

NOV 15 2007

NO. 36324-1-II

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

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STATE OF WASHINGTON,

Respondent,

v.

GEORGE W. SCANLAN,

Appellant.

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2007 DEC 10 PM 4:05  
THE  
COURT OF APPEALS DIVISION  
STATE OF WASHINGTON

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

The Honorable Rosanne Buckner, Judge

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BRIEF OF APPELLANT

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**TABLE OF CONTENTS**

	Page
A. ASSIGNMENT OF ERROR .....	1
Issue Pertaining to Assignment of Error .....	1
B. STATEMENT OF THE CASE .....	2
1. Procedural history .....	2
2. Burglary charge .....	2
C. ARGUMENT .....	3
THE FIRST DEGREE BURGLARY CHARGE MUST BE DISMISSED BECAUSE THE INFORMATION FAILED TO ALLEGE THE ESSENTIAL ELEMENT OF OWNERSHIP OR OCCUPANCY .....	3
D. CONCLUSION .....	8

**TABLE OF AUTHORITIES**

Page

**WASHINGTON CASES**

*State v. Borrero*,  
147 Wn.2d 353, 58 P.3d 245 (2002)..... 1

*State v. Goodman*,  
150 Wn.2d 774, 83 P.3d 410 (2004)..... 3

*State v. Kjorsvik*,  
117 Wn.2d 93, 812 P.2d 86 (1991)..... 4

*State v. Klein*,  
195 Wash. 338, 80 P.2d 825 (1938) ..... 4-6

*State v. McCarty*,  
140 Wn.2d 420, 998 P.2d 296 (2000)..... 7

*State v. Vangerpen*,  
125 Wn.2d 782, 888 P.2d 1177 (1995)..... 3

*State v. Wilson*,  
136 Wn. App. 596, 150 P.3d 144 (2007)..... 5

**RULES, STATUTES AND OTHERS**

Black’s Law Dictionary 1536 (7th ed. 1999)..... 6

Const. art. I, section 22 ..... 1, 3

CrR 2.1(a)(1)..... 1

RCW 9A.52.010(3)..... 6

RCW 9A.52.020 ..... 5

**TABLE OF AUTHORITIES** (CONT'D)

	Page
<u>RULES, STATUTES AND OTHERS (CONT'D)</u>	
Rem. Rev. Stat. § 2063 .....	4, 6
Rem. Rev. Stat., § 2579 .....	4
U.S. Const. amend. 6 .....	1, 3

A. ASSIGNMENT OF ERROR

The state violated the appellant's constitutional rights under article I, section 22 of the Washington Constitution<sup>1</sup> and the Sixth Amendment to the federal constitution,<sup>2</sup> as well as his right under CrR 2.1(a)(1),<sup>3</sup> by charging him with first degree burglary without alleging the essential element of the ownership or occupancy of the burglarized building.

Issue Pertaining to Assignment of Error

Did the state violate article I, section 22 of the Washington Constitution and the Sixth Amendment, as well as CrR 2.1(a)(1), by charging the appellant with first degree burglary without alleging the essential elements of the ownership or occupancy of the burglarized building?

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<sup>1</sup> "In criminal prosecutions the accused shall have the right . . . to demand the nature and cause of the accusation against him[.]"

<sup>2</sup> "In all criminal prosecutions, the accused shall . . . be informed of the nature and cause of the accusation[.]"

<sup>3</sup> The . . . information shall be a "plain, concise, and definite written statement of the essential facts constituting the offense charged." *State v. Borrero*, 147 Wn.2d 353, 359, 58 P.3d 245 (2002).

B. STATEMENT OF THE CASE

1. Procedural history

The state charged the appellant, George W. Scanlan, with the following counts: (1) first degree felony murder, (2) first degree burglary, (3) first degree robbery, (4) first degree robbery, (5) second degree assault, (6) second degree arson and (7) first degree unlawful possession of a firearm (“VUFA”). CP 1-6. The state also alleged Scanlan committed counts 1 through 5 while armed with a firearm for sentence enhancement purposes. CP 1-6. A Pierce County jury found Scanlan guilty of counts 1 through 3, and counts 6 and 7. The jury also found Scanlan was armed with a firearm while committing the crimes alleged in counts 1 through 3. CP 81-88. The trial court imposed concurrent, standard range sentences totaling 480 months. CP 98-100. The court also imposed consecutive sentencing enhancements totaling 180 months. CP 98-100. Scanlan’s total confinement term was 660 months. CP 100.

