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Division II
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NO. 54258-7-II

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

STATE OF WASHINGTON,

Respondent,

v.

SAMMY WEAVER,

Appellant.

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

The Honorable Daniel L. Goodell, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The evidence was insufficient to prove first-degree burglary.

2. The trial court violated due process protections when it instructed the jury on an alternative means for which there was insufficient evidence.

3. The sentencing court violated due process protections when it accepted the State's bare assertions to prove Mr. Weaver's offender score.

Issues Pertaining to Assignments of Error

1. When the defendant did not have notice that he was trespassed from a store, was his entry into that store during business hours unlawful?

2. When store employees deliberately engaged the defendant in conversation, in a ruse to detain him until the police arrived, did the defendant remain unlawfully in the store?

3. When the defendant did not knowingly communicate a threat to anyone, and the alleged victim did not perceive any threat until after the defendant left the store, did the defendant enter the store with the intent to commit criminal harassment "therein?"

4. Even if the evidence was sufficient to show the defendant entered the store unlawfully, must the conviction be reversed because the

jury was told it could convict for either unlawful entry or unlawful remaining?

5. In order to prove the defendant's offender score, may the State rely solely on its bare assertions that two prior felony convictions did not wash out?

B. STATEMENT OF THE CASE

Sammy Weaver is a 59-year-old disabled veteran. RP 314. In the summer of 2019, Mr. Weaver was intermittently homeless, staying with various relatives in the Belfair area and "kinda bounc[ing] around." RP 206, 226-27. He was also a frequent visitor to the Belfair NAPA Auto Parts store. See RP 106-07, 109, 117, 183-86. Sometimes Mr. Weaver's interactions with store employees were pleasant, but more often he annoyed the staff with complaints. E.g., RP 106-07, 183-86. Mr. Weaver would often insult store employees or complain about products he had purchased elsewhere. RP 106, 122.

In response to Mr. Weaver's erratic behavior, the NAPA store employees decided to "trespass" him. RP 108-09, 189. According to the employees, this meant they sometimes told Mr. Weaver to leave the store, told him he was trespassing or unwelcome, or physically escorted him out. RP 109, 125-26, 183-86.

The employees did not always enforce the trespass against Mr. Weaver, however. See RP 106-07, 184, 190-92. Sometimes Mr. Weaver behaved politely, and on those occasions store employees would assist him and he would leave without incident. RP 106-08, 184. On the more frequent occasions that Mr. Weaver was rude to the store employees, they sometimes responded by trying to placate him. RP 107, 123-25, 131. Rather than asking him to leave, the employees would offer to address his concerns. RP 123-25. Mr. Weaver claimed he was unaware of any policy generally excluding him from the store. RP 208.

By August of 2019, Mr. Weaver had developed a pattern that was frustrating for store employees: he would show up at the store, bother the employees who were present, and then leave before they could summon an off-site manager or senior employee. RP 109, 132, 190-92, 294-95. In response to that pattern the store's manager, Brendan Farlow, directed employees to call the police the next time Mr. Weaver appeared. RP 189-90.

On August 6, 2019, Mr. Weaver drove to the store and parked his car. RP 128-29. Employee Christopher Schamerhorn immediately told employee Nathan Datus to call 911. RP 128-29. Mr. Datus did so, and he remained on the line with 911 dispatch as Mr. Weaver entered the store. RP 129. No employee later recalled telling Mr. Weaver to leave that day. RP

105-50, 181-205. Mr. Weaver thought he remembered somebody asking him, "[W]hat do you want this time?" RP 208.

As Mr. Weaver entered the store, Mr. Schamerhorn was standing behind the store's counter. RP 117. Mr. Schamerhorn had known Mr. Weaver for about two years and did not like him. RP 106. The two men had an ongoing conflict unrelated to the NAPA store and, earlier in the summer, Mr. Schamerhorn had punched Mr. Weaver in the face. RP 110, 115-16, 127.

Mr. Weaver walked directly up to the counter and began talking with Mr. Schamerhorn. RP 117, 210. Mr. Weaver was angry about an incident that occurred two weeks earlier, in which he believed store employees had put too much oil into another customer's car. RP 107, 117. From his position behind the counter, Mr. Schamerhorn could not see the lower part of Mr. Weaver's body. RP 118.

