

**FILED**

JUN 24, 2012

Court of Appeals  
Division III  
State of Washington

No. 30542-2-III

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

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

BRANDON SCOTT LANGFORD,

Defendant/Appellant.

---

Appellant's Brief

---

DAVID N. GASCH  
WSBA No. 18270  
P.O. Box 30339  
Spokane, WA 99223-3005  
(509) 443-9149  
Attorney for Appellant

**TABLE OF CONTENTS**

A. ASSIGNMENT OF ERROR.....4

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR.....4

C. STATEMENT OF THE CASE.....4

D. ARGUMENT.....5

Mr. Langford’s right to due process under Washington  
Constitution, Article 1, § 3 and United States Constitution,  
Fourteenth Amendment was violated where the State failed to  
prove the essential elements of the crime of residential burglary...5

E. CONCLUSION.....9

**TABLE OF AUTHORITIES**

<u>Cases</u>	<u>Page</u>
<i>In re Winship</i> , 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).....	5, 6
<i>State v. Baeza</i> , 100 Wn.2d 487, 670 P.2d 646 (1983).....	5, 7
<i>State v. Collins</i> , 2 Wn. App. 757, 470 P.2d 227, 228 (1970).....	6
<i>State v. Green</i> , 94 Wn.2d 216, 616 P.2d 628 (1980).....	6
<i>State v. Moore</i> , 7 Wn. App. 1, 499 P.2d 16 (1972).....	6
<i>State v. Murbach</i> , 68 Wash.App. 509, 843 P.2d 551 (1993).....	8

<i>State v. Myers</i> , 133 Wn.2d 26, 941 P.2d 1102 (1997).....	7
<i>State v. Neal</i> , 161 Wn.App. 111, 249 P.3d 211 (2011).....	8
<i>State v. Partin</i> , 88 Wn.2d 899, 567 P.2d 1136 (1977).....	7
<i>State v. Salinas</i> , 119 Wn.2d 192, 829 P.2d 1068 (1992).....	6, 7
<i>State v. Taplin</i> , 9 Wn. App. 545, 513 P.2d 549 (1973).....	6
<i>State v. Theroff</i> , 25 Wn. App. 590, 608 P.2d 1254, aff'd, 95 Wn.2d 385, 622 P.2d 1240 (1980).....	7
<i>State v. Zamora</i> , 63 Wn. App. 220, 817 P.2d 880 (1991).....	7

**Constitutional Provisions**

United States Constitution, Fourteenth Amendment.....	5
Washington Constitution, Article 1, § 3.....	5

**Statutes**

RCW 9A.04.110(7).....	8
RCW 9A.52.025(1).....	7

A. ASSIGNMENT OF ERROR

The evidence was insufficient to support the conviction of residential burglary.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Was Mr. Langford's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment violated where the State failed to prove the essential elements of the crime of residential burglary?

C. STATEMENT OF THE CASE

Brandon Langford was seen in the vicinity of his brother's house carrying a gas can around 10 p.m. His brother immediately checked his shed and discovered his gas can was missing. RP 28-30, 37. The police were called but were unable to locate Mr. Langford in the immediate area. RP 41, 44. Later that same night the police responded to another call in a different neighborhood reporting a prowler less than a mile from the first incident. The police located Mr. Langford hiding under a bush. RP 44-48.

A jury convicted Mr. Langford of residential burglary for the theft of the gas can. The jury was instructed in pertinent part:

To convict the defendant of the crime of residential burglary, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about August 23, 2011, the defendant entered or remained unlawfully in a dwelling;

(2) That the entering or remaining was with intent to commit a crime against a person or property therein; and

(3) That this act occurred in the State of Washington.

CP 15.

Dwelling means any building or structure, though movable or temporary, or a portion thereof, which is used or ordinarily used by a person for lodging.

CP 19.

This appeal followed. CP 34-35.

#### D. ARGUMENT

Mr. Langford's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment was violated where the State failed to prove the essential elements of the crime of residential burglary.

As a part of the due process rights guaranteed under both the Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment the state must prove every element of a crime charged beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). As the United States Supreme Court

explained in *Winship*: “[T]he use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law.” *In re Winship*, 397 U.S. at 364.

Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. *State v. Moore*, 7 Wn. App. 1, 499 P.2d 16 (1972). As a result, any conviction not supported by substantial evidence may be attacked for the first time on appeal as a due process violation. *Id.* “Substantial evidence” in the context of a criminal case, means evidence sufficient to persuade “an unprejudiced thinking mind of the truth of the fact to which the evidence is directed.” *State v. Taplin*, 9 Wn. App. 545, 513 P.2d 549 (1973) (quoting *State v. Collins*, 2 Wn. App. 757, 759, 470 P.2d 227, 228 (1970)).

In determining the sufficiency of the evidence, the test is “whether, after viewing 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.” *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (citing *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980)). “When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn

in favor of the State and interpreted most strongly against the defendant." *Salinas*, 119 Wn.2d at 201, 829 P.2d 1068 (citing *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977)). "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, 829 P.2d 1068 (citing *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254, aff'd, 95 Wn.2d 385, 622 P.2d 1240 (1980)).

While circumstantial evidence is no less reliable than direct evidence, *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997), evidence is insufficient if the inferences drawn from it do not establish the requisite facts beyond a reasonable doubt. *Baeza*, 100 Wn.2d at 491, 670 P.2d 646. Specific criminal intent may be inferred from circumstances as a matter of logical probability." *State v. Zamora*, 63 Wn. App. 220, 223, 817 P.2d 880 (1991).

"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 other than a vehicle." RCW 9A.52.025(1). Dwelling is defined as "any building or structure, though movable or temporary, or a portion thereof, which is used or ordinarily used by a

person for lodging." RCW 9A.04.110(7). The jury in this case was so instructed. CP 15, 19.

There is insufficient evidence to support Mr. Langford's conviction because the shed he entered from which he allegedly stole the gas can was not a "dwelling."

In *State v. Neal*, 161 Wn.App. 111, 249 P.3d 211 (2011), Troy Neal argued he was improperly convicted of residential burglary because the tool room he entered unlawfully, though located in a residential apartment building, was not a "dwelling." Neal contended there was insufficient evidence to support this element because no one lived or slept in the tool room. The Washington Supreme Court held the statutory definition of "dwelling" does not mean that the part of the building actually entered unlawfully must be used for lodging. Instead, the statutory definition was satisfied because the apartment building itself, in which the tool room was located, was used for lodging. *Neal*, 161 Wn.App. 111, 113-14, 249 P.3d 211.

In an earlier case preceding *Neal*, the Court held that a garage attached to a home was part of a "dwelling" because it was a portion of a building used as lodging. *State v. Murbach*, 68 Wash.App. 509, 513, 843 P.2d 551 (1993).

In this case, unlike in *Neal*, Mr. Langford did not enter any building used for lodging to enter the shed. Moreover, unlike *Murbach*, Mr. Langford did not enter a garage or other structure that was attached to the residence. There is nothing in the record, herein, to indicate the shed was anything other than a separate structure. Since the shed was not contained within a dwelling or attached to a dwelling, it does not meet the definition of “dwelling” pursuant to the statute or the cases cited above. Therefore, because this essential element was not satisfied, the evidence was insufficient to support the conviction for residential burglary.

E. CONCLUSION

For the reasons stated, the conviction should be reversed.

Respectfully submitted June 24, 2012,

---

s/David N. Gasch  
Attorney for Appellant

PROOF OF SERVICE (RAP 18.5(b))

I, David N. Gasch, do hereby certify under penalty of perjury that on June 24, 2012, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or e-mailed by prior agreement (as indicated), a true and correct copy of brief of appellant:

Brandon Scott Langford  
#317080  
1313 N. 13<sup>th</sup> Ave  
Walla Walla WA 99362

**E-mail: prosecuting@co.benton.wa.us**  
Andrew Kelvin Miller  
Benton County Prosecutors Office  
7122 W. Okanogan Place, Bldg. A  
Kennewick WA 99336-2359

---

s/David N. Gasch, WSBA #18270  
Gasch Law Office  
P.O. Box 30339  
Spokane, WA 99223-3005  
(509) 443-9149  
FAX: None  
gaschlaw@msn.com