

No. 44811-4-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Appellant,

vs.

Tom Reeves,

Respondent.

Lewis County Superior Court Cause No. 13-1-00112-2

The Honorable Judge James Lawler

Brief of Respondent

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STATEMENT OF FACTS AND PRIOR PROCEEDINGS

The trial court dismissed a prosecution against Tom Reeves following a *Knapstad*¹ hearing based on undisputed facts. CP 37. The state had charged Mr. Reeves with retail theft with extenuating circumstances, in that “at the time of the theft, [he was] in possession of an item, article, implement or device designed to overcome security systems, contrary to the Revised Code of Washington 9A.56.360(1) and (4).” CP 1.

Mr. Reeves was alleged to have removed a security device from merchandise at WalMart using an ordinary pair of pliers. CP 19-24. The court found the evidence insufficient as a matter of law to prove that Mr. Reeves committed retail theft with extenuating circumstances.² CP 37. The court held that an ordinary pair of pliers does not “constitute ‘an item, article, implement, or device designed to overcome security systems...’” CP 38.

The state appealed the dismissal. CP 39.

¹ *State v. Knapstad*, 107 Wn.2d 346, 729 P.2d 48 (1986).

² RCW 9A.56.360. The statute has since been amended to replace the word “extenuating” with the word “special.” Laws 2013 Ch. 153 § 1 (effective January 1, 2014).

ARGUMENT

THE TRIAL COURT CORRECTLY DISMISSED THE CHARGE BY APPLYING THE PLAIN AND UNAMBIGUOUS LANGUAGE OF RCW 9A.56.360.

The interpretation of a statute is a question of law reviewed *de novo*. *State v. Engel*, 166 Wn.2d 572, 576, 210 P.3d 1007 (2009).

Statutes that involve a deprivation of liberty must be strictly construed. *In re Detention of Hawkins*, 169 Wn.2d 796, 801, 238 P.3d 1175 (2010). In interpreting a statute, the court's duty is to "discern and implement the legislature's intent." *State v. Williams*, 171 Wn.2d 474, 477, 251 P.3d 877 (2011).

The court's inquiry "always begins with the plain language of the statute." *State v. Christensen*, 153 Wn.2d 186, 194, 102 P.3d 789 (2004). Absent evidence of a contrary intent, words in a statute must be given their plain and ordinary meaning. *State v. Lilyblad*, 163 Wn.2d 1, 6, 177 P.3d 686 (2008).

Where the language of a statute is clear, legislative intent is derived from the language of the statute alone. *Engel*, 166 Wn.2d at 578; *see also State v. Punsalan*, 156 Wn.2d 875, 879, 133 P.3d 934 (2006) ("Plain language does not require construction."). A court "will not

engage in judicial interpretation of an unambiguous statute.” *State v.*

Davis, 160 Wn. App. 471, 477, 248 P.3d 121 (2011).³

Mr. Reeves was charged with violating RCW 9A.56.360. The statute provides (in relevant part) as follows:

A person commits retail theft with extenuating circumstances if he or she commits theft of property from a mercantile establishment with one of the following extenuating circumstances: (a) To facilitate the theft, the person leaves the mercantile establishment through a designated emergency exit; (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; or (c) The person committed the theft at three or more separate and distinct mercantile establishments within a one hundred eighty-day period.

RCW 9A.56.360(1). The statute thus elevates shoplifting to a felony if any of the three aggravating factors are present.

Mr. Reeves was charged with possessing a tool “designed to overcome security systems.” RCW 9A.56.360(1)(b). The trial court correctly concluded that an ordinary pair of pliers is not a tool “designed to overcome security systems.” RCW 9A.56.360(1)(b); CP 38.

The statute’s plain language applies only to tools made specifically for bypassing security systems. This is confirmed by the examples given in the statute’s text: “lined bags or tag removers.” RCW 9A.56.360(1)(b).

³ If a criminal statute is ambiguous, the ambiguity must be interpreted in favor of the defendant. *Seattle v. Winebrenner*, 167 Wn.2d 451, 462, 219 P.3d 686 (2009). A statute is ambiguous when the language is susceptible to more than one reasonable interpretation. *Id.*, at 456.

