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NO. 55312-7-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

TOMMY B. GEORGE and
JOHN GEORGE,

Appellants.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE PARIS KALLAS

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

	Page
A. <u>ISSUES PRESENTED</u>	1
B. <u>STATEMENT OF THE CASE</u>	2
1. PROCEDURAL HISTORY	2
2. SUBSTANTIVE FACTS	4
C. <u>ARGUMENT</u>	9
1. A RATIONAL JUROR COULD HAVE FOUND BEYOND A REASONABLE DOUBT THAT THE DEFENDANTS ATTEMPTED TO OBTAIN BY MEANS OF DECEPTION PROPERTY IN VALUE GREATER THAN \$1,500.....	9
a. Standard of Review.....	10
b. The State Presented Sufficient Unrebutted Evidence That the Defendants Attempted to Obtain by Deception Over \$1,500 from the Sale of the Truck to an Undercover Detective.....	12
2. THE THEFT STATUTES CHALLENGED BY THE DEFENDANTS ARE NOT UNCONSTITUTIONALLY VAGUE.	22
a. Standard of Review For Statutory Vagueness.....	23

b.	The Defendants Fail to Prove Beyond A Reasonable Doubt That RCW 9A.56.010(18) and RCW 9A.56.020(1)(b) Are Unconstitutionally Vague Because They Do Not Apply these Statutes To the Facts of Their Case.....	25
D.	<u>CONCLUSION</u>	30

TABLE OF AUTHORITIES

Page

Table of Cases

Washington State:

City of Bellevue v. Lorang, 140 Wn.2d 19,
992 P.2d 496 (2000)..... 24

City of Spokane v. Douglass, 115 Wn.2d 171,
795 P.2d 693 (1990)..... 23, 24

McCurdy v. Union Pac. R. Co., 68 Wn.2d 457,
413 P.2d 617 (1966)..... 16

Port of Seattle v. Equitable Capital Group, Inc.,
127 Wn.2d 202,
898 P.2d 275 (1995)..... 16

State v. Billups, 62 Wn. App. 122,
813 P.2d 149 (1991)..... 26

State v. Camarillo, 115 Wn.2d 60,
794 P.2d 850 (1990)..... 12

State v. Carver, 113 Wn.2d 591,
781 P.2d 1308 (1989)..... 23

State v. Clark, 13 Wn. App. 782,
537 P.2d 820 (1975)..... 16

State v. Coria, 120 Wn.2d 156,
839 P.2d 890 (1992)..... 23

State v. Cozza, 19 Wn. App. 623,
576 P.2d 1336 (1978)..... 26

State v. Davidson, 20 Wn. App. 893,
584 P.2d 401 (1978)..... 21

State v. Delmarter, 94 Wn.2d 634,
618 P.2d 99 (1980)..... 11

<u>State v. Emerson</u> , 10 Wn. App. 235, 517 P.2d 245 (1973).....	21
<u>State v. Galisia</u> , 63 Wn. App. 833, 822 P.2d 303 (1992).....	11
<u>State v. Gohl</u> , 109 Wn. App. 817, 37 P.3d 293 (2001).....	11
<u>State v. Green</u> , 94 Wn.2d 216, 616 P.2d 628 (1980).....	11
<u>State v. Halstien</u> , 122 Wn.2d 109, 857 P.2d 270 (1993).....	24
<u>State v. Isom</u> , 18 Wn. App. 62, 567 P.2d 246 (1977).....	11, 12
<u>State v. John George</u> , Case No. 55313-5-I	3
<u>State v. Kleist</u> , 126 Wn.2d 432, 895 P.2d 398 (1995).....	19
<u>State v. Lee</u> , 128 Wn.2d 151, 904 P.2d 1143 (1995).....	19
<u>State v. Lee</u> , 135 Wn.2d 369, 957 P.2d 741 (1988).....	29
<u>State v. Luther</u> , 125 Wn. App. 176, 105 P.3d 56 (2005).....	22
<u>State v. Markham</u> , 40 Wn. App. 75, 697 P.2d 263 (1985).....	27
<u>State v. Melrose</u> , 2 Wn. App. 824, 470 P.2d 552 (1970).....	16, 17
<u>State v. Salinas</u> , 119 Wn.2d 192, 829 P.2d 1068 (1992).....	11

<u>State v. Shaw</u> , 120 Wn. App. 847, 86 P.3d 823 (2004).....	18
<u>State v. Smith</u> , 111 Wn.2d 1, 759 P.2d 372 (1988).....	23
<u>State v. Smith</u> , 115 Wn.2d 434, 798 P.2d 1146 (1990).....	18
<u>State v. Tommy George</u> , Case No. 55312-7-I	3
<u>State v. Wellington</u> , 34 Wn. App. 607, 663 P.2d 496 (1983).....	20
<u>State v. Wood</u> , 44 Wn. App. 139, 721 P.2d 541 (1986).....	11

