

No. 32607-1-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

KAMMIE JOY JENSEN, Appellant.

BRIEF OF APPELLANT

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TABLE OF CONTENTS

I. ASSIGNMENTS OF ERROR.....1

 1. The State’s evidence was insufficient to support the convictions.....1

 2. The court erred by calculating Ms. Jensen’s offender score as 6.....1

Issues Pertaining to Assignments of Error

 A. Was the State’s evidence insufficient to support the convictions? (Assignment of Error 2).....1

 B. Did the court err by calculating Ms. Jensen’s offender score as 6 when her two Oregon misdemeanor convictions for fraudulent use of a credit card were not comparable to a Washington felony? (Assignment of Error 2).....1

II. STATEMENT OF THE CASE.....2

III. ARGUMENT.....4

 A. The State’s evidence was insufficient to support the convictions.....5

 B. The court erred by calculating Ms. Jensen’s offender score as 6 when her two Oregon misdemeanor convictions for fraudulent use of a credit card were not comparable to a Washington felony.....6

IV. CONCLUSION.....11

TABLE OF AUTHORITIES

Table of Cases

<i>In re Pers. Restraint of Lavery</i> , 154 Wn.2d 249, 111 P.3d 837 (2005).....	8
<i>In re Winship</i> , 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed.2d 368 (1970).....	4
<i>State v. Drum</i> , 168 Wn.2d 23, 225 P.3d 237 (2010).....	5
<i>State v. Ford</i> , 137 Wn.2d 472, 973 P.2d 452 (1999).....	8, 10
<i>State v. Green</i> , 94 Wn.2d 216, 616 P.2d 628 (1980).....	5
<i>State v. Hutton</i> , 7 Wn. App. 726, 502 P.2d 1037 (1972).....	5, 7
<i>State v. McCorkle</i> , 137 Wn.2d 490, 973 P.2d 461 (1999).....	9, 11
<i>State v. Morley</i> , 134 Wn.2d 588, 952 P.2d 167 (1998).....	8
<i>State v. Stockwell</i> , 129 Wn. App. 230, 118 P.3d 395 (2005), <i>aff'd</i> 159 Wn.2d 394, 150 P.3d 82 (2007).....	8
<i>State v. Thomas</i> , 135 Wn. App. 474, 144 P.3d 1178 (2006), <i>review denied</i> , 161 Wn.2d 1009 (2007).....	9, 11
<i>State v. Tili</i> , 148 Wn.2d 350, 60 P.3d 1192 (2003).....	8
Statutes	
ORS 165.055.....	9
RCW 9A.56.020.....	10

I. ASSIGNMENTS OF ERROR

1. The State's evidence was insufficient to support the convictions.

2. The court erred by calculating Ms. Jensen's offender score as 6.

Issues Pertaining to Assignments of Error

A. Was the State's evidence insufficient to support the convictions? (Assignment of Error 1).

B. Did the court err by calculating Ms. Jensen's offender score as 6 when her two Oregon misdemeanor convictions for fraudulent use of a credit card were not comparable to a Washington felony? (Assignment of Error 2).

II. STATEMENT OF THE CASE

Kammie Joy Jensen was charged by amended information with count I: second degree identity theft, count II: second degree possession of stolen property, and count III: third degree theft. (CP 67). The case proceeded to jury trial.

On November 20, 2013, Lowell Compton inadvertently left his wallet containing a White Pine Credit Union debit card on the cashier's counter at Bi-Mart in Clarkston. (6/24/14 RP 150-52,

158). Realizing he had forgotten it, Mr. Compton returned to Bi-Mart and watched store video showing a man had taken his wallet and left with a woman. (*Id.* at 151-52). He reported the incident to the credit union and the police. (*Id.* at 153). Mr. Compton did not know a Jeffrey Stevens or Ms. Jensen and did not give either of them permission to use his card. (*Id.* at 154).

