

FILED

JUN 08 2018

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 35183-1-III

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

STATE OF WASHINGTON,
Plaintiff/Respondent,

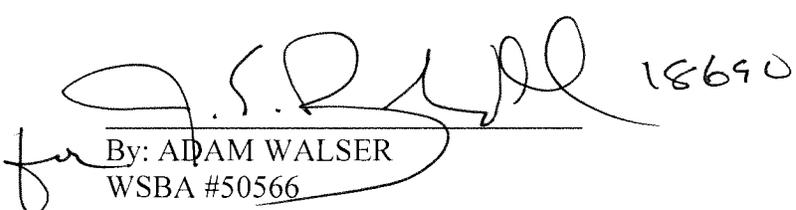
v.

JASON LEE PRIEST
Defendant/Appellant

APPEAL FROM THE SUPERIOR COURT OF
LINCOLN COUNTY, STATE OF WASHINGTON
HONORABLE JOHN STROHMAIER

BRIEF OF RESPONDENT

JEFFREY S. BARKDULL
Prosecuting Attorney
Lincoln County, Washington

 18690
By: ADAM WALSER

WSBA #50566

SPECIAL DEPUTY PROSECUTOR

Lincoln County

PO Box 874

Davenport, WA 99122

(509)725-4040

TABLE OF CONTENTS

I.	STATEMENT OF THE FACTS	1
II.	ARGUMENT AND AUTHORITY	6
III.	CONCLUSION	16

TABLE OF AUTHORITIES

WASHINGTON CASES

In re Winship, 397 U.S. 358 (1970)	6
Jackson v. Virginia, 443 U.S. 307 at 318 (1979)	6
State v. Drum, 168 Wn.2d 23, 34-35 (2010)	6
State v. Green, 94 Wn.2d.216 at 220 (1980)	6
State v. Salinas, 119 Wn. 2d 192, 201 ((1992)	7
State v. Wentz, 149 Wn.2d 342, 347 (2003)	6

WASHINGTON CONSTITUTION, STATUTES AND COURT RULES

RCW 9A.04.100	6
---------------	---

FILED

JUN 08 2018

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

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

STATE OF WASHINGTON,

Plaintiff/Respondent,

v.

JASON LEE PRIEST,

Defendant/Appellant.

Court of Appeals # 35183-1-III
Lincoln County # 16-1-000010-7
RESPONDENT'S BRIEF

COMES NOW, the Respondent, State of Washington, by and through Adam Walser, Special Deputy Prosecuting Attorney for Lincoln County, and respectfully submits this brief.

I. STATEMENT OF THE FACTS

On 8 May, 2015, Mr. Travis Blake, an employee of American Tower Corporation, visited a wireless cell phone tower located near Sprague Washington. I RP (Sitter) at 18¹. At that time Travis Blake was responsible for all wireless towers owned by American Tower in Eastern

Washington and Northern Oregon. I RP (Sitter) at 17. Upon arriving at the tower, Mr. Blake quickly determined that the facility had been vandalized and several thousand feet of copper material had been stolen. I RP (Sitter) at 18-19. In addition to the theft of copper, several electronics cases had been tipped over and the electronics inside stolen. I RP (Sitter) at 18. Included in the stolen copper were between 15 and 20 “Guidelines”, cut directly from the ceiling. I RP (Sitter) at 18. The materials to replace these guidelines alone cost hundreds of thousands of dollars. I RP (Sitter) at 21. The cost of cleaning up after the vandalism was approximately \$33,000. I RP (Sitter) at 22. Mr. Blake had been at the facility several weeks prior, no such vandalism or theft had taken place at the time of that prior visit. I RP (Sitter) at 24 & 109.

Law enforcement seized a small flashlight, left on the ground outside the scene of the tower theft. I RP (Sitter) at 78. A latent fingerprint was removed from the seized flashlight which was identified as belonging to Corey Butler. I RP (Sitter) at 78. A cigarette butt, also recovered at the scene, was found to have residual DNA belonging to Corey West. I RP (Sitter) at 78. After being approached by law enforcement, Butler admitted

¹ For the sake of continuity, Respondent’s brief shall cite to the verbatim reports

to being the first person to approach the tower facility at some time in 2014 or early 2015. I RP (Sitter) at 38. After this initial visit to the facility, Butler returned with West who both admitted to stealing copper wire from the exterior of the facility on this visit. I RP (Sitter) at 28-29 & 43-44. Butler and West subsequently entered the facility and found that it contained a significant additional amount of copper, however they lacked the tools necessary to remove it. I RP (Sitter) at 40.

