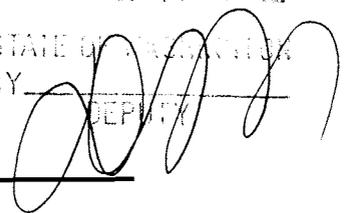


COURT OF APPEALS
DIVISION II

09 JUN 12 PM 12:22

STATE OF WASHINGTON
BY  DEPUTY

No. 37922-8-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

JOHN KENNETH ROBERTS,

Appellant.

On Appeal from the Pierce County Superior Court
Cause No. 07-1-05024-0
The Honorable Rosanne Buckner, Judge

OPENING BRIEF OF APPELLANT

STEPHANIE C. CUNNINGHAM
Attorney for Appellant
WSBA No. 26436

4616 25th Avenue NE, No. 552
Seattle, Washington 98105
Phone (206) 526-5001

TABLE OF CONTENTS

I.	ASSIGNMENTS OF ERROR	1
II.	ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR	1
III.	STATEMENT OF THE CASE	2
IV.	ARGUMENT & AUTHORITIES.....	6
	A. <u>The State failed to prove that Roberts personally entered Wohlwend's house, or that he personally intended to commit a crime once inside the house.</u>	6
	B. <u>The trial court erred when it instructed the jury that it could presume an intent to commit a crime inside the house, because the evidence did not establish that Roberts entered the house and there were other reasonable conclusions that could follow from the State's evidence.</u>	9
V.	CONCLUSION.....	14

TABLE OF AUTHORITIES

CASES

<i>City of Tacoma v. Luvone</i> , 118 Wn.2d 826, 827 P.2d 1374 (1992)	6
<i>State v. Berglund</i> , 65 Wn. App. 648, 829 P.2d 247 (1992)	10, 12, 13
<i>State v. Deal</i> , 128 Wn.2d 693, 911 P.2d 996 (1996).....	10
<i>State v. Guloy</i> , 104 Wn.2d 412, 705 P.2d 1182 (1985).....	14
<i>State v. Hanna</i> , 123 Wn.2d 704, 871 P.2d 135 (1994).....	10
<i>State v. Jackson</i> , 112 Wn.2d 867, 774 P.2d 1211 (1989)	10, 11, 13, 14
<i>State v. Salinas</i> , 119 Wn.2d 192, 829 P.2d 1068 (1992)	7

OTHER AUTHORITIES

RAP 2.5(a)	10
RCW 9A.52.025	7
U.S. Const. Amd. 14	10
Wash. Const. Art.1, § 7	10

I. ASSIGNMENTS OF ERROR

1. The State failed to prove beyond a reasonable doubt every essential element of the crime of residential burglary.
2. The trial court erred when it gave Instruction Number 6, which instructed the jury that it could presume criminal intent from proof of entry into the residence.
3. Appellant's due process rights were violated when the trial court gave Instruction Number 6, because the instruction created an impermissible presumption and relieved the State of its burden of proving every element of the charged crime.

II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Did the State fail to prove that Appellant entered the residence, where the State only proved that Appellant broke several windows on the house? (Assignment of Error 1)
2. Did the State fail to prove that Appellant intended to commit a crime inside the residence where the State proved only that Appellant broke several windows on the house, and one other person was present during the incident who could have entered the house and taken the stolen items? (Assignment of Error 1)
3. Did the trial court err when it instructed the jury that it could

presume criminal intent from the fact of entry into the residence, where the State failed to prove actual entry, and where there were other reasonable conclusions that could follow from the State's evidence? (Assignments of Error 2 & 3)

III. STATEMENT OF THE CASE

Denise Wohlwend lives in a single-family home located at 6635 South Junett in Tacoma, Washington. (RP 94) In September of 2008, Wohlwend allowed her friend, Heather Duffy, to stay in her home, because Duffy had no place to live and Wohlwend needed the extra money she could receive by charging Duffy rent. (RP 101-02, 108) Duffy paid Wohlwend \$200 to stay in the home through the month of September. (RP 102, 108) Wohlwend intended to give her a key to the house, but never got around to it. (RP 102-03)

John Kenneth Roberts was Duffy's boyfriend, and also a friend of Wohlwend's ex-boyfriend. (RP 100, 101, 107) During the summer and fall of 2008, Roberts visited the house on occasion, and also stayed overnight a few times. (RP 100)

On the afternoon of September 22, 2008, Vestal Tabor was doing yard work at his mother-in-law's house, which is next door to

