NO. 43440-7-II
Cowlitz Co. Cause NO. 11-1-01297-0

COURT OF APPEALS, DIVISION II OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ADRIAN J. KRAMER,

Appellant.

BRIEF OF RESPONDENT

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I. PROCEDURAL HISTORY

The appellant was charged by amended information with assault in the first degree, robbery in the first degree, and burglary in the first degree, along with three counts of burglary in the second degree. Each of the first degree crimes included a deadly weapon enhancement. These charges stemmed from a series of incidents where the appellant entered a Fred Meyer store in Longview after having been trespassed for shoplifting. In the final incident on December 12, 2011, the appellant attacked a store security officer with a hatchet, severing a portion of the man's ear.

The appellant proceeded to jury trial on April 16, 2012, before the Honorable Judge Michael Evans. After a four day trial the jury returned guilty verdicts for all charges and enhancements, along with special verdicts finding aggravating factors. The appellant was subsequently sentenced to an exceptional sentence above the standard range. The instant appeal timely followed.

II. STATEMENT OF THE CASE

On December 12, 2009, the appellant entered the Fred Meyer store in Longview, Washington to steal merchandise. As the appellant moved around the store a loss prevention officer, Duane McCabe, saw him pick up two flashlights and conceal the items inside his coat. RP 158-159. Mr. McCabe followed the appellant and watched him go through the check-out

line without paying for the flashlights. After the appellant exited the store, Mr. McCabe approached and identified himself as a Fred Meyer loss prevention officer. RP 160. Mr. McCabe detained the appellant and asked him to come back inside the store. RP 161.

Once back inside the store, Mr. McCabe took a photograph of the appellant and trespassed him from all Fred Meyer property. Mr. McCabe presented the appellant with a Fred Meyer document entitled "Criminal Trespass Notice" and informed the appellant that if he returned to Fred Meyer he could be arrested for "just being there" and that if he shoplifted again he would be charged with burglary. RP 162.

Mr. McCabe further testified that he went over each provision of the written notice individually with the appellant, and that the appellant initialed each separately. RP 163-164. Mr. McCabe also stated that the appellant signed the form, acknowledging that he had read and understood its terms. Id. The appellant did not appear confused about the terms of the trespass notice, and did not have any questions about the extent or duration of the ban. RP 165. On direct examination, Mr. McCabe stated that:

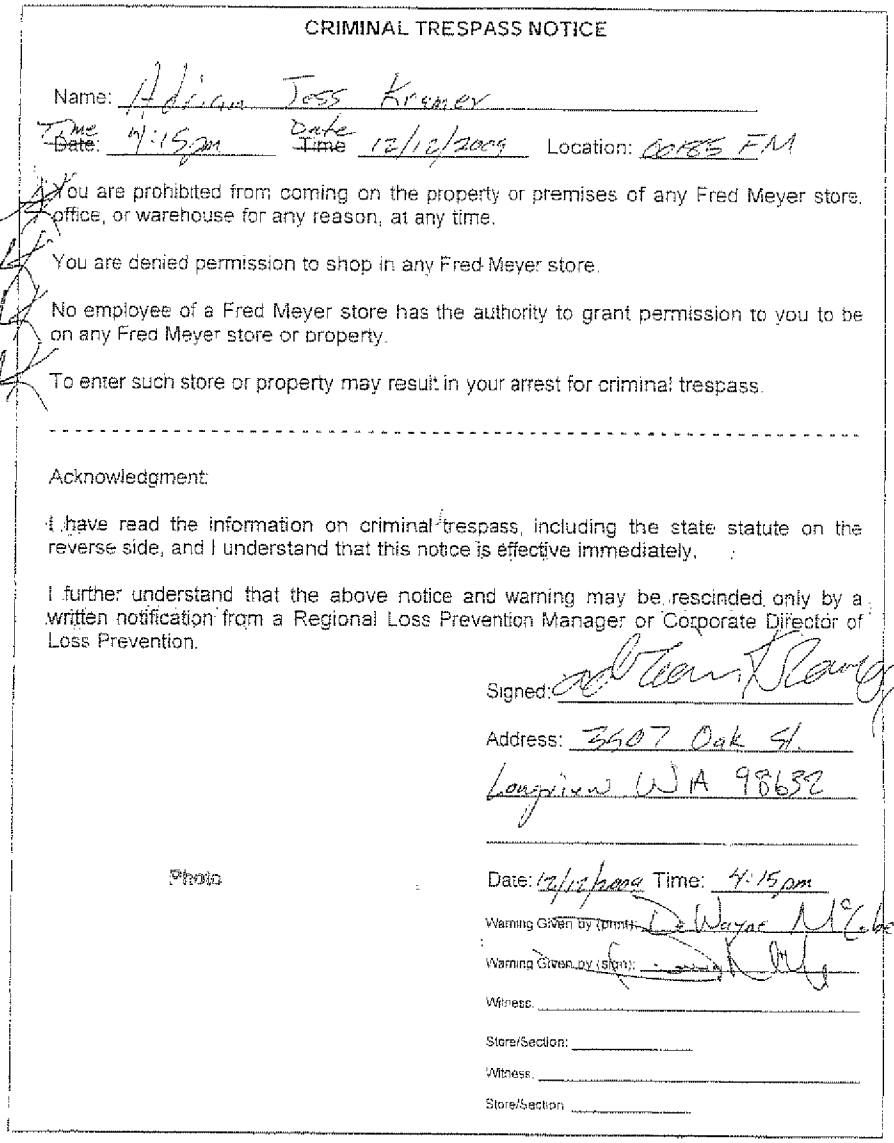
> Q: Did you tell him that it would be okay if he came back in a week or two?
>
> A: I told him that he would not be allowed back in the Fred Meyer store, or warehouse, or even on the property.

