

NO. 34896-9-II

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

NICHOLAS C. ROWNAN, APPELLANT

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DIVISION II
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STATE OF WASHINGTON
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Appeal from the Superior Court of Pierce County
The Honorable Stephanie A. Arend

No. 05-1-06123-7

BRIEF OF RESPONDENT

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Table of Contents

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR..... 1

 1. Did the jury have sufficient evidence to convict defendant of possession of stolen property in the second degree? 1

B. STATEMENT OF THE CASE. 1

 1. Procedure..... 1

 2. Facts 2

C. ARGUMENT..... 4

 THE JURY HAD SUFFICIENT EVIDENCE TO FIND DEFENDANT GUILTY OF POSSESSION OF STOLEN PROPERTY IN THE SECOND DEGREE..... 4

D. CONCLUSION. 9

Table of Authorities

State Cases

<u>Seattle v. Gellein</u> , 112 Wn.2d 58, 61, 768 P.2d 470 (1989).....	4
<u>State v. Barrington</u> , 52 Wn. App. 478, 484, 761 P.2d 632 (1987), review denied, 111 Wn.2d 1033 (1988)	5
<u>State v. Camarillo</u> , 115 Wn.2d 60, 71, 794 P.2d 850 (1990).....	5
<u>State v. Casbeer</u> , 48 Wn. App. 539, 542, 740 P.2d 335, <u>review denied</u> , 109 Wn.2d 1008 (1987).....	5
<u>State v. Cord</u> , 103 Wn.2d 361, 367, 693 P.2d 81 (1985).....	6
<u>State v. Delmarter</u> , 94 Wn.2d 634, 638, 618 P.2d 99 (1980)	5
<u>State v. Joy</u> , 121 Wn.2d 333, 338, 851 P.2d 654 (1993).....	4
<u>State v. Mabry</u> , 51 Wn. App. 24, 25, 751 P.2d 882 (1988).....	4
<u>State v. McCullum</u> , 98 Wn.2d 484, 488, 656 P.2d 1064 (1983)	4
<u>State v. Salinas</u> , 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).....	5
<u>State v. Tollett</u> , 71 Wn.2d 806, 431 P.2d 168 (1967).....	8, 9
<u>State v. Turner</u> , 29 Wn. App. 282, 290, 627 P.2d 1323 (1981).....	5

Statutes

RCW 9A.56.010(1).....	6
RCW 9A.56.140(1).....	6
RCW 9A.56.160(1)(c)	6

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the jury have sufficient evidence to convict defendant of possession of stolen property in the second degree?

B. STATEMENT OF THE CASE.

1. Procedure

On December 12, 2005, the Pierce County Prosecutor's Office charged NICHOLAS CHRISTOPHER ROWNAN, hereinafter "defendant," with one count of possessing stolen property in the second degree. CP 1-2. The court held a CrR 3.5 hearing on February 6, 2006, and the matter proceeded to a jury trial that day. RP 5-52.¹ The jury found defendant guilty of possessing stolen property in the second degree. RP 126-28; CP 42, 58-68.

After the jury returned its guilty verdict, defendant moved for judgment notwithstanding the verdict on grounds that the jury did not have sufficient evidence to convict defendant. RP 129-30. The court denied defendant's motion. RP(3/24) 1 – RP(5/26) 6.

¹ The transcript of the Report of Proceedings is contained in four volumes. The portion of the transcript containing the CrR 3.5 hearing and the trial are contained in the first three volumes, which are paginated consecutively. The fourth volume is divided into three sections, none of which is paginated consecutively. Citations to pages in volumes one through three will be preceded by "RP" (i.e., "RP 1"). Citations to pages in volume four will be preceded by "RP([date of proceeding])" (i.e., "RP(3/24) 1").

On May 26, 2006, the court sentenced defendant to 29 months of confinement with credit for 172 days served. RP(5/26) 7-8; CP 58-68. He was also ordered to pay monetary penalties. RP(5/26) 7-8; CP 58-68. From entry of this judgment and sentence, defendant has filed a timely notice of appeal. CP 69.

2. Facts

On December 9, 2005, defendant used a miniature credit card to rent room 144 at the Econolodge, a hotel in Tacoma, Washington. RP 52, 59, 69, 86-87; CP 24. The card looked like a miniature credit card that was small enough to fit on a key ring. RP 64-65, 88. It bore an account number that belonged to Jason Finley, but the name Donald Rownan appeared on the card. RP 55-58, 65, 89. Defendant signed the name Donald Rownan on the credit card receipt. RP 88. During the transaction, defendant presented an identification card that bore the name Donald Rownan. RP 87-88. He also registered for the room as Donald Rownan. RP 87. Steven Teixeira, the manager of the Econolodge, photocopied the identification card and filed it along with the credit card receipt. RP 87-88.