Mr. Datus was standing 12-14 feet away from Mr. Weaver, observing his interaction with Mr. Schamerhorn and talking to the 911 dispatcher. RP 137-38; Ex. 5. According to Mr. Datus, the conversation between Mr. Weaver and Mr. Schamerhorn "started to get heated" and Mr. Weaver pulled a knife out of a sheath on his belt for "[a] couple seconds," holding it in a low position where Mr. Schamerhorn could not see it. RP

138-39, 146. Another employee, Michael Christen, was also keeping an eye on Mr. Weaver and never saw him take the knife out of its sheath. RP 197.

Mr. Schamerhorn suggested that Mr. Weaver speak with the manager, Mr. Farlow, on the phone. RP 123-25, 131. Mr. Schamerhorn then called Mr. Farlow and handed the phone to Mr. Weaver, who had a "cordial" conversation with the manager for about two minutes. RP 123-125. Mr. Farlow kept Mr. Weaver on the phone for as long as possible, trying to detain him in the store until the police could get there. RP 189. Mr. Farlow invited Mr. Weaver to come back to the store the following day, to speak with him in person. RP 190. Mr. Weaver agreed to return in the next couple of days, and then left the store, before law enforcement arrived. RP 124, 139, 210.

After Mr. Weaver left the store, Mr. Datus told Mr. Schamerhorn that Mr. Weaver had been holding a knife under the counter while the two men were talking. RP 138. At that point, Mr. Schamerhorn said he became aware of the knife, and became fearful of Mr. Weaver, for the first time. RP 118-19, 121-22, 127.[1]

After informing Mr. Schamerhorn about the knife under the counter, Mr. Datus followed Mr. Weaver outside, still talking with the 911

[1] Another store employee had seen Mr. Weaver wearing the knife on at least one prior occasion and reported this to Mr. Schamerhorn. RP 109, 127. On that occasion, Mr. Schamerhorn felt irritated but not fearful of Mr. Weaver. RP 127.

dispatcher, and watched him drive away. RP 139, 212-13. According to Mr. Datus, Mr. Weaver pointed an object at him as he drove away from the store, which Mr. Datus thought looked like a gun. RP 140. Mr. Datus said nothing about this to the 911 dispatcher, but later testified that he was so frightened by this object that he "hit the ground." RP 139-40, 144-48, 167. Mr. Weaver denied threatening to shoot anyone, and said he was unaware that Mr. Datus was following him when he left the store. RP 213.

From the NAPA store, Mr. Weaver drove directly to a nearby pub, because he "had business down there with the owner." RP 213. Sergeant Kelly LaFrance located him a few hundred yards away from the pub and attempted to pull his vehicle over. RP 154. When Mr. Weaver pulled into the pub's parking lot and got out of his car, Sergeant LaFrance told him, "Sammy, stop." RP 154. When he did not stop, Sergeant LaFrance tased him. RP 155. Mr. Weaver later testified that he was not aware Sergeant LaFrance was following him until he woke up on the ground and heard her say, "[D]on't get up, you're under arrest." RP 214.

A short while later, Mr. Datus told investigating detectives that Mr. Weaver had pointed a gun at him. RP 149, 163. Since Mr. Weaver was not carrying a gun when he was arrested, detectives impounded his vehicle and applied for a search warrant. RP 164, 168. Upon executing the warrant,

officers recovered a "makeshift piece of metal that resembles a pistol." RP 102.

Based on these events, the State charged Mr. Weaver with first degree burglary and felony harassment. CP 11-12.

The felony harassment count named Mr. Datus as the victim. CP 12. The State alleged that, when Mr. Weaver pointed the metal object at Mr. Datus, this was a threat to kill. RP 268-69; 281.

With respect to the first-degree burglary count, the State's theory was that Mr. Weaver unlawfully entered the NAPA Auto Parts store on August 6, 2019, while armed with a deadly weapon, and did so with the intent to commit the crime of misdemeanor harassment inside the store. RP 238-40. See RCW 9A.52.020(1) ("[a] person is guilty of burglary in the first degree if, with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building and if, in entering or while in the building or in immediate flight therefrom, the actor or another participant in the crime . . . is armed with a deadly weapon").

The State argued that the victim of this harassment was Mr. Schamerhorn, whom Mr. Weaver had knowingly threatened with bodily injury by briefly touching or holding the knife under the counter, where Mr. Schamerhorn could not see it. RP 121, 274-76. Per defense counsel's

request, the jury was also instructed on the lesser included offense of criminal trespass. RP 171; RP 266-67.

