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Court of Appeals
Division III
State of Washington

31847-8-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

ANATOLIY MELNIK, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF BENTON COUNTY

APPELLANT'S BRIEF

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A. ASSIGNMENTS OF ERROR

1. The evidence was insufficient to support the conviction.

2. The court erred in giving Instruction Number 14:

> Any person who finds property that is not unlawful to possess, the owner of which is unknown, and who wishes to claim the found property, shall:
>
> (A) within seven days of the finding acquire a signed statement setting forth an appraisal of the current market value of the property prepared by a qualified person engaged in buying or selling like items or by a district court judge unless the property found is cash, and
>
> (B) within seven days report the finding of the property and surrender, if requested, the property or a copy of the evidence of the value of the property to the chief law enforcement officer or his or her designated representative of the governmental entity where the property was found and serve written notice upon the officer of the finder's intent to claim the property if the owner does not make out his or her right to it under RCW Chapter -- well, the appropriate RCW.
>
> Now (2) within 30 days the report the governmental entity shall cause notice of the finding to be published at least once a week for two successive weeks in a newspaper of general circulation in the county where the property was found unless the appraised value of the property is less than the cost of publishing notice. If the value is less than the cost of publishing notice, the governmental entity may cause notice to be posted or published in other media or formats that do not incur expense to the governmental entity.

(RP 279-80)

B. ISSUES

1. Absent any evidence connecting the defendant with the theft of the stolen jewelry, is evidence the defendant sought to sell the property the day after the theft sufficient to permit any rational trier of fact to conclude beyond a reasonable doubt that the defendant knew the property was stolen?

2. Absent any evidence connecting the defendant with the theft of the stolen jewelry, does a jury instruction restating the statute governing claiming found property, which includes provisions requiring the finder, to report the finding and surrender the property within 7 days, improperly shift the burden of proof to the defense in violation of due process?

C. STATEMENT OF THE CASE

In sooth, I know not why I am so sad.
It wearies me; you say it wearies you;
But how I caught it, found it, or came by it,
What stuff 'tis made of, whereof it is born,
I am to learn;
And such a want-wit sadness makes of me
That I have much ado to know myself.

(Shakespeare, The Merchant of Venice act 1, sc. 1)

On Sunday, January 13th, Tiffany Glassick came home from church to find her home had been burglarized. (RP 82) She called the police. (RP 92) She

reported that numerous small items of gold jewelry had been stolen, including an engagement ring with a very large diamond. (RP 89-92)

About 24 hours later, Anatoliy Melnik entered Money Tree and asked what he would be given in payment for numerous small gold items of jewelry, one of which was an engagement ring containing what appeared to be a large diamond. (RP 171) The Money Tree lender told Mr. Melnik he would not be paid for the diamond, but ultimately paid him for the weight of gold. (RP 172, 188-93)

On the evening of January 16, Mr. Melnik approached an employee at Ace Pawn and offered to sell him the alleged diamond. (RP 143) The clerk became suspicious and notified the police of his suspicion. (RP 146) The pawnshop staff retained possession of the diamond. (RP 149)

The State charged Mr. Melnik with two counts of trafficking in stolen property. (CP 1-2) Police detective John Davis testified that while Mr. Melnik was in jail he placed telephone calls to a female named Brooke. (RP 250) Officer Davis listened to the conversations, and told the jury that he heard Mr. Melnik describe in detail his finding a bag of jewelry in a park in Pasco. (RP 251) Mr. Melnik did not testify.

The State proposed, and the court gave, a jury instruction relating to a civil procedure for claiming found property:

> Instruction Number 14:
>
> Any person who finds property that is not unlawful to possess, the owner of which is unknown, and who wishes to claim the found property, shall (A) within seven days of the finding acquire a signed statement setting forth an appraisal of the current market value of the property prepared by a qualified person engaged in buying or selling like items or by a district court judge unless the property found is cash, and
>
> (B) within seven days report the finding of the property and surrender, if requested, the property or a copy of the evidence of the value of the property to the chief law enforcement officer or his or her designated representative of the governmental entity where the property was found and serve written notice upon the officer of the finder's intent to claim the property if the owner does not make out his or her right to it under RCW Chapter -- well, the appropriate RCW.
>
> Now (2) within 30 days the report the governmental entity shall cause notice of the finding to be published at least once a week for two successive weeks in a newspaper of general circulation in the county where the property was found unless the appraised value of the property is less than the cost of publishing notice. If the value is less than the cost of publishing notice, the governmental entity may cause notice to be posted or published in other media or formats that do not incur expense to the governmental entity.

