

NO. 43672-8-II
Cowlitz Co. Cause NO. 08-1-00670-8

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,

Respondent,

v.

TODD CHRISTOPHER GRANGE,

Appellant.

BRIEF OF RESPONDENT

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I. PROCEDURAL HISTORY

The appellant was charged by information with one count of theft in the first degree. The State further alleged the existence of an aggravator factor for abuse of trust. CP 3-4. The appellant proceeded to jury trial on June 18, 2012 before the Honorable Judge Michael Evans. The next day, the jury returned a guilty verdict and returned a special verdict finding the existence of the aggravating factor. The trial court imposed an exceptional sentence of nine months. The instant appeal timely followed.

II. STATEMENT OF THE CASE

In general, the State agrees with the statement of the case provided by the appellant. Where appropriate, the State cites to further pertinent facts in the record.

III. ISSUES PRESENTED

1. Was There Sufficient Evidence to Support the Appellant's Conviction for Theft by Deception?
2. Did the Trial Court Comment on the Evidence?

IV. SHORT ANSWERS

1. Yes.
2. No.

V. ARGUMENT

I. There Was Sufficient Evidence the Appellant Committed Theft by Deception.

The appellant claims there was insufficient evidence to support his conviction, arguing there was no evidence he used deception to obtain money from Mr. Rehling. When the sufficiency of the evidence is challenged, the test is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the defendant was guilty beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 220-222, 616 P.2d 628 (1980). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. State v. Partin, 88 Wn.2d 899, 906-907, 567 P.2d 1136 (1977). Moreover, a claim of insufficiency “admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.” State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Additionally, an appellate court defers to the jury's determination of witness credibility. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

Here, the evidence established, in the light most favorable to the State, that the appellant entered into a contract for professional services

with Mr. Rehling. Mr. Rehling testified the appellant did not perform the various services, programming and computer training, that he paid for. RP 39-41, 56-68. Instead, the appellant took Mr. Rehling's money, including \$6,284 for software the appellant purported he could obtain at a substantial discount off the market price, and disappeared. RP 68. The appellant never provided the software Mr. Rehling had paid for, nor did he ever refund Mr. Rehling's money. RP 72.

The jury was charged in instruction number ten that "deception" occurred when:

An actor knowingly creates or confirms another's false impression that the actor knows to be false, or fails to correct another's impression that the actor previously has created or confirmed, *or promises performance that the actor does not intend to perform or knows will not be performed.*

RP 191-192 (emphasis added). Here, there was ample evidence that the appellant took Mr. Rehling's money and did not provide the services or goods for which he had received payment. When viewed in the light most favorable to the State, the appellant's taking of the victim's money, subsequent disappearance, and his complete failure to ever provide the goods or a refund gives rise to a reasonable inference that he acted deceptively.

The appellant's defense at trial was that he intended to make good on his promises, but failed to do so because of inclement weather, a dead

cellphone battery, and other excuses. The appellant claimed he never refunded the money because Mr. Rehling actually owed him. The appellant had shifting and evasive explanations for why he had entered into a civil agreement with the Oregon Department of Justice to make restitution to Mr. Rehling, but agreed he never actually followed through by paying the victim back. RP 140-165. Had this testimony been believed by the jury, the appellant would have been acquitted. Plainly, the jury did not credit his testimony. This court will not revisit the credibility of competing testimony. Camarillo, 115 Wn.2d at 71. The appellant's version of the events does not negate the State's evidence, which provided sufficient facts from which the jury could, and did, find he had acted deceptively. This Court should find the jury's verdict was supported by sufficient evidence.

II. The Special Verdict Form Was Not a Comment on the Evidence.

The appellant argues the trial court commented on the evidence by tendering a special verdict form to the jury that read as follows:

QUESTION: Did the defendant use his position of trust, confidence, or fiduciary responsibility to facilitate the commission of the crime?

