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Division III
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IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON
DIVISION III
No. 355152-III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

ANDREW THOMAS DEWEY,

Defendant/Appellant

Respondent's Brief

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A. RESPONSE TO ASSIGNMENTS OF ERROR

- a. The court did not abuse its discretion when it allowed the state to amend the Information before the jury was instructed when the amendment was only to specify a different manner of committing the crime originally charged.
- b. There was sufficient evidence for the jury to convict the defendant of second degree burglary when the state presented evidence that the defendant entered the structure and loaded items belonging to the victim into his truck parked outside the structure and fled and hid when the police arrived, even though the jury found him not guilty of theft in the second degree and possession of stolen property in the second degree.

B. ISSUES PRESENTED

- a. When a defendant is charged with violating a no contact order by contacting a victim and there is evidence to support the state never intended that manner of committing the violation, can the state amend the information before the case is submitted to

the jury to a violation of the no contact order by violating the restraints on a residence instead?

C. STATEMENT OF THE CASE

Mr. Dewey was originally charged via information on June 12, 2017 with four counts – Count One, Residential Burglary (Domestic Violence, “DV”); Count Two, Violation of a court order, DV; Count Three, Obstructing Law Enforcement; and Count Four, Possession of a Stolen Vehicle. (CP at 6 – 7). On the morning trial began, the state amended the charges to change Count One to Burglary in the Second Degree, DV and added two new counts – Theft, 2nd, DV and Possession of Stolen Property, 2nd, DV. (CP at 83 – 85).¹

Cyndee Dewey testified that she was married to the defendant for eighteen years but was currently in the process of obtaining a divorce and had filed for divorce on May 20 (RP at 79, 45, and 78). During the divorce process, she went to court and got an order of protection against Mr. Dewey to

¹ The amended Information added the new charges as Counts Two (Theft, 2¹ and Three (PSP, 2nd), so the other counts all increased numerically by two numbers: Violation of a Court Order, DV became Count Four, Obstructing became Count Five, etc. (CP at 83 – 85). In the 2nd Amended Information, there were six total counts.

protect herself and her son that included consulting a lawyer and having a hearing on the order; a hearing that Mr. Dewey attended (RP at 45 – 46). She testified that she loved the defendant (RP at 46). A certified copy of the order was admitted as State’s exhibit 12 (RP at 65). Ms. Dewey told the jury about the no contact order hearing (RP at 45 – 54, 63 – 64). At the hearing, Mr. Dewey presented information to the judge that he wanted his hammer and tool belt back so he could work and he indicated to the judge those personal tools were at their shared residence on Canyon Road. (RP at 48).

There was also a discussion at the order hearing regarding Ms. Dewey’s keys – he told the judge he did not have them (RP at 64).

Ms. Dewey also explained that on the order, not only was the 2900 Canyon Road residence a property that was listed as protected, but the order also listed 1560 Twin Lakes Road as a protected property (RP at 49). Ms. Dewey told the jury this was a recreational property with an outbuilding that is enclosed and has a bathroom inside it; this building was called various things throughout the trial: building, garage, shop, storage unit, structure, cabin, residence, car port with a

bathroom, storage shed; under county code per the defense witness, the building could not be used as a primary residence² (RP at 49 – 50, 55, 76, 96, 116, 131, 154, 217, 218, 243). She testified it was a property Mr. Dewey was aware of and that they stored valuables there (RP at 51). She told the jury that she had found Mr. Dewey at the property at times she didn't know he was there and believed that he lived at the property without her knowledge or consent (RP at 51, 74). She testified that there were things in that building that belonged to Mr. Dewey, but according to the judge at the protection hearing, the distribution of property would be handled when the divorce happened (RP at 52). They also discussed how Mr. Dewey could get any property he needed (what he indicated was his hammer and tool belt) by setting up an appointment with law enforcement and setting a date and time he could come get his things in a civil standby (RP at 53, 241).

² The defense witness from the county permit department, Lisa Iammarino did describe that people frequently illegally live in structures not approved for residence and that she had continually received reports about this property that people were using it inappropriately (RP at 221, 223). The defendant admitted to the deputies at the time he was arrested he was living at the property (RP at 130, 176).

Ms. Dewey specifically testified that her intention was to keep their property safe and be able to divide it equitably during the divorce (RP at 53, 79 – 80). Mr. Dewey signed the order in court that day and was able to raise any issues about the order and property at the hearing with the judge (RP at 54). The order indicated Mr. Dewey was to arrange the civil standby and they would exchange property (RP at 79). No standby ever happened. Deputy Kivi testified that he had reviewed the order between the defendant and Ms. Dewey and had personally served the order on the defendant in May (RP at 114).

