

STATE OF MONTANA,

Plaintiff and Appellee,

v.

DAVID MICHAEL YOUMANS,

Defendant and Appellant.

BRIEF OF APPELLANT

On Appeal from the Montana Eighth Judicial District Court,
Cascade County, the Honorable John W. Parker, Presiding

APPEARANCES:

CHAD WRIGHT
Appellate Defender
DEBORAH S. SMITH
Assistant Appellate Defender
Office of State Public Defender
Appellate Defender Division
P.O. Box 200147
Helena, MT 59620-0147
debbiesmith@mt.gov
(406) 444-9505

ATTORNEYS FOR DEFENDANT
AND APPELLANT

TIMOTHY C. FOX
Montana Attorney General
C. MARK FOWLER
Bureau Chief
Appellate Services Bureau
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

JOSHUA A. RACKI
Cascade County Attorney
AMANDA L. LOFINK
Deputy County Attorney
121 4th Street North
Great Falls, MT 59401

ATTORNEYS FOR PLAINTIFF
AND APPELLEE

TABLE OF CONTENTS

TABLE OF CONTENTS	1
TABLE OF AUTHORITIES.....	2
STATEMENT OF THE ISSUE.....	3
STATEMENT OF THE CASE	3
STATEMENT OF THE FACTS	6
STANDARD OF REVIEW.....	14
SUMMARY OF ARGUMENT	14
ARGUMENT	16
 The State failed to provide sufficient evidence to prove beyond a reasonable doubt that Mr. Youmans committed theft. The Prosecutor relied only on Mr. Youmans’s uncorroborated admission to Officer Scheer that Ms. Merchant’s bank shorted him \$20 of her money, without providing any proof that Ms. Merchant did not receive her money or that Mr. Youmans intended to deprive her of the money.....	
A. Applicable legal standards.....	16
B. Mr. Youmans’s uncorroborated admission to Officer Scheer that he was shorted \$20 by Ms. Merchant’s bank when he withdrew an unspecified amount of money for her is insufficient to prove he committed theft.	19
CONCLUSION.....	25
CERTIFICATE OF COMPLIANCE.....	26
APPENDIX.....	27

TABLE OF AUTHORITIES

Cases

<i>In re Winship</i> , 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)	20
<i>Jackson v. Virginia</i> , 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)	20
<i>State v. Akers</i> , 2017 MT 311, 389 Mont. 531, 408 P.3d 142	20
<i>State v. Giant</i> , 2001 MT 245, 307 Mont. 74, 37 P.3d 49	15, 16, 21
<i>State v. McGarvey</i> , 2005 MT 308, 329 Mont. 439, 124 P.3d 1131	10
<i>State v. Polak</i> , 2018 MT 174, 392 Mont. 90, 422 P.3d 112	12, 15, 16, 22

Statutes

Mont. Code Ann. § 45-4-103	1
Mont. Code Ann. § 45-6-301(1)(a)	1, 14, 20
Mont. Code Ann. § 45-7-207(1)(a)	1
Mont. Code Ann. § 45-9-102	1
Mont. Code Ann. § 45-10-103	1
Mont. Code Ann. § 46-16-403	2, 8, 10, 15

Mont. Crim. J. Inst.

1-119 (2009)	18
--------------------	----

STATEMENT OF THE ISSUE

Did the State present sufficient evidence to prove beyond a reasonable doubt that David Youmans committed theft, where the only evidence of the alleged theft was officer testimony that Mr. Youmans's housemate claimed, without corroborating evidence, he stole her money?

STATEMENT OF THE CASE

The State charged David Michael Youmans with four offenses: (1) criminal possession of dangerous drugs, a felony, in violation of Mont. Code Ann. § 45-9-102; (2) criminal possession of drug paraphernalia, a misdemeanor, in violation of Mont. Code Ann. § 45-10-103; (3) theft, a misdemeanor, in violation of Mont. Code Ann. § 45-6-301(1)(a); and (4) tampering with or fabricating physical evidence (attempt), a felony, in violation of Mont. Code Ann. §§ 45-7-207(1)(a) and 45-4-103. (D.C. Docs. 2 (Information (04/28/2017) (Counts I – III)), 29 (1st Amended Information (01/08/2018) (adding Count IV)).) The case proceeded to trial. (02/20/2018 Trial Tr.; 02/21/2018 Trial Tr.; D.C. Docs. 49 (Minutes (02/20/2018), 54 (Minutes (02/21/2018)).) At the close of testimony, before the case was submitted to the jury, the Defense moved to dismiss

Count III for insufficient evidence, pursuant to Mont. Code Ann. § 46-16-403. (02/21/2018 Tr. at 49.)

