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SUPREME COURT  
STATE OF WASHINGTON

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**SUPREME COURT OF THE  
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

JOSEPHINE KATHLEEN SPARLING, APPELLANT

Appeal from the Superior Court of Pierce County  
The Honorable Sergio Armijo

No. 05-1-04714-5

**BRIEF OF RESPONDENT**

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did defendant's act of driving her vehicle directly at the pedestrian who was trying to prevent her from stealing gasoline constitute first degree robbery when defendant displayed what appeared to be a deadly weapon, her vehicle, and thereby created fear in injury?

2. Was there sufficient evidence to support a conviction for first degree robbery under the "displays" alternative where defendant (1) left the gas station without paying for the gas she pumped into her vehicle; and (2) then drove her vehicle at a pedestrian, attempting to hit him, in order to overcome his resistance to her theft of the gas?

B. STATEMENT OF THE CASE.

1. Procedure

On September 26, 2005, the State charged JOSEPHINE KATHLEEN SPARLING, defendant, with first degree robbery (count I), attempting to elude a pursuing police vehicle (count II), unlawful possession of a controlled substance – methamphetamine (count III), and forgery (count IV). CP 1-4. On the first day of trial, May 22, 2006, the State filed an amended information which changed the name of the drug

charged in count III from methamphetamine to cocaine. CP 6-8. This was the only amendment to the original information. Id.

Defendant waived her right to a jury trial and a bench trial ensued. CP 5, RP 6-7. The court found defendant guilty as charged in the amended information. CP 37, RP 209.

Based on six prior felony convictions, the trial court determined that defendant had an offender score of 9. CP 12. The court sentenced her to the low end of the standard range: 129 months on count I, 22 months on counts II and III, and 12+ months on count IV. CP 12; 15.

This timely appeal follows.

## 2. Facts

On September 24, 2005, defendant pumped gas into her car at the Safeway gas pumps in Bonney Lake. RP 105-07. Defendant entered the kiosk at the fuel station and attempted to pay for the gas, approximately twenty dollars' worth, with a check drawn on the account of Nathan Bindara. RP 51, 106-07. The clerk asked defendant for identification and defendant said she did not have any. RP 107. Unable to verify the check, the clerk called the manager. RP 108. The clerk told defendant that the manager would be down and to please wait until he arrived. RP 108-09. When asked her name, defendant stated her name was "Nathan". RP 108. Defendant went to her car, got in it and drove away from the kiosk heading in the direction of the Safeway store. RP 109, 112.

The Safeway manager, Troy Williams, was heading out to the gas pumps pursuant to the clerk's call; he saw defendant walking to her car. RP 78. Williams recognized defendant from seeing her on the security monitor he was viewing inside Safeway when the clerk first called him about the problem with defendant's check. RP 74-76. As defendant drove away from the gas pumps, she headed towards Williams at a normal speed. RP 78-80. Williams knew that defendant saw him because he observed a startled expression on her face. RP 78. Williams was wearing dress slacks, a shirt and tie, and a name badge. RP 78-79. Williams was in the middle of the lane of travel and raised his hand trying to get defendant to stop. RP 79; CP 36. At that point, defendant increased her speed and swerved to her right, directly at Williams, attempting to hit him. RP 80-81; CP 36. Williams had to jump to avoid being struck. RP 81, CP 36. The right front bumper of defendant's vehicle brushed Williams' leg, causing him to spin, but not injuring him. RP 81; CP 36.

Defendant then sped out of the parking lot and nearly collided with a marked Bonney Lake Police car. RP 81. The police officer slammed on his brakes to avoid a collision. RP 127. He attempted to pull defendant over by activating his lights and siren, but defendant did not stop. RP 127. She cut through another gas station parking lot and drove eastbound on Highway 410, going 60-70 MPH in a 45 MPH zone. RP 128. There was traffic in both the oncoming lane and in defendant's lane of travel. RP 129. At times, defendant drove in the oncoming lane. RP 128.

Defendant's back car window was broken out so there was no barrier between defendant and the sound of the sirens. RP 128. Several other police units joined the chase. RP 35-36. Defendant turned on 234<sup>th</sup> and drove 60 -70 MPH in a 35 MPH zone, again driving in the oncoming lane to pass other cars. RP 130. At a "T" intersection, defendant ran the stop sign, ignoring commands over the officer's public address system to stop. RP 131. Eventually, defendant turned into a cul-de-sac and her exit was blocked by police cars. RP 22, 132. She was taken into custody without incident. RP 132, 23.

During a search incident to arrest, officers located a glass smoking pipe and straw, a scale, a baggie with white powder substance, and checks which were not issued to defendant. RP 47-8, 134-39.

