

FILED

DEC 22, 2015

Court of Appeals
Division III
State of Washington

33645-0-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JILL J. FERGUSON aka JILL J. FLECK, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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I. APPELLANT'S ASSIGNMENTS OF ERROR

1. Insufficient evidence supports the conviction for possessing stolen property.
2. Trial counsel's assistance was ineffective in failing to object to inadmissible hearsay testimony about the value of the stolen property.

II. ISSUES PRESENTED

1. Was there sufficient evidence to support the conviction of the defendant for second degree possession of stolen property?
2. Was the defendant's trial lawyer ineffective for failing to object to testimony which was not hearsay?

III. STATEMENT OF THE CASE

The defendant was charged by information with one count of possession of stolen property in the second degree. CP 1. The matter proceeded to trial and the defendant was convicted as charged. The defendant timely appealed.

Substantive facts.

On January 20, 2014, David Ulane, and his wife Janet Bressler, parked their car in downtown Spokane and had dinner. RP 2. During dinner, someone smashed the back window of their automobile. RP 22. Ms. Bressler had several items taken, including a MacBook Air laptop

computer. RP 22. The couple filed a police report after the incident.
RP 22.

That evening, Mr. Ulane activated the Apple tracker for his stolen computer.¹ RP 25.

Days later, Mr. Ulane received an email from Apple indicating the stolen computer was at a computer repair store, Strong Solutions. RP 25, 27. Mr. Ulane called the store the next morning. RP 27. He received information that a woman, later identified as the defendant, brought the computer into the store. The woman indicated she was having difficulty logging onto the computer. RP 27. This information was also passed onto law enforcement. RP 27.²

Jane Patten, an Apple specialist working at Strong Solutions, spoke with Mr. Ulane on January 23, 2014. Mr. Ulane provided her with a serial number of his stolen computer. RP 70-71. At the time, Ms. Patten had the

¹ Mr. Ulane was able to lock his computer, via the internet, so that the computer could not be opened or logged onto. RP 25, 31. In doing so, the Apple Corporation was notified to alert Mr. Ulane, by email, if someone attempted to open his stolen computer. RP 25.

² On January 23, 2014, Jack Strong, proprietor of Strong Solutions, had contact with the defendant. RP 30-31. The defendant brought the stolen computer into the store, indicating one of her children had locked it up. RP 31. The defendant provided a Best Buy receipt to the shop to validate the computer's warranty status. RP 33. The receipt did not match the stolen computer. RP 34. Mr. Strong was able to estimate a purchase date of October 9, 2012, with the serial number of the stolen computer. RP 33.

same computer in the shop for repair. RP 70-71. Ms. Patten later confirmed the defendant was the person who brought the computer to the shop for repair. RP 72.

In the afternoon hours of January 23, 2014, the defendant called the store and indicated she was going to pick up the computer. RP 35. In the interim, an employee contacted law enforcement. RP 71. Arrangements were made to have law enforcement present when the defendant arrived at the store. RP 35.

Stacey Carr, Spokane police detective, was assigned to the case. During the week the computer was reported stolen, she researched various internet sites for valuation of a similar computer, including Craigslist, eBay and Apple. RP 51, 58. She stated the value of the stolen computer was between \$800 and \$1500, according to those internet sites. RP 51.³

Detective Carr spoke with the defendant at the store. RP 46.⁴ The defendant stated she purchased the computer from her neighbor, "Roma." RP 46. The defendant stated she paid \$500 cash for the computer. RP 47.

³ Detective Carr was unaware of the exact condition and value of the computer when it was stolen. RP 58. The detective did remark she was provided an abundance of information on Apple products when speaking with the proprietor of Strong Solutions. RP 52.

⁴ The trial court conducted a CrR 3.5 hearing, and found the defendant's statements to law enforcement at the repair shop admissible at the time of trial. RP 9-20, 60-61.

The defendant further claimed she bought the computer from a neighbor, sometime between January 13, 2014 and January 17, 2014. RP 47, 49. The defendant later changed her story regarding the date she allegedly purchased the computer. RP 49.

IV. ARGUMENT

A. THERE WAS SUFFICIENT EVIDENCE TO CONVICT THE DEFENDANT OF SECOND DEGREE POSSESSION OF STOLEN PROPERTY.

The defendant argues the evidence was insufficient to prove that the stolen property she possessed exceeded \$750 in value. Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). “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.

The State may prove a property’s value by direct or circumstantial evidence. *State v. Hermann*, 138 Wn. App. 596, 602, 158 P.3d 96 (2007). Both types of evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). Appellate courts defer to the trier of fact on issues of conflicting testimony, witness credibility, and the persuasiveness

of the evidence. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

To convict the defendant of possession of stolen property in the second degree, the State had to prove that she possessed stolen property that exceeded \$750 in value. RCW 9A.56.160(1)(a). As the trial court instructed the jury, “Value means the market value of the property at the time and in the approximate area of the act.” RP 121; RCW 9A.56.010(21)(a). Market value is based on an objective standard and is the price that a well-informed buyer would pay to a well-informed seller. *State v. Kleist*, 126 Wn.2d 432, 438, 895 P.2d 398 (1995); *State v. Ehrhardt*, 167 Wn. App. 934, 944, 276 P.3d 332 (2012).