Q: Indefinitely?

A: Yes.

Id.

Mr. McCabe could not recall if the appellant received a copy of the trespass notice, but testified that the appellant had read the notice. RP 166. A copy of the trespass notice was admitted at trial as exhibit 13. RP 164. Exhibit 13 is reproduced below:



CRIMINAL TRESPASS NOTICE

Name: William Joss Kramer

~~Time~~ Date: 4:15pm ~~Date~~ Time 12/12/2009 Location: 6085 FM

You are prohibited from coming on the property or premises of any Fred Meyer store, office, or warehouse for any reason, at any time.

You are denied permission to shop in any Fred Meyer store.

No employee of a Fred Meyer store has the authority to grant permission to you to be on any Fred Meyer store or property.

To enter such store or property may result in your arrest for criminal trespass.

Acknowledgment:

I have read the information on criminal trespass, including the state statute on the reverse side, and I understand that this notice is effective immediately.

I further understand that the above notice and warning may be rescinded only by a written notification from a Regional Loss Prevention Manager or Corporate Director of Loss Prevention.

Signed: William Kramer

Address: 3507 Oak St

Longview WA 98632

Photo

Date: 12/12/2009 Time: 4:15pm

~~Warning Given by (print)~~: DeWayne McCabe

~~Warning Given by (sign)~~:

Witness:

Store/Section:

Witness:

Store/Section:

Subsequently, the appellant returned to the same Fred Meyer store on March 18, 2011. On this date, the appellant put on a new pair of shoes and exited the store without paying for them. Store security confronted the appellant outside and he fled. RP 187-194.

The appellant struck again at the Longview Fred Meyer on May 24, 2011. This time, the appellant was observing attempting to remove security tags from merchandise. The appellant left empty handed when he realized he was being observed. RP 199-202.

Undeterred, the appellant returned again on June 21, 2011 for the penultimate raid on the store's merchandise. This time, the appellant loaded a shopping cart with goods and pushed it outside without paying. When confronted by security, the appellant became aggressive and cursed at the store employees. During the confrontation a large hunting knife fell to the appellant's feet. It was unclear to the security officer if the appellant had attempted to draw the knife and fumbled it or simply dropped it accidently. The appellant again fled the scene. RP 202-213.

