

No. 43453-9-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Chase Cutts,

Appellant.

Skamania County Superior Court Cause No. 12-1-00017-2

The Honorable Judge Brian Altman

Appellant's Opening Brief

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

ASSIGNMENTS OF ERROR 1

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 1

STATEMENT OF FACTS AND PRIOR PROCEEDINGS 3

ARGUMENT 5

I. Mr. Cutts’s conviction violated his Fourteenth Amendment right to due process because the evidence was insufficient to prove the elements of second-degree trafficking in stolen property. 5

A. Standard of Review 5

B. Due process required the prosecution to prove that Mr. Cutts knew of and ignored a substantial risk that the equipment he sold to Hayes was stolen. 6

II. The trial judge erroneously admitted irrelevant evidence that was unfairly prejudicial, in violation of ER 401, ER 402, and ER 403. 7

A. Standard of Review 7

B. The trial court abused its discretion by admitting evidence of Hayes’s unsupported belief that Mr. Cutts planned to sell him stolen property. 8

CONCLUSION 10

TABLE OF AUTHORITIES

FEDERAL CASES

In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970)	5
Smalis v. Pennsylvania, 476 U.S. 140, 106 S.Ct. 1745, 90 L.Ed.2d 116 (1986).....	5, 7

WASHINGTON STATE CASES

Bellevue School Dist. v. E.S., 171 Wash.2d 695, 257 P.3d 570 (2011)	5
State v. Depaz, 165 Wash.2d 842, 204 P.3d 217 (2009).....	8
State v. DeVincentis, 150 Wash.2d 11, 74 P.3d 119 (2003)	7
State v. Everybodytalksabout, 145 Wash.2d 456, 39 P.3d 294 (2002)	8
State v. Kirwin, 166 Wash.App. 659, 271 P.3d 310 (2012).....	5
State v. R.H.S., 94 Wash.App. 844, 974 P.2d 1253 (1999).....	6

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. XIV	1, 5
------------------------------	------

WASHINGTON STATUTES

RCW 9A.08.010.....	6
RCW 9A.82.055.....	6, 9

OTHER AUTHORITIES

ER 401	1, 2, 7, 8, 9
ER 402	1, 2, 7

ER 403 1, 2, 7, 8, 9

ASSIGNMENTS OF ERROR

1. Mr. Cutts's conviction infringed his Fourteenth Amendment right to due process because the evidence was insufficient to prove the elements of second-degree trafficking.
2. The evidence was insufficient to establish that Mr. Cutts acted recklessly when selling equipment that later turned out to be stolen property.
3. The prosecution failed to prove that Mr. Cutts knew of and disregarded a substantial risk that the equipment he sold was stolen.
4. The evidence was insufficient to establish that Mr. Cutts acted recklessly when selling equipment that turned out to be stolen property.
5. The trial judge abused her discretion by admitting evidence that was irrelevant and unduly prejudicial evidence in violation of ER 401, 402, and 403.
6. The trial court erred by allowing Hayes to testify that he intended to buy "stolen" property from Mr. Cutts, without any foundation for his basis of knowledge.
7. The trial court erred by allowing officers to relay Hayes's hearsay statement that he knew Mr. Cutts was in possession of "stolen" property.
8. The trial court erred in entering order number 7 in the Order on Defendant's Motion in Limine.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. To obtain a conviction for second-degree trafficking in stolen property, the prosecution was required to prove that Mr. Cutts knew of and disregarded a substantial risk that equipment he planned to sell was stolen. Here, the prosecution produced no evidence showing how Mr. Cutts acquired the property or whether he knew its value when he arguably set a low price for it. Did the conviction violate Mr. Cutts's Fourteenth

Amendment right to due process because the evidence was insufficient to prove the elements of second-degree trafficking?

2. Evidence based on rumor and innuendo, or that otherwise lacks a basis in fact, is inadmissible under ER 401, ER 402, and ER 403. In this case the trial judge allowed Hayes to testify that he believed Mr. Cutts planned to sell him stolen property, without any foundation for this belief. Did the erroneous admission of this evidence prejudice Mr. Cutts?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Chase Cutts sold chain saws and weed-eaters to Chad Hayes, who was working as a police informant. RP 98-106, 111-116. The exchange wasn't recorded or directly observed by police. Hayes reported that he paid \$300 for the used equipment. RP 112, 171-184.

