

original

No. 35825-5-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

VLADIMIR N. SHCHERENKOV,

Appellant.

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DIVISION II
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STATE OF WASHINGTON
BY *[Signature]*
DEPUTY

On Appeal from the Pierce County Superior Court
Cause Nos. 06-1-00164-0 & 06-1-00206-9
The Honorable Linda CJ Lee, Judge

OPENING BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

A. Assignments of Error

1. The trial court erred when it told the jury in Instruction 9 that it could convict Appellant of robbery based only on an “implied” threat of force.
2. Trial counsel provided ineffective assistance when he failed to request that the jury be instructed on the lesser included offense of first degree robbery.
3. In convicting Appellant of first degree robbery, the State failed to present sufficient evidence to establish beyond a reasonable doubt the required element of force or threatened use of force.

B. Issues Pertaining to the Assignments of Error

1. Was Division 1 incorrect when it held for the first time in Washington case history that the State need only prove that a defendant made an “implied” threat in order to convict for first degree robbery of a financial institution, thereby creating essentially strict liability for robbery when one commits face-to-face theft inside a bank? (Assignment of Error 1)
2. Did the trial court’s Instruction 9 relieve the State of its burden of proving the statutorily required element of force or

threatened use of force, by allowing the jury to convict if it found merely an “implied” threat of force? (Assignment of Error 1)

3. Is first degree theft a lesser included offense of first degree robbery? (Assignment of Error 2)
4. Was trial counsel’s representation ineffective when he failed to request a first degree theft instruction on the mistaken belief that it was not a lesser included offense of first degree robbery? (Assignment of Error 2)
5. Was Appellant prejudiced by trial counsel’s failure to request a lesser included offense instruction, where the jury struggled with the one element that differentiates first degree robbery and first degree theft? (Assignment of Error 2)
6. Where Appellant made no overt threats or threatening gestures, did not display a weapon, and remained calm, did the State fail to present sufficient evidence to establish beyond a reasonable doubt that Appellant used force, a threat of force or fear of injury, a required element of first degree robbery? (Assignment of Error 3)

II. STATEMENT OF THE CASE

A. Procedural History

The State charged Vladimir N. Shcherenkov by Information with four counts of first degree robbery against a financial institution, pursuant to RCW 9A.56.190, 9A.56.200(1)(b), RCW 7.88.010. (CP 1-2, 196)¹ The charges stemmed from four robberies at different banks in and around Pierce County during December of 2005 and January of 2006. (CP 1-3, 196-97) The State alleged that Shcherenkov took money from the banks by “use or threatened use of immediate force, violence, or fear of injury” to the banks’ employees or customers. (CP 1-2, 196)

Over objection, the trial court instructed the jury that it could find that Shcherenkov’s actions “implied” the threatened use of force or violence. (RP6 810-15, 825-26, 829-30; CP 144, 275) Defense counsel did not request any lesser included offense instructions. (RP6 717-18) A jury convicted Shcherenkov as charged. (CP 158-60, 289; RP9 896-97)² The trial court imposed a

¹ The four incidents were originally charged under two different cause numbers, but were later consolidated for trial and for appeal. (CP 1-2, 196, 75-76, 206-07)

² Citations to the pretrial hearings will be to the date of the proceeding followed by the page number. Citations to the trial proceedings contained in volumes numbered 1 through 10 will be to the volume number followed by the page number.

standard range sentence totaling 84 months of confinement. (CP 179, 181, 303, 305; RP10 916) This appeal timely follows. (CP 164, 290)

B. Substantive Facts

1. *Wells Fargo Bank*

On December 22, 2005, Shcherenkov entered a Tacoma branch of Wells Fargo Bank and approached teller Linda Masten. (RP3 346, 347, 350, 351) Masten testified that Shcherenkov had a note in his hand, which he held up for her to read. (RP3 351-52) She did not read the entire note, but she remembers that it said in part: "Please be calm. This is a robbery." (RP3 353) Because Wells Fargo Bank trains all tellers to comply with any demands for money, Masten reached into her till and took out a handful of bills, then handed them to Shcherenkov. (RP3 357) Shcherenkov left the bank, and Masten alerted her supervisor. (RP3 357)

