*Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.*

## ENTRY ORDER

SUPREME COURT DOCKET NO. 2003-109

JANUARY TERM, 2004

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| State of Vermont | }APPEALED FROM:<br>}<br>} District Court of Vermont, Unit No. 3, Franklin Circuit<br>}<br>} |
| v. | }DOCKET NO. 974-7-02Frcr<br>} |
| Grant Devlin | }Trial Judge: Michael S. Kupersmith<br>}<br>} |

In the above-entitled cause, the Clerk will enter:

Defendant Grant Devlin appeals from a judgment of conviction, based on a jury verdict, of possession of stolen property, in violation of 13 V.S.A. ' 2561(b). He contends: (1) the evidence was insufficient to prove beyond a reasonable doubt that he knew or believed that the property was stolen; (2) the court erroneously admitted hearsay evidence and other allegedly improper testimony; and (3) the court committed plain error in allowing certain non-responsive testimony by a police officer. We affirm.

The record evidence may be summarized as follows. In October 2001, several pieces of equipment, including a Snap-On automotive diagnostic scanner, were stolen from Hull= s Auto Sales in the Town of Enosburgh. In April 2002, defendant purchased a scanner, later identified as the stolen scanner, from an acquaintance named Eric Rundstram, who lived in Fairfield. Defendant had stopped at Rundstram= s home to inquire about buying stereo equipment. Defendant was aware that Rundstram had served time in jail and was acquainted with people who would A buy just about anything.@ The owner of Hull= s Auto testified that he had paid $3000 for the scanner. Defendant paid Rundstram $250 for the scanner, and promised to pay another $100 after he resold it.

After purchasing the scanner, defendant drove to Burlington and attempted unsuccessfully to sell it to a garage. The owner of the garage informed defendant that the scanner was worth $2500 to $3000 new. Defendant then went to M & H Auto where he told the owner that he had bought the scanner for $2500 and offered to sell it for $1500. The owner declined, but informed defendant that he could sell it to the Snap-On dealer for $1900. Defendant then went to another garage, where he was told that the scanner was worth between $1000 and $1500. Defendant finally returned to M & H, where he sold it to the owner for $300.

Later, during the execution of a search warrant at defendant= s residence, defendant was asked by the investigating officer about another individual named Mark who was with defendant when he drove to the various garages. Defendant told the officer that Mark A had been in trouble with the law before@ and was trying to A stay straight,@ and that defendant had intentionally not told Mark what he was doing at the garages. The State also introduced evidence that defendant was an experienced buyer and seller of merchandise on the internet, where he frequently bought items at a low price and resold them for twice as much.

Although defendant testified that he did not know or believe the scanner was stolen, the jury returned a verdict of guilty, and defendant was sentenced to a term of two years, six months to eight years, and a $1000 fine. The court denied a post-trial motion for judgment of acquittal or new trial. This appeal followed.

Defendant first contends the evidence was insufficient to prove beyond a reasonable doubt that he knew or believed the

property in question was stolen. See State v. Moffitt, 156 Vt. 379, 381 (1991) (to convict under 13 V.S.A. ' 2561(b), jury must conclude that defendant actually knew or believed the goods were stolen). We will affirm a conviction if the evidence, viewed in the light most favorable to the State, and excluding any modifying evidence, fairly and reasonably supports a finding of guilt beyond a reasonable doubt. State v. Grega, 168 Vt. 363, 380 (1998). The evidence here showed that defendant bought the scanner from an individual whom he knew had a criminal record and was involved with others engaged in questionable buying and selling. Defendant wasted little time in attempting to resell the item, and knew B or quickly learned B that it was worth at least $1000 to $1900 in its current condition. After failing to persuade three different garages to purchase it, however, defendant quickly resold it for far less than it was worth, and for little more than he initially paid, although he was a relatively experienced dealer in used merchandise who knew how to turn a profit. Finally, defendant acknowledged to the investigating officer that he had intentionally kept his companion in the dark about the transaction because he had been in trouble with the law and was trying to A stay straight.@ These facts, while circumstantial, nevertheless amply support an inference that defendant knew the property was stolen. See, e.g, State v. Guppy, 129 Vt. 591, 597 (1971) (purchase of goods from individual with known criminal background supported inference that defendant knew items were stolen); State v. Maynard, 308 S.E.2d 665, 668 (N.C. Ct. App. 1983) (sale of items for substantially less than fair market value supported reasonable inference that defendant knew they were stolen).

