

REC'D

JUL 27 2011

King County Prosecutor  
Appellate Unit

NO. 66824-2-I

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

---

---

STATE OF WASHINGTON,

Respondent,

v.

U.R.,

Appellant.

---

---

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KING COUNTY, JUVENILE  
DIVISION

The Honorable Christopher Washington, Judge

---

---

FILED  
COURT OF APPEALS DIV I  
STATE OF WASHINGTON  
2011 JUL 27 PM 4:35

BRIEF OF APPELLANT

---

---

CHRISTOPHER H. GIBSON  
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC  
1908 E Madison Street  
Seattle, WA 98122  
(206) 623-2373

**TABLE OF CONTENTS**

|  | Page |
|--|------|
| A. <u>ASSIGNMENTS OF ERROR</u> .....                           | 1    |
| <u>Issue Pertaining to Assignments of Error</u> .....          | 1    |
| B. <u>STATEMENT OF THE CASE</u> .....                          | 2    |
| 1. <u>Procedural Facts</u> .....                               | 2    |
| 2. <u>Substantive Facts</u> .....                              | 3    |
| C. <u>ARUGMENT</u> .....                                       | 5    |
| THE EVIDENCE WAS INSUFFICIENT TO CONVICT U.R.<br>OF THEFT..... | 5    |
| D. <u>CONCLUSION</u> .....                                     | 9    |

**TABLE OF AUTHORITIES**

Page

WASHINGTON CASES

State v. Chapin  
118 Wn.2d 681, 826 P.2d 194 (1992).....6

State v. Hickman  
135 Wn.2d 97, 954 P.2d 900 (1998).....6

State v. Hill  
83 Wn.2d 558, 520 P.2d 618 (1974).....6

State v. Hundley  
126 Wn.2d 418, 895 P.2d 403 (1995).....8

State v. Smith  
155 Wn.2d 496, 120 P. 3d 559 (2005).....6

FEDERAL CASES

In re Winship  
397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).....6, 8

RULES, STATUTES AND OTHER AUTHORITIES

1 Wharton's Criminal Evidence § 16  
(13th ed. C. Torcia 1972).....6

H. Underhill, Criminal Evidence § 125  
(5th ed. P. Herrick 1956).....6

JuCR 7.11.....7

RCW 9A.56.020 .....6

U.S. Const. Amend. XIV .....6

A. ASSIGNMENTS OF ERROR

1. The evidence was insufficient to convict Appellant of third degree theft.

2. The trial court erred in entering findings of fact 4, 5, 6, 7, 28 & 29. CP 24, 26.

Issue Pertaining to Assignments of Error

At the fact-finding hearing the only eye witness to a third degree theft never identified the accused (the juvenile appellant here), as the person she saw take money from a tip jar where she worked, testifying only that it was a black teen male wearing a red tee shirt and jeans. The evidence showed Appellant was arrested near the scene of the theft because he was a black male teen wearing a red sweatshirt. He was not, however, wearing a red tee shirt or jeans.

1. Was the evidence insufficient to convict Appellant of third degree theft when the eye witness failed to specifically identify him as the thief and the basis for the guilty finding was his mere proximity to the scene of the theft?

2. Did the trial court err in entering findings of fact 4, 5, 6, 7, 28 & 29, all of which erroneously state or imply the eyewitness specifically identified the appellant as the person involved in the theft?

B. STATEMENT OF THE CASE

1. Procedural Facts

The King County Prosecutor charged juvenile appellant U.R. (d.o.b. 3/25/95), with first degree robbery and third degree theft. RP 1, 37; RCW 9A.56.050 & .200(1)(a)(ii).<sup>1</sup> The State alleged that on July 8, 2010, U.R. first stole money from a tip jar at "The Pink Spot" coffee shop and later, in a separate incident, robbed Nicholas Wetherbee of his cell phone by displaying what appeared to be a handgun. Supp CP \_\_ (sub no. 54, Motion for Joinder of Counts, 1/18/11).<sup>2</sup>

A fact-finding hearing was held before the Honorable Chris Washington, January 24-25 & February 1 & 3, 2011. 1RP & 2RP.<sup>3</sup> U.R. was found guilty as charged. CP 23-32; 2RP 128-29. On March 11, 2011, the court imposed a standard range disposition for the robbery (103-129 weeks), and no additional sanctions for the theft. CP 17-22; 2RP 168-69, 172. U.R. appeals. CP 19, 70.

---

<sup>1</sup> The charges were brought under separate cause numbers, but subsequently joined for fact-finding and remain joined on appeal. Supp CP \_\_ (sub no. 56, Order of State's Motion for Consolidation of Cases for Trial, 1/18/11).

<sup>2</sup> All supplemental Clerk's paper designation are from the King Co. Cause No. 10-8-02304-8 SEA, which is assigned to the robbery charge.

