

68575-9

68575-9

NO. 68575-9-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

TEMETRIUS HOLLIS,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE BRUCE HILYER

BRIEF OF RESPONDENT

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A. ISSUES

1. Evidence is sufficient to support a conviction if, when viewed in a light most favorable to the prosecution, any rational trier of fact could find the essential elements of the crime proven beyond a reasonable doubt. Here, the State presented evidence that Hollis' latent fingerprints were found in Mrs. Hooley and Ms. Tsai's residences on objects –a shower curtain rod and a JVC camcorder box –that had been stored in these respective homes for at least one year prior to the burglary. Both objects were purchased in packaging and neither homeowner knew Hollis nor gave him permission to enter their homes. Additionally, the defendant told detectives that he had never before been to Bellevue. Did the State produce sufficient evidence to support Hollis' convictions for residential burglary based upon the presence of his latent fingerprints?

2. Under RAP 2.5(a)(3), an issue may not be considered for the first time on appeal unless the error involves manifest constitutional error. Here, the trial court found that the JVC camcorder was not accessible to Hollis at a time prior to the burglary because it had been purchased online. In so finding, the trial court took judicial notice of the fact that "online purchases are

not through publicly accessible retail outlets.” Did Hollis waive review of this non-constitutional issue by failing to object?

3. This court reviews disputed findings of fact for substantial evidence. Where Hollis failed to object to the trial court taking judicial notice of a fact, and this finding was supported by the evidence and reasonable inferences drawn from the evidence, does substantial evidence support the trial court’s finding that the JVC camcorder had not previously been accessible to Hollis because it was sold by an “online retailer” and not “sold through a publicly accessible outlet”?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The State charged juvenile respondent, Temetrius J. Hollis, by information with two counts of residential burglary. CP 1-2. The cases proceeded by way of separate bench trials. CP 10. The trial court found Hollis guilty of two counts of residential burglary.¹
CP 10.

¹ The verbatim report of proceedings consists of one volume encompassing 2/28/2012, 3/5/2012, and 3/21/2012.

2. SUBSTANTIVE FACTS

a. Burglary Of E. Merle Hooley's Residence.

On Mother's Day, May 8, 2011, E. Merle Hooley left her Bellevue home, located at 310 142nd Ave NE, Bellevue, Washington, to spend the day with family. RP 17, 19-20. When Ms. Hooley returned home that evening, at about 8:30 p.m., she noticed that her lights were on. RP 20. As Mrs. Hooley entered her house, she realized that her bedroom had been ransacked. RP 20-21. Mrs. Hooley immediately called 911; police arrived shortly thereafter and escorted Mrs. Hooley through her home. RP 22-28. Together, they discovered that Mrs. Hooley's bedroom, living room, dining room, sewing room, and office had also been ransacked. RP 17, 22-28. Although Mrs. Hooley's television and houseplant were smashed on the floor of her bedroom, the only items that were missing were some coins and loose change. RP 24-25, 38.

As Mrs. Hooley and the police walked downstairs, they observed that the downstairs bathroom window was open and that the screen had been disturbed. RP 33. When Mrs. Hooley left earlier in the day, the downstairs bathroom window was shut and the screen was fully intact. RP 35-36. However, that evening the

screen was "flapping in the breeze" and the downstairs bathroom window was wide open. RP 37.

Outside of her residence, Mrs. Hooley and the police noticed that garden hose housing had been moved to a location beneath the window allowing access to the downstairs bathroom window. RP 35. Mrs. Hooley did not keep the garden hose housing beneath the window and it was not there earlier in the day. RP 36. It had been moved underneath the window during the day while Mrs. Hooley was gone. RP 36.