That same day, Mr. Finley looked at his bank account and noticed that \$70 had been withdrawn from the account. RP 52. He had not given anyone permission to use his account, so he called his bank. RP 55. When he spoke to his bank about the withdrawal, the bank told him that

the \$70 was used to pay for a room at the Econolodge where defendant was staying. RP 53. Mr. Finley immediately printed a bank statement for the account, reported his card stolen, called the Econolodge, and called the police. RP 53-54. The bank shredded his credit/debit card. RP 54.

Police Officers Tara Peery and Mark Waters responded to Mr. Finley's call. RP 55, 59, 69. They told Mr. Finley to meet them at the Econolodge. RP 54, 60, 70. When the officers arrived at the hotel, Mr. Finley met them in the parking lot and gave them a copy of his bank statement. RP 54, 6-62, 70. The officers then spoke to Mr. Teixeira and obtained the documents that he had filed when defendant rented the room. RP 70.

The officers then went to room 144, knocked on the door, and received permission from the occupants to enter the room. RP 62-63, 70-71. The officers found several people in the room, including defendant. RP 62-63, 71. The officers asked defendant for identification, but he claimed that he did not have any. RP 64, 71. There was a wallet on a table at which defendant was seated. RP 64, 72. Defendant claimed that the wallet belonged to his identical twin brother Donald. RP 64, 72-73. The officers asked to look in the wallet, and defendant gave them permission to do so. RP 64, 71. The miniature credit card that defendant had used to rent the room was inside the wallet. RP 65, 72-73. Defendant

initially told the officers that he did not use the card to rent the room, but later stipulated that he did in fact use the card to rent the room. RP 66; CP 24.

Defendant did not call any witnesses or testify at trial. He argued that the card belonged to his twin brother, that he did not know it contained a stolen account number, and that the State failed to prove the intent element of stolen property in the second degree. RP 111-113.

C. ARGUMENT.

1. THE JURY HAD SUFFICIENT EVIDENCE TO FIND DEFENDANT GUILTY OF POSSESSION OF STOLEN PROPERTY IN THE SECOND DEGREE.

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. State v. McCullum, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); see also Seattle v. Gellein, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); State v. Mabry, 51 Wn. App. 24, 25, 751 P.2d 882 (1988). The applicable standard of review is whether, 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. State v. Joy, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). Also, challenging the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. State v. Barrington, 52 Wn. App. 478, 484, 761 P.2d

632 (1987), review denied, 111 Wn.2d 1033 (1988) (citing State v. Holbrook, 66 Wn.2d 278, 401 P.2d 971 (1965)); State v. Turner, 29 Wn. App. 282, 290, 627 P.2d 1323 (1981). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Circumstantial and direct evidence are considered equally reliable. State v. Salinas, 119 Wn.2d 192; State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In considering this evidence, “[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal.” State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (citing State v. Casbeer, 48 Wn. App. 539, 542, 740 P.2d 335, review denied, 109 Wn.2d 1008 (1987)).

The written record of a proceeding is an inadequate basis on which to decide issues based on witness credibility. Credibility determinations are necessary because witness testimony can conflict; these determinations should be made by the trier of fact, who is best able to observe the witnesses and evaluate their testimony as it is given. On this issue, the Supreme Court of Washington said:

[G]reat deference . . . is to be given the trial court's factual findings. It, alone, has had the opportunity to view the witness' demeanor and to judge his veracity.

State v. Cord, 103 Wn.2d 361, 367, 693 P.2d 81 (1985) (citations omitted). Therefore, when the State has produced evidence of all the elements of a crime, the decision of the trier of fact should be upheld.

A person is guilty of possessing stolen property if he “knowingly...receive[s], retain[s], possess[es], conceal[s], or dispose[s] of” a stolen access device knowing that it has been stolen and he withholds or appropriates the stolen access device “to the use of any person other than the true owner or person entitled” to the access device. RCW 9A.56.140(1), RCW 9A.56.160(1)(c). “‘Access device’ means any card, ... account number, or other means of account access that can be used ... to obtain money, goods, services, or anything else of value.” RCW 9A.56.010(1). Thus, the State proved that defendant possessed stolen property if it provided evidence that (1) defendant possessed a stolen access device, (2) defendant used the access device, and (3) defendant knew that the access device was stolen.

