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Court of Appeals
Division II
State of Washington
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NO. 52204-7-II

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

STATE OF WASHINGTON, Respondent

v.

TYCAMERON LAKE, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.17-1-00535-5

BRIEF OF RESPONDENT

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RESPONSE TO ASSIGNMENTS OF ERROR

- I. The trial court properly denied Lake's motion to dismiss count six as Lake committed theft from multiple "mercantile establishments."**
- II. Ms. Deale was not acting as an agent of the State when she entered Lake's apartment and therefore the evidence she found was properly included in the search warrant.**
- III. The trial court has entered written findings of fact and conclusions of law on the CrR 3.6 hearing.**

STATEMENT OF THE CASE

The State charged Tycameron Lake (hereafter 'Lake') with three counts of Identity Theft in the First Degree, two counts of Possession of Stolen Property in the Second Degree, and one count of Organized Retail Theft in the Second Degree. CP 61-63. The allegations arose out of an incident wherein Lake used the accounts of elderly women at three stores to obtain merchandise by mail. The jury convicted Lake of two counts of Identity Theft in the First Degree, one lesser included count of Identity Theft in the Second Degree, two counts of Possession of Stolen Property in the Second Degree, and Organized Retail Theft in the Second Degree. CP 107-15.

At trial, the evidence showed that Lake lived in an apartment at an assisted living facility in Vancouver, Washington. RP 158, 162-63, 182, 443. In early 2017, Susan Odenbach, another resident at the assisted living

facility, discovered and reported that someone other than her had placed an order using her credit account with Montgomery Ward. RP 160-61, 202. The items ordered at Montgomery Ward included a television set, a wireless printer, a set of knives, and two pillows, totaling \$851.94. RP 250; Ex. 4. The items were shipped to Lake. Ms. Odenbach also discovered a second order on a credit account she had through a business called Monroe and Main. RP 164-65; Ex. 6. This order included items of clothing that were not in Ms. Odenbach's size; the items totaled \$488.30. RP 175-76. These items were also shipped to Lake's apartment. RP 252. Another resident at the assisted living facility, Betty Lane, also noticed that someone had placed an order using her credit account at ASHRO Lifestyles. RP 175. The shipping address for this order was Lake's apartment. RP 255; Ex. 5. This order was ultimately cancelled. RP 255.

On February 20, 2017, a television set was delivered to the nurse's office at the assisted living facility; the package was addressed to "Tycameron Lake." RP 192-96. Lake retrieved the package from the nurse's office and took it to her apartment. RP 195. The property manager at the assisted living facility, Julia Deale, began holding Lake's packages in her office, once they were delivered. RP 184. Ms. Deale held three packages addressed to Lake, including one from Monroe and Main. RP 184-86.

Catalogs were used to place the orders from the three businesses. RP 261. Each catalog sends customer catalogs by mail and include customer identification numbers and an EZ number that would allow anyone in possession of the catalog to access the customer's preapproved credit account. RP 261-62. Ms. Lane indicated that she did not tear the shipping label off of her catalogs and she threw them away in an unsecured dumpster behind the assisted living facility. RP 176. Ms. Odenbach received multiple catalogs in the mail every day and often gave them to other residents when she was done with them. RP 166-67.

Lake was interviewed by police about the orders. RP 203-04. Lake initially denied ordering any items or knowing anything about the orders placed on Ms. Odenbach's and Ms. Lane's accounts. RP 203. During a subsequent interview, Lake told police that she had found a television set outside her apartment, but claimed she did not order it and had returned it to the office at the assisted living facility. RP 205. Police obtained a search warrant for Lake's apartment; inside they found a television set, a wireless printer, multiple pillows, and women's clothing that matched the items from the Monroe and Main order. RP 265-66. In addition, police found mail addressed to Lake, catalogs belonging to Ms. Odenbach, Ms. Lane, and a checkbook belonging to Barbara Freeman inside Lake's apartment. RP 197, 275, 283.

