

No. 44811-4-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON  
DIVISION II

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**STATE OF WASHINGTON,**

Appellant,

vs.

**TOM ALLEN REEVES,**

Respondent.

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Appeal from the Superior Court of Washington for Lewis County  
Case No. 13-1-00112-2

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**Appellant's Opening Brief**

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**TABLE OF CONTENTS**

TABLE OF AUTHORITES ..... ii

I. ASSIGNMENTS OF ERROR ..... 1

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR ..... 1

III. STATEMENT OF THE CASE ..... 2

IV. ARGUMENT ..... 8

A. THE TRIAL COURT ERRED WHEN IT GRANTED REEVES’ MOTION TO DISMISS PURSUANT TO *STATE v. KNAPSTAD* AND CrR 8.3(c)..... 8

1. Standard Of Review..... 8

2. The Trial Court Erred When It Concluded The State Had Not Established A Prima Facie Case That The Pair Of Pliers Possessed And Used By Reeves To Facilitate The Theft Constituted An Item, Article, Implement, Or Device Designed To Overcome A Security System..... 9

3. The State Did Establish A Prima Facie Case Of Retail Theft With Extenuating Circumstances In The Third Degree..... 16

V. CONCLUSION..... 18

**TABLE OF AUTHORITIES**

**Washington Cases**

*State v. J.P.*, 149 Wn.2d 444, 69 P.3d 318 (2003)..... 14, 15

*State v. Knapstad*, 107 Wn.2d 346, 729 P.2d 48  
(1986) ..... 1, 6, 7, 8, 9, 16

*State v. McDougal*, 120 Wn.2d 334, 841 P.2d 1232 (1992)..... 15

*State v. Newcomb*, 160 Wn. App. 184, 246 P.3d 1286  
(2011) ..... 8, 9, 10

*State v. Steen*, 155 Wn. App. 243, 228 P.3d 1285 (2010) ..... 11

*State v. Stratton*, 130 Wn. App. 760, 124 P.3d 660 (2005)..... 11

**Washington Statutes**

RCW 9A.52.060 ..... 14

RCW 9A.56.360 ..... 11

RCW 9A.56.360(1) ..... 13

RCW 9A.56.360(1)(b) ..... 1, 2, 6, 7, 8, 10, 13, 17

**Other Rules or Authorities**

CrR 8.3(c) ..... 1, 7

Webster’s Third New International Dictionary ..... 13

## **I. ASSIGNMENTS OF ERROR**

1. The trial court erred by failing to conclude that the State had established a prima facie case that the pair of pliers possessed and used by Reeves during the commission of the theft constituted an item, article, implement, or device designed to overcome security systems, including, but not limited to, lined bags and tag removers.
2. The trial court erred when it ruled the State had failed to establish a prima facie case of Retail Theft with Extenuating Circumstances in the Third Degree under RCW 9A.56.360(1)(b).
3. The trial court erred when it dismissed the State's case under the rule of law established in *Knapstad* and pursuant to CrR 8.3(c).
4. The State assigns error to trial court's *Knapstad* motion conclusion of law 2.3.
5. The State assigns error to trial court's *Knapstad* motion conclusion of law 2.4.

## **II. ISSUES PERTAINING TO ASSIGNMENT OF ERROR**

- A. A person is guilty of retail theft with extenuating circumstances if at the time of the theft the person was in possession of an item, implement, article, or device designed to overcome security systems including, but not limited to, tag removers or lined bags. Did the trial court err by concluding that the State had failed to establish a prima facie case that the pair of pliers Reeves possessed and used to facilitate the theft constituted an item, article, implement, or device designed to overcome security systems, including, but not limited to, lined bags and tag removers?
- B. The State is permitted to proceed with a case when, considering the evidence with all reasonable inferences in favor of the State, there is sufficient admissible evidence to

support a conviction. Did the trial court err when it concluded that the State had failed to establish a prima face case of Retail Theft with Extenuating Circumstances in the Third Degree under RCW 9A.56.360(1)(b)?

- C. The trial court may dismiss a case on a pretrial motion from the defendant due to the State being unable to establish a prima facie case for the crime charged due to insufficient evidence. Did the trial court err when it ordered Reeves case dismissed without prejudice after finding the State had not established a prima facie case for Retail Theft with Extenuating Circumstances in the Third Degree?

