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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 35357-5-III

STATE OF WASHINGTON, Appellant,

v.

DUANE EDWARD GRAY, Respondent.

RESPONDENT'S BRIEF

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I. INTRODUCTION

After a jury convicted Duane Gray of unlawful redemption of food stamps under RCW 9.91.144, the trial court granted Gray's motion to arrest judgment on the grounds that the statute does not charge a crime because it did not clearly set forth elements establishing a criminal offense, and because the evidence presented at trial failed to sufficiently establish the violation, which applies to retail merchant activity. The State now appeals, contending the statute is sufficiently clear, that it applies to Gray's alleged conduct, and that the evidence was sufficient to prove the violation.

II. STATE'S ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR NO. 1: The State contends the trial court erred in granting Gray's motion to arrest judgment because:

- A. RCW 9.91.144 is not unconstitutionally vague;
- B. The trial court did not correctly define "redemption"; and
- C. The jury instructions accurately stated the law and the essential elements of a conviction under RCW 9.91.144.

ASSIGNMENT OF ERROR NO. 2: The State contends sufficient evidence was presented at trial to prove the essential elements of the charge.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

ISSUE NO. 1: Whether RCW 9.91.144 applies exclusively to activities of retail food merchants who accept food stamps and redeem them for cash from wholesalers or financial institutions.

ISSUE NO. 2: Whether, if RCW 9.91.144 can reasonably be interpreted to apply to consumer conduct in using food stamp benefits issued to another without authorization from DSHS, the rule of lenity requires the court to adopt the interpretation that criminalizes merchant conduct.

ISSUE NO. 3: Whether proof of permissively using an EBT card with knowledge that it was issued to somebody else establishes the essential elements of a crime under RCW 9.91.144.

IV. STATEMENT OF THE CASE

Duane Gray used an EBT card containing food stamp benefits issued to somebody else to buy food items in four transactions occurring over three days. RP 133-37, 146, 201, 208, 209, 210, 211, 213. In a pretrial statement to police, he informed them that the owner gave him the

card and the pin number, and he used the card and then threw it away. CP 8.

Based on these transactions, the State charged Gray with four counts of unlawful redemption of food stamps under RCW 9.91.144, one as a felony and three as misdemeanors. CP 311-13. At trial, the State presented testimony from a DSHS administrator who described the laws and regulations applicable to food stamp benefits, as well as the administration of the program in Washington. RP 143-44. According to the witness, food stamps are a federal program administered by the USDA and issued through a federal funding program by DSHS. RP 144. Approved benefits are issued on an EBT card, which functions like a debit card; the benefits are automatically deposited on the card twice a month, and food purchases are debited from the card at the grocery terminal. RP 146. A single card is issued under the name of the head of household. RP 149.

According to the DSHS witness, anybody living in the house and reported in the application can use the card, even though the card is in only the head of household's name. RP 154. Alternatively, disabled or elderly recipients can request that DSHS issue another card to an authorized representative to purchase groceries for them, but that

authorization has to be documented with DSHS. RP 155. It was undisputed that Gray was not reported to DSHS as a member of the recipient's household, nor was he an authorized user of the card in DSHS's records. RP 156. But the DSHS witness acknowledged she had no way of knowing whether the recipient had given Gray permission to use the card. RP 187.

The DSHS witness also described the rules and regulations applicable to food stamp benefits and the notifications given to applicants. She testified that Gray had applied for food stamp benefits in 2012 and had received a number of advisements at that time, including a notification that trading or selling benefits can result in disqualification from the program, explaining the process to obtain an alternate card holder, and warning not to give the card or pin number to anyone else. RP 158-59, 163, 171, 174. These advisements did not cite any laws or regulations; rather, the DSHS witness stated that there are so many codes and regulations, it is up to the applicant to research them. RP 186.

