

NO. 69813-3-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

FREDERICK GARRETT,

Appellant.

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DIVISION I
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JAY WHITE

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Under the invited error doctrine, a defendant cannot materially contribute to an error and then complain of it on appeal. 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. Garrett agreed during a bench trial that the victims' house was not a "dwelling" and that the trial court did not need to consider whether the house was a "dwelling." Did Garrett waive the right to raise this issue on appeal?

2. Following a bench trial, the court must enter written findings that establish a factual basis for each conclusion of law. Here, in its written findings, the court found the victims' house was damaged to the point of being uninhabitable. In its oral findings, the court found, more specifically, that the victims' house was a building and was not a dwelling. The court incorporated its oral findings and conclusions into the written findings. Did the court find that the house was not a dwelling?

3. An essential element is one whose specification is necessary to establish the very illegality of the charged behavior. The fact that a building is "other than a dwelling" is not necessary to

establish the illegality of burglary in the second degree. Has Garrett failed to demonstrate that the phrase is an essential element of the crime?

4. In a bench trial, if the findings of fact and conclusions of law do not state the ultimate facts supporting each element of the offense, that error can be cured by remand. Is remand the proper remedy if this Court finds that the trial court failed to state that the victims' house was "other than a dwelling" in its findings and conclusions?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

Defendant Frederick Garrett was charged by Amended Information with one count of burglary in the second degree and one count of theft of a firearm. CP 100-01. After waiving his right to be tried by a jury, Garrett was tried in a bench trial presided over by the Honorable Jay White. CP 102; 1RP¹ 8.

The court found Garrett guilty of burglary in the second degree and the lesser-included offense of attempted theft of a

¹ There are 4 volumes of verbatim report of proceedings. They will be referred to as follows: 1RP (Nov. 29, Dec. 3, and Dec. 4, 2012); 2RP (Dec. 5, 2012); 3RP (Dec. 6, 2012); and 4RP (Jan. 11, 2013).

firearm. 3RP 324-25, 333. The trial court imposed concurrent stand-range sentences of 52 months of incarceration for each count. CP 112, 114; 4RP 23.

2. SUBSTANTIVE FACTS.

David and Liezyl Smith, along with their three young children, lived in a house located at 675 Harrington Avenue Northeast in Renton, Washington.² 1RP 41. On April 4, 2011, after the Smiths had lived in the home for fifteen years, it was heavily damaged by fire. 1RP 43, 79. The house sustained structural damage to the ceiling and roof, along with smoke and water damage. 1RP 43, 89. Much of the house had to be “gutted out” and repaired. 1RP 66. Due to the damage, the family could no longer live in their home and had to move into a hotel. 1RP 44, 67. The City of Renton declared the house uninhabitable and put up yellow tape and a sign in front of the house. 1RP 67. Although there was extensive damage inside, all walls were still standing, all doors were intact or had been boarded up to seal off the inside of the home, and Liezyl was unsure if any fire damage could be seen from the outside of the house. 1RP 44, 47, 90.

² David Smith will be referred to as “David,” and Liezyl Smith will be referred to as “Liezyl.”

After the fire, most of the Smiths' possessions were soiled or damaged and remained inside the home. 1RP 45. However, the family occasionally returned to the home to gather their belongings, check on the home, and clean up the area. 1RP 45. Several weeks after the fire, while visiting the house, David noticed that a plywood board had been removed from the sliding door in the back of the house. 1RP 47. He nailed the board back in place and returned the following day with his family to check on the house. 1RP 47-48.

On May 1, 2011, Liezyl heard a "banging" noise from inside the house. 1RP 81. She looked inside and saw a man, who was later identified as Frederick Garrett, walking around inside their home. 1RP 81. As her husband went to investigate, Liezyl got their children back inside the car and called 911. 1RP 50-53. David saw Garrett inside the home carrying two rifles and a bag. 1RP 52-53. After David yelled at Garrett, Garrett ran out of the home and jumped over a back fence while carrying two bags. 1RP 53, 57-58. David recognized the bags as his property. 1RP 58.

A short while later, a Renton police officer saw Garrett walking through a nearby school yard. 1RP 103. When the officer

identified himself as law enforcement, Garrett started to run away. 1RP 104. After being chased by two officers on foot, Garrett was detained while trying to scale a chain-link fence. 1RP 105-07. Upon arrest, Garrett had several items belonging to the Smith family in his possession. 1RP 62. Between the Smiths' home and the location where Garrett was detained, a police officer located a duffle bag containing David's wetsuit and his two rifles. 1RP 112-13, 121-22.

