

FILED  
Court of Appeals  
Division III  
State of Washington  
9/17/2020 8:00 AM

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

NO. 37311-8-III

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STATE OF WASHINGTON,  
Plaintiff/Respondent,

v.

BRIAN WING,  
Defendant/Appellant

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BRIEF OF RESPONDENT

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APPEAL FROM THE SUPERIOR COURT OF  
LINCOLN COUNTY, No 19-8-00552-8

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STATE OF WASHINGTON,

Plaintiff/Respondent,

v.

BRIAN WING,

Appellant/Appellant.

Court of Appeals # 37311-8-III  
Lincoln County # 19-8-00552-8  
**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 October 22, 2019, Mrs. Mindy Halme arrived at her home, currently under construction, to find that the front door had been kicked in, the door jamb had been broken to pieces, such that it would no longer operate, and the door itself had been scratched and dented. RP 11, 56. Mrs. Halme had purchased this door assembly only two weeks prior, for

\$1,057.33. RP 13. At trial, Mrs. Halme testified that she and her husband attempted to repair both the door jamb and the door itself. RP 12. While they were able to temporarily repair the door, such that it could be shut and locked, a complete repair of the jamb was not possible and the scratches were unable to be removed or stained over. RP 12. Despite their attempts at repair, the door was not able to be repaired to its original condition and replacement was required. RP 12, 19.

Upon entering the home, Mrs. Halme discovered that Dewalt compound miter saw had been stolen from its stand. RP 11. The Dewalt miter saw had been purchased that same week. RP 11. On the floor, near the stolen miter saw stand, was a blue PayPal debit card bearing the name the Appellant, "Brian Wing.": RP 11-12. Mrs. Halme contacted the Lincoln County Sheriff's Department, Deputy Jared McLagan responded. RP 14.

Deputy McLagan observed a unique footprint on both the door, presumptively from when it had been kicked in, as well as inside the home near the missing saw's stand. 24, 31. After contacting contractors currently working on the home, as well as their headquarters, Deputy McLagan determined that none of the contractors working in the home were familiar with Appellant, nor had shoes containing that tread print. RP

33.

Deputy McLagan applied for, and was granted, a search warrant for the Appellant's home as well as the Appellant's vehicle. RP 33-34. Deputy McLagan executed the search warrant on Appellant's home on 22 October, 2019. RP 34. While the search warrant was being executed, Deputy McLagan observed the Appellant's vehicle approaching. RP 35. The Appellant's vehicle was stopped, the Appellant was observed driving and was detained. RP 35.

During a visual search of the Appellant's vehicle, Deputy McLagan observed sawdust consistent with that observed near the stand of the stolen saw at Mrs. Halme's residence. RP 37. Deputy McLagan observed the tread pattern on the Appellant's shoes appeared to be an exact match with the prints found at Mrs. Halme's home and on the broken door. RP 37. During a search of Appellant's vehicle, Deputy McLagan found a large Dewalt compound miter saw which matched the description of the saw stolen from Mrs. Halme's residence earlier that day. RP 39-40.

The Appellant was convicted, in a trial by jury, of second-degree burglary, second-degree malicious mischief and third-degree theft. CP 57-

59; RP 127. The court's original date of sentencing was scheduled for the following Monday, December 23, 2019. RP 132. Sentencing of the Appellant was continued to January 2, 2020, in order to provide Appellant with sufficient time to review a PC report which established the basis for eight prior convictions of the Appellant. RP 133. These convictions were for three counts of second-degree theft of an access device as well as five counts of theft. RP 134.

When the court reconvened on January 2 2020, all parties established that they had reviewed the provided report. RP 134. Prior to sentencing of the Appellant, the court reviewed the report and heard argument from the parties regarding how these convictions should be calculated into the Appellant's offender score. RP 135-139. The parties agreed that the three convictions for theft of an access device all occurred simultaneously at the time of the victim's wallet was stolen. RP 136.

The dispute between the parties concerned the five convictions for second-degree theft. RP 135-139. The theft second convictions took place when the Appellant used the credit cards stolen from the victim to purchase items from five different stores at five different locations. RP 137. These five thefts each took place on the same day. RP 135. The court

determined that each of the five thefts should each count as a separate event, as they each had a separate victim and each took places in a separate location. RP 156-157.

During sentencing, Appellant requested the court consider granting a Drug Offender Sentencing Alternative (DOSA). RP 133, 143, 146-147, 151-152. The court had previously determined that Appellant had been granted DOSA twice previously. RP 143. Prior to the court announcing its sentence, Appellant addressed the court both directly and through his attorney. RP 147-154. While much of the record of Appellant's statement is incomplete and marked as (Inaudible), the court's comments indicate that Appellant claimed that he had never denied guilt. RP 157. While announcing its sentence, the court addressed Appellant's claim that he had never denied guilt, the pointed out that Appellant had done so by pleading not guilty. RP 157.

## II. ARGUMENT.

### A. THE EVIDENCE SUPPORTING THE VALUE OF THE DAMAGED DOOR WAS SUFFICIENT TO SUSTAIN THE

**CONVICTION FOR SECOND DEGREE MALICIOUS  
MISCHIEF**

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; 90 S. Ct. 1068 (1970). The burden upon the state is one of proof beyond a reasonable doubt. REV. CODE WASH. (ARCW) § 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, 220; 616 P.2d 628 (1980)(emphasis in original.) (Citing *Jackson v. Virginia*, 443 U.S. 307, 318; 99 S. Ct. 2781 (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; 225 P.3d 237 (2010). (quoting *State v. Wentz*, 149 Wn.2d 342, 347; 68 P.3d 282 (2003), (citing *State v. Green*, 94 Wn.2d 216, 221; 616 P.2d 628 (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; 829 P.2d 1068 (1992).

A charge of second-degree malicious mischief requires that the state prove a Defendant caused damage valued in excess of \$750. *REV. CODE WASH. (ARCW) § 9A.48.080*. “‘Value’ for the purposes of theft means market value of the property at the time and in the approximate area of the theft.” *REV. CODE WASH. (ARCW) § 9A.56.010(21)*. Evidence of the price paid for an item is entitled to great weight. *State v Hermann*, 138 Wn.App 596, 602; 158 P.3d 96 (2007). But such evidence must not be too remote in time. *State v Melrose*, 2 Wn. App 824, 831; 470 P.2d 552 (1970). The price paid for an item of property, if not too remote in time, is proper evidence of value. *Id.*

At trial, evidence showed that the victim purchased the door for over \$1,000 just two weeks prior to the Appellant destroying it RP 13. Appellant’s brief argues that the State was required to prove that the victim’s door had no value as either a used door or as salvage in order to prove the damage element of the charged crime. App Br 8-10. However, the Washington State Supreme Court has previously held “evidence of retail price *alone* may be sufficient to establish value.”

*State v Longshore*, 41 Wn.2d 414, 430, 5 P.3d 1256 (2000) (emphasis in original). (See also *State v. Kleist*, 126 Wn.2d 432, 436, 895 P.2d 398, 400 (1995)). The court in *Longshore* elaborated that when “value has recently been established at a nearby place, that is proper evidence of value.” *Id.*

While evidence of salvage or resale value may very well be relevant in instances of significantly used items, that was clearly not the case here. The damaged property in this instance was purchased only days before and was still in like new condition. Evidence presented by the state of replacement value of the destroyed property was sufficient to prove value. Consequently, Appellant’s requested relief should be denied.

**B. THE COURT’S DETERMINATION OF  
APPELLANT’S OFFENDER SCORE WAS SUPPORTED BY  
THE RECORD AND CORRECTLY CALCULATED**

“In determining any sentence other than a sentence above the standard range, the trial court may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved

in a trial or at the time of sentencing, or proven ... Acknowledgment includes not objecting to information stated in the presentence reports and not objecting to criminal history presented at the time of sentencing.” REV. CODE WASH. (ARCW) § 9.94A.530.

Prior to Appellant’s sentencing hearing, Appellant’s attorney requested, and was provided by the state, a copy of a PC report regarding several of Appellant’s prior convictions. RP 133. It was Appellant’s attorney who propounded this document and placed its contents before the court for consideration. RP 133-134. The record makes it clear that Appellant’s attorney, the prosecutor as well as the judge reviewed this PC report and relied on its contents when determining Appellant’s offender score. RP 133-147. Equally, clear is that, at no time, did the Appellant object to the consideration of this PC report. Appellant should be barred from objecting to evidence which he himself had presented. Consequently, the evidence was properly considered by the court.

“‘Same criminal conduct’ ... means two or more crimes that require the same criminal intent, are committed at the same time and place and involve the same victim.” *REV. CODE WASH (ARCW) §*

9.94A.400(1)(a). “For multiple crimes to be treated as the ‘same criminal conduct’ at sentencing, the crimes must have (1) been committed at the same time and place; (2) involved the same victim; and (3) involved the same objective criminal intent.” *State v. Tili*, 139 Wn. 2d 107, 123. 985 P.2d 365 (1999) (citing *State v. Palmer*, 95 Wn. App 187, 190. 975 P.2d 1038 (1999)). “A trial court’s determination of what constitutes the same criminal conduct for purposes of calculating an offender score will not be reversed absent an abuse of discretion of misapplication of law.” *State v. Walden*, 69 Wn.App 183, 188. 847 P.2d 956 (1993) (see *State v. Burns*, 114 Wn. 2d 314; 788 P.2d 531 (1990)) (see also *State v. Collicott*, 112 Wn. 2d 399; 771 P.2d 1137 (1989)).

