- 70947-0

70947-0

No. 70947-0-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

JAMES HAGER,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

BRIEF OF APPELLANT

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A. SUMMARY OF ARGUMENT

James Hager was employed as a sheriff's deputy in the town of Gold Bar. In order to assist an elderly landowner, Hager attempted to evict an unwanted tenant from the landowner's property. Hager was charged with burglary in the second degree after he went on another individual's property and removed things from a storage container. Hager testified at trial that he did so only at the tenant's direction and under the mistaken belief that it was the tenant's property. The State alleged that Hager knew it was not the tenant's property and intended to steal the items from the storage container.

The trial court admitted evidence of an entirely separate incident in which Hager had permission to enter a property but acted beyond that permission when he cleared sightlines for hunting and tampered with a woman's car on the property. Because the trial court abused its discretion when it admitted this evidence, the case should be reversed and remanded for a new trial. Alternatively, the case should be reversed and remanded for dismissal because there was insufficient evidence to show Hager entered or remained unlawfully in a "building" or intended to commit a crime when he entered or remained on the property.

B. ASSIGNMENTS OF ERROR

1. The trial court abused its discretion when it admitted evidence of an entirely separate, unrelated incident in which Hager acted on another landowner's property without permission.

2. When the trial court entered a conviction of second degree burglary in the absence of sufficient evidence to prove each element of the offense beyond a reasonable doubt, it deprived Hager of his constitutional right to due process.

C. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Evidence is inadmissible to prove a defendant's character and show he acted in conformity with that character and evidence must be excluded if it is substantially more prejudicial than probative. Hager was charged with second degree burglary. The fact that Hager entered another individual's property and cleared debris without explicit authorization from the owner did not show absence of mistake and was far more prejudicial than probative. Did the trial court abuse its discretion in admitting this highly prejudicial evidence?

2. The due process provisions of the Fourteenth Amendment and of Article I, § 3 of the Washington Constitution require the State prove each element of an offense beyond a reasonable doubt. To

convict Hager of second degree burglary the State had to prove he intended to commit a crime against a person or property after entering a building. Where the State's evidence did not establish Hager entered a building or that he intended to commit a crime upon entering the property, is there sufficient evidence to support Hager's conviction for second degree burglary?

D. STATEMENT OF THE CASE

a. Facts related to the crime charged.

James Hager was a deputy with the Snohomish County sheriff's office. 8/13/13 RP 90-91. After a few years as a deputy, he was selected to fill a vacant position in Gold Bar. 8/13/13 RP 101.

Gold Bar is a small town, with only one grocery store, two gas stations, a small post office, and a handful of other businesses. 8/1/3/13 RP 14. Deputies assigned to Gold Bar are encouraged to stay engaged with the citizenry and make "proactive contacts," reaching out to individuals who law enforcement is concerned may be committing crimes or have knowledge helpful to solving open investigations. 8/13/13 RP 24. According to Hager's sergeant, Hager took this obligation seriously, making more proactive contacts than most other deputies. 8/13/13 RP 25.

Shortly after Hager began working in Gold Bar, his partner introduced him to an elderly man named Bill Pearson. 8/13/13 RP 104, 128. Mr. Pearson owned two properties in Gold Bar, both of which were "giant junkyards." 8/13/13 RP 9. The sheriff's office was engaged in an ongoing project to clean up properties like Mr. Pearson's, both to improve the town's appearance and because neglected properties often lead to problems such as squatting and thefts. 8/13/13 RP 9-10; 127. Mr. Pearson was in regular contact with the sheriff's office, as he often believed things had been stolen from him, and Hager tried to assist Mr. Pearson in cleaning up his properties. 8/13/13 RP 126-27.

However, before agreeing to work with Hager to clean up his properties, Mr. Pearson first wanted Donnie Anderson, an individual residing in a trailer on one of the properties, removed. 8/13/13 RP 128. The sheriff's office had assisted Mr. Pearson with removing an individual from his property before, but all of Hager's initial efforts to evict Mr. Anderson from the property failed. 8/13/13 RP 127, 132. Although Mr. Anderson agreed to leave, he was not making any progress toward doing so. 8/13/13 RP 136.

