

NO. 64016-0-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Appellant,

v.

DONALD OKERSON,

Respondent.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE HOLLIS HILL

COURT OF APPEALS
STATE OF WASHINGTON
2009 NOV 16 PM 4:51

BRIEF OF APPELLANT

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TABLE OF CONTENTS

| | Page |
|---|------|
| A. <u>ASSIGNMENTS OF ERROR</u> | 1 |
| B. <u>ISSUES PERTAINING TO ASSIGNMENTS OF ERROR</u> | 3 |
| C. <u>STATEMENT OF THE CASE</u> | 6 |
| 1. PROCEDURAL FACTS..... | 6 |
| 2. SUBSTANTIVE FACTS FROM TRIAL TESTIMONY..... | 6 |
| 3. TRIAL COURT'S PRETRIAL AND MID-TRIAL RULINGS..... | 12 |
| 4. TRIAL COURT'S FINDINGS AS TO THE MOTION FOR ARREST OF JUDGMENT..... | 17 |
| D. <u>ARGUMENT</u> | 19 |
| 1. THERE WAS SUFFICIENT EVIDENCE IN THE RECORD FROM WHICH A RATIONAL TRIER OF FACT COULD FIND OKERSON GUILTY OF SECOND DEGREE BURGLARY BEYOND A REASONABLE DOUBT. | 19 |
| 2. THE TRIAL COURT IMPROPERLY PROHIBITED OFFICER RIENER FROM TESTIFYING AS TO HIS LAY OPINION THAT THE UNTESTED SPARKLES ON OKERSON'S CLOTHING WERE SHARDS OF GLASS. | 30 |
| E. <u>CONCLUSION</u> | 35 |

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Miranda v. Arizona, 384 U.S. 486,
86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)..... 9, 10

Washington State:

In re Ness, 70 Wn. App. 817,
855 P.2d 1191 (1993)..... 21, 24

State v. Cole, 117 Wn. App. 870,
73 P.3d 411 (2003)..... 32

State v. Delmarter, 94 Wn.2d 634,
618 P.2d 99 (1980)..... 20

State v. Gentry, 125 Wn.2d 570,
888 P.2d 1105 (1995)..... 19

State v. Goodman, 150 Wn.2d 774,
83 P.3d 410 (2004)..... 20

State v. Halstien, 122 Wn.2d 109,
857 P.2d 270 (1993)..... 32

State v. Hosier, 157 Wn.2d 8,
133 P.3d 936 (2006)..... 19

State v. Kunze, 97 Wn. App. 832,
988 P.2d 977 (1999)..... 32, 33

State v. Longshore, 97 Wn. App. 144,
982 P.2d 1191 (1999), aff'd,
141 Wn.2d 414, 5 P.3d 1256 (2000)..... 20

State v. Loucks, 98 Wn.2d 563,
656 P.2d 480 (1983)..... 25, 27

| | |
|---|------------|
| <u>State v. Mace</u> , 97 Wn.2d 840, 650 P.2d 217 (1982)..... | 25, 26, 27 |
| <u>State v. Powell</u> , 126 Wn.2d 244, 893 P.2d 615 (1995)..... | 31 |
| <u>State v. Salinas</u> , 119 Wn.2d 192, 829 P.2d 1068 (1992)..... | 19, 20 |
| <u>State v. Stenson</u> , 132 Wn.2d 668, 940 P.2d 1239 (1997)..... | 31 |
| <u>State v. Thomas</u> , 150 Wn.2d 821, 83 P.3d 970 (2004)..... | 31 |
| <u>State v. Williams</u> , 96 Wn.2d 215, 634 P.2d 868 (1981)..... | 28 |

Statutes

Washington State:

| | |
|---------------------|----|
| RCW 9A.52.030 | 20 |
| RCW 9A.52.040 | 21 |

Rules and Regulations

Washington State:

| | |
|--------------|-------|
| CrR 7.4..... | 6, 19 |
| ER 403 | 33 |
| ER 701 | 30 |
| RAP 2.2..... | 6 |

A. ASSIGNMENTS OF ERROR¹

1. The trial court erred by finding the evidence insufficient for any rational trier of fact to find Okerson guilty of burglary in the second degree, and entering an order arresting the judgment of the jury.

2. The trial court erred in making the following findings of fact:

a. Officer Tung saw an *SUV* driving backwards at a high rate of speed out of the parking lot. (Order Arresting J. 1:20)

b. Okerson had walked, not run from the scene. (Order Arresting J. 1:21)

c. The stolen guitars were never found despite a canvas of the area around the store by responding officers. (Order Arresting J. 3:1-2)

d. No fingerprint evidence was presented to establish that Okerson entered the music store. (Order Arresting J. 3: 2-3)

¹ The court's written order is in paragraph form. CP 1-6. For clarity, the State has separated the paragraphs in the assignments of error, which are referenced by page and line numbers. Although some of the findings and conclusions appear to be mislabeled, the State has kept the same format as the trial court's written findings.

