Supreme Court No. __
(COA No. 75012-7-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

State of Washington,

Respondent,

v.

Michael Byrd,

Appellant.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND COURT OF APPEALS DECISION

Michael Byrd, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals' decision affirming his convictions pursuant to RAP 13.4(b)(4). A copy of this decision is attached to this petition.

B. ISSUES PRESENTED FOR REVIEW

This Court has not yet interpreted the term "transfer" within the meaning of the various "trafficking in stolen property" criminal statutes. Here, the Court of Appeals concluded that Mr. Byrd "transferred" stolen property under one of the "trafficking in stolen property" statutes despite Mr. Byrd never receiving any payment for the stolen goods he allegedly "trafficked" or otherwise completing the transaction. Additionally, the would-be "buyer" of the stolen goods never possessed the laptop. Should this court accept review under RAP 13.4(b)(4) to determine the meaning of "transfer" under the various "trafficking in criminal property" statutes?

C. STATEMENT OF THE CASE

The Snohomish County Prosecuting Attorney's Office charged Michael Byrd with one count of trafficking in stolen property in the second degree. CP 66-67. The State alleged that on April 10, 2015, Mr. Byrd "'recklessly' trafficked in stolen property." Id.

At Mr. Byrd's trial, Mr. Gerrodette stated that his Apple computer was stolen during a burglary of his home and that on April 10, 2015, he was summoned to the G&H pawn shop in Everett. 2/29/15 RP41-43.

The owner of this store– Yuriy Korlev –also testified about the events that transpired on April 10, 2015 at Mr. Byrd's trial. According to Mr. Korlev, Mr. Byrd told him that he had bought a laptop for $900 and wanted to sell it. 2/29/15 RP72. Mr. Korlev opened-up the laptop, "connected [it] to wi-fi, and messages started coming up on the screen." 2/29/15 RP72, 81. The messages displayed discussed a burglary and a stolen laptop. 2/29/15 RP73. Mr. Korlev wrote back to the person in the message exchange and was given Mr. Gerrodette's phone number. 2/29/15 RP73. Immediately, Mr. Korlev called the police and called Mr. Gerrodette. 2/29/15 RP73.

Once connected to the wi-fi network, the computer beeped. 2/29/15 RP46-47, 72. Mr. Korlev lied to Mr. Byrd and told him the beeping was just the store making sure the computer was working. Id. Mr. Korlev "didn't want to alert [Mr. Byrd] that the police were on their way." 2/29/15 RP73. He wanted Mr. Byrd to be caught: "people run off and there is no consequences, and so, we were kind of stalling him, telling him we were still doing research on the computer." Id. Mr. Korlev

also wanted to stall Mr. Byrd because if he were to buy stolen merchandise, "then the police would come and confiscate it" and he would take a loss. 2/29/15 RP83.

Mr. Korlev then took Mr. Byrd's identification and "made him an offer of $200… he agreed." 2/29/15 RP83. Mr. Korlev copied Mr. Byrd's identification and had him sign a purchase agreement, but he was never going to actually pay Mr. Byrd. 2/29/15 RP74-76; Ex. 4.

Mr. Byrd "went up to the window to get payment," but Mr. Korlev instructed his "office manager to stall him, because the police wasn't there yet." 2/29/15 RP75. He had the office manager tell another lie to Mr. Byrd: "we told him we're doing a till count and we have to do an up till and everything and told him it was going to be another few minutes until he gets payment." 2/29/15 RP75, 80. Mr. Korlev was not going to pay Mr. Byrd: "we had strong reasons to believe… there is something – something wrong there with the item he was trying to sell." 2/29/15 RP76.

The police arrived and put Mr. Byrd in handcuffs. Id. The laptop was returned to Mr. Gerrodette, and the court sentenced Mr. Byrd to 58 months of imprisonment. 2/29/15 RP99.

Mr. Byrd appealed, arguing that because he never received payment for the laptop, his crime was incomplete. However, the Court of Appeals affirmed his conviction on July 31, 2017. *State v. Byrd*, No.

750127, 2017 WL 3225943, at *1 (Wash. Ct. App. July 31, 2017). The court held a "transfer" within the meaning of RCW 9A.82.055 occurred via the purchase agreement. *Id*. at 2.

D. ARGUMENT

This court should accept review to clarify what the term "transfer" means under RCW 9A.82.055.

