No. 31698-0

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

STEVEN LEE SMITH, Appellant

APPEAL FROM THE SUPERIOR COURT

OF KLICKITAT COUNTY

REPLY BRIEF OF APPELLANT

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I. STATEMENT OF FACTS

Appellant stands on the facts presented in the opening brief and adds the following.

In the context of a pretrial ER 404(b) hearing, defense counsel raised the issue for the court that the corpus delicti of the charge of possession of a stolen firearm (the High Point model rifle) had not been established. (RP 63-64). Counsel argued there was no evidence the firearm in question was a stolen firearm; there had been no discovery of a stolen firearm police report, and no disclosure of any information about a possible rightful owner. *Id.* Counsel did not specifically object to introduction of the firearm as an exhibit at trial, but did object to admission of witness statements about the firearm and officer testimony as to the contents of the undisclosed police report information. (RP 66;88). The court allowed all the statements to be admitted at trial. (RP 71-72).

II. ARGUMENT

The Evidence Was Insufficient To Sustain A Conviction For Possession Of A Stolen Firearm.

Appellant stands on the facts and authority presented in the opening brief, incorporating by reference the arguments from the opening brief.

Mr. Smith was charged with possession of a stolen firearm, specifically a High Point model 995 rifle, serial number B99280. The State's basis for this charge was the report of a stolen firearm given to the Goldendale police department on January 2, 2013. Mr. Smith was found in possession of a High Point rifle in February 2013, and the charge was added on March 18, 2013. (CP 38).

To sustain the conviction, the State was required to prove beyond a reasonable doubt that Mr. Smith possessed a stolen firearm, knowing it was stolen. RCW 9A.56.310. It is axiomatic the State must present evidence the firearm was, in fact, stolen. *State v. McPhee,* 156 Wn.App. 44, 61, 230 P.3d 284 (2010). Due process requires the State must prove every element of a crime beyond a reasonable doubt. *State v. Green,* 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). Mr. Smith contends the State did not meet this heavy burden.

In its response brief, the State has asserted that it "was not required to prove that the High Point rifle in the courtroom was the same High Point rifle stolen on Christmas Eve, a point the State impressed upon the jury during closing argument." (Br. of Resp. at 8).[1] In closing argument, however, the State specifically argued:

> 'It's not beyond us to prove beyond a reasonable doubt that this gun –This is the gun that we are alleging was stolen – that this particular gun is the gun that was the subject of Lt. Bartowski's report. State believes that it is highly -that there's a lot of circumstantial that it is. We do not have a serial number in that report to match this gun, to show that it was stolen. And we're not pretending that we do. But what you do have about this particular firearm is that it was reported – there was a firearm reported stolen on Christmas Eve. This particular firearm was recovered on February 5th. That ties the two of them into time and place – in Goldendale." (RP 308).

The State's case for this count was premised on the police report. As argued in appellant's opening brief, there was no objective evidence to show that the firearm reported stolen was the

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[1] It has cited to a concurring opinion in *State v. Haddock*, 141 Wn.2d 103, 116, 3 P.3d 733 (2000), as authority that it need not allege or prove who owned the alleged stolen property, but only that the firearm at issue was stolen. (Br. of Resp. at 8). Aside from the fact that a concurring opinion does not have weight, the issue in *Haddock* was whether certain acts constituted the same course of criminal conduct for purposes of determining an offender score, not the State's burden of proof in a possession of a stolen firearm matter. *Haddock,* 141 Wn.2d 103.

same firearm found in Mr. Smith's possession: no identifying serial number, no admitted police report, no testimony by the purported owner of the weapon. The rifle was not identified as a stolen rifle nor could it be proved stolen as required under Washington case law. (*See State v. Morgan,* 3 Wn.App. 470, 471, 475 P.2d 923 (1970); *State v. Helms,* 77 Wn.2d 89, 459 P.2d 392 (1969); *State v. Hayes,* 3 Wn.App. 544, 475 P.2d 885 (1970); *State v. Withers,* 8 Wn.App. 123, 124, 504 P.2d 1151 (1972). It was nothing more than conjecture and speculation that the firearm found in Mr. Smith's vehicle was the same firearm reported stolen a month earlier. The existence of a fact cannot rest upon guess, speculation or conjecture by the jury. *State v. Hutton,* 7 Wn.App. 726, 728, 502 P.2d 1037 (1972).

Acknowledging the scant and weak evidence, the State argues the jury could somehow permissibly infer that the particular gun was stolen and Mr. Smith knew it was stolen, even if it was *not* the same firearm reported stolen. (Br. of Resp. at 9-10). However, the record shows that Mr. Smith had six guns in his home and one in his car. Only the High Point rifle was singled out and charged as a stolen firearm and that was because of the police report. .

Evidence is insufficient if the inferences drawn from it do not establish the requisite facts beyond a reasonable doubt. *State v. Baeza,* 100 Wn.2d 487, 491, 670 P.2d 646 (1983). The State did not present sufficient evidence for a rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas,* 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

The conviction is not supported by substantial evidence, that is evidence sufficient to persuade "an unprejudiced thinking mind of the truth of the fact to which the evidence is directed." *State v. Taplin,* 9 Wn.App. 545, 513, P.2d 549 (1973),(quoting *State v. Collins,* 2 Wn.Ap. 757, 759, 470 P.2d 227 (1970)).

The evidence here was insufficient to sustain the conviction and the remedy is dismissal with prejudice. *State v. DeVries,* 149 Wn.2d 842, 853, 72 P.3d 748 (2003).

III. CONCLUSION

Based on the foregoing facts and authorities, Mr. Smith respectfully asks this Court to reverse his conviction for possession of a stolen firearm and dismiss with prejudice. In the alternative, he asks this Court to reverse and remand for a new trial because the Court violated ER 404(b) and Mr. Smith was unfairly convicted.

Respectfully submitted this 4th day of March, 2014.

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CERTIFICATE OF SERVICE

(RAP 18.5(b)).

I, Marie Trombley, do hereby certify under penalty of perjury that on March 4, 2014, I mailed to the following by US Postal Service, first class mail, a postage prepaid, or emailed by prior agreement (as indicated) a true and correct copy of the Reply Brief of Appellant:

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