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Division II
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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

FIYORI BERHE BAHTA,

Appellant.

On Appeal from the Pierce County Superior Court
Cause No. 18-1-02443-1
The Honorable Michael Schwartz, Judge

OPENING BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

1. The State failed to meet its burden of proving beyond a reasonable doubt all of the essential elements of theft charged in counts 1-8.
2. The State presented insufficient evidence to establish that Fiyori Bahta was the perpetrator of the thefts charged in counts 1-8.
3. The State failed to meet its burden of proving beyond a reasonable doubt all of the essential elements of theft from a vulnerable adult in the first degree charged in count 2.
4. The State presented insufficient evidence to establish the value of items taken from the victim in count 2.

II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Where the State's evidence showed that Fiyori Bahta had access to the victims and opportunity to take the stolen property, and eventually possessed the stolen property, but there were no witnesses to the thefts and countless others had access and opportunity as well, did the State fail to prove beyond a reasonable doubt that Fiyori Bahta was the perpetrator of the thefts? (Assignments of Error 1 & 2)
2. Where a lay witness estimated that her mother's rings were

valued at more than \$5,000, but acknowledged that she did not know what the ring would cost to purchase, did not know where the ring was originally purchased, and did not know what the ring was made of, did the State fail to prove beyond a reasonable doubt that the rings had a market value exceeding \$5,000? (Assignments of Error 3 & 4)

III. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The State charged Fiyori Berhe Bahta with nine crimes related to jewelry taken from residents of the Weatherly Inn elder care facility. (CP 1-3, 28-31) The State charged five counts of theft from a vulnerable adult (RCW 9A.56.400), two counts of theft in the third degree (RCW 9A.56.020, .050), and two counts of trafficking in stolen property (RCW 9A.82.050). (CP 28-31)

The trial court denied Bahta's pretrial motion to admit other suspect evidence, and granted the State's request to admit evidence of uncharged thefts from the same facility and in the same timeframe as the charged incidents. (CP 20-22, 76-78; 12/05/18 RP 14-28; 29-38, 93-100)¹ After the State rested its case-in-chief,

¹ The transcripts will be referred to by the date of the proceeding contained therein.

the court denied Bahta's motion to dismiss for lack of evidence establishing the value of the items taken. (12/12/18 RP 594-607)

The jury convicted Bahta of all of the theft from a vulnerable adult charges, one of the third degree theft charges, and both trafficking charges. (12/13/18 RP 740-41; CP 67-75) The trial court imposed a standard range sentence totaling 46 months of confinement, and ordered drug treatment because Bahta was struggling with an opioid addiction at the time she committed the crimes. (02/01/19 RP 764, 769, 771; CP 84-87, 95) Bahta filed a timely notice of appeal. (CP 115)

B. SUBSTANTIVE FACTS

The Weatherly Inn is an assisted living facility in Tacoma, Washington. (12/06/18 RP 251, 252) The facility contains a memory care unit, where residents suffering from various stages of dementia and Alzheimer's disease receive care and treatment. (12/06/18 RP 252-53, 261-62) The memory care unit is staffed 24-hours a day, broken into three shifts (morning, evening, and graveyard). There is anywhere from eight to 15 nurses, caregivers, security, and other staff on duty at any given time. (12/06/18 RP 261-62; 12/10/18 RP 334, 338; 12/12/18 RP 520-21)

The memory care unit is accessible to visitors and staff

without the need for a key or passcode. (12/06/18 RP 258-59; 12/10/18 RP 334) However, doors to the unit are secured from the inside, so a person cannot exit the unit without typing a code into a keypad. (12/06/18 RP 258; 12/10/18 RP 335; 12/12/18 RP 515) The code is posted by the exit doors in a way that visitors and staff can recognize it, but that patients and memory care residents cannot. (12/06/18 RP 259; 12/10/18 RP 335-36; 12/12/18 RP 514)

Fiyori Bahta began working as a licensed practical nurse in the memory care unit on October 10, 2017. (12/10/18 RP 274; 2/12/18 RP 527) Bahta worked evening shifts, from 2:15 PM to 10:30 PM. (12/10/18 RP 274; 12/12/18 RP 618)

In mid-October, Weatherly Inn management were informed that several residents were missing rings or other jewelry. (12/10/18 RP 278, 280-81; 12/12/18 RP 524) Staff searched the facility, but were unable to locate the missing items. (12/10/18 RP 278-79; 12/12/18 RP 524)

