

Original

NO. 35825-5-II

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

VLADIMIR SHCHERENKOV, APPELLANT

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COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY *[Signature]*
DEPUTY

Appeal from the Superior Court of Pierce County
The Honorable Lisa Worswick
The Honorable Linda CJ Lee

No. 06-1-00164-0

No. 06-1-00206-9

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the court properly instruct the jury that a defendant commits a robbery when he implicitly threatens a bank teller in order to compel the teller to give him money to which he is not entitled?
2. Did the jury have sufficient evidence to find that defendant impliedly threatened to use force during the robberies when the State offered evidence that defendant informed each teller that he was robbing her, demanded money to which defendant was not entitled, and, in three cases, held one hand in his pocket at all times?
3. Did defendant receive effective assistance of counsel when his attorney correctly concluded that defendant was not entitled to a lesser included offense jury instruction?

B. STATEMENT OF THE CASE.

1. Procedure

On January 10, 2006, the Pierce County Prosecutor's Office filed an information charging VLADIMIR SHCHERENKOV, hereinafter "defendant," with three counts of first degree robbery in Cause No. 06-1-00164-0. CP 1-3. On January 13, 2006, the State initiated a second

prosecution by filing an information charging defendant with one count of first degree robbery in Cause No. 06-1-00206-9. CP 196-197.

On October 25, 2006, defendant moved to dismiss Cause No. 06-1-00164-0 under State v. Knapstad, 107 Wn.2d 346, 729 P.2d 48 (1986), claiming that the State had failed to allege that defendant threatened force or violence or used fear of injury when he took the money from the various banks. RP (10/25/06) 3-4.¹ The court denied the motion, finding that defendant's use of the word "robbery" in the notes he used in committing his crimes amounted to a threat. RP (10/25/06) 11. On November 13, 2006, the court consolidated the Cause Nos. 06-1-00164-0 and 06-1-00206-9 into one matter. CP 75-769; RP (11/13/06) 11. The court also held a CrR 3.5 hearing that day. RP (11/13/06) 14.

The matter proceeded to jury trial on November 16, 2006. RP (11/16/06) 373. During trial, the State proposed a jury instruction based on State v. Collinworth, 90 Wn. App. 546, 966 P.2d 905 (1998), which allowed the jury to find that defendant had impliedly threatened the tellers of the banks even if he did not expressly say he would hurt them or others. RP (11/15/06) 249; RP (11/21/06) 810. The court modified the instruction

¹ The Verbatim Report of Proceedings ("VRPs") is not paginated consecutively throughout the volumes. Citations to the VRPs will be preceded by "RP ([date of proceeding])." Thus, "RP (11/14/06) 95" refers to page number 95 in the volume reporting the proceedings of November 14, 2006. The very first volume in the VRPs (beginning with the proceedings of June 20, 2006) actually contains proceedings from June 20, 2006, September 28, 2006, October 25, 2006, and November 2, 2006.

and issued it to the jury as Instruction 9 over defendant's objection. RP (11/20/06) 532-533; RP (11/21/06) 717-830, 831-833; CP 133-154. Defendant claimed that Instruction 9 was inaccurate because State v. Collinworth was a sufficiency of the evidence case, but he did not propose an alternative instruction. RP (11/21/06) 811-812. The court also provided four "to convict" instructions which explained which elements the jury had to find in order to convict defendant of robbing each of the four banks he was charged with robbing. CP 133-154. Apart from the name of the banks, the instructions were identical and read,

To Convict the defendant of the crime of Robbery in The First Degree in regard to [name of bank], each of the following six elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the [relevant crime date], the defendant unlawfully took personal property from the person or in the presence of another person;
- (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 property of another;
- (4) That force or fear was used by the defendant to obtain or retain possession of the property or to prevent or overcome resistance to the taking;
- (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 these elements 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 these elements then it will be your duty to return a verdict of not guilty.

CP 133-154 (Nos. 13-16). Defendant stipulated that, apart from Instruction 9, to which he had earlier objected, the court's instructions were appropriate. RP (11/20/06) 522-523; RP (11/21/06) 717-830, 833. Defense counsel did not propose any instructions on lesser included offenses. RP (11/20/06) 717-718. He reasoned that the Court of Appeals had clearly stated that first degree theft was not a lesser included offense of first degree robbery and that any other possible lesser include offense instructions would not be tactically beneficial to his case. RP (11/20/06) 717-718.

