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COURT OF APPEALS

06 JUL 1986 AM 11:36  
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NO. 34161-1-II  
COURT OF APPEALS, DIVISION II

PM 6-5-06

STATE OF WASHINGTON,  
Respondent,

vs.

NATHAN W. HERMANN,  
Appellant,

APPEAL FROM THE SUPERIOR COURT  
FOR MASON COUNTY  
The Honorable James B. Sawyer II, Judge  
Cause No. 05-1-00202-6

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

01. The trial court erred in not taking count I, theft in the first degree, from the jury for lack of sufficiency of the evidence.
02. The trial court erred in improperly commenting on the evidence and thereby relieved the State of its burden of proving an essential element the crime of theft in the first degree beyond a reasonable doubt in violation of Washington Constitution Art. 4, Sec. 16 by court's instruction 21.
03. The trial court erred in permitting Hermann to be represented by counsel who provided ineffective assistance by failing to provide any authority when objecting to court's instruction 21.
04. The trial court erred in calculating Hermann's offender score.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

01. Whether the evidence is insufficient to establish the requisite value for a conviction for theft in the first degree? [Assignment of Error No. 1].
02. Whether the trial court erred in improperly commenting on the evidence and thereby relieved the State of its burden of proving an essential element the crime of theft in the first degree beyond a reasonable doubt in violation of Washington Constitution Art. 4, Sec. 16 by court's instruction 21? [Assignment of Error No. 2].

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03. Whether the trial court erred in permitting Hermann to be represented by counsel who provided ineffective assistance by failing to provide any authority when objecting to court's instruction 21. [Assignment of Error No.2].
04. Whether the trial court erred in calculating Hermann's offender score by including one point based on the State's contention that Hermann's was on community placement at the time of the current offense in violation of the Sixth Amendment requirement that a jury make the determination beyond a reasonable doubt? [Assignment of Error No. 4].

C. STATEMENT OF THE CASE

01. Procedural Facts

Nathan W. Hermann (Hermann) was charged by second amended information filed in Mason County Superior Court on November 2, 2005, with theft in the first degree, count I, and two counts of trafficking in stolen property in the first degree, counts II and III, contrary to RCWs 9A.56.030(1)(a), 9A.56.020(1)(a) and 9A.82.050. [CP 56-57].

No pre-trial motions were filed nor heard regarding either a CrR 3.5 or CrR 3.6 hearing. Trial to a jury commenced on November 1, 2005,

the Honorable James B. Sawyer II presiding.<sup>1</sup> Neither exceptions nor objections were taken to the jury instructions. [RP 06/06/05 64-65].

The jury returned verdicts of guilty as charged, Hermann was sentenced within his standard range and timely notice of this appeal followed. [CP 1-3, 11-20, 23-24, 26].

02. Substantive Facts

William Dobbs, the owner of Cash Northwest, a pawnshop, identified four loan contracts his business entered on March 19, 2005, showing the customer as Nathan W. Hermann, who was identified by an Alaskan ID, in addition to discussing the jewelry pawned as collateral for each loan. [RP 197, 198-200, 204-207].

Brandy Dobbs, an employee of Cash Northwest for 15 years, “is certified in diamond grading” and has “15 years experience looking at everything.” [RP 213]. She did a “quick and dirty” appraisal of the rings in State’s exhibits 5, 8, 11 and 14, placing the value at \$915, which did not take the color stones into account. [RP 213-14, 216].

It was based on the weight of the gold. We do a certain dollar amount per gram. And then if there were diamonds, we give credit for diamonds. A pawn shop does not price their jewelry for any colored stones. So if a - - the - - a topaz is real, people would get a really good deal because we

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<sup>1</sup> Hermann’s initial trial ended in a mistrial. [RP 140; CP 64].

only price it according to what gold is there and what little bit of diamonds.

[RP 213-14].

John Koch, the manager of City Pawn in January and February 2005, identified two collateral loans the pawnshop entered during those months, showing the customer as Nathan Hermann, who was identified by an Alaskan ID. [RP 219-221]. The first loan on January 13 was on a ring and the second loan on February 11 was on two different rings. [RP 219, 221].

Hermann stayed at Kristie Southerland's residence for a couple of weeks in the spring of 2005. [RP 226]. During this time, Southerland found several pawn slips, State's exhibits 4, 7, 10 and 13, in Hermann's belongings and took them to Herman's mother, Joann Hermann, leaving them on the front step of her home. [RP 228].

