69692-1

69692-1

NO. 69692-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

LARRY D. VIEAU,

Appellant.

BRIEF OF RESPONDENT

COURT OF APPEALS
STATE OF WASHINGTON
2013 SEP -6 PM 1:28

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I. ISSUES

1. Was the circumstantial evidence in this case sufficient to support the jury's finding the defendant guilty of the crime of second-degree theft?

2. The judgment and sentence contains the correct statutory citation for the offense as of the date of the commission of the crime. Should it be corrected to reflect the recodified citation in effect as of the later date that the information was filed, when the operative date is when the crime occurred?

II. STATEMENT OF THE CASE

Kimberly Hopper volunteers in the office at the Victory Foursquare Church in Marysville three days a week from 10 am to 3 pm. Verbatim Record of Trial Proceedings (hereafter "RP") 28-29. She was volunteering on March 22, 2012. RP 29. The church has an east and a west lobby, with a large central sanctuary between them. RP 31-35; Ex. 1.[1] The sanctuary has some unusual features: a castle façade, a town façade, and an ark in a half-boat shape. RP 35.

[1] Ex. 1 is a large sheet of paper bearing a roughly-drawn floorplan that witness Hopper used and referred to throughout her testimony. Because it was employed only for illustrative purposes, it did not go back to the jury during deliberations. See 1 CP 31. A reduced copy of the exhibit is attached hereto.

The church office where Ms. Hopper volunteers is by the east lobby and entrance. RP 31-33, 37; Ex. 1. One can see into this church office from the east lobby. RP 33-34. There is a sliding-glass window between the office and the east lobby. There is also a door from the office into an adjacent hallway. RP 32-33, 37-38; Ex. 1. This hallway door is visible from the east lobby too. RP 47. (A second door, from the office to the outside, is kept locked. RP 33, 34; see Ex. 1.)

Ms. Hopper kept her purse on the counter in the office. RP 33. One could see the purse and the counter it sat on from the east lobby. RP 33-34.

By the west lobby and entrance is a conference room and pastors' offices. RP 34-35, Ex. 1. To get from the west lobby to the east lobby requires one's going through the sanctuary. RP 34-36, 38; Ex. 1. The east lobby and church offices are not visible from the sanctuary, at least not when viewing the ark. RP 40.

The defendant Larry Vieau came into the church on March 22, 2012, sometime between 1 and 2 pm. He came in through the east lobby. RP 30-32. Ms. Hopper talked to him through the sliding-glass window. He asked whether the church had a hot meal program, whether it gave out gas vouchers, or whether it ran a food

bank. RTP 30, 38-39, 46. (Ms. Hopper marked where she and the defendant initially were located on Ex. 1 with a "K" and an "L." RP 32; Ex. 1.) The defendant said he needed gas and that his wife was ill. RP 38-39. Ms. Hopper, who by now had come out into the lobby, RP 33, 38, said the only ministry the church had of such nature was a food bank, but that was on a different day. RP 38-40, 46, 54.

Another visitor, Cheryl Lynn Cunningham, who was handing out flyers and mugs for a storage business, came over talked to the defendant as well. RP 39-40, 69-71. She gave him some $13 when he told her his wife was in the hospital. RP 39-40, 70.

Ms. Hopper recalled the defendant noticing that the church building and interior was unusual. She offered to take him on a tour of the sanctuary, and did so. RP 40. The other visitor, Ms. Cunningham, had gone by then. RP 41. Ms. Hopper recalled the defendant was impressed and "excited" by what he saw – including the ark – and said he was going to send his wife in to see it, too. RP 40, 41. He left, and a few moments later his wife Ladonna came in. She came in alone. Ms. Hopper gave her the same tour. RP 41, 43, 59-60. The tour takes about 5 minutes. RP 41. As

noted, one cannot see the lobby and office when in the sanctuary looking at the ark. RP 40.