In order to speed things up, Hager presented Mr. Anderson with solutions to the obstacles Mr. Anderson claimed he was facing, including providing Mr. Anderson with free gravel to situate him on a new property and locating a storage container for him at a reduced price. 8/13/13 RP 139-40. Although Mr. Anderson denied it at trial, Hager and Mr. Anderson's girlfriend, Kerry Eubanks, both testified that Mr. Anderson informed Hager he would not leave until he was able to retrieve his belongings from a property he owned in Skykomish. 8/8/13 RP 158; 8/13/13 RP 113, 140. Hager and Ms. Eubanks both explained that Mr. Anderson drew a map for Hager so that Hager could retrieve these items for him. 8/13/13 RP 113, 143. After Hager left, Mr. Anderson laughed and told Ms. Eubanks there was no way Hager would find the property, and if he did, he would get in trouble. 8/13/13 RP 114.

Hager located the property according to Mr. Anderson's directions. 8/13/13 RP 150. Although the property was behind two locked gates, Hager was able to unlock both gates using a Bonneville Power key a friend had given him for hunting and fishing. 8/13/13 RP 147-48. He found the storage container where Mr. Anderson had indicated it would be. 8/13/13 RP 151. Hager cut the padlock to the

container and took the things he assumed Mr. Anderson wanted. 8/13/13 RP 152. This included a woodstove, chimney pieces, and cedar planking, as well as some "junk" (chunks of metal and unidentifiable pieces of hardware). 8/8/13 RP 43, 64. Hager also took an extension cord that was providing power to a nearby yurt. 8/8/13 RP 47. Although the yurt was sparsely furnished with a refrigerator, bedding, and kitchenware, nothing in the yurt was touched. 8/8/13 RP 39, 64-65. Hager explained at trial that he was not sure what the yurt was but that he did not believe it belonged to Mr. Anderson. 8/13/13 RP 158-59.

Hager later learned Mr. Anderson had owned the property at one time, but Mr. Anderson had abandoned the property and it was "reclaimed" by the prior owner, who sold it to Marcus Swenson approximately eleven years before this incident. 8/8/13 RP 27-28, 157-58. The Swenson family constructed the yurt on the property and used it as their vacation home. 8/8/13 RP 34. However, the storage container was on the land when the Swensons purchased the property. 8/8/13 RP 35. It originally contained "random bits of automotive hardware," most of which Mr. Swenson took to the dump. 8/8/13 RP 37.

Shortly after Hager went on the property and removed the items from the storage container, the Swensons went to stay overnight. 8/8/13 RP 38. Immediately, they noticed the yurt had no electricity. 8/8/13 RP 38-39. The next day, Mr. Swenson discovered that things had been taken from the storage container. 8/8/13 RP 43. He reviewed footage from a security camera, which showed Hager taking the items, and provided the images to the King County sheriff. 8/8/13 RP 47, 71.

Deputy Garrett Jorgensen, with the King County sheriff's office, reviewed the images and spotted Hager's truck, which had a unique hoist, while driving to work a few days later. 8/8/13 RP 71, 76. He stopped Hager and questioned him about the incident on the Swenson property, which had occurred only 12 days before. 8/8/13 RP 76, 80-81. Although initially confused, Hager informed Deputy Jorgensen that he had been on the property to retrieve Mr. Anderson's things. 8/8/13 RP 81. After understanding that Deputy Jorgensen was investigating the incident as a burglary, Hager offered to return the property. 8/8/13 RP 89. The items were still stored outside Hager's home because, despite his repeated attempts, he had not been able to reach Mr. Anderson since the day Mr. Anderson drew the map directing him to the property. 8/13/13 RP 161-62.

During the investigation most of the property was returned to the Swensons. 8/8/13 RP 119. Hager was terminated from the sheriff's office as a result of the criminal charge. 8/12/13 RP 106. After a jury trial, Hager was convicted of one count of second degree burglary. CP 70.

b. Facts related to the separate incident admitted under ER 404(b).

