89621-6

IN THE SUPREME COURT

STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent

vs.

KAITLYN DAWN VANCE SELIX,

Petitioner.

PETITION FOR REVIEW

Court of Appeals No. 43721-0-II
Appeal from the Superior Court for Thurston County
The Honorable Chris Wickham, Judge
Cause No. 12-1-00220-1

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TABLE OF CONTENTS

Page

A. IDENTITY OF PETITIONER 1

B. COURT OF APPEALS DECISION 1

C. ISSUE PRESENTED FOR REVIEW 1

D. STATEMENT OF THE CASE 1

E. ARGUMENT 2

THERE WAS INSUFFICIENT EVIDENCE TO UPHOLD SELIX'S TWO CONVICTIONS FOR IDENTITY THEFT IN THE SECOND DEGREE WHERE THE STATE FAILED TO PROVE SHE POSSESSED EITHER PATRICIA OR MATTHEW BOWE'S IDENTIFICATION OR FINANCIAL INFORMATION WITH THE INTENT TO COMMIT, OR AID OR ABET, ANY CRIME 2

F. CONCLUSION 6

APPENDIX

TABLE OF AUTHORITIES

Page(s)

Washington Cases

State v. Craven, 67 Wn. App. 921, 841 P.2d 774 (1992) 3

State v. Delmarter, 94 Wn.2d 634, 618 P.2d 99 (1980) 3

State v. Roberts, 142 Wn.2d 471, 14 P.3d 713 (2000) 5

State v. Salinas, 119 Wn.2d 192, 829 P.2d 1068 (1992) 3

State v. Stein, 144 Wn.2d 236, 227 P.3d 184 (2001) 5

State v. Vasquez, No. 87282-1, 2013 WL 3864265 4

Federal Cases

In re Winship, 397 U.S. 358, 390 S. Ct. 1068, 25 L. Ed. 2d 368 (1970) 2

Constitutional Provisions

U.S. Const. Amend. 14 2

Const. art. 1, § 3 2

Statutes

RCW 9.35.020 3

RCW 9A.08.020 5

Rules

RAP 13.4(b)(1), (2), (3), (4) 2

A. IDENTITY OF PETITIONER

Your Petitioner for discretionary review is KAITLYN DAWN VANCE SELIX, the Defendant and Appellant in this case.

B. COURT OF APPEALS DECISION

The Petitioner seeks review of the Ruling Affirming Convictions of the Commissioner of the Court of Appeals, Division II, cause number 43721-0-II, filed September 17, 2013. A timely Motion to Modify Ruling Affirming Convictions was filed thereafter and was denied on November 7, 2013.

A copy of the Ruling Affirming Convictions is attached hereto in the Appendix at A1 through A10. A copy of the Order Denying Motion to Modify is in the Appendix at A11.

C. ISSUE PRESENTED FOR REVIEW

> Whether there was sufficient evidence to uphold Selix's two convictions for identity theft in the second degree where the State failed to prove she possessed either victim's identification or financial information with intent to commit, or aid or abet, any crime?

D. STATEMENT OF THE CASE

On January 31st and October 15th of this year, Selix filed a Brief and a Motion to Modify Ruling Affirming Convictions, alleging the trial court had erred in not taking counts II and III for identity theft in the second degree from the jury for lack of sufficient evidence of her intent to

commit, or aid or abet, any crime. The brief and motion set out facts and law relevant to this petition and are hereby incorporated by reference. Division II disagreed. There are reasons to question this decision.

E. ARGUMENT

It is submitted that the issues raised by this Petition should be addressed by this Court because the decision of the Court of Appeals is in conflict with Supreme Court and Court of Appeals decisions, and raises a significant question under the Constitution of the State of Washington and the Constitution of the United States, as set forth in RAP 13.4(b)(1), (2), (3) and (4).

THERE WAS INSUFFICIENT EVIDENCE TO UPHOLD SELIX'S TWO CONVICTIONS FOR IDENTITY THEFT IN THE SECOND DEGREE WHERE THE STATE FAILED TO PROVE SHE POSSESSED EITHER PATRICIA OR MATTHEW BOWE'S IDENTIFICATION OR FINANCIAL INFORMATION WITH THE INTENT TO COMMIT, OR AID OR ABET, ANY CRIME.[1]

Due Process requires the State to prove beyond a reasonable doubt all necessary facts of the crime charged. U.S. Const. Amend. 14; Const. art. 1, § 3; In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). The test for determining the sufficiency of the evidence is whether, after viewing the evidence in light most favorable

[1] As the argument is the same for each offense, the offenses are addressed collectively herein for the purpose of avoiding needless duplication.

to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. Salinas, at 201; State v. Craven, 67 Wn. App. 921, 928, 841 P.2d 774 (1992). Circumstantial evidence is no less reliable than direct evidence, and criminal intent may be inferred from conduct where "plainly indicated as a matter of logical probability." State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. Salinas, at 201; Craven, at 928.

