Supreme Court No.: _____
Court of Appeals No.: 70947-0-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JAMES HAGER,

Petitioner.

PETITION FOR REVIEW

KATHLEEN A. SHEA
Attorney for Petitioner

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Supreme Court

Washington Court of Appeals

Washington Statutes and Regulations

Washington Rules

Other Authorities

A. INTRODUCTION

At James Hager's trial, the State alleged Mr. Hager committed second degree burglary because a shipping container met the definition of a "building" as that word is ordinarily understood. The definition of a building, provided in RCW 9A.04.110(5), differentiates between a "building," as that word is ordinarily understood, and "a railway car" or "cargo container," but the State provided only the first part of this definition to the jury. The Court of Appeals affirmed, finding that a shipping container can become a building, as that word is ordinarily understood, based on how it is used.

This case presents an interesting issue of statutory construction and raises an issue of substantial public interest. This Court should accept review.

B. IDENTITY OF PETITIONER AND THE DECISION BELOW

Mr. Hager requests this Court grant review pursuant to RAP 13.4(b) of the decision of the Court of Appeals, Division One, in *State v. James Hager*, No. 70947-0-I, filed March 2, 2015. A copy of the opinion is attached as Appendix A. Mr. Hager's motion for reconsideration was denied April 1, 2015. A copy of this order is attached as Appendix B.

C. ISSUES PRESENTED FOR REVIEW

1. The Court of Appeals affirmed Mr. Hager's conviction for second degree burglary, finding that a shipping container is a "building," as that word is ordinarily understood, when the container is used for storage rather than shipping. Issues of first impression regarding statutory construction are matters of substantial public interest that should be reviewed by this Court. *See e.g. State v. Moeurn*, 170 Wn.2d 169, 240 P.2d 1158 (2010); *State v. Engel*, 166 Wn.2d 572, 210 P.3d 1007 (2009). Should this Court grant review to decide whether a shipping container becomes a "building," as that word is ordinarily understood, when it remains in one place and is used for storage? RAP 13.4(b)(4).

2. The Court of Appeals determined the trial court did not abuse its discretion when it admitted evidence of a separate incident to show absence of mistake under ER 404(b). Should review be granted in the substantial public interest where this evidence was used simply to suggest Mr. Hager was the type of person who would be likely to commit the crime charged, and the evidence was more prejudicial than probative? RAP 13.4(b)(4).

D. STATEMENT OF THE CASE

James Hager was a deputy with the Snohomish County sheriff's office. 8/13/13 RP 90-91. After being assigned to the small town of Gold Bar, he was encouraged to engage with the citizenry and make "proactive contacts." 8/13/13 RP 24. Taking this obligation seriously, Hager began working to relocate an individual, Donnie Anderson, whom an elderly citizen wanted off his property. 8/13/13 RP 127-28, 132.

Although Mr. Anderson denied it at trial, Hager and Mr. Anderson's girlfriend, Kerry Eubanks, both testified Mr. Anderson informed Hager he would not leave until he was able to retrieve his belongings from a property he owned in Skykomish. 8/8/13 RP 158; 8/13/13 RP 113, 140. Hager and Ms. Eubanks both explained Mr. Anderson drew a map for Hager so that Hager could retrieve these items for him. 8/13/13 RP 113, 143. After Hager left, Mr. Anderson laughed and told Ms. Eubanks there was no way Hager would find the property, and if he did, he would get in trouble. 8/13/13 RP 114.

Hager located the property according to Mr. Anderson's directions. 8/13/13 RP 150. He found an old shipping container, used for storage, where Mr. Anderson had indicated it would be. 8/13/13 RP

151. Hager cut the padlock to the container and took the things he assumed Mr. Anderson wanted. 8/13/13 RP 152. This included a woodstove, chimney pieces, and cedar planking, as well as some "junk" (chunks of metal and unidentifiable pieces of hardware). 8/8/13 RP 43, 64. Hager also took an extension cord that was providing power to a nearby yurt, but took nothing from the yurt, which he did not believe belonged to Mr. Anderson. 8/8/13 RP 47; 8/13/13 RP 158-59.

