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Court of Appeals
Division III
State of Washington

33643-3-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

CASEY J. WADE, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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I. APPELLANT’S ASSIGNMENTS OF ERROR

1. The court erred in denying appellant’s motion to dismiss.
2. The court erred in Finding of Fact No. 15. CP 94.
3. The court erred in Conclusion of Law No. 1. CP 95.
4. The evidence was insufficient to convict appellant of theft

with special circumstances in the third degree.

II. ISSUES PRESENTED

1. Whether a reasonable trier of fact could find that thirty-five “very strong” magnets held together by a metal key, approximately the size of a security device sensor, is a “device designed to overcome a security system”?
2. Whether the defendant should be required to pay costs in the event that his appeal is unsuccessful?

III. STATEMENT OF THE CASE

Casey Wade was charged in Spokane Superior Court with one count of retail theft with special circumstances in the third degree on April 24, 2015. CP 5, 15.¹ The matter proceeded to trial on June 29, 2015. RP 2.

Loss prevention officer Christopher Stemen was working at Walmart in Spokane County, Washington, on April 22, 2015. RP 80-81. According to one of the door greeters, Mr. Wade entered the store with a significantly large backpack, and Mr. Stemen went to observe Mr. Wade

¹ The court subsequently permitted the State to amend the information to correct a scrivener’s error.

as he walked through the store. RP 81. Mr. Stemen observed Mr. Wade walk into men's wear, select two tank tops, which he placed in the top area of the shopping cart. RP 82. Mr. Wade then headed back into the electronics department, to where the video games were located. RP 82. The defendant selected some video games that were in "keeper cases"² or security devices, and placed them in the top part of the cart along with the tank tops. RP 83.

The defendant then made his way from the electronics section to the housewares department, and selected three pillows, and "strategically" placed them in the cart around his backpack. RP 83. Mr. Wade then entered one of the tow aisles where he concealed the video games in his backpack. RP 84. He then walked to the automotive section of the store, and selected two neon lights charging cords for cell phones, that one would plug into a car adapter. RP 84. Those items were secured on a "walking peg," a device deactivated by magnets or "brute force." RP 84.

The defendant pushed his cart to the front of the store, grabbed his backpack and cut through a closed register to go into the restroom. RP-84-85. The defendant never made any attempt to pay for the items in his possession. RP 85. When Mr. Stemen looked in the shopping cart, he

² "Keeper cases" are clear plastic cases that are a couple of inches thick, and are tall enough to hold a video game or DVD. They have a magnetic strip that locks them. If someone attempts to leave the store with a keeper case still on a product, the door alarms will sound. RP 83.

saw that there were no electronic items remaining inside. RP 85. Mr. Stemen then called Crime Check to request an officer respond to the store. RP 85.

After Mr. Wade left the restroom, Mr. Stemen went inside and saw nine keeper cases in the garbage can. RP 86. Mr. Stemen stopped Mr. Wade in the foyer of the store, and announced that he was store security. RP 86. Apparently, Mr. Wade was not cooperative because Mr. Stemen decided that he had to release Mr. Wade so that no one was hurt. RP 87. However, after Mr. Wade was released, a “good Samaritan” grabbed Mr. Wade and detained him in front of the store. RP 87. After about five minutes, Mr. Wade agreed to go back into the store. RP 88.

Law enforcement arrived and searched the defendant and his backpack. From inside the backpack, law enforcement recovered nine video games and the charging cords. RP 88. From the defendant’s right side pocket, law enforcement recovered a tumbler key, as well as a number of “really strong magnets.” RP 95. At trial, the magnets and the tumbler key were admitted as exhibits 1 and 2, respectively. RP 96. Deputy Nelson testified that he knows through his training and experience that “strong magnets like that can be used to defeat the video case-type securities because the magnets releases [sic] the locking mechanisms on those cases.” RP 100.

The State also admitted security footage of Mr. Wade's movements through the store, as well as one of the keeper cases. RP 97, 102. Defense counsel cross examined both the loss prevention officer and the deputy about the ordinary nature of both the tumbler key and the magnets that were recovered from the defendant's person at the time of his arrest. RP 104-105, 127-128.

After both parties rested, the defendant moved to dismiss the case on the grounds that the state had presented insufficient evidence that Mr. Wade was "in possession of an article, implement or device that is designed to overcome a security system." RP 136-137. At the time the trial was held, the Supreme Court had not yet ruled on the issue, and Division I and II of the Court of Appeals were split on whether a common too, (in those cases, wire cutters) qualifies, as a matter of law, as a device designed to overcome a security system.

