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Court of Appeals
Division III
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 33645-0-III

STATE OF WASHINGTON, Respondent,

v.

JILL J. FERGUSON a.k.a. FLECK, Appellant.

APPELLANT'S BRIEF

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I. INTRODUCTION

Jill Ferguson a.k.a. Fleck was convicted of possessing stolen property in the second degree based upon her possession of a used MacBook Air laptop. The sole evidence of the property's value at trial was testimony from a detective that she reviewed some internet websites to determine the value of similar computers, but she did not ever inspect the property and her testimony does not reflect any consideration of its condition or any depreciation based on the computer being used. Trial counsel failed to object to the testimony although it was hearsay and although it was the State's only evidence of an essential element of the charge. Because the evidence of value is insufficient to support the conviction, it should be reversed and a judgment of guilt for possessing stolen property in the third degree, a gross misdemeanor, should be entered.

II. ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR 1: Insufficient evidence supports the conviction for possessing stolen property in the second degree.

ASSIGNMENT OF ERROR 2: Trial counsel's assistance was ineffective in failing to object to inadmissible hearsay testimony about the value of the stolen property.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

ISSUE 1: Does the State fail to establish that property has a value exceeding \$750 in value when it presents only generalized internet market research without any inspection or knowledge of the condition of used property?

ISSUE 2: Is trial counsel ineffective in failing to object to hearsay testimony concerning the market value of stolen property when such hearsay comprises all of the State's proof of an essential element of the charge?

IV. STATEMENT OF THE CASE

Jill Ferguson a.k.a. Fleck¹ was charged with possessing stolen property in the second degree consisting of a 2012 Macbook Air laptop computer. CP 1-2. The laptop was taken from the car of Janet Bressler and David Ulane in January of 2014 while they were eating out downtown. RP 21-22, 24-25. When they discovered the laptop was gone, Ulane locked the computer through iCloud and initiated a tracking service that would report its location when it was turned on. RP 25-26. The

¹ Although this matter is entitled "State v. Jill Ferguson," at the proceedings below, it was clarified that the Appellant goes by the last name of "Fleck" and was referred to as "Jill Fleck" throughout the trial proceedings. RP 5. Accordingly, this brief will refer to her as "Jill Fleck."

computer was traced to Strong Solutions, a computer repair store, a few days later. RP 27.

The owner of Strong Solutions identified Fleck as the individual who brought the laptop in to be serviced, telling him that her children had been playing with it and locked it. RP 30-31. Police contacted Fleck when she returned to the store to pick the computer up and she explained that she had purchased the laptop from a neighbor for \$500 cash. RP 45-47. A man purporting to be the neighbor later called the police to state that he had sold the computer to Fleck after buying it on Craigslist. RP 50-51.

The investigating detective testified that based on several websites including eBay, Craigslist, and some Apple websites, that the value of similar computers was between \$800 and \$1,500. RP 51. However, the detective did not ever examine the computer and consequently was unaware of any particular qualities of the computer that could have affected its value, and conceded that she did not know the computer's exact value. RP 57, 58. The owners of the laptop did not know what its value was. RP 23.

The jury convicted Fleck of possessing stolen property in the second degree and the trial court sentenced her to 30 days on electronic home monitoring. CP 36, 51, RP 152. Fleck now appeals. CP 60.

V. ARGUMENT

The sole issue on appeal concerns the sufficiency of the State's evidence that the value of the 2012 MacBook Air exceeded \$750 to establish the essential element of possessing stolen property in the second degree, and trial counsel's failure to object to the same. In reviewing the sufficiency of the evidence, the court views the evidence in the light most favorable to the State to determine whether any rational trier of fact could find each element proven beyond a reasonable doubt. *State v. Pruitt*, 145 Wn. App. 784, 790, 187 P.3d 326 (2008). In evaluating a claim of ineffective assistance of counsel, the court considers whether the defendant has shown a deficient representation that falls below an objective standard of reasonableness and prejudices the case. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

Possessing stolen property in the second degree is a class C felony requiring proof that the defendant possesses stolen property other than a firearm or a motor vehicle exceeding \$750 in value. RCW 9A.56.160. A conviction requires proof that the defendant possessed the property, the

property was in fact stolen, and the defendant knew the property was stolen. *State v. Plank*, 46 Wn. App. 728, 731, 731 P.2d 1170 (1987).

