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NO. 34290-1-II

STATE OF WASHINGTON

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

STATE OF WASHINGTON
Appellant/
Cross-Respondent,

v.

SCOTT MICHAEL LIDEN,
Cross-RESPONDENT/
Appellant.

APPEAL FROM THE SUPERIOR COURT
FOR THURSTON COUNTY
CAUSE NO. 04-1-00279-0

HONORABLE PAULA CASEY, Judge

BRIEF OF APPELLANT

EDWARD G. HOLM
Prosecuting Attorney
in and for Thurston County

JAMES C. POWERS
Deputy Prosecuting Attorney
WSBA #12791

Thurston County Courthouse
2000 Lakeridge Drive, SW
Olympia, WA 98502
Telephone: (206) 786-5540

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A. ASSIGNMENTS OF ERROR

1. In the Order on Motion for Arrest of Judgment, entered on December 22, 2005, the trial court erred in finding that the prosecution had failed to present sufficient evidence that the defendant robbed a financial institution, as defined in RCW 7.88.010 or RCW 35.38.060. CP 185.

2. In the Order on Motion for Arrest of Judgment, entered on December 22, 2005, the trial court erred in concluding that the prosecution had failed to present sufficient evidence that the defendant in the present case was guilty of robbery in the first degree. CP 185.

3. In the present case, the trial court erred in arresting judgment and vacating the jury's verdict of guilt for robbery in the first degree, and instead sentencing the defendant for robbery in the second degree.

B. STATEMENT OF THE ISSUES

1. Whether this appeal, wherein the State challenges the trial court's arrest of judgment, seeks to reinstate the verdict of the jury in the defendant's trial, and does not seek to subject the defendant to a second trial for the same offense, can be successfully pursued without violating constitutional protections against double jeopardy.

2. Considering the evidence presented at the trial of the present cause in the light most favorable to the State, and drawing all reasonable inferences from that evidence in the State's favor, whether the evidence was sufficient for a reasonable trier of fact to find it proved beyond a reasonable doubt that the defendant committed robbery within and against a financial institution, as defined in RCW 7.88.010 or RCW 35.38.060, and was therefore guilty of robbery in the first degree.

B. STATEMENT OF THE CASE

As of February 5, 2004, Holly Tagavilla was a teller at the Tumwater branch of Heritage Bank, located at Capitol Boulevard and Trosper Road. Her main job responsibility was to assist customers with deposits and withdrawals at the bank. 12-5-05 Trial RP 5-6. She had been trained by Heritage Bank to be a teller, and had worked there as a teller since 1999. 12-5-05 Trial RP 16.

On February 5, 2004, Tagavilla was working at the bank and observed the defendant come inside. She motioned him over to her to see if she could be of help. The defendant stated he wanted to make a withdrawal from a checking account. Tagavilla gave him a counter check for that purpose, and the defendant filled it out and handed it over. 12-5-05 Trial RP 7-8. The check had been written for cash, and the name for the account had been written as Steve Wilson, but no account number had been provided. 12-5-05 Trial RP 8, Ex. 3.

Tagavilla asked the defendant for identification. The defendant then took back the counter check and wrote on the back of it. He then handed it back to Tagavilla. She saw that he had written the words "I have a gun" on the check. 12-5-05 Trial RP 9.

The defendant then said the word "Okay" in a questioning voice. Tagavilla nodded her head and began taking money out of a cash drawer. The defendant then instructed her to only give him only one hundred dollar bills. She then went to another drawer to obtain those. Then he said he wanted twenties also, and she complied. She handed over to the defendant approximately 1,800 dollars. 12-5-05 Trail RP 10-11.

The defendant took the money and walked out of the bank. Tagavilla then screamed that she had just been robbed. The bank was immediately locked down and police were called. 12-5-05 Trial RP 12.

John Morris was also at the Tumwater branch of Heritage Bank on February 5, 2004. He regularly did his banking at that branch of

Heritage Bank, and on this day was there to make a deposit. Morris observed the defendant entering the bank as he entered also. Morris proceeded to fill out paperwork and then get in line to do business with a teller. During the period, at some point, the defendant asked Morris where the deposit slips were. 12-5-05 Trial RP 59-60, 72.

