70862-7

70862-7

NO. 70862-7-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

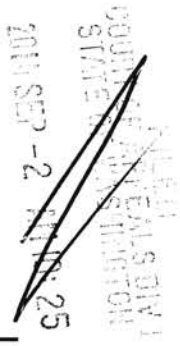
STATE OF WASHINGTON,

Respondent,

v.

NATHANIEL CLARK,

Appellant.



ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

Washington Court of Appeals Decisions

United States Supreme Court Decisions

Federal Court Decisions

United States Constitution

Washington Constitution

Statutes

Court Rules

Other Authorities

A. INTRODUCTION.

John Reynolds walked into two banks one afternoon, leaving one because he was unable to speak to a teller and obtaining money from the second after giving a teller a note to put money in his bag. He did not "hint" he had a weapon. Nathaniel Clark was charged as Mr. Reynolds' accomplice to a robbery and attempted robbery because he drove Mr. Reynolds to these banks. An essential element of robbery is that a person takes money by actual or threatened immediate force, yet neither Mr. Reynolds nor Mr. Clark used, implied, or intended the use of force to take money. The prosecution failed to prove an essential element of robbery and attempted robbery.

Mr. Clark cried during the trial. The prosecution told the jury that his tears were those of a con artist and manipulator. The court overruled the defense objection to using an accused person's behavior during trial as evidence of his character. The State also convinced the court to name some of Mr. Clark's prior convictions in a jury instruction and only limit how the jury could use those convictions. The insufficiency of the evidence and the impropriety of certain arguments and instructions to the jury require reversal of Mr. Clark's convictions for robbery and attempted robbery.

B. ASSIGNMENTS OF ERROR.

1. By failing to prove an essential element of robbery and attempted robbery, the State did not meet its burden of proof.

2. The prosecutor's argument that the jury could use Mr. Clark's behavior during trial as evidence against him violated his rights to be present at trial under Article I, section 22 and the Sixth Amendment as well as his state and federal due process rights to be convicted only upon properly admitted evidence.

3. The court failed to properly instruct the jury the purpose for which it admitted Mr. Clark's prior convictions

4. Instruction 6 improperly 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.

5. The cumulative error resulting from the prosecutor's improper argument about Mr. Clark's credibility and the court's deficient instructions on using Mr. Clark's prior convictions violated his state and federal constitutional rights to a fair trial.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. An essential element of robbery is that the perpetrator uses or threatens immediate force in order to obtain or retain stolen property.

Mr. Reynolds asked to see a teller in one bank, and handed a teller a note to put money into a bag in another bank, but he had no weapon and did not imply he would use force. Without evidence of the threat of immediate force, did the prosecution fail to prove that a robbery or attempted robbery occurred?

2. A jury may rely only on evidence adduced from witnesses or admitted exhibits to determine whether the prosecution has met its burden of proof. The prosecution argued to the jury that tears Mr. Clark shed during trial were more likely due to him being a con artist or manipulator rather than showing his innocence. The court overruled Mr. Clark's objection. Was it improper and prejudicial for the prosecution to encourage the jury to draw negative inferences against Mr. Clark based on his behavior in the courtroom?

3. When a court admits an accused person's prior convictions for dishonesty or other convictions deemed relevant to the accused's credibility, the jury must be directed that those convictions may be used only for assessing the accused's credibility and not for propensity to violate the law. The court's Instruction 6 told the jury that some of Mr. Clark's prior convictions could be used only for weighing his credibility, without limiting the rest of the convictions also elicited for

credibility purposes. Did this incorrect instruction prejudice Mr. Clark when his credibility was the central disputed issue in the case?

D. STATEMENT OF THE CASE.

Nathaniel Clark spent a few days in the Snohomish County jail in early 2012. 8/6/13RP 49-50, 157. While there, he met another detainee, John Reynolds. *Id.* at 48-49. Mr. Reynolds begged Mr. Clark to post bail for him when he was released. *Id.* at 49-50. Mr. Reynolds needed to see a doctor for back surgery. *Id.* Mr. Clark agreed and arranged Mr. Reynolds' release with a bail company. *Id.* at 53, 161-62.

Mr. Reynolds promised to repay Mr. Clark once he was released. 8/6/13RP 53. On February 10, 2012, he asked Mr. Clark to give him a ride to a Banner Bank in Kirkland so he could get money to repay him. *Id.* at 57. He told Mr. Clark that he needed this particular bank because "my mom and my grandma" use this bank. *Id.* Mr. Clark drove him to the bank and waited in his car about one block away. *Id.* at 57-58.

When Mr. Reynolds went to the front door of this Banner Bank, he saw a male employee inside. 8/6/13RP 73. Mr. Reynold thought Banner Banks usually had small staffs of two to three female employees who would be unlikely to challenge him. *Id.* at 73-74.