At trial, the court granted the State's motion to admit evidence pursuant to ER 404(b) of a separate, unrelated incident that occurred several weeks after the alleged crime. 8/7/13 RP 50, 67. The State called four witnesses just to testify about this separate incident, which they did in great detail. 8/12/13 RP 7, 50, 66, 145.

John Fernald testified he owned property in Index, although he lived in Nevada at the time of trial. 8/12/13 RP 49. He had lived on the land in Index for a period of time, but it was too "rugged" to rent to someone else after he moved to Nevada. 8/12/13 RP 50-51. Instead, he designated two friends as caretakers for the property and later allowed a woman, Teresa Kohler, to live in a structure located on the property. 8/12/13 RP 11, 51.

After he moved to Nevada, Mr. Fernald's property was subject to repeated thefts. 8/12/13 RP 41, 54, 69. The property had locked

gates, but one of the caretakers, Gerald Reule, testified that he had been forced to replace the lock eight times since Mr. Fernald left. 8/12/13 RP 67. Mr. Fernald did not report the thefts until his solar panels were stolen, which was the "last straw." 8/12/13 RP 52.

Hager, in his former capacity as a deputy, responded to Mr. Fernald's 911 call. 8/12/13 RP 52. When Hager came to take the report, he spoke to both Mr. Fernald and Mr. Reule. 8/12/13 RP 52, 72. Hager testified that he spoke mostly to Mr. Reule, who gave him the combination to the padlock and told him to come back on the property at any time to hunt or camp. 8/13/13 RP 178-181. At trial, Mr. Reule confirmed that he had given Hager the combination to the lock and permission to enter the property, and that no time limit had been imposed on that permission. 8/14/13 RP 61. However, while he indicated he "may have" talked with Hager about hunting, he stated that he did not give Hager permission to enter the property to hunt or camp. 8/14/13 RP 61-62.

Ms. Kohler testified that several weeks after Hager allegedly burglarized the Swenson property, she was cleaning out the structure where she planned to live when she saw a white truck pulling a flatbed trailer onto Mr. Fernald's property. 8/12/13 RP 16-17. Ms. Kohler was

frightened and, after hiding in the bushes for a while, eventually made it back to where she parked her car. 8/12/13 RP 17-21. When she returned to her car, the hood was up, the sparkplugs and registration had been taken, and a note indicated that she should walk up the hill if she wanted everything back. 8/12/13 RP 21-22. Instead, she walked down to the highway and called 911. 8/12/13 RP 22.

At trial Hager explained he thought Ms. Kohler's car was suspicious, so he disabled the car and took the registration so that she would have to identify herself before leaving the property. 8/14/13 RP 182. Hager was on the property to clear sightlines through the blackberry bushes, so that he could successfully hunt a bear he saw on the property. 8/13/13 RP 183. He brought two friends with him who owned equipment so that they could do this quickly. 8/13/13 RP 183-84. He also moved a log that was partially blocking the roadway. 8/13/13 RP 184.

After the incident, Hager contacted Mr. Fernald and told him he had been hunting a bear on the property and clearing blackberry bushes in order to do so. 8/12/13 RP 60. He requested permission to hunt the bear, which Mr. Fernald initially gave but rescinded a few days later.

8/12/13 RP 60-61. There were no charges filed against Hager related to this incident. 8/6/13 RP 59; 8/7/13 RP 51.

E. ARGUMENT

1. The admission of Hager's actions on the Fernald property violated ER 404(b).

The State is not permitted to introduce evidence simply to show a defendant tends to act in a particular way. "ER 404(b) is a categorical bar to admission of evidence for the purpose of proving a person's character and showing that the person acted in conformity with that character." State v. Gresham, 173 Wn.2d 405, 420, 269 P.3d 207 (2012). "ER 404(b) is not designed 'to deprive the State of relevant evidence necessary to establish an essential element of its case,' but rather to prevent the State from suggesting that a defendant is guilty because he or she is a criminal-type person who would be likely to commit the crime charged." State v. Foxhoven, 161 Wn.2d 168, 175, 163 P.3d 786 (2007) (quoting State v. Lough, 125 Wn.2d 847, 859, 889 P.2d 487 (1995)).

