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SEP 24, 2013

Court of Appeals
Division III
State of Washington

NO. 313174-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent

v.

JEFFREY HOWARD KELLER, Appellant

APPEAL FROM THE SUPERIOR COURT
FOR BENTON COUNTY

NO. 11-1-01229-1

BRIEF OF RESPONDENT

ANDY MILLER
Prosecuting Attorney
for Benton County

CHRISTOPHER M. HOXIE
Deputy Prosecuting Attorney
BAR No. 46293

ANITA I. PETRA
Prosecuting Attorney
BAR NO. 32535
OFFICE ID 91004

7122 West Okanogan Place
Bldg. A
Kennewick WA 99336
(509) 735-3591

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I. STATEMENT OF FACTS

On July 9, 2011, the defendant was observed acting suspiciously in Wholesale Sports in Kennewick, Washington. (RP¹ 37). Loss Prevention Officer (LPO) Mike Hempstead observed the defendant selecting numerous fishing rods and attempting to peel the tags off less expensive rods and place them on more expensive rods. (RP 38-43). Mr. Hempstead contacted the police based upon this conduct. (RP 64).

Officer Reynolds contacted the defendant in the store and found the defendant in possession of a St. Croix fishing pole and reel valued at \$299.00 and a Shakespeare travel pole valued at \$29.00. (RP 26-30). The St. Croix fishing pole had the bottom half of the manufacturer's sticker ripped off and the UPC sticker from a cheaper pole, an Okuma valued at \$29.99, attached. (RP 43). All this was captured on video. (RP 49). Officer Reynolds and LPO Hempstead watched the video and saw the defendant drop tags from poles. (RP 65). The officers then went to those locations in the store and found a hang tag and the UPC sticker for the \$299.99 fishing pole. (RP 65).

On August 2, 2011, at approximately 12:10 p.m., LPO Jamison Swanson observed the defendant pushing a Dyson DC 25, valued at

¹ "RP" refers to the Verbatim Report of Proceedings of 04/12/12, 08/06/12, 12/04/12, and 12/10/12, reported and filed by Court Reporter Renee Munoz.

\$549.00, in a shopping cart at the Home Depot store where Mr. Swanson was employed. (RP 83). The defendant pushed the cart to hardware, selected a shelving board, and placed it on top of the vacuum. (RP 84). The defendant then went to a register and purchased the Dyson. (RP 84). The Dyson rung up as a \$79.96 Hoover vacuum, causing a loss of \$469.04 to Home Depot. (RP 84). The defendant got into a car that was parked in the loading zone before Mr. Swanson could verify that the vacuum had the wrong UPC code attached. (RP 84, 90-91). Upon researching this theft, Mr. Swanson discovered that the defendant had come back to the store later that night. (RP 91). The defendant had selected a Dyson DC 24 vacuum valued at \$449.00, placed a UPC code for a \$79.96 Hoover vacuum on the Dyson, selected a shelving board and placed it on the vacuum, and went to the register. (RP 92-93). The Dyson vacuum rang up as \$79.96, causing a loss of \$369.04. (RP 92).

On August 3, 2011, LPO Jamison Swanson was on duty at the Home Depot store, and saw the defendant pushing a shopping cart in the store, and observed him select a Dyson DC 25 vacuum cleaner valued at \$549.00, and place it in his shopping cart. (RP 93-94). The defendant then went to the middle of the lighting aisle, where he placed a UPC code for a Hoover vacuum valued at \$79.96 on the Dyson DC 25 vacuum. (RP 93-94). The defendant then proceeded to the hardware department and

selected a shelving board, and placed it on top of the vacuum cleaner. (RP 94). The defendant then approached the register to check out, and the \$549.00 vacuum rang up at \$79.96, causing a loss of \$469.04 to Home Depot. (CP 171-72; RP 94-95).

