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Court of Appeals

Division III

State of Washington

No. 32247-5-III
IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

JOHN C. JACKSON,

Defendant/Appellant.

Appellant's Brief

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TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR.....5

B. ISSUES PERTAINING TO ASSINGMENTS OF ERROR.....5

C. STATEMENT OF THE CASE.....6

D. ARGUMENT.....7

 1. Mr. Jackson’s right to due process under Washington
 Constitution, Article 1, § 3 and United States Constitution,
 Fourteenth Amendment was violated where the State failed to
 prove an essential element of the crime of second degree
 possession of stolen property, to wit, that the value of the stolen
 property possessed by Mr. Jackson was over \$750.....7

 2. The jury instruction on accomplice liability improperly departed
 from the language of the statute and essentially allowed the jury to
 impose strict liability on Mr. Jackson.....10

 3. The conviction for second degree possession of stolen property
 merges with the conviction for first-degree trafficking in stolen
 property.....12

E. CONCLUSION.....14

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>In re Winship</i> , 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).....	7, 8
<i>State v. Baeza</i> , 100 Wn.2d 487, 670 P.2d 646 (1983).....	7
<i>State v. Collins</i> , 2 Wn. App. 757, 470 P.2d 227, 228 (1970).....	8
<i>State v. Clark</i> , 13 Wn. App. 782, 537 P.2d 820 (1975).....	9
<i>State v. Cronin</i> , 142 Wn.2d 568, 14 P.3d 752 (2000).....	11
<i>State v. Kleist</i> , 126 Wn.2d 432, 895 P.2d 398 (1995).....	9
<i>State v. Michielli</i> , 132 Wn.2d 229, 238, 937 P.2d 587 (1997).....	12
<i>State v. Moore</i> , 7 Wn. App. 1, 499 P.2d 16 (1972).....	8
<i>State v. Prater</i> , 30 Wn. App. 512, 635 P.2d 1104 (1981).....	13
<i>State v. Roberts</i> , 142 Wn.2d 471, 14 P.3d 713 (2000).....	11
<i>State v. Taplin</i> , 9 Wn. App. 545, 513 P.2d 549 (1973).....	8
<i>State v. Vladovic</i> , 99 Wn.2d 413, 662 P.2d 853 (1983).....	12, 13

Constitutional Provisions and Statutes

United States Constitution, Fourteenth Amendment.....7

Washington Constitution, Article 1, § 3.....7

RCW 9A.08.020.....10

RCW 9A.08.020(3)(a).....11

RCW 9A.56.010(18)(a).....8

RCW 9A.56.160(1)(a).....8

A. ASSIGNMENTS OF ERROR

1. The evidence was insufficient to sustain the conviction for second degree possession of stolen property.
2. The jury was given an incorrect instruction on accomplice liability.
3. The conviction for second degree possession of stolen property merges with the conviction for first-degree trafficking in stolen property.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Was Mr. Jackson's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment violated where the State failed to prove an essential element of the crime of second degree possession of stolen property, to wit, that the value of the stolen property possessed by Mr. Jackson was over \$750?
2. Did the jury instruction on accomplice liability improperly departed from the language of the statute and essentially allow the jury to impose strict liability on Mr. Jackson?
3. Does the conviction for second degree possession of stolen property merge with the conviction for first-degree trafficking in stolen property?

C. STATEMENT OF THE CASE

John Jackson was convicted of first-degree trafficking in stolen property and second degree possession of stolen property. The alleged offense occurred in June 2012 following a burglary at A & A Auto Wrecking and Towing in Kittitas County. Radiators, tire rims and catalytic converters were stolen. RP 20-45. Law enforcement was unable to obtain any physical evidence or leads on who committed the burglary and theft. RP 168-69, 185. Shortly thereafter, Mr. Jackson and another man showed up selling similar items to a recycling business in Tacoma. RP 100-02. They received \$473 for those items. RP 128-29.

