NO. 45613-3-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent

v.

ADAM PHILIP THOMAS, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.13-1-01540-4

SUPPLEMENTAL BRIEF OF RESPONDENT

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INTRODUCTION

Following oral argument in this case the court ordered the parties to respond in a supplemental brief to the following questions:

Does failing to pay for restaurant food constitute the taking of services or the taking of personal property?

In this context, address RCW 9A. 56. 010(15), which defines "services" to include, but not be limited to, "labor, professional services, transportation services, electronic computer services, the supplying of hotel accommodations, restaurant services, entertainment, the supplying of equipment for use, and the supplying of commodities of a public utility nature such as gas, electricity, steam, and water."

Can robbery be based on the taking of services?

In this context, address RCW 9A.56.190, which states that a "person commits robbery when he or she unlawfully takes personal property" and RCW 9A.56.020(1)(a), which defines "theft" as "[t]o wrongfully obtain or exert unauthorized control over the property or services of another or the value thereof.

ARGUMENT

I. Does failing to pay for restaurant food constitute the taking of services or the taking of personal property?

The failing to pay for restaurant food constitutes the taking of services *and* the taking of personal property. Property writ large is defined at RCW 9A.04.110(22) to mean "*anything of value*, whether tangible or *intangible*, real or personal." (emphasis added). The definitions provided in RCW 9A.04.110 apply to the entire "title unless a different meaning plainly is required." Accordingly, these definitions apply to the offense of robbery unless a "different meaning plainly is required" under the associated chapter or statute. *State v. Shcherenkov*, 146 Wn.App. 619, 625, 191 P.3d 99 (2008) (applying definition of "threat" under RCW 9A.04.110(27) to the offense of robbery);[1] *State v. Sparling*, 141 Wn.App. 542, 170 P.3d 83 (2007) (applying definition of "deadly weapon" under RCW 9A.04.110(6) to the offense of robbery). A different meaning is not plainly required by chapter 9A.56 RCW because that chapter does not define "property." Thus, for example, the crimes of possession of stolen

[1] The State believes that it claimed at oral argument that *Shcherenkov* applied the property definition found at RCW 9A.04.110(22) to robbery. Such a claim is incorrect as *Shcherenkov* applied a different definition found in that section to robbery and did not discuss the definition of property. 146 Wn.App. at 625. The State apologizes for its unintentional misstatement at oral argument. A straightforward and logical argument can be made, however, and is made above, that just as the threat definition is properly taken from RCW 9A.04.110 so would be the property definition since neither term is defined in chapter 9A.56 RCW.

property and theft both apply the definition of property under RCW 9A.04.110(22) and both crimes are codified with robbery in chapter 9A.56 RCW. *State v. Douglas*, 50 Wn.App. 776, 778, 751 P.2d 311 (1988); *State v. Jacobson*, 74 Wn.App. 715, 720-21, 876 P.2d 916 (1994). Nothing in RCW 9A.56.190, where robbery is defined, compels a different conclusion. As a result, the definition of property found at RCW 9A.04.110(22) applies to the offense of robbery.

This definition, moreover, encompasses both services and personal property because a service is something of value as is personal property. In other words, services and personal property are each a more specific category or subset of property as defined under RCW 9A.04.110(22). That said, the two terms are not mutually exclusive, but rather can be coextensive as explained below. While services is "defined" under RCW 9A.56.010(15) to include a number of different services and "restaurant services" in particular, the meaning of the term itself is not further clarified. The contours of *personal* property in the context of the offense of robbery are, on the other hand, clarified by case law. Property is considered personal property for the purposes of a robbery if the person from whom the property was taken had "an ownership interest in the property taken, or some representative capacity with respect to the owner of the property taken, or actual possession of the property taken." *State v.*

Latham, 35 Wn.App. 862, 864-65, 670 P.2d 689 (1983); *State v. Tvedt*, 153 Wn.2d 705, 714, 107 P.3d 728 (2005) (holding that "in order for a robbery to occur, the person from whom or from whose presence the property is taken must have an ownership, representative, or possessory interest in the property.").

Essentially then, one question becomes whether the restaurant service in this case is personal property. The answer is yes. First, the restaurant service provided to Mr. Thomas—seating him in the restaurant, taking his order, making his food and drink, and providing those items to him—constitutes property because the service is something "of value" regardless of whether it is "tangible or intangible." RCW 9A.04.110(22). Second, the restaurant service provided to Mr. Thomas was the personal property of Mr. Estrada, the owner of the restaurant, because he had an "ownership, representative, or possessory interest in the property," i.e., the value of the service provided. *Tvedt*, 153 Wn.2d at 714. Consequently, the failure to pay for restaurant food constitutes the taking of personal property by way of taking "restaurant services."

