

67416-1

67416-1

REC'D

NO. 67416-1-I

DEC 07 2011  
King County Prosecutor  
Appellate Unit

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

REC'D

DEC 08 2011  
King County Prosecutor  
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

V.A.,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KING COUNTY, JUVENILE  
DIVISION

The Honorable Chris Washington, Judge

BRIEF OF APPELLANT

ERIC J. NIELSEN  
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC  
1908 E Madison Street  
Seattle, WA 98122  
(206) 623-2373

2011 DEC 7 PM 4:38

COPIES TO: [unclear]  
[unclear]  
[unclear]

**TABLE OF CONTENTS**

	Page
A. <u>ASSIGNMENTS OF ERROR</u> .....	1
<u>Issues Pertaining to Assignments of Error</u> .....	1
B. <u>STATEMENT OF THE CASE</u> .....	2
1. <u>Procedural Facts</u> .....	2
2. <u>Substantive Facts</u> .....	2
3. <u>Facts Pertaining to Assignments of Error</u> .....	6
C. <u>ARGUMENTS</u> .....	7
1. THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE CONVICTION BECAUSE THE ONLY EVIDENCE OF THE ESSENTIAL ELEMENT, THAT V.A. KNOWINGLY ENTERED OR REMAINED UNLAWFULLY, WAS BASED ON INADMISSIBLE HEARSAY AND INCOMPETENT TESTIMONY. ....	7
2. THE EVIDENCE WAS INSUFFICIENT TO SHOW V.A. DID NOT REASONABLY BELIEVE SHE WAS PERMITTED TO BE IN THE APARTMENT.....	10
D. <u>CONCLUSION</u> .....	12

**TABLE OF AUTHORITIES**

	Page
<b><u>WASHINGTON CASES</u></b>	
<u>Car Wash Enters., Inc. v. Kampanos</u> 74 Wn. App. 537, 874 P.2d 868 (1994).....	11
<u>City of Bremerton v. Widell</u> 146 Wn.2d 561, 51 P.3d 733 (2002).....	11
<u>Hollingsworth v. Wash. Mut. Sav. Bank</u> 37 Wn. App. 386, 681 P.2d 845 (1984).....	8
<u>State v. Armenta</u> 134 Wn.2d 1, 948 P.2d 1280 (1997).....	11
<u>State v. Brown</u> 127 Wn.2d 749, 903 P.2d 459 (1995).....	8
<u>State v. Chapin</u> 118 Wn.2d 681, 826 P.2d 194 (1992).....	7
<u>State v. Colquitt</u> 133 Wn. App. 789, 137 P.3d 892 (2006).....	7
<u>State v. Edwards</u> 131 Wn. App. 611, 128 P.3d 631 (2006).....	8
<u>State v. Enlow</u> 143 Wn. App. 463, 178 P. 3d 366 (2008).....	7
<u>State v. Miles</u> 77 Wn.2d 593, 464 P.2d 723 (1970).....	9
<u>State v. Read</u> 147 Wn.2d 238, 53 P.3d 26 (2002).....	9
<u>State v. Ryan</u> 48 Wn.2d 304, 293 P.2d 399 (1956).....	10

**TABLE OF AUTHORITIES (CONT'D)**

	Page
<u>State v. Smith</u> 155 Wn.2d 496, 120 P. 3d 559 (2005).....	7

**FEDERAL CASES**

<u>In re Winship</u> 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).....	7
--	---

**RULES, STATUTES AND OTHER AUTHORITIES**

ER 602 .....	1, 8
ER 801 .....	1, 8
ER 802 .....	8
RCW 9A.44.086 .....	2
RCW 9A.52.010 .....	8
RCW 9A.52.080 .....	8

A. ASSIGNMENTS OF ERROR

1. The court erred in entering finding of fact # 4. CP17.<sup>1</sup>
2. The court erred in entering conclusions of law II #'s 1,2 and 3. CP 18.
3. The court erred in admitting prejudicial hearsay statements in violation of ER 801(c).
4. The court in admitting testimony, where the witness did not have personal knowledge of the facts testified to, in violation of ER 602.
5. There was insufficient evidence to support appellant's conviction.

Issues Pertaining to Assignments of Error

Appellant was charged with second degree trespass for unlawfully entering and remaining in an apartment. Appellant testified a member of the group she was with told her that the apartment belonged to his aunt. The maintenance supervisor of the complex where the apartment was located testified he was told by the property manager, who did not testify at trial, that the apartment was vacant and the property manager did not give anyone permission to be in the apartment.

