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IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff / Appellee vs. JOSHUA CAMPBELL, Defendant / Appellant	Case No. 20100558-CA

BRIEF OF APPELLANT

APPEAL FROM THE FOURTH DISTRICT COURT, UTAH COUNTY, STATE OF UTAH,
FROM A CONVICTION OF RETAIL THEFT, A THIRD DEGREE FELONY,
BEFORE THE HONORABLE DAVID MORTENSEN

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FILED
UTAH APPELLATE COURTS

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff/Appellee, vs. CHRISTOPHER DUANE ELLIS, Defendant/Appellant.	:	Case No. 2010563-CA

BRIEF OF APPELLANT

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JURISDICTION OF THE UTAH COURT OF APPEALS

This Court has appellate jurisdiction in this matter pursuant to the provisions of Utah Code Annotated § 78A-4-103(2)(e).

ISSUES PRESENTED AND STANDARDS OF REVIEW

1. Whether the trial court erred in denying Campbell's motion to quash the bindover of retail theft enhanced to a third degree felony based on at least two prior convictions? Because this issue presents matters of statutory interpretation it is reviewed by this Court non-deferentially for correctness. *State v. Graham*, 2006 UT 43, ¶ 16, 143 P.3d 268.

This issue was preserved in a motion to quash and during oral argument. R. 35-29, 47-45, 83.

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CONTROLLING STATUTORY PROVISIONS

All controlling statutory provisions are attached hereto in the Addenda.

STATEMENT OF THE CASE

A. Nature of the Case

Joshua Campbell appeals from the judgment, sentence and commitment of the Honorable David Mortensen, Fourth District Court, after the entry of a conditional plea to retail theft with prior convictions, a third degree felony.

B. Trial Court Proceedings and Disposition

Joshua Campbell was charged by Information filed in Fourth District Court on February 8, 2010 with Count 1 - retail theft with prior convictions, a third degree felony, in violation of Utah Code Annotated §§ 76-6-602 and 76-6-412.[1] R. 5-3.

On April 1, 2010 a preliminary hearing was held and the parties stipulated to the facts as stated in the probable cause statement for purposes of bind-over, namely that Campbell committed a theft at Wal-Mart on February 2, 2010. R. 27; 82: 2,3. The parties further agreed that the prior convictions relied upon by the State in the Information are: One, a conviction for retail theft, a class A misdemeanor, Fourth District Case No. 061400083; and two, a conviction for burglary and theft, third degree felonies, Fourth District Case No. 061403421. R. 82: 2-4. See also, R. 34. The trial court accepted the stipulations and the charge was bound-over for trial. R. 82: 3-5.

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On April 13, 2010 Campbell filed a motion to quash the bind-over order. R. 35-29. In the motion Campbell conceded that the State proffered evidence that was sufficient for the magistrate to find probable cause that he committed the offense of retail theft, a class B misdemeanor, but argued that the State failed to proffer sufficient evidence to establish that he had been previously convicted twice of criminal offenses that legally justified the enhancement of this charge from a class B misdemeanor to a third degree felony under the plain language of Utah Code Annotated § 76-6-412. Campbell also argued in reply that his conviction for theft and burglary in the other case (061403421) should only count as single prior conviction because it was a single criminal episode and the burglary conviction could not be used to enhance a subsequent theft charge without the accompanying theft under the plain language of section 76-6-412. R. 47-45.

After oral argument on the motions (R. 83), the trial court issued a written ruling denying Campbell's motion to quash. R. 62-50. Campbell subsequently entered a plea to retail theft, a third degree felony, conditioned on his right to appeal the denial of his motion to quash. R. 72-63.

On June 10, 2010 Campbell was sentenced to 0-5 years in the Utah State Prison to be served concurrently with the sentence he was already serving.

On July 9, 2010 Campbell filed a notice of appeal in Fourth District Court. R. 78.

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[1] Counts 2-4 of the Information apply only to a separate defendant, Autumn Marie Campbell.

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STATEMENT OF RELEVANT FACTS

The parties stipulated to the following factual basis for the charge: On February 2, 2010 in Payson, Utah, Campbell, along with another female, was observed by store personnel at Wal-Mart switching the price tags on items offered for sale in the store. When he was detained, Campbell told the police that he was switching the tags because he had a new home and could not afford to pay the prices that were marked on the items. His intention was to pay the lower price and deprive the merchant of the remainder of the value of the item. R. 34, 43.

