IN THE COURT OF APPEALS OF THE STATE OF ALASKA

TRAVIS LON REYES, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-13144 Trial Court No. 3AN-16-02171 CR MEMORANDUM OPINION No. 7014 — June 29, 2022

Appeal from the Superior Court, Third Judicial District, Anchorage, Michael D. Corey, Judge.

Appearances: Rachel E. Cella, Assistant Public Defender, and Samantha Cherot, Public Defender, Anchorage, for the Appellant. Terisia K. Chleborad, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Kevin G. Clarkson, Attorney General, Juneau, for the Appellee.

Before: Wollenberg, Harbison, and Terrell, Judges.

Judge TERRELL.

Travis Lon Reyes appeals his conviction for second-degree theft for stealing over $750 in merchandise from his employer over the course of several weeks,

from mid-February 2016 to March 7, 2016.[1] Reyes claims that the trial court committed plain error when it failed to instruct the jury that, in order to convict, it needed to: (1) be unanimous as to the specific acts of theft that he committed and (2) find that the thefts were committed as part of a single course of conduct. The State concedes error but argues that the omission of each instruction was harmless beyond a reasonable doubt.

We agree that the failure to provide these instructions to the jury was obvious error. And because we conclude that the failure to give a single-course-of-conduct instruction was not harmless beyond a reasonable doubt as to all the acts of theft, we reverse Reyes's conviction.

However, we also conclude that the failure to give both the factual unanimity and single-course-of-conduct instruction *was* harmless beyond a reasonable doubt as to the items Reyes took on one specific date — March 7, 2016. Moreover, the value of the items taken on that date exceeded the $250 threshold for third-degree theft — a charge on which the jury was instructed as a lesser included offense.[2] We therefore give the State the option on remand to either re-try the second-degree theft charge or elect entry of judgment for third-degree theft (with resentencing). If Reyes is retried, the court must give both a factual unanimity instruction and a single-course-of-conduct instruction to the jury.

Background facts and proceedings

In January 2016, Travis Reyes began working as a parts associate at Alaska Mining and Diving Supply, a company that sells and services snowmachines and outdoor

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[1] AS 11.46.130(a)(1).

[2] AS 11.46.140(a)(1) (theft of property or services valued at $250 or more, but less than $750).

gear. He began taking items from the Anchorage store about a month after he started working there. Reyes first took a Ski-Doo snowmachine jacket in mid-February 2016. On different occasions over the next few weeks, he took a Klim jacket and gloves, a balaclava, two snowmachine hood straps, and handlebar pads.

Reyes's last thefts took place on March 7, 2016. Reyes loaded a box with items taken from the store — a gas can, snowmachine belts, a hot dogger,[3] and scratchers[4] — put a postage label listing his Anchorage address (but with his girlfriend as the addressee), and took the box home in his truck. These items totaled $384.96, not including the cost of postage. Another employee, suspicious of the package because the store did not usually ship locally, notified a supervisor.

Later that day, the store's sales manager, Geoff Boyda, confronted Reyes, who admitted to taking items without paying for them. At Boyda's request, Reyes compiled a list of all the items he had taken.

Boyda then had an employee look up each of the parts taken and determine the current retail price of each part. He compiled this into a second list, which Reyes signed.

At trial, Boyda testified that, as to two of the parts (the hood straps and handlebar pads), store employees were unable to determine the exact item that was taken. But he stated that the retail value of the remainder of the items was $879.92. A parts manager from the store accompanied Reyes to his home to retrieve the items, some of which were returned to the store (albeit no longer in their original packaging).

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[3] A "hot dogger," also referred to by its brand name, Muffpot, is a device that can be attached to a snowmachine's exhaust system to keep food warm.

[4] Reyes explained that "scratchers" are a device that "hooks the snow and kicks snow up on your rails so you don't overheat your sled on hard-packed trails."

At this point, the police were contacted and Anchorage Police Department Officer Nicholas Saldana responded to the call. Officer Saldana spoke with Boyda, who gave him a copy of one of the lists of stolen items that Reyes had signed. Officer Saldana then went to Reyes's residence and spoke to him about the theft allegations. Reyes admitted that he had taken items from Alaska Mining and Diving, brought them home and used them, and intended to keep them. Officer Saldana arrested Reyes for theft.

Reyes was indicted on one count of second-degree theft for committing theft of property with a value of $750 or more.[5]

At trial, Reyes's defense was that he lacked the requisite culpable mental state of intent to deprive Alaska Mining and Diving of the merchandise without paying for it. He claimed that he simply thought that his actions represented a permissible use of a benefit that allowed Alaska Mining and Diving employees to obtain merchandise and put it on a charge account that would be paid back out of their paychecks.

During his testimony, Boyda explained the basics of the charge account system. Boyda stated that an employee who has worked for Alaska Mining and Diving for some probationary period (Boyda testified it was either ninety days or six months) becomes eligible for a charge account, which the employee can use to purchase an item from the store and pay for the item over time from their paychecks. Boyda admitted that there had been exceptions to the probationary period rule, and that Reyes in fact had a charge account opened for servicing his snowmachine before he had worked there for ninety days.

