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COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

CORY EVANS, APPELLANT

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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INDEX

I. ISSUE PRESENTED..... 1

II. STATEMENT OF THE CASE 1

III. ARGUMENT 4

 A. THE STANDARD OF REVIEW FOR A SUFFICIENCY
 OF THE EVIDENCE CHALLENGE IS HIGHLY
 DEFERENTIAL TO THE FINDING OF THE JURY..... 4

 B. THE JURY FOUND SUFFICIENT EVIDENCE OF A
 “FENCED AREA” TO SUPPORT MR. EVANS’
 CONVICTION FOR SECOND DEGREE BURGLARY..... 6

IV. CONCLUSION..... 11

TABLE OF AUTHORITIES

WASHINGTON CASES

State v. Davis, 182 Wn.2d 222, 340 P.3d 820 (2014)..... 5

State v. Engel, 166 Wn.2d 572, 210 P.3d 1007 (2009)..... passim

State v. Gans, 76 Wn. App. 445, 886 P.2d 578 (1994)..... 7

State v. Goodman, 150 Wn.2d 774, 83 P.3d 410 (2004) 5

State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980) 4, 9

State v. Hosier, 157 Wn.2d 1, 133 P.3d 936 (2006) 5, 10

State v. Jameison, 4 Wn. App. 2d 184, 421 P.3d 463 (2018) 5, 10

State v. Livengood, 14 Wn. App. 203, 540 P.2d 480 (1975) 7

State v. Randecker, 79 Wn.2d 512, 487 P.2d 1295 (1971) 6, 11

State v. Salinas, 119 Wn.2d 192, 829 P.2d 1068 (1992) 5, 9

State v. Thomas, 150 Wn.2d 821, 83 P.3d 970 (2004) 5, 10

State v. Vasquez, 178 Wn.2d 1, 309 P.3d 318 (2013)..... 5

State v. Wentz, 149 Wn.2d 342, 68 P.3d 282 (2003) 7

State v. Williams, 96 Wn.2d 215, 634 P.2d 868 (1981)..... 6, 9

STATUTES

RCW 9A.04.110..... 6

RCW 9A.52.030..... 6

I. ISSUE PRESENTED

Did the State present sufficient evidence of a “fenced area” to support Cory Evan’s conviction for burglary in the second degree?

II. STATEMENT OF THE CASE

Tom Hagen lived in the Quail Ridge community (herein “the property”) located at 54th Avenue and Hatch Road in Spokane, and was the president of the Quail Ridge Home Owners Association. RP 98-99. The property is a “gated community.” RP 99. Access to the property was by a gate off 54th Avenue: residents either entered a code into a keypad just outside the gate or pressed a button on a community-issued remote to open the gate, which then closed after fifteen seconds. RP 99; Exs. P-7, P-8. The property was open only to the residents, guests, and invited vendors. RP 100. It was not open to the public. RP 108. On either side of the gate was a brick wall. Exs. P-7, P-10.

Inside the wall, near the gate, was a pole that held five high-quality security cameras, all directed at different angles, to record who entered and exited the property. RP 100-101; Ex. P-9. The cameras transmitted video to a DVR recording system that stored the images. CP 100-01.

On or about April 10, 2017, four out of the five security cameras were removed from the pole and went missing. RP 101, 109, 111, 113; Ex. P-12. The wiring and the pole were damaged when the cameras were

removed and had to be replaced. RP 109-10, 112; Ex. P-1, P-10, P-11. The replacement value of the four cameras, a new security pole, the electrical wiring, and labor was valued at approximately \$4,700. RP 113-14.

Mr. Hagen and the residents of Quail Ridge downloaded the security video from the recording system, took several still photographs from the video, and gave this evidence to the police. RP 102, 104. The video was time and date stamped as April 10, 2017, at 3:45 a.m., and showed a male in a light-colored Russell brand hoodie climbing up and onto the brick wall and yanking the cameras off the pole. RP 104; Ex. P-1.

