

FILM  
COURT OF APPEALS  
DIVISION II

11 MAR 17 PM 12:27

STATE OF WASHINGTON

BY cm  
DEPUTY

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 Reply 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

**TABLE OF CONTENTS**

**TABLE OF CONTENTS ..... i**

**TABLE OF AUTHORITIES ..... ii**

**ARGUMENT.....3**

**I. The evidence was insufficient to prove beyond a reasonable doubt that Mr. Phelps threatened to use force.....3**

**II. The instructions allowed the jury to convict Mr. Phelps of robbery upon finding that that the teller was actually but unreasonably afraid.....5**

**III. The trial court should have instructed the jury on Theft in the Third Degree because the evidence supported an inference that only the lesser crime was committed.....6**

**CONCLUSION .....8**

**TABLE OF AUTHORITIES**

**FEDERAL CASES**

*Beck v. Alabama*, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980)...7

*Smalis v. Pennsylvania*, 476 U.S. 140, 106 S. Ct. 1745, 90 L. Ed. 2d 116 (1986).....5

**WASHINGTON STATE CASES**

*In re Pullman*, 167 Wash.2d 205, 218 P.3d 913 (2009).....7

*State v. Aumick*, 126 Wash.2d 422, 894 P.2d 1325 (1995).....6

*State v. Collinsworth*, 90 Wash.App. 546, 966 P.2d 905 (1997).....4

*State v. Fernandez-Medina*, 141 Wash.2d 448, 6 P.3d 1150 (2000).....7

*State v. Kyllo*, 166 Wash.2d 856, 215 P.3d 177 (2009).....6

*State v. Parra*, 96 Wash.App. 95, 977 P.2d 1272 (1999).....4

*State v. Shcherenkov*, 146 Wash.App. 619, 191 P.3d 99 (2008) .....4, 6

*State v. Smith*, 131 Wash.2d 258, 930 P.2d 917 (1997) .....6

*State v. Warden*, 133 Wash.2d 559, 947 P.2d 708 (1997).....7

**WASHINGTON STATUTES**

RCW 9A.56.190 .....4, 5

**OTHER AUTHORITIES**

67 Am.Jur.2d Robbery § 89 (2003).....6

Blackstone, *Commentaries on the Laws of England*, Volume IV .....5

## ARGUMENT

### **I. THE EVIDENCE WAS INSUFFICIENT TO PROVE BEYOND A REASONABLE DOUBT THAT MR. PHELPS THREATENED TO USE FORCE.**

Robbery requires proof of theft accomplished “by the use or threatened use of immediate force, violence, or fear of injury.” RCW 9A.56.190. In this case, the prosecution did not present any evidence establishing a threat, whether overt or implied. After handing the teller a note that said “Don’t panic” and “Put the money in the bag,” Mr. Phelps apologized twice, asked her to stop filling the bag, and thanked her as he left. He was calm and soft-spoken throughout. RP (3/30/10) 86-105.

Under these circumstances, the evidence was insufficient to prove robbery. Respondent argues that “an unlawful demand” implies a threat and thus can support a robbery conviction.<sup>1</sup> Brief of Respondent, pp. 6-11 (citing *State v. Collingsworth*, 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)). Appellant has already distinguished the facts of this case from those in *Collingsworth*, *Parra*, and *Shcherenkov*. See Appellant’s Opening Brief, pp. 7-10. Mr. Phelps did not make a “demand,” his requests were polite, and the

---

<sup>1</sup> Presumably this theory applies equally to nonthreatening but “unlawful” demands made by street people, pushy charities, and obnoxious relatives.

additional factors supporting each conviction in those cases were not present here.

Furthermore, the three cited cases were wrongly decided (to the extent they suggest that any unlawful demand for money qualifies as a robbery *per se* when made to a bank teller). Robbery, at common law and under the statute, requires proof that the accused obtained property by means of force or the threat of force. RCW 9A.56.190; Blackstone, *Commentaries on the Laws of England*, Volume IV, p. 241 (Robbery is “the felonious and forcible taking, from the person of another, of goods or money to any value, by putting him in fear.”)

To imply a threat where none was made is to dispense with an element of robbery; this does violence to the statute and to the traditional definition of robbery. The legislature may have the power to criminalize any unlawful demand for money; however, it has not attempted to do so. Instead, it has defined robbery in keeping with the common law definition. RCW 9A.56.190.

Mr. Phelps did not make a threat, either express or implied. Accordingly, the judgment and sentence must be vacated, the conviction reversed, and the case dismissed with prejudice. *Smalis v. Pennsylvania*, 476 U.S. 140, 144, 106 S. Ct. 1745, 90 L. Ed. 2d 116 (1986).

