STATE OF WISCONSIN

COURT OF APPEALS

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 OF PLAINTIFF-RESPONDENT

BRAD D. SCHIMEL
Attorney General

SANDRA L. TARVER
Assistant Attorney General
State Bar #1011578

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-7630 | Fax: (608) 266-9594
tarversl@doj.state.wi.us

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication.

ARGUMENT

The evidence was sufficient to support Eady's conviction of robbery of a financial institution.

A Milwaukee County jury found James Lee Eady, Jr. guilty of one count of robbery of a financial institution contrary to Wis. Stat. § 943.87 (23; 47:5). Wisconsin Stat. § 943.87 provides:

> 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.

A "financial institution" means a bank "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).

Eady does not challenge the sufficiency of the evidence to prove that he robbed the U.S. Bank at 5526 West Capitol Drive in Milwaukee on November 21, 2011. Nor does Eady dispute that, on the date of the offense, U.S. Bank was a financial institution within the meaning of Wis. Stat. § 943.87. Eady has never claimed that U.S. Bank was operating without a bank charter on the date of the offense.

Eady's sole claim is that the State introduced insufficient evidence to support his conviction because the State "presented no evidence that the victim was a chartered bank." Eady's brief at 7.

Eady is wrong. A bank charter is a "[d]ocument issued by governmental authority permitting a bank to conduct business." Black's Law Dictionary (10th ed. 2014). Like all other facts necessary to prove the commission of a crime, a bank charter can be proven by circumstantial evidence and inferences reasonably drawn from the evidence presented.

Applying the well-accepted standard of appellate review of a challenge to the sufficiency of the evidence to support a conviction, this court must conclude that the evidence was sufficient to prove that U.S. Bank was chartered at the time of the offense.

The standard of review of a challenge to the sufficiency of the evidence to support a criminal conviction is well established, and was accurately summarized in *State v. Webster*, 196 Wis. 2d 308, 320, 538 N.W.2d 810 (Ct. App. 1995):

> The standard of review that we apply when testing the sufficiency of the evidence is recited in *State v. Poellinger*, 153 Wis. 2d 493, 451 N.W.2d 752 (1990):
>
> > [I]n reviewing the sufficiency of the evidence to support a conviction, an appellate court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it.
>
> *Id.* at 507, 451 N.W.2d at 757-758 (citations omitted). Stated another way: "[t]his court will only substitute its judgment for that of the trier of fact when the fact finder relied upon evidence that was inherently or patently incredible—that kind of evidence which conflicts with the law of nature or with fully-established or conceded facts." *State v. Tarantino*, 157 Wis. 2d 199, 218, 458 N.W.2d 582, 590 (Ct. App. 1990). Additionally, the trier of fact is the sole arbiter of the credibility of witnesses and alone is charged with the duty of weighing the evidence. *See Poellinger*, 153 Wis. 2d at 506, 451 N.W.2d at 756.

The State concedes that a bank must be chartered to meet the applicable definition of a financial institution. But contrary to Eady's claim, the State introduced sufficient circumstantial evidence to prove that U.S. Bank was chartered at the time of the offense.

At trial, MG testified that she was employed as a supervisor by U.S. Bank on November 21, 2011 (43:62-63). She was working at the "Midtown" branch at 5526 West Capitol Drive in Milwaukee (43:62-63). Exterior signage identified the building as a branch of U.S. Bank (44:55; 52:Ex. 43).

MG testified that everything was normal and that she was servicing customers, taking phone calls, and performing her daily duties until the robbery occurred at about 9:27 that morning (43:63). MG testified that Eady approached her at a teller window and passed her a note demanding money (43:64-68). She gave him money from her drawer (43:69). Eady grabbed half of it and left (43:68-71).

RZ was the branch manager (44:5). MG alerted RZ that she had been robbed (44:5-6). The police were called (44:7). Officers were dispatched to the bank robbery (44:15-16). Both bank entrances were immediately secured and the bank was immediately closed down (44:6-7).

RZ testified that tellers are tasked each day with balancing their assigned cash drawers to ensure that they maintain certain cash levels (44:9). The drawers are kept in a bank vault at night (44:9). Immediately after the robbery, bank security staff audited MG's drawer and determined that the drawer was short $1,500 (44:9-10).

The bank's surveillance video was turned over to police (44:7). The video and digital snapshots developed from it depict the interior of the Midtown branch, including a safe box, teller

windows, and the station where customers fill out bank slips (43:65-66, 71-73).

