

FILED

SEP 28 2010

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON

28813-7-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

THOMAS A. SANKEY, APPELLANT

---

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

---

APPELLANT'S BRIEF

---

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Janet G. Gemberling  
Attorneys for Appellant

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#### A. ASSIGNMENTS OF ERROR

1. The trial court erred in finding Mr. Sankey guilty of first degree theft, where the evidence was insufficient.
2. The trial court erred in violating Mr. Sankey's right to be present at trial.
3. The trial court erred in denying Mr. Sankey's motion for a new trial, based upon his right to be present at trial.
4. The trial court erred in entering finding of fact number 7 in its Findings of Fact and Conclusions of Law regarding Mr. Sankey's motion for a new trial, stating "[a]s of the date of this ruling, the defendant has provided no showing that his absence was a medical necessity." (CP 184).

#### B. ISSUES

1. The evidence showed Beatrice Edwards contracted with Mr. Sankey to perform home repairs, and paid in advance. A police officer saw Mr. Sankey working on Ms. Edwards's home, doing one of the repairs stated in the contract, and saw that Mr. Sankey had purchased supplies necessary to complete the repairs. Was the evidence sufficient to support finding that Mr. Sankey obtained Ms.

Edwards's money by deception, or with the intent to deprive her of her property, as required for a conviction for first degree theft?

2. The trial court ruled that Mr. Sankey was voluntarily absent from trial, and continued the trial in his absence, despite the fact that both Mrs. Sankey and defense counsel told the trial court that Mr. Sankey was absent because he was seeking medical treatment. Did the trial court violate Mr. Sankey's right to be present at trial?
3. After the trial, Mr. Sankey provided documentation to the trial court stating he had a medical reason to be excused from court on the days of the trial. Did the trial court err in denying Mr. Sankey's motion for a new trial, based upon his right to be present at trial?

### C. STATEMENT OF THE CASE

On May 15, 2008, Tammy Sankey called Beatrice Edwards and offered to wash the windows on her home for \$70. (RP 71, 81-83). Ms. Edwards agreed, and thought it was a fair fee. (RP 71). A few days later, Mrs. Sankey and her husband, Thomas Sankey, arrived at Ms. Edwards's home. (RP 71-72, 81-82). Mr. Sankey proposed to do additional work on

Ms. Edwards's home, including re-caulking the windows and repairing the eaves and edge along the home. (RP 71, 114-116). Ms. Edwards wrote checks to Mr. and Mrs. Sankey for \$970, \$500 and \$146. (RP 72-74, 116). She also gave them \$100 in cash. (RP 75-76). Ms. Edwards signed a contract with Mr. and Mrs. Sankey for \$1,270 in services, with the understanding that this amount would cover "[r]epairs around the windows and the eaves [sic] along the house." (RP 77).

On May 26, 2008, at approximately 10:30 p.m., Spokane Police Officer Paul Buchmann arrived at Ms. Edwards's home, in response to a call by neighbors stating that there were two people at the home. (RP 120). Officer Buchmann saw a male and a female, later identified as Mr. and Mrs. Sankey, on the front porch. (RP 121-122, 124). Mr. Sankey was holding a caulking gun, and it "looked like he was caulking the window." (RP 122). When questioned by Officer Buchmann, Mr. Sankey stated that Ms. Edwards "contracted him to do some handy work around the house." (RP 123, 122). Mr. Sankey explained that "he was specifically hired to remove moss from her roof, install zinc flashing around her roof, clean her rain gutters and seal and paint her windows." (RP 125). Mr. Sankey showed Officer Buchmann "a plastic Home Depot bag on the back porch that had three roles [sic] of zinc strip." (RP 126).

Mr. Sankey also showed Officer Buchmann the contract he had with Ms. Edwards. (RP 129-130). The contract stated that Ms. Edwards would pay \$1,270 for painting, \$970 for zinc flashing to be installed, and a \$500 deposit “that would be paid up front, and the remainder paid within ten days of signing the contract[.]” (RP 130).

Spokane Police Officer Shaidon Storch arrived to assist Officer Buchmann. (RP 138-139). Officer Storch spoke with Ms. Edwards, and she showed him the contract she had entered into with Mr. Sankey. (RP 140). According to Officer Storch, Ms. Edwards told him the check for \$146 and the \$110 in cash were her payment for window washing. (RP 152).

Officer Buchmann told Mr. Sankey to leave Ms. Edwards’s home, and return only with her permission. (RP 128-129).

