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COURT OF APPEALS NO. 71238-1-I

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

STATE OF WASHINGTON,

Respondent,

V.

ZACHARY LARSON,

Appellant.

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

The Honorable Charles R. Snyder, Judge

OPENING BRIEF OF APPELLANT

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RULES, STATUTES AND OTHERS

A. ASSIGNMENT OF ERROR

The evidence was insufficient to convict appellant of theft with extenuating circumstances.

Issue Pertaining to Assignment of Error

The applicable statute required the state to prove appellant: (1) committed theft; and at the time, (2) was in 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) (emphasis added). Where there was no dispute appellant used an ordinary wire cutter to remove the security device from the shoes he allegedly stole, did the state fail to prove he was in possession of a device designed to overcome security systems?

B. STATEMENT OF THE CASE

On May 23, 2013, the Whatcom county prosecutor charged appellant Zachary Larson with retail theft with extenuating circumstances, allegedly committed on May 17, 2013. CP 2-3, 6-7. An individual is guilty of retail theft with extenuating circumstances if the individual commits theft of property from a mercantile establishment and at the time of the theft, is in 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) (emphasis added).

The affidavit for determination of probable cause alleged that Larson and his girlfriend, co-defendant Meichielle Smith-Beardon, stole a pair of Nike shoes from Marshall's department store. CP 4-5. Larson reportedly used a wire cutter to remove the security device from the shoes. CP 4.

On November 13, 2013, Larson filed a motion to dismiss for failure to establish a prima facie case, pursuant to State v. Knapstad, 107 Wn.2d 346, 729 P.2d 48 (1986). CP 8-44. Larson argued a "wire cutter" is not a "device designed to overcome security systems." CP 10 (emphasis added). As defense counsel reasoned, "a brick can be used to drive a nail into wood, and a book can prop open a door, but neither was designed for those purposes." CP 10.

In response, the state agreed there was no material factual dispute. However, the state argued the statute encompassed not only items made specifically for overcoming security devices, but ordinary items used or intended to be used for such a purpose, as well. Supp. CP __ (sub. no. 30, Memorandum in Opposition to Motion to Dismiss, 11/15/13).

In reply, Larson argued that if the Legislature had intended to include items used or intended to be used for such a purpose, despite their design, it could have done so, as it did in its definition of "burglar tools" or "drug paraphernalia." CP 46; RCW 9A.52.060;[1] RCW 69.50.102.[2]

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[1] RCW 9A.52.060 prohibits the manufacture or possession of burglary tools:

> (1) Every person who shall make or mend or cause to be made or mended, or have in his possession, any engine, machine, tool, false key, pick lock, bit, nippers, or implement adapted, designed, or commonly used for the commission of burglary under circumstances evincing an intent to use or employ, or allow the same to be used or employed in the commission of a burglary, or knowing that the same is intended to be so used, shall be guilty of making or having burglar tools.

Emphasis added.

[2] RCW 69.50.102 prohibits the use of drug paraphernalia:

> a) As used in this chapter, "drug paraphernalia" means all equipment, products, and materials of any kind which are used, intended for use, or designed for use in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance."

Emphasis added.

A hearing on the motion to dismiss was held November 18, 2013. The court noted that each side had presented a different definition, and that "one or the other of those could apply."[3] RP 7. The court therefore looked to what it presumed the Legislature intended and adopted the interpretation put forth by the state:

> So it really comes down, I think, to looking at it in the context of what does the statute intend, and I think the statute is intended to prohibit theft of items from stores which are, the theft of which is accomplished by the use of a device to overcome the store's security. That's the whole difference between just a shoplift and a theft, or a shoplift and a theft under the unfortunate language of the statute, extenuating circumstances. The difference isn't the theft. It isn't the value of the item. It isn't anything other than how do you overcome the security mechanisms unless you're talking about the other prong of the statute so many thefts over a certain period of time, but that's not relevant here. So in this instance, that's all we're talking about.
>
> And in that situation, it seems to me that a strict reading as being put forth here by Defendant would essentially undo the whole intent of the statute, and so when I look at the language that you both cited to me, the statute should be construed to effect their

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[3] As the defense articulated:

> The Merriam-Webster Dictionary defines "designed" as something "plan[ned] or mad[de] for a specific use or purpose." The Oxford English Dictionary defines "designed as something done or planned "with a specific purpose or intention in mind."

CP 10.

As the state posited, however, "[T]he dictionary definition of designed is, 'done, performed, or made with purpose and intent ....' Webster's Third New International Dictionary, 612." Supp. CP __ (sub. no. 30, Memorandum in Opposition to Motion to Dismiss, 11/15/13)

> purpose and unlikely, absurd or strained consequences should be avoided. The purpose of the statute is to make it clear that there's an enhanced level of offense for a theft that occurs when a person uses something to override or disable the security system that the store has built into it.

RP 7-8 (emphasis added).

Whether the wire cutters were conceived and manufactured for the purpose of overriding security systems did not matter, according to the court. RP 8. The court therefore denied the motion to dismiss. RP 9.

