95653-7

Supreme Court No. (to be set)
Court of Appeals No. 34762-1-III
IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,
vs.
James Dunleavy
Appellant/Petitioner

Walla Walla County Superior Court Cause No. 16-1-00200-2
The Honorable Judge John W. Lohrmann

PETITION FOR REVIEW

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DECISION BELOW AND ISSUES PRESENTED

Petitioner James Dunleavy, the appellant below, asks the Court to review the Court of Appeals published opinion entered on February 6, 2018.[1] This case presents three issues:

1. Did the trial court infringe Mr. Dunleavy's constitutional right to a verdict free of judicial coercion by instructing a divided jury that it must "continue to deliberate in order to reach a verdict"?
2. Must the burglary statute be interpreted narrowly, so that individual jail cells in a jail do not qualify as buildings separate from each other and from the facility in which they are located?
3. Did the State fail to prove that Mr. Dunleavy "unlawfully" entered a neighboring inmate's jail cell, where undisputed facts show he had an implied license to enter?

STATEMENT OF THE CASE

James Dunleavy, during his time in the Walla Walla County Jail, coveted his neighbor's burrito mix. RP 5. When a fight broke out in the common area of his unit, he took advantage of the chaos to sneak through that inmate's cell's open door to take the burrito mix. RP 5, 38-42, 57. For this action, he was charged with burglary in the second degree.[2] CP 1-2.

At trial, the State's theory was that the entry into another inmate's cell was an unlawful entry. RP 144-158, 168-169. The defense countered

[1] A copy of the opinion is attached.

[2] Mr. Dunleavy was also convicted of misdemeanor theft. CP 1-2, 36. The jury acquitted him of being an accomplice to assault. CP 1-2, 36.

that people enter each other's cells all the time, and that no one had ever been charged with criminal trespass for it. RP 14, 46, 68-69, 71-82, 95-96, 163. Jail staff testified that jail rules prevent entry into other people's cells, but no one knew whether Mr. Dunleavy had been notified of those rules. RP 21, 23, 43, 45.

During deliberations, the jury sent out a question: "Are the Walla Walla county jail policies legally binding? Are they considered law? What if we are not unanimous on a certain count?" CP 5. The court responded: "You are to review the evidence, the exhibits, and the instructions, and continue to deliberate in order to reach a verdict." CP 5.

The jury later returned a verdict of guilty on the burglary charge. CP 36. Mr. Dunleavy appealed, and the Court of Appeals affirmed in a published decision entered February 6, 2018. CP 54; *See* Appendix.[3]

ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

I. THE SUPREME COURT SHOULD ACCEPT REVIEW AND REVERSE MR. DUNLEAVY'S CONVICTIONS BECAUSE THE TRIAL JUDGE IMPROPERLY COERCED THE DELIBERATING JURY INTO RETURNING A VERDICT.

A. The Supreme Court should reaffirm that claims of judicial coercion can always be raised for the first time on review if based on facts in the record. The Court of Appeals' published opinion conflicts with this court's decision in *Ford*; furthermore, this case raises a

[3] The Court of Appeals remanded for resentencing based on the State's failure to prove Mr. Dunleavy's prior convictions. Opinion, pp. 14-15.

> significant question of constitutional law that is of substantial public interest. RAP 13.4 (b)(1), (3), and (4).

A manifest error affecting a constitutional right may be raised for the first time on appeal. RAP 2.5(a)(3). The showing required under RAP 2.5 (a)(3) "should not be confused with the requirements for establishing an actual violation of a constitutional right." *State v. Lamar*, 180 Wn.2d 576, 583, 327 P.3d 46 (2014).

To raise a manifest error, an appellant need only make "a plausible showing that the error… had practical and identifiable consequences in the trial." *Id.* An error has practical and identifiable consequences if "given what the trial court knew at that time, the court could have corrected the error." *State v. O'Hara*, 167 Wn.2d 91, 100, 217 P.3d 756 (2009), as corrected (Jan. 21, 2010).

A claim that judicial coercion affected a verdict may always be raised for the first time on review. *State v. Ford*, 171 Wn.2d 185, 188, 250 P.3d 97 (2011) (citing RAP 2.5(a)(3)). This is so because a trial judge who coerces a verdict "could have corrected the error"[4] by instructing jurors in a way that did not coerce a verdict.

[4] *See O'Hara*, 167 Wn.2d at 100. In *O'Hara,* the court declined to review an unpreserved instructional error, finding that the court's error was not "an error of constitutional dimension." *Id.*, at 104–05.

The *Ford* court unequivocally recognized this when it reviewed an allegation of judicial coercion raised for the first time on appeal:

> Appellate courts typically will not consider an issue raised for the first time on appeal. However, an error may be raised for the first time on appeal if it is a manifest error affecting a constitutional right. To demonstrate such an error, the defendant must show that the error actually prejudiced his rights at trial. A claim of judicial coercion affecting a jury verdict is such an error that we will review…

Ford, 171 Wn.2d at 188.

Under *Ford,* it is the "claim of judicial coercion" that raises manifest error, regardless of the merits of the claim. *Id.* Thus, in *Ford,* for example, the court found the constitutional error manifest even though the petitioner could not establish that the jury was still deliberating when it received the allegedly coercive directive. *Id.*, at 188-189.

