

FILED

AUG 15 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 29715-2-III

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

STATE OF WASHINGTON,

Respondent,

v.

JOSHUA JOHN GRIFFIN,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. The State did not prove beyond a reasonable doubt the elements of second degree burglary, in violation of constitutional due process.

2. The State did not prove beyond a reasonable doubt the elements of third degree theft, in violation of constitutional due process.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Constitutional due process requires the State to prove beyond a reasonable doubt all elements of a crime. To prove the crime of second degree burglary, the State must prove the defendant entered or remained unlawfully in a building with the intent to commit a crime therein. Did the State prove the elements of second degree burglary where it did not prove beyond a reasonable doubt Joshua Griffin entered the building with the intent to commit a crime?

2. To prove the crime of third degree theft as charged, the State was required to prove beyond a reasonable doubt Mr. Griffin wrongfully obtained or exerted unauthorized control over property of another with the intent to deprive the other person of the property. Did the State prove beyond a reasonable doubt Mr.

Griffin committed third degree theft where the evidence was insufficient to establish these elements?

C. STATEMENT OF THE CASE

Joshua Griffin was charged with one count of second degree burglary, RCW 9A.52.030(1), and one count of third degree theft, RCW 9A.56.050. CP 1-2.

At the jury trial, Daniel Pickett testified he is the foreman for EMCO General Construction Company in Moses Lake. RP 229-30. EMCO is located in an industrial park next to Inland Empire Weatherization Company. RP 231. Mr. Pickett often sleeps overnight at EMCO in a bedroom on the property. RP 229-30.

On August 23, 2010, at around 8:30 p.m., Mr. Pickett was sleeping in the bedroom when his dog woke him by growling. RP 234. The dog was looking out the window. RP 234. Mr. Pickett got up, looked out the window, and saw two people and a pickup truck at Inland Empire. RP 235. He did not recognize the people and thought they were both men. RP 241. It was dusk and no lights were on to illuminate the area. RP 241.

Mr. Pickett testified that one of the people was standing inside the fence that encircled Inland Empire and the other person was standing outside the fence, near the pickup truck. RP 235-40.

Mr. Pickett saw the person inside the fence throw a white bag or bucket over the fence to the other person, who put the item in the back of the truck. RP 235-40. Mr. Pickett then saw the truck drive away. RP 237. There were two people in the truck. RP 252. Mr. Pickett did not see any other item thrown over the fence. RP 240. He did not see anyone climb over the fence or enter a trailer that was inside the fence at Inland Empire. RP 253, 258.

Mr. Pickett called 911. RP 239. Police were dispatched and stopped a pickup truck matching the description provided by Mr. Pickett about one mile away from Inland Empire. RP 65. The driver, Anjannette Million, and the passenger, Mr. Griffin, were both arrested. RP 41-42, 48-49. After receiving Miranda¹ warnings, Mr. Griffin admitted he entered the property at Inland Empire. RP 144. He had cut across the property in order to meet his friend, Ms. Million, who was there to pick him up in her truck. RP 144. He was carrying a white bag of clothing with him as well as another bag and this is what he threw over the fence to Ms. Million. RP 144, 146-47. He did not enter any building on the property and did not intend to steal anything. RP 144. He was cooperative with police and not reluctant to talk to them. RP 143.

¹ Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

The truck was impounded. RP 42. Police executed a search warrant and in the bed of the truck found electrical components, old power boxes, meter boxes, rolls of cable, a bag with painted copper tubing, and aluminum bike rims. RP 82. Also in the truck were three, white, five-gallon buckets containing silverware. RP 123-24. In the back seat of the truck police found clothing on the floor and a white bag next to it. RP 149-50.

John Rickey testified he is the owner of Inland Empire. RP 189. The three buckets containing silverware found in Ms. Million's truck were his. RP 193. He had kept them inside a trailer on the property, which was not locked. RP 193. He had not used the silverware for a number of years. RP 207. Employees of the company had permission to enter the trailer. RP 216. Police did not test either the buckets or the trailer door for fingerprints. RP 152-53.

The jury found Mr. Griffin guilty of second degree burglary and third degree theft as charged. CP 36, 38.

D. ARGUMENT

THE STATE DID NOT PROVE ALL THE ELEMENTS OF SECOND DEGREE BURGLARY OR THIRD DEGREE THEFT, IN VIOLATION OF CONSTITUTIONAL DUE PROCESS

1. Due process requires the State to prove every element of the crime beyond a reasonable doubt. It is a fundamental principle of constitutional due process that the State must prove every element of a charged offense beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 477, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. Const. amend. XIV; Const. art. I, § 3.

In reviewing the sufficiency of the evidence to uphold a conviction, the question is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

2. The State did not prove all the elements of second degree burglary. To prove the charged crime of second degree burglary, the State was required to prove beyond a reasonable

doubt that Mr. Griffin entered the fence encircling the Inland Empire property, or remained unlawfully within the fence, with the intent to commit a crime against a person or property therein. RCW 9A.52.030(1); CP 30. The State's theory was that Mr. Griffin climbed the fence with the intent to steal. RP 290-91.

Mr. Griffin admitted he unlawfully entered the fenced area and therefore committed the crime of criminal trespass.² RP 144, 301-02. But he did not intend to steal anything or commit any other crime. RP 144. He merely cut across the property in order to meet Ms. Million, who was there to pick him up in her truck. RP 144.