Statutes

Washington State:

RCW 9A.28.020	2, 12, 21, 26
RCW 9A.56.010	13, 15, 22, 25-28, 30
RCW 9A.56.020	2, 13, 23, 25, 28-30
RCW 9A.56.030	2, 12
RCW 9A.56.140	27
RCW 9A.56.160	27

A. ISSUES PRESENTED

1. Evidence supports a conviction when any rational juror could find the crime elements proven beyond a reasonable doubt. A sufficiency challenge admits the truth of trial evidence, and all reasonable inferences are drawn in the State's favor. A person commits Attempted Theft in the First Degree by taking a substantial step toward obtaining by deception another's property in value over \$1,500. The person's deceptive acts, however, need not be the sole means of obtaining the property; instead, the person may use legitimate means in part. Defendants John George and Tommy George lied to an undercover detective, who was posing as a buyer, about the mileage and previous ownership of a truck that they had advertised in the newspaper for \$5,500; this was more than three times the \$1,800 they recently had paid a private seller for the truck, and the \$1,500 jurisdictional amount. Could any rational juror have found that the defendants attempted to obtain by deception property in value above \$1,500?

2. A constitutional challenge to a statute not implicating First Amendment protections requires proof beyond a reasonable doubt that the law is unconstitutional as applied to the facts of a defendant's case. A statute is unconstitutionally vague if it does not

define a criminal offense so that an ordinary person can understand what conduct is prohibited, or if it does not provide ascertainable standards of guilt to protect against arbitrary enforcement. The defendants claim that the statutory definitions of Theft by deception and the term "value" are unconstitutionally vague, but they fail to assert that their charged acts do not fall within the plain meaning and application of these statutes. At the same time, the language of these statutes makes clear that the use of deception to obtain valuable property is unlawful. Have the defendants failed to prove beyond a reasonable doubt that the statutes are unconstitutionally vague as applied to them?

B. STATEMENT OF THE CASE

1. PROCEDURAL HISTORY.

The State charged the defendants, John George and Tommy George, with Attempted Theft in the First Degree occurring during a period of time intervening between November 18, 2003 and November 19, 2003. The Information alleged specifically that the defendants attempted to obtain control of currency exceeding \$1,500 belonging to Detective O'Donnell of the Seattle Police Department by color and aid of deception, a violation of RCW 9A.28.020, 9A.56.030(1)(a), and 9A.56.020(1)(b). CP 1

(State v. John George, Case No. 55313-5-I); CP 1 (State v. Tommy George, Case No. 55312-7-I).

The defendants were jointly tried. 1RP – 3RP.¹ After the close of the State's evidence, the defendants moved for dismissal based on a theory of insufficient evidence of the value of the property that they had attempted to obtain by deception. 3RP 39. The court denied the motion, finding that prima facie evidence satisfied the jurisdictional amount of \$1,500. 3RP 54. Neither defendant then testified or attempted to rebut the State's evidence. The jury found the defendants guilty as charged. CP 42 (Case No. 55313-5-I); CP 12 (Case No. 55312-7-I). The defendants appealed their convictions under separate case numbers. CP 56 (Case No. 55313-5-I); CP 19 (Case No. 55312-7-I). The defendants are jointly represented on appeal, however, and have filed a single opening brief consolidated under Case No. 55312-7-I to set forth their issues on appeal.

¹ The Verbatim Report of Proceedings in this joint appeal is cited as follows: 1RP (September 7, 2004); 2RP (September 8, 2004); and 3RP (September 9, 2004).

2. SUBSTANTIVE FACTS.

Jerome Potter owned a 1974 Chevrolet "Cheyenne Super" pick-up truck. 2RP 36. He bought the half-ton truck in the early 1980s from a Renton dealership, and he drove it for personal and business purposes. 2RP 36-37. He installed a towing apparatus for his camper. 2RP 52, 57. After 100,000 miles, Potter replaced the truck's "350" engine with a more powerful "400" engine. 2RP 37, 56, 60.

In June 2003, Potter kept the truck in the fenced yard behind his Redmond home. 2RP 38. He had parked the truck there for a year-and-a-half to two years. 2RP 51. The truck had become undrivable due to a problem with the "differential," meaning the gear mechanism that made the rear wheels turn. 2RP 40. The truck, however, had no other major mechanical problems and was otherwise in running order. 2RP 51. Potter estimated that the truck had 185,000 miles of use. 2RP 37. After being shown a photograph of the truck's five-digit odometer, Potter conceded at trial that it showed approximately 70,000 miles, which reduced his estimate to 170,000 miles. 2RP 48. Due to the five-digit odometer, it was not possible for an ordinary buyer to determine whether the truck had over 100,000 miles. 2RP 109.

