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SUPREME COURT
STATE OF WASHINGTON
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SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON

Respondent.

v.

TOMMY B. GEORGE, and JOHN GEORGE

Appellants,

PETITIONER
SUPPLEMENTAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

Page	
1.	IDENTITY OF APPELLANT1
2.	DECISION BELOW.....1
3.	ISSUES PRESENTED FOR REVIEW 1
4.	STATEMENT OF THE CASE 1
5.	ARGUMENT 5
6.	CONCLUSION17

TABLE OF AUTHORITIES

	Page
Table of Cases	
<u>Washington Cases:</u>	
<u>State v. Green</u> , 94 Wn.2d 216, 616 P.2d 628 (1980).....	6
<u>State v. Fjermestad</u> , 114 Wn.2d 828, 791 P.2d 897 (1990).....	11
<u>State v. Kleist</u> , 126 Wn.2d 432, 895 P.2d 398 (1995).....	8, 10, 12, 13
<u>State v. Lee</u> , 128 Wn.2d 151, 904 P.2d 1143 (1995). . .	8,10, 11,12, 14, 15
<u>State v. Morley</u> , 119 Wn.App 939, 83 P.2d. 1023 (2004).....	8
<u>State v. Monk</u> , 42 Wn.App. 320, 711 P.2d 365 (1985).....	10
<u>State v. Rainwater</u> , 75 Wn.App. 256, 876 P.2d 979 (1994).....	8
<u>State v. Shaw</u> , 120 Wash.App. 847, 86 P.3d 823 (2004).....	9, 12
<u>State v Shulze</u> , 116 Wn.2d 30, 804 P.2d 566 (1991).....	11
<u>Washington Statutes:</u>	
RCW 9A.56.010(1)(b).....	10
RCW 9A.56.010(18)	6, 7, 9, 10, 11, 12, 17
RCW 9A.56.010(18)(b).....	10, 11
RCW 9A.56.010(18)(b)(1).....	11
RCW 9A.56.010(18)(e).....	14, 17
RCW 9A.56.020.....	7, 8

Other Jurisdictions:

State v. Brokaw, 134 Ariz. 532, 658 P.2d 185 (1982)..... .15

Other Authorities:

2 Wayne R., LaFave & Austin W. Scott, Substantive Criminal Law Sec.
8.5 at 357 (1986).....15

1. **IDENTITY OF APPELLANTS**

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

2. **DECISION BELOW**

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

3. **ISSUES PRESENTED FOR REVIEW**

1. Whether "value" for purposes of the degree of the theft is determined by the amount of money received or the difference between the amount of money received and the market value of the item sold.

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 2 at 43.

Mr. Potter initially described the truck as having 185,000 miles on the odometer, RP 2 at 37, however, later acknowledged that the odometer only had five digits on it, and that it was showing 70,000 miles on it at the time he sold the truck. RP 2 at 47. Prior to selling the truck, Mr. Potter acknowledged that it had been sitting in his back yard for a couple 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 the DOL does not require such a form on a car that old. RP 2 at 67.

Det. 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 met 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 drivable, to Pioneer Square where he met with the undercover officers again.

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 of this truck. 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 characteristics of a vehicle that will alter its value, such as leather interior, chrome wheels, radios, and numerous other items. RP 2 at 105-6. Whether a car has been owned by one or more persons, or has been garaged, are not value-altering characteristics, Det. Stokke agreed.

RP 2 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 telephone conversations with both Tommy and John George about their newspaper ad. RP 3 at 6-13. O'Donnell said that John George described 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 that's new on it is the wheels." RP 3 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 that time.

The State rested.

The defense moved to dismiss on the grounds that the State failed to introduce any evidence of loss in this case, as the victim received the value of the truck in exchange for the check. RP 2 at 103-106. In the alternative, the defense moved to dismiss the felony charge of Attempted Theft in The First Degree, and find that the State established only 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 Appellants' convictions at 132 Wn.App 654, 133 P.3d 487.

