IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Respondent on Review, v. SUNIE SHAWN WATERHOUSE, Defendant-Appellant, Petitioner on Review.	Washington County Circuit Court No. D121196M CA A153037 SC S062799

BRIEF ON THE MERITS OF RESPONDENT ON REVIEW, STATE OF OREGON

Review of the Decision of the Court of Appeals
on Appeal from a Judgment
of the Circuit Court for Washington County
Honorable GAYLE NACHTIGAL, Judge

Opinion Filed: October 15, 2014
Authored: Nakamoto, J.
Before: Armstrong, Presiding Judge, and Nakamoto, Judge, and Egan, Judge..

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BRIEF ON THE MERITS OF RESPONDENT ON REVIEW, STATE OF OREGON

INTRODUCTION

A jury convicted defendant of theft after he sneaked into a fenced facility in the middle of the night and stole a truckload of scrap metal. This case requires the court to decide whether the state introduced sufficient evidence that the stolen items had some market value so as to constitute "property" under the theft statute. The state and defendant largely agree on the correct interpretation of the statutory provisions at issue; their conclusions differ only as to whether the state met its evidentiary burden here. But, to survive defendant's motion for a judgment of acquittal, the state need only have introduced evidence from which a rational trier of fact could reasonably infer that the truckload of scrap metal had some above-zero market value. The state met that burden here.

QUESTION PRESENTED AND PROPOSED RULE OF LAW

Question Presented

Under ORS 164.015, a person commits theft when he or she takes the "property" of another. What evidence must the state introduce to show that stolen items constitute property?

Proposed Rule of Law:

Evidence from which a rational trier of fact could reasonably infer that a stolen item had some above-zero market value—in other words, that the item is

not completely worthless—establishes the "property" element of theft. When the state introduces evidence that a defendant stole a truckload of large metal items from a scrap metal bin, that a recycling company routinely picks up the bin when it is full and pays the victim company for the items contained therein based on type of metal and weight, that the victim company chose to place the items at issue in the scrap metal bin instead of the trash, and that defendant went through the hassle of sneaking into the fenced facility in the middle of the night to steal those items, a reasonable juror could conclude beyond a reasonable doubt that the items stolen had some above-zero market value.

STATEMENT OF MATERIAL FACTS

Defendant and a companion drove into a fenced microchip manufacturing facility in the middle of the night and loaded their pickup with scrap metal from a drop box on the property. (Tr 24-27, 31-33). They took a variety of metal items, including a chair, a shelving unit, gutters, and "some other heavier items." (Tr 32). A security guard saw what was happening and called 9-1-1. (Tr 28). Defendant and his companion then tried to drive away with their headlights turned off. (Tr 47). A police officer apprehended them as they attempted to leave the facility. (Tr 47).

The state charged defendant with third-degree theft, a Class C misdemeanor. At trial, the security guard testified that a recycling company routinely picked up the drop box when it was full and paid the microchip

company "for the value of the metals that were in there." (Tr 33). The precise amount paid depended upon the types of metal and weights of the items in the bin. (Tr 33, 41).

At the close of the state's case, defendant moved for a judgment of acquittal, arguing that the state had introduced insufficient evidence that the items taken had value. (Tr 66-68). The trial court denied the motion, noting that "[i]n the light most favorable to the State there's more than sufficient evidence to send it to the trier of fact." (Tr 68). The jury ultimately convicted defendant of one count of third-degree theft. (Tr 118-119).

