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COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

THOMAS A. SANKEY, APPELLANT

---

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

---

BRIEF OF RESPONDENT

---

STEVEN J. TUCKER  
Prosecuting Attorney

Andrew J. Metts  
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I.

APPELLANT'S ASSIGNMENTS OF ERROR

1. The trial court erred in finding Mr. Sankey guilty of first degree theft, where the evidence was insufficient.
2. The trial court erred in violating Mr. Sankey's right to be present at trial.
3. The trial court erred in denying Mr. Sankey's motion for a new trial, based upon his right to be present at trial.
4. The trial court erred in entering finding of fact number 7 in its Findings of Fact and Conclusions of Law regarding Mr. Sankey's motion for a new trial, stating "[a]s of the date of this ruling, the defendant has provided no showing that his absence was a medical necessity." (CP 184).

II.

ISSUES PRESENTED

- A. WAS THERE INSUFFICIENT EVIDENCE SHOWING FIRST DEGREE THEFT BY DECEPTION?
- B. DID THE DEFENDANT WAIVE HIS RIGHT TO BE PRESENT AT TRIAL BY VOLUNTARY ABSENCES?

- C. DID THE TRIAL COURT ERR IN FINDING THE DEFENDANT VOLUNTARILY ABSENTED HIMSELF FROM TRIAL THUS NEGATING ANY REASON TO GRANT A NEW TRIAL?
- D. DID THE DEFENDANT CREATE A VERITY ON APPEAL BY FAILING TO ARGUE HIS ASSIGNMENT OF ERROR NUMBER FOUR?

### III.

#### STATEMENT OF THE CASE

In this case, the victim, Beatrice Edwards, was 87 years old and had lived in her house for 41 years. RP 69. Ms. Edwards was mobility challenged. RP 70. The first contact between Ms. Edwards and the defendant occurred when he called on the telephone and offered to wash the windows for \$70. RP 71. The Sankeys arrived a few days after the phone call. RP 71.

When the couple arrived, they proposed to do work on the eaves of the residence as well as the windows. RP 71. Ms. Edwards was told her windows needed recaulking. RP 71.

Ms Edwards testified that she did not believe that she needed the services urged by the defendant. RP 78. According to Ms. Edwards, the

defendant did not complete the work and she did not think the defendant did anything. RP 78. Ms. Edwards stated that her house was fine. RP 78. Additionally, the defendant did not explain to Ms. Edwards why they might be doing work at 10:30PM. RP 78.

Ms. Edwards was told that the couple was married. RP 72. Ms. Edwards testified that she made out check #5664 in the amount of \$970. The check was made out to "T. Sankey" because, "[t]hat is what they told me to write." RP 73.

Ms. Edwards identified a second check in the amount of \$500. RP 73. This check was signed by Ms. Edwards and made out to "T. Sankey." RP 73.

Ms. Edwards testified that she made out check #5666 on May 15, 2008, in the amount of \$146. RP 74.

All checks were dated for the same day. RP 74. When asked why she wrote additional checks after the first check, Ms. Edwards stated that "...they just kept saying there was more supplies they needed, and it was a little bigger job; they needed more money." RP 75. Ms. Edwards testified that having the two Sankeys in her house and her by herself made Ms. Edwards uneasy. RP 116.

After the third check, “they” asked for some cash. RP 75. Ms. Edwards gave the couple \$100 in cash. RP 75. The reason for the request was that they ...needed some cash immediately....” RP 76.

The State introduced a signed bid proposal/contract for work to be done by the defendant in the amount of \$1,270. RP 77, Exh. D145. The bid proposal/contract was pre-printed with “Beans Home Services” along with a phone number and no address. Exh. D145. Ms. Edwards testified that she did not know why she gave the defendant \$1,616 in checks plus an additional \$100 in cash. RP 77.

Ms. Edwards recalled that the defendant stored a “Home Depot” bag containing “odds and ends” at her house. RP 79.