As the defendant left the bank, Morris heard a teller state that she had just been robbed. Morris observed the defendant hurry down the street in a southern direction, and then lost sight of him. 12-5-05 Trial RP 62-63.

On February 5, 2004, Steve Venable went to the Tumwater branch of Heritage Bank to make a deposit. He first used the drive-through window of the bank to do his business, but then realized he had made a mistake on his deposit slip. He then went into the bank to correct the error. 12-5-05 Trial RP 73-74.

Venable heard a teller state that she had just been robbed. He saw a man leaving the bank at that point. The man ran in a southern

direction. 12-5-05 Trial RP 74-75.

Police were dispatched to the bank in response to the robbery at approximately 2:40 that afternoon. The person who had committed the robbery was described as being a white male, 30 to 40 years old, wearing a grey hooded sweatshirt and black pants. 12-6-05 Trial RP 4-5. Meanwhile, the defendant had proceeded to a nearby Motel 6, where he checked in, paying cash and using his own name. 12-5-05 Trial RP 48.

Shortly thereafter, police received word that a man near the Motel 6 had offered money for a ride down to Lewis County. Police went to the motel and contacted a taxi driver who had been called to Room 121 to provide a ride, but on arrival had found no one there. 12-6-05 Trial RP 5-7.

Police then contacted the clerk at the Motel 6, and learned that a person named Scott Liden had just checked into Room 121, and that his clothing had matched the description of the bank robber. 12-6-05 Trial RP 8-9. A photograph of defendant

Scott Liden was shown by police to the clerk, and she identified that person as the one who had checked in. 12-6-05 Trial RP 10. A search warrant was obtained for a search of Room 121. A grey hooded sweatshirt and black pants were found inside the room. However, police were unable to locate Liden. 12-6-05 Trial RP 44-45.

The next day, February 6, 2004, the defendant contacted his brother, Jeff Liden, and arranged to have his brother drive him from Tumwater to Centralia. 12-6-05 Trial RP 20. The brother also obtained a motel room for the defendant. 12-6-05 Trial RP 20-21.

Police in Tumwater learned that Jeff Liden had paid for a motel room in Centralia. They contacted Centralia police, who went to the motel. As they approached, the defendant fled. 12-6-05 Trial RP 45-46, 59. Connie Scarsella observed the defendant run through her back yard. She confronted him about this, but he continued to run along railroad tracks and into the back yards of others, finally going out of her sight. 12-6-05

Trial RP 17-19.

The defendant later called his brother to tell him he was making his way down to Oregon and planning to go to California. He again called to tell his brother he was in Salem, Oregon. 12-6-05 Trial RP 23-25. By this time, police were in contact with Jeff Liden. Jeff informed police his brother was in Salem. Salem police arrested the defendant at a bus station. 12-6-05 Trial RP 47.

On February 9, 2004, the defendant was charged in Thurston County Superior Court Cause No. 04-1-00279-0 with one count of first-degree robbery in violation of RCW 9A.56.200(1)(a). CP 3. It was alleged that the robbery had been within and against a bank, trust company, mutual savings bank, credit union or savings and loan association located within the State of Washington and lawfully engaged in business in this state or authorized by law to accept deposits in this state. CP 3.

The matter proceeded to trial during the period of December 5-7, 2005. When the State

rested, the defendant moved to dismiss, claiming that the State had failed to present sufficient evidence that the robbery had been against a financial institution, as defined in RCW 7.88.010 or RCW 35.38.060. The defendant rested his motion on the fact that there was no direct evidence that Heritage Bank was lawfully engaged in business or lawfully authorized to accept deposits. 12-6-05 Trial RP 57-58. The court ruled that a reasonable juror could infer from the circumstantial evidence presented that the bank was operating legally when the robbery occurred, and so denied the defendant's motion. 12-6-05 Trial RP 61.

There was then testimony from a series of psychological experts with regard to a defense of diminished capacity. Psychiatrist John Kooiker testified that in his opinion the defendant was in a cocaine induced psychosis at the time of the robbery. 12-7-05 AM Trial RP 11. He noted that the defendant had claimed that he could only vaguely remember what he did in the robbery. However, Kooiker also acknowledged that a person

could suffer from a memory blackout about an event, and still have acted in a purposeful, goal-directed manner at the time of that event. 12-7-05 AM Trial RP 31-32, 43.

