

61621-8

61621-8

NO. 61621-8-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

MARTIN DALE ADAMS,

Appellant.

FILED
COURT OF APPEALS DIVISION ONE
STATE OF WASHINGTON
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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SKAGIT COUNTY

The Honorable John M. Meyer

REPLY BRIEF OF APPELLANT AND
RESPONSE TO STATE'S CROSS-APPEAL

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A. ARGUMENT IN REPLY

1. THE STATE DID NOT PROVE BEYOND A REASONABLE DOUBT THAT MR. ADAMS ENTERED OR REMAINED UNLAWFULLY IN THE SHOP BUILDING.

Due to the lack of corroborative evidence in this case, the State failed to prove that Mr. Adams entered the Salvage Boys shop. No fingerprints, witness descriptions or circumstantial proof of entry connect either Mr. Adams or Mr. Jones to the shop. There is evidence indicating that someone must have entered the shop and taken Mr. Bettys' property, but not that Mr. Adams entered or remained in the building on the night of June 8, 2007.

The State argues that there is sufficient evidence to support the conviction for second-degree burglary because Mr. Adams was hiding under an excavator on a lot neighboring the Salvage Boys shop when police officers with a canine unit arrived, and because Mr. Adams' truck contained stolen property. State's Response Brief at 11. The State begins by attempting to characterize Mr. Adams' actions as flight from the scene of the burglary. State's Response Brief at 1, 11, 16-17 (asserting that "the operator saw at least one person flee" and "the defendant and his co-conspirator fled from the property owner when confronted"). However, the facts

do not support this characterization because no one saw either Mr. Adams or Mr. Jones flee. Mr. Bettys, owner of the Salvage Boys shop, testified he thought he saw a shadow. RP 3/4/08 at 66. In response, Mr. Bettys yelled out for the shadow to stop or he would shoot. *Id.* No one testified they saw either Mr. Adams or Mr. Jones on the Salvage Boys' lot, although Mr. Adams' truck was parked near the outside gate to the shop.

Rather than a "flight from the scene," there was a distinct lack of corroborating evidence to show Mr. Adams was at the scene. Mr. Adams and Mr. Jones were found across the street from the shop, under a large excavator. RP 3/3/08 at 11; RP 3/4/08 at 149. Officer Hansen, the first on the scene, testified he did not attempt to collect any fingerprints because of his concern that Mr. Bettys and his associates had previously been in and out of the shop that night. RP 3/4/08 at 118. Officer Hansen did not look for any tracks in the muddy shop area. *Id.* Officer Hansen also did not check either of the defendants' shoes for mud. RP 3/4/08 at 133.

In addition, there was a lack of physical evidence of entry specific to that night because of the prior damage to the doors. The doorjamb had been previously broken and the exterior door could easily be opened without a key. RP 3/4/08 at 71. None of the

police officers examined the gate lock, the exterior door, or the door to the interior office, all of which had suffered physical damage prior to that night. RP 3/4/08 at 114, 116, 148, 187. The Salvage Boys shop had been broken into numerous times. According to Mr. Bettys, there were 30-40 thefts at the Salvage Boys property in the four years before this incident. RP 3/4/08 at 63. In the month before this incident, there had been two burglaries of the office and shop. *Id.* Officer Hansen testified he knew of at least 12 other occasions where the shop had been broken into. RP 3/4/08 at 114. Mr. Bettys explained that the doorjamb to the exterior door of the shop had been previously damaged during break-ins prior to June 8, 2007. RP 3/4/08 at 71.

The State also mischaracterizes what occurred after the canine unit found Mr. Adams' underneath the excavator:

At the time that Adams was taken out from under the excavator after the dog was sent in and bit him, Adams first stated that he was alone under the excavator... After he was placed in custody, he turned to the officers and told them that someone else was under the equipment...

State's Response Brief at 19-20. The State goes on to assert, in support of its theory that Mr. Adams was at least an accomplice, that if he had done nothing wrong he would not have told officers

no one was under the excavator. The State then draws the inference that Mr. Adams was trying to aid Jones. The State misconstrues the facts and draws an unsupported conclusion.

