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

STATE OF WASHINGTON, Respondent

v.

MARX WAYNE COONROD, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.16-1-00946-8

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

RESPONSE TO ASSIGNMENTS OF ERROR.....	1
I. The trial court properly declined to give a lesser included offense instruction for Theft in the First Degree or Theft in the Second Degree because neither is a lesser included offense of Robbery in the First Degree of a Financial Institution.	1
II. The trial court properly excluded as irrelevant Coonrod’s attempt to introduce evidence of another man at the bank on April 22, 2016 who some bank employee may have thought was Coonrod.....	1
STATEMENT OF THE CASE.....	1
A. Procedural History	1
B. Statement of Facts	2
ARGUMENT	6
I. The trial court properly declined to give a lesser included offense instruction for Theft in the First Degree or Theft in the Second Degree because neither is a lesser included offense of Robbery in the First Degree of a Financial Institution.	6
a. Legal Prong	7
b. Factual Prong.....	10
II. The trial court properly excluded as irrelevant Coonrod’s attempt to introduce evidence of another man at the bank on April 22, 2016 who some bank employee may have thought was Coonrod.....	13
a. Offer of Proof	14
b. Exclusion of Evidence and Standard of Review	15
CONCLUSION.....	19

TABLE OF AUTHORITIES

Cases

<i>Carter v. U.S.</i> , 530 U.S. 255, 120 S.Ct. 2159, 147 L.Ed.2d 203 (2000).	7, 8
<i>Chambers v. Mississippi</i> , 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed. 2d 297 (1973).....	16
<i>State v. Arndt</i> , --- Wn.2d ----, 453 P.3d 696, 703 (2019).....	15, 16, 17, 18
<i>State v. Blair</i> , 3 Wn.App.2d 343, 415 P.3d 1232 (2018).....	16
<i>State v. Boswell</i> , 185 Wn.App. 321, 340 P.3d 971 (2014).....	7, 8
<i>State v. Burnam</i> , 4 Wn.App.2d 368, 421 P.3d 977 (2018)	14, 15, 16
<i>State v. Clark</i> , 187 Wn.2d 641, 389 P.3d 462 (2017).....	15
<i>State v. Duarte Vela</i> , 200 Wn.App. 306, 402 P.3d 281 (2017).....	16, 17
<i>State v. Ellis</i> , 136 Wn.2d 498, 963 P.2d 843 (1998).....	16
<i>State v. Farnsworth</i> , 185 Wn.2d 768, 374 P.3d 1152 (2016)	11, 12
<i>State v. Fernandez-Medina</i> , 141 Wn.2d 448, 6 P.3d 1150 (2000)	11
<i>State v. Frazier</i> , 99 Wn.2d 180, 661 P.2d 126 (1983)	7, 10
<i>State v. Gamble</i> , 154 Wn.3d 457, 114 P.3d 646 (2005)	7
<i>State v. Nguyen</i> , 165 Wn.2d 428, 197 P.3d 673 (2008).....	6, 7
<i>State v. Perez-Valdez</i> , 172 Wn.2d 808, 265 P.3d 853 (2011).....	17, 18
<i>State v. Porter</i> , 150 Wn.2d 732, 82 P.3d 234 (2004).....	7, 11
<i>State v. Shcherenkoy</i> , 146 Wn.App. 619, 191 P.3d 99 (2008).....	11, 12
<i>State v. Song Wang</i> , 5 Wn.App.2d 12, 424 P.3d 1251 (2018).....	14
<i>State v. Tinker</i> , 155 Wn.2d 219, 118 P.3d 885 (2005).....	9
<i>State v. Workman</i> , 90 Wn.2d 443, 584 P.2d 382 (1978).....	6, 7
<i>State v. Young</i> , 48 Wn.App. 406, 739 P.2d 1170 (1987).....	16

Statutes

RCW 10.61.006	6
RCW 9A.56.030(1)(a)	9
RCW 9A.56.030(1)(b)	10
RCW 9A.56.040(1)(a)	9
RCW 9A.56.190.....	9, 10
RCW 9A.56.200(1)(b)	9