The trial court erred in entering the following conclusions of law:

a. Proof of entry was insufficient.

(Order Arresting J. 3:19)

b. Okerson was not seen close to the front glass door to the music store. (Order Arresting J. 3:19-20)

c. "The State saw fit neither to examine the defendant's coat to determine whether in fact it had glass on it, nor was any evidence presented to show that any blood was found at the scene of the crime." (Order Arresting J. 3:25; 4:1-2)

d. No evidence was offered linking the breaking, entering and thefts to Okerson. (Order Arresting J. 3:23-25)

e. The detective noted that the music store was not on a direct route between the Goodwill store and Okerson's parked car. (Order Arresting J. 4:23-24; 5:1-2)

f. The only evidence of entry, other than Okerson's proximity to the store following the burglary, is the existence of a "sparkly substance" on the defendant's coat, which the state declined to examine for proof that it was glass. (Order Arresting J. 5:18-20)

g. Proof of intent to commit a crime is insufficient.

(Order Arresting J. 5:21-22)

h. Evidence of a crime committed inside the music store points to the unknown occupants in a vehicle leaving the scene, instead of to Okerson. (Order Arresting J. 5:23-24)

4. The trial court erred by preventing a witness from testifying that he believed, based on his personal knowledge and experience, that the "sparkly items" he observed on Okerson were pieces of broken glass.

5. The trial court erred by preventing a witness to testify that he had previously seen "sparkly items" on a short collar simply because those items were no longer apparent on the collar by the time of trial.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. In considering a motion to arrest judgment in a criminal case based on alleged insufficiency of evidence, a trial court must accept the truth of the State's evidence, draw all reasonable inferences in favor of the verdict, and construe that evidence most strongly against the defendant. Okerson was charged with burglary in the second degree, which requires proof

that the defendant entered unlawfully in a building with the intent to commit a crime against person or property. The evidence in this case established that a police officer responding to an audible burglar alarm at a music store shortly after 1:00 a.m. discovered Okerson running away from the store and a vehicle speeding from the parking lot. The front glass door of the store was broken, shattered glass was strewn about the entrance, and five guitars were missing. Okerson, who was not far from the entrance with the broken window, had a torn pant leg, fresh cuts to his knee, glass shards on his jacket, and he provided three inconsistent stories about what happened at the music store. He was wearing one glove and had another glove in his jacket pocket. He appeared very nervous. A jury convicted the defendant at trial. Did the trial court err by arresting the verdict of the jury and in finding that no rational trier of fact could have found Okerson guilty?

2. Lay witnesses may offer an evidence-based opinion on their observations at a crime scene. Here, Officer Tom Reiner proposed to testify that the defendant's jacket was covered with small pieces of broken glass, but the trial court ruled that, because forensic testing had not been conducted, Officer Reiner could only say that there were numerous "sparkly items" on the jacket. Did

the trial court abuse its discretion by preventing the officer from testifying to his observations and his opinion that the sparkly items were shards of glass?

C. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

The State charged Donald Okerson on January 21, 2009 with Burglary in the Second Degree. CP 15-19. On the first day of trial, the State amended the information to add a count of Violation of the Uniformed Controlled Substances Act—Possession of Methamphetamine. CP 20-21. The jury found Okerson guilty as charged on count one of Burglary in the Second Degree, but acquitted him of possessing methamphetamine as charged in count two. CP 40-41.

Okerson filed a motion for arrest of judgment, under CrR 7.4(a)(3), which the court granted. RP 243-253; CP 45-48; CP 1-6.² The State timely appealed pursuant to RAP 2.2(b)(3).

2. SUBSTANTIVE FACTS FROM TRIAL TESTIMONY.

In the early morning hours of January 17, 2009, several Kent Police officers were dispatched to an audible burglar alarm call at that East Hill Music store, which is in a strip mall located near the intersection of SE 256th Street and 104th Avenue SE. RP 72-74,

² The Verbatim Report of Proceedings consists of five volumes that are consecutively paginated.

92, 95, 107-08. Officer Eric Tung was the first to arrive, between 14 and 16 minutes after the alarm was triggered.³ RP 72-73, 94-95. Officer Tung drove slowly into the north end of the strip mall parking lot and turned off the lights of his patrol car. RP 74-75, 93-94. None of the businesses, including the music store, appeared to be open. RP 75.

Officer Tung saw a man later identified as Okerson, walking and then running along the sidewalk that adjoins the store fronts of other businesses in the complex. RP 76. Okerson ran northbound, away from the front of the music store and toward Officer Tung's patrol car. RP 76-77, 98, 100-01. As Officer Tung drove toward Okerson, he saw the headlights of a car that was backing out of its parked position in front of the music store—about 100 feet from where he and Okerson were—and watched as it drove out a southern exit on the west side of the parking lot at a high rate of speed.⁴ RP 78-79, 98. He was unable to obtain additional details regarding the vehicle due to the darkness and heavy fog. RP 75, 78-79, 97.