Between October 19 and October 28, rings worn by residents Don Young, Helen Ettlin, Desa Gese, Lisa Peterson, Janet Reha, and Richard Taylor had disappeared. (12/10/18 RP 285-97; Exh. P16-P18, P84) And on October 21, rings and a watch disappeared from nurse Vicki Infante's purse, which she had left in

the nurses' charting room. (12/10/18 RP 310-11; 12/12/18 RP 553-54)

Supervisor Theresa Edwards notified the staff about the suspicious disappearances, and told all nurses and caregivers to check the residents for rings at the end of each shift and note in their charts whether the rings were still on the residents' fingers. (12/10/18 RP 296-97, 299; 12/11/18 RP 409-10, 411, 433-44) But rings continued to disappear. Rings belonging to Barbara Bishop, Beverly Brown, Ruby McFarland and MaryLu Beck were noted missing on November 6 and 7. (12/10/18 RP 300-07; Exh. P19-P21, P85)

Edwards decided to compare the dates that the items had been noted missing with the staffing schedules. (12/10/18 RP 322, 315, 326) She found that Bahta was the only staff member who worked a shift on each of the days that jewelry had been noted or reported missing. (12/10/18 RP 326; Exh. 6-11) Edwards interviewed Bahta about the missing jewelry, but Bahta denied any involvement in their disappearance. (12/10/18 RP 327; 12/12/18 RP 537)

Edwards contacted the police and relayed the information she had gathered, including Bahta's overlapping work schedule, to

Detective Scott Yenne. (12/06/18 RP 228; 12/10/18 RP 329)
Detective Yenne searched an online database of pawn shop transactions. (12/06/18 RP 233) He entered Bahta's name, and discovered that she had recently sold items to a shop in Tacoma called Gold Master's Precious Metals. (12/06/18 RP 237; 12/11/18 RP 372)

Gold Master's owner, David Berryman, testified that his business purchases gold and precious metals from individuals at below value, then resells the items at a higher price in order to make a profit. (12/11/18 RP 372, 373, 374) He always takes a photocopy of the item being sold, along with the seller's photo identification, before he concludes a transaction. (12/11/18 RP 374, 375-76) He immediately inputs the transactions into a law enforcement database, and holds the items for 30 days in case the property turns out to be stolen. (12/11/18 RP 376, 380, 381)

On October 23, 2017, Bahta sold rings and a small gold chain to Gold Masters, and was paid \$550.00. (12/11/18 RP 376-77, 379, 394; Exh. 33) On November 7, Bahta sold another six rings to Gold Masters and was paid \$1,750.00. (12/11/18 RP 382, 383-84, 385; Exh. 35)

Detective Yenne retrieved the rings from Gold Masters, and

confirmed that they belonged to Ettlin, Gese, Bishop, McFarland, Beck, Infante, and another resident, Ferdy Kollar.² (12/06/18 RP 240, 246-47; 12/10/18 RP 331, 332-33) Relatives of these residents testified at trial that rings belonging to their loved ones had been missing, and they identified the rings that were sold to Gold Masters and recovered by Detective Yenne as those same items. (12/10/18 RP 347-48; 12/11/18 RP 363, 364-65, 425, 426-27, 451, 454-55, 458, 459; 12/12/18 RP 499, 502)

Most of the relatives also testified about their belief as to the value of the rings, based on purchase price, appraisals, or recent internet searches for similar items. (12/11/18 RP 366, 425, 453, 460, 464; 12/12/18 RP 505-06, 568-69) Detective Yenne testified that gold and precious stones generally do not lose value, and instead increase in value over the years. (12/12/18 RP 588)

Two other nurses in the memory care unit testified that they saw Bahta alone with residents around the same time that those residents lost their rings. John Demotica testified that he called Bahta to MaryLu Beck's room to dress a wound on the night of November 6. (12/11/18 RP 411-12, 414, 416) Before he left Beck,

² The recovered rings belonging to these seven victims formed the basis for the seven theft charges. (CP 28-31) The degree of each charge depended on the value of the items taken from each victim. (CP 28-31)

he noted that she was wearing her ring. (12/11/18 RP 413-14) Beck's ring was missing on November 7. (12/10/18 RP 307; Exh. P21) And Charlene Caton testified that she saw Barbara Bishop and Beverly Brown wearing their rings at dinner on November 6. (12/11/18 RP 436-37, 438-39, 440-41) Caton later saw Bahta escort Brown from the dining room to the activity room, which she thought was odd because Brown preferred to spend evenings in the dining room. (12/11/18 RP 439-40, 441) Brown's and Bishop's rings were missing on November 7. (12/10/18 RP 300, 303; Exh. P19, P85)

