

**State of Wisconsin
Court of Appeals
District 1
Appeal No. 2010AP002715 - CR**

State of Wisconsin,

Plaintiff-Respondent,

v.

Dewayne Walter,

Defendant-Appellant.

**On appeal from a judgment of the Milwaukee County
Circuit Court, The Honorable David Hansher, presiding**

Defendant-Appellant's Brief and Appendix

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Statement on Oral Argument and Publication

The issue presented by this appeal, which involves the definition of “asportation” of property, has been only rarely addressed by the appellate court. Therefore, the appellant recommends both oral argument and publication.

Statement of the Issues

I. Whether the evidence was sufficient, as a matter of law, to sustain the asportation element of armed robbery.

ANSWERED BY THE TRIAL COURT: Yes

Summary of the Argument

The appellant, Dwayne Walter, was charged with two counts of armed robbery. The complaint alleged that Walter, and his companion, Solomon Graves, were involved in two separate armed robberies that occurred moments apart in the same vicinity. Each robbery involved a separate victim. Walter was acquitted of the first armed robbery. The facts of the second robbery are that Graves approached Joshua Jackson-Long, and asked him for a cigarette. Seconds later, according to Jackson-Long, Walter grabbed Jackson-Long from behind and wrestled him to the ground while possessing a knife or a

box-cutter. Once Jackson-Long was down, his jacket was pulled off of him. Then he was ordered to run away. Jackson-Long began to walk away, but he then changed his mind and ran back toward Walter and Graves to get his jacket back. At about that point, Graves dropped the jacket and ran away because the police came upon the scene.

Asportation-- or the carrying away-- of the property is an element of armed robbery. Although asportation does not require that the property be moved any certain distance, it does require that the property be moved away-- at least to some extent-- from the place where it was taken from the owner.

Here, even viewing the evidence in the light most favorable to the State, there is no evidence that Jackson-Long's jacket was moved away from the place where it was taken from him. As such, the evidence is insufficient as a matter of law to sustain Walter's conviction for armed robbery.

Statement of the Case

I. Procedural History

The appellant, Dwayne Walter (hereinafter "Walter") was charged with two counts of armed robbery, contrary to Sec. 943.32(2), Stats. arising out of incidents that occurred on January 19, 2010 in Milwaukee (counts one and three of the criminal complaint). (R:2) Walter entered not guilty pleas to both charges.

The case proceeded to jury trial on April 26, 2010. The jury returned verdicts finding Walter not guilty of count one (for clarity, the “Fumbanks robbery”), but guilty of count three (the “Jackson-Long robbery”). Thereafter, the court sentenced Walter to ten years in the Wisconsin State Prison, bifurcated as five years initial confinement and five years of extended supervision. (R:14).

Walter timely filed a notice of intent to pursue postconviction relief. (R:15) There was no postconviction motion; rather, Walter timely filed a notice of appeal.

II. Factual Background

Anthony Fumbanks testified that on January 19th, 2010, at about 2:00 a.m. he was standing at a bus stop on Milwaukee’s north side. (R:23-91) Fumbanks told the jury that while waiting for the bus, he was approached by a man (later identified as Walter). (R:23-92) As Walter approached, he was in the company of another individual, who was unknown to Fumbanks, but who was later identified as Solomon Graves (R:23-141). Before the two men reached Fumbanks, though, they separated. (R:23-94) Walter said something to effect of, “Is everything all right?” Fumbanks responded by saying that he did not want any trouble. (R:23-97) Walter nodded in the direction of Graves and, in response, Graves came toward the bus stop. (R:23-99) Graves asked whether Fumbanks had a cigarette, and Fumbanks indicated that he did not. At that

point, Graves asked Fumbanks for a dollar, and he said that he did not have a dollar. (R:23-101) According to Fumbanks, Graves then moved in closer to him, pulled out a box-cutter, placed it on his arm, and said, "Give me everything." (R:23-102) Fumbanks spun away, threw his money on the ground, and then ran out into the street. (R:23-103) He did not see either man pick up the money that he had thrown on the ground. (R:23-107) He then went into a nearby submarine sandwich shop and called the police. (R:23-106)

Moments later, Joshua Jackson-Long was walking home from his uncle's house (R:24-52) At the intersection of 24th Street and Chambers, Jackson-Long encountered two men, later identified as Walter and Graves. (R:24-55) Graves approached, asked Jackson-Long whether he had any marijuana, and Jackson-Long said that he did not. According to Jackson-Long, Walter then grabbed him from behind, and then he (Jackson-Long) started fighting with Graves (R:24-55, 64) Walter managed to get Jackson-Long to the ground, and was holding him down while Graves was trying to pull his (Jackson-Long's) coat off of him. (R:24-58) According to Jackson-Long, they got the coat off of him, but dropped it when they saw the police pulling up. (R:23-59). On this point, Jackson-Long's testimony was as follows:

Q All right. So they-- they told you to get out of there?

A They told me to run. They-- After they take my coat, they told me to run.

