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Court of Appeals
Division III
State of Washington

No. 32565-2-III

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

STATE OF WASHINGTON,
Plaintiff/Respondent,

vs.

JASON PAUL MARTINS,
Defendant/Appellant.

APPEAL FROM THE OKANOGAN COUNTY SUPERIOR COURT
Honorable Christopher E. Culp, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The evidence was insufficient to sustain the conviction of third degree theft as alleged in Count III.

Issue Pertaining to Assignment of Error

Was Mr. Martins' right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment violated where the State failed to prove essential elements of the crime of third degree theft—that he wrongfully obtained or exerted unauthorized control over property of another and intended to deprive another of the property?

B. STATEMENT OF THE CASE

Jason Paul Martins, the defendant, was charged with and convicted by a jury of one count of possession of a controlled substance—methamphetamine and two counts of third degree theft. CP 14, 149–50.

Shortly after midnight Okanogan County Sheriff's Deputy Shane Jones encountered a van with its front doors open parked on a dead-end roadway adjacent to the Columbia River and located at one end of Pateros, Washington. 6/3/14 RP 40, 43–47. Tammy Campbell was standing outside the van. Mr. Martins was sitting in the driver's seat and his ex-wife Shari Martins was sitting in the front passenger seat. 6/3/14 RP 48–49, 91. When

asked what they were doing there, Mr. Martins and Ms. Campbell said they were watching the fireworks being displayed along the river in nearby Brewster. 6/3/14 RP 49, 93. After further inquiries the deputy called for back-up assistance. During investigation officers found several baggies of methamphetamine in the van and women's purses. 6/3/14 RP 53, 55–57, 66–69, 77, 93–94, 102–03, 126–29.

Outside the nearby maintenance shop of the City of Pateros officers discovered hoses being used to siphon fuel from the tank of a city truck. 6/3/14 RP 45–46, 52, 54, 60, 104–05. Similar hoses were found on the driver's side floorboard of the van. 6/3/14 RP 64. Dale Parks, public works superintendent for Pateros, testified when he last saw the city truck there were no hoses or gas cans around it and they were “not some of the things that we would leave l[ying] around.” 6/3/14 RP 95, 97.

Under the driver's seat officers found two license plates, and one had current tabs. When asked about them, Mr. Martins said he was a collector. 6/3/14 RP 64–66, 113–14. An officer ran the plate numbers through dispatch and found they were registered to a business called Fluegge Construction. 6/3/14 RP 111–12; 6/4/14 RP 202. The construction company's site was nearby and the officer verified the plates matched up to the VIN numbers of two trailers there. 6/3/14 RP 45, 62, 112–13. When

told of this, Mr. Martins responded he had found the license plates in a dumpster. 6/3/14 RP 76, 133–34. Police noticed there was a license plate light sitting on top of the rear driver’s side wheel of the van. An officer checked and found one of the two Fluegge trailers was missing a similar light. 6/3/14 RP 114–15.

An officer testified there was a dumpster at the scene. 6/3/14 RP 133–34. No one from the Fluegge Construction Company testified at trial.

This appeal followed. CP 1.

C. ARGUMENT

Mr. Martins’ right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment was violated where the State failed to prove essential elements of the crime of third degree theft as alleged in Count III.

As a part of the due process rights guaranteed under both the Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment the state must prove every element of a crime charged beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). As the United States Supreme Court

explained in *Winship*: “[T]he use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law.” *In re Winship*, 397 U.S. at 364.

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)).

A person commits theft when he or she “wrongfully obtain[s] or exert[s] 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.” RCW 9A.56.020(1)(a). Third degree theft is theft of property or services not exceeding \$750 in value. RCW 9A.56.050(1).

Non-consent of the owner is an element of the crime of theft and may be proved by direct or circumstantial evidence. *State v. D. H.*, 31 Wn.