SUMMARY OF ARGUMENT

Campbell was charged and bound over for trial for retail theft as a third degree felony. The charge was enhanced to a third degree felony based upon two prior convictions—a prior misdemeanor retail theft conviction and a conviction from a single criminal episode for burglary and theft, third degree felonies. Campbell moved to quash the bindover of the charge as a felony based upon insufficient evidence to demonstrate that his prior convictions qualify as enhancing offenses under the plain language of Utah Code Annotated § 76-4-412(1)(b). The trial court denied the motion, and Campbell subsequently entered a conditional plea. Campbell asks this Court to reverse the trial court's denial of his motion to quash the bindover.

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ARGUMENT

I. THE TRIAL COURT ERRED IN DENYING CAMPBELL'S MOTION TO QUASH THE BINDOVER OF RETAIL THEFT AS A THIRD DEGREE FELONY BECAUSE THE EVIDENCE WAS INSUFFICIENT TO ESTABLISH THE TWO PRIOR CONVICTIONS REQUIRED BY UTAH CODE ANNOTATED § 76-6-412

Campbell was charged with retail theft enhanced to a third degree felony based upon two prior convictions. Utah Code Annotated §§ 76-6-602 and 76-6-412. The State relied on two prior cases two enhance this underlying retail theft charge to a felony. One, Fourth District Case 061400083 where Campbell was convicted of retail theft, a class A misdemeanor; and two, Fourth District Case 061403421 where Campbell was convicted of burglary and theft, third degree felonies, arising from a single criminal episode. R. 34. Campbell conceded that the State proffered sufficient evidence for the magistrate to find probable cause that he committed the offense of retail theft as a class B misdemeanor. However, he sought to quash the bindover of the underlying charge as a felony, arguing that he did not have two prior convictions for enhancement purposes. The trial court denied that motion and Campbell appealed.

A. Retail theft may be enhanced pursuant to Utah Code Annotated § 76-6-412(1)(b) but the crime of retail theft cannot qualify as a prior conviction to enhance under the plain language of that statute.

Campbell asserts that the theft enhancement statute, Utah Code Annotated § 76-6-412(1)(b), does not apply here because of two reasons. First, that retail theft cannot

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qualify as a prior conviction to enhance another theft/retail theft charge under the plain language of section 76-6-412(1)(b), although retail theft may be enhanced under that section pursuant to Utah Code Annotated §§ 76-6-602, 606.

Utah Code Annotated § 76-6-412(1)(b)(ii) provides that theft of property and services is punishable as a third degree felony if "the actor has been twice convicted of theft, any robbery, or any burglary with intent to commit theft." Campbell asserts that retail theft does not qualify as a conviction for "theft," "robbery," or "burglary with intent to commit a theft," under the plain language of Utah Code Annotated § 76-6-412(1)(b)(ii).

In interpreting statutes, appellate courts "first look to its plain language." *Savage v. Utah Youth Village*, 2004 UT 102, ¶ 18, 104 P.3d 1242 (citations omitted). *See also*, *State v. Gallegos*, 2007 UT 81, ¶ 12, 171 P.3d 426. Furthermore, "Statutory language is presumed to reflect a legislative process that 'use[s] each word advisedly and give[s] effect to each term according to its ordinary and accepted meaning.'" *State v. Laycock*, 2009 UT 53, ¶ 19, 214 P.3d 104 (quoting *State v. Low*, 2008 UT 58, ¶ 23, 192 P.3d 867 (internal quotation marks omitted)). In addition, this Court reads "the plain language of the statute as a whole[ ] and interpret its provisions in harmony with other statutes in the same chapter and related chapters." *Id.* (quoting *Miller v. Weaver*, 2003 UT 12, ¶ 17, 66 P.3d 592 (internal quotation marks omitted)).

Utah Code Annotated § 76-6-404 defines the elements of "theft": "A person

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commits theft if he obtains or exercises unauthorized control over the property of another with a purpose to deprive him thereof." Similarly, Utah Code Annotated § 76-6-403 further clarifies that, "Conduct denominating theft in this part constitutes a single offense embracing the separate offenses such as those heretofore known as larceny, larceny by trick, larceny by bailees, embezzlement, false pretenses, extortion, blackmail, receiving stolen property. An accusation of theft may be supported by evidence that it was committed in any manner specified in Sections 76-6-404 through 76-6-410...."

