

FILED
COURT OF APPEALS
DIVISION II

NO. 35509-4

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STATE OF WASHINGTON
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**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

MICHAEL RUNYON, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Brian Tollefson

No. 06-1-03321-5

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Was there sufficient evidence to find the defendant guilty of burglary in the second degree where the defendant entered a construction site that was enclosed on three sides by a heavy duty fence, with a natural barrier on the fourth side, prior to entering a two-story structure in the process of being demolished?

B. STATEMENT OF THE CASE.

1. Procedure

On July 20, 2006, MICHAEL SCOTT RUNYON, hereinafter “defendant” was charged by information with burglary in the second degree contrary to RCW 9A.52.030(1) in Pierce County Superior Court Cause No. 06-1-03321-5. CP 1.

On September 14, 2006, defendant waived his right to a 3.5 hearing regarding the admissibility of statements he made to officers after his arrest. RP 1, 5-6.

On September 19, 2006, all parties appeared for jury trial before the Honorable Brian Tollefson. RP 10. Following the State’s case-in-chief, the court denied defendant’s half-time motion to dismiss. RP 125-131. At the conclusion of trial, the jury unanimously found the defendant guilty of burglary in the second degree. RP 196-199, CP 47.

The standard sentencing range for defendant was 9-12 months due to prior convictions for burglary in the second degree and theft in the second degree. RP 203. On September 28, 2006, the court sentenced the defendant to 12 months incarceration with credit for 72 days served and imposed standard costs and fines totaling \$1,300. RP 208-209. The defendant filed a timely Notice of Appeal on October 26, 2006. CP 62.

2. Facts

At approximately 11:15 p.m. on July 18, 2006, Tacoma Police Officers David Johnson and Kenneth Bowers arrived at a construction site in South Tacoma in response to a burglary report; they were joined shortly thereafter by Officer Christopher Karl and his K-9 partner. RP 22, 34.

The site was where a strip mall was being demolished. RP 88. It was surrounded on three sides by a heavy-duty fence, approximately 8 feet high. RP 35, 84. On the fourth side of the site, behind the buildings, both ends of the fence abutted a berm, a small ditch which continued upward to create a 10 foot hill. RP 80. The general contractor used the hill as a natural barrier, completing the perimeter formed by the fence. RP 110. The perimeter's purpose was to protect the public from safety hazards, as well as to protect the construction site, including equipment being stored within it, from theft or tampering. RP 111. The superintendent of the site granted nobody, other than employees of the demolition contractor or general contractor, permission to be on the site that night. RP 113. An

employee of the demolition company secured and locked the fence after all employees left on July 18, 2006.

After entering the site through a section of the fence that had been pulled apart, the officers entered a partially demolished Mega Foods store and climbed a flight of stairs to a landing on the second story. RP 25. As Officer Karl's K-9 partner was clearing the rooms on the second floor, the officers observed the defendant through a doorway. RP 38. Initially, the defendant did not comply with Officer Karl's request to lie on the floor, but did so after Officer Karl informed the defendant that he would deploy his K-9 partner if he failed to comply. RP 26. After taking the defendant into custody and escorting him to a patrol car, Officer Johnson rejoined Officers Karl and Bowers as they continued to search the Mega Foods building. RP 27, 39. Officers Bowers and Johnson went onto the roof of the building, but did not locate any other suspects. RP 40.

After returning to the patrol car, the officers asked the defendant to identify himself. RP 41. The defendant provided a false name, but the officers recognized him from prior contacts and eventually obtained his real name. RP 41. After being advised of his Miranda rights, defendant stated to Officer Johnson that he had been in the building in order to obtain copper wire and plumbing materials which he could sell as scrap metal. RP 42-44.

At trial, however, defendant testified that he had entered the construction site in order to use the bathroom, which he knew was on the

second floor of the building. RP 143-144, 147-148. After viewing photographs of the scene, defendant agreed that he must have walked past a portable bathroom after entering the site, but did not remember it being there that night. RP 158. Defendant also testified that he realized he was missing his wallet after leaving the second floor; he was looking for it when he was arrested by the officers. RP 147-148.

C. ARGUMENT.

1. THERE WAS SUFFICIENT EVIDENCE TO FIND THE DEFENDANT GUILTY OF BURGLARY IN THE SECOND DEGREE BECAUSE THE CONSTRUCTION SITE MEETS THE STATUTORY DEFINITION OF "BUILDING."

The evidence presented in a criminal trial is sufficient to support a conviction of the crime charged if a rational trier of fact, after viewing the evidence in the light most favorable to the State, could find the essential elements of the crime beyond a reasonable doubt. State v. Joy, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). When the sufficiency of the evidence is challenged, the court will admit the truth of the State's evidence and any reasonable inferences from it. State v. Barrington, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), review denied, 111 Wn.2d 1033 (1988). Furthermore, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

A person is guilty of burglary in the second degree if, 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). The court instructed the jury that in order for the state to prove that defendant committed burglary in the second degree, it must show that (1) on or about July 18, 2006, the defendant entered or remained unlawfully in a building other than a dwelling; (2) the entering or remaining was with intent to commit a crime against a person or property therein; and (3) the acts occurred in the State of Washington. CP 36.

In defining the term “building”, the court instructed the jury that the term, “in addition to its ordinary meaning, includes any fenced area or any other structure used mainly for carrying on business therein, or for the use, sale or deposit of goods.” CP 40. Case law has discussed the ordinary meaning of the term “building” as:

A constructed edifice designed to stand more or less permanently, covering a space of land, usually covered by a roof and more or less completely enclosed by walls and serving as a dwelling, storehouse, factory, shelter for animals, or other useful structure—distinguished from structures not designed for occupancy (as fences or monuments) and from structures not intended for use in one place (as boats or trailers) even though subject to occupancy.