In order to admit the evidence under ER 404(b), the court must:

> (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the

> probative value of the evidence against its prejudicial effect.

Gresham, 173 Wn.2d at 421. Thus, ER 404(b) must be read in conjunction with ER 403, which requires the exclusion of evidence when its probative value is substantially outweighed by the danger of unfair prejudice. State v. Olsen, 175 Wn. App. 269, 280, 309 P.3d 518 (2013) (citing State v. Smith, 106 Wn.2d 772, 776, 725 P.2d 951 (1986)).

The proponent of the evidence has the burden to show its proper purpose. State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). A trial court's ruling to admit evidence under ER 404(b) is reviewed for an abuse of discretion. State v. Fisher, 165 Wn.2d 727, 745, 202 P.3d 937 (2009). A trial court abuses its discretion when its order is manifestly unreasonable or based on untenable grounds, or if the court fails to adhere to the requirements of the rule. State v. Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002); Fisher, 165 Wn.2d at 745.

a. The trial court abused its discretion when it admitted Hager's actions on the Fernald property to show an absence of mistake.

Hager was charged with one count of second degree burglary for entering the Swensons' land and taking items out of a storage container. CP 1. In a motion in limine, the State sought to introduce a

number of unrelated acts by Hager. 8/7/13 RP 48. The Court excluded most of what the State sought to introduce but permitted the State to present evidence of Hager's later actions involving the Fernald property. 8/7/13 RP 66-67. Hager had two friends with him the day he went to the Fernald property, and the court limited testimony to "the actions the State can link up to the defendant." 8/7/13 RP 68.

In admitting the evidence, the court accepted the State's argument that the evidence was admissible under ER 404(b) because it proved absence of mistake. 8/7/13 RP 67. Hager's defense at trial was that he had mistakenly taken the Swensons' property believing he was actually retrieving it for the rightful owner, Mr. Anderson, from Mr. Anderson's land. 8/14/13 RP 124. However, the court's rationale is untenable because Hager's actions on the Fernald property did not show Hager acted other than according to a good faith belief in the information Mr. Anderson provided.

The State's theory was that Hager went onto the Swensons' land with the intention of stealing from them. 8/14/13 RP 101. It presented evidence from Mr. Anderson that he had never asked Hager to retrieve items from the property or provided him with directions. 8/8/13 RP

158. However, in closing the State argued that perhaps the two had worked together to steal the property. 8/14/13 RP 100-01.

The incident on the Fernald property, in direct contrast to the charged crime, did not involve a theft. According to the State, Hager had received permission from one of the caretakers to enter the land, but abused that permission when he harassed a woman who had permission to stay on the property and cleared blackberry bushes in order to hunt a bear. 8/12/13 RP 21-22; 8/14/13 RP 61-62. Evidence of Hager's boorish actions on the Fernald property does not negate Hager's testimony that he was acting in good faith when he took items from the Swenson property, and was therefore not admissible as proof of absence of mistake.

b. The trial court abused its discretion when it admitted details of the Fernald incident that had little probative value and were highly prejudicial.

Even if this Court finds the trial court properly admitted evidence that Hager exceeded the bounds of the permission he was granted on the Fernald property, the court violated ER 404(b) when it permitted an Everett police officer to testify about his investigation of the case and allowed the State to delve into Hager's interaction with Ms. Kohler in painstaking detail.

The court permitted Brad Williams, a detective with the Everett police department who investigated the incident on the Fernald property, to testify. 8/12/13 RP 145-46. Despite the fact that no evidence was presented that Hager stole anything from the Fernald property, the detective testified that he investigates arsons, thefts, and burglaries. 8/12/13 RP 145. Detective Williams testified he photographed "property of value that might be of interest to somebody who's interested in taking property of value," such as a piece of metal pipe located in one of the structures on the land. 8/12/13 RP 151. He testified this type of item was valuable because it could be taken to a scrap yard and turned in for money, despite the fact there was no evidence that Hager had ever attempted to sell stolen scrap materials. 8/12/13 RP 152.

