Supreme Court No.: 93769-9
Court of Appeals No.: 73462-8-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

BRYAN SASS,

Petitioner.

PETITION FOR REVIEW

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

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A. IDENTITY OF PETITIONER AND THE DECISION BELOW

Bryan Sass, petitioner here and appellant below, requests this Court grant review of two issues in the substantial public interest pursuant to RAP 13.4(b)(4) of the decision of the Court of Appeals, Division One, in *State v. Sass*, No. 73462-8-I, filed October 3, 2016. A copy of the opinion is attached as an Appendix.

B. ISSUES PRESENTED FOR REVIEW

1. Whether the Court should grant review because no Supreme Court case holds that theft is a lesser included offense of robbery, although dicta from several cases indicate it is? RAP 13.4(b)(4).

2. Whether the Court should grant review to hold that, consistent with *State v. Farnsworth*, the evidence is insufficient to convict Mr. Sass of attempted robbery when he walked into a bank, waited his turn in line, asked for money and quietly stated he was there to rob the teller without any physical or verbal indication he was armed or intended harm? RAP 13.4(b)(1), (4).

C. STATEMENT OF THE CASE

On a warm August day, Bryan Sass entered a Chase bank branch in downtown Everett. 3/23/15 RP 19-21. Mr. Sass waited patiently in line for several minutes. 3/23/15 RP 22, 32-33, 42, 50, 56;

Exhibit 4, clip 2 at 00:00-02:30. Teller Djamila Ayouni was working at the drive-through window when Mr. Sass entered the bank. 3/23/15 RP 22. When Ms. Ayouni was done at the drive-through, she started assisting the interior line of customers, calling forward Mr. Sass. 3/23/15 RP 22-23, 42. He walked up to Ms. Ayouni's station and stood there casually, in a manner indistinguishable from the customers next to him. 3/23/15 RP 23; Exhibit 4, clip 2 at 02:30-02:48. In a soft voice, Mr. Sass said, "I need hundreds, fifties, and twenties in this order." 3/23/15 RP 23, 40-41.

Ms. Ayouni thought he was a customer who needed to make a withdrawal, so she asked for a debit card and identification to start filling out a withdrawal slip. 3/23/15 RP 23, 42. Although Mr. Sass had a debit card in his pocket, he responded, "No, ma'am, I came to rob you." 3/23/15 RP 24, 70, 77. When Ms. Ayouni said, "Excuse me?" Mr. Sass repeated the same words. 3/23/15 RP 24.

During this entire exchange, Mr. Sass's hands were visible on the counter; he did not make any threats; he did not make any attempts to move towards Ms. Ayouni; he did not make any attempts to grab her; and she did not see any weapons on him. 3/23/15 RP 45; Exhibit 4, clip 4 at 02:27-02:49.

At that point, Ms. Ayouni thought Mr. Sass wanted to take money from her. 3/23/15 RP 24. Her cash drawer was at the drive-through window, so she told Mr. Sass she would be right back, went around the corner to the drive through window, and pressed a silent security button. 3/23/15 RP 25. She had been trained to sound the alarm whenever she suspected "anything." 3/23/15 RP 42-43, 54. Seconds after Ms. Ayouni left, Mr. Sass walked away from the counter unhurriedly. Exhibit 4, clip 2 at 02:43-02:53.

The assistant bank manager, Brent Flagg, first observed Mr. Sass in line; he then saw Mr. Sass walk away from the counter looking "a little confused" after Ms. Ayouni went around the corner. 3/23/15 RP 25, 48-51. Mr. Flagg asked Mr. Sass if he needed any assistance. 3/23/15 RP 51; Exhibit 4, clip 2 at 02:52-03:12. In a quiet voice, Mr. Sass told Mr. Flagg, "she needed a debit." 3/23/15 RP 52, 57. Mr. Flagg asked what Mr. Sass meant, Mr. Sass repeated, "she needed a debit." 3/23/15 RP 52-53. Mr. Flagg told Mr. Sass, "I'm confused" and Mr. Sass said "so was he;" and Mr. Sass exited the bank. 3/23/15 RP 52-53; *see* Exhibit 4, clip 2 at 02:52-03:12.

Mr. Flagg did not see a weapon on Mr. Sass or anything in his hands. 3/23/15 RP 58. Mr. Sass did not shout, carry a note, or make

any threats. 3/23/15 RP 57. Mr. Flagg simply felt "nervous" based on Mr. Sass's appearance. 3/23/15 RP 58.

