

FILED

JUN 03, 2013

Court of Appeals
Division III
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 31359-0-III

STATE OF WASHINGTON, Respondent,

v.

JEROME LIONEL PLEASANT, Appellant.

APPELLANT'S BRIEF

Andrea Burkhart, WSBA #38519
Burkhart & Burkhart, PLLC
6 ½ N. 2nd Avenue, Suite 200
PO Box 946
Walla Walla, WA 99362
Tel: (509) 529-0630
Fax: (509) 525-0630
Attorney for Appellant

TABLE OF CONTENTS

AUTHORITIES CITEDii

I. INTRODUCTION.....1

II. ASSIGNMENTS OF ERROR.....1

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR2

IV. STATEMENT OF THE CASE.....3

V. ARGUMENT.....4

I. The introduction of the e-mail communication establishing the value of the GPS unit at \$1,400.00 violated Pleasant’s right to confront adverse witnesses and the error was prejudicial.....5

II. Even if the conviction could be sustained, the trial court’s sentence is unsupported by sufficient evidence in the record establishing Pleasant’s offender score.....10

VI. CONCLUSION.....11

CERTIFICATE OF SERVICE13

AUTHORITIES CITED

Federal Cases

Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).....5

Davis v. Washington, 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006).....6

Melendez-Diaz v. Massachusetts, 557 U.S. 305, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009)....7-8

State Cases

State v. Beadle, 173 Wn.2d 97, 108, 265 P.3d 863 (2011).....6

State v. Bergstrom, 162 Wn.2d 87, 169 P.3d 816 (2007).....10

State v. Guloy, 104 Wn.2d 412, 705 P.2d 1182 (1985).....9

State v. Hunley, 175 Wn.2d 901, 287 P.3d 584 (2012).....10-11

State v. Jasper, 174 Wn.2d 96, 271 P.3d 876 (2011).....5-6, 8

State v. Kirkpatrick, 160 Wn.2d 873, 161 P.3d 990 (2007).....8

State v. Kronich, 160 Wn.2d 893, 161 P.3d 982 (2007).....8

State v. Larkins, 147 Wn. App. 858, 199 P.3d 441 (2008).....10

State v. Rowland, 97 Wn. App. 301, 983 P.2d 696 (1999).....10

State v. Watt, 160 Wn.2d 626, 160 P.3d 640 (2007).....9

Statutes

RCW 5.45.020.....7

RCW 9.94A.510.....11

RCW 9.94A.530(2).....10

RCW 9A.56.040(1)(a).....5

RCW 9A.56.050.....5

I. INTRODUCTION

Jerome Pleasant was convicted of second degree theft of a GPS device fitted to him while he was on community custody. At trial, the only evidence presented establishing that the value of the GPS unit exceeded \$750.00, an essential element of second degree theft, was an e-mail from an out-of-court witness to a community custody officer stating that the value of the unit was \$1,400.00. The trial court admitted the e-mail over the defendant's objections to hearsay and violation of his confrontation rights.

After he was convicted, Pleasant was sentenced to twelve months and one day based on an alleged offender score of 6. But he did not stipulate to any prior criminal history, nor did the State present any evidence of prior criminal history beyond mere allegation. Consequently, the record fails to establish any factual basis for the offender score and the resulting sentence, which must be reversed.

II. ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR 1: The trial court erred by admitting testimonial hearsay evidence of the value of the GPS unit in violation of *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

ASSIGNMENT OF ERROR 2: The evidence admissible at trial was insufficient as a matter of law to establish Pleasant's guilt of theft in the second degree.

ASSIGNMENT OF ERROR 3: The record fails to support Pleasant's offender score of 6 and the resulting sentence.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

ISSUE 1: Was an e-mail sent to the community custody officer from the Washington Association of Sheriffs and Police Chiefs testimonial hearsay, such that its admission violated Pleasant's right to confront the witnesses against him? YES.

ISSUE 2: Absent the testimonial e-mail communication about the value of the GPS device, was there sufficient evidence to establish the value of the GPS device exceeded \$750.00 as required to convict Pleasant of theft in the second degree? NO.

ISSUE 3: When Pleasant did not stipulate to any prior criminal history and the record fails to establish any factual basis for an offender score of 6 beyond the prosecutor's bare assertions, is the sentence required to be reversed? YES.

IV. STATEMENT OF THE CASE

Jerome Pleasant was placed on community custody in Franklin County in April 2012. RP (11/30/12) at 6. His corrections officer required that he be monitored by a GPS device. RP (11/30/12) at 7. In May, the corrections officer observed that the GPS unit had died and was not recharged. RP (11/30/12) at 13. The officer contacted Pleasant in June at the Pasco DOC office, at which time Pleasant did not have the GPS device on or with him. RP (11/30/12) at 14-15. When asked where it was, Pleasant responded that he did not know where it was and when the officer told him that he should care because it was worth \$1,400.00, Pleasant replied that he should have pawned it. RP (11/30/12) at 16. A corrections official told Pleasant on June 8th that he needed to return the GPS unit by June 12th or he could face criminal charges. RP (11/30/12) at 28. Pleasant did not return the GPS unit by June 12th. RP (11/30/12) at 28.

