

66526-0

66526-0

NO. 66526-0-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

DAVID BRYNER,

Appellant.

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2011 NOV 28 PM 2:53

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE BRUCE HELLER

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Whether the trial court properly denied the defendant's request for an instruction on a lesser offense of Theft in the First Degree?

2. Did the State fail to prove that the defendant robbed a "financial institution" as required by RCW 9A.56.190 for the crime of Robbery in the First Degree?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The defendant, David Bryner, was charged with one count Robbery in the First Degree on February 12, 2010. CP 1-5. On February 25, 2010, the defendant was formally arraigned and the case was later set for trial on June 2, 2010. The case proceeded to trial on November 22, 2010. On December 2, 2010, the jury returned a unanimous verdict of guilty as charged in the original information. CP 180.

The defendant was sentenced on January 7, 2011 by the Honorable Bruce Heller and the court imposed a sentence of 101 months in prison, \$1,036 in restitution, victim penalty assessment,

\$100 DNA fee, no contact with the victims and 18 months community custody. Mr. Bryner timely appeals.

2. SUBSTANTIVE FACTS

On Wednesday, January 6, 2010, Amanda Running¹ was employed as a senior bank teller at Chase Bank, located at 33701 21st Avenue SW, in Federal Way, Washington. This particular branch of Chase Bank is located within a Fred Meyer Grocery store. Ms. Running had been employed at Chase Bank for over a year and her duties included customer deposits, withdrawals, maintaining bulk cash, processing deposits from the automated money machines, and bank closings. 12/1/10 RP 4-5.

At approximately 3:23pm, a white male, later identified as David Bryner herein identified as the defendant, entered the Chase Bank where Ms. Running was working. CP 3-4. The defendant wore a green logo baseball cap with an "M" logo clearly visible on the front of the cap. He also wore a dark blue colored parka according to Ms. Running's testimony at trial. CP 3-4 & 12/1/10 RP 13. After the defendant approached Ms. Running, located

¹ By time of trial witness Amanda Running had legally changed her name to Amanda Gradwohl.

behind the customer service counter, he handed her a computer generated note which read "DO NOT push the alarm! Slowly! Give me all the 20's 50's and 100's only! Not a joke DO not give me any: DYE PACKS, TRACKING DEVICES, OR BAIT MONEY! Do exactly as I say and no one will be hurt!" RP 13-14.

Ms. Running, while nervous, informed the defendant that she would reach for her keys to unlock the drawer containing money. She did this so as to avoid any sudden movements that might startle anyone, including the defendant who was behaving agitated. 12/1/10 RP 14, 16, 17. Ms. Running did not have any twenty dollar bills and gave the defendant all fifty and hundred dollar bills totaling just a few hundred dollars. After the defendant received the money he told Ms. Running "Give me more. Give me more." Ms. Running gave the defendant ten, five, and one dollar bills. 12/1/10 RP 13-14.

The defendant was then shown an empty drawer by Ms. Running and he immediately left the Chase Bank. On January 14, 2010, Detective VanderVeer of the Federal Way Police Department attempted to contact Anissa Stella and Ryker Stella, both protected persons in a No Contact Order against the defendant. Det. VanderVeer spoke with Ryker Stella who was shown a still photo of the male suspect from the robbery at Chase

Bank on January 6, 2010. CP 4-5. Ryker without doubt or hesitation stated that the person depicted in the photo was his mother's ex-boyfriend, David.

On January 26, 2010, Det. VanderVeer and Det. Lauer contacted Dianne Osborne at 620 S. 301 St., Federal Way, WA. Ms. Osborne was also shown a still photo of the Chase Bank robbery from January 6, 2010. Osborne also indicated without doubt or hesitation, the person depicted in the photo was David Bryner. CP 4-5.

On January 26, 2010, Det. VanderVeer interviewed Julie Mills who also recognized David Bryner as the suspect captured in the Chase Bank robbery still photo. CP 4-5. Later that same day, Det. VanderVeer spoke with Clyde R. Bryner in Gig Harbor, WA. After being shown a still photo from the Chase Bank robbery on January 6, 2010, Clyde indicated without hesitation or doubt that the person pictured was his son David Bryner.

Clyde also provided to the detectives a piece of paper found in the pocket of a suit which he recently loaned to his son David. Det. VanderVeer reviewed the note which was an apparent bank robbery demand note consistent in size and containing similar details as the demand note recovered during the robbery

investigation. CP 4-5. Both Ms. Osborne and Mr. Bryner identified the defendant at trial as the suspect in the photos. 11/30/2010 RP 102-03; 12/1/10 RP 48.

