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No. 91457-5

**IN THE SUPREME COURT FOR THE
STATE OF WASHINGTON**

STATE OF WASHINGTON, Respondent,

v.

ZACHARY SCOTT LARSON, Appellant.

SUPPLEMENTAL BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Whether the plain language of former RCW 9A.56.360(1)(b) “designed to overcome security systems” can only, when read in context of the statute as a whole, be reasonably interpreted as modifying the terms “article, item, implement or device” as to encompass any item, article implement or device who by its design enables the sophisticated thief to overcome the security measures used by the retailer to secure merchandise.

B. FACTS

Zachary Larson was charged with retail theft with extenuating circumstances pursuant to RCW 9A.56.0360(1)(b) . CP 6-7. On May 17th 2013, Keven Codrington, a loss prevention officer for Marshalls department in Bellingham, Washington observed Zachary Larson and companion Michelle Smith-Bearden enter the retail store and select a pair of Nike shoes. CP 85-87. Codrington observed Michelle Smith-Bearden pass the Nike shoes to Larson, who then used wire cutters he had brought into the store to cut wires to remove a security device secured by the wires that were attached to the shoes. Thereafter, the couple put the Nike shoes in their bag, covered them with their coats and continued shopping. Id. When Larson and Smith-Bearden paid for other items at the cashier, no attempt was made to pay for the Nike shoes hidden under their coats in their shopping bag. Id. Larson and Bearden were subsequently stopped

outside the store by security and Larson acknowledged he stole the merchandise. See, CP 85-87.

Prior to trial, Larson filed a motion to dismiss pursuant to State v. Knapstad, 107 Wash. 2d 346, 729 P.2d 48 (1986) arguing that the wire cutters used in this theft was not a device specifically “designed” to overcome security systems and therefore the state could not prove each element of the offense charged. The trial court rejected Larson’s narrow interpretation and concluded the wire cutters fell within the scope of the extenuating theft statute. RP 9. Following a stipulated bench trial predicated on police reports, the trial court found Larson guilty of retail theft with extenuating circumstances in the third degree. CP 51-53, 85-87, 56-64.

On appeal, division one of the court of appeals, in a split decision, again rejected Larson’s assertion that wire cutters do not fall within the scope of the statute. The court of appeals concluded the legislature intends to punish thieves who, anticipating the use of security measures by a merchant, has in his or her possession an item, article, implement or device that can overcome those security measures. The court recognized that wired devices are commonly used to secure merchandise and therefore wire cutters fall within the scope of the statute. State v. Larson, Slip.Op. 71238-1-0. The dissent in contrast, concluded the language of

the statute was ambiguous because the term “designed” is susceptible to differing interpretations including that the device must be specifically constructed to overcome a security device. Petition for review before this Court was thereafter granted.

C. ARGUMENT

The plain language of the retail theft statute is unambiguous on its face and subject to only one reasonable interpretation when read in context and in light of the legislature’s intent.

In 2006, the legislature added several new crimes, including the crime of retail theft with extenuating circumstances¹ to the organized retail theft section of the criminal code. These crimes were enacted in the face of growing concern over the increase in organized retail theft and to the substantial costs organized and sophisticated thefts results to both consumers and retailers nationally. See, S.B. Rep. 2704 at 2 (Laws of Wash. 2006, ch.277) (Wash.2006.)

The Retail theft with extenuating circumstances statute provides:

A person commits retail theft with extenuating circumstances if he or she commits theft from a mercantile establishment with one of the following extenuating circumstances:

¹ As noted by the court of appeals, RCW 9A.56.360 was amended effective January 2014 so replace the phrase “extenuating circumstances” with “special circumstances.” LAWS of 2013, ch.153 sec.1. The statutory language at issue in this case is unaffected by the amendment and remains in effect.

(a) To facilitate the theft, the person left the mercantile establishment through a designated emergency exit;

(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*; or

(c) the person committed the theft at three or more separate and distinct mercantile establishments within a 180-day period....

