

No. 33643-3-III

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

FILED
March 25, 2016
Court of Appeals
Division III
State of Washington

STATE OF WASHINGTON,
Plaintiff/Respondent,

vs.

CASEY J. WADE.,
Defendant/Appellant.

APPEAL FROM THE SPOKANE COUNTY SUPERIOR COURT
Honorable Linda G. Tompkins, Judge

BRIEF OF APPELLANT

SUSAN MARIE GASCH
WSBA No. 16485
P. O. Box 30339
Spokane, WA 99223-3005
(509) 443-9149
Attorney for Appellant

TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR.....1

B. STATEMENT OF THE CASE.....2

C. ARGUMENT.....6

Wade’s conviction violates due process because the state failed to prove all elements of the offense.....6

D. CONCLUSION.....16

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>In re Matter of Winship</i> , 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).....	6
<i>Jackson v. Virginia</i> , 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed. 2d 560 (1979).....	6
<i>Staats v. Brown</i> , 139 Wn.2d 757, 991 P.2d 615 (2000).....	15
<i>State v. Blazina</i> , 182 Wn.2d 827, 344 P.3d 680 (2015).....	15
<i>State v. C.G.</i> , 150 Wn.2d 604, 80 P.3d 594 (2003).....	6
<i>State v. Larson</i> , 184 Wn.2d 843, 365 P.3d 740 (2015).....	7, 8, 9, 11, 12, 13, 14, 15
<i>State v. Larson</i> , 185 Wn. App. 903, 344 P.3d 244 (2015), review granted, 183 Wn.2d 1007 (Wash., July 08, 2015).....	2, 4
<i>State v. Reeves</i> , 184 Wn. App. 154, 336 P.3d 105 (2014).....	2, 4, 12

Other Jurisdictions

Cenatis v. Florida, 120 So.3d 41, 44 (Fla. 4th DCA 2013).....14
State v. Blunt, 744 So.2d 1258 (Fla. 3d DCA 1999).....9, 10, 14

Statutes

U.S. Const., amend. 14.....6
F.S.A. § 812.015(7) (1997).....9
RCW 9A.56.360(1)(b).....7, 8, 9, 11, 12, 13, 15
RCW 10.73.160(1).....15

Court Rules

title 14 RAP.....15

Other Resources

<http://dictionary.cambridge.org/us/dictionary/english/magnet>.....11
<http://www.howmagnetnetwork.com/history.html>.....11
<http://www.kjmagnetics.com/uses.asp>;.....12
<http://www.kjmagnetics.coneomaginfo.asp>.....11
<http://www.molycorp.com/resources/the-rare-earth-elements/neodymium/>.....12

A. ASSIGNMENTS OF ERROR

1. The court erred in denying appellant's motion to dismiss.
2. The court erred in entering Finding of Fact No. 15. CP 94.
3. The court erred in entering Conclusion of Law No. 1. CP 95.
4. The evidence was insufficient to convict appellant of theft with special circumstances in the third degree.

Issue Pertaining to Assignments of Error

Whether the evidence was insufficient to convict appellant of theft with special circumstances when he possessed ordinary magnets at the time of theft and the statute requires possession of “an item, article, implement, or device designed to overcome security systems including, but not limited to, lined bags or tag removers”? RCW 9A.56.360(1)(b).

B. STATEMENT OF THE CASE

The Spokane county prosecutor charged appellant Casey J. Wade with retail theft with special circumstances, allegedly committed on April 22, 2015. CP 15. The affidavit of facts alleged that Wade stole nine video games from the Walmart store at 5025 East Sprague Avenue. Wade allegedly used a number of small magnets to remove the security cases from the games before leaving the store without paying. CP 6–7.

Pre-trial Wade filed a motion in limine to exclude opinion testimony whether the magnets were designed to overcome a security system, arguing it was a factual question for a jury. CP 19. The parties brought to the court's attention two conflicting decisions. A Division II case, *State v. Reeves*, 184 Wn. App. 154, 336 P.3d 105 (2014), held ordinary pliers were not "designed" to overcome a security system and reversed the conviction. A Division I case, *State v. Larson*, 185 Wn. App. 903, 344 P.3d 244 (2015)¹, held since ordinary wire cutters were used with the purpose of overcoming the security system, the conviction should be upheld. The court reserved ruling on the issue. RP 10–14.