A person commits second degree identity theft by "knowingly obtain(ing), possess(ing), us(ing), or transfer(ring) a means of identification or financial information of another person, living or dead, with the intent to commit, or aid or abet, any crime." RCW 9.35.020(1).

Though agreeing with Selix that there was insufficient evidence she possessed the identification or financial information with the intent to commit any crime [Ruling 7], the Commissioner upheld her two convictions for identity theft as an accomplice, ruling that she possessed the material with the intent to aid or abet any crime of another. [Ruling 8-9]. "(T)here is sufficient evidence from which a rational trier of fact could conclude beyond

a reasonable doubt that Selix intended to aid Beacon in committing possession of stolen property and identity theft." [Ruling 8].

At trial, the State, with good reason, never argued that Selix was guilty of identity theft as an accomplice by aiding or abetting another. To the contrary, the State's sole theory was that Selix was culpable as a principal:

> Once again does she have the intent to commit a crime? Numerous car prowling occurred. Numerous items were stolen. The defendant herself testified that the golf clubs, which were one of the items, very expensive item, that was stolen, she and, according to her, her friend (Beacon) went around the city throughout the day trying to pawn them at pawn shops (sic). (emphasis added).

[RP 125-26].

The reason for this is simple. Selix was convicted as a principal of three counts of possession of stolen property based on the various items, including the golf clubs, recovered from her vehicle. Given, as the Commissioner ruled, citing State v. Vasquez, No. 87282-1, 2013 WL 3864265, there was insufficient evidence to infer Selix's intent to commit any crime for purposes of the identity theft charges based on the circumstances, it is difficult to understand how it can alternatively be accepted that she acted with knowledge or intent to aid another in committing the same offenses under the same circumstances. This is a circle.

As correctly indicated by the Commissioner, accomplice liability attaches under the provisions or RCW 9A.08.020(3)(a), (a)(ii) [Ruling 7], which provides:

> (3) A person is an accomplice of another person in the commission of a crime if:
> (a) With knowledge that it will promote or facilitate the commission of the crime, he or she:
> (i) solicits, commands, encourages, or requests such other person to commit it; or
> (ii) aids or agrees to aid such other person in planning or committing it. . . .

RCW 9A.08.020 (emphasis added). WPIC 10.51—Accomplice Definition—was neither requested nor given in this case. [RP 63-64; CP 21-47]

An accomplice is not subject to strict liability for any crime committed by the principal. State v. Roberts, 142 Wn.2d 471, 513, 14 P.3d 713 (2000). RCW 9A.08.020 requires knowledge of the specific crime charged and not just any foreseeable crime committed as the result of the complicity. State v. Stein, 144 Wn.2d 236, 246, 27 P.3d 184 (2001).

This record does not support the Commissioner's ruling that the jury found Selix guilty of the two counts of identity theft because she knowingly promoted or facilitated another in committing identity theft (Bowes' debit and credit cards) or possession of stolen property (golf clubs).

F. CONCLUSION

This court should accept review for the reasons indicated in Part E and reverse and dismiss Selix's two convictions for identification theft in the second degree.

DATED this 2nd day of December 2013.

Thomas E. Doyle

THOMAS E. DOYLE
WSBA NO. 10634

CERTIFICATE

I certify that I served a copy of the above petition on this date as follows:

Carol La Verne
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Kaitlyn Dawn Vance Selix
4920 A Mount Tahoma Drive S.E.
Lacy, WA 98503

DATED this 2nd day of December 2013.

Thomas E. Doyle

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APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

THE STATE OF WASHINGTON,

Respondent,

v.

KAITLYN DAWN VANCE SELIX,

Appellant.

No. 43721-0-II

RULING AFFIRMING CONVICTIONS

Kaitlyn Dawn Vance Selix appeals her two convictions for second degree identity theft. She argues that the State did not present sufficient evidence at trial to prove beyond a reasonable doubt that she intended to commit or to aid or abet any crime using the financial information in her possession. This court considers this matter as a motion on the merits pursuant to RAP 18.14(a) and (e)(1),[1] and affirms the convictions.

