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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON  
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No. 37398-0-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

**James Aarts,**

Appellant.

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Thurston County Superior Court

Cause No. 07-1-02046-6

The Honorable Judges Chris Wickham and Anne Hirsch

**Appellant's Opening Brief**

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## ASSIGNMENTS OF ERROR

1. The Information was constitutionally deficient because it omitted an element of Burglary in the Second Degree.
2. The conviction was based on insufficient evidence because the state did not establish beyond a reasonable doubt that the building unlawfully entered was not a dwelling.
3. The trial court's "to convict" instruction omitted an element of Burglary in the Second Degree.
4. The trial court erred by giving Instruction No. 8, which reads as follows:

A person commits the crime of burglary in the second degree when he or she enters or remains unlawfully in a building with intent to commit a crime against a person or property therein.  
Instruction No. 8, Supp. CP.

5. The trial court erred by giving Instruction No. 12, which reads as follows:

To convict the defendant of the crime of burglary in the second degree as charged, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 26<sup>th</sup> day of November, 2007, the defendant entered or remained unlawfully in a building,
- (2) That the entering or remaining was with intent to commit a crime against a person or property therein, and
- (3) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty,  
Instruction No. 12, Supp. CP.

6. The trial court's instructions as a whole allowed conviction without proof of the essential elements of Burglary in the Second Degree.

7. Mr. Aarts was denied his constitutional right to a jury trial because the jury did not find that the building he entered was not a dwelling.
8. Mr. Aarts's conviction violated due process because the prosecutor was not required to prove that Mr. Aarts entered a building other than a dwelling.
9. The trial court erred by failing to properly determine Mr. Aarts's criminal history.
10. The trial court erred by failing to properly determine Mr. Aarts's offender score.
11. The trial court erred by adopting Finding No. 2.2, which purported to list Mr. Aarts's criminal history as follows:

CRIME	CRIME DATE	SENTENCE DATE	SENTENCING COURT	ADULT or JUVENILE	CRIME TYPE
Theft 2 <i>Washes out</i>	1/23/86	8/20/86	Thurston	Adult	NV
VUSCA – Possess	3/10/03	9/30/03	Thurston	Adult	NV
VUSCA – Possess	4/7/04	10/11/04	Thurston	Adult	NV

CP 5.

12. The trial court erred by adopting Finding of Fact No. 2.3, which reads (in part) as follows:

COUNT	OFFENDER SCORE	SERIOUSNESS LEVEL	STANDARD RANGE	ENHANCEMENTS	TOTAL STANDARD RANGE	MAXIMUM TERM
I	2	III	4-12 mos	Adult	4-12 mos	10 yrs / \$20,000

CP 5.

13. The trial court erred by sentencing Mr. Aarts with an offender score of two.

## ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. To be constitutionally sufficient, a charging document must allege all essential elements of an offense. In this case, the Information did not allege that the building Mr. Aarts entered was not a dwelling. Was the Information constitutionally deficient? Assignments of Error Nos. 1-8.
2. Burglary in the Second Degree requires proof that the accused unlawfully entered a building other than a dwelling. The state did not establish that the building entered here was not a dwelling. Was the evidence insufficient for conviction of Burglary in the Second Degree? Assignments of Error Nos. 1-8.
3. Jury instructions violate due process if they omit an essential element of the crime charged. In this case, the jury was not instructed that conviction required proof that the building entered was not a dwelling. Was Mr. Aarts's conviction obtained in violation of his constitutional right to due process? Assignments of Error Nos. 1-8.
4. Absent an admission from the offender, criminal history must be established by a preponderance of the evidence. Mr. Aarts did not admit to any prior convictions and the state did not submit any evidence of criminal history. Did the trial court err by sentencing Mr. Aarts with an offender score of two? Assignments of Error Nos. 9-13.

## **STATEMENT OF FACTS AND PRIOR PROCEEDINGS**

James Aarts was charged with Burglary in the Second Degree. The Information alleged (in part) that he “did enter or remain unlawfully in a building.” CP 2. At trial, the state presented evidence that the building was a former airplane hangar, but no one testified that the building was not also used (or ordinarily used) for lodging. RP (2/5/08) 17-83.

The court instructed the jury on the definition and elements of the crime as follows:

A person commits the crime of burglary in the second degree when he or she enters or remains unlawfully in a building with intent to commit a crime against a person or property therein. Instruction No. 8, Supp. CP.

