

No. 36107-8-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

JERALD L. McCOWAN,

Appellant.

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APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR MASON COUNTY

The Honorable James B. Sawyer II, Judge  
Cause No. 06-1-00490-6

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BRIEF OF RESPONDENT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in not taking count VI, attempted theft in the first degree, from the jury for lack of sufficiency of the evidence that the value of the property exceeded \$1,500.00.
2. The trial court erred in not dismissing count II, theft in the second degree, because the State failed to establish the corpus delicti for the offense independent of McCowan's admissions to the police.
3. The trial court erred in not dismissing count IV, theft in the second degree, because the State failed to establish the corpus delicti for the offense independent of McCowan's admissions to the police.
4. The trial court erred in permitting McCowan to be represented by counsel who provided ineffective assistance by failing to raise the issue regarding the lack or corpus delicti for count II, theft in the second degree.
5. The trial court erred in permitting McCowan to be represented by counsel who provided ineffective assistance by failing to raise the issue regarding the lack or corpus delicti for count IV, theft in the second degree.
6. The trial court erred in calculating McCowan's offender score when it included his alleged prior criminal VUCSA conviction in determining his offender score.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court err in not taking count six, attempted theft in the first degree, from the jury for lack of sufficient evidence when detailed testimony was provided by the property owner regarding what McCowan was trying to steal and how he attempted to complete his crime?
2. Did the trial court err in not dismissing counts two and/or four, alleging theft in the second degree, when corpus delicti was established that McCowan committed these offenses?

3. Did McCowan receive ineffective assistance of counsel when the record shows that his attorney employed a definite strategy to try and have his client acquitted on counts one through six by admitting to count seven, unlawful possession of methamphetamine?
4. Did the trial court err in calculating McCowan's offender score by including his 2003 VUCSA conviction from Thurston County when: (a) the conviction was recent; (b) local, Washington State criminal history; and (c) McCowan's only other felony prior to his sentencing in this case?

#### C. EVIDENCE RELIED UPON

The official Report of Proceedings will be referred to as "RP." The Clerk's Papers shall be referred to as "CP."

#### D. STATEMENT OF THE CASE

1 & 2. Procedural History and Facts. Pursuant to RAP 10.3(b), the State accepts Roberts' recitation of the procedural history and facts

3. Summary of Argument.

The trial court did not err in not taking count six, attempted theft in the first degree, from the jury for lack of sufficient evidence because detailed testimony was provided by the property owner regarding the large amount of copper wire McCowan tried to steal and how he attempted to complete his crime. The trial court also did not err in not dismissing

counts two and/or four, alleging theft in the second degree, because corpus delicti was established that McCowan committed these offenses.

Similarly, McCowan received effective assistance of counsel because his court-appointed attorney employed a definite strategy to have his client acquitted on all charges except count seven, unlawful possession of methamphetamine, by stipulating during closing argument that his client was guilty of only that offense.

Lastly, the trial court did not err in calculating McCowan's offender score when it included his 2003 VUCSA conviction from Thurston County because: (a) the conviction was recent; (b) local, Washington State criminal history; and was (c) McCowan's only other felony prior to sentencing in this case. The judgment and sentence of the trial court is complete, correct, and should be affirmed.

#### E. ARGUMENT

1. THE TRIAL COURT DID NOT ERR IN NOT TAKING COUNT SIX, ATTEMPTED THEFT IN THE FIRST DEGREE, FROM THE JURY FOR LACK OF SUFFICIENT EVIDENCE BECAUSE DETAILED TESTIMONY WAS PROVIDED BY THE PROPERTY OWNER REGARDING THE LARGE AMOUNT OF COPPER WIRE THAT McCOWAN TRIED TO STEAL AND HOW HE ATTEMPTED TO COMPLETE HIS CRIME.

The trial court did not err in not taking count six, attempted theft in the first degree, from the jury for lack of sufficient evidence because

detailed testimony was provided by the property owner regarding the large amount of copper wire McCowan tried to steal and how he attempted to complete his crime.

