d-1 nani]
hearing: July 19, 2006
date: July 24, 2006

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 24441-5-III**
	)	
Respondent,	)	
	)	
v.	)	**Division Three**
	)	
JANET KATHERINE BOYLES,	)	
	)	
Appellant.	)	**UNPUBLISHED OPINION**

KATO, J.—Janet Katherine Boyles appeals her conviction of one count of second degree theft. She contends the court erred by refusing to give her proposed necessity instruction, she was denied effective assistance of counsel, and the evidence was insufficient to support her conviction. We affirm.

On December 8, 2004, Ms. Boyles was leaving Colville when she saw two small dogs running down the center of the road. She slowed down and drove past them. Ms. Boyles then turned around and stopped her car in the middle of the road. One of the dogs continued running. Ms. Boyled approached the other.

The dog was wet and had burrs in her muzzle. She put the dog in her car and drove toward two driveways off the roadside.

When Ms. Boyles arrived at the first driveway, she tried to drive up but was unable to because of compacted snow and ice. She then got out of the car and attempted to walk up the driveway, but was unsuccessful. Ms. Boyles left and returned later that night to look for "missing dog" posters. Report of Proceedings (RP) at 146. Not seeing any posters, she took the dog with her to Spokane.

The next day, Ms. Boyles returned to the Colville area to look for postings about a missing dog. She then called a local radio station and reported finding a black Scottish Terrier. Ms. Boyles left her number with the radio station and drove back to her home in Kennewick. On December 13, she received a call from Shanlee Johnson, who told Ms. Boyles she had her dog. Ms. Boyles told Ms. Johnson she would be in Colville the next day and they could make arrangements for her to pick up the dog. Ms. Boyles, however, did not return to Colville. Ms. Johnson then called the police to report the theft of her dog.

After speaking with Ms. Johnson, Deputy Chris Wanzenried contacted Ms. Boyles, who told him she had found a black Scottish Terrier. The deputy asked her if she was going to return the dog to Ms. Johnson. Ms. Boyles said she did

not think she had to return the dog because of its condition. She told him the dog was wet, muddy, and in bad shape. Ms. Boyles believed Ms. Johnson was running a "puppy mill." RP at 59. She also told the deputy that "possession is 9/10ths of the law" and "finders/keepers, losers/weepers." RP at 59-60. She said Deputy Wanzenried could not prove she had the dog. When he reminded Ms. Boyles she had already told both him and the radio station she had the dog, she asked the deputy what would happen if she no longer had the dog. After speaking with the deputy for 20 to 30 minutes, Ms. Boyles eventually agreed to return the dog to Ms. Johnson at noon on December 16.

At 11:00 a.m. on December 16, Ms. Boyles called Deputy Wanzenried and told him she no longer had the dog. She had stopped at a park to let the dog use the restroom, but the dog ran away. Ms. Boyles could not provide the name of the park or its location. She thought the park was somewhere in Spokane Valley, but she was not sure.

Ms. Boyles was charged with one count of second degree theft. The case proceeded to jury trial. Ms. Boyles proposed a necessity instruction prior to her testimony. The court rejected the instruction. The jury convicted Ms. Boyles as charged. This appeal follows.

Ms. Boyles contends the court erred when it refused to give her proposed necessity instruction. A necessity defense is available only when circumstances caused the accused to take unlawful action to avoid a greater injury. *State v. Jeffrey*, 77 Wn. App. 222, 224, 889 P.2d 956 (1995). The defense is not available if a reasonable, legal alternative to violating the law existed. *Id*. at 225.

To obtain a necessity instruction, "the defendant must prove by a preponderance of the evidence that (1) he or she reasonably believed the commission of the crime was necessary to avoid or minimize a harm, (2) the harm sought to be avoided was greater than the harm resulting from a violation of the law, and (3) no legal alternative existed." *State v. Gallegos*, 73 Wn. App. 644, 651, 871 P.2d 621 (1994).

Ms. Boyles argues that taking the dog was necessary to avoid the harm of it being run over and killed. But she had a reasonable, legal alternative to taking the dog. She could have taken the dog to a local animal shelter; she did not. Because a legal alternative to violating the law existed, Ms. Boyles was not entitled to assert a necessity defense at trial. The court properly refused to give her proposed necessity instruction.

