IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. KARL GEORGE ALLMAN, Appellant.	No. 42008-2-II UNPUBLISHED OPINION

Penoyar, J. — Karl George Allman appeals his jury conviction for second degree theft and his sentence.[1] He contends the evidence was insufficient to sustain his theft conviction and that the State failed to prove his criminal history for sentencing purposes. We affirm his conviction, vacate his sentence, and remand for resentencing.

Facts

On August 6, 2010, Michael Agostini went to his local bank in Tacoma. After parking his car in the bank's parking lot, he saw a man, later identified as Allman, standing on the driver-side front tire of a black 2008 Dodge Ram truck that was parked in the adjacent parking lot. Agostini observed Allman force the driver-side window down, enter the truck, and duck down while inside the truck. Ninety seconds later, Allman got out of the truck and began walking away from the area.

Agostini ran into the bank to find the truck's owner. As he entered, he unknowingly passed by the truck's owner, Benjamin Vrieze, as he left the bank. After discovering that nobody in the bank owned the truck, Agostini saw Vrieze standing outside next to the Dodge Ram

[1] Allman was also convicted on a second degree vehicle prowling charge, but he does not challenge that conviction.

looking upset. Agostini ran outside and told Vrieze what he had seen, gave Vrieze the suspect's description, and pointed Vrieze in the direction where Allman had fled.

Vrieze testified that when he returned to his truck, he noticed that the driver door had been unlocked, that there were smudged finger prints on the top of his window, and that the glove compartment and center console had been opened. He then discovered that personal items were missing from his truck including his Zune (a Microsoft MP3 player), Blue Tooth earpiece, Garmin global positioning system (GPS) device, GPS tracking chip, and connector cables.

Vrieze began searching for the suspect that Agostini had described and saw him walking eastward a few blocks away on 19th and Union. Vrieze called the police on his cell phone as he followed the suspect while driving slowly in the far right lane of traffic. Vrieze observed the suspect playing with the stolen items as he was walking.

Tacoma Police Sergeant Sean Darland, a motorcycle officer, saw Vrieze talking on his cell phone and driving well below the speed limit with his truck's flashers on. Darland activated his lights and pulled behind Vrieze's truck for a routine traffic stop. Vrieze explained that somebody had broken into his truck and pointed out Allman as the culprit, who was walking about 100 yards away from them.

Darland got back on his motorcycle, rode past Allman, made a U-turn, activated his lights, and apprehended Allman at gunpoint. Darland arrested, handcuffed, and searched Allman, finding all of the noted items taken from Vrieze's truck on Allman's person.

On August 9, 2010, the State charged Allman with second degree theft and second degree vehicle prowling. At trial, Agostini, Vrieze, and Darland testified to events as above described. Vrieze also testified that to replace the stolen items it would cost him $199 for the Zune, $483 for

the downloaded music, $279 for the Garmin GPS, $479 for the tracking chip, $49.99 for the Blue Tooth earpiece, and $9.99 for the connector cables. Vrieze stated that he had confirmed all of the prices through a customer service employee at Costco.

The jury found Allman guilty as charged on March 15, 2011. On April 15, 2011, the court sentenced Allman to 22 months in custody for the theft charge, and 365 days for the vehicle prowling charge. Allman appeals his theft conviction and sentence.

analysis

I. Sufficiency

Allman first contends that the State presented insufficient evidence to support his second degree theft conviction. We disagree.

The standard for determining sufficiency of the evidence on appeal is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). In challenging the sufficiency of the evidence, the appellant admits the truth of the State's evidence and all inferences that can reasonably be drawn from it. *State v. McNeal*, 145 Wn.2d 352, 360, 37 P.3d 280 (2002). Circumstantial and direct evidence have equal weight. *State v. Varga*, 151 Wn.2d 179, 201, 86 P.3d 139 (2004). The State bears the burden of proving all the elements of the crime charged, but we will reverse a conviction for insufficient evidence only if no rational trier of fact could find that the State met its burden. *State v. Teal*, 152 Wn.2d 333, 337, 96 P.3d 974 (2004).

Allman specifically argues that the State failed to provide evidence of the fair market value of the used items that had been stolen. In order to prove second degree theft, the State was

required to present evidence that the defendant stole property exceeding $750 in value, but not exceeding $5000 in value. *See* former RCW 9A.56.040(1)(a) (2009). "Value" is defined as "the market value of the property at the time and in the approximate area of the act." Clerk's Papers (CP) at 33 (Instr. 11); *see also* former RCW 9A.56.010(18)(a) (2006). Market value is an objective standard and consists of the price a "well-informed buyer would pay to a well-informed seller." *State v. Longshore*, 141 Wn.2d 414, 429, 5 P.3d 1256 (2000) (quoting *State v. Kleis*t, 126 Wn.2d 432, 435, 895 P.2d 398 (1995)); *State v. Shaw*, 120 Wn. App. 847, 850, 86 P.3d 1194 (2004).