Forensic psychologist Brett Trowbridge testified that the defendant had told him he could not remember much of anything about the robbery, and could not remember much of anything about his entire past life. Trowbridge concluded that the defendant was malingering, faking the claimed psychological symptoms. He also concluded that the defendant had acted in a very purposeful, goal-directed manner at the time of the robbery. 12-7-05 AM Trial RP 67-70.

Psychologist Marilyn Ronnei testified that the first time she evaluated the defendant, he also told her he had virtually no memory of his past, and that she also concluded he was malingering. Then, the second time she evaluated him, the defendant had a much better memory, and he admitted that he had lied during the first evaluation. 12-7-05 AM Trial RP 86-87. Ronnei

concluded that at the time of the robbery the defendant had the capacity to act in a purposeful, goal-directed manner. 12-7-05 AM Trial RP 101.

After both sides had finally rested, the defendant renewed his motion to dismiss for insufficient evidence as to whether the defendant had committed a robbery against a financial institution. The court again denied the motion. 12-7-05 PM Trial RP 4-5, 15.

The court then instructed the jury on the definition of a financial institution based on RCW 7.88.010 and RCW 35.38.060.

Financial institution means 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.

Financial institution also means 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.

Jury Instruction No. 10. 12-7-05 PM Trial RP 34; CP 101-120.

The defendant was found guilty as charged. CP 122. On December 13, 2005, the defendant filed

a motion pursuant to CrR 7.4 to arrest judgment for reason of insufficiency of the evidence. CP 123-179. The State filed its response on December 20, 2005. CP 180-184. The matter was then heard and considered by the court on December 22, 2005.

The defendant again argued that there was no direct evidence showing that Heritage Bank was either lawfully engaged in business or that the bank was lawfully authorized to accept deposits. 12-22-05 Hearing RP 5. The State countered that, while there was no direct evidence on these points, there was circumstantial evidence which could reasonably have been relied upon by jurors in finding that the State had proven beyond a reasonable doubt that the robbery was committed against a financial institution. 12-22-05 Hearing RP 7. The trial court ruled that there must be some formal testimony from a bank official or some formal state certification that the bank is lawfully engaged in business or is lawfully authorized to accept deposits. 12-22-05 Hearing RP 18-20.

The trial court then ruled that the evidence was insufficient in this trial for jurors to have found it proved beyond a reasonable doubt that the robbery was against a financial institution. Therefore, the conviction for first-degree robbery was reduced to the lesser degree offense of robbery in the second degree. 12-22-05 Hearing RP 18. The court entered an Order on Motion for Arrest of Judgment. In that Order, the court found the following:

The State has provided insufficient facts to establish beyond a reasonable doubt that the defendant is guilty of the crime of Robbery in the First Degree for failure to prove the defendant robbed a financial institution as defined in RCW 7.88.010 or RCW 35.38.060. The court finds sufficient facts to find the defendant guilty of the crime of Robbery in the Second Degree.

CP 185. The defendant was then given a standard range sentence for the lesser offense of second-degree robbery. CP 186-194.

A Notice of Appeal was then filed by the State on January 12, 2006. CP 195-206.

C. ARGUMENT

1. Since the relief sought by the State in this appeal is to reinstate the verdict of the

jury in the defendant's trial, and therefore would not subject the defendant to a second trial for the same offense, this appeal will not place the defendant in double jeopardy, and therefore it is permissible pursuant to RAP 2.2(b)(3).

In this appeal, the State contends that the trial court erred in arresting judgment as to the jury's verdict of guilty for the crime of robbery in the first degree. RAP 2.2(b)(3) states as follows:

(b) Appeal by State or a Local Government in Criminal Case. Except as provided in section (c), the State or a local government may appeal in a criminal case only from the following superior court decisions and only if the appeal will not place the defendant in double jeopardy:

...(3) *Arrest or Vacation of Judgment.*
An order arresting or vacating a judgment.

Thus, the State's appeal in this case is appropriate provided it will not place the defendant in double jeopardy. Here, the State seeks to re-instate the jury's verdict of guilt for the crime of first-degree robbery. If that relief is granted, there will be no need for a second trial, and so the defendant will not be placed in double jeopardy.

