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No. 70947-0-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

JAMES HAGER,

Appellant.

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

APPELLANT'S REPLY BRIEF

KATHLEEN A. SHEA
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

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A. ARGUMENT IN REPLY

1. The State did not prove Hager committed second degree burglary beyond a reasonable doubt.

a. The State did not prove beyond a reasonable doubt that Hager entered or remained unlawfully in a "building."

In order to obtain a conviction for second degree burglary, the State was required to prove that Hager entered or remained unlawfully in a "building" when he went into a storage container. RCW 9A.52.030; CP 1. Under RCW 9A.04.110(5),

> "Building," in addition to its ordinary meaning, includes 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.

At trial, the jurors were not given this full definition. Instead, the trial court instructed the jury that a building was defined as follows: "[b]uilding, in addition to its ordinary meaning, includes any dwelling or fenced area." CP 54.

In its response, the State concedes it offered this limited instruction. Resp. Br. at 35; see Supp. CP ___ (sub no. 41). It also does not dispute that jury instructions not objected to become the law of the case. See State v. Hickman, 135 Wn.2d 97, 102, 954 P.2d 900

(1998). Instead, the State argues it met its burden of proving Hager entered a building because the storage container was enclosed, large enough to enter, and able to accommodate a human being. Resp. Br. at 36.

The State relies on State v. Johnson for this argument. 159 Wn. App. 766, 247 P.3d 11 (2011). In Johnson, Division II of this Court addressed whether a locomotive was a "railway car," and therefore a building for purposes of second degree burglary under RCW 9A.04.110(5). 159 Wn. App. at 769. It found that a locomotive qualified as a railway car, and that even if it did not, it still qualified as a building. Id. at 772. The Court found:

> When analyzing the general understanding of "building" under the burglary statute, Washington courts have determined that structures or premises that are (1) enclosed, (2) large enough to enter, and (3) able to accommodate a human being, definitively qualify as a "building."

Id. at 772. The Johnson Court relied on its prior decisions in State v. Miller, 91 Wn. App. at 869, 873, 960 P.2d 464 (1998) and State v. Deitchler, 75 Wn. App. 134, 137, 876 P.2d. 970 (1994), to make this finding. Id.

In both Miller and Deitchler, the Court examined the definition of a "building" when the defendant was convicted of second degree burglary based on the State's allegation he broke into a storage unit within a larger building. Miller, 91 Wn. App. at 871-72; Deitchler, 75 Wn. App. at 137. In Deitchler, the defendant inserted his hand into an evidence locker, which was ten inches high by ten inches wide, at a police station. 75 Wn. App. at 135. The Court found that, under the definition of "building," the storage locker "was neither a 'unit' of the police station nor a 'separate building.'" Id. at 137. Thus, there was insufficient evidence to find he committed a burglary. Id. at 138.

In Miller, the defendant was found guilty of two counts of second degree burglary after he entered an apartment building and then entered a storage locker within that building. 91 Wn. App. at 870. The Court found that, unlike in Deitchler, "the storage locker [the defendant] broke into was large enough to accommodate a human being, that is, to allow entry or occupation." Id. at 873. The jury was therefore provided with sufficient evidence to convict on both counts of second degree burglary. Id. at 873.

In Johnson, the Court relied on the language in Miller that had emphasized the fact that the storage locker at issue was large enough to

accommodate a person. Johnson, 159 Wn. App. at 772; Miller, 91 Wn. App. at 872-73. However, in the cases cited by the Johnson court, the issue was not what constituted the "ordinary meaning" of a building, as it is here. Instead, the Court's focus in those cases was whether a storage locker within a building constituted its own separate building. Miller, 91 Wn. App. at 873; Deitchler, 75 Wn. App. at 137. Similarly, in Johnson, the issue was whether a locomotive qualified as a railway car. 159 Wn. App. at 769. In each instance, the Court was examining whether the structure at issue met the definition of "building" not as the word is ordinarily used, but as otherwise included by RCW 9A.04.110(5).