In June 2003, Tommy George approached Potter at his home and asked if Potter wanted to sell the truck. 2RP 39, 43. Potter agreed to sell the truck, but first disclosed the mechanical problem with the differential. 2RP 42. Potter also informed George that the truck's engine had been replaced and told him the mileage. 2RP 42. When George asked for a price, Potter told him \$2,500. 2RP 43.

A few days later, Tommy George returned with his father, John George to take a second look at the truck and to negotiate a lower price. 2RP 43-44. Potter had compared the pricing of similar vehicles to determine "a general consensus [of] what was advertised in the paper for approximately the same condition." 2RP 58. He found other advertisements for "exactly that truck." 2RP 58. Although his truck was approximately 30 years old, he believed it was in better condition "than most" and determined its value accordingly. 2RP 58. Potter sold the truck to John George for \$1,800. 2RP 45, 64. Potter sent the required form regarding sale of the truck to Olympia. 2RP 65. John George arranged to have a tow truck transport the Cheyenne. 2RP 44.

Seattle Police Detective Daniel Stokke investigated classified advertisements for fraud as part of his work in the

Intelligence Unit. 2RP 79. He looked for vehicles advertised with claims that sounded “too good to be true.” 2RP 80. In the November 4, 2003 issue of the Seattle Times newspaper, an advertisement appeared for a “1974 Cheyenne Super, one half T . . . one owner, 350 V-8, AT . . . all stock and originally garaged . . . 70K miles, stock and original . . . very nice, \$5,500.” 2RP 81. The abbreviation “AT” meant “automatic tow package.” 2RP 81.

After reading the advertisement, Detective Stokke believed that it was possibly fraudulent, although he could not find published, standardized pricing information for the truck, due to its age. 2RP 82, 100, 103. He called the listed telephone number and spoke to an individual with a male voice who stated that his father was the original owner of the truck, which had been purchased new. 2RP 84. When Detective Stokke asked to whom he should speak for more information, he was told, “Tommy or John.” 2RP 84.

Detective Stokke later arranged to have Detectives Richard O’Donnell and Dana Duffy pose undercover as buyers. 2RP 85. Detective O’Donnell contacted Tommy George, using the telephone number listed in the classified advertisement, to ask about the truck. 2RP 5-6. Tommy told Detective O’Donnell that the truck was for sale for \$5,500. 3RP 6. When Detective O’Donnell said that he

was interested in restoring the truck, Tommy responded: "You don't need to restore it, the car's in perfect condition, it has 70,000 miles on it. My father was the one that bought the car brand new, and it's pretty much always been left in the garage." 3RP 6.

Tommy also said that the truck was registered in his father's name. 3RP 7.

Detective O'Donnell requested to speak to Tommy's father. John George called Detective O'Donnell about ten minutes later. 3RP 8. John gave Detective O'Donnell directions to Renton to look at the truck. 3RP 8. John also represented that the truck had 70,000 miles, was in "great shape," had "always been in the garage," and that he had been the "only owner." 3RP 9.

On November 18, 2003, Detective O'Donnell and Detective Duffy, posing as Detective O'Donnell's girlfriend, went to Renton to view the truck. 2RP 86-87. They met with John George while Detective Stokke observed the transaction from across the street in an undercover vehicle. 2RP 87-88. John repeated his claim that the truck had 70,000 miles, always had been garaged, and was in great shape. 3RP 12, 35. John again claimed to be the original owner. 3RP 13. Detective O'Donnell noted that the truck appeared well-kept, did not appear to have any rust, and that the body-work

looked very good. 3RP 26. After Detective O'Donnell started the truck's engine, he offered to pay the asking price in cash on the spot. 3RP 13. John said that he had to retrieve the title from a safety deposit box, so they agreed to make arrangements to complete the sale the next day. 3RP 13.

The second meeting occurred in downtown Seattle on November 19, 2003. 2RP 89. Detective Stokke saw Tommy George exit the parked truck and meet with Detective O'Donnell. 2RP 90. John George was sitting in a SUV parked nearby. 2RP 91. Detective Stokke had given Detective O'Donnell a \$5,500 money order to complete the sale. 2RP 99. As Detective O'Donnell walked with Tommy to the truck, Tommy repeated the claim that the vehicle had 70,000 miles, had been owned only by his father, had been garaged "most of the time," and was in great condition. 3RP 18-19. Tommy stated that only the tires were new. 3RP 18. When Detective O'Donnell gave Tommy the money order, Tommy handed him back a certificate stating that the truck was being purchased for \$2,500 and needed repair of the engine, brakes and the body. 3RP 19. Tommy explained that although the actual deal was for \$5,500, the certificate would save Detective

O'Donnell money on taxes. 3RP 21. Tommy again represented that the truck was in perfect working order. 3RP 21.