Defendant argues that certain evidence could conceivably support a contrary inference, e.g., that the scanner might have come from Rundstram= s father, a mechanic, that defendant was only attempting to protect his companion after he learned that the item was stolen, and that defendant gave his true name and address to the eventual purchaser. Viewed in its entirety and in the light most favorable to the State, however, the evidence was more than sufficient to lead a reasonable jury to conclude beyond a reasonable doubt that defendant knew or believed the property was stolen. Grega, 168 Vt. at 382.

Defendant next contends the court erred in two instances in admitting hearsay evidence. The first instance occurred during the prosecutor= s opening statement, when he referred to a telephone call received by the police from one of the mechanics who had rejected the scanner, indicating that the caller A suspected it was stolen.@ Defense counsel objected on hearsay grounds, noting that the State did not plan to call the mechanic in question. The court reserved its ruling, but instructed the jury that statements by counsel were not evidence. Later, when asked to describe the information received in the telephone call, a state police officer indicated that the caller had been offered the scanner at a A really reduced price.@ A defense objection was sustained. The prosecutor then asked a follow-up question concerning the caller= s report A about [a] possibly stolen diagnostic scanner.@ Defense counsel asked that the statement be stricken, but the court denied the request and directed counsel to move on. Later, during deliberations, the jury asked to hear the officer= s testimony concerning the telephone call.

Assuming that the statements in question were actually offered for their truth, we nevertheless conclude that any error in their admission was harmless beyond a reasonable doubt. State v. Lipka, 817 A.2d 27, 33 (2002). The court explained to the jury during the prosecutor= s argument that statements of counsel were not evidence, and later sustained defense counsel= s objection to the officer= s testimony relating to the caller= s concern about the scanner and directed counsel to move on. See State v. Muir, 150 Vt. 549, 551 (1988) (we assume the jury followed the court= s evidentiary instructions and rulings). Furthermore, any prejudice resulting from the officer= s testimony was minimal; the officer= s statements indicated at most that the police investigation was instigated by a mechanic who suspected the scanner had been stolen. There was no dispute, however, about the fact that the scanner in question was stolen, and the other evidence B recounted above B amply supported an inference that defendant knew the scanner was stolen. Accordingly, we are persuaded beyond a reasonable doubt that the jury would have convicted defendant even if it had not heard the statements in question. Id.

Defendant cites two further instances of improper testimony. When asked if defendant had told him the price he paid for the scanner, the investigating officer responded, A Supposedly he bought it from Eric Rundstram for $250, which is a little ridiculous.@ The court sustained a defense objection, admonishing the witness not to A editorialize.@ Shortly thereafter, the same witness, when asked the price that defendant had sought for the scanner, observed that defendant had informed one of the garage owners that A he didn= t know how to run the equipment, so I= m sure the guy was wondering, well, he paid $2500 for it, and he doesn= t know how to run it.@ The court sustained a defense objection. Despite the court= s rulings, defendant now maintains that the court should have directed the jury to ignore the officer= s characterization of the purchase price as A ridiculous@ and should have stricken the officer= s statement speculating

as to what the garage owner was thinking. We note, however, that there were no requests for additional curative instructions, and we discern no basis to conclude that the court= s rulings sustaining the objections and directing the witness not to editorialize were insufficient, or that the testimony was so prejudicial as to constitute plain error. See State v. Bailey, 144 Vt. 86, 99-100 (1984) (failure to object or request specific curative instruction will not be considered on appeal unless error is so grave as to strike at heart of defendant= s constitutional rights).

Finally, defendant contends the court committed plain error by failing, on its own motion, to strike a statement by the investigating officer. When asked whether defendant had indicated when he purchased the scanner, the officer responded that defendant thought it was April 9th, but AI knew he was lying at that point because I learned that he attempted to sell it in Burlington on the 8th.@ Defendant asserts that the officer improperly commented on facts not in evidence, as the date and contents of the telephone call to the police were not admitted, and argues that the prejudicial effect of the testimony requires reversal. We are not persuaded, however, that any potential error in failing to strike the testimony on this collateral issue was so serious as to strike at the heart of defendant= s constitutional rights. State v. Pelican, 160 Vt. 536, 538 (1993).

Affirmed.

BY THE COURT:

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Jeffrey L. Amestoy, Chief Justice

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John A. Dooley, Associate Justice

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Paul L. Reiber, Associate Justice