In closing, defense counsel argued that the evidence was insufficient to sustain the burglary conviction, both because Mr. Weaver had not "unlawfully" entered or remained in the store and because Mr. Weaver did not enter the store with the intent to commit any crime. RP 285-86.

Counsel argued Mr. Weaver sometimes had a license to enter the store and sometimes did not, but certainly did on the day in question, August 6, 2019. RP 285-86. On that day, all the testimony showed the employees invited him in and encouraged him to stay, in a "ruse" to detain him until the police arrived. RP 285-86. In light of that ruse, counsel argued, Mr. Weaver was not in the NAPA store unlawfully. RP 285-86, 289-90.

Defense counsel also noted that Mr. Schamerhorn testified he was not even aware that Mr. Weaver had a knife, and was not fearful of Mr. Weaver, at any time while Mr. Weaver was in the store. RP 286. Counsel argued this meant Mr. Weaver never made any threat, as required for the crime of misdemeanor harassment. RP 286. Thus, the evidence was insufficient to show he entered the NAPA store with the intent to commit a crime therein. RP 286.

The prosecutor acknowledged that the store employees had deliberately detained Mr. Weaver on August 6, 2019, so that he would still

be there when the police arrived. RP 294-95. But he told the jury this was irrelevant, since the employees had told Mr. Weaver on past occasions that he was "trespassed" from the store. RP 294. According to the prosecutor, this meant that Mr. Weaver had an obligation to leave the store despite the employees' ruse to keep him there: "He knew he had to leave and he didn't leave. He came in. *It was illegal for him to come in and it was illegal for him to remain."* RP 295 (emphasis added).

With respect to the burglary charge, the prosecutor acknowledged that Mr. Weaver "left before Mr. Schamerhorn knew that he'd been holding the knife." RP 276. But he argued this was irrelevant to the burglary offense because, in order to commit the crime of misdemeanor harassment, one need not threaten immediate harm to a victim, but can instead place the victim in reasonable fear of a future harm. RP 276.

The prosecutor also told the jury to ignore the lesser included offense of criminal trespass: "I'm not going to talk about criminal trespass. Frankly, it's the State's position that burglary one is the appropriate charge here." RP 281.

The jury convicted Mr. Weaver as charged. RP 302-03.

At sentencing, the prosecutor asserted that Mr. Weaver had prior convictions for residential burglary and unlawful possession of a controlled substance, and he asked the defense to "basically stipulate" to those

convictions so sentencing could proceed right away. RP 308. The prosecutor said Mr. Weaver had been sentenced for the controlled substances offense on January 7, 2014, and for the residential burglary on January 27, 1999. RP 308. Defense counsel acknowledged the "1997 res burg conviction," and said that the controlled substances conviction was "currently on appeal from 2012." RP 308-09.

The prosecutor also asserted that "Mr. Weaver has a substantial amount of misdemeanor criminal history that prevents any of these felonies from washing out." RP 311. He did not specify what this history included. RP 311. Defense counsel did not respond to this assertion. RP 311-15.

In light of Mr. Weaver's alleged criminal history and "the nature of this offense," the State requested 48 months for the burglary conviction, the top of the standard range, to run concurrently with a 12-month sentence for the felony harassment. RP 3113. According to the prosecutor, "Mr. Weaver is slowly starting to escalate, turning [from] a nuisance to something much more dangerous, and it's – and the way we can protect this community is locking him up for as long as we can." RP 312.

Defense counsel argued there was only very weak evidence that Mr. Weaver ever made any credible threat and explained, "Mr. Weaver thinks that this is more of a customer voicing his displeasure with the establishment." RP 315. He asked the court to impose an exceptional

sentence downward or, in the alternative, the low end of the standard range. RP 315.

Mr. Weaver asked the court for leniency, asserting that he had no violent history and was not a violent person. RP 301. He explained that he carried a hunting knife for self-protection, including from people like Mr. Schamerhorn, who had testified to punching Mr. Weaver in the face. RP 301.

The court agreed with the prosecutor that the upper end of the range was appropriate. RP 319. It imposed 45 months for the burglary count, to run concurrently with 10.5 months on the felony harassment count, followed by eight months of community custody. RP 319-20.