Wohlwend's house. (RP 120, 121, 125) He saw Roberts arrive in a silver truck, remove a ladder, and climb up to one of the windows on Wohlwend's house. (RP 125, 126) Roberts then climbed down from the ladder, approached Tabor and introduced himself. (RP 126)

Roberts told Tabor that his girlfriend was supposed to leave a key to the house so that Roberts could go inside, but that she had not done so. (RP 127) Roberts said he was going to have to break some windows in order to get into the house. (RP 127) A short time later, Tabor heard the sound of glass breaking. (RP 127) He heard the sound several times over the next 15-20 minutes, and testified that he thought the glass was being broken into a garbage can. (RP 127)

In the early afternoon of the following day, September 23, 2008, Tabor saw Roberts arrive again, this time driving a maroon-colored car. (RP 122) He saw Roberts going back-and-forth between the car and into the fenced yard. (RP 123) He did not hear any glass breaking on this day. (RP 137)

On both days, Tabor heard Roberts talking to a woman Roberts called Heather. (RP 124, 128, 134, 136) Tabor did not see Roberts go inside the home on either the 22nd or the 23rd of

September. (RP 134, 136) He never saw Roberts carry anything out of the home or the yard. (RP 135, 137)

On September 22nd, Wohlwend noticed a small break in her kitchen window. (RP 95, 96) She looked around the house and noticed nothing unusual and nothing missing. (RP 104, 109) When she arrived home on the afternoon of September 23, she noticed that several other windows had been broken. (RP 95) Inside the house, she saw graffiti painted on a wall, and noticed that a DVD player and a small case containing DVDs were missing. (RP 94, 95, 96) She called the police to report the incident. (RP 94)

While on routine patrol duty on the afternoon of September 23, Tacoma Police Officer Christopher Martin saw a maroon-colored hatchback speeding down a South Tacoma street. (RP 60, 61, 63) The car failed to stop at a clearly visible stop sign. (RP 62) The car turned left into the oncoming lane, still driving at a high rate of speed. (RP 62)

Martin activated his patrol car's lights and siren, but the car did not slow down. It rapidly approached another intersection marked with a stop sign. (RP 62) The car finally screeched to a stop just past the sign, and cross-traffic cleared the intersection without incident. (RP 62) The car accelerated through the

intersection, then pulled over to the right shoulder. (RP 62-63)

Martin immediately ordered the driver, John Roberts, out of the car and took him into custody. (RP 64-65) He also detained the passenger, Heather Duffy. (RP 67, 84) Martin smelled intoxicants on Roberts' breath, and Roberts admitted that he had been drinking some beer. (RP 66) Martin also noticed that Roberts' left forearm had been wrapped in a gauze bandage. (RP 67) Roberts told Martin that he cut his arm on glass the day before. (RP 67)

Martin searched the vehicle, and found a half-full can of beer, which Roberts admitted was his. (RP 67) He also saw clothing, a DVD player and a DVD case in the trunk area of the car. (RP 68) Martin also checked Roberts' driving status, and learned that his license had been suspended. (RP 72)

Later that day Martin was dispatched to Wohlwend's house in response to her report. (RP 73-74) He noticed three broken windows, and it appeared that glass had been partially cleaned up from around the outside of the house. (RP 75) He also went inside the home, but did not notice any damage or graffiti. (RP 88)

Martin suspected that Roberts and Duffy were involved. (RP 77) He created a photo montage for Tabor, who positively

identified Roberts. (RP 77-79, 128-29) Martin also showed Wohlwend the DVD player and DVD case taken from Roberts' car, and she said they matched the ones taken from her home. (RP 98-99) Wohlwend testified that neither Duffy nor Roberts had her permission to be in the home on September 22 or 23, and neither had permission to take any of her possessions. (RP 103, 104-05)

The State charged Roberts by Information with one count of residential burglary (RCW 9A.52.025), one count of reckless driving (RCW 46.61.500), and one count of driving with a suspended license (RCW 46.20.342(1)(c)). (CP 1-2) The jury found Roberts guilty as charged. (RP 177; CP 39-41) The trial court sentenced Roberts within his standard range to 70 months of confinement. (RP 194; CP 50, 53) This appeal follows. (CP 64)

IV. ARGUMENT & AUTHORITIES

- A. The State failed to prove that Roberts personally entered Wohlwend's house, or that he personally intended to commit a crime once inside the house.

"Due process requires that the State provide sufficient evidence to prove each element of its criminal case beyond a reasonable doubt." *City of Tacoma v. Luvone*, 118 Wn.2d 826, 849, 827 P.2d 1374 (1992) (citing *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)). Evidence is sufficient to

support a conviction only 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). “A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” *Salinas*, 119 Wn.2d at 201.

