

FILED
Jul 22, 2013
Court of Appeals
Division III
State of Washington

NO. 309061-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent

v.

DAVID LEE BELOTE, Appellant

APPEAL FROM THE SUPERIOR COURT
FOR BENTON COUNTY

NO. 11-1-00090-1

BRIEF OF RESPONDENT

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I. NATURE OF THE CASE

The defendant, David Lee Belote, brought this action to appeal his conviction for one count of Trafficking in Stolen Property in the Second Degree.

II. COURSE OF THE PROCEEDINGS

The defendant was charged by Second Amended Information with Possession of Stolen Property in the Second Degree, and Trafficking in Stolen Property in the First Degree. (CP 11-12). The case proceeded to a jury trial on October 31, 2013. (RP¹ 3). The court instructed the jury on the lesser-included count of Trafficking in Stolen Property in the Second Degree. (CP 87, 89-90). After deliberations, the jury was hung on both counts, but found the defendant guilty of the lesser-included charge of Trafficking in Stolen Property in the Second Degree. (CP 99, 100). The defendant was sentenced to eight months jail, and ordered to pay a \$500.00 victim assessment, \$500.00 fine, \$100.00 felony DNA collection fee, and enumerated costs in the amount of \$1,430.91. (CP 107-08, 113). This appeal follows. (CP 116).

¹ “RP” refers to the Verbatim Report of Proceedings, Jury Trial Volumes 1 and 2, filed by Court Reporter John R. McLaughlin.

III. STATEMENT OF FACTS

Alpha Computer Center was burglarized sometime after closing at 5:00 p.m. on Monday, November 1, 2010, and before employee Melinda Jones arrived at work at approximately 7:30 a.m. on Tuesday, November 2, 2010. (RP 7-9; EX 5). The store is located in Richland, Washington. (RP 7). After arriving at work and seeing that the glass portion of the front door of the store was broken, Ms. Jones called 911. (RP 9-10). Ms. Jones testified that three laptop computers that had been on display were stolen, as well as two iMac desktop computers. (RP 12, 15). The two iMacs that were stolen had been inside sealed factory boxes. (RP 18-19). Store owner Frank Ward testified that the serial number for one of the stolen iMacs, a 27-inch model that retails for \$1,700.00, was W8038A8VDB6. (RP 20, 22,).

Richland Police Department Detective Damon Jansen was assigned to investigate the burglary. (RP 32, 34). A representative from the Seattle Police Department contacted Detective Jansen and advised the stolen 27-inch iMac was sold to a pawn shop in Seattle. (RP 35). The Seattle Police Department shipped the iMac to the Richland Police Department. (RP 35). Upon receiving the iMac, Detective Jansen verified that the serial number was the same as the 27-inch model that was stolen from Alpha Computer Center. (RP 39).

Detective Robert Benson testified that he is the forensic examiner for the Richland Police Department, and that he examined the stolen iMac. (RP 98, 100-01). Detective Benson testified that based on his training and experience, he is able to find identifying information on a computer that a typical computer user might believe has been deleted. (RP 112). Detective Benson verified that the date and time on the computer were accurate. (RP 101). He testified that the only user identification set up on the iMac, "nuke bomb", was created on November 2, 2010, around 9:50 p.m. (RP 102-03, 106). Detective Benson found an e-mail account on the computer associated with user "nuke bomb" with the address of bombsawaymusic@gmail.com. (RP 107).

Detective Jansen contacted the pawn shop where the stolen iMac had been recovered and was advised that the defendant was the person who pawned the computer. (RP 35). In an attempt to locate the defendant, Detective Jansen contacted the defendant's family and friends and advised them that he needed to talk to the defendant about a stolen computer. (RP 44-45).

Detective Jansen eventually located the defendant at a residence in Kennewick on January 14, 2011. (RP 45-46). The homeowner permitted Detective Jansen to enter the residence to search for the defendant, and Detective Jansen located the defendant hiding under a bed. (RP 45-46).

Prior to any questioning by Detective Jansen, the defendant stated “he bought that computer.” (RP 46).

