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JUN 29, 2012

Court of Appeals
Division III
State of Washington

30786-7-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

DAVID M. LUST, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF FERRY COUNTY

APPELLANT'S BRIEF

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INDEX

A. ASSIGNMENT OF ERROR1

B. ISSUE1

C. STATEMENT OF THE CASE.....1

D. ARGUMENT3

 1. CONVICTIONS FOR BOTH SECOND- AND
 THIRD DEGREE THEFT VIOLATED MR.
 LUST’S CONSTITUTIONAL GUARANTEE
 AGAINST DOUBLE JEOPARDY3

E. CONCLUSION.....7

TABLE OF AUTHORITIES

WASHINGTON CASES

IN RE PERS. RESTRAINT OF ORANGE, 152 Wn.2d 795, 100 P.3d 291 (2004).....	3, 4
STATE V. BERLIN, 133 Wn.2d 541, 947 P.2d 700 (1997).....	5, 6
STATE V. CALLE, 125 Wn.2d 769, 888 P.2d 155 (1995).....	3, 4
STATE V. FRAZIER, 99 Wn.2d 180, 661 P.2d 126 (1983).....	6
STATE V. FREEMAN, 153 Wn.2d 765, 108 P.3d 753 (2005).....	4
STATE V. JACKSMAN, 156 Wn.2d 736, 132 P.3d 136 (2006).....	3, 4, 5
STATE V. LOUIS, 155 Wn.2d 563, 120 P.3d 936 (2005).....	4
STATE V. OSE, 156 Wn.2d 140, 124 P.3d 635 (2005).....	3
STATE V. ROYBAL, 82 Wn.2d 577, 512 P.2d 718 (1973).....	6

SUPREME COURT CASES

BLOCKBURGER V. UNITED STATES, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932).....	4
---	---

CONSTITUTIONAL PROVISIONS

U.S. CONST. Amend. V.....	2
WASH. CONST. Art. I, § 9.....	3

STATUTES

RCW 9A.56.040(1)..... 3
RCW 9A.56.050(1)..... 4

A. ASSIGNMENT OF ERROR

1. The court erred in finding Mr. Lust Guilty of second degree theft.

B. ISSUE

1. The defendant pleaded guilty to theft of a purse. Thereafter, the State charged him with six counts of theft of the credit cards contained in the purse and the court found him guilty on all six charges. Under double jeopardy principles, does the defendant's third degree theft conviction preclude the subsequent second degree theft convictions based on the same act of stealing the purse?

C. STATEMENT OF THE CASE

On Halloween, David Lust stole Artie McRae's purse from a table in the Sportsman's Bar while Ms. McRae was dancing. (RP 137-39) The purse contained a wallet, and the wallet contained six credit cards. (RP 135-36) Mr. Lust took the purse out into the parking lot, examined its contents, and left it near a white jeep at the north end of the parking lot. (RP 119-20, 143)

A short time later, the theft was discovered, and a video recording showed that Mr. Lust had taken the purse. (RP 137-39) The McRaes and some friends went outside and accosted Mr. Lust as he was returning to the parking lot. (RP 119, 126-28) After initially denying the theft, Mr. Lust eventually told them where the purse was. (RP 119-21, 1228) When Ms. McRae recovered her purse it still contained the six credit cards. (RP 143)

The State initially charged Mr. Lust with theft of the purse, lying to the police, and possession of stolen property. (CP 1-2) On November 4, 2011, Mr. Lust pleaded guilty to third degree theft and making a false statement. (RP 6-7) The State subsequently amended the information to dismiss the possession charge and charge Mr. Lust with six counts of second degree theft of an access device. (RP 68; CP 55-58) Following a bench trial on March 9, the court found Mr. Lust guilty of six counts of second degree theft of an access device. (CP 71)

D. ARGUMENT

1. CONVICTIONS FOR BOTH SECOND- AND THIRD DEGREE THEFT VIOLATED MR. LUST'S CONSTITUTIONAL GUARANTEE AGAINST DOUBLE JEOPARDY.

The United States Constitution provides that a person may not be “subject for the same offense to be twice put in jeopardy of life or limb.” U.S. Const. amend. V. The Washington State Constitution similarly provides that a person may not “be twice put in jeopardy for the same offense.” Wash. Const. art. I, § 9. The constitutional guarantee against double jeopardy protects a person from receiving multiple punishments for the same offense. *State v. Calle*, 125 Wn.2d 769, 776, 888 P.2d 155 (1995).

