

2012 WL 5950439 (Mass.App.Ct.) (Appellate Brief)
 Appeals Court Of Massachusetts.

COMMONWEALTH OF MASSACHUSETTS, Appellee,

v.

Joanne NOEL, Defendant-Appellant.

No. 2011-P-2107.

October, 2012.

Suffolk County

Commonwealth's Brief On Appeal from the Suffolk Superior Court

[Daniel F. Conley](#), District Attorney, For the Suffolk District.

And On the Brief, Nicole Lim, Law Student Intern, Georgetown Law School.

[Donna Jalbert Patalano](#), Assistant District Attorney, BBO No. 651223, One Bulfinch Place, Boston, MA 02114, (617) 619-4081, donna.patalano@state.ma.us.

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
ISSUE PRESENTED	1
STATEMENT OF THE CASE	1
STATEMENT OF FACTS	3
ARGUMENT	8
THE JURY PROPERLY CONVICTED THE DEFENDANT OF TWO COUNTS OF LARCENY BECAUSE THE DEFENDANT COMMITTED MULTIPLE ACTS WITH LARCENOUS INTENT	8
A. THE ENACTMENT OF THE 1995 AMENDMENT TO THE LARCENY STATUTE SUPPORTS CHARGING AND CONVICTING THE DEFENDANT OF TWO LARCENY CHARGES	13
B. THE DEFENDANT COMMITTED MULTIPLE ACTS, EACH OF WHICH WAS NOT NECESSARY TO THE COMPLETION OF THE OTHER.	14
CONCLUSION	17
ADDENDUM	18
CERTIFICATION	1

TABLE OF AUTHORITIES

Cases

Commonwealth v. Brouillard , 40 Mass. App. Ct. 448 (1996)	15
Commonwealth v. Donovan , 395 Mass. 20 (1985)	
Commonwealth v. Fitzpatrick , 14 Mass. App. Ct. 1001 (1982), <i>rev. denied</i> , 388 Mass. 1103 (1983)	15, 16
Commonwealth v. Maldonado , 429 Mass. 502 (1999)	15
Commonwealth v. Mamay , 407 Mass. 412 (1990)	12
Commonwealth v. Murray , 401 Mass. 771 (1988)	10, 11
Commonwealth v. Sanchez , 405 Mass. 369 (1989)	12
Commonwealth v. Taylor , 428 Mass. 623 (1999)	10

Statutes

G.L. c. 266, § 30	1, 11, 13
---	-----------

Other Authorities

H.R. 1266, 1995-1996 Sess. (Ma. 1995)	14
---	----

Rules

***1 ISSUE PRESENTED**

Whether the defendant's convictions for larceny from persons sixty years of age or older should be affirmed where the defendant committed multiple takings from two **elderly** victims, and where the stolen jewelry and cash were stored in separate containers.

STATEMENT OF THE CASE

On April 11, 2006, a Suffolk County grand jury indicted the defendant, Joanne Noel, on: two counts of larceny under \$250, in violation of G.L. c. 266, § 30(1) (001 & 002); two counts of larceny under \$250 from a person sixty years of age or older, in violation of G.L. c. 266, § 30(5) (003 & 004); and five counts of larceny over \$250 from a person sixty years of age or older, in violation of G.L. c. 266, § 30(5) (005-009) (D.R. 1, 11-19; Docket Nos. SUCR2006-10339-001 to -009).¹

On October 11, 2006, the defendant filed a motion to bifurcate the charges (D.R. 4, 35) and a supporting ***2** memorandum (D.R. 36-41). On January 26, 2007, she filed two motions to dismiss the charges (D.R. 4, 20-21). On October 10, she filed a memorandum in support of her motions to dismiss (D.R. 5, 25-34).

