FILED
Feb 11, 2015
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

Respondent's Brief

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I. RESPONSE TO APPELLANT'S ASSIGNMENT OF ERROR

A. There was sufficient evidence to sustain a conviction for Possession of Stolen property in the Second Degree.

B. Any incorrect instruction on accomplice liability was harmless error.

C. Possession of Stolen Property in the Second Degree did not merge with Trafficking in Stolen Property in the First Degree

II. STATEMENT OF FACT

Randy Heistand owns A&A Auto Wrecking and Towing on Canyon Road in Kittitas County, Washington. (Report of Proceedings of Trial, Tuesday, January 7, 2014 p. 20) It is a salvage yard, where they sell used parts and junked cars. (RP 21) When people have cars to get rid of, A&A buys them, dismantles the cars, and sells off the parts. (RP 21) When the cars are done A&A crushes them and hauls them to Tacoma. (RP 21) The cars are assigned A&A yard numbers when they come in. (RP 22) The parts from dismantled cars are put in a storage shed and in various places at the wrecking yard. (RP 22) Each part--for example, each catalytic converter--is numbered and marked. (RP 23) They are then sold to core buyers, such as Cal Bag Metals. (RP 23) Each vehicle has to be recorded on a manifest as well as their record sheets so the parts can be traced. (RP 25)

On Friday June 15, 2012, the wrecking yard closed for the week. On Monday, June 18, the employees came in and noticed the front lock

had been cut. (RP 26) As they went in, they saw another lock had been cut off and doors opened. (RP 26) Radiators had been shuffled and the copper ones taken. (RP 37, 70) Between 80 and 100 catalytic converters were gone. (RP 39. 69, 75) Catalytic converters have platinum in them and the value varies. (RP 40) They can go from $50 all the way to over $300 in value. (RP 39) There were a similar number of radiators. (RP 40) Radiator prices also vary. The aluminum ones are maybe $5 to $8. The copper ones can be between $15 and $35 apiece. (RP 40) Mr. Heistand could not say exactly what the proportion of aluminum to copper radiators was, but he noticed all his copper ones were missing. (RP 37-40) There were also between 100 and 125 wheels taken from a big pile of aluminum rims. (RP 45, 68) All the parts are marked with red paint. (RP 42, 45-46) The sheriff was called and deputies responded. (RP 46-47, 86) Various employees testified about the missing parts. (RP 66-77, 90-95)

In court, the owner, Mr. Heistand, did recognize the defendant as having been in his yard before. (RP 49) Heistand said that Jackson had been there with some neighbors with whom he had had a property dispute. (RP 163) He clearly did not have permission to have stolen auto parts.

(RP 49)

Right away that day, Mr. Heistand's spouse, Kim Bunn, who also manages his office, called core buyers and wrecking yards, trying to find where their property had been taken. (RP 79) She "hit a bingo" when she called CalBag Metals in Tacoma, though some of the property could have gone to other yards which she did not call, as well. (RP 79)

When Ms. Bunn called in June, CalBag metals was able to find the A&A yard numbers on catalytic converters and radiators. (RP 80) These corresponded with numbers Ms. Bunn had on bills of lading. (RP 81-85) Ms. Bunn testified that there had been quite a few parts because the business had 3 months worth of salvage parts piled up. (RP 83-84)

A representative from CalBag, Umberto Munoz, testified that Monday, June 18, he received a phone call from the wrecking yard that indicated some items were stolen. (RP 101-102, 104) He remembered that on Saturday, June 16,when he was working, Mr. Jackson, whom he identified in court, came in with "Eugene" [Swanson], who had been a regular customer, whom he has known for years. (RP 102) Jackson and Eugene brought in some catalytic converters with red marks on them. (RP

103) He was concerned and suspicious of the red markings, and he told Mr. Jackson this. (RP 104) When he got the call on Monday from Mr. Heistand's wrecking yard business, he checked the parts that Mr. Jackson had turned in. They had A&A's wrecking yard numbers on them. (RP 105-108) He had photos from a camera at CalBag identifying Mr. Jackson. (RP 109)

