No. 71238-1-I

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON, Respondent,

v.

ZACHARY LARSON, Appellant.

BRIEF OF RESPONDENT

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C. FACTS

Zachary Larson charged with retail theft with extenuating circumstances pursuant to RCW 9A.56.0360(1)(b). CP 6-7. On May 17th 2013, Keven Codrington, a loss prevention officer for Marshalls in Bellingham, Washington observed Zachary Larson and companion Meicheille Smith-Bearden enter the retail store and select a pair of Nike shoes. CP 85-87. Codrington then watched as Meichelle Smith-Bearden passed the Nike shoes to Larson, who then used wire cutters to cut and remove wires that attached the security device to the shoes. Thereafter, the couple put the Nike shoes in their bag, covered them with their coats and continued shopping. Id. When Larson and Smith-Bearden paid for other items at the cashier, no attempt was made to pay for the Nike shoes hidden under their coats in their shopping bag. Id.

Larson and Bearden were subsequently stopped outside the store by security and Larson later acknowledged he stole the merchandise for Baeden. See, CP 85-87.

Prior to trial, Larson filed a motion to dismiss pursuant to State v. Knapstad, 107 Wash. 2d 346, 729 P.2d 48 (1986) arguing that the wire cutters used in this theft was not a device "designed" to overcome security systems and therefore the state could not prove each element of the offense charged. After hearing argument, reviewing the memoranda and the statute in question, the court rejected Larson's narrow interpretation of the statute instead determining that wirecuttters fell within the scope of the statute proscribing and denied Larson's motion to dismiss. RP 9.

Thereafter, Larson stipulated to a bench trial predicated on the police reports and the trial court found Larson guilty of retail theft with extenuating circumstances in the third degree. CP 51-53, 85-87, 56-64. Following sentencing, Larson timely appeals, again asserting the wire cutters used do not constitute a "device" designed to overcome security systems as proscribed by the statute. CP 70-84.

D. ARGUMENT

1. A plain reading of the retail theft statute demonstrates the legislature intends to hold persons in possession of wire cutters or other items, implements, devices or articles the design

of which enables them to overcome security measures and steal, to be criminally accountable pursuant to RCW 9A.36360(1)(b) of retail theft with extenuated circumstances.

Larson contends RCW 9A.56.360 only prohibits possession of items which were *specifically designed* to thwart store security systems. Larson contends therefore, that short of possessing wire cutters or a lined bag, the statute doesn't apply. He asserts consequently, that the state has insufficient evidence to support Larson's conviction for retail theft with extenuating circumstances because the wire cutters Larson used to cut the wires of a security tag in order to steal merchandise were not *specifically designed* to overcome security measures but merely generically designed to cut wires. Br. of App at 9. *Emphasis added.*

The state asserts, contrary to Larson's argument, that the plain language of the statute demonstrates a person committing theft who is found in possession of wire cutters that in their design effectively can overcome the security measures of the retailer, falls within the scope of retail theft with extenuating circumstances statute. Wire cutters in this instance, equates to having a tag remover. Wire cutters, by their generic name, reveal they are designed to cut wires and in this instance, the merchant's security system amounted to the use a wired secured device. In order to overcome the security system in place, the more sophisticated

thief would need to use a tag remover or wire cutters to quickly and efficiently steal merchandise. Larson's narrow interpretation of the retail theft statute at issue should be rejected.

Issues of statutory construction are questions of law reviewed de novo on appeal. State v. Evans, 177 Wash. 2d 186, 298 P.3d 724 (2013). The purpose of statutory interpretation is "to determine and give effect to the intent of the legislature." Id., *citing,* State v. Sweany, 174 Wash. 2d 909, 914, 281 P.3d 305 (2012). Legislative intent is, when possible, derived solely from the plain language of the statute. Evans, 177 Wash. 2d 186. If the meaning of a statute is plain on its face, courts will give effect to the plain meaning. State v. Ervin, 169 Wash. 2d 815, 239 P.3d 354 (2010).

