71311-6

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No. 91577-6

No. 71311-6-I

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

STATE OF WASHINGTON,

Respondent,

v.

DAVID EARL WOODLYN,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

APPELLANT'S OPENING BRIEF

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MAUREEN M. CYR
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

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A. ASSIGNMENT OF ERROR

David Woodlyn's constitutional right to a unanimous jury verdict was violated because the State did not present sufficient evidence to prove one of the alternative means of committing the crime that was charged and presented to the jury.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

In order to safeguard the state constitutional right to a unanimous jury verdict, the State must present sufficient evidence to prove beyond a reasonable doubt each alternative means of committing the crime that it presents to the jury. If sufficient evidence does not support each relied-upon alternative, the conviction must be reversed unless the reviewing court can conclude that the jury based its verdict on the alternative for which there was sufficient evidence. Here, the jury was presented with two alternative means of committing the crime but only one of those alternatives was supported by sufficient evidence. Must the conviction be reversed where it is impossible to conclude that the jury relied on the proper alternative in reaching its verdict?

C. STATEMENT OF THE CASE

For several years, David Woodlyn mowed lawns and did yard work for people who lived near his home in West Seattle. RP 716. He

used the money he made mowing lawns to supplement his social security disability income. RP 733-34. He did not advertise his services but instead got business through word of mouth and was highly regarded. RP 698, 716. His regular customers found him to be very reliable and consistent. RP 690-700, 702-07.

Mr. Woodlyn would often cash the checks he received for performing yard work at the White Center branch of Bank of America. RP 429-30, 607-08, 623-24. He did not have an account at the bank but could cash the checks by showing his identification. RP 607. Mr. Woodlyn cashed checks written by various people on several occasions without incident. RP 608, 623-24.

One day during the summer of 2011, Mr. Woodlyn was walking through a residential neighborhood near the White Center branch of the bank and noticed that the lawn in front of Dora Kjellerson's home needed mowing. RP 719. He knocked on her front door and asked if she wanted him to cut her grass. RP 719. Ms. Kjellerson was an elderly woman who needed help taking care of her lawn and yard because both her partner and her son, who used to do the yard work, had recently passed away. RP 579, 598-99.

Ms. Kjellerson agreed to allow Mr. Woodlyn to cut the grass and when he finished she paid him $60. RP 719-20. Mr. Woodlyn returned two to three weeks later and pruned Ms. Kjellerson's trees. RP 721. He returned again several times that summer to cut her grass. RP 722. Ms. Kjellerson's family members who visited her that summer said, however, that they never saw him mowing the grass and thought her yard looked overgrown. RP 481-82, 504, 600.

Ms. Kjellerson had a Bank of America checking account and was a regular customer at the White Center branch. RP 606. She would walk from her home to the bank once or twice a week. Id. Cindy Cleary, the assistant manager at the bank, said Ms. Kjellerson had come in regularly since at least 1998, when Ms. Cleary started working there. Id.

One day during summer 2011, Mr. Woodlyn came into the bank to cash a check on Ms. Kjellerson's account. RP 609. The check was signed by Ms. Kjellerson and was for an amount between $60 and $100. RP 610. Ms. Cleary thought Ms. Kjellerson's signature did not look right so she called her on the telephone and asked if she had written the check. Id. After speaking with Ms. Kjellerson, Ms. Cleary processed the check and gave the cash to Mr. Woodlyn. RP 611-12.

From July 22 to August 12, 2011, Mr. Woodlyn cashed a total of seven checks on Ms. Kjellerson's account. RP 746-51. The amounts of the checks varied from $60 to $440. Id. All of the checks were signed by Ms. Kjellerson but Mr. Woodlyn wrote in his name and the dollar amounts. RP 648-49, 676, 746-51.

Ms. Kjellerson signed several other checks that were cashed by people other than Mr. Woodlyn during late spring and summer of 2011. RP 462-63, 467-71, 643-49. The checks were made out to several different individuals and entities and were for various amounts. Id. As she did with Mr. Woodlyn, Ms. Kjellerson signed the checks but allowed other people to fill in the rest of the information. RP 649.