In contrast, the offense of retail theft—commonly referred to as shoplifting, is defined in a completely separate part from the definition of theft, Utah Code Annotated § 76-6-602. Moreover, it is not included in Section 76-6-403's list of conduct denominated as "theft." In addition, the enhancement under Section 76-6-412(1)(b)(ii) only applies to "theft." It does not include "retail theft" nor does it specify that it applies to "any theft" like it does to "any robbery" or "any burglary with intent to commit theft."

Because it must be assumed that the legislature has chosen its words advisedly and purposefully, it must likewise be presumed that the legislature did not intend to include the act of retail theft/shoplifting within the sphere of conduct statutorily defined as "theft." Therefore, because retail theft does not fall within the definition of theft, retail theft is not one of the crimes enumerated in the plain language of Utah Code Annotated § 76-6-412(1)(b)(ii) that may be used as a basis for enhancement of the current retail theft charge against Campbell. Accordingly, Campbell asks that this Court reverse the trial

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court's use of his prior conviction for retail theft as a conviction which may enhance the current charge.

B. **Campbell's prior convictions for burglary and theft, which were committed in a single criminal episode, only qualify as one prior conviction under the plain language of Utah Code Annotated § 76-6-412(1)(b)(ii).**

The second reason that the theft enhancement statute, Utah Code Annotated § 76-6-412(1)(b)(ii), does not apply here is because Campbell's other convictions for theft and burglary were committed in a single criminal episode and only qualify as one prior conviction under the plain language of Utah Code Annotated § 76-6-412(1)(b)(ii).

For burglary to qualify as an enhancing offense under the plain language of Section 412(1)(b)(ii), it must have been committed "with intent to commit theft." Burglary can be committed in any number of ways, however, for it to apply to enhance under Section 412(1)(b)(ii) it must have been committed "with intent to commit theft." Therefore, in all cases where burglary can be used to enhance under that section, a defendant would necessarily be guilty of either attempted theft or theft.

Campbell asserts that the enhancement provision of Section 412(1)(b)(ii) was enacted to deter repetitive criminal conduct rather than to enhance based on a single prior criminal episode. Otherwise, the use of the word "twice" in the statute—the requirement that there be two prior convictions—would be devoid of meaning.

Accordingly, Campbell asserts that the plain language of Section 412(1)(b)(ii) in this case requires an additional, separate prior conviction for "theft," "robbery," or

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"burglary with intent to commit theft" before it applies to the current charge at issue here.

CONCLUSION AND PRECISE RELIEF SOUGHT

Campbell asks that this Court reverse the trial court's denial of his motion to quash, and that this matter be remanded to the Fourth District Court with instructions that Campbell's plea to retail theft as a third degree felony may be withdrawn.

DATED this 24th day of January, 2011.

MARGARET P. LINDSAY
Counsel for Appellant

CERTIFICATE OF MAILING

I hereby certify that I delivered two (2) true and correct copies of the foregoing Brief of Appellant to the Appeals Division, Utah Attorney General, 160 East 300 South, Sixth Floor, P.O. Box 140854, Salt Lake City, UT 84114, this 24th day of January, 2011.

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ADDENDA

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76-6-403. Theft -- Evidence to support accusation.

Conduct denominated theft in this part constitutes a single offense embracing the separate offenses such those heretofore known as larceny, larceny by trick, larceny by bailees, embezzlement, false pretense, tortion, blackmail, receiving stolen property. An accusation of theft may be supported by evidence that it as committed in any manner specified in Sections **76-6-404** through **76-6-410**, subject to the power of the urt to ensure a fair trial by granting a continuance or other appropriate relief where the conduct of the fense would be prejudiced by lack of fair notice or by surprise.

nended by Chapter 32, 1974 General Session
ownload Code Section Zipped WordPerfect 76_06_040300.ZIP 1,927 Bytes

<< Previous Section (76-6-402.5) Next Section (76-6-404) >>

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tah Code
itle 76 Utah Criminal Code
hapter 6 Offenses Against Property
ection 404 Theft -- Elements.

76-6-404. Theft -- Elements.

A person commits theft if he obtains or exercises unauthorized control over the property of another with purpose to deprive him thereof.

