

NO. 69692-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

LARRY VIEAU,

Appellant.

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

APPELLANT'S OPENING BRIEF

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COURT OF APPEALS DIV I
STATE OF WASHINGTON

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A. SUMMARY OF ARGUMENT

Although the State presented enough evidence for a reasonable jury to conclude someone took Kimberly Hopper's access device, the State did not show Larry Vieau was the perpetrator. He was never seen with any of Ms. Hopper's property or even in the immediate vicinity of it. A subsequent search of his vehicle turned up no evidence. Others were around Ms. Hopper's access device when it was stolen. The conviction should be reversed and the charge dismissed.

In the alternative, the judgment and sentence should be remanded to correct a scrivener's error in the listed subsection of the second degree theft statute.

B. ASSIGNMENTS OF ERROR

1. In the absence of sufficient evidence to establish beyond a reasonable doubt Mr. Vieau was the perpetrator, the conviction violates due process.

2. The judgment and sentence contains a scrivener's error that cites an incorrect subsection of the second degree theft statute.

C. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. The federal and state constitutions require the State prove all essential elements of a charged offense beyond a reasonable doubt. For

any crime, the State bears the burden of proving the identity of the perpetrator beyond a reasonable doubt. Where the State failed to show beyond a reasonable doubt that Mr. Vieau was the perpetrator of the theft of the access device, should the conviction be reversed and the charge dismissed with prejudice?

2. Should the judgment and sentence be remanded to reflect the subsection of the second degree theft statute under which Mr. Vieau was charged and tried, theft of an access device?

D. STATEMENT OF THE CASE

Kimberly Hopper volunteers in a church office in Marysville, Washington. RP 28-29. On March 22, 2012, she arrived at the church around 10 a.m. RP 29. She left her purse in the church office, where it was visible from the lobby through a half wall of windows. RP 33-34, 43. The purse was bright green, and she left the top zipper wide open. RP 43. She believes she had a large, fake-snakeskin wallet inside her open purse, in which she kept her bank cards and debit card. RP 45. She worked for about four hours before looking for her wallet. RP 44.

Sometime around 1 p.m., Larry Vieau entered the church looking for a ministry that no longer functioned at that church. RP 30. Ms. Hopper was in the office behind a counter when Mr. Vieau entered.

RP 31. The half wall of windows opening into the church lobby from the office was open. RP 32-33. Mr. Vieau approached the window and asked Ms. Hopper about the ministry. RP 32-33. At some point during the conversation, Ms. Hopper walked out into the east lobby of the church to talk with Mr. Vieau, who introduced himself to her. RP 32-34, 48. Around that time a marketer for a local business, Cheryl Cunningham, entered through the west lobby entrance to the church. RP 66-67. She testified that the door was unlocked, and a group of people directed her inside. RP 71. She walked through the main part of the church to find the pastor and encountered Mr. Vieau and Ms. Hopper. RP 66-67, 69-70.

Mr. Vieau told Ms. Hopper and Ms. Cunningham that his wife was in town for medical treatment but they were low on gas. RP 38-39. He asked Ms. Hopper whether the church could help out, but she told him the church did not have funds for that. RP 39. However, Ms. Cunningham did help Mr. Vieau, by providing him with approximately 13 dollars. RP 39-40, 70. Ms. Cunningham then distributed marketing materials to Ms. Hopper and left from the closest exit. RP 70-71.

Next, Ms. Hopper told Mr. Vieau about the church building and gave him a brief tour. RP 40. According to Ms. Hopper, the sanctuary

is impressive and unique. RP 48-49. Mr. Vieau seemed impressed and excited about the building. RP 40. He said he would send his wife inside to have a look for herself. RP 40. Then Ms. Hopper saw Mr. Vieau exit the church. RP 41.

His wife, Ladonna Vieau, came into the church a few minutes later and also identified herself by name. RP 41, 43, 49. Ms. Hopper showed Ms. Vieau around the church, providing a tour similar to that she gave Mr. Vieau. RP 41. When they returned within view of the lobby, Ms. Hopper noticed Mr. Vieau come out of a hallway and exit the church, moving quickly. RP 41-42. Ms. Hopper did not see Mr. Vieau in the hallway or in the office. RP 51-52, 55. Ms. Hopper was unsure why Mr. Vieau came back inside the church. RP 62. Ms. Vieau and Ms. Hopper spoke for a few additional minutes and then Ms. Vieau left. RP 43.

Ms. Hopper returned to the office. RP 43. She went into her purse to look for a pen and noticed her wallet was not in her purse. RP 43. Ms. Hopper checked her car for the wallet, but did not see it there. RP 44. She called the police and then canceled her credit and bank cards. RP 46-48.

In addition to Ms. Cunningham, Ms. Hopper was aware of other people who were in the church on March 22. A bible study group was meeting in the conference room from 1 to 3 p.m. RP 30, 35-36. The pastor and associate pastor were in and out of the church throughout the day. RP 34-35. Ms. Hopper testified the west lobby entrance was usually locked, but Ms. Cunningham testified she entered through that door. RP 36, 71. The self-locking door to the office was shut and locked while Ms. Hopper was absent from the office, but the half wall of windows were open. RP 32-34.

A police officer stopped Ms. Vieau in her vehicle the next day. RP 75. The officer searched Ms. Vieau's vehicle for evidence of Ms. Hopper's belongings but found "absolutely nothing" related to her. RP 76-78. The police officer was not aware of the other people in the church around that time—the bible study group, the pastor and associate pastor, and Ms. Cunningham. RP 77.

