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DIVISION II

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STATE OF WASHINGTON

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COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

**Bradley Johnson,**

Appellant.

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Grays Harbor County Superior Court Cause No. 08-1-00381-0

The Honorable Judge F. Mark McCaulay

**Appellant's Reply Brief**

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## ARGUMENT

### **I. THE EVIDENCE WAS INSUFFICIENT TO PROVE MR. JOHNSON BURGLARIZED A BUILDING, BECAUSE A TRAIN LOCOMOTIVE IS NOT A BUILDING.**

Due process requires proof beyond a reasonable doubt of every element of an offense. U.S. Const. Amend. XIV; *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). A conviction based on insufficient evidence must be reversed and the case dismissed with prejudice. *Smalis v. Pennsylvania*, 476 U.S. 140, 144, 106 S. Ct. 1745, 90 L. Ed. 2d 116 (1986).

Second-degree burglary requires proof (*inter alia*) that the accused person entered or remained in a “building.” RCW 9A.52.030(1). The word building is defined to include any “railway car.” RCW 9A.04.110(5). The ordinary meaning of “railway car” is “a wheeled vehicle adapted to the rails of railroad...” *Dictionary.com* (based on the *Random House Unabridged Dictionary*, Random House, Inc. 2009).

The phrase “railway car” should be interpreted to mean those cars pulled or pushed by a locomotive, but not the locomotive itself. This interpretation is required by the context and by the rule of lenity, as outlined in the Opening Brief. Appellant’s Opening Brief, at pp. 7-8,

citing RCW 9A.04.110(5) and *State v. Gonzales Flores*, 164 Wn.2d 1, 186 P.3d 1038 (2008).

Respondent apparently misunderstands Mr. Johnson's argument about understanding the phrase "railway car" in context. *See* Appellant's Opening Brief, pp 5-9. Mr. Johnson does not argue that the phrase "used for lodging of persons... etc." modifies the phrase "railway car." Brief of Respondent, pp. 4-5 ("Contrary to the assertion of the defendant..."). Instead, Mr. Johnson asks the court to interpret "railway car" in "the context of the statute in which that provision is found..." *In re Detention of Strand*, 167 Wn.2d 180, 188, 217 P.3d 1159 (2009). The court should not ignore the rest of the provision when interpreting the phrase "railway car."

*State v. Petit*, cited by Respondent, supports this interpretation of "railway car." Brief of Respondent, p. 5, citing *State v. Petit*, 32 Wash. 129, 72 P. 1020 (1903). In *Petit*, the Supreme Court held that flat cars are excluded from the definition of "railroad car" (the phrase used in a predecessor statute). *Petit*, at 130 ("These cars, it seems to us, do not come within the definition given by the statute, which evidently had relation to box cars, or some kind of a car that is enclosed so that an entry can be made.") One lesson of *Petit* is that the phrase "railroad car" is not as easy to interpret as it might at first seem, since a flat car (which would

fit within the ordinary, lay meaning of “railroad car”) does not qualify as a railroad car in the legal sense of the phrase, under the predecessor statute at issue in *Id.*, *supra*.

None of the other authorities cited by Respondent address the question raised by this case: whether a locomotive qualifies as a “railway car.” See Brief of Respondent, p. 5. Accordingly, they are inapposite, and do not control. At best, they stand for the proposition that a theoretical locomotive lacking enclosed space would not qualify as a “railway car;” they do not establish that a locomotive such as the one here qualifies as a “railway car.”

A locomotive is not a “railway car.” Because Mr. Johnson was alleged to have burglarized a locomotive, the evidence was insufficient to prove a burglary. His conviction must be reversed and the evidence dismissed with prejudice. *Smalis, supra*.

**II. THE TRIAL JUDGE ERRONEOUSLY ADMITTED IRRELEVANT AND PREJUDICIAL EVIDENCE.**

Irrelevant evidence is inadmissible. ER 402. Furthermore, relevant evidence “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice...” ER 403. Finally, “[e]vidence of other... acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however,

be admissible for other purposes...” ER 404(b). Admission under ER 404(b) requires the trial court to analyze the evidence on the record. *State v. Asaeli*, 150 Wn.App. 543, 576, 208 P.3d 1136 (2009). Borderline cases are resolved in favor of the accused. *State v. Trickler*, 106 Wn.App. 727, 733, 25 P.3d 445 (2001).

The trial judge abused his discretion by admitting evidence relating to Mr. Johnson’s prior sales of copper wire. First, the judge did not conduct a complete analysis on the record, and did not adopt a complete analysis supplied in one of the parties’ arguments. RP 63-65. Respondent apparently concedes that the trial court did not properly analyze the factors. Brief of Respondent, pp. 6-9. *See, e.g., In re Pullman*, 167 Wn.2d 205, 212 n.4, 218 P.3d 913 (2009) (Failure to argue an issue equates to an apparent concession). The court erred by admitting the evidence without analyzing the required factors (or adopting one party’s analysis of the required factors). *Asaeli*, at 576.

Second, the evidence was highly prejudicial, and should have been excluded under ER 403 and ER 404(b). The evidence suggested that Mr. Johnson was involved in other copper wire thefts, and invited conviction based on his criminal propensity. This violated his right to due process

under the Fourteenth Amendment.<sup>1</sup> U.S. Const. Amend. XIV; *Garceau v. Woodford*, 275 F.3d 769, 775 (9th Cir. 2001), *reversed on other grounds* at 538 U.S. 202, 123 S. Ct. 1398, 155 L. Ed. 2d 363 (2003).

The error was not harmless. Respondent contends that the outcome of the trial would have been the same, even if the evidence had been excluded. Brief of Respondent, pp. 9-10. This is incorrect; jurors could have had a reasonable doubt that Mr. Johnson actually entered the locomotive, or that he intended to commit a crime within. Mr. Johnson was first observed on the catwalk on the exterior of the locomotive, and the backpack, bag, and tools were not on his person when he was arrested. RP 36, 38-41, 50.

The evidence should have been excluded. It was irrelevant, prejudicial, and inadmissible under ER 402, ER 403, and ER 404(b). There is a reasonable probability that the error materially affected the outcome of the trial. *Asaeli*, at 579. Accordingly, Mr. Johnson's conviction must be reversed, and the case remanded to the superior court for a new trial. *Id.*

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<sup>1</sup> The U.S. Supreme Court has reserved ruling on this issue. *Estelle v. McGuire*, 02 U.S. 62, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991).

**CONCLUSION**

For the foregoing reasons, Mr. Johnson's conviction must be reversed and the case dismissed with prejudice. In the alternative, the case must be remanded to the superior court for a new trial.

Respectfully submitted on February 25, 2010.

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CERTIFICATE OF MAILING

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

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and to:

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All postage prepaid, on February 25, 2010.

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 February 25, 2010.

  
\_\_\_\_\_  
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