Police identified the downstairs bathroom window as the most likely point of entry, and processed the area for latent fingerprints. RP 95. The window was large enough for an intruder to enter; it was 14 inches square with an interior ledge approximately eight inches deep. RP 33. Immediately inside the downstairs bathroom window was a shower with a shower curtain hanging by a curtain rod. RP 32-33. Mrs. Hooley purchased the shower curtain rod about a year prior at a discount store in Bellevue called Tuesday Morning, a clearance house for catalog stores. RP 34, 39-40. When Mrs. Hooley purchased the shower curtain rod it was encased in "plastic shrink wrap" that "was impossible to open." RP 40. Mrs. Hooley had left the curtain rod in the shrink wrap for

about six months after she had purchased it until she could convince her son to install the rod in the bathroom. RP 34, 40.

Police dusted the window ledge, the framing of the window, and the shower curtain rod for latent fingerprints. RP 96. Police obtained latent prints of comparison value from the curtain rod. RP 96.

Fingerprint Examiner Carl Nicoll received the prints and ran them through the Automated Fingerprint Identification System (AFIS), where the prints were identified as those of Hollis, the respondent. RP 121-22. On October 27, 2011, Mr. Nicoll subsequently took exemplar prints from Hollis. RP 122. Mr. Nicoll compared the exemplar prints to the latent prints recovered from Mrs. Hooley's residence. RP 123-24. Mr. Nicoll concluded with "absolute" certainty that the latent prints recovered from the shower curtain rod belonged to Temetrius J. Hollis. RP 123-24.

Mrs. Hooley did not know Temetrius J. Hollis and he did not have permission to enter her residence on May 8, 2011. RP 38-39.

b. Burglary Of Ilin Tsai's Residence.

In 2011, Ms. Tsai had lived at 15015 NE 10th Place, Bellevue, Washington, for eight years. RP 56. The house belonged

to her mother and father, who reside there with her sister part-time while her parents lived at the Bellevue house “every other two months.” RP 56-57.

On June 19, 2011, Ms. Tsai left her house to spend the day with friends and family. RP 57. At about 7:00 p.m., when she returned home that evening, she noticed that the sliding glass door was open. RP 60. Ms. Tsai knew that when she had left her home earlier in the day that the sliding glass door was locked and closed. RP 60. She confirmed that the door was open before going to a neighbor’s house where she called the police. RP 61.

After police had searched the three-story house, they escorted Ms. Tsai through the house in order to determine if anything was missing. RP 57, 61. Together they discovered that two of Ms. Tsai’s computers were missing. RP 62. They also noticed that a JVC camcorder that was kept in the closet of a spare bedroom used for storage was missing from its box. RP 62. The empty JVC camcorder box was lying on the floor of the spare bedroom and the contents of the box were “scattered around on the floor.” RP 64. Specifically, the user manual and software for the camcorder were on the floor. RP 65.

The JVC camcorder belonged to Ms. Tsai's father and had been stored in the box in the closet of the spare bedroom for approximately one year. RP 64. The JVC camcorder was purchased online and was delivered to the house in packaging. RP 73.

As Ms. Tsai and police made their way through the house, Ms. Tsai realized that in addition to the JVC camcorder and two computers, a Playstation, a third computer, a Sony camcorder, a camera, a backpack full of books, and packages from the front porch were also taken. RP 70.

Ms. Tsai and the police also noticed that a screen was missing from an upstairs bathroom window. RP 65-66. Although Ms. Tsai often left the bathroom window open, the bathroom window screen had been removed. RP 67, 78. Police recovered the missing screen. RP 78. Police observed that the fence just below the exterior of the bathroom window made the window easily accessible to an intruder. RP 70. Officers determined that the bathroom window was the likely point of entry and that the intruder had exited through the sliding door. RP 79.

Police dusted for fingerprints at the likely point of entry and on or near where objects had been moved in the residence.

RP 100. Police recovered latent fingerprints from the exterior of the empty JVC camcorder box in the spare bedroom. RP 100.

On June 22, 2011, Fingerprint Examiner Carl Nicoll received the latent prints and ran them through the Automated Fingerprint Identification System (AFIS), where the prints were identified as those of Hollis, the respondent. RP 125-28.

