

No. 81072-9

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ROGER DEAN ENGEL,

Petitioner.

ON REVIEW FROM THE COURT OF APPEALS, DIVISION ONE

SUPPLEMENTAL BRIEF OF PETITIONER

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A. SUMMARY OF ARGUMENT

Roger Dean Engel was convicted of burglary in the second degree for entering the yard of Western Asphalt Company and stealing tire rims there. Because only one-third of the yard is actually enclosed by a fence, Mr. Engel argues it is not a “building” under the statutory definition, and therefore the State did not meet its burden of proving each element of the crime beyond a reasonable doubt.

The Court of Appeals acknowledged this is a question of first impression but affirmed Mr. Engel's conviction. State v. Engel, No. 58176-7-I, LEXIS 2828 (Wash., October 15, 2007). Although recognizing the Supreme Court has held that a lot with a fence running on only one side is not a fenced area, the Court of Appeals held that “combined natural barriers and man-made fencing create a ‘fenced area’ in satisfaction of the ‘building’ element of the second degree burglary requirements.” Engel, slip op. at 8. This definition is contrary to the ordinary meaning of “fenced area” and creates more questions than it resolves. This Court should instead adopt a common sense approach and hold that an area is a “fenced area” (and therefore, a “building”) only if the main purpose of the layout is to protect the private property inside it.

B. ISSUE PRESENTED

To support a conviction for burglary in the second degree, the State had to prove Mr. Engel entered or remained unlawfully in a building. "Building" is statutorily defined to include any "fenced area." The State alleged Mr. Engel unlawfully entered the yard of the Western Asphalt Company, only one-third of which was enclosed by a fence. Did the resulting burglary conviction violate due process, requiring reversal?

C. STATEMENT OF THE CASE

At trial, Western Asphalt Company Comptroller Yvonne O'Leary testified that after a number of items were stolen from the premises, her employer Western Asphalt installed a video surveillance system. 3/21/06RP 95-96. A hidden camera was installed near the shop area. 3/21/06RP 98.

On January 13, 2005, Ms. O'Leary went through the surveillance system's event logs and found footage from the hidden camera showing that the night before, two individuals entered the property. 3/21/06RP 100. The business was closed at the time and the individuals did not have permission to be on the premises. 3/21/06RP 110-11. Another theft occurred later that month and was also captured on video. 3/21/06RP 101. Ms. O'Leary asked a

consultant to copy both videos onto a CD-ROM and gave it to the police. 3/21/06RP 101.

Western Asphalt Owner William Peterson testified that his business had been the subject of multiple thefts. 3/21/06RP 122. After installing the surveillance system, he and his staff decided to place some old aluminum tire rims outside a locked shed as "bait" in order to get a close-up video. 3/21/06RP 126. On January 13, 2005, he reviewed footage taken the night before, which showed two individuals taking the tire rims away. This incident was not reported to the police until some time later, when another theft occurred. 3/21/06RP 158.

King County Deputy Sheriff William Michaels viewed the video and recognized the two men as Roger Engel and Gary Shaw, both of whom he knew through various interactions in the small community of Maple Valley, is on a first 3/21/06RP 144-46, 148. Gary Shaw confessed to the January 12 burglary and named Mr. Engel as the other suspect in that incident. 3/22/06RP 12.

On September 16, 2005, the Prosecuting Attorney for King County charged Roger Engel with burglary in the second degree. CP 1-3. Following a jury trial before the Honorable James Cayce, Mr. Engel was convicted as charged. CP 32-37.

D. ARGUMENT

THE STATE PRESENTED INSUFFICIENT
EVIDENCE TO SUPPORT ENGEL'S CONVICTION
FOR BURGLARY IN THE SECOND DEGREE.

1. Sufficient evidence must be presented to support each element of the crime charged. The State has the burden of proving each element of the crime charged beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); Seattle v. Gellein, 112 Wn.2d 58, 62, 768 P.2d 470 (1989). On a challenge to the sufficiency of the evidence, this Court must decide whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found all the essential elements of second degree burglary beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

When the sufficiency of the evidence is challenged, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. Id.