Evidence is sufficient if, viewed in the light most favorable to the State, it permits any rational trier of fact to find all of the essential elements of the crime beyond a reasonable doubt. State v. Joy, 121 Wash. 2d 333, 338, 851 P.2d 654 (1993); see State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). In a criminal case, the State must prove each element of the alleged offense beyond a reasonable doubt. State v. Ware, 111 Wash.App. 738, 741, 46 P. 3d.280 (2002); cited by State v. Alvarez, 128 Wash.2d 1, 13, 904 P.2d 754 (1995). A claim of insufficiency admits the truth of the State's evidence and requires that all reasonable inferences be drawn in favor of the State and interpreted most strongly against the defendant. Salinas, 119 Wn.2d at 201.

Direct evidence is not required to uphold a jury's verdict; circumstantial evidence can be sufficient. State v. O'Neal, 159 Wash.2d 500, 506, 150 P.3d 1121 (2007). Circumstantial evidence is accorded equal weight with direct evidence. State v. Delmarter, 94 Wash.2d 634, 638, 618 P.2d 99 (1980). In reviewing the evidence, deference is given to the trier of fact, who resolves conflicting testimony, evaluates the credibility of witnesses, and generally weighs the persuasiveness of the

evidence. State v. Walton, 64 Wash.App. 410, 415-16, 824 P.2d 533 (1992); see State v. Rooth, 129 Wash.App. 761, 773, 121 P.3d 755 (2005).

In McCowan's case, David Kamin, a local contractor and co-owner of the property, went into great detail regarding the damage his building sustained. As Mr. Kamin noted:

[I]t's gonna cost us probably 20 grand to have new poles and transformers put up just to service our lower buildings, let alone have power to the big building that they were stealing from. RP 74: 23-25; 75: 1.

Mr. Kamin was also quite specific as to the "system" that McCowan and his co-defendants employed to steal copper wiring from his building. As

Mr. Kamin described:

[T]hey had a system down there. They had come-alongs and stuff like that. They would-must bend the wire and hook come-alongs and just pull them through all...the wire that's in conduit...anywhere from four-inch to two-inch, and they just physically start pulling them out with a come along. RP 75: 18-23.

That Mr. Kamin specifically noted that the damage McCowan caused to his building would probably cost him "20 grand" was more than sufficient for the charge of attempt theft first degree in count six to go to the jury. RP 74: 23-24. Juries are presumed to follow the court's instructions, and it was for the jury to consider whether the statutory threshold had been satisfied by the evidence presented. No error occurred.

2. THE TRIAL COURT DID ERR IN NOT DISMISSING COUNTS TWO AND/OR FOUR ALLEGING THEFT IN THE SECOND DEGREE BECAUSE CORPUS DELICTI WAS ESTABLISHED THAT McCOWAN COMMITTED THESE OFFENSES.

The trial court did not err in not dismissing counts two and/or four, alleging theft in the second degree, because corpus delicti was established that McCowan committed these offenses.

Washington's version of the corpus delicti rule requires that the State produce evidence, independent of the accused's statements, sufficient to support a finding that the charged crime was committed by someone. State v. Valdez, 137 Wash.App. 280, 290, 152 P.3d 1048 (2007); see State v. Bernal, 109 Wash.App. 150, 152, 33 P.3d 1106 (2001). A confession or admission, standing alone, is insufficient to establish the corpus delicti of a crime. Valdez, 137 Wash.App. at 290-291; see State v. Vangerpen, 125 Wash.2d 782, 796, 888 P.2d 1177 (1995).

The State has the burden of producing evidence sufficient to satisfy the corpus delicti rule. State v. Whalen, 131 Wash.App. 58, 62, 126 P.3d 55 (2005); see State v. Riley, 121 Wash.2d 22, 32, 846 P.2d 1365 (1993). If sufficient corroborative evidence exists, the confession or admission of a defendant may be considered along with the independent evidence to establish a defendant's guilt. State v. Whalen, 131 Wash.App. at 62. To

be sufficient, independent corroborative evidence need not establish the corpus delicti, or ‘body of crime,’ beyond a reasonable doubt, or even by a preponderance of the evidence. Rather, independent corroborative evidence is sufficient if it prima facie establishes the corpus delicti.

