COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

21-P-816

COMMONWEALTH

vs.

TODD J. GERMAINI.[1]

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

A jury convicted the defendant, Todd J. Germaini, of receiving stolen property in violation of G. L. c. 266 § 60, and larceny by false pretenses in violation of G. L. c. 266, § § 30 (1) and 34. He thereafter pled guilty to being a common and notorious thief under G. L. c. 266, § 40. On appeal, the defendant argues that the judge should have allowed his motion for a required finding of not guilty on all charges because there was insufficient evidence to establish beyond a reasonable

[1] The Superior Court docket reflects that the defendant is also known as Todd J. Germaine. We use Germaini because although the indictments name Todd J. Germaine, the Superior Court docket reflects that during the course of the trial, the spelling was amended to Germaini by agreement.

doubt that the property was in fact stolen and that he knew that it was stolen. We agree and therefore reverse the convictions.[2]

We review a claim of insufficient evidence to determine whether "viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt" (emphasis in original; citation omitted). Commonwealth v. Latimore, 378 Mass. 671, 677 (1979), S.C., 423 Mass. 129 (1996). We summarize the relevant facts in the light most favorable to the Commonwealth as follows. On December 9, 2017, the defendant, Todd Germaini, went to Cash Point, a local pawn shop store in Falmouth, to sell two brand new water pumps. One pump was a "Jabsco Water Puppy" ("Jasbco") and the other a "Pentair Shurflo" ("Shurflo") pump that were in open boxes. Despite their being worth significantly more, the defendant sold the two items for a total of fifty-five dollars.

The Commonwealth charged the defendant with receiving stolen property and its theory at trial was that those two pumps were stolen from West Marine, a marine supply store in Falmouth.

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[2] The appeal from the denial of the defendant's motion for a new trial was consolidated in this court with his direct appeal from the convictions. Given our disposition of the direct appeal, the appeal from the denial of the motion for a new trial is dismissed, not on the merits, but because it is moot. See Commonwealth v. Marte, 84 Mass. App. Ct. 136, 145 n.8 (2013); Commonwealth v. Cutty, 47 Mass. App. Ct. 671, 678 n.9 (1999).

West Marine sold the same make and model of the pumps, which it purchased in lots of ten thousand at a time. West Marine did not have the exclusive right to sell these particular pumps and they could be found in other marine stores as well.

Approximately three weeks after the defendant sold the pumps to Cashpoint, the inventory manager of West Marine, Philip Field, conducted a mini-inventory in the plumbing department.[3] Field discovered a discrepancy between what the inventory system on the computer showed to be in stock and what was actually in stock. Specifically, West Marine was missing a Jabsco pump, a Shurflo pump, a third type of pump, and some feet of hose. According to Field, discrepancies in the inventory were not uncommon. Field was unaware of any break-ins at, or thefts from, the store in the three months since the last inventory had been done. He acknowledged that if the pumps were stolen from West Marine, he had no idea who was the thief. Field did not recall ever seeing the defendant in the store and there was no

[3] Field testified that the last time West Marine had completed an inventory was in September, three months prior to conducting the mini-inventory. At trial, Field testified to the process as a perpetual count adjustment. During the course of the year, Field would go section by section of the store and scan all of the labels that were on the shelf and match them to the computer to see if there was any discrepancy. Field then made adjustments so that the physical inventory and computer inventory would match.

other evidence linking the defendant to the store or any employee of the store.

At trial, Field testified that, by looking at the picture of the pumps sold to Cashpoint, he could recognize the products as being the same make and model as two of the pumps missing from his store's inventory. The two pumps had the manufacturer's identification on a barcode, but there were no specific identifying markings on the pumps or serial numbers or unique SKU numbers that connected the pumps to West Marine's inventory. Due to the high volume of pumps West Marine purchased (ten thousand at a time), West Marine did not assign a unique identification number to the pumps, and the packaging of the pumps were not unique to West Marine.

