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Court of Appeals
Division III
State of Washington

No. 30006-4-III
IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

CYNTHIA K. HETHERINGTON,

Defendant/Appellant.

Appellant's Brief

DAVID N. GASCH
WSBA No. 18270
P.O. Box 30339
Spokane, WA 99223-3005
(509) 443-9149
Attorney for Appellant

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A. ASSIGNMENT OF ERROR

The evidence was insufficient to support the convictions for first degree trafficking in stolen property and second degree theft.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Was Ms. Hetherington's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment violated where the State failed to prove the essential elements of the crimes of first degree trafficking in stolen property and second degree theft?

C. STATEMENT OF THE CASE

Catherine Munro worked as a housekeeper for an elderly disabled man named Larry Richmond in the fall of 2010. RP 145-48, 278-79.

Around December 21, 2010, Mr. Richmond discovered two rings that had belonged to his deceased wife were missing from the box in which they were kept inside a dresser drawer. Mr. Richmond became very upset with this discovery and notified the police. RP 148-52, 200-01. Ms. Munro testified she was familiar with the two rings, where they were kept, and saw the empty ring-box. RP150-52. She had not looked in the ring-box for six months prior to October 2010. She had not seen Mr. Richmond

look in the box either or ever noticed him handling the rings. RP 154-55, 163.

Ms. Hetherington became Mr. Richmond's caregiver October 14, 2010. RP 154. Prior to that time, one of the caregivers in the house was a woman named Kelly Smith. RP156. An unidentified male, who was Smith's companion or possibly her husband, was also present in the house at times prior to Ms. Hetherington's arrival. RP 187-89, 351, 360. Ms. Munro's daughter was a caregiver as well and was sometimes present in Mr. Richmond's house taking care of his friend, Arlene Ericson, who also resided in the house at that time. RP 160-61, 170. Ms. Munro testified there could have been as many as a dozen caregivers/workers in and out of the house prior to the time the rings were discovered missing. RP 162-63, 282.

The police initially suspected that Kelly Smith had taken the rings. RP 169. Ms. Smith had previously been a caregiver for Arlene Ericson in the Seattle area and had stolen a ring and a credit card from Arlene Ericson and charged over \$5000 to the credit card. RP 170, 182-83, 185, 187, 360. The police were unable to obtain any more information on Kelly Smith or her whereabouts. RP 170-71, 187-88.

Police eventually discovered the rings had been pawned by Ms. Hetherington on November 2nd and 3rd, 2011. RP 173. Ms. Hetherington at first denied any knowledge of the rings or pawning them, but later admitted she found the rings in a bag in the mud near her parked car on October 17th and later pawned them. RP 176-77, 274, 349. She waited until November to pawn the rings because she wanted to see if anyone reported any rings missing in the newspaper. RP 355-56. She did not make any connection between the rings she found and those missing from Mr. Richmond's house until the police arrested her at her house on January 17, 2011. RP 349, 357-58. She denied stealing the rings from Mr. Richmond. RP 359. Officer Watts, the lead investigator in this incident, testified he had no way of knowing whether the rings were in the house after Kelly Smith and her male companion left around September 28th or anytime prior to Ms. Hetherington's arrival at the house on October 17th. RP 181, 195.

Mr. Richmond died in March 2011, before this matter came to trial. RP 147. A jury convicted Ms. Hetherington of two counts of trafficking in stolen property and one count of second degree theft. CP 160-62.

This appeal followed. CP 195.

D. ARGUMENT

Ms. Hetherington's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment was violated where the State failed to prove the essential elements of the crimes of first degree trafficking in stolen property and second degree theft.

As a part of the due process rights guaranteed under both the Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment the state must prove every element of a crime charged beyond a reasonable doubt. State v. Baeza, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). As the United States Supreme Court explained in Winship: “[T]he use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law.” In re Winship, 397 U.S. at 364.

Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. State v. Moore, 7 Wn. App. 1, 499 P.2d 16 (1972). As a result, any conviction not supported by substantial evidence may be attacked for the first time on appeal as a due process

violation. Id. “Substantial evidence” in the context of a criminal case, means evidence sufficient to persuade “an unprejudiced thinking mind of the truth of the fact to which the evidence is directed.” State v. Taplin, 9 Wn. App. 545, 513 P.2d 549 (1973) (quoting State v. Collins, 2 Wn. App. 757, 759, 470 P.2d 227, 228 (1970)).

