62631-1

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NO. 62631-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

RICHARD HODGES,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Michael Hayden

APPELLANT'S REPLY BRIEF

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A. ARGUMENTS IN REPLY

1. THE STATE DID NOT LAY A PROPER FOUNDATION UNDER THE BUSINESS RECORD EXCEPTION TO PROVE THE MODE OF PREPARATION OF THE SALES RECEIPT.

The State failed to prove the value of the items stolen from Safeway exceeded $250 when it did not lay a proper foundation under the business record exception for an itemized sales receipt. The receipt was the only evidence of value, and with its exclusion, no rational trier of fact could find the essential elements of the charge of theft in the second degree beyond a reasonable doubt. Therefore, Mr. Hodges argues that his conviction for theft in the second degree should be reversed and dismissed with prejudice.

The business record exception states:

> A record of an act, condition or event, shall in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.

RCW 5.45.020. The main source of Mr. Hodges' argument is that the State failed to lay the foundation for the mode of preparation of the receipt. Because the store manager, Mr. Mbacke, did not

testify to how the prices were calculated, the trial court abused its discretion in admitting the receipt.

The State argues it laid the necessary foundation for admitting the Safeway receipt because the store manager "calculated and created this receipt consistent with his standard practice," "[t]he receipt was date-stamped at the time he calculated the value of the merchandise," and the "receipt was calculated that same night, around the time Mbecke [sic] reported Hodges' theft to police." Brief of Respondent at 19. Based on these facts, the State contends it showed all of the necessary elements to establish a business record.

The State glosses over the foundational requirement that a records custodian describe how the prices on the receipts are generated, urging this Court to note that all of the cases Mr. Hodges cites "simply show how the courts have deferred to a trial court's sound discretion as technologies have changed." Brief of Respondent at 20. The cases cited in Mr. Hodges opening brief do more than that; they require some sort of explanation of how the prices on a receipt are calculated before the receipt can be admitted into evidence.

In the most recent case cited by Mr. Hodges, State v. Quincy, this Court found the State laid a proper foundation for an itemized receipt where a loss prevention manager testified that itemizing stolen merchandise by scanning a UPC code on the products is standard procedure whenever a theft occurs at his store and explained how prices were assigned to particular items and how that information was stored and accessed through the store's computer system. State v. Quincy, 122 Wn. App. 395, 400, 95 P.3d 353 (2004), review denied 153 Wn.2d 1028 (2005). The State argues Quincy focuses on the question of whether the loss prevention officer was the custodian of the record. Brief of Respondent at 22. However, Quincy also stands for the proposition that the business record exception requires specific testimony about how a receipt is created and why it should be relied upon as an accurate calculation of the value of stolen items. Quincy, 122 Wn. App. at 400.

That type of testimony is exactly what was lacking in this case. Mr. Mbacke simply testified he totaled the price of the items in the cart by "Ringing it through the machine to see how much is it." 6RP 14. Unlike Quincy, the State offered no evidence about how the scanner worked, the accuracy of the prices that ring up, or

how the prices were calculated. Even without testimony of how the computer system worked, the State could have introduced the receipt if it elicited proof that the price tags on the items matched the prices that rang up on the receipt and that those prices were nonnegotiable. Mr. Mbacke admitted the way he could tell if the prices that came up on the scanner were accurate was by looking at the price tags; however, he did not double-check the price tags for the items in Mr. Hodges' cart or take pictures of each item to show the price of the item. 6RP 18-19. Mr. Hodges compared his case to several other cases in his opening brief; these cases also required some proof of a description of the mode of calculating the prices.[1]

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[1] See State v. Kleist, 126 Wn.2d 432, 436, 895 P.2d 398 (1995) (holding an adequate foundation is laid if the State elicits testimony to prove the amounts listed on the receipt match the price tags on the stolen items, the computer system generating the prices is accurate, and that retail prices were nonnegotiable); State v. Rainwater, 75 Wn. App. 256, 261-62, 876 P.2d 979 (1994) (holding a list of prices compiled by looking at the stolen items' price tags is substantial evidence of value as long as the case involves a retail store that is commonly known to sell its goods for a non-negotiable price as shown on the tag); State v. Farrer, 57 Wn. App. 207, 209, 787 P.2d 935 (1990) (holding State laid foundation for value where security officers had firsthand knowledge of store pricing procedures and testified the price tag reflected the amount customers must pay for an item, which was nonnegotiable). Unlike Rainwater, Kleist, and Farrer, the State in this case did not demonstrate the price tags on the stolen merchandise matched the prices listed on the receipt and did not introduce evidence that Safeway is a retail store that is commonly known to sell its goods for the nonnegotiable price listed on the tag.