Wade's jury trial began on June 29, 2015. RP 50. During trial, the state presented testimony from Walmart loss prevention officer Christopher Stemen and Spokane County Deputy Sheriff Wade Nelson. RP 79–90, 91–107, 108–30, 131–34. The state rested its case and the defense rested its case immediately thereafter without presenting any evidence. RP 135. Wade made a motion to dismiss the charge for failure to present sufficient evidence that the magnets were "designed" to overcome security systems.

¹ *Review granted*, 183 Wn.2d 1007 (Wash., July 08, 2015).

The court denied the motion to dismiss and entered written findings of fact and conclusions of law. RP 136–52; CP 92–95. In pertinent part the findings and conclusions state:

...

3. [W]hile in the electronics section Mr. Semen saw the defendant remove video games from the shelves and place them into his shopping cart. The video games were locked in keeper box security containers.²

4. [T]he keeper box security containers were designed to be opened by magnets.

5. [T]he Wal-Mart checkout persons had magnets at their location to remove the keeper boxes at the point of sale. At trial Mr. Semen demonstrated how the magnets opened the keeper box security containers.³

6. [W]hile in the toy section Mr. Stemen saw the defendant putting the video games into his backpack.

7. [W]hen the defendant got to the front of the store the defendant took his backpack out of the shopping cart and left the shopping cart behind. He walked past the checkout counters without making an effort to pay for any merchandise, [and] then he entered the men's room.

8. [M]r. Stemen immediately checked the shopping cart and found none of the video games or other electronics the defendant had placed in his cart. He called the police.

...

² The keeper boxes are clear plastic, a couple of inches thick, and have a magnetic strip on them that locks them. Leaving the store with the keeper case on will set off the door alarms. RP 83.

³ Mr. Stemen described the tool used by Walmart employees as “a plastic housing with four magnets in it.” RP 118, 126–27.

13. [D]eputy Nelson arrested the defendant and placed him in handcuffs. He then searched the backpack incident to arrest. Deputy Nelson found nine video games still wrapped in cellophane packaging. He also found a Bluetooth device and electronics cables consistent with the items Mr. Stemen saw the defendant place in his shopping cart.

14. [D]eputy Nelson found strong magnets in the defendant's pocket. Deputy Nelson testified that as part of his training and experience he looks for magnets in these situations because individuals intending to steal an item from a store frequently use magnets to overcome security devices such as the keeper box in this case.

15. The facts in this case are distinguishable from the facts in *Reeves*. In *Reeves* the defendant brought pliers into the store and used those pliers to cut the cables of a spider wrap security device from a surveillance camera set. That was not how the spider wrap device was designed to be removed from the camera. The evidence in the present case showed that the defendant brought magnets into the store to remove a security device that was designed to be removed with magnets.

16. The court also noted that in a factually similar case to *Reeves* (defendant used wire cutters to cut off security device held in place with wires), *State v. Larson*, 185 Wn. App. 903, 344 P.3d 244 Wn. App. Div. 1, 2015, Division 1 did not agree with *Reeves* from Division 2. They found that ordinary tools such as wire cutters could fall within the category of devices intended to overcome security devices as defined in the statute.

...

[Conclusion of Law] 1. Looking at the evidence presented in a light most favorable to the State, a reasonable finder of fact could find the defendant guilty of the charge in this case, retail theft with special circumstances in the third degree.

CP 93–95.

In closing argument the state argued Wade used ordinary magnets to open the security boxes:

And what is the evidence in this case? The security system that Mr. Wade obviously overcame is a keeper box that's designed – it's designed – to be opened by a magnet. And you saw what they had at Walmart: a magnet. All they used was a magnet to open it up.

And on this day in question, April 22nd of 2015, Mr. Wade had a plan. He went into Walmart with magnets in his pocket. It doesn't – a magnet doesn't have to be just designed to open this box. Magnets can do many things. It doesn't have to be solely designed to open this box. Magnets can be used to hold something on the wall. Magnets can be used to, you know, pull metal filings out of a scientific beaker during an experiment, but magnets are also designed to open these keeper boxes.

And Mr. Wade went into the store that day – we know he did because we found them in his pocket – and he – when asked why he had them in there, he said, well, they're kind of like toys to me; that's why I carry these magnets in my pocket. That's what he told the deputy. He went into the store – his plan was to go in there with those magnets to overcome these security devices.

