

No. 32607-1-III

IN THE COURT OF THE APPEALS
OF THE STATE OF WASHINGTON

DIVISION III

THE STATE OF WASHINGTON, Respondent

v.

KAMMIE J. JENSEN, Appellant.

BRIEF OF RESPONDENT

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I. ISSUES

1. WAS THERE SUFFICIENT EVIDENCE TO SUPPORT THE JURY'S VERDICT OF GUILTY ON EACH CHARGE?
2. WERE THE APPELLANT'S TWO CONVICTIONS IN OREGON FOR CREDIT CARD FRAUD COMPARABLE TO WASHINGTON FELONIES?

II. ARGUMENT

1. SUFFICIENT EVIDENCE SUPPORTS THE JURY'S VERDICT OF GUILTY ON EACH CHARGE.
2. THE APPELLANT'S TWO CONVICTIONS IN OREGON FOR CREDIT CARD FRAUD WERE COMPARABLE TO WASHINGTON FELONIES AND THEREFORE PROPERLY INCLUDED IN HER OFFENDER SCORE.

I. STATEMENT OF THE CASE

On November 20, 2013, Lowell Compton's wallet was stolen from the checkout counter at Bi-Mart, in Clarkston, Washington. Report of Proceedings (hereinafter RP) at pp.151, 152. Inside the wallet was his debit card issued by White Pine Credit Union which provided access to his checking account with that institution. RP 151. The card had his name and account number printed on the face. RP 153. Mr. Compton inadvertently left his wallet on the counter when he paid for his purchases. RP 152. When Mr. Compton got to his vehicle, he noticed his wallet missing returned to the store. RP 152. Mr. Compton contacted store personnel and reviewed the video which revealed that a man, later identified as Jeffrey Stevens, had taken the wallet. RP 152, 177. The Appellant, Kammie J. Jensen, was in the store with Mr. Stevens and was present near the registers when Mr. Stevens took the wallet. RP 158, 177. Both immediately left Bi-Mart together. RP 157. The Appellant and Stevens then got into Stevens' vehicle where he showed her the wallet and told her he picked it up off the counter. RP 178.

After leaving Bi-Mart, the two then traveled to a park across the river in Lewiston, Idaho where Mr. Stevens took out the contents of the wallet and laid them out on the seat of his pickup, including the credit card, driver's license and medical cards of Mr. Compton. RP 178-179. They then discussed using the stolen credit card to make

purchases and drove back into Clarkston, Washington for the purposes of using the card at WalMart. RP 181.¹ Mr. Stevens used the card to make purchases. RP 182-183. He then gave the Appellant the card and she used it to make purchases. RP 183. During their shopping spree, the card was used three times at Walmart for one hundred thirty-five dollars and sixty-three cents (\$135.63), and three hundred two dollars and fifty-one cents (\$302.51). RP 170, 217. When the Appellant used the card, she initially attempted to purchase items totaling three hundred thirty-four dollars and sixteen cents (\$334.16) and requested one hundred dollars (\$100.00) cash back. RP 228. This transaction was declined, presumably because she didn't enter the PIN properly. RP 228. The Appellant then reran the transaction and made the purchase, this time by running the card as a credit card and signing for the transaction. RP 228. In signing, the Appellant simply scribbled on the signature pad instead of signing her name, or the name of the card holder, Mr. Compton. RP 260 - 261. Mr. Stevens then made another purchase on the card approximately fifteen minutes later. RP 228. This shopping spree lasted from approximately 5:47 p.m. when store security video at Walmart shows the Appellant and Mr. Stevens first entering the store, until 8:21 p.m. when both leave the building for the last time. RP 228-229. The

¹Mr. Stevens apparently first used the card to purchase a cola at Albertson's Grocery Store to see if the card worked. RP 182, 171.

video shows that the two entered the store on multiple occasions, and entered and left the store at different times with the first transaction occurring at 6:12 p.m. and the last occurring at 8:15 p.m. RP 228.

