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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

LEONARD MICHAEL HAAN,

Appellant.

On Appeal from the Pierce County Superior Court
Cause No. 17-1-03943-0
The Honorable Stephanie Arend, Judge

OPENING BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

1. The trial court erred by accepting a guilty plea that lacked a factual basis.
2. Leonard Haan's *Alford* guilty plea is invalid because there was no factual basis to support any of the charges.

II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Whether the trial court committed reversible error when, in accepting Leonard Haan's *Alford* guilty plea, it relied on a written probable cause statement to establish a factual basis for each count but the probable cause statement provided insufficient facts for each count? (Assignments of Error 1 & 2)
2. Where there is no indication that Leonard Haan understood the State's evidence was insufficient to support the guilty plea, must his convictions be reversed and must he be permitted to withdraw his guilty plea? (Assignments of Error 1 & 2)

III. STATEMENT OF THE CASE

The State filed an original Information charging Leonard Michael Haan with two counts of second degree identity theft, one count of second degree possession of stolen property, and one

count of taking a motor vehicle without permission. (CP 3-5) Haan subsequently agreed to plead guilty to an Amended Information charging one count of attempted second degree identity theft and one count of third degree possession of stolen property. (CP 16-17, 19; 06/04/19 RP 4-5)

At the plea hearing, the court engaged with Haan in the usual colloquy about his understanding of his rights, the charges, and the consequences of the plea. (06/04/19 RP 5-12) Haan did not provide his own statement of facts, but instead agreed that the court could review the declaration for probable cause to establish a factual basis for the plea. (CP 23; 06/04/19 RP 5, 10)

According to the declaration for probable cause, Haan was arrested after he was found riding as passenger in a stolen vehicle. (CP 2)

[D]uring the booking process, correction deputies noted a number of credit cards in Haan's wallet. Two of the cards, both Alaska Airlines Visa cards, did not belong to Haan. The cards were Bank of America Alaska Airlines Mileage Plan Visa cards issue[d] to Richard Wilson Amos and Mia Grace Amos. The card issued to Mia Amos still had the activation notice sticker on the front. The officer asked Haan about the card and he said he didn't know them, he said found the credit cards on the floor near his laundry room earlier that morning and that he had five roommates and he had no idea how the cards came to be in his house. When asked why he picked them up and put

them in his wallet, rather than discard them or call police, he did not have an answer. The officer contacted Richard Amos and he said he believed those cards belonged to him and his wife and seemed confused as to why Haan would have them. He said he didn't know Roberson or Haan and never gave them permission to have his credit cards.

(CP 2) The court found a sufficient factual basis, and accepted Haan's plea. (06/04/19 RP 12)

At the sentencing hearing, Haan explained to the judge that he found the credit cards and intended to return them to the bank or the police, but he entered the plea agreement because his attorney told him it was the best outcome he could expect to receive.

(07/02/19 RP 4-5) The court adopted the State's sentencing recommendation of 364 days, deferred for one year. (CP 25-27; 07/02/19 RP 6) Haan filed a timely Notice of Appeal. (CP 28)

IV. ARGUMENT & AUTHORITIES

This Court should permit Haan to withdraw his plea because the plea lacks a factual basis.

In entering a plea of guilty, an accused necessarily waives important constitutional rights, including the right to a jury trial, the right to confront one's accusers, and the privilege against self incrimination. *Boykin v. Alabama*, 395 U.S. 238, 243, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969); *Wood v. Morris*, 87 Wn.2d 501, 505,

554 P.2d 1032 (1976). To be valid, a guilty plea must be intelligently and voluntarily made and with knowledge that certain rights will be waived. *Wood*, 87 Wn.2d at 505-06.

“Due process requires an affirmative showing that a defendant entered a guilty plea intelligently and voluntarily.” *State v. Ross*, 129 Wn.2d 279, 284, 916 P.2d 405 (1996) (citing *State v. Barton*, 93 Wn.2d 301, 304, 609 P.2d 1353 (1980)). Whether a plea is knowingly, intelligently, and voluntarily made is determined from a totality of the circumstances. *Wood*, 87 Wn.2d at 506.

