

No. 29715-2-III

FILED
November 15, 2011

**IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III**

Court of Appeals
Division III
State of Washington

STATE OF WASHINGTON,

Respondent,

v.

JOSHUA JOHN GRIFFIN,

Appellant.

**APPEAL FROM
GRANT COUNTY SUPERIOR COURT**

BRIEF OF RESPONDENT

Respectfully submitted:

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Prosecuting Attorney**

By: 
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I. IDENTITY OF RESPONDENT

The State of Washington, represented by the Grant County Prosecutor, is the Respondent herein.

II. RELIEF REQUESTED

Respondent asserts no error occurred in the trial and conviction of the Appellant.

III. ISSUE

Whether, from the evidence presented at trial, the State proved beyond a reasonable doubt that the Appellant committed the crimes of burglary in the second degree and theft in the third degree.

IV. STATEMENT OF THE CASE

On August 24, 2010 the Appellant was charged by information with one count of second degree burglary under RCW 9A.52.030(1), and one count of third degree theft under RCW 9A.56.050. Clerk's Papers (CP) 1-2.

At the jury trial, which was held on February 9-10, 2011, Daniel Pickett testified he is the foreman for EMCO General Construction Company in Moses Lake. Report of Proceedings (RP) 229-30. EMCO is

located in an industrial park next to Inland Empire Weatherization Company. RP 231. Mr. Pickett often sleeps overnight at EMCO in a bedroom on the property. RP 229-30.

On August 23, 2010, around 8:30 p.m., Mr. Pickett was sleeping in the bedroom when his dog woke him by growling. RP 234. The dog was looking out the window. RP 234. Mr. Pickett got up, looked out the window, and saw two people and a pickup truck at Inland Empire. RP 235. He did not recognize the people and thought they were both men. RP 241. Normally Mr. Pickett does not see people out walking in that area. RP 248. It was dusk and no lights were on to illuminate the area. RP 241. No one lives in that area except for Mr. Pickett. RP 247-248. It is an industrial park with industrial type businesses only. There are no homes or restaurants in that area. RP 140.

Mr. Pickett testified that he observed one of the persons standing inside the fence that encircled Inland Empire and the other person was standing outside the fence, near the pickup truck. RP 235-40. Mr. Pickett saw the person inside the fence throw a white bucket or bag over the fence to the other person, who put the item in the back of the truck. RP 235-40. Mr. Pickett then saw the truck drive away, going south. It turned on Wheeler Road and still did not have its lights turned on. RP 237, 251. There were two people in the truck when it was driving away. RP 252.

Mr. Pickett did not see any other item thrown over the fence. RP 240. He did not see anyone climb over the fence or enter a trailer that was inside the fence at Inland Empire. RP 253, 258.

Mr. Pickett called 911. RP 239. Police were dispatched and stopped a pickup truck matching the description provided by Mr. Pickett about one mile away from Inland Empire on Wheeler Road. RP 65. The driver, Anjannette Million, and the passenger, Joshua Griffin, the Appellant, were both arrested. RP 41-42, 48-49. After being advised of their Constitutional Rights regarding making statements to the police, the Appellant admitted he entered the property at Inland Empire. RP 144. Appellant never did ask why he was stopped when he was first being questioned. RP 50. He informed the police that he had cut across the property in order to meet his friend, Ms. Million, who was there to pick him up in her truck. RP 144. He was carrying a white bag of clothing with him as well as another bag and this is what he threw over the fence to Ms. Million. RP 144, 146-147. Appellant would not tell the police what was in the second bag. RP 70. The Appellant told the police he did not enter any building on the property and did not intend to steal anything. RP 144.

The truck was impounded. RP 42. Police executed a search warrant and in the bed of the truck found electrical components, old power

boxes, meter boxes, rolls of cable, a bag with painted copper tubing, and aluminum bike rims. RP 82. Also located in the bed of the truck were three white five-gallon buckets containing silverware. RP 123-24. What was not found in the bed of the pickup was a white duffel bag with clothes in it. RP 91.

Found hidden, in the cab of the truck, between the regular seat and the seat cover of the pickup, was the Appellant's wallet. RP 88-89. In the back behind the bench seat of the truck police found clothing on the floor and a white bag amongst the clothes. RP 149-50.

John Rickey testified he is the owner of Inland Empire. RP 189. The three buckets containing silverware found in Ms. Million's truck were his. RP 193. He had kept them inside a trailer on the property, which was not locked. RP 193. He had not used the silverware for a number of years. RP 207. Employees of the company had permission to enter the trailer. RP 216. Mr. Rickey never gave permission for the Appellant to go onto his property nor did he give him permission to take the buckets of silverware which he stored in his trailer. RP 196-197

The jury found the Appellant guilty of second degree burglary and third degree theft as charged. CP 36, 38.