Defendant was advised of her *Miranda*<sup>1</sup> rights, which she understood and waived. RP 40-44; 140. Defendant had a far away blank stare and may have been on drugs. RP 38; 42. She admitted to using methamphetamine the night before. RP 142. When asked about the check she tried to pass at Safeway, defendant stated that she did not know whose check it was, but knew that it had the name of "Nathan something" on it. RP 141. Defendant said she may have blacked out after she left Safeway. RP 142. When asked other questions about her driving and the drugs found in the car, defendant did not answer, merely staring at the officer.

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<sup>1</sup> Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1966).

RP 142-43. At the time, defendant had several outstanding warrants for her arrest. RP 45-46.

The white powdery substance found in defendant's car was tested at the Washington State Patrol crime lab and was found to be cocaine. RP 151.

Defendant did not testify at trial. RP 161.

The trial court found defendant guilty as charged. CP 33-38.

C. ARGUMENT.

1. DEFENDANT'S ACT OF DRIVING HER VEHICLE DIRECTLY AT THE PEDESTRIAN WHO WAS TRYING TO PREVENT HER FROM STEALING GASOLINE CONSTITUTES FIRST DEGREE ROBBERY BECAUSE SHE DISPLAYED WHAT APPEARED TO BE A DEADLY WEAPON, HER VEHICLE, THUS CREATING FEAR OF INJURY.

First degree robbery is set forth in RCW 9A.56.200:

- (1) A person is guilty of robbery in the first degree if:
  - (a) In the commission of a robbery or of immediate flight therefrom, he or she:
    - (i) Is armed with a deadly weapon; or
    - (ii) Displays what appears to be a firearm or other deadly weapon; or
    - (iii) Inflicts bodily injury; or

...

"Deadly weapon" is defined as:

[A]ny explosive or loaded or unleaded firearm, and shall include any other weapon, device, instrument article, or substance, including a **“vehicle”** as defined in this section, which, **under the circumstances in which it is used**, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily harm[.]

RCW 9A.04.110(6) [emphasis added]. “Vehicle” is defined primarily as a “motor vehicle”. RCW 9A.04.110(27). Therefore, a motor vehicle, such as defendant’s Honda, could qualify as a deadly weapon under the first degree robbery statute. However, the vehicle does not become a deadly weapon until such time as defendant uses it, or attempts to use it, in a manner which could readily cause death or substantial bodily harm. RCW 9A.04.110(27). For example, a parked car is not a deadly weapon. However, if a car is mobile, it is up to the trier of fact to decide if the manner in which it is driven brings it into the scope of the definition of a deadly weapon. In this case, defendant swerved her car toward Williams, the Safeway manager, attempting to hit him in order to prevent or overcome his resistance to the taking. She was using her vehicle in a manner that, under the circumstances, was capable of readily causing death or substantial bodily harm. The court had ample evidence upon which to base its finding that defendant was using her car as a deadly weapon.

Defendant seems to argue that the two alternative means of committing robbery under subsections (i) and (ii) are mutually exclusive.

Defendant cites no authority supporting this claim that the weapon must be fake to satisfy the requirement of the “displays” alternative.

Under defendant’s analysis, (1) defendant would either have to be considered armed the minute she drives up in the car, or (2) a defendant could never be said to use a motor vehicle as a deadly weapon. The first option does not meet the definition of a vehicle as a deadly weapon, because it is not a deadly weapon until it is used in a manner where it is readily capable of causing death or substantial bodily injury. RCW 9A.04.110(6). The second option is contrary to statute and case law. A vehicle *can* be a deadly weapon if used as set forth in the statute. There is nothing that prohibits the application of the definition of deadly weapon to the first degree robbery statute. Defendant argues that if this Court affirms defendant’s conviction, it will elevate every robbery to first degree robbery where a vehicle is used to transport the perpetrator to and from the scene. BOA at 19-20. This is incorrect because if the vehicle is merely being used as transportation, it does not meet the definition of deadly weapon. But where, as here, the perpetrator drives the vehicle *toward* a pedestrian who is resisting the taking of the admittedly stolen property, at that point, and not until that point, does it become a deadly weapon. To suggest, as defendant does, that the use of deadly force in this situation merely amounts to third degree theft is totally inconsistent with the first degree robbery statute.

Defendant also argues that in order to “display” a weapon or what appears to be a weapon, it must have been concealed to begin with. This also assumes a conclusion not supported by authority.

