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Court of Appeals
Division III
State of Washington

No. 31889-3-III

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,
Plaintiff/Respondent,

vs.

WILLIAM MICHAEL LOBIE,
Defendant/Appellant.

APPEAL FROM THE GRANT COUNTY SUPERIOR COURT
Honorable Evan E. Sperline, Judge

BRIEF OF APPELLANT

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TABLE OF CONTENTS

A.	ASSIGNMENT OF ERROR.....	1
B.	STATEMENT OF THE CASE.....	1
C.	ARGUMENT.....	3
	The evidence was insufficient to convict Mr. Lobie of theft.....	3
D.	CONCLUSION.....	10

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>In re Winship</i> , 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).....	3
<i>Jackson v. Virginia</i> , 443 U.S. 307, 61 L.Ed.2d 560, 99 S.Ct. 2781 (1979).....	6
<i>Bremerton v. Corbett</i> , 106 Wn.2d 569, 723 P.2d 1135 (1986).....	6, 7
<i>State v. Aten</i> , 130 Wn.2d 640, 927 P.2d 210 (1996).....	6, 7
<i>State v. Baeza</i> , 100 Wn.2d 487, 670 P.2d 646 (1983).....	4
<i>State v. Collins</i> , 2 Wn. App. 757, 470 P.2d 227, 228 (1970).....	4
<i>State v. Crediford</i> , 130 Wn.2d 747, 927 P.2d 1129 (1996).....	3

<i>State v. DuBois</i> , 79 Wn. App. 605, 904 P.2d 308 (1995).....	6, 8
<i>State v. Fellers</i> , 37 Wn. App. 613, 683 P.2d 209 (1984).....	9
<i>State v. Green</i> , 94 Wn.2d 216, 616 P.2d 628 (1980).....	6
<i>State v. Hundley</i> , 126 Wn.2d 418, 894 P.2d 403 (1995).....	4
<i>State v. Lung</i> , 70 Wn.2d 365, 423 P.2d 72 (1967).....	7
<i>State v. Moore</i> , 7 Wn. App. 1, 499 P.2d 16 (1972).....	4
<i>State v. Myers</i> , 133 Wn.2d 26, 941 P.2d 1102 (1997).....	4
<i>State v. Pineda</i> , 99 Wn. App. 65, 992 P.2d 525 (2000).....	7
<i>State v. Ray</i> , 130 Wn.2d 673, 926 P.2d 904 (1996).....	7
<i>State v. Taplin</i> , 9 Wn. App. 545, 513 P.2d 549 (1973).....	4

Statutes

U.S. Const. amend. 14.....	1, 3
Wash. Const. art. 1 § 3.....	1, 3
RCW 9A.56.020.....	5
RCW 9A.56.020(1).....	5
RCW 9A.56.050(1).....	5

A. ASSIGNMENT OF ERROR

The evidence was insufficient to establish that appellant committed third degree theft.

Issue Pertaining to Assignment of Error

The State charged appellant with third degree theft for allegedly shoplifting items from Wal-Mart. The only evidence presented at trial was the testimony of a Wal-Mart Loss Prevention Officer (LPO). When the State failed to present any evidence to show that the appellant stole items and the allegedly stolen items were the property of another, was Mr. Lobie's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment violated by the failure to prove the essential elements of the crime?

B. STATEMENT OF THE CASE

Eric Paulson, a loss prevention officer, observed William Michael Lobie switch the tag on a notebook and place an ink cartridge in his pocket while inside a Wal-Mart store. 7/17/13 RP 4–5, 7–8, 17–18. Mr. Lobie was apprehended after purchasing a notebook and then going to leave the store. 7/17/13 RP 12, 18. When told he needed to come with the LPOs to their office, Mr. Lobie “just said he was sorry.” 7/17/13 RP 18.

Paulsen alleged two ink cartridges and a ball cap were stolen.

7/17/13 RP 20. Moses Lake Police Officer Juan Rodriguez investigated.

7/17/13 RP 38–40. After reading *Miranda* rights, the officer said Mr.

Lobie admitted he took some ink cartridges and a ball cap without paying for them and changed the sticker on a day planner for a cheaper price.

7/17/13 RP 40–41; 7/18/13 RP 29. During the search incident to arrest, police found a ball cap, a small baggy of meth, a glass smoking device and six credit cards previously stolen from Maria Arceo in Mr. Lobie’s pant and coat pockets. 7/17/13 RP 19, 41, 44.

