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DISTRICT IV

May 23, 2014

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You are hereby notified that the Court has entered the following opinion and order:

2013AP685-CR State of Wisconsin v. Rahn E. Gearhart (L.C. # 2011CF2445)

Before Lundsten, Sherman and Kloppenburg, JJ.

Rahn Gearhart appeals a judgment of conviction for robbery of a financial institution. Gearhart contends that the evidence was insufficient to support the conviction, and that the circuit court erroneously instructed the jury as to the element of threatened use of imminent force. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2011-12).[1] We summarily affirm.

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

Gearhart was convicted of robbery of a financial institution following a jury trial. Trial evidence established that Gearhart entered a bank and handed a note to the teller that stated, "Do not panic. This is a bank robbery. Place $2,000 in front of me. $100, $50 and $20 bills with no more than 15 bills of any type. Thank you." When the teller turned away to retrieve the money, Gearhart stated, "hey, hey," the teller turned back and Gearhart said, "just give me the money." The teller explained that the money was in the back, and then the teller retrieved the money and handed it to Gearhart. Gearhart took the money, left the bank, and walked across the street to a newspaper office and turned himself in.

Gearhart contends that the evidence was insufficient to support his conviction. He argues that there was no evidence at trial that Gearhart ever threatened to use imminent force if the bank teller did not comply with Gearhart's demand for money. We conclude that the evidence was sufficient to support the jury verdict.

We will not disturb a jury verdict "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." ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). Moreover, we will uphold a jury verdict "[i]f 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." ***Id.***

Here, a reasonable inference from the trial evidence was that Gearhart threatened to use imminent force to obtain the money from the bank teller. Gearhart handed the bank teller a note stating "Do not panic. This is a bank robbery," and instructing the teller to place $2,000 in front of Gearhart. When the teller turned away, Gearhart said "hey, hey," and told her to just give him

the money. The jury was entitled to find that Gearhart's words and actions implied that he would use force if the teller did not comply. Indeed, the term "bank robbery" connotes more than a peaceful request to be given money, and a reasonable inference from an announcement of a bank robbery is a threat to use force.

We next address Gearhart's challenge to a jury instruction. Because there is no standard jury instruction for robbery of a financial institution, the court crafted its own instruction. The court's proposed instruction included the following language as to the requirement that the State prove Gearhart acted forcibly:

> "Forcibly" means that [Gearhart] … threatened the imminent use of force against [the bank teller] with the intent to compel her to submit to the taking or carrying away of the money or property. "Imminent" means "near at hand" or "on the point of happening."
>
> The threat of force does not require express threats of bodily harm. It is met if the taking of the money or property is attended with such threatening by menace, word or gesture as in common experience is likely to create an apprehension or danger and induce a person to part with money or property for their own safety.

Defense counsel objected to the second paragraph, arguing that the court improperly utilized the definition of threat of force in ***State v. Johnson***, 231 Wis. 2d 58, 69, 604 N.W.2d 902 (Ct. App. 1999). Counsel pointed out that ***Johnson*** involved an ordinary robbery under WIS. STAT. § 943.32 rather than robbery of a financial institution under § 943.87. The circuit court determined that its crafted instruction properly stated the law, and used the proposed language in its instructions to the jury.

Gearhart contends that the circuit court erroneously instructed the jury as to the threatened use of imminent force element of robbery of a financial institution. *See* WIS. STAT. § 943.87. He argues that the circuit court erred by crafting a jury instruction based on

Johnson's interpretation of the threatening use of imminent force element under the ordinary robbery statute. *See* ***Johnson***, 231 Wis. 2d 58; WIS. STAT. § 943.32. Gearhart bases this argument on the fact that the statutes for robbery and robbery of a financial institution are not identical.

The problem with Gearhart's argument is that he fails to explain how any distinction between the statutes renders the court's instruction on threatened imminent use of force a misstatement of law. *See* ***State v. Steffes***, 2013 WI 53, ¶22 n.7, 347 Wis. 2d 683, 832 N.W.2d 101 (explaining that "a circuit court has wide latitude to give instructions based on the facts of a case" and that "'[o]nly if the jury instructions, as a whole, misled the jury or communicated an incorrect statement of the law will we reverse and order a new trial'" (quoted source omitted)). While Gearhart argues that it was improper for the circuit court to rely on our language in ***Johnson*** interpreting threatened use of force because ***Johnson*** involved an ordinary robbery rather than robbery of a financial institution, Gearhart does not explain why that distinction makes a difference. In other words, Gearhart has not explained why the threat of imminent use of force element would have a different meaning under the interrelated statutes. *See* WIS. STAT. §§ 943.32 and 943.87; *see* also WIS JI−CRIMINAL 1479 and 1508.

Therefore,

IT IS ORDERED that the judgment is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals