

NO. 34410-6-II

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

STATE OF WASHINGTON,

Respondent,

v.

CHARRITA NOBLE,

Appellant.

Ks
STATE OF WASHINGTON
COURT OF APPEALS
DIVISION II
NOV 11 2006

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 04-1-01967-1

BRIEF OF RESPONDENT
and
RESPONSE TO PERSONAL RESTRAINT PETITION

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This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.
DATED November 7, 2006, Port Orchard, WA
[Signature]
Original AND ONE COPY filed at the Court of Appeals, Ste. 300, 950 Broadway, Tacoma WA 98402; Copy to counsel listed at left.

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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the evidence was sufficient to support Noble's conviction for theft and three counts of possession of stolen property where Noble was seen taking merchandise from two stores, and found in a car containing stolen merchandise from those two stores and from two additional stores that she had been seen in, all in a very short time frame?

2. Whether Noble's sentence properly runs consecutively to a prior sentence that had been imposed before she committed the current crimes?

3. Whether Noble should be granted appellate release, considering that she committed the present crimes while on appellate release for a very similar crime?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Charrita Noble was charged by information filed in Kitsap County Superior Court with: (1) second-degree theft from Toys "R" Us; (2) first-degree possession of stolen property involving merchandise taken from Big 5 Sporting Goods; (3) second-degree possession of stolen property involving merchandise taken from JC Penney; and (4) second-degree possession of stolen property involving merchandise taken from the Kitsap Mall Hallmark

store. CP 11. A jury found her guilty as charged. CP 90.

B. FACTS

Angelina Gonzalez had known Charrita Noble for five or six years.¹ 3RP 170. On December 18, 2004, Gonzalez and Noble left their homes in King County and went to the Kitsap Mall. 3RP 171. Gonzalez was the owner of the Tahoe. 3RP 171. Noble's aunt and two cousins were with them. 3RP 172. The mall was their first stop in Kitsap County. 3RP 173. There was no merchandise in the truck before they arrived at the mall. 3RP 173. The women all went into the mall together, but then split up. 3RP 174. Gonzalez and Michelle went to the bathroom. 3RP 174.

After they came out, Gonzalez saw Noble in the Hallmark store with Bridget. 3RP 176. Gonzalez saw Noble with a party-store bag. 3RP 176. Phyllis Hagel was the sales leader at the Hallmark store at Kitsap Mall. 3RP 152. That evening, she became aware that merchandise was missing – DVD's, and numerous Christmas tree ornaments. 3RP 156. The shelf was completely cleared. 3RP 156.

The women proceeded to Penney's, where Gonzalez saw Noble's cousin Sheron taking things. 3RP 176-77. Debra Skinner, the assistant manager for women's apparel at the JC Penney store, was notified by loss

¹ Gonzalez pled guilty to second-degree theft, first-degree possession of stolen property, and two counts of second-degree possession of stolen property in connection with the incident

prevention personnel of two suspicious women in her department. 2RP 118-20. She proceeded to watch them. 2RP 120. They were both carrying large “party bags”. 2RP 120. One of the bags was semi-transparent, and Skinner could see a security device in it that was used exclusively by JC Penney. 2RP 120.

One woman was Hispanic, in her thirties, and the other was African-American. 2RP 120. Skinner observed them walk through the juniors department and then they quickly walked off into the men’s department. 2RP 121. Skinner saw three other women while they were still in the juniors department. 2RP 122. She did not focus on them because she was following the merchandise. 2RP 122. Skinner did not directly associate the three with the other two until after the deputies called about the recovered merchandise. 2RP 122.

Once in the men’s department, the Hispanic woman asked to use the phone. 2RP 121-22. She set the bag down while she used it, and then both women left the store, without the bags. 2RP 121. Skinner recovered the bags and totaled up the merchandise for internal loss-prevention record-keeping. 2RP 123. After Gonzalez and Sheron went outside together from Penney’s, they subsequently returned to the store, and Noble was there with the other

and testified at Noble’s trial. 3RP 169, 170.

two women. 3RP 178.

Eventually the party left the mall with Noble driving. 3RP 179. They went to Big 5 Sporting Goods. 3RP 179. All five of them went in, but not at the same time. 3RP 180. Noble had a big party-store bag with her. 3RP 180.

They left Big 5 and went to Toys "R" Us. 3RP 181. Noble drove again. 3RP 181. Noble had a big bag again. 3RP 181. Once in the store, Gonzalez observed Noble putting stuff in it. 3RP 181.

