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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 36908-1-III

STATE OF WASHINGTON, Respondent,

v.

MICHAEL WAYNE HELMS, Appellant.

APPELLANT'S BRIEF

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TABLE OF CONTENTS

AUTHORITIES CITED.....ii

I. INTRODUCTION.....1

II. ASSIGNMENTS OF ERROR.....1

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR1

IV. STATEMENT OF THE CASE.....2

V. ARGUMENT.....4

 A. The trial court abused its discretion by admitting testimony about retail price that was told to the testifying witness by an unidentified person at Amazon at an unspecified time4

 B. Evidence of retail price was insufficient to prove market value when the items in question were intentionally taken out of the retail market and given to law enforcement to use in a sting operation.....9

VI. CONCLUSION.....11

CERTIFICATE OF SERVICE12

AUTHORITIES CITED

State Cases

State v. Coleman, 19 Wn. App. 549, 576 P.2d 925 (1978).....7

State v. Ehrhardt, 167 Wn. App. 934, 276 P.3d 332 (2012).....5

State v. Hayward, 152 Wn. App. 632, 217 P.3d 354 (2009).....8

State v. Kleist, 126 Wn.2d 432, 895 P.2d 398 (1995).....5

State v. Morley, 119 Wn. App. 939, 83 P.3d 1023 (2004).....6, 9, 10

State v. Quincy, 122 Wn. App. 395, 95 P.3d 353 (2004).....7, 8

State v. Rainwater, 75 Wn. App. 256, 876 P.2d 979 (1994).....6, 7, 8

State v. Shaw, 120 Wn. App. 847, 86 P.3d 823 (2004).....5, 6

Statutes

RCW 5.45.020.....7

RCW 9A.56.160.....5, 9

RCW 9A.56.170.....9

Court Rules

ER 801(c).....6

ER 802.....6

ER 803(a)(17).....6

I. INTRODUCTION

Over Michael Helms's objection, the State was permitted to introduce at trial hearsay testimony that comprised the only evidence of the value of property taken. Because an essential element of the charge of possessing stolen property in the second degree is that the value of the property exceeded \$750, the error was harmful. Moreover, the evidence showed retail value, which was insufficient to establish market value when the items never entered the retail market but were given to a U.S. postal inspector to use in a sting operation. The conviction should be reversed.

II. ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR NO. 1: The trial court erred in overruling Helms's objection to hearsay testimony concerning the value of the property taken.

ASSIGNMENT OF ERROR NO. 2: Insufficient evidence supports the market value of the property as exceeding \$750.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

ISSUE NO. 1: Whether information about the value of property provided to a testifying witness by an unspecified Amazon employee is hearsay.

ISSUE NO. 2: Whether a hearsay exception applies to the evidence of value provided to a testifying witness by an unknown employee of Amazon.

ISSUE NO. 3: Whether the error in admitting the hearsay testimony was harmless when the State presented no other evidence of value.

ISSUE NO. 4: Whether retail price is sufficient to establish the market value of property that was not offered for sale but was rather provided to a U.S. postal inspector at no cost to use in a sting operation.

IV. STATEMENT OF THE CASE

The State accused Michael Helms of possessing stolen property in the second degree, requiring it to prove that he knowingly possessed stolen property having a value exceeding \$750. CP 4, 43. At trial, the jury heard from a postal inspector about a parcel theft sting conducted in Yakima in December 2018. RP (Amended) at 146-48. The inspector testified that he packed a bait package with an iPad, a Kindle and a cover, some Crest Whitestrips, a camera, and headphones. RP (Amended) at 149, 152, 154, 155. The bait package would then be placed on a porch with a GPS tracker that would activate when the package was moved. RP (Amended) at 162.

The State then asked the inspector to testify to the value of the items in the box. RP (Amended) at 158. Helms objected that the witness lacked personal knowledge and the value was hearsay. RP (Amended) at 158. Elaborating, the witness testified that he was given the items from Amazon as part of an ongoing partnership and Amazon told him the price of the items. RP (Amended) at 159. Helms again objected that the price given to the witness was hearsay, and the trial court overruled the objection. RP (Amended) at 160, 161. The witness then testified that the value of the items was \$1,097.67. RP (Amended) at 161.

On cross-examination, the witness conceded that the only basis for his testimony as to the value of the items was what Amazon told him. RP (Amended) at 168. Although he stated that he sometimes looked items up on Amazon to verify their prices because they change sometimes when items get old, he did not specify whether he looked up any of the items in the bait package and noted that he did not compare prices with other retailers. RP (Amended) at 169. He acknowledged that items sometimes became “beat up” during the operations and when they could not be used anymore, they would be replaced by Amazon. RP (Amended) at 168-69. Lastly, he conceded that nobody had purchased the items to use in the sting. RP (Amended) at 169.

