

67709-8

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NO. 67709-8-1

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

STATE OF WASHINGTON,

Respondent,

v.

GLENN T. SMITH,

Appellant.

BRIEF OF RESPONDENT

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STATE OF WASHINGTON

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I. ISSUES

1. Burglary requires an unlawful entry with intent to commit a crime. A person can be deemed to have entered or remained unlawfully in a building open to the public if his or her invitation or license to enter has been previously revoked. The defendant stole items from a retail store and was apprehended. He had previously been told he was no longer welcome at the establishment. Was there sufficient evidence to convict him of burglary?

2. A defendant is entitled to a lesser included offense instruction only if each element of the lesser included offense is a necessary element of the offense charged and the evidence, when viewed most favorably to the defendant, supports that only the lesser crime was committed. Did the trial court err when it denied a request for a lesser-included-crime instruction for theft, when that crime includes an element (taking) not included in the charged crime of burglary?

II. STATEMENT OF THE CASE

On May 1, 2011, Derek Buckner, a loss prevention officer (“asset protection associate”) for Wal-Mart, was on duty at the Everett Wal-Mart when he saw the defendant pushing a cart with a 5-pack of printer ink. This attracted his attention for two reasons:

First, because printer ink is a “high theft item;” and, secondly, because he recognized the defendant as someone who had attempted thefts there before, but who had abandoned items and left when he noticed store security watching him. 8/29 – 8/30/11 Verbatim Record of Proceedings at Trial (hereafter “Trial RP”) 46-48, 62-63. Buckner called up to the camera room, where Wal-Mart has both stationary and “pan tilt zoom” cameras, and told them to focus on the defendant. He then went upstairs to the room himself and took over aiming the cameras. Trial RP 48-50. Buckner deliberately left the floor to avoid another incident of the defendant’s dumping the merchandise and leaving when he felt himself watched. Trial RP 53-54. This time, Buckner decided, he was going to watch on camera. Id.

The defendant selected a garbage can and put that in the cart. He put his backpack on a shelf after taking his personal belongings (in plastic bags) out of it. Trial RP 51-52. Buckner described this as “staging the backpack.” Trial RP 52. The defendant then went over to health and beauty aids, where he selected K-Y lubricant and some Trojan vibrating-ring condoms, and put them in the garbage can. He then began grabbing “massive amounts” of “5-Hour Energy” drinks and put them in the

garbage can, too. Buckner recalled the defendant kept looking around as he did so. Trial RP 52-53.¹

The defendant went back to where he had left his backpack. He ripped the energy drinks out of their packaging, placing the bottles in the backpack. (Buckner explained this is a common practice of thieves, since some packaging can contain anti-theft sensors. The defendant looked around some more. Trial RP 53-54. He then ripped open the 5-pack of printer ink and put that into his backpack, too. Trial RP 54. He then headed towards the front of the store, and asked an employee where the restroom was. After 6 minutes he came back out, walked through the registers to the front door, and exited the store. Trial RP 54-55.

As soon as the defendant had gone into the bathroom, Buckner had called 9-1-1. When the defendant exited the store, Buckner and others followed him. An officer had just arrived, and Buckner pointed the defendant out to him. Trial RP 55-56. Everett Police officer Chris Olsen took the defendant into custody. Trial RP 56, 66-69. He was joined shortly by Officer Curtis Haberlach. Trial RP 69, 73.

¹ As Buckner testified, he referred to images on a video of the incident. Trial RP 50-51.

The defendant's backpack was searched incident to arrest. Underneath the defendant's plastic-bagged personal belongings, officers found the items Buckner had seen the defendant steal. Trial RP 57, 76. Buckner ran the items through a cash register to catalog them and establish their retail value. Trial RP 58; Ex. 1. He also ascertained from store files that after a prior incident, at the same store in 2007, the defendant had been "trespassed," that is, told he was unwelcome in Wal-Mart and banned for life from all stores. Buckner informed police of this. Trial RP 59-60; Ex. 2. Following store policy Buckner then "trespassed" the defendant again. Trial RP 59-61; Ex. 5.

