

73462-8

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June 17, 2016  
Court of Appeals  
Division I  
State of Washington

73462-8

NO. 73462-8-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

BRYAN SASS,

Appellant.

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

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APPELLANT'S REPLY BRIEF

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Marla L. Zink  
Attorney for Appellant

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

**TABLE OF CONTENTS**

A. ARGUMENT IN REPLY ..... 1

    1. The evidence is insufficient to sustain the robbery conviction because Mr. Sass calmly requested money without any physical or verbal indication he was armed or intended harm.... 1

    2. The requested lesser-included offense instruction for attempted first degree theft should have been provided .....5

    3. The Court should accept the State’s concession that the offender score was miscalculated and remand for resentencing..... 7

B. CONCLUSION ..... 8

**TABLE OF AUTHORITIES**

**Washington Supreme Court Decisions**

*State v. Berlin*, 133 Wn.2d 541, 947 P.2d 700 (1997)..... 7

*State v. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980)..... 5

*State v. Johnson*, 173 Wn.2d 895, 270 P.3d 591 (2012) ..... 1

*State v. McKague*, 172 Wn.2d 802, 262 P.3d 1225 (2011) ..... 6

*State v. Witherspoon*, 180 Wn.2d 875, 329 P.3d 888 (2014) ..... 6

**Washington Court of Appeals Decisions**

*State v. Collinsworth*, 90 Wn. App 546, 966 P.2d 905 (1997) ..... 1, 2

*State v. Farnsworth*, 184 Wn. App. 305, 348 P.3d 759 (2014) ..... 1, 5, 6

*State v. Herrera*, 95 Wn. App. 328, 977 P.2d 12 (1999)..... 6

*State v. O’Connell*, 137 Wn. App. 81, 152 P.3d 349 (2007) ..... 6

*State v. Shcherenkov*, 146 Wn. App. 619, 191 P.3d 99 (2008) ..... 3, 4, 6

*State v. Smith*, 115 Wn.2d 434, 798 P.2d 1146 (1990)..... 6

**Statutes**

RCW 9A.28.020 ..... 1

RCW 9A.56.020 ..... 6

RCW 9A.56.030 ..... 6

RCW 9A.56.190 ..... 1, 6

RCW 9A.56.200 ..... 6

A. ARGUMENT IN REPLY

- 1. The evidence is insufficient to sustain the robbery conviction because Mr. Sass calmly requested money without any physical or verbal indication he was armed or intended harm.**

Robbery requires the use or threatened use of immediate force, violence, or fear of injury. RCW 9A.56.190. The State charged Mr. Sass with attempted robbery in the first degree, and therefore had to show he had the specific intent to commit first degree robbery. RCW 9A.28.020(1); *see State v. Johnson*, 173 Wn.2d 895, 901, 270 P.3d 591 (2012). But the evidence is insufficient to show Mr. Sass used or threatened the use of immediate force, violence or fear of injury. *See State v. Farnsworth*, 184 Wn. App. 305, 348 P.3d 759 (2014) (evidence of robbery insufficient), *review granted* 183 Wn.2d 1001 (2015) (oral arg. heard Oct. 22, 2015).

The State overstates this Court's decision in *Collinsworth*. Resp. Br. at 5-6. *Collinsworth* does not control here. That case involved unchallenged findings, including that the tellers were fearful of immediate injury. *State v. Collinsworth*, 90 Wn. App 546, 554, 966 P.2d 905 (1997). Although the teller here testified she was "scared" that Mr. Sass was there to "rob" her, she did not say she was fearful of any immediate injury or use of force. 3/23/15 RP 39. Additional facts

distinguish these cases. Mr. Sass had waited patiently in line for several minutes, and stood at the counter casually, in a manner indistinguishable from the three other customers at the teller counter. Exhibit 4, clip 2 at 02:30-02:48. Mr. Sass had the same calm, casual demeanor when he responded to Mr. Flagg on his unremarkable way out of the bank. 3/23/15 RP 51-53, 57-58; Exhibit 4, clip 2 at 02:53-03:12. In *Collinsworth*, on the other hand, the Court relied on the defendant's nervous appearance and use of a direct, demanding and serious voice. The tellers there also testified they felt personally threatened or feared for the immediate safety of others. *Id.* at 548-50. Most of the tellers also believed the defendant was armed. *Id.* at 549-50.

