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NO. 65839-5-I

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

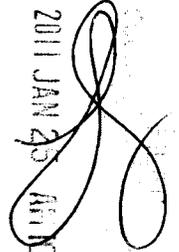
STATE OF WASHINGTON,

Respondent,

v.

KEVIN WAIS,

Appellant.

2011 JAN 25 AM 10:03


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

The Honorable Alan R. Hancock, Judge
Superior Court Cause No. 10-1-00091-8

BRIEF OF RESPONDENT

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I. STATEMENT OF THE ISSUES

A. Whether the appellant's conviction should be upheld when the trial court correctly declined to provide a lesser-included jury instruction.

II. STATEMENT OF THE CASE

A. Substantive Facts

Oak Harbor Police Officer Serloyd Carter reported to the home at 481 SE Ely Street, Oak Harbor, Washington on April 26, 2010 based on a report of a possible residential burglary. RP 60-61. Officer Carter observed that the home had been ransacked, with numerous things thrown throughout the home. RP 62. He found movies and DVDs stacked in the living room, ammunition thrown on the floor, and a freezer left open. RP 65. A garbage can, filled with nonperishable food was outside the home. RP 68. He also observed a gun safe that looked like someone had attempted to break into it. RP 66. The handle was bent and the door was dented and scratched as if someone had been trying to pry on it. *Id.*

Oak Harbor Detective Ron Hofkamp also reported to the scene April 26 and observed tire tracks consistent with a small vehicle in the grass near the home. RP 95-97. Det. Hofkamp contacted the homeowner,

Roger Brown, who was in Colorado. RP 41, 104. Det. Hofkamp and Mr. Brown arranged to meet at the residence on April 28, once Mr. Brown returned to Washington. RP 49, 105.

When Det. Hofkamp had not heard from Mr. Brown by 10:00 am on April 28, he attempted to call the residence. RP 105-06. Receiving no answer to his phone call, Det. Hofkamp went to the house. RP 106. He drove into the driveway and saw a pickup, not the victim's, parked in the carport. *Id.* As he got out of his van, Det. Hofkamp saw a male, the appellant, exiting the residence's garage. *Id.* The appellant looked at Det. Hofkamp, crouched behind the pickup, snuck in an eastbound direction, and ran southbound away from the property. RP 106-08. A second person exited the victim's home and also fled southbound on foot. RP 107-08.

Inside the victim's house, Det. Hofkamp observed evidence of a burglary in progress. RP 120. He saw items stacked in the hallway that were not there on April 26. *Id.* The gun safe, which had been against the south wall of the master bedroom, had been moved to block the doorway of that room. *Id.* The gun safe weighed approximately 850 pounds in addition to the weight of the guns it contained. RP 52. Mr. Brown needed a forklift to get the safe into his truck and an hour, a winch, a refrigerator dolly, and two men to move the safe into the house. RP 53. The safe

appeared to have been moved approximately 10 feet using metal pipes taken from Mr. Brown's garage. RP 53-54.

Following his arrest, the appellant was identified as the man seen fleeing Mr. Brown's garage; however, the appellant claimed he was only walking from a nearby gas station to his girlfriend's house. RP 125-26.

B. Statement of Procedural History

The appellant was charged with one count of residential burglary. CP 35-36. Prior to trial, the appellant offered proposed jury instructions for the lesser crime of criminal trespass in the first degree. RP 24-25, 146-51, 156-60, 187; CP 37-43. The trial court considered the appellant's proposed instructions and found that criminal trespass may necessarily be committed if a person commits residential burglary. RP 147. However, the trial court also found that there was no evidence in this case to establish any theory that only the crime of criminal trespass was committed as opposed to residential burglary. RP 191. The trial court, therefore, did not instruct the jury on a lesser crime. See CP 15-32. The appellant was convicted of the crime of residential burglary. CP 3, 14.

III. ARGUMENT

A. Standard of Review

Instructions are sufficient if they are supported by substantial evidence; allow the parties to argue their theories of the case; and, when read as a whole, properly inform the jury of the applicable law. *State v. Hutchinson*, 135 Wn.2d 863, 885 (1998). Challenged jury instructions are reviewed de novo. *State v. Jackman*, 156 Wn.2d 736, 743 (2006).

B. The trial court correctly rejected proposed instructions for criminal trespass in the first degree.

The appellant's conviction should be upheld because the evidence in this case did not allow a reasonable inference that the appellant committed criminal trespass but did not commit residential burglary. Although instructions may be given for an offense which is necessarily included within the indicted charge, a defendant is not entitled to instruction on a lesser offense unless two conditions are met. *State v. Workman*, 90 Wn.2d 443, 447 (1978). First, each of the elements of the lesser offense must be necessary elements of the charged offense. *Id.* at 447-48. Second, the evidence in the case must support a reasonable inference that only the lesser crime was committed. *State v. Fernandez-Medina*, 141 Wn.2d 448, 455 (2000); *Workman*, 90 Wn.2d at 447-48 (1978). The trial court correctly found the evidence in this case did not

support a reasonable inference that the appellant committed only criminal trespass in the first degree.

