

69842-7

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NO. 69842-7-I

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

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL J. EVANS,

Appellant.

REC'D
JUL 31 2013
King County Prosecutor
Appellate Unit

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

The Honorable Mary I. Yu, Judge

BRIEF OF APPELLANT

ANDREW P. ZINNER
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

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SUPERIOR COURT
KING COUNTY
CLERK

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A. ASSIGNMENTS OF ERROR

1. The State failed to prove the complainant was particularly vulnerable to either theft of a motor vehicle or trafficking in stolen property.

2. There was no nexus between the finding of particular vulnerability and the commission of trafficking in stolen property.

Issues Pertaining to Assignments of Error

1. Did the State fail to prove the complainant was particularly vulnerable to either theft of a motor vehicle or trafficking in stolen property?

2. When a person's vehicle gets stolen by deception, and is later sold to someone else, can the original owner of the vehicle be particularly vulnerable to trafficking in stolen property?

B. STATEMENT OF THE CASE

Leon Lucas lost his wife of 53 years to cancer near the end of September, 2011. 5RP 44, 54.¹ After determined its "blue book" value, Lucas put her 1999 Cadillac up for sale. 5RP 44-45, 54. Michael Evans,

¹ The verbatim report of proceedings is referred to as follows: 1RP – 10/29/12; 2RP – 10/30/12 (a.m.); 3RP -- 10/30-31/12 (p.m.); 4RP – 10/31/12 (a.m.); 5RP -- 11/1/12 (a.m.); 6RP – 11/1/12 (p.m.); 7RP – 11/5/12; 8RP – 1/24/13.

who introduced himself as Michael Miller, came by with his brother to see the car. After taking it for a test drive, Evans offered to buy the car for \$3,895 and Lucas accepted. 5RP 44-45. The parties went inside Lucas's apartment to consummate the deal and Evans put down \$100. 5RP 45-46, 50, 68, 79.

During the meeting, "Anna Miller" and her young daughter arrived. 5RP 46-47. Lucas and Evans talked for a bit, during which time Evans's brother grabbed the keys and title to the car from a table and left. 5RP 45-49. The transaction occurred quickly so Lucas did not have time to draw up a contract. 5RP 54.

A few days later, Evans called Lucas and told him the car's engine blew up and would cost \$5,000 to fix. 5RP 49, 53, 70, 79. That was the last time Lucas heard from Evans. In the weeks that followed, however, Miller made five small payments totaling \$275. 5RP 49-50, 69. She never said it was from Evans, only that it was a car payment. 5RP 49-53, 80.

Miller told Lucas her husband died of cancer and she lost everything she had. She needed money to buy a catering business and offered to make Lucas a partner in the business. 5RP 55-57. In the ensuing months, before Lucas realized Miller had swindled him, he had "loaned" her nearly \$300,000 in cash. 4RP 26-28, 33-36; 5RP 58-63.

Lucas did not stop loaning Miller money until his son had his assets frozen. 5RP 63. Lucas told the case detective he had always wanted to open a restaurant and was excited about the catering business. 4RP 55.

It was not until the end of 2011 that Lucas told his son about his investment in the catering business. 4RP 19-20. The son contacted police, who became involved in January 2012. 4RP 22, 41-44, 51.

Meanwhile, Evans sold the Cadillac in November 2011 for \$4,400. 3RP 48-56; 4RP 64-66. This was apparently not unusual. Evans's neighbor testified she often saw Evans power-washing five or six cars at a time and putting them up for sale. 3RP 42-44. The detective went onto craigslist.com and found several cars Evans was selling. 4RP 84.

Police learned of the sale several months into the swindling investigation. 4RP 64-66. The detective recognized Evans's name, because Evans and his friend, Yana Ristick, had financially exploited several elderly men a few years earlier. 4RP 67-72.

After getting a description of Evans from the Cadillac buyer, and of "Miller" from Lucas, the detective created photo montages containing Evans and Ristick. 4RP 72-74. The Cadillac buyer chose their photos from the montages as depicting the people who sold him the car. 3RP 56-59; 4RP 74-77. The detective also showed montages to Lucas. He

immediately chose Ristick's photo as depicting Miller. He chose two photos, one depicting Evans, as the man who bought the car. 4RP 79-81

Lucas received no more car payments. 4RP 83. Officers eventually arrested Evans and Ristick. 3RP 20.

The State charged Evans with motor vehicle theft "by color and aid of deception" and first degree trafficking in stolen property. The State alleged Lucas was a particularly vulnerable victim. CP 21-22. The State charged Ristick with five counts of first degree theft and three counts of second degree theft. CP 22-26.

