

COURT OF APPEALS
DIVISION II
FILED IN 1992
STATE OF WASHINGTON
BY *Cn*

NO. 40733-7-II

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

STATE OF WASHINGTON,
Respondent,

v.

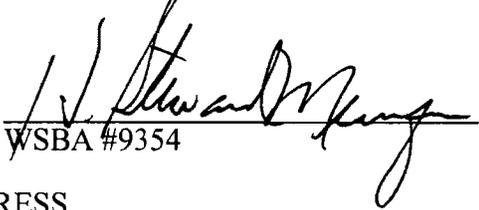
RUFUS PHELPS, III,
Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR GRAYS HARBOR COUNTY

THE HONORABLE GORDON L. GODFREY, JUDGE

BRIEF OF RESPONDENT

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RESTATEMENT OF FACTS

Shortly after noon on January 11, 2010, the defendant walked into Our Community Credit Union and approached Deborah Melton's teller station. She greeted him and in response the defendant handed her a note written on a piece of white paper that said, "Don't panic" "Put the money in the bag" (RP 86-87). After reading the note Ms. Melton began to panic and looked up at the defendant, at which point he said, "Yeah, I am sorry." Ms. Melton testified that she again looked at the defendant in disbelief and he again said, "Yeah, I am sorry." (RP 87). She testified that she looked around and then apparently ducked, though she wasn't clear about that, and then after determining that the defendant wasn't going away, started putting money into the bag that he had placed on the counter. (RP 87-88). Ms. Melton testified that she turned to take money from her cash tray to place in the bag, when she turned back around the note was gone. (RP 88).

Ms. Melton indicated that she had been trained many times on what to do during a robbery and had been instructed to give away the bait money first which would trigger a silent alarm. (RP 88-89). She testified that while she had gone through extensive training over the years that she had worked for the credit union, when faced with the situation she simply went into instinct mode and instead of placing the bait money in the bag first, she began to place all the money into the bag leaving the bait money to the last. (RP 88).

When Ms. Melton got to the bait money after placing all her other money in the bag provided by the defendant, he told her “that is enough” said “thank you” and then left the credit union. (RP 88, 90).

Ms. Melton indicated that she had an alarm underneath the counter in front of her station, but that she did not activate the alarm because she was afraid he would see her do so and she did not want to provoke him. (RP 89-90). The defendant took \$6,735.00 from the credit union. (RP 91).

The bank had at least four surveillance cameras that were operating and recorded the robbery. (RP 76-77). When police responded to the 911 call from the credit union, the credit union manager, Kristi Templeton, was able to pull up the video recording of the robbery to show the officers and print a still picture of the person that had taken the credit union’s money. (RP 64-65). One of the officers that responded to the credit union to assist in processing the scene, Detective Peterson, viewed the video for purposes of trying to determine where the suspect may have left fingerprints. (RP 133-134). While he was reviewing the video of the incident, Detective Peterson recognized the suspect based upon prior experience as Rufus Phelps. (RP 135).

The photographs that were obtained from the surveillance video were then shown to Ms. Patty Berg and her daughter Jamie Berg. Patty Berg and her daughter Jamie had known the defendant for almost six years prior to the robbery and both identified the photographs taken by the

surveillance camera as being the person they knew as “Slim” or Rufus Phelps. (RP 110-111, and RP 114-115).

The defendant was subsequently arrested on January 15, 2010, by Deputy Sean Gow, while he was walking south along State Route 109. (RP 123). At the time of the arrest the defendant had two bags on his shoulder and a gold case that he was carrying. A search of the defendant’s person by Deputy Gow at the time of the arrest uncovered \$1,100.00. Later the bags the defendant was carrying were searched and an additional \$1,600.00 was found hidden behind the foam padding in the case that the defendant was carrying at the time of his arrest. (RP 128-129). One of the bags which the defendant had on him at the time of his arrest was a green bag admitted as Exhibit 4 and matched the description of the bag utilized during the robbery with a distinctive design on it that was captured in still photographs taken from video of the robbery at the credit union. (RP 84, 127-128 and 141-142).

At the conclusion of the State’s case, the defendant moved to dismiss the charge due to insufficient evidence to establish the use or threatened use of force to support the robbery charge. (RP 152). The court denied the defendant’s motion to dismiss and the defendant rested without calling any witnesses or presenting any evidence. (RP 155, 159). The defendant then objected to the giving of instructions number 5 and 7, which contained the definition of robbery and the element’s instruction respectively. (RP 156-157). The defendant also requested that a lesser

included instruction on the third degree theft be given as well. (RP 157). The court denied the requested lesser included instruction on third degree theft on the basis that there wasn't any evidence to support the lesser included theft defense. (RP 158).

