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Court of Appeals
Division III
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 30921-5-III

STATE OF WASHINGTON, Respondent,

v.

LAMAR JAY LOOMIS, Appellant.

APPELLANT'S BRIEF

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I. INTRODUCTION

Lamar Jay Loomis was charged and convicted of trafficking in stolen property in the first degree and possession of stolen property in the third degree after he sold two mounted truck tires to a scrap yard and attempted to sell a number of aluminum truck wheels to the same purchaser. At trial, the alleged victim, Mark Mizer, testified that all of the truck wheels belonged to him and had been recently stolen from his property. But he also described the wheels stolen from his property as size 24.5 wheels; trial testimony from the purchaser established that the wheels Loomis tried to sell him were 22.5 inch wheels, and he did not purchase them for that reason.

As a result of the discrepancy, the trial court granted Loomis's motion for arrest of judgment as to the conviction for possession of stolen property. However, the trial court denied the motion as to the trafficking count, based on a statement made by one of the State's witnesses to the purchaser that the wheels belonged to his uncle. Reasoning that because the State's witness was acting as Loomis's "agent," the witness's statement could establish Loomis's own knowledge that two of the wheels were stolen, the trial court found that there was sufficient corroboration of the "knowledge" element of the trafficking charge and denied the motion.

On appeal, Loomis contends that the evidence was insufficient to establish the “knowledge” element of the trafficking charge as to the two mounted wheels sold, in light of the fact that the remaining wheels comprising the large lot that the trial court deemed suspicious were not the wheels that Mizer reported stolen. Because the only remaining fact cited by the trial court as corroborative of Loomis’s knowledge was a statement that (1) the testifying witness could not state with certainty occurred, or who said it, and (2) was not inconsistent with Loomis’s innocence, the evidence was insufficient to corroborate the knowledge element. Accordingly, the conviction should be reversed.

II. ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR 1: The trial court erred in denying Loomis’s motion to arrest judgment as to the conviction for trafficking in stolen property in the first degree.

ASSIGNMENT OF ERROR 2: Insufficient evidence supports the conviction for first degree trafficking in stolen property.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

ISSUE 1: Was there sufficient evidence of the “knowledge” element of the trafficking charge to sustain Loomis’s conviction?

ISSUE 2: When the trial court denied Loomis's motion for a directed verdict at the close of the State's evidence because it determined there was sufficient circumstantial evidence of knowledge in "the unusual lot, the proximity in time to when the theft occurred, and the representations of the sellers," was it error to deny Loomis's motion to arrest judgment when it was later determined that the large number of wheels offered for sale by Loomis were not the wheels that were stolen from Mizer and the only corroborating evidence of guilt was uncertain, circumstantial, and equally consistent with Loomis's innocence?

ISSUE 3: Did the trial court err in concluding that a witness's equivocal and uncertain testimony that he thought the defendant or another witness might have told him that the stolen property belonged to the other witness's uncle as sufficient corroborating evidence to establish Loomis's knowledge that the property was stolen?

IV. STATEMENT OF THE CASE

Lamar Loomis was charged with first degree trafficking in stolen property or second degree trafficking in the alternative, and third degree possession of stolen property relating an incident in which he sold two truck wheels to a local scrap yard. CP 25-26. In April 2010, Mark Mizer received a call that his farm in George had been entered while he was in

Yuma, Arizona. RP (Trial)¹ 69-71. A storage van on the property was broken into and Mizer reported that 26 aluminum wheels, two of them mounted with steer tires, were missing, along with a considerable amount of other property. RP (Trial) 73, 93-94. Mizer identified the steer tire wheels as being 24.5 inches and the remaining wheels being 22.5 inches. RP (Trial) 76-77, 82, 90.

A few months later, Mizer visited the scrap yard belonging to Kelly Hellewell and located two aluminum wheels mounted with steering tires that he identified as the ones taken from his property. RP (Trial) 80-81, 136. Hellewell identified Loomis as the individual who had sold him the tires. RP (Trial) 147. Hellewell further testified that Loomis frequently sold him scrap, sometimes as often as three or four times a week, and he always had somebody with him to present Identification. RP (Trial) 148-49.

