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Division II
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No. 53527-1-II

**Court of Appeals, Div. II,
of the State of Washington**

State of Washington,

Respondent,

v.

Marx W. Coonrod,

Appellant.

Brief of Appellant

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1. Introduction

Marx Coonrod's defense to charges of bank robbery had two central planks: 1) this was a case of mistaken identity—*i.e.*, Coonrod was not the thief; and 2) the criminal conduct constituted merely theft, not robbery. Both central planks were undermined by errors of the trial court in excluding portions of Coonrod's mistaken identity evidence and in declining to instruct the jury on the lesser included offense of theft. These errors prejudiced Coonrod and call for reversal of the judgment and sentence and remand for a new trial.

2. Assignments of Error

Assignments of Error

1. The trial court erred in declining to give jury instructions on the lesser included offense of Theft.
2. The trial court erred in excluding evidence of mistaken identity related to Doug Shattuck walking in front of the bank and using the ATM on April 22.

Issues Pertaining to Assignments of Error

1. A criminal defendant is entitled to have the jury instructed on lesser included offenses when the legal and factual prongs of the *Workman* test are satisfied. Here, both prongs are met by the lesser included offense of theft. Did the trial court err in declining to instruct the jury on the lesser included offenses? (assignment of error 1)

2. Relevant evidence is admissible. Coonrod planned to offer evidence of mistaken identity to question the reliability of the bank employees' testimony that the same man was the offender in all three incidents. Did the trial court abuse its discretion in excluding this evidence? (assignment of error 2)

3. Statement of the Case

3.1 The State's evidence at trial described three incidents at Umpqua Bank in Vancouver, Washington.

The State charged Marx Coonrod with three counts of Robbery I of a financial institution and one count of Attempted Robbery I of a financial institution, arising from three incidents at Umpqua Bank on February 1, March 16, and April 22, 2016. CP 1-2. The State explained at trial that the key issue was who committed the crimes. *E.g.*, 5 RP 919. The Defense emphasized that it was not just about who did it but also about what actually happened. 5 RP 930-40.

On February 1, 2016, a medium height, heavy-set man entered the bank. 1 RP 71.¹ He was wearing a dark colored

¹ There was extensive testimony from multiple witnesses regarding the three incidents. The three following paragraphs will cite only sparingly from the testimony of bank staff. Their full testimony can be found at 1 RP 65-116 (Darcy Reed, regarding all three incidents); 1 RP 164-85 (Nicole Miller, Feb. 1 and Mar. 16); 2 RP 194-215 (Loretta Gilbert, Feb. 1 and Mar. 16); 2 RP 216-39 (Thalia Meza, Feb. 1 and Apr. 22); 2 RP 240-49 (Stuart Blighton, Mar. 16); 2 RP 250-77 (Monece Blankinship, all three incidents); 2 RP 301-13 (Erica Tannler, Mar. 16 and Apr. 22); 3 RP 405-13 (Dayle Dawson, Apr. 22); 3 RP 413-22 (Dina

jacket, jeans, a bandana and sunglasses over his face, a beanie-style hat, and a hood over his head. 1 RP 71. A bank employee called out, “Oh my God, we’re being robbed!” 1 RP 70. The man walked up to a teller station, pushed a customer aside, and demanded money from the teller, speaking in a sturdy tone, “Give me your 50s and 100s.” 1 RP 71, 169. The teller gave him money from her drawer. 2 RP 226. The man stepped over to the next teller, who also gave him money from her drawer. 2 RP 226. The man walked out of the bank and turned right, walking across the parking lot toward a pizza restaurant. 1 RP 72. Bank staff noticed he had a distinctive walk, not quite a limp, but heavier on one side than the other. 1 RP 73. The thief got away with \$1,690 of the bank’s money. 1 RP 77. Security camera footage was played for the jury. 1 RP 79; Ex. 135.