Ms. Boyles next contends she received ineffective assistance of counsel,

who failed to raise a "good faith claim of title" defense. Appellant's Br. at 1. To establish ineffective assistance of counsel, a defendant must show her attorney's performance was deficient and she was prejudiced by the deficiency. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). The first prong is met by showing defense counsel's performance was not reasonably effective under prevailing professional norms. The second prong is met by showing that, but for counsel's errors, the result would have been different. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). If either prong of the test is not satisfied, the inquiry ends. *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

Ms. Boyles argues she would not have been convicted if counsel had proposed an instruction for a "good faith claim of title" to the property. She is entitled to jury instructions that allow her to argue her theory of the case, as long as the instructions do not mislead the jury and properly state the applicable law. *State v. Tili*, 139 Wn.2d 107, 126, 985 P.2d 365 (1999). An instruction on a "good faith claim of title" is appropriate in some cases involving various degrees of theft, public assistance fraud and taking a motor vehicle without permission. 11

Washington Pattern Jury Instructions: Criminal 19.08, at 252 (2d ed. 1994).

"In any prosecution for theft, it shall be a sufficient defense that: The property or service was appropriated openly and avowedly under a claim of title made in good faith, even though the claim be untenable." RCW 9A.56.020(2)(a). Behind the good faith claim of title defense is the theory that a defendant who in good faith believed she had a claim of title lacked the requisite intent to steal. *State v. Hicks*, 102 Wn.2d 182, 187, 683 P.2d 186 (1984).

But in light of the evidence here, Ms. Boyles fails to show that asserting this defense likely would have changed the outcome. She knew the dog belonged to someone else. She testified she looked for missing dog postings. Ms. Boyles called a radio station and reported finding a lost dog. She also told Deputy Wanzenried she found a black Scottish Terrier. Ms. Boyles has not shown a "good faith claim of title" defense was even supportable by the evidence or she would not have been convicted if counsel had raised the defense. She received effective assistance.

Ms. Boyles also contends the evidence was insufficient to support her conviction. In reviewing a sufficiency of the evidence challenge, the test is whether, after viewing the evidence in a light most favorable to the State, any

rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). The elements of a crime may be established by either direct or circumstantial evidence, and one type is no more valuable than the other. *State v. Thompson*, 88 Wn.2d 13, 16, 558 P.2d 202, *appeal dismissed*, 434 U.S. 898 (1977). "Credibility determinations are within the sole province of the jury and are not subject to review." *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997). Assessing discrepancies in trial testimony and the weighing of evidence are also within the sole province of the fact finder. *State v. Longuskie*, 59 Wn. App. 838, 844, 801 P.2d 1004 (1990). Specific criminal intent "may be inferred from conduct where it is plainly indicated as a matter of logical probability." *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

A person is guilty of second degree theft when he or she commits theft of property or services exceeding $250 in value, but does not exceed $1500 in value. RCW 9A.56.040(1)(a). "Theft" is defined as "[t]o wrongfully obtain or exert

unauthorized control over the property or services of another or the value thereof, with intent to deprive him or her of such property." RCW 9A.56.020(1)(a).

Ms. Boyles claims nothing in the record establishes that taking the dog constituted theft. She argues the mere act of rescuing the dog off a slick road established she did not intend to deprive the owner of the dog. She points out she contacted a radio station, had contact with the dog's alleged owner, and tried to return the dog, until it ran away from her.

At trial, however, the evidence established Ms. Boyles told Ms. Johnson she would return the dog to Colville the "next day." RP at 155. She did not return the dog. When Deputy Wanzenried contacted her about returning the dog, Ms. Boyles told him she did not think she had to return it. She told the deputy the dog was in bad shape, "possession is 9/10ths of the law," "finders/keepers, losers/weepers," and he could not prove she had the dog. RP at 59-60. Ms. Boyles also asked him what would happen if she did not return the dog. One hour before she was to return it to Ms. Johnson, Ms. Boyles told the deputy she had lost the dog in a park. But she could not provide him with any details about the park. Based on this evidence, the jury could reasonably infer that Ms. Boyles intended to deprive Ms. Johnson of her dog. The evidence was sufficient to

support the second degree theft conviction.

Affirmed.

A majority of the panel has determined this opinion will not be printed in

the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Kato, J.

WE CONCUR:

Schultheis, A.C.J.

Brown, J.