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Court of Appeals
Division III
State of Washington

No. 31317-4-III
IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

JEFFREY H. KELLER,

Defendant/Appellant.

Appellant's Brief

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A. ASSIGNMENTS OF ERROR

1. The evidence was insufficient to prove the crime of second degree theft as charged in the information.

2. The trial court erred in concluding that the defendant was guilty of second degree theft. Conclusion of Law No. 12, CP 173.

3. The trial court erred in concluding that on August 3, 2011, the defendant possessed the Dyson DC25 vacuum cleaner with the intent to sell, transfer, dispense or otherwise disposes of the property to another person. Conclusion of Law No. 11, CP 173.

4. The trial court erred in concluding that the defendant was guilty of trafficking in stolen property in the first degree. Conclusion of Law No. 12, CP 173.

5. The evidence was insufficient to prove the crime of first degree trafficking in stolen property.

6. The trial court erred in sentencing Keller to 364 days on attempted third degree theft.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Should the charge of second degree theft be dismissed because the State failed to prove the crime as charged in the information?

2. Was there insufficient evidence independent of Keller's statements to establish the corpus delicti of the crime of first degree trafficking in stolen property?

3. Did the trial court err in sentencing Keller to 364 days on attempted third degree theft because attempted third degree theft is a misdemeanor with a sentencing range of only 0-90 days?

C. STATEMENT OF THE CASE

Jeffrey Keller was charged with first degree trafficking in stolen property, second degree theft and attempted third degree theft. CP 22-24. For the second degree theft the amended information stated that on August 2, 2011, Keller "did obtain control over two Dyson Vacuum Cleaners, property belonging to Home Depot, . . .by color or aid of deception, to wit: placed a UPC code for a lesser amount than the price of the item over the correct UPC code and paid for the item . . ." CP 23.

The evidence presented at the bench trial showed that on August 2, 2011, Keller went to Home Depot and purchased a Dyson DC 25 vacuum cleaner valued at \$549.00 around 12:00 pm and a Dyson DC 24 vacuum cleaner valued at \$449.00 around 7:30 pm. Both vacuum cleaners rang up at \$79.96 with a UPC code belonging to a Hoover vacuum cleaner. On both of these occasions Keller also purchased a shelving board that he

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place over the Dyson box in the shopping cart. CP 173. After paying for the items he left store, got in his vehicle and drove away. RP 84¹. The loss prevention manager observed Keller's actions on both occasions, but he never saw Keller place the lower valued UPC stickers on the Dyson boxes. RP 90-91.

On August 3, 2011, Keller returned to Home Depot and again purchase a Dyson DC25 vacuum cleaner valued at \$549 following the same procedure as before. This time the loss prevention manager observed Keller take a UPC sticker from his pocket and place it on the Dyson box. RP 93-94. After Keller paid at the cash register, the loss prevention manager detained Keller as he pushed the shopping cart of merchandise out of the store. RP 95. He asked Keller to come back to his office and then questioned him about his actions. CP 172.

Keller admitted to the two vacuum thefts from August 2, 2011, and said he gave the two vacuum cleaners to friends who sold them. He stated he used 'Google' to search for a quick way to make some money and found ticket switching so he decided to try it. He stated he printed the UPC codes from home, brought them to Home Depot and stuck them on the Dyson vacuum cleaner boxes. CP 172. The loss prevention manager later

¹ Citations designated "RP" are to the trial and sentencing held 8/6/12 and 12/4/12, respectively.

removed the fraudulent UPC sticker and found no other UPC tag underneath it. RP 108-09.

Defense counsel argued during closing argument that the State failed to prove second degree theft as charged in the information because there was no evidence that Keller placed a UPC code for a lesser amount than the price of the item *over* the correct UPC code. RP 140. He also argued there was a corpus delicti problem with the first degree trafficking in stolen property, since the only evidence of trafficking was Keller's confession to the loss prevention manager. RP 142.

The Court found Keller guilty of first degree trafficking in stolen property for the August 3rd incident and second degree theft for the two incidents on August 2nd. CP 173. It also found Keller guilty of attempted third degree theft on an unrelated incident consolidated with this trial. CP 172. The Court sentenced Keller to 364 days on the attempted third degree theft based on a sentencing range of 0-365 days.

This appeal followed. CP 175.

