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King County Prosecutor
Appellate Unit

COA NO. 69377-8-I

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

STATE OF WASHINGTON,

Respondent,

v.

CHARLES YOUNG,

Appellant.

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

The Honorable Chris Washington, Judge

BRIEF OF APPELLANT

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STATE OF WASHINGTON
DIVISION ONE

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A. ASSIGNMENTS OF ERROR

1. The evidence is insufficient to convict appellant of first degree robbery.

2. The court erred in failing to instruct the jury on third degree theft as a lesser included offense of first degree robbery.

Issues Pertaining to Assignments of Error

1. Whether the evidence is insufficient to convict appellant of first degree robbery because the State failed to prove beyond a reasonable doubt that appellant used force or threatened to use force when he obtained money from a bank teller?

2. Whether the court erred in failing to instruct the jury on third degree theft as a lesser included offense because, looking at the evidence in the light most favorable to appellant, a rational trier of fact could find that appellant only committed the lesser offense?

B. STATEMENT OF THE CASE

On May 2, 2011 at around 2:15 p.m., a man later identified as Charles Young walked into a Chase Bank in Seattle. 2RP¹ 109, 111-12. Young spoke to a teller named Teresa Quiba, saying he had lost his credit

¹ The verbatim report of proceedings is referenced as follows: 1RP – 5/18/12; 2RP – three consecutively paginated volumes consisting of 6/18/12, 6/19/12, 6/20/12, 6/21/12 (vol. I), 6/25/12 (vol. II), 6/26/12, 6/27/12 (vol. III); 3RP – 8/31/12.

card. 2RP 112. Quiba directed him to the personal banker, Robert Scavotto. 2RP 112, 123, 182. Young said "okay" and walked off. 2RP 113. He was relaxed and smiling. 2RP 113. Young then spoke to Scavotto for a few minutes about an issue with his debit card. 2RP 113, 185. Young was friendly. 2RP 186.

Young then got up and waited in line for a teller. 2RP 113, 186. When it was his turn, he approached teller Ambaro Yusuf at her station and gave her a note written on a bank payment stub. 2RP 113-14. The note read, "This is a robbery. Give me everything you have." 2RP 114-15.

Yusuf read the note and eventually realized it was a robbery. 2RP 115-16. She was shocked. 2RP 116, 132-33. She was scared. 2RP 116. She looked at Young, who whispered, "just do it." 2RP 116, 134. She then reached into her drawer and started putting money onto the counter. 2RP 116. As Yusuf pulled the money out, Young whispered "Just keep coming." 2RP 116. He was laughing. 2RP 117.

Yusuf did not see any weapons on Young. 2RP 117. She did not know for sure whether he had one. 2RP 117. She did not know what he would do if she did not do what he said. 2RP 117, 135, 141. Young never said anything like he had a gun or knife or that he would hit or hurt her. 2RP 133-35. He did not yell. 2RP 141.

Yusuf had training on dealing with bank robberies. 2RP 111, 132. She had been trained to "do what they say to be safe" and "just do it as they ask at the robbery." 2RP 111. She further explained she had learned as part of her training "if they come up to you and ask you to give them something, you give them because they could hurt you or hurt others." 2RP 111.

Young took the note and money and walked out of the bank with a limp. 2RP 119, 138. It was later determined that Young took \$110. 2RP 174. Yusuf hit the alarm button after Young left and 911 was called. 2RP 119. Seattle Police Department (SPD) officers and FBI Detective Carver responded, but a search of the area for Young was unsuccessful. 2RP 146-47.

The bank interaction was video recorded. 2RP 120-26. On May 4, surveillance images of the bank were put on the Seattle Police Department bulletin server. 2RP 149-50. SPD Detective Jones identified the man in the images as Young, whom he recently contacted. 2RP 215-17. Young had been sleeping in his broken down car. 2RP 222-24.

Yusuf and two other bank employees (Scavotto and Brynna Eldredge) picked Young's photo out of a photomontage as the man who took money from the bank. 2RP 126-30, 153-54, 189-92, 204-06.

Young was arrested on May 6. 2RP 218. During interrogation, Young tearfully told Detective Carver that he recently became homeless and was "scared to be out here." Ex. 3; Ex. 4 at 3.² He had done 31 years in prison and had been living on the outside for almost five years. Ex. 4 at 3. Young said he "wanted to get busted," although he really did not want to take money from the bank and was "fighting inside myself." Ex. 4 at 3, 5.