In order to be found guilty of the crime of receiving stolen property, "(1) one must buy, receive, or aid in the concealment of property which has been stolen or embezzled, (2) knowing it to have been stolen" (quotation and citation omitted).[4] Commonwealth v. Cromwell, 53 Mass. App. Ct. 662, 664 (2002). The Commonwealth need not prove the ownership of the item(s), but it must prove that the goods were stolen. Id. at

[4] Similarly, in a prosecution for larceny by false pretenses, the Commonwealth must prove (among other things) that the defendant made a false statement and "knew or believed the statement was false when he made it." Commonwealth v. Alvarez, 90 Mass. App. Ct. 158, 159-160 (2016).

665-666 & n.5. Proof that the property was stolen is often adduced from direct evidence from testimony of the rightful owner who testifies that he or she owns the specific property in question and that it was stolen.

The crime of receiving stolen property may also be proven by circumstantial evidence. Cromwell, 53 Mass. App. Ct. at 668. If the defendant's possession of the items alleged to have been stolen shows "'peculiarities' and 'occur[s] in a context fraught with suspicion'" then an inference may be drawn that the items were unlawfully possessed and that the defendant had knowledge that they were stolen. Id. quoting Commonwealth v. Kirkpatrick, 26 Mass. App. Ct. 595, 596 (1988). In Cromwell, sufficient circumstantial evidence existed where the defendant was apprehended in pre-dawn hours; blurted out "[y]ou got me, just take me in"; was sweating profusely; was concealing a car stereo with gouge marks, a screwdriver, and a radar detector in his pants; and had fresh marks on his hands. Id. at 662-663, 668-669.

The question then is whether the combination of the inventory discrepancy and the defendant's having sold the same make and model of pumps at a pawn shop for less than their worth was enough circumstantial evidence to allow a rational juror to conclude, beyond a reasonable doubt, that the pumps had been

stolen and, if so, that the defendant knew that the pumps had been stolen.

The case of Commonwealth v. Budreau, 372 Mass. 641 (1977) is particularly instructive when it comes to the issue of the level of proof necessary to establish that the item was stolen. In Budreau, the defendant was charged with receiving stolen property from items seized pursuant to a search warrant including a "'G E Stereo AM FM 8 track' unit model No. SC3205, one 'G E Speaker,' and one 'Audio Aristocrat Speaker.'" Id. at 643. No serial numbers were attached to any of the items, and they did not bear any particular identifying markings to differentiate these items from others produced by the same manufacturer. Id. at 643-644. At trial, a store owner in the local community where the defendant resided testified that several items had been stolen from his store about four months before, including some of the types of stereos and speakers that were located in the defendant's room and seized as part of the search warrant. Id. The items were not in any particular box or carton when they were seized, but when the store owner went to the police station to identify the property, they were in boxes with identifying numbers used by the store owner. Id. at 644. The police officer testified that he had no knowledge where the boxes at the station had come from. Id. At trial, the store owner was able to identify the boxes as his but

couldn't state for certain that the particular items inside the boxes were stolen from his store. Id. He could only say that they were the same type and model numbers and that the cardboard boxes had his own identification numbers or marks. Id. The court concluded under this set of facts there was insufficient evidence to permit an inference that the articles seized by the police were stolen. Id.

Here, there was less evidence than in Budreau that the items were stolen. It is undisputed that there was nothing specific to the two water pumps to identify them as being stolen such as a West Marine label, and no inventory numbers or serial numbers linking these pumps to West Marine. In this case, absent any other evidence of suspicious activity or behavior, the evidence was insufficient to support the conclusion that the pumps were stolen or that the defendant knew that they were stolen.[5] Accordingly, on the indictments charging receiving stolen property and larceny by false pretenses, the judgments are reversed and the verdicts are set aside. The guilty plea on the charge of being a common and notorious thief, is vacated, as

[5] Given this conclusion, we need not reach the defendant's other claims.

it was dependent on the other convictions. Judgments shall enter for the defendant on all charges.

So ordered.

By the Court (Milkey, Walsh & Hershfang, JJ.[6]),

Joseph F. Stanton

Clerk

Entered: November 23, 2022.

[6] The panelists are listed in order of seniority.