STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT I

Case No. 2015AP110-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JAMES LEE EADY, JR.,

Defendant-Appellant.

On Appeal from a Judgment of Conviction Entered in the Milwaukee County Circuit Court, the Honorable Charles F. Kahn, Jr., Presiding.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUE PRESENTED

Mr. Eady was convicted of robbing a financial institution. The jury was instructed that a "financial institution" means "a commercial bank whether chartered under the laws of this state, another state or the United States." This definition was taken directly from the statute defining a financial institution.

Was the evidence sufficient to convict Mr. Eady of robbing a chartered bank where no evidence was submitted to show that the bank had a charter?

The circuit court ruled that the jury could infer the victim was a "financial institution."

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Publication is appropriate because no published or unpublished case addresses what evidence is required to prove that a victim is a "financial institution." In 2006, the legislature created a new set of crimes against "financial institutions." Wis. Stat. §§ 943.80-943.92. Publication would provide guidance in all future cases alleged to have been committed against financial institutions.

Mr. Eady does not request oral argument as the issue in this case can be addressed adequately in briefing.

STATEMENT OF FACTS

On December 7, 2011, the State charged James Eady with one count of robbery of a financial institution, contrary to Wis. Stat. § 943.87. (2). The complaint alleged that Mr. Eady went into a U.S. Bank branch, and gave the teller a note that read: "Bitch give me the money. I'm not playin, I will blow your head off right now, don't play wit me $10,000.00." (2:1). The teller took the money from her drawer and put it in the tray where Mr. Eady could take it. (2:1). The complaint alleged that he took the money and left the bank. (2:1). The teller subsequently identified Mr. Eady in an in-person line-up. (2:2).

The case proceeded to trial.

The teller testified that on November 21, 2011, she was working as a supervisor at U.S. Bank. (43:62-63). She testified Mr. Eady came into the bank wearing a gold jacket. (43:62, 67). She testified that Mr. Eady came up to her window and passed her the demand note. (43:67). She then told Mr. Eady that she did not have that much cash in her drawer, and began to leave to get the money because she was trained to comply with a robber's demands. (43:68). She testified that Mr. Eady said "no," so she stayed and gave him the money she had. (43:69). The teller then identified a surveillance video of the robbery that was played for the jury. (43:73-74). She testified that she did not know exactly how much money Mr. Eady took, but she knew her drawer was $1500 short. (43:70).

The bank manager on duty testified that after the robbery, the teller gave her the demand note. (44:5-6). The manager confirmed that she was unaware of the robbery as it was occurring, and confirmed that $1500 was missing. (44:8, 10, 11).

Police Officer Robert Crawley testified that he was dispatched to the bank, and identified a series of pictures of the bank and the robbery taken by the surveillance camera. (44:15-27). Officer Michael Fedel testified that he found a gold jacket, hat, and hooded sweatshirt in a yard near the bank. (44:31, 32-35, 45).

An analyst from the State Crime Laboratory testified that the hat, jacket, and sweatshirt had DNA samples that matched Mr. Eady. (45:11-13, 17-18).

A number of other officers testified to their role in the investigation, including the line-up and a handwriting analysis of the demand note. Their testimony generally relates to the identification of Mr. Eady as the robber. As Mr. Eady is not challenging the identification in this case, their testimony is immaterial on appeal.

After the evidence was presented, the jury was instructed on the elements the State needed to prove before a guilty verdict could be reached.

> Robbery as defined in section 943.87 of the Wisconsin statutes is committed by one who with the intent to steal takes in the presence of an individual property that is opened by or under the custody and control of a financial institution from the person or presence of the individual by threatening the imminent use of force against the individual with intent to compel that person to submit to the taking or carrying away of the property. Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present. One, US Bank is a financial institution which is owned or had custody and control of US currency. Financial institution means a commercial bank whether chartered under the laws of this state, another state or the United States. Two, the defendant took and carried away

> money opened or in the custody and control of US Bank from the presence of an individual, [the teller]. Three, the defendant took the property with the intent to steal. This requires that the defendant had the mental purpose to take and carry away the property of another without consent and that the defendant intended to deprive US Bank permanently away of possession of the property. And four, the defendant acted forcibly. Forcibly means the defendant threatened the imminent use of force against [the teller] with the intent to compel [the teller] to submit to the taking or carrying away of the property. Imminent means near at hand or on the point of happening.

(45:51-53; App. 103-05).

After the jurors left to deliberate, trial counsel moved to dismiss, arguing that the State did not introduce any evidence as to the first element: that the owner of the money was a *chartered* bank. (45:77; App. 106).

> Mr. Jones: So I would make both the motion to dismiss at the close of the State's case and join that with a motion for a directed verdict under both standards. My argument would be simply that element number one requires that US Bank be a financial institution. Financial institution means commercial bank whether chartered under the laws of this state, another state or the United States, and I don't believe there was any testimony that they are a chartered bank.
>
> The Court: Mr. Mineo, what about that?
>
> Mr. Mineo: Well, I believe there was testimony that it is a bank. I think it's pretty clear that US Bank is a financial bank, a

commercial bank. We had testimony from several of their employees. They testified they worked for US Bank, where it's located. I think it's pretty clear that US Bank is a financial institution that had owned or had custody of US currency.

The Court: Regarding chartered, you know, the district attorney is the one that supplied that proposed instruction. It was agreed to by the parties, and it was read without any editing or review on my part as to what the law is. The Information I don't think refers to the word chartered. As far as the question of whether this was missed after—first of all, I don't think that merely by including it in the jury instruction the district attorney is allowed to add an element or some fact that has to be proven to the charge. In other words, that the bank was somehow chartered in some official or certified way. If that, in fact, really is the law, if that's what Ms. Hardtke when she prepared the proposed instruction has determined that that is a required element of the offense, then the question is could the jury find this by inference with all of the testimony that was presented, and, you know, my recollection of the evidence is the jury probably could do that taking into account the whole big picture of its entire operation including the photographs of what obviously has the look and feel of being a bank.

Now, Mr. Jones, I think you have done a very good job of preserving it for the

> Court of Appeals, but this would be an entirely legal determination if there was never a certificate presented of an official charter which had some US seal on it or a state seal on it saying chartered, if there was no evidence of this in the trial and if that is a required element and if Mr. Eady is convicted by this jury, then you will win it on appeal, but at this point I have to deny that motion, both motions, based on that argument.

(45:77-78; App. 106-07).

The jury found Mr. Eady guilty. (17). The court later sentenced Mr. Eady to ten years in confinement, followed by seven and a half years of extended supervision. (48:25).[1]

[1] Predecessor counsel previously filed a no-merit report in this case. This court rejected the no-merit report, and undersigned counsel was appointed. (54).

ARGUMENT

I. The Evidence at Trial Was Insufficient to Convict Mr. Eady of Robbing a Financial Institution.

There was insufficient evidence to convict Mr. Eady of robbing a financial institution. Ordinarily, a robbery can be committed against any person in possession of property. Wis. Stat. § 943.32; Wis. JI-Criminal 1479. In 2006, the legislature created a new, aggravated robbery: robbery of a financial institution. Wis. Stat. § 943.87; 2005 Wis. Act 212. As distinct from the existing elements of robbery, this new offense requires the State to show that the victim was a "financial institution." After satisfying that element, the maximum penalties for the robbery increase from 15 years imprisonment and a $50,000 fine to 40 years imprisonment and a $100,000 fine.

A "financial institution" is defined by statute as "a bank, as defined in s. 214.01(1)(c) . . . whether chartered under the laws of this state, another state or territory, or under the laws of the United States."