He admitted to writing a note to the teller and taking money from the bank. Ex. 4 at 4-6. He remembered that Yusuf "looked so scared" and he felt bad about that. Ex. 4 at 6. He said he "didn't mean to scare her" and "I think I was more afraid than she was." Ex. 4 at 6. He was not armed with a weapon. Ex. 4 at 7. He did not remember threatening anyone with violence. Ex. 4 at 7. After leaving the bank, he got some crack and some food and then went to sleep in his car. Ex. 4 at 6-7.

Young identified himself as the man in the surveillance video images. Ex. 4 at 7-9. Young stated "I didn't mean no harm, uh . . . Didn't really have no, didn't really want to rob no bank or nothing else. Uh, I know you hear all kinds of excuses as to why? Why that man, but . . . I

² Exhibit 3 is the actual recording of the interrogation. Ex. 4 is a transcript of the recording. 2RP 161-62.

just didn't want to be out." Ex. 4 at 9. He was sorry for what he did and said there was no excuse for it. Ex. 4 at 9.

The State charged Young with first degree robbery of a financial institution. CP 20. The defense proposed lesser offense instructions on third degree theft. CP 47-49; 2RP 236-241, 243-45. The court denied that request. 2RP 245. A jury convicted Young as charged. CP 55. The court sentenced Young to life imprisonment without the possibility of parole as a persistent offender. CP 62; 3RP 15. This appeal timely follows. CP 71-80.

C. ARGUMENT

1. THE STATE FAILED TO PRESENT SUFFICIENT EVIDENCE TO SUSTAIN THE CONVICTION.

Robbery is theft plus the taking of the property of another by the use or threatened use of force in the presence of the owner. State v. Handburgh, 119 Wn.2d 284, 291, 830 P.2d 641 (1992). Stated differently, there can be no robbery without force or a threat to use force. Looking at the evidence in the light most favorable to the State, Young neither used nor threatened to use force against the bank teller. The robbery conviction must therefore be reversed under the due process clause of the Fourteenth Amendment.

a. What The State Was Required To Prove.

Due process requires the State to prove all necessary facts of the crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Hundley, 126 Wn.2d 418, 421, 895 P.2d 403 (1995); U.S. Const. amend. XIV; Wash. Const. art. I, § 3. Evidence is sufficient to support a conviction only if, after viewing the evidence and all reasonable inferences in a light most favorable to the State, a rational trier of fact could find each element of the crime proven beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

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." RCW 9A.56.190. A person commits first degree robbery when in the commission of a robbery he or she "commits a robbery within and against a financial institution." RCW 9A.56.200(1)(b).

The "to convict" instruction accordingly provided:

To convict the defendant of the crime of robbery in the first degree, each of the following six elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about May 2, 2011, the defendant unlawfully took personal property from the person or in the presence of another;

(2) That the defendant intended to commit theft of the property;

(3) That the taking was against the person's will by the defendant's use or threatened use of immediate force, violence, or fear of injury to that person or to that person's property or to the person or property of another;

(4) That force or fear was used by the defendant to obtain or retain possession of the property;

(5) That the defendant committed the robbery within and against a financial institution; and

(6) That any of these acts occurred in the State of Washington.

If you find from the evidence that elements (1), (2), (3), (4), (5), and (6) have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of elements (1), (2), (3), (4), (5), or (6), then it will be your duty to return a verdict of not guilty.

CP 97 (Instruction 11).

Any force or threatened force, regardless of its severity, that induces an owner to part with property is sufficient to prove robbery. Handburgh, 119 Wn.2d at 293. "[I]f the taking of the property be attended with such circumstances of terror, or such threatening by menace, word or gesture as in common experience is likely to create an apprehension of danger and induce a man to part with property for the safety of his person, it is robbery." State v. Redmond, 122 Wn. 392, 393, 210 P.2d 772 (1922) (sufficient evidence where defendant was one of a group of four men who

waylaid a bank courier, put a gun to the courier's head, and directed the courier to drop the bank bag).