In their Published Opinion here, the Court of Appeals ignored *Ford.* Instead of examining the merits of Mr. Dunleavy's "claim of judicial coercion," the court sidestepped the issue by deciding the error was insufficiently manifest. Opinion, p. 6.

The Court of Appeals' decision conflicts with *Ford.* Furthermore, this case presents a significant constitutional issue that is of substantial public interest. The Supreme Court should accept review under RAP 13.4(b)(1), (3) and (4).

B. The Supreme Court should hold that an instruction directing a divided jury to "continue to deliberate in order to reach a verdict" improperly coerces a verdict and violates the constitutional right to a jury trial. The Court of Appeals published opinion conflicts with this court's decision in *Boogaard*; furthermore, this case raises a significant question of constitutional law that is of substantial public interest. RAP 13.4 (b)(1), (3), and (4).

The state and federal constitutions protect an accused person's right to a jury trial. U.S. Const. Amends. VI, XIV; Wash. Const. art. I, §§21 and 22. Among other protections, these provisions secure "the right to have each juror reach his verdict uninfluenced by factors outside the evidence, the court's proper instructions, and the arguments of counsel." *State v. Boogaard*, 90 Wn.2d 733, 736, 585 P.2d 789, 791 (1978). A judge presiding over a criminal trial may not interfere in the jury's deliberative process. *Id.*, at 737.

Once deliberations begin, the court may not instruct the jury "in such a way as to suggest the need for agreement." CrR 6.15 (f)(2). Any suggestion that a juror "should abandon his conscientiously held opinion for the sake of reaching a verdict invades [the jury] right." *Boogaard*, 90 Wn.2d at 736.

This is true "however subtly the suggestion may be expressed." *Id.* The rule is intended "to prevent judicial interference in the deliberative process… [T]he jury should not be pressured by the judge into making a

decision." *Id.*, at 736. To prevail, the appellant must show a reasonably substantial possibility that the verdict was improperly influenced. *Id.*

In *Boogaard,* for example, the trial judge asked jurors who had deliberated into the night if they thought they could reach a verdict within half-an-hour. When eleven of the jurors thought it possible, the court instructed the jury to continue deliberating for 30 minutes. *Boogaard*, 90 Wn.2d at 735. The Supreme Court reversed the defendant's conviction because the court's questions "unavoidably tended to suggest to minority jurors that they should 'give in' for the sake of that goal which the judge obviously deemed desirable namely, a verdict within a half hour." *Id.*, at 736.

Here, after deliberations began, the jury asked, "What if we are not unanimous on a certain count?" CP 5. The accompanying questions suggest that jurors were struggling with the burglary charge. CP 5.

The court's response improperly suggested a "need for agreement." CrR 6.15 (f)(2). By telling jurors to deliberate "in order to reach a verdict," the court applied subtle pressure suggesting the jury ought to reach a decision. *See Boogaard*, 90 Wn.2d at 736.

This violated Mr. Dunleavy's state and federal constitutional rights. *Id.;* U.S. Const. Amend. VI, XIV; Wash. Const. art. I, §§21 and 22. Although the first part of the court's answer properly directed jurors to

review their materials and continue to deliberate, the final clause—"continue to deliberate in order to reach a verdict"[5]— crossed the line into "judicial interference in the deliberative process." *Id.*

The timing of this directive creates "a reasonably substantial possibility that the verdict was improperly influenced." *Ford*, 171 Wn.2d at 188.[6] The court gave this supplemental instruction after the jury started deliberating, in response to a question relating to their lack of unanimity. The court's answer implied to jurors in the minority "that they should 'give in' for the sake of [reaching a verdict.]" *Boogaard*, 90 Wn.2d at 736.

The error deprived Mr. Dunleavy of his right to a jury trial. *Id.*

The Court of Appeals declined to reach the issue, citing RAP 2.5(a). Opinion, p. 6. According to the court, the instruction was "not so obviously coercive" as to create manifest error. Opinion, p. 6.

The Court of Appeals' Published Opinion conflicts with *Boogaard.* The *Boogaard* court made clear that judicial coercion is unconstitutional "however subtly the suggestion may be expressed." *Boogaard*, 90 Wn.2d at 736. An instruction need not be "obviously coercive;"[7] instead, any

[5] CP 5.

[6] Similar language can properly be given *before* deliberations commence. *See, e.g.,* CP 10 (admonishing jurors to act "with an earnest desire to reach a proper verdict"); CP 11 (telling jurors of their duty "to deliberate in an effort to reach a unanimous verdict," but directing them not to surrender their honest beliefs or change their minds "just for the purpose of reaching a verdict").

[7] Opinion, p. 6.

subtle suggestion to a deliberating jury that it must return a verdict violates the constitution. *Id.*

The Supreme Court should accept review and reverse Mr. Dunleavy's convictions. *Id.* The Court of Appeals' published opinion conflicts with *Boogaard* and presents a significant constitutional issue that is of substantial public interest. RAP 13.4(b)(1), (3) and (4).

II. THE SUPREME COURT SHOULD ACCEPT REVIEW AND HOLD THAT INDIVIDUAL JAIL CELLS ARE NOT SEPARATE "BUILDINGS" DISTINCT FROM THE JAIL IN WHICH THEY ARE LOCATED.

