IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. ANTHONY BRUCE ALLEN, Appellant.	No. 39543-6-II UNPUBLISHED OPINION

Hunt, J. — Anthony Bruce Allen appeals his jury convictions for second degree burglary and second degree malicious mischief. He argues that the trial court incorrectly instructed the jury about the unanimity requirement for the special verdict finding that he had committed the crimes charged shortly after being released from incarceration. Allen has also filed a statement of additional grounds (SAG), in which he argues that the evidence was insufficient to prove that he was the perpetrator of the crimes and that the police lacked probable cause when they arrested him. We affirm.

FACTS

At approximately 2:15 a.m., on April 18, 2009, Anthony Bruce Allen broke into the El Presidente Mexican restaurant in Vancouver and took the cash register by the front door, which had contained $40 to $50 in coins.[1] Two windows in the restaurant were broken, and officers

found coins and a big rock lying on the floor inside.

Vancouver Police officers discovered and photographed part of a shoe print pattern on a piece of broken glass outside the windows; they requested a K-9 unit. When Clark County Sheriff's Deputy Alan Earhart responded with his dog, they and Vancouver Police Officer Dennis Devlin began to track the intruder toward Interstate 5. When they got to the corner of the east wall of the Fort Vancouver motel, the dog stopped. Deputy Earhart directed the dog toward an underpass, where two individuals were sleeping; but the soles of their shoes did not match the print from the restaurant.

While in the underpass, the Officer Devlin observed Allen running from a row of bushes near the wall of the apartment building. Officers Devlin and Earhart chased Allen into the building's parking garage, where Officer Devlin told him to lie on the ground with his arms out. When Allen complied, two rolls of change fell out of his grip. His coat was covered with tiny glass particles; the sole of his shoe matched the print on the window glass; and his right index finger was cut.

After taking Allen into custody, Deputy Earhart and his dog backtracked the scent to the bushes where they had first seen him. Between the bushes and the wall, they found gloves, a crowbar, two rolls of quarters, and other change. At some point along the dog track, they also found the stolen cash register, smashed open, with was some blood on it.

The State charged Allen with second degree burglary and malicious mischief.[2] The jury

[1] Some of the change was in rolls, and some of it was loose.

[2] The information also contained another second degree burglary charge, based on an incident that had occurred in February. The jury did not convict on that charge, and the trial court declared a mistrial. Allen subsequently pleaded guilty to third degree theft. That charge is not at issue in this

convicted him on both counts. Following the verdict, the trial court gave the jury a special verdict form and the following supplemental instruction:

> If you find the defendant guilty of any of the crimes charged, you must then determine whether the following additional fact exists:
>
> Did defendant commit any of the crimes charged shortly after being released from incarceration?
>
> The State has the burden of proving the existence of this additional fact beyond a reasonable doubt. In order for you to find the existence of an additional fact in this case, you must unanimously agree that the additional fact has been proven beyond a reasonable doubt.

Clerk's Papers (CP) at 21-22; II Verbatim Report of Proceedings (VRP) at 230-31. The jury answered "yes" for both crimes on the special verdict. CP at 22. Based on this determination and Allen's high offender score, the court imposed an exceptional sentence of 120 months of confinement.[3]

ANALYSIS

I. Special Verdict Instruction

Allen argues that (1) the trial court's supplemental instruction was flawed because it did not specifically inform the jury that unanimity was not required for a "no" answer on the special verdict; and (2) in the absence of such an instruction, the members of the jury might have presumed that they all had to agree on an answer, whether "yes" or "no," and thus might have been pressured to defer to the majority view. This argument fails.

We find no reason in the record or elsewhere to believe that the jury would have made this

---

appeal.

[3] Allen's offender score was 26. Based on a score of 9 or more, his standard sentencing range was 51 to 68 months of confinement.

presumption here. The supplemental instruction expressly informed the jury that it had to be unanimous in order to answer "yes" and to find the "additional fact" that the defendant had committed either of the charged crimes shortly after being released from incarceration. In contrast, the trial court did not include a similar instruction informing the jury that it had to be unanimous in order to answer "no" if it could not unanimously answer "yes," implying that the unanimity requirement does not apply to a "no" finding. *See State v. Goldberg*, 149 Wn.2d 888, 72 P.3d 1083 (2003).

