

78982-4

55312-7-1

SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

RECEIVED  
COURT OF APPEALS  
DIVISION ONE

Respondent

v.

MAY 3 11 40 AM '00

TOMMY B. GEORGE and JOHN GEORGE,

Appellants

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PETITION FOR REVIEW

FROM THE COURT OF APPEALS, DIVISION ONE

COURT OF APPEALS CASE 55312-7-1

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~~BRIEF OF PETITIONER~~

*Pet for Review*

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## TABLE OF CONTENTS

	Page
1. IDENTITY OF MOVING PARTY.....	1
2. DECISION BELOW.....	1
3. ISSUES PRESENTED FOR REVIEW.....	1
4. STATEMENT OF THE CASE.....	2
5. ARGUMENT.....	5
6. CONCLUSION.....	16

## TABLE OF AUTHORITIES

Page

### Table of Cases

#### Washington Cases:

<u>Spokane v. Douglass</u> , 115 Wn.2d 171, 178, 795 P.2d 693 (1990).....	12, 13
<u>State v. Green</u> , 94 Wn.2d 216, 616 P.2d 628(1980).....	1, 5, 6, 7, 8,
<u>State v. Halstien</u> , 122 Wn.2d 432, 895 P.2d 398 (1995).....	12
<u>State v. Kleist</u> , 126 Wn.2d 432, 895 P.2d 398 (1995).....	1, 5, 6, 8,
<u>State v. Lee</u> , 128 Wn.2d 151, 904 P.2d 1143 (1995).....	1, 8, 9, 11, 13, 16
<u>State v. Schulze</u> , 116 Wn.2d 30, 804 P.2d 566 (1990).....	14
<u>State v. Shaw</u> , 120 Wash App. 847, 86 P.3d 823 (2004).....	7

#### Washington Statutes:

RCW 9A.56.010(18).....	5, 6, 7,13, 14,
RCW 9A.56.020.....	2, 8, 11, 15, 16
RCW 9A.56.020(b).....	9, 11, 15,

**1. IDENTITY OF PETITIONERS**

Petitioners Tommy B. George and John George, by and through their attorney, Jeffrey H. Smith, seek the relief designated in Part 2.

**2. DECISION BELOW**

Petitioners seek reversal of the Court of Appeals decision affirming the petitioner's convictions dated May 1, 2006.

**3. ISSUES REPRESENTED FOR REVIEW**

a. Discretionary Review should be granted because the Court of Appeals decision below unconstitutionally permits a person to be convicted of the crime of Theft in the first, second or third degree without requiring the State to prove the objective "market value" of the items taken, or that the item had any "market value" at all. This violates the Supreme Court holding in State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980) and State v. Kleist, 126 Wn.2d 432, 895 P.2d 398 (1995).

b. Discretionary Review should be granted because the Court of Appeals decision is contrary to the Washington State Supreme Court decision in State v. Lee, 128 Wn.2d 151, 904 P.2d 1143 (1995).

c. Discretionary Review should be granted because the Court of Appeals' interpretation of RCW 9A.56.020 renders the Theft statute unconstitutionally vague under the facts as applied in the instant case.

**4. STATEMENT OF THE CASE**

John and Tommy B. George repair and sell used cars for a living.

In June 2003, they purchased a 1974 Chevrolet Cheyenne half-ton truck from Jerome Potter for \$1,800.00. RP at 45. Mr. Potter had initially asked for \$2,500, but had been talked down in his price. RP at 43.

Mr. Potter initially described the truck as having 185,000 miles on the odometer, RP at 37, but later acknowledged that the odometer only had five digits on it, that it was showing 70,000 on it at the time he sold the truck and that he had been incorrect. RP 2 at 47. Prior to selling the truck, Mr. Potter acknowledged that it had been sitting in his back yard for a couple of years, and that it was not operable because of a problem with the rear differential. RP 2 at 40. During his negotiations with one or both of the Georges, Mr. Potter advised them that he had replaced the original engine with a larger one many thousands of miles before. Mr. Potter said that the new engine was actually larger than the original engine, and had more power. RP 2 at 56-57. Mr. Potter acknowledged that he did not

complete an odometer statement with the State because DOL does not require such a form on a car that old. RP 2 at 67.

