FILED
APRIL 1, 2015
Court of Appeals
Division III
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 32456-7-III Consolidated with No. 325601

STATE OF WASHINGTON, Respondent,

v.

SERENA FORD, Appellant.

APPELLANT'S BRIEF

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I. INTRODUCTION

Serena Ford was acquitted of burglarizing the home of Ann Black, but convicted of stealing and trafficking property taken from the home. On appeal, Ford contends that instructional error requires a new trial and that the restitution order improperly includes items of damage arising from the burglary charge for which she was acquitted.

II. ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR 1: The trial court erred in failing to give the requested lesser included instructions.

ASSIGNMENT OF ERROR 2: The trial court's instructions on the trafficking charged relieved the State of its burden of proof as to all of the essential elements of the charge.

ASSIGNMENT OF ERROR 3: Insufficient evidence supports the restitution award.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

ISSUE 1: Did the evidence presented at trial, viewed most favorably to Ford, permit an inference that she committed only the lesser proposed misdemeanor offenses to the exclusion of the greater offenses? YES.

ISSUE 2: By giving an unlimited instruction on accomplice liability, did the trial court permit the jury to convict Ford for a crime that required proof that she acted in a leadership role and not as an assistant in the commission of the crime, thereby relieving the State of its burden of proof? YES.

ISSUE 3: Did the trial court error in imposing restitution based upon an un-itemized insurance claim form when according to the trial testimony, the claim included losses incurred as the result of the burglary, on which charge Ford was acquitted? YES.

IV. STATEMENT OF THE CASE

In January 2014, the State charged Serena Ford with residential burglary, theft in the second degree, and trafficking in stolen property in the second degree arising from events that occurred nearly three years before. CP 2-3. In August 2011, Ann Black traveled to Spokane to visit her son, Chris. RP (4/8/14) at 30.[1] Chris Black had moved to Spokane to recover from a drug addiction. RP (4/8/14) at 66. He had a history of stealing things to support his drug habit. RP (4/8/14) at 79. Before he

[1] The verbatim reports of proceeding consist of four volumes prepared by two reporters. Some volumes are consecutively paginated, and others are not. For example, one volume prepared by Cathy Stark contains trial proceedings on April 8 and 9, 2014, and the page numbers restart at the beginning of the April 9 proceedings. This brief will therefore refer to the verbatim reports throughout by reference to the date of the hearing transcribed and the page number associated with that hearing date.

moved to Spokane, Chris[2] lived in a camper trailer at his mother's house with Paul Parks, who had also recently gotten out of drug treatment. RP (4/8/14) at 28, 66. Both Parks and Chris had full access to the house to shower, use the bathroom, eat, and stay in the air conditioning. RP (4/8/14) at 28-29, 67.

When Ann returned from Spokane on August 19, she found that her back door was broken, the closet safe was open, and items were missing. RP (4/8/14) at 30-33; RP (4/9/14) at 9. One of the items, a pocket watch belonging to her grandfather, was later recovered from a pawn shop in Yakima. RP (4/8/14) at 47, 49-50. Parks' signature was on the pawn slip. RP (4/8/14) at 96. Parks admitted pawning several items at different pawn shops in Yakima during that time frame and stated he did so at the request of Serena Ford and her boyfriend, Nick Allemand, because he had ID. RP (4/8/14) at 93, 95, 98, 99, 105. Chris stated that Ford and Allemand had been in Spokane overnight the same weekend Ann took him back to Ellensburg, and he had told them his mother was coming to Spokane. RP (4/8/14) at 72-73.

[2] Because Ann Black and Chris Black share a last name, this brief will refer to them by their first names for clarity. No disrespect is intended.

