

No. 47236-8-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON  
DIVISION II

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**STATE OF WASHINGTON,**

Appellant,

vs.

**ANGEL ROSE MARIE NELSON,**

Respondent.

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Appeal from the Superior Court of Washington for Lewis County  
Case No. 14-1-00594-1

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**Appellant's Opening Brief**

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## I. ASSIGNMENTS OF ERROR

1. The trial court erred by failing to conclude that the State had established a prima facie case that the gift card possessed and used by Nelson qualified as an access device.
2. The trial court erred when it ruled the State had failed to establish a prima facie case of Theft in the Second Degree under RCW 9A.56.040(1)(d).
3. The trial court erred when it ruled the State had failed to establish a prima facie case of Possession of Stolen Property in the Second Degree under RCW 9A.56.160(1)(c).
4. The trial court erred when it dismissed the State's case under the rule of law established in *Knapstad* and pursuant to CrR 8.3(c).

## II. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

- A. A person is guilty of Theft in the Second Degree when that person commits theft of an access device. Did the trial court err by concluding that the State had failed to establish a prima facie case that the gift cards Nelson stole constituted an access device?
- B. A person is guilty of Possession of Stolen Property in the Second Degree when that person knowingly receives, retains, possess, conceals, or disposes of a stolen access device. Did the trial court err by concluding that the State had failed to establish a prima facie case that the gift cards Nelson possessed, retained, concealed or disposed of constituted an access device?
- C. The State is permitted to proceed with a case when, considering the evidence with all reasonable inferences in favor of the State, there is sufficient admissible evidence to support a conviction. Did the trial court err when it concluded that the State had failed to establish a prima facie case of Theft in the Second Degree under RCW 9A.56.040(1)(d) and Possession of Stolen Property in the Second Degree pursuant to RCW 9A.56.160(1)(c)?

D. The trial court may dismiss a case on a pretrial motion from the defendant due to the State being unable to establish a prima facie case for the crime charged due to insufficient evidence. Did the trial court err when it ordered Nelson's case dismissed without prejudice after finding the State had not established a prima facie case for Theft in the Second Degree and Possession of Stolen Property in the Second Degree?

### **III. STATEMENT OF THE CASE**

On October 15, 2014, Charles Smith, Loss Prevention Manager for the Chehalis Kmart, contacted the police in regard to an employee's cash register being short \$330. CP 8. Chehalis Police Officer Fithen responded to Kmart to investigate the theft. CP 8. Mr. Smith explained to Officer Fithen that Kmart employee, Angel Nelson's, register was short \$330 on October 14, 2014. CP 8.

Mr. Smith reviewed store surveillance footage from 1700 hours until 2100 hours when Nelson had been working on cash register 1. CP 8. At 2024 hours Nelson left the register, selected several gift cards, returned to the register, placing the gift cards next to her register. CP 8. At 2028 hours, Nelson leaves the register again and selected another gift card. CP 8. Mr. Smith observed that at 2031 hours, Nelson scanned and activated an Amazon gift card for \$100 without placing any money into the

register. CP 8. Nelson then removed the Amazon gift card from its packaging and slid it behind her name badge. CP 8. At 2035 hours, Nelson scanned and activated a MasterCard gift card for \$206.95 without placing any money in the register. CP 8. Nelson made one last transaction at 2100 hours for a \$25 Joann's gift card. CP 8. Nelson hid each of the gift cards behind her name badge. CP 8.

Officer Fithen spoke to Nelson, who stated she was trying to help a friend who was recently diagnosed with cancer. CP 8. According to Nelson, she was trying to help him come up with money to pay his bills. CP 8. Nelson told Officer Fithen that she gave the cards to her friend, but refused to name her friend. CP 9. Officer Fithen located two of the stolen cards, the Amazon and Joann's gift cards, in Nelson's wallet. CP 9. Nelson stated she had used both of the cards. CP 9.

On October 16, 2015, the State charged Nelson with one count of Theft in the Second Degree for committing theft of an access device. RCW 9A.56.040(1)(d); CP 1-2. Nelson's attorney filed a motion to dismiss the charges pursuant to *State v. Knapstad* and a brief in support of the motion.<sup>1</sup> CP 5-25. The State filed a response to Nelson's motion. CP 28-33. The State also filed an

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

amended information charging Nelson with Count I: Theft in the Second Degree, and Count II: Possession of Stolen Property in the Second Degree. CP 26-27. On January 9, 2015 the trial court entertained Nelson's motion to dismiss. RP 1-7. The trial court ruled in favor of Nelson and dismissed the case. RP 4-6; CP 34. The State timely appeals. CP 35-37.

