

No. 39607-6-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,
Respondent,

v.

BRADLEY JOHNSON,
Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR GRAYS HARBOR COUNTY

THE HONORABLE F. MARK MCCAULEY, JUDGE

BRIEF OF RESPONDENT

H. STEWARD MENEFEE
Prosecuting Attorney
for Grays Harbor County

BY: *Gerald R Fuller*
GERALD R. FULLER
Chief Criminal Deputy
WSBA #5143

OFFICE ADDRESS:
Grays Harbor County Courthouse
102 West Broadway, Room 102
Montesano, Washington 98563
Telephone: (360) 249-3951

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T A B L E

Table of Contents

RESPONDENT’S COUNTERSTATEMENT OF THE CASE 1

Factual Background. 1

Procedural Background. 3

RESPONSE TO ASSIGNMENTS OF ERROR 4

1. A locomotive is a railway car.
(Response to Assignment of No. 1). 4

2. The trial court properly admitted evidence regarding
the sale of copper wire by the defendant.
(Response to Assignment of Error No. 2). 6

CONCLUSION 10

TABLE OF AUTHORITIES

Table of Cases

State v. Cunningham, 93 Wn.2d 823, 831, 613 P.2d
1139 (1980) 9

State v. Dertchler, 75 Wn.App. 134, 137-38, 876
P.2d 970, rev. denied, 125 Wn.2d 1015 (1995) 5, 6

State v. Green, 94 Wn.2d 506, 739 P.2d
1150 (1987) 6

State v. Matthews, 75 Wn.App. 278, 877 P.2d
252 (1994) 7

State v. Miller, 91 Wn.App. 869, 872-73, 960
P.2d 464 (1998) 5, 6

State v. Petit, 32 Wash. 129, 72 P. 1020 (1903) 5, 6

| | |
|--|---|
| <u>State v. Rogers</u> , 83 Wn.2d 553, 520 P.2d 159 (1974) | 9 |
| <u>State v. Salle</u> , 34 Wn.2d 183, 208 P.2d 872 (1949) | 8 |
| <u>State v. Wentz</u> , 149 Wn.2d 342, 348-49, 68 P.3d 282 (2003) | 5 |
| <u>U.S. v. Asher</u> , 178 F.3d 486 (7 th Cir. 1999) | 8 |

STATUTES

| | |
|------------------------|------|
| RCW 9A.04.110(5) | 4 |
| RCW 9A.52.030 | 3, 4 |

Table of Court Rules

| | |
|-------------|---|
| ER403 | 7 |
|-------------|---|

RESPONDENT'S COUNTERSTATEMENT OF THE CASE

Factual Background.

The Puget Sound Pacific Railroad maintains a rail yard in Elma, Washington. (RP 19). In the early morning hours of July 28, 2008, the rail yard was closed. (RP 19). A diesel electric locomotive, No. 2017, was located on the premises. The locomotive has an engineer's cab in the front, and a generator and a large diesel engine in the rear. The diesel engine turns the generator which produces electricity to turn the axles and drive the wheels of the locomotive. (RP 20). Behind the cab is a 2- to 3-foot electrical cabinet. Behind the electrical cabinet is a fully enclosed area containing the main generator, with the diesel engine in the rear of the locomotive. (RP 20-21). There is a catwalk on either side of the locomotive. (RP 20). There are doors to the engineer's cab in front and along the catwalk. There are doors to the rear compartment along the each side to allow access to the interior for maintenance and repair. (RP 21-23, 32, Exhibits 18, 21, 24, 15).

Shortly before 3 a.m. on July 28, 2008, Officer Hayden of the Elma Police Department was on patrol. Officer Hayden parked his patrol vehicle a short distance away from the rail yard and walked on foot onto

the premises. (RP 34-35). He walked to a location a short distance from locomotive No. 2017. As he approached the locomotive he could hear “small tinkling sounds” from inside the locomotive. He could also see light shining from above to underneath the locomotive. (RP 36). Officer Hayden ducked underneath a flat car that was hooked to the locomotive and positioned himself where he could see down the catwalk on the side of the locomotive. (RP 37, Exhibit 26). His vantage point was about 10 to 15 feet away from the locomotive. (RP 38). As he stood there he could still hear metal on metal noises coming from inside the locomotive. (RP 38).

As Hayden was watching the locomotive he observed the defendant come out onto the catwalk from inside the locomotive. (RP 38-39). When the defendant started walking down the catwalk, Hayden identified himself and turned on his flashlight. The defendant then began running down the catwalk toward the back of the locomotive. (RP 39, Exhibit 25). Hayden gave chase and caught the defendant near the back corner of the locomotive as the defendant was getting up off the ground. (RP 40).

Once the defendant was secured, Officer Hayden went inside the locomotive. He recovered tools, including bolt cutters. (RP 41, Exhibit 18, 7, 8). He also recovered a ratchet and a bolt. (RP 42, Exhibit 7). Additional tools were found on the person of the defendant when he was searched incident to arrest. (RP 45). None of the tools recovered either in

the locomotive or on the defendant's person belonged to the railroad. (RP 25, Exhibit 17, 18).