After the sale was completed, police took Tommy and John into custody. 3RP 21-22. Detective Stokke contacted John, who said after advisement of constitutional rights, "I promise I will never do this again. Please don't arrest me." 2RP 92. Detective Stokke subsequently showed Potter a photomontage, and Potter identified John George as the individual to whom he had sold the truck. 2RP 97. At trial, Potter identified Tommy George as the man who had originally asked to buy the truck. 2RP 43.

C. ARGUMENT

1. A RATIONAL JUROR COULD HAVE FOUND BEYOND A REASONABLE DOUBT THAT THE DEFENDANTS ATTEMPTED TO OBTAIN BY MEANS OF DECEPTION PROPERTY IN VALUE GREATER THAN \$1,500.

The defendants argue that the evidence did not show that the value of the property they attempted to obtain by deception exceeded the \$1,500 jurisdictional amount for Attempted Theft in the First Degree. They also contend that evidence of their fraudulent sale of the truck to an undercover detective did not show the deprivation of property to any alleged victim.

The record does not support these claims. Unrebutted evidence showed that the defendants attempted to obtain by deception \$5,500 from the detective for the truck. By law, the misrepresentations of the defendants about the truck's mileage and former ownership did not need to be the sole means of obtaining the \$5,500; thus, the jury was not required to determine the truck's actual value, or to deduct it from the selling price, to find the defendants guilty. But even if the difference between the \$1,800 the defendants paid for the truck and the \$5,500 selling price were relevant, prima facie evidence of this \$3,700 difference was not rebutted and constituted sufficient evidence of value. Lastly, since the factual or legal impossibility of the underlying offense, Theft in the First Degree, was not a defense to the charged Attempt, the jurisdictional value above \$1,500 was satisfied by evidence of the \$5,500 selling price, regardless of the detective's undercover role in the sting operation or the actual value of the truck. For these reasons, the evidence was sufficient to sustain the convictions.

a. Standard of Review.

An appellate court reviews a sufficiency challenge by determining whether, after viewing the evidence in the light most

favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 222, 616 P.2d 628 (1980). Such a challenge “admits the truth of the State’s evidence and all reasonable inferences therefrom.” State v. Gohl, 109 Wn. App. 817, 823, 37 P.3d 293 (2001). These inferences “must be drawn in favor of the State and most strongly against the defendant.” State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

In determining whether the necessary quantum of proof exists, an appellate court need not be convinced of the defendant’s guilt beyond a reasonable doubt, but only that substantial evidence supports the State’s case. State v. Galisia, 63 Wn. App. 833, 838, 822 P.2d 303 (1992). Circumstantial evidence is just as reliable as direct evidence. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980) (affirming conviction for Attempted Theft in the First Degree over sufficiency challenge). “Whether or not the circumstantial evidence excludes every reasonable hypothesis consistent with the accused’s innocence” is not “a relevant issue.” State v. Wood, 44 Wn. App. 139, 145, 721 P.2d 541 (1986) (quoting State v. Isom, 18 Wn. App. 62, 66-67, 567 P.2d 246

(1977)). Lastly, credibility determinations are not subject to review.

State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

- b. The State Presented Sufficient Unrebutted Evidence That the Defendants Attempted to Obtain by Deception Over \$1,500 from the Sale of the Truck to an Undercover Detective.

The defendants were convicted of Attempted Theft in the First Degree under the following statutes. The offense of Criminal Attempt is set forth in pertinent part as follows:

- (1) A person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he or she does any act which is a substantial step toward the commission of that crime.
- (2) If the conduct in which a person engages otherwise constitutes an attempt to commit a crime, it is no defense to a prosecution of such attempt that the crime charged to have been attempted was, under the attendant circumstances, factually or legally impossible of commission.

RCW 9A.28.020(1)-(2).

Theft in the First Degree requires theft of property or services “which exceed(s) one thousand five hundred dollars in value.” RCW 9A.56.030(1)(a). The term “value” includes the following definition for Theft offenses:

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

RCW 9A.56.010(18)(a).

The offense of Theft by deception means:

- (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;

RCW 9A.56.020(1)(b). To sustain a conviction for Theft by deception, "it is not necessary that deception be the sole means of obtaining the property or services." RCW 9A.56.010(4).

At trial, the State was required to prove the following elements beyond a reasonable doubt to convict each defendant of Attempted Theft in the First Degree: "(1) That on or about November 18 to November 19, 2003, the defendant did an act which was a substantial step toward the commission of Theft in the First Degree; (2) That the act was done with the intent to commit Theft in the First Degree; and (3) That the acts occurred in the State of Washington." CP 34 (Case No. 55313-5-I, Jury Instruction No. 19). The State met its burden of proof as follows.

