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NO. 62791-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

JEROME TALLEY
AKA AZIZUDDIN SALAHUD-DIN,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JIM ROGERS, JUDGE

BRIEF OF RESPONDENT

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A. ISSUE

1. To be constitutionally adequate, a charging document must include all essential elements of the crime charged. Burglary in the Second Degree contains two elements: 1) entering or remaining unlawfully in a building other than a vehicle or a dwelling; and 2) intent to commit a crime against a person or property therein. The information in this case alleged that Talley "did enter and remain unlawfully in a building, located at 4180 42nd Avenue NE, Seattle . . . with intent to commit a crime against a person or property therein." Was the information adequate, even though it did not allege specific ownership or occupancy of the building?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

Defendant Jerome Talley (aka Azizuddin Salahud-Din)¹ was charged by amended information with a single count of Burglary in the Second Degree. CP 1-5. The State alleged that, on October 29, 2007, Frank Graves came upon Talley passed out in the front

¹ The information uses the name "Jerome Talley." At trial, the defendant was referred to as "Azizuddin Salahud-Din." He is referred to as "Jerome Steven Talley" on the judgment and sentence, and "Jerome Talley" is the name that appears first on this Court's docket. The State will refer to the defendant in this brief as Jerome Talley. No disrespect is intended.

passenger seat of Graves's car, which was parked in Graves's garage; when apprehended by police, Talley had an iPod and a pair of sunglasses, both belonging to Graves, in his jacket pocket. CP 2.

A jury convicted Talley as charged. CP 7. The trial court sentenced him within the standard range. CP 39-46.

2. SUBSTANTIVE FACTS.

Frank Graves lives at 4180 42nd Ave. NE in the Laurelhurst neighborhood of Seattle. 2RP² 4-5. His home has a fully fenced back yard, and a free-standing garage that may be entered either through a door located inside the fenced area, or through an electric garage door off the alley. 2RP 6-7.

On October 29, 2007, Graves headed out to his garage between 6:30 and 7:00 a.m. 2RP 7-8. Entering through the door off his yard, Graves hit the switch that simultaneously opened the garage door to the alley and turned on the light. 2RP 8. He immediately noticed a bearded African-American male slumped in the front passenger seat, passed out, with one foot hanging out the

² The verbatim report of proceedings consists of three volumes, referred to in this brief as follows: 1RP (11-4-08); 2RP (11-5-08); 3RP (12-10-08).

door. 2RP 8-10. Not recognizing the man as anyone he knew, Graves went back into his house and called 911. 2RP 11.

Seattle Police Officer Michael Larned responded to the call. 2RP 18, 20-21. Entering the garage from the alley, Larned saw a man matching the description Graves had given, still asleep in the car, with a needle near his feet.³ 2RP 22-23. Larned woke the man up, walked him to the patrol car, and frisked him for weapons. 2RP 23. Larned placed the man under arrest for criminal trespass and, in a search incident to the arrest, discovered an iPod and a pair of sunglasses in the man's jacket pocket. 2RP 24-25. The man said that the items were not his, and probably belonged to the person who owned the car.⁴ 2RP 25. Larned then informed the man that he was under arrest for burglary. 2RP 26.

Talley testified on his own behalf. He said that he did not know where he had been living at the time of this incident, nor did he have any memory of how he had gotten to Laurelhurst or how he had ended up in Graves's garage. 2RP 32-33. He acknowledged a heroin addiction, and speculated that he might

³ Officer Larned identified Jerome Talley in court as the man he found in Graves's garage. 2RP 23.

⁴ Graves confirmed that the iPod and sunglasses were his, and that they had been in his car. 2RP 12.

have "used a little too much" on that occasion. 2RP 33-34. Talley said that he did not remember putting the iPod and the sunglasses in his pocket, but that he was not "trying to form intent to do something." 2RP 36-37, 40.

C. ARGUMENT

1. THE INFORMATION ALLEGED ALL OF THE ESSENTIAL ELEMENTS OF THE CRIME OF BURGLARY IN THE SECOND DEGREE.

Talley challenges the sufficiency of the information, claiming that it failed to allege an "essential element" of Burglary in the Second Degree -- the ownership or occupancy of the burglarized building. He makes this claim for the first time on appeal.

The claim is not well taken. While proof of ownership or occupancy might under certain circumstances be necessary to prove that entry was unlawful, ownership or occupancy is not in and of itself an element of the crime of burglary. In any event, when construed liberally in favor of validity, the information was sufficient to apprise Talley of the nature of the crime and allow him to prepare an adequate defense.

A charging document is constitutionally sufficient under the Sixth Amendment to the United States Constitution⁵ and article I, section 22 of the Washington Constitution⁶ only if it includes all essential elements of the crime, both statutory and nonstatutory. State v. Goodman, 150 Wn.2d 774, 784, 83 P.3d 410 (2004). The purpose of this requirement is to give notice to an accused of the nature of the crime so that he may prepare a defense. State v. Tandecki, 153 Wn.2d 842, 846-47, 109 P.3d 398 (2005) (citing State v. Kjorsvik, 117 Wn.2d 93, 101, 812 P.2d 86 (1991)).

When challenged for the first time on appeal, a charging document will be liberally construed in favor of validity. Tandecki, 153 Wn.2d at 848-49. An information is sufficient if (1) the necessary facts appear in any form, or by fair construction may be found, in the charging document, and (2) the defendant cannot show actual prejudice from any lack of notice. Tandecki, at 849 (citing Kjorsvik, 117 Wn.2d at 105-06).

Talley was charged with Burglary in the Second Degree pursuant to RCW 9A.52.030. CP 5. That statute provides that

⁵ "In all criminal prosecutions, the accused shall . . . be informed of the nature and cause of the accusation." U.S. Const. amend. VI.