This Court's determination of what exactly constitutes a "transfer" under RCW 9A.82.055[1] is a matter of substantial public interest under RAP 13.4(b)(4). This is because it will give attorneys, judges, and juries clear direction of what the term "transfer" means. This court has ruled that it will accept review of even a moot case[2] if it is a matter of "continuing and substantial public interest." *Hart v. Dep't of Soc. & Health Serv.*, 111 Wn.2d 445, 449, 759 P.2d 1206 (1988). The court in *Hart* recognized that issues involving the interpretation of statutes is an issue of substantial public interest because "it will help to guide public officials." *Id.*

Mr. Byrd was convicted of recklessly trafficking in stolen property. RCW 9A.82.010(19) defines "traffic" as follows:

> "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

[1] Trafficking in stolen property in the second degree.
(1) A person who recklessly traffics in stolen property is guilty of trafficking in stolen property in the second degree.
(2) Trafficking in stolen property in the second degree is a class C felony.

[2] This case is not moot.

> intent to sell, transfer, distribute, dispense, or otherwise dispose of the property to another person.

Here, the court held that the purchase agreement amounted to a "transfer" despite Mr. Byrd neither receiving any payment for the laptop nor Mr. Korlev ever actually possessing the laptop. *Byrd*, No. 750127, 2017 WL 3225943, at *2.

However, it remains unclear whether the Court of Appeals correctly interpreted the word "transfer." The dictionary provides several definitions of the term, including:

> ***a*** **:** to convey from one person, place, or situation to another **:**
> ***b*** **:** to cause to pass from one to another
> ***c*****:** *to make over the possession or control of*[3]

(emphasis added)

The dictionary provides that "transfer" also means:

> 3**:** to move to a different place, region, or situation; *especially***:** to withdraw from one educational institution to enroll at another[4]

If the Legislature intended the term "transfer" to mean "make over the possession or control of," then the Court of Appeals' ruling is clearly erroneous. Mr. Korlev never took possession of the computer.

[3] *Transfer*, Merriam Webster, https://www.merriam-webster.com/dictionary/transfer (last visited Aug. 28, 2017).

[4] *Id.*

Additionally, Mr. Korlev had no possessory interest in the purchase agreement because where a

> contract grows immediately out of, and is connected with, an illegal act, a court of justice will not lend its aid to enforce it…the law will aid neither party to an illegal agreement, but will leave the parties where it finds them. A contract which is contrary to the terms and policy of an express legislative enactment is *illegal and unenforceable.*

Hederman v. George, 35 Wn.2d 357, 362, 212 P.2d 841 (1949) (internal citations omitted) (emphasis added).

Because knowingly purchasing and selling stolen property is a criminal act and contrary to an express legislative enactment,[5] the purchase agreement was unenforceable.

The State's burden here was to prove beyond a reasonable doubt that Mr. Byrd had "trafficked" in stolen property, and if he never "transferred" the property, insufficient evidence supports his conviction, and therefore the conviction cannot stand. *Burks v. United States*, 437 U.S. 1, 11, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978).

This Court has not yet interpreted the term "transfer" within the meaning of RCW 9A.82.010(19). Because attorneys, judges, and juries currently possess no guidance regarding what "transfer" means under

[5] *See, e.g.* RCW 9A.56.140; RCW 9A.82.010(19).

RCW 9A.82.010(19), this court should accept review under RAP 13.4(b)(4).

E. CONCLUSION

For the reasons stated in this petition, Mr. Byrd asks this Court to accept review.

DATED this 30th day of August, 2017.

Respectfully submitted,

/s Sara S. Taboada
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IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. MICHAEL LOREN BYRD, Appellant.	No. 75012-7-I DIVISION ONE UNPUBLISHED OPINION FILED: July 31, 2017

LEACH, J. — Michael Byrd appeals his conviction for second degree trafficking in stolen property. Byrd challenges the sufficiency of the evidence to support his conviction. Also, he claims that the trial court improperly commented on the evidence when it sustained the State's objection to his defense counsel's closing argument. Because sufficient evidence supports Byrd's conviction and the trial judge properly sustained the State's objection to defense counsel's closing argument, we affirm.

Background

On April 10, 2015, Byrd went to G&H Pawn in Everett, Washington, to sell a MacBook Pro 17-inch laptop computer, along with a limited edition wireless speaker. Both those items had been stolen in a burglary of Michael Gerrodette's home a few days earlier.