ıacted by Chapter 196, 1973 General Session
ownload Code Section Zipped WordPerfect 76_06_040400.ZIP 1,520 Bytes

<< Previous Section (76-6-403) Next Section (76-6-404.5) >>

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76-6-412. Theft -- Classification of offenses -- Action for treble damages.

(1) Theft of property and services as provided in this chapter is punishable:
(a) as a second degree felony if the:
(i) value of the property or services is or exceeds $5,000;
(ii) property stolen is a firearm or an operable motor vehicle;
(iii) actor is armed with a dangerous weapon, as defined in Section **76-1-601**, at the time of the theft; or
(iv) property is stolen from the person of another;
(b) as a third degree felony if:
(i) the value of the property or services is or exceeds $1,500 but is less than $5,000;
(ii) the actor has been twice before convicted of any of the offenses listed in this Subsection (1)(b)(ii), if ch prior offense was committed within 10 years of the date of the current conviction or the date of the ense upon which the current conviction is based:
(A) theft, any robbery, or any burglary with intent to commit theft;
(B) any offense under Title 76, Chapter 6, Part 5, Fraud; or
(C) any attempt to commit any offense under Subsection (1)(b)(ii)(A) or (B).
(iii) in a case not amounting to a second-degree felony, the property taken is a stallion, mare, colt, lding, cow, heifer, steer, ox, bull, calf, sheep, goat, mule, jack, jenny, swine, poultry, or a fur-bearing imal raised for commercial purposes;
(c) as a class A misdemeanor if the value of the property stolen is or exceeds $500 but is less than ,500; or
(d) as a class B misdemeanor if the value of the property stolen is less than $500.
(2) Any person who violates Subsection **76-6-408**(1) or Section **76-6-413**, or commits theft of property scribed in Subsection **76-6-412**(1)(b)(iii), is civilly liable for three times the amount of actual damages, if y sustained by the plaintiff, and for costs of suit and reasonable attorney fees.

nended by Chapter 193, 2010 General Session
)wnload Code Section Zipped WordPerfect 76_06_041200.ZIP 2,675 Bytes

<< Previous Section (76-6-410.5) Next Section (76-6-412.5) >>

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tah Code
tle 76 Utah Criminal Code
hapter 6 Offenses Against Property
ection 602 Retail theft, acts constituting.

76-6-602. Retail theft, acts constituting.

A person commits the offense of retail theft when he knowingly:

(1) Takes possession of, conceals, carries away, transfers or causes to be carried away or transferred, any erchandise displayed, held, stored or offered for sale in a retail mercantile establishment with the intention retaining such merchandise or with the intention of depriving the merchant permanently of the ssession, use or benefit of such merchandise without paying the retail value of such merchandise; or

(2) Alters, transfers, or removes any label, price tag, marking, indicia of value or any other markings hich aid in determining value of any merchandise displayed, held, stored or offered for sale, in a retail ercantile establishment and attempts to purchase such merchandise personally or in consort with another at ss than the retail value with the intention of depriving the merchant of the retail value of such erchandise; or

(3) Transfers any merchandise displayed, held, stored or offered for sale in a retail mercantile tablishment from the container in or on which such merchandise is displayed to any other container with intention of depriving the merchant of the retail value of such merchandise; or

(4) Under-rings with the intention of depriving the merchant of the retail value of the merchandise; or

(5) Removes a shopping cart from the premises of a retail mercantile establishment with the intent of priving the merchant of the possession, use or benefit of such cart.

acted by Chapter 78, 1979 General Session
wnload Code Section Zipped WordPerfect 76_06_060200.ZIP 2,119 Bytes

<< Previous Section (76-6-601) Next Section (76-6-603) >>

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Utah Code
Title 76 Utah Criminal Code
Chapter 6 Offenses Against Property
Section 606 Penalty.

76-6-606. Penalty.

An act of theft committed in violation of this part shall be punished in accordance with Subsection **76-6-412**(1).

Amended by Chapter 236, 2000 General Session
Download Code Section Zipped WordPerfect 76_06_060600.ZIP 1,578 Bytes

<< Previous Section (76-6-604) Next Section (76-6-607) >>

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4TH DISTRICT
STATE OF UTAH
UTAH COUNTY

IN THE FOURTH JUDICIAL DISTRICT COURT, UTAH COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff, vs. JOSHUA CARL CAMPBELL Defendant.	**ORDER DENYING MOTION TO QUASH BIND-OVER** Date: June 8, 2010 Case No.: 101400412 Judge: David N. Mortensen

This matter comes before the court on Defendant's Motion to Quash the order to bind-over Defendant for further proceedings.

