

63839-4

63839-4

NO. 63839-4-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

NORMAN GOTCHER,

Appellant.

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COURT OF APPEALS
DIVISION I
SEATTLE, WASHINGTON

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE THERESA B. DOYLE

BRIEF OF RESPONDENT

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A. ISSUES

1. Whether the phrasing of a definitional instruction is a manifest constitutional error that may be raised for the first time on appeal, where the "to convict" instruction on the same point was correct, and properly informed the jury of the applicable law.

2. Whether jury instruction 5 was error when it was taken straight from the WPIC and the same instruction was found to be correct in State v. Pittman.

3. Whether any rational trier of fact could have found Gotcher guilty of attempted residential burglary when, not knowing the residents, he approached a home located at the end of a densely wooded, dead-end road, knocked and kicked at the front door, tried to open a sliding glass door, climbed a ladder onto the roof, and tried to open a second story window.

B. STATEMENT OF THE CASE

Rebecca Rohman resides in Maple Valley, Washington, with her husband. RP 6/9/2009 16. The Rohmans' two-story house is located at the end of a secluded, private, dead-end road that is about one-half to three-quarters of a mile long. RP 6/9/2009 17.

The abundance of trees in the area has drastically diminished the visibility of the houses in the neighborhood. RP 6/9/2009 17.

In the late afternoon of November 7, 2008, a dark, cloudy day, Ms. Rohman's dog began to growl after an audible knock at the front door of her home. RP 6/9/2009 25, 27. After another knock at the front door, Ms. Rohman approached the door, looked through the peephole, and saw a man she did not know, wearing dark sunglasses and a baseball cap. RP 6/9/2009 28-29. Ms. Rohman went upstairs to look out a set of windows to watch the stranger. RP 6/9/2009 31. She heard what sounded like the front door being kicked in, and then saw the man walk around the right side of her house and attempt to open a locked sliding glass door. RP 6/9/2009 32. When the door did not open, the man climbed a ladder adjacent to the sliding glass door and began to walk on her lower roof. RP 6/9/2009 32, 35. Ms. Rohman then dialed 9-1-1, and while she was on the phone, she heard the man attempt to open the bay windows of her bedroom (located on the back side of her home). RP 6/9/2009 36-37. Unable to open the bay windows, the man got off the roof and walked towards a maroon four-door car, which he entered and then drove away. RP 6/9/2009 38, 40.

Because of Ms. Rohman's 9-1-1 call, a helicopter from the King County Sheriff Department's air support unit was dispatched. RP 6/10/2009 6, 10. The officers in the helicopter saw a maroon sedan that matched the description of the car provided over the police radio. RP 6/10/2009 12. The officers then broadcast to patrol that they had the car in sight, and relayed the direction the car was travelling to the ground patrol units that were responding. RP 6/10/2009 12.

The maroon car was stopped by ground patrol and the driver was taken into custody. RP 6/10/2009 103. Ms. Rohman was then taken by officers to the location where the driver of the maroon car was being held. RP 6/9/2009 45. Ms. Rohman identified the car as the one that had been parked in her driveway earlier that day, and she identified the man in custody as the person who had tried to get into her house. RP 6/9/2006 46. The man Ms. Rohman identified was Norman Gotcher. RP 6/9/2009 47. Ms. Rohman had never before met Gotcher, and he did not have permission to enter her house. RP 6/9/2009 29.

Norman Gotcher was charged by information with the crime of attempted residential burglary. CP 1. The State amended the information to allege an aggravated circumstance, that the offense

was committed while the victim was home. CP 9-10. A jury found Gotcher guilty as charged, and he now appeals the conviction. CP 74-75, 99.

C. ARGUMENT

Gotcher argues that the phrasing of Instruction 5 confused the jury in a manner that relieved the State of its burden to prove the elements of attempted residential burglary. He also argues that the evidence presented by the State was insufficient to support a conviction. Both claims should be rejected. The first claim was not preserved for appellate review, and Instruction 5 did not confuse the jury, especially where the "to convict" instruction was clear. Finally, the State presented sufficient evidence to support the jury's verdict.

