IN THE SUPREME COURT OF GUAM

THE PEOPLE OF GUAM,
Plaintiff-Appellee,

v.

GERARD DE GUZMAN BELGA,
Defendant-Appellant.

Supreme Court Case No.: CRA15-004
Superior Court Case No.: CF0274-14

OPINION

Cite as: 2016 Guam 1

Appeal from the Superior Court of Guam
Argued and submitted on July 23, 2015
Hagåtña, Guam

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BEFORE: ROBERT J. TORRES, Chief Justice; F. PHILIP CARBULLIDO, Associate Justice; KATHERINE A. MARAMAN, Associate Justice.

TORRES, C.J.:

[1] Defendant-Appellant Gerard De Guzman Belga appeals his conviction for Retail Theft as a Second Degree Felony. On appeal, Belga argues that his conviction should be reversed due to a violation of his constitutional rights under *Apprendi v. New Jersey*, 530 U.S. 466 (2000). In the alternative, Belga argues that the trial court erred in denying his Motion for Acquittal because Plaintiff-Appellee People of Guam ("the People") failed to submit sufficient evidence to support his conviction.

[2] For the reasons set forth below, we reverse Belga's conviction and remand the case for retrial. However, we affirm the trial court's denial of Belga's Motion for Acquittal.

I. FACTUAL AND PROCEDURAL BACKGROUND

[3] Belga was indicted for Retail Theft as a Second Degree Felony in violation of 9 GCA §§ 43.20(a) and (f), 43.91(a), and 43.15. At trial, the People presented the testimony of three witnesses. In summary, the People's witnesses testified that on May 28, 2014, Belga stole several Makita drills from Home Depot, and that two days later, Belga returned to Home Depot, placed several more Makita drills into a shopping cart, and presented a falsified receipt indicating that he had purchased the items.

[4] The People's first witness, Mellourita Vuelban, testified that on May 30, 2014, she was working as a head cashier at Home Depot and was positioned at the "self-checkout" registers near the store's front entrance. Transcripts ("Tr.") at 3-4 (Jury Trial – Day 3, July 31, 2014).

She received a call from a cashier near the pro-exit[1] regarding an individual with four Makita drills presenting a receipt. That individual was identified as Belga. Vuelban testified that the receipt appeared to be fake – the transaction numbers on the receipt did not match, the lettering of the date was not straight, the quantity of items had an "x" symbol instead of an "@" symbol, and there was no record of the transaction in Home Depot's electronic records. *Id.* at 8-12, 16-17. The People presented as evidence the falsified receipt and a genuine receipt.

[5] The falsified receipt indicated that it was printed out on May 30, 2014, at 5:03 p.m. from Self-Checkout Register Number 58 ("Register 58"). Upon reviewing the video surveillance tape of the area surrounding Register 58, Vuelban testified that Belga was not at Register 58 around the time stated on the falsified receipt, nor did anyone else pass through the same area with Makita drills at that time. Another video showed that Belga was at a different register near the pro-exit at 5:01 p.m. and remained there until after the time indicated on the falsified receipt. Belga was detained as he walked out of the store with the drills.

[6] The People next called Airport Police Officer Marcia Quintanilla. Quintanilla testified that on May 30, 2014, at around 6:00 p.m., she responded to a call regarding a theft of property at Home Depot. After Quintanilla spoke to Grant Bickel, Home Depot's Asset Protection Manager, Belga was taken into custody.

[7] Finally, the People called Bickel, who testified that on May 30, 2014, he recognized Belga as the same person who had stolen several Makita drills from Home Depot two days earlier. On May 30, Bickel observed Belga place four Makita drills into a shopping cart and proceed towards the pro-exit. Belga never went to any register – self-checkout or otherwise – to pay for the items. Belga was stopped by the cashier to check his receipt. Bickel confirmed that

[1] The "pro-exit" refers to a side entrance at Home Depot. Vuelban testified that the pro-exit is about 30 feet away from the self-checkout counter area. Tr. at 5 (Jury Trial – Day 3).

