73462-8

FILED
February 22, 2016
Court of Appeals
Division I
State of Washington

NO. 73462-8-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

BRYAN SASS,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT

Bryan Sass walked into a bank and waited patiently in line. When he was called up to the teller, he quietly asked for money. He did not display a weapon, make a threatening gesture, or utter any threats. He said "I'm here to rob you," and then left the teller station without incident and without any money or property. On his way out of the bank, Mr. Sass also spoke with the assistant manager in a quiet voice, telling him the teller wanted a debit card and that he was confused. During this conversation, Mr. Sass never displayed a weapon, never made a threatening gesture, and never uttered any threats. He had a debit card in his pocket, but he never showed it to the teller.

Mr. Sass's conviction for attempted first degree robbery should be reversed because (1) he never used force or violence and did not threaten any immediate injury and (2) the trial court denied a requested instruction on the lesser-included offense of attempted theft.

B. ASSIGNMENTS OF ERROR

1. Insufficient evidence supports the conviction for attempted robbery in the first degree in violation of Mr. Sass's due process rights.

2. The trial court erred in denying Mr. Sass's request to instruct the jury on the lesser-included offense of first-degree theft.

3. The trial court erred in finding federal bank robbery comparable to Washington's crime of robbery, resulting in a miscalculation of Mr. Sass's offender score.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. To prove attempted first degree robbery in Washington, the State must show beyond a reasonable doubt the use or threatened use of immediate force, violence, or fear of injury. Did the State fail to prove this element where Bryan Sass patiently waited in line for a bank teller, casually approached the teller upon his turn, quietly asked for bills in a particular order, meekly told the teller he was there to "rob" her, made no gestures, kept his hands visible on the counter, and then calmly left the bank when the teller walked away without giving him any money?

2. If a defendant asks the court to instruct the jury on a lesser included offense and the evidence supports conviction only on the lesser offense, the failure to give the instruction violates due process.

Here the trial court applied the incorrect test, found that theft is not a lesser included offense of robbery, and did not instruct the jury as Mr. Sass requested. Did the court's denial of Mr. Sass's request for a lesser included offense instruction deny him due process where theft is a lesser included offense of robbery and the evidence suggested only a theft occurred here?

3. When calculating an offender score at sentencing, prior federal convictions are classified according to the Washington offense to which they are comparable. The trial court found Mr. Sass's prior federal bank robbery convictions comparable to first degree robbery in Washington, but at least two Washington elements are narrower than the federal offense and the factual record for the federal offense does not show the narrower Washington elements were satisfied. Did the trial court err by counting two federal convictions as comparable to first degree robbery, adding four points to Mr. Sass's offender score?

D. STATEMENT OF THE CASE

1. Unarmed and without menacing words or conduct, Bryan Sass asked for money at a bank without proof of an account.

On a warm August day, Bryan Sass entered a Chase bank branch in downtown Everett. 3/23/15 RP 19-21.[1] Mr. Sass waited patiently in line for several minutes. 3/23/15 RP 22, 32-33, 42, 50, 56; Exhibit 4, clip 2 at 00:00-02:30. Teller Djamila Ayouni was working at the drive-through window when Mr. Sass entered the bank. 3/23/15 RP 22. When Ms. Ayouni was done at the drive-through, she started assisting the interior line of customers, calling forward Mr. Sass. 3/23/15 RP 22-23, 42. He walked up to Ms. Ayouni's station and stood there casually, in a manner indistinguishable from the customers next to him. 3/23/15 RP 23; Exhibit 4, clip 2 at 02:30-02:48. In a soft voice, Mr. Sass said, "I need hundreds, fifties, and twenties in this order." 3/23/15 RP 23, 40-41.

