

67062-0

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No. 67062-0-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

JOHN PATRICK CHOAT,

Appellant.

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

The Honorable John Meyer

BRIEF OF APPELLANT

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COURT OF APPEALS DIV 1
STATE OF WASHINGTON
JUDICIAL CENTER

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A. ASSIGNMENTS OF ERROR

1. The State presented insufficient evidence to prove the essential elements of burglary in the first degree, in violation of Choat's Fourteenth Amendment right to due process.

2. The trial court erred in entering Finding of Fact 14.¹

3. The trial court erred in entering Finding of Fact 17.

4. The trial court erred in entering Finding of Fact 18.

5. The trial court erred in entering Finding of Fact 19.

6. The trial court erred in entering Finding of Fact 21.

7. The trial court erred in entering Finding of Fact 22.

8. The trial court erred in entering Finding of Fact 23.

9. The trial court erred in entering Finding of Fact 24.

10. The trial court erred in entering Finding of Fact 25.

11. The trial court erred in entering Finding of Fact 26.

12. The trial court erred in entering Conclusions of Law 1 and 2.

13. The trial court erred in adjudicating Choat guilty of Burglary in the First Degree.

¹ A copy of the trial court's findings of fact and conclusions of law on trial to the court is attached as an Appendix.

B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

The State bears the burden of proving the essential elements of a criminal charge beyond a reasonable doubt. Where the evidence did not show and the court did not expressly find that Choat entered a building unlawfully, must his ensuing conviction for burglary in the first degree be reversed and dismissed?

C. STATEMENT OF THE CASE

John Choat and Andrea Lukken were involved in a stormy relationship for two years. 1RP 69, 3RP 58. Both are avid pool players and met through a tournament league, of which they both were members. 3RP 36. The relationship was fueled largely by sex, and the two argued and broke up frequently, only to immediately resolve their differences and resume the relationship. 2RP 9; 3RP 58, 86. Although Lukken and Choat did not live together, they saw one another nearly every day and spent half their nights together. 2RP 9.

On Friday, August 20, 2010, Choat and Lukken argued and broke up, but by the next day they had reconciled and were once again sleeping together. 1RP 70. They saw each other several times that week and were intimate on both Saturday and Sunday. 2RP 20, 31-32.

On the evening of Thursday, August 26, Lukken and Choat had plans to go out on a date, but Choat did not show up at the appointed time or return Lukken's text messages, and Lukken became very angry. 2RP 22-24. Lukken eventually got in her car and went to look for Choat, only to find him drinking with a female bartender at Draft Pics, a bar where Choat worked as a bouncer and played pool. 2RP 24-25. Lukken became angry and jealous and stormed off, and Choat followed her, apologizing profusely. 2RP 25. Choat and Lukken spent the night together that night, and the next morning Lukken sent Choat an affectionate text message about his dog, who had been injured, and then another message asking Choat if he was "still being poopy" and stating that she wanted some food. 2RP 26. Choat responded, "what?" Id.

Lukken did not reply for nearly an hour and a half. Id. When she finally texted Choat, she was angry. She accused him of going out with "Miranda" that Wednesday night, of being on a "four-day binger," and told him he "can't stop lying and being a secretive lush." 2RP 27.

That Sunday, August 29, at approximately two p.m., Lukken sent Choat another furious message. In that message she accused him of having "whiskey dick the last three times we have been

together” and said, “you fucked me over for a good time with fat Miranda thinking I wouldn’t find out about it.” 2RP 30; 3RP 63. She accused him of having no control when he drank and said she was embarrassed to call him her boyfriend. 2RP 30.

That same afternoon, Choat was playing in a pool tournament at Draft Pics. 3RP 63. Lukken drove by shortly after sending the text message and Choat brandished his cell phone at her as if to ask, “what is this?” Id. Lukken said, “we need to talk.” 3RP 64. Choat explained that he was playing in a pool tournament, and would not be finished until that evening. 3RP 65.

Lukken was housesitting for friends, Marco Pugh and Dominic Cameron, and told Choat that she would be back at their house between 8:00 and 9:00 that evening. 3RP 65. Choat asked her if she wanted him to meet her there and she said yes. Id. Just then, a car drove behind Lukken and honked, and she drove away. Id.

