**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

| | |
|---|---|
| COMMONWEALTH OF PENNSYLVANIA,<br><br>Appellee<br><br>v.<br><br>JARRET BUSH,<br><br>Appellant | IN THE SUPERIOR COURT OF PENNSYLVANIA<br><br><br><br><br><br><br>No. 703 EDA 2012 |

Appeal from the Judgment of Sentence December 12, 2011
In the Court of Common Pleas of Delaware County
Criminal Division at No(s): CP-23-CR-0003724-2011

BEFORE: BENDER, J., LAZARUS, J., and COLVILLE, J.*

MEMORANDUM BY BENDER, J. Filed: February 22, 2013

Jarret Bush (Appellant) appeals from the judgment of sentence of 33 to 66 months' incarceration plus $10,382.10 in restitution following a jury trial at which Appellant was found guilty of receiving stolen property. Appellant challenges the weight and sufficiency of the evidence and also alleges errors relating to his sentence and the restitution imposed. We vacate and remand.

The trial court set forth the factual overview of this matter as follows:

> The following evidence was presented during trial: on March 13, 2011, the Newtown Square office of Automated Card Systems ("ACS"), a systems integrator for identity and identification products, was burglarized. The burglar(s) smashed in the exterior glass door to the office and an interior door and removed multiple printers, including three secure printers that

---

* Retired Senior Judge assigned to the Superior Court.

create secure identification cards for federal and state governments. They also stole several computer monitors, printer supplies and a camera.

While investigating the break-in, ACS's vice-president, Hugh Donnelly, observed Bush walking past the office, which is in a relatively remote location. Donnelly thought Bush was merely exercising until he saw him again pass by in the opposite direction, peering into the office. Donnelly pursued Bush and saw him run up a path and leave an adjoining parking lot in a black Cadillac.

On March 26, 2011, an ACS serviceman told Donnelly that an SP-75 printer (one of the secured printers) was on sale on Craigslist. Using a false name ("Bud Cody"), Donnelly responded to the advertisement and requested the printer's configuration number, which would identify the printer as a secure driver's license model. Donnelly received an e-mail reply from T.Munston@gmail.com that "these machines are priced to sell by week's end" along with a photograph of the configuration label confirming that the printer was one of the stolen secure printers. Donnelly contacted Detective Newell of the Newtown Township Police Department, who instructed Donnelly to continue e-mailing T.Munston to obtain additional information about the printers and the suspect.

Posing again as "Bud," Donnelly e-mailed an offer to purchase the printer for $3,000 by the end of the week. In response, T.Munston inquired whether "Bud" designed identifications and stated that he had three units for $3,200, cash only. "Bud" answered that he was in the business of printing insurance cards for union health plans and offered to purchase all three machines for $7,500 in cash. Eventually, "Bud" and T.Munston agreed to meet at Springfield Mall on March 31, 2011 to exchange the three units for $7,500 in cash. On March 30th, "Bud" gave T.Munston an undercover phone number provided by Detective Newell and asked that he call that evening to finalize the details of the meeting.

Detective Newell served a search warrant on Craigslist for information concerning the printer advertisement. He learned that a Ted or Theo Munston had opened the Craigslist account that posted the advertisement and the phone number associated with the posting. A second warrant served on Verizon revealed

that the phone number's subscriber was Patricia Bush, the defendant's mother.

On the evening of March 30th, Detective Newell received a call on the undercover phone from Patricia Bush's cellphone. The caller identified himself as "Josh." The two agreed to meet at Springfield Mall the next morning and discussed the intended use of the printers. When Detective Newell expressed concern that the printers were stolen or might not work, Josh replied that the printers were not stolen, and that he owned a computer company and was trying to sell these printers to make room for new inventory. He also stated that he would bring an electric converter to demonstrate that the printers worked.

On the morning of March 31st, police officers set up surveillance in the parking lot of Springfield Mall where the transaction was supposed to take place. Detective Newell observed Bush drive by with large printer boxes in the back seat of his car. The men spoke via telephone, and Bush informed the detective that he now wanted to meet across the street at the Olde Sproul Shopping Center. Detective Newell moved to the Olde Sproul Shopping Center and contacted Bush to tell him his position in the parking lot.

