

NO. 45228-6-II

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

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STATE OF WASHINGTON,

Respondent,

v.

GERALD LEWIS YANAC,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF  
KITSAP COUNTY, STATE OF WASHINGTON  
Superior Court No. 12-1-00955-2

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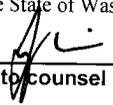
BRIEF OF RESPONDENT

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<b>SERVICE</b>	Catherine E. Glinski Po Box 761 Manchester, WA 98353 Email: cathyglinski@wavecable.com	This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, <i>or, if an email address appears to the left, electronically</i> . I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED April 16, 2014, Port Orchard, WA  <b>Original e-filed at the Court of Appeals; Copy to counsel listed at left.</b>
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## **I. COUNTERSTATEMENT OF THE ISSUES**

1. Whether the Defendant's claim of insufficient evidence must fail when, viewing the evidence in a light most favorable to the State, a rational trier of fact could have found that the State proved the essential elements of the charged offense beyond a reasonable doubt?

## **II. STATEMENT OF THE CASE**

### **A. PROCEDURAL HISTORY**

The Defendant, Gerald Lewis Yanac, was charged by information filed in Kitsap County Superior Court with one count of robbery in the first degree and one count of possession of a stolen vehicle. CP 1-5.<sup>1</sup> The Defendant waived his right to a jury trial and the case went forward as a bench trial on stipulated facts. CP 20-114. The trial court found the Defendant guilty of the robbery in the first degree and possession of a stolen vehicle. CP 115.<sup>2</sup> The trial then imposed a standard range sentence. CP 123. This appeal followed.

### **B. FACTS**

At the bench trial below the parties stipulated to certain facts and further stipulated to the admissibility of numerous police reports, witness statements, and transcripts from an interview with the primary witness.

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<sup>1</sup> An amended information was later filed which added a count of theft in the first degree as an "alternative" charge to the robbery count. CP 16; RP (July 8) at 15, 44.

<sup>2</sup> The trial court did not enter a verdict on the theft charge since this was only included as

See CP 20-25. In addition, the parties both stipulated to the admission of numerous photographs that were taken during the robbery. CP 8, 22; Exhibits 1-20 (included in the State's Supplemental Designation of Clerk's Papers, filed simultaneously with this brief). The stipulated facts and documents showed the following:

On August 15, 2012, Kathe Hoag was working as a teller at a Key bank in Port Orchard, Washington. CP 20-21. Business at the bank was slow that afternoon, and Ms. Hoag noticed a man (later identified as the Defendant) approaching the bank from the side of the building where it appeared he might have been using an ATM. CP 59-60. The Defendant was wearing a baseball cap and dark sunglasses and he was carrying a white plastic shopping bag. CP 20, 60.

The Defendant entered the bank and Ms. Hoag thought the Defendant looked "very suspicious." CP 20-21, 50. Ms. Hoag explained that this particular bank branch had a lot of regular customers and that it was "very rare that you see just somebody random come in." CP 62. Ms. Hoag also thought the Defendant looked suspicious as he "had his whole appearance blocked" by the hat and sunglasses, and because he walked with a "sense of urgency" as if he needed to "get in and out." CP 62.

Ms. Hoag was about to ask the Defendant to remove his sunglasses

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an "alternative" to the robbery charge. See RP (July 8) at 72.

when he approached Ms. Hoag's counter and opened up and held out the empty plastic shopping bag and said "Money." CP 20-21, 50. Ms. Hoag then replied, "Money?" and the Defendant then again said, "Money." CP 21. 60. Ms. Hoag selected some of the money from her cash drawer and placed it into the plastic bag. CP 21. The Defendant then said, "More." CP 21, 50, 60. Ms. Hoag then placed some more money into the bag and then told the Defendant, "That's it." CP 21.

Ms. Hoag later described that she was "[I]n a sense of shock and I just needed to, you know, get what he needed and get him out of here." CP 63. She further described that,

"I felt like I was in shock, and I didn't know how to respond. I was shaky. It almost seemed like a dream, and I just think that I was reacting automatically without even really thinking about what I was doing."

CP 64-65. Although the Defendant did not verbally threaten Ms. Hoag and she did not see a weapon, Ms. Hoag stated that,

"He looked like he could have a weapon, but he didn't say he had a weapon. So I don't know; am I supposed to be afraid of a weapon, you know? I was just very nervous."

CP 62-64, 80.

Ms. Hoag further explained that she felt like she needed to give the Defendant the money or else he might do something to hurt her. CP 65.

