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Court of Appeals
Division II
State of Washington
12/21/2017 1:30 PM

No. 50154-6-II

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

STATE OF WASHINGTON,

Respondent,

v.

JOEY MCMILLAN
Appellant.

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

The Honorable John C. Skinder
Cause No. 16-1-01085-34

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether the trial court properly instructed the jury as to the elements and related definitions of the offense of burglary in the second degree.

2. Whether the trial court properly denied a request for a lesser included instruction on the offense of criminal trespass in the first degree, where no rational juror could have found that McMillan committed only that offense.

B. STATEMENT OF THE CASE.

On June 25, 2016, Noel Vas, an information technology specialist at the Washington State Auditor's Office in Tumwater, Washington, went to work on the weekend to work on an IT deployment that was set for the following Monday. 1 RP 79-80. The Auditor's Office was not open to the public on that Saturday. 1 RP 80. Vas' office is located in the basement of the building. 1 RP 80. Vas went into his office and then went to the conference room next door to turn on some computers. When he left his room, he noticed some clothes on the floor, a broken blade and a piece of the ceiling tile on the floor. 1 RP 81-82. From the ceiling, there were wires hanging, and the plastic baseboard was pulled off. 1 RP 82. Vas looked straight and saw a man on all fours in a cubicle that belong to Mike Pierce. 1 RP 82.

Vas did not recognize the man and noticed he was on all fours playing with a plastic zip-lock bag that had some white substance on it. Vas noticed that the man did not have a shirt on. 1 RP 82. Vas started to walk towards the man and noticed that the chairs were overturned in the break room and it was just a mess, at which time Vas went back into his office. 1 RP 83. Vas called 911 and observed the police go into the building and come out with the man who he had seen. 1 RP 83-84.

Vas described the breakroom, stating, "the place was destroyed I guess," and noted that the bottom of a chair had been torn off, there were puncture marks, and the refrigerator was turned the wrong way. 1 RP 87-88. The Auditor's office experienced internet connectivity problems and some of the damaged wiring needed to be replaced. 1 RP 89. Vas found a knife blade stuck into the ground and noticed pry marks on a door that was inside the building. 1 RP 90.

Officer Tye Hollinger of the Tumwater Police Department responded to the Auditor's office. 1 RP 20, 24-25. Officers from the Olympia Police Department were also on seen to assist, including a K-9 officer. 1 RP 31, 32. The officers, including the K-9, entered the building to search for the individual. 1 RP 32. The officers went

down to the basement level as they came to a fairly large room or area with cubicles, McMillan jumped out from a cubicle area and threw himself onto the ground in front of the K-9. 1 RP 36-37.

During a search incident to arrest, Officer Hollinger found a syringe on McMillan's person. 1 RP 40-41. Officer Hollinger noticed that the break room of the Auditor's office was "completely destroyed," with chairs flipped over and items strewn about. 1 RP 42. It appeared as though a fire alarm had been ripped off. In the hallway, Hollinger noticed a knife stuck into a doorjamb of one of the adjacent rooms and ceiling tiles that looked like they had been pulled down or pushed up and wires coming out from the ceiling. 1 RP 42.

Officer Hollinger interviewed McMillan and McMillan indicated that he had been eating chips inside next to the cubicle. Officer Hollinger located and photographed chips in that area that McMillan appeared to have been eating. 1 RP 45. Vas identified McMillan as the person he had seen in the Auditor's office. 1 RP 55. The interview of McMillan occurred after he was read his rights. 1 RP 58. Hollinger noted that McMillan appeared to be under the influence of methamphetamine and was very polite. 1 RP 59. McMillan's responses were appropriate in the context of Hollinger's

questions and he did not appear to be hallucinating at the time he was speaking with Officer Hollinger. 1 RP 60.

Officer Hollinger was on scene with McMillan for approximately an hour, during which time McMillan appeared to be functioning at a level where he understood where he was and what his circumstances were. 1 RP 60-61. McMillan indicated that he had gone to the nearby Safeway and purchased heroin and methamphetamine. 1 RP 62. McMillan said he used both in the syringe when he shot up. 1 RP 63.

McMillan said that he found a door unlocked at the Auditor's office and he did not have any business there. 1 RP 63-64. He said he went into the building because people were hiding from him. 1 RP 64. McMillan acknowledged that the damage inside the breakroom was the result of his actions and indicated that he had removed the ceiling tiles and the wires that were down and that he had made the marks on the door in an effort to get into the IT department. 1 RP 64-65. He also admitted that he had been searching through items in the cubicles and had eaten some of the food that was inside the building. 1 RP 65. McMillan also stated that he put his pants back on after Vas made contact with him. 1 RP 68.

Diane Perry, the director of operations for the Auditor's Office responded to the building after another employee called her and told her that a burglary occurred. 1 RP 99-100. Perry indicated that the building is not generally open to the public and should not be left unsecured on the weekend. 1 RP 100. Perry noticed wood chips broken away from a lock inside of the building, broken ceiling tiles and wires hanging down and food pieces in various parts of the building. 1 RP 102. She indicated that there were issues with the electrical system and some damage to a fire alarm. 1 RP 102.