Defendant appealed, arguing that the trial court erred in denying the judgment of acquittal because the state failed to introduce sufficient evidence that the items taken had value.[1] The Court of Appeals affirmed. *State v. Waterhouse*, 266 Or App 346, 352, 337 P3d 195 (2014), *rev allowed*, 357 Or 111 (2015). In doing so, the court noted that, "evidence showing that a stolen item has *some* market value—*i.e.*, not *no* market value—is sufficient to prove that the item has the requisite value to support a conviction for theft in the third degree, whether or not the *specific* market value of the item is proved." *Id.*, 266 Or App at 350. The court then concluded that the evidence here, viewed in the

[1] Defendant also argued that the state failed to introduce sufficient evidence of intent, an argument that he does not renew before this court.

light most favorable to the state, "was sufficient to permit a reasonable juror to find that there was a market for the stolen items and that, thus, they had some market value that was not merely speculative." *Id.* at 351-52.

SUMMARY OF ARGUMENT

Under ORS 164.015, to constitute theft, the items stolen must be "property." "Property," in turn, is any article, substance, or thing of value. "Value" generally means the market value of the item at the time and place of the crime. And "market value" is the amount at which both buyers and sellers are willing to do business. Accordingly, to prove that an item is property, the state must show that it had some above-zero market value at the time and place of the crime—in other words, that the item was not worth nothing.

Here, the state introduced sufficient evidence to permit a reasonable juror to find that the items taken had some above-zero market value. The state introduced evidence that defendant stole a truckload of large metal items from a scrap metal bin, that a recycling company routinely picks up the bin when it is full and pays the victim company based on the types of metal and weights of the items, that the victim company chose to place the items at issue in the scrap metal bin instead of the trash, and that defendant went to considerable lengths to sneak into the fenced facility in the middle of the night to steal those items. That evidence, viewed in the light most favorable to the state, would allow a rational juror reasonably to infer that the items taken had some above-zero

market value. Accordingly, because the state introduced sufficient evidence that the items taken constituted property under the theft statute, the trial court correctly denied defendant's motion for a judgment of acquittal.

That conclusion should dispose of the case, and this court need not consider defendant's second question presented. Under ORS 164.115(5), if the value of an item cannot be ascertained with specificity, it is presumed to be less than $50. But the state does *not* contend that it may rely on that presumption in the absence of evidence that the items taken had some value. Accordingly, if this court agrees that the state introduced sufficient evidence that the items taken had some above-zero market value, then it should affirm; if not, it should vacate defendant's conviction.

ARGUMENT

The ultimate question that this case presents is whether the state introduced sufficient evidence that the items taken were property, which is an element of the crime of theft under ORS 164.015. As explained in greater detail below, to satisfy that element, the state needed only to show that the items had some above-zero market value, and the state did so here.

A. The state introduced sufficient evidence that the items taken were property.

1. To prove that an item is "property" under ORS 164.015, the state must generally introduce evidence that the item has some above-zero market value.

The state generally agrees with the statutory analysis contained in pages 7 through 16 of defendant's brief on the merits. For completeness, the state will briefly outline the analysis here.

When interpreting a statutory provision, this court applies the methodology set forth in *State v. Gaines*, 346 Or 160, 206 P3d 1042 (2009). Thus, this court looks first to the statute's text, context, and legislative history, and then, if necessary, it resorts to general maxims of statutory construction. *Gaines*, 346 Or at 172. The "paramount goal" of statutory interpretation is to determine the legislature's intent. *Id.* at 171.

A person commits theft when, with the "intent to deprive another of property," the person takes that property from its owner. ORS 164.015(1). "Property" means "any article, substance or thing of value[.]" ORS 164.005(5); *see also State v. Whitley*, 295 Or 455, 459, 666 P2d 1340, 1342 (1983) (to prove that an item was "property," state had to show that it had "value"). "Value," in

turn, is defined as "the market value of the property at the time and place of the crime[.]"[2] ORS 164.115(1).