Ms. Ayouni thought he was a customer who needed to make a withdrawal, so she asked for a debit card and identification to start

[1] The verbatim report of proceedings is transcribed in several separately-paginated volumes, which are referred to herein by the date of the first hearing transcribed in the volume (e.g., "12/18/14 RP"). The March 23, 2015 Jury Voir Dire Proceedings are referred to as "3/23/15 VD RP."

filling out a withdrawal slip. 3/23/15 RP 23, 42. Mr. Sass responded, "No, ma'am, I came to rob you." 3/23/15 RP 24. When Ms. Ayouni said, "Excuse me?" Mr. Sass repeated the same words. 3/23/15 RP 24. During this entire exchange, Mr. Sass's hands were visible on the counter; he did not make any threats; he did not make any attempts to move towards Ms. Ayouni; he did not make any attempts to grab her; and she did not see any weapons on him. 3/23/15 RP 45; Exhibit 4, clip 4 at 02:27-02:49.

At that point, Ms. Ayouni thought Mr. Sass wanted to take money from her. 3/23/15 RP 24. Her cash drawer was at the drive-through window, so she told Mr. Sass she would be right back, went around the corner to the drive through window, and pressed a silent security button. 3/23/15 RP 25. She had been trained to sound the alarm whenever she suspected "anything." 3/23/15 RP 42-43, 54. Seconds after Ms. Ayouni left, Mr. Sass walked away from the counter unhurriedly. Exhibit 4, clip 2 at 02:43-02:53.

The assistant bank manager, Brent Flagg, first observed Mr. Sass in line; he then saw Mr. Sass walk away from the counter looking "a little confused" after Ms. Ayouni went around the corner. 3/23/15 RP 25, 48-51. Mr. Flagg asked Mr. Sass if he needed any assistance.

3/23/15 RP 51; Exhibit 4, clip 2 at 02:52-03:12. In a quiet voice, Mr. Sass told Mr. Flagg, "she needed a debit." 3/23/15 RP 52, 57. Mr. Flagg asked what Mr. Sass meant, Mr. Sass repeated, "she needed a debit." 3/23/15 RP 52-53. Mr. Flagg told Mr. Sass, "I'm confused" and Mr. Sass said "so was he;" and Mr. Sass exited the bank. 3/23/15 RP 52-53; *see* Exhibit 4, clip 2 at 02:52-03:12. Mr. Flagg did not see a weapon on Mr. Sass or anything in his hands. 3/23/15 RP 58. Mr. Sass did not shout, carry a note, or make any threats. 3/23/15 RP 57. Mr. Flagg simply felt "nervous" based on Mr. Sass's appearance. 3/23/15 RP 58.

Mr. Sass was wearing a surgical mask and light gloves. 3/23/15 RP 21, 44, 46, 50. Although the hood of his sweatshirt was up, it did not mask his appearance—a large tattoo on his neck was clearly visible. 3/23/15 RP 21, 28, 44, 46; *see* Exhibits 8 & 9.

Someone in the branch called the police and Mr. Sass was quickly arrested, identified by his distinctive clothing and large neck tattoo. 3/23/15 RP 27-28, 54-55, 58, 61; Exhibits 8 & 9. Mr. Sass did not have any weapons on him, but he did have a Chase Bank debit card. 3/23/15 RP 70, 77. He told police he went into the bank to inquire about getting a debit card, and that he wore a surgical mask because he

had MRSA (methicillin resistant staphylococcus aureus). 3/23/15 RP 72-75. This diagnosis was confirmed at trial. 3/24/15 RP 9, 12-13.

2. The State charged Mr. Sass with first degree robbery.

Although Mr. Sass had no weapons, used no force or violence, and uttered no threat of the immediate use of force or violence, the State charged Mr. Sass with attempted first degree robbery. CP 309-10, 350-51. At trial, he requested an instruction on the lesser-included offense, attempted theft, which does not require the use of immediate force, violence or fear of injury; the trial court denied the request. CP 274, 280-82, 286, 301-02; 3/24/15 RP 3-8. During deliberations, the jury asked the court for an "additional explanation" of the "'use of immediate force, violence or fear of injury'" element of attempted first degree robbery. CP 262, 272. On agreement of the parties, the court instructed the jury to refer back to its instructions. CP 272; 3/24/15 RP 35.

