

No. 292401

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

LUIS A. CORDERO, Appellant

APPEAL FROM THE SUPERIOR COURT
OF FRANKLIN COUNTY
THE HONORABLE CARRIE L. RUNGE

OPENING BRIEF OF APPELLANT

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SUMMARY OF ARGUMENT

Luis Cordero was charged by amended information and convicted of burglary in the first degree. He raises three issues on appeal. First, the evidence was insufficient to sustain the conviction; next, the jury instructions did not allow him to fully argue the defense theory of the case; and last, the court abused its discretion when it imposed non-crime related prohibitions.

I. ASSIGNMENTS OF ERROR

- A. The State's evidence was insufficient to support a conviction for burglary in the first degree.
- B. The trial court erred when it denied the proposed reasonable belief defense instruction because it denied the defendant the opportunity to fully argue his theory of the case.
- C. The trial court abused its discretion and exceeded its authority when it imposed non-crime related prohibitions on Mr. Cordero.

Issues Pertaining To Assignments of Error

- 1. Was the State's evidence insufficient to support a conviction for burglary in the first degree?
- 2. Is entry unlawful when a visitor is invited into the residence by a minor who resides there?
- 3. Is it unlawful remaining in the premises when one with authority over the premises commands the visitor to

leave, but then blocks the doorway so they are prevented from leaving?

4. Did the State fail to prove Mr. Cordero entered or remained on the premises with intent to commit a crime against a person or property therein?
5. Is it error for the court to deny a proposed jury instruction if it prevents the defense from fully presenting its theory of the case?
6. Did the trial court abuse its discretion and exceed its authority when it imposed non-crime related prohibitions?

II. STATEMENT OF FACTS

Fourteen-year old Vanessa Suarez lived with her mother, Priscilla Garcia, in a residential motel room in Pasco. (RP 145). Ms. Garcia, concerned about a relationship between her daughter and Luis Cordero, contacted Officer Cano of the Pasco Police Department on March 27, 2010, and “wanted some information on what she could do in that situation.” (RP 66). When she spoke to Mr. Cordero on the phone that day, she told him if he “came around”, she was going to call the police. (RP 103).

On March 28, 2010, Luis Cordero went to pick up Vanessa Suarez at the motel room. (RP 81, 92). He knocked on the door. (RP 104). Witness testimony differed as to who opened the door

and invited Mr. Cordero inside. Ms. Garcia's son, Gabriel, who was visiting that day, testified Vanessa opened the door and invited Mr. Cordero inside. (RP 81, 87). Vanssa Suarez testified she answered the door, but it was her mother who told Mr. Cordero he could enter. (RP 168). Ms. Garcia testified she opened the door and her daughter pushed past her to let him inside. (RP 105, 120). The affidavit in support of probable cause stated, "Victim Garcia explained that Luis forced his way into the apartment without permission." (CP 130). Mr. Cordero told police that Vanessa Suarez invited him into the residence. (RP 145).

Once he was inside, Ms. Garcia told Mr. Cordero he had to leave. (RP 104). Gabriel Suarez testified his mother heard Mr. Cordero's voice and told him to get out, but then closed the door and told him, "You're going to stay." (RP 81). Mr. Cordero tried to leave the room, "begging her to let him go," but Ms. Garcia blocked the doorway. (RP 82-84, 88, 90, 105). Ms. Garcia testified she blocked him inside the apartment because she "wanted him to get arrested for dating her daughter." (RP 123-124).

After he was prevented from leaving, Mr. Cordero removed an unloaded gun from his pocket and clicked it numerous times. (RP 90). He never pointed the gun at anyone. (RP 91). He put the

gun back in his pocket, but kept clicking it. (RP 83). In a 911 call played at trial, Ms. Garcia is quoted in pertinent part:

“There’s a male here that’s not supposed to be here and the cops told me to immediately call them because he had beat up a guy. And he’s inside my house right now, and you know, I’m not – I’m standing by the door. Because he’s going out with my daughter, my 14-year—my 14-year-old-daughter...And he’s right here trying to push me out of the way....And he’s got a gun I believe. And I’m just tired of this boy.” (Ex. No. 4, transcription).

