

66748-3

66748-3

No. 66748-3-I

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

STATE OF WASHINGTON,

Respondent,

v.

PETER ANDREW RUNCHEY,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

The Honorable Ellen Fair

BRIEF OF APPELLANT

Susan F. Wilk
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2011 AUG 25 PM 4:55

TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR..... 1

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR..... 1

C. STATEMENT OF THE CASE..... 2

D. ARGUMENT 4

 1. THE STATE PRESENTED INSUFFICIENT EVIDENCE OF
 VALUE AS REQUIRED TO SUPPORT RUNCHEY’S
 CONVICTION FOR POSSESSION OF STOLEN PROPERTY
 IN THE SECOND DEGREE..... 6

 a. Value is an essential element of the crime of possession of
 stolen property in the second degree 6

 b. Evidence of retail value or cost of replacement is not
 sufficient to establish the value of used items 7

 c. The State did not prove the value of the property possessed
 by Runchey 8

 d. The remedy is reversal of Runchey’s conviction and remand
 for entry of judgment on the misdemeanor offense of
 possession of stolen property in the third degree 9

 2. THE EVIDENCE WAS INSUFFICIENT TO PROVE THAT
 RUNCHEY UNLAWFULLY ENTERED THE ALLEGEDLY
 BURGLARIZED PREMISES 10

E. CONCLUSION..... 11

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980) 5, 9
State v. Byrd, 125 Wn.2d 707, 887 P.2d 796 (1995)..... 5
State v. Engel, 166 Wn.2d 572, 210 P.3d 1007 (2009) 10
State v. Kleist, 126 Wn.2d 432, 895 P.2d 398 (1995) 6, 7
State v. Salinas, 119 Wn.2d 192, 829 P.2d 1068 (1992) 5

Washington Court of Appeals Decisions

In re Heidari, 159 Wn. App. 601, 248 P.3d 550 (2011) 9
State v. Clark, 13 Wn. App. 782, 537 P.2d 320 (1975) 7, 8
State v. Morley, 119 Wn. App. 939, 83 P.3d 1023 (2004) 6, 7

Washington Constitutional Provisions

Const. art. I § 3..... 5

United States Supreme Court Decisions

In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970)4

Statutes

RCW 9A.56.010 6
RCW 9A.56.160 6

A. ASSIGNMENTS OF ERROR

1. The State presented insufficient evidence to support Runchey's conviction for possession of stolen property in the second degree.

2. The State presented insufficient evidence to support Runchey's conviction for burglary in the second degree.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Value is an essential element of the charge of possession of stolen property, which the State must prove beyond a reasonable doubt. Evidence of the cost of replacing an item is not sufficient to prove value; rather, the State must prove market value, which is the price a well-informed buyer would pay a well-informed seller, where neither party is obligated to enter into the transaction. Did the State fail to prove value where it offered no evidence of market value, only of the cost the victim paid to replace stolen and damaged items? (Assignment of Error 1)

2. Runchey was alleged to have possessed stolen copper wire, but only a certain amount of wire was found in his actual possession. Where the State did not differentiate between wire recovered from Runchey's possession and wire recovered from places over which he had no dominion and control in assessing

value, must Runchey's conviction for possession of stolen property in the second degree be reversed? (Assignment of Error 1)

3. Did the State present insufficient evidence to support Runchey's conviction for burglary in the second degree where no direct evidence established he entered the premises that allegedly had been burglarized? (Assignment of Error 2)

C. STATEMENT OF THE CASE

On November 18, 2010, at approximately one a.m., appellant Peter Andrew Runchey received a telephone call from a friend of a friend, Robert Selbe, who asked Runchey if Runchey wanted to "come help get some wire." 2RP 109.¹ Runchey borrowed a car and drove Selbe to the Chicago Bridge and Iron Company (CBI), in Everett, Washington. 2RP 24, 32, 109.

Selbe led Runchey to an area outside of a chain link fence enclosing the CBI facility, where several spools of copper wire had been stacked. 2RP 109. A hole had been cut in the chain link fence. Id. The plan was to take the stacked wire back to Selbe's home. 2RP 111.

¹ The verbatim report of proceedings is cited herein as follows:

January 1, 2011	-	1RP
February 1, 2011	-	2RP
February 2, 2011	-	3RP
February 14, 2011	-	4RP

A resident living nearby was awakened by the sound of the car and saw two people dressed in dark clothes and hats get out and head toward a water main, which was by the CBI facility. 2RP 20-21. Finding the men suspicious, the resident called 9-1-1. 2RP 22.