Prima facie in this context means evidence of sufficient circumstances supporting a logical and reasonable inference of criminal activity. In determining whether the State has produced sufficient prima facie evidence, we must assume the truth of the State’s evidence and all reasonable inferences drawn therefrom. But the independent evidence must support a logical and reasonable inference of criminal activity only. State v. Whalen, 131 Wash.App. at 63. If the independent evidence also supports logical and reasonable inferences of non-criminal activity, it is insufficient to establish the corpus delicti.

In McCowan’s case, detailed testimony was provided by Mr. Kamin as to how his building had been “completely tor[n] apart,” specifically how:

These groups of guys have been working in there for months, taking the wire out, the brass fittings, the sink fixtures, lights, phone-numerous things. Electrical panels apart, heating radiators, air compressor wires. The list is a mile long and it’s very overwhelming to go in there an look at the mess that they’ve done. It’s in such disrepair we’d have to gut the whole building and start new. It’s in that sad of shape. RP 72: 23-25; 73: 1-5.

McCowan himself was caught red-handed by Officer Kostad of the Shelton Police Department on top of the building after hearing “sounds” that he heard “coming from the roof.” RP 31: 19-20. When Officer Kostad went up to the roof, he saw:

[N]umerous tools on the floor: a hammer, a come-along. And they were attempting to remove some copper wiring from the building. RP 33: 7-9.

Importantly, McCowan admitted that he had been to the building “three times” with his brother, “taking brass fittings [and] copper wiring.” RP 60: 19-20; 22-23. In an exchange between the State and Mr. Kamin, the dollar value of what McCowan stole was clarified, in that Mr. Kamin stated that \$210.00 paid to McCowan for one load “wouldn’t even put a dent” in what it would what it would actually cost him to replace the “aluminum wire, copper and brass” that was taken. RP 77: 24-25; 78: 1-5.

That McCowan received but \$210.00, \$260.00 or \$300.00 for a load of scrap metal does not mean that what he took was actually worth that amount. RP 60: 1-25; 61: 1-25; 62: 1-25. Put another way, Mr. Kamin reasoned quite correctly that just because McCowan sold the metal for a certain amount does not mean that is was worth only \$210.00, \$260.00 or \$300.00, as its true market value far exceeded those amounts. Assuming the truth of the State’s evidence and all reasonable inferences drawn therefrom, Mr. Kamin’s testimony, in conjunction with

McCowan's admissions and the fact that he was caught red-handed by the police trying to extract copper wire from the building demonstrates that the State established the prima facie requirement of Washington's corpus delicti rule. The trial court did not err in allowing counts two and four to go to the jury and its judgment and sentence should be affirmed.

3. McCOWAN RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE HIS COURT-APPOINTED ATTORNEY EMPLOYED A DEFINITE STRATEGY TO HAVE HIS CLIENT ACQUITTED ON ALL CHARGES EXCEPT COUNT SEVEN, UNLAWFUL POSSESSION OF METHAMPHETAMINE, BY STIPULATING DURING CLOSING ARGUMENT THAT HIS CLIENT WAS GUILTY OF ONLY THAT OFFENSE.

McCowan received effective assistance of counsel because his court-appointed attorney employed a definite strategy to have his client acquitted on all charges except count seven, unlawful possession of methamphetamine, by stipulating during closing argument that his client was guilty of only that offense.

We start with the strong presumption that counsel's representation was effective. State v. Rodriguez, 121 Wash.App. 180, 184, 87 P.3d 1201 (2004); see State v. Studd, 137 Wash.2d 533, 551, 973 P.2d 1049 (1999); State v. Schwab, 167 P.3d 1225, 1230, 2007 WL 2847556 (Wash.App. Div. 2). This requires the defendant to demonstrate the absence of legitimate strategic or tactical reasons for the challenged conduct.

Rodriguez, 121 Wash.App. at 184; see State v. McFarland, 127 Wash.2d 322, 336, 899 P.2d 1251 (1995).

To establish ineffective assistance of counsel, a defendant must show that: (1) his counsel's performance was deficient; and (2) the deficient performance resulted in prejudice. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); see McFarland, 127 Wash.2d at 334-335; State v. Keend, 166 P.3d 1268, 1271-1272, 2007 WL 2713926 (Wash.App. Div. 2).

