

Bank Robbery (18 U.S.C. § 2113)

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6.18.2113A Bank Robbery - Unarmed - Elements of the Offense (18 U.S.C. § 2113(a))

Count *(No.)* **of the indictment charges the defendant** *(name)* **with bank robbery, which is a violation of federal law.**

In order to find the defendant guilty of this offense, you must find that the government proved each of the following three elements beyond a reasonable doubt:

First: That *(name)* **took money that was in the care, custody or possession of** *(name of bank)* **from** *(name of bank employee)* **or from** *(name of bank)* **while** *((name of bank employee was)(another person was)(others were))* **present;**

Second: That *(name)* **used** *(force and violence)(intimidation); and*

Third: The deposits of *(name of bank)* **were then insured by the** *(Federal Deposit Insurance Corporation)(Federal Savings & Loan Insurance Corporation)(National Credit Union Administration Board).*

[The term "intimidation" means actions or words used for the purpose of making someone else fear bodily harm if he or she resists. It does not matter whether the victim was actually brave or timid. The actions or words must be such that they would intimidate an ordinary, reasonable person.]

Comment

Kevin F. O'Malley, Jay E. Grenig, & Hon. William C. Lee, 1A Federal Jury Practice and Instructions § 57.03 [hereinafter O'Malley et al., supra]; First Circuit § 4.18.

18 U.S.C. § 2113(a) provides:

Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another, or obtains or attempts to obtain by extortion any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association;

* * *

Shall be fined under this title or imprisoned not more than twenty years, or both.

If the charge is attempted bank robbery, the court should also give Instruction 7.01 (Attempt).

In addition to banks, as defined in § 2113(f), the statute also applies to robbery of credit unions as defined in § 2113(g) and savings and loan associations as defined in § 2113(h). The instruction does not contemplate use of any of these terms. As indicated, the language of the instruction should be adapted to reflect the applicable type of federal insurance.

In *United States v. Askari*, 140 F.3d 536, 541 (3d Cir. 1998), the Third Circuit addressed the meaning of intimidation under this provision. The court stated:

In determining whether intimidation is present, an objective standard is employed from the perspective of the victim, i.e., “whether ‘an ordinary person in the teller’s position reasonably could infer a threat of bodily harm from the defendant’s acts.’” As used in § 2113(a), the term ‘intimidation’ means ‘to make fearful or put into fear.’

The Government is not required to show either an ‘express verbal threat or threatening display of a weapon.’ Actual fear need not be proven, if the acts of the defendant would threaten an ordinary reasonable person. Thus, the government need show only that an ordinary person in the teller’s position would feel a threat of bodily harm from the perpetrator’s acts. (citation omitted).

A defendant can be guilty of bank robbery under § 2113(a) without actually removing it from the bank him or herself. In *United States v. Alessandro*, 637 F.2d 131 (3d Cir. 1980), the Third Circuit concluded that two defendants were properly convicted under this section even though they merely retrieved money that was removed from the bank by a bank employee following their instructions because they were holding his wife hostage. The court concluded that the defendants had taken the money from the person or presence of the bank employee. Noting that the majority of circuits addressing similar facts had reached the same conclusion, the court stated:

On this record, the money in the suitcase and bag was taken from [the bank employee] as a person and was in the care, custody, or management of the bank when deposited in the wooded area in Fort Lee known only to [the bank employee] and the defendants.

Alessandro, 637 F.2d at 144-45.

6.18.2113D Bank Robbery - Armed - Elements of the Offense (18 U.S.C. § 2113(d))

Count (No.) of the indictment charges the defendant (name) with armed bank robbery, which is a violation of federal law.

