

No. 48655-5-II

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

STATE OF WASHINGTON,

Respondent,

v.

Jonathan Watson

Appellant.

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

The Honorable Erik Price, Judge
Cause No. 13-1-01926-8

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether direct evidence was required to prove that Navy Federal Credit Union was a “financial institution” under RCW 7.88.010(6).
2. Whether there was sufficient evidence to prove that Navy Federal Credit Union was “authorized by federal or state law to accept deposits” in Washington State.
3. Whether Watson’s conviction for attempted robbery in Utah counts as a strike under Washington’s persistent offender statute.

B. STATEMENT OF THE CASE.

The State accepts Watson’s substantive and procedural facts of the case.

C. ARGUMENT.

1. Direct evidence was not required for the State to prove that Navy Federal Credit Union was a “financial institution” under RCW 7.88.010(6).

When interpreting a statute, the court must give effect to the plain meaning of the statute’s language. In re Wissink, 118 Wn. App. 870, 874, 81 P.3d 865 (2003). If the statute is unambiguous, a court may not engage in statutory construction. State v. Bolar, 129 Wn.2d 361, 366, 917 P.2d 125 (1996). However, the court must take efforts “to avoid absurd results.” State v. Liden, 138 Wn.App. 110, 117, 156 P.3d 259 (2007).

In the present case, Watson was charged with a robbery in the first degree pursuant to RCW 9A.56.200(1)(b). CP 3. RCW 9A.56.200(1)(b) states that a robbery in the first degree is committed when:

He or she commits a robbery within and against a financial institution as defined in RCW 7.88.010 or 35.38.060.

RCW 7.88.010(6) defines a financial institution as:

[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 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.

Watson contends that the State failed to prove its case because it did not show that Navy Federal Credit Union was a “financial institution” under either definition of a financial institution. Petitioner’s Brief 12. RCW 7.88.010(6) includes the term “credit union” and is relevant to Watson’s charge and conviction. Therefore, it is not necessary to determine whether credit unions are covered under RCW 35.38.060.

Watson argument specific to RCW 7.88.010 is that the State provided no direct evidence that Navy Federal credit Union was “authorized to accept deposits” in Washington State. Petitioner’s Brief 16. However, this claim ignores the holding in Liden. In that case, which interpreted RCW 7.88.010(6), the Court held that:

[T]he Legislature did not intend to require the State to provide direct evidence that a robbed bank is a ‘financial institution,’ certified or otherwise; assuming its sufficiency, circumstantial evidence will suffice.

Liden, 138 Wn. App. at 119. The Court found that requiring the State to produce direct evidence, “rather than circumstantial evidence—would produce an absurd interpretation of these ‘financial institution’ statutes.” Id. at 118.

The Court gave two reasons that requiring direct evidence in such cases would be absurd. Id. First, in none of the criminal statutes which include the phrase “financial institution”:

[H]as the Legislature 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.”

Id. Additionally, to require the State to produce direct evidence would be to “assume that the legislature intended to depart from ... long-standing principle and create an anomaly for first degree robbery.” Id. at 118-19. That longstanding principle is “that a

criminal conviction may rest solely on circumstantial evidence, which is equally reliable as direct evidence.” Id.

Liden remains good law and there is no reason for this Court to depart from it. Therefore, this Court should find that the State was not required to prove that Navy Federal Credit Union was a financial institution through direct evidence.

2. Because direct evidence was not required, the testimony of four credit union employees was sufficient to prove that Navy Federal Credit Union was “authorized by federal or state law to accept deposits” in Washington State.

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).

“[T]he critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt.” (Cite omitted.) This inquiry does not require a reviewing court to determine whether it believes the evidence at trial established guilt beyond a reasonable doubt. “Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a

reasonable doubt. (Cite omitted, emphasis in original.)

State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

“A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.” Salinas, 119 Wn.2d. at 201. Circumstantial evidence and direct evidence are equally reliable, and criminal intent may be inferred from conduct where “plainly indicated as a matter of logical probability.” 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). This 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). It is the function of the fact finder, not the appellate court, to discount theories which are determined to be unreasonable in light of the evidence. State v. Bencivenga, 137 Wn.2d 703, 709, 974 P.2d 832 (1999).

In Liden, the Court held that there was sufficient evidence to find that the Heritage Bank robbed by the defendant was a financial institution for three reasons:

First, Liden's robbery note, which he wrote on the back of the counter check, contained the printed words, "Reserved for Financial Institution Use." Ex. 3 (emphasis added). Second, Tagavilla testified that she was a Heritage Bank employee and that Liden threatened her while she was working inside Heritage Bank. Third, the remaining eyewitnesses testified they were on the premises to make bank deposits (i.e., banking activity) when they witnessed Liden both before and after the robbery.

138 Wn.App. at 119-120.

The State produced similar information in the present case. At trial, the State called four Navy Federal Credit Union employees to testify. RP 117, 453, 481, 512.1 All testified that the credit union accepts deposits.

Amanda Jackson was the first credit union employee to testify. RP 117. While Jackson was never explicitly asked if the credit union was "authorized by federal or state law to accept deposits," she did respond "yes" when asked if Navy Federal credit Union was, on the date of the robbery, "an institution that accepted deposits as a financial institution?" RP 120. She further testified

¹ Unless otherwise noted, all references to the Verbatim Report of Proceedings are to the trial transcripts dated November 16-19, 2015.

that Navy Federal Credit Union “is a full service credit union during operating hours.” Id.

The next employee to testify was Amanda Taylor. She answered “yes” when asked if, as part her job, she “takes deposits and dispenses money to the members” of the credit union. RP 454.

Jennifer Abramson was the third employee called to testify. She was asked if Navy Federal Credit Union was regulated “by a federal government agency with regard to its deposits?” RP 484. Abramson responded that the credit union was regulated and insured by the National Credit Union Association. Id. Abramson also responded “yes,” when asked if the credit union “accept[ed] deposits as a financial institution under the federal and state laws.” Id.

A similar question was posed to Stephanie Stephenson, the final employee called to testify. RP 511. She was asked whether Navy Federal Credit Union “accept[s] deposits as a financial institution in the State of Washington?” RP 513. Stephenson responded “yes” to that question. Id. She also testified that, as a member service representative at the credit union, she helps members with “opening new accounts, assisting members with questions, [and] doing transactions.” Id. Finally, Stephenson stated

that, in reference to seeing the defendant in line, “we would assume they were there for a cash transaction or deposit.” RP 516.

From the testimony of the four employees, there was sufficient evidence for the jury to conclude that Navy Federal Credit Union was “authorized by federal or state law to accept deposits in this state.” Why the employees may have not used this exact language, they all provided testimony that the credit union receives deposits. Their testimony is consistent with the requirements of Liden and is therefore sufficient.

3. The trial court correctly found Watson’s conviction for attempted robbery in Utah to be a strike under Washington’s persistent offender statute.

In Washington, a defendant found to be a persistent offender can be sentenced to life in prison without the possibility of parole.

RCW 9.94A.570. A persistent offender is an individual who:

- (i) Has been convicted in this state of any felony considered a most serious offense; and
- (ii) Has, before the commission of the offense under (a) of this subsection, been convicted as an offender on at least two separate occasions, whether in this state or elsewhere, of felonies that under the laws of this state would be considered most serious offenses and would be included in the offender score under RCW 9.94A.525; provided that of the two or more previous convictions, at least one conviction must have occurred before the commission of any of the other

most serious offenses for which the offender was previously convicted.

RCW 9.94A.030(38)(i-ii).

Attempted robbery in the second degree is considered a most serious offense. RCW 9.94A.030(33)(o). "A person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he or she does any act which is a substantial step toward the commission of that crime." RCW 9A.28.020 "A person is guilty of robbery in the second degree if he or she commits robbery." RCW 9A.56.210. An individual commits robbery:

[W]hen he or she unlawfully takes personal property from the person of another or in his or her presence against his or her will by the use or threatened use of immediate force, violence, or fear of injury to that person or his or her property or the person or property of anyone. Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking; in either of which cases the degree of force is immaterial. Such taking constitutes robbery whenever it appears that, although the taking was fully completed without the knowledge of the person from whom taken, such knowledge was prevented by the use of force or fear.

RCW 9A.56.190.

A conviction from another state can count as a strike under RCW 9.94A.570 if the out-of-state crime would be considered a most serious offense under Washington law. RCW

9.94A.030(38)(ii). Whether a foreign offense will be considered a most serious offense is controlled by RCW 9.94A.525(3). That statute states:

Out-of-state convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law. Federal convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law. If there is no clearly comparable offense under Washington law or the offense is one that is usually considered subject to exclusive federal jurisdiction, the offense shall be scored as a class C felony equivalent if it was a felony under the relevant federal statute.

Id.

Washington Courts have developed a two-part test to determine if an out-of-state statute is comparable to a Washington statute. State v. Thiefault, 160 Wn.2d 409, 415, 158 P.3d 580 (2007). In completing the two-part test:

A court must first query whether the foreign offense is legally comparable—that is, whether the elements of the foreign offense are substantially similar to the elements of the Washington offense. If the elements of the foreign offense are broader than the Washington counterpart, the sentencing court must then determine whether the offense is factually comparable—that is, whether the conduct underlying the foreign offense would have violated the comparable Washington statute.

Id. at 415.

In making the comparison, the Court may use facts that have been stipulated to, admitted, or proved beyond a reasonable doubt. In re Pers. Restraint of Lavery, 154 Wn.2d 248, 258, 111 P.3d 837 (2005). The standard of proof for finding comparability is preponderance of the evidence. State v. McKague, 159 Wn.App. 489, 517, 246 P.3d 558 (2011).