1. GOTCHER'S CHALLENGE TO INSTRUCTION 5 WAS NOT PRESERVED FOR APPELLATE REVIEW.

An appellate court may refuse to review a claim of error that was not raised at trial because the "failure to object deprives the trial court of [its] opportunity to prevent or cure the error." RAP 2.5; State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007).

However, RAP 2.5(a)(3) provides that a "manifest error affecting a constitutional right" may be raised for the first time on appeal. State v. Lynn, 67 Wn. App. 339, 342, 835 P.2d 251 (Wash.App Div.1, 1992). Essential to a RAP 2.5(a)(3) exception are the determinations that the alleged error 1) suggests a constitutional issue and, 2) that the alleged error is manifest. State v. McFarland, 127 Wn.2d 322, 334, 899 P.2d 1251 (Wash. 1995) (citing State v. Scott, 110 Wn.2d 682, 688, 757 P.2d 492 (1988)).

Not all trial errors that implicate a constitutional right are reviewable under RAP 2.5(a)(3). State v. Kirkman, 159 Wn.2d 918, 935 (2007) (citing Scott, 110 Wn.2d at 687) ("[N]oting that '[t]he exception is actually a narrow one, affording review only of certain constitutional questions.'"). Examples of constitutional questions that have been reviewed by Washington courts are issues involving free speech; the right to confront adverse witnesses; and double jeopardy claims. E.g., In re Dependency of T.L.G., 139 Wn. App. 1, 156 P.3d 222 (2007); State v. Price, 127 Wn. App. 193, 110 P.3d 1171 (2005); State v. Zumwalt, 119 Wn. App. 126, 82 P.3d 672 (2003). Once a truly constitutional issue has been identified, the defendant must show how, in the context of the trial, the alleged

error actually affected the defendant's rights. State v. McFarland, 127 Wn.2d 322, 334 (1995).

If the claim is based on jury instructions, "[a]s long as the instructions properly inform the jury of the elements of the charged crime, any error in further defining terms used in the elements is not of constitutional magnitude." State v. Stearns, 119 Wn.2d 247, 250, 830 P.2d 355 (1992). "[T]he constitutional requirement is only that the jury be instructed as to each element of the offense charged." State v. Scott, 110 Wn.2d 682, 689, 757 P.2d 492 (1988) (quoting State v. Wai-Chiu Ng, 110 Wn.2d 32, 44, 750 P.2d 632 (1988)). Thus, an error in a definitional instruction is not of constitutional magnitude, and can not be raised for the first time on review.

Gotcher argues that Instruction 5 relieved the State of its burden of proving Gotcher committed the crime of attempted residential burglary, but Gotcher never objected at trial, even when the trial court gave him the opportunity. RP 6/10/2009 25. The court asked Mr. Ewers, Gotcher's attorney, if he took exception to Instruction 5 and Mr. Ewers responded, "No, Your Honor." RP 6/10/2009 25. Thus, Gotcher's claim of error was not preserved, and it may be reviewed by the court only if the error is constitutional, and manifest.

Gotcher argues that the alleged error is constitutional and manifest because it robbed him of his right to due process. He is mistaken. Instruction 5 was only a definitional instruction. The "to convict" instruction, Instruction 11, set forth the elements of the crime that had to be proved beyond a reasonable doubt to support a conviction, and that instruction is unchallenged. See CP 94.

This case is wholly controlled by State v. Pittman. In that case, Pittman asserted that Instruction 5, a definitional instruction, relieved the State of its burden to prove all of the elements of attempted residential burglary. State v. Pittman, 134 Wn. App. 376, 381, 166 P.3d 720 (2006). In its opinion, the court found that the wording of Instruction 5 did not constitute error, and even if it did, the "crucial 'to convict' instruction" was proper. Id. at 383. Therefore, the "jury instructions as a whole properly informed the jury of the applicable law," and "[t]he alleged inadequacies in Instruction 5 did not result in practicable and identifiable consequences, so Pittman [could] not show manifest error reviewable for the first time on appeal." Id. at 384.

