

**STATE OF MICHIGAN
IN THE SUPREME COURT**

Appeal from the Michigan Court of Appeals
Shapiro, P.J., and Whitbeck and Gleicher, J.J.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

**Supreme Court
Docket No. 145371**

vs

CHANDRA VALENCIA SMITH-ANTHONY,

Defendant-Appellee.

Court of Appeals No. 300480
Oakland County Circuit Court No. 2010-232456-FH

Brief on Appeal - Appellee

Oral Argument Requested



BY: John D. Roach, Jr. (P53746)
LAW OFFICE OF JOHN D. ROACH, JR., PLC
Attorney for Defendant-Appellant
Columbia Center II
101 West Big Beaver Road, Suite 1400
Troy, Michigan 48084
(248) 721-6980

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JURISDICTIONAL STATEMENT

Defendant-Appellee accepts Plaintiff-Appellant's Jurisdictional Statement as accurate.

STATEMENT OF QUESTIONS PRESENTED

DID THE COURT OF APPEALS CORRECTLY DETERMINE THAT THERE WAS INSUFFICIENT EVIDENCE TO PROVE BEYOND A REASONABLE DOUBT THAT THE CRIME OF LARCENY FROM A PERSON OCCURRED WITHIN THE IMMEDIATE AREA OF CONTROL OR IMMEDIATE PRESENCE OF THE LOSS PREVENTION OFFICER?

The defendant would answer: "Yes."

The circuit court answered: "No."

The Court of Appeals answered: "Yes."

STATEMENT OF FACTS

Defendant-Appellee successfully appealed as of right her jury trial conviction of Larceny From a Person (MCL 750.357) in the Court of Appeals. As the Plaintiff-Appellant has submitted virtually the entire record needed in their Appendix, Defendant-Appellee will utilize those citations within this Brief.

Defendant-Appellee Chandra Valencia Smith-Anthony was charged with Count I, Unarmed Robbery, Count II, Retail Fraud, 2nd and Count III, Possession of Marijuana for an incident alleged to have occurred at Northland Mall in the City of Southfield on May 31, 2010. (Oakland County Case No. 2009-229212 FH). In a separate case, Ms. Smith-Anthony was also charged with Retail Fraud, 1st Degree. (Oakland County Case No. 2010-232465 FH). She would plead guilty on this charge and it would not go before the jury.

On August 19, 2010, jury trial commenced before the Honorable Michael Warren in the Oakland County Circuit Court. Over defense counsel objection, the prosecution successfully requested dismissal of Count II, Retail Fraud, 2nd and Count III, Possession of Marijuana (1a, 15a-17a).

Khai Krumbhaar testified that she was employed at Macy's Northland Mall location as a loss prevention detective (18a). On May 31, 2010, Krumbhaar was working around 10:00 a.m. when she saw Ms. Smith-Anthony on the closed circuit television from the second floor office of the loss prevention department (14-15a). Krumbhaar opined that Defendant "appeared extremely nervous" while carrying two bags through the Men's Department (20a).

Ms. Smith-Anthony walked around the store and picked up a fifty-eight dollar White Diamonds fragrance gift box (22a). Krumbhaar, dressed in plain clothes, then left the security office and went to the store floor to watch Ms. Smith-Anthony (22a). Krumbhaar entered an undefined 'visual range' (22-23a). Ms. Smith-Anthony was still carrying the White Diamonds gift box and put it into one of her bags as she walked (24a). Krumbhaar could still see part of the gift box sticking out and began following Defendant (25a). Krumbhaar testified that she 'was able to stay fairly close' to Ms. Smith-Anthony without defining what that meant or estimated distance (23a). Krumbhaar stated that she 'stayed back giving her some space' (25a).

Ms. Smith-Anthony walked out of the store (26a). Krumbhaar noted that it was store policy not to stop someone until they leave the store (28-29a). She then approached Ms. Smith-Anthony (29a). Krumbhaar claimed Ms. Smith-Anthony began shouting at her, turn and began to run (29a). Krumbhaar grabbed hold of her arm and the back of her shirt (29-30a). She claimed Ms. Smith-Anthony began scratching at her, biting at her and grabbed her hair (31-32a). This altercation takes place nearly two hundred feet from the Macy's store (31a).

Northland Mall security arrived moments later (33a). Krumbhaar alleged that Ms. Smith-Anthony pulled free and attempted to run (34a). She threw her bags down as she tried to flee but was stopped (34a). At the conclusion of Krumbhaar's testimony, the prosecution rested (80a).

