

Court of Appeals No. 42832-6-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON

Plaintiff/Respondent,

v.

OTHNIEL BLANCAFLOR,

Defendant/Appellant.

BRIEF OF APPELLANT

Appeal from the Superior Court of Pierce County,
Cause No. 10-1-02164-9
The Honorable Stephanie Arend, Presiding Judge

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I. ASSIGNMENT OF ERROR

The State presented insufficient evidence to convict Mr. Blancaflor of theft.

II. ISSUE PRESENTED

Did the State present sufficient evidence to convict Mr. Blancaflor of theft where the evidence introduced at trial did not establish that Mr. Blancaflor intended to deprive Mr. Huff and Ms. Viray of their wages?

III. STATEMENT OF THE CASE

A. Factual Background

In 2005, Mr. Othniel Blancaflor married Cynthia Blancaflor and they purchased an adult care facility named My Grandma's House (MGH). RP 745. When the Blancaflors took over operation of MGH, they continued the previous owner's method of accounting, including using the same accounting firm, Sutton McCann. RP 747. In 2005, 2006, and 2007, the Blancaflors paid all employees with checks and gave them W2 forms at the end of each year. RP 748.

In 2006, the financial health of MGH began to decline due to patients dying and moving, in addition to MGH having many caregivers on staff. RP 749. During 2007, there were times when MGH had difficulty making payroll so Mr. Blancaflor sold his personal assets to pay the employees until his personal assets ran out. RP 380, 760. Eventually, the Blancaflors caught up with all payroll owed in 2007. RP 380. By the

end of 2007, MGH could no longer afford to pay Sutton McCann to do the accounting. RP 750.

Eddie Hoff worked as a caregiver at MGH from 2007 through April of 2008. RP 758-759. Prior to January 2008, Mr. Blancaflor reported to the Washington State Department of Labor and Industries (L&I) that Mr. Hoff was an employee of MGH. RP 758-759. On paydays, Mr. Hoff would receive \$677.50 by check and an additional \$59 in cash. RP 373-374. Mr. Blancaflor paid Mr. Hoff the \$59 in cash so it would appear that Mr. Hoff was only receiving minimum wage and could keep his medical benefits. RP 374, 418-419.

Elvira Viray worked at MGH from July 2005 until May of 2008. PR 760. The Blancaflors also reported Ms. Viray as an employee to L&I until January of 2008. RP 760. In 2007, the Blancaflors paid Ms. Viray “under the table” \$80 per day to work on her days off. RP 499-500.

In 2008, Mr. Blancaflor paid Mr. Hoff and Ms. Viray on the 10th and 25th day of each month. RP 498, 779. In 2008, Mr. Hoff’s wage dropped from \$677.50 per pay period to \$650 per pay period. RP 379. Sometimes Mr. Blancaflor was unable to pay Mr. Hoff and Ms. Viray the full amount he owed them, but Mr. Blancaflor always paid them something. RP 779-780. Mr. Blancaflor also kept a running balance of

how much each employee had been paid and the amount that was still owed. RP 780-784.

Sutton McCann stopped performing accounting services for MGH, including payroll, at the end of the 3rd quarter in 2007. RP 597. Sutton McCann stopped working for MGH because Mr. Blancaflor called Sutton McCann and told them that MGH was going through difficult times and because MGH stopped paying Sutton McCann. RP 597, 599-600, 750.

In 2008, Mr. Blancaflor paid his employees in cash rather than by check in part because Sutton McCann was no longer performing payroll services and in part because he didn't want the paychecks to bounce. RP 762.

In 2008, Mr. Hoff was shorted pay. RP 390. Two or three of Mr. Hoff's 2008 paychecks bounced and he had to pay fees to the bank. RP 391. Mr. Hoff told Ms. Blancaflor about the bounced checks and she paid him in cash. RP 391. Mr. Hoff quit working for the Blancaflors on May 30, 2008. RP 392. Mr. Hoff quit because the Blancaflors could no longer afford to pay him. RP 392. At the time he quit, he was still owed around \$1,900. RP 392.

Ms. Viray stopped working for the Blancaflors on May 5, 2008. RP 508. Ms. Viray had not been paid for the period between April 25,

2008 and May 5, 2008. RP 509. At the time she stopped working for the Blancaflors, Ms. Viray was owed \$1,800 in back wages. RP 509.

In May of 2008, Mr. Hoff and Ms. Viray filed complaints with L&I against MGH for unpaid wages. RP 281-289, 393. Ms. Viray filed the claim only after Ms. Blancaflor called Ms. Viray and told Ms. Viray that Ms. Viray was not going to get any money. RP 510.

L&I determined that the Blancaflors still owed Mr. Hoff \$3,820.80 and owed Ms. Viray \$2,669.23. RP 294. On June 8, 2009, the Blancaflors, Mr. Hoff, and Ms. Viray all entered into a payment plan agreement under which the Blancaflors agreed to pay Mr. Hoff \$2,300 and agreed to pay Ms. Viray \$1,800. RP 298-302, 304-307. Mr. Hoff received one payment under the plan and Ms. Viray received one check that bounced. RP 302-303, 526.

Mr. Blancaflor attempted to sell a piece of property he owned in order to get the money to pay Mr. Hoff and Ms. Viray their back wages, but was unable to complete the sale because the person he had purchased MGH from had put a lien on the property Mr. Blancaflor was trying to sell. RP 791-792.

MGH went out of business in 2009. RP 784.

