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NO. 351688

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

SERGIO SAVAS MORENO,

Appellant.

DIRECT APPEAL
FROM THE SUPERIOR COURT
OF FRANKLIN COUNTY

RESPONDENT'S BRIEF

Respectfully submitted:
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I. IDENTITY OF RESPONDENT

The State of Washington, represented by the Franklin County Prosecutor, is the Respondent herein.

II. RELIEF REQUESTED

Respondent asserts no error occurred in the trial and conviction of the Appellant.

III. ISSUES

1. Did the trial judge abuse her discretion in admitting evidence in the absence of any objection and where the evidence was necessary and probative of an element of the offense and not unduly prejudicial?
2. Is there sufficient evidence the defendant knew the many collectible items he claimed to own were stolen where they had been burglarized from his neighbor's home only days earlier and where the carefully preserved items were found thrown about a crowded car several counties away after an apparent trip to a pawn shop for resale of some of the items?

IV. STATEMENT OF THE CASE

The Defendant/Appellant Sergio Moreno has been convicted by a jury of possessing stolen property in the second degree. CP 27.

On December 10, 2015, Pasco Detective Jeremy Jones made a traffic stop on a vehicle with five occupants visiting from Moses Lake. RP¹ 29-32, 52. The driver was Steven Gomez; the front passenger was Kornie Loera; and the three backseat passengers were the Defendant, Misty Baker, and Mike Schumacher. RP 10, 32-34, 37, 52, 58-60, 74. The detective arrested Mr. Gomez, Ms. Baker, and Ms. Loera on warrants. RP 32-33, 37. Ms. Baker had money sticking out of her bra. RP 34, 52. The detective asked Ms. Loera to collect it for him. RP 34. But before she could oblige him, one of the male passengers in the back seat retrieved it instead. RP 34.

When the detective observed a used methamphetamine pipe in the pocket on the front seat passenger door, he decided to obtain a search warrant for the vehicle. RP 35-36, 41, 47. The detective contacted the Defendant and Mr. Schumacher for not wearing their

¹ RP refers to the trial transcript for the dates of March 23, 24, and 27 and April 18, 2017.

seatbelts. RP 33, 74. But they were not arrested,² and they left on foot. RP 37, 52-53. [Defense counsel did not object to testimony regarding the arrest of three occupants or the discovery of the meth pipe. RP 35-37.]

Police documented their search with photographs. RP 41. Defense counsel informed the court that she had no objection to the admission of photographs and testimony describing the following evidence located in the vehicle:

- two alcoholic beverage containers, a cough syrup container, and a baggie with apparent methamphetamine on the floorboard of the back seat – (RP 42);
- two glass pipes used to consume methamphetamine – (RP 47-48); and
- a wooden box decorated with an eagle in the center console – (RP 48, 62).

The police found duffle bags and suitcases in the back of the

² The Defendant suggests that the detective misstated that the Defendant was arrested in December. Brief of Appellant (BOA) at 6. This is not the record. The detective testified that the backseat passengers were contacted about their seatbelts. RP 33. The defendant was not arrested, but allowed to leave, sent on his way on foot. RP 37, ll. 7-8, 13-16. If that testimony was not clear, the detective repeated it in cross-examination. RP 74.

vehicle as well as mint condition collections of coins, stamps in display cases, Disney paraphernalia, and model trains in original, unopened packaging. RP 50-51. Although it was apparent that great care had been taken to preserve the collectible items, they had been “thrown all over the vehicle.” RP 51.

Learning of a recent burglary in Moses Lake with lost property identical to what had been found in the back seat, detectives applied for a second warrant for the containers. RP 52-55, 78-79. Stephen Lybbert testified that he returned from vacation to find his home in disarray – collections of coins, locomotives, and dolls stolen. RP 88-89. Police recovered a large number of collectible coins in frames, boxes, books, and a bag; seven model trains; collectible stamps; and Disney memorabilia. RP 62-64, 66, 92. Mr. Lybbert was present during the execution of the second warrant and identified the duffle bags and the various collectible items (including trains and the Shirley Temple stamp collection) as being his property. RP 55, 63, 79, 90-95.

Some of Mr. Lybbert’s property was located on the persons of two of the arrested vehicle occupants. When booked into jail, Mr. Gomez was in possession of two silver coins in display cases. RP 58-60. Defense initially objected on foundational grounds to descriptions

of photographs of these coins, but counsel did not object to testimony describing Mr. Gomez's possession of the property. RP 58-59 ("I would ask that the photos not be discussed until after they are admitted."). More of Mr. Lybbert's property was located in an arrested occupant's purse. RP 69 (admitted without objection).