STATEMENT OF FACTS

On February 2, 2010 the Defendant, accompanied by a female, was observed switching price tags on items that were for sale at a Walmart store in Payson, Utah. After being detained by police officers, the Defendant explained that he had switched the price tags on items because he could not afford the store's marked price due to a new home he had acquired. By switching the price tags, his desire was to pay the merchant a lower price than what the item was being sold for.

The State proffered evidence showing the Defendant had previously been convicted of retail theft in February 2006 and burglary and theft in November 2006. In light of the evidence

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presented, this court found probable cause that the Defendant had committed retail theft with prior convictions, a third-degree felony under Utah Code Ann. §76-6-412(1)(b)(ii).

DISCUSSION

A. Introduction

In his motion, Defendant concedes to a finding of probable cause based on the evidence presented concerning the retail theft of February 2, 2010. However, he contends that the State has not provided sufficient evidence to demonstrate two prior convictions that would enhance his class B misdemeanor to a third-degree felony. Specifically, he argues that his prior conviction for retail theft does not qualify as a *theft* under Utah Code Ann. §76-6-412(1)(b)(ii). In the State's response, it argues that Defendant's previous convictions qualify to enhance the Defendant's present charge to a third-degree felony under Utah Code Ann. §76-6-412(1)(b)(ii). Defendant also argues that his November 2006 convictions for burglary and theft can only be considered as a single conviction for the purposes of enhancement under §76-6-412(1)(b)(ii).

Defendant moves to quash the bind-over order, arguing the State failed to offer evidence that the Defendant has been twice convicted of criminal offenses that justify application of the theft enhancement provisions under Utah Code Ann. §76-6-412(1)(b)(ii) ("theft enhancement statute"). That statute states that theft is punishable as a third-degree felony if "the actor has been twice before convicted of theft, any robbery, or any burglary with intent to commit theft."

As stated, the Defendant argues that the theft enhancement statute should not apply because: 1) based on a plain reading of Subsection 412(1), retail theft does not equate to theft for

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purposes of enhancing the charges under the statute, and 2) Defendant's convictions of burglary and theft in November 6, 2006 do not qualify as two convictions for enhancement purposes under Utah Code Ann. §76-6-412(1)(b)(ii). The court will address each of these in turn.

B. Retail Theft Analysis

When the language of Utah Code Ann. § 76-6-412(1)(b)(ii) is read as a whole and in harmony with other statutes governing retail theft, it appears the legislature intended retail theft to fall under the enhancing power of § 76-6-412(1)(b)(ii). The theft enhancement statute states that, if "the actor has been twice before convicted of theft, any robbery or any burglary with intent to commit theft," an additional theft is punishable as a third-degree felony. When interpreting the meaning of a statute, "we read the plain language of the statute as a whole, and interpret its provisions in harmony with other statutes in the same chapter and related chapters." *State v. Schofield*, 2002 UT 132, ¶ 8, 63 P.3d 667.

Defendant argues that based on a plain reading of § 76-6-412(1)(b)(ii), retail theft is not included in the term *theft*. Defendant contends that unlike robbery or burglary, theft as described in the statute is not proceeded by the word *any* and, thus, is limited in its application to the crime of simple theft as described in § 76-6-404. Although an isolated and myopic reading of the subsection might support the Defendant's position, a reading of the statute as a whole in the context of other related statutes does not.

To determine whether the legislature intended a distinction between retail theft and theft for enhancement under § 76-6-412(1)(b)(ii), both crimes must be viewed in relation to one

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another and the surrounding statutes. In *State v. Maestas* the Supreme Court of Utah stated that "a statute is passed as a whole and not in parts or sections . . . . Consequently, each part or section should be construed in connection with every other part or section so as to produce a harmonious whole." 2002 UT 123, ¶ 54, 63 P.3d 621.

In viewing the theft, retail theft, and theft enhancement statutes as a whole and relative to one another, the court finds that the legislature contemplated that other types of theft, outside of simple theft, would be included under the theft enhancement statute. First, both crimes receive punishment under the same statute, § 76-6-412. *See* Utah Code Ann.§ 76-6-606 (retail theft "punished in accordance with Subsection § 76-6-412(1)"). At no point in § 76-6-412 does the legislature draw a distinction between how theft and retail theft are punished. In fact, the words *retail theft* are never found in § 76-6-412; the only offense referenced is *theft*. Therefore, this court must presume that every reference to *theft* under Section 76-6-412 may also apply to *retail theft*, including the reference in the theft enhancement subsection of the statute.

