NO. 42877-6-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

DAVID MAXWELL,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 11-1-00250-9

BRIEF OF RESPONDENT

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This brief was served, as stated below, via U.S. Mail, the recognized system of interoffice communications, *or, if an email address appears to the right, electronically.* I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.
DATED August 23, 2012, Port Orchard, WA
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

CONSTITUTIONAL PROVISION

I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the trial court properly allowed the State to ask Maxwell if he had ever entered a place without permission to take metal after Maxwell testified on several occasions about his caution in obtaining permission before taking metal?

2. Whether Maxwell's claim that the evidence was insufficient to convict him of "criminal profiteering" is meritless where he was not charged with that non-existent crime, and the evidence was more than sufficient to establish the offense actually charged, first-degree trafficking in stolen property?

3. Whether Maxwell's admission, that he took pipes he did not have permission to take and thereafter sold them, was sufficient to establish that he knowingly trafficked in stolen property?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

David Maxwell was charged by information filed in Kitsap County Superior Court with seven counts of trafficking in stolen property, all occurring on different dates. CP 17-21. The jury acquitted on all but Count VII, which was alleged to have occurred on March 3, 2011. CP 19, 54-56.

Before trial the parties agreed that Maxwell's prior second-degree

burglary conviction was admissible as a crime of dishonesty, but that the underlying facts were not, unless Maxwell, by his testimony "opened the door." CP 15, 1RP 11.[1]

On direct examination, Maxwell asserted that his practice was to ask permission before taking scrap, and that he had permission to take scrap from the dumpster on Ida Street. 2RP 133, 137. He also stated that when permission was withdrawn he would stop taking metal from a location. 2RP 142. On cross-examination, Maxwell further asserted that he "never" took metal without permission. 2RP 152. Defense counsel then objected to the next question, "2010 you've never gone to any place to --."

The State argued that the fair implication of Maxwell's direct examination testimony was that he was very careful about making sure he had permission before taking metal. 2RP 154. The trial court agreed, and overruled the objection. 2RP 156. At Maxwell's request, a voir dire was conducted. 2RP 156. Maxwell asserted that he went to the dump or a dumpster to look for metal but they did not find any. 2RP 157.

Thereafter the State asked Maxwell if he ever took went any place to take metal without permission. 2RP 159. Maxwell answered "Yes." 2RP 159. No further questions were asked on that topic. No limiting instructions

[1] The trial court also ruled that Maxwell's prior forgery conviction was also admissible under

were requested.

B. FACTS

Arthur Morken was the warehouse manager at Vigor Marine, at 410 Ida Street in Bremerton. 1RP 54-55. He began work there in January 2009. 1RP 55. There were 10 by 14 "big signs" that had the business's name on the building. 1RP 56. The company manufactured items for use in maintaining Navy vessels. 1RP 56.

Vigor dealt with a lot of metal, including copper-nickel piping. 1RP 57. The left-over scrap metal was valuable. 1RP 58. They dealt with the scrap in a couple of ways. 1RP 58. One was to put it in a bin supplied by a local scrap facility, Navy City Metals. 1RP 58. When the bin was full they called Navy City, who sent someone to come pick it up. 1RP 58. More expensive scrap metal was kept inside the facility. 1RP 58. Granting permission to take scrap metal was Morken's responsibility. 1RP 58. During his tenure, Morken never granted anyone permission to do that. 1RP 59. He specifically never gave Maxwell permission. 1RP 66.

On March 3, 2011, Morken came to work and learned some materials were missing. 1RP 59. There had been about a half a dozen pieces of copper-nickel piping in the pickup truck the night before. 1RP 60. It had

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ER 609. CP 16, 1RP 12.

been cut out of a ship and brought to the facility to be used as a template for new piping. 1RP 60.

After determining that no one at Vigor had moved the pipes, Morken paid a visit to Navy City Metals. 1RP 61. The piping in question had come in moments before Morken arrived. 1RP 62. It was identifiable by numbers painted on it. 1RP 62.

Morken reviewed the security video from the night before. 1RP 64. Shortly after midnight, a vehicle pulled up and two people got out. 1RP 64-65. They grabbed the pipe from the Vigor truck, put it in their own and left. 1RP 65.

The steel dumpster was brought in in 2009. 1RP 68. Before that the property was vacant. 1RP 68.