Stephen Byron was the floor manager at Toys "R" Us. 2RP 73. An employee, Janet, summoned him to the kitchen aisle, where he saw four women stuffing toys into giant plastic bags. 2RP 76. They were all darker-skinned and wearing athletic-type clothing. 2RP 76. One had on a large coat with stripes on the arms. 2RP 76. They were all stuffing the toys into the bags, some of which were in a cart. 2RP 76.

Byron approached the women and asked if they needed help. 2RP 77. They said they were hiding the toys from the kids, which was not unusual in itself. 2RP 77. There did not appear to be any children with the women, however. 2RP 77. Janet took two of the bags to the service desk, and Byron held onto the cart. 2RP 77. The bags taken to the front desk were the ones Gonzalez and Michelle had. 3RP 186.

The woman with the cart started calling Byron names and accused

him of being racially motivated. 2RP 77. She then started heading out of the store with the cart, which Byron continued to hang on to. 2RP 77. They actually ended up outside the store. 2RP 78. Byron told Janet to call 911. 2RP 78. After they got outside, the two women who had gone to the desk with Janet took off running. 2RP 78. They had some merchandise, but Janet had recovered the bags. 2RP 79.

Byron's primary contact was with the older of the women, who had the cart. 2RP 79. She was around 30. 2RP 79. After they got outside she kept pushing the cart and the smaller woman was running back and forth looking for their car. 2RP 80. Then the woman who was looking for the car said she was going to get her Glock, and Byron let go of the cart. 2RP 80. The smaller woman was noticeably smaller than the other three. 2RP 80. They took off running toward the street, but there was a fence and they stopped. 2RP 80. Then the white SUV came up and they piled in the back. 2RP 80. One was still hanging out the back when it "pealed out." 2RP 81.

Byron was trying to get the license number when he saw the sheriff's car near Pier One, and he frantically waived to get the deputy's attention. 2RP 81. The deputy followed the truck. 2RP 81.

The deputy was Kitsap County Sheriff's Deputy Troy Graunke. 1RP 30. As he arrived at Toys "R" Us, the white Chevy Tahoe was leaving the

parking lot at a high rate of speed. 1RP 31-32. Its lights were off and someone's legs were hanging out the half-open right rear door. 1RP 31-32. Graunke followed the truck north on Silverdale Way and attempted to "do a stop." 1RP 33. The driver did not stop, however, and Graunke called for backup. 1RP 33. The car went through the Kitsap Mall parking lot and then exited going southbound. 1RP 34. Three or four backup deputies arrived and they ordered the five passengers out of the truck and took them into custody. 1RP 34-35.

There was a lot of merchandise in the truck that the passengers had to climb over to get out. 1RP 38. It filled the cargo and seating areas of the vehicle. 1RP 39. The stuff was stacked to the roof of the truck. 1RP 50. It was both loose and in bags. 1RP 39.

After the passengers were arrested, the deputies pulled the stuff from the truck and separated it into different piles, one for each retailer. 1RP 40.

A short while later the deputies called Toys "R" Us and asked Byron to come to the mall parking lot to identify the merchandise. 2RP 81. When Byron got to the mall, and the deputies were going through the stuff in the truck. 2RP 82. The women who had taken the stuff from the store were in the back of the patrol cars. 2RP 82.

He recognized four out of the five people detained in the mall parking

lot. 2RP 92. Byron identified the older woman with the cart as Sheron Noble. 2RP 83. Charrita Noble was the woman who had made the threat about the Glock. 2RP 83. Byron identified her in court as well. 2RP 83.

Byron went back to the store with a deputy and the recovered goods and rang them on the register to get an itemized accounting. 2RP 85. The total value of the items taken was \$942.21 without tax. 2RP 86, 94.

Robert Potter, the assistant manager at the Big 5 Sporting Goods in Silverdale, was notified by the deputies that they had recovered a substantial amount of the store's merchandise. 2RP 97-98. They brought it to the store and he did an inventory of the recovered items. 2RP 98. By checking the bar codes against the computerized inventory, he was able to determine that the items were indeed missing from his store. 2RP 99. There were 69 items totaling \$2,390.39, before tax. 2RP 99. The store had a surveillance video, which Potter turned over to the deputies. 2RP 101. The video showed Noble coming out of the Big 5 store. 3RP 202.

Later that evening the deputies brought Skinner some merchandise they had recovered that had JC Penney tags on it. 2RP 124. She rang it up and determined that it was worth \$912.01. 2RP 125-26.

