

FEB 17 2016

Ronald R. Carpenter
E Clerk MT

SUPREME COURT NO. 92665-4
COURT OF APPEALS NO. 45613-3-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ADAM P. THOMAS,

Petitioner.

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

The Honorable Daniel Stahnke, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner Adam P. Thomas asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition.

B. COURT OF APPEALS DECISION

Petitioner seeks review of the Court of Appeals unpublished opinion No. 45613-3-II. A copy of the opinion is attached as Appendix.

On January 6, 2016, the Clark County Prosecutor moved the Court of Appeals to publish its opinion. To date, the court has taken no action.

C. ISSUE PRESENTED FOR REVIEW

Do the acts of eating a restaurant meal and flashing a knife at the restaurant's proprietor in lieu of paying for the meal provide sufficient evidence of taking personal property from the person of the proprietor to make Mr. Thomas guilty of first degree robbery?

D. STATEMENT OF THE CASE

Adam Thomas went to Vancouver's El Presidente restaurant because he was hungry. RP 1A 49. He ordered a salad and an alcoholic drink from the restaurant owner and manager, Jorge Estrada. RP 1A 60. While he waited for his food to arrive and while he ate, he stepped outside to smoke about three times. RP 1A 60-61.

Mr. Thomas had eaten about half of his salad and drink, when he went back outside to smoke. RP 1A 66. This time, Mr. Thomas took his backpack with him. RP 1A 63. That made Mr. Estrada nervous. It suggested to him that Mr. Thomas would try to slip out without paying for his meal. RP 1A 61.

Mr. Estrada asked Mr. Thomas to either “cash out” or give him a debit card he could run. RP 1A 63-64. Mr. Thomas gave Mr. Estrada his Washington ID card and a Mastercard debit card. RP 1A 63, 64, 81. Mr. Estrada ran the card but payment was declined. RP 1A 63.

Mr. Estrada asked Mr. Thomas if he had an alternative way to pay for the meal. RP 1A 67. Mr. Thomas responded “I sure do,” then unfolded a pocket knife with a 3-4 inch blade. RP 1A 67, 70. Mr. Estrada, fearing he might be hurt, went inside the restaurant. RP 1A 67. Mr. Thomas took off running. Mr. Estrada called the police. RP 1A 67. No one from the restaurant attempted to follow or detain Mr. Thomas. RP 1A 68. A short while later, a police officer apprehended Mr. Thomas near his residence. RP 1A 76-78.

The State charged Mr. Thomas with robbery in the first degree with a deadly weapon enhancement for the knife. CP 1; RCW 9A.56.200(1)(a)(i); RCW 9A.56.200(1)(a)(ii); RCW 9.94A.533(4). The court also instructed the jury on the lesser included offense of theft in the

third degree. RP 1B 161; CP 38. The jury returned a verdict of guilty as charged. CP 3-5; RP 1B 259-60. The court sentenced Mr. Thomas to 81 months in prison. CP 8; RP 1B 267.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Whether a consumed restaurant meal is personal property that can be taken from the person such to satisfy the elements of robbery in the first degree is an issue of first impression for this court.

Pursuant to RAP 13.4(b)(3) and (4), a petition for review will be accepted by the Supreme Court if it presents a significant question of law under the Constitution of the State of Washington or if it involves an issue of substantial public interest that should be determined by the Supreme Court.

Robbery is the unlawful taking of personal property from the person of another, or in her presence, against her will through the use or threatened use of force. CP 45; RCW 9A.56.190. The state failed to prove that Mr. Thomas committed robbery because it could not prove that in “dining and dashing” from Mr. Estrada’s El Presidente restaurant, Mr. Thomas unlawfully took personal property. Instead, Mr. Thomas dashed without paying for his restaurant service. RCW 9A.56.010(15). Mr. Thomas’s robbery conviction must be reversed and dismissed.

The standard the reviewing court uses in analyzing a claim of insufficiency of the evidence is “[w]hether after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). A challenge to the sufficiency of the evidence admits the truth of the State’s evidence and all reasonable inferences that can be drawn therefrom. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). As there was insufficient evidence to support the conviction, this Court must reverse the conviction with instructions to dismiss. To do otherwise would violate Double Jeopardy. *State v. Crediford*, 130 Wn.2d 747, 760-61, 927 P.2d 1129 (1996).