The jury was instructed,

A person acts with intent, or intentionally, when acting with the objective or purpose to accomplish a result that constitutes a crime.

CP 31; see also RCW 9A.08.010(1)(a).

Here, the State did not prove Mr. Griffin acted with the objective or purpose to commit a theft. Mr. Pickett, the witness, did not see Mr. Griffin or anyone else enter the trailer where the buckets containing silverware were located. RP 253, 258. Mr. Pickett saw the individual inside the fence throw a white bucket or

² A person commits the crime of criminal trespass in the first degree if he "enters or remains unlawfully in a building." RCW 9A.52.070(1). "Building," in addition to its ordinary meaning, includes any . . . fenced area." RCW

bag over the fence to the other person standing by the truck. RP 235-40. But Mr. Griffin explained he threw a bag of clothing and another bag he had been carrying over the fence to Ms. Million. RP 144, 146-47. Indeed, police found some clothing and a white bag on the floor of the back seat of the truck. RP 149-50. Mr. Griffin told police he did not enter the trailer on the property and did not intend to steal anything. RP 144.

The State presented little evidence to tie Mr. Griffin to the buckets containing silverware. They did not find his fingerprints on the door to the trailer or on the buckets themselves. RP 152-53. The buckets were found in the truck, which belonged to Ms. Million, not Mr. Griffin. RP 41-42, 48-49. The State presented no evidence to show Mr. Griffin knew the buckets were in the truck.

In sum, the State did not present sufficient evidence to show Mr. Griffin entered or remained on the Inland Empire property with the intent to steal. Therefore, the evidence is insufficient to sustain the conviction. Apprendi, 530 U.S. at 477; In re Winship, 397 U.S. at 364.

9A.04.110(5). The jury was instructed on the lesser-included offense of first degree criminal trespass. CP 30-13.

3. The State did not prove all the elements of third degree theft. For the same reasons the State did not prove the elements of burglary, the State also did not prove Mr. Griffin committed the crime of third degree theft.

To prove the crime of third degree theft as charged, the State was required to prove beyond a reasonable doubt that Mr. Griffin "wrongfully obtained or exerted unauthorized control over property of another," and that he "intended to deprive the other person of the property." CP 34; RCW 9A.56.050(1)(a) ("A person is guilty of theft in the third degree if he or she commits theft of property or services which . . . does not exceed seven hundred fifty dollars in value"); RCW 9A.56.020(1)(a) ("Theft" means . . . [t]o wrongfully obtain or exert unauthorized control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services").

The jury was instructed that "wrongfully obtain" means "to take wrongfully the property or services of another." CP 35. The jury was also instructed that "unauthorized control" means "among other things, having another's property in one's possession, custody or control, to secrete, withhold or appropriate the same to

one's own use or to the use of any person other than the true owner or person entitled thereto." CP 35.

The State did not prove Mr. Griffin wrongfully obtained or exerted unauthorized control over the buckets containing silverware with the intent to deprive Mr. Rickey of the property. As stated, Mr. Griffin's fingerprints were not found on the buckets. RP 152-53. He did not throw any bucket over the fence; the items he threw over the fence were one bag of clothing and another bag. RP 144, 146-47. He did not enter the trailer and did not intend to steal anything. RP 144. The State did not prove he even knew the buckets were in the truck.

In sum, the State did not prove the elements of third degree theft beyond a reasonable doubt.

4. The charges must be dismissed. If the reviewing court finds insufficient evidence to prove an element of the crime, reversal is required. State v. Lee, 128 Wn.2d 151, 164, 904 P.2d 1143 (1995). Retrial following reversal for insufficient evidence is "unequivocally prohibited" and dismissal is the remedy. State v. Hardesty, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996) ("The double jeopardy clause of the Fifth Amendment to the U.S. Constitution protects against a second prosecution for the same offense, after

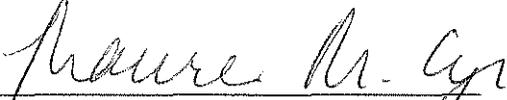
acquittal, conviction, or a reversal for lack of sufficient evidence.")
(citing North Carolina v. Pearce, 395 U.S. 711, 717, 89 S.Ct. 2072,
23 L.Ed.2d 656 (1969), overruled in part on other grounds by
Alabama v. Smith, 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865
(1989)).

Because the State did not prove all of the elements of
second degree burglary or third degree theft, those convictions
must be reversed and dismissed.

E. CONCLUSION

The State did not prove all of the elements of second degree
burglary and third degree theft, requiring reversal of the convictions
and dismissal of the charges.

Respectfully submitted this 12th day of August 2011.


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DIVISION THREE**

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	
v.)	NO. 29715-2-III
)	
JOSHUA GRIFFIN,)	
)	
APPELLANT.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 12TH DAY OF AUGUST, 2011, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] D. ANGUS LEE, DPA GRANT COUNTY PROSECUTOR'S OFFICE PO BOX 37 EPHRATA, WA 98823-0037	(X) () ()	U.S. MAIL HAND DELIVERY _____
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SIGNED IN SEATTLE, WASHINGTON THIS 12TH DAY OF AUGUST, 2011.

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