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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	
Plaintiff-Respondent,)	NO. 44872
)	
v.)	ADA COUNTY NO. CR-FE-2016-5674
)	
SHAWN JERRI COATS,)	REPLY BRIEF
)	
Defendant-Appellant.)	
_____)	

REPLY BRIEF OF APPELLANT

**APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF ADA**

HONORABLE RICHARD D. GREENWOOD
District Judge

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TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	1
Nature of the Case	1
Statement of the Facts and Course of Proceedings	1
ISSUES PRESENTED ON APPEAL.....	2
ARGUMENT.....	3
I. The State Failed To Prove Beyond A Reasonable Doubt Mr. Coats Committed Grand Theft Of Retail Goods Or Services During A Criminal Episode.....	3
II. Mr. Coats’s Convictions And Punishments For Grand Theft Of Retail Goods Or Services During A Criminal Episode And Fraudulent Use Of A Financial Transaction Card Violated His Right To Be Free Of Double Jeopardy.....	4
CONCLUSION.....	5
CERTIFICATE OF MAILING	6

TABLE OF AUTHORITIES

Cases

State v. Moffat, 154 Idaho 529 (Ct. App. 2013)4

STATEMENT OF THE CASE

Nature of the Case

Mr. Coats appeals from his judgment of conviction for three counts of grand theft, three counts of forgery, and one count of fraudulent use of a financial transaction card. On appeal, Mr. Coats argued that the State failed to prove one of the counts of grand theft (Count 5) beyond a reasonable doubt. (App. Br., pp.5–11.) Mr. Coats also argued that the convictions and punishment for the challenged count of grand theft (Count 5) and the single count of fraudulent use of a financial transaction card (Count 7) violated his right to be free from double jeopardy under the Idaho Constitution. (App. Br., pp.11–16.)

In response, the State disputes Mr. Coats's sufficiency argument, but agrees that Mr. Coats's double jeopardy rights were violated because, under the facts here, fraudulent use of a financial transaction card was a lesser included offense of grand theft. (*See* Resp. Br., pp.4–9.) Mr. Coats therefore focuses his reply argument to the sufficiency issue and just briefly addresses the double jeopardy issue.

Statement of Facts and Course of Proceedings

The statement of facts and course of proceedings were articulated in Mr. Coats's Appellant's Brief. (*See* App. Br., pp.1–3.) They are not repeated here, but are incorporated by reference.

ISSUES

- I. Did the State fail to prove beyond a reasonable doubt Mr. Coats committed grand theft of retail goods or services during a criminal episode?
- II. Did Mr. Coats's convictions and punishments for grand theft of retail goods or services during a criminal episode and fraudulent use of a financial transaction card violate his right to be free of double jeopardy?

ARGUMENT

I.

The State Failed To Prove Beyond A Reasonable Doubt Mr. Coats Committed Grand Theft Of Retail Goods Or Services During A Criminal Episode

On appeal, Mr. Coats argued the evidence was insufficient to prove he committed grand theft of retail goods and services during a criminal episode (Count 5).¹ (App. Br., pp.5–11.) The State disagrees. (Resp. Br., pp.4–7.) The State argues that, because theft is defined by not only taking property, but also obtaining or withholding it, the jury here could have found that Mr. Coats committed theft by withholding the retail goods and services from Mr. Morgan. (Resp. Br., p.6.) The State’s argument, however, fails to take into account the charging document and accompanying jury instruction for this grand theft offense. Mr. Coats was not charged with withholding retail goods and services. He was charged with “wrongfully *obtain[ing]*” retail goods and services. (R., p.124 (emphasis added).) Consistent with the charging document, the jury was instructed to find Mr. Coats “wrongfully *obtained* property described as: retail goods or services.” (R., p.175 (emphasis added).) The evidence must sufficient for the elements of the charged offense, not an uncharged one. In this case, the State failed to present sufficient evidence for the jury to find Mr. Coats wrongfully obtained retail goods and services from Walmart or Mr. Morgan. (*See* App. Br., pp.5–11.)

The State also seems to take issue with Mr. Coats’s emphasis on stolen property, but, again, this was an element of the offense. (*See* Resp. Br., p.6.) The jury had to find, beyond a reasonable doubt, that “the property was *stolen* during a series of unlawful acts committed over a

¹ In preparing this Reply Brief, undersigned counsel identified a typo in the Appellant’s Brief’s discussion of the Walmart purchases. On page 9, the Appellant’s Brief identifies three Walmart purchases for \$503.00. (App. Br., p.9.) The correct amount, however, is \$504.00. (*See* Resp. Br., p.5; State’s Ex. 1 (Bank Statement, p.4).)

period of up to three days.” (R., p.175 (emphasis added).) Similarly, the charging document stated that Mr. Coats “wrongfully obtained” the property, “*stolen*” over “three or more incidents of theft,” “which was *stolen* as part of a criminal episode over a period of up to three days from the owner.” (R., p.124 (emphasis added).) Here, the State failed to present any evidence of stolen property. Mr. Coats paid for the retail goods and services. They were not stolen from Walmart. Likewise, Mr. Coats did not steal retail goods and services from Mr. Morgan. Mr. Coats took Mr. Morgan’s debit card and then used it to make unauthorized purchases. (*See generally* App. Br., pp.7–9 (outlining the State’s evidence).) Whether or not the use of the debit card satisfies another crime is beside the point. Those criminal actions do not satisfy the elements of the offense of grand theft as charged in Count 5. For the reasons stated herein and in the Appellant’s Brief, Mr. Coats submits that the State failed to prove all of the elements of grand theft (Count 5) beyond a reasonable doubt.

II.

Mr. Coats’s Convictions And Punishments For Grand Theft Of Retail Goods Or Services During A Criminal Episode And Fraudulent Use Of A Financial Transaction Card Violated His Right To Be Free Of Double Jeopardy

The State does not dispute Mr. Coats’s double jeopardy violation. (Resp. Br., pp.7–9.) The State agrees that fraudulent use of a financial transaction card was a lesser included offense of grand theft. (Resp. Br., pp.8–9.) As a remedy, the State requests that this Court “merge” Mr. Coats’s conviction for the lesser included offense with the greater one. (Resp. Br., p.9.) In an abundance of caution, Mr. Coats wishes to underscore that the proper remedy is to vacate his judgment of conviction for the violative count—fraudulent use of a financial transaction card (Count 7). *See State v. Moffat*, 154 Idaho 529, 534 (Ct. App. 2013) (vacating judgment of conviction for offense that violated double jeopardy clause). If Mr. Coats’s conviction for this

offense is not vacated, Mr. Coats continues to be placed double jeopardy because his conviction and punishment (a fifteen-year sentence) would remain intact.

CONCLUSION

In light of the State's concession, Mr. Coats respectfully requests that this Court vacate his judgment of conviction for fraudulent use of a financial transaction card (Count 7) due to the double jeopardy violation. In addition, he respectfully requests this Court vacate his judgment of conviction for grand theft (Count 5) due to insufficient evidence.

DATED this 17th day of January, 2018.

_____/s/_____
JENNY C. SWINFORD
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 17th day of January, 2018, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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RICHARD D GREENWOOD
DISTRICT COURT JUDGE
E-MAILED BRIEF

KYLE O SCHOU
ADA COUNTY PUBLIC DEFENDER
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E-MAILED BRIEF

_____/s/_____
EVAN A. SMITH
Administrative Assistant

JCS/eas