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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ZACHARY LARSON,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR WHATCOM COUNTY

The Honorable Charles R. Snyder, Judge

SUPPLEMENTAL BRIEF OF PETITIONER

DANA M. NELSON
Attorney for Petitioner

NIELSEN, BROMAN & KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206) 623-2373



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A. ISSUE ADDRESSED IN SUPPLEMENTAL BRIEF

Whether the evidence was insufficient to convict petitioner of theft with extenuating circumstances when he possessed an ordinary pair of wire cutters at the time of theft, and the statute requires 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(1)(b).¹

B. SUPPLEMENTAL ARGUMENT

LARSON'S CONVICTION VIOLATES DUE PROCESS BECAUSE THE STATE FAILED TO PROVE ALL ELEMENTS OF THE OFFENSE.

Due process requires the state to prove every element of an offense beyond a reasonable doubt. U.S. Const. amend. XIV; In re Matter of Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). A conviction must be reversed for insufficient evidence where no reasonable fact finder would have found all the elements of the offense proven beyond a reasonable doubt.

¹ The legislature amended RCW 9A.56.360, effective 2014, and changed “extenuating circumstances” to “special circumstances.” The amendment does not otherwise affect the subsection cited. LAWS of 2013 ch. 153, § 1.

Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L.Ed.2d 560 (1979); State v. C.G., 150 Wn.2d 604, 610, 80 P.3d 594 (2003) (“under the plain reading of the statute, C.G.’s conviction for felony harassment must be reversed because there is no evidence that Mr. Haney was placed in reasonable fear that she would kill him”).

Under former RCW 9A.56.360(1)(b):

(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:

...

(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[.]

Emphasis added.

At issue in this case is what is meant by “designed.” As discussed below, under the plain language of the statute, ordinary wire cutters do not qualify, as they are a tool designed for electricians to make connections – not to overcome security systems.

Alternatively, the legislature’s intended meaning of “designed” is at least ambiguous, as recently evidenced by the split of authority interpreting the statute. See e.g. State v. Reeves, 184

Wn. App. 154, 336 P.3d 105 (2014) (dismissal of charge upheld where Reeves possessed "ordinary pliers"); cf. State v. Larson, 185 Wn. App. 903, 344 P.3d 244 (2015) (conviction affirmed where Larson possessed ordinary wire cutters). Indeed, Larson itself is a split decision. Larson, 185 Wn. App. at 912 (Trickey, J., dissenting) ("The phrase is susceptible of differing reasonable interpretations, one of which is that the device must be 'specifically constructed to overcome a security system'" (citing Reeves, 336 P.3d at 108). The rule of lenity therefore requires the statute to be construed in Larson's favor. State v. Evans, 177 Wn.2d 186, 192-93, 298 P.3d 724 (2013).

1. The Plain Language of the Statute Requires the State to Prove the Device Was Specifically Constructed to Overcome a Security System.

The meaning of a statute is a question of law that an appellate court reviews de novo. C.G., 150 Wn.2d at 608. The court's goal is to determine the legislature's intent and carry it out. Id. If a statute's meaning is plain, then the court must give effect to the plain meaning as expressing what the legislature intended. Id. If a word is not specifically defined by statute, the court derives the plain meaning of non-technical words using dictionary definitions. State v. Kintz, 169 Wn.2d 537, 547, 238 P.3d 470 (2010).

The legislature has not provided a definition for “designed” in RCW 9A.56.360. Accordingly, its meaning is derived from its dictionary definition. Reeves, 336 P.3d at 107-08.

The term “designed” means the purpose for which the item was manufactured or “devise[d] for a specific function or end.” Webster’s Collegiate Dictionary 338 (2003). Similarly, the American Heritage Dictionary defines the verb “design” as “to conceive or fashion in the mind; invent” and “to create or contrive for a particular purpose or effect.” American Heritage Dictionary of the English Language 506 (3d ed. 1992).

Applying the dictionary definition of “designed,” the state failed to prove Larson committed theft with extenuating circumstances, because wire cutters were not manufactured or devised to overcome security systems. On the contrary, they are a derivative of pliers, which possibly began as tongs to handle hot items.² A modern day version of wire cutters were patented by J.F. Funcik in 1958 for easier use by electricians in stripping insulation and making connections:

²See e.g. https://en.wikipedia.org/wiki/Diagonal_pliers; <https://en.wikipedia.org/wiki/Pliers>; <http://inventors.about.com/library/inventors/blpliers.htm>

During an electricians daily routine, he must constantly cut wire to length and strip insulation from the ends of wires in order to make the necessary connections. While in the past there have been devised numerous types of wire cutters and strippers, the efficiency of these tools has been very questionable and the tools have been of sizes which prohibit their convenient handling.