That evening Choat felt contrite, and before going to see Lukken he went to Safeway and bought her a single stem rose, and then to Taco Bell where he bought her a burrito for her lunch the next day. 3RP 67. Choat’s intention was to wait for Lukken on Pugh’s front porch with the flower. Id. As Choat was on his way

over to Pugh's home, however, Choat received a call from a friend, Dan Garcia, who was Pugh's next-door neighbor. 3RP 69. Garcia told Choat that Lukken had returned to Pugh's house with a man. 3RP 11-12, 69.

Choat was upset and suspicious. He nevertheless continued to Pugh's, where he saw Lukken's car parked in the driveway along with a blue pickup truck. 3RP 69-70. It was a hot evening, and the front door of the house was propped open, although the screen door was closed. 3RP 71. Choat grabbed the burrito, the flower, and his cell phone and went into the house. Id.

In the kitchen, Choat saw a man sitting with his back to him who at first he did not recognize. Lukken was sitting to the man's right. 3RP 72-73. Choat set the burrito, flower, and phone on a shelf and asked, "What's going on?" 3RP 73. The man turned, and Choat realized the man was Dan Kowzan, an acquaintance and fellow pool player. Id.

There were numerous beer bottles and cans on the table and an odor of alcohol in the air, and Choat realized that both Lukken and Kowzan were very drunk. 3RP 74-75. In the next moment, Kowzan appeared to grasp a beer bottle in a manner that suggested to Choat that he was preparing to use it as a weapon,

and Choat punched him in the cheekbone as hard as he could.

3RP 76. Kowzan stumbled back but still held the beer bottle, and Choat punched him in the face three more times until he went limp.

3RP 78.

According to Kowzan, he did not realize Choat was in the room until he saw a look of shock and surprise on Lukken's face. 2RP 66. He has a vague recollection of crashing through a plate glass table top, but otherwise believes he was unconscious almost from Choat's first punch. Id. Kowzan sustained multiple facial fractures and a torn retina as a result of the incident. 2RP 72-73, 81.

Although the ordinary residents of the home where the incident occurred, Pugh and Cameron, were not enthusiastic about Lukken having guests over in their absence, Lukken frequently had visitors. 2RP 49, 58. Pugh and Cameron knew Choat, and Choat had been a guest at parties in their home and had spent the night a few times. 2RP 52. During the time that Pugh and Cameron were away and Lukken was housesitting, Choat went to the house several times and had even had sex with Lukken there. 1RP 12-14, 32. Neither Pugh nor Cameron ever told Choat that he was not permitted to come over. 2RP 49, 52.

Based on these events, the Skagit County Prosecuting Attorney charged Choat with burglary in the first degree and assault in the first degree. Choat waived jury and the case was tried to the Honorable John Meyer. CP 11-12. The court rejected Choat's self-defense claim but convicted him of the lesser included offense to assault in the first degree of assault in the second degree. CP 26-33, 39. The court convicted Choat of burglary in the first degree as charged. Id. At sentencing, the court applied the provisions of the burglary anti-merger statute and, based upon an offender score of three, imposed a high end sentence on the burglary count of 48 months and 20 months on the assault count. CP 42. Choat appeals.

D. ARGUMENT

THE STATE PRESENTED INSUFFICIENT EVIDENCE TO PROVE THE ESSENTIAL ELEMENTS OF BURGLARY IN THE FIRST DEGREE.

1. The State bears the burden of proving the essential elements of a criminal offense. The State bears the burden of proving the essential elements of a criminal charge beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); State v. Byrd, 125 Wn.2d 707, 713, 887

P.2d 796 (1995); U.S. Const. amend. XIV; Const. art. I § 3. A challenge to the sufficiency of the evidence requires the appellate court to view the evidence in the light most favorable to the prosecution and decide whether any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. State v Green, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980). A claim of insufficiency admits the truth of the State's evidence and all inferences that can reasonably be drawn therefrom. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

2. That a person *unlawfully* entered or remained in a building, and that he did so with intent to commit a crime therein, are essential elements of burglary in the first degree. In order to convict Choat of burglary in the first degree, the trial court had to find:

(1) that on or about August 29, 2010, Choat unlawfully entered or remained in a building; and

(2) that in entering, while in the building, or in immediate flight therefrom Choat assaulted someone.

