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Court of Appeals
Division III
State of Washington

No. 34527-1-III

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

STATE OF WASHINGTON

Respondent

v.

JUSTIN WAYNE CROSON

Appellant

Initial Brief of Appellant

Appeal from Spokane County Superior Court No. 15-1-03848-7
The Honorable John O. Cooney

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INTRODUCTION

Mr. Croson was charged with, and convicted of residential burglary. He was also charged with First Degree Malicious Mischief, and Failure to Remain at the Scene of an Accident – Unattended Vehicle. He was found not guilty of these two charges by a jury.

At trial, rather than solicit testimony from an owner of the house in question, the State utilized a real estate listing agent to demonstrate possession and control for purposes of meeting the unlawful entrance element of residential burglary. The listing agent testified that he had access and control of the property, and that typically he controlled access to the premises. The agent did, however, acknowledge that it was possible that the owner of the property could have had work performed without his knowing about it. The agent's listing contract was not admitted into evidence, and no other evidence was admitted regarding the ownership of the property, or permission to enter the premises.

On appeal, this Court must determine whether sufficient evidence supports Mr. Croson's conviction. In so doing, this Court must consider whether its prior holding in *State v. J.P.*, 130 Wn. App. 887, 125 P.3d 215 (2005) is controlling, or whether that case should be limited to the more detailed facts and evidence found within that case. Mr. Croson's position is that the case is not controlling because, although facially similar, the

prosecution in that case elicited more detailed information about the listing agent's control and possession of the premises. Accordingly, Mr. Croson urges this Court to find that insufficient evidence supports his conviction.

ASSIGNMENT OF ERROR

ASSIGNMENT OF ERROR 1: Insufficient evidence supports Mr. Croson's conviction for residential burglary.

ISSUE

Whether sufficient evidence supports Mr. Croson's conviction for residential burglary where the listing agent was the only individual who testified that Mr. Croson did not have his permission to enter the dwelling, and no other evidence was adduced to demonstrate the agent's sole authority to grant access?

MATERIAL FACTS

On or about September 11, 2015, Dan Robisch noticed that there was an SUV with a trailer backed up to his neighbor's home. It caught his attention because the home was vacant. Verbatim Report of Proceedings (VRP) at 95. He attempted to contact the persons inside the home by knocking, and as he did so he noticed that the vehicle did not have license plates. *Id.* The trailer had only a garbage bag in it. *Id.* at 118. He received no response, though he did hear "banging" noises from the inside. *Id.* at 95. He then went back to his home and called 9-1-1, advising the operator that he believed a possible burglary was in process next door. *Id.* at 97.

After he finished his call with the emergency operator, Mr. Robisch took his truck, drove down the driveway shared by both houses, and parked the vehicle in front of the gate. *Id.* at 98. He then shut and locked the front gate. *Id.* After these acts, he then stood in the bushes until a neighbor, Debbie Long, came home. *Id.* at 101. He contacted Ms. Long, informed her of what was occurring. *Id.* Ms. Long then told her husband, William Long, who came out of his home to discuss the matter with Mr. Robisch. *Id.* at 101-02, 123-24. The two men then proceeded towards the vacant house. *Id.* at 103, 124.

After looking at the vehicle, Mr. Long instructed Mr. Robisch to again call 9-1-1. *Id.* at 104, 124, 127. He largely repeated his earlier statements to the operator. *Id.* at 104.

After this second call, Mr. Robisch walked back to Mr. Long, who was waiting by the vehicles. *Id.* at 105. At that point, an individual came out of the home – a man. *Id.* at 105, 129. The man entered the vehicle on the driver's side. A woman also came from somewhere near the house, and entered the vehicle on the passenger side. *Id.* Mr. Long approached the vehicle, and asked the occupants if there was anything he could do to help. VRP at 129. The man stated that no help was necessary, as they were checking on the welfare of the home on behalf of the bank. *Id.* at 131.