Detective Dan Stokke from the Seattle Police Department testified next. He said that he routinely reviews the classified ads in the newspapers for possible fraudulent car ads. He observed one such ad related to this truck. RP 2 at 80-82. Det. Stokke enlisted the assistance of two other detectives to attempt to purchase the truck from the seller. They went to Renton to examine the truck and meet with John George. They did not purchase the truck that day. RP 2 at 88-89. These same detectives arranged to purchase the truck the next day in downtown Seattle. At that time, Tommy George drove the truck, which was now repaired, to Pioneer Square where he met with the undercover officers again.

At this time, Tommy George sold the truck to the officer, RP 2 at 91, with the officer providing Tommy with a \$5,500 cashier's check. RP 2 at 99. The undercover officer gave the observing officers a signal, and the officers proceeded to arrest Tommy George and John George, who was parked nearby. RP 2 at 91.

Det. Stokke was asked about the value of this truck, and was unable to provide any evidence of the value. He said that this was a normal part of his job, but that there was insufficient available information to provide the jury with a value for this truck because of its age. RP 2 at

100-101. He acknowledged that there are certain specific characteristic of a vehicle that will alter its value, such a leather interior, chrome wheels, radios, an numerous other items. RP 2 at 105-6. Whether a cars has been owned by one or more persons, or has been garaged, are not value-altering characteristics, Det. Stokke agreed. RP2 at 106. Det. Stokke agreed that no odometer statement is required for 1970's era vehicles, due to their age. RP 2 at 106. Det. Stokke also acknowledged that he did not have the truck inspected to determine what type of engine it had, or whether the odometer had been altered in any way. He indicated that he could not tell from his cursory examination that the odometer had been tampered with in any way. RP 2 at 110.

Dets. Richard O'Donnell and Dana Duffy testified that they were undercover officers asked to pose as buyers for the truck. They met with John George to look at the truck, after Det. O'Donnell previously had a couple of telephone conversations with both Tommy and John George describing the truck as having "70,000 original miles, it's pretty much been in the garage all the time, it's in great shape. The only thing new on it is the wheels." RP3 at 12. After viewing the truck Det. O'Donnell and Mr. George made plans to transfer the truck the next day. RP 3 at 14. The next day, Det. O'Donnell and Tommy George met in Seattle and finalized the sale of the truck. RP 3 at 20-22. Immediately after completing the

sale of the truck for \$5,500, Tommy George was arrested. John George, who was parked nearby, was also arrested at this time.

The state rested.

The defense moved to dismiss on the grounds that the State has failed to introduce any evidence of the value of the truck. In the alternative, the defense moved to dismiss the felony charge of Attempted Theft in the First Degree, and find that the State established on the elements of Attempted Theft in the Third Degree, based on the definition of "value" found in RCW 9A.56.010, which states that items "having a value that cannot be ascertained...shall be deemed to have a value not exceeding \$250." This motion was denied.

The defense did not present any evidence at trial. Both defendants were convicted. This appeal timely followed.

The Court of Appeals, Division One, affirmed Petitioners' convictions. See Appendix.

## 5. ARGUMENT

a. **Discretionary Review Should Be Granted Because the Court of Appeals Decision Is Contrary to the Washington State Supreme Court's Holding in State v. Green and State v. Kleist.**

RAP 13.4(b) states that discretionary review should be granted when the decision of the Court of Appeals is in conflict with a decision of the Supreme Court. In this case, the Court of Appeals issued an opinion that is contrary to State v. Green, 94 Wn.2d 206, 616 P.2d 628 (1980), and State v. Kleist, 126 Wn.2d 432, 895 P.2d 398 (1995), regarding the state's evidence of the "market value" of the truck.

