IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

SHEILA ANN SUTTON,	)	
	)	
Appellant,	)	NOT FOR PUBLICATION
v.	)	Case No. F-2004-332
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

CHAPEL, PRESIDING JUDGE:

Sheila Ann Sutton was tried by jury and convicted of Count I, Grand Larceny in violation of 21 O.S.2001, § 1704, and Count II, Knowingly Concealing Stolen Property in violation of 21 O.S.2001, § 1713, both after two or more former convictions, in the District Court of Cherokee County, Case No. CF-2003-99. In accordance with the jury's recommendation the Honorable Mark. L. Dobbins sentenced Sutton to five (5) years imprisonment on Count I and four (4) years imprisonment on Count II, to run concurrently. Sutton appeals from these convictions and sentences.

Sutton raises nine propositions of error in support of her appeal:

I. The mere evidence that stolen shoes were discovered in a car in which Sutton was a passenger was insufficient to prove Sutton knowingly concealed stolen property;

II. The Court should have sustained the demurrer to grand larceny as, at most, only petit larceny was proved;

III. Sutton was improperly tried for "Grand Larceny" rather than for the more specific crime of "Larceny of Merchandise from a Retailer";

IV. The Court erred in ruling that testimony concerning a prior inconsistent statement by the State's key witness was inadmissible as hearsay;

V. Because Sutton did not deny flight or offer evidence to explain her conduct in leaving the scene of the crime, instructing the jury on evidence of flight violated Sutton's right to the presumption of innocence;

VI. The jury instructions were so incomplete that it cannot be said that the instructions fairly stated the applicable law;

VII. The prosecutor deprived Sutton of a fair trial by misrepresenting the law governing the crime of "knowingly concealing stolen property" and by grossly misstating the evidence supporting the crime;

VIII. The written judgment and sentence should be corrected to reflect accurately the oral pronouncement of the sentence imposed; and

IX. The trial errors cumulatively deprived Sutton of a fair trial and reliable result.

After thorough consideration of the entire record before us on appeal, including the original record, transcripts, exhibits and briefs, we find that Count II must be reversed with instructions to dismiss and Count I must be modified.

In Proposition I Sutton correctly claims the evidence was insufficient to support her conviction for knowingly concealing stolen property, the Reebok shoes stolen from Stages. To secure that conviction the State must show (a) a defendant knew the property was stolen and (b) acted in some way to conceal

the property from its rightful owner.[1] The first element is satisfied by evidence that the boys stole the shoes and put them in the car, in Sutton's presence.[2]

Sutton claims the State failed to show she concealed the property. This element "is not committed by the mere acquisition of stolen property, but depends upon acts after such acquisition in contravention of another's ownership."[3] It requires a "continuing act of concealing or withholding property".[4] "Concealing" does not require actual hiding of the property, but can include anything a defendant does to prevent its recovery by its owner.[5] The question is whether Sutton acted to conceal the property. Mere presence at a crime scene does not make a person liable for a crime.[6] The evidence showed that, when the car was stopped, Sutton was sitting in the back passenger seat and the shoes were on the passenger floorboard. Sutton did not own the car and was not driving it. No evidence showed she either stole or moved the shoes, or did anything other than sit near them. This Court has held a person could not be prosecuted for concealing stolen property where a stolen tractor was placed in his garage, he looked in the garage, and subsequently bought the tractor, since the act of concealing had occurred

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[1] *Antrobus v. State*, 1995 OK CR 41, 900 P.2d 1003, 1005; *Eslinger v. State*, 1987 OK CR 53, 734 P.2d 830, 832; *Fields v. State*, 1983 OK CR 106, 666 P.2d 1301, 1303; 21 O.S.2001, § 1713; OUJI-CR(2nd) 5-113.

[2] *McMillan v. State*, 1986 OK CR 94, 720 P.2d 1274, 1276 (proof that accused had reasonable cause to believe property was stolen is sufficient).

[3] *Nowlin v. State*, 2001 OK CR 32, 34 P.3d 654, 656, *quoting Bussett v. State*, 1982 OK CR 79, 646 P.2d 1293, 1295 (Cornish, J., specially concurring).

[4] *Nowlin*, 34 P.3d at 656.

[5] *Nipps v. State*, 1978 OK CR 30, 576 P.2d 310, , 311.