The defendant talked freely to police. He told them he steals things for a living – that this is his "job." He only steals, he stressed, from corporations, like Wal-Mart and Fred Meyer, and resells to mom-and-pop groceries. It's how he makes his money, he explained; it's what he does. Trial RP 75.

The State also called witnesses from the 2007 incident when the defendant was first "trespassed." Wal-Mart asset protection associates Abbi Gomersall and Kristi Daggett testified that on August 11, 2007, the defendant entered the Everett Wal-Mart with an empty duffel bag. The empty bag attracted their attention. They

saw the defendant leave the bag on a shelf and get a cart. He then put the bag in the cart and picked up 8 watches, and put them in the cart. He then went to another department, took a pair of scissors on sale, and used them to cut the watches from their packaging. He then put the watches in the bag. He picked up a couple of bottles of cologne and concealed them in the bag, too. Trial RP 12-14, 24-25. Gomersall and Daggett stopped him once he left the store, and somewhat forcefully guided him back inside. Trial RP 14-15, 25-26.

In the store security office, Daggett read the defendant a trespass notice, signed it, and told the defendant he was unwelcome in any Wal-Mart, anywhere in the world, for life. She explained to him that if he returned he could be charged with criminal trespass, and if he stole anything he would be charged with burglary, regardless of the amount stolen. Trial RP 28; Ex. 2. As she does whenever she "trespasses" someone, Daggett asked if the defendant understood that this was a lifetime ban, and the defendant answered yes. Daggett also took his picture. Trial RP 28-29, 31, 33; Ex. 3.

For her part, Ms. Gomersall (unlike Ms. Daggett) had no independent recollection of what had transpired once she and

Daggett took the defendant into the security office in August 2007. Trial RP 15-16. The arresting officer from 2007 had no independent recollection either. Trial RP 44. He did recall the defendant explaining why he did what he did. Trial RP 43.

The defendant testified he did not recall ever being “trespassed” from the Everett Wal-Mart in 2007. He said he had never seen the trespass form (Ex. 2) before. He did not recall any of the verbal warnings, either. Trial RP 84-85. (He did recall shoplifting that day. Trial RP 85.) Had he really been “trespassed,” he said, he would not have gone back in. Trial RP 88. He has been “trespassed” from other stores, and he doesn’t go into them. Id. He acknowledged multiple prior theft convictions. Trial RP 86-87. As for the incident in 2011, he said he entered the store to use the bathroom, and only decided to steal once he was inside. Trial RP 82.

The State charged the defendant with second-degree burglary. 1 CP 67-70. A jury found him guilty of it. 1 CP 25; 2 CP ___ (trial minutes). The defendant was sentenced at the low end of the standard range. 1 CP 14-24; 9/12/11 Verbatim Report of Sentencing 5. This appeal followed.

III. ARGUMENT

A. THERE WAS SUFFICIENT EVIDENCE OF THE DEFENDANT'S UNLAWFUL ENTRY INTO THE STORE TO SUPPORT HIS CONVICTION FOR BURGLARY.

The defendant argues that there was insufficient evidence to convict him of second-degree burglary.

Under the applicable standard of review, there will be sufficient evidence to affirm a criminal conviction if any rational trier of fact, viewing the evidence most favorably toward the State, could have found the essential elements of the charged crime were proved beyond a reasonable doubt. State v. Wentz, 149 Wn.2d 342, 347, 68 P.3d 282 (2003); State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A challenge to the sufficiency of the evidence admits the truth of the States' evidence. Salinas, 119 Wn.2d at 201; State v. Porter, 58 Wn. App. 57, 791 P.2d 905 (1990). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. Salinas at 201; State v. Soderholm, 68 Wn. App. 363, 373, 842 P.2d 1039 (1993).

