74803-3

No.74803-3-I
Snohomish County Superior Court No. 14-1-02325-6

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

STATE OF WASHINGTON,
Plaintiff-Respondent,

v.

SVEIN ARVE VIK,
Defendant-Appellant.

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Sep 07, 2016
Court of Appeals
Division I
State of Washington

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

The Honorable Bruce I. Weiss, Judge

APPELLANT'S OPENING BRIEF

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I.
ASSIGNMENTS OF ERROR

There was insufficient evidence to find Vik guilty of residential burglary.

II.
ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Must this Court reverse Vik's conviction for residential burglary when there was no evidence that Vik entered the Davis residence or in any way aided anyone in burglarizing the Davis residence on September 27, 2012?

III.
STATEMENT OF THE CASE

A. PROCEDURAL FACTS

Svein Vik was charged with residential burglary and possession of stolen property in the second degree. CP 104-105. His case was consolidated for trial with that of Edward Blunt and Michael Bruce. The three were tried by the same jury. Vik was convicted as charged. CP 18-21. Judgment and sentence were entered on January 26, 2015. CP 2-17.

B. SUBSTANTIVE FACTS

On September 27, 2012, William Campbell was walking dog at 5:30 a.m. in a Serene Lake neighborhood. He saw four individuals leave,

at different times, the carport attached to the house belonging to Sandra Davis at 3624 Serene Way. He also testified that he saw a white minivan leave a driveway and pull alongside a Jeep Cherokee. One of the individuals got into the Jeep for a moment. RP 8-90. He was unable to identify any of the individuals but he did call the police. RP 29, 116.

Detective Troy Koster responded to the call. While approaching the house he saw a dark colored Jeep Cherokee parked on the south side of the road facing eastbound. RP 94, 181. He saw someone laying down in the back seat and observed a backpack with property as well as bolt cutters in the car. RP 96, 183.

Koster learned that the man in the Jeep was Michael Bruce. RP 99, 186. Bruce claimed he had been at a barbeque on the other side of the lake and on his way home the Jeep broke down, so he decided to sleep in it. *Id.* Koster estimated that the Jeep was about 50 yards from the victim's house. RP 100, 187.

Koster also observed Blunt walking in the middle of the road near the Davis residence. RP 102, 189. Blunt claimed that he had been in the backyard of the residence with a girl named Teri and had become intoxicated and fallen asleep. RP 104, 191.

Detective Ainsworth was also dispatched to Serene Way. On the way he saw two males, later identified as Vik and Gorbunov, walking

towards a white van. Thinking that they could be involved, he stopped and talked to the driver, Karabut. He also briefly talked to Vik and Gorbunov, and asked if they wanted to go down to the precinct to get a soda and talk about what was happening that morning. *Id.*

Mr. Vik agreed to go to the station. He and Ainsworth talked for about an hour and a half. Thetone of the conversation was pleasant and Mr. Vik never indicated he wanted to speak to an attorney. In the course of questioning, Mr. Vik offered to have the officer come to his residence to see that there was no stolen property. RP 458-72.

Mr. Vik escorted the officers in and around his residence for about 15-20 minutes. RP 529-32. The officers took pictures of some items, in particular a rolled up rug.

Sandra Davis did not live full time in the home that was burglarized. However, it was filled with property. See Exhibit 51-54. She testified that the home had been burglarized multiple times before. The largest previous burglary had been committed just five days before this investigation. RP 731. The police had difficulty searching the home because it was so full of items. She claimed that $100,000 property had been stolen from her home. RP 112, 585. The police later showed the photo of the rug in Vik's house to Davis who said the rug was hers.

On October 4, 2012, Davis also supplied the police with a list of property she believed was taken from her home. Based upon this information, the police obtained a search warrant for Vik's house. Eight officers participated in a room-by-room search of Vik's residence. RP 565-66. The police found seven other people in the residence. RP 563-564. Ainsworth said:

> As we were searching we were finding lots of additional property that appeared to match property stolen from Ms. Davis and there was just so much of it that we wanted her guidance and help in further describing some of the items.

RP 532. And:

> Using the list [Davis] provided wasn't ... I didn't feel sufficient to adequately identify property that may have been on the list that may be there or may not be there.

RP 587.

So Ainsworth called Davis to the Vik residence. Davis came to the house during the execution of the search warrant. RP 764.[1] She said that in Vik's home she identified the following as her property: "bag beads, and a drinking horn, some music holders, and some silver plates, and a tea set and a picnic basket and some little figurines that had, unfortunately been broken because they were very fragile." RP 764.

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[1] Vik has also filed a Motion for Relief from Judgment under CrR 7.8 alleging that his trial counsel was ineffective for failing to move to suppress the fruits of this search because RCW 10.79.020 does not permit anyone other than law enforcement from executing a search warrant and because the warrant was overbroad.