According to Hellewell, when Loomis sold Hellewell the two steer tires in May 2010, he was with a person named Chuck Leivan with whom he regularly sold scrap. RP (Trial) 149-50. Loomis told Hellewell that he

¹ The verbatim reports of proceedings on appeal consist of a single volume of pretrial and post-trial proceedings, and two volumes of trial proceedings consecutively paginated. For purposes of this brief, "RP" shall refer to the volume containing pretrial and post-trial proceedings and "RP (Trial)" shall refer to the two-volume series of trial proceedings.

had some truck tires and wheels and Hellewell agreed to take a look at them. RP (Trial) 150. Hellewell described seeing two truck tires with aluminum wheels and 15 to 20 aluminum wheels in Loomis's van. RP (Trial) 154. Hellewell bought the tires but declined the wheels because they were not the right size for him, stating that he needed 22.5 and all of the wheels were 24.5. RP (Trial) 155-56. He paid \$450.00 for the tires, which Mizer testified was close to their fair market value. RP (Trial) 84, 156.

During the course of the transaction, Hellewell reported that either Loomis or Leivan told him that the wheels belonged to Leivan's uncle, but he could not remember who said it. RP (Trial) 153. He spoke to both Leivan and Loomis about the sale and felt that he was buying the property from both of them. RP (Trial) 156. Hellewell testified that in the course of his business he might buy between 100 and 500 aluminum truck wheels in a month, but that he had never bought 15 to 20 aluminum wheels from a single person, only commercial companies like Les Schwab. RP (Trial) 166, 176-77.

Following the close of the State's case, Loomis moved for a directed verdict on the grounds that there was insufficient evidence to satisfy the knowledge element of the trafficking charge. RP (Trial) 181.

The State contended that the items that were being sold by Loomis were “exactly the same type of item that was stolen from the property.” RP (Trial) 182. Because Loomis possessed Mizer’s items and did not normally sell aluminum wheels, the State argued the jury could infer that Loomis had knowledge that the items were stolen. RP (Trial) 183.

In denying Loomis’s motion, the trial court observed that there was no evidence Loomis participated in the theft of the items from Mizer’s property, nor any other evidence of how Loomis came into possession of the wheels. RP (Trial) 185. The trial court concluded that there was circumstantial evidence of knowledge arising from the fact that “it’s an unusual lot of property,” specifically the number of wheels and the fact that it was a private individual rather than a company trying to sell them, and the proximity in time – six days – from the time of the theft. RP (Trial) 185-86. The State further argued,

[T]he defendant is selling the tires that the victim, Mr. Mizer, identified as his, at the exact same time he was in possession and attempting to sell the same type of rims in a large quantity that was missing from Mr. Mizer’s property, as well. Less than a week later.

RP (Trial) 186. The State also pointed to Hellewell’s qualified testimony that he believed, but was not sure, that either Leivan or Loomis told him that the tires and wheels belonged to Leivan’s uncle, arguing that the

explanation was unreasonable when Loomis had both the tires stolen from Mizer and “the same type of stuff that’s stolen from Mr. Mizer sitting in there.” RP (Trial) 187. The trial court agreed, ruling,

My conclusion is that there is sufficient circumstantial evidence in the circumstances of testimony that I’ve indicated to argue this question to the jury . . . There is, in the court’s conclusion, sufficient circumstantial evidence in the unusual lot, the proximity in time to when the theft occurred, and the representations of the sellers to the extent they’re recalled by Mr. Hellewell, for a jury to find that the defendant knew that the property was stolen.

RP (Trial) 188.

In his defense, Loomis presented testimony from both his parents that Loomis began scrapping old vehicles for a living in about 2005. RP (Trial) 190, 193, 223, 224-25. Loomis commonly purchased old used semi trucks to scrap them and accumulated a number of semi truck tires and wheels over the years. RP (Trial) 195-96, 231. Loomis’s mother also testified about an incident in March 2010 when a house guest set up a target against a stack of truck tires to try out his new gun. RP (Trial) 235-36. She recalled that Loomis was able to salvage two of the tires, but she watched him break down the others to the rims. RP (Trial) 236.

The jury returned guilty verdicts on the first degree trafficking and third degree possession charges. CP 41-43. Subsequently, Loomis filed a

motion for arrest of judgment. CP 46. Observing that Mizer testified that the wheels stolen from his property were 22.5 inch wheels, while Hellewell testified the 15 to 20 aluminum wheels in Loomis's van were 24.5 inch wheels, Loomis contended that because the wheels in his van could not be the wheels stolen from Mizer, the evidence was insufficient to support the possession of stolen property charge and to establish the "knowledge" element of the trafficking charge. CP 58, 62.