C. ARGUMENT

1. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE CONVICTION FOR FIRST-DEGREE BURGLARY

No person may be convicted of a crime unless the prosecution proves every element of the charge beyond a reasonable doubt. State v. Johnson, 188 Wn.2d 742, 751, 399 P.3d 507 (2017). A conviction absent such proof violates both state and federal due process protections. Id. (citing U.S. Const. Amend. XIV; Wash. Const. art. I, § 3; In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Rich, 184 Wn.2d 897, 903, 365 P.3d 746 (2016).

Consistent with that standard, an appellate court will reverse a conviction for insufficient evidence where—construing the evidence in the light most favorable to the prosecution—no rational jury could find that all the elements were proved beyond a reasonable doubt. State v. Smith, 155 Wn.2d 496, 501, 120 P.3d 559 (2005).

A challenge to the sufficiency of the evidence may be raised for the first time on appeal. State v. Cardenas-Flores, 189 Wn.2d 243, 251, 263, 401 P.3d 19 (2017); State v. Jussila, 197 Wn. App. 908, 931-32, 392 P.3d 1108 (2017) (citing RAP 2.5(a)(2)).

A person commits the crime of first-degree burglary, as charged in this case,

> when he or she enters or remains unlawfully in a building with the intent to commit a crime against a person or property therein, and if, in entering or while in the building or in immediate flight therefrom, that person is armed with a deadly weapon.

CP 30. See RCW 9A.52.020(1); WPIC 60.01.

"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." RCW 9A.52.010(2). See CP 33.

Consistent with these definitions, Mr. Weaver's jury was instructed that:

> To convict the defendant of the crime of burglary in the first degree as charged in Count I, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about the 6th day of August, 2019, the defendant entered or remained unlawfully in a building;
>
> (2) That the entering or remaining was with the intent to commit a crime against a person or property therein;
>
> (3) That in so entering or while in the building or in immediate flight from the building the defendant was armed with a deadly weapon;
>
> (4) That any of these acts occurred in the State of Washington.

CP 35.

Viewed in the light most favorable to the State, the evidence admitted at Mr. Weaver's trial was insufficient to sustain the first-degree burglary conviction, for four reasons. First, in light of the ad hoc way in which the supposed "trespass" against Mr. Weaver was enforced, the evidence was insufficient to show his initial entry into the store was unlawful. Second, because the store employees deliberately engaged Mr. Weaver once he entered the store, in a ruse to prevent him from leaving before law enforcement arrived, the evidence was insufficient to show that Mr. Weaver "remained" in the store unlawfully. Third, because Mr. Weaver never intentionally communicated any threat, the evidence was insufficient to show that he intended to commit misdemeanor harassment. Finally,

because Mr. Schamerhorn perceived no threat until Mr. Weaver had already left, the evidence was insufficient to show that Mr. Weaver entered or remained in the store "with the intent to commit a crime therein."

a. The Evidence was Insufficient to Prove Mr. Weaver Unlawfully Entered the NAPA Store on August 6, 2019

The owner of private property may extend or revoke entry licenses at will and may even do so partially or impliedly. State v. Cantu, 156 Wn.2d 819, 824-25, 132 P.3d 725 (2006). Thus, the question whether a defendant to a burglary charge entered or remained unlawfully may be highly fact-specific. E.g., id. at 823-24 (analyzing whether juvenile's presumed license to enter parent's home was impliedly limited by deadbolt on bedroom door).

A shop may exclude certain members of the public, provided it does not do so on any discriminatory basis. State v. Kutch, 90 Wn. App. 244, 247-48, 951 P.2d 1139 (1998). But a person's entry into that shop is not unlawful, for purposes of the burglary statute, unless that person has notice that they are excluded. Id. at 248. This is because no entry to any building is unlawful if "[t]he actor reasonably believed that the owner of the premises, or other person empowered to license access thereto, would have licensed him or her to enter or remain." State v. Grimes, 92 Wn. App. 973, 977, 980, 966 P.2d 394 (1998) (quoting RCW 9A.52.090(3)).

When a defendant raises a reasonable belief defense to a charge of burglary or criminal trespass, the State bears the burden of negating it beyond a reasonable doubt. Bremerton v. Widell, 146 Wn.2d 561, 570, 51 P.3d 733 (2002); State v. Ponce, 166 Wn. App. 409, 417-18, 269 P.3d 408 (2012). The State did not meet that burden in Mr. Weaver's case.