Conviction for second-degree burglary requires proof that the defendant entered or remained unlawfully "in a building" with the intent to commit a crime against a person or property therein. RCW 9A.52.030(1). Mr. Dunleavy's entry into a neighboring jail cell did not amount to entering or remaining unlawfully "in a building." Because the evidence was insufficient, the burglary conviction must be reversed, and the charge dismissed with prejudice. U.S. Const. Amend. XIV; *State v. Rodgers*, 146 Wn.2d 55, 60, 43 P.3d 1 (2002).

Issues of statutory interpretation are reviewed *de novo. Matter of Marriage of Zandi*, 187 Wn.2d 921, 926, 391 P.3d 429 (2017). A statute that is susceptible to more than one reasonable interpretation is ambiguous. *State v. Jacobs*, 154 Wn.2d 596, 600-601, 115 P.3d 281

(2005). Under the rule of lenity, courts must interpret ambiguous statutes in favor of the accused, absent contrary legislative intent. *Id.*, at 603.

The statute defining "building" is ambiguous. *State v. Thomson*, 71 Wn. App. 634, 642, 861 P.2d 492 (1993). It must be interpreted in Mr. Dunleavy's favor, and cannot be stretched to make individual jail cells into separate buildings.

A. The Supreme Court should accept review to resolve the conflict between the Court of Appeals' Published Opinion and Division II's opinion in *Thomson.* The conflict highlights an issue of substantial public interest that should be decided by the Supreme Court. RAP 13.4(b)(2) and (4).

The definition of "building" specifies that "each unit of a building consisting of two or more units separately secured or occupied is a separate building." RCW 9A.04.110(5). None of the words in this phrase are defined (other than the word "building" itself). *See* RCW 9A.04.110(5); RCW 9A.52.010.

Division II of the Court of Appeals has found this phrase ambiguous. *Thomson*, 71 Wn. App. at 642. After examining the provision's legislative history, the *Thomson* court found that this definition applies to units "occupied or intended to be occupied by different *tenants* separately." *Id.,* at 644 (emphasis added).

In this case, Division III found the statute unambiguous. Opinion, pp. 10-11. According to Division III,

> [t]he plain meaning of the phrase lends itself to only one interpretation. The phrase unambiguously means any multi-unit building in which the units are separately secured or occupied.

Opinion, p. 11.

The Supreme Court should accept review to resolve this conflict between Divisions II and III. Furthermore, this case presents an issue of substantial public interest that should be decided by the Supreme Court. Review is appropriate under RAP 13.4(b)(2) and (4).

B. The Supreme Court should adopt the *Thomson* court's reasoning, clarify that individual jail cells are not separate buildings, and reverse Mr. Dunleavy's burglary conviction for insufficient evidence.

In *Thomson,* the court held that the rooms of a house were not separate buildings, even if equipped with locks and separately occupied by unrelated people at the time of the offense. *Thomson*, 71 Wn. App. at 635-636, 644-646.

In evaluating whether multiple rooms in a building qualify as separate buildings, the *Thomson* court placed great weight on the privacy interests of the occupants. According to the court, a family dwelling is a single building because each family member has the same privacy interest in the entire house, and that privacy interest in the entire house is shared by the other family members. *Id.* By contrast, occupied hotel rooms and apartments are separate buildings because each tenant has a privacy

interest in a single unit that is separate from the interests of other tenants. *Id.*

The *Thomson* court's reasoning requires reversal of Mr. Dunleavy's burglary conviction. Inmates, including pretrial detainees, have no legitimate expectation of privacy in their jail or prison cells. *Hudson v. Palmer*, 468 U.S. 517, 526, 104 S. Ct. 3194, 3200, 82 L. Ed. 2d 393 (1984); *Block v. Rutherford*, 468 U.S. 576, 589, 104 S. Ct. 3227, 3234, 82 L. Ed. 2d 438 (1984); *Bell v. Wolfish*, 441 U.S. 520, 556, 99 S. Ct. 1861, 1883, 60 L. Ed. 2d 447 (1979).

Indeed, "it is obvious that a jail shares none of the attributes of privacy of a home, an automobile, an office, or a hotel room." *Lanza v. State of N.Y.*, 370 U.S. 139, 143, 82 S. Ct. 1218, 1221, 8 L. Ed. 2d 384 (1962). Instead, "[n]o situation imaginable is as alien to the notion of privacy than an arrestee sitting in a jail cell." *State v. Cheatam*, 150 Wn.2d 626, 638, 81 P.3d 830 (2003) (internal quotation marks and citation omitted).

Upon arrival at jail, an arrestee's possessions are inventoried and may later be seized as evidence without a warrant. *Id.*, at 635. The arrestee may be strip searched on a showing of reasonable suspicion. *State v. Audley*, 77 Wn. App. 897, 908, 894 P.2d 1359 (1995). Inmate telephone

calls are not considered private and may be recorded. *See State v. Modica*, 164 Wn.2d 83, 186 P.3d 1062 (2008).