The State need not present direct evidence of the value of stolen property, rather, “the jury may draw reasonable inferences from the evidence, including changes in the condition of the property that affect its value.” *Ehrhardt*, 167 Wn. App. at 944. The jury may also rely on its “ordinary experience and knowledge” when determining the market value of stolen property from the evidence presented. *State v. Melrose*, 2 Wn. App. 824, 832, 470 P.2d 552 (1970).

In *Melrose*, evidence of the price paid for a camera five years before its theft, combined with consideration of the camera itself, was sufficient to establish market value. *Melrose*, 2 Wn. App. at 830–32. The

jury could consider the camera and allow for changes in condition that affected its market value. *Id.* at 831. The *Melrose* court reasoned that even if the State had introduced expert testimony about the camera's market value, the jury could have rejected that testimony and determined value from the other evidence by "using the judgment of persons of ordinary experience and knowledge." *Id.* at 832; *see also Hermann*, 138 Wn. App. at 602 (value need not be proven by direct evidence because jury may draw reasonable inferences from the evidence). In addition, the jury can consider changes in the property's condition that would affect its market value. *Melrose*, 2 Wn. App. at 831.

Similarly, in *State v. McPhee*, 156 Wn. App. 44, 65, 230 P.3d 284, *review denied*, 169 Wn.2d 1028 (2010), Division Two of this court relied on the trade value of stolen property as well as the jury's judgment in finding sufficient evidence of market value. In *McPhee*, the owner of stolen binoculars and tusks testified that he traded two salmon charter license permits, each worth \$750, for the binoculars, and the court admitted both the binoculars and tusks into evidence. *Id.* at 65–66. The trade value was essentially the price paid for the binoculars. There was no testimony about the timing of the trade.

With regard to the present case, the defendant's insufficient evidence claim admits the truth of Detective Carr's uncontested testimony

that the value of the Apple computer was between \$800 and \$1500. It also admits the reasonable inference that the jury in the present case was familiar with everyday items, such as Apple computers and their value, which costs substantially more than other computer manufactures' products.⁵

In addition, the defendant, who knowingly possessed the stolen computer, told Detective Carr she purchased the stolen computer for \$500 from a neighbor. The jury could reasonably infer she purchased the stolen computer for a price far below its fair market value because it was stolen. The advantage of purchasing stolen goods is the value paid to a thief or "fence" is substantially less than what the item would cost by legitimate means. Paying below market value for stolen property offsets the potential risks of possessing the stolen property; i.e., lack of title and the risk of a criminal penalty. Courts have recognized that stolen property is generally purchased substantially below market value. *See, e.g., United States v. Jewell*, 893 F.2d 193, 194 (8th Cir. 1990) ("[T]he purchase of the appliances at a ridiculously low price and the subsequent sale of the appliances at below market value is sufficient to support an inference that

⁵ See, <http://moneynation.com/how-to-afford-apple-computers-with-apple-financing/> (Apple computers are more expensive than other comparable computers and they retain their resale value); *State v. Johnson*, 461 S.W.3d 842, 845 (Mo. Ct. App. 2015) (the high cost of Apple brand products is common knowledge).

[the defendant] knew the appliances were stolen.”); *United States v. Gallo*, 543 F.2d 361, 368 (D.C. Cir. 1976) (holding knowledge that goods are stolen may be inferred from willingness to buy or sell at a price substantially less than market value); *Torres v. United States*, 270 F.2d 252, 259 (9th Cir. 1959) (“Such acts as attempts to conceal the goods, *sale of the goods at ridiculously low prices*, have been held sufficient circumstances from which a jury can properly draw an inference of knowledge that the goods were stolen. *It would seem fair to say that in each of the cases affirmed the actions on the part of the defendant were such that no reasonable person would have done them unless he suspected that there was something ‘wrong’ with the goods*”).

Accordingly, there was sufficient evidence to support the defendant’s conviction for second degree stolen property.

B. THE DEFENDANT’S LAWYER HAD A TENABLE BASIS FOR NOT OBJECTING TO DETECTIVE CARR’S TESTIMONY REGARDING THE VALUE OF THE COMPUTER. ACCORDINGLY, HE WAS NOT INEFFECTIVE FOR FAILING TO OBJECT TO THAT TESTIMONY AS POTENTIAL HEARSAY.