The PC report concerned Appellant’s three previous convictions for theft of an access device as well as five prior convictions for second-degree theft. RP 133-134. Each of the convictions for second-degree theft involved the use of one of the stolen credit cards at a separate store. RP 135. Appellant’s brief contends that these five charges for second-degree theft should have been considered the “same criminal conduct” and thus only counted once against

Appellant's offender score, given that they all "arose from the theft of property from a single victim..." App Br 13. However, the charges of second-degree theft all took place at a separate time and place and all involved different victims, the stores from whom Appellant stole merchandise using the stolen credit cards. RP 135. Thus, the determination of the trial court that these incidents were separate criminal acts trial court was proper under RCW 9.94A.400(1)(a).

The facts in the present case are analogous to those in State v Young, 97 Wn. App 235; 984 P.2d 1050 (1999). In Young, the Defendant was convicted on five counts of forgery when he presented the same photocopied check, on five separate occasions, to the same victim. Id at 238. Even though each of these crimes involved a photocopy of the same check, and was each perpetrated on the same victim, the Division I Court of Appeals found that they did not constitute the "same criminal conduct" and thus should be counted separately for sentencing purposes. Id at 244. In each charge for second-degree theft, Appellant perpetrated thefts against a different victim, did so at different times and often with different stolen credit cards.

When it determined that Appellant's convictions were separate criminal conduct, the trial court was operating in accordance with RCW 9.94A.400(1)(a). Consequently, it did not abuse its discretion and Appellant's requested relief should be denied.

**C. THE JUDGE DID NOT ABUSE HIS DISCRETION WHEN REFUSING APPELLANT'S REQUEST FOR DOSA**

“Ordinarily, a DOSA, as an alternate form of a standard range sentence, may not be appealed. But ‘this prohibition does not ... bar a party from challenging legal errors or abuses of discretion ...’ For example, a defendant may appeal a sentence ... if the defendant alleges a constitutional violation.” *State v Gronnert*, 122 Wn. App 214, 225; 93 P.3d 200 (2004) (quoting *State v Smith*, 118 Wn. App 288, 292; 75 P.3d 986 (2003)).

Appellant's brief alleges that comments made by the court while determining whether to grant Appellant's DOSA request violated his right to due process. App Br 14 – 20. However, the judge's comments were not an indication that the Appellant was unjustified in electing a trial, but were instead merely a response to Appellant's claim that he

had never denied guilt. RP 158.

A court has broad discretion whether to grant a defendant's DOSA request. *State v. Barton*, 121 Wn. App. 792, 90 P.3d 1138 (2004). This discretion includes whether the defendant and the community will benefit from the sentencing alternative. *Id.* A defendant's acceptance of responsibility is relevant to whether a defendant will ultimately benefit from a sentencing alternative. A claim that a defendant never denied guilt is contradicted by the fact that he had plead not guilty. A defendant has the right to hold the state to its burden. He does not however have the right to plead innocence and then subsequently deny that he has done so.

Appellant's claim he never denied guilt, subsequent to pleading not guilty, was clear evidence of Appellant's refusal to accept responsibility for his conduct. This is a proper factor in a court's decision whether to grant the DOSA request. However, it was not the sole factor. The court listed a litany of relevant and proper justifications for its denial. These included Appellant's repeated failure when previously granted DOSA, the lack of evidence that drugs in any way related to the charged crime, the effect on the

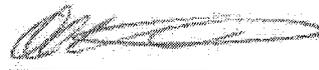
victim, as well as the overwhelming evidence of Appellants guilt. RP 157, 160.

Appellant's brief seeks to cast the court's comments as intended to chill a defendant's exercising their right to trial. However, these comments were made in response to claims made by Appellant himself. As such, Appellant's relief should be denied.

### III. CONCLUSION

For the reasons above, the State respectfully requests that the court deny Appellant's request to reverse the conviction for second degree malicious mischief and remand the case for entry of judgement on the less degree offense.

RESPECTFULLY SUBMITTED this 16th day of September, 2020.



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**September 16, 2020 - 11:06 PM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division III  
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**Appellate Court Case Title:** State of Washington v. Bryan Lee Wing  
**Superior Court Case Number:** 19-1-00060-8

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