The cells of Unit E of the Walla Walla County Jail hold two people. RP 3-4, 20. Inmates do not get to choose their cell assignments or their roommates. They do not have control over the locks on their doors. RP 14, 23-25. Cameras and microphones record their movements and conversations. RP 25. They are under constant observation by corrections officers. RP 26-28, 54. Their cells, personal belongings, and bodies may legally be searched at any time. *See Block*, 468 U.S. at 589; *Wolfish*, 441 U.S. at 556; *see also Palmer*, 468 U.S. at 526.

Because jail inmates have no reasonable expectation of privacy in their jail cells, the cells are not analogous to the hotel rooms described by the *Thomson* court. They are not "separate buildings" under RCW 9A.04.110(5).

Nor can jail inmates be described as legal "tenants" of their cells. A "tenant" is one who "holds or possesses lands or tenements by any kind of right or title." Black's Law Dictionary (10th ed. 2014).[8] Inmates have

[8] Washington's landlord-tenant law defines "tenant" as "any person who is entitled to occupy a dwelling unit primarily for living or dwelling purposes under a rental agreement." RCW 59.18.030(27).

no right or title to their cells, which are owned and controlled by the government.

Only one tenant—the Walla Walla Corrections Department—occupies the Walla Walla County Jail. *See State v. Deitchler*, 75 Wn. App. 134, 137, 876 P.2d 970 (1994) ("As far as the record shows, the police station was occupied by a single tenant, and thus was not a building consisting of two or more units separately secured or occupied.") Mr. Dunleavy is not charged with unlawfully entering an area separately occupied by a tenant other than the corrections department.

Unlike hotel guests or apartment-dwellers, inmates are not "tenants," and have no right to privacy in their assigned cells. This precludes a finding that each cell in a jail is a separate building. *Thomson*, 71 Wn. App. at 642.

At the time of the offense, Mr. Dunleavy was lawfully inside the Walla Walla County Jail. He did not enter or remain in a separate building when he went inside another inmate's cell. Accordingly, the evidence was insufficient to convict him of burglary. His conviction must be reversed, and the charge dismissed with prejudice. *Rodgers*, 146 Wn.2d at 60.

The Supreme Court should accept review. This case presents an issue of substantial public interest that should be resolved by the Supreme Court. RAP 13.4(b)(4).

III. THE SUPREME COURT SHOULD ACCEPT REVIEW AND HOLD THAT A JAIL INMATE DOES NOT ENTER A NEIGHBORING CELL "UNLAWFULLY" WHEN HE HAS AN IMPLIED LICENSE TO ENTER. THIS CASE PRESENTS AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST THAT SHOULD BE DECIDED BY THE SUPREME COURT. RAP 13.4(B)(2).

Conviction for burglary requires proof that the accused person entered or remained "unlawfully." RCW 9A.52.030(1). By itself, a defendant's intent to commit a crime does not transform lawful presence in a building into unlawful presence. *State v. Allen*, 127 Wn. App. 125, 137, 110 P.3d 849 (2005) (citing *State v. Miller*, 90 Wn. App. 720, 954 P.2d 925 (1998)). Were this not so, every crime committed indoors would be a burglary.

Instead, a person enters or remains unlawfully "when he or she is not then licensed, invited, or otherwise privileged to so enter or remain." RCW 9A.52.010(2).[9] A reasonable belief that a person with authority "would have licensed" the defendant to enter or remain negates the unlawfulness element of burglary. RCW 9A.52.090(3); *State v. J.P.*, 130 Wn. App. 887, 895, 125 P.3d 215 (2005); *City of Bremerton v. Widell*, 146 Wn.2d 561, 570, 51 P.3d 733 (2002).

[9] The statute clarifies that "[a] license or privilege to enter or remain in a building which is only partly open to the public is not a license or privilege to enter or remain in that part of a building which is not open to the public." RCW 9A.52.010(2). This provision has no application here; none of the areas involved were open to the public.

Under the common law,[10] a license to enter property may be implied. *State v. C.B.*, 195 Wn. App. 528, 538, 380 P.3d 626 (2016). A license to enter may arise "through conduct, omission, or by means of local custom, as well as through oral or written consent." *Singleton v. Jackson*, 85 Wn. App. 835, 839, 935 P.2d 644 (1997) (addressing premises liability).

Even when taken in a light most favorable to the State, the evidence does not show that Mr. Dunleavy unlawfully entered the neighboring cell. The State did not prove that he could not have reasonably believed he had an implied license to access the neighboring cells. The "local custom" in the jail, along with the corrections department's "conduct [and] omission[s]," allowed inmates to reasonably believe they had an implied license to access cells assigned to other inmates. *Id.*

Inmates routinely entered neighboring cells without consequence. RP 13-14, 46, 91, 99. One inmate testified that he often interacts with corrections officers while visiting cells assigned to someone else. RP 99. Although entries into other cells are "[n]ot within policy" and staff tries to keep such visits to a minimum, "[t]hey go on all the time." RP 66-67.

[10] The common law supplements penal statutes "insofar as [it is] not inconsistent with the Constitution and statutes." RCW 9A.04.060.

Under these circumstances, Mr. Dunleavy could have reasonably believed he had an implied license to enter cells assigned to other inmates. The jury clearly had questions about the alleged unlawfulness of his entry, as evidenced by their question about the jail policy. CP 5.