Bush arrived at the new location and removed the printers from his car. Detective Newell inspected the serial numbers, confirmed that the printers were the stolen units, and signaled the other officers to arrest Bush. Following his arrest, Donnelly identified Bush and his vehicle as the man and car he had seen near ACS's office on March 13th. Donnelly also identified the printers and other items found in Bush's car as stolen from ACS's office. The police recovered everything from Bush's car that had been stolen during the burglary except a CP-80 printer and a G-9 camera. They found the box for the G-9 camera in the trunk of the car.

Detective Newell recovered an Android phone in Bush's possession whose saved contacts included the "Bud Cody" alias used by the detective and Donnelly. The phone had three associated e-mail addresses (T.Munson@gmail.com, JarrettBush@yahoo.com, and JarrettBush@hotmail.com) as well as saved copies of the photographs of the printer e-mailed to Donnelly on March 26th.

Trial Court Opinion (T.C.O.), 6/12/12, at 2-5 (citations to the record omitted).

After a jury trial, Appellant was found guilty of receiving stolen property, but not guilty of criminal trespass. Following sentencing, Appellant filed post-sentence motions that were denied. He then filed the instant appeal and a timely concise statement of matters complained of on appeal pursuant to Pa.R.A.P. 1925(b). Appellant now raises four issues for our review:

> 1. Was the [v]erdict of [g]uilt against the weight of the evidence?
>
> 2. Was there insufficient evidence to convict [Appellant] of [r]eceiving [s]tolen [p]roperty?
>
> 3. Did the trial [c]ourt [a]buse its discretion by ordering $10,382.10 of restitution?
>
> 4. Did the trial court abuse its discretion in determining the value of the alleged received stolen property as an amount greater than $25,000?

Appellant's brief at 6.

We begin by first addressing Appellant's second issue, wherein he claims that the evidence was insufficient to convict him of the crime of receiving stolen property.

> In reviewing a sufficiency of the evidence claim, we must determine whether the evidence admitted at trial, as well as all reasonable inferences drawn therefrom, when viewed in the light most favorable to the verdict winner, are sufficient to support all elements of the offense. ***Commonwealth v. Moreno***, 14 A.3d 133 (Pa. Super. 2011). Additionally, we may not reweigh the evidence or substitute our own judgment for that of the fact

> finder. ***Commonwealth v. Hartzell***, 988 A.2d 141 (Pa. Super. 2009). The evidence may be entirely circumstantial as long as it links the accused to the crime beyond a reasonable doubt. ***Moreno, supra*** at 136.

***Commonwealth v. Koch***, 39 A.3d 996, 1001 (Pa. Super. 2011).

As noted, Appellant's sufficiency argument relates to his conviction for receiving stolen property, a crime that is discussed at length by this Court in ***Commonwealth v. Parker***, 847 A.2d 745 (Pa. Super. 2004).

> In order to convict a defendant for receiving stolen property, the Commonwealth must prove: "(1) the property was stolen; (2) the defendant was in possession of the property; and (3) the defendant knew or had reason to believe the property was stolen." ***Commonwealth v. Foreman***, 797 A.2d 1005, 1011 (Pa. Super. 2002) (citing ***Commonwealth v. Matthews***, 429 Pa. Super. 291, 632 A.2d 570, 571 (1993)).
>
> > [A] permissible inference of guilty knowledge may be drawn from the unexplained possession of recently stolen goods without infringing upon an accused's right of due process or his right against self-incrimination, as well as other circumstances, such as the accused's conduct at the time of arrest. Nonetheless, the mere possession of stolen property is insufficient to prove guilty knowledge, and the Commonwealth must introduce other evidence, which can be either circumstantial or direct, that demonstrates that the defendant knew or had reason to believe that the property was stolen. This additional evidence can include the nature of the goods, the quantity of the goods involved, the lapse of time between possession and theft, and the ease with which the goods can be assimilated into trade channels. Further, whether the property has alterations indicative of being stolen can be used to establish guilty knowledge. Finally, even if the accused offers an explanation for his possession of stolen property, the trier of fact may consider the possession as unexplained if it deems the explanation unsatisfactory.