Belga's receipt was fraudulent. Bickel approached Belga regarding the receipt, but allowed Belga to leave the store. Once Belga exited the store, Bickel detained Belga and escorted him to the office. Bickel questioned Belga about the theft incident from two days earlier and showed Belga a still photo of him from that day pushing a cart with three Makita drills and a Makita drill combo kit. When Bickel asked Belga if that was him in the photo, "he sort of replied 'Yes.'" Tr. at 25 (Jury Trial – Day 4, Aug. 1, 2014).

[8] Bickel also testified to the incident involving Belga and several Makita drills that occurred two days earlier, on May 28, 2014. On that day, Bickel witnessed a female select three Makita drills and place them in a shopping cart. The female later removed the items from the cart, had a conversation with Belga, and then put the three drills back into the cart. Belga then selected a different Makita drill combo kit and placed it into the cart. The female pushed the cart near the bathrooms and left the store. Then Belga retrieved the cart and proceeded to exit the store via the pro-exit. Bickel did not apprehend Belga on May 28 because based on Home Depot's policy, Belga was too far from the store to be safely apprehended.

[9] The People presented testimony that each of the Makita drills was valued at $299.00. No evidence was presented as to the value of the additional Makita drill combo kit alleged to have been stolen on May 28.[2]

[10] At the close of the People's case-in-chief, Belga moved for a judgment of acquittal, arguing that the evidence presented by the People was insufficient to sustain a conviction. The trial court denied the motion. Belga did not present any evidence.

[2] Although Bickel testified that on May 28, 2014, Belga stole a Makita combo kit in addition to the three Makita drills valued at $299.00, the People alleged that on May 28, 2014, Belga stole three Makita drills valued at $299.00 each, for a total of $897.00. Additionally, the People alleged that on May 30, 2014, Belga stole four Makita drills valued at $299.00 each, for a total of $1196.00. In aggregate, the total value of the drills stolen from both days amount to $2,093.00.

[11] The jury found Belga guilty of Retail Theft as a Second Degree Felony. Belga was sentenced to eight years imprisonment, with credit for time served. Moreover, Belga's sentence provided that upon release, he shall be placed on parole for a period of three years.

[12] Belga filed a timely Notice of Appeal.

II. JURISDICTION

[13] This court has jurisdiction over this appeal from a final judgment in a criminal case. 48 U.S.C.A. § 1424-1(a)(2) (Westlaw current through Pub. L. 114-93 (2015)); 7 GCA §§ 3107, 3108(a) (2005); 8 GCA § 130.15(a) (2005).

III. STANDARD OF REVIEW

[14] "The issue of a [sic] whether the trial court has violated the 'constitutional rule established in *Apprendi* is a question of law that we review *de novo*.'" *People v. Muritok*, 2003 Guam 21 ¶ 42 (quoting *United States v. Martin*, 278 F.3d 988, 1005 (9th Cir. 2002)).

[15] "A claim raised for the first time on appeal that a sentence violates a defendant-appellant's constitutional rights under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), is reviewed for plain error." *United States v. Lopez*, 500 F.3d 840, 848 (9th Cir. 2006) (citations omitted); *see also United States v. Cotton*, 535 U.S. 625, 631 (2002) (describing the federal plain error standard).

[16] "Where a defendant has raised the issue of sufficiency of evidence by motion for acquittal in the trial court, the denial of the motion is reviewed *de novo*." *People v. Anastacio*, 2010 Guam 18 ¶ 10 (citation omitted).

IV. ANALYSIS

[17] Belga raises two issues on appeal. First, he argues that the jury was required by *Apprendi v. New Jersey*, 530 U.S. 466 (2000), to make a factual finding that the two acts of theft alleged to

have occurred in this case were committed pursuant to "one scheme or course of conduct," and failure to instruct the jury to make this finding constituted an *Apprendi* violation warranting reversal of his conviction. Second, he argues that the People failed to submit sufficient evidence to support his conviction.