5. ARGUMENT

a. The State Failed to Introduce Sufficient Evidence of the Value of this Theft by Failing to Establish the Difference Between the Amount of Money Received and the Market Value of the Property Sold.

Sufficient evidence must be admitted at trial to support the defendant's conviction. State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980). On a sufficiency challenge, the evidence must be viewed in the light most favorable to the State. In this case, the State fails to meet its burden of establishing the value of any loss at all.

The definition of "market value" for property under 9A.56.010 depends on both the nature of that property, as well as the means of the theft.

RCW 9A.56.010(18) defines "value" as:

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

(b) Whether or not they have been issued or delivered, written instruments, except those having a readily ascertained market value, shall be evaluated as follows:

(i) The value of an instrument constituting an evidence of debt, such as a check, draft, or promissory note, shall be deemed the amount due or collectible thereon or thereby, that figure ordinarily being the face amount of the indebtedness less any portion thereof which has been satisfied;

(ii) The value of a ticket or equivalent instrument which evidences a right to receive transportation, entertainment, or other service shall be deemed the price stated thereon, if any; and if no price is stated thereon, the value shall be deemed the price of such ticket or equivalent instrument which the issuer charged the general public;

(iii) The value of any other instrument that creates, releases, discharges, or otherwise affects any valuable legal right, privilege, or obligation shall be deemed the greatest amount of economic loss which the owner of the instrument might reasonably suffer by virtue of the loss of the instrument.

.....

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

The four types of theft set forth in RCW 9A.56.020, though not separate crimes, have been termed “analytically distinct”. Similarly, the determination of the value of the stolen property appears to be “analytically distinct”.

Under RCW 9A.56.010(18), courts have applied both an objective and subjective approach to assessing the “market value” of property. “Market value” is the price which a well-informed buyer would pay to a well-informed seller,

where neither is obliged 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). While “value” has been defined by statute, the application of that statute by case law also establishes that the measure of value can be determined by the subjective loss to the victim. State v. Lee, 128 Wn.2d 151, 904 P.2d 1143 (1995).

Under either the taking, embezzlement, or appropriating lost or misdelivered property prongs of the statute, there is little potential for an exchange of items of value. RCW 9A.56.020. The property is simply illegally obtained by the suspect, and the value of that property is determined solely by its market value at the time and in the location of the theft.

Even in these seemingly straightforward cases, in which the property might have price tags or readily ascertainable value, courts have held the parties to a strict standard of proving the actual market value of the property. In State v. Rainwater, 75 Wn.App. 256, 876 P.2d 979 (1994), the Court held that the price tag of stolen merchandise constitutes substantial, but not conclusive, evidence of its market value provided the evidence establishes that the store does not negotiate the sales price. In State v. Morley, 119 Wn.App. 939, 83 P.2d 1023 (2004), the appellate court reversed Mr. Morley’s conviction for Attempted Theft in the First

Degree of a used generator due to the State's inability to establish the market value of the generator. The Court held that the only evidence of market value established that the used generator was worth approximately 40-45% of a new generator, and found him guilty of Attempted Theft in the Second Degree based on that evidence.

Courts have also applied this strict standard to defendant's for the market value of property, even when there is contradictory evidence of the appropriate value. In State v. Shaw, 120 Wn.App. 847, 86 P.2d 1194 (2004), the court permitted the case Det. to testify that he regularly refers to the Kelley Blue Book to establish the market value of vehicles, and that he did so in this case. The Det. also explained what information the site requires to value a car. In Shaw, the Det. determined that the car in question was valued by the Kelley Blue Book at \$2,520, even though the car was later sold for \$1,400 by the owner. 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 Kelley Blue Book value. The defendant's conviction for First Degree Possession of Stolen Property was affirmed.

