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

NO. 35947-2-II

FILED
COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY
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STATE OF WASHINGTON

Respondent,

vs.

Patrick Drum

Appellant.

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF WASHINGTON
FOR JEFFERSON COUNTY
Cause Number: 04-1-00110-8

BRIEF OF RESPONDENT

JUELANNE DALZELL
Jefferson County Prosecuting Attorney
Attorney for Respondent

P.O. Box 1220
Port Townsend, WA 98368
(360) 385-9180

Date: August 16, 2007

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STATEMENT OF THE CASE

I Restatement of Issues Presented

Defendant's appeal presents four issues:

A. One of the elements of Residential Burglary is intent to commit a crime against a person or property therein. RCW 9A.52.025 At the conclusion of a bench trial the trial court must enter findings of fact and conclusions of law sufficient to sustain the conviction. CrR 6.1(d). In the absence of a finding on a factual issue, an appellate court presumes that the party with the burden of proof failed to sustain the burden on the issue. *State v. Armenta*, 134 Wn.2d 1, 14, 948 P.2d 1280 (1997). Does the finding of fact's omission of the words "against a person or property" require a reduction to Criminal Trespass?

B. A permissive inference is an evidentiary device that allows the factfinder to infer the presumed fact from a proven fact. *State v. Brunson*, 128 Wn.2d 08, 105, 905 P.2d 346 (1995). However, when a permissive inference is the "sole and sufficient" proof of an element, the presumed fact must flow from the proven fact beyond a reasonable doubt. *Brunson* at 107, citing *County Court of Ulster County v. Allen*, 442 U.S. 140, 167, 99 S.Ct.2213, 60 L.Ed. 2d 777 (1979). Was the use of the permissive inference from RCW 9A.52.040 constitute "sole and sufficient" proof?

C. Due process prohibits the use of conclusive presumptions because they conflict with the presumption of innocence. *State v. Savage*, 94 Wn.2d 569, 573, 618 P.2d 82 (1980). Did the trial court use the inference from RCW 9A.52.040 conclusively?

D. Mr. Drum asserts the Drug Court Contract is equivalent to a guilty plea. To comport with due process, a guilty plea must be accompanied by an affirmative showing that the plea was made intelligently and voluntarily. *Boykin v. Alabama*, 395 U.S. 238, 23 L.Ed. 2d 274, 89 S.Ct. 1709 (1969). Was the Drug Court Contract equivalent to a guilty plea, and, if so, was it made intelligently and voluntarily?.

II Statement of Facts

Patrick Drum was charged with Residential Burglary in Jefferson County Superior Court. CP 1-2. The police report states that on Sept. 28, 2004,

Mr. Drum entered the residence of Mary Sanelli, who saw Mr. Drum in her residence, called 911, and fled to a neighbor's house. A neighbor saw Mr. Drum exit Ms. Sanelli's residence and move toward another house before being scared away by the neighbor. Mr. Drum was arrested shortly thereafter. RP 2.

Mr. Drum claimed he was under the influence of intoxicants and before trial, filed a completed Drug Court Contract with the court on October 29, 2004. RP 30, Supp. CP. The contract contained the following terms:

16. That it is the Judge's decision to determine when the defendant has earned the ability to graduate from the Program and to determine when termination from the Program will occur.

...

17. That if the defendant chooses to leave the Program within the first two weeks after signing the Drug Court Contract, withdrawal will be allowed, this contract will be declared null and void, and the defendant will assume prosecution under the pending charge(s) as if this contract had never been agreed to. The defendant agrees that this ability to withdraw from the terms of the contract will cease after the period of two weeks following the effective date of this contract and thereafter the defendant shall remain in the Program until graduation unless his/her participation is terminated by the Court. The defendant further agrees that the ability to withdraw from the terms of this contract will cease within the first two weeks, if he/she has committed a willful violation of this contract for which, in the judgment of the Court, he/she may be terminated from the program.

....

19. If the defendant is terminated from the Program, the defendant agrees and stipulates that the Court will determine the issue of guilt on the pending charge(s) solely upon the enforcement/investigative agency reports or declarations, witness statements, field test results, lab test results, or other expert testing or examinations such as fingerprint or handwriting comparisons, which constitutes the basis for the prosecution of the pending charge(s). The defendant further agrees and stipulates that the facts presented by such reports, declarations, statements and/or expert examinations are sufficient for the Court to find the defendant guilty of the pending charge(s).

....

Defendant acknowledges an understanding of, and agrees to waive

the following rights:

1. The right to a speedy trial;
2. The right to a public trial by an impartial jury in the county where the crime is alleged to have been committed;
3. The right to hear and question any witness testifying against the defendant;
4. The right to have witnesses testify for the defense, and for such witnesses to be made to appear at no expense to the defendant;
- and
5. The right to testify at trial.