Mr. Sass was convicted of attempted first degree robbery (RCW 9A.28.020; RCW 9A.56.200), from which he appeals. CP 2-14, 119-29; 252. At his sentencing hearing, the State argued two prior federal bank robbery convictions under 18 U.S.C. § 2113(a) were comparable to Washington's first degree robbery offense for purposes of

calculating Mr. Sass's offender score. CP 138; 5/18/15 RP 2-3, 6. Mr. Sass objected because the federal statute is broader and the facts pled and proved in the federal convictions do not show that the convictions fit the narrower Washington offense. CP 130-34; 5/18/15 RP 3-5. The sentencing court found the prior offenses comparable. CP 120-21; 5/18/15 RP 7-8. The court imposed only "mandatory" legal financial obligations. CP 121, 124.

E. ARGUMENT

1. Where Mr. Sass merely asked for money and quietly stated he was there to rob the teller without any physical or verbal indication he was armed or intended harm, the evidence of violence, fear of injury or a threat of immediate violence is insufficient to sustain the conviction.

Mr. Sass can only be convicted of attempted first degree robbery if the State proves every element of the crime beyond a reasonable doubt. *Blakely v. Washington*, 542 U.S. 296, 300-01, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004); *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).

On a challenge to the sufficiency of the evidence, this Court must reverse a conviction when, after viewing the evidence in the light most favorable to the prosecution, no rational trier of fact could have

found all the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); *State v. Drum*, 168 Wn.2d 23, 34-35, 225 P.3d 237 (2010).

a. To prove robbery in the first degree, the State must show violence, fear of injury, or immediate threat beyond a reasonable doubt.

"A person commits robbery when he or she unlawfully takes personal property from the person of another or in his or her presence against his or her will by the use or threatened use of immediate force, violence, or fear of injury to that person or his or her property or the person or property of anyone." RCW 9A.56.190 (emphasis added). "Robbery encompasses any 'taking of . . . property [that is] 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.'" *State v. Shcherenkov*, 146 Wn. App. 619, 191 P.3d 99 (2008) (alterations in original) (quoting *State v. Redmond*, 122 Wash. 392, 393, 210 P. 772 (1922)). This element distinguishes robbery from theft. *Compare* RCW 9A.56.190 *with* RCW 9A.56.020; RCW 9A.56.030(1)(b). Because the State charged Mr. Sass with attempted

robbery in the first degree, it had to show he had the specific intent to commit first degree robbery. RCW 9A.28.020(1); *see State v. Johnson*, 173 Wn.2d 895, 901, 270 P.3d 591 (2012).

b. Mr. Sass's actions and words, calmly waiting in line for a teller and quietly requesting funds, did not amount to violence, fear of injury, or a threat of immediate harm.

Absent the use or threatened use of immediate force, violence or fear of injury, a robbery conviction cannot stand. *State v. Farnsworth*, 184 Wn. App. 305, 348 P.3d 759 (2014), *review granted* 183 Wn.2d 1001 (2015) (oral arg. heard Oct. 22, 2015). In *Farnsworth*, the evidence was insufficient where McFarland, wearing a wig and sunglasses, simply handed over a note instructing the teller to "put the money in the bag." *Id*. at 307, 312. "McFarland did not insinuate that he would take further action if the teller did not comply with the note's instructions." *Id*. at 312. There were no threats or use of violence. *Id*. There was no evidence that McFarland was armed or that anyone believed him to be armed. *Id*. The bank tellers complied with McFarland's demand note and McFarland even said "Thank you" after receiving the money. *Id*. This Court held the evidence insufficient to support a conviction for robbery. *Id*. at 314.