On November 30, 2006, the jury asked whether a robbery occurs every time a person obtains money illegally from a bank teller without using fraud, forgery, or other similar means. RP (11/30/06) 888-889; CP 155-156. The court instructed the jury to reread the jury instructions. RP (11/30/06) 889-891; CP 157. On December 4, 2006, the jury convicted defendant of all four counts as charged. RP (12/4/06) 896-897; CP 176-187. The court sentenced defendant to 84 months' confinement with credit for 372 days served. RP (12/19/06) 916, 918; CP 176-187. The court also ordered monetary penalties. RP (12/19/06) 916; CP 176-187.

2. Facts

a. Wells Fargo Bank Robbery

On December 22, 2005, defendant entered the Wells Fargo Bank branch at 2624 North Pearl Street in Tacoma, Washington. RP (11/15/06) 347-348, 350. Defendant approached teller Linda Masten and held up a note that read, among other things, “Please be calm. This is a robbery” RP (11/15/06) 352, 353. Ms. Masten complied with the note and gave defendant money from her teller station. RP (11/15/06) 353-354, 356. There were five to ten people in the bank at the time, and Ms. Masten complied with the demand in the note “to keep everybody in the building safe.” RP (11/15/06) 351, 354, 392. She interpreted the term “robbery” as a threat to harm her, and she was particularly afraid that the robbery could escalate to violence. RP (11/15/06) 354, 368. Ms. Masten had been trained to comply with any robbery demand, but also said that “[f]or the safety of [her]self and others” she would have complied with the demand in the note even without that training. RP (11/15/06) 357. While Ms. Masten was giving defendant the money, defendant placed his hand in his pocket, possibly to reach for a cell phone, and this made Ms. Masten afraid that defendant was signaling an accomplice and escalating the incident. RP (11/15/06) 363-364.

After defendant received the money, he left the bank, got into a car he had brought, and left. RP (11/15/06) 357, 388; RP (11/20/06) 540. Ms. Masten notified her supervisor of the robbery. RP (11/15/06) 357, 388.

Ms. Masten was so frightened and shaken by the robbery that she had to go home for the day to calm down. RP (11/15/06) 358, 390; RP (11/16/06) 431. She was also distraught and upset when she later spoke to FBI agent Monte Shaide. RP (11/21/06) 770. Another teller on duty that day, Therese Giddens, later identified defendant from police photographs. RP (11/15/06) 396. When she did so, seeing defendant's picture made her nauseous due to the robbery's strong emotional impact on her. RP (11/15/06) 396.

b. Columbia Bank Robbery

On January 3, 2006, defendant entered the Columbia Bank branch on Gravelly Lane in Lakewood, Washington, which was very busy with customers. RP (11/16/06) 434, 453-454. Defendant approached teller Crystal Jackson. RP (11/16/06) 458. Defendant appeared very angry at the time and held his hands in his pockets. RP (11/16/06) 458. Staring blankly at Ms. Jackson and refusing to answer her greeting, defendant pulled a note out of his left pocket and placed it on the counter. RP (11/16/06) 459-460. The note read, among other things, "STAY CALM! This is a robbery. Put \$3,000 in envelopes." RP (11/16/06) 461. The note frightened Ms. Jackson, and during the encounter she felt threatened and was too scared to implement any security measures that would allow the police to track defendant. RP (11/16/06) 462, 464, 470-471, 479-481. She wanted to "just do whatever [defendant] wanted so he would leave."

RP (11/16/06) 462. Defendant continued to hold his right hand in his pocket while Ms. Jackson retrieved the money, which made Ms. Jackson believe he had a gun in that pocket. RP (11/16/06) 461, 464, 478.

Defendant left the bank, got into a car driven by a waiting accomplice, and drove away. RP (11/20/06) 543. Ms. Jackson did not tell her manager about the robbery until after defendant left the bank because she was afraid the robbery could escalate into a hostage situation. RP (11/16/06) 465. Ms. Jackson was nervous and agitated when she spoke to the police and Agent Shaide after the robbery. RP (11/16/06) 440; RP (11/21/06) 773. She was also nervous that evening and the following day. RP (11/16/06) 478.

c. Key Bank Robbery

On January 6, 2006, defendant walked into the Key Bank located at 138th Street and Pacific Avenue in Tacoma, Washington. RP (11/16/06) 410; RP (11/20/06) 580. This branch of Key Bank is robbed frequently and was quite busy with customers and tellers that day. RP (11/20/06) 575-576. Defendant covered his head with a hood and kept his hands in his pockets as he approached teller Debra Chase. RP (11/20/06) 580-581. Defendant held out a note for Ms. Chase which read "This is a robbery. Put \$3,000 in an envelope" RP (11/20/06) 583-584. The note scared Ms. Chase and made her feel threatened, which made it difficult for her to find an envelope. RP (11/20/06) 583, 585, 597. She was so

frightened that she had a hard time remembering what the note said while she tried to find money, and she forgot to implement some of the security measures the bank had designed to help the police track bank robbers. RP (11/20/06) 585-586. Ms. Chase said she had been trained to follow robbers' instructions to prevent anyone from getting hurt. RP (11/20/06) 586. Ms. Chase would have complied with the note even if she had not been trained to do so in order prevent defendant from hurting anyone. RP (11/20/06) 597. She eventually put \$2,500 in an envelope and gave it to defendant. RP (11/20/06) 588.