The prosecutor argued in closing argument that although Mr. Jackson only received \$473 for the stolen property he possessed, he should still be convicted of second degree possession of stolen property as an accomplice for the total amount of property stolen from the wrecking yard, which exceeded \$750. RP 235-37. The prosecutor admitted there was no evidence connecting Mr. Jackson to the burglary and theft at A & A Auto Wrecking and Towing. RP 224-25.

The jury was given the following instruction on accomplice liability in pertinent part:

A person who is an accomplice in the commission of a crime is guilty of that crime whether present at the scene or not.

A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of a crime, he or she either:

(1) solicits, commands, encourages, or requests another person to commit the crime;

or

(2) aids or agrees to aid another person in planning or committing a crime . . .

CP 23.

This appeal followed. CP 97.

D. ARGUMENT

1. Mr. Jackson's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment was violated where the State failed to prove an essential element of the crime of second degree possession of stolen property, to wit, that the value of the stolen property possessed by Mr. Jackson was over \$750.

As a part of the due process rights guaranteed under both the Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment the state must prove every element of a crime charged beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068,

1073, 25 L.Ed.2d 368 (1970). As the United States Supreme Court explained in *Winship*: “[T]he use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law.” *In re Winship*, 397 U.S. at 364.

Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. *State v. Moore*, 7 Wn. App. 1, 499 P.2d 16 (1972). As a result, any conviction not supported by substantial evidence may be attacked for the first time on appeal as a due process violation. *Id.* “Substantial evidence” in the context of a criminal case, means evidence sufficient to persuade “an unprejudiced thinking mind of the truth of the fact to which the evidence is directed.” *State v. Taplin*, 9 Wn. App. 545, 513 P.2d 549 (1973) (quoting *State v. Collins*, 2 Wn. App. 757, 759, 470 P.2d 227, 228 (1970)).

A person is guilty of second degree possession of stolen property if he or she possesses stolen property valued at more than \$750 but less than \$1500. RCW 9A.56.160(1)(a). Value is the market value of the property at the time and in the approximate area of the offense. RCW 9A.56.010(18)(a). Market value is the "price which a well-informed buyer would pay to a well-informed seller, where neither is obliged to enter into

the transaction." *State v. Kleist*, 126 Wn.2d 432, 435, 895 P.2d 398 (1995) (quoting *State v. Clark*, 13 Wn. App. 782, 787, 537 P.2d 820 (1975)).

Market value is based not on the value to any particular person, but rather on an objective standard. *Kleist*, 126 Wn.2d at 438, 895 P.2d 398.

Here, it is undisputed that the market value of the stolen property possessed by Mr. Jackson was \$473, the amount paid by the recycling company. This amount is obviously less than the \$750 amount required to find guilt under the statute. The prosecutor's argument that Mr. Jackson should still be convicted of second degree possession of stolen property as an accomplice for the total amount of property stolen from the wrecking yard is misplaced. There was no evidence that Mr. Jackson had any involvement in the burglary and theft at A & A Auto Wrecking and Towing, or that he ever possessed any stolen property other than the items he sold to the recycling company. The prosecutor even admitted in closing argument there was no evidence connecting Mr. Jackson to the burglary and theft. RP 224-25.

Absent any evidence connecting Mr. Jackson to the burglary and theft, there is no way to hold Mr. Jackson accountable, as an accomplice or otherwise, for the balance of property stolen from A & A. Such a leap assumes facts not in evidence. Therefore, since the value of stolen

property possessed by Mr. Jackson was less than \$750, the value element of the crime was not proven, and the evidence is insufficient to sustain the conviction for second degree possession of stolen property.

2. The jury instruction on accomplice liability improperly departed from the language of the statute and essentially allowed the jury to impose strict liability on Mr. Jackson.

Washington's accomplice liability statute provides in relevant part:

(1) A person is guilty of a crime if it is committed by the conduct of another person for which he is legally accountable.

(2) A person is legally accountable for the conduct of another person when:

....

(c) He is an accomplice of such other person in the commission of *the crime*.

(3) A person is an accomplice of another person in the commission of a crime if:

(a) With knowledge that it will promote or facilitate the commission of *the crime*, he

(i) solicits, commands, encourages, or requests such other person to commit it; or

(ii) aids or agrees to aid such other person in planning or committing it....

