69765-0

69765-0

NO. 69765-0-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

RANDY ROYAL,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE BRUCE HELLER

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

TOMÁS A. GAHAN
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 296-9650

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Table of Cases

Statutes

Other Authorities

A. ISSUES PRESENTED

1. A defendant's waiver of his right to counsel must be unequivocal. Royal asked to represent himself at trial, but only if the court would grant a continuance of his trial date. Where the presiding court denied the motion to continue, did it act within its discretion in denying Royal's motion to proceed pro se?

2. Evidence is sufficient when, in the light most favorable to the State and with all reasonable inferences in the State's favor, a rational juror could have found all of the elements beyond a reasonable doubt. The elements of theft in the first degree require that a defendant wrongfully take property from the person of another with intent to deprive the person of that property. Royal sold drugs to Jones, an undercover police officer, for the agreed-upon amount of $30. After the transaction was complete, Royal snatched the drugs out of Jones' hands and aggressively demanded all of his money back. Only after Jones handed over another $30 did Royal return the drugs. Was there sufficient evidence to prove theft in the first degree?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Defendant Randy Royal was originally charged on April 26, 2012 with delivery of a substance in lieu of a controlled substance (cocaine) and theft in the first degree. CP 1-4. He was convicted of both counts following a jury trial. CP 57-58. He was sentenced within the standard range. CP 93, 95.

2. SUBSTANTIVE FACTS

Seattle Police Officer Kevin Jones testified at trial that, on April 23, 2012, he was working as an undercover officer, disguised as a homeless transient. RP 132, 135, 138.[1] As part of an organized "buy bust" operation with other officers, Jones' role was to attempt to purchase narcotics from a street dealer and then signal to surrounding officers that the purchase had been completed; those officers would then move in for the arrest. RP 135-36. As part of the buy bust operation, Jones carried prerecorded currency: two $20 bills, a $10 bill, and two $5 bills, to be used for the purchase of drugs. RP 136.

[1] The consecutively paginated Verbatim Report of Proceedings will be referred to as RP.

Jones saw Royal standing with a group on the corner of 2nd Avenue and Bell Street in Seattle, and asked the group if anybody had crack cocaine; Royal replied that he was the only one in the area that "had any soup." RP 139-40. Jones testified that "soup" is another term for crack cocaine. RP 140. Royal asked Jones how much he was looking for, and Jones said he "was looking for $30, $30 worth of crack." RP 140. In response, Royal had Jones walk with him northbound on 2nd Avenue; Royal moved behind Jones while they walked ahead. RP 140. One of the men who was with Royal began walking alongside Jones "working as a lookout." RP 140.

After the lookout told Royal, "we're clear," Royal turned left down another street, but Jones hesitated because he wanted to make sure the "cover officers" were able to keep up. RP 141-42. Then Royal said, "What are you, a cop? Turn left," and Jones obeyed. RP 142.

After Jones turned, Royal handed him the package and Jones handed Royal the "agreed upon $30." RP 143. But after Jones had paid Royal the money, Royal "snatched" the package out of Jones' left hand. RP 144, 153. Jones testified about what Royal did next:

> [Royal] started to get more animated, his arms started coming up. He said, 'that's not enough, give me more,' at which point I pulled out more money. I had a 10[$] and I also had a 20[$] in my hand. I gave him the $10 bill. He saw I had that 20[$]. His arms are going back and forth like this, and he says, 'All or nothing, all or nothing,' and he steps into me. He's 6-2, 230 pounds. I'm 5-10, 170 pounds. He's towering over me, his arms are up. I gave him another $20. Just handed it to him. I was fearful. Gave him the money.

RP 143-44. Jones described how Royal's demeanor changed during the incident: initially, Royal was friendly, but once Jones had paid him the $30, Royal "snatched" the package out of Jones' hand and "his behavior became more aggressive." RP 154.

After Jones acquiesced and gave Royal all of his money, Royal "slapped the drugs down" in Jones' hand, and Jones said, "What the hell?" RP 145. Royal told him, "Fuck me, no, fuck you," and then placed his hand into his pocket, making Jones believe he had a gun. RP 145, 154. Jones gave a pre-designated "help" signal to the other officers, who moved in and arrested Royal. RP 145-46.

A forensic scientist testified at trial that the drugs inside the package that Royal sold to Jones were, in fact, mirtazapine, a prescription anti-depressant. RP 264-65. The jury also heard excerpts from jail telephone calls made by Royal where he admitted

that he sold some "bunko dope to the police" and that the drugs were "nothin' but a bunko charge... I threw some bunk dope to a motherfucker undercover policeman." Exhibits 20, 21, 22. In one of the calls, the other party asked Royal if he sold the police his "medicine or something?" and Royal answered, "Yeah, that's all it was." Exhibit 21.