Phyllis Hagel, at the Hallmark store, received a call from the police and went out to the mall parking lot, where they had a lot of Hallmark

merchandise. 3RP 157. There were a number of garbage-bag sized plastic Hallmark holiday bags that they put the stuff in to carry back to the store. 3RP 158. Back at the store, Hagel created a list of the items with their prices. 3RP 158. Before tax, the items totaled \$917.41. 3RP 160.

III. ARGUMENT

THE EVIDENCE WAS SUFFICIENT TO SUPPORT NOBLE'S CONVICTIONS.

Noble argues both that the trial court erred in denying her pre-verdict motion to dismiss Counts II through IV and that the evidence was insufficient to support her convictions on all four counts. These claims are without merit.

1. The denial of a motion to dismiss for insufficient evidence is not reviewable.

Once a jury verdict has been rendered a motion to dismiss is not appealable. Only the sufficiency of the evidence may be challenged. *State v. Olson*, 73 Wn. App. 348, 357, n. 6, 869 P.2d 110, *review denied*, 124 Wn.2d 1029 (1994). The State will therefore only address the issue of whether the evidence was sufficient to support Noble's convictions. As will be shown, it was.

2. Standard of review

It is a basic principle of law that the finder of fact at trial is the sole and exclusive judge of the evidence, and if the verdict is supported by substantial competent evidence it shall be upheld. *State v. Basford*, 76 Wn.2d

522, 530-31, 457 P.2d 1010 (1969). The appellate court is not free to weigh the evidence and decide whether it preponderates in favor of the verdict, even if the appellate court might have resolved the issues of fact differently. *Basford*, 76 Wn.2d at 530-31.

In reviewing the sufficiency of the evidence, an appellate court examines whether, viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could find that the essential elements of the charged crime have been proven beyond a reasonable doubt. *See State v. Green*, 94 Wn.2d 216, 220, 616 P.2d 628 (1980). The truth of the prosecution's evidence is admitted, and all of the evidence must be interpreted most strongly against the defendant. *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385 (1980). Further, circumstantial evidence is no less reliable than direct evidence. *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997). Finally, the appellate courts must defer to the trier of fact on issues involving "conflicting testimony, credibility of the witnesses, and the persuasiveness of the evidence." *State v. Hernandez*, 85 Wn. App. 672, 675, 935 P.2d 623 (1997).

3. Count I: Second-Degree Theft from Toys "R" Us

Noble argues that the evidence was insufficient to prove the theft from Toys "R" Us because the defense argued that the manager's eyewitness identification of Noble was unreliable. Plainly this argument misapplies the

standard of review. The identification must be construed in the light most favorable to the State.

He also challenges the sufficiency of the dollar amount of items taken. This contention is also without merit. The four women in the store, one of whom was positively identified as Noble, were clearly working together. The aggregate taken exceeded \$900. This claim is thus also without merit.

4. Possession of Stolen Property generally

Noble contests the sufficiency of the evidence, alleging that the State proved no more than her proximity to the stolen property. This argument ignores the bulk of the evidence and the inferences reasonably drawn from it. Here both the manager at Toys “R” Us and codefendant Gonzalez saw Noble taking items from the Toys “R” Us. Gonzalez saw Noble taking items from the Hallmark store. Gonzalez placed Noble in JC Penney and Big 5 with the other women. Noble appeared on the Big 5 security tape. Noble drove from several of the locations in a truck that had been empty when they arrived in Silverdale and was full to the roof with stolen goods by the time they were arrested, shortly after Noble facilitated their escape from Toys “R” Us by threatening to pull a gun on the manager. The jury could reasonably have concluded, and indeed it is the *only* reasonable conclusion it could have reached, that Noble was involved either as principle or accomplice in a group “shopping” spree at the four stores, and in possession of the stolen property

thereafter.

5. ***Count II: First-Degree Possession of Stolen Property from Big 5 Sporting Goods***

In addition to her claim regarding possession and accomplice liability, Noble asserts that there was no evidence that the property was taken from the Big 5 on the day in question of that Noble was involved in it. To the contrary, the testimony was that the truck was empty when the women arrived in Silverdale the truck was empty. When they were arrested there were 69 items from Big 5, worth more than \$2300. The manager verified that the items were indeed stolen.

6. ***Count III: Second-Degree Possession of Stolen Property from JC Penney***

Noble asserts there was no evidence that Noble acted as an accomplice at Penney's. Noble was not charged with taking anything from JC Penney, however, but of possessing the goods afterwards. Given her overall involvement in what was obviously a shoplifting expedition, as discussed above, the evidence was clearly sufficient to show possession as principle or accomplice.

