

FILED

APRIL 8, 2015

Court of Appeals
Division III
State of Washington

NO. 32565-2

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

STATE OF WASHINGTON,

RESPONDENT,

V.

JASON PAUL MARTINS

APPELLANT.

BRIEF OF RESPONDENT

KARL F. SLOAN
Prosecuting Attorney
237 4th Avenue N.
P.O. Box 1130
Okanogan County, Washington

509-422-7280 Phone
509-422-7290 Fax

Table of Contents

| | |
|--|----|
| A. Assignments of Error | 1 |
| B. Issues Pertaining to Assignment of Error | 1 |
| C. Statement of the Case | 1 |
| D. Argument | 5 |
| Accepting the truth of the state's evidence and all inferences that reasonably can be drawn therefrom, substantial evidence to support the elements of count 3 were presented to the jury permitting their finding of guilt. | |
| E. Conclusion | 10 |

Table of Authorities

| | |
|--|------|
| Cases | |
| 7 Wn. App. at 18..... | 6 |
| <i>Randecker</i> , | |
| 79 Wn.2d, 516- | 6 |
| <i>State v. Askham</i> , | |
| 120 Wn. App. 872, 86 P.3d 1224 (2004)..... | 7 |
| <i>State v. D. H.</i> , | |
| 31 Wn. App. 454, 643 P.2d 457 (1982)..... | 8 |
| <i>State v. Donckers</i> , | |
| 200 Wash. 45, 93 P.2d 355 (1939) | 6 |
| <i>State v. Dugger</i> , | |
| 75 Wn.2d 689, 453 P.2d 655 (1969) | 5, 6 |
| <i>State v. Gibson</i> , | |
| 79 Wn.2d 856, 490 P.2d 874 (1971) | 6 |
| <i>State v. Lewis</i> , | |
| 55 Wn.2d 665, 349 P.2d 438 (1960) | 6 |
| <i>State v. Moore</i> , | |
| 7 Wn. App. 1, 499 P.2d 16 (1972)..... | 6 |
| <i>State v. Myers</i> , | |
| 65 Wn.2d 911, 400 P.2d 372 (1965) | 5 |
| <i>State v. Randecker</i> , | |
| 79 Wn.2d 512, 487 P.2d 1295 (1971) | 6 |
| <i>State v. Taplin</i> , | |
| 9 Wn. App. 545, 513 P.2d 549 (1973)..... | 6 |
| <i>State v. Tinajero</i> , | |
| 154 Wn. App. 745, 228 P.3d 1282 (2009)..... | 7 |
| <i>State v. Wong Quong</i> , | |
| 27 Wash. 93, 67 P. 355 (1901) | 7, 8 |
| Statutes | |
| RCW 46.16.301, 46.16.280, 46.16.305, 46.16.595 | 9 |
| Regulations | |
| chapter 308-66 WAC | 9 |
| WAC 308-63-070(7), -120(4)..... | 9 |
| WAC -308-96 | 9 |
| Other Authorities | |
| WPIC 5.01 | 5 |
| WPIC 70.11 | 5 |

A. ASSIGNMENTS OF ERROR

Whether the defendant's claim that his due process rights were violated can be sustained where the State presented substantial direct and circumstantial evidence for the jury to find the defendant guilty of theft in the third degree as charged in count 3.

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

Can defendant assert a colorable due process violation claim where substantial evidence presented to the jury permitted them to find the defendant guilty beyond a reasonable doubt of theft in the third degree in count 3?

C. STATEMENT OF THE CASE

At approximately 12:40 am, on July 5th, 2013, Deputy Shane Jones was patrolling the area from the city Brewster to the city of Pateros. Pateros is approximately seven to eight miles from Brewster. Verbatim Transcript of *Proceedings of Trial from June 3 and 4, 2014* (hereinafter "RP") 41-43, 47. As Deputy Jones was traveling down the dead end, secluded portion of Lakeshore Drive, he observed a van parked with no lights on and with its front doors open. RP 43, 47, 91, 95, 100. The van was parked next to a Pateros City truck that was parked just outside the fenced and gated City of Pateros maintenance shop. The van was between the City shop and the boundary of adjoining business property that had trailers parked there. RP 45-46, 61-62. The property where the trailers were parked was separated from the van's location and City shop by shrubbery border and sign. RP 45, 61-62.