Defense counsel argued a Directed Verdict as to the charge of Unarmed Robbery stating the facts presented only supported a charge of Retail Fraud, 2nd Degree (81a). Judge Warren denied the Motion for Directed Verdict (82-84a).

Closing statements were argued by counsel and the trial court instructed the jury. There were no objections to the jury instructions or the verdict form. The jury returned a verdict of Guilty as to the lesser offense of Larceny from a Person (88a). Ms. Smith-Anthony pled guilty to Habitual Offender, 3rd.¹

On September 9, 2010, Judge Warren sentenced Ms. Smith-Anthony as to Larceny From a Person to 4-20 years (88a).²

Defendant-Appellee appealed to the Court of Appeals arguing that the evidence was insufficient to support a conviction of Larceny From a Person. The Court of Appeals agreed and reversed Ms. Smith-Anthony's conviction. *People v Smith-Anthony*, 296 Mich App 413; 821 NW2d 172 (2012). The Oakland County Prosecutors' Office filed an Application for Leave to Appeal which was granted by this Court on October 31, 2012.

Additional facts may be set forth in the argument section of this brief.

¹ Outside the presence of the jury, Ms. Smith-Anthony pled guilty in case 2010-232465 FH to Retail Fraud, 1st Degree. Ms. Smith-Anthony also pled guilty to Habitual Offender, 2nd. All parties were satisfied with the plea and the trial court accepted it.

² As to case 2010-232465 FH, Ms. Smith-Anthony was sentenced as to Retail Fraud, 1st to 28 months – 7 years 6 months with credit for 102 days.

ARGUMENT I

THE COURT OF APPEALS CORRECTLY DETERMINED THAT THERE WAS INSUFFICIENT EVIDENCE TO PROVE BEYOND A REASONABLE DOUBT THAT THE CRIME OF LARCENY FROM A PERSON OCCURRED WITHIN THE IMMEDIATE AREA OF CONTROL OR IMMEDIATE PRESENCE OF THE LOSS PREVENTION OFFICER.

ISSUE PRESERVATION:

Defendant-Appellee accepts the Issue Preservation of the Plaintiff-Appellant as factually accurate.

STANDARD OF REVIEW:

An appellate Court reviews *de novo* a claim regarding the sufficiency of the evidence. *People v Tombs*, 472 Mich 446,459; 697 NW2d 494 (2005); *People v Nowack*, 462 Mich 392, 399; 614 NW2d 78 (2000). See also *People v Hampton*, 407 Mich 354, 368; 285 NW2d 284 (1979).

A constitutional challenge to the sufficiency of the evidence can be reviewed on appeal in the absence of any objection in the trial court. *People v Patterson*, 428 Mich 502, 505 (1987). However in the present case, defense counsel argued a Motion for Directed Verdict as to the charge of Unarmed Robbery stating the facts presented only supported a charge of Retail Fraud, 2nd Degree (81a). Judge Warren denied the Motion for Directed Verdict (82-84a). This proper and timely Motion and argument preserved this issue for appellate review.

DISCUSSION:

Whether the evidence was sufficient to prove beyond a reasonable doubt that the crime of larceny from a person was committed within the “immediate area of control or immediate presence” of the loss prevention officer

A conviction based on insufficient evidence is unconstitutional. “[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every element necessary to constitute the crime with which he is charged.” *In Re Winship*, 397 US 358, 364; 90 S Ct 1068; 25 L Ed 2d 368 (1970). Circumstantial evidence and reasonable inferences drawn from the evidence may be sufficient to prove the elements of a crime. *People v Lee*, 243 Mich App 163; 622 NW2d71 (2000); *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993); *People v Chandler*, 201 Mich App 611; 506NW2d 882 (1993); *People v Flunten*, 115 Mich App 167, 171; 320NW2d 68 (1982). Inferences, however, must raise more than a possibility, and cannot be based on speculative or uncertain evidence. *People v Fisher*, 193 Mich App 284; 483 NW2d 452 (1992).

On review of the sufficiency of the evidence, an appellate court must determine whether the prosecution's evidence, viewed in a light most favorable to them, was sufficient to have allowed a rationale trier of fact to find proof beyond a reasonable doubt as to all of the essential elements. *Jackson v Virginia*, 443 US 307; 99 S Ct 2781; 61 L Ed 2d 560 (1979); *People v Robinson*, 475 Mich 1; 715 NW2d 44 (2006); *People v Hampton*, 407 Mich 354 (1979).