On June 8, 2017 at about 7:00 a.m. Deputy Dan Kivi was working patrol and doing a “drive through security check” at Twin Lakes (RP at 112). He routinely patrols areas with second homes, unoccupied cabins, etc. to make them secure against a growing problem with burglaries in Kittitas County (RP at 112). The area was described as rural (RP at 95, 150). Because he knew specifically about the prohibitions against Mr. Dewey being at the Twin Lakes Road, his suspicion was heightened when he saw a pickup truck backed down to the door of the cabin on the property

(RP at 116). He saw the truck was full of items and the headlights were on (RP at 116). He described the contents of the truck to be like someone was moving and loaded up the truck to take stuff from one location to another (RP at 117). He called for back up to investigate what was happening at the property with the truck and the structure and Deputy Ricky, Corporal Woody and Deputy Houseberg all arrived to aid in the investigation. (RP at 125, 149, 171).

Deputy Kivi called Ms. Dewey that morning asking if anyone had permission to be there and asking if she owned a blue truck. (RP at 123, 54). When she told him, “no,” he asked for her permission to investigate what he believed to be a burglary in progress at the Twin Lakes road property (RP at 54 – 55, 123 – 24). She said no one had permission to be at the property at that time; specifically Mr. Dewey did not have her permission to be there that day (RP at 55 – 56, 123).

Deputy Houseberg testified it was obvious that although it was kind of misty raining, the items in the back of the truck weren't that wet, so didn't appear to have been there very long (RP at 151).

The Deputies attempted to locate anyone inside the structure, but no one was inside (RP at 125). Deputy Houseberg testified that he banged very hard on the door and yelled really loudly for anyone inside the residence to come out; he also indicated he called the defendant by name (RP at 154, 155). The banging and yelling was loud enough for the neighbors to start coming out wondering what was going on (RP at 155). After an hour and a half after Deputy Kivi initially arrived at the property, Mr. Dewey was located hiding, laying down in the brush about forty yards from the structure on the property; approximately 175 feet from the property line (RP at 128, 166, and 174). Despite repeated instructions and commands by the police for anyone there to show themselves and even specific instructions when they saw Mr. Dewey to come out when they found him, he did not initially respond (RP at 129, 134; 174 – 75).

The defendant told Deputy Kivi he lived at the property and that the address wasn't listed as protected on the copy of the order he had been given by Deputy Kivi (RP at 130, 176).

The 1996 Chevy ¾ ton truck that was found at Ms. Dewey's property that day was registered and belonged to Rodney Riddle (RP at 117, 85, 124, 180). He indicated he had let his "female friend" Brenda Giorgiani borrow the truck and that he understood that the defendant was Ms. Giorgiani's cousin (RP at 84, 86). He said he had never given Mr. Dewey permission to drive the truck and that his agreement with Ms. Giorgiani was that she was the only person who was supposed to drive the truck because she was the only other insured driver (RP at 86 – 87). Brenda Giorgiani told the jury she gave the defendant permission to drive the truck the night before the burglary to Goodwill without Mr. Riddle's permission, although had not given the defendant permission to have the truck at the Twin Lakes address the next day (RP at 229, 232).

The truck and all the contents were taken to the sheriff's office where Mr. Riddle was able to identify any property from inside that was his or had been in the truck the last time Mr. Riddle had it (RP at 179, 180).

At a later time, Ms. Dewey was called into the sheriff's office to identify property that had been recovered

inside the truck at the property and she separated it into items that did belong to the defendant, things that were “community property,” or shared between them, and then items that were only hers. (RP at 57,181 – 182). There were photographs of the different groups of personal items that Ms. Dewey identified in court (RP at 57, 59, and 63). She left the things that she identified as belonging to Mr. Dewey with the sheriff (RP at 58). The things that belonged to her were identified as having a value of about \$800.00 and then some things that couldn’t be valued - they had sentimental value; she reiterated that she estimated the value of those things to be more than \$750.00 (RP at 59 – 61, 77).

At trial, the defendant testified that he was present at the protection order hearing and that he had complied with all of the restraints (RP at 239). He admitted they discussed specific property at the hearing, including a set of keys, his tool bags, and his hammer and agreed he was required to comply with a civil standby to get those belongings from Ms. Dewey. (RP at 240 – 241). He told the jury that the order did not address the address or the personal property at the property on Twin Lakes Road; it was his understanding that

would be dealt with at a later date (RP at 242 – 243). He said the judge didn't mention anything "out loud" about the Twin Lakes property and he described the property as a storage shed that looked like a cabin (RP at 243).