On October 16, 2007, the Commonwealth moved to dismiss two of the five counts of larceny over \$250 from a person sixty years of age or older (006 & 009) (D.R. 5). On that same day, the Honorable Christine McEvoy conducted a hearing on all of the motions (D.R. 5). She allowed the Commonwealth's motion to dismiss counts 006 & 009 and took the defendant's motions under advisement (D.R. 5-6). The next day (October 17, 2007), she denied the defendant's motions to dismiss (D.R. 20-21).

On November 14, 2007, the Commonwealth filed a *nolle prosequi* for both counts of larceny under \$250 (001 & 002) and one of the two counts of larceny under \$250 from a person sixty years of age or older (003) (D.R. 6).

On January 14, 2008, the Honorable Judith Fabricant denied the defendant's motion to bifurcate (D.R. 6). The defendant's jury trial then began with Judge Fabricant presiding (D.R. 6). On January 16, ***3** 2008, the Commonwealth moved to dismiss the remaining count of larceny under \$250 from a person sixty years of age or older (004) (D.R. 7). Judge Fabricant allowed the motion and dismissed the charge (D.R. 7).

On January 18, 2008, the jury found the defendant guilty of two counts of larceny over \$250 from a person sixty years of age or older (005 & 007) (D.R. 1). On January 22, 2008, the jury acquitted her of the remaining count of larceny over \$250 from a person sixty years of age or older (008) (D.R. 1).

On January 30, 2008, Judge Fabricant sentenced the defendant to 364 days in a house of correction for her first conviction of larceny over \$250 from a person sixty years of age or older (005), and five years on probation for her second such conviction (007) to be served after her incarceration (D.R. 8).

On February 12, 2008, the defendant filed a notice of appeal (D.R. 8). This Court entered the case on its docket on December 15, 2011.

STATEMENT OF FACTS**I. The Commonwealth's Case**

The defendant worked as a house cleaner for **elderly** citizens who had recently undergone medical ***4** operations (Tr. 1:161). The victims had all started using the defendant's services almost immediately after returning home from the hospital after

surgery (Tr. 2:8). The larceny charges stemmed from the defendant's actions in two households where she had worked. The victims found their jewelry and cash missing immediately after the defendant left their apartments (Tr. 1:180, Tr. 2:79).

Eighty-year-old Theresa Bucchierri and her seventy-three-year-old sister Clara² are long-time Boston residents (Tr. 1:167). They have lived together in the same house on East Fourth Street for almost fifty years (Tr. 1:167).

Although Clara and Theresa shared a bedroom, they kept their belongings stored separately (Tr. 1:171). Clara's jewelry box was on top of a long book case (Tr. 1:171). She also had a wicker basket that contained a small pink box which she used to store valuables, including a black onyx necklace (Tr. 1:171). Clara's purse, which she does not share with Theresa, was usually placed on top of her jewelry *5 box (Tr. 1:172). On the other hand, Theresa kept her jewelry in her own box on top of a triple dresser (Tr. 1:171).

On November 1, 2005, Theresa, who suffered from multiple chronic ailments, had a doctor's appointment (Tr. 2:28). Before the appointment, the sisters awaited the arrival of the defendant, their new housecleaner (Tr. 1:167). The defendant arrived at 9:30 a.m. (Tr. 1:174). Since this was the first time that the defendant had been inside the Bucchierri's house, Clara guided the defendant through the house, telling her what needed to be done along the way (Tr. 1:175, Tr. 2:6). After the tour, the defendant began cleaning the sisters' shared bedroom (Tr. 1:175). She spent two and a half hours alone in the bedroom, purportedly cleaning (Tr. 1:178).

After the defendant left the apartment, Clara went into the bedroom to get ready for Theresa's doctor's appointment (Tr. 1:179). Looking through her purse, which was in its usual place, Clara noticed that cash was missing (Tr. 1:179-180). She could not recall how much cash was originally in her purse but estimated that about \$450 had been taken (Tr. 1:180). *6 She then checked her jewelry box and found that her black onyx necklace, which was worth about \$400, was missing (Tr. 1:182). Hearing Clara muttering, Theresa entered the bedroom (Tr. 2:29). Theresa looked through her own jewelry box to discover that her gold chain and choker were missing (Tr. 2:30). The value of Theresa's stolen jewelry amounted to almost \$800 (Tr. 2:30). Clara then called the police (Tr. 1:182).