RCW 9A.52.020(1)(b).

According to statute, “[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.” RCW

9A.52.010(3). “License to enter a premises may be granted only by the person who resides in or otherwise has authority over the property.” State v. Grimes, 92 Wn. App. 973, 978, 966 P.2d 364 (1998). If a person has an express or implied license to enter premises granted by the person who resides in or has authority over the property, the entry is lawful.

And, a lawful entry is not rendered unlawful by the intent to commit a crime. State v. Allen, 127 Wn. App. 125, 131, 110 P.3d 849 (2005); see also id. at 137 (“A lawful entry, even one accompanied by nefarious intent, is not by itself a burglary. Unlawful presence and criminal intent must coincide for a burglary to occur.”). Thus, “[f]elonious entry is entry that is burglarious, as opposed to entry that is lawful or trespassory.” State v. Thomson, 71 Wn. App. 634, 637, 861 P.2d 492 (1993). Conversely, “proof of intent to commit a crime does not establish the other element—unlawful entry.” State v. Miller, 90 Wn. App. 720, 725, 954 P.2d 925 (1998). “[T]he harboring of criminal intent is [not] in itself sufficient to violate an implied limitation or to establish revocation of any license, invitation or privilege.” Id. at 727.

3. The State did not present sufficient evidence to prove that Choat’s entry and/or remaining in Pugh’s residence was unlawful.

The trial court entered several factual findings pertinent to the pivotal questions of whether Choat's entry into Pugh and Cameron's home was unlawful, and whether he had the intent to commit a crime. The court, however, did not decide the disputed question of whether Lukken had invited Choat to the home, and did not decide whether he intended to commit a crime.

a. The court did not expressly find that Choat's entry was unlawful and the facts supported the conclusion it was not. It was uncontested that on the day of the incident, Lukken and Choat were still involved in their tumultuous, sex-driven, on-again-off-again relationship, and the facts supported this conclusion. See 2RP 19 (Lukken texts Choat three days prior to the charged incident for his credit card information so that she can book their hotel stay in Oregon during an upcoming pool tournament); 2RP 25 (Lukken texts Choat two days before the charged incident to tell him she "got Billy [Choat's dog] a present"); 2RP 30 (Lukken texts Choat on the afternoon of the incident to complain about his allegedly inadequate sexual performance during their three previous sexual encounters, accuses him of being unfaithful to her, and says that she is "embarrassed" to "call him her boyfriend").

In Finding of Fact 4, the court found that on the afternoon of the incident Lukken and Choat saw one another and “there was some sort of exchange in Mount Vernon which made the defendant think that there was a need to have a conversation between him and Lukken.” CP 27. The court noted, as well, that “[t]here had been a lot of texting going back and forth for a several day period [that] show[ed] these two were embroiled in problems in their relationship.” Id.

The court did not resolve exactly what happened during the “exchange,” even though this discrepancy was relevant on the point of whether Lukken had in fact asked Choat to come to the home later that evening, as Choat testified, see 2RP 64-65, or whether they had had another argument leaving this question unresolved. But, significantly, in Finding of Fact 12, the court credited Choat’s testimony that he had purchased a rose and a burrito for Lukken. CP 28. This finding implies (a) that Choat had an invitation or license to enter the premises by a person who had authority to give such license, i.e., Lukken, and (b) that Choat did not harbor any intent to commit a crime.

In Finding of Fact 14, the court determined:

There was nothing that even approximated an open invitation for Choat at that house. The house was not his residence or building and was the building of another. On the date of this incident Choat was not expressly or impliedly invited into the house.

CP 28-29. This factual finding mistakes the issue. While Pugh and Cameron may not have extended a standing invitation to Choat (and, in fact, would have preferred he not be at the home while they were away), neither conveyed to Choat any directive that he was not permitted to visit the residence. 2RP 48-49, 58-59.

