IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. ARTHUR O'NEAL, Appellant.	)	No. 62964-6-I
	)	DIVISION ONE
	)	UNPUBLISHED OPINION
	)	FILED: November 29, 2010

Becker, J. — Arthur O'Neal bought a stolen digital camera and later sold the camera to a pawn shop. O'Neal was charged with first degree trafficking in stolen property but was convicted of the lesser included offense of trafficking in stolen property in the second degree. On appeal, he argues insufficiency of the evidence. We affirm.

FACTS

The key testimony is summarized in a narrative report of proceedings because the court reporter lost his notes.

Marilou Shrinker testified that her house was burglarized on July 30, 2007, and that her digital camera and camera lens were stolen.[1] She said she

[1] For simplicity, we refer to the digital camera and camera lens in the rest of the opinion as one item ("camera").

had bought the camera for at least several hundred dollars. She did not know O'Neal or know how he came to possess her camera.

Perry Bloch, owner of a pawnshop called Palace Jewelry and Loans, testified that O'Neal pawned the camera to him on August 20, 2007. He said that O'Neal had been a customer since at least 2004 and had redeemed and then repawned items on a couple of occasions. O'Neal had never pawned a stolen item before. Bloch said he was contacted by the police and informed that the camera was stolen. When O'Neal came back in November 2007 and tried to redeem the camera, Bloch informed O'Neal the camera could not be redeemed because it was stolen. O'Neal appeared surprised.

Officer Tara Hirjak, who investigated the case, testified O'Neal was never a suspect in the burglary where the camera was stolen. She spoke to O'Neal on the phone three times—once on January 3, 2008, and twice on January 10, 2008. O'Neal told her he had pawned the camera. He said he bought the camera from Terry Miller for about $100, although he was initially reluctant to do so because he thought the camera might be stolen. O'Neal provided a phone number and address for Miller. Officer Hirjak tried to call Miller but was unsuccessful in contacting him; she never went to Miller's address.

Detective Edwards testified about how goods sold at pawn shops are monitored. He reported he verified the "hit" on the camera and placed a hold on it at Palace Jewelry and Loan. Detective Edwards had no contact with O'Neal.

O'Neal testified in his own defense. He said he was unemployed and he

spent most of his days helping out people he knew, especially elderly people. He said he knew a Charles Miller and that he knew of Charles' brother, Terry Miller. He knew Terry Miller as "T." O'Neal testified he was not interested in getting to know T. T had approached O'Neal about purchasing the camera. O'Neal said he was not initially interested in buying the camera, but T approached him again about the camera and eventually O'Neal bought the camera for $100. O'Neal reported he was just trying to be a friend to T because he thought highly of T's brother, Charles Miller. He thought T would come back and buy the camera back from him. In the meanwhile, he would just hold it for him.

O'Neal testified he had never seen a digital camera before, but thought it was something nice, and so he put it in the pawn shop for safekeeping and to get a little money. He had been going to the pawn shop for three or four years, and he pawned items when he was short on cash. He knew pawn shops check to see if items are stolen. He said when he learned from Bloch that the camera was stolen, he was "shocked" and "blown away." O'Neal confirmed he had spoken to a female police officer but could not remember her name.

The jury heard closing arguments and was given its instructions on November 10. The jury was given the following to convict instruction for trafficking in stolen property in the second degree:

> To convict the defendant of the crime of trafficking in stolen property in the second degree, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> 1) That during a time intervening between August 20,

> 2007 and October 9, 2007, the defendant recklessly sold or transferred or distributed or dispensed or otherwise disposed of stolen property to another person, knowing that the property was stolen, and
>
> 2) That the property was stolen property; and
>
> 3) That the defendant acted with intent to sell or transfer or distribute or dispense or otherwise dispose of the property to another person; and
>
> 4) That the acts occurred in the State of Washington.

The first degree instruction varied only in that it used "knowingly" rather than "recklessly" in element 1.

After the jury was instructed, the prosecutor had a side bar with the court regarding instruction 14. After closing arguments, the court reported what occurred at the side bar. The court said that the prosecutor had challenged the requirement that the defendant know the property was stolen. The court found, and the prosecutor agreed, that the challenge came too late. The prosecutor had not objected to instruction 14 on this basis earlier when the parties were going over the instructions with the court.