#### **IV. ARGUMENT**

##### **A. THE TRIAL COURT ERRED WHEN IT GRANTED REEVES' MOTION TO DISMISS PURSUANT TO *STATE v. KNAPSTAD* AND CrR 8.3(c).**

The State established a prima facie case against Nelson for Theft in the Second Degree pursuant to RCW 9A.56.040(1)(d) and Possession of Stolen Property in the Second Degree pursuant to RCW 9A.56.160(1)(c). The trial court erred when it concluded the State had not established a prima facie case that the gift cards stolen by Nelson were not an access device. This Court should reverse the trial court's dismissal and remand the case back to the trial court to allow the State to prosecute Nelson for Theft in the Second Degree and Possession of Stolen Property in the Second Degree.

## **1. Standard Of Review.**

A trial court's decision to dismiss a case pursuant to a *Knapstad* motion is reviewed de novo. *State v. Newcomb*, 160 Wn. App. 184, 188, 246 P.3d 1286 (2011).

## **2. The Trial Court Erred When It Concluded The State Had Not Established A Prima Facie Case That The Gift Cards Nelson Stole And Activated Constituted An Access Device.**

The Supreme Court set forth the proper procedure for a pretrial motion to dismiss for failure to establish a prima facie case, now commonly referred to as a *Knapstad* motion. *Knapstad*, 107 Wn.2d at 356-57; *Newcomb*, 160 Wn.2d at 188-89. In a proper *Knapstad* motion there are no disputed facts and the motion should be submitted with a sworn affidavit containing all the facts and law the defendant relies upon to justify the dismissal. *Knapstad*, 107 Wn.2d at 356. Once the State agrees that there are undisputed facts which the State is relying upon to establish a prima facie case of guilt for the charged offense, the trial court holds a hearing. *Id.* at 356-57. The trial court must consider the evidence in the light most favorable to the State with all reasonable inferences drawn in favor of the State. *Newcomb*, 160 Wn. App. at 188. If the trial court determines the State has not established a prima facie case of guilt

then the trial court is to dismiss the case without prejudice. *Knapstad*, 107 Wn.2d at 357. The trial court does not enter findings of fact because it does not rule on issues of fact. *Id.*

The reviewing court views the facts of the case in the light most favorable to the State with all reasonable inferences found in favor of the State. *Newcomb*, 160 Wn. App. at 188-89 (citations omitted). The issue on appeal is, (1) did the State sufficiently counter the claim that there are no material facts in dispute, and (2) did the State sufficiently show that the undisputed facts establish a prima facie case of guilt? *Id.* at 189.

The State is not arguing that there are material facts in dispute. The only issue on appeal is did the State establish a prima facie case of guilt? Specifically, did the State establish a prima facie case that the gift cards Nelson stole and activated without payment meet the element of “an access device”? See RCW 9A.56.040(1)(d); RCW 9A.56.160(1)(c); RCW 9A.56.010(1). In this case, the elements of Theft in the Second Degree:

(1) A person is guilty of theft in the second degree if he or she commits theft of:

(d) An access device.

RCW 9A.56.040(1)(d). The elements of Possession of Stolen Property in the Second Degree in this case are:

(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.56.160(1)(c)

The argument boils down to whether the meaning of “access device” includes an activated gift card.<sup>2</sup> See RCW 9A.56.010(1); RCW 9A.56.040(1)(d); RCW 9A.56.160(1)(c). The trial court read the statute as requiring an access device to be linked to an account, such as a bank account or a line of credit that gives access to more than just what is loaded onto a prepaid gift card. RP 4, 6. The trial court stated in its ruling:

I have always thought -- and I've been actually waiting for an opportunity to express these thoughts -- that a gift card is not an access device in the way it was intended by the state Legislature, because it doesn't provide access to anything other than what they've already stolen.

So the degree of the theft is determined not by the fact that it's an access device but the amount that was improperly or unlawfully loaded onto the access device. That's all they can get access to. That's all it should be. I don't see that there's any reason to do greater protection because Walmart says: We won't give you cash -- Walmart or whatever -- but we'll give you a gift card you can use in the store or a cash card that you can use in the store for the amount that eventually they determined was stolen.