The Court of Appeals dismissed Mr. Dunleavy's argument by attempting to reframe it as an issue involving conflicting evidence. Opinion, p. 12. This was error.

The question presented here is whether a license may be implied from the undisputed facts. This is a mixed question of law and fact; such issues are reviewed *de novo. See, e.g., State v. Lopez,* No. 94418-1, Slip Op. at *6 (Wash. Feb. 15, 2018); *In re Stenson,* 174 Wn.2d 474, 488, 276 P.3d 286 (2012).

The State did not dispute testimony showing that inmates enter each other's cells. Instead, the State presented evidence that such entry was against official policy. RP 21-23, 43, 45, 66-67.

Even if Mr. Dunleavy was aware of the official policy, the undisputed facts created an implied license. *See Singleton,* 85 Wn. App. at 839 (explaining that a license may arise "through conduct, omission, or by means of local custom, as well as through oral or written consent.")

The State failed to prove Mr. Dunleavy unlawfully entered or remained in his fellow inmate's cell, and thus the evidence was

insufficient to prove burglary. RCW 9A.52.090(3); *J.P.*, 130 Wn. App. at 895; *Widell*, 146 Wn.2d at 570. The conviction must be reversed, and the charge dismissed with prejudice. *Rodgers*, 146 Wn.2d at 60.

The Supreme Court should accept review. This case presents an issue of substantial public interest that should be resolved by the Supreme Court. RAP 13.4(b)(4).

CONCLUSION

For the foregoing reasons, the Supreme Court should accept review, reverse Mr. Dunleavy's convictions, and dismiss the burglary charge with prejudice.

Respectfully submitted March 4, 2018.

BACKLUND AND MISTRY

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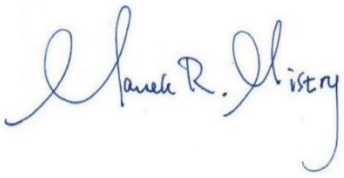

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CERTIFICATE OF SERVICE

I certify that I mailed a copy of the Petition for Review, postage pre-paid, to:

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and I sent an electronic copy to

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through the Court's online filing system, with the permission of the recipient(s).

In addition, I electronically filed the original with the Court of Appeals.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on March 4, 2018.

_____
Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant

APPENDIX:

Court of Appeals Published Opinion, filed on February 6, 2018.

Renee S. Townsley
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CASE # 347621
State of Washington v. James David Dunleavy
WALLA WALLA CO SUPERIOR COURT No. 161002002

Counsel:

Enclosed please find a copy of the opinion filed by the Court today. A party need not file a motion for reconsideration as a prerequisite to discretionary review by the Supreme Court. RAP 13.3(b); 13.4(a). If a motion for reconsideration is filed, it should state with particularity the points of law or fact which the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration which merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of the opinion. Please file an original and two copies of the motion (unless filed electronically). If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of this opinion (may be filed by electronic facsimile transmission). The motion for reconsideration and petition for review must be received (not mailed) on or before the dates they are due. RAP 18.5(c).

Sincerely,

Renee S Townsley

Renee S. Townsley
Clerk/Administrator

RST:pb
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FILED
FEBRUARY 6, 2018
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON, Respondent, v. JAMES DAVID DUNLEAVY, Appellant.	)))))))))	No. 34762-1-III PUBLISHED OPINION

LAWRENCE-BERREY, A.C.J. — James David Dunleavy appeals his convictions for second degree burglary and third degree theft. The convictions stem from Dunleavy, then an inmate at the Walla Walla County jail, going into another inmate's jail cell and taking his food. The central issue raised by Dunleavy is whether a jail cell is a separate building for purposes of RCW 9A.04.110(5). We hold that it is. We affirm Dunleavy's convictions, but remand for resentencing so the State can prove Dunleavy's offender score.

FACTS

Dunleavy was an inmate at the Walla Walla County jail in Unit E. In Unit E, there are eight cells capable of housing two inmates per cell. The cells open into a day room.

In Unit E, the cell doors are open from about 6:00 a.m. until 9:00 p.m. An inmate is permitted to close his cell door, but if he does, the door will remain locked until opened the next morning.

Dunleavy was hungry one day, so he asked inmate Kemp LaMunyon for a tortilla. LaMunyon responded that he did not have enough to share, but would buy more later and share with Dunleavy at that time. Dunleavy later bullied LaMunyon and threatened to "smash [him] out." Report of Proceedings (RP) at 5. Soon after, inmate John Owen attacked LaMunyon. During the attack, Dunleavy snuck into LaMunyon's jail cell and took some of LaMunyon's food.

LaMunyon was seriously injured by Owen. Jail security investigated the fight and the theft, and concluded that the two were related. Security believed that Dunleavy staged the fight between Owen and LaMunyon to give him an opportunity to take LaMunyon's food. Because of the seriousness of LaMunyon's injuries, and because security concluded that the fight and the theft were related, the jail referred charges to the local prosecuting authority. The State charged Dunleavy with second degree burglary, third degree theft, and second degree assault.

