73113-1

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Feb 02, 2016
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 REPLY BRIEF

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A. ARGUMENT IN REPLY

The evidence was insufficient to sustain the conviction because there was no evidence that Mr. Johnson specifically intended to steal an access device.

1. The statute required the State to prove Mr. Johnson intended to steal an access device.

The State contends it was not required to prove Mr. Johnson intended to steal an access device because, in general, the theft statute does not require the State to prove the defendant either knew the value of the property taken, or that he intended to acquire a particular dollar amount of property. SRB at 6-7. Even if this is true, however, the second degree theft statute *does* require the State to prove the defendant specifically intended to steal an access device. RCW 9A.56.040(1)(d).

The State relies on State v. Holmes, in which the Supreme Court stated broadly, "[i]n a prosecution for theft under RCW 9A.56 it is not necessary that the defendant either know the value of the property he has taken or intend to acquire a particular dollar amount of property. Neither factor is an element of theft even though 'intent to deprive' is a necessary element." State v. Holmes, 98 Wn.2d 590, 596, 657 P.2d 770 (1983) (citing State v. Delmarter, 97 Wn.2d 634, 618 P.2d 99 (1980)). In Delmarter, a prosecution for attempted first degree theft, the Supreme Court rejected the defendant's argument that the State was

required to prove he knew the property he attempted to steal had a value in excess of $1,500. Delmarter, 97 Wn.2d at 637. In rejecting the claim, the court held the first degree theft statute "d[id] not include as an element of the crime that defendant must have knowledge of the value of the property." Id.; former RCW 9A.56.030(1)(a).

Holmes and Delmarter stand for the proposition that the State may convict a defendant of first, second or third degree theft based on the dollar value of the property stolen without proving the defendant knew the value of the property, or intended to steal property worth a particular dollar amount. The theft statute sets forth three different degrees of theft. RCW 9A.56.030, .040, .050. In general, the dollar value of the property taken determines the degree of theft. See RCW 9A.56.030(1)(a) ("A person is guilty of theft in the first degree if he or she commits theft of . . . [p]roperty or services which exceed(s) five thousand dollars in value"); RCW 9A.56.040(1)(a) ("A person is guilty of theft in the second degree if he or she commits theft of . . . [p]roperty or services which exceed(s) seven hundred fifty dollars in value but does not exceed five thousand dollars in value"); RCW 9A.56.050(1)(a) ("A person is guilty of theft in the third degree if he or she commits theft of property or services which . . . does not exceed seven hundred

fifty dollars in value"). Under Delmarter, the State need not prove the defendant knew the relevant dollar amount of the property in order to be convicted of a particular degree of theft. Delmarter, 97 Wn.2d at 637.

But Delmarter does not address the particular question presented in this case. The theft statute also contains provisions requiring the State to prove the stolen property was a particular *kind* of property. In this case, for example, to prove second degree theft as charged, the State was required to prove Mr. Johnson "commit[ted] theft of . . . [a]n access device." RCW 9A.56.040(1)(d). That statutory provision, combined with the statutory definition of "theft," required the State to prove Mr. Johnson specifically intended to steal a particular kind of property, that is, an "access device."

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). In this case, "the property" is an "access device." RCW 9A.56.040(1)(d). As argued in the opening brief, the plain language of the statute requires the State to

prove the defendant intended to deprive the owner of "such property," which is, specifically, an "access device."

The State could not prove Mr. Johnson intended to deprive Ms. Farmer of her access device without also proving he knew she had an access device. Proof of intent requires proof of *knowing* conduct. State v. Sims, 119 Wn.2d 138, 142, 829 P.2d 1075 (1992); RCW 9A.08.010(2). "It is impossible for a person to intend to [commit a criminal act] without knowing what he or she is doing." Sims, 119 Wn.2d at 142. "[O]ne who acts intentionally acts knowingly." Id.

Even when the evidence is viewed in the light most favorable to the State, it is plain the State did not meet its burden of proof. There is no evidence that Mr. Johnson knew what was inside of Ms. Farmer's purse. He never opened the purse and there is no evidence to suggest he otherwise knew what was in it. The evidence was therefore insufficient to sustain the conviction.

*2. Even if it was "foreseeable" that the purse contained an access device, such speculation is not sufficient to sustain the State's burden to prove Mr. Johnson actually **knew** the purse contained an access device.*

The State also contends the evidence was sufficient to prove Mr. Johnson intended to deprive Ms. Farmer of her access devices because

it was "foreseeable" that the purse would contain credit or debit cards. SRB at 7. But foreseeability is not sufficient to prove the element of actual knowledge in a criminal case.