Officers searched the area outside the bank and found clothing matching the description of that worn by the robber (44:31-34). A U.S. Bank deposit slip was found in the clothing pocket and was introduced in evidence (44:35-37; 52:Ex. 34).

No witness was expressly asked whether U.S. Bank was chartered and no documentary evidence of a charter was presented as an exhibit at trial. Based on the facts and evidence detailed above, however, the jury was certainly justified in reaching the conclusion that U.S. Bank was chartered.

The evidence presented by the State established without question that the facility robbed was known as U.S. Bank and held itself out to be a bank; it was recognized, known and regarded as such by employees, customers, and law enforcement officers; it operated as a bank; it serviced customers and it employed managers, tellers, and corporate security staff.

In making the determination of guilt or innocence, the trier of fact is allowed to "take into account matters of common knowledge and experience in the affairs of life." *State v. Poellinger*, 153 Wis. 2d 493, 508, 451 N.W.2d 752 (1990). A reasonable fact finder, taking into account common knowledge and experience in the affairs of life, in light of all of the evidence showing that U.S. Bank was identified and regarded, represented itself, and functioned as a bank, could reasonably infer that U.S. Bank met all of the statutory attributes of a financial institution, including that it was chartered under state or federal law.

There is no basis for this court to reject this eminently reasonable inference. Without question, a finding of guilt may rest upon evidence that is entirely circumstantial; indeed, it has

been said that "circumstantial evidence is oftentimes stronger and more satisfactory than direct evidence." *Poellinger*, 153 Wis. 2d at 501. If the finding of guilt may "rest upon evidence that is entirely circumstantial" then, necessarily, a finding of one fact—a authorization to operate—may "rest upon evidence that is entirely circumstantial." *Id*. There is no logical or legal support for Eady's contention that one fact alone, out of the universe of facts that must be proven in any criminal case, cannot be inferred from the evidence. Eady's brief at 11-12.

It is remotely possible that a bank could represent itself, be regarded by others, and function as a legitimate bank even though it does not actually have the requisite governmental authorization. But the fact that such a remote possibility exists, did not require the fact finder here to draw the inference that U.S. Bank must not have had a bank charter at the relevant time.

> In viewing evidence which could support contrary inferences, the trier of fact is free to choose among conflicting inferences of the evidence and may, *within the bounds of reason*, reject that inference which is consistent with the innocence of the accused. *See Peters* [*v. State*, 70 Wis. 2d 22, 34, 233 N.W.2d 420 (1975)]. Thus, when faced with a record of historical facts which supports more than one inference, an appellate court must accept and follow the inference drawn by the trier of fact unless the evidence on which that inference is based is incredible as a matter of law. . . .
>
> . . . .
>
> . . . In reviewing the sufficiency of circumstantial evidence to support a conviction, an appellate court need not concern itself in any way with evidence which might support other theories of the crime. An appellate court need only decide whether the theory of guilt accepted by the trier of fact is supported by sufficient evidence to sustain the verdict rendered.

Poellinger, 153 Wis. 2d at 506-08.

Eady argues that absent testimony or documentary evidence that the bank was chartered, the fact finder could not infer the existence of a charter. Eady's brief at 11-12. The State disagrees. While direct testimony and documentary evidence are certainly options for proving a fact, they are not the only options.

In *State v. Booker*, 2006 WI 79, ¶ 1, 292 Wis. 2d 43, 717 N.W.2d 676, the Wisconsin Supreme Court held that the evidence was sufficient to sustain a conviction of two counts of exposing a child to harmful materials contrary to Wis. Stat. § 948.11, even though the jury did not view the video containing the harmful material, but only heard the children and a detective describe what they saw. The Wisconsin Supreme Court rejected the argument that the State could meet its burden of proof only by actually showing the video scenes to the jury. The court held that the testimony that described the contents of the video scenes shown to the children was sufficient to allow the jury to conclude that the video scenes constituted harmful material within the meaning of the statute. The statute required the jury to conclude that the material would appeal to the prurient interest of children, was patently offensive to prevailing standards in the adult community regarding what is suitable for children and when taken as a whole lacked serious literary, artistic, political or educational value for children of the age of those to whom it was shown. *Id.* ¶¶ 18-31.

