COURT OF APPEALS

STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

No. 77

OMAR DELEON,

Appellant.

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20 Eagle Street
Albany, New York
September 11, 2019

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

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CHIEF JUDGE DIFIORE: The next appeal on the calendar is the People of the State of New York v. Omar Deleon.

Good afternoon, counsel.

MS. YACKA-BIBLE: Good afternoon, Your Honors. May it please the court, I'm Andrea Yacka-Bible of The Legal Aid Society, appearing on behalf of appellant, Omar Deleon.

I'd like to request two minutes for rebuttal, please.

CHIEF JUDGE DIFIORE: Two minutes, you may.

And as a first matter, counsel, can you clarify your position? Are you saying that the evidence was legally insufficient as to the value of the item that was attached to the fishing device or as to all that were in there - - - in the box?

MS. YACKA-BIBLE: Both, Your Honor. So we - - - under point one, it's our position that the evidence was legally insufficient because an attempt crime, with an - - - with an aggravated element, with no attached mental state, that has not yet occurred, requires evidence of specific intent to both commit the core crime as well as to - - - to cause the aggravated element to occur or to - - - or to believe that it exists. So under point one, we're saying - - -

JUDGE GARCIA: But what about if there was a 2,000-dollar check attached to the bottle?

MS. YACKA-BIBLE: If there had been a 2,000-check - - -

JUDGE GARCIA: But he doesn't really get it out of the mailbox yet, so it's still an attempt. So you're saying you had to know there was a 2,000-dollar check on the end of the line?

MS. YACKA-BIBLE: Yes, Your Honor. If it's still an attempt, and if - - - so if it's - - - if he had not yet established dominion and control over that, then - - - then - - - then there would need to be proof of - - - but those are not the circumstances that occurred here, Your Honor.

JUDGE WILSON: Can I ask you about that for a second?

MS. YACKA-BIBLE: Sure.

JUDGE WILSON: The way I read our very, very old Harrison case, which involved slightly lifting the wallet from the breast pocket of somebody on a trolley, the little movement under somebody else's control makes that a completed larceny. So - - - if I - - - and tell me if you think I'm wrong, but under Judge Garcia's example, if the 2,000-dollar check is attached, there's really a completed larceny.

MS. YACKA-BIBLE: Exactly, Your Honor.

JUDGE GARCIA: What if the bottle hasn't moved at all, they just pull it out of the bottom of the mailbox but the check's attached, so now it hasn't even moved a centimeter out of the breast pocket. But the thing is attached, the bottle is now attached to a check on the bottom of the mailbox.

MS. YACKA-BIBLE: Right, Your Honor. So - - - so on page 25 of the opening brief we - - - we concede that had - - - had - - - in that case, had a 2,000-dollar check attached to the bottle, then it would have been a completed fourth-degree grand larceny because the - - - the evidence would have been - - -

JUDGE GARCIA: I guess my point is - - -

MS. YACKA-BIBLE: So - - -

JUDGE GARCIA: - - - can it also - - -

MS. YACKA-BIBLE: Um-hum.

JUDGE GARCIA: - - - be an attempt? It seems to me, again, we're just back to legal sufficiency of the attempt. So what they really just need to show is, you know, with the requisite intent, they took or attempted to take this property that belonged to someone else, and you have certain ways you can show that.

So in - - - in the hypothetical, let's assume it was an attempt, it's lying at the bottom of the mailbox, but it stuck to a 2,000-dollar check, I think they get

that. The issue I have here is there's no evidence of it being stuck to anything, right?

MS. YACKA-BIBLE: Correct, Your Honor. And that's - - - that's our - - - our point too, that even if you find that a general larcenous intent is enough, then the prosecution here has failed to present any evidence as to establishing the value of the property but - - -

JUDGE STEIN: But what about the dangerously-close analysis? So I - - - I think that we have held in a number of cases that - - - that an attempt crime has been committed, where the defendant's at the location that the crime - - - at which the crime will occur with the necessary instrumentalities - - - and both of those fit here, right, and even if the conduct constituting the crime had not yet been commenced.

So if that's the case, and we have intent to commit larceny, which I think is the core crime, right?