When the officer first saw the defendant, the defendant was seated in the driver's seat of the van. A female, Tammy Campbell, was standing outside and in front of the van. RP 48. Deputy Jones knew both the defendant and Campbell resided in the Twisp area. RP 48. A female, Shari Martins, was located in the front passenger seat of the van. RP 49.

The defendant initially claimed to be at the location to watch the fireworks, however, the fireworks earlier that evening were shot off in Brewster, and the defendant's van was parked across the street and away from the river. RP 49, 93. There was no fireworks display held in Pateros. RP 90.

The officer observed a two way radio on the van's driver's side dashboard that was powered on. The defendant was unable to produce the other radio. RP 50. The defendant's story later changed, and he told the deputy that he was at the location to pick up Ms. Campbell and his ex-wife, Ms. Martins, to take them to Wenatchee. RP 51, 93. Ms. Campbell claimed she had been given a ride to the Super Stop, which was located at the other end of Pateros. RP 51. The responses of the defendant and Campbell made the officer suspicious as did a strong odor of gasoline. The officer began looking around the immediate area with the aid of his flashlight and observed a pool of gasoline underneath the City truck. RP 52.

Due to the number of suspects at the scene, Deputy Jones requested back up and was joined by Brewster office Rory Williams. RP 53. Upon Officer Williams' arrival, Deputy Jones asked him to check the City truck. The officers found the truck's gas tank was being siphoned using a hose and gas can, and that gas was overflowing the can and spilling on the ground. RP 54, 96, 105-106. The officers stopped the siphoning.

RP 54, 59. The officers also located glass vials between the van and the City truck. RP 60. Dale Parks, the Pateros Public Works Superintendent also arrived on scene and identified the city truck and indicated that no hoses or gas cans had previously been left outside the City's shop fence. RP 95, 97.

Deputy Jones also made contact with Ms. Martins through the open van door and immediately saw baggies of methamphetamine on the floorboard near the open passenger door. RP 52-53, 57, 91, 129.

Officer Williams spoke with Ms. Campbell and Ms. Martins away from the defendant. RP 101. Deputy Jones re-contacted the defendant at the driver's side of the van. The defendant initially denied stealing gas from the City truck. Deputy Jones observed the two way radio and additional bags that looked similar to the ones he had seen on the passenger floorboard. RP 55. The defendant claimed the bags contained marijuana and took them from the dash and handed them to the deputy. One of the bags appeared to contain marijuana, the other bag contained methamphetamine. RP 56-57, 129.

Additional hoses, a screwdriver, and a funnel were found on the driver's side floorboard. Underneath the driver's seat, the deputy found two license plates. RP 64-66. The back of the van was cluttered with items, and when asked about them the defendant said he was a collector. RP 62, 65, 66, 76. The defendant gave officers permission to search the vehicle. During the search, additional bags were located in the van that contained within them bags of methamphetamine. RP 75. Sheriff's Sargent Hawley had arrived at the scene and assisted with the search. RP 76, 109.

Deputy Jones and Sgt. Hawley were able to determine through a records check that the two license plates found under the driver's seat belonged to a construction company located next to where the van was parked. RP 76, 111-112. Sgt. Hawley went over and found that two trailers were missing their license plates and using the trailer's vehicle identification numbers was able to verify that the two plates belonged to the two trailers. RP 112-113. One of the license plates still had valid tabs. RP 114. Only after officers found the plates under the driver's seat and matched the license plates to nearby trailers, did the defendant claim he obtained the license plates from a dumpster. RP 135. The only dumpster was next to the City's shop, on the opposite side of the van from the property where the trailers were located. RP 133-134.

Sgt. Hawley also found that a license plate light from one of the trailers had been placed on top of the driver's side rear tire of the defendant's van. RP 114. The light had been broken off of the trailer and the wiring was still attached. RP 114. The defendant told the officers he didn't have any knowledge of the trailer light whatsoever. RP 134

The defendant was charged by information with the crimes of possession of a controlled substance, methamphetamine; theft in the third degree for the fuel theft; and theft in the third degree for the license plates. CP 149-151. The defendant's jury trial was held on June 3 and 4, 2014. The jury was instructed in Instruction 13:

To convict the defendant of the crime of theft in the third degree, in count 3, each of the following three elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about July 5, 2013, the defendant wrongfully obtained or exerted unauthorized control over property of another or the value thereof not exceeding \$750 in value;
- (2) That the defendant intended to deprive the other person of the property; and
- (3) That this act occurred in the County of Okanogan.

