NO. 44438-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

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STATE OF WASHINGTON,

Respondent,

v.

JAMES BRADLEY,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

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# APPELLANT'S REPLY BRIEF

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NANCY P. COLLINS
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

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A. ARGUMENT.

1. **Neither at trial nor on appeal has the prosecution shown how Mr. Bradley actually used a baseball bat in a way that was likely to cause death, which is an essential element of the deadly weapon sentencing enhancement**

The prosecution properly concedes that a baseball bat does not meet the essential elements of the deadly weapon sentencing enhancement absent proof, beyond a reasonable doubt, that it was *actually used* in a manner likely or readily to produce death. RCW 9.94A.825; *see* Response Brief at 5-6. This definition is different from, and not synonymous with, the deadly weapon element of second degree assault. *See, e.g., In re Pers. Restraint of Tran*, 154 Wn.2d 323, 331-32, 111 P.3d 1168 (2005); RCW 9A.04.110(6); RCW 9A.36.021(1)(c).

There is no dispute that Mr. Bradley never touched the complainant Sage Sanchez with the baseball bat. At trial, the State focused on the notion that the bat was "capable" of causing substantial bodily harm, which would meet only the elements of second degree assault. RP 43. It also claimed the bat would be "capable, depending on where someone gets hit" of killing them. RP 438-39. But the prosecution did not point to any of Mr. Bradley's actual conduct to

show that he used the bat in a manner likely to produce Mr. Sanchez's death. *Id.*

The mere possibility that a bat could cause death is different from and not synonymous with proof that a bat was actually used in a manner "likely to produce or may easily and readily produce death." RCW 9.94A.825; *see, e.g., In re Pers. Restraint of Martinez*, 171 Wn.2d 354, 368 n.6, 256 P.3d 277 (2011). A baseball bat is commonly used innocuously, for sport, and it does not qualify as a *per se* weapon for the sentencing enhancement or otherwise, coaches, players, and parents would face lengthy sentences for having bats as they argued controversial calls during a game. It is the bat "as actually used" not as inherently dangerous that must be proved.

On appeal, the prosecution again asserts that the bat had the "capacity" to inflict death, disregarding the essential element that the additional punishment imposed for a deadly weapon enhancement requires evidence based on how the bat was actually used during the incident. *See Tran*, 154 Wn.2d at 329; Response Brief at 6.

The allegation that Mr. Bradley hit a car three times with the bat does not prove it was used in a manner likely to produce death. When Mr. Bradley hit the truck with the bat, Mr. Sanchez was standing still

while Mr. Bradley moved around the truck – the bat was directed at the truck and not Mr. Sanchez. RP 218-19. The State insists that the dents to the car show the dangerousness of the bat but Mr. Sanchez did not know whether Mr. Bradley caused the dents or the dents were already the truck – a 1988 Ford Ranger that belonged his father. RP 182, 191.

Once Mr. Sanchez walked away from the truck, toward neighbors, Mr. Bradley followed but remained at a distance of five feet away, then was separated from Mr. Sanchez by a car. RP 197, 220-21. He did not try to tackle Mr. Sanchez to the ground or lunge in an effort to hit Mr. Sanchez's body but miss. RP 199, 220. "The only time he swung the bat was hitting the truck." RP 277. He held the bat, ran after Mr. Sanchez, and repeatedly demanded that he be paid the money owed. RP 188-89, 199, 201, 216. He stopped once Mr. Sanchez agreed to pay him. RP 217.

In *Tran*, our Supreme Court recognized critical distinctions in the elements of the deadly weapon punishments deriving from different statutes. 154 Wn.2d at 329, 331-32. The increase in punishment for the deadly weapon enhancement was intended for particularly violent acts, not upon speculation that, had the incident been carried out differently, there is potential for lethal force. *Id.* at 329. Death, not merely bodily

injury, must be a "likely" outcome based how the bat was actually used. RCW 9.94A.825. Hitting a car, holding a baseball bat, and demanding payment for completed work, does not constitute the use of a bat in a manner likely to result in death or easily to have produced death.