Hager later learned Mr. Anderson had owned the property at one time, but Mr. Anderson had abandoned the property and it was "reclaimed" by the prior owner, who sold it to Marcus Swenson approximately eleven years before this incident. 8/8/13 RP 27-28, 157-58. The Swenson family constructed the yurt on the property and used it as their vacation home. 8/8/13 RP 34. The next time the Swensons went to stay in the yurt, they discovered that things had been removed from the shipping container. 8/8/13 RP 43. Footage from their security camera showed Hager taking the items. 8/8/13 RP 47.

Deputy Garrett Jorgensen, with the King County sheriff's office, reviewed the images and spotted Hager's truck, which had a unique hoist, while driving to work a few days later. 8/8/13 RP 71, 76. He stopped Hager and questioned him about the incident on the Swenson

property, which had occurred only 12 days before. 8/8/13 RP 76, 80-81. Although initially confused, Hager informed Deputy Jorgensen that he had been on the property to retrieve Mr. Anderson's things. 8/8/13 RP 81. After understanding Deputy Jorgensen was investigating the incident as a burglary, Hager offered to return the property. 8/8/13 RP 89. The items were still stored outside Hager's home because, despite his repeated attempts, he had not been able to reach Mr. Anderson since the day Mr. Anderson drew the map directing him to the property. 8/13/13 RP 161-62.

During the investigation most of the property was returned to the Swensons. 8/8/13 RP 119. Hager was terminated from the sheriff's office as a result of the criminal charge. 8/12/13 RP 106. After a jury trial, Hager was convicted of one count of second degree burglary. CP 70. The Court of Appeals affirmed Mr. Hager's conviction. Slip Op. at 11.

E. ARGUMENT IN FAVOR OF GRANTING REVIEW

1. This case should be granted review in the substantial public interest because a shipping container is not a "building," as that word is ordinarily understood.

The jury convicted James Hager of second degree burglary, finding that he entered a "building" when he entered a "connex box," or

large metal shipping container. Slip Op. at 1; 8/8/13 RP 35-36, 141-42. The full statutory definition of a building is as follows:

> "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.

RCW 9A.04.110(5). However, at trial, the jury was given only a portion of this definition. The 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. On appeal, the State conceded that this limited definition, combined with the facts presented at trial, required the State to show that the shipping container was a "building" as that word is ordinarily understood. Resp. Br. at 37; *see State v. Hickman*, 135 Wn.2d 97, 102, 954 P.2d 900 (1998) (jury instructions not objected to become the law of the case).

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 as to include a shipping container, 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 Court of Appeals found the structure at issue was a shipping container and that a shipping container, if used for its intended purpose, would not meet the definition of a "building," as that word is ordinarily understood. Slip Op. at 8-9. However, it affirmed Mr. Hager's conviction because it found that a shipping container *becomes* a building, as that word is ordinarily understood, when it is used for storage rather than its intended purpose. Slip Op. at 9.

In reaching this conclusion, the Court of Appeals examined the dictionary definition of "cargo" and "container," as well as the definition of "[i]ntermodal container" in WAC 296-56-60005. Under WAC 296-56-60005, an intermodal container is "a reusable cargo container of rigid construction and rectangular configuration *intended* to contain one or more articles of cargo or bulk commodities for transportation by water and one or more other transport modes without intermediate cargo handling." Slip Op. at 8-9 (emphasis added). The Court of Appeals found that according to the dictionary, a building is defined as:

> [a] constructed edifice *designed* to stand more or less permanently, covering a space of land, usu. covered by a

> roof and more or less completely enclosed by walls, and serving as a dwelling, storehouse, factory, shelter for animals, or other useful structure – distinguished from structures not *designed* for occupancy (as fences or monuments) and from structures not *intended* for use in one place (as boats or trailers) even though subject to occupancy.

Slip Op. at 9 (quoting Webster's Third New International Dictionary 292 (1993) (emphasis added)).

Both the definition of an intermodal container and a building focus on the *intended* use of the structure, not how it is ultimately used. The definition provided by WAC 296-56-60005 indicates that the ordinary meaning of a shipping container is a structure that was intended to contain cargo. A shipping container was not designed, as the dictionary definition of a building states, "to stand more or less permanently." In fact, a shipping container is specifically distinguished from a building in the dictionary definition because it is not designed for occupancy and not intended for use in one place. Thus, the definitions upon which the Court of Appeals relied actually undermine its holding, as they demonstrate that the ordinary meaning of a structure is based on the intended use of the structure, or its design, rather than how it used. Simply because an individual uses a shipping container

for storage does not transform the container into a building, because the *intended* use does not change.

