

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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No. 40733-7-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Rufus Phelps, III

Appellant.

Grays Harbor County Superior Court Cause No. 10-1-00033-2

The Honorable Judge Gordon L. Godfrey

Appellant's Opening Brief

Jodi R. Backlund
Manek R. Mistry
Attorneys for Appellant

BACKLUND & MISTRY
P.O. Box 6490
Olympia, WA 98507
(360) 339-4870
FAX: (866) 499-7475

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ASSIGNMENTS OF ERROR

1. Mr. Phelps's first-degree robbery conviction infringed his Fourteenth Amendment right to due process because the evidence was insufficient to prove the elements of the offense.
2. The prosecution failed to prove that Mr. Phelps unlawfully obtained property through the use or threatened use of force, violence, or fear of injury.
3. Mr. Phelps's conviction infringed his Fourteenth Amendment right to due process because the court's instructions relieved the state of its obligation to prove an essential element of the charged crime.
4. The court's instructions relieved the state of its burden to prove that Mr. Phelps unlawfully obtained property through the use or threatened use of immediate force, violence, or fear of injury.
5. The court's instructions failed to make the relevant legal standard manifestly clear to the average juror.
6. The court's instructions did not require jurors to apply an objective standard when evaluating Mr. Phelps's words and conduct.
7. The trial court erred by giving Instruction No. 5.
8. The trial court erred by giving Instruction No. 7.
9. The trial judge erred by refusing to instruct the jury on the lesser-included offense of Theft in the Third Degree.
10. The trial judge violated Mr. Phelps's statutory right to have jurors consider applicable lesser-included offenses.
11. The trial judge violated Mr. Phelps's Fourteenth Amendment right to due process by refusing to instruct on Theft in the Third Degree.
12. The trial judge violated Mr. Phelps's state constitutional right to a jury trial by refusing to allow the jury to consider the lesser-included offense of Theft in the Third Degree.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A conviction for first-degree robbery requires proof that the accused person used or threatened to use force, violence, or fear of injury to accomplish the alleged crime. Here, the prosecution relied on a note that read “Don’t panic” and “Put the money in the bag” as evidence that Mr. Phelps used or threatened to use force, violence, or fear of injury to rob a bank. Did Mr. Phelps’s conviction violate his Fourteenth Amendment right to due process because the prosecution failed to prove the essential elements of the charged crime?
2. A trial court’s instructions must inform the jury of the state’s burden to prove every essential element of the charged crime. Here, the court’s instructions allowed conviction absent proof that Mr. Phelps’s words and conduct, objectively viewed, communicated a threat to use force or violence. Did the trial court’s instructions relieve the state of its burden to prove the essential elements of robbery, in violation of Mr. Phelps’s Fourteenth Amendment right to due process?
3. An accused person is entitled to have the jury instructed on applicable lesser-included offenses. Here, the trial judge refused to instruct on the lesser-included offense of Theft in the Third Degree. Did the trial judge’s refusal to instruct on Theft in the Third Degree violate Mr. Phelps’s statutory and constitutional rights to have the jury consider applicable lesser-included offenses?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

A man walked into a credit union in Elma. He had a note that said, "Don't panic. Put the money in the bag." RP (3/30/10) 99. The teller was surprised and looked at the man, who told her "Yeah, I'm sorry." RP (3/30/10) 87. He did not mention a weapon or hold his hands out of sight. He put a bag on the counter. RP (3/30/10) 87-88, 92.

Each teller station had a stack of cash that was called bait money, which tripped an alarm at the police station when it was removed. RP (3/30/10) 67, 88-90. Instead of removing that money first, the teller gave him all of her money except for the bait money, which totaled \$6375. RP (3/30/10) 88-91. He said, "That's enough. Thanks," and walked out of the bank. RP (3/30/10) 88, 91, 96.

The man did not say anything else during the interaction, and he made no verbal threats. RP (3/30/10) 95-96, 99. He made no gestures or physical threats. RP (3/30/10) 101.

