

**NO. 45613-3-II**

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

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STATE OF WASHINGTON,

Respondent,

v.

**ADAM PHILLIP THOMAS,**

Appellant.

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

The Honorable Daniel Stahnke, Judge

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**BRIEF OF APPELLANT**

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LISA E. TABBUT  
Attorney for Appellant  
P. O. Box 1396  
Longview, WA 98632  
(360) 425-8155

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A. ASSIGNMENT OF ERROR

The State failed to prove an essential element of robbery in the first degree; that Mr. Thomas used force or fear to obtain or retain possession of a meal or to prevent or overcome resistance to the taking of a meal.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

The State is required to prove each essential element of the charged offense beyond a reasonable doubt. Robbery in the First Degree, as charged here, required the State to prove beyond a reasonable doubt that Mr. Thomas used force or fear to obtain or retain a meal or to prevent or overcome resistance to the taking of the meal. But Mr. Thomas had peaceably eaten the meal, and the taking occurred when the meal was eaten with no intent to pay for it. Thus a display of a knife outside of the restaurant was extraneous to the taking of the meal and did not prevent or overcome any resistance to the taking of the meal that had already been taken through consumption. Is Mr. Thomas entitled to reversal of his conviction for the State's failure to prove all essential elements of the charged offense?

C. STATEMENT OF THE CASE

Adam Thomas went to Vancouver's El Presidente restaurant because he was hungry. RP 1A<sup>1</sup> 49. He ordered a salad and an alcoholic drink from the restaurant owner and manager, Jorge Estrada. RP 1A 60. While he waited for his food to arrive and while he ate, he stepped outside to smoke about three times. RP 1A 60-61.

Mr. Thomas had eaten about half of his salad and drink, when he went back outside to smoke. RP 1A 66. This time, Mr. Thomas took his back pack. RP 1A 63. That made Mr. Estrada nervous. It suggested to him that Mr. Thomas would try to slip out without paying for his meal. RP 1A 61.

Mr. Estrada, walked outside and asked Mr. Thomas to either "cash out" or give him a debit card he could run. RP 1A 63-64. Mr. Thomas readily complied. He gave Mr. Estrada his Washington ID card and a Mastercard debit card. RP 1A 63, 64, 81. Mr. Estrada went inside and ran the card. Payment on the card was declined. RP 1A 63.

Per Mr. Estrada, he went back outside, told Mr. Thomas the card was declined, and asked Mr. Thomas how he was going to pay for the meal. RP 1A 67. Mr. Thomas responded by telling Mr. Estrada "I sure do" when asked for another type of payment. RP 1A 67. Mr. Thomas

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<sup>1</sup> There are two volumes of verbatim report of proceedings for this appeal –"RP 1A" and "RP 1B."

reached into his pocket and unfolded a pocket knife with a 3-4 inch blade. RP 1A 67, 70. The two men looked at each other. RP 1A 67. Mr. Estrada, fearing that he might be hurt, retreated back into the restaurant. RP 1A 67. Mr. Thomas took off running. Mr. Estrada called the police. RP 1A 67. No one from the restaurant attempted to follow or detain Mr. Thomas. RP 1A 68.

Vancouver police sergeant Jay Alie drove to the address listed on Mr. Thomas's ID and waited. RP 1A 77. After about 30 minutes, he saw a person matching Mr. Estrada's description of Mr. Thomas walking toward the address. RP 1A 76-78.

Sergeant Alie detained Mr. Thomas and advised him of his *Miranda*<sup>2</sup> rights. RP 1A 80. Mr. Thomas explained that he was hungry and knew he did not have money to pay for his meal.<sup>3</sup> RP 1A 49, 80-81. He denied ever being confronted by Mr. Estrada or being told by Mr. Estrada that the card had been declined. He denied showing Mr. Estrada a knife. RP 1A 91. Instead, Mr. Thomas said he left the restaurant premises immediately after giving the debit card and identification card to Mr. Estrada. RP 1A 91.

