

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE,)

v.)

WALLACE A. ZIMMERMAN,)

Defendant.)

ID. No. 1301007175

ORDER

AND NOW, TO WIT, this 9th day of December, 2013, **IT IS**

HEREBY ORDERED as follows:

Before the Court is Defendant Wallace Zimmerman’s (“Defendant”) Motion for Judgment of Acquittal. On July 23, 2013, a jury convicted Defendant of Theft over \$1,500, Criminal Mischief over \$1,000 but less than \$5,000, and Receiving Stolen Property less than \$1,500. Defendant was acquitted of the charges of Burglary Third Degree, the lesser included charge of Criminal Trespass Second Degree, and Criminal Mischief Over \$5,000. The Court has reviewed Defendant’s motion and the State’s Response. For the following reasons, the Defendant’s motion is **DENIED**.

Background

The charges in this case stem from events occurring at the same location on two separate dates: December 28, 2012 and January 6, 2013. On

December 28, 2012 at 11:50 p.m., a video surveillance camera captured a man within a fenced area at the NVF Factory located at 1156 Yorklyn Road in Hockessin, Delaware. On or about the following day, Harold Thomas (“Mr. Thomas”), the owner of the factory, became aware that someone had damaged an electrical box by removing three 120 foot long coils of copper wire from the premises.

On January 6, 2013 at about 5:30 or 6:00 p.m., Susanne Moran (“Ms. Moran”) was visiting a post office located near the NVF Factory when she observed a four-door sedan on the wrong side of the road with its lights on. She also viewed two men taking wire from the NVF Factory and putting it in the back of the sedan. Ms. Moran had difficulty seeing what the two men looked like because they were wearing hooded sweatshirts and it was fairly dark outside. However, Ms. Moran was able to write down the license plate number of the sedan and provide it to police.

Later that evening, at approximately 10:43 p.m., Officer Ryan Marley (“Officer Marley”) of the New Castle County Police Department (“NCCPD”) responded to Defendant’s residence at 27 Augusta Drive. Officer Marley observed a black Mercury Sable, registered to Defendant, with a license plate number matching the number provided by Ms. Moran. Officer Marley performed a search of the vehicle, which revealed rolls of

copper wire in the back of the vehicle. The police took pictures of the wire, but did not confiscate it.¹

Defendant was indicted by a grand jury for Burglary Third Degree, Theft over \$1,500, Criminal Mischief over \$5,000 and Receiving Stolen Property at \$1,500 or more based on Defendant's alleged conduct "on or about the 28th day of December, 2012, through the 6th day of January, 2013."² At the jury trial held on July 23, 2013, the State presented the testimony of Mr. Thomas, Ms. Moran, Officer Marley, and Detective David Graham ("Det. Graham") of the Property Crimes Squad of the NCCPD Criminal Investigation Unit.

Mr. Thomas described the wire removed on December 28, 2012 as a "large",³ "0.005 gauge, copper wire that has a single insulation sheath on it."⁴ He also stated that, in his capacity as owner, he was responsible for purchasing wire and that he was familiar with the costs associated with replacing the type of wire that was removed on December 28th. Mr. Thomas testified that the cost of replacing each 120-foot coil would be about \$3,480.00 at about \$29 a foot and that the cost to replace the electrical box would be \$4,000.

¹ State's Trial Exs. 1-3.

² Indictment.

³ Trial Trans. at 9:1-2.

⁴ *Id.* at 9:10-13.

Det. Graham testified that he performed the investigation of the wire stolen between December 28, 2012 and January 6, 2013. As part of the investigation, Det. Graham compared a still photo of the man captured in the NVF Factory's surveillance camera⁵ with a DMV photograph of the Defendant.⁶ Det. Graham opined that the individual captured on camera looked very similar to Defendant.

The jury returned a verdict of not guilty as to Burglary Third Degree, Criminal Trespass Second Degree, and Criminal Mischief over \$ 5,000. However, the jury found Defendant guilty as to Theft over \$1,500, Criminal Mischief over \$1,000 but less than \$5,000, and Receiving Stolen Property under \$1,500.

Standard of Review

The Court will grant a motion for acquittal, brought pursuant to Del. Super. Crim. Rule 29, where there is insufficient evidence to sustain a verdict of guilt.⁷ Evidence is sufficient when a rational trier of fact could "have found the essential elements of the crime beyond a reasonable doubt."⁸ "[T]he evidence, together with all legitimate inferences therefrom,

⁵ State's Tr. Ex. 4.

