

62964-6

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No. 62964-6-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

ARTHUR O'NEAL,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
THE STATE OF WASHINGTON FOR KING COUNTY

The Honorable Catherine Shaffer

BRIEF OF APPELLANT

THOMAS M. KUMMEROW
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A. ASSIGNMENT OF ERROR

There was not sufficient evidence presented at trial to support the jury's verdict that Arthur O'Neal was guilty of second degree trafficking in stolen property.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Due process under the United States and Washington Constitutions requires the State prove every element of the charged offense beyond a reasonable doubt. A person is guilty of second degree trafficking in stolen property when the State proves the person acted recklessly. The evidence showed Mr. O'Neal could have been more cautious in purchasing what turned out to be a stolen camera, but failed to rise to the level of proof that he acted recklessly. Is he entitled to reversal of his conviction with instructions to dismiss?

C. STATEMENT OF THE CASE

Arthur O'Neal is an unemployed man who spends his days helping people, mainly elderly people. CP Supp ____, Sub No. 102 at 4. Mr. O'Neal knew brothers Charles and Terry Miller. *Id.* Mr. O'Neal met Charles as a neighbor in the apartment building in which he lives. *Id.* He knew Terry only as "T," and knew him less well than Charles and wished to keep it that way. *Id.*

Terry O'Neal approached Mr. O'Neal on several occasions about a digital camera he wished to sell. *Id.* Mr. O'Neal was not interested in the camera and rebuffed Mr. Miller. *Id.* But because he was a good friend of Charles Miller and wanted to help his brother, Mr. O'Neal ultimately bought the camera for \$100. *Id.* at 4-5. Mr. O'Neal thought he would merely hold the camera for awhile and ultimately Mr. Miller would return and buy it back because "it was a nice camera." *Id.* at 5; 11/10/08RP 18.

Mr. O'Neal knew nothing about digital cameras other than how to turn them on. 11/10/08RP 20. Mr. O'Neal turned this camera on, noted it had a low battery and immediately turned it off. 11/10/09RP 16, 20. Because he was concerned about keeping the camera safe so he would have it to return to Mr. Miller, Mr. O'Neal took the camera to the Palace Jewelry and Loans, a pawn shop. CP Supp ____, Sub No. 102 at 2, 5. Mr. O'Neal learned about pawn shops in his teens and he sometimes pawned items when he needed a little money. *Id.* at 5; 11/10/08RP 19. When he took the camera to the pawn shop he did not need any additional money. 11/10/08RP 19.

Mr. O'Neal was aware that when an item is placed in a pawn shop, the shop runs a check with the police to determine whether

the item is stolen. *Id.* He expected Palace Jewelry to do the same. 11/10/08RP 19. He knew people that had taken items to pawn shops that were stolen and had gone to jail for it. 11/10/08RP 19.

Perry Bloch, the owner of Palace Jewelry, knew Mr. O'Neal, identifying him as a customer since at least 1994. CP Supp. ____, Sub No. 102 at 2. Mr. Bloch stated Mr. O'Neal had redeemed and repawned items on several occasions and had never pawned a stolen item. *Id.*

Seattle Police discovered the camera pawned at Palace Jewelry was stolen in a burglary and reported this to the owner. CP Supp ____, Sub No. 102 at 2, 4. The victim of the burglary did not know Mr. O'Neal and did not know how Mr. O'Neal came into possession of the camera. CP Supp ____, Sub No. 102 at 2.

Mr. O' Neal was notified the camera was stolen when he returned to Palace Jewelry and attempted to redeem it. *Id.* Mr. Bloch testified Mr. O'Neal appeared surprised when told the camera was stolen. *Id.* Mr. O'Neal cooperated with the police investigation and spoke to Officer Tara Hirjak on three occasions. *Id.* at 3. Mr. O'Neal testified Mr. Miller had pestered him to buy the camera for some time but he did not initially buy the camera because he thought it might be stolen. *Id.* Mr. O'Neal never heard

from Terry Miller after Mr. Miller sold him the camera. 11/10/08RP
17.

Mr. O'Neal was charged with trafficking in stolen property in the first degree. CP 1. Following a jury trial, Mr. O'Neal was convicted of the lesser degree of trafficking in stolen property in the second degree. CP 32.