The double jeopardy clause of the United

States Constitution guarantees that no person shall "be subject for the same offense to be twice put in jeopardy of life and limb". Fifth Amendment, U.S. Constitution. The double jeopardy clause of the Washington State Constitution guarantees that "No person shall be twice put in jeopardy for the same offense". Const. art I, s. 9. The state double jeopardy clause does not provide broader protection to criminal defendants than the federal double jeopardy clause. Rather, the double jeopardy clause of the Washington State Constitution is given the same interpretation the United States Supreme Court gives the Fifth Amendment. State v. Gocken, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995).

Both double jeopardy clauses encompass three separate constitutional protections. First, they protect against a second prosecution for the same offense after acquittal. Second, they protect against a second prosecution for the same offense after conviction. Third, they protect against multiple punishments for the same offense.

Gocken, 127 Wn.2d at 100, 107.

In this case, the defendant was convicted by jury verdict of the crime of first-degree robbery. The court then vacated that jury verdict claiming insufficient evidence. The issue is whether reinstatement of the jury's verdict would constitute double jeopardy.

In United States v. Wilson, 420 U.S. 332, 95 S.Ct. 1013, 43 L.Ed.2d 232 (1975), the jury returned a verdict of guilty against Wilson for converting union funds to his own use. Pursuant to a post verdict motion, the trial court vacated that conviction on the ground of pre-charging delay. The U.S. Court of Appeals held that the trial court's ruling was based in part on facts brought out during the trial, and so was essentially an acquittal, and so a government appeal of that dismissal would be a double jeopardy violation. Wilson, 420 U.S. at 333, 335.

On review, the United States Supreme Court disagreed. The Court ruled that a defendant has no legitimate claim to benefit from an error of

law if that error can be corrected without subjecting him to a second trial before a second trier of fact. If reversal on appeal would simply reinstate the jury's verdict, then such review would not offend against double jeopardy. Wilson, 420 U.S. at 345. The court noted that the concerns with a second trial after an acquittal do not apply in such a situation.

These interests, however, do not apply in the case of a postverdict ruling of law by a trial judge. Correction of an error of law at that stage would not grant the prosecutor a new trial or subject the defendant to the harassment traditionally associated with multiple prosecutions. We therefore conclude that when a judge rules in favor of the defendant after a verdict of guilty has been entered by the trier of fact, the Government may appeal from that ruling without running afoul of the Double Jeopardy Clause.

Wilson, 420 U.S. at 352-353.

In the present case, the trial court did not substitute its own consideration of the weight of the evidence for that of the jury. Rather, the court ruled as a matter of law that the quantum of evidence produced at trial was insufficient to support the jury's verdict. 12-22-05 Hearing RP 19-20. Correction of any error in this post-

verdict ruling of law by the trial judge would not subject the defendant to a second trial, but rather would result in reinstatement of the jury's verdict, and therefore under United States v. Wilson, supra, there is no double jeopardy problem with the present appeal by the State.

Applying the rule enunciated by the United States Supreme Court in Wilson, supra, the Ninth Circuit for the United States Court of Appeals has consistently upheld government appeals from judgments of acquittal entered by the District Court after a jury had convicted at trial. In United States v. Rojas, 554 F.2d 938 (9th Cir. 1977), the defendant was charged with conspiracy, making false claims against the government in the form of fraudulent tax returns, and possession of stolen property in the form of fraudulently obtained tax refund checks. At trial, the jury convicted Rojas on all counts. However, the trial court then set aside the jury's verdicts and entered a judgment of acquittal. The government appealed, and Rojas challenged that appeal on

double jeopardy grounds. Rojas, 554 F.2d at 940-941.

The Court of Appeals held that double jeopardy protections would only be implicated if the appeal presented the possibility of a second trial. However, since a successful government appeal would only reinstate the jury's guilty verdicts, and no further fact-finding proceedings would be necessary upon remand, there was no double jeopardy issue. Thus, the government's right to appeal was affirmed. Rojas, 554 F.2d at 941.

