

73539-0

73539-0

FILED
Nov 09, 2015
Court of Appeals
Division I
State of Washington

NO. 73539-0-I

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

STATE OF WASHINGTON,

Respondent,

v.

A.W.,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR WHATCOM COUNTY, JUVENILE
DIVISION

The Honorable Raquel Montoya-Lewis, Judge

BRIEF OF APPELLANT

JENNIFER J. SWEIGERT
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENT OF ERROR</u>	1
<u>Issue Pertaining to Assignment of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
C. <u>ARGUMENT</u>	3
THE TRIAL COURT VIOLATED JUCR 7.11(C) AND (D) WHEN IT FAILED TO FIND WHETHER THE SHED OR SHOP WAS A BUILDING, AN ELEMENT OF SECOND- DEGREE BURGLARY	3
D. <u>CONCLUSION</u>	7

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

State v. Alvarez
128 Wn.2d 1, 904 P.2d 754 (1995)..... 5, 6

State v. Commodore
38 Wn. App. 244, 684 P.2d 1364 (1984)..... 4

State v. Fellers
37 Wn.App. 613, 683 P.2d 209 (1984)..... 4

State v. Head
136 Wn.2d 619, 964 P.2d 1187 (1998)..... 6, 7

State v. Johnson
132 Wn. App. 400, 132 P.3d 737 (2006)..... 4, 5

State v. Souza
60 Wn. App. 534, 805 P.2d 237 (1991)..... 4, 6

RULES, STATUTES AND OTHER AUTHORITIES

JuCR 7.11..... 3, 4, 7

RCW 9A.04.110 5

RCW 9A.52.030 4

Webster’s Third New Int’l Dictionary 292 (1969) 5

A. ASSIGNMENT OF ERROR

The trial court erred in failing to enter a written finding regarding the essential element of entry into a building.

Issue Pertaining to Assignment of Error

Where the trial court failed to enter a written finding of fact concerning whether the unlawful entry was into a building, should the case be remanded for further findings of fact?

B. STATEMENT OF THE CASE

The Whatcom County prosecutor charged appellant A.W. with one count of second-degree burglary and one count of trafficking in stolen property. CP 2, 8. After a bench trial, the court acquitted A.W. on the trafficking charge, but found him guilty of second-degree burglary. CP 10-11. The subsequent disposition order sentenced A.W. to one day confinement, satisfied by time already served, and placed him on probation for four months, during which time he was required to complete 40 hours of community restitution. CP 14-15. Notice of appeal was timely filed. CP 20.

At trial, a homeowner testified several items were stolen from the shop or outbuilding on his farm. RP 10-11. The shop contains a work area and shelves and at the time, the door was generally left standing wide open. RP 24, 34, 39. Sixteen-year-old M.C. testified that, late one night, he and his friend A.W. went into what he described as an “old barn” on the property

without permission. RP 51-53, 57. According to M.C., he took a chainsaw and a hedge trimmer, while A.W. took miscellaneous tools and a hydraulic jack. RP 56, 58.

Several days later, M.C. tried to sell the chainsaw at a pawnshop. RP 65. He called Chase Olson to help him after the pawnshop would not deal with him because he was less than 18 years old. RP 67-68. After receiving \$150 for the chain saw, M.C. gave \$20 to Olson. RP 68-70. Olson testified the pair then smoked marijuana in his car, but M.C. denied doing so. RP 114. Detective Kenneth Gates found Neufeld's chainsaw by searching an online database of pawnshop inventory. RP 128.

The findings of fact regarding the burglary charge are as follows:

- 2.1 [A.W.] and [M.C.] unlawfully entered and remained in the shed located at 1021 W. Axton Road, Whatcom County, Washington on November 17, 2014, with the intent to commit a theft of property therein.
- 2.2 [M.C.] was the sole witness to the burglary at 1021 Axton Rd.
- 2.3 Mr. [C] testified that he and Mr. [W] entered the property at 1021 Axton Road and removed several items from the shop, placed them in Mr. [C]'s truck bed, and left the property with the items.
- 2.4 Mr. [C] testified that he did not smoke marijuana with another witness, Chase Olson; the court finds that his testimony on this point lacks credibility. However, this is not a sufficient reason to disregard his entire testimony. Mr. [C] had no motive to provide

untruthful testimony regarding the burglary event and gained no benefit from testifying in this manner.

2.5 The court finds that Mr. [C]'s testimony as to he and Mr. [W]'s actions in November of 2014 regarding their entry into the shop at 1021 W. Axton Road and their removal of several items from the shed to be credible.

CP 27-28. Based on these findings of fact, the court concluded, "The State has proven beyond a reasonable doubt the elements of Burglary in the Second Degree and therefore, [A.W.] is adjudicated guilty of that charge." CP 28. The court also incorporated any findings and conclusions contained in its May 12, 2015 Order on Adjudication and Continuance for Disposition. CP 28. That order states respondent was found guilty at an adjudicatory hearing of second-degree burglary committed on or about November 17, 2015. CP 10.