Officer Paul Buchman of the Spokane Police Department testified that he responded to Ms. Edwards residence on May, 26, 2008, as a result of a neighbor’s call to police about suspicious persons. RP 120-21. Ofc. Buchman contacted a male and a female on Ms. Edward’s front porch at 10:30PM. It appeared that the male was caulking a window. RP 122. The officer identified the male as the defendant. RP 122.

The defendant strongly urged the officer not to contact Ms. Edwards at that time. RP 123. The defendant told the officer that he did not have Ms. Edwards’ phone number. RP 123. The defendant stated that it would be bad for his business if the policeman contacted Ms. Edwards.

RP 123. The officer was unable to contact Ms. Edwards by knocking on the door but was able to contact Ms. Edwards by telephone at a number supplied by radio. RP 123.

Officer Buchman asked the defendant for background on the defendant's business. RP 124. The defendant stated that they owned their own business but the business had no name or business license. RP 124. The contract signed by Ms. Edwards was pre-printed with the defendant listed as the "business owner" and "painter." Exh. D145

When asked what he was hired to do, the defendant told the officer that he was to remove moss from Ms. Edward's roof, install zinc flashing around her roof, clean her rain gutters and seal/paint the windows. RP 125. When the officer asked how much this was to cost, the defendant refused to answer. RP 125.

Officer Buchman looked at the house and could not see that anything had been done. RP 126. The officer gave the defendant an opportunity to point out where work had been done and the defendant said it was too dark. So, the officer shined his flashlight on various places, then the defendant stated he did not have his glasses. RP 126.

Officer Buchman did not see a work truck when he arrived. The officer testified that in his opinion there was nothing on the house that appeared to need repair. RP 128.

Trial commenced and the jury was selected on November 2, 2009. The record reflects that the defendant was late. RP 34. The defendant was advised at the close of proceedings on November 2, 2009, that the trial would start again at 9:20AM the next day. RP 34. At six minutes before 10:00AM on November 3, 2009, the defendant was still not present. RP 34. The defendant is noted in the record as being present at 1:30PM. RP 92-93. The next day, November 4, 2009, the defendant was again absent at 10:10AM. RP 174. The defendant appeared in court at 11:45AM and sat down. RP 221. The jury indicated they had reached a verdict at 3:10 PM on November 4<sup>th</sup>. Despite being told by the court to remain "available," the defendant did not appear and the verdict was taken in his absence. RP 260-63.

The defendant was found guilty as charged of First Degree Theft by Deception and the jury returned a special verdict finding that Ms. Edwards was a particularly vulnerable victim. RP 264. The defendant filed this appeal. CP 203-04.

#### IV.

#### ARGUMENT

##### A. THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE JURY'S VERDICT.

When analyzing a sufficiency of the evidence claim, the court will draw all inferences from the evidence in favor of the State and against the defendant. *State v. Joy*, 121 Wn.2d 333, 339, 851 P.2d 654 (1993). The reviewing court will defer to the jury on the credibility of witnesses and the weight of the evidence. *State v. Bonisio*, 92 Wn. App. 783, 794, 964 P.2d 1222 (1998), *review denied*, 137 Wn.2d 1024 (1999). Even if an appellate court is convinced that a verdict is incorrect, that court will not override the verdict of the jury. *Burke v. Pepsi-Cola Bottling Co.*, 64 Wn.2d 244, 391 P.2d 194 (1964).

“The standard of review is whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt.” *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (*citing Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)); *accord, e.g., State v. Aver*, 109 Wn.2d 303, 310-11, 745 P.2d 479 (1987); *State v. Guloy*, 104 Wn.2d 412, 417, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 100, 106 S. Ct. 1208, 89 L. Ed. 2d 321 (1986).

“We give deference to the trier of fact. It is the trier of fact who resolves conflicting testimony, evaluates the credibility of witnesses, and generally weighs the persuasiveness of the evidence.” *State v. Prestegard*, 108 Wn. App. 14, 23, 28 P.3d 817 (2001); *State v. Mewes*, 84 Wn. App. 620, 622, 929 P.2d 505 (1997).