Rules

GR 14.1	8, 9
---------------	------

Unpublished Opinions

State v. Hubbard, 188 Wn.App. 1025, 2015 WL 3855147, 9-10 (2015) ... 8

State v. Sass, 196 Wn.App. 1017, 2016 WL 5719844, 4 n. 34 (2016) 9, 10,
12

State v. Smith, 173 Wn.App. 1032, 1032 WL 2013 815908, 1-3 (2013).... 8

RESPONSE TO ASSIGNMENTS OF ERROR

- I. **The trial court properly declined to give a lesser included offense instruction for Theft in the First Degree or Theft in the Second Degree because neither is a lesser included offense of Robbery in the First Degree of a Financial Institution.**
- II. **The trial court properly excluded as irrelevant Coonrod's attempt to introduce evidence of another man at the bank on April 22, 2016 who some bank employee may have thought was Coonrod.**

STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Marx Wayne Coonrod was charged by information with three counts of Robbery in the First Degree and one count of attempted Robbery in the First Degree for a series of events occurring at the same Umpqua Bank on February 1, 2016, March 16, 2016, and April 22, 2016. CP 1-3.

The case proceeded to a jury trial before the Honorable Daniel Stahnke, which commenced on April 15, 2019 and concluded on April 19, 2019 with the jury's verdicts finding Coonrod guilty as charged. CP 215-18; RP 64-950. The trial court sentenced Coonrod to a standard range sentence of 171 months of total confinement. CP 224-26; RP 970-71. Coonrod filed a timely notice of appeal. CP 240.

B. STATEMENT OF FACTS

On February 1, 2016, around 10:00 AM, Marx Coonrod entered an Umpqua bank wearing a dark colored jacket, jeans, a bandana and sunglasses over his face, and a dark beanie style hat and a hood over his head. RP 71, 145. Upon entering, Coonrod stated “this is a robbery” or “this is a bank robbery,” pushed a customer to the side, and approached a teller. RP 144, 224-25, 371, 426-27. Once at the teller, Coonrod demanded that the teller “give me your 50s and 100s,” before moving to a second teller and stating the same. RP 224-26.

As Coonrod exited the bank with \$1,690 of the bank’s money, everyone noticed a very distinct gait that was limp-like, but not a limp, and that he turned right and headed in the direction of a closed pizza shop. RP 77, 227-28. Coonrod walked this way due to surgery on his hips and screws in his knees. RP 655-56, 680. Employees at Vern Fonk insurance, which shared a wall with the bank, made the same observations as to Coonrod’s dress and gait when he passed a large window on the Vern Fonk side of the building on the way to the bank before the robbery, and on the way back in the direction of the closed pizza shop after the robbery. RP 121-23, 286-89. In total, six bank employees, two customers, and two Vern Fonk employees witnessed parts of the first robbery and testified to

their observations. RP 70-75, 77, 87, 121-23, 142-47, 149-150, 166-174, 184-85, 196, 199-206, 219-230, 253-263, 286-289, 369-373, 424-429.

After responding to the 911 call on February 1, the police found a dark beanie style hat in the alleyway by the closed pizza shop—the beanie was dry while the rest of the ground was wet—that contained the DNA of Marx Coonrod. RP 390-94, 451-53, 460, 458, 745-757.

On March 16, 2016, around 10:00 AM, Coonrod entered the same Umpqua bank, similarly dressed, with a blue bandana and sunglasses obscuring his face, and a hood over his head. RP 108, 417-18. This time, when he first walked in he said “no one move.” RP 306. Then, once again, Coonrod went directly to a teller and demanded that the teller “give me your 50s and 100s.” RP 243, 417-18. While the teller attempted to retrieve the money from the drawer, Coonrod repeated the Spanish word “andele.” RP 91, 243, 419. After getting \$4,850, and as he left, Coonrod said “everybody stay where you are” and exited the bank heading in the direction of the pizza shop with the same distinctive gait. RP 91-92, 103-04. And just as before, employees at Vern Fonk observed Coonrod on his way to rob the bank and on his back after the robbery, except this time an employee went outside and saw a white truck with ladder racks drive away from the alleyway area of the closed pizza shop. RP 123-27, 290-94, 503-07. In total, seven bank employees and three Vern Fonk employees

witnessed parts of the second robbery and testified to their observations. RP 88-93, 97-98, 100-01, 111-12, 123-27, 175-180, 207-214, 242-246, 264-272, 290-94, 303-309, 415-421, 431-33, 503-07.