This case is very similar to Pittman because the alleged error is found in the same definitional instruction used in Pittman, and because the "to convict" instruction in this case was proper as

well. Gotcher has not demonstrated that Instruction 5 had any effect on the jury; his claim is purely speculative. Thus, Gotcher's alleged error is not manifest and should not be reviewed by this court. Following the precedent set by Pittman, this court should find that Instruction 5 was not an error, or even if it was an error, the jury instructions as a whole properly informed the jury of the applicable law, resulting in no practicable and identifiable consequences. See Pittman, 134 Wn. App. 376. And, because the "to convict" instruction properly stated the elements that had to be proven beyond a reasonable doubt to find Gotcher guilty of the crime, the State was not relieved of its burden to prove the elements of the crime. Therefore, Gotcher has not presented this court with a due process claim, which would support review under RAP 2.5(a)(3).

Gotcher attempts to support his claims of manifest constitutional error by drawing parallels to other cases where the Court found actual manifest constitutional error. See State v. Stein, 144 Wn.2d 236, 27 P.3d 184 (2001); State v. Roberts, 142 Wn.2d 471, 14 P.3d 713 (2000); State v. Cronin, 142 Wn.2d 568, 14 P.3d 752 (2000); State v. Smith, 131 Wn.2d 258, 264, 930 P.2d 917 (1991). However, those cases are distinguishable.

In State v. Smith, the court held that the "to convict" instruction given to the jury was manifest constitutional error. However, the "to convict" instruction "purport[ed] to be a complete statement of the law, yet [it] state[d] the wrong crime as the underlying crime." State v. Smith, 131 Wn.2d 258, 264 (1991). Vital to the Court's conclusion was that the error was in the "to convict" instruction, which "must contain all of the elements of the crime because it serves as a 'yardstick' by which the jury measures the evidence to determine guilt or innocence." Id. at 263.

Although Roberts, Stein, and Cronin support Gotcher's assertion that an error found in an instruction other than the "to convict" instruction can constitute a manifest constitutional error, the opinions make it clear that review is appropriate only when those errors cause genuine confusion. State v. Stein, 144 Wn.2d 236 (2001); State v. Roberts, 142 Wn.2d 471 (2000); State v. Cronin, 142 Wn.2d 568 (2000).

Similar issues were addressed in the three cases. In Roberts and Cronin, an instruction erroneously stated that the jury could find accomplice liability if the defendants had knowledge of the specific crime the principle ultimately committed. State v. Roberts, 142 Wn.2d 471, 511 (2000); State v. Cronin, 142 Wn.2d 568, 579

(2000). This error, although not in the "to convict" instruction, went straight to the issue of "knowledge," the mens rea for the crime. Similarly, in Stein, the court reversed because "the instructions [t]here, taken as a whole, enabled the jury to convict Stein of conspiratorial liability for attempted murder without finding the necessary element of knowledge that his coconspirators intended to murder the victim." State v. Stein, 144 Wn.2d 236, 246 (2001).

Thus, the courts came to the conclusion that there was manifest constitutional error because the instructions caused genuine confusion, and may have allowed the juries to convict the defendants without the State proving the element of "knowledge." In contrast, the instruction in this case did not allow the jury to convict without the State proving all of the elements of the crime.

This court should hold that Gotcher has failed to show manifest constitutional error and that review is precluded under RAP 2.5.

2. INSTRUCTION 5 WAS CORRECT.

Gotcher alleges that Instruction 5 was misleading because it could be interpreted to mean Gotcher could be convicted if he had

the intent to commit attempted residential burglary. Br. of App. at 4.
He is incorrect.

The phrasing of Instruction 5 was not an error. The instruction provided that: "A person commits the crime of attempted residential burglary when, with intent to commit that crime, he or she does any act that is a substantial step toward the commission of that crime." CP 84; 11A Washington Pattern Jury Instructions: Criminal 100.01, at 384 (3rd ed.2008).

The trial court noted that Instruction 5 was "[s]traight from the WPIC." RP 6/10/2009 25. As this court has found, this same instruction is "clearly not erroneous," and "reading the instruction in a straightforward, commonsense manner, the average juror would interpret 'that crime' to mean residential burglary as the parties intended." State v. Pittman, 134 Wn. App. 376, 382 (2006). Especially when read together with the "to convict" instruction, there is no reason a juror would have been confused. This court should follow Pittman. The doctrine of stare decisis requires a clear showing that an established rule is incorrect and harmful before it can be abandoned, and Gotcher has not shown that Pittman is incorrect and harmful. See In re Stranger Creek v. Alby, 77 Wn.2d 649, 466 P.2d 508 (1970).