³ The alarm was triggered at 12:54 a.m. and the radio call went out at 1:08 a.m. RP 72-73, 94-95.

⁴ Officer Tung did not testify that the fleeing vehicle was an SUV.

Officer Tung then got out of his patrol car and several times commanded Okerston to stop before Okerson slowed to a walk and eventually stopped. RP 77, 79, 100-01. He detained Okerson between 100 to 150 feet from the music store's entrance. RP 107. Officer Tung noted that Okerson seemed really nervous; he shuffled his feet, moved his body to different angles, and hid his hands from view. RP 77-79, 98.

Shortly thereafter, Officers Lisa DeWilde, Jeremiah Johnson, and Bobby Hollis arrived. RP 79, 87, 102, 117. Officers DeWilde and Johnson went to the front of the music store, where they immediately noticed that the front glass door had a large hole in the lower right corner where the glass had been shattered and pushed inward. RP 112-13, 119-20, 122, 124; Exs. 8-15. Officer DeWilde also noticed that the upper portion of the glass door was only partially attached to the frame and that there were a number of pry marks on the door frame. RP 120, 122, 124, 130; Exs. 8-15. Officer DeWilde described the hole in the broken glass pane as just large enough for her to crawl through with her duty belt on. RP 120, 125. Officer Johnson kicked in the remaining glass so that he

and Officer DeWilde could search the store. RP 120, 122, 125, 127. No one was found inside the store. RP 126, 128. Officer DeWilde and Sergeant Cobb attempted, but were unable to locate any fingerprints around the door frame. RP 126.

While Officers DeWilde and Johnson were investigating the scene, Officer Tung handcuffed Okerson, advised him of his Miranda⁵ rights and conducted a pat down search. RP 80, 86, 102, 108. During the pat down, Officer Tung noticed that Okerson was wearing one black glove and had a matching glove in his coat pocket. RP 79-80; Ex. 6. Officer Tung, and later Officer DeWilde, saw that the right knee of Okerson's pants were ripped in several places with fresh blood stains on the fabric of his jeans. RP 82, 127-28; Exs. 2-5.

After Okerson acknowledged understanding his rights, he told Officer Tung that he was homeless and staying at the bottom of Kent's East Hill, near Titus and Smith Streets. RP 86-87. Okerson said that he had walked a few miles up the hill to the Goodwill store near 102nd Avenue SE and SE 256th Street, to look for discarded clothing. RP 86-87. Okerson explained that at some point during

⁵ 384 U.S. 486, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

his trip, he decided to walk by the music store, which was several miles northeast of the Goodwill. RP 86-87. Okerson told Officer Tung that he saw two men burglarizing the store, that he had nothing to do with the burglary, and that after seeing this, he started to run northbound from the store. RP 87.

Okerson was taken to the Kent Police Department where he was questioned by Officer Tom Riener. RP 166-67. After confirming that Okerson had been advised of his Miranda rights, Officer Riener asked Okerson what happened up near the music store on the East Hill. RP168. Okerson told Officer Riener different versions of his story each time he recounted what he observed. RP 167-68.

First, Okerson said that he heard a loud crashing sound, like glass breaking, and saw two guys carrying arm loads of property from the music store. RP 168. Next, Okerson told Officer Riener that he saw two men standing by a dark-colored car and that after noticing the two men, Okerson saw the big hole in the glass door of the store. RP 168. Okerson said that the men hurriedly left the parking lot in their car. RP 168. Okerson also told Officer Riener—

as a separate story—that the men shouted out something about the cops and took off running. RP 168. Upon further questioning by Officer Riener, Okerson said that he wasn't certain if the men ran from the area or if they drove away. RP 168.

While talking with Okerson, Officer Riener had noticed some small, sparkly particles on Okerson's shoulder area of his jacket. RP 169. Officer Riener told the jury that, based on his observation of the "speckles" or "sparkling items" on Okerson's clothing, he asked Okerson if he had been around any broken glass, which Okerson adamantly denied. RP 169, 173-74. Okerson further told Officer Riener that he had not been anywhere near the entry door to the music store, that he was "far, far away from it." RP 174. When Officer Riener told Okerson that he was going to confiscate his jacket as evidence, Okerson changed his story and said that he had been by some broken glass in a dumpster. RP 174. Officer Reiner pointed out to the jury where on shoulders of the jacket he saw the "speckles" (both in court and on the night of the burglary) and demonstrated how he was able to hold the jacket in the light to reveal the "sparkly items." RP 169-73.

Finally, Brian Van Winkle, the manager of the East Hill Music store, testified that he did not know Okerson and that Okerson did not have permission to enter the store after hours, nor remove anything from it. RP 155. He also stated that five or six guitars had been stolen; none were recovered. RP 157-58. Okerson did not testify at trial. RP 199.