Despite this glaring inconsistency, the Court of Appeals found additional support for its conclusion in *State v. Tyson*, 33 Wn. App. 859, 860-61, 658 P.2d 55 (1983). Slip Op. at 9. In *Tyson*, the Court held a defendant could be convicted of second degree burglary for entering a secured, parked semitrailer because the portion of the semitrailer the defendant entered was "a separate, detached container or structure from the truck tractor unit which was used to draw it, and was strictly a cargo trailer used for general freight." 33 Wn. App. at 863. The court did not find in *Tyson* that a vehicle was transformed into a cargo container. Instead, it found that the vehicle held a cargo container, and that cargo container was burgled. *Id.* The holding in *Tyson* provides no support for the Court of Appeals' determination in this case that the shipping container became a building, as that word is ordinarily understood, simply because it remained in one place and was used for storage.

The Court's focus on how the container was used, rather than how it was designed to be used, directly contradicts the definitions upon which the court relies. Under basic principles of statutory

construction, a shipping container is not a building, as that word is ordinarily understood, based on the definition provided in RCW 9A.04.110(5). Statutory interpretation is an issue of substantial public importance and this Court should grant review. RAP 13.4(b)(4); *see State v. Moeurn*, 170 Wn.2d 169, 240 P.2d 1158 (2010); *State v. Engel*, 166 Wn.2d 572, 210 P.3d 1007 (2009)

2. The Court should grant review in the substantial public interest because the admission of Hager's actions on another 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.

John Fernald testified he owned property in Index, although he lived in Nevada at the time of trial. 8/12/13 RP 49. In his absence, he designated two friends as caretakers for the property and later allowed a woman, Teresa Kohler, to live in a structure located on the property. 8/12/13 RP 11, 51. Despite the caretakers, Mr. Fernald's property was

subject to repeated thefts. 8/12/13 RP 41, 54, 69. Mr. Fernald did not report the thefts until his solar panels were stolen, which was the "last straw." 8/12/13 RP 52.

Hager, in his former capacity as a deputy, responded to Mr. Fernald's 911 call. 8/12/13 RP 52. When Hager came to take the report, he spoke to both Mr. Fernald and one of the caretakers, Gerald Reule. 8/12/13 RP 52, 72. Hager testified that he spoke mostly to Mr. Reule, who gave him the combination to the padlock and told him to come back on the property at any time to hunt or camp. 8/13/13 RP 178-181. At trial, Mr. Reule confirmed that he had given Hager the combination to the lock and permission to enter the property, and that no time limit had been imposed on that permission. 8/14/13 RP 61. However, while he indicated he "may have" talked with Hager about hunting, he stated that he did not give Hager permission to enter the property to hunt or camp. 8/14/13 RP 61-62.

Ms. Kohler testified that several weeks after Hager allegedly burglarized the Swenson property, she was cleaning out the structure where she planned to live when she saw a white truck pulling a flatbed trailer onto Mr. Fernald's property. 8/12/13 RP 16-17. When she returned to her car, the hood was up, the sparkplugs and registration

had been taken, and a note indicated that she should walk up the hill if she wanted everything back. 8/12/13 RP 21-22. Instead, she walked down to the highway and called 911. 8/12/13 RP 22.

At trial Hager explained he thought Ms. Kohler's car was suspicious, so he disabled the car and took the registration so that she would have to identify herself before leaving the property. 8/14/13 RP 182. Hager was on the property to clear sightlines through the blackberry bushes, so that he could successfully hunt a bear he saw on the property. 8/13/13 RP 183. He brought two friends with him who owned equipment so that they could do this quickly. 8/13/13 RP 183-84. He also moved a log that was partially blocking the roadway. 8/13/13 RP 184. There were no charges filed against Hager related to this incident. 8/6/13 RP 59; 8/7/13 RP 51.

