

70066-9

70066-9

NO. 70066-9-1

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

PAUL CULVER,

Appellant.

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

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OPENING BRIEF OF APPELLANT

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STATE OF WASHINGTON  
COURT OF APPEALS  
DIVISION ONE

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A. ASSIGNMENT OF ERROR

The State presented insufficient evidence to prove beyond a reasonable doubt that Mr. Culver intended to commit a crime against a person or property within a building.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

The United States and Washington Constitutions require the State prove all essential elements of a charged offense. Must Mr. Culver's conviction for burglary in the second degree be reversed and dismissed where the State failed to prove beyond a reasonable doubt that Mr. Culver intended to commit a crime against a person or property in a building?

C. STATEMENT OF THE CASE

Magnuson Park, located in the Sandpoint area of Seattle, formerly functioned as a U.S. Navy base. RP 102, 120-24, 182-84.<sup>1</sup> A group of buildings at the park, consisting of large barracks and dining halls, has been abandoned for years. The property is presently owned

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<sup>1</sup> The verbatim report of proceedings consists of consecutively-paginated volumes from dates between January 2, 2012 to January 8, 2012. They are referred to herein as RP \_\_\_\_.

by the University of Washington (UW), and UW is responsible for its maintenance. Id.

Due to the complex's isolation and disuse, these buildings have attracted a number of break-ins over the years by salvagers, requiring UW to hire contractors to fix the damage caused by vandals. RP 57-62, 216-20. Because the buildings contain pipes filled with asbestos, each time the buildings are vandalized, a contractor must inspect the damage to the pipes and drywall and have a special team conduct asbestos remediation work. RP 57-60, 120-24, 216-19. The facility manager of the property management firm at the Sandpoint property estimates that UW has spent more than \$300,000 during the past three years, just in maintenance and clean-up costs resulting from break-ins to these buildings. RP 216-19.<sup>2</sup>

On the morning of September 13, 2011, subcontractors working for UW had just arrived for work at Building 9, which is considered the most problematic building in the Sandpoint complex, due to its lack of security and the amount of vandalism it seems to attract. RP 65-69, 195 (“Building Number 9 is different. It’s big and it’s been neglected, but

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<sup>2</sup> Rick Pierce, the facility manager, notes that one break-in cost approximately \$220,000 in asbestos abatement alone. RP 218-19.

it's kind of its own special case.”). The custodian responsible for the complex, Jose Gonzales, had also just arrived at work for the day. RP 125-29. Mr. Gonzales saw an unidentified individual pulling piping out of the walls of Building 9, apparently to salvage it. RP 125-34. Mr. Gonzales pursued this individual by foot and by vehicle; when this individual returned to Building 9 a short time later, Mr. Gonzales told him he was calling the police. RP 133. The salvager fled, never to be apprehended. RP 133-35.<sup>3</sup>

Meanwhile, the asbestos abatement crew spoke with the custodian, Mr. Gonzales, while they waited for the police, who arrived shortly thereafter. RP 137-37. At this point, the asbestos crew and custodian suddenly noticed another individual, Paul Culver, who was also present that morning at the Sandpoint property. RP 138-39. Mr. Culver was not in the building, but was sitting in an alcove near the building. *Id.* Mr. Gonzales mentioned that he did not immediately notice Mr. Culver because he was not in the building, and was not really doing anything – he appeared to be “taking a break or something.” RP 138. One of the asbestos workers spoke to Mr. Culver

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<sup>3</sup> This individual who was seen pulling piping out of the walls was an uncharged, unidentified accomplice; the jury was instructed on accomplice liability at Mr. Culver's

and told him that he was not supposed to be in the alcove area, nor was he supposed to be working on the air conditioning units. RP 141.

Mr. Culver reportedly informed the custodian that a black truck parked near the Building 9 belonged to him; the workers and Mr. Gonzales showed the truck and its contents to law enforcement upon their arrival. RP 70, 85-87, 144-45, 188-89. The truck bed contained items, including an air conditioner and some plastic sheeting, that the workers believed came from their job site. Id. After the officers arrived and spoke to the workers and examined the items in the truck, they placed Mr. Culver under arrest. RP 172.

