NO. 43167-0-II

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

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STATE OF WASHINGTON,

Respondent,

v.

CHARLES FARNSWORTH, JR.,

Appellant.

---

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Gerald E. Johnson, Judge

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# BRIEF OF APPELLANT

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## A. ASSIGNMENT OF ERROR

The State failed to present sufficient evidence to establish all essential elements of first degree robbery beyond a reasonable doubt.

Issue Pertaining to Assignment of Error

Where the theft in this case was committed without any threat of force, threatening behavior or gestures, or weapon, did the State fail to present sufficient evidence of an essential element of first degree robbery, a threat of force or fear of injury?

## B. STATEMENT OF THE CASE

### 1. Procedural History

The State charged Charles Farnsworth, Jr., with acting as an accomplice to first degree robbery against a financial institution, pursuant to RCW 9A.56.190, RCW 9A.56.200(1)(b), and RCW 7.88.010. CP 1. The State alleged that on October 15, 2009, an accomplice to Farnsworth took the property of Harborstone Credit Union, a financial institution, "by use or threatened use of immediate force, violence, or fear of injury to [the teller], said force or fear being used to obtain or retain possession of the property or to overcome resistance to the taking." CP 1.

A jury convicted Farnsworth as charged. 17RP 1677.[1] The court found that this was Farnsworth's third "strike," and sentenced him to life without parole under the persistent offender act. 2/24/12 RP 80, CP 690, CP 695-707. This appeal timely follows. CP 716.

2. Substantive Facts

On October, 15, 2009, 69-year-old James McFarland walked into Harborstone Credit Union in Tacoma, presented a note to the teller, and walked away with around $300 in small bills. 9RP 435, 471, 481, 490, 13RP 1190.

The teller, Sarah Van Zuyt, testified that McFarland approached her station at the counter and pushed the note to her across the counter. 9RP 480-81. He was wearing a wig and dark glasses. 9RP 435. He did not speak. 9RP 500. The note said: "No die [sic] packs, no tracking devices, put the money in the bag." 9RP 483.

Several Harborstone employees, including Van Zuyt, testified that bank policy was to comply with such demands, whether or not there is a weapon. 9RP 486, 10RP 575, 591. Van

[1] Hereinafter, the transcript volumes that are numbered sequentially will be cited by number (i.e., 1RP) and the transcript volumes that are not numbered sequentially will be cited by the date (i.e., 1/2/11 RP).

Zuyt testified that she gave McFarland the cash because of bank policy and her training. 9RP 486. She said the reason for the policy was to avoid anyone being harmed. 9RP 486. She told the police officer at the time that she was not afraid, but did feel angry that McFarland had not provided her with the bag she was to put the money into. 9RP 530-31.

One bank employee testified that Van Zuyt seemed "really calm" after the robbery. 10RP 595. Another teller, Katrina Hinnenkamp, testified that she saw Van Zuyt retrieving the money for McFarland and noted that she seemed "frustrated" both when she took the money from the drawer and when she "shoved" the money to him. 11RP 873-74. However, on the stand Van Zuyt said she was "scared" and "in shock". 9RP 484. Hinnenkamp said that after the fact, Van Zuyt was "very shook up." 11RP 882.

Van Zuyt testified that she had also been trained to leave the larger bills in her drawer. 9RP 486. She decided that, since McFarland's note did not specify large bills, she would select only bills of $20 and smaller, leaving all the $50s and $100s in the drawer. 9RP 526, 532, 490. She handed the cash to McFarland, he said, "Thank you," and he walked out. 9RP 485. She never saw any weapon or indication of one. 9RP 531.

The tellers and customers watched from the windows of the bank as McFarland walked slowly away from the bank to a truck that was parked in the adjoining Home Depot parking lot. 9RP 441, 10RP 569-70. The truck drove slowly out of the lot and onto the street. 9RP 453-54, 10RP 571.

The truck was stopped by police a short time later. The truck was driven by McFarland's friend, 61-year-old Charles Farnsworth, Jr. 10RP 620, 623, CP 685. Under the front passenger seat, police found the wig, sunglasses and stolen cash. 10RP 626-27. Both men were arrested. 11RP 843, 849.

Facing a third strike that would mean life without parole, McFarland made a deal with the State to testify against Farnsworth in return for a reduction of the first degree robbery charge to first degree theft. 14RP 1347. His possible sentence was reduced from life without parole to eight to ten years. 14RP 1260.

McFarland testified that he and Farnsworth planned to steal from Harborstone that day to get money to buy heroin. 15RP 1390. He said that Farnsworth wrote the note he used. 14RP 1250. According to McFarland, his "experience" told him that the teller would do only what the note told her to do. 14RP 1254. He said he entered the bank, went up to the teller, gave her the note, and she

immediately complied. 14RP 1256. He said he could not tell if the teller was upset. 14RP 1256.