On the afternoon of August 19, 2011, Sergeant Rob Hoctor stopped a vehicle for having a cracked windshield. RP (4/8/14) at 111. The vehicle was about a mile away from Ann's house when he first saw it, and he stopped the vehicle about one-tenth of a mile away. RP (4/8/14) at 115, 126. Ford, who identified herself by presenting her driver's license, was driving and Parks was in the passenger seat. RP (4/8/14) at 111, 116. There was a third passenger in the back seat who did not show his face to Hoctor, but Hoctor was later able to identify the passenger as Allemand. RP (4/8/14) at 117-18. After the stop was concluded, Ford drove away in the opposite direction from Ann's house. RP (4/8/14) at 126.

At the close of the State's case, Ford moved to dismiss the burglary and theft charges. RP (4/9/14) at 53-56. The trial court denied the motions. RP (4/9/14) at 56.

The defense presented testimony from a witness who claimed he saw Ford and Allemand before noon on August 19, 2011 at a hotel in Yakima. RP (4/9/14) at 59-60. Parks was not present at the time, and the witness did not see any of the items missing from Ann's house. RP (4/9/14) at 61, 62. Ford and Allemand left just before noon. RP (4/9/14) at 60-61.

Ford testified that she and Allemand went to Spokane on August 15, 2011 to celebrate her birthday. RP (4/9/14) at 76. They went to Chris's house first and then to a casino in Spokane, where they spent the night. RP (4/9/14) at 77-78. They left the next day and returned to Ford's house in Cle Elum. RP (4/9/14) at 78-79. She did not remember if they stopped in Ellensburg to see her children, but they arrived home in the early afternoon on August 16 and remained in Cle Elum until the following weekend, when they went to Toppenish. RP (4/9/14) at 79. It was late on the way back from Toppenish, so they stopped and got a motel room in Yakima. RP (4/9/14) at 80.

On August 19, Ford and Allemand were in the hotel in Yakima when they got a call from Parks and drove to Ellensburg to pick him up. RP (4/9/14) at 80-81. They then drove back to Yakima. RP (4/9/14) at 81. Ford denied asking Parks to pawn anything for her and acknowledged she had pawned some items of her own around the same time. RP (4/9/14) at 83. She also admitted she was using methamphetamine and she drove Parks around Yakima during that time frame. RP (4/9/14) at 89, 97.

The defense requested a jury instruction on the lesser included offenses of theft in the third degree and trafficking in stolen property in

the third degree. RP (4/9/14) at 111-12. In support of the instruction, the defense argued that the evidence supported an inference that Parks had committed the burglary and that Ford's actions were reckless rather than intentional. RP (4/9/14) at 112-13. Because Ford was charged as an accomplice, the jury could conclude that she did not participate in the burglary and only knew about the watch pawned by Parks. RP (4/9/14) at 113. The trial court declined to give the instructions, stating that there was no evidence of theft other than in the second degree and no evidence of reckless involvement. RP (4/9/14) at 114.

The jury acquitted Ford of the burglary charge but convicted her of second degree theft and first degree trafficking in stolen property. RP (4/10/15) at 2, CP 79-81. The trial court denied Ford's motion to arrest judgment and sentenced her to 90 days' incarceration under a first time offender waiver. RP (4/25/15) at 147-49, 171, CP 92, 108. The court additionally imposed $6,635.77 in restitution based upon a "Victim's Restitution Report" submitted by the State showing a claim paid by Mutual of Enumclaw but providing no basis for the amount of the claim. CP 119. The trial court did not address restitution on the record during Ford's sentencing hearing. However, at trial Ann testified that she had filed a claim with Mutual of Enumclaw for the items taken from her home, including items never recovered or linked with the defendants, as well as

the cost to repair her back door that was broken during the burglary. RP (4/8/14) at 36-37.

Ford now appeals. CP 120-21.

V. ARGUMENT

A. The trial court erred in failing to give the requested lesser included instructions

At the close of evidence, the defense requested lesser included instructions for theft in the third degree and possessing stolen property in the second degree, both misdemeanors. RP (4/9/14) at 111-14. The trial court denied the request, stating that there was no evidence of recklessness. RP (4/9/14) at 114. Because both the facts and the law support the inference that only the lesser crimes were committed, the trial court erred in denying the proposed instructions.