Business records of receipts and video were produced and testified to by CalBag's office manager. (RP 119-136) They showed Mr. Swanson receiving money for the parts that were turned in on June 18. (RP 126) The office manager also testified to the fact that only licensed businesses could be given money of more than $30 immediately. (RP 123) For individuals, any amounts over thirty dollars must be by check, mailed ten days later. (RP 123)

Eugene Swanson testified he has a business account at CalBag Metals. (RP 139) Mr. Swanson was not a core buyer. He did not regularly deal in car parts. He had a property management business. (RP 139) He was allowed to plead guilty to Trafficking in Stolen Property in the Second degree in exchange for his testimony. (RP 141). He has

known the defendant, Mr. Jackson, for years. (RP 141) Because of a law mandating that people who turn in scrap have to wait a minimum of ten days to get their checks unless they are a licensed business, Mr. Jackson would ask him to take scrap in for him, since Mr. Swanson had a business license. (RP 142) He testified that on June 16, Jackson called him in the morning and met him at the CalBag scrap yard with the items in Jackson's little red truck. (RP 142-143). Swanson and Jackson turned the items in for cash and Swanson gave the money to Jackson, after taking 10% for his time. (RP 144) He did remember an employee of the scrap place warning him they were going to flag the items. (RP 145) In retrospect, he obviously wishes he had paid more attention to that. (RP 145)

A sheriff's deputy testified he responded to the burglary and theft call at A&A on June 18. (RP 165) He looked at locks that had been cut off and a piece of fence that had been pulled off. (RP 167-169) He did not spend much time but did follow up by calling CalBag, who had been identified by A&A as having received some of their property. (169-170) He did not call any other scrap places or core buyers. (170) But he did

look at a photo that CalBag had sent of the vehicle associated with A&A's stolen property. He was able to trace the license plate on a red truck to the defendant, John Jackson. (RP 170-172) He was then able to get a driver photo of Mr. Jackson and compare it to the photo of the suspect at CalBag, confirming it looked like Mr. Jackson. (RP 173). He tried to speak to Mr. Swanson and Mr. Jackson but never got hold of them. So he put the report on hold for a detective. (RP 173-174)

The A&A Wrecking Yard was broken into again around the 29th or 30th of October. (RP 47) This time a bunch of tools were gone. (RP 48) More catalytic converters, radiators, and rims were taken. (RP 48, 73) The Heistands called the police again.

Mr. Swanson testified that he did the same procedure in October, meeting Mr. Jackson and turning in car parts. In October, Jackson brought mostly radiators and maybe a couple catalytic converters. (RP 147-148) He took them in on the 29th and again on the 30th. (RP 148, 124)

In October, a detective took it over and finished the investigation.

(RP 183-184)

The defense called no witnesses. (RP 201, 217)

The jury deliberated and found Mr. Jackson guilty of Possession of Stolen Property in the Second Degree and Trafficking in Stolen Property in the First Degree for the June incident, though not for the October incident (CP 51-57) . They were offered a Possession of Stolen Property in the 3rd Degree charge as a lesser for Possession of Stolen Property 2, but they found Mr. Jackson guilty of Possession of Stolen Property 2. (CP 53, 54)

This appeal followed.

III. ARGUMENT

A. There was sufficient evidence to sustain a conviction for Possession of Stolen property in the Second Degree.

The standard for review when sufficiency of the evidence is questioned, is whether a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, when the evidence is viewed in the light most favorable to the State. State v. Bergeron, 105 Wn. 2d (1985). A challenge to the sufficiency of the evidence to support a criminal conviction admits the truth of the State's evidence and all inferences that can be reasonably drawn therefrom. All reasonable inferences must be drawn in favor of the State and most strongly against the defendant. State v. Salinas, 119 Wn. 2d 192 (1992).

In State v. Roth, 131 Wn. App. 556, the court further elucidated "The appellate court does not determine whether *it* believes that the evidence at trial established guilt beyond a reasonable doubt. Rather, the pertinent question is whether any rational trier of fact could have found the essential elements after viewing the evidence in the light most favorable to the State. "State v. Green, 94 Wash.2d 216, 221, 616 P.2d 628 (1980).

