

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	NO. 46969-2019
Plaintiff-Respondent,)	
)	KOOTENAI CO. NO. CR28-18-12859
v.)	
)	
ALEXANDER MICHAEL)	
MITCHELL,)	APPELLANT'S BRIEF
)	
Defendant-Appellant.)	
_____)	

BRIEF OF APPELLANT

**APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF KOOTENAI**

**HONORABLE RICH CHRISTENSEN
District Judge**

**ERIC D. FREDERICKSEN
State Appellate Public Defender
I.S.B. #6555**

**JUSTIN M. CURTIS
Deputy State Appellate Public Defender
I.S.B. #6406
322 E. Front Street, Suite 570
Boise, Idaho 83702
Phone: (208) 334-2712
Fax: (208) 334-2985
E-mail: documents@sapd.state.id.us**

**ATTORNEYS FOR
DEFENDANT-APPELLANT**

**KENNETH K. JORGENSEN
Deputy Attorney General
Criminal Law Division
P.O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534**

**ATTORNEY FOR
PLAINTIFF-RESPONDENT**

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STATEMENT OF THE CASE

Nature of the Case

Alexander Michael Mitchell appeals from his judgment of conviction for grand theft by possession of stolen property. Mr. Mitchell was convicted following a jury trial, and the district court imposed a sentence of seven years, with three and one-half years determinate. Mr. Mitchell appeals, and he asserts that there is insufficient evidence to support his conviction.

Statement of the Facts and Course of Proceedings

In this case, the State alleged that Mr. Mitchell, an employee at a restaurant, took a customer's credit card account number and then used it to make an unauthorized purchase. (*See generally*, Tr.) Mr. Mitchell was charged with grand theft by possession of a stolen financial transaction card account number as follows:

That the Defendant, ALEXANDER MICHAEL MITCHELL, on or about the 23rd day of June, 2018, in Kootenai County, Idaho, did wrongfully take, obtain, and/or withhold the property of another, to-wit: Lagonda McDonald, and where the property consists of a financial transaction card account number, all of which is contrary to the form, force and effect of the statute in such case made and provided and against the peace and dignity of the people of the State of Idaho.

(R., pp.46-47.) However, the charge was subsequently amended by the State and Mr. Mitchell went to trial on the following charge:

That the Defendant, ALEXANDER MICHAEL MITCHELL, on or about the 23rd day of June, 2018, in Kootenai County, Idaho, did knowingly receive or possess a financial transaction card account number belonging to Lagonda McDonald, either knowing the property was stolen by another or under such circumstances as would reasonably induce the defendant to believe the property was stolen and where the property was in fact stolen and the defendant had the intent to deprive the owner permanently of the use or benefit of the property; or the defendant knowingly used the property in such manner as to deprive the owner permanently of the use or benefit of the property all of which is contrary to the form, force and effect of the statute in such case made and provided and against the peace and dignity of the people of the State of Idaho.

(R., pp.149-50.) Accordingly, the jury instructions required the jury to find the following elements:

1. On or about June 23rd, 2018;
2. in the State of Idaho;
3. the defendant, ALEXANDER MITCHELL, knowingly received or possessed a financial transaction card account number belonging to Lagonda McDonald;
4. either knowing the property was stolen by another or under such circumstances as would reasonably induce the defendant to believe the property was stolen;
5. such property was in fact stolen; [and]
6. the defendant had the intent to deprive the owner permanently of the use or benefit of the property; or the defendant knowingly used the property in such manner as to deprive the owner permanently of the use or benefit of the property; and the property was the account number of a financial transaction card.

(R., pp.189-90.)

At trial, Lagonda McDonald testified that on June 20, 2018, she had lunch with friends at a restaurant called Radicci's. (Tr., p.142, Ls.9-24.) She identified Mr. Mitchell as her server at the restaurant and testified that he seemed nervous while serving them. (Tr., p.143, L.17 – p.144, L.22.) She paid for lunch with her credit card, which had her residence as the billing address. (Tr., p.145, Ls.2-15.) On June 23, 2018, Ms. McDonald was contacted by her bank and was informed of purchases that she did not make. (Tr., p.148, Ls.6-17.) She then cancelled her credit card. (Tr., p.151, Ls.7-10.)