(RP 279-80)

During closing argument, the prosecutor suggested to the jury that, even if at the time he attempted to sell it, Mr. Melnik believed the jewelry had been lost this would be sufficient evidence that he acted with knowledge that the property was stolen:

> What that tells you is that failure to know a law is not a defense to breaking a law. So, if the defendant wants to argue, "Well, I didn’t

> know I couldn't sell property that was lost the next day after I found it, that's not a defense to trafficking in stolen property. What knowingly is about in this case is, knowingly is that you knew of a fact or circumstance when you were committing the act.

(RP 287)

> In this case, the law of the case in Instruction Ten says theft means something very specific, and in this case it means either to wrongfully obtain property with the intent to keep it away from the real owner, but also to appropriate lost or misdelivered property with the intent to keep it from the true owner, and that is one scenario that you could believe happened in this case.

(RP 292) In making this argument, the State relied, in part, on the provisions of RCW 63.21.010, contained in Instruction Number 14, relating to reporting and turning over found property:

> So, if you believe his jail phone calls and just thought it was lost property, he knew by his very actions he had stolen property when he went to sell it at Money Tree and at Ace Pawn. That's the state of the law. That property is stolen by his actions of not reporting it or turning it over.

(RP 301)

The jury found Mr. Melnik guilty on both counts. (CP 60-61) The court imposed exceptional concurrent sentences of 100 months for each count based on Mr. Melnik's offender score of ten. The top of the standard range for each offense was 63–84 months. (CP 64, 67)

D. ARGUMENT

1. THE EVIDENCE WAS INSUFFICIENT TO PROVE BEYOND REASONABLE DOUBT THAT MR. MELNIK KNEW THE JEWELRY WAS STOLEN.

The State's evidence was insufficient to permit any rationl trier of fact to find beyond a reasonable that Mr. Melnik knew the jewelry was stolen.

The essential elements of trafficking in stolen property are established by statute:

> (1) 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.
> (2) Trafficking in stolen property in the first degree is a class B felony.

RCWA 9A.82.050[1].

The test for sufficiency is whether, viewing the evidence in a light most favorable to the State, any rational trier of fact could have found each essential element of the charge beyond a reasonable doubt. *State v. Salinas,* 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Salinas,* 119 Wn.2d at 201. A reviewing court neither weighs the

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[1] (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.

RCWA 9A.82.010.

evidence nor needs to be convinced that it established guilt beyond a reasonable doubt. *State v. Green,* 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

Circumstantial evidence and direct evidence are equally reliable, *State v. Delmarter,* 94 Wn.2d 634, 638, 618 P.2d 99 (1980), and we must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Camarillo,* 115 Wn.2d 60, 71, 794 P.2d 850 (1990); *State v. Walton,* 64 Wn. App. 410, 415–16, 824 P.2d 533 (1992).

State v. Killingsworth, 166 Wn. App. 283, 286-87, 269 P.3d 1064, 1067 (2012) *review denied*, 174 Wn.2d 1007, 278 P.3d 1112 (2012). A conviction will not be overturned unless there is no substantial evidence to support it. *Lamborn v. Phillips Pac. Chem. Co.,* 89 Wn.2d 701, 709–10, 575 P.2d 215 (1978).

The elements are further defined by statute: "Stolen property is defined as 'property that has been obtained by theft, robbery, or extortion.' RCW 9A.82.010(9)." *State v. Michielli*, 132 Wn.2d 229, 235, 937 P.2d 587 (1997).

> (1) "Theft" means:
> (a) To wrongfully obtain or exert unauthorized control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services; or
> (b) By color or aid of deception to obtain control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services; or

> (c) To *appropriate lost or misdelivered property* or services of another, or the value thereof, with intent to deprive him or her of such property or services.