The police arrived soon after the call. Accompanied by other officers, Michael Braley, a canine handler, tracked with the dog from the car toward the water main. 2RP 60. After an initial silence the officers heard crashing sounds in the woods and crouched down. 2RP 61. They eventually saw two individuals heading along the water line to the north. 2RP 63. They were carrying back packs and many other items. 2RP 64. Braley shined his flashlight on them and said, "Stop, police." Id.

The men started dropping things and attempted to flee. Id. Because the area was marshy the officers had to proceed with caution. As they got to the spot where the men had dropped the items, Braley saw spools of wire and what appeared to be a large duffel bag. 2RP 65, 70. The duffel bag in fact was Runchey, who was taken into custody. 2RP 70. Selbe was pursued with the dog and arrested at another location. 2RP 71.

Raymond Maw, the manager of CBI, testified that the facility had been burglarized for wire on multiple occasions. 2RP 38. He was called out to the facility the morning of the incident and identified several machines within the facility from which the wire had been cut. 2RP 31. He estimated that the replacement value of all the wire that was cut, including a spool of wire that was still by the fence when the police arrived, was between \$2200 and \$2300. 2RP 31.

No witness testified to the market value of the wire, nor did the State present any testimony regarding the value of the wire that was actually in Runchey's possession when he was arrested.

Runchey was prosecuted by amended information for one count of burglary in the second degree and one count of possession of stolen property in the second degree.² CP 74-75. A jury convicted Runchey as charged. CP 31-33. Runchey appeals. CP 2-3.

D. ARGUMENT

The State bears the burden of proving the essential elements of a criminal charge beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970);

² Selbe was not tried with Runchey and appears to have settled his case by plea.

State v. Byrd, 125 Wn.2d 707, 713, 887 P.2d 796 (1995); U.S. Const. amend. XIV; Const. art. I § 3. A challenge to the sufficiency of the evidence requires the appellate court to view the evidence in the light most favorable to the prosecution and decide whether any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. State v Green, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980). A claim of insufficiency admits the truth of the State's evidence and all inferences that can reasonably be drawn therefrom. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

The State did not present sufficient evidence to prove the value of the copper wire allegedly possessed by Runchey, as required to support his conviction for possession of stolen property in the second degree, nor did it prove that he or an accomplice entered the CBI facility as required to support his conviction for burglary.

1. THE STATE PRESENTED INSUFFICIENT EVIDENCE OF VALUE AS REQUIRED TO SUPPORT RUNCHEY'S CONVICTION FOR POSSESSION OF STOLEN PROPERTY IN THE SECOND DEGREE.

a. Value is an essential element of the crime of possession of stolen property in the second degree. Pursuant to statute, a person is guilty of possession of stolen property in the second degree if she or he possesses property, other than a firearm or vehicle, which exceeds \$750 in value but does not exceed \$5000 in value. RCW 9A.56.160. Value has a strict and precise meaning for purposes of a prosecution under this section: "Value' means the market value of the property or services at the time and in the approximate area of the criminal act." RCW 9A.56.010(18)(a). "Market value" is defined in Washington as "the price which a well-informed buyer would pay to a well-informed seller, where neither is obliged to enter into the transaction." State v. Kleist, 126 Wn.2d 432, 435, 895 P.2d 398 (1995) (citation omitted). Value is an essential element of the crime of possession of stolen property in the second degree. See State v. Morley, 119 Wn. App. 939, 942-43, 83 P.3d 1023 (2004).

b. Evidence of retail value or cost of replacement is not sufficient to establish the value of used items. “[I]t is well settled that evidence of any other valuation but the market value of stolen property has been held inadmissible unless it is first shown that there is no market value.” State v. Clark, 13 Wn. App. 782, 788, 537 P.2d 320 (1975). Further, replacement value is not the same as market value. Kleist, 126 Wn.2d at 438 (criticizing trial court for injecting consideration of “so-called ‘restitution issue’” into determination of value in theft prosecution); Morley, 119 Wn. App. at 943.