In "January/February" 2005, Joann Hermann (Joann) realized that a jewelry box containing several of her rings was missing from her residence. [RP 230-32]. "I couldn't find them. They were gone." [RP 232]. When she mentioned this to Hermann, "his girlfriend at the time, Kristie, was sitting there." [RP 232]. "I said my box of jewelry is not where it should be. Have you seen it. Everybody denied it." [RP 232]. "(T)here should have been 12 rings in the box." [RP 234]. She later

found the pawn slips left by Southerland and reported the incident to the police. [RP 233]. She eventually had contact with Hermann.

He evidently heard that I had called the police about it. He came over asking me if I would drop the charges if he could get the rings back ... He asked me if I found the other ring that was missing. I asked what other ring, and he said the one with the big diamond in the middle and the little diamonds around the outside.

[RP 235].

Up to that point, she wasn't aware the other ring was missing, which she immediately confirmed wasn't in the dresser drawer where she kept it. [RP 235]. Hermann then "went into my bathroom and came out with the (jewelry) box in his hand." [RP 236]. Joann "took it down to the police station." [RP 237]. Her son's identification is "an Alaska ID card." [RP 239]. Hermann told his mother he had pawned the rings twice, and specifically mentioned City Pawn. [RP 240].

Reviewing State's exhibits 5, 6, 8, 9, 11, 12, 14, 15, 17 and 18, which contained receipts for the purchase of rings taken from Joann, she placed the purchase price of the rings at over \$5,000.00. [RP 241-43, 245-47, 249; State's exhibits 6, 9, 12, 15, 17 and 18].

During cross examination, Joann asserted that there were 12 rings in her jewelry box, eight of which have been recovered. "My wedding ring and my mother's ring were also in the box. So that makes it ten."

[RP 249]. “(T)here are two other rings missing. I don’t know which ones of the other three or four that are missing were in the (jewelry) box(.)”

[RP 250]. Hermann never admitted to taking the three rings that are still missing, as listed in State’s exhibit 18. [RP 249, 253].

After advisement and waiver of rights, Hermann, on May 26, 2005, admitted to Detective Harry Heldreth to pawning his mother’s rings at two pawnshops: Cash Northwest and City Pawn. [RP 264-66].

D. ARGUMENT

01. THERE WAS INSUFFICIENT EVIDENCE TO UPHOLD HERMANN’S CRIMINAL CONVICTION FOR THEFT IN THE FIRST DEGREE.

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. Salinas, at 201; State v. Craven, 67 Wn. App. 921, 928, 841 P.2d 774 (1992). Circumstantial evidence is no less reliable than direct evidence, and criminal intent may be inferred from conduct where “plainly indicated as a matter of logical probability.” State v. Delmarter, 94 Wn.2d 634, 638,

618 P.2d 99 (1980). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. Salinas, at 201; Craven, at 928.

First degree theft is theft of property having a value exceeding \$1,500. RCW 9A.56.030(1). "Value" means market value at the time and place of the theft. RCW 9A.56.010(1); Court's instruction 10. [CP 39]. "Market value" is defined in this state as 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) (quoting State v. Clark, 13 Wn. App. 782, 787, 537 P.2d 820 (1975)). Market value is based on an objective standard, not on the value to any particular person. State v. Shaw, 120 Wn. App. 847, 850, 86 P.3d 823 (2004).

At trial, as set forth above, Dobbs, based on the weight of gold and credit for diamonds, did a "quick and dirty" appraisal of the rings in State's exhibits 5, 8, 11 and 14, placing the value at \$915. [RP 213-14, 216]. In addition, Joann Hermann, based on receipts for the purchase of the rings taken from her, placed the purchase price of the rings at over \$5,000. [RP 241-43, 245-47, 249, State's exhibits 6, 9, 12, 15, 17 and 18].