During the jury instructions conference, the parties struggled mightily to craft "to convict" instructions for the charges. RP 230-300. Observing that RCW 9.91.144 requires a violation of 7 U.S.C. § 2024(c) in obtaining and presenting food stamps for redemption, the parties

considered federal laws and cases to evaluate what constitutes a violation of 7 U.S.C. § 2024(c). RP 230-38, 266-280, 286-89. Unlike 7 U.S.C. § 2024(b), which criminalizes use, transfer, possession, or acquisition of food stamps in a manner not authorized by statute or regulations, § 2024(c) appears to apply to stores that accept food stamp benefits and present them for redemption. RP 271-72. But RCW 9.91.144 did not criminalize violations of 7 U.S.C. § 2024(b), only § 2024(c). Additionally, the federal statute requires knowledge that the food stamps had been received, transferred, or used in any manner in violation of the statutes and program regulations, and there were “a bazillion” regulations in the Code of Federal Regulations establishing disqualifying violations, including violations of state law. RP 277-79.

Eventually, after the trial court approved instruction language, Gray moved to dismiss the charges, arguing that the federal statute applicable to Gray was 7 U.S.C. § 2024(b) while § 2024(c) applied to retailers. RP 307. Because RCW 9.91.144 did not give the option to proceed under § 2024(b), it did not charge an offense. RP 308-09. The trial court denied Gray’s motion to dismiss, and he was subsequently convicted of all four counts. RP 310, 356.

Following the verdicts, Gray moved to arrest judgment. CP 352. First, he contended that the specific language of RCW 9.91.144 requires a violation of 7 U.S.C. § 2024(c), and under the case law, that statute applies to merchants. RP 366-68. Although one case suggested the statute could also apply to individuals, every case applying § 2027(c) dealt with merchants attempting fraud on the government, and if the statute could be interpreted in a manner that also applies to the individual, it is ambiguous and the rule of lenity applies. RP 367-68. Further, Gray argued that an accused has a due process right to know the nature of the charge, and notice is constitutionally inadequate when the accused has to search through all of the federal regulations to determine if there is a crime, or when terms are hazy, undefined, or defined by reference to ever-changing federal publications not readily available to the public. RP 370-71. Lastly, Gray argued that the DSHS witness did not testify to any specific regulations he allegedly violated by permissively using another person's EBT card. RP 373. Evidence that Gray was not an authorized user of the card could constitute a violation of 7 U.S.C. § 2024(b)(1), but it did not violate § 2024(c), and therefore could not be prosecuted under RCW 9.91.144. RP 373-74.

The State pointed out that a separate Washington statute, RCW 9.41.142, criminalizes trafficking in food stamps, but did not explain why

it did not charge Gray under that statute. RP 375. Instead, the State argued that 7 U.S.C. § 2024(c) applied to “redemption” of food stamps, and that could apply to a merchant redeeming the stamps for payment or the individual redeeming the stamps for food. RP 375-76. The State also argued that because Chapters 74.07 and 74.08 RCW set out prohibited and permissible uses for EBT cards, a person of common intelligence could know that using another person’s EBT card without authorization from DSHS was prohibited. RP 377-78.

Recalling the struggle to define the crime in the jury instructions, the trial court observed that there were a number of problems with the prosecution. First, 7 U.S.C. § 2024(c) requires a violation of rules and regulations, but there was no testimony or argument specifying which rule or regulation Gray was accused of violating, and the DSHS witness testified there were hundreds of rules and regulations. RP 381. Second, an average person would not know that you had to obtain approval from DSHS to use a recipient’s card when the recipient gave you the card and the pin number. RP 382-83. The court concluded that 7 U.S.C. § 2024(c) applied to conduct by vendors, who obtain food stamps for pennies on the dollar, perhaps in exchange for tobacco, alcohol, or other items food stamps may not lawfully be used to purchase, and then present them for redemption. RP 383. Lastly, the court pointed out that RCW 9.91.144

provides that a violation of 7 U.S.C. § 2024(c) is a felony, but § 2024(c) itself establishes both misdemeanor and felony violations depending on the amount of benefits redeemed. RP 385. As a result, it was unclear whether the misdemeanor could even be charged in Washington state. RP 386.

