Supreme Court No. 91412-5
(44382-1-II)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DEVON MARTEEN DANIELS,

Petitioner.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND DECISION BELOW

Devon Marteen Daniels, petitioner here and appellant below, asks this Court to grant review of the Court of Appeals decision terminating review dated February 11, 2014, pursuant to RAP 13.3(a)(1) and RAP 13.4(b). A copy of the decision is attached as Appendix A.

B. ISSUES PRESENTED FOR REVIEW

1. Persons summoned for jury service may only be excused by the court pursuant to Title 4.44 RCW, or "upon a showing of undue hardship, extreme inconvenience, public necessity, or any reason deemed sufficient by the court for a period of time the court deems necessary." RCW 2.36.100. Must the conviction be reversed and dismissed where the trial court failed to follow this procedure or to state a valid basis for removing a qualified juror?

2. A criminal defendant's constitutional right to due process is violated when a conviction is based upon insufficient evidence. In this case the State failed to present sufficient evidence that Mr. Daniels unlawfully entered or remained in the Forge Jack Pot's office. Was Mr. Daniels's right to due process violated when he was convicted of one count of burglary in the second-degree?

C. STATEMENT OF THE FACTS

Mr. Daniels was arrested and charged with second-degree burglary at the Forge Jack Pot convenience store, owned by Mark Freisem. Mr. Daniels presented a defense of general denial at trial. According to Maria Espinosa, a long-time clerk at the store Mr. Daniels came into the store on June 11, 2012 to get a cup of coffee. Mr. Daniels was unable to pay for the coffee and so Ms. Espinosa told him to go ahead and just take it without paying. 1RP 133-35. Mr. Daniels left the building and came back a few minutes later and asked Ms. Espinosa if he could use the restroom and she gave Mr. Daniels permission to do so. *Id.* at 37; 136. Mark Freisem was in the Forge when Mr. Daniels came back in and saw Ms. Espinosa give Mr. Daniels permission to use the restroom. He took the coffee cup in with him. It was later recovered on the desk in the office. 1RP 54. The restroom was not a public bathroom but Mr. Freisem and his employees did allow customers to use it. *Id.* at 37

Mr. Freisem asked Ms. Espinosa if the door to the office was locked. 1RP 54. The restroom was accessible within the store. The office was then entered through a door from the restroom marked "No Exit." There was a storage space that was accessible from the office.

Id. at 137. Ms. Espinosa had been in and out of the storage area that morning. *Id.* at 38; 136. Ms. Espinosa's testimony was conflicting regarding the office door. She stated that the door to the office from the restroom was usually closed and always locked, but also said that she was not sure if she had closed the door to the office when she last left it that morning. Ms. Espinosa testified that another client had used the restroom earlier that morning. *Id.* at 141-42. She was unclear as to whether or not the door was indeed closed when Mr. Daniels used the restroom. *Id.* at 139-43. Mr. Freisem may have told the 911 operator that the door was open. *Id.* at 104.

The door to the office could easily be opened even if locked, as the lock was faulty and often broken. A little jiggle of the handle and use of a shoulder and the door easily opened. 1RP 102-03, 137. The door has had to be repaired multiple times in the ten years Mr. Freisem has owned the store. 1RP 106. Mr. Freisem thought the amount of time Mr. Daniels spent in the restroom was cause for concern and went to investigate after he left the store. It only took Mr. Freisem a moment to see that the office door was open and that a desk drawer that had contained a bank bag with a deposit of $7,712.59 was gone. 1RP 57. Mr. Freisem ran out of the office and yelled at Mr. Daniels to stop; he

did not stop. Mr. Freisem followed him on foot but lost him. *Id.* at 78-79. He testified that Mr. Daniels was wearing a dark jacket, dark pants and a white shirt. *Id.* at 97-98.

The police were called and Mr. Freisem admittedly lied to the 911 operator by exaggerating the incident to get a quicker response. 1RP 107. The police arrived and joined Mr. Freisem's search. Mr. Freisem and some of his friends later found Mr. Daniels. *Id.* at 82-84. Mr. Freisem pulled out his personal handgun while yelling at Mr. Daniels to get on the ground. The police showed up ten minutes later and arrested Mr. Daniels. *Id.* at 84-85.

