73462-8

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May 18, 2016
Court of Appeals
Division I
State of Washington

NO. 73462-8-I

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

STATE OF WASHINGTON,

Respondent,

v.

BRYAN R. SASS,

Appellant.

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

I. ISSUES

(1) The defendant went into a bank and told the teller to give him hundreds, fifties, and twenties. When she asked him for identification, he told her that he came to rob her. Could a reasonable jury find the defendant guilty of attempted first degree robbery?

(2) Under the alternative charged in this case, the defendant would be guilty of attempted first degree robbery if he attempted to take property in the victim's presence. To be guilty of attempted first degree theft, he would have to attempt to take the property from her person, not merely in her presence. Under these charges, is attempted first degree theft a lesser included offense of attempted first degree robbery?

(3) If attempted first degree theft is a lesser included offense, was the defendant entitled to an instruction on that offense where the evidence showed that the defendant attempted to take property that was not on the victim's person?

(4) Do the records of the defendant's two federal bank robbery convictions establish that the defendant acted with intent to steal, so as to render those convictions comparable to the Washington crime of second degree robbery?

II. STATEMENT OF THE CASE

On August 11, 2014, the defendant (appellant), Bryan Sass, entered a branch of J.P. Morgan Chase Bank in Everett. Although it was a hot day, he was wearing a hoody and a surgical mask and gloves. After waiting in line, he was called up by Djamila Ayouni. Ms. Ayouni was a teller at the drive-through window. When there were no cars in line, she would also assist customers inside the bank. 3/23 RP 23.

The defendant told Ms. Ayouni that he needed hundreds, fifties, and twenties in that order. She asked him for his debit card and identification. He answered, "No, ma'am, I came to rob you." She said "excuse me," and he repeated the same words. She told him that she would get right back. She went to the drive-through window, where her cash drawer was located. There, she activated a silent alarm. 3/23 RP 23-25.

Brent Flagg was Assistant Branch Manager at the bank. He was told that a man had entered the branch wearing a surgical mask. He observed the defendant waiting in line. He was then asked to help another customer. When he returned his attention to the defendant, the defendant was walking away. The defendant looked "a little confused." Mr. Flagg asked if there was anything he

could help with. The defendant said that "she needed a debit." Mr. Flagg asked what he meant by that. The defendant repeated the same thing. Mr. Flagg said that he was confused and didn't understand. The defendant said, "So am I." He then left the bank. 3/23 RP 49-53.

The defendant was arrested a block away. 3/23 RP 61-63. He was carrying a syringe, a CO_2 canister, gloves, and some surgical masks.[1] 3/23 RP 66-67. He was questioned by Everett Police Det. Steven Brenneman. The defendant said that he went to the bank to inquire about getting a debit card. He wanted to open an account, possibly getting a debit card account. When asked if he had any money, the defendant said that he had 78 cents. Det. Brenneman then asked how he could expect to open an account with so little money. The defendant responded "that he had a debit card through Chase and was wondering if that was something he could use as a credit card in the future." 3/23 RP 72-75.

The defendant was also asked about the surgical mask and

[1] On cross-examination, Det. Brenneman testified that a police evidence report listed a Chase debit card with the defendant's name on it. 3/23 RP 76-77. The report itself was marked as an exhibit but never offered into evidence. There was no other evidence concerning this debit card.

gloves. He said that he was wearing them because he had a MRSA infection in his nasal cavity. Before he went to the bank, he had been at a park with some friends. He did not put on the mask until he was near the bank. Det. Brenneman asked why he didn't put on the mask when he was with his friends at the park. The defendant acknowledged that it didn't make any sense. 3/23 RP 73-74.

At trial, the defendant did not testify. The only defense witness was Dr. Eileen Bulger of Harborview Medical Center. She testified that the defendant had undergone a hernia repair on May 16. On May 30, he was treated for an infection in the surgical site. The infection was identified as Methicillin Resistant Staphylococcus Aureus (MRSA). The infection was in his groin, not his nasal cavities. Moreover, MSRA is not transmitted through the air. A person who has MSRA is not expected to wear a surgical mask. 3/24 RP 10-15.

