

No. 68251-2-I

IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

SPENCER THOMAS SANDBERG, JR.,

Appellant.

FILED
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CLERK OF COURT
STATE OF WASHINGTON

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Laura Gene Middaugh

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in admitting evidence of value of stolen items without sufficient foundation.

2. The evidence was insufficient to prove value beyond a reasonable doubt, as required to support Sandberg's conviction for theft in the first degree.

B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

In Washington, where the State charges an individual with theft and the degree of the offense depends upon the value of the items stolen, the State bears the burden of establishing the "fair market value" of the stolen items. "Fair market value" is "the price which a well-informed buyer would pay to a well-informed seller, where neither is obliged to enter into the transaction," and is not the value to any particular person, but rather is determined based on an objective standard. Where the State's sole proof of "fair market value" was the prices similar items commanded on online auction and sales sites such as eBay, Craigslist, and Amazon, did the trial court err in finding the evidence admissible to prove "fair market value?" Was the evidence

otherwise insufficient to prove the aggregate value of the stolen items was \$5,000 or more?

C. STATEMENT OF THE CASE

Rita Sodt and Jon Hansen lived together in an apartment in Ravenna, in Seattle. RP 261-62.¹ Sometime on July 13, 2010, when Hansen was out of town and Sodt was out of the apartment, the apartment was burglarized. RP 263, 269-77. Among the items stolen were a MacBook Pro, two cameras, an external hard drive, two trombones, a ukulele, a dynamic microphone and headphones, an effects board, a pearl necklace, and some other jewelry. RP 272-74, 278.

Based upon a fingerprint found on the interior windowsill of Sodt and Hansen's bedroom, appellant Spencer Sandberg was charged by amended information with one count of residential burglary and one count of theft in the first degree. RP 464-67; CP 27-28.

At trial, the State principally adduced evidence of the value of the stolen items from Hansen. Hansen testified that

¹ Hearings on multiple dates are contained in four consecutively paginated volumes of transcripts. They are referenced herein as "RP" followed by page number.

to determine value, he “looked on Craig’s List [sic] for the most part.” RP 355. Hansen explained that Craigslist was “an online way to sell, buy, uhm, used things, I guess – or not used things, but things people have.” Id.

He testified that on the day it was taken, his valve trombone was worth “probably about \$1200.” RP 357. He did not explain the basis for this valuation. He priced the other trombone by looking at “similar types of trombones, like, combination trombones for sale on eBay and Craig’s List [sic].” Id.

In order to ascertain the value of the ukulele, Hansen considered the price they paid for it (\$175) and “looked at – at prices of used and slightly used ukuleles on Craig’s List [sic].” RP 358. Sandberg objected to this testimony, but the court overruled the objection, on the basis that “Craig’s List [sic] is a way that people are selling things . . . It does indicate the price that things are being sold for out there, and . . . I don’t know how else you establish that.” RP 359-63.

Sandberg maintained, “Craig’s List [sic] is not a regulated marketplace. Just because someone is selling something doesn’t mean someone else is . . . willing to buy it for that price.” RP 364. The court ruled that with respect to the musical instruments, given that Hansen knew how much he had paid for the items and could assess the decrease in their value, the testimony would be permitted. Id.

Hansen was subsequently permitted to testify that the “sonic maximizer” was worth \$75 based upon research he conducted on Craigslist, that the microphone was worth \$50 because Hansen “was looking at microphones at the time” and that the headphones were “worth about \$75.” RP 380-83. Hansen likewise testified that the MacBook Pro was worth \$1300 based upon research conducted on “Amazon and Craigslist . . . and eBay probably.” RP 388-90.

Sodt testified that she was “advised to look on Craigslist and eBay” to determine the fair market value of the cameras and computer. RP 426. Sodt said the “list price” for a camera similar to a single-lens reflex camera that was stolen was “\$500.” RP 427. She did not specify whether

she saw this price on Craigslist or eBay. She testified that she was unable to find a listing for her point-and-shoot camera, but that she saw a listing for a camera with higher megapixels for \$175. Id. She again did not specify where she saw this listing. She claimed that the fair market value for the MacBook Pro was \$1300, stating, "There were some listed for that much." RP 428. The ukulele and case Sodt estimated at \$175, based upon similar internet research. RP 432-33.