---

<sup>1</sup> The trial court's written findings of fact and conclusions of law are attached hereto as an appendix and incorporated herein.

1. Did the court err in admitting the hearsay statements of the property manager?

2. Did the court err in admitting the testimony of the maintenance supervisor when he did not have personal knowledge of the facts he testified to?

3. Did the court err in entering finding of fact #4 where there was no admissible evidence to support that finding?

4. Were the court's conclusions of law II #'s 1,2 and 3 supported by the findings of fact where the findings were unsupported by any admissible evidence?

5. Was there insufficient evidence to support the conviction?

B. STATEMENT OF THE CASE

1. Procedural Facts

The King County Prosecutor's Office charged V.A. second degree trespass, in violation of RCW 9A.52.080. CP 1. At a bench trial, the Honorable Chris Washington found V.A. guilty. RP 106-107; CP 14. V.A. was sentenced to six months of supervision and 16 hours of community service. CP 20-22.

2. Substantive Facts

On the evening of February 10, 2011, police were dispatched to the Kent Terrace Apartment complex in response to a silent alarm. RP 26-27.

42. When police arrived they noticed a number of people inside unit G-103. RP 28. Police attempted to get the people inside the apartment to come outside. Someone in the apartment started to open the door but then ran back inside. RP 29. Police then went inside the apartment where they found a “bunch of people.” Id.

A police helicopter was also hovering over the apartment complex. RP 29. Officers in the helicopter notified officers on the ground there were people at the southwest corner of the complex and they had left the apartment through a window. RP 30-32. At the location police found V.A., and two others. RP 36. They were taken back to the apartment where police had detained the other people that were in the apartment. RP 38, 50-51.

V.A. was eventually arrested. RP 32. Officer Ken Clay transported V.A. to the police station and during the trip Clay asked V.A. what she was doing in the apartment. RP 53. She told Clay her friends had picked her up that evening but she did not know where they were going to take her. RP 54.

John Caudill is the maintenance supervisor for the Kent Terrace Apartments. RP 15. His job is to maintain the property. RP 15-16. Caudill said there was no furniture in apartment G-103. RP 18. Caudill said that apartment G-103 was vacant on February 10, 2011 and was going

to be leased the following month. RP 17. The prosecutor asked Caudill if he or anyone else gave V.A. permission to be in the apartment. RP 19. Caudill was allowed to testify that he was told by the property manager the apartment was vacant and it was the property manager who told him she did not give anyone permission to be in the apartment. RP 19-22.

V.A. testified she was “hanging out” with her friends Margie and TT. RP 61. Margie called her friend Raul who came and picked them up in his car. RP 62. Raul drove them to the apartment complex. V.A. had never been there before. RP 63-64.

When they arrived a group of people, who V.A. did not know, were there in another car. RP 64. She asked whose apartment they were at and someone in the other group told her it was his aunt’s house. RP 65.

The group from the other car started to go inside and V.A. and her two friends followed them. RP 66. When V.A. got inside she went directly to the bathroom, which was off the hallway. There was toilet paper in the bathroom. RP 69.

A few seconds after she left the bathroom there was a knock on the door and her friend TT ran by and told V.A. and Margie to “come on.” RP 70. V.A. followed TT out the back window and they walked to a neighbor’s yard. RP 70-71. There were there when the police confronted them. Id.

V.A. was in the apartment for about two or three minutes. RP 72. She did not walk into the living area nor was she able to see the living area because the others that were there blocked her view. RP 82-83. She did not know she was not allowed to be in the apartment. RP 72.

V.A.'s friend Margorie Kramer confirmed she was with V.A. and TT when Kramer called her friend Raul. RP 86. Raul picked them up and drove them to the apartment complex. When they arrived some of Raul's friends were already there in another car. RP 87. Someone in the other car said the apartment belonged to his aunt. RP 88.

Kramer said when they entered the apartment V.A. immediately went into the bathroom. RP 88. Kramer went into the living and saw there was no furniture but she assumed the person's aunt had moved out or was in the processes of moving out. RP 89.

A few seconds after V.A. came out of the bathroom the police arrived. RP 90. V.A. never walked through the apartment because soon after V.A. left the bathroom she and Kramer followed TT out the window. RP 90-91. Kramer explained that V.A. could not have seen into the living room because others were blocking her view. RP 95.

The court found V.A. guilty of the trespass. The court stated that V.A. should not have run but instead she should have stayed in the

apartment when the police arrived and explained to police what she testified to at trial. RP 106.