Lassen Electric came and dealt with the electrical damage, which cost around \$300. 1 RP 103. Approximately six to eight employees were involved in the cleanup of the office. 1 RP 104.

At trial, the defense offered the testimony of Dr. Michael Stanfill. 1 PR 136. Dr. Stanfill met with McMillan for "a couple of hours" on January 12, 2017. 1 RP 148. Based on his evaluation, Dr. Stanfill formed the opinion that McMillan lacked the ability to form intent with regard to the burglary charge due to methamphetamine and heroin use. 1 RP 153. However, Stanfill testified that McMillan had awareness when he was poking or pulling down ceiling tiles and he had awareness of going into the

breakroom. 1 RP 154-155. Dr. Stanfill stated, “ultimately my opinion was that he did have capacity to form intent around the malicious mischief charge.” 1 RP 155.

The jury convicted McMillan of burglary in the second degree and malicious mischief in the third degree. CP 63, 61. McMillan was sentenced to a term off incarceration of 38 months. CP 104. This appeal follows.

C. ARGUMENT.

1. **The trial court properly instructed the jury with regard to elements of burglary in the second degree.**

A challenged jury instruction is reviewed de novo. State v. Pirtle, 127 Wn.2d 628, 656, 904 P.2d 245 (1995). “Instructions must be read as a whole.” State v. Kroll, 87 Wn.2d 829, 843, 558 P.2d 173 (1976). The trial court has considerable discretion in deciding how many instructions to give. State v. Markham, 40 Wn.App. 75, 86, 697 P.2d 263, *review denied*, 104 Wn.2d 1003 (1985). The trial court also has considerable discretion in determining how jury instructions are worded. State v. Krup, 36 Wn.App. 454, 461-462, 676 P.2d 507, *review denied*, 101 Wn.2d 1008 (1984). Instructions are sufficient if they correctly state the

law, are not misleading, and permit counsel to argue his or her theory of the case. State v. Mark, 94 Wn.2d 250, 526, 618 P.2d 73 (1980).

Washington has adopted pattern jury instructions and notes on the appropriate use of those instructions to assist trial courts. State v. Bennett, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007). With regard to the charge of burglary in the second degree, the trial court instructed the jury:

A person commits the crime of burglary in the second degree when he or she enters or remains unlawfully in a building with intent to commit a crime against a person or property therein.

CP 82. This instruction mirrors the suggested instruction in the Washington Pattern Jury Instructions. 11A Washington Practice: Washington Pattern Jury Instructions: Criminal (4th Ed. 2016, 60.03). The trial court further instructed the jury:

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

CP 83. The definitional instruction given is identical to the recommended pattern instruction. 11A Washington Practice: Washington Pattern Jury Instructions: Criminal (4th Ed. 2016, 65.02). This definitional instruction, when taken as a whole with the

trial court's other instructions "provided the jury with the applicable law." State v. Cordero, 170 Wn.App.351, 370, 284 P.3d 773 (2012).

The court's instructions also correctly instructed the jury as the intent requirement of burglary in the second degree. "the intent required...is simply the intent to commit any crime against a person or property inside the burglarized premises." State v. Bergeron, 105 Wn.2d 1, 1, 711 P.2d 1000 (1985). The instructions provided by the trial court properly instructed the jury as to the law.

McMillan proposes an instruction that modified the language of WPIC 65.02. CP 37. In support of the proposed modified instruction, McMillan cited to State v. Gregor, 11 Wn.App. 95, 521 P.2d 960 (1974) and State v. Turner, 78 Wn.2d 267, 474 P.2d 91 (1970); neither of which support the modifications that McMillan proposed. Turner, very specifically discussed the mens rea for a violation of the Uniform Flag Law that was in effect at that time. Turner, 78 Wn.2d at 277-278. The holding of that decision is not applicable to the charge of burglary in the second degree.

In Gregor, the court looked at the entry requirement of burglary in the second degree of a dwelling as it was written at that time. Gregor, 11 Wn.App at 98. The court stated, "we are of the

opinion that the statutory offense of second degree burglary of a dwelling house of another involves no unlawfulness of entry except as the entry becomes unlawful by reason of the criminal intent of the person entering.” Id. The instructions that the trial court provided echoed the legal principle that the criminal intent to commit a crime therein is the intent that is at issue with the charge of burglary in the second degree.

The trial court’s instructions to the jury correctly stated the law, were not misleading, and allowed the defendant to argue his theory of the case. McMillan’s theory revolved around the testimony of Dr. Stanfill and the opinion that McMillan did not have intent to enter unlawfully or remain or to commit a crime. 2 RP 124. The jury instructions provided by the trial court allowed for that argument. The defense could, and did argue that McMillan’s voluntary intoxication made it impossible for him to intend to commit a crime therein when he entered the building or remained inside the building. In addition to the definitional instruction at issue, the trial court properly instructed the jury regarding the definition of intent and gave an instruction on voluntary intoxication. CP 87, CP 89. The instructions as a whole were adequate and the court did not err

in denying McMillan's request to use his modified version of WPIC 65.02.