Sodt had never had the pearl necklace appraised. Nevertheless, she estimated the necklace was worth \$500 based upon research she conducted on Amazon. RP 431, 435. She said she had "about six" pairs of earrings that were stolen that her family had purchased for her at a wholesale price of about \$50 each. RP 431.

A jury convicted Sandberg of both counts as charged. CP 29. Sandberg appeals. CP 310-19.

D. ARGUMENT

The trial court improperly admitted evidence of prices from internet auction sites to prove the “fair market value” of stolen items.

1. The State must present competent evidence of fair market value to support a conviction for theft in the first degree.

According to RCW 9A.56.030, a person is guilty of theft in the first degree if she takes “[p]roperty or services which exceed(s) five thousand dollars in value.” RCW 9A.56.030(1)(a). For purposes of this offense, “[v]alue’ means the market value of the property or services at the time and in the approximate area of the criminal act.” RCW 9A.56.010(21)(a). In Washington, “market value” means “the price which a well-informed buyer would pay to a well-informed seller, where neither is obliged to enter into the transaction.” State v. Kleist, 126 Wn.2d 432, 435, 895 P.2d 398 (1995). Market value “is based not on the value to any particular person, but rather on an objective standard.” State v. Shaw, 120 Wn. App. 847, 850, 86 P.3d 823 (2004) (citing Kleist, 126 Wn.2d at 438).

Washington courts have narrowly construed the requirement of proof of “fair market value.” In State v. Morley, 119 Wn. App. 939, 83 P.3d 1023 (2004), a case involving theft of used generators where the State relied on the retail price to establish the “fair market value,” the court cautioned that the depreciation of property must be considered according to a reliable calculus:

[T]he jury must consider any *depreciation* of the property in the hands of the owner, including any change in its condition. If the property stolen was not being held for sale, but was merely property in the possession or for the use of an individual owner, it may still have a market value if *sales of such used property* occur “with some regularity and uniformity.” ...

Morley, 119 Wn. App. at 943 (emphasis in original) (quoting 6 NY Prac. Crim. Law §12:13 (2003)).

2. Prices from on-line auction websites do not establish fair market value.

Sodt and Hansen determined the fair market value of the items that were stolen in the burglary based almost exclusively on research they conducted on eBay, Craigslist, and Amazon. However almost no testimony was presented regarding how these websites function. Hansen testified to a

very brief description of Craigslist (“an online way to sell, buy, uhm, used things, I guess – or not used things, but things people have,” CP 355), but offered no explanation of either eBay or Amazon. There was no explanation of how prices are determined on these websites, whether the prices listed on Craigslist, eBay, and Amazon are representative of prices in regulated marketplaces, or whether sales of the items that were stolen, for the prices that were listed, occur with sufficient “regularity and uniformity” to establish a reliable measure of “fair market value.” Indeed, there was no testimony as to whether the prices that are listed are the prices for which the items are in fact sold, nor was there testimony, with regard to the eBay listings, whether the prices were auction prices or “Buy it Now” listings.

In order to convict Sandberg of first degree theft, the State had to present evidence that the aggregate value of the items that were stolen exceeded \$5,000. RCW 9A.56.030(1)(a). The State’s submission of pricing evidence from Craigslist, eBay, and Amazon, without further

foundation or explanation, was insufficient to establish fair market value.

No Washington case has considered the question whether prices obtained from online auction websites are admissible to establish fair market value. However a number of Washington decisions are instructive on the issue. In Kleist, the Supreme Court refused to accept the proposition that “price tags are subject to judicial notice ‘of the fact that price tags on retail clothing generally reflect the market value of the clothing.’” Kleist, 126 Wn.2d at 435. The Court admonished, “judicial notice is inappropriate where the accuracy of the source is reasonably questioned.” Id. at 436.

In Shaw, this Court found that the use of the Kelley Blue Book valuation of a used car was appropriate to establish its market value but, importantly, a sufficient foundation was laid to establish the accuracy and uniformity of the pricing information, so the Court concluded the Kelley Blue Book fell within the “market reports” exception to ER

803(17).² Shaw, 150 Wn. App. at 850-51. In contrast to this case, the detective in Shaw “itemized the information the system requires to estimate a car's value: odometer reading, general condition of car, options, year, make, and model,” and testified that the Kelley Blue Book

is the most definitive and most widely used estimate of car values. When you buy a used car and apply for a loan banks generally use Kelley Blue Book value to establish the amount of loan, interest rate and that type of thing. Based on the history of the Kelley Blue Book and the amount of information available, the amount of information they require to make the estimate of the value, I believe is the most accurate.

