

No. 71612-3-I

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

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STATE OF WASHINGTON,  
Respondent/Cross-Appellant,

v.

DANIEL FISCHER,  
Appellant/Cross-Respondent.

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

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The State did not prove every element of the crime of burglary in the first degree beyond a reasonable doubt.

2. The State did not prove every element of assault in the third degree beyond a reasonable doubt.

3. The State did not prove every element of malicious mischief in the third degree beyond a reasonable doubt.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A defendant may not be convicted of a crime unless the State proves every element of that crime beyond a reasonable doubt. U.S. Const. amends. VI, XIV; Const. art. I, §§ 3, 22. Daniel Fischer was convicted of first degree burglary, which required the State to prove that Mr. Fischer unlawfully entered or remained unlawfully in Adam Kronbeck's house with the intent to commit a crime therein and that he assaulted Mr. Kronbeck while in the building. Mr. Fischer and his family had been residing temporarily in Mr. Kronbeck's house, but left without all of their property. When Mr. Kronbeck asked him to get his property, Mr. Fischer entered the residence in order to retrieve items that Mr. Kronbeck had not put in his front yard. Viewing the evidence in the light most favorable to the State, did the State prove beyond a

reasonable doubt that Mr. Fischer (1) unlawfully entered the residence or (2) acted with the intent to commit a crime inside the house?

2. Mr. Fischer was charged with third degree assault by means of negligently causing bodily harm that is accompanied by substantial pain that extends for a period sufficient to cause considerable suffering. RCW 9A.36.031(1)(f). Mr. Kronbeck testified his face was swollen for three weeks and he suffered facial and emotional pain. Viewing the evidence in the light most favorable to the State, did the State prove beyond a reasonable doubt that Mr. Fischer negligently caused bodily injury accompanied by substantial pain that caused considerable suffering?

3. Mr. Fischer was convicted of malicious mischief in the third degree because he damaged a door when he entered Mr. Kronbeck's house. Viewing the evidence in the light most favorable to the State, did the State prove beyond a reasonable doubt that Mr. Fischer acted with malice when he kicked open a door in order to gain entry to the house?

### C. STATEMENT OF THE CASE

Daniel Fischer, his wife Rebecca, and their one-year-old daughter Nicole were living in Everett in the spring of 2013. 2/11/14(AM) RP 28, 31.<sup>1</sup> When they unexpectedly needed to leave the home where they had been staying in March, their friend Adam Kronbeck agreed they could live in his one-bedroom home. 2/10/14 RP 33, 39-41, 72-75; 2/11/14(AM) RP 31-32, 49.

The Fischers rode their bicycles to Mr. Kronbeck's home with their belongings, which included clothing, a portable crib, toys, and food. 2/10/14 RP 75; 2/11/14(AM) RP 32. They later brought Mrs. Fischer's cat, which she uses for emotional stability due to her mental disabilities. 2/10/14 RP 43; 2/11/14(AM) RP 33-34. The Fischers made their home in Mr. Kronbeck's living room. Id. at 32.

Mr. Kronbeck expected the Fischers would only stay for a few nights, and he claimed he told the family that he could not have visitors for more than two weeks. 2/10/14 RP 41, 42. Mr. Kronbeck, however, never limited the Fischers' stay or told them they had to leave.

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<sup>1</sup> The verbatim report of proceedings for the morning of February 11, prepared by court reported Donna Hunter, is marked "9:30 a.m." in addition to the date.

The verbatim report of proceedings of the afternoon session, prepared by court reported Deanna M. Ellis, is marked only with the date. That volume, however, is not cited here.

2/11/14(AM) RP 33, 36, 42-43. They did not pay rent and did not have a house key. 2/10/14 RP 42-43; 2/11/14(AM) RP 43.

Eventually Mr. Kronbeck and Mrs. Fischer began having a hard time getting along with each other in the small house. 2/10/14 RP 47. One day in April the Fischers voluntarily left the house based upon remarks Mr. Kronbeck made when Mr. Fischer's daughter from a prior marriage, her mother, and Mrs. Fischer's mother were visiting them. 2/10/14 RP 45-46; 2/11/14(AM) RP 29, 34-35, 44. Using their bicycles for transportation, the Fischers moved to a motel. 2/11/14(AM) RP 35. They could not put all of their possessions in their bicycle trailers, however, and left many of their belongings behind intending to get them later. 2/10/14 RP 46, 76-77; 2/11/14(AM) RP 35-36. A stereo and the cat were among the items left behind. 2/11/14(AM) RP 35.

