

NO. 34290-1-II

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

STATE OF WASHINGTON,
Appellant,

v.

SCOTT MICHAEL LIDEN,
Respondent/Cross-Appellant.

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

HONORABLE PAULA CASEY, Judge

BRIEF OF RESPONDENT/CROSS-APPELLANT

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CONSTITUTIONAL

Fifth Amendment, U.S. Const.

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STATUTES and COURT RULES

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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 concluding that the crime of Robbery in the Second Degree was a Lesser Included offense of Robbery in the First Degree of a Financial Institution.
2. In the Order on Motion for Arrest of Judgment, entered on December 22, 2005, the trial court erred in concluding that the defendant should be found guilty of Robbery in the Second Degree.

B. STATEMENT OF THE ISSUES

1. The Trial Court May Take Judicial Notice of a State Statute to determine that the definition of a financial institution of a material element of the crime prohibited under RCW 9A.56.200(b).
2. Whether the Trial Court may not enter a lesser included offense that is not provided for by law.
3. An Appellate Court may affirm a Trial Court decision on any reasonable grounds and may only reverse for an abuse of discretion.

C. STATEMENT OF THE CASE

The Respondent/Cross-Appellant adopts the Statement of the Appellant as the Statement of the Case, with the following exception to the statement on page 11 regarding the claim that:

“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.” Appellants brief at 11.

The defendant argued that:

“The state did not present any evidence of the lawful engagement in business. The state did not present any evidence of authorization by law to accept deposits. The state did not present any testimony of any witness regarding Heritage Bank’s lawful engagement in business nor its authority by law to accept deposits in the state of Washington.” (12-22-05 hearing RP 5.) (Emphasis added.)

In addition the court determined that the definition of “financial institution” was a material element of the crime and that the State had failed to provide any evidence from which the jury could determine that element. 12-7-05 hearing RP 11, 14, 18-19.

D. ARGUMENT

1. The Trial Court May Take Judicial Notice of a State Statute to determine that the definition of a financial institution is a material element of the crime prohibited under RCW 9A.56.200(b)

The Constitution and public statutes of state will be judicially noticed by all courts of state. State v. Whetstone, 30 Wash.2d 301, 191 P.2d 818; certiorari denied 69 S.Ct. 131, 335 US 858, 93 L.Ed. 405 (1948) The Appellate Court may take judicial notice of any fact that the court of original jurisdiction judicially notices. Town of Forks v. Fletcher, 33 Wash.app.104, 652 P.2d 16 (1982) The Appellate court in this case may take judicial notice that the State offered no competent evidence of the legal status of the alleged financial institution.

2. The Trial Court may not enter a lesser included offense that is not provided for by law.

The Legislature did not intend Robbery in the Second Degree to be available to defendants as a lesser included offense under the newly codified RCW 9A.56.200 when the alleged Robbery occurred within and against a Financial Institution as

defined by RCW 7.88 and RCW 35.38.

Evidence in a case must support an inference that *only* the lesser crime was committed before a lesser included offense instruction is required as a matter of right. State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978). (emphasis added)

In State v. Besio, 80 Wn.App. 426, 907 P.2d 1220 (1995) the court opined that the appellate court's function in interpreting a statute is to discover and give effect to the Legislature's intent. That intent may be discovered by evaluating "the enactment as a whole, along with statutes pertaining to the same subject matter, which must be harmonized if at all possible." (quoting State v. Bernhard, 108 Wn.2d 527 533, 741 P.2d 1 (1987))

The Washington State 2002 legislature intended to harmonize available punishments for bank robbers in Washington State with federal punishments for essentially the same crimes prosecuted in federal court. (See Defense Motion on Reconsideration) The Legislature clearly excluded lesser included offenses for bank robbers in Washington State.

The test for determining if a crime is a lesser included

offense is the two-pronged Workman test. Workman.

1. If each of the elements of the lesser offense is a necessary element of the offense charged. **And**
2. The evidence supports an inference that the lesser crime was committed.

In evaluating the first prong of the Workman test the Liden court must determine if each element of Robbery in the Second Degree is a necessary element of Robbery in the First Degree of a Financial Institution. Robbery in the Second Degree can be maintained against a defendant when there is not the use of force or threat of use of force with a deadly weapon in the commission of the robbery against a person or another entity *that is not a Financial Institution*. RCW 9A.56.210. Robbery of a Financial Institution is Robbery in the First Degree or nothing. RCW 9A.56.200.

In Liden, the jury could not from the evidence presented rationally find the defendant guilty of Robbery in the First or Second Degree. As has already been determined by the trial court the evidence was insufficient to support Robbery in the First Degree of

a Financial Institution. Additionally, the jury could not have rationally found that the defendant was guilty of Robbery in the Second Degree of a Financial Institution because the legislature has precluded the possibility of such a finding.