Id. at 851.

Other jurisdictions that have considered the question whether pricing information from sites such as eBay, Craigslist, and Amazon may be offered to show fair market value generally decline to find the evidence admissible for this purpose, or restrict the bases upon which such evidence may be used. See e.g. United States v. Reinhard, 407 Fed.

² To satisfy this exception, the references must be “[m]arket quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.” ER 803(17).

Appx. 389 (11th Cir. 2011)³ (commenting, “although auction prices are often good indicators of market value, Reinhard sold the work at issue here online, through eBay,” and finding formal appraisals superior measures of fair market value) Brody v. Village of Port Chester, 2008 WL 3398111, S.D. N.Y. (2008) (landowner not entitled to compensation for property allegedly in buildings demolished by village where the sole evidence of value was “quotes from eBay or other suppliers”); In re Seaton, 462 B.R. 562 (Bkrtcy. E.D. Va., 2011) (insufficient evidence of fair market value presented where debtor testified to “Buy it Now” prices but did not supply evidence such as the date of acquisition, the condition, or the original cost of the items); Spartech Polycom, Inc., v. City of St. Clair, 2011 WL 801986 (Mich. App. 2011)⁴ (noting statutory restrictions against using auction prices to determine an item’s market value; finding

³ According to Fed. R. App. Proc. 32.1, a court “may not prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written dispositions” (a) that have been designated as unpublished, not for publication, and the like, and (b) issued after January 1, 2007.

⁴ In Michigan, unreported decisions are not precedential, but may be cited so long as a copy of the decision is provided to the court and parties. Mich. Court Rule 7.215(C)(1). A copy of the decision cited in this brief is attached as an Appendix.

testimony regarding eBay prices competent because witness testified he relied solely on “Buy it Now” prices).

Again, in this case, the State’s witnesses did not specify whether the prices they found on eBay were “Buy it Now” prices or auction prices. They did not indicate whether the prices they found on Craigslist and Amazon were in fact the prices for which the items sold, nor did they show that the prices were based upon an objective standard, rather than the valuation placed by one specific person on the items. In short, the bare bones foundation laid by the State for the introduction of the price information on Craigslist, Amazon, and eBay was insufficient to support admission of the evidence. This Court should conclude that the trial court erred in admitting the pricing evidence.

3. The evidence was otherwise insufficient to prove that the items taken had a value of more than \$5,000.

When the sufficiency of the evidence is challenged, the court must view the evidence in the light most favorable to the prosecution and decide whether any rational trier of fact could have found the elements of the crime beyond a

reasonable doubt. State v Green, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980) . A claim of insufficiency admits the truth of the State's evidence and all inferences that can reasonably be drawn therefrom. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Where a conviction is supported by insufficient evidence, it must be reversed and dismissed. Burks v. United States, 437 U.S. 1, 11, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978).

Assuming without conceding that the State laid sufficient foundation for the evidence of the fair market value of the stolen trombones, in light of Hansen's familiarity with the instruments and their valuation, the remaining items were priced based solely on Hansen and Sodt's "research" on eBay, Craigslist, and Amazon. The State thus failed to present sufficient evidence to prove the fair market value of the remainder of the stolen items. Sandberg's conviction should be reversed and dismissed.

E. CONCLUSION

This Court should conclude the trial court improperly permitted the State to prove “fair market value” by introducing pricing information from online sales and auction sites that were not shown to be reliable or accurate sources. This Court should further conclude that because of the deficiency in the State’s proof of value, the State did not prove the essential elements of theft in the first degree. Sandberg’s conviction for theft in the first degree should be reversed and dismissed.

DATED this 25th day of July, 2012.

Respectfully submitted:

 # 39042 for

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APPENDIX

Not Reported in N.W.2d, 2011 WL 801986 (Mich.App.)
(Cite as: 2011 WL 801986 (Mich.App.))

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT
RULES BEFORE CITING.

UNPUBLISHED

Court of Appeals of Michigan.
SPARTECH POLYCOM, INC., Petitioner–Appellee,
v.
CITY OF ST. CLAIR, Respondent–Appellant.

Docket No. 295334.
March 8, 2011.

Tax Tribunal; LC No. 00–329583.

