IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. ALNISSIA MOORE, Appellant.	No. 38793-0-II UNPUBLISHED OPINION

Penoyar, C.J. — Alnissia Moore appeals her first degree theft conviction for shoplifting sweaters from a Ralph Lauren Polo store. She first argues that the trial court should not have allowed evidence of uncharged misconduct under ER 404(b). She contends that the evidence at trial was insufficient to support a first degree theft conviction. She argues next that the trial court abused its discretion when it failed to give a missing witness instruction. Additionally, she challenges the constitutionality of the accomplice liability statute. Finally, she argues that the jury instructions were flawed because (1) the accomplice liability instruction allowed conviction without proof of an overt act and (2) the knowledge instruction conflated two mental states and removed the State's burden to establish all elements of the offense. We affirm in part, vacate judgment on the first degree theft conviction, and remand for sentencing for the inferior third degree theft offense.

FACTS

I. Background

On August 27, 2008, Moore went shopping at the Centralia outlet mall with Charrita Noble. The two entered the Ralph Lauren Polo outlet store together. Moore approached the

only sales associate on the floor, Reid Zucati, and questioned him about Polo products. When Zucati walked to the back to look for a dress for Moore, he noticed Noble putting cashmere sweaters into a bag. Zucati alerted the managers in the back room to the theft. When Zucati and the managers reached the front of the store, Noble had left. Moore was still present, so merchandising manager Alison Townsend went to help her. Moore exchanged cashmere sweaters for a gift card and then asked about the same dress she had questioned Zucati about earlier. After the exchange, Moore left the store.

Once Moore left the store, Townsend counted the number of cashmere sweaters in the store and compared it to the number from the last cycle count.[1] Her count revealed that there were 41 sweaters missing.[2] At trial, Townsend stated that the company estimates 40 percent of thefts are external, 40 percent are internal, and the remaining 20 percent of lost merchandise is the result of paperwork errors. The sweaters cost $49.99 each. After speaking with the asset protection manager, Townsend called the police to report the theft.[3]

On September 4, 2008, Moore went shopping again with Noble and two others. They stopped at the Centralia outlet mall, where one of the other passengers, Sang Nguyen, attempted to return a cashmere sweater matching the style stolen on August 27. Moore and Noble remained in the van. Townsend noted that Nguyen lacked a receipt and that he got into a van matching the

[1] Townsend testified that cycle counts involve using an RF gun (which scans each tag) to count "high-priced" items twice a week. Report of Proceedings (RP) (Dec. 1, 2008) at 81. She did not testify as to when the last count had occurred.

[2] Another manager counted 40 missing sweaters.

[3] It is company policy to only report thefts over a certain dollar amount. The asset protection manager decides whether or not to report to the police.

description of the van that Moore and Noble left in on August 27. Townsend notified the police, and an officer pulled over the van within five minutes of Nguyen leaving the store.

The police searched the van and found a red Macy's bag matching the bag Noble had stuffed sweaters into on August 27. Detective Carl Buster took the bag apart and found that it was a "booster bag" lined with foil to allow tagged items to pass through the security sensor.[4] Report of Proceedings (RP) (Dec. 2, 2008) at 119. The search also revealed Polo cashmere sweaters that matched the style stolen on August 27. Police searched Moore's purse and found approximately $4,500 in gift cards from various stores.

The State charged Moore with first degree theft. The State also charged Noble with first degree theft and Nguyen with trafficking in stolen property; both pled guilty and agreed to testify against Moore.

II. Trial

A. Motion to Exclude Evidence

In a pretrial motion, the defense asked to exclude evidence from the September 4 search as irrelevant. The trial court denied the motion to exclude evidence from the September 4 search stating, "I'm not going to exclude testimony of the sweaters, the search, or any of that." RP (Dec. 1, 2008) at 15. The court later reaffirmed its decision: "I'm going to allow the testimony. . . . I can't rule at this point that it's irrelevant." RP (Dec. 1, 2008) at 29. After Moore was convicted, defense counsel moved for an arrest of judgment, in part because the September 4 evidence was irrelevant and prejudicial. The trial court reiterated that it was not going to change

[4] Buster tested the booster bag by placing Polo sensors inside it and walking out of the store; he concluded that it defeated the security system.

the evidentiary rulings from the trial and denied the motion for an arrest of judgment.