The State alleged Mr. Engel committed burglary in the second degree by entering the yard of Western Asphalt Company and taking aluminum tire rims which had been left outside a shed in order to lure thieves within view of a hidden camera.

To convict Mr. Engel of burglary in the second degree, the State was required to prove that, intending to commit a crime against a person or property therein, Mr. Engel entered or remained unlawfully in a building other than a vehicle or dwelling. RCW 9A.52.030(1). Because it did not prove that the Western Asphalt yard was a "building," the State failed to prove every element of the crime.

2. The Western Asphalt yard was not a "building" as defined by statute because it was not a "fenced area" under the ordinary meaning of the phrase. "Fenced area" is included in the statutory definition of "building." RCW 9A.52.110(5). There is no statutory definition for "fenced area." "Absent a contrary legislative intent, we give a term that is not defined by statute its ordinary meaning." State v. Wentz, 149 Wn.2d 342, 352, 68 P.3d 282 (2003) (finding that ordinary meaning of "fenced area" applied to a residential backyard fully enclosed by a solid wood fence) citing Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 813, 828

P.2d 549 (1992). Here, the jury was correctly instructed that “building, in addition to its ordinary meaning, includes any fenced area.” Instruction No. 7, CP 20. However, the Western Asphalt yard is only partially fenced. 3/21/06RP 117.

The front and one side of the yard are bound by a chain-link fence topped by barbed wire and a large gate which is locked when the business is closed. 3/21/06RP 118, 130; CP 46-47 (App. B).¹ The fence ends on the side of the property, where the business keeps stock piles of gravel and other raw materials. 3/21/06RP 118. There is no fence here because when the stockpiles are at their largest, they would encroach upon, damage, or destroy the fence. 3/21/06RP 118. The size of these stock piles varies according to the season; they are smallest from January to March. 3/21/06RP 118-19. This incident occurred in January.

There is no fence on the rest of the property. Western Asphalt owner William Peterson testified “probably two-thirds of our property” is “encase[d]” by “high” and “sloping banks.” 3/21/06RP 130. Mr. Peterson testified that in the unfenced portions of the yard, “the terrain... probably acts as a fence more than anything.”

¹ State’s Exhibits 1-4 are color photographs of the Western Asphalt yard. Black and white photocopies of these exhibits are attached as Appendices A-D, respectively.

3/21/06RP 130. Mr. Peterson identified State's Exhibit 1 as "the back of our yard, which you can see the banks." CP 46-47 (App. A); 3/21/06RP 131. The photograph shows a large hill with a stock pile in the foreground and a cliff on the right side of the frame. The State presented no evidence that this hill or bank was of such a steep grade that it would be impossible or even difficult for the average person to walk up or down it. In fact, Mr. Peterson indicated that the Western Asphalt property would be accessible by way of this hill:

DEFENSE COUNSEL: Do you know what's beyond that hill in the background:

MR. PETERSON: Residences.

DEFENSE COUNSEL: If you walk up that hill, can you see into the residential area?

MR. PETERSON: I would assume so, yeah.

3/21/06RP 161. Apart from Mr. Peterson's conclusory statement that the "terrain ... acts as a fence," no evidence was presented that the nature of the terrain actually would keep intruders out, or any explanation of how it would do so. 3/21/06RP 119.

Mr. Peterson identified State's Exhibit 2 as the front entrance to the Western Asphalt property, as viewed from inside the property. 3/21/06RP 131. The photograph shows the chain link fence, the gate standing open, and no fence to the left of the

gate. App. B. The terrain to the left of the gate is on a gentle incline. App. B. On the inside of the gate, the road forks and leads off to the left. App. B. Mr. Peterson testified this is an "internal road" which leads only to Western Asphalt's aggregate supplier approximately 4-500 feet away. 3/21/06RP 160-61. Although the supplier is a completely separate business, there is no physical boundary between the two properties. 3/21/06RP 160-61.

