

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3519-20

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ERIC A. BURNHAM,

Defendant-Appellant.

APPROVED FOR PUBLICATION

December 21, 2022

APPELLATE DIVISION

Submitted December 12, 2022 – Decided December 21, 2022

Before Judges Whipple, Mawla, and Marczyk.

On appeal from the Superior Court of New Jersey,
Law Division, Middlesex County, Accusation No.
21-02-0181.

Joseph E. Krakora, Public Defender, attorney for
appellant (Daniel S. Rockoff, Assistant Deputy Public
Defender, of counsel and on the briefs).

Matthew J. Platkin, Attorney General, attorney for
respondent (Valeria Dominguez, Deputy Attorney
General, of counsel and on the brief).

The opinion of the court was delivered by

MARCZYK, J.S.C., t/a

The question before us on appeal is whether sales tax should be included when calculating the "full retail value" of merchandise under New Jersey's shoplifting gradation statute, N.J.S.A. 2C:20-11(c). This issue has not been authoritatively addressed in any prior decisions. For the reasons discussed below, we conclude sales tax should not be included as part of the valuation of the full retail value of merchandise when determining the gradation of shoplifting offenses.

Defendant pled guilty to fourth-degree shoplifting, N.J.S.A. 2C:20-11(b)(1) and N.J.S.A. 2C:20-11(c)(3), and third-degree shoplifting, N.J.S.A. 2C:20-11(b)(1) and N.J.S.A. 2C:20-11(c)(2). The trial court subsequently imposed two three-year probationary terms and two ninety-day jail terms to run concurrently. Defendant appeals and primarily argues the third-degree gradation statute, N.J.S.A. 2C:20-11(c)(2), should not be interpreted to encompass sales tax. Based on our review of the record and the applicable legal principles, we reverse and remand for further proceedings.

I.

On February 11, 2020, defendant shoplifted a PlayStation 4 video game console from a Kohl's department store. The price of the PlayStation 4 was \$299.99, exclusive of sales tax. Pursuant to N.J.S.A. 2C:20-11(c)(3), defendant's charge for shoplifting the PlayStation 4 was given a fourth-degree

gradation because the value of the merchandise was at least \$200, but did not exceed \$500. On February 27, 2020, defendant returned to Kohl's and shoplifted an Xbox One, the price of which was \$499.99, but with sales tax included the cost was over \$500. Pursuant to N.J.S.A. 2C:20-11(c)(2), defendant's charge for shoplifting the Xbox One was given a third-degree gradation, based on the total cost of the merchandise exceeding \$500.

Defendant raises the following points on appeal:

POINT I

AS THIS COURT PREVIOUSLY HELD AS A MATTER OF LAW, THE SHOPLIFTING GRADATION STATUTE, N.J.S.A. 2C:20-11(c), DOES NOT ENCOMPASS SALES TAX. THE TRIAL COURT MUST THEREFORE AMEND THE JUDGMENT TO REFLECT THAT SHOPLIFTING MERCHANDISE VALUED BY THE RETAILER AT \$499.99 EXCLUSIVE OF TAX IS A FOURTH-DEGREE OFFENSE, NOT A THIRD-DEGREE OFFENSE.

POINT II

THIS COURT MUST ALSO ORDER A RESENTENCING BECAUSE (1) THE SENTENCING COURT ERRONEOUSLY VIEWED [DEFENDANT] AS A THIRD-DEGREE OFFENDER, AND (2) THE SENTENCING COURT FAILED TO APPLY MITIGATING FACTOR [FOURTEEN] EVEN THOUGH [DEFENDANT] WAS UNDER AGE [TWENTY-SIX] AT THE TIME OF THE OFFENSE.

The State counters defendant acknowledged at the plea colloquy the Xbox One was valued at over \$500 and therefore waived his right to contest the charge to which he pled guilty. The State further contends defendant did not receive an excessive sentence, and the trial court properly weighed and applied the appropriate aggravating and mitigating factors. Moreover, the State asserts defendant received a significantly lower sentence than his potential exposure for a third-degree shoplifting conviction. Lastly, the State notes defendant never requested the trial court to apply mitigating factor fourteen, N.J.S.A. 2C:44-1(b)(14).

II.

Because defendant neither moved before the trial court for his plea to be vacated based on an improper gradation of the shoplifting offense, nor requested the court consider mitigating factor fourteen, our review is under the plain error standard. R. 2:10-2. Under that standard, we disregard any errors or omissions "unless [they are] of such a nature as to have been clearly capable of producing an unjust result" R. 2:10-2. "Plain error is a high bar" State v. Santamaria, 236 N.J. 390, 404 (2019). "The 'high standard' used in plain error analysis 'provides a strong incentive for counsel to interpose a timely objection, enabling the trial court to forestall or correct a potential error.'" Ibid. (quoting State v. Bueso, 225 N.J. 193, 203 (2016)).

