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I. ASSIGNMENTS OF ERROR

1. The trial court erred by convicting Allman of second degree theft without sufficient evidence of the fair market value of the used items stolen.
2. The trial court violated due process by sentencing Allman based on the State's unproved assertion of his prior criminal history.
3. The State failed to prove Allman's criminal history by a preponderance of the evidence.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether there was insufficient evidence to support the conviction for second degree theft where there was no evidence presented of the fair market value of the used items stolen.
2. Whether the trial court violated due process when accepting the State's unproved assertion of Allman's criminal history and offender score when Allman had not affirmatively relieved the State of its burden of proof.

III. STATEMENT OF THE CASE

This case arose from an incident where Karl Allman was alleged to have illegally entered a motor vehicle and took a number of items from within. He was charged with both theft in the second degree and vehicle prowling in the second degree. CP 1-2.

According to the testimony put forth at trial, Allman had entered a truck through the window and took a few items, including the GPS unit and an MP3 player. RP 34-35, 47-50, 53-58, 69. He was only in the truck for 90 seconds. RP 35. He was arrested a few blocks away and all of the property was recovered. RP 53-58, 67-68.

Allman was convicted of both counts. RP 119. At sentencing, the State presented an unsigned "stipulation" to prior history as proof of the criminal history warranting an offender score of eight. RP 129-30. Noting that the defense had not stipulated to the prior history, the parties had the following discussion:

THE COURT: I am looking at this now, what I just asked for, and it says "Refused to sign." There is no stipulation?

[PROSECUTOR]: There isn't. This is a trial,

Your Honor.

THE COURT: No stipulation as to his offender score.

[PROSECUTOR]: Apparently not.

THE COURT: Okay. And so before we even get into the sentence, then, do we need to get certified copies of convictions or any information of that sort?

[PROSECUTOR]: Well, I wasn't aware that there was going to be an argument and I --

THE COURT: I am just looking at what you passed to me, and it said "no stipulation," so that's kind of the first thing that always comes to my mind.

[PROSECUTOR]: That's true. So I guess we will have to find out if that's the case. They are all here in Pierce County, so I can get them. I just don't have them --

THE COURT: Right.

[PROSECUTOR]: -- right here.

THE COURT: [Defense]?

[DEFENSE]: Usually, Your Honor, after a trial, as you may know, I don't think I am the only defense attorney who does this, it's usually not uncommon for us not to stipulate to the offender score since the case is going to be going up on appeal.

THE COURT: Really? That's kind of uncommon for me, but.

[DEFENSE]: Really?

THE COURT: Yeah. Most cases, the parties have stipulated what the offender score is so we know we are all talking about the same sentencing range. Otherwise, if it's -- if the offender score is zero, I assume his range isn't going to be 17 to 22 months, and that would be the time for you to argue that it's not.

[DEFENSE]: And I usually do it pro forma, Your Honor, and they all are Pierce County cases, so I don't know that I -- I don't have any argument about whether or not his priors are correct.

I will indicate that I believe his range is 17 to 22 months on the Theft in the Second Degree. But I believe his offender score is a seven, isn't that what we agreed on?

[PROSECUTOR]: No, we took out one. Well, hold on. Well, I have it as an eight. The range is 17 to 22. Do you have the SRA, I can take a look at it? Because we did take out that one.

[DEFENSE]: You're right.

[PROSECUTOR]: Yeah, it is an eight.

[DEFENSE]: It is an eight. There was earlier an issue with an identity theft case being apparently counted twice.

[PROSECUTOR]: That's correct, and we took care of that.

[DEFENSE]: So I can sign off on the stipulation if Your Honor wants.

THE COURT: It's not if I want. I mean, I am asked to sentence him. I don't know what his record is. I don't do the research. The prosecutor tells me it's eight, it's 17 to 22. If you think it's different, tell me, and now is the time to tell me before I, you know, consider a 22-month sentence, if you think it's wrong or what the issues might be or if you want the State to get certified copies of the convictions or, you know.

[DEFENSE]: I believe his offender score is an eight, and he is 17 to 22.

THE COURT: Okay. All right. Okay.

[PROSECUTOR]: Okay.

4/15/11 RP 127-30. The court accepted the State's assertions as to criminal history and sentenced Allman to the maximum of the standard

range, 22 months, for theft, to be served concurrently with the vehicle prowling conviction. CP 50, 53, RP 134. This appeal timely follows.

IV. ARGUMENT

ISSUE 1: THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE CONVICTION FOR SECOND DEGREE THEFT BECAUSE THERE WAS NO EVIDENCE PRESENTED OF THE FAIR MARKET VALUE OF THE USED ITEMS STOLEN.

Due process requires the State to prove all elements of a crime beyond a reasonable doubt. *State v. Aver*, 109 Wn.2d 303, 310, 745 P.2d 479 (1987). Evidence is insufficient to support a conviction when, viewed in the light most favorable to the prosecution, it would not permit a rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

To prove second degree theft, the State must present evidence that the defendant stole property exceeding \$250 in value but not exceeding \$1,500 in value, or that he stole a motor vehicle of a value less than \$1,500. RCW 9A.56.040(1)(a) and (d). "Value" refers to the market value of the property at the time and in the general area of the crime. RCW 9A.56.010(18)(a). Market value is an objective standard and

consists of the price a well-informed buyer would pay to a well-informed seller. *State v. Longshore*, 141 Wn.2d 414, 429, 5 P.3d 1256 (2000).