In the present case, the State presented no evidence that the victim was a chartered bank. The circuit court noted that the location of the robbery had the "look" and the "feel" of a bank. (45:78; App. 107). But the statutes do not expose a defendant to an extra 25 years imprisonment and $50,000 in fines for robbing a place with the "look" or "feel" of a bank. After deciding to pursue this charge with its enhanced penalties, the State was required to prove, beyond a reasonable doubt, that the victim was a chartered bank. The State failed to prove this essential element of the offense. Therefore, this Court should reverse.

A. The State was required to prove that the victim was a commercial bank with a charter from the United States, Wisconsin, or another state.

Due process demands that the prosecution prove each element of a charged offense beyond a reasonable doubt. ***In re Winship***, 397 U.S. 358, 364 (1970); ***State v. Harvey***, 2002 WI 93, ¶ 19, 254 Wis. 2d 442, 647 N.W.2d 189. On appeal, a court must reverse a defendant's conviction where "the evidence, viewed most favorably to the state and the conviction is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990).

"Unquestionably, the state has the burden of proving each essential element of a crime charged beyond a reasonable doubt." ***State v. McAllister***, 107 Wis. 2d 532, 533, 319 N.W.2d 865 (1982). "Equally beyond dispute is the proposition that where the finder of fact is a jury, rather than a judge, proof of all essential elements must be tendered to the jury." ***Id.***

In the present case, the State was required to prove three elements to convict Mr. Eady of robbing a financial institution: (1) U.S. Bank was a "financial institution" that owned money or property; (2) Mr. Eady took money from U.S. Bank; and (3) Mr. Eady acted forcibly.[2]

[2] The circuit court instructed the jury that the State was also required to prove Mr. Eady took the money with intent to steal. (45:51-52; App. 103-04). However, Wis. Stat. § 943.87 does not require that the property be taken with intent to steal. It appears that the court's instruction was taken from the pattern instruction for robbery, which *does* require intent to steal. Wis. Stat. § 943.32; Wis. JI-Criminal 1479.

There is no pattern jury instruction for robbery of a financial institution. In 2006, the legislature created a new subchapter of offenses against financial institutions, including robbery of a financial institution. 2005 Wis. Act 212. The jury instruction committee noted that this new subchapter created a series of crimes against financial institutions. Wis. JI-Criminal 1508. However, the committee concluded that pattern instructions would be unnecessary because the new offenses generally mirrored preexisting crimes, with the only modification being that a financial institution was the victim. ***Id.*** (e.g. theft from a financial institution, bribery involving a financial institution, and extortion against a financial institution).

Despite the absence of a pattern instruction, the instruction given to the jury accurately identified the elements of robbing a financial institution.[3]

The court further instructed the jury that a "[f]inancial institution means a commercial bank *whether chartered under the laws of this state, another state or the United States*." (45:52; App. 104) (emphasis added).

This instruction also accurately reflected the statutory requirements. A "financial institution" is a term of art, defined by statute. Relevant to this case, a "financial institution" means "a bank, as defined in s. 214.01(1)(c) . . . whether chartered under the laws of this state, another state or territory, or under the laws of the United States[.]" Wis. Stat. § 943.80(2). Thus, if the robbed institution did not have a

[3] "Whoever by use of force or threat to use imminent force takes from an individual or in the presence of an individual money or property that is owned by or under the custody or control of a financial institution is guilty of a Class C felony." Wis. Stat. § 943.87.

charter to bank, the defendant could not be guilty of robbing a financial institution.

That U.S. Bank was chartered by this state, another state, or the United States was an essential element of the offense that the State was required to prove beyond a reasonable doubt. The statute expressly requires that the victim be a chartered bank. When the State decided to take advantage of the increased penalties for robbing a financial institution, the State obligated itself to prove that the victim was actually a financial institution.

