

No. 35947-2-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Patrick Drum,

Appellant.

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COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY ADRIAN
DEPUTY

Jefferson County Superior Court

Cause No. 04-1-00110-8

The Honorable Judge Craddock Verser

Appellant's Opening Brief

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ASSIGNMENTS OF ERROR

1. Mr. Drum's conviction of Residential Burglary was based on insufficient evidence.
2. The prosecution failed to establish that Mr. Drum intended to commit a crime against a person or property inside the residence.
3. The trial court erred by convicting Mr. Drum of Residential Burglary without finding that Mr. Drum intended to commit a crime against a person or property inside the residence.
4. The trial court violated Mr. Drum's right to due process by improperly using a permissive inference.
5. The trial court unlawfully used a permissive inference as the "sole and sufficient" evidence of an element of Residential Burglary, even though the presumed fact did not follow from the proven fact beyond a reasonable doubt.
6. The trial court violated Mr. Drum's right to due process by improperly using a mandatory presumption.
7. The trial court erred by shifting the burden to Mr. Drum to rebut the inference that he intended to commit a crime against a person or property inside the residence.
8. The trial court erred by adopting a finding of fact which read as follows: "Defendant entered with intent to comitt [sic] a crime in the residence." Supp. CP.
9. Mr. Drum's Drug Court contract was equivalent to a guilty plea.
10. The trial court erred by accepting Mr. Drum's Drug Court contract without affirmative proof that he entered the contract intelligently, voluntarily, and with a full understanding of its consequences.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Patrick Drum was charged with Residential Burglary. At a bench trial, the state relied on proof that Mr. Drum entered or remained

unlawfully in a residence as the sole and sufficient proof that he intended to commit a crime against a person or property within the residence. The trial court applied the inference, found that Mr. Drum had not satisfactorily provided an alternate explanation, and concluded that Mr. Drum had entered unlawfully with intent to commit a crime. The court did not find that Mr. Drum intended to commit a crime against a person or property.

The trial court eventually entered findings of fact and conclusions of law. Based solely on the inference described above, the court adopted a finding that "Defendant entered with intent to commit [sic] a crime in the residence."

1. Was Mr. Drum's conviction based on insufficient evidence? Assignments of Error Nos. 1-8.
2. Did the prosecution fail to establish that Mr. Drum intended to commit a crime against a person or property inside the residence? Assignments of Error Nos. 1-8.
3. Did the trial court err by finding Mr. Drum guilty of Residential Burglary without finding that he intended to commit a crime against a person or property? Assignments of Error Nos. 1-8.
4. Did the trial court err by relying on a permissive inference as the sole and sufficient proof of an element, where the presumed fact did not flow beyond a reasonable doubt from the established fact? Assignments of Error Nos. 1-8.
5. Did the trial court violate Mr. Drum's right to due process by improperly using a mandatory presumption? Assignments of Error Nos. 1-8.
6. Did the trial court erroneously shift the burden of proof to Mr. Drum to rebut the inference that he intended to commit a crime against a person or property inside the residence? Assignments of Error Nos. 1-8.

7. Did the trial court err by finding that "Defendant entered with intent to comitt [sic] a crime in the residence" based solely on the fact that Mr. Drum entered or remained illegally? Assignments of Error Nos. 1-8.

Initially, Mr. Drum had intended to enter Drug Court. He signed a drug court contract in which he waived his trial rights, stipulated to the admissibility of facts contained in the police report, and stipulated that the facts were sufficient for a finding of guilt. The record does not establish that he was aware he was agreeing that the facts were sufficient for a finding of guilt. Nor does the record establish that he was aware of the direct consequences of a finding of guilt.

8. Was Mr. Drum's Drug Court contract equivalent to a guilty plea because it required Mr. Drum to stipulate that the agreed facts were sufficient for a finding of guilt? Assignments of Error Nos. 9-10.

9. Did the trial court err by accepting Mr. Drum's Drug Court contract without affirmative proof that he entered the contract intelligently, voluntarily, and with a full understanding of its consequences? Assignments of Error Nos. 9-10.

