IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Appellant, v. GARY RONALD DAUBENSPECK, Respondent.	No. 38755-7-II UNPUBLISHED OPINION

Bridgewater, J. — The State appeals the trial court's order dismissing its second degree burglary charge against Gary Ronald Daubenspeck, arguing that it adequately disputed the material facts. Concluding that the trial court did not err, we affirm.[1]

The State charged Daubenspeck with one count of second degree burglary—domestic violence and one count of third degree malicious mischief—domestic violence. In support of those charges, the deputy prosecuting attorney filed an affidavit in support of probable cause stating that, on August 23, 2008, Daubenspeck entered his ex-wife Jessie Hargadine's shop, which is attached to her residence, by removing the air conditioner unit from a window. When Daubenspeck entered the window, he damaged the air conditioner unit and another fixture, causing less than $250 in damage. The affidavit stated that once inside, Daubenspeck attempted to enter the room where Hargadine was located, but Hargadine locked the door. After police apprehended Daubenspeck, he told police that his key to the residence did not work and that he broke in to retrieve his computer. With regard to whether Daubenspeck attempted to enter the

[1] A commissioner of this court initially considered the State's appeal as a motion on the merits under RAP 18.14 and then transferred it to a panel of judges.

room where Hargadine was located, the police report stated,

> Jessie said she was able to close and lock the door so Gary could not get into the room. . . .
>
> . . . .
>
> The next day, I contacted Jessie Daubenspeck by phone and . . . . [she] did mention when Gary came upstairs after he heard her on the phone she tried to shut the door but it remained open about four inches with her blocking it. She said she believed Gary did not try to get in because she would not have been able to hold the door shut.

CP at 26, 28.

After the State charged Daubenspeck, Hargadine addressed a letter to the prosecutor, stating in part:

> After Gary was arrested, I spoke with the Prosecutor's office and told them that I did not think that Gary should be prosecuted. I told them that he needed help with his alcoholism as well as needing to see a psychiatrist because of his depression. I informed them that nothing was broken as a result of the incident, that Gary took nothing that didn't belong to him, and I assured them that Gary didn't assault or threaten me in any way. . . .
>
> . . . It was clear immediately after this occurred that it was an unfortunate misunderstanding, not a crime. I have never excluded Gary from the residence. The majority of his belongings are still in the home. He had been coming to the house regularly over the weeks prior to this incident as we readied the home for appraisal. On several occasions, he even spent the night. He has continued to pay the mortgage on the home. . . . I am not afraid of Gary, I am afraid for him. He needs help in dealing with his medical issues. He does not deserve to be prosecuted for a purely domestic misunderstanding.

CP at 29.

According to Hargadine, on the night of the incident, her car was not at the residence because it was being repaired. Daubenspeck, who previously resided with Hargadine at the residence, later explained that he did not think Hargadine was home at the time of the incident because her car was not there, and he entered through the window because he rarely carried keys to the residence as he and Hargadine rarely locked the doors.

Daubenspeck filed a motion to dismiss the second degree burglary charge under *State v. Knapstad*, 107 Wn.2d 346, 729 P.2d 48 (1986). Daubenspeck and Hargadine filed declarations in support of the motion, and Daubenspeck attached to the motion: (1) the above letter from Hargadine; (2) another letter from Hargadine addressed to the trial court and to counsel for the State; (3) the police report for the August 23 incident; and (4) a memorandum from the prosecutor's office stating its intent not to prosecute Daubenspeck for a separate incident that occurred on August 18, 2008. With regard to the August 18 incident, Daubenspeck's former attorney, Adam Kick, filed a declaration stating that the State had arrested Daubenspeck for burglary and criminal trespass but later agreed not to prosecute Daubenspeck on those charges because "'you can't be guilty of breaking into your own house.'"

In response to Daubenspeck's motion to dismiss, counsel for the State filed an affidavit stating:

> As the deputy prosecuting attorney for the State of Washington, I specifically deny and dispute the purported material facts alleged in the defendant's pleadings as follows:
>
> A. Within the Declaration in Support of Motion to Dismiss (Knapstad) of defense counsel Randall C. Krog:
>
> 1. Exhibit 2 to that declaration, a letter from Jessie Hargadine, fka Jessie Daubenspeck;
>
> 2. Exhibit 3 of the same declaration, another letter from Jessie Hargadine, fka Jessie Daubenspeck.
>
> B. The entirety of the Declaration of Gary Daubenspeck in Support of Motion to Dismiss (Knapstad).
>
> C. The entirety of the Declaration of Jessie Hargadine in Support of Motion to Dismiss (Knapstad).
>
> D. Sections six, seven, and eight within the Declaration of Adam Kick in Support of Motion to Dismiss (Knapstad).