Mr. Compton reported the theft of his wallet to police who investigated. RP 153. Mr. Compton did not know either the Appellant or Mr. Stevens and had not given them permission to use his debit card. RP 154. Detective Brock Germer² contacted the Appellant for an interview, wherein she admitted using the card and claimed that she had performed work for Mr. Stevens and he was teaching her to drive a bulldozer. RP 260. She stated that she was owed money by Mr. Stevens in the amount of four hundred (\$400.00) to five hundred dollars (\$500.00). RP 268. Mr. Stevens denied owing her any money and there was other evidence presented at trial showing that he did so owe money to the Appellant. RP 184. She told Detective Germer that she knew Mr. Stevens and that they had lived together in Pullman. RP 268. She admitted signing for the purchase and stated that Mr. Stevens told her to scribble on it. RP 261.

The Appellant was (ultimately) charged with Identity Theft in the Second Degree, Possession of Stolen Property in the Second Degree, and Theft in the Third Degree and. Information, Clerk's

²Detective Germer of the Pullman Police Department provided assistance to the Clarkston Police Department due to the Appellant residing in Pullman, Washington at the time of this investigation. RP 252 - 253.

Papers (herein after CP) 67 - 68. Mr. Stevens was likewise charged and pled guilty to Identity Theft Second Degree, Theft in the Second Degree, and Theft in the Third Degree, based upon the above facts. RP 184, 200.

The Appellant proceeded to jury trial. RP 57 - 347. At trial, the defense did not dispute that the card was stolen or that the Appellant had used the card to make purchases. RP 133. The Appellant instead argued that she did not have knowledge that the card was stolen and that she, like Mr. Compton, was a victim of these crimes. RP 132 - 133. The Appellant did not testify during presentation of the defense's case or otherwise. RP 290 - 296.

At the conclusion of trial, the jury found the Appellant guilty as charged. RP 345, CP 105 - 107. A sentencing hearing was held on June 30, 2014. RP 39. During hearing, the State asserted that the Appellant had criminal history as follows:

	CRIME	DATE OF SENTENCE	SENTENCING COURT (County & State)	DATE OF CRIME
1	Theft 1	06/04/12	Wasco, OR	12/30/11
2	Forgery 2	06/21/02	Hood River, OR	05/18/02
3	Forgery 2	06/24/02	Hood River, OR	08/22/01
4	Theft 2	06/21/02	Hood River, OR	05/18/02
5	Theft 2	06/24/02	Hood River, OR	08/22/02
6	Fraudulent Use of Credit Card	06/21/02	Hood River, OR	05/18/02
7	Fraudulent Use of Credit Card	06/24/03	Hood River, OR	08/22/02
8	False Information to Police	05/29/02	Hood River, OR	05/18/02

The State provided copies of the judgements from the Oregon courts concerning the felony convictions and provided the sentencing court with copies of the pertinent Oregon and Washington statutes. Prior Criminal History with Oregon and Washington Statutes, CP 112 - 133, RP 39 - 40. The State argued that her offender score was six, resulting in a standard range of seventeen to twenty-two months on the most serious charge of Identity Theft in the Second Degree and argued that the Oregon convictions for Fraudulent use of a Credit Card were comparable to the Washington felony crimes of Unlawful Factoring of a Credit or Payment Card Transaction and/or Identity Theft under RCWs 9A.56.290 and 9.35.020, respectively. RP 40, 46. The Appellant did not dispute the accuracy of her criminal history and adopted the same as recited by the State. RP 41 - 42. The Appellant further conceded that the Oregon convictions for Forgery Second Degree and Theft in the First Degree were comparable to the Washington felony crimes of Forgery and Theft in the Second Degree respectively. RP 41, ll. 5 - 11. The Appellant's only objection to her offender score calculation related to whether the Oregon convictions for Fraudulent Use of a Credit Card under ORS 165.055 were comparable to Washington felony crimes. RP 41 - 42. The sentencing court found, based upon the statutes provided and the conviction records, that those crimes were comparable to the felony

offenses under Washington law³ and, on an offender score of six, sentenced the Appellant to twenty months incarceration. Judgement and Sentence, (*hereinafter: J & S*) CP 137 - 149. On July 17, 2014, the Appellant filed timely notice of appeal. Notice of Appeal, CP 153 - 166. The Appellant has, to date, not filed a *Pro Se* Brief.