On October 27, 2011, Mr. Nicoll subsequently took exemplar prints from Hollis. RP 122, 129. Mr. Nicoll compared the exemplar prints to the latent prints recovered from Ms. Tsai's residence and concluded that the latent prints belonged to Temetrius J. Hollis. RP 131.

Ms. Tsai did not know Temetrius J. Hollis and he did not have permission to enter her residence on June 19, 2011. RP 72.

c. Arrest Of Hollis Following Identification.

On July 14, 2011, Bellevue Police Officer Steven Hoover contacted the defendant at the Department of Corrections Office in Federal Way where he arrested him for residential burglary. RP 87. After Officer Hoover read Hollis his Miranda warnings and juvenile warnings, he asked Hollis if he "ever is in Bellevue." RP 90. Hollis said "no." RP 90. When Officer Hoover asked Hollis if he had

friends in Bellevue or if he ever went to Bellevue, Hollis answered "no." RP 90.

C. ARGUMENT

1. THE STATE PRESENTED SUFFICIENT EVIDENCE TO SUPPORT HOLLIS' CONVICTIONS FOR RESIDENTIAL BURGLARY.

Hollis maintains that there was insufficient evidence to support his convictions for residential burglary, arguing that the State failed to present evidence from which the trier of fact could reasonably infer that his fingerprints could only have been impressed at the time the crime was committed. His claim should be rejected. In each case Hollis' convictions were predicated on evidence that his fingerprints were found on property kept within two separate residences. Neither homeowner knew the defendant and neither gave him permission to enter their homes. Moreover, the objects upon which the defendant's fingerprints were located had been stored in these homes for at least one year prior to the burglaries. And, following his arrest, Hollis told the police that he had never been to Bellevue, Washington. Thus, it was reasonable for the trier of fact to infer that Hollis had no prior opportunity, other than during the burglaries, to leave these latent fingerprints.

under the beyond a reasonable doubt standard. State v. Bridge, 91 Wn. App. 98, 955 P.2d 418 (1998).

A claim of insufficiency of the evidence 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). Circumstantial evidence is considered equally as reliable as direct evidence. State v. Delmarter, 94 Wn. App. 634, 638, 618 P.2d 99 (1980). An appellate court must defer to the trier of fact on issues involving conflicting testimony, credibility of the witnesses, and persuasiveness of the evidence. State v. Hernandez, 85 Wn. App. 672, 675, 935 P.2d 623 (1997).

In determining whether there is sufficient evidence, the reviewing court determines not "whether *it* believes the evidence at trial established guilt beyond a reasonable doubt," but whether "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Green, 94 Wn.2d at 221 (emphasis added); State v. Fiser, 99 Wn. App. 714, 718, 995 P.2d 107, rev. denied, 141 Wn.2d 1023 (2000).

b. The State Presented Sufficient Evidence Supporting Hollis' Conviction For Residential Burglary Of Mrs. Hooley's Home.

Under the standard set forth above, the uncontroverted evidence presented at trial was sufficient to sustain Hollis' conviction for residential burglary.

At trial, the State presented evidence that the downstairs bathroom window was the point of entry. RP 95. When Mrs. Hooley left the morning of May 8, 2011, she went to visit family, the window was closed and the screen intact. When she returned home that evening and realized she had been burglarized, the screen had been removed and the window was open. RP 37. The shower curtain rod was located just inside the downstairs bathroom window. RP 34, 40. Hollis' fingerprint was found just inside the entry point on a shower curtain rod in the downstairs bathroom. RP 121-22. The shower curtain rod, purchased at a store in Bellevue a year before the burglary, was wrapped in plastic shrink wrap at the time of purchase and remained encased in plastic for six months as it sat in Mrs. Hooley's home until her son installed the curtain rod. RP 34, 40.

Given that Hollis told police he had never been to Bellevue, it is patently unreasonable that he innocently came into contact with

the shower curtain rod either at Mrs. Hooley's home or at Tuesday Morning, the store in Bellevue where Mrs. Hooley purchased the rod.