Daniel Morey, the owner of the restaurant, testified next. He testified that Mr. Mitchell was his employee, and the State used Mr. Morey to introduce a video showing Mr. Mitchell running the credit card. (State's Exhibit 2.) The video shows Mr. Mitchell using his cell phone while running the card. (State's Exhibit 2.) The State's theory was that Mr. Mitchell took a picture of the card. (See generally, Tr.) The State then introduced a business record from Yeti

indicating that Ms. McDonald's card was used to purchase several items totaling \$119.97, and that the shipping name and address were Mr. Mitchell's. (Tr., p.217, L.15 – p.219, L.10.) The State never recovered or searched Mr. Mitchell's cell phone, nor did they ever find the Yeti products. (Tr., p.226, Ls.1-17.)

Mr. Mitchell made a motion for a judgment of acquittal following the State's case. (Tr. p.238, Ls.16-24.) Mr. Mitchell acknowledged that he may be guilty of petit theft or criminal possession of a financial transaction card number, but he asserted that he was not guilty of grand theft. (Tr., p.239, Ls.5-16.) He argued that the State failed to meet elements 4 and 5 of the jury instruction, requiring that Mr. Mitchell either knew the property was stolen by another or under such circumstances as would reasonably induce the defendant to believe the property was stolen, and that the property was in fact stolen. (Tr., p.239, Ls.17-23; R., pp.189-90.) The court reserved ruling on the motion but denied the motion without analysis following the verdict. (Tr., p.253, Ls.24-25; p.320, L.13 – p.321, L.9.)

The district court imposed a sentence of seven years, with three and one-half years determinate. (R., p.241.) Mr. Mitchell appealed. (R., p.256.) He asserts that there is insufficient evidence to support his conviction and the district court therefore erred by denying his motion for a judgment of acquittal.

ISSUE

Is there insufficient evidence to support Mr. Mitchell's conviction for grand theft by possession of stolen property?

ARGUMENT

There Is Insufficient Evidence To Support Mr. Mitchell's Conviction For Grand Theft By Possession Of Stolen Property

A. Introduction

Mr. Mitchell submits that the state submitted insufficient evidence to support his conviction for grand theft by possession of stolen property.

B. There Is Insufficient Evidence To Support Mr. Mitchell's Conviction For Grand Theft By Possession Of Stolen Property

“This Court will not overturn a judgment of conviction, entered upon a jury verdict, where there is substantial evidence upon which a reasonable trier of fact could have found that the prosecution sustained its burden of proving the essential elements of a crime beyond a reasonable doubt.” *State v. Sheahan*, 139 Idaho 267, 285 (2003). “Evidence is substantial if a reasonable trier of fact would accept it and rely upon it in determining whether a disputed point of fact has been proven.” *State v. Eliassen*, 158 Idaho 542, 546 (2015). A conviction can be based primarily upon circumstantial evidence, *State v. Stevens*, 93 Idaho 48, 50–51 (1969), and “even when circumstantial evidence could be interpreted consistently with a finding of innocence, it will be sufficient to uphold a guilty verdict when it also gives rise to reasonable inferences of guilt,” *State v. Severson*, 147 Idaho 694, 712 (2009).

Idaho Criminal Rule 29 provides that when a verdict of guilty is returned, the court, on motion of the defendant, shall order the entry of a judgment of acquittal if the evidence is insufficient to sustain a conviction of the offense. The test applied when reviewing the district court's ruling on a motion for judgment of acquittal is to determine whether the evidence was sufficient to sustain a conviction of the crime charged. *State v. Fields*, 127 Idaho 904, 912–13 (1995). When reviewing the sufficiency of the evidence where a judgment of conviction has

been entered upon a jury verdict, the evidence is sufficient to support the jury's guilty verdict if there is substantial evidence upon which a reasonable trier of fact could have found that the prosecution sustained its burden of proving the essential elements of a crime beyond a reasonable doubt. *State v. Herrera–Brito*, 131 Idaho 383, 385 (Ct. App. 1998).

