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63174-8

No. 63174-8-I

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

STATE OF WASHINGTON,

Respondent,

v.

WUBE YOSEPH GOBENA,

Appellant.

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

APPELLANT'S OPENING BRIEF

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STATE OF WASHINGTON  
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**A. ASSIGNMENTS OF ERROR**

1. In the absence of substantial evidence in the record, the court erred in finding Gobena acted as a "blocker." CP 17 (FOF 7, 10).

2. In the absence of substantial evidence in the record, the court erred in finding Gobena engaged in "nesting." CP 17 (FOF 10).

3. The court erred in concluding the State proved the elements of theft in the second degree beyond a reasonable doubt. CP 19.

4. The court erred in concluding Gobena was guilty of theft in the second degree. CP 19.

5. The State did not prove beyond a reasonable doubt that Wube Gobena was guilty of theft in the second degree.

**B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR**

To prove a person is guilty as an accomplice to a crime, the State must prove beyond a reasonable doubt the person associated himself with the undertaking, participated in it as something he desired to bring about, and intentionally sought by his actions to make it succeed. Did the State prove beyond a reasonable doubt that Gobena was guilty as an accomplice to a

shoplifting, where he was present in close proximity to the principal during the incident, but did not take, conceal or possess any of the items that he was charged with stealing?

C. STATEMENT OF THE CASE

On July 31, 2008, Wube Gobena was charged, along with co-defendant Zenebe Worota, with one count of second degree theft. CP 1; RCW 9A.56.040(1)(a); RCW 9A.56.020(1)(a). Mr. Gobena waived his right to a jury trial and the case proceeded to a joint bench trial. CP 5.

Shelly Hernandez, a loss prevention officer at Costco on Fourth Avenue South in Seattle, testified she was on duty on the afternoon of March 30, 2008. CP 16; 1/20/09RP 18, 26. As she was walking the floor, she observed Gobena and Worota together pushing a shopping cart. CP 17; 1/20/09RP 26. She observed Gobena standing by the cart, "holding a package next to his body and the cart." CP 17. She assumed Gobena was engaged in "blocking," a behavior common among shoplifters. CP 17; 1/20/09RP 26.

Hernandez then noticed Worota standing next to the cart and cutting open a package with a sharp tool. CP 17. Hernandez witnessed Worota remove a camera from the packaging and

watched as he concealed it in his jacket pocket. CP 17. Worota then tossed the damaged packaging behind a pallet of goods. CP 17.

Hernandez called cashier Don Hildwein on her cell phone to assist her in observing the suspected shoplifters. CP 17. From separate locations, Hernandez and Hildwein observed the defendants walk a short way down another aisle before "Worota reached into the cart, which contained multiple goods, and pulled out another package." CP 17. Hernandez believed this behavior amounted to "nesting," another tactic common among shoplifters. CP 17. Hernandez and Hildwein observed Worota again cut open a package, remove a camera, and conceal the camera on his person before discarding the packaging behind another aisle of goods. CP 17.

The defendants shopped for a while longer before proceeding to the cash register line. CP 17; 1/20/09RP 38. The men paid for the items in their shopping cart and walked toward the exit. CP 17; 1/20/09RP 98. They did not pay for the two cameras hidden on Worota's person. CP 17. As the men exited the store, Hernandez contacted them and asked them to accompany her to the back office, which they did. CP 18; 1/20/09RP 39-41. The men

were placed in separate offices. CP 18; 1/20/09RP 42. Hernandez asked Worota to empty his pockets, which he did. CP 18; 1/20/09RP 43. Among the contents of his pockets was the knife blade he had used to cut open the camera packaging. CP 18; 1/20/09RP 43. Hernandez then asked Worota for any unpaid items on his person, and he took out a digital camera from his coat pocket. CP 18; 1/20/09RP 43. Later, the second camera was found on Worota, along with accessories for the two cameras. CP 18; 1/20/09RP 50-53.

While interacting with Worota, Hernandez noticed he had a white Adidas shoe tag in his shirt pocket. CP 18; 1/20/09RP 43. She then noticed he was wearing new shoes that matched the tag she found. CP 18; 1/20/08RP 43-44. When she asked Worota where his shoes were, he stated they were out on the store floor. CP 18; 1/20/09RP 43-44. A Costco employee found Worota's shoes and returned them to him. CP 18; 1/20/09RP 45.