Despite the lack of evidence, the State charged Mr. Vieau with Second degree theft of an access device. CP 63 (citing RCW 9A.56.040(1)(c)). He was convicted. CP 30.

E. ARGUMENT

1. The conviction should be reversed and dismissed with prejudice because the State failed to prove Mr. Vieau was the perpetrator beyond a reasonable doubt.

a. The State must prove each element of the charged offense beyond a reasonable doubt.

A criminal defendant may only be convicted if the State proves every element of the crime beyond a reasonable doubt. *Blakely v. Washington*, 542 U.S. 296, 300-01, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004); *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). On a challenge to the sufficiency of the evidence, this Court must reverse a conviction when, after viewing the evidence in the light most favorable to the prosecution, no rational trier of fact could have found all the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); *State v. Drum*, 168 Wn.2d 23, 34-35, 225 P.3d 237 (2010).

b. The State failed to prove that Mr. Vieau perpetrated theft of an access device.

The State presented sufficient evidence to prove that someone stole Ms. Hopper's wallet, including an access device. However, the

State failed to prove Mr. Vieau was the perpetrator. “It is axiomatic in criminal trials that the prosecution bears the burden of establishing beyond a reasonable doubt the identity of the accused as the person who committed the offense.” *State v. Hill*, 83 Wn.2d 558, 560, 520 P.2d 618 (1974); accord *State v. Thomson*, 70 Wn. App. 200, 211, 852 P.2d 1104 (1993). The State’s evidence did not show beyond a reasonable doubt that Mr. Vieau was the person who committed this offense.

No one saw Mr. Vieau with an access device of Ms. Hopper’s. No one saw Mr. Vieau with Ms. Hopper’s wallet. Neither Ms. Hopper nor anyone else saw Mr. Vieau in the hallway or in the office where Ms. Hopper’s wallet was. RP 51-52, 55. The Vieau’s car was searched and “absolutely” no evidence related to the offense was discovered. RP 77-78.

The State’s only evidence was that Ms. Hopper saw Mr. Vieau walking quickly in the church when she returned from giving Ms. Vieau a tour of the sanctuary. RP 41-42, 51-52, 62. But doors to the church were open; Ms. Cunningham had been inside the church; a group was meeting in the church at the time; others could have been in and out of the church; and Ms. Hopper had not seen her wallet since

she had arrived at the church four hours earlier. RP 34-35, 54-55, 66-71. Moreover, though Mr. Vieau indicated he was in need of money, he then received money from Ms. Cunningham. RP 69-70.

The State's evidence was insufficient to show Mr. Vieau was the perpetrator beyond a reasonable doubt.

- c. The State's failure to prove Mr. Vieau was the perpetrator requires reversal of the conviction and dismissal of the charge with prejudice against refiling.

The absence of proof beyond a reasonable doubt of an element requires dismissal of the conviction and charge. *E.g., Jackson*, 443 U.S. at 319; *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). The Double Jeopardy Clause of the Fifth Amendment bars retrial of a case dismissed for insufficient evidence. *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969), *reversed on other grounds by Alabama v. Smith*, 490 U.S. 794, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989). Because the State failed to prove Mr. Vieau was the perpetrator of Ms. Hopper's stolen access device, the Court should reverse his conviction and dismiss the charge with prejudice.

2. The judgment and sentence should be remanded to correct an error in the statute listed for the conviction.

If this Court does not reverse the conviction, the judgment and sentence should be remanded to correct a scrivener's error. Mr. Vieau was charged with theft of an access device, which is second-degree theft, on July 10, 2012. CP 63. The second-degree theft statute was revised effective June 7, 2012. At the time of the charge and Mr. Vieau's conviction, the statute provided:

(1) A person is guilty of theft in the second degree if he or she commits theft of:

(a) Property or services which exceed(s) seven hundred fifty dollars in value but does not exceed five thousand dollars in value, other than a firearm as defined in RCW 9.41.010 or a motor vehicle;

(b) A public record, writing, or instrument kept, filed, or deposited according to law with or in the keeping of any public office or public servant;

(c) Metal wire, taken from a public service company, as defined in RCW 80.04.010, or a consumer-owned utility, as defined in RCW 19.280.020, and the costs of the damage to the public service company's or consumer-owned utility's property exceed seven hundred fifty dollars but does not exceed five thousand dollars in value; or

(d) An access device.

(2) Theft in the second degree is a class C felony.

RCW 9A.56.040. The judgment and sentence states Mr. Vieau was convicted under subsection (1)(c). CP 15. However, there was no evidence or charge that Mr. Vieau stole metal wire. He was charged and convicted of theft of an access device. The judgment and sentence should be amended to reflect that his conviction is under RCW 9A.56.040(1)(d).

F. CONCLUSION

Because the State failed to prove Mr. Vieau was the perpetrator of the stolen access device, this Court should reverse the conviction and dismiss the charge with prejudice. In the alternative, the judgment and sentence should be amended to reflect the appropriate subsection of the second-degree theft statute.

DATED this 6th day of June, 2013.

Respectfully submitted,



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Washington Appellate Project
Attorney for Appellant

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DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent/Cross-appellant,)	
)	NO. 69692-1-I
)	
LARRY VIEAU,)	
)	
Appellant-Cross-respondent.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 6TH DAY OF JUNE, 2013, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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