At the conclusion of the trial and the court's instructions, the jury convicted the defendant of the crime charged and the matter is now before the court on appeal.

RESPONSE TO ASSIGNMENTS OF ERROR

- 1. The evidence at trial was sufficient to convince any rational trier of fact that the defendant took property by the threatened use of immediate force, violence, or fear of injury.**

The defendant argues that there was insufficient evidence presented at trial to support the conviction of the defendant for the charge of Robbery in the First Degree. In particular, the defendant argues that the evidence was insufficient as to the element of robbery that required the use or threatened use of immediate force, violence, or fear of injury to accomplish the taking of property.

A challenge to the sufficiency of the evidence to convict admits the truth of the state's evidence and all inferences that reasonably can be drawn from that evidence. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Evidence will be sufficient to support a conviction if, when it is viewed in the light most favorable to the state, any rational trier of fact may find the essential elements of the crime beyond a reasonable doubt. Salinas 119 Wn.2d at 201, 829 P.2d 1068. Determinations of credibility

are for the trier of fact and are not subject to appellate review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). On issues concerning conflicting testimony, credibility of witnesses, and persuasiveness of the evidence the appellate court defers to the jury. State v. Walton, 64 Wn.App. 410, 415, 824 P.2d, 533, review denied 119 Wn.2d 1011, 833 P.2d 386 (1992).

A person commits a robbery when he unlawfully takes personal property with an intent to commit theft from the person or in the presence of another against that person's will by the use or threatened use of immediate force, violence, or fear of injury to that person or to the person of anyone. RCW 9A.56.190. Any threat, regardless of how slight, which causes an owner to part with property, is sufficient to sustain a robbery conviction. State v. Handburgh, 119 Wn.2d 284, 293, 830 P.2d 641 (1992).

In the case of robbery, the threat to use immediate force, violence, or cause injury includes an indirect or implied threat and does not require an explicit or an overt threat on the part of the defendant. State v. Shcherenkov, 146 Wn.App. 619, 626, 191 P.3d 99 review denied, 165 Wn.2d 1037 (2009). Thus, an implied threat is sufficient to support a robbery conviction in the State of Washington. Shchernenkoy, 146 Wn.App. at 626. An unlawful demand for the money from a bank teller either verbally or by use of a note, even without an overt or explicit threat or the display of a weapon, can support a conviction for robbery. State v.

Shcherenkov, 146 Wn.App. 627-629; State v. Parra, 96 Wn.App. 95, 101-102, 977 P.2d 1272 (1999); State v. Collinsworth, 90 Wn.App. 546, 553-554, 966 P.2d 905 (1998).

In this case the defendant walked up to the teller at the credit union and handed her a note on a white piece of paper written in black felt pen with nice penmanship and neat print that began with the line “Don’t panic.” The next line was “Put the money in the bag.” When Ms. Melton looked back at him in disbelief, the defendant said “yeah, I am sorry” indicating that it was really happening and confirming Ms. Melton’s interpretation of the note. The defendant then handed over a bag to Ms. Melton and she began to place money from her tray into the bag and only stopped when she reached the bait money, which was the only money remaining in her tray. Ms. Melton stopped at that point because the defendant told her “that’s enough,” indicating to her that he apparently knew that was bait money and its removal would set off the alarm. (RP 87-88).

Ms Melton testified that when confronted with the note she panicked and despite having worked for the credit union for a number of years and undergone extensive training courses of how to handle a robbery, it just went out the window and she went into an instinctive mode. Ms. Melton said the only thing she managed to do was to protect herself and the others in the bank by getting him out the door and giving him what he wanted. She also testified that when she turned to take

money from her tray to put in the bag and turned back, the note had been removed. (RP 87-89)

Ms. Melton indicated that when he made the statement “yeah, I am sorry” it was not really apologetic but more like saying to her that this was actually happening to you. (RP 90). Ms. Melton testified that she did have an alarm at the foot of her teller’s counter, but she did not trigger the alarm because she was scared and did not want to bring attention to the triggering of the alarm. (RP 90). Ms. Melton testified that when he spoke to her the look on his face was calm and condescending. It scared her enough to give him her money and that she would not have ordinarily have given the money to someone if she hadn’t been scared and felt there was some kind of threat. (RP 96). She later testified that when he told her that was enough and stopped her from giving him the bait money, his tone of voice was slightly different while still calm, it appeared that he clearly knew what he was doing when he stopped her from giving him the bait money. (RP 98). Ms. Melton was very clear that she wouldn’t have given him the money unless she thought there was a threat. She had been robbed and that was her threat. She had a note saying “Don’t panic.” “Put the money in the bag.” That was enough for her to go into action. (RP 100-104).