MS. YACKA-BIBLE: Right.

JUDGE RIVERA: And why is - - - why wasn't he dangerously close to committing that crime, knowing that there were 3,000 dollars or more in money orders in that box in which he had placed - - - in fact, he, in some ways, had gone further. He actually placed the device in the box. Why do we even need to know whether it was attached to his device or not if he came dangerously close?

MS. YACKA-BIBLE: Right, Your Honor. So the - - - the fact that there was - - - that the prosecution introduced evidence that there were money orders of 3,050 dollars in the mailbox is not evidence as to value of what he was dangerously close to stealing because this is unlike the - - - the completed crime in Mitchell which respondent relies on.

So in - - - in Mitchell the wallet's contents were established. Inside the wallet was a credit card. Here the value of the envelope contents that he caught on - - - on his fishing device was never established. It's as if the wallet in Mitchell were empty. And so - - -

JUDGE GARCIA: But actually, that's a little bit different. To take Judge Stein's point that I now understand is kind of when you throw the bottle into the mailbox, right, is it really just then a question for the jury, did you get dangerously close to sticking to one of those envelopes that we know were in the mailbox that had over 1,000 dollars, I guess, in money orders, or whatever they were. So why isn't that right?

MS. YACKA-BIBLE: Because, Your Honor, there's a - - - there are gaps in the prosecution's proof here. There's a lack of evidence, and the - - - it's just far too speculative on this record. We have no information about how many envelopes were in the mailbox overall, how many

envelopes contained money orders.

JUDGE FAHEY: But don't we still have - - - no matter what they got out, that person knew that they were knowingly possessing stolen property; would you say that's correct? You stick the - - -

MS. YACKA-BIBLE: Yes.

JUDGE FAHEY: - - - device into the mailbox, everything you take out is stolen. The person doing that knows that.

MS. YACKA-BIBLE: Absolutely, Your Honor.

JUDGE FAHEY: Right.

MS. YACKA-BIBLE: Yes.

JUDGE FAHEY: Doesn't that - - - isn't that what happened in Mitchell? Isn't it the same thing? He knowingly possessed stolen property; that's it. Now, what's inside the envelope, that varies from envelope to envelope. But - - - and so some property you knowingly possessed and some you were attempting, you were dangerously near to possessing it. And see that's why I'm having a hard time - - -

MS. YACKA-BIBLE: Um-hum.

JUDGE FAHEY: - - - with why isn't Mitchell just dispositive of this.

MS. YACKA-BIBLE: Two things about that, Your Honor. So - - - so the - - - one of the questions here is

what level of larceny is this, right? So - - -

JUDGE FAHEY: I understand.

MS. YACKA-BIBLE: So he's - - -

JUDGE FAHEY: I understand.

MS. YACKA-BIBLE: If he's dipping in - - -

JUDGE FAHEY: That's a little separate analysis than - - - than - - - that has to do with the core crime element. It's a little bit different than what we're talking about right now. Just stick with the "knowingly possessed".

MS. YACKA-BIBLE: Right, but he - - - he's knowingly possessing stolen property, but he does not know what the - - - the value is - - -

JUDGE FAHEY: All right. So you - - -

MS. YACKA-BIBLE: - - - of that property.

JUDGE FAHEY: So you will concede that he knowingly possesses it. Then we're into the analysis of whether or not he has to know it's 3,000 dollars or whether that's an aggravating strict liability factor that comes afterwards.

MS. YACKA-BIBLE: Right. And Your Honor - - -

JUDGE FAHEY: Right.

MS. YACKA-BIBLE: - - - if I may just leave - - -

JUDGE FAHEY: Go ahead.

MS. YACKA-BIBLE: We've sort of veered into my -

- - my point too, and I'd like to go back to just sort of establish some of the things under point one about why we - - - why it's our position that an attempt is - - - an attempt, where the aggravated element has not occurred, that requires proof of intent to both commit the core crime as well as to - - - to commit the aggravating element or to - - - or at least to believe that it exists. So - - - so it may be help - - -

JUDGE STEIN: So why is that? Why?

