

66174-4

66174-4

NO. 66174-4-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

HUONG TRAN VAN,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE THERESA DOYLE

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

	Page
A. <u>ISSUE</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
1. PROCEDURAL FACTS	1
2. SUBSTANTIVE FACTS	2
C. <u>ARGUMENT</u>	7
1. THERE WAS SUFFICIENT EVIDENCE FROM WHICH A RATIONAL TRIER OF FACT COULD CONCLUDE VAN TOOK PROPERTY FROM THE VICTIM	7
D. <u>CONCLUSION</u>	16

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Jackson v. Virginia, 443 U.S. 307,
99 S. Ct. 2781, 61 L. Ed. 2d 560 (1970)..... 8

Washington State:

State v. Camarillo, 115 Wn.2d 60,
794 P.2d 850 (1990)..... 9, 13

State v. Cord, 103 Wn.2d 361,
693 P.2d 81 (1985)..... 8

State v. Gerber, 28 Wn. App. 214,
622 P.2d 888 (1981)..... 8

State v. Green, 94 Wn.2d 216,
616 P.2d 628 (1980)..... 7, 8

State v. Heffner, 126 Wn. App. 803,
110 P.3d 219 (2005)..... 15

State v. Israel, 113 Wn. App. 243,
54 P.3d 1218 (2002)..... 9

State v. Mermis, 105 Wn.App. 738,
20 P.3d 1044 (2001)..... 15

State v. Nam, 136 Wn. App. 698,
150 P.3d 617 (2007)..... 9, 10

State v. Theroff, 25 Wn. App. 592,
608 P.2d 1254 (1980)..... 8

State v. Thomas, 150 Wn.2d 821,
83 P.3d 970 (2004)..... 8, 13

State v. Walton, 64 Wn. App. 410,
824 P.2d 533 (1992)..... 9, 13

Statutes

Washington State:

RCW 9.41.010..... 9
RCW 9A.56.030 9, 15
RCW 9A.56.190 10

Other Authorities

3 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW
§ 20.3 at 179 (2nd ed. 2003) 10

A. ISSUE

1. Theft in the first degree requires evidence that the defendant took property from the person of another. The victim testified that Van and his accomplices took his property and ran. Was the evidence sufficient to prove Van and his accomplices took property from the person of another?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The defendant, Huong Tran Van, was charged with robbery in the first degree. CP 1. The State alleged that on November 7, 2009, Van, along with several juvenile accomplices, ordered over one hundred dollars worth of pizzas to be delivered, and then robbed the delivery person. CP 3-8. The State amended the information to robbery in the first degree, and as an alternative theft in the first degree (by taking property from a person). CP 7-8; 1RP 3.¹ The jury found Van not guilty of robbery in the first degree and not guilty of the lesser included offense of robbery in the second

¹ The verbatim report of proceedings consists of ten volumes, which will be referred to in this brief as follows: 1RP (8/2/10 - morning), 2RP (8/2/10 - afternoon), 3RP (8/3/10), 4RP (8/4/10), 5RP (8/5/10), 6RP (8/9/10 - morning), 7RP (8/9/10 - afternoon), 8RP (8/10/10), 9RP (9/17/10), and 10RP (9/29/10).

degree. CP 47, 48. The jury convicted Van of the lesser offense of theft in the third degree. CP 49. The jury also found Van guilty of the alternative count of theft in the first degree. CP 50. Van was sentenced on January 7, 2011. CP 94-99. The court imposed a standard range sentence of two months of confinement for theft in the first degree, and to avoid any double jeopardy violation did not impose sentence on theft in the third degree. CP 94-99; 10RP 2.

2. SUBSTANTIVE FACTS

Hieu Phan was a delivery driver for Domino's Pizza. 4RP 26. He had moved to the United States from Vietnam in 1997, and worked two jobs. 4RP 26-27. He had worked for Domino's for fourteen years. 4RP 28. His boss described him as a good employee, that they had discussed a managing position, but Phan declined because he had difficulty speaking English. 4RP 106. As Phan's boss described, "He doesn't always get his thoughts across." 4RP 106. He worked out of the store on Beacon Hill. 4RP 28.