A. *Apprendi* Violation

1. Whether an *Apprendi* Violation Occurred

[18] Belga argues that *Apprendi* and 9 GCA § 43.20(f) required the jury to find that the two acts of theft alleged to have occurred in this case were committed pursuant to "one scheme or course of conduct." Appellant's Br. at 4-5 (May 8, 2015). Because the record is devoid of any such factual finding, Belga argues that an *Apprendi* violation occurred. *Id.* The People concede that such failure to instruct the jury to make a finding of fact on the issue of "one scheme or course of conduct" was error. Appellee's Br. at 11 (June 3, 2015).

[19] In *Apprendi*, the United States Supreme Court held that under the Sixth Amendment, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. 466, 490 (2000).

[20] In *Alleyne v. United States*, the Court overruled its decision in *Harris v. United States*, 536 U.S. 545 (2002), and extended the *Apprendi* rule to cases involving judicial fact-finding that increases the mandatory minimum sentence for a crime. *Alleyne v. United States*, 133 S. Ct. 2151, 2155 (2013). The Court reasoned:

> Any fact that, by law, increases the penalty for a crime is an "element" that must be submitted to the jury and found beyond a reasonable doubt. Mandatory minimum sentences increase the penalty for a crime. It follows, then, that any fact that increases the mandatory minimum is an "element" that must be submitted to the jury. Accordingly, *Harris* is overruled.

Id. (citations omitted). The Court further stated:

> The touchstone for determining whether a fact must be found by a jury beyond a reasonable doubt is whether the fact constitutes an "element" or "ingredient" of the charged offense. In *Apprendi*, we held that a fact is by definition an element of the offense and must be submitted to the jury if it increases the punishment above what is otherwise legally prescribed. While *Harris* declined to extend this principle to facts increasing mandatory minimum sentences, *Apprendi*'s definition of "elements" necessarily includes not only facts that increase the ceiling, but also those that increase the floor. Both kinds of facts alter the prescribed range of sentences to which a defendant is exposed and do so in a manner that aggravates the punishment. Facts that increase the mandatory minimum sentence are therefore elements and must be submitted to the jury and found beyond a reasonable doubt.

Id. at 2158 (citations omitted).

[21] Belga was charged with Retail Theft as a Second Degree Felony in violation of 9 GCA §§ 43.20(a) and (f), 43.91(a), and 43.15. Record on Appeal ("RA"), tab 8 at 1 (Indictment, June 6, 2014). Theft constitutes a felony of the second degree if the amount involved exceeds $1,500.00. 9 GCA § 43.20(a) (2005). Theft constitutes a felony of the third degree if the amount involved is less than $1,500.00 but exceeds $500.00. 9 GCA § 43.20(b). Amounts involved in thefts committed pursuant to one scheme or course of conduct in any period of twelve consecutive months may be aggregated in determining the grade of the offense. 9 GCA § 43.20(f).

[22] At trial, the People's theory was that Belga committed two incidents of theft, each amounting to less than $1,500.00 but exceeding $500.00. Appellant's Br. at 2-3; Appellee's Br. at 12-13. The value of the items stolen from both days aggregated to over $1,500.00. Hence, the People argued that Belga was guilty of committing Retail Theft as a Second Degree Felony. However, the issue of whether the thefts were committed pursuant to one scheme or course of

conduct was not charged in the indictment, not submitted to the jury, and thus, not proved beyond a reasonable doubt.