Similarly, in Eady's case, the fact finder was not required to see the actual charter document in order to draw the reasonable inference that U.S. Bank was properly chartered. The trial testimony, which demonstrated that that the facility known as U.S. Bank actually held itself out to be a bank, operated as a bank, and was recognized, known and regarded as such by law enforcement, employees, and customers, was sufficient to allow the fact finder to draw the reasonable inference that U.S. Bank was properly chartered.

Eady misplaces reliance on *State v. Powers*, 2004 WI App 156, 276 Wis. 2d 107, 687 N.W.2d 50. Eady's brief at 10-12. The State charged Powers with violating Wis. Stat. § 940.225(2)(g), under which it is a crime to have sexual intercourse with a patient of an "inpatient health care facility" as defined by Wis. Stat. § 940.295(1)(i). *Powers*, 276 Wis. 2d 107, ¶¶ 1-2. Wisconsin Stat. § 940.295(1)(i) defined an "inpatient health care facility" as "any hospital . . . or other place licensed or approved by the [DHFS]." *Powers,* 276 Wis. 2d 107, ¶ 9 (alteration in *Powers*) (emphasis omitted).

Powers was a physician's assistant who worked for the Tomah VA Medical Center operated by the United States Department of Veterans Affairs. *Id.* ¶ 4. The complaint alleged that Powers had sexual intercourse with a patient of that facility. *Id*. After his arraignment, Powers moved to dismiss on the ground that the VA Medical Center is not an "inpatient health care facility" as charged by the State. *Id.* ¶ 5. The trial court denied the motion. *Id*.

On appeal, the parties did not dispute, and this court accepted as a stipulated fact, that the Tomah Veterans Medical Center "'is subject to federal regulation, but is not licensed or regulated by the state.'" *Id.* ¶ 10. This court held that because, as a matter of fact, that facility is not licensed or approved by DHFS, it is not an inpatient health care facility within the meaning of Wis. Stat. § 940.225(2)(g). *Id.* ¶¶ 11-12. Accordingly, *Powers* held that the trial court should have dismissed the charge because the statute did not apply to the defendant. *Id.* ¶ 20.

Powers is not analogous. First, the applicable statute in Eady's case broadly defines a financial institution as including a bank, "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, the statute applies regardless of whether U.S. Bank was a state chartered or a U.S. chartered bank. The

evidence was sufficient to convict so long as the jury could infer that the bank had either a state or federal charter.

Second, *Powers* was resolved on the stipulated fact that the hospital was *not* licensed or approved by DHFS. In Eady's case, the defense has never contended that U.S. Bank was not chartered under state or federal law. There was no suggestion before or during trial and no evidence presented that would have any tendency whatsoever to show that U.S. Bank was conducting business without a state or federal charter. Absent any argument, evidence or claim to the contrary, the fact finder was entitled to draw the reasonable inference that U.S. Bank was operating under the authorization of a bank charter.

A fact finder is entitled to draw the reasonable inference that things are exactly what they appear to be, at least absent any evidence or indication to the contrary. For example, in *State v. Kitowski*, 44 Wis. 2d 259, 266, 170 N.W.2d 703 (1969), the Wisconsin Supreme Court upheld a conviction for arson. The court held that the evidence was sufficient for the jury to conclude beyond a reasonable doubt that the fire was of incendiary origin where "the fire was on the enclosed back porch [of the house]. There was testimony that there was nothing on that back porch which was likely to cause fire by spontaneous combustion, nor was there any evidence of a storm or any other natural factors which would account for the fire." *Id.* at 264.

In *Kitkowski*, the court applied common sense, reasoning that where there is not a scintilla of evidence to the contrary, a fact finder may draw the reasonable inference that things are what they appear to be:

> [T]here was a complete lack of evidence showing the possibility that the fire resulted from natural causes. While the remote possibility of a fire occasioned by natural causes was not ruled out, we believe that the law is correctly stated in *Grimes v. State* (1949),

79 Ga. App. 489, 54 S. E. 2d 302, quoting from Curtis, *Law of Arson*, p. 533, sec. 486:

> "the mere possibility that the fire was occasioned by spontaneous combustion or by some other cause innocent of criminal intent, does not demand an acquittal, for the jury must act on probabilities, not possibilities."

The evidence in the instant case very strongly ruled out natural causes. Taking the evidence as a whole, we are satisfied that it was sufficient to satisfy the jury beyond a reasonable doubt that the fire was of an incendiary nature and that the defendant was the incendiary. In *Lock v. State* (1966), 31 Wis. 2d 110, 115, 142 N. W. 2d 183, we stated the test to be used before this court will reverse a conviction on the basis of the insufficiency of the evidence. We said therein:

> '* * * the evidence when considered most favorably to the state and the conviction must be so insufficient in probative value and force that it can be said as a matter of law that no trier of the facts acting reasonably could be convinced to that degree of certitude which the law defines as 'beyond a reasonable doubt.''

