IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent/Cross Appellant, v. MARK ARNOLD JOHNSON, Appellant/Cross Respondent.	No. 38728-0-II UNPUBLISHED OPINION

Van Deren, J. — Mark Arnold Johnson appeals his convictions for second degree burglary and first degree theft, arguing that insufficient evidence supports his convictions He also contends that he received ineffective assistance of counsel when his attorney failed to object to testimony about his arrest. And he further argues that the trial court either erred or failed to exercise its discretion when it decided that it would treat prior convictions for second degree burglary and malicious mischief as separate offenses for the purpose of his offender score. The State cross appeals Johnson's sentence, arguing that Johnson's prior conviction for attempted second degree arson did not wash out after five years under subsections (2) and (4) of former RCW 9.94A.525 (2007). We hold that insufficient evidence supports Johnson's convictions and remand for dismissal.

FACTS

Rude Incorporated logs lands owned by timber companies, sawmills and others in Oregon and Washington. As part of its operation, Rude stores heavy machinery and a trailer containing smaller equipment on its job sites. From the fall of 2007 until the spring of 2008, Rude logged land at DNR Road 1100 inYacolt, Washington, for the Murphy Mill, a veneer plywood plant that had bought timber from the Department of Natural Resources. Heavy snow prevented Rude from working on the property from March 16 until April 8, and Rude managed to remove much of its equipment from the job site, but the trailer and a "Cat"[1] remained. Report of Proceedings (RP) at 15.

When Rude's owner, Timothy Rude,[2] returned to the property on April 8, he found that the Cat had moved and that the trailer's back door had been removed. Little remained in the trailer, and the few items left behind had been destroyed.[3] Larger stolen items included a generator, a hose press, and a hydraulic cylinder.[4] Timothy contacted the Clark County Sheriff's Office and Deputy Sheriff Richard Guadan investigated the site.

Guadan could not retrieve useful fingerprints from the trailer. Initially, Guadan saw a cigarette on the floor of the trailer but did not take notice of it until Timothy commented that his only smoking employee would not have left the cigarette. Guadan photographed the trailer and

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[1] Presumably Rude left behind a machine manufactured by Caterpillar and not a feline.

[2] We refer to Mr. Rude as Timothy to distinguish him from the company.

[3] According to an insurance document, Rude reported a loss of $37,745.32.

[4] Timothy testified that two people could move the generator without difficulty, but a single person could move it with enough effort. The hose press weighed 70 pounds and the hydraulic cylinder weighed 100 to 125 pounds.

then collected the partially smoked cigarette, which bore the letters "W-I-N." RP at 27. The state crime laboratory notified Guadan that deoxyribonucleic acid (DNA) on the cigarette matched a sample of Johnson's DNA that was on file at the Department of Corrections.[5]

After Guadan retrieved Johnson's contact information, he visited Johnson at his girl friend's home on N.E. Dole Valley Road, a road that connected to DNR 1100 Road. Johnson exited the home with a pack of Winston cigarettes in his hand, which Guadan asked him to put down. Guadan "advised [Johnson] that he was under arrest for burglary [and] placed him into "custody." RP at 37. Johnson responded calmly, but asked questions, and Guadan explained that "we [c]ould discuss it when we got down to the precinct, and I specifically told him it was for burglary but we would talk about it later." RP at 38.

A fellow deputy sheriff collected Johnson's property, including the cigarettes, and Guadan offered Johnson a cigarette. Johnson partially smoked the cigarette, then threw it on the ground. Guadan retrieved it before Johnson could crush it. After the deputy retrieved the cigarette, Johnson's demeanor changed. He became "irate" and noted that the deputy had taken the cigarette for evidence, calling out "to his girlfriend that [the deputies] made him smoke a cigarette and now [they] were taking it as evidence." RP at 57. Johnson described these actions as "chickenshit" and "a punk move," and he commented on Guadan's sexuality. RP at 39.

At the precinct, Guadan explained that he had investigated the theft at Rude's trailer and showed Johnson a few pictures taken outside of the trailer. Johnson recognized the area as being near Tarbell Mountain and stated that he drove past the trailer while collecting wood with friends. They walked around it, stood at the back of the trailer, and drank some beer. Johnson said that

[5] Timothy did not know and had never before seen Johnson.

they were at the trailer three or four months earlier.[6] He denied seeing the Cat or entering the trailer and commented "that the door was on it when he was there." RP at 46-47.