Mr. Culver was charged with burglary in the second degree. CP 1. He was not charged with theft for any of the materials found in the black truck.<sup>4</sup> Mr. Culver was convicted of the sole count of burglary, following a jury trial. He appeals. CP 55.

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trial without objection. CP 31.

<sup>4</sup> This may be due to the attenuation in Mr. Culver's connection to the items in the truck, or the generic nature of the items themselves. See, e.g., RP 83 (asbestos worker unclear if Mr. Culver ever admitted ownership of the black truck); RP 85-87, 94-95, 193-96 (noting the materials are "generic" and are used at "many sites").

D. ARGUMENT

THERE WAS INSUFFICIENT EVIDENCE TO CONVICT MR. CULVER OF BURGLARY IN THE SECOND DEGREE.

a. The State bears the burden of proving all essential elements of an offense beyond a reasonable doubt. The State has the burden of proving each element of the crime charged beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); State v. Cronin, 142 Wn.2d 568, 580, 14 P.3d 752 (2000). This allocation of the burden of proof to the prosecutor derives from the guarantees of due process of law contained in article I, section 3 of the Washington Constitution<sup>5</sup> and the Fourteenth Amendment to the federal constitution. Sandstrom v. Montana, 442 U.S. 510, 520, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979); State v. Acosta, 101 Wn.2d 612, 615, 683 P.2d 1069 (1984). On a challenge to the sufficiency of the evidence, this Court must reverse a conviction when, after viewing the evidence in the light most favorable to the prosecution, no rational trier of fact could have found all the essential elements of the offense beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct.

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<sup>5</sup> Art. I, section 3 provides, “No person shall be deprived of life, liberty, or property, without due process of law.” U.S. Const. Amend. XIV.

2781, 61 L.Ed.2d 560 (1979); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

When an innocent explanation is as equally valid as one upon which the inference of guilt may be made, the interpretation consistent with innocence must prevail. United States v. Bautista-Avila, 6 F.3d 1360, 1363 (9<sup>th</sup> Cir. 1993). “[U]nder these circumstances, a reasonable jury must necessarily entertain a reasonable doubt.” United States v. Lopez, 74 F.3d 575, 577 (5<sup>th</sup> Cir. 1996). Speculation and conjecture are not a valid basis for upholding a jury’s guilty verdict. State v. Prestegard, 108 Wn. App. 14, 42-43, 28 P.3d 817 (2001).

b. The State did not prove Mr. Culver had the intent to commit a crime against a person or property within the building. To establish a burglary in the second degree, the State was required to prove two elements: (1) that Mr. Culver entered or remained unlawfully in a building; and (2) that he intended to commit a crime against a person or property therein. RCW 9A.52.030(1).

First, since Mr. Culver was never inside Building 9, the State could not prove unlawful entry to a building. RP 138-39 (Mr. Culver was squatting in the alcove area and “wasn’t doing anything” when custodian saw him). The State’s theory was that Mr. Culver had

entered the fenced-in area near an alcove of the building. However, the evidence at trial failed to prove that Mr. Culver had unlawfully entered the fenced area either. RP 96-97 (upon seeing Mr. Culver, asbestos worker “didn’t pay a whole lot of attention to the gate”), 201-03 (project manager not clear if site was secure one week before incident, including gate to fenced area), 224, 227-28 (gate had latch but was unlocked; lacked no-trespassing signs and had no security).