All of the Umpqua and Vern Fonk employees who were present for both the February 1 and March 16 robberies were certain that the robber was the same person on account of his dress, gait, and actions. RP 88, 92, 97, 103-04, 126, 130, 177, 182, 211, 214, 268, 290-92, 431-32, 436

On April 22, 2016, around 10:00 AM, Coonrod returned to the Umpqua bank for the third time. This time, upon reaching the entrance to the bank and observing a security guard, he turned away and headed back to his white truck with ladder racks, which was parked in the same alleyway by the closed pizza shop where the beanie was found. RP 102-03, 274-75, 405-410, 682-86. Multiple Vern Fonk employees who observed him approaching and leaving the bank thought that this was the same person who they had seen on the days of the previous robberies. RP 130, 296, 513-14, 518. A bank employee who saw Coonrod walking away agreed. RP 103-04. One of the Vern Fonk employees ran outside and took pictures of Coonrod and his white truck with ladder racks. RP 508-522. Coonrod was pictured wearing a black hooded sweat shirt, camouflage pants, and gloves. RP 514-16. The employee who took the pictures indicated that this was the same truck parked in the same place that she

had seen on March 16 after the robbery. RP 518. Just as before, multiple bank and Vern Fonk employees testified as to their observations on April 22. RP 102-04, 106, 127-132, 231-35, 273-77, 294-99, 310-11, 398-400, 405-410, 508-522.

When Coonrod, who matched the physical description given by the witnesses, was arrested he admitted to going to the Umpqua bank on April 22, but decided not to enter after seeing the security guard. RP 554, 682, 720. He also admitted to parking his white truck with ladder racks in the alleyway by the closed pizza shop. RP 683-84. Coonrod acknowledged that it was him and his truck in the photographs taken by the Vern Fonk employee. RP 686. Coonrod indicated he had gone to the bank to get change for a \$100 bill and denied being the robber. RP 683.

The police executed search warrants on Coonrod's residence and truck. RP 565, 574, 581-82. In the residence the police discovered a blue bandana, similar to what the robber was wearing during the second robbery, and sunglasses, and in the truck they found black work clothes, a beanie style hat, camouflage pants, and another pair of sunglasses. RP 569-570, 581-82, 585. Finally, a detective obtained cell phone records for Coonrod's phone. RP 690-91. The records showed that Coonrod's phone was turned off or not connected to his cellular network on the morning of

the robberies and attempted robbery at Umpqua Bank.¹ RP 693, 695-99, 702-07.

Coonrod did not testify. *See* RP. Instead, he called six witnesses with whom he had contact on the days on which the robberies took place or for whom he had worked. RP 830-34, 842-877.

ARGUMENT

I. The trial court properly declined to give a lesser included offense instruction for Theft in the First Degree or Theft in the Second Degree because neither is a lesser included offense of Robbery in the First Degree of a Financial Institution.

RCW 10.61.006 provides that a “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.” In practice, our courts describe the offenses that are “necessarily included” in the charge the defendant is facing as lesser-included offenses. *State v. Nguyen*, 165 Wn.2d 428, 434, 197 P.3d 673 (2008). In order to determine whether an offense is a lesser-included offense we apply the *Workman* test as provided in *State v. Workman*, 90 Wn.2d 443, 584 P.2d 382 (1978). The *Workman* test states that a:

¹ Coonrod’s phone was turned off on 1/31 at 9:21 PM and turned back on on 2/1 at 2:23 PM, turned off again on 3/16 at 7:52 AM and turned back on on 3/16 at 11:30 AM, turned off again on 4/21 at 7:21 PM and turned back on on 4/22 at 10:43 AM. RP 693-704.

defendant is entitled to an instruction on a lesser included offense if two conditions are met. First, each of the elements of the lesser offense must be a necessary element of the offense charged. Second, the evidence in the case must support an inference that the lesser crime was committed.