The State presented evidence of the jail's policies through Sergeant Anthony Robertson. Sergeant Robertson testified that new inmates are informed of the jail's

policies when they are booked into jail. Inmates are informed, "first and foremost, they are not supposed to go into each other's cell." RP at 20. Sergeant Robertson explained that cells are assigned to inmates, and each inmate can expect privacy in their assigned space. Sergeant Robertson explained that inmates sometimes enter other inmates' cells without permission and if a separate crime occurs during the trespass, he will refer the matter for prosecution as a burglary.

After the State presented its case, Dunleavy moved to dismiss the second degree burglary charge on the basis that an inmate's cell is a separate building for purposes of RCW 9A.04.110(5). The trial court considered the parties' arguments, denied Dunleavy's motion to dismiss, and the case continued forward.

Dunleavy called one witness who testified that Dunleavy did not conspire with Owen to assault LaMunyon. After closing arguments, the case was submitted to the jury.

The jury began deliberating at 1:30 p.m. At 4:00 p.m., the jury sent a written note to the trial court through the bailiff. The note asked, "Are the Walla Walla county jail policies legally binding? Are they considered law? What if we are not unanimous on a certain count?" Clerk's Papers (CP) at 5. The trial court, counsel, and Dunleavy discussed how the trial court should respond. The trial court's response read, "You are to review the evidence, the exhibits, and the instructions, and continue to deliberate in order

to reach a verdict." CP at 5. No party objected to this response. Less than one hour later, the jury returned a verdict finding Mr. Dunleavy guilty of second degree burglary and third degree theft but not guilty of second degree assault.

At sentencing, Dunleavy wrote a letter to the court that his counsel read into the record. Through this letter, Dunleavy asked for a sentencing alternative rather than the State's sentencing recommendation of three to five years' confinement. The State represented that Dunleavy had an offender score of 9+. The State did not offer any evidence of Dunleavy's prior convictions. Defense counsel did not contest the State's representation of Dunleavy's offender score. The trial court sentenced Dunleavy based on the State's representation that Dunleavy had an offender score of 9+.

Dunleavy timely appealed.

ANALYSIS

TRIAL COURT'S RESPONSE TO JURY QUESTIONS NOT MANIFEST ERROR

Dunleavy first argues the trial court violated his constitutional right to a jury trial by improperly coercing the jury to reach a verdict.

Dunleavy did not preserve this claim of error by objecting below to the trial court's response to the jury's questions. Nevertheless, RAP 2.5(a)(3) permits an appellate court to review an unpreserved claim of error if it involves a "manifest error affecting a

constitutional right." Our RAP 2.5(a)(3) analysis involves a two-prong inquiry. First, the alleged error must truly be of constitutional magnitude. *State v. Kalebaugh*, 183 Wn.2d 578, 583, 355 P.3d 253 (2015). Second, the asserted error must be manifest. *Id.*

1. Constitutional magnitude

Dunleavy meets the first part of the RAP 2.5(a)(3) test. The state and federal constitutions protect an accused person's right to a jury trial. U.S. CONST. amends. VI, XIV; WASH. CONST. art. I, §§ 21, 22. Among other protections, these provisions secure "the right to have each juror reach his verdict uninfluenced by factors outside the evidence, the court's proper instructions, and the arguments of counsel." *State v. Boogaard*, 90 Wn.2d 733, 736, 585 P.2d 789 (1978). This right prohibits a judge from coercing a criminal jury to reach a verdict. *Id.* at 736-37. Dunleavy's claim that the trial court improperly coerced the jury to reach a verdict therefore is truly of constitutional magnitude. *See also State v. Ford*, 171 Wn.2d 185, 188, 250 P.3d 97 (2011).

2. Manifest error

Dunleavy fails to meet the second part of the RAP 2.5(a)(3) test. We construe "manifest" in a manner that strikes a careful policy balance between requiring objections to be raised so trial courts can correct errors and permitting review of errors that actually resulted in serious injustices to the accused. *Kalebaugh*, 183 Wn.2d at 583.

"[M]anifestness 'requires a showing of actual prejudice.'" *Id.* at 584 (internal quotation marks omitted) (quoting *State v. O'Hara*, 167 Wn.2d 91, 99, 217 P.3d 756 (2009)). "'To demonstrate actual prejudice, there must be a plausible showing . . . that the asserted error had practical and identifiable consequences in the trial of the case.'" *Id.* (internal quotation marks omitted) (quoting *O'Hara*, 167 Wn.2d at 99). In addition, such consequences "'should have been reasonably obvious to the trial court,' and the facts necessary to adjudicate the claimed error must be in the record." *Id*. at 588 (quoting *O'Hara*, 167 Wn.2d at 108, 99). By limiting our review of unpreserved constitutional errors to errors that are obvious, adjudicable from the record, and resulted in actual prejudice, we strike the proper policy balance.

Here, after only two and one-half hours of deliberating, the jury asked whether the Walla Walla County jail policies are legally binding, whether they are considered law, and what if they could not reach a unanimous verdict on one count. The trial court, after seeking input from the State and Dunleavy, responded in writing, "You are to review the evidence, the exhibits, and the instructions, and continue to deliberate in order to reach a verdict." CP at 5. This response is not so obviously coercive as to constitute manifest error. Because the unpreserved claim of error was not obvious, it is not reviewable under RAP 2.5(a)(3).