She explained that the way the Defendant walked into the bank made her think that he was “obviously on a mission,” and that his tone of voice caused her to feel that she needed to give him the money. CP 65. Specifically, Ms. Hoag stated that when the Defendant first said “money” she responded by questioning him (by saying “Money?”) and the Defendant “said it again with that authority in his voice, and I felt like I needed to do it.” CP 65.

Ms. Hoag further explained that situation was threatening and she was nervous “because it’s in a bank, obviously he wants money,” and that if “somebody is going to rob a bank they know there’s going to be some serious consequences.” CP 74.

After Ms. Hoag finished placing the money in the bag, the Defendant turned away and walked out of the bank without saying anything else. CP 21. Ms. Hoag immediately dialed 911 and yelled to her manager, Heather Freeman, to lock the door. CP 59-61. Ms. Freeman then locked the door of the bank and watched as the Defendant got into a truck in the parking lot and drove away. CP 21.

After the robbery, police officers responded to the bank and were advised a short time later that a pickup truck had crashed into a fence at an abandoned house a short distance away, and the driver of the truck was described as being a white male with a mustache and glasses. CP 31.

Officers went to the scene and found the Defendant (who matched the description of the bank robber) near the pickup truck. CP 31. The Defendant was ultimately arrested on an outstanding warrant and a wad of cash was found in his pants, as was a key to the pickup. CP 31-32. Officers also brought Ms. Hoag and Ms. Freeman to the scene and both identified the Defendant as the bank robber. CP 31-32. Officers also learned that the truck was a stolen vehicle. CP 21.

At the bench trial below the defense did not contest that the Defendant had committed the crime of possession of a stolen vehicle and theft in the second degree. RP (July 8) at 65. Rather, the sole argument below was that the Defendant had not committed the crime of robbery in the first degree because the Defendant had not threatened to use force. RP (July 8) at 65.

At the conclusion of the bench trial the trial court found the defendant guilty of robbery in the first degree and possession of a stolen vehicle. RP (July 8) at 69-70. The trial court explained its verdict in a lengthy and detailed oral ruling in which the court first cited several Washington cases that both parties had discussed at length during argument: *State v. Shcherenkov*, 146 Wn.App. 619, 191 P.3d 99 (2008), *review denied*, 165 Wn.2d 1037 (2009), and *State v. Collingsworth*, 90 Wn.App. 546, 966 P.2d 905 (1997), *review denied*, 135 Wn.2d 1002

(1998); *See*, RP (July 8) at 65.

The trial court, however, also cited numerous Federal cases where the courts had held that a defendant's actions were sufficient to prove the crime of bank robbery and the existence of an implied threat despite the fact that no direct or express threats were made. RP (July 8) at 67-69. The trial court then explained that in light of these cases she was convinced beyond a reasonable doubt that that the elements of the crime of robbery had been met. RP (July 8) at 69-70. The trial court further explained that,

This is, firstly, a bank. And I think that we cannot lose sight of the fact that the defendant is walking into a bank, not a shopping center, not a clothing store, not a grocery store, but a bank whose only purpose is managing the money of its customers.

He doesn't shoplift; rather, he walks right up to a teller and says quote "Money," end quote. But the teller has seen him coming. She indicated that as she was watching him approach, that she thought he looked suspicious. She didn't recognize him as a customer. And it was the way that he walked in the door, that he had sunglasses on, that he was kind of fidgety, and that then he walked up to her window and said, "Money." These things created an aura of fear for the teller such that she was not going to comply with his request. She was very nervous; she was intimidated by him. Even though she says she – she didn't feel like her life was threatened, she did feel that under the circumstances, it was important for her to comply with his demand.

He then puts down a grocery bag on the surface of the teller's station. And as the event continues, as the teller pulls money out of the drawer, he moves the bag and reaches forward with his hands beyond and into the teller's personal space, and this also is behavior which I find can

constitute the threatened use of force. When one puts both hands very near the teller, it could be very easy for him to grab her by the arms or even by the throat because he's invaded her personal space with the bag, demanding more money.

When you put all of those things, the way that he said it, the way that he looked, the way that he walked into the bank, and the fact that it was a bank and he went right up to a teller, does supply facts beyond a reasonable doubt to satisfy the element of the crime.

RP (July 8) at 70-71.

The trial court also entered written findings of fact and conclusions of law that largely mirrored the court's oral ruling. CP 115-18. In those findings and conclusion the trial court again went through the relevant factual findings and concluded that the Defendant impliedly threatened the immediate use of force through his actions and appearance. CP 117.

