

NO. 43672-8-II

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

STATE OF WASHINGTON,

Respondent,

v.

TODD CHRISTOPHER GRANGE,

Appellant.

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

The Honorable Michael H. Evans, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The evidence is insufficient to support the conviction of first degree theft.

2. The trial court impermissibly commented on the evidence as to the special verdict by instructing the jury that appellant occupied a position of trust, confidence, or fiduciary responsibility regarding the complaining witness.

Issues pertaining to assignments of error

1. Appellant was charged with first degree theft by color or aid of deception. Where the State presented no evidence of deception used to induce the owner to part with his property, must appellant's conviction be reversed?

2. Did the trial court impermissibly comment on the evidence by instructing the jury to determine whether appellant used "his position of trust, confidence, or fiduciary responsibility" to facilitate the offense?

B. STATEMENT OF THE CASE

1. Procedural History

On June 23, 2008, the Cowlitz County Prosecuting Attorney charged appellant Todd Grange with one count of first degree theft, alleging he obtained control over United States currency belonging to Olympic Transcore by color or aid of deception. CP 1-2; RCW

9A.56.030(1)(a) and RCW 9A.56.020(1)(b). The information was amended on November 3, 2011, adding Dan Rehling as a property owner and adding notice of intent to seek an exceptional sentence. CP 3-4.

The case proceeded to jury trial before the Honorable Michael H. Evans. The jury returned a guilty verdict and a special verdict that Grange had used his position of trust, confidence, or fiduciary responsibility to facilitate the commission of the offense. CP 43-44. On June 22, 2012, the court entered a judgment and sentence, indicating that the standard range for the offense was 0-90 days and imposing a sentence of 9 months. CP 45-57. The court did not complete the Exceptional Sentence paragraph of the form, although it attached findings of fact and conclusions of law for an exceptional sentence. CP 47, 54. On September 28, 2012, the court entered an amended judgment and sentence, including both the Exceptional Sentence paragraph and the written findings and conclusions. CP 78-90.

Grange filed this timely appeal. CP 69.

2. Substantive Facts

In March 2007, Anton Dan Rehling, owner of Olympic Transcore, entered into a contract with Todd Grange for work on Rehling's website.

1RP¹ 41. Rehling paid Grange a retainer of \$2080. 1RP 43. On April 3, 2007, Rehling gave Grange a check for \$6284 to purchase software Olympic Transcore needed. 1RP 50, 54. When Rehling had not received the software by April 24, 2007, he filed a complaint with the Woodland Police Department. 1RP 23-24. Grange was charged with first degree theft by deception. CP 1-2.

Rehling testified at trial that he had hired Shawn Swanner to build a network for his shipping company that allowed shippers and drivers to communicate with Olympic Transcore. 1RP 33-35. Rehling was so happy with the network Swanner created that he decided to market it. 1RP 35. Rehling said he then discovered that the platform for the website had been pirated and therefore could not be marketed. 1RP 35. When he learned that, he ended his relationship with Swanner. He locked Swanner out of the server and placed a craigslist ad for another computer expert to help him make is program legal. 1RP 35, 81.

Grange responded to Rehling's ad. 1RP 36. In his letter Grange said he was an internet database programmer, and he listed a number of certifications relevant to the task. 1RP 38. Grange met with Rehling at his office in Woodland, Washington, on March 28, 2007. 1RP 38, 41.

¹ The Verbatim Report of Proceedings is contained in two volumes, designated as follows: 1RP—6/18/12; 2RP—6/19/12 and 6/22/12.

Rehling was impressed when Grange said that he had worked with Microsoft and knew Bill Gates. 1RP 39.

Rehling decided that Grange had all the qualifications he was looking for, and they entered into a contract. 1RP 39, 41. Grange was to provide services to make Rehling's website legal and also train Rehling's disabled son to be administrator of the website. 1RP 44. Rehling created the contract, cutting and pasting language he found in another agreement. 1RP 77, 79.

Rehling testified that after they entered into the contract, Grange immediately started work under the agreement. 1RP 87. Grange did some troubleshooting work on the company's servers. He also conducted one training session with Rehling and his son, showing them how to set up an email server. 1RP 47-48.

According to Rehling, at a meeting on April 3, 2007, Grange gave Rehling a list of the various licenses and programs needed to make the website legal. Although this software could cost over \$12,000, Grange said he had an account with Microsoft and could get the software at a 50% discount. 1RP 49-50. Rehling thought this sounded like a good deal, and he wrote Grange a check for \$6284 to purchase the software. 1RP 50, 54. Grange estimated that he would have the software within a week or two. 1RP 51.