Prior to accepting the contract the court discussed it with Mr. Drum and established that Mr. Drum had reviewed it thoroughly with his attorney and believed he understood it. RP 31-32. The following colloquy occurred on October 29, 2004:

“THE COURT: Actually, it must. I’ve got here a Drug Court Contract, Mr. Drum. Did you review that thoroughly with Mr. Charleton (Drum’s Attorney).

MR.DRUM: Yes, I did.

THE COURT: Do you understand what you’re getting into?

MR.DRUM: Yes, I do.

THE COURT: This is not an easy way to get out of a felony conviction. It requires a lot of effort on your part, and you’ll be under the scrutiny of the court for the next at least two years, do you understand that?

MR.DRUM: Yes, I do.

THE COURT: And that jail time will be imposed if you violate the conditions of your agreement with the court, and sometimes you end up getting more jail time in Drug Court than you would by pleading guilty, just because you can't stay straight, you know that?

MR.DRUM: Yes, I do.”

Forty two days later, on December 10, 2004, Mr. Drum asked to be released from the Drug Court Contract. RP 36.

In a January 21, 2005, hearing in Jefferson County Superior court, Mr. Drum made the following statement about the events of Sept. 28, 2004:

“I – I was very intoxicated this day, and I was asking this lady to use the phone. I'm not going to say that my record doesn't show cases where I've entered people's houses high on intoxicants. I've definitely got to quit doing that stuff, 'cause it puts my mind in a state where I just have no respect for property or things. But at the time when she confronted me, my intent was to ask if I could use the phone, 'cause I was high and lost...” RP 71

On February 4, 2005, the court found Mr. Drum guilty of Residential Burglary in a bench trial. The court made a Finding of Fact that Mr. Drum entered the residence with intent to commit a crime. RP 69-70.

Argument

III Standard of Review

Evidence is sufficient to support a conviction if, when viewed in the light most favorable to the State, 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 there from.” *Id.* at 201. Circumstantial evidence and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

We will not disrupt a trier of fact's credibility determinations. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). Rather, we defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Walton*, 64 Wn.App. 410, 415-16, 824 P.2d 533 (1992).

IV The evidence was sufficient to prove Mr. Drum guilty of residential burglary and the court found criminal intent

In a criminal case, conviction requires proof beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed. 2nd 368 (1970).

RCW 9A.52.040 Inference of Intent. 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.

Evidence is sufficient if, after reviewing it in the light most favorable to the State, a rational trier of fact could have found the essential elements of the charge proved beyond a reasonable doubt. *State v. Myers*,

133 Wn.2d 26, 37, 941 P.2d 1102 (1997). By claiming the evidence is insufficient, the defendant admits the truth of the State's evidence and all reasonable inferences that can reasonably be drawn from it. *Myers*, 133 Wn.2d at 37. All reasonable inferences are drawn in favor of the State and against the defendant. *Id.*

In this case, Mr. Drum stipulated that the evidence in the police report was sufficient to find him guilty as part of the Drug Court Contract he signed. The court verified Mr. Drum was familiar with the Drug Court Contract and had reviewed it with his attorney. Mr. Drum was charged with Residential Burglary. One of the elements of Residential Burglary is intent to commit a crime against a person or property therein. RCW 9A.52.025. Thus Mr. Drum has stipulated he had the required intent.

After the Drug Court Contract was terminated, Mr. Drum attempted to convince the court that his unlawful residential entry was due to intoxicants and there was no criminal intent. The court found Mr. Drum's explanation unconvincing and entered a finding of fact that Mr. Drum acted with criminal intent. The evidence, Mr. Drum's stipulations, and the permissive inference from RCW 9A.52.040 were sufficient to find guilt.

Criminal Rule 6.1(d) requires courts in bench trials to enter written findings and conclusions. *State v. Head*, 136 Wn.2d 619, 621-22, 964 P.2d 1187 (1998). The findings must address the elements of each crime

separately and indicate the factual basis for each. *State v. Denison*, 78 Wn.App. 566, 570, 897 P.2d 437 (1995). If the written findings do not address each element of the offense, and there is no evidence in the record to support the omitted findings, reversing and dismissing the charge is warranted. *State v. Alvarez*, 128 Wn.2d 1, 19, 904 P.2d 754 (1995). If, however, the court failed to enter written findings and conclusions, but sufficient evidence in the record establishes that the State met its burden of proof; the case may be remanded for revision of the findings. *Head*, 136 Wn.2d at 624; *Alvarez*, 128 Wn.2d at 19. Here, since the state clearly met its burden of proof, at most the case could be remanded for revision of the findings to include the words “against a person or property.”

However, since Mr. Drum has already stipulated to the sufficiency of the evidence to prove he is guilty of residential burglary, revision of the finding of fact is unnecessary to show guilt for that crime.

Mr. Drum’s conviction should be affirmed.

V The trial court correctly used a permissive inference for proof of intent.