1. Failure to pay for a meal and beverage at a restaurant constitutes the taking of a service and not the taking of property from, or in the presence of, another.

Although the first of the six required to-convict elements of robbery requires theft of personal property, there is no definition of “personal property” in RCW 9A.56. As applied to all of RCW 9A, unless a different meaning is plainly required, “property” means “anything of value, whether tangible or intangible, real or personal.” RCW 9A.04.110; RCW 9A.04.110(22). RCW 9A.04.110 is a preliminary article. As such, it

is meant to apply broadly to any crime under RCW 9A with a property nexus (e.g., burglary, malicious mischief, arson).

It is the second of the six required to-convict elements of robbery, “theft of property,” that defines the contours of property applied specifically in the context of robbery. One could use force to take personal property from another, but it is not a robbery unless there is an intent to commit theft. RCW 9A.56 adopts a more specific meaning of property than that generically provided in RCW 9A.04.110. What emerges is a departure from the grab-all definition of property in RCW 9A.04.110(22).

In RCW 9A.56, the definition of theft distinguishes “services” as something distinct from the broad concept of “property.” Theft means,

- (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; or
- (c) To appropriate lost or misdelivered 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). And specifically, “services” include restaurant services. RCW 9A.56.010(15).

Robbery requires the theft of personal property. Restaurant services are not property. When the plain language of a statute is

unambiguous, the plain meaning governs. *State v. McDaniel*, 185 Wn. App. 932, 936, 344 P.3d 1241, *review denied*, 183 Wn. 2d 1011 (2015). Statutes are construed as a whole, giving effect to all the language used. *Ralph v. State Dept. of Natural Resources*, 182 Wn. 2d 242, 343 P.3d 342 (2014).

Mr. Thomas is not guilty of robbery because he did not take personal property from the person or in the presence of Jorge Estrada.

In closing argument, the state asserted restaurant services and the value of the meal were interrelated but separate.

[I]t becomes quite clear that he was intending to steal not only the food but the services in preparing it. The time it took to take that raw material – those raw foods, cook it, prepare it and then serve it. Everything that went along with it. The – using the actual restaurant, a portion of it to eat, using their silverware all of that, not just the food. He was stealing that but everything else that went in along with it.

RP 1B 233-34. People go to a restaurant to partake of the service of a meal. *The meal is the service. There is no restaurant service without the meal.*

2. Robbery cannot be based on the taking of services.

"Services" includes, but is not limited to, labor, professional services, transportation services, electronic computer services, the supplying of hotel accommodations, restaurant services, entertainment, the

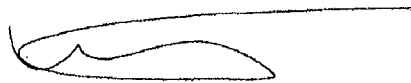
supplying of equipment for use, and the supplying of commodities of a public utility nature such as gas, electricity, steam, and water[.]

RCW 9A.56.010(15). As argued above, RCW 9A.56 distinguishes “services” from “property.” Taking “personal property” is an essential element of robbery. As services are not property, one cannot commit the robbery of services.

F. CONCLUSION

This Court should accept review and reverse Mr. Thomas’s first degree robbery conviction for insufficient evidence.

Respectfully submitted this 16th day of February 2016.



LISA E. TABBUT/WSBA #21344
Attorney for Adam P. Thomas

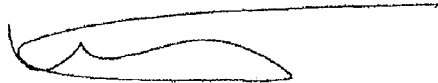
CERTIFICATE OF SERVICE

Lisa E. Tabbut declares as follows:

On today's date, I efiled this Petition for Review with (1) the Washington State Supreme Court via the Court of Appeals Division Two efile, (2) Aaron Bartlett, Clark County Prosecutor's Office at prosecutor@clark.wa.gov; and (3) Adam P. Thomas/DOC# 313527, Coyote Ridge Corrections Center, PO Box 769, Connell, WA 99326.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed February 16, 2016, in Winthrop, Washington.



Lisa E. Tabbut, WSBA No. 21344
Attorney for Adam P. Thomas

APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

December 22, 2015

DIVISION II

THE STATE OF WASHINGTON,

Respondent,

v.

ADAM P. THOMAS,

Appellant.