A jury found the defendant guilty of attempted first degree robbery. 1 CP 252. At sentencing, the State introduced records of the defendant's eight prior adult felonies and four juvenile felonies. 1 CP 140-239. Two of the adult felonies were federal bank robberies. 1 CP 193-226. The court counted these as equivalent to second degree robbery. Sent. RP 6-7. This yielded an offender

score of 12 and a standard sentence range of 96¾ to 128¼ months. The court sentenced the defendant to 100 months' confinement. 1 CP 121-22.

III. ARGUMENT

A. WHERE THE DEFENDANT DEMANDED MONEY AND TOLD THE VICTIM THAT HE WAS THERE TO ROB HER, THERE WAS SUFFICIENT EVIDENCE TO CONVICT HIM OF ATTEMPTED ROBBERY.

The defendant claims that the evidence was insufficient to support his conviction for attempted first degree robbery.

> The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant.

State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (citation omitted).

The divisions of this court have disagreed on what facts are necessary to prove robbery. According to this Division, bank robbery can be proved by "an unequivocal demand for the immediate surrender of the bank's money, unsupported by even the pretext of any lawful entitlement to the funds." Such a demand "is fraught with the implicit threat to use force." State v. Collinsworth,

90 Wn. App. 546, 553, 966 P.2d 905 (1997), review denied, 135 Wn.2d 1002 (1998). In Collinsworth, the defendant told a bank teller, "Give me your hundreds, fifties, and twenties." Id. at 549. Although the defendant made no express threats, this Division held that there was sufficient evidence to convict the defendant of robbery. Id. at 553-54.

Division Two applied a more restrictive rule in State v. Farnsworth, 184 Wn. App. 305, 348 P.3d 759 (2014), review granted, 183 Wn.2d 1001 (2015) (agued 10/22/15). There, the defendant wrote a note that said, "No die packs, no tracking devices, put the money in the bag." An accomplice gave this note to a credit union teller and received $300 in cash. In a 2-1 decision, Division Two held that there was insufficient evidence that the defendant planned to communicate a threat to use immediate force, violence, or fear of injury. Id. at 312 ¶ 17. The dissenting judge agreed with the analysis of Collinsworth. Farnsworth, 184 Wn. App. at 316 ¶ 35 (Worswick, J., dissenting).

Ultimately, the disagreement between Farnsworth and Collinsworth will need to be resolved by the Supreme Court. For purposes of the present case, however, it does not matter which

rule is followed. Even under Division Two's rule, the evidence in the present case is sufficient to establish an intent to commit robbery.

This is clear from Division Two's decision in State v. Shcherenkov, 146 Wn. App. 619, 191 P.3d 99 (2008), review denied, 165 Wn.2d 1037 (2009). There, the defendant was convicted of four counts of bank robbery. In one of the incidents, the defendant entered a branch of Wells Fargo Bank. He handed a teller a note that said, "Please be calm. This is a robbery." The defendant was "calm and did not do anything physical." Id. at 622 ¶ 3. Division Two nonetheless concluded that there was sufficient evidence to establish a robbery. The tellers reasonably interpreted the language in the note to be threatening "because robbery inherently involves a threat of immediate force." Id. at 628-29 ¶ 23.

The defendant describes Shcherenkov as a case where "the defendant had his hand in his pocket causing tellers to believe he had a gun." Brief of Appellant at 11. This was true of a different incident involving a robbery of Rainier Pacific Bank. Shcherenkov, 146 Wn. App. at 623 ¶ 6. During that incident, the defendant never referred to a "robbery," so the court looked to other facts to establish a threat of force. Id. at 629 ¶ 23. During the Wells Fargo incident, however, the defendant did not keep his hand in his

pocket. Although he reached into his pocket at one point, the teller believed that he was reaching for a cell phone or radio – not a gun. Id. at 622 ¶ 3. In upholding the defendant's conviction for that incident, Division Two did not rely on the defendant's reaching into his pocket. Rather, the court relied on the defendant saying "this is a robbery," which implied a threat of immediate force. Id. at 628-29 ¶ 23.

