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Division III
State of Washington

30906-1-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

DAVID LEE BELOTE, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF BENTON COUNTY

APPELLANT'S BRIEF

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in finding Mr. Belote guilty of trafficking in stolen property in the second degree, where the evidence was insufficient.
2. The trial court erred in sentencing Mr. Belote based upon an offender score of two.
3. The trial court erred in not listing the total legal financial obligation owed by Mr. Belote.

B. ISSUES

1. The evidence showed Mr. Belote bought a computer on the street, in a box. Mr. Belote pawned the computer, with his personal information on it, knowing the transaction would be reported to the police. He remained in contact with the pawn shop after the transaction. Under these facts, was the evidence sufficient to support a finding that Mr. Belote acted recklessly, as required to find him guilty of trafficking in stolen property in the second degree?
2. The trial court sentenced Mr. Belote based upon an offender score of two. Included in his offender score were one prior conviction for a class B felony and one prior

conviction for a class C felony. At sentencing, the State failed to show that Mr. Belote was confined pursuant to a felony conviction or had committed a crime that resulted in conviction in the ten consecutive years before the commission of the crime in this case. Did the trial court err in sentencing Mr. Belote based on an offender score of two, where his one prior conviction for a class B felony and one prior conviction for a class C felony had washed out?

3. At sentencing, the trial court imposed legal financial obligations, but did not set forth the total owed. Should the case be remanded for entry of the total legal financial obligation?

C. STATEMENT OF THE CASE

David Belote produced a music compact disk (CD), and went to Seattle to sell copies of the CD on the streets. (RP[1] 124-125, 127-129). According to Mr. Belote, while selling CDs, he met an individual named Gilbert, nicknamed Scooby, who was very interested in his music.

[1] The report of proceedings consists of seven volumes. The fourth and fifth volumes contain some pretrial matters and the jury trial. The references to "RP" herein refer to these two volumes. References herein to the other five volumes include the date. The seventh and final volume is a verbatim transcript of State's Exhibit 11, played in open court on November 1, 2011.

(RP 129-130; RP (Nov. 1, 2011) 3-6; State's Ex. 11). Mr. Belote and Scooby discussed the software Mr. Belote used to produce the CD, and then got into a discussion about computers. (RP 130-131). Mr. Belote told Scooby he needed more memory space for his music production software. (RP 130-131). Scooby told Mr. Belote he had a new, in-the-box iMac desktop that he was trying to sell. (RP 131-132, 136; RP (Nov. 1, 2011) 4-6, 33; State's Ex. 11). They agreed on a price of 700 dollars, plus four CDs. (RP 132-134, 174-175; RP (Nov. 1, 2011) 5; State's Ex. 11). Scooby left, returned with the computer, and Mr. Belote bought it from him. (RP 133-134; RP (Nov. 1, 2011) 5).

After he got behind in his rent payments, Mr. Belote decided to pawn the computer. (RP 137-138; RP (Nov. 1, 2011) 10-11; State's Ex. 11). He pawned the computer at Cash American Pawn Exchange in Seattle, to store manager Joseph Brigham, for 400 dollars. (RP 75, 79-82, 95, 140; RP (Nov. 1, 2011) 26; State's Ex. 11). Mr. Belote informed Mr. Brigham he planned to return for the computer. (RP 93, 96, 139-140, 180). Subsequently, Mr. Brigham received two phone calls from the Seattle Police Department regarding the computer. (RP 86-87). The computer was confiscated from the pawn shop as stolen property. (RP 35, 86-87). The serial number on the computer matched that of a computer stolen from Alpha Computer Center in Richland. (RP 7, 15, 18-20, 39).

The State charged Mr. Belote with one count of possessing stolen property in the second degree, between November 3, 2010, and November 18, 2010, and one count of trafficking in stolen property in the first degree, on November 18, 2010. (CP 11-12).

