Note: In the case title, an asterisk (*) indicates an appellant and a double asterisk (**) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2018-234

MAY TERM, 2019

State of Vermont v. Jeremy T. Joseph*	}	APPEALED FROM:
	}	
	}	Superior Court, Bennington Unit,
	}	Criminal Division
	}	
	}	DOCKET NO. 417-5-15 Bncr
		Trial Judge: William D. Cohen

In the above-entitled cause, the Clerk will enter:

Defendant appeals jury convictions on three counts of taking a parcel of realty—in this case trees—in violation of 13 V.S.A. § 2504. We affirm.

For the second time, this matter is before this Court. In May 2015, the State charged defendant with violating § 2504 based on allegations that, while cutting down trees pursuant to an agreement with a property owner, he intentionally cut down and took trees on three neighbors' properties without their permission. In May 2016, while defendant's trial was pending, the Legislature enacted 13 V.S.A. § 3606a, which made it a misdemeanor to knowingly or recklessly "cut down, fell, destroy, remove, injure, damage, or carry away any timber or forest product." 13 V.S.A. § 3606a(a)(1). In September 2016, in response to § 3606a's enactment and the parties' memoranda of law, the criminal division ruled that § 3606a repealed § 2504 by implication with respect to the taking of trees and timber. The trial court ordered the State to file an amended complaint charging defendant with violating § 3606a, or the court would dismiss the charges unless the State filed a timely appeal. The State appealed, and this Court reversed the criminal division's decision, ruling that § 3606a did not repeal § 2504 by implication, but rather "provided for minimal incarceration tied to knowing and reckless timber trespass," thereby "fill[ing] the gap by providing a misdemeanor charge along with the [more general] felony charge in § 2504." State v. Joseph, 2017 VT 52, ¶ 14, 205 Vt. 31.

A jury trial then followed on remand, resulting in defendant's conviction for violating § 2504. Defendant appeals that conviction, arguing that the trial court erred by denying his motion for judgment of acquittal, insofar as the State failed to present evidence in support of two essential elements of the crime—that he was the person who took the trees and that, in doing so, he had the specific intent to steal the trees.

This Court reviews a denial of a motion for a judgment of acquittal using "the same standard as that employed by the trial court: we view the evidence in the light most favorable to the State, excluding any modifying evidence, and determine whether it is sufficient to fairly and reasonably convince a trier of fact that the defendant is guilty beyond a reasonable doubt." State v. Davis, 2018 VT 33, ¶ 14 (quotation and alteration omitted). Because the "standard is deferential

to the role of the jury," trial "courts should grant a judgment of acquittal only when there is no evidence to support a guilty verdict." Id. (quotation omitted); see State v. Johnson, 2013 VT 116, ¶ 26, 195 Vt. 498 ("A judgment of acquittal is proper only if the prosecution has failed to put forth any evidence to substantiate a jury verdict."). Nonetheless, "evidence that gives rise to mere suspicion of guilt or leaves guilt uncertain or dependent upon conjecture is insufficient" to support a finding of guilt beyond a reasonable doubt. State v. Albarelli, 2011 VT 24, ¶ 17, 189 Vt. 293.

The charged offense makes it a felony for one "who by a trespass with intent to steal, takes and carries away anything of value that is parcel of the realty, or annexed thereto, and the property of another against his or her will." § 2504. The State charged defendant with three counts of violating the statute by intentionally stealing trees on the neighboring properties of the person who hired him to remove trees on that person's property.

At trial, the State presented the testimony of the property owner who hired defendant to remove trees, as well as the three neighboring property owners whose trees were taken. The defense cross-examined those witnesses but presented none of its own witnesses.

Viewed most favorably to the State, the evidence revealed the following facts. The first witness for the State was one of the neighbors, who testified that two men, including one who she believed was defendant, came up her driveway inquiring about her next-door neighbor—the man who later hired defendant. She stated that the men asked her if she was interested in having specific trees cut down on her property, including an oak tree that was thirty-six inches in diameter and located well within her property line only twenty-four feet from her office in the back of her house. She testified that she told the men that she did not want any of her trees cut, and most particularly the oak tree, because she loved them, and they had an aesthetic value beyond their monetary value. She reiterated that she never gave the men permission to cut her trees. She also testified that four permanent eighteen-to-twenty-inch-high PVC tubes covering rebars marked her property at the corners, and that it was possible to see the markers from a distance of fifty-to-one-hundred feet, depending on the conditions. On cross-examination, she stated: "All you have to do is stand and look, and you can see the two corners and draw a line between the two of them, and you can tell right there it's my property." She testified that the logging operation took five of her trees, including the oak tree. She acknowledged that she did not see anyone physically take the trees, but she testified that after she discovered the trees had been cut, her neighbor had defendant talk to her, and defendant tried to convince her to take a cord and a half of wood as payment, but she refused.

