No. 47506-5-II

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

STATE OF WASHINGTON,

Respondent,

v.

DAVID KALAC,

Appellant.

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

APPELLANT'S REPLY BRIEF

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A. ARGUMENT

1. The evidence was insufficient to prove burglary.

a. Jail cells within a jail are not separate "buildings" within the meaning of the burglary statute.

The State bore the burden to prove that Mr. Kalac "entered or remained unlawfully in a building." CP 102. The State's theory was that Mr. Kalac, a jail inmate, entered another "building" by entering a jail cell, where another inmate was confined. Because the other cell was not a "building" separate from the jail, the State failed to prove that Mr. Kalac committed burglary. Br. of App. at 9-16.

The term "building" has its "ordinary meaning" and includes "any dwelling." RCW 9A.04.110(5); CP 99. "Each unit of a building consisting of two or more units separately secured or occupied is a separate building." Id.

The State argues that the jail cell was a "building" because "any dwelling" qualifies as a "building," and the cell was a "dwelling."[1] Br. of Resp't at 8. This argument is inconsistent with Thomson, which held that a woman's bedroom was not a "building" separate from the house itself. State v. Thomson, 71 Wn. App. 634, 646, 861 P.2d 492 (1993). If the

[1] "'Dwelling' means any building or structure, though movable or temporary, or a portion thereof, which is used or ordinarily used by a person for lodging." RCW 9A.04.110(7).

State were correct, the defendant in Thomson would have lost. The defendant, however, won because the room was within a single family house where each family member has a privacy interest in the entire house. Id. at 645-46; see also State v. Deitchler, 75 Wn. App. 134, 137, 876 P.2d 970 (1994) (evidence locker inside police station not a separate building because there was one tenant); State v. Miller, 90 Wn. App. 720, 729, 954 P.2d 925 (1998) (stalls and coin boxes were not separate buildings inside car wash occupied by a single tenant).

The State argues that each jail cell is its own unit, occupied by their own tenants. See Br. of Resp't at 13-14. The State's argument appears to be that the jail is akin to an apartment complex, where each "unit" would qualify as a separate building.

The problem with such an analogy is that the inmates were not tenants. The government was the tenant. The inmates did not choose to live in the jail. The government forcibly imprisoned them there. Moreover, contrary to the State's contention, the inmates did not possess the jail or their cells, the government did. This Court should reject the contention that Mr. Kalac entered "[Mr.] Carlson's house." Br. of Resp't at 14.

But even assuming that the jail inmates could be said to be "tenants," they are more like tenants in a single family residence. Like

these tenants, they may have their own "room" (i.e., their cell), but they share the rest of the building. The day room was a common area that the inmates shared. RP 562-63, 591. Like tenants in a single family house, the privacy interest of each "tenant" is not different from other "tenants." Thomson, 71 Wn. App. at 645. Hence, like in Thomson, "it makes sense to characterize the burglarized rooms as parts of a single building." Id.

Thus, the only reasonable interpretation is that jails cells are not separate "buildings" within the meaning of the statute. At the least, this is a reasonable interpretation and thus the rule of lenity requires adoption of it. State v. Thomson, 71 Wn. App. at 645-46; Miller, 90 Wn. App. at 730. This Court should hold that the jail cell was not a separate building within the jail and reverse the conviction for burglary.

b. The State failed to prove that Mr. Kalac's presence in the cell was unlawful.

The State bore the burden of proving that Mr. Kalac "entered or remained unlawfully." CP 101 (emphasis added). To prove this, "the State must introduce evidence that the entrant was 'not then licensed, invited, or otherwise privileged to so enter or remain.'" State v. Schneider, 36 Wn. App. 237, 241, 673 P.2d 200 (1983) (quoting RCW 9A.52.010(3). The State failed to do so.

Mr. Kalac was an inmate in the jail. He was supposed to be there. While he was supposed to have remained in his designated cell, the State did not introduce evidence that Mr. Kalac's entry into Mr. Carlson's designated cell was unlawful. Cf. State v. Wilson, 136 Wn. App. 596, 607-08, 150 P.3d 144 (2007) (no-contact order which forbade defendant from contacting girlfriend did make defendant's entry into home where girlfriend lived unlawful). This cell was part of the jail, where inmates like Mr. Kalac were supposed to be. He was not expressly forbidden from being in Mr. Carlson's designated cell. Cf. State v. Crist, 80 Wn. App. 511, 515, 909 P.2d 1341 (1996) (son was privileged to be in father's home, but his entry into his father's locked bedroom was unlawful because father had expressly ordered his son to stay out of this room).