Circumstantial evidence and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

The jury was instructed that they had to find:

1. The crime occurred between May 15, 2008 and July 2, 2008, the defendant, by color or aid of deception obtained money from the victim;
2. The amount of money exceeded \$1500.00;
3. That the defendant intended to deprive the victim of the money;
4. The acts occurred in Spokane, Washington.

CP 94, RP 202.

The question is whether there is sufficient evidence from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt.

For a “sufficiency of the evidence” argument, the State does not have to “prove” the elements as claimed by the defendant. The State must

only show that there is sufficient evidence, from which the trier of fact could find each of the elements beyond a reasonable doubt.

In this case there is no debate as to the date window for the crime, or that the amount of money exceeded \$1,500.00. The defendant has not argued those issues on appeal.

The remaining elements are whether the defendant used “color or aid of deception” to intentionally deprive the victim of the money. “Color or aid of deception” was defined to the jury as deception operating to bring about the “obtaining of property or services.” “It is not necessary that deception be the sole means of obtaining the property or services.” CP 95, RP 202. Deception was defined to the jury as occurring when an actor knowingly creates or confirms another’s false impression that the actor knows to be false. CP 96, RP 202.

In this case, the victim, Beatrice Edwards, was 87 years old and had lived in her house for 41 years. RP 69. Ms. Edwards was mobility challenged. RP 70. The first contact between Ms. Edwards and the defendant occurred when he called on the telephone and offered to wash the windows for \$70. RP 71. The couple arrived a few days after the phone call. RP 71.

When the couple arrived, they proposed to do work on the eaves of the residence. RP 71. Ms. Edwards was told her windows needed recaulking. RP 71.

All checks were made out on the same day to Mr. Sankey. RP 74. When asked why she wrote additional checks after the first check, Ms. Edwards stated that "...they just kept saying there was more supplies they needed, and it was a little bigger job; they needed more money." RP 75.

After the third check, "they" asked for some cash. RP 75. Ms. Edwards gave the couple \$100 in cash. RP 75. The reason for the request was that they "...needed some cash immediately...." RP 76.

The State introduced a signed bid/contract for work to be done by the defendant in the amount of \$1,270. RP 77. This document is pre-printed with the name "Beans Home Services." The defendant portrayed himself as owning "Beans" yet he told Ofc. Buchman that his business had no name or business license. Presenting Ms. Edwards with what looks like a valid document portraying the defendant as owning/operating "Beans Home Services" would be evidence of deception standing alone. Ms. Edwards testified that she did not know why she gave the defendant \$1,616 in checks plus an additional \$100 in cash when the original agreement was for \$1,270. RP 77.

Ms Edwards testified that she did not believe that she needed the services urged by the defendant. RP 78. According to Ms. Edwards, the defendant did not complete the work and she did not think the defendant did any work. RP 78. Ms. Edwards stated that she her house was in fine shape. RP 78.

Officer Paul Buchman of the Spokane Police Department testified that he responded to Ms. Edward's residence on May, 26, 2008 as a result of a neighbor's call to police about suspicious persons. RP 120-21. Ofc. Buchman contacted a male and a female on Ms. Edward's front porch at 10:30PM. It appeared that the defendant was caulking a window. RP 122.

The defendant strongly urged the officer not to contact Ms. Edwards at that time. RP 123. The defendant stated that it would be bad for his business if the policeman contacted Ms. Edwards. RP 123. The officer tried to contact the victim anyway but was unable to make contact by knocking on the door. The officer was able to contact the victim by calling a telephone number the officer obtained from radio. Since Ms. Edwards could have added a great deal to the understanding of the situation, it was odd that the defendant did not want the police talking to her.

The defendant was counterfactual on multiple occasions during the officer's investigation. The defendant told the officer that he did not have

Ms. Edwards's phone number. If that is so, how did the defendant make arrangements to work that evening? The defendant told the officer that "they" owned their own business but the business had no name or business license. RP 124. That information is not consistent with the document presented by the defendant to Ms. Edwards at the outset of the work. The document signed by Ms. Edwards stated that the defendant was a painter for Beans Home Services. If the defendant's business had no name, from where did the "Beans Home Services" name appear?