Hernandez and a Seattle police officer testified that during a search of Gobena, the only item found was a package of wiring that had the same brand name as one of the cameras found on Worota. CP 18; 1/20/09RP 53-54, 125, 129-30. Gobena testified that no wiring or any other stolen item was ever found on his person.

1/22/09RP 9. Gobena also testified that he did not notice Worota open any camera packages, take any cameras, or try on any shoes. 1/22/09RP 7. He never tried to conceal Worota's actions. 1/22/09RP 7.

Hernandez looked up the value of the stolen goods on a store computer and verified the cost of the items on the store floor. CP 18; 1/20/09RP 55-56. The two cameras were valued at \$190 and \$160, respectively. CP 18; 1/20/09RP 57-58. The shoes were valued at \$35. CP 18; 1/20/09RP 58.

The court found Gobena guilty as charged of second degree theft.<sup>1</sup> CP 9, 19; RCW 9A.56.040(1)(a); RCW 9A.56.020(1)(a).

#### D. ARGUMENT

THE STATE DID NOT PROVE BEYOND A REASONABLE DOUBT THAT GOBENA WAS GUILTY AS AN ACCOMPLICE TO THE CRIME OF SECOND DEGREE THEFT

1. Due process requires the State to prove every element of the crime beyond a reasonable doubt. It is a fundamental principle of constitutional due process that the State must prove every element of a charged offense beyond a reasonable doubt.

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. 14; Const. art. 1, § 3.

In reviewing the sufficiency of the evidence to uphold the conviction, the question is whether, after viewing the evidence in the light most favorable to the State, any 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).

To prove the charged crime of second degree theft, the State was required to prove beyond a reasonable doubt that Gobena wrongfully obtained property belonging to Costco with the intent to deprive Costco of the property. CP 1, 19; RCW 9A.56.020(1)(a). In addition, the State was required to prove the value of the property stolen exceeded two hundred fifty dollars. CP 1, 19; Former RCW 9A.56.140(1)(a) (2007).<sup>2</sup>

2. The State did not prove beyond a reasonable doubt that Gobena acted as an accomplice. When viewed in the light most favorable to the State, the only evidence of Gobena's participation

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<sup>1</sup> The court's written findings of fact and conclusions of law are attached as an appendix.

in the crime was the wiring found in Gobena's coat pocket, which had the same brand name as one of the cameras stolen, and Hernandez's and Hildwein's observations of Gobena's behavior. 1/22/09RP 25. Gobena was not found in possession of any of the three stolen items the State relied upon to prove the crime. The State was therefore required to prove Gobena was guilty as an accomplice to the crime.

To prove Gobena was guilty as an accomplice, the State had to prove more than that he was present at the scene and knew a crime was being committed. In re Welfare of Wilson, 91 Wn.2d 487, 491-92, 588 P.2d 1161 (1979). The State had to prove Gobena associated himself with the undertaking, participated in it as something he desired to bring about, and sought by his actions to make it succeed. State v. J-R Distributors Co., 82 Wn.2d 584, 592-93, 512 P.2d 1049 (1973). Mere assent to the commission of a crime is not enough to make someone an accomplice. State v. Renneberg, 83 Wn.2d 735, 739, 522 P.2d 835 (1974). Neither is presence at the scene sufficient, even when coupled with knowledge that the presence aids in the crime's commission. State v. Rotunno, 95 Wn.2d 931, 933, 631 P.2d 951 (1981). The

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<sup>2</sup> Laws 2009, ch. 431, § 8, in subsec. (1)(a), increased the monetary amounts for second degree theft from \$250 to \$750 and from \$1,500 to \$5,000.

accomplice must *intend* that his presence facilitate the commission of the crime. Wilson, 91 Wn.2d at 491.

In Wilson, a group of youths tied a rope around a tree, strung it across a road, and pulled the rope taut as cars approached, creating the risk of an accident. 91 Wn.2d at 489. Although Wilson was present in the group, there was no evidence that he actually touched or pulled the rope. Id. at 490. The Supreme Court rejected the trial court's conclusion that Wilson's presence at the scene, his "involve[ment] in the whole atmosphere of what was going on," and his failure to leave once he realized what was happening rose to the level of accomplice liability. Id. at 490. Although the court acknowledged that presence at the scene of an ongoing crime may be sufficient to demonstrate accomplice liability if the person is "ready to assist" in the crime, the court concluded there was insufficient evidence in the record indicative of Wilson's readiness to "assist." Id. at 491.