⁶ State's Tr. Ex. 5.

⁷ *Conyers v. State*, 396 A.2d 157, 160 (Del. 1978) (quoting *State v. Biter*, 119 A.2d 894, 898 (Del. Super. 1955)).

⁸ *Carter v. State*, 933 A.2d 774, 777 (Del. 2007) (citing *Poon v. State*, 880 A.2d 236, 238 (Del.2005)).

must be considered from the point of view most favorable to the State.”⁹

The Court “does not distinguish between direct and circumstantial evidence of defendant's guilt.”¹⁰

Discussion

Defendant argues that no reasonable jury could have found him guilty of Theft in excess of \$1,500 and Criminal Mischief in excess of \$1,000 because there is insufficient evidence as to the value of the wire taken and the property damaged. Defendant insists that, by acquitting him of the charges of Burglary Third Degree and Criminal Trespass Second Degree, the jury did not intend to consider the evidence of the value of the wire taken and damage on December 28, 2012. Therefore, according to Defendant, there was insufficient evidence to support the guilty verdicts for Theft over \$1,500 or Criminal Mischief over \$1,000 because the record does not show the value of the property taken or damaged on January 6, 2013.

Defendant’s argument that the jury did not intend to consider evidence from December 28th is similar to the defendant’s argument in *Tilden v. State*, 513 A.2d 1302 (Del. 1986). In *Tilden*, the defendant was convicted of two counts of Robbery Second Degree along with two counts of Possession of a

⁹ *Conyers*, 396 A.2d at 160 (quoting *Biter*, 119 A.2d at 898)).

¹⁰ *Cline v. State*, 720 A.2d 891, 892 (Del. 1998).

Deadly Weapon during the Commission of a Robbery.¹¹ The defendant argued that, since robbery in the second degree is elevated to robbery in the first the degree when a deadly weapon is charged, the jury “implicitly rejected” the evidence regarding the weapon element by finding him guilty of robbery second degree.¹² For this reason, the defendant argued and the State conceded that the verdicts were legally inconsistent.¹³ Nevertheless, the Supreme Court held that the legally inconsistent verdicts could be upheld based on the application of the rule of jury lenity, which allows the court to conduct an independent analysis of the sufficiency of the evidence.¹⁴

Defendant’s contention that the jury did not intend to consider the evidence of the value of the wire taken and the property damaged on December 28, 2012 is unpersuasive. This is not a case, like *Tilden*, where the acquitted offenses share an element with the offenses which resulted in guilty verdicts. The elements for Burglary Third Degree and the lesser included crime of Criminal Trespass Second Degree are not identical to the elements for Theft over \$1,500¹⁵ or Criminal Mischief over \$1,000.¹⁶

¹¹ *Tilden*, 513 A.2d at 1303-04.

¹² *Id.* at 1305.

¹³ *Id.* at 1304-05.

¹⁴ *Id.* at 1307.

¹⁵ 11 *Del. C.* 841(a) states that “[a] person is guilty of theft when the person takes, exercises control over or obtains property of another person intending to deprive that person of it or appropriate it.”

¹⁶ 11 *Del. C.* § 811(a)(1)-(3) states:

Neither crime of Theft or Criminal Mischief requires unlawfully entering or remaining in a building or real property as required for Burglary Third Degree and Criminal Trespass.¹⁷ Since the elements are not identical or predicated upon one another,¹⁸ the jury's verdicts should not be viewed as its intent to reject the evidence of the value of the property taken and damaged on December 28, 2012.

Viewing the evidence in a light most favorable to the State, a reasonable jury could have found that Defendant committed Theft of the wire with a value of over \$1,500 and Criminal Mischief in excess of \$1,000 by damaging the electric box. The value of property for these crimes must be assessed in accordance with 11 *Del. C.* § 221. Under § 221(1), the value of property that is the subject of a theft is “the market value of the property at the time and place of the crime, or if that cannot be satisfactorily

(a) A person is guilty of criminal mischief when the person intentionally or recklessly:

- (1) Damages tangible property of another person; or
- (2) Tampers with tangible property of another person so as to endanger person or property; or
- (3) [Omitted]

¹⁷ 11 *Del. C.* § 824 provides that “[a] A person is guilty of burglary in the third degree when the person knowingly enters or remains unlawfully in a building with intent to commit a crime therein.” Section 822 states that “[a] person is guilty of criminal trespass in the second degree when the person knowingly enters or remains unlawfully in a building or upon real property which is fenced or otherwise enclosed in a manner manifestly designed to exclude intruders.”