As she emerged from the sanctuary with the defendant's wife, Ms. Hopper to her surprise saw the defendant back in the church, walking quickly through the east lobby and heading straight outside. He did not say goodbye to Ms. Hopper nor even wait for or acknowledge his wife. It looked to Ms. Hopper like he was coming from the hallway where the office door was: As Ms. Hopper came out of the sanctuary she saw the defendant coming from her right, where the hallway begins, right by a potted tree. He was walking quickly, like he didn't want to be seen. Trial RP 41-43, 51-52, 59-62. Ms. Hopper had not seen the defendant come back in. RP 59. (She marked the location of the potted tree with a "T" on Ex, 1. RP 60; Ex. 1.)

Unfortunately, Ms. Hopper had left the hallway door to the office open. RP 51, 64.

Ms. Hopper chatted with the defendant's wife for a minute or two. The wife then left. RP 43. Ms. Hopper, looking for a pen, noticed her purse, still on the counter, was "more open" than usual. RP 43, 55. She looked inside and realized her wallet and her checkbook were gone. RP 43-45. There were bank cards,

including a debit card, in the wallet. RP 45. She went out to her car to see if they had fallen out onto the passenger-side floorboard, but they had not. RP 44, 55. Meanwhile, she saw the defendant's car driving away. RP 46.

Ms. Hopper called 911 and her bank. She was able to cancel her cards within 20 minutes. RP 46-48. A police officer responded around 2 pm and took her statement. RP 74, 76.

Police encountered the defendant's wife the following day. A search of the car did not yield anything incriminating. RP 75-76.

Once Ms. Cunningham had left, Ms. Hopper had not seen anyone else (other than the defendant and his wife) in or near the east lobby or office. RP 34, 41. Other than dealing with the defendant, his wife, and Ms. Cunningham, she had been in the church office the whole time. RP 44. No one else had been in the office. RP 47. A women's Bible study group had been meeting in the conference room, but that is over by the west lobby. RP 35-36, 47, 52, 53, 67; Ex. 1. And, as noted above, to get from the west lobby to the east lobby, one must go through the central sanctuary. RP 34-36, 38; Ex. 1.

The defense did not bring a motion to dismiss pursuant to State v. Green[2] after the State rested. RP 84-87. For his part, the defendant did not testify. Id. In closing, his counsel argued reasonable doubt: that the defendant was never seen actually coming out of the hallway, nor holding the wallet; that there was no fingerprint or video evidence; that a destitute person seeking assistance in a church was neither suspicious nor unusual; that mere vicinity is not enough; and that others, after all, were in the church too. RP 95-109.

The defendant was charged with second-degree theft, of an access device. 1 CP 63-64. A jury convicted him as charged, 1 CP 30, and he was sentenced within the standard range. 1 CP 15-26. This appeal followed. 1 CP 2-14.

III. ARGUMENT

A. VIEWED IN THE LIGHT MOST FAVORABLE TO THE STATE, DRAWING ALL INFERENCES IN ITS FAVOR, AND DISREGARDING ALL EVIDENCE FAVORING THE DEFENDANT, THERE WAS SUFFICIENT EVIDENCE TO CONVICT THE DEFENDANT OF SECOND-DEGREE THEFT OF AN ACCESS DEVICE.

Under the applicable standard of review, is sufficient

[2] State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980), examining, in light most favorable to the prosecution, whether there is sufficient evidence to send a case to the jury.

evidence to affirm a criminal conviction if any rational trier of fact, viewing the evidence most favorably toward the State, could have found the essential elements of the charged crime were proved beyond a reasonable doubt. State v. Kintz, 169 Wn.2d 537, 551, 238 P.3d 470 (2010); State v. Wentz, 149 Wn.2d 342, 347, 68 P.3d 282 (2003); State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A challenge to the sufficiency of the evidence admits the truth of the States' evidence. Salinas, 119 Wn.2d at 201; State v. McPhee, 156 Wn. App. 44, 62, 230 P.3d 284, review denied, 169 Wn.2d 1028 (2010); State v. Porter, 58 Wn. App. 57, 791 P.2d 905 (1990). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. State v. Hosier, 157 Wn.2d 1, 8, 133 P.3d 936 (2006); Salinas at 201; State v. Soderholm, 68 Wn. App. 363, 373, 842 P.2d 1039 (1993).