MS. YACKA-BIBLE: Okay. Well, okay, it may be helpful to just back up and say what - - - to begin, what we agree with, what are the points of agreement. So we all agree that for a completed crime of grand larceny, if you steal something, even if you don't know the value, then you're culpable for its value because that - - - you've caused the harm, and that - - - that's this court's holding in Mitchell. That's not what we have here.

We also agree that in an attempted crime, when the aggravating element has actually occurred, then strict liability attaches. Again, the harm has occurred, and therefore it's appropriate to impose strict liability. That's this court's holding in Miller and Fullan. Again, that's not what we have here because the - - - the value, the aggravating element, has not occurred.

And this court held in Coleman that where an

attempted promotion - - -

JUDGE STEIN: If we disagree with that premise, that the aggravating element has to have occurred, do you lose?

MS. YACKA-BIBLE: If under - - - we - - - we would - - - if - - - if that's your position, if the court finds that there are not these distinctions, that we're outside of - - - if we're not outside of the realm of - - - of Mitchell and Miller, but instead we're within that, then under point one, then you're - - - you're disagreeing with - - - with our contention, which is that under Coleman that there - - - that Coleman required that the - - - the - - - to support the attempted promotion of a prostitution of someone who is younger than sixteen that - - - that the prosecution needed proof that the - - - that Mr. Coleman specifically intended to both commit the core crime of knowingly promoting prostitution and to traffic in someone younger than sixteen because he believed that the person he was attempting to traffic was fifteen.

So in contrast, the completed crime of trafficking someone who's younger than sixteen does not require any proof of specific intent because the aggravating factor would actually have occurred in that case. And that's when it's appropriate to impose strict liability.

But when the aggravating element has not occurred, then it's - - - it's inappropriate to hold someone criminally liable to a higher degree of culpability when they neither intended for it to occur nor did it actually occur.

JUDGE RIVERA: Well, it's possible that was the legislative intent. Tell me how it's not the legislative intent. You may - - - you may not like that outcome, but if it's the legislative intent, that's what the law calls for.

MS. YACKA-BIBLE: But the - - -

JUDGE RIVERA: You've got to go across the street to deal with it, right?

MS. YACKA-BIBLE: Well, Your Honor, if I may - - - I see that my time is up, but if I - - -

CHIEF JUDGE DIFIORE: You may, of course.

MS. YACKA-BIBLE: - - - may answer the question. Two things about legislative intent is that - - - so under Penal Law 15.15, subsection (2), it - - - it says that: "although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of such offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such culpable mental state." And: "A statute

defining a crime, unless clearly indicating a legislative intent to impose strict liability, should be construed as defining a crime of mental culpability."

And what we're asking this court to consider is that, in the context of attempts, attempts are different. Attempts where the aggravating element has not occurred are different, and there's no legislative intent here to impose strict liability in an attempted grand larceny when the value of the - - - of the property has not been established.

CHIEF JUDGE DIFIORE: Thank you, counsel.

Counsel?

MR. SLOTT: Good afternoon. I'm David Slott. I'm from the Bronx County District Attorney's office.

It's undisputed in this case that the defendant had the intent to steal property from inside the mail collection box.

JUDGE GARCIA: Let's say, counsel, that the bottle's coming out of the mailbox and there's a birthday card stuck to it. What do you charge?

MR. SLOTT: That would be a petit larceny, assuming there's - - -

JUDGE GARCIA: So the fact that you don't put in the proof that it's a birthday card gets you grand larceny?

MR. SLOTT: No, the fact of the matter is that

there was evidence before the grand jury, and I think that hasn't been mentioned before. This is in the grand jury phase; the sufficiency questions are much more, I would say, liberal to the People. The evidence before the grand jury is that the task force had put in money orders in excess of 3,000 dollars.

JUDGE GARCIA: Into the mailbox?

MR. SLOTT: Into the mailbox, and they were present prior to the defendant - - -

JUDGE GARCIA: Is there something stuck to the bottle in this case or no?

MR. SLOTT: There is evidence before the grand jury that various items, so - - -

JUDGE GARCIA: So how do we know it isn't a birthday card?

