73113-1

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Court of Appeals
Division I
State of Washington

73113-1
NO. ~~79113-1-I~~

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

STATE OF WASHINGTON,

Respondent,

v.

JOHN HENRY JOHNSON,

Appellant.

BRIEF OF RESPONDENT

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I. ISSUES

1. Was there sufficient evidence to convict the defendant of second degree theft?

2. Can a scrivener's error in the judgment and sentence be challenged for the first time on appeal?

II. STATEMENT OF THE CASE

The defendant was charged with one count of second degree theft while on community custody. CP 193. Mr. Farmer testified that on August 22, 2013, he and his wife and their two small children were at the Pottery Barn store in Alderwood Mall shopping for a couch. They had settled into a couch adjacent to the cash stand and were looking at fabric samples. Mr. Farmer got bored, so he took their three year old to explore the front of the store. The two were seated in a two person chair by the front entrance of the store looking at the entrance. Ms. Farmer was still back by the cash stand with their younger child in a stroller. Mr. Farmer testified that he used to work in retail store design so he was very aware of the layout of the store and the only operational cash stand was the one his wife was at with the clerk. 1 RP 76-8.

While waiting, Mr. Farmer heard the sound of his wife's purse being picked up. He explained that the purse is a Coach

purse and has a very heavy gauge chain that makes a distinct sound when it is picked up. Thinking they were going to be leaving, Mr. Farmer looked over his shoulder for his wife. What he saw was the defendant attempting to put his wife's purse into a thin white plastic shopping bag like you would get at Safeway. The purse was folded in half. He had half of it in the bag with the chain hanging out. The defendant was trying to get the chain into the bag, which is what Mr. Farmer heard that attracted his attention. While trying to put the purse in the plastic bag, the defendant was moving at a pretty fast clip towards the front entrance. Mr. Farmer stood up and confronted him, saying that the purse was not his. Without breaking stride, the defendant took the purse and handed it to Mr. Farmer. The defendant then turned around and walked to the back of the store and exited out into the parking lot. Mr. Farmer followed the defendant while calling 9-1-1. The defendant walked briskly straight through the parking lot and ran across the street. The defendant kept looking back at Mr. Farmer, but he did not stop. Mr. Farmer never lost sight of the defendant and continued to follow him until the police apprehended him. 1 RP 76, 78-80, 82, 84, 86, 93, 108.

Ms. Farmer testified that while shopping for a sofa, she was in the middle section of the Pottery Barn store speaking with a sales clerk about fabrics at the only open checkout stand. The couches were arranged around the checkout stand. Ms. Farmer had left her Coach purse on the couch when she stepped up to the stand to speak with the clerk. Ms. Farmer estimated that she was only three to five feet from her purse while she was speaking with the sales clerk. Ms. Farmer's husband and her four years old daughter had become bored with shopping and had moved to another area of the store about 20 feet away, by the mall entrance. Ms. Farmer had her wallet, keys, lip gloss, personal credit and debit cards, her business debit and credit cards, a blank check for her daughter's preschool and her identification in her purse. Ms. Farmer became aware that her purse had been taken when she heard her husband yelling at the defendant. Ms. Farmer's husband handed her back her purse and continued to follow the defendant out of the store. I RP 60-2, 63-5,70-2.

Officer Blakely of the Lynnwood Police department testified he was the officer to contact the defendant. He noted the defendant had a white plastic bag in his hand when he contacted him. 1 RP 114.

The defendant testified at trial. On cross-examination, he changed his version of events numerous times and gave multiple different reasons for leaving the store. He never explained why he left by the same door he came in when he had business to attend to at the mall. 1 PR 152, 154, 169-170, 172-3,179-180. The jury found the defendant guilty. CP 147.