In testing the sufficiency of the evidence, the reviewing court does not weigh the persuasiveness of the evidence. Rather, it defers to the trier of fact on issues involving conflicting testimony, credibility of witnesses, and the weight of the evidence. State v. Stewart, 141 Wn. App. 791, 795, 174 P.3d 111 (2007) (citing State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980)); State v.

Hernandez, 85 Wn. App. 672, 675, 935 P.2d 623 (1997). Evidence favoring the defendant is not considered. State v. Randecker, 79 Wn.2d 512, 521, 487 P.2d 1295 (1971) (negative effect of defendant's explanation on State's case not considered), State v. Jackson, 62 Wn. App. 53, 58 n.2, 813 P.2d 156 (1991) (defense evidentiary inference cannot be used to attack sufficiency of evidence to convict).

The rules apply equally to a circumstantial evidence case, for circumstantial evidence is no less reliable than direct evidence. Stewart, 141 Wn. App. at 795; Delmarter, 94 Wn..2d at 638; State v. Zamora, 63 Wn. App. 220, 223, 817 P.2d 880 (1991); see WPIC 5.01. Direct and circumstantial evidence carry the same weight. State v. Varga, 151 Wn.2d 179, 201, 86 P.3d 139 (2004). Circumstantial evidence is sufficient to prove any element of a crime. State v. Garcia, 20 Wn. App. 401, 405, 579 P.2d 1034 (1978) (citing State v. Lewis, 69 Wn.2d 120, 123-24, 417 P.2d 618 (1966)).

Here, Ms. Hopper's purse, sitting on the office counter, was visible from the east lobby. RP 33-34. She had left the office door to the hallway open. RP 51, 64. The open office door was visible from the east lobby too. RP 47. The defendant would have

realized, from the tour, that the office, hallway, and east lobby are not visible when viewing the ark in the sanctuary. See RP 40; Ex. 1. And he would have known that the sanctuary tour took five minutes. See RP 41. Once Ms. Cunningham had left, he would have realized no one else was around the east lobby/office area. See RP 34, 41.

He had told Ms. Cunningham his wife was in the hospital, when actually she was outside in the parking lot. RP 40, 41, 70.

Having taken the tour, he told Ms. Hopper he would go get his wife and have her take the 5-minute tour too. RP 40, 41. He left and his wife came in, alone. RP 43. The jury was free to draw the inference that this was the defendant's plan.

As the tour was concluding, Ms. Hopper saw the defendant now back in the church, not squarely in the east lobby area but actually by a potted tree, right by where the hallway begins and close to the open office-hallway door. RP 41-42, 51-52, 60-63; Ex. 1. The defendant was walking quickly and purposefully toward the exit, as though he didn't want to be seen. Id. Perhaps oddest of all, he did not say goodbye to Ms. Hopper, nor even acknowledge or wait for his own wife. Id. Ms. Hopper discovered her wallet and

checkbook were missing within a minute or two. RP 43, 55. Her purse, still on the counter, was "more open" than it had been. Id.

Viewed in the light most favorable to the State, drawing all reasonable inferences in its favor, and disregarding evidence or inferences favoring the defendant, there was sufficient evidence for a jury to find the defendant stole Ms. Hopper's checkbook and wallet, with her bank cards inside.

The defendant disagrees, citing the lack of additional evidence. BOA 6-8. The jury could have drawn different inferences, more favorable to the defendant, on these facts. But it was also free not to do so. Moreover, the defendant's argument on appeal completely ignores the unique layout of the church. See Ex. 1. Under the requisite deferential standard of review, there was sufficient evidence for a rational fact-finder to find the defendant guilty of second-degree theft.

