

63344-9

63344-9

NO. 63344-9-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

JOSEPH WIEGERT,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE RICHARD EADIE

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

	Page
A. <u>ISSUE PRESENTED</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
C. <u>ARGUMENT</u>	2
1. THE APPROPRIATE STANDARD OF REVIEW.	3
2. GIVEN THE APPROPRIATE STANDARD OF REVIEW, THE STATE PRESENTED SUFFICIENT EVIDENCE FROM WHICH A REASONABLE JURY COULD INFER AND CONCLUDED THAT THE APPELLANT INTENDED TO DEPRIVE HOME DEPOT OF MERCHANDISE.	5
D. <u>CONCLUSION</u>	10

TABLE OF AUTHORITIES

Page

Table of Cases

Washington State:

State v. Bencivenga, 137 Wn.2d 703,
974 P.2d 832 (1999)..... 4, 7, 8

State v. Butler, 53 Wn. App. 214,
766 P.2d 505 (1989)..... 5

State v. Camarillo, 115 Wn.2d 60,
794 P.2d 850 (1990)..... 4

State v. Ferreira, 69 Wn. App. 465,
850 P.2d 541 (1993)..... 5

State v. Gallagher, 112 Wn. App. 601,
51 P.3d 100 (2002)..... 4, 5

State v. Green, 94 Wn.2d 216,
616 P.2d 628 9

State v. Hendrickson, 129 Wn.2d 61,
917 P.2d 563 (1996)..... 4

State v. Jackson, 112 Wn.2d 867,
774 P.2d 1211 (Wash., 1989)..... 7, 8

State v. Jones, 71 Wn. App. 798,
863 P.2d 85 (1993)..... 5

State v. Lewis, 69 Wn.2d 120,
417 P.2d 618 (1966)..... 6

State v. Louthier, 22 Wn.2d 497,
156 P.2d 672 (1945)..... 5

State v. Salinas, 119 Wn.2d 192,
829 P.2d 1068 (1992)..... 4

<u>State v. Swan</u> , 114 Wn.2d 613, 790 P.2d 610 (1990).....	5
<u>State v. Walton</u> , 64 Wn. App. 410, 824 P.2d 533 (1992).....	4
<u>State v. Willis</u> , 67 Wn.2d 681, 409 P.2d 669 (1966).....	6
<u>State v. Wilson</u> , 125 Wn.2d 212, 883 P.2d 320 (1994).....	5

Statutes

Washington State:

RCW 9A.08.010	5
RCW 9A.563.340	3

A. ISSUE PRESENTED

Viewing the evidence in the light most favorable to the State, did the State provide sufficient evidence such that any rational jury could find the Appellant guilty beyond a reasonable doubt of organized retail theft in the second degree? Specifically, did the State provide sufficient evidence at trial to establish that the Appellant intended to deprive Home Depot of property?

B. STATEMENT OF THE CASE

On October 29, 2007, at about 8:00 p.m., the Appellant entered the Bitter Lake - Home Depot located on Aurora Avenue North in Seattle. RP 25-28. The Appellant entered via the contractor's door, which are large bay doors to help accommodate merchandise too big to remove via normal doors. RP 26. The Appellant walked directly to a tile table saw valued at \$697.00 and placed it on a flat cart. RP 28-30, 45. He then proceeded to roll the saw around the store, but never touched, stopped at, or examined any other merchandise. RP 28-30. The Appellant then went to the contractor's door, left the flat cart with the saw near the final cash register next to the exit, and exited the store. RP 29-30. The Appellant did not pay for the saw. RP 30, 37.

A couple minutes later, a female entered the store and walked directly to the saw, grabbed the cart with the saw on it, and rolled it out of the store without paying. RP 37-39. The female pushed the saw directly to the Appellant's vehicle parked nearby the contractors' door exit. RP 38-39. The Appellant, who was standing outside the car waiting, lifted the saw off the cart and began loading it into the car when he was contacted by Home Depot Loss Prevention Officer Bryan Perkins. RP 38-40. The Appellant and the female were later arrested. RP 84-85.

The Appellant was charged by amended information with organized retail theft in the second degree, with second degree theft as an alternative charge. CP 4-5. At trial, Home Depot Loss Prevention Officer Mr. Perkins testified to the events described above. The Appellant did not testify.