After reviewing the security recordings, officers suspected that Rufus Phelps was the person who had taken the money. RP (3/30/10) 135. They spoke with Mr. Phelps's father and his girlfriend, and arrested him four days after the incident. RP (3/30/10) 108-113, 117-131. The state charged Mr. Phelps with Robbery in the First Degree, alleging that the

robbery had been accomplished “by the use or threatened use of immediate force, violence, or fear of injury.” CP 1.

At trial, Mr. Phelps sought dismissal of the charge because there was no evidence of a force or threat. RP (3/30/10) 152. The court denied his motion. RP (3/30/10) 154-155.

The trial judge refused to give an instruction on the lesser-included offense of Theft in the Third Degree, noting that “[W]e have a video. It’s not like the young lady had a tray of money or a wad of bills, or call it what you wish, and left them on the counter and turned her back and somebody went by and swiped it.” RP (3/30/10) 157. The court’s instruction defining robbery read (in relevant part):

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

No. 5, Court’s Jury Instructions, Supp. CP.

The court’s “to convict” instruction included similar language. No. 7, Court’s Jury Instructions, Supp. CP. None of the court’s instructions required jurors to evaluate Mr. Phelps’s words and conduct objectively, to determine whether or not a reasonable teller would have believed that he threatened use of immediate force, violence, or fear of injury. Court’s Instructions, Supp. CP.

The jury convicted Mr. Phelps as charged. After sentencing, he timely appealed. CP 3-10, 11-12.

ARGUMENT

I. MR. PHELPS’S CONVICTION VIOLATED HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BECAUSE THE EVIDENCE WAS INSUFFICIENT TO PROVE THE ELEMENTS OF FIRST-DEGREE ROBBERY BEYOND A REASONABLE DOUBT.

A. Standard of Review

Constitutional questions are reviewed *de novo*. *State v. Schaler*, 169 Wash.2d 274, 282, 236 P.3d 858 (2010). Evidence is insufficient to support a conviction unless, when viewed in the light most favorable to the state, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *State v. Engel*, 166 Wash.2d 572, 576, 210 P.3d 1007 (2009).

B. The prosecution failed to prove beyond a reasonable doubt that Mr. Phelps took property “by the use or threatened use of immediate force, violence, or fear of injury.”

The due process clause of the Fourteenth Amendment requires the state to prove every element of an offense beyond a reasonable doubt. U.S. Const. Amend. XIV; *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). The remedy for a conviction based on insufficient evidence is reversal and dismissal with prejudice. *Smalis v.*

Pennsylvania, 476 U.S. 140, 144, 106 S. Ct. 1745, 90 L. Ed. 2d 116 (1986).

A person is guilty of robbery when s/he “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 persons or property. RCW 9A.56.190. Conviction thus requires proof that the accused person either used or threatened to use immediate force, violence, or fear of injury. *Id.*

In this case, there is no evidence that Mr. Phelps used or threatened to use force, violence, or fear of injury. The evidence established that Mr. Phelps handed the teller a note that said “Don’t panic” and “Put the money in the bag.” He apologized twice, asked her to stop when she had put enough money into the bag, and thanked her as he left. He was calm and soft-spoken, and he never made any verbal or physical threats. RP (3/30/10) 86-105. Although she was afraid, her fear was inspired by his facial expression, which she described as “calm and condescending.” RP (3/30/10) 96.

Under these circumstances, the prosecution failed to establish that Mr. Phelps used or threatened to use force, violence, or fear of injury. The evidence was insufficient to prove robbery; accordingly, the conviction must be reversed and the case dismissed with prejudice. *Smalis, supra.*

C. The case is not controlled by *Collinsworth, Parra, and Shcherenkov*.

Mr. Phelps's conduct differs from that of the defendants in three bank robbery cases cited in the prosecutor's trial memorandum. *See pp. 3-4*, Trial Memorandum, Supp. CP (citing *State v. Collinsworth*, 90 Wash.App. 546, 966 P.2d 905 (1997), *State v. Parra*, 96 Wash.App. 95, 977 P.2d 1272 (1999), and *State v. Shcherenkov*, 146 Wash.App. 619, 191 P.3d 99 (2008)). *Collinsworth, Parra, and Shcherenkov* involved bank robbery convictions premised on indirect threats of violence; however, all three cases involved stronger evidence of threatening words or conduct than that present here.