To sustain its burden to prove an element of the crime, the State must present affirmative evidence of the element and cannot rely upon "guess, speculation, or conjecture." State v. Colquitt, 133 Wn. App. 789, 796, 137 P.3d 892 (2006). To say that the State can meet its burden to prove the defendant knew the property he stole was an access device because it was foreseeable that the purse probably contained an access device is to rely upon speculation and conjecture. That is not the kind of affirmative evidence required to prove the existence of an element beyond a reasonable doubt.

3. Under the law of the case doctrine, the State assumed the burden to prove Mr. Johnson specifically intended to steal an access device.

Even if the statute does not require the State to prove as an element of the crime that Mr. Johnson knew the property he stole was an access device, the State assumed the burden to prove that element under the law of the case doctrine. The State does not address this aspect of Mr. Johnson's argument in its brief.

The to-convict jury instruction stated the State must prove beyond a reasonable doubt 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," when the State does not object to a to-convict jury instruction, it assumes the burden to prove all of the elements contained in the instruction, even if those elements are not required by the statute. State v. Hickman, 135 Wn.2d 97, 102, 954 P.2d 900 (1998). Here, the to-convict instruction stated the State must prove Mr. Johnson "intended to deprive [Ms. Farmer] of the access device." CP 157. Because the State did not object to the instruction, it bore the burden to prove Mr. Johnson intended to deprive Ms. Farmer of her access device. Hickman, 135 Wn.2d at 102. As stated above, the State could not prove Mr. Johnson intended to steal Ms. Farmer's access device without proving he knew she had an access device. Sims, 119 Wn.2d at 142; RCW 9A.08.010(2).

This case is indistinguishable from other cases in which our courts applied the law of the case doctrine to hold that the State bore

the burden to prove a *mens rea* element contained in a to-convict instruction even if that element was not required by the statute. In State v. Goble, 131 Wn. App. 194, 200, 126 P.3d 821 (2005), for instance, the to-convict instruction stated that to convict Goble of third degree assault, the State must prove he knew the person he assaulted was a law enforcement officer. Although the statute did not require the State to prove Goble knew the victim was a law enforcement officer, under the law of the case doctrine, the State assumed the burden to prove such knowledge because the element was included without objection in the to-convict instruction. Id. at 201 & 201 n.2 (citing Hickman).

Similarly, in State v. Hudlow, 182 Wn. App. 266, 285-86, 331 P.3d 90 (2014), the trial court instructed the jury, without objection, that to convict Hudlow it must find "the defendant knew that the substance delivered was a controlled substance methamphetamine." Although the statute did not require the State to prove Hudlow knew the nature of the substance he delivered, under the law of the case doctrine, the State assumed the burden to prove such knowledge because it was included in the to-convict jury instruction. Id. (citing Hickman).

Finally, in State v. Abuan, 161 Wn. App. 135, 156, 257 P.3d 1 (2011), the court instructed the jury that to convict Abuan of second degree assault, the State must prove he "assaulted Fomai" with specific intent to cause bodily harm to "another" by use of a deadly weapon, or with specific intent to create an apprehension of bodily harm in "another" and that Fomai experienced fear in fact. The doctrine of transferred intent generally allows the State to convict a person of assaulting someone even if he intended to assault someone else. But in Abuan, the State assumed the burden of proving the defendant specifically intended to assault the particular victim because that element was contained in the to-convict instruction. Id. The Court explained, "[w]hen the jury instruction identifies a victim, i.e., 'Fomai,' thus specifying 'another' as did the jury instruction here, it is the law of the case and there is no room for a transferred intent analysis without a transferred intent jury instruction." Id. (citing Hickman).

This case is indistinguishable from Goble, Hudlow, and Abuan. The to-convict instruction stated the State must prove beyond a reasonable doubt that Mr. Johnson "intended to deprive [Ms. Farmer] of the access device." CP 157. Because the State did not object to the instruction, it assumed the burden to prove Mr. Johnnson intended to

steal a particular kind of property—an access device. Even if the statute did not require the State to prove that element, the State assumed the burden to prove it under the law of the case doctrine. Hickman, 135 Wn.2d at 102. Because the State presented no evidence to show Mr. Johnson specifically intended to steal an access device, the State did not meet its burden of proof and the conviction must be reversed and the charge dismissed. Id. at 103.

B. CONCLUSION

Because the State did not prove the elements of the crime beyond a reasonable doubt, the conviction must be reversed and the charge dismissed.

Respectfully submitted this 2nd day of February, 2016.

/s/ Maureen M. Cyr

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DIVISION I

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

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 2ND DAY OF JANUARY, 2016, 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 2ND DAY OF JANUARY, 2016.

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