To claim that the legislature did not intend to include retail theft in § 76-6-412(1)(b)(ii), but did intend to include it in other portions of § 76-6-412, draws an artificial distinction unsupported by the plain language of the statute. This is consistent with the legislature's application of § 76-6-412 to theft, theft by deception (76-6-405), theft by extortion (76-6-406), theft of lost, mislaid, or mistakenly delivered property (76-6-407), theft by receiving stolen property (76-6-408), theft of services (76-6-409), theft of a rental vehicle (76-6-410.5), as well as other forms of theft. None of these subspecies of theft are explicitly referenced in § 76-6-412,

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but this is the section which controls the punishment of each of these crimes. Had the legislature wanted to make a distinction as to punishment, or the enhancement of punishment as the defendant argues, the court could have done as it did in altering the punishment for wrongful appropriation. *See* Utah Code Ann. § 76-6-404.5.[1]

Second, when the statutes governing theft and retail theft are read together, it becomes apparent that the broad term *theft,* encompasses many more specific types of theft, including retail theft. Section 76-6-404 states the elements for a simple theft: "A person commits theft if he obtains or exercises unauthorized control over the property of another with a purpose to deprive him thereof." Section 76-6-602 gives the elements of retail theft. The applicable subsection (2) in this case states:

> A person commits the offense of retail theft when he knowingly:
>
> . . .
>
> Alters, transfers, or removes any label, price tag, marking, indicia of value or any other markings which aid in determining value of any merchandise displayed, held, stored or offered for sale, in a retail mercantile establishment and attempts to purchase such merchandise personally or in consort with another at less than the retail value with the intention of depriving the merchant of the retail value of such merchandise.

In substance, both of these statutes are nearly identical. Each has elements of an unauthorized exercise of control over the property of another and an intent to deprive the owner of the full value of that property. The similarity of the elements of these two offenses is further evidence

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[1]The wrongful appropriation statute, in Subsection (3), provides for punishment "one lower degree than theft." *See* Utah Code Ann. § 76-6-404.5.

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that the legislature intended each to be punished similarly. If it were not so, the statutes might very well run afoul of that law; that is, that crimes which are essentially identical in substance, but carry different penalties, are expressly prohibited under the law. *See State v. Shondel,* 22 Utah 2d 434, 453 P.2d 146 (Utah 1969).

Finally, the statute when read as a whole shows the legislature's intent to punish repeat offenders more severely than those who commit a similar crime for the first time or second time. The use of the word *any* before robbery and burglary indicates a broad application of the entire statute. In *State v. Hall*, 2008 UT App 148, ¶ 2, 184 P.3d 636 the defendant argued that the theft enhancement statute did not apply to vehicle burglaries because the statute did not so specify. The court held that the use of the words *any burglary* evidenced the legislature's intent to include all crimes classified as burglaries in the code under the theft enhancement statute. *Id.* The court said that the intent of the legislature with regard to the statute is "to punish theft more severely when the actor has been repeatedly convicted of crimes involving theft: thefts, robberies, and burglaries involving the intent to commit theft." *Id.*[2] It is clear that the legislature's intent under the enhancement statute is to punish repeat offenders. There is no indication that the legislature sought to differentiate the level of punishment between types of theft based on the identity of the

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[2]Such a policy of punishing repeat offenders can be traced to early 1600's colonial law. In Virginia, burglars, when found guilty of a first offense, were branded with the letter "B" on the forehead. Second time offenders were brought in front of the public and whipped. Finally, burglars who where audacious enough to commit a third offense of burglary were "put to death, as being incorrigible," thus divesting them of any opportunity to become fourth time offenders. Lawrence M. Friedman, A History of American Law, 33 (Simon & Schuster 2005) (1973).

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victim as a merchant.

