

68220-2

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No. 68220-2-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Appellant,

v.

COREY THOMAS,

Respondent.

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

BRIEF OF APPELLANT

GREGORY C. LINK
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COURT OF APPEALS
STATE OF WASHINGTON
NO. 68220-2-I
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A. ASSIGNMENT OF ERROR

In the absence of any evidence from which a reasonable juror could conclude Corey Thomas or an accomplice entered a building, the trial court deprived Mr. Thomas of due process by entering a conviction for second degree burglary.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

The Due Process Clause of the Fourteenth Amendment requires the State prove each element of an offense. On review, a court must determine whether the State presented sufficient evidence to permit a reasonable juror to find each element of the offense beyond a reasonable doubt. Where it is wholly unreasonable to conclude or infer Mr. Thomas or an accomplice entered a building, did the State offer sufficient evidence to sustain Mr. Thomas's conviction of second degree burglary?

C. STATEMENT OF CASE

Early in the morning, Kevin Stone and Shane Crum, saw two men cross Edmonds Way from the direction of the Edmonds Smoke Shop towards a QFC grocery store, and enter the passenger side of a car in the grocery store parking lot. 10/25/11 RP 102, 110. The men were not carrying anything as they crossed the street. Id. at 107, 116.

Minutes earlier, police had received a report of an alarm at the smoke shop. The first officers that arrived at the smoke shop saw the

glass front door was broken. 10/25/11 RP 52. Otherwise, however, the interior of the store, and its inventory, appeared undisturbed. Id. at 80-81. The shop's owner, Muhammed Anwar, soon arrived and confirmed nothing was missing. Id. at 83.

A second officer arriving at the store, saw Mr. Crum and Mr. Stone in the QFC parking lot, and asked them if they had observed an activity at the smoke shop. 10/25/11 RP 121. The men pointed the officer to the car which was just then leaving the parking lot. Id. at 114.

Police immediately followed the car, which was not speeding, eventually stopping it a short distance away. 10/25/11 RP 121-22, 125. During that low-speed pursuit, the car was out of the officer's sight for no more than 10 seconds. Id. at 127.

Mr. Thomas was driving the car, with two other passengers, when it was stopped. 10/25/11 RP 122. A search of the car and the three men did not uncover any item taken from the smoke shop. Id. at 126, 139.

Despite his initial statements that nothing was missing, Mr. Anwar subsequently claimed that 82 cartons of cigarettes were in fact missing. 10/25/11 RP 170. However, Mr. Anwar never provided any documentation of the items allegedly taken. Id. at 168

The State charged Mr. Thomas with second degree burglary. CP 72. A jury convicted Mr. Thomas as charged. CP 28.

The trial court subsequently rejected the State's request that it impose restitution for the cigarettes Mr. Anwar claimed were stolen. CP 1-3.

D. ARGUMENT

The State did not prove each element of second degree burglary beyond a reasonable doubt.

1. The State must prove each element of an offense beyond a reasonable doubt.

A criminal defendant may only be convicted if the government proves every element of the crime beyond a reasonable doubt. Blakely v. Washington, 542 US. 296, 300-01, 124. S. Ct. 2531, 159 L. Ed. 2d 403 (2004); Apprendi v. New Jersey, 530 U.S. 466, 476-77, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); United States v. Gaudin, 515 U.S. 506, 510, 115 S. Ct. 2310, 132 L. Ed. 2d 444 (1995); In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Green, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). The constitutional rights to due process and a jury trial "indisputably entitle a criminal defendant to 'a jury determination that he is guilty of every element of the crime beyond a reasonable doubt.'" Apprendi, 530 U.S. at 476-77 (quoting Gaudin, 515 U.S. at 510).

This Court may affirm the conviction only if it can conclude that a rational trier of fact could find each element beyond a reasonable doubt.

Green, 94 Wn.2d at 221-22.

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.

The State did not provide sufficient evidence to permit a reasonable juror to conclude Mr. Thomas or an accomplice entered the store.