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Patrick Drum was charged with Residential Burglary in Jefferson County Superior Court. CP 1-2. He requested and was provided a court-appointed attorney. RP 3-5, 9. At his Preliminary Appearance on September 29, 2004, Mr. Drum told the court that he did not have any intent to commit a crime, but was highly intoxicated when he entered the residence. RP 4-5. The next day, Mr. Drum asked the court to consolidate his case with a criminal trespass charged in district court (and referenced in the probable cause affidavit), and to consider his acts a "crime spree." RP 11-12.

At his arraignment on October 8, 2004, Mr. Drum addressed the court personally, and asked that the charge be dismissed (or in the alternative, reduced to criminal trespass) because he did not have the intent to commit a crime in the residence. RP 15. The judge explained that he could presume from the unlawful entry that Mr. Drum intended to commit a crime. RP 16.

On October 15, 2004, Mr. Drum's attorney told the court that his client had a significant substance abuse problem, and that "[t]his case itself involved Mr. Drum inhaling poppers and entering... a residence." RP 21. Through his attorney, Mr. Drum indicated that he wished to

pursue Drug Court, despite the availability of a defense to the burglary charge (his lack of intent to commit a crime). RP 20-22. A completed Drug Court contract was filed with the court on October 29, 2004. RP 30, Supp. CP. Included in the contract was the following language:

...17. That if the defendant chooses to leave the Program within the first two weeks after signing the Drug Court Contract, withdrawal will be allowed, this contract will be declared null and void, and the defendant will assume prosecution under the pending charge(s) as if this contract had never been agreed to. The defendant agrees that this ability to withdraw from the terms of this contract will cease after the period of two weeks following the effective date of this contract and thereafter the defendant shall remain in the Program until graduation unless his/her participation is terminated by the Court. The defendant further agrees that the ability to withdraw from the terms of this contract will cease within the first two weeks, if he/she has committed a willful violation of this contract for which, in the judgment of the Court, he/she may be terminated from the program.

...19. If the defendant is terminated from the Program, the defendant agrees and stipulates that the Court will determine the issue of guilt on the pending charge(s) solely upon the enforcement/investigative agency reports or declarations, witness statements, field test results, lab test results, or other expert testing or examinations such as fingerprint or handwriting comparisons, which constitutes the basis for the prosecution of the pending charge(s). The defendant further agrees and stipulates that the facts presented by such reports, declarations, statements and/or expert examinations are sufficient for the Court to find the defendant guilty of the pending charge(s).

20. Defendant waives the right to challenge the legality of any investigative or custodial detention, or the legality of any search or seizure, or the sufficiency of Miranda warnings or voluntariness of statement made, pertaining to any evidence which forms part of the basis for the prosecution of the pending charge(s)...

...Defendant acknowledges an understanding of, and agrees to waive the following rights:

1. The right to a speedy trial;
2. The right to a public trial by an impartial jury in the county where the crime is alleged to have been committed;
3. The right to hear and question any witness testifying against the defendant;
4. The right at trial to have witnesses testify for the defense, and for such witnesses to be made to appear at no expense to the defendant; and
5. The right to testify at trial....

Drug Court contract, Supp. CP.

Prior to accepting the contract, the court had the following

colloquy with Mr. Drum:

THE COURT: ...I've got here a Drug Court Contract, Mr. Drum. Did you review that thoroughly with Mr. Charlton?

MR. DRUM: Yes, I did.

THE COURT: Do you understand what you're getting into?

MR. DRUM: Yes, I do.

THE COURT: this is not an easy way to get out of a felony conviction. It requires a lot of effort on your part, and you'll be under the scrutiny of the court for the next at least two years, do you understand that?

MR. DRUM: Yes, I do.

THE COURT: And that jail time will be imposed if you violate the conditions of your agreement with the court, and sometimes you end up getting more jail time in Drug Court than you would by pleading guilty, just because you can't stay straight, you know that?

MR. DRUM: Yes, I do.

RP 31-32.

After acceptance into Drug Court, Mr. Drum was to be held in custody until a bed date for inpatient treatment opened up. RP 33. Mr. Drum remained in custody and attended Drug Court sessions while waiting for a bed date. RP 33. He was never provided a bed date for treatment. RP 41.

On December 10, Mr. Drum, who was still in custody, asked to be released from Drug Court, saying "I think it's a good program, but I just don't think it's for me." RP 36. The prosecutor gave him a written plea offer, and the court set a pretrial hearing, an omnibus hearing, and a date for a jury trial. RP 36-37.