To convict the defendant of the crime of burglary in the second degree as charged, each of the following elements of the crime must be proved beyond a reasonable doubt:

- 1) That on or about the 26<sup>th</sup> day of November, 2007, the defendant entered or remained unlawfully in a building,
- 2) That the entering or remaining was with intent to commit a crime against a person or property therein, and
- 3) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty, Instruction No. 12, Supp. CP.

The jury returned a verdict of guilty. CP14.

At sentencing, the state did not allege or present evidence that Mr. Aarts had any criminal history. Without discussion, stipulation, or presentation of evidence, the court found that Mr. Aarts had two prior convictions, and sentenced him with an offender score of two. CP 5; RP (2/15/08) 3-11. This timely appeal followed. CP 3-11.

### ARGUMENT

**I. MR. AARTS’S CONVICTION MUST BE REVERSED BECAUSE OF DEFICIENCIES IN THE CHARGING DOCUMENT, THE EVIDENCE, AND THE COURT’S INSTRUCTIONS.**

**A. Conviction required proof that Mr. Aarts unlawfully entered a building that was not a dwelling.**

The elements of an offense are determined with reference to the language of the statute. *See State v. Leyda*, 157 Wn.2d 335 at 346, 138 P.3d 610 (2006); *State v. Stevens*, 127 Wn. App. 269 at 274, 110 P.3d 1179 (2005). The meaning of a statute is a question of law reviewed *de novo*. *State Owned Forests v. Sutherland*, 124 Wn.App. 400 at 409, 101 P.3d 880 (2004). The court’s inquiry “always begins with the plain language of the statute.” *State v. Christensen*, 153 Wn.2d 186 at 194, 102 P.3d 789, (2004). If the statute’s meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent. *Sutherland, supra*, at 409; *see also State v. Punsalan*, 156 Wn.2d

875, 133 P.3d 934 (2006) (“Plain language does not require construction;” *Punsalan*, at 879, *citations omitted*). The court must interpret statutes to give effect to all language used, rendering no portion meaningless or superfluous. *Sutherland*, at 410.

RCW 9A.52.030 provides (in relevant part): “A person is guilty of burglary in the second degree if, with intent to commit a crime against a person or property therein, he enters or remains unlawfully in a building other than a vehicle or a dwelling.” Under the plain language of the statute, conviction requires proof that the building unlawfully entered was not a dwelling.

The statute is not ambiguous, and thus is not subject to statutory construction. *Punsalan*, *supra*. Furthermore, this language must be given effect, and may not be rendered superfluous. *Sutherland*, at 410. Finally, giving force to this provision does not render the entire statute absurd or meaningless; thus this court may not “correct” the statute on that basis. *In re Det. of Martin*, \_\_\_ Wn.2d \_\_\_ at \_\_\_, 182 P.3d 951 (2008).

B. The case must be dismissed without prejudice, because the charging document failed to allege that Mr. Aarts entered a building that was not a dwelling.

A criminal defendant has a constitutional right to be fully informed of the charge he or she is facing. This right stems from the Fifth, Sixth and Fourteenth Amendments to the Federal Constitution, as well as Article

I, Section 3 and Article I, Section 22 (amend. 10) of the Washington State Constitution. A challenge to the constitutional sufficiency of a charging document may be raised at any time. *State v. Kjorsvik*, 117 Wn.2d 93 at 102, 812 P.2d 86 (1991). Where the Information is challenged after verdict, the reviewing court construes the document liberally. *Kjorsvik*, at 105. The test is whether or not the necessary facts appear or can be found by fair construction in the charging document. *Kjorsvik*, at 105-106. If the Information is deficient, no prejudice need be shown, and the case must be dismissed without prejudice. *State v. Franks*, 105 Wn.App. 950, 22 P.3d 269 (2001).

In this case, the operative language of the Information does not allege that the building entered was not a dwelling, as required by RCW 9A.52.030. CP 2. Nor can this requirement be found under a liberal reading of the document. Because of this, the Information is deficient and dismissal is required, even in the absence of prejudice. *Kjorsvik, supra*.

C. The case must be dismissed with prejudice because the evidence was insufficient to prove beyond a reasonable doubt that the building was not a dwelling.

