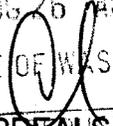


FILED
COURT OF APPEALS
DIVISION II

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No. 37398-0-II

STATE OF WASHINGTON
BY 

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

JAMES AARTS,

Appellant.

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

The Honorable Chris Wickham, Judge
Cause No. 07-1-02046-6

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether the document charging Aarts with second degree burglary was constitutionally deficient because it did not allege that the building Aarts was accused of entering was not a dwelling.

2. Whether the State proved at trial that the building Aarts was accused of entering was not a dwelling.

3. Whether the jury instruction containing the elements of the crime of second degree burglary was constitutionally deficient because it failed to inform the jury that the building was not a dwelling.

4. Whether Aarts' acknowledged his criminal history at sentencing and thus waived his right to challenge his offender score on appeal.

B. STATEMENT OF THE CASE

1. Procedure.

Aarts was charged by information on November 28, 2007, with one count of burglary in the second degree. CP 2. No pretrial motions were made or heard, and a jury trial began on February 5, 2008, concluding the following day. Aarts did not testify nor call any witnesses. Trial RP 83. The jury found Aarts guilty as charged and did not consider lesser-included offenses of first and second degree criminal trespass. CP 47-48. Sentencing was held on February 15, 2008. Two prior drug possession convictions from 2003 and 2004 were counted to give him an offender score of two, and his standard range was four to twelve months. CP 15. He was

sentenced to eight months incarceration, midpoint of the standard range. This appeal followed.

2. Facts

On November 26, 2007, David Brumfield, the owner of a business called Brumfield's Auctioneers, in Thurston County, Washington, checked the premises of his business early in the morning and found everything in order. Early in the afternoon of the same day, he again drove by the premises and discovered that the door to a storage building was ajar. He saw Aarts standing near the building. Trial RP 64-65. Aarts, carrying what appeared to be a box, ran to a vehicle and drove off on Tilly Road. Brumfield, calling the police on his phone, followed until Aarts turned down a road that Brumfield was unfamiliar with, apparently waving Brumfield to follow. Brumfield declined, and remained on Tilly Road for approximately ten minutes until a sheriff's deputy arrived. Trial RP 67-69.

Lt. Ware arrived at the scene and saw Aarts' blue Camero backed into an access road on vacant property. Aarts was kneeling behind the car, and there were parts from a vacuum cleaner, among other items, on the ground behind the car. Trial RP 58-62. The investigation was turned over to Deputy Westby, who

contacted Aarts. Aarts said he had been gathering personal possessions in a wooded area. On the ground directly beneath the trunk of the Camero there were the Kirby vacuum cleaner parts, some miscellaneous metal, and a blue-handled hammer. Brumfield arrived and identified the items as having been taken from his business property. Trial RP 22-23 Brumfield further identified Aarts as the person he'd seen speeding away from his business.

Aarts was placed under arrest. He denied entering the building. Blumfield testified that the hammer and vacuum cleaner parts had been in the building the last time he had checked, which was in early November. They were not in the building when he checked after Aarts' arrest, and a number of other items were also missing. Trial RP 76-78.

C. ARGUMENT

1. The charging document was not constitutionally deficient because it omitted the words "other than a dwelling".

Under the Sixth Amendment to the United States Constitution and Article 1, section 22 of the Washington State Constitution, a charging document must set forth all of the essential elements of the alleged crime so that a criminal defendant can be apprised of the nature of the charge and can prepare an adequate

defense. State v. Kjorsvik, 117 Wn.2d 93, 97, 812 P.2d 86 (1991). When the sufficiency of the charging document is raised for the first time on appeal, the court will engage in a liberal construction of the document in order to determine its validity. Under that liberal analysis, the appellate court examines: (1) whether the essential elements of the alleged crime appear in any form in the charging document, or whether they can be found by fair construction; and if so, (2) whether the defendant can show that he was nonetheless actually prejudiced by the inartful language used in the document. Kjorsvik, 117 Wn.2d at 105-106. In the present case, the defendant has not alleged any prejudice.

It is not necessary to use the exact words of a statute in a charging document. It is sufficient if words conveying the same meaning are used. A court should be guided by common sense and practicality in construing the language. Even missing elements may be implied if the language supports such a result. State v. Moavenzadeh, 135 Wn.2d 359, 262, 956 P.2d 1097 (1998).