On January 13, 2006 -- less than three months after the Bucchierri incident -- Evelyn Kahn, another **elderly** woman and long-time resident of Boston, hired the defendant as a housecleaner (Tr. 2:64). Kahn needed help cleaning her apartment because she recently had undergone an operation to get her knees and hip replaced (Tr. 2:64-66).

Right before the defendant arrived at her house, Kahn placed an envelope in her dresser drawer under some sweaters (Tr. 2:66). The envelope contained \$1,500 that Kahn intended to use to pay her bills (Tr. 2:65). When the defendant arrived, she spent an hour and a half alone in Kahn's bedroom (Tr. 2:78). There was a caretaker present to assist Khan while the *7 defendant was clearing, but the caretaker and Kahn never left the living room (Tr. 2:77).

The next morning, Kahn searched for her envelope because she needed to buy groceries (Tr. 2:79). She found her envelope on top of her sweaters and discovered that all of her money was gone (Tr. 2:79). She searched through her drawer and found that several pieces of her jewelry, valued at approximately \$700, were also missing (Tr. 2:80). She promptly called the police to report the theft (Tr. 2:80).

II. The Defendant's Motion to Dismiss

The defendant moved to dismiss the count based on the theft of Theresa's jewelry (007) on the grounds that the Bucchierri thefts counted as one crime [MTD Tr. 8].³ The defendant relied on *Commonwealth v. Donovan*, 395 Mass. 20, 29 (1985) [MTD Tr. 8]. In her motion to bifurcate the charges, however, she claimed that there was no single scheme or plan to her actions [MTD Tr. 16].

The prosecutor, in his opening statement, emphasized that the Bucchierri sisters had their own *8 drawers and had separate, individual areas in their shared bedroom (Tr. 1:157-158). In his closing argument, he asked the jury to consider separately the testimony of Clara and Theresa (Tr. 3:27). The jury found the defendant guilty of the two counts of larceny from the Bucchierri sisters (005 & 007) (Tr. 3:85-86) but not guilty of larceny from Kahn (008) (Tr. 4:17).

ARGUMENT

THE JURY PROPERLY CONVICTED THE DEFENDANT OF TWO COUNTS OF LARCENY BECAUSE THE DEFENDANT COMMITTED MULTIPLE ACTS WITH LARCENOUS INTENT.

The two Bucchierri larceny charges were not part of a single, larcenous scheme. The defendant, citing *Commonwealth v. Donovan*, 395 Mass. 20 (1985), argues that she should not have been convicted of two counts of larceny because the act of stealing property from Clara and Theresa at the same time and in the same bedroom constituted one crime (D.B. 19). However, time and location are not dispositive elements that determine whether multiple acts of stealing count as a single count of larceny. For this reason, this Court should affirm the defendant's two convictions.

*9 In *Donovan*, the defendants stole from several people by executing a single plan. *Id.* at 29. The defendants placed a single, phony night deposit box on the wall of one bank. *Id.* The box was there for a single night. *Id.* Seven people placed their money in the phony deposit box, while the defendants waited. *Id.* The *Donovan* Court held that there was a single criminal intent to take the money from one phony night deposit box, and thus a single larcenous scheme. *Id.*