In addition, *Collinsworth* does not control here because that court looked to federal decisions interpreting the federal bank robbery statute to determine the sufficiency of the evidence of threatened use of immediate force under Washington law. 90 Wn. App. at 552. As the State concedes, the federal and state offenses are defined differently on this element of intent. Resp. Br. at 15-16. Accordingly, in light of the facts of this case, federal case law is inapposite.

Division Two's decision in *State v. Shcherenkov*, 146 Wn. App. 619, 191 P.3d 99 (2008) also depended on more evidence of specific intent to use or threaten the use of immediate force, violence, or fear of injury. In the Wells Fargo bank incident discussed by the State, the defendant had a prewritten demand note stating "Please be calm. This is a robbery."; the teller testified she complied for her own or other's safety; she interpreted "robbery" to convey an intent to harm; she believed the situation could escalate beyond the note; and she believed the defendant reached in his pocket to escalate the situation perhaps by calling for assistance. *Compare Shcherenkov*, 146 Wn. App. at 622 with Resp. Br. at 7-8. These facts go beyond the calm Mr. Sass, who made no gestures, and the testimony of the teller presented here.

In another incident charged in *Shcherenkov*, the defendant kept his hand in his pocket, implying he had a gun. 146 Wn. App. at 622-23. The teller there testified the defendant bore a look indicating his seriousness. *Id.*

In yet a third incident, the defendant entered the bank with his hands in his pockets then held up a demand note. 146 Wn. App. at 623. The teller in that incident also testified that the defendant's conduct caused her concern for someone getting hurt and that she felt personally

threatened. *Id.* In upholding the sufficiency of the evidence on each of these counts, the Court relied on the explicit note and the tellers' perception of a threat of immediate harm. *Id.* at 628-29.

The final incident in *Shcherenkov* also included greater evidence of specific intent:

In the fourth incident, Shcherenkov entered a Puyallup branch of Rainier Pacific Bank and approached bank teller Tanya James. As he approached, he kept his hands in his pockets. He smiled and set a note on the counter that stated in heavy capital letters, "Place \$4,000 in an envelope. Do not make any sudden movements or actions. I will be watching you." RP at 669. His other hand remained in his pocket. James interpreted the "I will be watching you" part of the note to mean that he possibly had a weapon he might use. James "just did what [they] were trained to do and [gave] him what he asked for so that there were no injuries to anybody." RP at 670.

146 Wn. App. at 623. Here, the Court held

A rational trier of fact could reasonably interpret Shcherenkov'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. Furthermore, Shcherenkov kept his hand in his pocket for the entire exchange, and the jury could have reasonably found that he was deliberately insinuating that he had a weapon.

*Id.* at 629.

Division Two distinguished *Shcherenkov* in a case more similar to the incident at issue here than any of the incidents at issue in *Shcherenkov*. *Farnsworth*, 184 Wn. App. at 310-11.

The evidence is insufficient to show the element of use or threatened use of immediate force, fear or injury, where Mr. Sass asked for denominations in a calm, casual, quiet demeanor, said he was there to “rob” but then left of his own volition without making any threats, without gesturing, and without using force. This absence of proof requires dismissal of the conviction and charge. *E.g.*, *State v. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980).