The court held another hearing on December 17, 2004. The state asked the court to strike the jury and set a bench trial, since Mr. Drum had waived his right to a jury trial as part of his Drug Court contract. RP 40. Defense counsel objected, noting that Mr. Drum had not "been able to participate meaningfully in Drug Court." RP 41. Defense counsel told the court that Mr. Drum "was opting out of Drug Court," although more than two weeks had passed since his entry into the program. RP 43. Defense counsel went on to say that if the state had objected to the jury trial setting, the defense would have argued in favor of allowing him to opt out despite the fact that more than two weeks had passed. RP 43. The issue was

deferred until a later date. RP 44. Mr. Drum asked the court to reduce the charge to criminal trespass since the state could not establish the elements of burglary. RP 46.

At a hearing on December 28, the prosecutor told the court "it's my understanding that really what the issue is is that we need to set a bench trial. There was a motion for a bench trial." RP 54. After a discussion regarding conditions of release, the court set the motion for a hearing, commenting "I don't see a whole lot of issues there. It seems to me that-- I don't know. I'll listen to the argument... you know, he signed an agreement... You know, he's got two weeks to opt out. He didn't opt out in two weeks. So, it looks to me he gets a bench trial... I don't know why I set it for a jury trial. I wasn't thinking." RP 58-59. A few days later, the court introduced the hearing on the motion as follows: "This is on to correct an error that I made a while back. I've forgotten what it was. I set the matter for a jury trial; it should have been set for a bench trial. And so we'll set it..." RP 61.

On January 21, 2005, the Court held a hearing to determine Mr. Drum's guilt. The prosecution suggested that Mr. Drum had waived his right to argue his case; however, the court responded by saying "I invited argument." RP 69. The defense asserted that Mr. Drum was too intoxicated (from using inhalants) to form the intent to commit a crime,

and that there was no evidence that he intended to commit a crime in the house. RP 68-72. Mr. Drum told the court he was very intoxicated and was asking to use a phone. RP 70.

The judge indicated that he would infer criminal intent from the illegal entry, and found Mr. Drum guilty as charged: "I will infer the intent to commit a crime when you entered there, because there's no other reason for you to be in there." RP 69-70. Mr. Drum was sentenced (with an offender score of two) to 12+ months in prison. CP 3-13. At sentencing, Mr. Drum told the court that he wished to appeal. RP 72.

Findings of Facts and Conclusions of Law were entered on February 4, 2005, and included the following: "Defendant entered with intent to comitt [sic] a crime in the residence." Supp. CP. Despite Mr. Drum's statement that he wished to appeal, his counsel did not file a Notice of Appeal. RP 72, Supp. CP. *Pro se*, Mr. Drum filed numerous motions with the trial court. RP 78, 84-85, 91, 99, 102; Supp. CP. At two of the hearings on these motions, the judge reiterated his reasons for finding Mr. Drum guilty:

...THE COURT: It occurs to me, Mr. Seaman, in order to address this, that perhaps- Perhaps Findings of Facts and Conclusions of Law and Judgment, I mean, finding him guilty of Burglary should be entered, so at least the Court of Appeals has something to review. Now, what I would suggest-- I mean, the-- What I did-- And I'll say it for the record, I don't know where Mr. Drum is. I thought he was-- someone would be here on his behalf or he

would. What I did was, after he had indicated that he wanted to be out of Drug Court-- and the file will reflect the date that he indicated that. He did not want to participate into Drug Court. He was accepted into Drug Court, signed the Drug Court Contract, and then decided he did not want to participate in Drug Court. We set the matter for a-- both due process and hearing to determine his guilt. The hearing was based on the exhibits admitted, which were the officers' reports. And Mr. Drum was allowed to say-- It's my recollection-- I don't have the transcript of it-- It's my recollection that he did say that I didn't commit-- I didn't intend to commit a crime.

I made a finding under the statute, I think it's -- I don't know 9A.52. It's in 9A.52 that says once un- unlawful entry is found that there's a- I don't want to call -- I'm not sure to call it a presumption, or-- If there's no other explanation, then based on the unlawful entry without other explanation, there's sufficient proof for Second Degree Burglary [sic]. There was no other explanation for him to be in that house. An so my thought is we draft Findings and Conclusions -- when I say "we" I mean you-- draft and present Findings and Conclusions based on that-- on those findings, including in there the procedure from Drug Court that progressed to the Bench Trial. And I enter that and send it to Mr. Drum and say file your Personal Restraint Petition of appeal, if he thinks he can get a direct appeal.

