73113-1

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Oct 26, 2015
Court of Appeals
Division I
State of Washington

No. 73113-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

JOHN HENRY JOHNSON,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENT OF ERROR

The State did not prove the elements of the crime beyond a reasonable doubt.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

To prove second degree theft as charged, the State was required to prove John Johnson wrongfully took Kendra Farmer's credit card and specifically intended to deprive her of the credit card. But the evidence showed only that Mr. Johnson picked up a purse belonging to Ms. Farmer, and that the purse contained a credit card. There is no evidence that Mr. Johnson ever opened the purse or *knew* it contained a credit card. Did the State therefore fail to prove Mr. Johnson specifically intended to deprive Ms. Farmer of her credit card?

C. STATEMENT OF THE CASE

On August 22, 2013, John Johnson went to Alderwood Mall to do some window shopping and return some merchandise. 1/27/15(a.m.)RP 152, 180. He walked through the Pottery Barn store in order to get to the mall. 1/27/15(a.m.)RP 152, 154. While in the store, he noticed a purse that had been left unattended, sitting on a sofa. 1/27/15(a.m.)RP 153, 169-70. He picked up the purse in order to find the rightful owner. 1/27/15(a.m.)RP 154, 177. He looked around for a

store employee to whom he could safely entrust the purse. 1/27/15(a.m.)RP 154.

The purse belonged to Kendra Farmer, who was shopping for sofas with her husband and two young children. 1/26/15RP 60. Ms. Farmer had left her purse on a sofa while talking to a sales associate a few feet away. 1/26/15RP 61. She had her back to the purse and forgot she had left it there. 1/26/15RP 61, 68, 71, 74.

Ms. Farmer's husband Ryan was standing near the front of the store with their daughter. 1/26/15RP 77. Mr. Farmer noticed when Mr. Johnson picked up the purse because the purse had a metal chain that made a distinctive noise. 1/26/15RP 78. Mr. Farmer accosted Mr. Johnson and said "that's my wife's purse." 1/26/15RP 79; 1/27/15(a.m.)RP 153. Mr. Johnson said, "Oh, really?" or "Oh, okay," and immediately returned the purse to Mr. Farmer without resistance. 1/26/15RP 79, 89, 102; 1/27/15(a.m.)RP 153, 171.

Mr. Johnson testified he did not try to conceal the purse. 1/27/15(a.m.)RP 157, 177. He did not intend to steal it. 1/27/15(a.m.)RP 177, 179. Mr. Farmer said it looked like Mr. Johnson was trying to put the purse inside a plastic shopping bag that he was carrying. 1/26/15RP 78, 86, 91.

There is no evidence that Mr. Johnson ever opened the purse or knew what was inside of it. 1/26/15RP 91; 1/27/15(a.m.)RP 153. The purse contained Ms. Farmer's wallet, keys, identification, and a number of credit and debit cards. 1/26/15RP 65. Ms. Farmer looked in the purse afterward and verified that nothing was missing. 1/26/154RP 66.

After returning the purse to Mr. Farmer, Mr. Johnson turned around and started walking toward the back entrance of the store. 1/26/15RP 80, 89; 1/27/15(a.m.)RP 154. Mr. Farmer followed him, saying "where do you think you're going? You're not going anywhere. You're going to jail." 1/26/15RP 81. Mr. Farmer called 911 while continuing to follow Mr. Johnson out of the store. 1/26/15RP 83. The police responded and arrested Mr. Johnson nearby. 1/26/15RP 84; 1/27/15(a.m.)RP 113.

Mr. Johnson was charged with one count of second degree theft of an "access device." CP 193; RCW 9A.56.040(1)(c). After a jury trial, he was convicted as charged. CP 147.

D. ARGUMENT

1. The State did not prove Mr. Johnson specifically intended to deprive Ms. Farmer of her access device, where there was no evidence that he knew she *had* an access device

Mr. Johnson was charged with second degree theft of an "access device." CP 193. The statute provides that "[a] person is guilty of theft in the second degree if he or she commits theft of . . . (d) An access device."[1] RCW 9A.56.040(1)(d).

For purposes of this case, "theft" means "[t]o wrongfully obtain or exert unauthorized control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services." RCW 9A.56.020(1)(a); CP 157, 193. The terms "wrongfully obtain" and "exert unauthorized control" in the statute are sometimes referred to together as "theft by taking." State v. Linehan, 147 Wn.2d 638, 644, 56 P.3d 542 (2002).