The interior of the locomotive contains high voltage copper cabling and copper wire to conduct the electricity from the generator to the motors that power the wheels. When the locomotive was inspected following the defendant's arrest, it was discovered that some of the cables had been undone and additional cable stolen. (RP 26-27).

Evidence at trial was that the defendant had sold 105 pounds of No. 2 copper wire to a recycling business in Pacific, Washington, on the day prior to his arrest. (RP 69-70).

Procedural Background.

The defendant was charged by Information on July 29, 2008, with Burglary in the Second Degree, RCW 9A.52.030. The matter was eventually tried to a jury on July 14, 2009. The jury returned a verdict of guilty. The defendant was sentenced on August 3, 2009. The court imposed a standard range sentence.

During the trial, outside the presence of the jury, the court took testimony from Kimberly Wagner-Droz, an employee of Valley Recycling who was personally acquainted with the defendant. An offer of proof was made that the defendant sold copper wire to Valley Recycling on July 27, 2008, the day prior to the burglary. (RP 58-60). The court found the evidence relevant on intent and motive. The court found that the probative

value of the evidence was not substantially outweighed by the danger of unfair prejudice. (RP 63-64). The testimony was presented to the jury along with a limiting instruction. (RP 65-67). Ms. Wagner-Droz identified business documents from Valley Recycling to establish that the defendant had sold 105 pounds of #2 copper wire the day prior to the burglary. (RP 69-70). The same cautionary instruction was included in the court's instructions to the jury. (Instruction No. 18).

The defendant rested following presentation of the State's case. No challenge was made to the sufficiency of the evidence to prove that this railway car was a "building."

RESPONSE TO ASSIGNMENTS OF ERROR

1. A locomotive is a railway car. (Response to Assignment of No. 1).

A person commits the crime of Burglary in the Second Degree when, with intent to commit a crime against a person or property therein, he enters or remains unlawfully in a "building." RCW 9A.52.030. The term "building" has a particularized meaning. RCW 9A.04.110(5).

"Building," in addition to its ordinary meaning, includes any dwelling, fenced area, vehicle, railway car, cargo container or any other structure used for lodging of persons or for carrying on business therein, or for the use, sale or deposit of goods....

The term "railway car" is not otherwise defined. Contrary to the assertion of the defendant, the words "...used for lodging of persons or

carry on business therein....” only modify the term “other structure.” The other terms in the statute stand alone, unmodified by that phrase. State v. Wentz, 149 Wn.2d 342, 348-49, 68 P.3d 282 (2003). Guidance in State law is found in State v. Petit, 32 Wash. 129, 72 P. 1020 (1903). In Petit, the Washington Supreme Court held that a flat car loaded with wheat and covered by a tarpaulin was not a “building” within the meaning of the burglary statute. Petit, 32 Wash. at 130-131:

These cars, its seem to us, do not come within the definition given by the statute, which evidently had relation to boxcars or some kind of car that is enclosed so that entry can be made. Under the ordinary understanding of the words “break and enter” it is difficult to see how a person could break and enter a flat car loaded with wheat upon which a canvas is laid.

There may be many kinds of railway cars. A railway car is a “building” so long as it is enclosed and large enough to allow entry to accommodate human beings. State v. Miller, 91 Wn.App. 869, 872-73, 960 P.2d 464 (1998); State v. Dertchler, 75 Wn.App. 134, 137-38, 876 P.2d 970, rev. denied, 125 Wn.2d 1015 (1995). It only need to be “...enclosed so that entry may be made....” Petit, supra, at p. 130. The photos show the interior of the locomotive. In the case at hand, the officer saw the defendant walk onto the catwalk from inside the locomotive. (RP 39, 43, Exhibit 26).

The defendant has cited to the Random House unabridged dictionary defining railway car as “a wheeled vehicle adapted to the rails

of a railroad.” The State accepts this definition as modified by the holdings in Miller, Dertchler and Petit. There is nothing complicated about this definition when taken in light of the prior reasoning of the court. A locomotive is fully enclosed. It has doors that allow access from the outside. It is built to accommodate human access. It travels on tracks. Under these circumstances, it certainly is a “railway car.” There is no reason to believe that the legislature intended to discriminate between types of railway cars so long as the particular car is enclosed and large enough to accommodate human beings. It is difficult to see how anyone could be confused or not put on notice by the terms of the statute that when they break into a locomotive that they are entering a railway car.

There is substantial evidence to support the jury’s finding that this railway car was a “building.” State v. Green, 94 Wn.2d 506, 739 P.2d 1150 (1987).

This assignment of error must be denied.

2. The trial court properly admitted evidence regarding the sale of copper wire by the defendant. (Response to Assignment of Error No. 2).