III.

Shoplifting is defined as purposely taking possession of merchandise offered for sale by a store with the intention of depriving the merchant of the possession, use, or benefit of such merchandise or converting the same "without paying to the merchant the full retail value thereof." N.J.S.A. 2C:20-11(b)(1). "Shoplifting constitutes a crime of the third degree . . . if the full retail value of the merchandise exceeds \$500 but is less than \$75,000" and a crime of the fourth degree "if the full retail value of the merchandise is at least \$200 but does not exceed \$500." N.J.S.A. 2C:20-11(c)(2)-(c)(3). "Full retail value" is defined by the statute as "the merchant's stated or advertised price of the merchandise[.]" N.J.S.A. 2C:20-11(a)(7).

To determine whether sales tax is properly included in calculating the full retail value under the shoplifting statute, it is useful to examine the statutory gradation scheme for theft. Theft constitutes a crime of the third degree if "[t]he amount involved exceeds \$500 but is less than \$75,000" and a crime of the fourth degree if "the amount involved is at least \$200 but does not exceed \$500." N.J.S.A. 2C:20-2(b)(2)(a) and (3). Notably, the "[a]mount involved" is defined as "the fair market value at the time and place of the operative act." N.J.S.A. 2C:1-14(m). Importantly, although the shoplifting statute is silent as to whether sales tax should be considered in determining the

full retail value, the general theft statute provides the "amount involved" in a theft "shall include, but shall not be limited to, the amount of any State tax avoided, evaded or otherwise unpaid, improperly retained or disposed of." N.J.S.A. 2C:20-2(b).¹

In short, the Legislature determined in adopting the theft statutes the amount of sales tax should be considered in determining the "amount involved" in the theft. However, the Legislature made no such determination in enacting the shoplifting statute. We generally do not assume the Legislature intended anything other than the plain language of the statute. See, e.g., Zabilowicz v. Kelsey, 200 N.J. 507, 517 (2009) ("The Legislature knows how to draft a statute to achieve [a] result when it wishes to do so."). Therefore, we believe the better approach is to interpret "full retail price" to mean the pre-tax price.

Moreover, the purpose of the shoplifting statute is "preventing the loss of merchandise without full payment—the protection of inventory." De

¹ Cannel, New Jersey Criminal Code Annotated, comment 5 on N.J.S.A. 2C:20-11 (2022), notes "[t]he phrase 'full retail value' is defined by N.J.S.A. 2C:20-11(a)(7). It merely means price. This phrase should not be confused with the concept of value used in grading offenses under 2C:20-2(b). As used there, the value of goods stolen is not necessarily exactly the same as the retail price." Further, "[t]he phrase, 'full retail value' is used in an entirely different context and conclusiveness of price as value is required insofar as flexibility would allow a shoplifter to alter price labels and argue that he was merely correcting them to reflect true or market value." Ibid.

Angelis v. Jamesway Dep't Store, 205 N.J. Super. 519, 525 (App. Div. 1985).

The sales tax on a particular piece of merchandise is not a part of a store's inventory, and it should not be considered in assessing the value of the merchandise stolen. Accordingly, we conclude there is no basis for the State to include sales tax when grading a defendant's shoplifting charge.

The presentencing report in the record indicates the Xbox One at issue was valued at \$499.99. The State does not dispute this figure. The State's third-degree gradation of the shoplifting charge—for a value exceeding \$500—appears to have improperly included sales tax. Because this merchandise's full retail value was not calculated properly, it had a potentially significant impact on defendant given that a third-degree shoplifting offense exposes him to a significantly longer term of imprisonment than a fourth-degree offense. Based on the analysis above, we determine defendant's conviction of a third-degree shoplifting offense must be reversed.

A guilty verdict may be molded to convict on a lesser-included offense if "(1) defendant has been given his day in court, (2) all the elements of the lesser included offense are contained in the more serious offense[,] and (3) defendant's guilt of the lesser included offense is implicit in, and part of, the jury verdict." State v. Farrad, 164 N.J. 247, 266 (2000) (citation omitted). Here, because fourth-degree shoplifting requires proof of the same elements as

third-degree shoplifting—the only difference being that the punishment is less severe if the full retail value of the merchandise is at least \$200 but does not exceed \$500—defendant's judgment of conviction must be amended to reflect a conviction for fourth-degree shoplifting as a lesser-included offense of third-degree shoplifting. Lastly, because we are remanding for resentencing regarding the molded fourth-degree shoplifting charge, the trial court should also consider mitigating factor fourteen, N.J.S.A. 2C:44-1(b)(14), in its decision.

Reversed and remanded for further proceedings. We do not retain jurisdiction.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION