

FILED
OCT 04, 2013
Court of Appeals
Division III
State of Washington

No. 31502-9-III

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,
Plaintiff/Respondent,

vs.

BENJAMIN EARL GARFIELD,
Defendant/Appellant.

APPEAL FROM THE GRANT COUNTY SUPERIOR COURT
Honorable John M. Antosz, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in denying appellant's motion to dismiss made at the close of the State's case in chief.

2. The evidence was insufficient to prove appellant knowingly possessed a stolen firearm.

Issue Pertaining to Assignments of Error

Possession of a stolen firearm requires proof beyond a reasonable doubt the defendant knew the firearm was stolen. Appellant purchased a firearm for \$120 to \$140 from an unknown person at a gas station. Did the State fail to meet its burden to prove appellant's mental state beyond a reasonable doubt?

B. STATEMENT OF THE CASE

The defendant, Benjamin Earl Garfield, was charged with Possessing a Stolen Firearm. CP 1. At a jury trial, the State presented the following relevant testimony.

In November 2008, a number of guns and some tools were reported stolen from the Grant County residence of Mr. and Mrs. Lecocq. One of

the guns was a .30–06 Eddy Stone rifle. . RP¹ 64–71, 200. The thief was apparently never found.

Nearly four years later—on September 11, 2012—then 23-year-old Mr. Garfield, pawned the Eddy Stone rifle for \$75 at the Olde World Trading Company business in Ephrata because he needed gas money. CP 1, 87; RP 72–73, 78–80, 84, 184. Mr. Garfield said he owned the gun. RP 82. Mr. Garfield provided information to the employee for purposes of filling out the pawn slip, including his full name and physical information, date of birth, driver’s license number, a description of the rifle and his current address. RP 77–78, 195–96. As required for any pawn transaction, the matter was reported to the Ephrata Police Department. RP 74, 76.

Logan Nelson, a police department employee, ran the serial number in a local data base and found the gun had been reported stolen. RP 94, 96, 99–101. The following day, Ephrata Police Officer Billy Roberts confiscated the stolen firearm as evidence. RP 111–18. Grant County Sheriff’s Deputy Michael Earney contacted Mr. Garfield at his residence on family property in rural Grant County, outside of George, Washington. RP 181, 183. Mr. Garfield said he’d pawned the gun, which

¹ “RP ___ ” citations are to the two volume transcript of the trial reported by Tom Bartunek, which has consecutively numbered pages.

he'd bought a couple years ago from a Hispanic male who needed money to buy gas. RP 184–86, 188. Mr. Garfield said didn't know the gun was stolen. He mentioned the gun had been checked during a past contact by the Wenatchee National Forest Service and the park ranger didn't tell him it was stolen. RP 184. Mr. Garfield was more than cooperative and willing to talk to the investigating detective, and accepted the deputy's offer of a ride because he didn't have a car. RP 184–86.

At the station, Ephrata Police Detective Christopher Huffman interviewed Mr. Garfield for about 36 minutes. RP 193–94, 201–02, 213. Mr. Garfield again said he'd pawned the gun a few days earlier. RP 202. He'd also pawned the same rifle on a previous occasion, at the Moses Lake office of Olde World Trading Company. RP 221.

Mr. Garfield told the detective he'd purchased the Eddy Stone rifle a couple of years before, from a Hispanic man at the Quik Stop in Quincy, Washington. RP 203, 205. While getting fuel, he overheard the man unsuccessfully try to sell a firearm to three men in a black Dodge pickup. He described the three men as all “camo[u]flaged” out, as if they were duck hunters or some type of hunters. RP 204, 226. Apparently the Hispanic man was selling the gun because he needed gas money to get to Mexico. Mr. Garfield told the man he might be interested. After looking

at the gun in the man's trunk, Mr. Garfield bought it for \$120 to \$140 because he liked old rifles. RP 205–06. During the interview, Mr. Garfield consistently described how he came to purchase the rifle and denied knowing it was stolen. RP 217–18.