### **III. ARGUMENT**

#### **A. THE DEFENDANT'S CLAIM OF INSUFFICIENT EVIDENCE MUST FAIL BECAUSE, VIEWING THE EVIDENCE IN A LIGHT MOST FAVORABLE TO THE STATE, A RATIONAL TRIER OF FACT COULD HAVE FOUND THAT THE STATE PROVED THE ELEMENTS OF THE CHARGED OFFENSE BEYOND A REASONABLE DOUBT.**

The Defendant argues that the evidence below was insufficient to prove that he threatened to use immediate force, violence, or fear of

injury. App.'s Br. at 5-9. This claim is without merit because, viewing the evidence in a light most favorable to the State, a rational trier of fact could have found that the State proved the essential elements of the crimes beyond a reasonable doubt.

As the Defendant notes, a challenge to the sufficiency of the evidence presented at a bench trial requires the appellate court to determine whether substantial evidence supports the trial court's finding of fact and whether those findings support the trial court's conclusions of law. App.'s Br. at 6, *citing State v. Stevenson*, 128 Wn.App. 179, 193, 114 P.3d 699 (2005).<sup>3</sup>

Furthermore, a challenge to the sufficiency of the evidence admits the truth of the State's evidence and all inferences that can reasonably be drawn from the evidence. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial evidence and direct evidence are considered equally reliable when weighing the sufficiency of the evidence. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004).

In the present appeal the Defendant has acknowledged that this

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<sup>3</sup> Although the bench trial below was based purely on documentary evidence that is equally available to a reviewing court, this Court has previously explained that this fact does not mandate de novo review. *See, State v. Bartolome*, 139 Wn.App. 518, 521, 161 P.3d 471 (2007). Rather, the appropriate standard of review is for this Court to "leave it for the trial court to weigh this conflicting stipulated evidence and to resolve factual disputes" and for the reviewing court to limit its review to the determination of "whether substantial evidence supports the trial court's verdict." *Bartolome*, 139 Wn.App. at 522.

Court has held that the threat required in a robbery charge may be either express or implied. App.'s Br. at 7, citing *State v. Shcherenkov*, 146 Wn.App. at 619. In addition, the Defendant has acknowledged that the Court of Appeals has further held that,

“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.”

App.'s Br. at 7, citing *State v. Collingsworth*, 90 Wn.App. at 553. Nevertheless, the Defendant argues that the evidence in the present case did not support the conclusion that he threatened Ms. Hoag because there was no evidence that communicated that he would use force if she did not comply. App.'s Br. at 8. The Defendant’s claim, however, is without merit because the evidence was sufficient to establish each of the elements of the charged offense.

A person commits the crime of robbery in the first degree, when, inter alia, he or she commits a robbery within and against a financial institution. RCW 9A.56.200. A person commits robbery when he “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.” RCW 9A.56.190. The statute further provides that the “degree of force is immaterial,” and Washington courts have explained that “Any force or threat, no matter how slight, which induces an owner to part with his property, is sufficient to sustain a robbery conviction.” See, RCW 9A.56.190; *State v. Handburgh*, 119 Wn.2d 284, 293, 830 P.2d 641 (1992).

In the present appeal the Defendant claim (that the evidence was insufficient because he made no direct threat) is contrary to Washington law. For instance, in *Collinsworth*, the Court of Appeals upheld five convictions for robbery and one conviction for attempted robbery despite the defendant's claim that he did not use, or threaten to use, force. *Collinsworth*, 90 Wn.App. at 548.

In the first robbery in *Collinsworth* the defendant, who appeared nervous and fidgety, approached a bank teller and told him in a “serious” tone of voice, “I need your hundreds, fifties and twenties.” *Collinsworth*, 90 Wn.App. at 548. When the teller paused, unsure of what to do, the defendant said, “I’m serious,” and later added “No bait, no dye.” *Id.* The defendant did not put his hands in his pocket or otherwise indicate that he had a weapon, but because the defendant was wearing baggy clothing the teller could not determine whether he had a weapon. *Id.*

In the second robbery the defendant again approached a bank teller

and said “Give me your hundreds, fifties and twenties.” *Collinsworth*, 90 Wn.App. at 549. When the teller responded, “Excuse me?” the defendant repeated “Give me your hundreds, fifties and twenties.” *Id.* After the teller placed \$20 and \$50 bills on the counter, the defendant said, “Give me your hundreds.” When the teller replied that he did not have any, the defendant grabbed the money and walked out of the bank. *Id.* The teller also described that the defendant appeared “a little nervous” and used a “direct and demanding” voice and leaned in the teller’s direction.

