

NO. 33160-8-II

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

STATE OF WASHINGTON,

Respondent,

v.

CODY SPRINGER,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 04-1-01262-5

BRIEF OF RESPONDENT

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This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.
DATED June 2, 2006, Port Orchard, WA [Signature]
Original AND ONE COPY filed at the Court of Appeals, Ste. 300, 950 Broadway, Tacoma WA 98402; Copy to counsel listed at left.

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STATUTE

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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether evidence that Springer unlawfully entered Townsend's pool house with intent to make unauthorized use of the phone is sufficient to prove second-degree burglary?

2. Whether Springer's contentions regarding accomplice liability are irrelevant where the evidence clearly established Springer's guilt as a principal?

3. Whether the trial court did not abuse its discretion for refusing a mistrial where the State briefly elicited evidence that Springer's accomplice was also facing trial for the offense?

4. Whether the prosecutor properly stated the law of burglary when he argued the State only had to prove intent to commit any crime to establish the crime?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Cody Springer was charged by information filed in Kitsap County Superior Court with burglary and bail jumping. CP 60. The jury found him guilty as charged. CP 85.

B. FACTS¹

Jay Townsend's son Dan moved out a week before Townsend's pool house was burglarized. 2RP 72. Dan moved to Tucson, and "said his good-byes for a month and a half to all his friends" before he left. 2RP 72. The TV was at the far end of the room from the door. 2RP 76.

The morning of the burglary, Townsend awoke to his dog "going crazy" about 12:30 in the morning. 2RP 77. It was a distinctive bark, like there was a person there. 2RP 77. He got up and looked out the window of his daughter's bedroom and saw that the bathroom light was on in the pool house and saw two "shadow figures" moving about behind the blind 2RP 78. Townsend had not left the lights on. 2RP 78. The light in the main room where the TV was was not on; only the bathroom light was on. 2RP 85.

As Townsend proceeded through the living room, he saw the two leaving the pool house. 2RP 80. They were heading around the edge of the pool toward the gate to exit from the pool enclosure. 2RP 80. They were within three feet of each other. 2RP 80. Townsend could not see whether they were carrying anything at that point. 2RP 80.

Townsend then went into the next room, and from there it looked like

¹ Springer does not challenge his bail-jumping conviction, so only the fact pertaining to the burglary will be discussed.

something was being carried, so he opened the window and yelled at them.
2RP 80. Neither of them asserted that they were just there to use the phone.
2RP 81.

Townsend measured the distance afterward. 2RP 180. They were eight feet away when he opened the door. 2RP 180. Townsend then headed to the sliding glass doors, and by then they had taken off running. 2RP 81. Afterward, he found the 27-inch television from the pool house five feet from the gate, by the fire pit. 1RP 20, 2RP 92.

The phone sits on the opposite side of the pool table from the door. 2RP 85. The pool house was approximately 40 by 22 feet. 2RP 86. The phone was about 20 feet from the door. 2RP 86. One would have to go through one of the two pool enclosure gates to get to the pool house from the outside. 2RP 88.

Townsend called the police, and Deputy Ben Herrin was the first to arrive. 2RP 37. Herrin was waiting at the end of Townsend's long dirt driveway for a second unit to arrive when Townsend came down the driveway in his truck. 2RP 38-39.

Deputy Baker arrived with his tracking dog. 2RP 42. They started beside the house and went down the sidewalk past the pool house. 2RP 42. The track led into the woods behind the house after that. 2RP 43. They went

50 to 60 yards into the woods. It was dark. 2RP 44. It took about 50 minutes, and at the end of the track they found Springer and Joseph Baza 2RP 46, 48.

Springer was obviously intoxicated. Herrin could smell a strong odor of alcohol and his speech was slurred. 2RP 49. Springer never asserted that Baza took the TV. 2RP 49. He said he ran because he was scared. 2RP 49.

Townsend identified Baza and Springer as the two he had seen on his property. 2RP 49. Townsend had seen them from about 20 feet away. 2RP 49. Baza looked familiar to Townsend. He had been a friend of Dan's but it had been six or seven years since he had been to the house. 2RP 96. Townsend did not know Springer and had never seen him at the house. 2RP 96. They did not have permission to be there. 2RP 96.