On March 16, 2016, a man with the same build as the first thief entered the bank. 3 RP 417. He was wearing a sweatshirt and jeans, a bandana and sunglasses over his face, and a hood over his head. 3 RP 418. A bank employee screamed, “He’s back!” 1 RP 89. The man demanded money from a teller, saying, “Give me your 50s and 100s.” 3 RP 418. While the teller retrieved the money from her drawer, the man said the Spanish word, “andele,” (as in, “hurry up”) a few times. 3 RP 419. Bank

Stepanyuk, Mar. 16); and 3 RP 423-36 (Payton Rittenburgh, Feb. 1 and Mar. 16).

staff were sure that he was the same thief from February 1. 1 RP 92. After he left, he turned right and headed toward the pizza restaurant. 1 RP 92. The thief got away with \$4,850 of the bank's money. 1 RP 98. Security camera footage was played for the jury. 1 RP 96; Ex. 136.

On April 22, 2016, the bank had a security guard at the entrance. 1 RP 102-03. A man walked across the front of the bank toward the outside ATM and then walked back away. 2 RP 233-34, 235, 274-75, 311. Bank staff believed it was the same man from previous incidents. 2 RP 275. The man did not enter the bank. 1 RP 106. No money was taken. 1 RP 106.

Workers at the neighboring business had seen the man walk to and away from the bank on February 1 and March 16. 1 RP 121-22, 125-26.² They believed it was the same man both times. 1 RP 126. On April 22, they saw a man walk toward the bank but then turn around after he passed the business and walk back behind the pizza restaurant and drive away in a White Ford Ranger extended cab pickup. 1 RP 129-31; 2 RP 299. The man they saw on April 22 was not covering his face. 1 RP

² Like the preceding paragraphs, this paragraph will cite only sparingly from the testimony of the Vern Fonk employees. Their complete testimony can be found at 1 RP 117-36 (Marylou Aviles, all three incidents); 2 RP 281-300 (Keon Maghsoudi, all three incidents); 3 RP 395-404 (Rosie Perez, Feb. 1 and Apr. 22); and 3 RP 501-27 (Shirlene Hoy, Mar. 16 and Apr. 22).

135. They believed this was the same man and the same truck as they had seen on March 16. 3 RP 513-14, 518.

3.2 The police investigation of the incidents came to focus on Marx Coonrod.

Marx Coonrod is a handyman. 5 RP 843, 848, 855. He works for cash. 5 RP 855, 869. He does not even have a checking account. 5 RP 869. On February 1, Coonrod was building a fence in Scappoose, Oregon. 5 RP 850. On March 16, Coonrod was working and fishing with a friend. 5 RP 859. On April 22, Coonrod did go to the Umpqua Bank branch, to get change for a \$100 bill, but saw the security guard and decided not to go in because his breath smelled like alcohol. 4 RP 682-83.

While investigating the February 1 incident, Vancouver police located a beanie-style cap behind the nearby pizza restaurant. 1 RP 160. The beanie was collected and submitted to the state crime lab for DNA analysis. 3 RP 393, 458; 4 RP 745. The DNA profile obtained from the beanie matched records of a “Mark Coonrod.” 4 RP 751-52.

With the DNA result, the police focused their investigation on Marx Coonrod. *See* 4 RP 650-52. Detective Martin visited Coonrod’s residence in Scappoose and observed a man matching the description from the bank incidents leaving

Coonrod's apartment and entering a white Ford Ranger. 4 RP 655.

Police returned later and arrested Coonrod. 3 RP 557. After obtaining a search warrant, they searched Coonrod's truck and residence. 3 RP 564. They located and seized a blue bandana, sunglasses, a beanie hat, and camouflage pants, among other things. *E.g.*, 3 RP 569-70.

Detective Martin questioned Coonrod. 4 RP 676-77. Coonrod denied any connection to the beanie cap located on February 1. 4 RP 687. Martin obtained a DNA sample from Coonrod. 4 RP 688. The DNA profile from the beanie matched the reference sample obtained from Coonrod. 4 RP 753-55.

Martin obtained cell phone records for Coonrod's phone. 4 RP 690-91. The records showed that Coonrod's phone was turned off or otherwise not connected to the network on the morning of each of the Umpqua Bank incidents. 4 RP 695, 699, 702-03.