Garrett was originally charged in Count I with the crime of residential burglary. CP 1-2. Before trial, Garrett filed a motion to dismiss pursuant to State v. Knapstad, 107 Wn.2d 346, 729 P.2d 48 (1986). CP 7-12. In the motion, Garrett argued that the evidence could not establish a prima facie case for residential burglary because the Smiths' home was not a "dwelling." CP 9. Garrett claimed that because the home was not a dwelling, he could not have committed residential burglary, but "[h]e may have committed theft, criminal trespass, or [b]urglary in the [s]econd [d]egree." CP 9. After Garrett filed this motion, the State amended

the charge in Count I from residential burglary to burglary in the second degree. CP 100-01; 1RP 6; 3RP 268.³

After both sides rested their cases at trial, the court discussed the relevant law with the parties. 2RP 256-57; 3RP 263. The court noted the language in the second degree burglary statute that states: "enters or remains unlawfully in a building other than a vehicle or a dwelling." 3RP 264. The court asked the prosecutor if the State was arguing that the Smiths' burned-out residence did not constitute a "dwelling." 3RP 265. The prosecutor explained that whether the Smiths' home qualified as a "dwelling" was a matter for the trier of fact to determine. 3RP 265. The prosecutor continued to explain that due to the uninhabitable condition of the Smiths' home, the charge was amended to second degree burglary, which requires the State to prove only that the house is a building. 3RP 266. Garrett's counsel agreed with the prosecutor that the Smiths' home did not constitute a dwelling: "Legally it's not a dwelling. So it's a building." 3RP 268-69.

The court asked the parties if they agreed that, as a correct statement of law in this case, the State had to prove that the house was a building and that the trier of fact did not need to consider

³ Although the motion to dismiss was filed, it was never argued in court. 3RP 268.

whether the building was a dwelling. 3RP 269-70. Both Garrett and the State agreed that the State had to prove that the house was a building, and that the court did not need to determine whether the Smiths' home was a dwelling. 3RP 270.

After finding Garrett guilty, in the court's oral findings for Count I, the court found that the Smiths' home was "clearly a building." 3RP 324-25. The court noted that the parties previously agreed that the court did not need to consider whether the house was a dwelling. 3RP 324. In any event, the court found that the Smiths' home did not meet the definition of a dwelling at the time of the burglary due to its damaged condition. 3RP 324-25.

C. ARGUMENT

1. IF THE TRIAL COURT ERRED IN FAILING TO MAKE AN EXPLICIT FINDING AS TO WHETHER THE VICTIMS' HOUSE WAS A "DWELLING," GARRETT INVITED THE ERROR.

Garrett argues that the trial court erred in not making a finding that the victims' burned-out home was "other than a dwelling" as an essential element of burglary in the second degree. However, Garrett invited any error because he agreed that the

victims' home was not a dwelling and that the court did not need to consider whether it was a dwelling.

Under the invited error doctrine, a party "cannot set up an error at trial and then complain of it on appeal." In re Dependency of K.R., 128 Wn.2d 129, 147, 904 P.2d 1132 (1995). If the party claiming error "materially contributed" to the error, then the party's claim is waived. Id. The invited error doctrine applies even to errors of constitutional magnitude otherwise reviewable for the first time on appeal under RAP 2.5. State v. Henderson, 114 Wn.2d 867, 869-70, 792 P.2d 514 (1990). The rule recognizes that "[t]o hold otherwise would put a premium on defendants misleading trial courts." Id. at 868. Courts apply the doctrine strictly, sometimes with harsh results. See, e.g., State v. Studd, 137 Wn.2d 533, 546-47, 973 P.2d 1049 (1999) (holding the doctrine applicable when a defendant proposed a standard WPIC instruction later found to be legally erroneous); State v. Smith, 122 Wn. App. 294, 299, 93 P.3d 206 (2004) (defendant who participated in drafting of jury instruction may not challenge the instruction on appeal).

The offense of burglary is divided into three degrees: first, residential, and second. RCW 9A.52.020; RCW 9A.52.025; RCW 9A.52.030. A person is guilty of residential burglary if, with intent to

commit a crime therein, he “enters or remains unlawfully in a dwelling other than a vehicle.” RCW 9A.52.025. A person is guilty of burglary in the second degree if, with intent to commit a crime therein, he “enters or remains unlawfully in a building other than a vehicle or a dwelling.” RCW 9A.52.030. Although residential burglary and burglary in the second degree are both Class B felonies, the legislature mandated that residential burglary is to be considered a more serious offense than second degree burglary for sentencing purposes. RCW 9A.52.025(2).

“Dwelling” is defined by statute as “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).

“Building” is defined, in relevant part, as “in addition to its ordinary meaning” including “any dwelling, fenced area, vehicle, railway car, cargo container, or any other structure used for lodging of persons or for carrying on business therein, or for the use, sale, or deposit of goods[.]” RCW 9A.04.110(5). Whether a building qualifies as a “dwelling” for purposes of residential burglary depends on “all relevant factors” and is a matter for the trier of fact to determine.