Detective Williams further testified that he made contact with Hager at Loth Lumber, a "multipurpose" site that also housed metal. 8/12/13 RP 153. He stated he believed Richard Wagner was the manager of Loth Lumber, and the State later elicited from Hager that Mr. Wagner was one of the friends with him on the Fernald property the day of the incident. 8/12/13 RP 154; 8/14/13 RP 50.

Detective Williams testified that when he made contact with Hager at Loth Lumber, Hager stated that he had been "waiting for [them]" to speak to him. 8/12/13 RP 155. Detective Williams described how they agreed to meet at the Monroe police department for a formal interview, and recited statements Hager made during this interview. 8/12/13 RP 156-163.

In addition, the State was permitted to elicit testimony about Ms. Kohler's fears when she saw Hager enter the property, how she attempted to sneak back to her car, and how she hid in the bushes for as long as she could. 8/12/13 RP 18-20. The court also permitted evidence that Hager removed the sparkplugs from Ms. Kohler's car and her registration in order to speak with her before she left, and that Ms. Kohler was so frightened when she discovered this that she called 911. 8/12/13 RP 21-22.

The State is not permitted to present evidence of other acts simply to suggest Hager is the type of person that would be likely to commit the crime charged. Foxhoven, 161 Wn.2d at 175. Yet that is exactly what the State was allowed to do in this case. The State had no explanation for why a deputy would drive to another county and steal seemingly random items from a storage container. Instead, it had to

rely on speculation that Hager was engaged in other possible nefarious or criminal activity to show that Hager was the type of person who would do this.

The trial court was required to weigh the probative value of the evidence against its prejudicial effect. Gresham, 173 Wn.2d at 421. "When evidence is likely to stimulate an emotional response rather than a rational decision, a danger of unfair prejudice exists." State v. Beadle, 173 Wn.2d 97, 120, 265 P.3d 863 (2011) (quoting State v. Powell, 126 Wn.2d 244, 264, 893 P.2d 615 (1995)). Evidence should be excluded if "its effect would be to generate heat instead of diffusing light, or ... where the minute peg of relevancy will be entirely obscured by the dirty linen hung upon it." Smith, 106 Wn.2d at 774 (quoting State v. Goebel, 36 Wn.2d 367, 379, 218 P.2d 300 (1950)). In doubtful cases, "the scale should be tipped in favor of the defendant and exclusion of the evidence." Smith, 106 Wn.2d at 776 (quoting State v. Bennett, 36 Wn. App. 176, 180, 672 P.2d 772 (1983)).

Evidence of the police investigation of the Fernald incident, and Hager's interaction with Ms. Kohler, offered nothing to show that he had not mistakenly followed Mr. Anderson's directions when entering the Swenson property. Instead, it was highly prejudicial information

that the State used to imply that Hager was engaged in ongoing, but unspecified, criminal activity. This is not permitted under ER 404(b). Gresham, 173 Wn.2d at 420.

c. The remedy is reversal and remand for a new trial.

When evidence is erroneously admitted under ER 404(b), the case must be remanded if "within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected." Gresham, 173 Wn.2d at 433 (quoting State v. Cunningham, 93 Wn.2d 823, 831, 613 P.2d 1139 (1980)). Relying on the testimony that Mr. Wagner was present with Hager on the Fernald property and that he managed what Detective Williams believed was a "multipurpose" facility that housed metal, the State argued in closing that "[t]his wasn't bear hunting season. For [Hager] and his scrap yard worker, Richard Wagner, it was collecting season." 8/14/13 RP 100. Thus, the State relied on the inadmissible evidence to speculate that Hager was engaged in ongoing criminal activity on other people's property.

The evidence presented by the State under 404(b) was unfairly prejudicial to Hager and there is a reasonable probability it had a material effect on the outcome of Hager's trial. The case should be

remanded and the trial court instructed to exclude evidence of the Fernald incident. Gresham, 173 Wn.2d at 433-34.