### **III. STATEMENT OF THE CASE**

On February 15, 2013, at approximately 4:59 p.m., Wal-Mart Asset Protection Associate, Kayden Goodwin, saw a man, later identified as Reeves, in the fabric department of the Chehalis Wal-Mart store. CP 26. Because Reeves was moving through the store at a high rate of speed, looking around nervously, and in possession of a number of high priced and high theft objects in his cart, Mr. Goodwin began surveillance of Reeves. CP 26. Reeves was observed selecting a notebook, one package of markers, and one package of pens, then placing the items into the top portion of his cart. CP 26. Mr. Goodwin then observed Reeves proceed into the electronics department and select a surveillance camera set. CP 26. Reeves next went into the automotive department and selected a few items. CP 26. Reeves then went into the toy

department and selected bike accessories, placing the items into the bottom of his cart. CP 26.

Mr. Goodwin continued to watch Reeves. CP 26. Reeves went into the housewares department, where he used a pair of pliers to cut the spider wrap, a type of security device, off of the surveillance camera set. CP 23, 26, 30, 33, 36. Reeves disposed of the spider wrap security device by throwing it on a shelf. CP 26. Reeves next went into the apparel department where he concealed the surveillance camera set, propane, a notebook, razors, a flashlight, and a dremel set into a red backpack Reeves had taken from a shelf in the sporting goods department. CP 26. Reeves cut the tag off the red backpack and walked towards the front of the store, leaving his cart in the women's apparel department. CP 26. Reeves walked towards the front of the store, bypassing all the working and attended registers. CP 26. Reeves made no attempt to pay for the concealed and unpaid for merchandise. CP 26. Reeves walked past the electronic article sensor and exited the store. CP 26.

Mr. Goodwin and another Asset Protection Associate approached Reeves, identifying themselves verbally and visually as Wal-Mart Asset Protection. CP 26. Mr. Goodwin asked Reeves

about the unpaid merchandise he possessed. CP 26. Reeves would not admit to the theft. CP 26. Mr. Goodwin asked Reeves to accompany Mr. Goodwin back inside the store and into the Asset Protection office. CP 26. Reeves refused and continued walking. CP 26. Reeves told Mr. Goodwin, "You better not touch me. Get the fuck away from me. I'm not going anywhere with you." CP 26. Mr. Goodwin informed Reeves that if Reeves did not agree to go inside and to the Asset Protection office Mr. Goodwin would call the police. CP 26. Reeves told Mr. Goodwin to call the cops and not to touch him. CP 26. Mr. Goodwin called the Chehalis Police Department at 5:10 p.m. CP 26.

Chehalis Police Officer Ayers received a call at 5:11 p.m. regarding a theft in progress at Wal-Mart. CP 22. The description given to Officer Ayers from dispatch was the subject was a white male, approximately five feet, nine inches tall, with a bald head, wearing a white t-shirt and blue jeans. CP 22. Dispatch also informed Officer Ayers that the subject seen with one red backpack and one gray backpack, pedaling a bicycle heading in the direction of Town Center. CP 22. Officer Ayers saw a man, later identified as Reeves, matching the description given by dispatch, pedaling a bicycle eastbound on Chamber Way. CP 22.

Officer Ayers activated his emergency overhead lights and attempted to stop Reeves. CP 22. Officer Ayers rolled down the window of his patrol car and ordered Reeves to stop. CP 22. Reeves eventually complied and was taken into custody. CP 22. After being read his *Miranda* warnings Reeves spoke to Officer Ayers. CP 22. Reeves admitted to being all over Wal-Mart and confirmed he did not pay for any merchandise and had only a small amount of money on his EBT card. CP 22. Reeves told Officer Ayers that he had brought both of the backpacks and the items contained in the backpacks into Wal-Mart. CP 22.

Officer Ayers searched the red backpack and the gray backpack Reeves had in his possession. CP 23. Inside the gray backpack were Reeves' personal effects. CP 23. Inside the red backpack Ayers located several items Mr. Goodwin identified as belonging to Wal-Mart. CP 23. The red backpack contained the surveillance cameras, a dremel tool set, batteries, propane tanks and other items. CP 23, 32-34. The pliers Reeves used to overcome the spider wrap security device was located and placed into evidence. CP 23, 30, 36. The total value of the items stolen was 461 dollars and 62 cents (before tax). CP 28.