"Market value" is not defined in the statute. The ordinary meaning at the time the legislature enacted ORS 164.115(1) was "a price at which both buyers and sellers are willing to do business." *Webster's Seventh New Collegiate Dictionary* 518 (1970); *see also Webster's Third New Int'l Dictionary* 1383 (unabridged ed 2002) (defining "market value" as "a price at which both buyers and sellers are willing to do business **:** the market or current price."); *State v. Dickerson*, 356 Or 822, 829, 345 P3d 447 (2015) ("When the legislature does not provide a definition of a statutory term, we ordinarily look to the plain meaning of the statute's text to determine what particular terms mean."). To the extent that "market value" might be considered a legal term, rather than a term of common usage, the legal dictionary in existence at the time similarly defined it as "[t]he price property would command in the market." *Black's Law Dictionary* 1123 (4th ed 1968); *see also Dickerson*, 356 Or at 829-30 (legal dictionaries in existence at the time of the statute's enactment are useful for determining the meaning of undefined legal terms).

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[2] This provision also provides that, if the market value is not ascertainable, value will mean "the cost of replacement of the property within a reasonable time after the crime." ORS 164.115(1). The state did not contend below, nor does it assert here, that the replacement cost should be used to determine value in this case.

An examination of the context supports the understanding that "market value" means the price at which a hypothetical willing seller and willing buyer would do business. Then-existing Oregon case law defined "market value" in the condemnation context as "the amount which the land would bring if it were offered for sale by one who desired but was not obliged to sell and was bought by one who was willing but not obliged to buy." *State By & Through State Highway Comm'n v. Superbilt Mfg. Co.*, 204 Or 393, 412, 281 P2d 707 (1955); *see also Lindell v. Kalugin*, 353 Or 338, 349, 297 P3d 1266 (2013) ("Case law existing at the time of the adoption" of the statute "forms a part of the context."). Similarly, New York case law at the time defined "market value" under the larceny statute as "the price at which [the items] would probably have been sold in the regular course of business at the time when and place where they were stolen." *People v. Irrizari*, 5 NY2d 142, 146, 156 NE2d 69, 71 (1959); *see also* Commentary to Criminal Law Revision Commission Proposed Oregon Criminal Code (hereinafter "Commentary"), Final Draft and Report (1970) § 131 at 139 (providing that the section defining value was "derived substantially from New York Revised Penal Law § 155.20"); *Kalugin*, 353 Or at 355 ("As a general rule, when the Oregon legislature borrows wording from a statute originating in another jurisdiction, there is a presumption that the legislature borrowed the controlling case law interpreting the statute along with it.").

Finally, the legislative history supports the conclusion that the legislature intended to give "market value" its common, then-existing meaning. *See, e.g.*, Oregon Criminal Law Revision Commission, Meeting Minutes at 9 (March 23, 1968) (noting that "market value had a well-established meaning that didn't need to be defined" and that "market value under larceny cases was an accepted method of establishing the value of stolen property").

Accordingly, to establish that the items taken were property, the state had to introduce evidence from which a reasonable juror could infer that a hypothetical willing buyer would have paid some above-zero amount to purchase the item from a hypothetical willing seller—in other words, that the price the property would have commanded in the market would had been above zero.

2. The state introduced sufficient evidence of value to survive defendant's motion for a judgment of acquittal.

In reviewing a trial court's denial of a motion for a judgment of acquittal, this court "considers whether any rational trier of fact, accepting reasonable inferences and making reasonable credibility choices, could have found the essential elements of the crime beyond a reasonable doubt." *State v. Lupoli*, 348 Or 346, 366, 234 P3d 117 (2010). In doing so, this court "reviews the facts in the light most favorable to the state and draws all reasonable inferences in the state's favor." *Id.*

Defendant argues that the state failed to introduce sufficient evidence to allow a rational juror to conclude that the items taken constituted property, an element of the general offense of theft described in ORS 164.015. But, viewed in the light most favorable to the state, the evidence here was more than sufficient to allow a rational trier of fact to conclude beyond a reasonable doubt that the items taken had some above-zero market value.