Instead of entering that bank, Mr. Reynolds walked across the street to a nearby Union Bank. 8/6/13RP 74. As he walked in wearing dark clothes and sunglasses, the bank's employees suspected he intended to steal money. 7/29/13RP 39, 45; 7/31/13RP 15. Union Bank employee Holly Jacobson approached Mr. Reynolds and asked if he had a deposit. 7/29/13RP 42. Mr. Reynolds said yes. *Id.* She offered to take the deposit from him at a desk in the lobby, but he said he would see a teller. *Id.* at 42-43. She repeated her offer. *Id* at 43. Mr. Reynolds motioned to the teller station but instead of taking any other action he turned and left the bank. *Id.*at 44. A surveillance videotape depicts his actions in the bank. Ex. 10.

Mr. Reynolds returned to Mr. Clark's car and said he needed to go to a different Banner Bank. 8/6/13RP 74, 185. He was sitting in the back seat because Mr. Clark had a laptop he used as the car's stereo in the front seat. *Id.* at 58. Mr. Clark found a different bank several miles away and drove Mr. Reynolds there. *Id.* at 186. He parked on the street, not in the bank's lot, because he was unfamiliar with the area. *Id.* at 188.

Mr. Reynolds entered this Banner Bank wearing a white shirt, black pants, black hat and a neck warmer pulled over his mouth. Ex.

19; 7/29/13RP 84. Based on his outfit, the bank's employees suspected he was there to steal money. 7/30/13RP 31, 55, 76. One employee called 911 "purely" due to Mr. Reynold's outfit, even though he had not heard Mr. Reynolds ask for anything. *Id.* at 76. At least one other employee pressed a silent alarm button before he approached any teller. 7/29/13RP 100; 7/30/13RP 31, 55.

Mr. Reynolds walked to teller Jillian Clark's station and handed her a note that "told me to give him money and put it into a zipper bag he had." 7/29/13RP 99. Ms. Clark described Mr. Reynolds as "fairly calm. He didn't hint toward a weapon." *Id.* at 101. Because she had been repeatedly trained not to ask questions and to comply with such requests, she put smaller bills into Mr. Reynolds' bag. *Id.* at 100-01. He asked her, "is that all?" and she said, "no," giving him larger bills as well. *Id.* at 101, 107. Although Ms. Clark was shaking and scared, she "wasn't scared for [her own] safety" and did not have safety concerns generally. *Id.* at 101.

Mr. Reynolds left the bank less than one minute after he entered, running to Mr. Clark's car and telling him to drive away. 8/6/13RP 194; Ex. 19 (video showing Mr. Reynolds inside bank for about 43 seconds). Mr. Clark was on the phone with his girlfriend and did not understand

Mr. Reynolds' urgency until a police car pulled behind them and activated its signal. 8/6/13RP 189, 194. Mr. Clark started to pull over but at Mr. Reynolds' insistence, he fled from the police into rush hour traffic, ultimately hitting several cars and injuring at least one driver before his car came to a stop. *Id.* at 198-200; 7/25/13RP 37-38, 43-47, 117-18; 7/29/13RP 121-23, 130

Once the police arrived, Mr. Clark was cooperative. 7/25/13RP 140; 8/5/13RP 54. He gave a lengthy recorded statement to a detective explaining how he met Mr. Reynolds and what they did together. Ex. 63 (transcribed as Ex. 144).[1] He insisted he did not know Mr. Reynolds intended to steal money from the bank. 8/6/13RP 178-79, 182-85, 188. Mr. Reynolds told the police that Mr. Clark knew what he was doing, but he later explained that this statement to the police was not true. *Id.* at 77-79, 154-55. He pled guilty to several charges, including robbery and attempted robbery, and received a sentence of 171 months in prison. 8/6/13RP 45, 83-84. He refused to implicate Mr. Clark even though the State offered him a lower sentence if he would do so. *Id.* at

[1] Although Ex. 144 is a transcript of Mr. Clark's recorded interview with the detective, the transcript includes some redacted portions. Redactions include pages 11-12 and 29 where there are black markings on the transcript.

45. At Mr. Clark's trial, he testified that he acted on his own, without telling Mr. Clark what he was doing. *Id.* at 46, 71-76.

Mr. Clark was convicted of first degree robbery, attempted first degree robbery, attempting to elude a pursuing police vehicle, and felony hit and run. CP 85. He received a standard range sentence. CP 86, 88.

Pertinent facts are addressed in further detail in the argument sections below.

E. ARGUMENT.

1. **When a person steals or attempts to steal property without threatening immediate force, the prosecution has not proven the essential elements of robbery or attempted robbery**

a. *Robbery requires the prosecution to prove the perpetrator used the threat of immediate force or injury to take another person's property.*

The burden of proving the essential elements of a crime unequivocally rests upon the prosecution. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. Const. amend. 14; Wa. Const. art. I, § 3. Proof beyond a reasonable doubt of all essential elements is an "indispensable" threshold of evidence the State must establish to garner a conviction. *Winship*, 397 U.S. at 364.

To determine whether there is sufficient evidence for a conviction, reasonable inferences are construed in favor of the prosecution but they may not rest on speculation. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); *State v. Green*, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980). "[E]vidence is insufficient to support a verdict where mere speculation, rather than reasonable inference, supports the government's case." *United States v. Nevils*, 598 F.3d 1158, 1167 (9th Cir. 2010). "When intent is an element of the crime" it "may not be inferred from conduct that is 'patently equivocal.'" *State v. Vasquez*, 178 Wn.2d 1, 7, 309 P.3d 318 (2013).

Mr. Clark was charged with one count of first degree robbery and a second count of attempted first degree robbery related to two separate incidents. CP 22-23.

> A person commits robbery when he unlawfully takes personal property from the person of another or in his presence against his will by the use or threatened use of *immediate* force, violence, or fear of injury to that person or his property or the person or property of anyone. Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking; in either of which cases the degree of force is immaterial.

RCW 9A.56.190 (emphasis added). When a robbery occurs "within and against a financial institution," it is elevated to first degree robbery. RCW 9A.56.200.

Robbery is distinguished from theft by the essential element of using or threatening immediate force or injury as the mechanism for wrongfully obtaining property. *See, e.g.,* RCW 9A.56.190; RCW 9A.56.030(1)(b) (defining theft in the first degree as wrongfully taking property "from the person of another" or wrongfully obtaining property worth over $5000). Theft and robbery are penalized in the same chapter of the criminal code. *State v. Tvedt*, 153 Wn.2d 705, 712, 107 P.3d 728 (2005) (citing Laws of 1975, 1st Ex.Sess., ch. 260, §§ 9A.56.010–9A.56.210). Robbery involves a theft but with heightened risk flowing from "actual and threatened force, violence, and injury" used to achieve the taking. *Id.* To establish a robbery, a "forcible taking must occur." *Id.*

Penal statutes are given "a strict and literal interpretation." *State v. Delgado*, 148 Wn.2d 723, 727, 63 P.3d 792 (2003). The court "cannot add words or clauses to an unambiguous statute when the legislature has chosen not to include that language." *Id.* The Legislature purposefully used different language to define the essential elements of these offenses. *Id.* Theft is

committed by wrongfully taking property "from the person of another," or based on its value, while robbery requires not only wrongfully taking property, but also accomplishing it "by the use or threatened use of immediate force, violence, or fear of injury." RCW 9A.56.030; RCW 9A.56.190. These additional elements mark robbery as a more serious offense, subject to increased punishment, and may not be construed as superfluous.

b. *John Reynolds did not use or threaten immediate force, violence, or fear of injury to obtain property from Banner Bank.*

Mr. Reynolds entered Banner Bank wearing black pants, a white shirt, a black beanie, and neck warmer pulled up over his lower face. Ex. 19. His entry alone prompted one bank employee to call 911 and one teller to press the button used to trigger a security alarm. 7/30/14RP 31, 55, 76. These tellers suspected he intended to steal money because of the clothing he wore. *Id.* at 31, 55, 76.

Mr. Reynolds had no weapon and did not "hint" that he might have one. He calmly handed a note to teller Jillian Clark and this note told her to "give him money" and put it into a bag with "no dye packs." 7/29/13RP 99, 109. She complied, giving him smaller bills. *Id.* at 100-01. He asked her if that was all, and she added larger bills. *Id.* at 101. He said to the tellers, "don't press any buttons." *Id.* at 102. He left once he received the money. The

incident lasted less than one minute. When asked if she had safety concerns during the incident, teller Ms. Clark said, "No, I wasn't scared for my safety." *Id.* at 101. She explained that the thief was calm, he "didn't hint toward a weapon" and she had been trained to comply with any such requests without asking questions. *Id.*

A robbery requires some conduct or language by the perpetrator provoking the fear of immediate force or fear of immediate injury. *See State v. Shcherenkov*, 146 Wn.App. 619, 624-25, 191 P.3d 99 (2008). It occurs when there is taking of property "attended with such *circumstances of terror,* or such threatening by *menace, word or gesture* as in common experience is likely to create an apprehension of danger and induce a man to part with property for the safety of his person." *Id.* (quoting *State v. Redmond,* 122 Wash. 392, 393, 210 P. 772 (1922) (emphasis added in *Shcherenkov*).

Although the threat may be communicated indirectly, by gesture or word choice, some affirmative act is required. *See State v. Gallaher,* 24 Wn.App. 819, 821-22, 604 P.2d 185 (1979) (explaining that "threat" in context of robbery requires a threat of "immediate" force).

In *State v. Collinsworth*, 90 Wn.App. 546, 966 P.2d 905 (1997), the court noted that no Washington cases had addressed the evidence necessary to prove robbery "where the defendant does not utilize overt physical or verbal

threats or display a weapon." *Id.* at 552. Due to the absence of state case law, the court turned to federal cases construing the federal bank robbery statute. These federal cases led the court to sweepingly conclude that even when "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 use of force." *Id.* at 553-54.

However, the analysis in *Collinsworth* is misguided. *Collinsworth* relied on federal cases because it viewed the federal statute as "analogous," but it is markedly broader than RCW 9A.56.190. Cases decided after *Collinsworth* unequivocally hold that "the elements of federal bank robbery and robbery under Washington's criminal statutes are not substantially similar" and therefore "are not legally comparable." *In re Pers. Restraint of Lavery*, 154 Wn.2d 249, 255-56, 111 P.3d 837 (2005).

Division Two questioned the logic of *Collinsworth* in *Shcherenkov*, refusing to say whether it agreed with *Collinsworth*'s statement that any demand for money by a person not entitled to it constitutes the implied threat of force. 146 Wn.App. at 626. *Shcherenkov* declined to adopt or endorse *Collinsworth* beyond the general statement that an indirect threat could be sufficient. *Id.* at 628.

Under 18 USC 2113(a), a federal bank robbery occurs when a person "by force and violence, or by intimidation, takes, or attempts to take" property from a bank. It also occurs when a person "enters or attempts to enter any bank, . . . with intent to commit . . . any felony affecting such bank, . . . or any larceny." 18 U.S.C. 2113(a). Although one mode of committing the federal offense is by "intimidation," Washington requires the threat of *immediate force* needed to commit robbery. *Gallaher*, 24 Wn.App. at 821-22. The "immediate" threat required by RCW 9A.56.190 is that the "threatened harm" must be "while the robbery is taking place." *Id.* Based on the differences in the statutes, federal cases do not determine when a robbery occurs under state law.

Mr. Reynolds was "calm" according to the teller. 7/29/13RP 101. He did not fidget, act jittery, or even "hint" that he had a weapon. *Id.* The teller said she "wasn't scared for her safety." *Id.*

Although the teller was scared from the moment she saw Mr. Reynolds enter the bank, a person's general fear about what a "would-be bank robber might do" does not establish reasonable fear of injury even under the broader federal law. *United States v. Thornton*, 539 F.3d 741, 750 (7th Cir. 2008). In *Thornton*, a passerby saw a man opening the door of a bank wearing an obvious disguise and the passerby feared he could be injured because of

his interaction with a man who he presumed was going to rob the bank. *Id.* at 743-44. The court explained that this generalized assumption does not meet the criminal law's requirement of individualized culpability based on actual behavior. *Id.* at 750 (citing *United States v. Wagstaff*, 865 F.2d 626, 629 (4th Cir. 1989)). The prosecution must prove the perpetrator's efforts to induce fear of injury as a means of committing the theft. *Id.*

Similarly to *Thornton*, people who saw Mr. Reynolds enter the bank in his black outfit assumed he was there to steal money. 7/29/13RP 84, 94. Based on his clothing alone, before he said anything or passed his note to the teller, the teller next to Ms. Clark pressed a security button. *Id.* at 100. Branch manager Sean Haugh called 911 "purely based on" Mr. Reynolds' outfit, even though he could not hear anything being said and Mr. Reynolds "seemed very straightforward." 7/30/14RP 76. Wearing suspicious clothes inside a bank does not constitute a threat of immediate force, violence, or injury as required for robbery.

Mr. Reynolds explained that he was not interested in using force to obtain money. 8/6/13RP 73. He selected Banner Bank because he believed they usually had a small staff of female tellers who would simply comply with his request for money. *Id.* When he went to the door of one Banner Bank and

saw a man inside, he left to find a different bank without entering. *Id.* He wanted to take money with as little resistance as possible.

General fear premised on perceptions of how a bank robber might behave impermissibly presumes the threat of immediate violence without regard to individual behavior. Mr. Reynolds was calm and unarmed. He did not encourage fearfulness of immediate injury by drawing on the perception that a bank robber could be armed and dangerous, such as by proclaiming "this is a hold up" or holding a hand near his waist to generate fear he had a weapon.

If the elements of bank robbery were established by a mere demand for money inside a bank, the Legislature would have created a separate element defining bank robbery differently from other robberies. By requiring that an actual robbery occur inside a bank to meet the elements of first degree robbery, the Legislature has not diluted the requirement of an actual threat of immediate force or fear of immediate bodily injury.

Mr. Reynolds did not threaten the immediate use of force or injury to steal the bank's money. He took advantage of bank protocol that directs tellers to comply with requests for money without asking questions. 7/29/13RP 83. While his actions may constitute theft, they do not meet the elements of robbery based on the evidence presented to the jury.

c. *There was insufficient evidence of an attempted robbery at Union Bank.*

About two hours before Mr. Reynolds stole money from Banner Bank, he entered a Union Bank. 7/29/13RP 38. He was wearing black pants with a black jacket and hat. *Id.* at 39; Ex. 10. He wore sunglasses without any face mask. *Id.*

Just as at Banner Bank, his attire alone caused the Union Bank employees to presume he intended to steal money. 7/29/13RP 45; 7/31/13RP 15. Before he said or did anything, a bank employee approached Mr. Reynolds and asked if he had a deposit. 7/29/13RP 42. Mr. Reynolds said, "yes." *Id.* She offered to take the deposit from him at a work desk in the bank lobby. *Id.* This desk did not have a cash drawer like a teller station. *Id.* at 45. Mr. Reynolds hesitated and said he would go to a teller window. *Id.* at 43. She repeated that she could take his deposit at the desk. *Id.* Mr. Reynolds said again he would go to a teller window, but then he turned and left. *Id.* at 43-44. He did not approach the teller desk, did not display a weapon, and did not use threatening words or gestures. Ex. 10.

"To be guilty of attempt, one must act with intent to commit a specific crime. . . .' RCW 9A.28.020(1)." *State v. Johnson*, 173 Wn.2d 895, 901, 270 P.3d 591 (2012). To commit an attempted robbery, the

perpetrator must specifically intend a forcible taking of property, coupled with a substantial step beyond mere preparation. RCW 9A.28.020(1); *see In re Pers. Restraint of Francis*, 170 Wn.2d 517, 524, 242 P.3d 866 (2010).

Mr. Reynolds took a substantial step toward stealing money by entering the bank in a disguise and asking to go to the teller window. But the prosecution did not demonstrate Mr. Reynolds had the required "specific intent" to take property by force or threat of force. *Johnson*, 173 Wn.2d at 905 ("specific intent" of committing charged crime is "the mental state required for criminal attempt"). Although Mr. Reynolds agreed that his plan was to rob the bank, he used the term as a layperson; what he intended was to get money from the bank that did not belong to him but he did not want to use force to take the money and he walked out of two banks when he feared he could not obtain money readily. 8/6/13RP 73-74. The intent to steal money is an attempted theft; it is not an attempted robbery unless accompanied by the specific intent to take money by force or threat of force.

The prosecution does not meet its burden of proof by asking "why else" would someone have entered a bank in a disguise other than intending to forcibly steal property. *See Vasquez*, 178 Wn.2d at 7.

Intent to commit a crime "may not be inferred from conduct that is patently equivocal." *Id.*

In similar situations, the Supreme Court has reversed convictions premised upon speculation about a person's intent without evidence of sufficient conduct demonstrating the person's specific intent. In *State v. Brockob,* 159 Wn.2d 311, 331, 150 P.3d 59 (2006), the court held there is insufficient evidence for a jury to infer that a person intends to manufacture methamphetamine because he shoplifts an illegal amount of pseudoephedrine, a primary ingredient in methamphetamine. While pseudoephedrine is commonly used in making methamphetamine, and the defendant stole an unusually large quantity beyond legitimate personal use, a jury may not simply presume he intended to use it to make methamphetamine. *Id.* at 331-32.

Similarly, the State does not prove that a person in possession of forged identification documents intends to use those documents to defraud others, even though there appears to be no other reason to have such identification cards. *Vasquez.* 178 Wn.2d at 7. Because the intent to defraud is a separate element of the offense, possession of forged documents does not demonstrate the necessary intent to defraud required for forgery.

Likewise, entering a bank in a disguise and asking to see the teller does not satisfy the prosecution's burden of proving the specific intent to steal money by force. Mr. Reynolds did not demonstrate the intent to take property by force or fear. He walked out of two banks when he perceived or surmised he might face resistance from the tellers. 8/6/13RP 73-74. Even when viewing the evidence in the light most favorable to the prosecution, there was insufficient evidence that he intended to steal money from Union Bank by force, which is the necessary *mens rea* required to prove attempted robbery.

d. *The convictions for robbery and attempted robbery must be dismissed due to insufficient evidence.*

Absent proof of every essential element, a conviction must be reversed and the charge dismissed. *State v. Hundley*, 126 Wn.2d 418, 421-22, 895 P.2d 403 (1995). It was essential for the prosecution to establish that either Mr. Reynolds or Mr. Clark committed robbery and attempted robbery of the two banks. Mr. Clark sat in the car, as an alleged getaway driver, so the State needed to prove Mr. Reynolds' actions met the elements of robbery in the first degree of Banner Bank and he specifically intended to commit robbery of Union Bank. Without sufficient proof Mr. Reynolds threatened immediate force or injury in

the case of Banner Bank, or intended to do so when inside Union Bank, both convictions must be reversed.

