

**FILED**  
JAN 14, 2016  
Court of Appeals  
Division III  
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 33645-0-III

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STATE OF WASHINGTON, Respondent,

v.

JILL J. FERGUSON a.k.a. FLECK, Appellant.

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APPELLANT'S REPLY BRIEF

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## I. ARGUMENT

The State contends without factual or legal support that Detective Carr's testimony that she reviewed various websites including Ebay, Craigslist and Apple websites to determine the value of the computer establishes that those websites fit within ER 803(a)(17)'s hearsay exception for "market reports, [and] commercial publications." This contention is specious.

The State cites no authority from any jurisdiction in which a detective's self-directed internet search of websites selected according to no particularly identified methodology has been held to satisfy ER 803(a)(17). The contrary example provided by the State, the Kelley Blue Book, has by contrast been recognized by multiple jurisdictions including our own as a "standard and reliable reference for valuation of vehicles." *State v. Shaw*, 120 Wn. App. 847, 852, 86 P.3d 823 (2004) (citing *State v. Erickstad*, 620 N.W.2d 136, 145, 200 N.D. 202 (2000)). Another example of an exhibit admitted pursuant to the ER 803(a)(17) exception is a chart of county wages for certain county positions prepared by the State and used as the basis for calculating wage loss. *Kohn v. Georgia-Pacific Corp.*, 69 Wn. App. 709, 724, 850 P.2d 517 (1993). These examples differ from the evidence in this case in critical respects.

Most significantly, the Kelley Blue Book and the compilation described in *Kohn* squarely meet ER 803(a)(17)'s definition of "Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations." The *Kohn* evidence was, as defined, a compilation of wage information published by the State and relied upon by experts in the field. The Kelley Blue Book is a commercial publication, "used to determine what a person might expect to pay when buying a used car, or to receive when selling one." *Shaw*, 120 Wn. App. at 852. By contrast, a private sale listing on an internet marketplace is simply that ... a listing. Just as the plural of "anecdote" is not "data," the detective's review of multiple individual listings does not somehow convert those listings into a thorough, rigorous, and professionally accepted compilation of the market price of a used Apple laptop.

Indeed, facially, nothing in the existence of a listing is evidence that the listed item actually sold for the list price. EBay, for example, is an auction style format in which a minimum bid is established, and the highest bidder wins the item after the auction deadline passes. *Sayeedi v. Walser*, 15 Misc.3d 621, 626, 835 N.Y.S.2d 840 (2007). However, eBay also offers sellers an option to request a fixed price under an option called "Buy It Now." *Perfumebay.com, Inc. v. eBay, Inc.*, 506 F.3d 1165, 1169

(9<sup>th</sup> Cir. 2007). It is entirely unclear from the record whether the detective relied upon auction pricing or buy-it-now pricing in formulating the valuation estimate, let alone whether any actual sales were closed at the listed prices.

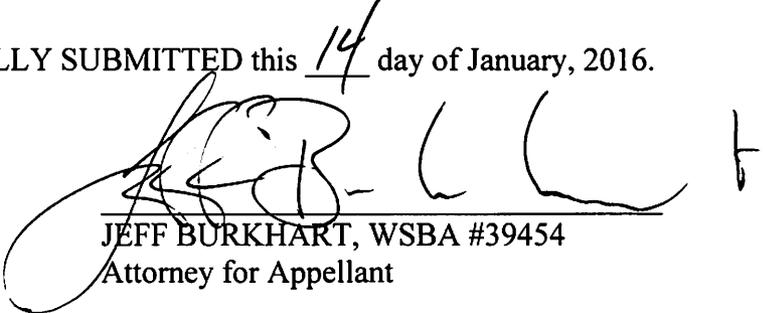
Second, the State failed to present any evidence establishing the required foundation that the types of individual listing searches performed by the detective were “generally used and relied upon by the public or by persons in particular occupations.” Hearsay exceptions exist because they describe circumstances thought to ensure that the statement is probably reliable. *State v. Karpenski*, 94 Wn. App. 80, 108, 971 P.2d 553 (1999), *abrogated on other grounds in State v. C.J.*, 148 Wn.2d 672, 63 P.3d 765 (2003). Thus, the “market report” exception is considered a reliable form of hearsay because it reflects an analytical methodology that is sufficiently rigorous to pass scrutiny among experts and the general public. And while it is not entirely implausible that eBay and Craigslist listings could be reviewed, compiled, and analyzed in a statistically sound manner that accounts for outliers, selection bias, product condition, and variable market conditions, nothing in the record reflects that such rigor was employed here. The detective simply relied upon unauthenticated information from the internet, which is not subject to a hearsay exception. *See State v. Davis*, 141 Wn.2d 798, 854, 10 P.3d 977 (2000).

Accordingly, the State is incorrect in contending that the individual listing searches performed in this case fall within the exception of ER 803(a)(17). And because the evidence was not within the hearsay exception and comprised the entire state's case on the essential element of the property's value, the failure to object to its admission was neither reasonably strategic nor harmless.

## **II. CONCLUSION**

For the foregoing reasons, Fleck respectfully requests that the court reverse her conviction and remand the cause to enter judgment on the lesser included offense of possessing stolen property in the third degree.

RESPECTFULLY SUBMITTED this 14 day of January, 2016.

  
\_\_\_\_\_  
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Attorney for Appellant

**DECLARATION OF SERVICE**

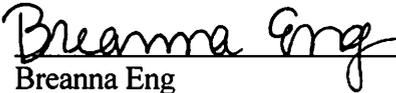
I, the undersigned, hereby declare that on this date, I caused to be served a true and correct copy of Appellant's Reply Brief upon the following parties in interest by depositing them in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

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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 14<sup>th</sup> day of January, 2016 in Walla Walla, Washington.

  
Breanna Eng