In *Jackson v Virginia, supra*, the United States Supreme Court held that when determining whether a decision is based on sufficient evidence, the state court "must consider not whether there was any evidence to support the conviction, but whether there was sufficient evidence to justify a rational trier of fact in finding guilt beyond a reasonable doubt." *People v Hampton, supra*, 366. In *People v Wolfe*, 440 Mich 508 (1992), this Court stated: "This standard was articulated by the United States Supreme Court in *Jackson v Virginia*, 443 US 307 (1979), and has been applied regularly by the courts of this state." *Id.* at 514.

Jackson, and its progeny rejected the "any evidence" test and focused on relevancy and sufficiency of the evidence. The Michigan Supreme Court in *Hampton, supra*, stated that sufficiency of the evidence is:

designed to determine whether all the evidence, considered as a whole, justifies submitting the case to the trier of fact or requires a judgment as a matter of law.... In quantitative terms, the fact that a piece of evidence has some tendency to make the existence of a fact more probable, or less probable, does not necessarily mean that the evidence would justify a reasonable juror in reasonably concluding the existence of that fact beyond a reasonable doubt. *Hampton, supra* at 367-368.

In the present case, Ms. Smith-Anthony, charged with Unarmed Robbery (MCL 750.530), was convicted of the lesser offense of Larceny from a Person. MCL 750.357. Larceny from the person states:

Larceny from the person — Any person who shall commit the offense of larceny by stealing from the person of another shall be guilty of a felony, punishable by imprisonment in the state prison not more than 10 years. (MCL 750.357)

There was no evidence that proved the taking was within the 'immediate area of control or immediate presence' of Macy's loss prevention officer. Krumbhaar saw Ms. Smith-Anthony on the closed circuit television from the second floor office of the loss prevention department (18-19a). Viewing her through the closed circuit camera, Krumbhaar saw Ms. Smith-Anthony walk around the store and pick up a fifty-eight dollar White Diamonds fragrance gift box in the women's fragrance department (22a). At that time, Krumbhaar, dressed in plain clothes, then left the security office and went to the store floor to watch Ms. Smith-Anthony (22a). Krumbhaar entered an undefined 'visual range' (22-23a). Ms. Smith-Anthony was still carrying the White Diamonds gift box and put it into one of her bags as she walked (24a). Krumbhaar could still see part of the gift box sticking out and began following Defendant (25a). Krumbhaar testified that she 'was able to stay fairly close' to Ms. Smith-Anthony without defining what that meant or estimated distance (23a). Krumbhaar did note that she 'stayed back giving her some space' (25a).

Ms. Smith-Anthony walked out of the store (26a). Krumbhaar noted that it was store policy not to stop someone until they leave the store (28-29a). She then approached Ms. Smith-Anthony (29a). Krumbhaar claimed Ms. Smith-Anthony began shouting at her, turn and began to run (29a). Krumbhaar grabbed hold of her arm and the back of her shirt (29-30a). This altercation takes place nearly two hundred feet from the Macy's store (30a).

The testimony at trial simply does not support any definition of 'immediate area of control or immediate presence'. The distance between Krumbhaar and Ms.

Smith-Anthony remained undefined throughout the incident. 'Visual range' and 'fairly close' are subjective terms and Krumbhaar was not even asked to guess as to distance. By Krumbhaar's own admission, she 'stayed back giving her (Ms. Smith-Anthony) some space'. So much space, in fact, that when she finally attempted to apprehend Ms. Smith-Anthony, they were nearly 200 feet from the entrance of Macy's (30a). This would suggest that Krumbhaar remained at a great distance from Ms. Smith-Anthony if she did not reach her until nearly two hundred feet beyond the entrance to the store. Further, this is the only testimony as to distance presented at trial.

Assuming all the facts in favor of the prosecution, Ms. Smith-Anthony was, at best, guilty of third degree Retail Fraud (MCL 750.356d(4)(b), from Macy's Department Store. This fact was noted by Judges Gleicher and Shapiro in the Court of Appeals opinion (94a).

Property taken from a victim or while under his control, though not actually from the person, is probably sufficient to satisfy the requirement of "from the person of another." *People v Gould*, 384 Mich 71 (1970). An essential element of this crime is that it is accomplished by stealing from a person. *People v Stevens*, 9 Mich App 531 (1968). "From the person" means in his possession or his immediate presence. *People v Gould, supra*. There is no argument that Krumbhaar was not in physical possession of the item, and Defendant-Appellee would argue that 'immediate presence' is not defined as 'visual range'. *People v Perkins*, 262 Mich App 267; 686 NW2d 237 (2004).