At trial, Frank Ward, one of the owners of Alpha Computer Center, testified that three portable computers and two iMac desktop computers were missing from the store. (RP 18-20). City of Richland Police Detective Damon Jansen testified that when he initially located Mr. Belote to talk to him about the computer, Mr. Belote told him he bought the computer. (RP 46). Mr. Belote told Detective Jansen he bought the computer, new in the box, from an individual named Scooby, for 700 dollars, plus four CDs. (RP (Nov. 1, 2011) 5-6, 33; State's Ex. 11). Mr. Belote told Detective Jansen he pawned the computer, rather than selling it. (RP (Nov. 1, 2011) 10; State's Ex. 11). He also told Detective Jansen that Scooby had a nice car and that "he looked like he was on top of his game." (RP (Nov 1, 2011) 31; State's Ex. 11). Detective Jansen told the court he was not able to locate Scooby. (RP 51).

Mr. Brigham testified that he handled the pawn transaction with Mr. Belote on November 18, 2010. (RP 79-80). He told the court that in addition to pawn loans, he also purchases items. (RP 75-76, 96). Mr. Brigham said Mr. Belote pawned the computer, rather than selling it to

him, meaning that he would come back and get the computer. (RP 90). He told the court Mr. Belote showed him valid identification. (RP 88, 91). Mr. Brigham testified he was clear with Mr. Belote that all transactions in the store were reported to the police. (RP 78-79, 91-92). He told the court Mr. Belote called the pawn store after the transaction to check in, and that he told Mr. Belote that the police were investigating the computer. (RP 87-88, 93-95).

City of Richland Police Detective Robert Benson, a forensic examiner, testified that he examined the iMac computer. (RP 100-101). He told the court there was only one user on the computer. (RP 102). Detective Benson testified he found Mr. Belote's personal information on the computer, and that it did not appear that Mr. Belote was trying to hide his identity on the computer. (RP 105, 110, 113). Detective Benson said that there was music software on the computer, and the software was running when he started the computer. (RP 114).

Mr. Belote testified consistent with the facts stated above. (RP 121-150, 152-184). He also testified that when he bought the computer from Scooby, it was in a box. (RP 132, 134, 158, 175). He testified that because it was in a box, "I excluded the fact that it had to be stolen." (RP 158). Mr. Belote told the court that Scooby was well dressed and business-oriented, and "I didn't really think anything like this guy is

trying to hustle me or anything like that." (RP 132). He said he had no problems logging in and registering the computer. (RP 135-136). He testified that he put his personal information on the computer, and "I didn't have any reason to believe that it was stolen." (RP 136-137). Mr. Belote told the court that when he pawned the computer, he was told that the transaction would be reported to the police. (RP 139-140). He testified he pawned the computer, rather than selling it, and planned to come back to get the computer. (RP 140-141, 180). Mr. Belote told the court that he called the pawn shop after the transaction to check in. (RP 141-143).

In addition to the two charged crimes, the jury was instructed on the lesser-included offense of trafficking in stolen property in the second degree. (CP 86-87). The jury was instructed that in order to convict Mr. Belote of this crime, the following elements must be proved, beyond a reasonable doubt: "(1) [t]hat on or about November 18, 2010, the defendant recklessly trafficked in stolen property; and (2) [t]hat the events occurred in the State of Washington." (CP 87). The jury was also instructed on the definitions of "recklessly." (CP 78, 84).

The jury convicted Mr. Belote of the lesser-included offense of trafficking in stolen property in the second degree. (CP 100). He was sentenced to eight months' confinement, based upon an offender score of

two. (CP 105, 108; RP (May 7, 2012) 9). The Judgment and Sentence listed Mr. Belote's criminal history as follows:

CRIME		DATE OF SENTENCE	SENTENCING COURT (*County and State*)	DATE OF CRIME	**A or J** *Adult, Juv.*	TYPE OF CRIME	DV* Yes
1	Possession of Stolen Property in the Second Degree	6/2/99	Benton County, WA	1/9/98	A	NV	
2	Theft in the First Degree	1/6/95	Benton County, WA	11/23/94	A	NV	

(CP 105).

Mr. Belote agreed that this criminal history was "true and accurate." (CP 111).

