NO. 45326-6-II

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

STATE OF WASHINGTON,
Respondent,

v.

TIMMY LEROY SHERMAN,
Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR GRAYS HARBOR COUNTY

THE HONORABLE F. MARK MCCAULEY, JUDGE

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other

RESPONDENT'S COUNTER STATEMENT OF THE CASE

Jim Peterson lives on a 6.75 acre plot on the east side of Highway 101 near Hoquiam. VRB 7/16/2013 at 20-21. Mr. Peterson builds logging roads for a living. *Id.* He stores and works on his equipment on his property, but the property is not open to the public. *Id.* at 21 - 22. There are 12 buildings on the property, mostly large buildings. *Id.* at 21. Mr. Peterson's property is gated, with tin roofing bolted to a fence surrounding the property. *Id.* at 41. There are no signs announcing Mr. Peterson's business, but there are "No Trespassing" signs posted at both entrances to Mr. Peterson's property. *Id.* at 40 - 41. Mr. Peterson has no employees, but has, on occasion, employed one friend at a time. *Id.* at 39.

When Mr. Peterson got home on November 26, 2012 he knew someone had been in his shop because a string he had run through an eyelet on the door was broken. *Id.* at 23 – 24. He saw that his dresser drawer was ajar. *Id.* at 23. He saw that the change he leaves on his computer table was gone. *Id.* at 24. He then watched the video captured by his video surveillance system. *Id.*

The video showed Defendant driving onto Mr. Peterson's property. *Id.* at 28. Defendant would have had to come 600 – 700 feet into Mr.

Peterson's property to be seen by the surveillance system. *Id.* The video shows Defendant walking into Mr. Peterson's shop. *Id.* at 29. Mr. Peterson lives in this shop. *Id.* at 21. Defendant is seen reaching towards the area where Mr. Peterson's change is. *Id.* at 30. The video also shows Defendant taking a box of "Thin Mints." *Id.* at 59. The video shows Defendant opening the refrigerator and the dresser, then walking back into another part of the shop. *Id.* at 31. The video also shows Defendant lifting an empty gas can, but he did not take it. *Id.* at 32.

Grays Harbor Sheriff's Deputy Bob Wilson responded and recognized Defendant in the video. *Id.* at 83. He and other deputies responded to an address on Ocean Beach Road where Deputy Wilson knew Defendant to be staying. *Id.* When they arrived Deputy Wilson recognized a vehicle in the driveway as the same vehicle in Mr. Peterson's video surveillance. *Id.* at 84. Deputy Wilson knocked on the door and asked for Defendant, who immediately darted out of view. *Id.* at 85. Deputy Wilson took Defendant into custody. *Id.* Defendant said that he did not commit any burglaries. *Id.* at 86. He claimed he had been at Mr. Peterson's looking for a job. *Id.* at 87. A box of "Thin Mints" was seen in the car the deputies recognized from the video, and later seized. *Id.* at 87 – 88.

RESPONSE TO ASSIGNMENTS OF ERROR

1. **Defendant was not entitled to a "reasonable belief" jury instruction, but trial counsel did make that argument.**

Defendant asserts that the only available defense was the "reasonable belief" defense codified in RCW 9A.52.030 . Defendant first claims that trial counsel did not assert this defense in closing argument. Brief of Appellant at 7. Defendant next claims that failing to request WPIC 19.06, which instructs the jury on "reasonable belief," is tantamount to ineffective assistance. *Id.* The first claim is factually inaccurate because trial counsel did make that argument. The second claim is legally inaccurate because that instruction is not available for burglary charges.

Trial counsel argued the reasonable belief defense.

In closing argument Defendant's trial counsel said, "It's reasonable to assume that my client in driving by and seeing this ginormous shop and other structures said to himself, hey, maybe I could find work there." VRP 7/16/13 at 112-113. He also argued, "But there was no testimony whatsoever that there was a no trespassing sign at the door." *Id.* at 113. Lastly, he stated, "Once again, I don't think trespass has been proven because there wasn't a no trespassing sign on the doors of that building

itself. It was just near the open gate. And my client assumed, hey, I can go here and look for work. That's what we've got a case of, a person looking for work and making a very dumb choice." *Id.* at 119-120.

In sum, trial counsel's defense strategy was the "reasonable belief" defense. The argument was that Defendant knew that this building was a business and it was reasonable for him to enter it to ask for employment. Trial counsel was not ineffective.

A burglar is not entitled to a "reasonable belief" instruction.

Trial counsel was not ineffective for not requesting an instruction based on RCW 9A.52.090(3) because that instruction is not available to a burglary defendant. *State v. Cordero*, 170 Wn.App 351, 369-70, 284 P.3d 773, 782 (2012).

In *Cordero* the defendant was convicted of Burglary 1. *Id.* at 355. On appeal, he argued that it was error to refuse to give an instruction based on RCW 9A.52.090(3). *Id.* at 369. He argued that *State v. J.P.* to support his position, just as Defendant does now. *Id.*

The Court rejected the defendant's argument, stating that the provided instructions "...provided the jury with the applicable law and allowed Mr. Cordero to argue his theory that he had been invited into Ms. Garcia's room and was therefore at the premises lawfully." *Id.* at 370.