Choat had stayed at the residence several times while Pugh and Cameron were there. 2RP 49, 52. Moreover, Lukken, the person who had authority over the premises in Pugh and Cameron's absence, had brought Choat over to the house several times and had even had sexual intercourse with Choat there. 2RP 12-14, 32. In Finding of Fact 16, the court conceded that "Lukken . . . had previously invited Choat there," but found that she "wanted to use the place as a bit of a getaway so that she could go there and feel safe." CP 29. In the same finding of fact, the court notes that it was likely Lukken had locked the door "in the past when she wanted to be sure that she could be there and not be disturbed."
Id.

On this occasion, however, Lukken did not lock the door; it was propped open, signaling an invitation to someone like Choat – Lukken’s boyfriend of two years – that he could enter. 1RP 82; 3RP 71. Thus, Finding of Fact 16 does not settle the question whether Lukken had invited Choat to the home.

Other factual findings suggest that Kowzan was surprised to see Choat at the house that night. See e.g. Findings of Fact 18-24 (CP 30). To the extent these findings imply that Lukken was similarly taken by surprise, they are not supported by substantial evidence in light of the trial court’s failure to resolve what happened during the afternoon “exchange” at Draft Pics.

“[L]ack of an essential finding is presumed equivalent to a finding against the party with the burden of proof[.]” In re the Welfare of A.B., 168 Wn.2d 908, 927, 232 P.3d 1104 (2010); State v. Armenta, 134 Wn.2d 1, 14, 948 P.2d 1280 (1997) (“In the absence of a finding on a factual issue we must indulge the presumption that the party with the burden of proof failed sustain their burden on this issue.”). Under these decisions, and in light of the court’s other factual findings, the trial court’s failure to resolve the question of what happened during Lukken and Choat’s

“exchange” on the afternoon of the incident must be construed against the State.

In Miller, the defendant entered an open self-service car wash, broke into several coin boxes, and was convicted of theft and burglary. 90 Wn. App. at 723. Because the car wash was open to the public, the Court concluded that there was no unlawful entry. Id. at 725-26.

In so holding, the Court rejected the State’s contention that “any entry or remaining for an illegitimate or criminal purpose violates the license, invitation or privilege and is unlawful.” Id. at 725. The Court found that “[t]he State’s argument is not supported by the statute or by case law and would lead to results far outside the legislative intent.” Either Lukken expressly invited Choat to come to Pugh and Cameron’s residence, or the fact that she left the screen door open constituted an implied invitation. Therefore, Choat’s entry into the residence was not unlawful.

b. The State failed to prove the essential element of criminal intent. Because the facts strongly supported the conclusion that Lukken had conveyed an express or implied invitation to Choat, his intent was immaterial, even though Choat learned from Garcia that Lukken had brought another man to the

house on his way there. Miller, 90 Wn. App. at 725-26; See 3RP 9-12, 69. Again, however, the facts found by the trial court strongly imply an absence of criminal intent. See Finding of Fact 12 (CP 28) (“Before he had gotten that phone call Choat intended to go over to where Lukken was.”).

Even after seeing Kowzan’s blue pickup truck in the driveway of Pugh and Cameron’s house, Choat did not arm himself or enter the home manifesting aggression. Rather, he brought in the gifts he had purchased for Lukken, and his cell phone. 3RP 71. These facts undermine any inference that Choat entered the home intending to commit a crime.

In sum, (1) the evidence was insufficient to show that Choat entered Pugh and Cameron’s home unlawfully, (2) he did not have the intent to commit a crime when he went there, and (3) even if he formed this intent upon seeing Lukken with Kowzan, this does not elevate the crime to a burglary. This Court should conclude the evidence was insufficient to support Choat’s conviction for this offense.

3. The remedy is reversal and dismissal of Choat’s burglary conviction. “Retrial following reversal for insufficient evidence is ‘unequivocally prohibited’ and dismissal is the remedy.” State v.

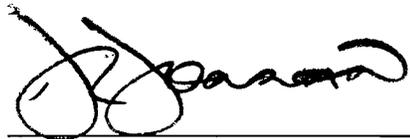
Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998) (citing State v. Hardesty, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996)). Because the evidence was insufficient to support the essential elements of unlawful entry or remaining and criminal intent, Choat's conviction for burglary in the first degree should be reversed and dismissed.

E. CONCLUSION

For the foregoing reasons, this Court should reverse and dismiss Choat's conviction for burglary in the first degree.

