

No. 47667-3-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

JEREMY ANTONE OLSON,

Appellant.

On Appeal from the Pierce County Superior Court
Cause No. 14-1-03433-6
The Honorable Garold Johnson, Judge

OPENING BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

1. The State failed to meet its constitutional burden of proving all of the elements of the charged crime beyond a reasonable doubt.
2. The State failed to prove beyond a reasonable doubt that Jeremy Olson personally entered a building unlawfully.
3. Any future request by the State for appellate costs should be denied.

II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Did the State fail to meet its burden of proving that Jeremy Olson personally entered a school building unlawfully where he was contacted by police outside of a classroom and was in possession of items believed to be school property, but where school alarms showed only that someone possibly opened the classroom door and entered the room, and where a construction dumpster next to the building contained discarded school property? (Assignments of Error 1 & 2)
2. If the State substantially prevails on appeal and makes a request for costs, should this court decline to impose appellate costs because Jeremy Olson does not have the ability to repay the costs, he has previously been found

indigent, and there is no evidence of a change in his financial circumstances? (Assignment of Error 3)

III. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The State charged Jeremy Antone Olson and co-defendant Santana Templer each with one count of second degree burglary (RCW 9A.52.030(1)). (Olson CP 1-2; Templer CP 75-76) The State did not charge Olson and Templer as accomplices, and the trial court denied the State's request to include accomplice language in the jury instructions. (Olson CP 1-2, 24; Templer CP 75-76, 97; RP 338-39) The jury nevertheless found both Olson and Templer guilty as charged. (Olson CP 35; Templer CP 108; RP 407)

The trial court sentenced Olson within his standard range to 51 months of confinement, and imposed only mandatory legal financial obligations (LFOs). (Olson CP 46-47, 49; RP 456) This appeal timely follows. (Olson CP 64)

B. SUBSTANTIVE FACTS

Martin Brewer works in the maintenance department for the White River School District. (RP 233) At approximately 5:30 on the

evening of August 30, 2014, he received a telephone call from a security company because a door alarm at the White River Alternative School had been tripped. (RP 234, 237, 266) Shortly after, the security company reported that it had detected motion inside one of the classrooms of the school. (RP 235, 266)

Brewer contacted fellow employee David Bonn and asked him to go to the school to see what was going on. (RP 266, 286) When Bonn arrived, he found that the door to room 12 was closed but not secured. (RP 266-67, 287) He secured the door and reset the alarm, then walked around the building. (RP 287-88) Bonn did not see any items outside the building and did not see any people or vehicles in the area. (RP 288-89)

Brewer received another call from the security company just after 8:00 PM reporting multiple door entry and interior motion alarms at the school. (RP 237-38, 267) The security system indicated that the doors to rooms 12 and 13 had been opened and detected motion in the area connecting the two rooms. (RP 238, 241, 279-80)

Pierce County Sheriff's Deputy Eric Jank responded to the scene at 8:42 PM. (RP 141-42) When he arrived, he drove through the parking lot and saw a red Jeep Cherokee parked near

the building. (RP 144) He saw Jeremy Olson loading several large speakers, some sound equipment, and a spotlight into the back of the Jeep. (RP 151-52) On the floor of the passenger area, he found a screwdriver, a chisel and a flashlight. (RP 152) Santana Templer and a young child were also sitting inside the Jeep. (RP 149-50, 152)

Olson told Deputy Jank that he took the items from the covered sidewalk next to the building. (RP 169, 172, 177) Templer said that Olson took the items out of a dumpster. (RP 173, 220) That construction dumpster, located about 50 feet away from where the Jeep was parked, was filled with large items including several chairs and a file cabinet. (RP 144, 177-78, 185-86)

Deputy Jank also inspected the building. He noticed a metal plate missing from door 12, making the bolt lock visible and accessible from outside the door. (RP 150-51) The bolt could be easily manipulated to unlock and open the door. (RP 151) Brewer arrived soon after and identified the items in the back of Olson's Jeep. (RP 173-74) He testified the items belonged to the school and had been stored in room 12. (RP 174-75)

IV. ARGUMENT & AUTHORITIES

- A. THE STATE FAILED TO PROVE THAT OLSON PERSONALLY ENTERED THE WHITE RIVER ALTERNATIVE SCHOOL BUILDING.

“Due process requires that the State provide sufficient evidence to prove each element of its criminal case beyond a reasonable doubt.” City of Tacoma v. Luvene, 118 Wn.2d 826, 849, 827 P.2d 1374 (1992) (citing In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)). Evidence is sufficient to support a conviction only if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). “A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” Salinas, 119 Wn.2d at 201.

“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(1). Neither the Information nor the

jury instructions included the theory of accomplice liability,¹ so the State was required to prove that Olson *personally* entered the school building.