C. ARGUMENT

THE STATE FAILED TO PRESENT SUFFICIENT EVIDENCE TO ESTABLISH BEYOND A REASONABLE DOUBT THAT MCFARLAND USED FORCE OR THREATENED USE OF IMMEDIATE FORCE, VIOLENCE, OR FEAR OF INJURY TO OBTAIN OR RETAIN THE MONEY.

Under the state and federal constitutions, a criminal conviction requires proof beyond a reasonable doubt. Jackson v. Virgina, 443 U.S. 307, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). On review, evidence is not sufficient to support a conviction unless, after viewing the evidence in the light most favorable to the State, any rational trier of fact could find all of the elements of the crime charged beyond a reasonable doubt. State v. DeVries, 149 Wn.2d 842, 849, 72 P.3d 748 (2003).

Farnsworth was charged under RCW 9A.56.200(1)(b), which makes it first degree robbery to commit a robbery "within and against a financial institution." CP 1, 648. Robbery is defined by statute as the taking of personal property from another person:

> By the use or threatened use of immediate force, violence, or fear of injury to that person or his property or the person or property of anyone. Such force or

> fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking; in either of which cases the degree of force is immaterial.

RCW 9A.56.190. The jury in this case was so instructed. CP 647, 651. Thus, the "use or threatened use of immediate force, violence, or fear of injury" is an essential element of the crime of first degree robbery.

In this case, the State failed to prove that McFarland used or threatened the use of immediate force, violence or fear of injury. McFarland walked up to Van Zuyt and handed her a note that said: "No die [sic] packs, no tracking devices, put the money in the bag." 9RP 483. McFarland did not say anything to the teller (other than "thank you"), nor did he make any threatening gestures. 9RP 485, 500. This note does not contain any threat. Van Zuyt testified that her reason for giving McFarland the cash was bank policy, not fear. 9RP 486. At the time of the incident, she told police she was not afraid, just angry. 9RP 530-31. On the stand, Van Zuyt said she was "scared" at the time of what "might" happen, but she did not say that this was due to anything McFarland did. 9RP 484. The evidence showed that McFarland committed a theft by requesting money from Van Zuyt and relying on bank policy, rather than

threats, to obtain that money. 14RP 1254. There is no evidence that McFarland used or threatened the use of immediate force, violence or fear of injury.

The State may argue that under current caselaw, a demand note presented without any threat is sufficient evidence of first degree robbery. The Court of Appeals has held that despite clear statutory language requiring the State to prove that the defendant used force or threats of force, demanding money from a bank teller can create an "implied threat" that elevates the crime to first degree robbery. See, e.g., State v. Collinsworth, 90 Wn. App. 546, 966 P.2d 905 (1997); State v. Shcherenkov, 146 Wn. App. 619, 191 P.3d 99 (2008). The facts of this case are distinguishable from both Collinsworth and Shcherenkov because both of those cases involved evidence of the defendant's threat.

In Collinsworth, the defendant told the teller "I need your hundreds, fifties and twenties." When the teller paused, Collinsworth said, "I'm serious." As the teller gathered the money, Collinsworth added, "No bait, no dye." Collinsworth was wearing baggy clothing that made the teller unsure if he had a weapon. The teller testified that he: "perceived Collinsworth's words to be an ultimatum or threat to harm other employees or customers if he did

not comply." 90 Wn. App. at 546. By contrast, McFarland did not verbally demand money from the teller. His note was not threatening and he did not add any instructions. Moreover, Van Zuyt testified that she did not give McFarland money because she perceived a threat, but because of bank policy. 9RP 486. This is clearly the case, because Van Zuyt remained calm enough to choose the smallest bills to give McFarland, 9RP 526, while if she had been afraid, one would expect her to give McFarland as much as possible.

This case is also distinguishable from Shcherenkov, because McFarland did not use any words in his demand note that could be interpreted as an implied threat. In three of his four robberies, Shcherenkov presented a demand note to the teller "explicitly stating that he was robbing them." 146 Wn. App. at 628-29. The court held that: "The tellers reasonably interpreted this language to be threatening because robbery inherently involves a threat of immediate force." 146 Wn. App. at 629. By contrast, McFarland did not use any threatening words like "robbery" or "hold-up." The note he presented was merely a request for money without any threat.

Even if Collinsworth and Shcherenkov are found to be factually analogous, the court should reject the rule created in this line of cases in favor of the clear and unambiguous statutory language. These cases have wrongly relieved the State of its burden of proving that the defendant used actual "force, violence, or fear of injury."