SUFFICIENCY OF THE EVIDENCE

Dunleavy next challenges the sufficiency of the evidence to sustain his conviction for second degree burglary. He argues a jail cell is not a separate building and, even if it is, he had an implied license to enter LaMunyon's cell. We disagree with both arguments.

Standard of review

In a criminal case, the State must provide sufficient evidence to prove each element of the charged offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 316, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). In evaluating the sufficiency of the evidence, the court must determine whether, when viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Pirtle*, 127 Wn.2d 628, 643, 904 P.2d 245 (1995). A claim of insufficiency of the evidence admits the truth of the State's evidence and all reasonable inferences from that evidence. *State v. Kintz*, 169 Wn.2d 537, 551, 238 P.3d 470 (2010). Reviewing courts also must defer to the trier of fact "on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence." *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004). This court does not reweigh the evidence and substitute its judgment for that of the jury. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d

628 (1980). For sufficiency of evidence claims, circumstantial and direct evidence carry equal weight. *State v. Varga*, 151 Wn.2d 179, 201, 86 P.3d 139 (2004).

Rules of statutory interpretation

Dunleavy's argument also requires interpretation of a definitional statute related to burglary. Statutory interpretation is a question of law reviewed de novo. *State v. Evans*, 177 Wn.2d 186, 191, 298 P.3d 724 (2013). "The purpose of statutory interpretation is 'to determine and give effect to the intent of the legislature.'" *Id.* at 192 (quoting *State v. Sweany*, 174 Wn.2d 909, 914, 281 P.3d 305 (2012)). "When possible, we derive legislative intent solely from the plain language enacted by the legislature, considering the text of the provision in question, the context of the statute in which the provision is found, related provisions, and the statutory scheme as a whole." *Id.* "Plain language that is not ambiguous does not require construction." *Id.* "If more than one interpretation of the plain language is reasonable, the statute is ambiguous and we must then engage in statutory construction." *Id.* at 192-93. "We may then look to legislative history for assistance in discerning legislative intent." *Id.* at 193. "If a penal statute is ambiguous and thus subject to statutory construction, it will be 'strictly construed' in favor of the defendant." *Id.* (quoting *State v. Hornaday*, 105 Wn.2d 120, 127, 713 P.2d 71 (1986)). "This means that we will interpret an ambiguous penal statute adversely to the defendant

only if statutory construction 'clearly establishes' that the legislature intended such an interpretation." *Evans*, 177 Wn.2d at 193 (quoting *City of Seattle v. Winebrenner*, 167 Wn.2d 451, 462, 219 P.3d 686 (2009)).

1. Jail cells are separate buildings for purposes of proving burglary

"A person is guilty of burglary in the second degree if, with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building other than a vehicle or a dwelling." RCW 9A.52.030(1). RCW 9A.04.110(5) defines "building" in relevant part as

> any . . . structure used for lodging of persons . . . ; *each unit of a building consisting of two or more units separately secured or occupied is a separate building*.

(Emphasis added.)

Dunleavy does not dispute that a jail is a building used for lodging of persons, specifically inmates. The evidence at trial established that each cell is secured at night and an inmate can secure his cell from others. The evidence at trial further established that each cell is separately occupied by two inmates. We discern no ambiguity. A jail cell is a separate building for purposes of proving burglary.

Dunleavy cites *State v. Thomson*, 71 Wn. App. 634, 861 P.2d 492 (1993) in support of his argument that a jail cell is not a "unit of a building . . . separately secured

or occupied." In *Thomson*, the victim rented a house and invited the defendant to stay in a guest bedroom. *Id*. at 636. Sometime during the night, the guest broke into the victim's bedroom and raped her. *Id*. The *Thomson* court considered whether the defendant satisfied the first degree rape statute by feloniously entering a building. *Id*. at 637. There, the State argued that the phrase "'*a building consisting of two or more units separately secured or occupied*'" meant "any building in which at least one room happens to be separately locked or occupied at the time of a crime." *Id.* at 642. In contrast, the defendant argued that the phrase meant "a building occupied or intended to be occupied by different tenants separately, for example, a hotel, apartment house, or rooming house." *Id.* The *Thomson* court, without employing a plain meaning analysis, concluded that the phrase was ambiguous and examined the history of the statute.[1] *Id.* at 643-44.

[1] *Thomson* quotes the drafter's commentary that states, "'multi-unit buildings is consistent with a similar provision in the definition of "dwelling house" . . . see also, *State v. Rio*, 38 Wn.2d 446, 450, 230 P.2d 308, *cert. denied*, 342[ ] U.S. 867 [230 P.2d 308] (1951)." *Thomson*, 71 Wn. App. at 644 (some emphasis omitted).

In *Rio*, the Washington Supreme Court upheld a burglary conviction where the defendant, a worker who resided in his employer's house, entered the bedroom of his employer and committed a felony against his employer's wife. 38 Wn.2d at 450-51. *Thomson*, contrary to *Rio*, holds that a burglary does not occur when a houseguest breaks into his host's bedroom and commits a felony against his host. *Thomson*, 71 Wn. App. at 646. But because we need not explicitly overrule *Thomson* to decide this case, the observations noted above are dicta.