2. **By using instructions and arguments encouraging the jury to convict Mr. Clark based on his prior convictions and demeanor during trial, he was denied his right to a fair trial.**

The crux of Mr. Clark's defense was that he thought Mr. Reynolds was withdrawing money from the bank legally, not stealing it, as he told the police when arrested and the jury during trial. Although the State bore the burden of proof, the critical question for the jury was whether Mr. Clark's explanation of events was truthful. But the prosecution improperly asked the jury to use his demeanor in the courtroom as evidence of his deceitful character and the court gave confusing, prejudicial instructions to the jury about how they could use Mr. Clark's prior convictions as evidence against him. Due to the importance of Mr. Clark's credibility in persuading the jury he was not an accomplice to Mr. Reynolds, these errors denied him a fair trial.

a. *An accused person's presence or behavior at trial is not evidence that may be used against him.*

Article I, section 22 "explicitly" recognizes a defendant's rights to appear at trial, present a defense, and testify, establishing a broader right to participate in the proceedings than the Sixth Amendment. *State*

v. Martin, 171 Wn.2d 521, 531, 252 P.3d 872 (2011); U.S. Const. amend. 6; Wa. Const. art. I, § 22. These are rights of "great importance." *Id.*

The prosecution may not use its closing argument as the platform for asking the jury to draw negative inferences about the defendant's presence at trial. *Id.* at 535-36. If the prosecution wants to use the defendant's participation in the trial as a mechanism for questioning his credibility, it must elicit such evidence during cross-examination of the defendant. *Id.* During cross-examination, the jury may observe the defendant's demeanor and "determine whether the defendant is exhibiting untrustworthiness." *Id.* at 536. But at other times during the trial, such as closing argument, it is improper for the prosecution to ask the jury to infer that the defendant's behavior in the courtroom is evidence that it may consider against him. *Id.*; *see State v. Klok*, 99 Wn.App. 81, 85, 992 P.2d 1039 (2000).

A defendant's demeanor during trial is not evidence. *State v. Barry,* 179 Wn.App. 175, 178, 317 P.3d 528, *rev. granted*, 180 Wn.2d 1021 (2014). A prosecutor may not "comment on a defendant's demeanor" while in the courtroom, or "invite the jury to draw from it a

negative inference about the defendant's character" from his courtroom behavior. *Klok*, 99 Wn.App. at 85.

In *Klok*, the prosecutor pointed out to the jury during closing argument that the defendant was "the guy who has been laughing through about half of this trial." *Id.* at 82. The defense did not object to the remark. This Court ruled that it was improper for the prosecutor to comment on Mr. Klok's demeanor and to imply that the jury should draw a negative inference about his character from his conduct in the courtroom, although without an objection the court found the error harmless. *Id.* at 85.

In the case at bar, Mr. Clark objected when the prosecutor's closing argument included numerous comments about the tears he shed during trial. 8/7/13RP 105. The prosecutor encouraged the jury to consider his tears as demonstrating he was either a "con artist" or felt sorry only for himself. 8/7/13RP 104-05. Mr. Clark had cried while testifying as well as during other parts of the trial. *Id.* at 106-07. The court overruled Mr. Clark's objection, telling the jury that the "issue of demeanor" was properly before them. *Id.* at 105.

The prosecutor later explained to the court that it would have been improper for him to comment on how Mr. Clark reacted to

testimony during the trial, but he meant his comments to refer to Mr. Clark's testimony at trial. *Id.* at 106. The defense countered that it had not been "clear to the jury at all" that the prosecution was only talking about Mr. Clark's crying while testifying and explained that he had cried during other parts of the trial as well. *Id.* at 107.

The judge said his impression had been that the prosecutor was referring to Mr. Clark's trial testimony and that is why he overruled the objection. *Id.* But the prosecutor never told the jury that he was only referring to Mr. Clark's tears while testifying, as defense counsel pointed out. *Id.* The jury had no way to know that the prosecutor was only referring to Mr. Clark's demeanor during testimony from the prosecutor's argument.

The prosecutor framed his discussion as a general principle that Mr. Clark's tears should be considered "a con job" to "garner sympathy" and make him "look sensitive, damaged, or wronged." 8/7/13RP 105. He did not refer to any particular point in time that Mr. Clark reacted with tears but spoke broadly about how his tears can be construed to negatively reflect his character and his guilt. *Id.* at 104-06. In the course of discussing whether Mr. Clark's tears were a con job or tears for himself, he drew the jury's attention to Mr. Clark's personality

off-the-stand, alluding to the jury's consideration of his character generally and saying "[f]or the other side of his personality, you don't need to just rely on what Mr. Clark said on the stand." *Id.* at 106. Although the prosecutor did not explicitly refer to Mr. Clark's behavior in the courtroom, he acknowledged that the jury would be thinking about "who the real Nathaniel Clark is." *Id.* Neither the prosecutor nor judge told the jury that it may not consider tears he shed while listening to testimony during the trial, even though Mr. Clark objected because Mr. Clark had been crying other parts of the trial as well. I*d.* at 107.

