24-10:05. He continued to flee, even after striking another motorist in excess of 50 m.p.h., and only stopped when he crashed into a concrete barrier. 8RP 43-47. Reynolds told police that Clark "knew everything." 13RP 79. Clark lamented that Reynolds was cooperating with the police and had told them everything. Ex. 63, call1330126171_280\5.16 to 6.59.wav (played at 12RP 70). He repeatedly threatened Reynolds, if he did not recant. Ex. 63, Track 2 at 14:46-15:05; 12RP 108-09.

Clark and Reynolds testified at trial in a manner that was highly incredible, especially when compared to their initial statements to police. As the trial court bluntly explained to Clark at sentencing, "None of your story made any sense . . . ." 17RP 29. First, Clark claimed that he risked $35,000 to bail Reynolds out of jail, even though they had just met. 14RP 16-17. Reynolds told detectives that he and Clark actually met a year and half previously, in prison. 13RP 105-06. At trial, Reynolds switched his explanation to match Clark's—that they had only met in the Snohomish County Jail, a few days before the bank robberies. 13RP 48-49. He explained, nonsensically, that he originally lied to detectives about when he met Clark out of embarrassment. 13RP 106.

Second, between the $500 that Clark paid for Reynolds's bail and the additional money that he paid for Reynolds's motel room, Reynolds owed Clark between $650 and $750. 14RP 15-18. Reynolds gave Clark $1,200 on February 9. 13RP 99; 14RP 20-21. There was therefore no need for Clark to take Reynolds to other banks on February 10; the debt was already satisfied. Clark testified that he allowed Reynolds to believe that he had actually paid $3,500 for his bail, because, if Reynolds thought that he only owed Clark $500, he would have placed the debt on the "back burner." 14RP 17-18. A reasonable jury could have disbelieved this explanation.

Third, Clark claimed that he bailed Reynolds out of jail so that Reynolds could seek medical treatment. 13RP 158-59. Yet, as the trial court observed, once Reynolds was bailed out of jail by Clark, the issue of medical treatment seemed to disappear entirely. 17RP 19-20. There was no evidence that Reynolds ever sought medical treatment, or even mentioned it again after being bailed out; instead, he drove around with Clark for several days on a two-county crime spree.

Fourth, Clark's explanation for why Reynolds told him to drive to the Banner Bank in Kirkland was absurd. He testified that he believed Reynolds's story, that Reynolds's family members were customers of that

bank, and so the bank would allow Reynolds to cash a check for Clark without having any valid identification. 13RP 179.

Fifth, Clark testified that he parked down the street from the bank in Kirkland because there was no other parking available. 13RP 183. But there was in fact ample parking available at that bank. 9RP 33, 144-45, 162-63.[19] There was also ample parking available at the lot of the Banner Bank in Bellevue. 9RP 85-92; 10RP 79-81. Clark did not park there either. 13RP 188. While he claimed that he simply missed the parking lot, 13RP 188, the jury was free to weigh the credibility of this explanation.

Sixth, Clark's and Reynolds's explanations of the cell phone evidence in this case was also absurd. Reynolds claimed that he used at least three of the phones recovered from the car to rob the banks, all without Clark's knowledge. 13RP 71, 127-33. He claimed that he used one of the phones to play a police scanner in Clark's car, out loud. 13RP 130-31. The audio from the police scanner was then picked-up by another cell phone in the car, and broadcast to a cell phone and Bluetooth earpiece that Reynolds wore on his person. 13RP 71, 127-29. When asked how he

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[19] Witness Rusty Cahall observed multiple open parking spots at the Kirkland bank when Reynolds ran out. 9RP 162-63. While Cahall did not see if they were available at the exact time that Clark pulled-up, Reynolds was only in the bank for approximately 61 seconds. Ex. 10, Camera 1 at 16:48:10.85-16:49:05.28 (played at 9RP 67, 77).

