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ASSIGNMENTS OF ERROR

1. Mr. Johnson's conviction infringed his Fourteenth Amendment right to due process because the evidence was insufficient to prove the elements of second-degree burglary.
2. The state failed to prove that that Mr. Johnson unlawfully entered a "building."
3. The trial judge abused his discretion by admitting irrelevant evidence in violation of ER 402.
4. The trial judge abused his discretion by admitting prejudicial evidence in violation of ER 403 and ER 404(b).
5. The trial judge abused his discretion by failing to conduct a complete 404(b) analysis on the record.
6. The trial judge abused his discretion by admitting evidence that Mr. Johnson had previously sold copper wire to a recycling center.
7. The trial judge abused his discretion by admitting evidence that Mr. Johnson was in possession of a receipt for the sale of copper wire at the time of his arrest.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A conviction for second-degree burglary requires proof that the accused unlawfully entered in a "building." The prosecution established that Mr. Johnson unlawfully entered a train locomotive, and argued that the locomotive qualified as a "railway car." Did Mr. Johnson's conviction violate his Fourteenth Amendment right to due process because it was based on insufficient evidence that he unlawfully entered a "building?"
2. Evidence that is irrelevant and prejudicial should not be admitted at trial. Here, the trial judge admitted evidence that Mr. Johnson possessed a receipt for the sale of copper wire, and had previously sold copper wire to a recycling center. Did the trial court err by admitting irrelevant and prejudicial evidence?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Elma police officer Hayden was at the railroad yard when he heard noises coming from a locomotive at around two o'clock in the morning.

RP 34-37. This particular locomotive, number 2017, was parked and used for parts in repairing other diesel-electric locomotives. RP 20. The officer saw the light of a flashlight, and then a man on the catwalk. RP 36, 38.

The man jumped down and fell, and Hayden arrested him. RP 39-40.

The man was Bradley Johnson, who was employed doing building demolitions. RP 40, 61-62. Hayden searched Mr. Johnson (and a backpack and bag found at the scene), and found tools, including a bolt cutter and wrench. He did not find any copper. RP 41, 50.

The state charged Mr. Johnson with Burglary in the Second Degree: alleging that he unlawfully entered "a building as defined by RCW 9A.04.110(5), *to wit*: a railway car." CP 1.

At the time of his arrest, Mr. Johnson had a receipt in his pocket for a recent sale of "Number 2" copper to a recycling center. RP 14; Exhibit 22, Supp. CP. The state sought to admit the receipt and the testimony of Kimberly Droz, who worked at the metal recycler where Mr. Johnson had sold the copper. RP 14, 57-63. Mr. Johnson objected to the admission of this evidence, arguing that it was not relevant to the charge

and that any relevance was outweighed by its prejudicial impact. RP 15.

The court ruled that the evidence was admissible, finding that:

And - and 403 says - 402 I guess says any relevant evidence - and let me flip to it real quickly. Evidence Rule 402 says, All relevant evidence is admissible except as limited by the constitutional requirements or otherwise provided by statute or by these rules. And so generally you admitted relevant evidence. 403 says, The court should exclude it if it's substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

And I can find none of the above applied. Like I said, any evidence that tends to link a person to a crime from the defendant's point of view may be prejudicing them in that it may result in the guilty verdict. But it certainly is not unfair prejudice, it's simply circumstances on or about the time in fact the day before that the jury take into consideration. He may have an innocent explanation of where he got this copper from, that's up to him whether or not he wants to testify about some - some other way that he had this copper. But coupled with the fact that they had break-ins to this engine and what was intended to be taken is copper, it all links together and tends to prove the case. And I don't - I don't even know if - I guess I'll touch on 404(b) I'm not sure that it even applies because that deals with other crimes, wrongs or acts and in and of itself selling copper to somebody that purchases copper is not necessarily a crime or wrong or act unless you're dealing in stolen copper.

But even if the rule applies in some way I think it would be the part that talks about it's admissible for other purposes such as to prove motive, opportunity, intent, preparation, plan, knowledge, identity and absence of mistake or accident, I think it would go to prove the motive and intent of why he was inside a - this train engine in the early morning hours of July 28th, 2008. I guess that would be circumstantial evidence that he - he was intending to steal more copper if he had in fact stole some before or intending to do it on this night in question. So I believe it's all subject to obviously to interpretation and argument and jury consideration,

but I can't exclude it based on the rules of evidence and I'm going to admit her testimony and allow it.

RP 64-65. Ms. Droz testified, and told the jury that Mr. Johnson had sold 105 pounds of "number 2" copper the day before his arrest. RP 69-71.

Before the court made this ruling regarding the receipt's admission, the shop foreman, who repaired the locomotives in this yard, testified. During the defense cross-examination, he stated that this particular locomotive had been the subject of multiple thefts in the recent past. RP 30-31.

At the close of the evidence, the court gave the following definition of a building: "The term 'building,' in addition to its ordinary meaning, includes any railway car." Instruction No. 7, Court's Instructions to the Jury, Supp. CP.

