

69842-7

69842-7

NO. 69842-7-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL J. EVANS,

Appellant.

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COURT OF APPEALS
DIVISION I

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MARY YU

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. The State alleged that Leon Lucas was particularly vulnerable and that his vulnerability was a factor in the defendant's commission of theft of a motor vehicle and trafficking in stolen property charges. The jury found that the vulnerable victim aggravator applied to both the theft of a motor vehicle and the trafficking in stolen property charges. Do the facts in the record support the jury's finding that Leon Lucas was particularly vulnerable to the crime of theft of a motor vehicle?

2. The State concedes that there was no nexus between the finding of particular vulnerability and the commission of trafficking in stolen property.

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

Michael Evans was charged by way of amended information with theft of a motor vehicle and trafficking in stolen property in the first degree. CP 24. As to each count, the State filed an aggravator alleging that "the defendant knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance." Id.

On November 5, 2012, a jury found Evans guilty on both counts and found in special verdict forms that the aggravator applied to each crime. CP 35, 37. The trial court sentenced Evans to an exceptional sentence of 63 months on the theft charge and 90 months on the trafficking charge, to be served concurrently. CP 46.

2. SUBSTANTIVE FACTS.

At the time of the trial, the victim, Leon Lucas, was 80 years old. 4RP 11. Lucas has one grown son, Jeffrey Lucas, who works as a psychologist at McChord Air Force Base. 4RP 8-9. On September 23, 2011, Lucas lost his wife of fifty-three years, Alice, to cancer. 5RP 44. Shortly after Alice¹ died, Lucas put her 1999 Cadillac up for sale by placing a “for sale” sign in the window, and parking the car in his front yard. 5RP 44-45. Within a week of his doing so, the appellant, Michael Evans, calling himself “Mike Miller,” and another male whom he referred to as his brother, came to look at the car. 5RP 45. Evans took the car for a test drive, offered Lucas \$3895 for it, and Lucas accepted. 5RP 45. Evans, the other male, and Lucas then went inside Lucas’ apartment. Id. Once inside, Evans gave Lucas \$100 as down payment, and said nothing

¹ To avoid confusion, the State will refer to each of the Alice and Jeffrey Lucas by their first names. The State intends no disrespect in so doing.

further at the time about how he would pay for the balance owing on the car. Id. The second male then grabbed the keys and title to Lucas' car from a table and left. 5RP 45-49. The deal with Evans happened so fast that Lucas did not have time to draw up a contract. 5RP 54.

While they were meeting in Lucas' home, a woman Evans introduced as "Anna Miller" and her young daughter arrived. 5RP 47. "Miller" was later identified as Evans' co-defendant, Yana Ristick. 4RP 79-81. Ristick told Lucas that her husband had died of cancer, she had a child, she had lost everything she had, and she had nowhere to go. 5RP 55. She told him she needed money to buy a catering business and offered Lucas a partnership in the business. 5RP 55-57. Over the span of about six months, Lucas gave approximately \$300,000 to Ristick for her alleged catering business. 4RP 33-34. Lucas' "loans" to Ristick finally ended when Jeffrey had the accounts frozen. 5RP 63.

A few days after taking the car, Evans called Lucas and accused him of selling him a "lemon," telling him that the engine of the car had blown up and would cost \$5,000 to replace. 5RP 49, 53, 70, 79. Lucas never heard from Evans again. Over the next

few weeks, Ristick made five small payments for the car, totaling \$275. 5RP 49-50, 69.

After taking the car from Lucas, Evans quickly sold it for \$4400. 3RP 48-56; 4RP 64-66. Seattle Police learned of the sale several months into their investigation. 4RP 64-66. Detective St. John was familiar with Evans and Ristick from a prior case she had investigated in which they had scammed several elderly men a few years earlier. 4RP 67-72. The buyer of the Cadillac identified Ristick and Evans in photo montages. 3RP 56-59; 4RP 74-77. Lucas was able to identify Ristick in a montage, and selected two photos, one of which was of Evans, as the man who took his car. 4RP 79-81.

After receiving the five payments from Ristick, Lucas received no more payments on his car. 4RP 83. Ristick and Evans were eventually arrested by Seattle Police. 3RP 20.

