

FILED

FEB 09 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 28874-9-III

**WASHINGTON STATE COURT OF APPEALS
DIVISION III**

STATE OF WASHINGTON,

RESPONDENT,

v.

B. M. S.,

APPELLANT.

BRIEF OF RESPONDENT

**D. ANGUS LEE
PROSECUTING ATTORNEY**

**By: Jessica Cafferty, WSBA #38102
Deputy Prosecuting Attorney
Attorney for Respondent**

**PO BOX 37
EPHRATA WA 98823
(509)754-2011**

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I. IDENTITY OF RESPONDENT

The State of Washington, represented by the Grant County Prosecutor, is the Respondent in this matter.

II. ASSIGNMENT OF ERROR

Appellant asserts that there was insufficient evidence to convict the Appellant of Residential Burglary and Malicious Mischief in the Second Degree.

III. ISSUE

Was there Sufficient Evidence to Support the Appellant's Convictions?

IV. STATEMENT OF THE CASE

At a fact-finding hearing, the State presented testimony the State presented evidence through the testimony of Jack Williams. (RP 2/10/10 18-75). Mr. Williams owned a duplex rental home on 8959 B Tinker Loop in Moses Lake that was occupied by the Respondent's family. (RP 2/10/10 20). Mr. Williams sent a Notice to Terminate Tenancy to the Appellant's family on June 17, 2008. (RP 2/10/10 25). The notice

required that the Appellant's family leave the residence by July 31, 2008. (RP 2/11/10 19).

After the Appellant's family left the residence, Mr. Williams saw that the home had been damaged. (RP 2/10/10 30). Specifically, "[a]ll the sheet rock, every room the sheet rock was kicked in. Windows were broken uh magic marker pens all over the walls uh just that kind of stuff. Just completely destroyed it." (RP RP 2/10/10 30).

Mr. Williams hired a construction company to do repairs inside the home and he personally completed repairs inside the garage of the rental home. (RP 2/10/10 30). Among the repairs Mr. William completed included; filling in holes, sanding, and painting the inside of the garage. (RP 2/10/10 32). Some of these repairs were done on August 11, 2008. (RP 2/10/10 45).

When Mr. Williams left the home on August 11, 2008, he left one can of spray foam inside the garage. (RP 2/10/10 45). Mr. Williams brought the spray foam can to the property. (RP 2/10/10 33). There were no spray foam cans outside the home in the backyard when he left. (RP 2/10/10 46).

The next morning, on August 12, 2008, Mr. Williams returned to the rental home and saw that the walls, floors and ceiling in the garage had been sprayed with spray foam. (RP 2/10/10 34). Mr. Williams saw that

the door to the garage had been damaged; “you could see where something had been jammed in to slide the bolt over so they could get the door open.” (RP 2/10/10 35). He also saw a spray foam can outside the garage door and not inside the garage. (RP 2/10/10 46).

This can was collected by Sergeant Mark Biallas of the Moses Lake Police Department (RP 2/10/10 80). This can was later tested at the Washington State Patrol Forensic Crime Lab by Scott Redhead. (RP 2/10/10 95). Mr. Redhead testified that a latent print found on the dome portion of a spray paint can, under the lid, near the nozzle was a match to the Appellant’s right index finger. (RP 2/10/10 104).

Additionally, Michelle Razey provided testimony on behalf of the State at the fact-finding hearing. (RP 2-10-10 112-142). Ms. Razey lives in the adjoining home in the duplex at 8959 Tinker Loop. (RP 2/10/10 112). She testified that the Appellant was in the backyard at 8959 Tinker Loop digging up bushes on August 11, 2008 between 9:00PM and 10:00PM. (RP 2/10/10 112-117). Upon seeing the Appellant in the backyard, Ms. Razey warned the Appellant that she was going to call the police and she retrieved her phone. (RP 2/10/10118).

When Ms. Razey returned to the backyard with her phone, she saw someone at the door to the garage in the backyard. (RP 2/10/10 118). This person had a “screwdriver or something” and it was “noisy like he

was picking the wood.” *Id.* Ms. Razy then testified that she “heard the creaking of the door. I could see the motion of the door opening...And then I heard a really loud um air can of spray.” (RP 2/10/10 120).