Second, if there is no unlawful entry, the State may not rely on an inference of unlawful intent, and must prove the intent to commit a crime beyond a reasonable doubt. County Court of Ulster County v. Allen, 442 U.S. 140, 167, 99 S.Ct. 2213, 60 L.Ed.2d 777 (1979); State v. Brunson, 128 Wn.2d 98, 107-08, 905 P.2d 346 (1995). The finder of fact must look at all of the circumstances surrounding the act in determining whether the inference applies. State v. Bergeron, 105 Wn.2d 1, 19-20, 711 P.2d 1000 (1985). The court may not infer intent to commit a crime from evidence that is “patently equivocal.” State v. Jackson, 112 Wn.2d 867, 876, 774 P.2d 1211 (1989) (holding that even where defendant broke a window, inference is equally consistent with two different interpretations – attempted burglary or malicious mischief); but see State v. Bencivenga, 137 Wn.2d 703, 711, 974 P.2d

832 (1999) (holding inference to be appropriate in situation where facts were unequivocal, including defendant who admitted to prying lock off restaurant door at 3:30 a.m.).

Here, there was no entry into the building or the fenced area; therefore the State was required to prove the intent to commit a crime.<sup>6</sup> Yet, the inference of Mr. Culver's intent to commit a crime was not supported by the evidence. The State presented testimony that several items were found in a black truck on the property, including a roll of white plastic sheeting, some telecom cable, and a cooling unit. RP 84-87, 188-97. Despite efforts to tie these materials to the job site, the supervisor for the asbestos abatement team and the project manager for the UW contractor agreed that the materials found in the black truck could have come from any building in the Sandpoint area. RP 85-87, 94-95, 193-96 (noting the materials are "generic" and are used at "many sites").<sup>7</sup> The project manager also stated that there were other construction sites in the area that had recently experienced break-ins and

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<sup>6</sup> Even if the State had proved Mr. Culver had entered the fenced area, the State would have been required to prove the inference beyond a reasonable doubt, which they did not.

vandalism, which could also account for the construction materials found in the black truck. RP 195.

As a consequence, the evidence of Mr. Culver's intent was equivocal, and the State failed to prove his intent to commit a crime within the building. Therefore, the trial court's conclusion that Mr. Culver was guilty of burglary in the second degree was not supported by substantial evidence.

c. The prosecution's failure to prove all essential elements requires reversal. The absence of proof beyond a reasonable doubt of an element requires reversal of the conviction and dismissal of the charge. Jackson, 443 U.S. at 319; Green, 94 Wn.2d at 221. The Fifth Amendment's Double Jeopardy Clause bars retrial of a case, such as this, where the State fails to prove an essential element. North Carolina v. Pearce, 395 U.S. 711, 717, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), reversed on other grounds, Alabama v. Smith, 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989).

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<sup>7</sup> The fact that Mr. Culver was ultimately not charged with theft in the third degree for the items in the truck indicates the weakness of his connection to the materials, as well as to the truck. See, e.g., RP 83 (asbestos worker unclear if Mr. Culver ever admitted ownership of the black truck). Mr. Culver's statements to law enforcement in connection to the truck were suppressed following a CrR 3.5 hearing, due to a Miranda violation. RP 46-50.

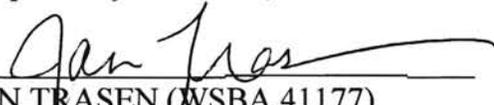
The State failed to prove beyond a reasonable doubt that Mr. Culver entered the building, and that he intended to commit a crime within the premises where he was arrested, an essential element of the charged offense. Absent proof of every essential element, the conviction must be reversed and the charge dismissed. State v. Hundley, 126 Wn.2d 418, 421-22, 895 P.2d 403 (1995).

E. CONCLUSION

For the foregoing reasons, Mr. Culver respectfully requests this Court reverse his conviction and remand the case for further proceedings.

DATED this 23<sup>rd</sup> day of October, 2013.

Respectfully submitted,

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

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 70066-9-I
v.	)	
	)	
PAUL CULVER,	)	
	)	
Appellant.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 23<sup>RD</sup> DAY OF OCTOBER, 2013, 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] KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X] PAUL CULVER 728692 COYOTE RIDGE CORRECTIONS CENTER PO BOX 769 CONNELL, WA 99326-0769	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

**SIGNED** IN SEATTLE, WASHINGTON THIS 23<sup>RD</sup> DAY OF OCTOBER, 2013.

X \_\_\_\_\_ 

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