As Cordero did, Defendant points to *State v. J.P.* for the proposition that this instruction must be given in Burglary cases. This is not supported by subsequent case law. Firstly, "J.P. was a bench trial; at issue was whether abandonment could be argued to the trial court as a defense." *State v. Ponce*, 166 Wn. App. 409, 417, 269 P.3d 408, 412 (2012), reconsideration denied (Mar. 26, 2012). Secondly, *J.P.* addresses an abandonment defense, not "reasonable belief." *State v. J.P.*, 130 Wn. App. 887, 894-95, 125 P.3d 215, 219 (2005). Thirdly, "*J.P.* did no more than recognize that—because the unlawful entry element of criminal trespass is identical to the unlawful entry element of burglary—a statutory defense to criminal trespass that negates its unlawful entry element must also negate the unlawful entry element of burglary." *Cordero* at 370 (citing *Ponce*). "*J.P.* did not hold or suggest that a defendant charged with burglary was entitled to have an additional jury instruction, addressing a statutory defense that the legislature has provided only for criminal trespass, where the court's jury instructions are already sufficient to apprise the jury of the law and enable the defendant to argue his theory of lawful entry." *Id.*

In the instant case trial counsel did argue that Defendant was in the building for a legitimate purpose and reasonably believed that he was

entitled to enter, contrary to Defendant's claims. Trial counsel did not request an instruction on reasonable belief because Defendant was not entitled to such an instruction. Defendant did not receive ineffective assistance of counsel at his trial.

2. The prosecutor did not commit prosecutorial misconduct because he did not misstate the law and the argument was harmless because there was no dispute that Defendant entered a building.

During rebuttal the deputy prosecutor discussed illegal entry and the difference between Burglary and the lesser-included crime of Criminal Trespass. The deputy prosecutor gave an example of a chainsaw on a lawn. Defendant apparently believes that this cannot be a burglary, but he is mistaken because a burglary can be committed in fenced-in areas. Additionally, there can be no prejudice in this case because it was undisputed that Defendant entered a building.

Burglary can be committed as in the example.

Taking a chainsaw from a lawn, as the deputy prosecutor's example, can be a burglary. "A person is guilty of burglary in the second degree if, with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building…" RCW 9A.52.030(1). For the purposes of burglary, "'Building,' in addition to its

ordinary meaning, includes any… fenced area…" RCW 9A.04.110(5). A chainsaw taken from a fenced-in lawn is a burglary. There was no misstatement of the law.

Additionally, in the instant case there was evidence that the premises in the instant case were fenced in. The victim, Jim Peterson, testified, "…and like I said tin roof covering bolted onto the fence. So nobody can see in." VRP 7/7/2013 at 41. "There's a gate. And then I have like tin roofing all the way across so no you can't see in my property." *Id.* at 34.

There was no misconduct because there was no misstatement of the law. Burglaries can be committed in fenced areas such as Jim Peterson's property.

There is no conceivable prejudice because it was undisputed Defendant entered a building.

"The defendant bears the burden of establishing that the conduct complained of was both improper and prejudicial." *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239, 1265 (1997) (citing *State v. Mak*, 105 Wash.2d 692, 726, 718 P.2d 407 (1986).) "If the defendant proves the conduct was improper, the prosecutorial misconduct still does not constitute prejudicial error unless the appellate court determines there is a

substantial likelihood the misconduct affected the jury's verdict. *Id.* (citing *State v. Brett*, 126 Wash.2d 136, 175, 892 P.2d 29 (1995).)

In the instant case there was no dispute Defendant entered a building in the common sense of the word. The jury saw a video of Defendant entering Mr. Peterson's building. VRP 24 - 39. In closing argument Defendant admitted to "…walking into a room where Mr. Peterson sleeps… looking around, grabbing a little bit of change and a box of thin Mints." *Id.* at 114.

Because there was no dispute Defendant entered a building and committed a theft, even assuming, *arguendo*, that the deputy prosecutor's argument caused the jury to believe a trespass onto open land is a burglary, that scenario was not at issue in this case. Any misstatements were harmless.

Defendant claims that there was no "direct evidence" that Defendant intended to commit a crime when he entered and remained in the building. However, "In determining the sufficiency of the evidence, circumstantial evidence is not to be considered any less reliable than direct evidence." *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99, 101 (1980) (citing *State v. Gosby*, 85 Wash.2d 758, 539 P.2d 680 (1975).) The

fact that Defendant committed a theft while in the building seems to be sufficient circumstantial evidence of his intent.

Defendant fails to meet his burden of explaining how he was prejudiced by the alleged misstatement of the law so his assignment of error fails.

3. Defendant stipulated to his offender score. There was no miscalculation.

Defendant claims that his own statement of his offender score did not state his release date from prison and therefore is incorrect because some offenses could have "washed out." However, Defendant stipulated to his offender score and a stipulation to an offender score resolves all potential factual issues for sentencing. *State v. Hickman*, 116 Wash.App. 902, 907, 68 P.3d 1156 (2003).

When Defendant pled guilty to Possession of Methamphetamine, his attorney said, "I'm also handing forward a statement on his criminal history." VRP 4/22/12 at 3. This statement appears to show an offender score of 11. Clerk's Papers at 016. This matches the calculation of his offender score in the Statement of Prosecutor. *Id.* at 054-055. Because the calculation offered by Defendant matches that of the prosecuting

attorney this is a stipulation. There was no error at sentencing and Defendant need not be resentenced.

CONCLUSION

The jury instruction Defendant now argues his trial counsel should have requested was not available to him. The argument Defendant claims his trial counsel should have argued was argued. The alleged prosecutorial misconduct was not a misstatement of the law and could not possibly have caused prejudice. Defendant clearly stipulated to his offender score, thereby resolving all possible factual arguments. In short, Defendant's assignments of error are without merit and this court should deny all three.

DATED this _____ day of May, 2014.

Respectfully Submitted,

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JFW/

GRAYS HARBOR COUNTY PROSECUTOR

May 22, 2014 - 8:31 AM

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