After the court heard argument by both parties, RP 136-148, and examined the magnets and barrel key for herself, RP 146, 150-151, the court denied the motion, having been satisfied that the magnetic device's "constitution represented a design unlike a pair of pliers that's designed for many, many, many purposes." RP 150. The court described at length the magnetic device that was admitted as exhibit 1 - "it was a set of individual magnets," "that were placed along a small key" with the

magnets stacked in columns “adhering to themselves in a workable unit,” the dimensions of which came very close to fitting the dimensions of the magnetic components in the case.³ RP 150-151.

Mr. Wade was subsequently convicted by the jury as charged, CP 39, and was sentenced to 90 days in custody, with credit for 71 days. CP 49-50. He timely appealed his conviction. CP 59.

IV. ARGUMENT

A. THE TRIAL COURT PROPERLY DENIED THE DEFENDANT’S MOTION TO DISMISS, FINDING THAT A REASONABLE JUROR COULD FIND THAT THE MAGNETS AND KEY DEVICE WAS A DEVICE DESIGNED TO OVERCOME A SECURITY SYSTEM.

Mr. Wade challenges the sufficiency of the evidence supporting his conviction for third degree retail theft with extenuating circumstances. The purpose for sufficiency of the evidence review is “to guarantee the fundamental protection of due process of law.” *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). 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*,

³ The Court entered written findings of fact and conclusions of law on the motion to dismiss on August 4, 2015. CP 92-95. The court found that the magnets in this case were distinguishable from the facts of *Reeves, infra*, and concluded that a reasonable finder of fact could find the defendant guilty based on these circumstances of retail theft with special circumstances in the third degree. CP 94-95.

119 Wn.2d 192, 201, 829 P.2d 1068 (1992). When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the state and interpreted most strongly against the defendant. *Id.* A claim of insufficiency admits the truth of the state’s evidence and all inferences that reasonably can be drawn therefrom. *Id.* In a sufficiency of the evidence challenge, the court is highly deferential to the decision of the jury. *State v. Davis*, 182 Wn.2d 222, 227, 340 P.3d 820 (2014).

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 (emphasis added).

At the time of Mr. Wade’s trial, there was a split between Division I and Division II regarding whether or not ordinary tools (wire cutters and pliers) were devices designed to overcome a store security system. In *State v. Reeves*, Division II held that “ordinary” pliers used to cut the cables of a spider wrap security system were not such a device. 184 Wn. App. 154, 336 P.3d 105 (2014). Division I disagreed with the holding of *Reeves*, and held, that in its view, ordinary wire cutters used to

cut security device wires are such a device. *State v. Larson*, 185 Wn. App. 903, 344 P.3d 244 (2015).

While Mr. Wade’s matter was pending appeal, the Supreme Court reviewed Division I’s holding in *Larson*.⁴ The Supreme Court reversed *Larson*, holding that a plain language analysis of RCW 9A.56.360(1)(b) demonstrates that the legislature intended the statute to have a narrow scope, and that devices “designed to overcome security systems” for the purposes of the statute, is limited to those articles, items, implements and devices that are *created*, whether by the defendant or the manufacturer, with the *specialized purpose of overcoming security systems*. *State v. Larson*, 184 Wn.2d 843, 855, 365 P.3d 740 (2015).

In evaluating the question below, the trial court did not consider Division I’s holding in *Larson*, but rather based its decision on *Reeves*,⁵ RP 149-150, which, as discussed above, is largely consistent with the Supreme Court’s decision in *Larson*. In considering the defendant’s motion to dismiss the charge, the court described the magnetic device

⁴ Prospective application of court decisions includes application to those cases not yet final, including cases on appeal. See *State v. Hanson*, 151 Wn.2d 783, 91 P.3d 888 (2004).

⁵ “I am basing my decision solely on *Reeves*.” RP 149.

introduced by the State as evidence that the defendant had possessed a device designed to overcome a store security system:

This exhibit was a set of individual magnets. I think there were 32, perhaps, that were placed along a small key. And their attractive components were operating in such fashion that they were adhering strongly to the small key. And the key, I think, was perhaps embedded, sort of. There were two outside magnets, three in a row, then the key, then the remainder of the magnets. I could be recalling that improperly. It might have been the key and then all three rows of the magnets, but those individual magnets were stacked, were placed close to the key and adhering to the key, and then the three columns of magnets were adhering to themselves in a workable unit. At first it looked like they were actually bound together, but at closer inspection, it was clear that their own magnetic forces were holding them to each other and to the small key that were all fitting in this rectangular overall shape.