On the other hand, this Court has upheld convictions where there is an actual showing of the threatened use of immediate force, fear or injury. In *Shcherenkov*, the evidence of an immediate threat was sufficient where the defendant had his hand in his pocket causing tellers to believe he had a gun while saying "This is a robbery." *Shcherenkov*, 146 Wn. App. at 624-25. In *State v. Collinsworth*, the nervous-appearing defendant used a direct, demanding and serious voice, and the tellers testified they felt personally threatened or feared for the immediate safety of others. 90 Wn. App 546, 548-50, 966 P.2d 905 (1997). The unchallenged findings included that the tellers were fearful of immediate injury. *Id*. at 554. Most of the tellers also believed the defendant was armed. *Id*. at 549-50.[2] Although our Supreme Court's recent decision in *State v. Witherspoon* did not involve a bank robbery, the court found sufficient evidence of immediate threat of harm where the defendant had one hand behind his

[2] To determine the sufficiency of the evidence of threatened use of immediate force under Washington law, the *Collinsworth* court looked to federal decisions interpreting the federal bank robbery statute. 90 Wn. App. at 552. However, as set forth in Section Three below, the offenses are defined differently under Washington and federal law on this very element. Accordingly, in light of the facts of this case, federal case law is inapposite.

back and told the victim he had a pistol. *State v. Witherspoon*, 180 Wn.2d 875, 885, 329 P.3d 888, 893 (2014).

In the light most favorable to the State, the evidence here shows only that after patiently waiting in line, Mr. Sass said, in a calm, quiet voice, "I need hundreds, fifties, and twenties in this order." *E.g.*, 3/23/15 RP 23, 41, 42, 56; Exhibit 4, clip 2. The teller then asked Mr. Sass for his bank card and identification, to which he responded quietly, "No, ma'am, I came to rob you." 3/23/15 RP 23-24, 41. Mr. Sass did not have a weapon of any type. He did not use a demand note. He did not make any threatening or suggestive gestures. He did not act threateningly or menacingly. 3/23/15 RP 45, 57-58; 5/18/15 RP 10 (at sentencing, court notes Sass demonstrated no oral intimidation or aggressiveness); Exhibit 4, clips 2, 4. The State did not show that Mr. Sass acted with specific intent to commit a first degree robbery.

Although Ms. Ayouni testified she was "scared" that Mr. Sass was there to "rob" her, she did not say she was fearful of any immediate injury or use of force. 3/23/15 RP 39. Mr. Sass had waited patiently in line for several minutes, and stood at the counter casually, in a manner indistinguishable from the three other customers at the teller counter. Exhibit 4, clip 2 at 02:30-02:48. Mr. Sass had the same

calm, casual demeanor when he responded to Mr. Flagg on his unremarkable way out of the bank. 3/23/15 RP 51-53, 57-58; Exhibit 4, clip 2 at 02:53-03:12.

At trial, the prosecutor argued Mr. Sass intimidated Ms. Ayouni with his clothing, by "demanding" money, and by saying, "I'm here to rob you." 3/24/15 RP 19-21. This argument demonstrates the insufficiency of the State's evidence because intimidation is not adequate to satisfy Washington's robbery offense. *United States v. Bingham*, 628 F.2d 548, 549 (9th Cir. 1980); *see* Section 3, *infra*. Likewise, Mr. Sass's use of the word "rob" without any attending physical or verbal behavior does not communicate the "intent to cause bodily injury, to damage property, or to physically confine or restrain another person." *Farnsworth*, 184 Wn. App. at 310 (citing RCW 9A.04.110(28)(a)-(c)). An individual's use of the word "rob" does not necessarily, or even probably, connote our state's particular definition of the offense. *Farnsworth*, 184 Wn. App. at 310 n.5. The common definition of "rob" infrequently includes the use of unlawful force or threat of injury. Dictionary.com, http://dictionary.reference. com (last visited Feb. 8, 2016) (listing definitions, most of which do not include the use of force or threat of injury). As this Court has noted, "It is a

colloquialism similar to people saying their house was robbed when they really meant it was burglarized." *Farnsworth*, 184 Wn. App. at 310 n.5.

This case is therefore more like *Farnsworth* than like *Collinsworth* or *Shcherenkov*. The evidence is insufficient to show the element of use or threatened use of immediate force, fear or injury, where Mr. Sass asked for denominations in a calm, casual, quiet demeanor, said he was there to "rob" but then left of his own volition without making any threats, without gesturing, and without using force.

c. Because the State failed to prove Mr. Sass used or threatened to use immediate force, violence, or fear of injury, the conviction must be reversed and the charge dismissed with prejudice.