The appellate court will not substitute its view for that of the jury as to the credibility of the witnesses, the weight to be given to the testimony, and the reasonable inferences to be drawn from the evidence. *State v. Decker*, 108 Idaho 683, 684 (Ct. App. 1985). The evidence is considered in the light most favorable to the prosecution. *Herrera–Brito*, 131 Idaho at 385.

Additionally, “statutory interpretation is a question of law over which this Court exercises free review.” *Carrillo v. Boise Tire Co.*, 152 Idaho 741, 748 (2012). When a question before this Court requires statutory interpretation, this Court applies the following principles:

The objective of statutory interpretation is to derive the intent of the legislative body that adopted the act. Statutory interpretation begins with the literal language of the statute. Provisions should not be read in isolation, but must be interpreted in the context of the entire document. The statute should be considered as a whole, and words should be given their plain, usual, and ordinary meanings. It should be noted that the Court must give effect to all the words and provisions of the statute so that none will be void, superfluous, or redundant. When the statutory language is unambiguous, the clearly expressed intent of the legislative body must be given effect, and the Court need not consider rules of statutory construction.

State v. Schulz, 151 Idaho 863, 866 (2011) (quoting *Farber v. Idaho State Ins. Fund*, 147 Idaho 307, 310 (2009) (internal citations omitted)).

As set forth in the Statement of Facts, the jury was instructed on the following elements of grand theft in this case:

1. On or about June 23rd, 2018;
2. in the State of Idaho;
3. the defendant, ALEXANDER MITCHELL, knowingly received or possessed a financial transaction card account number belonging to Lagonda McDonald;

4. either knowing the property was stolen by another or under such circumstances as would reasonably induce the defendant to believe the property was stolen;
5. such property was in fact stolen; [and]
6. the defendant had the intent to deprive the owner permanently of the use or benefit of the property; or the defendant knowingly used the property in such manner as to deprive the owner permanently of the use or benefit of the property; and the property was the account number of a financial transaction card.

(R., pp.189-90.) Mr. Mitchell asserts that the State failed to produce evidence on elements 4 and 5.

First, the State was required to produce evidence that Mr. Mitchell received or possessed the account number “either knowing that the property was stolen by another or under such circumstances that would reasonably induce him to believe that the property was stolen.” (R., p.189.) There is no evidence of that in this record. The property was certainly not stolen by another. There is no evidence, and the State never asserted, that anyone other than Mr. Mitchell was involved in the taking of the card number.¹ There is also no evidence that Mr. Mitchell

¹ The “by another” language is no longer in the grand theft statute. Idaho Code section 18-2403(4) provides:

A person commits theft when he knowingly receives, retains, conceals, obtains control over, possesses, or disposes of stolen property, knowing the property to have been stolen or under such circumstances as would reasonably induce him to believe that the property was stolen, and

- (a) Intends to deprive the owner permanently of the use or benefit of the property;
or
- (b) Knowingly uses, conceals or abandons the property in such manner as to deprive the owner permanently of such use or benefit; or
- (c)) Uses, conceals, or abandons the property knowing such use, concealment or abandonment probably will deprive the owner permanently of such use or benefit.

received or possessed the property under circumstances where he would reasonably believe the property was stolen. By its terms, this element does not apply to the person that actually takes the property – the initial thief either knows the property is stolen or not; they do not possess property under circumstances where they “reasonably believe” the property was stolen. A different subsection of the theft statute applies to a person who wrongfully takes property, as opposed to the person that possesses stolen property. Idaho Code sections 18-2403(1) and (2) apply to the person who has “wrongfully” taken, obtained, or withheld property from another. However, Mr. Mitchell was not charged with wrongfully taking, obtaining, or withholding the card number. In this case, there is simply no evidence that Mr. Mitchell received or possessed property “either knowing that the property was stolen by another or under such circumstances that would reasonably induce him to believe that the property was stolen.”