Mr. Sass was wearing a surgical mask and light gloves. 3/23/15 RP 21, 44, 46, 50. Although the hood of his sweatshirt was up, it did not mask his appearance—a large tattoo on his neck was clearly visible. 3/23/15 RP 21, 28, 44, 46; *see* Exhibits 8 & 9.

Someone in the branch called the police and Mr. Sass was quickly arrested, identified by his distinctive clothing and large neck tattoo. 3/23/15 RP 27-28, 54-55, 58, 61; Exhibits 8 & 9. Mr. Sass did not have any weapons on him, but he did have a Chase Bank debit card. 3/23/15 RP 70, 77. He told police he went into the bank to inquire about getting a debit card, and that he wore a surgical mask because he had MRSA (methicillin resistant staphylococcus aureus). 3/23/15 RP 72-75. This diagnosis was confirmed at trial. 3/24/15 RP 9, 12-13.

Although Mr. Sass had no weapons, used no force or violence, and uttered no threat of the immediate use of force or violence, the State charged Mr. Sass with attempted first degree robbery. CP 309-10, 350-51. At trial, he requested an instruction on the lesser-included offense, attempted theft, which does not require the use of immediate force, violence or fear of injury; the trial court denied the request. CP

274, 280-82, 286, 301-02; 3/24/15 RP 3-8. During deliberations, the jury asked the court for an "additional explanation" of the "'use of immediate force, violence or fear of injury'" element of attempted first degree robbery. CP 262, 272 (the court instructed the jury to refer back to its instructions); 3/24/15 RP 35.

Mr. Sass was convicted of attempted first degree robbery (RCW 9A.28.020; RCW 9A.56.200). CP 2-14, 119-29; 252.

The Court of Appeals affirmed in an unpublished opinion, holding Mr. Sass was not entitled to a jury instruction for theft and the evidence was sufficient to convict him of attempted robbery. Slip Op. at Appendix.[1]

D. ARGUMENT

1. The Court should grant review because no Supreme Court decision holds theft is a lesser included offense of robbery, although dicta and application of the legal test from *Blockberger* indicate that it is.

Review is in the substantial public interest because the lower courts, parties and practitioners lack clear authority that theft is legally a lesser included offense of robbery. The Court should grant review

[1] The Court of Appeals also held the trial court miscalculated Mr. Sass's offender score and remanded for resentencing. Slip Op. at 10-12. Mr. Sass does not petition this Court to accept review of that issue.

and, because the evidence supports only a theft occurred here, reverse for a new trial.

a. Consistent with extensive dicta, theft is legally a lesser included offense of robbery.

Mr. Sass's trial court denied a lesser included theft instruction because it found it did not meet the legal or factual test. The Court of Appeals did not reach the issue, but noted the deficiency in authoritative case law. Slip Op. at 8 & n.34. Courts like Mr. Sass's require clear authority on the legal sufficiency of theft as a lesser included for robbery.

Where requested, an accused is entitled to an instruction on a lesser-included offense where: (1) each element of the lesser offense must necessarily be proved to establish the greater offense as charged (legal prong); and (2) viewed in the light most favorable to the defendant, the evidence in the case supports an inference that the lesser offense was committed (factual prong). *State v. Berlin*, 133 Wn.2d 541, 548, 947 P.2d 700 (1997) (overruling *State v. Lucky*, 128 Wn.2d 727, 912 P.2d 483 (1996)); *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978).

In *Berlin* it was settled that the legal comparability of the lesser-included offense must be tested against the crime as charged, not as set

forth in the statute. 133 Wn.2d 541. In adopting this test, the Court rejected the notion that a lesser included offense must take into account all the alternative means of satisfying the greater offense. The Court first considered the history of the lesser-included offense doctrine as it existed at common law:

> This rule originally developed as an aid to the prosecution when the evidence introduced at trial failed to establish an element of the crime charged. Thus, the rule gave the prosecution the flexibility to instruct the jury consistent with the evidence actually presented. The rule also benefited the defendant by providing a third alternative to either conviction for the offense charged or acquittal. Thus, the rule allowed the defendant to instruct the jury on an alternative theory of the case, a lesser crime than that charged by the State.

Berlin, 133 Wn.2d at 544-45 (citing *Beck*, 447 U.S. at 633).

The court next reviewed its own decision in *Lucky* and found it erroneous, in pertinent part, because it "virtually eliminate[d] the Legislature's codification of a common-law rule," and was inequitable to both the prosecution and the defense in that it "preclude[d] a lesser included offense instruction whenever a crime may be statutorily committed by alternative means." *Berlin*, 133 Wn.2d at 547. The court accordingly held,

> Only when the lesser included offense analysis is applied to the offenses <u>as charged and prosecuted, rather than to the offenses as they broadly appear in statute</u>, can both

> the requirements of constitutional notice and the ability to argue a theory of the case be met. This is fair to both the prosecution and the defense.