The absence of proof of an element beyond a reasonable doubt requires dismissal of the conviction and charge. *E.g., Jackson*, 443 U.S. at 319; *State v. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980). The Double Jeopardy Clause of the Fifth Amendment bars retrial of a case dismissed for insufficient evidence. *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969), *reversed on other grounds by Alabama v. Smith*, 490 U.S. 794, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989). Because the State failed to prove Mr. Sass used or threatened to use immediate force, violence, or fear of injury, the

Court should reverse the conviction and dismiss the charge with prejudice.

2. The conviction should be reversed because the trial court erroneously denied Mr. Sass an instruction on the lesser included offense of attempted first degree theft.

Even if the Court finds sufficient evidence, Mr. Sass is entitled to a new trial because the trial court erroneously denied him a requested instruction on attempted theft in the first degree, a lesser included offense of attempted first degree robbery. 3/24/15 RP 3-8; CP 280-82, 286 (Sass's requested lesser offense instructions).

a. When requested by the defendant, a court must instruct the jury on a lesser included offense supported by the evidence.

Generally, an accused may only be convicted of offenses contained in the indictment or information. *Schmuck v. United States*, 489 U.S. 705, 717-18, 109 S. Ct. 2091, 103 L. Ed. 734 (1989). Pursuant to statute, however, an accused "may be found guilty of an offense the commission of which is necessarily included within that with which he is charged in the indictment or information." RCW 10.61.006. The failure to instruct the jury on a lesser offense, where the evidence might allow the jury to convict the defendant of only the

lesser offense, violates the Fourteenth Amendment. *Beck v. Alabama*, 447 U.S. 625, 636-38, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980).

b. First degree theft is a lesser included offense of robbery in the first degree.

Where requested, an accused is entitled to an instruction on a lesser-included offense where: (1) each element of the lesser offense must necessarily be proved to establish the greater offense as charged (legal prong); and (2) viewed in the light most favorable to the defendant, the evidence in the case supports an inference that the lesser offense was committed (factual prong). *State v. Berlin*, 133 Wn.2d 541, 548, 947 P.2d 700 (1997) (overruling *State v. Lucky*, 128 Wn.2d 727, 912 P.2d 483 (1996)); *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978).

In *Berlin* it was settled that the legal comparability of the lesser-included offense must be tested against the crime as charged, not as set forth in the statute. 133 Wn.2d 541. In adopting this test, the Court rejected the notion that a lesser included offense must take into account all the alternative means of satisfying the greater offense. The Court first considered the history of the lesser-included offense doctrine as it existed at common law:

> This rule originally developed as an aid to the prosecution when the evidence introduced at trial failed to establish an element of the crime charged. Thus, the rule gave the prosecution the flexibility to instruct the jury consistent with the evidence actually presented. The rule also benefited the defendant by providing a third alternative to either conviction for the offense charged or acquittal. Thus, the rule allowed the defendant to instruct the jury on an alternative theory of the case, a lesser crime than that charged by the State.

Berlin, 133 Wn.2d at 544-45 (citing *Beck*, 447 U.S. at 633).

The court next reviewed its own decision in *Lucky* and found it erroneous, in pertinent part, because it "virtually eliminate[d] the Legislature's codification of a common-law rule," and was inequitable to both the prosecution and the defense in that it "preclude[d] a lesser included offense instruction whenever a crime may be statutorily committed by alternative means." *Berlin*, 133 Wn.2d at 547. The court accordingly held,

> Only when the lesser included offense analysis is applied to the offenses <u>as charged and prosecuted, rather than to the offenses as they broadly appear in statute</u>, can both the requirements of constitutional notice and the ability to argue a theory of the case be met. This is fair to both the prosecution and the defense.

Id. at 548 (emphasis added).

