IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. RUFUS A. PHELPS, III, Appellant.	)	No. 67364-5-I
	)	DIVISION ONE
	)	UNPUBLISHED OPINION
	)	FILED: September 26, 2011

Spearman, J. — Rufus Phelps appeals his conviction of robbery in the first degree. He argues that the evidence presented by the State was insufficient to prove beyond a reasonable doubt that he threatened to use force when taking the money from the bank teller. He also contends that the trial court's instructions defining robbery and setting forth the necessary elements of first-degree robbery relieved the State of its burden of proving each element of the crime beyond a reasonable doubt. Finally, Phelps argues that the trial court erred when it refused to instruct the jury on the lesser offense of theft in the third degree.

Viewing the evidence in the light most favorable to the State, we conclude it is sufficient to support the jury's guilty verdict. We also conclude that the jury

instructions were proper. Accordingly, we affirm.

FACTS

On January 11, 2010, Rufus Phelps walked into a credit union in Elma, Washington. The teller greeted Phelps, and in response Phelps gave the teller a note that said, "Don't panic. Put the money in the bag." The teller was surprised and looked at Phelps in disbelief. Phelps told her, "Yeah, I'm sorry," twice. Then Phelps put a bag on the counter and the teller filled it with $6375. After the teller had put almost all of the money at her station in the bag, Phelps said, "That's enough" and, "Thank you," and walked out of the bank with the bag of money.[1]

Phelps did not make any verbal threats to the teller during the interaction, nor did he make any threatening gestures, but the teller understood the note to be a threat to use force if she did not comply with Phelps's demand. The teller described Phelps's tone as both calm and condescending, as if he knew exactly what he was doing. Phelps's actions caused the teller to panic. She could not remember all of the things that happened during her interaction with Phelps. Additionally, she failed to follow her extensive robbery training, which included teaching tellers to first give a robber alarm-triggering "bait money." The teller complied with Phelps's request and failed to activate alarms because she was

[1] Phelps directed the teller to stop putting money in the bag once the bait money was all that was left at her station. Bait money sets off an alarm at the local police station when it is removed from the teller station.

"scared"; "didn't know what he was capable of doing"; and didn't want to "try anything to provoke him."

At the conclusion of the State's case, Phelps sought dismissal of the charge because there was no evidence that the robbery had been accomplished by the "use or threatened use of immediate force, violence, or fear of injury. . . ." The court denied his motion on the grounds that the evidence was sufficient to support a conclusion that Phelps implied a threat to use force.

Phelps objected to jury instruction number five because it defined robbery as requiring an "explicit or implied" threat to use force and number seven because it used the phrase "explicit or implied threatened use, of immediate force…." The trial court overruled the objection, stating that just because the demand for money was done in a "friendly" and "mostly nonverbal way" did not change the fact that it was still a demand backed up by an implied threat to use force.

Phelps requested that the court instruct the jury on the lesser included offense of theft in the third degree. The trial court denied the request because the evidence showed that Phelps took money directly from the frightened teller rather than merely stealing unattended money. The jury convicted Phelps of robbery in the first degree. He appeals.

DISCUSSION

A. Sufficiency of the evidence.

The due process clause of the Fourteenth Amendment of the United States Constitution requires that the state prove every element of a crime beyond a reasonable doubt. U.S. Const. Amend. XIV; In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). To determine whether the evidence is sufficient to sustain a conviction, we must determine "whether any rational fact finder could have found the essential elements of the crime beyond a reasonable doubt." [2] State v. Engel, 166 Wn.2d 572, 576, 210 P.3d 1007 (2009). 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). In answering this question we view the evidence in the light most favorable to the State and draw all reasonable inferences in the State's favor. Id. Determinations of credibility are for the trier of fact and are not subject to appellate review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). On issues concerning conflicting testimony, credibility of witnesses, and persuasiveness of the evidence, this court defers to the jury. State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533 (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).

[2] Phelps attempts to portray this as a constitutional question which must be reviewed de novo. However, the standard of review for challenges to the sufficiency of the evidence is well established. See, e.g., State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Washington's robbery statute provides that, "[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. "Any force or threat, no matter how slight, which induces an owner to part with his property, is sufficient to sustain a robbery conviction." State v. Handburgh, 119 Wn.2d 284, 293, 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. 546, 553, 966 P.2d 905 (1997).