Next, another of the neighbors testified that his property line was marked with iron posts covered by white drainage pipes and that two trees were cut on his property during the logging operation even though he never gave defendant permission to do so. He acknowledged that he did not see who cut down the trees, but he stated that when he called defendant about the trees cut inside his property line, defendant told him he "was going to come down and kick [his] ass."

The property owner who hired defendant testified that he and defendant walked the owner's property line, which was "clearly marked" by PVC pipes. The property owner stated that "you can see all the way down [the property line], pipe to pipe to pipe to pipe," and that he pointed out the boundary markers to defendant during an initial walk-through. He also testified that when one of his neighbors became concerned that defendant was approaching that neighbor's property, he walked his property line again with defendant to make sure defendant knew exactly where the boundary line was. He stated that that neighbor then placed red tape on the boundary line to make sure defendant knew where the line was. When asked if it was clear to defendant where the property lines were, the property owner responded, "Absolutely."

Finally, the third neighbor testified that when he saw that the logging operation had crossed his property line, he called defendant, who threatened him. He further testified that the next day defendant apologized to him, but then left without anyone ever seeing him again. The neighbor testified that he never gave defendant permission to take any trees from his property, but that the logging operation removed fifteen trees located thirty-to-forty feet on his side of the "very visible" property line.

Following the close of the State's evidence, defendant moved for a judgment of acquittal, V.R.Cr.P. 29(a), arguing that the State failed to present any evidence that defendant himself entered the neighbors' properties with the intent to steal the trees. The State responded that it did not matter if defendant was the person who actually used the chain saw to cut down the trees because he was the one who was managing the operation and was told where the property lines were. The court declined to grant defendant judgment of acquittal but indicated that it would not instruct the jury on any type of respondeat superior liability. Accordingly, with respect to the first element of the charged offense—whether defendant was the person who committed the alleged acts—the court instructed the jury that defendant could not be "criminally responsible for the acts of his employees or agents." The court instructed that the essential elements are that, at the date and place alleged, defendant "took and carried away" trees or timber without the property owner's consent, and at the time he took the trees or timber, he intended to steal it. The jury convicted defendant on all three counts.

Following the convictions, defendant renewed his motion for judgment of acquittal, arguing that the State presented no evidence to satisfy the first element of the charged crime—that defendant was the person who removed the trees. In a written decision, the trial court denied the motion, ruling that there was significant circumstantial evidence—in particular, defendant's conversations with the property owners—from which reasonable inferences could be drawn that defendant personally engaged in the logging operation he had agreed to perform.

On appeal, defendant argues that the State failed to present sufficient evidence that (1) he was the one who cut and removed the neighbors' trees and (2) he had the specific intent to steal them. He contends that the evidence showed only that his role in the operation was to communicate with the customers and respond to any grievances. According to defendant, none of his conversations with the property owners demonstrated beyond a reasonable doubt that he personally cut the trees, and thus the jury was left to speculate that it was him that did so. The State responds that the jury could have reasonably inferred based on the circumstantial evidence presented at trial that defendant was responsible for taking the trees and that he did so with the intent to steal them.

As an initial matter, assuming the evidence was sufficient to demonstrate that defendant took the neighbors' trees, there was plainly sufficient evidence for the jury to infer that defendant took the trees with an intent to steal them. Undisputed testimony revealed that on multiple occasions defendant was shown clearly marked property lines and that, although he absolutely understood where those property lines were, trees were taken on the neighbors' properties beyond those property lines without notice or the neighbors' permission. The most egregious example was the taking of an oak tree from one of the neighbors' properties after the neighbor explicitly told defendant he could not take it. Based on this circumstantial evidence, the jury could have concluded, assuming defendant was the one who took the trees, that he took the trees with the intent to steal them. See State v. Cole, 150 Vt. 453, 456 (1983) ("Intent is rarely proved by direct evidence; it must be inferred from a person's acts and proved by circumstantial evidence.").

The closer question is whether the evidence was sufficient to satisfy the State's burden of proving beyond a reasonable doubt that defendant took the neighbors' trees. Before addressing

the question of whether there was sufficient evidence for the jury to conclude that defendant was the person who took and carried away the trees, in violation of § 2504, we consider defendant's contention that, given the State's theory of the case at trial, the jury could not have convicted him unless there was sufficient evidence that he actually cut the trees himself. Although defendant used the word "cut" in his brief, he did not articulate this contention until oral argument on appeal, when he asserted, and the State conceded, that the State's theory of the case at trial was he cut the trees and that therefore the State had to prove he actually cut the trees. Notwithstanding the State's concession at oral argument, the record does not support defendant's contention.