The three checks written by Ms. Edwards were cashed on May 16, 2008 at Numerica Credit Union. (RP 158). Spokane Police Detective Kirk Kimberly reviewed still shots of the security camera footage from Numerica Credit Union, and saw Mr. Sankey. (RP 158-159).

The State charged Mr. Sankey with one count of first degree theft.<sup>1</sup> (CP 1). The State alleged that “on or about between May 15, 2008 and

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<sup>1</sup> The State also alleged an aggravating factor, that “the defendant[ ] knew and should have known that the victim of the current offense was particularly vulnerable or incapable of resistance[.]” (CP 1). This aggravating factor was found by the jury, but it

July 2, 2008,” Mr. Sankey obtained control over more than \$1,500 belonging to Ms. Edwards, “by color and aid of deception.” (CP 1).

Trial commenced on November 2, 2009, with jury selection. (RP 32). Mr. Sankey was present in court on that day. (RP 6). The next morning, Mr. Sankey was not present. (RP 33). The trial court stated that Mrs. Sankey had called the court, and indicated “that Mr. Sankey was ill, and it would be a while before he got here, if he got here at all.” (RP 34). Defense counsel told the court that Mrs. Sankey had called his office and said that Mr. Sankey had passed out, that they were going to take him to the CHAS<sup>2</sup> clinic, and that they would arrive at court as soon as they could. (RP 35-36). The trial court said, “[i]t would seem that until I have some actual verification of him being ill and under some doctor’s care, that what I have at his point is a voluntary nonappearance.” (RP 38). The trial court proceeded without the presence of Mr. Sankey, conducting a CrR 3.5 hearing.<sup>3</sup> (RP 39, 41-57). Following the hearing, the trial court indicated it had made a preliminary finding of voluntariness. (RP 65).

The trial court said:

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was later set aside by the trial court, upon motion by Mr. Sankey. (CP 170-171, 186-187; RP 264, 347-348).

<sup>2</sup> Defense counsel stated the CHAS Clinic “is a free clinic or the clinic for people that don’t have insurance.” (RP 35-36).

<sup>3</sup> When Mr. Sankey appeared later that day, the trial court permitted him to testify for the purposes of the CrR 3.5 hearing. (RP 103-109).

And I think in the context of him being a reluctant participant, the fact that we don't have any outside verification that he has a physical or illness problem, the fact that he appeared to be okay yesterday and the fact that we have now waited for him about an hour and a half, an hour and 40 minutes, it now being five to 11:00, I think all of those things come into play certainly in terms of whether he voluntarily is not present.

(RP 65).

Defense counsel told the trial court, "the update that came through my office was that he was at the doctor's office, that being the CHAS Clinic . . . and that they anticipate they would be here somewhere around 11:00 a.m." (RP 66). The trial court went forward with the trial with the testimony of Ms. Edwards, without Mr. Sankey present. (RP 67-91).

Mr. Sankey arrived in court that afternoon. (RP 93). The trial court gave him the opportunity to address his absence, and he told the court that he had been at the CHAS clinic. (RP 96-98).

Ms. Edwards, Officer Buchmann, Officer Storch, and Detective Kimberly testified on behalf of the State, consistent with the facts stated above. (RP 68-90, 112-161). Ms. Edwards also testified that Mr. and Mrs. Sankey had not finished the job, and also said "I don't know that they did anything." (RP 78). According to Ms. Edwards, Mr. and Mrs. Sankey purchased some material, contained in a Home Depot bag, and they kept it at her home for a while. (RP 78).

At the close of the State's case Mr. Sankey moved to dismiss the first degree theft charge, arguing there was insufficient evidence to support the charge. (RP 164-166, 169-170). The trial court denied the motion. (RP 170-172).

On the third day of trial, November 4, 2009, Mr. Sankey was again not present in court. (RP 174). Defense counsel told the court Mrs. Sankey had telephoned to let him know she and Mr. Sankey were at the CHAS Clinic again, and that Mr. Sankey was "really sick." (RP 179). The trial court said "until and unless I have some outside documentation that this is -- and more than just phone calls -- an emergency, at this point I'm going to indicate that I think it's a voluntary absence from the courtroom." (RP 189). The trial court then proceeded without Mr. Sankey. (RP 193). Defense counsel rested without presenting any witnesses. (RP 194).

Mr. Sankey arrived in court when the State concluded its closing argument. (RP 221-222). When the jury returned with its verdict, however, Mr. Sankey was again not present in court. (RP 260). Defense counsel told the court that he spoke to Mrs. Sankey, and that she and Mr. Sankey were at the Deaconess Hospital Emergency Room. (RP 260-261). The trial court proceeded to take the verdict without Mr. Sankey present, stating "I just have nothing demonstrated to me that he is

unable to be in court.” (RP 262-263). The jury found Mr. Sankey guilty of first degree theft, as charged. (CP 106; RP 264).

