

FILED

OCT 21 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 29240-1-III

STATE OF WASHINGTON
COURT OF APPEALS - DIVISION III

STATE OF WASHINGTON,

Respondent,

vs.

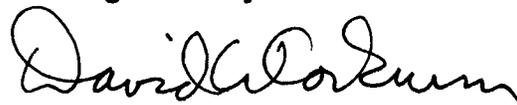
LUIS ANTONIO CORDERO

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR
FRANKLIN COUNTY

BRIEF OF RESPONDENT

SHAWN P. SANT
Prosecuting Attorney



by: David W. Corkrum, #13699
Deputy Prosecuting Attorney

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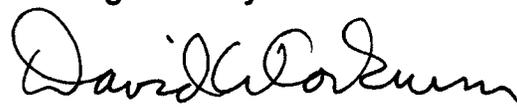
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I. STATEMENT OF FACTS

A. Procedural History

Appellant, Luis Antonio Cordero, was charged by an Information filed March 31, 2010, with the felony crime of Residential Burglary, RCW 9A.52.025(1), a class "B" felony. (CP 6). The appellant was arraigned on April 6, 2010. A First Amended Information was filed on May 18, 2010 charging the appellant with the crime of Burglary in the First Degree, RCW 9A.52.020(1)(a), a class "A" felony. (CP 17). On May 25, 2010, the appellant entered into a stipulation regarding any oral and/or written statements made by appellant were voluntarily made and were made after full advisement and understanding of the appellant's constitutional rights and would be admissible at trial. (CP 30). The appellant was found guilty by jury verdict on June 8, 2010, of the crime of Burglary in the First Degree. (CP 46). The Appellant was sentenced on June 30, 2010, by the Honorable Carrie L. Runge to 17 months of incarceration and filed a notice of appeal on July 23, 2010. (CP 52, 54).

B. FACTS RELEVANT TO MOTION

Respondent accepts and relies upon the Appellant's statement of facts and requests it be incorporated within respondent's motion. Respondent also presents the following additional facts to supplement Appellant's statement of facts.

Priscilla Garcia testified that she was currently living in Pasco with her daughter, Vanessa, who had recently turned 15 years of age. (RP 98-99). Ms. Garcia knew the appellant and believed he was 20 years of age. She was aware that her daughter, who was 13 going on 14, had been dating the appellant and Ms. Garcia disapproved of that relationship. (RP 101). Ms. Garcia stated she moved to Pasco from Grandview, Washington, in order to stop the relationship between the appellant and her daughter. The efforts on her part included the obtaining of no contact orders concerning the appellant and Vanessa. (RP 102). On the day in question, Ms. Garcia, her daughter Vanessa and a son by the name of Gabriel were at Ms. Garcia's apartment. Ms. Garcia became aware of someone being at the front door and when the door opened, the appellant was standing in the doorway. Vanessa pushed Ms. Garcia to the side and appellant entered the

residence. Ms. Garcia immediately told the appellant he had to leave. (RP 104). Upon seeing a handgun in appellant's hand, Ms. Garcia called the police. Ms. Garcia testified she was not going to allow the appellant to take her minor daughter with him and blocked the door so Vanessa would not be able to leave. Both the appellant and Ms. Garcia's daughter pushed her to the floor and exited the apartment. (RP 105).

II. ARGUMENT

A. **APPELLANT'S CONVICTION FOR BURGLARY IN THE FIRST DEGREE WAS PROVED BEYOND A REASONABLE DOUBT BY SUBSTANTIAL EVIDENCE IN THE RECORD.**

In reviewing a challenge to the sufficiency of the evidence, the court views the evidence in a light most favorable to the State to determine whether a rational trier of fact could find the elements of the offense beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980); State v. Treat, 109 Wn. App. 419 426, 35 P.3d 1192 (2001). The appellant admits the truth of the State's evidence and all reasonable inferences that can reasonably be drawn from it for the purposes of the examination. State v. Colquitt, 133 Wn. App. 789, 137 P.3d 892 (2006). To

convict the appellant of burglary in the first degree, the State must prove:

- 1) The appellant entered or remained unlawfully in a building;
- 2) That the entering or remaining was with 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 appellant or an accomplice in the crime charged was armed with a deadly weapon or assaulted a person.
RCW 9A.52.020

The State must prove one of the alternate means of committing burglary, either the appellant unlawfully entered or remained unlawfully in the dwelling with the intent to commit a crime. RCW 9A.52.030(2) The court may broadly interpret the “intent to commit a crime” element of burglary. State v. Stinton, 121 Wn. App. 569, 576, 89 P.3d 717 (2004). To prove intent, the State must only show the intent to commit any crime against a person or property while inside the premises. Id. A person unlawfully remains in a dwelling when he was invited to enter, the invitation was expressly or impliedly limited, the person’s behavior violated such limits, and “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). In this case the appellant entered the victim’s apartment without her permission and remained after being told to leave. The appellant was armed with a hand gun in an attempt to intimidate the victim and knocked Ms. Garcia to the ground while in the apartment committing an assault. (RP 105). Appellant then took Ms. Garcia’s minor daughter from the apartment in complete disregard for her mother’s directions to leave without her daughter. Even if the Court were to find the appellant had permission to enter the apartment, he definitely exceeded the scope of his invitation when he pushed Ms. Garcia to the ground.

When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. State v. Salinas, 119 Wn.2d 192, 200, 829 P.2d 1068 (1992).