2. **The prosecution failed to prove that Mr. Bradley committed the offense of obstruction when he briefly hid in a shed on his own property.**

The criminal offense of obstruction of law enforcement does not occur any time a suspect does not wait at the scene of an incident for the police to arrive and arrest him, as the prosecution argues. The prosecution spends no time distinguishing or even addressing case law demonstrating that the obstruction statute must be narrowly construed due to the potential it infringes on constitutionally protected conduct or constitutionally guaranteed privacy rights. *See* Appellant's Opening Brief at 15-16

Instead, it claims that the tool shed was located on someone else's property, and therefore Mr. Bradley had no right to ignore the police's warrantless entry. Response Brief at 10. But the police officers testified that the toolshed was on the property at 819 South Puget Sound Avenue, the same location as the incident to which they were responding. RP 336, 344-45. Mr. Bradley was a tenant and lived on the

property where the toolshed was located. RP 271. Mr. Bradley's housemate Elizabeth Blankenship said "we have" a toolshed "out back," describing it as part of their home. RP 278. The prosecution presented no evidence that this tool shed was not part of the home. Indeed, given the Mr. Bradley's yard work, laying bricks and pulling weeds on the property, it is irrational to presume he lacked access to the toolshed. RP 186, 272, 302.

The time and effort it took for the police officers to arrest Mr. Bradley was minimal, even to the police officers themselves. RP 346-47, 348-49. After announcing "Tacoma police", they waited "probably 10, 15 seconds" or "a few seconds" until they opened the shed door. RP 348-49. Mr. Bradley was "taken into custody without incident." RP 350. The arresting officer had driven around the neighborhood looking for Mr. Bradley and in total, he spent about ten minutes involved in his search. RP 353. Mr. Bradley did not exit the shed as initially requested, but the shed door was unlocked and he did not resist, struggle, threaten, or flee. RP 348-49. Given this minimal conduct, and Mr. Bradley's lawful presence on the property, he did not commit a crime by failing to volunteer himself to be arrested while inside a building at his home.

### 3. Theft is not proven by a temporary taking and abandonment of property

The prosecution agrees that a "well-established" principle confines the criminal offense of theft to "the continued or permanent unauthorized use of another's property." Response Brief at 13. While not a separate statutory element, the intent to deprive required for theft contemplates the intent to deprive for a continued period of time, more than a temporary, momentary use by another. *See State v. Walker*, 75 Wn.App. 101, 108, 897 P.2d 957 (1994). Yet after stating the law, the prosecution ignores this principle and insists that any momentary taking of property constitutes a theft.

Absent the intent to deprive the owner of his property, there can be no theft. RCW 9A.56.020(1)(a); *State v. Walters*, 162 Wn.App. 74, 86, 255 P.3d 835 (2011) ("intent to permanently deprive is an element of a theft prosecution" under state law). The leaf blower Mr. Bradley allegedly moved from Mr. Sanchez's truck to his porch, a porch that was in plain view of the neighbors as well as Mr. Sanchez, does not constitutes an intentional and unlawful taking of property as required for theft. RP 304, 382-83; RCW 9A.56.020.

Courts "do not infer criminal intent from evidence that is patently equivocal. Rather, inferences of intent may be drawn only 'from conduct that plainly indicates such intent as a matter of logical probability.'" *State v. Vasquez*, 178 Wn.2d 1, 14, 309 P.3d 318 (2013). In *Vasquez*, the defendant gave ambiguous answers regarding whether he intended to use forged identification cards to defraud someone. The Court of Appeals ruled that his possession of the cards alone showed his intent to defraud because there was no legitimate purpose for having such a card. *Id.* at 7. The Supreme Court reversed, holding that Mr. Vasquez's explanation about the cards "demonstrate ambiguity" as to whether he was trying to defraud anyone. *Id.* at 14. "As such, they are patently equivocal and do not support an inference of intent to injure or defraud." *Id.*

Just as moving a leaf blower from a truck to a nearby deck does not plainly indicate the intent to deprive the owner of the property, Mr. Bradley's temporary taking of the car keys, followed by his quick abandonment of the keys as he dropped them in front of his house mate and left, does not provide a rational basis to infer the intent to deprive the owner of the property to the degree required to prove theft. *See Vasquez*, 178 Wn.2d at 14; RP 287-88. Even in the context of a

sufficiency of the evidence review, as in *Vasquez* and here, patently equivocal evidence may not support a rational inference of the intent to steal. Taking keys then immediately leaving them in a place where they will be easily returned to the owner is, at most, patently equivocal evidence of intent to deprive the owner of property for a continued period and does not establish a theft occurred.

