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COURT OF APPEALS
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STATE OF WASHINGTON
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No. 34896-9-II

**COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II**

STATE OF WASHINGTON,

Respondent,

v.

NICHOLAS CHRISTOPHER ROWNAN,

Appellant/Defendant.

PIERCE COUNTY SUPERIOR COURT

CAUSE NO. 05-1-06123-7

THE HONORABLE STEPHANIE A. AREND,

Presiding at the Trial Court.

APPELLANT'S OPENING BRIEF

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I. ASSIGNMENT OF ERROR

The State failed to prove beyond a reasonable doubt that Mr. Rownan had knowledge that the debit card number was stolen where the debit card was in his brother's name, not in the name of the alleged victim.

II. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Was knowledge of a stolen access device proved where the evidence showed that the debit card used by Mr. Rownan was in his brother's name, and insufficient evidence was presented that would allow the jury to infer that Mr. Rownan had knowledge that the card was issued to anyone other than his brother?

III. STATEMENT OF THE CASE

1. Procedural History

On December 12, 2005, the appellant/defendant, Nicholas C. Rownan, was charged by Information with one count of Possessing Stolen Property in the Second Degree in violation of RCW 9A.56.140(1) and RCW 9A.56.160(1)(c). The property in question was alleged to have been a credit card number issued to John Finley. The acts constituting the offense were alleged to have occurred on

December 9, 2005. CP 1-2.

On February 6, 2006, the case proceeded to trial by jury. Mr. Rownan represented himself at trial, with attorney John Austin acting as appointed stand-by counsel. On February 7, 2006, after the State rested, Mr. Rownan brought a motion to dismiss the prosecution on the basis that he was improperly accused in the Information, and therefore, lacked adequate notice of the charge against him. Specifically, Mr. Rownan argued that the Information incorrectly identified the access device as a *credit* card number where the trial testimony showed that the number was in fact issued for a *debit* card. Mr. Rownan further argued that a debit card can only be used in conjunction with a pin number which distinguishes it from a credit card. RP 2 93-97.

The State moved, pursuant to Criminal Rule 2.1 (a)(1), to amend the Information to properly identify the number as belonging to a debit card. The trial Court denied Mr. Rownan's motion to dismiss and allowed the State to reopen its case in order to correct the error and

amend the Information. RP 2 100.¹ Mr. Rownan was convicted as charged. CP 42.

On May 26, 2006, the Superior Court sentenced Mr. Rownan to twenty-nine (29) months in the Department of Corrections, which represents the high end of Mr. Rownan's presumptive range. CP 58-68. A timely Notice of Appeal was filed on May 31, 2006. CP 43-48.

2. Summary of Trial Testimony

● Jason Finley

Jason Finley testified that on the morning of December 9, 2005, he perused his on-line checking account to determine his balance. Later the same day he made an ATM cash withdrawal from his checking account. He noticed that his account was about \$70. short.

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No written Amended Information was filed. The distinction between a credit and a debit card is not material to the charge, however. In *State v. Schloredt*, 97 Wash.App.189,987 P.2d 647(1999) the Court rejected the defense argument that evidence must be presented by the State to show an access device is operational, that is, that it can be used to obtain funds, goods, or services to sustain a conviction for Possession of Stolen Property. Whether the debit card number here was usable, therefore, is not legally material to the crime of Possession of Property in the Second Degree. Additionally, the record shows that the debit card number here was usable. Finally, the trial court record presents no evidence to show that a debit card must always be used with a pin number to obtain funds, goods or services.

RP 1 53. Mr. Finley then went into his bank where he became aware that a charge in the sum of \$68.72 had been made to his debit card account at 9:30 a.m. The debit card allows charges to be taken directly from Mr. Finley's checking account. The charge for \$68.72 was by the Econolodge in Tacoma, Washington. The bank employee shredded Mr. Finley's debit card in his presence. RP 1 53-54.

Mr. Finley next proceeded to telephone the Econolodge. The manager of the Econolodge confirmed that Mr. Finley's bank card number had been used to pay for a room. Mr. Finley then telephoned 911. He was instructed to meet the police at the Econolodge.