could have been playing a police scanner out loud in the vehicle throughout both incidents without Clark noticing, Reynolds testified that Clark was probably distracted. 13RP 133. Clark, too, was unable to credibly account for the cell phone evidence. He complained to his fiancée that several of his phones were found in Reynolds's possession, when they were arrested. Ex. 63, call 1330576106_208\5.01 to 10.57.wav at 04:34-04:39 (played at 12RP 82). When his fiancée incredulously asked him, during a recorded phone call, why he gave multiple cell phones to Reynolds, Clark was silent for a moment and then blurted, "Are you smart? I mean, is that retarded? I mean, what are you, a fucking—?" *Id.* at 5:02-05:19. She acknowledged her slip-up, saying, "Yeah . . . yeah. Never mind."[20] *Id.*

Seventh, Clark's explanation for why he fled from the police was incredible. Clark told detectives that he knew that it was futile to attempt to flee through rush-hour traffic in downtown Bellevue. Ex. 63, Track 3 at 9:24-10:05. He claimed that he did so anyway, simply because Reynolds insisted upon it. *Id.*; 13RP 198-99. Yet at the same time, he claimed to be "not a fucking lackey-ass, fucking getaway driver" and "not somebody's bitch ass." Ex. 63, Track 3 at 12:54-13:00. It made no sense that Clark, self-assured and no one's lackey, would obey Reynolds's insistence that

[20] Clark and his fiancée knew that their calls were being recorded. 12RP 17-18.

he speed through rush-hour traffic, strike at least one motorist, and crash his car into a concrete barrier.

Finally, Reynolds initially told the police that Clark "knew everything." 13RP 79. It was only after Clark threatened Reynolds multiple times that Reynolds changed his story and recanted. Ex. 63, Track 2 at 14:45-15:05; 12RP 101, 108-09; 13RP 79, 81-82, 154-55. The fact that Reynolds had previously been assaulted for testifying on behalf of the State was also in evidence—information that the jury would have considered when weighing the reasons why Reynolds recanted his statement to the police. 13RP 150-51.

With all this in mind, there was simply no credible scenario in which Clark was unaware of—and not an accomplice to—Reynolds's conduct. This is true irrespective of any consideration of Clark's prior convictions. Because the untainted evidence was so overwhelming that it necessarily supported a guilty verdict, Clark's convictions should be affirmed.

3. THE PROSECUTOR PROPERLY ASKED THE JURY TO CONSIDER CLARK'S MANNER WHILE TESTIFYING IN WEIGHING THE CREDIBILITY OF HIS TESTIMONY.

Clark asserts that he was denied a fair trial because the prosecutor commented in closing argument about his demeanor throughout the trial.

But the record establishes that the prosecutor commented solely on Clark's demeanor while testifying, and for the limited purpose of weighing Clark's credibility. The jury was instructed to consider only Clark's demeanor while testifying, for that purpose. Clark's argument should be rejected.

a. Relevant Facts.

The jury was instructed that it was the sole judge of the credibility of each witness, and that, in judging the credibility of a witness, it could consider "the manner of the witness *while testifying*." CP 46 (Instruction 1) (emphasis added). The jury was further instructed to disregard any remark, statement, or argument by an attorney that was contrary to the trial court's instructions. *Id.*

During closing argument, the prosecutor discussed Clark's demeanor while he was testifying:

> Pros.: One doubt you may have is were Mr. Clark's tears genuine? Maybe they were. It can be an emotional experience to face the consequences of your actions and your choices, to think and feel the futility of trying to explain away every damning piece of evidence. You can imagine how frustrating, oppressive, and even sad that can be. And maybe in his mind, since this happened, Mr. Clark has convinced himself that he's not as guilty as John Reynolds; after all, Clark didn't enter the bank, Mr. Clark loaned the money to Reynolds, and this is the way he is repaid. Reynolds ratted him down and then Reynolds did a horrible job on the stand trying to lie for Clark. And that can be upsetting too.