In *Collinsworth*, Division One affirmed five convictions for robbery and one conviction for attempted robbery. In the first incident, the defendant wore loose, baggy clothing, and appeared nervous and fidgety. He used a serious tone of voice to say, "I need your hundreds, fifties, and twenties," responded to the teller's hesitation by saying "I'm serious," and instructed the teller not to put bait money or dye in his bag. *Collinsworth*, at 548.

In the second incident, the defendant appeared nervous, used a direct and demanding voice, leaned toward the teller, twice ordered the teller to give him "hundreds, fifties, and twenties," and repeated his

demand for hundred dollar bills before grabbing the money and leaving the bank. *Id.*, at 549. In the third incident, the defendant twice demanded all of a teller's fifties and hundreds. *Id.* In the fourth incident, he wore a baggy sweatshirt and held one hand by his waist, suggesting that he had a weapon. He put a bag on the counter and asked for hundreds and fifties with no dye packs. *Id.*, at 549-550. In the fifth incident, he handed the teller a bag and told her to fill it, using a regular tone of voice. (He aborted this attempt when the teller was unable to find her keys). *Id.*, at 550. In the sixth incident, he used a "'firm, direct' voice," ordered the teller to give him twenties, fifties, and hundreds, confirmed that he was serious, and told the teller not to give him a dye pack. *Id.*, at 550.

Similarly, in *Parra*, Division One affirmed a robbery conviction where the defendant entered the bank wearing a black hood covering his face, though he did not make explicit threats. He moved quickly, demanded money from the tellers, and held his right hand tucked in the front of his pants as though he had a firearm. *Parra*, at 98.

In *Shcherenkov*, Division Two affirmed four robbery convictions. In the first incident, the defendant held up a note reading, "Please be calm. This is a robbery." He also reached into his pocket for a cell phone or radio, raising concerns "that he was signaling someone else and that the robbery was going to escalate." *Shcherenkov*, at 622. In the second

incident, the defendant kept his right hand in his pocket, implying that he had a gun, while showing a note that read, "Stay calm. This is a robbery. Put \$3,000 in envelopes." *Id.* at 622-623. In the third incident, he entered a bank with a hood over his head and his hands in his pockets. He showed a note reading, "This is a robbery. Put \$3,000 in an envelope." In the fourth incident, the defendant kept both hands in his pockets as he approached a teller, and then, with one hand still in his pocket, displayed a note that read, "Place \$4,000 in an envelope. Do not make any sudden movements or actions. I will be watching you." *Id.* at 623.

In both *Collinsworth* and *Shcherenkov*, the Court found threats were implied by certain cues - cues that are not present in this case. These cues included, in various combinations, the defendant's loose clothing (capable of concealing a weapon), the use of a hood to conceal his face, his demeanor (nervous and/or fidgety), his tone of voice (serious, firm, direct), his gestures (leaning close to the teller, holding his hand near a pocket, reaching into a pocket), the implied presence of a hidden weapon or nearby confederates, the specific words used (such as the use of the word 'robbery,' and the references to bait money, to dye packs, and to specific denominations), and the repetition of demands.

Mr. Phelps, by contrast, was calm, nonthreatening, and did not display any of these cues. Accordingly, *Collinsworth* and *Shcherenkov*

should not control his case, and the evidence was insufficient for conviction of robbery.

II. MR. PHELPS'S CONVICTION VIOLATED HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BECAUSE THE COURT'S INSTRUCTIONS RELIEVED THE STATE OF ITS BURDEN TO PROVE THE ESSENTIAL ELEMENTS OF ROBBERY.