This Court addressed an analogous circumstance in ***State v. Powers***, 2004 WI App 156, 276 Wis. 2d 107, 687 N.W.2d 50. There, the defendant was charged as an employee of a health care facility who had sexual contact with a patient. ***Id.*** at ¶ 2. The statute indicated that only employees of a "hospital . . . or other place licensed or approved by the [DHS]" could be charged. ***Id.*** at ¶ 9; Wis. Stat. § 940.295(1)(i). The defendant was an employee of the Tomah VA Medical Center. ***Id.*** at ¶ 2. The defendant moved to dismiss the charge before trial, arguing that because the VA Medical Center was not licensed by DHS, he was not an employee of a qualifying health care facility. ***Id.*** at ¶ 5. This Court permitted an interlocutory appeal and agreed with the defendant. ***Id.*** at ¶¶ 5-6. The charge was dismissed because the State would have been unable to prove an essential element of the offense: that the defendant was an employee of a *DHS licensed* health care facility. ***Id.*** at 20.

Just as the State in ***Powers*** would have been required to prove the existence of the medical center's license, the State here must prove the existence of the bank's charter. Powers could not be convicted if he worked at an unlicensed

medical center, and Mr. Eady cannot be convicted if he robbed an unchartered bank.

The fact that the U.S. Bank "looks" or "feels" like a chartered bank is immaterial. The Tomah VA Medical Center probably seemed a lot like a health care facility when seen in pictures. But because it was not licensed by the DHS, the defendant could not be charged or convicted for having sexual contact with a patient. Similarly, Mr. Eady can only be convicted of robbing a financial institution if the State met its burden to prove that he robbed a chartered bank.

B. No evidence was introduced to show that the victim was a chartered bank; therefore, Mr. Eady's conviction should be reversed.

Based on the record, any argument that the bank had or did not have a charter is simply speculation. The State did not introduce any testimony or exhibit that the victim was a chartered bank. A number of witnesses testified that the robbery occurred at a U.S. Bank, or colloquially referred to the location as a "bank." (43:62, 63; 44:5, 15, 16). But no evidence proved the location was a chartered bank.

The existence of a bank charter cannot be inferred from testimony or pictures shown to the jury. Some elements of an offense must be proven circumstantially. For example, it is beyond dispute that intent or knowledge can be inferred. Wis. JI-Criminal 923A. It would be almost impossible to convict if "definite and substantive proof" of intent were required. ***Strait v. State***, 41 Wis. 2d 552, 559, 164 N.W.2d 505 (1969).

But a bank charter is not like intent. A bank charter is not in the defendant's mind and is easily susceptible to "definite and substantive proof." Proving the existence of a

charter probably would have been simple had any effort been undertaken. The State did not attempt to elicit testimony from the bank manager that the bank was chartered, nor did the State attempt to introduce an exhibit proving the charter.

Powers demonstrates that the court cannot infer the existence of a bank charter. When the State elects to charge an aggravated offense, it must prove the occasionally more stringent elements required to invoke that offense and its enhanced penalties. The jury in ***Powers*** could not have inferred that the VA Medical Center was licensed by the DHS. *See* 276 Wis. 2d 107, ¶ 20. The charter either exists or it does not. And even places that look like banks or medical centers do not necessarily have the necessary license or charter. Thus, there is no basis to infer the existence of a bank charter.

Mr. Eady had no obligation to prove that the bank *did not* have a charter. "The burden of persuasion remains with the state throughout the trial, and as to any element the burden cannot be shifted to the defendant." ***State v. Schulz***, 102 Wis. 2d 423, 307 N.W.2d 151 (1981). Thus, his decision to present no evidence has no bearing on the State's error.

If this Court finds that the State failed to prove that the victim was a chartered bank, it must remand the case with instructions that the circuit court enter a judgment of acquittal. ***State v. Wulff***, 207 Wis. 2d 143, 144, 557 N.W.2d 813 (1997) (citing ***Burks v. United States***, 437 U.S. 1 (1978)).

CONCLUSION

For the reasons stated above, Mr. Eady asks that this Court reverse the decision of the circuit court and remand with instructions that the circuit court enter a judgment of acquittal.

Dated this 27th day of March, 2015.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 3,208 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 27th day of March, 2015.

Signed:

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CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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