The crime of theft requires proof beyond a reasonable doubt that the defendant had a specific intent to deprive the owner of his or her

[1] An "access device" is "any card, plate, code, account number, or other means of account access that can be used alone or in conjunction with another access device to obtain money, goods, services, or anything else of value, or that can be used to initiate a transfer of funds, other than a transfer originated solely by paper instrument." RCW 9A.56.010(1); CP 160.

property.[2] RCW 9A.56.020; State v. Blancaflor, 183 Wn. App. 215, 240, 334 P.3d 46 (2014).

Constitutional due process required the State to prove this element of specific intent beyond a reasonable doubt.[3] See Apprendi v. New Jersey, 530 U.S. 466, 477, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. Const. amend. XIV; Const. art. I, § 3.

Although intent is typically proved through circumstantial evidence, inferences of intent may be drawn only from conduct that plainly indicates such intent as a matter of logical probability.[4] State v. Vasquez, 178 Wn.2d 1, 8, 309 P.3d 318 (2013). Intent may not be inferred from evidence that is "patently equivocal." Id.

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[2] "Specific intent" is "an intent to produce a specific result, as opposed to an intent to do the physical act that produces the result." State v. Esters, 84 Wn. App. 180, 184, 927 P.2d 1140 (1996) (internal quotation marks and citation omitted).

[3] In reviewing the sufficiency of the evidence, the question is whether, after viewing the evidence in the light most favorable to the State, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

[4] The jury was instructed: "A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result that constitutes a crime." CP 158.

Moreover, "where specific intent is an element of a crime, the specific intent must be proved as an independent fact and cannot be presumed from the commission of the unlawful act." State v. Louther, 22 Wn.2d 497, 502, 156 P.2d 672 (1945). In other words, in a prosecution for theft, a specific intent to deprive cannot be presumed from evidence that the defendant wrongfully obtained or exerted unauthorized control over the property of another. The element of specific intent to deprive must be proved as an independent fact. Id.

In this case, the State bore the burden to prove Mr. Johnson had a specific intent to deprive Ms. Farmer of her "access device," and not simply that he had an intent to deprive her of *any* of her property. The State's burden to prove Mr. Johnson's specific intent to deprive Ms. Farmer of her access device is plain from the language of the statute, the charging document, and the jury instructions.

The theft statute defines "theft" as "[t]o wrongfully obtain or exert unauthorized control over *the property* or services of another or the value thereof, with intent to deprive him or her of *such property* or services." RCW 9A.56.020(1)(a) (emphases added). For purposes of second degree theft, "the property" is an "access device." RCW 9A.56.040(1)(d). The second term, "such property," refers to the

earlier term "the property," which is an "access device." See Webster's Third New International Dictionary 2283 (1993) (the word "such" means "of this or that character, quality, or extent : of the sort or degree previously indicated or implied," or "previously characterized or specified"); State v. Wentz, 149 Wn.2d 342, 351, 68 P.3d 282 (2003) ("Under the last antecedent rule, unless a contrary intention appears in the statute, qualifying words and phrases refer to the last antecedent.") (internal quotation marks and citation omitted). Thus, applying basic principles of statutory construction, the second degree theft statute requires the State to prove the defendant had a specific intent to deprive the owner of his or her "access device."

Consistent with the statute, the language in the information alleged that Mr. Johnson had a specific intent to deprive Ms. Farmer of her credit card. The information alleged Mr. Johnson "did wrongfully obtain or exert unauthorized control over an access device of another, to-wit: a credit card belonging to Kendra Farmer, with intent to deprive such other of *such property*." CP 193 (emphasis added).

Finally, the language in the to-convict jury instruction required the jury to find that Mr. Johnson (1) "wrongfully obtained or exerted unauthorized control over property of another"; (2) the property was

"an access device"; and (3) Mr. Johnson "intended to deprive the other person of *the access device*." CP 157 (emphasis added).

Under the "law of the case doctrine," the State bore the burden to prove all of the elements contained in the to-convict instruction beyond a reasonable doubt, even if any of those elements were not required by the statute. State v. Hickman, 135 Wn.2d 97, 102, 954 P.2d 900 (1998). Thus, the jury instructions required the State to prove Mr. Johnson "intended to deprive [Ms. Farmer] of the access device." CP 157.

Contrary to constitutional due process, the State did not bear its burden to prove this element beyond a reasonable doubt. The State did not prove Mr. Johnson had a specific intent to deprive Ms. Farmer of her access device because there is no evidence that he *knew* she had an access device. Mr. Johnson never opened Ms. Farmer's purse and did not know what was inside of it. 1/26/15RP 91; 1/27/15(a.m.)RP 153. Although Ms. Farmer said the purse contained a number of credit and debit cards, 1/26/15RP 65, there is no evidence that Mr. Johnson *knew* there were credit or debit cards inside the purse.