Deficient performance is performance 'below an objective standard of reasonableness based on consideration of all the circumstances'. Rodriguez, 121 Wash.App. at 184. Prejudice means that there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different. McFarland 127 Wash.2d at 334-335. Effective assistance of counsel does not mean 'successful assistance of counsel.' State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972). Competency of counsel will be determined upon the entire record. State v. Gilmore, 76 Wn.2d 293, 297, 456 P.2d 344 (1969).

Court-appointed counsel summed-up his strategy best during closing argument when he stated:

Good evening, folks. This is going to sound a bit unusual. I'm going to ask you to find Mr. McCowan guilty of what he's guilty of; that is, the unlawful possession of the controlled substance, the methamphetamine, as he told the officers that found the jacket and told the detective in his interviews that it was his methamphetamine. RP: 129: 9-15.

Defense counsel went on to argue that with the remaining six counts,

McCowan was:

[U]nder the impression that his brother was there legitimately, and throughout their business dealings that he's known of, it's always been legal and legit. RP 129: 16-20.

Defense counsel did not provide ineffective assistance because: (a) the State established corpus delicti, (b) knew that McCowan's offender score had been calculated correctly before sentencing; and (c) employed a definite strategy to try and have his client acquitted on six out of seven felonies. Neither prong of Strickland was satisfied and the trial court did not err.

4. THE TRIAL COURT DID NOT ERR IN CALCULATING McCOWAN'S OFFENDER SCORE BY INCLUDING HIS 2003 VUCSA CONVICTION FROM THURSTON COUNTY BECAUSE: (A) THE CONVICTION WAS RECENT; (B) LOCAL, WASHINGTON STATE CRIMINAL HISTORY; AND WAS (C) McCOWAN'S ONLY OTHER FELONY PRIOR TO SENTENCING IN THIS CASE.

The trial court did not err in calculating McCowan's offender score by including his 2003 VUCSA conviction from Thurston County because: (a) the conviction was recent; (b) local, Washington State criminal history; and was (c) McCowan's only other felony prior to sentencing in this case.

We review a sentencing court's calculation of an offender score de novo. State v. Bergstrom, 169 P.3d 816, 2007 WL 3105095 (WA S.Ct. October 25, 2007); see State v. Tili, 148 Wash.2d 350, 358, 60 P.3d 1192 (2003). Generally, the trial court calculates an offender score by adding together the current offenses and the prior convictions. State v. Bergstrom, 169 P.3d 816; see RCW 9.94A.589(1)(a). But, if the trial court finds that some of the prior offenses encompass the same criminal conduct, then those offenses count only as one crime.

The State bears the burden of proving the existence of prior convictions by a preponderance of the evidence. State v. Bergstrom, 169 P.3d 816; see In re Pers. Restraint of Cadwallader, 155 Wash.2d 867, 876, 123 P.3d 456 (2005). The best evidence to establish a defendant's prior conviction is the production of a certified copy of the prior judgment and sentence. State v. Bergstrom, 169 P.3d 816; see State v. Lopez, 147 Wash.2d 515, 519, 123 P.3d 456 (2005). Where the sentencing court's offender score determination is challenged on appeal for insufficient evidence of prior convictions, the case law provides three approaches to

analyze the issue, assuming the defendant has not pleaded guilty. State v. Bergstrom, 169 P.3d 816.

First, if the State alleges the existence of prior convictions at sentencing and the defense fails to ‘specifically object’ before the imposition of the sentence, then the case is remanded for resentencing and the State is permitted to introduce new evidence. Second, if the defense does specifically object during the sentencing hearing but the State fails to produce any evidence of the defendant’s prior convictions, then the State may not present new evidence at resentencing. (Emphasis in the original), State v. Bergstrom, 169 P.3d 816; see In re Pers. Restraint of Cadwallader, 155 Wash.2d at 877-878. After the defense specifically objects [and] places the sentencing court on notice that the State must present evidence, the State is held to the initial record on remand. State v. Bergstrom, 169 P.3d 816; see State v. Ford, 137 Wash.2d 472, 480, 973 P.2d 452 (1999).