The statutory definition of "threat" in RCW 9A.04.110(28) applies to robbery offenses. State v. Shcherenkov, 146 Wn. App. 619, 625, 191 P.3d 99 (2008) (citing former RCW 9A.04.110(27), now codified at (28)), review denied, 165 Wn.2d 1037, 205 P.3d 131 (2009). It is applicable here because Young indisputably did not use actual force to obtain or retain the money. The issue is whether the evidence is sufficient to establish Young "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." RCW 9A.56.190.

Under RCW 9A.04.110(28), to "[t]hreat[en]" means to "communicate, directly or indirectly the intent" to take the applicable action. Shcherenkov, 146 Wn. App. at 625. "In the robbery context, therefore, the 'threatened use of immediate force, violence, or fear of injury' means a direct or indirect communication of the intent to use immediate force, violence, or cause injury." Id.

Criminalization of a threat has First Amendment implications. "While laws may proscribe 'all sorts of conduct' the same is not true of speech." State v. Kilburn, 151 Wn.2d 36, 42, 84 P.3d 1215 (2004). Speech protected by the First Amendment may not be criminalized.

Kilburn, 151 Wn.2d at 42. To avoid unconstitutional infringement on protected speech, criminal statutes must be read to prohibit only "true threats." State v. Schaler, 169 Wn.2d 274, 284, 236 P.3d 858 (2010).

The harassment statute, which likewise incorporates the definition of "threat" currently codified at RCW 9A.04.110(28), is one such example. Schaler, 169 Wn.2d at 285-86; State v. J.M. 144 Wn.2d 472, 476-78, 28 P.3d 720 (2001). Other statutory offenses that criminalize threats are likewise limited to "true threats." See State v. Johnston, 156 Wn.2d 355, 357, 363-64, 127 P.3d 707 (2006) (threats to bomb or injure property); State v. Brown, 137 Wn. App. 587, 591, 154 P.3d 302 (2007) (threats involving intimidating a judge); State v. Smith, 93 Wn. App. 45, 49 n.3, 966 P.2d 411 (1998) (threats to bomb a government building); State v. Stephenson, 89 Wn. App. 794, 800-01, 966 P.2d 411 (1997) (threats involving intimidating a public servant). The "true threat" requirement is imposed so that criminal statutes prohibiting threats do not encompass constitutionally protected speech. State v. Williams, 144 Wn.2d 197, 207, 26 P.3d 890 (2001).

Because the definition of "threat" found at RCW 9A.04.110(28) applies to robberies,³ any such speech must be measured under the "true threat" principle. "[W]hether a true threat has been made is determined

³ Shcherenkoy, 146 Wn. App. at 625.

under an objective standard that focuses on the speaker." Kilburn, 151 Wn.2d at 44. "A true threat is a statement made in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted . . . as a serious expression of intention to inflict bodily harm upon or to take the life of another person." Schaler, 169 Wn.2d at 283 (quoting Kilburn, 151 Wn.2d at 43) (internal quotation marks omitted). The true threat standard "requires the defendant to have some mens rea as to the result of the hearer's fear: simple negligence." Schaler, 169 Wn.2d at 287. Sufficiency of evidence must be measured in light of this standard. Id. at 290-91.

b. What The State Failed To Prove.

Looking at the evidence in the light most favorable to the State, it failed to prove Young threatened to use force or threat of force to obtain the money from the teller. Young did not display a weapon or imply he had one. He did not tell the teller he would harm her or anyone else in the event he did not get the money. 2RP 117, 133-35. His request for money is insufficient to show he threatened to use force to obtain the money. The State did not prove the element consisting of "the use or threatened use of immediate force, violence or fear of injury." RCW 9A.56.190.

The court in State v. Collinworth held there was sufficient evidence of bank robbery because, even though Collinworth made no

overt threatening gestures and did not display a weapon, his unequivocal demands for immediate surrender of the bank's money were sufficient to show he took the bank's property through the use or threatened use of "immediate force, violence, or fear of injury." State v. Collinsworth, 90 Wn. App. 546, 548, 966 P.2d 905, review denied, 135 Wn.2d 1002 (1998). "In each incident, Collinsworth made a clear, concise, and unequivocal demand for money. He also either reiterated his demand or told the teller not to include 'bait' money or 'dye packs,' thereby underscoring the seriousness of his intent." Collinsworth, 90 Wn. App. at 553.

