NO. 83913-6-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

AUTUMN HARTLEY,

Appellant.

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

The Honorable Marybeth Dingledy, Judge

REPLY BRIEF OF APPELLANT

JENNIFER L. DOBSON
Attorney for Appellant

NIELSEN KOCH & GRANNIS, PLLC
The Denny Building
2200 Sixth Avenue, Suite 1250
Seattle, Washington 98121
206-623-2373

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A. ARGUMENT IN REPLY

I. THE TOW YARD WAS NOT A BUILDING FOR PURPOSES OF THE BURGLARY STATUTE.

Appellant, Autumn Hartley, asserts the State did not prove all of the elements of second-degree burglary because it did not prove that she entered or remained unlawfully in a "building." Brief of Appellant (BOA) at 4-16. Specifically, she asserts the tow yard did not qualify as a "building" under the statute because, despite being fenced in, it does not fall under the common-law concept of "curtilage." Id. In response, The State asserts there is sufficient evidence to establish the "building" element of the burglary offense because "the tow yard was an area completely enclosed." BOR at 14 (citing 101). It suggests that any completely fenced area, regardless of whether it is "curtilage," meets the definition of building. Brief of Respondent (BOR) at 8-12. This reflects a fundamental misreading of key Washington Supreme Court decisions addressing the "fenced area" provision of the burglary statute.

Oddly, the State begins its response by charging that appellant "ignores the fact that the Legislature specifically added 'fenced area' to the definition of 'building' in RCW 9A.04.110(5)." BOR at 8-9. Ms. Hartley does not ignore the statute – indeed she quotes it in her opening brief. BOA at 5 (quoting RCW 9A.04.110(5)). The problem is that the statute does not really answer the question raised here because the Legislature does not define "fenced area."

Next, the State claims appellant has "ignored" the case law that define what is a fenced area. BOR at 9. Again, this is odd because Mr. Hartley's opening brief reviews the relevant case law. BOA at 5-10. Instead, it appears the State takes issue with the way appellant reads and applies these cases.[1]

[1] The State is correct that Ms. Hartley does not cite to certain unpublished cases from other divisions. However, she has not ignored these. Instead, in keeping with the reasoning set forth in her opening brief and herein, she respectfully concludes these are not useful as persuasive authority because they are inconsistent with binding authority.

The State relies heavily on State v. Wentz, 149 Wn.2d at 342, 350, 68 P.3d 282(2003) to support its claim that any completely fenced space, regardless of whether it is tied to a structure, is a "fenced area" for purposes of the burglary statute. BOR at 9-10. However, Wentz actually supports Ms. Hartley's position that the "fenced area" must qualify as the curtilage.

In Wentz, the defendant was properly convicted of burglary when he was found hiding in the backyard of a house. Wentz, 149 Wn.2d at 345, 352. Wentz accessed the backyard by climbing the fence that, along with the house, surrounded the yard. Id. at 345. The backyard qualified as a "fenced area" under the statute because it conformed to the common-law concept of curtilage, which is tied to a house or structure.[2] State v. Engel,

[2] At common law, the curtilage was the area immediately surrounding a dwelling house that received the same protection under the law of burglary afforded to the house itself. United States v. Dunn, 480 U.S. 294, 300, 107 S. Ct. 1134, 94 L. Ed. 2d 326 (1987). The area was so intimately tied to the home that an individual would reasonably expect it to be treated as part of the home. Id.

166 Wn.2d 572, 579-80, 210 P.3d 1007 (2009).

In its response, the State glosses over the Washington Supreme Court's reliance on common law concepts to interpret the statutorily undefined term "fenced area." BOR at 9-11. Instead, the State points in isolation to the Supreme Court's statement: "The curtilage is an area that is completely enclosed either by fencing alone or… a combination of fencing and other structures." BOR at 12 (citing Engel, 166 Wn.2d at 780). In doing so, however, the State discounts Engel's lengthy analysis of the common law that proceeds this statement. That is problematic.

One cannot properly understand Engel's interpretation of the term "fenced area" without delving into its analysis of common law. Engel states "the plain meaning of 'fenced area' may be ascertained by examining the common law." 166 Wn.2d at 779. Looking to the common law, it explains "'fenced area' may be understood as a contemporary formulation of the concept of curtilage." Id. at 850. It clarifies "the fenced area concept was

incorporated into the dwelling element of common law burglary." Id. at 850 (citing 3 LAFAVE & SCOTT, supra, § 21.1, at 213–14). Notably, while recognizing the dwelling element of burglary has been expanded by statute to include "[m]any kinds of structures," the Supreme Court still recognized that a structure is a necessary part of that element. Id. at 580, n. 6.

Under Engel, for a fenced area to constitute a building within the meaning of the burglary statute it must be tied to a specific structure. Indeed, the Supreme Court stated as much when it concluded: "The common law context indicates that the plain meaning of 'fenced area' is limited to the curtilage of a building or structure that itself qualifies as an object of burglary (as defined in RCW 9A.04.110(5))." Id. at 580 (emphasis added). This statement precedes the State's cherry-picked statement "The curtilage is an area that is completely enclosed either by fencing alone or… a combination of fencing and other structures." BOR at 12 (citing Engel, 166 Wn.2d at 780). When this latter sentence is read in isolation it might suggest that a

completely fenced area would be sufficient to meet the definition of a "building" even without any connection to a building or structure. However, when this sentence is read in conjunction with the sentence that precedes it, there can be no doubt that a fenced area must be tied to a particular building or structure.

In this case, the State charged Ms. Hartley only with "enter[ing] or remain[ing] unlawfully in the building of a tow yard." CP 72. It did not charge her of entering or remaining unlawfully in an otherwise qualified object of the burglary under RCW 9A.04.110(5). While the State proved the tow yard was completely enclosed, there was insufficient evidence to prove that the tow yard was the curtilage of a building or structure. Accordingly, it does not meet the definition of building under Engel, and reversal is required.

II. APPELLANT WITHDRAWS ARGUMENT REGARDING SUPERVISION FEES.

In her opening brief, appellant challenged boilerplate language for community custody supervision fees. This was in

error, as no community custody supervision was ordered. As such, appellant withdraws this issue from consideration.

B. CONCLUSION

For the reasons stated above and in petitioner's opening brief, this Court should grant review and vacate the shelter care order.

I certify that this document contains 1108 words excluding the parts exempted by RAP 18.17.

DATED this 9th day of January, 2023.

Respectfully submitted,

NIELSEN, KOCH& GRANNIS, PLLC

JENNIFER L. DOBSON,
WSBA 30487
Office ID No. 91051

NIELSEN KOCH & GRANNIS P.L.L.C.

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