In *Klok*, this Court ruled the prosecutor's reference to the defendant as the guy laughing during trial was improper but not reversible error without an objection. It noted that had the defendant objected and the judge overruled it, the effect would be "legitimizing the improper argument." 99 Wn.App. at 85. Also, the lack of objection showed that the defense attorney, who would be "acutely attuned to perceive the possible prejudice of the prosecutor's remarks," did not seem "unfair or untrue" to the defense. *Id.*

Unlike *Klok*, Mr. Clark objected to the argument about his in-court demeanor. 8/7/13RP 105. He pointed out that it was unfair to comment on his tears during the trial, and he had cried while in the

courtroom, not merely when testifying. *Id.* at 107. By overruling the objection and telling the jury that it was proper to consider Mr. Clark's demeanor without instructing the jury that his demeanor while testifying was the only demeanor in evidence, the court legitimized the prosecutor's efforts to draw negative inferences from Mr. Clark's demeanor during the lengthy trial.

b. *The right to a fair trial includes the right to exclude highly prejudicial evidence that lacks probative value.*

The "constitutional floor" established by the Due Process Clause "clearly requires a fair trial in a fair tribunal" before an unbiased court. *Bracy v. Gramley*, 520 U.S. 899, 904-05, 117 S. Ct. 1793, 1797, 138 L. Ed. 2d 97 (1997); U.S. Const. amend. 14; Wash. Const. art. I, § 3, 21, 22. The right to a fair trial includes the right to be tried for only the offense charged. *State v. Mack*, 80 Wn.2d 19, 21, 490 P.2d 1303 (1971). It also includes the right to present a defense. *Pennsylvania v. Ritchie*, 480 U.S. 39, 56, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987).

Erroneous evidentiary rulings violate due process by depriving the defendant of a fundamentally fair trial. *Estelle v. McGuire*, 502 U.S. 62, 75, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991); *Dowling v. United States*, 493 U.S. 342, 352, 107 L. Ed. 2d 708, 110 S. Ct. 668 (1990)

(improper evidentiary rulings deprive a defendant of due process where it is so unfair as to "violate[ ] fundamental conceptions of justice").

ER 609(a) provides that a witness's prior conviction for a crime of dishonesty is admissible as impeachment evidence.[2] ER 609(a) also permits a court to admit a prior conviction that does not fall within the category of a crime of dishonesty if it determines that the probative value outweighs the prejudicial effect.

Courts must "narrowly construe ER 609(a) because of the danger for injustice associated with admitting evidence of a criminal defendant's past convictions." *State v. Garcia*, 179 Wn.2d 828, 847, 318 P.3d 266 (2014). Evidence of a defendant's prior convictions is "inherently prejudicial" and a defendant will have "well-founded fears" that the admission of such convictions undermines the constitutional right to testify freely in one's defense. *State v. Jones*, 101 Wn.2d 113,

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[2] (a) General Rule. For 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 (1) was punishable by death or imprisonment in excess of 1 year under the law under which the witness was convicted, and the court determines that the probative value of admitting this evidence outweighs the prejudice to the party against whom the evidence is offered, or (2) involved dishonesty or false statement,

120, 677 P.2d 131 (1984), *overruled on other grounds by State v. Brown*, 113 Wn.2d 520, 554, 782 P.2d 1013 (1989). When prior convictions are admitted for impeachment purposes, the court should instruct the jury that "the conviction is admissible only on the issue of the witness' credibility, and, where the defendant is the witness impeached, may not be considered on the issue of guilt." *Brown*, 113 Wn.2d at 29. "Due to the potentially prejudicial nature of prior conviction evidence, these limiting instructions are of critical importance." *Id.*

c. *The court incorrectly instructed the jury on the limited use of the conviction evidence over defense objection.*

Before trial, the prosecution said it intended to use Mr. Clark's two convictions for crimes of dishonesty under ER 609 if he testified. CP 30. It identified these offenses as his 2005 convictions for theft in the third degree and forgery. 7/23/13RP 15; Supp. CP _, sub. no. 88 (State's Trial Memorandum, page 17). But at the outset of the prosecution's cross-examination of Mr. Clark, it told the court it wanted to elicit additional convictions. 8/7/13RP 4, 6. Defense counsel objected and cautioned against the use of Mr. Clark's convictions to

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regardless of the punishment.

argue he was predisposed to acting with criminal intent. *Id.* at 6-7. The judge agreed to admit the convictions because the jury had already heard that Mr. Clark had been in prison before and he was not contesting that he "had a long history of criminal offenses." *Id.* at 6.

Based on this ruling, the prosecution elicited that Mr. Clark not only had convictions from 2005 for theft in the third degree and forgery, but he also had convictions from 2007 of "felony assault in the third degree," possession of stolen property in the second degree, unlawful possession of a firearm in the second degree, and delivery of drugs. 8/7/13RP 9, 11.

At the time this information was elicited, the court did not instruct the jury that this information was admitted only to the extent it affected the jury's assessment of Mr. Clark's credibility. *Id.*

At the close of the case, the court gave an instruction proposed by the prosecution, over defense objection:

> 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).