In *Goldberg,* the trial court instructed the jury:

> In order to answer the special verdict form "yes[,]" you must *unanimously* be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you have a reasonable doubt as to the question, you must answer "no[.]"

Goldberg, 149 Wn.2d at 893. The Supreme Court held that this instruction did not require unanimity for a "no" answer and that the jury had "performed as it was instructed" when it returned a verdict of "no," despite the fact that some jurors had disagreed. *Goldberg*, 149 Wn.2d at 893.[4]

Neither the instruction in *Goldberg* nor the instruction the trial court gave here specifically informed the jury that it need not be unanimous to answer "no" to the special verdict question. Instead, both instructions focused on the need for unanimity beyond a reasonable doubt in order to answer "yes." Thus, the logical inference from both the *Goldberg* instruction and the

[4] The error in *Goldberg* arose, not from the instruction, but from the trial court's decision that the jury must continue to deliberate after it indicated that it was unable to reach a verdict. *Id*. In contrast, *see State v. Bashaw*, No. 81633-6, 2010 WL 2615794 (Wash. July 1, 2010), in which the trial court had instructed, "Since this is a criminal case, all twelve of you must agree on the answer to the special verdict." *Id*. at *2. The Washington Supreme Court held this instruction was reversible error because it required unanimity for either finding, "yes" or "no." *Id.* at *7.

supplemental instruction here was that unanimity was not required for a negative finding. Finding no reason to question the jury's verdict, we affirm.

II. SAG Issues

Allen first argues in his SAG that the police lacked probable cause to arrest him. We disagree. Probable cause is sufficient "'where the facts and circumstances within the arresting officer's knowledge, and of which the officer has reasonably trustworthy information, are sufficient to warrant a person of reasonable caution in a belief that'" the defendant committed the offense. *State v. Terrovona*, 105 Wn.2d 632, 643, 716 P.2d 295 (1986).

Flight is circumstantial evidence of guilt and, thus, can be an element of probable cause. *State v. Baxter*, 68 Wn.2d 416, 421-22, 413 P.2d 638 (1966); *State v. Rowell*, 144 Wn. App. 453, 459, 182 P.3d 1011 (2008), *review denied*, 165 Wn.2d 1021 (2009) (citing *State v. Price*, 126 Wn. App. 617, 645, 109 P.3d 27 (2005)); *Evans,* 45 Wn. App. at 680. The tracking behavior of the K-9 unit was also circumstantial evidence of Allen's guilt, supporting probable cause in this case. *See State v. Nichols*, 34 Wn. App. 775, 779, 663 P.2d 1356 (1983); *State v. Socolof*, 28 Wn. App. 407, 410-11, 623 P.2d 733 (1981). We hold this evidence sufficient to justify a reasonable belief that Allen had committed the burglary.

Similarly lacking merit is Allen's second claim that the evidence was insufficient to prove that he was the one who entered the restaurant. Evidence is sufficient to support a verdict in a criminal prosecution if, viewed in the light most favorable to the State, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Scoby*, 117 Wn.2d 55, 61, 810 P.2d 1358 (1991). Circumstantial evidence is as reliable as direct evidence. *State v.Turner*, 103 Wn. App. 515, 520, 13 P.3d 234 (2000). A claim of insufficiency admits the

truth of the State's evidence and all reasonable inferences therefrom. *Turner*, 103 Wn. App. at 520.

Here, there was clear evidence that somebody had entered the El Presidente restaurant through a window, had taken one register and cash from the other register, and had apparently cut himself as evinced by the blood on the stolen register. Ultimately, the burglar's scent trail led officers to a point 10 feet from a row of bushes where Allen was standing. When Allen saw them, he ran. He had two rolls of coins in his possession when they caught him; his coat was covered with tiny glass particles; the sole of his shoe matched the print on the window glass; and his right index finger was cut. In the bushes where Allen had first been seen, the officers found two rolls of coins, a crowbar, and a pair of gloves. The gloves had a hole in the right index finger, and there was blood in that area. This is more than enough evidence to establish Allen's identity as the burglar.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Hunt, J.

We concur:

Armstrong, PJ.

Quinn-Brintnall, J.