A. Standard of Review

Alleged constitutional violations are reviewed *de novo*. *Schaler*, at 282. A manifest error affecting a constitutional right may be raised for the first time on review. RAP 2.5(a)(3). A reviewing court “previews the merits of the claimed constitutional error to determine whether the argument is likely to succeed.” *State v. Walsh*, 143 Wash.2d 1, 8, 17 P.3d 591 (2001).¹ An error is manifest if it results in actual prejudice, or if the appellant makes a plausible showing that the error had practical and identifiable consequences at trial. *State v. Nguyen*, 165 Wash.2d 428, 433, 197 P.3d 673 (2008).

Jury instructions are reviewed *de novo*. *State v. Hayward*, 152 Wash.App. 632, 641, 217 P.3d 354 (2009). Instructions must be manifestly clear because juries lack tools of statutory construction. *See*,

¹ The policy is designed to prevent appellate courts from wasting “judicial resources to render definitive rulings on newly raised constitutional claims when those claims have no chance of succeeding on the merits.” *State v. WWJ Corp.*, 138 Wash.2d 595, 603, 980 P.2d 1257 (1999).

e.g., *State v. Kyllo*, 166 Wash.2d 856, 864, 215 P.3d 177 (2009); *State v. Berg*, 147 Wash.App. 923, 931, 198 P.3d 529 (2008); *State v. Harris*, 122 Wash.App. 547, 554, 90 P.3d 1133 (2004).

B. The court's instructions did not require jurors to evaluate Mr. Phelps's words and conduct objectively, and thereby relieved the prosecution of its obligation to prove that he used or threatened use of immediate force, violence, or fear of injury.

Due process requires the prosecution to prove every element of the charged crime. U.S. Const. Amend. XIV; *Winship, supra*. A trial court's failure to instruct the jury as to every element requires reversal. U.S. Const. Amend. XIV; *State v. Aumick*, 126 Wash.2d 422, 429, 894 P.2d 1325 (1995).

Robbery requires proof beyond a reasonable doubt that the accused person "use[d] or threatened use of immediate force, violence, or fear of injury" to persons or property. RCW 9A.56.190. The word "threat" means "to communicate, directly or indirectly the intent" to injure persons or property. RCW 9A.04.110. The standard is an objective one, requiring a determination of "whether an ordinary person in the bank employee's position could reasonably infer a threat of bodily harm from the defendant's acts." *Shcherenkov*, at 625 (quoting 67 Am.Jur.2d Robbery § 89, at 114 (2003) (addressing "intimidation" standard of 18 U.S.C. §2113)).

In this case, the court’s instructions failed to make the objective standard manifestly clear to the average juror. Instead, the instructions required proof only that the taking was accomplished by the “use, or explicit or implied threatened use, of immediate force, violence or fear of injury...” No. 7, Court’s Jury Instructions, Supp. CP. Nothing in the “to convict” instruction or any of the other instructions required the jury to evaluate Mr. Phelps’s conduct from the perspective of a reasonable person. Court’s Jury Instructions, Supp. CP. Under the instructions, the teller’s subjective belief that Mr. Phelps threatened to use force or violence—in this case, based on his calm and condescending facial expression, RP (3/30/10) 100—was sufficient to establish the element. This relieved the prosecution of its burden to prove that Mr. Phelps’s words and conduct, viewed objectively, threatened immediate use of force or violence.

Mr. Phelps’s conviction violated his Fourteenth Amendment right to due process. U.S. Const. Amend. XIV; *Winship, supra*; *Aumick, supra*. The conviction must be reversed and the case remanded for a new trial. *Id.*

- C. The court's modified instructions defining robbery relieved the state of its burden to prove that the taking was accomplished by the use or threatened use of force.