The value of property, as an element of the Theft statutes, is defined under RCW 9A.56.010 (18) as:

(a) "Value" means the market value of the property or services at the time and in the approximate area of the criminal act;

(e) Property or services having value that cannot be ascertained pursuant to the standards set forth shall be deemed to be of a value not exceeding two hundred and fifty dollars;

For purposes of distinguishing between first, second, and third-degree Theft, in which the distinction is based on the market value of property at time and in approximate area of offense, "market value" is the price which a well-informed buyer would buy from a well-informed seller, where neither is obligated to enter into the transaction; market value is based not on the value to any particular person, but rather on an objective standard. State v. Kleist, 126 Wn.2d. 432, 895 P.2d 398 (1995).

According to the above statute, if the evidence fails to establish market

value, or such value is not ascertainable, it is deemed to be less than \$250.

The failure to establish any “market value” for the truck in this case establishes that there is insufficient evidence to support petitioners’ convictions for Theft under State v. Green, supra.

An alternative permissible means of proving “market value” was used in State v. Shaw, 120 Wash. App 847, 86 P.3d 823 (2004), where the court permitted the case detective to testify that he regularly uses the Kelley Blue Book to establish the market value of vehicles, and that he did so in that instance. The detective also explained the specific information the site evaluates to value a car. In Shaw, the detective determined that the car in question was valued by the Kelley Blue Book at \$2,500, even though the car had actually sold for \$1,400. The Court, on appeal, rejected appellant’s argument that the sales price of \$1,400 established the market value under RCW 9A.56.010(18), and concluded that the appropriate market value of \$2,520 was established by the Kelly Blue Book, as testified to by the detective, and affirmed the defendant’s conviction for First Degree Possession of Stolen Property .

In the instant case, the state offered no evidence of the National Automobile Dealers Association (NADA) or Kelley Blue Book values for the truck in question. The detective testified that he routinely used NADA or Kelley Blue Book values, was familiar with the information needed to

establish value through the Kelley Blue Book process, but that he could find no value in the NAD or Kelley Blue Book for this truck. RP at 100-101. Det. Stokke acknowledged that the NADA and Kelley Blue Book only have values on cars dating back to 1984. He further agreed that some vehicles of that age in NADA or Kelley Blue Book may have a value of zero. RP at 103-104.

The only evidence the State offered as to the “value” of this truck was the sales price the undercover detectives agreed to pay. As in the Shaw case, the actual sales price fails to establish the market value of the item. Since no market value for this 1974 truck could be found, and none was offered into evidence, the State has failed to establish the essential element of value in excess of \$250, as required to support a conviction for Attempted Theft in the First (or Second) Degree as charged in this case. The Court of Appeals decision below is contrary to State v. Green, *supra* and State v. Kleist, *supra*.

**b. Discretionary Review Should be Granted Because the Court of Appeals Decision is Contrary to the Washington State Supreme Court Decision in State v. Lee, 128 Wn.2d 151, 904 P.2d 1143 (1995).**

RCW 9A.56.020 defines Theft among several different definitions as:

(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;

In State v. Lee, 128 Wn.2d, 151, 904 P.2d 1143 (1995), the Supreme Court reversed a conviction for Theft where the appellant had improved otherwise uninhabitable property to the point where he was able to collect rent, even though he did not yet own the property. The property could not have been rented by for the repairs made to it by the appellant.

As the court stated:

...in fact, (appellant's) actions secured them the house that...they...desired. Thus (appellant's) acquisition of the \$700 resulted in no loss (to the victim), as each received what they bargained for.

State v. Lee, supra at 163.

Similarly, in the instant case, the evidence establishes that John and Tommy George purchased an inoperable truck, performed repair work on the truck to the point where it became operable, and sold it for more than they paid. The evidence at trial established that the false information provided by the Georges was not information that would alter the value of the truck. Further, the evidence of the mileage on this engine was not previously established. As Det. Stokke acknowledged, the value-altering aspects of a vehicle in the Kelley Blue Book are the physical parts of the vehicle, such as leather interior or CD player. He indicated that a vehicle

having one owner, or being garaged, are not even mentioned as factors in the Kelley Blue Book. RP at 105-106.