Furthermore, the failure to pay for restaurant food also constitutes the taking of personal property by way of taking tangible property or the value thereof. Here, the food and drinks taken, and not paid for, are not indivisible from the service. Mr. Estrada, as the owner of the restaurant,

originally had to purchase the chicken, purchase the other salad components, and purchase the different alcoholic and non-alcoholic beverages that made up the meal that Mr. Thomas ordered. These items had value as food and drink—as *property*—irrespective of whether they ended up in a meal served to a customer. Mr. Estrada also had an "ownership, representative, or possessory interest in th[is] property." *Tvedt*, 153 Wn.2d at 714. Had Mr. Thomas walked into the kitchen and out the back door with the same items, it would be indisputable that a theft of Mr. Estrada's personal property occurred. There is no compelling reason to allow the method of the taking employed to be determinative as to the type of property taken, i.e., whether the property qualifies as personal property or a service, because the thief cannot change the inherent nature of the property or the property's relationship to its owner.

Mr. Thomas, when he purposely failed to pay for restaurant food, took the personal property of Mr. Estrada by taking from him the restaurant services provided and their value thereof and by taking tangible property from him and its value thereof.

II. Can robbery be based on the taking of services?

As explained above, robbery can be based on the taking of services because the taking of services can constitute the taking of personal property. This conclusion is not undermined by the incorporation of the

theft definition and its attendant terms, which have become part of the analysis as to whether a robbery occurred. While RCW 9A.56.190 states that a "person commits robbery when he or she unlawfully takes personal property" and does not include an intent element, our courts have held that an "intent to steal is an essential element of the crime of robbery." *State v. Kjorsvik*, 117 Wn.2d 93, 98, 812 P.2d 86 (1991) (citations omitted).[2] Thus, an unlawful taking occurs for the purposes of a robbery when a person commits theft. *State v. Byers*, 136 Wn. 620, 241 P. 9 (1925) (holding that robbery includes the elements of the crime of larceny); RCW 9A.56.100.

Theft is defined as "[t]o 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." RCW 9A.56.020(1)(a) (emphasis added). Furthermore, "[w]rongfully obtains" and "exerts unauthorized control" means "[t]o take the property or services of another." RCW 9A.56.010(22)(a). That these definitions seemingly differentiate between "property or services" is of no importance, because the definitions do not create alternative means of committing theft. *See State v. Linehan*, 147 Wn.3d 638, 56 P.3d 542

[2] The jury in this case was instructed that "[a] person commits the crime of robbery when he or she unlawfully *and with intent to commit theft* thereof takes personal property from the person . . ." CP 33 (emphasis added).

(2002). Accordingly, a jury need not unanimously find that the evidence established a "theft of property" or that the evidence established a "theft of services." Thus, as incorporated into robbery, a theft occurs regardless of whether the *personal property* was property—narrowly defined—or services, or the value of either. A jury in a robbery case, consequently, must only conclude that the evidence established that the defendant intended to commit theft when he or she took the personal property at issue.

This analysis is in accordance with the classification of robbery with other property crimes within the criminal code. *Tvedt*, 153 Wn.2d at 712. *Tvedt* recognized that though robbery is also a crime against the person, the "legislature classified robbery with property crimes, indicating a focus on the nature of robbery offenses as crimes against property." *Id.*, FN 2 ("The legislature's placement of an offense within the criminal code is evidence of legislative intent.") (citations omitted). This heightened focus on robbery as a crime against property supports the inference that robbery prohibits the taking of *any* property by force or the threat thereof, and not just some subset of property. If the legislature wanted to restrict robbery so that the crime would only apply to the taking of physical, personal property and not services, it would have explicitly done so.

Instead, the legislature only qualified that the property at issue had to be "personal" property to sustain a robbery conviction.

The procedural posture of this case, wherein the Appellant is challenging the sufficiency of the evidence supporting the conviction, helps to apply the above analysis to the facts of the case. When viewing the evidence in a light most favorable to the State and drawing reasonable inferences in its favor, the evidence establishes that Mr. Thomas unlawfully took personal property from Mr. Estrada.

CONCLUSION

For the reasons argued above, Mr. Thomas's conviction should be affirmed.

DATED this 8 day of October, 2015.

Respectfully submitted:

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