On November 7, 2010, Phan was sent to make a delivery to the Katherine Place Apartments. Katherine Place Apartments provides housing for the homeless and low income families.

3RP 53. There are locked gates at the entrances to the building.
3RP 56-58. Residents can "buzz" in visitors. 3RP 58. The delivery was for a large order including five pizzas, two chickens, and soda that came to over one hundred dollars. 4RP 29-30. Phan arrived at the apartment and he called the customer to be "buzzed" in.
4RP 31. He was told they would meet him at the gate to let him in.
4RP 31.

Five young men arrived at the gate. 4RP 31. One suspect opened the gate and two others asked to check the pizzas.
4RP 32. The others stayed inside the gate. 4RP 32. Phan did not agree to let them check the pizzas because Domino's has a policy that the customer must pay before they are given their food.
4RP 34. Phan testified that the suspects then grabbed the food from him and ran. 4RP 33. Van repeatedly testified that the food was taken from him. 4RP 33, 34, 35, 45, 55, 75, 76, 77.

According to Phan, after the pizzas were taken two suspects then came up behind him. 4RP 35. He was told to leave his money, cell phone, and wallet on the ground. 4RP 36. Phan testified that one of the suspects had what appeared to be a gun at his side. 4RP 35, 54. He had about twenty dollars on him at the time. 4RP 37. Phan left his belongings and ran. 4RP 36. All the

suspects went through the gate and ran. 4RP 37. Phan was eventually let back into the gate by a manager and recovered his phone and wallet, but his money was gone. 4RP 38. Phan called his manager and then called 911. 4RP 39-40.

Later that night the Domino's manager found a pizza "cheese" box from the order left at the front door of the store. There was a note written on it saying "thank you." 4RP 96.

The manager of Katherine's Place Apartments, Cheryl Collins, learned about the incident the following day. 3RP 53, 59. The apartment complex has surveillance cameras at the gates, in the stairwells, and in the parking garage. 3RP 59-64. She reviewed the footage and saw that the cameras captured part of the incident. 3RP 59. The video at the Juneau Street entrance showed two people at the gate at 10:37pm. 3RP 65. The video showed a group of people running in the garage at 10:40pm. 3RP 64; 4RP 12. The cameras then captured a group of people leaving the Martin Luther King Way entrance (opposite the Juneau Street entrance). 4RP 14. She provided the video to the police. 4RP 149.

The video also showed a resident of the building walking up the stairwell moments before the incident occurred. 3RP 62-63.

The resident was sixteen-year-old Emmanuel Gondo. 3RP 62-63. Gondo testified that he knew Van and his friends and saw them in the courtyard the night of the incident. 4RP 131. Gondo reviewed the surveillance video and was able to indentify Van and others² for the police. 4RP 141-42. He also gave the police Van's phone number, which was the same number used to place the pizza order. 4RP 118, 151; 5RP 10-11.

Police contacted Van and arrested him. 4RP 153. Van was advised of his rights and he agreed to talk to the police. 4RP 154; 5RP 10-11. Van admitted that he and his friends stole the pizzas. 4RP 160; 5RP 12. He told police that he and his friends were smoking marijuana and decided to rob a pizza delivery person. 4RP 161. Van acknowledged that he came up with the plan because he had worked for a pizza shop in the past and believed the police would not get involved if no one was hurt and no weapons were involved. 4RP 162. Van admitted that his friends, Jack Deng, Alex Mai, Daniel Beyene, and Joshua Sum were all involved. 4RP 161. They went to the Katherine Place Apartments because they knew it was a gated and locked building. 4RP 162.

² Gondo indentified Jack Deng, Alex Mai, Daniel Beyene, and Joshua Sum. 4RP 152. They were juveniles and they entered deferred dispositions for attempted robbery in the second degree. 5RP 36, 88.