In *Collinsworth*, Division One suggested that “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.” *Collinsworth*, at 553-54 (footnote omitted).² Apparently relying on this language, the trial court in this case altered the instructions defining robbery, inserting the phrase “explicit or implied” to modify the “threatened use of force” alternative. Nos. 5, 7, Court’s Jury Instructions, Supp. CP. The court failed to provide any guidance explaining how to evaluate whether or not Mr. Phelps’s words and conduct implied a threat to use force.

By adding language allowing jurors to convict based only on an undefined implied threatened use of force, the trial court inappropriately blurred the distinction between robbery and theft, and relieved the state of its burden to prove an actual threat to use force. The court’s instruction transforms any unlawful request for money within a bank into robbery simply because of where the request is made. The court’s instruction

² The *Shcherenkov* Court declined to address this statement.

therefore relieved the state of its burden of proving beyond a reasonable doubt the actual use or threatened use of force, an essential element of robbery. RCW 9A.56.190.

The modified instructions relieved the prosecution of its burden to prove the essential elements of the offense, and violated Mr. Phelps's Fourteenth Amendment right to due process. U.S. Const. Amend. XIV; *Winship, supra*; *Aumick, supra*.

D. The instructional errors were prejudicial and require reversal.

Failure to instruct on an essential element requires reversal. *State v. Smith*, 131 Wash.2d 258, 263, 930 P.2d 917 (1997) ("*Smith I*"). Constitutional error is presumed prejudicial, and the state bears the burden of proving harmlessness beyond a reasonable doubt. *State v. Toth*, 152 Wash.App. 610, 615, 217 P.3d 377 (2009). To overcome the presumption, the state must establish beyond a reasonable doubt that the error was trivial, formal, or merely academic, that it did not prejudice the accused, and that it in no way affected the final outcome of the case. *City of Bellevue v. Lorang*, 140 Wash.2d 19, 32, 992 P.2d 496 (2000). Reversal is required unless the state can prove that any reasonable fact-finder would reach the same result absent the error and that the untainted evidence is so overwhelming it necessarily leads to a finding of guilt. *State v. Burke*, 163 Wash.2d 204, 222, 181 P.3d 1 (2008).

The errors here are presumed prejudicial, and Respondent cannot meet its burden of establishing harmless error under the stringent test for constitutional error. *Toth*, at 615. Mr. Phelps's conviction must be reversed and the case remanded for a new trial. *Id.*

III. MR. PHELPS'S CONVICTION MUST BE REVERSED BECAUSE THE TRIAL JUDGE ERRONEOUSLY REFUSED TO INSTRUCT THE JURY ON THE LESSER-INCLUDED OFFENSE OF THEFT IN THE THIRD DEGREE.

A. Standard of Review

A trial court's refusal to instruct on a lesser-included offense is reviewed *de novo* if the refusal is based on an issue of law. *City of Tacoma v. Belasco*, 114 Wash.App. 211, 214, 56 P.3d 618 (2002). If the refusal is based on a factual dispute, the evidence is taken in a light most favorable to the defendant, and review is for an abuse of discretion. *Id.*; *see also State v. Smith*, 154 Wash.App. 272, 278, 223 P.3d 1262 (2009) ("*Smith II*") (citing *State v. Fernandez-Medina*, 141 Wash.2d 448, 461, 6 P.3d 1150 (2000)).

B. The refusal to instruct on Theft in the Third Degree denied Mr. Phelps his statutory right to have the jury consider lesser-included offenses.

Under RCW 10.61.006, "the defendant 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." An accused person is entitled to an instruction on a lesser-included offense if (1) each element

of the lesser offense is a necessary element of the charged offense, and (2) the evidence supports an inference that only the lesser crime was committed.³ *Nguyen*, at 434. Instructions on a lesser offense should be given if there is “even the slightest evidence” that the accused person may have committed only that offense. *State v. Parker*, 102 Wash.2d 161, 163-164, 683 P.2d 189 (1984), (quoting *State v. Young*, 22 Wash.273, 276-277, 60 P. 650 (1900)). The instruction should be given even if there is contradictory evidence. *Fernandez-Medina*, at 456. The right to an appropriate lesser degree offense instruction is “absolute,” and failure to give such an instruction requires reversal. *Parker*, at 164.