But I'll make conclusions of law that the evidence was sufficient to find Burglary in the Second Degree: the evidence of the unlawful entry without reasonable explanation of the reason for the unlawful entry, coupled with the fact that the woman saw him and ran out of the house and whatever time of day, I believe it was the nighttime. The only inference is he intended to commit a crime; why else would he be there? He did not say that he was mistaken about the residence being his home or a friend of his and simply walked in the backdoor accidentally. And there is no other explanation, other than he went-- he was going to take something or commit some crime against persons or property in the place. So, from that, see if you can draft some Findings of Facts and Conclusions of Law and a Judgment of finding him guilty of Second Degree Burglary. I don't know if we need that. But those Findings of Facts and Conclusions of Law support the Judgment and Sentence entered when ever. And we can shoot that off to Mr.

Drum and say you can appeal that or file a Person Restraint Petition.

MR SEAMAN: Okay. The State will prepare them, Your Honor.¹
RP 93-95.

...THE COURT: The one paragraph of the Drug Court Contract that he cites is a-- it's not equivalent to a guilty plea at all. He's-- The people who enter Drug Court get a huge benefit, if they follow through. And doing that, in order to be sure that they may or may not be convicted, they give up the right to a jury trial, they give up the right to hear and question witnesses, and they agree to trial-- a trial based on the police reports, or the investigative officer's reports. While they do say there's sufficient evidence to find guilt, a judge independently reviews the evidence against him-- as I did in Mr. Drum's case-- to determine whether there was sufficient evidence for guilt. There was sufficient evidence for guilt in Mr. Drum's case. He entered a home of another person without permission and scared that person. He-- There was no other reason for him to be in there than to commit some crime. And, quite frankly, there was no reason for him to be there. It's not like he lived next door and walked into the wrong house. He broke into a house, entered it unlawfully, and was found guilty of Burglary. And that's amply justified by the record in this case...
RP 99-100.

Mr. Drum filed a Personal Restraint Petition on January 3, 2006.

He alleged, among other things, that he had requested a direct appeal but that his attorney had not filed a Notice of Appeal on his behalf. The state conceded the issue, and Division II ordered that a direct appeal be

¹ No additional Findings of Fact and Conclusions of Law, other than those entered February 4, 2005, were ever filed.

initiated, appointed Backlund and Mistry to represent Mr. Drum on his direct appeal, consolidated the direct appeal with the PRP, and accelerated review.

ARGUMENT

I. MR. DRUM'S BURGLARY CONVICTION MUST BE REVERSED BECAUSE THE STATE FAILED TO PROVE AND THE COURT FAILED TO FIND THAT HE INTENDED A CRIME AGAINST PEOPLE OR PROPERTY WITHIN THE RESIDENCE.

In a criminal case, conviction requires proof beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). On review, evidence is not sufficient to support a conviction unless, after viewing the evidence in the light most favorable to the State, any rational trier of fact could find all of the elements of the crime charged beyond a reasonable doubt. *State v. DeVries*, 149 Wn.2d 842 at 849, 72 P.3d 748 (2003). The criminal law may not be diluted by a standard of proof that leaves the public to wonder whether innocent persons are being condemned. *DeVries*, at 849. The reasonable-doubt standard is indispensable, because it impresses on the trier of fact the necessity of reaching a subjective state of certitude on the facts in issue. *DeVries*, at 849.

Where the evidence is insufficient to support a conviction, the Double Jeopardy Clause requires reversal and remand for dismissal with

prejudice. *State v. Brown*, 137 Wn. App. 587 at 592, 131 P.3d 905 (2007).

Although a claim of insufficiency admits the truth of the state's evidence and all inferences that can reasonably be drawn from it, *DeVries*, at 849,

this does not mean that the smallest piece of evidence will support proof beyond a reasonable doubt. In the end, the evidence must be sufficient to convince a rational jury beyond a reasonable doubt. *DeVries, supra*.

