

COA No. 28874-9-III

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

---

STATE OF WASHINGTON, Respondent,

v.

BRIAN M. SMILEY, Appellant.

---

BRIEF OF APPELLANT

---

Kenneth H. Kato, WSBA # 6400  
Attorney for Appellant  
1020 N. Washington St.  
Spokane, WA 99201  
(509) 220-2237

COA No. 28874-9-III

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

---

STATE OF WASHINGTON, Respondent,

v.

BRIAN M. SMILEY, Appellant.

---

BRIEF OF APPELLANT

---

Kenneth H. Kato, WSBA # 6400  
Attorney for Appellant  
1020 N. Washington St.  
Spokane, WA 99201  
(509) 220-2237

TABLE OF CONTENTS

I. ASSIGNMENTS OF ERROR

Assignment of Error A: The court erred by relying on fingerprint evidence to find guilt.....1

Assignment of Error B: The State’s evidence was insufficient to support a finding of guilt..... 1

Issues Pertaining to Assignment of Error..... 1

1. Did the court err by relying solely on fingerprint evidence to find guilt, contrary to the holding in *State v. Bridge*, 91 Wn. App. 98, 955 P.2d 418 (1998)? (Assignment of Error A).....1

2. Was the State’s evidence insufficient to support a finding of guilt? (Assignment of Error B).....1

II. STATEMENT OF THE CASE.....1

III. ARGUMENT.....4

A. The court erred by relying solely on fingerprint evidence to find guilt.....4

B. The State’s evidence was insufficient to support a finding of guilt beyond a reasonable doubt.....7

IV. CONCLUSION.....8

TABLE OF AUTHORITIES

Table of Cases

*State v. Bridge*, 91 Wn. App. 98, 955 P.2d 418 (1998).....1, 5, 6, 8

*State v. Colquitt*, 133 Wn. App. 789, 137 P.3d 892 (2006).....7

*State v. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980) .....7

*State v. Murbach*, 68 Wn. App. 509, 843 P.2d 551 (1993).....6  
*State v. Myers*, 133 Wn.2d 26, 941 P.2d 1102 (1997)..... 7  
*State v. Zamora*, 63 Wn. App. 220, 817 P.2d 880 (1991)..... 5

## I. ASSIGNMENTS OF ERROR

A. The court erred by relying on fingerprint evidence to find guilt.

B. The State's evidence was insufficient to support the finding of guilt.

### Issues Pertaining to Assignments of Error

1. Did the court err by relying solely on fingerprint evidence to find guilt, contrary to the holding in *State v. Bridge*, 91 Wn. App. 98, 955 P.2d 418 (1998)? (Assignment of Error A).

2. Was the State's evidence insufficient to support a finding of guilt? (Assignment of Error B).

## II. STATEMENT OF THE CASE

Mr. Smiley was charged by information in juvenile court with one count of residential burglary and one count of second degree malicious mischief. (CP 1). No error is assigned to the court's findings at the adjudicatory hearing as substantial evidence supports them. What is challenged, however, are the court's conclusions and finding of guilt flowing from those findings.

The court's findings of fact stated:

1. On August 11, 2008, Brian Smiley was in the backyard of 8959 B Tinker Loop, Moses Lake, WA. This is in Grant County, WA. This fact is undisputed by all parties.

2. There was quite a bit of evidence produced at the Fact Finding Hearing, by both sides, concerning the Lease that [Mr. Smiley's] family had with the landlord. I make no finding as to whether the family was "forced out" or left on their own accord. I also make no findings as to whether [Mr. Smiley] was justified in removing the Raspberry Canes from the backyard as the State had indicated during the Fact Finding Hearing that it was not seeking any Trespass Charge for being in the backyard.

3. Michelle Razey, one of the State's witnesses, stated that upon contacting Mr. Brian Smiley and Ashley Ellingsworth in the backyard of 8959 B Tinker Loop she went inside to tell her husband about the contact.

4. Ms. Razey further testified that she came back out of her residence at 8959 B Tinker Loop and saw someone who matched Brian Smiley's description at the back door to the garage at 8959 B Tinker Loop. This person appeared to have a screwdriver and was doing something to the door. Ms. Razey could not positively identify this individual.