Prior to trial, the court held hearings pursuant to CrR 3.5 and CrR 3.6 to determine the admissibility of Lake's statements to police and of the evidence found pursuant to the search warrant. RP 6-7, 56-57. At the CrR 3.6 hearing, Lake argued that the search warrant affidavit included information that was unlawfully found pursuant to a search of her apartment by Ms. Deale. RP 6-7, 56-57, 79-81. Lake argued Ms. Deale was acting as an agent of the State when she entered Lake's apartment and then shared what she saw inside the apartment with police. RP 79-81. At the suppression hearing, Ms. Deale testified. RP 65-69. Ms. Deale indicated that on March 8, 2018 she was present when Lake was arrested by law enforcement. RP 66. At the time of her arrest, Lake used a walker to walk to the patrol vehicle. RP 68, 70. However, the walker could not go to the jail, so it needed to stay at the apartment building. RP 73. Ms. Deale then asked Lake if she wanted Ms. Deale to take the walker and put it in her apartment. RP 66. Lake said "yes." RP 67. Ms. Deale was never instructed to enter Lake's apartment by the officer present, Officer Lear; Ms. Deale was never encouraged to enter Lake's apartment by Officer Lear. RP 66-67, 71. Officer Lear believed the walker was taken and put back in the building's foyer; he wasn't sure who took the walker, and does not recall Lake talking to Ms. Deale about her walker. RP 71. Ms. Deale then went to Lake's apartment and observed a television and a canon

printer inside Lake's apartment. RP 67. Afterwards, Ms. Deale told Officer Lear about what she saw inside Lake's apartment. RP 67, 71-72. The trial court found that Ms. Deale was not acting as a state agent and the private search was not conducted by police. RP 81-83. The trial court denied Lake's motion and admitted the evidence that was seized pursuant to the search warrant at trial. RP 83.

The trial court entered findings of fact and conclusions of law on the CrR 3.5 hearing and the CrR 3.6 hearing on January 11, 2019. CP 179-86.

In closing, defense argued that with regards to count 6, Lake had not stolen items from a "mercantile establishment" as required. RP 368.

The jury convicted Lake of six counts, including two counts of Identity Theft in the First Degree, one count of Identity Theft in the Second Degree, two counts of Possession of Stolen Property in the Second Degree, and one count of Organized Retail Theft in the Second Degree. CP 107-15. The trial court sentenced Lake to a standard range sentence of 45 months. RP 447. Lake then timely filed this appeal. RP 166-67.

ARGUMENT

I. The trial court properly denied Lake’s motion to dismiss count six as Lake committed theft from multiple “mercantile establishments.”

Lake contends the trial court erred in failing to dismiss count 6, Organized Retail Theft in the Second Degree because the State failed to present sufficient evidence that the thefts involved a “mercantile establishment.” However, the state presented sufficient evidence that the theft involved a “mercantile establishment.” Lake’s claim fails.

Absent a contrary legislative intent, a reviewing court gives a term that is not defined by statute its ordinary meaning. *State v. Wentz*, 149 Wn.2d 342, 352, 68 P.3d 282 (2003) (citing *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 813, 828 P.2d 549 (1992)). Courts may look to dictionary definitions to determine a word’s ordinary meaning. *State v. Johnson*, 159 Wn.App. 766, 247 P.3d 11 (2011) (citing *State v. Gonzalez*, 168 Wn.2d 256, 263-64, 226 P.3d 131, *cert denied*, 562 U.S. 928, 131 S.Ct. 318, 178 L.Ed.2d 207 (2010)). However, statutes may be ambiguous if they are subject to more than one reasonable interpretation. *Id.* (citing *State v. McGee*, 122 Wn.2d 783, 787, 864 P.2d 912 (1993)). But if one of the interpretations is a strained interpretation, though possible, such interpretation is not reasonable and will not render a statute ambiguous. *Id.* (citing *McGee*, 122 Wn.2d at 787, *State v. Brooks*,

157 Wn.App. 258, 262, 236 P.3d 250 (2010), *State v. Leek*, 26 Wn.App. 651, 656, 614 P.2d 209, *rev. denied*, 94 Wn.2d 1022 (1980), *Tesoro Ref. & Mktg. Co. v. Dep't of Revenue*, 164 Wn.2d 310, 320, 190 P.3d 28 (2008), and *Cerrillo v. Esparza*, 158 Wn.2d 194, 203-04, 142 P.3d 155 (2006)). Simply because a party can conceive of an alternative interpretation does not render a statute ambiguous. *Tesoro Ref. & Mktg. Co.*, 164 Wn.2d at 320. Additionally, “[f]or a statute to be ambiguous, two reasonable interpretations must arise from the language of the statute itself, not from considerations outside the statute.” *Cerrillo*, 158 Wn.2d at 203-04.

Lake contends that the use of the phrase “mercantile establishment” in RCW 9A.56.360 requires that a theft be made from a store that is open to the public where someone does their shopping in person, as opposed to an online store or a situation where someone does their shopping via a catalog. However, this is a strained interpretation of the term “mercantile establishment,” and it ignores the plain meaning of the wording of the statute. This appears to be a matter of first impression as the State has been unable to find any case law discussing this issue.