3. Facts Pertaining to Assignments of Error

Prior to trial defense counsel moved to exclude Caudill from testifying the apartment was vacant and that nobody was given permission to be in the apartment. RP 7-8. Counsel argued the testimony was inadmissible because based on her interview with Caudill, he had no personal knowledge of those facts and he received that information from the property manager, therefore his testimony was hearsay. RP 8. The court declined to rule on the motion preferring to wait until Caudill testified. RP 9.

Over V.A.'s contemporaneous hearsay and lack of personal knowledge objections, Caudill was allowed to testify that apartment G-103 was vacant on February 10, 2011 and that neither he nor anyone else had permission to be in the apartment after hours. RP 19. On cross examination Caudill testified he was told by the property manager that the apartment was vacant and it was also the property manager who told him she did not give anyone permission to be in the apartment. RP 22.

C. ARGUMENTS

1. THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE CONVICTION BECAUSE THE ONLY EVIDENCE OF THE ESSENTIAL ELEMENT, THAT V.A. KNOWINGLY ENTERED OR REMAINED UNLAWFULLY, WAS BASED ON INADMISSIBLE HEARSAY AND INCOMPETENT TESTIMONY.

Due process under the Fourteenth Amendment of the United States Constitution requires the State to prove all necessary facts of the crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Smith, 155 Wn.2d 496, 502, 120 P. 3d 559 (2005). Evidence is insufficient to support a conviction unless viewed in the light most favorable to the State, any rational trier of fact could find each essential element of the crime beyond a reasonable doubt. State v. Chapin, 118 Wn.2d 681, 691, 826 P.2d 194 (1992).

To sustain a conviction following a bench trial, this Court must determine whether (1) the evidence supports the findings of fact; (2) the findings of fact support the conclusions of law; and (3) the conclusions of law support the judgment. State v. Enlow, 143 Wn. App. 463, 467, 178 P. 3d 366 (2008). In determining the sufficiency of evidence, existence of a fact cannot rest upon guess, speculation, or conjecture. State v. Colquitt, 133 Wn. App. 789, 796, 137 P.3d 892 (2006).

To support the second degree criminal trespass conviction, the State was required to prove that V.A., "knowingly enter[ed] or remain[ed] unlawfully upon premises of another[.]" RCW 9A.52.080(1). To establish a person was "unlawfully" on the premises, the State must prove that the person was "not then licensed, invited, or otherwise privileged to so enter or remain." RCW 9A.52.010(3).

Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. ER 801(c). Hearsay is inadmissible unless it qualifies as one of the exceptions to the hearsay rule. ER 802; State v. Brown, 127 Wn.2d 749, 903 P.2d 459 (1995). Whether a statement was inadmissible hearsay is reviewed de novo. State v. Edwards, 131 Wn. App. 611, 614, 128 P.3d 631 (2006).

Additionally, under ER 602, "A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." The rule bars testimony related to facts when they are based only on the reports of others. Hollingsworth v. Wash. Mut. Sav. Bank, 37 Wn. App. 386, 393, 681 P.2d 845 (1984).

The court found that "No representative of Kent Terrace Apartments or persons with authority to give permission to enter

apartment G-103 gave permission to the respondent or any of her friends to enter.” CP 17 (appendix, finding of fact no. 4). The evidence that nobody with authority gave V.A. permission to be in the apartment was Caudill’s testimony. Caudill testimony was based on what he was told by Darien Fuller, the property manager. RP 20-21. Fuller did not testify. Caudill testified to Fuller’s out of court statements to prove the truth of the matter asserted—that V.A. was in the apartment unlawfully because she did not have permission from the owner or anyone with authority to be there, an essential element of the offense. In addition, because Caudill’s testimony was based on what Fuller told him, he did not have personal knowledge of that fact.

In bench trials, the presumption on appeal is that the trial judge, knowing the applicable rules of evidence, will not consider matters that are inadmissible when making findings. State v. Miles, 77 Wn.2d 593, 601, 464 P.2d 723 (1970). Showing the trial court relied on inadmissible evidence to make essential findings that it otherwise would not have made or by showing the verdict is not supported by sufficient admissible evidence rebuts the presumption. State v. Read, 147 Wn.2d 238, 245-46, 53 P.3d 26 (2002). The Supreme Court in Ryan specified when reviewing courts could presume inadmissible evidence was not considered by the trial judge: "Where a case is heard by a judge without a jury, a new trial

should not be granted for error in the admission of evidence, if there remains substantial admissible evidence to support the findings, unless it appears that the findings are based on the evidence which should have been excluded." State v. Ryan, 48 Wn.2d 304, 308, 293 P.2d 399 (1956).