The jury convicted Mr. Johnson as charged, and he was sentenced. CP 3-10. This timely appeal followed. CP 11-12.

ARGUMENT

I. MR. JOHNSON’S CONVICTION VIOLATED HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BECAUSE THE EVIDENCE WAS INSUFFICIENT AS A MATTER OF LAW TO PROVE HE BURGLARIZED A “BUILDING.”

A. Standard of Review

The interpretation of a statute is an issue of law, reviewed *de novo*.

In re Detention of Strand, 167 Wn.2d 180, 186, 217 P.3d 1159 (2009).

Evidence is insufficient to support a conviction unless, when viewed in the light most favorable to the state, a rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *State v.*

Colquitt, 133 Wn. App. 789, 796, 137 P.3d 892 (2006).

B. The prosecution was required to prove the elements of the second-degree burglary beyond a reasonable doubt, including that Mr. Johnson unlawfully entered a “building.”

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, 364, 90 S.Ct.

1068, 25 L.Ed.2d 368 (1970). The criminal law may not be diluted by a

standard of proof that leaves the public to wonder whether innocent

persons are being condemned. *State v. DeVries*, 149 Wn.2d 842, 849, 72

P.3d 748 (2003). 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.¹ *Id.*, at 849. The remedy for a conviction based on insufficient evidence is reversal and dismissal with prejudice. *Smalis v. Pennsylvania*, 476 U.S. 140, 144, 106 S. Ct. 1745, 90 L. Ed. 2d 116 (1986); *Colquitt*, *supra*.

RCW 9A.52.030 provides that “[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.” RCW 9A.52.030(1). Thus, in order to convict a person of second-degree burglary, the prosecution is required to prove that the accused person burglarized a “building.”

C. The evidence was insufficient to convict Mr. Johnson because a locomotive is not a “building.”

Principles of statutory interpretation require a “comprehensive reading” of statutes, deriving legislative intent from “ordinary meaning of the language at issue, the context of the statute in which that provision is

¹ 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. On review, the appellate court must find the proof to 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, 391, 97 P.3d 745 (2004); *State v. Carlson*, 130 Wn. App. 589, 592, 123 P.3d 891 (2005). The evidence must also 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, 568, 815 P.2d 277 (1991), *citation omitted*.

found, related provisions, and the statutory scheme as a whole.” *Strand*, at 188 (internal quotation marks and citations omitted). This requires that provisions be read in context, with individual words understood in conjunction with the other words with which they are associated, rather than in isolation. *Id.*, at 188 (quoting *State v. Roggenkamp*, 153 Wn.2d 614, 623, 106 P.3d 196 (2005)).

Where a statute fails to define a term, rules of statutory construction require that the term be given its plain and ordinary meaning, derived from a standard dictionary if possible. *McClarty v. Totem Elec.*, 157 Wn.2d 214, 225, 137 P.3d 844 (2006). Where a criminal statute is capable of more than one interpretation, the rule of lenity requires that it be construed in the manner most favorable to the accused person. *State v. Gonzales Flores*, 164 Wn.2d 1, 17, 186 P.3d 1038 (2008).

The word “building,” in addition to its ordinary meaning, “includes any dwelling, fenced area, vehicle, railway car, cargo container, or any other structure used for lodging of persons or for carrying on business therein, or for the use, sale or deposit of goods; each unit of a building consisting of two or more units separately secured or occupied is a separate building...” RCW 9A.04.110(5). Here, the prosecution alleged that Mr. Johnson burglarized a “railway car.” CP 1.

The statute does not clarify what is meant by the phrase “railway car.” The ordinary meaning of “railway car” is “a wheeled vehicle adapted to the rails of railroad...” *Dictionary.com* (based on the *Random House Unabridged Dictionary*, Random House, Inc. 2009). Under this definition, “railway car” might mean any of the units of a railway train (including the locomotive), or it could be limited to the rail cars pulled (or pushed) by a locomotive.

When examined in context (as required by *Strand, supra*), the phrase should be interpreted to mean those cars pulled or pushed by a locomotive. This is so because the definition of “building” refers to a list of structures (“dwelling, fenced area, vehicle, railway car, cargo container”) that qualify as buildings *per se*, followed by the phrase “or any other structure used for [lodging or business], or for the use, sale or deposit of goods...” RCW 9A.04.110(5). This suggests that those structures that qualify as buildings *per se* are included within the definition because they are special cases of structures used for lodging, business, or storage of goods. This makes sense: burglary involves crime against persons or property within the structure burglarized. Thus railway cars—including passenger cars, boxcars, freight cars, and other cars where people are housed or goods are stored—are targets for those committing burglary, and should be protected under the statute.