The retail theft statute reads in pertinent part,

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

...

- (c) The person committed theft at three or more separate and distinct mercantile establishments within a one hundred eighty-day period.

RCW 9A.56.360(1)(c). There is no further definition of “mercantile establishment” in chapter 9A.56, or even in title 9A. A definition from www.vocabulary.com, an online dictionary, defines “mercantile establishment” as “a place of business for retailing goods.”¹ The free dictionary from www.thefreedictionary.com also defines “mercantile establishment” as “a place of business for retailing goods.”² Merriam-Webster does not define the phrase “mercantile establishment,” however it defines “mercantile” as “of relating to merchants or trading,” and “of, relating to, or having the characteristics of mercantilism.”³ Establishment has many meanings, including “something established, such as: a settled arrangement, established church, a permanent civil or military organization, a place of business or residence with its furnishings and staff, a public or private institution.”⁴ “A place of business” means “an office or location where main business transactions are executed and its

¹ Vocabulary.com Dictionary. Available at: <https://www.vocabulary.com/dictionary/mercantile%20establishment>, accessed on June 19, 2019.

² The Free Dictionary by Farlex. Available at: <https://www.thefreedictionary.com/mercantile+establishment>, accessed on June 19, 2019.

³ Merriam-Webster. Available at: <https://www.merriam-webster.com/dictionary/mercantile>, accessed on June 19, 2019.

⁴ Merriam-Webster. Available at: <https://www.merriam-webster.com/dictionary/establishment>, accessed on June 19, 2019.

records are stored.”⁵ The stores from which Lake stole property have places of business where business transactions are executed and records are stored. To take Lake’s definition of “mercantile establishment” would be to carve out a specific subset of stores, of businesses that offer goods for sale, and exclude another subset of stores, only applying the aggravated offense to certain stores, a differentiation the legislature did not intend. Online stores and stores that accept orders over catalogs still have physical locations where the goods are stored and where their records are kept. The businesses that Lake stole from are actual businesses which sell goods to consumers, the same as a brick and mortar store. The point of the retail theft statute is meant to apply to theft from retailers, as opposed to theft from individuals, “retail” being the “sale of commodities or goods in small quantities to ultimate consumers.”⁶ The businesses from which Lake stole are clearly retailers. They are included as they are of the type of business that the statute was intended to cover. While other means of committing the same crime may require the defendant’s presence in a brick and mortar store, the means the State charged here did not so require.

⁵ Business Dictionary. Available at: <http://www.businessdictionary.com/definition/place-of-business.html>, accessed on June 19, 2019.

⁶ Merriam-Webster. Available at: https://www.merriam-webster.com/dictionary/retail?utm_campaign=sd&utm_medium=serp&utm_source=jsonld, accessed on June 19, 2019.

Lake's interpretation of the retail theft statute is unreasonably limited and is not supported by the plain meaning of the words included in the statute. Simply because Lake could conceive of a different meaning does not mean that the statute is ambiguous or that her interpretation is reasonable. Under the plain language of the term "mercantile establishment," the stores from which Lake stole are covered. Lake's claim that the evidence was insufficient to support the jury's verdict because the stores cannot be considered "mercantile establishments" fails.

II. Ms. Deale was not acting as an agent of the State when she entered Lake's apartment and therefore the evidence she found was properly included in the search warrant.

Lake claims the evidence found in her apartment by Ms. Deale was the result of an unlawful governmental search and therefore should not have been included in the search warrant affidavit that the police authored in order to obtain a search warrant to search her apartment. Lake's claim that Ms. Deale was acting as a state agent is without evidentiary support as the trial court found Ms. Deale and Officer Lear to be credible witnesses and rejected Lake's version of events. The search warrant was properly issued upon probable cause after the evidence Ms. Deale lawfully found was included in the affidavit. Lake's claim fails.

The Fourth Amendment to the United States Constitution and article I, section 7 of the Washington Constitution protect an individual's

right to privacy from government trespass. *See, e.g., State v. Rankin*, 151 Wn.2d 689, 694-95, 92 P.3d 202 (2004). Both the Fourth Amendment and article I, section 7 apply only to searches by state actors, and not those searches done by private individuals. *Burdeau v. McDowell*, 256 U.S. 465, 475, 41 S.Ct. 574, 65 L.Ed. 1048 (1921); *Store v. Carter*, 151 Wn.2d 118, 124, 85 P.3d 887 (2004). However, the protections afforded by Fourth Amendment and article I, section 7 do apply to searches done by private individuals if those individuals are acting as government agents. *State v. Clark*, 48 Wn.App. 850, 855, 743 P.2d 822 (1987).

