

NO. 34543-9

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**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

ERIN N. KELLY, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable Brian Chushcoff and the Honorable Rosanne Buckner

No. 05-1-03539-2

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**BRIEF OF RESPONDENT**

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the State adduce sufficient evidence to find the defendant guilty of theft in the second degree?

B. STATEMENT OF THE CASE.

1. Procedural History

On July 19, 2005, Erin Noreen Kelly, hereinafter “defendant,” was charged by way of information with one count of theft in the second degree. CP 1.

On February 14, 2006, the parties appeared before the Honorable Rosanne Buckner for jury trial. RP 4<sup>1</sup>.

On February 16, 2006, the jury found the defendant guilty of one count of theft in the second degree. CP 110, RP 183. The defendant was subsequently sentenced on March 10, 2006. CP 155-165.

This timely appeal was filed on March 10, 2006. CP 134-143.

2. Facts

On the afternoon of July 16, 2005, Matthew Morrison and Syed Rashid were both employed as security personnel for a Target retail store

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<sup>1</sup> The verbatim report of proceedings consists of multiple volumes. For purposes of this brief, the report of proceedings from the jury trial conducted February 14-16, 2006, shall be referred to as “RP.”

in Tacoma, Washington. RP 36, RP 78. Morrison and Rashid each testified that on that day they had observed a man enter the Target store and begin placing various items of merchandise into a garbage can box. RP 40-41, RP 79-80. Morrison then testified that the man placed a puncture on the top of the garbage can box and subsequently left the store on a bicycle. RP 41. Morrison testified that they then began surveillance of the garbage can box that the man had filled with merchandise via surveillance camera. RP 41.

After approximately two to three hours, Morrison and Rashid observed the defendant entering the aisle the garbage can box was located on, talking on a cellular telephone. RP 41-42, RP 81. Morrison continued to observe the garbage can box and the defendant via surveillance camera, while Rashid began to physically follow and observe the defendant. RP 42, RP 81-82. Both Morrison and Rashid testified that they observed the defendant select the garbage can with the merchandise within from among several of the same type of garbage can boxes. RP 42-43, RP 80, 83. Rashid testified that as the defendant was attempting to place the garbage can box in her cart, the box tilted and the top opened due to the amount of merchandise within. RP 83. Rashid further testified that he then observed

the defendant place the box on the floor and push the merchandise back in with her hand. RP 83. The defendant subsequently secured the top of the box with tape while still in the store. RP 83.

Eventually, the defendant approached the front of the store and the checkout where she proceeded to pay for the garbage can and a soda. RP 43, RP 83. According to the testimony of Morrison and Rashid, the defendant made no attempt to pay for the items concealed within the garbage can box and then attempted to leave the store. RP 43-45, RP 83-84. The defendant was stopped and detained before exiting the store. RP 43.<sup>2</sup>

Rashid testified that he inventoried the merchandise concealed in the garbage can box and that the total value of the items was \$714.89. Both Morrison and Rashid positively identified the defendant at trial. RP 36-37, RP 78-79.

Tacoma Police Department Officer Joseph Bundy responded to the Target store regarding the theft and contacted an individual he identified as the defendant. RP 24-25. Defendant told Officer Bundy that she had done something stupid, that she knew it was wrong to steal, and that she

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<sup>2</sup> Morrison explained that it is “Target policy” to detain shoplifters right before they exit the store. RP 43.

was doing a friend a favor. RP 25-26. Officer Bundy then took the defendant into custody. RP 26.

Robert Throm testified that he was the man who had been observed packing the garbage can box with merchandise at the Target store on July 16, 2005. RP 141. Throm claimed he did not know the defendant and said he had not conspired with her to commit the theft. RP 142.

C. ARGUMENT.

1. THE STATE ADDUCED SUFFICIENT EVIDENCE TO PROVE BEYOND A REASONABLE DOUBT THAT THE DEFENDANT COMMITTED THE CRIME OF THEFT IN THE SECOND DEGREE.

The applicable standard of review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Joy, 121 Wn.2d 333, 338, 851 P.2d 654 (1993); State v. Rempel, 114 Wn.2d 77, 82-83, 785 P.2d 1134 (1990) (citing State v. Green, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980) and Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781, 61 L.Ed.2d 560 (1979)). A challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences drawn there from. State v.