The cynical side of you may say, you know, this is all just a con job to garner sympathy, that like the repeated references to him being a dad or a husband, that this is all just a con artist, to make him look sensitive, damaged, or wronged. We all know that tears don't necessarily mean that someone's telling the truth.

Def.: I'm going to object to the characterization, Your Honor. This I think we're very close to being improper on the closing.

Court: Overruled. He can speak to the issue of demeanor, which is what he's doing.

Pros.: But don't think for a minute that the tears means that he's not guilty. If those tears are genuine, they're tears for no one but himself . . . .

14RP 104-05.

Outside the presence of the jury, the prosecutor clarified his earlier comment:

Pros.: I just wanted to put on the record that the State made a comment in closing regarding defendant's tears, and I wanted to make sure that the record reflected that that comment was related to his demeanor on the stand and how he was acting on the stand. It would be improper to comment on how the defendant was reacting to testimony, but there was no record of him crying on the stand, so I just wanted to make sure that I make my record now.

Def.: Your Honor, and I will just say that there were tears while he was sitting here, and I don't think it was clear to the jury at all about which he was referring to, but counsel can make his record.

Court: Well, let me suggest, counsel, I was here and it was very apparent to me, as it would have been to the jury, that while he was on the witness stand he was seemingly emotional and

> that there were ample tears. I did not observe the same kind of demeanor sitting at counsel table. So I think that the impression I got from closing argument was that he was speaking directly about the defendant's demeanor while he was on the witness stand, and that's the reason I didn't sustain the objection.
>
> What the jury instruction allows them to consider is the demeanor of the witness while testifying, and he was commenting on his demeanor while testifying.

14RP 107-08.

In rebuttal, the prosecutor cautioned the jury to make its determination based, ultimately, on the evidence, and not on Clark's demeanor:

> [The] defense had asked you to assess Mr. Clark's credibility, and that's important too. When you look and listen to somebody . . . you're going to assess their demeanor and see whether they're credible. But that's not all we look at to see whether somebody's credible. That can actually be incredibly dangerous. You all know from your common experience, somebody can look at you right in the eye and tell you something and they're lying. So what do you look at? You don't just assess how they sound or how they look. You look at to [sic] whether it makes any sense, and that's why you don't just look at what Mr. Clark says or what Mr. Reynolds says, but you look at the big picture, the big picture that we presented to you, and that big picture is all of this evidence here, and all of that testimony, and all of the phone records that you heard and that you saw.

14RP 140-41.

b. The Prosecutor Permissibly Commented On Clark's Manner While Testifying.

The "courtroom demeanor of a *non-testifying* criminal defendant is

an improper subject for comment by a prosecuting attorney." *United States v. Mendoza*, 522 F.3d 482, 491 (5th Cir. 2008) (emphasis added); *accord State v. Klok*, 99 Wn. App. 81, 85, 992 P.2d 1039 (2000). However, "whenever a witness takes the stand, he necessarily puts the genuineness of his demeanor into issue," *Stewart v. United States*, 366 U.S. 1, 6, 81 S. Ct. 941 (1961), and "the defendant's credibility is in issue whenever he testifies." *Id.* at 6 n.13. A prosecutor may therefore comment upon a defendant's demeanor while testifying, for the limited purpose of making argument regarding the jury's assessment of the defendant's credibility.

In this case, the record simply does not establish that the prosecutor commented on Clark's demeanor while he was not testifying. The prosecutor commented on Clark's tears. The record demonstrated that Clark cried only when testifying. Although Clark's attorney claimed that Clark also cried at counsel table, the trial court settled the dispute by finding otherwise. 14RP 107. Appellate courts grant considerable deference to a trial court's observations of a person's in-court demeanor. *See State v. Floyd*, 178 Wn. App. 402, 410, 316 P.3d 1091 (2013); *State v. Read*, 163 Wn. App. 853, 864, 261 P.3d 207 (2011). The trial court's observations in this case deserve similar deference.