Mr. Garfield was a hunter. He mentioned using this gun one time for hunting elk, but said it was heavy and hard to carry around. RP 209, 216. During that trip in November 2009, he and his friends were contacted by a Fish and Wildlife agent. Mr. Garfield was pretty sure the gun had “come back clear” when the agent checked it, but later said he was only 70 to 75 percent sure it was this rifle that had been checked. RP 210–11, 215, 221–22.

Agent Chad McGary, Washington Department of Fish and Wildlife game warden, testified about the November 2009 encounter that took place during elk season in the Colockum Pass (which is an area in the mountains directly north of Ellensburg). RP 154–55, 162, 244. He checked the hunting licenses of Mr. Garfield and his two companions in the car. RP 165. The agent didn't remember ever running across an Eddy Stone rifle, which he described as uncommon. RP 163. However in 2009 he looked at lots of rifles because he checks every hunter's gun to see if it's loaded or unloaded, and didn't remember every single situation. RP

175–76. The agent did not recall whether he did or did not run a records check on Mr. Garfield’s gun. If a gun checked stolen, registered to someone else or was involved in some other violation, he would issue a citation and generate a report. RP 177–78. The agent does not keep records of guns that come back “clean” when checked. RP 180.

At the close of the State’s case, defense counsel made a motion to dismiss the charge, arguing there was insufficient evidence Mr. Garfield knew the gun was stolen or had intentionally withheld or appropriated the gun from its true owner. RP 236–38. The court denied the motion, saying there was sufficient circumstantial evidence to allow the jury to decide. RP 241–45.

Mr. Garfield did not testify.

The jury found Mr. Garfield guilty of possessing a stolen firearm as charged. CP 86. Mr. Garfield had no prior felony offenses, and the court sentenced him to 90 days of confinement under the First Time Offender Waiver of Standard Sentence provisions. CP 88, 90.

This appeal followed. CP 105–06. The court entered an order staying the sentence pending appeal. CP 107–08.

C. ARGUMENT

The evidence was insufficient to convict Mr. Garfield of possession of a stolen firearm because no evidence showed he knew the weapon was stolen.

“Bare possession of stolen property is insufficient to justify a conviction,” for possession of a stolen firearm. State v. McPhee 156 Wn. App. 44, 62, 230 P.3d 284, *rev. denied*, 169 Wn.2d 1028 (2010).

Knowledge that the firearm is stolen is an essential element of the offense. McPhee, 156 Wn. App. at 62, *citing State v. Couet*, 71 Wn.2d 773, 775, 430 P.2d 974 (1967); RCW 9A.56.310. Mr. Garfield’s conviction for possession of a stolen firearm under RCW 9A.56.310² should be reversed because the State failed to prove beyond a reasonable doubt whether he knew the weapon was stolen.

In every criminal prosecution, due process requires the State prove every fact necessary to constitute the charged crime beyond a reasonable doubt. In re Winship 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L.Ed.2d 368 (1970). In a challenge to the sufficiency of the evidence, the court views the evidence in the light most favorable to the prosecution and inquires

² RCW 9A.56.310 provides in relevant part, A" person is guilty of possessing a stolen firearm if he or she possesses, carries, delivers, sells, or is in control of a stolen firearm.”

whether the evidence was sufficient for a rational trier of fact to find guilt beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L.Ed.2d 560 (1979), *overruled on other grounds by* Schlup v. Delo, 513 U.S. 298, 115 S. Ct. 851, 130 L.Ed.2d 808 (1995); State v. Green, 94 Wn.2d 216, 220–21, 616 P.2d 628 (1980), *overruled on other grounds by* Washington v. Recuenco, 548 U.S. 212, 126 S. Ct. 2546, 165 L.Ed.2d 466 (2006).