The manager of White Pine Credit Union said Mr. Compton had a checking account and debit card with them on November 20, 2013. (6/24/14 RP 160-61, 164). Mr. Compton reported the card as stolen or missing on November 22 and it was “shut off.” (*Id.* at 168). The card had been used with a PIN on November 20 at the Clarkston Bi-Mart. (*Id.* at 169). The manager testified there were three subsequent transactions at the Clarkston Wal-Mart for \$135.63, \$334.16, and \$302.51. (*Id.* at 170). The funds in Mr. Compton’s checking account were reduced by the purchases. There were two subsequent transactions at Albertson’s the same day as the Wal-Mart purchases. (*Id.* at 172-73).

Jeffrey Stevens had been shopping at Bi-Mart with Ms. Jensen just before he stole Mr. Compton’s wallet from the checkout counter. (6/24/14 RP 174-77). Mr. Stevens said Ms. Jensen did

not know he picked up the wallet. (*Id.* at 178). When they got to his pickup, he told her he had it. (*Id.*). In the truck, Mr. Stevens went through the wallet to see what was there. Ms. Jensen knew he was looking in it. (*Id.* at 179). They discussed going to the Wal-Mart and using the debit card in the wallet to buy a few things. (*Id.* at 181). Mr. Stevens did a test run with the card and bought a coke to see if it would work. (*Id.* at 182). He gave the card to Ms. Jensen after he checked out. (*Id.* at 183). He thought she had used it because she came out of Wal-Mart with items she was shopping for. (*Id.*). The card was eventually tossed in a dumpster in Pullman. (*Id.* at 184).

Mr. Stevens was charged and pleaded guilty to several offenses, including identity theft. (6/24/14 RP 185-86). In the plea deal, he was to testify against Ms. Jensen. (*Id.* at 201-202).

Detective Brock Germer of the Pullman police was asked by the Clarkston police to contact Ms. Jensen, who lived in Pullman. (6/25/14 RP 252-53). She said she did not use any stolen card at Bi-Mart. (*Id.* at 258). Ms. Jensen admitted knowing Mr. Stevens and making purchases with his card. (*Id.* at 259-60). She used it at Wal-Mart and was at Albertson's but did not use the card there.

(*Id.* at 260). When she signed the receipt after using the card, Mr. Stevens told her to just scribble something. (*Id.* at 260-61). Ms. Jensen did not know the wallet had been stolen. (*Id.* at 261).

There were no exceptions taken to the court's instructions. (6/25/14 RP 300). The jury found Ms. Jensen guilty of second degree identity theft, second degree possession of stolen property, and third degree theft. (CP 105-107). Using an offender score of 6, the court sentenced Ms. Jensen in the standard range to 20 months for identity theft, 13 months for possession of stolen property, and 364 days for third degree theft, to run concurrently. (CP 140). This appeal follows. (CP 153).

III. ARGUMENT

A. The State's evidence was insufficient to support the convictions.

The State must prove beyond a reasonable doubt every element of a charged crime. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed.2d 368 (1970). In a challenge to the sufficiency of the evidence, the test is whether, viewing it in a light most favorable to the State, any rational trier of fact could find the essential elements of the crime beyond a reasonable

doubt. *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). A claim of insufficient evidence admits the truth of the State's evidence and all reasonable inferences from it. *State v. Drum*, 168 Wn.2d 23, 35, 225 P.3d 237 (2010). Although credibility issues are for the finder of fact to decide, the existence of facts cannot be based on guess, speculation, or conjecture. *State v. Hutton*, 7 Wn. App. 726, 728, 502 P.2d 1037 (1972).

The defense to the second degree identity theft and second degree possession of stolen property charges was that Ms. Jensen did not know the debit card was stolen. (6/25/14/ RP 323). The element of knowledge is required to prove those two charges. (CP 95, 97). The defense to the third degree theft charge was that Ms. Jensen had no intent to deprive Mr. Compton of his property when \$334.16 was taken from his bank account in the Wal-Mart purchase where his debit card was used. (6/25/14 RP 327). The element of intent is required to prove theft. (CP 99).