In determining the plain meaning of a provision, this Court considers the text of the statutory provision at issue, the context of the provision in the statute itself, related provisions and the statutory scheme as a whole. Id. Terms which are not defined by statute are given their plain and ordinary meaning unless a contrary legislative intent is indicated. State v. Jones, 172 Wash. 2d 236, 242, 257 P.3d 616 (2011).

In 2006, the legislature added several new crimes, including the crime of retail theft with extenuating circumstances to the organized retail theft section of the criminal code. These crimes were enacted in the face

of growing concern over the increase in organized retail theft and to the substantial costs organized and sophisticated thefts resulted to both consumers and retailers nationally. See, S.B. Rep. 2704 at 2 (Laws of Wash. 2006, ch.277) (Wash.2006.)

The Retail theft with extenuating circumstances statute provides:

> A person commits retail theft with extenuating circumstances if he or she commits theft from a mercantile establishment with one of the following extenuating circumstances:
>
> (a) To facilitate the theft, the person left the mercantile establishment through a designated emergency exit;
>
> **(b) the person was, at the time of the theft, in possession of an item, article, implement or device *designed* to overcome security systems *including but not limited to, lined bags or tag removers***; or
>
> (c) the person committed the theft at three or more separate and distinct mercantile establishments within a 180-day period....
>
> (4) A person is guilty of retail theft with extenuating circumstances in the third degree if the theft involved constitutes theft in the third degree. Retail theft with extenuating circumstances in the third degree is a class C felony.

Emphasis added, RCW 9A.56.360 (2014).

While the legislature did not define the term 'designed' as used in this statute, they did reveal that they did not intend a narrow application of this term because the plain language in the statute also sets forth that possession of the proscribed items designed to overcome security systems *includes, but is not limited to possession of lined bags or tag removers.*

RCW 9A.56.360 (1)(b). Given this additional language, it is clear the legislature meant what it said and that the phrase 'designed to overcome security systems' in modifying the terms 'item, article, implement or device' refers to the conceivable purpose for which the item [wire cutters], was designed or used for as it relates to overcoming security measures and does not require that the item in question only be designed for the specific purpose of thwarting security measures. If the item in question, predicated on its design can overcome the security measures, the article, implement, devise or item falls within the scope of the statute.

Given the language of the statute, the context and ordinary meaning of the term 'designed' and the additional qualifying language in the statute itself, it is clear possession of wire cutters, an item designed to cut wires falls within the proscribed conduct because, in this instance, the merchandise was secured by a tag attached by wires that had to be cut to overcome the security system. Thus, a thief would need a tag remover or alternatively an item, implement or device designed to cut wires overcome the security measures and steal the merchandise. Larson's narrow interpretation of this statute should be rejected.

To support Larson's argument, he cites to numerous dictionary definitions of 'designed' and the term 'design.' While, RCW 9A.56.360 does not further define the term 'designed' this Court may look to

dictionary definition of the term to discern the legislature's plain intent. State v. Johnson, 159 Wash. App. 766, 770, 247 P.3d 11 (2011).

> 'Designed' is defined as:
>
> > contrived or taken to be employed for a particular purpose. Fit, adapted, prepared, suitable, appropriate. Intended, adapted, or designated. The term may be employed as indicating a bad purpose with evil intent.

Deluxe Black's Law Dictionary, Sixth Edition 447 (1990). Designed has also been defined as "done, performed, or made with purpose and intent..." Webster's Third New International Dictionary, 612 (1993). Larson defines 'designed' as something planned or made for a specific use or purpose. Something planned , intended, purposeful, deliberate... to create or contrive for a particular purpose of effect. See, Br. of App. at 8.

