

July 10, 2018

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

KIMBERLY LEONE PARENT,

Appellant.

No. 50275-5-II

UNPUBLISHED OPINION

JOHANSON, J. — Kimberly Parent argues that her convictions for second degree robbery and third degree theft violate the prohibition against double jeopardy. The State concedes error on this issue. We accept the State’s concession, vacate Parent’s third degree theft conviction, and remand for resentencing.

FACTS

On December 6, 2015, Parent entered a grocery store and placed items in a reusable shopping bag. Tyler Randt-Williams, a loss prevention officer at the store, observed Parent leave the store carrying the reusable bag without paying for the items that she carried.

After Parent left the store, Randt-Williams, accompanied by another grocery store employee, contacted Parent outside in the parking lot and said, “Store security. Is there anything you failed to pay for?” Verbatim Report of Proceedings (VRP) (March 16, 2017) at 30. Parent “denied the theft” and pushed Randt-Williams away. VRP (March 16, 2017) at 30. Randt-

Williams tried to pull Parent into the store, and Parent engaged in a physical altercation with him. During the fight, Parent bit Randt-Williams's forearm. After the fight, store personnel determined that Parent's shopping bag contained merchandise worth about \$22 for which she had not paid.

Parent was charged with one count of second degree robbery and one count of third degree theft. After a jury trial, she was convicted on both counts. The sentencing court imposed 12 months plus 1 day for the second degree robbery and 364 days in jail with 364 days suspended for the third degree theft. Parent filed a timely appeal.

ANALYSIS

Parent argues that her second degree robbery and third degree theft convictions violate double jeopardy because her robbery and theft convictions are the same in law and fact. The State concedes error. We accept the State's concession.

I. PRINCIPLES OF LAW

We review double jeopardy claims de novo. *State v. Freeman*, 153 Wn.2d 765, 770, 108 P.3d 753 (2005).

Double jeopardy prohibits multiple convictions for the same offense. *Freeman*, 153 Wn.2d at 770. When, as here, statutes do not expressly permit multiple punishments for the same underlying conduct, we determine whether two convictions amount to double jeopardy using the "same evidence" *Blockburger*¹ test. *Freeman*, 153 Wn.2d at 772. Under this test, we presume that a conviction violates double jeopardy when the evidence required to support a conviction for one crime would have been sufficient to support a conviction on another crime. *Freeman*, 153

¹ *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932).

Wn.2d at 776. As such, “if the crimes, as charged and proved, are the same in law and in fact, they may not be punished separately.” *Freeman*, 153 Wn.2d at 777. In this inquiry, we must “consider the elements of the crimes as charged and proved, not merely as the level of an abstract articulation of the elements.” *Freeman*, 153 Wn.2d at 777.

A person commits second degree robbery when, with the intent to steal, he “unlawfully takes personal property from the person of another or in his or her presence against his or her will by the use or threatened use of immediate force, violence, or fear of injury to that person or his or her property or the person or property of anyone.” RCW 9A.56.190, .210; *State v. McIntyre*, 112 Wn. App. 478, 480-81, 49 P.3d 151 (2002); *State v. Kjorsvik*, 117 Wn.2d 93, 98, 812 P.2d 86 (1991). “Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking.” *McIntyre*, 112 Wn. App. at 481 (quoting RCW 9A.56.190). To commit second degree robbery, a person necessarily commits a theft. *McIntyre*, 112 Wn. App. at 481.

A person commits third degree theft by committing the theft of property or services that do not exceed \$750 in value.² RCW 9A.56.050. “Theft” is defined as “[t]o wrongfully obtain or exert 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).

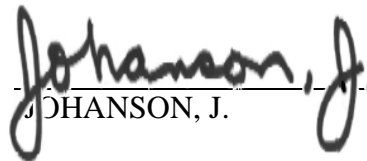
II. CONCESSION PROPER

Here, Parent’s conviction for third degree theft violates double jeopardy because her conviction for second degree robbery, as charged and proved, was the same in law and in fact to

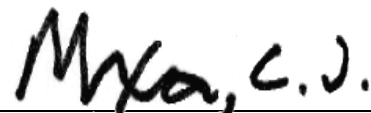
² Proof of the goods’ value is not an essential element of third degree theft. *State v. Tinker*, 155 Wn.2d 219, 222, 118 P.3d 885 (2005). As such, the State does not need to prove the value of stolen goods to establish third degree theft. *See Tinker*, 155 Wn.2d at 222.

her third degree theft conviction. *See Freeman*, 153 Wn.2d at 777. Parent was convicted of second degree robbery because intending to steal the store's property, she unlawfully took the store's property when she left the store without purchasing the goods and then used force against the store's loss prevention officer to retain possession of the property. *See RCW 9A.56.190; McIntyre*, 112 Wn. App. at 481. Similarly, Parent's third degree theft charge was based on her unlawfully taking the store's goods with the intent to deprive the store of the goods. *See RCW 9A.56.050*. Thus, the proof of Parent's intentional, unlawful taking of store property, which was necessary to support her second degree robbery conviction, was the same evidence used to support her third degree theft conviction. *See McIntyre*, 112 Wn. App. at 481. Accordingly, Parent's third degree theft conviction violates double jeopardy. *See Freeman*, 153 Wn.2d at 772. As such, we accept the State's concession, vacate Parent's third degree theft conviction, and remand for resentencing.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.


JOHANSON, J.

We concur:


MAXA, C.J.


SUTTON, J.