RP 187–88.

The jury found Wade guilty as charged. CP 39. The court sentenced Wade to 90 days confinement. CP 49.

This appeal followed. CP 59. Wade was indigent for purposes of defending against the charges. Because of his continued indigency, the court determined Wade was entitled to counsel on appeal and the costs of preparing the appellate record at public expense. CP 73–76, 77–78. The

judgment and sentence provides that “[a]n award of costs on appeal against the defendant may be added to the total legal financial obligations.” CP 53.

C. ARGUMENT

1. Wade’s conviction violates due process because the state failed to prove all elements of the offense.

Due process requires the State to prove every element of an offense beyond a reasonable doubt. U.S. Const. amend. XIV; *In re Matter of Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). A conviction must be reversed for insufficient evidence where no reasonable fact finder would have found all the elements of the offense proven beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed. 2d 560 (1979); see also *State v. C.G.*, 150 Wn.2d 604, 610, 80 P.3d 594 (2003) (under the plain reading of the statute, C.G.’s conviction for felony harassment must be reversed because there is no evidence that Mr. Haney was placed in reasonable fear that she would kill him).

Under 9A.56.360(1)(b):

(1) A person commits retail theft with special circumstances if he or she commits theft of property from a mercantile establishment with one of the following special circumstances:

...

(b) The person was, at the time of the theft, in possession of an item, article, implement, or device designed to overcome security systems including, but not limited to, lined bags or tag removers[.]

Emphasis added.

The relevant question is whether ordinary magnets are “designed to overcome security systems” for purposes of the offense. The plain language of the statute indicates they are not.

The recent decision in *State v. Larson* is instructive. There, the court considered whether ordinary wire cutters were “designed to overcome security systems” within the context of retail theft. *State v. Larson*, 184 Wn.2d 843, 365 P.3d 740 (2015). Based on a plain language analysis the court concluded the legislature did not intend to include ordinary items within the scope of the statute. *Larson*, 365 P.3d at 743.

The *Larson* court determined the legislature intended to limit the scope of RCW 9A.56.360(1)(b) to items similar to the two illustrative

examples of lined bags and tag removers, rather than expand the scope to any item that could conceivably be used to overcome security systems.

Lined bags are an example of an article created by a thief for the specific purpose of committing retail theft. Also known as “booster bags,” these are typically bags lined with layers of tinfoil. A lined bag overcomes a security system by preventing detection of the security device by security scanners when the thief exits the store. As its name states, the sole purpose of a tag remover is to remove security tags from merchandise. The intended, lawful purpose is for retail employees to remove tags from merchandise after the customer has purchased it. But in the hands of a thief, the tag removers become a highly effective tool for overcoming a store’s security system.

Larson, 365 P.3d at 743 (citation omitted). Thus, to fall within the statute’s scope of aggravating circumstances sufficient to elevate theft to a more serious offense, the offending items must be “highly specialized tools with little to no utility outside of the commission of retail theft” and from which it “can be reasonably inferred that there is no reason a person would be in possession of these items except to facilitate retail theft.”

Larson, 365 P.3d at 744.

To avoid the absurd result that virtually any shoplifting offense could otherwise fall within the scope of RCW 9A.56.030(1)(b), the court stated that items commonly carried in pockets or even a pocket itself if used to conceal a stolen item cannot reasonably be viewed as a “device designed to overcome security systems.” *Larson*, 365 P.3d at 744. To

avoid adding words to an unambiguous statute when the legislature has chosen not to include that language, the court determined that “designed” is not synonymous with “used” and that the statute plainly criminalizes the *possession* of certain tools, not the thief’s actual or intended use of the items. *Larson*, 365 P.3d at 744–45.

Based on its plain language analysis, the *Larson* court held that “‘designed to overcome security systems’ ” for the purposes of retail theft with ‘[special]’ circumstances under RCW 9A.56.360(1)(b) is limited to those items, articles, implements, or devices created—whether by the defendant or manufacturer—with the specialized purpose of overcoming security systems. Ordinary tools, such as pliers or the wire cutters used by *Larson*, do not fall within the scope of RCW 9A.56.360(1)(b).” *Larson*, 365 P.3d at 746.