After the August 3, 2011, incident, the defendant was stopped by Swanson who identified himself as Home Depot Security. (RP 95). Swanson asked the defendant to accompany him back to the office, and the defendant did so. (RP 96). Once in the office, the defendant told Swanson that he did steal the two Dyson vacuum cleaners from the previous day. (RP 96). The defendant stated he printed the UPC codes at home and brought them to the store to stick on the Dyson vacuums. (RP 97). The defendant stated he used *Google* to search for a way to make some quick money, and he found ticket switching as an option so he decided to try it. (RP 97).

II. ARGUMENT

1. ***Goldsmith* is not on point, and the Information provided the defendant with all notice required.**

The defendant argues that the Information filed in this case was so defective as to require reversal. The defendant relies on *State v. Goldsmith* heavily in his analysis, attempting to analogize this case to *Goldsmith*. 147 Wn. App. 317, 195 P.3d 98 (2008). *Goldsmith* is not on

point, however. *Goldsmith* deals with a very specific fact pattern. The State, in *Goldsmith*, charged Mr. Goldsmith with a violation of RCW 9A.44.083. *Id.* at 322. RCW 9A.44.083 is a statute that provides two disjunctive means of committing the crime proscribed. In *Goldsmith*, through an apparent error, the State charged the defendant with one, and only one means of committing a crime, and proceeded to only offer proof showing that the other means was the one actually committed. *Id.* As a result, the Information was valid on its face... it simply charged a different crime than the one the State actually proved. *Id.*

This case is obviously different. In order for the defendant's arguments to be correct, the crime of placing the UPC stickers over the UPC stickers already on the box would have to be legally distinct from the crime of simply placing a new UPC sticker on the box. That is not the case.

The defendant here was charged with an Information that provided all the statutory elements of the crime, all of which were proved at trial, and the finder of fact was informed of. It also provided information beyond the elements of the crime. For instance, the date range of the crime, that the crime took place in Benton County, and that the defendant performed this crime by placing the UPC stickers over the other stickers. (CP 23). Their inclusion in the Information does not render them elements

of the crime. The State proved each and every element of the crime of Theft in the Second Degree, as charged, at trial.

To convict the defendant of the crime of theft in the second degree, each of the following four elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about _____, the defendant
 - [(a) wrongfully obtained or exerted unauthorized control over property [or services] of another [or the value thereof];
 - [or]
 - [(b) by color or aid of deception, obtained control over property [or services] of another [or the value thereof];
 - [or]
 - [(c) appropriated lost or misdelivered property [or services] of another [or the value thereof];]
- [and]
- (2) That the property [or services] exceeded [\$250] [\$750] in value [but did not exceed [\$1,500] [\$5,000] in value];
- (3) That the defendant intended to deprive the other person of the property [or services]; and
- (4) That this act occurred in the State of Washington.

If you find from the evidence that elements (2), (3), and (4), and any of the alternative elements [(1)(a)] [(1)(b)] or [(1)(c)], have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

WPIC 70.06.

While the WPICs are not binding upon the court, the courts of Washington have stated that WPIC 70.06 is an accurate statement of the elements of the crime of Theft in Second Degree, when charged under RCW 9A.56.040(1)(a), as opposed to the alternative means of committing Theft in the Second Degree. *State v. Lee*, 128 Wn.2d 151, 159, 904 P.2d 1143 (1995). No matter if the defendant placed the sticker over the UPC

sticker on the box, or if he simply placed a UPC sticker on the box, the defendant, by color and aid of deception, obtained control over property of another. The alleged error in the precise method of deception the defendant used had no impact upon what the elements of the crime were. As a result, *Goldsmith* cannot be said to be controlling.

The court has drawn a firm line between errors in a charging document with regards to the elements, and errors in a charging document with regards to extraneous information.

Convictions based on charging documents which contain only technical defects (such as an error in the statutory citation number or the date of the crime or the **specification of a different manner of committing the crime charged**) usually need not be reversed. However, omission of an essential statutory element cannot be considered a mere technical error.