Defendant took the envelope and left the bank, and Ms. Chase dialed 911. RP (11/20/06) 588. Ms. Chase was so frightened that she hung up on the 911 operator twice. RP (11/20/06) 585. She was still frightened when she tried to fill out a witness statement later that day. RP (11/20/06) 596. For three or four months after the robbery, Ms. Chase jumped every time a customer took something out of his or her pocket in front of Ms. Chase. RP (11/20/06) 596. Police investigators found a partial fingerprint belonging to defendant at Key Bank after the robbery. RP (11/16/06) 410, 419.

d. Rainier Pacific Bank Robbery

On January 9, 2006, defendant walked into the Rainier Pacific Bank branch located at 11821 Canyon Road East in Puyallup, Washington. RP (11/20/06) 658. There were three employees and two

other customers in the bank at the time. RP (11/20/06) 661-662.

Defendant approached teller Tanya James with his hands in his pockets. RP (11/20/06) 666. Defendant placed a note in front of Ms. James that read in heavy capital letters, "PLACE \$4,000 IN AN ENVELOPE. DO NOT MAKE ANY SUDDEN MOVEMENTS OR ACTIONS. I WILL BE WATCHING YOU." RP (11/20/06) 668-669. Defendant's other hand remained in his pocket during the incident. RP (11/20/06) 668.

Ms. James did as the note ordered her to do. RP (11/20/06) 670, 674, 678. She had been trained to follow robbers' instructions when she felt threatened by them. RP (11/20/06) 670, 674, 678, 707, 720-721. She believed that the note implied defendant had a gun or might be violent, so she complied with the note to protect herself and the people in the bank. RP (11/20/06) 670, 674, 678. While collecting the money, Ms. James was able to pull a bill trap, which activated a silent alarm. RP (11/20/07) 671. She did not pull the manual alarm until defendant left the bank, however, because she was afraid defendant would see her. RP (11/20/06) 672.

Defendant held one hand in his pocket during the entire encounter and left the bank once Ms. James gave him the envelope of money. RP (11/20/06) 671.

After the robbery, Ms. James was nervous and frantic, which was out of character for her. RP (11/20/06) 688-689; RP (11/21/06) 776, 802. She was still affected by the robbery after that day, becoming nervous

whenever she saw someone wearing the kind of stocking cap that defendant wore during the robbery. RP (11/20/06) 674.

e. Defendant's Arrest

Acting on Crimestoppers tip, officers from the FBI, the Lakewood Police Department, and the Tacoma Police department acted on a tip and went to the New Horizon Hotel in Federal Way, Washington, where defendant was staying, on January 12, 2006. RP (11/13/06) 39; RP (11/16/06) 515-517; RP (11/20/06) 534-535. As part of their standard practice, the officers brought ballistic shields in case defendant was armed, and they formed a wall with the shields before calling defendant to the door and arresting him. RP (11/21/06) 778-779. They apprehended defendant and brought him to the Tacoma Police Department for questioning by officers from the Lakewood Police Department, Tacoma Police Department, and FBI. RP (11/20/06) 535. Defendant admitted during questioning that he had robbed all four banks. RP (11/20/06) 540, 542; RP (11/21/06) 739-741, 781.

C. ARGUMENT.

1. INSTRUCTION 9 DID NOT RELIEVE THE STATE OF PROVING ALL THE ELEMENTS OF FIRST DEGREE ROBBERY.

A person commits the crime of first degree robbery when the person “a robbery within and against a financial institution.” RCW 9A.56.200. A person commits robbery when he or she

unlawfully takes personal property from the person of another or in his presence against his will by the use or threatened use of immediate force, violence, or fear of injury to that person or his property or the person or property of anyone. Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking; in either of which cases the degree of force is immaterial.

RCW 9A.56.190. “[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. Parra, 96 Wn. App. 95, 101, 977 P.2d 1272 (1999); see also State v. Collinsworth, 90 Wn. App. 546, 966 P.2d 905 (1997); State v. Handburgh, 119 Wn.2d 284, 830 P.2d 641 (1992). “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.” State v. Collinsworth, 90 Wn. App. at 553-554. The degree of force that a defendant uses in taking the property is immaterial; if it is sufficient to

compel a victim to part with his or her property, it satisfies the “threat of force” requirement of robbery. State v. Parsons, 44 Wash. 299, 303, 87 P. 349 (1906).