The alleged victim of the theft was Mr. Youmans's housemate at the time. Defense Counsel argued that the State merely had presented testimony from the arresting officer about the housemate's reported theft of an unspecified amount of money, without providing any independent proof of the claimed theft. (02/21/2018 Tr. at 50 – 51.) The prosecutor rejoined that the arresting officer testified to Mr. Youmans's admission to withdrawing his housemate's money from the bank at her request and being shorted \$20; the prosecutor argued the officer's testimony was sufficient to prove theft beyond a reasonable doubt. (02/21/2018 Tr. at 51 – 52. *See also* 02/20/2018 Tr. at 207.) The District Court denied the motion to dismiss, ruling that when viewed in the light most favorable to the State, the arresting officer's testimony could establish the elements of theft beyond a reasonable doubt. (02/21/2018 Tr. at 53 – 54.)

The jury returned a guilty verdict on all four counts. (02/21/2018 Tr. at 126; D.C. Doc. 54.1 (Verdict).) The District Court ordered a presentence investigation ("PSI") and set a sentencing date.

(02/21/2018 Tr. at 128 – 29; D.C. Doc. 55 (02/27/2018) (Order Setting Sentencing Upon Jury Trial).)

At sentencing, the District Court orally pronounced the following sentence:

(1) Count I, criminal possession of dangerous drugs, a felony – four years at the Montana State Prison (“MSP”), with 360 days credit for time served;

(2) Count II, criminal possession of drug paraphernalia, a misdemeanor – six months at the Cascade County Detention Center with credit for time served, to run concurrently with Count I;

(3) Count III, theft, a misdemeanor – six months at the Cascade County Detention Center with credit for time served, to run concurrently with Counts I and II;

(4) Count IV, attempt to tamper with evidence, a felony – ten years at MSP with six years suspended, to run concurrently with Counts I, II, and III.

(Sent. Tr. at 27, 31; oral pronouncement attached hereto as App. A.)

The District Court also ordered restitution of \$733.00 and imposed

conditions recommended in the PSI. (App. A at 30 – 31; Sent. Tr. at 5 – 9.) The written judgment, as amended, conforms with the oral pronouncement of sentence. (D.C. Docs. 59 (Judgment of Conviction and Sentencing Order (04/19/2018)), 67 (Order to Amend Sentencing Judgment (06/20/2018)¹); both documents are attached hereto as App. B.)

Mr. Youmans timely appealed.

STATEMENT OF THE FACTS

The Alleged Theft

Tiffany Merchant called the Great Falls Police Department one morning to report that her roommate, David Youmans, had taken some of her money. (02/20/2018 Tr. at 203.) Officer Steve Scheer responded to the call. (02/20/2018 Tr. at 202 – 03.) When he arrived at her home, Ms. Merchant explained “she was on SSI [i.e., Supplemental Security Income] due to several disabilities she had[,]” which to Officer Scheer made it “obvious that she had some physical and maybe some delayed

¹ The District Court amended the written judgment at Mr. Youmans’s request, without opposition, to reflect its oral pronouncement that the sentences on all four counts run concurrently. (App. A at 27, 31; D.C. Docs. 62, 66, 67.)

mental capacity as well.” (02/20/2018 Tr. at 204.) Officer Scheer stated, “she definitely had some physical disabilities that made walking a little bit of a chore.” (02/20/2018 Tr. at 204.) Ms. Merchant was the only person at home when Officer Scheer made his initial contact with her. (02/20/2018 Tr. at 205.) The trial record does not indicate how much money Ms. Merchant reported as missing. Nor does it provide Ms. Merchant’s explanation of how Mr. Youmans allegedly took her money.²

When Officer Scheer returned to the home later, Mr. Youmans was also present. (02/20/2018 Tr. at 205 – 06.) Officer Scheer stood by the front door in the living room and called to Mr. Youmans, whom he could see nearby in the kitchen, to come talk to him. (02/20/2018 Tr. at 206.) Officer Scheer stated that Mr. Youmans “seemed shocked I was there.” (02/20/2018 Tr. at 207.) He testified:

² At sentencing, Mr. Youmans stipulated to \$733.00 in restitution, as that was the amount the State alleged he stole in the affidavit that supported the motion for leave to file an Information. (Sent. Tr. at 5, 8 – 9. D.C. Doc. 1 at 4.) According to the affidavit, \$733.00 was the amount of Ms. Merchant’s SSI check that allegedly was cashed by Mr. Youmans. (Sent. Tr. at 8 – 9. D.C. Doc. 1 at 4.) The District Court ordered Mr. Youmans to pay \$733.00 in restitution. (Sent. Tr. at 9; App. A at 30; App. B at 3.) At trial, however, there was no testimony or other evidence presented to the jury about a \$733.00 SSI check or Mr. Youmans cashing such a check.

A [Officer Scheer].: I asked him – I basically said, “Well,” in anticipation that he would explain his side of things regarding the money.

Q [Prosecutor].: And did he say anything?

A. Yeah. He provided a story of how he had gone to get the money at the bank, he had gotten shorted by about \$20.00. He was going to return to the bank and get that problem taken care of and he never made it back home. He ended up meeting a friend named John, and they went driving around for a while until they ended up out in Vaughn, Montana.

Q. And was he able to further identify John to you other than the name John?

A. No.

Q. And did he tell you what occurred out in Vaughn?

A. He said he got to hang out with some friends and partying. And during this time. John took his car, which also contained the money that belonged to Ms. Merchant.

Q. Was he able to identify where in Vaughn he went?

A. No.

Q. Was he able to tell you any of the other individuals he partied with?

A. No.

Q. How did he get home? Did he tell you?

A. He said he walked from Vaughn to Great Falls.

Q. About how far is that?

A. I think it's – to the city limits, I think it's close to 11 miles.

(02/20/2018 Tr. at 207 – 08.)

Officer Scheer requested Ms. Merchant to provide written documents to support her theft assertion; she provided none.

(02/21/2018 Tr. at 16.) Officer Scheer testified he conducted a very, very thorough search of Mr. Youmans's bedroom in the home – he went through dresser drawers, searched Mr. Youmans's clothing, and looked under the mattress searching for evidence of the alleged theft.

(02/21/2018 Tr. at 32 – 33.) Officer Scheer acknowledged he found no cash or documents that would support a theft charge. (02/21/2018 Tr. at 33.) Further, Officer Scheer conceded as true that he ultimately “did not find any evidence to connect David Youmans with a theft charge[.]”

(02/21/2018 Tr. at 33.) Ms. Merchant did not testify at trial. The Defense introduced no witnesses.

The Motion to Dismiss

At the close of evidence, outside of the jury's presence, Defense Counsel moved to dismiss Count III, the misdemeanor theft charge, for insufficient evidence, pursuant to Mont. Code Ann. § 46-16-403.

(02/21/2018 Tr. at 49.) Counsel argued the only evidence that was submitted was the report of a theft by Ms. Merchant, who submitted no documents to prove any theft occurred and did not testify at trial.

(02/21/2018 Tr. at 50, 52, 56.) Counsel observed that Officer Scheer himself conceded he found no evidence to support a theft charge, even after his thorough investigation. (02/21/2018 Tr. at 50, 56.) Under these circumstances, when viewing the evidence in the light most favorable to the prosecution, the Defense contended there was insufficient evidence for the jury to find Mr. Youmans guilty of theft. (02/21/2018 Tr. at 51.)

The Prosecutor countered:

Your Honor, the State's position is that this goes to the weight of the evidence, which would be for the jury to decide. Officer Scheer testified yesterday that Tiffany Merchant advised that she had given her bank card to the Defendant to go take money out of the ATM for her and that he

did not bring it back.^[3] Officer Scheer also testified that the Defendant claimed that the ATM^[4] had shorted him and he was going to remedy that situation, but then his vehicle was borrowed or taken from somebody, and that's where it was. I think that based on that testimony, those facts in evidence, there is evidence before the jury that they can decide whether it is sufficient to reach the level of beyond a reasonable doubt, and it goes to the weight of the evidence.

