

Consol No. 30778-6-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

ORRY L. ADAMS, APPELLANT

---

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

---

BRIEF OF RESPONDENT

---

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Prosecuting Attorney

Deric A. Martin  
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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

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I.

ISSUE PRESENTED

- A. Theft means to wrongfully obtain or exert unauthorized control over another's property with the intent of depriving her of it. Property is wrongfully obtained if the defendant employs deception to gain it. Theft in the First Degree occurs when the defendant wrongfully obtains or exerts unauthorized control over property taken from the victim's person. Adams used deception to take \$70 from Phillips' person with the intention of keeping it for himself. Is Adams' conviction supported by sufficient evidence?

II.

STATEMENT OF FACTS

The State relies upon the Findings of Fact and Conclusions of Law Regarding Non-Jury Trial marked as CP 28-31.

Orry Adams convinced his victim, Cynthia Phillips to hand him \$70 on the false promise that he would buy drugs for her. He intended, however, to keep her money for himself. But for Adams' deception, Phillips would not have given him her money. This evidence was sufficient to support the trial court's finding that Adams committed Theft in the First Degree by wrongfully obtaining property from the person of his victim by color or aid of deception.

### III.

#### ARGUMENT

Adams contends that there was insufficient evidence in this case for the judge to find him guilty of Theft in the First Degree. He is incorrect.

A defendant is guilty of Theft in the First Degree if he “commits theft” either of property worth more than \$5,000, or of “[p]roperty of any value... taken from the person of another.” RCW 9A.56.030(1)(a) and (b). “Theft” is defined by statute in Washington. It means:

- (a) To wrongfully obtain or exert unauthorized control over the property... of another... with intent to deprive him or her of such property....; or
- (b) By color or aid of deception to obtain control over the property... of another... with intent to deprive him or her of such property....; or
- (c) To appropriate lost or misdelivered property... of another... with the intent to deprive him or her of such property....

RCW 9A.56.020(1)(a), (b), (c).

The phrase “by color or aid of deception” means that the defendant’s “deception operated to bring about the obtaining of the property...; it is not necessary that deception be the sole means of obtaining the property....” RCW 9A.56.010(4). The Legislature specified that “deception” occurs when the defendant:

- (a) Creates or confirms another’s false impression which the [defendant] knows to be false; or

- (b) Fails to correct another's impression which the [defendant] previously has created or confirmed; or...
- (e) Promises performance which the [defendant] does not intend to perform or knows will not be performed.

RCW 9A.56.010(4)(a), (b), (e).

Finally, the Legislature defines "wrongfully obtains" as follows:

- (a) To take the property or services of another;
- (b) Having any property... in one's possession, custody or control as a bailee, factor, lessee, pledgee, renter, servant, attorney, agent... or person authorized by agreement... to secrete, withhold, or appropriate the same to his or her own use....

RCW 9A.56.010(19)(a), (b). While the Legislature did not define the word "take," the Court of Appeals gave it the following meaning in the context of a Theft prosecution: "To lay hold of; to gain or received into possession; to seize; to deprive one of the use or possession of; to assume ownership." *State v. Britten*, 46 Wn. App. 571, 574, 731 P.2d 508 (1987) (*quoting* Black's Law Dictionary 1303 (5th ed. 1979)).

Thus, to prove Adams committed Theft in the First Degree in this case, the State had to show that he took property from the person of Cindy Phillips with the intent of depriving her of that property. The trial court found these elements were proved beyond a reasonable doubt and the evidence is amply sufficient to support that verdict. Adams employed deception to take \$70 from Phillips' person. His intent was to keep the money for himself, thereby depriving Phillips of its value. But for Adams' deception, Phillips would not have handed him her \$70.

Alternatively, Adams took (*i.e.*, laid hold of, received into his possession, assumed ownership of) \$70 from the person of Cindy Phillips with the intention of appropriating it for himself. Adams' conduct thus fits squarely within the plain language of the statute as either wrongfully obtaining Phillips' money or exerting unauthorized control over it.