In short, when analyzing the legal prong for a lesser-included offense, a court need not consider all the alternative statutory means of

committing the crime. *Id*. at 548. Rather, the court should apply the *Workman* test to the offense as charged and prosecuted, not as the offense may be broadly set forth in the statute. *Id*. at 547-48.

In applying the factual prong of the *Workman* test, a court must view the supporting evidence in the light most favorable to the party requesting the instruction. *State v. Fernandez-Medina*, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000). The instruction should be given "[i]f the evidence would permit a jury to rationally find a defendant guilty of the lesser offense and acquit him of the greater." *State v. Warden*, 133 Wn.2d 559, 563, 947 P.2d 708 (1997) (citing *Beck*, 447 U.S. at 635).

Theft in the first degree is legally a lesser included offense of first degree robbery. Every element of theft is a necessary element of robbery. To prove first degree robbery as charged here, the State had to show (among other things) that Mr. Sass attempted to unlawfully take property from a person or in the presence of another, and that he intended to commit theft of the property. CP 262 (to-convict instruction). These are the same elements the jury would have had to find to convict Mr. Sass of attempted first degree theft. CP 281.

That theft is a lesser included offense of robbery has been made clear in several cases. In *Farnsworth*, the trial court provided an

instruction on theft in the first degree where the defendant was charged with robbery. 184 Wn. App. at 308. Furthermore, in *State v. Witherspoon*, our Supreme Court considered whether it was ineffective assistance of trial counsel not to request a lesser included theft instruction on robbery charges. 180 Wn.2d at 886-87. Although the Court rejected the ineffective assistance claim, it did apparently accept that theft is a lesser included offense of robbery. *Id.* (finding decision not to request lesser was a prudent tactical decision); *accord Shcherenkov*, 146 Wn. App. at 630 n.4 (treating first-degree theft as a lesser-included offense of first-degree robbery, but rejecting appellant's factual basis for a lesser-included instruction); *State v. O'Connell*, 137 Wn. App. 81, 95, 152 P.3d 349 (2007) (same); *see also State v. Herrera*, 95 Wn. App. 328, 330, 977 P.2d 12 (1999) (party concedes theft is lesser included of robbery); *State v. McKague*, 172 Wn.2d 802, 804, 262 P.3d 1225 (2011) (jury instructed on third degree theft as a lesser included offense of first degree robbery).

Where the facts in the light most favorable to the moving party would permit a jury to find the defendant guilty of theft rather than robbery, the instruction must be given.

c. The trial court denied Mr. Sass's requested instruction on first degree theft because it applied an overruled legal test.

The trial court denied Mr. Sass an instruction on theft in the first degree because it applied the outdated legal test and determined theft was not a lesser included offense of robbery. This decision was wrong.

On Mr. Sass's request for the instruction, the court relied on *State v. Roche*, 75 Wn. App. 500, 878 P.2d 497 (1994). *Roche* held that theft is not a lesser included offense of robbery, because robbery can be committed by the alternative means of taking property in the presence of a person, not simply from the person, as required for theft. 3/24/15 RP 5. The trial court's reliance on *Roche* is misplaced. That decision relies on the alternative means test our Supreme Court overruled in *Berlin*. As set forth above, theft is a lesser included offense of robbery under the legal prong of the *Workman* test. The court's ruling was legally erroneous.

The facts here, moreover, support the giving of a theft instruction. The jury could rationally interpret the evidence as showing Mr. Sass intended to deprive the bank of its property when he requested money without presenting any account information. The jury could also find he took a substantial step toward wrongfully taking property from the bank when he walked in and when he asked the teller for

money. Likewise, the jury could also not have found that Mr. Sass acted or attempted to act with violence, fear or threats. That is the distinction between attempted theft and attempted robbery presented here. The factual prong of the *Workman* test is also satisfied.

The trial court erred when it denied Mr. Sass's instructions.

d. The improper denial of the first degree theft instruction requires reversal and remand for a new trial.

Failure to give a proposed instruction on a defense that is supported by evidence in the record is reversible error. *State v. Stevens*, 158 Wn.2d 304, 310, 143 P.3d 817 (2006); *State v. Griffin*, 100 Wn.2d 417, 420, 670 P.2d 265 (1983).