In determining the value of an item, evidence of price paid is entitled to great weight. *State v. Hermann*, 138 Wn. App. 596, 602, 158 P.3d 96 (2007) (citing *State v. Melrose*, 2 Wn. App. 824, 831, 470 P.2d 552 (1970)). The jury can consider changes in the property's condition that would affect its market value. *Hermann*, 138 Wn. App. at 602. Value need not be proven by direct evidence as the jury may draw reasonable inferences from the evidence. *Hermann*, 138 Wn. App. at 602. Evidence of retail price *alone* may be deemed sufficient to establish value. *Longshore*, 141 Wn.2d at 430 (citing *Kleist*, 126 Wn.2d at 436). Proper evidence of market value may include a value established by a nearby place. *Longshore*, 141 Wn.2d at 430.

Here, the evidence was sufficient to place the value of the items stolen from Vrieze's truck in excess of $750. Vrieze stated that he reviewed his purchase receipts before testifying and for each item stolen, he stated what he paid for the item and what it would cost to replace it. The prices he quoted totaled almost $1,500. This evidence, considered in the light most favorable to the State, was sufficient to convict Allman of second degree theft.

Allman relies on *State v. Morley*, 119 Wn. App. 939, 83 P.3d 1023 (2004), but that case does not assist him. The *Morley* court held that evidence of new retail value was insufficient to prove market value under the specific facts of that case. 119 Wn. App. at 943. *Morley* involved attempted theft of a used generator from an equipment rental company, which had purchased the generator at less than retail price, and the item had depreciated in value due to its use as rental equipment. 119 Wn. App. at 940-43. Here, Vrieze purchased the items at issue at retail prices and testified that their condition was like "new" and "flawless." Report of Proceedings (RP) at 87, 89, 90. Only the connecting cables were purchased "used." RP at 91. *See State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (credibility determinations are for the trier of fact and cannot be reviewed on appeal). Under these facts, *Morley* does not apply.

The State presented sufficient evidence for the jury to conclude that the value of the items stolen from Vrieze's truck exceeded $750. Thus, Allman's challenge to his second degree theft conviction fails.

II. Sentencing

Allman argues that the State failed to meet its burden of proving his criminal history at sentencing because the State merely presented a summary of such history, and defense counsel did not stipulate to it.[2] Allman relies on this court's recent decision in *State v. Hunley*, 161 Wn.

[2] At the sentencing hearing, defense counsel made clear that she was not stipulating to the State's summary of Allman's convictions. But defense counsel (confusingly) also indicated that Allman's offender score was eight and his standard range was 17 to 22 months on the second degree theft charge. This was the same score and range that the State advocated.

App. 919, 253 P.3d 448, *review granted*, 172 Wn.2d 1014 (2011). In *Hunley*, the defendant did not acknowledge and did not object to the State's summary of his criminal history at sentencing. 161 Wn. App. at 924. *Hunley* rejected the notion that a prosecutor's summary of defendant's criminal history could establish prima facie evidence of defendant's criminal history for sentencing purposes, or that defendant's failure to object to that summary constituted acknowledgement of such history. 161 Wn. App. at 928. Specifically, a majority of the *Hunley* panel held "the 2008 amendments to RCW 9.94A.500(1) and RCW 9.94A.530(2) [which provided for the prima facie showing and acknowledgement as expressed above] cannot constitutionally convert a prosecutor's 'bare assertions' into evidence or shift the burden of proof by treating the defendant's silence as acknowledgement." 161 Wn. App. at 929. The *Hunley* court vacated the defendant's sentence and remanded for resentencing, permitting the State to present evidence of defendant's past convictions. 161 Wn. App. at 929.

Allman contends that, absent the defense's stipulation, *Hunley* requires the State to present evidence of his criminal history, which the State failed to do in his case. In response, the State concedes that it did not satisfy its burden to prove Allman's criminal history by a preponderance of the evidence as required in *Hunley*. The State agrees that the appropriate remedy is to vacate Allman's sentence and remand for resentencing, at which time the State may present proof of Allman's criminal history. *See Hunley*, 161 Wn. App. at 929-30. In light of the State's concession, and consistent with *Hunley*, we vacate Allman's sentence and remand for resentencing, at which time the State may present evidence of Allman's criminal history.

We affirm Allman's convictions, vacate his sentence, and remand for resentencing consistent with this opinion.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Penoyar, J.

We concur:

Quinn-Brintnall, J.

Van Deren, J.