Further, the jury was instructed to base its credibility determinations on the manner of the witness while testifying, and to disregard any arguments by an attorney that were inconsistent with its instructions. CP 46-47 (Instruction 1). Clark does not assert that these instructions were erroneous, nor would any authority appear to support such a claim. The jury is presumed to have followed the court's instructions, absent evidence to the contrary. *State v. Montgomery*, 163 Wn.2d 577, 596, 183 P.3d 267 (2008). Here, there is no evidence that the jury disregarded its instructions.

Even if the prosecutor improperly commented on Clark's demeanor, the comment was harmless. If an error is constitutional in nature, "the State bears the burden of proving that the error is harmless beyond a reasonable doubt." *State v. Kindell*, 181 Wn. App. 844, 853, 326 P.3d 876 (2014). A non-constitutional error requires reversal only if there is "a reasonable probability that the error materially affected the outcome of the trial." *Id.* Even assuming that the constitutional error standard applies, the asserted error was harmless because any reasonable jury would have convicted Clark beyond a reasonable doubt.

First, the jury was properly instructed by the trial court and is presumed to have followed those instructions. Second, as discussed in greater detail above, the evidence overwhelmingly established Clark's

guilt. Clark's and Reynolds's inconsistent and implausible testimony greatly undermined Clark's credibility, irrespective of any consideration of his demeanor in the courtroom. Because any reasonable jury would have convicted Clark beyond a reasonable doubt, Clark's convictions should be affirmed.[21]

D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Clark's convictions.

DATED this 16th day of December, 2014.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: _____
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Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

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[21] Clark also assigns cumulative error. Brief of Appellant, at 2. This doctrine applies "only when several trial errors occurred which, standing alone, may not be sufficient to justify a reversal, but when combined together, may deny a defendant a fair trial." *State v. Hodges*, 118 Wn. App. 668, 673-74, 77 P.3d 375 (2003). Clark does not discuss this issue anywhere else in his brief or explain how it applies to his case. His claim should be rejected for this reason alone. *See State v. Thomas*, 150 Wn. 2d 821, 868-69, 83 P.3d 970 (2004) (declining to address inadequately briefed argument). On the merits, Clark's claim fails because there were no errors. *Hodges*, 118 Wn. App. at 674. If there were errors, his claim still fails because any errors were "few and ha[d] little or no effect on the outcome of the trial." *State v. Weber*, 159 Wn.2d 252, 279, 149 P.3d 646 (2006).

APPENDIX A

The above image is a video still taken from the security footage that was admitted as State's Exhibit # 10. Specifically, the video still is taken from "Camera 1" at 16:48:11.16. This footage was played for the jury at 9RP 77-78. As identified in the above portion of the transcript, the footage depicts Reynolds passing by a security camera just inside the door of the Kirkland Union Bank on February 10, 2012.

APPENDIX B

The above image is a video still from the security footage that was admitted as State's Exhibit # 19. Specifically, the video still is taken from the "Teller 2" camera at time-stamp 17:58:23.36. This footage was played for the jury at 9RP 98-102. As identified in the above portion of the transcript, the footage depicts Reynolds at the counter of the Banner Bank in Bellevue on February 10, 2012.

APPENDIX C

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON, Plaintiff, vs. NATHANIEL SHANE CLARK, Defendant.	No. 12-C-01300-1 SEA ER 404(b) WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. ER 404(b) Findings of Fact

The court finds the following facts by a preponderance of the evidence:

1. On February 9, 2012, one day prior to the charged crimes, the Defendant, Nathaniel Clark, drove the co-Defendant, John Reynolds, to the T-Mobile retail store in Everett. While there, Mr. Reynolds stole a cellular phone from the store. The Defendant was present and witnessed Mr. Reynolds stealing that phone. The Defendant drove both of them away from that location.