The upshot of the court's holding was this: "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." Id. Subsequent decisions rely on Collinsworth for the proposition that "a demand upon a bank teller to surrender the bank's funds carries with it an implicit threat of force." E.g., State v. Parra, 96 Wn. App. 95, 103, 977 P.2d 1272, review denied, 139 Wn.2d 1010, 994 P.2d 849 (1999).

The time has come to reconsider this proposition. The court in Shcherenkov stopped short of endorsing Collinsworth and for good reason. Shcherenkov, 146 Wn. App. at 626, 628. Shcherenkov argued Collinsworth "removes the State's burden to establish that the defendant

actually used or threatened to use force[,] . . . turns any demand for money within a bank into robbery simply because of the nature of the bank environment, and has essentially imposed strict liability for any face-to-face theft from a bank." Id. at 628 (quoting brief of appellant). The Court of Appeals ultimately held sufficient evidence supported Shcherenkov's robbery convictions, not based on Collinsworth, but because the evidence was stronger than in Collinsworth. Shcherenkov, 146 Wn. App. at 628.

The Collinsworth standard conflates the taking of property and "financial institution" elements in the robbery statute (RCW 9A.56.190 and RCW 9A.56.200(1)(b)) with the threatened use of force element, thus violating basic rules of statutory construction. "In determining the elements of a statutorily defined crime, principles of statutory construction require the court to give effect to all statutory language if possible." State v. Smith, 155 Wn.2d 496, 502, 120 P.3d 559 (2005). Reviewing courts must not treat words in a statute as meaningless or superfluous. State v. Tandecki, 153 Wn.2d 842, 847, 109 P.3d 398 (2005); State v. Roggenkamp, 153 Wn.2d 614, 624, 106 P.3d 196 (2005).

The Collinsworth standard, in treating the taking of property from a bank teller via demand as sufficient to show robbery, effectively renders "by the use or threatened use of immediate force, violence or fear of injury" superfluous because it will always be found by the taking itself.

See In re Dependency of K.D.S., 176 Wn.2d 644, 656, 294 P.3d 695 (2013) (in parental rights termination case, rejecting interpretation that RCW 13.34.180(1)(f) element is proven so long as RCW 13.34.180(1)(e) element is proven because such interpretation would render RCW 13.34.180(1)(f) superfluous).

The Collinsworth proposition, when applied in a given case, in practice eliminates the statutory requirement that the taking from a financial institution be accomplished by use or threatened use of immediate force, violence or fear of injury. RCW 9A.56.190; RCW 9A.56.200(1)(b). Collinsworth purports to give meaning to the threat of force element but in reality the element ceases to have meaning if it is always found where someone takes money from a bank by demand.

Indeed, under the reasoning of Collinsworth and cases like it, a homeless person panhandling on the street would be guilty of robbery just by walking up to a passerby and making a serious demand for money or presenting a cardboard note with a demand for money to a driver waiting for a traffic light to turn green. Something more than a serious demand for money is needed to show a robbery.

Whether sufficient evidence supports a conviction is a fact specific inquiry. That "something more" is found in Shcherenkoy, where the court found sufficient evidence to support the bank robbery convictions where,

in addition to a demand for money, the defendant kept his hands in his pockets or reached into his pocket, thus implying he had a weapon or that the situation was about to escalate. Shcherenkov, 146 Wn. App. at 622-23, 629. Young did not imply he had a weapon by putting his hands in his pockets or by any other means. Here the required element of force or threat of force is absent.

A conviction must be reversed for insufficient evidence where, viewing the evidence in a light most favorable to the State, no rational trier of fact could have found the elements of the crime established beyond a reasonable doubt. Hundley, 126 Wn.2d at 421-22. "[T]he reasonable-doubt standard is indispensable, for it 'impresses on the trier of fact the necessity of reaching a subjective state of certitude on the facts in issue.'" Id. (quoting Winship, 397 U.S. at 364). "No reasonable trier of fact could reach subjective certitude on the fact at issue here." Hundley, 126 Wn.2d at 422.