V. ARGUMENT

A. **THE STATE PROVED ALL THE ELEMENTS OF SECOND DEGREE BURGLARY AND THIRD DEGREE THEFT AND DID NOT VIOLATE THE APPELLANT'S CONSTITUTIONAL DUE PROCESS RIGHTS.**

Due process requires the State to prove every element of the crime beyond a reasonable doubt. It is a fundamental principle of constitutional due process that the State must prove every element of a charged offense beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 477, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 368 (1970); U.S. Const. Amend. XIV; Const. Art. 1, section 3.

In reviewing the sufficiency of the evidence to uphold a conviction, the question is whether, after reviewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

1. The State proved all the elements of second degree burglary.

The Appellant argues that the State did not prove he acted with the objective or purpose to commit a theft when he remained unlawfully within the fenced area which he admits he entered.

This court will review sufficiency of the evidence challenges to determine whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 220-22, 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. *Id.* Circumstantial evidence and direct evidence are equally reliable. *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 appellate review. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

In order to prove that the Appellant committed the crime of second degree burglary the statute requires the State to prove two elements (1) intent to commit a crime and (2) an entry which is not "licensed, invited, or otherwise privileged . . ." *State v. Steinbach*, 101 Wn.2d 460, 462, 679 P.2d 369 (1984). Any challenge to the sufficiency of the evidence admits all inferences that reasonably can be drawn therefrom. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

Unlawful entry, like any other element of a crime, may be proved by circumstantial evidence. *State v. Gear*, 30 Wn. App. 307, 310, 633 P.2d 930 (1981); *see also State v. Rhoads*, 101 Wn.2d 529, 532, 681 P.2d 841 (1984). The evidence, presented by the State, supports an inference that the Appellant's entry into the fenced area of the business was not "licensed, invited, or otherwise privileged." Undisputed evidence established that the building was not open for business at the time the Appellant jumped the fence. The testimony of the owner of the business, John Rickey, established that when the Appellant jumped the fence and entered the building he did so without permission. RP 197. This evidence, when viewed in the light most favorable to the State, together with all inferences which can reasonably be drawn therefrom, was sufficient to enable a rational trier of fact to find beyond a reasonable doubt that the Appellant was not licensed, invited, or privileged to enter the fenced area of the building. But the Appellant also argues that the State did not prove that the Appellant intended to commit a crime when he jumped the fence.

If the State has proven unlawful entry, the intent to commit a crime may be inferred, unless the evidence demonstrates the entry was without criminal intent. *State v. Bennett*, 20 Wn. App. 783, 788-89, 582 P.2d 569 (1978). Intent to commit a crime may be inferred when a person

enters or remains unlawfully. *State v. Cantu*, 156 Wn.2d 819, 826, 132 P.3d 725 (2006); see *State v. Bishop*, 90 Wn.2d 185, 189, 580 P.2d 259 (1978). RCW 9A.52.040 defines the permissible inference of criminal intent as follows:

In any prosecution for burglary, any 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, unless such entering or remaining shall be explained by evidence satisfactory to the trier of fact to have been made without such criminal intent.

A permissive inference is constitutionally impermissible only when “there is no rational way the trier could make the connection permitted by the inference.” *State v. Grayson*, 48 Wn. App. 667, 670, 739 P.2d 1206 (1987) (internal quotation marks omitted) (quoting *State v. Johnson*, 100 Wn.2d 607, 616, 674 P.2d 145 (1983), overruled on other grounds by *State v. Bergeron*, 105 Wn.2d 1, 711 P.2d 1000 (1985)). Thus, for a trier of fact to draw inferences from proven facts, the inference must be “rationally related” to the proven facts. *State v. Jeffries*, 105 Wn.2d 398, 442, 717 P.2d 722 (1986). The State need only establish that criminal intent was “more likely than not.” *State v. Deal*, 128 Wn.2d 693, 700, 911 P.2d 996 (1996) (citing *State v. Brunson*, 128 Wn.2d 98, 107, 905 P.2d 346 (1995)). The inference of criminal intent is “supported by common knowledge and experience.” *State v. Brunson*, 76 Wn. App. 24, 27, 877 P.2d 1289 (1994), *aff’d*, 128 Wn.2d 98, 905 P.2d 346 (1995).

The finder of fact looks at all the facts and circumstances surrounding the act. *Bergeron*, 105 Wn.2d at 19-20. The inference of criminal intent is "supported by common knowledge and experience." *Brunson*, 76 Wn. App. at 27. Indeed, "noncriminal reasons for unlawfully entering a dwelling are few." *Id.* (quoting *State v. Bishop*, 90 Wn.2d 185, 189, 580 P.2d 259 (1978)).