D. ARGUMENT

THE JURY'S VERDICT THAT MR. O'NEAL
RECKLESSLY TRAFFICKED IN STOLEN
PROPERTY WAS NOT SUPPORTED BY
SUBSTANTIAL EVIDENCE

1. The State bears the burden of proving each of the essential elements of the charged offense beyond a reasonable doubt. In a criminal prosecution, the State is required to prove each element of the crime charged beyond a reasonable doubt. U.S. Const. amend 14; *Apprendi v. New Jersey*, 530 U.S. 466, 471, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). The standard the reviewing court uses in analyzing a claim of insufficiency of the evidence is "[w]hether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have

found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *Green*, 94 Wn.2d at 221. A challenge to the sufficiency of evidence admits the truth of the State's evidence and all reasonable inferences that can be drawn therefrom. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

“A person who recklessly traffics in stolen property is guilty of trafficking in stolen property in the second degree.” RCW 9A.82.055(1). “Traffic' means to sell, transfer, distribute, dispense, or otherwise dispose of stolen property to another person, or to buy, receive, possess, or obtain control of stolen property, with intent to sell, transfer, distribute, dispense, or otherwise dispose of the property to another person.” RCW 9A.82.010(19). “A person is reckless or acts recklessly when he knows of and disregards a substantial risk that a wrongful act may occur and his disregard of such substantial risk is a gross deviation from conduct that a reasonable man would exercise in the same situation.” RCW 9A.08.010(1)(c).

2. There was not sufficient evidence presented to support a finding that Mr. O'Neal acted recklessly. Reckless conduct includes both a subjective and an objective component. *State v. R.H.S.*, 94 Wn.App. 844, 847, 974 P.2d 1253 (1999). A trier of fact is permitted to find actual subjective knowledge if there is sufficient information that would lead a reasonable person to believe that a fact exists. RCW 9A.08.010(1)(b)(ii); *R.H.S.*, 94 Wn.App. at 847. Thus, whether an act was reckless depended on both what the defendant knew and how a reasonable person would have acted knowing these facts. *Id.*

The evidence produced at trial indicated Mr. O'Neal was a cautious man who bought the camera as part of his joy in helping people. Mr. O'Neal wanted to assist Terry Miller because he was the brother of Mr. Miller's good friend, Charles Miller. Mr. O'Neal rebuffed repeated attempts by Terry Miller to sell the camera but purchased it only to keep it safe so that he could return it to Mr. Miller at some point. Further, Mr. O'Neal knew the police would be notified if the camera was stolen when he pawned it at Palace Jewelry, and he knew people who had been arrested who pawned stolen items.

Hindsight shows Mr. Miller could have been more cautious in dealing with Terry Miller, but the evidence fails to rise to the level of recklessness as required for a trafficking conviction. The evidence failed to show Mr. O'Neal knew the camera was stolen, as well as failing to show that a reasonable person knowing what Mr. O'Neal knew would have acted any differently. *R.H.S.*, 94 Wn.App. at 847. The State failed to prove that Mr. O'Neal was guilty of trafficking in stolen property in the second degree.

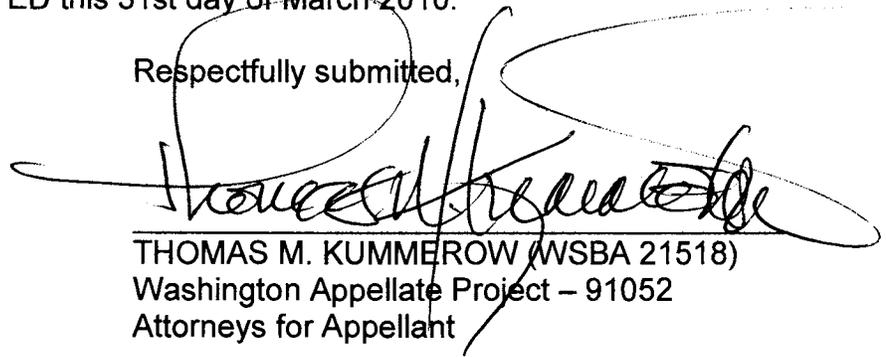
3. This Court must reverse and remand with instructions to dismiss the conviction. Since there was insufficient evidence to support Mr. O'Neal's conviction, this Court must reverse the conviction with instructions to dismiss. To do otherwise would violate double jeopardy. *State v. Crediford*, 130 Wn.2d 747, 760-61, 927 P.2d 1129 (1996) (the Double Jeopardy Clause of the United States Constitution "forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding."), *quoting Burks v. United States*, 437 U.S. 1, 9, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978).

E. CONCLUSION

For the reasons stated, Arthur O'Neal submits this Court must reverse his conviction for second degree trafficking in stolen property with orders to dismiss.

DATED this 31st day of March 2010.

Respectfully submitted,

A large, stylized handwritten signature in black ink, appearing to read 'Thomas M. Kummerow', is written over the typed name and extends upwards into the 'Respectfully submitted,' line.

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Attorneys for Appellant

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I, MARIA ARRANZA RILEY, STATE THAT ON THE 31ST DAY OF MARCH, 2010, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SEATTLE, WA 98104		
[X] ARTHUR O'NEAL	()	U.S. MAIL
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C/O COUNSEL FOR APPELLANT	(X)	RETAINED FOR
WASHINGTON APPELLATE PROJECT		MAILING ONCE
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SIGNED IN SEATTLE, WASHINGTON THIS 31ST DAY OF MARCH, 2010.

X _____
[Signature]

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