Later on the same day, Detective Jansen conducted a recorded interview with the defendant at the Richland Police Department. (RP 46). The defendant initially indicated he lived at a residence where Detective Jansen had already verified he did not live. (RP 48). The defendant then admitted he had not lived at that residence for a couple of years. (RP 48). The defendant stated that he left the Tri-Cities sometime in October of 2010, and had not been in the Tri-Cities during November of 2010. (RP 49). The defendant indicated that after leaving the area, he stayed in motels in the Seattle area for a week or two and then moved in with his girlfriend’s family. (RP 49-50). The defendant stated that he went to Seattle to sell his music and was selling his compact discs in downtown Seattle on a street corner. (RP 50).

The jury heard part of Detective Jansen’s recorded interview with the defendant, which was admitted as Exhibit 11. (RP 50-51). In the recording, the defendant stated that he was selling his compact discs in Seattle in an area of town where he had also sold them a week earlier. (RP of EX. 11 at 3, 8). The defendant stated that when selling the CDs in downtown Seattle, a male drove by him, turned his car around, and approached the defendant. (RP of EX. 11 at 3). The male identified

himself as Gilbert, but said people call him Scooby. (RP of EX. 11 at 5-6). The defendant stated that Scooby said he had a good friend who ran an Apple store in Seattle and gets good deals on computers. (RP of EX. 11 at 4-5). Scooby stated that this friend gave him an iMac that was still in the box and unopened, and that he would sell it to the defendant for \$900.00. (RP of EX. 11 at 5). The defendant stated that he knew that Macs were expensive. (RP of EX. 11 at 7). The defendant asked to check out the computer, so Scooby left to get it and returned about an hour later with the computer. (RP of EX. 1 at 5). The defendant stated that he could only afford to pay \$700.00 for the computer, because he had been spending a lot of money at the motel. (RP of EX. 1 at 5). The defendant stated that Scooby agreed to take \$700.00 plus four of the defendant's compact discs in exchange for the computer. (RP of EX. 1 at 5). The defendant stated he did not take the computer out of the box to make sure that it worked before purchasing it. (RP of EX. 11 at 33). The defendant did not obtain any contact information for Scooby, such as his address or phone number. (RP 174).

The defendant stated he and Scooby discussed where they were from, with the defendant advising Scooby he was from the Tri-Cities. (RP of EX. 11 at 9). The defendant stated that Scooby said he left Spokane to get away from the gang lifestyle, and to ask about him in Spokane because

he is well known there. (RP of EX. 11 at 9, 30-31). The defendant stated that Scooby said he was trying to get away from the crazy life, and was going to “[P]retty much go legit”. (RP of EX. 11 at 9-10). The defendant described Scooby as having a tattoo of the word loyalty on the left side of his neck. (RP of EX. 11 at 8). Scooby also referenced “kick[ing] it” with his “homeboy” Goofy, and stated that Goofy is well known to police. (RP of EX. 11 at 23).

Detective Jansen checked law enforcement databases, but was never able to locate anyone who fit the description of Scooby. (RP 51). Detective Jansen was able to identify an individual with the street name of Goofy who was from the Tri-Cities, but that person had a warrant for his arrest for Robbery in the First Degree and could not be located. (RP 51-52).

The defendant advised Detective Jansen that he knew he purchased the computer from Scooby on a Saturday. (RP of EX. 11 at 10). The defendant could not remember the exact date he purchased the computer, because he had been going downtown selling his music a lot. (RP of EX. 11 at 10). The defendant stated that he was living with Tommy, one of his girlfriend’s family members, at the time he purchased the computer. (RP 50; RP of EX 11 at 10). He stated that he didn’t move in with Tommy until they had been in Seattle for a week. (RP 170). When Detective

Jansen challenged the defendant about his timeline of events, the two had the following exchange:

[Det. Jansen]: But you understand that that is too big of a coincidence?

[Defendant]: I'm sorry. I –

[Det. Jansen]: The fact that it [the 27 inch iMac] was taken right about the same time you end up leaving Tri-Cities, and then you end up with it in Seattle and just happened to –

[Defendant]: It was taken about the same time I left Tri-Cities.

[Det. Jansen]: Uh-huh.

[Defendant]: No, it wasn't.

[Det. Jansen]: How do you know?

[Defendant]: How do I know?

[Det. Jansen]: Yeah.

[Defendant]: What do you mean, how do I know?

[Det. Jansen]: Exactly. How do you know?

(RP of EX. 11 at 28).