C. ARGUMENT

1. THEFT IN THE FIRST DEGREE IS NOT A LESSER INCLUDED OFFENSE OF ROBBERY IN THE FIRST DEGREE AND THUS THE TRIAL COURT'S DENIAL OF THE DEFENDANT'S REQUESTED INSTRUCTION WAS PROPER.

a. Relevant Law And Applicable Standard Of Review.

The defendant's right to request a lesser included offense instruction is based upon RCW 10.61.006². An instruction is warranted when (1) each of the elements of the lesser are necessary elements of the crime charged and (2) the evidence may equally support an inference that the lesser offense was committed. State v. Davis, 121 Wn.2d 1, 4, 846 P.2d 527 (1993). The first requirement is explored under a "legal" prong and the second a "factual" prong. State v. Rodriguez, 48 Wn. App. 815, 817, 740 P.2d 904, 109 Wn.2d 1016 (1987).

² RCW 10.61.006 states in pertinent part: In all other cases the defendant may be found guilty of an offense the commission of which is necessarily included within that with which he or she is charged in the indictment or information.

Under the "legal" prong a defendant is entitled an instruction on a lesser offense *only when* the crime "could not be committed" without also committing the lesser offense (emphasis added). State v. Curran, 116 Wn.2d 174, 183, 804 P.2d 558 (1991). However, a lesser included offense instruction is inappropriate when alternative means exist by which the charged crime can be committed, one of which would not result in the commission of the alleged lesser included offense. Davis, 121 Wn.2d at 5-6.

The "factual" prong requires the trial court to view the evidence in the light most favorable to the party requesting the instruction. State v. Fernandez-Medina, 141 Wn.2d 448, 455, 6 P.3d 1150 (2000).

b. Theft In The First Degree Is Not A Lesser Included Offense Of Robbery In The First Degree.

Robbery in the First Degree may be committed *without* committing Theft in the First Degree when a person takes (1) property in the presence of another person or (2) property valued at less than \$1,500. Theft in the First Degree is not a lesser included offense of Robbery in the First Degree. State v. Roche, 74 Wn. App. 500, 878 P.2d 497 (1994).

In Roche, defense challenged the trial court's decision not to include a lesser offense instruction of Theft in the First Degree wherein the defendant was charged with Robbery in the First Degree. Robbery in the First Degree may be proven by two alternative means which do not establish elements of Theft in the First Degree. Roche, 75 Wn. App. 500 at 511.

First, robbery may be committed by taking property in the "presence of another" which is *not* an element of Theft in the First Degree. Second, under either means of committing Robbery, taking property from the person of another or taking property in the presence of another, the property taken need not be valued in excess of \$1,500 which is an alternative means to committing Theft in the First Degree. Roche, 75 Wn. App. 500 at 511.

c. Argument.

Applying the legal prong analysis established in Curran and used in Roche, the trial court properly denied the defendant's request for a lesser included instruction because the elements of Theft in the First Degree are *not* necessary elements of Robbery in the First Degree. The defendant was not denied of Due Process or deprived of a lesser included instruction.

Additionally, the defendant, David Bryner, had taken in total \$1,036 from Chase Bank in the presence of another person, Ms. Running. Under a "factual" prong analysis, one alternative means of committing Theft in the First Degree, property in excess of \$1,500, is not met.

Applying the legal prong analysis established in Curran and used in Roche, the trial court properly denied the defendant's request for a lesser included instruction because the elements of Theft in the First Degree are *not* necessary elements of Robbery in the First Degree. The defendant was not denied of Due Process or deprived of a lesser included instruction.

2. THERE EXISTED SUFFICIENT EVIDENCE AT TRIAL SUCH THAT A REASONABLE JURY COULD FIND THAT MR. BRYNER COMMITTED THE CRIME OF ROBBERY AGAINST A "FINANCIAL INSTITUTION."

a. Relevant Law And Applicable Standard Of Review.

Evidence is sufficient to support a conviction if, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements proved beyond a reasonable doubt. State v. Hendrickson, 129 Wn.2d 61, 81, 917

P.2d 563 (1996). An appellant's claim of insufficient evidence admits the truth of the State's evidence. State v. Salinas, 119 Wn.2d 192, 829 P.2d 1068 (1992). Also, "all reasonable inference from the evidence must be drawn in favor of the State and against the Appellant." State v. Gallagher, 112 Wn. App. 601, 613, 51 P.3d 100 (2002).

In reviewing for sufficiency, appellate courts draw no distinction between circumstantial and direct evidence presented at trial, because both are considered equally reliable. State v. Bencivenga, 137 Wn.2d 703, 711, 974 P.2d 832 (1999). Credibility determinations are for the finder of fact and are not reviewed on appeal. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). Thus, an appellate court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992).

b. Statutory Review.

