

NO. 44133-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

KENNETH BERGMAN,

Appellant.

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

The Honorable Beverly Grant, Judge

BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENTS OF ERROR</u>	1
<u>Issues Related to Assignments of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
C. <u>ARGUMENT</u>	5
BERGMAN’S CONVICTION SHOULD BE VACATED BECAUSE THE STATE FAILED TO PROVE ENTRY INTO A “BUILDING” OR “FENCED AREA.”	5
D. <u>CONCLUSION</u>	12

TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>In re Detention of Heidari</u> 174 Wn.2d 288, 274 P.3d 366 (2012)	12
<u>State v. Deitchler</u> 75 Wn. App. 134, 876 P.2d 970 (1994) <u>review denied</u> , 125 Wn.2d 1015 (1995)	10
<u>State v. Engel</u> 166 Wn.2d 572, 210 P.3d 1007 (2009)	5- 9, 11, 12
<u>State v. Garcia</u> __ Wn.2d __, 318 P.3d 266 (2014)	11
<u>State v. Gore</u> 101 Wn.2d 481, 681 P.2d 227 (1984)	11
<u>State v. Green</u> 94 Wn.2d 216, 616 P.2d 628 (1980)	5
<u>State v. Jacobs</u> 154 Wn.2d 596, 115 P.3d 281 (2005)	11
<u>State v. Johnson</u> 132 Wn. App. 400, 132 P.3d 737 (2006) <u>review denied</u> , 159 Wn.2d 1006 (2007)	9, 10
<u>State v. Johnson,</u> 159 Wn. App. 766, 247 P.3d 11 (2011)	10
<u>State v. Miller</u> 91 Wn. App. 869, 960 P.2d 464 (1998) <u>review denied</u> , 137 Wn.2d 1012 (1999)	10
<u>State v. Roadhs</u> 71 Wn.2d 705, 430 P.2d 586 (1967)	8

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>State v. Roggenkamp</u> 153 Wn.2d 614, 106 P.3d 196 (2005).....	9
<u>State v. Wentz</u> 149 Wn.2d 342, 68 P.3d 282 (2003).....	5, 7, 8, 9, 11
 <u>FEDERAL CASES</u>	
<u>Anders v. California</u> 386 U.S. 738, 18 L. Ed. 2d 493, 87 S. Ct. 1396 (1967).....	6
<u>Bouie v. Columbia</u> 378 U.S. 347, 84 S. Ct. 1697, 12 L. Ed. 2d 894 (1964).....	11
<u>In re Winship</u> 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).....	5
 <u>RULES, STATUTES AND OTHER AUTHORITIES</u>	
Laws of 1975, 1st Ex.Sess., ch. 260	8
RCW 9A.04.110(5).....	1, 6, 7, 9
RCW 9A.52.030	2, 5
U.S. Const. amend. XIV	5, 11
Wash. Const. art. I, § 3	5, 11
Wash. Const. art. I, § 10	11
Webster's Thrid New Int'l Dictionary (1969)	10

A. ASSIGNMENTS OF ERROR

1. The evidence is insufficient to support appellant's conviction for second degree burglary.

2. The trial court erred in entering judgment finding appellant guilty for second degree burglary. CP 101-03.

Issues Related to Assignments of Error

The evidence showed that the area of a Tacoma metal yard was partially but not completely surrounded by a fence. Undisputed testimony showed that people could enter the yard by walking right in.

The state nonetheless theorized the metal yard was either (1) a "fenced area," or (2) a "structure used for . . . carrying on business therein, or for the use, sale, or deposit of goods," and therefore constituted a "building" as defined in RCW 9A.04.110(5).

1. Where the supreme court has held that an area is not a "fenced area" under RCW 9A.04.110(5) unless it is fully enclosed, did the state fail to prove this necessary element of burglary?

2. Did the state also fail to prove the unenclosed area was a "structure" as contemplated by RCW 9A.04.110(5)?

B. STATEMENT OF THE CASE

On July 5, 2013, the Pierce County prosecutor charged appellant Kenneth Bergman with second degree burglary and second

degree theft. CP 1-2; RCW 9A.52.030(1). The jury found Bergman guilty of burglary but not guilty of theft. CP 76-77.

The state's theory at trial was that Michael Hall and Bergman tried to steal metal from the metal yard at Tacoma Metals, in the tideflats area. 2RP 31-40, 56-62. About 220 pounds of metal had been loaded into three buckets. Ex. 11-13, 18-21; 1RP¹ 130-32, 138-39. Yard superintendent Andrew Matthaei watched on security camera video while two men moved the buckets on a cart. He did not see the men load the buckets. Ex. 7, 9, 15; 1RP 118-21, 125-27, 133-34. Matthaei called 911. Ex. 1A; 1RP 70-84, 118-19.

Much of the metal yard was fenced and otherwise blocked by "roll-off boxes," but there was a substantial gap in the fence around the yard. 1RP 112-13, 122-25, 127, 137-38, 140-41, 153, 161-62; 2RP 8-11; Ex. 10-11.² Matthaei said he had posted five or six "no trespassing" signs on the property. 1RP 128. Nonetheless, Matthaei admitted a person could get onto the property by "walk[ing] right off

¹ This brief references the two transcripts as: 1RP - October 11-26, 2012 reported by Syndie Hagardt; 2RP – October 18, 2012, reported by Carla Higgins.

² The state offered the security videotape and several photographic exhibits, but none contradicted the undisputed testimony that the fence did not enclose the yard. Ex. 7-15.

the sidewalk. You can walk right in.” RP 125. In the recorded 911 call, Matthaei said the two men were “outside the building, behind these roll-off boxes.” Ex.1A, about 1:30-1:50.

Port of Tacoma Patrol Officer Martin Kapsch confirmed the buckets were in “an open area” and that he was able to walk to the buckets without going over or entering any fencing. 1RP 162. The state also theorized that several large “roll-off boxes” or dumpster-like boxes partially blocked access to the yard, 1RP 122-25, but Officer Barbara Salinas confirmed she did not have to climb any barriers or go through any fencing to get past the boxes. 2RP 8.

The defense offered testimony from Michael Hall. He admitted he loaded the buckets. He confirmed the buckets were in an open area with no fence blocking access to the yard. 2RP 14. Hall also said he had loaded the buckets the night before, and he had led Bergman to believe the metal belonged to Hall. 2RP 14-19.

The jury was instructed that a person commits second degree burglary when he “enters or remains unlawfully in a building with intent to commit a crime against a person or property therein.” CP 54. The jury was instructed that “[b]uilding, in addition to its ordinary meaning, includes any fenced area. Building also includes any other

structure used mainly for carrying on business therein or for the use, sale, or deposit of goods.” CP 55.³

In closing, the prosecutor argued the metal yard either was a “fenced area,” or a “structure used mainly for carrying on business therein.” 2RP 37, 57-58. Defense counsel countered that “fenced area” does not mean “barricaded area,” and that the evidence showed the metal yard was not completely fenced and that a person could walk into the yard from the sidewalk. 2RP 45. Counsel further argued there was no evidence that anyone entered any other “structure” or “building” in the metal yard. 2RP 46.

The jury found Bergman guilty of burglary but not of theft. CP 76-77. The trial court sentenced him to a Drug Offender Sentencing Alternative (DOSA) term of 29.75 months in prison and 29.75 months on community custody. CP 108. This appeal timely follows. CP 87.

³ The state proposed the instruction. Compare CP 33 with CP 64-69.

C. ARGUMENT

BERGMAN'S CONVICTION SHOULD BE VACATED BECAUSE THE STATE FAILED TO PROVE ENTRY INTO A "BUILDING" OR "FENCED AREA."

The state and federal constitutional right to due process requires the state to prove all elements of a charged offense beyond a reasonable doubt. U.S. Const. amend. 14; Const. art. 1, § 3; In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). A conviction should be reversed where no rational trier of fact, viewing the evidence in a light most favorable to the state, could find all elements of the charged crime proven beyond a reasonable doubt. State v. Engel, 166 Wn.2d 572, 576, 580, 210 P.3d 1007 (2009). A court will use ordinary rules of statutory construction to determine the necessary elements of a statutory offense. Id. at 578-79; State v. Wentz, 149 Wn.2d 342, 347-51, 68 P.3d 282 (2003).

To support a second degree burglary conviction, the state had to prove Bergman unlawfully entered a "building." RCW 9A.52.030(1); CP 58.

(5) "Building," in addition to its ordinary meaning, includes any dwelling, fenced area, vehicle, railway car, cargo container, or any other structure used for lodging of persons or for carrying on business therein, or for the use, sale, or deposit of goods; each unit of a building

consisting of two or more units separately secured or occupied is a separate building[.]

RCW 9A.04.110(5). As Bergman previously argued in his pro se statement of additional grounds,⁴ the metal and buckets were not in a “fenced area” and the state therefore failed to prove entry into a “building.”

Engel is on point. Engel was convicted of second degree burglary for stealing wheels from the business premises of Western Asphalt. The property was protected partially by a fence and partially by steep slopes. The front gate was locked when the theft occurred. Engel, 166 Wn.2d at 574-75.

On appeal, Engel argued the evidence was insufficient to show he entered a building or fenced area because “the ordinary meaning of ‘fenced area’ is an area totally enclosed by a fence[.]” Engel, at 578.

⁴ Bergman’s initial appointed appellate counsel filed a brief and motion to withdraw pursuant to Anders v. California, 386 U.S. 738, 18 L. Ed. 2d 493, 87 S. Ct. 1396 (1967). This Court directed additional briefing after newly-appointed counsel moved to modify a Commissioner’s ruling that did not fully and fairly address Bergman’s claim.

The state, on the other hand, argued “the common understanding of fenced area includes an area partially enclosed by a fence, where topography and other barriers combine with the fence to close off the area to the public.” Id.

The supreme court rejected the state’s position and held that a partially fenced area does not meet the definition of “building” in RCW 9A.04.110(5). Id. at 580. This holding logically followed the supreme court’s prior decision in Wentz. See 149 Wn.2d at 352 (backyard completely surrounded by a 6-foot high fence with locked gates is a “fenced area”), at 357 (Madsen, J., concurring) (fence “must enclose or contain an area”). The Engel court reasoned the Legislature intended to limit the crime of burglary to those situations where a person unlawfully enters the curtilage of an enclosed area. Engel, 166 Wn.2d at 580.

The curtilage is an area that is completely enclosed either by fencing alone or, as was the case in Wentz, a combination of fencing and other structures. This result is consistent with the common law and avoids absurd results.

Id. at 580 (emphasis added).

When applied here, Engel and Wentz lead to one conclusion. Matthaei, Kapsch, Salinas, and Hall each made it clear that the fence did not enclose the metal yard – instead, people could walk right in.

Under Engel and Wentz, the lack of complete enclosure is fatal to the state's case.

In response, the state may suggest the metal yard was a "structure . . . used for carrying on business." This appears to have been the state's fallback theory in closing argument. 2RP 37, 57-58.

But the theory is meritless. Before 1975, the question whether a fenced area was a "structure" that could be burglarized depended on the "main purpose" for the fence.

[W]here the fence is of such a nature that it is erected mainly for the purpose of protecting property within its confines and is, in fact, an integral part of a closed compound, its function becomes analogous to that of a "building" and the fence itself constitutes a "structure" subject to being burglarized.

Wentz, 149 Wn.2d at 349 (quoting State v. Roadhs, 71 Wn.2d 705, 708-09, 430 P.2d 586 (1967)). In a 1975 amendment, however, the legislature expressly included "fenced area" within the definition of a "building." Wentz, at 349 (citing Laws of 1975, 1st Ex.Sess., ch. 260). As the supreme court then made clear in Wentz, the Roadhs "main purpose" test is a relic from the prior statute and no longer applies. Wentz, 149 Wn.2d at 350. The question has instead been conclusively answered by Engel and Wentz.

Although “structure” is not separately defined, it must be read in context with the other types of structures listed in the statute, *i.e.* “dwelling, fenced area, vehicle, railway car, cargo container[.]” Engel, 166 Wn.2d at 577 n.4 (under the maxim “noscitur a sociis” “[t]he meaning of words may be indicated or controlled by those with which they are associated. State v. Roggenkamp, 153 Wn.2d 614, 623, 106 P.3d 196 (2005)”). Like a “fenced area,” each of the other types of listed structures – dwelling, vehicle, railway car, and cargo container – are enclosed. The state’s failure to prove an enclosed “fenced area” does not expand the meaning of the other listed structures. Mobile “roll-off” boxes are not “structures” under any plain reading of the statute, and these did not completely block access to the yard. Although Tacoma Metals may have coupled a partial fence with “roll-off” boxes in an effort to block access, the area was not enclosed and therefore not a “structure” under RCW 9A.04.110(5), as construed in Engel and Wentz.