MR. SLOTT: Well, with respect to the items that were stuck to the bottle as - - - as is conceded - - -

JUDGE GARCIA: That's a completed larceny.

MR. SLOTT: That is a completed larceny, as was conceded by - - -

JUDGE GARCIA: So you have a completed larceny - - -

MR. SLOTT: - - - appellant on page 25.

JUDGE GARCIA: - - - but we don't know the value. So now you want to say because we didn't put the proof in,

it's grand larceny?

MR. SLOTT: Well, no, because, as was said before, the defendant became - - - got dangerously close to stealing those money orders.

JUDGE GARCIA: So there's a completed and an attempt?

MR. SLOTT: Yes, that could be argued. It wasn't charged that way, but it certainly could be argued that way.

JUDGE WILSON: And so what if the police put a loaded firearm in the mailbox? Then that's attempted possession of a weapon in the second degree?

MR. SLOTT: No, Your Honor, because - - -

JUDGE WILSON: Why?

MR. SLOTT: Because there's an element of knowing, knowing possession.

JUDGE GARCIA: And it wouldn't stick to the bottle probably.

JUDGE WILSON: Well, maybe you need superglue or something. What - - -

MR. SLOTT: There would be - - -

JUDGE WILSON: So what's the knowing element?

MR. SLOTT: There needs to be a knowing element, similar to - - - to narcotics, knowingly and unlawfully possessing the weapon. So until that item is - - - is

within one's possession and they now know that they are possessing the firearm, it wouldn't be a completed or an attempted crime, just as if you were to, I don't know, borrow someone's jacket and it had an illegal item in it. It's not a knowing crime at that point.

JUDGE GARCIA: So if you smashed a glass case with all this jewelry in it, and you took one out, and that's the completed larceny of the bracelet - - -

MR. SLOTT: Yes.

JUDGE GARCIA: - - - you could be charged with the attempt of - - - because you were dangerously close to everything else?

MR. SLOTT: That would be the argument. And the - - - yes to that. And the counter-argument that appellant puts forward today is if you did do a smash-and-grab, and assuming there's no - - - burglary aside, assuming there's a smash and grab and you don't grab anything, that's a B misdemeanor. That's an attempted petit larceny. That's the crime there. That's - - - that's what's put forward there.

And - - - and it's the unique nature of this crime of - - - of mailbox fishing that is - - - that is a situation where mailboxes are outside. You don't typically have that additional element of a potential burglary. This is a financial crime at heart where - - - where people - -

-

JUDGE RIVERA: So if you put in the bottle with the sticky thing on it - - -

MR. SLOTT: Yes.

JUDGE RIVERA: - - - he pulls it out. I know they're trying to stop him before he makes much of a move, but he actually takes the bottle. I think there are four envelopes attached to it. Am I - - - there are some envelopes attached to it.

MR. SLOTT: The - - -

JUDGE RIVERA: It's a little unclear, right, because - - -

MR. SLOTT: The complaint - - -

JUDGE RIVERA: - - - there's, like, three or four money orders. Anyway - - -

MR. SLOTT: Yes.

JUDGE RIVERA: - - - the point is he then walks away from the box.

MR. SLOTT: Right.

JUDGE RIVERA: Walks away from the box, completed, of course. Is it, nevertheless, an attempt to get more than the ones that he took, which is your argument in response to Judge Garcia about breaking the glass and - - - and taking the jewelry?

MR. SLOTT: With respect to - - - you're saying

had he pulled the fishing device out, walked away with those four items - - -

JUDGE RIVERA: Yes, correct, and they get him at the corner of the block.

MR. SLOTT: Correct, it would be completed larceny of those items - - -

JUDGE RIVERA: Sure, because that's what he took, right.

MR. SLOTT: - - - and - - - and it would be attempted larceny of those items - - -

JUDGE RIVERA: Of everything else that was in the mailbox?

MR. SLOTT: That which we could ascribe value to. The police and the task force and the post office aren't going through and opening up every envelope in there to see the value. We do know that there is the specific - - -

JUDGE RIVERA: So if he wanted to argue that's not what he intended, your position would be that's his argument to the jury; he'd show I walked away, that was the end, I wasn't looking to take anything else?