B. Missing Witness Instruction

On the final day of trial, the defense objected to the trial court's refusal to give a missing witness instruction to the jury. As part of their pleas, both Noble and Nguyen agreed to testify against Moore, but neither was called during trial. The defense felt that Noble and Nguyen were particularly available to the State as a result of their plea deals. The trial court declined to give the missing witness instruction because there was no restriction on either witness's ability to testify nor were the witnesses particularly available to the State.

C. Verdict and Sentencing

On December 2, 2008, the jury found Moore guilty of first degree theft. The trial court sentenced Moore to 30 days' confinement. Moore appeals.

ANALYSIS

I. Evidence of Prior Misconduct

Moore argues that the trial court erroneously admitted evidence from the search of the van on September 4 in violation of ER 404(b). Specifically, she argues that the trial court failed to identify the purpose for admitting the evidence, did not determine the relevance of the evidence, and did not balance the probative value of the evidence against its prejudicial effect.[5] We disagree.

We review a trial court's interpretation of ER 404(b) de novo as a matter of law and determine whether the rule was properly applied. *State v. Fisher*, 165 Wn.2d 727, 745, 202 P.3d

[5] Moore does not argue that the trial court failed to find by a preponderance of the evidence that misconduct occurred.

937 (2009). Under ER 404(b), "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Such evidence may be admissible for other purposes including proof of motive, intent, or common scheme or plan. *Saldivar v. Momah*, 145 Wn. App. 365, 395, 186 P.3d 1117 (2008). Prior to the admission of evidence under ER 404(b), the trial court must (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose of admitting the evidence, (3) determine the relevance of the evidence to prove an element of the crime, and (4) weigh the probative value of the evidence against its prejudicial effect. *Fisher*, 165 Wn.2d at 745.

The trial court must complete the ER 404(b) analysis on the record in order to permit us to determine whether the trial court's exercise of discretion was based on careful and thoughtful consideration of the issue. *State v. Foxhoven*, 161 Wn.2d 168, 175, 163 P.3d 786 (2007). However, when the record as a whole allows us to decide the admissibility of evidence, the lack of an articulated balancing process by the trial court is not reversible error. *State v. Gogolin*, 45 Wn. App. 640, 645, 727 P.2d 683 (1986).

Moore is incorrect when she argues that the trial court failed to identify the purpose for admitting the evidence. The State argued that the evidence from September 4 showed a common scheme or plan. After considering the State's argument, the trial court ruled, "I'm going to allow the testimony . . . . I can't rule at this point that it's irrelevant." RP (Dec. 1, 2008) at 29. Thus, the trial court accepted the State's argument that the evidence showed a common scheme or plan.

The trial court also determined the relevance of the evidence. Evidence of a common scheme or plan is relevant when the existence of the crime is at issue. *State v. DeVincentis,* 150 Wn.2d 11, 21, 74 P.3d 119 (2003). At trial, the State argued that the evidence from September 4

showed that Moore's involvement in the scheme was more than mere presence at the Polo store. On September 4, Moore was found in a van with sweaters that matched the style stolen on August 27. She had $4,500 worth of gift cards in her possession, similar to the gift card she obtained from Polo on August 27. She was in the company of Nguyen who had, minutes ago, attempted to return a cashmere sweater without a receipt, just as Moore had done on August 27. The similarities between the sweaters stolen and those found in the van and the circumstances of Moore's and Nguyen's returns provide evidence of Moore's involvement in a larger scheme. Therefore, the evidence was relevant. The trial court determined the relevancy of the evidence when it heard both sides argue about the relevancy and then chose not to exclude the evidence.