The GPS device was subsequently recovered in July 2012, undamaged and usable. RP (11/30/12) at 17, 20. Pleasant was arrested and charged with theft in the second degree. CP 75; RP (11/30/12) at 17.

During trial, and over a defense objection, the trial court allowed the State to present evidence of the value of the GPS device in the form of

an e-mail sent from the Washington Association of Sheriffs and Police Chiefs to a community custody officer. RP (11/30/12) at 11. The State argued, without foundation, that the e-mail constituted a business record and the trial court overruled Pleasant's objections on hearsay and confrontation grounds. RP (11/30/12) at 12. Based on the e-mail, the State's witness testified that the value of the GPS unit was \$1,400.00. RP (11/30/12) at 13. The e-mail was introduced as Exhibit 2. RP (11/30/12) at 20. No other evidence of the value of the GPS device was admitted.

The jury convicted Pleasant of second degree theft, as charged. CP 25. The trial court sentenced him to a standard range sentence of twelve months plus one day, based on an offender score of 6. CP 13, 18. Pleasant did not stipulate to any prior criminal history and the record contains no evidence of any prior criminal history beyond the bare allegations set forth in the judgment and sentence. CP 13. Pleasant appeals. CP 6.

V. ARGUMENT

Under the facts of this case, Pleasant's conviction cannot stand because it rests entirely upon evidence improperly admitted contrary to his right to confront adverse witnesses. Moreover, even if the conviction were valid, the sentence must be reversed because the State failed to

present any evidence of prior convictions beyond mere allegation sufficient to impose sentence based upon an offender score of 6.

- I. The introduction of the e-mail communication establishing the value of the GPS unit at \$1,400.00 violated Pleasant's right to confront adverse witnesses and the error was prejudicial.

Pleasant's conviction for second degree theft must be reversed.

The only evidence introduced as to the value of the GPS unit was impermissibly introduced testimonial hearsay, which deprived Pleasant of his right to confront the witness as to the unit's value. Absent the improperly introduced evidence, there was no other evidence establishing that the value of the unit exceeded \$750.00, as required to establish theft in the second degree. RCW 9A.56.040(1)(a). Consequently, the evidence does not support the sufficiency of a conviction greater than the gross misdemeanor offense of theft in the third degree. RCW 9A.56.050.

In *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), the U.S. Supreme Court announced the rule that the Sixth Amendment right to confrontation prohibits the admission of testimonial statements by a non-testifying witness. In general, a testimonial statement is "a solemn declaration or affirmation made for the purpose of establishing or proving some fact." *State v. Jasper*, 174 Wn.2d

96, 109, 271 P.3d 876 (2011). However, in the absence of a comprehensive rule establishing which statements are testimonial, Washington courts have developed two tests for distinguishing testimonial from non-testimonial hearsay. At issue in this case concerns statements made to law enforcement, in which the court considers whether “the circumstances objectively indicate that there is no . . . ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.” *State v. Beadle*, 173 Wn.2d 97, 108, 265 P.3d 863 (2011) (*quoting Davis v. Washington*, 547 U.S. 813, 822, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006)).

There can be little question that the e-mail communication at issue in this case was a testimonial statement, made to a law enforcement officer for the purpose of establishing an element of the charged offense at trial – namely, the value of the GPS unit. The e-mail contained a precise statement as to the value of the GPS unit assigned to Pleasant, as well as other units. RP (11/30/12) at 12. The only possible reason for such an e-mail to a law enforcement officer from a law enforcement support agency is to assist in establishing the value of the unit at trial.

At trial, the State did not argue that the e-mail was not testimonial, but rather argued that it was not hearsay because it constituted a business record. It is true that a record of an act, condition or event may be admitted into evidence if the custodian “testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at, or near the time of the act, condition or event” and if the court determines admission is justified. RCW 5.45.020. Notably, however, the State provided none of the foundational testimony required by the statute to establish that the e-mail constituted an admissible business record. Having failed to meet the minimal foundational requirements for admission, the business record exception does not apply.

Moreover, even if the e-mail *were* a business record, its character as such does not remove it from the operation of the bar against testimonial hearsay. In *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 308, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009), the U.S. Supreme Court considered whether introducing certificates by forensic analysts showing the results of forensic tests performed violated the defendant’s confrontation rights. In holding that the introduction of the certificates was unconstitutional, the U.S. Supreme Court observed that even if the certificates at issue qualified as business records, they would still implicate the defendant’s confrontation rights. *Id.* at 321. First, a business

record reflecting a regularly conducted business activity that involves the production of evidence for use at trial does not apply as a business record. *Id.* The question is whether the record is calculated for use in the court, not in the business. *Id.* Indeed, the purpose of the business record exception to the hearsay rule is that such statements were by their nature not testimonial, but rather for the purpose of administering an entity's affairs. *Id.* at 324. When statements contained in such records are testimonial, the declarants must be subject to cross-examination under the Sixth Amendment. *Id.*