The law concerning the giving of jury instructions may be summarized as:

We review the trial court’s jury instructions under the abuse of discretion standard. A trial court does not abuse its discretion in instructing the jury, if the instructions: (1) permit each party to argue its theory of the case; (2) are not misleading; and, (3) when read as a whole, properly inform the trier of fact of the applicable law.

State v. Fernandez-Medina, 94 Wn. App. 263, 266, 971 P.2d 521, review granted, 137 Wn.2d 1032, 980 P.2d 1285 (1999) (citing Herring v. Department of Social and Health Servs., 81 Wn. App. 1, 22-23, 914 P.2d 67 (1996)). A criminal defendant is entitled to jury instructions that accurately state the law, permit him to argue his theory of the case, and are supported by the evidence. State v. Staley, 123 Wn.2d 794, 803, 872 P.2d 502 (1994).

CrR 6.15 requires a party objecting to the giving or refusal of an instruction to state the reason for the objection. The purpose of this rule is to afford the trial court an opportunity to correct any error. State v. Colwash, 88 Wn.2d 468, 470, 564 P.2d 781 (1977). Consequently, it is the duty of trial counsel to alert the court to his position and obtain a ruling before the matter will be considered on appeal. State v. Rahier, 37 Wn. App. 571, 575, 681 P.2d 1299 (1984), citing State v. Jackson, 70

Wn.2d 498, 424 P.2d 313 (1967). Only those exceptions to instructions that are sufficiently particular to call the court's attention to the claimed error will be considered on appeal. State v. Harris, 62 Wn.2d 858, 385 P.2d 18 (1963); State v. Jackson, 70 Wn.2d 498, 424 P.2d 313 (1967). A mere exception to the refusal to give requested instructions, without more, does not constitute a sufficient statement of the grounds for objection. State v. Robinson, 92 Wn.2d 357, 361, 597 P.2d 892 (1979); State v. Myers, 6 Wn. App. 557, 494 P.2d 1015, cert. denied, 409 U.S. 1061, 93 S. Ct. 562, 34 L. Ed. 2d 513 (1972). A challenge to a jury instruction may not be raised for the first time on appeal unless the instructional error is of constitutional magnitude. State v. Dent, 123 Wn.2d 467, 478, 869 P.2d 392 (1994).

In determining whether the evidence adduced at trial sufficiently supports the court's decision to give a particular instruction, the appellate court "must view the supporting evidence in the light most favorable to the party that requested the instruction." State v. Wingate, 155 Wn.2d 817, 823 n. 1, 122 P.3d 908 (2005). The jury is presumed to follow instructions to disregard improper evidence. State v. Copeland, 130 Wn.2d 244, 285, 922 P.2d 1304 (1996). Here, the State requested Instruction 9, which the court modified. RP (11/20/06) 522-523; RP (11/21/06) 717-830, 833. On appeal, defendant only objects to the following bolded portions Instruction 9:

A person commits the crime of robbery when he or she unlawfully and with intent to commit theft takes personal property from the person or in the presence of another against that person's will by the use, or explicit **or implicit 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 anyone. The force or fear must be used to obtain or retain possession of the property or to prevent or overcome resistance to the taking, in either of which cases the degree of force or threat is immaterial.

RP (11/21/06) 831-832; CP 133-154 (emphasis added).

Instruction 9 accurately states the law with respect to first degree robbery. Under State v. Collinsworth, a person commits first degree robbery when he or she enters a bank and makes an unequivocal demand for money to which he does not appear to be lawfully entitled because such demands imply a threat of force. Collinsworth, 90 Wn. App. at 553-554. Defendant implied such a threat in each robbery he committed; in each case he demanded money to which he was not entitled. RP (11/15/06) 352, 353; RP (11/16/06) 461; RP (11/20/06) 583-584, 668-669. In fact, defendant was even more threatening than Collinsworth. He told each teller that he was committing a robbery. RP (11/15/06) 352, 353; RP (11/16/06) 461; RP (11/20/06) 583-584, 668-669. The only reasonable way any of the teller could interpret the use of that word was that, if the tellers did not do as he asked, he would become violent or otherwise dangerous. In some cases, the note was written in capital letters and contained exclamation points. RP (11/16/06) 461; RP (11/20/06) 668-669. When defendant robbed Rainier Pacific Bank, he wrote that he would be

watching the teller, implying that he would do something to the teller if she acted in a way that defendant did not like. RP (11/20/06) 668-669. In three of the banks, defendant held one hand in his pocket during the entire exchange, suggesting that he had a weapon or that he was signaling an accomplice. RP (11/15/06) 363-364; RP (11/16/06) 461, 464, 478; RP (11/20/06) 668. In light of these facts, the trial court had ample reason to think the jury could conclude that defendant impliedly threatened the tellers in order to force them to give him money. These threats brought the case squarely within Collinsworth, so Instruction 9 was appropriate.