A defendant is entitled to have the jury instructed on the defense theory of the case. *State v. Staley*, 123 Wn.2d 794, 803, 872 P.2d 502 (1994). Defendants in Washington have a statutory right to instruction on lesser included offenses when certain conditions are satisfied. RCW 10.61.006; *State v. Condon*, ___ Wn.2d ___, 343 P.3d 357, 361 (2015). The conditions to be established are (1) Whether each element of the

lesser offense is a necessary element of the crime charged (the "legal prong") and (2) Whether the evidence in the case supports an inference that the lesser crime was committed to the exclusion of the greater (the "factual prong"). *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978); *State v. Hunter*, 152 Wn. App. 30, 44, 216 P.3d 421 (2009).

When the reviewing court considers a refusal to give a lesser included offense instruction, it evaluates disputes under the factual prong for abuse of discretion and disputes under the legal prong *de novo*. *State v. Walker*, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998). Because the present case concerns the trial court's ruling that the evidence did not satisfy the factual prong, the abuse of discretion standard applies. An abuse of discretion occurs when the trial court's decision is manifestly unreasonable or is based upon untenable grounds or reasons. *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997).

To satisfy the factual prong, there must be some affirmative evidence from which the jury could conclude that the defendant committed the lesser crime; however, this evidence need not be presented by the defendant, or even consistent with the defense case. *State v. McClam*, 69 Wn. App. 885, 888-89, 850 P.2d 1377 (1993). In evaluating whether the factual prong has been met, the trial court "must view the

supporting evidence in the light most favorable to the party requesting the lesser included offense instruction." *Condon*, 343 P.3d at 363 (*citing State v. Fernandez-Medina*, 141 Wn.2d 448, 445-56, 6 P.3d 1150 (2000)). If the jury could rationally convict the defendant of the lesser offense while simultaneously acquitting on the charged offense, the instruction should be given. *State v. Henderson*, 180 Wn. App. 138, 148, 321 P.3d 298 (2014).

Ford was charged with theft in the second degree, which requires proof that she knowingly obtained or exercised unauthorized control over property belonging to another worth in excess of $750.00 in value, with intent to deprive the owner of the property. RCW 9A.56.020, 9A.56.040. Third degree theft contains the same elements except that the property taken does not exceed $750.00 in value. RCW 9A.56.050. Third degree theft is a lesser included offense to second degree theft under the legal prong because each element of third degree theft must be proven to establish a second degree theft; it is the value of the property taken that elevates the charge from the third to the second degree.

Similarly, Ford was charged with trafficking in stolen property in the first degree. That charge requires proof of one of two alternate means: (1) that she knowingly initiated, organized, planned, financed, directed, managed, or supervised the theft of property for sale to others, or (2)

knowingly trafficked in stolen property RCW 9A.82.010(19), 9A.82.050. Second degree trafficking requires proof that she trafficked in stolen property recklessly. RCW 9A.82.055. The elements are thus identical to the second alternative means of the first degree charge with the exception of the mental state requirement, which is elevated to "knowing" from "reckless" when the degree of the crime is elevated.

In the present case, the only item specifically identified with the burglary and associated with the defendants was a pocket watch. Parks testified that he pawned items given to him by Allemand and Ford at five or six different pawn shops. RP (4/8/15) at 95, 105. However, in reviewing the items pawned by Parks, Ann was only able to identify the watch as her property. RP (4/9/15) at 5, 33-34. The value of the watch was not established at trial to exceed $750.00. RP (4/8/15) at 61. No evidence was ever presented that Parks, Allemand or Ford possessed or pawned any other item belonging to Ann. Ford denied that she ever gave any property to Parks to pawn, but admitted that she sometimes pawned items for money and if she knew the person she got it from, she would probably believe him if he told her it was not stolen. RP (4/9/15) at 83, 96.