**2. The requested lesser-included offense instruction for attempted first degree theft should have been provided.**

Mr. Sass requested a lesser included offense instruction for attempted theft in the first degree. CP 280-82, 286 (Sass’s requested lesser offense instructions). This instruction would have directed the jury that it could convict Mr. Sass of the lesser included charge if it found Mr. Sass attempted a theft by taking rather than a robbery. Theft is generally a lesser included offense of robbery. *E.g.*, *State v. Witherspoon*, 180 Wn.2d 875, 886-87, 329 P.3d 888 (2014) (reviewing claim that counsel’s decision not to seek a lesser included offense

instruction for theft constituted ineffective assistance); *Farnsworth*, 184 Wn. App. at 308 (court provided instruction on first-degree theft as lesser included offense of robbery); *Shcherenkov*, 146 Wn. App. at 630 n.4 (treating first-degree theft as a lesser-included offense of first-degree robbery, but rejecting appellant's factual basis for a lesser-included instruction); *State v. O'Connell*, 137 Wn. App. 81, 95, 152 P.3d 349 (2007) (same); *State v. Herrera*, 95 Wn. App. 328, 330 n.1, 977 P.2d 12 (1999) (party concedes theft is lesser included of robbery); *State v. McKague*, 172 Wn.2d 802, 804, 262 P.3d 1225 (2011) (jury instructed on third degree theft as a lesser included offense of first degree robbery).

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

considered crime as charged and prosecuted when evaluating propriety of lesser included offense instruction). While taking from the person of another has not been defined with regard to theft in the first degree, this Court does not have to decide that issue because the attempted taking here was from the person of another, if at all.

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

**3. The Court should accept the State’s concession that the offender score was miscalculated and remand for resentencing.**

The State concedes that the trial court erred in finding federal bank robbery comparable to Washington’s crime of robbery, resulting in a miscalculation of Mr. Sass’s offender score. The federal bank robbery statute is legally broader than Washington’s first degree robbery statute, and the proven facts of the prior offenses do not

support the narrower elements that would satisfy this state's statute. For the reasons set forth in Mr. Sass's opening brief, as conceded in the State's response brief, if the conviction is not overturned for insufficiency or the failure to provide the lesser offense instruction, this Court should remand to the trial court for resentencing.

B. CONCLUSION

Robbery is an aggravated form of theft based on the use or threatened use of immediate force. Because the State's evidence on this element was lacking, the conviction should be reversed and the charge dismissed. Mr. Sass acted calmly, spoke softly, and made no distinguishable or threatening gestures. His use of the word "rob" cannot elevate this act from attempted theft to attempted robbery.

In the alternative, the matter should be remanded for a new trial where the jury is instructed on the lesser included offense of attempted theft in the first degree.

DATED this 17th day of June, 2016.

Respectfully submitted,

s/ Marla L. Zink  
Marla L. Zink – WSBA 39042  
Washington Appellate Project  
Attorney for Appellant

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

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|----------------------|---|---------------|
| STATE OF WASHINGTON, | ) |               |
|                      | ) |               |
| Respondent,          | ) |               |
|                      | ) | NO. 73462-8-I |
|                      | ) |               |
| BRYAN SASS,          | ) |               |
|                      | ) |               |
| Appellant.           | ) |               |

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 17<sup>TH</sup> DAY OF JUNE, 2016, I CAUSED THE ORIGINAL **REPLY 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] SETH FINE, DPA<br>[sfine@snoco.org]<br>SNOHOMISH COUNTY PROSECUTOR'S OFFICE<br>3000 ROCKEFELLER<br>EVERETT, WA 98201 | ( )<br>( )<br>(X)<br>( ) | U.S. MAIL<br>HAND DELIVERY<br>AGREED E-SERVICE<br>VIA COA PORTAL |
| [X] BRYAN SASS<br>707483<br>WASHINGTON STATE PENITENTIARY<br>1313 N 13 <sup>TH</sup> AVE<br>WALLA WALLA, WA 99362        | (X)<br>( )<br>( )        | U.S. MAIL<br>HAND DELIVERY<br>_____                              |

**SIGNED** IN SEATTLE, WASHINGTON, THIS 17<sup>TH</sup> DAY OF JUNE, 2016.



X \_\_\_\_\_

**Washington Appellate Project**  
701 Melbourne Tower  
1511 Third Avenue  
Seattle, Washington 98101  
☎(206) 587-2711