The State is not permitted to introduce evidence simply to show a defendant tends to act in a particular way. "ER 404(b) is a categorical bar to admission of evidence for the purpose of proving a person's character and showing that the person acted in conformity with that character." *State v. Gresham*, 173 Wn.2d 405, 420, 269 P.3d 207 (2012). "ER 404(b) is not designed 'to deprive the State of relevant evidence necessary to establish an essential element of its case,' but

rather to prevent the State from suggesting that a defendant is guilty because he or she is a criminal-type person who would be likely to commit the crime charged." *State v. Foxhoven*, 161 Wn.2d 168, 175, 163 P.3d 786 (2007) (quoting *State v. Lough*, 125 Wn.2d 847, 859, 889 P.2d 487 (1995)).

The Court permitted the State to present evidence of Hager's actions involving the Fernald property, accepting the State's argument that the evidence was admissible under ER 404(b) because it proved absence of mistake. 8/7/13 RP 66-67. However, the incident on the Fernald property, in direct contrast to the charged crime, did not involve a theft. According to the State, Hager had received permission from one of the caretakers to enter the land, but abused that permission when he harassed a woman who had permission to stay on the property and cleared blackberry bushes in order to hunt a bear. 8/12/13 RP 21-22; 8/14/13 RP 61-62. Evidence of Hager's boorish actions on the Fernald property does not negate Hager's testimony that he was acting in good faith when he took items from the Swenson property, and was therefore not admissible as proof of absence of mistake.

In addition, even if the trial court properly admitted the evidence, the court violated ER 404(b) when it allowed an Everett

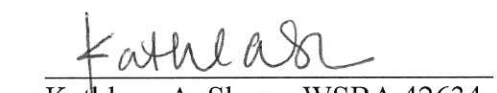
police officer to testify about his investigation of the case and permitted Ms. Kohler to describe her perspective of the Fernald incident in painstaking detail. The State is not permitted to present evidence of other acts simply to suggest Hager is the type of person that would be likely to commit the crime charged. *Foxhoven*, 161 Wn.2d at 175. Here, the State was permitted to use highly prejudicial information to imply Hager was engaged in ongoing, but unspecified, criminal activity. This is not permitted under ER 404(b), and raises an issue of substantial public interest. This Court should accept review.

F. CONCLUSION

On each of these bases, the Court should grant review of the Court of Appeals opinion affirming Mr. Hager's second degree burglary conviction.

DATED this 1st day of May, 2015.

Respectfully submitted,



Kathleen A. Shea – WSBA 42634
Washington Appellate Project
Attorney for Petitioner

APPENDIX A

COURT OF APPEALS, DIVISION I OPINION

March 2, 2015

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. JAMES E. HAGER, Appellant.	)	No. 70947-0-I DIVISION ONE UNPUBLISHED OPINION FILED: March 2, 2015

TRICKEY, J. — James Hager appeals his conviction for second degree burglary. He contends that the trial court abused its discretion in admitting evidence of a similar incident under ER 404(b), and that the evidence was insufficient to show he entered or remained in a building with the intent to commit a crime. Finding no error, we affirm.

FACTS

In 2002, Marcus Swenson purchased a piece of rural property in Skykomish, Washington. The property, located "way out in the woods," is reachable only by a forest service road and two sets of locked gates.[1] Only Swenson, the two adjacent property owners, and the power company possessed keys to the gates. Present on the property at the time Swenson purchased it was a "connex box," a large metal shipping container.[2] Finding it to be "a good storage container," Swenson cleaned out the container, which contained "[a] lot of junk . . . random bits of automotive hardware," and put his own belongings inside, including a cast iron woodstove, a double-insulated steel stovepipe, and a disassembled cedar hot tub.[3] He kept the container locked with a padlock. Swenson also constructed a yurt and two small outbuildings on the property.

---

[1] Report of Proceedings (RP) (Aug. 8, 2013) at 28, 112.
[2] RP (Aug. 8, 2013) at 35-36, 141-42.
[3] RP (Aug. 8, 2013) at 37-47, 63.

Swenson lived in Seattle and went out to the property every two to six weeks. On May 11, 2012, Swenson and his family arrived and noticed that the electricity powering the yurt was not working, there were deep ruts leading to the container, the padlock was missing, and the woodstove, stovepipe, and pieces of the hot tub were gone.[4] Swenson's security camera footage from May 4, 2012 showed a large truck and trailer entering the property and leaving with his items.