It is therefore the primary object of this invention to provide an improved wire stripper and cutter which may be conveniently held in ones hand and which is so constructed whereby it may be adjusted for the particular size of wire to be stripped so that the insulation may be readily stripped from the wire and at the same assuring that the wire will in no way be damaged.

<http://www.google.com/patents/US2995052>.

Although case law interpreting the meaning of "designed" appears scant, other jurisdictions have looked to the originally intended purpose for the device to determine whether it was "designed" for a particular use. See e.g. United Ohio Ins. Co. V. Schaeffer, 18 N.E.3d 863 (Ohio Ct. App. 6th Dist. Erie County 2014). Schaeffer involved an insurance dispute. Donald Schaeffer loaned his tractor to the "Mason Jar" for a "bar crawl" event. Unfortunately, the tractor overturned while pulling three trailers full of people, injuring 28. Schaeffer was named as a defendant in the personal injury suit; he sought to be defended and indemnified by

his insurance company, United Ohio Insurance Co. ("United").
Schaeffer, 18 N.E.3d at 864. United disputed any liability. Id.

United appealed after the trial court granted summary judgment in favor of Schaeffer. Inter alia, the trial court held Schaeffer was entitled to coverage under the recreational motor vehicle liability endorsement to his farm policy, on grounds the tractor qualified as a "motorized vehicle" that "could be" used as a recreational vehicle." Schaeffer, 18 N.E.3d at 864-65.

The endorsement provided coverage of bodily injury or property damage for which the insured becomes legally responsible arising out of:

- A. the ownership, operation, maintenance, use, loading, or unloading of a recreational motor vehicle;
- B. the entrustment by an insured of a recreational motor vehicle to any person[.]

Schaeffer, 18 N.E.3d at 865-66.

Under the policy, "recreational vehicle" was defined as:

A motorized land vehicle operated by you or any family member, designed for recreational use off public roads including, but not limited to, snowmobiles, tri-carts, all-terrain vehicles, similar motorized vehicles, and motorized scooters with an engine size under 30 cc's and does not exceed 25 miles per hour.

Schaeffer, 18 N.E.3d at 866 (emphasis added).

On appeal, the court sided with United that the tractor did not qualify as a “recreational vehicle” because it was not “designed” for recreational use:

We agree with United that the tractor at issue was not designed for recreational use. The term “designed” means the purpose for which the item was manufactured or “devise[d] for a specific function or end.” Webster’s Collegiate Dictionary 338 (2003). There is no dispute that the tractor was manufactured to be used in farming, not for recreational activities.

Schaeffer, 18 N.E.3d at 866 (emphasis added).

The second issue on appeal was whether the tractor qualified as a “motor vehicle.” Schaeffer, 18 N.E.3d at 866-67. The bottom line is that Schaeffer would be entitled to coverage under the farm policy if the tractor qualified as a “motor vehicle” as opposed to a “*motorized* vehicle.” Id. at 864, 867. To qualify as a motor vehicle under the policy, the vehicle had to be either “subject to motor vehicle registration” or “designed for use on public roads.” Schaeffer, at 866 (emphasis added). Schaeffer argued the tractor was “designed for use on public roads.” Id. at 867.

Despite the well-settled policy that clauses are to be interpreted broadly in favor of coverage, the court disagreed the tractor was “designed” for use on public roads:

In our view, the fact that the tractor was equipped with safety features allowing its use on public roads does not alter its purpose as farm equipment. These features were installed because limited public road travel was anticipated in such instances as going from farm field to field. The tractor's slow speed and slow acceleration and stopping make it unsafe for extended road travel. Thus, we find that the tractor at issue was a motorized vehicle and subject to the exclusions which apply to sections L and M as set forth above.

Schaeffer, 18 N.E.3d at 867 (emphasis added).³ The appellate court therefore entered summary judgment in favor of United. Id.

In interpreting a criminal statute similar to that at issue here, Florida has also looked to the originally intended purpose of the device to determine whether it was "designed" for a particular use. State v. Blunt, 744 So.2d 1258 (Fla. 3d DCA 1999). Rosa Blunt and Tiara Williams were charged with violating F.S.A. § 812.015(7) (1997), which provided:

It is unlawful to possess, or use or attempt to use, any antishoplifting or inventory control device countermeasure within any premises used for the retail purchase or sale of any merchandise.