Masten testified that during the incident Shcherenkov behaved calmly, and did not say anything or make any physical movements. (RP3 354-55) He held the note in both hands, but at some point Masten heard his cell phone make a noise and saw Shcherenkov reach into his pocket and silence it. (RP3 356, 365) Masten testified that Shcherenkov neither used nor overtly

threatened to use force or violence. (RP3 364) Masten was nevertheless afraid because she knew from her training that these situations can sometimes turn violent. (RP3 354)

2. *Columbia Bank*

On January 3, 2006, Shcherenkov entered a Lakewood branch of Columbia Bank and approached teller Crystal Jackson. (RP4 452, 453, 458) Shcherenkov had one hand in his pocket, and with the other hand he put a piece of paper on the counter. (RP4 459, 460) A note written on the paper read: "Stay calm. This is a robbery. Put \$3000 in envelopes." (RP4 460) Because Jackson had also been trained to comply with all demands for money, she put a stack of bills into an envelope and gave it to Shcherenkov. (RP4 4621, 462) Shcherenkov took the envelope and calmly walked out of the bank. (RP4 461, 464)

Jackson also testified that Shcherenkov did not threaten to use force or violence. (RP4 478) But he kept one hand in his pocket, which made her feel threatened. (RP4 464, 478) Her fear stemmed more from what she had learned in her security training, rather than anything specific that Shcherenkov did. (RP4 480)

3. *Key Bank*

On January 6, 2006, Shcherenkov entered a Tacoma branch

of Key Bank and approached teller Deborah Chase. (RP5 571, 576, 561) Shcherenkov took both hands out of his pockets and placed a note on the counter, which read: "This is a robbery. Put \$3000 in an envelope." (RP5 583-84) Shcherenkov kept both hands on the note, and did not speak. (RP5 583, 587) Chase had also been trained to comply with demands for money, so she handed Shcherenkov some cash, and he left the branch. (RP5 586, 588) She did not consider Shcherenkov's behavior to be threatening. (RP5 597)

4. *Rainier Pacific Bank*

On January 9, 2006, Shcherenkov entered a Puyallup branch of Rainier Pacific Bank and approached teller Tanya James. (RP5 658, 665) Shcherenkov had his hands in his pockets, but James noticed nothing unusual and was not concerned. (RP5 665, 666, 667) Shcherenkov put a note on the counter, which read: "Place \$4000 in an envelope. Do not make any sudden moves or actions. I will be watching you." (RP5 669) James complied because she had also been trained to do so, and gave money to Shcherenkov. (RP5 670) He took the money, and left the branch. (RP671)

James was concerned that Shcherenkov might have a

weapon because he said he was watching her. (RP5 674) But she testified that Shcherenkov did not threaten to use violence, and did not make any threatening physical gestures. (RP5 676)

5. *Additional Facts*

Other bank employees and customers testified they were completely unaware of the incidents until notified by the tellers afterwards, and they noticed nothing disturbing or threatening about Shcherenkov or his behavior. (RP4 387-88, 400, 433, 438, 443; RP5 609, 613, 622, 686, 688)

Based on images taken by the banks' security cameras, a Crimestoppers tip, and witness photo identifications, police focused their investigation on Shcherenkov. (RP4 514-16, 520; RP6 731-32, 733, 757-58, 759) Police arrested Shcherenkov on January 12, 2006, and he confessed during questioning. (RP5 534, 539-40; RP6 740, 781, 787-88)

III. ARGUMENT & AUTHORITIES

A. The trial court's Instruction 9 relieved the State of its burden of proving the element of force or threatened use of force.

1. *Robbery Law & Jury Instruction Number 9*

The State charged Shcherenkov with first degree robbery under RCW 9A.56.200(1)(b), which criminalizes a robbery "within

and against a financial institution.” (CP 1-2, 196) Robbery is defined by statute as the taking of personal property from another person:

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. Therefore, to prove a robbery has been committed, the State must establish that property was illegally taken and that the defendant used or threatened to use force.

RCW 9A.56.190.

In this case, the trial court modified the statutory definition of robbery, and gave the following instruction to the jury:

A person commits the crime of robbery when he or she unlawfully and with intent to commit theft takes personal property from the person or in the presence of another against that person's will by the use, or explicit or implied threatened use, or immediate force, violence, or fear of injury to that person or to that person's property or to the person or property of anyone. The 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.