“Displays” is not defined by statute. The dictionary definition is: “to spread or stretch out or wide: unfold . . . *exhibit to the sight or mind*: . . . manifest, disclose . . .” State v. Henderson, 34 Wn.App. 865, 867, 664 P.2d 1291 (1983) (*quoting Webster’s Third New International Dictionary* 654 (1976)). A perpetrator’s words alone are insufficient; some physical manifestation is also required. State v. Scherz, 107 Wn. App. 427, 27 P.3d 252 (2001) (threat of hand grenade insufficient where no witness saw physical manifestation of the threat)). Threats alone are insufficient to elevate the offense to first degree robbery because a threat alone constitutes second degree robbery. RCW 9A.56.190, .210(1). The Legislature did not provide a threat as a basis for first degree robbery, “instead choosing to require the act of display.” In re Bratz, 101 Wn. App. 662, 5 P.3d 759 (2000).

The cases relied on by defendant analyze the meaning of what constitutes “displays” as opposed to an analysis comparing the alternative means of committing first degree robbery. Defendant bridges significant gaps in his analysis with unfounded, unsupported assumptions. The first is that an actual deadly weapon that otherwise meets the requirements for displays can only be charged under the armed alternative because the two

are mutually exclusive. The second is that to satisfy the requirement of displays, the weapon or what appears to be a weapon, must have first been concealed. Under defendant's theory, the car cannot be displayed because it was visible all along. However with a vehicle, it does not become a weapon until such time as it is used in the proscribed manner.

In fact, a perpetrator who enters a business with a real gun plainly visible in his hand from the minute he enters the store and robs the clerk could be guilty under both alternatives "armed" and "displays". The perpetrator is "armed" if the State can produce evidence that firearm was real. State v. Mathe, 35 Wn. App. 572, 574-75, 668 P.2d 599 (1983) (guns used to charge first degree robbery not recovered, but victims described them in detail). The perpetrator has also "displayed" what appears to be a firearm. The fact that it is a real gun does not mean he did not display it to the victim. The ordinary meaning of display is show or exhibit. See State v. Kennard, 101 Wn. App. 533, 537, 6 P.3d 38 (2000).

Defendant assigned error to "Conclusion of Law III that the defendant used or threatened to use force to retain the stolen gasoline or to overcome resistance to the taking." BOA at 1. However, he does not assign error to the remaining portion: "[A]nd while in flight from the Safeway store, the **defendant attempted to hit Mr. Williams** with her vehicle, which under the circumstances in which it was being used constituted a deadly weapon." CP 37 [emphasis added]. Defendant does not assign error to any of the Findings of Fact. Unchallenged findings of

fact are verities on appeal. State v. Broadway, 133 Wn.2d 118, 131, 133, 942 P.2d 363 (1997); *see* RAP 10.3(g). In the instant case, the trial court found:

Mr. Williams had been inside the Safeway store when he was notified by an employee at the gas station kiosk that an unidentified female (later identified as the defendant) had just driven away after fueling her vehicle without paying for the gas. Mr. Williams then walked out of the main store into the parking lot in an attempt to identify and stop the vehicle. While Mr. Williams was standing in the south exit of a parking stall, he saw the defendant's vehicle. Mr. Williams walked down the center of the lane between the parking stalls and **approached the defendant's vehicle from the front** while putting both of his hands up in the air to advise the defendant's approaching vehicle to stop. Upon seeing Mr. Williams, the defendant accelerated her vehicle and **attempted to drive right at him, forcing Mr. Williams to jump out of the way of the vehicle**. Mr. Williams was lightly swiped on the right leg by the defendant's vehicle front right bumper as it passed by him. **If Mr. Williams had not jumped out of the way he would have been hit and probably severely injured.**

CP 36 [emphasis added].

Defendant's argument and legal conclusions on appeal do not seem to take into consideration that Williams was in front of the car as defendant accelerated toward him. RP 78; CP 36. Nor does she acknowledge that defendant attempted to hit Williams with her vehicle. CP 37. The issues in this case turn on these crucial facts.

Defendant's action of swerving toward Williams was a menacing physical act with a deadly weapon, her vehicle. This use of force with a deadly weapon and the resulting fear of injury was used against Williams

to prevent or overcome his resistance to the taking of the gasoline. This constitutes first degree robbery.

Contrary to defendant's assertion, there is no danger that affirming the defendant's conviction will lead to a robbery being elevated to first degree robbery merely if the victim *sees* the vehicle that the perpetrator arrived with and used to depart the scene. *See* BOA at 20. What elevates defendant's crime to first degree robbery here, is not that she drove a vehicle to and from the scene, but that she *used* it as a deadly weapon to overcome resistance to the taking. This is a critical difference between defendant's argument and the actual facts of this case as applied to the first degree robbery statute.