The State charged Coonrod with three counts of Robbery and one count of Attempted Robbery arising from the three incidents. CP 1-2.

3.3 The trial court excluded Coonrod's mistaken identity evidence and declined to instruct the jury on the lesser included offense of theft.

In support of his contention that he did not commit the crimes, Coonrod planned to present evidence that on April 22, a man named Doug Shattuck made a transaction at the ATM outside the bank at about the same time when Coonrod was approaching the bank. *See* 1 RP 49. Footage from the ATM showed Mr. Shattuck wearing a hoodie. 1 RP 50. The purpose of this evidence would have been to discredit the testimony of bank staff who said that the same individual was seen on all three occasions. 1 RP 50-51. The bank staff were so suspicious of anyone of Coonrod's build wearing a hoodie that when they saw Mr. Shattuck walking in front of the bank toward the ATM, they erroneously concluded that he was the thief from before. 1 RP 50-51.

The State moved to exclude this evidence. CP 140. The trial court determined that the evidence was not relevant under ER 401 and granted the State's motion. 1 RP 52-54.

At the end of the trial, Coonrod requested the jury be instructed on lesser included offenses of Theft I and/or Theft II. 5 RP 880. Coonrod argued that under *State v. Farnsworth*, 184 Wn. App. 305, 348 P.3d 759 (2014), *rev'd on other grounds*, 185 Wn.2d 768, 374 P.3d 1152 (2016), theft is a lesser included

offense to robbery. 5 RP 881. The State argued that an unpublished case, *State v. Sass*, No. 73462-8-I (Oct. 3, 2016), was persuasive authority that first degree theft is not a lesser included offense to first degree robbery of a financial institution. 5 RP 883. The trial court held that theft is not a lesser included offense to robbery under both prongs of the *Workman* test. 5 RP 883. The trial court declined to give the instruction. 5 RP 886. Coonrod excepted to the absence of a lesser included offense instruction. 5 RP 903-04.

In closing, Coonrod argued that there was reasonable doubt that he was the thief in some or all of the three incidents. 5 RP 933-35, 937-38. He also argued that the thief's conduct did not meet the required elements of robbery but was merely theft. 5 RP 935-940. Because only robbery was charged and instructed, Coonrod asked the jury to find him not guilty. 5 RP 940.

The jury returned a guilty verdict on all four counts. CP 215-18; 5 RP 948-50. The trial court sentenced Coonrod to the upper end of the standard range: 171 months for each of the robbery counts and 120 months for the attempted robbery. 6 RP 970-71.

4. Argument

4.1 The trial court erred in declining to give a lesser included offense instruction for theft.

Generally a defendant can be tried and convicted only of crimes with which he or she is charged, but a jury is permitted to find a defendant guilty of a lesser offense that is necessarily included in the charged offense. *State v. Berlin*, 133 Wn.2d 541, 544, 947 P.2d 700 (1997). This common law rule was codified in Washington at RCW 10.61.006, which provides, “In all other cases the defendant may be found guilty of an offense the commission of which is necessarily included within that with which he or she is charged in the indictment or information.”

The modern interpretation of the statute is set forth in *State v. Workman*, 90 Wn.2d 443, 584 P.2d 382 (1978), in which the court established a two-part test for lesser included offenses. Under the “legal prong,” each of the elements of the lesser offense must be a necessary element of the charged offense. *Berlin*, 133 Wn.2d at 545-46. Under the “factual prong,” the evidence in the case must support an inference that the lesser crime was committed. *Id.* This Court reviews the legal prong de novo and the factual prong for abuse of discretion. *State v. Walker*, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998).

In a recent case on lesser included offenses, the Washington Supreme Court observed, “Giving juries this option

is crucial to the integrity of our criminal justice system because when defendants are charged with only one crime, juries must either convict them of that crime or let them go free. In some cases, that will create a risk that the jury will convict the defendant despite having reasonable doubts. As Justice William Brennan explained, ‘Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of some offense, the jury is likely to resolve its doubts in favor of conviction.’ *Keeble v. United States*, 412 U.S. 205, 212–13, 93 S.Ct. 1993, 36 L.Ed.2d 844 (1973). To minimize that risk, we err on the side of instructing juries on lesser included offenses. A jury must be allowed to consider a lesser included offense if the evidence, when viewed in the light most favorable to the defendant, raises an inference that the defendant committed the lesser crime instead of the greater crime.” *State v. Henderson*, 182 Wn.2d 734, 736, 344 P.3d 1207 (2015).