Adams argues that, despite the fact he took Phillips' money directly from her person with the intention of depriving her of it, he is guilty only of Theft in the Third Degree. This is true, he claims, because he accomplished the taking by means of deception and there was no "taking" (*e.g.*, pickpocketing) involved. His claim is not supported by the Theft statute or the cases interpreting it.

In *State v. Lineham*, the defendant's bank erroneously deposited over \$100,000 into his account. *State v. Lineham*, 147 Wn.2d 638, 641-42, 56 P.3d 542 (2002). Lineham consulted his attorney about what he should do with the money and was advised that he could not keep it. *Id.* at 642. Nevertheless, Lineham failed to report the error to the bank and took possession of the money by withdrawing it from his account and depositing it into accounts at other banks. *Id.* The bank later discovered its error and demanded Lineham return the money, which Lineham refused to do so. *Id.*

The State charged Lineham with Theft in the First Degree and he was convicted. *State v. Lineham*, 147 Wn.2d at 642-43. Lineham appealed, arguing that the common law offense of "theft by embezzlement" was one of the alternative

means of committing Theft and that the State had failed to present evidence of that crime to the jury. *Id.*

The Washington Supreme Court disagreed. *State v. Lineham*, 147 Wn.2d at 648. Although “theft by embezzlement” had essentially been codified as a type of theft under RCW 9A.56.010, the Court rejected Lineham’s claim that it had therefore created an alternative means of committing Theft. *Id.* at 647-48. Instead, the Court held that the definitions set forth in RCW 9A.56.010 were “mere terms” while the alternative means of committing theft were actually set forth in RCW 9A.56.020 (*i.e.*, theft by wrongfully obtaining another’s property and theft by exerting unauthorized control over another’s property). *Id.* at 648 (emphasis in original). The court went on that, because it serves solely as definitional term, “theft by embezzlement... is not an additional means of committing theft. Rather, it is one way to define the alternative means of theft by ‘wrongfully obtain[ing] or exert[ing] unauthorized control’ in RCW 9A.56.020(1)(a).” *Id.*

The Court went on to hold that the State could prove Lineham guilty of First Degree Theft by showing that he had exerted “unauthorized control” over the victim’s property by means of either “taking” it or by “embezzling” it (*i.e.*, gaining the property by color of deception in violation of an agreement or special trust). *State v. Lineham*, 147 Wn.2d at 654. Put another way, the alternative means of committing Theft—by wrongfully obtaining” another’s property or by “exerting unauthorized control” over it—could each be proved by meeting any of the various

definitions of Theft set forth in RCW 9A.56.010. *Id.* Thus, “theft by embezzlement” was merely one of several ways to either “wrongfully obtain” or to “exert unauthorized control” over the victim’s property. *Id.*

In this case, Adams employed deception to wrongfully obtain property from Phillips’ person. Alternatively, he employed deception to exert unauthorized control over property taken from Phillips’ person. In either case, his conduct makes him guilty of Theft in the First Degree.

Citing *State v. Mermis*, Adams argues that receiving property voluntarily released by the victim does not amount to a “taking” for purposes of RCW 9A.56.030(1)(b). Brief of Ap., p. 10-11. Adams, however, reads *Mermis* too broadly.

Mermis befriended the victim, Johnson. *State v. Mermis*, 105 Wn. App. 738, 20 P.3d 1044 (2001). He pretended to be wealthy and promised to pay Johnson \$55,000 for a car Johnson was selling. *Id.* at 741-42. On September 6, 1995, based upon Mermis’ deception, Johnson instructed his wife to give Mermis the keys to the car. *Id.* Mermis took possession of the car that day, but did not make payment. Later, on September 26, 1995, Mermis returned to Johnson’s home and—employing the same deception—convinced Johnson voluntarily to hand over the vehicle’s title so Mermis could transfer the car into his own name. *Id.* at 742. By early October, when Mermis still had not paid for the car, Johnson demanded its return. *Id.* On

September 18, 1998, when Mermis still had not returned the vehicle, the State filed a charge of Theft in the First Degree and Mermis was convicted. *Id.* at 742-43.