The case at bar, however, is distinguishable from *Donovan*. In *Donovan*, the defendant acted once when he executed a single plan by setting up one phony deposit box and waited for the victims to place money in the box. See *id.* Moreover, there was but one container in *Donovan*: the phony night deposit box. *Id.* Here, the defendant did not execute such a plan by passively waiting for her victims to act. Rather, she actively stole from Clara and Theresa by taking items from their separate containers. The acts of the defendant, thus, were not part of a single, larcenous scheme. Based on the evidence, the jury could have found that the defendant committed three different acts: opening and taking jewelry from Clara's jewelry box (Tr. *10 1:182); opening and taking jewelry from Theresa's jewelry box (Tr. 2:30); and unzipping Clara's purse and taking cash from it (Tr. 1:182).⁴ Additionally, unlike in *Donovan* where there was only one container for safe valuables, in this case there were at least three separate containers -- the two jewelry boxes and the purse -- which were safe places for the sisters to place their valuables. See *Donovan*, 395 Mass. at 29. The defendant's reliance on *Donovan*, therefore, is misplaced.

The case at bar is more like *Commonwealth v. Murray*, 401 Mass. 771 (1988). In *Murray*, the jury found the defendant guilty of 180 separate counts of larceny, even though he committed all the larceny counts at the same location and targeted the same victim. *Id.* at 772. *Murray* contended that his larceny convictions constituted only one continuing crime because he committed identical acts (forging *11 checks) against the same company. *Id.* The Supreme Judicial Court disagreed, holding that, if the defendant obtained his employer's money by forging a check with larcenous intent 180 times, he committed 180 crimes of larceny. *Id.* Using the same reasoning, this Court should affirm the defendant's convictions here. She took three identical actions -- reaching into a container with larcenous intent -- to steal goods from Theresa and Clara. Although identical in action, each one of the stealings was a separate larceny.

Larceny is the unpermitted taking of personal property of another, with intent to deprive the other of the property permanently. G.L. c. 266, § 30. Thus, in *Murray*, the Commonwealth properly charged the defendant with 180 counts of larceny because the defendant obtained his employer's money with larcenous intent 180 times. *Murray*, 401 Mass. at 772. In this case, the defendant obtained two victims' personal property through multiple acts with larcenous intent. In opening and taking items from multiple

containers in the room (Tr. 1:180, 182), the defendant took property from the sisters multiple times with the *12 intent to deprive them of it permanently. This Court, therefore, ought to affirm the convictions.

What is more, the Commonwealth emphasized to the jury in its opening that the Bucchierris sisters had their own separate, individual areas in their shared bedroom (Tr. 1:157-158). In *Commonwealth v. Mamay*, 407 Mass. 412, 418-419 (1990), it was significant that “the prosecutor consistently highlighted the different actions of the defendant” and that the victim did the same during her testimony. *Id.* at 418-419 (distinguishing *Commonwealth v. Sanchez*, 405 Mass. 369, 381-382 (1989), where there were similar facts, but “the Commonwealth did not argue that it was a wholly separate act”). As in *Mamay*, where the victim testified to the different actions of the defendant, the Bucchierris sisters emphasized that, even though they shared the same bedroom, their belongings were stored in separate and distinct places. *Id.* As in *Mamay*, the prosecutor also highlighted the different actions of the defendant and emphasized that the jewelry and cash were in separate containers in the room (Tr. 1:158). *Id.* at 418-419. Based on the evidence and the argument, it was clear to the jury *13 what each count charged, and the jury properly convicted the defendant of two counts of larceny (Tr. 3:85-86).

A. The Enactment Of The 1995 Amendment To The Larceny Statute Supports Charging And Convicting The Defendant Of Two Larceny Charges.

The enactment of the 1995 amendment supports the reasoning that the defendant's acts of taking from different containers owned by the sisters constituted different larcenies. The *Donovan* Court held that the Massachusetts Legislature was silent on the issue of whether it intended to authorize multiple convictions for a larcenous scheme that affected multiple victims. *See Donovan*, 395 Mass. at 28. Since the statute was silent, the Supreme Judicial Court resolved it in favor of the defendant. *See id.* at 29. However by 1995, the Legislature was no longer silent, particularly in a situation like this where victims of the larceny are **elderly**.