The defendant next argues her trial lawyer was ineffective by failing to object to Detective Carr’s testimony of the value of the stolen computer. More specifically, the defendant argues Detective Carr’s

testimony regarding the value of the stolen computer was allegedly hearsay and it should have been objected to by her trial counsel.⁶

Standard of review.

An appellate court reviews claims of ineffective assistance of counsel de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009).

An appellate court gives great judicial deference to trial counsel's performance and begins its analysis with a strong presumption that counsel was effective. *Strickland v. Washington*, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

The state and federal constitutions guarantee criminal defendants the right to effective assistance from counsel. *State v. Grier*, 171 Wn.2d 17, 32, 246 P.3d 1260 (2011), *cert. denied*, 135 S.Ct. 153 (2014). Prevailing on an ineffective assistance claim requires the defendant to establish both deficient performance and prejudice. *Id.* at 32–33.

⁶ Where the alleged deficient performance consists of an attorney's failure to object. "The decision of when or whether to object is a classic example of trial tactics. Only in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal." *State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662 (1989).

To establish deficient performance, the defendant must show that his or her counsel's performance fell "below an objective standard of reasonableness." *Id.* at 32–33.

To show prejudice, the defendant must "establish that there is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would have been different." *Id.* at 34 (citation omitted).

If the ineffective assistance claim fails on one prong, an appellate court does not address the other prong. *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

Where it is a failure to challenge the admission of evidence that is alleged to constitute ineffective assistance, the defendant must show (1) an absence of legitimate strategic or tactical reasons supporting the challenged conduct, (2) that an objection to the evidence would likely have been sustained, and (3) that the result of the trial would have been different had the evidence not been admitted. *State v. Saunders*, 91 Wn. App. 575, 578, 958 P.2d 364 (1998).

In *State v. Shaw*, 120 Wn. App. 847, 86 P.3d 823 (2004), the defendant was arrested and charged with first degree possession of stolen property after police observed him get into and try to start a stolen 1987 Honda Accord. *Id.* at 849. At trial, the investigating detective testified that

he used the Kelley Blue Book Internet site to research the car's value. *Id.* Overruling a defense hearsay objection, the trial court allowed the detective to testify that the value of the car was \$2,520. *Id.*

On appeal, Shaw argued that the court erred by admitting the Kelley Blue Book evidence. *Id.* at 850. The court ruled that the evidence was properly admitted under ER 803(a)(17). *Id.* at 851.

The appellate court determined that the foundation laid by the detective's testimony showed that the Kelley Blue Book was a publication used to determine what a person might expect to pay when buying or selling a used car. *Id.* at 852. Relying on authority from other jurisdictions, the court held that the Kelley Blue Book was a standard and reliable reference for the valuation of vehicles and thus admitted the evidence under ER 803(a)(17). *Id.*

Similarly, in *United States v. Grossman*, 614 F.2d 295, 296 (1st Cir. 1980), the defendant was convicted of receiving stolen property (Colibri cigarette lighters). At trial, a Colibri catalog⁷ was admitted as evidence to establish the retail value of the lighters. The federal court of

⁷ "The catalog admitted was a published compilation generally used and relied upon by retailers of Colibri lighters." *Grossman*, 614 F.2d at 297. It displayed pictures of and listing prices for Colibri cigarette lighters. *Id.* at 297.

appeals held the trial judge properly admitted the catalog under Fed.R.Evid. 803(17).⁸

Contrary to the defendant's argument in the present case, the testimony by Detective Carr regarding the value of the stolen computer was properly admissible under ER 803(a)(17).⁹ Accordingly, the defendant cannot show the testimony concerning value would have been excluded had his lawyer objected at trial because grounds for admission of the testimony arguably existed. *See, State v. Butler*, 53 Wn. App. 214, 217, 766 P.2d 505 (1989), *review denied*, 112 Wn.2d 1914 (1989) (improperly admitted evidence does not constitute error if a proper basis existed for admission); *State v. DeLeon*, 185 Wn. App. 171, 193, 341 P.3d 315 (2014), *review granted in part*, 184 Wn.2d 1017 (2015); *State v. Fortun-Cebada*, 158 Wn. App. 158, 172, 241 P.3d 800 (2010) (“[w]here a claim

⁸ The court also found the catalog admissible under the “business records” exception, Fed.R.Evid. 803(6).

⁹ **ER 803(a) Specific Exceptions.** The following are not excluded by the hearsay rule, even though the declarant is available as a witness:...

17) *Market Reports, Commercial Publications.* Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.

ER 803(a)(17).

of ineffective assistance of counsel rests on trial counsel's failure to object, a defendant must show that an objection would likely have been sustained").

The defendant's lawyer was not ineffective for failing to object to the testimony.

V. CONCLUSION

Based upon the foregoing argument, the defendant's conviction for possession of stolen property in the second degree should be affirmed.

Dated this 22 day of December, 2015.

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CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on December 22, 2015, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

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12/22/2015

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(Place)

Kim Cornelius

(Signature)