

66192-2

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NO. 66192-2-1

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

STATE OF WASHINGTON,

Respondent,

v.

SEBASTIAN L. LUBERS,

Appellant.

REC'D

AUG 17 2011

King County Prosecutor
Appellate Unit

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

The Honorable Laura Gene Middaugh, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY¹

BECAUSE THE "INFERENCE OF INTENT" INSTRUCTION IS FORBIDDEN IN AN ATTEMPTED BURGLARY CASE, THE CONVICTION MUST BE REVERSED.

In the Brief of Appellant (BOA), Sebastian L. Lubers argued the trial court erred by giving jurors WPIC 60.05, the "inference of intent" instruction. He relied on State v. Jackson, 112 Wn.2d 867, 876, 774 P.2d 1211 (1989), which held the instruction could not be given without evidence of entering or remaining. BOA at 6.

The State attempts to distinguish Jackson by noting the trial court modified WPIC 60.05 to make it applicable to the charge of attempted burglary:

A person who *attempts to* enter or remain unlawfully in a building may be inferred to have acted with intent to commit a crime against a person or property therein. This inference is not binding upon you and it is for you to determine what weight, if any, such inference is to be given.

Jackson, 112 Wn.2d at 872. WPIC 60.05 does not include the italicized words "attempts to" and neither did the instruction in Lubers' trial. CP 39 (instruction 10). As a result, the State maintains, Lubers' jury was informed only that "it could infer intent if [it] determined that [Lubers]

¹ Lubers rests on the Brief of Appellant at 7-19 for his arguments that Officer Person improperly rendered opinions on guilt and trial counsel was ineffective for failing to object to the opinions.

entered or remained unlawfully in the building." Brief of Respondent (BOR) at 5-7. The State asserts that because there was evidence Lubers entered the apartment, the instruction was proper. BOR at 7-8, 11-12.

Here is the state's theory:

Ms. Limas' window screen was pulled up and away from its usual position. The only way that act could have been accomplished was by gripping the screen from the inside, i.e., the side facing the building, and pulling it up and away. In gripping the screen from the inside, someone entered Ms. Limas' apartment. Moreover, Lubers was the only person in the area and was carrying items commonly used in the commission of burglaries.

BOR at 12. The only logical conclusion, according to the State, was that Lubers entered the apartment. Id.

Lubers disagrees with the state's assertion the evidence establishes the screen was bent upward. Officer Whitehead described Exhibit 11 as a photo that showed how the screen was "pried down" with what he opined was a "screwdriver or other type of prying tool." RP 136. In describing Exhibit 12, Whitehead testified, "You can see that it was actually forcibly broken right here at this point." RP 136-37. The prosecutor clarified that Whitehead "was talking about the part that's bent down" RP 137. Ms. Limas testified the screen was not bent and the crack in the window captured in Exhibit 11 was not there before the night at issue. RP 59.

No witness testified the screen was bent "upward." This defeats the state's theory. In any event, the state's own witness professionally

opined that the damage to the window was from a prying tool, not hands. Because the state's supposition is without factual support, this Court should reject it.

The state now finds itself in a curious position. Whereas at trial the state needed only to show Lubers took a substantial step to enter the apartment, the inference instruction now requires it to prove actual entry. The real question, then, is whether the record on appeal establishes actual entry.

The word "enter" when constituting an element or part of a crime, shall include the entrance of the person, or the insertion of any part of his or her body, or any instrument or weapon held in his or her hand and used or intended to be used to threaten or intimidate a person or to detach or remove property[.]

RCW 9A.52.010(2).

It is undisputed there was no evidence of "entry" into the residential portion of the apartment, through an open window or any other means. Instead, the damaged screen and crack in the window suggests whomever was outside the apartment when Limas called police got no further than the outer surface of the window glass. In fact, it is just as likely that, while prying and bending and breaking the screen with the prying tool from the outside of the building, the unidentified stranger exerted enough pressure on the window frame as to cause the glass to crack. Under this equally likely scenario, there was no entry at all, even

into the space between the inside of the screen and the outside of the window.

Simply put, even if evidence of actual "entry" in an attempted burglary case avoids reversal of a burglary conviction under Jackson, here the state failed to establish the suspect achieved entry. For this reason, the trial court erred by giving the "inference of intent" instruction.

This brings us to the state's fall-back argument, that any error in giving the inference instruction was harmless. BOR at 12-17. Lubers disagrees. As the Supreme Court held in Jackson, "[T]he giving of the instruction could not be harmless error since it tended to prove an element of the commission of a crime." 112 Wn.2d at 877.