Mr. Kronbeck was upset because the Fischers left some of their possessions in his house. 2/10/14 RP 48. When he and his friends Dan Moen and Joel Moen got drunk on the evening of April 10, Mr. Kronbeck complained about the Fischers for an hour or two. 2/10/14 RP 47-49. The Moens suggested Mr. Kronbeck throw the Fischers' property out, and the three men put the property in the middle of the

front yard. Id. at 48-49, 80. According to Mr. Kronbeck, either the Moens or a passer-by took Mr. Fischer's stereo. Id.

Mr. Kronbeck called Mrs. Fischer in the middle of the night and left a message telling her to come get the family's belongings. 2/10/14 RP 50; 2/11/14(AM) RP 37. Mr. Fischer arrived at Mr. Kronbeck's home at about 7:00 a.m. and tried to pack his family's possessions and food into one bicycle trailer. 2/10/14 RP 50-51. When Mr. Fischer knocked on the back door, Mr. Kronbeck claimed it was not his fault and closed the door on Mr. Fischer. Id. 53-54, 82.

According to Mr. Kronbeck, Mr. Fischer forced the door open, shoved him into the living room, hit Mr. Kronbeck in the face with his fists, and then left. 2/10/14 RP 54-55, 59-61. Mr. Kronbeck was still under the influence of alcohol when the police arrived to investigate. Id. at 80-81, 88, 105; 2/11/14(AM) RP 8. Mr. Kronbeck's face was swollen and his eye was swollen shut the next day. 2/10/14(AM) RP 68. His injuries were treated with ibuprofen and cold packs. Id.

The Snohomish County Prosecutor charged Mr. Fischer with burglary in the first degree, assault in the third degree, and malicious mischief in the third degree. CP 182-83. He was convicted after a jury trial before the Honorable Janice Ellis. CP 47, 49-50. Mr. Fischer was sentenced to 30 months in prison followed by 18 months community

custody and a concurrent 364-day suspended sentence with 24 month probation. CP 14-15, 23-24.

D. ARGUMENT

1. **The State did not prove beyond a reasonable doubt that Mr. Fischer committed the crime of burglary in the first degree.**

a. The State was required to prove every element of first degree burglary beyond a reasonable doubt.

The due process clauses of the federal and state constitutions require the State prove every element of a crime beyond a reasonable doubt. Appendi v. New Jersey, 530 U.S. 466, 476-77, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); U.S. Const. amends. VI, XIV; Const. art. 1, §§ 3, 22. On appellate review, the court must reverse if, after viewing the evidence in the light most favorable to the prosecution, it determines that a rational trier of fact could not have found an element of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 334, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); State v. Green, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980).

Mr. Fischer was convicted of burglary in the first degree. RCW 9A.52.020(1)(b); CP 80, 182. The first degree burglary statute reads:

A person is guilty of burglary in the first degree if, with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a

building and if, in entering, or while in the building or in immediate flight therefrom, the actor or another participant in the crime (a) is armed with a deadly weapon, or (b) assaults any person.

RCW 9A.52.020(1). The State did not prove beyond a reasonable doubt that Mr. Fischer (1) unlawfully entered the building or (2) acted with the intent to commit a crime against a person or property inside the building. This Court should therefore reverse his first degree burglary conviction.

b. The State did not prove beyond a reasonable doubt that Mr. Fischer unlawfully entered or remained in the building.

In order to convict Mr. Fischer of first degree burglary, the State was required to prove beyond a reasonable doubt that he entered or remained unlawfully in a building. RCW 9A.52.020(1); State v Woods, 63 Wn. App. 588, 590, 821 P.2d 1235 (1991). To establish this element, the State must show that Mr. Fischer was not “licensed, invited, or otherwise privileged to so enter or remain” in the building. RCW 9A.52.010(5).