DATED this 30th day of September, 2011.

Respectfully submitted:

 (19271) for:

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5 SUPERIOR COURT OF WASHINGTON

6 COUNTY OF SKAGIT

<p>8 STATE OF WASHINGTON,</p> <p>9 Plaintiff,</p> <p>10 v.</p> <p>11 JOHN PATRICK CHOAT,</p> <p>12 Defendant.</p>	<p>NO. 10-1-00711-2</p> <p>FINDINGS OF FACT AND CONCLUSIONS OF LAW ON TRIAL TO THE COURT</p>
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13 THE COURT having heard the testimony at the bench trial and
14 having considered the evidence and arguments of counsel, makes and
15 enters the following findings:

16 I. FINDINGS OF FACT

17 1. The Court has jurisdiction of the parties and the subject
18 matter, since ~~that~~ all events material herein occurred in Skagit
19 County, State of Washington.

20 2. The incident occurred in Mount Vernon, Washington.

21 3. The Defendant, John Choat, and Andrea Lukken had an on-
22 and-off contentious relationship for a period of two years leading
23 up to August 29th, 2010. They would be together; then they would
24 break up, then get together again, and break up. There was ~~sort~~
25 ~~of~~ an unhealthy attraction between the two that ~~may have been~~
26 fueled by testosterone, alcohol, and relationships with various
27 people. It was on-and-off ~~pretty~~ toxic atmosphere.

0026

ORIGINAL

J1

2

28

pm

pm

1 4. On August 29, 2010, Lukken and Choat saw one another,
2 and there was some sort of ~~inter~~^{ex}change in downtown Mount Vernon
3 which made the Defendant think that there was a need to have a
4 conversation between he and Lukken.

Jmm.

5 5. There had been a lot of texting going back and forth for
6 a several-day period. There were some times that Lukken would
7 send a number of consecutive texts, wouldn't get a response, then
8 eventually a response would come. The texts show these two were
9 ~~just~~ embroiled in problems in their relationship.

Jmm.

10 6. After the exchange downtown, Choat went into a pool
11 tournament. Choat probably did not drink that day since he was
12 accused of difficulty in maintaining the type of relationship that
13 he and Lukken had when he ~~had been~~^{was} drinking, and ~~that~~^{that} he found ~~it~~
14 offensive. He had just made a decision not to drink or to drink
15 very little that day. Choat won the pool tournament.

Jmm.

16 7. Lukken was with ~~different~~^{other} friends at a party that day.
17 She ultimately ended up with Daniel Kowzan, the ~~ultimate~~ victim.
18 Kowzan and Lukken may have had one or two drinks that day. Of the
19 two, Kowzan had had more to drink.

Jmm.

20 8. Around 9:00 p.m. on August 29th, 2010, they ended up at
21 the residence that she was watching for Nick Cameron and Marco
22 Pugh at 1904 6th Street in Mount Vernon.

23 9. After pool and before he arrived at that address himself
24 Choat had seen Daniel Garcia and asked Garcia to let him know when
25

1 Lukken returned to the 6th Street house because he wanted to carry
2 on the conversation about their relationship.

3 10. Choat knew there was a problem with the relationship and
4 that was something they had to talk out. ~~The Court believes~~ He *John.*
5 wanted to see what he could do to mend the relationship.
6 Regardless of his testimony that it was not a big deal to him, ~~the~~
7 ~~Court believes~~ it was important for whatever reason for Choat to *John.*
8 mend or have this relationship on a better basis than it certainly
9 had appeared to be for the past several days.

11 11. Choat was informed in a phone call by the next door
12 neighbor, Garcia, that Lukken had come home to 1904 South 6th and
13 was also told there was a man there.

14 12. Before he had gotten that phone call Choat intended to
15 go over to where Lukken was. Choat had picked up one rose and a
16 burrito that he expected her to have for lunch the next day. He
17 had those with him when he received the phone call. He immediately
18 went over to 1904 South 6th, by foot or by car.