At trial, the defendant denied living at the structure on Twin Lakes Road and said no one could live there (RP at 244). He also said "it was not stated anywhere in the order that I could not be at that property." (RP at 249). He reiterated to the jury that the address 1560 Twin Lakes Road was not a "residence," but was a property. (RP at 250). He said he never made any attempts to contact Ms. Dewey in violation of the order (RP at 253). He admitted taking the cotton candy bowl and dome valued at almost \$500.00 but said his intent was to return it to Ms. Dewey when they had the civil standby (RP at 259 – 60). He said all the other property he took from the Twin Lakes road property was for personal use (RP at 261).

The first day of trial the prosecutor indicates they have finished the state's jury instructions and those instructions were filed that morning (RP at 143; CP at 94 – 100). At the conclusion of trial, defense moved to dismiss

count 4 (violation of no contact order) of the amended information because that count alleged Mr. Dewey violated the order by contacting Ms. Dewey (CP at 83 -85). The state responded with a request to amend the information to conform to the evidence and the previously filed jury instructions that had been written to allege the violation occurred as a result of the defendant being at a protected residence (RP at 311; CP at 94 – 100). The court specifically referenced CrR 2.1(d) and authorized the amendment of the Information, even after both sides rested but prior to the verdict (RP at 312 -313). The defense argued that the defendant had been prejudiced because he had already testified (RP at 313). After a recess, defense renewed their objection to the amended information (RP at 314). The court specifically asked the defense attorney to explain the prejudice to the defendant, because, “it seems to [the court] your entire defense, starting with the voir dire of the jury was talking about the residence.” (RP at 315). The prosecutor pointed out to the court that had defense understood the information actually was alleging a violation by contacting the victim, a Knapstad motion would have been appropriate

because none of the state's discovery supported actual contact with the victim on the date alleged and the police reports clearly indicated they contacted the victim that day in Ellensburg, nowhere near the Twin Lakes property (RP at 315). The court was not persuaded by the additional argument from the defense and denied the motion to dismiss the no contact order violation count and authorized the amendment to the Information (RP at 316).

The jury found the defendant guilty of Count One, Burglary in the 2nd Degree and answered the special DV question as "yes;" not guilty of Counts Two (Theft, 2nd, DV) and Three (PSP, 2nd, DV); guilty of Count Four, violating the no contact order and answered the special DV question as "yes;" guilty of Count five, obstructing a law enforcement officer, and not guilty of Count six, possession of a stolen vehicle. (RP at 373 – 374, CP at 150 – 159).

D. ARGUMENT

a. Amendment of Information

A trial court's ruling on a motion to amend an information is reviewed for abuse of discretion. State v. Schaffer, 120 Wn.2d 616, 621-22, 845 P.2d 281

(1993). A trial court abuses its discretion if its decision is manifestly unreasonable or is based on untenable grounds or for untenable reasons. State v. Lord, 161 Wn.2d 276, 283-84, 165 P.3d 1251 (2007). A defendant has the constitutional right to be notified of the nature of the charges against him. WASH. CONST. art I, § 22. A trial court may permit the State to amend the information at any time before verdict or finding if the defendant's substantial rights are not prejudiced or the amendment is one of mere form, not substance. CrR 2.1(d); State v. Allyn, 40 Wn. App. 27, 35, 696 P.2d 45 (1985). The burden is on the defendant to show prejudice. State v. Gosser, 33 Wn. App. 428, 435, 656 P.2d 514 (1982). “The defendant has the burden of showing specific prejudice to a substantial right.” State v. Thompson, 60 Wn. App. 662, 666, 806 P.2d 1251 (1991). A defendant might be prejudiced if the amendment leaves him without adequate time to prepare a defense to the charge. State v. Purdom, 106 Wn. 2d 745, 748, 725 P.2d 622 (1986). In cases where the amendment was not

material, courts have properly allowed the State to amend the information while denying the defense's continuance request. See Schaffer, 120 Wn.2d 621-22; Allyn, 40 Wn. App. at 35. The fact a defendant does not request a continuance is persuasive of lack of surprise and prejudice. State v. Brown, 74 Wn.2d 799, 447 P.2d 82 (1968); State v. Jones, 26 Wn. App. 1, 612 P.2d 404 (1980). Where the principal element in the new charge is inherent in the previous charge and no other prejudice is demonstrated, it is not an abuse of discretion to allow amendment on the day of trial. State v. Johnson, 7 Wn. App. 527, 500 P.2d 788 (1972), aff'd, 82 Wn.2d 156, 508 P.2d 1028 (1973). It is not an abuse of discretion to refuse to grant a continuance if the "principal element in the new charge is inherent in the previous charge and no other prejudice is demonstrated . . ." State v. Gosser, 33 Wn. App. 428, 435, 656 P.2d 514 (1982). Amending an information to include an alternative means of committing a crime formerly charged after a mistrial on the original charge is permissible if

substantial rights of the defendant are not prejudiced.