The vehicle accelerated away very rapidly. *Id.* at 132. Mr. Long had to jump back in order to avoid contact with the trailer. *Id.* at 133. As he jumped back, he drew a pistol from his pocket and began running after the vehicle, which had been stopped at the end of the driveway. *Id.* at 132-135. The female alighted from the vehicle, walked to the gate, entered the appropriate code, and opened the gate. 166-67.

By this time Mr. Long had caught up with the vehicle, and, showing his weapon, instructed the occupants to get out of the vehicle and wait for law enforcement. VRP at 135, 137. Instead, the vehicle accelerated around the parked truck and onto the roadway. As it did so, the trailer hit the parked truck, causing damage. *Id.* at 109-110, 136.

Spokane County Sheriff's Deputy Ryan Walter was dispatched to respond to Mr. Robisch's call. *Id.* at 150. Deputy Mark Melville also responded to the call. *Id.* at 150, 177. The deputies received a description of the vehicle, and were advised that it had left the scene of the purported burglary. *Id.* at 151. The deputies activated their lights and sirens, and stopped the vehicle. *Id.*

The deputies had both occupants of the vehicle exit, and the deputies placed both in handcuffs and separated, one into each patrol vehicle. *Id.* at 152, 179. Deputies subsequently identified the male driver as Justin W. Croson, and his female companion as Starla Dillard. *Id.* at 152-53, 178-79.

Both were cooperative with deputies. *Id.* The vehicle had miscellaneous clothing, tools, and the like inside. *Id.* at 163. The tools included bolt cutters, hammer, Sawzall, and a screwdriver, which was utilized to start the vehicle. *Id.* at 163, 181-82. The vehicle itself was not stolen. VRP at 14.

After detaining Mr. Croson, Deputy Walter read Mr. Croson his *Miranda*¹ warnings, and Mr. Croson indicated that he understood them. Mr. Croson then, upon questioning, informed the deputy that he was at the residence helping Ms. Dillard pick up, as well as install a stove and work on cabinets. *Id.* at 154-55. He did not know who Ms. Dillard's employer was, only that Ms. Dillard had been instructed to clean the residence. *Id.*

Mr. Croson subsequently indicated that Mr. Long had produced a firearm and so that is what caused him and Ms. Dillard to leave the residence so quickly. *Id.* Deputies were unable to locate a property owner at that time, and so Mr. Croson and Ms. Dillard were permitted to leave after Mr. Croson was cited with Driving While License Suspended. *Id.* at 156-57.

When the deputies investigated the vacant home, they found that there was no back door – the door could not be located. *Id.* at 167-68. The deputies also found that the kitchen had been partially disassembled, the

¹ *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602; 16 L. Ed. 2d 694.

refrigerator was missing, and the stove was loaded onto a dolly. *Id.* at 168, 183-86. The deputies did not attempt to obtain fingerprints. *Id.* at 172.

After further investigation, Mr. Croson was charged with Residential Burglary, First Degree Malicious Mischief, and Failure to Remain at the Scene of an Accident – Unattended Vehicle.

During pretrial motions, the defense moved to exclude information related to the fact that the vehicle required a screwdriver to start, since it was not stolen and such information would be unduly prejudicial. VRP at 13. This motion was granted. *Id.*

Consistent with this motion, the defense also moved to exclude statements made by the witnesses that the vehicle driven by Mr. Croson had no license plates, and was believed stolen by the witnesses. VRP at 14. The motion regarding the belief that the vehicle was stolen was granted, but the motion related to the license plates was denied, the court reasoning that the missing plates could be evidence of intent. *Id.* at 15.

At trial, Ryan Fuller testified that he was the only authorized listing agent for the owner of the vacant home, that he had been on September 11, 2015, and that he had not authorized either Mr. Croson or Ms. Dillard to enter the premises for the purpose of doing work, and that he did not know Mr. Croson. VRP at 60, 62, and 75-76. He did, however, acknowledge that although improbable, it was possible that the change in the property

from the time he viewed it initially, and the time he viewed in on September 11, 2015 could have occurred without his knowledge. VRP at 60.

