

No. 48079-4-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

ADAM CHRISTOPHER DIAZ,

Appellant.

On Appeal from the Pierce County Superior Court
Cause No. 15-1-01288-8
The Honorable K.A. Van Doorninck, Judge

OPENING BRIEF OF APPELLANT

STEPHANIE C. CUNNINGHAM
Attorney for Appellant
WSBA No. 26436

4616 25th Avenue NE, No. 552
Seattle, Washington 98105
Phone (206) 526-5001

TABLE OF CONTENTS

I.	ASSIGNMENTS OF ERROR	1
II.	ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR	1
III.	STATEMENT OF THE CASE	1
	A. PROCEDURAL HISTORY.....	1
	B. SUBSTANTIVE FACTS	2
IV.	ARGUMENT & AUTHORITIES	5
	A. THE STATE FAILED TO MEET ITS BURDEN OF PROVING ALL OF THE ESSENTIAL ELEMENTS OF THE CRIME OF FIRST DEGREE CRIMINAL TRESPASS.....	5
	B. ANY FUTURE REQUEST FOR APPELLATE COSTS SHOULD BE DENIED.	7
V.	CONCLUSION	10

TABLE OF AUTHORITIES

CASES

<u>City of Tacoma v. Luvene</u> , 118 Wn.2d 826, 827 P.2d 1374 (1992).....	5
<u>State v. Allen</u> , 101 Wn.2d 355, 678 P.2d 798 (1984).....	6
<u>State v. Finley</u> , 97 Wn. App. 129, 982 P.2d 681 (1999).....	6
<u>State v. Hardesty</u> , 129 Wn.2d 303, 915 P.2d 1080 (1996).....	7
<u>State v. Hickman</u> , 135 Wn.2d 97, 954 P.2d 900 (1998).....	7
<u>State v. Nolan</u> , 141 Wn.2d 620, 8 P.3d 300 (2000)	8
<u>State v. Salinas</u> , 119 Wn.2d 192, 829 P.2d 1068 (1992)	5, 6
<u>State v. Sinclair</u> , 2016 WL 393719 (2016)	7, 9-10

OTHER AUTHORITIES

RAP 14.2	7
RAP 15.2	9
RCW 9A.08.010.....	6
RCW 9A.52.070.....	6
RCW 10.73.160	7

I. ASSIGNMENTS OF ERROR

1. The State failed to meet its burden of proving all of the essential elements of the crime of first degree criminal trespass.
2. Any future request for appellate costs should be denied.

II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Where the evidence shows that Adam Diaz merely opened unlocked doors, stepped into residents' rooms, looked around, and left, did the State fail to prove beyond a reasonable doubt that he *knowingly* entered or remained unlawfully in the rooms? (Assignment of Error 1)
2. Should this court deny any future request for appellate costs where Adam Diaz does not have the ability to repay the costs, he has previously been found indigent, and there is no evidence of a change in his financial circumstances? (Assignment of Error 2)

III. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The State charged Adam Christopher Diaz with one count of possession of stolen property (RCW 9A.56.140, .150), three counts of first degree criminal trespass (RCW 9A.52.070), one count of

driving with a suspended license (RCW 46.20.342), and one count of failure to install an ignition interlock device (RCW 10.05.140, 46.20.720). (CP 9-13)

The State conceded during closing statements that it had not proved criminal trespass charged in count two. (TRP 229)¹ The jury was unable to reach a verdict on the possession of stolen property charge, but found Diaz guilty of the remaining counts. (TRP 272-73, 277, 278-79; CP 17-22) The trial court imposed a suspended sentence within the standard range, and legal financial obligations. (SRP 8; CP 62-66) This appeal timely follows. (CP 70)

B. SUBSTANTIVE FACTS

The Weatherly Inn is a senior retirement and assisted living facility in Tacoma. (TRP 104-05) On March 31, 2015, caregiver Annie Kimani was in room 353 assisting resident Thelma Gilmur, when she heard the door to the unit open and close. (TRP 86, 87, 89) Kimani assumed it was another caregiver so she shouted “hello,” but no one responded. (TRP 88) A few minutes later, she saw a man walk out of Gilmur’s bathroom and leave the unit. (TRP

¹ The transcripts of trial labeled Volumes 1 thru 6 will be referred to as “TRP.” The transcript of the sentencing hearing will be referred to as “SRP.”

90, 91) Kimani described the man as five feet eight inches tall, and wearing a red jacket. (TRP 91) She called the front desk to report the encounter.² (TRP 91)

That same day, Dennis Gunnarson was visiting his in-laws, who live in room 309. (TRP 96) He heard the door open, and when he turned to look he saw that a young man had walked into the room. (TRP 98-99) The man looked towards the bedroom and did not see Gunnarson. (TRP 99-100) Gunnarson said “May I help you?” (TRP 100) The man, who Gunnarson described as ethnic with dark hair, said he was looking for his grandmother’s apartment. (TRP 100-01) Gunnarson told the man that he was in the wrong room, and the man turned and left.³ (TRP 102)

Weatherly Inn general manager Sunya Grantham was notified that a suspicious man dressed in dark pants and a red sweatshirt had been seen walking into residents’ rooms on the third floor. (TRP 104, 107-08, 119) She saw a man matching that description near the third floor elevators. (TRP 110, 119) Grantham asked the man, Adam Diaz, about the reports and about personal items that had been reported missing. (TRP 111-12)

² This incident formed the basis for the criminal trespass charged in count three.

³ This incident formed the basis for the criminal trespass charged in count four.

Diaz said he did not know anything about the missing items, and told Grantham he was there visiting his grandmother. (TRP 113)

Grantham checked the visitor logbooks for the day, and saw that Diaz had not signed in. (TRP 113-15) So Grantham told Diaz that he was trespassing and that he was not welcome on the property. (TRP 117) According to Grantham, Diaz stormed out of the building and yelled profanities as he walked through the parking lot. (TRP 118)

Responding officers encountered Diaz as he was driving out of the parking lot. (TRP 66-67) They contacted Diaz, who told them he had been looking for his grandmother. (TRP 68-69, 71) Diaz was wearing a red jacket and dark pants. (TRP 73, 126) Gunnarson was shown Diaz's driver's license, and identified Diaz as the man who entered room 309. (TRP 101) During a search incident to arrest, the officer found a lady's wristwatch, which a Weatherly Inn resident had previously reported stolen, in Diaz's pocket. (TRP 76, 135, 153-54, 161, 168)

Diaz has several driving infractions and is classified as a habitual traffic offender. (TRP 175, 177) As a result, his driver's license was in suspended status on March 31, 2015. (TRP 179) Diaz is also required to have an ignition interlock device installed in

his vehicle. (TRP 179) But there was no interlock device on the ignition of Diaz's car on March 31, 2015. (TRP 75, 209)

Diaz's grandmother, Jenny Black, was a resident of the Weatherly Inn in March of 2015. (TRP 200) Diaz visited Black several times that month, and she asked him to come over and move furniture for her on March 31st. (TRP 200-02) Black had asked Diaz to run some errands for her after he finished moving the furniture. (TRP 202) Black's room number is posted outside of her door, but her name is not. (TRP 201)

IV. ARGUMENT & AUTHORITIES

- A. THE STATE FAILED TO MEET ITS BURDEN OF PROVING ALL OF THE ESSENTIAL ELEMENTS OF THE CRIME OF FIRST DEGREE CRIMINAL TRESPASS.

“Due process requires that the State provide sufficient evidence to prove each element of its criminal case beyond a reasonable doubt.” City of Tacoma v. Luvone, 118 Wn.2d 826, 849, 827 P.2d 1374 (1992) (citing In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)). Evidence is sufficient to support a conviction only if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). “A claim of

insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." Salinas, 119 Wn.2d at 201.

In order to convict Diaz for first degree criminal trespass, the State must prove "he knowingly enter[ed] or remain[ed] unlawfully in a building." RCW 9A.52.070(1); see also State v. Finley, 97 Wn. App. 129, 136, 982 P.2d 681 (1999). And "knowingly" is defined as actually being aware of facts or possessing "information which would lead a reasonable man in the same situation to believe that facts exist[.]" RCW 9A.08.010(1)(b)(ii). Criminal trespass includes a specific mental state: a knowing unlawful entry into or remaining in a building. State v. Allen, 101 Wn.2d 355, 361, 678 P.2d 798 (1984).

The State's evidence in this case did not prove that Diaz entered the various rooms knowing his entry was unlawful. Diaz's grandmother, whom he had been invited to visit, lived on the same floor in an unmarked room. (TRP 200-01) Diaz told everyone he encountered that he was looking for his grandmother. (TRP 71, 199, 113) He did not remain in any rooms after encountering other residents and after it became clear his grandmother was not there. (TRP 90, 102) Diaz simply opened unlocked doors, stepped into

the rooms, looked around, and left. (TRP 86, 90, 100, 102, 106)
This does not prove beyond a reasonable doubt that Diaz knew when he entered each room that his entry was unlawful.

The reviewing court should reverse a conviction and dismiss the prosecution for insufficient evidence where no rational trier of fact could find that all elements of the crime were proven beyond a reasonable doubt. State v. Hardesty, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996); State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998). Accordingly, this Court should reverse and dismiss Diaz's trespassing convictions.

B. ANY FUTURE REQUEST FOR APPELLATE COSTS SHOULD BE DENIED.⁴

Under RCW 10.73.160 and RAP Title 14, this Court may order a criminal defendant to pay the costs of an unsuccessful appeal. RAP 14.2 provides, in relevant part:

A commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, unless the appellate court directs otherwise in its decision terminating review.

⁴ Recently, in State v. Sinclair, 2016 WL 393719, at *5 (2016) Division one concluded "that it is appropriate for this court to consider the issue of appellate costs in a criminal case during the course of appellate review when the issue is raised in an appellant's brief." Diaz is including an argument regarding appellate costs in his opening brief in the event that this Court agrees with Division 1's interpretation of RAP 14.2.

But imposition of costs is not automatic even if a party establishes that they were the “substantially prevailing party” on review. State v. Nolan, 141 Wn.2d 620, 628, 8 P.3d 300 (2000). In Nolan, our highest Court made it clear that the imposition of costs on appeal is “a matter of discretion for the appellate court,” which may “decline to order costs at all,” even if there is a “substantially prevailing party.” Nolan, 141 Wn.2d at 628.

In fact, the Nolan Court specifically rejected the idea that imposition of costs should occur in every case, regardless of whether the proponent meets the requirements of being the “substantially prevailing party” on review. 141 Wn.2d at 628. Rather, the authority to award costs of appeal “is permissive,” the Court held, so that it is up to the appellate court to decide, in an exercise of its discretion, whether to impose costs even when the party seeking costs establishes that they are the “substantially prevailing party” on review. Nolan, 141 Wn.2d at 628.

Should the State substantially prevail in Diaz’s case, this Court should exercise its discretion and decline to award any appellate costs that the State may request. First, Diaz owns no property, has no assets, and he owes at least \$2,200 in previously ordered court fines. (CP 64-65, 76-78) There was no evidence

below, and no evidence on appeal, that Diaz has or will have the ability to repay additional appellate costs.

Furthermore, the trial court found that Diaz is indigent and entitled to appellate review at public expense. (CP 71-72) This Court should therefore presume that he remains indigent because the Rules of Appellate Procedure establish a presumption of continued indigency throughout review:

A party and counsel for the party who has been granted an order of indigency must bring to the attention of the trial court any significant improvement during review in the financial condition of the party. The appellate court will give a party the benefits of an order of indigency throughout the review unless the trial court finds the party's financial condition has improved to the extent that the party is no longer indigent.

RAP 15.2(f).

In State v. Sinclair, 2016 WL 393719, at *7 (2016), Division 1 declined to impose appellate costs on a defendant who had previously been found indigent, noting:

The procedure for obtaining an order of indigency is set forth in RAP Title 15, and the determination is entrusted to the trial court judge, whose finding of indigency we will respect unless we are shown good cause not to do so. Here, the trial court made findings that support the order of indigency.... We have before us no trial court order finding that Sinclair's financial condition has improved or is likely to improve. ... We therefore presume Sinclair

remains indigent.

Similarly, there has been no evidence presented to this court, and no finding by the trial court, that Diaz's financial situation has improved or is likely to improve. Diaz is presumably still indigent, and this Court should decline to impose any appellate costs that the State may request.

V. CONCLUSION

The State failed to prove that Diaz knowingly entered or remained unlawfully in rooms at the Weatherly Inn, so his trespass convictions must be reversed. This court should also decline any future request to impose appellate costs.

DATED: March 4, 2016



STEPHANIE C. CUNNINGHAM
WSB #26436
Attorney for Adam C. Diaz

CERTIFICATE OF MAILING

I certify that on 03/04/2016, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Adam C. Diaz, #371625, Washington Corrections Center, P.O. Box 900, Shelton, WA 98584.



STEPHANIE C. CUNNINGHAM, WSBA #26436

CUNNINGHAM LAW OFFICE

March 04, 2016 - 12:27 PM

Transmittal Letter

Document Uploaded: 7-480794-Appellant's Brief.pdf

Case Name: State v. Adam C. Diaz

Court of Appeals Case Number: 48079-4

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: _____

Answer/Reply to Motion: _____

Brief: Appellant's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: _____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: S C Cunningham - Email: sccattorney@yahoo.com

A copy of this document has been emailed to the following addresses:

pcpatcecf@co.pierce.wa.us