Gabriel Suarez said Mr. Cordero tried to get out by pushing Ms. Garcia, but, “my mom had Luis by the hands and Luis was facing the door and my mom pulled Luis.” (RP 84, 89). Mr. Cordero pushed Ms. Garcia aside and left. (RP 89, 125). Ms. Suarez also pushed her mother aside and left after Mr. Cordero. (RP 84).

Officers responded to the 911 call and arrested both Mr. Cordero and Ms. Suarez. (RP 21, 26, 33, 65). The unloaded gun and a small bag of marijuana were found in nearby bushes. (RP 31 42). Mr. Cordero was charged by amended information with burglary in the first degree. (CP 124-125).

At trial, the court declined to give an instruction proposed by the defense:

A person has not entered or remained unlawfully in a building if the person reasonably believed that the owner of the premises or other person empowered to license access to the premises would have licensed the defendant to enter or remain.

The State has the burden of proving beyond a reasonable doubt that the trespass was [un]lawful. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty as to this charge.

(CP 100).

During jury deliberations, the jury submitted one question to the court: "Is it lawful for a person to whom [sic] has been restricted from entry to be invited by a minor?" (CP 49). With the agreement of the parties, the court responded: "Refer to the court's instructions on the law." (CP 49).

Mr. Cordero was convicted in a jury trial and sentenced to 17 months incarceration, and an additional 18 months of community custody. (CP 36). As part of community custody, the court ordered Mr. Cordero to have "No contact with known gang members. No possession of gang paraphernalia including clothing, insignia, medallions, etc." (CP 38). Mr. Cordero appeals.

III. ARGUMENT

The Due Process Clause of the Fourteenth Amendment and Article 1, §§ 3, 22 Washington State Constitution require the state

to prove every element of an offense beyond a reasonable doubt. U.S. Const. Amend. XIV; Wash. Const. art. 1, §§ 3, 22; *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). In a challenge to the sufficiency of the evidence, the test is whether, viewing it in a light most favorable to the State, any rational trier of fact could find the essentials elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). In such a challenge, the defendant admits the truth of the State's evidence and all reasonable inferences that can reasonably be drawn from it. *State v Colquitt*, 133 Wn. App. 789, 137 P.3d 892 (2006). Credibility determinations are for the trier of fact and not subject to review. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

Whether the evidence is sufficient to support a conviction is an issue of law. *State v. Knapstad*, 107 Wn.2d 346, 351-52, 729 P.2d 48 (1986). An appellate court reviews issues of law *de novo*. *State v. McCormack*, 117 Wn.2d 141, 143, 812 P.2d 483 (1991), *cert. denied*, 502 U.S. 1111, 112 S.Ct. 1215, 117 L.Ed.2d 453 (1992).

A. The Evidence Was Insufficient To Sustain A Conviction For Burglary In The First Degree.

To convict Mr. Cordero of burglary in the first degree, the State was required to prove (1) he entered or remained unlawfully in a building; (2) with the intent to commit a crime against a person or property therein; and (3) when entering, or in the building, or in immediate flight from the building, he or another participant in the crime was armed with a deadly weapon or assaulted another person. RCW 9A.52.020. Here, no rational trier of fact could find the essential elements of the crime beyond a reasonable doubt, because the evidence directly contradicts a finding of guilt. *Green*, 94 Wn.2d at 220.

1. The State's Evidence Was Insufficient To Prove Mr. Cordero Unlawfully Entered The Premises Because He Was Invited Inside.

"A person enters or remains unlawfully in or upon premises when he is not then licensed, *invited*, or otherwise privileged to so enter or remain." RCW 9A.52.010(3). The State bears the burden of proving the entry was unlawful. *State v. Bergeron*, 105 Wn.2d 1, 16, 711 P.2d 1000 (1985). Under burglary statutes, "Only a person who *resides in* or otherwise has authority over the premises may grant permission for another to enter or remain." RCW 9A.52.025;

State v. J.P. 130 Wn. App. 887, 892, 125 P.3d 215 (2005).

(Emphasis added).

The record here is very clear: Mr. Cordero was invited into the residence. Ms. Garcia and Gabriel Suarez both testified that Vanessa Suarez invited Mr. Cordero into the residence. (RP 81, 105). Ms. Suarez testified she opened the door, but Ms. Garcia invited Mr. Cordero into the home. (RP 168). Regardless of the exact chain of events, the testimony establishes it was one or the other of the residents who granted permission for him to enter.