At sentencing, the trial court imposed legal financial obligations. (CP 106, 107, 113; RP (May 7, 2012) 9). The trial court did not list the total legal financial obligation owed by Mr. Belote, neither in the Judgment and Sentence nor in a subsequent order. (CP 104-113).

Mr. Belote appealed. (CP 116).

D. ARGUMENT

1. THE TRIAL COURT ERRED IN FINDING MR. BELOTE GUILTY OF TRAFFICKING IN STOLEN PROPERTY IN THE SECOND DEGREE, WHERE THE EVIDENCE WAS INSUFFICIENT.

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. 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)). "[A]ll reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." *Id*. (*citing State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977)). Furthermore, "[a] claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Id*. (*citing State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254 (1980)).

In order to find Mr. Belote guilty of trafficking in stolen property in the second degree, the jury had to find that he recklessly trafficked in

stolen property. (CP 87); *see also* RCW 9A.82.055 (defining trafficking in stolen property in the second degree). Pawning a stolen item falls under the definition of trafficking. *See State v. Hermann*, 138 Wn. App. 596, 604, 158 P.3d 96 (2007) (stating that "[e]vidence that a defendant knowingly pawns stolen goods is sufficient to support a charge of trafficking in stolen property."). The trial court defined recklessly as:

> 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 this disregard is a gross deviation from conduct that a reasonable person would exercise in the same situation.
>
> When recklessness as to a particular result or fact is required to establish an element of a crime, the element is also established if a person acts intentionally or knowingly as to that result or fact.

(CP 78); *see also* RCW 9A.08.010(1)(c) (defining recklessly).

Mr. Belote did not act recklessly when he pawned the computer. The State failed to prove that at the time he pawned the computer, he knew of and disregarded a substantial risk that the computer was stolen. Mr. Belote had a consistent explanation for how he obtained the computer. From his first contact with Detective Jansen through his testimony at trial, Mr. Belote maintained that he bought the computer from Scooby. (RP 46, 129-134; (RP (Nov. 1, 2011) 5-6, 33; State's Ex. 11). He testified that Scooby was well-dressed and business-oriented, and he was not concerned with the purchase. (RP 132). He told Detective Jansen that

Scooby had a nice car and that "he looked like he was on top of his game." (RP (Nov 1, 2011) 31; State's Ex. 11).

Mr. Belote testified that the computer was in a box at the time he bought it, and that he had no reason to believe it was stolen. (RP 136-137, 158; RP (Nov. 1, 2011) 6, 33; State's Ex. 11). He also told Detective Jansen the computer was in the box when he bought it. (RP (Nov. 1, 2011) 6, 33; State's Ex. 11).

When pawning the computer, Mr. Belote was aware the transaction would be reported to the police. (RP 78-79, 91-92, 139-140). He pawned the computer while it contained his personal information. (RP 105, 110, 113, 136-137). Mr. Belote was clear that he planned to return to the pawn shop to retrieve the computer, and called the pawn shop after the transaction to check in. (RP 87-88, 90, 93-96, 139-143, 180).

The facts surrounding Mr. Belote's purchase of the computer, the pawning of the computer, and his follow-up calls to the pawn shop are inconsistent with Mr. Belote knowing of a substantial risk that the property was stolen. (CP 78); RCW 9A.08.010(1)(c). Mr. Belote bought the computer in a box; pawned the computer, with his personal information on it, knowing the transaction would be reported to the police; and remained in contact with the pawn shop after the transaction. Under these facts, Mr. Belote did not know of and disregard a substantial risk

that he would be transferring stolen property when he pawned the computer, nor was his conduct a gross deviation from what a reasonable person would exercise in the same situation.

A rational jury could not have found Mr. Belote guilty, beyond a reasonable doubt, of trafficking in stolen property in the second degree. *See Salinas*, 119 Wn.2d at 201 (*citing Green*, 94 Wn.2d at 220-22). There was insufficient evidence that he acted recklessly when he pawned the computer. Because the evidence presented at trial was insufficient to support Mr. Belote's conviction, his conviction must be reversed and the charge dismissed with prejudice. *See State v. Smith*, 155 Wn.2d 496, 505, 120 P.3d 559 (2005) (stating "'[r]etrial following reversal for insufficient evidence is 'unequivocally prohibited' and dismissal is the remedy.'") (*quoting State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998)).