Mr. Adams never stated he was alone underneath the excavator. Instead, Mr. Adams said, "It's just me." RP 03/04/2008 at 100. When Mr. Adams made this statement he was coming out from under the equipment, being bitten by the canine, and encountering officers. *Id.* Under these circumstances, the only reasonable interpretation would be that he was telling the officers he was unarmed. This interpretation is supported by the fact Mr. Adams next told Officer Hansen that Mr. Jones was underneath the excavator as well. *Id.* If his goal was to aid Mr. Jones, it is unlikely Mr. Adams would tell police where he was located. Officer Hansen talked with both Mr. Adams and Mr. Jones after they were apprehended. RP 3/4/08 at 107. Both men explained they had stopped to urinate and hid underneath a piece of heavy equipment when they heard Mr. Bettys' threat that he would shoot. *Id.*

Finally, the State again misstates the facts by asserting that the canine unit tracked a scent trail straight from the scene of the burglary to the excavator. State's Response Brief at 14, 15, 16. In fact, the canine unit tracked around the property, but the dog did

not track to the shop by itself. The canine unit was taken around the back of the shop but did not pick up the scent at the shop. It only picked up the scent later, after crossing the street from the shop to the adjacent property and then being looped back around. *Id.* at 99, 116-17. In addition, the dog's nose left the trail in the middle of the track and later returned to the ground near the excavator. *Id.* at 30-32. Thus, viewing the facts in the light most favorable to the State, while the canine unit did discover Mr. Adams underneath the excavator, the track was in no way a direct route from the shop to the excavator.

Thus, two of the three key factual allegations made by the State in support of the conviction (alleged fight from the scene, hiding under the excavator) are simply not supported by the evidence. The third, possession of stolen property, is by itself insufficient to support the conviction.

It is well settled that proof of possession of recently stolen property, by itself, is not prima facie evidence of burglary. *State v. Mace*, 97 Wn.2d 840, 843, 650 P.2d 217 (1982), citing *State v. Garske*, 74 Wn.2d 901, 903, 447 P.2d 167 (1968). When the police conducted a search of Mr. Adams' truck, they found certain items that Mr. Bettys reported were in the shop earlier that day,

including a come along chain, other chains, and a milk crate. RP 3/3/08 at 40, 42, 43.

Viewing the evidence in the light most favorable to the State, there is no evidence indicating that Mr. Adams entered the building. Without an actual nexus between the burglary and the possession, the State cannot meet its burden in proving that Mr. Adams was a principal or accomplice to burglary in the second degree.

Even assuming the State could prove that Mr. Jones committed burglary, the State could not prove that Mr. Adams had any knowledge of Mr. Jones' crime, intended that he succeed, or was ready to assist him. However, where, as here, the State presented insufficient evidence to convict the defendant as a principal, it logically follows that the State must prove beyond a reasonable doubt that he was an accomplice. Because the State failed to do so the conviction must be reversed.

2. THE TRIAL COURT EXCEEDED ITS
STATUTORY AUTHORITY WHEN IT IMPOSED
"RESTITUTION" FOR AN UNPROVEN LOSS.

It is the State's obligation to establish the amount of restitution. *State v. Dedonado*, 99 Wn. App. 251, 257, 991 P.2d 1216 (2000). "The decision to impose restitution and the amount thereof are within the trial court's discretion." *State v. Hunotte*, 69

Wn. App. 670, 674, 851 P.2d 694 (1993) (citing *State v. Bennett*, 63 Wn. App. 530, 535, 821 P.2d 499 (1991)). The appellate courts should reverse a restitution order if it is “manifestly unreasonable or the sentencing court exercised its discretion on untenable grounds or for untenable reasons.” *Hunotte*, 69 Wn. App. at 674 (internal citations omitted). Restitution may only be ordered where the trial court finds a causal connection between the crime charged and proven and the injuries for which compensation is made. *State v. Clapp*, 67 Wn. App. 263, 276, 834 P.2d 1101 (1992), rev. denied, 121 Wn.2d 1020 (1993); RCW 9.94A.753; RCW 9A.20.030.