At trial, the state introduced several kinds of evidence that permitted the reasonable inference that the items taken had some above-zero market value. First, the state introduced evidence as to the nature of the items themselves. Defendant and his companion stole multiple sizeable items from the scrap metal drop box, including a chair, shelving unit, gutters, and some other "heavier" items. (Tr 32). Everything they took was metal. (Tr 32). They stole enough items that it took approximately 15 to 20 minutes for them to load a pickup truck parked flush with the bin. (Tr 33). And the officer who apprehended them observed that "the bed of the pickup truck was full[.]" (Tr 50).

The existence of a market for scrap metal is a matter of common knowledge, and the state introduced evidence that quantity of metal items here was significant. The state also introduced evidence that at least some of the metal items were furniture and fixtures—a chair, a shelving unit, gutters—and were therefore likely made from useful and common types of metal. Accordingly, the jury, relying on its common sense and general experience,

could reasonably have inferred that the large quantity of metal items taken had some above-zero market value. *See* Oregon Uniform Jury Instruction No. 1008 ("In deciding this case you may draw inferences and reach conclusions from the evidence, if your inferences and conclusions are reasonable and are based on your common sense and experience."); *State v. Hines*, 84 Or App 681, 684, n 2, 735 P2d 618 (1987), *rev den*, 303 Or 590 (1987) ("So long as [jurors] are correctly instructed that a finding of guilty cannot be made on less than proof beyond a reasonable doubt, it cannot be error to also instruct them that they may use their powers to reason and common sense.").

Second, the state introduced evidence that a specific buyer, who had an established ongoing relationship with the victim company, would have purchased the items. This evidence went above and beyond the general requirement of showing that a market for the items existed such that they could have been sold to a hypothetical buyer for some above-zero amount. At trial, a security guard for the victim company testified that employees would fill up the scrap metal drop box, and then a recycling company would "take it away, and then they send us money for the value of the metals that were in there." (Tr 33). He further testified that the recycling company determined value based on the type of metal and the weight. (Tr 41). Accordingly, items made of copper or heavier items might be particularly valuable. (Tr 33). But there was no

indication that the recycling company ever paid *nothing* for any type of metal.[3] Thus, this evidence—combined with the fact that the items taken were both metal and weighty and the other circumstantial evidence of value—permitted the reasonable inference that the truckload of scrap metal that defendant stole was worth *something*.

And third, the state introduced evidence of individuals' behavior with respect to the taken items at around the time and place of the crime, which reflected those individuals' beliefs that the items had an above-zero market value. The agents of the victim company, which had an ongoing relationship with the recycling company and presumably understood the types of items for which the recycling company would offer remuneration, chose to place the items in the scrap metal drop box, rather than the trash. That fact permits the

[3] It is possible, given the absence of explicit testimony on this point at trial, to imagine that the recycling company did not pay for every type of metal. It is also conceivable that some of the items in the truckload might have been made of types of metal for which this particular recycling company did not offer remuneration. And it is theoretically possible, although highly implausible, that defendant happened to steal only items from the bin for which neither this particular recycling company nor anyone else would pay, and that defendant's entire truckload was therefore worthless. But, the existence of a chain of highly speculative inferences that could have resulted in an acquittal does not require an acquittal as a matter of law. Instead, the question is whether, *when viewed in the light most favorable to the state*, the evidence was sufficient for a rational juror reasonably to infer that defendant's stolen truckload of scrap metal had some above-zero value on the general market. As discussed above, the state introduced sufficient evidence here, and the trial court correctly denied defendant's motion for a judgment of acquittal.

inference that whoever placed the items in the bin believed that they were valuable as scrap. Moreover, defendant chose to undertake the risk and physical labor of sneaking into a fenced microchip facility, past no trespassing signs, at three in the morning, to load his pickup truck full of assorted metal items. (Tr 24, 28-29, 31-33). And, when faced with an entire bin of scrap metal, defendant and his companion chose to steal these particular items. Thus, defendant's actions also permit the inference that defendant believed the items had some above-zero market value.