2. THE TRIAL COURT ERRED IN SENTENCING MR. BELOTE BASED UPON AN OFFENDER SCORE OF TWO.

At sentencing, "[i]f the court is satisfied by a preponderance of the evidence that the defendant has a criminal history, the court shall specify the convictions it has found to exist." RCW 9.94A.500(1). The burden is on the State to prove the existence of prior convictions, by a preponderance of the evidence. *State v. Mendoza*, 165 Wn.2d 913, 920,

205 P.3d 113 (2009). "It is the obligation of the State, not the defendant, to assure that the record before the sentencing court supports the criminal history determination." *Id.*

Under RCW 9.94A.525, the sentencing court is required to determine an offender score based upon the number of adult and juvenile felony convictions existing before the date of sentencing. RCW 9.94A.525(1). Prior convictions that are class B felonies "wash out" of the offender score under the following circumstances:

> Class B prior felony convictions other than sex offenses shall not be included in the offender score, if since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender had spent *ten consecutive years* in the community without committing any crime that subsequently results in a conviction.

RCW 9.94A.525(2)(b) (emphasis added).

Prior convictions that are class C felonies "wash out" of the offender score under the following circumstances:

> [C]lass C prior felony convictions other than sex offenses shall not be included in the offender score if, since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender had spent *five consecutive years* in the community without committing any crime that subsequently results in a conviction.

RCW 9.94A.525(2)(c) (emphasis added).

"[A] sentence based on a miscalculated upward offender score is in excess of statutory authority and generally may be challenged at any time." *In re Pers. Restraint of Cadwallader*, 155 Wn.2d 867, 874, 123 P.3d 456 (2003) (*citing In re Pers. Restraint of Goodwin*, 146 Wn.2d 861, 873-74, 50 P.3d 618 (2002)). "The defendant cannot agree to a sentence in excess of that which is statutorily authorized." *Id*. (*citing Goodwin*, 146 Wn.2d at 876). A sentencing court's calculation of an offender score is reviewed *de novo*. *State v. Bush*, 102 Wn. App. 372, 377, 9 P.3d 219 (2000).

The Judgment and Sentence listed Mr. Belote's criminal history. (CP 105). The first listed crime, possession of stolen property in the second degree, was a class C felony, and the second listed crime, theft in the first degree, was a class B felony. *See* RCW 9A.56.160(2) (possession of stolen property in the second degree); RCW 9A.56.030(2) (theft in the first degree). From the date of sentencing, June 2, 1999, of the crime of possession of stolen property in the second degree, until the commission of the crime in this case, November 18, 2010, more than eleven years elapsed. (CP 87, 105). Even with an offender score of one, the maximum standard range sentence for this crime of possession of stolen property in the second degree was 90 days' confinement. *See* RCW 9.94A.515 (ranking possession of stolen property in the second degree as a

seriousness level I offense); RCW 9.94A.510 (listing the standard range of 0-90 days confinement, for a crime with a seriousness level of I and an offender score of one). This would have put Mr. Belote's release date sometime in September, 1999, more than eleven years before the commission of the crime in this case. Because the State failed to show that Mr. Belote was confined pursuant to a felony conviction or committed a crime that resulted in conviction in the ten consecutive years before the commission of the crime in this case, November 18, 2010, his prior convictions washed out of his offender score. *See* RCW 9.94A.525(2)(b) (wash-out for class B felonies); RCW 9.94A.525(2)(c) (wash-out for class C felonies).

Because an offender cannot waive a challenge to a miscalculated offender score, Mr. Belote's agreement that his criminal history was "true and accurate" does not change this result. *See Cadwallader*, 155 Wn.2d at 874 (*citing Goodwin*, 146 Wn.2d at 873-74). Mr. Belote did not stipulate that these convictions had not washed out. *Cf. State v. Foster*, 140 Wn. App. 266, 276, 166 P.3d 726 (2007) (the State was relieved of its burden of proof, where the defendant stipulated that a prior conviction did not wash out).