They ordered over one hundred dollars worth of food including pizza, chicken wings and soda and waited in the courtyard. 4RP 164, 166. The delivery man (Phan) arrived, and some of the accomplices waited inside the apartments to let the others back inside. 4RP 167. Van went to meet Phan. 4RP 167. He opened the gate on Juneau Street, and Deng asked to check the pizza order. 4RP 167. According to Van, the delivery man handed the pizzas to Deng to check. 4RP 167; 5RP 19-20. They then took the bags of food from the delivery man and ran into the building. 4RP 167-68. Van said they ate the food, and then went back to Domino's and one of the others threw an empty pizza box at the door with a note on it. 4RP 168. Van denied there were any weapons involved in the robbery. 4RP 168.

Van testified at trial, and reaffirmed the account he gave to police. 5RP 40. Van testified that he intended to "trick" the delivery person, and that Phan had handed over the merchandise for them to inspect, then he and his friends ran off. 5RP 49. Van's accomplices testified for the defense. Deng and Beyene testified that the delivery man willingly handed over the pizzas when they asked to check the order. 6RP 31, 49-50, 60-61. Alex Mai waited in the apartment to hold the door for the others and claimed the

delivery person handed the pizzas to the other accomplices.

6RP 97. Joshua Sum testified that he waited in the getaway car and did not see what happened. 6RP 16, 22.

The jury found Van guilty of theft in the first degree. CP 50.

The jury acquitted Van on the robbery charge. CP 47-48.

C. ARGUMENT

1. THERE WAS SUFFICIENT EVIDENCE FROM WHICH A RATIONAL TRIER OF FACT COULD CONCLUDE VAN TOOK PROPERTY FROM THE VICTIM.

Van contends that the evidence was not sufficient to find that he took the pizzas from Phan. He argues that he tricked Phan into handing over the pizzas and should have been convicted of theft in the third degree (by deception). Brief of Appellant at 13-14.

However, there was ample evidence that Van physically took the property from Phan as required by the statute.

The standard of review for determining the sufficiency of the evidence to sustain a criminal conviction 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. Green, 94 Wn.2d 216,

221, 616 P.2d 628 (1980) (citing Jackson v. Virginia, 443 U.S. 307, 316-20, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1970)). In State v. Gerber, 28 Wn. App. 214, 622 P.2d 888 (1981), this court noted:

A challenge to the sufficiency of the evidence admits the truth of the State's evidence and all inferences that can reasonably be drawn therefrom. The evidence is interpreted most strongly against the defendant and in a light most favorable to the State...When there is substantial evidence, and when that evidence is conflicting or is of such a character that reasonable minds may differ, it is the function and province of the jury to weigh the evidence, to determine the credibility of the witnesses, and to decide the disputed questions of fact.

Gerber, 28 Wn. App. at 217 (citing State v. Theroff, 25 Wn. App. 592, 593, 608 P.2d 1254 (1980)).

It is not necessary that the reviewing court itself be convinced of the defendant's guilt beyond a reasonable doubt. Gerber, 28 Wn. App. at 221. Appellate courts must continue to give deference to the trier of fact to resolve conflicts in testimony, weigh evidence, and draw reasonable inferences therefrom. Jackson, 443 U.S. at 319; Gerber, 28 Wn. App. at 622.

When there is a factual dispute as a result of conflicting testimony or assessments of credibility the Court must defer to the jury. State v. Thomas, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004) (citing State v. Cord, 103 Wn.2d 361, 367, 693 P.2d 81 (1985));

State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992).

The Court of Appeals does not substitute its judgment for that of the jury on factual issues. State v. Israel, 113 Wn. App. 243, 269, 54 P.3d 1218 (2002). Credibility determinations are for the trier of fact and are not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

Theft in the first degree is defined by RCW 9A.56.030. CP 7-8. The State charged Van under subsection (1)(b) that requires:

(1) A person is guilty of theft in the first degree if he or she commits theft of:

...
(b) Property of any value, other than a firearm as defined in RCW 9.41.010 or a motor vehicle, *taken from the person of another*.