The same conclusion applies here. The evidence is insufficient to show Gobena's intent to facilitate commission of the crime and readiness to assist. Again, the evidence showed little more than that Gobena was present at the scene. He never

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The amendments do not apply to Gobena's case.

concealed any items, cut any packaging, or handled any of the stolen merchandise. 1/20/09RP 76, 106; 1/22/09RP 25. The court found only that he "[held] a package next to his body and the cart." CP 17. Hernandez also testified Gobena was setting up items around the cart. 1/20/09RP 28. But when shopping at a store like Costco, it is customary to hold packages and arrange them in a shopping cart. Such behavior is not sufficient to prove the person intended to facilitate the commission of a crime.

Further, although some wiring was found in Gobena's jacket pocket, which matched the brand name of one of the stolen cameras, Hernandez did not check the wiring for a serial number and could not be certain it came from one of the stolen cameras. 1/20/09RP 76, 131-32.

Instead, Worota must be deemed wholly responsible for the crime. All of the stolen items, the two cameras and the Adidas shoes, were found on his person. CP 18. Only Worota handled the items, cut open and discarded the packaging, and concealed the goods. CP 17. He was later found in possession of the box cutter used to cut open the packages. CP 18.

In sum, the State failed to present sufficient evidence to prove beyond a reasonable doubt Gobena acted with an intent to

facilitate Worota's shoplifting. Although Gobena was present at the scene, and may have been aware of what was occurring, this is not enough to prove he was an accomplice to the crime. Therefore, the conviction must be reversed and dismissed.

E. CONCLUSION

Because the State failed to prove beyond a reasonable doubt that Gobena was guilty as an accomplice to second degree theft, the conviction must be reversed and the charge dismissed.

Respectfully submitted this 16th day of September 2009.

  
MAUREEN M. CYR (WSBA 28724)  
Washington Appellate Project - 91052  
Attorneys for Appellant

## **APPENDIX**



1 Lamont's, and the Gap. She completed Costco's training program after she was hired by the  
2 company three years ago. Hernandez encounters an average of four shoplifters per month. She  
is paid a salary, which does not depend on her catching shoplifters.

3 4. Don Hildwein has been employed by Costco for a little less than three years. His  
4 primary job is that of a cashier, but he assists Hernandez with loss prevention duties when  
5 required. Hildwein completed a three month loss prevention training with Macy's while an  
6 employee of Costco.

7 5. Neither Hernandez nor Hildwein had ever met the defendant Gobena or the defendant  
8 Worota before March 30, 2008.

9 6. While on duty at approximately 3:20pm, Hernandez was on the store floor and  
10 monitoring for shoplifters. At that time she observed the defendants together towards the back of  
11 the store.

12 7. Hernandez first observed Gobena standing by their cart and holding a package next to  
13 his body and the cart. Due to her training and experience, Hernandez recognized this behavior as  
14 "blocking", and suspected that Gobena was trying to block the view of people around him.

15 8. Hernandez then noticed Worota standing next to the cart and cutting open a package  
16 with a sharp tool. Hernandez witnessed Worota remove a camera from the packaging and  
17 watched as he concealed it in his jacket pocket. Worota then tossed the damaged packaging  
18 behind a pallet of goods.

19 9. Having witnessed an act of suspected shoplifting, Hernandez called Hildwein on her  
20 cell phone to assist. Hildwein obtained permission to leave his duties as cashier and came to  
21 Hernandez's position. Hildwein identified the two defendants and verified with Hernandez that  
22 he was observing the right people. Except for when she called 911, Hernandez was in constant  
23 phone communication with Hildwein until she exited the store to contact the defendants.

10 10. The defendants then walked a short ways down another isle of goods before Worota  
11 reached into the cart, which contained multiple goods, and pulled out another package.  
12 Hernandez called such behavior as "nesting" because it is another strategy used by shoplifters.  
13 With Gobena again acting as a blocker, the loss prevention officers witnessed Worota again cut  
14 open a package and remove a camera. Hildwein observed Worota conceal the camera on his  
15 person and then discard the packaging behind another pallet of goods.

16 11. The defendants then began walking towards cashiers. At this time, Hernandez called  
17 911 due to her observations and the fact that Worota was using a sharp object. The defendants  
18 proceeded through the cashiers, paying for the various goods in their cart. The cameras, which  
19 remained hidden on Worota's person, were never paid for.

20 12. Neither defendant had permission to take goods from Costco without paying for  
21 them.