[6] *Hackney v. State*, 1994 OK CR 29, 874 P.2d 810, 814. A person must engage in an act or omission committing, aiding, or encouraging the commission of a crime to be liable. 21 O.S.2001, § 172.

before he became involved.[7] We have found concealment where a defendant had constructive control over stolen guns by hiding them near his motel room and retaining the keys to the room.[8] No such evidence of constructive control or any action aiding in concealment was presented here.

The State argues that Sutton's subsequent involvement in the Wal-Mart larceny showed her guilty *knowledge* regarding the Stages loot. This Court has held that evidence of other property stolen at the same time as the charged property is appropriate other crimes evidence on a charge of concealing stolen property.[9] However, generally, other crimes evidence of a similar crime committed soon before or after the charged crime should not be admitted where the crimes are independent and were separately completed.[10] Such evidence may be admissible if the two crimes are so similar as to show a distinctive pattern or method of operation.[11] Sutton's alleged involvement in the Stages incident is not comparable to her involvement in the Wal-Mart larceny and the two crimes do not show a distinctive pattern or method.

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[7] *Stotts v. State*, 1969 OK CR 57, 452 P.2d 164, 166. *See also Wyatt v. State*, 1988 OK CR 58, 752 P.2d 1131, 1133 (defendant hid property in brush on his stepbrother's farm); *Lister v. State*, 1988 OK CR 136, 758 P.2d 831, 833-34 (evidence showed defendant concealed the property by hiding it from everyone); *Brewer v. State*, 1976 OK CR 183, 554 P.2d 18, 21-22 (informant's subsequent acceptance of stolen guns did not negate charge of concealing, because act of concealing stolen property was complete when defendant hid property after taking it).

[8] *Brewer*, 554 P.2d at 20.

[9] *Taylor v. State*, 1982 OK CR 88, 646 P.2d 615, 616; *see also Payne v. State*, (evidence of other stolen property appropriate where other crimes were committed concurrently with the charged crime)

[10] *See, e.g., Jones v. State*, 1995 OK CR 34, 899 P.2d 635, 649, *cert. denied*, 517 U.S. 1122, 116 S.Ct. 1357, 134 L.Ed.2d 524 (1996).

[11] *See, e.g., Lott v. State*, 2004 OK CR 27, 98 P.3d 318, 334, cert. denied, __ U.S. __, 125 S.Ct. 1699, __ L.Ed.2d __ (2005) (subsequent rape and murder of elderly victims showed identity and highly distinctive method of operation); *Welch v. State*, 2000 OK CR 8, 2 P.3d 356, *cert. denied*,

Identity is not an issue in this case; Sutton was certainly in the car and the only issue is whether she concealed the Stages shoes. Even if this Court agreed that Sutton's subsequent adventures at Wal-Mart were relevant to show guilty knowledge of the Stages loot, that would not settle the question. As we discuss above, sufficient evidence showed Sutton knew the shoes were stolen. The only question is whether she concealed them, and the Wal-Mart evidence sheds no light on that issue.

Insufficient evidence was presented to show that Sutton concealed the Stages merchandise. The Count II conviction for Knowingly Concealing Stolen Property is reversed with instructions to dismiss.

In Proposition II Sutton claims the demurrer to Count I should have been sustained, as the evidence proved petit larceny but not grand larceny. Sutton was charged with stealing "DVD players and monitors". The evidence showed that she stole one DVD player worth $487. The boys each took a DVD player worth $296. Adding the total of all three DVD players, the $500 limit for grand larceny is surpassed. The Information need not specifically allege that a defendant aided and abetted others in committing a crime, and this Information did not name any other defendant.[12] The State argued at trial that this was group grand larceny, and that Sutton and the boys acted as a team. Had the jury known what to do with this information, that would indeed have supported a grand larceny conviction. However, the trial court denied the

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531 U.S. 1056, 121 S.Ct. 665, 148 L.Ed.2d 567 (subsequent rape and murder of similar victims showed identity and distinctive method of operation).