Upon meeting police officers at the Econolodge, Mr. Finley showed the officers the unauthorized charge from a bank printout. Shortly thereafter the police showed him a driver's license photo of Donald Rowan. Mr. Finley did not recognize the person in the photo. He explained that no one was authorized to use his bank card, that his bank does not issue the mini-key chain credit card of the type that was utilized to pay for the hotel room, that he had not lost his actual debit card, and that he did not know "how this would have happened." RP

1 55. Mr. Finley identified, in court, the bank card number that was printed on the micro credit card (Plaintiff's Exhibit No. 1). The name on the bank card, however, was not his. The name on the micro card was Donald Rownan, whom Mr. Finley testified he did not know. RP 1 55-57.

- **Tara Perry**

Tara Perry is a police officer with the Tacoma Police Department. Officer Perry testified that at about 2:00 p.m. on December 9, 2005 she was working patrol when she received a dispatch call to the Econolodge for a "suspicious person, fraud." RP 1 59.

Officer Perry first contacted Mr. Finley who was in the parking lot of the Econolodge. Next, she contacted the motel manager, who provided a copy of Donald Rownan's identification card. The manager also provided Officer Perry with the bank card number that was used to rent the motel room. The number was written on the transaction receipt for Room 144. RP 1 60-62.

Officer Perry then went to Room 144 where she made contact

with several individuals who were inside the room. Officer Perry asked to speak with Donald Rowan, and was told he had just left with his girlfriend. The officers were given verbal permission to come inside. RP 1 63. Once inside Officer Perry met the appellant who identified himself as Nicholas Rowan. Mr. Rowan had no identification on him at that time. A wallet was sitting near Mr. Rowan on a table. Mr. Rowan advised the officers that the wallet belonged to his twin brother, Donald Rowan. Mr. Rowan gave the officers permission to open the wallet. Inside the wallet the officer located a Balley's identification, on which was Donald Rowan's photograph, and the mini credit card used to rent the room. RP 1 64-67.

Officer Perry detained the appellant, Nicholas Rowan, to verify that he was Donald Rowan's twin brother. Officer Perry confirmed that Nicholas Rowan was who he claimed to be. RP 1 64.

Officer Perry testified that the hotel manager, Mr. Teixeira, positively identified Nicholas Rowan as the man who had used the mini bank card to purchase the room. RP 1 66. Nicholas Rowan denied using the card. RP 1 67.

- **Mark Waters**

Mark Waters is a police officer with the Tacoma Police Department. Officer Waters testified that on December 9, 2005 he was working a two-officer car patrol with Officer Perry when they received a dispatch call to go to the Econolodge. RP 1 69,72. Officer Waters testified that the two officers first contacted Mr. Finley, then the hotel manager. Mr. Finley advised the officers that his bank card number had been used without his authorization. RP 1 70,75. The manager gave the officers a copy of the transaction receipt and a copy of Donald Rownan's driver's license. RP 1 70. The officers next went to Room 144 where they contacted Nicholas Rownan. Officer Waters testified that Mr. Rownan was cooperative. RP 1 73.

- **Stephen Teixeira**

Stephen Teixeira is employed by the Econolodge in Tacoma. Mr. Teixeira testified that on December 9, 2005 he received a call from a man who indicated that an unauthorized charge by the Econolodge had just appeared on his bank records. Consequently, Mr. Teixeira telephoned Room 144 to request that the room be paid for in cash. The

cash payment was received and the funds were returned to the bank card account. RP 2 86-87. 91-92.

Mr. Teixeira identified Nicholas Rowman as the person who initially registered for the motel room under the name of Donald Rownan. He did not recall seeing Nicholas and Donald together at the same time. RP 2 87-88.

3. Stipulation

The parties agreed to, and the jury was read the following Stipulation to Facts:

The Defendant NICHOLAS CHRISTOPHER ROWNAN on 12-9-05 was the person that presented the mini credit card to the manager of the Econolodge as payment for room # 144. CP 24.

IV. ARGUMENT

THE EVIDENCE WAS INSUFFICIENT TO CONVICT MR. ROWNAN OF THE CRIME OF POSSESSION OF STOLEN PROPERTY IN THE SECOND DEGREE BECAUSE THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT MR. ROWNAN HAD KNOWLEDGE THAT THE DEBIT CARD NUMBER WAS STOLEN.

