IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JULIAN DANIEL DUTKEL, Appellant.	No. 40679-9-II UNPUBLISHED OPINION

Hunt, J. — Julian Daniel Dutkel appeals his jury convictions for second degree theft and bail jumping. He challenges the sufficiency of the evidence to support his theft conviction, and he contends that the trial court improperly and unconstitutionally restricted his testimony about his defense to the bail jumping charge. We affirm.

FACTS

I. Theft

On June 14, 2009, Alyson Peter, who was in charge of the Sunglass Hut store in the Vancouver Mall, was training another salesperson, David Patrino. Julian Dutkel entered the Sunglass Hut to return a pair of Oakley sunglasses that he had bought the month before. After receiving his refund, he asked to look at some designer sunglasses. Peter showed him to a display rack at the end of the cash-register counter toward the back of the store and took a few pairs of Prada glasses off the rack for Dutkel to try on. While Dutkel was trying on two different pairs, a

man and a woman came into the store together. To answer a question for these other customers, Peter walked 20 feet to the other side of the store where Patrino had been helping the couple and asked Patrino to assist Dutkel. Between the time Peter left Dutkel and Patrino walked over to him, Dutkel was alone for a few moments.

Within a minute, Peter had answered the two other customers' question and had returned to where Patrino and Dutkel, the only people at the back of the store, were standing. Patrino asked Peter if she had sold a pair of Prada glasses earlier in the day because the designer rack had an empty spot where a pair normally would have been. In fact, one pair of the Prada glasses that Dutkel had tried on had occupied that spot. Peter suspected that Dutkel had taken them, but she did not confront him directly because it was against company policy. When Peter asked Dutkel how he liked the Prada glasses he had tried on, he told her that he had not found anything he liked and asked for the information for a Sunglass Hut in Portland. After Dutkel left, Peter checked the inventory, confirmed that a pair of Prada glasses—priced at over $300.00—was missing and called the police.

II. Procedure

The State charged Dutkel with second degree theft. When he failed to appear for trial, the State amended the information to include a charge of bail jumping. Dutkel appeared in court with his lawyer a week later, and the trial was rescheduled.

The State moved in limine to exclude Dutkel's proposed "I-forgot" and "mistaken as to time [of trial]" defenses to the bail jumping charge–that he had missed showing up for trial on March 8, 2010, because in early March he was in the process of moving; that he had lost the scheduling order; and that he had believed the trial was scheduled for 1:30 pm, not 9:00 am, based

on his check of the Judicial Information System (JIS), a web-based court information service. 1 Verbatim Report of Proceedings (VRP) at 22, 25. The trial court granted the State's motion and precluded Dutkel from using the "I-forgot" defense when he testified at trial about his failure to appear for the original March 8 trial date. 1 VRP at 29. The trial court also precluded Dutkel from arguing his proposed "mistaken as to time [of trial]" defense—that he had lost his paperwork and that he had received incorrect information about his trial schedule when he searched the JIS. Clerk's Papers (CP) at 19. The trial court did not preclude Dutkel from offering evidence to support a "mistake of fact" defense that he had no notice of the trial date and time.[1]

At trial, Peter testified about the above facts concerning the theft. In addition, the State called Vancouver Police Officer Misty Ross to testify about her investigation of the theft and her interview with Peter.

Dutkel also called Officer Ross as a defense witness. Ross testified that she had spoken only briefly with Patrino and that Peter had said he had had only minimal contact with Dutkel. Dutkel elicited from Ross that Patrino had told her he had walked over toward where Dutkel was trying on glasses, but he (Patrino) did not remember having had much interaction with Dutkel.

[1] In its motion in limine, the State also asked the trial court to preclude Dutkel from offering evidence that he had been "mistaken as to [the] time" that the trial was to begin. 1 VRP at 22, 25. But during the hearing on the State's motion, Dutkel did not raise a "mistake of fact" defense that he lacked knowledge of the trial date. Br. of Appellant at 22. Instead, as we note above, Dutkel proposed a defense that he had lost his paperwork and had received incorrect JIS information about his trial's start time. Thus, it was this aspect of Dutkel's "mistaken as to time" defense that the trial court's order excluded, CP at 19, distinct from the "mistake of fact" defense that Dutkel now asserts for the first time on appeal—that he never received actual notice or had knowledge of the trial date. Br. of Appellant at 22.