In interpreting a criminal statute similar to that at issue here, Florida has also looked to the originally intended purpose of the device to determine whether it was “designed” for a particular use. *State v. Blunt*, 744 So.2d 1258 (Fla. 3d DCA 1999). Rosa Blunt and Tiara Williams were charged with violating F.S.A. § 812.015(7) (1997), which provided:

It is unlawful to possess, or use or attempt to use, any antishoplifting or inventory control device countermeasure within any premises used for the retail purchase or sale of any merchandise.

The charge was based on the allegation Blunt and Williams wrapped tinfoil around the store security sensors to evade detection of the stolen merchandise in their bag. *Blunt*, 744 So.2d at 1259. In granting the defendants' motion to dismiss, the trial judge ruled:

Tinfoil, by itself, does not fall under the definition of an 'antishoplifting or inventory control device countermeasure' found in § 812.015(1)(i) because tinfoil is not an item or device which is designed, manufactured, modified, or altered. The tinfoil may have been used in such fashion. However, use is not part of the definition.

Blunt, 744 S.2d at 1259.

The appellate court agreed and upheld the dismissal:

We entirely agree. The trial court's interpretation is in accord with the plain words of the statute. If there were any doubt (and we think there is none), when the language is susceptible of differing constructions; it shall be construed most favorably to the accused. § 775.021 (1), Fla. Stat. (1997).

Id.

Magnets are commonly used tools with a general purpose, "like wire cutters or pliers," and do not fit within the narrow scope of RCW

9A.56.360(1)(b). *Larson*, 365 P.3d at 745. Magnets⁴, defined by one publication⁵ as objects that are able both to attract iron and steel objects and also push them away, are ubiquitous ordinary items with the general purpose of providing repulsion and attractant force qualities. Strong magnets simply have a greater holding force thereby allowing use of a smaller magnet.⁶

A diverse sample of use applications involving strong magnets include collecting space dust on Mars, magnetic therapy, filtering metal flakes out of car oil, levitation experiments, mounting signs or tracking devices, latching cupboards, refrigerator magnets, jewelry clasps and pierce-free body jewelry, homemade compass, fishing reel brakes, removing dents from brass musical instruments, cell phones and portable CD players, traction magnets for slot cars, magnetic couplers on model railroad cars, interchangeable parts for miniature war gaming, magic tricks

⁴ The most popular legend accounting for the discovery of magnets is that of an elderly Cretan shepherd named Magnes. Legend has it that Magnes was herding his sheep in an area of Northern Greece called Magnesia, about 4,000 years ago. Suddenly both, the nails in his shoes and the metal tip of his staff became firmly stuck to the large, black rock on which he was standing. To find the source of attraction he dug up the Earth to find lodestones (load = lead or attract). Lodestones contain magnetite, a natural magnetic material Fe₃O₄. This type of rock was subsequently named magnetite, after either Magnesia or Magnes himself. <http://www.howmagnetwork.com/history.html>.

⁵ <http://dictionary.cambridge.org/us/dictionary/english/magnet>.

⁶ <http://www.kjmagnetics.coneomaginfo.asp>.

and toys.⁷ Thus, magnets by themselves are not items “created” with the “specialized purpose of overcoming security systems.” *Larson*, 365 P.3d at 746. The magnets may have been used in such a fashion. However, the statute does not criminalize the actual or intended use of common magnets to overcome security devices. *Id.* at 744; *see also State v. Reeves*, 184 Wn. App. at 161. Ordinary tools such as the magnets possessed by Wade do not fall within the scope of RCW 9A.56.360(1)(b). *See id.* at 746.

The court below adopted the state’s argument that the security system itself—the plastic keeper box container fitted with a magnetic strip to lock it shut—was designed to be unlocked by use of magnets and therefore Wade’s use of common magnets to defeat the system violated the statute. CP 94 at paragraph 15; RP 144–46, 148, 149–52. This simplistic conclusion incorrectly relies on Wade’s *use* of magnets where the statute criminalizes only possession and not actual or intended use. *Larson*, 365 P.3d at 744. The conclusion also wrongly disregards the statute’s requirement that the offending device be “designed” with the specialized purpose of overcoming security systems. RCW 9A.56.360(1)(b); *Larson*, 365 P.3d at 745.

⁷ <http://www.kjmagnetics.com/uses.asp>; <http://www.molycorp.com/resources/the-rare-earth-elements/neodymium/>.