Here, if Caudill's hearsay testimony was properly excluded, there was no "substantial admissible evidence" to support the court's finding that nobody with authority permitted V.A. to be in the apartment. The court's finding is unsupported by admissible evidence and without that finding its conclusions of law that V.A. entered or remained in the apartment unlawfully or knew she entered or remained unlawfully was likewise unsupported. Thus, there was insufficient evidence to support V.A.'s conviction.

2. THE EVIDENCE WAS INSUFFICIENT TO SHOW V.A. DID NOT REASONABLY BELIEVE SHE WAS PERMITTED TO BE IN THE APARTMENT.

It is a statutory defense to the crime of criminal trespass that "[t]he actor reasonably believed that the owner of the premises, or other person empowered to license access thereto, would have licensed him to enter or remain." RCW 9A.52.090(3). The "[s]tatutory defenses to criminal trespass negate the unlawful presence element of criminal trespass," and "once a defendant has offered some evidence that his or her entry was

permissible[.] ... the State bears the burden to prove beyond a reasonable doubt that the defendant lacked license to enter.” City of Bremerton v. Widell, 146 Wn.2d 561, 570, 51 P.3d 733 (2002).

Even if Caudill’s testimony was properly admitted, the evidence was still insufficient to support V.A.’s conviction. V.A. presented evidence that her entry was permissible. Both V.A. and Kramer testified they were told by a member of the group at the apartment that the apartment belonged to his aunt. The court’s finding that no person with authority gave V.A. permission to be in the apartment does not rebut V.A.’s evidence she reasonably believed she has permission to be in the apartment and the court made no finding on the issue of V.A.’s statutory defense nor did it find V.A. and Kramer were not credible. See, State v. Armenta, 134 Wn.2d 1, 14, 948 P.2d 1280 (1997) (holding that in the absence of a factual finding, "we must indulge the presumption that the party with the burden of proof failed to sustain their burden on this issue"): Car Wash Enters., Inc. v. Kampanos, 74 Wn. App. 537, 546, 874 P.2d 868 (1994) ("The absence of a finding of fact in favor of the party with the burden of proof about a disputed issue is the equivalent of a finding against that party on that issue" ). On this record, the State failed to prove V.A. did not have license to enter or remain the apartment and for this separate reason the evidence was insufficient to support her conviction.

D. CONCLUSION

For the above reason, V.A.'s conviction should be vacated.

DATED this 2 day of December, 2011.

Respectfully submitted,

NIELSEN, BROMAN & KOCH

A handwritten signature in black ink, appearing to read "Eric J. Nielsen", written over the printed name.

ERIC J. NIELSEN  
WSBA No. 12773  
Office ID No. 91051  
Attorneys for Appellant

**FILED**  
KING CC  
JUN 30 2011  
SUPERIOR COURT  
BY JOVELITA V AVILA DEPUTY

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23

**SUPERIOR COURT OF WASHINGTON FOR KING COUNTY  
JUVENILE DIVISION**

STATE OF WASHINGTON,	)	
	)	
	)	Plaintiff,
	)	No 11-8-00868-3
	)	
vs	)	
	)	
VITERESA ROSA ANDINO,	)	<b>FINDINGS OF FACT AND</b>
D O B 02/05/1995	)	<b>CONCLUSIONS OF LAW</b>
	)	<b>PURSUANT TO CrR 6 1(d) and</b>
	)	<b>JuCR 7 11(d)</b>
Respondent	)	
	)	
	)	

THE ABOVE-ENTITLED CAUSE having come on for trial on June 14, 2011, before the undersigned judge in the above-entitled court, the State of Washington having been represented by Brandy Gevers, the Respondent appearing in person and having been represented by her attorney, Twyla Carter, the court having heard sworn testimony and arguments of counsel, and having received exhibits, now makes and enters the following findings of fact and conclusions of law

FINDINGS OF FACT

1

1 That on or about February 10, 2011 Viteresa Andino (the Respondent) arrived at the Kent Terrace Apartments, at 25611 98<sup>th</sup> Avenue South in Kent, Washington.