A. HANN’S PLEA TO ATTEMPTED IDENTITY THEFT AND POSSESSION OF STOLEN PROPERTY LACKED A FACTUAL BASIS.

CrR 4.2(d) provides that “[t]he court shall not accept a plea of guilty, without first determining that it is made voluntarily, competently and with an understanding of the nature of the charge and the consequences of the plea.” CrR 4.2(d) also requires the court to be satisfied that a factual basis exists for the plea.

Haan entered the type of plea that is authorized by *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970), and *State v. Newton*, 87 Wn.2d 363, 552 P.2d 682 (1976). Under these cases, a defendant may voluntarily, knowingly, and intelligently plead guilty even if he is unable or unwilling to admit

that he participated in the acts constituting the crime. *Alford*, 400 U.S. at 37. When a defendant enters an *Alford* plea, however, the trial court must exercise extreme caution to ensure that the plea satisfies constitutional requirements. *Newton*, 87 Wn.2d at 373.

In order to find that a factual basis exists, the court need not be convinced beyond a reasonable doubt that the defendant is guilty. *State v. Saas*, 118 Wn.2d 37, 43, 820 P.2d 505 (1991) (citing *Newton*, 87 Wn.2d at 370). Instead, a factual basis exists if the evidence is sufficient for a jury to conclude that the defendant is guilty. *Newton*, 87 Wn.2d at 370 (quoting *United States v. Webb*, 433 F.2d 400, 403 (1st Cir. 1970)). The plea court may consider any reliable source of information to determine whether there is sufficient evidence, as long as it is made part of the record at the time of the plea. *State v. Osborne*, 102 Wn.2d 87, 95, 684 P.2d 683 (1984) (citing *In re Keene*, 95 Wn.2d 203, 210 n. 2, 622 P.2d 360 (1980)).

“The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt.” *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). When the sufficiency of the evidence is challenged,

all reasonable inferences from the evidence must be drawn in favor of the State and interpreted against the defendant. *Salinas*, 119 Wn.2d at 201.

1. Attempted Identity Theft

To convict Hann of identity theft, the facts must prove that he intended to commit identity theft and that he did “any act which is a substantial step toward the commission of that crime.” RCW 9A.28.020. A person commits identity theft when they “knowingly obtain, possess, use, or transfer a means of identification or financial information of another person, living or dead, with the intent to commit, or to aid or abet, any crime.” RCW 9.35.020(1). The facts in the probable cause declaration do not show that Haan intended to commit any other crimes with the credit cards.

The specific criminal intent of the accused may be inferred from the conduct where it is plainly indicated as a matter of logical probability. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). However, it is well settled that where a crime requires proof of intent, bare possession alone is not sufficient. *State v. Vasquez*, 178 Wn.2d 1, 7-8 309 P.3d 318 (2013); *State v. Brockob*, 159 Wn.2d 311, 318, 330-31, 150 P.3d 59 (2006). Courts do not infer criminal intent from evidence that is patently equivocal. *Vasquez*,

178 Wn.2d at 13. That is because such an inference relieves the State of its burden to prove all of the elements of the crime beyond a reasonable doubt. *Vasquez*, 178 Wn.2d at 7.

For example, possession of forged instruments alone is insufficient to prove an intent to injure or defraud. *Vasquez*, 178 Wn.2d at 7-9; *State v. Esquivel*, 71 Wn. App. 868, 870, 863 P.2d 113 (1993). Possession of cold tablets containing pseudoephedrine, even when they are removed from their packaging, is insufficient to prove an intent to manufacture methamphetamine. *Brockob*, 159 Wn.2d 331-32. And bare possession of a controlled substance does not alone prove an intent to deliver, even when possessed in quantities greater than needed for personal use. *State v. O'Connor*, 155 Wn. App. 282, 290-91, 229 P.3d 880 (2010); *State v. Campos*, 100 Wn. App. 218, 222, 998 P.2d 893 (2000).

In this case, the declaration did not contain sufficient evidence to show that Hann intended to commit a crime using the identification or financial information of other persons. There was no evidence that Hann stole the credit cards from the Amoses. There was no evidence that Hann ever used the cards to obtain false identification, credit, services, or other things of value. There

was no evidence that Hann tried to sell the cards to someone else who would commit such crimes. There was simply no evidence beyond bare possession that could establish that Hann had the intent to commit another crime.