When reviewing a statute, the court must give effect to the Legislature's intent. Review begins with the plain language of the statute. Lacey Nursing Ctr. Inc. v. Dep't of Revenue, 128 Wn.2d 40,

53, 905 P.2d 338 (1995). Additionally, when a statute is ambiguous the court determines legislative intent from the statute language alone. Waste Mgmt. of Seattle, Inc., v. Util. & Transp. Comm'n., 123 Wn.2d 621, 629, 869 P.2d 1034 (1994). When interpreting statutes the court must avoid absurd results. State v. J.P., 149 Wn.2d 444, 450, 69 P.3d 318 (2003).

c. RCW 9A.56.200(1)(b); "Financial Institution."

A person commits Robbery in the First Degree when committed within and against a financial institution as defined in RCW 7.88.010 or 35.38.060.³ Under RCW 7.88.010(6) a "Financial institution" is:

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 also defines a "Financial institution" as:

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.

³ RCW 9A.46.200(1)(b): A person is guilty of robbery in the first degree if: (b) He or she commits a robbery within and against a financial institution as defined in RCW 7.88.010 or 35.38.060.

In review of criminal statutes, the legislature has not required the State to produce direct evidence, in addition to circumstantial evidence to prove that a particular enterprise is a "financial institution" as an element of a crime. State v. Liden, 138 Wn. App. 110, 118, 156 P.3d 259 (2007). To require the State to submit direct, rather than circumstantial evidence would produce an absurd interpretation of "financial institution" statutes. Liden, 138 Wn. App. 156 at 118. In Liden, the State presented testimony from a bank teller, employee, who was working at the time Mr. Liden threatened and demanded money by writing a note on the back of a counter check. Liden, 138 Wn. App. 110 at 114.⁴

d. There Exists Sufficient Circumstantial Evidence To Support That Mr. Bryner Committed The Crime Of Robbery Within And Against A "Financial Institution."

At trial, State's witness Amanda Gradwohl testified that on January 6, 2010, she was working as a senior teller at the Chase Bank location where the robbery had occurred. As a senior teller,

⁴ The note in Liden was admitted into evidence and contained the phrase "Reserved for Financial Institution Use." Another witness testified they were at the bank to make a financial deposit when the robbery occurred. Liden, 138 Wn. App. 110 at 114.

Ms. Gradwohl's position required her to handle customer deposits, withdrawals, maintaining bulk cash, process deposits from an automated money machine, process night deposits, secure confidential material and open or close the bank for business. 12/1/10 RP 4-7. When asked if Chase Bank is regulated by federal and state laws, Ms. Gradwohl answered "yes." RP 5. Not only did Ms. Gradwohl testify about the *type* of transactions carried out on a regular basis but she also explained *how* deposits, withdrawals and cashed checks are processed. RP 6-8.

The State in Mr. Bryner's case produced sufficient circumstantial evidence at trial to support the jury's finding that Mr. Bryner committed the crime of Robbery in the First Degree within and against a "financial institution" beyond a reasonable doubt.

Mr. Bryner overlooks this presented evidence and instead seeks an absurd result as discussed in Roche. The defendant's conviction is supported by the evidence and the State's burden had been met.

D. CONCLUSION

Mr. Bryner was not entitled to a lesser instruction of Theft in the First Degree because the "legal" and "factual" prongs established in Curran are not satisfied and for reasons examined in Roche. The trial court was proper in its denial of Mr. Bryner's request.

The State presented sufficient circumstantial evidence to support the jury's finding that Mr. Bryner committed the crime of Robbery in the First Degree within and against a "financial institution." The jury's finding should be affirmed.

DATED this 23rd day of November, 2011.

Respectfully submitted,

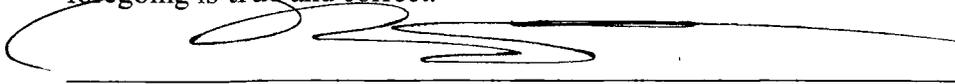
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Certificate of Service by Mail

Today I deposited in the mails of the United States of America, a properly stamped and addressed envelope directed to Gregory Charles Link, of Washington Appellate Project, at the following address: 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, the attorney of record for the appellant, containing a copy of the BRIEF OF RESPONDENT in STATE V. DAVID BRYNER, Cause No. 66526-0-I in the Court of Appeals of the State of Washington, Division I.

I certify under the penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

A large, stylized handwritten signature in black ink, appearing to be 'G. Link', written over a horizontal line.

Name

Date

Done in Seattle, Washington

11-28-2011