Young's conviction must therefore be reversed and the charge dismissed with prejudice. State v. DeVries, 149 Wn.2d 842, 853, 72 P.3d 748 (2003) (setting forth remedy where insufficient evidence supports conviction). The prohibition against double jeopardy forbids retrial after conviction is reversed for insufficient evidence. State v. Anderson, 96 Wn.2d 739, 742, 638 P.2d 1205 (1982).

2. THE CONVICTION MUST BE REVERSED BECAUSE THE COURT ERRED IN REFUSING THE DEFENSE REQUEST TO INSTRUCT THE JURY ON THE LESSER OFFENSE OF THEFT.

Assuming arguendo the evidence was sufficient to support a robbery conviction, the trial court erred by failing to instruct the jury on third degree theft as a lesser included offense. There was affirmative evidence from which the jury, looking at the evidence in the light most favorable to Young, could have rationally concluded the State failed to prove the element of robbery requiring Young to use or threaten to use immediate force while still finding that Young committed theft. Reversal is the remedy.

- a. The Accused Has A Statutory And Due Process Right To Have The Jury Instructed On A Lesser Offense.

By statute, defendants in Washington are entitled to have juries instructed not only on the charged offense, but also on all lesser included offenses. RCW 10.61.006. A defendant is entitled to have the jury fully instructed on the defense theory of the case if there is evidence to support that theory. State v. Fernandez-Medina, 141 Wn.2d 448, 461, 6 P.3d 1150 (2000); State v. Ginn, 128 Wn. App. 872, 878, 117 P.3d 1155 (2005); State v. Theroff, 95 Wn.2d 385, 389, 622 P.2d 1240 (1980). This is a due process requirement. State v. Koch, 157 Wn. App. 20, 33, 237 P.3d 287

(2010), review denied, 170 Wn.2d 1022, 245 P.3d 773 (2011); U.S. Const. amend. XIV; Wash. Const. art I, § 3.

The refusal to give lesser included offense instructions where the evidence supports such instruction therefore not only violates the statutory right but also the right to due process under the Fourteenth Amendment. Beck v. Alabama, 447 U.S. 625, 637, 638 n.14, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980) (in capital case, due process requires instruction on lesser offense when supported by evidence); Berroa v. United States, 763 A.2d 93, 95 & n.4 (D.C. Ct. App. 2000) (applying rule in non-capital case); Vujosevic v. Rafferty, 844 F.2d 1023, 1027-28, 1028 n.1 (3d Cir. 1988) (same); Ferrazza v. Mintzes, 735 F.2d 967, 968 (6th Cir. 1984) (same); State v. Oldroyd, 685 P.2d 551, 555 (Utah 1984) (same).

b. The Court Denied Young's Request To Have The Jury Instructed On The Lesser Offense Of Third Degree Theft.

Defense counsel requested instruction on third degree theft as a lesser included offense of first degree robbery. CP 47-49; 2RP 236-241, 243-45. The court asked why the teller would give Young money if there was not an implied threat. 2RP 239. Counsel responded, "whatever the teller's rationale for giving the money is, is not the question. The question is whether or not Mr. Young threatened anybody and whether or not the State has proven that the threat was brought in this case. And I think there

is a real factual question as to that, and it's a factual question for the jury." 2RP 239-40.

The prosecutor, citing Shcherenkoy, argued there was no rational reason why Yusuf gave Young the money other than a threat and Yusuf testified she was in fear. 2RP 242.

Defense counsel distinguished Shcherenkoy. In that case, the teller testified the defendant kept his hand in his pocket, implying he had a gun. No such evidence was present in Young's case. The note itself was the basis for the teller's fear. 2RP 237, 243-44. Counsel argued it was "a question of fact whether or not Mr. Young threatened anybody; whether or not Mr. Young implied a threat by the note, and whether or not Mr. Young by his actions created a reasonable threat that those would be carried out." 2RP 238.

When the court asked what basis the teller would have to hand over the money without the element of fear, defense counsel offered "Shock. Training. They said to simply comply. And there was testimony to that effect. The individual in the bank. We had the teller testifying about the training, about de-escalating the situation, keeping everybody safe. That is different than fear. There are alternative explanations." 2RP 244.