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<sup>2</sup> *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

<sup>3</sup> At a pre-trial CrR 3.5 hearing, the court found Mr. Thomas's statements to the police admissible. RP 1A 37-55.

The police took Mr. Estrada to take a look at Mr. Thomas. Mr. Estrada easily identified Mr. Thomas. RP 1A 73.

Officer Jeremy Souza also advised Mr. Thomas of his *Miranda* rights. Mr. Thomas repeated to Officer Souza the statements he made to Sergeant Alie. RP 1B 101.

Neither Sergeant Alie nor Officer Souza found a knife on Mr. Thomas's person or in his possession. RP 1A 81-82; RP 1B 102-03.

The State charged Mr. Thomas with robbery in the first degree alleging that "in the commission of said crime or in the immediate flight therefrom, [Mr. Thomas] was armed with a deadly weapon and/or displayed what appeared to be a firearm or other deadly weapon, to wit: a knife," in violation of RCW 9A.56.200(1)(a)(i) and 9A.56.200(1)(a)(ii). CP 1. The State also pled a deadly weapon enhancement for the knife. CP 1; RCW 9.94A.533(4).

Mr. Thomas did not testify at trial and presented no defense witnesses. RP 1B 128-29.

At Mr. Thomas's request, the jury was instructed on the lesser included offense of theft in the third degree. RP 1B 161; Supplemental Designation of Clerk's Papers, Court's Instructions to the Jury (sub nom. 21), Instruction 20. The jury found Mr. Thomas guilty of both the robbery in the first degree and the weapon enhancement. CP 3-5; RP 1B 259-60.

The court sentenced Mr. Thomas to 81 months. CP 8; RP 1B 267. Mr. Thomas appeals his conviction. CP 20-21.

D. ARGUMENT

THE STATE FAILED TO PROVE THAT ANY FORCE OR FEAR USED BY MR. THOMAS WAS USED TO OBTAIN OR RETAIN POSSESSION OF PROPERTY OR TO PREVENT OR OVERCOME THE RESISTANCE TO THE TAKING OF PROPERTY AS IS REQUIRED TO PROVE ROBBERY IN THE FIRST DEGREE.

1. The State bears the burden of proving each of the essential elements of the charged offense beyond a reasonable doubt.

In criminal prosecution, the State is required to prove each element of the crime charged beyond a reasonable doubt. U.S. Const. Amend XIV; *Apprendi v. New Jersey*, 530 U.S. 466, 471, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). The standard the reviewing court uses in analyzing a claim of insufficiency of the evidence is “[w]hether 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.” *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *Green*, 94 Wn.2d at 221. A challenge to the sufficiency of the evidence admits the truth of the State’s evidence and all reasonable

inferences that can be drawn therefrom. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

To prove robbery in the first degree as charged in this case, the State was required to prove beyond a reasonable doubt that Mr. Thomas (1) unlawfully took property from or in the presence of another, (2) he intended to do so (3) by use or threatened use of force (4) in order to obtain or retain the property or to overcome resistance to the taking, and (5) in the commission of the robbery or flight therefrom he was armed with a deadly or what appeared to be a deadly weapon. RCW 9A.56.200(1)(a)(i); RCW 9A.56.200(1)(a)(ii); CP 1. Mr. Thomas submits the State proffered insufficient evidence to prove that any fear or force used by him was used in order to obtain or retain the meal or to overcome resistance to the taking of the meal.

2. The State failed to prove the essential element that any fear or force used by Mr. Thomas was used in order to obtain or retain the meal or to overcome resistance to the taking of the meal.

Mr. Thomas contends that, although the evidence was that he showed Mr. Estrada a knife after he packed up and left the restaurant,<sup>4</sup> he did not do so in order to obtain or retain the meal or to overcome resistance to the taking of the meal.

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<sup>4</sup> Mr. Thomas denied ever showing a knife to Mr. Estrada. RP 1A 91; RP 1B 102.

