

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	No. 64016-0-I
Appellant,)	
)	DIVISION ONE
v.)	
)	UNPUBLISHED OPINION
DONALD D. OKERSON,)	
)	
Respondent.)	FILED: July 26, 2010
)	

Appelwick, J. — A jury convicted Okerson of second degree burglary. The State appeals the trial court’s grant of Okerson’s motion to arrest judgment pursuant to CrR 7.4(a)(3), arguing there was sufficient evidence of the entry element. After the State filed its opening brief, Okerson filed a motion to concede error. We reject the motion to concede error and address the merits of the sufficiency challenge. Because there was sufficient evidence to support the jury’s finding that Okerson entered the music store, we reverse the trial court’s order arresting judgment and remand for sentencing.

FACTS

In the early morning of January 17, 2009, Kent police officers were dispatched to a burglar alarm at the East Hill Music Center store. Officer Eric

Tung was the first to arrive, approximately 15 minutes after the alarm triggered. Officer Tung observed Okerson running and then walking away from the vicinity of the music store.¹ In the same moment, Officer Tung also observed a vehicle back out of a parked position in front of the music store and exit the parking lot “rather quickly.”² Officer Tung commanded Okerson to stop a few times before Okerson slowed to a walk and stopped. Okerson told Officer Tung he was homeless and staying at the bottom of Kent’s East Hill.

Other officers arrived at the scene. They noticed the glass door of the music store had a large hole in the lower right corner. One officer testified that the hole was big enough for her to crawl through with her duty belt on. Officers searched the store, but no one was inside. No fingerprints were found around the door.

As other officers investigated the scene, Officer Tung handcuffed Okerson, advised him of his rights, and conducted a pat down search. Officer Tung noticed that Okerson was wearing one black glove and had the matching glove in his pocket. Officer Tung noticed that the right knee of Okerson’s pants was ripped, with some “red coloring coming through the jeans that looked consistent with blood.”

Okerson did not testify at trial. The State presented evidence about what

¹ The State assigns error to court’s finding that Okerson was walking away from the scene. Officer Tung’s testimony is that Okerson was running and then walking away from the scene. Okerson began walking after Officer Tung ordered him to stop.

² Officer Tung could not obtain additional details about the vehicle due to darkness and fog.

Okerson had told police officers at various points throughout the evening. Okerson told Officer Tung that on his walk to Goodwill, where he was going to look for clothes, he saw two men burglarizing the music store and then started to run. At the police department, Officer Tom Riener questioned Okerson. Okerson told Officer Riener that he heard a loud crashing sound as he was passing by the music store, and saw men carrying things away from the music store. He told Officer Riener he saw men standing by a car near the music store and then noticed the big hole in the front door of the store. He also reported that the men shouted something about cops and took off, but Okerson could not remember whether they ran or drove away.

As Officer Riener interviewed Okerson, he noticed small, sparkly particles on Okerson's jacket, near the shoulder area. Okerson denied having been around broken glass at all, and denied having been anywhere near the music store door. When Officer Riener told Okerson he would take the jacket as evidence, Okerson changed his story and explained that he had been around some broken glass in a dumpster. Officer Riener pointed out to the jury during his trial testimony where the "sparkly material" was located on Okerson's jacket.³

³ Okerson filed a motion in limine to preclude any mention of the glass on the jacket. The State was not able to obtain crime lab analysis of the material to confirm it was glass. The court ruled that Officer Reiner could testify as to what he saw on the jacket, but could not say affirmatively it was glass. The State objected to this ruling and assigned error to it on appeal. The court's decision was not an abuse of discretion. State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003) (the decision to admit or exclude evidence is reviewed for an abuse of discretion). The court specifically stated that, because no one was qualified to say definitely that it was glass and because the jury could see the sparkly material with its own eyes, Officer Reiner's statement that the sparkly material was glass would be marginally probative and highly prejudicial.

The manager of the music store testified that five or six guitars had been stolen from the store that evening, and none were recovered. There was not any evidence connecting Okerson with possession of the missing guitars.

The State charged Okerson with burglary in the second degree.⁴ After the State had presented its case, Okerson moved to dismiss, arguing that the State had failed to prove that Okerson had entered the music store. Okerson did not present any evidence. The trial court denied the motion to dismiss. The case went to the jury, and the jury returned a guilty verdict for burglary in the second degree.

Okerson filed a motion for arrest of judgment, arguing there was insufficient evidence of Okerson's entry into the music store. The trial court granted Okerson's motion to arrest judgment. The State timely appealed the order arresting judgment. Okerson's defense counsel filed a motion to concede error instead of a reply brief. We reject the motion to concede error and now reach the merits.

DISCUSSION

Under CrR 7.4(a)(3), a defendant may bring a motion for arrest of judgment for "insufficiency of the proof of a material element of the crime." In ruling on a motion to arrest judgment, the trial court does not weigh the evidence, but may only test or examine the sufficiency thereof. State v. Coleman, 54 Wn. App. 742, 746, 775 P.2d 986 (1989) (sufficiency of the

⁴ The State also amended the information to charge him with possession of methamphetamine, but the jury acquitted him of that charge.

evidence is legally the same issue as insufficiency of the proof of a material element of the crime). In reviewing a trial court's decision on a motion for arrest of judgment, the appellate court applies the same standard as the trial court: that is, whether there is sufficient evidence that could support a verdict. State v. Longshore, 97 Wn. App. 144, 147, 982 P.2d 1191 (1999), aff'd, 141 Wn.2d 414, 5 P.3d 1256 (2000). Evidence is sufficient if any rational trier of fact viewing it most favorably to the State could have found the essential elements of the charged crime beyond a reasonable doubt. Id.