In 1995, the Legislature amended the larceny statute to include a special section for crimes committed against **elderly** persons. G.L. c. 266, § 30, as amended through St. 1995, c. 297, § 9. The *14 addition of such a section came with an overhaul of several other statutes to include a special provision for the **elderly** when it came to assault, abuse, **neglect**, and financial exploitation. *See* H.R. 1266, 1995-1996 Sess. (Ma. 1995). When then-Governor William Weld signed the bill, he commented that the crimes against the **elderly** are especially heinous, and that the purpose of the overhaul was to help the Commonwealth further protect its **elderly** and disabled citizens. *Id.* Clara and Theresa were the same type of **elderly** citizens that the statute was enacted to protect. They were part of the State's most vulnerable victims, for whom the Legislature and the Governor recognized the need of special protections because of that vulnerability. The 1995 amendment was thus enacted. With this Legislative intent in mind, this Court should affirm the defendant's convictions because she stole from two **elderly** victims.

B. The Defendant Committed Multiple Acts, Each Of Which Was Not Necessary To The Completion Of The Other.

The defendant contends that her convictions violate the double jeopardy clause because they subject her to multiple punishments for the same offense (D.B. 20- *15 22). The jury, however, properly convicted the defendant of two counts of larceny because there were distinct, multiple acts committed by the defendant, none of which was necessary to the completion of the others. When a defendant commits more than one act against a victim, and one of the separate acts is not necessary to the completion of the others, that act is properly charged individually from the others. *Commonwealth v. Fitzpatrick*, 14 Mass. App. Ct. 1001, 1002 (1982), *rev. denied*, 388 Mass. 1103 (1983). *Accord Commonwealth v. Brouillard*, 40 Mass. App. Ct. 448, 449 n.3 (1996). That is precisely what happened here. *See Commonwealth v. Maldonado*, 429 Mass. 502, 509 (1999) (whether the offenses were separate and distinct acts or part of a single criminal episode was a question of fact for the jury). The defendant committed at least two distinct acts, neither of which was necessary to the completion of the other, when she stole from the Bucchierris sisters.

In *Fitzpatrick*, the defendant argued that his convictions were duplicative because “one cannot rape a person without also committing an indecent assault and battery.” *Fitzpatrick*, 14 Mass. App. Ct. at 1002. *16 However, this Court ruled that the indecent touchings were separate from and unnecessary to the acts of penetration. *Id.* In this case too, there were two distinct

acts because the sisters' jewelry was segregated by the sisters into separate containers. As in *Fitzpatrick* where the indecent touchings were independent from the rape, in this case, the act of stealing Theresa's jewelry was separate and independent from the acts of stealing Clara's jewelry and cash. *See id.* That the defendant committed two very similar crimes does not preclude convictions for both of her criminal acts. The defendant's argument to the contrary must fail.

*17 CONCLUSION

For the foregoing reasons, the Commonwealth respectfully requests that this Honorable Court affirm the defendant's convictions.

Footnotes

- 1 The Commonwealth refers to the defendant's record appendix as (D.R. [page]); to the defendant's brief as (D.B. [page]); to the motion to dismiss transcript as (MTD Tr. [page]); and to the trial transcript as (Tr. [vol.]: [page]).
- 2 Pursuant to [Mass. R.A.P. 16\(d\)](#), the Commonwealth refers to the sisters by their first names in order to promote clarity for the Court.
- 3 The defendant also moved to dismiss all of the charges on other grounds (see D.R. 20-21, 23, 25-34), but she has not raised those grounds on appeal.
- 4 The Commonwealth could have charged the defendant twice for stealing from Clara because she stole items from Clara's purse and from her jewelry box. The Commonwealth, however, exercised its prosecutorial discretion not to. *See Commonwealth v. Taylor*, 428 Mass. 623, 629 (1999) (prosecutor has wide discretion in deciding whether to prosecute particular defendant).

End of Document

© 2015 Thomson Reuters. No claim to original U.S. Government Works.