

NO. 71415-5-I

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

STATE OF WASHINGTON,

Respondent,

v.

JASON A. WILLIAMS,

Appellant.

BRIEF OF RESPONDENT

MARK K. ROE
Prosecuting Attorney

SETH A. FINE
Deputy Prosecuting Attorney
Attorney for Respondent

Snohomish County Prosecutor's Office
3000 Rockefeller Avenue, M/S #504
Everett, Washington 98201
Telephone: (425) 388-3333

FILED
COURT OF APPEALS
DIVISION I
JAN 14 2015
SEATTLE
W

TABLE OF CONTENTS

I. ISSUES 1

II. STATEMENT OF THE CASE..... 1

III. ARGUMENT 4

 A. THERE WAS SUFFICIENT EVIDENCE TO PROVE THAT THE DEFENDANT ENTERED AND REMAINED IN THE VICTIMS' RESIDENCE WITH INTENT TO COMMIT A CRIME. 4

 1. Under The Jury Instructions, It Was Sufficient For The State To Prove That The Defendant Intended To Commit The Single Crime Of Theft. 4

 2. If The Evidence Is Considered Insufficient To Prove Residential Burglary, The Proper Remedy Is Remand For Entry Of Judgment On The Lesser Offense Of First Degree Criminal Trespass..... 8

 B. INTENT TO COMMIT DIFFERENT UNDERLYING CRIMES ARE NOT "ALTERNATIVE MEANS" OF COMMITTING THE CRIME OF RESIDENTIAL BURGLARY..... 9

 C. SINCE THE DEFENDANT WAS INFORMED OF THE UNDERLYING CRIMES ON WHICH THE STATE WOULD RELY, THE COURT PROPERLY EXERCISED ITS DISCRETION IN DENYING HIS UNTIMELY MOTION FOR A BILL OF PARTICULARS. 11

IV. CONCLUSION 13

TABLE OF AUTHORITIES

WASHINGTON CASES

<u>In re Heidari</u> , 174 Wn.2d 288, 274 P.3d 666 (2012).....	8
<u>State v. Bergeron</u> , 105 Wn.2d 1, 711 P.2d 1000 (1985).....	6
<u>State v. Brockob</u> , 159 Wn.2d 311, 150 P.3d 59 (2006)	7
<u>State v. Brown</u> , 45 Wn. App. 571, 726 P.2d 60 (1986).....	13
<u>State v. Hickman</u> , 135 Wn.2d 97, 954 P.2d 800 (1988)	5
<u>State v. Hosier</u> , 157 Wn.2d 1, 133 P.3d 936 (2006).....	7
<u>State v. Johnson</u> , 100 Wn.2d 607, 674 P.2d 145 (1983).....	6
<u>State v. Noltie</u> , 116 Wn.2d 831, 809 P.2d 190 (1991)	11, 12
<u>State v. Owens</u> , 180 Wn.2d 90, 323 P.3d 1030 (2014)	9
<u>State v. Randecker</u> , 79 Wn.2d 512, 487 P.2d 1295 (1971)	7
<u>State v. Smith</u> , 159 Wn.2d 778, 154 P.3d 873 (2007)	10
<u>State v. Sony</u> , ___ Wn. App. ___, ___ P.3d ___, 2014 WL 6435691 (decided 11/17/14)	9

WASHINGTON STATUTES

RCW 9A.04.110(5).....	8
RCW 9A.08.010(3).....	8
RCW 9A.52.070(1).....	8

COURT RULES

CrR 2.1(c).....	12
RAP 2.1(c).....	11

I. ISSUES

(1) The defendant was charged with residential burglary. The court instructed the jury that the State was required to prove that the defendant entered or remained in a dwelling with intent to commit a crime. The instructions went on to define the crime of third degree theft and the term "assault." Under these instructions, was the State required to prove that the defendant intended to commit *both* theft and assault?

(2) Do intent to commit theft and intent to commit assault constitute "alternative means" of committing the crime of residential burglary?

(3) Shortly before trial, the defendant filed an untimely motion for a bill of particulars. In responding to the motion, the prosecutor identified the underlying crimes that he would rely on to prove residential burglary. Did the trial court abuse its discretion in denying the defendant's motion for a bill of particulars?

II. STATEMENT OF THE CASE

At around 10:45 p.m. on January 25, 2013, Nicholas Spencer-Berger was watching a movie in his bedroom bed with his wife, Keri Devilbiss. Their two daughters were in their own bedroom. Mr. Spencer-Berger and Ms. Devilbiss heard a loud

sound from downstairs. She went into their daughters' room. Mr. Spencer-Berger picked up his phone to call 911. He saw the defendant, Jason Williams, at the top of the stairs. He had never seen the defendant before. 1 Trial RP 8-10, 22, 81-82.

Mr. Spencer-Berger told the defendant to get out of the house. The defendant asked why Mr. Spencer-Berger was following the defendant. He told Mr. Spencer-Berger to give him keys. He then asked who was in the adjacent room (which was the daughters' room). Mr. Spencer-Berger falsely told him that no one was there. The defendant opened the door to that room. Mr. Spencer-Berger pushed him out of the way and closed the door. 1 Trial RP 10-13, 21.

Mr. Spencer-Berger got the defendant downstairs. The defendant shut the front door and locked it. Mr. Spencer-Berger hit him and knocked him over. He opened the front door. Police entered and arrested the defendant. 1 Trial RP 13-15.

On inspecting his house, Mr. Spencer-Berger found that a window had been broken in his attached garage. A log was lying on the garage floor. In his car, the glove box had been emptied. The contents of the glove box were on the passenger seat. 1 Trial RP 15-16.

The defendant told police that “he was there to confront the homeowner about following him regarding some type of a disturbance or altercations that occurred at Fred Meyer earlier in the day.” He said that “he had come there to try and get some answers from the homeowner.” He had “a sixth sense that told him where this person lived at,” which was what brought him to Mr. Spencer-Berger’s home. The defendant said the he knocked on the door to speak with the homeowner. When no one answered, he broke a window with a log. 1 Trial RP 102.

The defendant claimed that a friend had dropped him off. 1 Trial RP 102. When police examined the neighborhood, however, they found the defendant’s car parked about two blocks away. 1 Trial RP 62.

The defendant was later examined by a psychiatrist, Dr. Margaret Dean. He told her that he had believed that a man was following him. He felt that this was threatening. “He was scared and he felt the need to confront the person and put a stop to it.” 2 Trial RP 190-92, 199-200. Dr. Dean believed that the defendant had experienced a drug-induced psychotic episode. 2 Trial RP 217. Another psychiatrist agreed with that conclusion. 2 Trial RP 271-72.

The defendant was charged with residential burglary. 1 CP 100. A jury found him guilty as charged. 1 CP 40.

III. ARGUMENT

A. THERE WAS SUFFICIENT EVIDENCE TO PROVE THAT THE DEFENDANT ENTERED AND REMAINED IN THE VICTIMS' RESIDENCE WITH INTENT TO COMMIT A CRIME.

1. Under The Jury Instructions, It Was Sufficient For The State To Prove That The Defendant Intended To Commit The Single Crime Of Theft.

The defendant claims that the evidence was insufficient to prove residential burglary, as that crime was defined in the jury instructions. Under those instructions, the State was required to prove that the defendant entered or remained unlawfully in a dwelling "with intent to commit a crime against a person or property therein." CP 51, inst. no. 8. At trial, the prosecutor argued that the defendant intended to commit two crimes: assault and theft. 1 Trial RP 348. The defendant does not dispute the sufficiency of the evidence to prove intent to commit theft. He nevertheless argues that the evidence was insufficient because the State purportedly failed to prove intent to commit assault.

The defendant's argument is based on the "law of the case doctrine." Under that doctrine, parties are bound by the instructions given at trial unless they timely object. If those instructions include

an unnecessary element, the State is required to prove that element. State v. Hickman, 135 Wn.2d 97, 954 P.2d 800 (1988). This legal principle is, however, irrelevant to the present case, because the instructions did not add any new element. In particular, nothing in the instructions required the State to prove intent to commit *both* theft and assault.

The “to convict” instruction set out the following elements:

To convict the defendant of the crime of residential burglary, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 25th day of January, 2013, the defendant entered or remained unlawfully in a dwelling;
- (2) That the entering or remaining was with intent to commit a crime against a person or property therein; and
- (3) That the acts occurred in the State of Washington.

CP 51, inst. no. 8.

The instructions went on to provide the following definitions:

An assault is an act, with unlawful force, done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.

CP 55, inst. no. 12.

A person commits the crime of theft in the third degree when he or she commits theft of property or services.

CP 58, inst. no. 14.

Under these instructions, the State was required to prove that the defendant entered or remained unlawfully with intent to commit “a crime.” Third degree theft was defined as a “crime.” If the defendant intended to commit third degree theft, he intended to commit “a crime.” The instructions did not require the State to prove that the defendant intended to commit more than one crime – only that he intended to commit “a crime.” If the defendant intended to commit third degree theft, and the other two elements set out in instruction no. 8 were proved, the defendant was guilty of residential burglary as defined in the instructions.

A jury is generally entitled to infer that an unlawful entry was made with intent to commit theft. State v. Johnson, 100 Wn.2d 607, 625, 674 P.2d 145 (1983), overruled in part on other grounds, State v. Bergeron, 105 Wn.2d 1, 711 P.2d 1000 (1985). This inference was reinforced by two additional facts. First, the defendant emptied out the glove box of the victim’s car and placed the items on the passenger seat. 1 RP 16. The car was in a garage attached to the house. 1 RP 64. The jury could infer that the defendant looked

through the glove box for valuable items to steal. Second, the defendant told the victim to give him keys. 1 RP 10. The jury could infer that the defendant intended to steal either the keys themselves or items that could be unlocked with the keys.

When reviewing a challenge to the sufficiency of the evidence, the court determines 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. Brockob, 159 Wn.2d 311, 336, 150 P.3d 59 (2006). All reasonable inferences are drawn in the prosecution's favor and interpreted most strongly against the defendant. State v. Hosier, 157 Wn.2d 1, 8, 133 P.3d 936 (2006). Evidence favoring the defendant is not considered. State v. Randecker, 79 Wn.2d 512, 521, 487 P.2d 1295 (1971). In the present case, a reasonable jury could infer that the defendant intended to commit theft within the residence. The evidence was therefore sufficient to support a conviction for residential burglary.

2. If The Evidence Is Considered Insufficient To Prove Residential Burglary, The Proper Remedy Is Remand For Entry Of Judgment On The Lesser Offense Of First Degree Criminal Trespass.

Even if the State were required to prove intent to assault, the defendant is not entitled to outright dismissal. When the State fails to prove the charged offense, the proper remedy is remand for entry of judgment on a lesser offense, if the following requirements are satisfied: (1) The jury necessarily found the elements of the lesser offense and (2) the jury was explicitly instructed on the lesser offense. In re Heidari, 174 Wn.2d 288, 293 ¶8, 274 P.3d 666 (2012). Here, the jury was expressly instructed on the lesser offense of first degree criminal trespass. CP 59-60, inst. no. 16-17. This satisfies the second requirement of Heidari.

The first requirement is satisfied as well. To convict the defendant of residential burglary, the jury had to find that the defendant “entered or remained unlawfully in a dwelling” with intent to commit a crime. CP 51, inst. no. 8. For a defendant to be guilty of first degree criminal trespass, he would have to knowingly enter or remain unlawfully in a building. RCW 9A.52.070(1); CP 60, inst. no. 17. By definition, every dwelling is a “building.” RCW 9A.04.110(5). Proof of intent also establishes “knowledge.” RCW 9A.08.010(3).