In the face of a request for a lesser offense instruction, reversal is required where jurors are given an all-or-nothing choice. *Beck*, 447 U.S. at 634; *Keeble v. United States*, 412 U.S. 205, 212-13, 93 S. Ct. 1993, 36 L. Ed. 2d 844 (1973).

Here, the jury was given an all-or-nothing choice, despite Mr. Sass's request for an instruction of theft in the first degree. The requested instruction was legally proper under the first prong of the *Workman* test, as set forth above. It was also factually supported by the evidence. As discussed in section one, above, the evidence that Mr. Sass acted in a violent or threatening manner was lacking. The jury

could have found the evidence sufficient to show an attempt to deprive the bank of its property but insufficient to prove the greater attempted robbery offense. Even absent the lesser included offense instruction, the jury's question for "additional explanation" on the "'use of immediate force, violence or fear of injury'" element demonstrates the evidence might have factually supported only an attempted theft conviction. CP 272.

The trial court's refusal to provide the instruction consequently requires reversal.

3. Mr. Sass's offender score was miscalculated because prior federal bank robbery convictions are not legally or factually comparable to first degree robbery in Washington.

Over Mr. Sass's objection, the trial court found two prior federal bank robbery convictions comparable to first degree robbery in Washington, increasing Mr. Sass's offender score by four points. CP 120-21, 130-34, 137-42; 5/18/15 RP 2-8; RCW 9.94A.030(55)(a)(i) (class A felony is categorized as a "violent offense"); RCW 9.94A.525(3), (8) (comparability provision; prior violent offense convictions count as two points when current offense is also violent offense). The trial court erred because the federal bank robbery statute is legally broader than Washington's first degree robbery statute, and

the proven facts of the prior offenses do not support the narrower elements that would satisfy this state's statute.

It is uncontroverted that federal bank robbery is not legally comparable to first degree robbery in Washington. *In re Personal Restraint of Lavery*, 154 Wn.2d 249, 255, 111 P.3d 837 (2005); *State v. Freeburg*, 120 Wn. App. 192, 197, 84 P.3d 292 (2004). This is because the federal offense is a general intent crime, whereas the Washington offense requires a showing of specific intent to steal. *Lavery*, 154 Wn.2d at 255; *Freeburg*, 120 Wn. App. at 197.

Our statute is also narrower than the federal offense because it requires "the use or threatened use of immediate force, violence, or fear of injury." RCW 9A.56.190. The 'intimidation' element of 18 U.S.C. § 2113(a) is not equivalent to the threat of immediate force essential to commit robbery in Washington. Intimidation is satisfied by a lesser showing: that a reasonable person would feel in fear of bodily harm. *United States v. Bingham*, 628 F.2d 548, 549 (9th Cir. 1980). To commit robbery under RCW 9A.56.190, on the other hand, the threat must be temporally "immediate" and must communicate that the force or violence will occur "while the robbery is taking place." *State v. Gallaher*, 24 Wn. App. 819, 822, 604 P.2d 185 (1979). Washington's

statute requires an affirmative communication by word or gesture displaying intent to use immediate force or violence or to cause injury. *Shcherenkov*, 146 Wn. App. at 625. Washington also requires a serious expression of intent to carry out the threat. *Id.*; *see State v. France*, 180 Wn.2d 809, 818, 329 P.3d 864 (2014).

Because the federal statute is broader than the Washington offense in these two regards, Mr. Sass's prior federal convictions can be included in his offender score only if facts sufficient to satisfy Washington's narrower elements are proved in the record supplied by the State. *State v. Hunley*, 175 Wn.2d 901, 917-18, 287 P.3d 584 (2012). The factual record here is insufficient as to both the intent and the "use or threatened use of immediate force, violence or fear of injury" element.