Q All right.

A And then they had dropped the coat-- I guess they seen the police riding up. Then the police must have seen what was already going on.

Q Okay. So they left and they took your coat.

A Yeah. They took my coat. And then they--

Q What do you-- What do you-- Are you walking away at this point?

A No. I was-- Yeah, I was walking away towards-- going towards, you know, my house. And then I had turned around and started running back towards them trying to get my coat back because I wasn't just gonna leave without my coat.

(R:24-60)

Police officers had, in fact, immediately responded Fumbanks' call and, while patrolling the area, they noticed a man who "just didn't seem right"¹ (R:23-132) About a half-block away, they saw two other men², one of whom was dropping a black coat. (R:23-133, 134) It appeared to the police that the two men were walking together (R:23-147). When the men saw the police, they separated. *Ibid.* The officers chased one of the men (later identified as Graves) R:23-140). After a short chase, he was captured. (R:23-141) Likewise, police chased the other individual, later identified as Walter, and captured him as well. (R:23-151) According to the officer who arrested him, Walter had small cuts on his hands. (R:23-152)

Police questioned Walter about the incidents. Walter initially said that he did not know anything about the first

¹Presumably, this was Joshua Jackson-Long

²The men were later identified as Graves and Walter.

incident (Fumbanks), but he admitted that he was at the scene of the second incident (Jackson-Long). His belief at the time of the second incident was that he was breaking up a fight. (R:24-9) In the process of breaking up the fight, he attempted to grab a knife from Jackson-Long and, in the process, Walter's hand was cut. (R:24-11)

During a second interview, Walter further explained that he had been drinking at a bar called "JJ's" with his friend, Solomon Graves. (R:24-37, 38) He and Graves left the bar to see whether they could buy some drugs. Walter saw a man sitting at a bus-stop (Fumbanks), and he went over to talk to the man. (R:24-40). Graves, on the other hand, went toward a nearby gas station. After a moment, though, Walter gestured for Graves to come over to the bus stop. (R:24-41). When Graves got over to the bus-stop he had a "crazy look on his face", and he sat down next to Fumbanks. At that point, Fumbanks bolted out into the street. Walter did not see a knife in Graves' hand. (R:24-43)

According to Walter, he and Graves then walked away from the bus-stop, but they were on opposite side of the street. (R:24-44) Minutes later, Graves then got into a confrontation with another man (Jackson-Long). *Ibid.* When the two started fighting, Walter ran across the street and tackled Jackson-Long. (R:24-45) At some point during the melee, Walter's hand was cut. *Ibid.*

Walter testified at trial. He told the jury a similar version

of events. He said that he and Graves were walking around looking for some cocaine to buy, and Walter saw Fumbanks sitting at the bus-stop. (R:24-85) He approached him, sat down next to him, and asked whether he (Fumbanks) had a cigarette. Fumbanks said that he did not. (R:24-87) Walter gestured at Graves and, when Graves arrived at the bus-stop, Fumbanks bolted into the street. *Ibid.*

Walter went on to explain that after the incident with Fumbanks, he and Graves walked away. They were on opposite sides of the street as they walked. (R:24-91) Walter said that he turned around and looked back. He saw Graves and Jackson-Long in boxing stances, circling like they were going to fight. (R:24-92) Walter saw the two swing at each other, and so he ran across the street and grabbed Jackson-Long (R:24-93) After a brief tussle, Jackson-Long reached into his pocket and produced a knife. (R:24-94) Walter tried to grab the knife, and his hand was cut. *Ibid.* Walter denied that he took Jackson-Long's coat. (R:24-96)

Argument

I. The evidence was insufficient, as a matter of law, to convict Walter of armed robbery in the Jackson-Long incident.

A. Standard of Appellate Review

The standard of appellate review on challenges to the sufficiency of the evidence to support a verdict in a criminal

case is well-known. In *State v. Poellinger*, 153 Wis. 2d 493, 501 (Wis. 1990), the Supreme Court held:

We hold that the standard for reviewing the sufficiency of the evidence to support a conviction is the same in either a direct or circumstantial evidence case. Under that standard, an appellate court may not reverse a conviction unless the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt.

B. The Elements of Armed Robbery

Sec. 943.32(2), Stats., provides:

(1) Whoever, with intent to steal, takes property from the person or presence of the owner by either of the following means is guilty of a Class E felony:

(a) By using force against the person of the owner with intent thereby to overcome his or her physical resistance or physical power of resistance to the taking *or carrying away of the property*;
or

(b) By threatening the imminent use of force against the person of the owner or of another who is present with intent thereby to compel the owner to acquiesce in the taking *or carrying away of the property*.

(2) Whoever violates sub. (1) by use or threat of use of a dangerous weapon, a device or container described under s. 941.26 (4) (a) or any article used or fashioned in a manner to lead the victim reasonably to believe that it is a dangerous weapon or such a device or container is guilty of a Class C felony.