The argument that the absence of the word *any* before the word *theft*, though it is present in front of the words *robbery* and *burglary*, somehow indicates that the legislature intended to exclude retail theft under the enhancement statute is contrary to the legislature's broad intent to punish repeat offenders and the argument also fails to address the legislature's intent that these offenses be treated similarly. Such an argument denied the express import of § 76-6-606, which provides that retail theft shall be punished in accordance with Subsection (1) of § 76-6-412 – not just a part of Subsection (1). Thus, § 76-6-412, wholly devoid of the term *retail theft* still applies by virtue of the express reference § 76-6-606 to § 76-6-412. Defendant's argument that retail theft can be enhanced by simple theft, but that simple theft cannot be enhanced by prior convictions of retail theft, advocates a distinction the legislature did not make.

Because the statute when read as a whole and in harmony with related statutes does not show a legislative intent to differentiate between theft and retail theft for purposes of enhancement under Utah Code Ann. § 76-6-412(1)(b)(ii), Defendant's argument fails.

Defendant's last argument actually undercuts his own position. Defendant argues that the legislature's recent amendment of the gang enhancement statute – § 76-3-203.1 – evidences an intent by the legislature to uniformly treat theft and retail theft as distinct legal theories. However, the manner in which § 76-3-203.1 was amended was more a function of statutory drafting than a substantive statement to be applied wholesale here. If anything, the manner in which § 76-3-203.1 was amended shows the weakness of Defendant's argument in construing §

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76-6-412(1).

Prior to 2009, § 76-3-203.1(4)(j) designated "theft and related offenses under Title 76, Chapter 6, Part 4" as among the offenses which could be enhanced when the crime was committed in concert with two or more persons. In 2009 the statute was amended to apply the enhancement to "theft and related offenses under Title 76, Chapter 6, Part 4, Theft, ***or Part 6, Retail Theft***" (emphasis added). However, the amendment was required, not because a reference to theft generically could not have worked, but because the legislature had expressly in the pre-2009 version, for whatever reason – likely a simple drafting issue – limited the applicability of §76-3-203.1 to those thefts found in Chapter 6, Part 4, which does not include retail theft.

If anything, this action shows that had the legislature intended to limit the enhancement provision (Sub-subsection (b)(ii) of 76-6-412(1)) to exclude retail theft, the legislature could have limited Sub-subsection (b)(ii) to apply only to "theft and related offenses under Title 76, Chapter 6, Part 4, Theft," but they did not. Instead, the legislature left the language general by simply referring to theft and the legislature made Subsection (1) of 76-6-412, without limitation, applicable to retail theft by enactment of § 76-6-606. Accordingly, this court concludes that the legislature intended what they said: All of Subsection (1), including Sub-subsection (b)(ii), applies to retail theft, and a prior retail theft can qualify as the basis for enhancement.

Therefore, the court concludes that a prior conviction of retail theft, in connection with at least one other conviction for theft, robbery, or burglary, can result in a third-degree felony under 760-6-412(1)(b)(ii). On this basis, Defendant's motion must be denied.

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C. The theft and burglary convictions

As a separate ground to quash the bind-over order, and assuming that a prior conviction for retail theft cannot be used to enhance the retail theft charge here, Defendant argues that his convictions for burglary and theft on November 6, 2006 constitute a single criminal conviction for enhancement purposes under Utah Code Ann.§ 76-6-412(1)(b)(ii). Although this issue is moot under the analysis above, because this matter will likely be the subject of appeal, this court will address the merits of this argument as well.

Defendant claims that § 76-6-412(1)(b)(ii) requires two convictions arising out of separate incidents. Otherwise, the offense of burglary with intent to commit a theft would often result in two separate convictions – burglary and theft – and would, therefore, always be counted twice for enhancement purposes. Defendant believes this is contrary to the intent of the legislature and makes the word *twice* in the statute devoid of meaning. The State argues that Defendant's November 6, 2006 burglary and theft convictions should count as two separate convictions under the enhancement statute and cites case law to that effect.[3] The court finds that Defendant's November 6, 2006 convictions for burglary and theft should, indeed, be considered two convictions under the theft enhancement statute.

The plain language of the theft enhancement statute and case law support the argument that two convictions arising out of the same incident may count separately for enhancement

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[3] The State references *State v. Hunt*, 906 P.2d 311 (Utah 1995) and *State v. Brooks*, 631 P.2d 878, 881 (Utah 1981) in support of its argument.

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purposes. In *State v. Hunt*, the court found that two counts of drug use or possession in the same information, both of which had yet to be entered, could both count for purposes of enhancement under the drug enhancement statute. 906 P.2d 311 (Utah 1995). The statute stated that a defendant convicted under the subsection "upon a second or subsequent conviction under [the] subsection is guilty of a second degree felony." *Id.* *See* Utah Code Ann. § 58-37-8(1)(b)(ii).