Lake contends that Ms. Deale was acting as a state agent when she entered Lake's apartment and found the stolen merchandise. Lake argues that police ordered or directed Ms. Deale to enter Lake's apartment. However, the record does not support Lake's version of events and the trial court specifically found Lake not to be a credible witness and rejected her version of events. Instead, the Court found Ms. Deale to be a credible and neutral witness and entered findings of fact that Ms. Deale was not directed or encouraged by law enforcement to enter Lake's apartment.

A private individual may become an agent of the state if the private individual's actions were "instigated, encouraged, counseled, directed, or controlled" by the state or by state officers. *State v. Agee*, 15 Wn.App. 709, 713-14, 552 P.2d 1084 (1976), *aff'd*, 89 Wn.2d 416, 573 P.2d 355

(1977). Key things to consider when determining whether a private individual acted as an agent of the state is “whether the government knew of and acquiesced to the intrusive conduct,” and whether the private individual “intended to assist law enforcement efforts or to further his own ends.” *Clark*, 48 Wn.App. at 856. Only when both of those inquiries are answered in the affirmative can a private individual be deemed to be a state agent. *State v. Swenson*, 104 Wn.App. 744, 754, 9 P.3d 933 (2000) (citing *United States v. Miller*, 688 F.2d 652 (9th Cir. 1982)). A close working relationship between police and a private individual may be equivalent to joint action, thereby rendering the private individual an agent of the state. *State v. Birdwell*, 6 Wn.App. 284, 288, 492 P.2d 249 (1972). However, mere contact between police and a private individual does not make that private individual a state agent. *State v. Walter*, 66 Wn.App. 862, 866, 833 P.2d 440 (1992). Whether a private individual was acting as a state agent depends on the particular circumstances of the case. *Clark*, 48 Wn.App. at 856. Essentially, it is necessary to find that the government was either directly involved in the search as a participant, or indirectly as an “encourager” or instigator of the private individual’s actions. *Id.* (citing *United States v. Walther*, 652 F.2d 788, 791 (9th Cir. 1981)).

On review, an appellate court reviews a suppression ruling to determine whether substantial evidence supports the challenged findings

of fact, and whether the findings of fact support the conclusions of law. *State v. Armenia*, 134 Wn.2d 1, 9, 948 P.2d 1280 (1997). Conclusions of law are reviewed de novo. *Id.* The defendant bears the burden of showing that a private citizen who provides evidence to the government was acting as an agent of the state. *Clark*, 48 Wn.App. at 856. A party that does not contest findings of fact waives the argument that findings of fact were improperly made, and uncontested findings of fact are treated as verities on appeal. *State v. Radcliffe*, 139 Wn.App. 214, 220, 159 P.3d 486 (2007); *State v. Alexander*, 125 Wn.2d 717, 723, 888 P.2d 1169 (1995). Lake did not contest the trial court's findings of fact and has therefore waived argument that the findings were not properly supported by the record. However, even if this Court were to review the propriety of the findings of fact, there is sufficient evidence to support the findings. Appellate courts generally review findings of fact to see whether they are "clearly erroneous." *State v. Estrella*, 115 Wn.2d 350, 355, 798 P.2d 289 (1990) (citing *State v. Pennington*, 112 Wn.2d 606, 608, 772 P.2d 1009 (1989)). In addition, a trial court's credibility determinations and resolution of the truth from competing evidence will not be disturbed on appeal. *Garofalo v. Commellini*, 169 Wn. 704, 705, 13 P.2d 497 (1932); *DuPont v. Dep't of Labor & Indus.*, 46 Wn.App. 471, 479, 730 P.2d 1345 (1986); *State v.*

Rooney, 190 Wn.App. 653, 663 n. 5, 360 P.3d 913 (2015) (citing *State v. W.R.*, 181 Wn.2d 757, 770, 336 P.3d 1134 (2014)).