The Due Process Clause of the Fourteenth Amendment requires the state to prove every element of an offense beyond a reasonable doubt. U.S. Const. Amend. XIV; *In re Winship*, 397 U.S. 358 at 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). On review, evidence is not sufficient to

support a conviction unless, after viewing the evidence in the light most favorable to the state, any rational trier of fact could find all of the elements of the crime charged beyond a reasonable doubt. *State v. DeVries*, 149 Wn.2d 842 at 849, 72 P.3d 748 (2003). The criminal law may not be diluted by a standard of proof that leaves the public to wonder whether innocent persons are being condemned. *DeVries*, at 849. The reasonable doubt standard is indispensable, because it impresses on the trier of fact the necessity of reaching a subjective state of certitude on the facts in issue. *DeVries*, at 849.

Although a claim of insufficiency admits the truth of the state's evidence and all inferences that can reasonably be drawn from it, *DeVries*, at 849, this does not mean that the smallest piece of evidence will support proof beyond a reasonable doubt. In the end, the evidence must be sufficient to convince a rational jury beyond a reasonable doubt. *Devries, supra*. Since the reasonable doubt standard is the highest standard of proof, review is more stringent than in civil cases. In other words, the proof must be more than mere substantial evidence, which is described as evidence sufficient to persuade a fair-minded, rational person of the truth of the matter. *Rogers Potato v. Countrywide Potato*, 152 Wn.2d 387 at 391, 97 P.3d 745 (2004); *State v. Carlson*, 130 Wn. App. 589 at 592, 123 P.3d 891 (2005); *Northwest Pipeline Corp. v. Adams County*, 132 Wn.

App. 470; 131 P.3d 958 (2006), *citing Davis v. Microsoft Corp.*, 149 Wn.2d 521 at 531, 70 P.3d 126 (2003). It also must be more than clear, cogent and convincing evidence, which is described as evidence “substantial enough to allow the [reviewing] court to conclude that the allegations are ‘highly probable.’” *In re A.V.D.*, 62 Wn.App. 562 at 568, 815 P.2d 277 (1991), *citation omitted*.

Here, the state was required to prove beyond a reasonable doubt that Mr. Aarts entered a building that was not a dwelling. RCW 9A.52.030. 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...” Nothing in the record establishes beyond a reasonable doubt that the building Mr. Aarts was accused of entering was not used (or ordinarily used) for lodging. RP (2/5/08) 17-83. In the absence of such proof, the conviction must be reversed and the case dismissed with prejudice. *DeVries, supra*.

D. The case must be remanded for a new trial because the court’s instructions failed to require proof that the building was not a dwelling.

Jury instructions, when taken as a whole, must properly inform the jury of the applicable law. *State v. Douglas*, 128 Wn.App. 555 at 562, 116 P.3d 1012 (2005). An omission or misstatement of the law in a jury instruction that relieves the state of its burden to prove every element of

the crime charged is erroneous and violates due process. *State v. Thomas*, 150 Wn.2d 821 at 844, 83 P.3d 970 (2004); *State v. Randhawa*, 133 Wn.2d 67; 941 P.2d 661 (1997). The failure to instruct on all the elements of an offense is a constitutional error that may be raised for the first time on appeal. *State v. Mills*, 154 Wn.2d 1 at 6, 109 P.3d 415 (2005). The error is presumed to be prejudicial. *State v. Kiehl*, 128 Wn. App. 88 at 91, 113 P.3d 528 (2005). Reversal is required unless the prosecution can establish that the error was harmless beyond a reasonable doubt. *State v. Jones*, 106 Wn. App. 40 at 45, 21 P.3d 1172 (2001). See *State v. Brown*, 147 Wn.2d 330 at 341, 58 P.3d 889 (2002); *Neder v. United States*, 527 U.S. 1, 119 S.Ct. 1827, 144 L.Ed. 2d 35 (1999); *Pope v. Illinois*, 481 U.S. 497, 107 S.Ct. 1918, 95 L.Ed. 2d 439 (1987).

A “to convict” instruction must contain all the elements of the crime, because it serves as a “yardstick” by which the jury measures the evidence to determine guilt or innocence. *State v. Lorenz*, 152 Wn.2d 22 at 31, 93 P.3d 133 (2004). The jury has the right to regard the “to convict” instruction as a complete statement of the law. *State v. Smith*, 131 Wn.2d 258 at 263, 930 P.2d 917 (1997) (“*Smith I*”). The adequacy of a “to convict” instruction is reviewed *de novo*. *State v. Deryke*, 149 Wn.2d 906 at 910, 73 P.3d 1000 (2003).