Viewing this evidence in a light most favorable to the State, the trier of fact could reasonably infer that the Hollis touched the object, the shower curtain rod, as he entered through the bathroom window in the course of the burglary.

This Court's opinion in State v. Lucca, 56 Wn. App. 597, 784 P.2d 572 (1990) is instructive. In Lucca, a "fingerprint-only" case, the defendant was charged with burglary based on evidence that Lucca's latent fingerprint was found on a piece of broken glass at the presumed point of entry. Id. at 599. The defendant argued that the evidence was insufficient to sustain his conviction where it was unknown whether the fingerprint was on the inside or outside of the window, where no evidence was presented as to the age of the fingerprint, and no evidence placed the defendant near the residence at the time of the burglary. Id.

In Lucca, this Court found the evidence sufficient and affirmed the conviction for three reasons. First, the window was "not accessible to the general public." Id. at 601. Second, the homeowner did not "know Lucca and never gave him permission to

enter his home.” Id. And finally, “Lucca offers no evidence presenting any other reasonable explanation as to how his fingerprint came to be on the window.” Id. This Court concluded that based on the evidence presented that the trier of fact “was entitled to conclude that it is not reasonable that Lucca would have made the fingerprint other than at the time of the burglary.” Id. (emphasis added).

Such is the case before this Court. Given these specific facts and circumstances it is not reasonable to infer that Hollis left these fingerprints at any time other than during the commission of this burglary.

Applying a standard of reasonableness, the State is not required to rule out or exclude “all inferences or reasonable hypotheses consistent with innocence... the record must contain sufficient probative facts from which a factfinder could reasonably infer a defendant’s guilt under the beyond a reasonable doubt standard.” Mikes, 947 F.2d at 357. Thus, in a case such as Lucca, the State was not required to rule out or exclude the remote possibility that the defendant could have installed the window a decade prior, or that he had never worked in a glass factory where

he had handled the pane of glass that was subsequently installed in the victim's home.

The facts presented in this case are distinguishable from State v. Bridge, 91 Wn. App. 98, 955 P.2d 418 (1988). In Bridge, the State charged the defendant with burglary in the second degree. Id. at 99. The evidence linking the defendant to the burglary was a latent fingerprint found on a tag on a magnetic tool that had been recently purchased. Id. During the burglary the tool had been moved from its usual resting place and had been dropped at the point of entry. Id.

Division Three of this Court reversed the conviction finding that the State had failed to present evidence from which a reasonable trier of fact could conclude that the fingerprint could only have been impressed at the time of the burglary. Id. at 99. The Court found that the State had failed to meet its burden for two reasons. First, the tool on which Bridge's latent print was recovered was recently purchased. Id. at 101. Second, when purchased, the tool was in the "stream of commerce" and exposed to the public, not sold in packaging. Id. Because the tool was exposed to the public, it was "accessible to Mr. Bridge before being moved by the victim to his barn." Id. While the tool in Bridge was recently

purchased at an unknown location, here, the shower curtain rod was purchased at Tuesday Morning, a store in Bellevue, Washington, in a city that Hollis claimed to have never visited. RP 90. Even if Hollis had been at the store, his fingerprint could not have been left on the shrink-wrapped curtain rod at that time.

When viewed in a light most favorable to the State, the record contains sufficient facts from which the trier of fact could reasonably infer the defendant's guilt beyond a reasonable doubt.

c. The State Presented Sufficient Evidence Supporting Hollis' Conviction For Residential Burglary Of Ms. Tsai's Residence.

Under the standard set forth above, the uncontroverted evidence presented at trial was sufficient to sustain Hollis' conviction for residential burglary.

