

No. 34921-3-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Darrell Johnson,

Appellant.

Grays Harbor Superior Court

Cause No. 05-1-00590-7

The Honorable Judge David Foscue

Appellant's Reply Brief

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COURT OF APPEALS

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ARGUMENT

I. THE TRIAL COURT'S FAILURE TO GIVE A *PETRICH* INSTRUCTION DENIED MR. JOHNSON HIS CONSTITUTIONAL RIGHT TO A UNANIMOUS JURY.

Respondent argues that no unanimity instruction was needed at Mr. Johnson's jury trial, as he was only charged with one incident of trafficking stolen property. Specifically, Respondent claims that the state only presented proof of trafficking the guitar, and points to the offense date on the Information. According to Respondent, the evidence regarding the motorcycle parts was admitted only to show the absence of mistake in trafficking the guitar. Brief of Respondent, p. 2.

This cannot have been clear to the jury. The state brought significant evidence relating to the stolen motorcycle parts. Deputy Shrader testified that the victim's sons had described missing Harley-Davidson parts when they made their report, including cams, carburetors, and a custom two-piece gas tank. RP 5. The victim's sons testified about missing boxes of Harley-Davidson parts and a unique custom-painted gas tank, worth between \$500-\$800; the missing items, including the gas tank, were later recovered from David Shaver. RP 14-16, 57, 59-60. Deputy Shrader went to David Shaver's home and recovered several Harley-Davidson carburetors, the specific gas tank that had been

described, and several boxes of Harley-Davidson parts. RP 7-8. David Shaver testified that Mr. Johnson had approached him to purchase the Harley-Davidson parts. RP 23-24. He testified that he paid \$100 for the parts, although they were worth far more, and that he turned over all of the parts to the police. RP 25-26. Mr. Shaver also testified that he planned to sell the parts at a rally later in the year, and that he only purchased the parts to help Mr. Johnson. RP 26-28. The state recalled Deputy Shrader to explain that Mr. Johnson had denied knowing that the motorcycle parts had been stolen, had described the parts as not clean but not corroded and in good but not mint condition. RP 31-32, 34-35.

During closing, the prosecutor argued “The two things that we really focus on are the Harley parts and the Fender Redondo, acoustic guitar. These are the things that somehow ended up in Mr. Johnson’s possession...” RP 71. He later told the jury that

...David Shaver testified that he purchased Harley parts from Mr. Johnson. The Harley parts that came out of Danny Burnett’s house. He purchased them from Mr. Johnson, approximately, \$100. Mr. Johnson took \$100 for Harley parts that were worth between 5 and \$800. And when he was questioned as to where they came from, he came up with a story. Well, these are parts that –my dad repossesses cars and these are parts out of those vehicles. That’s not true. There were the parts out of Danny Burnett’s house. They were identified by the Burnett brothers. They were recovered. Mr. Shaver, turned them over to Deputy Schrader, who had them identified by the Burnetts. When the deputy contacts Mr. Johnson, says, well, I bought those parts for \$50, purchased parts that were worth in excess of five to \$800 for \$50. And then went

on to say, okay, you bought these from John Finney, did you know they were stolen? No, I asked if they were hot. If you have to ask if they are hot you know they are stolen.
RP 73-74.

During rebuttal, the prosecutor stressed the importance of the motorcycle parts:

Ms. Svoboda: Thank you. Well, I guess if it's a box of dirty old parts then it's fair game. It just doesn't make any sense. That argument makes no sense. And the testimony was actually, these were parts that were used, not that they were damaged or unusable. They were project parts, actually being used, and the parts are not really the issue here. Jon Finney is not the issue. Who stole the items originally out of the house is not the issue. It's a great smoke screen, but it totally gets off the track of what you are here to look at. You are only here to look at, did the State meet the elements set out for trafficking, and we are really hinging on knowledge here.
RP 82.

Nothing in the record suggests that the motorcycle parts incident was introduced solely to establish absence of mistake relating to the guitar.¹ Instead, it is clear from the record that the state prosecuted Mr. Johnson for trafficking the motorcycle parts as well as the guitar. Because of this, a *Petrich* instruction was required.²

¹ Nor is it clear that any of the evidence introduced would have been admissible under this theory.

