

67709-8

67709-8

NO. 67709-8-I

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

STATE OF WASHINGTON,

Respondent,

v.

GLENN T. SMITH,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT

Glenn T. Smith was charged with burglary in the second degree for entering or remaining inside a Wal-Mart store with intent to commit theft. Under *State v. Berlin*,¹ Mr. Smith was entitled to a lesser-included instruction for the crime of theft because the legal elements of that crime were necessarily demonstrated by proof of the greater crime (second-degree burglary) as charged. Further, the evidence presented supported a conviction for theft in the third degree. The trial court therefore erred in refusing to give the lesser-included theft instruction requested by Mr. Smith.

The State also presented insufficient evidence that Mr. Smith received notice that his privilege to enter Wal-Mart had been revoked. Because notice is a necessary element of the crime as charged, the conviction should be reversed and dismissed with prejudice.

B. ASSIGNMENTS OF ERROR

1. The trial court prejudicially erred and violated Mr. Smith's constitutional rights to present a defense and due process in refusing to provide the requested instruction for the lesser-included offense of theft in the third degree.

¹ *State v. Berlin*, 133 Wn.2d 541, 548, 947 P.2d 700 (1997).

2. In the absence of sufficient evidence to establish beyond a reasonable doubt Mr. Smith received notice that his entry into Wal-Mart in 2011 was unlawful, his conviction violates his constitutional right to due process.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The Sixth Amendment right to present a defense and the Fourteenth Amendment right to due process entitle a defendant to have the jury instructed on his defense theory. An accused person is entitled to an instruction on a lesser-included offense where the lesser crime is legally a lesser-included offense of the greater crime as charged and the facts in the light most favorable to the accused support the inference that only the lesser crime was committed. The State charged Mr. Smith with burglary in the second degree, specifying that he entered or remained unlawfully in the Wal-Mart store with intent to commit theft therein. Theft is thus a lesser-included offense of burglary in the second degree as charged. Factually the two offenses also coincided: the evidence supported the inference that only theft was committed. Did the trial court err in refusing to provide the defense-requested instruction on theft in the third degree?

2. The United States and Washington Constitutions require the State prove all essential elements of a charged offense beyond a reasonable doubt. Burglary in the second degree requires the State to prove the defendant entered or remained in a building unlawfully. Where the place is a public building, the State must show the defendant received notice that he is no longer licensed, invited, or privileged to enter. Should the conviction be reversed because the State failed to prove beyond a reasonable doubt that Mr. Smith received notice he was trespassed from all Wal-Mart stores indefinitely?

D. STATEMENT OF THE CASE

Mr. Smith was caught stealing various items from the Wal-Mart store in Everett, Washington on May 31, 2011. *E.g.*, RP 47-48, 55-57.

The State charged Mr. Smith with burglary in the second degree under the theory that Mr. Smith (a) was trespassed for life in 2007 and thus entered or remained in Wal-Mart unlawfully and (b) intended to commit the crime of theft inside Wal-Mart. *E.g.*, CP 69 (information). The State alleged Mr. Smith was trespassed from Wal-Mart stores for life in August 2007. The 2007 trespass notice was contested at trial.

Abbi Gomersall, who used to work in Wal-Mart's asset protection group, testified she had no recollection of the 2007 incident

with Mr. Smith. RP 8-9, 17-18. She does not recall him signing a trespass document, and if he was handcuffed, he would not have been asked to do so. RP 16. Although Wal-Mart's trespass policies fluctuated around 2007, Ms. Gomersall testified that when the store trespassed an individual, the trespass was for "a lifetime." RP 17-19.

Another asset protection manager at Wal-Mart, Kristi Daggett, testified she did have an independent recollection of trespassing Mr. Smith, though she participates in approximately 40 shoplifting and trespass incidents each year. RP 21-23, 32. Ms. Daggett's testimony, however, focused on her general procedures when trespassing an individual. She testified that when an individual being trespassed is handcuffed—as was Mr. Smith—she explains to them "you're no longer welcome to Wal-Mart, any Wal-Mart anywhere in the world, the rest of your life. If you come back, you can and will be charged with criminal trespassing." RP 28. She does not read the trespass notice verbatim. RP 31. Ms. Daggett admitted nothing on the trespass form indicates she had any discussion with Mr. Smith about the notice. RP 31; *see* CP __ (Exhibit 2 (2007 restriction notification)).² Similarly,

² A supplemental designation of clerk's papers was filed on February 17, 2012 requesting the trial court transmit to this Court the exhibits indicated throughout this brief.