Vicki Infante testified that she took off her rings and watch and placed them inside her purse before she started her shift on October 21. (12/12/18 RP 553, 553-54) Bahta was the only other person in the room at the time. (12/12/18 RP 557) When Infante returned after her shift, the rings and watch were gone. (12/12/18 RP 560)

Bahta acknowledged that she sold the jewelry to Gold Masters. (12/12/18 RP 641-42, 646) But she denied taking the items from the residents. (12/12/18 RP 649) Another nurse, Crystal Tupito, gave Bahta the rings and asked her to sell them for her because she did not have a photo identification and could not

do it herself. (12/12/18 RP 625-26, 639-40, 645-46) Bahta agreed to do this for Tupito because Tupito had recently assisted Bahta when she had been locked out of her car, and because Tupito told her she was a single mother and was having financial problems and needed the money. (12/12/18 RP 635-36, 637, 638, 646) Bahta testified that Tupito said the jewelry was hers, so Bahta did not know that they were stolen items. (12/12/18 RP 640, 646) Bahta was unaware that more than one ring had gone missing, so she did not realize Tupito's jewelry could have been those stolen items. (12/12/18 RP 623-24, 640, 645)

IV. ARGUMENT & AUTHORITIES

“Due process requires that the State provide sufficient evidence to prove each element of its criminal case beyond a reasonable doubt.” *City of Tacoma v. Luvene*, 118 Wn.2d 826, 849, 827 P.2d 1374 (1992) (citing *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)); U.S. Const. amend. 14. Evidence is sufficient to support a conviction only if, viewed in the light most favorable to the prosecution, 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. The State failed to meet its burden of proving the identity of the perpetrator of the thefts and the value of McFarland’s rings.³

A. THE STATE FAILED TO PROVE THAT BAHTA PERPETRATED THE THEFTS OF JEWELRY.

The State presented sufficient evidence to prove that someone stole rings and jewelry from residents and a nurse at the Weatherly Inn. However, the State failed to prove that Bahta was the perpetrator. “It is axiomatic in criminal trials that the prosecution bears the burden of establishing beyond a reasonable doubt the identity of the accused as the person who committed the offense.” *State v. Hill*, 83 Wn.2d 558, 560, 520 P.2d 618 (1974); accord *State v. Thomson*, 70 Wn. App. 200, 211, 852 P.2d 1104 (1993).

The State’s evidence did not show beyond a reasonable doubt that Bahta was the person who committed the theft offenses. The State showed that Bahta had the opportunity to take the jewelry, by showing that she had access to the residents and that

³ “[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)).

she was working on the days the jewelry disappeared. And the State showed that Bahta eventually had possession of the items. But no witness testified they actually saw Bahta take a ring, or saw Bahta with a ring while on the Weatherly Inn premises. And the evidence also showed that multiple staff and visitors had the same opportunity and access. The State did not show that Bahta, as opposed to one or more of these other persons, was responsible for taking one or more of the items from the residents.

The State's evidence was insufficient to show beyond a reasonable doubt that Bahta was the perpetrator of each of the thefts.

B. THE STATE FAILED TO PROVE THAT THE VALUE OF MCFARLAND'S RINGS EXCEEDED \$5,000.

In regards to McFarland, the State charged Bahta with theft from a vulnerable adult in the first degree. (CP 28-29) But there was insufficient evidence to support Bahta's conviction on this count because the State did not prove the market value of the rings.

To find Bahta guilty of this crime, the jury had to find that she "commit[ed] theft of property or services that exceed(s) five thousand dollars in value ... of a vulnerable adult." RCW

9A.56.400(1)(a). “Theft” means to “wrongfully obtain or exert unauthorized control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services[.]” RCW 9A.56.020(1)(a).

For the purpose of proving the various degrees of theft, “value” is defined as “the market value of the property or services at the time and in the approximate area of the criminal act.” RCW 9A.56.010(21)(a). “Market value” means “the price which a well-informed buyer would pay to a well-informed seller, where neither is obligated to enter into the transaction.” *State v. Longshore*, 141 Wn.2d 414, 429, 5 P.3d 1256 (2000) (internal quotation marks omitted) (citations omitted).

The State called McFarland’s daughter, Gaye Jacobs, to testify about the value of her mother’s rings, and the following exchange took place:

- Q. And are you familiar with the approximate value of the ring?
- A. I’m not familiar with the -- I don’t know how much it cost. I would -- could guess how much it would cost.
- Q. Okay. Are you familiar with jewelry at all?
- A. Yes.
- Q. Okay. And would you estimate that the value of that ring –
- A. I would estimate that that’s about \$10,000.
- Q. Would you estimate it’s above \$5,000?