IV. DISCUSSION

1. SUFFICIENT EVIDENCE SUPPORTS THE JURY'S VERDICT OF GUILTY ON EACH CHARGE.

The Appellant first argues that there was insufficient evidence to support her convictions for Identity Theft in the Second Degree, Possession of Stolen Property in the Second Degree, and Theft in the Third Degree. See Brief of Appellant, p. 4. "The test for reviewing a defendant's challenge to the sufficiency of evidence in a criminal case is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt." State v. Finch, 137 Wn.2d 792, 831, 975 P.2d 967 (1999) (*internal citations and quotes omitted*). All reasonable inferences from the evidence are drawn in favor of the State and interpreted against the defendant. See State v. Pirtle, 127 Wn.2d 628, 643, 904 P.2d 245 (1995).

To convict the Appellant of the crime of Identity Theft in the

³The Court adopted the State's calculation but did not expressly state to which felony offenses that the Oregon convictions were comparable. RP 49.

Second Degree, the State was required to prove:

- (1) That on or about November 20, 2013, the [Appellant] knowingly obtained, possessed, transferred or used a means of identification or financial information of another person;
- (2) That the [Appellant] acted with the intent to commit or to aid or abet any crime; and
- (3) That any of these acts occurred in Asotin County, the State of Washington.

See Court's Instructions to the Jury, Instruction 8, CP 86 - 104.

See also WPIC 131.06, and RCW 9.35.020(3).

To convict the Appellant of the crime of Possessing Stolen

Property in the Second Degree, the State was required to prove:

- (1) That on or about November 20, 2013, the [Appellant] knowingly received, retained, possessed, concealed or disposed of stolen property;
- (2) That the [Appellant] acted with knowledge that the property had been stolen;
- (3) That the [Appellant] withheld or appropriated the property to the use of someone other than the true owner or person entitled thereto;
- (4) That the stolen property was an access device; and
- (5) That any of these acts occurred in Asotin County, the State of Washington.

See Jury Instructions, Instruction 10, CP 86 - 104. See also WPIC

70.11, and RCW 9A.56.160(1)(c).

Finally, to convict the Appellant of the crime of Theft in the

Third Degree, the State was required to prove:

(1) That on or about November 20, 2013, the [Appellant] wrongfully obtained or exerted unauthorized control over property of another or the value thereof not exceeding seven-hundred and fifty dollars (\$750.00) in value; and

(2) That the [Appellant] intended to deprive the other person of the property; and

(3) That this act occurred in Asotin County, the State of Washington

See Jury Instructions, Instruction 12, CP 86 - 104. See also WPIC 70.11, and RCW 9A.56.050.

The Appellant herein makes no challenge to any of the elements of any of these offenses except as they relate to her knowledge that the debit card she used was stolen. She does not dispute that, the card was, in fact, stolen by Mr. Stevens, that she possessed or even that she used the card, or that her use was unauthorized by the actual owner and card holder. The entirety of her claim of insufficient evidence relates to lack of proof that she knew the card was stolen. Brief of Appellant, p. 5. As full review of the record reveals, there is considerable and overwhelming evidence that she knew the card was stolen.

As stated above, where there is a challenge to the sufficiency of the evidence, all evidence is viewed in the light most favorable to the prosecution, and all reasonable inferences from the evidence are drawn in favor of the State and interpreted against the defendant. See

State v. Finch, and State v. Pirtle, *supra*. If the State proves that the defendant had information that would lead a reasonable person in the same situation to believe that the property was stolen, then the fact-finder is permitted, but not required, to make the inference that the defendant knew that the property was stolen. See State v. Shipp, 93 Wn.2d 510, 512-17, 610 P.2d 1322 (1980) (*interpreting RCW 9A.08.010(1)(b) [13] as permitting rather than directing the jury to find that the defendant had knowledge if it finds that the ordinary person would have knowledge under the circumstances*); see also State v. Rockett, 6 Wn. App. 399, 402, 493 P.2d 321 (Div. I, 1972) (*in grand larceny case, proof that defendant had actual knowledge that the items were stolen was not required, finding it sufficient that the defendant had knowledge of facts sufficient to put him on notice that the items were stolen*).