RCW 9A.08.020 (emphasis added).

In contrast, the jury instruction given in the present case provided in relevant part:

A person who is an accomplice in the commission of *a crime* is guilty of that crime whether present at the scene or not.

A person is an accomplice in the commission of *a crime* if, with knowledge that it will promote or facilitate the commission of *a crime*, he or she either:

(1) solicits, commands, encourages, or requests another person to commit the crime;

or

(2) aids or agrees to aid another person in planning or committing *a crime* . . .

CP 23 (emphasis added).

In *State v. Roberts*, 142 Wn.2d 471, 14 P.3d 713, (2000), the Washington Supreme Court found a jury instruction similar to this one that used the italicized language “*a crime*” improperly departed from the language of the statute and essentially allowed the jury to impose strict liability on the defendant. 142 Wn.2d at 511, 14 P.3d 713; accord *State v. Cronin*, 142 Wn.2d 568, 579, 14 P.3d 752 (2000). The Court stated the language of the accomplice liability statute establishes a mens rea requirement of “knowledge” of “*the crime*.” *Roberts*, 142 Wn.2d at 510, 14 P.3d 713 (citing RCW 9A.08.020(3)(a)). The statute's history, derived from the Model Penal Code, establishes that “the crime” means the charged offense. *Id.*

The instruction in the present case is indistinguishable from the one improperly given in *Roberts*. Since the instruction allowed the jury to impose strict liability on Mr. Jackson, it improperly departed from the language of the statute. Therefore, as in *Roberts*, the convictions must be reversed.

3. The conviction for unlawfully displaying a weapon merges with the convictions for first-degree robbery.

"The [merger] doctrine arises only when a defendant has been found guilty of multiple charges, and the court then asks if the Legislature intended only one punishment for the multiple convictions." *State v. Michielli*, 132 Wn.2d 229, 238, 937 P.2d 587, reconsideration denied (1997). Merger is "a doctrine of statutory interpretation used to determine whether the Legislature intended to impose multiple punishments for a single act which violates several statutory provisions." *State v. Vladovic*, 99 Wn.2d 413, 419 n. 2, 662 P.2d 853 (1983). The doctrine only applies "where the Legislature has clearly indicated that in order to prove a particular degree of crime (e.g., first degree rape) the State must prove not only that a defendant committed that crime (e.g., rape) but that the crime was accompanied by an act which is defined as a crime elsewhere in the

criminal statutes (e.g., assault or kidnapping)." *Vladovic*, 99 Wn.2d at 421, 662 P.2d 853.

Crimes merge when proof of one crime is necessary to prove an element or the degree of another crime. *Vladovic*, 99 Wn.2d at 419-21, 662 P.2d 853. If one of the crimes involves an injury that is separate and distinct from that of the other crime, the crimes do not merge. *Vladovic*, 99 Wn.2d at 421, 662 P.2d 853.

In *State v. Prater*, 30 Wn. App. 512, 516, 635 P.2d 1104 (1981), the court held that where striking the victim was part of the force used to induce her to find money, the object of the robbery, and the purpose and effect was to intimidate the victim, the assault inflicted was not separate and distinct from the force required for robbery, and thus the assault merged into the defendants' robbery convictions.

Here, as in *Prater*, the crime of second degree possession of stolen property merges with first-degree trafficking in stolen property, since the act of possessing the stolen property was necessary to the later trafficking in stolen property. The evidence clearly shows that that the primary purpose of the criminal act was trafficking in stolen property. The possession of stolen property was not separate and distinct from the means used to commit the trafficking in stolen property. Therefore, the second

degree possession of stolen property merges with the first-degree trafficking in stolen property. Mr. Jackson's offender score and sentence should be reduced accordingly.

D. CONCLUSION

For the reasons stated the convictions should be reversed or, in the alternative, the case remanded for resentencing.

Respectfully submitted November 13, 2014,

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PROOF OF SERVICE (RAP 18.5(b))

I, David N. Gasch, do hereby certify under penalty of perjury that on November 13, 2014, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of the brief of appellant:

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