State's request for OUJI-CR (2nd) 2-5, 2-6 and 2-9, defining principals, aiding and abetting, and merely standing by. The jury thus had no guidance as to how to get to "grand larceny", at $500, where the evidence showed Sutton only stole something worth $487. The evidence was not insufficient to support grand larceny. However, the jury was not properly instructed on the crime of grand larceny and was unable to properly consider the evidence supporting that charge.[13]

The State argues that the omission of proper instructions was not error since the evidence was in line with the law. That is of no help if the jury is not properly instructed on the law. The State also argues this error was harmless as Sutton cannot show prejudice – the sentence she received was within the range of sentencing for both grand and petit larceny. We disagree. Sutton was sentenced to five years, the minimum possible sentence, for grand larceny after two or more priors. Five years is the maximum sentence for petit larceny after priors. Despite the State's request for a twenty-year sentence, the jury gave Sutton the minimum sentence she could receive under their incomplete instructions.[14]

Due to improper instruction, the jury could not have found Sutton guilty of grand larceny. However, the evidence and instructions support a conviction for petit larceny. Rather than remand this case, in the interests of justice and

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[12] *Hackney*, 874 P.2d at 814, n 8.
[13] *Pinkley v. State*, 2002 OK CR 26, 49 P.3d 756, 760.
[14] Sutton was allowed, without objection, to give a statement in mitigation to the jury before sentencing.

judicial economy this Court will modify Sutton's conviction in Count I to petit larceny.[15] Petit larceny after two or more prior offenses has no minimum sentence and is punishable by up to five years imprisonment. Sutton's sentence is modified to two years imprisonment.

Sutton correctly claims in Proposition V that the jury was improperly instructed on flight. Witnesses testified that Sutton and the boys fled Wal-Mart. Contrary to the State's assertion on appeal, Veron Sutton offered no explanation for his mother's flight. When asked whether his mother said to let her out of the car, she didn't want any part of this, Veron replied that Sutton said "something similar" but had not said that. To call this ambiguous comment a *defendant's* explanation of her flight is to stretch the term beyond all meaning. Case law and the OUJI comments clearly state that this instruction is not to be given under these circumstances,[16] and the trial court should not have given it. The State argues that this error was harmless given the evidence of Sutton's guilt. On the contrary, in *Mitchell* this Court stated, "[W]e believe the violation of a defendant's fundamental presumption of innocence to be far more grave; and, thus the error to be fundamental."[17] Given our resolution of other issues, reversal is not necessary.

In Proposition VI Sutton argues that the trial court failed to give numerous standard instructions which are designed to assist the jury in every case. The State does not dispute this, but argues that this failure is harmless

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[15] *McCarty v. State*, 2002 OK CR 4, 41 P.3d 981, 984-85.
[16] *Mitchell v. State*, 1993 OK CR 56, 876 P.2d 682, 685.
[17] *Id.*

given the evidence of guilt. No matter how strong the evidence of guilt, it simply cannot outweigh the importance of a fairly instructed tribunal. Sutton did not receive that, and her right to a fair trial was hopelessly compromised. These errors in instruction contribute to our resolution of the case.

The trial court should give the standard jury instructions unless they do not fairly and accurately state the law which applies to a particular case.[18] The trial court neglected to give several instructions, all of which were relevant to this case and which should be given in every case. These include: (a) OUJI-CR (2nd) 10-3,[19] the charging instruction; (b) OUJI-CR (2nd) 5-92[20] and 5-110,[21] introducing Grand Larceny and Concealing Stolen Property; (c) defining terms for both charged crimes as set out in OUJI-CR (2nd) 5-106 and 5-114; and the routine instructions on evidence in OUJI-CR Chapter 9 – (c) OUJI-CR (2nd) 9-1,[22] (d) OUJI-CR(2nd) 9-2,[23] (e) OUJI-CR (2nd) 9-3,[24] (f) OUJI-CR(2nd) 9-7.[25] As

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[18] 12 O.S.2001, § 577.2.

[19] The defendant, [Name of Defendant], is charged in the information/indictment with [State Crime Charged and Summarize Material Facts of Information or Indictment] on or about [Date] in [County] County, Oklahoma. The trial court gave a modified version of this instruction, which stated "The defendant has/have been charged with the crimes stated in these instructions." This does not accurately reflect the purpose of a charging instruction, which should include a summary of material facts.
To this charge the defendant has entered a plea of not guilty.

[20] The defendant is charged with: [grand/petit larceny] [grand larceny in (a dwelling/vessel)/(the nighttime)] [larceny of domestic animals/fowls] [larceny of an automotive driven vehicle] [larceny from a house] [grand/petit larceny of (oil products)/merchandise] [entering with the intent to steal copper], of [Description of Property Allegedly Stolen] in the possession of [Name of Possessor] on [Date] in [Name of County] County, Oklahoma.