And while it is true that the "price paid for an item of property, if not too remote in time, is proper evidence of value(,)" State v. Melrose, 2

Wn. App. 824, 831, 470 P.2d 552 (1970), that is not the situation here. In Melrose, the property in question was purchased in 1965 and recovered in 1969. Melrose, 2 Wn. App. 830. In contrast, the theft in this case occurred in 2005 for items purchased in 1980 [State's exhibit 9; RP 242; CP 54], 1988 [State's exhibit 18; RP 246-47; CP 55], 1989 [State's exhibit 9; RP 242; CP 54], 1991 [State's exhibit 6; RP 241; CP 54], 1992 [State's exhibits 12, 15; RP 243-45; CP 55], 1997 [State's exhibit 18; RP 246-47; CP 55], 1999 [State's exhibit 6; RP 241; CP 54] and 2001 for \$156.60. [State's exhibit 12; RP 243; CP 55]. See State v. Morley, 119 Wn. App. 939, 943-44, 83 P.3d 1023 (2004) (Evidence was insufficient to establish requisite value for a conviction for first degree theft, as used stolen property's retail value was not evidence of its fair market value).

The stolen jewelry in this case was used property at the time of the theft, and the State did not produce sufficient direct evidence "not too remote in time" that its market value exceeded \$1,500 at the time of the theft. And the verdict form did not require the jury to identify the particular items of property underlying the conviction. Instead, the jury convicted Hermann of "Theft in the First Degree as charged in Count I." [CP 26]. Under these circumstances, Hermann's conviction for theft in the first degree must be reversed and dismissed.

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02. THE TRIAL COURT IMPERMISSIBLY  
COMMENTED ON THE EVIDENCE  
IN VIOLATION OF WASHINGTON  
CONSTITUTION ART. 4, SEC. 16 BY  
GIVING INSTRUCTION 21.

The trial court, over objection, impermissibly  
commented on the evidence when it submitted instruction 21 to the jury.

[RP 267-68]. The instruction reads:

Evidence of a retail price may be sufficient to establish  
value.

[CP 50].

Art. 4, Sec. 16 of the Washington Constitution provides:

Judges shall not charge juries with respect to  
matters of fact, nor comment thereon, but shall  
declare the law.

The constitution has made the jury the sole judge of the weight of  
the testimony and of the credibility of the witnesses. State v. Crotts, 22  
Wash. 245, 250-51, 60 P. 403 (1900). The purpose of prohibiting judicial  
comments on the evidence is to prevent the trial judge's opinion from  
influencing the jury. State v. Hansen, 46 Wn. App. 292, 300, 730 P.2d  
706, 737 P.2d 670 (1986). And while a defendant on appeal is ordinarily  
limited to specific objections raised before the trial court, he or she may,  
for the first time on appeal, argue that an instruction was an improper

comment on the evidence. State v. Levy, 156 Wn.2d 709, 719-20, \_\_\_ P.3d \_\_\_ (2006); RAP 2.5(a)(3).

Once it has been demonstrated that a trial judge's conduct or remarks constitute a comment on the evidence, a reviewing court will presume the comments were prejudicial. State v. Lane, 125 Wn.2d 825, 838, 889 P.2d 929 (1995). A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error. State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002). "The burden rests on the State to show that no prejudice resulted to the defendant unless it affirmatively appears in the record that no prejudice could have resulted from the comment." Id. (citation omitted). In applying the constitutional harmless error analysis to a case involving judicial comment, our Supreme Court has held:

[E]ven if the evidence commented upon is undisputed, or "overwhelming," a comment by the trial court, in violation of the constitutional injunction, is reversible error unless it is apparent that the remark could not have influenced the jury.

State v. Bogner, 62 Wn.2d 247, 252, 382 P.2d 254 (1963).

The purpose of prohibiting judicial comments on the evidence is to prevent the trial judge's opinion from influencing the jury. State v. Hansen, 46 Wn. App. at 300. A statement by the court constitutes a comment on the evidence if the court's attitude toward the merits of the

case or the court's evaluation relative to the disputed issue is inferable from the statement. Id. The touchstone of error in a trial court's comment on the evidence is whether the feeling of the trial court has been communicated to the jury. State v. Trickel, 16 Wn. App. 18, 25, 553 P.2d 139 (1976), review denied, 88 Wn.2d 1004 (1977).

To convict Hermann of theft in the first degree, the State, in part, was required to prove beyond a reasonable doubt that the property exceeded \$1,500 in value. As previously set forth, without consideration the of the sales receipts showing the retail price of the jewelry taken from Joann Hermann, the State did not carry its burden in this regard. Indeed, during closing argument, the State urged the jury to consider the retail price as evidence of value. [RP 279, 305]. Instruction 21 could have been read as a direction or a comment by the court that the evidence of the retail price of the jewelry was sufficient, standing alone, was sufficient to prove the value of the property exceeded \$1,500, with the unassailable result that it provided an untenable method for the jury to find Hermann guilty of theft in the first degree of property exceeding \$1,500. The instruction effectively removed this issue for the jury's consideration, and amounted to an unconstitutional comment on the evidence in violation of Art. 4, sec. 16 of the Washington Constitution.

