

NO. 35440-3-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

RICHARD YANAC,

Appellant.

COURT OF APPEALS
DIVISION II
07 JUL 23 PM 4:12
STATE OF WASHINGTON
BY *[Signature]*
DEPUTY

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 06-1-00070-4

BRIEF OF RESPONDENT

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This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.
DATED July 19, 2007, Port Orchard, WA *[Signature]*
Original AND ONE COPY filed at the Court of Appeals, Ste. 300, 950 Broadway, Tacoma WA 98402; Copy to counsel listed at left. *[Signature]*

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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the trial court abused its discretion when: (1) the trial court did not preclude Yanac from examining Hannagan regarding her bias; and, (2) the trial court properly precluded Hannagan from testifying about Blithe's bias because Blithe was not a witness and his bias, therefore, was not relevant?

2. Whether the trial court abused its discretion in excluding reference to Blithe's out of court statement that he had no idea if the telescope was stolen when: (1) Blithe's state of mind was not relevant to a material issue; and, (2) the statement was not relevant to Yanac's knowledge because the statement at issue could not have affected Yanac's knowledge or dispelled his admitted suspicions that the telescope was stolen?

3. Whether the cumulative error doctrine applies when the trial court committed no error?

4. Whether, viewing the evidence in a light most favorable to the state, the evidence was sufficient when it showed that Yanac was in possession of the stolen telescope in connection with corroborative evidence of other inculpatory circumstances demonstrating guilty knowledge?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Richard Yanac was charged by information filed in Kitsap County Superior Court with one count of possession of stolen property in the first degree. CP 10, RP 3. At trial, the jury found the Defendant guilty, and the trial court later imposed a standard range sentence. CP 14. This appeal followed.

B. FACTS

i. The State's Witnesses

Narrows Park is owned by Pierce County and is a 37-acre park located on the Gig Harbor side of the Narrows Bridge. RP 50. The county had installed a number of amenities at the park including two telescopes from which people could view the construction of the second Narrows Bridge. RP 50-51. On May 6, 2005, one of these telescopes was stolen. RP 52. Skip Ferrucci, the Superintendent of Parks for Pierce County at the time of the theft, testified that the stolen telescope was a "Seacoast" telescope, model number KE1693, and was worth approximately \$3,500. RP 49, 57, 65, 72.

Sometime after the theft, the Pierce County Sheriff's Office received an anonymous tip that the stolen telescope was located at Yanac's residence, and Deputy Eric Janson of the Kitsap County Sheriff's Office was asked to respond to Yanac's residence to investigate the tip. RP 74, 82. Deputy

Janson went to Yanac's home on August 5, 2005 and saw that there was an old diesel transit bus next to the house. RP 76. Deputy Janson then spoke with Yanac and asked him if he had a telescope, and Yanac admitted that the telescope was in the bus. RP 77. Yanac showed Deputy Janson the telescope, which was bolted to the floor of the bus. RP 77-78. Although the bus was filled with "old items" the telescope looked very new, did not have any scratches on it, and was stamped with "KE1693." RP 79.

Yanac told the deputy that he had obtained the telescope from a man named "Mike," but did not give the deputy a last name for this person and did not provide any other contact information for "Mike." RP 78, 86-87. Deputy Janson asked Yanac if he owed Mike anything, and Yanac responded, "No." RP 78. Deputy Janson also asked Yanac if he thought the telescope might be stolen and Yanac said "yes," and also indicated that he had an idea that it might be stolen. RP 78, 85.

Yanac allowed Deputy Janson to take the telescope, which Deputy Janson then turned over to a Pierce County deputy. RP 85. The telescope was eventually returned to the parks department and reinstalled at the park. RP 53.

After Mr. Ferrucci and Deputy Janson had testified, the State rested. RP 90.

ii. Yanac's Witnesses

Yanac initially indicated that he may be calling Vanessa Hannagan (the source of the anonymous tip) as a witness and, prior to trial, the State brought a motion in limine regarding a defense the admissibility of Hannagan's testimony. RP 5-19, CP 67. The State argued that Hannagan should not be allowed to testify regarding the reasons she called 911 and should not be allowed to testify that a third party, Mike Blithe, also suggested that she should call 911. RP 5-6.

An offer of proof was made outside the presence of the jury and Hannagan stated that she reported to the authorities that Yanac had a stolen telescope. RP 13-14. Hannagan stated that she was a former girlfriend of Yanac's and that she had made the report to law enforcement because she was angry with him. RP 14. Hannagan also stated that Mike Blithe initially suggested that she should report Yanac to the police to get even with him and Hannagan also claimed that Blithe was jealous of Yanac and also wanted to get even with him. RP 14.