Here, the charged offense includes five essential elements: 1) unlawfully taking personal property from the person or in the presence of the victim; 2) intent to commit theft of the property; 3) against the victim’s will by use of threatened use of immediate force, violence, or fear of injury; 4) use of force or fear to obtain or retain possession of the property; and 5) within or against a financial institution. RCW 9A.56.190 and .200(1)(b); CP 180-82 (to-convict instructions).

The lesser offense of theft has two essential elements: 1) wrongfully obtaining or exerting control over property of another; and 2) intent to deprive the person of the property. RCW 9A.56.020. The degree of a theft offense is determined primarily by the value of the property taken: property over \$5,000 in value is first degree theft, and property between \$750 and \$5,000 in value is second degree theft. RCW 9.56.030 and .040. Value is not an essential element of third degree theft. *State v. Tinker*, 155 Wn.2d 219, 225, 118 P.3d 885 (2005).

When a person unlawfully takes personal property from the person or in the presence of another with intent to commit theft—the first two elements of robbery—the person also necessarily wrongfully obtains or exerts control over property of another with intent to deprive the person of the property—the essential elements of theft. Thus, under the “legal prong,” the elements of the lesser offense are necessary elements of the charged offense. The fact that robbery has extra elements—from the person or in the presence; use of threat, force, or fear; and within or against a financial institution—does not change the analysis. Indeed, it is precisely these extra elements that make robbery the greater offense and theft the lesser. The “legal prong” of the *Workman* test is satisfied.

The “factual prong” is also satisfied. The evidence in this case demonstrates that the lesser crime was committed. The

thief wrongfully obtained control over the bank's money with intent to deprive the bank of that money. There was also room for reasonable doubt that the theft was accomplished by use of threat, violence, force, or fear such as to make it clearly robbery.

Although the use of threat, force, or fear can be implied by the offender's conduct, the question is a factual matter for the jury. *State v. Farnsworth*, 185 Wn.2d 768, 775-76, 374 P.3d 1152 (2016). As a threshold matter, the *Farnsworth* court noted that an implied use of force could exist where "an ordinary person in the victim's position could reasonably infer a threat ... from the defendant's acts." *Id.* at 776.

In *Farnsworth*, the court was examining the sufficiency of evidence of an implied use of force. *Farnsworth*, 185 Wn.2d at 775. In doing so, it viewed the evidence in a light favorable to the State, asking "whether any rational finder of fact could have found that the State proved each element beyond a reasonable doubt." *Id.*

But just because one hypothetical finder of fact could reasonably infer a threat from the defendant's acts in that case does not mean that **every** rational finder of fact would make the same finding. Indeed, the *Farnsworth* court observed, "In every such case, the circumstances will be unique and context-dependent." *Farnsworth*, 185 Wn.2d at 779.

The standard for determining whether a lesser included offense instruction is warranted is much more defendant-friendly than the sufficiency of the evidence standard. For lesser included offenses, the question is whether a jury could rationally acquit the defendant of the greater offense. *Berlin*, 133 Wn.2d at 551-52. Instead of viewing the evidence favorably to the state, courts are required to view the evidence in the light **most favorable to the defendant**. *Henderson*, 182 Wn.2d at 736 If, as here, a rational finder of fact could conclude that there was reasonable doubt as to one of the elements of the greater offense, the lesser included instruction should have been given. *See Berlin*, 133 Wn.2d at 552 (where there was evidence raising reasonable doubt that the defendant could form the intent to kill, the defendant was entitled to a lesser included offense instruction).