A week before the pipes were taken from the truck he noticed that someone had emptied the bin as well. 1RP 71. When he went out to Navy City, he asked why they had emptied the bin, since he had not requested it. 1RP 72.

Levi Taylor was the manager of Navy City Metals., which was a recycling center for scrap metal. 1RP 74-75. He produced receipts showing he had purchased copper-nickel pipe from Maxwell on February 11, 12, 17, 18, 19, 21, and March 3, 2011. 1RP 78-80. Taylor had dealt with Maxwell in

the past and knew him. 1RP 78.

Deputy Sheriff Scott Eberhard was dispatched to Vigor Marine on March 3. 1RP 87. After speaking to Morken, he proceeded to Navy City Metals. 1RP 87. He collected the receipts into evidence. 1RP 88. He then called Maxwell's number and left a message. 1RP 90.

When Maxwell called back, it was Eberhard's day off and Deputy Patrick Dawson fielded the call. 1RP 99. Maxwell told him that he had taken some metal and sold it to Navy City Metals. 1RP 100. Maxwell stated that he had a business called D. Max Metals, and went to Navy City about once a week. 1RP 101. He also stated that his business license was expired. 1RP 101.

Eberhard subsequently spoke to Maxwell on March 8. 1RP 91. Maxwell stated that he had gotten the metal involved in each of the transactions from Vigor and then sold it to Navy City. 1RP 92. Maxwell referred to Vigor as "the place on Ida Street." 1RP 95. He did not seem confused by the reference to Vigor. 1RP 96. He said he had been collecting metal from there for about five years. 1RP 96.

Eberhard viewed the security video at Vigor. 1RP 93. In it the thieves were driving a dark-colored Chevy Blazer. 1RP 93. Maxwell told Eberhard that he drove a Blazer. 1RP 94. Maxwell admitted to taking the

pipes from the Vigor company truck. 1RP 94.

Maxwell testified that he had hauled scrap metal for the last five years. 2RP 131 He got the metal mostly from driving around and if he saw scrap he would stop and ask if they wanted to get rid of it. 2RP 133. Maxwell asserted that he had been picking up metal from the Ida Street location since 2005. 2RP 137. Someone was throwing metal into the bin there, and told him it was all right to take metal from the bin, but not from the yard. 2RP 137. The "yard" did not have a fence; it was just a parking lot. 2RP 138. He did not know the name of the business at the time he started taking metal from Ida Street. 2RP 140. Nor did he know Vigor's name. 2RP 141. Originally he picked up from about eight or ten businesses. 2RP 141. As the price of metal went up, many of them stopped giving away the scrap. 2RP 141. They would tell him that they did not need him to do it anymore. 2RP 142. After they told him that he did not continue to take their metal. 2RP 142. At the Ida Street location the sheriff was the first person to contact him about taking the metal. 2RP 143. He told the deputies that he had permission to take the metal. 2RP 144, 146. The Navy City dumpsters had their name on them. 2RP 147. Maxwell asserted that he did not take metal from those dumpsters. 2RP 147. He did not see their name on the Ida Street dumpster. 2RP 147.

Maxwell pled guilty to second-degree attempted burglary in 2010, and

to forgery in 2002. 2RP 140.

On cross, Maxwell asserted that he "never" went to a place of business and took metal without permission. 2RP 152. After the objection discussed above in the procedural history was resolved outside the presence of the jury, Maxwell answered that he had, in 2010, gone someplace without permission to take metal. 2RP 159.

Maxwell admitted that all the copper-nickel referenced in the Navy City receipts had come from Vigor. 2RP 160-62. He had never met Morken. 2RP 166. He also admitted that he did not get permission to take metal from the back of the truck. 2RP 167. The only time he took anything from the truck was on March 3. 2RP 171.

III. ARGUMENT

A. THE TRIAL COURT PROPERLY ALLOWED THE STATE TO ASK MAXWELL IF HE HAD EVER ENTERED A PLACE WITHOUT PERMISSION TO TAKE METAL AFTER MAXWELL TESTIFIED ON SEVERAL OCCASIONS ABOUT HIS CAUTION IN OBTAINING PERMISSION BEFORE TAKING METAL.

Maxwell argues that the trial court erred in allowing the State to inquire whether in 2010, he had entered a place without permission to take metal. This claim is without merit because Maxwell opened the door to the

question by testifying several times on direct to the effect that he was always careful to obtain permission before he took metal.