Here, reversal of the restitution order is required because the State failed to prove the causal connection to the crime. The State could not begin to prove a causal link because the theft of the keys was not charged or proven. Neither defendant was charged with theft of the keys. The jury made no findings regarding the keys. There was no evidence Mr. Adams played any role in taking the keys. No keys were found on Mr. Adams’ or Mr. Jones’ person. Nonetheless, the trial court ordered Mr. Adams to pay \$17,171 in restitution to Mr. Bettys. This amount was calculated by the estimate of the cost to replace the key and ignition for 212 vehicles at \$81 per vehicle.

Mr. Bettys kept the keys to the cars on his lot in a can in his inner office. On the night in question, neither Mr. Bettys nor the officers entered the inner office because they found that door was still locked. RP 3/4/08 at 80. Mr. Bettys did not have a reason to think the shop's office had been entered when he examined the door with the police, but the next day he noticed scrape marks. RP 3/4/08 80-81. Also on the next day, Mr. Bettys discovered the can of keys missing from the inner office. *Id.*

No keys or can were recovered when the police searched Mr. Adams' truck after he was arrested. Detective King obtained a search warrant, searched Mr. Adams' truck, and photographed the items in the truck. RP 3/4/08 at 152-53. Detective King worked from a list of property that Mr. Bettys had provided to the police department after viewing the truck. RP 3/4/08 at 161-62, 165-66. Mr. Bettys also visited the search location with Detective King and pointed out certain items in the truck that he believed were his property. *Id.* Detective King did not recall the coffee can of keys, and there was no mention of a coffee can with keys in King's report, prepared the same day he conducted the search of Mr. Adams' truck. *Id.*; RP 3/4/08 at 153.

Mr. Adams could not have made off with the keys because he was arrested on site, his truck towed by police so it could be searched, and any of Mr. Bettys' property recovered during the search was returned.

During the redirect examination of Mr. Bettys, when the State tried to elicit testimony regarding the keys and corresponding replacement value, the defense objected that this information was irrelevant. RP 3/4/08 at 84. The court agreed and sustained the objection. *Id.*

Because the State did not prove that Mr. Adams possessed the keys or committed a theft of the keys, the court's restitution order lacked any finding of a causal connection. The evidence was insufficient to support the restitution ordered. The restitution order was therefore manifestly unreasonable, and the court exercised its discretion on untenable grounds.

B. RESPONSE TO STATE'S CROSS APPEAL

The offender score statute, RCW 9.94A.525(2)(c) provides as follows:

(c) Except as provided in (e) of this subsection, class C prior felony convictions other than sex offenses shall not be included in the offender score if, since the last date of release from confinement (including full-time residential treatment) pursuant to a felony

conviction, if any, or entry of judgment and sentence, the offender had spent five consecutive years in the community without committing any crime that subsequently results in a conviction.

Mr. Adams was convicted for a class C felony that occurred on August 17, 1993. See CP 53-61 (Judgment & Sentence), CP 64-66 (Findings of Fact & Conclusions of Law on Calculation of Defendant's Felony Score for Sentencing). In December 1998 he was charged with burglary and failed to appear at his April 29, 1999 hearing. CP 64-65. Adams appeared in the case again in April 2004 after he was arrested on April 16, 2004 on a separate cause number. CP 65. In this case, the trial court found that Mr. Adams was offense free in the community for the five years between the crime occurring in December 1998 and April 2004. CP 65.

The State argues that because Mr. Adams was in pretrial warrant status for failing to appear at his April 29, 1999 hearing, he was not offense free in the community during that time. However, as the trial court correctly found, and under the plain language of RCW 9.94A.525(2)(c), Mr. Adams has spent five years in the community without committing a crime that subsequently results in a conviction. Moreover, even if the trial court erred in calculating the offender score, any error was harmless.

1. THE COURT PROPERLY CALCULATED MR. ADAMS' OFFENDER SCORE BECAUSE MR. ADAMS HAD BEEN OFFENSE FREE IN THE COMMUNITY FOR FIVE YEARS.