Before Collinsworth, Washington law required either "circumstances of terror" or actual threatening words or gestures to support a robbery conviction. 90 Wn. App. at 551 (quoting State v. Redman, 122 Wn. 392, 393, 210 P. 772 (1922)). The Collinsworth court noted that no Washington case had previously found robbery had been committed in the absence of some overt physical or verbal threat or display of a weapon. 90 Wn. App. at 552.

Instead of following established Washington law and the language of the statute, the Collinsworth court followed federal caselaw, which held an overtly non-threatening note and demeanor nevertheless created an "implicit threat" that met the statutory requirement of proof of "intimidation." Collinsworth, 90 Wn. App. at 552 (citing 18 U.S.C. § 2113(a) and United States v. Hopkins, 703 F.2d 1102 (9th Cir. 1983). Collinsworth held that an "implied threat"

is sufficient to sustain a conviction for first degree robbery, reasoning:

> No matter how calmly expressed, an unequivocal demand for the immediate surrender of the bank's money, unsupported by even the pretext of any lawful entitlement to the funds, is fraught with the implicit threat to use force.

90 Wn. App. at 553-54 (footnotes omitted). While not endorsing all of Collinsworth's language, Shcherenkov followed it in holding that an "implied threat" is sufficient. 146 Wn. App. at 628.

Collinsworth and its progeny have blurred the line between theft and robbery and relieved the State of its burden of proof on a necessary element of first degree robbery—the use or threatened use of immediate force. Collinsworth's rule flies in the face of clear statutory language and creates a strict-liability crime that turns any theft that occurs within a bank into first degree robbery.

Federal courts have also expressed concern about interpreting the statutory threat (or intimidation) requirement so broadly that it becomes superfluous in every theft. In United States v. Wagstaff, 865 F.2d 626 (4th Cir. 1989), the court stated:

> The flaw in this analysis, however, is that it would seem to read the requirement of intimidation entirely out of the statute. It is hard to imagine a theft of money from a bank that could not be characterized as "forceful," . . . and "aggressive." Any face-to-face theft

> would seem to create "a dangerous situation." A theft other than by surprise would be an impressive feat; "fear" must be reasonable fear of bodily harm based on the acts of the defendant. And the presumption that every robbery involves a weapon would seem to make the "intimidation" requirement redundant. The problem with the ... approach, then, is that it substitutes a set of assumptions about the actions of a person taking money from a bank for the individualized analysis of that person's actual behavior called for by the [statute's] "intimidation" requirement. This in effect eliminates the statutory command that the government prove intimidation as a separate element of the crime of robbery.

Wagstaff, 865 F.2d at 628-29.

RCW 9A.56.190 does not make every theft in a bank into a first degree robbery, it requires the State to prove that the defendant used an actual threat. The Statutory language is clear and unambiguous and therefore the court should "give effect to that language and that language alone because we presume the legislature says what it means and means what it says." State v. Radan, 143 Wn. 2d 323, 330, 21 P.3d 255 (2001). If the Legislature had wanted to create a strict-liability offense where a theft is committed in a bank, it could have done so. The courts should not broaden the statute to a point where it essentially makes superfluous one of the statutory clauses.

Collinsworth and its progeny have created a rule that permits the jury to "imply" a threat where the defendant did not actually make one based on what might happen, not what actually did happen. While the bank has good reason to have a policy of teller compliance, this does not convert every theft to first degree robbery. A defendant should not be convicted based on what others might do or might have done in a similar situation. Thus, the rule stated in Collinsworth should be rejected in favor of following the clear statutory requirement of use of force or threat of force.

There is insufficient evidence that McFarland used force or a threat of force in this case because he made no actual or implied threat, made no threatening gestures, and did not have a weapon. Consequently, the State did not prove that a first degree robbery was committed and that Farnsworth was an accomplice to it.

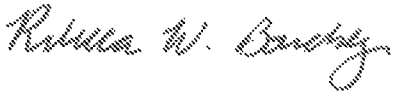
## D. CONCLUSION

Farnsworth respectfully requests that the court reverse his conviction for first degree robbery because the State failed to provide sufficient evidence of all essential elements of the crime.

DATED: January 28, 2013

Respectfully submitted,

NIELSEN, BROMAN & KOCH



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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**
**DIVISION TWO**

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| Respondent, | ) | |
| | ) | |
| v. | ) | COA NO. 43167-0-II |
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| CHARLES FARNSWORTH, | ) | |
| | ) | |
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THAT ON THE 27TH DAY OF JANUARY 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] CHARLES FARNSWORTH
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WASHINGTON STATE PENITENTIARY
1313 N. 13TH AVENUE
WALLA WALLA, WA 99362

**SIGNED** IN SEATTLE WASHINGTON, THIS 27TH DAY OF JANUARY 2013.

X Patrick Mayovsky

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