The State's information mirrored the language of the statute, alleging in each count that defendant "with intent to steal, took and carried away" the trees. At the beginning of the trial, the court told the jury that the State was alleging in each count that defendant "took and carried away" the trees. In opening statements to the jury, the prosecutor stated that defendant "took" the trees, and defense counsel stated that there was no evidence defendant intended to steal the trees. In moving for judgment of acquittal at the close of the State's case, defense counsel argued that there was no evidence defendant entered the property "with the intent to carry off" the trees. The prosecutor responded that defendant "was the one responsible for all the trees and the person responsible for deciding which trees to be cut." Shortly thereafter, when defendant renewed his Rule 29 motion at the close of evidence, the prosecutor stated it did not matter if he was the one who "used the chainsaw" because he "took the trees" after being shown the precise boundary lines. The trial court denied defendant's motion but stated that it would not charge the jury on a principal-agency theory.

In his closing argument to the jury, the prosecutor spoke exclusively in terms of defendant "taking" the trees. For his part in closing, defense counsel stated, in relevant part, that there was no evidence that defendant was "the one who cut these trees." The trial court then charged the jury that, for each count, the State had to prove beyond a reasonable doubt that defendant was the person who "took and carried away" the trees. As noted, the court explicitly instructed the jury that defendant was "not criminally responsible for the acts of his employees or agents." This record does not demonstrate that the State's theory of the case required the State to prove that defendant personally cut each of the trees himself. Rather, its theory—consistent with the statute, its information, its argument at trial, and the trial court's instruction—was that defendant took and carried away the trees.

We do not understand the act of "taking" a tree to be synonymous with "personally sawing down" that tree. We note that the statute pursuant to which defendant was charged is not specific to trees at all. See 13 V.S.A. § 2504 (imposing criminal penalties against "a person who by a trespass with intent to steal, takes and carries away anything of value that is parcel of the realty, or annexed thereto, and the property of another against his or her will") (emphasis added). There is nothing about the statute that focuses on the specific act of cutting down a tree, rather than taking and carrying it away. This is in contrast to Vermont's timber trespass statute that specifically provides "No person shall knowingly or recklessly . . . cut down, fell, destroy, remove, injure, damage or carry away any timber or forest product placed or growing . . . ." 13 V.S.A. § 3606a (emphasis added). The distinction makes sense. The timber trespass statute, which is situated in a chapter of the Vermont Statutes that is focused on trees and plants, is concerned with damage to trees or timber. Section 2504, situated in a chapter governing crimes relating to larceny and embezzlement, is focused on the taking and carrying away of the thing of value that is annexed to the realty—in this case, trees. To the extent that defendant's argument on appeal is that the State's burden in the trial below was to prove beyond a reasonable doubt that defendant personally felled each tree in question, we reject that argument.

This consideration impacts our analysis of the central question in this appeal: We conclude that the circumstantial evidence at trial was sufficient for the jury to reasonably infer that defendant took the trees. See State v. Kerr, 143 Vt. 597, 603 (1983) (noting "well established" principle "that the guilt of a defendant in a criminal case may be proved by circumstantial evidence alone, if that evidence is proper and sufficient in itself," and stating that law does not "permit[] its violators to hide behind 'speculation and conjecture' in the presence of sufficient facts and circumstances to justify an inference of guilt"). The testimony at trial revealed that defendant was the person who held himself out to the property owners as in control of the logging operation. He and he alone walked the boundary lines to make sure that the logging was done only on the property of the person who hired him. With respect to the one neighbor, defendant indicated that he wanted a particular oak tree, and the tree was taken even after the neighbor explicitly told defendant that he could not take that tree or any other tree on her property. That neighbor testified at trial that after she confronted defendant about taking her trees, he tried to convince her to take a cord and a half of wood "for the trees he had cut." In his after-the-fact conversations with the other neighbors, defendant did not indicate that their trees had been accidently cut by others in the logging operation, or taken by those working for or with him without his permission or participation, but instead verbally threatened the neighbors. Although these conversations certainly did not amount to a confession of guilt, they provided further support for the reasonable inference that defendant had taken the trees. See Santiago v. State, 181 A.3d 796, 808 (Md. 2018) (noting that inadmissibility of defendant's pre-arrest silence is based on "unique interactions police officers have with suspects" and does not necessarily apply in non-police interactions, where "silence in the presence of an accuser or non-threatening bystanders may indeed signify acquiescence in the truth of the accusation" (quotation omitted)). This is not a situation where the jury found defendant guilty based on a principal-agent or employer-employee relationship, as the court explicitly instructed the jurors not to do. Rather, the evidence was sufficient for the jury to conclude beyond a reasonable doubt that defendant "took and carried away" the respective neighbors' trees.

Affirmed.

BY THE COURT:

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Beth Robinson, Associate Justice

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Harold E. Eaton, Jr., Associate Justice

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Karen R. Carroll, Associate Justice