7. ***Count IV: Second-Degree Possession of Stolen Property from Hallmark***

Finally as to the Hallmark store, the circumstantial evidence shows a plot in which all five women were involved. Notably Noble had the same

type of bag in the Hallmark store that she was using in the Toys “R” Us and carried into the Big 5, and which the Penney’s manager saw her cousin carrying stolen merchandise in. The evidence was sufficient and Noble’s convictions should be affirmed.

IV. PRP RESPONSE

Noble filed two claims separate claims for relief in the trial court, which were separately transferred to this court as personal restraint petitions. This Court called for a response to both claims under one case number. The PRP was thereafter consolidated with this direct appeal.

A. NOBLE’S SENTENCE IN THE CURRENT CASE PROPERLY RUNS CONSECUTIVE TO THE SENTENCE IN HER KING COUNTY THEFT CASE.

Noble first claims that that the trial court erred in not running the sentence in the present case concurrent with her sentence in a prior King County theft case. Noble committed the current Kitsap County offenses on December 18, 2004. According to the SCOMIS docket, Appendix A, she was sentenced on the King County offense on April 5, 2004. That offense was a second-degree theft, a felony. *See State v. Noble*, 2005 WL 519063 (Wn. App. Mar. 7, 2005) (Appendix B). By Noble’s own account, she was out on appeal bond in the King County case until 2006. Noble was therefore under sentence for a felony at the time she committed the present offenses.

RCW 9.94.589(2)(a) provides that such sentences must run consecutively:

Except as provided in (b) of this subsection, whenever a person while under sentence for conviction of a felony commits another felony and is sentenced to another term of confinement, the latter term shall not begin until expiration of all prior terms.

There therefore was no basis for the trial court to run these sentences concurrently. This request for relief should be denied.

B. NOBLE SHOULD NOT BE RELEASED ON APPEAL BECAUSE SHE COMMITTED THE CURRENT OFFENSES WHILE ON RELEASE PENDING THE APPEAL OF A VIRTUALLY IDENTICAL CRIME.

Noble next claims that she should be granted appellate release. RCW

9.95.062(1) provides:

Notwithstanding CrR 3.2 or RAP 7.2, an appeal by a defendant in a criminal action shall not stay the execution of the judgment of conviction, if the court determines by a preponderance of the evidence that:

- (a) The defendant is likely to flee or to pose a danger to the safety of any other person or the community if the judgment is stayed; or
- (b) The delay resulting from the stay will unduly diminish the deterrent effect of the punishment;

Here, the present crimes, involving over five thousand dollars of stolen merchandise, were remarkable similar to the crimes Noble previously committed in King County. *See Noble*, 2005 WL 519063, at *1-2. Notably the present crimes were committed *while* she was on appellate release in the

previous case. Obviously release would pose a danger to the community and unduly diminish the deterrent effect of the punishment. Release should be denied.

V. CONCLUSION

For the foregoing reasons, Noble's conviction and sentence should be affirmed, and her personal restraint petition should be dismissed.

DATED November 7, 2006.