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<sup>2</sup> After a thorough search of available case law the State could not find any reported cases in which this issue was decided by the courts, and therefore, it is an issue of first impression.

RP 4. The trial court went on to explain his ruling:

I want to make it clear that the reason for that, and I think I said this, but it's the amount and the fact that you can't access any more than what the card was loaded with, which was stolen property, which is the reason why it's not an access device in the way this was intended.

I know in Mr. O'Rourke's brief he talked about the difference between this and a debit card, and that's significant because the statute was changed from reading credit card to access device because a credit card and debit card were different. Somebody recognized that, and then the Legislature passed that.

Now, given these cash cards have come along since that time, I just can't buy off on the idea that it's going to elevate every one-dollar theft into a felony just because they load it on an access card and then stop the ability to access anything but that amount.

RP 6. The trial court's reading and interpretation of access device, in context of the statute, is an oppressively narrow interpretation that could lead to absurd results. Further, the trial court's ruling does not consider the plain language of the statute.

The courts will not employ judicial interpretation if a statute is unambiguous. *State v. Steen*, 155 Wn. App. 243, 248, 228 P.3d 1285 (2010). "A statute is ambiguous when the language is susceptible to more than one interpretation. *Steen*, 155 Wn. App. at 248. When the reviewing court is interpreting a statute its "goal is to ascertain and give effect to the intent and purpose of the legislature

in creating the statute.” *State v. Stratton*, 130 Wn. App. 760, 764, 124 P.3d 660 (2005) (citation and internal quotations omitted). The court looks to the plain language in the statute, the context of the statute, and the entire statutory scheme to determine the legislative intent. *Steen*, 155 Wn. App. at 248; *Stratton*, 130 Wn. App. at 764 (citations omitted). If the statute fails to provide a definition for a term then the courts look to the standard dictionary definition of the word. *Stratton*, 130 Wn. App. at 764. If the court finds that a statute is ambiguous, “the rule of lenity requires that we interpret it in favor of the defendant absent legislative intent to the contrary.” *Id.* at 765.

The legislature defined access device:

"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;

RCW 9A.56.010(1). The legislature adopted this definition in an amendment to the Theft in the Second Degree statute in 1987, removing credit card and replacing it with access device. RCW 9A.56.040; RCW 9A.56.010; *State v. Schloerdt*, 97 Wn. App. 789, 794, 987 P.2d 647 (1999). When the legislature changed the

statute it explained the reasoning from changing credit card to access device as,

Technology has significantly changed banking practices. The term "credit card" does not adequately define many of the mechanisms that allow people to obtain access to credit and checking accounts. Changing the definition will make it easier for prosecutor's [sic] to establish certain types of fraudulent transactions.

*State v. Standifer*, 110 Wn.2d 90, 94, 750 P.2d 258 (1988), citing House Bill Rep. 508, at 2, 50th Legislature (1987). It should be noted with the numerous changes in technology, banking and the expanded use of electronic gift cards throughout the last 28 years the legislature has never altered the statute's broad definition of access device. RCW 9A.56.010(1); WA Sess. Law 1987, c. 140, § 1.

A gift card is a card that can be used to obtain money, goods, services, or anything else of value. RCW 9A.56.010(1). A person may use a gift card that is tied to a specific retailer to purchase items from that retailer, such as the Amazon gift card or Joann's gift card Nelson stole. A person may also use a gift card, such as the MasterCard gift card Nelson stole, to obtain a wide range of goods, services or anything else of value. People who do not have the ability to have open lines of credit often use prepaid

VISA or MasterCard gift cards to purchase everything from gas to groceries to a meal at a restaurant. All of these types of purchases constitute goods, services, or anything else of value. See RCW 9A.56.010(1). If the legislature wanted to narrow the definition of access device to only include lines of credit and access to bank accounts it is able to do so, but as of today the legislature has not entertained such a narrow definition of access device. The trial court erred by reading such a narrow definition into the statutorily defined term access device.