The ordinary meaning of "fenced area" contemplates a property enclosed by a fence. The Western Asphalt yard was not so enclosed. A definition of "fenced area" which would include partially fenced properties would clearly be unreasonable, and beg the question: how much fence must a property have before it can be considered "fenced?" As the concurrence in this case noted, a lot with a fence running down only one side, separating it from the street, is not a "fenced area." Engel, slip op. at 8, citing Wentz, 149 Wn.2d at 356-57 (J. Madsen, concur.). The Western Asphalt yard was only one-third fenced. 3/21/06RP 130.

Nor can the terrain be considered a "fence." The banks and hills in the unfenced sections of the property *may* have discouraged unauthorized entry, but there was no evidence that they actually did so, or that they could prevent it. Even if the terrain were completely

impassable, it still would not be a fence, according to the ordinary and common-sense meaning of the word.

3. This Court should apply the *Roadhs* “main purpose” test to determine whether a property is a “fenced area.”

The Court of Appeals’ ruling begs the question: if a “fenced area” includes natural barriers, how much of a natural barrier is required?

Will the courts determine how steep a bank must be, or how dense a blackberry bush?

Mr. Engel does not argue that a property must be enclosed by an “impenetrable barrier” in order to be considered a fenced area. Engel, slip op. at 8. Indeed, many fences are penetrable. Instead, this Court should apply a common sense approach. Mr. Engel argues the Western Asphalt yard simply does not fall within the ordinary meaning of a “fenced area,” but in the alternative, this Court should return to the Roadhs test to analyze the purported barriers.

Before Wentz, Washington courts used the “main purpose” test announced in State v. Roadhs, 71 Wn.2d 705, 430 P.2d 586 (1967) to determine whether a fenced area was a “structure” or “building” subject to the burglary statutes. See, e.g. State v. Gans, 76 Wn. App. 445, 449-52, 886 P.2d 578 (1994), rev. denied, 126

Wn.2d 1020 (1995) (fenced area is a “building” if its main purpose is to protect personal property inside it); State v. Brenner, 53 Wn. App. 367, 377-78, 768 P.2d 509, rev. denied, 112 Wn.2d 1020 (1989) (wrecking yard completely enclosed by eight-foot fence is a “building”); State v. Livengood, 14 Wn. App. 203, 209, 549 P.2d 480 (1975) (under former statute, fence enclosing electrical substation and construction materials was a “structure” serving mainly to protect property).

Were the fence a mere boundary fence or one erected for the sole purpose of esthetic beautification, it would not constitute a “structure” as that term was intended to be interpreted by the legislature. However, where the fence is of such a nature that it is erected mainly for the purpose of protecting property within its confines and is, in fact, an integral part of a closed compound, its function becomes analogous to that of a “building” and the fence itself constitutes a “structure” subject to being burglarized.

Id. at 708-09 (emphasis in the original).

The Wentz Court held that, since the 1975 amendments explicitly included “fenced area” in the definition of a “building,” the Roadhs test was no longer necessary to analyze the purpose of a fence. Wentz, 149 Wn.2d at 350. Thus, Wentz did not overturn Roadhs, but merely found the analysis obsolete, in light of the 1975 amendments, to determine whether a fenced area is a building.

Since the legislature still has not provided insight into the definition of "fenced area," the Roadhs test is still the ideal tool to determine whether an area is a fenced area.

Here, the issue is not the actual fence, but whether the stock piles and terrain, where no fence existed, were mainly intended "for the purpose of protecting property within its confines." Id. There is no evidence that this was the case.

The Court of Appeals found that the "combined fence and terrain isolate and protect the Western Asphalt yard." Engel, slip op. at 8. However, there was no evidence that the natural barriers were *deliberately* used to form a barrier. No witness testified as to the reason why the yard had the layout that it did, or why the stock piles of aggregate were placed where they were. Western Asphalt employee Yvonne O'Leary testified there was no fence near the stock piles because "the stock piles varied depending on the time of year, and sometimes they would completely bury a fence." 3/21/06RP 118. Therefore, "it wasn't economical to put a fence in there." Id. No other reason was given for the placement of the piles; there was no evidence that the piles obviated the need for a fence, much less that the piles were intended to serve as a fence.

Thus, applying the Roadhs test, the main purpose of the stock piles and layout of the yard was not to protect property, and the yard therefore cannot be a fenced area.

4. The “main purpose” test would not undermine the public policy behind the burglary statutes. The Court of Appeals argues the rule proposed by Mr. Engel would undermine the public policy behind the burglary statutes. Engel, slip op. at 8. But if the legislature wishes to clarify the definition of “fenced area,” or to include unfenced areas in the burglary statutes, it will do so, and has made similar amendments in the past.

The legislative history of the criminal trespass statute is highly instructive. Before July 1979, criminal trespass in the first degree provided:

A person is guilty of criminal trespass in the first degree if he knowingly enters or remains unlawfully in a *building* or on real property adjacent thereto or upon real property which is fenced or otherwise enclosed in a manner designed to exclude intruders.

Former RCW 9A.52.070(1) (emphasis added). Criminal trespass in the second degree provided:

A person is guilty of criminal trespass in the second degree if he knowingly enters or remains unlawfully in or upon *premises* of another.

Former RCW 9A.52.080(1) (emphasis added).

The statutes now read:

A person is guilty of criminal trespass in the first degree if he knowingly enters or remains unlawfully in a building.

RCW 9A.52.070(1).

(1) A person is guilty of criminal trespass in the second degree if he knowingly enters or remains unlawfully in or upon premises of another under circumstances not constituting criminal trespass in the first degree.

RCW 9A.52.080(1). The statutory definition of "premises" includes "any building, dwelling, structure used for commercial aquaculture, or any real property." RCW 9A.52.010(1).

Analyzing the legislative history behind the 1979 amendments, the Court of Appeals found the legislature intended to create separate punishments for trespass in a building and trespass in fenced areas. State v. Brown, 50 Wn.App. 873, 877-78, 751 P.2d 331 (1988).

The effect of adoption of the amendments contained in these two sections would be to narrow the scope of the gross misdemeanor first degree criminal trespass offense to trespasses in a *building in its ordinary sense*. The reason for the necessity of the odd appearing phrase "other than a fenced area" is because of the definition of "building" in RCW 9A.04.110(5) which includes fenced areas for purposes of using the term "building" elsewhere in the

criminal code, in particular in such areas as arson or burglary. Moreover, all other types of trespasses other than in a building would be covered by the second degree criminal trespass offense graded at the misdemeanor level...

Id., quoting House Judiciary Committee Bill Files 307, at 5 (1979) (emphasis in quotation).

Thus, first-degree criminal trespass can be committed only by entering a building “in its ordinary sense,” which is clearly not a fenced area. Second-degree criminal trespass can be committed by entering “premises,” which include not only fenced areas but also open yards. State v. Mounsey, 31 Wn. App. 511, 518, 643 P.2d 892, rev. denied, 97 Wn.2d 1028 (1982). Most importantly for this case, through the 1979 amendments, the legislature specifically repealed language regarding “adjacent real property” and “fenced” or “enclosed” real property found in former RCW 9A.52.070(1). Brown, 50 Wn. App. at 877. Instead, the legislature focused on the distinction between “buildings” and non-building “premises.” Under that scheme, it is clear that whether a piece of property is completely or partially fenced, or not fenced at all, it can be “premises” subject to trespass.

The legislature could have chosen a similar approach with the burglary statute. Instead, it chose the “building” definition in

RCW 9A.52.110(5). Unlike the sweeping language of the “premises” definition, which includes “any real property,” the “building” definition lists specific items, including “fenced area.” In the absence of any indication to the contrary, the ordinary meaning of a fenced area must therefore mean an area enclosed by a fence.

5. Even under the standard put forth in the Court of Appeals’ opinion, the State did not carry its burden of proof. The Court of Appeals held that “[h]ere, the barbed-wire fence and terrain protects the contents of the yard and signals to would-be intruders that the area is not publicly accessible.” Engel, slip op. at 8. However, the Court did not explain, and the record does not show exactly how the terrain sends such a message. No testimony or exhibit indicates how the terrain looked from the outside of the yard. In many rural areas of this state, banks, cliffs, and hills are commonplace sights and send no message whatsoever.

