

66526-0

66526-0

NO. 66526-0-1

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

DAVID BRYNER,

Appellant.

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STATE OF WASHINGTON
COURT OF APPEALS
DIVISION ONE

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

BRIEF OF APPELLANT

GREGORY C. LINK
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, WA 98101
(206) 587-2711

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A. ASSIGNMENTS OF ERROR.

1. In the absence of proof beyond a reasonable doubt of each element of the offense, David Bryner's conviction for first degree robbery deprives him of due process.

2. The trial court erred and denied Mr. Bryner due process when it refused to instruct the jury on a lesser included offense.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. The Fourteenth Amendment's Due Process Clause requires the State prove each element of an offense beyond a reasonable doubt. To convict Mr. Bryner of first degree robbery the State was required to prove he committed a robbery in a financial institution. Did the State prove the offense occurred in a financial institution?

2. The Fourteenth Amendment's Due Process Clause requires a trial court to instruct on an inferior degree offense when requested by the defendant, where in the light most favorable to the defendant the evidence supports an inference that only the lesser offense was committed. In a prosecution for first degree robbery the State's evidence supported a reasonable inference that no force or threat of force was used to commit a theft. Did the trial

court deny Mr. Bryner due process when it refused to instruct the jury on the lesser offense of first degree theft?

C. STATEMENT OF THE CASE.

Amanda Gradwahl,¹ an employee at a Chase Bank branch, returned from her break and called the next person in line to her teller window. 12/1/10 RP 12-13. A man approached and handed Ms. Gradwahl a note telling her to give him all her larger bills and stating that if she complied no one would be injured. Id. at 13. Ms. Gradwahl complied, giving the man slightly more than \$1,000 from her cash drawer. Id. at 16.

Mr. Bryner's relatives identified him from bank surveillance photographs shown them by police officers. 11/30/10 RP 107, 112-13.

The State charged Mr. Bryner with first degree robbery. CP 1-5. A jury convicted him as charged. CP 180.

¹ Ms. Gradwahl was married and changed her last name after the events at issue in this case but prior to trial. At the time of the event her name was Amanda Running. She will be referred to by her name at the time of trial.

D. ARGUMENT

1. THE STATE DID NOT PRESENT SUFFICIENT EVIDENCE TO PROVE EACH ELEMENT OF THE OFFENSE BEYOND A REASONABLE DOUBT.

a. Due process required the State prove each element of the offense beyond a reasonable doubt. In a criminal prosecution, the Fourteenth Amendment Due Process Clause requires the State prove each essential element of the crime charged beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Evidence is sufficient only if, in the light most favorable to the prosecution, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

b. The State did not prove Mr. Bryner robbed a “financial institution.” RCW 9A.56.190 provides:

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. 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. Such taking constitutes robbery whenever it appears that, although the taking was fully completed without the knowledge of the person from whom taken, such knowledge was prevented by the use of force or fear.

A person commits first degree robbery when “he. . . commits a robbery within and against a financial institution as defined in RCW 7.88.010 or 35.38.060.” RCW 9A.56.200.

RCW 7.88.010(6) defines a “financial institution” as “a bank, trust company, mutual savings bank, savings and loan association, or credit union authorized by federal or state law to accept deposits in this state.” RCW 35.38.060 provides:

“Financial institution,” as used in the foregoing provisions of this chapter, means a branch of a bank engaged in banking in this state in accordance with RCW 30.04.300, and any state bank or trust company, national banking association, stock savings bank, mutual savings bank, or savings and loan association, which institution is located in this state and lawfully engaged in business.

Applying either statutory definition, the State did not establish the branch was authorized by state or federal law to engage in banking. Instead, the sum of the State’s evidence was that the branch accepted deposits and withdrawals and was “regulated” by state and federal law. 12/1/10 RP 5-6. The State’s evidence did not establish what these regulations entailed. Being

subject to state and or federal “regulation” is not the same as being authorized by federal and/or state law to engage in banking. There are countless businesses which are subject to government regulations of one sort or another, yet that does not make each of those businesses a financial institution. The State did not prove Mr. Bryner robbed a financial institution.

c. The Court must dismiss Mr. Bryner’s first degree robbery conviction. The absence of proof beyond a reasonable doubt of an element requires dismissal of the conviction and charge. Jackson, 443 U.S. at 319; State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). Where a case is reversed for insufficient evidence, the Fifth Amendment’s Double Jeopardy Clause bars retrial of a case. North Carolina v. Pearce, 395 U.S. 711, 717, 89 S.Ct. 2072, 23 L.Ed. 2d 656 (1969), reversed on other grounds, Alabama v. Smith, 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989)). Because the State failed to prove Mr. Bryner robbed a financial institution, the Court must reverse his conviction and dismiss the charge.