[23] For the crime of Retail Theft as a Second Degree Felony, a defendant can be sentenced as follows:

> In the case of theft as a felony of the second degree, the court shall impose a sentence of imprisonment of a minimum term of five (5) years and may impose a maximum term of up to ten (10) years; the minimum term imposed shall not be suspended nor may probation be imposed in lieu of the minimum term nor shall parole or work release be granted before completion of the minimum term. The sentence shall include a special parole term of not less than three (3) years in addition to such term of imprisonment provided, however, that in the case of an offender not previously convicted of a felony or of an offense constituting theft, the court may sentence the offender to not more than five (5) years imprisonment and the provisions of this subsection prohibiting probation, suspension, parole, or work release shall not be applicable to such offender.

9 GCA § 43.20(a).

[24] For the crime of Retail Theft as a Third Degree Felony, "the court may impose a sentence of not more than five (5) years." 9 GCA § 80.30(c) (2005).

[25] The sentencing range supported by the jury's verdict (i.e., without a finding of "one scheme or course of conduct") was zero to five years for each of the two incidents of theft as a third degree felony. However, the trial court imposed a sentence of eight years pursuant to the crime of Retail Theft as a Second Degree Felony. *See* RA, tab 53 at 2 (Judgment, Jan. 22, 2015). In effect, the trial court increased the mandatory minimum sentence from zero years, for committing two third degree felony thefts, to five years, for committing a second degree felony theft. Because the fact of "one scheme or course of conduct" increased the penalty to which the defendant was subjected, it was an element that had to be found by a jury beyond a reasonable doubt. *See Alleyne*, 133 S. Ct. at 2163. That fact was not charged in the indictment or submitted to the jury. Thus, we find that an *Apprendi* violation occurred.

2. Standard of Review

[26] A claim raised for the first time on appeal that a sentence violates a defendant's constitutional rights under *Apprendi* is reviewed for plain error. *Lopez*, 500 F.3d at 848 (citations omitted); *see also Cotton*, 535 U.S. at 631. On the other hand, "[a] properly preserved *Apprendi* error is reviewed for harmless error under the standard articulated in *Neder v. United States*, 527 U.S. 1 (1999)." *United States v. Guerrero-Jasso*, 752 F.3d 1186, 1193 (9th Cir. 2014) (citations omitted).

[27] Belga asserts that "[w]hile the defense counsel at trial did not object to the jury instructions, he did raise the issue of improper aggregation in his motion for acquittal." Appellant's Br. at 4. At the close of the People's case-in-chief, contemporaneous with his motion for acquittal, Belga's trial counsel stated:

> At the same time, Your Honor, we have an indictment that says one count of retail theft as a second degree felony, yet, in this matter we're talking about two different – two different incidences [sic]. And I – If we were to take each incident apart, none of them would rise to the point of a second degree felony, because none of them came up to a $1500 amount.

Tr. at 40 (Jury Trial – Day 4). This objection, however, was made in regards to a motion for acquittal based on sufficiency of evidence, rather than to Belga's sentence or to the jury instructions. Trial counsel never mentioned that the fact of "one scheme or course of conduct" must be submitted to a jury. Further, trial counsel never argued that an *Apprendi* violation occurred during the trial proceedings or at the sentencing hearing. Therefore, the issue was not properly preserved by Belga's trial counsel, and we proceed to conduct a plain error review. *See United States v. Stewart*, 306 F.3d 295, 313 (6th Cir. 2002) (finding that defendants' *Apprendi* claims were not preserved despite the fact that they objected in the trial court to the quantity of drugs because they failed to raise constitutional arguments); *see also United States v.*

Candelario, 240 F.3d 1300, 1303-04 (11th Cir. 2001) (stating that the first question a reviewing court must ask in cases raising *Apprendi* concerns is whether the defendant made a constitutional objection).