Although bare possession of recently stolen property will not support the assumption that a person knew the property was stolen, that fact plus slight corroborative evidence of other inculpatory circumstances tending to show guilt will support a conviction.

State v. Ford, 33 Wn. App. 788, 790, 658 P.2d 36 (Div. I, 1983).

There is substantial circumstantial evidence that the Appellant was aware of the stolen nature of the debit card. She was present at Bi-Mart when Mr. Stevens purloined Mr. Compton's wallet. It is undisputed that the Appellant herein was in possession of the debit

card and used the it to make purchases. She had ample opportunity to look at the card and see that the name of account holder was not "Jeremy Stevens." She knew Mr. Steven's name as she claimed to have worked with him and lived with him in Pullman. She was certainly aware that his name was not Lowell Compton. The use of the card is likewise indicative of her knowledge of it's stolen nature. The use of the card three times over a two hour period at the same store corroborates her criminal knowledge and intent. If she were truly owed money as she claims, Mr. Stevens would merely have rung up her purchases at the same time he was making his. Further, when she first tried to use the card at Walmart, it was denied when she attempted to take a cash advance. On her second attempt (without a cash advance which requires a PIN), she just scribbled on the signature pad instead of signing her name, or the name of Mr. Stevens. If she truly thought Mr. Stevens was authorized to use the card, she certainly would have inquired when the cash advance was rejected. Under these circumstances, the jury could circumstantially infer that she had knowledge that the debit card was stolen.

More significantly, there was direct evidence of her knowledge. Mr. Stevens testified that he told her he stolen the wallet, that he laid out the contents on the seat, including the debit card in question and that they discussed using the card. Further, they made a "test run"

with the card. Based upon his testimony alone, there was ample direct evidence of her knowledge that the debit card was stolen. The Appellant claims that the State's case rested entirely on Mr. Stevens' testimony, a convicted felon and accomplice, and therefore the jury could not possibly have convicted her of these charges. Brief of Appellant, p. 6. As discussed above, the State's case did not rest on his testimony and the evidence was sufficient without the testimony of Mr. Stevens.

Even so, a conviction may rest solely upon the uncorroborated testimony of an accomplice if the jury is satisfied beyond a reasonable doubt of the accused's guilt and has been sufficiently cautioned by the court to subject the accomplice's testimony to careful examination and to regard it with great care and caution. See State v. Badda, 63 Wn.2d 176, 385 P.2d 859 (1963); State v. Eichman, 69 Wn.2d 327, 418 P.2d 418 (1966). Clearly and contrary to the Appellant's assertions, proof of guilt beyond a reasonable doubt may rest on accomplice testimony. The Appellant may point out that no cautionary instruction was given in this case. However, a cautionary instruction is required only if the accomplice testimony is uncorroborated. See State v. Gross, 31 Wn.2d 202, 196 P.2d 297 (1948); State v. Lee, 13 Wn. App. 900, 538 P.2d 538 (1975). Here, there was video evidence of her use and possession of the card, in

addition to her confession. Mr. Steven's testimony was amply corroborated to the extent it was necessary to support convictions for the crimes charged. The guilty verdicts returned by the jury after careful consideration of the evidence should be affirmed.

2. THE APPELLANT'S TWO CONVICTIONS IN OREGON FOR CREDIT CARD FRAUD WERE COMPARABLE TO WASHINGTON FELONIES AND THEREFORE PROPERLY INCLUDED IN HER OFFENDER SCORE.

The last issue raised by the Appellant relates to her offender score and the court's inclusion of the two Oregon convictions for Fraudulent use of a Credit Card. Specifically, the Appellant claims that the trial court erred by finding that these two convictions were comparable to Washington felonies. On this issue the Washington Supreme Court established the stanard:

In determining whether foreign convictions are comparable to Washington strike offenses, we have devised a two part test for comparability. In Morley, we determined that for the purposes of determining the comparability of crimes, the court must first compare the elements of the crimes. In cases in which the elements of the Washington crime and the foreign crime are not substantially similar, we have held that the sentencing court may look at the defendant's conduct, as evidenced by the indictment or information, to determine if the conduct itself would have violated a comparable Washington statute.