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D. ARGUMENT

Issue No. 1. The charge of second degree theft should be dismissed because the State failed to prove the crime as charged in the information.²

The State must prove the essential elements of a crime. State v. Byrd, 125 Wn.2d 707, 713, 887 P.2d 396 (1995). If the State elects, even through inadvertence, to charge a defendant with different alternative of the crime than it intends to prove, that is what it has to prove. State v. Goldsmith, 147 Wn. App. 317, 324-25, 195 P.3d 98, (2008) (citing State v. Bryant, 73 Wn.2d 168, 171, 437 P.2d 398 (1968) ("It is axiomatic that the state has the burden of proving every element of the crime charged.")).

In Goldsmith, the State charged Mr. Goldsmith with child molestation in the first degree by the second of two alternative means. Goldsmith, 147 Wn. App. at 322, 195 P.3d 98. The State charged the second alternative means of committing first degree child molestation only. But it offered only evidence to show the first alternative means. Id. This Court held the State was required to prove the essential elements of the crime it charged. Goldsmith, 147 Wn. App. at 325, 195 P.3d 98.

² Assignments of Error Nos. 1 & 2.

The Court did not buy the argument that the problem was "merely a problem of notice." Id. It held that the information adequately notified Mr. Goldsmith of the necessary elements of the crimes the State says he committed. The State simply failed to prove those crimes. Id., citing State v. Brown, 45 Wn. App. 571, 576, 726 P.2d 60 (1986) (finding that one cannot be tried for an uncharged offense). The Court went on to hold that the information adequately charged and notified the defendant of the essential elements of the crime the State charged, just not the elements that the State proved or that the court instructed on. Id. The fact that the court's instructions set out the correct elements of the crime does not resolve the problem. Id., citing State v. Holt, 104 Wn.2d 315, 323, 704 P.2d 1189 (1985) ("an information which is constitutionally defective because it fails to state every statutory element of a crime cannot be cured by a jury instruction which itemizes those elements" (emphasis omitted)).

In Goldsmith, the State also complained that the defendant "sandbagged" the prosecutors, presumably by not complaining about the information when the State could have done something about it. Goldsmith, 147 Wn. App. at 326, 195 P.3d 98. But the Court held there is no authority for the proposition that the defendant has an affirmative

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obligation to notify the State that he did not commit the crime by the means charged, but that he did commit the crime by another means. Id.

Finally, the Court held that when the State charged one crime and proved another, it cannot now amend the information and again prove the same crime it proved during Mr. Goldsmith's first trial, as this violates constitutional prohibitions against double jeopardy. Id. The proper remedy is dismissal. Id.

Applying these principles to the facts of the present case, the amended information stated that on August 2, 2011, Keller “did obtain control over two Dyson Vacuum Cleaners, property belonging to Home Depot, . . .by color or aid of deception, to wit: placed a UPC code for a lesser amount than the price of the item *over* the correct UPC code and paid for the item . . .” CP 23 (emphasis added. There was no evidence that Keller placed a UPC code for a lesser amount than the price of the item *over* the correct UPC code.

The loss prevention manager observed Keller’s actions on both occasions on August 2nd, but he never saw Keller place the lower valued UPC stickers on the Dyson boxes. RP 90-91. Arguably, it could be inferred that Keller placed the tags on the boxes. In addition, he later confessed that he printed the UPC codes from home, brought them to

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Home Depot and stuck them on the Dyson vacuum cleaner boxes. CP

172.

However, even presuming these facts, Keller did not place the UPC stickers he made *over* the correct UPC code, as charged in the information. He merely stuck them on the boxes and covered up the correct UPC codes and the Dyson label on the box with a piece of shelving from the store. The loss prevention manager later confirmed the fact that Keller did not place the UPC stickers he made *over* the correct UPC code when he testified that he later removed the sham UPC sticker from one of the boxes and found no other UPC tag underneath it. RP 108-09.

As in Goldsmith, the State charged one crime and proved another. The problem is not a defective information or lack of notice. The information adequately notified Keller of the necessary elements of the crime the State says he committed. The State simply failed to prove the crime as it was specifically charged. As in Goldsmith, the State cannot now amend the information and again prove the same crime it proved during Keller's trial without violating double jeopardy. Therefore, the proper remedy is dismissal. Goldsmith, 147 Wn. App. at 326, 195 P.3d 98.