The items turned out to have been stolen months earlier in a burglary at the Stevenson Lodge. RP 227-241, 252-260. Mr. Cutts was not a suspect in the burglary. RP 62-63. The state charged Mr. Cutts with Trafficking in Stolen Property in the First Degree.¹ CP 1.

The defense moved in limine to prevent Hayes from testifying that he knew the used equipment was stolen property before the transaction occurred. RP 40-46; Defendant's Motion in Limine, Order on Defendant's Motion in Limine, Supp. CP. The prosecution argued that Hayes's belief that the items were stolen, despite its "vague" source, was admissible since it was not offered for the truth of the matter, and that it was relevant because it later turned out to be true. RP 40-41. The court denied the defense motion, ruling that Hayes's unsupported belief that the items were

¹ A companion charge of Possession of Stolen Property in the Second Degree was dismissed prior to trial. RP 20; CP 1-2.

stolen was admissible because officers often obtain information in this manner. RP 46, 88-89.

Hayes testified about the “stolen” property, using the term “stolen” repeatedly to describe how he set up the purchase. RP 93, 96, 116, 126. Officers also quoted Hayes, and discussed the property as “stolen” in describing the planned sting. RP 152, 191, 194, 198. Over defense objection, the court also admitted a police department receipt for the buy money; the receipt contained references to “stolen” property. RP 107-110, 172.

The state offered instructions allowing the jury to find Mr. Cutts guilty of the lesser included offense of second-degree trafficking. Although Mr. Cutts objected, the court gave the instructions. RP 312-319; Court’s Instructions to Jury, Supp. CP.

The state produced no direct evidence proving that Mr. Cutts knew the used equipment was stolen. Instead, the state argued that the sale price, the geographic proximity of the Stevenson Lodge, and Mr. Cutts’s denial that the equipment was stolen (in response to a concern voiced by Hayes) all provided evidence that Mr. Cutts knew the equipment was stolen. In the alternative, the prosecution argued that Mr. Cutts was at least reckless in his sale of the items. RP 331-340, 365-367. The defense countered that there was no proof that Mr. Cutts knew the value of the

items or that he acted recklessly when he sold them. Defense counsel also pointed out the absence of proof that Mr. Cutts had acquired the used equipment in a manner that should have raised red flags. RP 350-351, 359-362.

The jury found Mr. Cutts guilty of the lesser offense. Verdict Form B, Supp. CP. After sentencing, Mr. Cutts timely appealed. CP 3-21, 24-44.

ARGUMENT

I. MR. CUTTS'S CONVICTION VIOLATED HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BECAUSE THE EVIDENCE WAS INSUFFICIENT TO PROVE THE ELEMENTS OF SECOND-DEGREE TRAFFICKING IN STOLEN PROPERTY.

A. Standard of Review

Constitutional violations are reviewed de novo. *Bellevue School Dist. v. E.S.*, 171 Wash.2d 695, 702, 257 P.3d 570 (2011) at 702. The sufficiency of the evidence may always be raised for the first time on appeal. *State v. Kirwin*, 166 Wash.App. 659, 670 n. 3, 271 P.3d 310 (2012).

- B. Due process required the prosecution to prove that Mr. Cutts knew of and ignored a substantial risk that the equipment he sold to Hayes was stolen.

The due process clause of the Fourteenth Amendment requires the state to prove every element of an offense beyond a reasonable doubt.

U.S. Const. Amend. XIV; *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). The remedy for a conviction based on insufficient evidence is reversal and dismissal with prejudice. *Smalis v. Pennsylvania*, 476 U.S. 140, 144, 106 S.Ct. 1745, 90 L.Ed.2d 116 (1986).

To convict Mr. Cutts of second-degree trafficking in stolen property, the prosecution was required to prove that he recklessly trafficked in stolen property. RCW 9A.82.055. A person acts recklessly when s/he “knows of and disregards a substantial risk that a wrongful act may occur and his or her disregard of such substantial risk is a gross deviation from conduct that a reasonable person would exercise in the same situation.” RCW 9A.08.010. Recklessness therefore requires proof of both subjective and objective components: “[w]hether an act is reckless depends on both what the defendant knew and how a reasonable person would have acted knowing these facts.” *State v. R.H.S.*, 94 Wash.App. 844, 847, 974 P.2d 1253 (1999).