Subsequently, the jury heard that police received a notification that the package had been moved and responded to the area in question, where they saw Helms riding a bike while carrying a box. RP (Amended) at 170-76. Helms appeared to open the box, place the items inside the box into his backpack, and drop the box. RP (Amended) at 176. On contact, police recovered electronic devices in Helms's possession. RP (Amended) at 180. The items matched the serial numbers of the items that the postal inspector had packed inside the bait package. RP (Amended) at 164-65.

The jury convicted Helms of possessing stolen property in the second degree. RP (Amended) at 295; CP 55. The trial court sentenced him to 24 months' confinement and imposed a \$500 mandatory crime victim assessment. CP 60, 61, 74. Helms now appeals and has been found indigent for that purpose. CP 70, 71.

V. ARGUMENT

A. The trial court abused its discretion by admitting testimony about retail price that was told to the testifying witness by an unidentified person at Amazon at an unspecified time.

By charging Helms with possessing stolen property in the second degree, the State assumed the burden of proving that the value of the property contained in the bait package exceeded \$750. Because the only

evidence of the property's value consisted of inadmissible hearsay to which Helms properly objected, the evidence should not have been admitted. Moreover, the improper admission of the evidence affected the verdict because no other evidence was introduced to satisfy the State's burden of proof as to value. The conviction should be reversed.

Possessing stolen property in the second degree is a class C felony requiring proof that the defendant possesses stolen property other than a firearm or a motor vehicle exceeding \$750 in value. RCW 9A.56.160. The value of property is its market value at the time and in the approximate area of the offense, consisting of the price a willing and well-informed buyer would pay a willing and well-informed seller. *State v. Shaw*, 120 Wn. App. 847, 850, 86 P.3d 823 (2004) (citing *State v. Kleist*, 126 Wn.2d 432, 435, 895 P.2d 398 (1995)).

Evidence of retail price and price paid is not sufficient to establish value if the evidence is too remote in time. *State v. Ehrhardt*, 167 Wn. App. 934, 944, 276 P.3d 332 (2012). When property is used, the State may be required to present evidence of the condition or depreciation of the property to establish their market value. *Id.* at 946. Consequently, the market value of new property will be insufficient to establish the value of

used property. *See State v. Morley*, 119 Wn. App. 939, 944, 83 P.3d 1023 (2004).

Here, the postal inspector witness testified that he was told the property's value by Amazon. Because the value was a piece of information that was told to him by someone else outside of court, it was hearsay. Hearsay is a statement, other than one made by the declarant while testifying, offered in evidence to prove the truth of the matter asserted. ER 801(c). Hearsay testimony is generally inadmissible. ER 802.

Statements of unknown persons as to prices asked for sales of property are hearsay unless they fall within the exception for market reports and commercial publications, such as the Kelley Blue Book. ER 803(a)(17); *see Shaw*, 120 Wn. App. at 851 (discussing Kelley Blue Book as an exception to the hearsay rule). This is, in part, because price tags often merely establish "the probable range for reasonable negotiations" rather than a firm and fixed price. *Shaw*, 120 Wn. App. at 851 (*citing State v. Rainwater*, 75 Wn. App. 256, 262 n. 7, 876 P.2d 979 (1994), *review denied*, 127 Wn.2d 1010 (1995)).

When a proper foundation has been established, evidence obtained from a price tag placed on an item may be admissible as a business record.

Rainwater, 75 Wn. App. at 259-60; *State v. Coleman*, 19 Wn. App. 549, 553-54, 576 P.2d 925 (1978); see also *State v. Quincy*, 122 Wn. App. 395, 401, 95 P.3d 353 (2004), review denied, 153 Wn.2d 1028 (2005) (applying same rule to computer-generated pricing information obtained by loss prevention officer scanning the item's UPC code); RCW 5.45.020. Price tags and other similar records compiled in the ordinary course of business may be substantial evidence of market value when the case involves a retail store commonly known to sell its goods for a non-negotiable price listed on the tag. *Rainwater*, 75 Wn. App. at 261-62.