Id. at 548 (emphasis added).

In short, when analyzing the legal prong for a lesser-included offense, a court need not consider all the alternative statutory means of committing the crime. *Id.* at 548. Rather, the court should apply the *Workman* test to the offense as charged and prosecuted, not as the offense may be broadly set forth in the statute. *Id.* at 547-48.

In applying the factual prong of the *Workman* test, a court must view the supporting evidence in the light most favorable to the party requesting the instruction. *State v. Fernandez-Medina*, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000). The instruction should be given "[i]f the evidence would permit a jury to rationally find a defendant guilty of the lesser offense and acquit him of the greater." *State v. Warden*, 133 Wn.2d 559, 563, 947 P.2d 708 (1997) (citing *Beck*, 447 U.S. at 635).

Theft in the first degree is legally a lesser included offense of first degree robbery. Every element of theft is a necessary element of robbery. To prove first degree robbery as charged here, the State had to show (among other things) that Mr. Sass attempted to unlawfully take property from a person or in the presence of another, and that he

intended to commit theft of the property. CP 262 (to-convict instruction). These are the same elements the jury would have had to find to convict Mr. Sass of attempted first degree theft. CP 281.

That theft is a lesser included offense of robbery has been made clear in dicta in several cases. In *Farnsworth*, the trial court provided an instruction on theft in the first degree where the defendant was charged with robbery. 184 Wn. App. at 308. Furthermore, in *State v. Witherspoon*, this Court considered whether it was ineffective assistance of trial counsel not to request a lesser included theft instruction on robbery charges. 180 Wn.2d at 886-87. The Court rejected the ineffective assistance claim, but it apparently accept that theft is a lesser included offense of robbery. *Id.* (finding decision not to request lesser was a prudent tactical decision); *accord Shcherenkov*, 146 Wn. App. at 630 n.4 (treating first-degree theft as a lesser-included offense of first-degree robbery, but rejecting appellant's factual basis for a lesser-included instruction); *State v. O'Connell*, 137 Wn. App. 81, 95, 152 P.3d 349 (2007) (same); *see also State v. Herrera*, 95 Wn. App. 328, 330, 977 P.2d 12 (1999) (party concedes theft is lesser included of robbery); *State v. McKague*, 172 Wn.2d 802, 804, 262 P.3d

1225 (2011) (jury instructed on third degree theft as a lesser included offense of first degree robbery).

Below, the State argued theft is not a lesser included offense of robbery because first degree theft, in this context, is defined as a taking "from the person of another" whereas robbery is defined as a taking by force "from the person of another or in his or her presence." *Compare* RCW 9A.56.030(1)(b); RCW 9A.56.020 *with* RCW 9A.56.190; RCW 9A.56.200. But first degree theft, in this context, is a theft by taking just as a robbery is. *See State v. Smith*, 115 Wn.2d 434, 438, 798 P.2d 1146 (1990) (distinguishing theft by taking from theft by deception); *State v. Berlin*, 133 Wn.2d 541, 548, 947 P.2d 700 (1997) (court must considered crime as charged and prosecuted when evaluating propriety of lesser included offense instruction).

The State sought to prove Mr. Sass attempted to take money "from the person of another" because, if one believes the State's theory, he requested a teller hand him the money. Mr. Sass did not attempt to take money directly from the bank's cash drawer; he attempted to rely upon the teller to give it to him from her person (*i.e.*, to personally hand it to him). Thus the taking, as charged and prosecuted, was from the

person of another and Mr. Sass was entitled to the requested lesser-included offense instruction.

Because this Court has not clearly held that theft is a lesser-included offense of robbery, review should be granted. RAP 13.4(b)(4).

b. Because the evidence supports only an attempted theft here, the Court should reverse after accepting review.

Where the facts in the light most favorable to the moving party would permit a jury to find the defendant guilty of theft rather than robbery, the instruction must be given.

The facts here support the giving of a theft instruction. The jury could rationally interpret the evidence as showing Mr. Sass intended to deprive the bank of its property when he requested money without presenting any account information. The jury could also find he took a substantial step toward wrongfully taking property from the bank when he walked in and when he asked the teller for money. Likewise, the jury could also not have found that Mr. Sass acted or attempted to act with violence, fear or threats. That is the distinction between attempted theft and attempted robbery presented here. The factual prong of the *Workman* test is also satisfied.