The value of property is its market value at the time and in the approximate area of the offense, consisting of the price a willing and well-informed buyer would pay a willing and well-informed seller. *State v. Shaw*, 120 Wn. App. 847, 850, 86 P.3d 823 (2004) (citing *State v. Kleist*, 126 Wn.2d 432, 435, 895 P.2d 398 (1995)). A property owner may testify as to the property's value without being qualified as an expert. *State v. McPhee*, 156 Wn. App. 44, 65, 230 P.3d 284 (2010).

Evidence of retail price and price paid may be sufficient to establish value but not if the evidence is too remote in time. *State v. Ehrhardt*, 167 Wn. App. 934, 944, 276 P.3d 332 (2012). When property is used, the State may be required to present evidence of the condition or depreciation of the property to establish their market value. *Id.* at 946. Consequently, the market value of new property will be insufficient to establish the value of used property. *See State v. Morley*, 119 Wn. App. 939, 944, 83 P.3d 1023 (2004).

Here, the evidence of the MacBook Air's value consisted solely of the investigating detective's testimony that "[w]hen I researched it, I believe it was between 800 and \$1,500 depending on which site I went

through, eBay, Craigslist, some Apple websites.” RP 51. But the detective further acknowledged that she never examined the computer, and was unaware of its exact condition and value. RP 57-58. The testimony further does not establish whether the methodology employed by the detective was particularly reliable, or whether it reflected values in the Spokane area for used property as opposed to national markets for older, but unused property.

Furthermore, trial counsel failed to object to the detective’s testimony, which was plainly hearsay. Hearsay is a statement, other than one made by the declarant while testifying, offered in evidence to prove the truth of the matter asserted. ER 801(c). Statements of unknown persons as to prices asked for sales of property are hearsay unless they fall within the exception for market reports and commercial publications, such as the Kelley Blue Book. ER 803(a)(17); *Shaw*, 120 Wn. App. at 851. This is, in part, because price tags often merely establish “the probable range for reasonable negotiations” rather than a firm and fixed price. *Shaw*, 120 Wn. App. at 851 (citing *State v. Rainwater*, 75 Wn. App. 256, 262 n. 7, 876 P.2d 979 (1994)). Nothing in the evidence presented by the State shows that the detective’s internet research would qualify under the “market report” exception to the hearsay rule.

Alternatively, the facts upon which an expert bases an opinion and which is reasonably relied upon by experts in that field can be introduced even if otherwise not admissible in evidence. ER 703. But the State did not qualify the detective as an expert in valuation, nor was any foundation laid as to the detective's internet research methodology to show that it was the type of process and information reasonably relied upon by valuation experts.

Because the valuation evidence presented was hearsay, an objection to its admission should have been sustained. Trial counsel's failure to object therefore constituted an unreasonably deficient performance that prejudiced Fleck. *See State v. McLean*, 178 Wn. App. 236, 246, 313 P.3d 1181 (2013). While failures to object that consist of strategy or trial tactics do not constitute deficient performance, when the court cannot discern a legitimate reason not to object to damaging and prejudicial evidence, deficient performance is shown. *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Here, the detective's hearsay testimony comprised the entirety of the State's case as to an essential element of the felony charge. No conceivable strategic reason exists to effectively concede an element which the State was otherwise unable to prove, particularly when the objection should have

been sustained and the outcome of the trial would have been different. *See id.* at 79-80.

Because the State's evidence was insufficient to establish that the used MacBook Air had a value exceeding \$750 and because trial counsel's deficient performance concerned only the value of the property, the evidence was sufficient to support a conviction for the lesser included offense of possessing stolen property in the third degree, a gross misdemeanor. RCW 9A.56.170. Accordingly, Fleck's felony conviction should be reversed and the cause remanded to enter judgment against her for the gross misdemeanor charge.

VI. CONCLUSION

For the foregoing reasons, Fleck respectfully requests that the court reverse her conviction and remand the cause to enter judgment on the lesser included offense of possessing stolen property in the third degree.

RESPECTFULLY SUBMITTED this 2 day of November,
2015.



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Attorney for Appellant

DECLARATION OF SERVICE

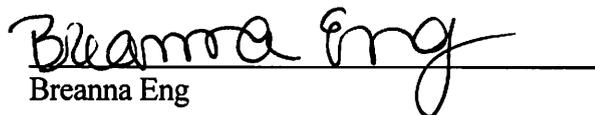
I, the undersigned, hereby declare that on this date, I caused to be served a true and correct copy of Appellant's Brief upon the following parties in interest by depositing them in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

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

Signed this 2nd day of November, 2015 in Walla Walla,
Washington.


Breanna Eng