Id. at 447-48 (citations omitted). The first prong of the *Workman* test is referred to as the “legal prong” and the second prong as the “factual prong.” *State v. Gamble*, 154 Wn.3d 457, 463, 114 P.3d 646 (2005).

a. Legal Prong

Our Supreme Court has further explained that as it pertains to the legal prong “if it is possible to commit the greater offense without having committed the lesser offense, the latter is not an included crime.” *State v. Frazier*, 99 Wn.2d 180, 191, 661 P.2d 126 (1983) (quotation omitted). This determination is made by “examin[ing] the statutory elements of the crime charged” and of the purported lesser-included offense. *State v. Boswell*, 185 Wn.App. 321, 334-35, 340 P.3d 971 (2014). Such an examination, which focuses only on the statutory elements, “requires a textual comparison of criminal statutes. . . .” *Carter v. U.S.*, 530 U.S. 255, 260-61, 120 S.Ct. 2159, 147 L.Ed.2d 203 (2000) (citation and internal quotation omitted); *Nguyen*, 165 Wn.2d at 436 (noting that “Washington’s test . . . is also the approach followed by the United States Supreme Court . . .”); *State v. Porter*, 150 Wn.2d 732, 736, 82 P.3d 234 (2004) (referring

to this as the “statutory approach” under which the “elements of the lesser offense must be ‘necessarily’ and ‘invariably’ included among the elements of the greater charged offense”) (citation omitted).

Furthermore, the examination of the elements of the relevant statutes under the legal prong does not take into account “the alleged facts supporting the charge.” *Boswell*, 185 Wn.App. at 336. That is, courts “do not examine the facts underlying the charge unless [they] reach the factual prong of the *Workman* test.” *Id.*; see also *State v. Hubbard*, 188 Wn.App. 1025, 2015 WL 3855147, 9-10 (2015); *State v. Smith*, 173 Wn.App. 1032, 1032 WL 2013 815908, 1-3 (2013).² A consideration of the facts of the case when applying the legal prong results in “a conflation of the two prongs of the *Workman* test” and prevents the “certain and predictable outcomes” provided by it. *Id.* at 334; *Carter*, 530 U.S. at 261.

Here, Coonrod requested that the jury be instructed on Theft in the First Degree or Theft in the Second Degree, and argued that each, in particular the Theft in the First Degree, constituted a lesser included offense of Robbery in the First Degree. RP 880-87, 903-04. Coonrod resumes this argument by arguing that the trial court erred in refusing to give the requested instructions. Because neither is a lesser included offense of Robbery in the First Degree as charged, however, Coonrod’s

² This Court’s opinions in *Hubbard* and *Smith* are unpublished. Pursuant to GR 14.1, the opinions “may be accorded such persuasive value as the court deems appropriate.”

argument fails. *State v. Sass*, 196 Wn.App. 1017, 2016 WL 5719844, 4 n. 34 (2016).³

As the robbery was charged, the State was required to prove that Coonrod took property “from the person of another *or in his [or her]* presence.” RCW 9A.56.190; CP 1-3, 180-82. Under the robbery statute, the value of the property one takes or attempts to take is immaterial to the determination of guilt. RCW 9A.56.190; RCW 9A.56.200(1)(b). In contrast, a person can be convicted of Theft in the First Degree when he or she commits a theft of property the value of which exceeds five thousand dollars. RCW 9A.56.030(1)(a). Similarly, a person can be convicted of Theft in the Second Degree when he or she commits a theft of property, the value of which exceeds seven hundred fifty dollars. RCW 9A.56.040(1)(a). In fact, “[v]alue is an essential element of higher degree theft statutes”—Theft in the First Degree and Theft in the Second Degree—“since the specification is necessary to establish the very illegality of the behavior.” *State v. Tinker*, 155 Wn.2d 219, 222, 118 P.3d 885 (2005) (internal quotation omitted). Accordingly, when a defendant commits a robbery of property valued at less than seven hundred fifty dollars he or she does not also necessarily commit either crime of Theft in the First Degree or Theft in the Second Degree. Thus, “it is possible to