Since the reasonable doubt standard is the highest standard of proof, review is more stringent than in civil cases. In other words, the proof must be more than mere substantial evidence, which is described as evidence sufficient to persuade a fair-minded, rational person of the truth of the matter. *Rogers Potato v. Countrywide Potato*, 152 Wn.2d 387 at 391, 97 P.3d 745 (2004); *State v. Carlson*, 130 Wn. App. 589 at 592, 123 P.3d 891 (2005); *Northwest Pipeline Corp. v. Adams County*, 132 Wn. App. 470, 131 P.3d 958 (2006), citing *Davis v. Microsoft Corp.*, 149 Wn.2d 521 at 531, 70 P.3d 126 (2003). It also must be more than clear, cogent and convincing evidence, which is described as evidence "substantial enough to allow the [reviewing] court to conclude that the allegations are 'highly probable.'" *In re A.V.D.*, 62 Wn.App. 562 at 568, 815 P.2d 277 (1991), *citation omitted*.

At the conclusion of a bench trial, the trial court is required to enter findings of fact and conclusions of law sufficient to sustain the conviction.

CrR 6.1(d). In the absence of a finding on a factual issue, an appellate court presumes that the party with the burden of proof failed to sustain their burden on the issue. *State v. Armenta*, 134 Wn.2d 1 at 14, 948 P.2d 1280 (1997); *State v. Byrd*, 110 Wn.App. 259 at 265, 39 P.3d 1010 (2002).

Under RCW 9A.52.025(1), which defines Residential burglary, “A person is guilty of residential burglary if, with intent to commit a crime against a person or property therein, the person enters or remains unlawfully in a dwelling other than a vehicle.” In this case, the only issue at trial was Mr. Drum’s intent at the time of the alleged burglary. The prosecution relied solely on RCW 9A.52.040 (“Inference of intent”) to establish that Mr. Drum intended to commit a crime against a person or property within the residence.²

The trial court adopted the inference: “I will infer the intent to commit a crime when you entered there because there’s no other reason for you to be in there...” RP 69-70. In accordance with CrR. 6.1, the trial judge entered written findings. Supp. CP. The findings indicate that “Defendant entered with intent to comitt [sic] a crime in the residence,” but do not include a finding that he intended a crime against a person or property. Supp. CP. The intent to commit a crime is not equivalent to the

² The state’s reliance on RCW 9A.52.040 is challenged elsewhere in this brief.

intent to commit a crime against a person or property. A person may trespass with intent to commit a crime-- such as use of drug paraphernalia, illegal gambling, or Minor in Possession of Alcohol-- without intending to commit any crime against a person or property.

The court's findings are inadequate to sustain Mr. Drum's conviction for Residential Burglary. In the absence of a finding that Mr. Drum intended a crime against a person or property within the residence, this court must presume that the state failed to sustain its burden.

Armenta, supra; Byrd, supra. Accordingly, the conviction must be reversed, the burglary charge must be dismissed with prejudice, and the case must be remanded for entry of a conviction for Criminal Trespass in the First Degree.

II. THE TRIAL COURT UNLAWFULLY USED A PERMISSIVE INFERENCE AS THE "SOLE AND SUFFICIENT" PROOF OF INTENT.

A permissive inference is an evidentiary device that allows the factfinder to infer the presumed fact from a proven fact. *State v. Brunson*, 128 Wn.2d 98 at 105, 905 P.2d 346 (1995). Ordinarily, a permissive inference is constitutional if the presumed fact flows more likely than not from proof of the basic fact. *Brunson*, at 107. However, when a permissive inference is the "sole and sufficient" proof of an element, the presumed fact must flow from the proven fact beyond a reasonable doubt.

Brunson, at 107, citing *County Court of Ulster County v. Allen*, 442 U.S. 140 at 167, 99 S. Ct. 2213, 60 L. Ed. 2d 777 (1979). This is so because “[t]he state may not circumvent its burden of persuasion through exclusive use of a permissive inference.” *Brunson*, at 107; see also *State v. Delmarter*, 68 Wn. App. 770 at 784, 845 P.2d 1340 (1993).

In *Brunson*, the Supreme Court found that circumstantial evidence other than the unlawful entry supported the inference that the defendants intended to commit crimes against persons or property. *Brunson*, at 109.