Appellant and his girlfriend, Patricia Doree, were enlisted by Butler and West to assist in removing the copper from the interior; Appellant possessed a cordless saws-all, cutters, snips and other tools necessary to remove it. I RP (Sitter) at 41. The theft and vandalism by Appellant began in 2015 and continued for approximately 6 months. I RP (Sitter) at 28, 50, 53. During this 6-month period Appellant assisted Butler and West in the theft of copper on multiple occasions. I RP (Sitter) at 40 & 43. Butler, West, Doree and Appellant each played an equal role in removing the copper material from the facility, often switching between cutting wire, removing the insulation, transporting material to the vehicles, including the guidelines, and engaging in “a little destruction.” I RP

of the proceeding using the same format as outlined in footnote 1, on page 3, of

(Sitter) at 41, & 46-47. The party regularly utilized Appellant's vehicle, a black pick-up truck, to transport stolen copper to Appellants residence, as well as transporting it to the scrap yard, where it was sold. I RP (Sitter) at 49.

William Adams, who briefly shared a cell with the Appellant, testified for the state. 2 RP (Sitter) at 10-31. Adams testified that while he and Appellant shared a cell, Appellant stated that he had visited the tower facility multiple times with West and Butler for the purposes of stealing copper material. 2 RP (Sitter) at 15. Appellant told Adams that he had removed "a lot" of wire from the walls and structure of the facility, at some point referencing \$38,000, referencing either retail value or total damages to the building. 2 RP (Sitter) at 15-16 & 19. Adams stated that he had met Appellant prior to his incarceration and, at that meeting, Appellant had attempted to sell him a Dewalt brand cordless tool set. 2 RP (Sitter) at 13. During the processing of the scene by law enforcement, Deputy Andy Manke, discovered that a Dewalt brand saws-all had been used to cut copper from the interior of the facility; this was the same brand of saws-all Appellant had previously tried to sell William Adams. 1 RP

the Appellant's Brief.

(Sitter) at 77 & 2 RP (Sitter) at 13.

Mark and Gail Lesky, who lived near Appellant and Dorree in 2015, both testified at Appellants criminal trial. 2 RP (Sitter) at 33 & 43. Both Mr. and Mrs. Lesky stated that they witnessed Appellant and Dorree moving large quantities of metal into their home through the basement window. 2 RP (Sitter) at 35 & 46. The Leskys were shown pictures of the groundwires stolen from the tower facility and positively identified them as the same material they witnessed the Appellant loading into his home through the basement window. 2 RP (Sitter) at 37, 41, 47, 50. Mr. Lesky witnessed at least two of these groundwires being moved into the home, while Mrs. Lesky observed the Appellant moving more than ten into the home. 2 RP (Sitter) at 38 & 47. Mr. Lesky stated he witnessed these instances while out on walks through his neighborhood. 2 RP (Sitter) at 39. Mrs. Lesky testified that she would wake up around 2:30-3:00 during the summer and fall of 2015; during that period, she witnessed Appellant loading metal into his home almost nightly. 2 RP (Sitter) at 44, 49. When pressed on cross-examination Mrs. Lesky repeatedly reiterated that she was sure she witnessed Appellant moving metal into his home primarily during the summer of 2015. 2 RP (Sitter) at 49.

After the conclusion of the State's evidence, Appellant testified in his own defense. 2 RP (Sitter) at 53. During his testimony, Appellant admitted that he first met West and Butler in 2015. 2 RP (Sitter) at 56. Additionally, Appellant admitted to being the owner of the tools utilized to remove copper from the facility. 2 RP (Sitter) at 67.