The evidence showed that during the charging period, each defendant met with Detective O'Donnell, who was posing as a buyer, for the purpose of selling him the Chevrolet "Cheyenne

Super" pick-up truck, which John George had bought from Jerome Potter for \$1,800 five months earlier. The truck had been advertised in the Seattle Times for \$5,500. Despite having knowledge of Potter's prior ownership of the truck, and that the truck had over 170,000 miles, each defendant affirmatively misrepresented to Detective O'Donnell that the truck had 70,000 original miles, and that John George had been the sole owner. On November 19, 2003, Detective O'Donnell gave Tommy George a \$5,500 money order for the truck as John George watched the transaction from a parked car. In return, Tommy handed the detective a certificate of sale.

Viewing this evidence in the light most favorable to the State, the State proved that the defendants used deception, at a minimum regarding the truck's mileage and previous ownership, to obtain by deception \$5,500 from Detective O'Donnell. The "market value" of the \$5,500 money order, which was the property that the defendants obtained through their deception, was \$5,500. Thus, there was sufficient evidence that the defendants committed the charged offense of Attempted Theft in the First Degree by seeking to obtain property with a value greater than \$1,500.

Under RCW 9A.56.010(4), the State was not required to prove, as the basis for the jurisdictional amount, the actual value the defendants obtained solely from their misrepresentations to Detective O'Donnell. As argued by the State in opposition to the motion to dismiss, the statute does not require "the jury to parse out how much the lie is worth." 3RP 47. Thus, the jury was not required "to parse out what the actual value of the item minus the lie is, nor . . . how much dollar value can be attached to an intangible like a one-owner car. Instead, the statute criminalizes lying about something characteristic in an attempt to get that property out of someone." 3RP 47. On appeal, the defendants fail to cite controlling authority to the contrary.² Accordingly, their claim must fail.

But even if the difference between the \$1,800 the defendants paid for the truck and the advertised \$5,500 price they obtained from the detective were determinative of the element of market value, the State's prima facie evidence of this \$3,700

² Rather, the defendants adopt the same reading of the law to challenge the statute's constitutionality. See Brief of Appellant at 15 ("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").

amount was not rebutted at trial and constituted sufficient evidence of market value above \$1,500.

A property owner may testify as to market value without being qualified as an expert. McCurdy v. Union Pac. R. Co., 68 Wn.2d 457, 467-68, 413 P.2d 617 (1966). This is because one who has owned property is presumed to be sufficiently acquainted with its value. Port of Seattle v. Equitable Capital Group, Inc., 127 Wn.2d 202, 211, 898 P.2d 275 (1995).

Furthermore, in State v. Melrose, 2 Wn. App. 824, 831, 470 P.2d 552 (1970), the Court of Appeals held that the "price paid for an item of property, if not too remote in time, is proper evidence of value." The Melrose court noted that even where evidence of market value received without objection is sparse, "[d]ue allowance can be made by the jury for changes in the condition of the property which affect its market value. Admissible evidence of price paid is entitled to great weight." Id. Direct evidence of market value is not required; instead, it is well established that evidence of purchase price, selling price, and the condition of the property at the time of a theft is admissible. State v. Clark, 13 Wn. App. 782, 787-88, 537 P.2d 820 (1975) (rejecting sufficiency challenge to larceny conviction despite competing market values for stolen steel, which

were dependent on whether steel was sold as scrap or as new).

While "expert opinion testimony concerning the market value of the property in question" may aid the jury, it is not required, and its weight "would still be for the jury." Melrose, 2 Wn. App. at 832.

The defendants willingly paid \$1,800 to Potter, a local seller, for the truck after negotiating down from \$2,500. Before selling the truck for \$1,800, Potter had compared the pricing of similar vehicles to determine "a general consensus [of] what was advertised in the paper for approximately the same condition." 2RP 58. During cross-examination, he agreed that he had found other advertisements for "exactly that truck." 2RP 58. Although his truck was approximately 30 years old, he believed it was in better condition "than most" and determined its value accordingly. 2RP 58. The \$1,800 selling price therefore constituted prima facie evidence of the truck's value in the Seattle area market. The lack of "the National Automobile Dealers Association (NADA) or Kelley Blue Book values for the truck in question" (Brief of Appellant at 9) does not detract from the "great weight" that should be accorded

the \$1,800 the defendants paid Potter to obtain the truck prior to resale.³

After buying the truck from Potter only a few months earlier, the defendants then advertised it in the Seattle Times for over three times what they had paid for it. Detective O'Donnell paid Tommy George the advertised price of \$5,500 in Seattle. The \$3,700 difference was two-and-a-half times the \$1,500 jurisdictional amount. With no evidence of what, if any, repairs were completed by the Georges, or the value such repairs added to the vehicle, the record contains nothing to offset this difference.⁴ The difference alone constitutes sufficient evidence that the value the defendants sought to obtain exceeded the jurisdictional amount for the charged

³ Contrary to implication by the defendants that State v. Shaw, 120 Wn. App. 847, 86 P.3d 823 (2004) requires such proof of published pricing, the Shaw court affirmed the defendant's conviction by applying the unremarkable standard of review for a sufficiency challenge: "Viewed in the light most favorable to the State, the evidence--including the Blue Book value--was sufficient for the jury to find the value of the Accord to be in excess of \$1,500." Shaw, 120 Wn. App. at 852-53.