The State's evidence was equivocal and amounted to nothing more than bare possession. This is not sufficient proof to prove the intent to commit another crime. Haan's plea therefore lacked a factual basis, and he should be permitted to withdraw it.

2. Possession of Stolen Property

The elements of possession of stolen property are: (1) actual or constructive possession of stolen property, and (2) actual or constructive knowledge the property is stolen. RCW 9A.56.140(1); *see State v. Richards*, 27 Wn. App. 703, 706, 621 P.2d 165 (1980). But the declaration did not contain sufficient evidence that the credit cards were stolen or, if they were, that Haan knew they were stolen.

Neither Richard nor Mia Amos said the cards had been stolen. Richard said he "believed" the cards were theirs and he "seemed confused as to why Haan would have them." (CP 2) These facts do not establish that the cards were actually stolen, rather than simply lost, misplaced, or discarded.

Furthermore, possession of stolen property alone is not sufficient to prove the defendant knew the property was stolen. *State v. Scoby*, 117 Wn.2d 55, 61-62, 810 P.2d 1358, 815 P.2d 1362 (1991). Although specific proof of actual knowledge is unnecessary, the State must show at least that Hann had “knowledge of facts sufficient to put him on notice that the [bank cards] were stolen.” *State v. Rockett*, 6 Wn. App. 399, 402, 493 P.2d 321 (1972); RCW 9A.08.010(b). Possession of the item combined with “corroborative evidence of other inculpatory circumstances tending to show guilt” can be sufficient. *State v. Ladely*, 82 Wn.2d 172, 175, 509 P.2d 658 (1973).

In this case, the declaration established nothing more than the fact that Haan possessed the credit cards. Haan’s plea to possession of stolen property therefore also lacked a factual basis, and he should be permitted to withdraw it as well.

B. HANN MAY RAISE THIS ISSUE FOR THE FIRST TIME ON APPEAL BECAUSE THE ABSENCE OF A FACTUAL BASIS UNDERMINES THE VOLUNTARINESS OF HIS PLEA.

A plea’s voluntariness is a constitutional requirement. In this case, the absence of a factual basis suggests the plea was involuntary. Because the voluntariness of a plea is of constitutional magnitude, and because the insufficient factual basis is obvious

from the record, Haan may raise this issue for the first time on appeal. RAP 2.5(a)(3) (a claim of error may be raised for the first time on appeal if it is a manifest error affecting a constitutional right).

The CrR 4.2(d) requirement of a factual basis for a plea is considered procedural. *In re Pers. Restraint of Hews*, 108 Wn.2d 579, 592 n.2, 714 P.2d 983 (1987). Failure to adhere to the technical requirements of CrR 4.2 does not in itself result in a constitutional violation. *See State v. Branch*, 129 Wn.2d 635, 642, 919 P.2d 1228 (1996) (holding lack of signature on a plea statement in violation of CrR 4.2(g) does not constitute a manifest injustice so long as the totality of the circumstances demonstrates the defendant's plea and waiver of rights is intelligently and voluntarily made).

Nonetheless, CrR 4.2 requires that the record of a plea hearing show the plea was entered voluntarily and intelligently. *Branch*, 129 Wn.2d at 642 (citing *Wood*, 87 Wn.2d at 511). The factual basis for a plea may be constitutionally significant where it relates to the accused's understanding of his plea. *Hews*, 108 Wn.2d at 591-92. In other words, for a plea to be voluntary, the accused must understand the law in relation to the facts to the

extent that he can make an informed decision regarding whether to plead guilty. *Hews*, 108 Wn.2d at 592 (citing *United States v. Johnson*, 612 F.2d 305, 309 (7th Cir. 1980)).

Here, there is nothing in the record to indicate Haan understood that the State must show he intended to commit a crime with the credit cards, that the cards were stolen, or that he knew they were stolen. And at sentencing Haan informed the judge that he did not intend to commit any other crime. In this case, the lack of factual basis undermined the voluntariness of Haan's guilty plea. Haan must be allowed to withdraw his plea.

V. CONCLUSION

For the reasons argued above, Haan's convictions must be reversed, and this Court should remand so that Haan may be permitted to withdraw his guilty plea.

DATED: November 27, 2019



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