The money was found, but not in Mr. Daniels's possession. 1RP 166; 2RP 235. There was a phone charger found with the money. 2RP 248. Mr. Daniels's fingerprints were not found in office, in the restroom, on the bank bag, on the phone charger or on the coffee cup. They were not found on anything associated with the crime. 2RP 253. There was a surveillance video admitted at trial that showed Mr. Daniels doing something with the front of his pants in the office. It did not show the bank bag. 1RP 192.

During voir dire juror number 18 stated that because of experiences she had growing up and living in Detroit she did not feel

that she could believe anything that police officers say. Jury Voir Dire (JVD) 97.[1] The State expressed concern over the juror's ability to be fair and impartial. *Id.* Juror number 18 was questioned further and expressed that she could indeed be fair and impartial. *Id.* at 103. She said that if she were the defendant she would want herself on the jury. *Id.* at 105. Over Mr. Daniels's objection the trial court granted the State's motion to dismiss for cause stating that Juror number 18 had "an all or nothing" attitude regarding the police. *Id.* at 109.

Mr. Daniels convictions were affirmed by an opinion issued by the Court of Appeals on February 11, 2015.

D. STATEMENT OF THE CASE

Mr. Daniels convictions and affirmation of those on direct appeal should be reviewed by this Court for several reasons. The right to due process and a conviction based on the State's fulfillment of its burden to prove all essential elements of a crime beyond a reasonable doubt is fundamental and soundly protected by both the United State's and Washington Constitution. U.S. Const. Amend. XIV; Wash. Const. Article I, § 3; *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L.Ed.2d 368 (1970). The Court of Appeals opinion that the State met

[1] Not all transcripts are labeled by volume so some are listed by name or date.

its burden to prove beyond a reasonable doubt all elements of the crime charged is in conflict with the decision of this Court in *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1970). RAP 13.4(b)(1).

The right to a trial by an impartial and indifferently chosen jury is a fundamental right and any issue regarding it presents a significant question of law under both the United States and Washington Constitutions fundamental. U.S. Const. Amend. XIV; Wash. Const. Article I, § 3; *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L.Ed.2d 368 (1970). The fact that Mr. Daniels's fundamental right to due process was violated makes his case ripe for review. RAP 13.4(b)(3). The violation of due process is always of substantial public interest and Mr. Daniels's case is no different. RAP 13.4(b)(4). It is for all of the above reasons that Mr. Daniels seeks review from this Court.

E. ARGUMENT

1. The Court of Appeal's ruling in Mr. Daniels's case in conflict with this Court's rulings that a conviction must be supported by sufficient evidence.

The Court of Appeals' affirmation of the State's failure at trial to present sufficient evidence to prove every essential element of a

crime charged beyond a reasonable doubt is in conflict with well established law. *In re Winship*, 397 U.S. 358, at 364. A criminal defendant's fundamental right to due process is violated when a conviction is based upon insufficient evidence. *Id.*; U.S. Const. Amend. XIV; Wash. Const. art. I § 3; *City of Seattle v. Slack*, 113 Wn.2d 850, 859, 784 P.2d 494 (1989); *State v. Green*, 94 Wn.2d 216 at 220-21.

Mr. Daniels was convicted of one count of burglary in the second-degree. 12/19/12RP 4. RCW 9A.52.030(1):

> 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.

"Enters or remains unlawfully" is defined in RCW 9A.52.010 as: "A person 'enters or remains unlawfully' in or upon premises when he or she is not then licensed, invited, or otherwise privileged to so enter or remain."