On May 16, 2012, a King County Sheriff's deputy saw the same truck and pulled it over. Hager, who at the time was a law enforcement officer for the city of Gold Bar, was driving. Hager admitted he had taken the missing items. He claimed he had done so on request from a man named Donald Anderson, who Hager claimed owned the property. The State ultimately charged Hager with one count of second degree burglary.

At trial, the State sought to introduce evidence of three other acts pursuant to ER 404(b). The first was Hager's admission to detectives that he suffered from a substance abuse problem and participated in a treatment program around the time of the incident at the Swenson property. The second involved a raid on a "chop-shop" operation on John Tharp's property that Hager participated in on May 23, 2012.[5] Hager returned to Tharp's property after dark that evening and removed a stolen utility trailer. Instead of returning the trailer to the victim, Hager towed it to a defunct lumber mill owned by his friend Richard Wagner. The third involved an incident on May 19, 2012 in which Hager, Wagner, and a third man went onto the property of John Fernald without permission. The trial court ruled that the State could not introduce evidence of drug use or the Tharp property incident. However, the trial court allowed testimony regarding the Fernald property incident as follows:

---

[4] RP (Aug. 8, 2013) at 38-45.
[5] Clerk's Papers (CP) at 108-09; RP (Aug. 13, 2013) at 170.

> In terms of the Fernald incident, this involves a trespass with permission sought later. There is probative value as to these allegations in the instant case in terms of absence of mistake. In looking at the probative value versus the prejudicial effect, the Court doesn't believe the State is allowed more leeway, just because the defendant is a police officer or that the case law allows admission for context, but I do believe there is a – there is proof here for absence of mistake in terms of the trespass and the permission being sought later. There is obvious prejudicial effect, but I do find that the probative value outweighs the prejudicial effect. I will allow the Fernald incident to be admitted and the Court will attempt to deal with the prejudicial effect by limiting the State somewhat in the amount that can be admitted as to this incident. I will allow the State to admit the evidence as to the defendant's actions only and I would exclude the actions of the associates or companion in the barn in terms of moving Ms. Kohler's property and I believe the testimony is taking her glasses. So I will exclude what the associates are alleged to have done and limit to the actions the State can link up to the defendant itself.[6]

Four witnesses testified regarding the Fernald property incident: Fernald, Gerald Reule, Teresa Kohler, and Detective Brad Williams. Fernald testified that he had moved to Nevada and left his property unoccupied. Fernald gave Reule, Kohler, and another man, Bill Cross, permission to access the property. Fernald had previously met Hager when some items were stolen from his property in August 2011 and Hager came out to take a report. Fernald did not give Hager permission to go on his property at any future time.

Reule testified that in May 2012, the gate leading to the Fernald property was locked with a key lock and only he, Kohler, and Cross had keys. Reule also did not give Hager permission to go on the property in a civilian capacity.

Kohler testified that she was on the property on May 19, 2012, when she saw a white truck pulling a flatbed trailer. She was frightened because she did not recognize the truck, and hid in some blackberry bushes. Kohler eventually made her way back to her car. Her car's hood was raised, her sparkplugs and registration were missing, and

---

[6] RP (Aug. 7, 2013) at 67-68.

on the windshield was a note that said, "Come see me for registration and etcetera. Jim Hager. I'm up top."[7] Kohler walked to the main road and called 911. When Kohler returned to her car, Hager was standing next to it. Hager told Kohler that he was friends with Fernald and had Fernald's permission to be there. The next day, May 20, Hager called Fernald and asked permission to go onto Fernald's property to hunt a bear.

Detective Williams testified that he investigated Hager's entry onto the Fernald property. Hager told Detective Williams that Fernald gave him permission to be on the property and Reule had given him the combination to a padlock on the gate. Following the incident, Hager called Fernald and asked him "to call his department and clear it up."[8]

Hager testified that, as part of his role as a police officer, he was helping an elderly man named Bill Pearson evict Donald Anderson, an unwanted tenant. Hager stated that Anderson told him that he owned the Swenson property and needed to retrieve some belongings from it before he could move. He claimed that Anderson drew him a map to reach the property. Anderson did not specify what property he allegedly wanted and Hager did not ask. Nor did Anderson give Hager the keys to the gates or the container. Hager testified that he drove to the Swenson property and used a power company key he had gotten from "a buddy of mine" to open the gates.[9] He cut the lock on the container with bolt cutters and gathered some items he assumed Anderson wanted. He stated that he attempted to contact Anderson to drop off the items, could not find Anderson, and decided to leave the items under a tarp at his own house. Regarding the Fernald property, he claimed that Reule invited him up to the Fernald property to camp and hunt a bear.