In this case, the basis for the trial court’s ruling is not clear. RP (3/30/10) 157-158. The court apparently believed that theft instructions were only appropriate if there was evidence that the money was a gift or given by mistake. RP (3/30/10) 158. This is an error of law; the court should have applied the *Workman* test, considered the evidence in a light most favorable to Mr. Phelps, and decided whether or not there was even the slightest evidence that Mr. Phelps only committed theft. Accordingly, review is *de novo*. *Workman*, *supra*; *Belasco*, *supra*.

³ This two-part legal/factual test is often referred to as the *Workman* test. See *State v. Workman*, 90 Wn.2d 443, 584 P.2d 382 (1978).

The trial court should have given the requested instructions on third-degree theft. First, third-degree theft is a lesser offense under the legal prong of the *Workman* test: a person who commits robbery is necessarily also guilty of misdemeanor theft, since robbery is theft committed in the presence of another and accomplished by means of threats or force. *Nguyen*, at 434; compare RCW 9A.56.190 with RCW 9A.56.020; see also Nos. 7-14, Defendant's Proposed Jury Instructions, Supp. CP.

Second, there was at least "slight" evidence that only theft occurred. When taken in a light most favorable to Mr. Phelps, the evidence established that he exploited bank policy, which apparently requires tellers to cooperate with criminal requests, even in the absence of a threat of force, to ensure the safety of staff and customers. RP (3/30/10) 86-105; see also *Shcherenkov*, at 622-623; *Collinsworth* at 548-550. Mr. Phelps politely asked for money, apologized for taking it, urged the teller not to panic, asked her to stop when she had given enough, and thanked her for providing it. RP (3/30/10) 86-105. The jury was entitled to conclude that he unlawfully took the bank's money without any threats and without the use of force. Unlawfully obtaining money by exploiting bank policy in this manner constitutes theft, not robbery, given the absence of force or threats.

The evidence supported the proposed instructions, establishing the factual prong of the *Workman* test. *Nguyen*, at 434. Accordingly, Mr. Phelps had a right to have the jury instructed on third-degree theft. RCW 10.61.006. The trial court's refusal to instruct the jury on the lesser-included offense requires reversal of the conviction and remand for a new trial. *Nguyen*, *supra*.

C. The refusal to instruct on Theft in the Third Degree denied Mr. Phelps his constitutional right to due process under the Fourteenth Amendment.

Refusal to instruct on a lesser-included offense can violate the right to due process under the Fourteenth Amendment. U.S. Const. Amend. XIV; *Vujosevic v. Rafferty*, 844 F.2d 1023, 1027 (3rd Cir. 1988). The constitutional right to such an instruction stems from “the risk that a defendant might otherwise be convicted of a crime more serious than that which the jury believes he committed simply because the jury wishes to avoid setting him free.” *Vujosevic*, at 1027. *See also Beck v. Alabama*, 447 U.S. 625, 634, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980) (In capital cases, “providing the jury with the ‘third option’ of convicting on a lesser included offense ensures that the jury will accord the defendant the full benefit of the reasonable doubt standard...”).⁴

⁴ The court in *Beck* explicitly reserved the question of whether or not the rule applies in noncapital cases. *Beck*, at 638, n.14. Some federal courts only review a state court's failure to give a lesser-included instruction in noncapital cases when the failure

In the absence of instructions on a lesser offense, the jury was forced to either acquit or convict Mr. Phelps; they did not have “the ‘third option’ of convicting on a lesser included offense...” *Beck, at 634*. Because the trial judge refused to instruct the jury on the lesser-included offense of third-degree theft, Mr. Phelps was denied his constitutional right to a fair trial under the due process clause. U.S. Const. Amend. XIV; *Vujosevic, supra*. The conviction must be reversed and the case remanded to the superior court. *Schaffer, supra*.

