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No. 36275-2-III

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

STATE OF WASHINGTON,

Respondent,

v.

TARESSA MAE MARCHAND,

Appellant.

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

The Honorable Christopher Culp

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT

Following a jury trial, Taressa Mae Marchand was found guilty of the lesser included offense of criminal trespass in the first degree in Count 1. The jury also deliberated over ten additional criminal charges, none of which are the subject of this appeal.

Ms. Marchand was originally charged with committing second degree burglary (Count 1) for knowingly entering or remaining "in a building, to wit: *fenced area* surrounding Clint Ames Property . . . ." (RP 381) (emphasis added). However, the jury opted to find her guilty of the lesser included offense of criminal trespass in the first degree. Because insufficient evidence existed to show Ms. Marchand entered or unlawfully remained in a "building" as required by statute and case law in order to prove the crime of criminal trespass in the first degree, this Court should reverse and dismiss the first degree criminal trespass conviction (Count 1) with prejudice.

B. ASSIGNMENTS OF ERROR

1. The trial court erred in finding Ms. Marchand guilty of criminal trespass in the first degree in Count 1, a lesser included offense, where the evidence was insufficient.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Issue 1: Whether the trial court erred in finding Ms. Marchand guilty of criminal trespass in the first degree in Count 1, a lesser included offense, where the evidence was insufficient to convict.

D. STATEMENT OF THE CASE

Clint Ames owned a rural piece of property located in Okanogan County, upon which were located several outbuildings and a small residence. (RP 240-246; 309-310). On March 18, 2018, Taressa Mae Marchand entered this fenced property without permission. (RP 245, 247, 402).

The State charged Ms. Marchand with three counts of second degree burglary (Counts 1, 6, 8), four counts of third degree malicious mischief (Counts 2, 4, 7, and 9), one count of residential burglary (Count 3), one count of third degree theft (Count 5), one count of third degree possession of stolen property (Count 10), and one count of making or having burglar tools (Count 11). (CP 39-44).

The case proceeded to a jury trial. (RP 233-426).

Ms. Marchand testified that on the evening of March 18, 2018, she was driving through a rural area of Okanogan County when she turned off the road. (RP 381-382). She stated the small Honda Civic she was driving became stuck in the mud and she "burn[ed] the clutch out" in trying to free the car. (RP 381-382, 415). She attempted to contact friends for help but no one came to her assistance and it was getting late. (RP 382-383). Due to the darkness, cold weather, and dwindling cellular phone battery to call for assistance, Ms. Marchand left the vehicle and began walking. (RP 383). Not long after she came upon a residence.

(RP 384). She entered Mr. Ames' property through an opening in the fence near the gate on his property. (RP 403-404).

While walking Ms. Marchand saw a home in the distance and approached it and knocked on the door. (RP 384). No one answered so she went around to the back of the house. (RP 384). Upon seeing the back door open, she believed the house was not occupied and she wondered whether it may have been burglarized. (RP 384-86). After searching the property and surrounding area, Ms. Marchand ultimately decided to stay the night in what she believed was an abandoned home. (RP 384-385).

A deputy testified that on March 19, 2018, she received a report of an abandoned vehicle on property near or on Cameron Lake Road. (RP 307-308). Upon arriving in the area, the deputy located an unaccompanied blue Honda Civic. (RP 309-310). After conducting some investigation into the vehicle, the deputy began to drive out of the area. (RP 310-317). A few miles later the deputy came upon Ms. Marchand, who was walking along the side of the road. (RP 317-319). The deputy stopped to speak with Ms. Marchand, and Ms. Marchand told the deputy she had burnt the clutch in her car and was trying to head back into town. (RP 317-319).

The jury was instructed on the crime of second degree burglary for Count 1. (CP 373; RP 443-444). The instruction specified that to find Ms. Marchand guilty on this count, the jury had to find she "entered or remained unlawfully in a

building, to wit: fenced area surrounding Clint Ames Property . . . ." (CP 373; RP 443-444).

The jury was also instructed on the lesser included offense of criminal trespass in the first degree for Count 1, which alleged the "defendant knowingly *entered or remained in a building to wit: fenced area* surrounding Clint Ames Property . . . . " (CP 381; RP 445-446) (emphasis added).

