

**NO. 45613-3-II**

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

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STATE OF WASHINGTON,

Respondent,

v.

**ADAM P. THOMAS,**

Appellant.

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

The Honorable Daniel Stahnke, Judge

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**SUPPLEMENTAL BRIEF OF APPELLANT**

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A. SUPPLEMENTAL ASSIGNMENTS OF ERROR

1. The trial court erred in entering a judgment of guilty against Mr. Thomas because there was no evidence that Mr. Thomas took personal property from restaurateur Jorge Estrada.

2. Because a restaurant meal is a service and not personal property, its taking without payment and with threatened use of force fails to establish sufficient facts to support a robbery conviction.

B. SUPPLEMENTAL ISSUES

1. Whether Mr. Thomas's robbery conviction should be reversed for insufficient evidence when the state proved only that Mr. Thomas flashed a knife at a restaurateur while intentionally skipping out on paying for a service, to wit: a restaurant meal?

2. Whether robbery of a service can form the basis for a robbery conviction when robbery requires proof of taking personal property from the person or in the presence of another but a service is not property?

C. SUPPLEMENTAL FACTS

The state charged Adam Thomas with a single count of robbery in the first degree stating in part,

On or about August 18, 2013, with intent to commit theft, did unlawfully take personal property that the Defendant did not own from the person or in the presence of Jorge Estrada, against such person's will, by use or threatened use of immediate force, and in the commission of said crime or in immediate flight therefrom, the

Defendant was armed with a deadly weapon and/or displayed what appeared to be a ... deadly weapon, to-wit: a knife:...contrary to 9A.56.190.

CP 1.

At trial, the court instructed the jury on the elements of First

Degree Robbery:

- (1) That on or about August 18, 2013, the defendant unlawfully took personal property from the person or in the presence of another;
- (2) That the defendant intended to commit theft of the property;
- (3) That the taking was against the person's will by the defendant's use or threatened use of force, violence, or fear of injury to that person;
- (4) That force or fear was used by the defendant to obtain or retain possession of the property or to prevent or overcome resistance to the taking;
- (5)(a) That in the commission of the acts or in immediate flight therefrom the defendant was armed with a deadly weapon or
- (5)(b) That in the commission of these acts or in immediate flight therefrom the defendant displayed what appeared to be a deadly weapon; and
- (6) That any of these acts occurred in the state of Washington.

CP 45 (Instruction 17).

The court instructed the jury on the meaning of theft:

Theft means to wrongfully obtain or exert unauthorized control over the property or services of another, or the value thereof, with intent to deprive that person of such property or services.

CP 36 (Instruction 8).

And the court instructed the jury specifically, "Services includes, but is not limited to, restaurant services." CP 38 (Instruction 10).

D. ARGUMENT

This court ordered the parties provide supplemental briefing on two issues:<sup>1</sup>

(1) Does failing to pay for restaurant food constitute the taking of services or the taking of personal property? In this context, address RCW 9A.56.010(15), which defines “services” to include, but not be limited to, “labor, professional services, transportation services, electronic computer services, the supplying of hotel accommodations, restaurant services, entertainment, the supplying of equipment for use, and the supplying of commodities of a public utility nature such as gas, electricity, steam, and water.”

(2) Can robbery be based on the taking of services? In this context, address RCW 9A.56.190, which states that a “person commits robbery when he or she unlawfully takes personal property” and RCW 9A.56.020(1)(a), which defines “theft” as “[t]o wrongfully obtain or exert unauthorized control over the property or services of another or the value thereof.”

**1. Failure to pay for a meal and beverage at a restaurant constitutes the taking of a service and not the taking of property from, or in the presence of, another.**

Robbery is the unlawful taking of personal property from the person of another, or in her presence, against her will through the use or threatened use of force. RCW 9A.56.190. The state failed to prove that Mr. Thomas committed robbery because it could not prove that in “dining and dashing” from Jorge Estrada’s El Presidente restaurant, Mr. Thomas unlawfully took personal property. Instead, Mr. Thomas dashed without

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<sup>1</sup> See Order of September 18, 2015.

paying for his restaurant service. RCW 9A.56.010(15). Mr. Thomas's robbery conviction must be reversed and dismissed.

Although the first of the six required to-convict elements of robbery requires theft of *personal property*<sup>2</sup>, there is no definition of "personal property" in RCW 9A.56.<sup>3</sup> As applied to all of RCW 9A, unless a different meaning is plainly required, "property" means "anything of value, whether tangible or intangible, real or personal." RCW 9A.04.110; RCW 9A.04.110(22). RCW 9A.04.110 is a preliminary article. As such, it is meant to apply broadly to any crime under RCW 9A with a property nexus (e.g., burglary, malicious mischief, arson).