Phelps claims that because he was calm and polite and made no overt verbal or physical threats while in the bank, the evidence is insufficient to establish beyond a reasonable doubt that he threatened to use immediate force, violence, or fear of injury to accomplish the taking of property. We disagree.

In Collinsworth, this court 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 each instance the defendant approached a bank teller and demanded a specific denomination of bills. If the teller hesitated, the defendant reiterated his demand and instructed the teller not to give him any bait money or dye packs. The

defendant often spoke in a quiet, serious voice and many of the tellers could not tell if he was armed. In each case, except for the aborted attempt, the teller gave the defendant the money he asked for because the teller felt personally threatened or was worried that the defendant might become violent if he or she refused to comply.

Likewise, in State v. Shcherenkov, 146 Wn. App. 619, 626, 191 P.3d 99 (2008), review denied, 165 Wn.2d 1037, 205 P.3d 131 (2009), Division Two of this court rejected the 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 that case, the defendant walked into several banks and handed a note to a teller. Id. at 622-23. The language of the notes varied, but they generally informed the teller that "[t]his is a robbery" or instructed the teller to "please be calm." Id. The notes also contained a demand that the teller put a specific amount of money into an envelope. Id. The defendant was calm and had a serious demeanor that at least one teller found intimidating. Id. at 623. He often wore baggy clothing where he could have concealed a weapon, although none of the tellers ever saw one. Id. at 622-23. All four of the tellers testified that they feared a violent reaction if they failed to comply with the demand for money. Id.

Phelps's attempt to distinguish his conduct from that of the defendants in Collinsworth and Shcherenkov is unpersuasive. In Shcherenkov, the defendant

used a note that started with some form of "stay calm" and a demand for a specific amount of money. This is almost identical to the language used by Phelps. There was no indication Phelps had a weapon in the present case, but this is no different than three of the four counts in Shcherenkov, and five of the six counts in Collinsworth. Likewise, Phelps's calm demeanor and serious voice were similar to the defendant in Collinsworth in at least four of the counts. Moreover, neither Phelps nor the defendants in Collinsworth or Shcherenkov made even a pretext of a legal claim to the money they were demanding.

Viewing the evidence of Phelps's conduct in the light most favorable to the State, it is sufficient to support a rational juror's finding that he took property from the teller by the threatened use of force.

B. Jury Instructions.

Phelps next argues the trial court erred because, although it instructed the jury it could find the defendant guilty based on a finding of an implied threat to use force, it "failed to provide any guidance explaining how to evaluate whether or not Mr. Phelps's words and conduct implied a threat to use force." Phelps asserts that the failure to do so was error because it allowed the jury to convict him based solely on the teller's subjective belief that Phelps threatened to use force against her, and because it "relieved the State of its burden to prove an actual threat to use force." Neither argument is well taken.

Generally, a party that has "failed to object at trial to the absence of an

instruction" may not raise the objection for the first time on appeal. State v. Scott, 110 Wn.2d 682, 684, 757 P.2d 492 (1988). With respect to jury instructions, objections must be "timely and well stated . . . 'in order that the trial court may have the opportunity to correct any error.'" Scott, 110 Wn.2d at 685-86 (quoting Seattle v. Rainwater, 86 Wn.2d 567, 571, 546 P.2d 450 (1976)). It is only where an instructional error is "of constitutional magnitude" that it may be challenged for the first time on appeal. Scott, 110 Wn.2d at 686 (citing RAP 2.5(a)(3)). The appellant must show manifest error involving a constitutional right. RAP 2.5(a)(3); State v. McDonald, 138 Wn.2d 680, 691, 981 P.2d 443 (1999). An error is "manifest" if it had "'practical and identifiable consequences in the trial of the case.'" State v. WWJ Corp., 138 Wn.2d 595, 603, 980 P.2d 1257 (1999) (quoting State v. Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (1992)).

