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

No. 30379-9-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

ANDRES ALEGRIA,

Appellant.

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

The Honorable Cameron Mitchell, Judge *Pro tem*

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The juvenile court erred in convicting Mr. Alegria of an uncharged alternative means of second degree burglary.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

The State may not try, and the juvenile court may not convict a defendant, of an uncharged alternative means of committing an offense. Here, the State charged the specific crime that Mr. Alegria intended to commit when he unlawfully entered the locked impound yard. The juvenile court failed to find the specific crime, finding instead the uncharged alternative of "a crime." Is Mr. Alegria entitled to reversal of his conviction for second degree burglary?

C. STATEMENT OF THE CASE

Andres Alegria was discovered inside a locked, fenced impound yard at 10:30 in the evening. CP 16.

The information charged Mr. Alegria with:

> COMES NOW Shawn P. Sant, Franklin County Prosecuting Attorney, and by this Information accuses ANDRES ALEGRIA of the crime of: BURGLARY IN THE SECOND DEGREE, [RCW 9A.52.030], A CLASS BE FELONY, committed as follows: That said ANDRES ALEGRIA, in the County of Franklin, State of Washington, on or about April 20, 2011, then and there, with the intent to commit a crime against person or property therein, *to wit: theft*, did enter or remain unlawfully in a building, other than a dwelling

> or a vehicle, located at 1716 West Lewis Street, Pasco, Washington.

CP 22 (emphasis added).

Based upon stipulated facts, the juvenile court found Mr. Alegria guilty. CP 14. The court's findings of fact and conclusions of law stated:

> FINDINGS OF FACT
>
> 1. On April 20, 2011, Respondent Andres Alegria entered the Casaday Beeline Towing's impound after business hours. The impound yard was completely enclosed and locked.
>
> 2. Mr. Alegria entered the impound yard for the purpose of accessing his car. That car had been lawfully impounded by law enforcement.
>
> 3. The impound yard had the superior possessory right to Mr. Alegria's vehicle.
>
> CONCLUSIONS OF LAW
>
> 1. Respondent entered Casaday Beeline Towing's impound yard *with the intent to commit a crime therein.*
>
> 2. For the purposes of Washington's burglary statute, the impound yard is a building.
>
> 3. Respondent is guilty of Burglary in the Second Degree.

CP 13-14 (emphasis added).

D. ARGUMENT

WHERE THE SPECIFIC OFFENSE INTENDED TO BE COMMITTED WAS CHARGED, THE JUVENILE COURT ERRED IN FINDING MR. ALEGRIA GUILTY OF AN UNCHARGED ALTERNATIVE

1. The State bears the burden of proving each of the essential elements of the charged offense beyond a reasonable doubt.

In a juvenile prosecution, the State is required to prove each element of the crime charged beyond a reasonable doubt. U.S. Const. amend. XIV; JuCR 7.11(a); *Apprendi v. New Jersey,* 530 U.S. 466, 471, 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); *State v. Alvarez,* 128 Wn.2d 1, 13, 904 P.2d 754 (1995). The standard the reviewing court uses in analyzing a claim of insufficiency of the evidence is "[w]hether, after viewing the evidence in the light most favorable to the prosecution, 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). A challenge to the sufficiency of evidence admits the truth of the State's evidence and all reasonable inferences that can be drawn therefrom. *State v. Salinas,* 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

This Court reviews the juvenile court's findings to determine whether they are supported by substantial evidence. *State v. Halstien*, 122 Wn.2d 109, 128-29, 857 P.2d 270 (1993); *State v. Echeverria*, 85 Wn.App. 777, 783, 934 P.2d 1214 (1997). If the factual findings are not supported by substantial evidence they must be stricken. *Truck Insurance. Exchange v. Merrell*, 23 Wn.App. 181, 596 P.2d 1334 (1979). Substantial evidence is that sufficient quantity of evidence necessary to persuade a fair-minded, rational person of the truth of the allegation. *Echeverria*, 85 Wn.App at 783.

2. <u>The State failed to prove Mr. Alegria intended to commit theft when he entered the impound yard</u>.

In order to prove Mr. Alegria was guilty of the offense charged, the State was required to prove that he, *with intent to commit the crime of theft* against a person or property therein, entered or remained unlawfully in a "building." RCW 9A.52.030(1); *State v. Johnson*, 159 Wn.App. 766, 769-70, 247 P.3d 11 (2011). As defined in RCW 9A.04.110(5), "'[b]uilding,' . . ., includes any . . . fenced area . . ."