When the owner of the pawnshop opened the computer, text messages appeared on the screen. Those messages said that the laptop had been stolen in a burglary. The

owner called the police and then contacted Gerrodette. Gerrodette had installed an Apple program giving him the ability to track his computer when it was turned on and connected to Wi-Fi. Gerrodette went to the pawnshop where he saw Byrd. Gerrodette later identified the computer as the one he had previously purchased for $2,700.

Byrd told the owner that he had recently purchased the computer for a little over $900. But when the computer beeped, Byrd did not recognize the sound as one for the arrival of incoming messages.

The owner testified that he viewed Byrd's driver's license to identify him and offered $200 for both items. Byrd agreed to the amount. The owner then made a copy of Byrd's license. The owner would not accept an item from someone who was pawning or selling it for another.

Byrd signed a purchase agreement, which stated that the items belonged to Byrd and that he agreed to sell them to the pawnshop for $200. Both Gerrodette and the owner noticed that Byrd was acting anxious, wanting to rush the transaction so he could leave. The owner delayed payment to Byrd, waiting for the police to arrive. When Byrd approached the cashier window to collect the money, the employees told him they were counting the till.

Officer Ross arrived at the pawnshop and saw a car parked near the shop with a passenger in the front seat. Suspecting that the person was involved with the stolen item, Ross approached the car. The passenger, Johnny Williams, told Officer Ross that he was waiting for his uncle, who was inside the pawnshop selling a laptop.

Officer Doonan arrived at the pawnshop next. He consulted with Officer Ross and then entered the pawnshop. Officer Doonan arrested Byrd for trying to sell a stolen laptop. Outside the pawn shop, Officer Doonan read Byrd his Miranda[1] rights from his department-issued Miranda card. Byrd agreed to speak with Officer Doonan. Byrd told Officer Doonan that his nephew, Williams, had asked him to pawn the laptop. He knew his nephew was a shoplifter and had a reputation of being a thief. But he still agreed to sell the laptop. He met his nephew and drove to the pawnshop.

The State charged Byrd with one count of second degree trafficking in stolen property. A jury convicted Byrd. Byrd timely appeals.

Analysis

Byrd claims that the State failed to prove all elements of the crime. He claims that no completed transaction occurred because he did not receive any actual payment for the computer. Thus, he argues, the evidence is insufficient. Byrd also asserts that the court incorrectly commented on the evidence in its ruling sustaining the prosecution's objection to his defense counsel's closing argument.

Sufficiency of the Evidence

To decide if sufficient evidence supports a conviction, an appellate court asks whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable

[1] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

doubt.[2] A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.[3]

Byrd contends his crime is incomplete because he never received payment. He cites State v. Benson[4] to support his position. In Benson, the State charged the defendant with bribing a witness.[5] The witness did not accept the bribe or agree to do so.[6] The Benson court held that the crime was incomplete because there was a failure to reach the necessary agreement to undertake the task.[7] Here, Byrd and the pawnshop owner reached an agreement.

RCW 9A.82.055 states that a person who "recklessly traffics in stolen property is guilty of trafficking in stolen property in the second degree." The statute provides a definition of "traffic" in a separate provision: "'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."[8]

The court properly instructed the jury that "'Traffic' means: to sell, transfer, distribute, or otherwise dispose of stolen property to another person."

The evidence here supports Byrd's conviction for second degree trafficking. Byrd took the stolen laptop to the pawnshop and negotiated its sale with the owner. He signed

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[2] State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).
[3] Salinas, 119 Wn.2d at 201.
[4] State v. Benson, 144 Wash. 170, 257 P. 236 (1927).
[5] Benson, 144 Wash. at 170.
[6] Benson, 144 Wash. at 171.
[7] Benson, 144 Wash at 171-72.
[8] RCW 9A.82.010(19).

an agreement to sell the laptop to the pawnshop for $200. While he waited in line with his paperwork to collect the $200, the police arrested him. The transfer had already been completed. The fact that the owner did not intend to pay Byrd is immaterial.

Comment on the Evidence

Byrd argues that the trial court prejudicially commented on the evidence when it upheld the State's objection to his closing argument.