[21] The defendant is charged with receiving/concealing stolen property of [Description of Alleged Stolen Property] received/concealed from [Person From Whom Allegedly Received or Concealed] on [Date] in [Name of County] County, Oklahoma.

[22] You should consider only the evidence introduced while the court is in session. You are permitted to draw such reasonable inferences from the testimony and exhibits as you feel are justified when considered with the aid of the knowledge which you each possess in common with other persons. You may make deductions and reach conclusions which reason and common sense lead you to draw from the fact which you find to have been established by the testimony and evidence in the case.

Sutton argues, without the general instructions introducing the charged crimes, the jury could have convicted her of concealing the stolen DVD players, with which she was not charged. OUJI-CR(2nd) 9-44,[26] regarding a defendant's right to testify, was not given. Sutton did not testify; a sitting juror had said she felt Sutton should testify if she was not guilty. Although two witnesses impeached McMath's testimony that he had not talked to Sutton, OUJI-CR (2nd) 9-20 on inconsistent pretrial statements was not given.

We discuss in Proposition II the lack of proper instruction regarding Sutton's liability for grand larceny. To compound that error, the jury received a definition of "petit larceny" without any instruction as to lesser included offenses.[27] While in theory jurors had the opportunity to find Sutton guilty of a lesser included offense, they had no guidance as to why that definition of "petit larceny" was there or what to do with it. Under these circumstances the jury could not have found Sutton guilty of a lesser included offense.

Sutton also complains that the trial court modified the standard instruction on the presumption of innocence. Rather than saying "the defendant", the court modified OUJI-CR(2nd) by saying "a" and "any" defendant. While pointless, the modifications did not erode Sutton's presumption of

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[23] This instruction defines direct evidence.
[24] This instruction defines circumstantial evidence.
[25] This instruction regards co-defendants. Although Veron was not charged along with Sutton, he testified that he had been charged with this crime, pled guilty and was on probation.
[26] The defendant is not compelled to testify, and the fact that a defendant does not testify cannot be used as an inference of guilt and should not prejudice him/her in any way. You must not permit that fact to weigh in the slightest degree against the defendant, nor should this fact enter into your discussions or deliberations in any manner.

innocence – the instruction clearly referred, in the context of the trial, to Sutton.

Sutton also claims the trial court should have instructed on her theory of defense on Count II – that mere proximity to stolen goods was not enough to show concealment of stolen property. Our resolution of Proposition I, dismissing Count II, renders this argument moot.

Our resolution of this case renders the remaining propositions moot.

Decision

The Judgment in Count I is **MODIFIED** to **PETIT LARCENY**. The Sentence in Count I is **MODIFIED** to **TWO (2)** years imprisonment. The Judgment and Sentence in Count II is **REVERSED** with instructions to **DISMISS**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeal*, Title 22, Ch.18, App. (2005), the MANDATE is ORDERED issued upon the delivery and filing of this decision.

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[27] OUJI-CR (2nd) 10-23 and 10-24 explain lesser included offenses and how a jury is to determine whether a defendant is guilty of a lesser included offense.

OPINION BY: CHAPEL, P. J.

LUMPKIN, V.P.J.:	CONCUR IN PART/DISSENT IN PART
C. JOHNSON, J.:	CONCUR
A. JOHNSON, J.:	CONCUR

LUMPKIN, VICE-PRESIDING JUDGE: CONCUR IN PART/DISSENT IN PART

I concur and agree that due to the failure of the trial court to provide the jury with a complete set of instructions on the applicable law, the conviction in Count I must be modified to Petit Larceny. However, I dissent to the modification of the sentence, based on the fact Appellant was convicted after two prior felonies and this theft took place during a planned group crime spree. I would find the law and evidence is more than sufficient to find the sentence appropriate. *Rea v. State*, 2001 OK CR 28, 34 P.3d 148.

In addition, I dissent to the reversal with instructions to dismiss Count II. This issue is totally overly analyzed, as if it were a law school problem rather than an application of the law in a common sense fashion by the members of the jury. I find the evidence supports the judgment and sentence rendered by the jury, even though a law school professor might be able to nuance it to death. I believe the citizens on the jury saw this case for what it was, a group crime spree of stealing and concealing the fruits of the crimes until they were fortunately caught. Appellant was acting in concert with each of the other offenders to accomplish that crime and it was vividly plain to the jury. I would affirm the judgment and sentence in Count II.