⁴ Even if the defendants had offered evidence reducing the difference below the \$1,500 jurisdictional amount, State v. Smith, 115 Wn.2d 434, 798 P.2d 1146 (1990) suggests that the \$5,500 selling price controlled the jurisdictional amount. The Smith court rejected a defendant's claim that the trial court erred by failing to instruct on lesser included offenses for Theft in the First Degree where the defendant had obtained only a \$600 discount through deception on the purchase of a \$3,000 computer program. Id. at 442 ("Defendant has failed to produce evidence that would support an inference that either theft in the second or third degree was committed").

offense. In short, the defendants failed to make any attempt to rebut the State's evidence that they attempted to obtain \$3,700 above the truck's prima facie market value; under these circumstances, a rational trier of fact could find proof beyond a reasonable doubt that the jurisdictional amount had been met. See State v. Kleist, 126 Wn.2d 432, 436-37, 895 P.2d 398 (1995) (victim of theft is not the "final arbiter of value"; the defendant is entitled to rebut the victim's evidence of market value).

The case of State v. Lee, 128 Wn.2d 151, 904 P.2d 1143 (1995), relied on by the defendants, is readily distinguishable because admission of evidence in that case showed that the defendant had made "well over \$700" in repairs to a rental home he did not own before fraudulently accepting a \$700 rental check from tenants. Lee, 128 Wn.2d at 164. Significantly, the Lee court noted that the prosecution had failed to name the proper theft victim, the owner of the property, who received nothing from the defendant's scam. Id. at 163. Lee is also distinguishable because the defendant was not charged with Attempt, an offense for which factual or legal impossibility is not a defense, as discussed below. Lastly, Lee did not involve a sting operation by police.

While the defendants assert that the evidence did not sufficiently show deprivation of property to any alleged victim, presumably referring to the role of the undercover detective in the sting operation, the State was not required to prove a completed deprivation for the charged Attempt. In State v. Wellington, 34 Wn. App. 607, 663 P.2d 496 (1983), the Court of Appeals affirmed a defendant's conviction for Attempted Theft in the Third Degree based on the defendant's misrepresentations to an undercover vice officer that the officer's purchase of a membership at a lingerie store would include performance of illicit sexual activity. The Court of Appeals affirmed the trial court's ruling that "in a prosecution for criminal attempt to commit theft by deception, it is not necessary in order to convict that the deception be successful." Wellington, 34 Wn. App. at 611. Rather, evidence of the defendant's "substantial steps" toward commission of the underlying Theft constituted ample evidence of the charged attempt: "That the undercover officer was not deceived is immaterial." Id. Moreover, the officer's undercover role did not bar the conviction for Attempted Theft: "Public policy requires that crime be detected and its perpetrators punished. Public policy also requires that a defendant be fairly treated. Practical considerations require that, in the performance by police

of crime detection duties, at least some deceitful practices and 'a limited participation' in unlawful practices be tolerated and recognized as lawful." Id. (quoting State v. Emerson, 10 Wn. App. 235, 240, 517 P.2d 245 (1973)).

Similarly, public policy supported Detective Stokke's investigation of the advertised misrepresentations of the defendants regarding the truck they were selling. It was immaterial that undercover Detective O'Donnell was not deceived by the misrepresentations of each defendant, or that Detective O'Donnell gave Tommy George a \$5,500 money order that could not be cashed as part of the sting operation.

Lastly, because the defendants were charged with Attempt, they were precluded at trial, and should be precluded on appeal, from arguing the factual or legal impossibility of the underlying Theft. RCW 9A.28.020(2) bars such an impossibility defense. State v. Davidson, 20 Wn. App. 893, 584 P.2d 401 (1978) is illustrative of this rule. The Davidson court affirmed the defendant's conviction for Attempted Possession of Stolen Property in the Second Degree, despite the defendant's claim that it was impossible for him to commit the underlying crime where goods he agreed to buy from an undercover officer were not, as the

defendant believed, stolen. Davidson, 20 Wn. App. at 898. In the instant prosecution, any argument by the defendants that their convictions should be reversed because it would have been impossible for them to commit the underlying Theft due to Detective O'Donnell's undercover role, or due to their unsuccessful efforts to actually obtain over \$1,500 in property, should be rejected for the same reasons. See also State v. Luther, 125 Wn. App. 176, 105 P.3d 56 (2005) (affirming defendant's conviction for Attempted Possession of Depictions of Minors Engaged in Sexually Explicit Conduct, despite factual impossibility where no minors were depicted).