The State charged Reeves with one count of Retail Theft with Extenuating Circumstances in the Third Degree for being in possession of an item, article, implement, or devise designed to overcome security systems while committing theft of property, valued at less than 750 dollars, from a mercantile establishment. RCW 9A.56.360(1)(b); CP 1-3. The trial court did not find probable cause under the rationale that the article, item, device, or implement in question must be specifically designed to commit thefts, and therefore must be more sophisticated in nature than a pair of pliers. CP 17. Reeves' attorney filed a motion to dismiss the charges pursuant to *State v. Knapstad*.<sup>1</sup> CP 8-11. The State filed a response and a declaration from counsel for the State. CP 12-36. On March 27, 2013 the trial court entertained Reeves' motion to dismiss. RP 1-7. The trial court ruled in favor of Reeves and dismissed the case. RP 5-6. The trial court entered the following findings of fact, conclusions of law, and order:

## I. FINDINGS OF FACT

- 1.1 As this is a *Knapstad* hearing, the Court does not make its own findings of fact. Instead, as required, the parties have both agreed and stipulated to the Court considering all of the facts contained in the State's Declaration of Counsel and attached exhibits. Those facts being agreed to, this Court now considers those facts in a light most favorable to the

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<sup>1</sup> *State v. Knapstad*, 107 Wn.2d 346, 729 P.2d 48 (1986).

State to determine whether a prima facie case exists for the charged offense.

## II. CONCLUSIONS OF LAW

- 2.1 The State has established a prima facie case that the named defendant did commit theft of property in an amount less than \$750.00 from a mercantile establishment.
- 2.2 The State has established a prima facie case that the named defendant was in possession of a pair of pliers at the time of the theft and did use these pliers to cut a security system off one of the stolen items during the theft.
- 2.3 The State has failed to establish a prima facie case that the pliers that the defendant possessed and used during the commission of the theft constitute “an item, article, implement, or device designed to overcome security systems, including, but not limited to, lined bags or tag removers.”
- 2.4 The State has failed to establish a prima facie case of Retail Theft with Extenuating Circumstances in the Third Degree under RCW 9A.56.360(1)(b).

## III. ORDER

- 3.1 The above captioned case is dismissed without prejudice pursuant to CrR 8.3(c)/*Knapstad*.

CP 37-38 (bold original). The State timely appeals. CP 39-42.

The State will further supplement the facts as needed throughout its argument.

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#### IV. ARGUMENT

##### A. THE TRIAL COURT ERRED WHEN IT GRANTED REEVES' MOTION TO DISMISS PURSUANT TO *STATE v. KNAPSTAD* AND CrR 8.3(c).

The State established a prima facie case against Reeves for Retail Theft with Extenuating Circumstances in the Third Degree pursuant to RCW 9A.56.360(1)(b). The trial court erred when it concluded the State had not established a prima facie case that the pliers possessed and used by Reeves to overcome the security system and facilitate the theft of the surveillance cameras was not an item, article, implement, or device designed to overcome security systems. CP 38. This Court should reverse the trial court's dismissal and remand the case back to the trial court to allow the State to prosecute Reeves for Retail Theft with Extenuating Circumstances in the Third Degree.

##### 1. Standard Of Review.

A trial court's decision to dismiss a case pursuant to a *Knapstad* motion is reviewed de novo. *State v. Newcomb*, 160 Wn. App. 184, 188, 246 P.3d 1286 (2011).

**2. The Trial Court Erred When It Concluded The State Had Not Established A Prima Facie Case That The Pair Of Pliers Possessed And Used By Reeves To Facilitate The Theft Constituted An Item, Article, Implement, Or Device Designed To Overcome A Security System.**

The Supreme Court set forth the proper procedure for a pretrial motion to dismiss for failure to establish a prima facie case, now commonly referred to as a *Knapstad* motion. *Knapstad*, 107 Wn.2d at 356-57; *Newcomb*, 160 Wn.2d at 188-89. In a proper *Knapstad* motion there are no disputed facts and the motion should be submitted with a sworn affidavit containing all the facts and law the defendant relies upon to justify the dismissal. *Knapstad*, 107 Wn.2d at 356. Once the State agrees that there are undisputed facts which the State is relying upon to establish a prima facie case of guilt for the charged offense, the trial court holds a hearing. *Id.* at 356-57. The trial court must consider the evidence in the light most favorable to the State with all reasonable inferences drawn in favor of the State. *Newcomb*, 160 Wn. App. at 188. If the trial court determines the State has not established a prima facie case of guilt then the trial court is to dismiss the case without prejudice. *Knapstad*, 107 Wn.2d at 357. The trial court does not enter findings of fact because it does not rule on issues of fact. *Id.*

The reviewing court views the facts of the case in the light most favorable to the State with all reasonable inferences found in favor of the State. *Newcomb*, 160 Wn. App. at 188-89 (citations omitted). The issue on appeal is, (1) did the State sufficiently counter the claim that there are no material facts in dispute, and (2) did the State sufficiently show that the undisputed facts establish a prima facie case of guilt? *Id.* at 189.