In the present case, the court concluded the difficulty in preparing the jury instructions reflected an effort to make the law fit the facts of the offense when it did not apply, and that Gray could not possibly defend against a crime for which the parties could not decide what the elements were until the instructions were crafted. RP 383-84. It granted Gray's motion to arrest judgment and entered findings of fact and conclusions of law supporting its ruling. RP 385, CP 373. The State now appeals. CP 377.

V. ARGUMENT

The State charged and tried Gray under the wrong statute. Instead of charging him with trafficking in food stamps under RCW 9.91.142, the State charged a violation of RCW 9.91.144, the unlawful redemption statute. Because RCW 9.91.144 expressly incorporates only 7 U.S.C. § 2024(c), and because 7 U.S.C. § 2024(c) applies to activity by merchants, Gray's conduct did not constitute a violation of RCW 9.91.144.

Accordingly, the trial court did not err in granting Gray's motion to arrest judgment under CrR 7.4.

CrR 7.4 authorizes a trial court to arrest judgment when the information does not charge a crime, or a material element of the crime has not been sufficiently proved. In reviewing a ruling on a motion to arrest judgment, the Court of Appeals engages in the same inquiry as the trial court. *State v. Longshore*, 141 Wn.2d 414, 420, 5 P.3d 1256 (2000). Here, the trial court granted Gray's motion pursuant to CrR 7.4(a)(2), concluding that the information did not charge a crime, and CrR 7.4(a)(3), concluding insufficient evidence supported a material element.

The State's prosecution of Gray under RCW 9.91.144 was fatally flawed because RCW 9.91.144 does not criminalize conduct by consumers. Its argument that the statute could be construed in a way that would render one person's permissive use of another's EBT card a criminal offense under that statute fails, because (1) "redemption" refers to conduct by merchants, not consumers; and (2) the State's interpretation of the statute would render it ambiguous by conflating separate criminal offenses established under 7 U.S.C. § 2024(b) and (c). Accordingly, the trial court did not err in concluding that the evidence failed to show Gray

violated RCW 9.91.144 by using another person's EBT card to obtain food.

The primary issue in this appeal is the trial court's interpretation of RCW 9.91.144 as applying only to merchant conduct. In interpreting statutes, courts aim to determine and give effect to the intent of the legislature. *State v. Evans*, 177 Wn.2d 186, 192, 298 P.3d 724 (2013). The court's first step in analyzing what a statute means is to consider the plain language of the statute in light of the text of the provision, the context of the statute, and the statutory scheme as a whole. *Id.* If the plain language is susceptible of more than one reasonable meaning, the statute is ambiguous. *State v. Ervin*, 169 Wn.2d 815, 820, 239 P.3d 354 (2010). If possible, such ambiguity will be resolved by construing the statute, considering legislative history, relevant caselaw, and principles of statutory construction. *Id.* But if the ambiguity cannot be resolved in this way, the rule of lenity requires the court to adopt the interpretation that favors the defendant, barring a clear legislative intention to the contrary. *Evans*, 177 Wn.2d at 192-93.

The information here alleged a violation of RCW 9.91.144, which states:

A person who, in violation of 7 U.S.C. Sec. 2024(c), obtains and presents food stamps as defined by the federal food stamp act, as amended, 7 U.S.C. Sec. 2011 et seq., or food stamp benefits transferred electronically, for redemption or causes such stamps or benefits to be presented for redemption through the program established under RCW 74.04.500 is guilty of a class C felony punishable according to chapter 9A.20 RCW.