3. FACTS REGARDING PRO SE MOTION

At Royal's September 21, 2012 omnibus hearing before the presiding judge, Royal asked the court for a new lawyer, declaring that he and his counsel were "not meeting eye to eye." RP 4. The court denied his motion. RP 6.

On November 5, 2012, the eve of the scheduled trial start date, Royal's counsel told the court that "in meeting with Mr. Royal outside of court, [Royal] indicated that he wished to go pro se." RP 21. The judge asked to hear from Royal who said: "I mean, you know, I just, I'll have a better chance of defending myself. I know, you know, the statutes and the rules of the courts and with the court ruling [sic]." RP 21-22. When the presiding judge asked Royal if he was "ready to go to trial tomorrow," the day trial was scheduled to begin, Royal said, "No... I would need some time to sit down

and discuss with myself, (unintelligible) discovery is. I'd have to get a, some other documents I'm trying to do with Dr. Julie." RP 22.

The judge asked Royal who "Dr. Julie" was, and Royal's counsel replied for him, "Dr. Julian. He wants me to, he wanted me to hire Dr. Julian." RP 22. Then the court turned to the prosecutor, asking him if he was "ready to go tomorrow" and the prosecutor answered, "yes." RP 22. Royal's attorney also answered ready for trial. RP 22. Speaking to Royal, the court said, "All right. Mr. Royal, if you want to represent yourself, you can do that, but trial's tomorrow. I'm not going to grant your request to go pro se if it involves a continuance." Royal said, "Well, I would need, I would need a couple days, Your Honor." RP 22. The court denied the motion, saying, "That's not an unequivocal request for one thing. It's conditioned upon a continuance and I'm not going to grant it." RP 22.

The court entered the following language in an order denying Royal's motion to proceed pro se: "Court rules defendant's request was not unequivocal and [was] contingent on a continuance request. Court incorporates its oral findings." CP 22.

C. ARGUMENT

1. ROYAL'S REQUEST FOR A CONTINUANCE WAS EQUIVOCAL BECAUSE IT WAS PREDICATED UPON THE COURT GRANTING A CONTINUANCE, SO THE COURT HAD DISCRETION TO DENY THE REQUEST.

Royal contends that the presiding judge violated his constitutional right to represent himself by denying Royal's pro se motion on the eve of trial. But Royal's motion was contingent on the court's granting a continuance that it did not grant, so Royal's request was not unequivocal and the denial of the motion was within the judge's discretion.

Under the state and federal constitutions, criminal defendants may waive their right to be represented by counsel and choose instead to represent themselves. State v. Fritz, 21 Wn. App. 354, 358-59, 585 P.2d 173 (1984). A defendant's decision to waive his right to counsel and proceed pro se must be timely, knowingly and intelligently made, and must be stated unequivocally. State v. Stenson, 132 Wn.2d 668, 737, 740, 940 P.2d 1239 (1997), cert. denied in 523 U.S. 1008 (1998); State v. DeWeese, 117 Wn.2d 369, 377, 816 P.2d 1 (1991); State v. Honton, 85 Wn. App. 415, 419, 932 P.2d 1276, review denied, 133 Wn.2d 1011 (1997).

A court's decision on a request to proceed pro se is reviewed for abuse of discretion. State v. Breedlove, 79 Wn. App. 101, 106, 900 P.2d 586 (1995). The degree of discretion granted to the trial court in rejecting a defendant's waiver of his right to counsel exists on a continuum corresponding to the timeliness of the request. Honton, 85 Wn. App. at 420. When the request is made as trial is about to commence, the court has some measure of discretion. Id.

In order to "protect defendants from making capricious waivers of counsel and to protect trial courts from manipulative vacillations by defendants regarding representation," Washington courts have consistently held that a defendant's request to proceed pro se must be "unequivocal." Stenson, 132 Wn.2d at 740. Courts should indulge "every reasonable presumption against a defendant's waiver of his right to an attorney." Id. at 741.

Here, trial was about to begin the following day, and the record does not demonstrate an unequivocal waiver. Royal's only request to proceed pro se, made on the eve of trial and nearly seven months after charges were filed, was conditioned on his request for a continuance, so he could review discovery and speak

with a medical expert who had not even been secured as a witness. RP 22.