The failure to instruct the jury on a lesser offense, where the evidence might allow the jury to convict the defendant of only the lesser offense, violates the Fourteenth Amendment. *Beck v. Alabama*, 447 U.S. 625, 636-38, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980). The Court should grant review and reverse and remand for a new trial. *See State v. Stevens*, 158 Wn.2d 304, 310, 143 P.3d 817 (2006); *State v. Griffin*, 100 Wn.2d 417, 420, 670 P.2d 265 (1983).

2. The Court should also grant review and hold, consistent with *Farnsworth*, that Mr. Sass did not commit an attempt to rob when he patiently waited in line, quietly asked for money, calmly stated he was here to rob and then left peacefully.

Robbery requires the use or threatened use of immediate force, violence, or fear of injury. RCW 9A.56.190. The State charged Mr. Sass with attempted robbery in the first degree, and therefore had to show he had the specific intent to commit first degree robbery. RCW 9A.28.020(1); *see State v. Johnson*, 173 Wn.2d 895, 901, 270 P.3d 591 (2012). Contrary to the Court of Appeals opinion, which interpreted the recent *Farnsworth* case, the evidence is insufficient to show Mr. Sass used or threatened the use of immediate force, violence or fear of injury. *See* Slip Op. at 3-6 (interpreting *State v. Farnsworth*, 185 Wn.2d 768, 374 P.3d 1152 (2016)).

In the light most favorable to the State, the evidence here shows only that after patiently waiting in line, Mr. Sass said, in a calm, quiet voice, "I need hundreds, fifties, and twenties in this order." *E.g.*, 3/23/15 RP 23, 41, 42, 56; Exhibit 4, clip 2. The teller then asked Mr. Sass for his bank card and identification, to which he responded quietly, "No, ma'am, I came to rob you." 3/23/15 RP 23-24, 41. Mr. Sass did not have a weapon of any type. He did not use a demand note.

He did not make any threatening or suggestive gestures. He did not act threateningly or menacingly. 3/23/15 RP 45, 57-58; 5/18/15 RP 10 (at sentencing, court notes Sass demonstrated no oral intimidation or aggressiveness); Exhibit 4, clips 2, 4. The State did not show that Mr. Sass acted with specific intent to commit a first degree robbery.

Although Ms. Ayouni testified she was "scared" that Mr. Sass was there to "rob" her, she did not say she was fearful of any immediate injury or use of force. 3/23/15 RP 39. Mr. Sass had waited patiently in line for several minutes, and stood at the counter casually, in a manner indistinguishable from the three other customers at the teller counter. Exhibit 4, clip 2 at 02:30-02:48. Mr. Sass had the same calm, casual demeanor when he responded to Mr. Flagg on his unremarkable way out of the bank. 3/23/15 RP 51-53, 57-58; Exhibit 4, clip 2 at 02:53-03:12.

At trial, the prosecutor argued Mr. Sass intimidated Ms. Ayouni with his clothing, by "demanding" money, and by saying, "I'm here to rob you." 3/24/15 RP 19-21. This argument demonstrates the insufficiency of the State's evidence because intimidation is not adequate to satisfy Washington's robbery offense. *United States v. Bingham*, 628 F.2d 548, 549 (9th Cir. 1980); *see* Section 3, *infra*.

Likewise, Mr. Sass's use of the word "rob" without any attending physical or verbal behavior does not communicate the intent to cause bodily injury, to damage property, or to physically confine or restrain another person. *See* RCW 9A.04.110(28)(a)-(c)). Because the common definition of "rob" infrequently includes the use of unlawful force or threat of injury, a layperson's use of the word "rob" does not necessarily, or even probably, connote our state's particular definition of the offense. Dictionary.com, http://dictionary.reference.com (last visited Oct. 23, 2016) (listing definitions, most of which do not include the use of force or threat of injury).

Unlike in *Farnsworth*, Mr. Sass did not reference die packs or tracking devices, and he did not have a threatening note. Slip Op. at 5 (citing *Farnsworth*, 185 Wn.2d at 778). There was no reasonable basis from which to imply an inference of intimidation of physical harm where Mr. Sass remained calm, his hands were visible, and peacefully walked away.

E. CONCLUSION

The Court should grant review to provide authority that theft is a lesser included offense of robbery and to apply the *Farnsworth*

decision and hold the evidence was insufficient to convict Mr. Sass of attempted robbery.

DATED this 23rd day of October, 2016.