Reyes testified that after he had been working for Alaska Mining and Diving for about a month, *i.e.*, in February 2016, he brought in his own snowmachine

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[5] AS 11.46.130(a)(1).

to be serviced. According to Reyes, he obtained an employee charge account from the service department manager, and was charged for the servicing of his snowmachine through this account. Reyes testified that he did not receive any training about the charge accounts, but heard about them from other employees. From the information Reyes had heard, the accounts seemed relatively flexible and employee-controlled. Reyes claimed that he did not initially want to use this account for anything other than his snowmachine, because he was trying to repair his credit and did not want to open or heavily rely on any credit accounts. But he testified that, after losing his jacket in mid-February 2016, he needed a new winter jacket and thought that taking the Ski-Doo snowmachine jacket and putting it on his employee charge account was his best course of action.

Reyes did not offer any explanation as to why he took additional items over the next two weeks — the Klim jacket and gloves, balaclava, snowmachine hood straps, and handlebar pads. He simply incorporated them into his general defense — that he did not take them without intending to pay for them and was going to pay for them using his employee charge account.

As to the last group of items Reyes took from Alaska Mining and Diving — the items that he removed from the store on March 7, 2016 (a gas can, snowmachine belts, hot dogger, and scratchers) — Reyes testified that he boxed them up and put a postage label on them addressed to his girlfriend in furtherance of a plan to propose to her. Reyes testified that he had concealed an engagement ring in a smaller box inside the main box, and hoped to surprise his girlfriend when she opened the package. But Reyes offered the same explanation for why his removal of the parts from the store was non-culpable — *i.e.*, he had put them on his employee charge account and would pay the account balance from his paychecks.

Reyes conceded that he had never documented the placing of all these items on his employee charge account — that is, he had never created a paper record in the store, or entered the purchases into the electronic book-keeping and inventory system. And Reyes did not testify that he ever notified another employee as to what he was doing when he removed the items, so that the items could be posted to his employee charge account. Reyes acknowledged that his training and understanding of the exact procedures for using the employee charge account program were incomplete, but stated that his impression, based on hearing other employees talk about their charge accounts, was that "[i]t wasn't something that it sounded like they had to go to management and . . . check in every time." Reyes said he saved the tags from all the items in a drawer at his home, and that this was his way of keeping track of the items that he attributed to his employee charge account.

The jury convicted Reyes of second-degree theft.

Reyes now appeals.

Why we reverse Reyes's conviction for second-degree theft, but authorize the State to elect entry of judgment for third-degree theft

Alaska Statute 11.46.980(c) provides that "[i]n determining the degree or classification of a crime under this chapter, amounts involved in criminal acts committed under one course of conduct, whether from the same person or several persons, shall be aggregated." In this case, the State charged Reyes with felony theft under a single-course-of-conduct theory. That is, the State sought to aggregate a series of thefts that individually were below the $750 threshold for second-degree theft in order to charge that degree of theft. The court was thus required to instruct the jury that in order to find

Reyes guilty, it needed to find that the thefts were committed as part of a single course of conduct.[6] The State concedes that the failure to do so in this case was error.

However, because Reyes did not object to the absence of a single-course-of-conduct instruction, this error does not warrant reversal of Reyes's conviction unless he can show plain error.[7] In *Buckwalter v. State*, we held that proof of a single course of conduct is an essential part of the State's case when it chooses to proceed under an aggregation theory.[8] Thus, in light of our decision in *Buckwalter*, there is no dispute that the error in this case was obvious and that it affected Reyes's substantial rights.

The only dispute is whether the error was prejudicial. Because the error is one of constitutional magnitude, the State has the burden of establishing that the error was harmless beyond a reasonable doubt.[9]

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[6] *See Buckwalter v. State*, 23 P.3d 81, 85-86 (Alaska App. 2001).

[7] *See Adams v. State*, 261 P.3d 758, 764 (Alaska 2011) (establishing that plain error is "an error that (1) was not the result of intelligent waiver or a tactical decision not to object; (2) was obvious; (3) affected substantial rights; and (4) was prejudicial").

[8] *Buckwalter*, 23 P.3d at 85-86.

[9] *See Adams*, 261 P.3d at 773. For the first time in his reply brief, Reyes cites to *Jordan v. State*, 420 P.3d 1143 (Alaska 2018), a case in which the Alaska Supreme Court held that the failure to instruct the jury on a contested element constitutes structural error — *i.e.*, error requiring automatic reversal without regard to prejudice. Reyes does not explicitly ask us to apply a structural error analysis, instead seeming to rely on *Jordan* to illustrate the errors he perceives in the State's harmlessness analysis.