(Emphasis added). *State v. Vangerpen*, 125 Wn.2d 782, 790, 888 P.2d 1177 (1995).

If the defendant could show some prejudice, the alleged mistake might be sufficient for reversal. However, the defendant cannot. The defendant's defense was general denial throughout the case. The defendant never admitted that he was stealing the vacuum cleaners. (RP 136-145).

The State proved the defendant committed the crime of Theft in the Second Degree, based upon an Information that informed the

defendant of all elements of the crime proved. A minor mistake in the precise nature of the deception the defendant used does not alter the fact that the defendant obtained control of the property of another with the aid of deception.

2. The defendant did not preserve the corpus delicti issue

Corpus delicti is a rule of evidence, not a constitutional requirement levied by either the Washington State, or Federal Constitution. *State v. C.D.W.*, 76 Wn. App. 761, 763, 887 P.2d 911 (1995). As a result, the defendant must take steps to preserve the error for the appellate court, in the form of a formal objection. *Id.* If the defendant does not take these actions, then the corpus delicti issue is waived. *Id.* “This court has consistently held that, to preserve an alleged trial error for appellate review, a defendant must timely object to the introduction of the evidence or move to suppress it prior to or during the trial.” *State v. Silvers*, 70 Wn.2d 430, 432, 423 P.2d 539 (1967). “To be timely, the party must make the objection at the earliest possible opportunity after the basis for the objection becomes apparent.” *State v. Gray*, 134 Wn. App. 547, 557, 138 P.3d 1123, 1128 (2006). “We therefore hold that a defendant who has initially stipulated that his confession may be admitted does not waive his right to challenge its admission based on the corpus del[i]cti rule

if he raises the challenge in the trial court before both sides have rested.”

State v. McConville, 122 Wn. App. 640, 649, 94 P.3d 401 (2004).

Mr. Keller was on notice that the State intended to use his confession long before this bench trial began. The State’s motions in limine, for instance, clearly demonstrate an intention to use the confession. (CP 10). These were filed on March 26, 2012, five months before the actual date of the trial. The defendant never made a motion to exclude his confession, based upon corpus delicti. No objection was raised to the admission of the confession through the testimony of Mr. Swanson. (RP 96-97). No objection was raised before the defense rested. (RP 130). The defendant never requested to have the confession stricken from the record. Corpus delicti is mentioned only in closing arguments, brought up during the defendant’s closing. (RP 143). Closing is an entirely inappropriate venue to bring up substantially novel legal issues for the court’s consideration. *State v. Davenport*, 100 Wn.2d 757, 760, 675 P.2d 1213 (1984). Even given this was a bench trial, it was still inappropriate. Allowing this to be sufficient to preserve the corpus delicti issue would encourage the worst kind of deceptive and manipulative behavior, and fail to advance the aims of the corpus delicti rule in any shape or fashion. While the court does not mandate it, the court has urged defense counsel to make corpus delicti arguments prior to trial, when possible. *State v.*

McConville, 122 Wn. App. at 640, FN 22. To allow the defendant to act in this way is completely contradictory to the orderly administration of justice.

The defendant failed to make any mention of corpus delicti until after both sides had rested. According to precedent, that is too late for the issue to be raised, even in a bench trial. Furthermore, it certainly was not the earliest possible opportunity. To allow the defendant to wait until closing, and then spring this kind of argument on the State furthers none of the goals of the corpus delicti rule, which is to prevent defendants from being convicted on the basis of false confessions. *City of Bremerton v. Corbett*, 106 Wn.2d 569, 576, 723 P.2d 1135 (1986). It would encourage defendants to never litigate these kinds of issues before trial, saving them until closing, when the State is unprepared for them and incapable of responding, even through rebuttal witnesses. The issue of corpus delicti was waived when the defendant's attorney elected to rest his case in chief without raising it. It has not been preserved for appellate review, and thus the defendant's arguments regarding it are irrelevant.