³ *Sass* is an unpublished opinion. Pursuant to GR 14.1 “unpublished opinions of the Court of Appeals . . . may be accorded such persuasive value as the court deems appropriate.”

commit the greater offense without having committed the lesser offense[s]” and Theft in the First Degree and Theft in the Second Degree are not “included crime[s]” of Robbery in the First Degree. *Frazier*, 99 Wn.2d at 191.

The same result obtains when considering the alternative means of committing Theft in the First Degree. That means of committing Theft in the First Degree criminalizes the taking of property, the value of which is immaterial, when the property is “taken from the person of another.” RCW 9A.56.030(1)(b). Robbery, on the other hand, can be committed when the relevant property is taken “from the person of another *or in his [or her] presence.*” RCW 9A.56.190. Consequently, a person can commit the crime of Robbery in the First Degree when the taking of property occurs in the “presence” of a victim without committing the alternative means of Theft in the First Degree. *Sass*, 2016 WL 5719844 at 4 n. 34. As a result, Coonrod’s argument fails under the legal prong of the Workman test.

b. Factual Prong

In determining whether the factual prong is satisfied, reviewing courts “view the supporting evidence in the light most favorable to the party that requested” the lesser-included instruction. *State v. Fernandez-*

Medina, 141 Wn.2d 448, 6 P.3d 1150 (2000). But, nonetheless, there must:

be a factual showing more particularized than . . . required for other jury instructions: Specifically, we have held that the evidence must raise an inference that only the lesser included . . . offense was committed to the exclusion of the charged offense. In other words, 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.

Porter, 150 Wn.2d at 737 (internal citations and quotations omitted).

Here, even when viewing the evidence in the light most favorable to Coonrod, it cannot be said to “raise an inference that only” theft was committed. *Id.* This is because in bank robbery cases the mere demand of a “bank’s money [when] unsupported by even the pretext of any lawful entitlement to the funds” can constitute a threat. *State v. Farnsworth*, 185 Wn.2d 768, 777-80, 374 P.3d 1152 (2016) (concluding that a note handed over to a teller that read “No die [sic] packs, no tracking devices, put the money in the bag” constituted a demand and a threat) (internal quotation omitted). *State v. Shcherenkov* is instructive. 146 Wn.App. 619, 191 P.3d 99 (2008). There, the defendant committed four different bank robberies by handing demand notes to bank tellers. *Id.* at 622-23. And like Coonrod, the defendant argued that the jury should be instructed on the lesser crime of Theft in the First Degree. *Shcherenkov* held, however, that

the defendant did not meet the factual prong of the lesser included test because “the evidence in this case does not permit a jury to rationally find that [the defendant] obtained the banks money *without* such a threat” and the defendant “never proposed any other means by which he induced the bank tellers to give him the money, no could any such reason be rational.” *Id.* at 630 (emphasis in original); *Farnsworth*, 185 Wn.2d at 778 (agreeing that “without the implicit threat to use force, it is difficult to imagine why the teller would comply with” a demand for money); *see also Sass*, 2016 WL 5719844 at 5.