CP 44. The appellant argues this form's use of the phrase "his position of trust" rather than "a position of trust" was a comment on the evidence that

directed a “yes” verdict on this aggravating factor. The appellant relies primarily on State v. Becker, 132 Wn.2d 54, 65, 935 P.2d 1321 (1997), for this proposition. In Becker, the trial court provided a special verdict form to the jury that included a “to-wit” that described a location in downtown Seattle as a school. Whether the location was in fact a school had been heavily contested at trial. 132 Wn.2d at 64-65. Thus, the court deemed it a comment on the evidence to describe the facility as a school in the special verdict form.

The instant case is easily distinguished from Becker. The special verdict form, CP 44, included the exact language chosen by the legislature to define the relevant aggravating factor. See RCW 9.94A.535(3)(n). Indeed, this special verdict form tracks verbatim the language found in the pattern jury instructions. WPIC 300.50. The special verdict form did not decide any factual issues for the jury, but merely set forth, in the language required, the question for them to answer.¹ Even if the jury had, from some strained reading of the form, believed the trial court was possibly commenting on the evidence, the court had previously instructed them it would not comment on the evidence and that any apparent comment must be disregarded. RP 187. In the context of the entire instructions, and the

¹ Outside of the “to-wit” in Becker, it is difficult to understand how a trial court can comment on the evidence by the phrasing of a *question* put to the jury.

nature of the form, the use of the word “his” instead of “a” cannot be construed as a comment on the evidence by the trial court.

Even assuming for the sake of argument this question was a comment, the record makes clear that no prejudice could have resulted. If the record affirmatively shows the defendant was not prejudiced by the comment, reversal is not required. State v. Levy, 156 Wn.2d 709, 725, 132 P.3d 1076 (2006). Unlike in Becker, the special verdict form did not resolve a key factual dispute in the case in the State’s favor. Indeed, the nature of the comment is so subtle and esoteric that it is difficult to understand what actual, as opposed to fanciful, prejudice could occur. There was no dispute at trial whether the appellant occupied a “position of trust” as it was agreed that he in the employ and trust of Mr. Rehling. See State v. Bissell, 53 Wn.App. 499, 767 P.2d 1388 (1989). The appellant had access to Mr. Rehling’s computer system and files, including codes to enter an off-site location housing the company’s computer servers. RP 68. The appellant was under contract to provide service to Mr. Rehling, and was his fiduciary. RP 129-133. Given this, there can be no prejudice to the appellant from the alleged comment. The Court should decline to reverse the appellant’s exceptional sentence on this basis.

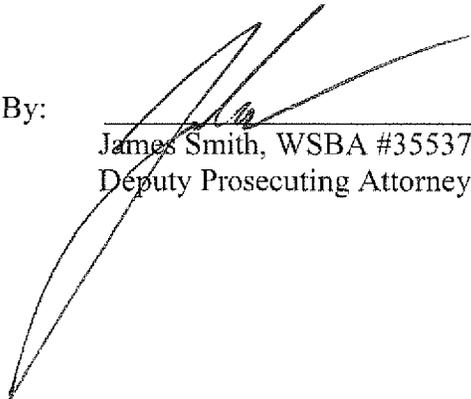
VI. CONCLUSION

Based on the preceding argument, the State respectfully requests the Court deny the instant appeal. The issues asserted by the appellant are not well founded in either the record or the law. The appellant's conviction and exceptional sentence should stand.

Respectfully submitted this 16th day of April, 2013.

Susan I. Baur
Prosecuting Attorney
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By:



James Smith, WSBA #35537
Deputy Prosecuting Attorney

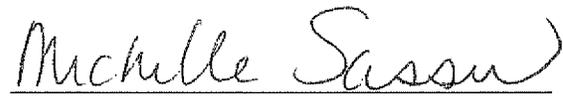
CERTIFICATE OF SERVICE

Michelle Sasser, certifies that opposing counsel was served electronically via the Division II portal:

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

Signed at Kelso, Washington on April 16th, 2013.


Michelle Sasser
Michelle Sasser

COWLITZ COUNTY PROSECUTOR

April 16, 2013 - 10:57 AM

Transmittal Letter

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