(emphasis provided). “Asportation”, or the carrying away of the property, is an element of the offense. In, *State v. Johnson*, 207 Wis. 2d 239, 246 (Wis. 1997), the Supreme Court

explained:

Asportation means "carrying away." (citation omitted) The robbery statute under which Johnson was convicted does not expressly require a "carrying away." Nonetheless, in 1972, the court construed Wis. Stat. § 943.32 to require asportation as an element of armed robbery. Moore, 55 Wis. 2d at 6. Subsequently, the court of appeals has relied on and refined Moore: Section 943.32 focuses on the taking of property and if the property was not moved, the crime of robbery was not committed. *State v. Dauer*, 174 Wis. 2d 418, 432, 497 N.W.2d 766 (Ct. App. 1993). The slightest movement is sufficient to meet the element of asportation. *Grady*, 93 Wis. 2d at 5. The movement must be a movement away from the area where the object was intended to be. (citation omitted)

C. The evidence was insufficient to show that Walter “carried away” Jackson-Long’s coat; and, therefore, there was insufficient evidence of asportation.

Again, it is important to recall Jackson-Long’s version of the relevant events. He testified that:

Q All right. So they-- they told you to get out of there?

A They told me to run. They-- After they take my coat, they told me to run.

Q All right.

A And then they had dropped the coat-- I guess they seen the police riding up. Then the police must have seen what was already going on.

Q Okay. So they left and they took your coat.

A Yeah. They took my coat. And then they--

Q What do you-- What do you-- Are you walking away at this point?

A No. I was-- Yeah, I was walking away towards-- going towards, you know, my house. And then I had turned around and started running back towards them trying to get my coat back because I

wasn't just gonna leave without my coat.

(R:24-60).

Viewing the testimony of Jackson-Long in the light most favorable to the verdict, as the court must, here is what Jackson-Long says happened: By use of force, Graves compelled Jackson-Long to remove his coat. Then Graves ordered Jackson-Long to run away. Instead, Jackson-Long *walked* in the direction of his home, but then changed his mind, and then he began running back toward Graves and Walter. At that point, probably because the police were on the scene, Graves dropped the jacket and ran away. A police officer testified that he saw Graves drop the jacket but, significantly, the officer is unable to testify that Graves had moved the jacket from the scene.

Even viewing the evidence in the light most favorable to the verdict, there is no evidence that Graves or Walter carried the jacket away from the scene.

The State may make the hyper-technical argument that Jackson-Long's jacket was, in fact, moved, however slightly, from *the area where the object was intended to be*-- which, of course, was on Jackson-Long's body. Such an argument must be rejected.

The case in which the phrase "where the object was intended to be" originated is, *Ryan v. State*, 95 Wis. 2d 83, 86 (Wis. Ct. App. 1980) [overruled on other grounds by *State v. Anderson*, 141 Wis. 2d 653, 667 (Wis. 1987)]. The facts in *Ryan* are as follows:

On September 11, 1974, at approximately 3:30 a.m., the defendant approached a woman at the intersection of North Broadway and East Michigan streets in Milwaukee and asked if she had any money. After striking the woman in the face, he grabbed her purse. *Defendant then pulled the victim down an alley* where he continued to hit her with his fists. . . . The defendant was attempting to pull the victim out by her hair when her screams attracted the police. Upon entering the alley, a police officer saw the defendant run from the scene and apprehended him.

In holding that the element of asportation was adequately established, the Court in *Ryan* wrote:

The defendant wrested possession and control of the purse from the victim by force *and carried it to the entrance to the alley*. The fact that defendant abandoned the purse does not alter the fact that he had assumed absolute possession after forcibly removing it from the owner's person

95 Wis. 2d at 100. There is no indication in *Ryan* as to how far it was from the scene of the abduction to the entrance to the alley; however, it is clear that the purse was carried from one point to another.

Here, there simply is no evidence that Jackson-Long's jacket was carried from one point to another after it was wrested from his person. Thus, evidence was insufficient as a matter of law to establish the element of asportation.

Conclusion

For these reasons, it is respectfully requested that the Court of Appeals reverse Walter's conviction and order that a judgment of acquittal be entered.

Dated at Milwaukee, Wisconsin, this _____ day of
February, 2011.

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Certification as to Length and E-Filing

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of the brief is 2712 words.

This brief was prepared using *Google Docs* word processing software. The length of the brief was obtained by use of the Word Count function of the software

I hereby certify that the text of the electronic copy of the brief is identical to the text of the paper copy of the brief.

Dated this _____ day of _____, 2011:

Jeffrey W. Jensen

**State of Wisconsin
Court of Appeals
District 1**

State of Wisconsin,

Plaintiff-Respondent,

v.

Dewayne Walter,

Defendant-Appellant.

Defendant-Appellant's Appendix

A. Record on Appeal

B. Excerpt of testimony of Joshua Jackson-Long

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19 (2) (a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law

to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this ____ day of February, 2011.

Jeffrey W. Jensen