Yanac argued that this evidence was relevant because the jury would wonder how 911 was called and why the police suspected Yanac might have the stolen telescope. RP 16. The State argued that Hannagan's state of mind was not relevant and that Blithe's statement to Hannagan was hearsay. RP 6,18.

The trial court ruled that Hannagan could not testify regarding what she had been told by Blithe since this was hearsay and noted that Hannagan's state of mind was not relevant (implying that the state of mind exception did not apply because Hannagan's state of mind was not an issue in the case). RP 18. The court noted, however, that Hannagan could testify that she called 911 and made the report about the stolen telescope, and the court further stated that the Defendant could, "examine her on the relationship, but I am just saying that you cannot ask her about what Mr. Blithe told her. Okay?" RP 19.

Although the trial court did not exclude all of Hannagan's testimony, Yanac nevertheless decided against calling Hannagan as a witness and indicated that Yanac himself would be the only defense witness. RP 94-95.

Yanac took the stand and admitted that he had five prior forgery convictions and one prior conviction for possession of stolen property. RP 105. Yanac also stated that he got the telescope from a person named "Mike," whom he did not know very well, and that he had worked on cars for Mike and his wife in the past and that he had "given them a good deal on a car." RP 107. On one occasion, while at Mike's house, Yanac saw the telescope lying on the ground outside of a shed and asked Mike about it. RP 107. Mike told him that someone "had left it there" and that "he wasn't sure where it came from exactly," and told Yanac he could have it. RP 107.

Defense counsel then asked, “Did you take a look at this telescope?” RP 107. Yanac responded, “Yes. After he said I could have it I said, ‘Well, is it stolen?’ And he goes, ‘I have no idea.’” RP 108. The State objected to the response as hearsay, and the court sustained the objection. RP 108.

The Defendant further testified that it had entered his mind that the telescope might be stolen, and admitted that he had told Deputy Janson that he had suspected as much. RP 109-112.

III. ARGUMENT

A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BECAUSE: (1) THE TRIAL COURT DID NOT PRECLUDE YANAC FROM EXAMINING HANNAGAN REGARDING HER BIAS; AND, (2) THE TRIAL COURT PROPERLY PRECLUDED HANNAGAN FROM TESTIFYING ABOUT BLITHE’S BIAS BECAUSE BLITHE WAS NOT A WITNESS AND HIS BIAS, THEREFORE, WAS NOT RELEVANT.

Yanac argues that the trial court erred in not allowing him to question Hannagan about why she called 911. App.’s Br. at 8. This claim is without merit because it misconstrues the trial court’s actual ruling and because the trial court properly excluded testimony regarding alleged statements of Blithe as he was not a witness and his out of court statements were hearsay and were not relevant.

The admission and exclusion of evidence are within the sound discretion of the trial court and, thus, are reviewed for abuse of discretion. *State v. Thomas*, 150 Wn.2d 821, 856, 83 P.3d 970 (2004). A decision to admit or exclude evidence, therefore, will be upheld absent an abuse of discretion, which may be found only when no reasonable person would have decided the same way. *Thomas*, 150 Wn.2d at 869.

1. The trial did not preclude Yanac from examining Ms. Hannagan, a defense witness, regarding her bias.

As a preliminary matter, the trial court did not preclude Yanac from calling Hannagan as a witness, nor did it preclude Yanac from examining Yanac about the fact that she reported Yanac to the police and that she had a prior relationship with Yanac that had turned sour. RP 19. Rather, the trial court only ruled that Yanac could not examine her regarding the out of court statements of Blithe. RP 18. Specifically, the court stated,

“You can cross-examine and can examine her on the relationship, but I am just saying that you cannot ask her about what Mr. Blithe told her. Okay?”

RP 19.

The issue before this court, therefore, is whether the trial court abused its discretion in excluding Blithe’s out-of-court statement to Hannagan. The trial court’s ruling, when viewed in its proper context, in no way limited Yanac’s ability to examine Hannagan (his own witness) regarding her bias. Rather, the trial court simply excluded evidence of Blithe’s possible bias.

Although Yanac argues that the trial court's ruling limited his ability to impeach Hannagan and to demonstrate bias, this argument is without merit since the trial court did not limit Yanac's ability to show Hannagan's bias. Rather, the trial court stated Yanac could inquire about Hannagan's relationship with Yanac and the fact that she reported him to the police. The only excluded evidence was the evidence regarding Blithe.