Ristick pleaded guilty and Evans had a jury trial. 2RP 5. Evans did not testify. The defense theory, as articulated during closing argument, was that he had entered into a lawful oral contract to buy the car, the breach of which was a civil question, not a criminal one. 7RP 30-31, 33. Defense counsel noted that Evans's neighbor often saw Evans selling cars. 7RP 34. Counsel maintained the several additional car payments called into question the State's claim Evans did not intend to pay for the car. 7RP 34-35. With respect to trafficking, counsel said Evans used his real name and driver's license when he sold the car and had a bank employee notarize the sale documents. This suggested, counsel argued, that Evans did not consider the car stolen. 7RP 36.

Counsel also asserted the State failed to prove Lucas was particularly vulnerable and Evans knew or should have known of Lucas's vulnerability. 7RP 38-41.

The jury found Evans guilty as charged and also found Lucas was particularly vulnerable. CP 34-36. Relying on the jury's finding, the trial court imposed exceptional, concurrent sentences of 63 months for theft and 90 months for trafficking. CP 69-78.

C. ARGUMENT

THE JURY'S FINDING THAT LUCAS WAS PARTICULARLY VULNERABLE IS NOT SUPPORTED BY PROOF BEYOND A REASONABLE DOUBT.

A jury must find facts supporting aggravating circumstances beyond a reasonable doubt. RCW 9.94A.537(3). A jury's finding is reviewed for sufficiency of the evidence. State v. Stubbs, 170 Wn.2d 117, 123, 240 P.3d 143 (2010). Courts review the evidence in the light most favorable to the State to determine whether a rational juror could have found the presence of the aggravating circumstance beyond a reasonable doubt. State v. Chanthabouly, 164 Wn. App. 104, 143, 262 P.3d 144 (2011), review denied, 173 Wn.2d 1018 (2012). The State failed to prove Lucas was particularly vulnerable.

a. Pertinent facts

Lucas was 80 years old at the time of trial. 4RP 11. He often repeated himself and his son became concerned about his cognitive abilities. Lucas, however, had no problem living independently. 4RP 18, 57. His apartment was clean and well-stocked with fresh food, he cooked for himself, and he owned and managed the triplex in which he lived. 3RP 30-31. He had two tenants, collected rent, and did maintenance. 5RP 44, 83.

In January 2012, Lucas's son requested an assessment of his father by a member of the geriatric crisis team for King County. 3RP 64, 78. The son was concerned that Lucas had given away a lot of money and either sold or gave away a car. There was concern Lucas was being duped. 3RP 79-81.

A geriatric mental health counselor met with Lucas at his residence twice in January. 3RP 82; 5RP 17. Lucas told the counselor he initially withdrew \$50,000 in cash from three different banks and gave it to Ristick. He did not enter into a formal, written contract because he trusted her. 3RP 85-86. The counselor administered two tests to measure Lucas's cognition. Lucas's scores indicated he had dementia. 3RP 92-100. The

counselor did not diagnose him with dementia, however, because he was functioning at a high level. 3RP 104; 5RP 3-4, 30-33. She instead diagnosed Lucas as suffering from cognitive disorder NOS. 3RP 103-04.

The counselor believed Lucas lacked insight or judgment about the decisions he was making, such as loaning or giving money to someone with no understanding of the real situation. 3RP 105; 5RP 5. According to the counselor, Lucas "doesn't have the sense of something that might not be safe." 5RP 16. She believed the impairment would become apparent to a layperson in more than a brief interaction with Lucas. 5RP 16-17. The counselor acknowledged that when a person loses a significant other to death, money can become less important to the survivor. Lucas told the counselor the money he spent was his and he was free to do with it what he wanted. 5RP 36.

As for the car, Lucas correctly recited the amount Evans owed based on their negotiated sale price of the car. 5RP 68-69. The debt -- \$3,520 -- was considerably less than his \$4,900 monthly income. 5RP 37. Indeed, Lucas explained to the counselor it was "a fraction of" his assets. 5RP 38.

An investigator for Adult Protective Services met several times with Lucas. He also noted Lucas functioned well. 5RP 87-89. Lucas did

not appear concerned about the money he loaned to Ristick. 5RP 93-97. Because Lucas had no documentation of the loans, the investigator could not determine whether financial exploitation occurred. 5RP 100.

b. Jury instructions

The trial court instructed the jury that if it found Evans guilty of motor vehicle theft, it must determine "[w]hether the defendant knew or should have known that the victim was particularly vulnerable or incapable of resistance." CP 59 (instruction 15). It provided the following definition:

A victim is "particularly vulnerable" if he or she is more vulnerable to the commission of the crime than the typical victim of theft of a motor vehicle. The victim's vulnerability must also be a substantial factor in the commission of the crime.

CP 60 (instruction 16); WPIC 300.11.