2. On February 9, 2012, one day prior to the charged crimes, Mr. Reynolds, robbed a Banner Bank branch in Everett. The Defendant drove Mr. Reynolds to nearby the location of that bank robbery. Mr. Reynolds was wearing the same outfit he was wearing the following day during the charged crimes. After Mr. Reynolds robbed that bank, he returned to the Defendant's vehicle, and the Defendant drove both of them away from that location. Later that night, Mr. Reynolds gave the Defendant most of the proceeds of that robbery ($1400), in repayment for the money the Defendant spent bailing Mr. Reynolds out of jail.

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3. The Defendant has previously served time in prison for convictions for VUCSA – Possession, Unlawful Possession of a Firearm in the Second Degree, Assault in the Third Degree, and Possession of a Stolen Vehicle. He was previously on community custody with the Washington State Department of Corrections. The Defendant was released from Snohomish County Jail shortly before the charged crimes.

B. ER 404(b) Conclusions of Law

The court makes the following conclusions of law:

1. Under ER 404(b), evidence of a defendant's prior bad acts "is not admissible to prove the character of a person in order to show action in conformity therewith." This evidence may be admissible for other purposes, however, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident. Although the rule sets out particular bases for admission, these bases are not exclusive.

2. Evidence was introduced at trial that the Defendant provided transportation for Mr. Reynolds to commit theft at a retail store one day prior to the charged crimes. The court finds that the purpose of introducing this evidence is to demonstrate the Defendant's knowledge of Mr. Reynolds's actions during the charged crimes. The court also finds that the purpose of introducing this evidence is to provide the immediate context for events close in time to the charged crimes. In addition, the Defendant either introduced this evidence himself, or did not object to the introduction of this evidence.

3. Evidence was introduced at trial that the Defendant provided transportation for Mr. Reynolds to rob a bank in Snohomish County one day prior to the charged crimes, and received the proceeds from that robbery. The court finds that the purpose of introducing this evidence is to demonstrate the Defendant's knowledge of Mr. Reynolds's actions during the charged crimes. The court also finds that the purpose of introducing this evidence is to provide the immediate context for events close in time to the charged crimes. The court also finds that the purpose of introducing this evidence is to demonstrate the joint plan by the Defendant and Mr. Reynolds that spanned several days. The court also finds that the evidence is relevant to impeach the credibility of both Mr. Reynolds and the Defendant with respect to the testimony that the Defendant drove Mr. Reynolds to the Kirkland and Redmond banks in the charged crimes for the purpose of Mr. Reynolds repaying a debt to the Defendant. The fact that Mr. Reynolds gave the Defendant the proceeds of the prior robbery directly impeaches that testimony. In addition, the Defendant opened the door to this testimony by introducing the testimony of Mr. Reynolds.

4. Evidence was introduced at trial that the Defendant was a convicted felon who had previously served time in prison and was supervised by DOC. The court finds

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that the purpose of introducing this evidence is to explain how the Defendant and Mr. Reynolds came to be acquainted shortly before the charged crimes. The court also finds that the purpose of introducing this evidence is to provide the immediate context for events close in time to the charged crimes. In addition, the Defendant either introduced this evidence himself, or did not object to the introduction of this evidence.

5. The court finds that the evidence is relevant to proving the charged crimes because it explains the Defendant's role in the robbery plan, offers evidence supporting the Defendant's knowledge of Mr. Reynolds's actions over the course of the days they spent together, and explains the sequence of events over the course of the days leading up to the charged crimes.

6. The court finds that the probative value of this evidence outweighs any prejudicial effect.

In addition to the above written findings and conclusions, the court incorporates by reference its oral findings and conclusions.

Signed this 6th day of September, 2013

JUDGE MICHAEL HAYDEN

Presented by:

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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Nancy Collins, the attorney for the appellant, at Nancy@washapp.org, containing a copy of the Amended Brief of Respondent, in State v. Nathaniel Shane Clark, Cause No. 70862-7, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 11th day of December, 2014.

U Brame

Name:
Done in Seattle, Washington