The same reasoning applies here. The evidence is overwhelming that Coonrod’s demands and interactions with the bank tellers led them to feel threatened and he fails to propose “any other means by which he induced the bank tellers to give him the money, no could any such reason be rational.” *Shcherenkov*, 146 Wn.App. at 630; Br. of App. at 13-14. This is especially true considering that (1) Coonrod came into the bank obscuring his face with a hoodie, glasses, a bandana, and a beanie; (2) pushed a customer aside on one occasion; (3) demanded the tellers “give me your 50s and 100s” by yelling or using a strong tone; (4) stated that this is a “robbery” on one occasion; (5) said for “no one [to] move” during the other; and (6) repeatedly told the tellers to hurry by saying “andelee.” *See, e.g.*, RP 71, 142-47, 166-174, 184-85, 196, 199-206, 219-230, 253-

272, 303-09, 371, 415-421, 424-429. No rational jury could come to the conclusion that during either of the two bank robberies that the tellers willingly gave Coonrod the money or that he stole the money by means other than under the threat of force. Accordingly, Coonrod's argument also fails under the factual prong and the trial court correctly ruled that Theft in the First Degree and Theft in the Second Degree should not be given to the jury as lesser included offenses.

II. The trial court properly excluded as irrelevant Coonrod's attempt to introduce evidence of another man at the bank on April 22, 2016 who some bank employee may have thought was Coonrod.

Coonrod claims that trial court erroneously excluded "mistaken identity evidence." Br. of App. at 15-16. But this is a much too charitable interpretation of the offer of proof Coonrod provided at trial. Twice Coonrod argued that he should be allowed to admit into evidence that bank employees claimed to have observed Coonrod on April 22, 2016 when, he claims, they really observed a Doug Shattuck who made an ATM transaction at about the same time that Coonrod approached the bank. RP 49-54, 351-57. The problem, however, is that Coonrod's offer of proof was much too vague to reach his conclusion.

a. Offer of Proof

“An offer of proof should (1) inform the trial court of the legal theory under which the offered evidence is admissible, (2) inform the trial court of the specific nature of the offered evidence so the court can judge its admissibility, and (3) create an adequate record for appellate review.” *State v. Burnam*, 4 Wn.App.2d 368, 377, 421 P.3d 977 (2018) (citation omitted). A failure to provide a “sufficiently definite and comprehensive” offer of proof is fatal to “obtain[ing] appeal review of trial court action excluding evidence.” *State v. Song Wang*, 5 Wn.App.2d 12, 26-27, 424 P.3d 1251 (2018).

Here, Coonrod’s offer of proof is insufficient; he fails to identify the witness or witnesses who purportedly mistakenly identified Shattuck as Coonrod, fails to identify the witness by which he would have admitted this evidence, and fails to explain how the bank witnesses’ certainty that the bank robber in February and March was the same person—where they saw him inside the bank, witnessed his distinctive gait, heard him speak, and saw his consistent disguise—is in any way diminished if one bank employee *inside* the bank saw a man *outside* the bank on April 22, and thought it *may* be the same robber as before when he acknowledges that he was actually outside the bank at basically the same time on that day. RP 49-54, 351-57. Moreover, Coonrod still fails to remedy his offer of proof’s

deficiencies by pointing to where in the record, e.g., the bank employees' testimony, there is support for his claim. Br. of App 7, 15-16.

Consequently, this Court should decline to review Coonrod's claim that the trial court erroneously excluded his proffered evidence.

b. Exclusion of Evidence and Standard of Review

When a defendant claims that an evidentiary ruling resulted in a violation of his or her right to present a defense, appellate courts employ a two-step standard of review. *State v. Arndt*, --- Wn.2d ----, 453 P.3d 696, 703 (2019) (citing *State v. Clark*, 187 Wn.2d 641, 648-56, 389 P.3d 462 (2017)). First, the trial court's evidentiary rulings are reviewed for an abuse of discretion and then "the constitutional question of whether these rulings deprived [the defendant] of [his or] her Sixth Amendment right to present a defense" is reviewed de novo. *Id.* RP 403-05. A court abuses its discretion when "no reasonable person would take the view adopted by the trial court." *Clark*, 187 Wn.2d at 648 (internal quotation omitted).