Ms. Daggett did not indicate in her notes whether she had a discussion with Mr. Smith about the notice or whether he acknowledged receiving the notice. RP 31. Notably, when Mr. Smith was trespassed after the 2011 incident, that form notes that he verbally acknowledged receipt of the notice. RP 64; CP __ (Exhibit 5 (2011 restriction notification)). Such acknowledgment is missing from the 2007 form. CP __ (Exhibit 2). On redirect, Ms. Daggett testified Mr. Smith did not seem confused that day and indicated he understood the trespass. RP 33. Ms. Daggett explained she recollected this incident over four years later, including her specific recollection as to Mr. Smith's demeanor and acknowledgment, simply because it was "an interesting scenario" that stood out "a little bit more than others." RP 24.

Everett Police Officer Scott Rizzo arrested Mr. Smith at Wal-Mart during the August 2007 incident. RP 36-38. He testified his signature appears on the trespass notice as a witness, but he has no independent recollection of the incident or signing the notice. RP 36, 44.

Mr. Smith admitted at trial he took various items from Wal-Mart without paying on May 31, 2011. RP 82, 110. He contested, however, that he had notice that his right to enter Wal-Mart had been revoked for

life. Mr. Smith testified he was never shown the 2007 trespass notice and does not recall it being read to him. RP 84-85. On May 31, 2011, he was not aware that he was not allowed inside Wal-Mart. RP 84. Further, Mr. Smith testified he has been trespassed from other stores based on unrelated incidents and he has complied with the terms of the notice provided in those cases. RP 88. Though asset protection had noticed Mr. Smith in the Everett Wal-Mart store prior to the May 31st incident, he had not been told that he was not welcome. RP 47-48, 62, 84.

Based on his theory of defense and the crime as charged, Mr. Smith requested the court provide an instruction on the lesser-included offense of theft in the third degree. CP 45; RP 92, 101. The court refused and exception was taken. RP 100-01. The jury ultimately convicted Mr. Smith of the crime charged, burglary in the second degree. CP 25.

Additional facts are set forth in the relevant argument sections below.

E. ARGUMENT

1. The trial court erroneously refused to provide the defense-proposed instruction on the lesser-included offense of theft in the third degree.

- a. Mr. Smith requested the jury be instructed on the lesser-included offense of theft in the third degree.

In charging Mr. Smith with second-degree burglary, the State specified the crime occurred with the intent to commit theft while inside Wal-Mart. CP 69. In pertinent part, the information provides: “That the defendant, on or about the 31st day of May, 2011, with intent to commit a crime of theft against a person or property therein, did enter and remain unlawfully in the building of Wal-Mart . . . proscribed by RCW 9A.52.030, a felony.” *Id.* Thus, as charged, burglary in the second degree was dependent upon Mr. Smith’s intent to commit theft. Moreover, the to-convict instruction required proof of “intent to commit a crime of theft . . . therein.” CP 34.

Mr. Smith requested that the court instruct the jury on the lesser-included offense of theft in the third degree. CP 45; RP 92. Reviewing the legal elements of burglary in the second degree as set forth in the statute, the court found theft was not a lesser-included offense because the elements of the crimes did not coincide. RP 99-100. The court did not consider the elements of the burglary offense as charged. *See id.*

Mr. Smith took exception to the court's refusal to provide the instruction on theft in the third degree. RP 101.

- b. The requested lesser-included offense instruction satisfied the *Workman* test as it coincided legally and factually with the crime charged.

Generally, an accused may only be convicted of offenses contained in the indictment or information. *Schmuck v. United States*, 489 U.S. 705, 717-18, 109 S. Ct. 2091, 103 L. Ed. 734 (1989).