In sum, the convictions of the defendants for Attempted Theft in the First Degree should be upheld because the evidence, viewed in the light most favorable to the State, sufficiently showed that the defendants attempted to obtain by deception property in value over \$1,500.

2. THE THEFT STATUTES CHALLENGED BY THE DEFENDANTS ARE NOT UNCONSTITUTIONALLY VAGUE.

The defendants argue next that RCW 9A.56.010(18), defining "value" under the Theft statutes, and RCW

9A.56.020(1)(b), defining the offense of Theft by deception, are unconstitutionally vague as applied to them. The defendants, however, fail to assert that their charged acts do not fall within the plain meaning and application of these statutes. At the same time, the language of these statutes makes clear that the use of deception to obtain valuable property is unlawful, a prohibition providing a readily ascertainable standard of guilt to guard against arbitrary enforcement. Accordingly, the constitutional claim of the defendants must also fail.

a. Standard of Review For Statutory Vagueness.

A statute is presumed constitutional. State v. Smith, 111 Wn.2d 1, 5, 759 P.2d 372 (1988). Unless First Amendment protections are implicated, appellate courts will only determine whether a statute is unconstitutional as applied to the facts of the case. State v. Carver, 113 Wn.2d 591, 781 P.2d 1308 (1989). This standard of review governs a claim that a statute is unconstitutionally vague. City of Spokane v. Douglass, 115 Wn.2d 171, 182, 795 P.2d 693 (1990); State v. Coria, 120 Wn.2d 156, 839 P.2d 890 (1992).

Under the due process clause of the Fourteenth Amendment, a statute is void for vagueness if either: (1) the statute "does not define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is proscribed"; or (2) the statute "does not provide ascertainable standards of guilt to protect against arbitrary enforcement." City of Bellevue v. Lorang, 140 Wn.2d 19, 30, 992 P.2d 496 (2000) (quoting State v. Halstien, 122 Wn.2d 109, 117, 857 P.2d 270 (1993)). A party challenging a statute's constitutionality on the theory that the law is unconstitutionally vague bears the "heavy burden" of proving "unconstitutionality beyond a reasonable doubt." Id. at 177.

The vagueness doctrine "does not demand impossible standards of specificity or absolute agreement." Douglass, 115 Wn.2d at 179. In addition, "the due process requirement that a penal statute define a criminal offense with sufficient definiteness does not extend to invalidating statutes which a reviewing court believes could have been drafted with greater precision." Id. Lastly, the fact that a statute "may require a subjective evaluation by a police officer to determine whether the enactment has been violated does not mean the ordinance is unconstitutional." Id. at 181.

- b. The Defendants Fail to Prove Beyond A Reasonable Doubt That RCW 9A.56.010(18) and RCW 9A.56.020(1)(b) Are Unconstitutionally Vague Because They Do Not Apply these Statutes To the Facts of Their Case.

The defendants argue that RCW 9A.56.010(18), defining "value," is unconstitutionally vague because it does not require a determination of a theft victim's "actual loss," meaning "the difference between the value of the property given and the value of the property received." Brief of Appellant at 15. The defendants argue that the lack of such a requirement may lead to an unconstitutionally arbitrary result whereby a defendant may be punished for "significantly more than he took." Brief of Appellant at 16. They point to no particular word or phrase in this statute to demonstrate vagueness.

While the defendant acknowledged that they must show vagueness as applied to the facts of their case, the hypothetical results they suggest do not satisfy this burden. Instead, the defendants seek to persuade this Court that the statute could be applied to reach an "absurd" result. Brief of Appellant at 17. The briefed argument of the defendants lacks a single citation to the record. Under these circumstances, this constitutional claim must

be rejected because the defendants fail to prove beyond a reasonable doubt that RCW 9A.56.010(18) is unconstitutional as applied to facts of their case.

Moreover, application of RCW 9A.56.010(18)(a) to the evidence shows that statute is not unconstitutionally vague. "Value" is defined as "the market value of the property or services at the time and in the approximate area of the criminal act." RCW 9A.56.010(18)(a). This simple definition is readily capable of being understood by an ordinary person. As applied to the defendants, it is also readily understandable. The purpose of the deceptions made by the defendants to facilitate sale of the truck was to obtain \$5,500. The "value" of \$5,500 under the statute was \$5,500, since the market value of money is its face value. Therefore, there is no question that the defendants attempted to obtain by deception property valued at \$5,500.⁵

⁵ The defendants virtually ignore the anticipatory nature of their offense of Attempted Theft in the First Degree. Significantly, the "substantial step" language of the Attempt statute has been upheld repeatedly over vagueness challenges. State v. Cozza, 19 Wn. App. 623, 626, 576 P.2d 1336 (1978); State v. Billups, 62 Wn. App. 122, 129, 813 P.2d 149 (1991). Moreover, as noted, factual or legal impossibility is not a defense to a charge of Attempt. RCW 9A.28.020(2). This rule further demonstrates the inapplicability of a requirement of "actual loss" to the definition of "value" under RCW 9A.56.010(18)(a), as applied to the facts in this case.