Police traced a receipt found in the car to the Coin Cradle in Kennewick where Ms. Baker and a Mr. Villanueva had sold miscellaneous coins and silver for \$485. RP 64-65 (admitted without objection). Police were only able to recover a "minimal amount" of Mr. Lybbert's property from the Coin Cradle. RP 69.

In total, the recovered property only encompassed about 20% of the property which had been stolen. RP 90.

Ms. Baker and Mr. Villanueva were charged with trafficking in stolen property. RP 69-70. The Defendant did not object to evidence of crimes or charges against Mr. Gomez and Ms. Baker and even emphasized these facts in cross-examination. CP 59, 69-70, 74.

On February 3, 2016, the Defendant called the detective and left two voicemails which were admitted and published as exhibit 16. RP 70-72, 74-75. The Defendant has not designated this exhibit on appeal, but it is described in the probable cause statement. CP 1; PE

16. In the voicemails, the Defendant asked how he could retrieve his property which had been taken from him during the traffic stop. CP 1. He provided the date of the traffic stop, the case number, and his phone number. CP 1-2; RP 72. He described the property as “four metal trains, one brass, a Shirley Temple stamp collection, a bunch of coins, and some Lincoln pennies.” CP 1.

The detective returned the call and had a conversation with the Defendant, but Mr. Moreno did not return to Pasco to retrieve any property or for any other purpose. RP 72-73. Instead, the detective resorted to identifying and locating the Defendant through his phone number. RP 73.

At trial, Mr. Lybbert recognized the Defendant as someone who had walked by the house. RP 95-96.

V. ARGUMENT

A. THE TRIAL JUDGE DID NOT ABUSE HER DISCRETION IN ADMITTING EVIDENCE WHERE NO OBJECTION WAS MADE AND WHERE THE EVIDENCE WAS HIGHLY PROBATIVE AND NOT UNDULY PREJUDICIAL.

The Defendant challenges the admission of the following evidence:

- the outstanding warrants for Mr. Gomez, Ms. Loera, and

- Ms. Baker which provided the lawful basis for the discovery of the methamphetamine pipes;
- the methamphetamine pipes which provided the lawful basis for the search which resulted in the finding of the stolen property; and
 - the burglary which proved the essential element that the property was stolen as opposed to lost.

BOA at 7. Only the last of these challenges is preserved for review. RP 53, 85-86. The court “may not” review an unpreserved assignment of error regarding the inadmissibility of evidence in the absence of manifest constitutional error. *State v. Powell*, 166 Wn.2d 73, 84, 206 P.3d 321, 327 (2009) (failure to object at trial waived claim on appeal). The Defendant has not alleged an exception under RAP 2.5(a).

At trial, the Defendant made no objection to the evidence that three of his companions had warrants for their arrest. RP 35-37. A court does not abuse its discretion in a matter not raised to its attention. Nor was that evidence offered for 404(b) purpose. It was introduced, not to show any person’s bad character, but to explain how the detective came to observe the meth pipe, i.e. while he was in the process of arresting one of the occupants.

The Defendant did not object to this evidence, because he needed it for his defense. The Defendant would later emphasize

arguably more prejudicial evidence, i.e. that Mr. Gomez and Ms. Baker would be charged with possessing stolen property. RP 74. It served Defendant's purposes not to object in order to be able to argue that he was a sheep among wolves. Unlike the others, "he had no warrants." RP 114. Unlike the others, "ultimately he was released from the scene." RP 114. In December, police "made a decision to charge two *other* individuals with crimes related to this: possessing stolen property." RP 115 (emphasis added). The Defendant argued that he had no knowledge the property had been stolen and police had "no reason to believe that Mr. Moreno had any knowledge." RP 115. He called police and tried to retrieve the property, because "he believed the items to be his friends'." RP 115. "[H]aving bad friends does not mean that he knew the items were stolen. It doesn't mean that he knew that *those acquaintances* had taken items." RP 115-16 (emphasis added).

The Defendant cannot have it both ways. He cannot admit the evidence for his defense theory (that those people with the warrants were the bad guys) and then complain that it was admitted in the absence of any objection.