Concerning the discrepancy on the mileage, it was significant that Jerome Potter inaccurately stated the vehicle mileage to the Georges, remembering it initially at 185, 000 miles, and then admitting that it must actually have been substantially less. Mr. Potter made an incorrect statement while selling his vehicle, which John and Tommy George then repeated, but Mr. Potter was not charged with a crime. While the State might argue that Mr. Potter's error resulted in an increased value for the vehicle, John and Tommy George also made errors in that in fact increased the value of the truck for their buyer. Specifically, John and Tommy George did not tell buyers that the truck actually had a 400cc engine, rather than a 350cc engine. Mr. Potter testified that he replaced the original engine with a larger one several years before selling the truck. This was not included in the classified ad for the truck, even though the size of the engine would be a physical characteristic of the truck that Det. Stokke testified would increase the value of the truck.

While John and Tommy George did make misrepresentations about the truck, just as Mr. Lee misrepresented himself as the property owner in State v. Lee, the evidence does not establish that these misrepresentations resulted in the alleged victims receiving anything less

than they bargained for. In Lee, the people received the use of rental property in exchange for money; in this instance, the buyers received the transfer of the truck in exchange for money. In such circumstances there can be no intent to deprive, as required under RCW 9A.56.020 (b), and ultimately no deprivation at all.

Further, by failing to establish the market value of this truck, the State cannot establish that there was any discrepancy whatsoever between the value of the truck and the \$5,500 offered for the truck. In failing to prove any difference in the value paid and the value of the truck, the State had failed to prove that any theft occurred at all.

c. **Discretionary Review Should be Granted Because The Court of Appeals Interpretation of RCW 9A.56.010 (18), RCW 9A.56.020 Renders Both Statutes Unconstitutionally Vague as Applied to a “Theft” in Which a Transfer of Property is Made.**

RAP 13.4(b) (3) declares that discretionary review should be granted if there is a significant question of law under the Constitution of the State of Washington or the United States. In the instant case, the constitutional question is: how can a criminal conviction for any form of Theft stand where there is no loss to the victim? Further, when property is exchanged between the “victim” and the “defendant” in a sale, it is unconstitutional to hold the defendant criminally accountable for the full

value of the item obtained from the victim, rather than the net loss to the victim. Such statutes are void for vagueness, because they do not protect against arbitrary enforcement.

The due process vagueness doctrine “serves two important purposes: first, to provide citizens with fair warning of what conduct they must avoid; and second, to protect them from arbitrary, ad hoc, or discriminatory law enforcement.” State v. Halstien, 122 Wn.2d 109, 116-17, 857 P.2d 270 (1993). Under the due process clause, a prohibition is void for vagueness if either: (1) it does not define the offence with sufficient definiteness such that ordinary people can understand what conduct is prohibited; or (2) it does not provide ascertainable standards of guilt to protect against arbitrary enforcement. Spokane v. Douglass, 115 Wn.2d 171, 178, 795 P.2d 693 (1990).

It should be noted that, when challenging prohibition that does *not* involve First Amendment rights, it is not properly evaluated for *facial* vagueness; instead, it must be evaluated *as applied*. Spokane v. Douglass, 115 Wn.2d at 182. Accordingly, appellants’ convictions for Attempted Theft are tested for unconstitutional vagueness by inspecting the actual conduct of the defendants to whom it is applied, and the particular facts of the case. Spokane v. Douglass, *supra*.

**1. RCW 9A.56.010(18) is Unconstitutionally Vague in Cases Where the Claimed Theft Involves the Transfer of Property of Allegedly Disproportionate Value, Because the Statute Does Not Provide Ascertainable Standards of Guilt to Protect Against Arbitrary Enforcement.**

RCW 9A.56.010(18) does not differentiate between theft by taking, where someone steals something of value, and a “theft” in which it is alleged that a misrepresentation leads to the exchange of property of disproportionate value. In State v. Lee, the court noted that a “loss to the victim is key in assessing whether an unlawful taking has occurred.” State v. Lee, *supra* at 162.