The court also instructed the jury that if it found Evans guilty of trafficking in stolen property, it must determine "[w]hether the defendant knew or should have known that the victim was particularly vulnerable or incapable of resistance." CP 63 (instruction 19). Unlike with respect to vehicle theft, however, the court gave no corresponding definitional instruction.

With respect to the theft count, the court gave jurors the following definition of "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 58 (Instruction 14); WPIC 79.04.

- c. The State failed to prove Lucas was particularly vulnerable to vehicle theft or trafficking.

A person is particularly vulnerable to a crime only if he is more vulnerable to the offense than other victims and the defendant knew of such vulnerability. State v. Bedker, 74 Wn. App. 87, 94, 871 P.2d 673, review denied, 125 Wn.2d 1004 (1994). The particular vulnerability must be "a substantial factor in the accomplishment of the crime." State v. Jackmon, 55 Wn. App. 562, 566, 778 P.2d 1079 (1989). With respect to theft, the State therefore needed to establish Lucas was more susceptible to Evans's deception than another private seller of a vehicle, and that Evans knew this.

Lucas acted as would a typical private seller. He put a "for sale" sign on the car and parked it in front of his residence. 5RP 46, 76. He checked the "blue book" value of the car. 5RP 45. He joined Evans and his brother for a test drive. 5RP 48. He thereafter accepted \$100 from Evans as a down payment. 5RP 50, 79. The transaction occurred too

quickly for the parties to draft a contract for the sale. Evans's brother took the title and keys and left. 5RP 54.

Evans had the opportunity to see Lucas's well-kept apartment, the condition of which impressed a professional geriatric evaluator. Given Lucas's high level of functioning, the evaluator was surprised at his performance on two cognition tests. The evaluator found Lucas to be cooperative and socially appropriate. 5RP 33. Unlike the evaluator, Evans did not test Lucas and was with him for only for a short time. There was no evidence Evans targeted Lucas; rather, he merely saw a car that was for sale.

An exceptional sentence is justified only when the conduct is proportionately more culpable than that inherent in the crime. State v. Chadderton, 119 Wn.2d 390, 398, 832 P.2d 481 (1992). To convict Evans of theft as charged, the State had to prove he obtained the car "by color and aid of deception." RCW 9A.56.020(1)(b). In other words, Evans had to successfully deceive Lucas. The deception here was the implied promise to make payments toward the purchase price of the car without intending to make them. Evans's conduct did not render him "proportionately more culpable" than what was required to commit the crime.

The State failed to present evidence to establish Lucas was particularly vulnerable to vehicle theft by deception or trafficking. This Court should reverse and remand for a standard range sentence.

- d. There was no nexus between particular vulnerability and trafficking.

Lucas's particular vulnerability was not a substantial factor in the accomplishment of the crime of trafficking in stolen property. Lucas's loss occurred as a result of the theft. Had Evans kept the car for himself and not sold it, there would not have been less loss to Lucas. Stated another way, Evans did not further victimize Lucas by selling the car. Regardless, Lucas was out \$3,520 – the amount Evans agreed to pay minus the \$375 Lucas received in payments.

The objective criminal purpose of first degree theft is to deprive a person of his property; the purpose of first degree trafficking is to sell or dispose of stolen property to another person. State v. Walker, 143 Wn. App. 880, 891, 181 P.3d 31 (2008). The crimes also have two different "victims," the owner of the stolen property and the person who later buys the property. Walker, 143 Wn. App. at 892. Given that the original owner is not a victim of the trafficking, he cannot be particularly vulnerable to the offense.

Because Lucas was harmed only by the theft, Evans's crime of trafficking was not aggravated by particular vulnerability. The trial court's exceptional sentence for trafficking is therefore incorrect. This Court should reverse the sentence and remand for imposition of a standard range term.

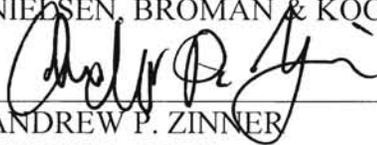
D. CONCLUSION

For the above reasons, this Court should vacate the exceptional sentences and remand for sentences within the standard range.

DATED this 31 day of July, 2010.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



ANDREW P. ZINNER

WSBA No. 18631

Office ID No. 91051

Attorneys for Appellant

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DIVISION ONE

STATE OF WASHINGTON,)	
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Respondent,)	
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v.)	COA NO. 69842-7-1
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MICHAEL EVANS,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 31ST DAY OF JULY, 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] MICHAEL EVANS
DOC NO. 802026
COYOTE RIDGE CORRECTIONS CENTER
P.O. BOX 769
CONNELL, WA 99326

SIGNED IN SEATTLE WASHINGTON, THIS 31ST DAY OF JULY, 2013.

X *Patrick Mayovsky*

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COURT OF APPEALS
STATE OF WASHINGTON
CLERK