3. Plain Error

[28] "Plain error is highly prejudicial error." *People v. Felder*, 2012 Guam 8 ¶ 19 (quoting *People v. Quitugua*, 2009 Guam 10 ¶ 11). This court will not reverse the jury's conviction "unless (1) there was an error; (2) the error is clear or obvious under current law; (3) the error affected substantial rights; and (4) reversal is necessary to prevent a miscarriage of justice or to maintain the integrity of the judicial process." *Id.* Belga bears the burden to demonstrate that reversal is warranted. *See id.*

a. Whether an error occurred

[29] The first inquiry of the plain error test is whether an error occurred. As discussed above, an *Apprendi* violation occurred in this case because the issue of whether the two acts of theft occurred pursuant to one scheme or course of conduct was not charged in the indictment and found by a jury beyond a reasonable doubt. Further, the People acknowledge that such failure to instruct the jury constituted error.

b. Whether the error is clear or obvious under current law

[30] The second inquiry is whether the error is clear or obvious under current law. This court has previously held:

> [A] determination of whether an error is "clear" for purposes of the plain error analysis does not require the existence of precedent exactly on point. . . . [T]he "plainness" of the error can depend on well-settled legal principles as much as well-settled legal precedents. We can, in certain cases, notice plain error in the absence of direct precedent, or even where uniformity among the circuits, or among state courts, is lacking. This rule is particularly appropriate for our jurisdiction, whose case law consists of slightly more than ten years of Guam

> Supreme Court precedent. It would be unfair to require defendants to demonstrate plain error with a case directly on point given that many issues have not yet been resolved by this court.

People v. Perry, 2009 Guam 4 ¶ 32 (second alteration in original) (citations and internal quotation marks omitted).

[31] Although this court has not yet ruled on whether the issue of "one scheme or course of conduct" must be submitted to a jury and found beyond a reasonable doubt, *Apprendi* and its progeny make clear that any fact that increases the mandatory minimum sentence is an essential element that must be submitted to the jury and found beyond a reasonable doubt. *See Alleyne*, 133 S. Ct. at 2155. The issue of "one scheme or course of conduct" was a fact that increased the mandatory minimum sentence that Belga could receive under the statutory scheme for Retail Theft. Therefore, in order for Belga to be convicted of Retail Theft in the Second Degree, the jury should have found beyond a reasonable doubt that the thefts occurred pursuant to "one scheme or course of conduct."

[32] Accordingly, the error is clear or obvious under current law.

c. Whether the error affected substantial rights

[33] Third, Belga must show that the clear error affected his substantial rights. Belga bears the burden to demonstrate that the error was prejudicial (i.e., that it affected the outcome of the case). *See People v. Fegarido*, 2014 Guam 29 ¶ 41. The People will prevail if the record contains no evidence to show that Belga was prejudiced. *See id.* In order to be prejudicial, the error must constitute a mistake so serious that but for the error, Belga probably would have been acquitted. *See id.*

[34] In the context of an *Apprendi* error, federal courts have held that "the substantial rights inquiry turns on whether [the court] can say beyond a reasonable doubt that the sentence would

have been the same absent the trial error . . . ." *United States v. Vazquez*, 271 F.3d 93, 101 (3d Cir. 2001) (emphases omitted) (citing *Neder*, 527 U.S. at 18). The defendant may not be entitled to a remedy if the court determines that the evidence was sufficiently conclusive to support the sentence actually imposed. *Id.* "However, substantial rights will be affected if, for example, 'the defendant contested the omitted element and raised evidence sufficient to support a contrary finding.'" *Id.* (quoting *Neder*, 527 U.S. at 19).

[35] Here, we cannot say beyond a reasonable doubt that Belga's sentence would have been the same absent the trial error. As Belga asserts, had the jury received an instruction regarding "one scheme or course of conduct" and had Belga been charged with two separate offenses, Belga could have been convicted of two counts of third degree felonies, rather than a second degree theft felony. As will be discussed further below, Belga would have been subject to a less restrictive sentencing scheme under such a conviction. Moreover, due to the fact that both the jury instructions and the indictment were defective, Belga's Sixth Amendment right to a jury trial was violated.

