

71530-5

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No. 71530-5-I

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

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STATE OF WASHINGTON,

Respondent,

v.

KIMBERLY ANN BAILEY,

Appellant.

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COURT OF APPEALS  
DIVISION ONE  
SEATTLE, WA



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

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APPELLANT'S REPLY BRIEF

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MAUREEN M. CYR  
Attorney for Appellant

WASHINGTON APPELLATE PROJECT  
1511 Third Avenue, Suite 701  
Seattle, Washington 98101  
(206) 587-2711

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A. ARGUMENT IN REPLY

**The State did not clearly show that Ms. Bailey believed and unambiguously adopted as true the department stores' allegations about the value of the property**

As argued in the opening brief, before a trial court may admit the out-of-court statement of a party-opponent as an “adopted admission,” the proponent of the evidence must show that the party “manifestly adopted and believed [a third-party statement] to be true.” Bertsch v. Brewer, 97 Wn.2d 83, 86, 640 P.2d 711 (1982); ER 801(d)(2)(ii) (out-of-court statement of party-opponent admissible if offered against the party and is “a statement of which the party has manifested an adoption or belief in its truth”). The proponent must show the party’s conduct manifested “the party’s assent to the truth of a statement made by another.” 2 Kenneth S. Broun, McCormick on Evidence §261, at 300 (7th ed. 2014). The proponent must produce “specific proof of such adoption.” Harris v. United States, 834 A.2d 106, 117 (D.C. Ct. App. 2003) (internal quotation marks and citation omitted).

Generally, a witness may not testify about the truth of a matter unless the witness has personal knowledge of it. See ER 602. The State contends the personal knowledge requirement set forth in ER 602

does not apply to adopted admissions of a party-opponent. But as the above authorities demonstrate, even if the personal knowledge requirement does not strictly apply, the State was still required to show that Ms. Bailey believed and assented to the truth of the allegations contained in the department store documents.

The requirement of personal knowledge may be dispensed with in the case of an admission of a party-opponent only if “the statement is fairly attributable to the party.” Harris, 834 A.2d at 116. In a criminal case, the State must clearly show that “the accused understood and unambiguously assented to the statements.” Id. at 117 (internal quotation marks and citation omitted).

If the circumstances show that the accused adopted *part* of the statement of a another, that is not sufficient to show that the accused understood and unambiguously assented to *all* of the third party’s statement. E.g., Harris, 834 A.2d 106, 122; State v. Damiano, 587 A.2d 396, 399 (R.I. 1991). In Harris, for example, the D.C. court held that the Assistant United States Attorney’s signature on an affidavit offered in support of a finding of probable cause manifested an intent to adopt the affiant’s conclusions as to probable cause, but “d[id] not necessarily imply agreement with the entire contents of the affidavit,

*i.e.*, with all the subordinate facts set forth in the affidavit.” Harris, 834 A.2d at 122.

Similarly, in Damiano, the Rhode Island court held that the accused’s conduct in pointing to a photograph in a newspaper article about a robbery and stating, “That’s me,” did not clearly manifest an intent to adopt as true all of the facts set forth in the article. Damiano, 587 A.2d at 399. At most, the defendant’s conduct manifested an intent to adopt the photograph that depicted him as one of the persons involved in the robbery, as well as the headline that stated the article related to a bank robbery. Id.

Contrary to the State’s argument, whether or not the accused had personal knowledge of matters asserted in the statement of another is relevant to the determination of whether she manifested a belief in the truth of the entire statement or only portions of it. Factors to consider in determining *which* portions of a statement the party intended to adopt include the extent to which the party explicitly vouched for the reliability of the statement or its third party source, as well as whether the statement was based upon the party’s personal knowledge or entirely on hearsay. Harris, 834 A.2d at 122.