The court refused to instruct the jury on third degree theft as a lesser offense, relying on Shcherenkov. 2RP 245. The court stated, "the teller testified concerning her fear; and that was in addition to the training that is mentioned by defense counsel, that her reaction to the situation was one of fear." 2RP 245.

c. Standard of Review

A defendant is entitled to a lesser offense instruction if (1) each of the elements of the lesser offense is a necessary element of the charged offense and (2) the evidence supports an inference that the defendant committed the lesser offense. State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978). The first requirement is the "legal prong;" the second requirement is the "factual prong." State v. Berlin, 133 Wn.2d 541, 546, 947 P.2d 700 (1997).

A trial court's refusal to give a jury instruction based on the evidence is generally reviewed for abuse of discretion, whereas the refusal to give a jury instruction based on the law is reviewed de novo. State v. Walker, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998); see State v. LaPlant, 157 Wn. App. 685, 687, 239 P.3d 366 (2010) (de novo review of legal prong of a request for a jury instruction on a lesser included offense; factual prong of a request for a jury instruction on a lesser included offense reviewed for abuse of discretion).

When the trial court bases an otherwise discretionary decision solely on application of a court rule or statute to particular facts, however, the issue is one of law reviewed de novo. State v. Tatum, 74 Wn. App. 81, 86, 871 P.2d 1123 (1994). A trial court's interpretation of case law is also reviewed de novo. State v. Willis, 151 Wn.2d 255, 261, 87 P.3d 1164 (2004). Furthermore, whether constitutional right has been violated is a question of law reviewed de novo. State v. Iniguez, 167 Wn.2d 273, 280, 217 P.3d 768 (2009). A court "necessarily abuses its discretion by denying a criminal defendant's constitutional rights." Iniguez, 167 Wn.2d at 280 (quoting State v. Perez, 137 Wn. App. 97, 105, 151 P.3d 249 (2007)).

De novo review is appropriate in Young's case because the trial court denied the lesser offense instruction by applying the facts of Young's case to the legal standard in determining whether such instruction was justified. Tatum, 74 Wn. App. at 86. Moreover, it is a question of law whether the failure to give lesser offense instruction violated Young's constitutional right to due process. Iniguez, 167 Wn.2d at 280.

d. The Legal Prong Of The Workman Test Is Satisfied Because Theft Is A Necessary Element Of Robbery.

"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." RCW 9A.56.020(1)(a). A person is guilty of third degree theft if he commits theft of property that does not exceed \$750 in value. RCW 9A.56.050(1)(a).

Since robbery includes the elements of larceny, third degree theft is always an included offense of robbery under the legal prong. Application of Salter, 50 Wn.2d 603, 605, 313 P.2d 700 (1957); State v. Byers, 136 Wn. 620, 622, 241 P. 9, 10 (1925) ("Robbery includes the elements of the crime of larceny, one of which is an intent to deprive the owner or other persons of the things taken."). The "to convict" instruction for first degree robbery required the State to prove "the defendant unlawfully took personal property" and that "the defendant intended to commit theft of the property." CP 97. The legal prong of the Workman test is satisfied because theft is a necessary element of first degree robbery. There was no dispute below that the legal prong was satisfied. 2RP 236.

- e. The Factual Prong Of The Workman Test Is Satisfied Because A Rational Trier Of Fact Could Find Young Committed Theft Rather Than Robbery Based On The Evidence Produced At Trial.

The factual prong of the Workman test is satisfied when evidence raises an inference that the lesser included offense was committed to the exclusion of the charged offense. Fernandez-Medina, 141 Wn.2d at 455. In other words, if the evidence would permit a jury to rationally find a

defendant guilty of the lesser offense and acquit him of the greater, a lesser offense instruction should be given. Berlin, 133 Wn.2d at 551.

In making this determination, the court must view the supporting evidence in the light most favorable to the party seeking the instruction and must consider all evidence presented at trial, regardless of its source. Fernandez-Medina, 141 Wn.2d at 455-56. The sole qualification is that "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." Id. at 456. In keeping with these principles, sufficient evidence to give a proposed instruction exists if a rational trier of fact could find the facts necessary to support the instruction. State v. Vinson, 74 Wn. App. 32, 37, 871 P.2d 1120 (1994).

The factual prong is satisfied in this case because affirmative evidence in the record, viewed in the light most favorable to Young, allowed for the inference that he did not use force or threat of force to take the money from the bank teller. The State's evidence affirmatively supports Young's theory. The jury could believe the State's evidence but draw a different conclusion than that urged by the State on the threat of force element.