In evaluating whether to give a lesser included offense instruction, the trial court must consider all of the evidence presented at trial, not merely evidence presented by the defendant. . *Fernandez-Medina*, 141 Wn.2d at 456. The totality of the evidence in this case fairly supports the inference that Ford was not involved with the burglary (as the jury found), but acted as an accomplice to Parks to pawn the watch. Considering the evidence that police reviewed Parks' pawn history and did not locate any other property belonging to Ann, the jury could infer from the evidence that Ford was not involved in a greater scheme but participated in trafficking the watch. Ford admitted sometimes selling items for cash without verifying whether the items were stolen, which would support an inference that her conduct was reckless rather than knowing. And the jury could have concluded from the evidence that Ford's involvement in taking Ann's property was limited to helping Parks pawn the watch, with a value of less than $750.00, without knowledge of or participation in the loss of the rest of Ann's property. As such, the evidence would permit the jury to rationally find Ford guilty of the lesser offense and acquit her of the greater. *See id.* (*quoting State v. Warden*, 133 Wn.2d 559, 563, 947 P.2d 708 (1997)).

Because the evidence supports the inference that only the lesser crimes of third degree theft and second degree trafficking in stolen

property were committed, the trial court abused its discretion in declining to give the requested instructions. The remedy for failing to give a lesser included instruction when warranted is reversal. *Henderson*, 180 Wn. App. at 143. Because the requested instructions here were appropriate and warranted in light of the evidence, Ford's convictions should be reversed.

B. The jury instructions erroneously permitted Ford to be convicted of organizing the theft of property for sale to others even if she only acted as an accomplice, relieving the State of its burden of proof on the essential element of the trafficking charge

The trial court instructed the jury that it could convict Ford for the conduct of another if she acted as an accomplice, by soliciting, commanding, encouraging or requesting another person to commit the crime, or by providing assistance in planning or committing the crime. CP 59. At the same time, the trial court instructed the jury that to convict Ford of first degree trafficking in stolen property, it must find that she knowingly initiated, organized, planned, financed, directed, managed, or supervised the theft of property for sale to others, or knowingly trafficked in stolen property. CP 73. Thus, the "to convict" instruction for trafficking in stolen property established alternate means of committing the offense, one of which expressly requires the defendant to act as a

principal by "initiating, organizing, planning, financing, directing, managing, or supervising" the transfer of stolen goods. The instruction thereby relieved the State of its burden of proof on every element of one of the alternative means of the trafficking charge because it permitted the jury to convict Ford as an accomplice for a crime that precludes accomplice liability.

Instructions that relieve the State of its burden of proof on every essential element require automatic reversal. *State v. DeRyke*, 149 Wn.2d 906, 912, 73 P.3d 1000 (2003) (*citing State v. Brown*, 147 Wn.2d 330, 339, 58 P.3d 889 (2002)); *see also State v. Sibert*, 168 Wn.2d 306, 320, 230 P.3d 142 (2010) (J. Alexander, dissenting). However, if the State is relieved of fewer than all of the essential elements, the error is presumed to be prejudicial unless it is affirmatively shown to be harmless. *State v. Smith*, 131 Wn.2d 258, 263-64, 930 P.2d 917 (1997).

As a preliminary matter, Ford did not object to the instructions at trial. Consequently, under RAP 2.5(a), the issue is waived unless an exception applies permitting review in the first instance on appeal. Here, the instructional defect is a manifest error affecting a constitutional right and should, therefore, be reviewed.