RCWA 9A.56.020 (emphasis added)

Knowledge that the trafficked property is stolen is an essential element of the offense. RCWA 9A.82.050; *State v. Killingsworth*, 166 Wn. App. at 287-88.

The jury instruction provided a definition of the concept of acting knowingly:

> A person knows or acts knowingly or with knowledge with respect to a fact or circumstance when he or she is aware of that fact or circumstance. It is not necessary that the person know that the fact or circumstance is defined by law as being unlawful or an element of a crime.
>
> If a person has information that would lead a reasonable person in the same situation to believe that a fact exists, the jury is permitted but not required to find that he or she acted with knowledge of that fact.
>
> When acting knowingly as to a particular fact is required to establish an element of a crime, the element is also established if a person acts intentionally as to that fact.

(CP 48)

In *Killingsworth*, *supra.*, substantial evidence that the defendant was closely tied to the events that occurred during and after the time the property was stolen supported the inference that he knew it was stolen:

> The two people seen near the Jetta before it was stolen fled in the direction of Killingsworths house. The Haggen's store video tied Killingsworth to the receipt found inside the Jetta and the Haggen's bag and beer can found next to it. The car was heavily

> damaged and abandoned in a field only a few blocks from Killingsworth's house. Viewed in a light most favorable to the State, this evidence supports inferences that Killingsworth was in the car sometime after 12:40 and was still in it when it was abandoned. Considering the condition of the car and its abandonment in a field, the jury could also infer that Killingsworth knew the car and its contents were stolen. The evidence was thus sufficient to support the knowledge element of the offense.

State v. Killingsworth, 166 Wn. App. at 287-88. No evidence in the present case connects Mr. Melnik with the theft of Ms. Glassick's jewelry. The property was not identified as belonging to any particular person or persons, the quantity was rather small, and the value of the property was not immediately apparent. (*See* RP 133)

The State argued, and the jury may have concluded, that Mr. Melnik's mere possession of the property, perhaps along with his failure to report it as found property pursuant to statute, supported the inference that he knew is was stolen. This theory would rely in part on a misapprehension of the meaning of the term "appropriate" used in the definition of theft. Mere possession of lost or mislaid property is insufficient to establish theft by misappropriation:

> (2) "Appropriate lost or misdelivered property or services" means obtaining or exerting control over the property or services of another which the actor *knows to have been lost or mislaid*, or to have been delivered under a mistake as to identity of the recipient or as to the nature or amount of the property;

RCWA 9A.56.010. (emphasis added) No evidence supports the inference that Mr. Melnik knew the found property had been lost or mislaid. There is, indeed,

no evidence as to any facts known to Mr. Melnik respecting the identity of the owner of the property or how the property came into Mr. Melnik's possession. No rational trier of fact could find beyond reasonable doubt that Mr. Melnik knew the jewelry had been stolen.

SHIFTING BURDEN OF PROOF

The court's jury instruction, in the language of RCW 63.21.010, could be understood by a jury to shift the burden of proof to Mr. Melnik to show that he did not know the jewelry was stolen.

Ordinarily, failure to object to a proposed jury instruction bars review. *State v. Scott,* 110 Wn.2d 682, 686, 757 P.2d 492 (1988). "But a party may raise a manifest error of constitutional magnitude for the first time on appeal. RAP 2.5(a)(3)." *State v. Jensen*, 149 Wn. App. 393, 398, 203 P.3d 393, 395 (2009). An instruction that could reasonably be understood as shifting the burden of proof to the defendant on an element of the offense is unconstitutional. *Francis v. Franklin,* 471 U.S. 307, 313, 105 S. Ct. 1965, 1970, 85 L. Ed. 2d 344 (1985); *In re Winship,* 397 U.S. 358, 364, 90 S. Ct. 1068, 1072, 25 L. Ed. 2d 368 (1970); *see State v. Hanna*, 123 Wn.2d 704, 710, 871 P.2d 135, 138 (1994).