Finally, although the trial court did not articulate a balancing test, the record as a whole allows us to decide the admissibility of the evidence. As discussed above, evidence from September 4 was relevant to the theft on August 27 because it indicated that Moore was part of a common scheme and clarified her role as more than mere presence during the theft. The probative value of the September 4 evidence outweighs its prejudicial effect. The trial court did not err when it admitted the evidence.

II. Insufficient Evidence

Moore argues that there was insufficient evidence that she stole at least $1,500 worth of merchandise because the State did not prove how many sweaters were stolen on August 27. She asks that we either remand for a new trial on a lesser offense or direct the trial court to enter judgment on a lesser offense. We direct the trial court to enter a judgment for third degree theft.

In order to convict a defendant of first degree theft, the jury must find that the defendant committed theft of property exceeding $1,500.[6] Former RCW 9A.56.030(1)(a) (2007) (Laws of

2007, ch. 199, §3). Evidence is legally sufficient to support a guilty verdict if any rational trier of fact, viewing the evidence in a light most favorable to the State, could find the elements of the charged crime beyond a reasonable doubt. *State v. Longshore,* 141 Wn.2d 414, 420-21, 5 P.3d 1256 (2000). We interpret all reasonable inferences in the State's favor. *State v. Hosier,* 157 Wn.2d 1, 8, 133 P.3d 936 (2006). Direct and circumstantial evidence carry the same weight. *State v. Varga,* 151 Wn.2d 179, 201, 86 P.3d 139 (2004). Credibility determinations are for the trier of fact and are not subject to review. *State v. Cantu,* 156 Wn.2d 819, 831, 132 P.3d 725 (2006). When an appellate court finds evidence insufficient to support a conviction for the charged offense, it will direct the trial court to enter judgment on a lesser offense when the lesser offense is necessarily proven at trial. *State v. Garcia,* 146 Wn. App. 821, 830, 193 P.3d 181 (2008).

In *State v. Ellard*, the appellate court found that there was insufficient evidence to prove the value element of first degree theft. 46 Wn. App 242, 246-47, 730 P.2d 109 (1986). The defendant was the owner of a tire franchise who resold tire casings to a school district that already owned the casings. *Ellard,* 46 Wn. App. at 243. The school district was billed over $3,000 for casings, and Ellard's employees testified that an unspecified number of district casings were sold back to the district after their identifying marks had been removed. *Ellard,* 46 Wn. App. at 246. Based on this evidence, the jury inferred that at least $1,500 of the casing charges were illegitimate. *Ellard,* 46 Wn. App. at 246. The appellate court found that it was impossible for the jury to determine how many casing charges were illegitimate. *Ellard,* 46 Wn. App. at 246-47.

[6] Moore was charged and convicted under the former statute which set the threshold for first and second degree theft at $1,500 and $250 respectively. *See* former RCW 9A.56.030(1)(a) (2007), former RCW 9A.56.040(1)(a) (2007) (Laws of 2007, ch. 199, §4).

The State only proved that there was fraud with respect to the casing charges; it did not produce evidence of the exact number of casings resold. *Ellard,* 46 Wn. App. at 247. As a result, the court reduced the conviction to third degree theft. *Ellard,* 46 Wn. App. at 247.

Similarly, in this case, there is insufficient evidence of first degree theft. At trial, the merchandising manager for Polo testified that she counted the sweaters after Moore and Noble left the store on August 27. She found that 41 sweaters were missing. The manager testified that "high-priced" items were counted twice a week, but she did not say when the last count prior to the theft occurred. RP (Dec. 1, 2008) at 81. The company estimates that 40 percent of the store's losses are from external theft with the remaining 60 percent from internal theft and paperwork errors. If 40 percent of the losses are from external theft, then likely only 16 of the 41 sweaters were stolen by non-employees. The sweaters cost $49.99. If Moore stole 16 of the sweaters, then she stole just under $800 worth of merchandise, well below the $1,500 threshold for first degree theft.[7] However, the State did not prove that Moore or her accomplice stole all 16 of the sweaters. Nor did it show that they stole at least six of the sweaters, which would be enough to meet the $250 threshold for second degree theft. Because the State only proved that a theft occurred, but did not prove the amount of the theft, we must direct the trial court to vacate the first degree theft conviction and enter a third degree theft conviction.