State v. McDonald, 123 Wn. App. 85, 91, 96 P.3d 468 (2004)

(defendant charged with residential burglary was entitled to

instruction on the lesser-included offense of second degree burglary where the owners of the burglarized house were not residing in the house while it was being remodeled, and the jury might have found that the house was not a “dwelling”).

Here, Garrett’s defense counsel filed a pretrial motion to dismiss the charge of residential burglary, arguing that the Smiths’ home did not qualify as a “dwelling.” CP 7-12. After the State amended the charge to burglary in the second degree, Garrett agreed that the Smiths’ home, due to its damaged condition, did not factually constitute a “dwelling.” CP 100-01; 3RP 268-69.

Additionally, Garrett agreed with the prosecutor and the trial court that the court did not need to consider whether the Smiths’ house was a “dwelling” for the charge of burglary in the second degree. 3RP 270.

Now, after Garrett explicitly invited the court to disregard whether the Smiths’ home qualified as a dwelling, he claims on appeal that whether a building is other than a “dwelling” is an essential element of second degree burglary and the trial court erred in not making that finding. This Court should refrain from reviewing this alleged error because it was invited by Garrett.

2. EVEN IF "OTHER THAN A DWELLING" IS AN ESSENTIAL ELEMENT OF BURGLARY IN THE SECOND DEGREE, THE COURT MADE A FINDING THAT THE VICTIMS' HOME WAS NOT A DWELLING.

Garrett claims that the trial court failed to make a finding that the home was "other than a dwelling." Garrett's claim fails. Even if "other than a dwelling" is an essential element of burglary in the second degree, the court found that the home did not constitute a dwelling due to its damaged condition. In any event, any deficiency in the findings is harmless error because it did not contribute to the verdict where the court clearly considered the issue of whether the home was a dwelling.

Following a bench trial, the court must enter written findings of fact and conclusions of law. CrR 6.1(d); State v. Head, 136 Wn.2d 619, 622, 964 P.2d 1187 (1998). The findings and conclusions enable an appellate court to review the questions raised on appeal. Head, 136 Wn.2d at 622. Each element must be addressed separately to establish the factual basis for each conclusion of law. Id. at 623. Additionally, the findings must state that an element has been met. State v. Alvarez, 128 Wn.2d 1, 19, 904 P.2d 754 (1995).

A trial court's oral opinion, without formal incorporation into the findings, is no more than an oral expression of the court's informal opinion at the time rendered. State v. Mallory, 69 Wn.2d 532, 533, 419 P.2d 324 (1966). However, an oral opinion has a final and binding effect when it is formally incorporated into the written findings and conclusions. Id. at 533-34.

The omission of an essential element from findings and conclusions in a bench trial is subject to harmless error analysis. State v. Banks, 149 Wn.2d 38, 46, 65 P.3d 1198 (2003). The test to determine whether an error is harmless is "whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." Id. at 44 (quoting Neder v. United States, 527 U.S. 1, 7, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)). Stated another way, an error is not harmless beyond a reasonable doubt where there is a reasonable probability that the outcome of the trial would have been different had the error not occurred. Banks, 149 Wn.2d at 44.

Here, even if this Court finds that "other than a dwelling" is an essential element, the trial court found that the Smiths' house was not a dwelling. CP 196-200; 3RP 324-35. Although both parties agreed that the court did not need to consider whether the

house was a “dwelling” as an element of second degree burglary, the court specifically made a finding that the house was not a dwelling due to its damaged condition. 3RP 324-35. In the written findings of fact, the court found the Smiths’ house was damaged by fire and deemed “uninhabitable.” CP 196-97. In its written conclusions of law, without specifically stating that the building was not a dwelling, the court implicitly made that finding by stating that the Smiths’ house was a “building” for purposes of finding Garrett guilty of burglary in the second degree. CP 199.

In its oral findings, the court unequivocally found that the Smiths’ house, due to its damaged condition, was a building and *not a dwelling*. 3RP 324-25. Although the court’s written findings and conclusions are less specific than its oral findings, the written findings explicitly *incorporate the oral findings and conclusions*. CP 200.

Even if this Court finds that “other than a dwelling” is an essential element *and* that element is missing from the findings, any such error is harmless. Here, it is clear that the trial court considered whether the house was a dwelling. 3RP 264-69, 324-35. Additionally, the written findings and conclusions imply that the court found the house was not a dwelling. CP 196-97, 199. As

a result, the trial court's decision would have been the same absent the alleged error; any error was, therefore, harmless beyond a reasonable doubt. See Banks, 149 Wn.2d at 45-46 (trial court's failure to make findings and conclusions regarding the element of knowledge was harmless in a bench trial because the court's findings demonstrated that the court considered knowledge and the findings and conclusions necessitated the inference of knowledge).