Ms. Kristi Templeton, the branch manager of the credit union, testified that she had checked under the name of Rufus Andrew Phelps III and Rufus Phelps and found that the bank did not have any record of an

account by either one of those names. Ms. Templeton also testified that as a result of the robbery, the bank remained closed even after the police had completed their investigation because everyone at the bank was “pretty shook up” and that she took extra precautions the next day when the credit union opened to ensure everyone’s safety. (RP 66-67).

It is clear from the testimony of Ms. Melton that the wording of the note, combined with the defendant’s tone and demeanor, caused her to turn over \$6,735.00. She didn’t know the defendant and he made no pretext of any lawful entitlement of that money. The defendant did not contradict or controvert any of the evidence or testimony presented during the trial. This evidence clearly supports the finding by a rational jury that an implied threat to use immediate force, violence or inflict injury had been used to obtain money from Ms. Melton.

The defendant attempts to distinguish this case from the facts in Collinsworth, 90 Wn.App. 546, and Shcherenkov, 146 Wn.App. 619. However, a review of the facts of those two cases indicate that this fact pattern is more similar than different.

In Collinsworth the case involved six counts of robbery or attempted robbery, all of them involving banks. In Count 1, Collinsworth simply entered the bank, appeared to be very nervous and fidgety and then in a serious tone of voice said “I need your hundreds, fifties and twenties.” When the teller paused, unsure what to do, Collinsworth simply said, “I am serious” and then after the money was being retrieved said “no bait, no

dye.” Collinsworth did not put his hands in his pockets or otherwise indicate in any way that he had a weapon.

In the second count, he simply entered the bank and demanded that the teller give him hundreds, fifties and twenties. When the teller responded with “excuse me,” Collinsworth repeated “give me your hundreds, fifties and twenties.” After the teller gave him the twenties and fifties and told him that he did not have any hundreds, Collinsworth simply left the bank.

In the third count, Collinsworth again simply approached a teller and demanded that he give him all his fifties and all his hundreds. At first the teller did not understand and Collinsworth repeated the demand. The teller then handed him the money and he left.

In the fourth count, Collinsworth entered another bank, approached the teller, placed a green cloth bag on the counter and asked the teller in a low voice to fill it with hundreds and fifties and no dye packs. The teller in that case put the money from the drawer on the counter and Collinsworth gathered up the money and left. In this case, the teller was unable to see one of Collinsworth’s hands, which he kept near his waist, close to a baggy sweatshirt, and the teller was concerned that he might have a weapon.

In the fifth count, Collinsworth again just approached the teller in the bank, handed the teller a bag and told her in a regular tone of voice to fill it. When the startled teller could not find the keys to her cash drawer,

Collinsworth told her to forget it and left. With the exception of the one count where Collinsworth kept his hand near his waist, where the teller could not tell if he had a weapon, these fact patterns are remarkably similar to the fact pattern used here. In addition to simply demanding money, the defendant in this case also added the statement, "Don't panic."

In each of the incidents involving Collinsworth, the word robbery was never used and the only time a weapon might have been involved was one time when the teller could not see his hand. In several of the incidents the teller assumed because of the demand for money unaccompanied by any lawful claim to the money, that Collinsworth was armed. Collinsworth did not at any time overtly make any threat or any indication that he was armed .

In the Shcherenkov case, there were four instances involved and the defendant did not display a weapon or threaten any of the tellers in those incidents with a weapon. He used a hand written note in all four incidents. In three of the incidents the notes said, "stay calm" or "please be calm this is a robbery." In the fourth incident, he simply had a note which said "Place four thousand dollars in an envelope. Do not make any sudden movements or actions. I will be watching you."

Like the present case, in three of the counts involving Shcherenkov he urged the teller not to panic or to stay calm and followed that with a demand for money. In one of the counts Shcherenkov put his hand in his

pocket, but the teller believed it was a cell phone or radio, and did not believe it was a weapon that he had in the pocket.

While all the fact patterns differ in minor ways, it is clear that in all of these cases the fact patterns involve an implied threat involving a demand for money from a financial institution without any legal pretext, buttressed by a statement such as stay calm, this is a robbery, or don't panic which implies danger to the recipient if they don't comply with the demand for the money.

The evidence in this case supports the jury's finding of an implied threat that supports the conviction on one count of First Degree Robbery.

2. The court's instruction number five defining the crime of Robbery and instruction number seven setting forth the elements of the crime of Robbery in the First Degree do not relieve the state of its burden to prove the elements of the crime charged beyond a reasonable doubt.