When the officer asked the defendant how much Ms. Edwards was to pay for the defendant's work, the defendant refused to answer. RP 125. Refusing to answer an officer's question regarding price would be another factor to be used by the jury in deciding the defendant's credibility as well as potential deception.

Officer Buchman looked at the house and could not see that any work had been done. RP 126. The officer gave the defendant an opportunity to point out where work had been done and the defendant said it was too dark to see. So, the officer shined his flashlight on various places but the defendant then decided that he did not have his glasses. RP 126. These excuses were so feeble that any rational trier of fact would have considered them more evidence of dishonest motives.

Taking the above facts in the light most favorable to the State, certain inferences can be derived by a reasonable jury. The victim was an elderly female living alone and she had mobility problems. Out of the blue, Tammy Sankey calls the victim and offers to clean the windows for \$70.00. When the Sankey's arrive a few days after the call, they convince Ms. Edwards to have additional work done on the house that Ms. Edwards had not contemplated having done.

Ms. Edwards testified that having the two Sankeys in her house and her by herself made her uneasy. RP 116. In what could be fairly inferred as a "bait and switch" tactic, a contract for \$970 was presented to Ms. Edwards. Amongst several oddities on the contract, the defendant lists himself as a "painter." There is nothing in the record indicating that the defendant was a licensed painter. As far as the testimony indicates, the defendant did not even have a ladder.

A rational person could conclude from the three checks cashed (at the issuing bank and all on the same day) plus the \$100 in cash that the defendant knew that he was taking the money under false pretenses from Ms. Edwards. Otherwise, why the hurry? A rational inference would be that the defendant wanted to get the money before Ms. Edwards noticed that no work had been done.

The defendant reinforced the intentional aspects of this theft with his own statements to police. The defendant asking the police not to contact Ms. Edwards would be a red flag in anybody's book. The fact that the defendant refused to tell the police officer how much money was involved infers an attempt to hide what he was doing.

The "intent" element is amply shown by the facts.

As noted previously, the jury was instructed: "It is not necessary that deception be the sole means of obtaining the property or services." CP 95, RP 202. Deception was defined as occurring when an actor knowingly creates or confirms another's false impression that the actor knows to be false. CP 96, RP 202.

This element is shown by the fact that the defendant represented himself as a "painter" when in fact he was not. Any homeowner would reasonably assume that the person presenting a contract to do certain work would be a business. It was certainly a mistake on Ms. Edward's part not to check out the defendant before handing over any money, but such things happen daily.

Because any deception involved does not need to be the sole means of obtaining Ms. Edward's money, a rational person could select any one of several deceptions perpetrated by the defendant. There were several deceptions to choose from, the inferences from which add up to

the defendant getting money from a handicapped, elderly lady using false pretenses.

B. THE DEFENDANT SUPPLIED NO PROOF THAT HE WAS OTHER THAN VOLUNTARILY ABSENT FROM THE PROCEEDINGS.

The record shows extreme patience on the part of the trial court in dealing with the defendant on this issue. The defendant told the court he wanted a delay in the trial. This places the actions of the defendant in a suspect light.

On the second day of trial, the defendant had been advised of the time schedule at the termination of the previous day's proceedings. RP 33. The defendant was advised by the trial court that the CrR 3.5 hearing would commence at 9:30. RP 33. At 9:54, the defendant still had not appeared. RP 35. The court noted that Ms. Sankey had called the court and stated that it would be "...a while..." before the defendant could get to court, if he got there at all. RP 34. The prosecutor added, without objection, that the defendant had been late on the previous day. RP 34. The prosecutor requested that the trial proceed without the defendant. RP 35.

Defense counsel stated that his office had received a communication from Ms. Sankey that the defendant had "passed out" and

was going to a clinic. RP 35. The defense counsel theorized that the defendant had health issues. RP 36.

The trial court noted that at the close of the previous day's proceedings, the trial judge did not notice any problems with the defendant. The defendant was up, moving and talking. RP 38. The trial judge noted that he had observed the defendant standing in the hallway, talking to persons. RP 39.