3. Even if the Court elects to reach the merits of the defendant's corpus delicti argument, there was sufficient evidence in the record to provide the corpus delicti for Trafficking in Stolen Property.

Corpus delicti is a judicially created rule of evidence, intended to prevent defendants from being convicted solely on the basis of a false confession. *State v. Aten*, 130 Wn.2d 640, 657, 927 P.2d 210 (1996). As a result, some kind of corroboration is required before a conviction can be grounded in a confession.

The independent evidence need not be of such a character as would establish the corpus delicti beyond a reasonable doubt, or even by a preponderance of the proof. It is sufficient if it *prima facie* establishes the corpus delicti.

“*Prima facie*” in this context means there is “evidence of sufficient circumstances which would support a logical and reasonable inference” of the facts sought to be proved. The evidence need not be enough to support a conviction or send the case to the jury.

Id. at 656.

“The corpus delicti can be proved by either direct or circumstantial evidence.” *Id.* at 655.

Looking at the evidence here, it is clear that the corpus delicti of trafficking in stolen property was established. The court cited three facts in particular that showed that the corpus delicti had been established. 1: The defendant, over a period two days, acquired three high-end vacuum cleaners. (RP 150). This is strong circumstantial evidence that the

defendant intended to sell at least some of these devices. The State is unaware of any legitimate reason to acquire three powerful, high-end vacuums in such a short time. This is certainly strong evidence that the defendant intended to dispose of them. 2: Mr. Keller targeted items which are common targets of those intending to steal property with the intention of later selling it. (RP 150). In fact, he targeted one of the three items most commonly stolen by individuals with those intentions. (RP 79). 3: The defendant intentionally stole three Dyson Vacuum Cleaners, in the same fashion, repeating many of the same steps. (RP 150). It showed the defendant had developed a consistent scheme or plan, via which he intended to continue stealing vacuums. This plan involved a fairly complicated scheme, requiring an understanding of how the scanning system worked. The defendant's crime spree was stopped only by the intervention of the Loss Prevention Officer. This leads to the natural conclusion that the defendant was engaged in a criminal enterprise, and that he intended to continue it.

The defendant also brings up that his confession allegedly contained no information about an intention to traffic the third vacuum. Mr. Keller admitted in his confession that the reason he was doing this was that "he had been looking for a quick way to make money" and found

ticket switching as an option, so he tried it. (RP 97). That clearly reflects an intention to traffic in the items.

4. The defendant appears to be correct about the sentence for attempted Theft in the Third Degree.

After reviewing the documents, it appears that Mr. Keller is correct in stating that his sentence for attempted third degree theft is beyond the sentencing range.

III. CONCLUSION

The State requests that the matter be remanded to the trial court so Mr. Keller's sentence on the charge of Theft in the Third Degree may be reduced to reflect the 0-90 day range, and to affirm the trial court on all other matters.

RESPECTFULLY SUBMITTED this 24th day of September 2013.

ANDY MILLER
Prosecutor


CHRISTOPHER M. HOXIE
Deputy Prosecuting Attorney
Bar No. 46293


for **ANITA I. PETRA**
Deputy Prosecuting Attorney
Bar No. 32535
OFC ID NO. 91004

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

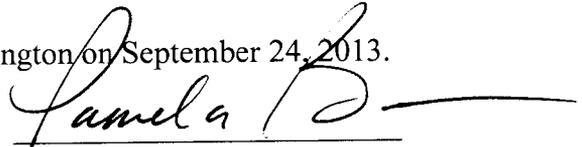
David N. Gasch
Gasch Law Office
P.O. Box 30339
Spokane, WA 99223-3005

E-mail service by agreement
was made to the following
parties: gaschlaw@msn.com

Jeffrey Howard Keller
409 W. 12th Avenue
Kennewick, WA 99337-4716

U.S. Regular Mail, Postage
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Signed at Kennewick, Washington on September 24, 2013.



Pamela Bradshaw
Legal Assistant