App. 454, 458, 643 P.2d 457 (1982); 13B Wash. Prac., Criminal Law § 2606 (2014-2015 ed.). However a jury is permitted to infer from one fact, the existence of another fact essential to guilt, only if reason and experience support the inference. *State v. Jackson*, 112 Wn.2d 867, 875, 774 P.2d 1211 (1989). Here, there was insufficient evidence to show Mr. Martins wrongfully obtained or exercised unauthorized control over the property of another where the State failed to present direct or circumstantial evidence the property had been taken without permission from trailers on the Fluegge Construction business premises.

Two Washington theft cases involving purely circumstantial evidence of non-consent of an owner are instructive. In *State v. Wong Quong*, 27 Wash. 93, 67 P. 355 (1901), the evidence established a diamond was removed from a ring while its owner was staying at the house in which defendant, a Chinaman, was a servant. The ring, when not worn, was kept in a tray in the owner's room; and, two days before its loss was discovered, a noise was heard in the upper part of the house, as though “a Chinaman was shuffling with his feet.” When arrested, the diamond was found in defendant's possession. The court held this evidence was sufficient to sustain a conviction for grand larceny. *Id.* The owner of the ring was not present to testify at trial. The court rejected appellant's

objection that the State failed to specifically show the owner's non-consent to the taking. The court reasoned non-consent is "simply one of the elements of larceny" and if the whole of the evidence tends substantially to support a conclusion that a larceny has been committed, the jury's verdict was justified. *Id.* at 94–95.

In the second case, *State v. D.H.*, supra, the store owner did not testify the customers who took clothing from the store did not have his permission. There, two friends of a store employee came to the clothing store where she worked and asked the employee whether they could shoplift. 31 Wn. App. at 456. D.H. told them to respect her. The store owner, who was suspicious of the friends, told the employee, D.H., to watch them carefully. D.H. testified she was with the two customers the entire time they were in the store including waiting outside as one friend used the restroom in the back hallway, and saw nothing taken. A door in the back hallway opened on an alley and parking area to the rear of the store. All three were arrested after a police officer saw the two friends removing clothing from hangers and throwing the hangers down a window well. The store owner identified the clothing as coming from his store and valued it at \$300. 31 Wn. App. at 455–56. In finding the element of non-consent proven, the appellate court found these circumstances permitted an

inference beyond a reasonable doubt the clothing was taken from the store without the permission of the owner. 31 Wn. App. at 458.¹

In each of the above cases there was evidence of a true owner, property indisputably located in its owner's possession from which it soon became missing, and the same property later found in the possession of a third party who had access to the property at the time it became missing. This evidence "tends substantially to support a conclusion that a larceny has been committed."

Unlike in *Wong Quong*, and *D.H.*, the middle circumstances are missing in this case. The State presented no evidence as to where the license plates or license plate light had been prior to that early morning encounter. All or some of the items might have been attached to the two trailers. One or both items may have been discarded by the true owner into a place such as a nearby garbage can or dumpster and later found by Mr. Martins as abandoned property to be added to his collection. There may be

¹ The court also found substantial evidence supported the trial court's findings D.H. knew of the theft as it was happening and intentionally looked the other way, allowing the theft to be completed and encouraging the friends in its commission. The court affirmed the trial court's finding that D.H. was guilty of theft in the second degree as an accomplice. 31 Wn. App. at 458–59.

other possibilities. But based on this lack of evidence one cannot reasonably infer from the one fact— that license plates registered to Fluegge Construction were found in Mr. Martins’ possession —the further fact that therefore he must have stolen the plates from the vehicles. Because there was not even circumstantial evidence the property was in its owner’s possession that night the “whole of the evidence” does not support a conclusion that a larceny had been committed. The State’s evidence fails to establish Mr. Martins wrongfully obtained or exerted unauthorized control over the license plates and intended to deprive another of the plates. The conviction must be reversed.

D. CONCLUSION

For the reasons stated the conviction should be reversed.

Respectfully submitted on February 4, 2015.

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PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on February 4, 2015, 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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