As to the specific intent to steal, Mr. Sass only pled that he "robbed" the bank "by giving a demand note to the teller and taking money that did not belong to me." CP 224. The content of the demand note is not in the record, and was not admitted by Mr. Sass. Although he admitted the money did not belong to him, he did not indicate an intent to permanently deprive the bank of that property. *See id.* Nothing in the record shows it was proved in the prior convictions that

Mr. Sass intended to permanently deprive the banks of the property. That record was required in order to count these prior convictions as comparable to first degree bank robbery.

The record also does not show the use or threatened use of immediate force, violence or fear of injury. As noted, Mr. Sass merely admitted to using a demand note; the contents of that note are not contained in the record. CP 224. The federal offense allows Mr. Sass to be convicted under broader circumstances, including the use of intimidation. *Compare, e.g.*, *Bingham*, 628 F.2d at 549 *with Gallaher*, 24 Wn. App. at 822; *Shcherenkov*, 146 Wn. App. at 625; *France*, 180 Wn.2d at 818. The record does not show that Mr. Sass's federal offenses were based on conduct that fit the narrower Washington offense.

Because the prior federal offenses are neither legally nor factually comparable to first degree robbery, they cannot be included in Mr. Sass's offender score. RCW 9.94A.525(3) (foreign conviction included only if comparable, there is no clearly comparable state offense, or subject to exclusive federal jurisdiction). Even if the federal offenses can be categorized as class C offenses for purposes of the offender score, they wash out and cannot be included under RCW

9.94A.525(2)(c). *See* RCW 9.94A.525(3) ("If there is no clearly comparable offense under Washington law or the offense is one that is usually considered subject to exclusive federal jurisdiction, the offense shall be scored as a class C felony equivalent if it was a felony under the relevant federal statute.").

Mr. Sass was sentenced to the federal offenses on February 27, 2002. CP 140, 195, 211. He then spent more than five years without being convicted of another crime. *See* CP 140-41. The State did not prove when he was released from confinement on the federal convictions. CP 140-239 (sentencing documents do not show release date); *see* 3/23/15 RP 10-11 (pretrial, State did not know release date); *Hunley*, 175 Wn.2d at 917-18 (State's burden to prove facts supporting offender score). Accordingly, these federal convictions wash out and must not be included in Mr. Sass's offender score.

If the conviction is not overturned for insufficiency or the failure to provide the lesser offense instruction, the sentence should be stricken and remanded for resentencing under the proper offender score calculation.

F. CONCLUSION

The conviction should be reversed and the charges dismissed because the State failed to prove that Mr. Sass used or threatened to use immediate force, violence, or fear of injury. Alternatively, the trial court erred when it failed to provide the jury with instructions on the lesser offense of attempted theft in the first degree.

However, if the convictions are affirmed, the sentence should be stricken and remanded because the court improperly included in the offender score two prior federal offenses that are not legally or factual comparable.

Finally, in the unlikely event the State is the substantially prevailing party on appeal, this Court should exercise its discretion and decline to award costs because Mr. Sass is indigent and does not and likely will not have the ability to pay. RAP 1.2(a), (c), 14, 15.2(f); *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015); *State v. Sinclair*, __ Wn. App. __, 2016 WL 393719, *2-7 (Jan. 27, 2016); *see* RCW 10.01.160(3); GR 34(a).

DATED this 22nd day of February, 2016.

Respectfully submitted,

s/ Marla L. Zink _____
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Washington Appellate Project
Attorney for Appellant

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

STATE OF WASHINGTON, Respondent,	)	NO. 73462-8-I
BRYAN SASS, Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 22ND DAY OF FEBRUARY, 2016, 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]	SETH FINE, DPA [sfine@snoco.org] [sfine@co.snohomish.wa.us] SNOHOMISH COUNTY PROSECUTOR'S OFFICE 3000 ROCKEFELLER EVERETT, WA 98201	( ) ( ) (X)	U.S. MAIL HAND DELIVERY AGREED E-SERVICE VIA COA PORTAL
[X]	BRYAN SASS 707483 WASHINGTON STATE PENITENTIARY 1313 N 13TH AVE WALLA WALLA, WA 99362	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON, THIS 22ND DAY OF FEBRUARY, 2016.

X_____

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