Spokane Police Sergeant Kurt Vigessa reviewed the surveillance footage and photographs. RP 122-23, 131-32. Sgt. Vigessa, a member of the Spokane Police Anticrime Team focused on active repeat offenders, immediately recognized Cory Evans as the male who climbed the brick wall and removed the cameras from the pole. RP 122-23. Sgt. Vigessa subsequently contacted Mr. Evans on April 28, 2017, and Mr. Evans was wearing a light-colored Russell brand hoodie. RP 124. At no time was Mr. Evans a resident, guest, or vendor at Quail Ridge. RP 100. Mr. Evans never had permission to enter the property or to remove the security cameras located within the property. RP 100.

The State charged Mr. Evans with one count of second degree burglary and one count of second degree malicious mischief. CP 7. At trial,

the State elicited from Mr. Hagen that the property was “a gated community,” that there were 38 residences “inside the property,” and that the only entrance to the property was via keypad at a gate “right off 54th.” RP 99. Further, Mr. Hagen testified that the property was not open to the public, and that the cameras and keypad provided security so residents could monitor who entered and exited the property to ensure only approved and welcomed individuals entered. RP 100-01.

Mr. Hagen testified that a picture admitted into evidence showed “the entry coming off of Hatch Road ... coming into the community.” RP 107; Ex. P-7. He further testified that another picture showed “a picture of the wall with a plaque that reads ‘Private’ and an entry -- a gated entry locked gate.” RP 108; Ex. P-8.

On cross-examination, Mr. Hagen testified regarding the cost to repair the pole after the cameras were removed, and about a suspicious vehicle, never identified, that twice drove up to the property gate and pressed buttons on the keypad in an unsuccessful attempt to gain entrance. RP 114-16. The driver of the suspicious vehicle was never identified because it made its attempts to enter during the time after the cameras had been taken and before they had been replaced. RP 116.

After the parties rested, the court instructed the jury that “a person commits the crime of burglary in the second degree when he or she enters

or remains unlawfully in a building with intent to commit a crime against a person or property therein,” and further, that a building “includes any fenced area.” CP 13, 22.

Mr. Evans’ sole defense was that he had been misidentified. RP 153-57. In closing, Mr. Evans’ attorney argued that police had apprehended the wrong individual and that the video footage showed an unknown person taking the cameras from the pole. RP 154. The jury convicted Mr. Evans on both counts. CP 32-33.

III. ARGUMENT

Mr. Evans argues the evidence was insufficient to convict him of second degree burglary, alleging there was no evidence that Quail Ridge had a wall or other structure surrounding the entire property. The evidence the State presented, properly viewed, refutes that contention.

A. THE STANDARD OF REVIEW FOR A SUFFICIENCY OF THE EVIDENCE CHALLENGE IS HIGHLY DEFERENTIAL TO THE FINDING OF THE JURY.

In reviewing a challenge to the sufficiency of the evidence, the test is whether, after viewing the evidence in a 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. Green*, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980). A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.

State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). All reasonable inferences from the evidence must be interpreted most strongly against the defendant. *State v. Hosier*, 157 Wn.2d 1, 8, 133 P.3d 936 (2006). A reviewing court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses and the persuasiveness of the evidence. *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004).

Circumstantial evidence carries the same weight, and is as reliable as, direct evidence. *State v. Goodman*, 150 Wn.2d 774, 781, 83 P.3d 410 (2004). “Inferences based on circumstantial evidence must be reasonable and cannot be based on speculation.” *State v. Vasquez*, 178 Wn.2d 1, 16, 309 P.3d 318 (2013). Nevertheless, “a verdict does not rest on speculation or conjecture when founded on reasonable inferences drawn from circumstantial facts.” *State v. Jameison*, 4 Wn. App. 2d 184, 197-98, 421 P.3d 463 (2018).

In a sufficiency of the evidence challenge, the court is highly deferential to the decision of the jury. *State v. Davis*, 182 Wn.2d 222, 227, 340 P.3d 820 (2014). In that regard, our Supreme Court has stated:

It is the province of the jury to weigh the evidence, under proper instructions, and determine the facts. It is the province of the jury to believe, or disbelieve, any witness whose testimony it is called upon to consider. If there is substantial evidence (as distinguished from a scintilla) on both sides of an issue, what the trial court believes after hearing the testimony, and what this court believes after

reading the record, is immaterial. The finding of the jury, upon substantial, conflicting evidence properly submitted to it, is final.