III. ARGUMENT

A. THERE WAS SUFFICIENT EVIDENCE FOR A RATIONAL TRIER OF FACT TO CONVICT THE DEFENDANT OF SECOND DEGREE THEFT.

Under the applicable standard of review, there is sufficient evidence to affirm a criminal conviction if any rational trier of fact, viewing the evidence most favorably toward the State, could have found the essential elements of the charged crime proved beyond a reasonable doubt. State v. Kintz, 169 Wn.2d 537, 551, 238 P.3d 470 (2010). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068, 1074 (1992). Circumstantial evidence and direct evidence are equally reliable. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). The jury is permitted to infer from one fact, the existence of another essential to guilt, if reason and experience support the

inference. State v. Jackson, 112 Wn.2d 867, 875, 774 P.2d 1211 (1989). Furthermore, the specific criminal intent of the accused may be inferred from the conduct where it is plainly indicated as a matter of logical probability. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99, 101 (1980). Just because there are hypothetically rational alternative conclusions to be drawn from the proven facts, the fact finder is not lawfully barred against discarding one possible inference when it concludes such inference unreasonable under the circumstances. Nothing forbids a jury from logically inferring intent from proven facts, so long as it is satisfied the state has proved that intent beyond a reasonable doubt. State v. Bencivenga, 137 Wn.2d 703, 708-09, 974 P.2d 832, 834 (1999). Furthermore, the specific criminal intent of the accused may be inferred from the conduct where it is plainly indicated as a matter of logical probability. Delmarter, 94 Wn.2d at 638, 618 P.2d 99). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. State v. Hosier, 157 Wn.2d 1, 8, 133 P.3d 936 (2006).

In testing the sufficiency of the evidence, the reviewing court does not weigh the persuasiveness of the evidence. Rather, it defers to the trier of fact on issues involving conflicting testimony,

credibility of witnesses, and the weight of the evidence. State v. Stewart, 141 Wn. App. 791, 795, 174 P.3d 111 (2007). Evidence favoring the defendant is not considered. State v. Randecker, 79 Wn.2d 512, 521, 487 P.2d 1295 (1971) (negative effect of defendant's explanation on State's case not considered), State v. Jackson, 62 Wn. App. 53, 58 n.2, 813 P.2d 156 (1991) (defense evidentiary inference cannot be used to attack sufficiency of evidence to convict). Credibility determinations are for the trier of fact and are not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990); State v. Cantu, 156 Wn.2d 819, 831, 132 P.3d 725 (2006).

The defendant contends there was not sufficient evidence for the jury to find he intended to deprive Ms. Farmer of the access devises in her purse when he took her purse. BOA 11. The defendant confuses knowledge with intent. In 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, 773 (1983). Just as RCW 9A.56.020-030(1)(a) does not include as an element of the

crime that defendant must have knowledge of the value of the property. There is no requirement that the defendant have knowledge that the item he is stealing is an access device, only that he intended to deprive the victim of property and that property was an access device.

However, there is also sufficient evidence to support the finding the defendant intended to deprive Ms. Farmer of her access devices. The defendant did not take the purse and leave the contents of the purse behind. When the defendant intentionally took with purse with the intent to deprive, he also took the contents with the intent to deprive. The purpose of a purse is to carry personal items, most commonly, identification, access devices, money, and cell phones. It was a foreseeable consequence that taking the purse would include taking credit and debit cards. It is also a reasonable inference, since most used purses to not possess significant value in themselves, that the intent in taking a purse is to take the valuables contained within it, the most valuable of which would likely be the access devices.

The defendant argues that intent may not be inferred from evidence that is "patently equivocal," citing State v. Vasquez, 178 Wn.2d 1, 309 P.3d 318 (2013). In Vasquez the defendant was

found to be in possession of a forged social security card and a forged permanent resident card in his own name. In that case, the State did not present any evidence the defendant had used either card to obtain employment. Id. at 4-5. Here, the defendant clearly intended to take the purse. He intended to deprive Ms. Farmer of her purse and its contents as he was attempting to conceal it in the plastic shopping bag he had with him while heading for the exit. Although the defendant argues his version of events, it is clear from the record, and the verdict, the jury did not believe him There is nothing equivocal about the evidence upon which the jury could rely in reaching its verdict. The jury was correctly instructed on the law and is assumed to follow the court's instructions. State v. Willis, 67 Wn.2d 681, 409 P.2d 669 (1966).