5. Ms. Razey also testified that she heard what sounded like an aerosol can going off from inside the garage after she saw the person at the back door of the garage.

6. On August 12, 2008, Mr. Jack Williams, the owner of the property at 8959 B Tinker Loop came back to the property. He and another individual had been doing some work on the house and came back to continue working.

7. Mr. Williams discovered that someone had broken into the garage located at 8959 B Tinker Loop and had sprayed some Foam Insulation all over the garage. He further testified that the can was inside the garage when he left the day before (August 11, 2008).

8. The can was collected by law enforcement (Sgt. Mark Ballais of the Grant County Sheriff's Office).

9. The can was taken into evidence and was subsequently analyzed by Scott Redhead of the Washington State Patrol Crime Laboratory.

10. Mr. Redhead, after experimenting with the can and examining it, discovered a Latent Finger Print on the dome portion of the can, under the lid, near where the nozzle is.

11. After comparing this Latent Print to a finger print of [Mr. Smiley], Mr. Redhead concluded that the Latent Print was a match to [Mr. Smiley's] right index finger. This finding was supported by 2 other peers at the State Patrol Crime Lab.

12. Although Ms. Michelle Razey's testimony was somewhat contradicted by testimony of other witnesses and by a previous declaration signed by her Under Penalty of Perjury, she did present testimony that placed [Mr. Smiley] at the scene of the crime, as did [Mr. Smiley's] own testimony as well as the testimony of Ashley Ellingsworth.

13. Further the evidence of the Finger Print on the can points to [Mr. Smiley] being in the garage. The Court is not convinced that the can found was the property of the Smiley family that had been left in a garbage can. Testimony was presented that the can that [Mr. Smiley] had used over 1 year previous. Further the can found matched the description of the type of can that was left in the garage the previous day by Mr. Jack Williams and did not match the description of any of the cans used by [Mr. Smiley's] family and left in the garbage can.

14. Mr. Williams presented testimony and an exhibit that showed he spent \$320.97 on materials to repair the damage done. He also testified that it took himself and a friend 4 days at 10 hours a day to clean up and repair the damage done. He applied a value of \$10.00 per hour for the work done for a total of \$800. (CP 40-42).

From these findings, the court made its conclusions of law and found Mr. Smiley guilty of count one, residential burglary, and

count 2, second degree malicious mischief. (CP 42-43). The evidence showed the garage was attached to the dwelling. (2/10/10 RP 21). An order on adjudication and disposition was entered on March 8, 2010. (CP 44-53). The disposition was within the standard range. (CP 46). The court stayed imposition of sentence pending appeal. (CP 54). In its order for release, the court imposed the specific condition requiring Mr. Smiley to complete his GED by September 8, 2010. (CP 55). Although the court invited a challenge to this condition, Mr. Smiley had no objection to completing his GED. (3/8/10 RP 15). The parties subsequently agreed to restitution in the amount of \$1120.97. (5/10/10 RP 2-5). Mr. Smiley appeals.

### III. ARGUMENT

A. The court erred by relying solely on fingerprint evidence to find guilt.

The court made these conclusions of law with respect to the fingerprint evidence:

1. I am not persuaded by the case cited by [Mr. Smiley] (*St. v. Bridge*, 91 Wn. App. 98) in that the finding of the court in *Bridge* was that to support a finding of guilt beyond a reasonable doubt in a case in which fingerprints are the *only evidence*, the state must make a showing, reflected in the record, that the object upon which the fingerprint was found was generally inaccessible to the

defendant at a previous time. (*Italics mine.*)

2. In the instant case there was more evidence than just the fingerprint. We had [Mr. Smiley] in the backyard late at night at about the same time that the crime was committed. The Court is not persuaded by [Mr. Smiley's] theory that Mr. Williams, or someone else, took a used can of spray foam from the garbage and left it there in an attempt to frame [Mr. Smiley]. There was no evidence produced to show that someone would know, or even should know, that [Mr. Smiley's] fingerprint would be on a can of spray foam, under the lid. (CP 42).