After that meeting, Rehling and Grange exchanged emails and spoke on the phone, but they did not see each other again. 1RP 56-58. Grange had to cancel meetings because he was taking care of emergency matters for other clients and because the software had not arrived yet. 1RP 59, 62. Grange explained in one of the emails that the software had been delayed arriving from the east coast due to weather. 1RP 66. When Grange did not deliver the software and Rehling could not reach him by phone, Rehling went to the address Grange had listed in the contract. He found that Grange was not living at that address. 1RP 67-68. Rehling then locked Grange out of the servers and emailed Grange, saying he wanted his money back. 1RP 68.

Grange responded by email, saying he had been busy with other clients, and because of the timing issues, he would refund Rehling's money. Grange said all the previous work he had done was at no charge, and any future work could be paid for as it was completed. 1RP 70-71. Rehling did not hear from Grange again. Rehling testified he did not receive the software, and Grange did not return the money Rehling paid him. 1RP 72.

Rehling gave his opinion that Grange never intended to do any of the work called for in the contract. He said Grange never had any accounts with Microsoft, never worked for Microsoft, and did not know

Bill Gates. He did not offer any proof of these claims, stating merely that it was his opinion. 1RP 86.

Steven Larsen, formerly a private investigator, testified that he worked on an investigation involving Grange in April 2007. 1RP 102-03. During the course of that investigation, he approached Grange in a Wal-Mart parking lot and asked him about the situation with Rehling. 1RP 103-04. Grange said he was hired by Rehling to build a website for his trucking business and was paid \$6700. While he was working on the project, he realized Rehling did not own the software he was using, and Grange decided not to complete the work. He said he was going to refund Rehling's money. 1RP 104.

The defense presented testimony from Shawn Swanner, who, like Grange, had a business relationship with Rehling that ended badly. Swanner testified that Rehling hired him to design a web application to manage his trucking business. 1RP 110. He worked for Rehling for about two years, during which time Rehling repeatedly added tasks to Swanner's project. 1RP 110-11. Toward the end of their relationship Rehling started questioning bills that Swanner sent, and he eventually locked Swanner out of the system. 1RP 111. Swanner testified that the website software he used in his work for Rehling was an open source platform, and he wrote no illegal applications. Rehling's claims that Swanner used pirated

software, and that he stole thousands of dollars from Rehling's family, were false. 1RP 112-14.

Finally, Grange testified that he started working on computers when he was in the Army, and he obtained several certifications, including database programming. 1RP 125. After leaving the Army he worked in the information technology field with various companies, including Medifast, Casio, Hewlett-Packard, Honeywell, Dell, and Microsoft. 1RP 126-27.

Grange answered Rehling's craigslist ad and signed a contract with Olympic Transcore in 2007. 1RP 129. Under the contract, Grange was to provide three hours of instruction twice a week and one hour of scripting a week, for a total of 32 hours. He started work immediately. 1RP 130. Rehling made several other requests for work not covered by the contract, and Grange provided those services as well. 1RP 133, 136-39. Grange testified that he received a check for \$2080 when he signed the contract, and he credited that toward the contract hours, but Rehling still owed him over \$9000 for the non-contract work. 1RP 140.

Grange also received a check from Rehling for the software. 1RP 141. He cashed the check and ordered the software, but he did not deliver it. 1RP 142. Grange testified that he had told Rehling he was doing a lot of work outside the contract and needed to be paid for that, but Rehling

had been evasive. 1RP 142-43. Grange therefore applied the software money to the amount Rehling owed him, and he told Rehling he would refund Rehling's money when Rehling paid Grange for the work he had done. 1RP 147, 149. Grange explained that this conversation was separate from the emails in evidence which discussed only money and work under the contract. 1RP 151.

Over defense objection, the State was permitted to impeach Grange's credibility with evidence that he had agreed to pay Rehling restitution in a civil case. 1RP 154-64. Grange testified that he signed an order issued by a civil court in Oregon on July 3, 2007, agreeing to pay Rehling \$8284 in restitution within 30 days. 1RP 164. He explained, however, that he did not pay Rehling because Rehling still owed him money. 1RP 164-65. The jury was instructed that it could consider evidence regarding this agreement only for the limited purpose of impeaching the credibility of the defendant. CP 33 (Instruction No. 5).

