

FILED  
Apr 30, 2012  
Court of Appeals  
Division III  
State of Washington

No. 30369-1-III

IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

ENRIQUE RETANA GONZALEZ,

Defendant/Appellant.

---

Appellant's Brief

---

DAVID N. GASCH  
WSBA No. 18270  
P.O. Box 30339  
Spokane, WA 99223-3005  
(509) 443-9149  
Attorney for Appellant

**TABLE OF CONTENTS**

A. ASSIGNMENTS OF ERROR.....5

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR.....5

C. STATEMENT OF THE CASE.....5

D. ARGUMENT.....8

1. Mr. Gonzalez’ right to due process under Washington  
Constitution, Article 1, § 3 and United States Constitution,  
Fourteenth Amendment was violated where the State failed to  
prove the essential elements of the crime of second degree  
burglary.....8

2. Mr. Gonzalez’ right to due process under Washington  
Constitution, Article 1, § 3 and United States Constitution,  
Fourteenth Amendment was violated where the State failed to  
prove the essential elements of the crime of driving under the  
influence (DUI).....11

E. CONCLUSION.....13

## TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>In re Winship</i> , 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).....	8
<i>State v. Baeza</i> , 100 Wn.2d 487, 670 P.2d 646 (1983).....	8, 10
<i>State v. Collins</i> , 2 Wn. App. 757, 470 P.2d 227, 228 (1970).....	9
<i>State v. Green</i> , 94 Wn.2d 216, 616 P.2d 628 (1980).....	9
<i>State v. Moore</i> , 7 Wn. App. 1, 499 P.2d 16 (1972).....	8
<i>State v. Myers</i> , 133 Wn.2d 26, 941 P.2d 1102 (1997).....	9
<i>State v. Partin</i> , 88 Wn.2d 899, 567 P.2d 1136 (1977).....	9
<i>State v. Salinas</i> , 119 Wn.2d 192, 829 P.2d 1068 (1992).....	9
<i>State v. Taplin</i> , 9 Wn. App. 545, 513 P.2d 549 (1973).....	9
<i>State v. Theroff</i> , 25 Wn. App. 590, 608 P.2d 1254, aff'd, 95 Wn.2d 385, 622 P.2d 1240 (1980).....	9
<i>State v. Zamora</i> , 63 Wn. App. 220, 817 P.2d 880 (1991).....	10

**Constitutional Provisions**

United States Constitution, Fourteenth Amendment.....8  
Washington Constitution, Article 1, § 3.....8

**Statutes**

RCW 9A.04.110(5).....10  
RCW 9A.52.030(1).....10  
RCW 46.61.502.....12

**Other Sources**

*New Oxford American Dictionary*, Version 2.0.2 (51.4), Copyright  
2005-2007 Apple Inc., last accessed April 27, 2012.....10-11

A. ASSIGNMENTS OF ERROR

1. The evidence was insufficient to support the conviction of second degree burglary.

2. The evidence was insufficient to support the conviction of driving under the influence (DUI)

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Was Mr. Gonzalez' right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment violated where the State failed to prove the essential elements of the crime of second degree burglary?

2. Was Mr. Gonzalez' right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment violated where the State failed to prove the essential elements of the crime of driving under the influence (DUI).

C. STATEMENT OF THE CASE

Deputy Risdon, a Chelan County deputy sheriff, on patrol at 1:10 a.m. pulled into an area of a closed business to investigate the presence of a Ford Explorer whose brake lights he had seen. When the deputy shined his spotlight on the vehicle he saw a man start to get out but then jump back in and close the door. The Explorer then accelerated down the road

for about 100 yards, abruptly slammed on its brakes, and three men jumped out fleeing into the surrounding brush. CP 33-34.

Eventually, sheriff's deputies located the driver, Enrique Retana Gonzalez, and arrested him. The deputies noticed a strong smell of intoxicants and that his eyes were bloodshot. CP 35. One deputy noted Mr. Gonzalez' coordination was fair and his facial color was normal. RP 70. Mr. Gonzalez did not understand English. He refused to take a breath test and no physical tests were conducted. RP 30, 33. He later admitted that he drank two beers earlier that evening, that he had started drinking at 9:00 p.m. that evening and his last drink was about an hour prior to being arrested. RP 70.