2. The State did not prove Hager committed second degree burglary beyond a reasonable doubt.

a. Due Process requires the State to prove each element of second degree burglary beyond a reasonable doubt.

The State bears the burden of producing sufficient evidence to prove beyond a reasonable doubt every essential element of a crime charged. In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); State v. Cantu, 156 Wn.2d 819, 825, 132 P.3d 725 (2006). A criminal defendant's fundamental right to due process is violated when a conviction is based upon insufficient evidence. Winship, 397 U.S. at 358; U.S. Const. amend. 14; Wash. Const. art. I, sec. 3; City of Seattle v. Slack, 113 Wn.2d 850, 859, 784 P.2d 494 (1989).

In order to convict Hager of second degree burglary the State was required to prove he entered or remained unlawfully in a building with the intent to commit a crime against a person or property therein. RCW 9A.52.030; CP 1. When the sufficiency of the evidence is challenged, the Court must determine whether, after viewing the evidence most favorable to the State, any rational trier of fact could have found the element beyond a reasonable doubt. State v. Salinas,

119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (citing State v. Green, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980)).

b. The State did not prove beyond a reasonable doubt that Hager entered or remained unlawfully in a "building."

The trial court instructed the jury that "[a] person commits the crime of burglary in the second degree when he or she enters or remains unlawfully in a building with intent to commit a crime against a person or property therein." CP 53. It defined "building" for the jury as follows: "[b]uilding, in addition to its ordinary meaning, includes any dwelling or fenced area." CP 54.

Jury instructions not objected to become the law of the case. State v. Hickman, 135 Wn.2d 97, 102, 954 P.2d 900 (1998). Where the State fails to object to an instruction limiting an element, the State must submit sufficient evidence to prove that element as delineated by the instructions. See, e.g., id. at 105; City of Spokane v. White, 102 Wn. App. 955, 964-65, 10 P.3d 1095 (2000); State v. Nam, 136 Wn. App. 698, 706-07, 150 P.3d 617 (2007); State v. Price, 33 Wn. App. 472, 474-75, 655 P.2d 1191 (1982). This holds true because regardless of whether the instruction was rightfully given, once given it becomes binding and conclusive upon the jury. Hickman, 135 Wn.2d at 101 n.2.

Here the State was required to prove that Hager entered a building, as ordinarily understood, or that Hager entered a dwelling or fenced area. See CP 54; Hickman, 135 Wn.2d at 102. The State failed to make this showing. Instead, the evidence showed Hager had entered the property through a locked gate on the roadway and then entered a locked storage container. 8/8/13 RP 28, 43. In closing, the State argued "[w]e know that the storage container is a building with four walls and a door that contains items." 8/14/13 RP 102.

The ordinary meaning of a building is not a storage container. The statutory definition of "building" specifically includes structures outside the ordinary meaning, including "any other structure used for... the... deposit of goods." RCW 9A.04.110; see also State v. Miller, 91 Wn. App. 869, 873, 960 P.2d 464 (1998) (a storage locker large enough to accommodate a human being was a building); State v. Tyson, 33 Wn. App. 859, 862-63, 658 P.2d 55 (1983) ("[t]he term 'building' under the burglary in the second degree statute... is broadly and uniquely defined, and among other things, includes cargo containers and other structures used for the deposit of goods"). However, this part of the definition was not provided to the jury, and the evidence was

insufficient for a jury to find Hager entered a building within the ordinary meaning of that term.

Thus, in order to find Hager guilty, the jury was required to find Hager entered a dwelling or a fenced area. CP 54. The State offered no evidence of this. There was no evidence that Hager entered a dwelling, and although the road to the property was barred by locked gates, there was no evidence of a fenced area. 8/8/13 RP 28. Locked gates alone are not sufficient to satisfy a "fenced area." State v. Engel, 166 Wn.2d 572, 580, 210 P.3d 1007 (2009) (burglary conviction reversed where yard was only partially enclosed by a fence); cf. State v. Wentz, 149 Wn.2d 342, 352, 68 P.3d 282 (2003) (conviction for burglary upheld where defendant entered a backyard surrounded by a six-foot, solid wood fence with padlocked gates).