After his arrest, Deputy Clinton Bergeron interviewed Springer. 1RP17. Springer said he and Baza knew Dan who used to live in the pool house, and they went there to use the telephone. They did not have a phone at their house, and needed a ride, so they walked over to the residence, found an unlocked door and went inside to use the phone.

Bergeron asked Springer, "What about the TV," but Springer did not respond directly. Springer did not say anything about the TV. Springer said he had been in the house along time ago, but did not say how long ago.

1RP19. Springer said he was there to use the phone and did not know anything about the television. 1RP22.

Springer testified at trial. He asserted that that they went to the pool house, and Baza got him the phone. 2RP 137. Springer went a foot or two inside. 2RP 138. He called Brown and began talking to her. 2RP 138. Baza switched the light on, but he was still outside on the phone. 2RP 139. He finished his call and put the phone down on a stand inside the door and told Baza that Brown was on her way. 2RP 140. Baza was still inside. 2RP 140. He assumed that Baza was following a few feet behind him. 2RP 141. Springer asserted that he heard someone yell, and then he saw Baza running, so he ran after Baza. 2RP 141. He claimed that Baza did not have anything in his arms. 2RP 143. Springer also asserted that was not inside the enclosure when he heard the yelling. 2RP 144. Baza was not inside the enclosure either. 2RP 145. Springer claimed that they never discussed taking a television, and he never saw Baza doing anything with the TV. 2RP 145. He did not know anything about the television until the police mentioned it. 2RP 145.

Springer denied that they had been drinking at all. 2RP 154. He also claimed that the dog started barking one to three minutes after he went out the gate. 2RP 162. He could not explain how Baza got in front of him. 2RP 162.

III. ARGUMENT

A. EVIDENCE THAT SPRINGER UNLAWFULLY ENTERED TOWNSEND'S POOL HOUSE WITH INTENT TO MAKE UNAUTHORIZED USE OF THE PHONE IS SUFFICIENT TO PROVE SECOND-DEGREE BURGLARY.

Springer argues that the evidence was insufficient to prove the crime of burglary. This claim is without merit because the unauthorized use of telephone services constitutes theft. Springer himself testified that not only did they intend to use the phone when he and Baza unlawfully entered the property, Springer himself personally used the phone.

It is a basic principle of law that the finder of fact at trial is the sole and exclusive judge of the evidence, and if the verdict is supported by substantial competent evidence it shall be upheld. *State v. Basford*, 76 Wn.2d 522, 530-31, 457 P.2d 1010 (1969). The appellate court is not free to weigh the evidence and decide whether it preponderates in favor of the verdict, even if the appellate court might have resolved the issues of fact differently. *Basford*, 76 Wn.2d at 530-31.

In reviewing the sufficiency of the evidence, an appellate court examines whether, viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could find that the essential elements of the charged crime have been proven beyond a reasonable doubt. *See State v.*

Green, 94 Wn.2d 216, 220, 616 P.2d 628 (1980). The truth of the prosecution's evidence is admitted, and all of the evidence must be interpreted most strongly against the defendant. *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385 (1980). Further, circumstantial evidence is no less reliable than direct evidence. *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997). Finally, the appellate courts must defer to the trier of fact on issues involving "conflicting testimony, credibility of the witnesses, and the persuasiveness of the evidence." *State v. Hernandez*, 85 Wn. App. 672, 675, 935 P.2d 623 (1997).

The intent to commit a specific named crime inside the burglarized premises is not an "element" of the crime of burglary in the State of Washington. The intent required is simply the intent to commit any crime against a person or property inside the burglarized premises. *State v. Jackson*, 112 Wn.2d 867, 879, 774 P.2d 1211 (1989). Thus, even the intent to use utility services such as electricity inside the unlawfully entered building has been deemed a sufficient to constitute a "crime" for the purposes of the burglary statute. *State v. Kolisynk*, 49 Wn. App. 890, 893-894, 746 P.2d 1224 (1987). Indeed, the theft statutes include, as property capable of being stolen, "services" such as the supplying of commodities of a public utility nature such as gas, electricity, steam, and water. RCW 9A.56.010 (12). Thus, even ignoring the removal of the television and the fact that

Townsend saw one of them holding a large object, and accepting Springer's claim at face value that they only intended to use the phone, the evidence was sufficient:

When confronted ... [the defendant] said he only wanted to "use the phone." This is not an innocent statement even taken at face value. An unpermitted use of the telephone nevertheless amounts to a theft of services and therefore [the defendant's] stated intention was an admission of his criminal intent, confirmed by his hasty retreat after being seen.