The Court also held that the combination of man-made fence and natural barrier served to “isolate and protect” the Western Asphalt yard. However, this conclusion was not supported by the evidence. There was no testimony that it would actually be difficult for a person to walk down the hill into the yard

and the photographs offer no clarity on this point. To the contrary, when defense counsel asked Mr. Peterson, "If you walk up that hill, can you see into the residential area?," he replied, "I would assume so, yeah," indicating that it *would* be possible to walk up (or, presumably, down) the hill. 3/21/06RP 161. Although Mr. Peterson testified that the terrain "probably acts as a fence more than anything," this vague and conclusory testimony cannot establish the fact that the terrain actually did act as a fence, only that it was more fence-like than nothing.

A common sense interpretation of the statute leads to the conclusion that the Court of Appeals erred; the Western Asphalt yard was not a fenced area and therefore not covered by the statutory definition of a "building."

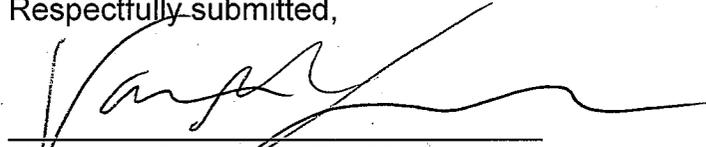
E. CONCLUSION

Whether through an ordinary definition of "fenced area," application of the Rhoads main purpose test, or the insufficiency of the evidence using the Court of Appeals' reasoning, this Court should find the State failed to prove each element of the crime beyond a reasonable doubt, depriving Mr. Engel of due process.

Mr. Engel therefore respectfully asks this Court reverse the conviction for second degree burglary.

DATED this 15th day of August, 2008.

Respectfully submitted,

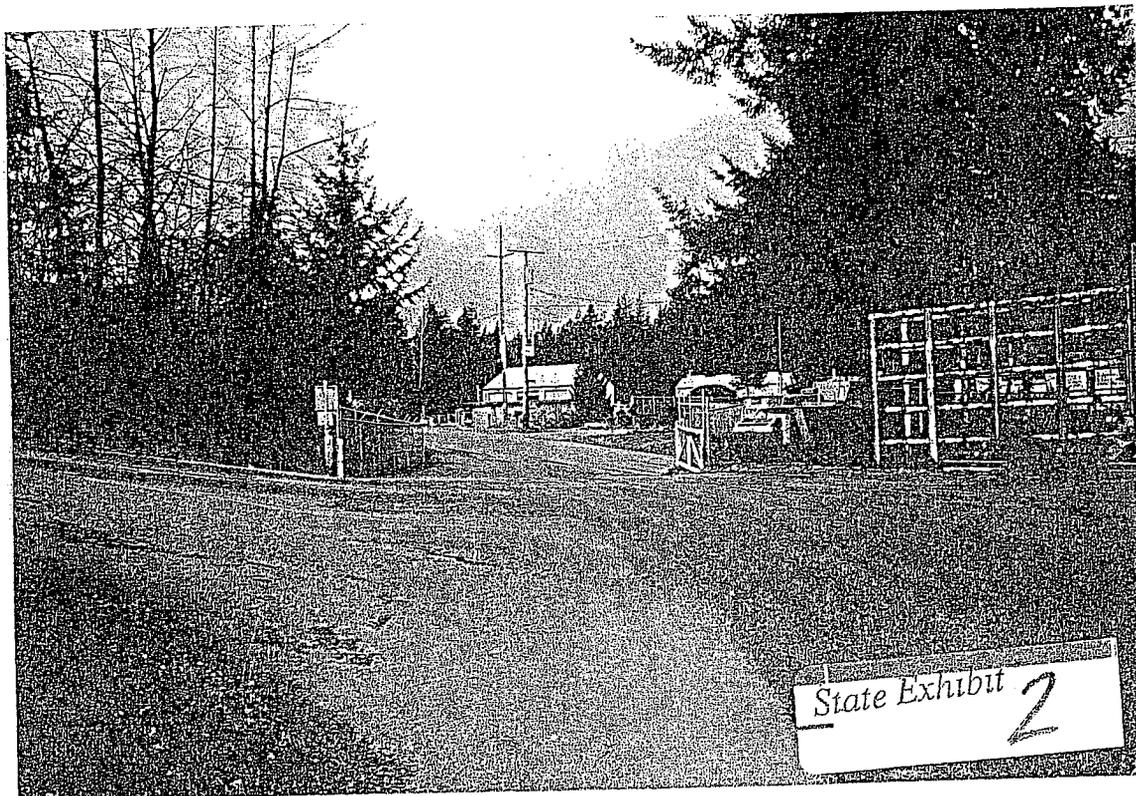
A handwritten signature in black ink, appearing to read 'Vanessa M. Lee', written over a horizontal line.