The jury returned a guilty verdict and a special verdict indicating that Grange used a position of trust, confidence, or fiduciary responsibility in committing the offense. CP 43-44. Relying on that aggravating factor and the fact that Grange's prior offenses had washed out of his offender score due to passage of time, the court imposed an exceptional sentence of 9 months. CP 45-57, 78-90.

C. ARGUMENT

1. THE EVIDENCE WAS INSUFFICIENT TO ESTABLISH BEYOND A REASONABLE DOUBT THAT GRANGE WAS GUILTY OF THEFT BY DECEPTION.

For a criminal conviction to be upheld, the State must prove every element of the charged crime beyond a reasonable doubt. U.S. Const. amend. 14; Const. art. 1, § 3; In re Winship, 397 U.S. 358, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970); State v. Crediford, 130 Wn.2d 747, 759, 927 P.2d 1129 (1996). “A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.” State v. Walton, 64 Wn. App. 410, 415, 824 P.2d 533, review denied, 119 Wn.2d 1011 (1992). But, as a matter of state and federal constitutional law, a reviewing court must reverse a conviction and dismiss the prosecution for insufficient evidence where no rational trier of fact could find that all elements of the crime were proven beyond a reasonable doubt. State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998); State v. Hardesty, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996); State v. Chapin, 118 Wn.2d 681, 826 P.2d 194 (1992); State v. Green, 94 Wn. 2d 216, 616 P.2d 628 (1980).

Grange was charged with first degree theft, by color or aid of deception. CP 3-4. Under the statute in existence during the charging period, the State had to prove Grange committed theft of property or

services which exceeded \$1,500 in value. Former RCW 9A.56.030(1)(a). Theft, as charged in this case, is defined as “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[.]” RCW 9A.56.020(1)(b). This method of theft is also defined by statute: “‘By color or aid of deception’ means that the deception operated to bring about the obtaining of the property or services; it is not necessary that deception be the sole means of obtaining the property or services[.]” RCW 9A.56.010(4).

Theft by deception, as defined by these statutes, focuses on the defendant’s words and conduct at the time the property is obtained. The question is whether deception by the defendant induced the victim to part with his money or property. See State v. Knutz, 161 Wn. App. 395, 405-06, 253 P.3d 437 (2011); State v. Casey, 81 Wn. App. 524, 527-31, 915 P.2d 587, review denied, 130 Wn.2d 1009 (1996).

Thus, to support a conviction of theft by deception, there must be some evidence of deception by Grange which induced Rehling to give Grange the checks. Evidence that Grange did not perform all the services called for under the contract, provide software, or return the money Rehling paid him is relevant only to the extent it suggests his intent at the

time he obtained the checks from Rehling. The focus has to be on the actions he used to obtain the checks.

There is no evidence that Grange was deceptive when entering into the contract with Rehling. Rehling testified that he entered into the contract with Grange because Grange had all the qualifications he was looking for. 1RP 39. No evidence was presented that Grange misrepresented his qualifications to Rehling. While Rehling gave his opinion that Grange never worked for Microsoft and did not have an account with Microsoft, he was clear that that was just his opinion, and no evidence was offered in support of it. 1RP 86. The only evidence regarding his qualifications came from Grange, who testified that he had worked for Microsoft, as well as numerous other companies in the field of information technology. 1RP 125-27.

Nor was there evidence that Grange used deception to obtain the funds to purchase software for Rehling. Rehling testified that he gave Grange the money for software because Grange told him the software was needed and that he had an account with Microsoft and could get the software at a discounted price. There was no evidence that Rehling did not, in fact, need the software identified by Grange, and no evidence that Grange did not have an account with Microsoft.

The State failed to present evidence of any deception by Grange during the charging period which induced Rehling to provide the checks. The subsequent failure to complete the work called for in the contract and provide the software may support a conviction under Former RCW 9A.56.020(1)(a) (wrongfully obtaining or exerting unauthorized control over property of another), but it is not sufficient to show deception at the time Grange acquired the checks from Rehling. Because the evidence is insufficient to prove the charged offense, Grange's conviction must be reversed and the charge dismissed.

2. THE TRIAL COURT COMMENTED ON THE EVIDENCE IN INSTRUCTING THE JURY REGARDING THE AGGRAVATING FACTOR.

In RCW 9.94A.535, the legislature identified an exclusive list of factors that can support a sentence above the standard range. One of these factors, which requires a finding by the jury beyond a reasonable doubt, is that "The defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense." RCW 9.94A.535(3)(iv). This aggravating factor requires the jury to find two elements: (1) that the defendant was in a position of trust, confidence, or fiduciary responsibility and (2) that he used that position in committing the offense. State v. Bedker, 74 Wn. App. 87, 95, 871 P.2d 673, review denied, 125 Wn.2d 1004 (1994); State v. Vermillion, 66

Wn.App. 332, 347, 832 P.2d 95 (1992), review denied, 120 Wn.2d 1030 (1993).