MR. SLOTT: I don't quite follow the hypothetical. Could you - - -

JUDGE RIVERA: Well, it sounds like you're saying yes, that's an attempt, and your evidence would have established that at that point. But I'm asking you, would

that foreclose him from arguing that walking away only with what he had on the bottle, not everything else of value, as you say - - -

MR. SLOTT: Yes.

JUDGE RIVERA: - - - that's in the mailbox shows that he really didn't have the intent to attempt to take everything else. He took all that he wanted and he walked away.

MR. SLOTT: That is something - - -

JUDGE RIVERA: He's getting his hundred bucks, right?

MR. SLOTT: That is something he could certainly argue, and that's something that could be put forward at trial as well as what appellant had mentioned with the number of envelopes and - - - and things like that. Likewise, the People could put forth additional evidence at trial.

But if - - - if that's his statement and that's his - - - his defense, that could be put forward, but it's not necessarily something that the jury needs to believe. And - - - and certainly he did come still dangerously close to stealing the - - - the money orders in excess of 3,000 dollars.

JUDGE RIVERA: And how does anyone know that, since there wasn't evidence about the contents of the

mailbox and the location of those particular money orders at the point in time when he's doing this fishing?

MR. SLOTT: There was evidence that these were inside the mailbox.

JUDGE RIVERA: Well, no, for sure, of course.

MR. SLOTT: Yes. It's - - - it's a small limited area. It's not - - - it's not - - - I think the motion court had given an example that one shouldn't be charged with attempting to - - -

JUDGE RIVERA: Well, you didn't put in evidence about what could be contained in this box, right?

MR. SLOTT: Mail was - - -

JUDGE RIVERA: Or what actually was in - - - well, not the kind; I'm not talking about that.

MR. SLOTT: Yes.

JUDGE RIVERA: The volume or what actually was in the box.

MR. SLOTT: Not within the grand jury. That's certainly something that - - - that should be put forth in - - - in - - - at trial. But it's not something which - - - which makes the grand jury presentation insufficient by saying - - -

JUDGE RIVERA: But you're saying that would have been your burden at trial.

MR. SLOTT: I don't know that it would have

necessarily been a burden, but it would be a smart piece of evidence to - - - to put in there. When he takes this - - - let me take a step back. He's so dangerously close that there's nothing he could - - - he could do to further the attempt of this crime without actually completing the crime. He's come to an agreement, a financial agreement with some individual that he's going to fish in this mailbox, get paid a hundred dollars. He either makes or obtains this special device used to take mail out of the collection box. He arrives at the early morning hours, it's 1 a.m., after people have presumably deposited mail for the day. It's at the end of the month when bills and rent are due. And - - -

JUDGE WILSON: There's no question he committed a crime. The thing that concerns me is that the severity of the crime isn't determined by anything having to do with his actions but rather by what the government decides to put in the mailbox. So you could have put a million-dollar check in there; it would be a worse larceny.

MR. SLOTT: That would be the - - - an attempted grand larceny I. The defendant is fishing with the hope but also with the risk that he's going to get a big - - - a big payout here. And - - - and I would say there's nothing unusual about the - - -

JUDGE RIVERA: Well, no, but he's - - - either

you believe him or not, right, but the position is that he's doing this for one hundred dollars.

MR. SLOTT: I think - - -

JUDGE RIVERA: He's actually not supposedly keeping the - - -

MR. SLOTT: That's certainly - - -

JUDGE RIVERA: - - - mail?

MR. SLOTT: That would be a really good defense argument - - -

JUDGE RIVERA: That's his defense?

MR. SLOTT: - - - at trial.

JUDGE RIVERA: Okay.

MR. SLOTT: But it's not a proper inference to be made at the grand jury stage. The inferences should be made in the light most favorable to the People. And as the Appellate Division did in this case, they took that statement to mean that he's trying to take as much mail as he can. And certainly if he were to show up to this person who's paying him with one letter, and it's a thank you card with nothing in it, it's going to hurt his - - - his chances for - - - for future employment in - - - in this - - - in this manner.