2. McMillan was not entitled to a jury instruction on the lesser included offense of criminal trespass in the first degree.

The State does not dispute a defendant's right to a lesser included instruction when the law and the facts of the case permit. Amendments V, VI, and XIV of the federal constitution require the trial court to give a requested instruction when the lesser included offense is supported by the evidence. Vujosevic v. Rafferty, 844 F.2d 1023 (1988). This right protects a defendant who might otherwise be convicted of a crime more serious than that which the jury believes he committed simply because it wishes to avoid setting him free. Keeble v. United States, 412 U.S. 205, 212-13, 36 L. Ed. 2d 844, 93 s. Ct. 1993 (1973).

Under current Washington law, the defendant's right to a lesser included instruction is, in addition to his federal rights, a statutory right. RCW 10.61.006 provides:

In all other cases [those not involving crimes with inferior degrees, RCW 10.61.003] the defendant may be found guilty of any offense the commission of which is necessarily included within that with which he is charged in the indictment or information.

See also State v. Bowerman, 115 Wn.2d 794, 805, 802 P.2d 116 (1990). This right applies when (1) each element of the lesser offense is a necessary element of the crime charged, and (2) the evidence supports an inference that only the lesser included crime was committed. State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978); State v. Peterson, 133 Wn.2d 885, 891, 948 P.2d 381 (1997). This two-prong test reflects consideration for the specific constitutional rights of the defendant, particularly his right to know the charges against him and to present a full defense. Peterson, 133 Wn.2d at 889. An inference that only the lesser offense was committed is justified “[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. Fernandez-Medina, 141 Wn.2d 448, 456, 6 P.3d 1150 (2000) (quoting State v. Warden, 133 Wn.2d 559, 563, 947 P.2d 708 (1997)).

In this case, McMillan’s request for a lesser included instruction fails on the second prong of the test. The law is clear regarding the first prong of the test. “Criminal trespass in the first degree is a lesser included offense of burglary in the second degree.” State v. Olson, 182 Wn.App. 362, 375, 329 P.3d 121 (2014); citing State v. Soto, 45 Wn.App. 839, 840-41, 727 P.2d 999

(1986). However, the facts at trial were such that a rational jury could not find McMillan guilty of the lesser offense without finding him guilty of the burglary.

There was overwhelming evidence presented that the Washington State Auditor's Office was not open to the public and McMillan had no license or invitation to be there on Saturday, June 25, 2016. There was also overwhelming evidence that while inside the building, McMillan caused significant property damage. McMillan demonstrated an understanding of Officer Hollinger's questions and acknowledged that the damage inside the breakroom was the result of his actions and indicated that he had removed the ceiling tiles and the wires that were down and that he had made the marks on the door in an effort to get into the IT department. 1 RP 64-65. He also admitted that he had been searching through items in the cubicles and had eaten some of the food that was inside the building. 1 RP 65.

Even the defense expert witness testified that McMillan had the capacity to form intent with regard to the malicious mischief charge. 1 RP 155, 196. McMillan argues that he somehow could have committed all of the damage without the ability to form intent, and then remained in the building after regaining the ability to

consciously make decisions, thus, he could have committed only the charge of criminal trespass in the first degree; however, this contention is not supported by the evidence.

Hearsay is generally not substantive evidence. State v. Sua, 115 Wn.App. 29, 49, 60 P.3d 1234 (2003). The only testimony regarding relating to a theory of criminal trespass after the damage occurred was based on Dr. Stanfill's report and statements made to him by McMillan. 1 RP 189. While this information was the proper subject of cross examination as matters that Stanfill considered in forming his expert opinion, it was not substantive evidence. The substantive evidence presented showed that McMillan had the ability to form the intent to commit malicious mischief at the time that he damaged property within the Auditor's Office.

As such, no rational juror could have found that he committed criminal trespass without also determining that while entering or remaining unlawfully, he had the intent to commit a crime against a person or property therein. As such, he does not meet the second prong of the Workman test and was not entitled to a lesser included instruction.

D. CONCLUSION.

The trial court did not err when it properly instructed the jury as to the elements of burglary in the second degree and the definitions related to that offense. The evidence overwhelming shows that no rational jury could find that McMillan committed only the lesser included offense of criminal trespass in the first degree without also finding that he committed burglary in the second degree. As such, the trial court did not err when it declined to give a lesser included instruction on that offense. The State respectfully asks that this Court affirm McMillan's convictions.

Respectfully submitted this 21 day of December, 2017.

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CERTIFICATE OF SERVICE

I certify that I served a copy of the Brief of Respondent on the date below as follows:

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I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 21st day of December, 2017, at Olympia, Washington.



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December 21, 2017 - 1:30 PM

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