3. TRIAL COURT'S PRETRIAL AND MID-TRIAL RULINGS.

Officer Riener testified at a pretrial hearing that he noticed that there were some "sparkling crystals" on the shoulders of Okerson's jacket and on the collar area of his shirt that he believed were consistent with what he had seen many times from people he had arrested for auto theft or burglary where the person had broken a window to gain entry.⁶ RP 22. He further stated that the crystals had "that very same shimmering [as the other glass he had seen]...to me it was a belief that it was glass speckles that were on the collar and shoulder areas" of Okerson's clothing. RP 22. Officer Riener also testified that he packaged Okerson's jacket for

⁶ Officer Riener has been an officer with the Kent Police for 18 years. RP 18.

evidence by rolling the collar in first so as to not lose any glass and then placed the jacket in a paper bag. RP 26.

During the subsequent motions *in limine*, the defense moved to preclude any mention of any glass found on Okerson's person. RP 36. Okerson argued that Officer Riener's testimony was the only evidence that the glass existed because Okerson's counsel had not seen any photos or the actual clothing. RP 36-37. The prosecutor explained that the coat and shirt were in evidence, that she had requested that the crime lab analyze the glass, but she was informed that the lab did not presently have anyone qualified to do the analysis due to a staff shortage. RP 37. The prosecutor then argued that although Officer Riener could not testify that the glass on Okerson's clothing was scientifically proven to be glass from the music store door, the officer should be able to testify as to his observation and that, based on his training and experience, he believed that sparkly material on the coat and collar were glass shards. RP 37-38. The significance of this evidence would then be argued to the jury.

The court then asked the State if the reason no analysis was done on the glass was because the crime lab did not have enough people, to which the prosecutor replied:

They informed me that they didn't have anyone who was qualified to do the analysis because all of those individuals have either left that agency or been moved on to another...division...and they weren't allowed to hire anybody due to the state budget cuts.

RP 38. The court responded:

[I] have a problem with the foundation for any kind of expert testimony on the part of the officer based on instances where he has observed sparkling matter on someone's shoulders in a car theft situation and therefore has decided that this is glass. I think under [ER] 403, that is probably not admissible....

RP 39.

After the noon recess, the court clarified its earlier ruling about the clothing and the glass:

I took a look at some cases and determined, to my satisfaction, that the state does not have an affirmative duty to test materials, so that really is not an issue. Then the question is whether there was any destruction of anything, and I haven't heard anything to that point....

I hold by the decision that Officer Riener, unless there is some further foundation laid, is not in a position to testify to an opinion as to what he saw... [I]f [the clothing] looks as it did when he looked at it on that occasion, he can point to what he saw, but if it doesn't look as it did, then really there can be no mention made of it..

* * *

I am probably not going to let him testify to something that the jury can see with their own eyes, because I think it is, in this case would be marginally probative and highly prejudicial for him to imply to the jury that

there was glass on the clothing, unless there is more basis known—of a scientific nature or an expert nature or something than ... what I have heard him testify to thus far.

RP 50-51. The court also ruled that Officer Riener could still testify about the conversation he and Okerson had about whether he had been around any glass. RP 53.

On the third day of trial, prior to his testimony in front of the jury, Officer Riener was able to show both attorneys the “sparkles” on Okerson’s jacket that he had testified to at the pretrial hearing. RP 160-61. Officer Riener was not able to see the “sparkles” on the shirt collar that he did on the night of the interview. RP 161. The defense renewed its motion to preclude any testimony regarding the glass on Okerson’s clothing. RP 160.

The court stated that Officer Riener was not permitted to testify that he saw “sparkles” on the shirt because the evidence “ha[d] been destroyed or disappeared or whatever.” RP 161. As to the jacket, the court ruled that if Officer Riener could testify that the jacket looked the same as it did during the interview, then he could testify as to what he saw, but was not allowed to testify as to his opinion about what the “sparkles” were because there had been no “analysis or testing done of the material...” RP 161. The court also

commented that Officer Riener did not qualify as an expert “just by virtue of the fact that he has done a number of auto theft investigations.” RP 162.

The prosecutor responded that Officer Riener’s testimony had been that he had investigated a number of auto thefts and burglaries involving broken glass and that what he saw on Okerson’s jacket was consistent with what he had seen in those cases. RP 162. The prosecutor further argued that whether the material appeared to be glass or not was within common knowledge. RP 162. The court stated that the jury could draw its own conclusion from the officer’s testimony as to whether the material was glass. RP 162. The court continued:

[B]ut if the state wants an opinion that the matter is glass, I don’t think that is a matter of common knowledge. If it is, the jury can reach that conclusion. If it is not, then you need expert testimony, and unfortunately, I guess the state doesn’t pay for that these days.

RP 162. The State noted its objection for the record. RP 163.