Vanessa M. Lee (WSBA 37611)
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APPENDIX A



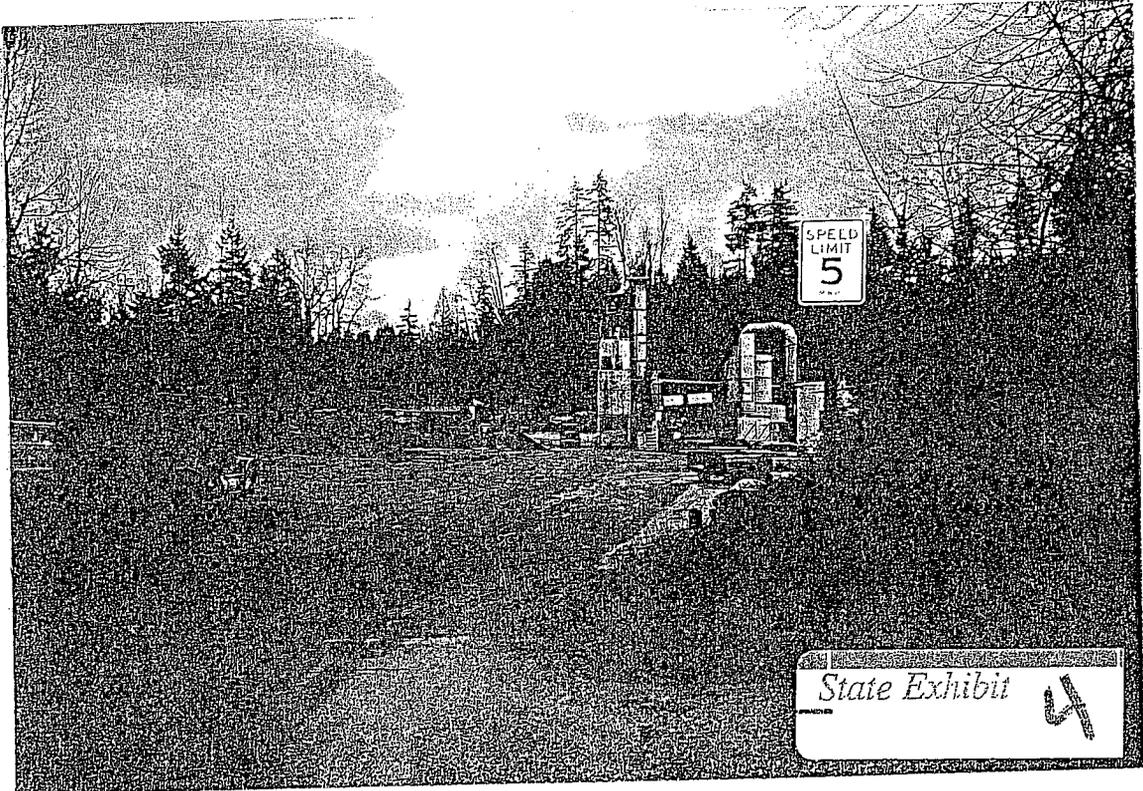
APPENDIX B



APPENDIX C



APPENDIX D



State Exhibit 4