Vik denied burglarizing Davis's home. He also contended the property in his home that Davis identified as hers was actually his property. He noted that he was a collector of sports cards, coins, stamps and antiques. RP 868-882.

IV.
ARGUMENT

A. THE STATE FAILED TO PROVE ALL ELEMENTS OF THE CRIME OF RESIDENTIAL BURGLARY BEYOND A REASONABLE DOUBT

1. Due Process Requires the State to prove Each Element of the Offense Charged beyond a Reasonable Doubt

The State bears the burden of producing sufficient evidence to prove beyond a reasonable doubt every essential element of a crime charged. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). A criminal defendant's fundamental right to due process is violated when a conviction is based upon insufficient evidence. *Id.*; U.S. Const. amend. XIV; Const. art. I, § 3; *City of Seattle v. Slack*, 113 Wn.2d 850, 859, 784 P.2d 494 (1989). On appellate review, evidence is sufficient to support a conviction only if, "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 318, 99 S.Ct. 2781, 61 L.Ed.2d

560, *reh'g denied*, 444 U.S. 890, 100 S.Ct. 195, 62 L.Ed.2d 126 (1979); *State v. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980).

2. The State did not prove that Mr. Vik Entered or Remained Unlawfully in a Dwelling

Mr. Vik was convicted of residential burglary, in violation of RCW 9A.52.025(1), which provides:

> A person is guilty of residential burglary if, with intent to commit a crime against a person or property therein, the person enters or remains unlawfully in a dwelling other than a vehicle.

A "dwelling" is "any building or structure, though movable or temporary, or a portion thereof, which is used or ordinarily used by a person for lodging." RCW 9A.04.110(7).

No person testified that Vik went into Davis's house, nor was there any evidence that Vik was an accomplice to anyone who went into the house. There was no evidence he drove anyone to the Davis house. There was no evidence he helped break into Davis's house. And, he was fully cooperative with the police.

Although the State found some of Davis's items in Vik's house, it is axiomatic that proof of possession of recently stolen property is insufficient to support a conviction for burglary or trespass. *State v. Mace*, 97 Wn.2d 840, 842-43, 650 P.2d 217 (1982); *State v. Q.D.*, 102 Wn.2d 19, 28, 685 P.2d 557 (1984). In *Mace*, the court reversed a burglary conviction

even though the State presented evidence that the defendant possessed and used bank cards that had been recently stolen out of the victim's home. *Mace*, 97 Wn.2d at 845. The victims had gone to bed at 2:00 a.m., and by 8:00 a.m. realized that an intruder had taken a purse and wallet from inside their apartment. *Id.* at 841-42. There was no evidence that anybody other than the victims and the thief had been inside the home between the time the property was last seen in the residence and the time it was discovered missing. *Id.* Still, the conviction could not stand. *Id.*

In *Q.D.*, the court reversed a trespass conviction even though the defendant had been found on school grounds with keys that had been stolen from inside the school building. *Q.D.*, 102 Wn.2d at 28. "While Q.D. was on the school grounds with the keys, the keys were not known to be missing until he was seen with them, and they had last been seen several hours before in a desk in an unlocked office." *Id.*

The evidence of Vik's unlawful entry was even more attenuated than that for Mace or Q.D. As argued above, there was no direct evidence he committed the burglary by entering the house or by aiding anyone who did enter. Ten days later Davis identified items in Vik's home that she asserted belonged to her. But that is simply insufficient to support the residential burglary conviction.

B. MR. VIK'S CONVICTION MUST BE REVERSED

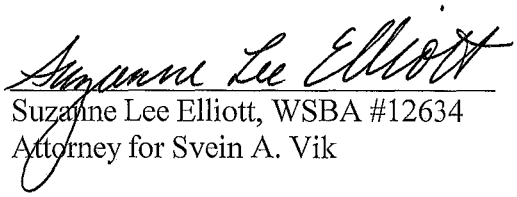
The absence of proof beyond a reasonable doubt of an element requires dismissal of the conviction and charge. *Jackson*, 443 U.S. at 319; *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998). The Fifth Amendment's Double Jeopardy Clause bars retrial of a case which is dismissed for lack of evidence. *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). "Retrial following reversal for insufficient evidence is 'unequivocally prohibited' and dismissal is the remedy." *Hickman*, 135 Wn.2d at 103 (citing *State v. Hardesty*, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996)). Because the State failed to prove beyond a reasonable doubt that Vik went inside Davis's house, his conviction for residential burglary must be dismissed.

V.
CONCLUSION

For the foregoing reasons, this Court should reverse Mr. Vik's conviction for residential burglary.

DATED this 7th day of September, 2016.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on the date listed below, I served by First Class United States Mail, postage prepaid, one copy of this brief on the following:

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