(02/21/2018 Tr. at 51 – 52.)

The District Court denied the motion to dismiss. (02/21/2018 Tr. at 54.) Remarking that Defense Counsel did not object to Officer Scheer's testimony concerning Ms. Merchant's statement about a theft, the District Court ruled:

. . . I do remember the statement elicited through Officer Scheer where Ms. Merchant felt that there had been a theft. . . . I do find that that statement is in evidence, and I find that that statement does defeat Defendant's motion for a directed verdict, because it puts us in a position where the elements of the case can be met in a light most favorable to the State. I'm not saying

³ None of these facts was in Officer Scheer's testimony. Instead, Officer Scheer testified only, "she [Ms. Merchant] wanted to report some of her money was taken by a roommate." (02/20/2018 Tr. at 203.)

⁴ Officer Scheer did not testify about an ATM. Rather, Officer Scheer testified that Mr. Youmans's told him "he had gone to get the money at the bank, [and] he had gotten shorted by about \$20.00." (02/20/2018 Tr. at 207.)

it's in a light most favorable to the State on an extremely strong footing, but I think it's within the legal parameters set forth in the *McGarvey* case⁵.”

(02/21/2018 Tr. at 53 – 54.) After the Court's ruling, the Prosecutor conceded, “while it may not be the most strong evidence, there is evidence in this case for the jury to make that determination, and it's their providence that they determine whether the weight of the evidence is sufficient or not.” (02/21/2018 Tr. at 55.)

Following a recess, and again outside the presence of the jury, Defense Counsel renewed Mr. Youmans's motion to dismiss:

[DEFENSE COUNSEL]: Yes. Thank you, Your Honor. Your Honor, I'd like to renew my motion for a directed verdict to dismiss Count III: Theft, pursuant to Montana Code Annotated 46-16-403. Your Honor, during the recess, I checked with the court reporter and asked the court reporter to review Officer Scheer's testimony yesterday upon direct-examination from [the Prosecutor]. And I don't have a written transcript in front of me, but according to the court reporter, Officer Scheer never mentioned a debit card or a credit card. The phrase that was used was “money.” And in the Court's ruling earlier today, if I recall correctly – and again I haven't looked at that transcript also, I believe the Court may have been under the impression that Officer Scheer had received information

⁵ *State v. McGarvey*, 2005 MT 308, 329 Mont. 439, 124 P.3d 1131.

about Mr. Youmans using a debit card. From what I can glean on this cursory review of the testimony yesterday, there was no statement from Officer Scheer about the use of a debit card or credit card.

So on that basis, Your Honor, since the Court mentioned the debit card in its ruling denying my previous motion, Your Honor, I'd like to ask for leave to renew my motion again[.] . . .

THE COURT: Thank you, [Defense Counsel]. And prior to hearing additional argument from the State, I do not recall using the word "debit card" in my oral order. I note that the State filed its amended information on January 4th of this year, and as Count III: Theft, is plead, there is no reference to a specific item of property. It's plead generally in regard to property of the owner. So, my ruling stands. I find that in a light most favorable to the State, pursuant to case precedent, that [Defense Counsel's] motion must be denied[.]

(02/21/2018 Tr. at 65 – 67.)

Closing Argument

During closing argument, the Prosecutor again incorrectly stated Officer Scheer's testimony:

The charge of theft, you heard testimony that Tiffany Merchant asked the Defendant to go to the ATM to withdraw money for her, and that when he didn't bring that money home she called in and reported the theft of her money. You heard that the Defendant admitted to Officer

Scheer, after only being said [sic], “Well,” that he failed to give her that money. And that he went into this elaborate, complex story of getting the money, but then the ATM shorted him so he was going to try and fix that, but instead he went to Vaughn and went to a party with a bunch of people who he couldn’t name, he couldn’t say where that party was. The only thing he could provide in terms of detail about that was conveniently that his friend, John – again no further detail or contact information as to who this John is, took his car that had the money in it, and that’s why the money wasn’t returned. The State has proven that the Defendant committed theft.

(02/21/2018 Tr. at 89 – 90.)

STANDARD OF REVIEW

The Court reviews *de novo* whether sufficient evidence supports a conviction. *State v. Polak*, 2018 MT 174, ¶ 14, 392 Mont. 90, 422 P.3d 112 (citations omitted).