2. *Any potential bias on the part of Blithe was not relevant because Blithe was not a witness.*

Blithe was not called as a witness by either the State or by Yanac. As there is no indication in the record that he was going to testify, his bias was not relevant and there was no testimony from him to impeach. Yanac's arguments, therefore, that the trial court's ruling limited his ability to impeach or show bias must fail because the trial court did not limit his ability to impeach Hannagan and because there was no testimony from Blithe to impeach. Yanac's citations to authority all deal with instances of alleged bias on the part of a witness. See App.'s Br. 12-15. The citations, however, are distinguishable by the fact that Mr. Blithe was not a witness below.

In short, the trial court did not preclude Yanac from calling Hannagan and having her testify that she reported Yanac to the police because she was mad at him. The fact that Blithe had also told Hannagan that he was mad at Yanac and suggested that she call the police had no relevance because Blithe

was not a witness and his feelings about Yanac were not relevant. For these reasons, Yanac's arguments must fail.

3. *Harmless error*

An evidentiary error which is not of constitutional magnitude, requires reversal only if the error, within reasonable probability, materially affected the outcome. *State v. Everybodytalksabout*, 145 Wn.2d 456, 468-69, 39 P.3d 294 (2002), *citing State v. Stenson*, 132 Wn.2d 668, 709, 940 P.2d 1239 (1997). An evidentiary error that does not result in prejudice to the defendant is not grounds for reversal. *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997), *citing Brown v. Spokane County Fire Protection Dist. No. 1*, 100 Wn.2d 188, 196, 668 P.2d 571 (1983). The error is "not prejudicial unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred." *Everybodytalksabout*, 145 Wn.2d at 469, *quoting Bourgeois*, 133 Wn.2d at 403. The error is harmless if the evidence is of minor significance compared to the overall evidence as a whole. *Everybodytalksabout*, 145 Wn.2d at 469, *citing Bourgeois*, 133 Wn.2d at 403.

Even assuming that the trial court erred in excluding any reference to Blithe's alleged bias, any error in this regard was harmless as Blithe was not a witness. The only relevance regarding Blithe's bias offered by Yanac was that Hannagan reported Yanac to the police due to the fact that she and Blithe

were both angry with him. The reason a citizen (other than the victim) turns a defendant in to the authorities, however, is not relevant to the issue of whether the defendant committed the crime. The issue before the jury in the present case was whether Yanac knowingly possessed stolen property. The fact that he was turned in by someone that was angry with him does not have any bearing on Yanac's guilt, and thus, is not relevant. The exclusion of this evidence, therefore, was harmless.

B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN EXCLUDING REFERENCE TO BLITHE'S OUT OF COURT STATEMENT THAT HE HAD NO IDEA IF THE TELESCOPE WAS STOLEN BECAUSE: (1) BLITHE'S STATE OF MIND WAS NOT RELEVANT TO A MATERIAL ISSUE; AND, (2) THE STATEMENT WAS NOT RELEVANT TO YANAC'S KNOWLEDGE BECAUSE THE STATEMENT AT ISSUE COULD NOT HAVE AFFECTED YANAC'S KNOWLEDGE OR DISPELLED HIS ADMITTED SUSPICIONS THAT THE TELESCOPE WAS STOLEN.

Yanac next claims that the trial court erred when it sustained the State's objection to Yanac's testimony that Blithe had told him that he had no idea if the telescope was stolen. App.'s Br. at 15. This claim is without merit because the statement was hearsay and was not relevant.

As outlined above, the admission and exclusion of evidence are within the sound discretion of the trial court and, thus, are reviewed for abuse

of discretion. *Thomas*, 150 Wn.2d at 856. A decision to admit or exclude evidence, therefore, will be upheld absent an abuse of discretion, which may be found only when no reasonable person would have decided the same way. *Thomas*, 150 Wn.2d at 869. An evidentiary error that does not result in prejudice to the defendant is not grounds for reversal. *Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). The error is “not prejudicial unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred.” *Everybodytalksabout*, 145 Wn.2d at 469, quoting *Bourgeois*, 133 Wn.2d at 403.

Hearsay is a statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted. ER 801(c). Yanac essentially argues that the out of court statement (“I have no idea”) was admissible either as a then existing mental or emotional condition or because it was offered as evidence of the state of mind of the hearer. See App.’s Br. at 17.

While ER 803 does outline an exception for statements of a declarant’s state of mind, out of court statements are admissible to show a declarant's state of mind only if said state of mind is “relevant to a material issue in the cause.” *State v. Stamm*, 16 Wn. App. 603, 559 P.2d 1 (1977), citing *State v. Murphy*, 7 Wn. App. 505, 509, 500 P.2d 1276, 1280 (1972); C. McCormick, Evidence s 249 (2d ed. E. Cleary 1972); 5 R. Meisenholder,

Wash.Prac. s 383 (1965). In the present case Blithe was not the victim nor was he even a witness, and Yanac has offered no reason why Blithe's state of mind was relevant to a material issue in the case.