This statute, by its plain language, charges as a state-level felony offense a violation of the federal statute 7 U.S.C. § 2024(c). 7 U.S.C. § 2024(c) states:

Whoever presents, or causes to be presented, benefits for payment or redemption of the value of \$100 or more, knowing the same to have been received, transferred, or used in any manner in violation of the provisions of this chapter or the regulations issued pursuant to this chapter, shall be guilty of a felony and, upon the first conviction thereof, shall be fined not more than \$20,000 or imprisoned for not more than five years, or both, and, upon the second and any subsequent conviction thereof, shall be imprisoned for not less than one year nor more than five years and may also be fined not more than \$20,000, or, if such benefits are of a value of less than \$100, shall be guilty of a misdemeanor and, upon the first conviction thereof, shall be fined not more than \$1,000 or imprisoned for not more than one year, or both, and, upon the second and any subsequent conviction thereof, shall be imprisoned for not more than one year and may also be fined not more than \$1,000. In addition to such penalties, any person convicted of a felony or misdemeanor violation under this subsection may be suspended by the court from participation in the supplemental nutrition assistance program for an additional period of up to eighteen months consecutive to that period of suspension mandated by section 2015(b)(1) of this title.

Thus, under its plain language, 7 U.S.C. § 2024(c) applies to persons or entities who present benefits for payment or redemption. Those terms are not defined under the federal code; as such, it is facially unclear whether the statute prohibits a consumer exchanging benefits for food unlawfully, or a merchant exchanging the benefits for cash from the government. *See generally* 7 U.S.C. § 2012 (defining various terms applicable to the chapter but not “payment,” “redeem,” or “redemption”).

In a case evaluating the mental state requirements of a related statute, 7 U.S.C. § 2024(b), the U.S. Supreme Court considered the relationship between it and § 2024(c) to clarify their respective meanings. 7 U.S.C. § 2024(b) provides, in pertinent part:

[W]hoever knowingly uses, transfers, acquires, alters, or possesses benefits in any manner contrary to this chapter or the regulations issued pursuant to this chapter shall, if such benefits are of a value of \$5,000 or more, be guilty of a felony and shall be fined not more than \$250,000 or imprisoned for not more than twenty years, or both, and shall, if such benefits are of a value of \$100 or more, but less than \$5,000, or if the item used, transferred, acquired, altered, or possessed is a benefit that has a value of \$100 or more, but less than \$5,000, be guilty of a felony and shall, upon the first conviction thereof, be fined not more than \$10,000 or imprisoned for not more than five years, or both, and, upon the second and any subsequent conviction thereof, shall be imprisoned for not less than six months nor more than five years and may also be fined not more than \$10,000 or, if such benefits are of a value of less than \$100, or if the item used, transferred, acquired, altered, or processed is a benefit that has a value of less than \$100,

shall be guilty of a misdemeanor, and, upon the first conviction thereof, shall be fined not more than \$1,000 or imprisoned for not more than one year, or both, and upon the second and any subsequent conviction thereof, shall be imprisoned for not more than one year and may also be fined not more than \$1,000.

Comparing the two statutes, the U.S. Supreme Court observed that § 2024(c) is primarily directed at stores that accept food stamps from program participants. *Liparota v. U.S.*, 471 U.S. 419, 428, 105 S. Ct. 2084, 85 L. Ed. 2d 434 (1985). Because grocers who participate in the food stamp program receive extensive information about the authorized use and handling of food stamps, the *Liparota* Court concluded it was unclear that Congress would have imposed a specific knowledge mental state requirement on grocers under § 2024(c) while allowing strict liability to be imposed against non-program participants, who may know nothing about food stamp rules or requirements, under § 2024(b). *Liparota*, 471 U.S. at 430. Accordingly, the *Liparota* Court concluded that in a prosecution for unlawfully acquiring or using food stamps under § 2024(b), proof of the defendant's knowledge that his actions were unauthorized by statute or regulation was an essential element. *Id.* at 433.