The due process guarantees of the Fourteenth Amendment obligate the State to present proof of each and every element of a criminal charge beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L.Ed.2d 368 (1970). As a result, the trial court is constitutionally required to instruct the jury as to each element of the offence. *State v. Pawling*, 23 Wn. App. 226, 232, 597 P.2d 1367 (1979) (*citing State v. Emmanuel*, 42 Wn.2d 799, 259 P.2d 845 (1953)). Instructions that relieve the State of its burden of proof violate due process because they permit the jury to convict without adequate evidence. *State v. Hanson*, 59 Wn. App. 651, 660, 800 P.2d 1124 (1990). Accordingly, the instructional error in this case is of constitutional magnitude to the degree it relieved the State of its burden of proof.

In *State v. Hayes*, 164 Wn. App. 459, 262 P.3d 538 (2011), the court considered instructions that permitted the jury to convict the defendant of leading organized crime as an accomplice. The charge of leading organized crime contains nearly identical language to the first alternative means of trafficking in the first degree, requiring proof of intentionally "organizing, managing, directing, supervising or financing any three or more persons with the intent to engage in a pattern of criminal profiteering activity." *Id.* at 466 (quoting RCW 9A.82.060(1)(a)). The

trial court in *Hayes* also gave the instruction on accomplice liability that was given in this case. *Id.* at 468.

In *Hayes*, the court of appeals agreed with the appellant that the language of the statute required proof that the accused is the leader, rather than merely the leader's assistant. *Id.* at 468. Noting that nothing in the accomplice liability statute itself limits its application to any particular crime, the *Hayes* court observed that "it is sometimes apparent from the way the legislature has defined a particular crime that traditional accomplice liability provisions are not applicable to that crime." *Id.* at 469. In evaluating the language of the organized crime statute, the court noted,

> [The crime] is committed by leading three or more other persons in a pattern of criminal profiteering activity. While guilt for the crime is predicated on group conduct, the conduct criminalized by the statute is the conduct of the leader. The participation required by the accused is leading three or more followers by organizing, managing, directing, supervising, or financing them. There must be a hierarchy in which the defendant is at the apex and three or more other persons are below.

Id. at 470. By including the accomplice language in the instructions, the trial court permitted the jury to convict the defendant for leading an organized crime operation even if it believed somebody else was the leader and the defendant merely provided assistance, thereby relieving the State of its burden of proof. *Id.* at 471.

While the first degree trafficking in stolen property statute does not require any particular number of other persons be "initiated, organized, planned, financed, directed, managed, or supervised," the language of the crime nevertheless necessitates that at least some other person is involved in the enterprise and the defendant is in a superior position to the other. To convict Ford under this prong of the statute, the State was required to prove that she was the leader of the criminal enterprise, and not merely an assistant to Parks. However, the accomplice instruction given did not in any way limit its applicability to the trafficking charge, nor did the instructions given in the trafficking charge limit the applicability of the accomplice instructions. Thus, under the instructions given, the jury was permitted to convict her as an accomplice under this prong even if her involvement was limited to knowingly driving Parks to the pawn shop to sell the stolen watch, or helping Parks devise a plan to dispose of the stolen property.

By permitting conviction as an accomplice for a crime that requires proof that the defendant acted in a leadership capacity, the instructions in this case, as in *Hayes*, relieved the State of its burden of proof of the essential elements of the trafficking charge. Accordingly, the instructions present an error of constitutional magnitude. *Hanson*, 59 Wn. App. at 663.

Moreover, the error was not harmless. Because the jury was not required to agree unanimously as to which of the alternative means of committing first degree trafficking was committed, it is entirely possible that the jury convicted Ford based upon differing interpretations of the evidence, which permitted multiple inferences as to the relative degrees of involvement between Ford, Allemand and Parks. The jury could have easily concluded that Parks was the individual who took the property, and Ford simply helped him dispose of it by driving him to the pawn shop without ever being in possession of it herself. Even under Parks' version of events, both Ford and Allemand gave him the property and asked him to pawn it, providing no evidentiary basis for concluding which one of them was in charge of the operation. And because Parks was the only person named on the pawn slip as well as the one with personal knowledge of the interior of Ann's home, the jury could easily have concluded that Parks took the property and pawned it with Ford merely acting as an assistant to achieve that task.