Because the State did not lay a proper foundation for admission of the itemized receipt, defense counsel's foundation objection should have been sustained. The receipt was the only evidence of value, and with its exclusion, no rational trier of fact could find the essential elements of the charge of beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980). Therefore, Mr. Hodges' conviction for theft in the second degree should be reversed and dismissed with prejudice.

2. THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO ORDER A COMPETENCY HEARING AND RELYING ON AN OUTDATED COMPETENCY EVALUATION WHEN THERE WAS EVIDENCE MR. HODGES' MENTAL STATE FLUCTUATED OFTEN AND THERE WERE NEW REASONS TO DOUBT HIS COMPETENCY BASED ON HIS BEHAVIORS IN COURT AND ASSERTIONS OF DEFENSE COUNSEL.

The State argues the trial court did not abuse its discretion by refusing to order Mr. Hodges to undergo another competency evaluation. Brief of Respondent at 16. In support of this argument, the State contends the trial court properly relied on a "current" Western State Hospital competency evaluation. Id. at 13. The State argues the trial court correctly concluded Mr. Hodges was malingering mental health symptoms in court based on the similarities between behaviors described in the report and those

witnessed in the courtroom. Id. This argument fails for two reasons.

First, Mr. Hodges' mental state was not static and was difficult to evaluate. Therefore, the court erred in relying on an outdated evaluation and substituting its judgment for that of a trained forensic evaluator. The State ignores the fact that the "current" competency evaluation was nearly two months old by the time trial commenced on July 16, 2007.[2] This evaluation, while concluding Mr. Hodges was currently competent to stand trial as of May 29, 2007, also noted Mr. Hodges has a "markedly fluctuating mental condition." CP 98. The evaluator, Dr. Gagliardi, described the difficulty of evaluating Mr. Hodges' mental condition on any particular occasion because he likely suffers from "chronic paranoid schizophrenia, a severe personality disorder with antisocial personality traits and malingering." Id. Even though Mr. Hodges was deemed competent to stand trial, he continued to "suffer from residual symptoms." Id. As proof that Mr. Hodges' mental state was difficult to evaluate, Dr. Gagliardi subsequently changed his

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[2] Dr. Gagliardi conducted the interview of Mr. Hodges on May 22 and 23, 2007. CP 99.

opinion about Mr. Hodges' competency, finding he was not competent to stand trial and was gravely disabled. CP 87, 96.

Second, contrary to the State's contention, the trial court had new reasons to doubt Mr. Hodges' competency to stand trial based on Mr. Hodges' behavior in the courtroom and the assertions of defense counsel. On the day of trial, defense counsel again expressed her opinion that Mr. Hodges could not understand what was happening in court. 2RP 5-6. Mr. Hodges had been talking to people who were not present for several days prior to the trial date. 2RP 5-6.

The court's lengthy colloquy did not yield results confirming Mr. Hodges' competency. Mr. Hodges had difficulty answering the court's questions and did not seem to remember or understand the charges against him, mentioning some sort of killing, not a theft or drug charge. 2RP 9. Although he responded that a lawyer is someone to help him out, he also thought his defense attorney was working with the prosecutor. 2RP 9, 11. Mr. Hodges strayed off topic several times during the questioning. When asked his name, he pointed to himself instead of answering. 2RP 15.

Because Mr. Hodges had such a lengthy, complicated, and fluctuating mental health history, the court abused its discretion in

relying on the nearly two month old competency report and refusing to order Mr. Hodges to undergo another competency evaluation. The trial court basically took on the role of forensic evaluator in denying a new evaluation. This was improper, as counsel's assertions and Mr. Hodges' behaviors in the courtroom gave the court a reason to doubt Mr. Hodges' competency.

Once the court had a reason to doubt Mr. Hodges' competency, the court had a constitutional and statutory duty to appoint an expert and order a formal hearing to determine competency before proceeding to trial. RCW 10.77.070. Reversal is the appropriate remedy because the court's failure to adhere to adequate procedural safeguards in determining competency violated Mr. Hodges' right to a fair trial. Pate v. Robinson, 383 U.S. 375, 377, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966).

B. CONCLUSION

Based on the foregoing, Mr. Hodges respectfully requests this Court find there was insufficient evidence to sustain his theft in the second degree conviction and dismiss it with prejudice. Mr.

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Hodges also asks this Court find the trial court violated his right to due process of law by proceeding to trial without observing adequate procedural safeguards to determine his competency.

DATED this 10th day of December, 2009.

Respectfully submitted,

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Attorney for Appellant

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DIVISION ONE

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	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 10TH DAY OF DECEMBER, 2009, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] MICHAEL PELLICCIOTTI, DPA KING COUNTY PROSECUTOR'S OFFICE APPELLATE UNIT 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 10TH DAY OF DECEMBER, 2009.

X_____

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