The defendant argues that the to convict instruction contained in numbers 5 and 7 of the supplemental clerk's papers relieves the state of the burden of proven beyond a reasonable doubt the element of threatened use of immediate force, violence or fear of injury. The defendant argues that because the instructions indicates that a threat may be either explicit or implied they somehow relieve the state of the burden of proving beyond a doubt the use of a threat.

The language contained in instruction number five, the definition of robbery, is virtually identical to the language of the instruction considered by the court in State v. Shcherenkov, 146 Wn.App. at 624.

(Instruction Number 5 Supplemental Clerk's Papers). The same argument was made in Shcherenkov that by adding the qualifying terms explicit or implied, the court had relieved the state of its burden of proving the use of force or the threatened use of force element to establish a robbery. The Shcherenkov court noted that under RCW 9A.04.110(27) the term threat means to communicate directly or indirectly the intent to take the applicable prohibited action. The court went on to state:

“definitions of both indirect and implied include the notion of communicating something in a way that is suggestive rather than explicit. Thus the trial courts “implied threat” instruction easily fits within the statutorily authorized indirect communication.”

State v. Shcherenkov, 146 Wn.App. 625.

Reading Shcherenkov and Collingsworth together discloses that neither case has changed the central element of robbery that requires the use or threatened use of immediate force, violence, or fear of injury. The state still must prove beyond a reasonable doubt that such a threat has been made, but the manner in which it is made, i.e. whether it is an explicit or implied communication of a threat is not an element. It is a correct statement of law under Shcherenkov and Collingsworth that a threat can be communicated either explicitly or impliedly. That statement of law does not relieve the state of its burden of proof as to whether a threat was made.

Instruction seven expressly required the state to prove beyond a reasonable doubt each of the elements listed in that instruction, which

included the use or explicit or implied threatened use of immediate force, violence or fear of injury. (Instruction Number 7, Supplemental Clerk's Papers). That instruction allowed counsel to argue defendant's theory of the case, the explicit or implied threat language was not misleading and properly informed the jury of the applicable law. State v. Aguirre, 168 Wn.2d 350, 363-364, 229 P.3rd 669 (2010). Furthermore, the challenged instructions did not relieve the State of its burden to prove the elements of robbery beyond a reasonable doubt.

3. The court properly denied the defendant's request for a lesser included instruction on the crime of Theft in the Third Degree.

The defendant argues that the trial court erred by denying him his requested instruction on Theft in the Third Degree as a lesser included offense of First Degree Robbery.

A criminal defendant may be held to answer for only those offenses which are contained in an information or indictment filed against him. State v. Irizarry, 111 Wn.2d 591, 592, 763 P.2d 432 (1988). Article 1, Section 22 of the Washington State Constitution insures a defendant's right to be informed of the charges against him and to be tried only for the offenses charged. State v. Peterson, 133 Wn.2d 885, 889, 948 P.2d 381 (1997).

However, under RCW 10.61.006, a defendant can be convicted of an offense that is a lesser included offense of the crime charged without being separately charged. In applying the statutory exception, the courts

have developed a two-part test, the first part being described as the legal prong, and the second part being described as the factual prong. This test incorporates the constitutional requirement of notice under Article 1, Section 22 of the Washington State Constitution into its legal prong. State v. Berlin, 133 Wn.2d 541, 545, 546, 947 P.2d 700 (1997). The two part test simply requires that (1) each of the elements of the lesser offense must be a necessary element of the offense charged, and (2) the evidence must support an inference that the lesser crime was committed. State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978).

To meet the factual prong, it is not enough that the jury might simply disbelieve the state's evidence. Some evidence must be presented which affirmatively establishes the defendant's theory on the lesser included offense before an instruction will be given under this test. State v. Fowler, 114 Wn.2d 59, 67, 785 P.2d 808 (1990). The factual test requires more than merely the sufficient evidence necessary to support the giving of any jury instruction, and, more specifically, requires the evidence must raise an inference that only the lesser included offense was committed to the exclusion of the charged offense. State v. Fernandez-Medina, 141 Wn.2d 448, 455, 6 P.3rd 1150 (2000); State v. Bowerman, 115 Wn.2d 794, 805, 802 P.2d 116 (1990).

A court reviews the adequacy of jury instructions based on an error of law de novo. But where the trial court refuses to give an instruction based on the facts of the case, it is reviewed for an abuse of discretion. State v. Hunter, 152 Wn.App. 30, 43, 216 P.3rd 421 (2009).