The Sixth Amendment to the U.S. Constitution and Article I, § 22 of the Washington Constitution guarantee "a defendant has the right to be informed of the charges against him and to be tried only

for offenses charged." *State v. Peterson,* 133 Wn.2d 885, 889, 948 P.2d 381 (1997). A defendant may be convicted only of those crimes with which he has been charged. *State v. Berlin,* 133 Wn.2d 541, 544, 550, 947 P.2d 700 (1997). As a result, the State may not try a defendant for an uncharged offense. *State v. Doogan,* 82 Wn.App. 185, 188, 917 P.2d 155 (1996). If the information alleges only one alternative means of committing the offense, it is error for the factfinder to consider uncharged alternatives, regardless of the strength of the evidence presented at trial. *State v. Bray,* 52 Wn.App. 30, 34, 756 P.2d 1332 (1988). The remedy for such a violation is reversal because it violates the defendant's right to notice of the crime charged. *Id.*

Here, while the specific crime alleged to have been intended when the person entered is not an element of the offense, the information charged the specific offense, thus the State bore the burden of proving that element as an alternative means of committing second degree burglary.[1] Instead, the State proved only, and the juvenile court only found, that Mr. Alegria entered the

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[1] *See State v. Bergeron,* 105 Wn.2d 1, 4, 711 P.2d 1000 (1985) (The intent to commit a specific named crime inside the burglarized premises is not an "element" of the crime of burglary, rather, the intent required is simply the intent to commit any crime against a person or property inside the burglarized premises).

building with the intent to commit merely "a crime" therein. CP 14. In so doing, by failing to find the elements of the offense of second degree burglary as charged, the juvenile court necessarily found that the State failed to carry its burden of proving the element that Mr. Alegria intended to commit the offense of theft beyond a reasonable doubt. *See State v. Armenta,* 134 Wn.2d 1, 14, 948 P.2d 1280 (1997) ("In the absence of a finding on a factual issue we must indulge the presumption that the party with the burden of proof failed to sustain their burden on this issue."). Thus, the juvenile court improperly convicted Mr. Alegria of the uncharged alternative of second degree burglary.[2] Mr. Alegria is entitled to reversal of his conviction. *Bray,* 52 Wn.App. at 34.

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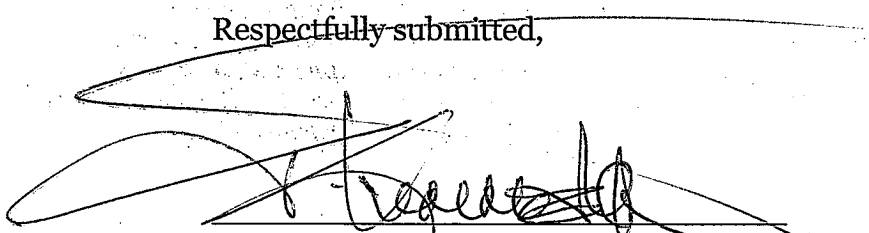
[2] To the extent the State relies upon the decision in *State v. Pollnow*, 69 Wn.App. 160, 166, 848 P.2d 1265 (1993), for the proposition that where the State charges the specific crime, it is error for the trial court to increase the State's burden based upon the information, that decision was overruled *sub silentio* by the Supreme Court in *State v. Hickman,* 135 Wn.2d 97, 102, 954 P.2d 900 (1998) ("In criminal cases, the State assumes the burden of proving otherwise unnecessary elements of the offense when such added elements are included without objection in the "to convict" instruction.").

F. CONCLUSION

For the reasons stated, Mr. Alegria requests this Court reverse his conviction with instructions to dismiss.

DATED this 2nd day of March 2012.

Respectfully submitted,



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DIVISION THREE

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	NO. 30379-9-III
	)	
ANDRES A.,	)	
	)	
JUVENILE APPELLANT.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 2ND DAY OF MARCH, 2012, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X]	SHAWN SANT, DPA FRANKLIN COUNTY PROSECUTOR'S OFFICE 1016 N 4TH AVE PASCO, WA 99301	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X]	A. A. 302 N 7TH AVE PASCO, WA 99301	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 2ND DAY OF MARCH, 2012.

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