But in an admitted effort to get a conviction by "putting all of the pieces of the puzzle together," the State piled unreasonable inference upon unreasonable inference derived from the testimony

of a convicted felon who cut a deal with the State for essentially 10 days in jail in exchange for his testimony against Ms. Jensen. (6/25/14 RP 320). That is hardly proof beyond a reasonable doubt. Since the convictions were based on guess, speculation, and conjecture, they cannot stand. *Hutton, supra*. The charges must be dismissed.

B. The court erred by calculating Ms. Jensen's offender score as 6 when her two Oregon misdemeanor convictions for fraudulent use of a credit card were not comparable to a Washington felony.

Ms. Jensen had prior criminal history in Oregon, where she had convictions for first degree theft, two second degree forgeries, two fraudulent uses of a credit card, and two second degree thefts. (CP 113-24, 139). The State contended her offender score was 6. (6/30/14 RP 39-40). The defense agreed with 4 of the points:

I think that on four of the points there's not really a whole lot of room for disagreement. She has the PSP in this case. A Theft 1 which I believe would be the equivalent of a Theft 2 in Washington State here. Two counts of Forgery in cases # 020050 and 020051 in the State of Oregon from June 21st, 2002. And I do agree with the State that the forgery statute there, while it is a misdemeanor there, it's a felony here and they're essentially – you know, the

exact same wording. So I don't think there's a lot of basis. I think that there is a point of dispute between the State and I as to the other two counts that she plead guilty to, and the two cases I just mentioned. Both of which are the fraudulent use of a credit card under Oregon Statute 165.055. State's alleging that's the equivalent of RCW 9A.56.290, Unlawful Factoring of Transactions. . . But, I think the bottom line is the question of which statute is broader. In other words, is it possible for Kammie Jensen to have committed the Oregon crime under the Oregon law without necessarily meeting the facts of the Washington law. And I think it is. And I think that the reason why is because the Washington law clearly is far more specific. It has five subparts that explicitly stating considerable detail what she would have had to do to have committed that crime within Washington State. Fraudulent Use of a Credit Card is very simple and can be summed up with; if you finally use a credit card with intent to injure and defraud, the card was stolen, the card had been revoked or canceled, or for any other reason the use of the card at all. So they have a catch all for basically any use of the card at all. That would make her guilty under the Oregon statute. There's no catch all like that in the Washington Statute. So I would suggest that based on that it is hypothetically possible she could be guilty under the Oregon law but not the Washington law. And I don't think the State has sufficiently shown that she would've been guilty under the Washington law and so I would argue that it's not appropriate to apply those two points. We should go back to what was both my original understanding and the State's original understanding that she has an offender score of four. (*Id.* at 41-42).

Without explanation, the court agreed with the State that Ms. Jensen's offender score was 6. (*Id.* at 49).

Review of the trial court's offender score calculation is de novo. *State v. Tili*, 148 Wn.2d 350, 358, 60 P.3d 1192 (2003). To include an out-of-state conviction in the defendant's offender score, the out-of-state conviction must be comparable to a Washington offense. *In re Pers. Restraint of Lavery*, 154 Wn.2d 249, 255, 111 P.3d 837 (2005). The statutes effective at the time the defendant committed the foreign offense control the court's comparability analysis. *State v. Morley*, 134 Wn.2d 588, 606, 952 P.2d 167 (1998).

To make the determination whether a foreign offense is comparable to a Washington offense, a two-part test is used. The first inquiry is to compare the foreign offense's elements with the comparable Washington offense's elements to decide if they are legally comparable. *State v. Ford*, 137 Wn.2d 472, 479, 973 P.2d 452 (1999). Offenses are legally comparable if their elements are identical or if the foreign offense is not broader than the Washington offense. *Id.* If they are, the inquiry ends. *State v. Stockwell*, 129 Wn. App. 230, 235, 118 P.3d 395 (2005), *aff'd* 159 Wn.2d 394, 150 P.3d 82 (2007).