(4) A person is guilty of retail theft with extenuating circumstances in the third degree if the theft involved constitutes theft in the third degree. Retail theft with extenuating circumstances in the third degree is a class C felony.

Emphasis added, former RCW 9A.56.360 (2014).

While the legislature did not define the term ‘designed’ as used in this statute, the plain language of the statute read in context reveals the legislature did not intend to apply a narrow definition or application of the term as advocated by Larson because the term ‘designed’ is used in context of a phrase “designed to overcome security measures.” Moreover, the statute plainly states that possession of items, articles, implements or devices ‘designed to overcome security measures’ includes, *but is not limited to, possession of lined bags or tag removers*. RCW 9A.56.360 (1)(b). The phrase ‘designed to overcome security systems’ in modifying

the terms 'item, article, implement or device' refers to whether the reasonable design of the item, article, implement or device, would enable the thief to overcome the security measures used by the retailer.

The plain language of the statute when read in context and in light of the legislature's intent in enacting the statute is unambiguous on its face. The scope of the statute encompasses any person, who in committing retail theft, is found in possession of an article, item, implement or device the design of which permits the thief to overcome the security measures of the retailer.

Issues of statutory construction are questions of law reviewed de novo on appeal. State v. Evans, 177 Wash. 2d 186, 298 P.3d 724 (2013). The purpose of statutory interpretation is "to determine and give effect to the intent of the legislature." Id., *citing*, State v. Sweany, 174 Wash. 2d 909, 914, 281 P.3d 305 (2012). Legislative intent is, when possible, derived solely from the plain language of the statute. Evans, 177 Wash. 2d 186. If the meaning of a statute is plain on its face, courts will give effect to the plain meaning. State v. Ervin, 169 Wash. 2d 815, 239 P.3d 354 (2010). The 'plain meaning' of a statutory provision is "discerned from the ordinary meaning of the language at issue, as well as from the context of the statute in which the provision is found, related provisions and the statutory scheme as a whole." State v. Jacobs, 154 Wash. 2d 596, 600, 115

P.3d 281 (2005). Where the plain meaning of the statute is clear, courts may not engage in statutory construction or consider the rule of lenity. State v. Bolar, 129 Wash. 2d 361, 366, 917 P.2d 125 (1996).

If a statute is subject to more than one *reasonable* interpretation, the statute is considered ambiguous. City of Seattle v. Winebrenner, 167 Wash. 2d 451, 219 P.3d 686 (2009). A statute is not ambiguous however just because there are more than one conceivable interpretations of the statute. State v. Hahn, 83 Wash. App. 825, 831, 924 P.2d 392 (1996). Additionally, a statute is not ambiguous for purposes of the rule of lenity just because there is a division of judicial authority of its proper construction. Reno v. Koray, 515 U.S. 50, 64-65, 115 S. Ct. 2021, 132 L. Ed. 2d 46 (1995).

“A court should not be hasty in finding an ambiguity because the result may be a construction of the statute that does not accurately reflect legislative intent.” Snoqualmie Valley Sch. Dist. No. 410 v. Van Eyk, 130 Wash. App. 806, 811, 125 P.3d 208 (2005).

State v. K.R., 169 Wash. App. 742, 748, 282 P.3d 1112 (2012). If after applying the rules of statutory construction the court concludes the statute is ambiguous, “the rule of lenity requires” the court to “interpret the statute in favor of the defendant *absent legislative intent to the contrary*.” Jacobs, 154 Wash. 2d 596. (*emphasis added*)

In determining the plain meaning of a provision, this Court considers the text of the statutory provision at issue, the context of the provision in the statute itself, related provisions and the statutory scheme as a whole. Id. Terms which are not defined by statute are given their plain and ordinary meaning unless a contrary legislative intent is indicated. State v. Jones, 172 Wash. 2d 236, 242, 257 P.3d 616 (2011).