On August 27, 2011, Mr. Woodlyn accompanied Ms. Kjellerson to the White Center branch and asked to withdraw some money from her account. RP 612-13. Ms. Cleary was suspicious and asked how much money they needed. RP 613. According to Ms. Cleary, Mr. Woodlyn asked how much money Ms. Kjellerson had. RP 614. Ms. Cleary refused to withdraw any money from the account. RP 614. Mr. Woodlyn was offended and left the bank, leaving Ms. Kjellerson behind. RP 615.

Ms. Cleary called the police and King County Sheriff Deputy Michael McDonald responded to the bank. RP 684-85. He asked Ms. Kjellerson why she was there and she responded, "David needs money for mowing the grass." RP 687. Deputy McDonald gave Ms. Kjellerson a ride back to her house. RP 687-90. While he was there, he looked around her yard and thought the grass looked overgrown. Id.

Soon after the August 27 incident, Ms. Kjellerson was evaluated by a geriatric mental health specialist. RP 523-52. The evaluator concluded that Ms. Kjellerson had moderate to severe dementia and could no longer live independently without help. Id. After that, the bank froze Ms. Kjellerson's bank accounts. RP 583-84. Ms. Kjellerson's sister acquired power of attorney and control over her finances. RP 481. Her niece now lives with her and takes care of her. RP 476.

The State charged Mr. Woodlyn with one count of second degree theft based on the seven checks he cashed on Ms. Kjellerson's account.[1] CP 1-2.

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[1] The State alleged Mr. Woodlyn cashed the checks as part of a "continuing criminal impulse, a continuing course of conduct and common scheme or plan" and thus the amount of all the checks could be totaled to exceed the $750 threshold required for second degree theft. CP 1; see RCW 9A.56.040(1)(a).

At trial, the jury was instructed on two alternative means of committing the crime. In the to-convict instruction, the jury was informed it could find Mr. Woodlyn guilty if it found beyond a reasonable doubt that, with an intent to deprive another of property, he either (1) "wrongfully obtained the property of another"; or (2) "by color or aid of deception, obtained control over property of another."[2] CP 72. The jury was instructed it need not be unanimous as to which alternative was proved beyond a reasonable doubt as long as each juror found that at least one alternative was proved. CP 72-73.

The instructions further defined these terms for the jury. The instructions stated: "Wrongfully obtains means to take wrongfully the property or services of another," and "By color or aid of deception means that the deception operated to bring about the obtaining of the property or services." CP 75-76. Another instruction further defined "deception":

> Deception occurs when an actor knowingly creates or confirms another's false impression which the actor knows to be false or fails to correct another's impression which the actor previously has created or confirmed or promises performance which the actor does not intend to perform or knows will not be performed.

CP 77.

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[2] A copy of the to-convict instruction is attached as an appendix.

The jury found Mr. Woodlyn guilty of second degree theft. CP 87. There was no special verdict form indicating which of the two alternative means of committing the crime the jury relied upon.

D. ARGUMENT

Mr. Woodlyn's constitutional right to jury unanimity was violated because one of the alternative means presented to the jury was not supported by sufficient evidence

1. In order to preserve Mr. Woodlyn's constitutional right to jury unanimity, the State was required to present evidence sufficient to prove each of the two alternative means presented to the jury beyond a reasonable doubt

Criminal defendants in Washington have a state constitutional right to a unanimous jury verdict. State v. Owens, 180 Wn.2d 90, 95, 323 P.3d 1030 (2014); Const. art. I, § 21. The right to jury unanimity may include the right to a unanimous determination as to the *means* of committing the crime if the defendant is charged with and the jury is instructed on more than one alternative means. Owens, 180 Wn.2d at 95. Express jury unanimity as to each means presented to the jury is required unless the State presents sufficient evidence to prove each means beyond a reasonable doubt. Id.

An alternative means crime is one by which the criminal conduct may be proved in a variety of ways. Id. at 96. An alternative

means statute describes conduct that "var[ies] significantly" among the various alternatives. Id. at 97.

It is well established that theft is an alternative means crime. State v. Linehan, 147 Wn.2d 638, 647, 56 P.3d 542 (2002). "[T]he alternative means available to accomplish theft describe *distinct acts* that amount to the same crime." State v. Peterson, 168 Wn.2d 763, 770, 230 P.3d 588 (2010). Two alternative means of committing theft are by wrongfully exerting control over someone's property or by deceiving someone to give up their property. Id.; RCW 9A.56.020(1)(a), (b). "In each alternative, the offender takes something that does not belong to him, but his *conduct* varies significantly." Id.