In determining the sufficiency of the evidence, the test is "whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (citing State v. Green, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980)). "When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." Salinas, 119 Wn.2d at 201, 829 P.2d 1068 (citing State v. Partin, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977)). "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, 829 P.2d 1068 (citing State v. Theroff, 25 Wn. App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385, 622 P.2d 1240 (1980)).

While circumstantial evidence is no less reliable than direct evidence, State v. Myers, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997), evidence is insufficient if the inferences drawn from it do not establish the requisite facts beyond a reasonable doubt. Baeza, 100 Wn.2d at 491, 670 P.2d 646. Specific criminal intent may be inferred from circumstances as a matter of logical probability." State v. Zamora, 63 Wn. App. 220, 223, 817 P.2d 880 (1991).

Here, there was insufficient evidence that Ms. Hetherington stole the rings or knew they were stolen when she pawned them. The housekeeper, Ms. Munro, testified she had not looked in the ring-box for six months prior to October 2010. She had not seen Mr. Richmond look in the box either or ever noticed him handling the rings. This means the rings could have been taken by anyone months before Ms. Hetherington's arrival in the house. Officer Watts, the lead investigator of this incident, reconfirmed this fact when he testified he had no way of knowing whether the rings were in the house after Kelly Smith and her male companion left around September 28th or prior to Ms. Hetherington's arrival at the house on October 17th.

The police initially suspected that Kelly Smith had taken the rings. This suspicion seemed reasonable considering Ms. Smith had previously

been a caregiver for Arlene Ericson in the Seattle area, had stolen a ring and a credit card from Ms. Ericson and had charged over \$5000 to her credit card. Moreover, Kelly Smith and an unidentified male, who was Smith's companion or possibly her husband, were both present in the house until just prior to Ms. Hetherington's arrival. Unfortunately, the police were unable to obtain any more information on Kelly Smith or her whereabouts.

In addition, Ms. Munro testified there could have been as many as a dozen caregivers/workers in and out of the house prior to the time the rings were discovered missing. In other words, any one or combination of a dozen people had the opportunity to take the missing rings prior to Ms. Hetherington's arrival. Since we don't know when the rings were taken, it is mere conjecture to assume they were taken by Ms. Hetherington simply because she was the one who pawned them. Therefore, there was insufficient evidence to support the conviction for second degree theft.

Considering the remaining convictions, the rings were pawned on November 2 and 3, 2010. Mr. Richmond did not discover that the rings were missing and notify the police until around December 21, 2010. As stated above, the evidence was insufficient to show Ms. Hetherington took

the rings. Thus, if Ms. Hetherington did not take the rings, she could not have known they were stolen until around December 21, 2010.

RCW 9A.82.050 requires that a person must know the property is stolen in order to be convicted of trafficking in stolen property.¹ Since the rings were pawned over 45 days before they were discovered missing, it would be impossible for Ms. Hetherington to know they were stolen if she found them in the mud as she testified. Therefore, there was insufficient evidence to support the convictions for first degree trafficking in stolen property.

E. CONCLUSION

For the reasons stated, the convictions should be reversed and the case dismissed.

Respectfully submitted November 15, 2011.

s/David N. Gasch, WSBA #18270
Gasch Law Office
P.O. Box 30339
Spokane, WA 99223-3005
(509) 443-9149
FAX: None
gaschlaw@msn.com

¹ RCW 9A.82.050(1) provides: A person who knowingly initiates, organizes, plans, finances, directs, manages, or supervises the theft of property for sale to others, or who knowingly traffics in stolen property, is guilty of trafficking in stolen property in the first degree.

PROOF OF SERVICE (RAP 18.5(b))

I, David N. Gasch, do hereby certify under penalty of perjury that on November 15, 2011, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or e-mailed by prior agreement (as indicated), a true and correct copy of brief of appellant:

Cynthia Hetherington (#350653)
c/o Eleanor Chase House WR
427 W 7th Ave
Spokane, WA 99204

E-mail: trasmussen@co.stevens.wa.us
Timothy Rasmussen
Stevens County Prosecutor
215 South Oak, Rm. 114
Colville WA 99114

s/David N. Gasch, WSBA #18270