The State is not arguing that there are material facts in dispute. The only issue on appeal is did the State establish a prima facie case of guilt? Specifically, did the State establish a prima facie case that the pliers as used and possessed in this case meet the element of “an item, article, implement, or device designed to overcome security systems”? See RCW 9A.56.360(1)(b). In this case, the elements of Theft with Extenuating Circumstances are:

(1) A person commits retail theft with extenuating circumstances if he or she commits theft of property from a mercantile establishment with one of the following extenuating circumstances:

(b) The person was, at the time of the theft, in possession of an item, article, implement, or device designed to overcome security systems including, but not limited to, lined bags or tag removers...

RCW 9A.56.360. For the theft to be in the third degree the amount of the merchandise stolen must be less than 750 dollars. RCW 9A.56.360.

The argument boils down to what is the meaning of “design” in the context of the Theft with Extenuating Circumstances statute. See RCW 9A.56.360(1)(b).<sup>2</sup> The trial court read the statute as required the device, item, article or implement to be specifically created and/or manufactured for the sole purpose of overcoming security systems. RP 5. The trial court stated in its ruling:

A couple of comments here: I agree with Mr. Enbody that the statute as it's read is - - or as it's written is meant to prohibit the theft, the retail theft of items and then using a device that is designed to overcome security systems, which brings to mind the tools that remove the magnetic security clip, the shopping bag that is lined with foil to block the scanners, those kinds of things.

To take it to this extreme - - if this type of activity is what the legislature intended to be theft with extenuating circumstances then it seems to me that they would say any time somebody removes a security device it is an extenuating circumstance. And that's really what you're trying to read into this I think. And that's not we [sic] have here and that's not what the statute says.

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<sup>2</sup> After a thorough search of available case law the State could not find any reported cases in which this issue was decided by the courts, and therefore, it is an issue of first impression.

RP 5-6. The trial court's reading and interpretation of the word design, in context of the statute, is an oppressively narrow interpretation that could lead to absurd results. Further, the trial court's ruling does not consider the plain language of the statute.

The courts will not employ judicial interpretation if a statute is unambiguous. *State v. Steen*, 155 Wn. App. 243, 248, 228 P.3d 1285 (2010). "A statute is ambiguous when the language is susceptible to more than one interpretation. *Steen*, 155 Wn. App. at 248. When the reviewing court is interpreting a statute its "goal is to ascertain and give effect to the intent and purpose of the legislature in creating the statute." *State v. Stratton*, 130 Wn. App. 760, 764, 124 P.3d 660 (2005) (citation and internal quotations omitted). The court looks to the plain language in the statute, the context of the statute, and the entire statutory scheme to determine the legislative intent. *Steen*, 155 Wn. App. at 248; *Stratton*, 130 Wn. App. at 764 (citations omitted). If the statute fails to provide a definition for a term then the courts look to the standard dictionary definition of the word. *Stratton*, 130 Wn. App. at 764. If the court finds that a statute is ambiguous, "the rule of lenity requires that we interpret it in favor of the defendant absent legislative intent to the contrary." *Id.* at 765.

Designed can have a number of different meanings and must be read in the context of the statute. RCW 9A.56.360(1); Webster's Third New International Dictionary, 612. The dictionary definition of designed is, "done, performed, or made with purpose and intent..." Webster's Third New International Dictionary, 612. The definition of designed does not require an implement designed for overcoming a security system to be specifically created for the task. "Made" is just one possible definition, but not any more important than "performed" or "done." The statute encompasses both items specifically made for overcoming security devices, such as tag removers, and ordinary items used to overcome security devices. RCW 9A.56.360(1)(b).