Second, there is no evidence of element 5, that the account number was “stolen.” The jury was instructed that “stolen property” meant “property over which control has been obtained by theft.” (R., p.196.) The jury was further instructed that a person steals property when that person “wrongfully takes, obtains, or withholds” property from another. Assuming all of the State’s evidence to be true, Mr. Mitchell simply took a photograph of a credit card. Mr. Mitchell submits that this number has not been “stolen.” Ms. McDonald had possession of both her card and card number when Mr. Mitchell returned the card at the restaurant and thus has not taken,

The “by another” language was stricken in 2001. However, this does not change Mr. Mitchell’s argument. The Statement of Purpose for the change stated, “this legislation will clarify Idaho Code, section 18 2403, by striking superfluous language.” 2001 Idaho Law Ch.112 (H.B. 244). Thus, the legislature did not intend to give the statute a new meaning. It simply felt “by another” was superfluous. Thus, the statute still requires that, for grand theft by possession, the defendant come into property that has already been stolen. And, in any event, the State charged Mr. Mitchell, and the jury was instructed, that the property needed to be stolen “by another.”

obtained, or withheld the number from her. Mr. Mitchell submits that if property could be taken, obtained, or withheld by taking a photograph, it could be done simply by memorizing a number as well. This is simply not theft.

However, as he did in district court, Mr. Mitchell acknowledges that his alleged actions, assuming them to be true, could constitute a crime. (Tr., p.239, Ls.5-16.) Idaho Code section 18-3125(1) provides that it is a felony “[t]o acquire [a financial transaction card] or [financial transaction card] number from another without the consent of the card holder or the issuer with the intent to use to defraud, or to, with the knowledge that it has been so acquired, receive an FTC or FTC number with the intent to use to defraud, or to sell, or to transfer the FTC or FTC number to another person with the knowledge that it is to be used to defraud.” I.C. § 18-3125(1). Mr. Mitchell submits that the charge of criminal possession of a financial transaction number is the appropriate charge in circumstances such as this one.

CONCLUSION

Mr. Mitchell requests that his conviction be vacated.

DATED this 10th day of December, 2019.

/s/ Justin M. Curtis
JUSTIN M. CURTIS
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of December, 2019, I caused a true and correct copy of the foregoing APPELLANT'S BRIEF, to be served as follows:

KENNETH K. JORGENSEN
DEPUTY ATTORNEY GENERAL
E-Service: ecf@ag.idaho.gov

/s/ Evan A. Smith
EVAN A. SMITH
Administrative Assistant

JMC/eas

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)
) No. 46969-2019
 Plaintiff-Respondent,)
) Kootenai County Case No.
 v.) CR28-18-12859
)
 ALEXANDER MICHAEL MITCHELL,)
)
 Defendant-Appellant.)
 _____)

BRIEF OF RESPONDENT

**APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF KOOTENAI**

HONORABLE RICHARD S. CHRISTENSEN
District Judge

LAWRENCE G. WASDEN
Attorney General
State of Idaho

COLLEEN D. ZAHN
Deputy Attorney General
Chief, Criminal Law Division

JEFF NYE
Deputy Attorney General
Criminal Law Division
P. O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534
E-mail: ecf@ag.idaho.gov

**ATTORNEYS FOR
PLAINTIFF-RESPONDENT**

JUSTIN M. CURTIS
Deputy State Appellate Public Defender
322 E. Front St., Ste. 570
Boise, Idaho 83702
(208) 334-2712
E-mail: documents@sapd.state.id.us

**ATTORNEY FOR
DEFENDANT-APPELLANT**

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STATEMENT OF THE CASE

Nature Of The Case

Alexander Michael Mitchell appeals from the judgment entered after a jury found him guilty of grand theft. Mitchell argues the state presented insufficient evidence.