2. Burglary charge

The state charged Scanlan with first degree burglary in pertinent part as follows:

[Scanlan] . . . did unlawfully and feloniously, with intent to commit a crime against a person or property therein, enter or remain unlawfully in the building, located at 12217 115<sup>th</sup> Avenue Court East, Puyallup, . . . and in

entering or while in such building or in immediate flight therefrom, [Scanlan] or another participant in the crime was armed with a firearm, a deadly weapon . . . .

CP 2.

Scanlan did not challenge the wording of this allegation at trial.

C. ARGUMENT

THE FIRST DEGREE BURGLARY CHARGE MUST BE DISMISSED BECAUSE THE INFORMATION FAILED TO ALLEGE THE ESSENTIAL ELEMENT OF OWNERSHIP OR OCCUPANCY.

An information charging burglary must allege the ownership or occupancy of the premises broken into so as to negate the defendant's right to enter. The information charging Scanlan with burglary failed to allege either ownership or occupancy. Because under even a liberal reading of the information the elements are missing, Scanlan's burglary conviction should be reversed.

An information is constitutional under article I, section 22 of the Washington and the Sixth Amendment only if it includes all statutory and nonstatutory essential elements of the charged offense. *State v. Goodman*, 150 Wn.2d 774, 784, 83 P.3d 410 (2004). The purpose of this rule is to properly notify the defendant of the charges against him and allow him to prepare and present a defense. *State v. Vangerpen*, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995). A challenge to the constitutional sufficiency of an

information may be raised for the first time on appeal. *State v. Kjorsvik*, 117 Wn.2d 93, 102-03, 812 P.2d 86 (1991).

In charging burglary, the ownership or occupancy of the premises allegedly broken into must be charged so as to negate the defendant's right to enter. *State v. Klein*, 195 Wash. 338, 341, 80 P.2d 825 (1938). The state charged the defendants in *Klein* with second degree burglary. *Klein*, 195 Wash. at 339. At the time, Rem. Rev. Stat., § 2579 [P.C. § 8772] defined second degree burglary as:

Every person who, with intent to commit some crime therein shall, under circumstances not amounting to burglary in the first degree, enter the dwelling-house of another or break and enter, or, having committed a crime [sic] therein, shall break out of, any building or part thereof, or a room or other structure [sic] wherein any property is kept for use, sale or deposit, shall be guilty of burglary in the second degree and shall be punished by imprisonment in the state penitentiary for not more than fifteen years.

*Klein*, 195 Wash. at 340.

In pertinent part, *Klein* and his co-defendant were charged as follows:

[the defendants] . . . did wilfully, unlawfully and feloniously, and with the intent to commit some crime therein, to-wit: larceny, break and enter a building, to-wit: The Tradewell Store building. [sic] located at 2813 Colby avenue, . . . managed by one John Bird . . . said building being a building in which property was then and there kept for use, sale or deposit.

*Klein*, 195 Wash. at 339. The *Klein* court, relying on authority holding occupancy and not ownership of the building was the essential element, as well as cases holding a person in direct management of a building is in law the occupant, found the information sufficient to charge burglary. *Klein*, 195 Wash. at 341-42.

Despite a change in the burglary statutes, *Klein* remains good law.<sup>4</sup> See, e.g., *State v. Wilson*, 136 Wn. App. 596, 606, 150 P.3d 144 (2007) (Just as courts did at common law, modern statutes treat burglary as an offense against habitation and occupancy rather than ownership of property). An information must still charge ownership or occupancy of the burglarized premises. Unlike in *Klein*, where the state alleged John Bird managed, i.e., occupied, the building at issue, the information in Scanlan's case asserts Scanlan "did unlawfully and feloniously, with intent to commit a crime . . . enter or remain unlawfully in the building located at

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<sup>4</sup> Scanlan was charged with first degree burglary. The current statute, RCW 9A.52.020, which was in effect when the instant burglary took place, provides:

- (1) A person is guilty of burglary in the first degree if, with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building and if, in entering or while in the building or in immediate flight therefrom, the actor or another participant in the crime (a) is armed with a deadly weapon, or (b) assaults any person.