Defendants have a constitutional right to present a defense. *Arndt*, 453 P.3d at 703. This right is not absolute, however, as defendants do not have a "constitutional right to present irrelevant evidence." *Burnam*, 4 Wn.App.2d at 376. More pointedly, our Supreme Court has remarked that "judges 'must not abdicate our gatekeeping role by receding from difficult decisions and letting the jury decide how much weight to give to evidence

that is in fact irrelevant.” *Arndt*, 453 P.3d at 710-11 (quoting *State v. Ellis*, 136 Wn.2d 498, 540, 963 P.2d 843 (1998)). Consequently, a defendant’s right to present a defense is still “subject to ‘established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.’” *State v. Blair*, 3 Wn.App.2d 343, 415 P.3d 1232 (2018) (quoting *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S.Ct. 1038, 35 L.Ed. 2d 297 (1973)). For example, a defendant must still inform “the trial judge of the specific nature of the offered evidence” and cannot just provide “repeatedly vague” offers of proof and still be heard to complain later that his right to present a defense was violated when such evidence is excluded. *Burnam*, 4 Wn.App.2d at 377-78.

Furthermore, even relevant defense evidence can be excluded provided that the State shows that the “evidence is so prejudicial as to disrupt the fairness of the fact-finding process.” *Id.* at 376. This shift—from the evidence rules controlling the admissibility of the evidence—occurs when evidence, which otherwise would or could be excluded by the evidence rules, is central to *the* defense. *State v. Duarte Vela*, 200 Wn.App. 306, 320, 402 P.3d 281 (2017); *State v. Young*, 48 Wn.App. 406, 413, 739 P.2d 1170 (1987).

Nonetheless, the constitutional right to present a defense does not mean that any and every bit of relevant evidence offered by the defense in support of its theory *is required* to be admitted. *Arndt*, 453 P.3d at 711-12; *State v. Perez-Valdez*, 172 Wn.2d 808, 814-16, 265 P.3d 853 (2011). In other words, a court may “properly exercise[] its gatekeeping function” and limit the evidence presented by the defense, even significantly, without violating a defendant’s right to present a defense when the defendant was still “able to present relevant evidence supporting [his or] her central defense theory.” *Id.*; *Perez-Valdez*, 172 Wn.2d at 816. Thus, in determining whether the exclusion of defense evidence “violated the defendant’s Sixth Amendment right to present a defense depends on whether the omitted evidence evaluated in the context of the entire record creates a reasonable doubt that did not otherwise exist.” *Duarte Vela*, 200 Wn.App. at 326.

Here, as argued above regarding the offer of proof, the evidence Coonrod sought to admit was irrelevant. Nonetheless, Coonrod was still able, and had the opportunity, to make the argument that he claims he wanted to make—and he in fact questioned the bank and Vern Fonk witnesses present on April 22 as to what they observed—regardless of whether the trial court admitted evidence about Mr. Shattuck. RP 276-77, 299, 312-13, 354-356, 402-03, 523-24. Furthermore, Coonrod was able to

admit additional evidence that was central to this defense—that he was not the robber—to include his own witnesses, six in total, with whom he had contact on the days on which the robberies took place or for whom he worked. RP 830-34, 842-877.

Because Coonrod was still “able to present relevant evidence supporting [his or] her central defense theory” the trial court did not abuse its discretion or deny Coonrod’s right to present a defense when it “properly exercised its gatekeeping function” to prevent Coonrod from introducing the Shattuck evidence. *Perez-Valdez*, 172 Wn.2d at 816; *Arndt*, 453 P.3d at 711-12. Regardless, even assuming error, any error regarding the Shattuck evidence was harmless beyond a reasonable doubt. The robber at the bank each of the three times was unmistakably Coonrod given the certainty of the multitude of witnesses, Coonrod’s DNA being found at scene, Coonrod’s distinctive gait, the travel patterns of the robber to his semi-hidden white truck with a ladder rack (Coonrod’s), clothes/disguise consistent with the robber being found in Coonrod’s home and vehicle, Coonrod turning off his cellphone contemporaneous to the robberies, and his own admission that he approached the bank on April 22, 2016 but fled upon seeing the security guard. Accordingly, Coonrod’s argument fails.

CONCLUSION

For the reasons argued above, Coonrod's convictions should be affirmed.

DATED this 23rd day of March, 2020.

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