Aarts was charged with second degree burglary under RCW 9A.52.030, which reads:

Burglary in the second degree. (1) 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.

Residential burglary, RCW 9A.52.025, requires that the entry be into a dwelling other than a vehicle. Aarts maintains that "other than a dwelling" is an essential element of second degree burglary, although he does not argue that "other than a vehicle" is.

"An 'essential element is one whose specification is necessary to establish the very illegality of the behavior.'" State v. Ward, 108 Wn. App. 621, 626-27, 32 P.3d 1007 (2001). "The charging document need not repeat the exact language of the statute." State v. Tinker, 155 Wn.2d 219, 221, 118 P.3d 885 (2005). In Ward, the defendants in a consolidated appeal were convicted of felony violations of no-contact orders that required the State to prove that the conduct which violated the order was an assault that did "not amount to assault in the first or second degree." Id., at 626. They characterized this language as an essential element and argued that their convictions must be reversed because it was not included in the charging document. The court held that the "not amounting to" language was not an essential element. "The effect of this provision is to elevate violations based on misdemeanor assaults to felonies." Id., at 626.

In State v. Dukowitz, 62 Wn. App. 418, 814 P.2d 234 (1991), the court reached a similar result when the defendant challenged his charging document because it did not allege that he had committed an assault “not amounting to assault in either the first, second, or third degree.” Id., at 422. “[T]he various means by which an assault may be committed do not comprise essential elements of fourth degree or simple assault. . . The converse is also true. The various means of committing assault that do not comprise a simple assault are not the essential elements of that crime.” Id. Here, the language “other than a dwelling” is describing a way that second degree burglary is *not* committed. Under the same reasoning as Ward and Dukowitz, it is not an essential element of second degree burglary. The illegality of the behavior is established by proof that Aarts entered a building with intent to commit a crime therein, and thus the charging document, CP 2, contained every essential element.

Even if “other than a dwelling” were an essential element, it can reasonably be implied by the language of the charging document in this case. By failing to challenge the information until appeal, a more liberal construction of the document is applied. “[W]hen an objection to an indictment is not timely made the

reviewing court has considerable leeway to imply the necessary allegations from the language of the charging document.” Kjorsvik, *supra*, at 104 (cite omitted). Here the allegation that Aarts entered a building (rather than a dwelling), leaves the obvious inference that the building which he is accused of entering is neither a dwelling nor a vehicle.

Aarts argues that if an information is deficient, the defendant need not prove prejudice. He cites to State v. Franks, 105 Wn. App. 950, 22 P.3d 269 (2001), a case in which the appellate court dismissed the charge because the charging language named a person other than the defendant, not because an essential element was omitted. That is not the rule. The test adopted in Kjorsvik requires a defendant challenging the charging language on appeal to prove not only that it was deficient, but that even if the essential elements can be reasonably inferred, he was nevertheless prejudiced thereby. Kjorsvik, *supra*, at 105-06. Here, Aarts has not alleged prejudice, and none is apparent from the record. He was accused of unlawfully entering a building with the intent to commit a crime, the evidence showed that he entered a particular building and was in possession of property that had formerly been in that building, and there was never any suggestion that he had entered

any other building. He cannot show prejudice even if “other than a dwelling” were an essential element.

2. There was sufficient evidence proved at trial that the building Aarts was accused of entering was a building other than a dwelling.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

“[T]he critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt.” (Cite omitted.) This inquiry does not require a reviewing court to determine whether *it* believes the evidence at trial established guilt beyond a reasonable doubt. “Instead, the relevant question is whether, 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*. (Cite omitted, emphasis in original.)

State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

“A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.” Salinas, *supra*, at 201. Circumstantial evidence and

direct evidence are equally reliable, and criminal intent may be inferred from conduct where “plainly indicated as a matter of logical probability.” State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

Credibility determinations are for the trier of fact and are not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). This court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992). It is the function of the fact finder, not the appellate court, to discount theories which are determined to be unreasonable in light of the evidence. State v. Bencivenga, 137 Wn.2d 703, 709, 974 P.2d 832 (1999).