Entry into a residence is lawful if the defendant has the occupant’s permission to enter. Woods, 63 Wn. App. at 590 (occupant had expressly revoked her son’s permission to enter home unless she was present); State v. Schneider, 36 Wn. App. 237, 241, 673 P.2d 200

(1983) (occupancy and possession, not title or ownership, determine the lawfulness of an entry). A defendant cannot be convicted of burglary for entering his own residence with felonious intent. State v. Wilson, 136 Wn. App. 596, 606, 150 P.3d 144 (2007). This applies to shared residences. Id. at 606, 608-09.

With Mr. Kronbeck's permission, Mr. Fischer and his family lived with Mr. Kronbeck in his apartment for several weeks. 2/10/14 RP 42-43; 2/11/14(AM) RP 31-32. Mr. Kronbeck never told the Fischers to leave or that they could not return when they left voluntarily. 2/10/14 RP 46; 2/11/14(AM) RP 33, 36. Mr. Kronbeck invited Mr. Fischer to retrieve his possessions, many of which Mr. Kronbeck had placed in his front yard, and he did not tell Mr. Fischer he could not enter the house or the yard to do so.

This case is unlike State v. Gohl, 109 Wn. App. 817, 37 P.3d 293 (2001). There, Heather Giaudrone told her boyfriend he could not come into her apartment on a particular night, so they went to the park. 109 Wn. App. at 820. When they returned to her apartment, Mr. Gohl asked for change for a telephone call; Ms. Giaudrone told him to wait outside while she went in and got him the change. Id. Mr. Gohl went inside against Ms. Giaudrone's instructions. Id. He then assaulted Ms.

Giaudrone and her roommate with a metal bar. Id. This Court found sufficient evidence of unlawful entry because Ms. Giaudrone testified she had told Mr. Gohl not to come in on several occasions. Id. at 823-24. Mr. Gohl had no license to be in the apartment. Id. Mr. Fischer and his family, in contrast, were residing in Mr. Kronbeck's apartment, and had permission to come and go. They were asked to return to obtain their remaining property.

The Fischers had a small amount of property, including food, clothing, blankets, and baby paraphernalia, all of which was important to the young family. 2/10/14 RP 41-42. Their primary mode of transportation was by bicycle, and they carried their daughter and their belongings in bike trailers. 2/10/14 RP 40; 2/11/14(AM) RP 32. The Fischers were unable to take all of their possessions with them when they left Mr. Kronbeck's apartment on their bicycles, and he testified the Fischers left a portable crib, food, clothing, toys, a stereo, and their cat at his apartment. 2/10/14 RP 49, 76-77; 2/11/14(AM) RP 44-45.

Instead of exercising care over this property, Mr. Kronbeck and two friends got drunk and put the property unsecured in Mr. Kronbeck's front yard. 2/10/14 RP 48-51, 80. Mr. Kronbeck believed one of his friends took the Fischer's stereo, "or it was someone just

down the street walking by and taking it as free items.” Id. at 80. As a gratuitous bailee, Mr. Kronbeck was responsible to care for the property until it was returned to its owner, not let his friends take it or place it outside where it could be taken or destroyed. State v. Kealey, 80 Wn. App. 162, 172, 97 P.2d 319 (1995) (even finder of lost property must return lost property to its owner), rev. denied, 129 Wn.2d 1021 (1996); Maitlen v Hazen, 9 Wn.2d 113, 123, 113 P.2d 1008 (1941) (gratuitous bailee liable for gross negligence or bad faith in handling bailor’s property).

The Fischers had been living in Mr. Kronbeck’s house and had permission to come and go as they saw fit. When they left, Mr. Kronbeck put their property in his yard and demanded they come get it in the middle of the night. Given these circumstances, the State did not prove beyond a reasonable doubt that Mr. Fischer unlawfully entered Mr. Kronbeck’s house when he was retrieving his property as requested.

- c. The State failed to prove Mr. Fischer intended to commit a crime when he entered Mr. Kronbeck’s home to retrieve his property.