State v. Williams, 96 Wn.2d 215, 222, 634 P.2d 868 (1981). Similarly expressed:

The fact that a trial or appellate court may conclude the evidence is not convincing, or may find the evidence hard to reconcile in some of its aspects, or may think some evidence appears to refute or negative guilt, or to cast doubt thereon, does not justify the court's setting aside the jury's verdict.

State v. Randecker, 79 Wn.2d 512, 517-18, 487 P.2d 1295 (1971).

B. THE JURY FOUND SUFFICIENT EVIDENCE OF A “FENCED AREA” TO SUPPORT MR. EVANS’ CONVICTION FOR SECOND DEGREE BURGLARY.

RCW 9A.52.030(1) provides that a person is guilty of burglary in the second degree if he enters or remains unlawfully in a building other than a vehicle or a dwelling with intent to commit a crime against persons or property therein. The legislature has defined a “building” as:

[I]n addition to its ordinary meaning, ... 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.

RCW 9A.04.110(5) (emphasis added). “[T]he underlying theory of the burglary statutes is the protection of persons or property and punishment for invasions that involve a risk of criminal harm or actual harm to persons or

property.” *State v. Wentz*, 149 Wn.2d 342, 357, 68 P.3d 282 (2003); *see also State v. Gans*, 76 Wn. App. 445, 449-52, 886 P.2d 578 (1994) (fenced area is a ‘building’ if its main purpose is to protect personal property inside it); *State v. Livengood*, 14 Wn. App. 203, 540 P.2d 480 (1975) (under former burglary statute, fence enclosing electrical substation and construction materials was a ‘structure’ because it served mainly to protect property). Absent a contrary legislative intent, a term that is not defined by statute is given its ordinary meaning. *Wentz*, 149 Wn.2d at 352. “Fenced area” is not defined by statute, but has been interpreted by the courts.

In *State v. Wentz*, our high court considered a backyard surrounded by a six-foot wooden fence with padlocked gates. *Id.* at 352. In that case, both the defendant and the apprehending officer had to climb over the fence to gain entry onto the property. *Id.* at 352. The Court found under the facts of the case, a rational fact finder could have found beyond a reasonable doubt that Wentz entered a fenced area, and therefore a “building.” *Id.* at 352. The Court concluded that “[t]he ordinary meaning of ‘fenced area’ clearly encompass[e]d the backyard in this case.” *Id.*

Later, in *State v. Engel*, 166 Wn.2d 572, 576, 210 P.3d 1007 (2009), the Supreme Court interpreted the term “fenced area.” In that case, it was established at trial that fencing, piles of rock and gravel, and embankments surrounded the property. *Id.* at 574-75. The State argued there that the

“fenced area includes an area partially enclosed by a fence, where topography and other barriers combine with the fence to close off the area to the public.” *Id.* at 578. The Court disagreed, stating:

[the] “fenced area” is limited to the curtilage of a building or structure that itself qualifies as an object of burglary.... The curtilage is an area that is completely enclosed either by fencing alone or ... a combination of fencing and other structures.

Id. at 580. The *Engel* court noted that:

[u]nder the State’s interpretation, would-be petty criminals who trespass might be liable for burglary even if the property line at their point of entry were unfenced and unmarked, even if they remained on the property without approaching any buildings or structures, and even if the property were such that they could enter and remain without being aware that it was fenced. Such examples are well outside the category of offenses the legislature intended to punish as burglary.

Id. Therefore, an individual who enters a fenced and marked curtilage, who is aware that the area is fenced, and has the intent to commit a crime against person or property therein, has committed the offense of burglary as defined by statute.