Where a statute is unambiguous, the court will determine the Legislature's intent from the language of the statute alone. *Waste Management of Seattle, Inc., v. Utilities and Transp. Com'n*, 123 Wn.2d 621, 869 P.2d 1034 (1994). The primary objective of statutory construction is to carry out legislative intent. *Bellevue Fire Fighters Local 1604, Intern. Ass'n of Fire Fighters, AFL-CIO, CLC v. City of Bellevue*, 100 Wn.2d 748, 675 P.2d 592 (1984).

Here, the unambiguous language of RCW 9.94A.525(2)(c) supports the trial court's offender score calculation. If the legislature had intended for the five-year statutory period to be tolled when a defendant was in pre-trial warrant status, the legislature could have included a provision to that effect. The legislature has included tolling provisions, for example, in laws governing community placement. See, e.g., RCW 9.94A.625(1) ("A term of confinement ordered in a sentence pursuant to this chapter shall be tolled by any period of time during which the offender has absented himself or herself from confinement without the prior approval of the entity in whose custody the offender has been

placed.”). Because no such tolling language is present in the offender score statute, the court can presume that the Legislature intended the interpretation favored by the plain language of the statute.

2. EVEN IF THE COURT ERRED IN CALCULATING THE OFFENDER SCORE, ANY ERROR WAS HARMLESS.

Where, as here, the standard range would have been the same even if the sentencing court had properly calculated the offender score, any error calculating a defendant’s offender score is harmless. *State v. Argo*, 81 Wn. App. 552, 569, 915 P.2d 1103 (1996). In *Argo*, the trial court erred by assigning an offender score of 16 instead of 13 because some of the counts he was convicted of constituted same criminal conduct, but the appellate court found this was harmless error because the standard range would have been the same. Here, as the trial court found and the State concedes in its response brief,¹ the standard range of 22 months would remain the same regardless of whether Mr. Adams’ offender

¹ As the State points out in a footnote in its brief:
Although it may be somewhat of an academic argument in the present case because the trial court indicated it would impose a standard range sentence of 22 months regardless of the offender score, the State believes that this matter should be resolved by a published appellate court decision.
State’s Response Brief at 24 (emphasis added).

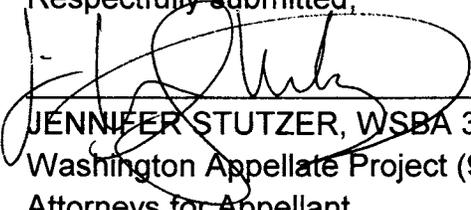
score was a 5 or 6. CP 65. Thus, under *Argo*, any error in the trial court's calculation of Mr. Adams' offender score was harmless.

C. CONCLUSION

For the reasons stated herein, there was insufficient evidence to find beyond a reasonable doubt that Mr. Adams acted as a principal or an accomplice in the burglary occurring on June 8, 2007. Further, because of the distinct failure of proof in this case, the trial court erred in ordering Mr. Adams to pay \$17,171 to re-key 212 cars. Finally, the trial court correctly found that Mr. Adams was offense free in the community for five years under RCW 9.94A.525(2)(c) and its finding should not be disturbed on appeal. Mr. Adams respectfully requests that this Court reverse the burglary conviction and the restitution order and deny the State's cross-appeal.

DATED this 10th day of June, 2009.

Respectfully submitted,


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DIVISION ONE**

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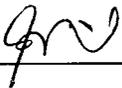
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DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 10TH DAY OF JUNE, 2009, I CAUSED THE ORIGINAL **APPELLANT'S REPLY BRIEF AND RESPONSE TO STATE'S CROSS-APPEAL** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X]	ERIK PEDERSEN SKAGIT COUNTY PROSECUTING ATTORNEY COURTHOUSE ANNEX 605 S. THIRD ST. MOUNT VERNON, WA 98273	(X) U.S. MAIL () HAND DELIVERY () _____
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SIGNED IN SEATTLE, WASHINGTON THIS 10TH DAY OF JUNE, 2009.

X _____


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