***Foreman***, 797 A.2d at 1012-1013, 797 A.2d at 1012-1013.

***Id.*** at 751 (footnote and some citations omitted). ***See also Commonwealth v. Newton***, 994 A.2d 1127, 1132 (Pa. Super. 2010) ("Guilty knowledge … may be proved by circumstantial evidence.").

Specifically, Appellant claims that although the Commonwealth proved that Appellant was in possession of the stolen items, it had not proven that Appellant knew or should have known that the items were stolen. To support this allegation, Appellant contends that because the black man who was walking around the property was unidentified, it does not follow that that person was Appellant. Rather, Mr. Donnelly only identified Appellant as one of the men in the Cadillac, not the man peering into and walking by the ACS office. Thus, Appellant claims that although he was in possession of the items two weeks after they were stolen, there was no direct or circumstantial evidence to prove that he knew or should have known the goods were stolen.[1]

---

[1] Appellant also argues that the Commonwealth did not prove that the items in Appellant's possession were in fact stolen. Instead, he argues that Mr. Donnelly did not claim title to the goods, which were allegedly owned by the state of Delaware. Appellant does not cite any support for the proposition that only the person or entity who has title to the stolen items can properly verify that the goods were stolen. Mr. Donnelly, as the vice president of ACS, identified the items that were removed from ACS's office without permission. That testimony is sufficient to prove that the goods recovered from Appellant were the stolen goods.

Although no testimony definitively identified the individual who walked back and forth in front of ACS's location, the premises was in a remote location and the break-in occurred on the weekend when no other vehicles were in the parking area. Mr. Donnelly's brother followed the unidentified man toward the parking lot and Mr. Donnelly saw Appellant in the Cadillac as it was leaving the parking lot adjacent to the building that housed ACS. Therefore, it is evident that Appellant was seen in the vicinity of ACS shortly after the break-in had occurred, was the same individual who met Detective Newell at the shopping center, and was attempting to sell the stolen items on Craigslist two weeks after the break-in. In considering the evidence in the light most favorable to the Commonwealth and giving deference to the credibility determinations made by the jury, we conclude that the evidence was sufficient to support Appellant's conviction for receiving stolen property.

Next, we address Appellant's contention that his conviction was against the weight of the evidence.

> A claim alleging the verdict was against the weight of the evidence is addressed to the discretion of the trial court. Accordingly, an appellate court reviews the exercise of the trial court's discretion; it does not answer for itself whether the verdict was against the weight of the evidence. It is well settled that the jury is free to believe all, part, or none of the evidence and to determine the credibility of the witnesses, and a new trial based on a weight of the evidence claim is only warranted where the jury's verdict is so contrary to the evidence that it shocks one's sense of justice. In determining whether this standard has been met, appellate review is limited to whether the trial judge's discretion was properly exercised, and relief will only be granted where the facts and inferences of record disclose a palpable abuse of discretion.

***Commonwealth v. Houser***, 18 A.3d 1128, 1135-1136 (Pa. 2011) (citations and internal quotation marks omitted).

In arguing his weight claim, Appellant's brief simply reiterates the same arguments he presents as to the sufficiency of the evidence. Appellant preserved his weight of the evidence challenge by raising it in a post-sentence motion. ***See*** Pa.R.Crim.P. 607 (weight of evidence claims must be raised before the trial court in a motion for a new trial to be preserved for appellate review). However, his contention that there was no proof as to certain elements of the crime of receiving stolen property goes to the sufficiency of the evidence, not the weight. ***See Commonwealth v. Hunter***, 768 A.2d 1136, 1143 (Pa. Super. 2001) (quoting ***Commonwealth v. Widmer***, 744 A.2d 745, 751-52 (Pa. 2000) ("A motion for a new trial on the grounds that the verdict is contrary to the weight of the evidence, concedes that there is sufficient evidence to sustain the verdict.")). We thoroughly assessed the sufficiency of the evidence, ***supra***, and determined that Appellant's conviction must be upheld. After examining the record pursuant to that review, we conclude that the trial court's verdict does not shock our sense of justice.