Contrary to the evidence, however, the court's conclusions reflect that Mr. Smiley's fingerprint was indeed the sole evidence supporting a finding of guilt. This is insufficient. *State v. Bridge*, 91 Wn. App. 98, 101, 955 P.2d 418 (1998). The court alluded to the fact that Mr. Smiley was in the backyard as other supporting evidence. But his presence in the yard was not proof of the crimes. No direct evidence shows he was in the garage. The only evidence putting him inside was circumstantial: the fingerprint on the spray foam can, which was itself found outside the garage. (CP 41). Although circumstantial evidence is no less reliable than direct evidence, nothing indicates Mr. Smiley was in the garage except the print. See *State v. Zamora*, 63 Wn. App. 220, 223, 817 P.2d 880 (1991).

Even though the trial court stated “there was more evidence than just the fingerprint,” the only other evidence mentioned was Mr. Smiley’s presence in the backyard. But he was not charged with trespass. (CP 41). The charges were residential burglary and second degree malicious mischief, both crimes allegedly committed in the dwelling/garage. See *State v. Murbach*, 68 Wn. App. 509, 513, 843 P.2d 551 (1993) (attached garage is a dwelling for purposes of residential burglary statute). Nothing but the fingerprint puts him inside. This is no more evidence than was before the learned trial judge in *Bridge*.

As noted by the court, Mr. Smiley presented evidence the spray foam can was the property of his family that had been used over a year ago and left in a garbage can. (CP 41-42; 2/11/10 RP 30-31, 53-54). Fingerprint evidence alone is sufficient to support a conviction if the trier of fact could infer from the circumstances that the fingerprint could only have been impressed at the time of the crime. *Bridge*, 91 Wn. App. at 100. The State is required to show that the object on which the print appears was inaccessible to the defendant before the time the crime was committed. *Id.* at 101. The State presented no such evidence and did not meet its burden.

Neither Mr. Smiley's presence in the backyard nor the fingerprint itself leads to a reasonable inference that the print could only have been impressed at the time of the crime. Accordingly, *Bridge* controls and the convictions should be reversed.

B. The State's evidence was insufficient to support a finding of guilt beyond a reasonable doubt.

In a challenge to the sufficiency of the evidence, the test is whether, viewing the evidence in a light most favorable to the State, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980). In such a challenge, the defendant admits the truth of the State's evidence and all reasonable inferences that can reasonably be drawn from it. *State v. Colquitt*, 133 Wn. App. 789, 137 P.3d 892 (2006). Credibility determinations are for the trier of fact and not subject to review. *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997).

Here, no rational trier of fact could find the essential elements of the crimes beyond a reasonable doubt. *Green*, 94 Wn.2d at 220. Mr. Smiley's presence in the backyard and fingerprint on a spray foam can found outside the garage are not

proof he committed the crimes. The evidence was insufficient to support the convictions. *Bridge*, 91 Wn. App. at 100-01.

#### V. CONCLUSION

Based on the foregoing facts and authorities, Mr. Smiley respectfully urges this Court to reverse his adjudication of guilt and dismiss the charges or remand for a new adjudicatory hearing.

DATED this 8<sup>th</sup> day of December, 2010.

Respectfully submitted,



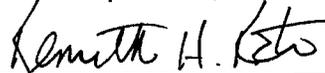
---

Kenneth H. Kato, WSBA #6400  
Attorney for Appellant  
1020 N. Washington  
Spokane, WA 99201  
(509) 220-2237

#### CERTIFICATE OF SERVICE

I, Kenneth H. Kato, certify that on December 8, 2010, I served a true and correct copy of the Brief of Appellant by first class mail, postage prepaid, on D. Angus Lee, Grant County Prosecutor, PO Box 37, Ephrata, WA 98823-0037 and Brian M. Smiley, 306 Biggs Drive, Moses Lake, WA 98837.

DATED this 8<sup>th</sup> day of December, 2010, at Spokane, WA.



---

Kenneth H. Kato