None of the items allegedly stolen from the store—a notebook, two ink cartridges and a ball cap—were produced at trial or admitted into evidence. The ball cap found by police was not identified as belonging to Wal-Mart.

Paulsen was asked if it was typical practice to stop people before they actually exit the store; he said “once they pass the EAS system, then we can stop them in the vestibule.” 7/17/13 RP 21. There was no testimony as to what an “EAS system” was.

Mr. Lobie testified in his own behalf. His girlfriend got paid earlier that day and was supposed to meet him by the Red “DVD Rental” Box inside the front of the store. 7/18/13 RP 24, 26. Mr. Lobie paid for the day

planner notebook and walked toward that part of the store hoping to get the money from her to purchase the rest of the items. He was intercepted by loss prevention officers while still in in the vestibule of the store.
7/18/13 RP 23–25.

The jury was instructed in order to convict Mr. Lobie of third degree theft, the State had to prove beyond a reasonable doubt that Mr. Lobie “wrongfully obtained or exerted unauthorized control over property of another” and “intended to deprive the other person of the property.” Instruction No. 10 at CP 33.

The jury convicted Mr. Lobie of possession of a controlled substance, possession of stolen property in the second degree (access devices) and theft in the third degree as charged. CP 38–40. This appeal followed. CP 46.

C. ARGUMENT

The evidence was insufficient to convict Mr. Lobie of theft.

In all criminal prosecutions, due process requires that the state prove every fact necessary to constitute the charged crime beyond a reasonable doubt. U.S. Const. amend. 14; Const. art. 1, § 3; *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970); *State v. Crediford*, 130 Wn.2d 747, 749, 927 P.2d 1129 (1996). Mere possibility,

suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. *State v. Moore*, 7 Wn. App. 1, 499 P.2d 16 (1972). As a result, any conviction not supported by substantial evidence may be attacked for the first time on appeal as a due process violation. *Id.* “Substantial evidence” in the context of a criminal case, means evidence sufficient to persuade “an unprejudiced thinking mind of the truth of the fact to which the evidence is directed.” *State v. Taplin*, 9 Wn. App. 545, 513 P.2d 549 (1973) (quoting *State v. Collins*, 2 Wn. App. 757, 759, 470 P.2d 227, 228 (1970)). While circumstantial evidence is no less reliable than direct evidence, *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997), evidence is insufficient if the inferences drawn from it do not establish the requisite facts beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 491, 670 P.2d 646 (1983).

A reviewing court should reverse a conviction for insufficient evidence where no rational trier of fact, when viewing the evidence in a light most favorable to the state, could have found the elements of the crime charged beyond a reasonable doubt. *State v. Hundley*, 126 Wn.2d 418, 421–22, 894 P.2d 403 (1995).

The State charged Mr. Lobie with third degree theft under RCW 9A.56.020 and .050(1). CP 2.

A person is guilty of theft in the third degree if he or she commits theft of property or services which (a) does not exceed seven hundred fifty dollars in value, or (b) includes ten or more merchandise pallets, or ten or more beverage crates, or a combination of ten or more merchandise pallets and beverage crates.

RCW 9A.56.050(1).

“Theft” means:

- (a) To wrongfully obtain or exert unauthorized control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services; or
- (b) By color or aid of deception to obtain control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services; or
- (c) To appropriate lost or misdelivered property or services of another, or the value thereof, with intent to deprive him or her of such property or services.

RCW 9A.56.020(1) (emphasis added). Thus, to convict Mr. Lobie of third degree theft, the State had to prove beyond a reasonable doubt that he exerted unauthorized control over the property (notebook, two ink cartridges and a ball cap), of another (Wal-Mart), with intent to deprive Wal-Mart of that property, and that the value of the property did not exceed \$750 in value.

Where a defendant challenges the sufficiency of the evidence, the proper inquiry is, when viewed in the light most favorable to the

prosecution, is there sufficient evidence for a rational trier of fact to find guilt beyond a reasonable doubt? *Jackson v. Virginia*, 443 U.S. 307, 319, 61 L.Ed.2d 560, 99 S.Ct. 2781 (1979); *State v. Green*, 94 Wn.2d 216, 220–21, 616 P.2d 628 (1980). Even under this generous standard, the State failed to meet its burden.

Although there are no Washington cases directly on point, the State's failure to meet its evidentiary burden here is readily apparent when compared to the circumstances in *State v. DuBois*, 79 Wn. App. 605, 904 P.2d 308 (1995). In *DuBois*, the State failed to meet its burden in a similar fashion, albeit in the context of the corpus delicti rule, which shares a similar standard with sufficiency of the evidence claims.