---

[7] RP (Aug. 12, 2013) at 32.
[8] RP (Aug. 12, 2013) at 163.
[9] RP (Aug. 13, 2013) at 147.

Anderson denied telling Hager to retrieve items for him or drawing Hager a map. He testified that sometime after the incident on the Swenson property Hager came out to his house late at night and "asked if I would say if he—I gave him permission."[10] Tharp, on whose property Anderson was living at the time, witnessed Hager, in civilian clothes, talking to Anderson between 2:00 and 3:00 a.m. on May 24, 2012.

The State proposed, and the trial court gave, the following instruction as Jury Instruction 7: "Building, in addition to its ordinary meaning, includes any dwelling or fenced area."[11] A jury convicted Hager as charged. Hager appeals.

ANALYSIS

ER 404(b) Evidence

Under ER 404(b), "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." But such evidence may be admissible for other purposes, such as to show "absence of mistake or accident." ER 404(b). In order to admit evidence under ER 404(b), the trial court must "(1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value against the prejudicial effect." State v. Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002). We review a trial court's ruling on the admissibility of ER 404(b) evidence for abuse of discretion. State v. Magers, 164 Wn.2d 174, 181, 189 P.3d 126 (2008). Abuse of discretion is shown only when a trial court's decision is manifestly unreasonable or based upon untenable grounds or reasons. Magers, 164 Wn.2d at 181.

---

[10] RP (Aug. 8, 2013) at 160.
[11] CP at 54, 119.

Hager contends the trial court erred in admitting evidence of the Fernald property incident because it was not relevant to show absence of mistake or accident. He argues that because he did not actually remove anything from the Fernald property, it was not analogous to the incident on the Swenson property. But Hager's defense to the burglary was that he *believed he had permission to be there*. Likewise, Hager's explanation regarding the Fernald property incident was that he *believed he had permission to be there*. There were other marked similarities between the two incidents: (1) Hager entered properties that he knew to be remote and unoccupied; (2) the owners denied giving Hager permission to go onto the properties at will or giving him keys he would need to open locked gates; (3) Hager attempted to seek permission after being confronted by law enforcement; and (4) Hager used his status as a law enforcement officer to justify his actions. The record reveals that the trial court carefully considered Hager's arguments and thoroughly described its reasoning in admitting the evidence. The trial court also limited the testimony to Hager's actions only and not those of his companions. Because the evidence of the Fernald incident tended to negate Hager's claim that he went onto the Swenson property and removed items by mistake, the trial court did not abuse its discretion in admitting it for that purpose.

Hager argues that even if evidence of the incident was admissible, the trial court should have prevented the State from eliciting certain details he claims are more prejudicial than probative. Specifically, Hager cites (1) Detective Williams' testimony that the Fernald property contained pieces of metal and equipment that could be taken to a scrapyard and sold for money, and that Detective Williams later ran into Hager at Loth Lumber, a "multipurpose"[12] site that housed large pieces of metal; and (2) Kohler's

[12] RP (Aug. 12, 2013) at 153.

testimony that she was frightened and hid from Hager and that Hager removed her sparkplugs and registration from her car. But the evidence regarding the value of scrap metal was probative to the issue of Hager's intent in going onto the properties. Additionally, because another detective had already testified as to the market for scrap metal, the evidence was, at most, cumulative. Kohler testified that she was frightened because she did not recognize Hager's truck, demonstrating that Hager did not have permission to be on the Fernald property. And Kohler's testimony that Hager left a note on her car established Hager's presence and identity. The probative value of this evidence outweighed any prejudice to Hager.

Sufficiency of the Evidence: "Building"

A person commits burglary in the second degree when, with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a "building." RCW 9A.52.030(1). Hager contends that the State's evidence was insufficient to show that he entered a "building" as defined in Jury Instruction 7.