3. SUFFICIENT EVIDENCE SUPPORTED THE JURY'S VERDICT.

Gotcher claims that even when viewing the evidence in a light most favorable to the State, the State did not prove beyond a reasonable doubt that he intended to commit a crime inside Ms. Rohman's home for the following reasons: Gotcher attempted to enter Ms. Rohman's home during the middle of the day; there was no testimony that Gotcher drove away at a high speed or was attempting to flee; there was no evidence presented that Gotcher damaged doors or windows in his effort to enter; and because the police did not recover burglar tools from Gotcher or his car. Br. of App. at 11.

But a list of evidence that the State did not present is not what establishes whether sufficient evidence was presented at trial. The relevant question is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." State v. Bencivenga, 137 Wn.2d 703, 706, 974 P.2d 832 (1999) (citing State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980)) (quoting Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)). To make that finding,

"the jury is permitted to infer from one fact the existence of another essential to guilt if reason and experience support the inference." State v. Bencivenga, 137 Wn.2d 703, 708 (1999) (citing State v. Jackson, 112 Wn.2d 867, 875, 774 P.2d 1211 (1989)) (quoting Tot v. United States, 319 U.S. 463, 467, 63 S. Ct. 1241, 1244, 87 L. Ed. 1519 (1943)). Also, "just because there are hypothetically rational alternative conclusions to be drawn from the proven facts, the fact finder is not lawfully barred against discarding one possible inference when it concludes such inference unreasonable under the circumstances. Nothing forbids a jury, or a judge from logically inferring intent from the proven facts, so long as it is satisfied the state has proved that intent beyond a reasonable doubt." State v. Bencivenga, 137 Wn.2d 703, 709 (1999).

The elements of attempted residential burglary are as follows: 1) That on or about (date), the defendant did an act that was a substantial step toward the commission of residential burglary; 2) That the act was done with the intent to commit residential burglary; and 3) That the act occurred in the State of Washington. 11A Washington Pattern Jury Instructions: Criminal 100.02, at 386 (3rd ed.2008). Residential burglary is committed when a person enters or remains unlawfully in a dwelling with the

intent to commit a crime against a person or property therein. 11A Washington Pattern Jury Instructions: Criminal 60.02.01, at 8 (3rd ed.2008).

The State presented evidence that Gotcher attempted to open Ms. Rohman's front door and her sliding glass door; that Gotcher climbed up on Ms. Rohman's roof and tried to open her bay windows; that Ms. Rohman positively identified Gotcher as being the man she saw on her property; that Ms. Rohman did not know Gotcher and had not given him permission to enter her house; and that Ms. Rohman's residence was in a private, secluded neighborhood in the state of Washington.

When viewing this evidence in a light most favorable to the prosecution, a rational trier of fact could have found, beyond a reasonable doubt, that on November 7, 2008, Norman Gotcher did an act that was a substantial step toward the commission of residential burglary; that Gotcher's acts were done with the intent to commit residential burglary; and that Gotcher's acts occurred in the State of Washington. See 11A Washington Pattern Jury Instructions: Criminal 100.02, at 386 (3rd ed.2008).

Therefore, the State did prove beyond a reasonable doubt that Norman Gotcher committed attempted residential burglary on November 7, 2008, and this court should affirm the conviction.

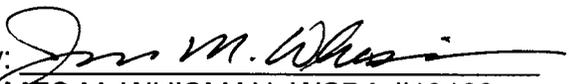
D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks the Court to affirm Mr. Gotcher's conviction.

DATED this 24th day of March, 2010.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mails of the United States of America, a properly stamped and addressed envelope directed to Gregory Charles Link, of Washington Appellate Project, at the following address: 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, the attorney of record for the appellant, containing a copy of the Brief of Respondent in STATE V. NORMAN GOTCHER, Cause No. 63839-4-I in the Court of Appeals of the State of Washington, Division I.

I certify under the penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Name

Done in Seattle, Washington

Date

03/24/10