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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.

Reply Brief of Appellant

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Table of Contents

1. Statement of the Case.....	1
2. Argument.....	2
2.1 The trial court erred in declining to give a lesser included offense instruction for theft.....	2
2.1.1 The legal prong of the <i>Workman</i> test is met because a person who commits first degree robbery also necessarily commits some degree of theft.	3
2.1.2 The factual prong is met because a rational juror could have reasonably concluded that the thief did not use force, violence, or threat.	7
2.2 The trial court abused its discretion in excluding Coonrod’s mistaken identity evidence as irrelevant.....	10
3. Conclusion	11

Table of Authorities

Cases

<i>State v. Berlin</i> , 133 Wn.2d 541, 947 P.2d 700 (1997)	2
<i>State v. Condon</i> , 182 Wn.2d 307, 343 P.3d 357 (2015)	9
<i>State v. Ellard</i> , 46 Wn. App. 242, 730 P.2d 109 (1986)	5
<i>State v. Farnsworth</i> , 185 Wn.2d 768, 374 P.3d 1152 (2016)	7
<i>State v. Henderson</i> , 182 Wn.2d 734, 344 P.3d 1207 (2015)..	2, 5, 8
<i>State v. Johnson</i> , 196 Wn. App. 1039, 2016 WL 6216258, No. 47876-5-II (Oct. 25, 2016)	9, 10
<i>State v. Sass</i> , 196 Wn. App. 1017, 2016 WL 5719844, No. 73462-8-I (Oct. 3, 2016)	6, 7
<i>State v. Shcherenkov</i> , 146 Wn. App. 619, 191 P.3d 99 (2008)	8
<i>State v. Tinker</i> , 155 Wn.2d 219, 118 P.3d 885 (2005)	5
<i>State v. Workman</i> , 90 Wn.2d 443, 584 P.2d 382 (1978)	2

Statutes

RCW 9A.56.020	3, 6
RCW 9A.56.030	3
RCW 9A.56.190	3

1. Statement of the Case

Coonrod would like to clarify a few brief points regarding the facts set forth in the briefs.

Both briefs relate that Coonrod was charged with four counts arising from three incidents. Two of those counts arose from the February 1 incident, where the thief took money from two different tellers (Desiree Adams and Thalia Meza). CP 1. One count arose from the March 16 incident, where the thief took money from only one teller (Dina Stepanyuk). CP 2. The fourth count—attempt—arose from the April 22 incident, where no thief ever entered the bank. *See* CP 2.

Coonrod's opening brief indicated, "He does not even have a checking account." This was an inaccurate statement.

Coonrod's son testified that he (the son) would occasionally hold cash on his father's behalf, but he did not say that his father did not have a checking account. 5 RP 869.

The State recites as fact that when the thief entered the bank on March 16, he said, "no one move." Br. of Resp. at 3. However, out of the eight witnesses in the bank that day, only one testified to this alleged statement. RP 306. The State recites as fact that as the thief left the bank on March 16, he said, "everybody stay where you are." Br. of Resp. at 3. However, out

of the eight witnesses in the bank that day, only one testified to this alleged statement. RP 91.

2. Argument

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

Coonrod's opening brief argued that the trial court should have given a jury instruction on the lesser included offense of theft. Br. of App. at 9-14. 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). Lesser-included offense instructions are analyzed under the two-prong *Workman* test. *See State v. Workman*, 90 Wn.2d 443, 584 P.2d 382 (1978). Under the "legal prong," each of the elements of the lesser offense must be a necessary element of the charged offense; under the "factual prong," the evidence in the case must support an inference that the lesser crime was committed. Br. of App. at 9 (citing *State v. Berlin*, 133 Wn.2d 541, 544, 947 P.2d 700 (1997)).

2.1.1 The legal prong of the *Workman* test is met because a person who commits first degree robbery also necessarily commits some degree of theft.

The legal prong of the *Workman* test, which compares the statutory elements of the greater and lesser crimes, is met here because a person who commits first degree robbery also necessarily commits some degree of theft. Coonrod's brief set forth the statutory elements of first degree robbery:

1) unlawfully taking personal property from the person or in the presence of the victim; 2) intent to commit theft of the property; 3) the taking was against the victim's will by use or 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. Br. of App. at 10 (citing RCW 9A.56.190 and .200(1)(b); CP 180-82 (to-convict instructions)).