Here, the jury was instructed on two distinct alternative means of committing the crime of theft. The jury was instructed it could find Mr. Woodlyn guilty of theft if it found either that he (1) "wrongfully obtained" Ms. Kjellerson's property; or that (2) "by color or aid of deception," he "obtained control over" Ms. Kjellerson's property. CP 72. The jury was expressly instructed it need not be unanimous as to which means it relied upon. CP 72-73. Thus, in order to preserve Mr. Woodlyn's constitutional right to a unanimous jury verdict, the State

was required to present sufficient evidence to prove each of these alternatives beyond a reasonable doubt. Owens, 180 Wn.2d at 95.

2. The State did not present sufficient evidence to prove beyond a reasonable doubt that Mr. Woodlyn "wrongfully obtained" Ms. Kjellerson's property because the State did not prove she did not consent to the taking

One of the alternative means presented to the jury was that Mr. Woodlyn "wrongfully obtained" Ms. Kjellerson's property. CP 72. The jury was instructed that "[w]rongfully obtains means to take wrongfully the property or services of another." CP 75.

Consistent with the jury instruction, the "wrongfully obtains" alternative means of committing theft is often referred to as "theft by taking." Linehan, 147 Wn.2d at 644. It is distinct from the "theft by deception" alternative. Id. The statutory crime of theft by taking arose from the common law crime of larceny. State v. Markham, 40 Wn. App. 75, 86, 697 P.2d 263 (1985).

Nonconsent of the owner of the property has long been an essential element of the crime of theft by taking. State v. D.H., 31 Wn. App. 454, 458, 643 P.2d 457 (1982); State v. Wong Quong, 27 Wash. 93, 94, 67 P. 355 (1901).

Thus, in order to safeguard Mr. Woodlyn's constitutional right to a unanimous jury verdict, the State was required to prove beyond a reasonable doubt all of the essential elements of the theft by taking alternative, including the element that Ms. Kjellerson did not consent to the taking of her property. Owens, 180 Wn.2d at 95. The question on review is whether the evidence was sufficient to justify a rational trier of fact finding this essential element beyond a reasonable doubt. State v. Ortega-Martinez, 124 Wn.2d 702, 708, 881 P.2d 231 (1994); State v. Green, 94 Wn.2d 216, 220, 616 P.2d 628 (1980); Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). Evidence is sufficient if after viewing the evidence in the light most favorable to the State, a rational trier of fact could have found the element beyond a reasonable doubt. Ortega-Martinez, 124 Wn.2d at 708.

The evidence was not sufficient to prove beyond a reasonable doubt that Ms. Kjellerson did not consent to the taking of her property. To the contrary, the evidence shows Ms. Kjellerson intended to allow Mr. Woodlyn to cash her checks and withdraw money from her bank account. All of the checks that Mr. Woodlyn cashed on Ms. Kjellerson's account were signed by Ms. Kjellerson. RP 610-12, 648-49, 676, 746-51. The State did not dispute that the signature on the

checks was Ms. Kjellerson's or that she intended to allow Mr. Woodlyn to cash the checks. Instead, the State's theory was that Mr. Woodlyn "got [Ms. Kjellerson] to sign over seven checks" by "convinc[ing her] that these checks were for mowing her lawn." RP 787. The State did not argue that Ms. Kjellerson did not intend to give Mr. Woodlyn the money but instead argued that she was "signing over these checks under false pretenses." RP 793.

The "wrongfully obtains" alternative means of committing theft is distinct from the "theft by deception" alternative. Linehan, 147 Wn.2d at 644; Peterson, 168 Wn.2d at 770. It is equivalent to a "theft by taking" and requires proof of the owner's nonconsent. Linehan, 147 Wn.2d at 644; D.H., 31 Wn. App. at 458; Wong Quong, 27 Wash. at 94. Thus, if the owner consents to the taking, even if her consent is obtained through deception, the evidence is not sufficient to prove the defendant "wrongfully obtained" the property. Because Ms. Kjellerson signed the checks and agreed to allow Mr. Woodlyn to cash them, she consented to the taking of her property. The State therefore did not prove beyond a reasonable doubt the "wrongfully obtains" alternative means that was presented to the jury.