Larson thereafter waived his right to a bench trial and agreed to the admissibility and accuracy of the police reports in order to decide his guilt or innocence. CP 51-53. The court found Larson guilty, reasoning again that wire cutters qualify as an implement or device designed to overcome security systems. CP 85-87; RP 17-18. The court imposed a sentence of 60 days of confinement. CP 56-64. This appeal follows. CP 70-84.

C. ARGUMENT

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. Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); see also 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 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.

The relevant question is whether an ordinary wire cutter meets this definition. The plain language of the statute indicates it does not.

This Court reviews questions of statutory interpretation de novo. In re Det. of Williams, 147 Wash.2d 476, 486, 55 P.3d 597

(2002). When interpreting a statute, "the court's objective is to determine the legislature's intent." State v. Jacobs, 154 Wash.2d 596, 600, 115 P.3d 281 (2005). The surest indication of legislative intent is the language enacted by the legislature, so if the meaning of a statute is plain on its face, the Court must "'give effect to that plain meaning.'" Id. (quoting Dep't of Ecology v. Campbell & Gwinn, LLC, 146 Wash.2d 1, 9, 43 P.3d 4 (2002)).

In determining the plain meaning of a provision, courts look to the text of the statutory provision in question, as well as "the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole." Id. An undefined term is "given its plain and ordinary meaning unless a contrary legislative intent is indicated." Ravenscroft v. Wash. Water Power Co., 136 Wash.2d 911, 920–21, 969 P.2d 75 (1998).

If, after this inquiry, the statute is susceptible to more than one reasonable interpretation, it is ambiguous and the Court "may resort to statutory construction, legislative history, and relevant case law for assistance in discerning legislative intent." Christensen v. Ellsworth, 162 Wash.2d 365, 373, 173 P.3d 228 (2007).

There is no statutory definition for "designed." Accordingly, it is given its plain and ordinary meaning. As defense counsel articulated:

> The Merriam-Webster Dictionary defines "designed" as something "plan[ned] or mad[de] for a specific use or purpose."[4] The Oxford English Dictionary defines "designed" as something done or planned "with a specific purpose or intention in mind."[5]

CP 10.

Similarly, Webster's dictionary defines "design" in a number of ways, including as both a verb and a noun, but these variants on the definition all share the quality that the design itself, or the thing designed, is something planned, intended, purposeful, deliberate, or even "schemed" towards some specific end or outcome. Com. V. Zortman, 611 Pa. 22, 23 A.3d 519 (Pa., 2011). 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). The Random House Unabridged Dictionary defines "designed" as "made or done

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[4] http://www.merriam-webster.com/dictionary/design

[5] http://www.oxforddictionaries.com/us/definition/american_english/design?q=designed#design__12

intentionally; intended, planned." Random House Unabridged Dictionary 539 (2d ed. 1993).

As defense counsel argued below, the statute – by its plain language – prohibits possession of only those items which were designed to thwart store security systems. But as defense counsel also pointed out, wire cutters have been in existence far longer than store security systems, and were designed to cut wire, not to remove tags from clothing items. A tag remover was designed for that purpose, and its possession by a shoplifter is stated specifically in the statute as a means of committing the felony offense. CP 10.

As the state will point out, it presented a different definition of "designed" as meaning: "done, performed, or made with purpose and intent." Supp. CP __ (sub. no. 30, Memorandum in Opposition of Motion to Dismiss, 11/15/13) (citing Webster's Third New International Dictionary, 612). As the state argued, "'Made' is just one possible definition, but not any more important that 'performed' or 'done.'" Id.

But when "performed" or "done" are inserted into the statute in place of "designed," the statute ceases to make sense. A person does not possess an item, article or device "performed" or "done" to

overcome security systems. Rather, a person possesses an item "made" to overcome security systems.

Moreover, at best, the state's definition merely goes to show an ambiguity at best. As the court below noted, "as you both cited me definitions of designed, one or the other of those could apply." RP 7. That the statute is susceptible to more than one reasonable meaning is also supported by case law interpreting the word "designed." See e.g. Olson v. Farrar, 338 Wis.2d 215, 809 N.W.2d 1 (2012).

There, a question of insurance coverage boiled down to whether the tractor involved in an accident was "designed for use on public roads" and therefore qualified as a "motor vehicle" in the insurance contract. Olson, 809 N.W.2d at 10. Relying on the American Heritage and Random House Dictionary Definitions, the court concluded the definition of "motor vehicle" was ambiguous:

> We conclude that the definition of "motor vehicle" is susceptible to more than one reasonable meaning. The phrase "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. By contrast, the phrase "designed for use" could refer more narrowly to the particular purpose for which the vehicle is contrived. The particular purpose for which a farm tractor is contrived is use on a farm, not a public road.

Olson, 809 N.W.2d at 12-13 (footnote omitted).

In finding no ambiguity, the court below looked at the "whole intent of the statute," which the court concluded was to provide a higher penalty for shoplifting when a device is used to overcome store security systems. RP 7-9. The problem with the court's reasoning is three-fold.

