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A. ASSIGNMENT OF ERROR

There was insufficient evidence to convict Ms. Kelly of theft in the second degree.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Is there sufficient evidence to convict Ms. Kelly of theft in the second degree where she denies committing the crime and the man who plead guilty to the crime previously testified that he worked alone and Ms. Kelly was not involved?

C. STATEMENT OF THE CASE

Factual and Procedural Background

On July 16, 2005, an individual known to loss prevention employees of the Target store at 23rd and Union in Tacoma to be a shoplifter was observed placing various items from around the store into an unpurchased garbage can and placing the garbage can back on the shelf. RP 36-41, 2-15-06.¹ This individual was later identified as Mr. Robert Throm. RP 140-141, 2-16-06. Mr. Throm put the garbage can back on the shelf at approximately 5 P.M. RP 54, 2-15-06. From 5 P.M. to 8 P.M. the loss prevention employees monitored the garbage can via video camera. RP 37-41, 54, 2-15-06.

Ms. Kelly was observed entering the aisle with the garbage can on it, speaking on a cell phone, putting the garbage can in her cart, taping the cardboard box surrounding the garbage can closed after the lid came loose,

¹ The record below is comprised of two separate trials held on different dates. Reference to the record will be made by giving the RP cite followed by the date of the hearing.

walking the floor of the store, and proceeding to the front of the store where she paid for a soda and the garbage can. RP 41-42,56-57, 83-84. The loss prevention officers had no idea how long Ms. Kelly was in the store prior to her placing the can in her cart. RP 53, 2-15-06. Prior to Ms. Kelly placing the garbage can in her shopping cart, the loss prevention officers had no reason to suspect Ms. Kelly was shoplifting and no reason to suspect she was connected to Mr. Throm. RP 54-55, 97, 2-15-06.

As Ms. Kelly tried to exit the store, the loss prevention officers stopped her and informed her that she needed to come with them. RP 57, 2-15-06. A loss prevention officer asked Ms. Kelly if she knew why she was being stopped and she said she believed that the loss prevention officers believed she had something in her purse. RP 57, 98-99, 2-15-06. Ms. Kelly was taken to the asset protection office where she remained for approximately two hours before Officer Bundy arrived. RP 58, 2-15-06. The loss prevention officers questioned Ms. Kelly in an attempt to get her to admit she had done something wrong, but Ms. Kelly did not admit to doing anything wrong. RP 58, 2-15-06. Ms. Kelly said she didn't "do it" and didn't know the merchandise was in the can. RP 65-66, 2-15-06.

The total value of the items found by the loss prevention officers in the garbage can was \$714.89. RP 84-85, 2-15-06.

Tacoma Police Officer Bundy was dispatched to a shoplifting call at the Tacoma Target on July 16, 2005. RP 24-25, 2-16-05. Officer Bundy contacted Ms. Kelly in the asset protection office at the store. RP 25. Officer Bundy testified that Ms. Kelly told him she was being detained because she did something stupid, she knew it was wrong to steal, and that she was doing a friend a favor. RP 28, 2-25-06. Officer Bundy testified that both loss prevention officers were present when Ms. Kelly made these statements (RP 30, 2-15-06), however, the loss prevention officers testified that they did not recall hearing Ms. Kelly say that it was wrong to steal (RP 66, 99, 2-15-06) or that she was helping out a friend. RP 99, 2-15-06.

On July 19, 2005, an order establishing conditions for Ms. Kelly was signed by a judge. RP 181-182, 11-16-05. This order stated the pretrial date for the cause was set for August 4, 2005. RP 181, 11-16-05. Also on July 19, 2005, a conditions of release was filed which informed the defendant she needed to appear for future court dates. RP 183, 11-16-05.

The prosecution produced a motion and declaration authorizing issuance of a bench warrant for Ms. Kelly for her failing to appear on August 4, 2005, an order authorizing the issuance of a bench warrant for

Ms. Kelly, as well as the formal bench warrant for Ms. Kelly. RP 184-185, 11-16-05.

Ms. Kelly was initially charged with theft in the second and bail jumping in a trial before Judge Bryan Chushcoff. The initial jury convicted Ms. Kelly on the bail jumping charge (CP 76) but hung on the theft charge.

Ms. Kelly was retried on the second degree theft charge in front of Judge Rosanne Buckner. RP 4, 2-14-06. The jury in the second trial convicted Ms. Kelly of second degree theft. CP 110.

Notice of appeal was timely filed on March 10, 2006. CP 134-143.

D. ARGUMENT

The State presented insufficient evidence to support a reasonable inference that Ms. Kelly knew the items were hidden in the garbage can.

This Court reviews challenges to sufficiency of evidence by determining whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could find the essential elements of the charged crimes beyond a reasonable doubt. *State v. Zakel*, 61 Wn. App. 805, 811, 812 P.2d 512 (1991), *affirmed*, 119 Wn.2d 563, 834 P.2d 1046 (1992), citing *State v. Rempel*, 114 Wn.2d 77, 82, 785 P.2d 1134 (1990).

RCW 9A.56.020 provides in pertinent part, "'Theft' means...[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 or services" (emphasis added).

Here, Ms. Kelly denied knowing that the merchandise was secreted in the garbage can and she actually paid the full price of the garbage can. Ms. Kelly told the loss correction officers that she thought they were stopping her because they suspected she had something in her purse, *not* because they thought she had something in the garbage can. The State offered the uncorroborated testimony of Officer Bundy that Ms. Kelly said she knew it was wrong to steal but she was helping a friend, but Officer Bundy's testimony is suspect in light of the fact that he also testified that the loss prevention officers were in the room when Ms. Kelly made these statements but the loss prevention officers testified that they did not recall hearing Ms. Kelly make these statements. Mr. Throm, the man observed by the loss prevention officers hiding the merchandise in the garbage can and who pled guilty to second degree theft based on those actions, came into court and testified that he was the one who was going to come back and steal the merchandise and that he did not know Ms. Kelly and was not working with her.

The State presented no evidence establishing that Ms. Kelly knew the merchandise was in the can, and therefore presented insufficient evidence to establish that she intended to deprive Target of the merchandise.

“Retrial following reversal for insufficient evidence is ‘unequivocally prohibited’ and dismissal is the remedy.” *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998).

This court should vacate Ms. Kelly’s conviction for second degree theft and dismiss that charge.

E. CONCLUSION

For the reasons stated above, this court should vacate Ms. Kelly’s conviction for second degree theft and dismiss that charge, and remand for resentencing with a lower offender score.

DATED this 11th day of August, 2006.

Respectfully submitted,



Reed Speir, WSBA No. 36270
Attorney for Appellant

CERTIFICATE OF SERVICE

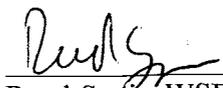
Reed Speir hereby certifies under penalty of perjury under the laws of the State of Washington that on the 11th day of August, 2006, I delivered a true and correct copy of the Brief of Appellant to which this certificate is attached by United States Mail, to the following:

Ms. Erin Kelly
3822 Sunset Drive
University Place, WA 98466

And, I delivered via legal messenger a true and correct copy of the Brief of Appellant and the Verbatim Report of Proceedings to which this certificate is attached, to

Pierce County Prosecuting Attorney's Office
930 Tacoma Avenue South
Tacoma, WA 98402

Signed at Tacoma, Washington this 11th day of August, 2006.



Reed Speir, WSBA No. 36270

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