The defendant stated that he didn't set up the computer immediately after purchasing it. (RP of EX. 11 at 15). Someone gave the defendant a keyboard for the computer, and a person named Sonny Duke gave him a music program. (RP of EX. 11 at 12, 15-16). The defendant then set up the user identification on the computer, using the name, Nukebomb. (RP of EX. 11 at 13, 16). He initially thought the user name he chose was "Bomb's way". (RP of EX. 11 at 14-15). The defendant stated that he had the computer about two weeks before he decided to pawn it, because he needed money to pay Tommy rent. (RP of EX. 11 at 11).

Detective Jansen conducted a second interview with the defendant on January 19, 2011. (RP 55). In that interview, the defendant stated that he had driven from the Tri-Cities to Seattle in a rental car. (RP 56). The defendant stated that he had actually gotten the computer from Scooby in the Tri-Cities, not in Seattle. (RP 56). A representative from Enterprise Holding, a rental car company, testified at trial that the defendant rented a car in Kennewick, Washington on November 1, 2010, and dropped it off at an unknown Enterprise location on November 5, 2010. (RP 71).

Joshua Brigham, a store manager for Cash American Pawn Exchange in Seattle, testified that on November 18, 2010, the defendant came in and used a 27-inch iMac to obtain a pawn loan. (RP 75, 79, 81). Mr. Brigham did not recall the defendant mentioning he had purchased the computer on the street two weeks earlier, and stated that would have raised a red flag for him that the computer may be stolen. (RP 80-81). Mr. Brigham gave the defendant \$350.00 cash for the iMac, which was then retained by Cash American Pawn Exchange as collateral for the loan. (RP 81-82). Mr. Brigham testified that he also spoke with the defendant after the iMac was placed on a police hold as suspected stolen property and provided him with the case detective's phone number. (RP 88, 95).

The defendant took the stand at trial and provided a third version of events surrounding his possession of the stolen iMac. (RP 122-184).

The defendant stated that although he was very bad with dates, he knew he drove to Seattle in a rental car on November 1, and stayed in a motel that night. (RP 127, 129, 138, 155). He went to downtown Seattle the next day around 3:00 or 4:00 p.m., and started selling his compact discs. (RP 128-129, 157). Scooby stopped and spoke with him for about an hour, during which time Scooby told him about the iMac. (RP 130-131). Scooby also advised the defendant that he was trying to change his life and get away from a bad scene. (RP 133). Scooby left, but returned with the iMac about an hour later, and the defendant purchased it. (RP 133-34). The defendant called his cousin, who came over and sold him a keyboard and music software. (RP 135). The defendant then created a user name and logged onto the computer. (RP 135-136).

After pawning the computer, the defendant testified that he called the pawn shop back to see if he could get an additional \$150.00 loan against it, and was advised there was a police hold on the item. (RP 142). The defendant later returned to the Tri-Cities and knew detectives were looking for him. (RP 143). When Detective Jansen located the defendant at a friend's residence, the defendant decided to hide under a bed because he didn't want to deal with the police. (RP 144). The defendant testified he told Detective Jansen that he purchased the computer in Kennewick because he thought the lie would get him out of jail. (RP 154, 160).

On cross-examination, the defendant admitted he only remembered relevant dates after listening to the testimony of other witnesses at trial. (RP 160-161). He stated that he knew he bought the computer on November 2, 2010, because he “put the date together” with his attorney. (RP 162). The defendant stated that his recollection of events was better a year later at trial than when he was interviewed by Detective Jansen in January of 2011, because after hearing witnesses testify “...I pretty much know the guidelines, the dates when everything occurred.” (RP 171).

III. ARGUMENT

A. The State presented sufficient evidence at trial for the jury to find the defendant guilty of Trafficking in Stolen Property in the Second Degree.

The defendant argues insufficient evidence was presented at trial for a rational jury to find him guilty of Trafficking in Stolen Property in the Second Degree. Evidence is sufficient to support a finding of guilt if, when viewed in the light most favorable to the State, a rational finder of fact could determine the essential elements of the crime occurred beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A claim of insufficient evidence admits the truth of the State’s evidence, as well as all reasonable inferences that can be drawn from that evidence. *Id.* “Circumstantial evidence and direct evidence are equally

reliable.” *State v. Fiser*, 99 Wn. App. 714, 718, 995 P.2d 107 (2000). “We defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of evidence.” *State v. Manion*, 173 Wn. App. 610, 633, 295 P.3d 270 (2013).