It was a *mistake* for the lesser included offense of Robbery in the Second Degree to be sent to the jury and for the defendant to be convicted of that crime. Additionally the judgment is *void* because the legislature never intended for Robbery in the Second Degree to be an option in bank robberies. CrR 7.8.

Senate House Bill 2511 (SHB 2511) from the State Session Laws of 2002 specifically modified RCW 9A.56.200 to eliminate the disparity in punishment between bank robberies committed with a "note only" and those committed with a deadly weapon. The sole intent of the legislature was to create only "one kind" of bank robbery in the State of Washington. Consequently, the legislature made it very clear to the public, defendants, and prosecutors that a conviction merely rested on a competent finding that the robbery occurred within and against a financial institution authorized by law.

Robbery in the Second Degree for a robbery against a financial institution fails the first prong of the Workman test because Robbery in the Second Degree only refers to robberies occurring against other individuals or entities that are not financial institutions.

Moving to the Second Prong of the Workman test the court must determine if reasonable inferences based on the evidence supports an inference that the lesser crime was committed. For the reasons noted above, this option is simply not available to would be bank robbers in the State of Washington. If it were there would have been no need for the legislature to modify RCW 9A.56.200.

In addition, State v. Lucky, quoting State v. Hurchalla, 75 Wn.App.417, 877 P.2d 1293 (1994) holds that:

"...if alternate means of committing a crime exist and the lesser included offense does not have to be committed to commit the crime by all of those alternate means, there cannot be a lesser included offense."

Mr. Liden asserts that the legal prong of the Workman test is not met to support his conviction of Robbery in the 2nd degree because each element of Robbery in the 2nd degree is not a necessary element of Robbery in the First Degree of a Financial Institution. To support that assertion he points out that it is not possible under current Washington law to Rob a bank in the second degree.

3. An Appellate Court May Affirm a Trial Court Decision on any Reasonable Grounds and May Only Reverse for an Abuse of Discretion.

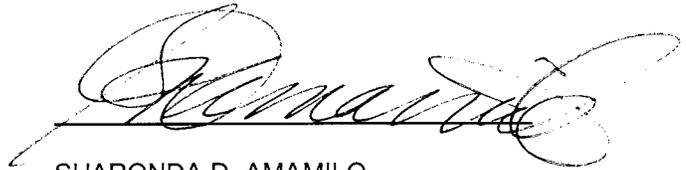
The Appellate court should affirm the decision of the trial court vacating the verdict of Robbery in the First Degree. City of Seattle v. Peterson, 39 Wash. App 524, 693 P.2d 757 (1985) held that “...where the city made no effort to supply the court with the type of information necessary to treat the issue of the reliability or accuracy of the radar unit...” Here, the State made no effort to supply the type of information to the court to determine if the alleged financial institution was indeed operating legally or authorized to accept deposits as defined by statute. Clearly, as the court noted, the state could have made a phone call. 12-22-05 hearing at RP 20. It was clearly within the purview of the court to determine questions of law. The court rightfully determined that the

legislative change intended to make the definition of "financial institution" a material element of the crime when a defendant is charged with robbing a bank.

CONCLUSION

Based on the foregoing the defendant respectfully requests that the defendant's conviction of Robbery in the Second Degree be dismissed with prejudice and that the court deny the State's request to reinstate the original verdict of the Jury.

SIGNED THIS 18TH DAY OF SEPTEMBER AT DUPONT, WASHINGTON.

A handwritten signature in black ink, appearing to read 'Sharonda D. Amamiolo', written over a horizontal line.

SHARONDA D. AMAMILO

ATTORNEY FOR M. SCOTT LIDEN

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STATE OF WASHINGTON

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Clerk

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

STATE OF WASHINGTON,
Appellant,

) NO: 34290-1-II

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) **PROOF OF SERVICE**

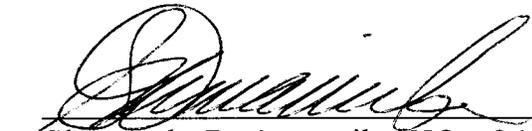
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Respondent/Cross-Appellant

PROOF OF SERVICE

I, Sharonda D. Amamilo, attorney for the Respondent, certify under penalty of perjury under the laws of the State of Washington, that I caused a copy of the Amended Table of Authorities of Respondent's Brief to be served to the Appellant's counsel, James Powers, DPA, on September 19, 2006, by sending it via facsimile to (360) 754-3358.

Signed this 19th day of September, 2006, at DuPont, Washington.



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