² Respondent's reliance on the offense date is unpersuasive. "[W]here time is not a material element of the charged crime, the language 'on or about' is sufficient to admit proof of the act at any time within the statute of limitations, so long as there is no defense of alibi." *State v. Hayes*, 81 Wn. App. 425 at 432, 914 P.2d 788 (1996).

II. THE SENTENCING COURT FAILED TO PROPERLY DETERMINE MR. JOHNSON'S CRIMINAL HISTORY AND OFFENDER SCORE.

Respondent first argues that any sentencing issues cannot be raised for the first time on appeal. Brief of Respondent, p. 4. This is incorrect. Illegal or erroneous sentences may be challenged for the first time on appeal. *State v. Ford*, 137 Wn.2d 472 at 477, 973 P.2d 452 (1999).

Respondent next argues that Mr. Johnson's failure to object to the "presentence report" constitutes an acknowledgment of prior convictions, citing RCW 9.94A.530(2). Brief of Respondent, p. 4. This is incorrect.

By statute, a presentence report is a document prepared at the court's request by the Department of Corrections. RCW 9.94A.500. *See also* CrR 7.1(a) ("the court may order that a presentence investigation and report be prepared by the Department of Corrections.") CrR 7.1(c) permits interested parties to file "other reports," but nowhere in the statute or the rule are these other reports given the same status as "presentence reports." RCW 9.94A; CrR 7.1.

No presentence report was requested by the court or filed by DOC in this case. The Statement of Criminal History relied upon by Respondent contains nothing more than allegation. As the Supreme Court made clear in *State v. Ford*:

The State does not meet its burden through bare assertions, unsupported by evidence. Nor does failure to object to such

assertions relieve the State of its evidentiary obligations. To conclude otherwise would not only obviate the plain requirements of the SRA but would result in an unconstitutional shifting of the burden of proof to the defendant. *State v. Ford, supra, at* 482.

Respondent's reliance on the prosecuting attorney's bare assertions is misplaced. Although the written statement prepared by the prosecuting attorney is undoubtedly helpful to both parties and to the court, it does not constitute proof under RCW 9.94A.

Furthermore, even if the prosecutor's bare allegations were considered a "presentence report" (as Respondent suggests), failure to object cannot constitutionally be held against Mr. Johnson. As the Supreme Court has made clear, any such requirement "would result in an unconstitutional shifting of the burden of proof to the defendant." *Ford, supra, at* 482.

Since the rule in *Ford* is constitutionally based, it cannot be overcome by statute (as Respondent suggests, relying on RCW 9.94A.530) or by court rule (such as CrR 7.1(c), which requires three days notice if the "presentence report" will be "controverted by the production of evidence.")

Accordingly, the trial court's findings are not supported by substantial evidence, sufficient to persuade a fair-minded, rational person of the truth of the finding. *Rogers Potato v. Countrywide Potato*, 152

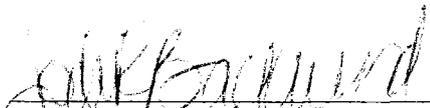
Wn.2d 387 at 391, 97 P.3d 745 (2004); *State v. Carlson*, 130 Wn. App. 589 at 592, 123 P.3d 891 (2005). Instead, there is not even “a mere scintilla” of evidence. *Northwest Pipeline Corp. v. Adams County*, 132 Wn. App. 470, 131 P.3d 958 (2006), *citing Davis v. Microsoft Corp.*, 149 Wn.2d 521 at 531, 70 P.3d 126 (2003). The court’s sentence must be vacated, and the case remanded for resentencing.

CONCLUSION

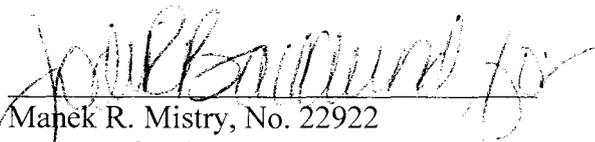
For the foregoing reasons, the conviction must be reversed and the case remanded for a new trial. In the alternative, the sentence must be vacated and the case remanded for resentencing.

Respectfully submitted on March 29, 2007.

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CERTIFICATE OF MAILING

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I certify that I mailed a copy of Appellant's Reply Brief to:

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and to:

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And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on March 29, 2007.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on March 29, 2007.



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