Hunt asserted that the statute only allowed for enhancement after a judgment of conviction was entered, whereby the first conviction could serve as a warning to offenders and give them the opportunity to reform before enhancement applied. *Id.* The court disagreed and found that the purpose of the statute was to deter a criminal from committing a second crime at any time, regardless of whether a previous conviction had been entered. *Id.* at 313. The plain language of the statute did not address the timing of the offenses, only the number of convictions.[4] *Id.* Thus, "a conviction on one count in an information can be a legal basis for enhancing other convictions based on counts charged in the same information." *Id.* at 314.

The theft enhancement statute is similar in purpose and construction to the drug enhancement statute cited in *Hunt*. In this case, the statute states that enhancement is appropriate where a defendant is *twice convicted* for theft, robbery, or burglary. Similar to *Hunt*, this statute does not specify a time requirement between the two convictions and the enhancement. The only

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[4]According to the *Hunt* court, the term *conviction* has two meanings: (1) establishment of guilt by plea or verdict, and (2) the final verdict entered on the plea or verdict. *State v Hunt,* 906 P.2d 311, 313 (Utah 1995). The court determined that in the context of the drug enhancement statute, the first meaning applied. *Id.* at 313-14.

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requirement is that the theft or burglary conviction occur *twice*. Thus, according to the plain language of the statute, any two convictions, regardless of their position in time, may count for enhancement purposes.

This court also concludes, as did the *Hunt* court, that this statute evidences the legislature's intent to deter multiple acts of theft or burglary regardless of when those acts occur in relation to one another or whether a formal conviction is entered before a subsequent offense. Therefore, this court concludes that a conviction on one count charged in an information can serve to enhance the penalty for another conviction charged in the same information and arising out of the same transaction under the theft enhancement statute.

In so concluding, the court looks to the issue at hand, that is, whether convictions for burglary and theft arising out of the same transaction may be considered separate convictions for purposes of the theft enhancement statute in this case. This court concludes that they can. In *State v. Brooks*[5] the court held that burglary with intent to commit theft does not require that a defendant actually remove an item from the victim's possession. 631 P.2d 878, 881 (Utah 1981). In *Brooks* the defendant entered into an apartment by breaking a screen and entering through a window. *Id.* at 879. He disturbed some items in the apartment, but did not remove anything. *Id.* at 880. The defendant argued that because nothing was stolen the conviction for burglary should

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[5] This case was overruled on an issue of juror dismissal by *State v. Baker*, 884 P.2d 1280 (Ut. Ct. App. 1994). No cases have overruled the court's holding that burglary with intent to commit theft does not require the defendant to steal property from the victim.

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have been reduced to criminal trespass. *Id.* The court disagreed, stating that a conviction for burglary with intent to commit theft only requires the act of entering a building with the intent to commit a theft–which intent may be reasonably inferred from the circumstances. *Id.* at 881. An actual theft – depriving another of their property – is not required. *Id.*

Because burglary with intent to commit theft may be present without an act of theft under *Brooks*, a court may convict a defendant of both burglary and theft in an instance where the theft is actually committed. *See State v. Hawkins*, 967 P.2d 966 (Ut. Ct. App. 1998). In such a circumstance, the burglary occurs the instant the perpetrator enters a building with an intent to commit theft. The actual theft occurs when he exercises control over the victim's property. In this case, the Defendant received two convictions for his crime of November 6, 2006–one for burglary and one for theft. Both the theft and burglary charges were counted for purposes of the enhancement statute.

Because theft and burglary convictions may arise out of the same transaction and because the theft enhancement statute may apply to two convictions regardless of their relationship in time or whether one was entered as a conviction before the other, this court finds that Defendant's convictions of theft and burglary, committed November 6, 2006, may each be counted for enhancement purposes under Utah Code. Ann.§ 76-6-412(b)(1)(ii).

CONCLUSION

Because retail theft counts as a theft for enhancement under Utah Code. Ann. § 76-6-412(b)(1)(ii), and because Defendant's theft and burglary convictions of November 6, 2006 may

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both count as convictions under that statute, Defendant's Motion to Quash the Bind-over Order is denied.

Dated this 8th day of June, 2010.

Judge David N. Mortensen
Fourth Judicial District Court

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