The distinction between theft by deception and the other forms of

theft lies in whether the defendant had lawful possession of the property prior to the theft. State v. Monk, 42 Wn.App. 320, 711 P.2d 365 (1985). Under the “color or aid of deception” prong of the statute, RCW 9A.56.010(1)(b), there is often, though not always, an exchange of property or services between the suspect and the victim brought about as a result of the deception.

Under RCW 9A.56.010(18), there appear to be three ways to evaluate the “market value” of property in the event there is an exchange of property: (1) the statutory application of RCW 9A.56.010(18); (2) the “objective” standard used in State v. Kleist, *supra*; or, (3). the “loss to the victim” approach set forth in State v. Lee, *supra*.

1. RCW 9A.56.010(18) Sets Forth a Procedure for Offsetting the Victim’s Loss with Full or Partial Satisfaction of the Debt to Determine the “Value” of the Loss.

Where there is an exchange of property resulting from some deception, the market value is not simply the face value of one part of the exchange. RCW 9A.56.010(18)(b). The statutory definition of “value” for cases involving a written instrument anticipates some form of exchange of property, and provides for an offset on the total value when any portion of

the debt has been satisfied. RCW 9A.56.010(18)(b). While a check can have a readily ascertained value, that value does not stand alone, when a transfer of property has occurred. State v. Lee, supra.

The statutory scheme provides that a “written instrument constituting evidence of debt, such as a check...shall be deemed the amount due...,that figure ordinarily being the face amount of the indebtedness less any portion thereof which has been satisfied.” RCW 9A.56.010(18)(b)(1) (emphasis added). Use of the word “ordinarily” in this statute indicates that the face value of the check should usually be reduced by any portion of the check that has been satisfied. State v. Ejermestad, 114 Wn.2d 828, 791 P.2d 897 (1990). If no portion of the check has been satisfied, then the face value of the check is “readily ascertained”.

A failure to use this offset approach when the exchange does not involve a written instrument would lead to the absurd result that a criminal defendant would be held less culpable if he received a check, than if he received some other type of property of identical value, such as a car. A statute will not be construed in a manner that leads to an absurd result. State v. Schulze, 116 Wn.2d 154, 804 P.2d 566 (1991).

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 Det. 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 NADA or Kelley Blue Book for this truck. RP at 100-101.

The only evidence the State offered as to the "value" of this truck was the sales price the undercover detectives agreed to pay, but that does not take into account what they received in exchange. As in the Shaw case, the actual sales price fails to establish the market value of the property. Since no market value for this truck could be found, and none was offered in evidence by the State, 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.

As enumerated in RCW 9A.56.010(18), this offset approach comports with the Court's definition of "market value" as set forth in Kleist, and is also consistent with both the "objective" and "loss of the victim" approaches described below and previously applied by the Court in Kleist and Lee, supra, in that the value is deemed the difference between the money paid and the property received.

2. The “Objective” Analysis Adopted by the Court in Kleist Requires Courts to look at the Transaction Itself, Rather than the Loss to Any Party.

If the courts are not looking at “value” from the perspective of the loss to the victim, or the gain to the defendant, they must look at the relative value of the items exchanged in the transaction to find the “objective” loss. Kleist, supra.

In Kleist, supra, the defendant attempted to introduce evidence of the value of identical property from a different department store. The trial court refused to permit this evidence because the value of these items at a competing store was not relevant to the value of the items at the store where they were stolen. “Market value” is defined as being the “value at the time and place of the offense, but evidence of value at a distant point is not relevant.” Kleist, supra at 431. Objectively, the loss in Kleist was the value stated on the sales tags, not the subjective value set by another retailer.

This approach provides courts with a structure by which to evaluate the sufficiency of the evidence of price tags, Blue Book values versus actual sales price or, more complex transactions involving rental

payments for short-term housing, without distinguishing between the means by which the theft was committed. This is because the focus is always on the transaction, if there is one, and not any subjective factors.

Looking at the transaction in Lee objectively, the tenants paid \$700 as short-term rent and stayed in the rental house for the term of their lease. They received the benefit of their bargain, and suffered no loss.