The trial testimony showed that the NAPA store employees enforced the "trespass" against Mr. Weaver in ad hoc fashion, sometimes telling him to leave and sometimes treating him like any other welcome customer. See RP 106-07, 109, 125-26, 183-86, 190-92. Thus, a reasonable person in Mr. Weaver's position would not know on any given day whether he had a license to enter. Under these circumstances, the State could not show that Mr. Weaver's entry into the store on August 6, 2019, was unlawful unless it showed that the trespass was in force that day, and that Mr. Weaver had reason to know this. See Kutch, 90 Wn. App. at 48.

The testimony at trial did not show this. On the contrary, it showed that when Mr. Weaver appeared on August 6, 2019, the employees present permitted his entry and then conspired to keep him in the store for as long as possible. RP 128-29, 189-90, 294-95. These facts are insufficient to establish an unlawful entry. See Widell, 146 Wn.2d at 570; Ponce, 166 Wn. App. at 417-18; Kutch, 90 Wn. App. at 48.

b. The Evidence was Insufficient to Prove Mr. Weaver Unlawfully Remained in the NAPA Store on August 6, 2019

Even where a person's initial entry into a building is unlawful, he does not "remain" unlawfully if he is thereafter detained by someone with authority over the premises. State v. Cordero, 170 Wn. App. 351, 284 P.3d 773 (2012).

In Codero, the defendant entered the home of a 14-year-old girl after her mother, who also lived there, had expressly excluded him. Id. at 364-65. After he entered, the mother called the police and then temporarily blocked the door so the defendant could not leave. Id. at 358. The testimony at trial showed that she did this either to detain the defendant until the police arrived, to prevent her daughter from leaving with him, or both. Id. at 366.

The Cordero court held that any period of time during which the mother prevented the defendant's departure "on any terms"—i.e., with or without the daughter, so that he would still be there when police arrived—could not "count as unlawful remaining" for purposes of the burglary charge. Id. at 366. The court explained that, in a typical burglary, the fact that a defendant "remained unlawfully" follows automatically from the fact of unlawful entry. Id. at 366. But it held that this is not the case

where a defendant enters unlawfully and is then detained by someone with authority over the premises. Id.

Cordero is consistent with authority from other states, applying burglary statutes materially indistinguishable from Washington's, holding that an entry is not unlawful if it is invited, by someone with authority over the premises, as part of a ruse to entrap the entrant and facilitate his arrest. Compare id. with Smith v. State, 362 P.2d 1071, 1072-73 (Alaska 1961). In Smith, the owner and employee of an auto parts store conspired to invite the defendant inside after hours while police waited outside, so police could catch the defendant in the act of attempting to destroy company records. 362 P.2d at 1071-72. The Alaska supreme court reversed the defendant's burglary conviction, holding that, even if the defendant intended to commit a separate felony once inside, his entry was not unlawful, for purposes of the burglary statute, if it was invited by someone with authority over the store. Id. at 1073-74.

The circumstances under which Mr. Weaver "remained" in the NAPA store on August 6, 2019, are just like the circumstances in both Cordero and Smith. As soon as they saw Mr. Weaver's car pull up, the employees present that day conspired to keep him there until the police arrived. RP 128-29, 189-90, 294-95. This ruse was in effect from the time Mr. Datus placed the 911 call until Mr. Weaver left the store, a

period during which Mr. Schamerhorn and Mr. Farlow deliberately engaged Mr. Weaver—Mr. Farlow even invited him to come back the following day—and during which no employee asked him to leave. RP 128-29, 189-90, 294-95. Under Cordero (and consistent with Smith, 362 P.2d at 1073-74) none of this time could "count as unlawful remaining" for purposes of the first-degree burglary charge. Cordero, 170 Wn. App. at 366.

c. The Evidence was Insufficient to Prove Mr. Weaver's "Intent to Commit a Crime Therein"

To obtain a conviction for burglary, the State must prove that the defendant unlawfully entered or remained in a building with "the intent to commit any crime against a person or property *inside the burglarized premises."* State v. Bergeron, 105 Wn.2d 1, 4, 711 P.2d 1000 (1985) (emphasis added). The State need not specify the precise crime the defendant intended to commit therein, but the predicate crime cannot simply be the unlawful entry itself, and it must be a crime "against 'a person or property.'" Id. at 7; State v. Stinton, 121 Wn. App. 569, 576, 89 P.3d 717 (2004) (quoting RCW 0A.52.025); RCW 9A.52.020(1).