Because jury instructions submitted without objection become the law of the case, and bind the State to what it must prove beyond a reasonable doubt, there was insufficient evidence for the jury to find Hager entered or remained unlawfully in a "building" and his conviction must be reversed. Hickman, 135 Wn.2d at 106.

c. The State did not prove beyond a reasonable doubt that Hager possessed the intent to commit a crime.

When an individual is charged with burglary, the jury is permitted to infer that he acted with the intent to commit a crime when he entered or remained unlawfully in a building. RCW 9A.52.040; State v. Cordero, 170 Wn. App. 351, 367, 284 P.3d 773 (2012). However, this statutory inference does not relieve the State of its burden to prove each element beyond a reasonable doubt, including the defendant's intent. Cordero, 170 Wn. App. at 367.

Here, Hager testified that he entered the Swenson property and took the items from the storage container under the good faith belief that he was doing so at the rightful owner's direction. 8/13/13 RP 139-40. Mr. Anderson's girlfriend, Ms. Eubanks, testified that she watched as Mr. Anderson drew up a map and instructed Hager on how to get to his property. 8/13/13 RP 110. She also testified that Mr. Anderson had always told her that he owned the property in Skykomish. 8/13/13 RP 111. However, after Hager left, Ms. Eubanks testified Mr. Anderson laughed and said that Hager was going to get in trouble. 8/13/13 RP 114.

The evidence showed Hager made no attempt to hide what he had done. He stored the items outside his home and acknowledged he

had them when stopped by the King County deputy. 8/8/13 RP 81, 117. The evidence at trial showed he had not tried to pawn anything recently. 8/12/13 RP 163. Some of what Hager took was "junk" and Hager testified he had no idea he had taken part of a hot tub, as he could not figure out the purpose of the cedar planks he removed from the storage container. 8/8/13 RP 64; 8/13/13 RP 152. He also did not touch other items of value in the nearby yurt, because he did not believe the yurt belonged to Mr. Anderson. 8/13/13 RP 158-59.

Instead, the State asked the jury to speculate that because Hager had been investigated for stealing items on the Fernald property, he had acted with the intent to commit theft on the Swenson property. 8/14/13 RP 100. This is not enough. No rational trier of fact could have found, beyond a reasonable doubt, that Hager intended to commit a crime when he entered or remained on the Swenson property. See Green, 94 Wn.2d at 221-22.

d. Hager's conviction for second degree burglary must be dismissed.

If the reviewing court finds insufficient evidence to prove an element of the crime, reversal is required. Green, 94 Wn.2d at 221; State v. Lee, 128 Wn.2d 151, 164, 904 P.2d 1143 (1995). Retrial following reversal for insufficient evidence is "unequivocally

prohibited" and dismissal is the remedy. State v. Hardesty, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996) ("[t]he double jeopardy clause of the Fifth Amendment to the U.S. Constitution protects against a second prosecution for the same offense, after acquittal, conviction, or a reversal for lack of sufficient evidence") (citing North Carolina v. Pearce, 395 U.S. 711, 717, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), overruled in part on other grounds by Alabama v. Smith, 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989)). Because the State failed to prove, beyond a reasonable doubt, that Hager committed second degree burglary, his conviction must be reversed.

F. CONCLUSION

For the reasons above this Court should reverse Hager's conviction and remand the case for dismissal or for a new trial with instructions not to admit evidence of the incident on the Fernald property.

DATED this 5th day of May 2014.

Respectfully submitted,

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Washington Appellate Project (91052)
Attorneys for Appellant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 70947-0-I
v.	)	
	)	
JAMES HAGER,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 5TH DAY OF MAY, 2014, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X] JAMES HAGER 17006 424TH DR SE GOLD BAR, WA 98251	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2014 MAY -5 PM 1:52

SIGNED IN SEATTLE, WASHINGTON THIS 5TH DAY OF MAY, 2014.

X_____

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710