3. "OTHER THAN A DWELLING" IS NOT AN ESSENTIAL ELEMENT OF BURGLARY IN THE SECOND DEGREE.

Without citing any authority to support his claim, Garrett argues that "other than a dwelling" is an essential element of second degree burglary. This claim is unpersuasive. Although this appears to be an issue of first impression, the language of the statute and Washington cases interpreting similar statutory language demonstrate that "other than a dwelling" is distinguishing language, not an essential element.

An "essential element is one whose specification is necessary to establish the very illegality of the behavior" charged. State v. Johnson, 119 Wn.2d 143, 147, 829 P.2d 1078 (1992) (citing United States v. Cina, 699 F.2d 853, 859 (7th Cir), cert.

denied, 464 U.S. 991 (1983). 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.

Here, to establish the illegality of the behavior, the State must show that a person entered or remained unlawfully in a building. The additional language “other than a vehicle or a dwelling” is not necessary to establish the very illegality of the behavior. Rather, “other than... a dwelling” simply distinguishes burglary in the second degree from the more serious offense of residential burglary. RCW 9A.52.025. This is consistent with the Legislature’s intent that residential burglary is “to be considered a more serious offense than second degree burglary.” RCW 9A.52.025(2). Furthermore, regarding “other than a dwelling” as distinguishing language, rather than an essential element, is supported by the burglary in the second degree WPIC,⁴ which designates “other than a dwelling” as optional language. WPIC 60.04.

Several Washington cases demonstrate that “other than a dwelling” is not an essential element. In State v. Ward, the

⁴ Washington Pattern Jury Instructions: Criminal.

Washington Supreme Court held that the phrase “does not amount to assault in the first or second degree” is not an essential element of felony violation of a no-contact order. 148 Wn.2d 803, 813, 64 P.3d 640 (2003). Instead, the court found that the language served to explain that all assaults committed in violation of a no-contact order will be penalized as felonies. Id. In State v. Rogers, a prosecution for possession of stolen property, the court held that the State must present evidence of the stolen property’s value *only* when the State seeks to convict the defendant of an offense requiring a greater value than the specified amount. 30 Wn. App. 653, 655, 638 P.2d 89 (1981).

Similarly, in State v. Tinker, the Washington Supreme Court held that the language in the former theft in the third degree statute, “does not exceed two hundred and fifty dollars in value,” is not an essential element. 155 Wn.2d 219, 220, 118 P.3d 885 (2005). Rather “does not exceed two hundred and fifty dollars in value” serves to distinguish theft in the third degree from higher degrees of theft where a value amount must be proven. Id. at 222-23.

Moreover, adopting Garrett’s contention that “other than a dwelling” is an essential element would have absurd results. If this Court were to interpret the statute as requiring the State to prove

that a building was “other than a dwelling” in order to prove burglary in the second degree, it would place a defendant in the awkward position of arguing that his conduct amounted to residential burglary, a more serious offense than the State charged. This interpretation was specifically rejected in Ward and Tinker. Ward, 148 Wn.2d at 812-13; Tinker, 155 Wn.2d at 224-25. Because Garrett’s claim that “other than a dwelling” is an essential element is contrary to the statutory language, case law, and would have absurd results, it should be rejected by this Court.

4. IF THIS COURT FINDS ERROR, THE PROPER REMEDY IS REMAND.

Garrett claims that the remedy for this alleged error would be reversal of his burglary conviction. This is incorrect. When findings of fact and conclusions of law do not state the ultimate facts for each element of the offense, the proper remedy is to remand for the trial court to enter findings based solely on evidence in the record.

After a bench trial, if the findings of fact and conclusions of law do not state the ultimate facts for each element of the offense, that error can be cured by remand for the trial court to enter such findings. Alvarez, 128 Wn.2d at 19. The only purpose of remand is

to allow the trial court an opportunity to enter more adequate findings of fact from the evidence already heard. Id. at 20-21. Thus, here, if this Court finds error in the trial court's findings of fact and conclusions of law, the proper remedy is remand.

D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Garrett's convictions.

DATED this 25 day of September, 2013.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

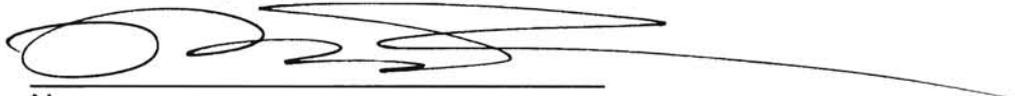
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Gregory C. Link, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the BRIEF OF RESPONDENT, in STATE V. FREDERICK GARRETT, Cause No. 69813-3 -I, in the Court of Appeals, Division I, for the State of Washington.

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

Dated this 25 day of September, 2013

A handwritten signature in black ink, consisting of a large, stylized 'G' followed by several loops and a long horizontal stroke extending to the right.

Name
Done in Seattle, Washington