Prior to this incident, Jeffrey Lucas had begun to notice that his father would repeat himself, and that it was difficult to redirect him. 4RP 19. On December 28, 2011, shortly after the death of his mother, Lucas called Jeffrey and told him that he had just invested in a catering business with someone named "Annie Miller." Id. When Jeffrey asked him for details about the business, such as

where it was located, what the phone number was, and to look at the paperwork, Lucas was unable answer any of his questions. Id. During that same time period, Jeffrey learned from his father that Lucas had sold Alice's car to "Mike," a man whom Annie had come with to look at the car. 4RP 20-21. Lucas told Jeffrey he was going to get \$60-70 in monthly payments for it. Id. Despite the fact that the car was in good condition, three days after the sale, "Mike" told Lucas that it had blown up. Id. "Mike" said that the car was in the garage being fixed, and that the whole engine needed to be repaired. Id. When Jeffrey asked his father to which garage the car had been taken, Lucas didn't know. Id. Jeffrey stated that this was very unlike his father. Id. After talking to lawyers, bank managers, and the Seattle Police Department, Jeffrey contacted an agency that conducts evaluations for mental capacity and asked them to evaluate Lucas. 4RP 22.

Seattle Detective Pamela St. John was assigned the investigation of this case in January, 2012. 4RP 51. Based on the initial information she received from Jeffrey's wife and from Lucas, St. John had concerns about Lucas' cognitive impairment. 4RP 57. She observed that every time she talked to Lucas, he would tell her his life story "over and over again." Id.

Karen Taifour is a member of the Geriatric Regional Assessment Team, a team that conducts assessments and provides other services to seniors in King County who are experiencing mental health crises or issues. 3RP 64. Taifour testified that dementia typically impacts both memory and cognition. 3RP 68. When cognition is impacted by dementia, one's judgment about who is safe and who is a potential danger to them can be impaired. 3RP 73.

Taifour conducted an assessment of Leon Lucas at the request of his son, Jeffrey. 3RP 80. She conducted the first part of her evaluation of Lucas on January 10, 2012. 3RP 81. She said that her first visit to him was unannounced. 3RP 20. When she knocked on the door, Lucas opened it, said "hi," turned away and began walking down the hall without questioning her as to who she was or why she was there. 3RP 20-21. She indicated that the fact that Lucas had allowed a stranger into his home without hesitation was a "red flag" for her with regard to his vulnerability. 3RP 82. She indicated that in their first meeting, Lucas wanted to tell her his whole life story. Id. On the subject of the car, she asked him

whether he had received a contract from “Mike” for the money “Mike” owed him. 3RP 84. Lucas responded, “No, I trust him. I know I can trust him.” Id. In her second visit to Lucas a week later, Lucas reported that the car was in the garage having its engine replaced, and said that “Annie” wanted it after it was fixed. Id. Lucas was unable to clarify the situation when Taifour asked for details. Id.

At the conclusion of her evaluation of Lucas, Taifour diagnosed him with “cognitive disorder NOS.” 3RP 104. She found that he was “clearly having significant short-term memory problems.” 5RP 5. She noted that he repeated himself a lot, and that he was sometimes confused. Id. She stated that Lucas’ test results were in the dementia range. 3RP 103. However, he was still functioning well in the sense of keeping himself and his home clean. 3RP 104. She further found that Lucas did not have insight or judgment about the decisions he was making. 3RP 105.

C. ARGUMENT

1. SUBSTANTIAL EVIDENCE SUPPORTS THE JURY'S FINDING THAT LEON LUCAS WAS PARTICULARLY VULNERABLE TO THE CRIME OF THEFT OF A MOTOR VEHICLE.²

Evans contends that the State failed to prove that Leon Lucas was particularly vulnerable to the crime of theft of a motor vehicle. This argument should be rejected. The jury had ample evidence before it to support its finding that Lucas was particularly vulnerable to that crime.

"The facts supporting aggravating circumstances shall be proved to a jury beyond a reasonable doubt." RCW 9.94A.537. In challenges to the sufficiency of the evidence of an aggravating factor, the appellate court reviews the evidence in the light most favorable to the State to determine whether any rational trier of fact could have found the presence of the aggravating factor beyond a reasonable doubt. State v. Yates, 161 Wn.2d 714, 752, 168 P.3d 359, 381 (2007). "Circumstantial and direct evidence are deemed equally reliable." Id.

² Because the State is conceding error on the issue of the nexus between Leon Lucas' vulnerability and the crime of trafficking in stolen property, it will not address the question of whether Lucas was particularly vulnerable to that crime.

One of the exclusive factors on which a sentence above the standard range can be based is that “the defendant knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance.” RCW 9.94A.535(3)(b). To justify a sentence based on particular vulnerability, the State must prove: (1) that the defendant knew or should have known, (2) of the victim’s particular vulnerability, and (3) that vulnerability must have been a substantial factor in the commission of the crime. State v. Mitchell, 149 Wn. App. 716, 724, 205 P.3d 920, 924 (2009) aff’d, 169 Wn.2d 437, 237 P.3d 282 (2010) (citing State v. Suleiman, 158 Wn.2d 280, 291-92, 143 P.3d 795 (2006)).