⁶ "In criminal prosecutions, the accused shall have the right . . . to demand the nature and cause of the accusation against him." Const. art. I, § 22.

"[a] person is guilty of burglary in the second degree if, with intent to commit a crime against a person or property therein, he enters or remains unlawfully in a building other than a vehicle or a dwelling." RCW 9A.52.030(1). "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(3).

Burglary in the Second Degree thus contains two elements: (1) entering or remaining unlawfully in a building other than a dwelling or a vehicle; and (2) intent to commit a crime against a person or property therein. See State v. Brunson, 128 Wn.2d 98, 104-05, 905 P.2d 346 (1995); State v. Schroeder, 67 Wn. App. 110, 116-17, 834 P.2d 105 (1992).

The information in this case closely mirrored the statute, and contained both of the necessary elements of the crime charged. The State alleged that Talley, in King County, Washington, on or about October 29, 2007, "did enter and remain unlawfully in a building, located at 4180 42nd Avenue NE, Seattle, in said county and state, with intent to commit a crime against a person or property therein." CP 5. Thus, the information was constitutionally sufficient.

Talley nevertheless asserts that "the ownership or occupancy of the premises allegedly broken into must be charged so as to negate the defendant's right to enter." Brf. of App. at 5. He relies for this argument on State v. Klein, 195 Wash. 338, 80 P.2d 825 (1938).

The holding of Klein, however, cannot be stretched so far. In that case, the defendants were charged with Burglary in the Second Degree under the statute then in effect:

Every person who, with intent to commit some crime therein shall, under circumstances not amounting to burglary in the first degree, enter the dwelling-house of another or break and enter, or, having committed a crime therein, shall break out of, any building or part thereof, or a room or other structure wherein any property is kept for use, sale or deposit, shall be guilty of burglary in the second degree

Klein, 195 Wash. at 340 (quoting Rem. Rev. Stat. § 2579). The information alleged that the defendants:

[D]id wilfully, unlawfully and feloniously, and with the intent to commit some crime therein, to-wit: larceny, break and enter a building, to-wit: The Tradewell Store building, located at 2813 Colby avenue, in the city of Everett, Washington, being managed by one John Bird of the city of Everett, Washington, said building being a building in which property was then and there kept for use, sale or deposit.

Klein, at 339.

On appeal, Klein argued that the information was insufficient, in that it alleged neither ownership nor occupancy of the building at issue. Id. at 341. The court rejected this argument, holding that "[i]n charging the crime of burglary, the ownership or occupancy of the premises alleged to have been broken into must be alleged *in some manner sufficient to negative the right of the person charged with the crime to enter the building.* Id. (italics added). The focus was thus not on the identity of the legal owner or occupant in and of itself, but rather on whether the information contained a sufficient allegation that the defendant did not himself have the right or privilege to enter the building.

The holding of Klein is consistent with the reasoning underlying an allegation of ownership, as recognized in contemporaneous case law: "Allegation of ownership is material for only two purposes: (1) To show on the record that the building burglarized is not the property of the accused, and (2) to identify the offense to such an extent as to protect the accused from a second

prosecution for the same offense."⁷ State v. Knizek, 192 Wash. 351, 355, 73 P.2d 731 (1937). It is also consistent with cases interpreting the modern burglary statute and concluding that it is the *unlawful* entering or remaining in a building that is an essential element of the crime. Brunson, 128 Wn.2d at 104-05; Schroeder, 67 Wn. App. at 116-17.

In any event, construed liberally in favor of validity, the information in this case was adequate. See Tandecki, 153 Wn.2d at 848-49. The allegation that Talley entered or remained "unlawfully" in the designated building is sufficient to negate his right to enter the building. CP 5; RCW 9A.52.010(3) ("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."); see Klein, 195 Wash. at 341. The information thus notified Talley of the nature of the crime charged, and allowed him to prepare his defense. See Tandecki, 153 Wn.2d at 846-47.

⁷ While cases cited by Talley stand for the proposition that an allegation of ownership or occupancy is *sufficient* to support a charge of burglary, they do not support his claim that such an allegation is *necessary* to the charge under all circumstances. See State v. Franklin, 124 Wash. 620, 623, 215 P. 29 (1923); State v. Burke, 124 Wash. 632, 633-34, 215 P. 31 (1923); Knizek, 192 Wash. 351, 355.

While Talley asks this Court to assume prejudice from the wording of the allegation, he specifies none.

D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Talley's conviction for Burglary in the Second Degree. The State also respectfully requests that this Court publish its opinion in this case. Despite several unpublished opinions on this same issue over the past few years, appellants continue to raise the claim. A published opinion would resolve the issue, providing needed guidance to parties and serving the interest of judicial economy.

DATED this 30th day of September, 2009.

Respectfully submitted,

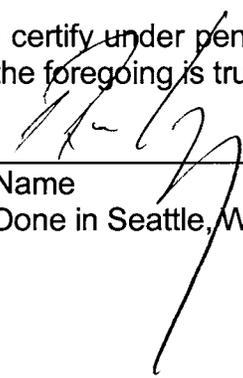
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to **Andrew P. Zinner**, the attorney for the appellant, at **Nielsen, Broman & Koch, PLLC**, 1908 East Madison, Seattle, WA 98122, containing a copy of the **Brief of Respondent**, in **STATE v. JEROME TALLEY (AKA AZIZUDDIN SALAHUD-DIN)**, Cause No. **62791-1-I**, in the Court of Appeals for the State of Washington, Division I.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Name
Done in Seattle, Washington

09-30-09

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