FACTS AND PROCEDURAL HISTORY

On February 20, 2012, Lacey Police Department Officer Mark William Eley initiated a traffic stop of a vehicle driven by Selix in Lacey, Washington. Two others,

[1] This court may, on its own motion, affirm or reverse the decision of a lower court on the merits. RAP 18.14(a). A motion on the merits to affirm will be granted if "the appeal . . . is determined to be clearly without merit." RAP 18.14(e)(1). In determining whether an appeal is "clearly without merit," we consider whether the issues for review "(a) are clearly controlled by settled law, (b) are factual and supported by the evidence, or (c) are matters of judicial discretion and the decision was clearly within the discretion of the trial court or administrative agency." RAP 18.14(e)(1).

later identified as Joshua Beacon and Lance Palmer, were also in the car with Selix. In the back seat of the car, Officer Eley noticed a set of custom-made golf clubs that he thought matched a set that had been reported stolen the night before. He returned to his patrol car and contacted Michael Henslee, the owner of the stolen golf clubs, to ask him to come to the scene to identify the clubs. Henslee identified the clubs as his.

Once Henslee had identified his golf clubs, Selix gave Officer Eley permission to do a more thorough search of her vehicle. A complete search of the vehicle revealed that it contained many other items that had been reported stolen including a car GPS unit, a Coach purse, a men's wallet, a checkbook belonging to Patricia and Matthew Bowe, a driver's license belonging to Matthew Bowe, a Chase debit card belonging to Patricia Bowe, iPods, and several other items. Selix told Officer Eley that a man named Keiwan left the clubs in her car before she started driving it that day. At trial, however, she admitted that Beacon was, in fact, the one who had put all of the stolen items, including Henslee's golf clubs, into her car when Selix picked him up. The other items that Officer Eley found belonged to the Bowes, Henslee, and Jerri McCoy.

Lacey Police Department Officer Carolyn Miller took Selix to Thurston County Jail for booking. As part of the standard booking procedures, Officer Miller patted Selix down to look for weapons and to remove any property from her person. During the pat down, Officer Miller discovered some "debit cards and miscellaneous [credit] cards" that were caught between Selix's leg and the elastic of her sweat pants. Report of Proceedings (RP) Jul. 17, 2012 at 40. The collection of cards belonged to the Bowes. Selix testified that when Officer Eley pulled her over Beacon handed her the stack of cards. She quickly put them into the waistband of her pants because she "didn't really

have time to process it all at the time." RP Jul. 18, 2012 at 80. Selix testified that she did not know what kind of cards they were when she accepted them from Beacon and that, because she trusted him, she did not suspect that the cards were stolen.

After a two-day trial, on July 18, 2012, a jury convicted Selix on three counts of second degree possession of stolen property and two counts of second degree identity theft. Selix timely appeals her convictions on both counts of second degree identity theft.

ANALYSIS

Selix claims that there was insufficient evidence to support her identity theft convictions. She argues specifically that the State did not prove that she possessed financial or identification information with the intent to commit or the intent to aid or abet any crime.

If, when viewing the evidence in the light most favorable to the State, any rational trier of fact could find the essential elements of a crime beyond a reasonable doubt, sufficient evidence exists to sustain the conviction. *State v. Hosier*, 157 Wn.2d 1, 8, 133 P.3d 936 (2006). A defendant who claims insufficiency of the evidence admits the truth of the State's evidence and all inferences that can reasonably be drawn from it. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). The reviewing court defers to the trier of fact on issues of conflicting testimony, witness credibility, and the persuasiveness of the evidence. *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004).

To convict Selix for second degree identity theft under RCW 9.35.020(1), (3), the State had to prove beyond a reasonable doubt that she knowingly possessed "a means of identification or financial information of another person, living or dead, with the intent to commit, or to aid or abet, any crime." The jury may infer Selix's specific criminal intent "from [her] conduct where it is plainly indicated as a matter of logical probability." *Delmarter*, 94 Wn.2d at 638.

Knowingly Possessed Financial Information

Selix does not dispute on appeal that she knowingly possessed a "means of identification or financial information of another person" and the facts are sufficient to support this finding. Br. of Appellant at 4-5 (quoting RCW 9.35.020(1)). During booking, Officer Miller found "a stack" of "debit cards and miscellaneous cards" in Selix's pant leg. RP Jul. 17, 2012 at 41, 40. The stack consisted of:

> a Capital One Mastercard belonging to Patricia Bowe[,] . . . a USAA card belonging to Patricia Bowe[,] . . . another USAA card belonging to Matthew Bowe, a Capital One credit card belonging to Patricia Bowe, and a City Card belonging to Matthew Bowe . . . a Lowe's credit card and a platinum Mastercard belonging to Matthew Bowe.