As set forth in section C. 1. a., supra, whether Young threatened to use force must be assessed in light of the statutory definition of "threat"

found at RCW 9A.04.110(28) and the "true threat" requirement. The threat aspect of the offense is determined under an objective standard that focuses on the speaker. Kilburn, 151 Wn.2d at 44. To convict Young, the State needed to prove Young's implied threat was "made in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted . . . as a serious expression of intention to inflict bodily harm upon or to take the life of another person." Schaler, 169 Wn.2d at 283. The State needed to prove Young was negligent as to the result of the hearer's fear. Id. at 287.

From this, the flaw in Shcherenkov becomes apparent. In that case, the court held, in the context of addressing an ineffective assistance of counsel claim, that the defendant was not entitled to instruction on first degree theft as a lesser offense to first degree robbery of a bank under the factual prong of the Workman test. Shcherenkov, 146 Wn. App. at 629-30. The court determined "the primary difference between the crimes of first degree theft and robbery is the use or threatened use of force, and the evidence in this case does not permit a jury to rationally find that Shcherenkov obtained the banks' money without such a threat. Shcherenkov 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." Id.

We see, then, that the court in Shcherenkov erroneously employed a standard that focuses on the hearer's state of mind rather than an objective standard that focuses on the speaker's state of mind. It quotes 67 Am. Jur.2d Robbery § 89, at 114 (2003) for the proposition that "[t]he determination of whether intimidation was used is based on an objective test of whether an ordinary person in the bank employee's position could reasonably infer a threat of bodily harm from the defendant's acts." Shcherenkov, 146 Wn. App. at 625. But 67 Am. Jur.2d Robbery § 89 addresses bank robbery under the Federal Bank Robbery Act. It does not deal with the speaker-based standard under Washington state law and, in particular, how the existence of a threat is assessed under RCW 9A.04.110(28) and the "true threat" standard.

A bank teller's subjective and objectively reasonable fear in response to a demand for money is a necessary predicate to prove a bank robbery but is not enough by itself to prove a robbery. Even in a harassment case, where the State is required to prove the victim's subjective fear and that the fear was objectively reasonable, it still needs to prove the person making a threat as defined by RCW 9A.04.110(28) was negligent as to the result of the hearer's' fear under an objective standard. Schaler, 169 Wn.2d at 283, 297; State v. C.G., 150 Wn.2d 604, 607-09, 80 P.3d 594 (2003); State v. E.J.Y., 113 Wn. App. 940, 953, 55 P.3d 673

(2002). If the State does not prove the person demanding money was negligent as to the hearer's fear of injury under an objective "true threat" standard, then the State has not proven robbery. Schaler, 169 Wn.2d at 283, 287; Kilburn, 151 Wn.2d at 44. It has only proven theft.

Upon request, a jury must be instructed on a lesser offense if there is even "the slightest evidence" that the defendant may have committed the lesser offense. State v. Parker, 102 Wn.2d 161, 164, 683 P.2d 189 (1984) (quoting State v. Young, 22 Wn. 273, 276-77, 60 P. 650 (1900)). A rational juror, looking at the affirmative evidence in the light most favorable to Young, could find that the State failed to prove beyond a reasonable doubt that Young was negligent that the teller would fear injury as a result of handing her the note and telling her to give him money. Under that scenario, Young committed theft, not robbery.

Young requested money, but he did not use force to get it. He made no overt threat to get it. 2RP 133-35. He did not imply he had a weapon. 2RP 117, 133-35. He did not yell at the teller. 2RP 141. Young expressed his intent to obtain the money. But he was also laughing as he did so. 2RP 117. Young told the detective that he did not mean to scare the teller. Ex. 4 at 6. A rational juror could find under these circumstances that the State failed to prove that Young should have foreseen that his request for money would also be interpreted as a serious

communication of intention to inflict immediate injury. The evidence allowed for divergent inferences.

Moreover, there is affirmative evidence in the record to show an explanation for why the teller gave Young the money other than an implied threat of violence. A rational trier of fact could find the teller parted with the money because that is what her training taught her to do. 2RP 111, 132. Shcherenkoy is distinguishable on this ground. A rational trier of fact, viewing this evidence in a light most favorable to the defense, could conclude offenders who take advantage of a training policy are thieves but not robbers.