Although Ms. Garcia had previously obtained a protection order to prevent Mr. Cordero from seeing her daughter, she had dropped the order by the date of this incident. (RP 112-113). There was no court order preventing Mr. Cordero from being on the premises.

Assuming it was Vanessa Suarez and not Ms. Garcia, who invited Mr. Cordero into the home, as a resident, she had the authority to invite her friend into the home while she gathered her things. Although there is no case law particularly on point to directly answer the question whether a teen can invite friends into the family home, courts have found children may, in appropriate situations, consent to entry by law enforcement officers of the

parent's home. See *State v. Jones*, 22 Wn. App. 447, 451-52, 591 P.2d 796 (1979).

“[W]hen officers seek consent from a minor for entry to a home, the effectiveness of the consent depends upon: (1) the age of the child, *because as children grow they gradually acquire discretion to admit whom they will on their own authority*; and (2) the scope of the consent given, in that a teenager could admit police to look about generally, but a child of eight could merely admit police to that part of the house which any caller would be allowed to enter.” Wayne R. LaFave, *Criminal Procedure* § 3.10, p. 255 (3rd ed. 2000). (Emphasis added).

Here, while it was not law enforcement seeking entry to the home, the principle that a teenager has authority to allow entry by another is applicable. Mr. Cordero entered the premises on the invitation of a resident who had the authority to extend the invitation. His entry was not unlawful.

2. The Evidence Was Insufficient To Prove Mr. Cordero Unlawfully Remained In The Premises After Being Told To Leave, Because He Tried To Leave And Ms. Garcia Blocked The Doorway Exit.

“Unlawful remaining” occurs when “(1) a person has lawfully entered a dwelling pursuant to license, invitation or privilege; (2) the invitation, license or privilege is expressly or impliedly limited; (3) the person's conduct violates such limits; and (4) the person's conduct is accompanied by intent to commit a crime in the

dwelling.” *State v. Crist*, 80 Wn. App. 511, 514, 909 P.2d 1341 (1996).

The question here is not one of credibility. Rather, it is whether substantial evidence supports the State’s case when no rational trier of fact could find beyond a reasonable doubt that Mr. Cordero unlawfully remained in the residence. By definition, to unlawfully remain in a home requires express or implied revocation of the privilege *and the person's conduct violates such limits* and the conduct is accompanied by intent to commit a crime in the dwelling. *Crist*, 80 Wn. App. at 514.

The evidence here was uncontroverted: Mr. Cordero was invited into the home. Once inside, at some point, Ms. Garcia told Mr. Cordero to leave the premises. When he attempted to comply with her directive, she closed the door and blocked his exit. Gabriel Suarez testified:

Q. So he was told to leave and he attempted to leave?

A. He wanted to leave, yes.

Q. Okay. And you're saying that he did not leave because she locked him inside the apartment?

A. (Nods head up and down).

Q. And when your mom—Once he started to leave, did she immediately try to block him inside the apartment?

A. Yes. Then she called the cops. (RP 88).

And again:

Q. Okay. And so it was also your testimony that your mom was pushed, correct?

A. Yes.

Q. And that your mom was actually holding onto Mr. Cordero in her attempt to get him not to leave?

A. Yes.
(RP 89).

The testimony showed Mr. Cordero's conduct did not violate the limits of the privilege or invitation. In fact, Mr. Cordero begged Ms. Garcia to move aside and allow him to leave. (RP 84). The 911 call offered by the State quotes Ms. Garcia as saying:

"And he's inside my house right now, and you know, I'm not – I'm standing by the door....And he's right here trying to push me out of the way....Him and my daughter are both right now trying to push me out of the way. No. You need to move – You... No. No." (Emphasis added).

(St. exh. 4: 911- transcription, p. 4).

All the State showed was that Ms. Garcia tried to actively block Mr. Cordero from leaving the premises. She wanted him to be arrested because she did not want him to date her daughter. (RP 123-124). Her action to block him from leaving cannot be imputed to him as unlawfully remaining in the home.

3. Mr. Cordero's Entry And Remaining On The Premises
Were Lawful And There Is Insufficient Evidence Of Intent
To Commit A Crime Against Person Or Property Therein.