**II. THE INSTRUCTIONS ALLOWED THE JURY TO CONVICT MR. PHELPS OF ROBBERY UPON FINDING THAT THAT THE TELLER WAS ACTUALLY BUT UNREASONABLY AFRAID.**

An objective standard applies to the determination of whether or not an accused robber threatened the use of force. *Shcherenkov*, at 625. The “threat” element requires proof that “an ordinary person in the bank employee’s position could reasonably infer a threat of bodily harm from the defendant’s acts.” *Id.* (quoting 67 Am.Jur.2d Robbery § 89, 114 (2003)). The court’s instructions did not make this objective standard “manifestly apparent to the average juror.” *State v. Kyлло*, 166 Wash.2d 856, 864, 215 P.3d 177 (2009) (internal quotation marks and citations omitted). The instructions allowed conviction based on the teller’s subjective but unreasonable fear. *See, e.g.*, Instruction No. 7, Court’s Instructions to the Jury, CP 46-47. This relieved the prosecution of its burden to establish an element of the offense, and requires reversal. U.S. Const. Amend. XIV; *State v. Aumick*, 126 Wash.2d 422, 429, 894 P.2d 1325 (1995); *State v. Smith*, 131 Wash.2d 258, 263, 930 P.2d 917 (1997).

Respondent does not address Mr. Phelps’s argument regarding the objective standard. Brief of Respondent, pp. 11-13. Nor does Respondent suggest that the instructions made the objective standard “manifestly apparent to the average juror.” *Kyлло*, at 864. The state’s failure to

address the objective standard may be treated as a concession. *See, e.g., In re Pullman*, 167 Wash.2d 205, 212 n.4, 218 P.3d 913 (2009).

**III. THE TRIAL COURT SHOULD HAVE INSTRUCTED THE JURY ON THEFT IN THE THIRD DEGREE BECAUSE THE EVIDENCE SUPPORTED AN INFERENCE THAT ONLY THE LESSER CRIME WAS COMMITTED.**

When considering a request for a lesser-included offense instruction, a judge must take the evidence in the light most favorable to the accused person. *State v. Fernandez-Medina*, 141 Wash.2d 448, 461, 6 P.3d 1150 (2000). The instruction should be given 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 Wash.2d 559, 563, 947 P.2d 708 (1997) (citing *Beck v. Alabama*, 447 U.S. 625, 635, 100 S.Ct. 2382, 2388, 65 L.Ed.2d 392 (1980)). The sole qualification is that “the evidence must affirmatively establish the defendant's theory of the case—it is not enough that the jury might disbelieve the evidence pointing to guilt.” *Fernandez-Medina*, at 456.

Taking all the evidence in a light most favorable to Mr. Phelps—without disbelieving any of it—a rational jury could have concluded that Mr. Phelps did not make a threat. He did not make an explicit verbal threat, and he did not make any threatening gestures. RP (3/30/10) 86-105. It is at least *arguable* that his conduct was non-threatening. In other

words, the presence or absence of a threat should have been a jury question. If jurors believed all the testimony presented by the state and decided that Mr. Phelps's conduct amounted to a threat, they would have convicted him of robbery. If jurors believed all the testimony presented by the state and decided that Mr. Phelps's conduct did not constitute a threat, they would have convicted him of Theft in the Third Degree. This was the defendant's theory of the case, and it is supported by the evidence. Because of this, the trial court should have instructed on the lesser-included offense. *Id.*

Instead of taking the evidence in a light most favorable to Mr. Phelps (as the proponent of the instruction), the judge weighed the evidence and decided that it established a threat. RP (3/10/10) 157-158. This deprived the jury of the opportunity to decide the issue. It also denied Mr. Phelps his constitutional and statutory right to a lesser-included offense. *Id.*

Respondent's argument displays a misunderstanding of the law. Respondent implies that Mr. Phelps was required to introduce evidence in order to obtain instruction on a lesser-included offense. Brief of Respondent, p. 15. This is not correct. Instead, the evidence introduced at trial must support the instruction, whether it was introduced by the prosecution or the accused person. *Id.*

Respondent also displays a misunderstanding of the Appellant's argument. According to Respondent, Mr. Phelps was "hoping the jury may disbelieve the state's evidence..." Brief of Respondent, p. 15. This, too, is incorrect. Mr. Phelps was hoping that the jury would believe the state's evidence, and draw a different conclusion than that urged by the prosecutor.

Mr. Phelps was entitled to an instruction on Theft in the Third Degree. Because he was denied such an instruction, his conviction must be reversed and the case remanded for a new trial. *Id.*

### **CONCLUSION**

Mr. Phelps's conviction for robbery must be reversed, and the case dismissed with prejudice. In the alternative, the case must be remanded for a new trial.

Respectfully submitted on March 16, 2011.

### **BACKLUND AND MISTRY**



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



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

COURT OF APPEALS  
DIVISION II

11 MAR 17 PM 12:27

STATE OF WASHINGTON

BY ca  
DEPUTY

CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Reply 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 March 16, 2011.

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 March 16, 2011.

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