The jury found the Appellant guilty of one count of organized retail theft in the second degree. CP 59.

C. ARGUMENT

The elements of organized retail theft in the second degree are that the Appellant: 1) wrongfully obtained property from a mercantile establishment, 2) intended to deprive the mercantile

establishment of the property, 3) that the crime was committed acting together with an accomplice, 4) that the property value exceeded \$250 dollars, and 5) that the acts occurred in the State of Washington. RCW 9A.563.340. Appellant contends that there was insufficient evidence presented to the jury to support a finding of guilt. See Brief of Appellant (hereinafter "Appellant's Brief"). More specifically, Appellant argues that there was insufficient evidence with regards to his intent to deprive the mercantile establishment of the property. Id. Appellant does not contest the sufficiency of the evidence with regards to any element of the crime of organized retail theft in the second degree other than "intent to deprive the mercantile establishment of the property." Id.

Appellant's argument must fail. The State presented sufficient evidence at trial such that a reasonable jury could find that Appellant intended to deprive a mercantile establishment, here Home Depot, of property.

1. THE APPROPRIATE STANDARD OF REVIEW.

Evidence is sufficient to support a conviction if, after viewing the evidence in the light most favorable to the State, any rational

trier of fact could have found the essential elements proved beyond a reasonable doubt. State v. Hendrickson, 129 Wn.2d 61, 81, 917 P.2d 563 (1996). An appellant's claim of insufficient evidence admits the truth of the State's evidence. State v. Salinas, 119 Wn.2d 192, 829 P.2d 1068 (1992). Also, "all reasonable inference from the evidence must be drawn in favor of the State and against the Appellant." State v. Gallagher, 112 Wn. App. 601, 613, 51 P.3d 100 (2002) (citing Salinas, 119 Wn.2d at 201).

In reviewing for sufficiency, appellate courts draw no distinction between circumstantial and direct evidence presented at trial, because both are considered equally reliable. State v. Bencivenga, 137 Wn.2d 703, 711, 974 P.2d 832 (1999). Credibility determinations are for the finder of fact and are not reviewed on appeal. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). Thus, an appellate court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992). Furthermore, reviewing courts need not themselves be convinced of an appellant's guilt beyond a reasonable doubt, but only that a reasonable trier of fact could so

find. Gallagher, 112 Wn. App. at 613. The appellate court may affirm for any basis apparent in the record. State v. Jones, 71 Wn. App. 798, 863 P.2d 85 (1993); State v. Swan, 114 Wn.2d 613, 790 P.2d 610 (1990); State v. Butler, 53 Wn. App. 214, 766 P.2d 505 (1989).

2. GIVEN THE APPROPRIATE STANDARD OF REVIEW, THE STATE PRESENTED SUFFICIENT EVIDENCE FROM WHICH A REASONABLE JURY COULD INFER AND CONCLUDED THAT THE APPELLANT INTENDED TO DEPRIVE HOME DEPOT OF MERCHANDISE.

A person acts with intent when “he or she acts with the objective or purpose to accomplish a result constituting a crime.” RCW 9A.08.010(1)(a). Short of a statement or admission by a person as to what he or she intended, direct evidence of intent is essentially impossible to come by. However, it has long been recognized that intent can legally be inferred from the facts and circumstances of a case. See, e.g., State v. Wilson, 125 Wn.2d 212, 217, 883 P.2d 320 (1994) (citing, *inter alia*, State v. Ferreira, 69 Wn. App. 465, 850 P.2d 541 (1993); State v. Louthier, 22 Wn.2d 497, 156 P.2d 672 (1945)). A finder of fact may infer intent from

the facts and circumstances surrounding an act. State v. Lewis, 69 Wn.2d 120, 123, 417 P.2d 618 (1966) (citing State v. Willis, 67 Wn.2d 681, 685, 409 P.2d 669 (1966)). "Although intent may not be inferred from conduct that is patently equivocal, it may be inferred from conduct that plainly indicates such intent as a matter of logical probability." Lewis, 69 Wn.2d at 123.