The dimensions and the length of those magnets in those three rows of magnets came very close to fitting the dimensions of the magnetic component in the case. And the dimensions of the slide, if you will, as we observed the witness operate the official device, when comparing the dimensions of the magnets to the case, which is also of record and will be going to the jury -- and that security case was Exhibit 3 -- it's clear the magnets fit or can fit in a very consistent fashion when placed in close proximity with the case, and the opening mechanism, locking mechanism will, in fact, operate to open the case.

Now, I have to commend the State for not going through that exercise of seeing if the witness could actually operate that magnet in that fashion, but it's clear these items will be going to the jury, and it's clear that a reasonable juror could find -- I'm not saying that all 12 of them beyond a reasonable doubt will find, but a reasonable juror could find that that series of disconnected items, individual magnets and a tiny little key, have been designed by their

functionality to defeat the locking mechanisms in that particular video security case.

RP 150-152.

The trial court, therefore, found that sufficient evidence existed to submit the ultimate issue to the jury whether this “magnetic key” was fashioned or designed to overcome a security system. CP 83.

The appellate court may consider the trial court’s oral rulings in interpreting findings of fact and conclusions of law, so long as there is no inconsistency. *See, State v. Eppens*, 30 Wn. App. 119, 126, 633 P.2d 92 (1981), *abrogated on other grounds by State v. Peltier*, 181 Wn.2d 290, 332 P.3d 457 (2014). Here, the trial court’s oral rulings and written findings of fact and conclusions of law are consistent – the oral rulings are simply more specific. An examination of Exhibits 1 and 3 demonstrates exactly what the trial court observed supporting its oral ruling. The device admitted as Exhibit 1 consists of 35 very strong magnets, held together by their own force and bound to each other by a small key.⁶ Ex. 1. It is the approximate size of the security device sensor located on the bottom of the keeper case. Ex. 3. It is for this reason that the trial court found “a reasonable juror could find that that series of disconnected items, individual magnets and a tiny little key, have been designed by their

⁶ This key is not to be confused with the “tumbler key” also admitted at trial. Ex. 2.

functionality to defeat the locking mechanisms in that particular video security case.” RP 152.

Appellant contends on appeal that these magnets “by themselves” are ordinary items, like the pliers or wire cutters in *Reeves* and *Larson*, that are not specifically “created with ‘the specialized purpose of overcoming security systems’” as required by the Supreme Court’s decision in *Larson*. Appellant’s Br. at 12. Appellant ignores the fact that these 35 magnets were attached to each other, and held together by a key, presumably a design of the defendant’s own creation.⁷ This is not a situation where the defendant had a few loose magnets rolling around in his pocket at the time of his arrest. Rather, this key and magnet design is an amalgamation of “commonly used tools with a general purpose” that have been modified for use in retail theft, and as such, may be submitted to the jury to determine whether it is a device “designed to overcome security systems.”⁸ *Larson*, 184 Wn.2d at 853. The trial court did not err

⁷ It is irrelevant if the defendant or a manufacturer designed the implement, so long as it was designed or created with the specialized purpose of overcoming security systems. *Larson*, 184 Wn.2d at 853.

⁸ Tutorials for (“legally”) overcoming keeper cases with magnets are easily found online. See, <https://www.youtube.com/watch?v=jbas19EwDlc> (where to buy strong magnets and how to affix to a piece of metal to overcome security devices) (last accessed 5/3/16); <https://www.youtube.com/watch?v=U4a1guwY9r4> (how to overcome lock and peg security systems with magnet device)(last accessed 5/3/16); <https://www.youtube.com/watch?v=ScxloxKJZ5Q> (last accessed 5/3/16); <https://www.youtube.com/watch?v=2HQRre7htwA> (last accessed 5/3/16); https://www.youtube.com/watch?v=3XmrZvHuK_8 (last accessed 5/3/16);

in finding that a reasonable trier of fact could find the defendant guilty of the charge, CP 83, and the question of whether this device was a device designed to overcome a store security system, was a question for the trier of fact. RP 152. Sufficient evidence existed to find the defendant guilty of the charge, and the jury verdict should remain undisturbed.

B. APPELLATE COSTS SHOULD BE IMPOSED IF THE STATE IS THE SUBSTANTIALLY PREVAILING PARTY ON APPEAL, THE DEFENDANT HAS THE FUTURE ABILITY TO PAY THE COSTS OF APPEAL.

Costs have been awarded to the successful party in Washington criminal cases since early statehood. *State v. Keeney*, 112 Wn.2d 140, 142, 769 P.2d 295 (1989). The issue of what costs are recoverable in criminal cases has repeatedly been reviewed by the Washington Supreme Court. *See, e.g., State v. Nolan*, 141 Wn.2d 620, 8 P.3d 300 (2000) (court has discretion under RCW 10.73.160(1) to impose costs on appeal, regardless of whether a claim is frivolous or meritorious); *Keeney*, 112 Wn.2d 140 (holding statutory attorney's fees are not recoverable on appeal).