2. Substantive Facts

In July 2010, Katie Osiadacz was a barista at "The Pink Spot" coffee shop in Federal Way. 2RP 3-4. Osiadacz testified at U.R.'s fact-finding and claimed that at 10:48 am on July 8, 2010, she saw two black teen males, one wearing a red tee shirt and jeans, the other wearing a white tee shirt and jeans, standing outside the drive-up window. She claimed she saw the one in the red tee shirt putting money from coffee shop tip jar into a backpack. 2RP 5-9, 11-12, 17, 27.

When she saw what they were doing she ran to the window, asked them to stop and return the money as they ran away, and then jumped out the window and chased them. 2RP 9. Osiadacz recalled the teen with the white tee shirt stopped briefly and walked towards her after she jumped out the window, but then turned and ran when the one in the red tee shirt said "come on." 2RP 11, 29. Osiadacz eventually gave up the chase, returned to the coffee shop and reported the theft to police. 2RP 12-13.

Shortly before Osiadacz's shift ended at 1 pm, police contacted her and asked her to look at two suspects detained nearby to see if they were the ones who took the tip money. 2RP 13-14. Osiadacz rode with an

---

<sup>3</sup> There are two volumes of verbatim report of proceedings referenced as follows: 1RP - January 24 & 25, 2011; and 2RP - February 1 & 3, 2011 & March 11, 2011.

officer to where the two people were detained. Based on their clothes, Osiadacz identified them as the thief and his companion. 2RP 15-16, 27.

Prior to Osiadacz testimony at the fact-finding, U.R.'s counsel showed her Exhibit 2, a picture of U.R. in a distinctive red sweatshirt. 2RP 25. On cross examination, Osiadacz admitted telling counsel she was sure the sweatshirt shown in Exhibit 2 was not what the thief wore when he stole the tip money. Id. Exhibit 2 is a photograph of U.R. taken following his arrest and shows him wearing a red sweatshirt displaying the phrase "Swag Gang", black athletic shorts (not jeans) and white shoes. 1RP 25-26.

At no time during her fact-finding testimony did Osiadacz specifically identify U.R. as the person who stole the tip jar money. See 2RP 3-29.

According to Officer Ray Bunk, he received a tip at about noon on July 8, 2010, that the two individuals who fled "The Pink Spot" after the money was stolen were at a bus stop about a quarter mile away. 1RP 13-14. When Bunk arrived at the bus stop, he detained two suspects, U.R. and another juvenile, I.W., and held them until a show-up viewing by Osiadacz could be conducted. 1RP 14-15. Bunk acknowledged U.R. was wearing a red sweat shirt while he was detained at the bus stop. 1RP 65.

Bunk testified that U.R. and I.W. were "both positively identified during an in-field showup [sic] as the two that took the tip jar [sic]." 1RP 14-15. U.R.'s counsel objected, arguing "the testimony regarding identification [should] be stricken unless [Officer Bunk] is prepared to testify that he heard the alleged victim make the identification." 1RP 16. Bunk subsequently admitted he did not personally hear Osiadacz identify them as the culprits. 1RP 15-16.

Officer Shon Lunt drove Osiadacz to the show-up identification at the bus stop. 2RP 31. Lunt claimed Osiadacz "positively identified" the detained individuals as the ones who took the tip money. 2RP 32.

Following his arrest, U.R. was interviewed by Detective Jeffrey Vanderveer. 1RP 158. U.R. denied any involvement in the theft, but admitted being in the vicinity when it occurred. 1RP 161.

C. ARGUMENT

THE EVIDENCE WAS INSUFFICIENT TO CONVICT U.R. OF THEFT.

The evidence was insufficient to conclude beyond a reasonable doubt that U.R. took the tip money. Although Osiadacz testified a black male teen in a red tee shirt stole the money, she never specifically identified U.R. as the thief at trial. The failure of the State to present

sufficient evidence linking U.R. to the theft requires reversal and dismissal of that charge with prejudice.

Due process requires the State to prove all necessary facts of the crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Smith, 155 Wn.2d 496, 502, 120 P. 3d 559 (2005). Evidence is insufficient to support a conviction unless viewed in the light most favorable to the State a rational trier of fact could find each essential element of the crime beyond a reasonable doubt. State v. Chapin, 118 Wn.2d 681, 691, 826 P.2d 194 (1992). A defendant may challenge the sufficiency of the evidence for the first time on appeal. State v. Hickman, 135 Wn.2d 97, 103 n.3, 954 P.2d 900 (1998).

It is axiomatic in criminal trials that the prosecution bears the burden of establishing beyond a reasonable doubt the identity of the accused as the person who committed the offense. 1 H. Underhill, *Criminal Evidence* s 125 (5th ed. P. Herrick 1956, Supp.1970); 1 Wharton's *Criminal Evidence* s 16 (13th ed. C. Torcia 1972). Identity involves a question of fact for the jury and any relevant fact, either direct or circumstantial, which would convince or tend to convince a person of ordinary judgment, in carrying on his everyday affairs, of the identity of a person should be received and evaluated.