4. **The two separate acts of alleged theft do not meet the definition of a single course of conduct that relieves the prosecution of its burden to prove a specific act to a unanimous jury**

Even if the separate takings of the leaf blower and keys could individually constitute theft, the court did not instruct the jury that it must unanimously agree upon what item Mr. Bradley intentionally stole. Where the prosecution offers multiple acts that could constitute the criminal act charged, the State must elect which of those acts it is relying on for the jury to convict, *or* the trial court must instruct the jury that it must unanimously decide that the State proved the same criminal act beyond a reasonable doubt. *State v. Kitchen,* 110 Wn.2d 403, 411, 756 P.2d 105 (1988). The only exception to this rule is when the prosecution establishes a continuing course of conduct.

The law of aggregation permits the jury to consider separate acts as part of a single course of conduct, but the jury must find such a course of conduct. *State v. Garman*, 100 Wn.App. 307, 315, 984 P.2d 453 (1999). In *Garman*, the to-convict instruction for the theft charge explicitly required the jury to find that the acts were part of a "continuing course of conduct." *Id.* No such instruction to the jury occurred here. On the contrary, the State argued Mr. Bradley's temporary movement of either item could constitute a theft.

The course of conduct exception fails when there is not sufficient evidence to support the two acts that the jury could have aggregated. Moving a leaf blower from a truck to a deck, both in open view, does not constitute theft. If the jurors relied on this allegation, the theft conviction violates due process. The prosecution's due process obligation remains in effect, even if there could have been a finding of a single course of conduct. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); *State v. Petrich*, 101 Wn.2d 566, 573, 683 P.2d 173 (1984). Because there insufficient evidence that at least one of the acts constituted theft, and there was no jury finding specifying which act it based its conviction upon, reversal is required.

### 5. As charged, the vehicle prowl and theft from the car convictions violate double jeopardy.

A double jeopardy violation occurs when the evidence required to support a conviction for one would have been sufficient to warrant a conviction for the other. *In re Personal Restraint of Orange*, 152 Wn.2d 795, 816, 100 P.3d 291 (2004); U.S. Const. amend. 5; Const. art. I, § 9.

In the case at bar, the evidence required to support Mr. Bradley's conviction for vehicle prowling was entering a vehicle with the intent to steal property. RCW 9A.52.100(1). As charged and proven, the evidence required to prove Mr. Bradley committed third degree theft was that he took property (keys and/or a leaf blower) from the inside of Mr. Sanchez's truck with the intent to deprive the owner of his property. RCW 9A.56.050(1); RCW 9A.56.020(1).

It is not the generic statutory elements but the elements as necessary for the case that control a double jeopardy claim. *Orange*, 152 Wn.2d at 518-19. The prosecution confuses this principle but twisting the legal requirements and the factual circumstance of the case in its response brief.

The charged theft could not have been committed without entering the car that held the property. Mr. Bradley was not accused or other means of committing vehicle prowl or theft. Here, Mr. Bradley could not have committed theft without also vehicle prowling. The prosecution does not address the pertinent case law cited in Mr. Bradley's opening brief. Instead, it reverts to generic statutory language and misapplies the controlling double jeopardy analysis.

6. **The court's finding that Mr. Bradley had the ability to pay discretionary legal financial obligations should be stricken because it is not supported by the record.**

Mr. Bradley was so desperately indigent at the time of the incident that he threatened his employer with a baseball bat when he was told that he would have to wait two weeks to be paid $75. RP 218. Despite this undisputed poverty, the court ordered that he pay discretionary costs of having an attorney appointed to represent him at his trial. CP 97-98. The court further found Mr. Bradley had the present ability to pay these extra costs. CP 97. The court's finding is not supported by the record. At the time of the incident, Mr. Bradley was unable to meet his personal financial obligations even when working as best he could. The court was not presented with sufficient evidence to

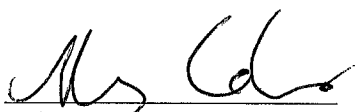
show that Mr. Bradley could reasonably pay additional costs, with compounding interest, that will only serve to make Mr. Bradley more financially desperate and destitute when he completes the prison sentence imposed in the case at bar.

B. CONCLUSION.

For the forgoing reasons as well as those discussed in Mr. Bradley's opening brief and his Statement of Additional Grounds, his convictions should be reversed and dismissed due to insufficient evidence and double jeopardy violations.

DATED this 31st day of October 2013.

Respectfully submitted,



NANCY P. COLLINS (28806)
Washington Appellate Project (91052)
Attorneys for Appellant

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**DIVISION TWO**

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| | ) | NO. 44438-1-II |
| v. | ) | |
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| JAMES BRADLEY, | ) | |
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