

No. 71612-3-I

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

STATE OF WASHINGTON,

Respondent,

v.

DANIEL FISCHER,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

APPELLANT'S REPLY BRIEF

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RAP 10.31

A. RESPONSE TO STATEMENT OF THE CASE

The Rules of Appellate Procedure require the parties to include a Statement of the Case that is a “fair statement” of the relevant facts and procedure. The Statement of the Case must include references to the record to support each factual statement. RAP 10.3(a), (b).

The record does not support the State’s assertion that Mr. Kronbeck heard Mr. Fisher yelling and throwing items around the front yard. Brief of Respondent at 3 (hereafter BOR); 2/10/14 RP 52. Mr. Kronbeck said that he could hear “noise” when Mr. Fischer was in the front yard and that Mr. Fischer “threw some stuff in the yard” as part of the process of trying to pack his family’s possessions into his bicycle trailer. 2/10/14 RP 51, 81. Mr. Kronbeck and his friends had placed the Fishers’ possessions in their daughter’s portable play pen in the front yard, although he admitted his friends may have stolen the Fishers’ stereo. Id. at 49-50, 80. Mr. Kronbeck described the amount of property the Fishers had left behind and testified that the Play and Pack was too heavy to lift. Id. at 51, 76-77. Mr. Kronbeck did not say that he heard Mr. Fischer doing anything other than trying to pack his possessions in the bicycle carrier.

Mr. Kronbeck said that he left a telephone message for Rebecca Fisher at about 4:00 a.m. telling her that he had placed the Fischers' possession in his front yard. 2/10/14 RP 78. According to the State, Mrs. Fisher did not listen to Mr. Kronbeck's voice message until 7:00 a.m. because she had stopped taking his telephone calls. BOR at 3. While Mrs. Fisher testified that she had stopped taking Mr. Kronbeck's telephone calls, she did not say that was the reason she did not answer her telephone in the middle of the night. 2/11/14(AM) RP 37, 45-46. While Mr. Kronbeck was partying with his friends at 3:00 or 4:00 a.m., but there is no evidence that the Fischers were similarly awake and taking telephone calls. See 2/10/14 RP 2/10/14 RP 47-50, 78, 80-81, 88; 2/11/14(AM) RP 7-8. Nor is there support in the record for the prosecutor's assertion that Mr. Kronbeck repeatedly called Mrs. Fischer to ask her to pick up her possessions. BOR at 2; 2/10/14 RP 47.

B. ARGUMENT IN REPLY

1. **The State misstates the standard of review.**

Mr. Fischer challenges the sufficiency of the evidence supporting his convictions for first degree burglary, assault in the second degree, and third degree malicious mischief. It is well-settled that the Sixth Amendment's due process clause requires the State prove

every element of a crime beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 476-77, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); In re Winship, 397 U.S. 358, 361-65, 367, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). On appellate review, the court must reverse if, after viewing the evidence in the light most favorable to the prosecution, it determines that a rational trier of fact could not have found an element of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 318-19, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); State v. Green, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980). “[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” Jackson, 443 U.S. at 319 (emphasis deleted).

The State tries to undermine this standard by asserting that “evidence favoring the defendant is not considered” by the reviewing court in determining if the State produced sufficient evidence to convict. BOR at 6. This is not the holding of Jackson, which states:

Once a defendant has been found guilty of the crime charged, the factfinder’s role as weigher of the evidence is preserved through a legal conclusion that upon judicial review all of the evidence is to be considered in the light most favorable to the prosecution.

443 U.S. at 319 (emphasis in original).

The State cites outdated authority or authority that does not support its claim. BOR at 6-7 (citing State v. Randecker, 79 Wn.2d 512, 487 P.2d 1295 (1971) and State v. Jackson, 62 Wn. App. 53, 813 P.2d 156 (1991)). The 1971 Randecker decision predates Jackson v. Virginia and Washington's adoption of its standard of review in Green. Green, 94 Wn.2d at 220-22. Randecker thus utilized the standard of review abandoned in Green – whether there was “substantial evidence” to support an element of the crime. Randecker, 79 Wn.2d at 517-19; Green, 94 Wn.2d at 219-22 (overruling Green I, 91 Wn.2d 431, 588 P.2d 1370 (1979) and its reliance on Randecker). Randecker also addresses a motion in arrest of judgment. If the decision survives Green and Jackson, it is limited to those motions.