The imposition of costs on criminal appeals is addressed by RCW 10.73.160 and RAP 14.1 – RAP 14.6. RCW 10.73.160 provides:

(1) The court of appeals, supreme court, and superior courts may require an adult offender convicted of an offense to pay appellate costs.

(2) Appellate costs are limited to expenses specifically incurred by the state in prosecuting or defending an appeal or collateral attack from a criminal conviction. Appellate costs shall not include expenditures to maintain and operate government agencies that must be made irrespective of specific violations of the law. Expenses incurred for producing a verbatim report of proceedings and clerk's papers may be included in costs the court may require a convicted defendant to pay.

RCW 10.73.160(1) and (2).⁹ See also *State v. Stump*, 2016 WL 1696754 (April 28, 2016) at *3, n. 4 (“RAP 14 authorizes appellate judges, commissioners, and clerks to award appellate costs to the State, including the costs of appointed counsel” citing *State v. Blank*, 131 Wn.2d 230, 234-35, 930 P.2d 1213 (1997) (upholding then new RCW 10.73.160’s application to indigent criminal defendants against a variety of constitutional challenges, in large part because of the after-the-fact possibility of remission); *Nolan*, 141 Wn.2d at 629 (affirming Court of Appeals’ award of costs to the State under RCW 10.73.160 and thus rejecting defendant’s attempt to limit such awards to frivolous appeals)). However, until the State actually moves for an award of costs pursuant to RAP 14.4, after this court issues its decision terminating review, this issue is not ripe for review. This court should decline to entertain the issue until it is properly before the court.

⁹ The constitutionality of RCW 10.73.160 has been considered by the Supreme Court and upheld. *State v. Blank*, 131 Wn.2d 230, 930 P.2d 1213 (1997).

However, to address the defendant's pre-emptive strike on the imposition of appellate costs, the State agrees that clearly under RCW 10.73.160, this court has discretion in imposing costs upon a litigant. Division I's recent decision in *State v. Sinclair*, 192 Wn. App. 380, 367 P.3d 612 (2016), which addresses Division I's interpretation of the rules and its understanding of the appellate court's power to exercise discretion in imposing costs is instructive on this issue.

While the defendant may have been determined to be indigent for purposes of assignment of trial counsel and appellate counsel, that does not mean that he will never have the ability to pay the costs of his appeal.¹⁰ The defendant reported that he has income of \$1000 per month from his self-employment as an upholsterer, CP 3, 75, and receives \$190 per month in food stamps. CP 75. He is no longer incarcerated on this

¹⁰ Simply because a defendant is indigent for purposes of the appointment of counsel, does not mean that that defendant will not be able to make minimal payments to the court to defray some or all of the cost of his or her appeal. While an indigent defendant is entitled to free counsel "when he needs it," only those who remain indigent or for whom repayment works a manifest hardship should be forever exempt from any obligation to repay the cost of the assistance of court appointed counsel. *Fuller v. Oregon*, 417 U.S. 40, 53, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974).

A defendant who is just above the line separating the indigent from the nonindigent must borrow money, sell off his meager assets, or call upon his family or friends in order to hire a lawyer. We cannot say that the Constitution requires that those only slightly poorer remain forever immune from any obligation to shoulder the expenses of their legal defense, even when they are able to pay without hardship.

Id.

charge, as he was sentenced to 90 days with 71 days credit for time served. CP 49-50. The defendant reported that he has expenses of child support of \$800 per month. CP 75. He did not report any other living expenses.

Because the defendant has reported a steady income and a skill that allows him to work, the court should consider imposing costs should the State prevail on this appeal. *See, State v. Baldwin*, 63 Wn. App. 303, 311, 818 P.2d 1116, 837 P.2d 646 (1991) (LFOs affirmed on appeal where the only evidence to support trial court's finding of ability to pay was a statement in the presentence report in which the offender described himself as employable).

V. CONCLUSION

The State respectfully requests that the court affirm the defendant's conviction for retail theft with special circumstances in the third degree. The trial court properly decided that in this situation, it was a jury question whether the thirty-five magnets and key device was, in fact, a device designed to overcome a store security system. It was not an ordinary tool, like pliers or wire cutters as addressed in *Larson* and *Reeves*, but rather, was comprised of ordinary items fashioned in an unusual way for the

purpose of overcoming a security system designed to be overcome by magnets.

Dated this 10 day of May, 2016.

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Prosecuting Attorney

A handwritten signature in black ink, appearing to read "Gretchen E. Verhoef", written over a horizontal line.

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