70720-5

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NO. 70720-5-I

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

STATE OF WASHINGTON,

Respondent,

v.

BENJAMIN I. ROY,

Appellant.

BRIEF OF RESPONDENT

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I. ISSUES

1. Was the trial court's decision to allow testimony regarding the DNA search warrant an abuse of discretion?

2. Was sufficient evidence presented to demonstrate that Chase Bank is a financial institution?

3. Did the court take judicial notice that Chase Bank is a financial institution?

II. STATEMENT OF THE CASE

On January 17, 2013, the defendant was charged by information with one count of first degree robbery. The defendant was convicted by jury verdict on July 22, 2013. The defendant was sentenced on July 31, 2013. CP 16-26, 30, 65-66.

Just before closing on November 29, 2011, the defendant entered the Chase Bank branch located in the Frontier Village area of Marysville, Snohomish County, Washington. The defendant had a bandana over his lower face and was carrying what appeared to be a gun. The defendant fanned the room with the "gun", announced that he had a gun and commanded that "nobody move, nobody F-ing move." He then walked up to the only teller on the line, and demanded she give him all her money. The teller, Farah Siko, opened her top drawer and gave the defendant all the money

in the drawer. The defendant grabbed the money and left the bank. The bank was equipped with surveillance cameras and pictures of the defendant in the bank were presented during trial. RP Vol. II 187- 190; 204 – 206; 212-214; 217 – 218; 278-280

There were a number of witnesses in the bank who testified at trial. Each of them testified regarding what they believed the defendant was wearing, and what he said. Although the general descriptions matched, the witnesses differed on some of the smaller details. The witnesses did agree the person depicted in the surveillance photographs was the person who robbed the bank. These witnesses were cross examined extensively on the descriptions they provided to the FBI agents investigating the bank robbery. RP Vol. II 198 – 197; 278 - 280; 283 – 284; Vol. III

Three witnesses testified that they had been in the bank on November 29, 2011, to conduct bank business. David Look, testified he had been in the bank earlier making a payment on his mortgage. James Glenn stated he had a checking account at Chase and on the evening in question he was in the Lake Stevens branch filling out a deposit slip when the defendant entered. Connie Swanson testified that she and her daughter were in the

bank at the deposit slip stand when the defendant entered. RP VII 245, 277 – 278.

Three bank employees also testified. Ms. Siko testified that she currently worked for Chase Bank as a branch manager, but she had been the lead teller at the Lake Stevens Brank on November 19, 2011. She was the only teller on the line when the defendant walked in. She identified a number of surveillance photographs of the defendant while he was in the bank. One showed the defendant approaching the teller station, one showed him grabbing the money from her hand, another showed him leaving with the money. RP Vol. II 186-187; 189-190; 196; 204-206.

Ms. Nardis testified she was a personal banker at the Lake Stevens branch of Chase Bank when the defendant robbed the bank. Ms. Nardis was seated at a desk in the main area of the bank. RP Vol. II 211; 213-214; 217-218.

Travis Olson testified he was currently an investment broker for Chase Bank, but that he had been a personal banker at the Lake Steven branch of Chase Bank when this robbery took place. Mr. Olson explained the robbery took place at the end of the day, "It's that end of the day rush when people are just making deposits to go home." Mr. Olson pointed out items in the photos of the bank

besides the individual who was robbing the bank, he pointed out there was a check writing stand and there were customers standing there. Mr. Olson testified there were customers in the bank at the time, making their final deposits for the day. Mr. Olson also testified that as a personal banker for Chase Bank he opened and closed accounts and took deposits. He also stated that the Lake Stevens branch of Chase Bank had a teller line where they take deposits and withdrawals. He said his testimony was based upon his personal activities and his knowledge of the deposit account agreement that Chase maintains for opening checking accounts. RP Vol. II 286 – 287; 293; 296; Vol. IV 680 – 683.

The defendant left the bank and could be seen from inside the bank running off to the left. Mr. Look was driving on the road to the left of the bank at that moment and the defendant ran in front of his truck. Mr. Look almost struck him. The defendant looked at Mr. Look then just ran off into an open field across the street from the bank. Mr. Look was later interviewed by the police and worked with a police sketch artist to produce a sketch that was as close as he could get it to the person he saw run in front of his truck. A copy of the sketch was admitted into evidence. RP Vol. II 247 – 249; 251 – 255.