“Where a defendant’s act supports charges under two criminal statutes, a court weighing a double jeopardy challenge must determine whether, in light of legislative intent, the charged crimes constitute the same offense.” *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 815, 100 P.3d 291 (2004). Washington courts look first to the statutory language to determine if it expressly permits multiple punishments for the applicable statutes.” *State v. Jackman*, 156 Wn.2d 736, 746, 132 P.3d 136 (2006).

“A person is guilty of theft in the second degree if he or she commits theft of . . . [a]n access device.” RCW 9A.56.040(1)(d). In the context of possession of stolen access devices, the legislature’s use of the language “an access device” implies that possession of multiple access devices constitutes multiple crimes, each of which may be separately punished without violating double jeopardy. *State v. Ose*, 156 Wn.2d 140, 148, 124 P.3d 635 (2005). Thus, the theft of each of six access devices constitutes a separate crime.

The issue here, however, is not whether Mr. Lust could be convicted of multiple counts of theft of an access device, but whether he could be convicted of both theft of an access device and theft of property. No statutory language authorizes separate punishments for these two offenses. “A person is guilty of theft in the third degree if he or she commits theft of property . . . which . . . does not exceed seven hundred fifty dollars in value” RCW 9A.56.050(1)(a).

Because the second- and third degree statutes do not expressly allow for multiple punishments, the court should consider the same evidence test established in *Blockburger v. United States*, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932); see *Jackman*, 156 Wn.2d at 746-47; *State v. Louis*, 155 Wn.2d 563, 569, 120 P.3d 936 (2005); *State v. Freeman*, 153 Wn.2d 765, 772, 108 P.3d 753 (2005); *Calle*,

125 Wn.2d at 777. “Under the same evidence test, double jeopardy is deemed violated if a defendant is ‘convicted of offenses that are identical both in fact and in law.’ ” *Louis*, 155 Wn.2d at 569, (*quoting Calle*, 125 Wn.2d at 777). “ ‘[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.’ ” *Orange*, 152 Wn.2d at 817, (emphasis omitted) (*quoting Blockburger*, 284 U.S. at 304).

The second degree theft statute requires theft of property consisting of an access device, while the third degree theft statute merely requires theft of property. Given that an access device is property, third degree theft does not require proof of any fact not also required to prove second degree theft of an access device. The underlying act, the theft of the purse and its contents, is the only act necessary to prove either offense. The two offenses are identical in law and in fact.

Put differently, “if a statute constitutes a lesser included offense of another statute, convictions for both offenses would violate double jeopardy.” *Jackman*, 156 Wn.2d at 749. Even if one statute is not invariably a lesser included offense of the other, under the same evidence test, if a court concludes that the facts the State must prove to convict the

defendant under the two statutes are the same, the convictions violate double jeopardy and the analysis ends.” *Jackman*, 156 Wn.2d at 750.

The Washington Supreme Court has established a two-part test for determining whether an offense is a lesser included offense of another. *State v. Berlin*, 133 Wn.2d 541, 545, 947 P.2d 700 (1997). “First, each of the elements of the lesser offense must be a necessary element of the offense charged. Second, the evidence in the case must support an inference that the lesser crime was committed.” *Berlin*, 133 Wn.2d at 545-46. “[I]f it is possible to commit the greater offense without having committed the lesser offense, the latter is not an included crime.” *State v. Frazier*, 99 Wn.2d 180, 191, 661 P.2d 126 (1983) (quoting *State v. Roybal*, 82 Wn.2d 577, 583, 512 P.2d 718 (1973)). The lesser included offense analysis applies “to the offenses as charged and prosecuted, rather than to the offenses as they broadly appear in statute.” *Berlin*, 133 Wn.2d at 548.

It is undisputed the credit cards were inside the purse and theft of the cards could not have been committed without theft of the purse. Under the facts of this case, the third degree theft was a lesser included offense of each of the second degree theft offenses. Under the double jeopardy protections of our State and Federal constitutions, Mr. Lust’s conviction on one count of third degree theft based on the theft of the purse precluded

his conviction of second degree theft based on any credit cards contained in the purse.

E. CONCLUSION

The second degree theft convictions should be reversed and dismissed.

Dated this 29th day of June, 2012.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION III

STATE OF WASHINGTON,)	
)	
Respondent,)	No. 30786-7-III
)	
vs.)	CERTIFICATE
)	OF MAILING
DAVID M. LUST,)	
)	
Appellant.)	

I certify under penalty of perjury under the laws of the State of Washington that on June 29, 2012, I served a copy of the Appellant's Brief in this matter by email on the following party, receipt confirmed, pursuant to the parties' agreement:

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I certify under penalty of perjury under the laws of the State of Washington that on June 29, 2012, I mailed a copy of the Appellant's Brief in this matter to:

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Signed at Spokane, Washington on June 29, 2012.


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