RCW 9A.56.030(1)(b) (emphasis added). The statute, by its plain reading, requires proof that the property be "taken from the person of another." Neither the statute nor cases addressing theft in the first degree define taking "from the person of another." Van correctly notes the only case addressing the definition of taking "from the person of another" is State v. Nam, 136 Wn. App. 698, 705, 150 P.3d 617, 620 (2007). In Nam, Division Two adopted the LaFave definition of taking from the person of another as "Property

is on the victim's person if it is in [her] hand, the pocket of the clothing [she] wears, or is otherwise attached to [her] body or [her] clothing." Id. at 705, citing 3 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 20.3 at 179 (2nd ed. 2003)³. The testimony of Phan established that the property was taken directly from him, satisfying the requirement that property be "taken from the person of another."

Phan testified, clearly and unambiguously, that Van and his accomplices took the merchandise from his hands and ran. 4RP 33, 34, 35, 45, 75, 76, 77. He did not willingly hand over the food as a result of a ruse. 4RP 34, 35, 45, 75. Phan described Domino's policy is to never give the food to the customer prior to payment. 4RP 34. Phan described the defendants asking to check the order, but never testified he gave them the pizzas, he reiterated that they grabbed the pizzas and ran. While Van used deception to

³ Nam was required to set the limits of taking property from the person of another in the context of a robbery in the second degree charge. Nam, 136 Wn. App. at 704. Robbery in the second degree requires taking "from the person of another or in his or her presence against his or her." RCW 9A.56.190. In Nam, the State instructed the jury only regarding taking "from the person of another" and neglected to include "in the presence of another." Id. at 703-04. Division Two found that the defendant taking the victim's purse that was on the seat next to her was not sufficient to show the property was taken "from the person of another." Id. at 707. In the present case, the limits of taking "from the person of another" is not at issue given Phan testified the items were taken from his hands. 4RP 75-76.

lure the victim to the scene, once the victim was there, the property was taken from his person.

Van and his accomplices testified at trial, and gave a different account. They contend that they "tricked" Phan into handing over the pizzas for inspection and then ran. 5RP 49; 6RP 31, 49-50, 60-61. Van fails to address the victim's clear, unambiguous testimony to the contrary. Van fails to cite to Phan's repeated assertions that he did not hand over the pizzas so Van and his accomplice could "check" them. Brief of Appellant at 15, citing only to 4RP 33. Phan testified numerous times that the pizzas were taken from him:

Q: And when the young men wanted to check the pizza what did you think about that?

A: Well, the other guys grab the pizza and ran. That's all.

4RP 33.

...

A: Well, when the two persons who wanted to check pizza I say pay me first or I come to your apartment you pay me and then I'll let you check the pizza.

Q: Why is it important that they pay you first?

A: That's our rule. They have to pay before they have to hold on their pizza.

4RP 34.

...

Q: Did they give you any money?

A: No. They did -- they took it pretty quick. They just grab it and ran pretty quick.

4RP 34.

...

As soon as I said that I want the money they grab the pizza and ran.
4RP 35.

...
Q So just to be clear, did you ever let the young men check the pizza?

A: No, at that moment the pizza was grabbed and, you know, they took off with it.
4RP 45.

...
Yeah they grabbed the pizza and ran.
4RP 55.

...
Q: And one of the black men grabbed the pizzas and they all ran off?

A: Yes. Well, one guy from that group grabbed the pizza.

Q: One guy grabbed - - from that group of five grabbed the pizza and they ran off?

A: Yes.

Q: Okay.

A: They - - they did it together.
4RP 56-57.

...
When the Asian guy told me that they wanted to check the pizza the other one ran over and grab the pizza and ran.
4RP 75.

...
Q: Now, when the pizza was grabbed, where was it grabbed from?

A: From my hand.
4RP 75-76.

...
Well, all three of them came up and grabbed the pizza and ran off.
4RP 77.

Van and his accomplices' testimony to the contrary was a factual dispute at trial. When reviewing the sufficiency of the evidence, this

factual dispute must be resolved in favor of the State. Thomas, 150 Wn.2d at 874-75; Walton, 64 Wn. App. at 415-16. Furthermore, the jury's credibility determinations are not subject to review. Camarillo, 115 Wn.2d at 71.