In this case, the defendant did not testify, present any witnesses, or submit any evidence to the court. The only issue the defendant raised was its claim at the conclusion of the state's case that there was insufficient evidence to support the threatened use of immediate force, violence or fear of injury to the person. (RP 152). The defendant then argued

“ . . . in the event that the jury would determine that there was no threat based on the actions of Mr. Phelps, and in that scenario then theft would be a viable lesser included.”

(RP 157). The court then specifically went through the nature of the evidence in terms of possibility of a theft instruction and reiterated again that, based on the evidence, he felt that clearly there was an implied threat and that the facts in the case were not consistent with or supported with sufficient evidence to find that only the crime of theft was involved. (RP 157-158).

In effect, the defendant was not claiming to have introduced affirmatively any evidence that only the crime of Theft in the Third Degree had been committed, but was requesting an instruction for Theft in the Third Degree hoping that the jury may disbelieve the state's evidence and not find that a threat had been made in this case.

Defendant's counsel was free to and did argue to the jury that very theory to the jury. The defendant conceded to the jury that he had committed a theft, that he had taken money from a financial institution in the presence of Ms. Melton, but argued that there was nothing that Mr. Phelps did that in any way implied that something was going to happen to anyone in the bank if he didn't get his money. (RP 192). The defendant expressly argued to the jury that any fear that Ms. Melton felt was not the result of anything that Mr. Phelps did or implied he would do if she did not comply with his note. (RP 193). The jury disagreed with defense counsel's argument and found the defendant guilty.

The defendant now argues that the evidence that was presented at trial would have supported an instruction on the lesser included crime of Theft in the Third Degree because the evidence established that Mr. Phelps merely exploited a bank policy, which requires tellers to cooperate with criminal requests, even in the absence of a threat of force, to insure the safety of staff or customers. However, a review of the record does not show any evidence that Ms. Melton would have turned over the \$6,735.00 to anyone who simply requested the monies as the defendant argues.

Ms. Melton several times indicated in her testimony that she panicked and that she did not follow proper bank procedures. She testified that she would not ordinarily give out money to a person who requested it, unless she felt there was some kind of threat. (RP 96, 103). A review of Ms. Melton's testimony makes it clear that before the note which said

“Don’t panic” “Put the money in the bag” and the defendant’s behavior, Ms. Melton would not normally have turned her money over to the defendant. Quite the opposite, Ms. Melton indicated that she did in fact panic and forgot to do most of the things that her training required her to do. There simply wasn’t any evidence that the defendant knew of, or was exploiting any bank policy that would require Ms. Melton to give out money at any request absent a threat. In any event, there isn’t even the slightest evidence that only the crime of Theft in the Third Degree was committed in this case, which is required in order to support the giving of the lesser included offense of the instruction for that crime.

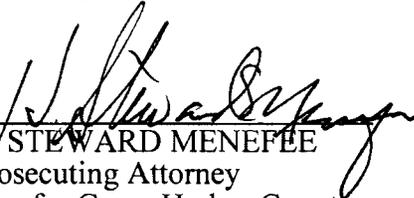
CONCLUSION

The record contains sufficient evidence to convince any rational trier of fact that the defendant committed the crime of Robbery in the First Degree. The instructions given by the court in this case were correct statements of law, which permitted the parties to argue their theories of the case to the jury and required the state to fully meet its burden of proving each element of the crime beyond a reasonable doubt. The court properly denied the defendant’s request for instruction on the lesser included offense of Theft in the third Degree in the absence of any affirmative evidence to support a rational inference that the defendant only committed

the lesser included offense of Theft in the Third Degree. Upon that basis,
the state requests the court affirm the defendant's conviction.

DATED this 14 day of February, 2011.

Respectfully Submitted,

By: 
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for Grays Harbor County
WSBA #9354

HSM/lh

COURT OF APPEALS
DIVISION II

FEB 15 AM 11:52

STATE OF WASHINGTON
BY C
DEPUTY

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

STATE OF WASHINGTON,

Respondent,

No.: 40733-7-II

v.

DECLARATION OF MAILING

RUFUS PHELPS, III.,

Appellant.

DECLARATION

I, Barbara Chapman hereby declare as follows:

On the 14th day of February, 2011, I mailed a copy of the Brief of Respondent to Manek R. Mistry and Jodi R. Backlund; Backlund & Mistry; P.O. Box 6490, Olympia, WA 98507 and to Rufus Phelps, III, DOC #264345, Clallam Bay Corrections Center, 1830 Eagle Crest Way, Clallam Bay, WA 98326, by depositing the same in the United States Mail, postage prepaid.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

Barbara Chapman