The prosecutor stated, without objection or contradiction, that the defendant was very insistent that the trial not go forward. RP 39. The trial court stated that since the court had no verification of voluntariness or nonvoluntariness, the court would proceed. RP 39. At this point defense counsel told the court he had tried to contact the defendant but was unsuccessful. RP 40.

At 1:30P.M. after the lunch break, the defendant was present. RP 93. The defendant told the court that prior to going to court that morning, he had trouble breathing and got dizzy. RP 97. The defendant claimed he waited in a long line at the medical clinic. According to the defendant, the doctors do not know exactly what was wrong with the defendant. RP 98. The defendant requested to keep a large cup of coffee at counsel table to help him stay awake. RP 99. The trial court explained the problems with people having to wait for the defendant, etc. The

defendant stated he wanted to testify at the CrR 3.5 hearing, even though the trial court had already ruled his statements admissible. RP 102-03.

As before, the defendant was advised of the time schedule for the following day at the close of proceedings. The defendant was told to be there at 9:00. He did not appear. RP 174. At 10:15, the defendant still had not arrived. RP 174.

Defense counsel indicated that the defendant thought he was supposed to be there at 10:00 and would be there. RP 177. Again, the message from Ms. Sankey was that they were at a medical clinic. RP 177. At 10:20, the defendant still did not appear. RP 178.

Apparently, at some point in closing arguments, the defendant appeared in court.

The trial court told the defendant to remain for the verdict, but apparently he did not follow the court's instructions as the jury was kept waiting for nearly an hour after signaling that they had a verdict. RP 260.

The trial judge stated that he had observed the defendant for at least an hour and 15 minutes and the defendant appeared O.K. RP 262. The trial court stated that unless something otherwise appeared, it appeared that the defendant was simply using an excuse to avoid being in court. RP 262. The trial court decided to take the verdict in the defendant's absence. RP 263-64.

A trial court's decision on a voluntary absence is reviewable for abuse of discretion. *State v. Garza*, 150 Wn.2d 360, 366, 77 P.3d 347 (2003). Both federal and state constitutions give a defendant the right to be present at trial. The defendant's right to be present can be waived. *Id.* at 367, 77 P.3d 347. A voluntary absence acts as an implied waiver. *Id.* To determine voluntariness, the trial court must "(1) [make] sufficient inquiry into the circumstances of a defendant's disappearance to justify a finding whether the absence was voluntary, (2) [make] a preliminary finding of voluntariness (when justified), and (3) [afford] the defendant an adequate opportunity to explain his absence when he is returned to custody and before sentence is imposed." *State v. Thomson*, 123 Wn.2d 877, 881, 872 P.2d 1097 (1994).

Once the trial court has undertaken the first two elements of the *Thomson test*, the burden shifts to the defendant to demonstrate that his or her absence was not voluntary. *Garza*, 150 Wn.2d 351. It is never the State's burden to show voluntariness. *Garza*, 150 Wn.2d 351. There is a presumption against a finding of waiver. *Id.*

In this case the trial court gave the defendant every opportunity to explain and prove his reason for being absent. The defendant was late on every day of the trial. The defendant relayed messages through his counsel to the effect that he was ill. Interestingly, the trial court observed

the defendant multiple times over the course of the trial and noted no apparent medical problems. There were no medical problems mentioned prior to trial and during trial, the absences were simply ascribed to medical treatment, but no specifics were forthcoming. The trial court waited hours for the defendant to show. CrR 3.4(b) provides:

The defendant's voluntary absence after the trial has commenced in his or her presence shall not prevent continuing the trial to and including the return of the verdict. A corporation may appear by its lawyer for all purposes. In prosecutions for offenses punishable by fine only, the court, with the written consent of the defendant, may permit arraignment, plea, trial and imposition of sentence in the defendant's absence.

CrR 3.4(b).

The defendant was present for the opening of the trial and then intermittently for the remainder of the trial. The Court in *State v. Jackson*, 124 Wn.2d 359, 878 P.2d 453 (1994) reversed the conviction due to the fact that while the defendant in that case was present for various pretrial proceedings, the defendant was not present when the case was called and the jury selected. That is not the case here. The defendant was present when the case was called and for jury selection. RP 6, RP 32. The trial court did not err in continuing the trial in the defendant's absence.