B. THERE IS NO SCRIVENER'S ERROR ON THE JUDGMENT AND SENTENCE.

Prior to June 7, 2012 (the effective date of an amendment that year) there were three ways of committing second-degree theft: by theft of property of services exceeding $750 but not exceeding $5000, RCW 9A.56.040(1)(a); by theft of a public record,

writing, or instrument filed or deposited or in the keeping of any public office, RCW 9A.56.040(1)(b); or theft of any access device, RCW 9A.56.040(1)(c). Former RCW 9A.56.040. As appellant correctly points out, the statute was amended in 2012, effective June 7, 2012, to add a fourth alternative, theft of metal wire, which it renumbered as RCW 9A.56.040(1)(c). This resulted in recodifying theft of an access device as RCW 9A.56.040(1)(d). LAWS 2012 c. 233 § 3; BOA 9-10. Because he was charged on July 10, 2012, 1 CP 63, appellant then argues that the recodified post-June subsection for access device should be reflected on his judgment and sentence. BOA 9-10. The judgment and sentence reads "RCW 9A.56.040(1)(c)," reflecting the correct citation for a pre-June 2102 crime. 1 CP 15.

Appellant is mistaken. The judgment and sentence is correct as entered and filed. The operative date is when the defendant committed the crime, not when he was charged. The crime here was committed on March 22, 2012. 1 CP 58-64. "A law that imposes punishment for an act that was not punishable when committed or increases the quantum of punishment violates the ex post facto prohibition." In re Pers. Restraint of Hinton, 152 Wn.2d 853, 861, 100 P.3d 801 (2004); accord Carmell v. Texas, 529 U.S.

513, 522, 120 S. Ct. 1620, 146 L. Ed. 2d 577 (2000) (quoting Calder v. Bull, 3 U.S. (Dall.) 386, 390, 1 L. Ed. 648 (1798)). There is no indication the Legislature intended the 2012 amendment to apply retroactively, and one wonders if it constitutionally could have done so if it had wished.

The State could not have prosecuted Mr. Vieau under the 2012 amendments, effective in June, had he, for example, stolen metal wire back in March. Surely appellate counsel would not, in such a case, agree that the operative date was when the State decided to charge Mr. Vieau, rather than when he committed the crime. While only the citation (rather than any substantive language) is at issue here, the same analysis governs. The statutory cite on the judgment and sentence is correct as of the date the crime was committed. There is no scrivener's error. No remand is required.

IV. CONCLUSION

The judgment and sentence should be *affirmed*.

Respectfully submitted on September 4, 2013.

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September 4, 2013

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2013 SEP -6 PM 1:28

Re: STATE v. LARRY D. VIEAU
COURT OF APPEALS NO. 69692-1-I

Dear Mr. Johnson:

The respondent's brief does not contain any counter-assignments of error. Accordingly, the State is withdrawing its cross-appeal.

Sincerely yours,

CHARLES F. BLACKMAN, #19354
Deputy Prosecuting Attorney

cc: Washington Appellate Project
Appellant's attorney

envelope

4th Sept 13

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

THE STATE OF WASHINGTON, Respondent, v. LARRY D. VIEAU, Appellant.	No. 69692-1-I AFFIDAVIT OF MAILING

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AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 4th day of September, 2013, affiant deposited in the mail of the United States of America a properly stamped and addressed envelope directed to:

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1511 THIRD AVENUE, SUITE 701
SEATTLE, WA 98101

containing an original and one copy to the Court of Appeals, and one copy to the attorney for the appellant of the following documents in the above-referenced cause:

BRIEF OF RESPONDENT

I certify under penalty of perjury under the laws of the State of Washington that this is true.

Signed at the Snohomish County Prosecutor's Office this 4th day of September, 2013.

DIANE K. KREMENICH
Legal Assistant/Appeals Unit