Respectfully submitted,

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APPENDIX A

Trial Court Docket

KING COUNTY SUPERIOR COURT Case#: 03107073 SEA
 STATE OF WASHINGTON VS NOBLE, CHARLITA CHANAYE AKA

Sub#	Date	Description/Name	Docket Code	Secondary
-	07/24/2003	CASE SETTING INFO	ADM01	
-	07/24/2003		NOTE	02-11-2004TO
		CEN: 172071	ACTION	
		EXP: 02-19-04	ACTION	
		LOC:	ACTION	
		INT:	ACTION	
		COMMENCE DATE:	ACTION	
		TRIAL SET EXP: 02-19-04	ACTION	
		THEFT 2	ACTION	
-	07/24/2003	FILING FEE ASSESSED	\$FFA	110.00
1	07/24/2003	INFORMATION	INFO	
2	07/24/2003	ORDER FOR WARRANT PR	ORW	
		ORIGINAL LOCATION - SEATTLE	LOCS	
-	07/31/2003	INITIAL ARRAIGNMENT	ARRAIGN	
3	07/31/2003	NOTICE OF SCHEDULING	NTSCH	08-14-2003
4	08/08/2003	SHERIFF'S RETRN ON WARRANT OF ARREST	\$SHRTWA	15.50
5	08/08/2003	NOT OF APPEAR AND REQ FOR DISCOVERY	NTARD	
6	08/14/2003	ORDER SETTING TRIAL DATE	ORSTD	10-27-2003
-	08/14/2003	SET CASE SCHEDULE	*ORSCS	10-27-2003ST
7	08/14/2003	STATUS CONFERENCE / HEARING	STAHRG	
8	08/14/2003	OMNIBUS APPLICATION OF PROS ATTY	OMAPA	
9	10/16/2003	RETURN OF SERVICE(LAW ENFORCE DEPT)	\$RTS	19.70
10	10/17/2003	HEARING CONTINUED: UNSPECIFIED	HCNTU	11-21-2003
11	10/17/2003	ORD FOR CONTINUANCE OF TRIAL DATE	ORCTD	12-01-2003
12	10/22/2003	NO CONTACT ORDER	ORNC	
13	11/06/2003	ORDER FR SEATTLE POLICE RECORDS	OR	
14	11/21/2003	ORD FOR CONTINUANCE OF TRIAL DATE	ORCTD	12-16-2003
15	11/21/2003	HEARING CONTINUED: UNSPECIFIED	HCNTU	12-05-2003
16	12/02/2003	SHERIFF'S RETURN OF SERVICE W/FEES	\$SHRTS	25.30
17	12/05/2003	HEARING CONTINUED: UNSPECIFIED	HCNTU	12-12-2003
18	12/05/2003	ORDER OF CONTINUANCE /OMNI	ORCNT	12-12-2003
19	12/12/2003	ORD FOR CONTINUANCE OF TRIAL DATE	ORCTD	01-20-2004
20	12/12/2003	HEARING CONTINUED: UNSPECIFIED	HCNTU	01-09-2004
21	01/09/2004	OMNIBUS HEARING	OMNHRG	
22	01/09/2004	OMNIBUS ORDER	OOR	
23	01/20/2004	ORD FOR CONTINUANCE OF TRIAL DATE	ORCTD	01-21-2004
24	01/20/2004	HOLD TRIAL UNTIL:	HOLD	01-21-2004
25	01/21/2004	ORD FOR CONTINUANCE OF TRIAL DATE	ORCTD	01-22-2004
26	01/21/2004	HOLD TRIAL UNTIL:	HOLD	01-22-2004
27	01/22/2004	ORD FOR CONTINUANCE OF TRIAL DATE	ORCTD	01-23-2004

28	01/22/2004	HOLD TRIAL UNTIL:	HOLD	01-23-2004
29	01/23/2004	HOLD TRIAL UNTIL:	HOLD	01-26-2004
30	01/23/2004	ORD FOR CONTINUANCE OF TRIAL DATE	ORCTD	01-26-2004
31	01/26/2004	HOLD TRIAL UNTIL:	HOLD	01-27-2004
32	01/27/2004	ORD FOR CONTINUANCE OF TRIAL DATE	ORCTD	01-28-2004
32A	01/27/2004	HOLD TRIAL UNTIL:	HOLD	01-28-2004
33	01/28/2004	TRIAL CONTINUED: UNSPECIFIED	TCNTU	02-03-2004
34	01/28/2004	HOLD TRIAL UNTIL:	HOLD	01-29-2004
35	01/28/2004	ORD FOR CONTINUANCE OF TRIAL DATE	ORCTD	01-29-2004
36	01/28/2004	ORD FOR CONTINUANCE OF TRIAL DATE	ORCTD	02-03-2004
37	01/29/2004	TRIAL CONTINUED: UNSPECIFIED	TCNTU	02-03-2004
38	02/03/2004	ORD FOR CONTINUANCE OF TRIAL DATE	ORCTD	02-04-2004
38A	02/03/2004	HOLD TRIAL UNTIL:	HOLD	02-04-2004
39	02/04/2004	ORD FOR CONTINUANCE OF TRIAL DATE	ORCTD	02-05-2004
40	02/04/2004	HOLD TRIAL UNTIL:	HOLD	02-05-2004
41	02/05/2004	ORD FOR CONTINUANCE OF TRIAL DATE	ORCTD	02-06-2004
42	02/05/2004	HOLD TRIAL UNTIL:	HOLD	02-06-2004
43	02/06/2004	ORD FOR CONTINUANCE OF TRIAL DATE	ORCTD	02-09-2004
44	02/06/2004	HOLD TRIAL UNTIL:	HOLD	02-09-2004
45	02/09/2004	TRIAL CONTINUED: UNSPECIFIED	TCNTU	02-10-2004
		JUDGE JEFFREY M. RAMSDELL DEPT 9	JDG09	
46	02/09/2004	HOLD TRIAL UNTIL:	HOLD	02-10-2004
47	02/09/2004	ORD FOR CONTINUANCE OF TRIAL DATE	ORCTD	02-10-2004
48	02/10/2004	HOLD TRIAL UNTIL:	HOLD	02-11-2004
49	02/10/2004	MOTION HEARING	MTHRG	
		JUDGE JEFFREY M. RAMSDELL DEPT 9	JDG09	
50	02/10/2004	ORD PERMITTING FILING AMENDED INFO	ORPFAI	
51	02/10/2004	AMENDED INFORMATION	AMINF	
52	02/10/2004	MEMORANDUM /STATE	MM	
53	02/10/2004	TRIAL BRIEF /DEFENDANT	TRBF	
53A	02/10/2004	JURY TRIAL	JTRIAL	
		CR LADD SUTHERLAND/TARALYNN BATES		
		CR JUDY RIZZO		
		JUDGE STEVEN G. SCOTT, DEPT 42	JDG42	
-	02/10/2004	JURY FEE ASSESSED/12	\$JFA	
54	02/11/2004	ASSIGNED TO SCOTT	AST	
55	02/17/2004	INSTRUCTIONS TO JURY /STATE	INS	
56	02/17/2004	INSTRUCTIONS TO JURY /DEF	INS	
57	02/18/2004	DEFENDANT'S PROPOSED INSTRUCTIONS	DFPIN	
58	02/18/2004	VERDICT FORM B-NOT USED	VRD	
59	02/18/2004	COURT'S INSTRUCTIONS TO JURY	CTINJY	
60	02/18/2004	VERDICT FORM A - GUILTY	VRD	
60A	02/18/2004	EXHIBIT LIST	EXLST	
60B	02/18/2004	STIP&OR RET EXHBTNS UNOPND DEPOSTNS	STPORE	
61	02/23/2004	NOTICE OF HEARING /SENT	NTHG	03-19-2004
		1:30/SCOTT	ACTION	