Thus, the jury necessarily found all of the elements of first degree criminal trespass. If the evidence is considered insufficient to prove burglary, the proper remedy is remand for entry of judgment on the lesser offense of first degree criminal trespass.

B. INTENT TO COMMIT DIFFERENT UNDERLYING CRIMES ARE NOT “ALTERNATIVE MEANS” OF COMMITTING THE CRIME OF RESIDENTIAL BURGLARY.

The defendant argues alternatively that intent to commit theft and intent to commit assault are “alternative means” of committing the crime of residential burglary. Based on this premise, he argues that his right to jury unanimity was violated by the insufficiency of evidence as to one of these means. See State v. Owens, 180 Wn.2d 90, 95 ¶ 7, 323 P.3d 1030 (2014). The premise is, however, incorrect. Distinct crimes that the defendant may intend to commit are not “alternative means” of committing burglary.

This issue was resolved by a case decided after the appellant’s brief was submitted: State v. Sony, ___ Wn. App. ___, ___ P.3d ___, 2014 WL 6435691 (decided 11/17/14). That case is closely analogous to the present case. The defendant there was charged with residential burglary. There was evidence that he entered and remained in the dwelling with intent to commit theft. The jury instructions allowed the jury to convict the defendant if he

entered or remained “with intent to commit a crime a crime against a person or property therein.”

The defendant argued that the burglary statute had two “alternative means”: (1) intent to commit a crime against a person and (2) intent to commit a crime against property. Because there was no evidence of the first “means,” he claimed that his right to jury unanimity was violated. This court, however, held that different crimes that a defendant may intent to commit do not constitute “alternative means.” Consequently, the defendant’s right to a unanimous verdict was not violated. Id. at 10-12.

The same analysis applies here. Intent to commit theft (a crime against property) does not constitute an “alternative means” from intent to commit assault (a crime against a person). When “alternative means” are not involved, a lack of evidence concerning a particular theory of guilt does not violate the right to jury unanimity. State v. Smith, 159 Wn.2d 778, 790 ¶ 20, 154 P.3d 873 (2007). Here, as discussed above, there was clearly sufficient evidence of intent to commit theft. Even if there was insufficient evidence of intent to commit assault, that insufficiency does not establish constitutional error.

C. SINCE THE DEFENDANT WAS INFORMED OF THE UNDERLYING CRIMES ON WHICH THE STATE WOULD RELY, THE COURT PROPERLY EXERCISED ITS DISCRETION IN DENYING HIS UNTIMELY MOTION FOR A BILL OF PARTICULARS.

Finally, the defendant argues that he was entitled to a bill of particulars specifying the crime that he allegedly intended to commit. “[R]equiring a bill of particulars is discretionary with the trial court and its ruling will not be disturbed absent a showing of abuse of discretion.” State v. Noltie, 116 Wn.2d 831, 844, 809 P.2d 190 (1991). The denial of the motion here was not an abuse of discretion.

To begin with, the motion was untimely. “A motion for bill of particulars may be made before arraignment or within 10 days after arraignment or at such later time as the court may permit.” RAP 2.1(c). The defendant did not file his motion for a bill of particulars until less than a week before trial.¹ CP 68. This occurred over nine months after arraignment. Supp. CP ____ (Criminal Minute Entry of

¹ The motion is contained in the Defense Trial Brief, which was filed on the first day of trial (11/12/13). The motion is dated November 8. The motion was, however, argued at a hearing on November 7. 11/7 RP 41.

2/4/13, docket no. 7).² The defendant never sought an order allowing late filing of this motion.