The jury found Mr. Douglas guilty of Residential Burglary, not guilty of First Degree Malicious Mischief, and not guilty of Failure to Remain at the Scene of an Accident – Unattended Vehicle. Clerk’s Papers (CP) at 56-59. Mr. Croson was subsequently convicted and sentenced to a DOSA of 36.75 months committed, and the same in community custody, for a total of 73.5 months – the midrange for his offender score of 9. CP at 104-117. This appeal timely followed. CP at 118-19.

ARGUMENT

Insufficient evidence was produced at trial to meet the elements of Residential Burglary. Accordingly, Mr. Croson’s conviction should be vacated.

It is axiomatic that, in order to determine whether suffice evidence was adduced at trial to support a conviction, this Court looks to whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Salinas*, 119 Wn. 2d 192, 201 P.2d 1068 (1992). As such, the State’s evidence is taken as true, and all reasonable inferences therefore drawn in its favor. *Id.* The State may prove its case through either direct or

circumstantial evidence, which are weighed equally. *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997).

In order to demonstrate the elements of Residential Burglary pursuant to RCW 9A.52.025, the State must demonstrate that Mr. Croson (1) entered or remained unlawfully in a dwelling; (2) with intent to commit a crime against a person or property therein. RCW 9A.52.025. A person enters or remains unlawfully if he does so without license, invitation, or privilege. RCW 9A.52.010(3). The ability to grant a license, invitation, or privilege to an individual to enter or remain in a dwelling lies solely with the person who resides in, or otherwise has the authority over a property. *State v. Grimes*, 92 Wn. App. 973, 978, 966 P.2d 394 (1998).

Further, there is an accompanying statutory inference that may be permitted. That statute provides:

In any prosecution for burglary, any person who enters or remains unlawfully in a building may be inferred to have acted with intent to commit a crime against a person or property therein, unless such entering or remaining shall be explained by evidence satisfactory to the trier of fact to have been made without such criminal intent.

RCW 9A.52.040. This inference is permissive, not mandatory, and does not wrongfully transfer the State's burden of proof to the defendant. *State v. Drum*, 168 Wn.2d 23, 35-36, 225 P.3d 237 (2010).²

In *State v. J.P.*, this Court had the opportunity to consider whether there existed sufficient evidence to support the appellant's conviction in circumstances similar to this case. In that case, J.P. was caught crawling out of a window of a vacant home which was being prepared for sale. 130 Wn. App. 887, 890-91, 125 P.3d 215 (2005). The home had the fresh smell of paint, and had been vandalized using paint. *Id.* J.P. was charged with, among other things, residential burglary.

At trial, a realty agent testified that she was serving as the listing agent for the vacant residence in question, that she had changed the locks on the residence and place her personal lock box on the door. She also informed the court that she did not know J.P. and did not give him permission to be inside the residence. *Id.* It also appears that the realtor

² Where a permissive inference is the "sole and sufficient" proof of an element, the presumed fact must flow from the proven fact beyond a reasonable doubt, so as to avoid circumventing the prosecution's burden of persuasion. *Drum*, 168 Wn.2d at 35-36. However, if the inference is only part of the state's proof, the presumed fact must flow more likely than not from a proven fact. *Id.* at 36.

may have provided as evidence a copy of her agreement with the property owner. *Id.* at 892-93.³

J.P. was found guilty by the trial court, which entered findings of fact and conclusions of law consistent with its oral ruling. *Id.* Critically, the trial court found that the agent possessed the only keys to the residence, and that fact was a notable verity on appeal. *Id.* at 893 n.1.

On appeal, J.P. challenged the sufficiency of the evidence to convict him of residential burglary. *Id.* He argued that the State failed to demonstrate the connection between the listing agent, her employer, and the property owner. *Id.* at 892.