Lake contends the police directed Ms. Deale to enter Lake's apartment. *See* Br. of Appellant, p. 17. In addition, Lake contends that Ms. Deale was instructed to enter Lake's apartment by police and that the police acquiesced to Ms. Deale's entry. *See* Br. of Appellant, p. 19. However, substantial evidence supports the trial court's findings that "Julia Deale was never directed, or encouraged, by law enforcement to enter the defendant's apartment." *See* CP 185. At the suppression hearing, Ms. Deale testified. RP 65-69. Ms. Deale indicated that on March 8, 2018 she was present when Lake was arrested by law enforcement. RP 66. At the time of her arrest, Lake used a walker to walk to the patrol vehicle. RP 68, 70. However, the walker could not go to the jail, so it needed to stay at the apartment building. RP 73. Ms. Deale then asked Lake if she wanted Ms. Deale to take the walker and put it in her apartment. RP 66. Lake said "yes." RP 67. Ms. Deale was never instructed to enter Lake's apartment by Officer Lear; Ms. Deale was never encouraged to enter Lake's apartment by Officer Lear. RP 66-67, 71. Officer Lear believed the walker was taken and put back in the building's foyer; he wasn't sure who took the walker, and does not recall Lake talking to Ms. Deale about her walker. RP 71. Ms. Deale then went to Lake's apartment and observed a

television and a canon printer inside Lake's apartment. RP 67. Afterwards, Ms. Deale told Officer Lear about what she saw inside Lake's apartment. RP 67, 71-72.

The trial court rejected Lake's testimony and found Ms. Deale and Officer Lear to be credible. CP 185. By the evidence of Ms. Deale's testimony and Officer Lear's testimony, the police did not ask Ms. Deale to take Lake's walker to her apartment, did not encourage Ms. Deale's entry into her apartment, and did not even know about Ms. Deale's entry into Lake's apartment until after the fact. This is the evidence that the trial court found to be credible. As the trial court is the finder of fact in a suppression hearing and its findings on credibility are not disturbed on appeal, there is clearly substantial evidence to support the trial court's findings of fact in this matter.

Even if Officer Lear had known that Ms. Deale was going to enter Lake's apartment to store the walker, this does not render Ms. Deale's actions governmental actions. "[M]ere knowledge by the government that a private citizen might conduct an illegal private search without the government taking any deterrent action [is] insufficient to turn the private search into a governmental one." *State v. Smith*, 110 Wn.2d 658, 666, 756 P.2d 722 (1988) (quoting *State v. Agee*, 15 Wn.App. 709, 714, 552 P.2d 1084 (1976), *aff'd*, 89 Wn.2d 416, 573 P.2d 355 (1977)). Mere knowledge

of a private search does not equate to instigation, encouragement, direction, or control over the private search. *See id.* Therefore, the only way to find that Ms. Deale's search was a governmental search was if Officer Lear instigated, encouraged, directed, or controlled the search. The evidence at the CrR 3.6 hearing that the trial court found to be credible was that Ms. Deale thought of taking the walker back to Lake's apartment, Ms. Deale instigated doing that act by asking Lake if she wanted her to do that, and then Ms. Deale went and completed the search without any knowledge by the police officer and certainly without any encouragement, direction, or instigation from or by Officer Lear. In addition, it is evident that Officer Lear had no control over the search based on the testimony of Ms. Deale and Officer Lear. Ms. Deale's search was a private search and not a governmental one. The trial court properly drew its conclusion that Ms. Deale was not a state actor when she entered the defendant's apartment. *See* CP 185. While Lake may wish the trial court found her testimony credible to the exclusion of Ms. Deale's and Officer Lear's, that is not what the trial court concluded. The trial court's credibility determinations are not subject to review and Lake must accept those results. The trial court did not find her credible and rejected her version of events. Therefore, Ms. Deale did not engage in a governmental search. The trial court's decision should be affirmed.

III. The trial court has entered findings of fact and conclusions of law regarding the CrR 3.5 and CrR 3.6 hearing; Lake's claim of error is moot.

Lake assigns error to the trial court's failure to enter written findings of fact and conclusions of law following the CrR 3.6 hearing in this matter. However, the trial court did enter written findings and conclusions regarding the CrR 3.6 hearing. Lake's claim of error is now moot.

On January 11, 2019, the trial court entered written findings and conclusions regarding the CrR 3.5 hearing and CrR 3.6 hearing held in this matter. CP 179-86. Lake was apparently unaware of the entry of these findings when she submitted her opening brief in this matter. The record is now complete and full appellate review is available to Lake. Lake's claim of error is now moot.

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CONCLUSION

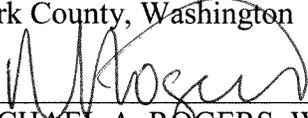
The trial court should be affirmed in all respects.

DATED this 20th day of June, 2019.

Respectfully submitted:

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