Respectfully submitted,

s/ Marla L. Zink
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APPENDIX

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

STATE OF WASHINGTON, Respondent, v. BRYAN RICHARD SASS, Appellant.	)	No. 73462-8-I UNPUBLISHED OPINION FILED: October 3, 2016

VERELLEN, C.J. — A jury convicted Bryan Sass of attempted first degree robbery of a financial institution. Sass appeals and argues that insufficient evidence supports his conviction because the State failed to establish that he used or threatened force, violence, or immediate injury. He also contends that the trial court erred in denying his request for an instruction on the lesser included offense of attempted first degree theft. Finally, he argues that the trial court erred in finding federal bank robbery comparable to Washington's crime of robbery, resulting in over calculation of Sass's offender score for purposes of sentencing. We conclude sufficient evidence supports Sass's commission of attempted first degree robbery and he was not entitled to an instruction on attempted first degree theft. However, the State concedes, and we agree, that his offender score was improperly calculated and we thus remand for resentencing.

FACTS

On August 11, 2014, Sass entered a branch of J.P. Morgan Chase Bank in Everett. Even though it was a very warm day, Sass wore a dark hooded sweatshirt with the hood pulled over his head, a surgical mask on his face, and gloves. After waiting in line, he was called to the counter by Djamila Ayouni, a teller at the drive-through window. Ayouni assisted customers inside the bank when the drive-through line was empty. Sass told Ayouni that he needed hundreds, fifties, and twenties, and she asked for his debit card and identification. He answered, "[N]o ma'am, I came to rob you."[1] She said, "[E]xcuse me," and he repeated the same words.[2] Sass did not make any attempt to grab Ayouni, and he did not show her any weapons. Ayouni walked across to the drive-up window where her cash drawer was located and activated a silent alarm. Sass walked away from the counter.

Brent Flagg was the assistant branch manager at the bank. He saw Sass waiting in line, wearing a surgical mask. Flagg testified that he saw Sass walking away from Ayouni and thought he looked a little confused. He asked Sass if he could help him, and Sass replied that "she needed a debit."[3] Flagg said he was confused and did not understand, and Sass replied, "[S]o am I."[4] Flagg testified that Sass made him nervous. Sass then left the bank.

Sass was arrested about a block away. When questioned by police, Sass said he was wearing a mask and gloves because he had an infection in his nasal cavity, but

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[1] Report of Proceedings (RP) (Mar. 23, 2015) at 24.

[2] Id.

[3] Id. at 52.

[4] Id.

he acknowledged he had not been wearing the mask earlier when he was in a park with friends. At trial, Dr. Eileen Bulger testified that Sass had undergone a hernia repair operation on May 16, and that he had been treated for an antibiotic resistant staph infection in his groin. Dr. Bulger also testified that the infection was not transmittable through the air and that an infected person would not be expected to wear a surgical mask.

The State charged Sass with attempted first degree robbery committed within and against a financial institution, in violation of RCW 9A.56.200(1)(b). At trial, Sass requested a jury instruction on the lesser included offense of attempted first degree theft, but the trial court denied his request. Based on the testimony of Ayouni, Flagg, and three police officers, and a videotape of Sass's activities at the bank, the jury convicted Sass as charged.

At sentencing, the State introduced records showing that Sass had eight prior felonies, two of which were federal bank robberies. Over Sass's objection, the trial court found the offenses comparable to the Washington crime of robbery, which yielded an offender score of 12, with a standard sentence of range of 96 to 128 months. The trial court sentenced Sass to 100 months' confinement.

Sass appeals.

DISCUSSION

Sufficiency of the Evidence

Sass claims that insufficient evidence supports his conviction because the State failed to establish that he used or threatened force, violence, or immediate injury. We review a defendant's challenge to the sufficiency of the evidence by asking whether any

rational trier of fact could have found the elements of the crime beyond a reasonable doubt.[5] In answering this question, we view the evidence in the light most favorable to the State, drawing all reasonable inferences in favor of the State.[6] We consider circumstantial and direct evidence to be equally reliable, and defer to the jury on questions of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence.[7] Evidence is sufficient if, after viewing it in the light most favorable to the State, a rational trier of fact could find each element of the crime beyond a reasonable doubt.[8]

"A person commits robbery when he or she unlawfully takes personal property from the person of another or in his or her presence against his or her will by the use or threatened use of immediate force, violence, or fear of injury to that person or his or her property or the person or property of anyone."[9] Our legislature has broadly defined "threat" to include indirect threats to cause bodily injury or to cause substantial harm to another's health or safety.[10] Sass was charged with attempted first degree robbery. Pursuant to RCW 9A.56.200(1)(b), a person commits first degree robbery when "[h]e or she commits a robbery within and against a financial institution as defined in RCW 7.88.010 or 35.38.060."

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[5] State v. Finch, 137 Wn.2d 792, 831, 975 P.2d 967 (1999).