C. ARGUMENT

THE TRIAL COURT VIOLATED JUCR 7.11(C) AND (D) WHEN IT FAILED TO FIND WHETHER THE SHED OR SHOP WAS A BUILDING, AN ELEMENT OF SECOND-DEGREE BURGLARY.

JuCR 7.11 provides:

(c) Decision on the Record. The juvenile shall be found guilty or not guilty. The court shall state its findings of fact and enter its decision on the record. The findings shall include the evidence relied upon by the court in reaching its decision.

(d) Written Findings and Conclusions on Appeal. The court shall enter written findings and conclusions in a case

that is appealed. The findings shall state the ultimate facts as to each element of the crime and the evidence upon which the court relied in reaching its decision. The findings and conclusions may be entered after the notice of appeal is filed. The prosecution must submit such findings and conclusions within 21 days after receiving the juvenile's notice of appeal.

JuCR 7.11.

Under this rule, the juvenile court is required to enter formal findings of fact and conclusions of law as to each element of the offense. State v. Souza, 60 Wn. App. 534, 537-38, 805 P.2d 237 (1991) (State v. Commodore, 38 Wn. App. 244, 250, 684 P.2d 1364 (1984); State v. Fellers, 37 Wn.App. 613, 616, 683 P.2d 209 (1984)). Findings are insufficient when they fail to address a statutory element of the offense. Id. The trial court, in neither its oral nor written findings of fact, found that the shed or shop that A.W. was charged with burglarizing was a building as required under RCW 9A.52.030 defining the elements of second-degree burglary.

The burglary statute provides, "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. Entry into a building other than a vehicle or dwelling is an essential element of second-degree burglary. RCW 9A.52.030; State v. Johnson, 132 Wn. App. 400, 406, 132 P.3d 737 (2006). A building is defined by statute:

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). Courts have determined the ordinary meaning of “building” to be

“[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.”

Johnson, 132 Wn. App. at 408 (quoting Webster’s Third New Int’l Dictionary 292 (1969)).

Here, the oral and written findings of fact and conclusions of law do not mention the word “building.” CP 27-28; RP 250-52. Nor do they mention any relevant part of either the statutory or ordinary definitions of “building.” CP 27-28.

In State v. Alvarez, 128 Wn.2d 1, 904 P.2d 754 (1995), the trial court omitted a written finding of fact that the defendant, who had been charged with harassment, placed the complainant in reasonable fear for her safety. The supreme court held that it was “evident from the trial record that there was sufficient evidence upon which a rational trier of fact, viewing the

evidence in the light most favorable to the State, could find beyond a reasonable doubt that Appellant's threats placed [the complainant] in reasonable fear for her safety." Id. at 14. Further, "because there was sufficient evidence in the record for a rational trier of fact to find the necessary element," the appellate court's remand of the case to the trial court "for revision of findings to adequately state ultimate facts" was correct. Id. at 19.

The standard delineated by the Alvarez court appears to be the same as the sufficiency of the evidence standard. In other words, if there is sufficient evidence for a reviewing court to affirm a conviction, then there is also sufficient evidence on the record that would make it appropriate for a reviewing court to remand the matter for further findings where an essential fact finding was not entered by the trial court.

Where, as here, the trial court has failed to enter formal findings as to each element of criminal liability, "the proper remedy is vacation and remand to permit entry of further findings if appropriate." Souza, 60 Wn. App. at 540-41; accord State v. Head, 136 Wn.2d 619, 621-26, 964 P.2d 1187 (1998); Alvarez, 128 Wn.2d at 18-19. It should be noted that on remand, the court may not take additional evidence as the findings and conclusions must be based on the evidence as it stands. Head, 136 Wn.2d at 625. Once satisfactory findings and conclusions have been entered, either

party may then appeal. Head, 136 Wn.2d at 626. A.W. requests this Court remand for entry of thorough and complete written findings and conclusions under JuCR 7.11(d).

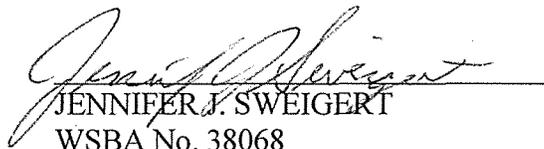
D. CONCLUSION

This case should be remanded for failure to enter written findings on an essential element of the offense as required by JuCR 7.11.

DATED this 9th day of November, 2015.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



JENNIFER J. SWEIGERT

WSBA No. 38068

Office ID No. 91051

Attorney for Appellant

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 73539-0-1
)	
A.W.,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 9TH DAY OF NOVEMBER 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] A.W.
72191 EVERETT RD
FERNDALE, WA 98248

SIGNED IN SEATTLE WASHINGTON, THIS 9TH DAY OF NOVEMBER 2015.

X Patrick Mayovsky