State v. Aleshire, 89 Wn.2d 67, 71, 568 P.2d 799

(1977); CrR 2.1(d).

A person can violate a no contact order by violating:

- (i) The restraint provisions prohibiting acts or threats of violence against, or stalking of, a protected party, or restraint provisions prohibiting contact with a protected party;
- (ii) A provision excluding the person from a residence, workplace, school, or day care;
- (iii) A provision prohibiting a person from knowingly coming within, or knowingly remaining within, a specified distance of a location;
- (iv) A provision prohibiting interfering with the protected party's efforts to remove a pet owned, possessed, leased, kept, or held by the petitioner, respondent, or a minor child residing with either the petitioner or the respondent; or
- (v) A provision of a foreign protection order specifically indicating that a violation will be a crime.

RCW 26.50.110 (1) (a) (i) – (v). All violations of this statute are a gross misdemeanor, unless one of the provisions listed in the statute exist to elevate the crime to a felony. RCW 26.50.110(1) (a); RCW 26.50.110(4) – (5).

In State v. Glosser, the state was permitted to amend the information on the first day of trial to amend the assault charge from a knowing assault of another with intent to commit a felony of first degree escape, RCW 9A.36.020 (1) (d) to a knowing assault of another with a weapon or other instrument or thing likely to produce bodily harm, 9A.36.020 (1) (c). 33 Wn. App. at 434. The defendant objected, claiming he was prepared to defend the charges as originally alleged, but not the charges as amended. Id. at 434 – 35. A continuance was not requested. Id. The court found because the state was required to prove the assault in each instance, the defendant failed to show prejudice and there was no abuse of discretion in the court allowing the amendment of the information on the first day of trial. Id.

Here, the amendment was made at a later time in the trial than the amendment at issue in Glosser; at the close of the defense case but before the jury was instructed and the case went to the jury for deliberation. There is no abuse of discretion in this

case for two reasons – first there is ample evidence that the amendment was a technical error not a legal amendment and second, the amendment did not change the type or degree of charge and based on the defense’s case, there is no prejudice.

First, the state filed jury instructions on the first morning of trial and in those proposed instructions, the to-convict and definitional instruction for the violation of the no contact order indicated the charge was related to Mr. Dewey going to the residence and not for contacting Ms. Dewey as charged in the first two informations. This fact carries a great inference that the state intended not to prove actual contact with the victim, but that the charge was supported by evidence that Mr. Dewey was in a protected place, the residence on Twin Pines Road. Additionally, as noted by the prosecutor in response to the defense argument about the amendment, all of the state’s discovery, along with the testimony in trial) was that the violation charge was for his presence at the property and not for

actually making contact with the victim. Combining all of this information, it seems very likely the way the case was charged, as violating the order by contacting the victim, was a typographical error and not a change in theory for the state at the end of trial.

Second, the change of the information in this case is like the change made by the state in Glosser, where the state changed from the same level of offense and degree of assault to a different type of assault that was still the same level and offense. Here, the original information alleged Mr. Dewey violated the order by contacting Cyndee Dewey. There was no evidence to support this charge. The amendment changed the violation to be a violation of the restraint provision that excluded him from a residence; a change from RCW 26.50.110(1) (a) (i) to RCW 26.50.110(1) (a) (ii). Both crimes were misdemeanors and they are alternative methods for committing the same crime as affirmed in Glosser and other cases.

Defense cites State v. Pelky, 109 Wn.2d 484 (1987) for the proposition that any mid-trial amendment leads to presumptive prejudice for a defendant. Even in Pelky, the supreme court distinguished the issues of a technical error or those errors like those in Glosser, lending support for the rule that when the amendment is only to a different manner of committing the crime originally charged, there is no presumptive prejudice. Id. at 490 – 91.

b. Sufficiency of Evidence

The standard of review for sufficiency of the evidence is whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (citing Jackson v. Virginia, 443 U.S. 307, 319, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979)); accord, e.g., State v. Aver, 109 Wn.2d 303, 310-11, 745 P.2d 479 (1987); State v. Guloy, 104 Wn.2d 412, 417, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020 (1986). “A

claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A reviewing court must defer to the fact finder on issues of conflicting testimony, witness credibility, and persuasiveness of the evidence. State v. Rodriguez, 187 Wn. App. 922, 930, 352 P.3d 200, review denied, 184 Wn.2d 1011 (2015).