Finally, the jury was also instructed on the following definition of "building":

> Building, in addition to its ordinary meaning, includes any dwelling or fenced area. Building also includes any other structure used for lodging of persons or for the use, sale or deposit of goods.
>
> Each unit of a building consisting of two or more units separately secured or occupied is a separate building.

(CP 374; RP 444).

A jury found Ms. Marchand guilty of the lesser included offenses of criminal trespass in the first degree (Counts 1, 3, 6, and 8). (CP 417-418, 452; RP 497-500). She was also found guilty of theft in the third degree (Count 5), and possession of stolen property in the third degree (Count 10). (CP 417-418, 452; RP 497-500). The jury acquitted Ms. Marchand of several charges, including the four charges of malicious mischief in the third degree (Counts 2, 4, 7, and 9), and the crime of making or having burglar tools (Count 11). (CP 414-416; RP 497-500).

Ms. Marchand timely appealed. (CP 462-467).

E. ARGUMENT

Issue 1: Whether the trial court erred in finding Ms. Marchand guilty of criminal trespass in the first degree in Count 1, a lesser included offense, where the evidence was insufficient to convict.

Ms. Marchand was found guilty of the lesser included offense of criminal trespass in the first degree, count 1, for entering the fenced area surrounding Clint Ames' property. (CP 381, 417; RP 498). Yet the jury was instructed criminal trespass in the first degree occurred when the defendant knowingly "entered or remained in a building." (CP 381; RP 444-445). Because the fenced area the defendant entered was not a building, the evidence was insufficient to prove Ms. Marchand was guilty of criminal trespass in the first degree.

In every criminal prosecution, due process requires that the State prove, beyond a reasonable doubt, every fact necessary to constitute the charged crime. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). Where a defendant challenges the sufficiency of the evidence, the proper inquiry is "whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (citation omitted). "[A]ll reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." *Id*. (citation omitted). Furthermore, "[a] claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Id*. (citation omitted).

"Circumstantial evidence and direct evidence are equally reliable." *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). Circumstantial evidence "is sufficient if it permits the fact finder to infer the finding beyond a reasonable doubt." *State v. Askham*, 120 Wn. App. 872, 880, 86 P.3d 1224 (2004) (citation omitted). The appellate court "defer[s] to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence." *Thomas*, 150 Wn.2d at 874-875.

"[A] criminal defendant may always challenge the sufficiency of the evidence supporting a conviction for the first time on appeal." *State v. Sweany*, 162 Wn. App. 223, 228, 256 P.3d 1230 (2011), *aff'd*, 174 Wn.2d 909, 281 P.3d 305 (2012) (citing *State v. Hickman*, 135 Wn.2d 97, 103 n. 3, 954 P.2d 900 (1998)); *see also* RAP 2.5(a)(2) (stating "a party may raise the following claimed errors for the first time in the appellate court . . . failure to establish facts upon which relief can be granted. . . ."). "A defendant challenging the sufficiency of the evidence is not obliged to demonstrate that the due process violation is 'manifest.'" *Id*.

The remedy for insufficient evidence to prove a crime is reversal, and retrial is prohibited. *State v. Smith*, 155 Wn.2d 496, 505, 120 P.3d 559 (2005).

In this case the jury was instructed on the crime of second degree burglary for count 1. (CP 373; RP 443-444). The second degree burglary instruction specified that to find Ms. Marchand guilty on this count, the jury had to find she

"entered or remained unlawfully in a building, to wit: fenced area surrounding Clint Ames Property . . . ." (CP 373; RP 443-444).

The jury was also instructed on the lesser included offense of criminal trespass in the first degree for count 1:

> (1) That on or about March 18th, 2018, the defendant knowingly *entered or remained in a building to wit: fenced area* surrounding Clint Ames Property at 2089 Cameron Lake Road;
> (2) That the defendant knew that the entry or remaining was unlawful; and
> (3) That this act occurred in the State of Washington.

(CP 381; RP 445-446) (emphasis added); *see also* RCW 9A.52.070 (first degree criminal trespass).

In addition, the jury was instructed on the following definition of "building":

> Building, in addition to its ordinary meaning, includes any dwelling or fenced area. Building also includes any other structure used for lodging of persons or for the use, sale or deposit of goods.
>
> Each unit of a building consisting of two or more units separately secured or occupied is a separate building.