Mr. Sankey provided the court with a note from Valley Hospital and Medical Center Emergency Department stating that he was discharged on November 5, 2009, and that he had had a medical reason to be excused from court from November 3 to November 8, 2009. (CP 120, 124; RP 277). Mr. Sankey also provided documentation that he was seen at Valley Hospital and Medical Center on November 4, 2009 at 11:21 p.m. (CP 118-119). In addition, he provided documentation that he was seen at Deaconess Medical Center on November 4, 2009. (CP 125). No time is indicated on this document. (CP 125).

Mr. Sankey filed a motion for a new trial, arguing, in part, that the trial court violated his right to be present at trial. (CP 128-133, 168-169; RP 350-371). After a hearing, the trial court denied the motion. (CP 183-185; RP 361-371). The trial court concluded that Mr. Sankey’s absence at trial was voluntary. (CP 184). The trial court found that “[a]s of the date of this ruling, the defendant has provided no showing that his absence was a medical necessity.” (CP 184).

Mr. Sankey appeals. (CP 203-204).

#### D. ARGUMENT

##### 1. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT MR. SANKEY'S CONVICTION FOR FIRST DEGREE THEFT.

In every criminal prosecution, due process requires that the State prove, beyond a reasonable doubt, every fact necessary to constitute the charged crime. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). When a defendant challenges the sufficiency of the evidence, the proper inquiry is “whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt.” *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (citing *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980)). “[A]ll reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant.” *Id.* (citing *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977)). Furthermore, “[a] claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” *Id.* (citing *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254, *aff’d*, 95 Wn.2d 385, 622 P.2d 1240 (1980)).

The State charged Mr. Sankey with first degree theft “by color and aid of deception” in violation of former RCW 9A.56.030(1)(a).<sup>4</sup> (CP 1); *see also* former RCW 9A.56.030(1)(a) (2007) (Laws of 2007, ch. 199, § 3) (defining first degree theft). Pursuant to former 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 . . . .” Former RCW 9A.56.030(1)(a) (2007) (Laws of 2007, ch. 199, § 3). Theft is defined in part 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).

The trial court set forth the elements of the crime in its to-convict jury instruction as follows:

- (1) That on or about between May 15, 2008 and July 2, 2008, the defendant by color or aid of deception, obtained control over property of another; and
- (2) That the property exceeded \$1500 in value;
- (3) That the defendant intended to deprive the other person of the property; and
- (4) That this act occurred in the State of Washington.

(CP 94).

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<sup>4</sup> Mr. Sankey was charged and convicted under the former first degree theft statute, which set the threshold for first degree theft of property or services exceeding \$1,500. *See* former RCW 9A.56.030(1)(a) (2007) (Laws of 2007, ch. 199, § 3). Since this time, the first degree theft statute was amended to set the threshold for first degree theft of property or services exceeding \$5,000. *See* Laws of 2009, ch. 431, § 7.

Jury instruction 11 defined “color or aid of deception” as follows:

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.

(CP 95); *see also* RCW 9A.56.010(4) (defining “color or aid of deception”).

Jury instruction 12 defined “deception,” stating that “[d]eception occurs when an actor knowingly creates or confirms another’s false impression that the actor knows to be false.” (CP 96); *see also* RCW 9A.56.010(5)(a) (defining “deception”).

“[T]he theft by deception statute . . . criminalizes the act of ‘[c]reat[ing] or confirm[ing] another’s false impression which the actor knows to be false,’ resulting in the actor ‘*obtain[ing] control* over the property of another . . . with intent to deprive him or her of such property.’” *State v. George*, 132 Wn. App. 654, 660, 133 P.3d 487 (2006) (alterations in original) (citations omitted).

Even under the generous standard for sufficient evidence, the State failed to meet its burden. The State did not prove that Mr. Sankey used deception to bring about the obtaining of money from Ms. Edwards. *See* RCW 9A.56.010(4). The State did not prove that Mr. Sankey knowingly created or confirmed a false impression he knew to be false. *See* RCW

9A.56.010(5)(a). To the contrary, Mr. Sankey entered into a contract with Ms. Edwards to complete repairs on her home. (RP 77). Ms. Edwards wrote Mr. Sankey three checks, and two of these checks, for \$970 and \$500, corresponded to amounts listed in the contract. (RP 130). Ms. Edwards also informed Officer Storch that the third check was for window washing. (RP 152).