State v. Brunson, 76 Wn. App. 24, 31, 877 P.2d 1289 (1994), *affirmed*, 128 Wn.2d 98 (1995). This case is indistinguishable from *Brunson*. This claim must be rejected.

B. BECAUSE THE EVIDENCE CLEARLY ESTABLISHED SPRINGER'S GUILT AS A PRINCIPAL, HIS CONTENTIONS REGARDING ACCOMPLICE LIABILITY ARE IRRELEVANT.

Springer next claims that the evidence was insufficient to show that that he acted as an accomplice. While the State submits that Springer's entire course of conduct strongly suggested that he and Baza acted in concert with full knowledge of each other's intent, because, as discussed in the previous section, the evidence fully established Springer's guilt as a principal this contention is irrelevant.

C. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION FOR REFUSING A MISTRIAL WHERE THE STATE ELICITED EVIDENCE THAT SPRINGER'S ACCOMPLICE WAS ALSO FACING TRIAL FOR THE OFFENSE.

Springer next claims that the prosecutor improperly attempted to shift the burden of proof when he brought out evidence, on cross-examination of Springer, that his accomplice Baza was also facing charges for the crime. The trial court did not abuse its discretion for denying a mistrial based on this inquiry.

First, it must be noted that in his brief Springer attempts to suggest that the questioning to which he objected went on at length, noting that "defense counsel continued to object to this line of questioning." Brief at 16. The implication is not, however, accurate. In fact only one more question: "- is he. All right. Now -," was asked, and was not answered. 2RP 164.

Turning to the substantive issue, the questioning did not, and certainly was not intended to, shift the burden of proof. While perhaps inartful, and likely irrelevant, the prosecutor was only attempting to bring out the fact that the State was also seeking to punish Baza for his role in the crime, as he explained to the court:

And since this is an accomplice liability case, they have a right to know – if we can bring it out through a witness – what the status is of that other person, your Honor, and that's all it is. There is no burden shift.

2RP 170. He reaffirmed his intent several times:

It is merely an inquiry that the State certainly believes is allowed to ask the question without harping on it. ... Absolutely, there is no burden shift. It is merely a question in one evidentiary point among hundreds to analyze

2RP 173. Indeed, he expressed mystification as the claim that he had attempted to shift the burden:

Your Honor, the public has got a right to see what the court system is doing and that the State has objectives and that people are going to be held what they believe is accountable for their crimes. In a severed case, such as this, they certainly have the ability to have – or they have the right to have that question answered, and have a question answered in a global sense, as the court pointed out in a de minimis way, doesn't shift any burden for this defendant; especially when there are jury instructions, too. I heard burden shift, burden shift, but I suppose I don't completely understand where exactly that burden shift is coming from.

2RP 175-76.

The court, which had the benefit of observing the questioning live, did not find that it was particularly egregious:

But specifically in this case it was a very de minimis inquiry, and so that's, I think, what we've got to focus on.

2RP 172. The court therefore concluded that a curative instruction would be more than adequate to take care of the problem:

This jury's job is to look at Mr. Springer and his actions, and it seems to me that a corrective instruction will take care of that; juries follow those instructions.

This whole question of burden shifting, I'm not sure if it is burden shifting or some sort of shifting of the need to

[corroborate]² the statement.

And certainly, Ms. Brown came in to corroborate what Mr. Springer's position was, that was a minor question, there was an objection, it was sustained. There was a further question, a motion to strike, that was overruled. But there were just two questions relating to Mr. Baza.

The jury will be told that they are not to consider Mr. Baza's presence or absence in any way as they exam Mr. Springer's guilt or innocence in this case. And by my way of thinking that will cure whatever missteps took place and a mistrial is unnecessary at this point.

2RP 177. The court thereafter proposed an instruction to the jury, Springer then proposed his own, but subsequently withdrew his request to instruct the jury on the issue. 3RP 203, 205-07.