1 13. Hernandez went outside to wait for the defendants to exit the store. Hildwein  
2 watched as they cleared the cashiers and went over to the food area and tire store. Several  
minutes later they exited the store.

3 14. Worota exited the store first and was contacted by Hernandez. In her testimony,  
4 Hernandez did not recall if Worota had actually left the store when he was contacted, but  
Hildwein testified that he had. The fact that the loss prevention officers contacted the defendants  
5 at a location past the cashiers and after they had paid for other goods is not in dispute.

6 15. Hernandez confronted Worota, and identified herself verbally and with her Costco  
7 badge. She asked Worota to come back to the Costco offices, and Worota complied. Hernandez  
8 did the same with Gobena, who also complied with her request.

9 16. In the Costco offices, the defendants were separated from each other. Both  
10 individuals were identified by their Washington identification cards.

11 17. Hernandez asked Worota to empty his pockets, and he did so. Among the contents of  
12 his pockets was the knife blade he had used to cut open the camera packaging.

13 18. Hernandez then asked Worota for any unpaid items on his person, and he took out a  
14 digital camera from his coat pocket. Worota did not hand over any other items. Later, the  
15 second camera was found on the defendant, along with accessories for the two cameras. The  
16 cameras and the accessories were photographed and the photograph was admitted at trial.

17 19. Hernandez found a shoe tag in Worota's shirt pocket. She then noticed that Worota  
18 was wearing new shoes, and that the tag matched the shoes. When she asked Worota where his  
19 shoes were, he stated they were still out on the floor. A Costco employee found Worota's shoes  
20 and returned them to him. The Costco shoes were undamaged and returned to the floor. The  
21 shoe tag was photographed along with the defendant's identification cards, and the photograph  
22 was admitted at trial.

23 20. The only item found on Gobena was a packaged accessory meant for one of the  
stolen cameras. Officer Derezes, who responded to Hernandez 911 call, compared the wiring to  
one of the cameras and the two items had the same brand name. The accessory found on Gobena  
was packaged in the same manner as the accessories found on Worota. The accessory found on  
Gobena was photographed and the photograph was admitted at trial.

21. Hernandez is familiar with the pricing system used at Costco and how items are paid  
for. She also knows how to look up and verify the value of goods sold at Costco. With the  
stolen items in this matter, Hernandez looked up their value on a store computer and verified the  
cost of the items on the store floor. The two cameras were valued at \$190 and \$160,  
respectively. The shoes were valued at \$35.

22. After the incident, Hernandez went back to the floor and found the two discarded  
packages. They confirmed that the stolen cameras matched the discarded and damaged  
packaging. The items were returned to the vendor.

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2  
3 CONCLUSIONS OF LAW

4 I.

5 The above-entitled court has jurisdiction over the subject matter and over the defendants Worota  
6 and Gobena in the above-entitled cause.

7 II.

8 The State has proven the following elements of Theft in the Second Degree under RCW  
9 9A.56.040(1)(a) and 9A.56.020(1)(a) beyond a reasonable doubt:

- 10 (1) That on or about March 30, 2008, the defendants wrongfully obtained or exerted  
11 unauthorized control over property of another exceeding \$250 in value;  
12 (2) That the defendants intended to deprive the rightful owner of the property; and  
13 (3) The acts occurred in King County, Washington.

14 II.

15 The defendants are guilty of the crime of Theft in the Second Degree.

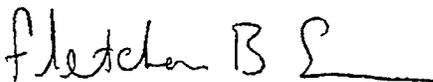
16 III.

17 Judgment should be entered in accordance with Conclusion of Law II. In addition to these  
18 written findings and conclusions, the Court hereby incorporates its oral findings and conclusions  
19 as reflected in the record.

20 SIGNED this 20 day of February, 2009.

21   
22 Judge Jeffrey Ramsdell

23 Presented by:



Fletcher B. Evans WSBA #36607

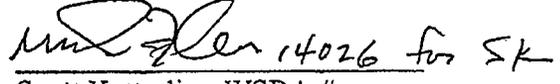
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3 Approved as to form:

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

STATE OF WASHINGTON, )  
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 Respondent, )  
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 v. )  
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 WUBE GOBENA, )  
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 Appellant. )

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 DIVISION ONE  
 NO. 63210-1  
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I, MARIA ARRANZA RILEY, STATE THAT ON THE 16<sup>TH</sup> DAY OF SEPTEMBER, 2009, 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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x \_\_\_\_\_ *[Signature]*

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