If the State has proven unlawful entry, the intent to commit a crime may be inferred, unless the evidence demonstrates the entry was without criminal intent. RCW 9A.52.040; *State v. Bennett*, 20 Wn. App. 783, 788-89, 582 P.2d 569 (1978). Here, the evidence showed Mr. Cordero did not enter or remain unlawfully in the room. He was invited inside. (RP 81, 87, 105, 168). When he was told to leave, he attempted to comply. (RP 81-84, 88, 90, 104-105).

The intent to commit a crime may also be inferred if the defendant's conduct and the surrounding facts and circumstances plainly indicate such an intent as a matter of logical probability. *State v. Woods*, 63 Wn. App. 588, 591, 821 P.2d 1235 (1991) (citing *State v. Bergeron*, 105 Wn.2d 1, 4, 711 P.2d 1000 (1985)). However, permissive inference does not relieve the State from meeting its burden to prove intent by a defendant to commit a crime. *State v. Stinton*, 121 Wn. App. 569, 573, 89 P.3d 717 (2004).

The evidence elicited at trial does not establish beyond a reasonable doubt that Mr. Cordero committed or even intended to

commit a crime. Even when viewed in the light most favorable to the State, all the State showed was that Mr. Cordero tried to free himself from Ms. Garcia so he could leave the premises. The State argued in closing that Mr. Cordero deliberately intimidated and assaulted Ms. Garcia so that he could leave with Vanessa Suarez. (RP 192-193). In fact, however, testimony directly contradicts that assertion.

Gabriel Suarez testified Mr. Cordero took a gun out of his pocket and clicked the hammer *after* Ms. Garcia trapped him in the home. (RP 83). He never pointed the unloaded gun at anyone and he put it back in his pocket. (RP 83, 88). Further, Mr. Cordero pushed Ms. Garcia aside *after she grabbed him* as he tried to leave. (RP 84).

Mr. Cordero had the right to leave the premises. Ms. Garcia was upset and wanted to have him arrested because he was dating her daughter. Ms. Garcia's conduct prevented him from easily leaving. Mr. Cordero's conduct in the particular facts and circumstances do not plainly indicate criminal intent as a matter of logical probability. As a matter of law, there was insufficient evidence to sustain Mr. Cordero's conviction.

B. The Trial Court Erred When It Denied The Proposed Reasonable Belief Defense Instruction Because It Denied The Defendant The Opportunity To Fully Argue His Theory Of The Case.

A defendant has a due process right to have the jury accurately instructed on his theory of defense if the instruction is supported by substantial evidence and accurately states the law. U.S. Const. amends. 5, 6, 14; *In re Winship*, 397 U.S. at 364; *State v. Hughes*, 106 Wn.2d 176, 191, 721 P.2d 902 (1986). Jury instructions, when taken as a whole, must properly inform the jury of the applicable law. *State v. Douglas*, 128 Wn. App. 555, 562, 116 P.3d 1012 (2005). When determining if the evidence at trial was sufficient to support the giving of an instruction, the court is required to view the supporting evidence in the light most favorable to the party that requested the instruction. *State v. Fernandez-Medina*, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000).

Here, Mr. Cordero maintained that he had been invited into the home and tried to leave when he was directed to do so. The evidentiary testimony supported his theory: he was invited in by either Vanessa Suarez or Ms. Garcia (RP 81,105, 68); he tried to

get past Ms. Garcia when she directed him to leave (RP 82-84, 88, 90, 105).

The jury instruction Mr. Cordero requested mirrored RCW 9A.52.090(3), the statutory defense to criminal trespass. (CP 100). In *State v. J.P.*, the defense was found applicable to the crime of burglary. *State v. J.P.*, 130 Wn. App. 887, 895, 125 P.3d 215 (2005). Defense proposed instruction WPIC 19.06 (modified) read:

A person has not entered or remained unlawfully in a building if the person reasonably believed that the owner of the premises or other person empowered to license access to the premises would have licensed the defendant to enter or remain.

The State has the burden of proving beyond a reasonable doubt that the trespass was [un]lawful. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty as to this charge.
(CP 100).

The court denied the instruction request.