The court's comment relieved the State of its burden of proving an essential element of theft in the first degree beyond a reasonable doubt in violation of Art. 4, section 16 of the Washington Constitution. An instructional error requires reversal when it relieves the State of its burden of proving every essential element of the crime. State v. DeRyke, 149 Wn.2d 906, 912, 73 P.3d 1000 (2003).

It cannot be said that the court's improper comment in instruction 21 did not influence the jury, especially since the evidence, without the receipts showing the retail price of the jewelry, failed to establish that the amount of the theft exceeded \$1,500. The State cannot sustain its burden of rebutting the presumption that the court's comment was prejudicial. This court should reverse Hermann's conviction for theft in the first degree because of the unconstitutional comment on the evidence made by the trial court in court's instruction 21.

03. HERMANN WAS PREJUDICED AS A RESULT OF HIS TRIAL COUNSEL'S FAILURE TO PROVIDE ANY AUTHORITY WHEN OBJECTING TO COURT'S INSTRUCTION 21.

A criminal defendant claiming assistance must prove (1) that the attorney's performance was deficient, i.e. that the representation fell below an objective standard of reasonableness under

the prevailing professional norms, and (2) that prejudice resulted from the deficient performance, i.e. that there is a reasonable probability that, but for the attorney's unprofessional errors, the results of the proceedings would have been different. State v. Early, 70 Wn. App. 452, 460, 853 P.2d 964 (1993), review denied, 123 Wn.2d 1004 (1994); State v. Graham, 78 Wn. App. 44, 56, 896 P.2d 704 (1995). Competency of counsel is determined based on the entire record below. State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972) (citing State v. Gilmore, 76 Wn.2d 293, 456 P.2d 344 (1969)). A reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on one prong. State v. Tarica, 59 Wn. App. 368, 374, 798 P.2d 296 (1990).

Additionally, while the invited error doctrine precludes review of any instructional error where the instruction is proposed by the defendant, State v. Henderson, 114 Wn.2d 867, 870, 792 P.2d 514 (1990), the same doctrine does not act as a bar to review a claim of ineffective assistance of counsel. State v. Doogan, 82 Wn. App. 185, 917 P.2d 155 (1996) (citing State v. Gentry, 125 Wn.2d 570, 646, 888 P.2d 1105 (1995)).

Should this court find that counsel for Hermann waived the issue relating to court's instruction 21 by failing to provide any authority when objecting to the instruction, after apparently being asked by the court to

do so [RP 268], then both elements of ineffective assistance have been established.

First, the record does not reveal any tactical or strategic reason why trial counsel would have failed to provide the authority for the reasons set forth in the preceding section of this brief. Had counsel done so, the trial court would not have given instruction 21, which, as previously argued, amounted to an unconstitutional comment on the evidence in violation of Art. 4, sec. 16 of the Washington Constitution.

To establish prejudice a defendant must show a reasonable probability that but for counsel's deficient performance, the result would have been different. State v. Leavitt, 49 Wn. App. 348, 359, 743 P.2d 270 (1987), aff'd, 111 Wn.2d 66, 758 P.2d 982 (1988). A "reasonable probability" means a probability "sufficient to undermine confidence in the outcome." Leavitt, 49 Wn. App. at 359. The prejudice here is self evident: but for counsel's failure to object by citing authority to the court's instruction 21, the court would not have given the instruction and the jury would not have been provided with an untenable method to find that Hermann was guilty of theft in the first degree of property exceeding \$1,500 in value.

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04. THE TRIAL COURT ERRED IN CALCULATING HERMANN'S OFFENDER SCORE BY INCLUDING ONE POINT BASED ON THE STATE'S CONTENTION THAT HERMANN WAS ON COMMUNITY PLACEMENT AT THE TIME OF THE CURRENT OFFENSE IN VIOLATION OF THE SIXTH AMENDMENT REQUIREMENT THAT A JURY MAKE THE DETERMINATION BEYOND A REASONABLE DOUBT.