[6] Id.

[7] State v. Thomas, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004.

[8] Id. at 874.

[9] RCW 9A.56.190.

[10] RCW 9A.04.110(28).

In State v. Farnsworth, a jury convicted the defendant of first degree robbery based on conduct that Sass admits is similar to his own, conduct that did not involve a weapon or any explicit threats.[11] Farnsworth's accomplice, wearing a wig as a disguise, approached the teller with a note stating "No die [sic] packs, no tracking devices, put the money in the bag."[12] Farnsworth claimed that there was insufficient evidence to convict him of first degree robbery because there was no threat of force. Our Supreme Court disagreed.

The Court recognized that the defendant's demand for money was not "an explicitly threatening message"[13] and that the defendant did not have, and never claimed to have, a weapon.[14] Nonetheless, the Court held that his message to the teller "was laden with inherent intimidation [because] [w]hen a person demands money at a bank, with no explanation or indication of lawful entitlement to money, it can imply a threat of force because without such a threat, the teller would have no incentive to comply."[15] Thus, "[a]n ordinary bank teller could reasonably infer an implied threat of harm under these circumstances."[16]

As in Farnsworth, despite the lack of an explicit direct threat or a weapon, the teller felt threatened.[17] Ayouni testified that as soon as Sass told her he was robbing her, she felt scared and started to panic. The facts support a finding "that a reasonable

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[11] 185 Wn.2d 768, 374 P.3d 1152 (2016).

[12] Id. at 778.

[13] Id. at 771.

[14] Id. at 776.

[15] Id. at 771-72.

[16] Id. at 772.

[17] Id. at 771-72.

person in the teller's position could reasonably infer a threat of bodily harm," and that Ayouni did indeed feel threatened.[18] Moreover, although Sass emphasized that he calmly asked Ayouni for the money, "'[n]o matter how calmly expressed, an unequivocal demand for . . . 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.'"[19]

Sass acknowledges that the facts in his case are similar to those in Farnsworth. In a statement of additional authorities, Sass highlights the Supreme Court's observation in Farnsworth that "[c]ontext matters."[20] But that observation relates to Farnsworth's "unfounded" concern that "any unlawful demand for money at a bank would constitute robbery."[21] Sass twice expressly declared his intent to rob the bank. And the context of those two unequivocal statements is that Sass was wearing a surgical mask, gloves and a hoody pulled down over his head, and he needed hundreds, fifties, and twenties. His statements are laden with an implied threat of force. There is no context or inference of a confused or mistaken mere demand for money.

There was sufficient evidence to establish that Sass threatened the use of force in attempting first degree robbery because his "conduct conveyed an implied threat of force designed to compel a reasonable person in the teller's position to give [him] money."[22]

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[18] Id. at 777 ("[D]emanding money from a teller communicate[s] an implied threat because it [is] 'objectively reasonable' for a bank teller to fear harm in [such] circumstances, even though no explicit threat was made." (quoting State v. Collinsworth, 90 Wn. App. 546, 551, 966 P.2d 905 (1997))).

[19] Id. (quoting Collinsworth, 90 Wn. App. at 553).

[20] Statement of Supplemental Auths. at 1-2.

[21] Farnsworth, 185 Wn.2d at 779.

[22] Id. at 779.

Lesser Included Offense Instruction

Sass maintains that he was entitled to an instruction on the lesser included offense of attempted first degree theft. We disagree.

In general, a defendant may only be tried and convicted "of crimes with which he or she is charged."[23] However, pursuant to Washington statute, a defendant may be convicted of a lesser included offense, a crime "the commission of which is necessarily included within that with which he is charged in the indictment or information"[24]

We apply the two-pronged Workman test in determining whether one crime is a lesser included offense of another.[25] "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."[26] The first prong is the "legal prong" and the second, the "factual prong."[27] The legal prong "incorporates the constitutional requirement of notice," while the factual prong incorporates the rule that "each side may have instructions embodying its theory of the case if there is evidence to support that theory."[28] Here, the trial court refused to give the attempted first degree theft instruction on both the legal and factual prong. We review the legal prong de novo and the factual prong for abuse of discretion.[29]

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[23] State v. Berlin, 133 Wn.2d 541, 544, 947 P.2d 700 (1997).

[24] RCW 10.61.006

[25] Berlin, 133 Wn. 2d at 545-46 (citing State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978)).

[26] Id. at 545-46.

[27] Id. at 546.

[28] Id.

[29] State v. Walker, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998).