The charge was based on the allegation Blunt and Williams wrapped tinfoil around the store security sensors to evade detection

³ Cf. Olson v. Farrar, 338 Wis.2d 215, 809 N.W.2d 1 (2012) (finding similar definition of motor vehicle susceptible to more than one reasonable interpretation and construing it in favor of coverage for the insured).

of the stolen merchandise in their bag. Blunt, 744 So.2d at 1259.

In granting the defendants' motion to dismiss, the trial judge ruled:

Tinfoil, by itself, does not fall under the definition of an "antishoplifting or inventory control device countermeasure" found in § 812.015(1)(i) because tinfoil is not an item or device which is designed, manufactured, modified, or altered. The tinfoil may have been used in such fashion. However, use is not part of the definition.

Blunt, 744 S.2d at 1259.⁴

The appellate court agreed and upheld the dismissal:

We entirely agree. The trial court's interpretation is in accord with the plain words of the statute. If there were any doubt (and we think there is none), when the language is susceptible of differing constructions, it shall be construed most favorably to the accused." § 775.021(1), Fla. Stat. (1997).

Id.

⁴ Cf. Cenatis v. Florida, 120 So.3d 41, 44 (Fla. 4th DCA 2013) (several identical Victoria's Secret bags stacked within each other, with several sheets of aluminum foil layered within the bag, also known as a "booster bag" qualified as an antishoplifting countermeasure, because it was an item that was "altered" to defeat an antishoplifting device). The Cenatis court distinguished Blunt, noting:

In Blunt, the defendant simply used an ordinary item in an unusual way; the defendant did not manufacture, design, modify, or alter the tinfoil in any manner. In this case, however, ordinary items were combined in an unusual way to create a device capable of avoiding detection by the door sensors. The plain language of the statute encompasses the modified shopping bag used in this case.

Cenatis, 120 So.3d at 44.

While the court did not explicitly state that it was applying a particular definition of design, it is clear the court applied the narrow originally-intended-purpose definition, also relied upon in the Schaeffer insurance case. Had it applied a broader definition, such as that recognized as a possible interpretation in Olson v. Farrar,⁵ it likely would have found tinfoil qualified. But the Blunt court did not so hold, ruling the plain language of the statute was clear and required a narrow interpretation.

In its response brief, the state may point out Division One in this case claimed to be relying on the “plain language” of the statute in holding ordinary wire cutters do in fact qualify as a device designed to overcome security systems. Larson, 185 Wn. App. at 907. But while the Larson majority purports to be relying on the statute’s plain language, its analysis shows otherwise.

At the outset, the court appears to interpret a “device designed to overcome security systems” as a “device which may be able to foil a store’s security system[.]”

⁵ Olson v. Farrar, 338 Wis.2d at 239 (in addition to the originally-intended-purpose definition, “designed for use” could refer to any conceivable purpose to which a vehicle could be put and one conceivable purpose for a farm tractor is use on a public road”).

Larson, 344 P.3d at 907. However, it cites to no dictionary definition or other authority for this interpretation of “designed.” Id. This Court has stated that when non-technical terms are undefined, they are given their dictionary definitions. Kintz, 169 Wn.2d at 547. In this instance, however, the appellate court appears to be making up its own definition.

Moreover, reading between the lines, the court’s definition seems to rely on the “use” to which the object or device is put (i.e. “may be able to foil”). But had the legislature intended to include items *used or intended to be used* to overcome security systems, regardless of design, it could have done so. See Brief of Appellant (BOA) at 3, 12 (citing RCW 9A.52.060, which criminalizes possession of implements “adapted, designed, or commonly used for the commission of burglary”; RCW 69.50.102 which defines drug paraphernalia as “materials of any kind which are used, intended for use, or designed for use in planting,” etc.; RCW 9A.56.063 which defines a “motor vehicle theft tool” as “any other implement shown by facts and circumstances that is intended to be used in the commission of a motor vehicle related theft”).

As the Reeves court noted, the legislature could have used similarly broad language in the statute for theft with extenuating circumstances, but chose not to. Reeves, 336 P.3d at 109. This Court will not add words or clauses to an unambiguous statute. State v. J.P., 149 Wn.2d 444, 450, 69 P.3d 318 (2003).