Jury Instruction 7 instructed the jury that "[b]uilding, in addition to its ordinary meaning, includes any dwelling or fenced area." Hager argues that because the State offered no evidence he entered a "dwelling" or "fenced area," the State was required to prove that what Hager entered fell within the "ordinary meaning" of "building." Hager argues that the shipping container is not a building within the ordinary meaning of the term. Hager points to RCW 9A.04.100(5), which provides the following definition for "building":

> "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.

(Emphasis added). Because RCW 9A.04.100(5) specifies that a "cargo container" is an example of a type of building "in addition to its ordinary meaning," Hager argues, a "cargo container" cannot also be a building within the ordinary meaning of the term.

The meaning of a statutory definition is an issue of law we review de novo. State v. Johnson, 132 Wn. App. 400, 406, 132 P.3d 737 (2006). Whether the evidence at trial meets that definition is a factual question we review for sufficiency of the evidence. Johnson, 132 Wn. App. at 406. Sufficient evidence supports a jury's verdict if a rational person viewing the evidence in the light most favorable to the State could find each element proven beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). We draw all reasonable inferences from the evidence in the State's favor and interpret them most strongly against the defendant. Salinas, 119 Wn.2d at 201.

"Cargo container" is not defined by statute. When a statutory term is undefined, we may look to a dictionary definition or related provisions to determine its meaning. Woodbury v. City of Seattle, 172 Wn. App. 747, 750, 292 P.3d 134, review denied, 177 Wn.2d 1018, 304 P.3d 114 (2013) . We also consider the context of the statute in which the provision is found. Woodbury, 172 Wn. App. at 750.

The dictionary defines "cargo" as "the lading or freight of a ship, airplane, or vehicle: the goods, merchandise, or whatever is conveyed," and "container" as "a receptacle (as a box or jar) or a formed or flexible covering for the packing or shipment of articles, goods, or commodities . . . a portable usu. metal compartment in which freight is placed for convenience of movement esp. on railroad container cars." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 339, 491 (1993). WAC 296-56-60005 also provides some guidance, defining "[i]ntermodal container" as "a reusable cargo container of rigid construction and rectangular configuration intended to contain one or more articles of

cargo or bulk commodities for transportation by water and one or more other transport modes without intermediate cargo handling."

"Building," on the other hand, is defined as "[a] constructed edifice designed to stand more or less permanently, covering a space of land, usu. covered by a roof and more or less completely enclosed by walls, and serving as a dwelling, storehouse, factory, shelter for animals, or other useful structure—distinguished from structures not designed for occupancy (as fences or monuments) and from structures not intended for use in one place (as boats or trailers) even though subject to occupancy." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 292 (1993).

The shipping container on the Swenson property was not being used to transport goods. It had been on the property for more than ten years, lodged in a heavily wooded area, and had consistently been used as a storage shed for the owner's personal items. Both the dictionary definitions and WAC 296-56-60005 support our conclusion that the structure Hager entered was a "building," within the ordinary meaning of the term, and not a "cargo container."

This conclusion is consistent with the only published case involving burglary of a cargo container. In State v. Tyson, 33 Wn. App. 859, 860-61, 658 P.2d 55 (1983), the defendant was convicted of second degree burglary involving a "loaded cargo trailer" at the Delta Truck Lines freight terminal that "had just arrived from California and was awaiting unloading. It was still attached to the truck tractor which had hauled it [to Washington]." The court held that such a structure was a "cargo container."

> In the present case, the uncontroverted testimony at trial established that the semitrailer, which had been broken into and entered, was a separate detachable container or structure from the truck tractor unit which was used to draw it, and was strictly a cargo trailer used for general freight. It was also, at the time of the unlawful entry, parked in the freight yard over a weekend awaiting the unloading of its cargo. Such evidence together with

> the reasonable inferences drawn therefrom was sufficient to convince any rational trier of fact beyond doubt that the trailer was either a cargo container or other structure used for the deposit of goods and thus was encompassed within the unique statutory definition of "building" for purposes of burglary in the second degree.

Tyson, 33 Wn. App. at 863 (footnotes and citations omitted).

Because Hager admitted he entered the shipping container and removed Swenson's items, the evidence was sufficient to allow the jury to conclude beyond a reasonable doubt that Hager entered a building.