Alleged errors of law in a trial court's jury instructions are reviewed *de novo*. *State v. Porter,* 150 Wn.2d 732, 735, 82 P.3d 234 (2004); *State v. Brown,* 132 Wn.2d 529, 605, 940 P.2d 546 (1997), *cert. denied,* 523 U.S. 1007, 118 S. Ct. 1192, 140 L. Ed. 2d 322 (1998).

It is insufficient that a jury instruction is an accurate statement of the law; the law must be applicable to the facts of the case, and may not serve to shift the burden of proof to the defendant in a criminal case:

> The jury instructions, taken in their entirety, must inform the jury that the State bears the burden of proving every essential element of a criminal offense beyond a reasonable doubt. *State v. Pirtle,* 127 Wash.2d 628, 656, 904 P.2d 245 (1995), *cert. denied,* 518 U.S. 1026, 116 S.Ct. 2568, 135 L.Ed.2d 1084 (1996) (citing *In re Winship,* 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970)). And the instruction must state the applicable law correctly; it is an error to give an instruction the evidence does not support. *State v. Benn,* 120 Wash.2d 631, 654, 845 P.2d 289, *cert. denied,* 510 U.S. 944, 114 S.Ct. 382, 126 L.Ed.2d 331 (1993).

State v. Jensen, 149 Wn. App. at 398-99.

The court's instruction setting forth in detail the procedure for establishing a civil claim to found property was not supported by any evidence. No evidence indicated Mr. Melnik attempted to assert any claim to the property under the provisions of RCW 63.21.010. The statute itself imposes no criminal liability for failing to report or surrender found property. Any implied duty to follow the procedures described in the statute is, by the terms of the statute itself, voluntary on the part of a person wishing to establish a legally defensible claim to the property against other claimants.

Nevertheless, the State sought to use the instruction to support an inference that Mr. Melnik had a duty to follow the procedures described in the statute upon coming into possession of any property not belonging to himself,

such that his failure to do so was evidence that he knew the property to be stolen or that he had misappropriated the property without regard to whether it was stolen.

Particularly in light of the prosecutor's closing arguments, the instruction could "reasonably be understood as shifting the burden of proof to the defendant" on an element of the offense, namely whether he knew the property was stolen. 471 U.S. at 313.

Jury instruction errors are reviewed for constitutional harmless error. *State v. Berube,* 150 Wn.2d 498, 505, 79 P.3d 1144 (2003). A constitutional error is harmless if it appears "beyond a reasonable doubt that the error did not contribute to the ultimate verdict." *Berube, supra.*

Evidence Mr. Melnik knew the jewelry was stolen was virtually non-existent and even if this court were inclined to defer to the jury's determination as to the inferences to be drawn from the evidence, such as it was, in light of the minimal nature of the evidence the giving of the constitutionally prohibited jury instruction cannot be deemed harmless.

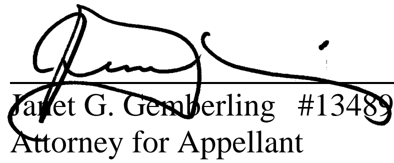
E. CONCLUSION

The evidence was insufficient to support the convictions; they should be reversed and the charges dismissed.

Alternatively, the verdicts were the product of an improper instruction tending to shift the burden of proof to the defendant. The convictions should be reversed and the matter remanded for a new trial.

Dated this 10th day of March, 2014.

JANET GEMBERLING, P.S.



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION III

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	No. 31847-8-III
	)	
vs.	)	CERTIFICATE
	)	OF MAILING
ANATOLIY MELNIK,	)	
	)	
Appellant.	)	

I certify under penalty of perjury under the laws of the State of Washington that on March 10, 2014, I served a copy of the Appellant's Brief in this matter by email on the following party, receipt confirmed, pursuant to the parties' agreement:

Andrew Miller
prosecuting@co.benton.wa.us

I certify under penalty of perjury under the laws of the State of Washington that on March 10, 2014, I mailed a copy of the Appellant's Brief in this matter to:

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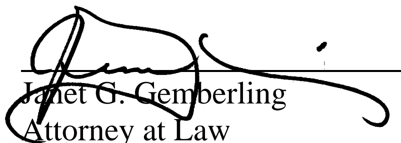
Signed at Spokane, Washington on March 10, 2014.



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