ER401 sets forth the definition of relevant evidence:

“Relevant evidence” means evidence having any tendency to make the existence of any fact that is consequence to the determination of the action more probable or less probable than it would be without the evidence.

No one would doubt that the fact that the defendant sold copper wire the day prior to the burglary, is relevant evidence to prove the defendant's intent and motive the following day when he was caught inside a locomotive containing large amounts of copper wire used to generate electricity to power the locomotive. The prior sale is relevant evidence which helps prove the defendant's intent to obtain copper wire to sell.

Such relevant evidence should only be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or may tend to mislead the jury. ER403. There is certainly is no danger of the jury misunderstanding the purpose of such testimony, particularly in light of the fact that the court issued both a verbal and handwritten limiting instruction.

Such evidence has been admitted in other context pursuant to ER404(b) to prove motive. Thus, in State v. Matthews, 75 Wn.App. 278, 877 P.2d 252 (1994), the State was allowed to present evidence of the defendant's poor financial condition to show his motive for robbery. In the case at hand, like Matthews, the defendant's motive is financial gain.

In the case at hand, the State was obligated to prove beyond a reasonable doubt that the defendant entered the railway car with intent to commit the crime of theft. One of the primary items of value to steal from the locomotive is copper wire. The proof that the defendant deals in goods

of kind, such as copper wire, is relevant to show that the defendant's purpose for being inside the locomotive on the following day.

The fact that the defendant had, on the day prior, sold copper wire, is not, in and of itself, a "prior bad act." There was no evidence that he committed other thefts of copper wire. The defendant's possession of the receipt for the sale of the copper wire, however, bears circumstantially upon his motive and intent at the time of his arrest. The receipt shows that on the day prior to this incident the defendant had sold copper wire. It shows circumstantially his purpose for being in the locomotive on this occasion, to steal copper wire.

There do not appear to be any cases directly on point with this factual situation. There are cases, however, in which the court has allowed much more egregious conduct to be admitted to prove motive and intent. See, for example, U.S. v. Asher, 178 F.3d 486 (7th Cir. 1999) in which the defendant was being prosecuted for dealing in stolen auto parts and salvaging in stolen vehicles. The court allowed testimony of the defendant's prior involvement and the similar theft ring to show that the defendant knew that he was dealing in stolen auto parts. In State v. Salle, 34 Wn.2d 183, 208 P.2d 872 (1949), a prosecution for receiving stolen property, the court properly admitted evidence of the defendant's possession of other stolen property to show guilty knowledge.

The evidence herein, was simply a receipt for the sale of a quantity of copper wire. The receipt was relevant evidence to show the

defendant's intent at the time of his arrest; to obtain copper wire to sell. Contrary to the assertion of the defendant, the trial court heard the offer of proof and made a reasoned analysis concerning the admission of this evidence. (RP 63-65). The trial court properly gave a limiting instruction. The defendant was not prejudiced unduly by the introduction of this such evidence.

Even if this court were to interject its opinion concerning the admissibility of the evidence for that of the trial court and find that the trial court improperly admitted such evidence, the error is harmless. The courts have recognized the standard when applying harmless error analysis to evidentiary rulings. A ruling concerning an evidentiary matter that is later determined to be error is not prejudicial unless, within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected. State v. Rogers, 83 Wn.2d 553, 520 P.2d 159 (1974). If, after review of the entire record, the reviewing court is convinced that the outcome of the trial would not have been affected, then the error is deemed harmless. State v. Cunningham, 93 Wn.2d 823, 831, 613 P.2d 1139 (1980).

In the case at hand, the defendant was caught inside the locomotive. The defendant was caught with the various tools of the trade including bolt cutters to cut the copper wire, ratchets to remove the bolts holding the wire to the frame and a flashlight to see in the dark. The

events occurred at 3:00 in the morning. The evidence of the defendant's guilt of the charged crime was overwhelming.

This assignment of error must be denied.

CONCLUSION

For the reasons set forth, the conviction must be affirmed.

Respectfully Submitted,

By: *Gerald R Fuller*
GERALD R. FULLER
Chief Criminal Deputy
WSBA #5143

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
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STATE OF WASHINGTON,

Respondent,

No.: 39607-6-II

v.

DECLARATION OF MAILING

BRADLEY JOHNSON,

Appellant.

DECLARATION

I, Barbara Chapman hereby declare as follows:

On the 2-1-10 day of January, 2010, I mailed a copy of the Brief of Respondent to Jodi R. Backlund; Manek R. Mistry; Backlund & Mistry; 203 Fourth Avenue East, Suite 404; Olympia, WA 98501-1189, and Bradley Johnson 826041; Stafford Creek Corrections Center; 191 Constantine Way; Aberdeen, WA 98520, by depositing the same in the United States Mail, postage prepaid.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

DATED this 1ST day of ~~January~~ FEBRUARY, 2010, at Montesano, Washington.

Barbara Chapman