- A. Pardon me?
Q. Is it above \$5,000?
A. I would think it would be.
...
Q. Are you aware whether or not the diamonds are real or cubic zirconium?
A. I am -- I don't know for sure. I mean, I would -- I would think that they would be real, but I've never taken it to a jeweler, so -- Yes, I would believe they would be real.
Q. Who purchased the ring?
A. After my father died, my mom got remarried, and so her second husband, James Clunes, bought the ring for my mother.
Q. Okay. And do you know where he purchased it from?
A. I don't know where.

(12/11/18 RP 366-67) This testimony was insufficient to prove the fair market value of the rings.

In *State v. Williams*, 199 Wn. App. 99, 105-11, 398 P.3d 1150 (2017), the defendant argued that the State presented insufficient evidence to convict him of second degree possession of stolen property. 199 Wn. App. at 104. In order to convict him of this crime, the State had to prove that the value of the stolen property the defendant possessed exceeded \$750 in value. 199 Wn. App. at 105. The evidence of value presented at trial consisted of a witness testifying that the value of the stolen property was "roughly \$800." 199 Wn. App. at 105.

Division 3 held there was insufficient evidence to support the

defendant's conviction. 199 Wn. App. at 105-11. The Court reasoned the witness was asked "to testify to a 'value' of the property, not to a 'market value or 'fair market value' of the property." 199 Wn. App. at 111. The Court further reasoned that the witness "did not testify to the basis of his opinion of value[,] and that "[f]or all we know, he used the purchase price of the goods, the replacement cost of the goods, or some intrinsic value to himself." 199 Wn. App. at 111.

The *Williams* court relied on several foreign cases to support its conclusion. 199 Wn. App. at 109-10. One of those cases, *Sanchez v. State*, 101 So.3d 1283 (Fla. Dist. Ct. App. 2012), is particularly helpful here as well. In that case, the victim of a theft briefly testified about the value of the property taken. The prosecutor asked her, "If you had to assign monetary value to this jewelry, what would it be?" The victim responded, "I don't know, a couple of hundred dollars maybe." 101 So.3d at 1285. She did not know the value of a camera purchased by her husband, but guessed that it was worth "maybe a hundred dollars." 101 So.3d at 1285. When questioned about two stolen remote controls, the victim twice stated that she did not know their value, but speculated a price of \$20 each. The reviewing court reversed the conviction,

declaring that when the owner estimates the value and no other proof is presented, the owner's evidence is insufficient to prove fair market value. 101 So.3d at 1287.

Here, as in *Williams* and *Sanchez*, testimony regarding the value of McFarland's rings was wholly inadequate. First, the State asked Jacobs for the "approximate value" of the rings, but not the "market value." Jacobs gave an estimate for the value of the rings, but gave no basis for her opinion. In fact, she repeatedly told the prosecutor that she was unsure and did not know the cost, value, source, or quality of the rings. The State therefore failed to meet its burden of proving that the value of the rings taken from McFarland exceeded \$5,000.

C. THE STATE'S FAILURE TO PROVE BAHTA WAS THE PERPETRATOR OF THE THEFTS OR PROVE THE VALUE OF MCFARLAND'S RINGS REQUIRES REVERSAL OF THE CONVICTIONS AND DISMISSAL OF THE CHARGES WITH PREJUDICE.

The reviewing court should reverse a conviction and dismiss the prosecution for insufficient evidence where no rational trier of fact could find that all elements of the crime were proven beyond a reasonable doubt. *State v. Hardesty*, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996); *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998). The Double Jeopardy Clause of the Fifth Amendment

bars retrial of a case dismissed for insufficient evidence. *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969).⁴ No rational trier of fact could find that Bahta was the perpetrator of the thefts or that McFarland's rings had a market value over \$5,000. Therefore, the Court should reverse her convictions and dismiss the charges with prejudice.

V. CONCLUSION

Because the State's evidence was insufficient to show Bahta was the perpetrator of the thefts, or that the value of McFarland's rings exceeded \$5,000, this Court should reverse the convictions and dismiss the charges with prejudice.

DATED: June 29, 2019



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CERTIFICATE OF MAILING

I certify that on 06/29/2019, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Fiyori B. Bahta, DOC# 413934, Mission Creek CCW, 3420 NE Sand Hill Road, Belfair, WA 98528.



STEPHANIE C. CUNNINGHAM, WSBA #26436

⁴ Reversed on other grounds by *Alabama v. Smith*, 490 U.S. 794, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989).

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