¹⁸ See *Davis v. State*, 706 A.2d 523 (Del. 1998).

ascertained, the cost of replacing the property within a reasonable time after the crime.”¹⁹ If the value cannot be ascertained, “its value shall be deemed to be an amount less than \$100.”²⁰ Delaware courts permit the value of the property to be established through testimony of its owner.²¹

The jury had before it the still photograph from the surveillance video of the man on the premises on December 28, 2012 and a copy of Defendant’s DMV photograph. Mr. Thomas testified that, sometime after the individual was captured on camera, he became aware that three 120-foot coils of wire were removed from the property and that the electrical box was damaged. Therefore, based on that evidence alone, the jury could have reasonably inferred that it was Defendant who took the 120-foot coils and that he also damaged the electrical box. As the owner of the property, Mr. Thomas testified that it would cost \$3,480.00 to replace each 120-foot coil that was taken and \$4,000 to replace the electrical box. Therefore, the evidence of the value was sufficient to support the guilty verdicts for Theft over \$1,500 and Criminal Mischief over \$1,000.

Defendant also argues that he may only be convicted of either Theft of less than \$1,500 or Receiving Stolen Property less than \$1,500 based on the

¹⁹ 11 *Del C.* § 224(1) (West)

²⁰ § 224(3).

²¹ *Carello v. State*, 860 A.2d 809, 2004 WL 2520905 (Del. 2004)(TABLE).

evidence from January 6, 2013 because, under 11 *Del. C.* § 856, he cannot be convicted of both crimes since they arise out of the “same transaction or series of transactions.”²² Defendant argues that “since the jury found defendant not guilty for the incidents that took place on December 28, 2012, the conviction for the felony Theft can only have been for the copper wire found in the defendant’s vehicle on January 6, 2013.”²³ As stated above, the jury could have determined that Defendant committed Theft over \$1,500 on December 28, 2012 based on the evidence relating to that date. The jury could have also reasonably found Defendant guilty of Receiving Stolen Property of less than \$1,500 on January 6, 2012.²⁴ Ms. Moran testified that, on January 6, 2013, she observed two men taking wire from the NVF Factory and putting it into the back of the sedan which was registered to

²² 11 *Del. C.* § 856 states:

(a) In any prosecution for theft or theft of a firearm, it is no defense that the accused is in fact guilty of receiving stolen property or receiving a stolen firearm. A person may be convicted of the crime which the person has in fact committed.

(b) In any prosecution for receiving stolen property or receiving a stolen firearm, it is no defense that the accused is in fact guilty of theft or theft of a firearm. A person may be convicted of the crime which the person has in fact committed.

(c) A person may not be convicted of both theft and receiving stolen property, or both theft of a firearm and receiving a stolen firearm, with regard to property appropriated in the same transaction or series of transactions. A person may be charged with the crime the person seems most likely to have committed and may be convicted as provided in subsections (a) and (b) of this section.

²³ Def. Mot. at ¶ 9.

²⁴ 11 *Del. C.* § 851 states:

A person is guilty of receiving stolen property if the person intentionally receives, retains or disposes of property of another person with intent to deprive the owner of it or to appropriate it, knowing that it has been acquired under circumstances amounting to theft, or believing that it has been so acquired.

Defendant. Officer Marley testified that, when he searched Defendant's Mercury Sable at Defendant's residence, he observed copper wires in the back of the sedan. The pictures submitted to the jury support Officer Marley's testimony. Based on these facts, the jury could have reasonably concluded that Defendant received the stolen wires, valued at less than \$1,500, on January 6, 2013.²⁵ Thus, the jury was not precluded by § 856(c) from finding Defendant guilty of Theft over \$1,500 and Receiving Stolen Property valued at less than \$1,500.

Conclusion

For the aforementioned reasons, Defendant's Motion for Judgment of Acquittal for the convictions of Theft over \$1,500, Criminal Mischief over \$1,000 and Receiving Stolen Property less than \$1,500 is **DENIED**.

IT IS SO ORDERED.

/s/ Calvin L. Scott
Judge Calvin L. Scott, Jr.

²⁵ Defendant points out that the felony charge of Receiving Stolen Property in excess of \$1,500 was amended to the misdemeanor charge of Receiving Stolen Property less than \$1,500.