The defendant here also points to Division Two's discussion of the word "robbery" in Farnsworth. As mentioned above, the defendant there was convicted as an accomplice. He wrote the demand note, but he did not personally enter the financial institution. In discussing the plan with his accomplice, the defendant referred to "robbing a bank." Farnsworth, 184 Wn. App. at 308 ¶ 6. Division Two held that this reference was a "colloquialism similar to people saying their house was robbed when they really meant it was burglarized." Id. at 310 n. 5.

This discussion must be viewed in context. The defendant referred to "robbing" only in a discussion with his accomplice. He did not threaten the teller with "robbery." The court distinguished these facts from Shcherenkov, where the victim was threatened with "robbery." Farnsworth, 184 Wn. App. at 762 ¶ 15. Farnsworth

thus agrees that a threat of "robbery" communicates an intent to use immediate force.

The evidence in the present case is therefore sufficient regardless of which rule is applied. Under this Division's analysis, the defendant's unequivocal demand for money, unaccompanied by any pretext of lawful entitlement, constituted an implicit threat of force. Collinsworth, 90 Wn. App. at 553. Under Division Two's rule, the defendant's statement that he "came to rob you" constituted an implicit threat of force. Shcherenkov, 146 Wn. App. at 628-29 ¶ 23. A jury could reasonably conclude that the defendant was guilty of first degree robbery.

B. THE TRIAL COURT PROPERLY REFUSED AN INSTRUCTION ON THE "LESSER INCLUDED OFFENSE" OF ATTEMPTED FIRST DEGREE THEFT.

1. Since It Is Possible To Commit Attempted First Degree Robbery As Charged In This Case Without Committing Attempted First Degree Theft, The Attempted Theft Is Not A Lesser Included Offense.

In his other challenge to the conviction, the defendant claims that he was entitled to an instruction on the "lesser included offense" of attempted first degree theft. Such an instruction is proper only when two requirements are satisfied:

> Under the first prong of the test (the legal prong), the court asks whether the lesser included offense consists solely of elements that are necessary to

> conviction of the greater, charged offense. Under the second (factual) prong, the court asks whether the evidence presented in the case supports an inference that *only* the lesser offense was committed, to the exclusion of the greater, charged offense.

State v. Condon, 182 Wn.2d 307, 316 ¶ 20, 343 P.3d 357 (2015) (court's emphasis; citation omitted). In the present case, the trial court concluded that neither prong was satisfied. 3/24 RP 6. The court was correct.

Under the legal prong, "if it is possible to commit the greater offense without committing the lesser offense, the lesser offense is not an included offense." State v. Stevens, 158 Wn.2d 304, 315, 143 P.3d 817 (2006). In carrying out this analysis, the court looks at the offense *charged* – not at alternative means that were uncharged. State v. Berlin, 133 Wn.2d 541, 548, 947 P.2d 700 (1997). Here, the defendant was charged with attempted first degree robbery under RCW 9A.56.200(1)(b), which covers robbery of a financial institution. 1 CP 309. "Robbery" is defined by statute as requiring that property be taken "from the person of another *or in his presence*." RCW 9A.56.190.

In contrast, first degree theft can be committed by taking (a) property exceeding $5,000 in value, (b) property "taken *from the person* of another," (c) an on-duty search and rescue dog, or (d)

commercial metal property, when the damage to the owner's property exceeds $5,000. RCW 9A.56.030(1). None of these alternatives are *necessary* for conviction of first degree robbery. Under the alternative involved in this case, the defendant could be convicted of the completed offense of first degree robbery for taking less than $5,000 in cash *in the presence* of the victim, even if the property was not taken from the victim's *person*. Such an act would not constitute first degree theft. Similarly, the defendant could be convicted of *attempted* first degree robbery for *attempting* to take money from the presence of the victim, without being guilty of *attempted* first degree theft. Since it is *possible* to commit attempted first degree robbery as charged in this case without also committed attempted first degree theft, the latter crime is not an included offense.

This court reached the same conclusion in State v. Roche, 75 Wn. App. 500, 878 P.2d 497 (1994). Although the court's analysis did not anticipate later Supreme Court decisions, its ultimate conclusion was correct. The court analyzed robbery as having two "alternative means": taking property (1) "from the person of another" or (2) "in his presence." First degree theft is included within only one of these means. Consequently, the court

determined that first degree theft is not a lesser included offense of first degree robbery. Id. at 510-11.

