NO. 70862-7-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

NATHANIEL SHANE CLARK,

Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MICHAEL HAYDEN

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# STATE'S RESPONSE TO APPELLANT'S SUPPLEMENTAL ASSIGNMENT OF ERROR

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## A. ISSUES PRESENTED

1. An accomplice must knowingly promote or facilitate the commission of a crime. Reynolds told multiple inmates that he would rob a bank if they bailed him out of jail. Clark bailed Reynolds out of jail and then drove him to two banks that Reynolds robbed or attempted to rob while dressed in black and wearing a face covering. Clark, who was previously convicted of theft, demonstrated his knowledge of the difference between theft and robbery by telling police that, while he had an extensive criminal history, he would never participate in a robbery. Was the evidence sufficient for a reasonable jury to find that Clark knowingly participated in a robbery?

## B. STATEMENT OF THE CASE

### 1. SUBSTANTIVE FACTS.

The State relies on the statement of facts contained in its previously filed Brief of Respondent.

### 2. PROCEDURAL HISTORY.

On January 29, 2015, this Court granted Clark's motion for leave to file a supplemental assignment of error, and directed the State to respond. The State now responds.

## C. ARGUMENT

### 1. THE EVIDENCE WAS SUFFICIENT FOR A REASONABLE JURY TO FIND THAT CLARK KNOWINGLY AIDED REYNOLDS IN ROBBING A BANK BY MAKING AN IMPLIED THREAT.

In his opening brief, Clark argued that the evidence was insufficient to prove that his accomplice, Reynolds, used or attempted to use an implied threat in order to rob a bank. Now, in his supplemental brief, Clark also asserts that the evidence was insufficient to prove that he knew of Reynolds's implied threat.[1] Clark's argument should be rejected. The evidence at trial showed that Clark was very much aware that the robbery and attempted robbery, which he planned and executed with Reynolds, depended on the making of an implied threat.

Clark relies on *State v. Farnsworth*, __ Wn. App. __, 340 P.3d 890 (Oct. 28, 2014). In that case, Division II of this Court reversed a conviction for bank robbery because it found that the evidence was insufficient either for a jury to find (1) that the principal made an implied threat; or (2) that the accomplice agreed to aid, abet, or encourage the commission of a crime involving an implied threat. 340 P.3d at 892-95. Clark's supplemental assignment of error entails only the second issue.

[1] A person is liable as an accomplice for the criminal conduct of another when, with knowledge that it will promote or facilitate the commission of the crime, he or she either (1) solicits, commands, encourages, or requests such other person to commit the crime; or (2) aids or agrees to aid such other person in planning or committing the crime. RCW 9A.08.020(3)(a)(i), (ii).

As a threshold matter, the State maintains that *Farnsworth* is wrongly decided.[2] The majority in that case failed to give proper deference to the jury's weighing of the facts in evidence. 340 P.3d at 900-01 (WORSWICK, J., dissenting in part). Regardless, the instant case is distinguishable on the facts in critical respects, as discussed below.

First, the evidence at trial established that Clark and Reynolds agreed to commit a "robbery," and knew precisely what this crime entailed. Reynolds told multiple inmates at the Snohomish County Jail—where he was incarcerated with Clark—that he would rob a bank if someone were to bail him out of jail. 13RP 55. Though Reynolds testified that these conversations occurred after Clark had already been released from custody, the jury was free to infer that Reynolds had made this offer to Clark. 13RP 55. The jury could reasonably have rejected Clark's incredible explanation that he actually bailed Reynolds out of jail

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[2] Clark asserts that the State inaccurately portrayed *Farnsworth* in its response brief. Reply Brief at 4-5. Clark misunderstands the State's argument. The State does not argue that the *Farnsworth* court treated the taking of money from a bank as neither robbery nor theft. The State recognizes that the *Farnsworth* court reversed the robbery conviction and remanded for resentencing on first-degree theft. 40 P.3d at 895. Instead, the State submits that this result is not only wrong but also internally inconsistent. The position taken by the *Farnsworth* court—that the bank teller in that case gave money in response to a note but not in response to an implied threat—necessitates the absurd conclusion that the taking is neither robbery nor theft. If a bank simply turns over money voluntarily, because someone has asked for it with a note, and the surrender of property has not been induced by a threat implicit in the note, then no wrongful taking has occurred. The defendant has not exercised unauthorized control over any property because it is merely the bank's policy to give money to anyone who asks for it in such a manner. This reasoning is flawed because, taken to its logical conclusion, it effectively decriminalizes a clearly illegal act—something that the legislature never could have intended.

because Reynolds needed medical treatment—especially given his claim that he had only just met Reynolds and still risked $35,000 to bail him out of jail. 13RP 157-59; 14RP 16-17. Further, there was no evidence at trial that Reynolds ever sought medical treatment after Clark bailed him out of jail; instead, he joined Clark on a multiple-county crime spree. It was reasonable for the jury to conclude that Clark and Reynolds agreed to this plan while in custody together.

While the *Farnsworth* court provided that an agreement to "rob" a bank is insufficient evidence of an agreement to use an implied threat,[3] there were additional facts in this case from which a jury reasonably could conclude that Clark understood his agreement with Reynolds to involve the use of an implied threat. Clark admitted to the police that he had an extensive criminal history in order to bolster the credibility of his claim that, while he may sell drugs or engage in other less serious criminal activity, he would never commit a *robbery*. Specifically, the jury heard that Clark told detectives:

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[3] The *Farnsworth* court concluded that the fact that the principal said that he and his accomplice were planning a "robbery" was "irrelevant," because this term is a mere "colloquialism." 340 P.3d at 893 n.5. While a defendant's use of this term "robbery" may not be conclusive proof that he intended to use an implied threat, it goes too far to say that it is *irrelevant* to a review of the sufficiency of the evidence. A jury reasonably could infer that a person who professes an intent to commit robbery is aware of what that crime entails. Every person is presumed to know the law, after all. *State v. Patterson*, 37 Wn. App. 275, 282, 679 P.2d 416 (1984).