II. ARGUMENT AND AUTHORITY

Sufficiency of the Evidence

It is a well established principle in the American Criminal Justice System that the burden of proof rests on the state. *In re Winship*, 397 U.S. 358 (1970). The burden upon the state is one of proof beyond a reasonable doubt. RCW 9A.04.100 (2011). On appeal, claims of insufficiency of evidence require the Appellate Court to determine “whether there was sufficient evidence to justify a rational trier of fact to find guilt beyond a reasonable doubt” *State v. Green*, 94 Wn.2d 216 at 220 (1980)(emphasis in original.) (Citing *Jackson v. Virginia*, 443 U.S. 307 at 318 (1979)). More specifically, “[t]he relevant question is ‘whether any rational fact finder could have found the essential elements of the crime beyond a reasonable doubt.’” *State v. Drum*, 168 Wn.2d 23, 34-35 (2010). (quoting *State v. Wentz*, 149 Wn.2d 342, 347 (2003), (citing *State v. Green*, 94

Wn.2d 216, 221 (1980))). Any “claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.” *State v. Salinas*, 119 Wn.2d 192, 201 (1992).

State’s Evidence Pertaining to the Time Frame of the Charged

Conduct

The evidence presented by the State at Appellant’s trial, which related to the time period in which the charged conduct took place, was sufficient to support the jury’s finding. The criminal conduct charged by the State was alleged to have been committed between 1 March and 8 May in 2015. CP 1. In his testimony, Travis Blake stated that he discovered the theft, burglary and malicious mischief during a visit to the location of the theft, on 8 May, 2015. 1 RP (Sitter) at 18. Mr. Blake’s testimony effectively “book-ends” the later extreme of when the charged conduct occurred. The only question posed by Appellant’s brief relates to whether the State’s evidence was sufficient to prove beyond a reasonable doubt that charged conduct took place *after* 1 March, 2015. The State was not required to prove that all of Appellant’s conduct took place within the charged time period, only that *some* of that conduct took place in the

charged period. The State's evidence proved exactly that.

In his trial testimony, Travis Blake asserted that, prior to 8 May 2015, he had last visited the tower facility "weeks or months" prior. 1 RP (Sitter) at 24. However, as testified to by Deputy Andy Manke, on 8 May 2015, Mr. Blake informed him that he had visited the tower "several weeks" prior. 1 RP (Sitter) at 60. A juror would be entirely reasonable in believing that Mr. Blake's memory on 8 May 2015 was more accurate than it would have been on almost two years after the fact, and thus "several weeks" was a more accurate assessment of his last visit. Appellant's assertion that "several weeks" may mean "10, 12 or 16 weeks" may not be technically false, but it is far from reasonable. When the testimony of Travis Blake and Deputy Manke are taken in the light most favorable to the government, a reasonable juror would certainly conclude the charged conduct took place, at least in part, after 1 March 2015.

Both Corey West and Corey Butler, co-conspirators in Appellant's crime, testified that Appellant's involvement in the charged conduct began in 2015. 1 RP (Sitter) at 28 & 50. The Appellant testified himself that, prior to 2015, he had not yet met Mr. Butler or Mr. West. 2 RP (Sitter) at

56. Mr. West and Mr. Butler also testified that they visited the facility, with Appellant, on multiple occasions; Mr. West elaborated that he and Appellant burglarized the facility approximately 20 times over a period of approximately six months. 1 RP (Sitter) at 39, 43 & 51. A reasonable juror who heard testimony that the Appellant's conduct began in the year 2015, continued for approximately six months and ended no later than May 8 2015, would certainly believe that conduct *must* have primarily taken place between 1 March and 8 May of 2015.

Appellant's brief implies that Corey Butler was "waffling" when he testified that the first visit to the tower facility was in 2014. However, a careful reading of the record makes it clear that the question put to Mr. Butler was not when Appellant first visited the tower facility, but instead when *Mr. Butler* first visited the tower facility. 1 RP (Sitter) at 38 & 40. As both Mr. Butler and Mr. West testified, they visited the facility at least once, likely twice, prior to the Appellant ever being there. 1 RP (Sitter) at 28, 30-31, 40, 44-45. When this portion of Mr. Butler's testimony is put into proper context, it is clear that it related to *his* visit in 2014 and thus has very little bearing on the time in which Appellant first visited the facility and is in no way inconsistent with the assertion that Appellant's

thefts began in 2015.