In re Pers. Restraint of Lavery, 154 Wn.2d 249, 255-258, 111 P.3d 837 (2005). (*citing* State v. Morley, 134 Wn.2d 588, 952 P.2d 167 (1998)(*internal citations omitted*).

LEGAL COMPARABILITY

The Supreme Court recently stated:

Under the legal prong of our two-part test, we first compare the elements of the out-of-state conviction to the relevant Washington crime. If the foreign conviction is identical to, or narrower than, the Washington statute, the foreign conviction counts toward the offender score as if it were the Washington offense.

State v. Olsen, 180 Wn.2d 468, 478, 325 P.3d 187 (2014). Under Oregon law, a person commits the crime of Fraudulent Use of a Credit Card under ORS § 165.055 under the following circumstances:

(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.

This statute require (1) fraudulent intent, (2) the use of a credit card to obtain property or services, and 3) knowledge that the card be stolen, forged, revoked, cancelled, or that use thereof was otherwise unauthorized. The State argued primarily that this statute was comparable to the crime of Unlawful Factoring of a Credit or Payment Card Transaction under RCW 9A.56.290. That statute 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, temporarily or permanently, information encoded on a payment card without the permission of the authorized user of the payment card or with the intent to defraud the authorized user, another person, or a financial institution;

(c) Presents to or deposits with, or causes another to present to or deposit with, a financial institution for payment a credit card or payment card transaction record that is not the result of a credit card or payment card transaction between the cardholder and the person;

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

(Inapplicable sections omitted). Section (1)(a) of this statute requires 1) the use of a scanning device to read or obtain coded information contained on the card, 2) without authorization from the card holder or financial institution, 3) with fraudulent intent. While the language is not verbatim, these two laws require substantially the same elements. The only significant difference in the Oregon Statute is that, in addition to the requirement of fraudulent intent and use fo the card, it requires that the use be for the purpose of obtaining goods or services. No such requirement exists in RCW 9A.56.290(1)(a), only

the reading of the card (use) without authorization with the requisite fraudulent intent. "Legal comparability means that the elements of a foreign conviction are substantially similar to the elements of a Washington crime." State v. Farnsworth, 133 Wn. App. 1, 17, 130 P.3d 389 (Div. I, 2006). ORS 165.055 is substantial similar to RCW 9A.56.290(1)(a). All the elements found in the Washington Crime of Unlawful Factoring of a Credit Card or Payment Card Transaction are contained within the elements of Fraudulent Use of a Credit Card. "Thus, where a foreign crime provides alternative elements, it must contain all the elements of its Washington counterpart to be considered comparable." See Farnsworth at 17. The two offenses are legally comparable.

FACTUAL COMPARABILITY

If the elements of the foreign crime are not substantially similar to the analogous Washington crime, or if the foreign law is broader than Washington's definition of a particular crime, the sentencing court may also look to factual comparability, the second prong of the test. Farnsworth, 133 Wn. App. at 17 - 18. Assuming this Court construes ORS 165.055 as being more broad than any one Washington statute, each alternate means would constitute a felony offense if committed in Washington. Factual comparability requires the sentencing court to determine whether the defendant's conduct,

as evidenced by the indictment or information, or the records of the foreign conviction, would have violated the comparable Washington statute. Farnsworth, at 18. The Court can consider the charging documents to establish the factual basis for the conviction for determining factual comparability. See State v. Thomas, 135 Wn. App. 474, 482, 144 P.3d 1178 (Div. I, 2006). (*Citing Shepard v. United States*, 544 U.S. 13, 125 S. Ct. 1254, 161 L. Ed. 2d 205 (2005)).