On appeal, Mermis claimed that the State had failed to file the charge against him within the three-year limitations period. *State v. Mermis*, 105 Wn. App. at 743. He argued that the State was required to file charges within three years of September 6, 1995, when he took possession of Johnson's car. *Id.* The Court of Appeals disagreed, holding that it was a question of fact for the jury whether there was a "continuing criminal impulse" spanning from September 6, 1995, when Mermis used deception to take possession of Johnson's car to September 26, 1995, when he employed the same deception to obtain the car's title. *Id.*

Adams argues there was no "taking" in *Mermis* because Johnson's wife voluntarily surrendered the keys to the vehicle. Brief of App., p. 12. This argument misreads the decision. The *Mermis* court held that the jury could find a "continuing criminal impulse" spanning from the date Johnson voluntarily surrendered the car to Mermis to the date Johnson voluntarily surrendered the car's title to him. *State v. Mermis*, 105 Wn. App. at 747. In other words, the voluntariness of the surrender, was irrelevant to the question of whether Mermis "took" Johnson's car. Indeed, so long as Mermis' deception constituted a "continuing criminal impulse," the State had met the requirements of the statute of limitations.

The argument that a taking involve some form of involuntariness is further negated by the case of *State v. Smith*, 115 Wn.2d 434, 798 P.2d 1146 (1990). In *Smith*, the defendant ordered computer software by mail. He pretended to be a college professor in order to qualify for a discount. *Id.* at 435-36. When he received the program, Smith copied it and returned the original to the manufacturer, claiming it would not work on his computer. *Id.* Police searched Smith's home and found the copied software, as well as copies of several other programs Smith had ordered and returned. *Id.* Smith was charged with Theft in the First Degree based upon the value of the software and was found guilty. On appeal, he argued his conviction must be reversed because the State failed to prove that his "taking" involved the common law element of "trespass." *Id.* at 441. The Supreme Court disagreed, stating: "Trespass is not required for statutory theft by taking. The Legislature may define crimes. Where it does so, its statutory definition may supersede common law." *Id.* (internal quotations and citations omitted).

The other cases cited by Adams also do not assist his claim. *State v. Nam*, 136 Wn. App. 698, 150 P.3d 617 (2007), *United States v. Jennings*, 515 F.3d 980 (9th Cir. 2008); *People v. Williams*, 9 Cal.App.4th 1465, 12 Cal. Rptr 2d 253 (1993); *People v. Pierce*, 226 Ill.2d 470, 877 N.E.2d 408 (2007); and *State v. Blow*, 132 N.J. Super. 487, 334 A.2d (1975), all stand for the proposition that a theft from the person as defined by statute requires a taking from the physical person of the victim. But there is no doubt in this case that the property was on Phillips' person

until Adams took possession of it, and thus these cases shed no light on the sufficiency of the State's evidence.

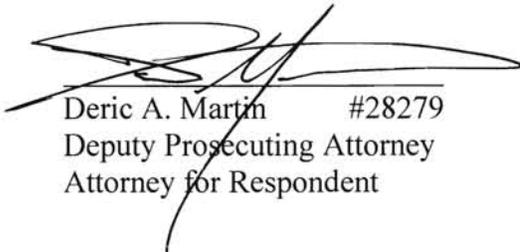
IV.

CONCLUSION

The trial judge correctly found the State had proven all the elements of Theft in the First Degree when it demonstrated that Adams intended to steal his victim's money and that he used deception to take that money from her person. This evidence is sufficient to prove either that Adams wrongfully obtained his victim's property from her person or that he exercised unauthorized control of it after taking it from her person. The fact that his victim surrendered the property voluntarily is irrelevant under the law. Adams' conviction should therefore be affirmed.

Dated this 11<sup>th</sup> day of February, 2013.

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FILED

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	Consol No. 30778-6-III
v.	)	
	)	CERTIFICATE OF MAILING
ORRY L. ADAMS,	)	
	)	
Appellant,	)	

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I certify under penalty of perjury under the laws of the State of Washington, that on February 4, 2013, I mailed a copy of the Respondent's Brief in this matter, addressed to:

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2/4/2013  
(Date)

Spokane, WA  
(Place)

*Susan M. Gasch*  
(Signature)