After the State rested, Okerson made a motion to dismiss because the State had not established a prima facie case against him. RP 191. Okerson argued that there was insufficient evidence to prove that he entered and remained unlawfully in the music

store. RP 191-92. In response, the prosecutor summarized the evidence presented that supported the conclusion that Okerson had crawled through the opening in the shattered glass door to enter the music store, and argued that the evidence was sufficient for a rational trier of fact to conclude that Okerson had committed burglary beyond a reasonable doubt. RP 193-94.

The court then asked counsel to step forward to the lower bench and review the aerial view of the scene. RP 194. The court asked several questions of counsel about the testimony in relation to the map, including where Officer Tung had been when we stopped Okerson and where the car was that had driven out of the lot upon his arrival. RP 194-95. The court took a five minute recess to consider the motion. RP 195. Upon returning to the bench, the court denied the motion without further comment. RP 196. Okerson presented no evidence or witnesses. The jury found Okerson guilty of second degree burglary. CP 40-41.

4. TRIAL COURT'S FINDINGS AS TO THE MOTION FOR ARREST OF JUDGMENT.

A little over two months after the verdict, the court held a hearing on Okerson's motion for arrest of judgment. After hearing

oral argument from both counsel the court read its prepared written decision into the record. RP 243-53; CP 1-6.

The court found that there was insufficient evidence of Okerson's entry into the music store because he was not seen in or close to the shattered glass door, and was walking rather than running away from the store when Officer Tung first saw him. RP 249-50; CP 3-4. The court further found that the State did not "see fit to examine the defendant's coat to determine whether in fact it had glass on it...." RP 250; CP 3-4. The court later reiterated its finding that although the "sparkly substance" on Okerson's coat was the only evidence to suggest that he entered the music store, the State had "declined to examine for proof that it was glass." RP 252; CP 5.

The court also found that there was insufficient evidence to establish the element of intent, stating that the evidence contradicted the theory that Okerson intended to commit a crime in the store because there were unknown persons that left the scene in a car and Okerson did not have any of the stolen guitars in his possession when arrested. RP 252; CP 5.

D. ARGUMENT

1. THERE WAS SUFFICIENT EVIDENCE IN THE RECORD FROM WHICH A RATIONAL TRIER OF FACT COULD FIND OKERSON GUILTY OF SECOND DEGREE BURGLARY BEYOND A REASONABLE DOUBT.

The trial court erred in granting Okerson's motion for arrest of judgment and vacating the jury's verdict. Sufficient evidence was presented for a rational trier of fact, viewing the evidence in a light most favorable to the State, to conclude that Okerson had entered or remained unlawfully in the East Hill Music store with the intent to commit the crime of theft.

Under CrR 7.4(a)(3), a judgment may be arrested on motion of the defendant if there is insufficient proof of a material element of the crime. "A claim of insufficiency admits the truth of the State's evidence and all reasonable inferences that reasonably can be drawn therefrom." State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992); State v. Hosier, 157 Wn.2d 8, 133 P.3d 936 (2006). "All reasonable inferences are drawn in favor of the verdict and interpreted most strongly against the defendant." State v. Gentry, 125 Wn.2d 570, 597, 888 P.2d 1105 (1995). Circumstantial evidence and direct evidence are equally probative.

State v. Goodman, 150 Wn.2d 774, 781, 83 P.3d 410 (2004); State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

A directed verdict or arrest of judgment is appropriate only if, when viewing the evidence in the light most favorable to the State, the court finds, as a matter of law, that there is no substantial evidence or reasonable inference to sustain a verdict for the State. State v. Longshore, 97 Wn. App. 144, 147, 982 P.2d 1191 (1999), aff'd, 141 Wn.2d 414, 5 P.3d 1256 (2000). The motion must be denied if there is *any* competent evidence from which a rational trier of fact, viewing the evidence in a light most favorable to the State, could have found that the essential elements of the charged crime had been proved beyond a reasonable doubt. Id. at 147 (emphasis in original); see also, Salinas, 119 Wn.2d at 201. Review of a trial court decision denying or granting a motion for arrest of judgment requires the appellate court to engage in the same inquiry as the trial court. Longshore, 141 Wn.2d at 420.

A person is guilty of burglary in the second degree, if, with intent to commit a crime against a person or property therein, he enters or remains unlawfully in a building other than a vehicle or a dwelling. RCW 9A.52.030. In any prosecution for burglary, any person who enters or remains unlawfully in a building may be

inferred to have acted with intent to commit a crime against a person or property therein, unless such entering or remaining shall be explained by evidence satisfactory to the trier of fact to have been made without such criminal intent. RCW 9A.52.040.

Here, the music store manager did not give Okerson permission to enter the store after hours by breaking the glass door. RP 155. None of the stores in the strip mall, including the music store, were open at the time the audible alarm was triggered in the wee hours of the morning. RP 75, 155. Besides the unknown occupants in the car that sped away upon Officer Tung's arrival, Okerson was the only person in the vicinity and he was initially running, not walking away from the scene of a burglary. RP 76-79, 98-101. Okerson was also the only person found 150 feet or less from the music store within 14 to 16 minutes of the alarm going off. RP 72, 94-95, 107. See In re Ness, 70 Wn. App. 817, 825, 855 P.2d 1191 (1993) (flight or presence of accused near scene of crime is sufficient corroborative evidence to support burglary conviction). In addition, Okerson had fresh cuts to his right knee, a torn pant leg, glass shards on the collar of his jacket, and was wearing only one of two gloves in his possession. RP 79-80, 82, 127-28; Ex. 2-6.