Mr. Daniels was given permission to enter the Forge Jack Pot's restroom. That restroom was connected to the store's office by an adjoining door that was according to testimony at trial often not locked. 1RP 104; 139-43. There was a complete lack of signage to indicate that

the office was off limits, such as a red "Private" or "Do Not Enter" signs. The sign on the door simply read "No Exit." *Id.* at 137. Contrary to this Court's ruling in *State v. Green*, 94 Wn.2d 216 at 221, at trial the State failed to introduce sufficient evidence to prove that Mr. Daniels entered or remained in the office unlawfully. Mr. Daniel's was convicted of second-degree burglary despite the State's failure to provide sufficient evidence of an element of the crime charged. The Court of Appeals affirmation of his conviction was erroneous as it goes against the basic tenant of criminal law that requires that the State must prove all essential elements of a charged crime beyond a reasonable doubt.

2. The right to a trial by an impartial and indifferently chosen jury is a fundamental right and any issue regarding it presents a significant question of law under both the United States and Washington Constitutions.

The accused in a criminal trial has a constitutional right to have a fair and impartial jury determine his guilt or innocence. U.S. Const. amends 6, 14; Wash. Const. art. 1, 3 § 22; *Taylor v. Louisiana*, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975); *Irvin v. Dowd*, 366 U.S. 717, 722, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961); *State v. Rupe*, 108 Wn.2d 734, 748, 743 P.2d 210 (1987), *cert. denied*, 486 U.S. 1061

(1988); *State v. Brett*, 126 Wn.2d 136, 157, 892 P.2d 29 (1995). "Washington, like every other state, is committed to the proposition that the right to a trial by jury includes the right to an unbiased and unprejudiced jury, and that a trial by jury, one or more of whose members is biased or prejudiced, is not a constitutional trial." *State v. Parnell*, 77 Wn.2d 503, 507, 463 P.2d 134 (1969).

A juror may only be removed for cause in very limited circumstances. Where a juror's views would "prevent or substantially impair the performance of his duties" that juror must be excused for cause. *State v. Hughes*, 106 Wn.2d 176, 721 P.2d 902 (1986) (quoting *Wainwright v. Witt*, 469 U.S. 412, 424, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985)). If a biased juror is permitted to deliberate, the accused is denied his constitutional right to trial by an impartial jury, requiring reversal. *Parnell*, 77 Wn.2d at 507; *State v. Gonzales*, 111 Wn. App. 276, 282, 45 P.3d 205 (2002).

Those summoned for jury service may only be excused by the court pursuant to Title 4.44 RCW, or "upon a showing of undue hardship, extreme inconvenience, public necessity, or any reason deemed sufficient by the court for a period of time the court deems necessary." RCW 2.36.100. Jurors may be removed for cause if they

possess a state of mind "which satisfies the court the potential juror [] cannot try the issue impartially and without prejudice." RCW 4.44.170; RCW 4.44.190. When a challenge for actual bias is made, the trial court must determine whether the prospective juror's state of mind is such that he or she can try the case fairly and impartially. RCW 4.44.190. This is a preliminary question that must be resolved by the court before the challenge itself may be ruled upon. *Ottis v. Stevenson-Carson Sch. Dist. No. 303*, 61 Wn. App. 747, 753, 812 P.2d 133 (1991). When a challenge for cause is made, opposing counsel can object either on the grounds that it is facially insufficient or that the facts needed to support it are not true. RCW 4.44.230-250.

There was insufficient showing of cause to excuse the potential juror. In this case juror number 18 voiced some concern during voir dire as to the honesty of police officers. JVD 97. Due to her experiences living in Detroit she had difficulty trusting law enforcement. When questioned further she said "I could be fair and impartial because if they have to prove something against someone they have to 100 percent in their proof in order to have these allegations against someone." *Id.* at 105. This was a sufficient rehabilitation and the State's motion to dismiss for cause should not have been granted.

A defendant has a right to a trial by a jury that is representative of the community. Under *Batson v. Kentucky*, a criminal defendant is entitled to a jury comprised of members who are selected pursuant to nondiscriminatory criteria. 476 U.S. 79, 85-86, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).[2] The selection process itself functions as an irreplaceable method of protecting the impartiality of the petit jury.[3]

"The petit jury has occupied a central position in our system of justice by safeguarding a person accused of crime against the arbitrary exercise of power by prosecutor or judge." *Batson*, 476 U.S. at 86 (*citing Duncan v. Louisiana*, 391 U.S. 145, 156, 88 S.Ct. 1444, 1451, 20 L.Ed.2d 491 (1968)); *see Taylor v. Louisiana*, 419 U.S. at 530.