There is no indication in the record that Mr. Sankey intended not to follow through with the repairs at the time he entered into the agreement with Ms. Edwards. Officer Buchmann saw Mr. Sankey at Ms. Edwards's home, holding a caulking gun, and it "looked like he was caulking the window[,]" one of the repair services he had agreed to provide. (RP 77, 122). Officer Buchmann also saw that Mr. Sankey had three rolls of zinc strip at the home. (RP 136). Ms. Edwards testified that Mr. and Mrs. Sankey purchased some material and kept it at her home for a while. (RP 78).

This testimony demonstrates that Mr. Sankey intended to complete the repairs in accordance with the contract. When he accepted Ms. Edwards's money, he did not create a false impression he knew to be false. *See* RCW 9A.56.010(5)(a) (defining "deception").

The State did not prove that Mr. Sankey intended to deprive Ms. Edwards of her property. *See* RCW 9A.56.020(1)(b). The evidence that

Mr. Sankey returned to Ms. Edwards's home to work on the windows, purchased supplies and left them at her home, shows that when Mr. Sankey accepted Ms. Edwards's money, he intended to complete the repairs on her home. (RP 78, 122, 136).

A rational jury could not have found Mr. Sankey guilty, beyond a reasonable doubt, of first degree theft. *See Salinas*, 119 Wn.2d at 201 (citing *Green*, 94 Wn.2d at 220-22). The evidence presented at trial was insufficient to support Mr. Sankey's conviction for first degree theft, and his conviction must be reversed and the charge dismissed with prejudice. *See State v. Smith*, 155 Wn.2d 496, 505, 120 P.3d 559 (2005) (“[r]etrial following reversal for insufficient evidence is “unequivocally prohibited” and dismissal is the remedy.”) (quoting *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998)).

2. THE TRIAL COURT VIOLATED MR. SANKEY'S RIGHT TO BE PRESENT AT TRIAL WHEN IT RULED HE WAS VOLUNTARILY ABSENT FROM TRIAL, EVEN THOUGH HE WAS SEEKING MEDICAL TREATMENT.

“A defendant has a right, under the Washington and United States Constitutions, to be present at trial.” *State v. Garza*, 150 Wn.2d 360, 367, 77 P.3d 347 (2003) (citing *State v. Thomson*, 123 Wn.2d 877, 880, 872 P.2d 1097 (1994)). This right may be waived by the defendant, with a voluntary and knowing waiver. *Id.* (citing *Thomson*, 123 Wn.2d at 880). But “[o]nce trial has begun in the defendant’s presence, a subsequent voluntary absence operates as an implied waiver, and the trial may continue without the defendant.” *Id.* (citing *Thomson*, 123 Wn.2d at 880-81); *see also* CrR 3.4(b) (“The defendant's voluntary absence after the trial has commenced in his or her presence shall not prevent continuing the trial to and including the return of the verdict.”).

A trial court’s decision to proceed with a trial in the defendant’s absence is reviewed for an abuse of discretion. *Id.* at 365-366. A trial court abuses its discretion when its decision is “manifestly unreasonable, or exercised on untenable grounds, for untenable reasons.” *State ex. rel Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

Whether a defendant’s absence from trial is voluntary is dependent upon the totality of the circumstances. *Garza*, 150 Wn.2d at 367 (citing

*Thomson*, 123 Wn.2d at 881). The trial court must take the following three steps:

- (1) [make] sufficient inquiry into the circumstances of a defendant's disappearance to justify a finding whether the absence was voluntary,
- (2) [make] a preliminary finding of voluntariness (when justified), and
- (3) [afford] the defendant an adequate opportunity to explain his absence when he is returned to custody and before sentence is imposed.

*Id.* (quoting *Thomson*, 123 Wn.2d at 881) (alterations in original) (internal quotation marks omitted).

“In performing the analysis, the court indulges every reasonable presumption against waiver.” *Id.* Throughout this inquiry, this presumption against waiver is the overarching principle. *Id.* at 368.

The trial court abused its discretion in finding that Mr. Sankey's absences from trial were voluntary. Mr. Sankey was not present at trial due to medical reasons, and this was communicated to the trial court for each of his absences. When Mr. Sankey was not present on the morning of November 3, 2009, Mrs. Sankey informed the trial court that Mr. Sankey was ill and told defense counsel that Mr. Sankey was going to the CHAS Clinic. (RP 34-36, 66). When Mr. Sankey was not present on the morning of November 4, 2009, Mrs. Sankey contacted defense counsel and informed him they were at the CHAS Clinic. (RP 179). When Mr.