Second degree burglary requires the State to prove, beyond a reasonable doubt, that "with intent to commit a crime against a person or property therein, he enters or remains unlawfully in a building other than a vehicle or a dwelling." RCW 9A.52.030(1). "[A]ny person who enters or remains unlawfully in a building may be inferred to have acted with intent to commit a crime against a person or property therein, unless such entering or remaining shall be explained by evidence satisfactory to the trier of fact to have been made without such criminal intent." RCW 9A.52.040. Okerson's motion to arrest judgment centered on the whether the State had proffered sufficient evidence of Okerson's entry into the music store.

There was no direct evidence of Okerson's entrance. However, circumstantial evidence is as reliable as direct evidence. State v. Fiser, 99 Wn. App. 714, 718, 995 P.2d 107 (2000). Officer Tung observed Okerson running away from the music store. When Officer Tung searched Okerson, Officer Tung found a pair of black gloves on Okerson's person. The hole in the door of the

music store was big enough for someone to have crawled through to gain entry. Officer Tung also noticed that Okerson's pants were ripped at the knee, with what appeared to be blood coming through the denim. Finally, Okerson's jacket had sparkly material across the shoulder, which the jury could have concluded was glass from the door of the music store.

While the State's witnesses testified about the other explanations Okerson gave for his presence in the area and the glass on his jacket, these explanations cannot overcome the inferences we must draw from the circumstantial evidence presented. The circumstantial evidence, viewing it most favorably to the State, would allow a rational trier of fact to conclude, beyond a reasonable doubt, that Okerson had entered the music store.

In arresting the judgment, the trial court relied on two cases, State v. Loucks, 98 Wn.2d 563, 656 P.2d 480 (1983), and State v. Mace, 97 Wn.2d 840, 650 P.2d 217 (1982). Both these cases are distinguishable. In Loucks, police responded to a burglary call and observed an open window and door. 98 Wn.2d at 564. A dog tracked Loucks's scent from the scene to a nearby residence and found Loucks. Id. at 565. He had been ticketed for jay walking in the area approximately an hour before the burglary. Id. The State charged him with second degree burglary. Id. at 565–66. Police recovered blood and fingerprints from the scene. Id. at 565. Analysis of the blood and fingerprints showed that neither belonged to Loucks, which tended to exculpate him rather than corroborate the dog tracking evidence. Id. at 567–68. The Supreme Court held that the dog tracking evidence alone was insufficient to support his conviction for

second degree burglary. Id. at 569.

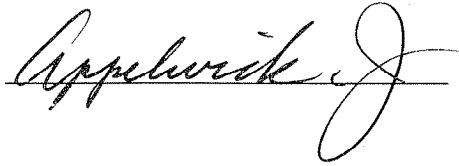
Here, no clear exculpatory evidence cast doubt on the State's case as in Loucks, where the dog tracking and his proximity to the scene of the crime was the only evidence against him. Circumstantial evidence beyond mere proximity to the music store door links Okerson to the crime: the black gloves, the blood on the knee of his jeans, the sparkly material on the shoulders of his jacket, and his flight from the officer at the scene.

In Mace, the State charged Mace with second degree burglary. 97 Wn.2d at 841. There, the burglar had stolen the female victim's purse, which contained credit cards and a cash card, and the male victim's wallet. Id. at 841–42. Someone had used the cash card the morning of the burglary. Id. at 842. Police retrieved the contents of the trash can near the cash machine where the card was used. Id. They found the wallet inside a bag. Id. Mace's fingerprints were on the bag, but not on the wallet. Id. The other piece of evidence against Mace was a bank receipt with his fingerprints. Id. It was found in the trash can next to a cash machine where someone had attempted to use the cash card the day after the burglary. Id. The Supreme Court reversed Mace's conviction, because that the evidence proved only that Mace may have possessed the stolen property, but there was no evidence of entry into the victims' residence. Id. at 842–43, 845.

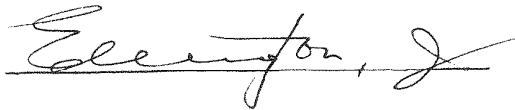
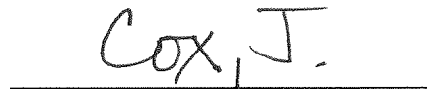
Okerson's case is unlike Mace, where the State built its case around the fact that Mace had possessed the stolen property. Here, the State did not present any evidence that Okerson possessed stolen property. Instead, it

presented circumstantial evidence of Okerson's entry into the music store. And, through operation of RCW 9A.52.040, once the State proved entry, the jury was allowed to infer that Okerson had the requisite intent to commit a crime against person or property.

The trial court erred in relying on Loucks and Mace and arresting the judgment based on insufficiency of the evidence of entry. We reverse and remand for sentencing.

A handwritten signature in cursive script, reading "Appelwick, J.", written over a horizontal line.

WE CONCUR:

A handwritten signature in cursive script, reading "Eberington, J.", written over a horizontal line.A handwritten signature in cursive script, reading "Cox, J.", written over a horizontal line.