III. Missing Witness Instruction

Moore argues that the trial court erred in declining to give a missing witness instruction when the prosecution failed to call Noble and Nguyen as witnesses. We disagree.

[7] "A person is guilty of a crime it if is committed by the conduct of another person for which he is legally accountable." RCW 9A.08.020(1).

We review a trial court's refusal to give a jury instruction to determine if the court's discretion was exercised in a manner that was manifestly unreasonable, or exercised on untenable grounds or for untenable reasons. *Wilson v. Horsley*, 137 Wn.2d 500, 505, 974 P.2d 316 (1999). In order for a missing witness instruction to be appropriate, the defense must establish that the prosecution would not knowingly fail to call a witness unless the witness's testimony was damaging. *State v. Davis,* 73 Wn.2d 271, 280, 438 P.2d 185 (1968). This instruction only applies when the witness is "peculiarly available" to one of the parties. *Davis,* 73 Wn.2d at 276-77 (quoting *McClanahan v. United States*, 230 F.2d 919, 926 (5th Cir. 1956)) A witness is peculiarly available if there is a "community of interest between the party and the witness," or the party has "so superior an opportunity for knowledge of a witness" as to make it probable the witness would have testified unless his testimony would have been damaging. *Davis,* 73 Wn.2d at 277.

The trial court did not abuse its discretion when it declined to give a missing witness instruction because the missing witnesses were not peculiarly available to the prosecution. There was no restriction on Noble's and Nguyen's ability to testify. They were not under the State's control. They were not sequestered. The trial court correctly refused to give the missing witness instruction because the witnesses were not peculiarly available to the prosecution.

IV. Accomplice Liability Statute

Moore next asserts that the accomplice liability statute, RCW 9A.08.020, is unconstitutionally overbroad because it criminalizes a substantial amount of speech and conduct protected under the First Amendment. She further argues that the jury instructions based on the statute are improper. We disagree.

A statute is overbroad if it criminalizes a substantial amount of constitutionally protected speech or conduct. *City of Seattle v. Huff,* 111 Wn.2d 923, 925, 767 P.2d 572 (1989) (quoting *Houston v. Hill*, 482 U.S. 451, 459, 107 S. Ct. 2502, 96 L. Ed. 2d 398 (1987). When conduct is involved, the overbreadth must be substantial, real, and judged in relation to the statute's legitimate sweep. *Broadrick v. Oklahoma,* 413 U.S. 601, 615, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973). The State cannot prohibit advocacy of law violation unless the "advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg v. Ohio,* 395 U.S. 444, 447, 89 S. Ct. 1827, 23 L. Ed. 2d 430 (1969).

Moore argues that the accomplice liability statute is overbroad because, by not defining "aid," it criminalizes a substantial amount of constitutionally protected speech or conduct. The statute states:

> (3) A person is an accomplice of another person in the commission of a crime if:
> (a) With knowledge that it will promote or facilitate the commission of the crime, he
> . . . .
> (ii) aids or agrees to aid such other person in planning or committing it.

RCW 9A.08.020(3)(a)(ii).

Similarly, Moore argues that the jury instruction was improper because it defines "aid" to include anything more than mere presence and knowledge of criminal activity. The court used the definition of "aid" found in 11 Washington Pattern Jury Instructions: Criminal 10.51, at 217-22 (3d ed. 2008), which states in part:

> A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she
> . . . .
> (2) aids or agrees to aid another person in planning or committing the crime.
>
> The word "aid" means all assistance whether given by words, acts, encouragement,

> support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.

See Supplemental Clerk's Papers (SCP) at 46; Instr. 12.

These arguments fail. Both the statute and the jury instruction contain limiting language. RCW 9A.08.020; SCP at 46; Instr. 12. The sections referring to "aid" are qualified by the following language: a person must have knowledge that her actions "will promote or facilitate the commission of the crime." *See* RCW 9A.08.020. This language precedes any mention of "aid" in either the statute or the instruction. *See* RCW 9A.08.020. The preceding language qualifies aid as advocacy directed at and likely to incite or produce imminent lawless acts, advocacy that is not protected under the holding of *Brandenburg*. Therefore, we conclude that the statute is not unconstitutionally overbroad and the jury instruction was not improper.