This Court reviews a trial court's denial of a mistrial motion based on prosecutorial misconduct for abuse of discretion. *State v. Borg*, 145 Wn.2d 329, 335, 36 P.3d 546 (2001). Abuse of discretion occurs if there has been an error and a substantial likelihood exists that resulting prejudice affected the jury's verdict. *State v. Crane*, 116 Wn.2d 315, 332-33, 804 P.2d 10, *cert. denied*, 501 U.S. 1237 (1991). The defendant must have been so prejudiced that only a new trial will ensure a fair trial. *State v. Mak*, 105 Wn.2d 692, 701, 718 P.2d 407, *cert. denied*, 479 U.S. 995 (1986). "The defendant bears the burden of showing that the conduct complained of was both improper and prejudicial." *Borg*, 145 Wn.2d at 335.

² The report of proceedings reads "collaborate."

Here, there was no suggestion in these two questions, or in any subsequent argument, that Springer bore any burden of disproving the charge. Moreover, even were the prosecutor's avowed purpose, *i.e.*, showing that Baza was also being prosecuted, irrelevant, there was already evidence before the jury that Baza had been arrested at the same time as Springer. The jury was instructed multiple times on the burden of proof, and that it was to consider only Springer's guilt in reaching its verdict. There simply is no likelihood that this inquiry, which the trial court described as "de minimis," so prejudiced Springer that it could only be cured by a new trial. The trial court's exercise of discretion should be upheld.

D. THE PROSECUTOR DID NOT MISSTATE THE LAW OF BURGLARY WHEN HE ARGUED THE STATE ONLY HAD TO PROVE INTENT TO COMMIT ANY CRIME TO ESTABLISH THE CRIME.

Springer finally claims that the prosecutor improperly misstated the law of accomplice liability in his closing argument. This claim is without merit because in the quotes passage, the prosecutor was not discussing the law of accomplice liability, he was addressing the law of burglary.

Indeed a review of the entire passage shows that the prosecutor was discussing the burglary "to-convict" instruction:

So now I'm just going to point out the to convict instruction. Again, the judge read them to you. This is what

you need to find these elements beyond a reasonable doubt, and this is what I submit to you that this case has exactly shown that.

First off, “Did Cody Springer or” -- not “and,” but “or” -- “an accomplice enter or remain unlawfully in a building?” Cabana, yeah that’s a building; you heard the testimony.

Is it unlawful entry? Yeah, because Jay Townsend told you it was, because he didn’t give anybody permission.

Did somebody enter that building? Yeah, Cody Springer entered it. Probably. Townsend told you he saw two people in there. Cody Springer said he may have entered it, it wasn’t sure. But he said that Baza pretty much handed him the phone that he used.

Now, here we go back to what did Cody Springer know and when did he know it. Was he entering or remaining in that building intentional to commit a crime? Well, that’s the question of the day.

Remember the inference instruction. If somebody is inside a building unlawfully you can infer that they went in there. So your common sense will dictate, based on this, evidence, *whether you believe he intended to commit that crime or not.*

Even if they are going to use the phone, you could probably argue among yourselves that itself could constitute a crime, and that’s even a long list of their local calls are part of a package plan, it may not add anything. Or how about turning on the light using electricity? Could that be? It could be as simple as that. And I’m not suggesting that you find that. But it doesn’t have to be a specific crime. It just has to be a crime. Did they intend to do that? I submit to you, oh, yeah. Look at the inference instruction and look at the facts. Yeah, they knew exactly what they were doing.

3RP 230-32.

Plainly, the prosecutor was only discussing the intent to commit a crime for purposes of the *burglary* statute. There is no discussion in this

passage of the law of accomplice liability or the instruction thereon. He is specifically speaking about *Springer's* knowledge and intent. As discussed in the first section above, Washington law does not require the State to allege or prove any specific crime to establish that a burglary occurred. The prosecutor's argument was thus not a misstatement of the law. Moreover, as also discussed above, since the evidence was more than sufficient to establish Springer's guilt as a principal, Springer cannot meet his burden of showing that the remark, even assuming, *arguendo*, that it was improper, was so ill-intentioned and flagrant that it caused such prejudice that a curative instruction would not have cured it. *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994), *cert. denied*, 514 U.S. 1129 (1995). This claim should also be rejected.

IV. CONCLUSION

For the foregoing reasons, Springer's conviction and sentence should be affirmed.

DATED June 2, 2006.

Respectfully submitted,

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