“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[.]” RCW 9A.52.025. The State neither charged nor requested an instruction on the theory of accomplice liability in this case. (CP 1-2, 15-38; RP 140-44) Therefore, to support a conviction for the crime of residential burglary, the State was required to prove that Roberts personally entered Wohlwend’s house, and that Roberts personally intended to commit a crime inside Wohlwend’s house. The State failed to establish either of these essential elements.

First, there was no evidence showing that Roberts was the individual who entered the home to gather the DVD player or DVD case. Tabor testified that on both days, he heard a woman’s voice and heard Roberts talking to a woman named Heather. (RP 124,

18, 134, 136) Tabor never saw Roberts go into or out of the house, and never saw him carry any items from the yard to his car. (RP 134, 135, 136, 137) Therefore, even though items taken from inside Wohlwend's house were found in Roberts' car, there is no evidence that Roberts, rather than Heather Duffy, entered the home to take these items.

In closing, the prosecutor argued that the jury could find that Roberts entered the house because a "body part" must be inserted into the house to break through a window. (RP 166) But there are countless ways to break a window that do not involve inserting a "body part" into the interior space of a home. And there was no testimony establishing the method Roberts used to break the windows.

Moreover, even though Roberts admitted he cut his arm on glass, it cannot be assumed that the cut occurred as a result of inserting his arm into the house, because there was testimony and evidence indicating that the glass was handled outside the house: Tabor testified that it sounded like glass was being broken over a trash can, and Officer Martin testified that the glass had been partially swept or raked up and placed into a trash can outside the house. (RP 67, 75-76, 127) The State simply failed to prove that

Roberts, or any part of Roberts' body, entered Wohlwend's house.

The State also failed to prove that Roberts personally intended to commit a crime inside the home. The State proved only that Roberts committed acts of vandalism outside the home. There is no evidence that he personally intended to do anything other than vandalize Wohlwend's home. There is no evidence that he, and not Duffy, entered the home and took the DVD player and DVD case. And it is irrelevant that Roberts' acts may have assisted Duffy in her taking of the DVD player and DVD case, as the State was required to prove that Roberts himself intended to commit an additional crime inside the home.

The State failed to prove both of these essential elements of residential burglary. Therefore, Roberts' conviction must be reversed.

- B. The trial court erred when it instructed the jury that it could presume an intent to commit a crime inside the house, because the evidence did not establish that Roberts entered the house and there were other reasonable conclusions that could follow from the State's evidence.

"Due process requires the State bear the 'burden of persuasion beyond a reasonable doubt of every essential element of a crime.' The State may, however, use evidentiary devices, such

as inferences and presumptions, to assist in meeting its burden of proof." *State v. Hanna*, 123 Wn.2d 704, 710, 871 P.2d 135 (1994) (citations omitted); *State v. Deal*, 128 Wn.2d 693, 698, 911 P.2d 996 (1996); U.S. Const. Amd. 14; Wash. Const. Art.1, § 7. In this case, Jury Instruction Number 6 reads:

A person who enters or remains unlawfully in a building may be inferred to have acted with intent to commit a crime against a person or property therein. This inference is not binding upon you and it is for you to determine what weight, if any, such inference is to be given.

(CP 23) It was error to give this instruction, however, because the State did not establish that Roberts entered Wohlwend's house or that Roberts intended to commit a crime within the house.¹

Without actual entry into a building, the jury may not be instructed that criminal intent may be inferred. *State v. Jackson*, 112 Wn.2d 867, 876, 774 P.2d 1211 (1989); *State v. Berglund*, 65 Wn. App. 648, 653, 829 P.2d 247 (1992). Moreover, such an instruction is improper if the most the evidence shows is equivocal conduct. In other words, "[a]n inference [of intent to commit a crime in a building] should not arise where there exist other reasonable

¹ At trial, defense counsel did not object to the use of this instruction. (RP 140-44) It is nonetheless reviewable because the argument is based on constitutional grounds. *Deal*, 128 Wn.2d at 698; RAP 2.5(a).

conclusions that would follow from the circumstances." *Jackson*, 112 Wn.2d at 876.

For example, in *State v. Jackson*, a police officer saw the defendant repeatedly kick the window area of the front door of a shop. The defendant quickly walked away when he saw the officer. On the door about 10 inches of Plexiglass had been pushed inward and part of the wood stock around the Plexiglas was broken out of its frame. Footprints matching the defendant's shoes were found on the Plexiglass. The molding which holds the glass in the frame was broken on the inside and there was wood on the floor. The defendant denied kicking the door. *Jackson*, 112 Wn.2d at 870.