No. 45613-3-II

UNPUBLISHED OPINION

BJORGEN, A.C.J. — Adam P. Thomas appeals his conviction for first degree robbery with a deadly weapon enhancement, arguing that because he consumed his restaurant meal before he threatened his server with a knife, insufficient evidence supports his robbery conviction. We disagree and affirm Thomas's conviction.¹

FACTS

Jorge Estrada owns El Presidente Mexican Cantina, a restaurant in Vancouver, Washington. He was waiting tables on August 18, 2013, when Thomas came in for dinner. Thomas ordered a salad and a drink and went outside to smoke a cigarette. During the meal, he left the table, went outside, and returned to his meal approximately three times. This caught

¹ This matter was initially considered by a commissioner of this court pursuant to RAP 18.14, and subsequently referred to a panel of judges.

Estrada's attention. When he was halfway through his meal, Thomas again left to smoke. He brought his backpack with him, which caused Estrada to think Thomas was finished eating.

Estrada followed Thomas out the front door and asked for payment for the meal. Thomas handed Estrada a Washington State identification card and a credit card, and Estrada went inside to process the payment. The credit card was declined, so Estrada returned outside to ask Thomas if he had another form of payment. Thomas replied, "I sure do," and pulled out a pocket knife and unfolded it. 1A Verbatim Report of Proceedings at 67. Estrada retreated inside the restaurant and Thomas ran off. Estrada called 911, and police later apprehended Thomas. Thomas admitted leaving the restaurant without paying for his meal, but denied threatening Estrada.

The State charged Thomas with first degree robbery with a deadly weapon enhancement. During trial, Thomas moved to dismiss this charge, arguing that because he had consumed the meal before threatening Estrada and leaving the restaurant, there was insufficient evidence that he used force to obtain or retain possession of the meal. The trial court denied the motion. Thomas requested, and received, a jury instruction on the lesser included offense of third degree theft.² The jury found Thomas guilty of first degree robbery and found the deadly weapon enhancement applied. The trial court imposed an 81-month sentence. Thomas appeals.

ANALYSIS

In reviewing an insufficient evidence claim, we view the evidence in the light most favorable to the State and determine whether any rational trier of fact could have found the

² On the theft charge, the jury was instructed that the definition of "services" includes "restaurant services" and that the State was required to prove the defendant wrongfully obtained the "property or services of another." Supp. Clerk's Papers at 35; *see also* RCW 9A.56.010(15).

elements of the charged crime beyond a reasonable doubt. *State v. Brown*, 162 Wn.2d 422, 428, 173 P.3d 245 (2007). We draw all reasonable inferences from the evidence in the State's favor and most strongly against the defendant. *Brown*, 162 Wn.2d at 428.

To convict Thomas of first degree robbery, the State had to prove beyond a reasonable doubt that he (1) unlawfully took personal property³ from the person of another, (2) by the use or threatened use of immediate force,⁴ and (3) during the commission of the robbery, was (i) armed with a deadly weapon, (ii) displayed what appeared to be a deadly weapon, or (iii) inflicted bodily injury. RCW 9A.56.190, .200(1)(a); *see also* RCW 9.94A.533(4) (deadly weapon sentencing enhancement). Thomas argues that because he had consumed the meal and left the restaurant before displaying a weapon, the evidence is insufficient to support his robbery conviction. *See State v. Hornaday*, 105 Wn.2d 120, 125, 713 P.2d 71 (1986) (superseded by statute) (holding that a minor could not possess alcohol after consuming it). The State responds that Washington's "transactional" analysis of robbery encompasses Thomas's actions. Br. of Resp't at 8.

Under Washington's "transactional" analysis of robbery, the taking of property is "ongoing until the assailant has effected an escape." *State v. Truong*, 168 Wn. App. 529, 535-36, 277 P.3d 74 (2012). The definition of "robbery," thus, includes "violence during flight immediately following the taking." *State v. Manchester*, 57 Wn. App. 765, 770, 790 P.2d 217 (1990); *see also State v. Handburgh*, 119 Wn.2d 284, 287-89, 830 P.2d 641 (1992) (the forceful retention of a

³ "Property" was defined in the instructions as "anything of value, whether tangible or intangible." 1B Verbatim Report of Proceedings at 189.