FINDINGS OF FACT AND CONCLUSIONS OF LAW  
PURSUANT TO JuCR 7 11(d) - 1

Daniel J. Sittlerberg, Prosecuting Attorney  
Juvenile Court  
1211 E Alder  
Seattle Washington 98122  
(206) 296 9025  
FAX (206) 296 8869

- 1        2 The Respondent arrived at the Kent Terrace Apartments with her friends Marjorie *CAW*
- 2        Kramer, Turk Markishtum, and ~~five males~~ *greater male. Four other males were already there*
- 3        3 Unit G103 was a vacant unit with no current occupant
- 4        4 No representative of Kent Terrace Apartments or person with authority to give permission to
- 5        enter Unit G103 gave permission to the Respondent or any of her friends to enter
- 6        5 The Kent Police Department previously installed trip wire alarms in various units at the
- 7        Kent Terrace Apartments
- 8        *5a John Caudill was the maintenance supervisor responsible for maintenance on the property*
- 9        6 A trip wire alarm was installed in Unit G103
- 10       7 The Respondent entered Unit G103 through the front door
- 11       8 At or about the time the Respondent entered Unit G103 with her friends, the trip wire alarm
- 12       notified police of an unauthorized entry
- 13       9 After entering through the front door, the Respondent walked ~~down the hallway~~ *to CAW* where her
- 14       friends were standing in a group
- 15       10 The Respondent used the bathroom inside Unit G103 *The respondent testified there was*
- 16       *bucket paper in the bathroom*
- 17       11 The Respondent did not see any furnishings, supplies, decorations, or other belongings
- 18       inside Unit G103 that indicated there was a current occupant
- 19       *CAW There were no furnishings and was CAW*
- 20       12 ~~The only item~~ inside the apartment ~~was~~ *was CAW* a bucket of dry wall ~~sitting~~ in the living room
- 21       13 The Respondent remained inside Unit G103 for at least several minutes
- 22       *CAW* 14 ~~The Respondent was inside Unit G103 long enough to see that no one lived there~~
- 23       15 When police arrived, the Respondent ran down a hallway, through a bedroom, and crawled
- 24       out the bedroom window
- 25       16 After crawling out the window, the Respondent ran and was stopped by police
- 26       approximately three units away from Unit G103, still on Kent Terrace Apartments property

FINDINGS OF FACT AND CONCLUSIONS OF LAW  
PURSUANT TO JuCR 7 11(d) - 2

Daniel I. Sitterberg, Prosecuting Attorney  
Juvenile Court  
1211 E Alder  
Seattle, Washington 98122  
(206) 296 9025  
FAX (206) 296 8869

1  
2 And having made those Findings of Fact the Court also now enters the following  
3

4 CONCLUSIONS OF LAW

5 I

6 The above-entitled court has jurisdiction of the subject matter and over the respondent,  
7 Viteresa Rosa Andino, who was born 02/05/1995, in the above-entitled cause

8 II

9 The State has proven the following elements of Criminal Trespass in the Second Degree,  
10 contrary to RCW 9A 52 080, beyond a reasonable doubt

- 11 1 On or about February 10, 2011, the Respondent Viteresa Andino, knowingly entered and  
12 remained unlawfully in Unit G103 at the Kent Terrace Apartments  
13 2 The Respondent knew that her entry into Unit G103 was unlawful  
14 3 The Respondent knew that remaining in Unit G103 was unlawful  
15 4 That the acts occurred in King County, Washington

16 In making these findings, the court relied upon the testimony of witnesses and evidence  
17 introduced at trial

18 III

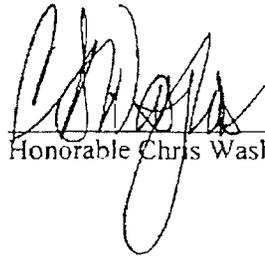
19 The respondent is found guilty of Criminal Trespass in the Second Degree

20 IV

21 Judgment should be entered in accordance with Conclusion of Law I In addition to these  
22 written findings, the Court incorporates all of its oral findings and conclusions as reflected in the  
23 record

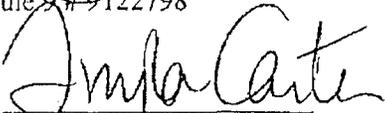
1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23

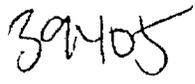
SIGNED this 30 day of June 2011

  
Honorable Chris Washington

Presented by

  
Brandy Gevers  
Rule 9 # 9122798

  
Twyla Carter  
Attorney for Respondent



IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

---

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 67416-1-I
	)	
ANDINO VITERESA,	)	
	)	
Appellant.	)	

---

**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 7<sup>TH</sup> DAY OF DECEMBER, 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] ANDINO VITERESA  
3035 CHICAGO STREET  
SEATTLE, WA 98108

**SIGNED** IN SEATTLE WASHINGTON, THIS 7<sup>TH</sup> DAY OF DECEMBER, 2011.

x Patrick Mayovsky

2011 DEC -7 PM 4:38  
COURT OF APPEALS DIV 1  
STATE OF WASHINGTON