No. 30778-6-III
IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

ORRY LEE ADAMS,

Defendant/Appellant.

APPEAL FROM THE SPOKANE COUNTY SUPERIOR COURT
Honorable Tari Eitzen, Judge

BRIEF OF APPELLANT

SUSAN MARIE GASCH
WSBA No. 16485
P.O. Box 30339
Spokane, WA 99223-3005
(509) 443-9149
Attorney for Appellant

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in finding the defendant guilty of theft in the first degree.

2. The trial court erred in denying the defense motion for reconsideration.

3. Insufficient evidence was presented to support the defendant's conviction for theft in the first degree.

Issues Pertaining to Assignments of Error

In Washington, as in the majority of jurisdictions, to support a charge of larceny from a person (i.e., theft in the first degree), the State must prove that property was physically taken from the victim. This requirement of "theft by taking" reflects the Courts' and Legislature's acknowledgment that such a taking creates a risk of confrontation between the victim and the defendant and constitutes a serious invasion of the victim's privacy. Here, the facts established a "theft by deception": the victim voluntarily surrendered the property, only later realizing that she had been tricked into relinquishing it. Did the State fail to prove a "theft by taking," as required to sustain a conviction for theft in the first degree?

B. STATEMENT OF THE CASE

On November 6, 2011, 17-year old defendant[1], Orry Adams, Cindy Phillips and her 15-year old son[2], Jacob Woodbury, were all present at Ms. Phillips' residence. It was Jacob's birthday and there was some general discussion about attempting to obtain drugs for him. At some point, Orry indicated to Jacob and Ms. Phillips that he could get the drugs, and the three left the residence to walk to the house where the drugs were supposed to be. Orry did not intend to actually purchase drugs for Ms. Phillips and her son, so Orry led the group to a random house and pretended they had arrived at the residence of a drug dealer. Orry stopped a few feet before the house he chose at random and told Ms. Phillips he would need her money before he went to the door to complete the fictitious transaction. Finding of Fact 10 at CP 29.

Ms. Phillips voluntarily counted out $70 in Orry's presence. Orry then took or accepted the money from Ms. Phillips, went to the house, pretended to knock on the door, and then ran away with the money. Finding of Fact 11 at CP 20.

[1] Orry Adam's date of birth is October 15, 1994. CP 7.
[2] Jacob testified he was 15 years old at the time of trial in February 2012, and the November 6, 2011 date of the incident was his birthday. 2/13/12 RP 87, 90–91.

Orry deceived Ms. Phillips into believing that he was going to use her money to purchase drugs and Ms. Phillips gave Orry her $70 to complete that purchase as a result and by color of this deception. Part of the $70 was intended to be a fee to Orry in exchange for his assistance in purchasing the drugs. Finding of Fact 12 at CP 30.

The State charged Orry with first degree robbery. CP 7. Due to automatic decline premised on the charge[3], Orry waived jury and proceeded to a bench trial before Superior Court Judge Tari Eitzen. CP 11; *see generally* 2/13/12 RP 1–141; 2/14/12 RP 146–160. The charge of first degree robbery was dismissed after the State's case-in-chief due to insufficient proof that a weapon or what appeared to be a weapon was used in the commission of the offense. Findings of Fact 5, 6 at CP 29.

The court, over defense objection, then proceeded with trial on the lesser included offenses of second degree robbery and first degree theft. After discussion concerning jurisdiction and agreement of the parties, the trial judge sat as a juvenile court judge for the remainder of the case. Finding of Fact 7 at CP 29; 2/14/12 RP 151–167.

[3] RCW 13.04.030(1)(e)(v)(C).

Defense counsel argued that Orry was guilty only of third degree theft. 2/14/12 RP 232–34/ Orry was found not guilty of the lesser included offense of second degree robbery. The court found that Orry used deception to obtain money from the person of Ms. Phillips, and adjudicated Orry guilty of the offense of first degree theft. Conclusions of Law 4, 5 at CP 30.

Defense counsel filed a motion for reconsideration, contending there was no evidence of property being taken from Ms. Phillips' "person" as required to sustain a conviction for theft in the first degree. As the property taken in her presence by color and aid of deception did not exceed $750 in value, only the elements of third degree theft had been satisfied. CP 15–20. The court denied the motion for reconsideration. CP 50.

The court imposed a standard range disposition of 52 to 65 weeks in the custody of the Department of Social and Health Services, Juvenile Rehabilitation Administration. CP 66.

This appeal followed. CP 73–74, 77–78.

C. ARGUMENT

The evidence was insufficient to prove the elements of theft in the first degree "from the person of another," instead establishing a theft by deception.