There is a narrow potential exception to the enclosure requirement. In State v. Johnson, 132 Wn. App. 400, 132 P.3d 737 (2006), review denied, 159 Wn.2d 1006 (2007), the court addressed whether a permanently constructed three-walled garage, with a roof, was a “building” even though it lacked a door. Citing the ordinary

definition of “building,”⁵ the court emphasized the “garage is permanent and immobile, covers a space of land, is roofed, and serves as a storehouse or other useful structure.” Johnson, 132 Wn.2d at 408.

But, in contrast to Johnson, this case involves an incomplete fence and mobile “roll-off” boxes. It does not involve a permanent, roofed, three-walled garage without a door. Whatever else might be said about Johnson’s narrow exception, it does not apply here.⁶

⁵ A constructed edifice designed to stand more or less permanently, covering a space of land, usu. 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.

Johnson, 132 Wn. App. at 408 (quoting WEBSTER’S THIRD NEW INT’L DICTIONARY 292 (1969)).

⁶ See also, State v. Johnson, 159 Wn. App. 766, 772, 247 P.3d 11 (2011) (locomotive is a “railway car”; it also is a common law “building” because it “was fully enclosed with outside doors that allowed access to an interior area that could accommodate a human being.”); State v. Miller, 91 Wn. App. 869, 872-73, 960 P.2d 464 (1998) (enclosed and padlocked storage locker in common area of apartment building was a “building”), review denied, 137 Wn.2d 1012 (1999); State v. Deitchler, 75 Wn. App. 134, 138 n.5 & n.6, 876 P.2d 970 (1994) (police evidence locker was not a separate “building”), review denied, 125 Wn.2d 1015 (1995).

Nor can the exception be broadened, because criminal statutes are strictly construed. State v. Garcia, ___ Wn.2d ___, 318 P.3d 266, 272 (2014). Assuming arguendo the statute could be ambiguous, the rule of lenity still requires that it be construed against the state. State v. Jacobs, 154 Wn.2d 596, 601, 115 P.3d 281 (2005).

Engel and Wentz have already determined that an area is not a “fenced area” unless it is enclosed. Even if a future court might be willing to entertain a more state-friendly construction of the statute, that new construction cannot apply retroactively to Bergman’s case.⁷

In light of Engel and Wentz, the state will likely concede there was no evidence that the area in question was a “dwelling,” “fenced area,” “vehicle,” “railway car,” or “cargo container.” Nor can an insufficiently enclosed outdoor fence transform itself into a “structure . . . used for carrying on business.” Under Engel and Wentz, if a fence

⁷ Due Process requires fair notice of prohibited conduct before punishment may be imposed for failing to comply. U.S. Const. amend. 14; Const. art. 1, § 3; Bouie v. Columbia, 378 U.S. 347, 350-51, 84 S. Ct. 1697, 12 L. Ed. 2d 894 (1964); State v. Gore, 101 Wn.2d 481, 489, 681 P.2d 227 (1984). The Due Process clauses also prevent courts from interpreting statutes in a fashion that would retroactively increase punishment. “An unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law, such as Art. I, § 10, of the Constitution forbids.” Bouie, 378 U.S. at 353; see also State v. Gore, 101 Wn.2d at 489.

can be a “structure,” it must at least enclose an area before that area falls within the scope of the burglary statute.

The state’s proof simply failed. The evidence is insufficient to support the burglary conviction. Because the jury was not instructed on any lesser included trespass offense,⁸ this Court should vacate the conviction and remand with directions to dismiss the charge with prejudice. Engel, 166 Wn.2d at 581; In re Detention of Heidari, 174 Wn.2d 288, 292-96, 274 P.3d 366 (2012).

D. CONCLUSION

This Court should vacate Bergman’s conviction and remand with directions to dismiss the charge with prejudice.

DATED this 4th day of April, 2014.

Respectfully Submitted,

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⁸ The state did not request an instruction and the court did not instruct the jury on any trespass offense. CP 20-63.

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DIVISION TWO

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Respondent,)

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KENNETH BERGMAN,)

Appellant.)

COA NO. 44133-1-II

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 4TH DAY OF APRIL 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] KENNETH BERGMAN
6622 146TH STREET SW
LAKEWOOD, WA 98439

SIGNED IN SEATTLE WASHINGTON, THIS 4TH DAY OF APRIL 2014.

X *Patrick Mayovsky*

NIELSEN, BROMAN & KOCH, PLLC

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