RP at Jul. 17, 2012 35-36. These cards were in the leg of Selix's pants at least from the time that Officer Eley pulled her over until booking. Based on this information, a rational trier of fact could conclude beyond a reasonable doubt that she knowingly possessed another person's identification or financial information.

Intent to Commit, or to Aid or Abet, Any Crime

Selix's appeal centers on the issue whether the State provided sufficient evidence from which any rational trier of fact could conclude that Selix possessed the Bowes' debit and credit cards "with the intent to commit, or to aid or abet, any crime."

RCW 9.35.020(1); *see also Hosier*, 157 Wn.2d at 8. Selix argues that the State simply did not present any evidence at trial to demonstrate that she intended to use the cards to commit any crime or to aid or abet others in committing any crime. In response, however, the State argues that, by possessing the cards, Selix was aiding or abetting Beacon's crime of second degree possession of stolen property and identity theft.[2] And her possession of the debit and credit cards helped Beacon avoid those charges. The State also argued that the jury could reasonably infer that Selix knew the golf clubs, purse, and GPS did not belong to Beacon and that driving him around to pawn these items was aiding or abetting identity theft.

RCW 9.35.020(1) envisions both principal and accomplice liability for those who possess the financial or identity information of another. In other words, Selix may be guilty of identity theft if she possessed the Bowes' debit and credit cards with intent to commit any crime herself or if she possessed the cards with intent to aid or abet any crime of another.

Liability as a Principal

Here, the State contends that it presented sufficient evidence that Selix possessed the Bowes' credit and debit cards with intent to commit "identity theft herself." Br. of Resp't at 3. There is, however, insufficient evidence to convict Selix as a principal in this case.

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[2] RCW 9A.56.160(1)(c) provides: "A person is guilty of possessing stolen property in the second degree if: . . . (c) He or she possesses a stolen access device." An "[a]ccess device" is "any card, plate, code, account number, or other means of account access that can be used . . . to obtain money, goods, services, or anything else of value." RCW 9A.56.010(1).

In *State v. Vasquez*, our Supreme Court addressed the level of proof required to demonstrate that a defendant had the "intent to injure or defraud," an element of the crime of forgery. *State v. Vasquez*, No. 87282-1, 2013 WL 3864265, at *3 (Wash. July 25, 2013) (quoting RCW 9A.60.020(1)(b)). It held that "patently equivocal evidence cannot give rise to an inference of an intent to injure or defraud." *Vasquez*, 2013 WL 3864265, at *7.

In *Vasquez*, a retail loss prevention officer (LPO) pulled a forged social security card and permanent resident card from the defendant's wallet. 2013 WL 3864265, at *6. Testimony was unclear as to whether the defendant claimed that the cards established his (false) identity or if the defendant was simply claiming possession of the cards. *Vasquez*, 2013 WL 3864265, at *7-8. A unanimous *Vasquez* court held that the jury may not make an inference of intent from such equivocal evidence. 2013 WL 3864265, at *6.

In this case, the State presents primarily equivocal evidence to support that Selix possessed the Bowes' debit and credit cards with intent to commit any crime. The limited unequivocal evidence establishes that Selix was not in possession of the Bowes' debit and credit cards until just after Officer Eley pulled her over when Beacon handed them to her. She accepted the stack of cards from Beacon without knowing or asking what they were. She put the stack of cards in the waistband of her pants, where they sat until booking.

The State offered no alternate theory for Selix's actions and simply asked the jury to infer from her behavior that she had the requisite intent. In its brief, the State cites Division Three's now-reversed opinion in *Vasquez* and asks "Why else would Selix have

[the cards]?" Br. of Resp't at 8 (citing *State v. Vasquez*, 166 Wn. App. 50, 53, 269 P.3d 370 (2012) ("And here why else would Mr. Vasquez have them"), *reversed* 2013 WL 3864265. While possession under unusual and poorly-explained circumstances may support an inference of knowledge,[3] *State v. Ladely*, 82 Wn.2d 172, 175, 509 P.2d 658 (1973), it does not support an inference of intent to commit any additional crime.

The clear holding of the *Vasquez* court is that "unexplained possession . . . is not circumstantial evidence that supports an inference of such intent." 2013 WL 3864265, at *7. In this case, where the unequivocal evidence establishes only that she was in possession of the cards moments before her conversation with Officer Eley, and the equivocal evidence establishes nothing more than potentially strange circumstances, the State has not carried its burden to prove beyond a reasonable doubt that any rational trier of fact could infer Selix's intent to commit any crime as a principal.