Id. at 265-66.

Similarly, this court in *State v. Van Buren*, 2008 WI App 26, ¶¶ 9-14, 307 Wis. 2d 447, 746 N.W.2d 545, rejected the defendant's claim that there was insufficient evidence to prove he possessed child pornography because the State did not present expert testimony that the pictures were of real children, rather than computer generated pictures. The court explained:

> In this case, the jury was handed pictures that look, for all the world, like photographs of children engaged in sexually explicit conduct. The jury by its verdict drew the inference that the pictures *were* photographs of children engaged in sexually explicit conduct. Though Van Buren urges that one could also infer that the images were computer-generated, the task of an appellate court is not to search for inferences inconsistent with guilt. It is to accept the

> inferences drawn by the trier of fact "within the bounds of reason." The jury concluded that the images here are just what they appear to be, and by no stretch of the imagination could we call that conclusion "incredible as a matter of law."

Id. ¶ 14.

Similarly, in *State v. Wilson*, 41 Wis. 2d 29, 31, 162 N.W.2d 605 (1968), the Wisconsin Supreme Court upheld the defendant's conviction of the crime of prostitution (having or offering to have nonmarital sexual intercourse for money), even though in the trial to the court there was "no direct evidence to the effect that the defendant was not married to the complainant or that she specifically offered to have sexual intercourse with him." The evidence showed that on a City of Milwaukee street at 2:10 a.m., the defendant walked up to a private automobile in which an undercover vice squad officer sat and "asked him if he was looking for a girl. He replied, 'Yes' and she responded that it would cost him some money. The officer asked, 'What for?' and the defendant replied, 'For a half and half.' He then asked, 'How much money?' and she said '20.'" *Id*.

At the defendant's direction, the officer followed her to a residence and accompanied her to a bedroom where the following occurred:

> When the two of them were in the bedroom, the defendant said it cost $20 to go to bed with her and $3 for the room. The officer gave her the $3 for the room which she gave to Miller. The defendant told the complainant to undress and then left the room. She returned to the bedroom and told him to put the $20 on the dresser. She then left the room and returned with a pan of water and a bar of soap. The officer then put the $20 on the dresser. The defendant insisted the officer get undressed first, whereupon he identified himself as a police officer and arrested her.

Id. at 32.

The prosecutor did not ask the undercover vice squad officer whether he and the defendant were husband and wife nor did he present any other direct evidence that the two were not husband and wife. There was, however, no evidence that the vice squad officer and the defendant were married. The Wisconsin Supreme Court concluded that, under these circumstances, the conduct of the defendant and the officer toward one another and the undisputed testimony at trial were sufficient to allow the trier of fact to find beyond a reasonable doubt that the defendant offered to have nonmarital sexual intercourse for money. *Id.* at 33-34.[1]

Applying the proper standard of appellate review to the record in this case, this court cannot conclude that the evidence in support of Eady's conviction is so lacking in probative force and value that it can be said that no trier of fact acting reasonably could have found that U.S. Bank was authorized by charter to conduct business at the time of the offense. Accordingly, Eady's conviction for robbery of a financial institution under Wis. Stat. § 943.87 must be affirmed.

[1] The State notes that *Kitkowski* and *Wilson* predate *Poellinger*, which clarified that the hypothesis-of-innocence rule is not part of the standard of review of a sufficiency-of-the-evidence challenge. *Poellinger*, 153 Wis. 2d at 505-07. Nonetheless, both cases remain valid for the purpose for which the State cites them here.

CONCLUSION

For the above reasons, the State requests that this court affirm Eady's judgment of conviction.

Dated this 15th day of June, 2015.

Respectfully submitted,

BRAD D. SCHIMEL
Attorney General

SANDRA L. TARVER
Assistant Attorney General
State Bar #1011578

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-7630
(608) 266-9594(Fax)
tarversl@doj.state.wi.us

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 3,445 words.

Dated this 15th day of June, 2015.

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SANDRA L. TARVER
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (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 Wis. Stat. § (Rule) 809.19(12).

I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of 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 15th day of June, 2015.

_____

SANDRA L. TARVER
Assistant Attorney General