

NO. 42008-2

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

STATE OF WASHINGTON, RESPONDENT

v.

KARL GEORGE ALLMAN, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable John A. McCarthy

No. 10-1-03363-9

RESPONSE BRIEF

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

1. Was there sufficient evidence for the jury to find defendant guilty beyond a reasonable doubt of theft in the second degree?
2. Was defendant denied due process when the trial court imposed a sentence where the State failed to prove defendant's criminal history by a preponderance of the evidence?

B. STATEMENT OF THE CASE.

1. Procedure

On August 9, 2010, the State charged Karl George Allman ("defendant") with theft in the second degree and vehicle prowling in the second degree. CP 1–2. The Honorable John A. McCarthy heard pretrial motions on March 10, 2011. RP 3.

The jury found defendant guilty as charged on March 15, 2011. RP 119. On April 15, 2011, the court sentenced defendant to 22 months in custody for the theft charge,¹ and 365 days for the vehicle prowling charge.² RP 131, 134; CP 47–59. This appeal was timely filed on April 18, 2011. CP 60.

¹ Defendant's offender score was 8 at the time of sentencing. CP 50. The standard range for the theft charge was 17–22 months. CP 50.

² Vehicle prowling in the second degree is a gross misdemeanor, punishable by 1–365 days in custody. *See* RCW 9A.52.100(2); *see also* RCW 9.92.020.

2. Facts

On August 6, 2010, Michael Agostini went to Columbia Bank in Tacoma to take care of a personal errand. RP 32. After parking his car, he saw defendant standing on the driver-side front tire of a black 2008 Dodge Ram that was parked in the adjacent parking lot. RP 32, 43. Defendant had his hand through the driver-side window, which had been partially rolled down. RP 34. Defendant forced the window down, entered the truck, and ducked down while inside the truck. RP 34. After nearly a minute and a half, defendant got out of the truck and began walking away from the area. RP 35.

Mr. Agostini ran into the bank to find the owner of the vehicle. RP 35. As he entered, he unknowingly passed the owner of the truck, Benjamin Vrieze, who was leaving the bank. RP 35–36, 43. After discovering that nobody in the bank owned the vehicle, Mr. Agostini saw Mr. Vrieze standing outside next to the Dodge Ram looking upset. RP 35–36. He ran outside and told Mr. Vrieze what he had seen, gave a description of the suspect, and pointed Mr. Vrieze in the direction where defendant had fled. RP 36.

Mr. Vrieze testified that upon returning to his truck, he noticed that the driver door had been unlocked, that there were smudged finger prints all over the top of his window, and that the glove compartment and center

console had been opened. RP 45. He noticed that his Zune,³ Blue Tooth earpiece, GPS, GPS tracking chip, and connector cables were all missing. RP 47.

Mr. Vrieze began searching for defendant and spotted him walking eastward just a few blocks away on 19th and Union. RP 50. Mr. Vrieze called the police on his cell phone while following defendant in his vehicle, driving approximately three miles per hour in the far right lane of traffic. RP 50. Mr. Vrieze noticed that defendant was busy shuffling through the stolen items while he was walking. RP 51.

Tacoma Police Sergeant Sean Darland, a motorcycle officer on duty at the time, saw Mr. Vrieze speaking on his cell phone and driving well below the speed limit. RP 64–65. Sergeant Darland activated his lights and contacted Mr. Vrieze for a routine traffic stop. RP 64. Mr. Vrieze explained that somebody had broken into his truck and pointed out defendant as the culprit, who walking about 100 yards away from them. RP 52, 64–65.

Sergeant Darland rode past defendant, made a U-turn, activated his lights, and stopped defendant. RP 66–67. After a subsequent search of defendant, Sergeant Darland found that defendant had possession of all of Mr. Vrieze's belongings. RP 68, 70, 74.

³ An MP3 player made by Microsoft. RP 47–48.

Mr. Vrieze testified that to replace the stolen items it would cost him \$199 for the Zune, \$483 for the downloaded music, \$279 for the Garmin GPS, \$479 for the tracking chip, \$49.99 for the Blue Tooth earpiece, and \$9.99 for the connector cables. RP 87–91. Mr. Vrieze stated that he had confirmed all of the prices through a customer service employee from Costco. RP 92.