“In determining whether the necessary quantum of proof exists, the reviewing court need not be convinced of the defendant’s guilt beyond a reasonable doubt, but only that substantial evidence supports the State’s case.” State v. Fiser, 99 Wn.App. 714, 718, 995 P.2d 107, review denied, 141 Wn.2d 1023 (2000). Substantial evidence is evidence that “would convince an

unprejudiced, thinking mind of the truth of the fact to which the evidence is directed.” State v. Hutton, 7 Wn.App. 726, 728, 502 P.2d 1037 (1972). In finding substantial evidence, we cannot rely upon guess, speculation, or conjecture. Hutton, 7 Wn.App. at 728.

State v. Prestegard, 108 Wn.App. 14, 22-23, 28 P.3d 817 (2001).

It is the sole province of the trier of fact to resolve conflicting testimony, evaluate the credibility of witnesses, and generally weigh the persuasiveness of the evidence. See State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992); see also State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). The jury obviously believed the testimony of Priscilla Garcia and discounted any other exculpatory evidence. Its determinations, including the weight placed on the evidence, should not be disturbed on appeal. When reviewing the evidence in the light most favorable to the State, all reasonable inferences must be drawn in favor of the State and interpreted most strongly against the defendant. The court should defer to the finder of fact on issues of conflicting testimony, witness credibility and persuasiveness of the evidence. State v. Thomas, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004).

B. NO ERROR WAS COMMITTED BY THE COURT IN THE INSTRUCTIONS GIVEN TO THE JURY.

Appellate courts analyze a challenged jury instruction by considering the instructions as a whole and reading the challenged portions in context. State v. Hayward, 152 Wa. App. 632, 642, 217 P.3d 354 (2009) (quoting State v. Pirtle, 127 Wa.2d 628, at 656-57, 904 P.2d 245 (1995)). The court will review an alleged error in jury instructions de novo. State v. Becklin, 163 Wa.2d 519, 525, 182 P.3d 944 (2008). The appellant proposed a **modified** version of WPIC 19.06 to the court to support his theory of his defense. The court denied his request. (RP 179-180). Appellant based his proposed instruction on State v. J.P., 130 Wa. App. 887, 125 P.3d 215 (2005). The trial court reasoned that the offense charged in J.P. was in fact a residential burglary rather than a first degree burglary. The trial court refers to the proposed instruction by saying: "It appeared from the modified 19.06 that you supined that maybe the first sentence was appropriate--- but certainly not the last sentence, since trespass is not a lesser included of the charge of burglary in the first degree." (RP 179). Each element of the lesser offense must be a necessary element of the offense charged. State v. Workman, 90 Wa.2d 44 447-48, 584 P.2d 382

(178). Due to the 1995 amendment to RCW 9A.52.020 changing “dwelling” to “building,” it appears that residential burglary is no longer a lesser offense of first degree burglary. Because the elements of the crimes are different, an individual could commit the crime of first degree burglary without committing the crime of residential burglary. A defendant is entitled to a lesser included offense instruction if (1) each element of the lesser offense is a necessary element of the charged offense (“the legal prong”), and (2) taking the evidence in the light most favorable to him or her, a jury could find that he or she committed the lesser offense instead of the charged offense (“the factual prong”). State v. Fernandez-Medina, 141 Wa.2d 448, 455-56, 6 3d 1150 (2000). The court did give an instruction based upon WPIC 65.02 which stated, “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.” Which was essentially the same as the appellant’s first sentence of his proposed instruction. Based upon the instructions given by the court the appellant was able to adequately argue his theory of the case. The jury was properly instructed by the court and accurately stated the law for the jury’s

deliberations. The judgment reached by them should not be disturbed by the appellate court.

C. THE COURT DID NOT ABUSE ITS DISCRETION IN IMPOSING THE TERMS OF APPELLANT'S COMMUNITY CUSTODY.

Community custody terms may be imposed under several circumstances. When offenders are sentenced to prison for certain offenses, the court must also impose a term of community custody. In this particular case the court was required to impose a term of 18 months of community custody. RCW 9.94A.701(2) The conditions of community custody are divided into three groups: those that are mandatory, those that are mandatory unless waived by the court, and those that are discretionary. The trial court may order the defendant to comply with crime-related prohibitions. RCW 9.94A.703(3)(f) A "crime-related prohibition" is a court order directly relating to the circumstances of the crime for which the offender was convicted. RCW 9.94A.030(10) The philosophy of crime-related prohibitions is that defendants may be prohibited from doing things related to their crime but not coerced into doing things to rehabilitate themselves. In the case at bar the appellant did not object to the additional conditions imposed by the court at

the time of sentencing. There was evidence produced at trial supporting the record that the defendant was transient in nature, was armed with a hand gun and recently released from custody during the commission of this offense. The conditions of community custody imposed by the court could arguably be related to the restrictions on the appellant's association with gang members or possession of gang paraphernalia in light of his conviction of a serious crime. The department of corrections has wide discretion in the imposition of conditions for the appellant during the time he is subject to community custody supervision. The sentencing order should stand as imposed.

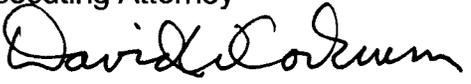
III. CONCLUSION

On the basis of the arguments set forth herein, it is respectfully requested that this court affirm the jury's finding of guilt, subsequent conviction and the judgment and sentence imposed.

Dated this 20 day of October 2011.

Respectfully submitted,

SHAWN P. SANT
Prosecuting Attorney

By: 
David W. Corkrum, WSBA #13699
Deputy Prosecuting Attorney