Here, the State presented sufficient circumstantial evidence that the defendant committed the crime of Trafficking in Stolen Property in the Second Degree. If the jury took the defendant at his word that a man named Scooby sold him the computer, a reasonable fact finder could determine that the defendant acted recklessly as defined in Jury Instruction Number 7, based on a number of factors. (CP 78). The defendant purchased what he knew was a brand new expensive computer still in the manufacturers’ box at a heavily-discounted price from a total stranger on a street corner. (RP of EX. 11, 3-7). The defendant did not know Scooby’s last name, address, phone number, or place of employment. Scooby admitted he had been a part of the gang lifestyle in Spokane, had lived what he described as a “crazy life,” and hung out with a male named Goofy, who was well known to police. (RP of EX. 11 at 9-10, 23). Based on this evidence, a reasonable jury could determine that the defendant knew of and disregarded a substantial risk that a wrong act could occur, and that his actions were a gross deviation from the conduct a reasonable person would exercise in that situation. (CP 78).

Just as likely, the jury could have determined that the defendant was not a credible witness, and was lying about how he came into possession of the computer because he believed that it was stolen. The jury heard testimony that the defendant actively avoided speaking to police about the case, including going so far as to hide under a bed. (RP 44-46). Once Detective Jansen located the defendant, the defendant lied about his address. (RP 48). The defendant admitted in his own testimony that he lied to Detective Jansen because he wanted to get out of jail, when he stated that he actually purchased the computer in the Tri-Cities. (RP 160). Between his recorded statement to Detective Jansen on January 14, 2011, his second unrecorded statement to Detective Jansen on January 19, 2011, and his testimony at trial on November 1 and 2, 2011, the jury heard three different versions of events from the defendant. The jury also heard the defendant admit he used the testimony of other witnesses at trial to piece together his own timeline of events. (RP 160-162, 171). In evaluating the defendant's credibility, a reasonable trier of fact could easily determine that the defendant was not only an unreliable witness, but that he repeatedly lied both when speaking to Detective Jansen and when testifying at trial.

The jury heard sufficient evidence to determine that the facts as the defendant stated them could simply not be true. Testimony from the

Alpha Computer Center employee and Detective Benson showed that the defendant was in possession of the stolen iMac within twenty-four hours of it being stolen. (RP 7-9, 102-03). Testimony from the rental car manager indicated that the defendant was in the Tri-Cities during the timeframe in which the Alpha Computer Center was burglarized. (RP 71). Yet the defendant initially insisted that he had not been in the Tri-Cities at the time of burglary, had stayed in a motel for a week or two after arriving in Seattle, had purchased the computer on a Saturday after he was already living with his girlfriend's Uncle Tommy, and had already been selling compact discs for a week or so before purchasing the computer. (RP 49-50, RP of EX. 11 at 5, 8, 10, 28). If the jury found Detective Benson's testimony credible, which the defense did not suggest was otherwise, they would have found the defendant's version of events simply could not be true. The jury was free to infer that the only reason the defendant would create such an elaborate but false version of events was because he believed the computer he pawned was stolen.

B. The defendant's challenge to his offender score is moot.

The defendant challenges the court's determination that his offender score was two. The issue is moot, however, because the defendant, sentenced to eight months confinement on May 7, 2012, has

already completed his sentence and was not sentenced to any community custody for this offense. (CP 104-113, 119). An issue is moot if the reviewing court is no longer able to provide any relief. *State v. Turner*, 98 Wn.2d 731, 733, 658 P.2d 658 (1983). There is no point in remanding this case to resentence the defendant when he has already completed the time ordered on the Judgment and Sentence.

Nor does this case present an issue of “continuing and substantial public interest” that otherwise warrants review even when moot. *Sorenson v. City of Bellingham*, 80 Wn.2d 547, 558, 496 P.2d 512 (1972). Even if the defendant’s offender score were not two, which the State is not conceding, the defendant is not subject to future harm from such an error. *State v. Harris*, 148 Wn. App. 22, 197 P.3d 1206 (2008) is directly on point. In *Harris*, the only reason the Court addressed the defendant’s moot claim regarding his offender score was because it included the important and continuing public issue of what types of documents from Louisiana were sufficient to prove that a prior conviction occurred. In explaining why the case was moot, the Court stated:

A case is moot if a court can no longer provide effective relief. The issue of Harris’s offender score is moot because he has been released from confinement, is not on community custody, and is not subject to another miscalculation based on this alleged error if he is convicted of another crime in the future. [citations omitted].