C. ARGUMENT.

1. THE STATE PRESENTED SUFFICIENT EVIDENCE TO CONVICT A RATIONAL TRIER OF FACT THAT DEFENDANT WAS GUILTY OF THEFT 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); *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, a challenge to 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 appellant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Circumstantial and direct evidence are considered equally reliable. *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. The differences in the testimony of witnesses create the need for such credibility determinations; these 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).

To convict defendant of theft in the second degree, the State was required to prove that defendant “commit[ed] theft of property \$750 in value but not exceeding \$5,000 in value.” CP 20–44 (Instruction 7); *see also* RCW 9A.56.040. “Value” is defined as “the market value of the property at the time and in the approximate area of the act.” CP 20–44 (Instruction 11); *see also* RCW 9A.56.010(18)(a). The market value is the price a well-informed buyer would pay to a well-informed seller. *State v. Longshore*, 141 Wn.2d 414, 429, 5 P.3d 1256 (2000).

Defendant argues that the State presented no evidence of the fair market value of the stolen items. Brief of Appellant at 1, 5. However, Mr. Vrieze testified that he reviewed his purchase receipts and confirmed the sale value of the items with a Costco employee before testifying. RP 92. He testified that if he had to repurchase the items, it would be \$199 for the Zune, \$483 for the downloaded music, \$279 for the Garmin GPS, \$479 for the tracking chip, \$49.99 for the Blue Tooth earpiece, and \$9.99 for the connector cables. RP 87–92. The total amount of items clearly exceeds the \$750 required to convict defendant of theft in the second degree. It was reasonable for the jury to infer that Mr. Vrieze was a well-informed buyer and that Costco was a well-informed seller.

Whether Mr. Vrieze’s testimony was credible was a determination for the jury. Although defendant argues that Mr. Vrieze’s conversation with the Costco employee was “dubious hearsay,” Brief of Appellant at 7, the jury’s determination in this regard was a credibility issue not

reviewable on appeal. *Camarillo*, 115 Wn.2d at 71. Moreover, defense counsel did not object to the testimony as hearsay, or move to strike any of the testimony regarding the Costco employee. *See* RP 92–93, 97–98.

Defendant next argues that the State’s evidence was insufficient because all of the stolen items were used and over two to four years old. Brief of Appellant at 6. He further argues that “[a]ll of the items taken were technology that is constantly subject to updates and change and it is incredibly unlikely that their value used would be anything near the value of the items brand new.” Brief of Appellant at 6. This argument, however, mischaracterizes both the condition and age of the items that defendant stole.

For example, the Garmin GPS and the tracking system were purchased in December 2009. RP 88. Therefore, the GPS and the tracking system were actually seven to eight months old when defendant stole them. Mr. Vrieze testified that the GPS system was in new condition and would cost him the full retail amount to replace. RP 88. It was reasonable for the jury to infer that the GPS and its software’s fair market value did not decrease substantially over the course of just over six months.

Next, when asked what condition the Zune was in, Mr. Vrieze responded, “Flawless. It sat in my – I mean, it rarely moved.” RP 87. Notwithstanding the fact that the Zune was purchased in December 2007, the prosecutor specifically inquired whether the Zune would cost more or less to repurchase:

Q. And, sir, if you had to replace the Zune, how much would it have cost you?

A. \$199.

Q. *So the price had not changed any?*

A. *No, and I wouldn't be able to receive that exact same one.*

RP 87 (emphasis added). From the testimony above, it was reasonable for the jury to infer that Mr. Vrieze would have had to pay \$199 in order to replace his Zune at the time of the crime. Furthermore, the \$483 worth of songs purchased by Mr. Vrieze does not fall into the technology argument that defendant insists would so severely hamper the fair market value.

Defendant relies on *State v. Morley*, 119 Wn. App. 939, 944, 83 P.3d 1023 (2004), to argue that the current retail price of the stolen goods was insufficient to show the fair market value of a used product. Brief of Appellant at 7. In *Morley*, the defendant stole a used generator from a rental equipment company. 119 Wn. App. at 940. During trial, the assistant manager for the rental company testified that the same generator would cost about \$2,000 at list price to replace. *Morley*, 119 Wn. App. at 942. During cross-examination, however, the assistant manager stated that the rental company could purchase all of its equipment from its supplier at a 40 to 45 percent discount off the list price—thus substantially cutting the repurchase price. *Morley*, 119 Wn. App. at 942.