At trial, the Defendant made no objection to testimony

regarding the glass pipe (much less the methamphetamine which was found in a baggie on the back floorboard). RP 35, 42, 47-48. For the first time on appeal, the Defendant claims the evidence of the pipe was offered to prove the character of a person in order show action in conformity therewith and not for any other admissible purpose. BOA at 5. This is not the record. The pipes were never tied to the Defendant. There was no testimony that he appeared to be under the influence of drugs or that he was tested or investigated for drug use. The detective testified the Defendant was allowed to just walk away. In fact, there is no record that anyone was charged with use of drug paraphernalia or possession of methamphetamine. And the evidence was not used to argue anything about the Defendant's or anyone else's character. The evidence was only offered for a plainly admissible purpose, i.e. to show why the detective had a legal basis to seek the first search warrant. RP 41 ("Wrote up a search warrant outlining the circumstances of the pipe in plain view, and we obtained a search warrant to go into the vehicle to look for further evidence of drug paraphernalia and narcotics"). Evidence is explicitly admissible under ER 404(b) for a non-character purpose.

The Defendant claims that a trial court is required to undergo

an analysis before admitting the evidence. BOA at 5 (citing *State v. Jackson*, 102 Wn.2d 689, 694, 689 P.2d 76 (1984)). This is false. There must first be an objection before the court. In *State v. Jackson*, 102 Wn.2d at 691, the defendant made a pretrial motion to suppress evidence of a prior assault. The trial court in *Jackson* had an opportunity to address the objection, and the challenge was preserved for review. Here there was no objection before the trial judge. The court is not obliged to make any party's objections for them. In the absence of a timely objection, the challenge is waived.

At trial, the Defendant did preserve objection to evidence of a burglary. RP 53, 85-86. Insofar as the Defendant belittles the trial judge for finding the evidence was not offered for the truth of the matter asserted (BOA at 7), the scorn is unwarranted. Hearsay was the Defendant's actual objection initially.

MS. MAPES: I'm objecting on the basis that anything he would testify to would be hearsay. ... I'm objecting on the basis that everything that he would say is hearsay.

RP 53. The court properly addressed the actual objection before it. A statement is not hearsay if it is not offered for the truth of the matter asserted. ER 801(c).

The next day, although the evidence had already been admitted through the detective, the Defendant offered an alternative basis to prevent the victim from repeating the fact. Then the Defendant argued that evidence that the property was stolen in a burglary would be unduly prejudicial, framing the challenge under ER 403, not ER 404(b). RP 85-86 (“any interest that the state may have would not be outweighed by the prejudice that would be to my client”). The standard of review for such a challenge is abuse of discretion. *State v. Barry*, 184 Wn. App. 790, 801, 339 P.3d 200 (2014).

The admissibility of evidence is within the discretion of the trial court and its decision will not be disturbed absent an abuse of discretion.

State v. Young, 158 Wn. App. 707, 720, 243 P.3d 172, 179 (2010).

The court overruled the objection, finding the evidence essential to prove the element that the property was “stolen.” RP 86-87. The court’s ruling is tenable. The State bore the burden of proving beyond a reasonable doubt that the property was stolen, not just misplaced. The evidence that proved it was stolen was that it disappeared in a burglary.

Insofar as the Defendant claimed that the evidence was unduly prejudicial, the trial judge properly noted that any prejudice would be

sufficiently balanced with a cross-examination showing the dearth of evidence to suggest that the Defendant was the person who entered Mr. Lybbert's home. RP 86. In fact, the prosecutor addressed this, eliciting from the victim that he never saw the burglar. RP 95. Moreover, the Defendant was not charged with a burglary.

The court did not abuse its discretion in admitting evidence that went directly to an element of the offense.

B. THERE IS SUFFICIENT EVIDENCE THAT THE DEFENDANT KNEW THE PROPERTY HE POSSESSED WAS STOLEN.

The Defendant claims there is insufficient evidence to show that he acted with knowledge that the property had been stolen. BOA at 9-10; CP 17. This is the same argument the Defendant put squarely to the jury, and which the jury rejected. RP 115-16, 124-26.

“A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). “[A]ll reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant.” *Id.* A reviewing court defers to the trier of fact on issues of conflicting testimony, witness credibility, and persuasiveness of the evidence.