In testing the sufficiency of the evidence, the reviewing court does not weigh the persuasiveness of the evidence. Rather, it defers to the trier of fact on issues involving conflicting testimony,

credibility of witnesses, and the weight of the evidence. State v. Stewart, 141 Wn. App. 791, 795, 174 P.3d 111 (2007) (citing State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980)). State v. Hernandez, 85 Wn. App. 672, 675, 935 P.2d 623 (1997). Evidence favoring the defendant is not considered. State v. Randecker, 79 Wn.2d 512, 521, 487 P.2d 1295 (1971); State v. Jackson, 62 Wn. App. 53, 58 n.2, 813 P.2d 156 (1991).

A person commits the crime of burglary in the second degree if, (1) with intent to commit a crime against a person or property therein, he (2) enters or remains unlawfully in a building other than a vehicle or a dwelling. RCW 9A.52.030; WPIC 60.04; State v. Brunson, 128 Wn.2d 98, 104-05, 905 P.2d 346 (1995). That the defendant intended to commit a crime, namely theft, inside the Everett Mall Wal-Mart was undisputed below and appears undisputed here. Instead, the issue at trial, and now on appeal, was whether the State had proved, or could prove, that the defendant had “entered or remained unlawfully.”

“A person ‘enters or remains unlawfully’ in or upon premises when he is not then licensed, invited, or otherwise privileged to so enter or remain.” RCW 9A.52.010(5). When a business is open to the public, entering or remaining, even with clear criminal intent, is

not enough by itself to prove unlawful entry. State v. Allen, 127 Wn. App. 125, 131, 110 P.3d 849 (2005); State v. Miller, 90 Wn. App. 720, 724-28, 954 P.2d 925 (1998) (rejecting California rule to the contrary, that no business owner would ever invite or license thieves to enter). But the license, privilege, or invitation to enter or remain can be revoked. E.g., State v. McDaniels, 39 Wn. App. 236, 239-40, 692 P.2d 894 (1984) (second entry into church to steal coat unlawful when parishioners had earlier asked defendant to leave). Specifically, a retail store or shopping mall can “trespass” an individual for shoplifting, thereby revoking the public invitation as to that person, such that, if the individual later re-enters, his entry may be deemed “unlawful” for purposes of the second-degree burglary statute. State v. Kutch, 90 Wn. App. 244, 247-50, 951 P.2d 1139 (1998) (citing McDaniels).

Walk-Mart loss prevention officer Kristi Daggett testified that after she and colleagues had caught the defendant shoplifting on August 11, 2007, they took him back to the store security office. She read him a trespass notice, told him what it meant – that he was banned from Wal-Mart for life – that if he returned he could be arrested for criminal trespass, and if he returned and stole anything, he could be charged with burglary. She asked him if he understood

all this and he answered yes. She also took his picture. Trial RP 25-29, 31, 33; Ex. 3 (photo bearing date stamp). And while she had her report to refer to, Ms. Daggett told the jury she also had an independent recollection of these events. Trial RP 23, 32.

Thus, the defendant's invitation, license, or privilege to remain had been revoked. When he returned thereafter, his entry was unlawful. See Kutch, 90 Wn. App. at 247-50; McDaniels, 39 Wn. App. at 239-40. Viewed in the light most favorable to the prosecution, there was sufficient evidence to support a conviction for second-degree burglary.

The defendant disagrees, arguing this is not enough. BOA 15-18. He distinguishes Kutch, saying there the defendant signed a notice that had its duration (one year) on it. Here, he argues, he did not sign the notice, and the notice does not say he was "trespassed" for life; in fact, it has no term on it at all. Id. But the defendant in Kutch argued similarly – that there was insufficient evidence of unlawful entry because he was not given a copy of the notice. The Kutch court found this irrelevant to the inquiry, finding that "[a] verbal notice might just as adequately inform him that his invitation had been revoked." Kutch, 90 Wn. App. at 248. A verbal notice was certainly enough in McDaniels. McDaniels, 39 Wn. App.

at 240. The same is true here. The defendant's focus on the written document completely ignores Ms. Daggett's clear and unequivocal testimony of what she told the defendant. Compare Trial RP 25-33 with BOA 15-18.