2. THERE WAS SUFFICIENT EVIDENCE TO SUPPORT A CONVICTION FOR FIRST DEGREE ROBBERY UNDER THE "DISPLAYS" ALTERNATIVE WHERE DEFENDANT (1) LEFT THE GAS STATION WITHOUT PAYING FOR THE GAS SHE PUMPED INTO HER VEHICLE; AND (2) SHE THEN DROVE HER VEHICLE AT THE STORE MANGER ATTEMPTING TO HIT HIM IN ORDER TO OVERCOME HIS RESISTANCE TO HER THEFT OF GAS.

The applicable standard of review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Joy, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). Also, a challenge to the sufficiency of the evidence admits the truth of the

State's evidence and any reasonable inferences from it. State v. Barrington, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), *review denied*, 111 Wn.2d 1033 (1988)(*citing State v. Holbrook*, 66 Wn.2d 278, 401 P.2d 971 (1965)); State v. Turner, 29 Wn. App. 282, 290, 627 P.2d 1323 (1981). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial and direct evidence are considered equally reliable. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

To prove the charge of first degree robbery, the State must prove:

- (1) That 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 immediate force, violence, or fear of injury to that person;
- (4) That force or fear was used by the defendant to prevent or overcome resistance to the taking; and
- (5) That in the commission of these acts or in the immediate flight therefrom, the defendant displayed what appeared to be a firearm or other deadly weapon.

RCW 9A.56.190, .200(1)(a)(ii); WPIC 37.02. In the instant case, defendant took gasoline from Safeway in the presence of the clerk and store manager, Williams. RP 76-78; 107; CP 36.

Defendant does not dispute that she intended to commit theft and that she did commit theft. BOA at 22.

Clearly the taking was against the will of both the clerk and manager Williams. The clerk requested that defendant remain in the kiosk. RP 109. Williams, who was in front of defendant's vehicle, raised his hand telling her to stop. RP 80. When defendant attempted to hit Williams with her car, Williams was placed in fear of injury. He jumped out of the way and ceased his efforts to stop her. RP 80-81.

Defendant used the force of her accelerating vehicle driven toward Williams to overcome his resistance to her theft of the gasoline and to prevent him from stopping her from leaving with the stolen gasoline.

While she was in the process of stealing the gasoline, defendant displayed a deadly weapon, her vehicle, by showing Williams that she was going to run over him with it if he did not allow the theft of the gasoline.

Defendant argues that "the State did not prove beyond a reasonable doubt that [defendant] fled and used force to retain the gasoline." BOA at 24. This statement ignores the fact the defendant fled in her vehicle, which she then used to attempt to strike the manager. Defendant argues that she fled for other reasons, one being that there was contraband in her vehicle. This argument fails to evaluate the evidence in the light most

favorable to the State, as required. See State v. Joy and State v. Salinas, *supra*. Further, the trial court found that “defendant both threatened and used force, violence and injury in order to retain the stolen gas and to overcome [Williams’] efforts at resisting her taking of the gas.” CP 37. Although labeled as a Conclusion of Law, this is actually a factual finding. Appellate review of the trial court’s findings of fact is limited to whether there exists substantial evidence in the record to support the finding. State v. Alvarez, 105 Wn. App. 215, 220, 19 P.3d 485 (2001). There is substantial evidence in the record to support this finding. At trial, the State presented testimony that defendant left the kiosk without paying for the gasoline after being asked to remain. RP 107-108. She saw Williams in front of her vehicle with his hand raised in an attempt to stop her. RP 78-80. She accelerated toward him and as he jumped out of the way, she swerved toward him, grazing his leg with the front bumper of her car. RP 80-81. This evidence more than supports the trial court’s finding on this issue.

Contrary to defendant’s implication, defendant did not merely get in her vehicle and drive off. She used the vehicle to as a weapon. She knew the manager was trying to stop her which was why she veered toward him. She had been traveling a normal rate of speed for a parking lot until the manager tried to stop her, at which time she sped up.

Defendant knew the manager was on his way to the kiosk because the clerk told her so. When viewed in the light most favorable to the State, there is overwhelming evidence satisfying the elements of first degree robbery.

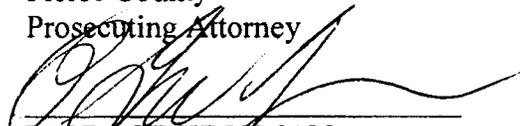
Under the facts of this case, defendant has failed to show that no reasonable trier of fact could find that defendant displayed her vehicle as a deadly weapon as she drove at Williams, attempting to hit him.

D. CONCLUSION.

For the foregoing reasons, the State respectfully requests that this Court affirm defendant's convictions and sentence.

DATED: February 20, 2007.

GERALD A. HORNE  
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Prosecuting Attorney



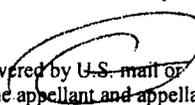
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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

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