Defendant inaccurately contends that Collinsworth absolves the state of its burden to prove the “use or threaten to use immediate force” element of first degree robbery by showing that a defendant made a demand for money to which he was not entitled. The State must prove that defendant made the request in order to show that there was a threat in the first place. If the State cannot prove the request was made, and has no other evidence that would satisfy the “use or threatened use of force” element, then the State cannot prove first degree robbery. Collinsworth leaves the burden on the State to prove each element of robbery beyond a reasonable doubt.

Defendant’s reading of RCW 9A.56.190 would allow a defendant to avoid robbery convictions based on mere semantics when the context clearly indicates that the defendant was making a threatening demand. When a defendant enters a bank and demands money to which he is not

entitled, he necessarily implies that he will harm the teller or another if he does not get the money. That person cannot reasonably believe that the teller will simply hand over the money because he has asked for it. The only reason a teller would have to give away the banks money would be that it would be necessary to protect the teller or another person. The present case demonstrates precisely the fear that such a demand for money can instill in a defendant. Here, defendant calmly demanded money to which he was not entitled and thereby instilled fear in each of the tellers with whom he interacted. These tellers remained frightened long after defendant had left, even though defendant did not specifically say that he would hurt them. Defendant mistakenly claims that these tellers were only afraid because the banks had trained them to be afraid and “not because of anything specific that [defendant] did.” Br. of Appellant at 22, n. 7. The tellers all said, however, that they would have been frightened even if they had not been trained to give defendant the money. (11/15/06) 357; RP (11/20/06) 597, 670, 674, 678, 707, 720-721. The mere absence of the words “or I will hurt you” did not transform defendant’s threatening demands into non-threatening requests.

Defendant improperly relies on United States v. Wagstaff, 865 F.2d 626, (4th Cir. 1989), for his claim that the Collinsworth decision reads the “use or threatened use of force” requirement out of RCW 9A.56.190. Wagstaff is a 4th Circuit opinion interpreting a federal statute and has no binding effect on this Courts’ interpretation of RCW

9A.56.190. Wagstaff was not concerned with whether an implicit threat was permissible under RCW 9A.56.190; it was concerned, as the Collinsworth court noted, with “whether a teller’s subjective fear, standing alone, was sufficient to establish a taking by intimidation” under federal law. Collinsworth, 90 Wn. App. at 554; 627-628.

Even if it were binding on this court, Wagstaff is factually distinguishable from this case. Wagstaff entered a bank, hid his face, walked behind a teller’s counter, and began taking money from an open teller drawer. Wagstaff, 865 F.2d at 627. He was not carrying a weapon, did not communicate in any way with anyone, and was at least 8 feet from the nearest teller when he took the money. Id. The Fourth Circuit held that under its interpretation of 18 U.S.C. §2113(a), the Government had to prove that Wagstaff had used intimidation by showing either that he explicitly threatened someone or that he implicitly possessed a weapon. Id. at 628. Because Wagstaff had not made any contact with anyone in the bank, the Government failed to prove this element. Id. In the present case, defendant contacted the tellers directly, informed them he was robbing them, demanded money from the them, and engaged in other conduct that suggested he would harm them if they did not comply. RP (11/15/06) 352, 353, 363-364; RP (11/16/06) 461, 464, 478; RP (11/20/06) 583-584, 668-669. Defendant’s direct contact with the tellers and obvious threats distinguish this case from Wagstaff.

In fact, Wagstaff undermines defendant's claim that Instruction 9 relieved the State of its burden to prove the "use or threatened use of force" element of first degree robbery by providing an example of a defendant who committed theft without committing robbery. Wagstaff took money from a bank in a way that did not threaten anyone in the bank, thus committing theft without committing robbery.

Instruction 9 accurately defined the crime of first degree robbery. Collinsworth allowed the court to instruct the jury on implied threats. Defendant impliedly threatened each teller by informing them they were being robbed, demanding money to which he was not entitled, making gestures that suggested he had a weapon, and telling one teller he was watching her. Collinsworth is consistent with RCW 9A.56.190 because it still requires the State to prove that the implicit threat was made. This Court should not break with Collinsworth because such a break would allow defendants to avoid robbery convictions even when they obtained the money through a clearly implied threat.