Statement Of The Facts And Course Of The Proceedings

On June 20, 2018, Alexander Michael Mitchell served Lagonda McDonald and her party at a restaurant in Coeur d'Alene. (Tr., p.141, L.23 – p.144, L.2.) Mitchell “seemed nervous” and “not quite comfortable.” (Tr., p.144, Ls.3-9.) After lunch, Mitchell brought McDonald the bill, and McDonald gave Mitchell her credit card. (Tr., p.146, L.25 – p.147, L.12.) Mitchell took the credit card to a point-of-sale terminal to process McDonald’s payment. (State’s Ex. 3 at 0:09-0:12; see Tr., p.165, L.22 – p.166, L.4.) Before using the terminal, he pulled his phone out of his pocket and held it between himself and McDonald’s credit card. (State’s Ex. 3 at 0:12-1:55.) Mitchell took approximately twice as long as normal processing McDonald’s payment. (Tr., p.177, Ls.15-20.) He then returned McDonald’s credit card and receipt to her table. (Tr., p.146, L.25 – p.147, L.12.)

Three days after McDonald’s visit to the restaurant, she noticed seven pending charges on her credit card that she did not authorize. (Tr., p.147, L.13 – p.149, L.11.) An investigation into the charges showed that McDonald’s credit card had been used without her authorization to purchase items totaling \$119.27 from a company called Yeti. (Tr., p.215, L.20 – p.218, L.14.) Mitchell was listed as the customer who made the unauthorized order from Yeti, and the shipping address for the items matched Mitchell’s home address. (Tr., p.217, Ls.10-16, p.218, L.24 – p.219, L.10, p.232, L.5 – p.233, L.3; see Tr., p.168, Ls.15-20.)

The state charged Mitchell with grand theft of McDonald's "financial transaction card account number." (R., pp.46-47, 149-50.) At trial, the state's theory was that Mitchell used his phone to make a copy of McDonald's credit card—"either by photo or inserting it"—before processing the payment for her meal, and then Mitchell used the copy to make unauthorized purchases. (Tr., p.283, L.1 – p.286, L.23.) The jury convicted Mitchell of grand theft. (R., p.166.)

The district court sentenced Mitchell to seven years with three and a half years fixed. (R., pp.241-42.) Mitchell timely appealed. (R., pp.256-59.)

ISSUE

Mitchell states the issue on appeal as:

Is there insufficient evidence to support Mr. Mitchell's conviction for grand theft by possession of stolen property?

(Appellant's brief, p.4.)

The state rephrases the issue as:

Has Mitchell failed to show the state presented insufficient evidence of grand theft?

ARGUMENT

Mitchell Has Failed To Show The State Presented Insufficient Evidence Of Grand Theft

A. Introduction

The state presented sufficient evidence that Mitchell committed grand theft. McDonald testified that she gave her credit card to Mitchell to pay for her meal at the restaurant. The video played for the jury showed Mitchell take out his phone and place it between himself and McDonald's credit card. The restaurant owner testified that Mitchell took twice as long as he should have processing McDonald's payment. The detective testified that fraudulent charges on McDonald's credit card were made in Mitchell's name ordering items to be shipped to Mitchell's home address. Based on all of the evidence the state presented, a reasonable juror could conclude that Mitchell copied McDonald's credit card number with the intent to use the credit card number to make unauthorized purchases. That is sufficient evidence of grand theft under Idaho law.

B. Standard Of Review

“This Court ‘will uphold a judgment of conviction entered upon a jury verdict so long as there is substantial evidence upon which a rational trier of fact could conclude that the prosecution proved all essential elements of the crime beyond a reasonable doubt.’” State v. Kralovec, 161 Idaho 569, 572, 388 P.3d 583, 586 (2017) (quoting State v. Severson, 147 Idaho 694, 712, 215 P.3d 414, 432 (2009)). This Court “view[s] the evidence in the light most favorable to the prosecution in determining whether substantial evidence exists” and “will not substitute [its] own judgment for that of the jury on matters such as the credibility of witnesses, the weight to be given to certain evidence, and the ‘reasonable inferences to be drawn from the evidence.’” Severson, 147 Idaho at 712, 215 P.3d at 432 (quoting State v. Sheahan, 139 Idaho 267, 285, 77 P.3d 956, 974 (2003)).