Furthermore, under the rule of lenity, the phrase “railway car” should be limited to include only those non-motorized cars pulled or pushed by a locomotive. *Gonzales Flores*, at 17. This is so because the rule of lenity requires the court to adopt that interpretation most favorable to the accused person. *Id.*

Since a locomotive is not a “railway car,” and since Mr. Johnson was alleged to have burglarized a locomotive, the evidence was insufficient to convict him of burglary in the second degree. His conviction must be reversed and the evidence dismissed with prejudice. *Smalis*, *supra*.

II. THE TRIAL JUDGE ERRONEOUSLY ADMITTED IRRELEVANT AND PREJUDICIAL EVIDENCE.

A. Standard of Review

Evidentiary rulings are reviewed for abuse of discretion. *State v. Fisher*, 165 Wn.2d 727, 750, 202 P.3d 937 (2009); *State v. Hudson*, 150 Wn.App. 646, 652, 208 P.3d 1236 (2009). A trial court abuses its discretion when its order is manifestly unreasonable or based on untenable grounds. *State v. Depaz*, 165 Wn.2d 842, 858, 204 P.3d 217 (2009). This includes when the court relies on unsupported facts, takes a view that no reasonable person would take, applies the wrong legal standard, or bases its ruling on an erroneous view of the law. *Hudson*, at 652.

An erroneous ruling requires reversal if it is prejudicial. *State v. Asaeli*, 150 Wn.App. 543, 579, 208 P.3d 1136 (2009). An error is prejudicial if there is a reasonable probability that it materially affected the outcome of the trial. *Id.*, at 579.

B. The trial judge abused his discretion by admitting evidence that was irrelevant, prejudicial, and inadmissible under the rules of evidence.

Irrelevant evidence is inadmissible at trial. ER 402. ER 401 defines relevant evidence as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Under ER 403, even relevant evidence “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”

Under ER 404(b), “[e]vidence of other... acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.”

Before evidence of prior acts may be admitted, the trial court is required to analyze the evidence and must ““(1) find by a preponderance of the evidence that the [conduct] occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value of the evidence against its prejudicial effect.”” *State v. Asaeli*, at 576 (quoting *State v. Pirtle*, 127 Wn.2d 628, 648-649, 904 P.2d 245 (1995)). The analysis must be conducted on the record.² *Asaeli*, at 576 n. 34. Doubtful cases should be resolved in favor of the accused person. *State v. Trickler*, 106 Wn.App. 727, 733, 25 P.3d 445 (2001).

Here, the court should have excluded the receipt found in Mr. Johnson’s pocket and the testimony of the Valley Recycling employee. First, the trial court failed to conduct a complete analysis on the record. RP 63-65. The court did not find by a preponderance of the evidence that the conduct occurred. RP 63-65. Nor did the court determine that the evidence was relevant to prove an element of the charged crime.³ See RP

² However, if the record shows that the trial court adopted a party’s express arguments addressing each factor, then the trial court’s failure to conduct a full analysis on the record is not reversible error. *Asaeli*, at 576 n. 34.

³ The court did articulate that the evidence went to motive or intent. RP 63-65

63-65. Second, the prosecutor's argument did not fill in the missing pieces. RP 63. The trial court abused its discretion by failing to conduct a complete analysis on the record, and by failing to adopt a complete analysis advanced by one of the parties.

Furthermore, the evidence was highly prejudicial. It suggested to the jury that Mr. Johnson may have been involved in prior copper wire thefts, and thus invited them to convict based on propensity evidence. The use of propensity evidence to prove a crime may violate due process under the Fourteenth Amendment.⁴ U.S. Const. Amend. XIV; *Garceau v. Woodford*, 275 F.3d 769, 775 (9th Cir. 2001), *reversed on other grounds* at 538 U.S. 202, 123 S. Ct. 1398, 155 L. Ed. 2d 363 (2003). A conviction based in part on propensity evidence is not the result of a fair trial. *Id.*, at 776, 777-778.

Evidence that Mr. Johnson had previously sold copper wire to a recycling center should have been excluded. It was irrelevant, prejudicial, and inadmissible. The error requires reversal, because there is a reasonable probability that it materially affected the outcome of the trial.

⁴ The U.S. Supreme Court has reserved ruling on this issue. *Estelle v. McGuire*, 02 U.S. 62, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991).

Asaeli, at 579. Accordingly, Mr. Johnson's conviction must be reversed, and the case remanded to the superior court for a new trial. *Id.*

CONCLUSION

For the foregoing reasons, Mr. Johnson's conviction must be reversed and the case dismissed with prejudice. In the alternative, the case must be remanded to the superior court for a new trial.

Respectfully submitted on January 19, 2010.

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COURT OF APPEALS
DIVISION II

10 JAN 20 PM 12:00

STATE OF WASHINGTON
BY [Signature]
DEPUTY

CERTIFICATE OF MAILING

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

Bradley Johnson, DOC #826041
Stafford Creek Corrections Center
191 Constantine Way
Aberdeen, WA 98520

and to:

Grays Harbor Co Pros Ofc
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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 January 19, 2010.

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 January 19, 2010.

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