The court disbelieved the State's theory that Orry used force or any threat to induce Ms. Phillips to give him the money. *See* 2/14/12 RP 235–38. Instead, the evidence showed that Ms. Phillips willingly handed the money to Orry so he could buy drugs for her. Once Ms. Phillips handed him the money, Orry pretended to knock on somebody's door and then ran away with her money. This evidence does not establish that the crime of theft in the first degree was committed. Rather, Orry committed the crime of theft by deception, and the court erred in finding him guilty of first degree theft.

1. The Legislature expressly distinguishes theft by taking from theft by deception as alternative means. "Theft" is defined at RCW 9A.56.020(1) as meaning, in relevant part:

> (a) To wrongfully obtain or exert unauthorized control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services; or
>
> (b) By color or aid of deception to obtain control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services . . .

The Supreme Court has noted that "[s]ubsection (a) is known as theft by taking while subsection (b) is known as theft by deception." State v. Smith, 115 Wn.2d 434, 438, 798 P.2d 1146 (1990) (citing State v. Southard, 49 Wn. App. 59, 741 P.2d 78 (1987)).

The term "by color or aid of deception" is further defined as, "to obtain control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services." RCW 9A.56.010(4). Finally:

> (5) "Deception" occurs when an actor knowingly:
>
> (a) Creates or confirms another's false impression which the actor knows to be false; or
>
> (b) Fails to correct another's impression which the actor previously has created or confirmed; or
>
> (c) Prevents another from acquiring information material to the disposition of the property involved; or
>
> (e) Promises performance which the actor does not intend to perform or knows will not be performed[.]

RCW 9A.56.010(5).

In State v. Casey, 81 Wn. App. 524, 915 P.2d 587 (1996), the court analyzed the evolution of the crime of "theft by deception" from the offense of "larceny." 81 Wn. App. 528. The court noted that the

Legislature's intent was to "broaden the scope of the statute to include more kinds of devious behavior." Id. The court explained:

> deception appears ... designed to encompass not only representations about past or existing facts, but also representations about future facts, inducement achieved by means other than conduct or words, and inducement achieved by creating a false impression even though particular statements or acts might not be false.

Id.

2. Under Washington law, theft in the first degree from the person of another requires proof of physical taking from the victim's person. A prosecution for "theft in the first degree", where not predicated on the value of the property, involves "theft by taking" and requires proof that property is physically taken from the person of another. RCW 9A.56.030(1)(b); *see* State v. Tvedt, 153 Wn.2d 705, 723 n. 2, 107 P.3d 728 (2005) (describing theft in the first degree as "the mere taking of property from the person of another, e.g., pick-pocketing").

Following this reasoning, in State v. Nam, 136 Wn. App. 698, 150 P.3d 617 (2007), a prosecution where the State omitted the "in the presence" language from its jury instructions defining robbery, the court strictly construed "from the person" as requiring taking "something on the person's body or directly attached to someone's physical body or clothing." 136 Wn. App. at 705. Because this literal construction precluded the

taking of items within a victim's "easy reach," the court held that the taking of the victim's purse from the passenger seat of her car was not a taking from her person. Id.

The Ninth Circuit Court of Appeals applied Nam's holding to the question whether a Washington conviction for theft in the first degree would be a violent felony under the federal Armed Career Criminal Act (ACCA). United States v. Jennings, 515 F.3d 980, 989 (9th Cir. 2008). The Court concluded that "theft from the person of another under Washington law means theft of 'something on or attached to a person's body or clothing'" creating a "serious potential risk of physical injury to another" as required for the offense to qualify under ACCA. Id. at 989-90.

Courts in other jurisdictions have similarly construed comparable out-of-state statutes. For example, in California, the crime of "grand theft" from a person is proved when a person snatches a purse, or steals someone's wallet from his pocket. *Compare* People v. Huggins, 51 Cal. App. 4th 1654, 60 Cal. Rptr. 2d 177 (1997) (elements of "grand theft" established where purse was snatched from under victim's foot; "the victim's purpose in placing the purse against her foot was to retain dominion and control over the purse") with People v. Williams, 9 Cal.App.4th 1465, 12 Cal. Rptr. 2d 253 (1992) (evidence insufficient to

establish "grand theft" where purse taken from passenger seat next to victim); *see also* People v. Morales, 49 Cal. App. 3d 134, 122 Cal. Rptr. 157 (1975) (equivocal evidence regarding use of force during purse-snatching supported issuance of grand theft lesser included offense instruction in felony murder prosecution predicated on robbery); People v. Herrin, 82 Cal.App.2d 795, 796, 187 P.2d 26 (1947) (wallet stolen from victim while he was unconscious).