The State was also required to prove that Mr. Fischer entered the house “with intent to commit a crime against a person or property

therein.” RCW 9A.52.020(1); CP 109; State v. Bergeron, 105 Wn.2d 1, 4, 16-17, 711 P.2d 1000 (1985).

Mr. Fischer’s case is similar to Woods, supra, where this Court reversed a second degree burglary conviction for lack of evidence that the defendant intended to commit a crime when he and his friend entered a residence to access the friend’s property. 63 Wn. App. at 591-92. The defendant and his friend Jeff kicked in a door at Jeff’s mother’s home, from which Jeff had been generally denied permission to enter. Id. at 589. Despite living elsewhere, Jeff still had possessions in his mother’s home. Id. at 591-92. The defendant testified they entered the home to get a jacket, and evidence arguably demonstrated the friends were also looking for bus fare. Id. at 589-92. However, the evidence was insufficient to prove intent to commit a crime because Jeff had belongings in his mother’s home and it was not clear from the unlawful entry or flight (upon seeing the Jeff’s mother) that the defendant intended to commit any offense inside. Id. at 591-92.

Mr. Fischer’s case is comparable. Mr. Fischer was no longer residing in Mr. Kronbeck’s house, but this family’s property was still there. Mr. Fischer went to the house in response to Mr. Kronbeck’s telephone message to come and get the Fischers’ belongings. Although

Mr. Kronbeck had placed the Fischers' belongings in a play pen in his front yard, some of the items were missing. Mr. Fischer therefore entered the house in order to retrieve his remaining items, not to commit a crime. Like the defendant in Woods who entered his former home where he still had possessions, Mr. Fischer entered Mr. Kronbeck's home to retain his family's possessions. The evidence was insufficient to show Mr. Fischer intended to commit a crime against a person or property.

d. Mr. Fischer's conviction must be reversed.

Mr. Fischer entered Mr. Kronbeck's house to retrieve his family's property. The State did not prove beyond a reasonable doubt that Mr. Fischer (1) unlawfully entered the home where he had been residing or (2) had the intent to commit a crime inside the residence. Mr. Fischer's first degree burglary conviction must be reversed and dismissed.

**2. The State did not prove beyond a reasonable doubt that Mr. Fischer committed the crime of assault in the third degree.**

Mr. Fischer was also convicted of third degree assault. CP 82. The elements of the crime as charged are that, in circumstances not constituting first or second degree assault, (1) the defendant caused

bodily harm, (2) the bodily harm was “accompanied by substantial pain that extends for a period sufficient to cause considerable suffering,” and (3) the defendant acted with criminal negligence. RCW 9A.36.031(1)(f); CP 95. Looking at the evidence in the light most favorable to the State, there is no evidence that the bodily injury in this case resulted in pain that extended for a period long enough to cause considerable suffering.

An extreme headache that lasted two weeks was held to constitute sufficient pain to fulfill the “considerable suffering” element of third degree assault in State v. Robertson, 88 Wn. App. 836, 947 P.2d 765 (1997), rev. denied, 135 Wn.2d 1004 (1998). In that case a high school student was waiting for a bus when a girl approached her, asked her to fight, and punched her in the face. 88 Wn. App. at 838-39. Three other girls joined and took turns holding the victim down, punching and kicking her, and slamming her head into the ground several times. Id. at 839.

At trial, the victim described her injuries and the pain she suffered. Robertson, 88 Wn. App. at 839. She lost three or four days of school and had a severe headache that lasted two weeks. She had bruises on many parts of her body, scrapes on her legs, a black eye, and

abrasions and lumps on her head. Id. Noting that the victim's headache was so severe she felt that "[her] brain was going to explode," this Court found that the combination of the extensive bruising, the black eye, and the two-week-long headache met the element of bodily harm accompanied by substantial pain that extends for a period of time sufficient to cause considerable suffering. Id. at 840-41.

Here, there was no medical testimony concerning Mr. Kronbeck's injuries. Mr. Kronbeck testified that his eye was swollen shut and it took three weeks for his facial swelling to go down. 2/10/14 RP 68. He claimed that his eye itched and he no longer slept on that side of his body. Id. at 68-70. However, his injury was treated only with antibiotics, "a mild pain reliever," and cold packs. Id. at 68-69. While Mr. Kronbeck related that he still suffered pain, he characterized the pain as "not just facial pain," but "emotional pain, humiliation pain." Id. at 69.