In order to find the defendant guilty of this offense, you must find that the government proved each of the following four elements beyond a reasonable doubt:

First: That (name) took money that was in the care, custody or possession of (name of bank) from (name of bank employee) or from (name of bank) while ((name of bank employee was)(another person was)(others were)) present;

Second: That (name) used (force and violence)(intimidation);

Third: That (name) intentionally [assaulted (name of person)][put the life of (name of person) in jeopardy] by the use of a dangerous weapon or device while taking the money; and

Fourth: The deposits of (name of bank) were then insured by the (Federal Deposit Insurance Corporation)(Federal Savings & Loan Insurance Corporation)(National Credit Union Administration Board).

[The term "intimidation" means actions or words used for the purpose of making someone else fear bodily harm if he or she resists. It does not matter whether the victim was actually brave or timid. The actions or words must be such that they would intimidate an ordinary, reasonable person.]

[An assault occurs whenever one person intentionally attempts or threatens to

injure someone else, and also has an apparent, present ability to carry out the threat such as by flourishing or pointing a dangerous weapon or device at the other. An "assault" may be committed without actually striking or injuring the other person.]

[To "put in jeopardy the life of any person by the use of a dangerous weapon or device" means to expose someone else to a risk of death by the use of a dangerous weapon or device.]

A "dangerous weapon or device" includes anything capable of being readily operated or wielded by one person to inflict severe bodily harm or injury upon another person. *[The weapon or device need not actually be capable of inflicting severe bodily harm or injury upon another. Rather, a weapon or device may be considered dangerous if it instills fear in the average person.]*

[To use a dangerous weapon (or device) means to actively employ the weapon (or device). This does not mean that the government must prove that (name) actually used the weapon (or device) to harm someone, although that would obviously constitute use of a weapon (or device). If (name) brandished or displayed a weapon (or device), or what reasonably appeared to those present to be a weapon, so others in the bank knew that it was available if needed, that is sufficient to constitute use of a weapon (or device). Similarly, if (name) referred to a weapon (or device) during the commission of the offense and actually possessed such weapon (or device), that is also sufficient to constitute use of a weapon (or device).

However, if (name) referred to a weapon (or device) during the offense but did not

actually possess the weapon (or device), that is not sufficient to constitute use of a weapon (or device). Likewise, if (name) possessed the weapon (or device) but kept it concealed and did not brandish, display, or refer to it during the commission of the offense, that is also not sufficient to constitute use of a weapon (or device).]

Comment

O'Malley et al., supra, § 57.06; First Circuit § 4.18; Eleventh Circuit § 72.3.

18 U.S.C. § 2113(d) provides:

Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined under this title or imprisoned not more than twenty-five years, or both.

If the charge is attempted armed bank robbery, the court should also give Instruction 7.01 (Attempt).

The phrase "by the use of a dangerous weapon or device" modifies both the "assault" and "jeopardy" provisions of subsection (d). *See Simpson v. United States*, 435 U.S. 6, 11-12 n.6 (1978).

The government must establish that the defendant actually had a dangerous weapon and that the defendant used the weapon. In *United States v. Wolfe*, 245 F.3d 257, 262 (3d Cir. 2001), the court held that the trial court committed plain error when it instructed the jury:

The fourth essential element that the government must prove beyond a reasonable doubt is that in committing the crime, the defendant deliberately and intentionally assaulted [the teller] or put her life in jeopardy by the use of a dangerous weapon .

...
* * *

The government must prove beyond a reasonable doubt that the defendant, during the commission of a bank robbery, committed acts or said words that would have caused an ordinary person to reasonably expect to die or face serious injury by the defendant's use of a dangerous weapon.

Wolfe, 245 F.3d at 260-61. The court noted that the instruction erroneously suggested that the jury "could convict based solely on the teller's reasonable belief that Wolfe was armed." 245 F.3d at 263-64. The court concluded that the error was harmless.

In *United States v. Beckett*, 208 F.3d 140 (3d Cir. 2000), the Third Circuit held that the defendant, who robbed a bank using “hoax bomb” could properly be convicted under 18 U.S.C. § 2113(d) even though the bomb was incapable of harming anyone. The court held that the following instruction properly stated the requirements for conviction under the assault prong of section 2113(d):

In order to sustain its burden of proof for the crime of armed bank robbery as charged in Count 2 of the indictment, the Government must first prove the three elements to be proved for bank robbery, as already stated. In addition, the Government must also prove that the defendant deliberately assaulted the Home Unity Savings Bank employees by the use of a dangerous weapon or device while taking the money. . . .