The final incident occurred on December 12, 2011 when the appellant once again descended upon Fred Meyer to shoplift. After loading his shopping cart with merchandise, the appellant exited the store while readying a hatchet concealed on his person. Two security officers confronted the appellant outside, at which time he attacked the closest, David Morrison, with his hatchet. The blow cut off the better part of Mr. Morrison's ear. The appellant then brandished the hatchet at the second officer, Michael Taylor, before fleeing the scene. RP 117-132, 70-75.

III. ISSUES PRESENTED

1. Were the Appellant's Burglary Convictions Supported by Sufficient Evidence?

IV. SHORT ANSWERS

1. Yes.

V. ARGUMENT

1. There Was Sufficient Evidence to Convict the Appellant of Burglary.

The appellant argues there was insufficient evidence to support the jury's finding that he was guilty of the four burglaries. Specifically, the appellant argues there was insufficient evidence to show that he unlawfully entered into Fred Meyer. However, when viewed in the light most favorable to the State, there was ample evidence to support the appellant's guilt for these charges.

When the sufficiency of the evidence is challenged, the reviewing court does not determine whether *it* believes the evidence offered a trial established the defendant's guilt beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 220-222, 616 P.2d 628 (1980). Instead, the test is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the defendant was guilty

beyond a reasonable doubt. Green, 94 Wn.2d at 220-222. All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. State v. Partin, 88 Wn.2d 899, 906-907, 567 P.2d 1136 (1977). Moreover, a claim of insufficiency "admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Where there is substantial evidence, and yet reasonable minds may differ as to the defendant's guilt, it is not for an appellate court to weigh the evidence and determine disputed questions of fact or credibility of witnesses. State v. Theroff, 25 Wn.App. 590, 593, 608 P.2d 1254 (1980); State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). Rather, this Court must defer to the trier of fact on issues of conflicting testimony, witness credibility, and the persuasiveness of the evidence. State v. Fiser, 99 Wn.App. 714, 719, 995 P.2d 107 (2000).

Unlawful access to the premises, either by unlawfully entering or unlawfully remaining, is an element of burglary in the first and second degree. RCW 9A52.020, RCW 9A.52.030. A person "enters or remains unlawfully" when he is not then licensed, invited, or otherwise privileged to so enter or remain. RCW 9A.50.010(5). A private property owner may restrict access to its property, including excluding certain persons from

areas otherwise open to the public. State v. Blair, 65 Wn.App. 64, 827 P.2d 356 (1992); State v. McDaniels, 39 Wn.App. 236, 240, 692 P.2d 894 (1984). A private property owner may exclude a person from its premises either expressly or impliedly. State v. Thomson, 71 Wn.App. 634, 638, 861 P.2d 492 (1993). An express exclusion typically takes the form of a "trespass notice." State v. Kutch, 90 Wn.App. 244, 951 P.2d 1139 (1998).

A trespass notice may be oral, written, or simply a "No Trespassing" sign. Blair, 65 Wn.App. at 68, Kutch, 90 Wn.App. at 248. There is no requirement in the law that the excluded person be given written notice, or a copy of the notice if the property owner chooses to use a written form. Kutch, 90 Wn.App. at 248. Indeed, the law does not require the notice comply with any particular form, wording, or process. This absence is unremarkable, given the broad rights vested in property owners to exclude persons or place restrictions upon access to their property.

Here, the appellant was caught shoplifting at the Longview Fred Meyer on December 12, 2009. On that date an employee of the store, Mr. McCabe, provided the appellant notice that he was trespassed from the premises. Mr. McCabe testified the appellant read the notice and initialed each of its provisions, and that the appellant further signed the trespass notice acknowledging its terms. RP 162-165. The actual written notice

was received as an exhibit at trial and is reproduced above. The appellant initialed the following terms of the notice:

- You are prohibited from coming on the property or premises of ***any*** Fred Meyer store, office, or warehouse for ***any reason, at any time.***
- You are denied permission to shop in ***any*** Fred Meyer store.
- No employee of a Fred Meyer store has the authority to grant permission to you to be on any Fred Meyer store or property.
- To enter such store of property may result in your arrest for criminal trespass.

The appellant also signed an acknowledgment that:

- I ***have read the information on criminal trespass***, including the state statute on the reverse side, and I understand that this notice ***is effective immediately.***

- I further understand that the above notice and warning ***may be rescinded only by a written notification*** from a Regional Loss Prevention Manager or Corporate Director of Loss Prevention.

Exhibit 13 (emphasis added).

Thus, the appellant received notice that he could not enter any Fred Meyer store, for any reason or at any time, and that his exclusion was permanent unless rescinded by written notification from Fred Meyer. This evidence was more than sufficient to prove the appellant unlawfully entered or remained by coming back to the same store to steal on four occasions.

In the face of the plain language of the trespass notice, the appellant seizes upon the testimony of Mr. McCabe that his exclusion was for an "indefinite" duration. The appellant argues that a trespass notice must be for a specified term, or else the notice is insufficient and the person may freely return to the premises. The appellant argues that Kutch requires the trespass notice specific the length of exclusion, however this argument is incorrect.

In Kutch, the trespass notice stated the defendant was excluded from the premises for one full year. The court observed "[t]his was a valid limitation." Id. at 249. The court did not hold that the notice *must* contain a specific length provision to be valid. The appellant does not provide any authority, other than this sentence, to support his argument. Also, a full and fair analysis of Kutch undermines the appellant's claim. The Kutch court cited to an Oregon case, State v. Ocean, 24 Or.App. 289, 546 P.2d 150 (1976), as authority for a retail store's ability to exclude certain members of the public, including known shoplifters. In Ocean, the Oregon court considered the validity of a trespass notice issued by a Fred Meyer store in Multnomah County. 24 Or. App. 289. The wording of this trespass notice is almost identical to the notice at issue here. Id. at fn. 1. The Ocean court upheld the same wording found in the instant case, and was cited

with approval by Kutch. Thus, it strains credulity to argue that the Kutch holding invalidates the trespass notice given to the appellant.

Indeed, such a rule would run counter to Blair and the Kutch court's observation that a "No Trespassing" sign is sufficient to exclude a person. Such a sign will obviously not state the length of the exclusion, but the validity of the exclusion is manifest. Consider also a circumstance where a shopkeeper ejects a person, be it for stealing, drunkenness, or general obnoxiousness, and tells the person "Get out and don't come back." May the ejected person return later and defeat a charge of trespassing because the shopkeeper did not add a specific time provision? This argument is without support in the law or common sense.

Additionally, even assuming, for the sake of argument, that a trespass notice must contain a specific length provision, the notice at issue here would satisfy this requirement. Here, the notice stated that it was effective immediately, and could only be rescinded by certain officers with Fred Meyer. Exhibit 13. Thus, the notice was permanent unless rescinded by the property owner.[1] Contrary to the appellant's argument, the evidence did not establish that he could not come back to the store "for a while." In fact, the evidence showed he could come back only if he received written permission to return.

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[1] The permanent nature of the ban was noted by court in Ocean. 24 Or.App. at 295.

Finally, to the extent that there could be any argument or debate as to whether the duration of the notice was "indefinite" as stated by Mr. McCabe or permanent as stated on the written form, this would be a question of fact for the jury to decide. Fiser, 99 Wn.App. at 719. When viewed in the light most favorable to the State, there was sufficient evidence from which the jury could conclude that the appellant had been trespassed from Fred Meyer and that his accessing of the premises was unlawful.

VI. CONCLUSION

Based on the preceding argument, the State respectfully requests the Court deny the instant appeal. There was sufficient evidence to support the appellant's convictions for burglary. The appellant's conviction should stand.

Respectfully submitted this 20th day of June, 2013.

Susan I. Baur
Prosecuting Attorney
Cowlitz County, Washington

By: _____
James Smith, WSBA #35537
Deputy Prosecuting Attorney

CERTIFICATE OF SERVICE

Michelle Sasser, certifies that opposing counsel was served electronically via the Division II portal:

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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on June 20th, 2013.

Michelle Sasser

Michelle Sasser

COWLITZ COUNTY PROSECUTOR

June 20, 2013 - 3:48 PM

Transmittal Letter

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