Defense trial counsel argued in closing that unlawful entry was not proved, noting her client had never been given a copy of the notice, and that Ms. Daggett was not credible, while her colleague and the officer, who did not independently recall the trespass warnings, were. See Trial RP 113-15. Counsel on appeal essentially repeats this jury argument. But in a sufficiency-of-the-evidence inquiry, inferences are drawn against the defendant, Salinas, 119 Wn.2d at 201, evidence favoring the defendant is not considered, Randecker, 79 Wn.2d at 521, Jackson, 62 Wn. App. at 58, and questions of persuasiveness and credibility are not weighed on review, but left to the fact-finder below, Stewart, 141 Wn. App. at 795, Delmarter, 94 Wn.2d at 638. That being so, the defendant's sufficiency argument fails.

B. BECAUSE THEFT INCLUDES AN ELEMENT (OF WRONGFULLY OBTAINING CONTROL) NOT INCLUDED IN THE CHARGED CRIME OF BURGLARY, THE TRIAL COURT DID NOT ERR IN DECLINING TO INSTRUCT THE JURY THAT THEFT WAS A LESSER-INCLUDED CRIME.

The defendant proposed a lesser-included instruction for third-degree theft. 1 CP 45-50. The State objected to it. Trial RP 98. The court inquired that since the State had to prove the intent to commit a crime therein, what crime could possibly be involved other than theft? Trial RP 98-99. The State responded:

MS. WALTERS [for the State]: The State has to prove he intended to commit the crime. But proving he actually did commit a Theft 3 is not something that the State has to prove for a burglary in the second degree.

THE COURT: Ms. Rancourt?

MS. RANCOURT [for the defense]: . . . I think that she's right, that it's not really a lesser included, but I think given the way he was charged in this case, specifically with the intent to commit theft, I do believe that it is a lesser included.

* * *

MS. WALTERS: . . . I think that we could have offered it as an alternative as a second count, but a lesser included would require or is given if each of the elements of the lesser included offense is a necessary element of the offense that's charged.

And I don't think that the State has to prove that a Theft 3 occurred or a theft of any kind;

merely that that was the intent of the defendant. I think in this case basically what's happening is defense is admitting the defendant committed the crime of theft, but I don't think that that goes to the underlying charge of burglary in the second degree.

THE COURT: Well, generally, that seems to be the law, Ms. Rancourt.

MS. RANCOURT: I understand, Your Honor. We'll defer to the Court.

THE COURT: Okay. Based on that argument, the court will not give the lesser included instructions in terms of the Theft 3.

Trial RP 99-100. The defendant repeats this argument on appeal. He is wrong. The trial court properly refused to give the instruction.

A defendant is entitled to an instruction on a lesser-included offense if (1) each element of the lesser offense is a necessary element of the offense charged (the "legal prong"), and (2) the evidence in the case supports an inference that only the lesser crime was committed (the "factual prong"). State v. Berlin, 133 Wn.2d 541, 545-46, 947 P.2d 700 (1997); State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978). The standard of review of the trial court's analysis of the legal prong is de novo, while application of the factual prong is reviewed for abuse of discretion. State v. Walker, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998). In

conducting the factual-prong inquiry, the evidence is viewed in the light most favorable to the proponent of the instruction. State v. Ward, 125 Wn. App. 243, 248, 104 P.3d 670 (2004), citing State v. Fernandez-Medina, 141 Wn.2d 448, 455, 6 P.3d 1150 (2000). Both prongs must be satisfied before a lesser-included instruction will be given to the jury. Workman, 90 Wn.2d at 447-48.