In the third robbery the defendant again approached a bank teller and said “Give me all your fifties and hundreds.” *Collinsworth*, 90 Wn.App. at 549. After the defendant repeated his request a second time the teller handed the defendant a number of \$100 bills. *Id.* Although he could not tell for sure, the teller stated that there was a possibility that the defendant had a weapon. *Id.*

In the fourth robbery the defendant approached a bank teller, placed a green cloth bag on the counter, and asked her in a low voice to fill it with “hundreds and fifties” with “no dye packs.” *Collinsworth*, 90 Wn.App. at 549. The teller put the \$100 and \$20 bills from her drawer on the counter, and the defendant gathered up the money and left. *Id.* at 550. Again, the teller never saw a weapon. *Id.*

Finally, in the fifth robbery the defendant approached a teller and

told him in a “firm, direct” voice, “Give me your twenties, fifties, and hundreds.” *Collinsworth*, 90 Wn.App. at 550. When the teller asked if he was serious, the defendant replied “yes” and added, “Don't give me a dye pack.” *Id* at 550. The teller then handed over the cash to the defendant who put it in the sack and left the bank. *Id*.

On appeal, the Court explained that there were no previous Washington cases that specifically addressed what evidence was necessary to establish robbery in circumstances where the defendant does not utilize an overt physical or verbal threat or display a weapon. *Collinsworth*, 90 Wn.App. at 551-52. After reviewing several analogous federal court opinions, the Court of Appeals ultimately affirmed the convictions, holding,

Under the circumstances of this case, 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.” 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. 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. “Any force or threat, no matter how slight, which induces an owner to part with his property is sufficient to sustain a robbery conviction.”

...

In this case, Collinsworth expressed his demands for money directly to the teller. Viewed in the light most favorable to the State, the evidence was sufficient to support the trial court's findings that Collinsworth obtained bank property through the use or threatened use of "immediate force, violence or fear of injury."

*Collinsworth*, 90 Wn.App. at 553-54.

Similarly, in *State v. Shcherenkov* this Court rejected a defendant's argument that the State failed to prove the use or threat of use of force element of robbery and upheld convictions on four counts of robbery. In the first three counts in that case the defendant walked into a bank and handed a note to a teller informing them that "this is a robbery." *Shcherenkov*, 146 Wn.App. at 622-23. This Court held that the evidence was sufficient on these count because the tellers reasonably interpreted this language to be threatening because "robbery" inherently involves a threat of immediate force. *Id* at 629.

On the fourth count, the defendant's note said in heavy capital letters, "Place \$4,000 in an envelope. Do not make any sudden movements or actions. I will be watching you." *Shcherenkov*, 146 Wn.App. at 629. This Court held that a rational trier of fact could reasonably interpret the defendant's statement, "I will be watching you," to be an indirect communication that he would use force if the teller did not comply with his demands, and thus the evidence was sufficient. *Id* at 629.

In the present case the Defendant's actions clearly mirror the facts in *Collinsworth*. In both cases the defendant did not directly threaten the teller or display a weapon. Nevertheless, both defendants entered a bank and asked for money unsupported by even the pretext of any lawful entitlement to the funds. As in *Collinsworth*, this act when viewed in its proper context was "fraught with the implicit threat to use force," and any force or threat, no matter how slight, which induces an owner to part with his property is sufficient to sustain a robbery conviction *Collinsworth*, 90 Wn.App. at 553-54. Thus, as in *Collinsworth*, the evidence in the present case, viewed in the light most favorable to the State, was sufficient to support the trial court's findings that the Defendant obtained bank property through the use or threatened use of "immediate force, violence or fear of injury." The evidence in the present also parallels the fourth count in *Shcherenkov* where the defendant did not use the word "robbery" or make any other direct threats. *Shcherenkov*, 146 Wn.App. at 629. As in *Shcherenkov*, however, the defendant's actions in the present case were sufficient to demonstrate an implied threat.