Mr. Thomas did not *obtain* the meal through force. He ordered the meal and it was brought to him by Mr. Estrada. This happened in the restaurant and was at all times a peaceable, mutual encounter. Nothing in the evidence supports a contrary interpretation.

Mr. Thomas did not *retain* the meal through force or use force to *overcome resistance* to the taking of the meal.

In *State v. Johnson*, Mr. Johnson walked into Wal-Mart, loaded a \$179 television-video cassette recorder combo into a shopping cart, removed the security tag, and pushed the cart out the front door. Two security guards observed him, followed him into the parking lot, and confronted him. Mr. Johnson abandoned the shopping cart and started to run away but suddenly turned back. One of the guards grabbed Mr. Johnson's arm, and he punched the guard in the nose and ran away. The Supreme Court found insufficient evidence of robbery in the first degree. *State v. Johnson*, 155 Wn.2d 609, 611, 121 P.3d 91 (2005). The court found Mr. Johnson abandoned the stolen television prior to punching the security officer thus Mr. Johnson did not use force in an effort to retain the television.

In *State v. Hornaday*, Mr. Hornaday, age 20, was arrested for illegal consumption of alcohol when a police officer thought Mr. Hornaday appeared intoxicated and the officer could smell alcohol on his

breath. Mr. Hornaday challenged the officer's authority to arrest him arguing the misdemeanor offense did not occur in the officer's presence. Under the law in existence at that time, an officer could only arrest for misdemeanors committed in the officer's presence. The issue was whether alcohol, once assimilated in a body, is still "present" or "possessed" by the consumer. The court ruled it was not and reversed Mr. Hornaday's conviction. *State v. Hornaday*, 105 Wn.2d 120, 128-29, 713 P.2d 71 (1986).

Applying the rationale of *Johnson* and *Hornaday* to the sufficiently of evidence in Mr. Thomas's case, once Mr. Thomas consumed the meal, he had essentially abandoned it as it had been assimilated into his body. As such, Mr. Thomas retained nothing. Mr. Thomas also had nothing in his possession to take through force or for which force could be used to overcome resistance to the taking.

3. This Court must reverse an remand with instructions to dismiss the conviction.

Since there was insufficient evidence to support the conviction, this Court must reverse the conviction with instructions to dismiss. To do otherwise would violate Double Jeopardy. *State v. Crediford*, 130 Wn.2d 747, 760-61, 927 P.2d 1129 (1996) (the Double Jeopardy Clause of the United States Constitution "forbids a second trial for the purpose of

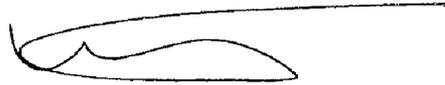
affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding”), *quoting Burks v. United States*, 437 U.S. 1, 9, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978).

E. CONCLUSION

For the reasons stated above, Mr. Thomas submits his conviction for robbery in the first degree must be reversed.

Dated this 20<sup>th</sup> day of May 2014.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Lisa E. Tabbut", written over a horizontal line.

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LISA E. TABBUT, WSBA #21344  
Attorney for Adam Phillip Thomas

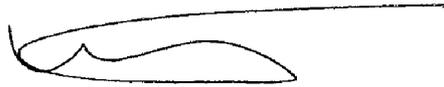
**CERTIFICATE OF SERVICE**

Lisa E. Tabbut declares as follows:

On today's date, I efiled Appellant's Brief to: (1) Anne Mowry Cruser, Clark County Prosecutor's Office, at prosecutor@clark.wa.gov; (2) the Court of Appeals, Division II; and (3) I mailed it to Adam Phillip Thomas, DOC# 313527, Coyote Ridge Corrections Center, PO Box 769, Connell, WA 99326.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed May 20, 2014, in Mazama, Washington.



Lisa E. Tabbut, WSBA No. 21344  
Attorney for Adam Phillip Thomas

## COWLITZ COUNTY ASSIGNED COUNSEL

**May 20, 2014 - 4:21 PM**

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