> I never robbed nothing. I've never—I mean, I might have had a lot of damn felonies in my, you know, for drugs and fighting and all kinds of shit when I was younger but I've never, I never robbed nothing.

Exhibit 63 at Track 1, 19:10-19:20.[4]

> But I'm not a stupid guy. I'm, I'm not gonna go to prison for—yeah, I've got like nine felony points, you know what I mean? If I do anything, if I piss on the sidewalk, I'm going to prison for five years. I'm not a stupid fucking guy, you know what I mean? There's a lot of shit that I can do. I would never rob a bank.

*Id.* at Track 2, 05:43-06:01. The jury also heard that Clark had previously been convicted of theft. 14RP 9. Given the evidence of Clark's prior conviction for theft, and his insistence that he would never commit robbery, the jury reasonably could have concluded that Clark understood the difference between theft and robbery. Thus, when he agreed with Reynolds to rob a bank, he knew that this entailed the use of an implied threat.

Reynolds's testimony also supported a reasonable inference that he was familiar with the threat element of robbery. He testified that at the time that he formulated his plan to rob a bank, he mistakenly believed that

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[4] Exhibit 63 was played for the jury at 12RP 56-58. As explained in the State's response brief, Exhibit 63 is an audio CD that contains portions of Clark's recorded interview with detectives, as well as phone calls recorded at the King County Jail. 12RP 51-58. The recorded interview is located in a directory on the CD titled "Transcript Nathaniel Clark redacted." That directory contains four separate audio files, referred to herein as Track 1, Track 2, Track 3, and Track 4—the order in which they were played for the jury. 12RP 56-58. Track 1 is titled "beginning to 21.30.wav." Track 2 is titled "22.53 to 54.44.wav." Track 3 is titled "55.03 to 1.09.31.wav." Track 4 is titled "1.10.10 to end.wav."

using a note was classified as second-degree robbery, not first-degree robbery. 13RP 56. Importantly, he did not testify that he thought that this would constitute *theft*—merely a lesser degree of robbery. Given the level of coordination and planning between Reynolds and Clark (and especially in light of Clark's statements to the police, discussed above), it was reasonable for the jury to infer that Clark likewise understood the elements of robbery.

Second, Reynolds's plan depended on the use of a threat. He testified that he chose Banner Bank because he knew it to be generally staffed by a small number of employees who were usually women. 13RP 73. He admitted that he aborted his initial attempt to enter a Banner Bank in Kirkland because he saw a male employee, who he thought would be more likely to resist. 13RP 73-74. While Clark testified that Reynolds told him to go to a Banner Bank because Reynolds could cash a check there without identification, the jury was free to disbelieve this explanation. 13RP 179. It was reasonable for the jury to conclude instead that Reynolds had told Clark that they should rob a Banner Bank because its usually female employees would be less likely to resist—i.e., more likely to submit to—an implied threat.

Third, Clark's and Reynolds's actions were fundamentally unlike the sad facts of *Farnsworth*. *Farnsworth* is marked by an almost

tragicomic incompetence: two older men, nearly 60 and 70, respectively, drug-addicted and homeless, one struggling to put on a wig and sunglasses and the other frustrated with his partner's "hem-hawing"—based on these facts, a reasonable jury could have concluded that such figures genuinely lacked an understanding that their actions involved a threat.[5] 340 P.3d at 892.

This is a far cry from Clark and Reynolds, two sophisticated actors who sought out who they believed would be vulnerable victims and employed Bluetooth cell phone technology and wireless police scanners to coordinate their crimes. 11RP 30-31, 101-02, 135, 137-55, 158; 12RP 62-63; 13RP 7-9, 71, 73, 127-33. It is also clear that Reynolds chose an intimidating appearance, not a mere disguise—he dressed all in black with black gloves, sunglasses, a partial black face covering and low black hat, and carried a black bag in Union Bank; and he dressed similarly at Banner Bank, with the addition of a ski mask. 9RP 39, 84; 10RP 28, 30; 11RP 14. It was reasonable for the jury to infer that Clark observed Reynolds in this outfit, immediately prior to and after the crimes (indeed, Clark provided Reynolds with the hat, 14RP 14). Their actions demonstrated that Clark and Reynolds intended to capitalize upon the lore of the ski-masked bank

[5] Of course, the fact that a jury reasonably *could have* acquitted is not a basis to overturn a conviction on a review of the sufficiency of the evidence, as the *Farnsworth* dissent recognizes.

robber and all of the menace that it implied. The evidence was sufficient for a reasonable jury to conclude that Clark knew of and agreed to aid Reynolds in the commission of a crime involving an implied threat, i.e., a robbery.

## D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Clark's convictions.

DATED this 6th day of March, 2015.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Nancy Collins, the attorney for the appellant, at Washington Appellate Project, 1511 3rd Ave, Suite 701, Seattle, WA, 98101, containing a copy of the Response to Supplemental Assignment of Error, in State v. Nathaniel Shane Clark, Cause No. 70862-7, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 6th day of March, 2015.

U Brame

Name
Done in Seattle, Washington

# KING COUNTY PROSECUTOR

## March 06, 2015 - 2:10 PM

**Transmittal Letter**



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