2. THE JURY HAD SUFFICIENT EVIDENCE FROM WHICH IT COULD CONCLUDE THAT DEFENDANT COMMITTED FOUR COUNTS OF FIRST DEGREE ROBBERY.

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. State v. McCullum, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); see also Seattle

v. Gellein, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); State v. Mabry, 51 Wn. App. 24, 25, 751 P.2d 882 (1988). The applicable standard of review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Joy, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). Also, challenging the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. State v. Barrington, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), review denied, 111 Wn.2d 1033 (1988) (citing State v. Holbrook, 66 Wn.2d 278, 401 P.2d 971 (1965)); State v. Turner, 29 Wn. App. 282, 290, 627 P.2d 1323 (1981). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Circumstantial and direct evidence are considered equally reliable. State v. Salinas, 119 Wn.2d 192; State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In considering this evidence, “[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal.” State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (citing State v. Casbeer, 48 Wn. App. 539, 542, 740 P.2d 335, review denied, 109 Wn.2d 1008 (1987)).

The written record of a proceeding is an inadequate basis on which to decide issues based on witness credibility. Credibility determinations

are necessary because witness testimony can conflict; these determinations should be made by the trier of fact, who is best able to observe the witnesses and evaluate their testimony as it is given. On this issue, the Supreme Court of Washington said:

[G]reat deference . . . is to be given the trial court's factual findings. It, alone, has had the opportunity to view the witness' demeanor and to judge his veracity.

State v. Cord, 103 Wn.2d 361, 367, 693 P.2d 81 (1985) (citations omitted). Therefore, when the State has produced evidence of all the elements of a crime, the decision of the trier of fact should be upheld.

A person commits robbery in the first degree when he (1) unlawfully takes personal property from the person of another or in his presence (2) takes property against the person will by "the use or threatened use of immediate force, violence, or fear of injury to that person or his property or the person or property of anyone," and (3) commits the robbery within and against a financial institution. RCW 9A.56.190, RCW 9A.56.200(1)(b), CP 133-154. On appeal, defendant only claims that there was insufficient evidence from which the jury could conclude that defendant used or threatened to use immediate force, violence, or fear of injury to the teller, the teller's property, another, or another's property to obtain the money from the four banks. Br. of Appellant at 21-23.

The State provided ample evidence that the defendant threatened to harm the teller or others during the Wells Fargo Bank robbery. Defendant informed Ms. Masten that he was robbing her and demanded money to which he was not entitled. RP (11/15/06) 352-353. At the time, there were five to ten other people in the bank who could be harmed if defendant became violent. RP (11/15/06) 351, 354, 357, 392. Ms. Masten gave defendant the money only because she was afraid the incident might escalate to violence and she or someone else might get harmed. RP (11/15/06) 351, 354, 392. It is reasonable to assume from the note's demands, the use of the word "robbery," and defendant's actions that defendant would harm Ms. Masten or the other people in the bank if Ms. Masten did not comply with defendant's request. Ms. Masten's testimony showed that defendant used sufficient force to commit robbery because her fear that defendant would harm someone prevented her from resisting defendant's demands for money. Drawing all inferences in the light most favorable to the State, the jury had sufficient evidence from which it could conclude that defendant took the money by an implied threat of force.

The State provided ample evidence that the defendant threatened to harm the teller or others during the Columbia Bank robbery. Defendant informed Ms. Jackson that he was robbing her and demanded money to which he was not entitled. RP (11/16/06) 461. The note he showed her used capital letters and an exclamation point, increasing the force of the command. RP (11/16/06) 461. Defendant appeared angry at the time and

kept one hand in his pocket the entire time he was in the bank, suggesting that he was holding a gun or other weapon. RP (11/16/06) 458, 461, 464, 478. At the time, the bank was very busy with customers and bank employees who might be harmed if the incident escalated to violence. RP (11/16/06) 434, 453-454. It is reasonable to assume from the note's demands, the use of the word "robbery," and defendant's actions that defendant would harm Ms. Jackson or the other people in the bank if Ms. Jackson did not comply with defendant's request. These implied threats were sufficient to overcome Ms. Jackson's resistance to defendant's demands: Ms. Jackson gave defendant the money because she was afraid the incident might escalate to violence and she or someone else might get harmed. RP (11/16/06) 462, 464-465, 470-471, 479-481. Drawing all inferences in the light most favorable to the State, the jury had sufficient evidence from which it could conclude that defendant took the money by an implied threat of force.

The State provided ample evidence that the defendant threatened to harm the teller or others during the Key Bank robbery. Defendant informed Ms. Chase that he was robbing her and demanded money to which he was not entitled. RP (11/20/06) 583-584. At the time, the bank was quite busy with customers and employees who could be hurt if the incident escalated into violence. RP (11/20/06) 575-576. It is reasonable to assume from the note's demands and the use of the word "robbery" defendant would harm Ms. Jackson or the other people in the bank if Ms.