The jury also heard testimony from Monroe Police Department K-9 Officer Carswell. Officer Carswell was called in to try to use his canine partner Joker to try to locate the defendant. Officer Carswell testified to the extensive training he and Joker had received. Officer Carswell explained that he had even done training with Joker in crowded dog parks to ensure that Joker would stay on task and not be distracted by other activity or scents, human or animal. Officer Carswell explained that Joker leads him on the track, not the other way around. Joker picked up the scent of the defendant at the door of the bank and followed the path indicated by the witnesses into the field across from the bank. Joker was actively tracking until part way through the field when Joker's intensity dropped off drastically. Officer Carswell felt the drop off was so dramatic that something was wrong, so he tried taking Joker back to different areas to see if he could pick up the scent. As they were working the field, Officer Aukerman, who was with them, told Officer Carswell he could see a black sweatshirt in the field. Officer Carswell continued to allow Joker to work the field and eventually Joker worked his way to the sweatshirt and indicated on it by biting it. Officer Carswell testified that there was old garbage and other things in the field but Joker sought out the

sweatshirt specifically. They continued working the field and located a $100 bill and then fresh bicycle tracks. RP Vol. III 409-410;416; 419 – 430.

Detective Irwin of the Lake Stevens Police Department responded to the scene and was the detective initially assigned to the case. He was advised of the location of the sweatshirt, $100 and bicycle tracks in the field. He marked and photographed all three and collected the sweatshirt and $100 bill. Det. Sgt. Jamison also responded to the scene. She was in the bank, coordinating the investigation with the FBI agents who responded. The next day, Det. Irwin and Det. Sgt. Jamison returned to the field in the daylight and did and exhaustive search and located a plastic bag with a hose nozzle they suspected had served as the "gun" used by the defendant in the robbery. They marked, photographed and collected this item as well. The collected items were sent to the Washington State Patrol Crime Lab for testing. RP Vol. III 368 – 373; 376 – 377; 379 – 382; 458 – 459; 466; 472; 475 – 478.

Mariah Low testified that she is a forensic scientist with the Washington State Patrol Crime Lab and she completed an additional one year training program to be a DNA analyst there. Ms. Low testified that she received the sweatshirt, hose nozzle;

black plastic bag and $100 bill from the Lake Stevens Police Department with a request to test the items for DNA. Ms. Low was able to obtain a partial DNA sample from the hose nozzle but was not able to identify a contributor for the DNA. Ms. Low testified she was able to obtain a mixed DNA sample from the sweatshirt. Ms. Low was able to run the information through a national database and obtained one sample that could be a potential contributor to the mixed DNA sample from the sweatshirt; that sample was attributed to the defendant. Ms. Low provided law enforcement with the defendant's name as a potential suspect. Law enforcement then provided her with a known sample from the defendant for comparison. Ms. Low testified only 1 in 1,000 individuals in the U.S. population is a potential contributor to the mixed sample. RP Vol. III 503 – 504; 553; Vol. IV 573 – 579; 586 – 587.

Det. Wachtveitl of the Lake Stevens Police Department testified that he took over as the lead investigator of this case. Det. Wachtveitl testified that he had received notification from Ms. Low that she had identified Benjamin Roy, the defendant, as a potential contributor to the DNA on the sweatshirt related to this this case. Det. Wachtveitl said he then obtained a search warrant for a DNA sample from Mr. Roy. Once he had obtained the DNA sample from

the defendant, he submitted it to Ms. Low at the WSP Crime Lab for comparison with the mixed sample she had obtained from the sweatshirt. Det. Wachtveitl explained that he did not give the defendant an opportunity to consent but simply got the search warrant.

III. ARGUMENT

It was not an abuse of discretion for the trial court to allow testimony about the DNA being obtained pursuant to a search warrant.

The admissibility of evidence is within the discretion of the trial court. State v. Atsbeha, 142 Wn.2d 904, 913, 16 P.3d 626 (2001). "This court will not reverse a trial court's decision absent an abuse of discretion, which occurs only when no reasonable person would take the view adopted by the trial court." Id. at 913-14. A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds or untenable reasons. State v. Finch. 137 Wn.2d 792, 810, 975 P.2d 967 (1999).