Accomplice Liability

Whether the evidence in this case establishes that Selix possessed the debit and credit cards with an intent to act as an accomplice in aiding or abetting Beacon's crimes is the remaining question. Accomplice liability attaches when "[w]ith knowledge that it will promote or facilitate the commission of a crime," a person "[a]ids . . . such other person in planning or committing" the crime. RCW 9A.08.020(3)(a), (a)(ii). Division Three of this court has defined "[a]id" as "all assistance whether given by words, acts, encouragement or support." *State v. Ferreira*, 69 Wn. App. 465, 471, 850 P.2d 541 (1993). The State argues that even if Beacon was the one who brought the stack of

[3] Again, this court notes that Selix is not challenging that she knowingly possessed the cards.

cards into the car, the evidence (and reasonable inferences therefrom) is sufficient to demonstrate Selix's intent to aid or abet "second degree possession of stolen property, access devices." Br. of Resp't at 3. Selix does not directly address the accomplice liability question in her brief apart from her general argument that the State failed to present any evidence of intent. This court is convinced that the State is correct that there is sufficient evidence from which a rational trier of fact could conclude beyond a reasonable doubt that Selix intended to aid Beacon in committing possession of stolen property and identity theft.

Here, the State presented direct evidence that: (1) Selix possessed the Bowes' identification and financial information; (2) Selix put the stack of cards into the waistband of her pants; (3) the stack of credit and debit cards was not discovered until later when Selix was booked at the County Jail; (4) Selix lied to Officer Eley about how the golf clubs got into her car; (5) Selix spent the day driving around with Beacon helping him pawn items in her car; (6) it was their intent to pawn the stolen golf clubs; and (7) she provided implausible explanations about why she possessed the Bowes' information and why the stolen property was in her car. *See Ladely*, 82 Wn.2d at 175. Additionally, Selix testified that she thought the Coach purse belonged to Beacon and that the mess in her car made it difficult to determine which items were hers and which were Beacon's. She also testified that because she trusted Beacon she did not think that there was any reason why she should not accept the stack of cards from him and that it was not strange for him to bring so many items into her car.

A jury could reasonably infer from this evidence that Selix put the stack of credit and debit cards into the waistband of her pants in order to conceal them from Officers

Eley and Miller. That Selix hid the stack of cards at Beacon's suggestion, separating the cards from the rest of the stolen property in her car, indicates a particular desire to help him by preventing their discovery. Had Selix been successful in concealing the cards, she either would have returned them to Beacon or continued carrying them as they drove around to pawn shops. Beacon could then have used the cards to commit identity theft by purchasing things with them or, as the record indicates was the goal, pawning Henslee's stolen golf clubs. She provided further aid to Beacon when she lied to Officer Eley about who put the clubs in her car, indicating her desire to help and protect Beacon.

As an essential element of Counts IV and V of the First Amended Information, the jury already found that Selix knowingly possessed the Bowes' stolen debit and credit cards and, here, Selix has not challenged that finding. From that finding and the above facts, the jury could reasonably infer that, by accepting and concealing the stack of cards in her pants, she knowingly promoted or facilitated Beacon in committing identity theft and possession of stolen property (the golf clubs as well as the Bowes' debit and credit cards).

Selix provided both words and acts to aid Beacon in possessing stolen property and committing identity theft. Although under the recent *Vasquez* decision, the State did not offer sufficient evidence to establish that Selix intended to commit the crime of identity theft as a principal, a jury could reasonably infer from the record that Selix knowingly possessed the Bowes' debit and credit cards with an intent to aid Beacon to commit any crime. Accordingly, it is hereby

ORDERED that the motion on the merits to affirm is granted and the convictions for second degree identity theft are affirmed.

DATED this 17th day of September, 2013.

Aurora R. Bearse
Court Commissioner

cc: Thomas Doyle
Carol La Verne
Hon. Christopher Wickham

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,
Respondent,

v.

KAITLYN SELIX,
Appellant.

No. 43721-0-II

ORDER DENYING MOTION TO MODIFY

APPELLANT filed a motion to modify a Commissioner's ruling dated September 17, 2013, in the above-entitled matter. Following consideration, the court denies the motion. Accordingly, it is

SO ORDERED.

DATED this 7th day of November, 2013.

PANEL: Jj. Johanson, Hunt, Penoyar

FOR THE COURT:

Johanson, A.C.J.
ACTING CHIEF JUDGE

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