D. The refusal to instruct on Theft in the Third Degree violated Mr. Phelps’s state constitutional right (under Wash. Const. Article I, Sections 21 and 22) to have the jury consider applicable lesser included offenses.

Under the Washington constitution, “The right of trial by jury shall remain inviolate...” Wash. Const. Article I, Section 21. Furthermore, “[i]n criminal prosecutions the accused shall have the right to ... a speedy public trial by an impartial jury...” Wash. Const. Article I, Section 22. As with many other constitutional provisions, the right to a jury trial under the Washington state constitution is broader than the federal right. *State v. Hobble*, 126 Wash.2d 283, 298-99, 892 P.2d 85 (1995); *City of Pasco v. Mace*, 98 Wash.2d 87, 97, 653 P.2d 618 (1982).

“threatens a fundamental miscarriage of justice...” *Tata v. Carver*, 917 F.2d 670, 672 (1st Cir. 1990)

As noted previously, Washington state constitutional provisions are analyzed with reference to the six nonexclusive factors set forth in *State v. Gunwall*, 106 Wash.2d 54, 720 P.2d 808 (1986). In this case, analysis under *Gunwall* supports an independent application of the state constitution. These two provisions establish an accused person's state constitutional right to have the jury instructed on applicable lesser-included offenses.

1. The language of Wash. Const. Article I, Sections 21 and 22 supports the existence of a state constitutional right to applicable jury instructions on lesser-included offenses.

The first *Gunwall* factor requires examination of the text of the state constitutional provisions at issue. Wash. Const. Article I, Section 21 provides that “[t]he right of trial by jury *shall remain inviolate...*” *emphasis added*. “The term ‘inviolat

... For [the right to a jury trial] to remain inviolate, it must not diminish over time.” *Sofie v. Fibreboard Corp.*, 112 Wash.2d 636, 656, 771 P.2d 711, 780 P.2d 260 (1989). Wash. Const. Article I, Section 22 (amend. 10) provides that “[i]n criminal prosecutions the accused shall have the right to ... a speedy public trial by an impartial jury...” The direct and mandatory language (“shall have the right”) implies a high level of protection.

Thus an accused person's right to have the jury consider a lesser-included offense remains the same as it existed in 1889, and "must not diminish over time," *Sofie v. Fibreboard Corp.*, at 656. *Gunwall* factor one favors an independent application of these provisions.

2. Significant differences in the texts of parallel provisions of the federal and state constitutions supports the existence of a state constitutional right to applicable jury instructions on lesser-included offenses.

The second *Gunwall* factor requires analysis of the differences between the texts of parallel provisions of the federal and state constitutions. Wash. Const. Article I, Section 21, which declares "[t]he right of trial by jury shall remain inviolate...", has no federal counterpart. The Washington Supreme Court in *Pasco v. Mace*, *supra*, found the difference between the two constitutions significant, and determined that the state constitution provides broader protection. This difference in language also favors an independent application of the state constitution.

3. State constitutional and common law history supports the existence of a state constitutional right to applicable jury instructions on lesser-included offenses.

Under the third *Gunwall* factor, this court must look to state constitutional and common law history. Article I, Section 21, Washington "preserves the right as it existed at common law in the territory at the time of its adoption." *Pasco v. Mace*, at 96. *See also State v. Schaaf*, 109

Wash.2d 1, 743 P.2d 240 (1987); *Hobble, supra*; *State v. Smith*, 150 Wash.2d 135, 151, 75 P.3d 934 (2003) (*Smith III*). In 1889, when our state constitution was adopted, the lesser-included offense doctrine was well-established under the common law. *Beck, at* 635 n. 9 (citing 2 M. Hale, *Pleas of the Crown* 301-302 (1736); 2 W. Hawkins, *Pleas of the Crown* 623 (6th ed. 1787); 1 J. Chitty, *Criminal Law* 250 (5th Am. ed. 1847); T. Starkie, *Treatise on Criminal Pleading* 351-352 (2d ed. 1822)).