The trial court's decision as to the scope of examination and whether to admit or exclude evidence, is within the discretion of the trial court and will not be reversed absent abuse of discretion. *State v. Neal*, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001). The trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds or reasons. *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997).

Under the well established "open door" rule, the trial court has the discretion to admit evidence that might otherwise be inadmissible if the witness testifies in a manner that warrants impeachment with that evidence. The open door rule is aimed at fairness and truth-seeking and allows the opponent to rebut misleading and inconsistent testimony regardless of whether the evidence is otherwise admissible under rules of evidence. *State v. Gefeller*, 76 Wn.2d 449, 455, 458 P.2d 17 (1969).

> It would be a curious rule of evidence which allowed one party to bring up a subject, drop it at a point where it might appear advantageous to him, and then bar the other party from all further inquiries about it. Rules of evidence are designed to aid in establishing the truth. To close the door after receiving only a part of the evidence not only leaves the matter suspended in air at a point markedly advantageous to the party who opened the door, but might well limit the proof to half-truths. Thus, it is a sound general rule that, when a party opens up a subject of inquiry on direct or cross-examination, he contemplates that the rules will permit cross-

> examination or redirect examination, as the case may be, within the scope of the examination in which the subject matter was first introduced.

Id.

Here, on direct examination, Maxwell asserted that his practice was to ask permission before taking scrap, and that he specifically had permission to take scrap from the dumpster on Ida Street. 2RP 133, 137. He also stated that when permission was withdrawn he would stop taking metal from a location. 2RP 142. Finally, he asserted that Navy City dumpsters had their name on them and he would not take metal from them. 2RP 147. Then on cross, he stated that he never took metal without permission. 2RP 152. From this testimony, the trial court concluded that the "inference here globally from the testimony that was offered is that the defendant is always very careful not to take metal without the permission of the owner of the metal." 2RP 156. It therefore allowed the following brief exchange:

> Q. Mr. Maxwell, question again.
>
> In 2010, did you ever go any place without permission to take metal?
>
> A. Yes.

2RP 159. This question and answer was thus highly relevant to impeach Maxwell's testimony to the effect that he always sought permission before taking metal. The trial court did not abuse its discretion.

Maxwell claims that this evidence amounts to character evidence

subject to ER 404(b). However, this evidence was not admitted "to prove the character of a person in order to show action in conformity therewith." It was admitted to directly contradict Maxwell's own claims about his usual practices. This is impeachment, not substantive evidence.

Even if this single question and answer could otherwise be considered improper character evidence, its admission would have been within the trial court's discretion. While ER 404(a) prohibits evidence of a person's character to prove conformity, "a criminal defendant who places his character in issue by testifying as to his own past good behavior may be cross examined as to specific acts of misconduct unrelated to the crime charged." *State v. Warren*, 134 Wn. App. 44, ¶ 43, 138 P.3d 1081 (2006), *aff'd*, 165 Wn.2d 17 (2008). Maxwell's claim is thus without merit.

Finally, even if the trial court could be deemed to have abused its discretion, any error would be harmless. An erroneous ruling is not reversible error unless the court determines that, "within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected." *State v. Smith*, 106 Wn.2d 772, 780, 725 P.2d 951 (1986). Improper admission of evidence constitutes harmless error if the evidence is of minor significance when compared with the evidence as a whole. *Neal*, 144 Wn.2d at 611.

Here, the alleged error would be absolutely harmless. Maxwell had already testified on direct examination that he had previously pled guilty to forgery and burglary. The one-sentence admission that he had tried to take metal before could hardly add much to that.

Furthermore, he testified that he had sold the metal to Navy City Metal and that he had taken it from the truck at Vigor. He testified that he drove a Blazer like that on the video of the thieves taking the metal. He testified that although he had permission to take metal from the dumpster, he had been told not to take metal from elsewhere on the property. He specifically testified that he had not received permission to take the metal from the truck.

Maxwell's contentions regarding the overwhelming prejudice of the question are thus overblown. His further contention that his acquittal on Counts I through VI demonstrates that prejudice is utterly without logic. The jury acquitted on the counts that Maxwell claimed he had permission to take the metal (*i.e.*, those involving the taking of metal from the dumpster) and convicted on the one count where he conceded he did not have permission.

This was in spite of Vigor's manager's testimony that he had never given anyone permission to take Vigor's scrap, in spite of his testimony that the building had been vacant before Vigor occupied it two years earlier, in

spite of his testimony that the dumpster was Navy City's. It is thus plain that the jury believed Maxwell, or at least gave him the benefit of the doubt. As such, this testimony clearly did not affect the verdicts.