Third degree assault as charged here required bodily injury, not emotional pain. RCW 9A.36.031(1)(f); State v. Perez, 137 Wn. App. 97, 109, 151 P.3d 249 (2007). Mr. Kronbeck did not describe substantial pain that extends for a period sufficient to cause substantial suffering. The State thus did not prove this essential element beyond a

reasonable doubt, and Mr. Fischer's conviction must be reversed and vacated.

**3. The State did not prove beyond a reasonable doubt that Mr. Fischer committed the crime of malicious mischief in the third degree.**

Mr. Fischer's conviction for malicious mischief in the third degree should also be reversed due to the lack of sufficient evidence of malicious intent. In order to convict Mr. Fischer of malicious mischief in the third degree, the jury was required to find that he knowingly and maliciously caused physical damage to Mr. Kronbeck's property.

RCW 9A.48.090(1)(a); CP 105. "Malice" is defined as "an evil intent, wish, or design to vex, annoy, or injury another person." RCW 9A.48.110(12); State v. Wooten, 178 Wn.2d 890, 894, 312 P.3d 41 (2013); CP 108. Malice may be inferred from "an act done in willful disregard of the rights of another." RCW 9A.48.110(12); CP 108.

The State alleged Mr. Fischer committed malicious mischief because he damaged Mr. Kronbeck's door by forcing the door open to enter the house. 2/11/14(PM) RP 16-17. The evidence, however, does not show that kicking the door open was a malicious act.

In Kinsman, this Court reversed a malicious mischief conviction because of a confusing and contradictory jury instruction defining malice. City of Bellevue v. Kinsman, 34 Wn. App. 786, 664 P.2d 1253 (1983). The defendant in that case had left her three-year old son with her brother so she could go out for a few hours. 34 Wn. App. at 787. When she returned to her brother's home after 2:00 a.m., the house was dark and locked. Id. The defendant, who had consumed some alcohol during the evening, knocked and then pounded on the door, eventually opening it. Id. at 787-88. She then confronted her brother's fiancé and hit her in the face. Id. at 788.

Addressing the facts, this Court found "scant evidence that Kinsman had an evil intent, wish, or design to vex, annoy, or injure anyone." Kinsman, 34 Wn. App. at 790. Instead, the defendant could have been "impelled by fear or concern for her son's safety." Id. The same factors are true in Mr. Fischer's case.

Mr. Fischer and his family had few possessions, and the food, clothing, toys and other items they left at Mr. Kronbeck's home were precious and expensive to replace. The facts of this

case show that Mr. Fischer was motivated by his need to care for his family and fear of the loss of property when he entered Mr. Kronbeck's home and broke the door. There is no evidence he acted with "an evil intent, wish, or design to vex, annoy, or injury anyone" when he forced the door open. Mr. Fischer's conviction for malicious mischief in the third degree must be reversed because the State did not prove beyond a reasonable doubt that he knowingly and maliciously damaged the door.

E. CONCLUSION

Mr. Fischer's convictions for first degree burglary, third degree assault, and third degree malicious mischief must be reversed and dismissed because the State did not prove every element of each crime beyond a reasonable doubt.

DATED this 30<sup>th</sup> day of September 2014.

Respectfully submitted,



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

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STATE OF WASHINGTON,	)	
	)	
Respondent/Cross-appellant,	)	NO. 71612-3-I
	)	
	)	
DANIEL FISCHER,	)	
	)	
Appellant-Cross-respondent.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 30<sup>TH</sup> DAY OF SEPTEMBER, 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:

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| [X] | DANIEL FISCHER<br>741779<br>MCC-WSR<br>PO BOX 777<br>MONROE, WA 98272-0777                      | (X)<br>( )<br>( ) | U.S. MAIL<br>HAND DELIVERY<br>_____ |

**SIGNED** IN SEATTLE, WASHINGTON, THIS 30<sup>TH</sup> DAY OF SEPTEMBER, 2014.

X \_\_\_\_\_ 

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