The term dangerous weapon or device means any object that can be used by one person to inflict severe bodily harm or injury upon another person. The weapon or device need not actually be capable of inflicting severe bodily harm or injury upon another to be dangerous, rather, a weapon or device may be considered to be dangerous if it instills fear in the average citizen creating an immediate danger that a violent response will follow.

208 F.3d at 152.

The court cited *McLaughlin v. United States*, 476 U.S. 16, 17 (1986), in which the Supreme Court held that an unloaded gun is a "dangerous weapon" as that term is used in Section 2113(d), stating:

First, a gun is an article that is typically and characteristically dangerous; the use for which it is manufactured and sold is a dangerous one, and the law reasonably may presume that such an article is always dangerous even though it may not be armed at a particular time or place. In addition, the display of a gun instills fear in the average citizen; as a consequence, it creates an immediate danger that a violent response will ensue. Finally, a gun can cause harm when used as a bludgeon.

If the defendant is charged with armed bank robbery and there is a question as to whether the facts support the charge of armed robbery or the charge of unarmed robbery under § 2113(a), the court may want to give the following lesser included offense instruction, based on Sand et al., supra, 53-16:

If, after careful consideration of all of the evidence, you have a reasonable doubt whether the defendant committed the robbery by assaulting someone with a dangerous weapon or putting someone's life in jeopardy with a dangerous weapon, then you must find the defendant not guilty of armed bank robbery. You may then consider whether the defendant is guilty of the lesser included offense of simple bank robbery. Simple bank robbery differs from armed bank robbery in that the

government need not prove that the defendant accomplished the robbery by using a dangerous weapon to assault someone or jeopardize someone's life. However, the government must prove beyond a reasonable doubt all of the other elements of bank robbery that I have described to you.

6.18.2113 -1 Bank Robbery - Inference From Possession of Recently Stolen Money

You have heard evidence that *(name)* was in possession of money recently stolen from *(name of bank)*. If the government proves beyond a reasonable doubt that the money in question had recently been stolen from a bank, by force and violence or intimidation, and that the defendant was in possession of that recently stolen money, then you may, although you need not, find that the defendant participated in the robbery.

The term "recently" has no fixed meaning. Whether the money may be considered recently stolen depends upon all the facts and circumstances shown by the evidence of the case. The longer the period of time since the robbery, the more doubtful the connection between the defendant's possession of the money and the robbery.

Let me emphasize that you are not required to make the connection between the defendant's unexplained possession of recently stolen bank money and participation in the robbery. The mere fact that I am telling you about this connection does not mean that I am encouraging you to make it. You have the right to reject this connection if you deem it appropriate to do so, even if you find that *(name)* was in possession of the money in question. Remember that, at all times, the government has the burden of proving beyond a reasonable doubt that *(name)* participated in the robbery, and that *(name)* is not required to offer any explanation

at all.

Comment

Hon. Leonard Sand, John S. Siffert, Walter P. Loughlin, Steven A. Reiss & Nancy Batterman, *Modern Federal Jury Instructions - Criminal Volumes 53-6* (Matthew Bender 2003).

In *United States v. Rispo*, 470 F.2d 1099, 1101 (3d Cir. 1973), a case addressing the defendants' challenge to convictions for, among other charges, transporting a stolen firearm, the Third Circuit considered the inference to be drawn from possession of recently stolen goods. The court noted that "such an instruction would be improper, absent proof of actual or constructive possession of the stolen property." The court went on to conclude that "[c]onsidering the evidence of such possession in this case, the court correctly charged that possession of the recently stolen property, not satisfactorily explained, was a circumstance from which the jury could infer that the persons in possession knew the property was stolen."