These facts are all consistent with the inference that Okerson had crawled through the hole in the shattered glass door of the music store where the guitars had just been stolen. Okerson's use of thick leather gloves suggested that, in addition to protecting his hands while breaking and maneuvering the glass, he did not want to leave fingerprints at the scene. The gloves thus explained both the lack of significant cuts to his hands and, therefore, significant blood deposits at the crime scene, and the lack of any fingerprint evidence at the point of entry. Okerson's torn right pant leg with small blood stains and the fresh cuts to his right knee strongly support the inference that he crawled through the broken glass into the music store.

There was no physical evidence to suggest that someone other than Okerson entered the music store and no other reasonable explanation for the incriminating evidence against Okerson. Thus, it stands to reason that Okerson, perhaps working in concert with the people who fled in the car, was caught because he entered the store via the broken glass, grabbed the guitars, and passed them through the broken window to the person or persons waiting in the car. As the officer approached, the people in the car

were able to flee whereas Okerson, who was inside the store, would have been delayed in getting away.

Okerson also provided the police with three inconsistent stories about what happened at the music store, as well as an implausible explanation for why he would be near the burglarized music store in the dead of night, when the entire strip mall was closed and he was several miles from where he was living. RP 86-87, 167-69. He also shifted his story in an effort to explain the apparent glass shards on this coat. RP 168-69. These inconsistent and shifting tales suggest consciousness of guilt.

Taking all of these reasonable inferences in a light most favorable to the State, a rational trier of fact could have found that Okerson burglarized the music store.

In granting Okerson's motion, however, the trial court made several important factual errors and drew improper inferences from the evidence. First, the trial court said that Okerson was not near the broken glass door. Proximity, in this context, is a relative term best left to the jury's judgment. Given it was the dead of night, an audible burglar alarm was sounding, there were no businesses open, a glass door was shattered, and no people were in the area (except those who were fleeing a crime), Okerson's presence 100 -

150 feet from the damaged door could strike a reasonable trier of fact as being "near" to the business, even if 100 feet would not seem "near" on a crowded shopping day at noon. This finding by the trial court was erroneous, and invaded the province of the jury.

Moreover, the court found that Okerson was walking *instead of* running away from the store. This finding is simply incorrect. The officer testified that Okerson was first running, then walking, away from the crime scene. RP 76-77, 98-100-01. A jury is entitled to infer consciousness of guilt from flight. In re Ness, 70 Wn. App. at 825. And, it would be entirely rational for the jury to conclude that Okerson slowed to a walk to *avoid* looking guilty, either upon seeing the officer or upon suspecting that an officer might be approaching. Okerson also had no plausible explanation for why he was several miles, rather than slightly detoured off the most direct route, from his original destination and his home. RP 86-87, 167-68. Further, the absence of fingerprints, despite the officers' attempt to find any, is entirely consistent with Okerson using the gloves to avoid leaving any. RP 126. In any event, the court's erroneous finding on these points suggests the court undervalued the inferences of guilt the jury was entitled to draw.

Additionally, the court erred in blaming the State for "not seeing fit" or "declining" to test the material on Okerson's coat. The State did attempt to obtain scientific verification of the officer's opinion that the material on the coat was glass but that testing was simply not available. Still, the unavailability of scientific proof does not detract from the reasonable inference that the material on the coat was glass. The jury could certainly draw that conclusion from the officer's description of what he saw that night, and from the circumstances. The trial court's comments suggest that it was punishing the State for not accomplishing the tests.

Finally, the court erroneously relied on State v. Loucks⁷ and State v. Mace⁸ in support of its ruling. RP 250-52; CP 1-6. In Loucks, the defendant was convicted of second degree burglary after a police dog tracked his scent from the basement of the burglarized house to Loucks, who was at the bottom of a stairwell at a nearby residence. 98 Wn.2d 563, 564-67, 656 P.2d 480 (1983). In addition to a broken window panel, officers found blood smears and fingerprints inside the home. Id. Loucks had been ticketed for jaywalking in the area approximately an hour before the

⁷ 98 Wn.2d 563, 656 P.2d 480 (1983).

⁸ 97 Wn.2d 840, 650 P.2d 217 (1982).

burglary. Id. He claimed then to be looking for an address in a different neighborhood. Id. Neither the blood nor the fingerprints that were found inside the burglarized house matched Loucks'. Id. at 568. On appeal, the court held that the dog tracking evidence identifying Loucks as the burglar was insufficient to sustain his conviction because not only was there was no other evidence linking the defendant to the burglary, there was evidence that suggested another person had committed the crime. Id. at 568-69.