As to the legal prong, the State charged Sass with attempted first degree robbery. Both the information and the to convict instruction include the statutory definition of "robbery," including the taking of "personal property *from the person of another or in his or her presence* . . . by the use or threatened use of immediate force, violence, or fear of injury."[30] "Theft" means "[t]o wrongfully obtain or exert unauthorized control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services."[31] First degree theft requires either the taking of property or services exceeding $5,000 in value or "[p]roperty of any value, . . . taken *from the person of another.*"[32]

The State makes a compelling argument that the statutory definition of robbery, from the person or in the presence of the victim, does not establish alternative means of committing robbery,[33] that the legal prong for a lesser included offense was not satisfied because, as charged and prosecuted, the jury could have convicted Sass of attempted first degree robbery based on taking property in the *presence* of the victim without meeting all of the elements of attempted first degree theft for the wrongful taking of property "*from the person.*"[34] But we need not rely upon the legal prong.

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[30] RCW 9A.56.190 (emphasis added).

[31] RCW 9A.56.020(1)(a).

[32] RCW 9A.56.030(1)(a), (b) (emphasis added).

[33] State v. Owens, 180 Wn.2d 90, 96, 323 P.3d 1030 (2014); see also State v Klimes, 117 Wn. App. 758, 769 n.3, 73 P.3d 416 (2003) (questioning whether taking property "from the person" or "in his presence" constitute alternative means).

[34] RCW 9A.56.030(1)(b) (emphasis added). Cases cited by Sass for the proposition that theft has been recognized as a lesser included offense of robbery either make broad statements in passing with no analysis, or fail to address the analysis offered by the State. See Farnsworth, 185 Wn.2d at 775-76 (containing a general statement about force or the threat of force being the difference between robbery and theft without analyzing or applying the Workman test); State v. Witherspoon, 180 Wn.2d

Without regard to the legal prong, the evidence at trial failed to satisfy the factual prong. Under the factual prong, there must be evidence introduced at trial to support a conviction of the lesser included offense.[35] On review, the court will view "the supporting evidence in the light most favorable to the party requesting the instruction.[36] But "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."[37] Only if there is enough evidence that a jury could rationally convict the defendant of the lesser offense "and acquit him of the greater, a lesser included offense instruction should be given."[38]

Here, even viewed in a light most favorable to Sass, there is insufficient evidence to support a jury finding that Sass attempted to take money without an implied threat of force. Sass wore a mask, gloves, and hoody pulled over his head, requested money from Ayouni without any legal authority to do so, and calmly told Ayouni twice that "I

875, 885-87, 329 P.3d 888 (2014) (analyzing the defendant's ineffective assistance claim on the assumption that theft is lesser included offense to second degree robbery, but without Workman analysis); State v. McKague, 172 Wn.2d 802, 804, 262 P.3d 1225 (2011) (failing to address whether third degree theft was properly included as a lesser included offense to first degree robbery because, although the defendant was charged with these crimes, he was convicted of third degree theft and second degree assault); State v. Shcherenkov,146 Wn. App. 619, 630, 191 P.3d 99 (2008) (analyzing ineffective assistance claim and finding that defendant could not meet the factual prong of the Workman test without addressing whether the legal prong of that test was satisfied); State v. O'Connell, 137 Wn. App. 81, 95-96, 152 P.3d 349 (2007) (same); State v. Herrera, 95 Wn. App. 328, 332, 977 P.2d 12 (1999) (applying Workman and concluding that third degree assault is not a lesser included offense of robbery without discussing the defendant's "concession" that third degree theft is a lesser included offense of first degree robbery).

[35] Berlin, 133 Wn.2d at 546, 551.

[36] State v. Fernandez Medina, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000).

[37] Id. at 456.

[38] Berlin, 133 Wn.2d at 551.

came to rob you."[39] Such conduct establishes the use of an implied threat of force.[40] Evidence that he appeared confused and made a self-serving statement that he was confused is not affirmative evidence of a mistaken or confused mere demand for money without an implied threat of force.[41] Stated another way, in this context, Sass's two unequivocal statements of "I came to rob you" do not allow any rational juror to find he intended to take money without an implied threat of force.[42] The trial court did not abuse its discretion in denying Sass's request for an instruction on attempted first degree theft.

Offender Score

Finally, Sass contends that the trial court erred in finding his two prior convictions for federal bank robbery were comparable to Washington's crime of robbery and thus erred in calculating his offender score. The State concedes the error, and we agree.

We apply a two-part test when determining whether a foreign conviction is comparable to a similar Washington offense.[43] First, the elements of the foreign conviction and the Washington offense are analyzed to determine whether the offenses

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[39] RP (Mar. 23, 2015) at 24.

[40] Farnsworth, 185 Wn.2d at 771-72.