Guadan told Johnson that "we found something in the trailer, something of [yours] inside the trailer." RP at 46. As soon as Guadan told Johnson that he found something of Johnson's inside the trailer, Johnson responded, "My cigarette butt." RP at 47 (internal quotation marks omitted). Johnson did not explain how the cigarette found its way into the trailer. When questioned, Johnson stated, "I have an idea. It wasn't me." RP at 48 (internal quotation marks omitted). He also stated, "Even if I did tell you, you guys [would] blame me anyway," and "I'm just gonna get blamed for it anyway." RP at 48 (internal quotation marks omitted). Eventually Johnson identified "Jimmy Smith" as the culprit, but Johnson could not supply contract information for Smith. RP at 48 (internal quotation marks omitted).

Guadan told Johnson that "he was under arrest for burglary and theft" and "took him down to the jail" where Guadan obtained two swabs for DNA testing.[7] RP at 49. According to Guadan, Johnson "didn't understand why we were doing this because his DNA was going to be in the [trailer] anyway." RP at 49-50. Guadan spoke to Johnson's girl friend and asked "if there were any tools or anything out of the ordinary in her house."[8] RP at 60. But Guadan did not obtain a search warrant for the girl friend's home or outbuildings, did not conduct any further investigation, did not locate any stolen property, and did not attempt to contact Jimmy Smith.

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[6] Johnson made this statement on June 2, 2008.

[7] Later testing confirmed that Johnson's DNA matched the DNA recovered from the cigarette in the trailer.

[8] The State did not call Johnson's girl friend and the trial court sustained the State's objection that her response was inadmissible hearsay.

The State charged Johnson with second degree burglary and first degree theft. The jury convicted Johnson on both charges. At sentencing, the trial court ruled that a prior conviction for attempted second degree arson washed out after five years, but that it would include John's previous convictions for second degree burglary and malicious mischief in his offender score. The trial court sentenced Johnson to 15 months of confinement for second degree burglary and 12 months of confinement for first degree theft, to run concurrently with the burglary sentence.

Johnson appeals his convictions and sentences. The State cross appeals the sentences.

ANALYSIS

Johnson argues that, although crimes occurred, insufficient evidence supports his convictions because the State's only evidence connecting him to the crimes consisted of a cigarette butt with his DNA recovered from the trailer. The State contends that sufficient evidence supports the convictions: The evidence included (1) the presence of a cigarette butt with Johnson's DNA in the trailer, (2) Johnson's admission that he was near the trailer around the time of the crime, (3) the fact that the cigarette was the same brand Johnson smoked, (4) Johnson's acknowledgment that his cigarette was found in the trailer, and (5) the fact that Johnson lived near the trailer.

When reviewing sufficiency issues, we view the evidence in the light most favorable to the State to determine whether "any rational trier of fact could have found the essential element of the crime beyond a reasonable doubt." *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "In determining the sufficiency of the evidence, circumstantial evidence is not to be considered any

less reliable than direct evidence." *State v. Delmarter*, 94 Wn.2d 634, 638, 618, P.2d 99 (1980). Facts, such as intent, may be inferred where "plainly indicated as a matter of logical probability" and the finder of fact "determine[s] what conclusions reasonably flow" from the circumstantial evidence in a case. *Delmarter*, 94 Wn.2d at 638; *State v. Bencivenga*, 137 Wn.2d 703, 711, 974 P.2d 832 (1999). We "defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence." *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004), *abrogated in part on other grounds by Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

The trial court instructed the jury that the State had to prove the following elements of second degree burglary beyond a reasonable doubt:

> (1) That between March 26, 2008 and April 8, 2008, MARK ARNOLD JOHNSON entered or remained unlawfully in a building;
> (2) That the entering or remaining was with intent to commit a crime against property therein; and
> (3) That this act occurred in the State of Washington.

Clerk's Papers (CP) at 38. The jury instructions also informed the jury that it had to find the elements of first degree theft beyond a reasonable doubt:

> 1) That between March 26, 2008 and April 8, 2008, MARK ARNOLD JOHNSON wrongfully obtained . . . control over property of another;
> (2) That the property exceeded $1500 in value;
> (3) That this act occurred in the State of Washington.