When there is substantial evidence, and when the evidence is of such a character that reasonable minds may differ, it is the function and the province of the jury to weigh the evidence, determine the credibility of the witnesses, and decide disputed questions of fact. State v. Theroff, 25 Wash.App. 590, 593, 608 P.2d 1254, *aff'd,* 95 Wash.2d 385, 622 P.2d 1240 (1980). This court must defer to the determinations of the trier of fact on such issues. State v. Fiser, 99 Wash.App. 714, 719, 995 P.2d 107 (2000). In reviewing the sufficiency of the evidence, circumstantial evidence is not considered any less reliable than direct evidence. State v. Delmarter, 94 Wash.2d 634, 638 (1980)."

In assessing the sufficiency of the evidence the trial court must consider all evidence presented to the jury. "Individual pieces of evidence, insufficient in themselves to prove a point, may in accumulation prove it. The sum of an evidentiary presentation may well be greater than its constituent parts." Bourjaily v. United States, 483 U.S. 171, 107 S. Ct. 268, 93 L. Ed 2d 246 (1987)

Turning to the evidence from this case, there was sufficient

evidence for the jury to find the defendant guilty beyond a reasonable doubt of possessing over $750 of stolen parts, if the evidence and reasonable inferences therefrom are looked at in the light most favorable to the state. The jury was entitled to look at all the evidence in the case and consider the totality of circumstances.

The evidence showed Mr. Jackson taking property within hours of its being stolen over to Cal Bag metals. The crime occurred after closing on June 15. (RP26). It is no stretch to conclude it was likely done after dark. Mr. Swanson indicated it was the morning of the 16th that Mr. Jackson called to meet him at CalBag. (RP 142). Exhibit 38 (see CP 9-10) shows the time that payment was made on the 16th from CalBag was 8:42 a.m.. (RP 224 and Exhibit 38). Considering, as the jury must have, that June 16 was likely to stay light for hours after the yard closed, and that the stuff ends up in Tacoma from Ellensburg, two or more hours away, before 8:42 a.m., Mr. Jackson demonstrably has part of the stolen property in his truck at CalBag just a few hours after it was stolen. Also, Mr. Jackson is aware of the wrecking yard and has been seen in it before. (RP 49, 163) It would not be an unreasonable inference to believe that he was

part of the acquisition of stolen property and a principal or accomplice to the possession of all of it. There is no dispute in the evidence that the amount stolen was considerably greater than $750. There were 80 to 100 catalytic converters which cost $55 or more. (RP 39, 69, 75) There were 80 to 100 radiators, ranging from $5 to $35). (RP 40) There were 100-125 rims. (RP 45-46)

The jury was also entitled to consider that Mr. Jackson was in a hurry to get his money. Not only was he there first thing in the morning at Cal Bag, but he arranged for an acquaintance of his who has a business account to meet him there so he could get his money right away, instead of waiting the ten days that ordinary people have to wait from the time they turn in items over $30. (RP 142) Over the course of time, he called Mr. Swanson with more stuff to recycle. Just before the second incident at A&A, which happened on October 30, he is still turning in radiators and catalytic converters with Mr. Swanson. (RP 147-148)

The jury is also able to consider that CalBag was somewhat suspicious even of the amount he brought over, saying something about that to Mr. Swanson. (RP 145) It is highly probable that the next truck

load of stolen property from A&A, which obviously existed, would not have been taken to CalBag that day. But since police did not contact him until October, he would have thought he had gotten away with it for some months. (RP 145-146, plus testimony of officers) There were many other scrap dealers, and they were not all checked by Ms. Bunn (or by the police). (RP 79, 170) Given the short time frame from theft to Mr. Jackson's turning over the property for money,, the fact that Mr. Jackson did come back to Mr. Swanson with more items later, sometimes a couple times a week, sometimes after a month, (RP 147), and given Jackson's familiarity with A&A in the first place, it was not unreasonable for the jury to believe beyond a reasonable doubt that he possessed more of A&A's stolen property than the amount he turned in for cash at this one scrap yard immediately. It is certainly not true that no reasonable jury could believe that under these facts.