In addition, the right to a trial by a jury that is representative of the community includes the right to a venire that is "indifferently chosen." *Batson*, 476 U.S. at 86-87 (*citing Strauder v. West Virginia*, 100 U.S. 303, 309, 25 L.Ed. 664 (1880)); *State v. Hilliard*, 89 Wn.2d

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[2] Even though this right does not extend to the right to a petit jury comprised of one's own race, the right to a fair and indifferent selection process is key to the *Batson* holding. 476 U.S. at 85-86.

[3] For example, the criminal rules permit both parties to exercise peremptory challenges against potential jurors without stating a reason. CrR challenges to exclude otherwise qualify and unbiased jurors based upon their race. U.S. Const. amend. 14; *Batson*, 476 U.S. at 98, *State v. Luvene*, 127 Wn.2d 690, 699, 903 P.2d 960 (1995).

430, 440, 573 P.2d 22 (1977) (*citing Taylor v. Louisiana*, 419 U.S. at 522).

The central purpose of *Batson* and its progeny is to enforce the court's duty to protect the right of defendants to an impartial jury, as well as to protect the rights of potential jurors to participate in the civic process. *Batson*, 476 U.S. at 87-88. It is also to ensure that our justice system is free from any taint of unfair bias, and to ensure that all "qualified citizens" under RCW 2.36.080(1) are guaranteed the opportunity to be considered for jury service.

The removal of Juror #18 tainted the jury selection process, depriving Mr. Daniels of a jury that was "indifferently chosen." Juror number 18 was properly rehabilitated when she stated that she could be fair and impartial while serving on the jury. JVD 104. The Court of Appeal's affirmation of a conviction based in part on the improper dismissal of Juror number 18 was a violation of Mr. Daniel's due process rights and therefore presents a question of law under both the United States and Washington State constitutions which requires review by this Court.

3. A conviction based on insufficient evidence and the State's failure to bear its burden of proof is a violation of due process and is always of substantial interest public interest.

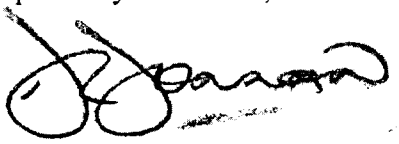
As discussed above the State bears the burden of presenting sufficient evidence to prove beyond a reasonable doubt every essential element of a crime charged and a conviction based on the failure to do so violates a criminal defendant's fundamental right to due process. *In re Winship*, 397 U.S. 358 at 364; U.S. Const. Amend. XIV; Const. art. I § 3; *City of Seattle v. Slack*, 113 Wn.2d 850 at 859. The right to due process is the backbone of the criminal justice system and any violation of that right is of substantial public interest.

F. CONCLUSION

Petitioner Devon Marteen Daniels respectfully requests that review be granted pursuant to RAP 13.4 (b).

DATED this 9th day of October 2014.

Respectfully submitted,



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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. DEVON M. DANIELS, Appellant.	No. 44382-1-II UNPUBLISHED OPINION

MAXA, J. — Devon Daniels appeals his convictions of second degree burglary and first degree theft. We hold that (1) the trial court did not err when it dismissed a potential juror for cause, (2) the trial court did not err when it admitted Daniels's booking photographs into evidence, and (3) there was sufficient evidence to support Daniels's burglary conviction. We also reject Daniels's statement of additional grounds (SAG) claims challenging the trial court's refusal to provide a lesser included jury instruction and arguing that the trial court should have excluded the victim's testimony because he lied to the 911 operator. Accordingly, we affirm Daniels's convictions.

FACTS

On June 11, 2012, Mark Friesman, the owner of a convenience store in Tacoma, placed a bank deposit bag containing store receipts totaling over $7,000 in a locked desk drawer in his office. Later, the store cashier gave Daniels permission to use the private store bathroom. The

door to Friesman's office could be accessed only through the bathroom. According to Friesman and the clerk, the office door was locked.