A person commits burglary in the second degree if, with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building other than a vehicle or a dwelling. RCW 9A.52.030 (1). The intent to commit a specific named crime inside the burglarized premises is not an element of the crime of burglary. State v. Jackson, 112 Wn.2d 867, 774 P.2d 1211 (1989). Where defendant was charged with burglary, with underlying crime identified as theft, no jury instructions on theft were required because theft was not element of crime. State v. Pollnow, 69 Wn. App.

160, 848 P.2d 1265 (1993). In burglary prosecution, state need only prove entry with criminal intent rather than intent to commit a particular crime. State v. Chelly, 32 Wn. App. 916, 651 P.2d 759, 1982 Wash. App. LEXIS 3263 (Wash. Ct. App. 1982), aff'd, 100 Wn.2d 607, 674 P.2d 145 (1983). Since identity of the underlying crime is not an element of burglary, jury unanimity as to it is not required. State v. Chelly, 32 Wn. App. 916, 651 P.2d 759 (1982), aff'd, 100 Wn.2d 607, 674 P.2d 145 (1983). Where defendant unlawfully and surreptitiously entered a closed building via an unusual and concealed route, took flight immediately upon discovery, and offered a lame or implausible explanation for being in the area, trial court's finding that defendant intended to commit a crime within the building was justified. State v. Couch, 44 Wn. App. 26, 720 P.2d 1387 (1986).

To prove the defendant committed theft in the second degree, the state was required to prove that he, “did wrongfully obtain or exert unauthorized control

over the property or services of another, or by color or aid of deception, obtained control over property of another or the value thereof, or appropriate lost or misdelivered property of another or the value thereof, having a value exceeding \$750.00, with intent to deprive him or her of such property or service, to wit: tubs with tools, DVD, other miscellaneous items belonging to Cyndee Dewey.” (CP at 90 – 92). A completed theft requires proof that the defendant actually obtained property belonging to another. State v. Barton, 28 Wn. App. 690, 695, 626 P.2d 509 (1981); see also State v. Goodlow, 27 Wn. App. 769, 773, 620 P.2d 1015 (1980) (distinguishing second degree theft from forgery for double jeopardy purposes; “theft conviction requires proof that the defendant actually gained control of the property” (emphasis added)). Only a "substantial step" toward committing a burglary is required. RCW 9A.28.020. State v. West, 18 Wn. App. 686, 691, 571 P.2d 237, 239 (1977).

Here there is sufficient evidence to support the burglary conviction because the state is only required to prove the defendant took a substantial step towards the burglary. There is absolutely no record of why the jury didn't convict on the Theft, 2nd charge or the PSP, 2nd charge – perhaps they didn't feel he had “completed” the theft because all the things were still in the truck at the property? Perhaps they didn't like the victim's valuation/estimation of her property and were concerned the value was less than \$750.00. Perhaps they didn't understand who actually owned the property since defense raised the “community property” issue during trial. The question is not before the court to speculate about why the jury acquitted the defendant, but rather, does the evidence when taken in the light most favorable to the state support the burglary conviction – it does. What is clear is that although the jury could not find proof beyond a reasonable doubt for the theft, 2nd and PSP, 2nd charges, that does not necessarily mean there is not sufficient evidence that the defendant committed

the burglary, 2nd with the intent to commit a crime.

There is no reading of that requirement that requires a conviction on any other crime.

Most compelling is the evidence the jury heard about the defendant and his responses on the day of the burglary. When police came to the residence, he fled the scene and hid for more than an hour and a half, while they were investigating and calling out his name. Additionally, when questioned by them about why he was there, he told them the address was not protected on the order and that he lived there. The jury was allowed to follow the court's instruction on the inference of intent if they found he unlawfully entered – no completed crime of theft or PSP or anything else is required, in fact the jury doesn't even need to be instructed or unanimous about the crimes they thought the defendant had the intent to commit.

E. CONCLUSION

For the reasons stated, the sentence should be affirmed. The case may be remanded to the Superior Court to strike the

superfluous appendix and amend the order on payment of Legal
and Financial obligations to conform to the court's order.

Dated this 14th day of June, 2018,

/s/ Jodi M. Hammond
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PROOF OF SERVICE

I, Jodi M. Hammond, do hereby certify under penalty of perjury that on 14th day of June, 2018, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of Respondent's Brief:

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