Id. at 26.

The *Harris* Court summarily rejected the same argument that the defendant makes in the instant case that the issue of the allegedly erroneous offender score is not moot because the defendant could be harmed by a future sentencing court's reliance on it:

That is incorrect. A sentencing court is required to calculate the defendant's offender score on "the date of sentencing for the offense for which the offender score is being computed." RCW 9.94A.525(1). When, as here, the defendant enters a guilty plea and objects to his criminal history calculation, the "disputed issues as to criminal history shall be decided at the sentencing hearing." RCW 9.94A.441. If the defendant objects, at sentencing the State must prove prior convictions by the preponderance of evidence with either a certified judgment and sentence or, if none is available, other comparable evidence. *State v. Bergstrom*, 162 Wash.2d 87, 93, 169 P.3d 816 (2007) (citing *Cadwallader*, 155 Wash.2d at 876, 123 P.3d 456; *State v. Lopez*, 147 Wash.2d 515, 519, 55 P.3d 609 (2002)).

Further, a prior judge's criminal history computation is not evidence of a certified judgment and sentence because Washington's sentencing law has been amended approximately 200 times in the 27 years since the legislature enacted the Sentencing Reform Act of 1981(SRA), ch. 9.94A RCW. *In re Pers. Restraint of Dalluge*, 162 Wash.2d 814, 818 n. 1, 177 P.3d 675 (2008) (noting that the SRA is traditionally amended several times each year); *In re Pers. Restraint of LaChapelle*, 153 Wash.2d 1, 7, 100 P.3d 805 (2004) (tallying 181 SRA amendments between 1981 and 2004). "Any sentence imposed under [the SRA] shall be determined in accordance with the law in effect when the current offense was committed." RCW 9.94A.345. Accordingly, a future sentencing court may not simply rely on a criminal history

from a previous judgment but must compute the offender score anew at any future sentencing hearing.

Id. at 27-28.

The instant case presents no continuing and substantial public interest that would permit the Court to resolve a moot claim. The Court should not address this claim. If the Court chooses to address this issue and remand the defendant's case for resentencing, the State will present certified copies of judgment and sentences showing the defendant's felonies do not wash out because of intervening misdemeanor and gross misdemeanor convictions.

C. The trial court properly listed the total amount of legal financial obligations on the Judgment and Sentence.

The defendant alleges that the trial court did not comply with RCW 9.94A.760(1) in listing the total amount of the defendant's legal financial obligations. RCW 9.94A.760(1) states in part that:

Whenever a person is convicted in superior court, the court may order the payment of a legal financial obligation as part of the sentence. The court must on either the judgment and sentence or on a subsequent order to pay, designate the total amount of a legal financial obligation and segregate this amount among the separate assessments made for restitution, costs, fines, and other assessments required by law.

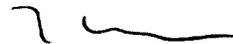
Here, the court listed in the Judgment and Sentence restitution owing in the amount of \$1,699.00, a \$500.00 victim assessment, a \$500.00 fine, and a \$100.00 felony DNA collection fee. (CP 106-07). Additionally, the court attached a Cost Bill to the Judgment and Sentence showing various court costs listed as totaling \$1,430.91. (CP 113). The Judgment and Sentence and attached Cost Bill comport with the requirements of RCW 9.94A.760(1).

V. CONCLUSION

The State presented sufficient evidence for a rational trier of fact to find the defendant guilty of the crime of Trafficking in Stolen Property in the Second Degree. The defendant's alleged error concerning his offender score is moot and presents no issue of a substantial and continuing public interest. There is no error in how the legal financial obligations are listed on the Judgment and Sentence and attached Cost Bill.

RESPECTFULLY SUBMITTED this 22nd day of July 2013.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

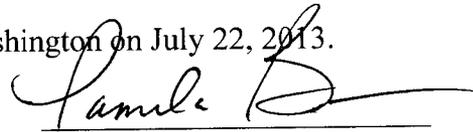
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Signed at Kennewick, Washington on July 22, 2013.



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