If you find from the evidence that elements (1), (2) and (3), have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of elements (1), (2), or (3), then it will be your duty to return a verdict of not guilty.

CP 30; WPIC § , WPIC 70.11. The Jury was also instructed in Instruction 3:

The evidence that has been presented to you may be either direct or circumstantial. The term "direct evidence" refers to evidence that is given by a witness who has directly perceived something at issue in this case. The term "circumstantial evidence" refers to evidence from which, based on your common sense and experience, you may reasonably infer something that is at issue in this case.

The law does not distinguish between direct and circumstantial evidence in terms of their weight or value in finding the facts in this case. One is not necessarily more or less valuable than the other.

CP 20; WPIC § , WPIC 5.01. On June 4, 2014, the defendant was found guilty on all counts. RP 217; CP 14. The defendant was sentenced on June 14, 2014, to three months in jail on count 1, and 364 days with 334 suspended on counts 2 and 3. RP 235-238; CP 4-13.

Defendant now appeals his conviction in count 3 for committing theft in the third degree.

D. ARGUMENT

Accepting the truth of the state's evidence and all inferences that reasonably can be drawn therefrom, substantial evidence to support the elements of count 3 were presented to the jury permitting their finding of guilt.

It is a general rule that the elements of a crime may be proved by circumstantial evidence. *E.g., State v. Dugger*, 75 Wn.2d 689, 690, 453 P.2d 655, 656 (1969).

It is well established in this state that the scope of appellate review of the sufficiency of circumstantial evidence is limited to a determination of whether the state has produced substantial evidence tending to establish circumstances from which the jury could reasonably infer the fact to be proved. *Dugger*, 75 Wn.2d at 690(citing *State*

v. Myers, 65 Wn.2d 911, 400 P.2d 372 (1965); *State v. Lewis*, 55 Wn.2d 665, 349 P.2d 438 (1960); *State v. Donckers*, 200 Wash. 45, 93 P.2d 355 (1939)).¹

Stated another way: A court does not weigh the evidence to determine whether the necessary quantum has been produced to establish some proof of an element of the crime; it may only test or examine the sufficiency thereof. See *Dugger*, 75 Wn.2d at 690; *State v. Randecker*, 79 Wn.2d 512, 517, 487 P.2d 1295, 1298 (1971). The jury is the sole and exclusive judge of the weight of evidence, and of the credibility of witnesses. The court must concern itself only with the presence or absence of the required quantum. *Randecker*, 79 Wn.2d, 517.²

A challenge to the sufficiency of the evidence admits the truth of the state's evidence and all inferences that reasonably can be drawn therefrom. Furthermore, the evidence is interpreted most strongly against the defendant and in a light most favorable to the state. *E.g.*, *State v. Gibson*, 79 Wn.2d 856, 858-59, 490 P.2d 874, 875 (1971).

¹ Appellant cites *State v. Moore*, 7 Wn. App. 1, 499 P.2d 16 (1972), on page 4 of his brief for support of the claim that mere suspicion etc. is not substantial evidence sufficient for due process and a conviction not supported by substantial evidence may be attacked for the first time on appeal. Even if these statements are correct, they are not found within the body of the decision in *Moore*, 7 Wn. App. 1. Appellant provides no pinpoint citation for this citation to *Moore* in his brief. *Moore* dealt with identification of the defendant, and discussed the need for pre-trial identification to comply with due process. *Moore*, 7 Wn. App. at 18. The language and erroneous citation appears to have come, at least in part, from the dissent in *State v. Taplin*, 9 Wn. App. 545, 557, 513 P.2d 549, 556 (1973).

