70862-7

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NO. 70862-7-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

NATHANIEL CLARK,

Appellant.

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

APPELLANT'S REPLY BRIEF AND SUPPLEMENTAL ASSIGNMENT OF ERROR

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B. ARGUMENT

1. **There was insufficient evidence of that Mr. Clark was knowingly aided a robbery without proof that force was used or threatened to be used to obtain property**

This Court recently acknowledged that an effort to steal money from a bank does not meet the essential elements of first degree robbery when there is no use or threat of force, even when the bank teller is scared during the encounter. *State v. Farnsworth*, _ Wn.App. _, 2014 WL 753675 at *2 (2014). In *Farnsworth*, two men agreed to steal money from a bank. One man, McFarland, entered the bank wearing a disguise, with a note that said, "No die [sic] packs, no tracking devices, put the money in the bag." *Id.* "The teller became frightened and handed money to McFarland. He then exited the bank and entered the vehicle driven by Farnsworth." *Id.*

These actions inside the bank did not contain any threat, implicit or explicit. Whether a threat occurred is not based on whether the tellers were afraid, but rather the perpetrator's actions. *Id.* at *3.

"Unquestionably and justifiably the victim was scared; however, there is nothing in the record, directly or circumstantially, to support a reasonable trier of fact finding beyond a reasonable doubt that McFarland made an implied threat to use force, violence, or fear of injury to any person." *Id.* After handing over his note demanding money be put in the bag, McFarland "did not insinuate that he would take further action if the teller did not comply with the note's instructions." *Id.*

Likewise, John Reynolds did not "hint" that he had a weapon when inside either bank or act as if he would use force if his demands were not satisfied. At Banner Bank, the teller from whom Mr. Reynolds requested money said, "I wasn't scared for my safety. He was fairly calm. He didn't hint towards a weapon. I didn't notice that he might have a weapon. It was just a note." *Id.* at 101. The teller first gave Mr. Reynolds smaller bills from a cash drawer that Mr. Reynold "put it in a bag and [he] said is that all." 7/29/13RP 101. The teller responded, "no, and I gave him the rest of what he could see." *Id.* Mr. Reynolds immediately left without further comment once he received the money.

At Union Bank, Mr. Reynolds pointed toward the teller desk and told a bank employee that he wanted see the teller to make a deposit,

without implying the use of force if his demands were not met. The bank employee repeated her intent to help him at a platform desk that was unconnected to a teller station. 7/29/13RP 42-43. He simply left the bank when he realized he was not going to be able to speak to the teller at the teller window as he desired.

Farnsworth analyzes circumstances remarkably similar to the case at bar. The prosecution is not relieved of its burden of proving that property was obtained by the use or threat of force simply because the intent to steal occurs inside a financial institution.

The State claims that Mr. Reynolds' acts are different from *Farnsworth* at Banner Bank because he said, "loud enough for everybody to hear, don't press any buttons." 7/29/13RP 102. By this point, a desk clerk who was not at the teller station was already on the phone to 911 and the buttons had already been pushed. Id.; 7/30/13RP 76. This direction from Mr. Reynolds was not accompanied by threats or gestures of potential weapons. His intent and efforts to steal money are not the equivalent of actually using or threatening immediate force to obtain this money, which is the essential distinction between theft and robbery.

At the Union Bank, the State claims Mr. Reynolds used force because he raised his voice at the teller who was directing him away from the teller station. But what the teller said was that he first spoke softly; he "[k]ept his chin down, kept his voice low." 7/29/13RP 44. Then he repeated his request that he go to a teller station and "his voice was a little more raised," and next raised his voice more. *Id.* His raised voice was not in conjunction with a request for money – instead, he was requesting that he be permitted to speak to a teller at a teller station. When the person helping him remained a platform desk that was unconnected with a cash drawer and declined his request that she move to a teller station, Mr. Reynolds walked out of the bank without further comment. He did not use force or the threat of force to press the teller to help him at a place from which he could steal money.

As in *Farnsworth*, Mr. Reynolds' actions inside the two banks bank did not constitute the use or threat of actual force to obtain or retain property of another, which is an essential element of robbery.

The State's efforts to distinguish or deride *Farnsworth* are based on inaccurately portraying the Court's analysis. It contends that *Farnsworth* Court treated the unlawful taking of money from a bank as "neither robbery nor theft." Response Brief at 23. But on the contrary,

Farnsworth remanded the case for sentencing on first degree theft, because the evidence, jury instructions, and verdict showed that the jury found Farnsworth aided in a theft from the bank. 2014 WL 7532675 at *4.