Pursuant to statute, however, an accused "may be found guilty of an offense the commission of which is necessarily included within that with which he is charged in the indictment or information." RCW 10.61.006. The failure to instruct the jury on a lesser offense, where the evidence might allow the jury to convict the defendant of only the lesser offense, violates the Fourteenth Amendment. *Beck v. Alabama*, 447 U.S. 625, 636-38, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980).

Where requested, an accused is entitled to an instruction on a lesser-included offense where: (1) each element of the lesser offense must necessarily be proved to establish the greater offense as charged (legal prong); and (2) viewed in the light most favorable to the defendant, the evidence in the case supports an inference that the lesser offense was committed (factual prong). *State v. Berlin*, 133 Wn.2d

541, 548, 947 P.2d 700 (1997) (overruling *State v. Lucky*, 128 Wn.2d 727, 912 P.2d 483 (1996)); *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978).

- i. The requested instruction legally coincided with burglary in the second degree as charged and proved.

Our Supreme Court firmly held in *Berlin* that the legal comparability of the lesser-included offense must be tested against the crime as charged, not as set forth in the statute. In *Berlin*, the Court first considered the history of the lesser-included offense doctrine as it existed at common law:

This rule originally developed as an aid to the prosecution when the evidence introduced at trial failed to establish an element of the crime charged. Thus, the rule gave the prosecution the flexibility to instruct the jury consistent with the evidence actually presented. The rule also benefited the defendant by providing a third alternative to either conviction for the offense charged or acquittal. Thus, the rule allowed the defendant to instruct the jury on an alternative theory of the case, a lesser crime than that charged by the State.

Berlin, 133 Wn.2d at 544-45 (citing *Beck*, 447 U.S at 633).

The court next reviewed its own recent decision in *Lucky* and found it erroneous, in pertinent part, because it “virtually eliminate[d] the Legislature’s codification of a common-law rule,” and was inequitable to both the prosecution and the defense in that it

“preclude[d] a lesser included offense instruction whenever a crime may be statutorily committed by alternative means.” *Berlin*, 133 Wn.2d at 547. The court accordingly held,

Only when the lesser included offense analysis is applied to the offenses as charged and prosecuted, rather than to the offenses as they broadly appear in statute, can both the requirements of constitutional notice and the ability to argue a theory of the case be met. This is fair to both the prosecution and the defense.

Id. at 548 (emphasis added). When analyzing the legal prong for a lesser-included offense, a court need not consider all the alternative statutory means of committing the crime. *Id.* at 548. Rather, the court should apply the *Workman* test to the offense as charged and prosecuted, not as the offense may be broadly set forth in the statute. *Id.* at 547-48. Therefore, this Court must compare the offense of burglary in the second degree, as charged and proven in the present case, with the proposed instruction on theft in the third degree.

As mentioned, the State charged Mr. Smith with second-degree burglary premised upon intent to commit theft. Accordingly, as charged, the elements of burglary in the second degree consisted of (1) entering or remaining unlawfully (2) with intent to (3) commit theft while therein. RCW 9A.52.030; RCW 9A.52.010(5) (defining unlawfully); CP 69 (information). The to-convict instruction likewise

tied the burglary offense to the intent to commit theft therein. CP 34. The elements of theft in the third degree are (1) wrongfully obtaining or exerting unauthorized control (2) over the property or services of another or the value thereof, (3) with intent to deprive him or her of such property or services. RCW 9A.56.020(1)(a). Because the value of the goods did not exceed \$750, the theft was in the third degree. RCW 9A.56.050; CP __ (Exhibit 1 (receipt)); RP 58-59. To satisfy its proof of burglary as charged in this case, the State had to and did demonstrate that Mr. Smith took items from Wal-Mart with intent to deprive Wal-Mart of those items. It even proved the value of the goods Mr. Smith stole. CP __; RP 58-59. The commission of theft in the third degree “is necessarily included within that which” he was charged—second-degree burglary. RCW 10.61.006.

In proving burglary as charged and instructed, the State necessarily proved theft. Therefore, the legal prong of the *Workman* test is satisfied.

- ii. The requested instruction factually coincided with burglary in the second degree as proved.