The court held: “[T]he generator’s retail value is not evidence of its fair market value *in the circumstances present here, i.e., when the object of the attempted theft is an item that the victim obtained at less than*

retail price,” Morley, 119 Wn. App. at 943 (emphasis added). The court reiterated that its holding was an exception to determining the fair market value of a used item because the generator “was obtained by [the rental company] for a price significantly less than retail price.” *Morley*, 119 Wn. App. at 944. The court also stated that the used generator’s market value had decreased substantially because it had been purchased for the very purpose of being rented out. *See Morley*, 119 Wn. App. at 944.

In the circumstances of the present case, the retail value of the items stolen was evidence of their fair market value. Mr. Vrieze did not originally purchase his belongings at a substantially discounted price, but instead paid the full retail value at Costco and Best Buy. RP 97. Whereas the victim in *Morley* was a rental business that could use its discount to repurchase the stolen item, Mr. Vrieze is an individual who does not have that same opportunity. Moreover, while the rental generator in *Morley* was subjected to substantial wear and tear, Mr. Vrieze did not rent out his belongings, but instead used them for his personal use, keeping them in the best condition as possible. *See* RP 87–92. Accordingly, the court’s ruling in *Morley* does not prohibit the jury’s consideration of the current retail price to determine the value of the property that defendant stole.

It was reasonable for the jury to determine that defendant stole the necessary amount to commit theft in the second degree. The uncontested total worth of the items that defendant stole was \$1499.98. The State

presented sufficient evidence for the jury to determine that defendant was guilty of theft in the second degree.

2. DEFENDANT’S CASE SHOULD BE REMANDED FOR RESENTENCING BECAUSE THE TRIAL COURT IMPOSED DEFENDANT’S SENTENCE WITHOUT AN EVIDENTIARY BASIS OF HIS CRIMINAL HISTORY

It is the State’s burden to prove a defendant’s criminal history by a preponderance of the evidence. *State v. Hunley*, 161 Wn. App. 919, 927, 253 P.3d 448 (2011) (citing *State v. Ford*, 137 Wn.2d 472, 479–80, 973 P.2d 452 (1999)); *see also* RCW 9.94A.500. The trial court must have some evidentiary basis in the record when imposing a sentence for the sentence to comport with due process. *Hunley*, 161 Wn. App. at 927. “The best evidence of a prior conviction is a certified copy of the judgment.” *Ford*, 137 Wn.2d at 480. A prosecutor’s assertions are merely argument and not considered evidence or facts. *Hunley*, 161 Wn. App. at 927.

Where the trial court imposes a sentence without a sufficient evidentiary basis, the reviewing court remedies the error by remanding for resentencing. *See Hunley*, 161 Wn. App. at 929–30 (citing *State v. Mendoza*, 165 Wn.2d 913, 930, 205 P.3d 113 (2009)). “On remand for resentencing . . . the parties shall have the opportunity to present and the court to consider all relevant evidence regarding criminal history,

including criminal history not previously presented.” *Hunley*, 161 Wn. App. at 930 (quoting RCW 9.94A.530(2)).⁴

Here, the record indicates that the trial court imposed defendant’s sentence without an evidentiary record of defendant’s criminal history. The State concedes that it did not satisfy its burden in proving defendant’s criminal history by a preponderance of the evidence. Accordingly, the appropriate remedy would be to vacate defendant’s sentence and remand for resentencing for the State to present proof of defendant’s criminal history. *See* RCW 9.94A.530(2).

D. CONCLUSION.

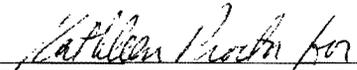
The State presented sufficient evidence for the jury to determine that defendant was guilty of theft in the second degree. Specifically, the jury heard testimony regarding the exact amounts it would cost to replace the items that defendant unlawfully took from Mr. Vrieze’s vehicle. The amount exceeded the \$750 required to find the defendant guilty. The State respectfully requests this Court to uphold defendant’s conviction. Because

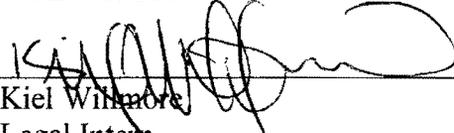
⁴ Although the *Hunley* court ruled that certain provisions of RCW 9.94A.530(2) are unconstitutional, the provision regarding the presentation of additional evidence during resentencing remained unaffected. *See Hunley*, 161 Wn. App. at 929–30.

the State failed to enter any evidence regarding defendant's criminal history, the State requests this Court to vacate defendant's sentence and remand for resentencing.

DATED: October 14, 2011.

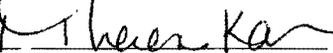
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