In Illinois, evaluating the question whether a taking must literally be from a victim's person or whether the crime is established where the property was in his presence and immediate control, the Supreme Court noted that the sole distinction between a common-law larceny and robbery "lies in the force or intimation used." People v. Pierce, 226 1I1.2d 4:70, 478-80, 877 N.E.2d 408 (2007).

New Jersey likewise requires that for a "theft from the person" the property must be taken from the victim's possession and while in his immediate presence, creating a danger of confrontation between the thief and victim and an invasion of the victim's person and privacy. State v. Blow, 132 N.J. Super. 487, 491, 334 A.2d (1975) (citing cases from other jurisdictions); *accord* State v. Link, 197 N.J. Super. 615, 619, 485 A.2d 1069 (1984).

As the discussions in Jennings, Blow and Pierce demonstrate, statutes ascribing a high seriousness level to the taking of property from the person of another do so because such taking creates a danger of confrontation between thief and victim and involve an invasion of the victim's privacy. *See* Jennings, 515 F.3d at 689; Blow, 132 N.J. Super. at 491; Pierce, 226 III. 2d at 478-80.

3. Because it does not involve a physical taking from the person of another, a theft by deception is not a theft in the first degree. As noted, almost universally at common law a larceny from a person is defined by the physical act of taking property from another's person, in part because of the risk of confrontation and danger such a theft creates. By definition, a theft by deception means that the victim was somehow tricked into relinquishing his property voluntary "under color or aid of deception." The persuasive authorities discussed above support a distinction between "theft by taking" which, if done from the person of another, is a first-degree theft and "theft by deception," which is not.

A Washington decision interpreting the "theft by deception" statute is also instructive. In State v. Mermis, 105 Wn. App. 738, 20 P.3d 1044 (2001), Mermis fraudulently obtained Terry Johnson's valuable Dodge Viper automobile and subsequently persuaded him to execute a title and

bill of sale. Id. at 741-42. Johnson, believing Mermis to be a man of substantial means, agreed to a sale for $55,000 and told his wife "to give the keys to Mermis because Mermis 'wanted to drive it.'" Id. at 742. Mermis never paid for the car and refused Johnson's demands that it be returned. The State ultimately filed an information alleging that Mermis,

> on or about September 26, 1995, with intent to deprive another of property, to-wit: a Dodge Viper having a value in excess of $1,500, did obtain control over such property belonging to Terry Johnson by color and aid of deception, and, did exert unauthorized control over such property[.]

Id. at 742 n. 5.

The issue on appeal was whether the prosecution was barred by the statute of limitations or whether Mermis' actions in obtaining the title and bill of sale constituted a continuing criminal impulse, enabling prosecution within the limitations period. Id. at 743-45. In analyzing the question, the court noted that "[t]he UCC makes a distinction between theft by deception and theft by taking, such that one who commits theft by deception acquires voidable title, while one who commits theft by taking acquires no title at all." Id. at 748 n. 5 (citation omitted). The court observed that while Washington has not adopted the provision that embodies that distinction, "Our cases nonetheless embrace it, generally

recognizing a difference between 'outright theft' (theft by trespass) and theft by deception." Id. (citing cases).

The evidence in Mermis established that Johnson's wife was instructed to hand Mermis the keys to the car under the mistaken belief that Mermis intended to pay for it. 105 Wn. App. at 742. This was not a theft from Johnson's wife's person as no "taking" occurred; it was a theft by deception.

Several hypotheticals help to illustrate this principle. Imagine, for example, a traveler at an airport. He hands his luggage to a person who claims to be a taxi driver. That person takes the luggage and drives away. This scenario describes a theft by deception, not a theft by taking, and thus would not support a conviction for theft in the first degree.

A woman in a shop intends to steal a valuable dress. A shop assistant hands the dress to the woman to try on, and in the dressing room the woman removes the tags from the dress, puts on her coat, and wears the dress out of the store. According to the State's theory in this case, the woman would have committed a theft in the first degree. But as in this case, the shop assistant willingly surrendered control over the dress to the woman, believing she intended to pay for it. The dress was not "taken" from her; rather, she was deceived into relinquishing control over it.

This Court should conclude that a prosecution for first degree theft from the person of another pursuant to RCW 9A.56.030(1)(b) necessarily requires proof of an actual taking, and excludes theft by deception.

4. The evidence viewed in the light most favorable to the State showed only that a theft by deception occurred. The judge convicted Orry of theft in the first degree. Because the evidence did not establish a taking from Ms. Phillips' person, but only a theft by deception, the theft in the first degree conviction must be vacated and dismissed, and this matter remanded for entry of a conviction on the lesser included offense of theft in the third degree and resentencing.