(CP 374; RP 444); 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 2.05 (4th Ed. 2016). Yet the comments to WPIC 2.05 state the definitional instruction for "building" should not be used in cases of criminal trespass. 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 2.05 (4th Ed. 2016). This is because the definition of "building" for purposes of burglary and first degree criminal trespass are not the same. *State v. Brown*, 50 Wn. App. 873, 751 P.2d 331 (2012), *abrogated on*

other grounds by In re Heidari, 174 Wn.2d 288, 274 P.3d 366 (2012); *see State v. Joseph*, 189 Wn.2d 645, 653, 405 P.3d 993 (2017) (acknowledging the definition of "building" for first degree criminal trespass is restricted to its plain meaning).

In *State v. Brown*, the court explained the legislature's 1979 statutory amendments to the codified version of first degree criminal trespass removed the broad definition of "building" as it was originally defined under RCW 9A.52.070. 50 Wn. App. at 875–77 (citing former RCW 9A.52.070). Prior to the amendment, first degree criminal trespass occurred when a person knowingly entered or remained unlawfully "in a building *or on real property adjacent thereto or upon real property which is fenced or otherwise enclosed in a manner designed to exclude intruders*." *Id*. at 875 (citing former RCW 9A.52.070). After legislative amendments, the *Brown* court recognized first degree criminal trespass now provides a person is guilty of the crime if she "knowingly enters or remains unlawfully in a building." *Id*. at 875-76 (citing RCW 9A.52.070). In contrast second degree criminal trespass only requires a person knowingly enter or remain unlawfully "in or upon premises of another under circumstances not constituting criminal trespass in the first degree." *Id*. at 876 (citing RCW 9A.52.080). Upon further analysis, the *Brown* court concluded that the legislature "clearly intended to exclude fenced areas from the definition of 'building' in the amended first degree criminal trespass statute." *Id*. at 878; *also State v. Joseph*, 189 Wn.2d 645, 652-54, 405 P.3d 993 (2017) (citing *Brown* with approval).

Here, the jury did not find Ms. Marchand guilty of second degree burglary in Count 1, but rather elected to find her guilty of the lesser included offense of first degree criminal trespass. (CP 414, 417; RP 497-98). However, insufficient evidence existed to support the lesser included conviction on Count 1.

Reviewing the trial as a whole in the light most favorable to the State, there is no question the evidence shows Ms. Marchand entered Mr. Ames' fenced property. (RP 403-404). Yet this evidence does not show Ms. Marchand entered a "building" when she entered the fenced area surrounding Mr. Ames' property. (CP 381; RP 403-404, 445-446). The law does not recognize that a "building" for purposes of first degree criminal trespass includes a fenced area. *Brown*, 50 Wn. App. at 878; *Joseph*, 189 Wn.2d at 652-54.

As charged by the State and presented at trial, Ms. Marchand did not enter a "building." The evidence does not support a conviction in Count 1 because Ms. Marchand entered a fenced area that did not constitute a "building" per the requirements of the first degree criminal trespass statute and ancillary case law. 9A.52.070 (first degree criminal trespass); *Brown*, 50 Wn. App. at 878; *Joseph*, 189 Wn.2d at 652-54.

Insufficient evidence exists to show Ms. Marchand entered or remained unlawfully in a building under Count 1, first degree criminal trespass. The jury instruction alleged she entered a fenced area yet required the jury find she entered or remained unlawfully in a building. (CP 381). Because no evidence exists to

show Ms. Marchand entered a building as a basis for the charge, she respectfully requests this Court reverse and dismiss Count 1 with prejudice.

F. CONCLUSION

Ms. Marchand respectfully requests this Court reverse and dismiss with prejudice her conviction for first degree criminal trespass in Count 1 due to insufficient evidence.

Respectfully submitted this 25th day of March, 2019.

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COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON Plaintiff/Respondent	)	COA No. 36275-2-III
vs.	)	Okanogan Co. No. 18-1-00168-2
TARESSA MAE MARCHAND Defendant/Appellant	)	PROOF OF SERVICE

I, Jill S. Reuter, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on March 25, 2019, I deposited for mailing by U.S. Postal Service first class mail, postage prepaid, a true and correct copy of the Appellant's opening brief to:

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Having obtained prior permission, I also served a copy on the Respondent at dstevens@co.okanogan.wa.us and sfield@co.okanogan.wa.us using the Washington State Appellate Courts' Portal.

Dated this 25th day of March, 2019.

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