Third, if the State alleges the existence of prior convictions and the defense not only fails to specifically object but agrees with the State’s depiction of the defendant’s criminal history, then the defendant waives the right to challenge the criminal history after [the] sentence is imposed. State v. Bergstrom, 169 P.3d 816; see In re Pers. Restraint of Goodwin, 146 Wash.2d 861, 874, 50 P.3d 618 (2002). More specifically, a defendant waives the right to argue on appeal that his crimes constitute the

same criminal conduct after the defense agrees in the defendant's own presentence memorandum that the criminal history as reported is correct. State v. Bergstrom, 169 P.3d 816; see State v. Nitsch, 100 Wash.App. 512, 997 P.2d 1000 (2000). Sentencing courts can rely on defense acknowledgement of prior convictions without further proof. State v. Bergstrom, 169 P.3d 816, see former RCW 9.94A.530(2) (2002); In re Pers. Restraint of Cadwallader, 155 Wash.2d at 873. Acknowledgment includes no objecting to information included in presentence reports. Former RCW 9.94A.530(2); see In re Pers. Restraint of Cadwallader, 155 Wash.2d at 874.

The distinction in McCowan's case is that his only prior criminal history that resulted in one point before this case was a local, 2003 VUCSA conviction from Thurston County. By contrast, the presentence report in Bergstrom documented that defendant Bergstrom's "criminal history included 11 felony convictions." State v. Bergstrom, 169 P.3d 816. Were multiple, prior felony convictions spanning years and/or possibly out of state convictions at issue in McCowan's case as they were in defendant Bergstrom's, then McCowan might have a more persuasive argument. As it was, McCowan's one prior felony was recent, local, and not contested at sentencing, where his attorney argued for and received DOSA for him. RP 146: 11-18. No further action by the State would

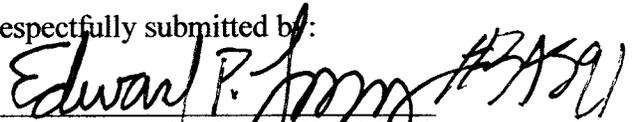
have been reasonable given this specific set of circumstances. The trial court did not err in calculating McCowan's offender score.

F. CONCLUSION

The State respectfully requests that the judgment and sentence of the trial court be affirmed.

Dated this 19<sup>TH</sup> day of November, 2007

Respectfully submitted by:



Edward P. Lombardo, WSBA #34591  
Deputy Prosecuting Attorney for Respondent  
Gary P. Burleson, Prosecuting Attorney  
Mason County, WA

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

STATE OF WASHINGTON,	)	
	)	No. 36107-8-II
Respondent,	)	
	)	DECLARATION OF
vs.	)	FILING/MAILING
	)	PROOF OF SERVICE
JERALD L. McCOWAN,	)	
	)	
Appellant,	)	
_____	)	

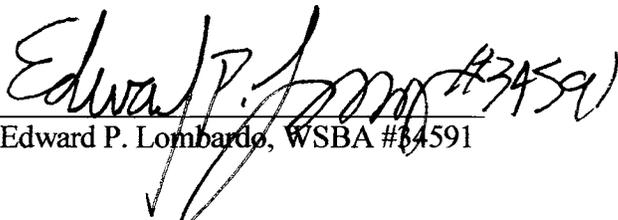
I, EDWARD P. LOMBARDO, declare and state as follows:

On MONDAY, NOVEMBER 19, 2007, I deposited in the U.S. Mail,  
postage properly prepaid, the documents related to the above cause number  
and to which this declaration is attached (BRIEF OF RESPONDENT), to:

Thomas Edward Doyle  
Attorney at Law  
P.O. Box 510  
Hansville, WA 98340-0510

I, EDWARD P. LOMBARDO, declare under penalty of perjury of  
the laws of the State of Washington that the foregoing information is true  
and correct.

Dated this 19<sup>TH</sup> day of NOVEMBER, 2007, at Shelton, Washington.

  
Edward P. Lombardo, WSBA #34591

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