2. The State did not prove Mr. Thomas or an accomplice entered the store.

The State did not prove beyond a reasonable doubt that anyone entered the store. The State's proof that Mr. Thomas or an accomplice entered the store hinged upon Mr. Anwar's belated claim that 82 cartons of cigarettes were missing from the store. It would be difficult to overlook 82 cartons of cigarettes - stacked together they are 3.8 cubic feet.¹ And yet, not a single cigarette, pack, carton or box was found anywhere outside the store. Nor was there any visible disturbance or the items inside the store.

¹ See <http://answers.yahoo.com/question/index?qid=20081119185802AA6oh8a> (carton of cigarettes is 11.25"x3.5"x2").

Police responded to the store within minutes of the alarm, thus providing a narrow time frame in which any theft could have occurred. 10/25/11 RP 43-44. While the glass in the door was knocked out, the door remained locked and a bar in the door required one to stoop beneath it to enter or exit the store. 10/25/11 RP 97. A task which could only be more difficult if one was attempting to carry out 82 cartons of cigarettes. Yet officers did not observe any dropped items on the floor.

The two witnesses who saw two men running across Edmonds Way from the direction of the store towards the QFC parking did not observe them carrying any items in their hands. 10/25/11 RP 107. Police officers noted nothing appeared out of order in the store, beyond the glass on the floor. 10/25/11 RP 82. When officers initially asked Mr. Anwar if anything was missing, he said no. Id. at 83.

The items Mr. Anwar later claimed to have been stolen would have been located behind the store's counter, out of view of a person standing in the open area of the store. 10/25/11 RP 88 Presumably even harder to spot with the lights off at 2:00 a.m. Yet, according to Mr. Anwar none of the hundreds of packages a cigarettes lining shelves in the main open area of the store were taken, only those hidden from view behind the counter. Id.

With the exception of a few seconds when it rounded a curve in the road, officers were able to follow and observe the car driven by Mr. Thomas from the time it left the QFC parking lot until it was stopped. 10/25/11 RP 127. Not a single cigarette was found in the car when it was stopped and searched. Id. at 126. Nor did any of the three men have a single cigarette in their possession. Id. at 208-09. Officers following the car from the parking lot did not see any items thrown from the car - certainly not 3.8 cubic feet of cigarettes. No items from the store were found along the route between the location of the arrest and the store. 10/25/11 RP 197. The store's owner did not provide any invoices or other documentation of lost items. 10/25/11 RP 168.

Tellingly, the trial court struck the State's request for restitution for the claimed loss of the cigarettes - plainly concluding Mr. Anwar's claim was at best absurd. CP 1-3.

To conclude Mr. Thomas or either of the other men entered the store and removed cigarettes would require one to find that 3.8 cubic feet of cigarettes simply disappeared. That is not a reasonable inference.

There was insufficient evidence that any of the three men entered the store. Thus, the State did not prove Mr. Thomas committed second degree burglary.

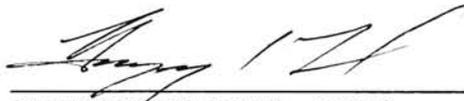
3. The Court should reverse Mr. Thomas's conviction.

The absence of proof beyond a reasonable doubt of an element requires dismissal of the conviction and charge. Green, 94 Wn.2d at 221. The Fifth Amendment's Double Jeopardy Clause bars retrial of a case, such as this, where the State fails to prove an added element. North Carolina v. Pearce, 395 U.S. 711, 717, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969), reversed on other grounds, Alabama v. Smith, 490 U.S. 794, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989). Because the State failed to prove Mr. Thomas or an accomplice entered the building, the Court must reverse his conviction

E. CONCLUSION

Because the State did not prove each element of the offense, this Court must dismiss Mr. Thomas's conviction.

Respectfully submitted this 31st day of July, 2012.



GREGORY C. LINK – 25228
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STATE OF WASHINGTON,)	
)	
Respondent/Cross-appellant,)	NO. 68220-2-I
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COREY THOMAS,)	
)	
Appellant-Cross-respondent.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 31ST DAY OF JULY, 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:

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SIGNED IN SEATTLE, WASHINGTON, THIS 31ST DAY OF JULY, 2012.

X _____ 

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