Mr. Evans argues that the State failed to elicit sufficient testimony that the property was fully fenced. This contention lacks merit. Here, viewing evidence in the light most favorable to the State, it is apparent there was sufficient evidence for the jury to properly find, beyond a reasonable doubt, that Mr. Evans committed burglary in the second degree because the

property was a “fenced area.” *See Salinas*, 119 Wn.2d at 201; *see also Green*, 94 Wn.2d at 221-22.

The jury heard reliable, credible, and uncontroverted evidence that the property was “a gated community,” that residences were “*inside* the property,” that the *only* entrance to the property was via a keypad code entrance at the gate, that five security cameras monitored this specific location, that “*the entry* coming off of Hatch Road ... coming into the community” was not open to the public, and that there is a brick wall erected to keep the area private and physically closed off to the public. Mr. Hagen’s testimony that the gate was “the” entrance to the property (as opposed to “an” entrance), and that the cameras existed to “watch people entering and exiting the community,” both allow the reasonable and only inference that this was the only place on the property a person could enter or exit the property. Mr. Hagen’s testimony provides substantial evidence of a fenced area, and as no evidence to the contrary was presented, this finding of the jury is final. *See Williams*, 96 Wn.2d at 222.

Quail Ridge was situated on property marked “Private,” which was gated and adjoined by a continuous brick wall; the jury saw numerous pictures of the brick wall extending into the distance; it was reasonable for the jury to infer that Mr. Evans could not enter the property without being aware that it was fenced. *See Engel*, 166 Wn.2d at 580. Viewing this

evidence in the light most favorable to the State and interpreting all reasonable inferences raised by the existence of a brick wall with a single gate in the State's favor, supports the jury's finding that the property was fenced area. *See Hosier*, 157 Wn.2d at 8. Mr. Evans' act of climbing a brick wall, invading the property, and then taking the cameras protected by that wall is undoubtedly the type of behavior the legislature intended to punish as burglary. *See Engel*, 166 Wn.2d at 580.

Mr. Hagen did not explicitly testify that the property was fully fenced; neither was it necessary for him to do so. Because the jury heard that the gate closed fifteen seconds after being opened by someone with a code or remote control, it can be reasonably be inferred the gate was closed when Mr. Evans breached the property's brick wall at 3:45 a.m. *See Thomas*, 150 Wn.2d at 874-85. Based on all the evidence, it was reasonable for the jury to infer that, without knowing the code or possessing a remote control, there was no other egress onto the property other than to scale the brick wall, as Mr. Evans did. *See Jameison*, 4 Wn. App. 2d at 197-98.

When viewed in the light most favorable to the State and taken as true, the evidence demonstrated Mr. Evans entered the property by climbing onto the brick wall instead of availing himself of the only proper entrance to the property, which was closed and monitored by multiple security cameras. Based on those facts, it was reasonable for the jury to infer

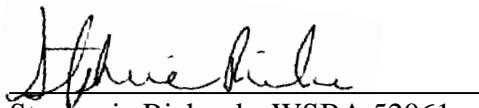
Mr. Evans entered a “fenced area,” here, the curtilage of the property, marked “Private,” to commit the crime burglary by intentionally taking the security cameras. *See Engel*, 166 Wn.2d at 580. Even if this Court finds this evidence less than convincing, out of deference to the fact finder, it should not set aside the jury’s verdict. *See Randecker*, 79 Wn.2d at 517-18.

IV. CONCLUSION

Properly viewed, the evidence presented by the State was sufficient to convict Mr. Evans of second degree burglary. Quail Ridge was described as a “gated community.” There was uncontroverted evidence that there is a brick wall around the property and uncontradicted testimony that the entrance to the property was “*the gate*.” Mr. Evans breached the property’s wall, which was clearly marked “Private.” The State proved that Mr. Evans entered a “fenced area” beyond a reasonable doubt. The State requests this Court affirm the jury’s verdict.

Respectfully submitted this 30 day of October, 2018.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
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STATE OF WASHINGTON,

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NO. 35990-5-III

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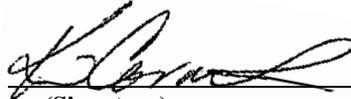
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