In reaching this holding, the Ninth Circuit Court of Appeals noted that every other circuit court that had considered this issue had reached the same conclusion, and that such a ruling was "correct and inescapable". Rojas, 554 F.2d at 941. Since United States v. Rojas was decided, the Ninth Circuit Court of Appeals has consistently upheld government appeals of a trial court's judgment of acquittal after the jury returned a verdict of guilty. United States v.

Martinez, 122 F.3d 1161, 1163 (9th Cir. 1997); United States v. Foumai, 910 F.2d 617, 619 (9th Cir. 1990); United States v. Sharif, 817 F.2d 1375, 1376 (9th Cir. 1987).

In State v. Howell, 40 Wn. App. 49, 696 P.2d 1253 (1985), a jury found Howell guilty of theft of livestock. On a post trial motion by the defendant, the trial court ruled that the prosecution had presented insufficient evidence on the element of venue, and therefore arrested judgment, vacating the conviction and dismissing the case pursuant to CrR 7.4(c). The State appealed, and the defendant challenged that appeal on the basis of double jeopardy. Howell, 40 Wn. App. at 49, 53.

Division Three of the Court of Appeals noted that the jury in Howell had found venue proved beyond a reasonable doubt, and so if the trial court's arrest of judgment was in error, the remedy would be to reinstate the verdict already reached by the jury. Therefore, a successful government appeal would not violate double

jeopardy. Howell, 40 Wn. App. at 53. The Court of Appeals then found the trial court had erred and proceeded to remand the case for reinstatement of the guilty verdict. Howell, 40 Wn. App. at 53-54.

As noted previously, the double jeopardy clauses of the federal and state constitutions protect a criminal defendant from multiple prosecutions and multiple punishments for the same offense. This appeal does not create the potential for either, and so would not constitute double jeopardy.

2. Considering the evidence presented at trial in the light most favorable to the State, and drawing all reasonable inferences from that evidence in the State's favor, the evidence was sufficient for a rational trier of fact to find it proved beyond a reasonable doubt that the defendant committed a robbery within and against a financial institution as defined in RCW 7.88.010 or RCW 35.38.060, and was therefore guilty of robbery in the first degree.

When a trial court enters an order arresting judgment as to a jury's guilty verdict, based on a determination that the evidence was insufficient, the appellate court's function is to determine whether the evidence is, in fact, legally

sufficient to support the jury's finding. State v. Robbins, 68 Wn. App. 873, 875, 846 P.2d 585 (1993). The evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A court reviewing the evidence to determine whether it is sufficient must draw all reasonable inferences from the evidence in the State's favor and interpret the evidence most strongly against the defendant. Salinas, 119 Wn.2d at 201. Circumstantial evidence and direct evidence are equally reliable. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). Credibility determinations are for the trier of fact and are not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). It is also the function of the fact finder, and not the court, to discount theories which are determined to be unreasonable in the light of the evidence. State

v. Bencivenga, 137 Wn.2d 703, 709, 974 P.2d 832 (1999).

At trial in the present cause, the jury found the defendant guilty of robbery in the first degree. There was no contention that the evidence was insufficient to prove the defendant guilty of robbery. Rather, the defendant argued that there was insufficient evidence for a rational trier of fact to have found it proved beyond a reasonable doubt that the robbery took place in and against a financial institution. Specifically, the issue was whether there was sufficient evidence to prove that Heritage Bank was lawfully accepting deposits in this state or was lawfully engaged in business. 12-22-05 Hearing RP 17.

Holly Tagavilla testified that as of the day of the robbery, which was February 5, 2004, she was a teller at Heritage Bank. 12-5-05 Trial RP 5-6. She had been trained by Heritage Bank for this position and had worked there as a teller since 1999. 12-5-05 Trial RP 16. Her job at the bank was to assist customers with deposits and

withdrawals. 12-5-05 Trial RP 6.

Tagavilla further testified that the defendant had asked to make a withdrawal from his checking account. She had given him a counter check to fill out for that purpose. 12-5-05 Trial RP 7-8. The defendant then wrote out the check for cash, but failed to put down an account number. Ex. 3. It was when Tagavilla asked the defendant for an account number that he indicated to her that this was a robbery. 12-5-05 Trial RP 8-9.