62	02/23/2004	WITNESS FEES ASSESSED	\$WFA	45.00
-	03/08/2004	TOTAL COURT COSTS =\$	\$NOTE	420.50
		S/D - 03/19/04 - SCOTT		
63	03/23/2004	NOTICE OF HEARING /SENT	NTHG	04-02-2004
		11:00/SCOTT	ACTION	
64	04/02/2004	COURT ORAL NOTICE RIGHT OF APPEAL	NTRA	
65	04/02/2004	SENTENCING HEARING	SNTHRG	
		CR TARALYNN BATES		
		JUDGE STEVEN G. SCOTT, DEPT 42	JDG42	
65A	04/02/2004	NOTICE INELIGIBLE POSSESS FIREARM	NTIPF	
66	04/05/2004	JUDGMENT AND SENTENCE	JS	
67	04/12/2004	LETTER /VAU	LTR	
68	04/22/2004	MTN FOR REVIEW AT PUB EXPENSE/DEF	MTAF	
69	04/22/2004	NOTICE OF APPEAL TO COURT OF APPEAL	NACA	
-	04/22/2004	FILING FEE NOT PAID	\$FFNP	
69A	04/22/2004	ORDER AUTHORIZING DEFT SEEK REVIEW	ORAU	
70	04/23/2004	NOTIFICATION OF FELONY CONVICTION	NTFC	
71	05/10/2004	PERFECTION NOTICE FROM CT OF APPLS	PNCA	
72	05/28/2004	DESIGNATION OF CLERK'S PAPERS	DSGCKP	
		54149-8/WAP /PGS 1-74		
		TRANS COA 6/18/04		
73	06/02/2004	INDEX CKS PPRS PGS 1-74	INX	
-	06/02/2004	CLERK'S PAPERS - FEE RECEIVED	\$CLPR	44.90
		0400528-CP/IFP/WAP/PD 6/15/04		
74	06/07/2004	ORDER EXTENDING TIME TO REPORT TO	OREXT	
		KC JAIL TO 06-25-2004 BY 4:00 PM		
75	06/09/2004	ACKNOWLEDGMENT OF 5990 CLOSURE /ST	AC	
76	06/15/2004	CKS PPRS PGS 1 - 74	NOTE	
-	06/23/2004	VERBATIM RPT TRANSMITTED 6/28/04	VRPT	
		HRG OF 2/11/04 & 2/12/04		
76A	06/23/2004	FINDINGS OF FACT&CONCLUSIONS OF LAW	FNFCL	
76B	06/23/2004	MOTION HEARING	MTHRG	
		CR TARALYNN BATES		
		JUDGE STEVEN G. SCOTT, DEPT 42	JDG42	
77	06/24/2004	ORDER ESTABLISHING COND. OF RELEASE	ORECRP	
		BAIL-\$500 CASH OR SURETY		
77A	06/24/2004	MOTION HEARING	MTHRG	
		CR TARALYNN BATES		
		JUDGE STEVEN G. SCOTT, DEPT 42	JDG42	
78	07/01/2004	BAIL BOND/ \$500	BLB	
-	07/20/2004	VERBATIM RPT TRANSMITTED 7/22/04	VRPT	
		HRG OF 2/10/04, 2/11/04		
-	08/04/2004	VERBATIM RPT TRANSMITTED 8/10/04	VRPT	
		HRG OF 2/17/2004		
-	08/04/2004	VERBATIM RPT TRANSMITTED 8/10/04	VRPT	
		HRG OF 2/18/2004		