Failure to instruct on an element of the crime is an error of constitutional magnitude that can be raised for the first time on appeal. Scott, 110 Wn.2d at 690 (citing State v. Davis, 27 Wn. App. 498, 505-06, 618 P.2d 1034 (1980) (failure to define robbery in accomplice liability instruction) (disapproved on other grounds, State v. Riker, 123 Wn.2d 351, 869 P.2d 43 (1994)). But Phelps's claim here is not that the trial court failed to instruct the jury as to all the elements of first degree robbery, but rather that it failed to define the term "implied threatened use… of immediate force…." It is well established that the

failure to instruct on the meaning of particular terms used in an instruction is not an error of constitutional magnitude. Scott, 110 Wn.2d at 690 ("[f]ailure to give a definitional instruction is not a failure to instruct on an essential element" and is not of constitutional magnitude). Thus, Phelps may not raise the issue for the first time on appeal. But even if we were to consider them, the arguments are without merit.

Instructions are proper when they accurately state the law and give the parties an opportunity to argue their theory of the case. State v. Aguirre, 168 Wn.2d 350, 363-64, 229 P.3d 669 (2010). The trial court's instruction regarding an explicit or an implied threat to use force to take property was an accurate statement of the law. Shcherenkov, 146 Wn. App. at 626. Phelps was also able to argue, and did argue, that the evidence did not support a conclusion that his actions constituted an implied threat.

Moreover, the argument that the jury convicted solely on evidence of the teller's subjective fear of an implied threat of force is simply inaccurate. There was objective evidence upon which the jury could have relied. A demand for another's property without any lawful authority, accompanied by the word "don't panic" implies that failure to comply will result in some coercive measures. In light of this evidence, the claim that the trial court's instructions relieved the State of its burden to prove an actual threat to use force to take the property is untenable and we reject it.

Phelps next argues the trial court erred by not giving an instruction for third-degree theft. We disagree. A defendant's right to a lesser included offense instruction is statutory. RCW 10.61.006; State v. Davis, 121 Wn.2d 1, 4, 846 P.2d 527 (1993). Under RCW 10.61.006, a "defendant may be found guilty of an offense the commission of which is necessarily included within that with which he is charged." A defendant is entitled to an instruction on a lesser included offense if each of the elements of the lesser offense is a necessary element of the charged offense (the legal prong) and the evidence supports an inference that the lesser crime was committed (the factual prong). State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978). If a trial court improperly refuses to give a lesser included offense instruction, the remedy is to set aside the conviction and remand for a new trial. State v. Parker, 102 Wn.2d 161, 166, 683 P.2d 189 (1984).

When a trial court's rejection of a proposed instruction is based on rulings as to the law, the refusal is subject to de novo review. State v. Lucky, 128 Wn.2d 727, 731, 912 P.2d 483 (1996), overruled on other grounds by, State v. Berlin, 133 Wn.2d 541, 947 P.2d 700 (1997). If a court refuses to give an instruction based on a factual dispute then we view the evidence in the light most favorable to the requesting party and the denial is reviewed for abuse of discretion. State v. Hunter, 152 Wn. App. 30, 43, 216 P.3d 421 (2009), review denied, 168 Wn.2d 1008, 226 P.3d 781 (2010).

Here, as a factual matter, Phelps was not entitled to an instruction on third degree theft. It is undisputed that Phelps took $6375, well beyond the $750 maximum for third degree theft. See RCW 9A.56.050. There was no error.[3]

Affirmed.

Spearman, J.

WE CONCUR:

Cox, J.

Becker, J.

[3] Phelps also asserts that his Fourteenth Amendment right to due process was violated when the trial court refused to give a lesser included offense instruction. Under the Fourteenth Amendment, "due process requires that a lesser included offense instruction be given only when the evidence warrants such an instruction. But due process requires that a lesser included offense instruction be given *only* when the evidence warrants such an instruction." Hopper v. Evans, 456 U.S. 605, 611, 102 S.Ct. 2049, 72 L.Ed.2d 367 (1982). As discussed above, the evidence in this case did not warrant an instruction on third degree theft.

Phelps further contends that he has an independent state constitutional right to a lesser included jury instruction. Even assuming that the Washington Constitution grants criminal defendants such a right, it is difficult to see how the Workman test violates that right. The Workman test requires little evidence in order for a defendant to be entitled to an instruction. However, it is error for a court to give an instruction not supported by the evidence. State v. Warden, 133 Wn.2d 559, 563, 947 P.2d 708 (1997). As has already been stated, the evidence simply does not support an inference that Phelps committed theft in the third degree. Therefore, his state constitutional rights were not violated by the denial of the instruction.