The State also relies upon a footnote in State v. Jackson, *supra*. The footnote, however simply explains the Sixth Amendment standard that all reasonable inference from the record are draw in favor of the State and not the defendant. Jackson, 62 Wn. App. at 58 n.2. In the body of Jackson, the court cites Green for the appropriate test when reviewing the sufficiency of the evidence. Id. at 57-58.

This Court should utilize the standard of review adopted in Jackson v. Virginia and Green in addressing Mr. Fischer's appeal and review "all of the evidence" in the light most favorable to the State to determine if a rational trier of fact could have found every element of each crime beyond a reasonable doubt. Jackson, 443 U.S. at 319.

2. The State did not prove beyond a reasonable doubt that Mr. Fischer committed burglary in the first degree.

An essential element of first degree burglary is unlawful entry into a building. RCW 9A.52.020(1). This requires proof that the defendant was not licensed, invited, or otherwise privileged to enter or remain in the building. RCW 9A.52.010(5). The State argues that unlawful entry was proved because the Fischers were no longer living with Mr. Kronbeck and because Mr. Fischer broke open Mr. Kronbeck's back door. BOR at 8. The circumstances of this case, however, reveal Mr. Fischer had permission to enter Mr. Kronbeck's house to retrieve his property.

The Fischer had lived in Mr. Kronbeck's house with his permission. They left voluntarily, but could not take all of their possessions on their bicycles. 2/10/14 RP 42-43, 46; 2/11/14(AM) RP 31-33, 36. Mr. Kronbeck complained to other people about the

Fischers' belongings and called Mrs. Fischer to notify her that they needed to get their property. 2/10/14 RP 47-48; 2/11/14(AM) RP 37. Mr. Fischer thus had implied permission to enter the home so that he could remove his family's belongings as Mr. Kronbeck requested.

As the State points out, the Woods Court found a juvenile exceeded any permission to enter his mother's room when he broke down the door. BOR at 8; State v. Woods, 63 Wn. App. 588, 591, 821 P.2d 1235 (1991). In Woods, however, there was also evidence that the mother had "expressly revoked permission for him to enter unless she was at home" and had made alternative living arrangements for her son. Woods, 63 Wn. App. at 590-91. Here, Mr. Kronbeck never revoked permission for Mr. Fischer to enter his residence and instead asked him to come and get his possession. Thus, the State did not prove beyond a reasonable doubt that Mr. Fischer unlawfully entered the house. His conviction should be reversed and dismissed.

3. The State did not prove beyond a reasonable doubt that Mr. Fischer committed malicious mischief in the third degree.

In order to convict Mr. Fischer of malicious mischief in the third degree, the jury was required to find that he knowingly and maliciously caused physical damage to Mr. Kronbeck's property. RCW

9A.48.090(1)(a); CP 105. “Malice” is defined as “an evil intent, wish, or design to vex, annoy, or injury another person.” RCW 9A.04.110(12); State v. Wooten, 178 Wn.2d 890, 894, 312 P.3d 41 (2013); CP 108.

The State argues that the jury correctly found Mr. Fischer acted with malice because he was angry, kicked in the door, and confronted Mr. Kronbeck. BOR at 13. The State, however, does not explain why anger establishes malice.

The facts of this case show that Mr. Fischer was attempting to obtain and protect his family’s property when he broke into Mr. Kronbeck’s home. This is not demonstrative of an “evil intent, wish, or design to vex, annoy, or injure.” Mr. Fischer’s conviction for malicious mischief in the third degree should be reversed and dismissed.

C. CONCLUSION

For the reasons stated above and in the Brief of Appellant, Mr. Fischer asks this Court to reverse his convictions for first degree burglary, third degree assault, and third degree malicious mischief because the State did not prove every element of each crime beyond a reasonable doubt.

DATED this 4th day of March 2015.

Respectfully submitted,



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

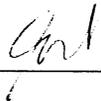
STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 71612-3-I
)	
DANIEL FISCHER,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 3RD DAY OF MARCH, 2015, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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