Finally, as both the trial court below and the court in *Collinsworth* noted, numerous federal cases have reached a result similar to the one in the present case and *Collinsworth*. As the *Collinsworth* court explained, the crime of bank robbery under 18 U.S.C. sec. 2113(a) criminalizes the

taking of property from a bank “by force and violence, or by intimidation.” *Collinsworth*, 90 Wn.App. at 552. Taking by “intimidation” is defined as “the willful taking in such a way as would place an ordinary person in fear of bodily harm.” *Collinsworth*, 90 Wn.App. at 552, citing *United States v. Bingham*, 628 F.2d 548, 548 (9th Cir.1980); *United States v. Harris*, 530 F.2d 576, 579 (4th Cir.1976); and *United States v. Higdon*, 832 F.2d 312, 315 (5th Cir.1987). Against this analogous statutory backdrop, numerous federal courts have repeatedly rejected the contention that express threats of bodily harm, threatening bodily gestures, or the physical possibility of a concealed weapon are required to establish bank robbery under 18 U.S.C. sec. 2113(a). *See, for instance, United States v. Lucas*, 963 F.2d 243, 248 (9th Cir.1992) (holding that defendant’s statement to teller to “Give me all your money, put all your money in the bag” in conjunction with teller’s statement that she was terrified, was sufficient to show a taking by intimidation); *United States v. Robinson*, 527 F.2d 1170, 1172 (6th Cir.1975) (evidence that defendant appeared nervous, gave the teller a black pouch, and said, “give me all your money,” was sufficient to establish intimidation under 18 U.S.C. 2113(a)); *United States v. Smith*, 973 F.2d 603, 605 (8<sup>th</sup> Cir 1992) (Evidence that defendant who appeared edgy and nervous and said that he wanted \$2,500 in fifties and hundreds and that the teller could blame this

on the president or whoever you want, was sufficient was sufficient to establish the intimidation element under 18 U.S.C. § 2113(a)). Numerous other cases have reached similar holdings. *See e.g., United States v. Hill*, 187 F.3d 698, (7th Cir. 1999); *United States v. Henson*, 945 F.2d 430 (1st Cir. 1991); *United States v. Gilmore*, 282 F.3d 398 (6th Cir. 2002); *United States v. Burnley*, 533 F.3d 901 (7th Cir. 2008).

Given all of the above mentioned caselaw, the evidence in the present case was sufficient to prove the crime of robbery. Specifically, the undisputed evidence showed that the Defendant entered the bank wearing a baseball cap and very dark sunglasses. CP 62. The teller noted that the Defendant appeared suspicious and fidgety, and the Defendant then approached the teller with a “sense of urgency” as if he was on a “mission.” CP 62, 65. The Defendant then placed a plastic shopping bag on the counter and demanded money, and this demand was unsupported by even the pretext of any lawful entitlement to the funds. CP 20-21, 50. The Defendant repeated his demand “with authority in his voice.” CP 65. In addition, the surveillance photographs show the Defendant leaning into the teller’s counter in what the trial court reasonably found was an invasion of the teller’s personal space. *See*, Exhibits 1-20 (State’s Supp. Designation of Clerk’s Papers), RP (July 8) at 70-71. These actions were fraught with the implicit threat to use force.

Not surprisingly, the teller explained that the Defendant's actions caused to feel nervous and shaky, and she explained that she was in a state of "shock" and that she needed to do what he asked so she could get him out of there. CP 63-65. Although the teller did not see a weapon and the Defendant did not display a weapon, the teller thought that the Defendant could have had one. CP 62-64, 80. The teller thus felt like she needed to give the Defendant the money or else he might do something to hurt her. CP 65. The teller reasonably understood, as any reasonable person in her situation would have, that the situation was threatening "because it's in a bank, obviously he wants money," and that if "somebody is going to rob a bank they know there's going to be some serious consequences." CP 74. Finally, Ms. Hoag further explained that she felt like she needed to give the Defendant the money or else he might do something to hurt her. CP 65.

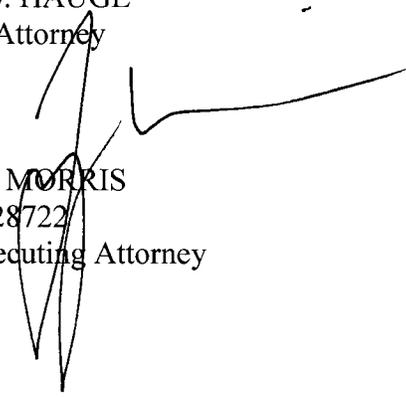
Given all of these facts, there clearly was substantial evidence to support the trial court's finding that the Defendant committed the crime of robbery in the first degree.

#### **IV. CONCLUSION**

For the foregoing reasons, the Defendant's conviction and sentence should be affirmed.

DATED April 16, 2014.

Respectfully submitted,  
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**April 16, 2014 - 11:07 AM**

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