The presiding judge (who had discretion to deny even an unequivocal request on the very eve of trial under Honton, 85 Wn. App. at 420), told Royal that he *would* permit him to proceed pro se, but that he was unwilling to continue the trial date. RP 22. Royal was unwilling to proceed as his own attorney *unless* the judge agreed to grant him a continuance; his waiver, then, was entirely equivocal. RP 22. Once the court indicated that it would not be granting a continuance of the trial date, Royal did not raise his motion again, nor did he raise it before the trial court. RP 22.

Because Royal's request to proceed pro se was one day before trial and was entirely contingent on the court granting a continuance that it did not grant, the court acted within its discretion in denying the request. This Court should affirm his convictions.

2. IN THE LIGHT MOST FAVORABLE TO THE STATE, ROYAL SNATCHED THE DRUGS AWAY FROM JONES AFTER JONES HAD PURCHASED THEM, SATISFYING THE ELEMENTS FOR THEFT IN THE FIRST DEGREE.

Royal argues that the State did not prove beyond a reasonable doubt that he committed theft in the first degree when

he snatched the drug package back from Jones and demanded more money. But Royal had given the drugs to Jones in exchange for the agreed-upon $30, and then he stole the package back by snatching it out of Jones' hand. In the light most favorable to the State, these actions satisfy the elements of theft in the first degree.

The State must prove every element of a crime beyond a reasonable doubt. State v. A.M., 163 Wn. App. 414, 419, 260 P.3d 229 (2011). When an appellant challenges the sufficiency of the evidence, the reviewing court views the evidence in the light most favorable to the State, drawing all reasonable inferences from the evidence in the State's favor and interpreting them "most strongly against the defendant." State v. Engel, 166 Wn.2d 572, 576, 210 P.3d 1007 (2009). The evidence is sufficient to support a conviction when, viewed in this light and with these inferences, any rational trier of fact could find the essential elements of the crime proven beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 820 P.2d 1068 (1992).

The "to convict" jury instruction for theft in the first degree required the jury, before it convicted, to find that Royal "wrongfully took property from the person of another" and "intended to deprive the other person of the property." CP 82. This instruction mirrored

the language in the theft statutes. RCW 9A.56.030(1)(b) and RCW 9A.56.020(1)(a). "Deprive" means to take away or to "take something away from." State v. Cuthbert, 154 Wn. App. 318, 338, 225 P.3d 407, review denied, 169 Wn.2d 1008, 234 P.3d 1173 (2010). Here, the State expressly argued that the "property" in question was the drugs Royal snatched away from Jones. RP 315-15.

The evidence here established that Royal committed theft in the first degree because he took the package from Jones after Jones had paid for it, and did so with the intent to deprive Jones of the package. In the light most favorable to the state, Royal's conduct and intent satisfy the statutory elements of theft in the first degree.

Nevertheless, Royal relies on State v. Walker, 75 Wn. App. 101, 106, 897 P.2d 957 (1994) to argue that he did not commit theft because Royal did not retain the property for a sufficient duration. Appellant's Opening Brief at 7. In Walker, this Court distinguished between the taking of a motor vehicle statute (TMV) and the theft statute, because a TMV could simply involve the unlawful taking of a car for the purpose of taking a "spin around the block," while the theft statute requires intent to deprive "for a substantial period of

time": "the joyriding statute [TMV] proscribes the *initial* use of an automobile, while the theft statute proscribes the *continued or permanent* unauthorized use of an automobile." Id. at 106, 108 (emphasis added). Because Royal snatched the drugs and only retained them for a few moments, Royal argues, he did not satisfy the requisite elements of theft.

But while the duration of the deprivation may be helpful in establishing the intent element for theft, as it was in Walker, the "intent to permanently deprive is not an element of the crime of theft as defined in RCW 9A.56.020(1)(a)." State v. Komok, 54 Wn. App. 110, 116, 772 P.2d 539, affirmed, 113 Wn.2d 810 (1989); State v. Moreau, 35 Wn. App. 688, 692, 669 P.2d 483 (1983). The Washington Practice Manual addresses the issue of a durational requirement for a theft charge:

> [T]heft requires only an intent to deprive the owner of the property, not an intent to permanently deprive. Thus, an intent to borrow property without authorization will support a conviction for either theft by taking, embezzlement, theft by deception, or misappropriation of lost property. The intent must, however, be to deprive the owner of the property, not merely the temporary use of it.

13B Wn. Prac., Criminal Law § 2606 (2012-2013 ed.) (internal citations omitted).