In determining the meaning of a word as it appears in a statute, this Court should *not* employ,

[a] mechanistic use of statutory construction rules [that] would lead [it] astray from [its] paramount duty, which is 'to ascertain and give expression to the intent of the Legislature.' *When faced with determining "the meaning of words used but not defined within a statute," this Court should "give careful consideration to the subject matter involved, the context in which the words are used, and the purpose of the statute."* If statutory language is susceptible to two constructions, one of which will promote the purpose of the statute and the second of which will defeat it, this Court will adopt the former construction. Moreover, this Court must construe statutes to avoid strained or absurd results.

State v. Silva, 106 Wash. App. 586, 592, 24 P.3d 477 (2001)(footnote references omitted) (emphasis added).

Larson argues this statute is ambiguous because there are numerous dictionary definitions of the term 'designed' and 'design,' any one of which may apply to the statute. Larson argues therefore, the rule of lenity requires this Court interpret this statute in his favor to narrowly interpret the statute as requiring the article, implement, item or device be

specifically and singularly designed with the purpose of overcoming a retailer security system.

'Designed' is defined as "contrived or taken to be employed for a particular purpose. Fit, adapted, prepared, suitable, appropriate. Intended, adapted, or designated. The term may be employed as indicating a bad purpose with evil intent." *Deluxe Black's Law Dictionary*, Sixth Edition 447 (1990). Designed is also similarly defined as "done, performed, or made with purpose and intent..." *Webster's Third New International Dictionary*, 612 (1993). Larson previously defined 'designed' as something planned or made for a specific use or purpose. Something planned, intended, purposeful, deliberate... to create or contrive for a particular purpose of effect. See, COA Br. of App. at 8.

A statute is not ambiguous merely because it or a term within it is capable of two or more interpretations. State v. Tili, 139 Wash. 2d 107, 115, 985 P.2d 365 (1999). Given the context of the term "designed" in this statute within the phrase 'designed to overcome security measures' and the additional qualifying language in the statute itself revealing the legislature did not intend the statute to be narrowly construed (not to be limited to tag removers and lined bags), it is clear possession of wire cutters, an item designed to cut wires falls within the proscribed conduct

where the security measures of the retailer encompass using wires to secure merchandise.

Larson's argument to limit applicability of the statute to only items, implements, devices etc. that *specifically and singularly are only designed* to overcoming security measures is inconsistent with the plain language of the statute. It ignores that the term 'designed' is not a stand-alone term but part of a phrase modifying the previous terms. It additionally ignores the specific language in the statute that reflects the legislature did not intend to limit applicability only to those items specifically designed to thwart retail security measures such as lined bags and tag removers. Larson's interpretation of this statute strains logic and contravenes the legislative intent.

If the item in question, predicated on its design can overcome the security measures, then possession of the article, implement, device or item falls within the scope of the statute. Marshall Department Store used a wired security device to secure the merchandise that Larson stole. Larson came into Marshalls with a plan and a tool, wire cutters, which he then used to efficiently overcome the security measure used by Marshalls in order to steal the merchandise. Wire cutters in this instance, equates under the statute, to having a tag remover or a lined bag and therefore elevates Larson's crime to felony theft with extenuating circumstances.

Where the statute specifically states it is not limited in application only to lined bags or tag removers, the statute should be read to give effect to the legislature's intent and permit application to a broader scope of items, articles, implements and devices that can be used to steal in a variety of retail theft settings. This effectuates the legislature's intent to hold the more sophisticated thief who brings with him or her implements or devices that can overcome the security measures of the retailer accountable under this felony theft statute.

The rule of lenity is inapplicable because the statutory language when read in context and in light of the legislature's intent is unambiguous and even if considered ambiguous because the legislature did not further define "designed" the statute is still nonetheless only subject to one reasonable interpretation. The rule of lenity does not require "forced, narrow or over strict construction if it defeats the intent of the legislature. State v. Carter, 89 Wash. 2d 236, 242, 570, 570 P.2d 1218 (1977) holding modified by State v. Cann, 92 Wash. 2d 193, 595 P.2d 912 (1979) P.2d P.2d 1218 (1977). The rule only applies where the statute is ambiguous and the legislative intent is insufficient to clarify the ambiguity. Matter of Sietz, 124 Wash. 2d 645, 652, 880 P.2d 34 (1994).