The only potential theory under which the out of court statement would have been relevant and offered for some relevant purpose was that Mr. Blithe's statement was relevant to show its effect on the hearer (Yanac). Under such a theory, the statement of Blithe would somehow be relevant to show whether Yanac knew the telescope was stolen. This argument must also fail, however, as the actual statement could not have had an effect on Yanac's knowledge, since Blithe stated he did not know whether the telescope was stolen or not. If the proposed testimony had been that Blithe informed Yanac that the telescope was not stolen (and Yanac had relied on this statement), then the out of court statement could have potentially had an effect on Yanac's state of mind, but here, Blithe only said he did not know if the telescope was stolen or not. Blithe's statement, therefore carried little to no relevance regarding the material issue of Yanac's knowledge.

In addition, even if this court were to assume that Blithe's statement was admissible to show the effect on the hearer or Yanac's state of mind, any error in excluding the evidence was harmless. In the case below, the State was required to show that Yanac either knew the telescope was stolen or had knowledge of facts sufficient to put him on notice that the property was

stolen. *Rockett*, 6 Wn. App. at 402; RCW 9A.08.010(1)(b).

In the present case, Yanac testified that he saw the telescope lying next to a shed and that the Blithe had told him that someone “had left it there” and that “he wasn’t sure where it came from exactly.” RP 107. The statement at issue (Blithe’s statement that he had no idea if the telescope was stolen) was essentially cumulative evidence as Yanac had already testified that Blithe had said he wasn’t sure where the telescope came from. RP 107.

In addition, Blithe’s statement that he had no idea if the telescope was stolen or not was of little help to Yanac’s defense. Rather, this evidence reinforced the State’s case by showing that Yanac should have been aware that the telescope was likely stolen since Blithe himself stated he had no idea if it was stolen or not and was unable to dispel Yanac’s admitted suspicions that the telescope was stolen. Although Yanac argues on appeal that the trial court erred by excluding the statement, his trial counsel did not argue below that the statement was admissible, and did not tell the trial court what purpose the statement was being offered for. These facts only further demonstrate that the actual statement (which came in a nonresponsive answer to a question from defense counsel) was not helpful to Yanac’s case. As the statement itself was essentially cumulative and was not helpful to the defense case (and was actually further evidence showing that Yanac was on notice that the telescope was likely stolen) any error in excluding the statement was

harmless.

C. THE CUMULATIVE ERROR DOCTRINE DOES NOT APPLY BECAUSE THE TRIAL COURT COMMITTED NO ERROR.

Yanac next claims that the cumulative error doctrine warrants reversal in this case. App.'s Br. at 22. The application of that doctrine is limited to instances when there have been several trial errors that standing alone may not be sufficient to justify reversal but when combined may deny a defendant a fair trial. *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). Examples include a cases in which there were five evidentiary errors along with discovery violations; *State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984), in which there were three instructional errors and improper remarks by the prosecutor during voir dire; *State v. Badda*, 63 Wn.2d 176, 183, 385 P.2d 859 (1963), in which a witness impermissibly suggested the victim's story was consistent and truthful, the prosecutor impermissibly elicited the defendant's identity from the victim's mother, and the prosecutor repeatedly attempted to introduce inadmissible testimony during the trial and in closing; *State v. Alexander*, 64 Wn. App. 147, 158, 822 P.2d 1250 (1992), and in which the court severely rebuked the defendant's attorney in the presence of the jury, the court refused to allow the testimony of the defendant's wife, and the jury was permitted to listen to a tape recording of a lineup in the absence

of court and counsel. *State v. Whalon*, 1 Wn. App. 785, 804, 464 P.2d 730 (1970).

Here, Yanac has not established any error at all, and certainly even if he has, none of it combined is of the magnitude appearing in the cited cases. *Greiff*, 141 Wn.2d at 929. Rather, the excluded evidence of Blithe's state of mind was of little to no relevance, and the excluded statement that Blithe had "no idea" whether the telescope was stolen was cumulative and was not helpful to the defense case. Any error therefore was harmless and caused no prejudice. Even if this court were to assume that the trial court erred below, the errors were harmless and, even when combined they did not deny Yanac a fair trial. For all of these reasons, Yanac's argument must fail.