More than a mere scintilla of evidence is needed to meet the beyond a reasonable doubt standard; "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. Miller, 60 Wn. App. 767, 772, 807 P.2d 893 (1991). Although a conviction may be sustained on circumstantial evidence, the existence of a fact cannot rest on guess, speculation, or conjecture. "This rule is even more essential in criminal cases where the evidence is entirely circumstantial." State v. Golladay, 78 Wn.2d 121, 130, 470 P.2d 191 (1970), *overruled on other grounds by* State v. Arndt, 87 Wn.2d 374, 553 P.2d 1328 (1976). In State v. Liles, 11 Wn. App. 166, 521 P.2d 973 (1974), the court explained:

When substantial evidence is present, the drawing of reasonable inferences therefrom and the doing of some conjecturing on the basis of such evidence is permissible and acceptable. If, however, the necessity for conjecture results from the fact that the evidence is merely scintilla evidence, then the necessity for conjecture is fatal.

Id. at 171 (citation omitted); *accord*, State v. Harris, 14 Wn. App. 414, 417–18, 542 P.2d 122 (1975).

Knowledge is generally proved by circumstantial evidence, but in this case, there was simply no evidence at all that Mr. Garfield knew the gun was stolen. Knowledge may be proven if there is information from which a reasonable person would conclude the fact at issue. CP 76 (instruction 7 defining knowledge); State v. Shipp, 93 Wn.2d 510, 514, 516, 610 P.2d 1322 (1980). Mr. Garfield told the detective he'd purchased the Eddy Stone rifle a couple of years before, from a Hispanic man at the Quik Stop in Quincy, Washington. RP 203, 205. While getting fuel, he overheard the man unsuccessfully try to sell a firearm to three men in a black Dodge pickup. He described the three men as all “camo[u]flaged” out, as if they were duck hunters or some type of hunters. RP 204, 226. Apparently the Hispanic man was selling the gun because he needed gas money to get to Mexico. Mr. Garfield told the man he might be interested. After looking at the gun in the man's trunk, Mr. Garfield bought it for \$120 to \$140 because he liked old rifles. RP 205–06. During the

interview, Mr. Garfield consistently described how he came to purchase the rifle and denied knowing it was stolen. RP 217–18.

Mr. Garfield’s explanation of the purchase was un-contradicted.

This issue does not hinge on the credibility of Mr. Garfield’s explanation.

The jury was entitled to disbelieve him. It was not entitled to find he knew the gun was stolen without proof beyond a reasonable doubt.

The mere fact that Mr. Garfield purchased a gun from a man in a parking lot is not proof that he knew the gun was stolen. In United States v. Howard, 214 F.3d 361, 364 (2d Cir. 2000) the Second Circuit explained the fallacy of this reasoning:

[T]he fact that appellant may have known that as a convicted felon he could not lawfully obtain a firearm does not tend to prove that he had reason to know that the gun in question was stolen. We have no basis on this record or on the arguments made to us to opine that such a significant portion of guns sold on the ‘black market’ are stolen that a purchaser would likely share such knowledge and believe that any particular gun sold on that market was even highly likely to have been stolen.

Id. at 364. Merely buying a gun from an unknown person is also not proof he knew it was stolen. Thomas v. State, 270 Ga. App. 181, 182, 606 S.E.2d 275, 277 (2004) (conviction for possession of stolen firearm reversed because only evidence of knowledge was that appellant had purchased the pistol for \$120 from someone he did not know).

The record is devoid of the types of evidence that have permitted a jury to infer knowledge in other cases. For example, only slight additional evidence may be required when the firearm in question was recently stolen. State v. Withers, 8 Wn. App. 123, 128, 504 P.2d 1151 (1972), *citing* State v. Portee, 25 Wn.2d 246, 170 P.2d 326 (1946). In the case of a recently stolen firearm, inconsistent statements about the firearm, attempts to sell it, or false or improbable explanations alone may be sufficient. State v. Pisauro, 14 Wn. App. 217, 220–21, 540 P.2d 447 (1975). But this firearm was not recently stolen. The owner reported the gun stolen in November 2008, and when asked when she had last seen the Eddy Stone rifle the owner could only say “Before it was stolen”. RP 65–66, 68. Thus the owner was not certain when the gun had disappeared. Mr. Garfield bought the gun a “couple of years” before he pawned it in September 2012. CP 1, 87; RP 72–73, 78–80, 84, 184, 203, 205. Assuming the gun was in fact stolen in November 2008, a “couple” of years does not reasonably mean four years ago. Because the gun was not recently stolen, even if Mr. Garfield’s account of how he acquired it appears improbable, that alone is not sufficient evidence he knew it was stolen.