The focus is on the accused's conduct in relation to the third-party statement rather than the contents of the statement itself because it is only the accused's reaction to the statement that is admissible as substantive evidence. State v. McKenzie, 184 Wash. 32, 37-38, 49 P.2d 1115 (1935). The third-party statement is admissible only as "a necessary predicate to the substantive evidence," and not as substantive evidence itself. Id. In other words, the declarant's statements are not admitted as substantive proof of the matters asserted, but rather merely to lay the foundation for a showing of whether the defendant manifested an intent to adopt them. State v. Neslund, 50 Wn. App. 531, 555-56, 749 P.2d 725 (1988). It is only for this reason that the third-party's statements are not considered hearsay and the accused does not have a Sixth Amendment right to confront the declarant. Id.

Here, the State did not clearly prove that Ms. Bailey understood and unambiguously adopted as true all of the allegations contained in the department store documents. This is especially apparent in regard to exhibit 18, the Macy's statement. In exhibit 18, Ms. Bailey signed a document that states,

I, Kimberly Ann Baily [sic] . . . make this statement voluntarily and of my own free will and accord, without intimidation by threats or promises, that on Friday, January 11, 2013, I did take merchandise and/or cash

belonging to Macy's without consent or permission and with the intent to permanently deprive Macy's of their property.

This statement was followed by a list of merchandise items, which included their alleged SKU numbers and prices. Exhibit 18. But nowhere in the statement does Ms. Bailey unambiguously assert an agreement with the alleged retail price or SKU number of each item, or the alleged total value of the items listed. She made no statement at all in relation to the prices or the SKU numbers listed on the document.

The SKU numbers and prices listed on the document were not admissible as substantive evidence because Ms. Bailey did not unambiguously manifest a belief in the truth of those allegations or an intent to adopt them. Although she admitted to "tak[ing] merchandise," Exhibit 18, she did not admit to the *value* or the SKU numbers of the merchandise. Her signature on the document does not unambiguously demonstrate an intention to adopt all of the information contained within the document. Harris, 834 A.2d at 122; Damiano, 587 A.2d at 399. She did not explicitly vouch for the reliability of the alleged monetary values or SKU numbers; she had no personal knowledge of those matters and instead all of the information available to her regarding these essential facts was based on hearsay. See Harris, 834

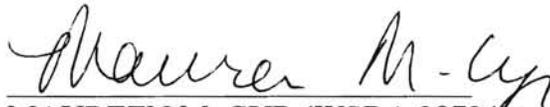
A.2d at 122. Under these circumstances, the State did not clearly show she unambiguously manifested an intent to adopt the truth of the allegations regarding the SKU numbers or values.

As argued in the opening brief, because the allegations regarding value and SKU numbers on Exhibit 18 were not admissible as adopted admissions of Ms. Bailey, the values set forth on Exhibit 29 were also not admissible. Without the allegations regarding value contained in the Macy's documents, the evidence was insufficient to prove the total value of the items allegedly stolen exceeded \$750. Thus, the State failed to prove the essential value element of the crime.

**B. CONCLUSION**

For the reasons set forth above and in the opening brief, the trial court erred in admitting hearsay evidence of value as adopted admissions of a party-opponent. Because that evidence was the only evidence of market value, an essential element of the crime, the conviction must be reversed.

Respectfully submitted this 27th day of January, 2015.

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

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 27<sup>TH</sup> DAY OF JANUARY, 2015, I CAUSED THE ORIGINAL **REPLY 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:

<p>[X] KRISTIN RELYEA, DPA [paoappellateunitmail@kingcounty.gov] KING COUNTY PROSECUTOR'S OFFICE APPELLATE UNIT 516 THIRD AVENUE, W-554 SEATTLE, WA 98104</p>	<p>(X) ( ) ( ) ( )</p>	<p>U.S. MAIL HAND DELIVERY E-MAIL BY AGREEMENT VIA COA PORTAL</p>
<p>[X] KIMBERLY ANN BAILEY 8900 AURORA AVE N #132 SEATTLE, WA 98103</p>	<p>(X) ( ) ( )</p>	<p>U.S. MAIL HAND DELIVERY _____</p>

**SIGNED** IN SEATTLE, WASHINGTON THIS 27<sup>TH</sup> DAY OF JANUARY, 2015.

X \_\_\_\_\_ 

**Washington Appellate Project**  
701 Melbourne Tower  
1511 Third Avenue  
Seattle, WA 98101  
Phone (206) 587-2711  
Fax (206) 587-2710