IN THE COURT OF APPEALS OF THE STATE OF ALASKA

CRYSTAL DAWN YOUNG, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-11920 Trial Court No. 3AN-12-12898 CR MEMORANDUM OPINION No. 6557 — January 3, 2018

Appeal from the Superior Court, Third Judicial District, Anchorage, Michael R. Spaan, Judge.

Appearances: Glenda Kerry, Law Office of Glenda J. Kerry, Girdwood, for the Appellant. Saritha R. Anjilvel, Assistant District Attorney, Anchorage, and Craig W. Richards, Attorney General, Juneau, for the Appellee.

Before: Mannheimer, Chief Judge, Allard, Judge, and Suddock, Superior Court Judge.[*]

Judge SUDDOCK.

Defendant Crystal Dawn Young was indicted for second-degree robbery for forcibly taking possessions from a victim, as well as for evidence tampering for then throwing some of these possessions out of her hotel room window before the police

[*] Sitting by assignment made pursuant to Article IV, Section 16 of the Alaska Constitution and Administrative Rule 24(d).

arrived.[1] At trial, the judge instructed the jury on the purported lesser-included offense of second-degree theft of a credit card.[2] Young's defense attorney told the judge that he had no objection to this instruction. The jury acquitted Young of second-degree robbery, but convicted her of second-degree theft, evidence tampering, and fourth-degree assault[3] (as a lesser-included offense of robbery).

On appeal, Young argues that we should reverse her conviction for second-degree theft, because that crime is not a lesser-included offense of robbery. We conclude that Young's tactical decision to approve the jury instruction on second-degree theft precludes a finding of plain error.

Young also contends that the evidence was insufficient to support her convictions for second-degree theft and for evidence tampering. We conclude that sufficient evidence supported these convictions.

Background facts and proceedings

In December 2012, a man visited Anchorage to attend his native corporation's annual shareholder meeting. While shopping, the man encountered Young, a woman he had hired as a prostitute during previous visits to Anchorage. The next morning, after he had attended a Christmas Party and then gone to a bar, the man met Young and her husband Kuukpik Long in an elevator at his hotel, where they were also staying. Young invited the man to her room. He first retrieved a bottle of whiskey from his room, and then proceeded to Young's.

---

1 AS 11.41.510(a)(1) and AS 11.56.610(a)(1), respectively.

2 AS 11.46.130(a)(7).

3 AS 11.41.230(a)(1).

When he arrived, Long was naked. The man disclaimed interest in a sexual encounter with Long, and Long got dressed. Soon after, Long hit the man in the face, causing him to lose his glasses. Long grabbed the whiskey bottle, and when the man tried to grab it back, Long struck him in the face several times.

Young took the man's wallet and exclaimed that it contained only three one-dollar bills. The man grabbed his wallet from Young and ran downstairs to the front desk to call the police. He was covered with blood and was missing one sandal, his eyeglasses, and his cell phone. He noticed that his cash and three cards — a Costco card, a Regal card, and a MasterCard — were missing from his wallet.

The police arrived and spoke with the victim. They then went to Young's room, knocked, and identified themselves as police officers. After about twenty seconds, Young opened the door and consented to a search of the room. The officers entered and found an open window through which they could see items on the ground two floors below. They retrieved three one-dollar bills and one five-dollar bill from Young's pocket. An officer gathered a sandal, cell phone, eyeglasses, and Costco and Carr's cards from the ground below. After retrieving these items, the officers did not further search the motel room. They did not recover the MasterCard.

The State charged Young and Long with second-degree robbery and evidence tampering. At the close of trial, the State requested Superior Court Judge Michael R. Spaan to instruct the jury on assault and second-degree theft (theft of an access device, the MasterCard) as lesser-included offenses of the robbery charge. The judge agreed, stating that these two offenses "parsed the robbery" into two separate acts of theft and assault.

Defense counsel stated that he had no objection to the proposed instructions on these lesser offenses. But the defense attorney did object to the proposed language

of the theft instruction. The judge made changes to the instruction, and the defense attorney then announced that he had no disagreement with the instruction as revised.

The jury acquitted Young of robbery but found her guilty of second-degree theft and fourth-degree assault, as well as the evidence tampering charge. Young now appeals her theft and evidence tampering convictions.