Objecting to this instruction, Mr. Clark argued that there was no reason to repeat these three convictions by name, because it prejudicially highlighted these convictions. 8/7/13RP 60-61. This instruction did not list or limit how the jury could use Mr. Clark's other convictions of "felony assault," unlawful possession of a firearm in the second degree, and delivery of drugs. 8/7/13RP 9, 11; CP 53.

The court overruled the defense objection because it believed the jury needed to know which offenses were crimes of "dishonesty" as opposed to crimes that "have come in for other purposes." 8/7/13RP 61. For example, the court believed the jury could use the fact that he was at Snohomish County Jail for any purpose, without limitation. *Id.* at 61-62.

The court gave another instruction that "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 that witness, and for no other purpose." CP 54 (Instruction 7). This instruction was intended to apply only to Mr. Reynolds' testimony, not Mr. Clark. 8/7/13RP 62-64.

The jury heard that Mr. Clark was convicted of several serious and even violent-sounding offenses, including "felony" assault and

unlawful possession of a firearm. 8/7/13RP 11. The prosecution did not seek the admission of these convictions to prove a material element of the charged offenses, but rather to challenge Mr. Clark's credibility. As the State conceded, these convictions would not have been admissible had Mr. Clark not testified. *See* 7/23/13RP 15; Supp. CP _, sub. no. 88 (State's Trial Memorandum, page 17); 8/7/13RP 60-61.

ER 609(a) governs the use of prior convictions for purposes of attacking credibility. It is not limited to crimes of dishonesty. *See State v. Russell*, 104 Wn.App. 422, 434, 16 P.3d 664 (2001). Prior convictions that are admitted to challenge a defendant's credibility may not be used "on the issue of guilt" but "only on the issue of the witness' credibility." *Brown*, 113 Wn.2d at 529.

The court instructed the jury that only the certain convictions for crimes of dishonesty were admitted for purposes of assessing Mr. Clark's credibility. CP 53. By highlighting some of Mr. Clark's convictions, and only telling the jury that those convictions could be used to assess his credibility, the jury was left to conclude that the evidence of Mr. Clark's felony assault, unlawful possession of a firearm, and drug delivery were pertinent as substantive evidence. The

jury received no limitations on how it could use these convictions elicited during the State's cross-examination of Mr. Clark.

This instruction was unfair because it highlighted some of Mr. Clark's prior convictions and it did not explain that the purpose of eliciting any of his convictions was to evaluate Mr. Clark's credibility, not to show Mr. Clark was more likely to be a dangerous or violent person due to his criminal history.

d. *Reversal is required.*

Improper arguments made despite defense objection and with the court's endorsement require reversal when "the improper comments caused prejudice." *State v. Lindsay*, 180 Wn.2d 423, 431, 326 P.3d 125 (2014). Instructions that mislead the jury also require reversal when "prejudice is shown by the complaining party." *State v. Aguirre*, 168 Wn.2d 350, 364, 229 P.3d 669 (2010).

How the jury assessed Mr. Clark's explanation of his role in the incident was critical to the outcome of the case. He explained that he did not know that Mr. Reynolds was going to steal money from the bank. Although Mr. Reynolds testified that Mr. Clark did not know about his intent to steal, Mr. Reynolds had told the police the opposite.

By urging the jury to use Mr. Clark's tears as evidence that he is a con artist, or that he feels sorry for himself, the prosecution impermissibly encouraged the jury to use his presence at trial and demeanor during the trial as evidence against him. By listing some of Mr. Clark's prior convictions in Instruction 6, the court highlighted Mr. Clark's criminal history and also implicitly suggested that his other convictions were admitted for purposes other than assessing his credibility. The instruction let the jury infer Mr. Clark's convictions for selling drugs, committing a felony assault, and unlawfully possessing a firearm show he is the type of person who expects his associates to steal money. Due to the importance of weighing Mr. Clark's believability at trial, these errors prejudiced Mr. Clark, requiring reversal of Mr. Clark's convictions for first degree robbery and attempted robbery.[3]

[3] Mr. Clark was also convicted of attempting to elude pursing police officers and hit and run. Although Mr. Clark felt pressured by Mr. Reynolds to commit these actions, Mr. Clark's credibility did not play a significant role in the prosecution for these offenses and it is less likely the improper arguments swayed the jury's assessment in deciding these allegations.

F. CONCLUSION.

Mr. Clark respectfully requests that his convictions be reversed for insufficient evidence. Alternatively, a new trial should be ordered due to the prejudicial effect of the prosecutor's improper arguments and court's erroneous instruction highlighting improperly admitted prior convictions.

DATED this 29th day of August 2014.

Respectfully submitted,

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Attorneys for Appellant

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 70862-7-I
v.	)	
	)	
NATHANIEL CLARK,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 29TH DAY OF AUGUST, 2014, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X] NATHANIEL CLARK 804975 CLALLAM BAY CORRECTIONS CENTER 1830 EAGLE CREST WAY CLALLAM BAY, WA 98326	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 29TH DAY OF AUGUST, 2014.

X_____

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