Here, however, the value evidence falls short of the *Rainwater* standard in several respects. First, the evidence did not come from a price tag or similarly affixed label placed on the item by a retailer. Instead, the postal inspector relied upon a spreadsheet¹ that he created based upon information told to him by "Amazon." RP (Amended) at 160, 161. Second, the postal inspector offered no foundational testimony as to how Amazon tracked and reported its pricing information. He did not testify who gave him the pricing information or their role at Amazon. He did not testify when the pricing information was generated or when it was communicated to him. And he did not testify to methods employed by

¹ The spreadsheet was not admitted into evidence. CP 57.

Amazon to establish pricing. Unlike in *Rainwater*, where the loss prevention officer followed ordinary store procedures by transferring price information from the tags onto another document and thereby created a legitimate business record, here, the postal inspector apparently just wrote down the number given to him by an unidentified person at Amazon at some unspecified time before Helms' arrest. *See* 75 Wn. App. at 259-60. This is classic hearsay – relaying unsworn information provided by another – that should not have been admitted.

A trial court's ruling admitting evidence is reviewed for abuse of discretion, which occurs when the decision is manifestly unreasonable or based upon untenable grounds or reasons. *Quincy*, 122 Wn. App. at 398-99. Here, the trial court acted unreasonably when it overruled Helms's hearsay objection because the testimony plainly was hearsay. The State did not assert a hearsay exception at the time, nor does one apply that would justify the admission of the postal inspector's testimony. Accordingly, the trial court's ruling was untenable.

Moreover, the error was harmful. "Where evidence is improperly admitted, the trial court's error is harmless if the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole." *State v. Hayward*, 152 Wn. App. 632, 651, 217 P.3d 354 (2009)

(quotations omitted). Here, the State presented no other evidence of the value of the property. It was required to prove that the value of the property exceeded \$750 in order to convict Helms of felony possession of stolen property; absent such evidence, it could only convict him of the misdemeanor. *Compare* RCW 9A.56.160 (possessing stolen property in the second degree), 9A.56.170 (possessing stolen property in the third degree). Consequently, the evidence of value was central to the State's case and essential to the felony conviction. Its admission was, therefore, harmful, and Helms should receive a new trial on the charge.

B. Evidence of retail price was insufficient to prove market value when the items in question were intentionally taken out of the retail market and given to law enforcement to use in a sting operation.

Retail value is not evidence of fair market value when the item was obtained at less than retail price, used, and not offered for sale. *Morley*, 119 Wn. App. at 943. Here, the postal inspector testified that the items were provided by Amazon as part of a regular partnership to conduct sting operations. RP (Amended) at 159. He said that Amazon told him he could use the items and if they weren't recovered, it was okay, but if he ever needed to get new ones, he could return the old ones. RP (Amended)

at 168-69. Consequently, the items were not purchased from Amazon.

RP (Amended) at 169.

Under these circumstances, evidence of retail pricing was insufficient to prove market value. The items used in the bait package were specifically *not* held out for retail sale by Amazon, but were given to the postal inspector to use in the sting operation. Thus, the facts are comparable to *Morley*, where the item at issue was a used generator that the owner purchased for below retail price and rented to customers. 119 Wn. App. at 944. Similarly here, the items provided for the bait package were used for an alternative purpose than retail sale by Amazon's choice. The State provided no evidence as to what (or if) the items could be sold for after having been used in the sting operation, nor any evidence of what it cost Amazon to initially acquire or replace the items – a value that would necessarily be less than retail price in order to provide Amazon with a profit margin. As in *Morley*, because the items here were taken out of the retail market and used for a different purpose, the retail price is an insufficient measure of the market value of the items taken.

Because the State failed to present evidence that the fair market value of the items contained in the bait package exceeded \$750, the evidence was insufficient to prove Helms committed the felony offense of

possessing stolen property in the second degree. Instead, the evidence could only support the misdemeanor conviction of possessing stolen property in the third degree. Accordingly, the conviction should be reversed and the case remanded for entry of judgment and resentencing for possessing stolen property in the third degree.

VI. CONCLUSION

For the foregoing reasons, Helms respectfully requests that the court REVERSE the conviction for possessing stolen property in the second degree and REMAND the case for retrial or for entry of judgment and resentencing on the lesser offense of possessing stolen property in the third degree.

RESPECTFULLY SUBMITTED this 27 day of January, 2020.

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CERTIFICATE OF SERVICE

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

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And, pursuant to prior agreement of the parties, by e-mail through the Court of Appeals' electronic filing portal to the following:

Bret A. Roberts
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Bret.Roberts@co.yakima.wa.us

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

Signed and sworn this 27 day of January, 2020 in Kennewick,
Washington.


Andrea Burkhart

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