“The fact that the victim was particularly vulnerable due to advanced age may alone, as a matter of law, be used to justify the imposition of an exceptional sentence.” State v. George, 67 Wn. App. 217, 221-22, 834 P.2d 664, 667 (1992) (overruled on other grounds). Washington appellate courts have frequently found that old age alone is a sufficient basis on which to impose a sentence above the standard range. See State v. Jones, 130 Wn.2d 302, 312, 922 P.2d 806, 809 (1996) (77-year-old victim); State v. Butler, 75 Wn. App. 47, 51-53, 876 P.2d 481, 484-85 (1994), review denied, 125 Wn.2d 1021, 890 P.2d 463 (1995)

(89-year-old victim); State v. Sims, 67 Wn. App. 50, 60, 834 P.2d 78, 83 (1992), review denied, 120 Wn.2d 1028, 847 P.2d 481 (1993) (78-year-old victim); State v. Clinton, 48 Wn. App. 671, 676, 741 P.2d 52, 55 (1987) (67-year-old victim). See Fine and Ende, 13B Washington Practice, Criminal Law, § 3903 (2012-2013). Further, “[v]ulnerability can be the result of characteristics other than the victim’s physical condition or stature.” State v. Ross, 71 Wn. App. 556, 565-66, 861 P.2d 473, 479 (1993), amended, 71 Wn. App. 556, 883 P.2d 329 (1994).

Here, Leon Lucas was 79 years old at the time this crime occurred. Seen in the light most favorable to the State, this fact alone is sufficient grounds on which this court can affirm the jury’s finding that he was particularly vulnerable. See George, supra, 67 Wn. App. at 221-22.

In addition to Lucas’ age, however, other facts support the jury’s finding of vulnerability. Lucas was suffering from advancing dementia, he was recently widowed, obviously lonely, and he lived alone. In Ross, supra, the Court of Appeals upheld the exceptional sentence on grounds of victim vulnerability due to the fact that the defendant chose to rob women who were alone in offices that were open to the public. The victims’ vulnerability was not a result of

their individual age or disability, but a result of the fact that they were alone and therefore vulnerable to attack.

Similarly here, upon entering Lucas' apartment and meeting him, Evans saw not only that he was old, but also that he was alone, lonely, and unprotected. Lucas' vulnerability further revealed itself to Evans by virtue of the fact that he allowed this group of strangers into his home without apparent hesitation. Lucas' vulnerability became further evident to Evans by his willingness to enter into a deal where Evans would pay him merely \$100 down for a car priced at \$3895, without a contract and without Lucas' ever having met Evans before. In addition, before the negotiations over the car were completed, Evans' accomplice grabbed the keys and title to the car and left with them. Lucas failed to respond to this event with any apparent concern, and continued to believe that Evans would follow through on his promise to pay him over time. Finally, the jury's finding of vulnerability came after they themselves had a chance to observe Lucas as he testified and was cross-examined. For all of these reasons, and seen in the light most favorable to the State, there was ample evidence on which the jury could rely in finding that Lucas was particularly vulnerable.

2. THE STATE CONCEDES THAT THE RECORD IS INSUFFICIENT TO DETERMINE THAT LEON LUCAS' VULNERABILITY WAS A SIGNIFICANT FACTOR IN EVANS' COMMISSION OF THE CRIME OF TRAFFICKING IN STOLEN PROPERTY.

Evans argues that the trial court erred in imposing an exceptional sentence above the standard range on the trafficking in stolen property charge, as the record contains insufficient evidence that Leon Lucas' vulnerability was a significant factor in Evans' commission of that crime. The State concedes that Lucas' vulnerability was not a substantial factor in the commission of Evans' sale of the stolen vehicle to a third party, and joins in Evans' request that the case be remanded for resentencing within the standard range on that charge.

D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Evans' sentence on the theft of a motor vehicle charge. Regarding the sentence on the trafficking in stolen property charge, the State respectfully asks this Court to remand

this case to the trial court to resentence Evans to a sentence within
the standard range.

DATED this 29th day of October, 2013.

Respectfully submitted,

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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 Andrew Zinner, 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. MICHAEL J. EVANS, Cause No. 69842-7-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.

Sandra Atkinson

Name

Done in Seattle, Washington

10/29/13

Date