A permissive inference is an evidentiary device that allows the factfinder to infer the presumed fact from a proven fact. *State v. Brunson*, 128 Wn.2d 98, 105, 905 P.2d 346 (1995). When a proven fact is the “sole and sufficient” proof of an element, the presumed fact must flow from the proven fact beyond a reasonable doubt. *Brunson* at 107, citing *County Court of Ulster County v. Allen*, 442 U.S. 140, 167, 99 S.Ct.2213, 60 L.d.

2d 777 (1979). Here, however, the proven fact of Mr. Drum's illegal presence in the house of another is supported by Mr. Drum's stipulation that the evidence in the police report is sufficient for the court to find guilt. Therefore the evidence was more than just a sole permissive inference and is sufficient to support his conviction.

Mr. Drum's conviction should be affirmed.

VI The trial court's guilty verdict did not violate Mr. Drum's constitutional right to due process

The Washington State Supreme Court has rejected the use of any conclusive presumption to find an element of a crime whether the presumption is judicially created or derived from statute. *State v. Mertens*, 148 Wn.2d 820, 834, 64 P.3d 633 (2003). However, the court has approved the permissive inference of intent to commit a crime "whenever the evidence shows a person enters or remains unlawfully in a building." *State v. Cantu*, 156 Wn.2d 819, 826 132 P.3d 725 (2006) (citing *State v. Grimes*, 92 Wn.App. 973, 980 n. 2., 966 P.2d 394 (1998)). The court overturned a guilty verdict where a juvenile broke into his mother's locked bedroom and the only evidence of criminal intent was the presumption of RCW 9A.52.040. *Cantu, Id.* In this case, unlike *Cantu*, Mr. Drum stipulated the evidence was sufficient to find guilt for residential burglary and Mr. Drum provided an explanation for his presence in the residence

that the trial court found unconvincing. The presumption was permissive, not mandatory, and was therefore constitutional.

Mr. Drum's conviction should be affirmed.

VII The Drug Court Contract does not violate due process

To comport with due process, a guilty plea must be accompanied by an affirmative showing that the plea was made intelligently and voluntarily, with an understanding of the full consequences of the plea. *State v. Barton*, 93 Wn.2d 301, 304, 609 P.2d 1353 (1980). In this case, Mr. Drum signed a Drug Court Contract in which he stipulated that the evidence was sufficient for a court to find guilt. In effect, it was a guilty plea.

Mr. Drum and his attorney drew up the Drug Court Contract in jail and asked the court to accept it. Before accepting Mr. Drum's contract the court asked whether Mr. Drum had: gone over the contract thoroughly with his attorney; understood it; understood that it would be a difficult contract and he would be under constant scrutiny by the court; and that jail time would be imposed "if you violate the conditions of your agreement with the court, and sometimes you end up getting more jail time in drug court than you would by pleading guilty, just because you can't stay straight, you know that?" Mr. Drum answered affirmatively to each question by the court showing that the contract was completed

intelligently, voluntarily, and with full understanding of the possible consequences. RP 31-32.

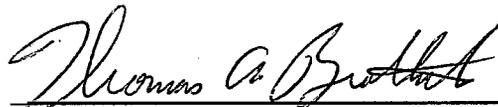
Mr. Drum's conviction should be affirmed.

CONCLUSION

The State respectfully requests that this Court affirm Appellant's sentence as determined by the trial court and that Appellant be ordered to pay costs, including attorney fees, pursuant to RAP 14.3,18.1 and RCW 10.73.

Respectfully submitted this 16th day of August, 2007

JUELANNE DALZELL, Jefferson County
Prosecuting Attorney



By: Thomas A. Brotherton , WSBA # 37624
Deputy Prosecuting Attorney

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON
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DIVISION II

STATE OF WASHINGTON,
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PATRICK DRUM,
Appellant.

Case No.: 35947-2-II
Superior Court No.: 04-1-00110-8

DECLARATION OF MAILING

Janice N. Chadbourne declares:

That at all times mentioned herein I was over 18 years of age and a citizen of the United States; that on the 16th day of August, 2007, I mailed, postage prepaid, a copy of the State's

BRIEF OF RESPONDENT to the following:

David C. Ponzoha, Clerk
Court of Appeals, Division II
950 Broadway, Suite 300
Tacoma, WA 98402-4454

Manek R. Mistry
Jodi R. Backlund
BACKLUND & MISTRY
203 Fourth Ave E., Suite 404
Olympia WA 98501

Patrick Drum, DOC #784289
Washington State Penitentiary
1313 N 13th Street
Walla Walla, Washington 99362

I declare under penalty of perjury under the laws of the State of Washington that the foregoing declaration is true and correct.

Dated this 16th day of August, 2007, at Port Townsend, Washington.


Janice N. Chadbourne
Legal Assistant

DECLARATION OF MAILING
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JUELANNE DALZELL
PROSECUTING ATTORNEY
FOR JEFFERSON COUNTY
Courthouse -- P.O. Box 1220
Port Townsend, WA 98368
(360) 385-9180