Barrington, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), rev. denied, 111 Wn.2d 1033 (1988) (citing State v. Holbrook, 66 Wn.2d 278, 401 P.2d 971 (1965)); State v. Turner, 29 Wn. App. 282, 290, 627 P.2d 1323 (1981). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Circumstantial and direct evidence are considered equally reliable. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In considering this evidence, "credibility determinations are for the trier of fact and cannot be reviewed upon appeal." State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990)(citing State v. Casbeer, 48 Wn. App. 539, 542, 740 P.2d 335, rev. denied, 109 Wn.2d 1008 (1987)).

The written record of a proceeding is an inadequate basis on which to decide issues based on witness credibility. The differences in the testimony of witnesses create the need for such credibility determinations; these should be made by the trier of fact, who is best able to observe the witnesses and evaluate their testimony as it is given. On this issue, the Supreme Court of Washington has stated:

Great deference . . . is to be given to the trial court's factual findings. In re Sego, 82 Wn.2d 736, 513 P.2d 831 (1973); Nissen v. Obde, 55 Wn.2d 527, 348 P.2d 421 (1960). It, alone, has had the opportunity to view the witnesses' demeanor and to judge his veracity.

State v. Cord, 103 Wn.2d 361, 367, 693 P.2d 81 (1985). Therefore, when the State has produced evidence of all the elements of a crime, the decision of the trier of fact should be upheld.

Defendant challenges her conviction for second degree theft, claiming insufficiency of the evidence as to the element of intent. CP 110, Opening Brief of Appellant at pages 5-6. The jury was instructed that in order for the defendant to be convicted of theft, the prosecution must introduce evidence that the defendant intended to deprive the rightful owner of property or services. CP 61, Instruction No. 8.<sup>3</sup>

The court instructed the jury that “a person acts with intent or intentionally when acting with the objective or purpose to accomplish a result, which constitutes a crime.” CP 64, Instruction No. 11.<sup>4</sup> “Specific criminal intent may be inferred where a defendant's conduct plainly indicates the requisite intent as a matter of logical probability.” State v. Hutchins, 73 Wn. App. 211, 216, 868 P.2d 196 (1994); State v. Stearns, 61 Wn. App. 224, 228, 810 P.2d 41, rev. denied, 117 Wn.2d 1012 (1991). The presence of required intent may be inferred from the consideration of

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<sup>3</sup> RCW 9A.56.020(1)(a)

<sup>4</sup> RCW 9A.08.010.

the defendant's conduct in the light of surrounding facts and circumstances.

State v. Woods, 63 Wn. App 588, 821 P.2d 1235 (1991).

In the present case, Rashid and Morrison observed defendant selecting a specific garbage can box that had been stuffed with additional merchandise from among several other boxes of the same type. RP 42-43, RP 80, 83. Rashid observed defendant attempting to place the box in her cart, the top opened, revealing the additional merchandise hidden inside. RP 83. Rashid further observed defendant pushing the merchandise back into the box and securing the box top with tape that she had selected from store merchandise. RP 83. Rashid and Morrison observed the defendant attempting to leave the store without paying for the merchandise within the box. RP 43-45, RP 83-84. According to Officer Bundy, defendant subsequently told him that she had done something stupid, knew it was wrong to steal, and was doing a friend a favor. RP 25-26. Viewing the totality of the evidence in the light most favorable to the State, it is clear that the jury received sufficient evidence to find that the defendant had intended to deprive the store in question of its merchandise without making payment, and thus the crime of theft in the second degree.

Defendant claims the State failed to present sufficient evidence to convict her of second degree theft because she denied committing the

crime and because her accomplice<sup>5</sup> testified defendant was not involved in the crime. The jury chose not to believe this testimony. CP 110. As credibility determinations are for the trier of fact and not subject to review on appeal,<sup>6</sup> defendant's claim fails. Accordingly, this court should find the State adduced sufficient evidence for a rational trier of fact to reasonably conclude the defendant is guilty of second degree theft.

D. CONCLUSION.

For the aforementioned reasons, the State respectfully requests that the defendant's conviction be affirmed.

DATED: November 29, 2006.

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<sup>5</sup> The court instructed the jury on accomplice liability. CP 58, Instruction No. 5.

<sup>6</sup> State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990)(citations omitted).

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

11/30/06 Heiser  
Date Signature

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