In Morley, a case in some respects similar to this case, the defendant was prosecuted for attempted first-degree theft based upon an alleged theft of a generator from a facility that rented such equipment. 119 Wn. App. at 941-42. The State’s sole evidence of value was the item’s replacement value. The Court found that because the State did not present evidence to prove market value, it did not sufficiently prove this essential element of the charged offense. Id. at 943.

In this case, Maw, the manager of CBI, testified regarding the approximate replacement value of the copper wire that was taken from the premises. 2RP 30-31. He said this amount was

between \$2200 and \$2300, but he had earlier told police he thought about \$1000 worth had been taken, because he “didn’t know the quantity that was actually taken.” 2RP 31. At one point Maw talked about how much copper wire might cost per pound, 2RP 30, but this testimony was not correlated to total bulk weight of the copper wire possessed by Runchey. No other witness testified about value, and no witness testified about market value. As noted, unless it is impossible to establish market value, replacement value does not prove the “value” element of a crime prosecuted under Chap. 9A.56 RCW. Clark, 13 Wn. App. at 788. The State did not present sufficient evidence to prove the wire’s value.

c. The State did not prove the value of the property possessed by Runchey. The State also failed to produce evidence sufficient to establish that the value of the wire actually possessed by Runchey exceeded the \$750 statutory minimum necessary to support a conviction for possession of stolen property in the second degree.

The evidence at trial established that some wire was found bundled by the chain link fence. 2RP 29. Other wire was recovered from the area where Runchey was arrested. The State made no effort to distinguish between the wire that had been

recovered from the scene of Runchey's arrest and the wire found by the fence in supplying the jury with evidence of value. Nor did the State attempt to differentiate between the wire recovered from Runchey and the wire recovered from Selbe when he was arrested some time later. This too, is an additional reason for this Court to hold that the State's evidence of value was insufficient to support Runchey's conviction for possession of stolen property in the second degree.

d. The remedy is reversal of Runchey's conviction and remand for entry of judgment on the misdemeanor offense of possession of stolen property in the third degree. Remand for resentencing on a lesser-included offense is permissible where the jury has been instructed on that offense or where the trier of fact has expressly found each of the elements of the lesser offense. Green, 94 Wn.2d at 234-35; In re Heidari, 159 Wn. App. 601, 606-07, 248 P.3d 550 (2011). Here, the court granted Runchey's motion for an instruction on the lesser included offense of possession of stolen property in the third degree. 3RP 125, 127; CP 51-52. This Court, therefore, should reverse Runchey's conviction for possession of stolen property in the second degree

and remand for entry of judgment on the lesser included offense of possession of stolen property in the third degree.

2. THE EVIDENCE WAS INSUFFICIENT TO PROVE THAT RUNCHEY UNLAWFULLY ENTERED THE ALLEGEDLY BURGLARIZED PREMISES.

A fenced area is an “other structure” which, if unlawfully entered, can support a conviction for burglary. State v. Engel, 166 Wn.2d 572, 580, 210 P.3d 1007 (2009). However, the State still bears the burden of proving that Runchey actually entered the structure. The State did not present sufficient evidence to meet this burden here.

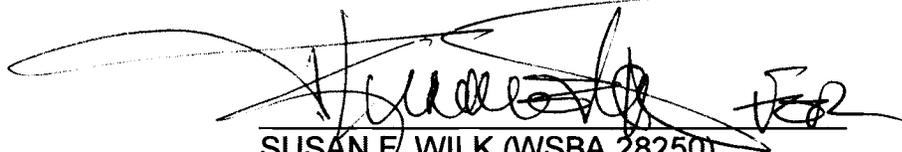
The State did not present unequivocal evidence that CBI was burglarized on November 18, 2010, rather than on some earlier occasion, as Maw had not been to the facility during the two weeks before November 18 and there had been several prior burglaries. The State did not call any eyewitnesses to the burglary. Nor did the State present any forensic evidence tending to establish that Runchey had been in the premises. This Court should conclude that the second-degree burglary conviction was not supported by sufficient evidence, and must be reversed and dismissed.

E. CONCLUSION

For the foregoing reasons, this Court should reverse and dismiss Runchey's conviction for burglary in the second degree. Runchey's conviction for possession of stolen property in the second degree should be vacated and judgment entered on the lesser included offense of possession of stolen property in the third degree.

DATED this 25th day of August, 2011.

Respectfully submitted:



SUSAN F. WILK (WSBA 28250)
Washington Appellate Project (91052)
Attorneys for Appellant