Appellant's third and fourth issues concern the amount of restitution imposed by the court at sentencing and the value of the stolen property as it relates to what the proper offense gravity score should be. The trial court conceded that the $10,382.10 restitution amount was imposed in error

under 18 Pa.C.S. § 1106, because Appellant was only convicted of receiving stolen property and acquitted of criminal trespass. The court acknowledges that under section 1106, the restitution amount should have been $1,199.50. ***See*** T.C.O. at 9. Therefore, the court requested that we vacate Appellant's sentence and remand for resentencing, stating:

> To correct this problem, the Court should impose a sentence of probation on remand in addition to Bush's prison sentence. As a condition of probation, the Court may order the defendant "to make restitution of the fruits of his crime or to make reparations, in an amount he can afford to pay, for the loss or damage caused thereby." 42 Pa.C.S. § 9754(c)(8). Unlike § 1106, § 9754 does not require a direct nexus between the defendant's crime and the victim's damages; restitution is available under § 9754 for more indirect injuries. The Superior Court has analyzed the distinction well:
>
> > [C]onsistent with the broader discretion granted to a sentencing court that chooses to impose restitution as a condition of parole, 42 Pa.C.S § 9754(c)(8) vests the court with an equally broad power to determine what the fruits of the crime are. This is considerably different than the language of 18 Pa.C.S. § 1106 which permits restitution only for losses that are a direct result of the crime. The more liberal language of § 9754(c)(8) is understandable given the purposes of rehabilitation … as long as the trial court is satisfied that restitution is being ordered so that the appellant will understand the cruelty of her conduct, be deterred from repeating the conduct, be encouraged to live in a responsible manner, and be able to pay these costs.
>
> *Commonwealth v. Popow*, 844 A.2d 13, 20 (Pa. Super. 2004) (citing also *Commonwealth v. Harner*, 533 Pa. 14, 617 A.2d 702, 707 n. 3 (1992)); *see also Commonwealth v. Kelly*, 836 A.2d 931, 933-34 (Pa. Super. 2003) (defendant convicted of receiving stolen property could be ordered, as condition of probation, to

> pay restitution in amount of repairs to victim's truck from which items had been stolen, even though he did not actually break into truck; where restitution is imposed [as] a condition of probation, required nexus between crime and victim's damages is relaxed).

T.C.O. at 9-10. Accordingly, we will vacate Appellant's judgment of sentence and remand for resentencing.

With regard to Appellant's claim that his offense gravity score should have been 5 rather than 6, we note that the court indicated that "defense counsel repeatedly conceded that the aggregate theft amount exceeded $25,000." T.C.O. at 8. Our review of the record does not reflect this acquiescence. Defense counsel discussed values, indicating that at most the aggregate total could reach $25,500, but further stated that without receipts only an approximation was possible. N.T. Sentencing, 12/12/11, at 15-17. Then, counsel stated "I will concede that the value is more than $2,500, but at this point there has been no factual determination that the value of specifically what was Receiving Stolen Property was at [$]25,000." ***Id.*** at 16.[2] Appellant further argues that the court's conclusion that the value exceeded $25,000 was based upon Mr. Donnelly's testimony without any documentation. In light of this discussion as to valuation of the stolen property and because we are remanding for the purpose of correcting the

---

[2] The trial court noted that an offense gravity score of 5 results in a standard sentencing guideline range of 12-17 months and that a score of 6 relates to a standard guideline range of 21-27 months. ***See*** T.C.O. at 8.

restitution imposed, we likewise direct that the court review the valuation and its impact on the offense gravity score. Accordingly, we are compelled to vacate Appellant's judgment of sentence and we remand this matter for resentencing.

Judgment of sentenced vacated. Case remanded for resentencing. Jurisdiction relinquished.

Judge Colville concurs in the result.