The deputies found a boat motor in the back of the Explorer. A boat that was parked in a partially fenced area next to a storage facility where the Explorer was stopped was missing a motor. CP 35. Mr. Gonzalez later told Deputy Rodriguez he and his companions walked into the storage facility area from the non-fenced west side. On the west side of the facility there is a steep hill approximately 75' long which has trees and brush covering it. This was the only area around the entire facility which was not chain-link-fenced and covered with barbed wire on top.

After taking the boat motor Mr. Gonzalez and the others carried it out the same way they walked in—bypassing the fence. Ex. 1, p. 3.

Mr. Gonzalez was convicted, following a trial to stipulated facts, of second degree burglary and DUI. Defense counsel argued there was insufficient evidence to support convictions for either charge. Regarding the burglary charge, the Court found the three-sided fenced area met the definition of a “building” and “fenced area,” although the Court admitted it had not done any research on the subject. RP 67-68. Neither counsel offered any legal authority on this issue one way or the other. RP 62-65.

Regarding the DUI charge, the Court found the driving observed by the deputy was insufficient evidence by itself to convict Mr. Gonzalez of DUI. But his refusal to take the breathalyzer, his admitting drinking two beers, the presence of beer bottles in the car, the odor of intoxicants, his bloodshot eyes, and the fact that he did not know his exact location was sufficient to find him guilty of DUI. RP 69-70.

This appeal followed. CP 51.

D. ARGUMENT

Mr. Gonzalez' right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment was violated where the State failed to prove the essential elements of the crime of second degree burglary.

As a part of the due process rights guaranteed under both the Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment the state must prove every element of a crime charged beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). As the United States Supreme Court explained in *Winship*: “[T]he use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law.” *In re Winship*, 397 U.S. at 364.

Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. *State v. Moore*, 7 Wn. App. 1, 499 P.2d 16 (1972). As a result, any conviction not supported by substantial evidence may be attacked for the first time on appeal as a due process violation. *Id.* “Substantial evidence” in the context of a criminal case,

means evidence sufficient to persuade “an unprejudiced thinking mind of the truth of the fact to which the evidence is directed.” *State v. Taplin*, 9 Wn. App. 545, 513 P.2d 549 (1973) (quoting *State v. Collins*, 2 Wn. App. 757, 759, 470 P.2d 227, 228 (1970)).

In determining the sufficiency of the evidence, the test 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." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (citing *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980)). "When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." *Salinas*, 119 Wn.2d at 201, 829 P.2d 1068 (citing *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977)). "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, 829 P.2d 1068 (citing *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385, 622 P.2d 1240 (1980)).

While circumstantial evidence is no less reliable than direct evidence, *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997),

evidence is insufficient if the inferences drawn from it do not establish the requisite facts beyond a reasonable doubt. *Baeza*, 100 Wn.2d at 491, 670 P.2d 646. Specific criminal intent may be inferred from circumstances as a matter of logical probability." *State v. Zamora*, 63 Wn. App. 220, 223, 817 P.2d 880 (1991).

RCW 9A.52.030(1) provides:

A person is guilty of burglary in the second degree if, with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a *building* other than a vehicle or a dwelling. (emphasis added)

RCW 9A.04.110(5) provides the following definition of "building":

"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; (emphasis added)

The New Oxford American Dictionary defines "fence" used as a noun as "a barrier, railing or other upright structure, typically of wood or wire, *enclosing* as area of ground to mark a boundary, control access, or prevent escape" (emphasis added). The same source defines "fence" used as a verb as "enclose or separate with a fence for protection or to prevent escape: *everything is fenced in to keep out the wolves.*" The same source defines "fenced" as "surround or protect with a fence: *our garden was not*

*fully fenced.*” *New Oxford American Dictionary*, Version 2.0.2 (51.4), Copyright 2005-2007 Apple Inc., last accessed April 27, 2012.