Under certain circumstances, the burglary statute permits the jury to infer intent to commit a crime "therein" from the mere fact of unlawful entry or remaining. RCW 9A.52.040. But this inference does not apply

where the "entering or remaining shall be explained by evidence satisfactory to the trier of fact to have been made without such criminal intent." Id.

In Mr. Weaver's prosecution, there was overwhelming evidence that he went to the NAPA Auto Parts store on August 6, 2019, with the non-criminal intent of lodging a customer complaint. RP 106-07, 183-86. Thus, the State did not rely on the permissive inference to prove his intent to commit a crime therein. See CP 22-45. Instead, it obtained a jury instruction on misdemeanor harassment and argued that Mr. Weaver committed that crime while in the store. RP 238-40, 276; CP 34.

The evidence was insufficient to support this prosecution theory, for two reasons. First, there was insufficient evidence that Mr. Weaver intended to commit the crime of misdemeanor harassment at all. Second, there was insufficient evidence that Mr. Weaver intended to commit the crime of misdemeanor harassment inside the burglarized premises.

i. The evidence was insufficient to prove Mr. Weaver's intent to commit misdemeanor harassment

Consistent with the prosecution theory, the jury was told instructed that:

> A person commits the crime of misdemeanor harassment when he or she, without lawful authority, knowingly threatens to cause bodily injury immediately or in the future to another person and when he or she by words or conduct places the person threatened in reasonable fear that the threat will be carried out.

CP 34. See RCW 9A.46.020(1).

To be guilty of criminal harassment, a person need not communicate a threat directly to the person threatened. State v. J.M., 144 Wn.2d 472, 488, 28 P.3d 720 (2001). Instead, for purposes of the criminal harassment statute, he can "knowingly threaten" bodily injury even if he communicates the threat only to a third party, and even if he does not know that this third party will relay the threat back to the victim. Id. at 476-88.

A person does not commit criminal harassment, however, unless he knowingly communicates a threat to *someone*. *Id*. at 481-82. As the court put it in J.M.:

> As to communicating the threat, the defendant *must be aware* that he or she is communicating a threat. Therefore, the individual who writes a threat in a personal diary, or who mutters a threat without awareness that it is heard, or who loudly makes a threat when he or she thinks no one else is around, does not "knowingly threaten."

Id. (emphasis added).

In this case, the State alleged that Mr. Weaver communicated a threat when he pulled a knife out of a sheath on his belt. See RP 279 (prosecutor arguing in closing that "any reasonable person would know that that knife would put somebody in great apprehension if you're standing there holding it there behind the counter"). But, viewed in the

light most favorable to the State, the trial testimony established only that Mr. Weaver removed the knife from its sheath for about two seconds and held it in a position where Mr. Schamerhorn, the alleged victim of the harassment, could not see it. RP 138-39 146. The only person who did see the knife out its sheath was Mr. Datus, who was at least 12 feet away, off to the side and not interacting with Mr. Weaver. RP 138-39 146, 197; Ex. 5. There is no evidence in the record that Mr. Weaver was even aware that Mr. Datus was observing him—much less that he knew Mr. Datus could see a fleeting gesture near his belt.

Under J.M., this record is insufficient to show that Mr. Weaver knowingly communicated a threat to anyone. See 144 Wn.2d at 481-82 ("the defendant must be aware that he or she is communicating a threat"). Assuming Mr. Weaver did take the knife out for two seconds, this was not an act of communication. Instead, it was like the diary entry or the muttered words in the J.M. court's analysis. Id. It was not meant for anyone to see, and therefore it does not establish that Mr. Weaver "knowingly threaten[ed]" Mr. Schamerhorn. Id.

Since the evidence is insufficient to establish a "knowing" threat, it follows that it is also insufficient to establish the higher mental state required here: intent to commit the crime of harassment inside the store. See RCW 9A.52.020(1) (burglary requires unlawful entry or remaining

"with intent to commit a crime therein"). If Mr. Weaver had intended to communicate a threat, he would have displayed the knife prominently rather than concealing it behind the counter. His two-second impulsive act, witnessed only by a person Mr. Weaver did not know was watching him, does not suffice to show his intent to commit harassment.

ii. The evidence was insufficient to prove Mr. Weaver's intent to commit misdemeanor harassment inside the allegedly burglarized premises

Even if the evidence were sufficient to show Mr. Weaver intended to commit criminal harassment, it would still be insufficient to support the first-degree burglary conviction because it is insufficient to show that he intended to harass Mr. Schamerhorn inside the allegedly burglarized premises. See Bergeron, 105 Wn.2d at 4.