[41] Id. at 776-77.

[42] Shcherenkov,146 Wn. App. at 630 (affirming the defendant's convictions for first degree robbery of a financial institution and holding that the defendant could not meet the factual prong of the Workman test and therefore counsel was not ineffective in failing to request an instruction on the lesser included offense of first degree theft because the evidence did "'not permit a jury to rationally find'" that the defendant obtained the money without a threat to use force, and he "has never proposed any other means by which he induced the bank tellers to give him the money, nor could any such reason be rational" (quoting Fernandez-Medina, 141 Wn.2d at 456)).

[43] State v. Olsen, 180 Wn.2d 468, 472, 325 P.3d 187 (2014).

are legally comparable.[44] If the foreign conviction is broader than the Washington offense, the statutes are not legally comparable and the court moves on to determine factual comparability.[45] To determine factual comparability, we consider "whether the defendant's conduct would have violated the comparable Washington statute."[46]

Federal bank robbery[47] is not legally comparable to robbery in Washington because Washington law requires proof of a specific intent to steal.[48] "Thus, a person could be convicted of federal bank robbery without having been guilty of second degree robbery in Washington."[49] Review of Sass's plea agreement fails to establish an intent to steal because he neither admitted nor stipulated that he acted with an intent to steal.[50] Because we agree that the State failed to establish that the federal bank robberies were factually equivalent to Washington robbery based on the failure to establish an intent to steal, we need not address Sass's argument that the federal law is broader than Washington law on the element of intimidation or threat. Moreover, whether the federal robberies should be calculated as class C felonies,[51] as the State

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[44] Id.

[45] Id. at 472-73.

[46] Id. at 473.

[47] 18 USC § 2113(a).

[48] In re Pers. Restraint of Lavery, 154 Wn.2d 249, 255, 111 P.3d 837 (2005); State v. Kjorsvik, 117 Wn.2d 93, 98, 812 P.2d 86 (1991) ("Although our robbery statute, RCW 9A.56.190, does *not* include an intent element, our settled case law is clear that 'intent to steal' *is* an essential element of the crime of robbery.").

[49] Lavery, 154 Wn.2d at 256.

[50] See Clerk's Papers at 217-25; Lavery, 154 Wn.2d at 258 (when examining "the underlying facts of a foreign conviction, facts that were neither admitted or stipulated to, nor proved to the finder of fact beyond a reasonable doubt in the foreign conviction [are] problematic").

[51] RCW 9.94A.525(3).

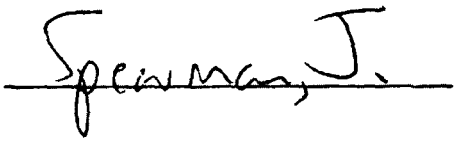
maintains, and thus count one point towards Sass's offender score, and whether the federal offenses "wash out" as Sass maintains,[52] we leave for the trial court to determine on remand.

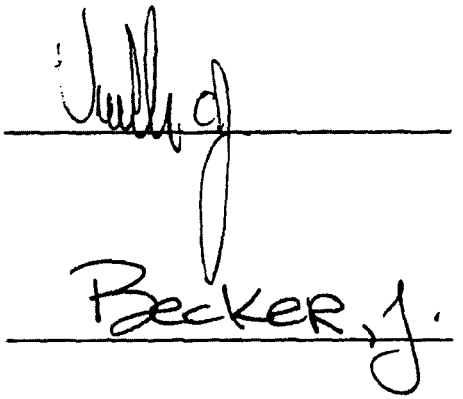
Costs

In his brief, Sass asked this court to deny the State its costs.[53] We note that an order of indigency and a supplemental order of indigency were filed in the trial court, and the record does not reflect a finding by the trial court that Sass's financial condition has improved. In light of Sass's indigency, we exercise our discretion "to rule that an award to the State of appellate costs is not appropriate."[54]

We affirm Sass's conviction, but remand for resentencing to recalculate Sass's offender score. Appellate costs will not be awarded.

WE CONCUR:





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[52] RCW 9.94A.525(2)(c).

[53] See RAP 14.2 (costs awarded to party that "substantially prevails on review" unless appellate court directs otherwise in decision terminating review); RCW 10.73.160 (court may order offender to pay appellate costs).

[54] State v. Sinclair, 192 Wn. App. 380, 394, 367 P.3d 612, review denied, 185 Wn.2d 1034 (2016).

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☒ petitioner

☐ Attorney for other party

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Washington Appellate Project

Date: October 24, 2016

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Court of Appeals Case Number: 73462-8

Party Respresented: PETITIONER

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