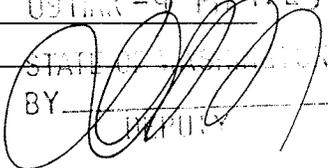


NO. 37922-8

COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

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

STATE OF WASHINGTON, RESPONDENT

v.

JOHN KENNETH ROBERTS, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable Rosanne Buckner

No. 07-1-05024-0

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**BRIEF OF RESPONDENT**

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

1. Whether the State adduced sufficient evidence that the defendant committed residential burglary?
2. Whether the trial court properly instructed the jury that it could infer an intent to commit a crime inside the house when the State adduced sufficient evidence to prove defendant entered the house?

B. STATEMENT OF THE CASE.

1. Procedure

On September 25, 2007, the Pierce County Prosecutor's Office charged JOHN KENNETH ROBERTS, hereinafter "defendant," with one count of residential burglary, one count of reckless driving, and one count of driving with a suspended license. CP 1-2. The case proceeded to trial on May 27, 2008, in front of the Honorable Rosanne Buckner. RP 3. On May 29, 2008, the jury found defendant guilty of all counts. RP 177; CP 39-41. Defendant was sentenced on July 1, 2008, to 70 months confinement. RP 194; CP 47-59. Defendant filed a timely notice of appeal. CP 64.

## 2. Facts

On September 23, 2007, Officer Christopher Martin was driving on routine patrol in his fully marked police vehicle when he witnessed defendant speed through a clearly posted stop sign. RP 61-62. Officer Martin activated his emergency lights and siren as he followed the vehicle which veered into oncoming traffic. RP 62. Defendant approached another stop sign, skidded to a stop and continued through pulling over at the next block. RP 62-63. Defendant got out of the driver's door of the vehicle and Officer Martin ordered him to lie on the ground. RP 64. A check on defendant's driving record returned a status of license suspended in the third degree. RP 72. Officer Martin handcuffed defendant and read him his Miranda rights. RP 65. Officer Martin also secured the two other occupants of the vehicle, Heather Duffey and Joseph McCummins. RP 82-84.

When asked why he was driving so fast by Officer Martin, defendant replied that he had stopped at the stop sign. RP 66. Officer Martin also noticed a smell of intoxicants on defendant's breath; Defendant admitted to drinking beer in the car. RP 66-67. Defendant told Officer Martin that he was living out of the vehicle and had purchased it from his sister the day before. RP 67. Officer Martin noticed defendant's left forearm was wrapped with a gauze bandage and defendant said he had

cut his arm on glass the day before. RP 67. Upon a search of the vehicle, Officer Martin found personal clothing, beer, a DVD player and DVD movies. RP 67-68.

Later that same day, Officer Martin was dispatched to Denise Wohlwend's residence to investigate a burglary involving broken windows, graffiti on the walls, and a stolen DVD player and movies. RP 73-74, 94-95. The location was three to four miles away from the traffic stop involving defendant. RP 74. Officer Martin found three broken windows: one in the kitchen, one in the laundry room and another in the bathroom. RP 76, 96. The glass from the bathroom and kitchen windows had been partially swept up. RP 86. Ms. Wohlwend told Officer Martin that one of the windows had been broken the day before. RP 95. Earlier that morning, before Officer Martin arrived, she found additional damage where the whole window was removed and the drape and blinds were messed up so she called the police. RP 95, 104.

Officer Martin developed two possible suspects, one of which was defendant. RP 77. He prepared a photo montage and showed it to a neighbor of Ms. Wohlwend's, Eugene Tabor, who identified defendant as the one who broke the windows. RP 78-79. Officer Martin also showed Ms. Wohlwend the DVD player and movies he had found in defendant's vehicle, and Ms. Wohlwend confirmed they were hers that had been stolen from her home. RP 98-99.

During trial, Ms. Wohlwend stated that she had known defendant for a few months prior to the burglary because he was friends with her ex-boyfriend and would come over occasionally. RP 100. She also stated that defendant had stayed at her house with his girlfriend, Ms. Duffy, three or four days prior to the robbery. RP 101. At the time, Ms. Duffy had asked permission and stayed with Ms. Wohlwend a couple of times before but did not have a key to the home. RP 102-03.

At trial, Eugene Tabor, the neighbor of Ms. Wohlwend, testified that he saw defendant at the house on September 22, 2007. RP 125. Defendant got a ladder and climbed up to a window at the corner of the house. RP 126. He came down and introduced himself to Mr. Tabor saying that in case Mr. Tabor heard any windows breaking, his girlfriend was supposed to leave a key but did not so he was breaking the windows to get in. RP 127. Mr. Tabor testified he heard what sounded like 10-12 windows breaking and falling into a trash can. RP 127. He also stated that the next day, September 23, 2007, he saw defendant parked by the garage for 15 to 20 minutes going back and forth from the yard. RP 123. Mr. Tabor also heard defendant speaking with a female. RP 127-28. Mr. Tabor confirmed he was contacted by Officer Martin and identified defendant in the photo montage. RP 128-29. Defendant chose not to testify in the case.