In State v. Kolisynk, the defendant was convicted of second-degree burglary for unlawfully entering a gas station after hours and turning on the pumps so he could steal fuel. 49 Wn. App. 890, 891, 746 P.2d 1224 (1987). The defendant appealed the conviction on the ground that he did not intend to commit a crime inside the building, since the pumps from which he stole the gas were outside. Id. The Court of Appeals affirmed the conviction, but only on the ground that the defendant had stolen "the electricity to operate the pump mechanism" while inside. Id. at 893-94. It

agreed that the subsequent theft of gasoline outside could not be the predicate crime supporting the burglary conviction. Id.

Similarly, in State v. Devitt, the defendant fled a police officer by unlawfully entering stranger's apartment, and the State charged him with burglary predicated on the crime of obstructing an officer. 152 Wn. App. 907, 909-10, 218 P.3d 647 (2009). The Court of Appeals held the evidence insufficient to sustain the conviction because, even assuming obstruction was a crime against a person, for purposes of the burglary statute, the officer was not in the apartment and thus the obstruction did not occur "therein." Id. at 913.

As detailed above, even if Mr. Weaver made a threat, Mr. Schamerhorn did not perceive this threat until Mr. Weaver had left the store. RP 118-19, 121-22, 127. As a matter of law, then, even if Mr. Weaver was in the store unlawfully, he did not accomplish the crime of misdemeanor harassment "therein." See RCW 9A.52.020(1); WPIC 60.01; 13 WAPRAC § 6:6 ("[t]he intent required for burglary is an intent to commit any crime inside the burglarized premises"); Devitt, 152 Wn. App. at 913; Kolisynk, 49 Wn. App. at 893-94.

2. IF THIS COURT FINDS THE EVIDENCE SUFFICIENT TO PROVE FIRST-DEGREE BURGLARY BASED ON UNLAWFUL ENTRY, IT MUST STILL REVERSE MR. WEAVER'S CONVICTION FOR THAT OFFENSE BECAUSE THE JURY MIGHT HAVE RELIED ON THE "UNLAWFULLY REMAINS" ALTERNATIVE MEANS, FOR WHICH THERE WAS INSUFFICIENT EVIDENCE

Under article I, section 21, of the Washington Constitution, a criminal defendant has the right to a unanimous jury verdict, but this does not necessarily include the right to a unanimous determination of the "means" by which the defendant committed the crime. State v. Woodlyn, 188 Wn.2d 157, 162-63, 392 P.3d 1062 (2017). When a crime may be committed via alternative means, a general verdict—which does not specify the means—will suffice under certain circumstances. Id. at 163. But a general verdict must always be reversed when the jury was instructed, and might have relied, on an alternative means for which there was insufficient evidence. Id. at 164-65.

First-degree burglary, as defined by statute and charged in this case, is an alternative means crime that may be accomplished either by unlawfully "entering" or by unlawfully "remaining" in a building. State v. Allen, 127 Wn. App. 125, 131, 110 P.3d 849 (2005). At Mr. Weaver's trial, the prosecutor told the jury it could rely on either means to convict Mr. Weaver. RP 295 ("It was illegal for him to come in and it was illegal for him to remain."). This meant the jury believed it had to convict Mr.

Weaver no matter when he formed the intent to commit misdemeanor harassment: he was guilty of burglary whether he entered with that intent or formed it only later, while he "remained" in the store talking with Mr. Schamerhorn. Id.; CP 30.

This error requires reversal. As explained above, even if Mr. Weaver's initial entry into the store was a trespass, his presence there became lawful as soon as the employees engaged him in a ruse to facilitate his arrest—a ruse that began at least as soon as Mr. Schamerhorn began speaking with Mr. Weaver at the counter. See section III.A.1.b. above. For this reason, there was insufficient evidence to support the alternative means of unlawful remaining, and it was reversible error to instruct the jury on that means. Cordero, 170 Wn. App. at 366 (where jury was instructed on both "enter" and "remain" means of committing burglary, conviction must be reversed if one means was supported by insufficient evidence).