2. THE TRIAL COURT'S REFUSAL TO INSTRUCT THE JURY THAT IT COULD CONVICT OF A LESSER OFFENSE DENIED MR. BRYNER DUE PROCESS.

a. Mr. Bryner properly requested an instruction on the lesser offense of first degree theft. Mr. Bryner requested the trial court instruct the jury on the lesser included offense of first degree theft. CP 175-177; 12/2/10 RP 8-11. The trial court refused to provide the instruction to the jury concluding there was no factual basis on which the jury could find Mr. Bryner guilty of only the lesser offense. 12/2/10 RP 11.

b. Due process requires a court provide instructions on lesser offenses where those instructions are supported by the evidence in the case. Generally a criminal defendant may only be convicted of those offenses charged in the information, or those offenses which are either lesser included offenses, or inferior degrees of the charged offense. Schmuck v. United States, 489 U.S. 705, 717-18, 109 S.Ct. 2091, 103 L.Ed. 734 (1989); State v. Tamalini, 134 Wn.2d 725, 731, 953 P.2d 450 (1998) (citing State v. Irizarry, 111 Wn.2d 591, 592, 763 P.2d 432 (1998)). However, RCW 10.61.003 and RCW 10.61.006 permit a conviction for an offense which is an inferior degree or lesser included offense of the

offense charged. The failure to instruct the jury on a lesser offense, where the evidence might allow the jury to convict the defendant of only the lesser offense violates the Fourteenth Amendment. Beck v. Alabama, 447 U.S. 625, 636-38, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980)).

An instruction on a lesser offense is warranted where: (1) each element of the lesser offense must necessarily be proved to establish the greater offense as charged (legal prong); and (2) the evidence in the case supports an inference that the lesser offense was committed (factual prong). State v. Berlin, 133 Wn.2d 541, 548, 947 P.2d 700 (1997); State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978).

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

offense was committed, rather than merely the conclusion that the jury might disbelieve the State's evidence, the instruction must be given. Fernandez-Medina, 141 Wn.2d at 456. Importantly, in reaching this determination the trial court cannot "limit[] its view of the evidence [to that presented by the defense] but must consider all of the evidence that is presented at trial." Id. (citing State v. Bright, 129 Wn.2d 257, 269-70, 916 P.2d 922 (1996)).

c. Mr. Bryner was entitled to have the jury instructed on the lesser offense. A robbery is in essence a theft of property from the person of another by force. RCW 9A.56.190; CP 191 (Instruction 7). The State charged Mr. Bryner with first degree robbery in this case because it alleged the robbery occurred in a financial institution. RCW 9A.56.200; CP 192 (Instruction 8). 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 commits first degree theft when he commits theft of any property "taken from the person of another." RCW 9A.56.030(1)(b). Each element of the "from the person of another" prong of first degree theft is a necessary element of first

degree robbery as charged in this case. Thus, the legal prong was satisfied.

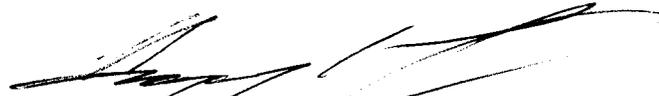
In the light most favorable to Mr. Bryner, the evidence permitted a reasonable juror to conclude that while Mr. Bryner took property from the person of another, he did not do so by force. Moreover, viewing the evidence in the light most favorable to Mr. Bryner, a reasonable juror could find that the note given to Ms. Gradwahl did not truly threaten the use of force. Thus, the factual prong was also satisfied and the court erred in refusing to instruct the jury on the lesser offense.

“A defendant in a criminal case is entitled to have the jury fully instructed on the defense theory of the case.” State v. Staley, 123 Wn.2d 794, 803, 872 P.2d 502 (1994). Mr. Bryner was entitled to the requested instructions in this case. Fernandez-Medina, 141 Wn.2d at 461-62. The trial court’s failure to instruct the jury on the lesser offense violated the Fourteenth Amendment. Beck, 447 U.S. at 636-38.

E. CONCLUSION.

For the reasons above, this Court must reverse Mr. Bryner's conviction.

Respectfully submitted this 28th day of September, 2011.

A handwritten signature in black ink, appearing to read 'Gregory C. Link', is written over a horizontal line.

GREGORY C. LINK -25228
Washington Appellate Project
Attorney for Appellant

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

STATE OF WASHINGTON,)

Respondent,)

v.)

DAVID BRYNER,)

Appellant.)

NO. 66526-0-I

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COURT OF APPEALS DIVISION ONE
STATE OF WASHINGTON

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 28TH DAY OF SEPTEMBER, 2011, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KING COUNTY PROSECUTING ATTORNEY
APPELLATE UNIT
KING COUNTY COURTHOUSE
516 THIRD AVENUE, W-554
SEATTLE, WA 98104

(X) U.S. MAIL
() HAND DELIVERY
() _____

[X] DAVID BRYNER
309165
WASHINGTON STATE PENITENTIARY
1313 N 13TH AVE
WALLA WALLA, WA 99362

(X) U.S. MAIL
() HAND DELIVERY
() _____

SIGNED IN SEATTLE, WASHINGTON THIS 28TH DAY OF SEPTEMBER, 2011.

X _____
[Signature]

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710