Coonrod also set forth the defining elements of theft:

1) wrongfully obtaining or exerting control over property of another; and 2) intent to deprive the person of the property. Br. of App. at 11 (citing RCW 9A.56.020). Theft is unique in that these defining elements are set forth in one section of the code, while other sections establish the degree of the crime by reference to the value or type of property stolen. *See* RCW 9A.56.030 and .040.

The two defining elements of theft are necessarily included in the first two elements of first degree robbery. Br. of App. at 11. Thus, any person who commits first degree robbery also **necessarily** commits some degree of theft. The key difference between the crimes is that robbery is theft with the added use or threat of force.

The State's argument defies this common sense and defeats the purpose of lesser-included offenses. According to the State, no degree of theft can ever be a lesser included offense of robbery—even though, by definition, robbery is merely an aggravated form of theft. In accord with the purpose of the common-law rule and the statute, in a case where the evidence supports an inference that the extra elements of robbery were not met, the jury should have the option to convict on the lesser offense of theft, because surely a theft was committed. The degree of the theft could then be determined with reference to the value or type of property stolen. If, as the State argues, theft cannot be a lesser-included offense of robbery simply because of the value determination, this hypothetical jury would be left to choose either to convict on the robbery charge, despite believing that the extra elements were not met, or to acquit, despite knowing that in fact a theft occurred. This is precisely the reason that lesser-included instructions are given. *See*

Henderson, 182 Wn.2d at 736 (“Giving juries this option is crucial to the integrity of our criminal justice system”).

The state erroneously relies on *State v. Tinker*, 155 Wn.2d 219, 222, 118 P.3d 885 (2005), for the proposition that first or second degree theft cannot be lesser included offenses because the value specification is an essential element of those crimes. The *Tinker* court was not presented with the question of lesser included offenses. Tinker was charged with third degree theft. *Tinker*, 155 Wn.2d at 220. The information did not state the value of the property stolen. *Id.* at 221. The *Tinker* court held that Tinker was properly charged because value is **not** an essential element of third degree theft. *Id.* at 222.

The *Tinker* court explained that under the statutory structure for theft, “The act of taking *any* item constitutes at least third degree theft.” *Tinker*, 155 Wn.2d at 222 (emphasis in original). Although the value specification is necessary to prove first or second degree theft as opposed to some other degree, *Id.* at 222, third degree theft remains a lesser included offense to the other two degrees, *Id.* at 224 (citing *State v. Ellard*, 46 Wn. App. 242, 730 P.2d 109 (1986) (remanding for resentencing as third degree theft when state produced insufficient evidence of value). These cases would require that third degree theft—a gross misdemeanor—is a lesser included offense of the much greater crime of first degree robbery.

This is probably not the result the State desired. There is a certain absurdity in using third degree theft as a lesser included offense to first degree robbery in a case where the value of the property stolen would otherwise rate the crime as first or second degree theft rather than third. If third degree theft is the only alternative option in a case where the value is high, a jury may be just as likely to err on the side of the greater offense as it would if there was no lesser included instruction given. Such a result would defeat the purpose of lesser included instructions. And yet, third degree theft as a less included offense to first degree robbery—regardless of the value—is the result mandated by the State’s hyper-technical application of the legal prong of the *Workman* test.

Coonrod suggests a common-sense middle ground more in harmony with the purpose of lesser-included instructions and still in harmony with the statutes and the case law. The Court should hold that theft—as defined in RCW 9A.56.020—is a lesser included offense of first degree robbery. The degree of theft on which a jury should be instructed as a lesser included offense in any given case should then depend on the value or type of property stolen.

This Court is under no obligation to follow the unpublished decision of Division I in *State v. Sass*, 196 Wn. App. 1017, 2016 WL 5719844, No. 73462-8-I (Oct. 3, 2016). The *Sass*

court analyzed the legal prong under the alternative means of committing theft “from the person of another.” *Sass* at *4. Coonrod does not rely on that alternative means. The reasoning of the *Sass* court on the legal prong is irrelevant here. It is also dicta, as the court did not decide the case on the basis of the legal prong. *Sass* at *4 (“But we need not rely on the legal prong”).

2.1.2 The factual prong is met because a rational juror could have reasonably concluded that the thief did not use force, violence, or threat.