In 1999, Watson was charged with attempted robbery for a violation of U.C.A 76-6-301. The charging document stated:

Robbery, a 3rd Degree Felony, at 209 South 1300 East, in Salt Lake County, State of Utah, on or about September 3, 1999, in violation of Title 76, Chapter 6, Section 301, Utah Code annotated 153, as amended, in that the defendant, John Sandy Watson, a party to the offense, intentionally or knowingly used force or fear of immediate force against Wendy Scheid in the course of committing a theft.

CP 183.

Prior to sentencing, the State and Defense had difficulty finding the exact language of U.C.A. 76-6-301, as it existed in 1999. 2/24/16 RP 63. After research by both parties, the State conceded and the Court accepted Watson's version of the statute. Id. That version of U.C.A. 76-6-301 reads:

- (1) A person commits robbery if:
 - (a) The person unlawfully and intentionally takes or attempts to take personal property in the possession of another from his person, or

- immediate presence, against his will, by means of force or fear, or
- (b) The person intentionally or knowingly uses force or fear of immediate force against another in the course of committing a theft.

CP 252-53.

Watson pled guilty before his Utah case could go to trial. In

Watson's statement attached to his pleading, Watson wrote:

On September 3, 1999, at 2280 So. Highland Drive I attempted to steal beer by means of a threat of harm to the employee of the convenience store located there.

CP 187.

Watson argues, as he did at sentencing, that the Utah statute, U.C.A. 76-6-301, differs from RCW 9A.56.190, .210. He contends that the element "by means of force or fear" is broader than the similar element in the Washington statute, which requires the robbery be done "by the use or threatened use of immediate force, violence or fear of injury." In making this argument, Watson points specifically to the lack of an immediacy requirement in the Utah statute.

The trial Court correctly found that the Utah and Washington statutes have substantially similar elements and that the lack of the word "immediate" in U.C.A. 76-6-301(1)(a) is not determinative. In

doing so, the court relied on State v. Morely, 134 Wn.2d 588, 952 P.2d 167 (1998), in which the Washington Supreme Court considered the differences between the robbery statute in the Uniform Code of Military Justice, UCMJ Article 22, and RCW 9A.56.190, .210. At the time of the defendant's conviction in Morely, UCMJ Article 22 stated:

Any person ... who with intent to steal takes anything of value from the person or in the presence of another, against his will, by means of force or violence or fear of immediate or future injury to his person or property ..., is guilty of robbery and shall be punished as a court-martial may direct.

While UCMJ Article 22 could be satisfied if the defendant's actions produced fear of "future injury," in contrast to the required proof of the defendant's use or threat of "immediate force" in RCW 9A.56.190, .210, the Court still concluded that "[t]he elements of the court-martial offense...[were] nearly identical to the definition of robbery in this state." Therefore, UCMJ Article 22 was "comparable to Washington offenses under RCW 9.94A.360(3)" for the purposes of the persistent offender statute. RCW 9.94A.360 was recodified as RCW 9.94A.525 in 2001.

U.C.A. 76-6-301(1)(a), as it existed in 1999, is very similar to UCMJ Article 22. UCMJ Article 22 required that a robbery be done

through “force or violence or fear of immediate or future injury.” U.C.A. 76-6-301(1)(a) requires that a robbery be done by “means of force or fear.” In neither statute is there a requirement that the “fear” be immediate. Fear of future action is enough to satisfy both statutes.

The lack of the word “immediate” in the foreign statute was not determinative in Morley. This Court should follow precedent in the present case. The fact that there is no immediacy requirement in U.C.A. 76-6-301(1)(a) should not be determinate and this Court should uphold the trial court’s finding that the elements of U.C.A. 76-6-301(1)(a) and RCW 9A.56.190, .210 are substantially similar for the purpose of sentencing a persistent offender.

Watson does not argue that there are any other substantial differences between U.C.A. 76-6-301(1)(a) and RCW 9A.56.190, .210. Therefore, his Utah conviction should count as a strike offense.

If this Court finds that the Utah and Washington statutes are not sufficiently similar, it must then determine “whether the conduct underlying the foreign offense would have violated” the Washington statute. Thiefault, 160 Wn.2d at 415. Under this analysis, Watson’s plea meets the elements required by RCW 9A.56.190, .210.

Watson's statement did not stipulate that his "threat of harm" was "immediate." However, common sense dictates that an individual threatening an employee while robbing a convince store does so to make that employee feel that they are in immediate danger. Otherwise, that threat does little to aid the perpetrator. Because Watson's plea meets the elements of the RCW 9A.56.190, .210, his Utah conviction counts as a strike, even if the language of the Utah statute is not identical to the Washington statute.

D. CONCLUSION.

For the reasons stated, this Court should uphold Watson's conviction and sentence.

Respectfully submitted this 15th day of September, 2016.

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CERTIFICATE OF SERVICE

I certify that I served a copy of the Brief of Respondent on the date below as follows:

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

Dated this 15th day of September, 2016, at Olympia,

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CYNTHIA WRIGHT, PARALEGAL

THURSTON COUNTY PROSECUTOR

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