As the State concedes, in this case the State was required to show that the storage container was a "building" as that word is ordinarily understood. Resp. Br. at 37. Most structures that are enclosed, large enough to enter, and able to accommodate a person may be included under the complete definition provided in RCW 9A.04.110(5). However, a "building" is defined as "a usually roofed and walled structure built for permanent use (as for a dwelling)."[1] The

[1] http://www.merriam-webster.com/dictionary/building (last accessed September 9, 2014).

ordinary meaning of a building does not include temporary containers used for storage, such as the structure at issue in this case.

Indeed, to hold otherwise would make much of RCW 9A.04.110(5) superfluous. It is a basic principle of statutory construction that a statute may not be construed in a manner which renders words meaningless or superfluous. State v. Ervin, 169 Wn.2d 815, 823, 239 P.3d 354 (2010). If the "ordinary meaning" of a building was so encompassing so as to include a structure that, by the State's estimate, looks "much like a railway car or the detached shipping containers on flatbed train cars" there would be no need for the remainder of the definition that specifically cites to railway cars, cargo containers, or other structures used for the deposit of goods. RCW 9A.04.110(5).

The State chose to provide a limited definition of the term "building" to the jury. CP 54; Supp. CP ___ (sub no. 41). Once it made that choice, it was bound to submit sufficient evidence to prove that element as delineated by the instruction. Hickman, 135 Wn.2d at 101-02. The State failed to prove, beyond a reasonable doubt, that by entering the storage container, Hager entered or remained unlawfully in a building, as that word is ordinarily understood. His conviction for

second degree burglary must be reversed and dismissed. State v. Hardesty, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996).

b. The State did not prove beyond a reasonable doubt that Hager possessed the intent to commit a crime.

In Hager's Opening Brief, he explains why the State failed to prove, beyond a reasonable doubt, that he possessed the intent to commit a crime. Op. Br. at 23-24. In its Response Brief, the State fails to respond to this insufficiency. The issue is therefore conceded. State v. Ward, 125 Wn. App. 138, 144, 104 P.3d 61 (2005) (issue conceded where no argument set forth in response). Hager's conviction for second degree burglary must be reversed and dismissed. Hardesty, 129 Wn.2d at 309.

2. The admission of Hager's actions on the Fernald property violated ER 404(b).

At trial, the court allowed the State to admit evidence, pursuant to ER 404(b), of a separate, unrelated incident that occurred several weeks after the alleged crime. 8/7/13 RP 50, 67. Four witnesses were called by the State at trial to testify in great detail about this separate incident, which occurred on a property owned by John Fernald.

8/12/13 RP 7, 50. 66, 145. The court admitted the evidence after finding it showed absence of mistake. 8/7/13 RP 67.

In its response, the State highlights that the trial court denied its motions to admit other alleged bad acts by Hager, implying that this is relevant when considering the court's decision to admit evidence of the incident on the Fernald property. However, the State had the burden to show that the evidence at issue was properly admissible under ER 404(b) and ER 403. State v. Gresham, 173 Wn.2d 405, 421, 269 P.3d 207 (2012). Whether the trial court denied other requests by the State is wholly irrelevant.

The State relies on State v. Olsen, 175 Wn. App. 269, 309 P.3d 518 (2013) and State v. Roth, 75 Wn. App. 808, 881 P.2d 268 (1994), for its assertion that evidence of the separate incident was properly admitted. Resp. Br. at 26. In Olsen, the defendant was charged with pouring gasoline on his girlfriend and threatening to kill her. Id. at 273-74. The defendant claimed any gasoline on his girlfriend was an accident incidental to his attempt to pour gasoline on the family dog, and the court allowed the State to admit evidence of prior violent acts the defendant committed against his girlfriend. Id. at 278. This Court found this was not an abuse of discretion. Id. at 283. Similarly, in

Roth, this Court affirmed the trial court's decision to allow the State to present evidence of the defendant's first wife's death during a trial in which he was alleged to have killed his second wife. 75 Wn. App. at 819-20 (finding "the marked similarities between the victims, the physical circumstances of the crimes, and the relatively complex nature of the crimes support a commonsense inference that the deaths of [the defendant's] spouses were not mere fortuities").