C. ARGUMENT.

1. THE JURY HAD SUFFICIENT EVIDENCE TO CONVICT THE DEFENDANT OF RESIDENTIAL BURGLARY AND FIND THAT HE ENTERED THE HOUSE INTENDING TO COMMIT A CRIME.

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. *State v. McCullum*, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); *see also Seattle v. Gellein*, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); *State v. Mabry*, 51 Wn. App. 24, 25, 751 P.2d 882 (1988). The applicable standard of review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found that the State met the essential elements of the crime beyond a reasonable doubt. *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). Also, challenging the sufficiency of the evidence admits 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) (*citing State v. Holbrook*, 66 Wn.2d 278, 401 P.2d 971 (1965)); *State v. Turner*, 29 Wn. App. 282, 290, 627 P.2d 1323 (1981). 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).

Circumstantial and direct evidence are considered equally reliable. *State v. Salinas*, 119 Wn.2d 192; *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In considering this evidence, “[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal.” *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (citing *State v. Casbeer*, 48 Wn. App. 539, 542, 740 P.2d 335, review denied, 109 Wn.2d 1008 (1987)).

The written record of a proceeding is an inadequate basis on which to decide issues based on witness credibility. Credibility determinations are necessary because witness testimony can conflict; these determinations should be made by the trier of fact, who is best able to observe the witnesses and evaluate their testimony as it is given. On this issue, the Supreme Court of Washington said:

[G]reat deference . . . is to be given the trial court's factual findings. It, alone, has had the opportunity to view the witness' demeanor and to judge his veracity.

*State v. Cord*, 103 Wn.2d 361, 367, 693 P.2d 81 (1985) (citations omitted). Therefore, if the State has produced evidence of all the elements of a crime, the decision of the trier of fact should be upheld.

To prove a defendant guilty of residential burglary, the State had to convince a jury of the following elements beyond a reasonable doubt:

- (1) That on or about the 23<sup>rd</sup> day of September, 2007, the defendant entered or remained unlawfully in a dwelling;
- (2) That the entering or remaining was with intent to commit a crime against a person or property therein; and
- (3) That the acts occurred in the State of Washington.

CP 15-38, Jury Instruction No. 11.

Defendant disputes the jury's finding that sufficient evidence existed to prove the first and second elements. Defendant's argument fails as to both elements because sufficient evidence did exist to prove that defendant entered Ms. Wohlwend's home and intended to commit a crime therein. Regarding the types of evidence presented, the jury was instructed that:

Evidence may be either direct or circumstantial. Direct evidence is that given by a witness who testifies concerning facts that he or she has directly observed or perceived through the senses. Circumstantial evidence is evidence of facts or circumstances from which the existence or nonexistence of other facts may be reasonably inferred from common experience. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. One is not necessarily more or less valuable than the other.

CP 15-38, Jury Instruction No. 3.

In the present case, there was overwhelming circumstantial evidence to prove the first element that defendant entered the home of Ms.

Wohlwend. Mr. Tabor identified defendant as the individual he saw go back and forth around the house two days in a row. RP 123, 135. Defendant told Mr. Tabor, who had heard glass breaking, that he was breaking windows to the house so that he could get in because his girlfriend forgot to give him the key. RP 127. Defendant told Officer Martin that the gauze on his arm was from broken glass the day before. RP 67. When Officer Martin investigated the burglary he found that the broken windows could have been slid open allowing defendant to enter the home. RP 76.

A person does not break multiple windows to get into a house they claim to have permission to enter. The logical inference is that defendant broke the windows in a frantic state because he did not have permission or means to enter Ms. Wohlwend's home lawfully. Furthermore, the jury could infer that defendant had entered the home through the windows and was transporting the various items from the house to his car when Mr. Tabor witnessed defendant go back and forth from the home. Ms. Wohlwend's property was later found in defendant's possession. RP 67-68, 98-99. Given this overwhelming evidence, and the jury instruction that circumstantial and direct evidence are weighed equally, a jury could find that defendant entered the home of Ms. Wohlwend.

As to the second element, the State also presented sufficient evidence to prove defendant intended to commit a crime once inside the home. Defendant had previously stayed with Ms. Wohlwend, but at the time of the burglary had no permission to enter her home. RP 101, 127. Nevertheless, he returned, breaking windows to get in. RP 101, 127. Defendant was speeding and arrested for reckless driving three to four miles away from the house the same day as the burglary occurred. RP 61-66, 74. Upon a search of the vehicle, Officer Martin found a DVD player and DVD's which were later identified by Ms. Wohlwend as the items stolen from her house. RP 67-68, 98-99.

