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Summary of *Stephans v. State*, 127 Nev. Adv. Op. 65

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Stuard T. Stephans, A/K/A Stuard Stephans, vs. State, 127 Nev. Adv. Op. 65 (October 06, 2011)¹

CRIMINAL LAW AND PROCEDURE - EVIDENCE

Summary

The Court considered an appeal of a grand larceny conviction, based on witness testimony used to prove the value of the stolen goods.

Disposition/Outcome

The Court concludes that the district court abused its discretion when it admitted State's witness testimony into evidence. Thus, defendant was entitled to reversal and retrial on the grand larceny charge.

Factual and Procedural History

Defendant Stuard Stephans ("Stephans") and a companion stole six bottles of cologne from a retail department store and one of the store's loss prevention field agents apprehended them. At trial, the State offered only the field agent's testimony to establish the value of the stolen goods. The agent based his value estimation on the price he remembered reading on the item's price tag. Stephans objected to the testimony as it lacked foundation, involved hearsay, and violated the best evidence rule. The district court sustained the foundation objection but overruled the remaining objections. Using the testimony about the price tag, the State established that the merchandise's value surpassed the \$250 minimum needed for a grand larceny conviction. A jury convicted Stephans of grand larceny, and defendant appeals this conviction.

Discussion

Justice Pickering authored the opinion for the unanimous three justice panel. The Court reiterated that prior to 2011, if the value of stolen goods in a theft exceeded \$250, it constituted grand larceny under NRS 205.220(1)(a).³ The State bore the burden of proving beyond a reasonable doubt that the value of the goods exceeds this amount.⁴ In this case, the State did not offer nor qualify the loss prevention agent as an expert. The State also failed to establish that the agent had personal knowledge to give lay testimony. Additionally, the State did not offer the price tags into evidence. Thus, the district court improperly admitted this testimony.

Evidence of price tags may be used to establish value of stolen goods for a retail department store.⁵ However, oral testimony from a non-owner as to value must be based on personal knowledge, not just on a reading of the price tag.⁶ Most courts have held that security

¹ By Emily Navasca.

³ NEV. REV. STAT. § 205.220(1)(a) (2007).

⁴ *State v. Ensz*, 503 N.W.2d 236, 238 (N.D. 1993) (interpreting a similar North Dakota statute)

⁵ *Calbert v. State*, 99 Nev. 759, 759-60, 670 P.2d 576 (1983).

⁶ 3 BARBARA E. BERGMAN & NANCY HOLLANDER, *WHARTON'S CRIMINAL EVIDENCE* § 12:27 at 397-400 (15th ed. 1999).

officers lack sufficient knowledge of the pricing system and, without a proper foundation, cannot testify to value by reciting the price they recall reading on the tags.⁷ Thus, the loss prevention field agent's reading of the price is not alone sufficient to establish value.

Courts are divided as to whether recitation of the contents of a price tag constitute hearsay, though the Supreme Court of Nevada held that it is not difficult to overcome the hearsay exception. Courts have allowed price tag evidence under the business record exception⁹, as courts can properly take judicial notice that the price tags generally reflect the value of the goods.¹⁰

Before the tags may be admitted under the hearsay exceptions, the admitting party must first lay a foundation for the tags by authenticating them and showing a basis for admission. However, the best evidence rule may bar oral testimony about the contents of the tag when the tag itself is not offered into evidence and the appropriate objection is made.¹¹ This rule excludes witnesses whose knowledge of the pertinent facts stem solely from the contents of the writing. Here, the witness based his testimony of value solely on what he remembers reading on the price tag. Thus, he lacked the independent knowledge of pricing which would allow testimony without raising a best evidence rule issue. Though the best evidence rule generally does not apply to recovered goods, it does not excuse failure to produce register receipts, or photographs of the price tags where retail price is the sole evidence of value.¹⁴

Admitting the field agent's hearsay testimony constituted a harmful legal error on the part of the district court. Without the testimony as to value, the record did not support a grand larceny conviction. Courts require affirmative proof of value in shoplifting cases when the value is close to the line dividing a misdemeanor and a felony. Stephans argued the proper remedy is an acquittal based on insufficient evidence. However, the reviewing court must consider all of evidence admitted, regardless of evidentiary error¹⁵, as the reviewing court cannot know what evidence would have been offered in place of the erroneously admitted evidence.¹⁶ The Court found the record with the erroneously admitted price tag sufficient to sustain defense's grand larceny conviction.¹⁷ Thus the Court remanded and reversed the grand larceny conviction.

The Court further affirmed the burglary and conspiracy convictions, as it found that the district court did not abuse its discretion on those charges.

⁷ *Eldridge v. United States*, 492 A.2d 879, 882 (D.C. 1985).

⁹ *Lauder v. State*, 195 A2d 610, 611 (Md. 1963); *State v. Odom*, 393 S.E.2d 146, 151 (N.C. Ct. App. 1990); *see Twine v. Com.*, 629 S.E.2d 714, 719 (Va. Ct. App. 2006).

¹⁰ *State v. Rainwater*, 876 P.2d 979, 982 (Wash. Ct. App. 1994); *State v. White*, 437 A.2d 145, 148 (Conn. Super. Ct. 1981).

¹¹ *Robinson v. Com.*, 516 S.E.2d 475, 479 (Va. 1999).

¹⁴ *See* 6 JACK B. WEINSTEIN & MARGRET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE § 1001.03[2] (Joseph McLaughlin ed., 2d ed. 2011); *see also* NEV. REV. STAT. § 52.385 (2007) (allowing the use of photographs as evidence so that stolen property may be returned).

¹⁵ *McDaniel v. Brown* 558 U.S. ___, ___, 130 S.Ct. 665, 672 (2010) quoting *Lockhart v. Nelson*, 488 U.S. 33, 41 (1988).

¹⁶ *United States v. Sarmiento-Perez*, 667 F.2d 1239, 1240 (5th Cir. 1982).

¹⁷ *See id.* at 5.

Conclusion

Evidence of value in a grand larceny case cannot be based solely on recitation of the contents of the stolen goods price tag, as such testimony is hearsay, lacks foundation, and violates the best evidence rule.