As to the identity of the person at the garage door, Ms. Razy first testified that she believed the person was the Appellant. (RP 2/10/10 122). On cross examination though, Ms. Razy stated, “It appeared to be him (the Appellant) but I cannot be 100% because he didn’t talk to me and it was – it’s dark in that corner...” (RP 2/10/10 141). Nonetheless, Ms. Razy testified that the person at the door to the garage appeared to be the same height, weight and thickness as the Appellant. *Id.* Additionally, she stated that the time lapse between the time she saw the person in the backyard by the door and the time she saw the Appellant digging up the bushes in the backyard was “three minutes.” (RP 2/10/10 140).

The Court found the Appellant guilty of Residential Burglary and Malicious Mischief in the Second Degree. (CP 40-42). The Court filed Findings of Fact, Conclusions of Law and Verdict on Fact Finding Hearing on February 16, 2010. (CP 40-42).

V. ARGUMENT

There was Sufficient Evidence to Support the Appellant’s Convictions.

The Appellant challenges whether there was sufficient evidence that he committed the crimes of Residential Burglary and Malicious Mischief in the Second Degree. The State argues that there was more than ample evidence to support the Appellant's convictions.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829, P.2d 1068 (1992). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn from it. *Id.*

Here, the State presented evidence through the testimony of Jack Williams. (RP 2/10/10 18-75). Mr. Williams owned a duplex rental home on 8959 B Tinker Loop in Moses Lake that was occupied by the Respondent's family. (RP 2/10/10 20). Mr. Williams sent a Notice to Terminate Tenancy to the Appellant's family on June 17, 2008. (RP 2/10/10 25). The notice required that the Appellant's family leave the residence by July 31, 2008. (RP 2/11/10 19).

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Additionally, the State presented evidence from Scott Redhead from the Washington State Patrol Forensic Crime Lab. (RP 2/10/10 84-109). Mr. Redhead testified that a latent print found on the dome portion of a spray paint can, under the lid, near the nozzle was a match to the Appellant’s right index finger. (RP 2/10/10 104).

As noted in the Appellant’s brief, there is a clear standard for fingerprint-only cases. In fingerprint-only cases, fingerprint evidence is sufficient to support a conviction if the trier of fact could infer from the circumstances that the fingerprint could only have been impressed at the time of the crime. *State v. Bridge*, 91 Wn. App. 98, 100, 955 P.2d 418 (1998), *citing*, *State v. Lucca*, 56 Wn. App. 597, 599, 784, P.2d 572 (1990). This standard is appropriate when there is no other evidence linking the defendant to the crime. *Id.* at 100-101.

The Appellant argues that the State failed to establish that the fingerprint in this case was impressed at the time of the crime; “The State

is required to show that the object on which the print appears was inaccessible to the defendant before the time the crime was committed.” (Appellant’s Br. 6). However, this standard is not applicable since the State presented additional evidence beyond the fingerprint. As such, this is not a fingerprint-only case and the rule from *State v. Bridge* is not appropriate.

As stated above, the Appellant was known to the victim. His family had previously occupied the victim’s rental home and had moved out after receiving a Notice to Terminate Tenancy. According to Mr. Williams the house was “destroyed.”

On the night of the burglary and malicious mischief, the Appellant was removing plants from the backyard of the home between 9:00PM and 10:00PM.

Lastly, Ms. Razey saw a person use a tool to gain entry into the garage and then heard the sound of an air can being sprayed. Ms. Razey saw this person at the door to the garage roughly three minutes after she saw the Appellant in the backyard. This person also matched the height, weight, and thickness (or build) of the Appellant.

Therefore, this case is well beyond the facts of *State v. Bridge*. There is substantial evidence beyond the fingerprint that links this Appellant to the crime and there is more than sufficient evidence to sustain

the convictions. As such, the Appellant's convictions for Residential Burglary and Malicious Mischief in the Second Degree should be affirmed.

IV. CONCLUSION

Based upon the foregoing analysis, the State respectfully requests that the Court uphold the decisions of the lower court and affirm the convictions of the Appellant.

DATED: February 8, 2011



Jessica Cafferty, WSBA #38102
Deputy Prosecuting Attorney