SUMMARY OF ARGUMENT

The State lacked evidence that Mr. Youmans stole money belonging to Ms. Merchant. Ms. Merchant declined to provide any proof of theft, even after reporting Mr. Youmans stole her money. In fact, nothing in the trial record contains specifics about the purported theft Ms. Merchant reported to the police.

The State relied exclusively at trial on uncorroborated admissions from Mr. Youmans concerning how the bank had shorted him \$20 of a withdrawal he made for Ms. Merchant. Mr. Youmans explained: he went to the bank to remedy being shortchanged; the missing money was in his car; and his friend John had driven off in the car. There is no evidence that Mr. Youmans intended to deprive Ms. Merchant of her money or that Ms. Merchant did not ultimately receive the missing \$20.

In an attempt to remedy its evidentiary deficits, during closing argument the prosecutor discussed purported facts that she claimed were in Officer Scheer's testimony, but were not. The prosecutor asserted that Mr. Youmans went to an ATM, withdrew money for Ms. Merchant, and then failed to give her any money. But that is not what Officer Scheer testified under oath.

Even viewing the evidence presented by Officer Scheer to the jury in the light most favorable to the State, no rational juror could find that the State proved beyond a reasonable doubt that Mr. Youmans was guilty of theft. The State failed to prove that Mr. Youmans obtained or exerted unauthorized control over Ms. Merchant's money with the purpose of depriving her of that money. Ms. Merchant refused to

provide any evidence of a theft to Officer Scheer, and she did not testify at trial. The State also did not prove that Mr. Youmans intended to deprive Ms. Merchant of the missing \$20, or that she did not ultimately receive all the money Mr. Youmans withdrew for her.

The District Court was incorrect as a matter of law when it denied Mr. Youmans's motion to dismiss the theft charge for insufficient evidence. The Court should reverse the District Court's denial of the motion, remand with instructions to vacate the conviction and its corresponding sentence, and issue a judgment of acquittal.

ARGUMENT

The State failed to provide sufficient evidence to prove beyond a reasonable doubt that Mr. Youmans committed theft. The Prosecutor relied only on Mr. Youmans's uncorroborated admission to Officer Scheer that Ms. Merchant's bank shorted him \$20 of her money, without providing any proof that Ms. Merchant did not receive her money or that Mr. Youmans intended to deprive her of the money.

A. Applicable legal standards.

Mont. Code Ann. § 45-6-301(1)(a) provides: "A person commits the offense of theft when the person purposely or knowingly obtains or

exerts unauthorized control over property of the owner and [] has the purpose of depriving the owner of the property[.]”

Mont. Code Ann. § 46-16-403 provides in pertinent part:

When, at the close of the prosecution’s evidence or at the close of all the evidence, the evidence is insufficient to support a finding or verdict of guilty, the court may, on its own motion or on the motion of the defendant, dismiss the action and discharge the defendant.

Evidence is insufficient to support a finding or verdict of guilty when, after reviewing the evidence in the light most favorable to the prosecution, no rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Polak*, ¶ 34 (citations omitted).

When considering the denial of a motion to dismiss for insufficient evidence, this Court considers only the trial testimony and the evidence properly before the jury. *State v. Giant*, 2001 MT 245, ¶ 10, 307 Mont. 74, 37 P.3d 49 (using the phrase “motion for a directed verdict” from an earlier version of Mont. Code Ann. § 46-16-403). The Court “cannot consider potential evidence that was not introduced, offers of proof discussed during arguments on motions if the evidence is not eventually offered and accepted, discussions in chambers or during sidebars, or

evidence not admitted at trial but admitted during the sentencing hearing.” *Giant*, ¶ 10.

In pertinent part, the relevant jury instruction given at Mr. Youmans’s trial states:

A statement made by a Defendant other than at this trial may be an admission.

An admission is a statement made by the accused, direct or implied, of facts pertinent to the issue, and tending, in connection with proof of other facts, to prove their guilt. *A conviction cannot be based on an admission or confession alone.*

Jury Instruction 29 (emphasis added) (filed 06/10/2020 with this Court; the jury instructions are not included with other documents listed in the District Court Case Register). *Accord* MCJI 1-119 (2009).