Here, as trial counsel pointed out, the state relied on the permissive inference in RCW 9A.52.040 as the “sole and sufficient” proof of Mr. Drum’s intent: “As I read [the] police reports, it appears that that inference would be the sole and sufficient proof of the element of entering with intent to commit a crime.” RP 68. The prosecution did not produce any circumstantial evidence (other than the unlawful entry) suggesting that Mr. Drum entered with intent to commit a crime against a person or property within the residence. Supp. CP.

Indeed, the circumstantial evidence suggests that Mr. Drum’s illogical behavior was prompted by his illegal consumption of inhalants rather than any criminal intent. First, as noted in his judgment and sentence, he had a long history of consuming inhalants. CP 5. Second, one officer “noted a strong odor of what appeared to be spray paint” about

Mr. Drum, and he was admitted to Drug Court based on his longstanding abuse of inhalants. Probable Cause Statement, Supp. CP; RP 21. Third, Mr. Drum did not act furtively, or attempt to hide his entry into the residence, either from Ms. Sanelli (the homeowner) or Mr. Egnew (a neighbor who went to confront him). Probable Cause Statement, Supp. CP. He did not take anything from Ms. Sanelli's house; instead, he left the house as he found it and walked toward the back door of a neighboring house. Probable Cause Statement, Supp. CP. Furthermore, he had trespassed two hours earlier (committing no crime other than malicious mischief during the unlawful entry), and was a suspect in yet another trespass. Probable Cause Statement, Supp. CP.

Under these circumstances, the evidence of unlawful entry is insufficient to establish beyond a reasonable doubt that Mr. Drum intended to commit any crime, much less a crime against a person or property within the residence. Accordingly, the court's use of the permissive inference as the sole and sufficient proof of criminal intent violated due process. Mr. Drum's conviction was based on insufficient evidence. The conviction must be vacated, the burglary charge dismissed with prejudice, and the case remanded for entry of a conviction for Criminal Trespass in the First Degree.

III. THE TRIAL COURT VIOLATED MR. DRUM'S CONSTITUTIONAL RIGHT TO DUE PROCESS BY FINDING GUILT BASED ON A MANDATORY PRESUMPTION.

Due process prohibits the use of conclusive presumptions because they conflict with the presumption of innocence.³ *State v. Savage*, 94 Wn.2d 569 at 573, 618 P.2d 82 (1980), citing *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979)) and *Morissette v. United States*, 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288 (1952). The Washington Supreme Court has “unequivocally rejected the [use of] any conclusive presumption to find an element of a crime;” this is so whether the presumption is judicially created or derived from statute. *State v. Mertens*, 148 Wn.2d 820 at 834, 64 P.3d 633 (2003).

In this case, the trial court relied (in part) on Division III's decision in *State v. Cantu*, 123 Wn. App. 404, 98 P.3d 106 (2004) (*Cantu I*). See RP 69. But the Supreme Court granted a Petition for Review in *Cantu* and overruled the Court of Appeals. *State v. Cantu*, 156 Wn.2d 819, 132 P.3d 725 (2006) (*Cantu II*). In *Cantu II*, the Supreme Court held, under circumstances very similar to these, that the trial court's application of RCW 9A.52.040 was unconstitutional. The Court began by noting that

³ Indeed, even permissive inferences are not favored in criminal law. *State v. Cantu*, 156 Wn.2d 819 at 826, 132 P.3d 725 (2006) (*Cantu II*).

“the text of RCW 9A.52.040 is unfortunate and... can be misleading.”

Cantu II at 827. The Court examined the prosecutor’s arguments and the trial judge’s ruling, and determined that RCW 9A.52.040 had been unconstitutionally applied: “The trial judge seemed to have found Cantu’s intent criminal on the belief that Cantu was unable to provide sufficient evidence to rebut the presumption.” *Cantu II* at 827. In particular, the *Cantu II* Court pointed out the trial judge’s statement that “the inference [has] not been rebutted, nor has there been any explaining, that [the defendant] didn’t go in [the bedroom] without the intent to commit a crime.” *Cantu II* at 828.