Aarts argues that nothing in the record proves that the building Aarts was accused of entering was not used for lodging. That is not the case. Deputy Westby testified that the building was used to store junk. Trial RP 31, 45. The victim testified that there was a pile of scrap aluminum piled in the middle of the building and another pile by the front door, Trial RP 70, that the building was not very secure and only lower-end “stuff” was stored there, Trial RP 76, and that boat motors and “all kinds of things” were kept there.

Trial RP 77. However, the evidence which most clearly shows the non-residential nature of the building are Exhibits 12, 16, and 17, which clearly show a rather dilapidated building that no reasonable juror would conclude was anyone's residence, or ever had been a residence. No specific testimony was required to convince a rational trier of fact that this building was just a building.

3. The jury instructions were not deficient because they failed to inform the jury that the building Aarts was accused of entering was "other than a dwelling".

A court reviews jury instructions de novo. State v. Cross, 156 Wn.2d 580, 617, 132 P.3d 80 (2006). Jury instructions are adequate if they allow the parties to argue their theories of the case, they are not misleading, and when read as a whole, they properly inform the jury of the applicable law. State v. Schneider, 36 Wn. App. 237, 242, 673 P.2d 200 (1983). Aarts is correct that the to-convict instruction must contain all of the essential elements of the offense. In this instance, Instruction No. 12, CP 36, did so. As discussed above, "other than a dwelling" is not an essential element and was not required to be in the instruction.

4. Aarts acknowledged his criminal history at sentencing, and thus the State was not required to prove it. By acknowledging his criminal history, he waived the right to challenge his offender score.

Aarts correctly cites to the law regarding sentencing, but he is not correct about factual issues. He asserts that no evidence was presented at sentencing that he had a criminal history and that his history was not mentioned by either party. The record shows that the prosecutor handed to the court both a copy of the defendant's criminal history as well as a scoring sheet, and informed the court that Aarts had two prior felonies from 2003 and 2004 that did not wash out. 02/15/08 RP 3. Defense counsel acknowledged "[h]e has some drug possession offenses from just a couple of years ago," and asked for a sentence at the bottom of the standard range, but did not contest the standard range. 02/15/08 RP 5. Aarts' attorney signed the Judgment and Sentence, which contained a written list of his prior offenses. CP 15, 20.

The court cannot be found in error for failing to calculate the offender score on the record when it has been provided a list of past offenses that is agreed to by the defense.

[I]f the State alleges the existence of prior convictions and the defense not only fails to specifically object but agrees with the State's depiction of the defendant's criminal history, then the defendant waives the right to challenge the criminal history after sentence is imposed. . . Sentencing courts can rely on defense acknowledgment of prior convictions without further proof. . .

State v. Bergstrom, 162 Wn.2d 87, 94, 169 P.3d 816 (2007).

Aarts waived his right to challenge his offender score when his attorney acknowledged at sentencing that he had two prior drug possession offenses in the recent past.

D. CONCLUSION.

There was no deficiency in the charging document, the evidence, or the jury instructions. Aarts acknowledged his criminal history at sentencing and waived his right to challenge his offender score on appeal. The State respectfully asks this court to affirm his conviction and sentence.

Respectfully submitted this 25th of August, 2008.



Carol La Verne, WSBA# 19229
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that I served a copy of the Brief of Respondent, No. 37398-0-II,
on all parties or their counsel of record on the date below as follows:

- US Mail Postage Prepaid
- ABC/Legal Messenger
- Hand delivered by

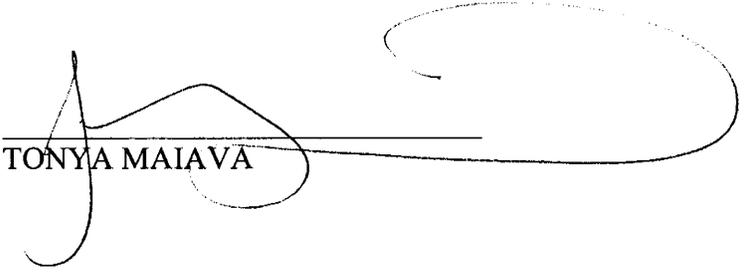
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I certify under penalty of perjury under laws of the State of
Washington that the foregoing is true and correct.

Dated this 25th day of August, 2008, at Olympia, Washington.



TONYA MAIAVA