Patrino did not testify.

Dutkel testified briefly, but his version of events differed from Peter's in some respects. Duktel denied stealing the Prada sunglasses. He maintained that (1) he had returned the pair of Oakley sunglasses he had brought with him after looking at the Prada sunglasses; (2) if he had been holding a pair of sunglasses while trying on the Prada sunglasses, the pair that he had been holding was probably the Oakley sunglasses he had yet to return; and (3) before he left the store, he told Peter and Patrino that he was willing to empty his pockets, but Peter had waived him off, indicating that the missing Prada sunglasses were somewhere in the store.

Dutkel did not testify that he had never received actual notice of his trial date, that he did not know the date of his trial, or that he was mistaken about the date of his trial from the outset.[2] Nor did he make an offer of proof that he lacked actual notice of the trial date, if, as he now implies for the first time on appeal, he was under the impression that the trial court's order in limine somehow precluded such testimony.

The jury found Dutkel guilty as charged. Dutkel appeals.[3]

ANALYSIS

I. Sufficient Evidence of Theft

Conceding that the evidence is sufficient to prove theft of the Prada sunglasses, Dutkel argues only that the evidence is insufficient to prove that he was the person who stole them because it is equally or more likely that Patrino stole them. This argument fails.

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[2] On appeal, Duktel concedes his failure to testify about these potentially exculpatory facts at trial.

[3] A commissioner of this court considered this matter under RAP 18.14 and referred it to a panel of judges.

In reviewing a challenge to the sufficiency of the evidence, we view the evidence in the light most favorable to the State and determine whether any rational trier of fact could have found the essential elements of the crime charged beyond a reasonable doubt. *State v. Montgomery*, 163 Wn.2d 577, 586, 183 P.3d 267 (2008) (citing *State v. Green*, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980)). A claim of insufficiency admits the truth of the State's evidence. *State v. Jones*, 144 Wn. App. 284, 301, 183 P.3d 307 (2008) (citing *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254 (1980)). We draw all reasonable inferences from that evidence in favor of the State. *Jones*, 144 Wn. App. at 301 (citing *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977)). We give circumstantial evidence the same weight as direct evidence. *State v. Clay*, 144 Wn. App. 894, 898, 184 P.3d 674 (2008) (citing *State v. Goodman*, 150 Wn.2d 774, 781, 83 P.3d 410 (2004)). And "we defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and persuasiveness of the evidence." *Jones*, 144 Wn. App. at 301 (citing *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004)).

When Dutkel first entered the Sunglass Hut to return the Oakley sunglasses that he had purchased earlier, he asked to keep the small, opaque white Sunglass Hut bag[4] that he was carrying. He still had this bag with him while he tried on the Prada sunglasses. Peter saw Dutkel in possession of the missing Prada sunglasses very shortly before they disappeared. Patrino noticed the empty space on the display rack as soon as he reached Dutkel. No one else was in that back area of the store when the Prada sunglasses disappeared. Viewed in the light most favorable to the State, this evidence supports a reasonable inference that it was Dutkel who took

[4] Dutkel testified that the bag he had was a Big 5 bag, not a Sunglass Hut bag.

the Prada sunglasses from the Sunglass Hut.[5]

II. Bail Jumping: Exclusion of "Exculpatory Evidence"

Dutkel next argues that, in restricting him from presenting exculpatory evidence to defend against the bail-jumping charge, the trial court violated his rights to a fair trial under the Fourteenth Amendment and article I, § 3 of the Washington State Constitution. More specifically, Dutkel argues for the first time on appeal that the trial court wrongfully precluded him from raising a "mistake of fact" defense that he never had knowledge of the correct trial date. Br. of Appellant at 18, 21. The record does not support this contention. On the contrary, the record shows that the trial court precluded Dutkel from testifying about only his "I-forgot" defense and his "mistaken as to the time" defense concerning incorrect JIS information about his trial date, which Dutkel concedes are not valid legal defenses.[6] CP at 19. The trial court did not

[5] Dutkel argues that it is just as likely, if not more so, that Patrino stole the sunglasses. He asserts that Patrino lied to Officer Ross, telling her that he had not had any interaction with Dutkel that day and knew nothing about the matter. The record does not support Dutkel's interpretation of the evidence.