-	08/20/2004	VERBATIM RPT TRANSMITTED 8/25/04	VRPT	
		HRG OF 2/12/2004		
-	08/20/2004	VERBATIM RPT TRANSMITTED 8/25/04	VRPT	
		HRG OF 4/2/2004		
79	04/08/2005	NOTICE OF WITHDRAWAL OF ATTORNEY	NTWDA	
80	01/24/2006	MANDATE /54149-8/AFFIRMED	MND	
81	03/06/2006	ORDER DIRECTING COMMENCEMENT OF	OR	
		SENTENCE		
82	03/07/2006	MEMORANDUM /PA	MM	

SCOMIS Notes:

APPENDIX B

H

State v. Noble Wash.App. Div. 1, 2005.

NOTE: UNPUBLISHED OPINION, SEE RCWA 2.06.040

Court of Appeals of Washington, Division 1.

STATE of Washington, Respondent,

v.

Charrita NOBLE, Appellant.

No. 54149-8-I.

March 7, 2005.

Appeal from Superior Court of King County; Hon. Steven Scott, J.

Nancy P. Collins, Corey Marika Endo, Washington Appellate Project, Seattle, WA, for Appellant.
 Alice Degen, Prosecuting Atty King County, Seattle, WA, for Respondent.

UNPUBLISHED OPINION

PER CURIAM.

*1 RCW 9A.56.010(18)(c) allows multiple incidents of third degree theft to be aggregated and charged as theft in the first or second degree. The statute does not abrogate the common law rule allowing aggregation of incidents of theft from the same owner and the same place under a general scheme or plan. Here, aggregation of thefts into one count falls under the common law rule. We therefore reject Noble's challenge to her conviction of second degree theft. Because the trial court did not violate Noble's right to a jury trial in considering the fact of prior convictions in determining her offender score, we affirm the sentence as well.

FACTS

Rebekah Yancey was the manager of the Northgate Lane Bryant store. In the spring of 2002, Yancey saw Charrita Noble and another young woman enter the store, grab 15 pairs of pants valued at \$44.50 per pair, and run from the store. A few weeks later, Yancey saw Noble and another individual enter the store, grab several items from a rack, and run away.

On April 15, 2002, Yancey saw Noble and an older woman enter the store. Yancey recognized Noble and watched her. Noble stayed near the front of the store

while the woman picked up a shirt and said she was going to try it on, walking behind a piece of equipment. A minute later, Yancey heard them whispering, 'You got the shirt?' 'Yeah, let's go,' and they left the store.^{FN1} Yancey could not find the shirt in the store after the women left. Yancey took her break and walked into the mall. She saw the women at the Brookstone store, and when the older woman left the store, Yancey followed her and watched her get into a car. Yancey called and gave the police the woman's license plate number.

FN1. Report of Proceedings (RP) (Feb. 12, 2003) at 40.

On January 21, 2003, Yancey saw a young woman walk into the store and pick up a stack of 10 to 15 pair of chino pants valued at \$39.50 per pair. Noble was standing at the front of the store. Yancey walked to the front of the store and saw the young woman put the pants into a large bag held by Noble. As the young woman then left the store, Yancey said, 'Can I help you?' and 'Can you please stop?'^{FN2} The women met a third woman, who said 'Let's go,' and they walked off into the mall.^{FN3} Because she had seen Noble participating in several incidents, Yancey called the police. Approximately 15 to 20 minutes later, Officer Steve Berg called and asked Yancey to look at three women who were in the mall; she immediately identified Noble as the person who had held the bag and carried the pants out of the store.