Sankey was not present for the verdict, Mrs. Sankey again contacted defense counsel and informed him that she and Mr. Sankey were at the Deaconess Hospital Emergency Room. (RP 260-261). By ruling Mr. Sankey's absences voluntary and continuing the trial in his absence, the trial court failed to "indulge[ ] every reasonable presumption against waiver." *Garza*, 150 Wn.2d at 367. And, because Mr. Sankey was absent from trial for medical reasons, the trial court's findings of voluntariness were not justified.

The trial court violated Mr. Sankey's right to be present at trial by ruling his absences for medical reasons voluntary. Accordingly, this court should reverse his conviction and order a new trial.

3. THE TRIAL COURT ERRED IN DENYING MR. SANKEY'S MOTION FOR A NEW TRIAL BASED ON HIS RIGHT TO BE PRESENT AT TRIAL WHEN MR. SANKEY PROVIDED DOCUMENTATION THAT HE HAD A MEDICAL REASON TO BE EXCUSED FROM COURT.

Pursuant to CrR 7.5, the trial court may grant a defendant's motion for a new trial for any one of eight enumerated causes, "when it affirmatively appears that a substantial right of the defendant was materially affected[.]" CrR 7.5(a). The eight enumerated causes include "[i]rregularity in the proceedings of the court . . . or any order of court, or

abuse of discretion, by which the defendant was prevented from having a fair trial . . . [and] [t]hat substantial justice has not been done.” CrR 7.5(a)(5), (8). The denial of a motion for a new trial is reviewed for an abuse of discretion. *State v. Copeland*, 130 Wn.2d 244, 294, 922 P.2d 1304 (1996) (citing *State v. Balisok*, 123 Wn.2d 114, 117, 866 P.2d 631 (1994)).

Mr. Sankey filed a motion for a new trial, arguing in part that the trial court violated his right to be present at trial. (CP 128-133, 168-169; RP 350-371). The trial court denied the motion, concluding that Mr. Sankey’s absence at trial was voluntary. (CP 184). The trial court found that, “[a]s of the date of this ruling, [Mr. Sankey] has provided no showing that his absence was a medical necessity.” (CP 184).

The trial court abused its discretion in denying Mr. Sankey’s motion for a new trial. Mr. Sankey provided documentation to show that his absence was a medical necessity. He provided the court with a note from Valley Hospital and Medical Center Emergency Department, stating that he had been discharged on November 5, 2009, and that he had a medical reason to be excused from court from November 3, 2009 to November 8, 2009. (CP 120, 124; RP 277). Mr. Sankey also provided documentation that he was seen at Deaconess Medical Center on

November 4, 2009, and at Valley Hospital Medical Center on the same day, although after court hours. (CP 118-119, 125).

Whether a defendant's absence from trial is voluntary is dependent upon the totality of the circumstances. *Garza*, 150 Wn.2d at 367 (citing *Thomson*, 123 Wn.2d at 881). After sufficient inquiry into the reasons for the defendant's absence, the court may, when justified, make a preliminary finding of voluntariness. *Id.* (quoting *Thomson*, 123 Wn.2d at 881). When the defendant returns, the court must give the defendant "an adequate opportunity to explain his absence." *Id.* (quoting *Thomson*, 123 Wn.2d at 881). Furthermore, there is a presumption against waiver of the right to be present. *Id.*

By providing medical documentation, Mr. Sankey established that his absences from trial were not voluntary. Given the totality of the circumstances, Mr. Sankey's absences from trial were not voluntary. *See Garza*, 150 Wn.2d at 367 (citing *Thomson*, 123 Wn.2d at 881). A new trial was warranted under both of the following causes: "[i]rregularity in the proceedings of the court . . . or any order of court, or abuse of discretion, by which the defendant was prevented from having a fair trial . . . [and] [t]hat substantial justice has not been done." CrR 7.5(a)(5), (8). Accordingly, the trial court erred in denying Mr. Sankey's motion for

a new trial based upon his right to be present at trial. This court should reverse his conviction and order a new trial.

E. CONCLUSION

There was insufficient evidence that Mr. Sankey obtained control over the property of Ms. Edwards by color or aid of deception, or that he intended to deprive Ms. Edwards of her property. This court should reverse the conviction and dismiss the charge with prejudice. In the alternative, the trial court violated Mr. Sankey's right to be present at trial and erred in denying his motion for a new trial, based upon his right to be present at trial. This court should reverse the conviction and remand this case for a new trial.

Dated this 23rd day of September, 2010.

GEMBERLING & DOORIS, P.S.



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