(Instruction 9; CP 144, 275) (emphasis added). In support of its decision to add the underlined language, the trial court relied on the

Division 1 opinion of *State v. Collinsworth*, 90 Wn. App. 546, 966 P.2d 905 (1997). (RP6 829-30, 833; RP7 838-840)

2. *The Collinsworth case was wrongly decided.*

The “implicit force” theory relied upon by the State and included in the trial court’s instructions, was first applied in Washington by Division 1 in *State v. Collinsworth, supra*. Following a bench trial, Collinsworth was found guilty of multiple counts of robbery of financial institutions. 90 Wn. App at 547. During each bank robbery, Collinsworth made his demands in a low voice without overtly threatening violence or brandishing a weapon. Each bank had policies requiring tellers to comply for the safety of employees and others in the bank. The tellers in each bank complied with Collinsworth in response to the perceived threat and in accord with bank policy. 90 Wn. App. at 548-50.

On appeal, Collinsworth challenged the sufficiency of the evidence to support the trial court’s finding that he took the bank’s money “through the use or threatened use of ‘immediate force, violence, or fear of injury.’” 90 Wn. App. at 548. He argued that the absence of force, violence or threat made his crimes mere theft.³

³ One means of committing theft is “to wrongfully obtain or exert unauthorized control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services.” RCW 9A.56.020(1)(a).

Division 1 first quoted the established principle of Washington law requiring either “circumstances of terror” or actual threatening words or gestures to support a robbery conviction. 90 Wn. App. at 551 (quoting *State v. Redman*, 122 Wn. 392, 393, 210 P. 772 (1922)). The court also noted that no Washington case had previously found robbery in the absence of some overt physical or verbal threat or display of a weapon. 90 Wn. App. at 552.

In the absence of state law, the court turned to federal law. The federal law criminalizes the taking of property from a bank “by force and violence, or by intimidation.” *Collinsworth*, 90 Wn. App. at 552 (citing 18 U.S.C. § 2113(a)). The court followed a line of federal cases holding that a bank robbery can be committed without overt threats, violence or force. 90 Wn. App. at 552-553. See also *State v. Parra*, 96 Wn. App. 95, 977 P.2d 1272 (1999) (relying on *Collinsworth* to reach a similar holding).

In deciding that the State had proved the use or threatened use of force element of first degree robbery, Division 1 held that an “implied threat” was sufficient to sustain a conviction for robbing a financial institution even if a defendant does not brandish a weapon or make an overt threat. 90 Wn. App. at 553-54. The court reasoned:

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

90 Wn. App. at 553-54 (footnote omitted).

Division 1's holding blurs the line between theft and robbery, and removes the State's burden to establish that the defendant actually used or threatened to use force. *Collinsworth* turns any demand for money within a bank into robbery simply because of the nature of the bank environment, and has essentially imposed strict liability for any face-to-face theft from a bank.

The observations of the court in *United States v. Wagstaff*, 865 F.2d 626 (4th Cir. 1989) are relevant here. In *Wagstaff*, the court reversed a federal conviction for robbery involving an unarmed thief on grounds of insufficient evidence.

Defendant Wagstaff's "forceful and purposeful behavior" was certainly "aggressive." His actions "obviously created a dangerous situation." He appears to have "relied on the surprise and fear of the bank personnel." And, indeed, "in . . . an incident of this kind . . . a weapon and a willingness to use it are not uncommon." [*United States v. Slater*, 692 F.2d 107, 109 (10 Cir. 1982)].

The flaw in this analysis, however, is that it would seem to read the requirement of intimidation entirely out of the statute. It is hard to imagine a theft of money from a bank that could not be characterized as "forceful," "purposeful," and "aggressive." Any

face-to-face theft would seem to create "a dangerous situation." A theft other than by surprise would be an impressive feat; "fear" must be reasonable fear of bodily harm based on the acts of the defendant. And the presumption that every robbery involves a weapon would seem to make the "intimidation" requirement redundant. The problem with the *Slater* approach, then, is that it substitutes a set of assumptions about the actions of a person taking money from a bank for the individualized analysis of that person's actual behavior called for by the § 2113(a) "intimidation" requirement. This in effect eliminates the statutory command that the government prove intimidation as a separate element of the crime of bank robbery.

Wagstaff, 865 F.2d at 628-29 (emphasis added).

Similarly, *Collinsworth's* holding that any demand for money inside a bank carries an implicit threat of force reads the "use or threatened use of immediate force" requirement out of RCW 9A.56.190. The Legislature specifically placed this requirement into the statute, to apply even when the crime is committed against or inside a bank.