Under *Liparota*, the distinction between unlawfully using benefits and unlawfully redeeming benefits is the distinction between consumer-level action and merchant-level action. This distinction is borne out by the

greater context of statutes and regulations detailing the participation of retail food stores and other merchant organizations in the food stamp program. For example, 7 U.S.C. § 2019 anticipates the enactment of regulations to “provide for the redemption of benefits accepted by retail food stores through approved wholesale food concerns or through financial institutions . . .” Under those regulations, 7 C.F.R. § 278.2(g)(1) provides that authorized retail food stores may redeem food stamps by presenting them through the banking system or through a wholesale food concern. 7 C.F.R. § 278.4 details the procedures to redeem food coupons, including requiring the retailer to endorse the coupon and presenting the coupons with an accompanying redemption certificate to obtain cash or credit. Thus, the administrative agencies charged with implementing the federal food stamp program understand the statutory term “redemption” to apply to merchant activity, not consumer activity such as Gray’s. That distinction reflects a reasonable interpretation of language left undefined by Congress, and thus, the interpretation of “redemption” as applying to the activities of retail stores in obtaining cash for the food stamp benefits accepted is entitled to deference from the courts. *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842-44, 104 S. Ct. 2778, 81 L. Ed 2d 694 (1984).

The State urges this court to adopt an alternative definition of the federal term “redeem” to that set forth in the federal scheme based upon its argument that the plain meaning of the term is “to exchange for something of value,” and can therefore be applied to consumer behavior as well as to merchant behavior. *Appellant’s Brief*, at 24. But if the term “redeem” can be interpreted in two ways, as applying to the merchant’s activity in presenting the coupons for cash as well as to the consumer’s activity in presenting the food stamps for food, then the rule of lenity requires adopting the construction that is favorable to the defendant. *State v. Gore*, 101 Wn.2d 481, 485-86, 681 P.2d 227 (1984). Here, that requires accepting the definition of “redeem” as applying to the merchant’s activity, not Gray’s.

The State further argues that the context of RCW 9.91.144 in relation to other statutes clarifies the Legislature’s intent to criminalize consumer activity in that statute. *Appellant’s Brief*, at 24-25. According to the State, a merchant who deals illegally in food stamps commits the crime of trafficking, and because trafficking is criminalized in RCW 9.91.142, RCW 9.91.144 must therefore apply to individuals who use benefits issued to someone else. *Id.* But the State’s analysis fails upon closer inspection. Under RCW 9.91.142:

A person who purchases, or who otherwise acquires and sells, or who traffics in, food stamps as defined by the federal food stamp act, as amended, 7 U.S.C. Sec. 2011 et seq., or food stamp benefits transferred electronically, is guilty of the following:

(1) A class C felony punishable according to chapter 9A.20 RCW if the face value of the stamps or benefits exceeds one hundred dollars; or

(2) A gross misdemeanor if the face value of the stamps or benefits is one hundred dollars or less.

Once again, this statute does not define the term “traffic,” but trafficking is defined in the Washington Criminal Code as

To sell, transfer, distribute, dispense, or otherwise dispose of stolen property to another person, or to buy, receive, possess, or obtain control of stolen property, with intent to sell, transfer, distribute, dispense, or otherwise dispose of the property to another person.

RCW 9A.82.010(19).

Applying this definition to the State’s interpretation, the distinction it seeks to draw between RCW 9.91.140, .142, and .144 disappears. First, it is not clear that a merchant who obtains food stamps unlawfully commits the crime of trafficking under RCW 9.91.142 if the food stamps are not stolen. Thus, using the example provided by the trial court of a merchant obtaining food stamps in exchange for prohibited items such as alcohol or tobacco, the merchant would not be guilty of trafficking

because the food stamp recipient was not a victim of theft but a voluntary participant in an illegal transaction.