B. Procedural Background

On May 19, 2010, Mr. Blancaflor was charged with three counts of failing to report or secure payment of compensation of employees in violation of RCW 51.48.020(1)(b). CP 1-4. Mr. Blancaflor was also charged with one count of theft in the first degree in violation of RCW 9A.56.010(18)(c), RCW 9A.56.020(1)(a), and RCW 9A.56.030(1)(a). CP 1-4. The theft charge was based on an allegation that, on or between the first day of January, 2007, and the thirtieth day of May, 2008, Mr. Blancaflor wrongfully obtained or exerted unauthorized control over the property (other than a firearm) or services of Mr. Hoff and Ms. Viray with intent to deprive Mr. Hoff and Ms. Viray of such property and services. CP 1-4.

On September 12, 2011, the charges against Mr. Blancaflor were amended to change the ending of the period of the alleged theft from the thirtieth day of May, 2008, to the thirtieth day of July, 2008. CP 61-64; RP 3-4.

Mr. Blancaflor's trial began on September 13, 2011. RP 75.

On September 22, 2011, the jury returned verdicts of guilty on all counts. CP 200-203; RP 1006.

Notice of Appeal was filed on October 28, 2008. CP 210.

IV. ARGUMENT

The State produced insufficient evidence to convict Mr. Blancaflor of theft where the evidence introduced at trial did not establish that Mr. Blancaflor ever intended to deprive Mr. Hoff or Ms. Viray of their wages.

Mr. Blancaflor was charged with one count of theft in the first degree in violation of RCW 9A.56.010(18)(c), RCW 9A.56.020(1)(a), and RCW 9A.56.030(1)(a). CP 1-4.

In 2007, RCW 9A.56.020(1)(a) defined the crime of theft to mean “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.”

As enacted in 2007, RCW 9A.56.010(18)(c) provided, in pertinent part:

whenever any series of transactions which constitute theft, would, when considered separately, constitute theft in the third degree because of value, and said series of transactions are a part of a criminal episode or a common scheme or plan, then the transactions may be aggregated in one count and the sum of the value of all said transactions shall be the value considered in determining the degree of theft involved.

Under the 2007 version of RCW 9A.56.030(1)(a), “[a] person is guilty of theft in the first degree if he or she commits theft of...[p]roperty or services which exceed(s) one thousand five hundred dollars in value other than a firearm.”

1. *Standard of review.*

This Court reviews challenges to sufficiency of evidence by determining whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could find the essential elements of the charged crimes beyond a reasonable doubt. *State v. Zakel*, 61 Wn. App. 805, 811, 812 P.2d 512 (1991), *affirmed*, 119 Wn.2d 563, 834 P.2d 1046 (1992), citing *State v. Rempel*, 114 Wn.2d 77, 82, 785 P.2d 1134 (1990). “A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

2. *Even viewed in the light most favorable to the State, the evidence introduced at trial did not support the inference that Mr. Blancaflor did not intend to pay Mr. Hoff or Ms. Viray for the work they had done at MGH.*

The State’s theory at trial was that Mr. Blancaflor had committed first degree theft by obtaining the services of Mr. Hoff and Ms. Viray with the intent to not pay them for those services. However, the evidence introduced at trial clearly established that Mr. Blancaflor fully intended to pay Mr. Hoff and Ms. Viray for the work they had done while employed at MGH and made every effort to do so.

It was not disputed that, although the Blancaflors fell behind on payroll during 2007, the Blancaflors had caught up with payroll and were

current by the end of 2007. RP 380, 760. It was also undisputed that Mr. Blancaflor raised the money to pay the employees of MGH by selling his personal property. RP 760.

In 2008, MGH was not performing well so Mr. Hoff's wage was lowered, the employees were paid in cash, and the Blancaflors were unable to pay Mr. Hoff and Ms. Viray the full amount owed to them for each pay period. RP 379, 762, 779-780. However, it was undisputed that the Blancaflors kept records of the amount of back wages still owed to Mr. Hoff and Ms. Viray and that Mr. Blancaflor attempted to sell off his last remaining parcel of real estate to pay those wages, but was unable to sell the property due to a lien. RP 779-784. Further, it was also undisputed that the Blancaflors entered an agreement with L&I to pay Mr. Hoff and Ms. Viray the back wages owed to them and that the Blancaflors made one payment pursuant to this agreement but that the Blancaflors had insufficient funds in their bank account to cover the check to Ms. Viray. RP 302-303, 526.

The evidence introduced at trial clearly indicates that Mr. Blancaflor made every effort to meet his obligations to pay Mr. Hoff and Ms. Viray what he owed them, even going so far as to sell his personal property to do so. The fact that he was ultimately unable to pay Mr. Hoff

and Ms. Viray what he owed them is not because he never intended to do so, but because he went broke and ran out of money.

The crime of theft requires that the defendant obtain the services of another with the intent to deprive the other of the value of those services. RCW 9A.56.020(1)(a). Even viewed in the light most favorable to the State with all inferences that can reasonably be drawn from the evidence drawn in favor of the State, the evidence introduced at Mr. Blancaflor's trial establishes that Mr. Blancaflor's failure to pay Mr. Hoff and Ms. Viray was due to the fact that his business and personal finances failed, not because Mr. Blancaflor never intended to pay them for their services.

The State's evidence in this case does not support the inference that Mr. Blancaflor did not intend to pay Mr. Hoff and Ms. Viray for the services they performed while employed at MGH. The undisputed evidence established that Mr. Blancaflor made every effort to pay Mr. Hoff and Ms. Viray as much as he could, kept track of how much money was still owing, and even agreed to pay them back under the agreement with L&I. The State's evidence established only that Mr. Blancaflor was **unable** to pay the back wages, not that he never intended to pay them.¹

¹ If anything, Mr. Blancaflor was too willing to work with Mr. Hoff and Ms. Viray regarding how they would be paid insofar as he agreed to pay them cash under the table in part to permit Mr. Hoff to continue to receive his medical benefits. RP 373-374, 418-419, 499-500.

ARNOLD LAW OFFICE

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