Before: FITZGERALD, P.J., and O'CONNELL and
METER, JJ.

PER CURIAM.

*1 Respondent City of St. Clair (“the city”) appeals as of right from a decision of the Michigan Tax Tribunal holding that petitioner's personal property be valued at the amounts proposed by petitioner's expert witness. The city argues on appeal that the expert's methodology was flawed and violated statutory restrictions. We affirm.

Petitioner manufactures plastic pellets that are sold to other manufacturers, often in the auto industry. Following an audit by Tax Management Associates, the State Tax Commission (STC) made a determination of valuation of petitioner's personal property for the tax years 2003, 2004, and 2005 that was adopted by the city. The STC retroactively increased the assessed and taxable values against petitioner for tax years 2003, 2004, and 2005. Petitioner timely appealed the STC order to the tax tribunal, along with valuations for tax years 2007 and 2008, but not 2006.

Petitioner supported its claims of lower true cash value by the testimony of personal property appraiser J. Michael Clarkson. Clarkson testified that in valuing petitioner's personal property he first inspected the plant inside and out, listing each piece of property and the date petitioner acquired the property. Clarkson

appraised all but a few pieces of equipment using a market comparison approach, which compares the appraised property to the prices paid for similar items in the current market. Clarkson testified that he relies heavily on the internet to find these prices. Clarkson generally relies on large websites like eBay or a conglomeration of market sellers. When using eBay, Clarkson looks at the “Buy It Now” price, rather than the auction price. Clarkson explained that the Buy It Now price is the price for which the seller would be willing to immediately part with the product. Clarkson acknowledged that he did not know if there were enforcement mechanisms attached to a Buy It Now price. At the close of the trial, the tribunal concluded that petitioner's valuations based on the eBay Buy It Now prices were sufficiently reliable.

The city argues on appeal that the method used by Clarkson does not meet the requirements of MCL 211.27 in determining true cash value. The city also argues that Clarkson did not demonstrate that he could verify a single sale that occurred through the use of eBay and that he failed to consider the impact of freight, taxes, and installation on the value of the property. Finally, the city argues that the tribunal failed to note that STC multiplier tables are to be used unless there is overwhelming evidence of a different market value.

The standard of review for Tax Tribunal cases is multifaceted. Where fraud is not claimed, this Court reviews the tribunal's decision for misapplication of the law or adoption of a wrong principle. We deem the tribunal's factual findings conclusive if they are supported by “competent, material, and substantial evidence on the whole record.” But when statutory interpretation is involved, this Court reviews the tribunal's decision de novo. [Wexford Med. Group v. City of Cadillac, 474 Mich. 192, 201, 713 N.W.2d 734 (2006) (citations omitted).]

*2 “Substantial evidence is the amount of evidence that a reasonable person would accept as being sufficient to support a conclusion; it may be substantially less than a preponderance of the evidence.” Wayne Co. v. Mich. State Tax Comm., 261 Mich.App. 174, 186–187, 682 N.W.2d 100 (2004).

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(Cite as: 2011 WL 801986 (Mich.App.))

This case revolves around the determination of the true cash value of petitioner's personal property, which is defined in the general property tax act, MCL 211.1 et seq. as follows:

As used in this act, "true cash value" means the usual selling price at the place where the property to which the term is applied is at the time of assessment, being the price that could be obtained for the property at private sale, and not at auction sale except as otherwise provided in this section, or at forced sale. The usual selling price may include sales at public auction held by a nongovernmental agency or person if those sales have become a common method of acquisition in the jurisdiction for the class of property being valued. The usual selling price does not include sales at public auction if the sale is part of a liquidation of the seller's assets in a bankruptcy proceeding or if the seller is unable to use common marketing technique to obtain the usual selling price for the property.... [MCL 211.27(1).]

True cash value is synonymous with "fair market value." Meadowlanes Ltd. Dividend Housing Ass'n. v. City of Holland, 437 Mich. 473, 484, 473 N.W.2d 636 n17; 437 Mich. 473, 473 N.W.2d 636 (1991). The burden of establishing the true cash value is on the petitioner. MCL 205.737(3).