First, there is evidence that defendant possessed a stolen access device. The miniature credit card was a stolen access device. It had Mr. Finley’s credit card number printed on it, and it gave the cardholder access to Mr. Finley’s bank account. RP 52-54. Mr. Finley did not give anyone else permission to use that number in order to access his bank account. RP 55. Defendant even demonstrated that he believed that the card was stolen by presenting false identification and signing a false name when he used the card. RP 87-88; CP 24. If defendant reasonably believed that he

had permission to use the card, he would not have thought he had to use a false identity when he used the card.

Defendant also possessed the card. He presented it to pay for the room at the Econolodge. RP 54, 61. Police officers found the card in a wallet in the same room in which they found defendant. RP 64, 71-72. Defendant claimed that the wallet belonged to Donald Rownan, who was nowhere to be found at the time. RP 64, 71. Because defendant misrepresented himself as Donald Rownan when he rented the hotel room, the jury could reasonably have concluded that defendant was in possession of the wallet that he claimed belonged to Donald Rownan. RP 87-88; CP 24.

Second, there is evidence that defendant used the access device. Mr. Finley's account was used to rent the room at the Econolodge where defendant was staying. RP 52-54, 64, 71. Mr. Teixeira identified defendant as the person who used the card. RP 61, 66, 70, 87, 90. Defendant even stipulated that he was the person who used the card to rent Room 144. CP 24.

Third, there is evidence that defendant knew that the access device was stolen. The account number on the card belonged to Mr. Finley, who did not give defendant permission to use the bank account. RP 52-53, 55. When defendant used the card, he misrepresented himself as Donald Rownan by providing false identification and signing the name "Donald Rownan" when he rented the room. RP 87-88. Defendant initially told

the police that he did not use the card, but later admitted that he was the person who used the card to check into the hotel. RP 66; CP 24. By using a false identity and lying about using the card, defendant demonstrated that he knew the account number was stolen, and that he did not have permission to use it. People typically do not use credit cards that belong to others. People also do not typically misrepresent themselves and lie to police when they are asked whether they used a particular card on a particular occasion. The jury could reasonably infer that defendant knew that the account numbers were stolen because defendant used someone else's card number without permission and then lied to the police about using it.

This case is similar to State v. Tollett, 71 Wn.2d 806, 431 P.2d 168 (1967). Tollet was found guilty of "grand larceny by way of receiving and withholding property of a value in excess of \$ 75 known to have been stolen." Id. at 806. On appeal, he claimed there was insufficient evidence to prove that he knew the tools were stolen. Id. at 810. At trial, the State provided evidence that Tollet did not have permission to use the tools, that Tollett sold the tools using the false name "Wilbert Underhill," and that Tollet accepted a check made out to Wilbert Underhill when he sold the tools. Id. The Tollett court affirmed Tollett's conviction, holding that

[w]hen the fact of possession of recently stolen property is supplemented by the giving of a false or improbable explanation of it ... or the giving of a fictitious name, a case is made for the jury.

Id. at 811.

In this case, defendant likewise demonstrated that he knew the account number was stolen. He claims that there is insufficient evidence to prove that he knew the account number was stolen. Br. of Appellant at 15-16. At trial, the State provided evidence that defendant did not have permission to use Mr. Finley's account number, that defendant provided a false name and identification when he registered for the room at the Econolodge, and that the defendant signed the credit card receipt using the false name. RP 55, 65, 87-89. Just as Tollet knew that the tools he was selling were stolen, defendant knew that the card number he was using was stolen.

The jury had sufficient evidence to convict defendant of possessing stolen property in the second degree because the State offered ample evidence that defendant possessed a stolen access device, used the access device, and knew that the access device was stolen.

D. CONCLUSION.

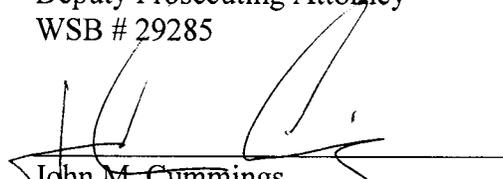
For the foregoing reasons, the State respectfully requests this Court to affirm defendant's convictions.

DATED: January 17, 2007.

GERALD A. HORNE
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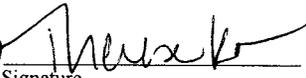
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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

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