Finally, Maxwell also faults the trial court for not giving a more thorough limiting instruction. No instruction was requested below, however. Questions of the admissibility of evidence, are not of constitutional magnitude and do not fall within RAP 2.5's exceptions, and thus may not be raised for the first time on appeal. *State v. Davis*, 141 Wn.2d 798, 850, 10 P.3d 977 (2000); *see also State v. Clark*, 139 Wn.2d 152, 156-57, 985 P.2d 377 (1999). Additionally, a party may only assign error in the appellate court on the specific ground of the objection made at trial. *State v. Guloy*, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985). Moreover, even if this claim were properly preserved, under the plain language of ER 105, the trial court has a duty to issue a limiting instruction only upon request for such an instruction, even in ER 404(b) cases. *State v. Russell*, 171 Wn.2d 118, ¶ 10, 249 P.3d 604 (2011). Maxwell fails to show any abuse of discretion.

B. MAXWELL'S CLAIM THAT THE EVIDENCE WAS INSUFFICIENT TO CONVICT HIM OF "CRIMINAL PROFITEERING" IS MERITLESS WHERE HE WAS NOT CHARGED WITH THAT NON-EXISTENT CRIME, AND THE EVIDENCE WAS MORE THAN SUFFICIENT TO ESTABLISH THE OFFENSE ACTUALLY CHARGED, FIRST-DEGREE TRAFFICKING IN STOLEN PROPERTY.

Maxwell next claims that the evidence was insufficient to establish the crime of criminal profiteering. This claim is without merit because Maxwell was not charged with "criminal profiteering," which in fact is not an offense under the Washington criminal code. Maxwell was charged with trafficking in stolen property, a crime for which the evidence was more than sufficient.

"Criminal profiteering" is an element of the offense of leading organized crime, which is proscribed by RCW 9A.82.060. The element is defined at RCW 9A.82.010(4). Neither of these facts is of relevance to Maxwell's conviction, however.

Maxwell was charged with, and convicted of, first-degree trafficking in stolen property under RCW 9A.82.050(1). CP 19, 56, 57.[2] That crime is

[2] The judgment and sentence correctly identifies the crime as first-degree trafficking in stolen property, but contains a scrivener's error referencing RCW 9A.82.55, which is second-degree trafficking. CP 57. The record is clear that Maxwell was charged with and convicted of first degree trafficking. The amended information alleges first-degree trafficking, and cites RCW 9A.82.050(1). CP 19. The distinction between the two crimes is the scienter element: first-degree trafficking requires that the crime be committed knowingly; second-degree requires

defined as follows:

> A person who knowingly initiates, organizes, plans, finances, directs, manages, or supervises the theft of property for sale to others, or who knowingly traffics in stolen property, is guilty of trafficking in stolen property in the first degree.

RCW 9A.82.050. Several of these terms are defined in RCW 9A.82.010:

* * *

> (16) "Stolen property" means property that has been obtained by theft, robbery, or extortion.

* * *

> (19) "Traffic" means to sell, transfer, distribute, dispense, or otherwise dispose of stolen property to another person, or to buy, receive, possess, or obtain control of stolen property, with intent to sell, transfer, distribute, dispense, or otherwise dispose of the property to another person.

"In interpreting a statute, this court looks first to its plain language. If the plain language of the statute is unambiguous, then this court's inquiry is at an end. The statute is to be enforced in accordance with its plain meaning." *State v. Armendariz*, 160 Wn.2d 106, ¶ 7, 156 P.3d 201 (2007) (citations omitted). Maxwell fails to indentify any ambiguity. The language set forth in RCW 9A.82.050(1) and further defined in RCW 9A.82.010(16) & (19) is clear and unambiguous. Maxwell knowingly trafficked in stolen property, *i.e.*, he sold property that has been obtained by theft to another person.

Furthermore, nowhere in either the offense itself or in the relevant

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only recklessness. The jury charge, while not identifying the degree of the offense, required knowledge, not recklessness. CP 39.

definitional sections does the term "criminal profiteering" appear. Most notably, the definition of "stolen property," while including "theft," does not require that the theft have been felonious.

Nor does the generic definition of "theft" include such a requirement, or include a minimum value. RCW 9A. 56.020(1). Indeed, Maxwell's argument is predicated on the contention that his theft was a misdemeanor. Since he thus acknowledges that the evidence shows he committed a theft, his argument is self-defeating.