Byrd did not raise this objection below. However, because the Washington Constitution expressly prohibits judicial comments on evidence, Byrd's assertion that the judge impermissibly commented on the evidence potentially raises an issue involving a manifest constitutional error that this court may consider for the first time on appeal.[9]

Article IV, section 16 of our constitution prohibits a judge from conveying to the jury his opinion about the merits of a case.[10] This provision prevents the jury from being influenced by knowledge conveyed to it by the court about the court's opinion of the evidence submitted.[11] To be a comment on the evidence, the court's attitude toward the merits of the defendant's case must be reasonably inferable from the court's statements.[12] We look to the case facts and circumstances to see if the judge made an improper comment.[13]

The following occurred during defense's closing argument:

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[9] State v. Levy, 156 Wn.2d 709, 719-20, 132 P.3d 1076 (2006).
[10] Levy, 156 Wn.2d at 723.
[11] State v. Jackman, 156 Wn.2d 736, 743-44, 132 P.3d 136 (2006).
[12] State v. Elmore, 139 Wn.2d 250, 276, 985 P.2d 289 (1999).
[13] State v. Jacobsen, 78 Wn.2d 491, 495, 477 P.2d 1 (1970).

> [DEFENSE COUNSEL]: . . . Now, I am not going to blame Mr. Korolev for some sharp dealing about setting up the sale of this laptop, because Mr. Byrd as long as you can remember the testimony, he asked him, well, I don't know what it is worth. He said that, well, here we'll find out, so he plugged it in and Mr. Korolev says, well, to complete the thing—because his nephew didn't have any identification. He couldn't have pawned it or sold it.
>
> [PROSECUTOR]: Your Honor, I am going to object. There is no testimony, other than Mr. Cox's opening statement, that listed that in evidence. Not one of the witnesses testified to that.
>
> THE COURT: Sustained.
>
> [DEFENSE COUNSEL]: I believe that the pawn shop owner said that you could not pawn it without having license or identification.
>
> THE COURT: The witness did make that statement, but there has been no evidence presented in this case that Mr. Williams, the individual identified as a nephew, did not have identification.
>
> [DEFENSE COUNSEL]: All right, Your Honor. But—
>
> THE COURT: So the objection is sustained.
>
> [DEFENSE COUNSEL]: The nephew did ask Mr. Byrd to pawn it for him. Now, to do this, Mr. Byrd had to claim ownership. Okay. Now, what are you willing to do to help out a relative?

(Emphasis added.)

Here, the trial court did not comment on the evidence. The State objected to the defense arguing facts not in evidence. There was no testimony about the nephew not having identification on him. Sustaining the objection and responding to defense counsel's argument about the objection was not an improper comment on the evidence. It did not indicate to the jury "'a personal opinion or view of the trial judge regarding the credibility, weight or sufficiency of some evidence introduced at the trial.'"[14]

[14] State v. Frazier, 55 Wn. App 204, 213, 777 P.2d 27 (1989) (quoting State v. Owen, 24 Wn. App. 130, 134, 600 P.2d 625 (1979)).

Moreover, here, because defense counsel's closing argument invited the State's objection, the trial court did not comment on the evidence when it made its ruling. Initially, the court concisely sustained the State's objection. Defense counsel then disputed both the objection and the court's ruling, arguing that the pawnshop owner testified that one could not pawn an item without identification. The court agreed but pointed out that the State objected because there was no evidence that the nephew did not have identification. Indeed, when it appeared that the defense counsel would continue to argue, the court interrupted and succinctly stated, "So the objection is sustained."

Defense continued to argue in its closing argument that Byrd was merely an innocent dupe of his nephew. Defense was able to present its theory of the case to the jury. The court's ruling did not amount to a comment on the evidence or prejudice the defendant.

Appellate Costs

Finally, Byrd asks this court to deny the State appellate costs based on his indigency. We generally award appellate costs to the substantially prevailing party on review. However, when a trial court makes a finding of indigency, that finding continues throughout review "unless the commissioner or clerk determines by a preponderance of the evidence that the offender's financial circumstances have significantly improved since the last determination of indigency."[15] Here, the trial court found Byrd indigent. If the State has evidence indicating significant improvement in Byrd's financial circumstances since the trial court's finding, it may file a motion for costs with the commissioner.

[15] RAP 14.2.

Affirmed.

Leach, J.

WE CONCUR:

Mann, J.

Appelwick, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 75012-7-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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Date: August 30, 2017

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