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Court of Appeals  
Division III  
State of Washington  
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NO. 35990-5-III

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

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STATE OF WASHINGTON,

Respondent,

v.

CORY EVANS,

Appellant.

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

The Honorable Timothy B. Fennessy, Judge

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BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENT OF ERROR</u> .....	1
<u>Issue Pertaining to Assignment of Error</u> .....	1
B. <u>STATEMENT OF THE CASE</u> .....	1
C. <u>ARGUMENT</u> .....	4
THE EVIDENCE IS INSUFFICIENT TO SUSTAIN EVANS'S BURGLARY CONVICTION.....	4
D. <u>CONCLUSION</u> .....	6

**TABLE OF AUTHORITIES**

	Page
<b><u>WASHINGTON CASES</u></b>	
<u>State v. Engel</u> 166 Wn.2d 572, 210 P.3d 1007 (2009) .....	5
<u>State v. Green</u> 94 Wn.2d 216, 616 P.2d 628 (1980) .....	4
<u>State v. Hickman</u> 135 Wn.2d 97, 954 P.2d 900 (1998) .....	6
<b><u>FEDERAL CASES</u></b>	
<u>In re Winship</u> 397 U.S. 358, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970) .....	4
<u>Jackson v. Virginia</u> 443 U.S. 307, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979) .....	4
<b><u>RULES, STATUTES AND OTHER AUTHORITIES</u></b>	
RCW 9A.04.110 .....	4
RCW 9A.56.210 .....	4

A. ASSIGNMENT OF ERROR

The evidence is insufficient to support appellant's conviction for Burglary in the Second Degree.

Issue Pertaining to Assignment of Error

To commit Burglary in the Second Degree, a defendant must unlawfully enter or remain in a building, which includes "any fenced area." To qualify as a building, however, the area must be completely enclosed by fencing alone or fencing and other structures. At appellant's trial, the State failed to elicit evidence satisfying this element of the charge. Is reversal of the conviction and dismissal of the charge required?

B. STATEMENT OF THE CASE

The Spokane County Prosecutor's Office charged Cory Evans with Burglary in the Second Degree and Malicious Mischief in the Second Degree based on the theft of security cameras and damage to a security system at the Quail Ridge residential community in Spokane. CP 2-7.

The prosecution's primary trial witness was Todd Hagen, Quail Ridge resident and President of the Home Owner's Association. RP 98-99. Hagen described Quail Ridge as a gated community consisting of 38 residences. RP 99. To enter from the

street, one must use a code on a keypad or click the button on a transponder to open the gate. RP 99, 107; exhibit P-7. It is a private community open only to residents, their guests, and invited vendors. RP 100, 108; exhibit P-8. Just inside the street gate, behind an adjoining wall at that location, sits a pole with five security cameras capturing shots from different angles and connected to a DVR in the "caretaker's residence." RP 100-101, 108-110; exhibits P-9, P-10, P-11. The purpose of these cameras is to monitor those entering and exiting the gates and to record their license plates. RP 101.

In April 2017, Hagen noticed all but one of the cameras had been removed from the pole. RP 101, 111; exhibit P-12. A recording of their theft revealed they had been taken at approximately 3:45 a.m. on April 10. RP 101-104. A number of still images from the recording, and the recording itself, were admitted at trial and show an individual climbing to the top of the entry wall, reaching out, and pulling the cameras from the pole. RP 102-106; exhibits P-1, P-2, P-4, P-5, P-6. The individual is wearing a hoodie, a cap, and a watch. Exhibits P-2, P-4, P-5. The pole on which the cameras had been mounted was damaged during the incident and, along with the missing cameras, had to be replaced at a total cost of approximately \$4,700.00. RP 109, 113, 115.

The prosecution also called two police officers to testify. Spokane Officer Kurt Vigesaa testified that he examined still shots from the Quail Ridge camera and recognized the individual as Cory Evans. RP 122-123. According to Officer Vigesaa, when he had contact with Evans on April 28, 2017, Evans was wearing a Russell-brand hooded sweatshirt that appeared to be the same hoodie depicted in the surveillance video. RP 123-126. He also was wearing a baseball cap and a silver Seiko men's watch. RP 126-128. Spokane Police Officer Steven Perry testified that he drove Evans to jail on April 28 and recalled the silver Seiko watch he was wearing. RP 119-120.

In closing, the State argued that the still shots and video showed Evans hopping atop the wall and stealing the cameras, and that all elements of the charged crimes had been established. RP 147-153, 157-159. The defense argued that the video and pictures were not sufficiently clear to identify the individual as Evans and that his physical build and clothing were different from the individual who stole the cameras. RP 154-157.

Jurors convicted Evans on both charges, the court imposed a prison-based DOSA (which it ran consecutively to other sentences Evans was serving), and Evans timely filed his Notice of Appeal. CP

32-33, 46, 58-59; RP 163-166, 178-181.

B. ARGUMENT

THE EVIDENCE IS INSUFFICIENT TO SUSTAIN EVANS'S BURGLARY CONVICTION.

In every criminal prosecution, due process requires that the State prove every fact necessary to constitute the charged crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970). Where a defendant challenges the sufficiency of the evidence, the proper inquiry is, when viewing the evidence in the light most favorable to the prosecution, whether there was sufficient evidence for a rational trier of fact to find guilt beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979); State v. Green, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980).

“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.” RCW 9A.52.030(1). “‘Building,’ in addition to its ordinary meaning, includes any . . . fenced area . . . .” RCW 9A.04.110(5). For the evidence of a “fenced area” to satisfy the definition of

building, the State must present proof of “an area that is completely enclosed either by fencing alone or . . . a combination of fencing and other structures.” State v. Engel, 166 Wn.2d 572, 580, 210 P.3d 1007 (2009). This the State failed to do at Evans’s trial.

Although, during opening statements, the prosecutor maintained that Quail Ridge had a wall of stone and brick “surrounding their community,” RP 93, no such evidence was ever presented. Instead, the State presented evidence that Quail Ridge is a gated community with a wall on either side of the entry gate. At no time was Todd Hagen (or any other witness) asked to describe what, if any, barrier existed around the entire perimeter of this rather sizeable community. Even in the light most favorable to the State, “gated” in this case merely means access restricted by a gate (with adjoining walls) at the entrance to the community. It falls well short of establishing “an area that is completely enclosed either by fencing alone or . . . a combination of fencing and other structures.” Engel, 166 Wn.2d at 580; see also id. at 578 (proof of natural physical barriers – such as hills and slopes -- will not suffice).

Engel controls the outcome in Evans’s case. Because the evidence at trial was insufficient to sustain a burglary conviction, Evans’s conviction must be reversed and the charge dismissed with

prejudice. Engel, 166 Wn.2d at 581; State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998).

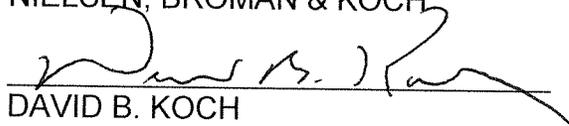
D. CONCLUSION

Evans's burglary conviction should be dismissed for insufficient evidence and the matter remanded for resentencing on the malicious mischief conviction.

DATED this 16<sup>th</sup> day of August, 2018.

Respectfully submitted,

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**Transmittal Information**

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