It is the second of the six required to-convict elements of robbery, "theft of property," that defines the contours of property applied specifically in the context of robbery. One could use force to take personal property from another, but it is not a robbery unless there is an intent to commit theft. RCW 9A.56 adopts a more specific meaning of property than that generically provided in RCW 9A.04.110. What emerges is a departure from the grab-all definition of property in RCW 9A.04.110(22). In RCW 9A.56, the definition of theft distinguishes "services" as something distinct from the broad concept of "property." Theft means,

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<sup>2</sup> CP 45

<sup>3</sup> The jury instructions did not define "personal property."

(a) To wrongfully obtain or exert unauthorized control over the **property or services** of another or the value thereof, with intent to deprive him or her of such property or services; or

(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; or

(c) To appropriate lost or misdelivered **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) (emphasis added in bold). And specifically, “services” include restaurant services. RCW 9A.56.010(15).

Robbery requires the theft of personal property. Restaurant services are not property. When the plain language of a statute is unambiguous, the plain meaning governs. *State v. McDaniel*, 185 Wn. App. 932, 936, 344 P.3d 1241, *review denied*, 183 Wn. 2d 1011 (2015).

Statutes are construed as a whole, giving effect to all the language used.

*Ralph v. State Dept. of Natural Resources*, 182 Wn. 2d 242, 343 P.3d 342 (2014).

Mr. Thomas is not guilty of robbery because he did not take personal property from the person or in the presence of Jorge Estrada.

In closing argument, the state asserted restaurant services and the value of the meal were interrelated but separate.

[I]t becomes quite clear that he was intending to steal not only the food but the services in preparing it. The time it took to take that raw material – those raw foods, cook it, prepare it and then serve it.



Everything that went along with it. The – using the actual restaurant, a portion of it to eat, using their silverware all of that, not just the food. He was stealing that but everything else that went in along with it.

RP 1B 233-34. The state may make this same argument in its supplemental brief. However, people go to a restaurant to partake of the service of a meal. The meal is the service. There is no restaurant service without the meal.

**2. Robbery cannot be based on the taking of services.**

"Services" includes, but is not limited to, labor, professional services, transportation services, electronic computer services, the supplying of hotel accommodations, *restaurant services*, entertainment, the supplying of equipment for use, and the supplying of commodities of a public utility nature such as gas, electricity, steam, and water[.]

RCW 9A.56.010(15). As argued above, RCW 9A.56 distinguishes "services" from "property." Taking "personal property" is an essential element of robbery. As services are not property, one cannot commit the robbery of services.

**E. CONCLUSION**

For the reasons stated above, Mr. Thomas's conviction for robbery in the first degree must be reversed and dismissed with prejudice.

Dated this 8<sup>th</sup> day of October 2015.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Lisa E. Tabbut', written over a horizontal line.

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LISA E. TABBUT, WSBA #21344  
Attorney for Adam Phillip Thomas

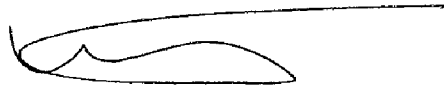
**CERTIFICATE OF SERVICE**

Lisa E. Tabbut declares as follows:

On today's date, I efiled Appellant's Supplemental Brief to: (1) Clark County Prosecutor's Office at prosecutor@clark.wa.gov; (2) the Court of Appeals, Division II; and (3) I mailed it to Adam Phillip Thomas, DOC# 313527, Coyote Ridge Corrections Center, PO Box 769, Connell, WA 99326.

I CERTIFY UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT.

Signed October 8, 2015, in Ashland, Oregon.



Lisa E. Tabbut, WSBA No. 21344  
Attorney for Adam P. Thomas

## COWLITZ COUNTY ASSIGNED COUNSEL

**October 08, 2015 - 4:17 PM**

### Transmittal Letter

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Case Name: State v. Adam Thomas

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Statement of Arrangements

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Answer/Reply to Motion: \_\_\_\_\_

Brief: Supplemental Appellant's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: \_\_\_\_\_

Hearing Date(s): \_\_\_\_\_

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

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### Comments:

No Comments were entered.

Sender Name: Lisa E Tabbut - Email: [ltabbutlaw@gmail.com](mailto:ltabbutlaw@gmail.com)

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