In the latter situation, where each party gives something of value to the other, the “loss”, if any, to the alleged victim is not solely the value of the property given. The alleged victim has also received something of value in exchange for their property. The “actual loss” to the victim is the difference between the value of the property given and the value of the property received, yet RCW 9A.56.010 (18) does not require such an approach. The statute permits the State to use a disproportionately larger figure, because it does not account for the property received by the “victim” and punished the defendant disproportionately by holding him legally accountable for the larger amount. This leads to the

unconstitutionally arbitrary result that a defendant is punished for significantly more than he actually took; or that he is punished for taking something of value when he actually received no additional value, and the victim incurred no “actual loss.”

If the statutory definition of value set forth in RCW 9A.56.010 (18) remained in effect, the outcome would lead to absurd results in situations where there is a transfer of claimed unequal value. A statute will not be construed in a manner that leads to absurd results. State v. Schulze, 116 Wn.2d 30, 804 P.2d 566 (1990).

For example, in this very case, John and Tommy George sold a truck containing a much larger engine than advertised. This increases the value of the truck. Even with the purported misrepresentations by the Georges, which had no value according to Det. Stokke, they could actually have sold the truck for less than its market value, and still be convicted of Attempted Theft in the First Degree because RCW 9A.56.010(18) does not require a determination of the “actual loss” to the victim. Using this analysis, John and Tommy George could repair the truck, increase its value to \$6,000, sell it for \$5,500 while making value-less misrepresentations and still be convicted of Attempted Theft at a felony level. Or they could sell the truck for a \$50 net loss to the “victim” and

still face a felony-level charge, because the total market value of the truck is \$5,500.

Such a result is absurd, since there is little or no loss to the “victim.” Such a result is also completely arbitrary, because it does not account for the “actual loss” to the victim, but arbitrarily inflates that loss to the full value of the property given by the “victim,” and leads to a conviction for a more serious charge, such as this felony charge, even though there is no evidence of any “actual loss” by the victim.

**b. RCW 9A.56.020(b) is Unconstitutionally Vague in Cases Where the Claimed Theft Involves the Transfer of Property of Allegedly Disproportionate Value, Because it Fails to Provide Fair Notice of What Conduct is Prohibited.**

RCW 9A.56.020 does not adequately inform citizens that they risk a criminal charge if they engage in unfair or inequitable sales techniques. Again, in this case, John and Tommy George made misrepresentations which Det. Stokke acknowledged would not actually alter the value of the truck. These misrepresentations were used by the State as the basis for their felony charges of Attempted Theft in the First Degree. Such unfair sales practices may constitute a violation of the Consumer Protection Act, or some other statute, but absent evidence that there is an “actual loss” to

the victim, cannot form the basis for a criminal charge or conviction. As is State v. Lee, supra, where the defendant put time and money into increasing the value of the property, then rented the property and kept the rent money, even though he did not own the property, there is no crime in this case where the State cannot provide that the misrepresentation cause and “actual loss” to the “victim.”

To avoid being constitutionally vague, a statute must provide citizens with fair notice of what conduct is prohibited. The Theft statute, RCW 9A.56.020 warns people that they may not take things of value from other people, by use of stealth or deception, or they will be charged with a crime. The court’s interpretation of this Theft statute, as applied in this case, prohibits use of any deception, regardless of whether there is any “actual loss” of any value whatsoever to the “victim.”

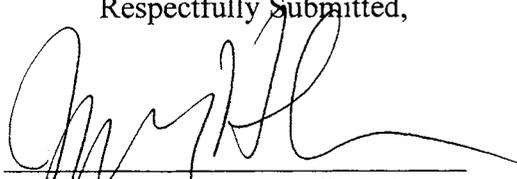
## **6. CONCLUSION**

Discretionary Review should be granted in this case because the conditions of RAP 13.4(b) (1) and (b) (3) have been met by Petitioners. There exists a conflict between existing Supreme Court case law and the decision below in this case. Further there exists significant question concerning the void for vagueness doctrine as applied to the facts of this

case under the Constitution of the State of Washington and the United States Constitution.

DATED this 30<sup>th</sup> day of May, 2006.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'Jeffrey H. Smith', written over a horizontal line.