John Morris testified that he did his banking at Heritage Bank, and that on February 5, 2004, he went to Heritage Bank to make a deposit. 12-5-05 Trial RP 59. After Morris entered the bank, the defendant asked him where the deposit slips were. 12-5-05 Trial RP 72. Morris was filling out paperwork to make his deposit when the robbery occurred. 12-5-05 Trial RP 60-62.

Steven Venable testified that on February 5, 2004, he went to Heritage Bank to make a deposit. He initially did his business with the drive-

through teller, but then realized he had made a mistake on his deposit slip. He therefore went inside the bank to correct the problem. 12-5-05 Trial RP 73-74. While he was in the bank, he heard a teller say that she had just been robbed. 12-5-05 Trial RP 74.

Thus, there was a great deal of evidence, without contradiction, that Heritage Bank was openly engaged in the business of banking, and had been for a number of years, including the acceptance of deposits. The remaining question was whether this was being done legally. The State argued that a juror could reasonably infer from this evidence that Heritage Bank was legally authorized to accept deposits, and was legally engaged in the business of banking. However, the court ruled that the State was required to provide some formal state certification of the bank's legality or some formal testimony from a bank officer to that effect in order to meet its burden of proof on this issue. 12-22-05 Hearing RP 18, 20.

This holding of the court ruled out the possibility of proving that the court was operating legally through circumstantial evidence. The holding therefore violated the rule that circumstantial evidence and direct evidence are equally reliable when considering the sufficiency of the evidence. Delmarter, 94 Wn.2d at 638.

In making this ruling, the trial court also gave no indication it was drawing all reasonable inferences from the evidence in the State's favor or interpreting the evidence most strongly against the defendant, as the court was required to do. Salinas, 119 Wn.2d at 201. The evidence showed that Heritage Bank had been engaged in the business of banking and accepting deposits for at least five years, since Tagavilla had been a teller there for that long, and it was her responsibility to assist with withdrawals and deposits. 12-5-05 Trial RP 6, 16. A reasonable juror could certainly infer beyond a reasonable doubt from that evidence that Heritage Bank was legally authorized to accept deposits. A

reasonable juror could also conclude that the idea Heritage Bank had been openly operating as a bank for some time without legal authorization was not a reasonable possibility, and not a basis for reasonable doubt. Viewing this evidence in the light most favorable to the State, and most strongly against the defendant, it simply cannot seriously be contended that a reasonable juror could not make such an inference in finding the charge proved.

Certainly, the sort of evidence the trial court was requiring would be the better, stronger evidence on this issue. However, the court appears to have confused the concepts of best evidence and sufficiency of the evidence. The element of the offense of first-degree robbery that must be proved is simply that the robbery was against a financial institution. Neither that element, nor the two pertinent definitions of the term "financial institution" required proof of any particular record. Rather, the element of offense simply required that a bank victimized in a

robbery be one legally authorized to accept deposits or lawfully engaged in business in order for a conviction to be rendered for first-degree robbery. Thus, nothing about these two definitions for "financial institution" would preclude proof by circumstantial evidence.

Curiously, although the trial court concluded that the State could only prove that the victim was a financial institution by certain forms of direct evidence, at the same time the court appears to have recognized that the circumstantial evidence at trial was sufficient to prove that element. At several times during the trial, the court denied the defense motion to find that there was insufficient evidence to prove this element of the offense. Then, during the 12-22-05 hearing at which the court vacated the jury's guilty verdict, the court stated as follows:

It seems so common sense to all of us sitting in this courtroom that Mr. Liden robbed a bank and that Heritage Bank is a bank in this community. It is almost nonsensical to say that more is needed for proof in this particular case.

12-22-05 Hearing RP 17.

In making his claim for insufficient evidence, the defendant relied heavily upon United States v. Ratigan, 351 F.3d 957 (9th Cir. 2003). CP 123-179. However, this case provided no support for the defendant's argument.

In Ratigan, the defendant was convicted of armed bank robbery among other offenses. One of the elements of the charge was that the victim bank was FDIC insured. Although the defendant appealed his conviction and sought certiorari to the United States Supreme Court, he never raised a sufficiency of the evidence issue at trial or on appeal. He subsequently filed a motion to vacate his sentence, claiming for the first time that the evidence at his trial had been insufficient to prove that the bank was FDIC insured on the day of the robbery. Ratigan, 351 F.3d at 961.