At trial, the State presented evidence that Ms. Tsai's house was secure when she left it. RP 60. The back door was closed and the window screen intact. RP 60. Hollis' latent fingerprints were found on the JVC camcorder box that had been moved from the closet inside a spare bedroom where it had been stored for about one year. RP 64. Not only had the JVC camcorder box been moved, but the JVC camcorder itself was missing and the user manual and software lay scattered on the bedroom floor. RP 64.

The JVC camcorder was purchased “online” and sent to the house in “packaging.” RP 73.

Viewing this evidence in a light most favorable to the State, it was reasonable for the trier of fact to infer that Hollis touched the box as he emptied it of its contents. Moreover, given that the camcorder was purchased a year prior online and arrived to the house in a package, it is not reasonable to infer that the defendant handled the JVC camcorder box prior to the time that it was packaged and delivered to Ms. Tsai’s residence. Thus, the evidence was sufficient to sustain this conviction.

Hollis argues that this case is analogous to Bridge, discussed *supra*. However, these facts are distinguishable from Bridge for two important reasons. First, here the JVC camcorder arrived to Ms. Tsai’s residence in a package. Thus, it was not accessible to the public in the same way as the tool in Bridge. And, of great concern to the Court in Bridge was the potential that an innocent person who simply handled an item offered for sale in the stream of commerce might be convicted of a crime based solely on the presence of their fingerprints on a moveable object. This case does not present those concerns. It is not reasonable to infer that Hollis himself sold the JVC camcorder online to Ms. Tsai’s father,

as Hollis argued in the trial court. RP 197-98. And, it is similarly unreasonable to infer that Hollis handled the box prior to it being shipped, in packaging, to Ms. Tsai's doorstep. As the trial court correctly observed, these "one-in-a-billion" possibilities are not reasonable inferences that can be drawn from the evidence. RP 16.

Hollis also argues that the facts concerning the JVC camcorder box are similar to the facts presented in Mikes v. Borg, *supra* at 355. In Mikes, the government's case rested on the fact that some of the defendant's fingerprints had been found on turnstile posts that lay near the victim's body. Id. at 355. The court carefully examined the "custody, location, and function of the objects involved," turnstile posts, and concluded that the State had failed to meet its burden because the posts had been purchased at a "going-out-of-business sale" and had previously been used in a public place for their ordinary purpose where they were accessible to the general public." Id. at 358-59.

These facts are distinguishable from Mikes. In this case, the JVC camcorder was not accessible to Hollis in the stream of commerce. And, applying a standard of reasonableness, it is not reasonable to infer that Hollis had access to the JVC camcorder box at any time other than during the burglary. Thus, the State has

met its burden to present sufficient evidence from which a reasonable trier of fact could find this charge proven beyond a reasonable doubt.

Accordingly, given the evidence presented at trial, the juvenile court's verdicts should be affirmed.

2. HOLLIS DID NOT PRESERVE HIS OBJECTION TO THE TRIAL COURT'S DECISION TO TAKE JUDICIAL NOTICE.

Hollis argues that the trial court erred by taking judicial notice of the fact that "online purchases are not through publicly accessible retail outlets in the same way as presumably occurred in the Bridge case." RP 187. However, Hollis failed to object to the court's taking of judicial notice of this fact. Because this is not a manifest error affecting a constitutional right, Hollis waived this assignment of error by failing to object.²

² Hollis also argues that the trial court "should give the parties notice and an opportunity to be heard." However, under the plain language of ER 201(e), a party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice..." Neither party made such a request.

a. Relevant Law.

Under RAP 2.5(a)(3), appellate courts may consider an issue raised for the first time on appeal only when it involves a “manifest error affecting a constitutional right.” To raise an issue not previously preserved, an appellant must show that (1) the error is manifest, and (2) the error is truly of constitutional dimensions. State v. O’Hara, 167 Wn.2d 91, 98, 217 P.3d 756 (2009). Hollis must first identify a constitutional error and then must show how the asserted error actually affected his rights at trial. State v. Kirkman, 159 Wn.2d 918, 926-27, 155 P.3d 125 (2007). Only after the court determines that the claim does in fact raise a manifest constitutional error does it move on to a harmless error analysis. State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995).