We disagree that the italicized phrase is ambiguous. The plain meaning of the phrase lends itself to only one interpretation. The phrase unambiguously means any multi-unit building in which the units are separately secured or occupied. There is no requirement, as suggested by the State in *Thomson*, that the unit be secured or occupied *at the time of the crime*. Nor, as suggested by the defendant in *Thomson*, is there any word in the phrase that limits its meaning to multi-unit buildings *with tenants*. If the legislature intended such meanings it could have said so. It did not. Because the phrase is unambiguous, resort to legislative history would be error. *Evans*, 177 Wn.2d at 192-93.

We conclude that a jail is a building that consists of two or more units separately secured or occupied. Accordingly, by application of RCW 9A.04.110(5), each unit or cell is a separate building.[2]

2. No implied license for unlawful entry

Dunleavy contends he did not commit burglary when he entered LaMunyon's cell because his entry was lawful from an implied license to enter the cell.

"A person 'enters or remains unlawfully' in or upon premises when he or she is not then licensed, invited, or otherwise privileged to so enter or remain." Former

[2] Dunleavy notes that *Thomson* placed great emphasis on the privacy interests of the occupants in its analysis. Because our analysis rests on the plain language of the statutory definition, we view the privacy interests of the occupants as irrelevant.

RCW 9A.52.010(5) (2011). Dunleavy argues the evidence established that inmates go in and out of each other's cells frequently and this custom or practice supported his reasonable belief that he had an implied license to enter other inmates' cells. *See State v. C.B.*, 195 Wn. App. 528, 538-39, 380 P.3d 626 (2016); *Singleton v. Jackson*, 85 Wn. App. 835, 839, 935 P.2d 644 (1997).

His argument is contrary to the standard that limits our review of factual issues. LaMunyon testified he did not give Dunleavy permission to enter his cell. Sergeant Robertson testified that inmates are told when they are first booked into jail that they may not enter another inmate's jail cell. Inmates are subject to punishment for breaking these rules, including criminal charges. Dunleavy did elicit testimony that inmates often go into the cells of other inmates. But the standard that limits our review contemplates conflicting evidence and requires us to resolve such conflicts in favor of the State. *Pirtle*, 127 Wn.2d at 643. A rational jury could find beyond a reasonable doubt that Dunleavy entered LaMunyon's cell unlawfully.

OFFENDER SCORE CALCULATION

Dunleavy contends the State did not meet its burden in proving his prior convictions to calculate his offender score at sentencing. The State argues in response

that it did not need to provide evidence of his prior convictions because he waived this challenge by affirmatively acknowledging his convictions. We agree with Dunleavy.

Sentencing errors resulting in unlawful sentences may be raised for the first time on appeal. *State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008). Offender score calculations are reviewed de novo. *State v. Moeurn*, 170 Wn.2d 169, 172, 240 P.3d 1158 (2010).

The State has the burden of establishing a defendant's prior criminal history by a preponderance of the evidence to determine his or her offender score at sentencing. *State v. Ford*, 137 Wn.2d 472, 479-80, 973 P.2d 452 (1999). An unsupported statement of prior criminal history is insufficient to satisfy the State's burden of proof. *State v. Hunley*, 175 Wn.2d 901, 910, 287 P.3d 584 (2012). The State is relieved of this burden if the defendant affirmatively acknowledges his or her prior criminal history; the defendant's mere failure to object is insufficient. *Id*. at 912.

The State argues Dunleavy has waived this argument because he is not claiming his offender score was incorrectly calculated but instead just that the State did not meet its burden of proof. The State relies on *In re Personal Restraint of Goodwin*, 146 Wn.2d 861, 50 P.3d 618 (2002). The *Goodwin* court discussed various ways defendants can

waive a claimed error in offender score calculations, including acknowledging facts, even erroneous facts, underlying an offender score calculation.

Dunleavy's statements at sentencing do not constitute an acknowledgement of facts. The State points to Dunleavy's letter to the trial court. In that letter, Dunleavy asked the trial court to impose a drug offender sentencing alternative, and mentioned "the prosecutor's recommendation" of three to five years. RP at 191. Dunleavy's mention of the prosecutor's recommendation does not constitute an admission of facts.

The State also points to Dunleavy's statement to the trial court during sentencing. The trial court questioned Dunleavy about his ability to pay legal financial obligations. In response, Dunleavy stated that he was paying legal financial obligations on "[a]t least six" prior offenses. RP at 201. Although this statement is an admission of prior offenses, it is not an admission of sufficient facts to establish an offender score of 9+.

The State complains that Dunleavy's challenge to his offender score is a waste of resources. This might be true. But the State can safeguard unnecessary challenges by obtaining the defendant's stipulation to an offender score, by obtaining a clear acknowledgement by the defendant of his offender score, or by presenting proof of the

defendant's prior convictions. We remand so that the State can pursue one of these three options.[3]

Affirmed in part; remanded for resentencing.

Lawrence-Berrey, A.C.J.

WE CONCUR:

Korsmo, J.

Pennell, J.

[3] Dunleavy requests that we deny the State an award of appellate costs in the event the State substantially prevails. We deem the State the substantially prevailing party. If the State seeks appellate costs, we defer the award of appellate costs to our commissioner in accordance with RAP 14.2.

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