Sufficiency of the Evidence: Intent

Finally, Hager argues that the State failed to present sufficient evidence that he entered the Swenson property with the intent to commit a crime, one of the elements of second degree burglary.[13] We disagree.

"In any prosecution for burglary, any person who enters or remains unlawfully in a building may be inferred to have acted with intent to commit a crime against a person or property therein, unless such entering or remaining shall be explained by evidence satisfactory to the trier of fact to have been made without such criminal intent." RCW 9A.52.040. The intent to commit a crime may also be inferred if the defendant's conduct and surrounding facts and circumstances plainly indicate such an intent as a matter of logical probability. State v. Woods, 63 Wn. App. 588, 591, 821 P.2d 1235 (1991). "In determining the sufficiency of the evidence, circumstantial evidence is not to be considered any less reliable than direct evidence." State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). We defer to the jury on issues of conflicting testimony, credibility

[13] Hager contends that the State conceded this argument because it failed to specifically address it in its response brief. But we need not decide whether the State's omission constituted a concession, because even if it did, we would decline to accept it. See In re Pers. Restraint of Goodwin, 146 Wn.2d 861, 875, 50 P.3d 618 (2002) (appellate court not bound by erroneous concession of legal error).

of witnesses, and the persuasiveness of the evidence. State v. Thomas, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004).

Here, the State presented sufficient evidence from which the jury could infer that Hager intended to commit a crime. Hager entered the Swenson property without permission, using a power company key to open the gates, and bolt cutters to open the lock on the shipping container. He then removed several items and took them to his own home where he placed them under a tarp. Though Hager argues that his presence on the Swenson property was merely the result of a misunderstanding and he did not intend to deprive anyone of their property, this explanation was clearly not persuasive to the jury. Sufficient evidence supports the conviction for second degree burglary.

Affirmed.

Trickey, J

WE CONCUR:

Leach, J.

Appelwick, J.

APPENDIX B

ORDER DENYING MOTION FOR RECONSIDERATION

April 1, 2015

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

STATE OF WASHINGTON, Respondent, v. JAMES E. HAGER, Appellant.	)	No. 70947-0-I ORDER DENYING MOTION FOR RECONSIDERATION

The appellant, James E. Hager, has filed a motion for reconsideration herein. The court has taken the matter under consideration and has determined that the motion should be denied.

Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

Done this 1st day of April, 2015.

FOR THE COURT:

Trickey, 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. 70947-0-I**, 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 or residence address as listed on ACORDS:

☒ respondent Nami Kim, DPA
[PAOAppellateUnitMail@kingcounty.gov]
[nami.kim@kingcounty.gov]
King County Prosecutor's Office-Appellate Unit

☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant Date: May 1, 2015
Washington Appellate Project

WASHINGTON APPELLATE PROJECT

May 01, 2015 - 3:00 PM

Transmittal Letter

Document Uploaded: 709470-Petition for Review.pdf

Case Name: STATE V. JAMES HAGER

Court of Appeals Case Number: 70947-0

Party Respresented: PETITIONER

Is this a Personal Restraint Petition? ○ Yes ◉ No

Trial Court County: ____ - Superior Court # ____

The document being Filed is:

- ○ Designation of Clerk's Papers ☐ Supplemental Designation of Clerk's Papers
- ○ Statement of Arrangements
- ○ Motion: ____
- ○ Answer/Reply to Motion: ____
- ○ Brief: ____
- ○ Statement of Additional Authorities
- ○ Affidavit of Attorney Fees
- ○ Cost Bill
- ○ Objection to Cost Bill
- ○ Affidavit
- ○ Letter
- ○ Copy of Verbatim Report of Proceedings - No. of Volumes: ____
  Hearing Date(s): _____
- ○ Personal Restraint Petition (PRP)
- ○ Response to Personal Restraint Petition
- ○ Reply to Response to Personal Restraint Petition
- ◉ Petition for Review (PRV)
- ○ Other: _____

Comments:

No Comments were entered.

Sender Name: Maria A Riley - Email: maria@washapp.org

A copy of this document has been emailed to the following addresses:

PAOAppellateUnitMail@kingcounty.gov
nami.kim@kingcounty.gov