As the defendant points out, Roche relied on the analysis of State v. Curran, 116 Wn.2d 174, 804 P.2d 558 (1991). Under Curran, the analysis looked at all possible means of committing the greater offense, not just the means that were charged. Curran was, however, overruled by Berlin, 133 Wn.2d at 548. To the extent that Roche looked beyond charged alternatives, its analysis is no longer valid.

Roche also failed to anticipate subsequent decisions dealing with "alternative means." This court has already questioned the conclusion that taking property "from the person" or "in his presence" constitute "alternative means." State v. Klimes, 117 Wn. App. 758, 769 n. 3, 73 P.3d 416 (2003). The Supreme Court later made it clear that statutory definitions do not create "alternative means." State v. Owens, 180 Wn.2d 90, 96 ¶ 9, 323 P.3d 1030 (2014). The statutory references to taking property "from the person of another" or "in his presence" both occur within the definition of "robbery" found in RCW 9A.56.190. These alternative definitions do not establish "alternative means" of committing first degree robbery.

These two analytical errors in Roche do not, however, alter the conclusion in the present case. The charge of attempted first degree robbery was based on only one alternative means: attempting to commit robbery of a financial institution. That crime can be committed by attempting to take money of any value *in the presence* of a bank's employees. Such a taking would not constitute first degree theft. It is therefore possible to commit attempted first degree robbery without committing attempted first degree theft. Phrasing the same conclusion a different way, the lesser offense does not consist *solely* of elements that are *necessary* to conviction of the greater offense. As a result, attempted first degree theft is not a lesser included offense of attempted first degree robbery. Condon, 182 Wn.2d at 316 ¶ 20; Stevens, 158 Wn.2d at 315. The trial court properly refused to instruct the jury on the lesser offense.

2. Alternatively, The Evidence Did Not Support An Instruction On The Lesser Offense, Since It Did Not Affirmatively Show That The Defendant Attempted To Take Property From The Person Of The Victim.

Even if attempted first degree theft passes the "legal prong," it does not pass the "factual prong" under the circumstances of this

case. An instruction on the lesser offense was therefore unwarranted.

As already mentioned, the issue under the "factual prong" is whether the evidence supports an inference that *only* the lesser offense was committed. Condon, 182 Wn.2d at 316 ¶ 20. The evidence must affirmatively establish the lesser offense. It is not enough that the jury might disbelieve the evidence pointing to guilt. In making this determination, the court views the evidence in the light most favorable to the party that requested the instruction. State v. Fernandez-Medina, 141 Wn.2d 448, 455, 6 P.3d 1150 (2000).

Applying the rule in the present case, there would have to be affirmative evidence that the defendant attempted to take property from the person of the teller. There was no such evidence. The defendant demanded "hundreds, fifties, and twenties." 3/23 RP 23. This money was in the teller's cash drawer, not on her person. 3/23 RP 24-25. There was no evidence that the defendant believed that the teller carried such large bills on her person. The defendant intended to take the money in her presence, which would be sufficient to constitute robbery. There is no affirmative evidence that he intended to take it from her person, which would be necessary to

constitute first degree theft. Since the "factual prong" is not satisfied, the trial court properly refused the instruction on the lesser offense of attempted first degree theft.

C. THE STATE CONCEDES THAT IT FAILED TO ESTABLISH THAT THE DEFENDANT'S TWO CONVICTIONS FOR FEDERAL BANK ROBBERY ARE FACTUALLY COMPARABLE TO SECOND DEGREE ROBBERY.

The final issue relates only to sentencing. The trial court counted two federal bank robbery convictions as equivalent to second degree robbery, yielding an offender score of 12. The defendant claims that these convictions should not be counted.

The federal crime of bank robbery is defined by 18 U.S.C. § 2113(a):

> Whoever, by force and violence, or by intimidation, takes or attempts to take, from the person or presence of another, or obtains or attempts to obtain by extortion any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association
>
> ...
>
> Shall be fined under this title or imprisoned not more than twenty years, or both.

The defendant here pleaded guilty to taking money from two different banks by force, threat, or intimidation. In his plea

statement, he admitted that he used a demand note and took money that did not belong to him. 1 CP 217-25.