The plain language of the statute requires that "at the time of the theft" the person be "in possession of an item, article, implement, or device designed to overcome security systems." RCW 9A.56.360(1)(b). The legislature also provided a non-inclusive list of such items, articles, or implements. RCW 9A.56.360(1)(b). The statute leaves open the possibility that devices other than sophisticated ones like a tag remover may be included by using the words, "including but not limited to." RCW 9A.56.360(1)(b). A person who brings a pair of pliers into a mercantile establishment

with the sole purpose of removing security devices, and does so to facilitate his theft, is no different than an offender that uses a clothing tag remover to steal clothing. This is because the statute is not simply criminalizing possession of particular tools for theft as the legislature did for the offense Making or Having Burglary Tools. See RCW 9A.52.060. Rather, the statute is criminalizing the dual act of possessing such tools of theft and also using them in a manner consistent with their intended purpose to accomplish the theft. RCW 9A.56.360(1)(b). Accordingly, it logically follows that the design of the device is not only modified by the natural state of the device, but also by the criminal design/mens rea of the actor.

The statute is aimed at stopping people from using some sort of tool to overcome a merchant's security system. A thief does not need to manufacture, nor would a thief manufacture, an intricate tool when a simple pair of pliers, scissors, or other common implement would suffice. The plain language makes it clear that its purpose is to prohibit theft that requires circumventing a security device by use of any type of instrument.

Furthermore, in construing a statute, a reading that results in absurd results must be avoided because it will not be presumed that the legislature intended absurd results. *State v. J.P.*, 149

Wn.2d 444, 450, 69 P.3d 318 (2003). “Unlikely, absurd or strained consequences resulting from a literal reading should be avoided.” *State v. McDougal*, 120 Wn.2d 334, 350, 841 P.2d 1232 (1992). Although the trial court’s reading of the statute is arguably supported by a certain reading of the words of the statute, if the statute is actually applied in that way, it would lead to an absurd result.

If “design” solely relates to the actual nature of the device in question and is unrelated to the manner in which the device is used, a person could be convicted of a felony offense solely for possessing such a device, and this is clearly not the intent of the statute. For example, if a person was in possession of a clothing tag remover when they walked into a Wal-Mart, but chose to steal a six-pack of beer as opposed to clothing, under a reading of the statute where device design is not dependent upon the manner in which the theft is committed, that person would be guilty of committing a felony. Under the trial court’s reading of the statute, this would indeed be result. A person would now become a felon for stealing a six-pack of beer solely because the person had a tag-remover on his or her person at the time of the theft.

The trial court erred when it did not consider the manner in which the device is used in conjunction with the inherent design of the device. The legislature intended to punish those people who use items to facilitate the removal of security systems in their theft of those items more harshly than your average shoplifter. Items that have security systems are usually big ticket or high theft items. Pliers that are brought into a store and used to cut off security systems are an item designed to overcome security systems. The trial court erred when it concluded the pliers do not meet the statutory definition and therefore the State did not establish a prima facie case that the pair of pliers was an item, article, implement, or device designed to overcome security systems. This Court should reverse the trial court's ruling dismissing this case and allow the State to proceed with its prosecution.

**3. The State Did Establish A Prima Facie Case Of Retail Theft With Extenuating Circumstances In The Third Degree.**

The State did establish a prima facie case of Retail Theft with Extenuating Circumstances in the Third Degree. After the *Knapstad* hearing the trial court entered the following conclusion of law:

The State has established a prima facie case that the named defendant did commit theft of property in an

amount less than \$750.00 from a mercantile establishment.

CP 38. The only element the trial court did not find the State had established a prima facie case for was that Reeves was in possession and used, at the time of the theft, an item, article, implement, or device designed to overcome security systems as required by RCW 9A.56.360(1)(b). CP 38. As argued above, the State did establish a prima facie case that the pliers Reeves possessed and used to cut the spider wrap off of the security cameras, to facilitate their theft, was “an item, article, implement, or device designed to overcome security systems.” RCW 9A.56.360(1)(b). Therefore, the State has established a prima facie case for Retail Theft with Extenuating Circumstances in the Third Degree pursuant to RCW 9A.56.360(1)(b). This Court should reverse the trial court’s dismissal of Reeves’ case and allow on remand for the State to proceed with its prosecution of Reeves for Retail Theft with Extenuating Circumstances in the Third Degree.

**V. CONCLUSION**

For the foregoing reasons, this Court should reverse the trial court's ruling dismissing Reeves' case and remand the case back to the trial court for continued prosecution of the charge Retail Theft with Extenuating Circumstances in the Third Degree.

RESPECTFULLY submitted this 7<sup>th</sup> day of August, 2013.

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# LEWIS COUNTY PROSECUTOR

## August 07, 2013 - 1:14 PM

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