The defendant argues that the intent to steal the purse is different than the intent to steal the items within the purse. He bases this argument on one sentence in the decision in State v. Lust, 174 Wn. App. 887, 300 P.3d 846 (2013). In Lust, the defendant stole a person's purse from a tavern. The purse had six credit and/or debit cards in it. The State charged Mr. Lust with one count of third degree theft of property under $750 for the purse and six counts of second degree theft of access device. The issue

before the court was whether the second degree theft convictions which followed the defendant's plea to the third degree theft violated double jeopardy. The court found they did not, because each crime included an element not found in the other. Second degree theft required proof of theft of access devices. Third degree theft (as charged in that case) required proof that the stolen property had a value of less than $750.[1]

This reasoning has little bearing on the present case. Lust holds that second degree theft requires proof of an additional element. It does not hold the jury is precluded from inferring that element from other facts. Here, the evidence supports a reasonable inference that the defendant intended to steal the contents of the purse, including the access devices. The evidence supports the jury verdict.

B. THE PROPER PROCEDURE FOR CORRECTING A SCRIVENER'S ERROR IS VIA MOTION IN THE TRIAL COURT, NOT BY RAISING THE ISSUE FOR THE FIRST TIME ON APPEAL.

The defendant points out that the judgment and sentence contains a scrivener's error. The defendant was convicted of

[1] This was evidently true of the charges in that case, but it is not true in general. Value is not usually an element of third degree theft. State v. Tinker, 155 Wn.2d 219, 118 P.3d 885 (2005).

second degree theft of an access device, RCW 9A.56.040(1)(d). CP 147. On the first page of the judgment and sentence it cites to RCW 9A.56.040(1)(c).

This error could readily have been corrected if anyone had pointed it out at the time. The defendant fails to explain why this issue can be raised for the first time on appeal. The issue does not fall into any of the categories identified in RAP 2.5(a). If the defendant believes that this error is significant, the proper remedy is to move to modify the judgment under CrR 7.8(a).

IV. CONCLUSION

The judgment and sentence should be affirmed.

Respectfully submitted on January 5, 2016.

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January 5, 2016

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Re: STATE v. JOHN H. JOHNSON
COURT OF APPEALS NO. 73113-1-I

Dear Mr. Johnson:

The respondent's brief does not contain any counter-assignments of error. Accordingly, the State is withdrawing its cross-appeal.

Sincerely yours,

MARA J. ROZZANO, #22248
Deputy Prosecuting Attorney

cc: Washington Appellate Project
Attorney(s) for Appellant

Sent via e-mail

On this day I ~~mailed a properly stamped envelope~~ addressed to the attorney for the defendant that contained a copy of this document.
I certify under penalty of perjury under the laws of the State of Washington that this is true.
Signed at the Snohomish County Prosecutor's Office this 5th day of Jan 2016

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

THE STATE OF WASHINGTON, Respondent, v. JOHN H. JOHNSON, Appellant.	No. 73113-1-I DECLARATION OF DOCUMENT FILING AND E-SERVICE

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 5th day of January, 2016, affiant sent via e-mail as an attachment the following document(s) in the above-referenced cause:

BRIEF OF RESPONDENT

I certify that I sent via e-mail a copy of the foregoing document to: The Court of Appeals via Electronic Filing and to Maureen M. Cyr, Washington Appellate Project, maureen@washapp.org; and wapofficemail@washapp.org.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 5th day of January, 2016, at the Snohomish County Office.

Diane K. Kremenich
Legal Assistant/Appeals Unit
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