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NO. 54258-7-II

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

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STATE OF WASHINGTON,

Respondent,

v.

SAMMY WEAVER,

Appellant.

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

The Honorable Daniel L. Goodell, Judge

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REPLY BRIEF OF APPELLANT

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ERIN MOODY  
Attorney for Appellant

NIELSEN KOCH, PLLC  
1908 E Madison Street  
Seattle, WA 98122  
(206) 623-2373

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A. ISSUES IN REPLY

1. Taken in the light most favorable to the State, the evidence shows that the NAPA store employees enforced a “trespass” against Mr. Weaver in *ad hoc* fashion, sometimes serving him and sometimes making him leave.

2. This court must reject the State’s proposed distinction between physical restraint and other means of detaining Mr. Weaver in the store. For purposes of negating the element of unlawful remaining, there is no difference between physical restraint and a ruse to detain him.

3. To support its argument that the mere wearing of a knife constituted a threat to cause bodily harm, for purposes of the misdemeanor harassment statute, the State analogizes Mr. Weaver’s “heated” conversation with Mr. Schamerhorn to a rape accomplished by the implied threat to use a firearm. This court must reject that analogy.

4. The State argues that a person commits misdemeanor harassment merely by wearing a knife while displaying anger about a customer service transaction. This court should reject that argument, which is not supported by any precedent.

5. The State correctly notes that the offense of burglary, as charged in this case, required the prosecution to prove only Mr. Weaver’s intent to commit misdemeanor harassment, and did not require proof of the

completed crime. But that point is irrelevant to Mr. Weaver's sufficiency claim because evidence of the completed crime was the *only* evidence of intent.

B. ARGUMENT IN REPLY

1. Taken in the Light Most Favorable to the State, the Evidence Shows that the NAPA Store Employees Enforced the "Trespass" Against Mr. Weaver in *Ad Hoc* Fashion, Sometimes Serving Him and Sometimes Making Him Leave

At trial, Mr. Weaver testified that he was never trespassed from the store. RP 208, 217-20. The jury apparently disbelieved that testimony. As the State knows, "[a] claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." Resp. at 6 (quoting State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)). Thus, in arguing his claim of sufficiency, Mr. Weaver is limited to citing testimony provided by the State's witnesses.

This testimony shows that, during late July and early August of 2019, the NAPA store employees variously welcomed and excluded Mr. Weaver. It does not show that a consistent "trespass" was in force on August 6.

The State acknowledges that, "during the two weeks prior to the August 6<sup>th</sup> incident Weaver had been in the store on a few occasions." Br. of Resp. at 8-9 (citing RP 139, 184, 191). But it contends this was only because

he “did not stay long enough for employees to do anything about the trespass violations.” Id. at 9 (citing RP 191-92).

The record does not support this contention.

According to the State’s witnesses, Mr. Weaver came into the store sometime between July 19 and 22, 2019, asking for advice about a used oil filter. RP 106-07, 184. On that occasion, employee Brian Kaufman offered to sell him a new filter because the one he was asking about was old and dirty. RP 107, 184. Both Mr. Schamerhorn and Mr. Kaufman testified that Mr. Weaver declined that offer, thanked Mr. Kaufman, and left. RP 107, 184.

According to Mr. Schamerhorn, Mr. Weaver returned on July 23, 2019, “with a woman saying that we overfilled her car with some oil.” RP 107. Mr. Schamerhorn said he told Mr. Weaver to wait, got the manager on the phone, and then invited Mr. Weaver to speak with the manager. RP 107. After Mr. Weaver spoke with the manager, Mr. Weaver “walked outside and was doing things with his car.” RP 108.

No employee testified that anyone told Mr. Weaver to leave on either of these late July occasions. RP 133-51 (Mr. Datus);<sup>1</sup> RP 105-32 (Mr.

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<sup>1</sup> Mr. Datus testified that Mr. Weaver “kn[e]w he was banned” because “[h]e was told multiple times by our manager, as well as other employees.” RP 139. The manager, Brendan Farlow, testified that Mr. Weaver “had been trespassed before,” but he did not explain when or how this occurred. RP 189-90. Mr. Farlow did not testify that he told Mr. Weaver he was banned from the store. RP 187-93.