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Issue No. 2. There was insufficient evidence independent of Keller's statements to establish the corpus delicti of the crime of first degree trafficking in stolen property.³

The corpus delicti doctrine “tests the sufficiency or adequacy of evidence, other than a defendant's confession, to corroborate the confession.” State v. Dow, 168 Wn.2d 243, 249, 227 P.3d 1278 (2010) (citing State v. Brockob, 159 Wn.2d 311, 327–28, 150 P.3d 59 (2006)). “The purpose of the corpus delicti rule is to prevent defendants from being unjustly convicted based on confessions alone. Dow, 168 Wn.2d at 249 (citing City of Bremerton v. Corbett, 106 Wn.2d 569, 576, 723 P.2d 1135 (1986)). A defendant's incriminating statement is not sufficient to establish that a crime occurred. Brockob, 159 Wn.2d at 328.

To satisfy the corpus delicti rule, the State must present evidence independent of the incriminating statement that shows the crime described in the defendant's statement occurred. Brockob, 159 Wn.2d at 328. In determining whether this standard is satisfied, appellate courts review the evidence in the light most favorable to the State. Brockob, 159 Wn.2d at 328. The independent evidence need not be sufficient to support a conviction, but it must provide prima facie corroboration of the crime

³ Assignments of Error Nos. 3-5.

described in a defendant's incriminating statement. Brockob, 159 Wn.2d at 328. Prima facie corroboration exists if the independent evidence supports a “logical and reasonable inference” of the facts the State seeks to prove. State v. Vangerpen, 125 Wn.2d 782, 796, 888 P.2d 1177 (1995). The independent evidence must be consistent with guilt and inconsistent with innocence. State v. Aten, 130 Wn.2d 640, 660, 927 P.2d 210 (1996). Furthermore, “the State must still prove every element of the crime charged by evidence independent of the defendant's statement.” Dow, 168 Wn.2d at 254 (citing Brockob, 159 Wn.2d at 328).

Here, in order to prove first degree trafficking in stolen property the State needed to prove that Keller possessed or obtained control of the third Dyson vacuum on 8/3/11, with intent to sell or to otherwise dispose of it to another person. RCW 9A.82.010(19); RCW 9A.82.050(1). The State failed to meet this burden. The State presented no evidence that Keller intended to sell or to otherwise dispose of the August 3rd Dyson to another person. Keller was detained by the loss prevention manager before he even left the store so he had no opportunity to even arrange to sell or to otherwise dispose of the Dyson.

Moreover, Keller’s confession to the loss prevention manager concerned only the two Dyson vacuum cleaners from the August 2nd

incident. The first degree trafficking in stolen property charge stemmed from the August 3rd incident. See Conclusion of Law No. 11, CP 173. Keller said nothing about what he intended to do with the Dyson taken on August 3rd. So in actuality there is not even a confession to support trafficking from the August 3rd incident.

In any event, the State failed to provide prima facie corroboration of the crime described in Keller's incriminating statement. Therefore, it did not satisfy the corpus delicti rule and the evidence is insufficient to establish that the crime occurred.

Issue No. 3. The trial court erred in sentencing Keller to 364 days on attempted third degree theft because attempted third degree theft is a misdemeanor with a sentencing range of only 0-90 days.⁴

Third degree theft is a gross misdemeanor. RCW 9A.56.050(2). An attempt crime is a misdemeanor when the crime attempted is a gross misdemeanor or misdemeanor. RCW 9A.28.020 (e). Attempted third degree theft is therefore a misdemeanor. The sentencing range on a misdemeanor is 0-90 days not 0-365 as was employed by the trial court. RCW 9.92.030. Accordingly, the 364 days imposed by the trial court was

⁴ Assignment of Error No. 6.

an illegal sentence. Keller needs to be resentenced on that charge within a sentencing range of 0-90 days.

E. CONCLUSION

For the reasons stated, the convictions for first degree trafficking in stolen property and second degree theft should be reversed and the case remanded for resentencing on the attempted third degree theft conviction within a range of 0-90 days.

Respectfully submitted July 26, 2013,

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PROOF OF SERVICE

I, David N. Gasch, do hereby certify under penalty of perjury that on July 26, 2013, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of Appellant's Brief:

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