State v. Hill, 83 Wn.2d 558, 560, 520 P.2d 618 (1974).

Here, to convict U.R. of third degree theft as charged, the State had to prove beyond a reasonable doubt that he was the person who on July 8,

2010, "wrongfully obtain[ed] or exert[ed] unauthorized control over" money that belonged to The Pink Spot coffee shop, "with intent to deprive [The Pink Spot] of such property or services." RCW 9A.56.020(1)(a); CP

1. As the fact-finding court noted, there was evidence sufficient to find U.R. "was certainly in the location where" both the theft and the robbery occurred, and that "[t]he issues really come down to identification." 2RP

126. With regarding to the theft charge, the court oral ruling provides:

[the] barista did not obviously have . . . time to make an identification of the person who went into the tip jar other than red, and so again [, as in the robbery,] it's red and white. It is significant to me that she picked the person who was wearing the red shirt versus any other color shirt and that later on [U.R. and I.W.] were found and [approximately \$80] was found with these two people, albeit in the backpack of [I.W.], but the proximity physically of where these people were found, the money being in the backpack and frankly [the robbery victim's] observation [that U.R. and I.W.] were coming from the direction of] the coffee shop, all adds to the reasons why I would make this finding that [U.R.] is guilty of the crime of theft in the third degree.

2RP 129.

The court's subsequent written findings pursuant to JuCR 7.11(d), are far more specific. For example finding of fact 4 provides that "[t]he barista turned and saw [U.R.] reaching in the drive-through window and stealing money." CP 24. Similarly, findings of fact 5, 6 and 7 specifically identify U.R. as the person whole stole \$80 from the tip jar, ran from the

coffee shop and who "the barista" chased and yelled at. Id. Likewise, findings of fact 28 and 29 specifically identify U.R. as the person Osiadacz identified as the thief. CP 26.

The record does not support the court's written findings. As the court acknowledged in its oral ruling, Osiadacz failed to ever specifically identify U.R. as the thief. The most she could say was that the thief was a black teen male wearing a red tee shirt and blue jeans. Although U.R. is a black teen male, he was not wearing a red tee shirt and jeans. Instead, U.R. was wearing a distinctive red sweat shirt, which Osiadacz was certain was not what the thief wore. Moreover, U.R. wore black athletic shorts instead of jeans. Osiadacz never made the claims set forth in findings of fact 4, 5, 6, 7, 28 and 29, are not otherwise supported by the evidence and therefore entered in error.

The court's oral ruling reveals that it was U.R.'s mere proximity to the scene of the theft that it relied on as the basis to convict. Proximity should not be enough. As the United States and Washington Supreme Courts have recognized, "[T]he reasonable-doubt standard is indispensable, for it 'impresses on the trier of fact the necessity of reaching a subjective state of certitude on the facts in issue.'" In re Winship, 397 U.S. at 364; State v. Hundley, 126 Wn.2d 418, 421, 895 P.2d 403 (1995).

Here, U.R.'s mere proximity to the scene of the theft cannot reasonably provide the necessary basis for a subjective state of certitude that he was the thief. This Court should reverse and dismiss.

D. CONCLUSION

For the reasons stated, this Court should reverse U.R.'s theft conviction and dismiss the charge with prejudice.

DATED this 27th day of July, 2011.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



CHRISTOPHER H. GIBSON

WSBA No. 25097

Office ID No. 91051

Attorneys for Appellant

ERIC J. NIELSEN  
ERIC BROMAN  
DAVID B. KOCH  
CHRISTOPHER H. GIBSON

OFFICE MANAGER  
JOHN SLOANE

LAW OFFICES OF  
**NIELSEN, BROMAN & KOCH, P.L.L.C.**

1908 E MADISON ST.  
SEATTLE, WASHINGTON 98122  
Voice (206) 623-2373 · Fax (206) 623-2488

WWW.NWATTORNEY.NET

LEGAL ASSISTANT  
JAMILAH BAKER

DANA M. LIND  
JENNIFER M. WINKLER  
ANDREW P. ZINNER  
CASEY GRANNIS  
JENNIFER J. SWEIGERT

OF COUNSEL  
K. CAROLYN RAMAMURTI  
JARED B. STEED

State V. U.R.

No. 66824-2-I

Certificate of Service by Mail

On July 27, 2011, I deposited in the mails of the United States of America,  
A properly stamped and addressed envelope directed to:

U. R., II  
Green Hill School  
375 SW 11th Street  
Chehalis, WA 98532

Containing a copy of the opening brief, re U.R.  
Cause No. 66824-2-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.

  
\_\_\_\_\_  
John Sloane  
Office Manager  
Nielsen, Broman & Koch

7-27-11  
Date  
Done in Seattle, Washington

FILED  
COURT OF APPEALS DIV I  
STATE OF WASHINGTON  
2011 JUL 27 PM 4:35