Schamerhorn); RP 181-87 (Mr. Kaufman); RP 187-93 (Mr. Farlow); RP 187-205 (Michael Christen).

Mr. Kaufman testified that “the week before” July 25, 2019, he physically removed Mr. Weaver from the store and told him not to come back. RP 183-84. It is not clear whether this occurred before or after Mr. Kaufman’s cordial transaction with Mr. Weaver regarding the used oil filter. See RP 106-07, 184.

With respect to July 24, 2019, Mr. Schamerhorn testified that (1) he could not remember whether Mr. Weaver came into the store that day and (2) on that day, Mr. Weaver came into the store and Mr. Schamerhorn told him, “[Y]ou are trespassing; you are not welcome here, please leave.” RP 108-09. It is not clear what “inferences . . . reasonably can be drawn” from this completely contradictory testimony. Salinas, 119 Wn.2d at 201.

Finally, Mr. Farlow testified that by August 6, 2019, Mr. Weaver had “been trespassed” from the store, at some unspecified time in the past. RP 189. Mr. Farlow said that he nevertheless invited Mr. Weaver, during their phone conversation on August 6, to come back to the store the following day. RP 189-90. At trial, Mr. Farlow acknowledged that this “[d]oes not make a lot of sense.” RP 191.

Contrary to the State’s assertion, this testimony does not show that Mr. Weaver had notice, on August 6, 2019, that he was permanently

excluded from the store. See Br. of App. at 14-15 (citing State v. Kutch, 90 Wn. App. 244, 248, 951 P.2d 1139 (1998)). Instead, it shows that employees sometimes told Mr. Weaver he was unwelcome, and sometimes served him as they would any customer. On August 6, 2019, the employees engaged Mr. Weaver in conversation and asked him to speak with the manager, who then invited Mr. Weaver to return the next day. RP 123-25, 139, 189-90.

2. To Rebut Mr. Weaver’s Sufficiency Argument on the Element of Unlawful Remaining, the State Relies on an Irrelevant Distinction between Physical and Restraint and the Ruse to Keep Mr. Weaver in the Store

The State concedes that the employees engaged Mr. Weaver in the hopes that he would *remain* in the store on August 6, 2019, and that the phone conversation with the store manager was part of this plan. Resp. at 12 (quoting RP 189) (“[t]he store manager testified that ‘it was also kind of a way to keep him at the store’”). Yet the State contends this ruse is irrelevant to the burglary charge—that it did not render Mr. Weaver’s presence in the store lawful—because the employees did not *physically* restrain Mr. Weaver against his will. Resp. at 11.

This argument must fail. As Mr. Weaver explained in his opening brief, “unlawful remaining” is negated by either physical restraint or entrapment by other means. Br. of App. at 16-17 (citing State v. Cordero,

170 Wn. App. 351, 366, 284 P.3d 773 (2012), and Smith v. State, 362 P.2d 1071, 1072-73 (Alaska 1961)). Remaining is not “unlawful” if it is “invited.” RCW 9A.52.010(2) (“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.”). And one can be “invited” to remain even though one is not physically prevented from leaving.

The State also attempts to distinguish the phone conversation with the manager—which it apparently concedes functioned as an invitation to remain—from the interactions that preceded it.<sup>2</sup> But that conversation occurred only because it was suggested by Mr. Schamerhorn, who then dialed the phone and handed it to Mr. Weaver. RP 123-25, 131.

The ruse to keep Mr. Weaver in the store on August 6, 2019, was perpetrated by all the employees present that day, as well as by the manager. It functioned as an invitation and negated the “unlawful remaining” element of burglary. See Smith, 362 P.2d at 1072-73.

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<sup>2</sup> Resp. at 12 (“The manager’s willingness to speak with Mr. Weaver is not a waiver of the *previously* imposed exclusion . . . Thus, substantial evidence supports a finding that Weaver remained unlawfully, *at least for a time*, inside the NAPA store.”) (Emphasis added.)