Further, the court's conclusion fails to recognize the statute's scope does not extend to common, ordinary and unmodified items with a general purpose such as magnets. *See Larson*, 365 P.3d at 745, 746. The statute provides an illustrative example of an offending item, tag removers. Security tags are presumably placed on merchandise to protect against theft. "As its name states, the sole purpose of a tag remover is to remove security tags from merchandise. The intended, lawful purpose is for retail employees to remove tags from merchandise after the customer has purchased it. But in the hands of a thief, the tag removers become a highly effective tool for overcoming a store's security system ... [It is a] highly specialized tool[] with little to no utility outside of the commission of retail theft ... [and] it can be reasonably inferred that there is no reason a person would be in possession of the[] item except to facilitate retail theft." *Larson*, 365 P.3d at 743. Here, Walmart placed merchandise in security boxes designed to be opened with magnets. Unlike tag removers, magnets are not highly specialized tools. They have immeasurable utility outside of the commission of retail theft and there are many possible reasons a person would be in possession of them for reasons other than to facilitate theft. Wade's possession of common magnets that he used to defeat the system did not violate RCW 9A.56.260(1)(b).

The *Larson* court left open the possibility that “perhaps an ordinary tool that has been specifically modified for use in retail theft might constitute a device ‘designed to overcome security systems’ ”, citing *Cenatis v. Florida*, 120 So.3d 41, 44 (Fla. 4th DCA 2013). *Larson*, 365 P.3d at 746. In *Cenatis*, several identical Victoria’s Secret bags which were stacked within each other, with several sheets of aluminum foil layered within the bag, also known as a “booster bag,” were held to qualify as an antishoplifting countermeasure because it was an item that was “altered” to defeat an antishoplifting device. The *Cenatis* court distinguished *Blunt*, noting:

In *Blunt*, the defendant simply used an ordinary item in an unusual way; the defendant did not manufacture, design, modify, or alter the tinfoil in any manner. In this case, however, ordinary items were combined in an unusual way to create a device capable of avoiding detection by the door sensors. The plain language of the statute encompasses the modified shopping bag used in this case.

Cenatis, 120 So.3d at 44.

Here, Wade simply used an ordinary item in an unusual way; he did not manufacture, design, modify, or alter the magnets in any manner. The magnets are not “highly specialized tools with little to no utility outside of the commission of retail theft” and from which it “can be reasonably inferred that there is no reason a person would be in possession of these items except to facilitate retail theft.” *Larson*, 365 P.3d at 744.

Because the magnets do not fall within the scope of RCW 9A.56.360(1)(b), the evidence was insufficient to support his conviction for retail theft with “special” circumstances under the statute. The conviction must be reversed. *Larson*, 365 P.3d at 746.

2. Appeal costs should not be imposed.

The trial court found Wade to be indigent and unable to pay for the expenses of appellate review and entitled to appointment of appellate counsel at public expense. CP 73–76, 77–78. If Wade does not prevail on appeal, he asks that no costs of appeal be authorized under title 14 RAP. RCW 10.73.160(1) states the “court of appeals ... may require an adult ... to pay appellate costs.” “[T]he word ‘may’ has a permissive or discretionary meaning.” *Staats v. Brown*, 139 Wn.2d 757, 789, 991 P.2d 615 (2000). Thus, this Court has ample discretion to deny any request for costs by the State.

Trial courts must make individualized findings of current and future ability to pay before they impose legal financial obligations (LFOs). *State v. Blazina*, 182 Wn.2d 827, 834, 344 P.3d 680 (2015). Only by conducting such a “case-by-case” analysis” may courts “arrive at an LFO order appropriate to the individual defendant’s circumstances.” *Id.* Accordingly, Wade’s ability to pay must be determined before

discretionary costs are imposed. However, the trial court made no such finding. RP 210–12; CP 48. Instead, the court waived all non-mandatory fees. CP 51–53.

Without a basis to determine that Wade has a present or future ability to pay, this Court should not assess appellate costs against him in the event he does not substantially prevail on appeal.

D. CONCLUSION

Because the state failed to prove Wade possessed a device *designed* to overcome security systems at the time of the offense, his conviction should be reversed.

Respectfully submitted on March 25, 2016.

s/Susan Marie Gasch, WSBA #16485
Gasch Law Office P.O. Box 30339
Spokane, WA 99223-3005
(509) 443-9149
FAX: None
gaschlaw@msn.com