Here, the State needed to prove only that Royal wrongfully took property from Jones with intent to deprive him of that property, not that he retained the property for any particular length of time after snatching it. Jones testified that he and Royal had agreed on the price of $30 before Royal handed him the drugs; it was only once the drugs were purchased with the agreed-upon $30 that Royal snatched them back and demanded that Jones hand over *all* of his money. RP 140, 143-44. After Jones had paid Royal for the drugs the first time, for the negotiated price, the purchase was completed, and the drugs now belonged to Jones. RP 144, 153. What happened next was not further "negotiation" regarding the price of the drugs, as Royal argues, but a shakedown of Jones for all of his remaining money, for drugs that he already owned. Appellant's Opening Brief at 11.

A rational juror evaluating the evidence at trial could easily have found that Royal intended to *deprive* Jones of his drugs when he snatched them, and it was only Jones' willingness to give in to Royal's demands for more money that convinced Royal to return the stolen drugs to him. A reasonable inference from Jones' testimony would be that the only reason that Royal retained the stolen drugs for a brief period, rather than permanently, was

because he successfully intimidated Jones into handing over the rest of his money. A theft of property conditioned on additional payment is still a theft.

Royal argues that Royal was only taking back property that was already his. Appellant's Opening Brief at 10. Attempting to support this contention, Royal relies on State v. Pike, 118 Wn.2d 585, 590, 826 P.2d 152 (1992), where Pike asked a repair shop to install an engine in his car, and then took the repaired car from the shop without paying for it. Id. at 588-89. A jury convicted Pike of theft in the second degree, but the Washington Supreme Court reversed the conviction "because a right to payment is only a general contractual claim" and not a "superior possessory interest in the repaired car itself." Id. at 594.

But Pike does not apply to the facts here because Jones actually bought the drugs from Royal before Royal snatched them out of his hand. RP 143-44. Unlike in Pike where Pike merely failed to uphold his end of a "contractual obligation," Royal physically stole property from Jones that belonged to Jones, and made it his own again. RP 143-44, 154. Had Pike sold the car to the shop for an agreed price, accepted the money in exchange for the car and the keys, then snatched back the keys and driven off

with the car while retaining the money the shop had paid initially, the case would have resolved differently, and the comparison to this case would be more appropriate.

In that situation, Pike would have committed theft even if, after stealing the car back, he had demanded more money and, after receiving more money from the shop, had returned the car to the shop. Similarly, the moment Royal snatched the drugs away from Jones with the intent to deprive Jones of them, even if he did it with the intent of squeezing more money out of Jones, he committed theft under the statute. Holding Jones' property hostage until Jones hands over all of his money does not, despite Royal's contention to the contrary, negate the initial theft of the property.

Retaining the property of another in an effort to extort more money from the owner is still a theft. In The City of Seattle v. Shepherd, 93 Wn.2d 861, 613 P.2d 1158 (1980), the defendants were pawnbrokers who retained property they had purchased, supposedly in good faith, that was later revealed to be stolen. Id. at 863. When the rightful owners requested the return of their stolen property from the pawnbrokers, the pawnbrokers refused to return it until and unless the rightful owners paid the pawn fees, claiming they had a "good faith claim of title." Id. The trial court

granted the pawnbroker's motion to dismiss based on their good faith claim. Id.

But the Washington Supreme Court held that the pawnbrokers' original good faith claim was irrelevant once the rightful owners proved their property interest; the court explicitly stated that "theft occurs" where the "pawnbroker refuses to return the property to the rightful owner unless the owner pays the pawn fee." Id. at 868-69.

While arising from vastly different facts, Shepherd still supports the notion that refusing to return property to its owner, absent some unjust payment, is a theft. Royal attempts to make a claim similar to that of the pawnbrokers, arguing that he had a good faith claim to his drugs, but he ignores the fact that he had already sold the drugs to Jones, relinquishing any good faith claim to the drugs in the first place.

In the light most favorable to the State, and with all reasonable inferences drawn in the State's favor, the evidence here is sufficient for any rational trier of fact to have convicted Royal of theft in the first degree beyond a reasonable doubt. This Court should affirm.

Royal took Jones' property and held it hostage until Jones paid twice the agreed-upon rate. In the light most favorable to the State and with all favorable inferences in the State's favor, the elements of theft in the first degree were satisfied.

D. CONCLUSION

For the foregoing reasons, the defendant's conviction should be affirmed.

DATED this 1 day of July, 2013.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: _____
TOMÁS A. GAHAN, WSBA #32779
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to NANCY COLLINS, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the BRIEF OF RESPONDENT in STATE V. RANDY ROYAL, Cause No. 69765-0 -I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 1 day of July, 2013

Name
Done in Seattle, Washington