A. THE TRIAL COURT DID ENGAGE IN ANALYSIS WEIGHING THE WARRANTS RELEVANCE AGAINST THE POTENTIAL PREJUDICIAL EFFECT.

In his brief, the defendant claims the trial court allowed testimony from Det. Wachtveitl that he collected the defendant's

DNA pursuant to a search warrant without engaging in any analysis of the warrant's relevance or prejudicial effect. Brief of Appellant 9. This ignores the initial hearing held mid-trial, outside the presence of the jury, regarding the admissibility of testimony about the search warrant and the trial court's initial ruling on the motion which was "strongly" objected to by the defendant. Initially, the court ruled

> I think you are both giving the jury too much credit in relation to what they might speculate, what they might think. I think you both get to reserve your positions with the simple question whether Mr. Roy voluntarily provided his DNA sample, and the response would be no. The State can argue what they want in relation to that. The jury's not going to know it was a basis for a warrant at all never mind something to do with some unrelated matter. So I'll allow that question.
>
> RP Vol. IV 645 – 649.

Prior to any additional testimony from Det. Wachtveitl, the defendant's trial counsel re-raised the issue, stating he strongly objected to the court's proposed solution. The state responded by arguing the relevance of the testimony with regard to rebuffing a consciousness of innocence argument, that a reasonable inference could be argued that absence testimony as to how the DNA was obtained would allow the argument that he cooperated with providing his DNA because he was not afraid to do so, he knew he was innocent. RP Vol. IV 652-654.

The defendant's argues the jury would speculate that the issuance of the search warrant would mean there was a probability the accused was involved in criminal activity. Brief of Appellant 12. This ignores that the jury already had testimony regarding the basis of the search warrant from Mariah Low. The defendant's name was identified as a potential donor to the DNA mixture found on the sweatshirt. RP Vol. IV 648. After discussing the probative value to the jury, in relation to the prejudicial impact on the jury, the trial court allowed limited testimony regarding the search warrant. The court then further refined its ruling to indicate the testimony should explain that the warrant was obtained as a matter of protocol and that the defendant was not given the opportunity to decline to provide a sample before the warrant was obtained. The court clearly weighed the probative value to the state against the prejudicial effect. RP 654-655.

B. EVEN IF THE TESTIMONY REGARDING THE SEARCH WARRANT WAS ADMITTED IN ERROR, IT WAS HARMLESS.

The prejudice to the defendant was not high. Although the parties and the court were aware of the defendant's other robbery conviction, the jury was not aware the defendant had any prior history. The jury was aware the defendant's name had come up as

a potential donor to a mixed DNA sample associated with this case. The WSP Crime Laboratory Technician gave the defendant's name to law enforcement. Law enforcement got a search warrant to get a comparison sample from the defendant and gave the sample they obtained to the WSP technician to complete her analysis. Under these circumstances, the issuance of a search warrant does not imply that a court had made an affirmative determination of the defendant's guilt.

The DNA sample found on the sweatshirt was a mixed sample with three potential donors. Based on the U.S. population it was estimated that one in one thousand individuals was a potential donor. RP 577; 586-587.

The defendant's claim that the state's case was weak ignores the photographic evidence in the case. This is seen clearly in his representations of the state's position at the sentencing hearing. The defendant asserts the state conceded "there was not a lot of definitive evidence." Brief of Appellant 17. When the statement was actually, "And quite frankly, as the Court knows that absent the photograph of the individual, of Mr. Roy as he was leaving the bank there was not a lot of definitive evidence." 2RP 3. The defendant also argues the state's recommendation at

sentencing and the sentencing court following the recommendation reflect a concession this was a weak case. Brief of Appellant 17-18. However, this again ignores the reasons stated by both. The prosecutor explained her recommendation was based on the timing of this prosecution to another robbery conviction the defendant had already obtained. That incident had occurred after this case, but was resolved before this matter was referred to the prosecutor's office. She also advised the court her recommendation was based on defendant's relative lack of criminal history and that this would be his first time going to prison and therefore, the low end of the range, 46 months appeared to be sufficient penalty. 2 RP 9. The sentencing court specifically set forth the things he took into consideration were the fact the victim teller did not appear at sentencing or provide a statement to the court and the recommendation of the experienced prosecutor, as well as the defendant's age. 2RP 12-13.