Next, the court of appeals in this case appears to fashion a totality-of-the-circumstances test to apply in determining whether possession of a particular device is criminalized under the statute:

The decisive issue is whether the act which the device was designed to perform is meant to effect an outcome – namely, a security system being overcome.

In order to determine whether a device is designed as such, it is necessary to consider not only the device itself but also the object upon which the device, often in the hands of an individual, acts. More to the point, it must be determined whether the object meant to be neutralized, disabled, or thwarted by the device is actually used in security systems. For instance, in order to determine whether the use of a tag remover is designed to overcome a security system, it is necessary to consider whether tags are used in security systems.

Larson, 185 Wn. App. at 910 (emphasis added, footnote omitted).

In the footnote, the court claims its “analysis does not depend upon the actual use of a device (or lack thereof) in each case.” Larson, 185 Wn. App. at 910, n.3. Rather:

[O]ur consideration of usage on an abstract level is premised on the notion that the relationship between the device and the object upon which it acts will often suggest a design of or purpose for that device. Thus, while it is true that, in this case, Larson used wire cutters to cut the wire and thereby overcome the store's security system, our conclusion would be the same if it had been found only that he was in possession of wire cutters while committing retail theft.

Emphasis added.

Again, however, the court fails to cite to anything supporting this definition or test. In fact, the test looks similar to that set forth by the legislature for motor vehicle theft tools. RCW 9A.56.063, supra (defining a "motor vehicle theft tool" as "any other implement shown by facts and circumstances that is intended to be used in the commission of a motor vehicle related theft[.]"). And despite the court's protestations, the test seems to take into consideration the possessor's intended use of the device, because the court directs consideration of not only the device itself, but "the object upon which the device, often in the hands of an individual, acts."

Yet, the legislature did not include such broad language in the theft with extenuating circumstances statute. And as an aside, it appears the court's definition of "designed" depends on the circumstances of the individual case. For instance, under the

court's definition, it appears that tag removers would not qualify as a device designed to overcome security systems if the particular security system at issue did not have tags as an anti-theft countermeasure. But such a result is entirely at odds with the statute, which specifically lists tag removers as among the criminalized devices.⁶ The appellate court's interpretation therefore leads to an absurd result. This Court presumes the legislature did not intend an absurd result. State v. Ervin, 169 Wn.2d 815, 823, 239 P.3d 354 (2010).

And contrary to lead appellate opinion in this case, legislative history shows the legislature was, indeed, primarily concerned with devices whose primary purpose is to facilitate retail theft. See Larson, 185 Wn. App. 911. In the House Bill creating the crime of theft with extenuating circumstances, the legislature stated its intent to target sophisticated and organized thieves of retail merchandise:

⁶ As indicated in the petition for review, there is nothing inconsistent with the Reeves court's "primary purpose" test or Larson's originally-intended-purpose definition of "designed" and the legislature's inclusion of tag removers among the list of devices designed to overcome security systems. Petition for Review (PR) at 11. Tag removers – whether used to perpetrate retail theft or "by retailers to disable security systems following an exchange of currency for goods" (as noted by the Larson lead opinion) – are still expressly designed to overcome security systems.

Organized retail theft is a serious problem in this state and it is growing. Organized retail theft is not the same as traditional shoplifting. These criminals are bold, violent, and extremely organized. These thefts are responsible for the majority of merchandise lost in retail establishments. These criminals are aware of the different state laws. When a state gets tough on these criminals, they move on to other states. Anti-theft devices are ineffective in stopping organized retail theft. This type of crime can lead to health problems if stolen food is stored in an unsafe manner. The ability to aggregate value and to prosecute these crimes across county lines will help prosecutors bring charges against these criminals. This state should send a message that organized retail theft is not allowed in this state.

H.B. Rep. on H.B. 2704, 59th leg., reg. sess. (Wash. 2006).

As noted in Reeves, the bill report "provide[s] some support for interpreting former RCW 9A.56.360(1)(b) as applying only to devices made specifically for the purpose of overcoming security systems and not to ordinary devices a defendant intends to use to facilitate retail theft." Reeves, 336 P.3d at 109. In any event, it is more supportive of Larson's interpretation than the interpretation of the lead appellate opinion in his case.

In sum, the language of the statute is clear. The legislature intended to reach those who, at the time of the theft, are in possession of a device designed – i.e. specifically constructed – to overcome security systems. This interpretation is supported by the

dictionary definition of “designed,” the legislature’s use of broader language in other statutes (signaling a different intent here), its expressed intent to target sophisticated shoplifters, and the persuasive authority from other jurisdictions ascribing a narrow definition to “designed.”