Furthermore, the state argues that "even if the court excluded the instruction," there was strong evidence of intent to commit a crime. BOR at 13. This is not the proper analytical method; this Court must "presume that juries follow *all* instructions given." State v. Stein, 144 Wn.2d 236, 247, 27 P.3d 184 (2001) (emphasis added). Under proper constitutional harmless error analysis, an error is presumed prejudicial unless the reviewing court concludes the error "could not have rationally affected the verdict." State v. DeRyke, 149 Wn.2d 906, 912-13, 73 P.3d 1000 (2003); see State v. Williams-Walker, 167 Wn.2d 889, 910-11, 225 P.3d 913 (2010) (instruction that misstates or omits element is harmless error only

where element is supported by uncontroverted evidence such that a reviewing court can conclude beyond a reasonable doubt the verdict would have been same without error).

In addition to proposing an incorrect harmless error test, the state relies on Lubers' failure to testify or "offer any evidence that would negate an essential element of the crime" as a reason to find the error harmless. BOR at 13. This is improper argument.

A prosecutor may not comment on a defendant's failure to testify. State v. French, 101 Wn. App. 380, 386, 4 P.3d 857 (2000), review denied, 142 Wn.2d 1022 (2001). Not only does the accused have a constitutional right to remain silent, he also "has no duty to present evidence; the State bears the entire burden of proving each element of its case beyond a reasonable doubt." State v. Fleming, 83 Wn. App. 209, 215, 921 P.2d 1076 (1996), review denied, 131 Wn.2d 1018 (1997). Finally, a prosecutor may not argue the accused failed to present evidence unless the accused testified about an exculpatory theory that could have been supported by an available witness. State v. Barrow, 60 Wn. App. 869, 872, 809 P.2d 209, review denied, 118 Wn.2d 1007 (1991). For these

reasons, Lubers asks this Court to disregard this portion of the state's argument.²

The state relies on State v. Bencivenga³ for the proposition that the fact-finder may logically infer intent from proven facts provided it is satisfied the state has proved that intent beyond a reasonable doubt. BOR at 15. Lubers does not quarrel with this general assertion, so long as the fact-finder is not a jury that is instructed using WPIC 60.05. When it is, the error is not harmless because "[t]he instruction coming from the trial judge indicated that the defendant had entered the building and did so with the intent to commit a crime against the property therein." Jackson, 112 Wn.2d at 877.

The court found Bencivenga guilty after a bench trial. The problem that existed in Lubers, and was found to be error in Jackson, thus did not arise in Bencivenga. Bencivenga thus does not support the state here. See State v. Brooks, 107 Wn. App. 925, 931, 29 P.3d 45 (2001) ("Brooks' reliance on Jackson is misplaced. As the Supreme Court explained in a more recent case, Jackson does not apply where there is no

² For the same reasons, Lubers makes the same request with respect to the prosecutor's use of the identical analysis on page 25 of the Brief of Respondent.

³ 137 Wn.2d 703, 709, 974 P.2d 832 (1999).

jury instruction at issue such as there was in Jackson. See State v. Bencivenga, 137 Wn.2d 703, 708, 974 P.2d 832 (1999))."⁴

The state also cites State v. Brunson⁵ to support the same claim. Brunson is distinguishable because appellant West, charged with residential burglary, had clearly entered the complainant's kitchen before she roused him. See Brunson, 128 Wn.2d at 101-02 ("A man had climbed halfway through her kitchen window and was leaning on the counter top with his hands straddling the kitchen sink."). The trial court did not err by giving WPIC 60.05; indeed, the instruction was designed for just such circumstances.

The trial court erred by using the instruction in Lubers' trial. The error was not harmless, and this Court should reverse the conviction.

⁴ The state also relies on State v. Chacky, 177 Wash. 694, 695-96, 33 P.2d 111 (1934), where the Court concluded the state presented sufficient proof of intent to survive a half-time motion to dismiss by presenting evidence a security guard observed the accused pry off one of the two locks on the entry door to a grocery store at about midnight before running off at the guard's approach. BOR at 15-16. But because the trial court did not employ an "inference of intent" instruction, Chacky does not apply.

⁵ 128 Wn.2d 98, 101-02, 905 P.2d 346 (1995). The state cites to facts from appellant Eric West's appeal.

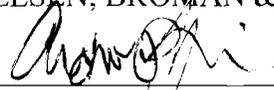
B. CONCLUSION

For the reasons cited herein and in the Brief of Appellant, this Court should reverse Lubers' conviction and remand for a new trial.

DATED this 17 day of August, 2011.

Respectfully submitted,

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DIVISION ONE**

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Respondent,)	
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v.)	COA NO. 66192-2-1
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SEBASTIAN LUBERS,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 17TH DAY OF AUGUST, 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] SEBASTIAN LUBERS
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SIGNED IN SEATTLE WASHINGTON, THIS 17TH DAY OF AUGUST, 2011.

x *Patrick Mayovsky*

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