To be clear, the court should not reach this question. As outlined in section III.A.1.a., Mr. Weaver did not enter the store unlawfully on August 6, 2019. And, even if he had, the only evidence of Mr. Weaver's intent to commit misdemeanor harassment was Mr. Datus's testimony that Mr. Weaver momentarily pulled out his knife. RP 138-39, 146. This occurred after Mr. Weaver had been in the store long enough for his

conversation with Mr. Schamerhorn to "get heated," a point at which the ruse to detain him was in full effect. RP 128-29, 138-39, 189-90, 285-86, 294-95. Thus, the evidence was insufficient to show that Mr. Weaver formed any intent to commit harassment before he was already lawfully remaining in the store at the employees' implied invitation.

If this court disagrees, however, and finds the evidence sufficient to show Mr. Weaver entered unlawfully and with the intent to threaten bodily injury, then his conviction must be reversed because the jury was improperly instructed on the unsupported means of unlawful remaining. Cordero, 170 Wn. App. at 366.

3. THE TRIAL COURT VIOLATED DUE PROCESS PROTECTIONS WHEN IT ACCEPTED THE PROSECUTOR'S BARE ASSERTION THAT TWO PRIOR CONVICTIONS DID NOT WASH OUT

At sentencing, the State may not prove a defendant's criminal history with "bare assertions." State v. Hunley, 175 Wn.2d 901, 915, 287 P.3d 584 (2012). A trial court that relies on such assertions violates the defendant's right to due process. Id. The court may rely on the defendant's affirmative acknowledgment of prior convictions, but a mere failure to object is not an affirmative acknowledgment. Id.

As noted, the State alleged at the sentencing hearing that Mr. Weaver had two prior convictions, one for residential burglary in January

1999 and the other for unlawful possession of a controlled substance in January 2014. RP 308. It relied on these alleged convictions to argue that Mr. Weaver had an offender score of four on the burglary count. RP 311-12.

The prosecutor properly acknowledged that both prior convictions were eligible to "wash out" because they were so old and so far apart in time. RP 311.[2] But he asserted, with no evidence, that "Mr. Weaver has a substantial amount of misdemeanor criminal history that prevents any of these felonies from washing out." RP 311. Defense counsel did not respond to this assertion. RP 311-15.

There is no evidence in the record that Mr. Weaver was ever convicted of a misdemeanor offense, and defense counsel never affirmatively acknowledged the existence of any such conviction. See RP 311-15. Thus, the trial court violated Mr. Weaver's right to due process when it relied on the prosecutor's bare assertion that unspecified and

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[2] See RCW 9.94A525(2)(b) (prior class B felony other than sex offense washes out if offender spends ten consecutive years in the community, after release from confinement or entry of judgment and sentence, without subsequently committing any crime that results in a conviction); Laws of 1989, 2nd Exec. Sess., ch. 1, § 1 (residential burglary class B felony); RCW 9.94A.525(2)(c) (where present conviction is not for felony driving under the influence offense, class C prior felony other than sex offense washes out if offender spends five consecutive years in the community, after release from confinement or entry of judgment and sentence, without committing any crime that subsequently results in a conviction); Laws of 2003, ch. 53, §334(2) (unlawful possession of controlled substance is Class C felony).

unverified misdemeanor convictions prevented the 2014 and 1999 offenses from washing out. See RP 311 ("I mean, there's ample misdemeanors between the felonies and basically running all the way up to the date, and so there's not a issue of any of these washing out.").

Even if this court does not dismiss or reverse Mr. Weaver's conviction for first-degree burglary, his case must be remanded to the trial court for resentencing. Hunley, 175 Wn.2d at 906 n.2.

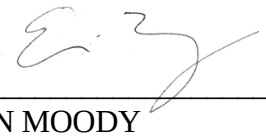
D. CONCLUSION

The evidence was insufficient to prove Mr. Weaver committed first-degree burglary, and his conviction on that count must therefore be dismissed with prejudice. If this court finds the evidence was sufficient to show that Mr. Weaver unlawfully entered the store with intent to commit criminal harassment therein, then his conviction must still be reversed because the jury might have relied on the unsupported alternative means of unlawful remaining. Finally, if this court does not dismiss or reverse Mr. Weaver's conviction for first-degree burglary, it must remand the case to the trial court for resentencing because the State relied on bare assertions to prove Mr. Weaver's criminal history.

DATED this 30th day of March, 2020.

Respectfully submitted,

NIELSEN KOCH, PLLC



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