In this instance the language reflects what the legislature intended. To permit application of the statute to any sophisticated thief who comes

into a store or place of business with a plan to steal and an item that can effectively overcome the security system of the retailer. For example, the statute would similarly apply to a person possessing bolt cutters that could be used to cut a lock of a secured fenced retail area securing lawn mowers to a person caught stealing the lawn mower.

This Court's duty is to ascertain and give effect to the intent and purpose of the legislature. In determining the legislature's intent via statutory construction, this Court should avoid unlikely, absurd or strained results. State v. Stannard, 109 Wash. 2d 29, 36, 742 P.2d 1244 (1987). Engaging in statutory construction to give effect to the legislature's intent to permit application of the statute in these situations in the face of an alleged potential ambiguity from the legislature's failure to further define 'designed' is permissible. In construing legislative actions "(t)he courts, in pursuance of giving effect to the intention of the legislature, are not controlled by the literal meaning of the statute, but the spirit or intention of the law prevails over the letter thereof, and no construction should be given to a statute which leads to gross injustice or absurdity." Amburn v. Daly, 81 Wash. 2d 241, 246, 501 P.2d 178 (1972).

Statutory analysis supports that the legislature did not intend to adopt Larson's narrow interpretation of the statute or that the statute is subject to two or more reasonable interpretations. The senate house bill

reflects the legislature, in passing the retail theft statute, wanted to address and hold accountable sophisticated thieves who engaged in retail theft with stiffer consequences. S.B. Rep. 2704 (2006)(Laws of Wash. ch. 277) (Wash.2006.) The retail theft and other related newly enacted crimes enable counties to aggregate multiple offenses together and, as reflected in this case, hold thieves who use more sophisticated measures to accomplish a theft or come into a store with a plan and implements or devices to overcome the security measures used by a merchant in order to effect a quick and efficient theft, to be criminally accountable as a felon.

With the legislature's intent in mind, in conjunction with the plain language, in context and as a whole of RCW 9A.56.360(1)(b), it is clear the legislature intended the statute to encompass criminals who at time of the theft, had in their possession items, implements, articles or devices who's design enables them to overcome the security measures of merchants to steal merchandise.

Moreover, the legislature did not intend to limit application of the statute only to thieves who possessed lined bags or tag removers at the time of the theft and accordingly used broader language within this statute. Larson's interpretation is unreasonable and would require the state to prove the item or implement found in possession of the thief at the time of the theft was 'designed' solely and specifically to overcome the

merchant's security system in order to obtain a conviction. The legislature did not require the article, item, implement, or device be *manufactured* solely for the purpose of thwarting retail security measures.

Such a strained reading would contravene the legislature's intent and is not a reasonable reading of the statute.

A person bringing wire cutters into a retail store for the purpose of cutting wires to remove a security device to facilitate his or her theft is similarly situated under this statute to a person who uses a tag remover – where a tag is used to secure merchandise or lined bag to accomplish his or her theft. This is because the statute is not criminalizing the possession of particular tools commonly used for theft as the legislature did in for having or making burglary tools. See, RCW 9A.52.060. Instead, the statute is criminalizing the dual act of possessing such tools, the design of which enables the more sophisticated thief to thwart security system of the merchant to efficiently steal. RCW 9A.56.060. Larson's argument should be rejected.

D. CONCLUSION

For the foregoing reasons, the State requests that the Court affirm Larson's conviction for retail theft with extenuating circumstances.

DATED this 13th day of August, 2015.

Respectfully submitted,



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CERTIFICATE

I certify that on this date I placed a copy of the attached document in the in the United States mail with proper postage thereon, or otherwise caused to be delivered, to this Court and Counsel, addressed as follows:

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