In the instant case, the facts and circumstances surrounding the incident give rise to an inference that the Appellant intended to deprive Home Depot of the saw. Here the Appellant entered the store and immediately retrieved a saw. RP 28-30. The Appellant then wandered around the store briefly in what was an apparent attempt to not look suspicious. Id. The Appellant then left the saw directly next to a cash register next to the contractors' door exit. RP 29-30. Mere minutes later, a young woman then walked in the store and went directly to the saw left by the Appellant next to the contractors' doors. RP 37. The young woman then pushed the saw out the contractor's door exit without paying for the property. RP38-39. The young woman pushed the saw directly to the Appellant who was standing outside his vehicle, waiting for her. RP 38-39. When the woman arrived at the vehicle the Appellant

immediately began to load the saw into his vehicle when he was contacted by a Home Depot loss prevention officer. RP 38-40.

These facts and circumstances give rise to the inference that the Appellant, working together with his female accomplice, intended to deprive Home Depot of the saw. The scheme was intelligent, and apparently intended to provide both the Appellant and his female accomplice with the defense that “the other person paid for it.” However, after viewing all the evidence and making determinations of credibility, the jury determined beyond a reasonable doubt, that the Appellant intended to deprive the Home Depot of the saw.

The Appellant’s reliance on State v. Bencivenga, 137 Wn.2d 703, 708, 974 P.2d 832 (1999) is wholly misguided. The appellant incorrectly claims that Bencivenga is somehow dispositive in this matter by claiming that the Bencivenga stands for the proposition that “an inference should not arise where there are other reasonable conclusions that follow from the circumstance.” Appellant Brief at 5, quoting Bencivenga, 137 Wn.2d 708. To begin, Appellant failed to attribute this sentence to State v. Jackson, 112 Wn.2d 867, 871, 774 P.2d 1211, 1212 – 1213 (Wash., 1989), which the court in Bencivenga was quoting when it

referenced this sentence. The court in Bencivenga goes on to explain the specific sentence, which is heavily relied upon by the Appellant, by stating “if the finder of fact concludes an alternative *reasonable* explanation exists for the Appellant's actions, then the State has failed to meet its burden of establishing guilt beyond a reasonable doubt.” Id at 708. Or in other words, there is reasonable doubt.

Importantly, the court in Bencivenga then went on to caution against:

[A]ppropriating to the appellate court the role of factually determining the reasonableness of an inference. Just because there are hypothetically rational alternative conclusions to be drawn from the proven facts, the fact finder is not lawfully barred against discarding one possible inference when it concludes such inference unreasonable under the circumstances. Nothing forbids a jury, or a judge, from logically inferring intent from proven facts, so long as it is satisfied the state has proved that intent beyond a reasonable doubt... An essential function of the fact finder is to discount theories which it determines unreasonable because the finder of fact is the sole and exclusive judge of the evidence, the weight to be given thereto, and the credibility of witnesses.

State v. Bencivenga, 137 Wn.2d 703, 709, 974 P.2d 832, 834 – 835 (Wash., 1999).

The Appellant appears to be requesting the appellate court to infringe on the sanctity of the jury and determine that Appellant's alternative theory was reasonable; specifically that he thought his companion paid for the merchandise. See Appellant's Brief at 5. To begin, there was no testimony at trial that the Appellant believed his female companion paid for the merchandise, rather, counsel for the Appellant simply made that argument. However most importantly, the reasonableness of alternative theories was decided by the jury when they unanimously convicted the Appellant. It is inappropriate for the Appellant to request the appellate court to now determine the "reasonableness" of this alternative theory.

The role of the appellate court in the instant case is to determine whether any rational jury, viewing the evidence in the light most favorable to the prosecution, could have found, beyond a reasonable doubt, all the essential elements of the crime. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628. The State provided sufficient evidence at trial, when viewed in a light most favorable to the State, to prove beyond a reasonable doubt that the Appellant intended to deprive Home depot of property, specifically a tile saw, thus his appeal must fail.

D. CONCLUSION

There was sufficient evidence from which a reasonable jury could find that Appellant intended to deprive the Home Depot of merchandise. The State, therefore, respectfully requests that this Court affirm Appellant's conviction.

DATED this 17 day of November, 2009.

Respectfully submitted,

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