19 13. Choat had been to 1904 South 6th Street in Mount Vernon
20 about ten times in his life. In the two months that Lukken had
21 been house sitting, Choat had been there a total of three times.
22 He apparently spent the night there with Andrea two times, one of
23 those times he was on one couch and she was on another couch. The
24 other time he had been there it had been perhaps two weeks before
25 this incident to help Lukken mow the lawn.
26
27
28

1 14. There was nothing that even approximated an open
2 invitation for Choat at that house. The house was not his
3 residence or building and was the building of another. On the
4 date of this incident Choat was not expressly or impliedly invited
5 into the house.
6

7 15. After they came to the house, they were sitting at the
8 table in the kitchen with Kowzan's back ~~was~~ to the front of the
9 house. Lukken was in a position so that she could see somebody
10 coming into the kitchen area. Lukken had not locked the door.
11

12 16. ~~The Court is satisfied that~~ Lukken, even though she had
13 previously invited Choat there, ~~that she kind of~~ wanted to use
14 that place as a bit of a getaway so that she could go there and
15 feel safe. The 911 tape is significant where she kept saying "I
16 should have locked the door". That was an excited utterance under
17 the stress of an event which suggested ~~to me~~ very strongly that is
18 maybe something she had done in the past when she wanted to be
19 sure that she could be there and not be disturbed.
20

21 17. On this day she did not lock the door. The screen door
22 was open. The back door was open because of the need to have some
23 breeze circulate through the house. Lukken and Kowzan were
24 sharing a glass of wine; there may have been a beer bottle in the
25 vicinity which ended up broken after the altercation and swept up.
26 ~~The Court finds that~~ when paramedics arrived they cleaned up some
27 of the mess and get things out of the way to treat Kowzan.
28

1 18. Choat came up, didn't knock, walked in, and wasn't
2 heard. Choat didn't act like he was there. Choat ~~testified he~~
3 had said "what's going on" or words to that effect.

John

4 19. Lukken and Kowzan were surprised when he came into the
5 kitchen. ~~The Court believes it is possible that~~ Choat rather
6 quietly went in there so that he wouldn't be heard.

John

7 20. From this point, there are a couple different versions
8 about what happened.

9 21. ~~The Court believes~~ Choat went in quietly and then
10 probably says something along the lines of "what is going on?
11 What is happening here?". He took both people sitting at the
12 kitchen table by surprise, since they didn't expect him.

John

13 22. ~~The Court believes~~ Choat went in angry and upset and was
14 not walking slowly but was moving quickly.

John

15 23. Kowzan stood up and turned slightly and the was hit on
16 the right side of the face by Choat's right hand.

17 24. Kowzan appeared to be trying to figure out some way to
18 react to a surprise invader in the house. But before he could do
19 anything he was struck.

20 25. At that point Kowzan went to the floor and Choat
21 followed, punching Kowzan hard and causing injury.

22 26. ~~The Court does not believe that~~ Choat was ^{not} defending
23 himself. Choat described Kowzan as turning to the right. If
24 Choat had been face on and he was going to be attacked, his right
25
26
27
28

John

1 hand would have most likely hit Kowzan on the left side of the
2 face. Here, there appeared to be no blow to the left side of
3 Kowzan's face. ~~The Court does not believe that Kowzan ever got to~~
4 the point where it was necessary for Choat to defend himself. *Jm.*

5
6 27. Kowzan was first evaluated by Dr. Liebrand at the Skagit
7 Valley hospital.

8 28. Kowzan suffered major multiple fractures. He had an
9 eyeball which was being forced forward because of swelling.

10 29. There was concern that optic nerve swelling could cause
11 blindness. Because of that and that there wasn't sufficient staff
12 at the Skagit Valley Hospital ER for maxillofacial injuries, it was
13 decided he should be airlifted ~~up~~ to Harborview, which is the main
14 trauma center in the Pacific Northwest. *Jm.*

15
16 30. Dr. Liebrand's testimony did not indicate a probability
17 of death from the injury, ~~He did testify there was a risk of death~~
18 because there could have been some discrete bleeding on the brain, *only*
19 but he was more concerned about the risk of blindness. *Jm.*

20 31. There was no evidence of significant serious permanent
21 disfigurement since there was no significant permanent loss or
22 impairment of the function of any bodily part or organ.