In this case, the court's instructions regarding this aggravating factor removed the first element from the jury's consideration. First, the court instructed the jury that,

For the purposes of the special verdict form, the State has the burden of proving beyond a reasonable doubt that the defendant used his position of trust, confidence, or fiduciary responsibility to facilitate the commission of the crime.

CP 42 (Instruction No. 13). Then, in the special verdict form, the jury was asked the following:

QUESTION: Did the defendant use his position of trust, confidence, or fiduciary responsibility to facilitate the commission of the crime?

CP 44. The jury was given no law to guide its deliberations on the "position of trust, confidence, or fiduciary responsibility" element. Worse, the court instructed the jury that Grange in fact occupied such a position ("his position").

Washington's constitution prohibits judges from commenting on the evidence: "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." Wash. Const. art. IV, § 16. It is thus error for the judge to instruct the jury that matters of fact have been established as a matter of law. State v. Baxter, 134 Wn.

App. 587, 592-93, 141 P.3d 92 (2006) (“Including victim’s birthdate in jury instructions, where the victim’s age is an element of the crime charged, is a manifest violation of this provision.”). A special verdict form which removes a disputed issue of fact from the jury’s consideration is “tantamount to a directed verdict.” State v. Becker, 132 Wn.2d 54, 65, 935 P.2d 1321 (1997).

In Becker, the special verdict form asked the jury if the crime had been committed within 1000 feet of a school, “to wit: Youth Employment Education Program School.” Becker, 132 Wn.2d at 64. Whether the Youth Employment Education Program constituted a school had been disputed at trial. Because the form stated that the program was a school, the special verdict constituted a comment on the evidence. Id. at 65.

In this case, the trial court commented on the evidence in the concluding instruction and the special verdict form, which asked the question, “Did the defendant use his position of trust, confidence, or fiduciary responsibility to facilitate the commission of the crime?” CP 44. The court’s instructions removed the factual question of whether Grange occupied a position of trust, confidence, or fiduciary responsibility from the jury, instructing them that he did. With this first element of the aggravating circumstance determined by the court, the jury was left to deliberate only on the second element: whether that position was used to

facilitate the commission of the offense. Here, as in Becker, the removal of the factual question from the jury constituted a judicial comment on the evidence. See Becker, 132 Wn.2d at 65.

Judicial comments on evidence are presumed prejudicial, and the State bears the burden of establishing the absence of prejudice, unless the “record affirmatively shows no prejudice could have resulted.” Baxter, 134 Wn. App. at 593 (citing State v. Levy, 156 Wn.2d 709, 725, 132 Wn.2d 1076 (2006)). To meet this heavy burden, the State must show that, without the erroneous comment, “no one could realistically conclude that the element was not met.” Baxter, 134 Wn. App. at 593.

The State cannot meet its burden in this case. While there might have been evidence to support a finding that Grange occupied a position of trust, the issue could have gone either way with the jury. Although Grange held himself out as an expert in the field with the qualifications Rehling lacked, Rehling was the party who prepared the contract the parties signed, defining the nature of their relationship. Moreover, Rehling and Grange had known each other less than a month when Rehling went to the police, after meeting through a craigslist ad. These circumstances argue against a finding that a trust relationship had been established. Because the jury realistically could have concluded that Grange did not hold a position of trust, confidence, or fiduciary

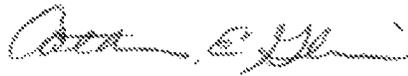
responsibility, the court's comment on the evidence was prejudicial, and the special verdict does not support an exceptional sentence.

D. CONCLUSION

The State failed to present evidence that Grange used deception to obtain control of Rehling's property, and Grange's conviction should be reversed and the charge dismissed. Moreover, the court's comment on the evidence renders the jury's special verdict invalid.

DATED this 15th day of January, 2013.

Respectfully submitted,



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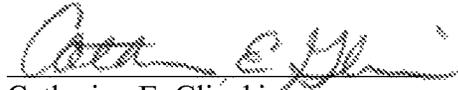
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Catherine E. Glinski
Done in Port Orchard, WA
January 15, 2013

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