The State could not rely upon speculation that Mr. Johnson should have known Ms. Farmer's purse probably contained credit or

debit cards. The State may not rely upon guess, speculation, or conjecture to prove an element of the crime. State v. Colquitt, 133 Wn. App. 789, 796, 137 P.3d 892 (2006).

Moreover, the structure of the criminal statute demonstrates the Legislature's intent that, when criminal intent is an element of the crime, the State bears a simultaneous burden to prove actual knowledge. The criminal statute creates a hierarchy of mental states in declining order of seriousness: intent, knowledge, recklessness, and criminal negligence. RCW 9A.08.010; State v. Johnson, 173 Wn.2d 895, 905, 270 P.3d 591 (2012). The mental state of "specific intent" is the highest mental state requirement defined by statute. Johnson, 173 Wn.2d at 905. Within this hierarchy, "proof of a higher mental state is necessarily proof of a lower mental state." State v. Acosta, 101 Wn.2d 612, 618, 683 P.2d 1069 (1984); RCW 9A.08.010(2). Thus, for example, proof of intent necessarily establishes knowledge. City of Spokane v. White, 102 Wn. App. 955, 10 P.3d 1095 (2000).

Under that same logic, a *lack* of knowledge necessarily equates to a lack of intent.

A useful analogy is the crime of unlawful possession of a controlled substance with intent to manufacture or deliver. That crime

requires as an essential element proof that the defendant possessed a controlled substance with the intent to manufacture or deliver it. State v. Sims, 119 Wn.2d 138, 142, 829 P.2d 1075 (1992). Proof of the crime requires proof that the defendant *had knowledge* of the nature of the controlled substance, as "[i]t is impossible for a person to intend to manufacture or deliver a controlled substance without knowing what he or she is doing. By intending to manufacture or deliver a controlled substance, one necessarily knows what controlled substance one possesses as one who acts intentionally acts knowingly." Id.

Likewise, it is impossible for a person to wrongfully obtain or exert unauthorized control over another person's access device with the intent to deprive the owner of the access device if the purported wrongdoer has no knowledge that the access device even exists. Proof of intent requires proof of *knowing* conduct. Id.

When a person steals a purse and is charged with second degree theft based on the theft of debit or credit cards found inside the purse, the State must separately prove the defendant intended to deprive the owner of the credit and debit cards. See State v. Lust, 174 Wn. App. 887, 892, 300 P.3d 846 (2013). In Lust, the defendant took a tavern patron's purse without her permission and removed six credit and debit

cards from a wallet inside. Id. at 889. He was convicted of third degree theft for stealing the purse and second degree theft for stealing the credit and debit cards. The Court held the two offenses were not factually or legally identical, in part, because "the theft statute required proof Mr. Lust intended to deprive the tavern patron of the purse when he took it without her permission and he separately intended to deprive her of the credit and debit cards when he removed them from the wallet inside." Id.

Similarly, here, the charge of second degree theft of an access device required proof of Mr. Johnson's separate, specific intent to deprive Ms. Farmer of her credit and access cards, which was not satisfied by proving simply that he had an intent to deprive her of her purse. The State did not meet its burden of proof because there is no evidence that Mr. Johnson *knew* Ms. Farmer's purse contained any credit or debit cards, much less that he intended to deprive her of them. Thus, the evidence was insufficient to sustain the charge beyond a reasonable doubt.

2. The judgment and sentence contains a scrivener's error that must be corrected

Mr. Johnson was charged and convicted of second degree theft of an access device under RCW 9A.56.040(1)(d). CP 157, 193. But

the judgment and sentence incorrectly states he was convicted of second degree theft under a different prong of the statute, RCW 9A.56.040(1)(c). CP 20. Because the statutory reference in the judgment and sentence is erroneous, it must be corrected.

E. CONCLUSION

The State did not prove the elements of the crime because it did not prove beyond a reasonable doubt that Mr. Johnson intended to deprive Ms. Farmer of her access device. Thus, the conviction must be reversed and the charge dismissed.

Respectfully submitted this 26th day of October, 2015.

s/ Maureen M. Cyr

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON, Respondent, JOHN JOHNSON, Appellant.	)))))))))	NO. 73113-1-I

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 26TH DAY OF OCTOBER, 2015, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON, THIS 26TH DAY OF OCTOBER, 2015.

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