Jeffrey H. Smith WSBA# 16437  
LAW OFFICES OF JEFFREY H. SMITH  
Attorney for the Petitioners

# APPENDIX

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE**

STATE OF WASHINGTON,	)	No. 55312-7-1
	)	(consolidated with
Respondent,	)	No. 55313-5-1
	)	
v.	)	
	)	
JOHN S. GEORGE, and	)	PUBLISHED OPINION
TOMMY B. GEORGE, and each	)	
of them,	)	
	)	
Appellants.	)	FILED: May 1, 2006

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ELLINGTON J. Tommy and John George advertised a truck for sale. Police thought their ad sounded too good to be true. After a sting operation, the Georges were convicted of attempted first degree theft by deception. They challenge the sufficiency of the evidence, emphasizing the absence of proof of the market value of the truck. They also contend that two of the governing definitional statutes are unconstitutionally vague. We hold that the evidence was sufficient to establish the deprivation required for theft, that the degree of theft by deception is determined by looking to the value of the property obtained, not the net benefit to the thief or net loss to the victim, and that the statutes are not unconstitutional as applied. We therefore affirm.

### **FACTS**

In June 2003, John George and his son Tommy bought a 1974 Chevrolet Cheyenne Super pickup truck from Jerome Potter. At the time, the truck was inoperable due to a problem with the rear wheel differential, and had been parked in Potter's yard for more than two years. Potter disclosed the mechanical problem, and also disclosed that the truck had 185,000 miles on it. Potter also said he had replaced the original 350 engine with a more powerful 400 engine. The Georges paid Potter \$1,800 for the truck.

After performing some repairs and rendering the truck operable, the Georges advertised the truck for sale in the Seattle Times as follows: "1974 Cheyenne Super 1/2 T, 1 ownr, 350 v8, AT, tow pkg. All stock and original gar'd. 70 K mi very nice \$5,500."<sup>1</sup>

A Seattle Police Department detective read the ad and suspected it was fraudulent. After locating and identifying the truck, the detective confirmed with Potter the truck's actual specifications. Two other detectives then posed as buyers. The Georges told them that John George was the original owner, and that the truck had always been garaged and had 70,000 miles on it. After examining the truck and starting the engine, one of the detectives arranged to purchase it for the asking price. Tommy delivered the truck, and the undercover detective offered him a valid cashier's check for \$5,500. Both Georges were then arrested.

The State charged the Georges with attempted first degree theft by deception. They were tried together. The State presented the evidence described above, but

presented no evidence of the market value of the truck at the time of the attempted sale. At the close of the State's evidence, the Georges moved for dismissal, contending that absent proof of the value of the truck, there was no evidence of any loss and certainly no evidence to support theft in the first degree. The court denied the motion. The jury returned verdicts of guilty.

### **ANALYSIS**

Evidence is sufficient if it would permit any rational trier of fact, viewing the evidence in the light most favorable to the State, to find the essential elements of the offense beyond a reasonable doubt.<sup>2</sup> Substantial evidence exists where there is a "sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding."<sup>3</sup>

Theft by deception means "[b]y 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."<sup>4</sup>

Actual Loss. The Georges point out that proof of a deprivation to the victim is required to support a theft conviction, and contend that because the State failed to prove the truck was worth less than the detective agreed to pay, there was no evidence their deception would have resulted in any loss. Thus they first contend the evidence established no crime at all.

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<sup>1</sup> Clerk's Papers at 7.

<sup>2</sup> State v. Kleist, 126 Wn.2d 432, 435, 895 P.2d 398 (1995).

<sup>3</sup> State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994).

<sup>4</sup> RCW 9A.56.020(1)(b).

The Georges rely on State v. Lee.<sup>5</sup> Lee contracted to purchase an uninhabitable house. He was required by the contract to provide insurance. While the sale was pending, Lee repaired the house to render it insurable and then rented it to a family left homeless by a fire, charging the Red Cross \$700 in rent. He was convicted of second degree theft by deception, on grounds that he obtained or exerted control over property belonging to the Red Cross or to the homeless family.<sup>6</sup> The Washington Supreme Court held that neither victim suffered any deprivation because “*each received what they bargained for*”: the Red Cross found housing for a family, and the family was indeed housed.<sup>7</sup>

Here, the putative buyer of the truck did not get what he bargained for. The Georges repeatedly claimed the truck had been driven only 70,000 miles by its only owner and had always been garaged. None of this was true. The Georges object that according to the State’s evidence, whether the truck had only one owner or was always garaged is not germane to its market value, and point out that they added value by making repairs to the truck. They do not, however, suggest that a difference in 100,000 miles on the truck is irrelevant to its value. To induce the sale, the Georges falsely described the truck in the significant matter of mileage, if nothing else. The

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<sup>5</sup> 128 Wn.2d 151, 904 P.2d 1143 (1995).