The instructional error had real and practical effects on the outcome of the case because it permitted the jury to convict on a theory of events that was highly plausible, but inadequate to meet the State's burden of proof. Accordingly, the requirements of RAP 2.5(a)(3) are met and Ford's conviction should be reversed.

C. The trial court erred in imposing restitution in an amount that is not supported in the record

The trial court entered a restitution award of 6,635.77 based upon a "Victim's Restitution Report" submitted by the State showing a claim paid by Mutual of Enumclaw. CP 119. Although the report states that supporting documentation is attached, that documentation does not appear to have been entered into the record. At trial, Ann testified that she had filed a claim with Mutual of Enumclaw for the items taken from her home, including the cost to repair her back door that was broken during the burglary. RP (4/8/14) at 36-37. Thus, it appears from the record that the restitution award may contain items of damage for crimes other than the ones of which Ford was convicted, and which Ford's conduct did not cause.

Restitution assessments are within the trial court's discretion and are reversed when the trial court abuses its discretion, or its supporting findings are not supported by substantial evidence. *State v. Griffith*, 164 Wn.2d 960, 965, 195 P.3d 506 (2008). Restitution is only allowed for losses that are causally connected to the crime charged. *State v. Tobin*, 161 Wn.2d 517, 524, 166 P.3d 1167 (2007). The causal connection is

determined by applying a "but-for" test – but for the charged crime, the loss would not have occurred. *Griffith*, 164 Wn.2d at 966.

Griffith involved theft of jewelry that, in total, was valued at $11,500. 164 Wn.2d at 962. The defendant was convicted of possessing stolen property after she attempted to sell some of the jewelry to a coin shop. *Id.* at 964-65. However, the coin shop owner stated that he could not identify all of the items in the defendant's possession as the same jewelry that was stolen from the victim. *Id.*

In reversing the restitution assessment, the Supreme Court observed that culpability for possession of stolen property does not include culpability for stealing it. *Griffith*, 164 Wn.2d at 967. There, the fact that the defendant was convicted after bringing "stuff" to the coin shop was not substantial evidence that the defendant unlawfully possessed all of the victim's stolen property. *Id.*

In the present case, Ford was acquitted of the burglary charge; however, the insurance claim that provided the basis for the restitution award appears to have included damages to Ann's door caused during the burglary based upon Ann's trial testimony. But the destruction of the door is not causally related to the charged conduct of theft and trafficking. In acquitting Ford of the burglary, the jury necessarily rejected that she was

responsible for breaking and entering the property. Accordingly, an award of restitution for those items of damage that were caused by the burglar and not by Ford is unsubstantiated. The restitution award should be vacated and the case remanded.

VI. CONCLUSION

For the foregoing reasons, Ford respectfully requests that the court reverse her convictions and vacate the restitution order, and remand the case to the trial court for further proceedings.

RESPECTFULLY SUBMITTED this 15 day of April, 2015.

ANDREA BURKHART, WSBA #38519
Attorney for Appellant

DECLARATION OF SERVICE

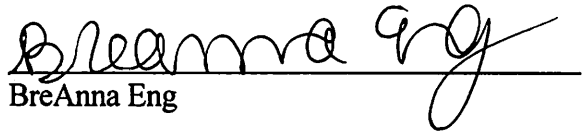
I, the undersigned, hereby declare that on this date, I caused to be served a true and correct copy of Appellant's Brief upon the following parties in interest by depositing them in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

Serena Ford
404 W. University Way, #1
Ellensburg, WA 98926

And by e-mail to the Respondent pursuant to prior agreement between the parties at jodi.hammond@co.kittitas.wa.us

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed this 1st day of April, 2015 in Walla Walla, Washington.



BreAnna Eng