If the offenses are not legally comparable, the next inquiry is

to examine whether the offenses are factually comparable. *State v. Thomas*, 135 Wn. App. 474, 480, 144 P.3d 1178 (2006), *review denied*, 161 Wn.2d 1009 (2007). Offenses are factually comparable if the defendant's conduct constituting the foreign offense, as evidenced by the undisputed facts in the foreign record, would constitute a Washington offense. *Id.* The trial court can consider only facts that were proved to a trier of fact beyond a reasonable doubt or that the defendant admitted or stipulated to. *Id.* at 482. The State bears the burden of providing sufficient evidence to prove by a preponderance of the evidence that a foreign offense is comparable with a Washington offense. *State v. McCorkle*, 137 Wn.2d 490, 493, 973 P.2d 461 (1999).

ORS 165.055, fraudulent use of a credit card, provides in pertinent part:

- (1) A person commits the crime of fraudulent use of a credit card if, with intent to injure or defraud, the person uses a credit card for the purpose of obtaining property or services with knowledge that:
 - (a) The card is stolen or forged;
 - (b) The card has been revoked or canceled; or
 - (c) For any other reason the use of the card is unauthorized by either the issuer or the person

to whom the credit card is issued. . .

RCW 9A.56.020, credit, payment cards – unlawful factoring

of transactions, provides in pertinent part:

(1) A person commits the crime of unlawful factoring of a credit card or payment card transaction if the person:

(a) Uses a scanning device to access, read, obtain, memorize, or store . . . information encoded on a payment card . . .

(b) Uses a reencoder to place information encoded on a payment card onto a different card . . .

(c) Presents to . . . a financial institution for payment a credit card or payment card transaction record that is not . . . between the cardholder and the person;

(d) Employs, solicits, or otherwise causes a merchant. . . to present to or deposit with a financial institution for payment a credit card or payment card transaction record that is not . . . between the cardholder and the merchant;

(e) Employs, solicits, or otherwise causes a merchant or another to become a merchant . . .

As argued by the defense, the Washington statute is far more specific than the Oregon statute for fraudulent use of a credit card. The elements of ORS 165.055 are not substantially similar to the elements of RCW 9A.56.020 and the Oregon offense is much broader than the Washington offense. *Ford*, 137 Wn.2d at 479. Since they are not legally comparable, the next inquiry is whether

the offenses are factually comparable. *Thomas*, 135 Wn. App. at 480.

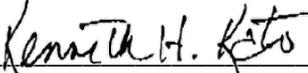
The State produced certified copies of the two Oregon judgments for fraudulent use of a credit card. (CP 119-20, 121-23). The judgments were the result of guilty pleas, but the State produced no statements of defendant on plea of guilty. The State did file a copy of the complaint against Ms. Jensen that involved Harry's Texaco, but it did not file the complaint in the case involving Peggy's Roost Tavern. (See CP 124-25). The record fails to reflect the facts admitted or stipulated to by Ms. Jensen that were the basis for her guilty pleas for fraudulent use of a credit card. This is insufficient to show the Oregon offenses were factually comparable to the Washington offense of unlawful factoring. *Thomas*, 135 Wn. App. at 480, 482. Accordingly, the State failed to meet its burden of proving by a preponderance of the evidence that the Oregon offense was comparable to the Washington offense. *McCorkle*, 137 Wn.2d at 495. Ms. Jensen must be resentenced using an offender score of four.

IV. CONCLUSION

Based on the foregoing facts and authorities, Ms. Jensen

respectfully urges this court to reverse her convictions and dismiss the charges or, in the alternative, to remand for resentencing with the correct offender score.

DATED this 19th day of June, 2015.



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CERTIFICATE OF SERVICE

I certify that on June 19, 2015, I served the brief of appellant by first class mail, postage prepaid, on Kammie Joy Jensen, # 358360, 9601 Bujacich Rd. NW, Gig Harbor, WA 98332; and by email, as agreed by counsel, on Ben Nichols at lwebber@co.asotin.wa.us.