Thirty years prior to the adoption of the state constitution in 1889, the Court for Washington Territory addressed a parallel doctrine (relating to inferior degree offenses), and declared that “There is no better settled principle of criminal jurisprudence than that under an indictment for a crime of a high degree, a crime of the same character, of an inferior degree, necessarily involved in the commission of the higher offense charged, may be found.” *Clarke v. Washington Territory*, 1 Wash. Terr. 68, 69 (1859).

It was against this backdrop that the framers decided that “[i]n criminal prosecutions the accused shall have the right” to a jury trial, and that the jury trial right “shall remain inviolate.” Wash. Const. Article I, Sections 21 and 22. Accordingly, *Gunwall* factor 3 supports an independent application of Article I, Sections 21 and 22 in this case, and

establishes a state constitutional right to instructions on applicable lesser-included offenses.

4. Pre-existing state law supports the existence of a state constitutional right to applicable jury instructions on lesser-included offenses.

The fourth *Gunwall* factor “directs examination of preexisting state law, which ‘may be responsive to concerns of its citizens long before they are addressed by analogous constitutional claims.’” *Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wash.2d 791, 809, 83 P.3d 419 (2004) (quoting *Gunwall*, at 62). Just one year prior to adoption of the state constitution, the court noted that a jury had the power to convict an accused person “‘of any offense, the commission of which is necessarily included within that with which he is charged in the indictment.’” *Timmerman v. Territory*, 3 Wash. Terr. 445, 449 (1888) (quoting Territorial Code of 1881, Section 1098). This language endures in the current provision. See RCW 10.61.006. Accordingly, *Gunwall* factor four supports a state constitutional right to applicable instructions on a lesser-included offense.

5. Differences in structure between the federal and state constitutions supports the existence of a state constitutional right to applicable jury instructions on lesser-included offenses.

The fifth *Gunwall* factor always points toward pursuing an independent state constitutional analysis. *Young, at 180*. Thus factor five favors Mr. Phelps's position.

6. The right to a jury trial is a matter of particular state interest or local concern, and supports the existence of a state constitutional right to applicable jury instructions on lesser-included offenses.

The sixth *Gunwall* factor deals with whether the issue is a matter of particular state interest or local concern. The right to a jury trial is a matter of state concern; there is no need for national uniformity on the issue. *Smith III, at 152*. *Gunwall* factor number six thus also points to an independent application of the state constitution, and supports the existence of a state constitutional right to applicable jury instructions on lesser-included offenses.

All six *Gunwall* factors favor an independent application of Article I, Section 21 and 22 of the Washington Constitution. Our state constitution protects an accused person's right to have the jury consider lesser-included offenses. The trial judge's failure to instruct on the lesser-included offense of third-degree theft violated Wash. Const. Article I, Sections 21 and 22. Accordingly, Mr. Phelps's conviction must be reversed and the case remanded to the trial court for a new trial.

CONCLUSION

For the foregoing reasons, Mr. Phelps's conviction must be reversed and the case dismissed with prejudice. In the alternative, if the case is not dismissed, it must be remanded for a new trial.

Respectfully submitted on November 3, 2010.

BACKLUND AND MISTRY



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant



Manek R. Mistry, WSBA No. 22922
Attorney for the Appellant

CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Opening Brief to:

Rufus Phelps, DOC #264345
Clallam Bay Corrections Center
1830 Eagle Crest Way
Clallam Bay, WA 98326

and to:

Grays Harbor Prosecutor
102 W. Broadway, #102
Montesano, WA 98563

And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on November 3, 2010.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on November 3, 2010.



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant

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CLALLAM COUNTY
CLALLAM BAY
CORRECTIONS CENTER
CLALLAM BAY, WA 98326