Taken together, that evidence, viewed in the light most favorable to the state, was sufficient to permit a rational trier of fact to conclude beyond a reasonable doubt that the items taken were property. Accordingly, the trial court correctly denied defendant's motion for a judgment of acquittal.

Defendant nevertheless insists that the evidence was insufficient. He appears to posit two primary arguments in support of that contention.

First, defendant contends that the objects that defendant took might have contributed nothing to the recycling company's valuation of the full bin of scrap metal. In other words, he asserts that no evidence supported the conclusion that this particular recycling company would have paid anything for the particular items that defendant took when it valued the contents of the full bin of scrap metal. (Defendant's Brief on the Merits 5, 17-18). In support of that argument, defendant posits that the recycling company might have "operated much like

how a consignment store could purchase used clothes, or a book store could purchase used books." (Defendant's Brief on the Merits 17). Accordingly, defendant argues that the recycling company might have picked through the full bin and paid money only for those items it decided were valuable, and that no evidence suggests that the recycling company would have taken a particular liking to any of the specific pieces of scrap metal that defendant stole. (Defendant's Brief on the Merits at 17-18).

Defendant's argument fails for two reasons. As an initial matter, the state was *not* required to show that this particular recycling company would have paid money for the particular items taken. Instead, the state's burden was to show that a market for these types of items existed such that they would have commanded some above-zero price in a transaction between a hypothetical willing buyer and a hypothetical willing seller. Obviously, showing that a specific buyer routinely purchased these types of items from the victim could help the state prove that fact, but it is by no means a prerequisite to doing so. Accordingly, the particular policies of this specific recycling company are largely beside the point, and defendant's focus on them is a persistent error in his brief on the merits. The critical question is whether the state introduced sufficient evidence from which a rational trier of fact could infer that the items stolen had an above-zero value on the general market. As discussed above, the state satisfied that burden.

Moreover, defendant's analogy is inapt. When a second-hand dealer of books or clothes decides which items to purchase, it considers a number of subjective factors in making its discretionary decision. For clothing dealers, those factors might include whether the buyer believes the item offered is fashionable, whether it is seasonally appropriate, its condition and size, and whether it is similar to other items already in stock. For book dealers, the considerations are likely similar—the condition of each item, whether it is the most current edition, the presence of similar items in stock, whether it is a book likely to be in demand by students in an upcoming academic term, etc.

A recycler of scrap metal, by contrast, need not make any such discretionary and subjective determinations in deciding what to purchase. Scrap metal is valuable because of its intrinsic properties, not because of the shifting tides of fashion or literary preference. *See Webster's Third New Int'l Dictionary* (unabridged ed 2002) (defining "scrap," in relevant part, as "valuable only as raw material (~ metal)"). It is difficult to imagine that a scrap metal recycling company would sift through a bin of scrap metal and, instead of determining value based on metal type and weight, pay only for those items it finds particularly appealing. The nature of scrap metal simply does not permit or invite such subjective or discretionary factors to enter into the calculation of value.

Second, defendant argues that the state failed to prove that a market existed for anything other than full bins of scrap metal. Accordingly, defendant asserts that, even if the taken items would have contributed to the value of a full bin of scrap metal, there is no evidence that any market existed for those items once they were no longer part of the full bin. (Defendant's Brief on the Merits 5, 19-21).

Defendant primarily focuses on the issue of quantity. He asserts that, although the evidence showed that a market existed for full bins of scrap metal, there was insufficient evidence that a market existed for the *amount* of metal defendant stole. In support of that argument, defendant asserts that, although a market exists for a ton of gravel, there is no market for a handful of gravel. Thus, in defendant's view, his truckload of stolen scrap metal was, metaphorically, a mere handful of gravel, so insignificant that no market existed for it.

