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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON  
BY \_\_\_\_\_

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 Reply Brief**

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## ARGUMENT

### I. MR. AARTS'S CONVICTION MUST BE REVERSED.

- A. The plain language of RCW 9A.52.030 requires proof that Mr. Aarts entered a building other than a vehicle or a dwelling.

Under the plain language of RCW 9A.52.030, a conviction for Burglary in the Second Degree requires proof that the accused person entered “a building other than a vehicle or a dwelling.” This requirement describes an essential element of the offense, in the same manner that the person’s entry or remaining must be unlawful, and must be done with the intent to commit a crime against a person or property within. RCW 9A.52.030. *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). Respondent argues that this language does not describe an element, and should be judicially excised from the statute. Brief of Respondent, p. 6. According to Respondent, this language describes “a way that second degree burglary is *not* committed.” Brief of Respondent, p. 6, *emphasis in original*.

Respondent cites no authority supporting its position (that an essential element can be ignored if it can be characterized as a way the offense is *not* committed). Brief of Respondent, pp. 3-7. Where no

authorities are cited, it can be assumed that counsel, after diligent search, has found none. *McCormick v. Dunn & Black, PS*, 140 Wn. App. 873 at 883, 167 P.3d 610 (2007).

In fact, “[s]econd degree burglary includes an element of unlawfully entering or remaining ‘in a building other than a vehicle or a dwelling.’ *State v. Johnson*, 132 Wn. App. 400 at 406, 132 P.3d 737 (2006). *See also State v. Wentz*, 149 Wn.2d 342 at 350, 68 P.3d 282 (2003) (“entry into a dwelling is residential burglary...; entry into a vehicle is vehicle prowling...; and entry into a building other than a dwelling or a vehicle is second degree burglary...”).

The two cases cited by Respondent do not apply here. *See* Brief of Respondent, pp. 5-6, *citing State v. Ward*, 108 Wn.App. 621, 32 P.3d 1007 (2001), *affirmed by State v. Ward*, 148 Wn.2d 803, 64 P.3d 640 (2003); *and State v. Dukowitz*, 62 Wn.App. 418, 814 P.2d 234 (1991). Neither *Ward* nor *Dukowitz* involved editing a clearly worded statute to delete a necessary fact. Furthermore, the court in *Dukowitz* refused to consider the appellant’s argument because of his failure to cite to any authority in his argument. *Dukowitz* at 422.

Under the reasoning advanced by Respondent, any element from any offense can be eliminated if it is preceded by any exclusionary phrase like the phrase “other than...” But when the state charges felony murder,

it must allege and prove that the defendant or an accomplice caused “the death of a person *other than* one of the participants...” RCW 9A.32.030, RCW 9A.32.050, *emphasis added*. Similarly, when the state charges harassment via threats to property, it must allege and prove that the defendant threatened “[t]o cause physical damage to the property of a person *other than* the actor...” RCW 9A.46.020, *emphasis added*.

The legislature’s use of the phrase “other than” does not allow the state to ignore any succeeding language. If the phrase “other than” is used to outline the elements of an offense, they are still elements of the offense, even though they relate to facts that help explain what is *not* included in the definition of the offense. This is so because the elements of an offense are determined with reference to the language of the statute, regardless of what that language is. *Leyda, supra*.

B. The Information did not allege that Mr. Aarts entered a building that was not a dwelling.

Because the Information does not allege (even by fair implication) that Mr. Aarts entered a building other than a dwelling, the case must be dismissed without prejudice. *State v. Kjorsvik*, 117 Wn.2d 93, 812 P.2d 86 (1991). Respondent seems to misunderstand the *Kjorsvik* rule regarding the requirement for proof of prejudice. *See* Brief of Respondent, p. 7. The question under *Kjorsvik* is “(1) do the necessary

facts appear in any form, or by fair construction can they be found, in the charging document; and, *if so*, (2) can the defendant show that he or she was nonetheless actually prejudiced by the inartful language which caused a lack of notice?” *Kjorsvik*, at 105-106, *emphasis added*. Under the two part test, the issue of prejudice arises only where the “necessary facts appear in any form, or by fair construction can... be found” in the Information. *Kjorsvik* at 105-106. If the Information is deficient—that is, if the necessary facts *do not* appear in any form—then prejudice need not be established: “If the necessary elements are neither found nor fairly implied in the charging document, prejudice is presumed and reviewing courts reverse without reaching the question of prejudice.” *State v. Courneya*, 132 Wn. App. 347 at 351, 132 P.3d 737 (2006). It is only when the Information contains the necessary language by fair implication that the issue of actual prejudice is examined.

Here, the Information did not include any indication that the “building” was not a residence. The words “building” and “dwelling” have some overlap: most dwellings are buildings, and many buildings are dwellings. Because of this, the word “building” in the Information does not fairly imply that the building here was other than a dwelling.

Respondent's argument on this point is without merit.<sup>1</sup> *See* Brief of Respondent, p. 6-7.

C. The evidence was insufficient to prove that the building allegedly entered was not a dwelling.

Mr. Aarts stands on the argument made in the Opening Brief.

D. The instructions did not require the jury to find that the building allegedly entered was not a dwelling.

Respondent does not provide additional argument relating to the court's instructions. Brief of Respondent, p. 10. Accordingly, Mr. Aarts stands on the arguments made in the Opening Brief and set forth above.

**II. THE RECORD DOES NOT SUPPORT THE COURT'S FINDINGS ON MR. AARTS' CRIMINAL HISTORY AND OFFENDER SCORE.**

The state did not introduce evidence in the trial court establishing Mr. Aarts' criminal history. Whatever documents the prosecutor purportedly handed to the court are not a part of the record. Accordingly, the record does not support the court's findings.

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<sup>1</sup> By contrast, the word "building" does fairly imply that the building was not a vehicle. Furthermore, the state's evidence clearly established that the building was not a vehicle. Accordingly, Mr. Aarts does not raise any arguments regarding the phrase "other than a vehicle."

**CONCLUSION**

For the foregoing reasons, Mr. Aarts' conviction must be reversed and the case either dismissed with prejudice, dismissed without prejudice, or remanded for a new trial. If the conviction is not reversed, Mr. Aarts must be resentenced with an offender score of zero.

Respectfully submitted on September 17, 2008.

**BACKLUND AND MISTRY**

  
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CERTIFICATE OF MAILING

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

James Aarts  
203 S 2<sup>nd</sup> Ave. SW  
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and to:

Thurston Co Prosecuting Attorney  
2000 Lakeridge Dr. S.W., Building 2  
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And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on September 17, 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 September 17, 2008.

  
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