⁴ Pursuant to RCW 9A.56.190, "[s]uch force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking; in either of which cases the degree of force is immaterial."

stolen bicycle constitutes a robbery); *State v. Robinson*, 73 Wn. App. 851, 856, 872 P.2d 43 (1994) (“Pursuant to [the transactional view of robbery], a robbery can be considered an ongoing offense so that, regardless of whether force was used to obtain property, force used to retain the stolen property or to effect an escape can satisfy the force element of robbery.”).

In *Manchester*, for example, the defendant hid cigarettes under his coat and left a store. A guard followed him out of the store and took his arm to escort the defendant back inside. 57 Wn. App. at 766-67. The defendant broke away and displayed a weapon as he left. *Manchester*, 57 Wn. App. at 766-67. The defendant argued that the robbery statute required “that the use of force occur prior to completion of the taking.” *Manchester*, 57 Wn. App. at 769. The court rejected his argument:

The fatal flaw in Manchester’s argument is that it ignores the plain language of the statute: “force or fear . . . used to . . . retain possession of the property, or to prevent or overcome resistance to the taking. . . .” In each instance, it is undisputed that Manchester used force to retain at least some of the stolen property. In doing so, his actions fall squarely within the provisions of the statute.

Manchester, 57 Wn. App. at 769 (alteration in original).

This transactional analysis, however, has an outer limit. In *State v. Johnson*, relied upon by Thomas, a defendant abandoned stolen property before punching a security guard. 155 Wn.2d 609, 610, 121 P.3d 91 (2005). The *Johnson* court, in reversing the robbery conviction, wrote:

[T]he force must relate to the taking or retention of the property, either as force used directly in the taking or retention or as force used to prevent or overcome resistance “to the taking.” Johnson was not attempting to retain the property when he punched the guard but was attempting to escape after abandoning it.

Johnson, 155 Wn.2d at 611. Under *Johnson*, then, the State cannot prove robbery if the force is unrelated “to the taking or retention” of the property or is not “used to prevent or overcome

resistance to the taking.”⁵ *Johnson*, 155 Wn.2d at 611; *see also* RCW 9A.56.190 (“Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking; in either of which cases the degree of force is immaterial.”).

Here, unlike in *Johnson*, Thomas’s use of force was employed to overcome Estrada’s resistance to his taking of a meal for which he did not intend to pay. Unlike the defendant in *Johnson*, Thomas did not abandon the personal property of another (the meal) when he consumed it.⁶ Rather, Thomas’s act of consuming the meal converted the personal property for his own use. This conversion, or taking, of the personal property then became unlawful when Thomas attempted to leave the restaurant without paying for the meal. Because the State presented evidence that Thomas displayed a knife while trying to prevent Estrada’s resistance to his taking of the meal without paying for it, sufficient evidence supported the jury’s verdict finding Thomas guilty of

⁵ Also, the transactional analysis is inapplicable

[w]hen it is undisputed that the defendant used force to take personal property unlawfully from a person “or in his presence against his will” but used no additional force to retain the property or to effect an escape. . . . Such a taking is the common law form of robbery, codified in the first sentence of RCW 9A.56.190, where force is used to effect the unlawful taking. It is unnecessary in that situation to consider whether any force was used to retain the stolen property or to effect an escape.

Robinson, 73 Wn. App. at 857 (robbery was completed when co-defendant grabbed victim’s purse after a struggle and walked away).

⁶ Thomas asserts in his supplemental brief that, because the robbery statute requires the unlawful taking of “personal property,” his taking of restaurant services cannot form the basis for his first degree robbery conviction. RCW 9A.56.190. However, even though “services” is defined by RCW 9A.56.010(15) to include “restaurant services,” Thomas’s consumption of the meal also constituted a taking of personal property, in addition to a taking of restaurant services. Thus, we need not decide in this appeal whether a defendant commits robbery when taking a pure service.

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first degree robbery. Accordingly, we affirm Thomas's conviction.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Bjorge, A.C.J.

BJORGE, A.C.J.

We concur:

Maxa, J.

MAXA, J.

Lee, J.

LEE, J.

LISA E TABBUT LAW OFFICE

February 16, 2016 - 7:57 AM

Transmittal Letter

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Petition for Review No. 92665-4

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