In any event, we need not decide whether the structural error analysis set out in *Jordan* applies to this situation because we conclude that the failure to give a single-course-of-conduct instruction as to the second-degree theft charge was not harmless beyond a reasonable doubt. And as to the March 7, 2016 thefts for which we are authorizing the State to enter a third-degree theft conviction, Reyes never contested that those thefts were part of a single course of conduct — either by requesting a jury instruction setting out the course of conduct requirement or by actively disputing that the thefts on that single day were properly

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Having reviewed the record, we are unable to say that the failure to give a single-course-of-conduct jury instruction was harmless beyond a reasonable doubt as to the acts of theft that preceded the final acts of theft on March 7, 2016. In *Buckwalter*, we held that, to establish a single course of conduct, the State must prove that the defendant engaged in a "calculated" series of thefts — *i.e.*, a series of thefts that were part of "an overarching scheme or plan."[10] Here, a reasonable juror could have reasonable doubt that Reyes's initial acts of theft were the result of a calculated plan. For instance, the jury could have concluded that his initial theft of the Ski-Doo snowmachine jacket was his spontaneous reaction to an unplanned event, the loss of his winter jacket, and that he took the later items — the Klim jacket and gloves, the balaclava, the snowmachine hood straps, and the handlebar pads — simply because he saw how easy it was to do so. There is a reasonable possibility that a reasonable juror could have found that only the March 7, 2016 thefts were the result of a conscious plan, and that his initial actions were simply opportunistic acts of theft. Accordingly, the failure to give a single-course-of-conduct instruction cannot be viewed as harmless beyond a reasonable doubt with respect to all of Reyes's thefts, which were collectively relied on to exceed the value threshold for second-degree theft. We therefore reverse Reyes's conviction for second-degree theft.

However, we conclude that the failure to give a single-course-of-conduct instruction was harmless beyond a reasonable doubt as to the items taken on

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[9] (...continued)
aggregated. *See Alvarado v. State*, 440 P.3d 329, 333 n.14 (Alaska App. 2019) (recognizing that the word "contested," as used in *Jordan*, is potentially ambiguous — it could be interpreted to mean that the defendant actively disputed the element as part of his defense at trial, or it could mean that the defendant actually objected to the omission of the element from the jury instructions).

[10] *Buckwalter*, 23 P.3d at 85-86.

March 7, 2016 (items totaling almost $385). The evidence showed that Reyes put the items in a single box, affixed a postage label to make it appear he was shipping the items, used another person's name (his girlfriend's) as the addressee, and later provided a cover story (the charge-accounts explanation). There is no reasonable possibility that a jury would find that the theft of these items was not part of a single, calculated plan. Indeed, this evidence would appear to meet the common law aggregation requirement of unity of time, place, owner, and intent, which is even stricter than Alaska's statutory course-of-conduct requirement.[11]

As a result of this conclusion, we must decide whether the failure to give a factual unanimity instruction as to the aggregated second-degree theft charge would affect the entry of a conviction solely for the items taken on March 7. In *Ramsey v. State*, we held that a factual unanimity instruction is required where the State aggregates together a series of lower-value thefts in order to charge a defendant with a higher degree of theft.[12] In other words, jurors must be instructed that they are required to agree on which individual thefts the defendant committed. In light of *Ramsey*, the State correctly concedes that the court erred in failing to give a unanimity instruction to the jury with respect to all the thefts that it alleged comprised the crime of second-degree theft, *i.e.*, all the thefts alleged in this case.

It is not clear that a factual unanimity instruction would have been required as to only those items that Reyes took on March 7 and put into a single box. But even assuming such an instruction was required, we conclude that any error was harmless beyond a reasonable doubt. Reyes acknowledged which items were taken on that date and offered a unitary explanation — he put the items in a box as part of a plan to surprise

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[11] *Id.* at 84-85.

[12] *Ramsey v. State*, 355 P.3d 601, 602 (Alaska App. 2015).

his girlfriend with an engagement ring hidden in the box, but he intended to pay for all the items using his employee charge account. The jury must necessarily have rejected this explanation, because it could not have convicted Reyes of second-degree theft (theft of $750 or more) without the $384.96 in items taken on March 7.

Because the failure to give a single-course-of-conduct instruction and a unanimity instruction was harmless beyond a reasonable doubt as to the items taken on March 7, 2016, and because the aggregate value of those items, $384.96, exceeded the $250 threshold for third-degree theft, the State may, on remand, elect entry of judgment for third-degree theft.[13] (The jury was instructed on this lesser offense, at Reyes's request, and Reyes's attorney acknowledged in closing argument that the items taken on March 7 exceeded the value threshold for third-degree theft.) If the State makes this election, Reyes must be resentenced.

Alternatively, the State may re-try Reyes for the crime of second-degree theft. If Reyes is retried, the court must give both a factual unanimity instruction and a single-course-of-conduct instruction to the jury.

Conclusion

Reyes's conviction for second-degree theft is REVERSED. The State may re-try Reyes for this offense, or the State may elect to have judgment entered for third-degree theft after Reyes is resentenced for the lesser offense.

[13] AS 11.46.140(a)(1).