The trial court granted the motion as to the possession charge and denied it as to the trafficking charge. RP 57. Because the possession charge was premised on evidence that the multiple aluminum wheels in Loomis's van when he sold the two tires to Hellewell were stolen from Mizer, the trial court concluded that because the wheels in Loomis's van were not the same size as Mizer's wheels, there was insufficient evidence that the wheels in Loomis's van were stolen. RP 57-60. With respect to the trafficking charge, however, the trial court reasoned that while mere possession of stolen property close in proximity in time to the theft of the property required "some slight corroboration," corroboration could be established through the fact that Leivan acted as Loomis's accomplice. RP 61-62. Despite the fact that Hellewell clearly testified that he was "not total 100 percent" sure about his recollection, the trial court stated that Hellewell had testified that either Loomis or Leivan had told him that the

tires belonged to Leivan's uncle. RP 62. Consequently, the court reasoned, by making the statement in the capacity of Loomis's agent, Leivan's statement (if he made it) was sufficient corroborating evidence of knowledge to uphold the jury's verdict. RP 62-63.

Accordingly, the trial court sentenced Loomis to 9 months' incarceration. CP 253. Loomis timely appeals. CP 266.

V. ARGUMENT

Possessing stolen property, alone, is insufficient to create an inference that the person possessing it knows that it is stolen. Here, there was no direct evidence that Loomis knew the tires he sold to Hellewell were stolen. Circumstantial evidence that might tend to show consciousness of guilt – selling the property to a stranger, for a reduced price, at an unusual hour; attempting to hide the property; evasiveness, misrepresentations, or implausible explanations; acquiring the property under suspicious circumstances; etc. – is conspicuously absent in this case. In denying Loomis's motion, the trial court relied on testimony from Hellewell – testimony that Hellewell himself stated he was not completely sure about – that either Loomis or Leivan told him the tires belonged to Leivan's uncle. This scant, equivocal testimony does not provide

sufficient corroboration of Loomis's knowledge to sustain the guilty verdict. The conviction for first degree trafficking should be reversed.

In a challenge to the sufficiency of the evidence, the reviewing court considers 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. Hellman*, 138 Wn. App. 596, 602, 158 P.3d 96 (2007). In challenging the sufficiency of the evidence, the appellant admits the truth of the State's evidence and all inferences that can reasonably be drawn from it, giving equal weight to circumstantial and direct evidence. *Id.* (citing *State v. McNeal*, 145 Wn.2d 352, 360, 37 P.3d 280 (2002); *State v. Varga*, 151 Wn.2d 179, 201, 86 P.3d 139 (2004)). The State bears the burden of proving all the elements of the crime charged beyond a reasonable doubt. *Id.* (citing *State v. Teal*, 152 Wn.2d 333, 337, 96 P.3d 974 (2004); *State v. McCullum*, 98 Wn.2d 484, 489, 656 P.2d 1064 (1983)).

Similarly, under CrR 7.4(a)(3), judgment may be arrested when there is insufficient evidence of a material element of the crime charged. In ruling on a motion for arrest of judgment, a trial court is required to view the State's evidence and consider whether it could reasonably support a finding of guilt beyond a reasonable doubt. *State v. Robinson*,

35 Wn. App. 898, 900-01, 671 P.2d 256 (1983) (citing *State v. Green*, 94 Wn.2d 216, 220-221, 616 P.2d 628 (1980)).

A person commits the crime of trafficking in stolen property in the first degree when he knowingly traffics in stolen property. RCW 9A.82.050. The State bears the burden of proving beyond a reasonable doubt that the defendant knew that the property was stolen. *State v. Killingsworth*, 166 Wn. App. 283, 287, 269 P.3d 1064, review denied, 174 Wn.2d 1007, 278 P.3d 1112 (2012).

It is long established that bare possession of stolen property, alone, cannot sustain a conviction; instead, there must be some slight evidence corroborating the defendant's guilt. *State v. Douglas*, 71 Wn.2d 303, 306, 428 P.2d 535 (1967). Such corroborative evidence may include "the giving of a false or improbable explanation of it, or a failure to explain when a larceny is charged, or the possession of a forged bill of sale, or the giving of a fictitious name." *Id.* Moreover, to convict a defendant on circumstantial evidence alone, the evidence "must not only be consistent with each other and consistent with the hypothesis that the accused is guilty, but also must be inconsistent with any hypothesis or theory which would establish, or tend to establish, his innocence." *Id.* at 307 (citing *State v. Gillingham*, 33 Wn.2d 847, 854, 207 P.2d 737, 741 (1949)).

In the present case, there was no direct evidence presented that Loomis knew the tires he sold to Hellewell were stolen. When he moved for a directed verdict, the trial court correctly considered the presence of multiple other truck wheels in his van, close in time to the theft of similar property from Mizer, as sufficient corroborative evidence to justify submitting the case to the jury. But on the motion for arrested verdict, it was evident that the other wheels did not belong to Mizer because they were not the same size as the wheels taken from Mizer's property. The presence of the other wheels in Loomis's van could not, at that stage, was not corroborative of Loomis's guilt because there was no evidence that his possession of the wheels was not innocent and consistent with the testimony of Loomis's parents that Loomis had been scrapping vehicles for years and accumulated a number of truck wheels.