The value argument was discussed in great detail in closing argument (RP 234-238) and the $750 was mentioned to the jury over and over. A lesser included instruction was given to the jury for Possession of Stolen Property in the Third Degree. (CP 54) The jury believed from all

the evidence that Mr. Jackson possessed more than $750 of stolen property. (CP 53) As the law in *Theroff* and *Fiser* indicate, when there is substantial evidence of facts and reasonable inferences, even if reasonable minds may differ, the court must defer to the determinations of the trier of fact on such issues. Taking the evidence in the light most favorable to the State, the jury could conclude that Mr. Jackson had to be part of the greater possession of stolen property. There was sufficient evidence for the charge. The total amount of property taken was many thousands of dollars. Considering that Mr. Jackson was seen in possession of one truckload within a few short hours, was in a hurry to convert it into cash, and then over the course of months went back with similar items, getting those converted into cash (totaling well over $750 altogether (RP 236-239 shows some of the math) as well, the jury was reasonable in believing he had possessed more than $750 from this incident.

B. Any incorrect instruction on accomplice liability was harmless error.

Mr. Jackson was charged in the case as a principal or

accomplice, and a jury instruction about accomplice liability was given. Unfortunately, somehow an older version of the instruction was given that had the words 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.
>
> (2) Or
>
> Aids or agrees to aid another person in planning or committing a crime. ...(CP 23)

As defense notes in his Brief of Appellant, the Washington Supreme Court in *State v. Cronin*, 142 Wn.2d 568 (2000) has found that the language "a crime," as it is used in the second paragraph and in subsection (2) improperly departs from the language of the statue, and should be replaced by "the crime," -- which was properly done in subsection (1) -- so that the jury understands that the assistance and mental state must be directed toward committing the crime that is charged and not some uncharged crime.

Although the instruction was in error, it is still subject to harmless error analysis. In *State v. Brown*, 147 Wn.2d at 332, the Court said, "An erroneous instruction is harmless if, from the record in the case, it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." Whether a flawed jury instruction is harmless error depends on the facts of a particular case.

In *State v. Carter*, 154 Wn.2d 71 (2005), a similarly incorrect jury instruction was given.

In *Carter* the Court held,

> "The giving of an erroneous accomplice liability instruction may be found to be harmless even where it is clearly evident that the defendant was convicted as an accomplice based only on his or her knowledge of the crime charged... However, where a defendant is charged with only one crime, a flawed accomplice liability instruction may not be harmless where evidence of uncharged crimes is presented to the jury." *Carter* at 81.

It continued,

> "Where the prosecution neither presents evidence of uncharged crimes nor argues that the jury may base accomplice liability on the defendant's knowledge of any crime other than the one charged, the erroneous accomplice

> instruction may be harmless." *Carter* at 82, and citing also *State v. Stovall*, 115 Wn. App. 650 (2003) and also *State v. Moran*, 119 Wn. App. 197 (2003)

In *Carter*, the court reviewed the record and determined that the State did not present evidence of any uncharged crimes or argue about convicting her based upon any other crimes than the charged ones, so it was satisfied beyond a reasonable doubt that the erroneous accomplice liability jury instruction did not contribute to Carter's conviction.

In *Stovall*, the court placed great weight on the actual argument on the prosecutor. The prosecutor of one of the defendants in that case did argue an uncharged crime, and that case required a reversal and new trial. However as to the other defendant, the prosecutor argued only about the defendant aiding in the commission of *this crime*, which was sufficient for the court to find that the erroneous instruction was harmless error. (*Stovall* at 657-658)

In *Moran*, the Court held that "If there is evidence that a defendant facing multiple charges directly participated as a principal in one of the charged crimes, the difference between "a crime" and "the crime" in the accomplice liability instruction is harmless beyond a reasonable doubt

with respect to those crimes." *Moran* at 212. In *Moran* also, the court looked at the prosecutor's argument. Since the prosecutor only addressed the charged crime during closing argument and did not wrongly emphasize the "a crime" language in the instruction or tell the jury it could find accomplice liability based on an uncharged crime, the court did decide that the error was harmless and did not require reversal.