When the sufficiency of the evidence is challenged, the court must view the evidence in the light most favorable to the prosecution and decide whether any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. State v Green, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980). A claim of insufficiency admits the truth of the State's evidence and all inferences that can reasonably be drawn therefrom. State v. Salinas, 119 Wn.2d 192,201,829 P.2d 1068 (1992).

The judge dismissed the charged crime of robbery in the first degree and acquitted Orry of the lesser included offense of robbery in the

second degree. CP 29–30. The judge thus necessarily rejected the State's theory that a gun or even a threat of force was involved in the crime.

Thus, the question that remains is whether Orry physically wrested the money from Ms. Phillips or whether he tricked her into giving it to him. Jason said Orry "snatched" the money when his mother pulled it out of her pocket. 2/13/12 RP 92. Ms. Phillips said Orry reached and grabbed her money as she was counting it out from one hand to the other. 2/13/12 RP 118–19. However the trial court clearly based its finding of guilt on Orry's deception.

In making its ruling, the trial court first noted that "[i]n this case, everybody had significant credibility issues" and "when you have a case like this where nobody seems all that believable, you can nevertheless sort of get a sense of whose story makes more sense, even though it's perhaps not a story that you want to believe." 2/14/12 RP 235–36. The court specifically disbelieved Ms. Phillips' and her son's story that the incident occurred while they were just going to the store to get Ms. Phillips some cigarettes, and that the $70 was intended to purchase an ice cream cake for her son's birthday celebration the following day: "I don't find their testimony believable that – about this ice cream cake and going to the

store." 2/14/12 RP 236; *see generally* 2/13/12 RP 91–92, 96, 115–17, 121–22.

Instead, "what makes more sense to [the Court] is the version that [Orry] tells, … that this was sort of a joint venture and he decided to fool them." 2/14/12 RP 236. Having determined whose testimony was credible, the trier of fact continued: "I believe based on the testimony and your testimony that [Ms. Phillips] thought she was giving you money so you could buy drugs for her and you decided to be clever and pretend that you were knocking on somebody's door and run away with her money." 2/14/12 RP 237. The court concluded that [Orry] took Ms. Phillips' $70 with the intent to deceive her by color, aid of deception, to keep her money for himself … " and found that "absent the intentional deception by [Orry], Ms. Phillips would not have given [Orry] the $70." 2/14/12 RP 237; Finding of Fact 13 at CP 30.

The finding of guilt herein was based on Orry's deception in securing the voluntary relinquishment of money from Ms. Phillips. This does not constitute a physical taking from the person, but does constitute a theft in Ms. Phillips' presence. "By color or aid of deception" Orry "obtain[ed] control over the property ... with intent to deprive [Ms. Phillips

of such property." RCW 9A.56.020. The State did not prove a theft in the first degree.

5. The remedy is vacation and dismissal of the theft in the first degree conviction and entry of a conviction for the lesser included offense of theft in the third degree. "The Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding." Burks v. United States, 437 U.S. 1, 11, 98 S.Ct. 2141,57 L.Ed.2d 1 (1978). Orry's conviction for theft in the first degree must therefore be reversed and dismissed. Upon dismissal and vacation of the theft in the first degree conviction, remand for entry of a conviction on the lesser included offense of theft in the third degree[4] is proper. *See* State v. Gilbert, 68 Wn. App. 379, 384-88, 842 P.2d 1029 (1993) ("This court may remand for entry of a conviction on a lesser offense even when a lesser was never submitted to the jury, so long as the jury necessarily found all the elements of the lesser offense.").

D. CONCLUSION

For the reasons stated, this Court should conclude that the State proved only a theft by deception and, by extension, did not prove a theft in the first degree. Orry's conviction for theft in the first degree must be reversed and dismissed.

Respectfully submitted on November 3, 2012.

s/Susan Marie Gasch, WSBA #16485
Gasch Law Office
P.O. Box 30339
Spokane, WA 99223-3005
(509) 443-9149
FAX: None
gaschlaw@msn.com

[4] RCW 9A.56.050 provides in relevant part that "(1) A person is guilty of theft in the third degree if he or she commits theft of property or services which (a) does not exceed seven hundred fifty dollars in value, … . RCW 9A.56.050(1)(a).

PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on November 3, 2012, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of brief of appellant:

Orry L. Adams (#844249)
c/o Greenhill School – Hawthorne Unit
375 S.W. 11th Street, Mail Stop S21-5
Chehalis WA 98532

E-mail: kowens@spokanecounty.org
Mark E. Lindsey/Andrew Metts
Deputy Prosecuting Attorney
1100 West Mallon Avenue
Spokane WA 99260-2043

_____
s/Susan Marie Gasch, WSBA #16485