Collinsworth creates a presumption of guilt based not on the actual actions or intentions of the defendant, but rather on a "set of assumptions" or beliefs about persons who would take money from a bank. That presumption is simply not supported by the language of that Statute, and cannot be added to it by the courts. If the Legislature wanted to create such a presumption (and thereby

create strict liability for thefts inside a bank), or elevate crimes of theft that take place within a bank without regard for the actual acts or intentions of the defendant, it surely could have done so. For example, the Legislature created a separate burglary statute for burglaries that take place within a dwelling or residence. See RCW 9A.52.025. The Legislature certainly could have done the same for thefts within a bank, but it did not. The Legislature specifically requires that the defendant actually use or threaten the use of force, even when the theft is inside a bank, and the courts must apply the statute according to its plain language. *State v. Wilson*, 125 Wn.2d 212, 217, 883 P.2d 320 (1994).

3. *The trial court's Instruction 9 relieved the State of its burden of proof.*

The State must prove each essential element of a crime beyond a reasonable doubt. *State v. Cronin*, 142 Wn.2d 568, 580, 14 P.3d 752 (2000) (citing *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 1072, 25 L. Ed. 2d 368 (1970)). The jury may not be instructed in a manner that would relieve the State of this burden. *Cronin*, 142 Wn.2d at 580 (citing *State v. Jackson*, 137 Wn.2d 712, 727, 976 P.2d 1229 (1999)).

Because of this serious flaw in the *Collinsworth* holding, it

should not have formed the basis for the trial court's jury instruction in this case. By adding the language allowing the jury to convict based only on an "implied threatened use" of force, the trial court inappropriately blurred the distinction between robbery and theft. The court's instruction therefore relieved the State of its burden of proving beyond a reasonable doubt the actual use or threatened use of force. "[A] conviction cannot stand if the jury was instructed in a manner that would relieve the State of this burden[.]" *Cronin*, 142 Wn.2d at 580 (citing *Jackson*, 137 Wn.2d at 727). Shcherenkov's convictions must therefore be reversed.

B. Trial counsel's failure to request that the jury be instructed on the lesser included offense of first degree theft was ineffective and prejudicial to Shcherenkov.

Effective assistance of counsel is guaranteed by both the United States and Washington State constitutions. U.S. Const. amd. VI; Wash. Const. art. I, § 22 (amend. x); *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Mierz*, 127 Wn.2d 460, 471, 901 P.2d 286 (1995).

The test for ineffective assistance of counsel has two parts: (1) the defendant must show that defense counsel's conduct was deficient, i.e., that it fell below an objective standard of

reasonableness; and (2) such conduct must have prejudiced the defendant, i.e., there is a reasonable probability that, but for the deficient conduct, the outcome of the proceeding would have been different. *State v. Thomas*, 109 Wn. 2d 222, 225-26, 743 P.2d 816 (1987) (adopted test from *Strickland*).

1. *Trial counsel's representation was deficient because he failed to request that the jury be instructed on first degree theft, which is a lesser included offense of first degree robbery.*

During trial, counsel informed the court that he would not request a first degree theft jury instruction, stating: "it is not a lesser included. I did the research on that, and I am convinced that the Court of Appeals tells us very clearly that Theft 1 is not a lesser included of robbery first degree." (RP6 717-18) Trial counsel was mistaken, as it is by no means settled law in Washington that first degree theft is not a lesser included offense of first degree robbery.

In *State v. Roche*, 75 Wn. App. 500, 511, 878 P.2d 497 (1994), Division 1 held that first degree theft is not a lesser included offense of first degree robbery because there are two alternative means of committing robbery⁴, one of which does not include the elements of first degree theft. However, the basis for the *Roche*

⁴ By taking property "from the person of another" or by taking property in the "presence" of another. *Roche*, 75 Wn. App. at 511 (citing RCW 9A.56.190).

court's conclusion is no longer valid: in examining the elements of alternative means of committing first degree robbery, the *Roche* court relied on reasoning in *State v. Curran*, 116 Wn.2d 174, 183, 804 P.2d 558 (1991), which was subsequently overruled by *State v. Berlin*, 133 Wn.2d 541, 947 P.2d 700 (1997).

