

NO. 50202-0-II

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

STATE OF WASHINGTON,

Respondent,

v.

DALTON JOHNSON,
Appellant.

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

The Honorable Jennifer A. Forbes, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The state failed to prove all of the essential elements of the crime trafficking in stolen property in the second degree.

Issue Presented on Appeal

Did the state fail to prove the essential elements of trafficking in stolen property in the second degree where the evidence did not establish beyond a reasonable doubt that appellant knew the item was stolen and acted recklessly with respect to this knowledge?

B. STATEMENT OF THE CASE

a. Procedural Facts.

Johnson was originally charged with trafficking in stolen property in the second degree and charged by amended information with trafficking in stolen property in the first degree. CP 1-10. Johnson was convicted of trafficking in stolen property in the second degree and acquitted on the first degree charge. CP 36-37, 40-50. This timely appeal follows. CP 53.

b. Substantive Facts.

Someone stole Peter Aguiar's generator from his garage November 22, 2016. RP 74-75. In an attempt to locate his

generator, Aguiar called several pawn shops until he found one that indicated had recently received a generator. RP 76. The serial number for the generator matched the serial number of the generator sold to Cash America. RP 97-98. After providing the serial number to the police, Kitsap Deputy Paul Tufts filed a burglary report, obtained a pawn shop receipt from Cash America for the generator, and obtained surveillance video of the sale. RP 90, 97.

The manager of Cash America, James Blackburn, testified to the standard procedure for buying items which includes verifying the identity of the seller. RP 107-114. Generally, Cash America distinguishes traffickers from legitimate sellers by determining if the person is familiar with the item proposed for sale. For example, Cash America requires the seller to demonstrate that he or she can operate the item offered for sale. RP 108, 137, 142-43. Cash America also obtains identification and observes the seller's mannerisms to detect a trafficker. RP 109. Cash America followed this procedure in this case. RP 108-09, 137.

Johnson, with a friend, sold the generator to Cash America. RP 141, 150. Kendall Church, an employee of Cash America

bought the generator after Johnson was able to easily start the generator and after Johnson provided his correct name, driver's license and signed the pawn slip indicating that he was a legitimate seller. RP 107-114, 121-22, 135-147, 157. Johnson informed Church that the generator was a gift from his grandfather and Johnson appeared to be a legitimate seller; he was "very courteous, very nice", normal, not nervous. RP 141-43, 152-53.

The video depicted Johnson's friend appearing to cover his face with his hand. RP 156-57. Sean Goodman was the 'friend'. RP 220. Goodman was a childhood friend of Johnson's with whom Johnson maintained intermittent contact. RP 215-218. Goodman contacted Johnson and informed Johnson that Goodman had received a generator from his parents and needed assistance selling it. RP 220.

Johnson knew that Goodman hung around people Johnson did not like and that Goodman was having hard times because his parents kicked him out of their house, but he had never known Goodman to steal and believed him when he said the generator was from his parents. RP 217-18, 220-23, 248-50. Goodman assured Johnson that the generator was not stolen. RP 221.

Johnson sold the generator for Goodman as a favor and not for compensation, but after the sale, at a gas station, Goodman paid \$10 for gas for Johnson's car and bought Johnson a package of cigarettes. RP 251-52.

C. ARGUMENT

THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THE ESSENTIAL ELEMENTS OF TRAFFICKING IN STOLEN PROPERTY IN THE SECOND DEGREE.

The mens rea for trafficking in stolen property in the second degree is reckless. RCW 9A.82.055. Here the state failed to prove that Johnson recklessly trafficked in stolen property.

a. Standard of Review

In every criminal prosecution, due process requires that the state prove, beyond a reasonable doubt, every fact necessary to constitute the charged crime. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Where a defendant challenges the sufficiency of the evidence, the proper inquiry is "whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt." *State v. Houston-Sconiers*, 188 Wn.2d 1, 15, 391 P.3d 409 (2017) (*citing State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068

(1992)). All reasonable inferences from the evidence are drawn in favor of the state and interpreted “most strongly” against the defendant. *Houston-Sconiers*, 188 Wn.2d at 15; *Salinas*, 119 Wn.2d at 201.

“Circumstantial evidence and direct evidence are equally reliable.” *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). The appellate court “defer[s] to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence.” *Thomas*, 150 Wn.2d at 874-875.

Sufficient means more than a mere scintilla of evidence; there must be that quantum of evidence necessary to establish circumstances from which the jury could reasonably infer the fact to be proved. *State v. Fateley*, 18 Wn. App. 99, 102, 566 P.2d 959 (1977). The remedy for insufficient evidence to prove a crime is reversal, and retrial is prohibited. *State v. Smith*, 155 Wn.2d 496, 505, 120 P.3d 559 (2005).