Van contends that the video contradicts Phan's testimony that the pizzas were taken from him. Brief of Appellant at 15. Van is incorrect. The video is low quality, and did not record audio. See Ex. 2. The images are grainy, blurry, and in stop action. Much of the interaction between Phan and the suspect is obscured by the open door. The video ends in the middle of the encounter and does not show how the transaction ended.⁴ Moreover, while the video camera was aimed at the gate on Juneau Street, Van testified that the group moved into the courtyard, hence off camera. 5RP 19-20. Even Deng, who admitted he was the one on the video, noted it was not clear⁵. 6RP 31-23. One cannot watch the video alone to determine what happened. The video requires some explanation from the witnesses, and was subject to different

⁴ The record is not clear why the video abruptly ends while Phan and the suspect are still standing in the opened doorway.

⁵ Defense counsel asked Deng to view the video in court and Deng noted, "It's not really clear." 6RP 31. Later, defense counsel asked Deng if he could see what was happening in the video and Deng answered "No." 6RP 32. Deng went on to explain his version of events without reference to the video. 6RP 32.

interpretations at trial. The fact that the witnesses provided differing accounts of what happened on the video simply means there was a factual dispute that must be resolved in a light most favorable to the State.

Van spends considerable time arguing that theft in the first degree by taking is different from theft in the third degree by deception. Van's argument fails for several reasons. First, while the elements of the offenses are different, Van fails to cite any authority to suggest that theft by taking from a person, and theft by deception are mutually exclusive. None of the cases cited by Van hold that using some deception to assist in taking property directly from the person of another can only be theft by deception. Second, 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. In other words, taking the pizzas from the delivery driver and refusing to pay for them is not deceptive. Phan did not walk away from the transaction only to learn later that he was duped. It was immediately apparent that the pizzas were being stolen from him.

Finally, his argument fails because factually, the evidence was sufficient to prove Van and his accomplices took property "from the person" of Phan.⁶ The evidence showed Van and his friends took the pizzas from Phan's hands. Van, through hypotheticals, poses the question of whether tricking someone into handing over property constitutes taking property from a person⁷. Brief of Appellant at 13. But, this is not a question posed by the facts of this case. The evidence in a light most favorable to the State demonstrates that Phan did not willingly hand over property. The evidence showed Van and his friends took the pizzas and ran. That is taking "from the person of another" by any definition.

The jury had ample evidence to conclude that Van took the merchandise from Phan. Viewing the evidence in the light most

⁶ Van also spends considerable time arguing that theft by taking is a more serious crime than theft by deception due to the risk of a confrontation. The statute does not support this assertion. Theft in the first degree includes taking any property over \$5,000 in value, even if the taking is accomplished by deception. RCW 9A.56.030(1)(a); see State v. Heffner, 126 Wn. App. 803, 110 P.3d 219 (2005) (theft by deception of over \$5,000 charged as theft in the first degree).

⁷ Van relies on State v. Mermis, 105 Wn.App. 738, 20 P.3d 1044 (2001) to argue that deceiving the victim into handing over property by a promise of future payment is not a "taking" for the purposes of the statute of limitations. Brief of Appellant at 12. Mermis is distinguishable by the fact that the deception was ongoing for some time with further promises of payment after the property was obtained. *Id.* at 742-43. Here, there was not an ongoing deception, the exchange of money and property was to be contemporaneous. Van immediately taking the property and running was not a deception.

favorable to the prosecution, any rational trier of fact could have found Van committed theft in the first degree. Van's sufficiency of the evidence argument must be rejected.

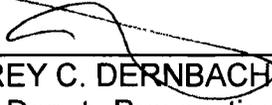
D. CONCLUSION

For the foregoing reasons, the State asks this Court to affirm Van's conviction for theft in the first degree.

DATED this 14th day of October, 2011.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Susan Wilk, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. HOUNG VAN, Cause No. 66174-4-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

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