The State agrees that "there was no particular testimony as to specific jail regulations in the record." Br. of Resp't at 15. Had the State introduced some concrete evidence of a jail regulation forbidding inmates from entering cells not assigned to them, then the State likely would have met its burden on this requirement. The State, however, simply assumed that Mr. Kalac's entry was unlawful because he left his designated cell without permission. This was insufficient.

The State argues that even if Mr. Kalac entered the cell lawfully, his "remaining" there was unlawful. Br. of Resp't at 18. Mr. Kalac,

however, immediately complied with instructions to stop fighting Mr. Carlson when confronted by the officers. RP 652. These officers had authority over the cell, not Mr. Carlson. He left the cell peaceably with the officers. RP 655. The evidence did not establish that Mr. Kalac "remained unlawfully" in the cell.

This Court should hold that the State failed to prove the "unlawfully" requirement and reverse the conviction for burglary.

2. The evidence was insufficient to prove unlawful imprisonment.

To prove unlawful imprisonment, the State bore the burden of proving that Mr. Kalac "restrained the movements of Wayne Carlson in a manner that substantially interfered with his liberty." (emphasis added). "Substantial" means "considerable." State v. Rich, 184 Wn.2d 897, 904-05, 365 P.3d 746 (2016); State v. McKague, 172 Wn.2d 802, 805, 262 P.3d 1225 (2011). Thus, the State had to prove that any restraint by Mr. Kalac upon Mr. Carlson was considerable.

Impliedly recognizing that the physical force used by Mr. Kalac against Mr. Carlson did not result in a considerable interference of Mr. Carlson's liberty of movement, the State focuses on the evidence that Mr. Kalac closed the door behind him when he entered the cell. Br. of Resp't at 20-22. Below, however, the State conceded that this was insufficient

during rebuttal and identified Mr. Kalac's assaultive conduct against Mr. Carlson as the sole evidence supporting the charge. RP 1039 ("[Mr. Carlson's] liberty was restricted by [Mr. Kalac's] physical force. Forget the shape of the cell that he's in or that the cell door must be closed.") (emphasis added). Hence, the State abandoned this theory.

Regardless, the shut door did not substantially interfere with Mr. Carlson's liberty of movement. It was only closed for about two minutes. The duration does matter because our Supreme Court has interpreted the term substantial to mean "considerable." Being locked in a room for about two minutes does not constitute a considerable interference. The State's reliance on State v Robinson, 92 Wn.2d 357, 597 P.2d 892 (1979) is unavailing because the law on what "substantial" means has changed. Rich, 184 Wn.2d at 904-05; McKague, 172 Wn.2d at 805.

Moreover, contrary to the State's arguments, the evidence did not establish that Mr. Kalac closed the door with the purpose of trapping Mr. Carlson. Mr. Kalac admitted that he closed the door, but that he wasn't thinking about why he did so. RP 904.

As for the simple assault, the State does not contest Mr. Kalac's argument that this was insufficient to establish considerable interference with Mr. Carlson's liberty of movement. Br. of App. at 20-21; Br. of

Resp't at 19-22. The Court should accept the implied concession that the assaultive conduct was insufficient to prove considerable interference.

This Court should hold that the State failed to prove unlawful imprisonment and reverse this conviction.

3. The State's concessions should be accepted.

The State properly concedes that retrying Mr. Kalac for attempted murder is barred by the prohibition against double jeopardy. Br. of Resp't at 23. The order dismissing the charge "without prejudice" is erroneous. Br. of Resp't at 23. The trial court should be instructed to enter a corrected order. Br. of Resp't at 23.

As for costs, the State is not seeking them. Br. of Resp't at 24. Thus, the court should direct that no costs will be imposed. State v. Sinclair, 72102-0-I, 2016 WL 393719, at *6 (Wash. Ct. App. Jan. 27, 2016) ("The State has the opportunity in the brief of respondent to make counterarguments to preserve the opportunity to submit a cost bill.").

B. CONCLUSION

The convictions for burglary and unlawful imprisonment should be reversed for insufficient evidence. The Court should instruct that the charge of attempted murder is to be dismissed with prejudice.

DATED this 8th day of April, 2016.

Respectfully submitted,

/s Richard W. Lechich
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STATE OF WASHINGTON, Respondent, v. DAVID KALAC, Appellant.	)))))))))	NO. 47506-5-II

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