“A new trial cannot be granted where the evidence adduced at the first trial proves insufficient to support a conviction. . . . Once a reviewing court has found the evidence legally insufficient, the proper remedy is a judgment of acquittal.” *Polak*, ¶ 35 (citations omitted).

///

///

B. Mr. Youmans's uncorroborated admission to Officer Scheer that he was shorted \$20 by Ms. Merchant's bank when he withdrew an unspecified amount of money for her is insufficient to prove he committed theft.

The only evidence adduced at trial that Mr. Youmans committed theft was provided through Officer Scheer's testimony. Following is a summary of the sum total of that evidence:

Officer Scheer testified, "We were called by the homeowner to – she wanted to report some of her money was taken by a roommate." (02/20/2018 Tr. at 203.) This is the *only* evidence the jury received concerning Ms. Merchant's description of an alleged theft. The jury received no evidence indicating how much money Ms. Merchant reported that Mr. Youmans allegedly stole or the circumstances of the purported theft.

Officer Scheer found no money during his very thorough search of Mr. Youmans's and Ms. Merchant's home. (02/21/2018 Tr. at 31 – 33.) Ms. Merchant declined to provide Officer Scheer any documentation to prove a theft had occurred, even though he requested her to do so. (02/21/2018 Tr. at 16.) Ms. Merchant did not appear in court to testify.

The only evidence the jury heard relating to a possible theft of Ms. Merchant's money consisted of Mr. Youmans's own admissions to

Officer Scheer. Mr. Youmans explained he went to the bank to get an unspecified amount of money for Ms. Merchant and had gotten shorted by about \$20.00. Mr. Youmans told Officer Scheer that he went to the bank to get that problem taken care of, but never made it back home with the missing money. Rather, Mr. Youmans ended up meeting a friend named John, and they drove out to Vaughn, Montana, where they partied with friends. (02/20/2018 Tr. at 207 – 08.)

John then drove off in Mr. Youmans's car, which had Ms. Merchant's money in it, leaving Mr. Youmans stranded in Vaughn. Mr. Youmans had to walk home to Great Falls. (02/20/2018 Tr. at 207 – 08.) Officer Scheer acknowledged that Mr. Youmans's car was not parked at the home during his two visits there to investigate the theft, and conceded that the missing vehicle was consistent with Mr. Youmans's explanation of events. (02/21/2018 Tr. at 18 – 19.)

During the argument on Mr. Youmans's motion to dismiss for insufficient evidence, outside of the presence of the jury, the Prosecutor inaccurately contended, "Officer Scheer testified yesterday that Tiffany Merchant advised that she had given her bank card to the Defendant to go take money out of the ATM for her and that he did not bring it back."

(02/21/2018 Tr. 51.) The trial transcript belies the Prosecutor's summary of Officer Scheer's testimony. Defense Counsel pointed out during argument on the motion that Officer Scheer did not mention a debit card or a credit card during his testimony. (02/21/2018 Tr. at 66 – 67.)

The transcript establishes only that the bank shorted Mr. Youmans \$20 and he returned to the bank to get the missing money. Mr. Youmans put the money in his car, but then his friend John drove off in his car and he had to walk home. Officer Scheer did not testify that Ms. Merchant gave Mr. Youmans her bank card to get money from an ATM that he did not bring back – these allegations are simply not in evidence.

Nevertheless, during closing argument the Prosecutor again mischaracterized Officer Scheer's testimony, asserting incorrectly: "you heard testimony that Tiffany Merchant asked the Defendant to go to the ATM to withdraw money for her, and that when he didn't bring that money home she called in and reported the theft of her money. You heard that the Defendant admitted to Officer Scheer, after only being said [sic], "Well," that he failed to give her that money." (02/21/2018 Tr.

at 89.) But this is not what Officer Scheer told the jury. The Prosecutor told a story to the jury that was unsupported by the evidence, which the jury apparently believed.

To convict Mr. Youmans of theft, the State had to prove beyond a reasonable doubt that he purposely or knowingly obtained or exerted unauthorized control over Ms. Merchant's money with the purpose of depriving her of that money. Mont. Code Ann. § 45-6-301(1)(a). *Accord* Jury Instruction 21 (same).