Had Hollis preserved this claim for review, this Court reviews the trial court’s decision to take judicial notice *de novo*. Welch Foods v. Benton County, 136 Wn. App. 314, 324, 148 P.3d 1092 (2006).

- b. Even If Preserved, The Trial Court Properly Took Judicial Notice Of The Fact That A Traditional Retail Setting Is Distinguishable From An Online Purchase.

Pursuant to ER 201, the court may take judicial notice of adjudicative facts:

A judicially noted fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

Here, the trial court distinguished the facts concerning the burglary of Ms. Tsai's residence from those presented in Bridge when it took judicial notice of the fact that "online purchases are not through publicly accessible retail outlets in the same way as presumably occurred in the Bridge case." RP 187. And, although the trial court at one time used the phrase "judicial notice," the trial court subsequently referred to this decision as an "inference, because it [the JVC camcorder] was purchased online, it wasn't something that was sitting out open in the store which could have been handled by the respondent." RP 197. In other words, it was reasonable to infer the fact that purchase of the JVC camcorder is distinguishable from a traditional retail setting where products are displayed in a manner that is easily accessible to the public such as

in Bridge, and Mikes. Thus, because the purchase of the JVC camcorder was made by way of an online purchase, it is unreasonable to infer that Hollis handled it as it passed through the stream of commerce prior to arriving on Ms. Tsai's doorstep.

Even if this court reviews this assignment of error, the difference between traditional retail purchases and online purchases is not a fact in reasonable dispute. Accordingly, the trial court properly took judicial notice of this fact.

3. FINDINGS OF FACT 6, 9, 11, AND 13 ARE SUPPORTED BY SUBSTANTIAL EVIDENCE.

Hollis argues that finding of fact 13 is unsupported by substantial evidence because the trial court's finding is premised upon both the testimony of Ms. Tsai and the trial court's decision to take judicial notice concerning the online purchase of the JVC camcorder. Presumably, Hollis assigns error to findings of fact 6, 9, and 11, because they concern the trial court's finding that the State presented sufficient evidence to sustain both counts of residential burglary.

However, because Hollis failed to object to the trial court's taking of judicial notice and because this finding reflects a

reasonable inference based upon the evidence presented at trial, sufficient evidence supports these findings.

a. Relevant Law.

Where a trial court makes findings of facts and conclusions of law following a bench trial, this Court's review is limited to whether the findings of fact are supported by substantial evidence and whether the findings support the conclusions of law. State v. Stevenson, 128 Wn. App. 179, 193, 114 P.3d 699 (2005). Evidence is substantial when it is sufficient "to persuade a fair-minded person of the truth of the stated premise." State v. Reid, 98 Wn. App. 152, 156, 988 P.2d 1098 (1999).

b. The Trial Court's Findings Of Fact Are Supported By Substantial Evidence.

The trial court's findings of fact are supported by substantial evidence. And, although Hollis now assigns error to finding of fact 13, he did not object at the time the court took judicial notice of this fact. Additionally, given the testimony and evidence presented at trial, it was reasonable for the trial court to infer that there is a significant difference between a product sold through a publicly

accessible outlet such as a retail store compared to an online purchase that is delivered in packaging to one's doorstep, as was the JVC camcorder box.

D. CONCLUSION

For all of the foregoing reasons, the State asks this Court to affirm Hollis' two convictions for residential burglary.

DATED this 17th day of February, 2013.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

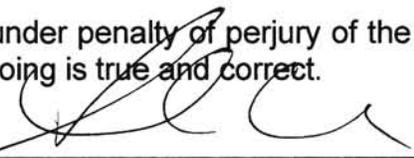
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Dana M. Nelson, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. T.H., Cause No. 68575-9-I, in the Court of Appeals, Division I, for the State of Washington.

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



Name Sue Trujillo
Done in Seattle, Washington

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