<sup>6</sup> Id. at 154. The State did not charge Lee with theft from the owner of the house.

<sup>7</sup> Id. at 163 (emphasis added).

evidence was sufficient to establish the deprivation necessary to prove an unlawful taking.<sup>8</sup>

Theft in the First Degree. The degree of theft depends upon the value of the property deceptively obtained. To establish attempted theft in the first degree, the State must prove the attempted theft of “[p]roperty or services which exceed(s) one thousand five hundred dollars in value.”<sup>9</sup> Value is “the market value of the property or services at the time and in the approximate area of the criminal act.”<sup>10</sup>

The Georges contend the State failed to prove theft in the first degree because there was no evidence of the truck’s market value. Relying on State v. Kleist<sup>11</sup> and State v. Shaw,<sup>12</sup> the Georges point out that market value is an objective standard. They contend the agreed price for the truck was not evidence of market value because it was subjective. They further argue the value of the truck is not ascertainable, because organizations such as Kelly Blue Book and the National Automobile Dealers Association do not have data for cars made before the early 1980s. Where value is not ascertainable, the charge is theft in the third degree.<sup>13</sup>

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<sup>8</sup> Because the charge was an attempt crime, the State had only to prove deception, intent, and a substantial step, not that the victim was fooled, or actually suffered a loss. See State v. Wellington, 34 Wn. App 607, 611, 663 P.2d 496 (1983) (citing RCW 9A.28.020(1)).

<sup>9</sup> RCW 9A.56.030(1)(a).

<sup>10</sup> RCW 9A.56.010(18).

<sup>11</sup> 126 Wn.2d 432, 435, 895 P.2d 398 (1995).

<sup>12</sup> 120 Wn. App. 847, 86 P.3d 823 (2004).

<sup>13</sup> RCW 9A.56.010 (18)(e).

These arguments concern methods of determining the value of property other than money,<sup>14</sup> and would be relevant if the Georges were charged with theft of the truck.<sup>15</sup> The theft by deception statute, however, criminalizes the act of “[c]reat[ing] or confirm[ing] another’s false impression which the actor knows to be false,”<sup>16</sup> resulting in the actor “*obtain[ing] control over the property of another . . . with intent to deprive him or her of such property.*”<sup>17</sup> Further, theft by color or aid of deception means that “the deception operated 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.*”<sup>18</sup> In drawing the line between criminal conduct and sharp business practices, the legislature clearly contemplated that something in addition to pure deception will be involved. Indeed, in many acts of theft by deception, something falsely described is given in exchange to induce the transaction.

We are mindful that in Lee the court stated, “it appears that the loss to the victim, rather than the benefit to the offender, is key in determining the existence *and the value* of a deprivation.”<sup>19</sup> The Georges do not contend this language controls here, but we would reject such an argument. Lee involved theft by unauthorized control or

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<sup>14</sup> Kleist, 126 Wn.2d at 440 (prosecution and defense permitted to introduce price tags to establish the price of stolen items); Shaw, 120 Wn. App. at 852 (evidence of a stolen car’s Blue Book price sufficient to establish the car’s value).

<sup>15</sup> The definition of theft by taking is “[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(a).

<sup>16</sup> RCW 9A.56.010(5)(a).

<sup>17</sup> RCW 9A.56.020(b).

<sup>18</sup> RCW 9A.56.010(4) (emphasis added).

<sup>19</sup> Lee, 128 Wn.2d at 163 (emphasis added).

deception. The issue was whether the evidence established the underpinning deprivation. The court was not analyzing the degree of theft or the value of the property obtained thereby.