State v. Johnson, 132 Wn. App. 400, 408, 132 P.3d 737 (2006). Under RCW 9A.04.110(5), the term includes, in addition to any fenced area, “any railway car, cargo container, or any other structure used mainly for carrying on business therein, or for the use, sale or deposit of goods.” When a person is charged under the current burglary statute for unlawfully entering or remaining in a fenced area, the State need not show that the fence was erected mainly for the purpose of protecting property within its confines. State v. Wentz, 149 Wn.2d 342, 68 P.3d 282 (2003). Thus, a fenced area is a “building” for purposes of a burglary charge under RCW 9A.52.030(1), regardless of the purpose for which the fence was erected.

The appellate court reviews the meaning of a statutory definition de novo, as an issue of law. State v. Wentz, 149 Wn.2d 342, 346, 68 P.3d 282 (2003)(interpreting the definition of building as it relates to burglary). Once the court determines the proper construction or meaning of the statute, however, whether the evidence produced at trial matches or meets that definition is a factual question for the trier of fact that the court reviews for sufficiency of the evidence. Id. at 352 (citing to sufficiency standards and applying those standards), see also, State v. Gans, 76 Wn. App. 445, 446-47, 452, 886 P.2d 578 (1994), overruled on other grounds by Wentz, 149 Wn.2d 342, 68 P.3d 282 (2003).

It is undisputed on appeal that the defendant entered and remained in the construction site with intent to commit a crime and that his acts

occurred in the State of Washington. Thus, the only pertinent issue is whether the construction site falls within the definition of a “building.”

Prior courts have found that a partially enclosed structure falls within the scope of that term. In State v. Johnson, for example, the defendant entered a garage that only had three sides due to a missing door. 132 Wn. App. 400, 132 P.3d 737 (2006). The court held that the partially enclosed garage met the statutory requirement that the structure be “more or less completely enclosed.” Id. at 408. In State v. Wentz, a residential backyard surrounded by a tall fence with locked gates was considered a “building.” 149 Wn.2d 342, 68 P.3d 282 (2003). The court held that the limiting language of RCW 9A.04.110(5) requiring that “a structure” be “used for lodging of persons or for carrying on business therein, or for the use, sale, or deposit of goods,” did not apply to the term “fenced area.” Id. at 351-352. Thus, any fenced area should be considered a “building,” even if it is not used for business or storing goods.

In this case, both the Mega Foods structure and the fenced construction site meet the definition of “building” in RCW 9A.04.110(5). The mere fact that the store’s removal requires a demolition company demonstrates that the structure was designed to be permanent. Also, Officer Johnson’s testimony regarding his investigation of the area reveals that the structure had a second story, as well as a roof. RP 40, 62. Additionally, although the back side had been partially torn off, three sides of the structure, including its large façade, were still standing. The Mega

Foods, therefore, is similar to the three-sided garage in Johnson, which the court found to be a building.

As to the “usefulness” stipulation in the ordinary definition of the term “building,” defendant contends that the Mega Foods was being demolished and, in that condition, served no useful purpose. Brief of Appellant at 4. The business being conducted at the site, however, was the demolition of the buildings, which the construction company was under contract to perform. RP 110. Within the scope of the contract was the right to remove salvageable materials such as copper wire, steel, and plumbing materials which could be sold as scrap metal, constituting some of the profit derived from the demolition. RP 110. Due to recent theft of such materials, the demolition company occasionally sent employees to the location at night to monitor the buildings, indicating that salvageable materials remained. RP 113-114. When taken together, the above information constitutes sufficient evidence upon which a reasonable trier of fact could base a belief beyond a reasonable doubt, that the Mega Foods structure meets the statutory definition of “building.”

In addition to the Mega Foods structure itself being a building, the fenced-in area encompassing the structure falls within the statutory definition of “building” provided by RCW 9A.04.110(5). The defendant contends that the fenced area cannot be considered a building because the “fence around the construction site was not a fully enclosed area.” Brief of Appellant at 5. The statutory language, however, makes no requirement

that an area be enclosed by fencing on all sides. It simply states that the term “building” includes “*any* fenced area.” RCW 9A.04.110(5) (emphasis added). Furthermore, a broad interpretation of the term was recognized by the Supreme Court in Wentz where it held that the limiting language in RCW 9A.04.110(5) regarding the purpose of a structure, does not apply to the term “any fenced area.”

Here, the heavy duty fence which stood 8 feet in height, paired with the natural barrier, clearly separated the construction site from the surrounding area. RP 35. Furthermore, the fence was secured or locked at each access point to prevent the public from entering and to protect any property therein from theft. RP 72-74, 111. The defendant entered the site through the fence at a point that had been pulled apart rather than entering through the back side, showing that the use of a natural barrier to enclose the area, rather than fencing, had no impact on defendant’s ability to enter the site. RP 144. When taken together, the above information provides sufficient evidence upon which a reasonable trier of fact could base a belief beyond a reasonable doubt, that the fenced-in construction site meets the statutory definition of “building.”

Even under defendant’s testimony, the evidence is uncontroverted that defendant entered both the fenced area and the partially demolished Mega Foods store. As such, there was sufficient evidence to support the jury’s determination that defendant entered a “building” in the commission of a burglary.

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D. CONCLUSION.

STATE OF WASHINGTON
BY DM
DEPUTY

For the foregoing reasons, the State respectfully requests that the conviction be upheld.

DATED: JUNE 4, 2007

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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

6/4/07 [Signature]
Date Signature