Because the defendant had not previously raised this issue, he faced a refusal of the court to consider it on the basis of procedural default. To avoid this outcome, Ratigan argued that the issue was one of the court's subject matter

jurisdiction, rather than a matter of evidentiary sufficiency. However, the United States Court of Appeals rejected this argument. Therefore, the court ruled that the defendant's claim was in fact procedurally barred. Ratigan, 351 F.3d at 963-964. Thus, in Ratigan, the court never addressed the issue of sufficiency of the evidence.

However, in another case cited in Ratigan, the Ninth Circuit Court of Appeals made clear that minimal circumstantial evidence that a bank was FDIC insured would be sufficient to support a jury's verdict of guilt when that was an element of the offense. In United States v. Allen, 88 F.3d 765 (9th Cir. 1996), Allen was convicted on 35 counts of making false applications to two financial institutions. An element of each offense was that the victim bank was FDIC insured. For all but two of the counts, the victim bank was Western Bank. The only evidence showing that Western Bank was FDIC insured was that on several forms entered as exhibits, the phrase "Member FDIC" appeared in the printed language. Allen, 88

F.3d at 768-769. This evidence that the bank held itself out as FDIC insured was sufficient to support the jury finding that element of the offense proved beyond a reasonable doubt. Allen, 88 F.3d at 769-770.

In the present case, the evidence as a whole shows that Heritage Bank by its conduct held itself out as authorized to accept deposits, and had been doing so for years. Moreover, the counter check for Heritage Bank that the defendant used to write that he had a gun, which was admitted as Exhibit 3, had printed on the back the phrase "Reserved for Financial Institution Use", indicating that Heritage Bank held itself out as a financial institution, just as the bank in Allen, supra, held itself out as FDIC insured. Ex. 3. Viewing this evidence in the light most favorable to the prosecution, a rational trier of fact could have found beyond a reasonable doubt that Heritage Bank was legally authorized to accept deposits at the time of the robbery committed by the defendant in the present case, and was a financial

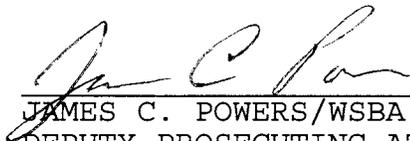
institution.

D. CONCLUSION

Based on the arguments set forth above, the State respectfully asks this court to find that the trial court's arrest of judgment in this case was in error because the evidence at trial was sufficient to support the jury's verdict, and therefore to reinstate the jury's guilty verdict for the crime of robbery in the first degree.

DATED this 31st day of May, 2006.

Respectfully submitted,



JAMES C. POWERS/WSBA #12791
DEPUTY PROSECUTING ATTORNEY

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COURT OF APPEALS

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NO. 34290-1-II

STATE OF WASHINGTON

BY James C. Powers DEPUTY IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
Respondent)	DECLARATION OF
)	MAILING
v.)	
)	
SCOTT MICHAEL LIDEN,)	
Appellant)	

STATE OF WASHINGTON)	
)	ss.
COUNTY OF THURSTON)	

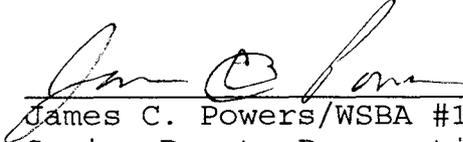
James C. Powers declares and affirms:

I am a Senior Deputy Prosecuting Attorney in the Office of Prosecuting Attorney of Thurston County; that on the 1st day of June, 2006, I caused to be mailed to Respondent/Cross-Appellant's attorney, SHARONDA THOMPSON AMAMILO, a copy of the Brief of Appellant, addressing said envelope as follows:

Sharonda Thompson Amamilo,
Law Office of Amamilo and Associates
1570 Wilmington Drive, Suite 200
Dupont, WA 98327-8773

I certify (or declare) under penalty of perjury
under the laws of the State of Washington that the
foregoing is true and correct to the best of my
knowledge.

DATED this 1st day of June, 2006 at Olympia, WA.


James C. Powers/WSBA #12791
Senior Deputy Prosecuting Attorney