First, whether the court's conclusion as to the Legislature's intent may appear reasonable, the enacting bill does not have a statement of intent. CP 29-44. House Bill 2704 and the Bill Analysis for that legislation simply repeat the words of the statute without any explanation of the legislation intent behind the law.

Second, the legislature has demonstrated repeatedly that it knows how to prohibit not only the possession of tools designed to commit a crime, but also tools commonly used in the commission of a crime. For instance, RCW 69.50.102 prohibits the use of drug paraphernalia:

> a) As used in this chapter, "drug paraphernalia" means all equipment, products, and materials of any kind which are used, intended for use, or designed for use in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling, or otherwise

introducing into the human body a controlled substance."

Emphasis added.

Similarly, RCW 9A.52.060 prohibits the manufacture or possession of burglary tools:

> (1) Every person who shall make or mend or cause to be made or mended, or have in his possession, any engine, machine, tool, false key, pick lock, bit, nippers, or implement adapted, designed, or commonly used for the commission of burglary under circumstances evincing an intent to use or employ, or allow the same to be used or employed in the commission of a burglary, or knowing that the same is intended to be so used, shall be guilty of making or having burglar tools.

Emphasis added.

RCW 9A.56.063 prohibits the manufacture or possession of motor vehicle theft tools:

> (1) Any person who makes or mends, or causes to be made or mended, uses, or has in his or her possession any motor vehicle theft tool, that is adapted, designed, or commonly used for the commission of motor vehicle related theft, under circumstances evincing an intent to use or employ, or allow the same to be used or employed, in the commission of motor vehicle theft, or knowing that the same is intended to be so used, is guilty of making or having motor vehicle theft tools.
>
> (2) For the purpose of this section, motor vehicle theft tool includes, but is not limited to, the following: Slim jim, false master key, master purpose key, altered or shaved key, trial or jiggler key, slide hammer, lock

> puller, picklock, bit, nipper, any other implement shown by facts and circumstances that is intended to be used in the commission of a motor vehicle related theft, or knowing that the same is intended to be so used.

Emphasis added.

RCW 46.04.500 defines "roadway:"

> "Roadway" means that portion of a highway improved, designed, or ordinarily used for vehicular travel, exclusive of the sidewalk or shoulder even though such sidewalk or shoulder is used by persons riding bicycles. In the event a highway includes two or more separated roadways, the term "roadway" shall refer to any such roadway separately but shall not refer to all such roadways collectively.

Emphasis added.

It is therefore clear that by "designed" the legislature intended something different than "used" or "intended to be used." See e.g. In re Pers. Restraint of Dalluge, 162 Wash.2d 814, 820, 177 P.3d 675 (2008) ("When the legislature uses different words in the same statute, we presume the legislature intends those words to have different meanings."). While the above referenced statutes are not within the same statutory scheme as retail theft with extenuating circumstances, they are analogous and provide strong evidence the legislature knows how to outlaw the use of tools commonly used in the commission of a crime, regardless of design.

The third problem with the court's holding below was that it wrongly concluded Larson's statutory interpretation would lead to absurd results. RP 7. On the contrary, as defense counsel pointed out, the state and court's interpretation lead to strained or absurd results:

> For example, any shoplifter whose purse contained a metallic nail file would be subject to prosecution under this statute, since the nail file could be used to remove a tag; any shoplifter who puts stolen merchandise into his opaque pocket would also be subject to prosecution, since the concealment of merchandise in this way is akin to concealment in a lined bag.

CP 13.

In short, the court's interpretation is not supported by the plain language of the statute. This Court does not subject an unambiguous statute to statutory construction and has "declined to add language to an unambiguous statute even if it believes the Legislature intended something else but did not adequately express it." Kilian v. Atkinson, 147 Wn.2d 16, 20, 50 P.3d 638 (2002). That is essentially what the court did here by adding or substituting "used" for "designed."

Regardless, Larson's interpretation is just as reasonable as the court's, as evidenced by the statutes set forth above and case

law interpreting the word "designed." As such, the rule of lenity requires the statute to be interpreted in favor of Larson. State v. Coucil, 170 Wash.2d 704, 706–07, 245 P.3d 222 (2010). Because Larson was in possession of a wire cutter – which is not an article or device designed to overcome security systems, such as a lined bag or tag removers – his felony conviction for retail theft with extenuating circumstances must be reversed.

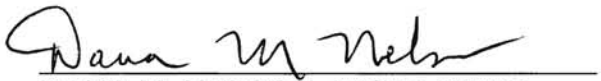
D. CONCLUSION

Because the state failed to prove Larson possessed a device *designed* to overcome security systems at the time of the offense, his conviction should be reversed.

Dated this 30th day of May, 2014

Respectfully submitted

NIELSEN, BROMAN & KOCH



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

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 71238-1-I
	)	
ZACHARY LARSON,	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 30TH DAY OF MAY 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL AND/OR VIA EMAIL.

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SIGNED IN SEATTLE WASHINGTON, THIS 30TH DAY OF MAY 2014.

X Patrick Mayovsky