2. Alternatively, the Rule of Lenity Requires the Statute To Be Construed in Larson’s Favor.

Assuming arguendo this Court does not agree that the plain language of the statute necessarily leads to Larson’s interpretation, the preceding section demonstrates that Larson’s interpretation of “designed” is, at the very least, a reasonable one. See e.g., Reeves, 336 P.3d at 108 (noting different dictionary definitions of “designed” and “design” support the differing interpretations advocated by the parties); Olson v. Farrar, 338 Wis.2d at 239 (same). When the plain language of a statute is susceptible to more than one reasonable interpretation, the statute is ambiguous. Ervin, 169 Wn.2d at 820.

To resolve the ambiguity and determine the legislature’s intent, this Court resorts to other indicia of legislative intent, including principles of statutory construction, legislative history, and relevant case law. State v. Ervin, 169 Wn.2d 815, 820, 239 P.3d

354 (2010). If these indicators are insufficient to resolve the ambiguity, under the rule of lenity the Court must interpret the ambiguous statute in favor of the defendant. Evans, 177 Wn.2d at 192-93. This Court will not construe an ambiguous statute against a defendant unless the principles of statutory construction clearly establish that the legislature intended such an interpretation. Evans, 177 Wn.2d at 193.

The rules of statutory construction do not “clearly establish” the legislature intended a broad definition to apply to “designed.” Reeves, 336 P.3d at 109. If anything, principles of statutory construction and other interpretive aids tend to support Larson’s interpretation. Reeves, 336 P.3d at 109.

First, the principle that “specific words modify and restrict the meaning of general words when they occur in a sequence” supports Larson’s interpretation. See e.g. State v. Gonzales Flores, 164 Wn.2d 1, 13, 186 P.3d 1038 (2008) (describing the statutory interpretation principle of ejusdem generis). More specifically, the legislature specifically listed “lined bags and tag removers” as examples of items designed to overcome security systems. RCW 9A.56.360(1)(b). As the Reeves court noted, these

items have little utility apart from “blocking a store security camera or removing retail security bags.” Reeves, 336 P.3d at 108. From this, a reasonable inference can be made that the legislature intended to criminalize items that were manufactured or created to overcome security systems, not just any device that conceivably could be used to overcome security systems.

Second, a comparison to other criminal statutes describing the use of tools for specific purposes also supports Larson’s interpretation. For instance, the burglary tools statute and the motor vehicle theft statute both criminalize items *commonly used* for the commission of such crimes. RCW 9A.52.060(1); RCW 9A.56.063(1). From the absence of similarly broad language in the theft with extenuating circumstances statute, a reasonable inference is that the legislature intended a narrower meaning.

Finally, as indicated in the previous section, there is nothing in the legislative history that suggests a broad interpretation was intended. In fact, it appears the legislature intended to target sophisticated shoplifters. As the Reeves court noted, it would be reasonable to assume organized thieves would use more specialized tools than traditional shoplifters. Reeves, 336 P.3d at 109.

Assuming this Court disagrees the plain language of the statute requires Larson's interpretation, his interpretation is at least a reasonable one. Because the principles of statutory construction do not clearly establish a different intent, the statute must be construed in Larson's favor.

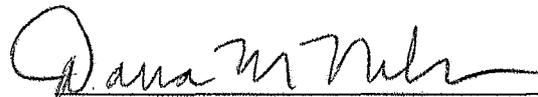
D. CONCLUSION

Under the plain language of the statute, ordinary wire cutters do not qualify as a device designed to overcome security systems. Alternatively, Larson's interpretation is at least a reasonable one. The rule of lenity requires this Court to resolve the ambiguity in his favor.

Dated this 14th day of August, 2015

Respectfully submitted

NIELSEN, BROMAN & KOCH



DANA M. NELSON, WSBA 28239

Office ID No. 91051

Attorneys for Petitioner

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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Respondent,

v.

ZACHARY LARSON,

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) SUPREME COURT NO. 91457-5
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x Patrick Mayovsky

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Attached for filing today is a supplemental brief of petitioner for the case referenced below.

State v, Zachary Larson

No. 91457-5

- Supplemental Brief of Petitioner

Filed By:
Dana Nelson
206.623.2373
WSBA No. 28239
nelsond@nwattorney.net