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STATE OF WASHINGTON  
COUNTY OF SNOHOMISH  
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NO. 68220-2-1

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

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STATE OF WASHINGTON,

Respondent,

v.

CORY L. THOMAS,

Appellant.

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BRIEF OF RESPONDENT

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## **I. ISSUES**

Evidence showed that the defendant and an accomplice attempted to break into a store. Physical evidence supported an inference that the intruders entered through a broken window in the front door and exited through the back door. The store owner testified that items were missing from the store. Does this evidence support the jury's determination that the defendant or his accomplice entered the store, so as to be guilty of second degree burglary?

## **II. STATEMENT OF THE CASE**

Some time before 2 a.m. on the morning of May 12, 2009, an alarm was tripped at the back door of the Edmonds Smoke Shop. Police responding to the location found that glass in the front door had been broken with a rock. The door itself was still locked. 2 RP 56-59. A sign that had been behind the door was knocked over. 2 RP 134. All the glass had been removed from the door. 2 RP 132. Wires in front of the building and in the phone box serving the building had been cut. 2 RP 63; 3 RP 217. The back door did no show any sign of forced entry. 2 RP 68.

Apart from the glass on the floor, the shop was orderly. There was, however, a cigarette pack on one of the shelves that

was askew. Behind this pack was a "big empty void." 2 RP 69. Muhammad Anwar, the store owner, testified that 42 cartons of cigarettes and two or three boxes of cigars were missing from his store. 2 RP 157.

At around 2 a.m., Shane Crum and Kevin Stone were driving to work. They saw two men crossing the road nearby. The men got into a car parked by a bowling alley. They drove down the street, turned into a store parking lot, pulled into the back entrance, and drove back to the bowling alley. When police arrived, Mr. Crum pointed out this car. 2 RP 101-04, 110-14.

Police pursued the car and stopped it. The driver was the defendant (appellant), Cory Thomas. His passenger was co-defendant Shannon Traylor. 2 RP 121-23, 204-06. The defendant told police that he was planning to meet some girls on Aurora. 2 RP 123. Mr. Traylor said that he was planning to meet a woman in Edmonds. 2 RP 206.

Police searched the car pursuant to a warrant. Under the front seat were two ski masks, each with a pair of gloves inside. Also in the car was a knit cap with holes cut in it and another pair of gloves. On the driver's door, there was a portable light. In the rear seat were two large Tupperware tubs. In the trunk were a

screwdriver, a wrench, and five sockets. There were no cigarettes or packaging in the car. 2 RP 189-98, 125; ex. 69-72.

At some time after May 12, police examined the area of the shop for cigarettes. The record does not indicate when this occurred. Nothing was found. 2 RP 198.

### **III. ARGUMENT**

#### **A. THE EVIDENCE SUPPORTS THE JURY'S FINDING THAT THE DEFENDANT OR AN ACCOMPLICE ENTERED THE STORE.**

##### **1. The Jury's Decision To Accept A Witness's Credibility Cannot Be Overturned By This Court.**

The defendant challenges the sufficiency of the evidence. His brief does not, however, even mention the applicable standard of review. "[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). "A claim of insufficient evidence admits the truth of the State's evidence and all inferences that can be reasonably drawn therefrom." State v. Allen, 90 Wn. App. 957, 960, 955 P.2d 403 (1998).

In this case, the store owner testified that over 40 cartons of cigarettes were missing after the burglary. 2 RP 157. This

supports an inference that one or more burglars entered the store and took the missing cigarettes. The defendant claims that the testimony was not credible. This court cannot consider such a claim. "Credibility determinations are for the trier of fact and are not subject to review." State v. Mines, 163 Wn.2d 387, 391, 179 P.3d 835, 837 (2008).

Even if this court had the power to overturn the jury's assessment of the owner's credibility, there would be no reason for it to do so. The defendant essentially argues that it was impossible for him or his accomplice to have taken the cigarettes. The record does not support his claims.

To begin with, physical evidence corroborated the owner's testimony. Police observed that a cigarette pack on one of the shelves was askew, when everything else in the store was orderly. Behind this pack was a "big empty void." 2 RP 69. This testimony supports an inference that someone jarred the cigarette pack while removing the items that had been in the empty space.

The defendant claims that "[p]olice responded to the store within minutes of the alarm, thus providing a narrow time frame in which any theft could have occurred." Brief of Appellant at 5. The record shows that police arrived at the scene at 2:06 a.m. 2 RP 46.

An officer testified that the alarm was recorded by the alarm company at 1:58 a.m. He admitted, however, that he had not verified this information. 2 RP 143-44.

Even more significant, the alarm was tripped to the *back* door. 2 RP 43-44. The apparent point of entry, however, was through the *front* door. 2 RP 46, 68. The jury could infer that the perpetrators entered without setting off an alarm but tripped one when they left. They could have been inside the store for any amount of time.

Although the police were unable to locate the stolen cigarettes, this does not prove that the owner's testimony was false. There is no evidence that police conducted a timely search of the area. A detective testified that he directed a search at some point, but he did not specify when this occurred. 2 RP 198.