“[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.” *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 1073, 25 L. Ed. 2d 368 (1970). “The question whether a defendant has been convicted upon inadequate evidence is central to the basic question of guilt or innocence. The constitutional necessity of proof beyond a reasonable doubt is not confined to those defendants who are morally blameless.” *Jackson v. Virginia*, 443 U.S. 307, 323, 99 S. Ct. 2781, 2791, 61 L. Ed. 2d 560 (1979). *Accord State v. Akers*, 2017 MT 311, ¶ 14, 389 Mont. 531, 408 P.3d 142 (recognizing that due process requires the State to prove beyond a reasonable doubt

every element of a crime charged in a criminal prosecution, and reflects “a profound judgment about the way in which law should be enforced and justice administered”) (citations omitted).

Here, the State provided no evidence at trial to establish how much money Ms. Merchant claimed Mr. Youmans took.⁶ To prove theft, the State merely offered uncorroborated admissions from Mr. Youmans. A conviction cannot be based on an admission alone. (Jury Instruction 29.)

But even if Mr. Youmans’s admissions alone were sufficient to support a conviction, which they are not, the facts Mr. Youmans admitted do not prove the essential elements of theft beyond a reasonable doubt. Mr. Youmans went to the bank to get an unspecified amount of money for Ms. Merchant. He explained the bank shorted him

⁶ The amount of restitution to which Mr. Youmans stipulated at sentencing, which was the amount alleged to have been stolen in the affidavit supporting the information, is not relevant to deciding whether the State presented sufficient evidence at trial to support a conviction. *Giant*, ¶ 10. The State did not present a shred of evidence that Mr. Youmans took \$733.00 from Ms. Merchant. Similarly, the alleged manner of the purported theft is inapposite to the motion to dismiss for sufficient evidence, because the State presented no evidence or testimony that Ms. Merchant gave Mr. Youmans her SSI check to cash or that he kept all the money from the check. *Giant*, ¶ 10.

\$20, and that he returned to the bank to remedy the problem. Mr. Youmans said that the missing money was in his car that John had taken.

This evidence does not prove beyond a reasonable doubt that Mr. Youmans obtained or exerted unauthorized control over Ms. Merchant's money. There is no evidence that once he collected the missing \$20 from the bank, Mr. Youmans was supposed to have returned the \$20 to Ms. Merchant before going to Vaughn with his friend. The only evidence concerning the whereabouts of the \$20 was that John had driven away with it, which does not prove that Mr. Youmans intended to deprive Ms. Merchant of her \$20.

The theft charge should not have been allowed to go to the jury. No rational juror could have found the State proved the essential elements of theft beyond a reasonable doubt, even when considering the evidence in the light most favorable to the State. *Polak*, ¶ 34. The story the Prosecutor told the jury during closing argument was not based on record evidence. The District Court ruling denying Mr. Youmans's motion to dismiss for insufficient evidence was incorrect as a matter of law. *Polak*, ¶ 39.

CONCLUSION

For the foregoing reasons, Mr. Youmans respectfully requests the Court to reverse the District Court's denial of his motion to dismiss the theft charge for insufficient evidence, vacate the theft conviction and the sentence related thereto, and remand with instructions to enter a judgment of acquittal for theft.

Respectfully submitted this 29th day of July, 2020.

OFFICE OF STATE PUBLIC DEFENDER
APPELLATE DEFENDER DIVISION
P.O. Box 200147
Helena, MT 59620-0147

By: /s/ Deborah S. Smith
DEBORAH S. SMITH
Assistant Appellate Defender

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this primary brief is printed with a proportionately spaced Century Schoolbook text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 4,635, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Deborah S. Smith
DEBORAH S. SMITH

APPENDIX

Oral Pronouncement of Sentence.....App. A

Judgment of Conviction and Sentencing Order; Order to Amend
Sentencing Judgment.....App. B

CERTIFICATE OF SERVICE

I, Deborah Susan Smith, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 07-29-2020:

Timothy Charles Fox (Prosecutor)
Montana Attorney General
215 North Sanders
PO Box 201401
Helena MT 59620
Representing: State of Montana
Service Method: eService

Joshua A. Racki (Prosecutor)
121 4th Street North
Suite 2A
Great Falls MT 59401
Representing: State of Montana
Service Method: eService

Electronically signed by Kim Harrison on behalf of Deborah Susan Smith
Dated: 07-29-2020