

FILED

OCT 16, 2012

Court of Appeals
Division III
State of Washington

No. 30786-7-III

COURT OF APPEALS, DIVISION III
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent

v.

DAVID M. LUST

Appellant

APPEAL FROM THE SUPERIOR COURT
FERRY COUNTY
HONORABLE ALLEN C. NIELSON

BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

A. RESPONSE TO ASSIGNMENT OF ERROR

The Court Did Not Err In Finding Lust Guilty of Theft in the Second Degree.

B. ISSUE

When a person steals a purse containing personal property including access cards, can he avoid felony convictions for the stolen access cards by pleading guilty to the misdemeanor theft of the purse itself.

C. FACTS

On October 30, 2011, David Lust and Yvonne Kirkendall stole Artie McRae's purse from a booth at the Sportsmen's Restaurant in Republic. RP 137-39. The purse contained a wallet and other items of personal property, including six credit and debit cards attached to accounts in Mrs. McRae's name, her son's name and her daughter's name. RP 138-40, RP 143-46. The theft was caught on video. RP RP 106, 139. Lust was apprehended by police a short time after the theft occurred. RP 72.

On November 4, 2012, Lust was arraigned charges of Possession of Stolen Property: Access Device, Theft in the Third Degree (purse) and Making False Statements. RP 6-7. At arraignment, Lust pleaded not guilty to the access device charge and guilty to the gross misdemeanor theft of the purse and making false statements. RP 7. The Court questioned the

State regarding the split plea, and the State pointed out what the defendant was likely trying to do, which was try to bar a prosecution for the access cards by pleading to the theft of the purse. RP 7. The Court asked Lust and his counsel if they were sure they wanted to do this, to which defense counsel responded: "We are, your honor." RP 7. The statement of defendant on plea of guilty makes no mention of the access devices:

On October 30, 2011, in Ferry County, I took another person's purse without permission and lied about it to the arresting officer.

RP 10.

On March 9, 2012, the case proceeded to bench trial on an Amended Information which listed one count of Theft in the Second Degree: Access Device for each card stolen. RP 68. At trial, Ms. McRae testified that the stolen purse was hers, and that it contained items such as ibuprofen and lip gloss, and six credit and debit cards. RP137, 143-44. The credit and debit cards were contained in a wallet inside the purse, and were linked to separate accounts, some of which belonged to Ms. McRae, some to her son and some to her daughter. RP 144-148. The defendant was found guilty on all counts. RP 167.

ARGUMENT

A. LEGAL ARGUMENT

1. Double Jeopardy Prohibits Multiple Punishments for the "Same Crime".

The Fifth Amendment to the United States Constitution and Article I, Section 9 of the Washington Constitution prohibit multiple punishments

for the same crime. In applying this principle, courts closely analyze the facts to determine whether the different charges actually relate to "the same crime". To help apply Double Jeopardy principles to particular fact patterns, the courts rely on the legal construct of "unit of prosecution". Double jeopardy prohibits multiple prosecutions based on multiple violations of the same statute *only* if the defendant commits a single unit of the crime. *See, State v. Westling*, 145 Wn.2d 607, 40 P.3d 669 (2002); *State v. Adel* 136 Wn.2d 629, 634, 965 P.2d 1072 (1998). Thus, the proper inquiry is what unit of prosecution the Legislature intended in writing the statute under which the Defendant is charged. *See, Westling*, 145 Wn.2d at 610.

2. The Unit of Prosecution for Theft of an Access Device is One Per Stolen Access Device.

The Defendant asserts that his conviction for stealing the purse prohibits continued prosecution for theft of the access devices in the purse. His argument ignores clear mandatory precedent.

The Defendant was convicted under RCW 9A.56.040(1)(d), which provides:

- (1) A person is guilty of theft in the second degree if he or she commits theft of:
-
- (d) An access device.

The unit of prosecution under this statute is one count for each

stolen access device possessed. *State v. Ose*, 156 Wn.2d 140, 144, 124 P.3d 635 (2005).

In *State v. Ose*, supra, the defendant was convicted of 25 counts under RCW 9A.56.160(1)(c) for possession of 25 stolen credit cards. The defendant appealed and Division Three of the Court of Appeals reversed, holding that 'possession of property owned by different persons is only a single crime' so 'possession of multiple stolen credit cards was a single act constituting one offense.' The Washington Supreme Court accepted review and sustained the convictions, holding:

We reverse the Court of Appeals and hold that the legislature unambiguously defined the unit of prosecution for violations of RCW 9A.56.160(1)(c) as possession of each access device. Therefore, Ms. Ose's multiple convictions for possession of multiple access devices did not violate the double jeopardy prohibition.

State v. Ose, 156 Wn.2d at 149. Thus, the unit of prosecution is different for the purse and for the access cards. They are not the same crime and are not subject to Double Jeopardy principles.

3. The Defendant's Conviction for Theft of the Purse, Does Not Bar Prosecution for Theft of an Access Device.

At arraignment, Defendant made a tactical and strategic decision to plead guilty to the gross misdemeanor theft of the purse and try to thereby bar prosecution for felony theft of the access devices. This tactical decision may have been reasonable in light of the strength of the State's evidence -- in short, the Defendant was unlikely to win on the facts, so he instead argues a point of law. However, under clearly existing law,

separate counts can be charged for each access device contained inside the purse. This must hold true for the purse also; to hold otherwise would lead to absurd results. Thus, there is no cited case holding conviction for theft of a motor vehicle as a bar to prosecution for theft of the firearm found inside the vehicle. Nor is there a case holding conviction for possession of a stolen motor home as barring prosecution for theft of the stolen items inside the motor home. Where the unit of prosecution is different, the crimes are not the same.

Lust could argue that double jeopardy now prevents the State from prosecuting him for theft of the ibuprofen, lip gloss or paper gift certificate in the purse. But he was not charged with those crimes, because the Legislature has not defined a separate unit of prosecution for ibuprofen, lip gloss or paper gift certificates. The Legislature has clearly indicated -- and the courts recognize -- a separate unit of prosecution for theft of access devices, and that is how this case was charged.

CONCLUSION

Pursuant to the points and authorities cited above, the State respectfully requests that the Defendant's convictions be affirmed.

Respectfully submitted this 8th day of October, 2012.

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No. 30786-7-III
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PROOF OF SERVICE

I, Cynthia Nelson, do hereby certify under penalty of perjury that on October 16, 2012, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of:

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DATED this 16th day of October, 2012, in Republic, Ferry County, Washington.

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