70720-5

70720-5

NO. 70720-5-I

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

STATE OF WASHINGTON,

Respondent,

v.

BENJAMIN ROY,

Appellant.

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

The Honorable Bruce I. Weiss, Judge

REPLY BRIEF OF APPELLANT

KEVIN A. MARCH
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

A. ARGUMENT IN REPLY

THE STATE PROVIDED INSUFFICIENT EVIDENCE THAT THE BANK QUALIFIED AS A FINANCIAL INSTITUTION

The State bears the burden of proving all elements of a charged offense beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). A conviction must be reversed where, viewing the evidence in the light most favorable to the State, no rational tier of fact could find all elements of the charged crime beyond a reasonable doubt. State v. Engel, 166 Wn.2d 572, 576, 580, 210 P.3d 1007 (2009). Even when viewing the evidence in the light most favorable to the prosecution, the State failed to prove that Chase Bank qualified as a "financial institution" as that term is statutorily defined. Accordingly, this court must reverse Roy's conviction and remand for dismissal of this prosecution with prejudice.[1]

It is telling that the State fails to address Roy's arguments that there was insufficient direct evidence to show Chase qualified as a financial institution. See Br. of Resp't at 13-15. Instead, the State merely points to the fact that bank employee Travis Olsen "testified that his understanding that Chase bank was operating lawfully in the State of Washington was

[1] In his opening brief, Roy requested reversal and remand for retrial. Br. of Appellant at 34. This was an oversight. When the State fails to meet its burden of proof, as it did in this case, "[t]he conviction is reversed and the charges are dismissed with prejudice." State v. Hickman, 135 Wn.2d 97, 99, 954 P.2d 900 (1998).

based upon the deposit account agreement he uses for checking accounts." Br. of Resp't at 14. In addition, the State writes that "Olsen also testified he was personally aware of Chase bank's advertising campaign in the area through TV ads, [I]nternet ads[,] and print ads[,] including the deposit services." Br. of Resp't at 15. But nowhere in its briefing does the State address the fact that Olsen's testimony was not based on personal knowledge, constituted hearsay, failed to satisfy the best evidence rule, and was therefore wholly inadmissible. See Br. of Appellant at 21-26. The State's failure to take on Roy's arguments regarding the complete lack of direct evidence that Chase qualified as a financial institution indicates that the State has no response, ostensibly because there is none. This court must not consider Olsen's inadmissible testimony to establish that Chase qualified as a statutorily defined financial institution.

Similarly, the State does not respond to Roy's arguments regarding the insufficiency of circumstantial evidence in this case. Instead, without citing the record, the State asserts that people were at the bank to "conduct bank business," and that "[t]hree employees testified they worked for the bank [and] . . . . to accepting deposits as part of their jobs." Br. of Resp't at 14. Rather that demonstrating that that these facts give rise to a reasonable inference that Chase qualified as a statutorily defined financial institution, the State merely makes the same specious arguments as Division Two in

State v. Liden, 138 Wn. App. 110, 119-20, 156 P.3d 259 (2007). Br. of Resp't at 14; cf. Br. of Appellant at 28-32 (providing a full analysis of the fallacious reasoning in Liden). The Liden court's and the State's paucity of legitimate reasoning is alarming and, if accepted by this court, would relieve the State of its burden to prove every element of an offense beyond a reasonable doubt. The fact that the Lake Stevens Chase has employees or that people go there to conduct "bank business" does not support a reasonable inference that Chase meets the very specific statutory definition of financial institution provided in RCW 7.88.010(6) or RCW 35.38.060, as RCW 9A.56.200(1)(b) requires.

Turning to these statutory definitions, the State seems to imply that Roy only addressed the definition of financial institution in RCW 7.88.010(6). Br. of Resp't at 15. To the contrary, Roy provided a full analysis of the definition of "financial institution" provided in RCW 35.38.060 that requires "any 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." Br. of Appellant at 20. Roy then repeatedly demonstrated that the State's evidence failed to prove that Chase was authorized under federal or state law to accept deposits *or* to engage in business. Br. of Appellant at 20, 22-23, 26-33.

Finally, the State writes that Roy "asserts error in the court having taken judicial notice that Chase bank is a financial institution." Br. of Resp't at 15. Roy acknowledged that the trial court did not explicitly take judicial notice of Chase's lawful authority to engage in business or accept deposits, but noted only that the trial court implied it might be able to. Br. of Appellant at 26-27. Roy provided thorough analysis of this issue in anticipation that the State might assert in response that judicial notice of Chase's lawful operations was warranted in this case. Apparently, however, Roy had no cause for concern, as the State has not made this argument.

B. CONCLUSION

Because the State utterly failed to prove one of the charged elements of first degree robbery—Chase's qualification as a financial institution defined under RCW 7.88.010(6) or RCW 35.38.060—this court must reverse Roy's conviction and remand with instructions to dismiss this prosecution with prejudice.

DATED this 1st day of July, 2014.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

KEVIN A. MARCH
WSBA No. 45397
Office ID No. 91051
Attorneys for Appellant

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

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
vs.	)	COA NO. 70720-5-I
	)	
BENJAMIN ROY,	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 1ST DAY OF JULY 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL AND/OR EMAIL.

[X] SNOHOMISH COUNTY PROSECUTOR'S OFFICE
3000 ROCKEFELLER AVENUE
EVERETT, WA 98201
Diane.Kremenich@co.snohomish.wa.us

[X] BENJAMIN ROY
DOC NO. 368036
MONROE CORRECTIONS CENTER
P.O. BOX 777
SHELTON, WA 98272

SIGNED IN SEATTLE WASHINGTON, THIS 1ST DAY OF JULY 2014.

X Patrick Mayovsky