At 2:20 p.m. on November 10, 2008, the jury inquired into the to convict instruction for trafficking in stolen property in the second degree:

> Instruction # 14 element # 1 states "knowing that the property was stolen." Is this wording correct?
> We drew a distinction between 1st & 2nd degree based on "knowing" vs. "recklessly." Yet it appears even 2nd degree requires knowledge. Is this correct?

The court responded at 2:41 p.m. by telling the jury to "Reread your instructions."

The jury found O'Neal guilty of the lesser included offense of trafficking in stolen property in the second degree.

The court sentenced O'Neal, who had no prior criminal history, to the lowest end of the standard range and converted the jail time to 232 hours of community service. The judge remarked she was "sorry this case was ever brought. . . . It is hard for me to reprimand Mr. O'Neal for essentially trying to be a nice guy. And it is really hard for me to believe that this is what the legislature had in mind when they were thinking about trafficking."

O'Neal appeals. He argues there was insufficient evidence to find him guilty of trafficking in stolen property in the second degree.

In determining whether there is sufficient evidence to support a conviction, the test 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). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. Salinas, 119 Wn.2d at 201. In reviewing the evidence, we leave credibility determinations to the fact finder and do not review them on appeal. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). A trier of fact may properly render a guilty verdict based on circumstantial evidence alone, even if the evidence is also consistent with a hypothesis of innocence. State v. Kovac, 50 Wn. App. 117, 119, 747 P.2d 484 (1987). Retrial following reversal for insufficient evidence is unequivocally

prohibited and dismissal is the remedy. State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998).

Pawning a stolen item comes within the definition of trafficking. See State v. Hermann, 138 Wn. App. 596, 604, 158 P.3d 96 (2007). ("Evidence that a defendant knowingly pawns stolen goods is sufficient to support a charge of trafficking in stolen property."). It was undisputed that O'Neal pawned a stolen camera. The issue was whether O'Neal acted recklessly in doing so, knowing that the camera was stolen.

Jury instructions not objected to become the law of the case. Hickman, 135 Wn.2d at 102. "In criminal cases, the State assumes the burden of proving otherwise unnecessary elements of the offense when such added elements are included without objection in the 'to convict' instruction." Hickman, 135 Wn.2d at 102. The statute defining the crime of trafficking in stolen property in the second degree does not include the phrase "knowing it was stolen." RCW 9A.82.055(1). While the State did object to instruction 14 after the jury was instructed, the court found this objection came too late. The prosecutor herself agreed it was too late. No error is assigned on appeal by the State to this ruling. We assume, without deciding, that the State was required to prove in this case not only that O'Neal acted recklessly in pawning the camera but also that he knew it was stolen.

The jury was instructed on recklessness in instruction 15:

> A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a wrongful act may

> occur and the disregard of such substantial risk is a gross deviation from conduct that a reasonable person would exercise in the same situation.
>
> Recklessness also is established if a person acts intentionally or knowingly.

The jury was instructed on knowledge in instruction 8:

> A person knows or acts knowingly or with knowledge when he or she is aware of a fact, circumstance or result which is described by law as being a crime, whether or not the person is aware that the fact, circumstance or result is a crime.
>
> If a person has information which would lead a reasonable person in the same situation to believe the facts exist which are described by law as being a crime, the jury is permitted but not required to find that he or she acted with knowledge.
>
> Acting knowingly or with knowledge also is established if a person acts intentionally.

There was evidence tending to show that O'Neal was simply ignorant of the fact that the camera was stolen, including his own testimony that he was "shocked" and "blown away" when he learned it was stolen. But the test is not whether the jury could have reached a different result; it is whether there was sufficient evidence to support the jury's verdict. The jury could conclude O'Neal had information that would lead a reasonable person to believe the camera was stolen. They could find that a reasonable person would know the camera would cost more than $100 and a reasonable person would know that buying an item on the street from a stranger necessarily carries a substantial risk that the item is stolen property. O'Neal knew the seller, T, only well enough to know he did not want to be friends with him. O'Neal bought the camera from T "on the street" even though he admitted it occurred to him the camera might be stolen. Based

on this information, and deciding not to take O'Neal's testimony at face value, the jury could find that O'Neal knew the camera was stolen.

If O'Neal knew the camera was stolen, it follows that he knew and disregarded a substantial risk that he would be transferring stolen property when he pawned the item.

Affirmed.

Becker, J.

WE CONCUR:

Dwyer, C.J.

Cox, J.