Nor is it clear that the two defendants were the only perpetrators of this crime. Witnesses saw two people running from the vicinity of the store. 2 RP 101-03, 110-11. They did not, however, observe the store itself. Other accomplices could have fled in a different direction.

Consistent with this evidence, a jury could have inferred the following: At some time before 2 a.m., the perpetrators entered

through the broken window on the front door. They took some cigarettes, disturbing a cigarette pack and leaving an empty space on the shelf. They exited through the back door, not knowing that this would set off an alarm. When it did, they stashed the incriminating cigarettes somewhere nearby and fled to their car parked nearby. Unfortunately for them, they were seen running to their car, pursued, and arrested. Unfortunately for the store owner, police failed to search the area for the cigarettes, so they were never found. This reconstruction of the events is consistent with all of the evidence. It provides a reasonable basis for the jury to credit the store owner's testimony. Consequently, there is no justification for this court to overturn the jury's credibility assessment.

The defendant claims that it is "telling" that the trial court did not award restitution for the cigarettes. Brief of Appellant at 6. This fact is of no significance. At sentencing, defense counsel argued that the defendant should not pay restitution for the cigarettes because he was not personally involved in taking them. 3 RP 306. The court treated this as a legal argument that did not require any factual determination. 3 RP 310. The court has broad discretion in setting restitution. It is not bound by the jury's findings concerning the amount of loss. State v. Kinneman, 155 Wn.2d 272, 282 ¶ 17,

119 P.3d 350 (2005). Its decision not to award restitution for this item does not reflect any factual determination that the theft did not occur.

In any event, any factual decision made by the court did not bind the jury. If two fact-finders make different determinations, this does not demonstrate that either determination is unsupported. The jury was entitled to believe the store owner's testimony. Based on that credibility determination, the jury could properly find that the defendant or his accomplice entered the store.

**2. Even Apart From The Store Owner's Testimony, There Was Evidence Showing That Burglars Entered The Store.**

Furthermore, even if this court could somehow discount the testimony about the missing cigarettes, other evidence supports an inference that one or more burglars entered the store. At least four other facts support this inference. First, the store alarm was tripped to the *back* door. 2 RP 43-44. There was no apparent damage to the back door, but the *front* door was broken. 2 RP 46, 68. The jury could infer that the perpetrators entered through the front door and exited through the back door, whether or not they took anything in between.

Second, a sign that had been behind the front door was knocked down. 2 RP 134. The jury could infer that this resulted from the entry of some person or object into the store.

Third, a cigarette pack in the store was disarranged. 2 RP 69. The store owner testified that he straightened everything up before he closed for the night. 2 RP 161-62. The jury could infer that the pack was jarred by one of the burglars, whether or not this was done in the process of taking merchandise.

Fourth, *all* of the glass in the bottom part of the door was removed. 2 RP 132. The jury could infer that after breaking the window, the perpetrators removed the rest of the glass to prepare a safe entry point. The jury could also infer that it would be impossible to remove *all* of the glass without reaching inside the window with at least a portion of a hand or tool.

The word "enter" ... shall include the entrance of the person, or the insertion of any part of his or her body, or any instrument or weapon held in his or her and used or intended to be used to threaten or intimidate a person or to detach or remove property.

RCW 9A.52.010(4). If even a portion of a perpetrator's hand or tool penetrated the plane of the door, this constituted "entry" and rendered the perpetrator guilty of burglary.

In short, both witness testimony and valid inferences from the evidence support the jury's finding that the defendant or his accomplice entered the store. The evidence is therefore sufficient to support the defendant's conviction for second degree burglary.

**B. IF THE EVIDENCE IS INSUFFICIENT TO PROVE BURGLARY, IT IS STILL SUFFICIENT TO PROVE ATTEMPTED BURGLARY.**

Even if this court determines that the evidence is insufficient to establish a completed burglary, it is still sufficient to establish an attempted burglary. A court can direct entry of judgment on a lesser charge if (1) the jury was instructed on that charge and (2) in finding the defendant guilty of the crime charged, the jury necessarily found every element of the lesser crime. In re Heidari, 174 Wn.2d 288, 274 P.3d 366 (2012).

In the case, the jury was instructed on the lesser offense of attempted second degree burglary. That crime required that the defendant or an accomplice did an act that was a substantial step toward the commission of burglary in the second degree, with intent to commit that crime. CP 53, inst. no. 22. In convicting the defendant of second degree burglary, the jury found that the defendant unlawfully entered a building with intent to commit a crime against a person or property therein. CP 50, inst no. 19. A

person who actually enters a building has taken a substantial step towards that entry. A person who enters a building with intent to commit a crime therein has acted with the intent to commit second degree burglary.

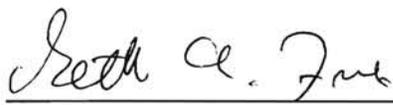
The jury's verdict thus establishes all of the elements of second degree burglary. The jury was instructed on that crime. Even if there is no evidence of an actual entry, the evidence supports a finding of an attempt to enter. Consequently, even if the court reverses the conviction for second degree burglary, it should remand for entry of judgment on the lesser crime of attempted second degree burglary.

#### **IV. CONCLUSION**

The judgment and sentence should be affirmed.

Respectfully submitted on November 1, 2012.

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