Herein, the area that Mr. Gonzalez and his accomplices allegedly entered to take the boat motor does not meet the above definition of “fence” or “fenced” because the area was not “enclosed,” “surrounded” or “protected” with a fence. The area in question did have a fence on three of its four sides, but the fourth side was only protected by being on a steep hillside, which apparently was not steep enough to prevent someone from walking in and walking out carrying a boat motor. In any event, the fourth side entered by the perpetrators was not fenced. Hence, the area in question does not meet the dictionary definition of “fenced area” or the statutory definition of “building.” Therefore, the State did not prove the essential element of the crime of second degree burglary—entering or remaining unlawfully in a building—beyond a reasonable doubt.

2. Mr. Gonzalez’ right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment was violated where the State failed to prove the essential elements of the crime of driving under the influence (DUI).

The law regarding sufficiency of the evidence is set forth in the previous issue.

RCW 46.61.502. provides in pertinent part:

(1) A person is guilty of driving while under the influence of intoxicating liquor or any drug if the person drives a vehicle within this state: . . . .

(b) While the person is under the influence of or affected by intoxicating liquor or any drug . . .

Here there was insufficient evidence that Mr. Gonzalez was “under the influence of or affected by intoxicating liquor or any drug.” There was only evidence that he had consumed alcohol. The deputies noticed a strong smell of intoxicants and that his eyes were bloodshot. CP 35. This is only evidence of consumption not intoxication. The same is true of Mr. Gonzalez’ admission of drinking two beers earlier and the presence of beer bottles in the vehicle. The deputy noted Mr. Gonzalez’ coordination was fair and his facial color was normal. RP 70. This observation would indicate Mr. Gonzalez was not under the influence.

The Court found the driving observed by the deputy was insufficient evidence by itself to convict Mr. Gonzalez of DUI. The driving the deputy saw was very brief and consistent with someone trying to escape, not of DUI. In addition, there was no breath test and no physical tests were conducted. RP 30, 33. There was no evidence of stumbling, staggering, incoordination or slurred speech. In summation, there was only evidence that Mr. Gonzalez had consumed alcohol some

time that evening, not that he was under the influence of or affected by it when he was arrested. Therefore, the evidence was insufficient to support this essential element of DUI—that Mr. Gonzalez was under the influence of or affected by intoxicating liquor or any drug.

E. CONCLUSION

For the reasons stated, the convictions should be reversed.

Respectfully submitted April 30, 2012,

---

s/David N. Gasch  
Attorney for Appellant

PROOF OF SERVICE (RAP 18.5(b))

I, David N. Gasch, do hereby certify under penalty of perjury that on February 14, 2012, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or e-mailed by prior agreement (as indicated), a true and correct copy of brief of appellant:

Enrique R. Gonzalez  
General Delivery  
Mattawa WA 99349

**E-mail:** [gary.riesen@co.chelan.wa.us](mailto:gary.riesen@co.chelan.wa.us)  
Gary Riesen  
Prosecuting Attorney  
P.O. Box 2596  
Wenatchee, WA 98807-2596

---

s/David N. Gasch, WSBA #18270  
Gasch Law Office  
P.O. Box 30339  
Spokane, WA 99223-3005  
(509) 443-9149  
FAX: None  
[gaschlaw@msn.com](mailto:gaschlaw@msn.com)

COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

FILED  
May 2, 2012  
Court of Appeals  
Division III  
State of Washington

STATE OF WASHINGTON, )  
Plaintiff/Respondent, )  
vs. )  
)  
ENRIQUE R. GONZALEZ, )  
Defendant/Appellant. )

No. 30369-1-III

PROOF OF SERVICE  
AMENDED  
(RAP 18.5(b))



I, David N. Gasch, do hereby certify under penalty of perjury that on April 30, 2012, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or e-mailed by prior agreement (as indicated), a true and correct copy of Appellant's Brief:

Enrique R. Gonzalez  
General Delivery  
Mattawa WA 99349

**E-mail:** [gary.riesen@co.chelan.wa.us](mailto:gary.riesen@co.chelan.wa.us)  
Gary Riesen  
Prosecuting Attorney  
P.O. Box 2596  
Wenatchee, WA 98807-2596

---

s/David N. Gasch, WSBA #18270

PROOF OF SERVICE

Gasch Law Office, P. O. Box 30339  
Spokane WA 99223-3005  
(509) 443-9149  
FAX - None  
[gaschlaw@msn.com](mailto:gaschlaw@msn.com)