Because Young agreed to the jury instruction, on second-degree theft, no plain error occurred

Young argues on appeal that the judge should not have instructed the jury on second-degree theft. She cites our decision in *Lampkin v. State* for the proposition that a "lesser offense is not 'included' in the greater offense unless the defendant's guilt of the lesser offense *automatically* follows from a finding that the defendant is guilty of the greater offense."[4] Here, the robbery indictment alleged that Young had taken unspecified property from another person by force. To prove that Young committed second-degree theft, the State was required to prove an additional element not included in the robbery indictment: that Young stole an access device, specifically, a credit card. Thus, conviction of this purported lesser-included offense would not have automatically flowed from proof of the robbery.

But Young did not object to having the jury instructed on this offense, and so must show plain error. The standard for plain error is: (1) there must be error, and the error must not have been the result of an intelligent waiver or a tactical decision not to object; (2) the error must be obvious; (3) the error must affect substantial rights; and (4) the error must be prejudicial.[5] When determining whether an attorney made a tactical

---

[4] *Lampkin v. State*, 141 P.3d 362, 367 (Alaska App. 2006) (emphasis in the original).

[5] *Adams v. State*, 261 P.3d 758, 773 (Alaska 2011).

decision not to object, the attorney's decision must be "plainly obvious from the face of the record, not presumed in the face of a silent or ambiguous record."[6]

Here, the record demonstrates that Young's defense attorney affirmatively approved of the second-degree theft instruction.[7] Even if theft of an access device was not a lesser-included offense of the robbery charge, the defense attorney made a tactical decision to endorse the instruction — likely because second-degree robbery is a class B felony, while second-degree theft is only a class C felony.

Because Young's defense attorney made a tactical choice, we conclude that no plain error occurred.

The evidence was sufficient for the jury to find that Young committed theft of an access device

Young challenges the sufficiency of the evidence supporting her conviction of second-degree theft. She claims that the evidence is insufficient because the police did not find the credit card, and because the victim, on cross-examination, acknowledged a hypothetical possibility that he could have lost the MasterCard the previous day.

When determining whether the State presented sufficient evidence to support a conviction, this Court views the evidence and the reasonable inferences that can be drawn therefrom in the light most favorable to the jury's verdict, and determines

---

[6] *Goldsbury v. State*, 342 P.3d 834, 838 (Alaska 2015) (quoting *Moreno v. State*, 341 P.3d 1134, 1146 (Alaska 2015)).

[7] *See Johnson v. State*, 2016 WL 3220953, at *3 (Alaska App. June 8, 2016) (unpublished) (finding that the explicit acquiescence by two defense lawyers to several questions to be posed by the judge to the defendant was tactical and precluded a finding of plain error).

whether a fair-minded juror could have concluded that the State had proved its case beyond a reasonable doubt.[8]

Here, the victim testified that, when he arrived at the hotel desk after he fled from Young's room, he noticed that his MasterCard was missing. He habitually kept this particular credit card on the right side of his wallet with other cards. His wallet still contained credit cards on its left side, where they were not readily visible.

During cross-examination, the victim agreed to the theoretical possibility that he could have inadvertently left the card in a grocery store or a cab. But no specific evidence suggested that this had actually occurred.

The MasterCard was not among the objects discarded through the motel window, and it was not found on the person of Young or Long. But the police did not search the motel room. Either Young or Long could have placed the card out of sight in the room before the police entered.

Viewing the evidence in the light most favorable to upholding the jury's verdict, we conclude that the jury could have found that there was no reasonable possibility that the victim coincidentally lost his MasterCard after his arrival in Anchorage the day before the theft, without noticing its absence. The evidence at trial was sufficient to support the jury's verdict finding Young guilty of theft of this access device.

Sufficient evidence supported Young's conviction for evidence tampering

Young concedes on appeal that either Young or Long threw the victim's possessions out the motel room window. But she argues that this act was consistent with

---

[8] *See Iyapana v. State*, 284 P.3d 841, 848-49 (Alaska App. 2012); *Lawrence v. State*, 269 P.3d 672, 675 (Alaska App. 2012).

an abandonment of the property rather than concealment from the police. Accordingly, Young contends that the evidence was insufficient to establish evidence tampering.

We have previously upheld an evidence tampering verdict with respect to a holster that a defendant concealed under his friend's bed prior to the arrival of police.[9] Here, the jury could find that Young and Long anticipated that the flight of the bloodied victim, deprived of his eyeglasses and his credit card, presaged the imminent arrival of the police — and that the two then attempted to conceal evidence of their crimes. Accordingly, the evidence was sufficient for the jury to find Young guilty of evidence tampering.

Conclusion

We AFFIRM the judgment of the superior court.

[9] *Y.J. v. State*, 130 P.3d 954, 956 (Alaska App. 2006).