[36] Accordingly, we find that Belga has met his burden of proof to show that his substantial rights were affected by the *Apprendi* error.

d. Whether reversal is necessary to prevent a miscarriage of justice or to maintain the integrity of the judicial process

[37] The final prong of the plain error test is whether reversal is necessary to prevent a miscarriage of justice or to maintain the integrity of the judicial process. This court has held:

> Reversal for plain error is permissive, not mandatory. If the forfeited error is plain and affects substantial rights, the court of appeals has authority to order correction, but is not required to do so. It is this distinction between automatic and discretionary reversal that gives practical effect to the difference between harmless-error and plain-error review, and also every incentive to the defendant to raise objections at the trial level. The plain error rule allows a reviewing court to exercise its discretion and notice a forfeited error in those circumstances in which

> a miscarriage of justice would otherwise result – that is, where the defendant is actually innocent. But plain error is not limited to cases where the putative error causes the conviction of an innocent person; it also applies to cases where the putative error affects the fairness or integrity of the trial.

Quitugua, 2009 Guam 10 ¶¶ 47-48 (citations and internal quotation marks omitted).

[38] In applying the fourth prong of the plain error test, the U.S. Supreme Court has held that a trial court's error of failing to submit an element of an offense to the jury does not seriously affect the fairness, integrity, or public reputation of judicial proceedings in cases where evidence of the element was overwhelming and essentially uncontroverted. *See Cotton*, 535 U.S. at 632-33; *see also Johnson v. United States*, 520 U.S. 461, 470 (1997) (finding that the error of the trial court's failure to submit "materiality," an element of the false statement offense, to the jury did not seriously affect the fairness, integrity, or public reputation of judicial proceedings because the evidence of "materiality" was "overwhelming" and "essentially uncontroverted").

[39] In the instant case, the indictment did not allege and the jury did not decide that the two thefts occurred pursuant to one scheme or course of conduct. It cannot be said that the evidence of "one scheme or course of conduct" was "overwhelming" and "essentially uncontroverted." While having their similarities, the two theft incidents differed in methodology, as one theft involved an accomplice while the other did not, and one theft involved the presentation of a false receipt while the other did not. Moreover, the fact that the thefts occurred two days apart leads to the possibility that Belga formed two separate felonious intents, rather than performing both thefts pursuant to a single impulse. Thus, the evidence of "one scheme or course of conduct" was not overwhelming and essentially uncontroverted, and the failure of the trial court to instruct the jury as to whether the two thefts occurred pursuant to one scheme or course of conduct seriously affected the fairness, integrity, or public reputation of judicial proceedings.

[40] Additionally, had the jury received an instruction regarding "one scheme or course of conduct" and had Belga been charged with two separate theft offenses, Belga could have been convicted of two counts of third degree theft felonies, rather than a second degree theft felony. If Belga had been convicted of two third degree theft felonies, he would not have been subject to the additional sentencing restrictions of a second degree theft felony conviction. Specifically, a second degree theft felony requires the court to impose a minimum sentence of five years, while a third degree felony has no minimum sentence requirement. *Compare* 9 GCA § 43.20(a), *with* 9 GCA § 80.30(c). This minimum sentence cannot be suspended, probation may not be imposed in lieu of the minimum term, and no parole or work release can be granted before completion of the minimum term. 9 GCA § 43.20(a). Moreover, the second degree theft felony sentence must include a special parole term of not less than three years in addition to the term of imprisonment provided. *Id.* There are no such restrictions prohibiting probation, suspension, parole, or work release for a conviction of a third degree theft felony. *See* 9 GCA § 80.30(c). We find that reversal is necessary to prevent a miscarriage of justice and to maintain the integrity of the judicial process because the trial court's failure to instruct the jury regarding the issue of "one scheme or course of conduct" caused Belga to be subject to the additional restrictions of liberty provided by the sentencing scheme for a second degree theft felony that he may not have faced had the proper instructions been given.