V. Overt Act in Jury Instructions

Moore next contends that the accomplice liability instruction relieved the State of its burden to prove that she committed an overt act. We disagree.

We review alleged errors in jury instructions de novo. *State v. Willis,* 153 Wn.2d 366, 370, 103 P.3d 1213 (2005). Jury instructions are flawed if they, as a whole, fail to properly inform the jury of applicable law, are misleading, or prohibit the defendant from arguing her theory of the case. *State v. Tili,* 139 Wn.2d 107, 126, 985 P.2d 365 (1999).

Mere presence at the scene of the crime, even when the defendant has assented to the commission of the crime, is not enough to find accomplice liability. *State v. Luna,* 71 Wn. App. 755, 759, 862 P.2d 620 (1993). The State must show that the defendant was ready to assist with

the crime. *Luna,* 71 Wn. App. At 759. An accomplice is criminally liable when she intended to facilitate another in committing the crime by providing assistance through her presence and actions. *State v. Trout,* 125 Wn. App. 403, 410, 105 P.3d 69 (2005).

In this case, the jury instructions were not erroneous. Moore relies on *State v. Renneberg*, 83 Wn.2d 735, 552 P.2d 835 (1974), to show that an accomplice liability instruction requires "some form of overt act." Appellant's Br. at 24. However, in *Renneberg*, the court held that a separate instruction requiring the finding of an overt act was unnecessary because the instruction accurately reflected the law regarding aiding and abetting. 83 Wn.2d at 739. Similarly, the instructions in Moore's case accurately reflected the law and informed the jury that mere presence and knowledge of criminal activity was not sufficient for accomplice liability. The instructions properly informed the jury of applicable law.

VI. Knowledge Instruction

Moore argues that the knowledge instruction the trial court gave was erroneous because it conflated two mental states and relieved the State of its burden of establishing all the elements of an offense. Her argument fails.

At trial, the court instructed the jury that "[a]cting knowingly or with knowledge also is established if a person acts intentionally." Supp CP at 40. Moore argues that this instruction could allow the jury to find that any intentional act by Moore satisfies the knowledge requirement of the accomplice liability instruction. Thus, the jury could have found that she knowingly facilitated the theft by intentionally returning merchandise even though she was ignorant of Noble's theft.

Moore relies on this court's decision in *State v. Goble*, holding that similar jury

instructions were confusing because they conflated the knowledge and intent. 131 Wn. App. 194, 203, 126 P.3d 821 (2005). In *Goble*, the defendant appealed his third degree assault conviction for assaulting a police officer. 131 Wn. App. at 196. The elements of Goble's crime required the jury to determine two mental states: his intent to assault and his knowledge that the victim was a police officer. *Goble*, 131 Wn. App. at 203. This court held that the knowledge instruction was confusing and allowed the jury to find that Goble's intent to assault satisfied the knowledge requirement regarding the victim's status as a police officer. *Goble*, 131 Wn. App. at 203-04.

Moore's case is distinguishable from *Goble*. In Moore's case, the instructions only required the jury to consider one mental state: knowledge that her actions would promote or facilitate the commission of a crime. In *State v. Gerdts*, this court held that *Goble* only applies when the jury has to consider more than one mental state. 136 Wn. App. 720, 728, 150 P.3d 627 (2007). When there is only one mental state to consider, there is no danger of conflation. *Gerdts*, 136 Wn. App. at 728. We follow *Gerdts* and reject Moore's argument.

We vacate Moore's first degree theft conviction and remand for sentencing for the inferior degree offense of third degree theft, but otherwise affirm the trial court.

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 pursuant to RCW 2.06.040, it is so ordered.

Penoyar, C.J.

We concur:

Worswick, J.

Serko, J.P.T.