Jackson did not comply with defendant's request. These implied threats were sufficient to overcome Ms. Chase's resistance to defendant's demands: Ms. Chase gave defendant the money because she was afraid the incident might escalate to violence and she or someone else might get harmed. RP (11/20/06) 585-586, 596-597. Drawing all inferences in the light most favorable to the State, the jury had sufficient evidence from which it could conclude that defendant took the money by an implied threat of force.

The State provided ample evidence that the defendant threatened to harm the teller or others during the Rainier Pacific Bank robbery. Defendant informed Ms. James that he was robbing her and demanded money to which he was not entitled. RP (11/20/06) 668-669. The note was written in all capital letters, ordered Ms. James not to make any sudden movements, and told her that defendant would be watching her. RP (11/20/06) 668-669. Defendant kept one hand in his pocket throughout the robbery, which suggested he had a gun or other weapon. RP (11/20/06) 666, 668, 671. At the time, there were three employees and two customers in the bank who might be harmed if the incident escalated into violence. RP (11/20/06) 670, 672, 674, 678, 688-689. It is reasonable to assume from the note's demands, the use of the word "robbery," and defendant's actions that defendant would harm Ms. James or the other people in the bank if Ms. James did not comply with defendant's request. It is also reasonable to infer that these threats

overcame Ms. James's resistance to defendant's demands. Drawing all inferences in the light most favorable to the State, the jury had sufficient evidence from which it could conclude that defendant took the money by an implied threat of force.

Viewing the evidence in the light most favorable to the State, it is clear that during the four bank robberies, defendant's notes and actions implied that he would harm the tellers or others if the tellers did not comply with his demand for money. In each case, this implied threat overcame the teller's will to resist defendant's demands for money. The jury thus had sufficient evidence to convict defendant of four counts of first degree robbery.

3. DEFENSE COUNSEL WAS NOT INEFFECTIVE FOR CHOOSING NOT TO REQUEST A LESSER INCLUDED OFFENSE INSTRUCTION.

Defendant challenges defense counsel's decision not to request a lesser included offense instruction on the crime of first degree theft; defendant does not challenge defense counsel's decision not to request other lesser included instructions. Br. of Appellant at 14-20. The right to effective assistance of counsel is the right "to require the prosecution's case to survive the crucible of meaningful adversarial testing." United States v. Cronin, 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L. Ed. 2d 657 (1984). When such a true adversarial proceedings has been conducted, even if defense counsel made demonstrable errors in judgment or tactics,

the testing envisioned by the Sixth Amendment has occurred. Id. “The essence of an ineffective-assistance claim is that counsel’s unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect.”

Kimmelman v. Morrison, 477 U.S. 365, 374, 106 S.Ct. 2574, 2582, 91 L. Ed. 2d 305 (1986).

A defendant who raises a claim of ineffective assistance of counsel must show: (1) that his or her attorney’s performance was deficient, and (2) that he or she was prejudiced by the deficiency. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Under the first prong, deficient performance is not shown by matters that go to trial strategy or tactics. State v. Garrett, 124 Wn.2d 504, 520, 881 P.2d 185 (1994). Under the second prong, the defendant must show that there is a reasonable probability that, but for counsel’s errors, the result of the trial would have been different. State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987).

Judicial scrutiny of a defense attorney’s performance must be “highly deferential in order to eliminate the distorting effects of hindsight.” Strickland, 466 U.S. at 689. The reviewing court must judge the reasonableness of counsel’s actions “on the facts of the particular case, viewed as of the time of counsel’s conduct.” Id. at 690; State v. Benn, 120 Wn.2d 631, 633, 845 P.2d 289 (1993).

What decision [defense counsel] may have made if he had more information at the time is exactly the sort of Monday-morning quarterbacking the contemporary assessment rule forbids. It is meaningless...for [defense counsel] now to claim that he would have done things differently if only he had more information. With more information, Benjamin Franklin might have invented television.

Hendricks v. Calderon, 70 F.3d 1032, 1040 (C.A. 9, 1995).