Nor do the cases Maxwell cites support his claims. *State v. Munson*, 120 Wn. App. 103, 83 P.3d 1057 (2004), involved a conviction for leading organized crime, which as noted above, does include the element of criminal profiteering. That case simply held that the various underlying felonies set forth in the definition of criminal profiteering were alternative means of committing the offense, and that the evidence was sufficient.

Maxwell misrepresents the holding in *State v. Thomas*, 103 Wn. App. 800, 14 P.3d 854 (2000), that the title of an enactment defines the scope and purpose of the law. In *Thomas*, the issue was whether the legislative enactment violated the subject-in-title rule set forth in Const. art. 2, § 19. The statement is true in that context.

In interpreting a validly-enacted part of the Washington Criminal

Code, Title 9A, however, the opposite proposition is true: the caption does not control over the plain language of the statute, and indeed is legally not part of the statute:

> Chapter, section, and subsection captions are for organizational purposes only and shall not be construed as part of this title.

RCW 9A.04.010(5); *see also State v. Lundell*, 7 Wn. App. 779, 782 n.1, 503 P.2d 774 (1972) (where the statute contains specific instruction such as that in RCW 9.9A.010(5), the title and headings may not be considered even in interpreting an ambiguous statute). And in any event, as noted above, Maxwell mails to even address the issue of ambiguity, much less demonstrate any ambiguity that would require statutory construction. This claim should be rejected.

C. MAXWELL'S ADMISSION THAT HE TOOK PIPES HE DID NOT HAVE PERMISSION TO TAKE AND THEREAFTER SOLD THEM WAS SUFFICIENT TO ESTABLISH THAT HE KNOWINGLY TRAFFICKED IN STOLEN PROPERTY.

Maxwell next claims that the evidence was insufficient to establish the element of knowledge. This claim is without merit where Maxwell testified that he did not have permission to take the metal from the truck or any place besides the dumpster.

It is a basic principle of law that the finder of fact at trial is the sole

and exclusive judge of the evidence, and if the verdict is supported by substantial competent evidence it shall be upheld. *State v. Basford*, 76 Wn.2d 522, 530-31, 457 P.2d 1010 (1969). The appellate court is not free to weigh the evidence and decide whether it preponderates in favor of the verdict, even if the appellate court might have resolved the issues of fact differently. *Basford*, 76 Wn.2d at 530-31.

In reviewing the sufficiency of the evidence, an appellate court examines whether, viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could find that the essential elements of the charged crime have been proven beyond a reasonable doubt. *See State v. Green*, 94 Wn.2d 216, 220, 616 P.2d 628 (1980). The truth of the prosecution's evidence is admitted, and all of the evidence must be interpreted most strongly against the defendant. *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385 (1980). Finally, the appellate courts must defer to the trier of fact on issues involving "conflicting testimony, credibility of the witnesses, and the persuasiveness of the evidence." *State v. Hernandez*, 85 Wn. App. 672, 675, 935 P.2d 623 (1997).

Maxwell's argument is predicated on the notion that the "metal was deliberately left outside the fence in circumstances calculated to deceive a reasonable person into thinking it had no value and that the owner did not care what happened to it." Brief of Appellant at 15. This bizarre contention

is contrary to both the law and the facts.

First, as both Morken and Maxwell testified that there was no fence. 1RP 68, 2RP 138. Secondly, Maxwell cites no principle of law that holds that belongings left in the back of a truck parked on private property may be presumed to be free for the taking by the general public. Further, Maxwell testified that while he allegedly had permission to take metal from the dumpster that permission was specifically limited to the dumpster and specifically did not extend to materials elsewhere in the "yard." 2RP 137. He also specifically testified that he did not have permission to take the pipes from the truck. 2RP 167. After Maxwell personally removed the pipes from the truck that he knew he did not have permission to take them from, he sold them. It cannot be said that the evidence was insufficient to show he knowingly sold stolen property.

IV. CONCLUSION

For the foregoing reasons, Maxwell's conviction and sentence should be affirmed.

DATED August 23, 2012.

Respectfully submitted,

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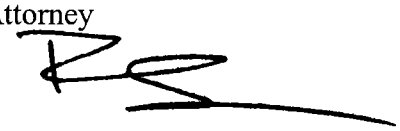

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