On the other hand, it is possible that RCW 9.91.142 employs a broader, plain language definition of “trafficking” to mean “the business of bartering or buying and selling,” or “illegal or disreputable usually commercial activity.” See *Merriam-Webster Online Dictionary*, available at <https://www.merriam-webster.com/dictionary/traffic> (last visited Feb. 26, 2018). But in that case, the charge of trafficking would be equally applicable to all participants in the commercial activity, including the seller, the buyer, and the cooperative merchant, thus eradicating the tidy distinction the State seeks to draw. In other words, everyone who deals unlawfully in food stamp benefits is guilty of trafficking, while the seller of benefits is guilty of an additional crime under RCW 9.91.140 and the merchant redeemer is guilty of an additional crime under RCW 9.91.144.

In any event, the State’s interpretation looks past RCW 9.91.144’s express incorporation of 7 U.S.C. § 2024(c) limiting the conduct criminalized under the statute. That federal statute has its own context that belies the State’s categorization. As observed above, 7 U.S.C. § 2019, the statute that comes the closest to defining what it means to “redeem” benefits, describes redemption as a process for merchant retailers to obtain

payment from a food wholesaler or financial institution. And as observed in *Liparota*, 7 U.S.C. § 2024(c) establishes a different and more limited type of violation than 7 U.S.C. § 2024(b), which broadly penalizes the knowing violation of program rules and regulation in the use, acquisition, or possession of food stamps. Indeed, by contending that a consumer can “redeem” benefits at a grocery store, rather than “use” them, the State’s argument completely collapses the distinction between § 2024(b) and § 2024(c), rendering both provisions effectively duplicitous.

For whatever reason – perhaps poor drafting, perhaps policy choice – the Washington legislature did not choose to make a violation of 7 U.S.C. § 2024(b) a state crime. The State’s recourse for that omission is not to attempt to shoehorn a prosecution onto conduct the statute does not fit. The State could have charged Gray under the trafficking statute, RCW 9.91.142, for acquiring food stamp benefits that were not issued to him and using them in commerce. Alternatively, it could have referred Gray to federal authorities for prosecution under 7 U.S.C. § 2024(b). Its decision not to pursue these options is not a reason to stretch the interpretation of 7 U.S.C. § 2024(c) beyond its breaking point.

As a matter of plain language interpretation, the statutory context of 7 U.S.C. § 2024(c), and by extension, RCW 9.91.144, favors the trial

court's interpretation of the statute as criminalizing merchant, rather than consumer, conduct. This interpretation is strengthened by the consistent interpretations of the agencies empowered to adopt regulations to implement the statute, as well as the U.S. Supreme Court's analysis in *Liparota*. The State's argument to the contrary, rather than resolving statutory ambiguities, creates them; its overly broad interpretation of the term "redeem" is simply an effort to transform § 2024(c) into § 2024(b) to enlarge the scope of a prosecution under RCW 9.91.144. Even if this can be construed as a reasonable interpretation, the existence of multiple interpretations required the trial court to adopt the one most favorable to Gray under the rule of lenity. It did not err in doing so.

Understanding that RCW 9.91.144 criminalizes activity by retail merchants in presenting coupons for payment, the charged conduct by Gray on the dates in question did not constitute a crime under RCW 9.91.144. The trial court correctly concluded that the charged conduct did not constitute "redemption" within the meaning of the statute and that the evidence presented at trial failed to establish unlawful "redemption" activity. Accordingly, it appropriately granted Gray's motion to arrest judgment under CrR 7.4.

VI. CONCLUSION

For the foregoing reasons, the order granting Gray's motion to arrest judgment should be AFFIRMED.

RESPECTFULLY SUBMITTED this 27 day of February, 2018.

A handwritten signature in black ink, appearing to read "Andrea Burkhart", written over a horizontal line.

ANDREA BURKHART, WSBA #38519
Attorney for Respondent

CERTIFICATE OF SERVICE

I, the undersigned, hereby declare that on this date, I caused to be served a true and correct copy of the foregoing Respondent's Brief upon the following parties in interest by depositing them in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed this 27 day of February, 2018 in Walla Walla,
Washington.



Andrea Burkhardt

BURKHART & BURKHART, PLLC

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