The sentencing court did voice concern that the state made its recommendation because it felt this case was weaker than some others, but the court told the defendant why he thought he was convicted. "I don't know what the jury thought or

didn't think, but, frankly, I think what happened is that they saw that image from the bank photos..." RP 7/31/13 8-11.

C. SUFFICIENT EVIDENCE WAS ADMITTED TO ESTABLISH CHASE BANK IS A FINANCIAL INSTITUTION.

Under the applicable standard of review, there will be sufficient evidence to affirm a criminal conviction if any rational trier of fact, viewing the evidence most favorably toward the State, could have found the essential elements of the charged crime were proved beyond a reasonable doubt. State v. Kintz, 169 Wn.2d 537, 551, 238 P.3d 470 (2010); State v. Wentz, 149 Wn.2d 342, 347, 68 P.3d 282 (2003); State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A challenge to the sufficiency of the evidence admits the truth of the States' evidence. Salinas, 119 Wn.2d at 201; State v. McPhee, 156 Wn. App. 44, 62, 230 P.3d 284, review denied, 169 Wn.2d 1028 (2010); State v. Porter, 58 Wn. App. 57, 791 P.2d 905 (1990). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. State v. Hosier, 157 Wn.2d 1, 8, 133 P.3d 936 (2006); Salinas at 201; State v. Soderholm, 68 Wn. App. 363, 373, 842 P.2d 1039 (1993).

First degree robbery is defined under RCW 9A.56.200 and can be satisfied by showing a robbery of a financial institution as defined by RCW 7.88.010 or RCW 35.38.060. Circumstantial evidence is sufficient to establish a robbed bank is a financial institution. State v. Liden, 138 Wn. App. 110, 119, 156 P.3d 259, 264 (2007). In Liden the court held that to require the state to produce direct evidence, rather than circumstantial evidence would produce an absurd interpretation of the financial institution statutes. Id. at 119.

In this case, multiple witnesses testified they were at the bank during the robbery. They were there to conduct bank business, paying mortgages, or making deposits. Three employees testified they worked for the bank. They all testified to accepting deposits as part of their jobs. There was further testimony from Mr. Olsen indicating his job was to open and close accounts, take deposits, and take care of the clients. RP 680-681. On cross examination, Mr. Olsen's basis for his knowledge of the day to day operations of Chase bank was called into question. On re-direct, Mr. Olsen testified that his understanding that Chase bank was operating lawfully in the state of Washington was based upon the deposit account agreement he uses for checking accounts. Mr.

Olsen also testified he was personally aware of Chase bank's advertising campaign in the area through TV ads, internet ads and print ads including the deposit services. RP 683.

There are multiple definitions of financial institution that satisfy RCW 9A.56.200. RCW 35.38.060 defines a financial institution as "...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." There is no requirement in this definition that the institution be state and federally authorized to accept deposits. There was more than sufficient evidence to show Chase bank was a financial institution; a national banking association lawfully engaged in business in this state.

The defendant asserts error in the court having taken judicial notice that Chase bank is a financial institution. Appellant's brief 26-27. The court's specific ruling in this matter was, "I'm a little bit concerned in relation to taking judicial notice of a fact in relation to an element....so, I wouldn't be inclined to allow it to proceed from the standpoint of judicial notice." RP 672. Since the court did not take judicial notice, this issue is moot.

D. THE CUMULATIVE ERROR DOCTRINE DOES NOT APPLY IN THIS CASE.

The application of that [cumulative error] doctrine is limited to instances when there have been several trial errors that standing alone may not be sufficient to justify reversal but when combined may deny a defendant a fair trial. State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390, 399 (2000). As in Greiff this case the defendant has only alleged two errors: did the trial court abuse its discretion by admitting testimony about obtaining a search warrant for the defendant's DNA; and, was there sufficient evidence Chase bank is a financial institution. Sufficiency of the evidence does not pertain to cumulative error. Either there is sufficient evidence, or there is not. The only other alleged error is the testimony regarding obtaining a search warrant to gather the defendant's DNA. Although the defendant attacks this issue from many different angles, there is still only the one that could have impacted the jury. Assuming there was error, as argued above, it was harmless and cumulative error does not apply.

IV. CONCLUSION

For the reasons stated above, the conviction should be affirmed.

Respectfully submitted on June 19, 2014.

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