Similarly, in *State v. Jasper*, 174 Wn.2d 96, 271 P.3d 876 (2012), the Washington Supreme Court held that admission of abstracts of driving records based upon a review of the defendant's driving records violates the defendant's right to confrontation. The certificates improperly admitted in *Jasper* went beyond merely authenticating otherwise admissible public records but served as substantive evidence as to what the record contained or did not contain. *Id.* at 115. Concluding that the statements were testimonial notwithstanding other potentially applicable hearsay exceptions, the *Jasper* court overruled its prior decisions in *State v. Kirkpatrick*, 160 Wn.2d 873, 161 P.3d 990 (2007) and *State v. Kronich*, 160 Wn.2d 893, 161 P.3d 982 (2007), finding that their reasoning could not be reconciled with the *Melendez-Diaz* decision.

Here, the e-mail communication was made for evidentiary purposes against Pleasant, to establish an essential element of the charge against him. The declarant was not made available for cross-examination as to the basis of his knowledge, the recency of his information, or any other factor that may affect the value of the GPS device. Under *Melendez-Diaz* and *Jasper*, the e-mail communication was clearly testimonial and its admission without production of the declarant was reversible constitutional error.

The improper admission of testimonial hearsay in violation of the confrontation clause is reviewed under a harmless error standard. *State v. Watt*, 160 Wn.2d 626, 633, 160 P.3d 640 (2007). As a constitutional error, prejudice is presumed and the State bears the burden of proving beyond a reasonable doubt that the error was not harmless. *Id.* at 635. Washington courts apply the “overwhelming untainted evidence” test to determine if a constitutional error is harmless beyond a reasonable doubt, by considering whether the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt. *State v. Guloy*, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985). In the present case, because the improperly admitted hearsay was the only evidence establishing an essential element of the charge – namely, the value of the GPS unit – the error was not harmless and the conviction must be reversed.

- II. Even if the conviction could be sustained, the trial court's sentence is unsupported by sufficient evidence in the record establishing Pleasant's offender score.

The evidence in the record fails to support the trial court's imposition of sentence based upon an offender score of 6. The trial court's calculation of an offender score is reviewed *de novo*. *State v. Larkins*, 147 Wn. App. 858, 862, 199 P.3d 441 (2008). Because a trial court acts without statutory authority when it imposes sentence based on an erroneous offender score, the calculation of the score may be raised for the first time on appeal. *State v. Rowland*, 97 Wn. App. 301, 304, 983 P.2d 696 (1999).

The State bears the burden to prove the existence of prior convictions by a preponderance of the evidence. *State v. Bergstrom*, 162 Wn.2d 87, 93, 169 P.3d 816 (2007). The trial court may rely on no more information than is admitted by the defendant, acknowledged, or proved at trial or at sentencing. RCW 9.94A.530(2). Although RCW 9.94A.530(2) states that a defendant acknowledges prior criminal history alleged by the State by failing to object at the time of sentencing, the Washington Supreme Court held in *State v. Hunley*, 175 Wn.2d 901, 287 P.3d 584 (2012) that the statute is unconstitutional on its face by depriving the State

of its burden to present some evidence of prior convictions.

Consequently, a defendant's failure to object cannot constitute an acknowledgment in the absence of sufficient evidence presented by the State. *Id.* at 917.

In the present case, no evidence exists in the record establishing the existence of any prior convictions or any agreement or acquiescence by Pleasant in the truth of the State's bare assertions. Accordingly, Pleasant should have been sentenced based on an offender score of 1, considering only the trial court's finding that Pleasant was on community custody at the time of the current offense. CP 13. With an offender score of 1, the standard range sentence is 0-90 days. RCW 9.94A.510. The trial court's sentence of twelve months plus one day thus exceeds the trial court's authority under the Sentencing Reform Act in light of the evidence produced by the State in support of its requested sentence.

VI. CONCLUSION

Pleasant's conviction for second degree theft is unsupportable because the only evidence establishing the essential element of the value of the GPS unit exceeding \$750.00 was inadmissible testimonial hearsay by a declarant who was not subject to cross-examination. Because the error was not harmless, the conviction must be reversed and the case

remanded for a new trial. However, even if the conviction were legally supportable, the sentence imposed is not. Because the State failed to produce any evidence beyond bare assertion that Pleasant had an offender score of 6, the sentence must be vacated and the case remanded.

RESPECTFULLY SUBMITTED this 3rd day of June,
2013.



ANDREA BURKHART, WSBA #38519
Attorney for Appellant

DECLARATION OF SERVICE

I, the undersigned, hereby declare that on this date, I caused to be served a true and correct copy of Appellant's Brief upon the following parties in interest by depositing them in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

Shawn P. Sant
Franklin County Prosecutor's Office
1016 North Fourth Avenue
Pasco, WA 99301

Jerome Lionel Pleasant
1818 W 4TH PL APT A
Kennewick, WA 99336

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed this 3rd day of June, 2013 in Walla Walla, Washington.


Andrea Burkhart