The State also cites *State v. Witherspoon*, 180 Wn.2d 875, 884, 329 P.3d 888 (2014), as defining conduct that constitutes an implied threat of force during a robbery. But it neglects to mention that in *Witherspoon*, when the victim confronted the defendant as he was stealing her property, the defendant held his hand behind his back and "said he had a pistol." *Id.* at 881.

The State relies on *State v. Collinsworth*, 90 Wn.App. 546, 548-500, 966 P.2d 905 (1997), but in that case, all six tellers *testified* that they not only perceived the defendant's actions as threatening, but they each perceived that he had a weapon, seemed like he had one, or was actually threatening harm it if they did not comply. No teller testified that Mr. Reynolds seemed to have a weapon or implied he would hurt them if they did not comply.

Farnsworth aptly analyzes a far more similar factual situation and the legal requirements of robbery. It properly holds that a person may not be an accomplice to a robbery absent the use of threatening

conduct to obtain property and without the accomplice's knowledge of such threatening behavior.

2. **There was insufficient evidence of Mr. Clark's accomplice liability to robbery**.

When legal culpability is imposed for the actions of another, the State must prove the evidence showed beyond a reasonable doubt that the person is guilty as an accomplice. RCW 9A.08.020. *State v. Roberts*, 142 Wn.2d 471, 14 P.3d 713 (2001); *State v. Cronin*, 142 Wn.2d 568, 579, 14 P.3d 752 (2001). A person may be convicted as an accomplice of another person if:

> (a) With knowledge that it will promote or facilitate the commission of the crime, he or she:
> (i) Solicits, commands, encourages, or requests such other person to commit it; or
> (ii) Aids or agrees to aid such other person in planning or committing it.

RCW 9A.08.020 (3).

Accomplice liability may not rest on a person's mere presence at the scene even with knowledge of ongoing criminal activity. *In re Wilson,* 91 Wn.2d 487, 492, 588 P.2d 1161 (1979). It may not be predicated on knowing that his or her acts will promote or facilitate "a crime" rather than the crime charged. *State v. Grendahl,* 110 Wn.App. 905, 907, 911, 43 P.3d 76 (2002). It does not extend to acts or crimes

that are merely foreseeable. *State v. Stein*, 144 Wn.2d 235, 246, 27 P.3d 184 (2001).

Washington's accomplice liability law is premised on the principal pronounced that a person "must associate with the undertaking, participate in it as something he desires to bring about, and seek by his actions to make it succeed." *Wilson*, 91 Wn.2d at 491. The United States Supreme Court has explained that the premise of accomplice liability is that the co-participant has advance knowledge of the cohort's intent to act with violence, such as possession of a firearm, in order to convict him of aiding and abetting. *Rosemond v. United States*, _ U.S. _, 134 S. Ct. 1240, 1251, 188 L. Ed. 2d 248 (2014).

Farnsworth found insufficient evidence that the purported getaway driver, Mr. Farnsworth, possessed sufficient knowledge to be an accomplice to robbery, rather than theft. 2014 WL 7532675 at *4. An accomplice must act with actual "knowledge of the specific crime that is eventually charged, rather than with knowledge of a different crime or generalized knowledge of criminal activity." *Id.* (quoting *State v. Holcomb,* 180 Wn.App. 583, 590, 321 P.3d 1288, *rev. denied,* 180 Wn.2d 1029 (2014)).

The Supreme Court has reiterated this express requirement in its recent decision in *State v. Allen*, _ Wn.2d _, 2015 WL 196496 at *3 (Jan. 15, 2015). To convict a person of first degree premeditated murder as an accomplice, "the State was required to prove that Allen *actually* knew that he was promoting or facilitating Clemmons in the commission of first degree premeditated murder." In *Allen*, the prosecution argued to the jury that if Mr. Allen aided another person at a time that he "should have known" this other person was planning on killing several people, he was guilty as an accomplice to first degree murder. The Supreme Court explained that the prosecution must prove the accomplice's "actual knowledge that principal was engaging in *the* crime eventually charged." *Id.* (citing *State v. Shipp,* 93 Wn.2d 510, 517, 610 P.2d 1322 (1980) (emphasis added)).