However, as used in the context of this statute, the term 'designed' is not a stand-alone term. Instead it is used in the context of a clause or phrase 'designed to overcome security systems' which modifies the previous terms listed, specifically 'items, article, implements or devices.' As such the statute plainly states it encompasses possession of items, articles, implements or devices the design of which enables persons to overcome security systems. Moreover, the legislature's intent as reflected in the plain language of the statute is further revealed by the subsequent

language of the statute where legislature specifically states the statute ***includes but is not limited to***, lined bags or tag removers.

The language of the statute, read in proper context, plainly states that other items, implements, articles or devices whose design enables the more sophisticated thief to efficiently and effectively overcome security measures in order to steal merchandise, fall within the scope of the statute.

Larson's argument to limit applicability of the statute to only items, implements, devices etc that ***specifically and singularly are only designed*** to overcoming security measures is inconsistent with the plain language of the statute, ignores that the term 'designed' is not a stand-alone term but part of a phrase modifying the previous terms. Larson's interpretation strains logic and would limit the applicability of the statute in exactly the manner the legislature did not intend as reflected in the language it used qualifying that these items, articles, devises and implements included *but not limited to"*....tag removers and bag liners. The statute is unambiguous when read as a whole and in context. Larson's argument should be rejected.

If this Court determines the plain meaning of the language of the statute is susceptible to more than one reasonable interpretation and determines the phrase 'designed to overcome security systems' is ambiguous, this Court may engage in further statutory construction to

discern the legislature's intent using statutory construction, examining legislative history and relevant case law to discern the legislatures intent. Evans, 177 Wash. 2d at 189. Statutory construction will not be construed adversely to a defendant where the statute is ambiguous, unless statutory analysis 'clearly establishes' the contrary meaning was the leglislatures intent. Id.

Statutory analysis further supports that the legislature did not intend to adopt Larson's narrow interpretation of the statute. The senate house bill reveals that in passing the retail theft statute, the legislature wanted to address and hold accountable sophisticated thieves who engaged in retail theft with stiffer consequences. S.B. Rep. 2704 (2006)(Laws of Wash. ch. 277) (Wash.2006.) The retail theft and other related newly enacted crimes enable counties to aggregate multiple offenses together and, as reflected in this case, hold thieves who used more sophisticated measures to accomplish a theft, criminally accountable as a felon.

With the legislatures intent in mind, in conjunction with the language, in context and as a whole of RCW 9A.56.360(1)(b), it is clear the legislature intended the statute to encompass criminals who at time of the theft, had in their possession items, implements, articles or devices who's design enabled them to overcome security measures to steal

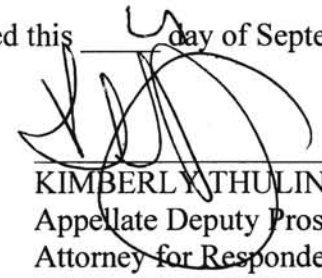
merchandise. It would be absurd to require the state to prove the item or implement was designed solely and specifically to overcome a merchant's security system in order to convict a thief of retail theft with extenuating circumstances. Moreover, the statute's plain language and legislative history indicate that is not what the legislature intended.

A person bringing wire cutters into a retail store for the purpose of cutting wires to remove a security device to facilitate his or her theft is similarly situated under this statute to a person who uses a tag remover or lined bag to accomplish his or her theft. This is because the statute is not criminalizing the possession of particular tools for theft as the legislature did in for Having or making Burglary tools. See, RCW 9A.52.060. Instead, the statute is criminalizing the dual act of possessing such tools the design of which enables a thief to thwart security systems and steal. RCW 9A.56.060. Larson's argument should be rejected.

E. CONCLUSION

The State respectfully requests this Court to deny Larson's appeal and affirm his conviction for retail theft with extenuating circumstances.

Respectfully submitted this ____ day of September, 2014.



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CERTIFICATE

I certify that on this date I placed in the U.S. mail with proper postage thereon, or otherwise caused to be delivered, a true and correct copy of the foregoing document to this Court, and appellant's counsel of record, Dana Nelson addressed as follows:

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Legal Assistant — Date