“Evidence is substantial if a ‘reasonable trier of fact would accept it and rely upon it in determining whether a disputed point of fact has been proven.’” Id. (quoting State v. Mitchell, 130 Idaho 134, 135, 937 P.2d 960, 961 (Ct. App. 1997) (brackets omitted)). “Substantial evidence may exist even when the evidence presented is solely circumstantial or when there is conflicting evidence.” State v. Southwick, 158 Idaho 173, 178, 345 P.3d 232, 237 (Ct. App. 2014). “In fact, even when circumstantial evidence could be interpreted consistently with a finding of innocence, it will be sufficient to uphold a guilty verdict when it also gives rise to reasonable inferences of guilt.” Id.

C. The State Presented Substantial Evidence To Show Mitchell Stole McDonald’s Financial Account Number

The state presented sufficient evidence for a reasonable juror to conclude that Mitchell committed grand theft. The district court’s instruction on the elements of grand theft tracked the statute:

In order for the defendant to be guilty of Grand Theft by Possession of Stolen property, the state must prove each of the following:

1. On or about June 23rd, 2018;
2. in the state of Idaho;
3. the defendant, ALEXANDER MITCHELL, knowingly received or possessed a financial transaction card account number belonging to Lagonda McDonald,
4. either knowing the property was stolen by another or under such circumstances as would reasonably induce the defendant to believe the property was stolen,
5. such property was in fact stolen,
6. the defendant had the intent to deprive the owner permanently of the use or benefit of the property; or the defendant knowingly used the property in such manner as to deprive the owner permanently of the use or benefit of the property; and the property was the account number of a financial transaction card.

(R., pp.189-90); see I.C. § 18-2403(4). The state proved each of those elements when it presented evidence showing that Mitchell made and kept a copy of McDonald’s credit card number without McDonald’s permission and used the credit card number to make unauthorized purchases.

Mitchell argues the state did not present evidence sufficient to satisfy the fourth element. (Appellant’s brief, pp.7-8.) The state agrees that it did not present evidence showing “the property was stolen *by another*” (R., p.189 (emphasis added)),¹ but the “or” in the fourth element means it did not have to present such evidence, see State v. Cota-Medina, 163 Idaho 593, 600, 416 P.3d 965, 972 (2018) (“The word ‘or’ is a disjunctive particle used to express an alternative or to give a choice of one among two or more things.” (internal quotes omitted)). Instead, the state could satisfy the fourth element by proving that Mitchell possessed the credit card number “under such circumstances as would reasonably induce the defendant to believe the property was stolen.” (R., p.189.) The state did so by presenting evidence that Mitchell surreptitiously copied McDonald’s credit card number. The fact Mitchell copied McDonald’s credit card number without her permission would “reasonably induce [Mitchell] to believe the property was stolen.” (R., p.189.)

Mitchell’s argument that a thief cannot “reasonably believe the property was stolen” because he “knows the property is stolen” contradicts both logic and the English language. (Appellant’s brief, p.8.) To believe is simply “to consider to be true or honest.” Believe, Merriam-Webster Online, <https://www.merriam-webster.com/dictionary/believe> (last accessed 2/26/2020). To know means “to be aware of the truth or factuality of.” Know, Merriam-Webster Online, <https://www.merriam-webster.com/dictionary/know> (last accessed 2/26/2020). A person who is “aware of the truth or factuality of” a proposition necessarily “consider[s] [it] to be true.” Thus, a

¹ Because the legislature removed the “by another” phrase from the statute in 2001, see 2001 Idaho Sess. Laws Ch. 112, Mitchell’s argument that this form of grand theft requires the property to be stolen “by another” finds no support in the statute.

thief who knows property is stolen necessarily believes that the property was stolen. See People v. Price, 850 N.E.2d 199, 205 (Ill. 2006) (“We also agree with the State that the actual thief has no choice but to believe that the property possessed is stolen.”).