But - - - but there - - - there's nothing unusual about the police looking at the penal law, trying to hit certain thresholds to effectively and efficiently use their

limited resources to - - - to address a constant major issue in society. This is a financial crime at its heart. This is - - - this is the attempt to try to steal cash, checks.

JUDGE FEINMAN: Can't you just, if you want to deal with that issue, go to the legislature and say: make it a D or an E or a C felony to, you know, go fishing in a mailbox, regardless of what they get or - - -

MR. SLOTT: That would be - - - and that's something which has been done with ATM machines and that - - - that could be done. However - - -

JUDGE GARCIA: Isn't it a federal felony already to steal mail out of a mailbox?

MR. SLOTT: Yeah, I mean, it's - - - it's a crime, but again, this is a financial crime at heart. This is people putting checks, money orders into the mail with the belief that it's safe, and this opportunity to - - - to steal is happening. The opportunity is on thousands of street corners throughout the entire state.

The New York Times article that we cited in our brief mentioned that, in New York City alone, there was 3,000 reported incidents in 2018. That's up from 2,800 the year before in 2017. This creates, if you follow the defense's theory, a low-risk, high-reward, if - - - if they get away with it, and that can't be the legislature's

intent.

CHIEF JUDGE DIFIORE: Thank you, counsel.

MR. SLOTT: Thank you.

CHIEF JUDGE DIFIORE: Counsel?

MS. YACKA-BIBLE: As Your Honors pointed out, there are other ways that the prosecution could have - - - could have prosecuted this. It could have - - - it was a joint task force between NYPD and the - - - the federal government. Mailbox tampering is - - - is something that could have been charged as a felony in the federal system, and it wasn't here because really the facts that we have here is - - - are that this is merely an attempted petit larceny.

There - - - although the legal sufficiency standard certainly is one that's viewed in light most favorable to the People, it's really the - - - the motion court's role, in reviewing the legal sufficiency, is to determine whether the facts, if proven, and the inferences that logically flow from those facts, apply proof of every element of the charged crimes.

And we have no reasonable inferences to - - - to suggest that Mr. Deleon was going to continue to - - - to fish from the box so that he could get every - - - every possible piece of mail. He only caught four envelopes. And although we don't know the - - - the number of the

total envelopes in that mailbox, it's reasonable to infer that there were probably hundreds of mailboxes - - - I mean, hundreds - - -

JUDGE STEIN: So your position is if the police had put a million-dollar money order in there and all he - - - all he was going there for was, you know, something so that he could get paid his hundred dollars for doing this and getting paid, right?

MS. YACKA-BIBLE: Right.

JUDGE STEIN: So if he just had the sheer bad luck of his fishing device getting that million-dollar money order, then that's what he's charged with. If - - - if his sheer luck is that he gets a thank you note, then he's basically scot-free. That - - - that's what it depends on, what he actually catches?

MS. YACKA-BIBLE: Yes, Your Honor, and that's the - - - if - - - if someone - - -

JUDGE STEIN: Does that make good policy sense?

MS. YACKA-BIBLE: But that's true of a - - - that's true of any completed crime, Your Honor. So in - - - in a situation where there's a sting operation, so if there had been an undercover sitting on a park bench, and there's a check on the - - - you know, next to him, and somebody grabs it thinking that, you know, it's not possible that it's going to be a million-dollar check, then

yes, they could be charged with attempted grand larceny I. I mean, that's the - - - that's the risk that he took but - - - but it's - - - so yes, so - - -

JUDGE STEIN: But to me - - -

MS. YACKA-BIBLE: Um-hum.

JUDGE STEIN: - - - the mailbox is more like the wallet, though, okay? So - - - so you - - - you take the wallet - - - I realize you're taking the whole thing and you're not taking the whole mailbox but - - - and there's a credit card in it.

MS. YACKA-BIBLE: Um-hum.