In State v. Mace, an apartment was broken into sometime between 2:00 and 8:00 a.m. 97 Wn.2d 840, 841-42, 650 P.2d 217 (1982). Afterwards, a number of items were missing, including a purse containing a wallet and a bank card. Id. The bank card was used twice at a cash machine in a neighboring city at 4:30 a.m. that morning, and someone had also attempted to use the debit card the following day. Id. at 842. The stolen wallet was found inside a paper sack that had been put in the trash can next to where the bank card had been used. Id. Mace's fingerprints were on the sack but not the wallet. Id. Mace's fingerprints were also found on a bank receipt in the trash next to the cash machine where someone had tried to use the stolen card the day after the burglary.

Id. The court held that this evidence, without further corroboration, was insufficient to sustain the burglary conviction. Id. at 844-45.

In concluding that the instant case was similar to Loucks and Mace, the court noted a lack of forensic evidence as to whether the “sparkly substance” on Okerson’s coat was glass, a lack of any evidence of blood found at the scene, and a fleeing car with unknown occupants. The court found that these facts established a lack of intent on Okerson’s part and reasonable doubt as to his involvement in the burglary. This was incorrect.

First, for reasons discussed above and below, expert testimony was not necessary to establish that the material on Okerson’s coat was glass, and the court erred in using this as a basis to undermine the jury’s verdict.

Second, given the small amount of visible blood on Okerson’s pants, and the minor cuts on his knees, it was not reasonable for the court to conclude that fresh blood drops *should* have been visible near the entry point of the music store, such that additional evidence could be gathered and tested. Ex. 2-5. Okerson wore gloves and there was no evidence that he, or anyone else, had bled extensively at the scene. RP 79-80; Ex. 6

Third, the jury was entitled to infer that Okerson was working together with the fleeing car's occupants. This inference supported, rather than negated, the State's theory of the case. The trial court, however, used the existence of the fleeing car to conclude that its existence was *necessarily inconsistent* with Okerson's guilt.⁹ In reality, this conclusion is simply an *alternative* theory about the evidence which, on a motion to vacate the jury's verdict, was not proper.

The court should have recognized that the jury was entitled to resolve these competing inferences from the evidence. Twelve ordinary people drawn at random from the community concluded that it was reasonable to infer from the evidence—blood, torn pants leg, gloves, apparent glass or “sparkles” on jacket, location, flight, nervousness, different versions of his story—that Okerson entered or remained unlawfully in the music store. It is not the place of a single judge to usurp the judgment of the jury as to reasonable inferences from the evidence. Otherwise, the judge sits as a “thirteenth juror” on the case. State v. Williams, 96 Wn.2d 215,

⁹ The court entered a conclusion of law that the stolen guitars were not located despite a canvass of the area by the officers. CP 3. In addition to mislabeling this factual finding, the court also must have misunderstood Officer DeWilde's testimony, which was that the store, rather than the area around it, was canvassed. RP 128.

227, 634 P.2d 868 (1981) (whether an element of the crime has been proven is a question ultimately to be determined by the trier of fact; therefore, it is “a matter better left to the unanimous, contemporaneous assessment of twelve jurors than to the retrospective guesswork of a single judge acting as a thirteenth juror.”)

The trial court’s error in granting the arrest of judgment is further demonstrated by the fact that the court denied Okerson’s motion to dismiss for insufficient evidence after the State rested. RP 196. The defense did not present any evidence. RP 199. Thus, the court’s denial of Okerson’s motion to dismiss and the subsequent grant of Okerson’s motion for arrest of judgment were based on the court’s consideration of the exact same evidence under the exact same standard, and yet yielded opposite results.

Because a rational trier of fact, viewing the evidence and all reasonable inferences therefrom in a light most favorable to the State, could find that each element of second degree burglary had been proven beyond a reasonable doubt, Okerson’s motion for arrest of judgment should have been denied.

2. THE TRIAL COURT IMPROPERLY PROHIBITED OFFICER RIENER FROM TESTIFYING AS TO HIS LAY OPINION THAT THE UNTESTED SPARKLES ON OKERSON'S CLOTHING WERE SHARDS OF GLASS.

For two reasons, the trial court abused its discretion by precluding Officer Riener from testifying that he believed, based on his knowledge and experience with broken glass, that the “sparkly items” or “speckles” he observed on Okerson’s shirt collar and jacket were pieces of broken glass. First, an expert witness was not required for the State to present evidence that the “sparkles” were glass because Officer Riener’s testimony and opinion as what he saw could be easily evaluated by the jury based on the jurors’ personal knowledge. Second, Officer Riener’s opinion would have been helpful to the jury in determining whether there was sufficient evidence to establish, beyond a reasonable doubt, that Okerson entered or remained unlawfully in the music store.