3. This Court Should Reject the State’s Novel Argument that the Mere Act of Wearing a Knife While Upset Can Constitute a Threat to Cause Bodily Harm

The State contends Mr. Weaver’s mere act of wearing the knife into the store was an unlawful threat. Br. of Resp. at 15-16. The State made no such argument at trial, and this court should reject it now. See RP 278-80.

In support of this argument, the State cites State v. Bright, 129 Wn.2d 257, 270, 916 P.2d 922 (1996), and State v. Lubers, 81 Wn. App. 614, 620-21, 915 P.2d 1157 (1996)). Both Bright and Lubers involved prosecutions for rape, accomplished by the implied threat to use a firearm if the victim resisted. Bright, 129 Wn.2d at 261; Lubers, 81 Wn. App. at 619-21. In both cases, the defendant ordered the victim to submit to sexual intercourse, using both words and physical force, while displaying a weapon. Bright, 129 Wn.2d at 263 (after physically forcing victim’s head into his lap, and still wearing gun on his uniform holster, police officer ordered victim, whom he was transporting to jail, “to get out [of the police car], drop her pants and underwear, lean against the car, and face away from him”); Lubers, 81 Wn. App. at 620 (after laying gun on the ground next to victim, one defendant “wrapped his legs around [her] neck, choked her, pulled up her shirt, and held her down while [the other defendant] raped her”). In both cases, the appellate court held that a rational jury could find

an implied threat to use the weapon. Bright, 129 Wn.2d at 267; Lubers, 81 Wn. App. at 621.

Neither Bright nor Lubers supports the State's argument that the mere wearing of a weapon, even while engaged in a "heated" conversation about motor oil, can constitute a "threat[] to cause bodily injury" for purposes of the misdemeanor harassment statute. RCW 9A.46.020(1); RP 138-39. Rather, consistent with all the precedent the State cites, there must also be some words or conduct implying that the defendant actually intends to use the weapon. Br. of Resp. at 15-16 (citing Bright, 129 Wn.2d at 270; State v. Pinkney, 2 Wn. App. 2d 574, 411 P.3d 406 (2018); State v. Burke, 132 Wn. App. 415, 421, 132 P.3d 1095 (2006); Lubers, 81 Wn. App. at 620-21).

The State also contends that proof of an actual threat is unnecessary in this case, since the jury needed only to find Mr. Weaver's *intent* to commit misdemeanor harassment. Br. of Resp. at 14-15. But in this case evidence of the completed crime was the only evidence that could possibly support a finding of intent. There was no evidence that Mr. Weaver tried to communicate a threat to Mr. Schamerhorn but was somehow thwarted. Instead there was evidence that, even though Mr. Weaver could have brandished the knife so that Mr. Schamerhorn could see it, he chose not to. See Br. of App. at 21-22 (citing RP 138-39, 146, 197; Ex. 5).

For all the reasons given in the opening brief, the evidence was insufficient to show that Mr. Weaver knowingly communicated a threat to cause bodily injury to Mr. Schamerhorn.

C. CONCLUSION

The evidence was insufficient to sustain a conviction for first-degree burglary because it was insufficient to show (1) unlawful entry, (2) unlawful remaining, or (3) intent to communicate a threat. Mr. Weaver's conviction for that offense must be dismissed with prejudice.

Even if this court concludes that the evidence was sufficient to establish first-degree burglary predicated on unlawful entry, it must still reverse Mr. Weaver's conviction because the jury might have relied on the unsupported alternative means of unlawful remaining.

DATED this 15th day of July, 2020.

Respectfully submitted,

NIELSEN KOCH, PLLC

  
\_\_\_\_\_  
ERIN MOODY, WSBA No. 45570  
Office ID No. 91051  
Attorneys for Appellant

**NIELSEN KOCH P.L.L.C.**

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Sender Name: John Sloane - Email: Sloanej@nwattorney.net

**Filing on Behalf of:** Erin Irene Moody - Email: MoodyE@nwattorney.net (Alternate Email: MoodyE@nwattorney.net)

Address:  
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