Turning to this case, then, the State would have to prove that Mr. Jackson's actions promoted the crimes of Trafficking in Stolen Property and Possession of Stolen Property, not some other uncharged crime. In *Cronin*, this was a problem for the State. But in the case of one of *Stovall*'s defendants, in *Moran*, and in the instant case, it is not.

It is clear from the testimony and the argument of both the prosecutor and defense that the only crimes that were planned or committed under the facts were in fact, exactly those crimes that were charged, i.e. Trafficking in Stolen Property and Possession of Stolen Property. Unlike the prosecutor in *State v. Bui (consolidated with Cronin)*, who urged the jury to convict the defendant as an accomplice if he knew his actions would facilitate any crime, (see *Cronin*, above) the prosecutor

here urged and argued only the crimes of trafficking and possession. (See closing argument, RP 219-239) In fact, Mr. Jackson was a principal rather than an accomplice by the facts that were presented, since the only facts the jury heard were that the property was in Mr. Jackson's truck when Mr. Jackson showed up, and that Mr. Jackson called up and requested Mr. Swanson to help him sell the property. Mr. Jackson unloaded the items in the video, and Mr. Jackson got the money from Mr. Swanson at the end. Thus, if Jackson were to be found guilty of the Trafficking, (as he was) it is because he himself trafficked the property, and/or because he solicited or requested Mr. Swanson to traffic the stolen property—soliciting or requesting the crime to occur. In this section of the instruction about soliciting or requesting the crime, the proper word, "the," was used. The jury could not have been confused about accomplice liability with respect to Trafficking in Stolen Property. The only time the prosecutor discussed accomplice liability at all in closing argument with respect to Trafficking, was in urging the jury to find that he had asked Mr. Swanson to sell the property with him. (RP 223-224) The prosecutor said,

> "So if Mr. Swanson is the one that receives the check, it doesn't matter because a person who is guilty of a

> crime is guilty just as – an accomplice is just as guilty as the principal. That's what the instruction told you that. And we have all known that you're just as guilty if you're an accomplice to someone else. You're just as guilty. So any transferring, distributing, dispensing stolen to another person we all know it's bad enough to have stolen property, to take something and use it yourself, but the Legislature has made even a different crime, it's trafficking in stolen property. If you take stuff and then sell it or if you have the stolen property even if you weren't the one that originally took it, if you have some to sell and that's what we have got here...We found it because he trafficked it because he and Mr. Swanson together had trafficked it."

The jury was not invited to find Mr. Jackson had some other crime on his mind. The jury was told Mr. Jackson had committed this crime himself with another person. Mr. Jackson was a principal. Under *Moran* this instructional error was harmless as to Trafficking.

With regard to possession of stolen property, again, the actual evidence showed principal liability with regard to Mr. Jackson. Mr. Swanson never actually or constructively possessed the property at all. Mr. Jackson did. Mr. Swanson merely allowed Mr. Jackson to use Mr. Swanson's business account to be credited with the money for the property, so that Mr. Jackson could be paid immediately. Thus, Mr. Jackson was a principal under all the facts presented to the jury. To the

extent Mr. Jackson might have accomplice liability for any portion of the stolen property at that time in the keeping of other persons, it again is unambiguously a crime involving only possession of stolen property. The prosecutor's argument to the jury about accomplice liability here was:

> "It's not reasonable to think that separate burglaries happened, you know, over the course of time at A&A and that Mr. Jackson only ended up with $473 worth and other people totally unrelated to him and unknown to him stole the others. Now what happens if it took two or 3 people to carry that stuff out and they split all this stuff up and Mr. Jackson took his part or some of his part to be sold at CalBag you still are to find Mr. Jackson an accomplice for the possession of stolen property of all of it. So that's why the State is returning to a higher degree, Stolen Property Second Degree, because he is still an accomplice." (RP 236)

The prosecutor, thus, argued only "the" crime that was charged, even if the instruction said "a" crime in one of its parts. The jury was not asked to find the defendant guilty because he was an accomplice to anything but possession of stolen property.