23
24 32. The Court finds that there was a temporary but
25 substantial disfigurement, temporary loss or impairment through
26 numbness and a problem with Kowzan's teeth, causing an issue with *Jm.*
27 function of a bodily part and fractures of a bodily parts.

1 33. The Court has two reasons to doubt whether Choat acted
2 with intent to inflict great bodily harm. First, we have the
3 testimony of Michael Bogh who said Choat related both what he was
4 accused of having done and what he did giving reason to doubt
5 whether he hit him four or five times or thirty times. Second, if
6 he had struck Kowzan so many times in the face hitting hard bone,
7 hard head, he would have been likely to scrape up his knuckles
8 ~~quite~~ ^{quite} badly had he hit him as many times as described. Beyond
9 blood on his hands, there was no evidence of battered up hands.
10 So the Court has reason to doubt that he hit him thirty or forty
11 times. ~~And~~ ^{Since} if the Court has reason to doubt, the Court cannot
12 find that he intended to inflict great bodily harm.
13

14 34. Therefore, the court has insufficient facts to find that
15 Choat acted with intent to inflict great bodily harm.
16

17 II. CONCLUSIONS OF LAW

18 NOW, THEREFORE, the Court concludes that based upon the
19 testimony and evidence, the defendant, John Choat committed the
20 following offenses in the following manner:

21 1. On August 29th, 2010, in the County of Skagit, with
22 intent to commit a crime against a person or property therein did
23 enter or remain unlawfully in 1904 South 6th Street, Mount Vernon,
24 the building of another. Choat knew that a man was in there with
25 his girlfriend. Because of his anger and his possessiveness of
26 the relationship, Choat entered the building uninvited intending
27

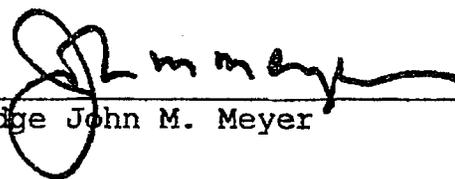
1 to commit a crime against a person therein. Choat also unlawfully
2 remained in the building to commit an unprovoked assault on
3 Kowzan.

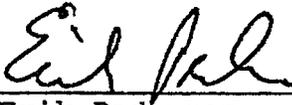
4 2. On August 29th, 2010, in the Skagit County, Washington,
5 Choat did intentionally assault Daniel Kowzan and recklessly
6 inflict substantial bodily harm. Choat did not act in self
7 defense.
8

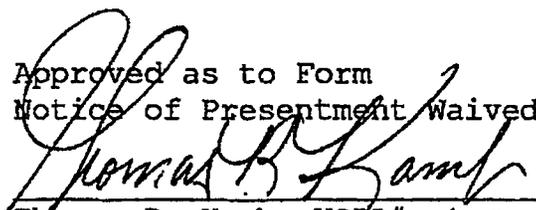
9 III. RULING

10 Therefore, the Court finds the defendant, John Choat,
11 guilty of the crime of Burglary in the First Degree as charged in
12 count I and the lesser degree crime of Assault in the Second
13 Degree to Assault in the First Degree as charged in count II.

14
15 Dated this 23 day of March 2011.

16
17 
18 Judge John M. Meyer

19
20 Presented by:
21 
22 Erik Pedersen, WSBA#20015
23 Senior Deputy Prosecutor

24
25 Approved as to Form
26 Notice of Presentment Waived
27 
28 Thomas R. Kamb, WSBA# 16944
Attorney for Respondent

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 67062-0-I
v.)	
)	
JOHN CHOAT,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 30TH DAY OF SEPTEMBER, 2011, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] RICHARD WEYRICH, DPA
SKAGIT COUNTY PROSECUTOR'S OFFICE
COURTHOUSE ANNEX
605 S THIRD ST.
MOUNT VERNON, WA 98273

(X) U.S. MAIL
() HAND DELIVERY
() _____

[X] JOHN CHOAT
709958
WASHINGTON STATE PENITENTIARY
1313 N 13TH AVE
WALLA WALLA, WA 99362

(X) U.S. MAIL
() HAND DELIVERY
() _____

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SIGNED IN SEATTLE, WASHINGTON THIS 30TH DAY OF SEPTEMBER, 2011.

X _____ 

Washington Appellate Project
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