When Friesman saw Daniels leave the bathroom, he immediately went into the bathroom and noticed that the office door was ajar, his desk drawer was open, and the bank deposit bag was gone. He chased after Daniels, but Daniels ran across the street and disappeared. Friesman and two store patrons later went looking for Daniels, and found him walking behind a local business. A police officer searched a residential area where Friesman had seen Daniels walking and discovered scattered one dollar bills and a jacket. Another officer then searched the area and recovered the stolen bank deposit bag. The State charged Daniels with second degree burglary and first degree theft.

During jury voir dire, juror 18 stated that she had witnessed the police do a lot of things that were not right, and therefore she could not be fair and impartial toward police officers. She stated: "I don't believe anything coming out of their mouth." Report of Proceedings (RP) (Dec. 10, 2012) at 79. Upon further questioning, juror 18 stated that she could be fair and impartial. However, she also stated that law enforcement officers would "have to really prove their case" for her to believe them because of her observing things that were not right. RP (Dec. 10, 2012) at 104. She agreed that she would hold police officers to a higher standard of proof and would need "100 percent proof" in order for her to believe the testimony of police officers. RP (Dec. 10, 2012) at 106. She also admitted that if she were the prosecutor she would not want someone like her on the jury.

Following this examination, the State moved to dismiss juror 18 for cause. The trial court granted the State's motion over Daniels's objection.

During trial, the State sought to introduce Daniels's booking photographs taken after his arrest. The State reasoned that because Daniels had substantially changed his appearance, the photographs could help identify him as the person seen on the convenience store video surveillance tapes. Daniels objected, arguing that there was already testimony that he had been arrested and booked into jail and therefore the photographs were unnecessary to prove any contested issue. The trial court allowed the State to introduce the photographs.

Daniels requested a lesser included instruction of criminal trespass on the burglary charge. The trial court denied the instruction, finding that there was no evidence to support it.

The jury found Daniels guilty of both charged offenses. Daniels appeals.

ANALYSIS

A. DISMISSING JUROR FOR CAUSE

Daniels argues that the trial court denied him his right to an impartial and indifferently chosen jury when the trial court dismissed juror 18 for cause. We disagree.

1. Legal Principles

Both the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 22 of the Washington Constitution guarantee criminal defendants the right to trial by an impartial jury. *State v. Davis*, 175 Wn.2d 287, 312, 290 P.3d 43 (2012). Either party may exercise this right by moving to dismiss any prospective juror for cause where the juror shows actual bias. RCW 4.44.130, .190. A juror possesses actual bias where he or she evidences a "state of mind . . . which satisfies the court that the challenged person cannot try the issue impartially and without prejudice to the substantial rights" of the party challenging the potential juror. RCW 4.44.170(2).

We review a trial court's decision on a challenge for cause for an abuse of discretion. *Davis*, 175 Wn.2d at 312. We give great deference to the trial court because of its ability " 'to observe the juror's demeanor [during voir dire] and, in light of that observation, to interpret and evaluate the juror's answers to determine whether the juror would be fair and impartial.' " *Id.* (quoting *State v. Gentry*, 125 Wn.2d 570, 634, 888 P.2d 1105 (1995)).

2. Dismissal of Juror 18 For Cause

Juror 18 initially stated that she could not believe anything that police officers said because she had seen the police do things that were not right, and that this would impact her ability to be fair and impartial. This statement was sufficient to support a for cause dismissal based on actual bias under RCW 4.44.130 and RCW 4.44.170(2).

Daniels argues that during subsequent questioning, juror 18 was rehabilitated because she stated that she could be fair and impartial. But the State continued its questioning after juror 18 said she could be fair, and Juror 18 stated that if a police officer was testifying she would have a higher standard of proof. She stated that there had to be 100 percent proof in order for her to believe a police officer.

The record indicates that juror 18 was not able to set aside her personal experiences and render a verdict based on the law and facts presented at trial. The trial court had the benefit of observing and questioning this potential juror, and decided that dismissal was appropriate. We hold that this decision was reasonable based on juror 18's comments.