Nelson not only took the card while in the store, she activated the card, concealed the card, removed the card from the store and used the card to purchase items from places other than her place of employment. CP 8-9. This case is nearly indistinguishable from a situation where a person steals a credit or debit card. Both situations involve the unauthorized taking/possession of a card. That card gives the holder access to funds. In this case, the funds are limited to the amount the cards were activated for. In the other example, the funds are, in the case of a credit card, the limit placed on the card by the credit card company or, in the case of a debit card, the amount in the account holder's bank account. The question of how much money a person

holding one of these cards has access to does not apply here. The fact the card accesses funds that allows someone “to obtain money, goods, services, or anything else of value” is what makes the charges of Theft in the Second Degree and Possession of Stolen Property in the Second Degree appropriate. See RCW 9A.56.010(1); RCW 9A.56.040(1)(d); RCW 9A.56.160(1)(c). Nelson used, by her admission, two of the cards to purchase items. In the case of a credit/debit card, the purpose was the same. When a person purchases an item with a card (credit, debit or gift) the process is nearly identical in all locations. The balance available on the card is checked to determine if the amount available is sufficient to cover the anticipated purchase. Whether the card is a prepaid credit card gift card or some type of revolving credit card account does not matter.

Nelson activated the three gift cards. CP 8. This activation made the balances she placed onto the cards, without providing actual funds for the balance, available for her use. An activated device is required for a card to be considered an access device. *State v. Rose*, 175 Wn.2d 10, 17-18, 282 P.3d 1087 (2012). In *Rose*, Ruth Georges had thrown out a credit card offer she received in the mail because she did not have the \$30 necessary to

activate the card that came with George's name printed on it. *Rose*, 175 Wn.2d at 13. Rose was arrested regarding a residential burglary and the stolen credit card was found in his possession. *Id.* at 12. The State charged Rose with Possession of Stolen Property in the Second Degree for having a stolen access device. *Id.* The Supreme Court held that the credit card was not an access device because it was not activated, there was no evidence in the record that Rose could activate the card, and it was therefore not available to be used to obtain goods, services or anything else of value. *Id.* at 17-18. Unlike Rose, the cards Nelson took were activated, thereby allowing her access to the funds on those cards which is further evidenced by her statement that she used the Amazon and Joann's gift cards the officer later recovered from Nelson's wallet. CP 9.

The amount available on an access device does not matter, it is the status of a card being an access device that elevates the theft to Theft in the Second Degree or Possession of Stolen Property in the Second Degree, a felony. RCW 9A.56.040. If Nelson had stolen a credit card with a \$200 limit it would still be Theft in the Second Degree because she stole an access device. When a gift card is taken and that card has the ability to access an amount of money, regardless of how limited or expansive, it

becomes Theft in the Second Degree, a felony. A gift card provides the person holding the gift card access to a type of account where money is stored, this is sufficient to constitute an access device under the plain meaning of the statute. RCW 9A.56.010(1).

The trial court erred when it concluded that for something to be considered an access device it must be tied to a bank account or a line of credit. RP 4, 6. The trial court's erroneous conclusion led it to rule that the gift cards did not meet the statutory definition of access device and therefore the State did not establish a prima facie case that Nelson stole an access device or possessed a stolen access device. This Court should reverse the trial court's ruling dismissing this case and allow the State to proceed with its prosecution.

**3. The State Did Establish A Prima Facie Case Of Theft In The Second Degree And Possession Of Stolen Property In The Second Degree.**

The State did establish a prima facie case of Theft in the Second Degree and Possession of Stolen Property in the Second Degree. After the *Knapstad* hearing the trial court ruled that a gift card does not qualify as an access device. CP 34. The only element the trial court did not find the State had established a prima facie case for was that the item Nelson stole and possessed was

an access device. RP 4, 6, CP 34. As argued above, the State did establish a prima facie case that the gift cards Nelson stole and possessed was a “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...” RCW 9A.56.010(1). Therefore, the State has established a prima facie case for Theft in the Second Degree and Possession of Stolen Property in the Second Degree pursuant to RCW 9A.56.010(1); RCW 9A.56.040(1)(d); RCW 9A.56.160(1)(c). This Court should reverse the trial court’s dismissal of Nelson’s case and allow on remand for the State to proceed with its prosecution of Nelson for Theft in the Second Degree and Possession of Stolen Property in the Second Degree.

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**V. CONCLUSION**

For the foregoing reasons, this Court should reverse the trial court's ruling dismissing Nelson's case and remand the case back to the trial court for continued prosecution of the charges Theft in the Second Degree and Possession of Stolen Property in the Second Degree.

RESPECTFULLY submitted this 28<sup>th</sup> day of May, 2015.

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# LEWIS COUNTY PROSECUTOR

**May 28, 2015 - 3:07 PM**

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