In this case, the evidence admitted under ER 404(b) involved an entirely separate property and a very different set of facts. The evidence showed Hager had received permission from one of the caretakers to enter the Fernald property and that a caretaker gave him the combination to the gate lock.[2] 8/14/13 RP 61. However, it suggested he later abused that authority by harassing a woman, Teresa Kohler, who was rightfully on the property and by clearing blackberry bushes in order to hunt a bear. 8/12/13 RP 21-22; 8/14/13 RP 61-62.[3]

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[2] The State argues Hager, as a patrol officer, had this power "inherently." Resp. Br. at 29. The basis for such power, allegedly vested in patrol officers, is unclear.

[3] The State also argues Hager committed a theft while on the property because he removed Ms. Kohler's sparkplugs from her car. It also, without citation, alleges Hager "cut down a large tree" on the property. In fact, the evidence showed Hager did not have the intent required for theft when he removed the sparkplugs, and that he had moved a log partially blocking the road, not cut down a tree. 8/12/13 RP 21-22, 29, 71.

This evidence did not negate Hager's testimony that he was acting in good faith when he entered the property belonging to the Swensons.

In addition, even if this Court finds the trial court properly admitted the evidence, the court violated ER 404(b) when it allowed an Everett police officer to testify about his investigation of the case and permitted Ms. Kohler to describe her perspective of the Fernald incident in painstaking detail. The State accuses Hager of taking "issue with minute details," but these details, which allowed the State to present a very descriptive account of the event, were highly prejudicial and offered little to no probative value. Resp. Br. at 30.

For example, taken as a whole, some of the details provided by the State improperly suggested that Hager had entered the Fernald property to steal metal. The detective who investigated the incident testified he was assigned to arsons, thefts, and burglaries. 8/12/13 RP 145. He testified he photographed metal pipe found on the land and that this kind of item could be taken to a scrap yard and turned in for money. 8/12/13 RP 151-52. He further testified that he made contact with Hager at Loth Lumber, a "multipurpose" site that housed metal, and that he believed that one of the friends Hager admitted was with

him on the Fernald property was the manager of this "multipurpose" site. 8/12/13 RP 153-54; 8/14/13 RP 50.

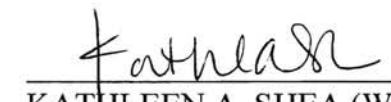
The State claims such details were innocently provided because the detective's testimony regarding his assignment was simply "the standard introduction" and because there was "no evidence admitted that Loth Lumber was a criminal outpost or that people associated with it were criminals." Resp. Br. at 32. However, the implication from these details was clear. The court's admission of this information, as well as the details provided by Ms. Kohler, violated ER 404(b). See Op. Br. at 14-17. The case must be remanded with instructions to exclude evidence of the incident on the Fernald property. Gresham, 173 Wn.2d at 433-34.

B. CONCLUSION

For the reasons stated above and in his opening brief, Hager respectfully requests this Court reverse his conviction and remand the case for dismissal or, in the alternative, for a new trial with instructions not to admit evidence of the incident on the Fernald property.

DATED this 10th day of September, 2014.

Respectfully submitted,



KATHLEEN A. SHEA (WSBA 42634)
Washington Appellate Project (91052)
Attorneys for Appellant

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

STATE OF WASHINGTON, Respondent, v. JAMES HAGER, Appellant.	)))))))))	NO. 70947-0-I

DECLARATION OF DOCUMENT FILING AND SERVICE

I, NINA ARRANZA RILEY, STATE THAT ON THE 10TH DAY OF SEPTEMBER, 2014, I CAUSED THE ORIGINAL **REPLY 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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[X] JAMES HAGER 17006 414TH DRIVE SE GOLD BAR, WA 98251	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 10TH DAY OF SEPTEMBER, 2014.

X 

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710