3. *Batson* Claim

Daniels argues that he had the right to trial by a jury that is representative of the community. He cites *Batson v. Kentucky*, in which the United States Supreme Court held that a

party cannot exercise a peremptory juror challenge on the basis of race. 476 U.S. 79, 89, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). However, Daniels presents no argument or even allegation that juror 18 was dismissed because of her race, and does not provide reference to anything in the record that would support a *Batson* challenge. Therefore, we need not address *Batson*.

Daniels further argues that the jury was not indifferently chosen. However, there is no indication in the record that juror 18 was dismissed for any reason other than her voir dire responses, which demonstrated that she would not be able to render a fair and impartial verdict.

We hold that the trial court did not abuse its discretion in dismissing juror 18 for cause.

B. ADMISSION OF BOOKING PHOTOGRAPHS

Daniels argues that the trial court erred in allowing the State to admit his booking photographs. He argues that this created a prejudicial inference of criminal propensity and that the booking photographs served no substantive purpose in proving the identity of the perpetrator. We disagree.

We review a judge's rulings on the admission of evidence for abuse of discretion. *State v. Ruiz*, 176 Wn. App. 623, 634, 309 P.3d 700 (2013), *review denied*, 179 Wn.2d 1015 (2014), *cert. denied*, 135 S. Ct. 69 (2014). A court abuses its discretion when its decision is based on untenable grounds or reasons. *Id.* Nonconstitutional error is not prejudicial unless, within reasonable probabilities, the error materially affected the trial outcome. *State v. Tharp*, 96 Wn. 2d 591, 599, 637 P.2d 961 (1981).

The State may introduce a defendant's booking photograph when the perpetrator's identity is a disputed issue at trial, particularly when the defendant materially changes his appearance between his arrest and his trial. *State v. Scott*, 93 Wn.2d 7, 13, 604 P.2d 943 (1980).

Daniels's case is similar to that in *State v. Rivers*, 129 Wn.2d 697, 712, 921 P.2d 495 (1996), where the court held that admitting the defendant's booking photograph had a proper purpose:

> Because Defendant Rivers raised the issue of identity during opening statements, the photograph of the Defendant on the day of the crime was relevant as it tended to show that the victim's description to police matched the man arrested shortly after the robbery. The admission of the photo was not prejudicial because the jury knew the Defendant was arrested for the crime on which he was being tried, and the jury would reasonably have been aware that a booking procedure, including photographing the Defendant, would have existed.

Id.

Here, the only issue at trial was the perpetrator's identity. The State showed the jury the store's surveillance videos and several witnesses identified Daniels as the perpetrator. The booking photographs showed Daniels's appearance at the time of the offenses. And because Daniels changed his appearance after his booking and before trial, as in *Rivers* the photographs were material and not prejudicial. *See also State v. Tate*, 74 Wn.2d 261, 267, 444 P.2d 150 (1968) (photograph properly admitted because witness had identified defendant from photograph and defendant had changed his appearance between his arrest and his trial); *State v. McCreven*, 170 Wn. App. 444, 485, 284 P.3d 793 (2012) (booking photograph is not necessarily prejudicial); *State v. Wheeler*, 22 Wn. App. 792, 796-97, 593 P.2d 550 (1979) (because photograph was taken at time of arrest, it did not show criminal propensity and it was properly admitted to show identity).

We hold that the trial court did not abuse its discretion in admitting Daniels's booking photographs.

C. SUFFICIENCY OF THE EVIDENCE AS TO BURGLARY

Daniels argues that the State failed to prove that he committed second degree burglary. Specifically, he argues that the evidence did not show that he entered or remained unlawfully in the store office with intent to commit a crime therein as required under RCW 9A.52.030(1). He claims that the evidence did not show that he was prohibited from entering the office. We disagree.