This amount greatly exceeded the \$1,500 jurisdictional amount, and the challenged statute provided a readily ascertainable standard, i.e., market value, for determining guilt. RCW 9A.56.010(18)(a) does not require proof of actual loss for theft by deception because such proof is not required under RCW 9A.56.010(4), which expressly states that a defendant's deception need not "be the sole means of obtaining the property." While the defendants may disagree with the nature of the offense created by the legislature, due to their apparent belief that a thief should profit in a determinable amount from any act that may be charged as Theft in the First Degree by deception, it cannot be said that the statutory definition of "value" is vague as applied to the facts of this case.⁶ See State v. Markham, 40 Wn. App. 75, 83-84, 697 P.2d 263 (1985) (securities statute, which criminalized fraud in the offer and sale of a "security," as specifically defined, was not

⁶ By analogy, a defendant may be convicted of Possessing Stolen Property in the Second Degree (PSP) for possessing a stolen motor vehicle valued at less than \$1,500 under RCW 9A.56.160(1)(d) and RCW 9A.56.140(1); or a defendant may be convicted of the same offense for possessing stolen property with a determined value above \$250 under RCW 9A.56.160(1)(a) and RCW 9A.56.140(1). While the legislature could have imposed a statutory requirement for the State to prove determined market value under the stolen-motor-vehicle prong to sustain a conviction, the legislature did not.

unconstitutionally vague as applied to the defendant's fraudulent dealings in "investment contracts").

For similar reasons, RCW 9A.56.020(1)(b), defining the offense of Theft by deception, is not unconstitutionally vague. The offense of Theft by deception means: "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." RCW 9A.56.020(1)(b). This statute, like RCW 9A.56.010(18)(a), must be read with the statutory qualification under RCW 9A.56.010(4) that Theft by deception does not require deception to be the sole means of obtaining the property.

The defendants again point to no particular word or phrase in this statute to demonstrate vagueness. Instead, they likewise complain that a defendant may be convicted despite the lack of evidence regarding "actual loss." Brief of Appellant at 19. This argument is hypothetical, instead of an application of the statute to the facts of this case. It should therefore be rejected for the previously discussed reasons.

As applied to the defendants, the statute was not vague because the evidence showed plainly that "by color or aid of deception" (misrepresentations by the defendants regarding the

truck's mileage and previous ownership), the defendants attempted "to obtain control over the property . . . of another" (Detective O'Donnell's \$5,500), "with intent to deprive him . . . of such property" (Tommy George accepted the \$5,500 money order from Detective O'Donnell and returned a certificate of sale to finalize the transaction). There was no risk of arbitrary enforcement because the defendants, and not the undercover detectives, created their deceptive claims and set the value of their attempted theft at the advertised price of \$5,500, which was more than three times the jurisdictional amount. The efforts of the defendants to sell the truck by misrepresenting the mileage and previous ownership clearly fit within the plain meaning of RCW 9A.56.020(1)(b), which prohibits the use of such deception but does not require proof of actual loss. See State v. Lee, 135 Wn.2d 369, 393, 957 P.2d 741 (1988) ("A defendant whose conduct clearly fits within the proscriptions of a statute does not have standing to challenge the constitutionality of that statute for vagueness").

After being taken into custody, John George told Detective Stokke, "I promise I will never do this again. Please don't arrest me." 2RP 92. These were not the words of a man who did not understand the criminal nature of the deceptive truck sale that he

had perpetrated with the complicity of his son, Tommy George. Instead, this statement after advice of constitutional rights demonstrates the easily understood criminal nature of these acts under RCW 9A.56.010(18) and RCW 9A.56.020(b)(1). Under the facts of this case, the claim of the defendants that these statutes are unconstitutionally vague must fail.

D. CONCLUSION

For these reasons, the convictions of John George and Tommy George for Attempted Theft in the First Degree should be affirmed.

DATED this 3rd day of October, 2005.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Jeffrey H. Smith, the attorney for the appellant, at Law Offices of Jeffrey H. Smith, 1601 Fifth Avenue, Suite 2200, Seattle, WA, 98101-1651, containing a copy of the BRIEF OF RESPONDENT, in STATE V. JOHN GEORGE and STATE V. TOMMY GEORGE, consolidated under Cause No. 55312-7-1, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

W Brame
Name
Done in Seattle, Washington

10/3/25
Date

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DIVISION I
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