[41] Accordingly, we find that Belga has met his burden regarding the fourth prong of the plain error test and that the *Apprendi* violation that occurred in this case was plain error.

B. Sufficiency of Evidence

[42] Although reversal of Belga's conviction is warranted due to the *Apprendi* error, we must still address Belga's sufficiency of evidence claim. *See Anastacio*, 2010 Guam 18 ¶ 16 ("[E]ven

if a defendant's conviction can be vacated on other grounds, if the defendant also raises sufficiency of the evidence as one ground, the court must consider this argument because a finding of insufficiency would result in acquittal rather than a less favorable outcome to the defendant, such as vacating the conviction and exposing him to possible retrial." (citation and internal quotation marks omitted)).

[43] "When ruling on a motion for judgment of acquittal, the trial court is concerned with the existence or nonexistence of evidence, not its weight, and this standard remains constant even when the People rely exclusively on circumstantial evidence." *People v. Mendiola*, 2014 Guam 17 ¶ 21 (quoting *People v. Song*, 2012 Guam 21 ¶ 29).

[44] On appeal of a denial of a motion for judgment of acquittal, the standard of review is not whether the prosecution proved each element of the offense beyond a reasonable doubt, because at this stage the trier of fact has previously determined the defendant to be guilty beyond a reasonable doubt. *Id.* ¶ 15. Thus, the reviewing court is not charged with making a determination as to the defendant's guilt, but instead must determine if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Id.* In making such a determination, the reviewing court must view the evidence in a light most favorable to the prosecution. *Id.*

[45] Belga was convicted of Retail Theft as a Second Degree Felony in violation of 9 GCA §§ 43.20(a) and (f), 43.91(a), and 43.15. RA, tab 53 at 1 (Judgment). Taken together, these statutes provide that a person is guilty of Retail Theft as a Second Degree Felony if he or she knowingly

> takes possession of, carries away, transfers or causes to be carried away or transferred, any merchandise displayed, held, stored or offered for sale in a retail mercantile establishment with the intention of retaining such merchandise or with the intention of depriving the merchant permanently of the possession, use or

> benefit of such merchandise without paying the full retail value of such merchandise.

9 GCA § 43.91(a) (2005). Moreover, such action must involve a theft of an amount above $1,500.00. 9 GCA § 43.20(a). Finally, "[a]mounts involved in thefts committed pursuant to one scheme or course of conduct . . . may be aggregated in determining the grade of the offense." 9 GCA § 43.20(f).

[46] Therefore, in order to sustain Belga's conviction based on sufficiency of the evidence grounds, the record must contain evidence that Belga knowingly took possession of, carried away, or transferred merchandise valued in an amount above $1,500.00 with the intention of retaining such merchandise or with the intention of depriving the merchant permanently of the possession, use or benefit of such merchandise without paying the merchant the full retail value of such merchandise. Moreover, the record must contain evidence that any separate occurrences of theft occurred pursuant to one scheme or course of conduct.

[47] The People's first witness, Vuelban, testified that on May 30, 2014, she was working near the "self-checkout" registers near Home Depot's front entrance. Tr. at 4 (Jury Trial – Day 3). She received a call from a cashier near the pro-exit regarding an individual with four Makita drills presenting a receipt. *Id.* at 6-7. That individual was identified as Belga. *Id.* at 8. Vuelban testified that the receipt appeared to be fake and described the numerous discrepancies between Belga's falsified receipt and a genuine Home Depot receipt. *Id.* at 8-12, 16-17.

[48] Belga's falsified receipt indicated that it was printed on May 30, 2014, at 5:03 p.m. from Register 58. *Id.* at 23, 25-26. Video surveillance evidence from the area surrounding Register 58 revealed that Belga was not at Register 58 around the time stated on the falsified receipt, nor did anyone else pass through the same area with Makita drills at that time. *Id.* at 34. Another

video showed that Belga was at a different register near the pro-exit at 5:01 p.m. and remained there until after the time indicated on the falsified receipt. *Id.* at 35-36. Belga was detained as he walked out of the store with the drills. *Id.* at 45-46.