Similarly, in this case, the judge cited *Cantu I*, and went on to say “[W]hat’s he doing in somebody else’s house anyway... unless he’s got the intent to commit a crime. So, I’m going to find that... I will infer the intent to commit a crime when you entered there, because there’s no other reason for you to be in there...” RP 69-70. The judge reiterated these thoughts at a subsequent hearing: “If there’s no other explanation, then based on the unlawful entry without other explanation, there’s sufficient proof for Second Degree Burglary [sic]. There was no other explanation for him to be in that house... the evidence of the unlawful entry without reasonable explanation of the reason for the unlawful entry, coupled with the fact that the woman saw him and ran out of the house and whatever

time of day, I believe it was the nighttime. The only inference is he intended to commit a crime; why else would he be there? He did not say that he was mistaken about the residence being his home or a friend of his and simply walked in the backdoor accidentally. And there is no other explanation, other than he went-- he was going to take something or commit some crime against persons or property in the place." RP 93-95.

As these comments show, the trial judge impermissibly shifted the burden of proof and applied RCW 9A.52.040 in an unconstitutional manner by refusing to acquit absent proof of some "other reason for [Mr. Drum] to be in there." RP 69-70. As in *Cantu II*, the trial court's use of a mandatory presumption violated due process. The conviction must be reversed and the case remanded for a new trial. *Cantu II*.

IV. DRUG COURT CONTRACT VIOLATES DUE PROCESS BECAUSE EQUIVALENT TO A GUILTY PLEA.

To comport with due process, a guilty plea must be accompanied by an affirmative showing that the plea was made intelligently and voluntarily. *Boykin v. Alabama*, 395 U.S. 238, 23 L. Ed. 2d 274, 89 S. Ct. 1709 (1969). The record of a plea hearing (or clear and convincing extrinsic evidence) must affirmatively disclose that a guilty plea was made intelligently and voluntarily, with an understanding of the full

consequences of the plea. *State v. Barton*, 93 Wn.2d 301 at 304, 609 P.2d 1353 (1980).

An abbreviated proceeding for determining guilt may be equivalent to a guilty plea. *Brookhart v. Janis*, 384 U.S. 1 at 7, 86 S. Ct. 1245, 16 L. Ed. 2d 314 (1966). Under such circumstances, the abbreviated proceeding is constitutional only if it comports with the protections required for guilty plea hearings. *Brookhart, supra*.

In this case, the Drug Court contract signed by Mr. Drum was equivalent to a guilty plea. In addition to stipulating to the facts in the police reports and waiving most of his trial rights (the right to a speedy public trial by an impartial jury, the right to hear and question witnesses, the right to have witnesses testify and appear at no expense, and the right to testify), Mr. Drum purportedly also “agree[d] and stipulate[d] that the facts presented by [the police reports] are sufficient for the Court to find the defendant guilty of the pending charge(s).” Drug Court contract, Supp. CP. In other words, the contract purported to limit Mr. Drum’s rights even more than if he had agreed to a stipulated facts bench trial. The contract required Mr. Drum to agree that he was guilty and was tantamount to a guilty plea.

Since the contract was equivalent to a guilty plea, the record must affirmatively demonstrate that Mr. Drum entered into the contract

intelligently and voluntarily, with a full understanding of the consequences. *Barton, supra*. Here, the record is inadequate to meet this requirement. The record does not indicate that Mr. Drum knew he was giving up the right to contest the sufficiency of the evidence, or that he knew his standard range, the scope of financial penalties, the term of community custody, or any other direct consequences of a finding of guilt. Because of this, the contract is invalid, and the trial court should not have accepted it. Mr. Drum's conviction must be reversed, the contract declared void, and the case remanded for a jury trial. *Brookhart, supra*.

CONCLUSION

For the foregoing reasons, Mr. Drum's conviction for Residential Burglary must be reversed and the case dismissed with prejudice. In the alternative, the case must be remanded for a jury trial.

Respectfully submitted on June 1, 2007.

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DIVISION II

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STATE OF WASHINGTON

BY 3
DEPUTY

CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Opening Brief to:

Patrick Drum, DOC# 784289
Washington State Reformatory
P.O. Box 777
Monroe, WA 98272

and to:

Juelanne B. Dalzell
Jefferson County Prosecuting Attorney
P.O. Box 1220
Port Townsend, WA 98368-0920

And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on June 1, 2007.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF
THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE
AND CORRECT.

Signed at Olympia, Washington on June 1, 2007.



Jodi R. Backlund, No. 22917
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