CP at 41-42.

The trial court granted Daubenspeck's *Knapstad* motion and dismissed without prejudice

the second degree burglary charge. The State then dismissed without prejudice the remaining third degree malicious mischief charge, arguing that dismissal of the second degree burglary charge precluded it from providing context for the third degree malicious mischief charge.

The State argues that its affidavit satisfied the requirements for overcoming a criminal motion to dismiss under *Knapstad*. We review de novo a trial court's decision to dismiss criminal charges under *Knapstad* and views the facts and all reasonable inferences in the light most favorable to the State. *State v. O'Meara*, 143 Wn. App. 638, 642, 180 P.3d 196 (2008) (citing *State v. Missieur,* 140 Wn. App. 181, 184, 165 P.3d 381 (2007)). We will affirm the dismissal if no rational fact finder could have found the essential elements of the crime beyond a reasonable doubt. *O'Meara*, 143 Wn. App. at 641 (citing *State v. Wilhelm,* 78 Wn. App. 188, 191, 896 P.2d 105 (1995)).

In order to prevail on a *Knapstad* motion, the defendant must establish that no material facts are in dispute and that the facts do not establish a prima facie case of guilt. *Knapstad*, 107 Wn.2d at 356. The State can overcome the defendant's motion by filing an affidavit, including an affidavit of probable cause or a responsive affidavit, which specifically denies those material facts alleged by the defendant. *Knapstad,* 107 Wn.2d at 356. The trial court's decision turns on the State's ability to prove a prima facie case, not by the facts asserted in the affidavit, but by the facts admissible at trial. *State v. Freigang*, 115 Wn. App. 496, 503, 61 P.3d 343 (2002) (citing CR 56(e) (shall set forth such facts as would be admissible in evidence)), *review denied*, 149 Wn.2d 1028 (2003). If the State shows it can prove a prima facie case, then the trial court must dismiss the defendant's motion. *Knapstad,* 107 Wn.2d at 356.

A person is guilty of second degree burglary if, (1) with intent to commit a crime against a

person or property therein, (2) he enters or remains unlawfully in a building other than a vehicle or a dwelling. RCW 9A.52.030. "A person 'enters or remains unlawfully' in or upon premises when he is not then licensed, invited, or otherwise privileged to so enter or remain." RCW 9A.52.010(3).

The State's second degree burglary charge rests on its assertion that Daubenspeck attempted to enter the room where Hargadine was located, presumably in order to assault Hargadine. But this assertion stems from a misstatement of the information contained in the police incident report. No evidence shows that Daubenspeck attempted to enter the room where Hargadine was located. Instead, according to the police incident report, Hargadine alleged that she locked the door so that Daubenspeck *could not enter*—not that he *attempted to enter*. Hargadine confirmed that information in her declaration. Only the State's affidavit of probable cause alleges that Daubenspeck actually attempted to enter the room, and that affidavit is only determinative insofar as it is based on admissible evidence. *Freigang*, 115 Wn. App. at 503 (affidavits of non-witness deputy prosecuting attorneys are proper competent evidence for court to consider in ruling on a *Knapstad* motion, but decision turns on admissible evidence).

Daubenspeck has therefore established that the following material facts are not in dispute: (1) he entered Hargadine's residence without permission through a window in an attached shop; (2) dropped an air conditioner unit that had been located in the window; (3) proceeded upstairs towards the room where Hargadine was located; and finally (4) retrieved his own computer and left through the front door. Viewing those facts and inferences in the light most favorable to the State, a rational fact finder could find beyond a reasonable doubt that Daubenspeck entered the residence without license, invitation, or privilege to do so. But no rational fact finder could have

found beyond a reasonable doubt that Daubenspeck intended to commit a crime against Hargadine or any property inside the residence. Daubenspeck did not attempt to enter Hargadine's room or otherwise commit a crime against her. He removed only his own computer from the residence, and at the time of the incident, he had been performing repairs to the residence in preparation for an appraisal. Thus, Daubenspeck has shown that the facts do not establish a prima facie case of second degree burglary.

The State's affidavits, including its affidavit of probable cause and response affidavit, deny and dispute those material facts, but they do so without support from any admissible evidence contained in the record. A bald denial and dispute of Daubenspeck's factual allegations, without more, does not present a material "fact" admissible at trial and does not satisfy the requirements of *Knapstad*. *See Freigang*, 115 Wn. App. at 503; CR 56(e). The trial court did not err when it granted Daubenspeck's motion to dismiss.

Affirmed.

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record under RCW 2.06.040.

Bridgewater, J.

We concur:

Houghton, P.J.

Quinn-Brintnall, J.