Defendant is mistaken. Gravel is valuable because of its usefulness, not because of any precious qualities of the rock from which it is made. And gravel is useful primarily in the aggregate (for example, to cover a driveway). Thus, because very small amounts of gravel may not be not useful, they might not be valuable. Scrap metal, by contrast, is valuable for its intrinsic properties. Accordingly, even small amounts of metal have some theoretical worth. Of course, it is possible that, because of transaction costs and other considerations,

no market may exist for certain *de minimis* amounts of intrinsically valuable materials, but that is not the situation presented here. Defendant stole a *pickup truck-full* of scrap metal. Common sense and general experience indicate that that is not the type of *de minimis* amount for which no market exists.

Defendant also seems to argue that there is something special about collections. He argues that that the value of a collection may be more than the sum of the values of the individual items contained within it, and that evidence as to the value of a collection may reveal little or nothing about the value of any object as an individual, apart from the collection. (Defendant's Brief on the Merits 4-5, 20).

But a bin of scrap metal does not take on any special value by virtue of its status as a collection. Instead, the total value of a bin of scrap metal is simply the sum of the values of each item within that bin, and the objective value of each item, in turn, is based on its type of metal and weight. In other words, the value of a whole bin of scrap metal is, in fact, precisely the sum of individual values of its parts. And the value of any individual piece of scrap metal remains the same, regardless of whether it is within the collection or apart from it. This makes sense because a bin of scrap metal—unlike, for example, a complete collection of a particular comic book or set of baseball cards—derives its value simply from the aggregate intrinsic worth of its contents as raw material, not from any special significance it acquires as a collection. Nor is a

bin of scrap metal organized in any way that makes it more valuable as a whole than in parts. A house, for example, might, by virtue of the energy expended to organize its constituent parts into something new and useful, be worth more than the components from which it has been assembled. But a bin of scrap metal is simply a haphazard agglomeration, only as valuable as the items it contains.

In sum, the state introduced sufficient evidence from which a rational trier of fact could conclude beyond a reasonable doubt that defendant stole property. Accordingly, the trial court correctly denied defendant's motion for a judgment of acquittal, and this court should affirm the decision of the Court of Appeals.

B. The presumption in ORS 164.115(5), although not necessary to the success of the state's case, does apply here.

Defendant's "Second Question Presented" appears to be premised upon the assumption that the state will argue that, even if it failed to introduce sufficient evidence that the items taken had some above-zero market value, it will nonetheless prevail because it may rely on the alternate rule of replacement cost in ORS 164.115(1) or the presumption established by ORS 164.115(5).

(Defendant's Brief on Merits 1, 21). The state does not make that argument here.[4]

1. The state prevails purely based on the analysis above.

Defendant's entire argument is that the state failed to introduce sufficient evidence of the "property" element of the general crime of theft under ORS 164.015. In other words, defendant's argument is premised solely on his contention that the state failed to prove that a market existed such that a willing buyer would have paid a willing seller *something* for the items taken. But, as discussed above, the state did introduce sufficient evidence that the items taken had some above-zero market value and were, therefore, property. Accordingly, the state introduced sufficient evidence to support defendant's conviction for theft, and that conclusion resolves this case. *See State v. Cox*, 336 Or 284, 292, 82 P3d 619 (2003) (The theft statute "creates single, consolidated offense that, at its core, prohibits the intentional and unlawful deprivation or appropriation of property from its owner.").

2. In any event, the presumption established by ORS 164.115(5) applies here.

Under ORS 164.115(5), "[w]hen the value of property cannot reasonably be ascertained, it shall be presumed to be an amount less than $50 in a case of

[4] The alternate method of determining value based on replacement cost under ORS 164.115(1) is simply not at issue in this case.

theft[.]" This defendant-friendly presumption ensures that, when the state fails to adduce evidence from which the *specific* value of the property can be reasonably ascertained, defendant can be convicted only of the least serious degree of theft—third-degree theft, a Class C misdemeanor. ORS 164.115(5); *see also* ORS 164.043 (defining third-degree theft as theft of property valued at less than $100); Commission, Meeting Minutes at 9 (March 23, 1968) (noting the question whether the presumption now contained at ORS 164.115(5) was a disputable presumption "would not arise because the section referred to a defendant's presumption").