Clearly based on the facts presented, there was a charging error by the Prosecutors' Office in that Ms. Smith-Anthony did not take any items from the possession or presence of any person. Assuming facts in favor of the prosecution, Ms. Smith-Anthony took a \$58 perfume gift box from a Macy's Department store. This was not a Larceny from a Person but a Retail Fraud case, specifically a Retail Fraud, 3rd Degree case.

MCL 750.356d (Retail fraud in second or third degree) states:

(1) A person who does any of the following in a store or in its immediate vicinity is guilty of retail fraud in the second degree, a misdemeanor punishable by imprisonment for not more than 1 year or a fine of not more than \$2,000.00 or 3 times the value of the difference in price, property stolen, or money or property obtained or attempted to be obtained, whichever is greater, or both imprisonment and a fine:

(a) While a store is open to the public, alters, transfers, removes and replaces, conceals, or otherwise misrepresents the price at which property is offered for sale with the intent not to pay for the property or to pay less than the price at which the property is offered for sale if the resulting difference in price is \$200.00 or more but less than \$1,000.00.

(b) While a store is open to the public, steals property of the store that is offered for sale at a price of \$200.00 or more but less than \$1,000.00.

(c) With intent to defraud, obtains or attempts to obtain money or property from the store as a refund or exchange for property that was not paid for and belongs to the store if the amount of money or the value of the property obtained or attempted to be obtained is \$200.00 or more but less than \$1,000.00.

(2) A person who violates subsection (4) and who has 1 or more prior convictions for committing or attempting to commit an offense under this section, section 218, 356, 356c, or 360, or a local ordinance substantially corresponding to this section or section 218, 356, 356c, or 360 is guilty of retail fraud in the second degree.

(3) A person who commits retail fraud in the second degree shall not be prosecuted under section 360.

(4) A person who does any of the following in a store or in its immediate vicinity is guilty of retail fraud in the third degree, a misdemeanor punishable by imprisonment for not more than 93 days or a fine of not more than \$500.00 or 3 times the value of the difference in price, property stolen, or money or property obtained or attempted to be obtained, whichever is greater, or both imprisonment and a fine:

(a) While a store is open to the public, alters, transfers, removes and replaces, conceals, or otherwise misrepresents the price at which property is offered for sale, with the intent not to pay for the property or to pay less than the price at which the property is offered for sale, if the resulting difference in price is less than \$200.00.

(b) While a store is open to the public, steals property of the store that is offered for sale at a price of less than \$200.00.

(c) With intent to defraud, obtains or attempts to obtain money or property from the store as a refund or exchange for property that was not paid for and belongs to the store, if the amount of money, or the value of the property, obtained or attempted to be obtained is less than \$200.00.

(5) A person who commits retail fraud in the third degree shall not be prosecuted under section 360.

(6) The values of the difference in price, property stolen, or money or property obtained or attempted to be obtained in separate incidents pursuant to a scheme or course of conduct within any 12-month period may be aggregated to determine the total value involved in the offense under this section.

Plainly stated, the Oakland County Prosecutors' Office mischarged Ms. Smith-Anthony with Unarmed Robbery and obtained a conviction for the lesser offense of Larceny from a Person, when the facts presented in the light most favorable to the prosecution were Retail Fraud, 3rd Degree.

Because there was no evidence on essential elements of Larceny from a Person, specifically the item did not belong to the security guard nor was it in her possession or “immediate area of control or immediate presence” at any time, the Court of Appeals properly reversed the conviction. MCL 750.357; US Const Am V; US Const Am XIV; Mich Const 1963, art 1, § 17.

Larceny From A Person statute with respect to “presence” and “from the person” and the common law

Defendant-Appellee submits that the Plaintiff-Appellant has presented an extraordinary and exhaustive analysis and argument as to the history and definitions of “presence” and “from the person” commencing with the Athenian legal system until modern jurisprudence. Ultimately, this Court must decide if an undetermined “visual range” satisfies the statutory and common-law definitions of “presence” and/or “from the person”. Defendant-Appellee would argue that it does not.

As noted by Plaintiff, the current statute for Larceny From A Person does not define the phrase “from the person”. MCL 750.357. Defendant-Appellee argues that the Plaintiff wants this Court to expand the definition beyond the statutory meaning to include an undetermined visual range, something the Court of Appeals was unwilling to do (93a).