In applying the factual prong of the *Workman* test, a court must view the supporting evidence in the light most favorable to the party requesting the instruction. *State v. Fernandez-Medina*, 141 Wn.2d 448,

455-56, 6 P.3d 1150 (2000). The instruction should be given “[i]f the evidence would permit a jury to rationally find a defendant guilty of the lesser offense and acquit him of the greater.” *State v. Warden*, 133 Wn.2d 559, 563, 947 P.2d 708 (1997) (citing *Beck*, 447 U.S. at 635).

At trial, Mr. Smith admitted he stole merchandise worth approximately \$250 from the Wal-Mart store. RP 82, 110. The State’s evidence also demonstrated that Mr. Smith perpetrated theft. *E.g.*, CP ___ (Exhibit 1); RP 47-48, 55-59, 67-69, 73, 75. According to Wal-Mart, the value of the property was approximately \$250. CP ___ (Exhibit 1); RP 82, 110. Thus, the evidence was sufficient to permit a jury to rationally find Mr. Smith guilty of theft in the third degree. *See Warden*, 133 Wn.2d at 563; RCW 9A.56.050.

Conversely, the evidence of burglary in the second degree was controverted. Mr. Smith contested the State’s theory that he received notice he had been trespassed for life from Wal-Mart. RP 84-85, 88, 113-17. The State’s evidence was also equivocal: two witnesses who were present during the 2007 incident, Ms. Gomersall and Officer Rizzo, had no recollection of notifying Mr. Smith about the trespass; a third witness, Ms. Daggett, testified she explained the trespass to Mr. Smith, but the form contains no indication he acknowledged or

understood the notice. RP 8-9, 17-18, 21-23, 31-32, 36, 44; CP __ (Exhibit 2). Further, the trespass notice is silent as to the applicable time period. CP __ (Exhibit 2). Therefore, even if the jury found Mr. Smith had received notice of a trespass, the jury could have reasonably believed the notice did not convey that the trespass applied for life.

In sum, the evidence in the light most favorable to Mr. Smith supported a finding that he was guilty of theft in the third degree but not of second-degree burglary.

- c. The court's refusal to provide the requested instruction requires reversal of Mr. Smith's conviction.

Each party is entitled to have the jury instructed on its theory of the case where there is evidence to support that theory. *State v. Williams*, 132 Wn.2d 248, 259-60, 937 P.2d 1052 (1997); *State v. Hughes*, 106 Wn.2d 176, 191, 721 P.2d 902 (1986). Failure to give a proposed instruction on a defense that is supported by evidence in the record is reversible error. *State v. Stevens*, 158 Wn.2d 304, 310, 143 P.3d 817 (2006); *State v. Griffin*, 100 Wn.2d 417, 420, 670 P.2d 265 (1983).

In some circumstances, the failure to give a lesser-included offense instruction may be harmless error where, although the trial court wrongly fails to give a lesser-included offense instruction, a jury

is instructed on an intermediate offense but convicts the defendant of the greater crime. *See, e.g., State v. Guilliot*, 106 Wn. App. 355, 368-69, 22 P.3d 1266, *review denied*, 145 Wn.2d 1004 (2001); *State v. Hansen*, 46 Wn. App. 292, 296-97, 730 P.2d 706 (1986), *modified*, 737 P.2d 670 (1987). For example, if in a first-degree murder prosecution the court instructs the jury on both first- and second-degree murder, but declines to issue a manslaughter instruction, the failure to give the manslaughter instruction would be harmless if the jury rejected second-degree murder and rendered a conviction on the greater crime. *Guilliot*, 106 Wn. App. at 368-69. The rationale for this rule is that if the jury had believed the accused was less culpable, it would have convicted on the intermediate offense, thus issuance of the requested lesser-included offense instruction would not have affected the verdict.³

Courts have disapproved circumstances, however, where jurors are given an all-or-nothing choice. *Beck*, 447 U.S. at 634; *Keeble v. United States*, 412 U.S. 205, 212-13, 93 S. Ct. 1993, 36 L. Ed. 2d 844 (1973).

³ For example, in *Hansen*, the Court found the trial court's refusal of an unlawful imprisonment instruction in a first-degree kidnapping prosecution harmless where the court issued a lesser-included offense instruction on second-degree kidnapping. The Court concluded the jury's rejection of second-degree kidnapping signaled it would have also rejected the similar but lesser offense of unlawful imprisonment. 46 Wn. App. at 297-98.