Jury instructions are intended to provide guidance to the jury in its deliberations and assist in delivering a proper verdict. *State v. Allen*, 89 Wn.2d 651, 654, 574 P.2d 1182 (1978). The lack of instruction here is significant in view of the question posed by the jury during deliberation: "Is it lawful for a person to whom [sic] has been restricted from entry to be invited by a minor?" (CP 49). The jury here was guessing as to the law. Jurors should not have to

speculate about the law. *State v. Olmedo*, 112 Wn. App. 525, 534-535, 49 P.3d 960 (2002).

The jury should have been instructed that it is a statutory defense to the crime if “the actor reasonably believed that the owner of the premises, *or other person empowered to license access thereto*, would have licensed him to enter or remain.” RCW 9A.52.090(3). (Emphasis added). Mr. Cordero contends that had the jury been properly instructed, they may likely have come to the conclusion that he reasonably believed he was given permission to enter by a person empowered to license him to enter or remain.

If the defense theory is supported by substantial evidence and the law is accurately stated, it is reversible error to refuse to give a defense-proposed instruction. *State v. Agers*, 128 Wn.2d 85, 93, 904 P.2d 715 (1995). This court should reverse the conviction.

C. The Trial Court Abused Its Discretion When It Imposed Non-Crime Related Prohibitions As Part Of The Community Custody Conditions.

Mr. Cordero challenges a condition imposed by the court that he may have “No contact with known gang members. No

possession of gang paraphernalia including clothing, insignia, medallions, etc.” (CP 38).

Under RCW 9.94A.505, the general sentencing statute of the Sentencing Reform Act, “[A]s a part of any sentence, the Court may impose and enforce crime-related prohibitions and affirmative conditions as provided in this chapter.” RCW 9.94A.505(8). A “crime-related prohibition” is an order of a court prohibiting conduct that *directly relates to the circumstances of the crime* for which the offender has been convicted. RCW 9.94A.030 (10). (Emphasis added). A “circumstance” is defined as “[a]n accompanying or accessory fact.” *State v. Williams*, 157 Wn.App. 689, 692, 239 P.3d 600 (2010).

Here, there is nothing in the record to indicate there was anything gang-related about the circumstances of the events. Although no causal link needs to be established between the condition imposed and the crime committed, the condition must relate to the circumstances of the crime. *State v. Llamas-Villa*, 67 Wn.App. 448, 456, 836 P.2d 239 (1992). Mr. Cordero asserts that the restriction is invalid because it is not related to the circumstances of the crime; there was no gang involvement.

Further, the type of clothing, insignia, jewelry, or tattoos he might wear is not related to the underlying conviction.

The sentencing authority of the court is limited to that provided by statute. When the court acts without statutory authority in imposing a sentence, that error can be addressed for the first time on appeal. *State v. Moen*, 129 Wn.2d 535, 545, 919 P.2d 69 (1996). Further, sentencing conditions, including crime-related prohibitions, are reviewed for abuse of discretion. *State v. Riley*, 121 Wn.2d 22, 36-37, 846 P.2d 1365 (1993). Abuse of discretion occurs when the decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. *State v. Hayes*, 55 Wn.App. 13, 16, 776 P.2d 718 (1989).

Here, the court's imposition of the restrictions was exercised on untenable grounds. The record was devoid of any facts suggesting gang-involvement or lifestyle being directly related to the circumstances of the offense. The order was an abuse of discretion and should be vacated.

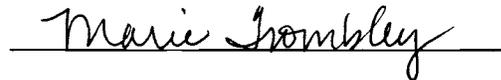
IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Cordero respectfully requests this court to reverse and dismiss the burglary

in the first-degree conviction for insufficient evidence and vacate the non-crime related prohibitions.

Dated this 23rd day of March, 2011.

Respectfully submitted,



Marie Trombley, WSBA 41410
Attorney for Appellant Cordero

CERTIFICATE OF SERVICE

I, Marie Trombley, attorney for appellant Cordero, do hereby certify under penalty of perjury under the laws of the United States and the State of Washington, that a true and correct copy of the Brief of Appellant was sent by first class mail, postage prepaid on March 23, 2011, to Luis A. Cordero, DOC # 341950, Washington State Penitentiary, 1313 N. 13th Ave., Walla Walla, WA 99362; and David Wayne Corkrum, 1016 N. 4th Ave, Pasco, WA 99301.



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