Washington courts apply the corpus delicti rule and preclude the use of confessions or admissions of a person charged with a crime unless independent evidence corroborates the corpus delicti of the crime. *State v. Aten*, 130 Wn.2d 640, 655–56, 927 P.2d 210 (1996). One of the oldest confession doctrines of Anglo-American law, the corpus delicti rule was established by court to protect defendants from the possibility of an unjust conviction based upon a false confession alone. *Bremerton v. Corbett*, 106 Wn.2d 569, 575–76, 723 P.2d 1135 (1986).

The independent evidence must prima facie establish that the charged crime did in fact occur. It must support a logical and reasonable inference of the facts sought to be proved. *Aten*, 130 Wn.2d at 656. Review is de novo, but, like the review process in a challenge to the sufficiency of the evidence, the independent evidence and the logical inferences drawn are considered in the light most favorable to the State. *State v. Pineda*, 99 Wn. App. 65, 77, 992 P.2d 525 (2000). The corpus delicti is not established when the independent evidence supports reasonable and logical inferences of both criminal agency and non-criminal cause. *Aten*, 130 Wn.2d at 660–61 (clarifying *Bremerton v. Corbett*); see also *State v. Ray*, 130 Wn.2d 673, 681, 926 P.2d 904 (1996) (applying same principle). Rather, “[t]he final test is whether the facts found and the reasonable inferences from them have proved the nonexistence of any reasonable hypothesis of innocence.” *Aten*, 130 Wn.2d at 660 (quoting *State v. Lung*, 70 Wn.2d 365, 371, 423 P.2d 72 (1967)).

Thus, although stated differently, determining whether the State has met its burden under the corpus delicti rule is analogous to determining whether there is sufficient evidence to convict. For a corpus delicti challenge, the issue is whether, absent the confession, there is

sufficient evidence when considered in the light most favorable to the State to rule out any reasonable hypothesis for innocence. Similarly, for a sufficiency of the evidence challenge the issue is whether there is sufficient evidence when considered in the light most favorable to the State to find the defendant guilty beyond a reasonable doubt.

In *Dubois*, a customer at a grocery store reported seeing the defendant slip something into her pocket. When confronted by a cashier outside the store, the defendant pulled out a pack of cigarettes, which she had not purchased at the store, and said, “I’m sorry; I’ll pay double.” *Dubois*, 79 Wn. App. at 607–08. In finding insufficient evidence of corpus delicti for the resulting theft charge, the court noted that “[t]he State did not present any evidence of distinctive packaging or a price tag that could have tied the cigarette pack to the store” *Dubois*, 79 Wn. App. at 610. The court reversed the defendant’s conviction, concluding that “[e]ven when . . . viewed in the light most favorable to the State, [the defendant’s] possession of cigarettes shortly after exiting a grocery store, without more, is insufficient to support a reasonable inference that the store suffered a loss or that some criminal agency caused the loss.” *Dubois*, 79 Wn. App. at 611.

Like the cigarettes in *Dubois*, there is no evidence here that Wal-Mart suffered a loss or that some criminal agency caused the loss because there is no evidence the items allegedly stolen from Wal-Mart were found on Mr. Lobie while he was in the vestibule. Proof of the corpus delicti requires evidence that the crime charged was committed by someone. *State v. Fellers*, 37 Wn. App. 613, 615, 683 P.2d 209 (1984). None of the items allegedly stolen from the store—a notebook, two ink cartridges and the ball cap found by police—were produced at trial or admitted into evidence or identified as belonging to Wal-Mart.

The State failed to present the price tags or the items themselves, either of which could have shown that Mr. Lobie had in fact exerted wrongful control over property and where Mr. Lobie obtained the items. Instead, the State merely showed that Paulson saw Mr. Lobie switch a price tag on a notebook and place an ink cartridge and perhaps a ball cap in his pocket in one part of the Wal-Mart store before going to a different section of the store and purchasing a day planner notebook, and then continue walking inside the store. The State failed to provide any evidence that the ball cap in Mr. Lobie's possession or any of the items allegedly stolen but not recovered were the property of another, much less property of Wal-Mart.

D. CONCLUSION

For the reasons stated, Mr. Lobie's conviction for third degree theft must be reversed.

Respectfully submitted on June 23, 2014.

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PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on June 23, 2014, 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 brief of appellant:

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