The three most common approaches to valuation are the capitalization of income approach, the market approach, and the cost-less-depreciation approach. ^{FN1} Antisdale v. City of Galesburg, 420 Mich. 265, 276, 362 N.W.2d 632 (1984). "It is the duty of the tax tribunal to select the approach which provides the most accurate valuation under the circumstances of the individual case." Id. at 277, 362 N.W.2d 632. Variations on these approaches are acceptable if accurate and reasonably related to the fair market value of the property. Meadowlanes, 437 Mich. at 485, 473 N.W.2d 636. The tribunal is not bound to accept either party's theory of valuation, and has a duty to make an independent determination of true cash value. Great Lakes Div. of Nat'l. Steel Corp. v. City of Ecorse, 227 Mich.App. 379, 389-390, 576 N.W.2d 667 (1998).

^{FN1}. The STC multiplier tables are a form of the cost-less-depreciation approach.

The city contends that Clarkson's use of eBay

runs afoul of statutory restrictions against using auction prices to determine an item's market value. Under MCL 211.27, auction prices may only be used to determine the true cash value if auction sales "have become a "common method of acquisition" for that type of property in Michigan. The city asserts that there is no evidence that petitioner or any other company ever bought any machinery through eBay.

It is undisputed that Clarkson relied on the Buy It Now prices listed for the items, which he identified as the price for which the seller would be willing to immediately part with the item. The Buy It Now price is a fixed price set by the seller, not a price offered by prospective buyers participating in an auction.^{FN2} As for the city's assertion that a valuation based on the market approach must be supported by evidence of verified sales, respondent fails to identify any statute, case law, or administrative rule or regulation that requires such a showing. See Nat'l. Waterworks, Inc. v. Int'l. Fidelity & Surety, Ltd., 275 Mich.App. 256, 265, 739 N.W.2d 121 (2007). In fact, Antisdale suggests that offers for sale are sufficient. Antisdale, 420 Mich. at 277, 362 N.W.2d 632 n1 ("The market value of a given property is estimated by comparison with similar properties which have recently been sold or offered for sale in the open market.") (citation and internal quotation marks omitted). Further, Clarkson's report included actual listings for each item that he appraised.

^{FN2}. We note that one Buy It Now option available on eBay.com "[c]reate[s] a fixed price listing, with no bidding allowed." The other "[c]reate[s] an auction-style listing," and "buyers can choose whether to buy [the] item right away or compete in the auction." The second "Buy It Now price is available until someone bids on the item or the reserve price is met." Although the second option is an "auction-style listing," it still sets a fixed price above the reserve price that the seller has indicated will result in an immediate sale.

*3 The city also asserts that petitioner's valuation fails to account for freight, installation, and taxes associated with any sale. In Lionel Trains, Inc. v. Chesterfield Twp., 224 Mich.App. 350, 354-355, 568 N.W.2d 685 (1997), this Court concluded that installation, freight, and sales tax are appropriately included in true cash value unless there is evidence that such

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(Cite as: **2011 WL 801986 (Mich.App.)**)

costs are not part of the market. In this case, the tribunal specifically found adequate evidence that freight, installation, and taxes were not included in the market prices of the goods at issue, and under those conditions *Lionel Trains* did not foreclose the tribunal from excluding the additional charges. There is substantial evidence supporting this conclusion. *Wexford*, 474 Mich. at 201, 713 N.W.2d 734.

Lastly, the city claims that the tribunal failed to follow authority requiring it to use the STC's multiplier tables unless faced with overwhelming evidence of a different market value. The city cites several tribunal cases standing for this proposition; however, none of these cases are binding on this Court. *Catalina Marketing Sales Corp. v. Dep't. of Treasury*, 470 Mich. 13, 23, 678 N.W.2d 619 (2004). Moreover, the cases conflict with decisions published by our Supreme Court. In *Antisdale*, which predates any of the cases cited by the city, the Supreme Court required the tribunal to choose the valuation approach "which provides the most accurate valuation under the circumstances of the individual case." *Antisdale*, 420 Mich. at 277, 362 N.W.2d 632. This rule was echoed by the Court in *Meadowlanes*, 437 Mich. at 485, 473 N.W.2d 636. In neither case did the Court suggest that the STC multiplier tables enjoy any type of presumptive favor, let alone that another approach can only supplant the tables if supported by overwhelming evidence.

Affirmed.

Mich.App.,2011.
Spartech Polycom, Inc. v. City of St. Clair
Not Reported in N.W.2d, 2011 WL 801986
(Mich.App.)

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SPENCER SANDBERG,)	
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Appellant.)	

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STATE OF WASHINGTON

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