The Appellant, when confronted by the police only minutes after he left in the pickup, was not believable. First, he said he was waiting in the area for his friend to pick him up. RP 70. When looking at that statement the evidence showed the trier of fact that there was no reason for the Appellant to be in that area that time of night. It was 8:15 pm, or later and only industrial type businesses are located in that area. RP 56, 140. There was no evidence showed to the jury the Appellant was reasonably visiting anyone in the area. It was not a logical answer.

Second, the Appellant told the police that when he was walking in that area he just happened to see his ride sitting behind the victim's building on a ditch canal road at dusk. RP 70. The road she was on is not normally used for traffic either by cars or pedestrians. RP 248.

The Appellant continued to tell the police that he did in fact go into the fenced area by jumping the fence both to get in and to leave. RP 70. The witness, Mr. Pickett, did see a person on the inside of the fence

tossing a white bucket or bag over. RP 235-40. The Appellant said he threw a white and brown bag over the fence. RP 70. The person on the other side of the fence took the item he threw over and placed it in the bed of the truck. RP 235-40. When the police searched the truck no white bag was found, only three white buckets. RP 91. The only clothes that were found during the search were located behind the bench seat of the pickup and they were not in a white bag. RP 149-150.

The third circumstance supporting conviction is the stolen property found in the truck. The three buckets of silverware were found to have been stolen from the shed located on the victim's property. This was found in the truck bed only minutes after it left the back of Inland Empire's property.

After considering the entire record before the court, including all the evidence, both direct and circumstantial, this court should find that the State proved the essential elements of second degree burglary beyond a reasonable doubt.

2. The State proved all the elements of third degree theft.

For the same reasons the State argues it proved the elements of burglary in the second degree, the State also proved the Appellant committed the crime of third degree theft.

The State agrees with the Appellant that to prove the crime of third degree theft, the State was required to prove beyond a reasonable doubt that the Appellant “wrongfully obtained or exerted unauthorized control over property of another,” and that he “intended to deprive the other person of the property.” CP 34; RCW 9A.56.050(1) (a) (“a person is guilty of theft in the third degree if he or she commits the theft of property or services which ... does not exceed seven hundred fifty dollars in value”); RCW 9A.56.020(1) (a) (“‘Theft’ means...[t]o wrongfully obtain or exert unauthorized control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services.”).

When deliberating, the jury was instructed that “wrongfully obtain” means “to take wrongfully the property or services of another.” CP 35. The jury was also instructed that “unauthorized control” means “among other things, having another’s property in one’s possession, custody or control, to secrete, withhold or appropriate the same to one’s own use or to the use of any person other than the true owner or person entitled thereto.” CP 35.

Taking into account all the evidence that was discussed prior to this issue raised, Mr. Rickey also testified regarding the value of the items taken. He stated that there were five place settings for silverware valued at \$15 for each setting. He stated that three buckets of silverware were taken which would value between a couple of hundred dollars to one thousand dollars. RP 194-195. Cpl. Tufte also testified that when he reviewed the crime scene where the buckets were taken from, the footprints and evidence found showed that the prints were fresh as there was no dust in the area where the buckets were lifted from. RP 74.

After reviewing all the facts that were presented at trial, when viewed in the light most favorable to the State, together with all inferences which can reasonably be drawn therefrom, the evidence presented was sufficient to enable a rational trier of fact to find beyond a reasonable doubt that the Appellant committed the crime of theft in the third degree.

VI. CONCLUSION

The State proved all of the elements of second degree burglary and third degree theft. The convictions should not be reversed and the convictions should stand affirmed.

Dated this 15th day of November 2011.

Respectfully submitted,
D. ANGUS LEE
Prosecuting Attorney

By: 
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COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,)	
)	
Respondent.)	No. 29715-2-III
)	
v.)	
)	
JOSHUA JOHN GRIFFIN,)	DECLARATION OF MAILING
)	
Appellant.)	
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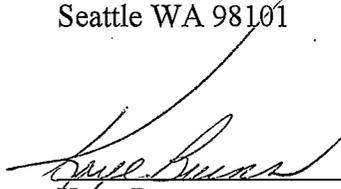
Under penalty of perjury of the laws of the State of Washington, the undersigned declares:

That on this day I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to Appellant and to Maureen M. Cyr, attorney for Appellant, containing a copy of the *Brief of Respondent* in the above-entitled matter.

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Dated: November 15, 2011.



Kaye Burns

Declaration of Mailing.