The *Berlin* Court held that the elements of the lesser included offense need not be necessary elements of every alternative statutory means of the greater offense, but only of the means charged and prosecuted. See 133 Wn.2d at 548. The *Berlin* court expressly overruled *State v. Lucky*, 128 Wn.2d 727, 912 P.2d 483 (1996), and impliedly overruled *Curran*.⁵ See *Berlin*, 133 Wn.2d at 548-49. The *Berlin* court reaffirmed "the lesser included offense rule as laid forth in *Workman*, prior to [the court's] discussions in *Curran*, *Davis*, and *Lucky*." *Berlin*, 133 Wn.2d at 548 (citing *State v. Workman*, 90 Wn.2d 443, 584 P.2d 382 (1978)). See also Seth A. Fine and Douglas J. Ende, 13B WASHINGTON PRACTICE, CRIMINAL LAW, § 2305 n.2 (stating that the *Roche* analysis, holding that first degree theft was not a lesser included offense of first degree robbery, "no longer appears to be valid");

⁵ *Lucky* relied on *Curran* and *State v. Davis*, 121 Wn.2d 1, 7, 846 P.2d 527 (1993).

and *State v. Klimes*, 117 Wn. App. 758, 769 n.4, 73 P.3d 416 (2003) (calling into question *Roche's* conclusion that "from the person of another" and in the "presence" of another are alternative means). Accordingly, trial counsel's opinion that existing case law holds that theft is not a lesser included of robbery was incorrect.

A review of the statutes in question and the facts of this case show that a first degree theft can be a lesser included offense of first degree robbery, and an instruction should have been proposed and given in this case. An instruction on a lesser included offense is warranted when (1) each of the elements of the lesser offense is a necessary element of the offense charged, and (2) the evidence in the case supports an inference that only the lesser crime was committed. *State v. Fernandez-Medina*, 141 Wn.2d 448, 454, 6 P.3d 1150 (2000) (citing *Workman*, 90 Wn.2d at 447-48). The first part of the test is known as the "legal prong" and the second part as the "factual prong." *Berlin*, 133 Wn.2d at 545-46 (internal citation omitted) (citing *Workman*, 90 Wn.2d at 447-48).

First degree theft is defined as wrongfully taking property or services from the person of another with intent to deprive him or her of such property or services. RCW 9A.56.020(1)(a), .030. As charged in this case, a person commits first degree robbery when

he or she “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[.]” RCW 9A.56.190.

Each element of first degree theft is a necessary element of first degree robbery as charged and prosecuted in this case—the taking of property from another person. First degree robbery adds the element of force or threatened use of force. Therefore, first degree theft is a lesser included of first degree robbery, and the legal prong of the test is met. *See State v. O’Connell*, 137 Wn. App. 81, 95, 152 P.3d 349 (2007) (treating first degree theft as a lesser included of first degree robbery, but rejecting the factual prong based on the evidence in the record).

The factual prong is also met in this case. When determining if the evidence at trial was sufficient to support the giving of an instruction, the appellate court is to view the supporting evidence in the light most favorable to the party that requested the instruction. *See State v. Cole*, 74 Wn. App. 571, 579, 874 P.2d 878 (1994).⁶ More specifically, a requested jury instruction on a lesser

⁶ Overruled on other grounds by *Seeley v. State*, 132 Wn.2d 776, 940 P.2d 604 (1997).

included offense should be administered "if 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 v. Alabama*, 447 U.S. 625, 635, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980)). Shcherenkov argued at trial that his actions did not constitute the use or threatened use of force. (RP7 866-69) Shcherenkov made no explicitly threatening statements or gestures, was not armed, did not display a weapon, and behaved calmly. (RP3 355, 364; RP4 400, 437, 464, 478; RP5 597, 622, 667, 676) Viewed in Shcherenkov's favor, the evidence supports the conclusion that only a theft occurred because no force was used and no threats of force were made.

Counsel's misreading of current case law on this issue, and his failure to propose a first degree theft instruction when the facts clearly warranted it, fell below objective standards of reasonableness.

2. *Counsel's failure to request the lesser included offense instruction was prejudicial.*

To warrant reversal, there must be a reasonable probability that, but for the deficient conduct, the outcome of the proceeding

would have been different. *Thomas*, 109 Wn. 2d at 225-26. A “reasonable probability” means a probability “sufficient to undermine confidence in the outcome.” *State v. Leavitt*, 49 Wn. App. 348, 359, 743 P.2d 270 (1987). However, a defendant “need not show that counsel’s deficient conduct more likely than not altered the outcome of the case.” *Strickland*, 466 U.S. at 693.