3. The conviction must be reversed because it is possible that the jury relied upon the improper alternative in reaching its verdict

If two alternative means are presented to the jury but one is not supported by sufficient evidence, the conviction must be reversed unless the reviewing court can determine that the verdict was based only on the alternative for which there was sufficient evidence. State v. Allen, 127 Wn. App. 125, 130, 110 P.3d 849 (2005). If the State presented evidence of only one means, then the reviewing court can conclude the jury must have relied only upon that means in reaching a unanimous verdict. State v. Fleming, 140 Wn. App. 132, 136-37, 170 P.3d 50 (2007). But if the State presented evidence that the jury might have relied upon to find that both alternatives were proved, the conviction must be reversed. Allen, 127 Wn. App. at 132-35.

Here, the to-convict instruction expressly informed the jury that it could rely upon both alternative means. CP 72. But the jury was not informed that in order to convict Mr. Woodlyn under the "wrongfully obtains" alternative, the State must prove beyond a reasonable doubt that Ms. Kjellerson did not consent to the taking of her property. The jury was instructed only that "wrongfully obtains" means "to take wrongfully the property or services of another." CP 75.

This instruction was not sufficient to inform the jury that "wrongfully obtains" means obtained without consent.

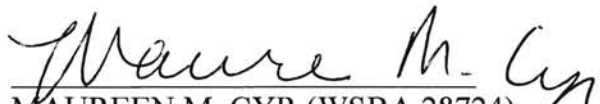
The jury could have concluded that Mr. Woodlyn "wrongfully obtained" Ms. Kjellerson's property, even though she consented to the taking, because he allegedly deceived her into believing she was giving him the money to mow her lawn. In fact, the deputy prosecutor encouraged the jury to find that the theft occurred not because Ms. Kjellerson did not consent to the taking but because she signed the checks "under false pretenses." RP 793. Thus, the jury could have erroneously concluded that taking money with consent but "under false pretenses" is equivalent to taking money without consent. From this record, this Court cannot conclude that the jury did not rely on the "wrongfully obtains" alternative in reaching its verdict.

In sum, the evidence was not sufficient to prove the "wrongfully obtains" alternative beyond a reasonable doubt, but it is possible that at least some of the jurors relied upon that alternative in reaching their verdict. Therefore, Mr. Woodlyn's constitutional right to jury unanimity was violated and the conviction must be reversed. Owens, 180 Wn.2d at 95; Ortega-Martinez, 124 Wn.2d at 708; Allen, 127 Wn. App. at 132-35.

E. CONCLUSION

Because the jury was instructed on an alternative means that was not supported by sufficient evidence, the conviction must be reversed.

Respectfully submitted this 27th day of June, 2014.



MAUREEN M. CYR (WSBA 28724)
Washington Appellate Project - 91052
Attorneys for Appellant

APPENDIX

No. 7

To convict the defendant of the crime of theft in the second degree, each of the following four elements of the crime must be proved beyond a reasonable doubt:

(1) That during a period of time intervening between July 22, 2011, through August 12, 2011, the defendant

(a) wrongfully obtained the property of another; or

(b) by color or aid of deception, obtained control over property of another; and

(2) That the property exceeded $750 in value;

(3) That the defendant intended to deprive the other person of the property; and

(4) That the defendant's acts were part of a series of transactions which were part of a common scheme or plan, a continuing criminal impulse, or a continuing course of conduct;

(5) That this act occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

If you find from the evidence that elements (2), (3), (4), and (5) and any of the alternative elements (1)(a), or (1)(b), have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. To return a verdict of

guilty, the jury need not be unanimous as to which of alternatives (1)(a) or (1)(b) has been proved beyond a reasonable doubt, as long as each juror finds that at least one alternative has been proved beyond a reasonable doubt.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of elements (1), (2), (3), (4), or (5), then it will be your duty to return a verdict of not guilty.

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 71311-6-I
v.	)	
	)	
DAVID WOODLYN,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 27TH DAY OF JUNE, 2014, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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[X] DAVID WOODLYN 6420 CALIFORNIA AVE SW #510 SEATTLE, WA 98136	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 27TH DAY OF JUNE, 2014.

X_____

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710