The logical inference from this evidence is that, defendant was in the home of Ms. Wohlwend, saw her DVD player and DVD's and developed the requisite intent that he was going to steal the items from the home. He broke the windows in an effort to quickly and easily remove the items when Ms. Wohlwend was not home. He further was caught speeding when he was in possession of the missing items because he knew he had committed a crime and was trying to get away from the scene. This, combined with all the evidence used to prove the first element, provide sufficient evidence to prove that defendant intended to commit a crime upon entering or remaining in Ms. Wohlwend's home. As such,

there can be no dispute that sufficient evidence existed to find defendant entered and remained in the home of Ms. Wohlwend intending to commit a crime.

2. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY THAT IT COULD INFER AN INTENT TO COMMIT A CRIME INSIDE THE HOUSE WHEN SUFFICIENT EVIDENCE EXISTED TO PROVE DEFENDANT HAD ENTERED THE HOUSE.

A trial court's jury instructions are reviewed under the abuse of discretion standard. A trial court does not abuse its discretion in instructing the jury, if the instructions: (1) permit each party to argue its theory of the case; (2) are not misleading; and, (3) when read as a whole, properly inform the trier of fact of the applicable law. *State v. Fernandez-Medina*, 94 Wn. App. 263, 266, 971 P.2d 521, review granted, 137 Wn.2d 1032, 980 P.2d 1285 (1999), citing *Herring v. Department of Social and Health Servs.*, 81 Wn. App. 1, 22-23, 914 P.2d 67 (1996). A criminal defendant is entitled to jury instructions that accurately state the law, permit him to argue his theory of the case, and are supported by the evidence. *State v. Staley*, 123 Wn.2d 794, 803, 872 P.2d 502 (1994).

CrR 6.15 requires a party objecting to the giving or refusal of an instruction to state the reason for the objection. The purpose of this rule is to afford the trial court an opportunity to correct any error. *State v. Colwash*, 88 Wn.2d 468, 470, 564 P.2d 781 (1977). Consequently, it is

the duty of trial counsel to alert the court to his position and obtain a ruling before the matter will be considered on appeal. *State v. Rahier*, 37 Wn. App. 571, 575, 681 P.2d 1299 (1984), citing *State v. Jackson*, 70 Wn.2d 498, 424 P.2d 313 (1967). Only those exceptions to instructions that are sufficiently particular to call the court's attention to the claimed error will be considered on appeal. *State v. Harris*, 62 Wn.2d 858, 872-3, 385 P.2d 18 (1963).

In the present case, defendant contends the trial court's decision to include the following instruction in the jury instruction packet was error:

A person who enters or remains unlawfully in a building may be inferred to have acted with intent to commit a crime against a person or property therein. This inference is not binding upon you and it is for you to determine what weight, if any, such inference is to be given.

WPIC 60.05; CP 15-38, Jury Instruction No. 6.

In order to give this instruction, there must be evidence that the defendant entered or remained lawfully in a building. *State v. Jackson*, 112 Wn.2d 867, 876, 774 P.2d 1211 (1989).

In the present case, defendant failed to object to this instruction at trial, and the issue is therefore waived on appeal. RP 141.

The court should also note that defendant's reliance upon *State v. Jackson*, 112 Wn.2d 867, 774 P.2d 1211 (1989), is misplaced. *Jackson* involved a defendant who repeatedly kicked and damaged a door and was charged and convicted of *attempted* burglary. *Jackson*, 112 Wn.2d at 869.

Defendant fails to mention this in his brief, and the fact that in *Jackson* there was no evidence to suggest defendant ever entered or remained in the building. *Jackson*, 112 Wn.2d at 870. The court there held that “WPIC 60.05 may be given as a proper instruction in a burglary case. However, where the State pleads and proves only attempted burglary, as here, the instruction is improper.” *Jackson*, 112 Wn.2d at 876. Because the present case concerns a burglary charge by the State with sufficient evidence that defendant entered the house, the instruction was proper and defendant’s comparison to *Jackson* is wrong.

Likewise, defendant’s reliance upon *State v. Berglund*, 65 Wn. App. 648, 829 P.2d 247 (1992), is also misplaced. In *Berglund*, the court questioned whether fingerprints on the interior of a window were sufficient evidence to conclude that the defendant had entered the building. The court concluded that such evidence was sufficient that the defendant entered the building and therefore, the instruction permitting an inference of intent was proper. Nowhere in the case does it state that it is specifically fingerprint evidence that must be proven in order to constitute sufficient evidence for entry into the building. Rather, this case just concludes that the fingerprint evidence was sufficient to show the defendant entered the building in this case. Therefore, as long as sufficient evidence exists that defendant entered the building, regardless of the specific type of evidence, the instruction permitting inference of intent is proper, as was the case here.

D. CONCLUSION.

For the foregoing reasons, the State respectfully requests this Court to affirm defendant's convictions.

DATED: March 9, 2009.

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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.

3.9.09  
Date Signature 