Mitchell also argues the state did not present sufficient evidence to show the credit card number was “stolen” because, in Mitchell’s view, taking a picture of a credit card number cannot qualify as stealing. (Appellant’s brief, pp.8-9.) The grand theft statute begs to differ. The statute expressly contemplates that a person can commit grand theft by stealing a credit card *number*—as opposed to the credit card itself. I.C. § 18-2407 (explaining a person commits grand theft if he steals “a financial transaction card” *or* a “financial transaction card account number”). And the statute dictates that “[a] person *steals* property and commits theft when, with intent to deprive another of property or to appropriate the same to himself or to a third person, he wrongfully takes, obtains or withholds such property from an owner thereof.” I.C. § 18-2403(1) (emphasis added).

Under the plain language of the statute, Mitchell stole the credit card number. He indisputably took the credit card number when he copied it with his phone. See Take, Merriam-Webster Online, <https://www.merriam-webster.com/dictionary/take> (last accessed 2/26/2020) (defining “take” as “to get into one’s hands or into one’s possession, power, or control”). And he took the credit card number “wrongfully” because he did not have McDonald’s permission to copy the credit card number for his own personal use. See Wrongful, Merriam-Webster Online, <https://www.merriam-webster.com/dictionary/wrongfully> (last accessed 2/26/2020) (defining “wrongful” as “having no legal sanction”); see also (Tr., p.151, Ls.3-6).

That leaves only the question of whether Mitchell had the “intent to deprive another of property or to appropriate the same to himself” when he made the copy. I.C. § 18-2403(1). But this Court need not answer that question because Mitchell did not argue in his opening brief that

the state failed to present evidence as to Mitchell's intent. (Appellant's brief, pp.8-9 (arguing only that McDonald's credit card number was not "taken, obtained, or withheld")); see Bolognese v. Forte, 153 Idaho 857, 866, 292 P.3d 248, 257 (2012) ("We will not consider assignments of error not supported by argument and authority in the opening brief."). Indeed, Mitchell did not even challenge on appeal the state's showing on the sixth element—the intent element—of the crime. (Appellant's brief, pp.5-9.)

Nevertheless, even if this Court reaches the question of Mitchell's intent, the state presented sufficient evidence for a reasonable juror to conclude Mitchell had the "intent . . . to appropriate the [credit card number] to himself." I.C. § 18-2403(1). Under the statute, to appropriate property to oneself means "[t]o exercise control over it . . . permanently or for so extended a period or under such circumstances as to acquire the major portion of its economic value or benefit." I.C. § 18-2402(1)(a).

Based on Mitchell's decision to wrongfully copy McDonald's credit card number and use it to make a number of unauthorized transactions, a reasonable juror could have found that Mitchell copied the credit card number with the intent "[t]o exercise control over it . . . permanently" by continuing to make unauthorized purchases. I.C. § 18-2402(1)(a). The mere fact that McDonald put an end to Mitchell's spending spree by cancelling the credit card number does not change Mitchell's intent at the time he wrongfully took the number by copying it. (See Tr., p.151, Ls.7-13.) And nothing in the record suggests Mitchell planned on returning to McDonald the copied credit card number. Because the state presented evidence that Mitchell wrongfully took McDonald's credit card number with the intent to exercise control over it permanently, a reasonable jury could have—and did—find Mitchell guilty of grand theft.

CONCLUSION

The state respectfully requests this Court affirm the judgment entered after a jury found Mitchell guilty of grand theft.

DATED this 28th day of February, 2020.

/s/ Jeff Nye
JEFF NYE
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 28th day of February, 2020, served a true and correct copy of the foregoing BRIEF OF RESPONDENT to the attorney listed below by means of iCourt File and Serve:

JUSTIN M. CURTIS
DEPUTY STATE APPELLATE PUBLIC DEFENDER
documents@sapd.state.id.us

/s/ Jeff Nye
JEFF NYE
Deputy Attorney General

JN/dd