[49] In addition, the People also called Bickel, who testified that on May 28, 2014, he witnessed a female select three Makita drills and place them in a shopping cart. Tr. at 9-10, 20 (Jury Trial – Day 4). The female later removed the items from the cart, had a conversation with Belga, and then put the three drills back into the cart. *Id.* at 20-21. Belga then selected a different Makita drill combo kit and placed it into the cart. *Id.* at 21. The female pushed the cart near the bathrooms and left the store. *Id.* at 21. Then Belga retrieved the cart and proceeded to exit the store via the pro-exit. *Id.* at 21. Bickel did not apprehend Belga on May 28 because based on Home Depot's policy, Belga was too far from the store to be safely apprehended. *Id.* at 22-23.

[50] On May 30, 2014, Bickel recognized Belga as the same person who had stolen several Makita drills from Home Depot two days earlier and observed Belga place four Makita drills into a shopping cart and proceed towards the pro-exit. *Id.* at 11-14. Belga never went to any register – self-checkout or otherwise – to pay for the items. *Id.* at 15. Belga was stopped by the cashier to check his receipt. *Id.* at 14. Bickel confirmed that Belga's receipt was fraudulent. *Id.* at 17-18. Bickel approached Belga regarding the receipt, but allowed Belga to leave the store. *Id.* at 23-24. Once Belga exited the store, Bickel detained Belga and escorted him to the office. *Id.* at 24. Bickel questioned Belga about the theft incident from two days earlier and showed Belga a still photo of him from that day pushing a cart with three Makita drills and a Makita drill combo kit. *Id.* at 24-25. When Bickel asked Belga if that was him in the photo, "he sort of replied 'Yes.'" *Id.* at 25.

[51] The People presented testimony that each of the Makita drills was valued at $299.00. Tr. at 24 (Jury Trial – Day 3); Tr. at 12 (Jury Trial – Day 4).

[52] Viewing this evidence in a light most favorable to the People, we find that sufficient evidence was produced to support Belga's conviction of Retail Theft as a Second Degree Felony. Given Belga's use of a fraudulent receipt and testimony that on two occasions, Belga exited Home Depot with Makita drills without paying for the items, a rational trier of fact could have found the essential elements of theft beyond a reasonable doubt. Moreover, given the similarities between the two events (e.g., both took place at Home Depot, both involved the same type of Makita drills, both involved Belga attempting to leave the store via the pro-exit with the drills in his possession, the two events took place only two days apart), a rational trier of fact could have found that the thefts occurred pursuant to one scheme or course of conduct.

[53] It is not contradictory to find the evidence sufficient to support a conviction for Retail Theft as a Second Degree Felony while at the same time reversing the conviction for that charge on *Apprendi* grounds. While viewing the evidence in the light most favorable to the prosecution leads us to conclude that a rational trier of fact could have found the essential elements of the crime – including that the thefts were committed pursuant to "one scheme or course of conduct" – beyond a reasonable doubt, the failure to submit that element to the jury violated Belga's rights under *Apprendi* and constituted plain error warranting reversal of his conviction.

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V. CONCLUSION

[54] We find that the People presented sufficient evidence to sustain a conviction for Retail Theft as a Second Degree Felony, and, thus, the trial court did not err in denying Belga's Motion for Acquittal. However, we find that the trial court's failure to instruct the jury as to the issue of "one scheme or course of conduct" was plain error under *Apprendi*. Therefore, we **REVERSE** Belga's conviction and **REMAND** the case for retrial.

/s/
F. PHILIP CARBULLIDO
Associate Justice

/s/
KATHERINE A. MARAMAN
Associate Justice

/s/
ROBERT J. TORRES
Chief Justice