A challenge to the calculation of an offender score may be raised for the first time on appeal. State v. Roche, 75 Wn. App. 500, 513, 878 P.2d 497 (1994); State v. McCorkle, 137 Wn.2d 490, 495, 973 P.2d 461 (1999). Although a defendant generally cannot challenge a presumptive standard range sentence, he or she can challenge the procedure by which a sentence within the standard range was imposed. State v. Ammons, 105 Wn.2d 175, 183, 718 P.2d 796, cert. denied, 479 U.S. 930 (1986). A defendant does not acknowledge an incorrect offender score simply by failing to object at sentencing. State v. Ford, 137 Wn.2d 472, 482-83, 973 P.2d 452 (1999). A sentencing court's calculation of a defendant's offender score is a question of law and is reviewed de novo. State v. Mitchell, 81 Wn. App. 387, 390, 914 P.2d 771 (1996); State v. Allyn, 63 Wn. App. 592, 596, 821 P.2d 528 (1991) (citing Hoffer v. State, 110 Wn.2d 415, 420, 755 P.2d 781 (1988), aff'd on rehearing, 113 Wn.2d 148 (1989)).

A claimed manifest error affecting a constitutional right may be raised for the first time on appeal. RAP 2.5(a)(3); State v. Scott, 110 Wn.2d 682, 686, 757 P.2d 492 (1988). Here, the error at issue is of constitutional magnitude and may be challenged for the first time on appeal. Moreover, the Washington Supreme Court has held that that a sentence in excess of statutory authority is subject to collateral attack, that a sentence is excessive if based on a miscalculated upward offender score, “that a defendant cannot agree to punishment in excess of that which the Legislature has established,” and that “in general a defendant cannot waive a challenge to a miscalculated offender score.” In re Goodwin, 146 Wn.2d 861, 873-74, 50 P.3d 618 (2002). In defining the limitations to this holding, the court, citing State v. Majors, 94 Wn.2d 354, 616 P.2d 1237 (1980) as instructional, went on to explain that waiver does not apply where the alleged sentencing error is a legal error leading to an excessive sentence, as opposed to where the alleged error “involves an agreement to facts (e.g., agrees to be designated as habitual offender in hopes of obtaining a shorter sentence), later disputed, or if the alleged error involves a matter of trial court discretion.” Id.

Here, the court calculated Hermann’s offender score as 8, which included one point based on the State’s contention that Hermann was on

community placement at the time of the current offense.<sup>2</sup> [RP 317; CP 12]. Although Hermann objected to the inclusion of this point in his offender score, the court counted it and sentenced him based on an offender score of 6. [CP 10, 16].

A jury, not a judge, must make the factual determination beyond a reasonable doubt whether a defendant was on community placement at the time of his or her crime, since this is not within the narrow “prior conviction” exception set forth in Blakely v. Washington, \_\_\_ U.S. \_\_\_, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004); State v. Jones, 126 Wn. App. 136, 107 P.3d 755, review granted, 124 P.3d 659 (2005); State v. Hochhalter, 131 Wn. App. 506, 518-24, 128 P.3d 104 (2006).<sup>3</sup>

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<sup>2</sup> RCW 9.94A.525(17) provides that a judge will increase a defendant’s offender score by one point if the offender was on community placement at the time of the current conviction.

<sup>3</sup> Cf. State v. Giles, (2006 Lexis 830), where Division II, the same court, consisting of two members not on the panel that issued Hochhalter, disagreed with this conclusion, holding that consistent with Division III’s decision in State v. Hunt, 128 Wn. App. 535, 541-43, 116 P.3d 450 (2005), a trial court does not violate a defendant’s right to a jury trial by adding a point to his offender score because of his community placement status.

Because Hermann's community placement status was not proved to a jury, and because harmless error analysis is foreclosed by binding precedent, Hermann's sentence must be reversed and remanded for resentencing to an offender score that does not include the one point for community placement. See State v. Hughes, 154 Wn.2d 118, 110 P.3d 192 (2005).

E. CONCLUSION

Based on the above, Hermann respectfully requests this court to reverse and dismiss his conviction for theft in the first degree and to remand his case for resentencing consistent with the arguments presented herein.

Dated this 5<sup>th</sup> day of June 2006.

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STATE OF WASHINGTON

BY \_\_\_\_\_  
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CERTIFICATE

We certify that we mailed a copy of the above brief by depositing it in the United States Mail, first class postage pre-paid, to the following people at the addresses indicated:

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WSBA NO. 1063