Officer Ross testified that Patrino had said he stood near Dutkel but did not really interact with him and did not see Dutkel take anything. Patrino's comments to Officer Ross were consistent with those Peter had given her. In short, nothing more than mere opportunity even remotely suggests that Patrino might have stolen the glasses; and such mere opportunity is not enough to support Dutkel's allegation. *See State v. Thomas,* 150 Wn.2d 821, 857, 83 P.3d 970 (2004) ("Mere opportunity to commit the crime is not enough as such evidence is 'the most remote kind of speculation.'") (quoting *State v. Downs*, 168 Wn. 664, 668, 13 P.2d 1 (1932))).

Furthermore, as we explain above, all that is necessary to support the theft conviction is substantial evidence on which the jury could base its conviction. The existence of conflicting testimonies or theories does not diminish our holding here because, again, we do not second guess the jury's determinations of witness credibility and of the evidence's weight and persuasiveness.

[6] Dutkel concedes that (1) forgetfulness is not a defense to a charge of bail jumping, and (2) the State needed only to prove his knowledge of the trial date "at some point prior to the scheduled hearing." Br. of Appellant at 16.

preclude him from testifying about his newly–alleged-on-appeal "mistake" about his lack of actual notice and knowledge of the trial date. 1 VRP at 25, 29. Thus, this argument also fails.

Dutkel was present at his January 2010 arraignment on the theft charge, at which the trial court set two future court dates, a readiness hearing, and a trial, as follows:

> [COURT]: Okay. A not guilty plea will be received. This was Department 3, wasn't it?
> [DEF. COUNSEL]: Yes.
> [COURT]: How about March 8th at forty-nine days?
> [DEF. COUNSEL]: Okay.
> [COURT]: March 4th would be readiness.
> [DEF. COUNSEL]: Okay.

1 VRP at 7. Thereafter, both dates were entered on the court's scheduling order, which advised Dutkel that he was required to appear on each of those dates. Dutkel and his attorney signed the order, and they each received a copy, both of which reflected these court dates. When Dutkel appeared for the readiness hearing on March 4, he was again advised that trial would begin on March 8, at 9:00 am. Nothing in the record controverts that Dutkel clearly received notice of the March 8 trial date. Dutkel, however, did not appear for trial as scheduled on March 8.[7]

A person released by court order or admitted to bail is guilty of bail jumping if "with knowledge of the requirement of a subsequent personal appearance before any court of this [S]tate," he then fails to appear. RCW 9A.76.170(1). "[T]he knowledge requirement is met

[7] Dutkel argues that the trial court erred in precluding him from presenting evidence that he never received actual knowledge of his trial date. As we have already noted, the record shows that the trial court did not preclude his presenting this "mistake of fact" defense; on the contrary, Dutkel was free to offer evidence that he never received actual notice of his trial date or that he was mistaken from the outset about the date of his trial. But he offered no such evidence at trial, a fact that he concedes in his brief. Br. of Appellant at 8. Moreover, again as we have noted above, the State provided ample evidence that Dutkel did, in fact, have actual knowledge of his trial date.

when the State proves that the defendant has been given notice of the required court dates." *State v. Fredrick*, 123 Wn. App. 347, 353, 97 P.3d 47 (2004) (citing *State v. Carver,* 122 Wn. App. 300, 306, 93 P.3d 947 (2004)). The State satisfied this knowledge requirement by proving that Dutkel received actual notice of his trial date on multiple occasions. The State needed to prove that Duktel received notice of his trial date, not that he retained knowledge of the specific trial date in the days leading up to his absence. *See Carver*, 122 Wn. App. at 305-06. The State was not required to prove that Dutkel had actual knowledge of this date and that he remembered it every day thereafter.

The record does not support Dutkel's contention that the trial court prevented him from presenting a "mistake of fact" defense that he lacked knowledge of the trial date. Br. of Appellant at 22. Furthermore, there was ample evidence showing that Dutkel had actual notice of the trial date, thus satisfying the knowledge requirement of the crime of bail jumping. We hold, therefore, that the trial court did not err in its evidentiary ruling in limine precluding the legally improper "I-forgot" and "mistaken as to time of trial" defenses.[8]

Affirmed.

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.

Hunt, J.

We concur:

[8] *Carver*, 122 Wn. App. at 306.

Van Deren, J.

Worswick, A.C.J.