Like in *Farnsworth*, there was no evidence of a plan between Mr. Reynolds and Mr. Clark to use or threaten force. Mr. Clark denied knowledge of Mr. Reynolds' intent to steal. Even if the jury could have concluded Mr. Clark knew Mr. Reynolds needed money and would steal from the bank to get money, there was no basis for him to conclude that he was aiding in a forcible threat to take such money. No one had a weapon.

Aiding someone who is stealing money from a bank does not automatically equate to the use of force or threat of force. Consequently, "[w]e cannot say that when the plan merely calls for the principal to hand a 'demand note' to a teller of a financial institution that a robbery occurs." *Farnsworth*, 2014 WL 7532675 at *4. Absent evidence that Mr. Clark aided Mr. Reynolds with actual knowledge he was facilitating the charged robbery, the prosecution has not meet its burden of proving Mr. Clark knowingly aided Mr. Reynolds in committing or attempting to commit robbery.

3. **Mr. Clark was prejudiced by the prosecution and court's emphasis on his courtroom demeanor and prior convictions.**

For the reasons explained in Appellant's Opening Brief, the State's argument about Mr. Clark's courtroom demeanor and the court's incorrect instructions to the jury regarding its use of evidence that Mr. Clark had been convicted of crimes in the past both affected the outcome of the trial.

The prosecution contends that urging the jury to find Mr. Clark lacked credibility by shedding tears only referred to Mr. Clark's tears while testifying. Response Brief at 48. But the prosecutor did not limit his comments in this fashion. Defense counsel, the person who is

present and positioned closest to Mr. Clark in the courtroom, objected to this argument because Mr. Clark had cried during other parts of the trial when he was simply exercising his right to be present. 8/7/13RP 107. The judge's impression of how he interpreted the prosecutor's comments do not speak to how the jury heard or considered the arguments. The State incorrectly frames the issue as a question of deferring to the judge's observations to make a ruling terminating pro se representation due to the defendant's disruptive conduct, as in *State v. Floyd*, 178 Wn.App. 402, 410, 316 P.3d 1091 (2013), *rev. denied*, 180 Wn.2d 1005 (2014), or how the judge sitting as fact-finder in a bench trial resolved questions of witness credibility, as in *State v. Read*, 163 Wn.App. 853, 864, 261 P.3d 207 (2011).

The question is what the jury saw and heard, and the judge does not control how jurors interpret the State's argument, particularly when the judge did not instruct the jury to base its decision only on Mr. Clark's in-court testimony and not his general demeanor during the trial as the State urged.

Furthermore, Mr. Clark objected to the admissibility of prior convictions if used for propensity purposes and inaccurate jury instructions regarding use of Mr. Clark's prior convictions. 8/7/13RP 4,

6, 60-61. The defense attorney did not withdraw her objections after the court ruled against her, instead, she signaled her understanding the court had ruled and moved on with her argument on other issues. These issues are preserved for appeal because the judge was informed of the error and declined to properly limit the testimony or accurately instruct the jury.

Finally, the State applies the wrong harmless error test. As explained in Appellant's Opening Brief, improper arguments made despite defense objection and with the court's endorsement require reversal when "the improper comments caused prejudice." *State v. Lindsay*, 180 Wn.2d 423, 431, 326 P.3d 125 (2014). Instructions that mislead the jury also require reversal when "prejudice is shown by the complaining party." *State v. Aguirre*, 168 Wn.2d 350, 364, 229 P.3d 669 (2010). Mr. Clark objected to the prosecutor's argument and to the court's instructions to the jury on how it may use evidence of his uncharged misconduct. This is not a situation where the court applies a "stringent" manifest constitutional error standard as the prosecution concocts on appeal. Mr. Clark's credibility was essential to evaluating whether he was an accomplice to Mr. Reynolds, or, as he testified, he did not knowingly aid Mr. Reynolds in a bank robbery. The State

impermissibly influenced this decision by condemning Mr. Clark for being present and emotional during the trial and then encouraged the jury to use his past convictions against him. These errors affected the jury's deliberations on these contested matters and require reversal.

C. CONCLUSION.

For the foregoing reasons and those discussed in Appellant's Opening Brief, Mr. Clark's convictions must be reversed due to insufficient evidence, or alternatively, a new trial ordered.

DATED this 21st day of January 2015.

Respectfully submitted,

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

STATE OF WASHINGTON, Respondent, v. NATHANIEL CLARK, Appellant.	)))))))))	NO. 70862-7-I

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 21ST DAY OF JANUARY, 2015, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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