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No. 66174-4-1

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

STATE OF WASHINGTON,

Respondent,

v.

HUONG VAN,

Appellant.

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

The Honorable Teresa Doyle

APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

In Washington, a prosecution for first degree theft by taking from the person of another, under RCW 9A.56.030(1)(b), requires specific proof that the defendant took “something on the person’s body or directly attached to someone’s physical body or clothing.” State v. Nam, 136 Wn. App. 698, 705, 150 P.3d 617 (2007); see also United States v. Jennings, 515 F.3d 980, 989 (9th Cir. 2008). Washington distinguishes between theft by taking and theft by deception, which is defined as “[b]y color or aid of deception to obtain control over the property or services of another or the value thereof, with intent to deprive him of such property or services . . .” RCW 9A.56.020(1)(b).

This case involves the theft of pizzas from a delivery driver by several teenagers, including appellant Huong Van. Van admitted stealing the pizzas, explaining that he and his friends tricked the driver into handing over the pizzas. Although the complainant in this case alleged that the young men grabbed the pizzas from his hands and then used or threatened the use of force to rob him, the jury rejected the bulk of his testimony and acquitted Van of the most serious charges against him.

The jury was not instructed that a theft “from the person” of another strictly requires proof that the taking literally was from the person’s body. Construed in the light most favorable to the State, the evidence does not support the conclusion that the taking was from the driver’s person, and the jury could have convicted Van based on a loose construction of the offense. Van’s conviction for theft in the first degree must therefore be reversed and this matter remanded for reinstatement of his conviction for theft in the third degree.

1. BY ACQUITTING VAN OF THE MOST SERIOUS CHARGES AGAINST HIM, THE JURY REJECTED THE COMPLAINANT’S TESTIMONY.

The State claims that the evidence was sufficient to convict Van of theft in the first degree (theft by taking from the person of another), based on Van’s theft of pizzas from a Domino’s delivery driver, Hieu Phan. But the State omits mention of the critical fact that the jury acquitted Van of robbery in the first degree and of the lesser included offense of robbery in the second degree. CP 47-48. The jurors thus signaled that they disbelieved Phan’s testimony that Van and his friends used force or the threat of force to deprive him of property.

Although the State references this fact in its very brief summation of the “procedural facts”, Br. Resp. at 1-2, it is not discussed again in the State’s analysis. But, given the fact that the jury instructions could have permitted the jurors to convict Van of first degree theft under his version of the facts, it is absolutely salient to this Court’s evaluation of Van’s sufficiency challenge.

2. THE VIDEO EVIDENCE CONTRADICTS PHAN’S CLAIM THAT THE PIZZAS WERE GRABBED FROM HIM.

The State also attempts to minimize the video evidence that was admitted at trial. The State instead harps on the fact that Phan said repeatedly that the pizzas were grabbed from his hands. Br. Resp. at 11-12. The video contradicts Phan’s testimony that the pizzas were grabbed, and instead shows Phan handing the pizzas one by one to Van. Ex 2.¹

A sufficiency of the evidence challenge requires the Court to draw reasonable inferences in the State’s favor. State v. Salinas, 119 Wn.2d 192, 829 P.2d 1068 (1992). The video evidence is fairly unequivocal: although it does not show the entirety of the exchange

¹ The State claims that the video is not clear, but this is a determination that this Court can make itself, as the video has been designated for purposes of appeal and thus is available for this Court’s review. The pertinent exchange appears in the third video ‘frame’ (second segment), entitled MLK 110709 10:37 pm 002 (duration 30 seconds).

between Van and Phan, it does show Phan handing over the pizzas one by one. It does not show anyone grabbing the pizzas.

Subsequently, the video shows the door closing on Phan as the boys run away, in opposition to Phan's testimony and consistent with the testimony of Van and his witnesses.

The inference that the State asks this Court to draw – that the video evidence should be ignored in favor of Phan's repeated claims that the pizzas were grabbed – is not a reasonable inference from the evidence. This is particularly so given that the jury otherwise did not find Phan to be a credible witness, because they rejected his allegations of a robbery. In reviewing the video evidence, this Court would not be weighing the evidence, but rather determining whether the inference the State urges the Court to draw is reasonable. It is not. This Court should conclude that even in the light most favorable to the State, the evidence does not establish Van grabbed the pizzas from Phan.

3. BECAUSE THE JURY WAS NOT INSTRUCTED ON THE STRICT PROOF REQUIRED FOR A CONVICTION OF FIRST DEGREE THEFT FROM THE PERSON OF ANOTHER, IT IS POSSIBLE THAT THE JURY BASED ITS VERDICT ON VAN'S DECEPTION.

Finally, while the State concedes a theft by taking from the person of another requires a physical taking of property from another person's body, the State ducks the issue of whether the jury mistakenly could have convicted Van if they believed Phan was tricked into handing property to him. Indeed, the State asks this Court to conclude that trickery may constitute theft in the first degree. See Br. Resp. at 14 ("None of the cases cited by Van hold that using some deception to assist in taking property directly from a person of another can only be theft by deception.") The State also claims that Van "has cited no authority to suggest that theft by taking from a person, and theft by deception, are mutually exclusive." Id. The State evidently failed to carefully read either Van's brief or the pertinent statutes.

At pages 5-7 of his opening brief, Van discusses the alternative means created by RCW 9A.56.020, and the definitions relevant to a theft "by color or aid of deception." At pages 7-12, Van analyzes theft by taking and discusses the evolution of grand

larceny at common law nationwide. As noted, the Ninth Circuit in Jennings held a Washington conviction for theft in the first degree could constitute a violent felony under the Armed Career Criminals Act because “theft from the person of another under Washington law means theft of ‘something on or attached to a person's body or clothing’”, which creates a “serious potential risk of physical injury to another.” 515 F.3d at 989-90 (quoting Nam). In short, it is the State that has failed to rebut Van’s arguments with any legal authority or persuasive analysis.

Finally, the State contends, “even assuming Van’s account of the incident were true, receiving property from a person and refusing to pay for it is not deceptive, it is merely taking.” Br. Resp. at 14. The State conveniently neglects to mention that Phan handed over the pizza only because Van and his friends told him they wanted to check the accuracy of the order (i.e., they tricked him). See 4RP 161-62, 5RP 19, 49. But, while this semantic and factual debate is interesting, it ultimately is a digression, since the jury actually convicted Van of theft in the third degree – a charge which Van all along has conceded was proven. CP 49.

This Court should conclude (a) the evidence does not reasonably support the inference that Van and his friends physically

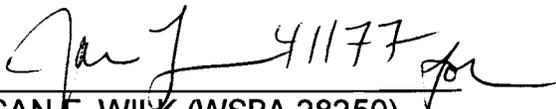
wrested property from Phan, but rather that they committed theft by deception; and (b) the jury's rejection of Phan's testimony regarding the use of force, and the fact that the jury was not directed to limit its consideration to a physical taking from a person's body, suggest the jury could have convicted Van of theft in the first degree even if they believed he committed only a theft by deception. Van's conviction should be reversed and the matter remanded for reinstatement of his conviction for theft in the third degree.

B. CONCLUSION

For the foregoing reasons, and for the reasons argued in Van's opening brief, this Court should conclude that the State failed to prove theft in the first degree, and instead proved only theft by deception. Van's conviction should be reversed and this matter remanded for reinstatement of his conviction for theft in the third degree.

DATED this 2/5 day of November, 2011.

Respectfully submitted:


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DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
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HUONG VAN,)	
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Appellant.)	

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