Coonrod’s brief argued that the factual prong of the *Workman* test was met here because, viewing the facts in a light favorable to Coonrod, a rational juror could have reasonably concluded that the thief did not use force, violence, or threat. Br. of App. at 11-14. Thus, the evidence supports an inference that theft was committed, not robbery.

The State’s reliance on *State v. Farnsworth*, 185 Wn.2d 768, 374 P.3d 1152 (2016), is misplaced. The *Farnsworth* court was analyzing the sufficiency of the evidence to support a conviction based on use of force, violence, or threat. *Farnsworth*, 185 Wn.2d at 775. The standard for sufficiency of evidence views the evidence in a light favorable to the State. The standard for a lesser included instruction is the opposite—viewing the evidence

in a light favorable to the defendant. Henderson, 182 Wn.2d at 736. *Farnsworth* is of no help here.

Equally unhelpful is the case of *State v. Shcherenkov*, 146 Wn. App. 619, 191 P.3d 99 (2008). In *Shcherenkov*, the defendant had robbed four banks by passing notes, which said, “Stay calm. This is a robbery,” or, “Do not make any sudden movements or actions. I will be watching you.” *Id.* at 623. The thief in this case did not make any such communications. Thus the *Shcherenkov* court’s conclusion that a jury could not rationally find that the defendant obtained the bank’s money without force does not apply under the facts of this case.

As highlighted in Coonrod’s opening brief, out of all of the witnesses to the incidents, only one testified that the thief said, “no one move,” as he entered on March 16. Only one testified that the thief said, “stay where you are,” as he left on March 16. Only one testified that he said it was a robbery as he entered on February 1. A rational juror could reasonably conclude that these statements were never made.

The bank had a policy instructing tellers not to resist when a person demanded cash. The bank’s policy is, no doubt, intended to protect the safety of its employees by not allowing them to assess each incident on its particular facts, on the assumption that most demands will be backed up by the use of force. But the bank’s policy does not dictate the jury’s

deliberation. The jury must examine the particular facts of each incident. Here, the thief did not make any express threats, and a rational jury could conclude that there were no implied threats.

Where competing inferences are possible, the Court must view the evidence most favorable to Coonrod. *See State v. Condon*, 182 Wn.2d 307, 320-21, 343 P.3d 357 (2015). In *Condon*, the court observed, “There was certainly evidence from which a jury could have inferred premeditation. But there was also evidence from which it could have inferred that premeditation was lacking.” *Id.* at 320. The same is true here—although there was evidence from which a jury could infer an implied threat, there was also evidence from which it could have inferred that there was no implied threat. In such a situation, the court must view the evidence in the light favorable to giving the instruction.

Similarly instructive is this Court’s recent decision in *State v. Johnson*, 196 Wn. App. 1039, 2016 WL 6216258, No. 47876–5–II (Oct. 25, 2016) (unpublished).¹ In *Johnson*, the distinction between the greater and lesser offenses was that the threat made was a threat to kill. *Id.* at *4. The evidence showed that the defendant had threatened, “I’m gonna break your f[***]ing neck.” *Id.* This Court noted that a threat to break a person’s neck is not necessarily a threat to kill. *Id.* Viewing the

¹ This case is cited as persuasive authority under GR 14.1.

evidence in a light favorable to the defendant, it was possible for the jury to infer that the threat was only of injury, not death, therefore the trial court abused its discretion by not giving the lesser included offense instruction. *Id.*

The Court should hold that theft is a lesser included offense to first degree robbery and that Coonrod was entitled to jury instructions on theft as a lesser included offense, with a degree based on the value of property stolen. The Court should reverse the convictions and remand for a new trial, in which the lesser included offense instructions should be given.

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

Coonrod also argued that the trial court abused its discretion in excluding evidence that the State's witnesses were mistaken in believing that Coonrod was visible through the bank windows on April 22, when it was actually a man named Doug Shattuck. Br. of App. at 15-16. Coonrod argued that the evidence was relevant. The identity of the thief was a major issue. The only link between the February 1 and March 16 incidents was the testimony of witnesses that they thought it looked like the same man both times. But they also thought it was the same man on April 22, when it wasn't. On April 22 it was Doug Shattuck, a man who had no connection at all to the

previous two incidents, except that on April 22 he was wearing a hoodie and looked similar to the thief. This evidence was relevant because it had a tendency to make it less probable that Coonrod was the offender on all three occasions. The trial court abused its discretion in excluding this relevant evidence as being irrelevant.

3. 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 22nd day of April, 2020.

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