Here, the jury was given an all-or-nothing choice, despite Mr. Smith's repeated request for an instruction on theft in the third degree. No intermediate instruction was provided. Because the requested instruction supported Mr. Smith's theory of the case and was supported by the evidence, the trial court's refusal to provide the instruction requires reversal.

2. The conviction should be reversed because the State presented insufficient evidence Mr. Smith received notice that entry into the Wal-Mart store was unlawful.

A criminal defendant has the right to a jury trial and may only be convicted if the State proves every element of the crime beyond a reasonable doubt. *Blakely v. Washington*, 542 U.S. 296, 300-01, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004); *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). On a challenge to the sufficiency of the evidence, this Court must reverse a conviction when, after viewing the evidence in the light most favorable to the prosecution, no rational trier of fact could have found all the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); *State v. Drum*, 168 Wn.2d 23, 34-35, 225 P.3d 237 (2010).

To prove burglary in the second degree based on entry or remaining in a public building, the State must demonstrate the accused received notice he was no longer licensed or privileged to enter the building. RCW 9A.52.010(5); *State v. Kutch*, 90 Wn. App. 244, 247-48, 951 P.2d 1139 (1998); CP 35 (jury instruction 7, defining unlawfully). In *Kutch*, the defendant was notified that his invitation to enter a store in the Yakima Mall was revoked for one year when he was arrested for shoplifting. 90 Wn. App. at 246. Mr. Kutch was shown a written notice informing him of the revocation. *Id.* He signed the form. *Id.* He was charged with second degree burglary when he was caught shoplifting from the same store several months later. *Id.* On appeal, Mr. Kutch argued the written notice revoking his right to enter the store was insufficient because he did not receive a copy of the notice and did not understand what he was signing. *Id.* at 248. The court found the revocation provided sufficient notice because it was specifically directed to Mr. Kutch, he signed the document acknowledging the revocation, and the revocation included the time (one year) and place (the store) of the revocation. *Id.* at 248-49.

Here, the State failed to present sufficient evidence to show Wal-Mart notified Mr. Smith he was trespassed from all stores

indefinitely. Unlike Mr. Kutch, Mr. Smith did not sign the revocation notice and the notice does not indicate his acknowledgement of the revocation. CP __ (Exhibit 2). Mr. Smith testified he did not receive a copy of the notice to review and does not recall it being read to him. RP 84-85. Mr. Smith admitted he had been subject to other revocations, and had not returned to those buildings because he understood the terms of the revocation. RP 88. He did not know, however, that he was not permitted inside the Everett Wal-Mart. RP 84. The evidence does not support a finding beyond a reasonable doubt that Mr. Smith received notice of the revocation.

Even if the evidence supported a finding that Mr. Smith received notice, the notice is ambiguous as to how long it applies. In *Kutch*, the notice was sufficient because it specified the applicable time period—one full year. 90 Wn. App. at 248-49. Here, the notice is silent as to its duration. CP __ (Exhibit 2). It is therefore insufficient to show Mr. Smith had notice that was prevented from entering or remaining in a Wal-Mart store four years later.

Consequently, the State failed to prove an essential element of the crime. Mr. Smith's conviction should be reversed and the charge dismissed with prejudice against the State to refile. *See, e.g., Jackson,*

443 U.S. at 319; *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969) (retrial barred by constitutional right to be free from double jeopardy), *reversed on other grounds by Alabama v. Smith*, 490 U.S. 794, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989); *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

F. CONCLUSION

Mr. Smith's conviction for burglary in the second degree should be reversed on two independent bases. First, the trial court should have provided the defense-requested instruction on the lesser-included offense of theft in the third degree. Second, insufficient evidence proved Mr. Smith had notice that his entry into or remaining in Wal-Mart was unlawful. This latter ground also requires dismissal of the charge with prejudice.

DATED this 5th day of March, 2012.

Respectfully submitted,



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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 67709-8-I
)	
GLENN SMITH,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 5TH DAY OF MARCH, 2012, I CAUSED THE ORIGINAL **OPENING 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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SIGNED IN SEATTLE, WASHINGTON, THIS 5TH DAY OF MARCH, 2012.

X _____ 