CP at 40.

In closing, the State recognized the limits of its case: No one saw [Johnson] go into this trailer . . . this is purely a circumstantial evidence case." RP at 99. The State reviewed the full extent of its evidence against Johnson: (1) Johnson admitted that he and friends were on the

property around the time the crime occurred; (2) a cigarette butt with Johnson's DNA was in the trailer; (3) the cigarette butt in the trailer was the same brand Johnson smoked and Rude's employee would not have smoked in the trailer; (4) when interviewed, Johnson acknowledged the presence of his cigarette butt in the trailer; (5) Johnson could not explain the cigarette butt's presence in the trailer and did not supply any additional information to the police about an individual he thought might have been involved; and (6) Johnson lived near the property. As the State noted, "[T]he bottom line is that the evidence obtained in this case is, in fact, the case of [Johnson]'s DNA [being] found on a cigarette left inside the trailer. Period." RP at 120.

The State may often charge a person who possessed stolen articles yet lack direct evidence connecting the defendant to the theft and the burglary. *See, e.g.*, *State v. Trombley*, 132 Wash. 514, 518-20, 232 P. 326 (1925). To support a conviction under these circumstances, courts have required possession of the property plus some evidence of the theft: "'When a person is found in possession of recently stolen property, slight corroborative evidence of other inculpatory circumstances tending to show his guilt will support a conviction.'" *State v. Portee*, 25 Wn.2d 246, 253-54, 170 P.2d 326 (1946) (quoting 4 Clark Asahel Nichols, on Applied Evidence § 29, at 3664-65 (1928)), *abrogated on other grounds by Fong Foo v. United States*, 369 U.S. 141, 82 S. Ct. 671, 7 L. Ed. 2d 629 (1962). For instance, possession of recently stolen property accompanied by additional evidence, such as the defendant's flight; the defendant's presence near the burglary scene; the defendant's use of fictitious names; or circumstantial proof of entry, could support a burglary conviction. *State v. Mace*, 97 Wn.2d 840, 843-45, 650 P.2d 217; *Portee*, 25 Wn.2d at 254.

In one instance, a team that had committed burglary at a tavern where police found a tire

iron was also convicted of burglary of a second tavern because the tire iron "matched marks on the sill of the forced window." *State v. Weaver*, 60 Wn.2d 87, 88, 371 P.2d 1006 (1962). The *Weaver* court reversed the conviction:

> The only proof of the [defend]ants' connection with this count is the discovery in a spot where [defend]ants had been of a tool which may or may not have been used in the commission of the offense charged. There is a total absence of proof that [defend]ants used the tool. The essential proofs that [defend]ants committed the crime charged cannot be supplied by such a pyramiding of inferences.

60 Wn.2d at 88.

Here, the State proved Johnson's presence but did not provide evidence that Johnson took Rude's property or that he had the requisite intent to commit either crime. Viewed in the light most favorable to the State, the evidence shows that Johnson was in the trailer sometime during the period when Rude left the trailer unattended. But that evidence does not demonstrate that Johnson took or ever possessed Rude's property. The State need not have supplied direct evidence of Johnson's possession of the property, but should have provided at least circumstantial evidence that Johnson took the property. This circumstantial evidence could have included evidence such as witness testimony, bank account information, or conspicuously timed purchases to sustain convictions for burglary and theft. Without more, the State's evidence is insufficient to support Johnson's convictions for first degree theft and second degree burglary.

These convictions are reversed and we remand for dismissal.[9] *See State v. Stanton*, 68 Wn. App. 855, 867, 845 P.2d 1365 (1993).

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.

Van Deren, J.

We concur:

Bridgewater, J.

Hunt, J.

[9] Neither Johnson nor the State discuss in their briefs whether a lesser included offense warrants resentencing following reversal of the first degree theft and second degree robbery convictions. *See*, *State v. Hutchins*, 73 Wn. App. 211, 218, 868 P.2d 196 (1994); *see, e.g.*, *State v. Bingham*, 105 Wn.2d 820, 823, 828, 719 P.2d 109 (1986). Thus, we do not remand for resentencing.