Even viewing the evidence in the light most favorable to the State, there is insufficient evidence to prove this element. The first entry through the door and motion within room 12 was detected at 5:35 PM. (RP 266) The second entry and motion was detected two and one-half hours later, at 8:09 PM. (RP 279-80) It was nearly 30 minutes before Deputy Jank saw Olson and Templer in the parking area, next to a dumpster filled with discarded school equipment. (RP 141, 144)

The State presented no evidence, such as footprints or fingerprints, to show that Olson opened the doors or entered the building. The State also presented no evidence that he was the person who removed the items from room 12. The State's evidence established only that Olson was outside the building three hours after the first entry and 30 minutes after the second entry. The State did not prove that Olson actually entered the building at either point in time.

The reviewing court should reverse a conviction and dismiss

¹ See Olson CP 1, 24; Templer CP 97.

the prosecution for insufficient evidence where no rational trier of fact could find that all elements of the crime were proven beyond a reasonable doubt. State v. Hardesty, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996); State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998). Because no rational trier of fact could have found beyond a reasonable doubt that Olson entered the White River Alternative School building, this court must reverse his burglary conviction and dismiss the charge.

B. ANY FUTURE REQUEST FOR APPELLATE COSTS SHOULD BE DENIED.²

Under RCW 10.73.160 and RAP Title 14, this Court may order a criminal defendant to pay the costs of an unsuccessful appeal. RAP 14.2 provides, in relevant part:

A commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, unless the appellate court directs otherwise in its decision terminating review.

But imposition of costs is not automatic even if a party establishes that they were the “substantially prevailing party” on review. State

² Recently, in State v. Sinclair, -- P.3d --, 2016 WL 393719 at *5 (2016) Division 1 concluded “that it is appropriate for this court to consider the issue of appellate costs in a criminal case during the course of appellate review when the issue is raised in an appellant’s brief.” Olson is including an argument regarding appellate costs in his opening brief in the event that this Court agrees with Division 1’s interpretation of RAP 14.2.

v. Nolan, 141 Wn.2d 620, 628, 8 P.3d 300 (2000). In Nolan, our highest Court made it clear that the imposition of costs on appeal is “a matter of discretion for the appellate court,” which may “decline to order costs at all,” even if there is a “substantially prevailing party.” Nolan, 141 Wn.2d at 628.

In fact, the Nolan Court specifically rejected the idea that imposition of costs should occur in every case, regardless of whether the proponent meets the requirements of being the “substantially prevailing party” on review. 141 Wn.2d at 628. Rather, the authority to award costs of appeal “is permissive,” the Court held, so that it is up to the appellate court to decide, in an exercise of its discretion, whether to impose costs even when the party seeking costs establishes that they are the “substantially prevailing party” on review. Nolan, 141 Wn.2d at 628.

Should the State substantially prevail in Olson’s case, this Court should exercise its discretion and decline to award any appellate costs that the State may request. First, Olson owns no property or assets, and has no job and no income. (Olson CP 76) Olson will be incarcerated for the next 4 years, and owes at least \$1,036 in previously ordered LFOs and restitution. (Olson CP 47, 49, 71-72) There was no evidence below, and no evidence on

appeal, that Olson has or will have the ability to repay additional appellate costs.

Furthermore, the trial court found that Olson is indigent and entitled to appellate review at public expense. (CP 69-70) This Court should therefore presume that he remains indigent because the Rules of Appellate Procedure establish a presumption of continued indigency throughout review:

A party and counsel for the party who has been granted an order of indigency must bring to the attention of the trial court any significant improvement during review in the financial condition of the party. The appellate court will give a party the benefits of an order of indigency throughout the review unless the trial court finds the party's financial condition has improved to the extent that the party is no longer indigent.

RAP 15.2(f).

In State v. Sinclair, -- P.3d --, 2016 WL 393719 at *7 (2016), Division 1 declined to impose appellate costs on a defendant who had previously been found indigent, noting:

The procedure for obtaining an order of indigency is set forth in RAP Title 15, and the determination is entrusted to the trial court judge, whose finding of indigency we will respect unless we are shown good cause not to do so. Here, the trial court made findings that support the order of indigency.... We have before us no trial court order finding that Sinclair's financial condition has improved or is likely to improve. ... We therefore presume Sinclair

remains indigent.

Similarly, there has been no evidence presented to this court, and no finding by the trial court, that Olson's financial situation has improved or is likely to improve. Olson is presumably still indigent, and this Court should decline to impose any appellate costs that the State may request.

V. CONCLUSION

The State's evidence may have established that someone unlawfully entered the White River Alternative School building, but the State did not prove that Olson was that person. Olson's conviction should be reversed and the charge dismissed with prejudice. This court should also decline any future request to impose appellate costs.

DATED: March 14, 2016



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WSB #26436

Attorney for Jeremy A. Olson

CERTIFICATE OF MAILING

I certify that on 03/14/2016, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Jeremy A. Olson, DOC# 717305, Coyote Ridge Corrections Center, P.O. Box 769, Connell, WA 99326-0769.



STEPHANIE C. CUNNINGHAM, WSBA #26436

CUNNINGHAM LAW OFFICE

March 14, 2016 - 1:21 PM

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