When this approach is applied to the instant case, it is impossible to objectively determine the relative value of the items, because the State presented no evidence of the market value of the truck that was sold. The evidence in this case establishes what the Georges paid for this inoperable truck. RP 9/8/04 at 45. No evidence was introduced concerning the value of the parts and labor put into this truck to render it operable. No Blue Book value for this truck was available, according to Det. Stokke. Det. Stokke was otherwise unable to determine the market value for this truck. RP2 at 103-106.

Without the State introducing sufficient evidence of the market value of the truck, it is impossible to objectively determine the loss, if any, in this case. Consequently, under RCW 9A.56.010(18)(e), the value of the loss is deemed to be less than \$250, and the Georges would each be guilty

of a misdemeanor theft.

3. The “Loss to the Victim” Analysis Also Requires an Analysis of the Entire Transaction, but Determines Value Solely on the Subjective Basis of the Loss to the Victim.

In Lee, the Court applied a standard that “the loss to the victim, rather than the benefit to the offender, is key in determining the existence and value of a deprivation”. Lee, supra at 163, citing State v. Brokaw, 134 Ariz. 532, 658 P.2d 185 (1982).

Note that the matter is stated in terms of the owner’s deprivation rather than the thief’s gain, in recognition of the majority view that, for larceny, there need be no intent on the part of the thief to gain a benefit for himself...

Lee, supra, citing, 2 Wayne R., LaFave & Austin W. Scott, Substantive Criminal Law Sec. 8.5 at 357 (1986). The Court further cited Brokaw with favor on this topic:

We conclude, therefore, that the correct measure of the value of services...is the value of the performance actually brought about by the offender’s conduct, *that being the value that most correctly represents the loss to the victim.*

Brokaw, supra at 535 (emphasis added).

In Lee, the defendant was charged with theft by deception for renting a house that he did not own. The renters exchanged rent payments

with the suspect for use of the property. This Court reversed Lee's conviction and dismissed the theft charges, finding that the renters received exactly what they bargained for – short-term housing at the rate agreed to by the suspect - and suffered no loss.

In applying this “loss of the victim” approach, the Court examined the entire transaction, and did not simply focus on the victim's payments. Had the Court not examined the entire transaction, it would have had to find the loss “value” based solely on what the victim's paid - \$700. And Lee's conviction might have been affirmed (the case was reversed on other grounds, as well). By looking at the whole transaction, the court concluded there was no loss, and dismissed the charges.

Applying this analysis in the instant case, the “loss to the victim” is the amount paid for the truck - \$5,500 – less the “market value” of the truck. The victim did not suffer a \$5,500 loss in this case because he received property of some indeterminable value to partially or fully satisfy the \$5,500 payment. The value of the truck could range anywhere from nothing to \$5,500, or higher. Since the State did not introduce sufficient evidence of the value of the truck, and the loss to the victim is undetermined, the Georges can only be found guilty of a misdemeanor.

Whether the Court utilizes the “objective” or “loss to the victim”

approach in applying RCW 9A.56.010(18) to this case, the entire transaction is examined to determine the “value”, and to determine the degree of theft in the defendant’s case. Absent sufficient evidence of “value”, subsection (e) requires the courts to find that the “value” does not exceed \$250.

CONCLUSION

The “value” of loss, as defined by RCW 9A.56.010(18) and case law, is the difference between the amount of money received and the market value of the property sold. The State’s failure to introduce evidence of the value of the truck in this case renders it impossible to determine the loss amount as a result of this transaction. Absent any determination of value, RCW 9A.56.010(18)(e) requires that the value be deemed to be less than \$250. The convictions for both John and Tommy George for Attempted Theft in the First Degree should be reversed, and convictions for Theft in the Third Degree should be entered.

Dated this 28th day of March, 2007

Respectfully Submitted,

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FILED AS ATTACHMENT
TO E-MAIL