In every criminal prosecution, due process requires the State to prove every fact necessary to constitute the charge beyond a reasonable doubt. *In re Winship*, 397 U.S. 358,364,25 L.Ed.2d 368, 90 S.Ct. 1068 (1970). Where an appellant challenges the sufficiency of the evidence, the proper inquiry is, when viewing the evidence in the light most favorable to the State, whether there was sufficient evidence for a rational trier of fact to find guilt beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307,319,61 L.Ed. 2d 56099 S. Ct.2781 (1979); *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); *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 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. In cases involving only circumstantial evidence and a series of inferences, the essential proof of guilt cannot be supplied solely by a pyramiding of inferences. State v. Bencivenga, 137 Wn.2d 703,711,974 P.2d 832 (1999) (citing State v. Weaver, 60 Wn.2d 87,89,371 P.2d 1006 (1962)).

Mr. Rownan was charged with possessing stolen property under RCW 9A.45.140(1) and RCW 9A.56.160(1)(c). It was alleged he possessed a stolen “access device.”² See CP 1-2.

“Access device” means any card, plate, code, account number, or other means of account access that can be used alone or in conjunction with another access device to obtain money, goods, services, or anything else of value, or that can be used to initiate a transfer of funds, other than a transfer originated solely by paper instrument.

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RCW 9A.56.140(1) reads:

Possessing stolen property—Definition—Access devices, presumption. (1) “possessing stolen property” means knowingly to receive, retain, possess, conceal, or dispose of stolen property knowing that it has been stolen and to withhold or appropriate the same to the use of any person other than the true owner or person entitled thereto.

RCW 9A.56.160(1)(c) reads: Possessing property in the second degree—Other than firearm. (1) A person is guilty of possessing stolen property in the second degree if:...(c) He or she possesses a stolen access device.

RCW 9A.56.010(3).

To convict Mr. Rownan for possession of stolen property in the second degree, the State had to prove, in part, that he possessed the property, knowing it had been stolen. Bare possession of recently stolen property alone is not sufficient to justify a conviction. State v. Portee, 25 Wn.2d 246, 170 P.2d 326 (1946).

The Legislature defined knowledge in RCW 9A.08.010(1)(b):

Knowledge. A person knows or acts knowingly or with knowledge when (i) he is aware of a fact, facts, or circumstances or result described by a statute defining an offense; (ii) he has information which would lead a reasonable man in the same situation to believe that facts exist which facts are described by a statute defining an offense.

The statutory reference to the “reasonable man” constitutes a comparison that creates only a possible inference of knowledge. “The jury must still find subjective knowledge.” State v. Vanoli, 86 Wn.App. 643, 937 P.2d 1166 (1997). “The Legislature had defined knowledge to include one’s reasonable, subjective belief. It is the subjective knowledge of the illegal use.... which brings the conduct within the statutory definition.” State v. Johnson, 119 Wash.2d 167, 829 P.2d

1082 (1992).

If the State proves that the defendant had information that would lead a reasonable person in the same situation to believe that the property in question was stolen, the jury is permitted *but not required* to infer that the defendant knew the property was stolen. State v. Shipp, 93 Wash.2d 510, 610 P.2d 1322 (1980).

Mr. Rownan's jury was instructed, in relevant part, as follows:

INSTRUCTION NO. 6

A person commits the crime of possessing stolen property in the second degree when he or she knowingly possesses a stolen access device.

Possessing stolen property means knowingly to possess, stolen property knowing that it has been stolen and to withhold or appropriate the same to the use of any person other than the true owner or person entitled thereto.

INSTRUCTION NO. 7

To convict the defendant of the crime of possessing stolen property in the second degree, each of the following elements of the

crime must be proved beyond a reasonable doubt:

(1) That on or about the 9th day of December, 2005, the defendant knowingly possessed stolen property;

(2) That the defendant acted with knowledge that the property had been stolen;

(3) That the defendant withheld or appropriated the property to the use of someone other than the true owner or person entitled thereto;

(4) That the stolen property was an access device; and

(5) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 8

Stolen means obtained by theft.

INSTRUCTION NO. 9

Access device means any card, plate, code, account number, or other means of account access that can be used alone or in conjunction with another access device to obtain money, goods, services, or anything else of value, or that can be used to initiate a transfer of funds, other than a transfer originated solely by paper instruments.

INSTRUCTION NO. 10

A person knows or acts knowingly or with knowledge when he or she is aware of a fact, circumstance or result which is described by law as being a crime, whether or not the person is aware that the fact, circumstance or result is a crime.

If a person has information which would lead a reasonable person in the same situation to believe that facts exist which are described by law as being a crime, the jury is permitted but not required to find that he or he acted with knowledge.

CP 25-41; See also WPIC 77.05, 77.06, 77.08, 79.07, 10.02.