The Supreme Court examined this statute in In re Lavery, 154 Wn.2d 249,111 P.3d 837 (2005). The court concluded that the federal crime is not comparable to the Washington crime of robbery. This is because the federal crime requires only "general intent," while the Washington crime requires "specific intent to steal." Id. at 255 ¶ 12.

In the trial court, the State acknowledged this lack of legal comparability. The State nonetheless contended that the two crimes are factually comparable. In determining factual comparability, the court may consider only facts that were admitted, stipulated to, or proved beyond a reasonable doubt. State v. Olsen, 180 Wn.2d 468, 473-74 ¶ 9, 325 P.3d 187, cert. denied, 135 S.Ct. 287 (2014). Here, it does not appear that the defendant admitted or stipulated that he acted with intent to steal. Consequently, the State concedes that the two federal convictions were improperly scored as equivalent to Washington robberies.

The defendant contends that the federal convictions should not be counted for a second reason: the federal element of "intimidation" is purportedly broader than the Washington element

of "threatened use of immediate force, violence, or fear of injury." Although it makes no difference in this case, the court should reject this argument. Federal cases have defined taking by "intimidation" as meaning "wilfully to take by putting in fear of bodily harm." United States v. Alsop, 479 F.2d 65, 66-67 (9th Cir. 1973). The defendant suggests that under the federal statute, the fear need not be "immediate." If a person attempts to take property by threat of future bodily injury, that conduct would constitute first degree extortion. RCW 9A.56.120, RCW 9A.04.110(28)(a); see RCW 9A.56.110 (defining "extortion"). For scoring purposes, there is no difference between first degree extortion and second degree robbery -- both are classified as violent offenses.[2] RCW 9.94A.030(55)(a)(x), (xi). Moreover, since 18 U.S.C. § 2113(a) refers separately to "extortion," it is doubtful whether "intimidation" is properly construed as extending to future threats.

At sentencing, both parties assumed that if the federal convictions were not considered equivalent to robberies, the defendant would have an offender score of 8. This assumption was incorrect. If a federal conviction has no clearly comparable offense

[2] Although irrelevant to this case, both are also "strike" offenses. RCW 9.94A.030(33)(f), (o).

under Washington law, it is scored as a class C felony conviction. RCW 9.94A.525(c). Counting the federal convictions in this manner would reduce the offender score from 12 to 10 – which has the same sentencing range. Nonetheless, the sentencing court might have imposed a lower sentence within the range if it had been aware of the lower offender score. The State therefore agrees that the appropriate remedy is remand for re-sentencing.

The defendant claims that when the federal convictions are counted as class C felonies, they "washed out" and should not be counted. The record does not support this claim. The documents submitted by the prosecutor showed that the defendant was sentenced to 86 months imprisonment on February 27, 2002. CP 195-96, 201-02. Following his release, he was convicted of harassment committed on April 6, 2009. CP 227. Unless he completed an 86-month sentence in less than 26 months (between February 27, 2002 and April 6, 2004), he did not spend 5 years in the community between these convictions. Additionally, the State presented a sworn summary showing that the defendant was confined on the federal charges in April, 2014. CP 66-67. It is, however, unnecessary for this court to determine whether these

convictions "washed out," since that issue can be resolved on remand.

IV. CONCLUSION

The conviction should be affirmed. The case should be remanded for resentencing.

Respectfully submitted on May 18, 2016.

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

THE STATE OF WASHINGTON, Respondent, v. BRYAN R. SASS, Appellant.	No. 73462-8-I DECLARATION OF DOCUMENT FILING AND E-SERVICE

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 18th day of May, 2016, affiant sent via e-mail as an attachment the following document(s) in the above-referenced cause:

BRIEF OF RESPONDENT

I certify that I sent via e-mail a copy of the foregoing document to: The Court of Appeals via Electronic Filing and to Marla L. Zink, Washington Appellate Project, marla@washapp.org; and wapofficemail@washapp.org.

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

Dated this 18th day of May, 2016, at the Snohomish County Office.

Diane K. Kremenich
Legal Assistant/Appeals Unit
Snohomish County Prosecutor's Office