Mr. Belote was sentenced to eight months' confinement, on May 7, 2012. (CP 108; RP (May 7, 2012) 9)). By the time his appeal is heard, it

is possible that Mr. Belote will already have served his term of confinement. "A case is moot if a court can no longer provide effective relief." *State v. Ross*, 152 Wn.2d 220, 228, 95 P.3d 1225 (2004) (*quoting State v. Gentry*, 125 Wn.2d 570, 616, 888 P.2d 1105, *cert. denied*, 516 U.S. 843, 116 S. Ct. 131, 133 L. Ed. 2d 79 (1995)). However, in order to provide guidance to lower courts, a court may still reach a determination on the merits "if a case presents an issue of continuing and substantial public interest and that issue will likely reoccur[.]" *Id*. This exception to the mootness doctrine applies here. Inclusion of washed out felonies in an offender score, based upon a defendant's acknowledgment of his criminal history but absent a stipulation that the prior convictions did not wash out, is an issue of continuing and substantial public interest that is likely to reoccur. *See Ross*, 152 Wn.2d at 228; *see also State v. Harris*, 148 Wn. App. 22, 28-29, 197 P.3d 1206 (2008) (applying this exception to review the defendant's challenge to his offender score, subsequent to his release from confinement).

Mr. Belote's two prior felony convictions, for possession of stolen property in the second degree and theft in the first degree, washed out. *See* RCW 9.94A.525(2)(b), (c). The trial court should have sentenced Mr. Belote with an offender score of zero. *See* RCW 9.94A.525. Mr. Belote's sentence must be reversed, and the case remanded for resentencing using

the correct offender score. *See State v. Ford*, 137 Wn.2d 472, 485, 973 P.2d 452 (1999) (setting forth this remedy for a miscalculated offender score).

3. THE TRIAL COURT ERRED IN NOT LISTING THE TOTAL LEGAL FINANCIAL OBLIGATION OWED BY MR. BELOTE.

Under RCW 9.94A.760:

> Whenever a person is convicted in superior court, the court may order the payment of a legal financial obligation as part of the sentence. The court *must* on either the judgment and sentence or on a subsequent order to pay, designate the total amount of a legal financial obligation and segregate this amount among the separate assessments made for restitution, costs, fines, and other assessments required by law.

RCW 9.94A.760(1) (emphasis added).

The trial court did not list the total legal financial obligation owed by Mr. Belote, neither in the Judgment and Sentence nor in a subsequent order. (CP 104-133). Under RCW 9.94A.760(1), the trial court must set forth the total. Accordingly, the case should be remanded for entry of the total legal financial obligation owed, as mandated by RCW 9.94A.760(1).

E. CONCLUSION

The evidence was insufficient to support Mr. Belote's conviction, because there was insufficient evidence that he acted recklessly when he

pawned the computer. Mr. Belote's conviction must be reversed and the charge dismissed with prejudice.

In the alternative, the trial court erred in sentencing Mr. Belote based upon an offender score of two. Mr. Belote's sentence must be reversed, and the case remanded for resentencing using the correct offender score.

Finally, the case should be remanded for entry of the total legal financial obligation owed, as mandated by RCW 9.94A.760(1).

Dated this 8th day of March, 2013.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION III

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	No. 30906-1-III
	)	
vs.	)	CERTIFICATE
	)	OF MAILING
DAVID LEE BELOTE,	)	
	)	
Appellant.	)	

I certify under penalty of perjury under the laws of the State of Washington that on March 8, 2013, I served a copy of the Appellant's Brief in this matter by email on the following party, receipt confirmed, pursuant to the parties' agreement:

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I certify under penalty of perjury under the laws of the State of Washington that on March 8, 2013, I mailed a copy of the Appellant's Brief in this matter to:

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Signed at Spokane, Washington on March 8, 2013.

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