There is no possibility that the jury convicted Mr. Jackson of either trafficking or possessing stolen property because he was involved as an accomplice to some other crime. The error in submitting the old version of the jury instruction was harmless beyond a reasonable doubt.

C. Possession of Stolen Property in the Second Degree did not merge with Trafficking in Stolen Property in the First Degree.

The doctrine of merger is a rule of statutory construction which only applies where the Legislature has clearly indicated that in order to prove a particular degree of crime the State must prove not only that a defendant committed that crime but that the crime was accompanied by an act which is defined as a crime elsewhere in the criminal statutes. *State v. Vladovic*, 99 Wn.2d 413 (1983) Courts have looked to the two crimes in question to determine whether the offense includes an element not included in the other. *Vladovic* at 423-424.

In the current case, each crime does involve an element which is not included in the other, and proof of one does not necessarily prove the other. The defendant was convicted of Trafficking in Stolen property in the First Degree. This crime required proof that the defendant knowingly sold or transferred property he knew to be stolen to another. This crime does not require that the property be of any particular value.

See RCW 9A.82.010(19) and 9A.82.050. Also, Trafficking may be committed by selling it, as the co-defendant, Mr. Swanson, did, without ever possessing it. On the other hand, Possession of Stolen Property in the Second Degree requires knowing possession of stolen property that had a value of more than $750. See RCW 9A.56.160. It does not require any sort of transfer of property.

The ultimate question is whether the Legislature intended that one must be proven in order to be found guilty of another. The State contends that the legislature did not so intend. Trafficking in Stolen Property can occur with a 50 cent candy bar. But that could not form the basis of Possession of Stolen Property in the Second Degree. In the case at hand, the Legislature has shown no intent to raise the degree of trafficking because of the commission of the Possession of Stolen property, as it has in, for example Rape in the First Degree, which is a higher level crime because it also involves a kidnapping. Thus the crimes should not merge.

IV. CONCLUSION

Since Mr. Jackson was in possession of a truckload of stolen property within a few short hours of its being taken, which was just a small part of a large amount worth well over $750, since he was in a hurry to get this load converted to cash, and since he wasn't caught and over the course of months went back again with similar items to turn those into cash, there was sufficient evidence for the jury to find him guilty of possession of over $750 of stolen property.

Since the prosecutor never argued that the erroneous accomplice liability instruction should lead the jury to find the defendant guilty as an accomplice of anything but the crimes with which he was charged, and since the evidence and argument were directed for the most part toward his liability as a principal, not an accomplice for Trafficking, and for Possession of Stolen Property both, the incorrect instruction was harmless.

Since the Legislature has shown no desire to have Trafficking in Stolen Property in the First Degree require a Possession of Stolen

Property in the Second Degree as proof of an element of Trafficking, and since the two crimes each have elements that are separate from the other, the two crimes should not merge.

Respectfully submitted,

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COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON, Plaintiff/Respondent.	)	No. 32247-5-III PROOF OF SERVICE
vs	)	
JOHN C. JACKSON, Defendant/Appellant.	)	

STATE OF WASHINGTON)
) ss.
County of Kittitas)

The undersigned being first duly sworn on oath, deposes and states:

That on the 11th day of February, 2015, affiant deposited into the mail of the United States a properly stamped and addressed envelope directed to:

Renee S. Townsley, Clerk Court of Appeals Division III 500 N. Cedar St. Spokane, WA 99210	David N. Gasch PO Box 30339 Spokane, WA 99223-3005	John C. Jackson 1502 N. Columbia Blvd. Vancouver, WA 98660

containing copies of the following documents:

(1) Respondent's Brief
(2) Proof of Service

SIGNED AND SWORN to (or affirmed) before me on this 11th day of July, 2014 by Jacob R Schroeder.

NOTARY PUBLIC in and for the
State of Washington.
My Appointment Expires: 09-10-17