As noted above, the evidence in this case supports a conclusion that Shcherenkov did not use or threaten to use force. And the jury clearly struggled with this issue, as evidenced by the note it presented to the court during deliberations, asking:

Must obtaining bank money illegally from a non-
accomplice bank teller mean a robbery has occurred?
(Excluding check fraud, forgery, etc)

(CP 156, 287)

The jury wondered whether it must convict simply because a taking of money occurred inside the bank, regardless of whether Shcherenkov made any overt threats or used force. If presented with a first degree theft instruction, there is a high probability that the jury would have acquitted on the robbery charge and convicted Shcherenkov of theft instead. As a result, Shcherenkov was prejudiced by trial counsel’s failure to request a first degree theft instruction, and his convictions must be reversed.

C. The State failed to present sufficient evidence to establish beyond a reasonable doubt the required element of use of force or threatened use of force or fear of injury.

“Due process requires that the State provide sufficient evidence to prove each element of its criminal case beyond a reasonable doubt.” *City of Tacoma v. Luvene*, 118 Wn.2d 826, 849, 827 P.2d 1374 (1992) (citing *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)). Evidence is sufficient to support a conviction only if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). “A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” *Salinas*, 119 Wn.2d at 201.

Under *Collinsworth*, theft becomes a robbery not because of anything that the defendant does or says, but because both the courts and bank personnel seem to believe that any demand for money is fraught with extreme danger. While the bank policy requiring tellers to comply with demands for money might make sense from the bank’s point of view to minimize the risk of harm to

its employees and customers, it does not and should not convert every theft of money from a bank into a robbery. A defendant should not be convicted based on what others might do or might have done in a similar situation. A defendant should not be convicted based on a fear created by the actions of others.⁷ A defendant should be punished for his acts and intentions alone.

As argued above, the *Collinsworth* decision is overbroad, and wrongly decided. And before *Collinsworth*, no Washington case had previously found robbery in the absence of some overt physical or verbal threat or display of a weapon. 90 Wn. App. at 552. This court should not break with that long line of authority, and should reject the *Collinsworth* analysis.⁸

Instead, this court should require the State to prove each of the statutory elements of first degree robbery, including proof of an overt act of force or overt threat of force. This element was not established in this case because Shcherenkov expressed no threats to any of the tellers, displayed no weapon, made no

⁷ The tellers testified that they were afraid in large part because they had been told over and over in training about different terrible things that can happen during thefts within a bank branch, not because of anything specific that Shcherenkov did. (RP3 354; RP4 462, 479, 480; RP5 585, 586, 597)

⁸ This Court is not bound by the *Collinsworth* decision. Because *Collinsworth* is a Division 1 case, it is merely persuasive authority and is not binding on this court. See *Joyce v. State, Dept. of Corrections*, 116 Wn. App. 569, 591 n.9, 75 P.3d 548 (2003).

threatening gestures, and remained calm. There was simply no evidence that Shcherenkov threatened the use of force in order to obtain the bank's money. Rather, the tellers all specifically testified that he did not. (RP3 364; RP4 400, 478; RP5 597, 676)

Moreover, the evidence actually supports the conclusion that Shcherenkov was making every effort to not be threatening or cause fear. He chose to not make any threats of violence. He chose to not brandish a weapon or pretend to be armed. He chose to remain calm and not make any threatening gestures. The evidence does not show any intent to use threats of violence or fear of injury to obtain money from the tellers.

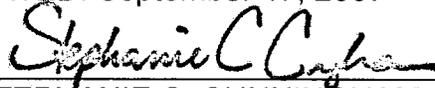
The State's evidence does not establish the required elements of first degree robbery, and Shcherenkov therefore requests that his robbery convictions be vacated.

IV. CONCLUSION

The trial court's Instruction 9, which incorporated the incorrect and overbroad *Collinsworth* decision, relieved the State of its burden of proving the essential statutory element of force or threatened use of force. Shcherenkov was also denied his right to effective assistance of counsel when his trial attorney failed to request the appropriate lesser included offense instruction. Finally,

the State did not establish that Shcherenkov used or threatened to use force, and his conduct did not constitute robbery merely because the act of taking money from a bank is perceived to be potentially dangerous. For all the reasons argued above, Shcherenkov respectfully requests that this court reverse his four first degree robbery convictions and remand for new trial or for dismissal with prejudice.

DATED: September 17, 2007



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CERTIFICATE OF MAILING

I certify that on 09/17/2007, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to:

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