The testimony of Mark and Gail Lesky was highly probative of the timing of the criminal conduct, yet entirely ignored in Appellant's brief. Mr. and Mrs. Lesky both testified that they lived near Appellant in the spring of 2015, that they saw Appellant moving large quantities of metal material into his home on multiple occasions at this time and that this material looked identical to the material stolen from the tower facility. Mrs. Lesky was adamant that she observed this during the summer of 2015. She even explained how she knew her observation of Appellant was during the summertime of 2015; because she observed the behavior around 2:00am - 3:00 am, and that she only wakes up that early in the summer and fall. 1 RP (Sitter) at 48. The evidence at trial established that the Appellant was disposing of the stolen material in his home, on multiple occasions, over an extended period of time during the summer of 2015. Travis Blake's testimony made it clear that Appellant's criminal conduct could not have taken place any time after 8 May 2015. No reasonable person could have heard Mrs. Lesky testify that she witnessed Appellant's behavior in the summer of 2015 and believe that it must have taken place in the months of January and February of that year.

Admittedly, the State did not prove the exact date when each and every one of Appellant's criminal acts took place; but the State was not held to such a burden. The State was also not required to prove that *all* of the criminal conduct took place during the charged period. In order to satisfy the elements relating to the charged time period, the State was only required to prove that some relevant criminal conduct took place between 1 March and 8 May of 2015. When all evidence provided by the State's witnesses, and the Appellant himself, is taken in the light most favorable to the State, it is far greater than what would be necessary to convince a reasonable juror that the State had met its burden. Thus, the Appellant's appeal on this basis should be denied.

***State's Evidence Pertaining to the Value of the Charged
Conduct***

At Appellant's criminal trial, the jury returned a finding of guilt for Burglary in the Second Degree, Theft in the First Degree and Malicious Mischief in the First Degree. Theft in the First Degree required the State prove that the cost of the damage to the owner's property, as a result of Appellant's act, exceeded \$5,000 in value. 2 RP (Sitter) at 108. Malicious Mischief in the First degree required the State prove that

Appellant caused physical damage to the property of another in an amount exceeding \$5,000 in value. 2 RP (Sitter) at 111. The evidence presented by the State at Appellant's trial, which related to the value of the damage and theft by Appellant, was sufficient to support the jury's finding.

The State's first witness, Mr. Travis Blake, testified that between fifteen and twenty wave-guidelines were cut out and stolen from the facility. 1 RP (Sitter) at 20. Mr. Blake testified that the cost of replacing these "wave-guides" alone would be several hundred thousand dollars. 1 RP (Sitter) at 21. Simple math would indicate that the damage caused by removing even a single wave-guide, as well as the materials necessary to replace it, would very-likely exceed \$5000.

Deputy Manke testified that the stolen wave-guides were cut from the structure "with some sort of saw" and that Dewalt brand saws-all blades were found at the facility. 1 RP (Sitter) at 67. Appellant's co-conspirator, Mr. Butler, testified that the interior of the facility, including the wave-guides, could not be removed without tools which the Appellant provided. 1 RP (Sitter) at 40-41. Mr. West testified that Appellant was handling the wire and large breakers throughout the theft process and that "everyone had an equal role" in both the theft and destruction. 1 RP

(Sitter) at 46-47. William Adams testified that the Appellant attempted to sell him a Dewalt saws-all and the Appellant admitted to being the owner of the tools used to remove material from the facility. Consequently, it follows that Appellant was an active participant in much, if not all, removal of the wave-guides.

Mr. and Mrs. Lesky both testified that they observed Appellant moving large pieces of copper into the basement window of his home and that these pieces looked identical to the wave-guides stolen from the tower facility. 2 RP (Sitter) at 35 & 46. If even one wave-guide was stolen by Appellant, both the value of the loss and the damage caused would be sufficient to satisfy the State's burden on both charges. Mrs. Lesky testified that she witnessed the Appellant moving the wave-guides into his home more than ten separate times during the Spring and Summer of 2015. 2 SP (Sitter) at 46-49. This testimony makes it absolutely clear that Appellant was directly responsible for the theft of a great number of wave-guides, if not all of them.