As to the June 24, 2002 conviction for Fraudulent Use of a Credit Card, the Complaint therein charged the Appellant in pertinent part as follows:

[T]he defendant, on or about 08/22/2001, in the County of Hood River and the State of Oregon, did unlawfully, with intent to injure and defraud, use a credit card, to wit: a Texaco credit card, for the purposes of obtaining money, with knowledge that her use of the card was not authorized by Carlos Linares, the holder of the card.

CP 112 - 133 (Complaint in Court No. 020051CM). The Appellant limits her discussion to comparability of the Oregon crime to RCW 9A.56.020. However, the State also argued that the Oregon crime is also comparable to Identity Theft in the Second Degree under RCW 9.35.020(3). RP 46. The facts alleged in the above Complaint would fall squarely within and support conviction for Identity Theft in the Second Degree under RCW 9.35.020. The unauthorized use of a card (financial information) to obtain goods or services constitutes the crime of Identity Theft. See State v. Sells, 166 Wn. App. 918, 921,

271 P.3d 952 (Div. I, 2012). Identity Theft in any degree is a felony. See RCW 9.35.020. The crime described in the Complaint for which the Appellant was convicted on June 24, 2002, as identified under Oregon law as Fraudulent Use of a Credit Card is factually comparable to Identity Theft under RCW 9.35.020 and therefore properly included in the offender score.

As identified by the Appellant, the State did not provide the Court with a copy of the Complaint for the conviction which entered June 21, 2002 under ORS 165.055 in Court No. 020050CM. CP 112 - 133. However, looking at the language of that statute, one cannot commit a violation thereof that would not constitute a felony under some Washington Statute.

If the card used in Oregon was stolen or forged in violation of ORS § 165.055(1)(a), this would constitute the crimes of Unlawful Factoring under RCW 9.56.290(1)(a) as discussed above. Further, such violation would also necessarily constitute the offense of Possession of Stolen Property Second Degree under 9A.56.160(1)(a) where all that is required is 1) possession of a stolen card, 2) with knowledge it was stolen, and 3) that she withheld or appropriated the property to the use of someone other than the true owner. Finally, if the card was forged, the use thereof would constitute the offense of Forgery under RCW 9A.60.020(1) by the uttering or putting off as true

(use) an instrument (forged card) that one knows to be false with the intent to defraud. See also WPICs 130.02 and 130.03.⁴ The sentencing court correctly included the two Oregon convictions under ORS 165.055 as comparable to felony crimes under Washington law.

Finally, it should be noted that, even in the event that the Appellant is granted remand for resentencing, she is not necessarily entitled to have her offender score predetermined as a “four” as argued in her brief. The State should be given opportunity to provide any available additional support for the court to determine whether the these offenses are factually comparable. State v. Jones, 182 Wn.2d 1, 8-11, 338 P.3d 278 (2014).

V. CONCLUSION

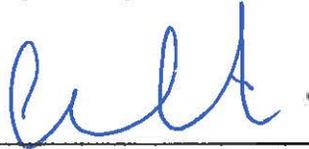
The Appellant’s convictions for Identity Theft in the Second Degree, Possessing Stolen Property in the Second Degree, and Theft in the Third Degree were supported by ample evidence and should be

⁴While there is no direct statement as to how much value she obtained as a result of the criminal act for which she was convicted under ORS 165.055, the court therein ordered restitution to Peggy’s Roost Tavern in the amount of six hundred dollars (\$600.00). Assuming this is the amount she charged to the card, this would have constituted Theft in the Second Degree under the version of the theft statute then in effect 2001. See RCW 9A.56.040 *circa* 2001. See also State v. Thiefault, 160 Wn.2d 409, 415, 158 P.3d 580 (2007)(*[T]he sentencing court must then determine whether the offense is factually comparable—that is, whether the conduct underlying the foreign offense would have violated the comparable Washington statute*). (*Emphasis added*).

affirmed. Further, because the Appellant's Oregon convictions for Fraudulent Use of a Credit Card were properly included in her offender score, the court correctly calculated her offender score to be six. Therefore, the Judgment and Sentence entered herein should be affirmed. The State respectfully requests this Court render a decision affirming the trial court.

Dated this 24th day of July, 2015.

Respectfully submitted,



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