“[A] criminal defendant may always challenge the sufficiency of the evidence supporting a conviction for the first time on appeal.” *State v. Sweany*, 162 Wn. App. 223, 228, 256 P.3d 1230 (2011), *aff'd*, 174 Wn.2d 909, 281 P.3d 305 (2012) (*citing State v. Hickman*,

135 Wn.2d 97, 103 n.3, 954 P.2d 900 (1998)); see also RAP 2.5(a)(2) (stating “a party may raise the following claimed errors for the first time in the appellate court ... failure to establish facts upon which relief can be granted. . . .”). “A defendant challenging the sufficiency of the evidence is not obliged to demonstrate that the due process violation is ‘manifest.’” Id.

b. Trafficking In Stolen Property.

RCW 9A.82.050 provides:

(1) A person who recklessly traffics in stolen property is guilty of trafficking in stolen property in the second degree.

Id. “‘Traffic’ means to sell, transfer, distribute, dispense, or otherwise dispose of stolen property to another person, or to buy, receive, possess, or obtain control of stolen property, with intent to sell, transfer, distribute, dispense, or otherwise dispose of the property to another person.” RCW 8A.82.010(19).

A person is reckless or acts recklessly when he or she **knows of and disregards a substantial risk that a wrongful act may occur** and his or her disregard of such substantial risk is a gross deviation from conduct that a reasonable person would exercise in the same situation.” (Emphasis added) RCW

9A.08.010(1)(c). “Stolen property’ means property that has been obtained by theft, robbery, or extortion.” RCW 9A.82.010(16).

To prove that Johnson committed trafficking in stolen property in the second degree, the state had to establish beyond a reasonable doubt that Johnson knew the generator was stolen, and recklessly disregarded this knowledge when he sold it to the pawn shop. *Winship*, 397 U.S. at 364; RCW 9A.82.055.

Criminal Negligence is defined as:

(d) CRIMINAL NEGLIGENCE. A person is criminally negligent or acts with criminal negligence when he or she fails to be aware of a substantial risk that a wrongful act may occur and his or her failure to be aware of such substantial risk constitutes a gross deviation from the standard of care that a reasonable person would exercise in the same situation.

RCW 9A.08.010(1)(d). The difference between criminal negligence and reckless is that for reckless the defendant “knows of and disregards a substantial risk” that the item may be stolen, whereas for negligence the state need only prove that the defendant failed to be aware of the risk. RCW 9A.08.010(1)(c), (d).

Johnson knew that Goodman was having trouble and had been kicked out of his parent’s home, but he did not know that

Goodman had been involved in prior thefts. RP 217-18, 220-23, 248-50. Johnson also obtained the assurance he needed from Goodman that the generator was not stolen. *Id.* This information does not directly or by inference establish beyond a reasonable doubt that Johnson knew of and disregarded a substantial risk that a wrongful act might occur if he sold the generator for Goodman. *Winship*, 397 U.S. at 364; RCW 9A.08.010(1)(c). Rather, the evidence may have established that Johnson was negligent. Negligence does not however meet the mens rea for the crime of trafficking in stolen property in the second degree.

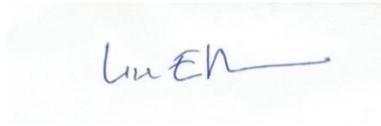
Because the state failed to prove that Johnson acted recklessly, this Court must reverse and remand for dismissal with prejudice for insufficient evidence that Johnson acted recklessly.

D. CONCLUSION

For the reasons discussed herein, Dalton Johnson respectfully requests this Court reverse and remand for dismissal with prejudice for insufficient evidence that Johnson acted recklessly.

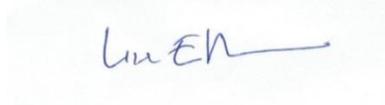
DATED this 7th day of September 2017.

Respectfully submitted,

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LISE ELLNER
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I, Lise Ellner, a person over the age of 18 years of age, served the Kitsap County Prosecutor's Office kcpa@co.kitsap.wa.us and Dalton Johnson, c/o Kitsap County Jail/#2017002297, 614 Division St # MS-33, Port Orchard, WA 98366-4614 a true copy of the document to which this certificate is affixed on September 7, 2017. Service was made by electronically to the prosecutor and Dalton Johnson by depositing in the mails of the United States of America, properly stamped and addressed.

A handwritten signature in blue ink, appearing to read "Lise Ellner", is centered within a light gray rectangular box.

Signature

LAW OFFICES OF LISE ELLNER

September 07, 2017 - 11:43 AM

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