The Plaintiff notes that, historically, the offense included and required a taking ‘from the person’. *People v Calvin*, 60 Mich 113, 121; 26 NW 851 (1886). There is no mention of “presence” or “immediate area of control” or anything else beyond ‘the

person' in the first version of the Michigan statute. 1838 RS, pt 4, tit I, ch 4, Sec 16. It is also missing from the second version of the penal law as well. Michigan Penal Code 1931 PA 328.

Defendant-Appellee acknowledges that this Court has ruled that larceny from the person 'embraces the taking of property in the possession and *immediate presence of the victim*'. *People v Chamblis*, 395 Mich 408; 236 NW2d 473 (1975)(Emphasis added).

The Court of Appeals extended that zone of 'immediate presence' in a robbery case to 'within his reach, inspection, *observation* or control'. *People v Beebe*, 70 Mich App 154; 245 NW2d 547 (1976)(Emphasis added).

As noted by the Plaintiff, the distance between Ms. Smith-Anthony and the security guard was a "vague proximity" with nothing to go on beyond a claimed visual distance. The Plaintiff is asking this Court to extend the statutory definition of "from the person of another" and the accepted inclusion of "from the person's immediate area of control or immediate presence" to include visual ranges of an unknown distance but clearly beyond arm's reach according to the trial testimony of Ms. Krumbhaar (22-25a).

Plaintiff would suggest that the phrase "personal space" contained in the Opinion from the Court of Appeals creates an unworkable, subjective standard. Yet, the Plaintiff wants this Court to reverse based on the testimony in the present case which was based on the subjective distance of "visual range" or "fairly close" (22-23a). This would create an equally unworkable, subjective standard made even more complex when one considers security cameras and their effects on "visual range" of

loss prevention officers (22a). Historically, there have been no hard and fast rules of distance as it relates to “from the person” or “immediate presence” or “immediate area of control”. The Courts have taken the cases and the facts to tailor case law that has, at some times, been inconsistent due to this inherent subjectivity. Even the one-time arm’s length is subjective based on the size and ‘wingspan’ of an individual.

The Court in *Perkins*, also citing *People v Adams*, utilized the phrase "the invasion of the person or immediate presence of the victim." *People v Perkins*, 262 Mich App 267, 271-272; 686 NW2d 237 (2004); *People v Adams*, 128 Mich App 25, 30; 339 NW2d 687 (1983). “Nevertheless, the offense of larceny from a person is separated from other larceny offenses because it is committed in the immediate presence of another person. *Adams, supra* at 32. The "Legislature decided that larceny from a person presents a social problem separate and apart from simple larceny." *Id.* Specifically, "the invasion of the person or immediate presence of the victim." *Id.* Defendant would argue that “immediate presence” is not an indeterminate visual range and certainly not the equally vague “fairly close” (23a).

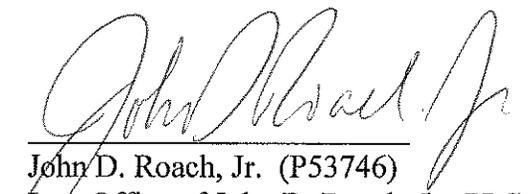
The Court of Appeals recently reconfirmed its ruling in *People v Perkins*, regarding the elements of Larceny from A Person. The Court held that to prove the elements of larceny from a person, the prosecution must show that the defendant (1) took someone else’s property without consent, (2) moved the property, (3) intended to steal or permanently deprive the owner of the property, and (4) took the property from the person or from the person’s immediate area of control or immediate presence. *People v Brantley*, 296 Mich App 546; ___ NW2d ___ (2012).

There has never been a bright line test for what defines “presence” as it relates to the Larceny From A Person statute. Historically, terms like “from the person”, “immediate presence”, or “immediate area of control” have been used but not specifically defined. In the present case, the Plaintiff-Appellant is requesting that this Court extend the definition of “presence” to an undetermined visual range. The Court of Appeals rejected this argument and so should this Court.

RELIEF REQUESTED

WHEREFORE, the Defendant-Appellee, Chandra Valencia Smith-Anthony, respectfully requests that this Honorable Court affirm the judgment of the Court of Appeals.

Respectfully submitted,


John D. Roach, Jr. (P53746)
Law Office of John D. Roach, Jr., PLC
Attorney for Defendant-Appellant
101 West Big Beaver Road, Suite 1400
Troy, Michigan 48084
(248) 721-6980

Dated: January 29, 2013.