IN THE COURT OF APPEALS OF THE STATE OF ALASKA

MARGARET MARIE BUTTS, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-11992 Trial Court No. 3PA-14-606 CR MEMORANDUM OPINION No. 6489 — July 5, 2017

Appeal from the District Court, Third Judicial District, Palmer, John W. Wolfe, Judge.

Appearances: Gavin Kentch, Law Office of Gavin Kentch, LLC, Anchorage, for the Appellant. Lindsey Burton, Assistant District Attorney, Palmer, and Craig W. Richards, Attorney General, Juneau, for the Appellee.

Before: Mannheimer, Chief Judge, Allard, Judge, and Coats, Senior Judge.*

Judge MANNHEIMER.

* Sitting by assignment made pursuant to Article IV, Section 11 of the Alaska Constitution and Administrative Rule 23(a).

Following a jury trial, Margaret Marie Butts was convicted of one count of third-degree theft for shoplifting merchandise worth slightly over $50.[1] On appeal, Butts claims that the trial judge committed plain error by giving the pattern jury instruction on the meaning of "obtain", because that pattern instruction does not specify that a defendant's exertion of control over another person's property must be unauthorized. Butts also claims that the trial judge committed error by refusing to give her trial attorney's proposed jury instruction that "the mere act of placing unpurchased items into a purse or bag is not sufficient to constitute the act of theft." For the reasons explained in this decision, we reject both of these claims of error, and we therefore affirm Butts's conviction.

Underlying facts

Two Walmart theft-prevention employees testified that, while Butts was shopping, she placed some items of merchandise in her shopping cart but she placed other merchandise in her purse, out of view. She then moved to a different section of the store, where she removed some of the items from her cart and put these items in her purse, again out of view.

Butts then proceeded to the store's self-checkout area, where she paid for the items in her cart, but not for the items in her purse. Butts then left the checkout area and started walking toward the store exit. Still pushing her shopping cart, Butts walked past the security pedestals, then through a set of exit doors and into the vestibule leading to the outside. The theft-prevention employees stopped her before she could go out the last set of doors.

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[1] AS 11.46.100(1) (theft defined), and former AS 11.46.140(a) (2012) (third-degree theft defined).

According to the testimony at trial, the store employees asked Butts why she had stolen the merchandise, and Butts answered that she needed clothing for her boyfriend. Butts told the employees that her boyfriend was getting out of the hospital, and he needed clean clothes.

Butts offered a different account of her actions when she testified at trial. Butts claimed that all of the merchandise was in her shopping cart when she approached the self-checkout area, but at that point she changed her mind about purchasing some of these items, so she placed them in her purse.

Butts acknowledged that, when she went through the self-checkout area, she paid only for the items that were in her cart, and not for the items in her purse, but she claimed that her intention (when she left the checkout area) was to first purchase a drink at the McDonald's restaurant inside the store, and then proceed to the customer service counter to return the items that she had placed in her purse.

Butts also disputed the Walmart employees' testimony that she was stopped in the vestibule leading to the outside. Butts testified that the employees stopped her before she had passed through the security pedestals, while she was still inside the store and headed toward McDonald's.

The litigation of the jury instructions in the trial court

At Butts's trial, the trial judge provided the jury with the pattern instructions on the elements of theft.[2] In pertinent part, these instructions told the jury that the State was required to prove:

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[2] *See* AS 11.46.990(2) (defining the verb "appropriate") and AS 11.46.990(12) (defining the verb "obtain").

- that Butts intended to deprive another of property, or to appropriate the property of another to herself or to a third person; and
- that, acting with this intent, Butts obtained the property of another.

Butts's attorney did not object to these jury instructions. However, the defense attorney proposed an additional instruction: he asked the judge to instruct the jurors that "the mere act of placing unpurchased items into a purse or bag is not sufficient to constitute the act of theft."

The trial judge declined to give the defense attorney's proposed additional instruction. The judge concluded that the defense attorney's point — *i.e.*, that Butts's act of placing items into her purse was not theft if she had no intent to steal the items — was already covered by the pattern instructions. However, the judge assured the defense attorney that, when the attorney delivered his summation to the jury, he could argue that the State had failed to prove that Butts acted with the *mens rea* required for theft.