D. VIEWING THE EVIDENCE IN A LIGHT MOST FAVORABLE TO THE STATE, THE EVIDENCE WAS SUFFICIENT BECAUSE IT SHOWED THAT YANAC WAS IN POSSESSION OF THE STOLEN TELESCOPE IN CONNECTION WITH CORROBORATIVE EVIDENCE OF OTHER INCULPATORY CIRCUMSTANCES DEMONSTRATING GUILTY KNOWLEDGE.

Yanac next claims that there was insufficient evidence to convict him of possession of stolen property. App.'s Br. at 29. This claim is without merit because, viewing the evidence in a light most favorable to the State, the evidence at trial showed that Yanac possessed stolen property in connection

with “slight corroborative evidence of other inculpatory circumstances,” which is sufficient to prove the guilty knowledge necessary to support a conviction for possession of stolen property under Washington law.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the State, it permits any 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). 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. Circumstantial evidence and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

A reviewing court defers to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992). Thus, credibility determinations are for the trier of fact and are not subject to review. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

To convict Yanac of first degree possession of stolen property, the State had to prove that he knowingly received, retained, possessed, concealed, or disposed of stolen property exceeding \$1,500 in value, knowing it was stolen, and that he withheld or appropriated that property for the use of any

person other than the person entitled to it. RCW 9A.56.140(1), 9A.56.150. Stated another way, the elements of possession of stolen property are: (1) actual or constructive possession of stolen property, and (2) actual or constructive knowledge the property is stolen. RCW 9A.56.140(1); *See State v. Richards*, 27 Wn. App. 703, 706, 621 P.2d 165 (1980); *State v. Jennings*, 35 Wn. App. 216, 219, 666 P.2d 381 (1983).

A person knows of a fact by being aware of it or having information that would lead a reasonable person to conclude the fact exists. RCW 9A.08.010(1)(b). Both circumstantial evidence and direct evidence are equally reliable to establish knowledge. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

In a prosecution for possessing stolen property, the State does not have to show the defendant had actual knowledge that the property was stolen. *State v. Rockett*, 6 Wn. App. 399, 402, 493 P.2d 321 (1972). Rather, it is enough if the defendant had knowledge of facts sufficient to put him on notice that the property was stolen. *Rockett*, 6 Wn. App. at 402.

Possession of stolen property in connection with “slight corroborative evidence of other inculpatory circumstances” is sufficient to prove the guilty knowledge necessary to support a conviction for possession of stolen property. *State v. Rhinehart*, 21 Wn. App. 708, 712, 586 P.2d 124 (1978),

quoting State v. Portee, 25 Wn.2d 246, 253-54, 170 P.2d 326 (1946). *See also State v. Womble*, 93 Wn. App. 599, 604, 969 P.2d 1097 (1999). It is not essential that there be actual and positive knowledge that the goods were stolen. It is sufficient if there is constructive knowledge through notice of facts and circumstances from which guilty knowledge may be inferred. *State v. Rye*, 2 Wn. App. 920, 927, 471 P.2d 96 (1970), *citing State v. Salle*, 34 Wn.2d 183, 208 P.2d 872 (1949). The presence of additional suspicious circumstances related to a stolen item is relevant to prove facts and circumstances from which guilty knowledge may be inferred. *See State v. Rockett*, 6 Wn. App. 399, 402-03, 493 P.2d 321 (1972).

In the present case, it was uncontested that the telescope had recently been stolen, and was valued at \$3,500. In addition, Yanac admitted that he thought the telescope might be stolen. Yanac's admitted concerns in this regard were corroborated by the fact that he saw the \$3,500 telescope, which was in good condition, laying next to a shed at Blithe's residence, and Blithe told him that he did not know where it had come from, and told Yanac that he could have it. These facts, when viewed in a light most favorable to the State, were either sufficient for a jury to conclude that Yanac knew the telescope was stolen or were sufficient for a jury to infer guilty knowledge based upon the suspicious circumstances under which Yanac obtained the telescope. The State, therefore, established possession of the stolen property

in connection with "slight corroborative evidence of other inculpatory circumstances," and this evidence was sufficient to prove the guilty knowledge necessary to support a conviction for possession of stolen property.

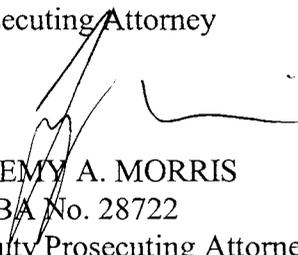
IV. CONCLUSION

For the foregoing reasons, Yanac's conviction and sentence should be affirmed.

DATED July 19, 2007.

Respectfully submitted,

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DOCUMENT1