However, the loss and damage associated with the wave-guides was not the only loss and damage suffered at the tower facility, or perpetrated by the Appellant. Appellant himself, as evidenced by the

testimony of Mr. William Adams, claimed that he removed “a lot” of wire from the wall and structure of the tower facility. 2 RP (Sitter) at 15. While relaying the details of his exploits to Mr. Adams, Appellant took responsibility for \$38,000 in either retail loss or damage to the facility. 2 RP (Sitter) at 19.

Mr. West explained that Appellant was handling and moving large amounts of wire and large breakers within the racks; much of this material was later carried away from the facility using Appellant’s vehicle. 1 RP (Sitter) at 46-47 & 49. Each load of scrap removed from the tower facility would result in approximately three loads to the scrap yard. Mr. West testified that they would receive between \$300-\$500 for each load of scrap delivered to the scrap yard; \$100-\$200 less than the usual amount, given its stolen nature. 1 RP (Sitter) at 48 & 50. Using the numbers provided by Mr. West, a single load of material removed from the facility, would easily fetch between \$900-\$1500 in payments by to Appellant and his co-conspirators. This number would ordinarily have been between \$1,200-\$2,100, had the material not been stolen. One need not speculate in order to know that scrap yards pay only pennies on the dollar for scrapped copper wire. As such, even had Appellant only had a hand in a single load

of material taken from the facility, it undoubtedly would have represented far more than \$5,000 in both value loss and damage to the tower facility owners.

The effect of Appellant's actions were testified to by himself, his co-conspirators, Appellant's neighbors at the time and Appellant's former cell-mate. This testimony establishes that Appellant was engaged in theft of materials and destruction of the tower facility on up to twenty separate instances, for approximately six months. The testimony of these witnesses, when admitted as true and in the light most favorable to the State, *clearly* establishes that Appellant's actions caused both losses and damages far in excess of \$5,000. The numbers provided relating to value and damage, testified to by both Mr. Blake and Appellant, are in no way speculative. They represent relatively concrete amounts of \$33,000, \$38,000 and over \$100,000. If *any* of these values was believed by the juror, then the State not only met its burden relating to value, but exceeded it by several times. For these reasons, the Appellant's requested relief should be denied.

Record On Sentencing

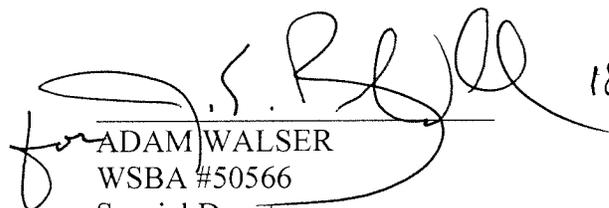
The State concedes that the trial court did not sufficiently articulate into the record what facts the Appellant's offender score calculation was

based upon. A review of the record indicates that the court was almost certainly reviewing a copy of Appellant's criminal history, however identification of that material was never specifically entered into the transcript of proceedings. Consequently, Appellant's request that this matter be remanded back to the trial court for calculation of the Appellant's offender score should be granted.

III. CONCLUSION

For the reasons above, the State respectfully requests that the court deny Appellant's request for reversal of his convictions and that the matter be remanded back to the trial court for re-calculation of Appellant's offender score.

RESPECTFULLY SUBMITTED this 25th day of May, 2018

 18690
ADAM WALSER
WSBA #50566
Special Deputy
Prosecuting Attorney

FILED

JUN 08 2018

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

Certificate of Mailing

I, Sandi Rodenbough, do hereby certify and declare that I am the administrative assistant to the Deputy Prosecuting Attorney for Lincoln County, and that I deposited in the United States Post office in the City of Davenport, Lincoln County, Washington, on the date below, a properly stamped and addressed envelope(s) directed to the appellant Ms. Andrea Burkhart, at the address of PO Box 1241, Walla Walla, WA 992362 containing a true and correct copy of: Brief of Respondent.

Dated: 5-31-2018


SANDI RODENBOUGH