And, in fact, during the defense summation, the defense attorney argued (without objection) that although Butts had placed unpaid-for merchandise in her purse, this fact (standing alone) was not sufficient to prove "that Ms. Butts intended to take that merchandise without paying."

Butts's arguments on appeal

Although Butts's trial attorney did not object to the instructions regarding theft that the trial judge gave to the jury, Butts contends on appeal that the judge committed error when he gave the jurors the pattern instruction on what it means to "obtain" property. [3]

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[3] *See* AS 11.46.990(12), which defines the verb "obtain" for purposes of the theft statutes.

Alaska Criminal Rule 30(a) declares that "no party may assign as error any portion of the charge [to the jury] or [any] omission therefrom unless the party objects ... before the jury retires to consider its verdict". Thus, Butts must show that the judge's decision to give the pattern instruction on the meaning of "obtain" constituted plain error.

Butts argues that the pattern jury instruction on "obtain" was plainly erroneous because, tracking the wording of AS 11.46.990(12)(A), the pattern instruction stated that "obtain" meant "to exert control over the property of another". As Butts correctly notes, this Court has held that a person does not commit theft unless they exert *unauthorized* control over the property of another. *See Simon v. State*, 349 P.3d 191, 197 (Alaska App. 2015). Relying on our holding in *Simon*, Butts points out — correctly — that the pattern instruction on "obtain" is flawed because it does not specify that the government must prove that a defendant's exertion of control over someone else's property was unauthorized.

But as we explained above, Butts's trial attorney did not object to the giving of this instruction, so Butts must now show plain error. And in the context of jury instructions, plain error exists only "where the erroneous instruction or lack of instruction creates a high likelihood that the jury followed an erroneous theory, resulting in a miscarriage of justice."[4]

As demonstrated by the final arguments of the prosecutor and the defense attorney, Butts's case was not litigated on the issue of whether her act of placing merchandise in her purse was authorized or unauthorized. The issue that was actively litigated at Butts's trial was her state of mind — *i.e.*, whether she intended to steal the

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[4] *Iyapana v. State*, 284 P.3d 841, 847-48 (Alaska App. 2012), quoting *Dobberke v. State*, 40 P.3d 1244, 1247 (Alaska App. 2002) and *In re Estate of McCoy*, 844 P.2d 1131, 1134 (Alaska 1993).

merchandise (as the State alleged) or return it to the customer service desk (as Butts claimed).

When the prosecutor and defense attorney argued Butts's case to the jury, they focused on her intent. The prosecutor argued that Butts's actions, and her contemporaneous statements to the store employees, showed that she intended to steal the merchandise. The defense attorney argued that Butts was telling the truth (or that there was at least a reasonable possibility that Butts was telling the truth) when Butts testified that she had no intention of leaving the store without paying for the items in her purse — that she was, instead, headed toward the customer service desk, where she intended to disclose and return the merchandise that she had placed in her purse.

Given the way this case was litigated, there is no reasonable possibility — much less a high likelihood — that the jury's verdict was affected by the flaw in the pattern jury instruction on the meaning of "obtain" (*i.e.*, the instruction's failure to specify that a defendant's exertion of control over property must be unauthorized). The attorneys in this case asked the jurors to decide whether Butts intended to steal the merchandise when she walked through the checkout area without paying for it. The jurors resolved this issue against Butts — but their decision did not hinge on the definition of "obtain". We therefore reject Butts's claim of plain error.

For much the same reasons, we uphold the trial judge's rejection of Butts's proposed instruction that "the mere act of placing unpurchased items into a purse or bag is not sufficient to constitute the act of theft." As the trial judge noted, this concept was already implicit in the other jury instructions. And as we have explained, this concept was expressly clarified for the jury during the final arguments of both the prosecutor and the defense attorney. Both attorneys told the jury that Butts's act of placing the unpaid-for merchandise in her purse was not theft unless Butts intended to walk out of the store without paying for the items in her purse.

Conclusion

The judgement of the district court is AFFIRMED.

We recommend that the supreme court's committee on criminal pattern jury instructions amend the pattern instruction defining "obtain", so that the instruction reflects our holding in *Simon v. State*, 349 P.3d 191, 197 (Alaska App. 2015).