In this case, Allman was alleged to have stolen the following: a used Zune MP3 player purchased in 2007 for \$199 (RP 87); a used GPS unit and information chip, purchased in 2009 for \$758 (RP 88); a used Blue Tooth earpiece purchased in 2007 for \$49.99 (RP 90); power cords purchased in 2009 for \$9.99 (RP 91). In addition, the State argued that the songs downloaded to the MP3 player, also available on the owner's computer, were "stolen," and that they had a purchase value of \$483 (RP 87, 93). There was no evidence presented as to the value of these used items other than their "replacement" value new, which was alleged by the unsupported testimony of the owner in each instance to be identical to the purchase prices years before. RP 87, 88, 89, 90, 91, 92. The owner stated that his information as to the current purchase price of these items, purchased new, came from a phone conversation with a Costco employee. RP 92.

This evidence was insufficient to show the fair market value of items that were used, 2-4 years old. All of the items taken were technology that is constantly subject to updates and change and it is incredibly unlikely that their value used would be anything near the value of the items brand new. While evidence of the price paid is entitled to

weight in determining the value of an item the trier of fact must also consider evidence of the changes in the property's condition that would affect its market value at the time it was stolen. *Longshore*, 141 Wn.2d at 430; *State v. Hermann*, 138 Wn. App. 596, 158 P.3d 96, 99 (2007) (citing *State v. Melrose*, 2 Wn. App. 824, 831, 470 P.2d 552 (1970)). Therefore, if the property is used, the State must produce evidence of the market value of the used property at the time of the theft.

In *State v. Morley*, 119, Wn.App. 939, 83 P.3d 1023 (2004), the case involved the theft of a used generator. The court held that evidence of the original value was insufficient to support a determination of the value at the time of the theft.

Likewise, the evidence here of the original purchase price and dubious hearsay evidence of the current purchase price of new items, is insufficient evidence of the fair market value at the time of theft. Therefore, the second degree theft conviction must be reversed.

ISSUE 2: THE TRIAL COURT VIOLATED DUE PROCESS WHEN ACCEPTING THE STATE'S UNPROVED ASSERTION OF ALLMAN'S CRIMINAL HISTORY AND OFFENDER SCORE WHEN ALLMAN HAD NOT AFFIRMATIVELY RELIEVED THE STATE OF ITS BURDEN OF PROOF.

At sentencing, the State bears the burden under the due process clause to prove the existence of prior convictions by a preponderance of the evidence. *In re Pers. Restraint of Cadwallader*, 155 Wn.2d 867, 876,

123 P.3d 456 (2005). “The best evidence of a prior conviction is a certified copy of the judgment.” *State v. Lopez*, 147 Wn.2d 515, 519, 55 P.3d 609 (2002) (quoting *State v. Ford*, 137 Wn.2d 472, 480, 973 P.2d 452 (1999)). It is the obligation of the State, not the defendant, to assure that the record before the sentencing court supports the criminal history determination. *Ford*, 137 Wn.2d at 480. The SRA cannot relieve the State of this constitutional burden or shift it to the defense. *State v. Hunley*, 161 Wn.App. 919, 929, 253 P.3d 448 (2011).¹ This reflects fundamental principles of due process, which require that a sentencing court base its decision on information bearing “some minimal indicium of reliability beyond mere allegation.” *Ford*, 137 Wn.2d at 481 (internal quotation marks omitted) (quoting *United States v. Ibarra*, 737 F.2d 825, 827 (9th Cir.1984)).

In this case, the defense did not stipulate to the prior history and the State did not provide any proof of the prior convictions it alleged to the court. 4/15/11 RP 127-30. The State may argue that the defense counsel orally stipulated with her statement that “I believe his offender score is an eight, and he is 17 to 22.” 4/15/11 RP 130. However, defense counsel clearly told the court that she was not stipulating to the criminal history

¹ “RCW 9.94A.530(2) is facially unconstitutional insofar as it provides that the defendant’s failure to object to the ‘bare assertions’ in a criminal history summary constitutes acknowledgement.” *Hunley*, 161 Wn.App. at 929.

and only made the above statement after pressure from the court. 4/15/11
RP 127-30. Since it was the State's burden of proof to provide sufficient
evidence of the prior convictions, the sentencing judge cannot shift the
burden to the defense by forcing defense counsel to disprove the State's
bare assertions.

In *Hunley*, this court held that:

The State does not meet its burden through bare assertions,
unsupported by evidence. Nor does the 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.*

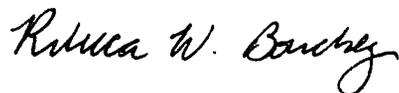
161 Wn.App. 919, 928 (*citing Ford*, 137 Wn.2d at 482). Thus, the
defense counsel's forced statement that she was unaware of problems with
the State's recitation of Allman's criminal history is an attempt by the trial
court to shift the burden to the defense. The burden on the State is not
onerous—all the prosecutor needed to do was to provide copies of the
judgments in question, which it did not do. In the absence of any evidence
to support it, the State's bare assertions of Allman's criminal history were
not sufficient evidence and the trial court erred by sentencing Allman
without sufficient evidence of his criminal history.

Because the State failed to prove Allman's criminal history, as required by due process, Allman's sentence must be vacated and this case must be remanded for re-sentencing.

V. CONCLUSION

The trial court violated due process when it convicted Allman of second degree theft without sufficient evidence of the fair market value of the used items stolen. In addition, the court erred when it sentenced Allman based on the State's bare assertions as to his criminal history. The State did not meet its burden of providing Allman's criminal history by a preponderance of the evidence. Therefore, Allman's sentence must be reversed and remanded for re-sentencing.

DATED: August 22, 2011



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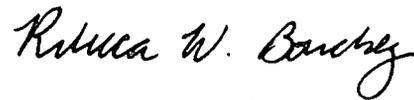
BY _____
DEPUTY

CERTIFICATE OF SERVICE

I certify that on August 22, 2011, I caused a true and correct copy of this Appellant's Brief to be served on the following via prepaid first class mail

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