The elements of second-degree burglary, as discussed above, are (1) entering or remaining unlawfully in a building, (2) with the intent to commit a crime against a person or property therein. RCW 9A.52.030; WPIC 60.04; State v. Brunson, 128 Wn.2d at 104-05. A person commits the crime of third-degree theft, on the other hand, if he or she (1) wrongfully obtains or exerts unauthorized authority or control over another's property (2) that does not exceed \$750 in value, (3) with intent to deprive that person of that property. RCW 9A.56.020(1)(a) (theft generally); RCW 9A.56.050 (third-degree theft); WPIC 79.01 (definition of theft generally), WPIC 79.02 (definition of "wrongfully obtain"); WPIC 70.11 (elements third-degree theft); State v. Cuthbert, 154 Wn. App. 318, 337-38, 225 P.3d 407 (2010).

Even a cursory review will reveal the elements of the two crimes are not the same. Compare RCW 9A.52.030 and WPIC

60.04 with RCW 9A.56.020(1)(a), RCW 9A.56.050, WPIC 79.02, and WPIC 70.11. Specifically, to prove burglary, the State must show a defendant entered *with the intent* to commit a crime, but it need not prove that the intended crime was *completed*. Id.; State v. Beaman, 143 Wash. 281, 283, 255 P. 91 (1927) (because one can commit theft without committing burglary, and commit a burglary without committing theft, “the gist of each offense is entirely separate” and convictions for both do not violate double jeopardy); see State v. Dorosky, 28 Wn. App. 128, 133-34, 622 P.2d 402 (1981)² (because of their differing definitions, burglary and theft cannot be committed by a “single act” for purposes of a more lenient juvenile sentence under RCW 13.40.180). Theft, on the other hand, requires proof that the person wrongfully obtained control of another’s property – in other words, *took it*. Burglary requires no such proof.

The defendant argues, as he did at trial, that this distinction may be the case generally, but is not so here, because the State elected to name the crime intended, namely, theft, in its charging document and in the “to convict” instruction. But that does not change the analysis: *naming* the intended crime in the charging

² Review granted, 95 Wn.2d 1021, dismissed, 96 Wn.2d 1011 (1981).

document did not require the State to also prove its *completion*. The trial court correctly so found. Trial RP 98-100.

The defendant disagrees. Relying on Berlin, he argues that analysis of the Workman test must turn on how a case is charged and proved, not on how it is statutorily defined. BOA 9-10, citing Berlin, 133 Wn.2d at 548. This is true, as far as it goes. But Berlin does not support his argument.

Berlin rejected a prior rule³ that had effectively precluded a lesser included instruction for any crime (and there are many) that may be statutorily committed by two or more alternative means, regardless of whether a single alternative had been charged in a particular case. Berlin, 133 Wn.2d at 548. Instead, the Berlin court held that the legal prong of the Workman test requires a comparison of the elements of the crime, as charged, with that of the proposed lesser included offense. Berlin at 550. This is still element-to-element analysis under the legal prong. And element-to-element analysis does not support the defendant's claim.

The defendant instead reads Berlin to mean that if the crime "intended therein" is not only identified in the charging document and instructions, but also happens to be proved, either by State's

³ In State v. Lucky, 128 Wn.2d 727, 912 P.2d 483 (1996).

evidence or the defendant's own admission, then the intended crime becomes a lesser-included of burglary. BOA 9-15. The effect would be that proof of the intended crime at trial trumps legal-prong analysis altogether. But Berlin does not articulate such an analysis. And such a construction is a departure from precedent.

In determining whether a lesser-included instruction should have been given, both the legal and factual prongs of the Workman test must be satisfied. Workman, 90 Wn.2d at 447-48. To satisfy the legal prong, each element of the lesser offense must be necessary element of the charged offense. Berlin, 133 Wn.2d at 545-46; Workman, 90 Wn.2d at 447-48. Because this is not the case with theft and burglary, the defendant's argument fails.

IV. CONCLUSION

The judgment and sentence for burglary should be *affirmed*.

Respectfully submitted on June 12, 2012.

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