In this case, there is no proof that Mr. Cutts acted recklessly, because the prosecution failed to introduce evidence establishing his

actual knowledge of the risk that the property was stolen. The state didn't prove how Mr. Cutts came into possession of the used equipment; accordingly, no inference can be drawn from the circumstances surrounding his acquisition of the property. Nor is there any indication that he knew—or even that he had a reasonable guess—about the value of the used equipment. RP 92-241, 252-286. Without proof of such knowledge, the fact that he sold the equipment to Hayes for \$300 has no bearing on his mental state (contrary to the prosecution's argument to the jury). RP 334-340, 366-367.

Because the prosecution failed to prove that Mr. Cutts knew there was a substantial risk the property was stolen, the evidence was insufficient to prove recklessness. Accordingly, his conviction must be reversed and the case dismissed with prejudice. Smalis, at 144.

II. THE TRIAL JUDGE ERRONEOUSLY ADMITTED IRRELEVANT EVIDENCE THAT WAS UNFAIRLY PREJUDICIAL, IN VIOLATION OF ER 401, ER 402, AND ER 403.

A. Standard of Review

The correct interpretation of an evidentiary rule is a question of law, reviewed de novo. *State v. DeVincentis*, 150 Wash.2d 11, 17, 74 P.3d 119 (2003). If the rule has been correctly interpreted, the decision to admit or exclude evidence is reviewed for an abuse of discretion. *Id.*

A trial court abuses its discretion when its order is manifestly unreasonable or based on untenable grounds. *State v. Depaz*, 165 Wash.2d 842, 858, 204 P.3d 217 (2009). An erroneous ruling requires reversal if it is reasonably probable that the error affected the outcome. *State v. Everybodytalksabout*, 145 Wash.2d 456, 468-69, 39 P.3d 294 (2002).

B. The trial court abused its discretion by admitting evidence of Hayes's unsupported belief that Mr. Cutts planned to sell him stolen property.

Irrelevant evidence is inadmissible at trial. ER 402. ER 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Under ER 403, even relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

In this case, Hayes was permitted to testify (over objection), that he knew Mr. Cutts planned to sell him stolen property. RP 40-46, 62, 93, 96-99. Likewise, Detective Wyckoff testified (over objection) that Hayes alerted police to Mr. Cutts's possession of stolen property. RP 152. There

is no indication Hayes had any legitimate basis to suspect the property Mr. Cutts had was stolen.²

This evidence was irrelevant, because Hayes's state of mind did not relate to any element of the charged crime. ER 401; RCW 9A.82.055. Furthermore, in the absence of proof as to Hayes's basis of knowledge, the jury was left to speculate that Mr. Cutts had told Hayes the property was stolen, or that Hayes somehow knew Mr. Cutts had been involved in its theft. Thus, the evidence was unfairly prejudicial under ER 403.

There is a reasonable probability that the error affected the outcome of the case. The sole question at trial was whether or not Mr. Cutts acted recklessly. By implying that he'd confessed to Hayes or been involved in the theft from the lodge, the prosecution unfairly tipped the balance in favor of conviction.

The trial court abused its discretion by admitting evidence that was irrelevant and unfairly prejudicial. ER 401, ER 403. The conviction must be reversed and the case remanded for a new trial, with instructions to exclude the testimony.

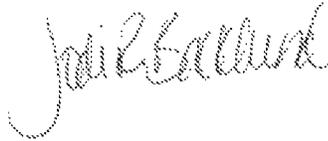
² Apparently, he concluded that the property was stolen based largely on his belief that Mr. Cutts is a thief. RP 43-45.

CONCLUSION

For the foregoing reasons, the conviction must be reversed and the case dismissed with prejudice. In the alternative, the case must be remanded for a new trial.

Respectfully submitted on November 14, 2012,

BACKLUND AND MISTRY

A handwritten signature in cursive script that reads "Jodi R. Backlund".

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

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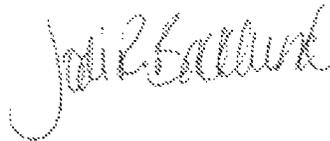
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on November 14, 2012.



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BACKLUND & MISTRY

November 14, 2012 - 2:24 PM

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