Furthermore, the teller did not specifically testify that it was her fear that induced her to hand over the money as opposed to her shock or bank policy. The testimony was ambiguous in this regard. 2RP 116, 132-33. Furthermore, the teller testified that she did not know what Young would do if she did not do what he said. 2RP 117, 135, 141. In other words, she did not know if Young would use force to get what he wanted in the event she did not comply. A rational juror could infer her fear was the inducement, but that is not the only inference available.

In the present case, affirmative evidence was presented from which a rational trier of fact could reasonably infer that Young did not use or threaten to use immediate force, violence or fear of injury, in carrying out

this crime. Regardless of plausibility of the circumstances, "the defendant had an absolute right to have the jury consider the lesser-included offense on which there is evidence to support an inference it was committed." Parker, 102 Wn.2d at 166.

It is critical in understanding Collinsworth to recognize what the court found and what the court did not find. Collinsworth is a case about sufficiency of the evidence, not about lesser offense instructions. The court did not find that a jury was unable to rationally infer from the absence of a weapon and of any overt threat that there was no intent to use or threaten the use of immediate force, violence or fear of injury. Rather, the court found "[v]iewed in the light most favorable to the State, the evidence was sufficient to support the trial court's findings" that the defendant was guilty of robbery. Collinsworth, 90 Wn. App. at 554 (emphasis added).

The court reasoned "the fact that Collinsworth did not display a weapon or overtly threaten the bank tellers does not *preclude* a conviction for robbery. 'The literal meaning of words is *not necessarily* the intended communication.'" Id. at 553 (emphasis added) (quoting State v. Scherck, 9 Wn. App. 792, 794, 514 P.2d 1393 (1973)). The court did not find, and the court was far from holding, that whenever a person hands a note demanding money to a bank teller that a rational trier of fact could *only* find that the

element of the use or threatened use of immediate force, violence or fear of injury was satisfied.

That the trier of fact could draw an inference favorable to the State does not preclude a rational trier of fact from drawing a reasonable inference in favor of the defendant. The distinction from this case is therefore obvious. When reviewing sufficiency of the evidence on appeal, the evidence is viewed in a light most favorable to the State. Green, 94 Wn.2d at 221. But when reviewing whether the evidence supports an instruction on a party's theory of the case, the evidence is viewed in a light most favorable to the party proposing the instruction. Fernandez-Medina, 141 Wn.2d at 455-56; State v. Bergeson, 64 Wn. App. 366, 367, 824 P.2d 515 (1992).

In the present case, the jury could have rationally found that Young was guilty only of third degree theft. It could reach this conclusion based upon the affirmative evidence presented by the State. Accordingly, the trial court should have given the requested jury instructions on third degree theft.

"In this state a trial judge is not deemed a 'thirteenth juror.'" State v. Williams, 96 Wn.2d 215, 221-22, 634 P.2d 868 (1981). It is the province of the jury to determine the facts. Williams, 96 Wn.2d at 222. The trial judge here, in refusing to give the jury an opportunity to decide whether Young committed theft as opposed to robbery, usurped the fact-finding province of the jury.

Reversal is required when a defendant is entitled to instruction on a lesser charge and the trial court fails to give it. Parker, 102 Wn.2d at 163-64, 166; Fernandez-Medina, 141 Wn.2d 462. Young's conviction for first degree robbery must therefore be reversed and the case remanded for a new trial.

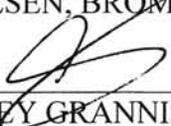
D. CONCLUSION

For the reasons set forth, Young requests reversal of the conviction.

DATED this 20th day of May 2013

Respectfully Submitted,

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

STATE OF WASHINGTON)

Respondent,)

v.)

CHARLES YOUNG,)

Appellant.)

COA NO. 69377-8-1

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 20TH DAY OF MAY 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 YOUNG
NO. 623777
MONROE CORRECTIONS CENTER
P.O. BOX 777
MONROE, WA 98272

SIGNED IN SEATTLE WASHINGTON, THIS 20TH DAY OF MAY 2013.

x Patrick Mayovsky

2013 MAY 20 PM 4:31
COURT OF APPEALS DIV 1
STATE OF WASHINGTON