FN2. *Id.* at 35.

FN3. *Id.* at 33.

Noble was charged with one count of second degree theft. The to-convict instruction stated that the jury could convict Noble if either (a) The property exceeded \$250 in value; or (b) The defendant's acts were part of a common scheme or plan, and the combined value of the property exceeded \$250 in value.

During closing argument, the prosecutor explained to the jury that they could find guilt on the basis of either the January 21, 2003 theft or all the other incidents together. The jury returned a general verdict of guilt. Noble appeals.

DISCUSSION

*2 Aggregation. Noble contends the evidence was not sufficient to support both alternative means set out in the to-convict instruction. Such a challenge admits the truth of the State's evidence and all reasonable inferences from it.^{FN4} In determining whether a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, we draw all reasonable inferences from the evidence in favor of the State.^{FN5} Specifically, she contends the evidence was insufficient on the aggregation alternative means.

FN4. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

FN5. *Id.*

RCW 9A.56.010(18)(c) permits a series of third degree thefts to be aggregated and charged as one count whenever they are 'part of a criminal episode or a common scheme or plan.' Noble contends the statute limits aggregation to incidents that individually constitute only third degree theft, and that the State may not aggregate where any individual theft involves property valued at more than the minimum value for second degree theft (\$250).

This is incorrect. At common law, theft from the same owner and same place may be a series of crimes, or a single crime. The State has 'considerable latitude to either aggregate charges or to bring multiple charges.'^{FN6} The aggregation statute authorizes aggregation in specific circumstances, but it 'does not purport to abrogate the common law principle ... {that} property stolen from the same owner and from the same place by a series of acts constitutes one crime if each taking is the result of a single continuing criminal impulse or intent pursuant to a general larcenous scheme or plan.'^{FN7}

FN6. *State v. Kinneman*, 120 Wn.App. 327, 337, 84 P.3d 882 (2003), review denied, 152 Wn.2d 1022 (2004).

FN7. *State v. Barton*, 28 Wn.App. 690, 694, 626 P.2d 509 (1981) (citing *Vining*, 2 Wn.App. at 808).

In this case, the cropped pants, the items taken from

the standing rack, the shirt, and the chino pants all belonged to Lane Bryant. All the incidents occurred at the Northgate Lane Bryant store^{FN8} and comprised a general scheme or plan to shoplift from that store. Although the prosecutor stated during closing that the value of three of the four shoplifts was over \$250, the only evidence of value related to the cropped pants and the chino pants, which were each worth over \$250. There was sufficient evidence of both alternative means.

FN8. Noble contends the State improperly relied on a theft from the Brookstone store to meet the aggregation requirements. Noble is mistaken. During closing, the prosecutor referred to one incident as 'the Brookstone incident' in describing the theft of a shirt from Lane Bryant that occurred prior to Yancey's sighting Noble in Brookstone.

Calculation of Offender Score. Relying on *Apprendi v. New Jersey*^{FN9} and *Blakely v. Washington*,^{FN10} Noble contends that the trial court's use of three prior adult convictions to determine her offender score violated her right to a jury trial as to every fact that increased her authorized punishment. "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."^{FN11} At sentencing, Noble stipulated to her criminal history. Her prior convictions were entered pursuant to proceedings that provided her with all necessary constitutional safeguards.^{FN12}

FN9. 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

FN10. U.S., 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).

FN11. *Id.* at 2536 (quoting *Apprendi*, 530 U.S. at 490).

FN12. *Apprendi*, 530 U.S. at 488.

It is not 'impermissible for judges to exercise discretion taking into consideration various factors relating both to offense and offender in imposing a judgment within the range prescribed by statute.'^{FN13} In this case, the trial court used the prior convictions to determine the prescribed standard range, including the statutory maximum. Noble received a standard

range sentence for this crime.

FN13. *Id.* at 481.

*3 Noble takes issue with the rule exempting prior convictions from proof to a jury. This argument requires an abandonment of *Almendarez-Torres v. United States*,^{FN14} which the Supreme Court expressly reaffirmed in *Blakely*. We decline Noble's invitation to abandon *Almendarez-Torres*. The trial court did not violate Noble's constitutional rights at sentencing.

FN14. 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998).

Affirmed.

Wash.App. Div. 1, 2005.
State v. Noble
Not Reported in P.3d, 126 Wash.App. 1016, 2005
WL 519063 (Wash.App. Div. 1)

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