Our Supreme Court concluded that giving the inference instruction was error both because there was no evidence of actual entry and because "an inference cannot follow that there was intent to commit a crime within the building just by the defendants' shattering of the window in the door. This evidence is consistent with two different interpretations; one indicating attempted burglary, a felony; and the other malicious mischief, a misdemeanor." *Jackson*, 112 Wn.2d at 876.

In contrast, in *State v. Berglund* the court upheld use of an inference instruction in an attempted burglary case because there

was evidence consistent only with actual entry and the only reasonable inference could have been that the defendant intended to commit a crime inside the building. 65 Wn. App. at 653. There, the defendant left fingerprints on the inside of the exterior pane of a double-paned window, showing that he had continued to try to widen the opening even after he first broke the window with a rock. *Berglund*, 65 Wn. App. at 649.

The court concluded that while breaking the window could have shown only vandalism, the fingerprint evidence showed that the defendant had entered the building with his hands and tried to create a larger opening by breaking away or attempting to break away more window glass. *Berglund*, 65 Wn. App. at 652. Such evidence was "reasonably consistent only with an attempt to get into the building" and there was therefore no error under *Jackson*. *Berglund*, 65 Wn. App. at 653.

Unlike *Berglund*, there is no fingerprint evidence in this case that establishes conclusively that any part of Roberts' body entered the window space. As argued in detail above, the State did not establish that Roberts, or any part of Roberts' body, entered Wohlwend's house, either during or subsequent to the breaking of the windows.

This case is similar to *Jackson*, and compels the same result. Here, as in *Jackson*, there was neither evidence of actual entry, nor a reasonable inference that Roberts personally intended to commit a crime within the house simply by breaking the windows. *Jackson*, 112 Wn.2d at 876.

Even assuming, without conceding, that Roberts' actions could be interpreted as evidence of an intent to commit a crime inside Wohlwend's house, that is not the only reasonable interpretation of the evidence. As in *Jackson*, the State's evidence could be consistent with two different interpretations; one indicating burglary and the other simply malicious mischief or vandalism. *Jackson*, 112 Wn.2d at 876.

Because the State did not establish actual entry into Wohlwend's house, and because the act of breaking the glass is an equivocal act, the jury should not have been instructed that criminal intent may be inferred. *Jackson*, 112 Wn.2d at 876, *Berglund*, 65 Wn. App. at 653.

This instructional error was not harmless. "A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error. Constitutional error is

presumed to be prejudicial and the State bears the burden of proving that the error was harmless.” *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985) (citing *State v. Stephens*, 93 Wn.2d 186, 190-91, 607 P.2d 304 (1980)).

In holding that the same instructional error was not harmless, the *Jackson* court states:

the giving of the instruction was not harmless error since it tended to prove an element of the commission of a crime. The instruction coming from the trial judge indicated that the defendant had entered the building and did so with the intent to commit a crime against the property therein. We do not need to determine whether the "overwhelming evidence" test would be applicable since we are convinced the inference of intent instruction was not harmless.

Jackson, 112 Wn.2d at 877 (citing *Guloy*, 104 Wn.2d at 426). For these same reasons, the giving of the instruction was not harmless error in this case either. Roberts' conviction must therefore be reversed and remanded for a new trial. *Jackson*, 112 Wn.2d at 879.

V. CONCLUSION

The State failed to prove that Roberts entered Wohlwend's house, and failed to prove that his acts showed an intent to commit a crime inside the house. The State therefore failed to prove every essential element of residential burglary, and Roberts' conviction

must be reversed. Alternatively, because of this failure of proof, the trial court erred when it instructed the jury that it could presume intent. For this reason as well, Roberts' conviction must be reversed.

DATED: January 10, 2009



STEPHANIE C. CUNNINGHAM

WSBA No. 26436

Attorney for John Kenneth Roberts

CERTIFICATE OF MAILING

I certify that on 01/10/2009, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: (1) Kathleen Proctor, DPA, Prosecuting Attorney's Office, 930 Tacoma Ave. S., Rm. 946, Tacoma, WA 98402; and (2) John K. Roberts, DOC#789484, Clallam Bay Corrections Center, 1830 Eagle Crest Way, Clallam Bay, WA 98326



STEPHANIE C. CUNNINGHAM
WSBA No. 26436

09 JAN 12 PM 12:22
STATE OF WASHINGTON
BY _____
DEPT _____
COURT OF APPEALS
CLALLAM COUNTY