² Although the words "proof" and "evidence" are frequently used interchangeably, there is a distinct difference. "Evidence" (both direct and circumstantial) is a narrower term than "proof". Evidence is only a medium by which proof may be established. *Randecker*, 79 Wn.2d, 516-17(citations omitted). Proof of a fact in issue may be established by any one, or by a combination of, several legal media including evidence, presumptions, and matters judicially noticed. *Id.* Proof is the effect of employing any or all such media within the legal rules for the purpose of producing conviction in the mind of a judge or jury, excluding, however, mere argument. *Id.* The "substantial evidence" rule merely spells out the quantum of "evidence" necessary to produce the "proof" required; it does not provide a different test. *Id.*

Circumstantial evidence need not compel a finding of guilt. It is sufficient if it permits the fact finder to infer the finding beyond a reasonable doubt. *E.g.*, *State v. Askham*, 120 Wn. App. 872, 880, 86 P.3d 1224, 1228 (2004) (internal citations omitted).

The fact that an appellate court may conclude the evidence is not convincing, or may find the evidence hard to reconcile in some of its aspects, or may think some evidence appears to refute or negate guilt, or to cast doubt thereon, does not justify the court's setting aside the jury's verdict. *State v. Tinajero*, 154 Wn. App. 745, 751, 228 P.3d 1282, 1285 (2009) (*citing Randecker*, Wash. 2d 512). It is unnecessary for the court to be satisfied of the defendant's guilt beyond a reasonable doubt. It is only necessary for the court to be "satisfied that there is 'substantial evidence' to support either the state's case, or the particular element in question. *Id.*

In the present case, the defendant was caught in the act of stealing gas from a City of Pateros truck and was found in possession of two license plates and a trailer light removed from trailers on an adjoining property.

Appellant argues the State did not put forth substantial evidence to show the license plates had been taken without the owner's permission, because the defendant came up with a story that he found them in a dumpster near the City's shop *after* police had identified the plates as belonging to the trailers parked at the neighboring business property. This is despite the fact that one plate still bore valid tabs; and the defendant could offer no explanation for the presence of the trailer light taken from one of the same trailers, found sitting atop his van's driver side tire when police contacted him.

Appellant cites to *State v. Wong Quong*, 27 Wash. 93, 94, 67 P. 355, 355 (1901) in support of his argument. However it appears to undercut his position. In *Wong*

Quong, 27 Wash. 93, the evidence was that the defendant, as an employee of the home, had access to the room where the visiting owner of a diamond ring was staying. The diamond was taken possibly with someone entering or exiting through a window in the room that opened onto a porch. The diamond was subsequently found in the possession of the defendant. The defendant testified that he found the diamond near the walk leading to the porch. The ring's owner did not testify about the ring, its condition, whether permission was given to take it, or anything else.

As in this case, the defendant's principal objection in *Wong Quong*, 27 Wash. 93 was that the state failed to show nonconsent of the owner of the property to the taking. *Wong Quong*, 27 Wash. at 94-95. The *Wong* Court correctly stated that nonconsent of the owner of property alleged to have been stolen is simply one of the elements of larceny, to be proven by the same means and in the same manner as all the other elements must be proven. It may be shown by the circumstances of the case, and the question of the sufficiency of such circumstances to establish the fact is usually one for the jury, and not for the court. *Id.*

The *Wong* Court concluded, that it will not do to say that theft can be proven only by the owner. The public has an interest in seeing that the guilty are punished, and the rule proposed by the Appellant would permit the escape of all at whose trial the state was unable to procure the attendance of such owner. *Id.*³

³ Appellant also cites to *State v. D. H.*, 31 Wn. App. 454, 643 P.2d 457, 459 (1982). As in the present case, the defendant in *D.H.* argued there was no evidence which would permit a rational trier of fact to find beyond a reasonable doubt that clothing was taken from The Fashion Express without permission, where the owner of the Store apparently did not testify to that fact. *D. H.*, 31 Wn. App. at 456, 458 (owner testified that the clothing had an aggregate retail value of \$300; and the two women had been in his store earlier that day for about an hour but had made no purchases). The Court in *D.H.* reiterated that nonconsent of the owner is an element of the crime of theft and need not be proved by direct evidence, and that the circumstances of the case when viewed in the light most favorable to the State permit an inference beyond a reasonable doubt. *D. H.*, 31 Wn. App. at 457-58.

In the present case there was both direct and circumstantial evidence for the jury to find guilt on count 3. The defendant was contacted in the act of stealing gasoline at around 12:40 am. Additional hoses were on the floor board, and near the trailer license plates that he had stashed under his seat. A license plate light that had been broken off of one of the trailers had been placed on the defendant's driver's side tire. The property where the trailers were located was physically separate from the City Shop and the dumpster. One plate sill had valid tabs affixed. The defendant provided law enforcement multiple inconsistent statements. His version about taking the plates from the dumpster came out only after the plates were matched to the nearby trailers; and the defendant could offer no explanation about the presence of the trailer light.