We do not believe the legislature intended an inquiry into the thief's net gain or the victim's net loss once the fact of a deprivation is established. The evidence establishing existence and value of a deprivation will be the same in takings theft cases (and often, in unauthorized control cases as well), but in deception cases, the statute requires a different analysis. RCW 9A.56.020(b) looks only to the value of the property obtained, not the net result of the exchange. Here, the property the Georges attempted to obtain was a valid cashier's check for \$5,500. Where the property stolen is money, there is no need to determine value.

The evidence was sufficient to establish the value element of attempted theft in the first degree.

Definitions of Value and Theft. The Georges next argue that the controlling definitional statutes, RCW 9A.56.010(18) and RCW 9A.56.020, are unconstitutionally void for vagueness as applied here.

"The due process clause of the Fourteenth Amendment requires that citizens be afforded fair warning of proscribed conduct."<sup>20</sup> "[A]n ordinance is unconstitutionally vague if a challenger demonstrates, beyond a reasonable doubt, either (1) that the ordinance does not define the criminal offense with sufficient definiteness that ordinary

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<sup>20</sup> City of Spokane v. Douglass, 115 Wn.2d 171, 178, 795 P.2d 693 (1990) (citing Rose v. Locke, 423 U.S. 48, 49, 46 L. Ed. 2d 185, 96 S. Ct. 243 (1975)).

people can understand what conduct is proscribed, or (2) does not provide ascertainable standards of guilt to protect against arbitrary enforcement.”<sup>21</sup>

Vagueness challenges not involving the First Amendment are evaluated in light of the particular facts of each case.<sup>22</sup> The statute is tested by inspecting the actual conduct at issue, not by examining hypothetical situations “at the periphery of the statute’s scope.”<sup>23</sup>

The Georges first argue that the value definition in RCW 9A.56.010(18) is unconstitutionally vague because it does not differentiate between outright theft and a deceptive exchange of property of disproportionate value, and therefore encourages arbitrary enforcement.<sup>24</sup> Value for purposes of the theft by deception statute is the value of the property obtained by the deception. The Georges do not explain why that definition encourages arbitrary enforcement; they merely complain that it criminalizes transactions in which the thief nets no gain. But that is not the question because “the theft statute does not require that the offender be benefited by the theft.”<sup>25</sup> The Georges’ proposed distinction is not relevant for due process purposes and the statute is not vague for failing to make it.

The Georges next contend the definition of theft by deception in RCW 9A.56.020(b) is unconstitutionally vague as applied to them because it ensnares

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<sup>21</sup> Id.

<sup>22</sup> Id. at 182.

<sup>23</sup> Id. at 182–183.

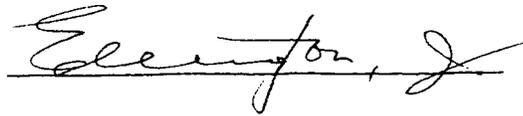
<sup>24</sup> RCW 9A.56.010(18) defines value as “the market value of the property or services at the time and in the approximate area of the criminal act.”

<sup>25</sup> Lee, 128 Wn.2d at 163.

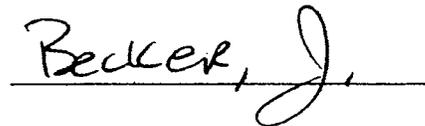
those who merely engage in “inequitable sales techniques”<sup>26</sup> without causing actual loss to the victim. They contend the statute fails to give fair notice that it criminalizes any use of deception, regardless of loss. This is not, however, the effect of the statute. Rather, the Georges’ interpretation is an extension of their arguments about value and loss, which we have already rejected. Further, this interpretation ignores the elements of knowledge of falsity and intent to deprive.

We hold that neither statute is unconstitutionally vague as applied to the Georges.

Affirmed.

A handwritten signature in cursive script, appearing to read "Edington, J.", written over a horizontal line.

WE CONCUR:

A handwritten signature in cursive script, appearing to read "Schindler, ACF", written over a horizontal line.A handwritten signature in cursive script, appearing to read "Becker, J.", written over a horizontal line.

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<sup>26</sup> App. Br. at 18.