Here, the common thread of the witness testimony, viewed in a light favorable to the defendant, is that the thief entered the bank, demanded 50s and 100s, took the money he was given, and left. On March 16 he said, “andele”—hurry up—while he waited for the teller to produce the cash. He made no other demands or threats. He did not brandish any weapons or make any threatening gestures. He used no violence.

Out of the many witnesses in the bank on February 1, only one claimed to have heard the thief declare that it was a

robbery. In reality, it was another bank employee who called out, “Oh my God, we’re being robbed!” 1 RP 70. A rational juror could have found that the thief did not actually make this statement.

Out of the many witnesses in the bank on March 16, only one claimed to have heard the thief say, “stay where you are.” A rational juror could have found that the thief did not actually make this statement.

A hoodie, bandana, and sunglasses are not of themselves threatening. They are not a sign of impending violence. They are, in this case, a disguise—a sign that the thief did not want to be recognized. A rational juror could have found that this disguise did not constitute an implied threat.

Viewing the evidence in a light most favorable to the defendant, a rational juror could have reasonably concluded that there was at least a reasonable doubt as to whether the thief used force, violence, or threat—either express or implied—and therefore was not guilty of robbery. The defendant was entitled to a lesser included offense instruction so the jury would not have to make the all-or-nothing choice on robbery. The trial court erred in denying the instruction. This Court should reverse and remand for a new trial, in which a lesser included offense instruction for theft should be given.

4.2 The trial court abused its discretion in excluding Coonrod's mistaken identity evidence as irrelevant.

“All relevant evidence is admissible. ... Evidence which is not relevant is not admissible.” ER 402. “Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” ER 401.

In support of his contention that he did not commit the crimes, Coonrod planned to present evidence that on April 22, a man named Doug Shattuck made a transaction at the ATM outside the bank at about the same time when Coonrod was approaching the bank. *See* 1 RP 49. Footage from the ATM showed Mr. Shattuck, a man of similar build to Coonrod, wearing a hoodie. 1 RP 50. The purpose of this evidence would have been to discredit the testimony of bank staff who said that the same individual was seen on all three occasions. 1 RP 50-51. The bank staff were so suspicious of anyone of Coonrod's build wearing a hoodie that when they saw Mr. Shattuck walking in front of the bank toward the ATM, they erroneously concluded that he was the thief from before. 1 RP 50-51. The trial court granted the State's motion to exclude the evidence, finding that it was not relevant under ER 401. 1 RP 52-54.

The evidence was relevant. As the State argued in both opening and closing, *see* 5 RP 930, the identity of the thief was a major issue in the case. Although the DNA found in the beanie cap arguably linked Coonrod to the February 1 incident, the only link between the February 1 and March 16 incidents was the testimony of bank staff that they believed it was the same man both times. Coonrod’s “mistaken identity” evidence would have had a tendency to undermine the reliability of the bank staff testimony. If they believed that Doug Shattuck was the same man as in the February 1 and March 16 incidents, when clearly he was not, could their testimony that the same man committed the February 1 and March 16 incidents be relied on? Or was there room for reasonable doubt? The “mistaken identity” evidence had a tendency to make the existence of a fact of consequence—the identification of Coonrod as the offender on all three occasions—less probable than it would be without the evidence.

The trial court abused its discretion in finding the “mistaken identity” evidence irrelevant and excluding it. Coonrod had a constitutional right to present this relevant evidence in his defense. *See State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010). This Court should reverse the judgment and sentence and remand for a new trial.

5. Conclusion

The trial court erred in declining to give a lesser included offense instruction on theft. The trial court abused its discretion in excluding Coonrod's mistaken identity evidence. This Court should reverse the judgment and sentence and remand for a new trial.

Respectfully submitted this 19th day of December, 2019.

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Certificate of Service

I certify, under penalty of perjury under the laws of the State of Washington, that on December 19, 2019, I caused the foregoing document to be filed with the Court and served on counsel listed below by way of the Washington State Appellate Courts' Portal.

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I further certify that on December 19, 2019, I served the Brief of Appellant and a copy of RAP 10.10 on the Appellant, Marx Coonrod, by depositing a copy in the U.S. mail, postage paid, to the following address:

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