When the ineffectiveness allegation is premised upon counsel's failure to litigate a motion or objection, defendant must demonstrate not only that the legal grounds for such a motion or objection was meritorious, but also that the verdict would have been different if the motion or objections had been granted. Kimmelman, 477 U.S. at 375; United States v. Molina, 934 F.2d 1440, 1447-48 (9th Cir.1991). An attorney is not required to argue a meritless claim. Cuffle v. Goldsmith, 906 F.2d 385, 388 (9th Cir.1990). The standard of review for effective assistance of counsel is whether, after examining the whole record, the court can conclude that defendant received effective representation and a fair trial. State v. Ciskie, 110 Wn.2d 263, 751 P.2d 1165 (1988). A presumption of counsel's competence can be overcome by showing counsel failed to conduct appropriate investigations, adequately prepare for trial, or subpoena necessary witnesses. Id. An appellate court is unlikely to find ineffective assistance on the basis of one alleged mistake. State v. Carpenter, 52 Wn. App. 680, 684-685, 763 P.2d 455 (1988).

A defendant is only entitled to an instruction on a lesser included offense if (1) each of the elements of the lesser offense is a necessary element of the offense charged, and (2) the evidence in the case supports the inference that only the lesser crime was committed. State v. Workman, 90 Wn.2d 443, 447-448, 584 P.2d 382 (1978); State v. Berlin, 133 Wn.2d 541, 548, 947 P.2d 700 (1997); State v. Peters, 47 Wn. App. 854, 860, 737 P.2d 693 (1987).

Defendant was charged with committing robbery by (1) unlawfully taking personal property from the person of another or in his presence (2) taking the property against the person's will by "the use or threatened use of immediate force, violence, or fear of injury to that person or his property or the person or property of anyone," and (3) committing the robbery within and against a financial institution. CP 1-3, 196-197; RCW 9A.56.190, RCW 9A.56.200(1)(b). Under the robbery statute, "taking something from another's person would be to take something on the person's body or directly attached to someone's physical body or clothing." State v. Chamroeum Nam, 136 Wn. App. 698, 705, 150 P.3d 617 (2007).

A person commits first degree theft when he (1) wrongfully obtains or exerts unauthorized control over the property of another, (2) intends to deprive the person of such property, and (3) the value of the property exceeds a value of \$1,500 or is taken from the person. RCW 9A.56.020(1)(a), RCW 9A.56.030(1)(a) and (1)(b). The phrase "from the

person” in the first degree theft statute does not encompass a taking that is merely in someone’s presence. See State v. Roche, 75 Wn. App. 500, n. 7 511, 878 P.2d 497 (1994) (citing State v. Reese, 12 Wn. App. 407, 409, 529 P.2d 1119 (1974) (“the omission of words from a statute must be considered intentional on the part of the legislature”)).

Defendant was not entitled to a lesser included offense instruction in this case under the Workman-Berlin test. First, defendant could not have met the legal prong of the Workman-Berlin test. The State charged defendant in this case with committing first degree robbery either by unlawfully taking personal property from the person of another or in that person’s presence. CP 1-3, 133-154, 196-197. As charged, defendant could have committed first degree robbery by threatening the tellers and forcing them to give him less than \$1,500 from their tills at the banks. Such a crime would fail to satisfy the third element of first degree theft: the taking would not have been from the person of another and the value of the property would not have been \$1,500 or more. Thus, defendant could have committed first degree robbery as charged without committing first degree theft.

Second, defendant could not have met the factual prong of the Workman-Berlin test because the evidence in this case does not support the inference that only theft was committed. As argued above, the State presented evidence that defendant entered each bank, threatened a teller by demanding money and telling her he was robbing her, and took the money

from her. This evidence supports the inference that defendant robbed the bank by threatening the tellers. Because the evidence supports more than just the inference that defendant committed first degree theft, the factual prong of the Workman-Berlin test fails and defendant was not entitled to a lesser included offense instruction. See Peters, 47 Wn. App. at 860.

Because defendant was not entitled to a lesser included offense instruction, defendant has failed to prove either prong of the ineffective assistance of counsel test. Counsel's performance was not deficient because he was correct that first degree theft was not a lesser include offense of the charged crime of first degree robbery. Even if defense counsel's performance was deficient, defendant has failed to show prejudice because there is no reason that the court would have given an instruction to which defendant was not entitled. Defendant has failed to meet the high burden of proving ineffective assistance of counsel in this case.

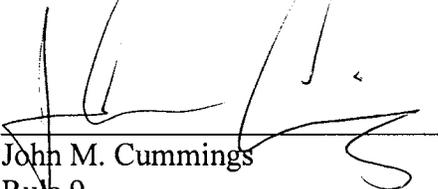
D. CONCLUSION.

For the foregoing reasons, the State respectfully requests that this Court affirm defendant's sentence.

DATED: JANUARY 23, 2008.

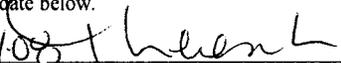
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Rule 9

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

1-24-08 
Date Signature

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DIVISION II
08 JAN 24 PM 2:00
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BY  DEPUTY