There was more than substantial direct and circumstantial evidence presented, for a reasonable finder of fact to find the defendant stole the plates from the nearby trailers.

Moreover, the defendant's claim that the plates were taken from a dumpster would also have to assume the owner of the trailers discarded a current and valid license plate, making the owner unable to use the trailer on the roadway; and that the owner also failed to comply with the requirements regarding proper disposal of those license plates. WAC -308-96 sets out the proper method of surrender or disposal of license plates. ⁴

⁴ WAC -308-96 **Surrender and disposition of license plates**

(1) What license plates are required to be surrendered? Only license plates authorized under RCW 46.16.301, 46.16.280, 46.16.305, 46.16.595 and dealer/manufacturer plates are required to be surrendered under chapter 308-66 WAC. Wreckers and scrap processors, hulk haulers must dispose of license plates according to WAC 308-63-070(7), -120(4).

(2) Where do I surrender my Washington vehicle license plates? You may surrender your Washington vehicle license plates in the following manner:

(a) Take them to your local vehicle licensing office;

(b) Mail them to the department of licensing in Olympia, Washington.

(3) What do Washington vehicle licensing offices do with surrendered license plates?

(a) License plates surrendered to Washington vehicle licensing offices will be invalidated to make them unusable;

Contrary to the inference raised by Appellant - the state need not disprove all other "possibilities" or theories that a defendant may attempt to assert. The jury determines the degree of credibility given to any statements, and ultimately whether any "reasonable" doubt exists.

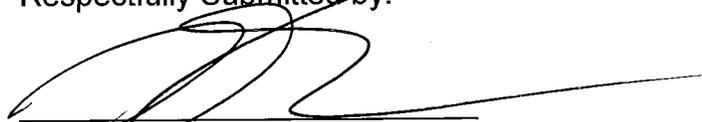
E. CONCLUSION

Accepting the truth of the State's evidence and all inferences that reasonably can be drawn therefrom, the State presented substantial evidence to support the elements of count 3, theft in the third degree, including the ownership and origins of the plates. The assertion by the defendant that he found the plates was not supported by any direct or circumstantial evidence in the case. The jury had substantial evidence to support its finding of guilt beyond a reasonable doubt.

The defendant's conviction should be affirmed

Dated this 8 day of April 2015

Respectfully Submitted by:



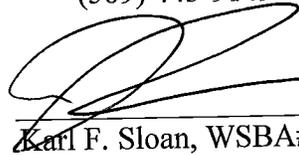
KARL F. SLOAN, WSBA #27217
Prosecuting Attorney
Okanogan County, Washington

-
- (b) Washington vehicle licensing offices will recycle or otherwise dispose of the invalidated plates that have been surrendered.
- (4) If I choose to dispose of the Washington vehicle license plates that are no longer valid, how is this done? Other than license plates indicated in subsection (1) of this section, you may dispose of your invalid Washington vehicle license plates in the following ways:
- (a) Remove or invalidate the month and year tabs and bend the plates so they are no longer usable;
 - (b) Shred the entire license plate; or
 - (c) After the month and year tab have been removed or invalidated, recycle the license plate in such a way that it cannot be confused with a valid Washington license plate.
- (5) How does the department dispose of my surrendered Washington vehicle license plate? Once the department has received the Washington vehicle license plate, it must surrender it to the department of general administration for disposal under RCW 43.19.1919.g of license plates.

PROOF OF SERVICE

I, Karl F. Sloan, do hereby certify under penalty of perjury that on April 8, 2015, I provided email service, a true and correct copy of Brief of Respondent, to:

E-mail: gaschlaw@msn.com
Susan Gasch
Gasch Law Office, P. O. Box 30339
Spokane WA 99223-3005
(509) 443-9149



Karl F. Sloan, WSBA# 27217

KARL F. SLOAN
Okanogan County Prosecuting Attorney
P. O. Box 1130 • 237 Fourth Avenue N.
Okanogan, WA 98840
(509) 422-7280 FAX: (509) 422-7290