The state agrees with defendant that, by virtue of the presumption's use of the term "property" and the definition of "property" discussed above, the presumption cannot come into play until the state offers evidence that the items taken had some above-zero value. The purpose of the presumption is not to relieve the state of its burden to establish the "property" element of the crime of theft, but simply to clarify which degree of theft applies when the state shows that an item was worth *something* but fails to introduce more specific evidence of value. Here, as discussed above, the state introduced sufficient evidence from which a rational juror could conclude that the items taken had some value, but it failed to introduce evidence establishing the precise value of the items

taken. Accordingly, the presumption applies, and defendant receives the benefit of being subject to no greater charge than third-degree theft.[5]

Defendant also asserts—very briefly and without any developed argument—that the state should also have to prove that it cannot reasonably ascertain the precise quantitative value of the stolen property before the presumption may apply. (Defendant's Brief on the Merits 23, 25). But given the legislature's apparent understanding that the presumption benefits the defendant, and its choice to define the general crime of theft as merely requiring proof that the item taken is property (*i.e.* has some above-zero value), that requirement would not make sense. Moreover, the statute does not clarify *by*

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[5] That result would likely obtain even in the absence of the presumption. Once the state has proven the general elements of theft (which requires simply that the state show the items taken were property, not that they had any specific value), the only question that remains is which degree of theft defendant has committed. The structure of the statutory scheme indicates that third-degree theft is the catchall provision for stolen items whose value does not meet the thresholds for second- or first-degree theft. Accordingly, when the state shows that a stolen item has some above-zero value, but fails to establish its specific value beyond speculation (in other words, fails to show that the item is worth $100 or more or $1000 or more), a conviction for third-degree theft is appropriate. The presumption simply ensures this result, to defendant's benefit. In any event, defendant has not made any argument as to the appropriate degree of theft here, nor has he asserted that the state was required to prove the value of the taken items with greater specificity—he takes issue solely with the sufficiency of the evidence as to the "property" element of the general crime of theft under ORS 164.015, which he concedes (and the plain language of the text confirms) requires only that the state show that the items taken were worth *something* on the market.

whom the value of property cannot reasonably be ascertained, or from *what* information. Given the context and legislative history, the best reading of the provision is that, whenever *the finder of fact* cannot reasonably ascertain the precise value of the item *from the evidence adduced at trial*, the value shall be presumed to be less than $50. *See People v. Tremere*, 31 AD2d 639, 639, 295 NYS2d 956 (1968) (applying the presumption to automatically reduce a conviction for grand larceny to petit larceny because of insufficient evidence that the property had a market value of more than $100, without considering whether the state could have put forth better evidence of value). Accordingly, regardless of why the state failed to present sufficient evidence of specific value, the presumption applies so long as the state introduced sufficient evidence that the item taken had some above-zero value.

Finally, even if the state were required to show that it could not reasonably ascertain the specific value of the stolen items before the presumption would apply, it met that burden here. Neither the security guard nor the arresting officer could remember the precise nature of all of the stolen items, and no one appears to have weighed the items or determined their composition, aside from the fact that they were all metal. (Tr 32, 50-51). Accordingly, the state lacked sufficient information from which it could reasonably ascertain the precise value of the stolen items. The presumption therefore applies.

CONCLUSION

This court should affirm the decisions of the Court of Appeals and the trial court.

Respectfully submitted,

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that on July 28, 2015, I directed the original Brief on the Merits of Respondent on Review, State of Oregon to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Ernest Lannet and Sarah Laidlaw, attorneys for appellant, by using the court's electronic filing system.

CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(2)(d)

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 5,479 words. I further certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(2)(b).

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