12217 15<sup>th</sup> Avenue Court East . . . .” No owner or occupant is mentioned. Therefore, the information fails to negate Scanlan’s right to enter.

The state may claim by alleging Scanlan “enter[ed] or remain[ed] unlawfully in the building located at 12217 15<sup>th</sup> Avenue Court East,” it sufficiently apprised him he had no right to enter the premises. This argument would likely be based on RCW 9A.52.010(3), which provides, “A person ‘enters or remains unlawfully’ in or upon premises when he is not then licensed, invited, or otherwise privileged to so enter or remain.”

When the Court ruled in *Klein*, there was no statutory counterpart to RCW 9A.52.010(3). Nevertheless, Rem. Rev. Stat. § 2063 provided terms not defined by law were to be construed according their common usage. Klein’s information stated Klein and a cohort “unlawfully . . . enter[ed] a building . . . .” *Klein*, 195 Wash. at 339. “Unlawful entry” is defined as “The crime of entering another’s property, by fraud or other illegal means, without the owner’s consent.” Black’s Law Dictionary 1536 (7th ed. 1999). Therefore, the combination of Rem. Rev. Stat. § 2063 and the common definition of “unlawful entry” is essentially the same as RCW 9A.52.010(3).

Nevertheless, the *Klein* court found use of the words “unlawfully . . . ent[ered]” did not obviate the need to allege an ownership or occupancy

interest in the building entered. This reasoning has not changed and Scanlan's information was constitutionally deficient for failing to allege ownership or occupancy in the "building located at 12217 15<sup>th</sup> Avenue Court East [.]”

Scanlan did not challenge the language of the information before the verdict. When such is the case, the sufficiency of the information is to be construed liberally and will be found sufficient only if (1) the required elements appear in any form or can be found by fair construction of the face of the information; and, if so (2) the defendant can nevertheless show he was actually prejudiced by the language used. *State v. McCarty*, 140 Wn.2d 420, 425, 998 P.2d 296 (2000). If the missing elements are not found or cannot fairly be implied, prejudice is assumed and dismissal without prejudice is the proper remedy. *McCarty*, 140 Wn.2d at 425-26, 428.

A liberal reading of Scanlan's information fails to reveal, by implication or otherwise, the essential elements of ownership or occupancy of 12217 15<sup>th</sup> Avenue Court East. Dismissal without prejudice is therefore warranted.

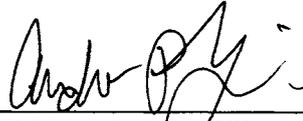
D. CONCLUSION

The state violated Scanlan's constitutional due process right to be notified of the charge of burglary because of a deficient information. Scanlan respectfully requests this Court to reverse and dismiss his conviction without prejudice.

DATED this 19 day of December, 2007.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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CENTRAL DISTRICT  
STATE OF WASHINGTON  
BY: [Signature]  
DEPOSIT

NO. 36324-1-II

COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

STATE OF WASHINGTON

*Respondent,*

v.

GEORGE SCANLAN,

*Appellant.*

AMENDED  
CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On December 10, 2007, I deposited in the US mail, a properly stamped and addressed envelope containing a true and correct copy of the following documents on the parties below:

**Documents Served:**

1. Brief of Appellant

**Via Mail to:**

George Scanlan, 776276 &  
Washington Corrections Center  
P.O. Box 900  
Shelton, WA 98584

Kathleen Proctor  
Pierce Co. Prosecutor  
930 Tacoma Ave. South  
# 946 County-City Bldng.  
Tacoma, WA 98402

Dated this 28<sup>th</sup> day of December, 2007.

By: [Signature]  
Amy Cox/Patrick Mayovsky  
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