The test for determining sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Rose*, 175 Wn.2d 10, 14, 282 P.3d 1087 (2012). In a sufficiency of the evidence claim, the defendant admits the truth of the State's evidence and all reasonable inferences drawn from that evidence. *Id.* Credibility determinations are made by the trier of fact and not subject to review. *State v. Miller*, 179 Wn. App. 91, 105, 316 P.3d 1143 (2014). Circumstantial and direct evidence are equally reliable. *Id.*

The trial court's unchallenged instruction defined entering and remaining unlawfully: "A license or privilege to enter or remain in a building that is only partly open to the public is not a license or privilege to enter or remain in that part of the building that is not open to the public." Clerk's Papers at 248. The testimony at trial demonstrated that Daniels did not have a license or privilege to enter the office. Although Daniels had permission to enter the bathroom, he exceeded that privilege when he opened the locked office door. Further, there was clear evidence that Daniels entered the office. The video surveillance tapes show Daniels in the office, reaching over the desk. He also left his coffee cup on the desk.

We hold that there was sufficient evidence to support Daniels's burglary conviction in that he entered the office unlawfully (without license or privilege) with an intent to commit a crime therein.

D. SAG CLAIMS

1. Lesser-Included Jury Instruction

Daniels claims that the trial court should have given his proposed lesser included instruction on criminal trespass for the second degree burglary charge. We disagree.

A defendant is entitled to a lesser included instruction only if (1) each of the elements of the lesser offense is a necessary element of the offense charged (legal prong), and (2) the evidence in the case supports an inference that only the lesser crime was committed (factual prong). *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978). The defendant must establish both the legal and factual prongs in order to have a lesser included instruction given at trial. *Id.*

For a second degree burglary conviction, RCW 9A.52.030 requires the State to prove that the defendant entered or remained unlawfully in a building other than a vehicle or a dwelling with the intent to commit a crime against a person or property in the building. For a first degree criminal trespass conviction, RCW 9A.52.070 requires the State to prove that the defendant knowingly entered or remained unlawfully in a building.

The legal prong is met here because first degree criminal trespass is a lesser included offense to a charge of second degree burglary. *State v. Soto*, 45 Wn. App 839, 841, 727 P.2d 999 (1986). However, the factual prong is not met here because there was no evidence that Daniels committed only the lesser offense. There is no reasonable view of the evidence that Daniels

simply went into the office to look around without intending to commit a crime. Daniels opened a locked door to the office, rummaged through the owner's desk, opened a locked drawer, and took the bank deposit bag containing the store receipts and money. The surveillance videos support this as does the evidence linking Daniels to the bank deposit bag found several blocks away. The only conclusion that can be drawn from the evidence is that Daniels went into the office with the intent to commit a crime.

We hold that the trial court did not err in denying Daniels's request for a lesser included instruction.

2. Witness Credibility

Daniels argues that the trial court should have excluded Friesman as a witness because he lied to the 911 operator when he said that Daniels had pushed him when leaving the store. Friesman explained during trial that he exaggerated what had happened because he had learned from previous situations that if you want the police to prioritize your case, you have to make it seem more urgent. He admitted at trial that Daniels did not push him and that he did not recall telling the reporting police officers that Daniels pushed him.

But Friesman's false statement to the 911 operator did not provide the basis for the trial court to completely exclude Friesman as a witness. Daniels used Friesman's statements in his defense to show that Friesman tended to exaggerate the truth for his own purposes. As a result, his truthfulness with the 911 operator was a matter for the jury to consider in assessing his credibility. *See State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (this court does not assess the credibility of witnesses). We reject Daniels's claim.

We affirm Daniels's convictions.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

MAXA, J.

We concur:

JOHANSON, C.J.

LEE, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 44382-1-II**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office / residence / e-mail address as listed on ACORDS / WSBA website:

☒ respondent Kawyne Ann Lund, DPA
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Pierce County Prosecutor's Office

☒ petitioner

☐ Attorney for other party

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Washington Appellate Project

Date: March 12, 2015

WASHINGTON APPELLATE PROJECT

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Transmittal Letter

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Case Name: STATE V. DEVON DANIELS
Court of Appeals Case Number: 44382-1

Is this a Personal Restraint Petition? Yes ■ No

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Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

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Statement of Additional Authorities

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Objection to Cost Bill

Affidavit

Letter

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Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

■ Petition for Review (PRV)

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