ER 701 provides that a lay witness’s testimony in the form of opinions or inferences is limited to those opinions and inferences which are rationally based on the perception of the witness, helpful to a clear understanding of the witness’s testimony or the determination of a fact in issue, and not based on scientific, technical, or other specialized knowledge.

A trial court's decisions as to the admissibility of evidence are reviewed under an abuse of discretion standard. State v. Stenson, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997). When a trial court's exercise of its discretion is manifestly unreasonable or based upon untenable grounds or reasons, an abuse of discretion exists. Id. citing State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995).

Here, the court erroneously prohibited Officer Riener from testifying, based on his observations and personal experience, that he perceived the "sparkly items" on Okerson's shirt collar and on the shoulders of his jacket as pieces of glass, on the incorrect conclusion that expert forensic testimony was required. Officer Riener's proposed testimony was similar to the kinds of lay testimony that Washington courts have held were properly admitted in several analogous cases. For example, In State v. Thomas, the trial court did not abuse its discretion by allowing two witnesses to testify that the gunshots that they heard were from a handgun, as distinguished from a shotgun, because the opinions was based on their individual experiences with the sounds of shot guns and handguns. 150 Wn.2d 821, 870, 83 P.3d 970 (2004).

Similarly, in State v. Kunze, the admission of testimony concerning visible similarities and differences between latent earprints and the exemplars did not require general acceptance in the forensic science community; such “eyeballing” of readily discernable similarities and differences was based on personal knowledge that could readily be understood and evaluated by the jury. 97 Wn. App. 832, 856, 988 P.2d 977 (1999). The court also upheld the admission of testimony from two officers that, based on their personal observations of the scene or photos of it, each thought that the scene was unusual and might have been “staged.” Id. at 858. The officers’ lay opinions were permissible in light of their personal knowledge and experience, and of the fact that they were testifying to inferences readily understandable by the jury. Id.; see also State v. Halstien, 122 Wn.2d 109, 128, 857 P.2d 270 (1993) (affirming admission of lay opinion that substance appeared to be semen.); State v. Cole, 117 Wn. App. 870, 73 P.3d 411 (2003) (affirming admission of detective’s testimony about direction of a cut mark on victim's throat when testimony was based on first-hand knowledge and was helpful to a clear understanding of a fact put in issue by the defense).

Officer Riener's testimony was relevant, circumstantial evidence that tended to show that Okerson crawled through the opening created in the lower right corner of the music store's shattered glass door. Ex. 8-15. Similar to the officers in Kunze, Officer Riener's conclusion that the "sparkles" on Okerson's coat were pieces of glass was based on his 18 years of experience that included investigating numerous cases where he had arrested a person that had gained access to a building or a car by breaking a glass window or door. RP 22. Officer Riener was also able to show the jury the large and very minute "sparkly" particles on the collar of Okerson's jacket by holding it in the sunlight. RP 169-73. Under the circumstances, the only reasonable explanation of the "sparkly" particles was that they were pieces of glass from the music store door.

This testimony would have assisted the jury in its determination of whether the State had proven one of the elements of the offense—that Okerson entered or remained unlawfully in the music store. The court cited ER 403 as a basis for its ruling, but there was nothing unfairly prejudicial, confusing, or misleading about Officer Riener's proposed testimony. That the "sparkly items" were indeed pieces of glass was corroborated by Okerson's own

words when he told Officer Riener that he had come across broken glass in a dumpster earlier that day. It is also telling that Okerson did not offer this explanation until he realized that Officer Riener saw the glass shards on his jacket. Additionally, the court appears to have excluded testimony about the shirt collar simply because the particles had fallen off the collar since the item was placed in evidence. There is no basis in law to exclude the officer's testimony about what he saw the night of the crime, as opposed to what still exists, especially when it is entirely reasonable to conclude that the glass has simply fallen off in the months since the crime.

For these reasons, the trial court abused its discretion in excluding Officer Riener's testimony that Okerson had glass shards on his clothing.

Finally, it is likely that the trial court's error in excluding this evidence influenced its decision on the sufficiency of the evidence. But, if true, it simply shows that the trial court disagreed with the jury that the sparkles on Okerson's jacket were glass. This disagreement is contrary to law. The jury was entitled to make the reasonable inference that the "sparkles" on the jacket were pieces of glass.

E. **CONCLUSION**

For these reasons, the trial court's order should be reversed,
and the matter remanded for sentencing.

DATED this 16th day of November, 2009.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

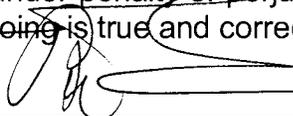
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Michael McCullough, the attorney for the appellant, at Associated Counsel for the Accused, 429 W. Harrison Street, Suite 201, Kent, WA 98032-4491, containing a copy of the Brief of Appellant and verbatim report of proceedings, in STATE V. DONALD DEAN OKERSON, Cause No. 64016-0-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Name Bora Ly
Done in Seattle, Washington

11-16-2009

Date

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