In Mr. Rownan's case, the State barely met its burden to prove that the debit card number was stolen by producing evidence that the

bank account number, through which unauthorized funds were withdrawn, was issued by Mr. Finley's bank to Mr. Finley. Although the State completely failed to explain how Donald Rowan's name came to appear on the mini-credit card with Mr. Finley's account number, under applicable appellate standards, wherein all reasonable inferences from the evidence must be drawn in favor of the State, such evidence was sufficient for Mr. Rowan's jury to conclude that the debit card number was stolen.³ Additionally, the State met its burden to prove the element of "possession" by introducing Mr. Rowan's stipulation that he had used the mini-debit card to purchase the room. CP 24. Likewise, the State proved that access to Mr. Finley's account was accomplished via a debit card number, and a debit card number satisfies the statutory definition of an access device. RCW 9A.56.010(3).

The State, however, failed to prove the essential mens rea of the

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While the burden of proof lies solely with the prosecution, no evidence was elicited or presented to establish a likelihood or even a possibility that bank error was the reason Donald Rowan's name appeared with Mr. Finley's bank account number.

crime of possession of property in the second degree. The prosecution presented insufficient evidence to show that Mr. Rownan knew the debit card number was stolen. Nor did the State present sufficient evidence to prove that Mr. Rownan had information that would lead a reasonable person to conclude that the debit card number was stolen. On the contrary, a reasonable person would believe that the number on a bank card was issued to the person whose name appears on the card. The evidence was undisputed that the name that appeared on the debit card used by Mr. Rownan was that of his twin brother, Donald Rownan.⁴ An inference of knowledge was, therefore, unavailable to the jury under these facts.

During closing argument the State argued that the element of knowledge was proved beyond a reasonable doubt by the evidence that Mr. Rownan had registered for the hotel room using his brother's name and debit card, and that he had denied doing so to the police. The

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Notably, post verdict, the jury asked whether Mr. Rownan actually has a twin brother, to which inquiry the prosecutor responded affirmatively. The jury then stated that had they understood this fact the verdict would have been different. RP 02-24-06 p.6.

State also argued that the lack of evidence presented by the defense proved knowledge. The prosecutor argued: "And there's no testimony that Donald Rownan was ever seen or ever present." RP 2 109.⁵ While the State did not argue that Donald Rownan did not exist, but rather that he had not been seen, the implication that Donald Rownan may not exist all all resonated with the jury, as evidence by its post-verdict question to this effect. RP 02-24-06 p.6.

Mr. Rownan's stipulation that he had registered for the motel room combined with his denial to the police that he had done so simply was not sufficient evidence to prove that he knew the number on the debit card had been stolen. No other evidence of knowledge was presented. The only reasonable conclusions based on the record established are either that (1) Mr. Rownan did not know the debit card number belonged to someone other than his brother, or (2) the State failed to adequately investigate and/or present evidence sufficient to

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Although this sole improper comment does not rise to the level of reversible error by shifting the burden of proof it clearly misrepresents the testimony. The uncontroverted testimony was that Donald Rownan had been in the hotel room, but had left with his girlfriend. RP 1 63. (No objection was made by the defense and no curative instruction was requested.)

establish Mr. Rownan's knowledge. The remedy for a conviction based on insufficient evidence is unequivocally dismissal. State v. Smith, 155 Wn.2d 496,505,120 p.3d 559 (2005).

V. CONCLUSION

For all of the foregoing reasons and conclusions, the appellant, Nicholas Rownan respectfully requests that this Court reverse and dismiss Mr. Rownan's conviction of possession of stolen property in the second degree.

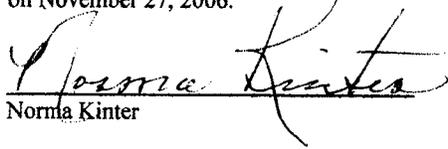
RESPECTFULLY SUBMITTED this 27th day of November,
2006.



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CERTIFICATE OF SERVICE

The undersigned certifies that on November 27, 2006, she delivered in person to the Pierce County Prosecutor's Office, County-City Building, 930 Tacoma Ave. South, Tacoma, WA. 98402, and by the U.S. Post Office to appellant, Nicholas C. Rownan, DOC # 790484, Stafford Creek Corrections Center, 191 Constantine Way, Aberdeen, WA. 98520, true and correct copies of this Opening Brief. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on November 27, 2006.


Norma Kinter

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