At the hearing on the motion, the court inquired why it was filed so late. Defense counsel's only explanation was that he had believed that the case would be resolved via a plea to a lesser offense. 11/7 RP 44-45. Obviously this explanation is inadequate. It would be unusual for plea negotiations to be completed within the 10-day period that CrR 2.1(c) allows for filing a motion for a bill of particulars. Moreover, the late filing of the motion strongly suggests that the defendant did not truly need the information to prepare for trial. Because the motion was untimely, the court did not abuse its discretion in denying it.

Even apart from the untimeliness of the motion, there were proper grounds for denial.

The test in passing on a motion for a bill of particulars should be whether it is necessary that defendant have the particulars sought in order to prepare his defense and in order that prejudicial surprise will be avoided. A defendant should be given enough information about the offense charged so that he may, by the use of diligence, prepare adequately for the trial.

Noltie, 116 Wn.2d at 845. If the government has provided the

² This document is being submitted via a supplemental designation of clerk's papers.

necessary information in any satisfactory form, no bill of particulars is necessary. Id. In particular, a bill of particulars is unnecessary if the affidavit of probable cause contains adequate information about the facts underlying the charge. State v. Brown, 45 Wn. App. 571, 578, 726 P.2d 60 (1986).

In responding to the motion for a bill of particulars, the prosecutor specified four crimes that the defendant intended to commit: assault, disorderly conduct, theft, and robbery. 2 CP 106-07; 11/7 RP 46-49 At trial, the prosecutor relied on two of those crimes: assault and theft. 2 Trial RP 348. The defense was thus placed on notice concerning the State's theory of the case. Since any necessary information was provided, the court did not abuse its discretion in denying a bill of particulars.

IV. CONCLUSION

The judgment and sentence should be affirmed.

Respectfully submitted on November 21, 2014.

MARK K. ROE
Snohomish County Prosecuting Attorney

By: 

SETH A, FINE, #10937
Deputy Prosecuting Attorney
Attorney for Respondent



**Snohomish County
Prosecuting Attorney
Mark K. Roe**

Criminal Division
Joan T. Cavagnaro, Chief Deputy
Mission Building, MS 504
3000 Rockefeller Ave.
Everett, WA 98201-4060
(425) 388-3333
Fax (425) 388-3572

November 21, 2014

Richard D. Johnson, Court Administrator/Clerk
The Court of Appeals - Division I
One Union Square
600 University Street
Seattle, WA 98101-4170

**Re: STATE v. JASON A. WILLIAMS
COURT OF APPEALS NO. 71415-5-I**

Dear Mr. Johnson:

The respondent's brief does not contain any counter-assignments of error. Accordingly, the State is withdrawing its cross-appeal.

Sincerely yours,



SETH A. FINE, #10937
Deputy Prosecuting Attorney

cc: Nielsen, Broman & Koch
Appellant's attorney

21st NOV 14


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

RECEIVED
NOV 11 2014
COURT OF APPEALS
DIVISION I
SEATTLE, WA
[Handwritten signature]

THE STATE OF WASHINGTON,

Respondent,

v.

JASON A. WILLIAMS,

Appellant.

No. 71415-5-I

AFFIDAVIT OF MAILING

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 21st day of November, 2014, affiant deposited in the mail of the United States of America a properly stamped and addressed envelope directed to:

THE COURT OF APPEALS - DIVISION I
ONE UNION SQUARE BUILDING
600 UNIVERSITY STREET
SEATTLE, WA 98101-4170

NIELSEN, BROMAN & KOCH
1908 EAST MADISON STREET
SEATTLE, WA 98122

containing an original and one copy to the Court of Appeals, and one copy to the attorney for the appellant of the following documents in the above-referenced cause:

BRIEF OF RESPONDENT

I certify under penalty of perjury under the laws of the State of Washington that this is true.

Signed at the Snohomish County Prosecutor's Office this 21st day of November, 2014.

A handwritten signature in black ink, appearing to read 'Diane K. Kremenich', written over a horizontal line. The signature is stylized and cursive.

DIANE K. KREMENICH
Legal Assistant/Appeals Unit