This Court, relying in part upon *State v. Schneider*, 36 Wn. App. 237, 241, 673 P.2d 200 (1983), concluded that the property owner was not required to testify that J.P. did not have permission to enter or remain in the residence, noting that this Court looks only to “the” person with possession or occupancy of the property over the alleged burglar to determine if the entry was lawful. *Id.* at 894. This Court then concluded that, since the listing agent had testified that she had authority over the premises, the trial

³ The Court’s opinion on the matter is somewhat unclear as to this point, however in its discussion of the contract, the Court indicates that the contract was with the realtor at the time of trial, and that the contract “had not yet been offered as an exhibit,” implying that it was later offered, or may otherwise relied upon in establishing her authority over the property for purposes of the findings and conclusions.

court was permitted to determine that J.P. had entered unlawfully. *Id.* The Court did not reach the question of the sufficiency of the evidence with regard to demonstrating intent, or otherwise discuss the statutory permissive inference regarding intent as that element was unchallenged.

Although impliedly answered in the negative by this Court, the question of whether it is necessary for the State to demonstrate exclusion by all persons equally capable of granting entry to a property was not expressly answered. This conclusion is certainly logical in situations, such as J.P., where the realtor testified as to the exclusive nature of her possession and control over the property at issue, and where the trial court made such a finding. *J.P.*, 130 Wn. App. At 891 n.1.

However, a straightforward application of *J.P.*'s logic may become somewhat problematic in situations such as the instant case where the realtor acknowledges the possibility that the property owner acted separate and apart from his involvement, and likewise testified only as to what "generally" occurred rather than what expressly occurred in this instance. VRP at 53-55, 58, 61. The analysis also becomes more problematic in the absence of findings and conclusions supporting a conviction, as occurs in the case of a jury trial. This then, lends a certain degree of uncertainty to the proceedings – an uncertainty which should not be construed against the defendant.

Here, as in *J.P.*, the State produced the testimony of Mr. Fuller, who testified that he was the sole listing agent, that he had authority to authorize people to enter the vacant home, that he had had the locks changed, and that he did not authorize Mr. Croson or Ms. Dillard to enter the home. VRP at 60, 62, and 75-76.

However, unlike the facts in *J.P.*, Mr. Fuller acknowledged that it was nonetheless possible that work was authorized or done without his knowledge. VRP at 61. Moreover, he also acknowledged that the property owners were involved in directing work done to the property, that the owner selected the contractor, and that it was not done solely at his behest. VRP at 60-62. Finally, unlike *J.P.*, there is no information supporting the admission of a contract or other such agreement from which a trier of fact could determine the exclusivity of Mr. Fuller's control and possession of the property on the date in question vis-à-vis the owners. *See Generally*, VRP, CP.

Nor does any other information in the record support the inference that the entrance was unlawful. Unlike *J.P.*, Mr. Croson exited the premises by the front door. VRP at 105, 129. Moreover, the jury expressly found that he was not guilty of malicious mischief, thereby rebutting any inference to be taken from the condition of the interior. CP at 58. Moreover, the only

testimony regarding statements by Mr. Croson all agreed that he believed he was there permissibly. VRP at 131, 154-55.

As such, even taking this information in a light most favorable to the State, the most that can be said to have been proven is that Mr. Croson himself did not have Mr. Fuller's explicit permission to enter the premises. The State did not demonstrate beyond a reasonable doubt either that Mr. Fuller had *sole* authority to grant permission to enter the premises, or that Mr. Croson had not received permission from the owner or someone associated therewith. Accordingly, insufficient evidence supports the jury's finding that Mr. Croson was guilty of Residential Burglary since the State could not demonstrate beyond a reasonable doubt that Mr. Croson entered the dwelling unlawfully. Therefore, the conviction should be vacated by this Court.

CONCLUSION

The unlawful entry element of residential burglary was not established beyond a reasonable doubt because insufficient evidence was offered at trial, unlike the situation that occurred in *J.P.* This Court should therefore distinguish that case and find that here, where critical information was not presented, insufficient evidence supports the jury verdict and vacate Mr. Croson's resulting conviction.

Respectfully submitted this 28th day of December, 2016 by:

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that I personally caused this INITIAL BRIEF OF APPELLANT to be delivered to the following individual(s) addressed as follows:

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