The trial court was likely correct when it found the elements of criminal trespass in the first degree are necessary elements of residential burglary. The first prong of the Workman analysis is met where it is not possible to commit the greater offense without having committed the lesser offense. *See State v. Frazier*, 99 Wn.2d 180, 191 (1983). The crime of criminal trespass in the first degree includes only an element that a defendant knowingly entered or remained unlawfully in a building. RCW 9A.52.070(1). Residential burglary requires that a defendant entered or remained unlawfully in a dwelling with intent to commit a crime. RCW 9A.52.025(1). The term “building”, as used in the definition of criminal trespass includes a “dwelling”. RCW 9A.04.110(5). The trial court in this case found that criminal trespass in the first degree is necessarily committed if the person commits residential burglary. RP 190-91.

However, the trial court found the second Workman prong was not met in this case. RP 191. Instruction for a lesser charge is appropriate only when the evidence supports a rational inference that only the lesser included offense was committed to the exclusion of the charged offense. *Fernandez-Medina*, 141 Wn.2d at 455. The factual requirement for instruction on a lesser included crime is more particularized than that

required for other jury instructions. *Id.* at 455. While evidence is reviewed in the light most favorable to the party requesting instruction on a lesser charge, that evidence must affirmatively establish the appellant's theory of the case. *Id.* at 455-56. It is not enough that the jury might disbelieve the evidence point to guilt. *Id.* at 456. In this case, the trial court properly refused to provide a lesser included instruction because the evidence did not support a theory that the appellant committed criminal trespass in the first degree to the exclusion of residential burglary. RP 191.

The evidence in this case did not affirmatively establish that the appellant committed only the crime of criminal trespass. Because the jury was instructed on accomplice liability, see CP 28, such an inference would require a belief that the appellant entered the victim's garage or home without intent to commit or aid a crime. The jury was also instructed regarding the obvious, if non-binding, inference that a person unlawfully entering a building does so with intent to commit a crime. CP 27. No evidence was presented by either party that suggested any alternative explanation for the appellant's presence on the victim's property. Thus, the only interpretation of the evidence in this case that would allow a finding of only criminal trespass is simple disbelief of the instructed inference and the evidence of the appellant's participation in an ongoing burglary.

Detective Hofkamp's observation of two people, including the appellant, fleeing the victim's home was consistent with the evidence inside the home that more than one person was involved in the burglary. See RP 106-08. The damage inside the home was too extensive to have been produced by a single intruder. The victim's possessions were strewn throughout the entire house. RP 43-44. Stacks of items were also left in the house and elsewhere on the property, ready for pickup. RP 65, 68. The damage inside the home was so extensive that the victim still hadn't determined the extent or put everything back together by the time of trial. RP 45.

The movement and damage to the victim's gun safe particularly required more than one participant. That safe, not including the guns inside, weighed approximately 850 pounds. RP 52. It was loaded into the victim's truck by the seller using a forklift, and it required an hour, a winch, a refrigerator dolly and two men to get it into the house. RP 53. The victim even struggled to move just the safe door when it fell off because the burglars had cut the hinge pins and attempted to pry the handle off. RP 47, 52. That massive safe was moved from its usual location, using pipes taken from the victim's garage, across the bedroom to block the door to the room. RP 53-54.

The evidence showed not only that more than one person was involved in the burglary, but that the appellant was one of those persons. He was one of two men seen fleeing the victim's property, where a burglary was in progress. RP 106-09. No other people were found on the property. RP 50, 107. Specifically, the appellant was seen exiting the victim's garage, where pipes that were used to move the victim's gun safe were taken. RP 106. Despite Det. Hofkamp's positive identification that he was the person seen fleeing the victim's garage, the appellant attempted to claim that he was walking from a gas station to his girlfriend's home. RP 125-26.

Disbelief of this evidence of intent would require an irrational belief that the escaped second burglar was the only culprit. The 850-pound gun safe that required so much time, effort, and manpower to put in place was not moved by a single man. The vast destruction throughout the victim's home was not created by a single burglar. The appellant, who was clearly present, could not have been unaware of the obvious burglary in progress. He also exposed his guilty mind by fleeing from the scene and lying after his arrest about his presence at the scene. An inference that the appellant knew of the burglary but neither participated nor interfered is not rational.

That inference would also not be sufficient to allow a lesser-included jury instruction. It is not enough to warrant a lesser-included instruction that the jury might disbelieve the evidence pointing to guilt; instead, the evidence must affirmatively establish the appellant's theory of the case. *Fernandez-Medina*, 141 Wn.2d at 456. In this case, no evidence was presented to create a reasonable inference that the appellant was at the victim's home for any purpose other than participation in a burglary. Thus, an instruction for a lesser crime was inappropriate.

IV. CONCLUSION

The trial court in this case correctly declined to provide instruction for the lesser crime of criminal trespass in the first degree. Though the court found criminal trespass in the first degree meets the legal prong of *Workman*, it correctly found the evidence in this case does not support a reasonable inference that only criminal trespass was committed to the exclusion of residential burglary. No evidence was provided that would allow a reasonable jury to find the appellant entered the appellant's residence or garage without an intent to commit a crime. This Court should, therefore, affirm the appellant's conviction.

Respectfully submitted this 24th day of January, 2011.

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