State v. Thomas, 150 Wn.2d 821, 874–75, 83 P.3d 970 (2004). After viewing the evidence in the light most favorable to the State, interpreting all inferences in favor of the State and most strongly against the Defendant, the Court must determine whether any rational trier of fact could have found the essential elements beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *State v. Salinas*, 119 Wn.2d at 201.

The state need only show “knowledge of facts sufficient to put him on notice that they were stolen.” *State v. Rockett*, 6 Wn. App. 399, 402, 493 P.2d 321, 323 (1972). Possessing a large number of the same sort of item for the purpose of quick resale to dealer is sufficient to prove knowledge that the items were stolen. *Id.* The Defendant was in possession of seven model trains. He was in possession of so many coins – packed in bags, boxes, books, and display cases. And that was only the 20% that remained. The goods had already been resold to at least one out-of-county pawn shop.

Here the evidence was that the Defendant was found several counties away with property that belonged to his neighbor. He had been seen in the vicinity of the residence that was burglarized. RP 96 (“I saw him walk down the street by our house.”). He would have

known when his older neighbor had flown south for the winter such that the home was vacant. RP 89. He could be circumstantially connected with the burglary, and there can be “no more convincing evidence as to the element of knowledge that the property was wrongfully appropriated than proof that the defendant himself had stolen it.” *State v. Flint*, 4 Wn. App. 545, 546-47, 483 P.2d 170 (1971).

He was found in possession of the property within days of the theft and already most of the items had been disposed of. RP 89-90.

[P]ossession of recently stolen property calls for an explanation. ...

....

Possession of recently stolen property and a dubious account concerning its acquisition is sufficient to present a question of fact and to meet the ‘beyond a reasonable doubt’ test of criminal evidence.

When a person is found in possession of recently stolen property, slight corroborative evidence of other inculpatory circumstances tending to show his guilt will support a conviction. When the fact of possession of recently stolen property is supplemented by the giving of a false or improbable explanation of it, * * * a case is made for the jury.

State v. Hatch, 4 Wn. App. 691, 694, 483 P.2d 864, 866–67 (1971).

The property taken was of the sort that is attractive to burglars. It had a lot of value and was easily pawned or resold. In fact, it had

been sold to the Coin Cradle, a pawn shop in Kennewick. RP 91. Although the vehicle occupants were all from Moses Lake and could have sold the property much closer to home, they travelled across several counties where the resale would be less likely to attract attention. It is implausible that these collectible items would have any sentimental value to the Defendant. RP 92 (a Shirley Temple book with collectible stamps and stories of her movie career and a Canadian steam locomotive that the Lybberts rode on their 20th anniversary). They were thrown about the back of a fully occupied car. Clearly, their only value to him was quick resale. The Shirley Temple book had a name plate that had been removed. RP 92.

Interpreting all inferences in favor of the State and most strongly against the Defendant, the Defendant and his companions appeared to be acting in concert. Ms. Baker had pawned some of the property. Mr. Gomez, who was driving, had more of the property. They were driving the property across several county lines for resale. It stands to reason they were acting together to quickly dispose of hot property. Additionally, a person of ordinary prudence in the Defendant's position would have knowledge that bags of collectibles being transported for resale at a pawn shop and thrown about a car in

the company of people with criminal warrants – were stolen.

And the Defendant did not present himself as someone who was in the wrong place at the wrong time. He left two messages telling police the property was his. It had been taken from him. He did not claim he was picking it up for a friend. He identified it by date and case number, and he provided his phone number. He said he had an ownership interest. There is no evidence he provided police with proof that he came by the property honestly or innocently. The evidence was that when he realized he had been found out, he disappeared. Police had to locate him by his phone number. Flight is evidence from which we can infer consciousness or knowledge of guilt. *State v. McDaniel*, 155 Wn. App. 829, 853-54, 230 P.3d 245, 259 (2010).

The evidence was sufficient that the Defendant knew the property was stolen.

VI. CONCLUSION

Based upon the forgoing, the State respectfully requests this Court affirm the Appellant's conviction.

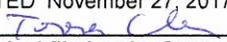
DATED: November 27, 2017.

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| <p>Edward Penoyar edwardpenoyar@gmail.com tamron_penoyarlaw@comcast.net</p> | <p>A copy of this brief was sent via U.S. Mail or via this Court's e-service by prior agreement under GR 30(b)(4), as noted at left. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED November 27, 2017, Pasco, WA  Original filed at the Court of Appeals, 500 N. Cedar Street, Spokane, WA 99201</p> |
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