In this case, the “to convict” instruction did not require the state to prove beyond a reasonable doubt that Mr. Aarts entered a building that was not a dwelling as required by RCW 9A.52.030. Instruction No. 12, Supp. CP. Because the instruction omitted an essential element, the conviction must be reversed and the case remanded for a new trial with proper instructions. *Jones, supra; Brown, supra.*

**II. THE TRIAL COURT FAILED TO PROPERLY DETERMINE MR. AARTS’ CRIMINAL HISTORY AND OFFENDER SCORE.**

RCW 9.94A.500(1) requires that the court conduct a sentencing hearing “before imposing a sentence upon a defendant.” Furthermore, “[i]f the court is satisfied by a preponderance of the evidence that the defendant has a criminal history, the court shall specify the convictions it has found to exist. All of this information shall be part of the record... Court clerks shall provide, without charge, certified copies of documents relating to criminal convictions requested by prosecuting attorneys.” RCW 9.94A.500(1).

“Criminal history” means more than just a list of prior felonies (although it is often treated as such). Instead, “criminal history” is defined to include all prior convictions and juvenile adjudications, and “shall include, where known, for each conviction (i) whether the defendant has been placed on probation and the length and terms thereof; and (ii)

whether the defendant has been incarcerated and the length of incarceration.” RCW 9.94A.030(13). To establish criminal history, “the trial court may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing.” RCW 9.94A.530(2).

In this case, no evidence was presented that Mr. Aarts had any criminal history; nor did he admit or acknowledge any prior convictions. RP (2/15/08) 3-11. Indeed, Mr. Aarts’ criminal history was not even mentioned on the record by either party. The sentencing court did not determine his criminal history or calculate his offender score on the record. RP (2/15/08) 3-11. Despite the absence of any evidence of criminal history, the Judgment and Sentence reflected a finding that Mr. Aarts had two prior felony convictions and an offender score of 2. CP 5. There is no indication in the record as to how this finding was made. RP (2/15/08) 3-11.

A trial court’s findings are reviewed for substantial evidence. *Rogers Potato v. Countrywide Potato*, 152 Wn.2d 387 at 391, 97 P.3d 745 (2004). Because of the absence of any evidence of criminal history, the findings in this case are completely unsupported and must be vacated. *Rogers Potato, supra*. The sentence must also be vacated, and the case

remanded for resentencing.<sup>1</sup> See *State v. Mendoza*, 139 Wn. App. 693, 162 P.3d 439 (2007), review granted at *State v. Mendoza*, 163 Wn.2d 1017, 180 P.3d 1292 (2008).

Because the state failed to even allege any criminal history at the sentencing hearing, it is held to the existing record. *In re Pers. Restraint of Cadwallader*, 155 Wn.2d 867, 123 P.3d 456 (2005); *State v. Feeser*, 138 Wn. App. 737, 158 P.3d 616 (2007). Upon remand, Mr. Aarts must be resentenced with an offender score of zero.

### CONCLUSION

The prosecution failed to establish beyond a reasonable doubt that the building entered did not qualify as a dwelling. Because of this, the conviction must be reversed and the case dismissed with prejudice. Furthermore, the deficiency in the charging document requires reversal and dismissal without prejudice. In the alternative, because of the omissions in the court's instructions, the case must be remanded for a new trial with proper instructions.

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<sup>1</sup> As the Supreme Court said in *State v. Ford*: "Even if informal, seemingly casual, sentencing determinations reach the same results that would have been reached in more formal and regular proceedings, the manner of such proceedings does not entitle them to the respect that ought to attend this exercise of a fundamental state power to impose criminal sanctions." *State v. Ford*, 137 Wn.2d 472 at 484, 973 P.2d 452 (1999).

CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Opening Brief to:

James Aarts  
203 S 2<sup>nd</sup> Ave. SW  
Tumwater, WA 98511

and to:

Thurston Co Prosecuting Attorney  
2000 Lakeridge Dr. S.W., Building 2  
Olympia, WA 98502

And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on June 30, 2008.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on June 30, 2008.

  
\_\_\_\_\_  
Jodi R. Backlund, WSBA No. 22917  
Attorney for the Appellant

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