The defendant claims his absences were not voluntary, but for medical reasons. The defendant asserted that he had gone to various

clinics but also claimed that the clinics would not provide written verification. The defendant did not offer to subpoena the doctors and/or nurses providing medical care. The bottom line for all of the defendant's alleged medical problem claims is that they were simply the self-serving statements of the defendant.

As the trial court noted at one point, the defendant said from the outset that he wanted more time. It is highly suspect that the defendant did not produce any evidence that this alleged medical problem existed prior to the first day of trial. The defendant also did not have an explanation for his apparent good health once he finally arrived for court each day. A reasonable inference from the defendant's reluctance to get the trial underway and the "convenient" nature of his alleged medical problems would lead a reasonable person to conclude that the defendant was purposely trying to disrupt the trial.

The trial court made factual findings regarding the defendant's motion which the defendant has not challenged on appeal. The defendant assigned error to one of the trial court's findings of fact, but does not go farther than the initial assignment of error. The defendant does not argue the issue. "[Defendant] challenges specific findings of fact entered by the trial court, but does not support those assignments of error with argument or citation to authorities. Accordingly, we do not consider those

assignments of error. *See* RAP 10.3(a)(5); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992); *State v. Farmer*, 116 Wn.2d 414, 433, 805 P.2d 200, 812 P.2d 858 (1991)” *State v. Lee*, 147 Wn. App. 912, 199 P.3d 445 (2008).

Since the defendant has not challenged the trial court’s findings of fact, those findings must be accepted as verities on appeal. *State v. Hill*, 123 Wn.2d 641, 870 P.2d 313 (1994). In addition to the finding regarding the defendant’s apparent good health, the defendant presented no proof that he suffered from medical problems before trial or *after* the trial. The defendant claimed to have been up on Ms. Edward’s roof doing work (despite not having a ladder) when the sorts of breathing problems claimed by the defendant would certainly have been evident. Yet, the defendant waited until the trial commenced and went to clinics. He arranged appointments in the middle of the trial.

The trial court can only make rulings based on the information it has at the time of the rulings. Both of the notes mentioned by the defendant on appeal were not before the trial court at the time the jury verdict was returned. RP 261-63. The trial court opined that if the defendant had shown up the afternoon of November 4, 2009, the court was going to have the defendant arrested due to the problems caused by the defendant. RP 270.

In response to the defendant's claims on appeal, the "medical notes" provided by the defendant are pointless. The notes do not indicate that the defendant had a medical problem, only that the defendant *complained* of a medical problem. There is nothing in either note that weighs against a finding of a voluntary absence from the proceedings. It would be very easy, (and in character with the rest of the defendant's claims and behaviors), for the defendant to simply present himself at a clinic and assert any number of alleged medical problems. The trial court did not make any unreasonable findings in light of the vague and unsupported slips of paper. A logical explanation would be that the defendant could not get proof of his maladies because there never was anything wrong with him. No doctor would supply a note indicating reasons why the defendant appeared in the clinic if no actual medical reason was discovered.

The trial court correctly determined that the defendant was voluntarily absenting himself from the proceedings. The defendant made no serious attempt to explain his absences during parts of every day of the trial. The defendant did not present testimony from his wife, who supposedly was present for the clinic visits, did not connect a clinic person with the trial court (even by phone), or offer a reasonable explanation for why he appeared hale and hearty during several hours of proceedings and

suddenly (without warning) absent himself from the proceedings. This was a short, three-day trial. If the defendant was so medically impaired as to miss multiple proceedings, some rational explanation should have been provided. No explanation was ever forthcoming.

V.

#### CONCLUSION

For the reasons stated, the conviction of the defendant should be affirmed.

Dated this 9<sup>th</sup> day of November, 2010.

STEVEN J. TUCKER  
Prosecuting Attorney

A handwritten signature in black ink, appearing to read "Andrew J. Metts", written over a horizontal line.

Andrew J. Metts #19578  
Deputy Prosecuting Attorney  
Attorney for Respondent