Appellant complains that this definition of “designed” is “oppressively narrow.” Appellant’s Opening Brief, p. 12. Appellant suggests that “designed” could mean “done or performed.” Appellant’s Opening Brief, p. 12.

This is incorrect; the state’s proposed reading of the statute makes no sense. If the phrase “done or performed” were substituted for “designed,” the statute would require proof that the accused person possessed “an item, article, implement, or device [done or performed] to overcome security systems including, but not limited to, lined bags or tag removers...” RCW 9A.56.360(1)(b). A tool cannot be “done or performed to overcome security systems.” A lined bag or tag remover is not an item “done or performed to overcome security systems.” Appellant’s nonsensical interpretation should be rejected.

A person does not commit the crime by shoplifting while possessing *any* tool that could overcome a store’s security system. This is so because courts “must not interpret a statute in any way that renders any portion meaningless or superfluous.” *Broughton Lumber Co. v. BNSF Ry. Co.*, 174 Wn.2d 619, 634, 278 P.3d 173 (2012). If possession of any tool were sufficient, the phrase “designed to overcome security systems” would be superfluous. RCW 9A.56.360(1)(b); *Broughton*, 174 Wn.2d at 634.

Nor does the statute permit conviction where a person actually uses an ordinary tool to defeat a security system. Appellant’s contrary argument renders a portion of the statute superfluous. Appellant’s Opening Brief, p. 14. An ordinary tool—such as a screwdriver, a pair of pliers, or a hammer—is not “designed to overcome security systems,” regardless of how it is used. RCW 9A.56.360(1)(b). The manner of a tool’s use does not change the purpose for which it was designed. Furthermore, the statute makes no mention of the manner in which the tool is used.

Presumably, an ordinary tool could be modified into an implement that qualifies under the statute.⁴ Had Mr. Reeves sharpened his pair of pliers, or transformed them in some other way, the facts may have been sufficient to go to the jury. But the state did not put forward any evidence that Mr. Reeves altered his pliers to facilitate the theft. Absent such evidence, the pliers were not “designed” to overcome the store’s security system.

The legislature could have criminalized the use of a specialized tool to overcome a merchant’s security system. It did not. Instead, it

⁴ Appellant correctly notes that the nonexclusive list set forth in the statute “leaves open the possibility that devices other than sophisticated ones like a tag remover” may qualify to elevate a crime under RCW 9A.56.360.

criminalized shoplifting, and elevated the crime to a felony when the person also possesses a specialized tool such as a tag remover or a lined bag. A shoplifter in possession of a specialized tool such as a tag remover may be convicted of a felony, even if s/he steals only a “six-pack of beer as opposed to clothing.” Appellant’s Opening Brief, p. 15. This may be a harsh result, but it is not an absurd one.

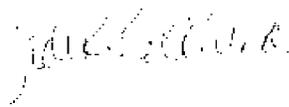
The ordinary pliers Mr. Reeves possessed were not designed to overcome a security system. Accordingly, the state failed to make out a *prima facie* case. The trial court properly ordered the prosecution dismissed. The court’s order should be affirmed.

CONCLUSION

The trial judge correctly dismissed the prosecution. His order should be affirmed.

Respectfully submitted on October 8, 2013,

BACKLUND AND MISTRY



Jodi R. Backlund, WSBA No. 22917
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A handwritten signature in black ink, reading "Manek R. Mistry". The signature is written in a cursive style with a large initial "M".

Manek R. Mistry, WSBA No. 22922
Attorney for the Appellant

CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Respondent's Brief, postage prepaid, to:

Tom Reeves
1208 Alder Street
#308
Centralia, WA 98531

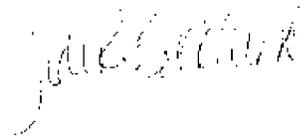
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Lewis County Prosecuting Attorney
appeals@lewiscountywa.gov

I filed the Respondent's Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on October 8, 2013.



Jodi R. Backlund, WSBA No. 22917
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BACKLUND & MISTRY

October 08, 2013 - 12:34 PM

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