JUDGE STEIN: Here you go fishing in a mailbox and - - - you know, and - - - and there are certain money orders in it. So that's what's determinative, not what you actually got because it's an attempt, it's - - - it's not - - - and - - - and the intent is not - - - the specific intent for the amount of money is not required. You just have to come dangerously close; that's - - - that's what I come back to. And I'm not sure - - -

MS. YACKA-BIBLE: I understand that, Your Honor. So you're saying that your view is that all that is required in this context is that he have a general larcenous intent and the - - - and it's our position that, because he did not catch one of the money orders, that he cannot be charged with the attempt to steal something of

that value. And there are no logical inferences that he was going for the entire mailbox which would be the equivalent of - - - of the purse in Mitchell. He - - - he was paid to assume the risk of getting caught. There was no evidence that he was paid a bonus if he - - -

JUDGE RIVERA: But why would the - - -

MS. YACKA-BIBLE: - - - did get something of value.

JUDGE RIVERA: - - - legislature be less concerned about attempting, right, with your argument? I'm not quite understanding that. Why would the legislature see it your way which is, as I understand your way, is if you complete it, that's horrible, right?

MS. YACKA-BIBLE: Um-hum.

JUDGE RIVERA: That's horrible, we want to address that. But if you're simply attempting and you don't know that - - - or you didn't intend to attempt to get - - - I'm just going to make up the one million dollars because that's what we're talking about, that therefore you get off. Why - - - why is the legislature not as outraged by the latter as the former, which seems to be your position, unless I misunderstood you. You can clarify if I misunderstood you.

MS. YACKA-BIBLE: Well, there's - - - there - - - there are two positions. So in terms of under - - - you

know, it is our view that if the - - - that strict liability is there to be imposed for situations where the - - - the harm has occurred or - - - or a situation, for example, where there is an elevated risk of harm. So for example, displaying a firearm. This court has held in Smith and Lopez that, you know, displaying a firearm, even if it's not an actual firearm, increases people's fear, and that can be a strict liability crime.

But in this situation, whereas - - -

JUDGE RIVERA: But why wouldn't the legislature be as concerned about the near attempt, not knowing about it, but the attempt that might achieve that very harm.

MS. YACKA-BIBLE: Because it's merely - - -

JUDGE RIVERA: Don't you want to deter the conduct?

MS. YACKA-BIBLE: Certainly, Your Honor, and the - - - and the evidence of - - - that what's most effective at deterring people is - - - is a swift arrest and prosecution.

And we acknowledge that Mr. Deleon committed a crime here. He - - - he did have the intent to commit a larceny. This is - - - but only on these facts. It only rose to the level of an attempted petty larceny. And the legislature is not reasonable to imagine that they are going to want to impose strict liability, under these

circumstances, because if you look at, for example - - - if I may.

So - - - so in Mitchell, let's say Mitchell, the facts of Mitchell were an attempt crime. And again, we have the same facts as in Mitchell where somebody is - - - is going to - - - to steal a wallet. The - - - it's reasonable to infer from those facts that the person reasonably believed it was likely that a credit card, which the legislature did deem to be grand larceny in the Fourth Degree, that there's a credit card inside.

Say that there's a white envelope on the bench next to you, and I - - - I go for it. Of course I'd be intercepted before that happened. And say there happens to be a credit card inside. The facts would be far - - - it'd be a much less reasonable inference to imagine that I intended to steal a credit card. And it's our view that the legislature - - - the default is that - - - that a crime is one that has a mental culpability attached to it unless the legislature specifically, you know - - -

JUDGE FAHEY: I think we got that. I think what you're saying - - -

MS. YACKA-BIBLE: Yeah.

JUDGE FAHEY: - - - is that there wasn't an intent here to steal the 3,000 dollars and without that specific intent there can't be a crime. And you're also

arguing that the punishment here doesn't fit the crime.

MS. YACKA-BIBLE: Precisely, Your Honor.

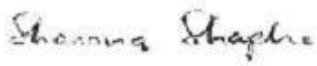
CHIEF JUDGE DIFIORE: Thank you, counsel.

MS. YACKA-BIBLE: Okay. Thank you, Your Honors.

(Court is adjourned)

C E R T I F I C A T I O N

I, Sharona Shapiro, certify that the foregoing transcript of proceedings in the court of Appeals of The People of the State of New York v. Omar Deleon, No. 77, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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