Familiarity with the location of the theft when combined with a dubious explanation has also been held sufficient to show knowledge that property was stolen. State v. Smyth, 7 Wn. App. 50, 499 P.2d 63 (1972). For example, Smyth admitted he had visited the home the property was stolen from on several occasions. Id. at 51–52. There was also evidence he attempted to obtain a fictitious bill of sale while he was in jail awaiting trial. Id. at 52–54. On appeal, the court held that these facts, taken together, were sufficient to submit the question of guilt to the jury. Id. at 53–54. But here, no evidence was presented that Mr. Garfield was familiar with the location of the theft. The owner didn't know Mr. Garfield and didn't know who broke into the house. RP 70. There was also no evidence Mr. Garfield had any connection with anyone who had access to the home.

Inconsistent stories of acquisition of property or selling (or purchase) prices well below market value have also been held sufficient to show knowledge that property was stolen. *See, e.g., State v. Ladely*, 82 Wn.2d 172, 174-76, 509 P.2d 658, 660 (1973) (Evidence on issue of knowledge of stolen character of antique revolver was sufficient to convict defendant of grand larceny by receiving and concealing stolen property, where defendant gave police three different versions about his ownership

and where he acquired revolver); Melson v. United States, 207 F.2d 558, 559 (4th Cir. 1953) (“[T]hese circumstances, particularly the low price at which the eggs were sold by the defendant and his associate, and the obliteration of marks of ownership from the cartons, were such as to justify the inference that the defendant had knowledge that the goods had been stolen.”). Here, Mr. Garfield consistently described how he came to purchase the rifle and always denied knowing it was stolen. \$120 to \$140 is not an insignificant amount of money and the State presented no evidence that the purchase price was out of line for a used rifle.

Mr. Garfield’s conduct and testimony of the State’s own witnesses did not prove whether he knew the gun was stolen. There was not a scintilla of evidence of “guilty knowledge”. Mr. Garfield freely admitted his purchase and ownership and pawning³ of the gun (RP 82, 184–86, 188, 202–03, 205); he provided full information to the employee of the Ephrata branch of the pawn shop business for purposes of filling out the pawn slip, including his full name and physical information, date of birth, driver’s license number, a description of the rifle and his current address (RP 77–78, 195–96), and he was “more than cooperative” in speaking to police

³ That Mr. Garfield has no “guilty knowledge” is further supported by his un-contradicted statement to Detective Huffman that he had pawned the same rifle on a previous occasion, at a different office of Olde World Trading Company in Moses Lake, Washington. RP 221.

(RP 184–86, 213–14). This evidence was also entirely consistent with the facts that Mr. Garfield was not precluded by any felony history from purchasing a rifle, he was a hunter of big game, he liked older guns and he owned other guns⁴. Mr. Garfield was only about 19 years old at the time of the purchase but given his un-contradicted familiarity with weapons, he was also presumably comfortable with making a rifle purchase other than from a firearm store. There was no improbable or contradictory explanation. No familiarity with the locale of the theft. No demonstrated opportunity. No recent theft. No absurdly low purchase price. No Washington case has upheld a conviction for knowingly possessing stolen property based on such thin evidence.

The jury's conclusion could only have been based on impermissible speculation. No reasonable fact-finder could conclude beyond a reasonable doubt that Mr. Garfield knew the firearm was stolen. His conviction for possession of a stolen firearm should be reversed.

⁴ RP 208, 211, 220–21.

D. CONCLUSION

For the reasons stated, the conviction for possessing a stolen firearm should be reversed and dismissed.

Respectfully submitted on October 4, 2013.

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PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on October 4, 2013, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of brief of appellant:

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