Instead, the trial court concluded that Hellewell's testimony that Loomis or Leivan told him that the wheels belonged to Leivan's uncle was sufficient corroborative evidence to sustain the verdict. But this evidence cannot corroborate Loomis's guilty knowledge for several reasons. First, according to Hellewell's own testimony, he was not certain that the statement was made, or by whom. Leivan, who testified at trial, denied that he conversed with Hellewell. RP (Trial) 104, 110-11. Consequently, there was insufficient evidence that the statement was even made.

Second, the trial court's ruling speculated that Leivan acted as Loomis's agent in making any statements to Hellewell. But again, there was no evidence that Loomis directed Leivan to make any such statement, or that he even knew if Leivan said it.

Under these circumstances, the circumstantial evidence was equally as consistent with Loomis's innocence as with his guilt. Absent the statement that Hellewell thought, but could not be certain, was made, there was no corroborating evidence that Loomis knew the truck tires were stolen. The facts themselves are, as Hellewell conceded, as consistent with the statement being made as with the statement not being made. But even if Leivan did make the statement to Hellewell, it is at least as likely that he did so without Loomis's knowledge as that he did so as Loomis's agent. And while it is certainly possible that the statement is properly attributed to Loomis through Leivan through some joint effort to explain where the tires came from, it is also possible that the tires actually *did* come from Leivan's uncle – there being, in the record, no other evidence of who originally stole them from Mizer or how Loomis came to have them in his van.

In *Douglas*, the Washington Supreme Court considered a defendant's explanation that he purchased stolen property from an Indian

whom he had never seen before or since, with no witnesses present besides the Indian's family and no bill of sale or other documentary evidence substantiating the transaction. 71 Wn.2d at 306-07. There, the Court reasoned,

There were at least three hypotheses that a jury might accept: one, that the defendant was lying and there had been no transaction with an Indian; two, that the defendant did buy articles from the Indian, but that, under the circumstances, he must have known that they were stolen; and three, that he did buy the articles from the Indian and that he did it in good faith, believing that they belonged to the Indian. Either of the first two would lead to a verdict of guilty; the third to a verdict of not guilty.

Id. at 307. Consequently, the *Douglas* Court held that it was error for the trial court to decline to give the defendant's proffered instruction that the circumstantial evidence must be inconsistent with any hypothesis or theory that would tend to establish the defendant's innocence.

Likewise in this case, the circumstantial evidence of Leivan's statement – even if he made it – was not inconsistent with Loomis's innocence because he could have either made it on his own without Loomis's knowledge, or he could have been telling the truth. As circumstantial evidence of Loomis's guilt, it is insufficient to corroborate his knowledge that the tires were stolen.

In sum, the conviction for first degree trafficking in stolen property fails on the evidence contained in this record. The statement that the tires came from Leivan's uncle was insufficient to corroborate that Loomis knew the tires were stolen both because Hellewell was uncertain that the statement was made, and because even if it was made, it is as consistent with Loomis's innocence as with his guilt. Accordingly, the conviction should be reversed.

VI. CONCLUSION

There was no direct evidence that Loomis knew the tires he sold to Hellewell were stolen. Instead, the State presented a circumstantial case based on Loomis's possession of the stolen property close in time to when they were stolen from Mizer, and his possession of multiple other aluminum truck wheels like the ones that Mizer had reported missing. The trial court erred in denying Loomis's motion to arrest judgment after the evidence revealed that the multiple other aluminum wheels that Loomis had in his van the day he sold the two stolen tires to Hellewell were not the same wheels as Mizer reported stolen. The only remaining evidence relied upon by the trial court to corroborate that Loomis knew the tires were stolen was Hellewell's uncertain testimony that either Loomis or Leivan might have told him the tires came from Leivan's uncle.

The evidence is insufficient because even if the statement was actually made – which Hellewell could not say with certainty – the statement is not inconsistent with Loomis’s innocence.

Consequently, the evidence supporting Loomis’s conviction for first degree trafficking in stolen property was insufficient as a matter of law. The motion to arrest judgment should have been granted, and the conviction should be reversed.

RESPECTFULLY SUBMITTED this ~~29th~~ day of October, 2012.



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DECLARATION OF SERVICE

I, the undersigned, hereby declare that on this date, I caused to be served a true and correct copy of Appellant's Brief upon the following parties in interest by depositing them in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed this 29th day of October, 2012 in Walla Walla, Washington.


Andrea Burkhart