

original

Court of Appeals No. 34648-6-II

2007-11-14

2007-11-14

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COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON

Plaintiff/Respondent,

v.

SEAN WESLEY CROCKER,

Defendant/Appellant.

BRIEF OF APPELLANT

Appeal from the Superior Court of Kitsap County,
Cause No. 06-1-00012-7
The Honorable Theodore Spearman, Presiding Judge

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I. ASSIGNMENTS OF ERROR

1. There was insufficient evidence to convict Mr. Crocker of residential burglary.
2. The prosecutor engaged in misconduct during closing argument.
3. Mr. Crocker received ineffective assistance of counsel.

II. ISSUES PRESENTED

1. Was there sufficient evidence to convict Mr. Crocker of residential burglary where Mr. Crocker admitted unlawfully entering a garage and was arrested therein, but did not have any property that belonged to the owner on his person and nothing was missing from the garage and Mr. Crocker explained his non-criminal intent in entering the garage? (Assignment of Error No. 1)

2. Did the prosecutor commit misconduct that was prejudicial to the defense when he stated a fact not in evidence that negated an inference that someone other than Mr. Crocker had “rifled through” the Enderles’ property? (Assignment of Error No. 2)

3. Did Mr. Crocker receive ineffective assistance where (1) defense counsel failed to object to the prosecutor’s misconduct during closing argument and (2) failed to request an instruction for the lesser included crime of first-degree criminal trespass? (Assignment of Error No. 3)

III. STATEMENT OF THE CASE

On December 31, 2005, Mrs. Ted Enderle heard someone in her two-story garage at about 2:00 a.m and woke up her husband. CP 81. Mr. Enderle heard footsteps go up the garage staircase, then turned on the floodlights that illuminate his driveway. CP 83. While Mrs. Enderle called 911 (CP 85), Mr. Enderle went outside the house and saw that the rear door of the garage, which he had left unlocked, was open. CP 84. Mr. Enderle used the remote control to open the front garage door. CP 85.

The Enderles then waited in the bedroom, watching their driveway and yard to see if anyone exited the garage, until police arrived. CP 85-86. No one exited the garage before the police arrived. CP 86. Police found Sean Crocker on the second story of the garage when they arrived 10-15 minutes after the 911 call. CP 61; CP 64.

Mr. Enderle testified that nothing was taken from his garage on December 31, 2005. CP 96. He also testified that construction was ongoing in the garage, and that the contractor doing work in the garage had "been going in and out and storing things there." CP 84.

Mr. Crocker was arrested at the scene for residential burglary. CP4. Mr. Crocker was initially charged with burglary in the second degree. CP 1. By Amended Information, Mr. Crocker was charged with residential burglary. CP 31.

Trial to the jury resulted in a guilty verdict. RP 148. On stipulated facts, the trial court found that Mr. Crocker was in community custody at the time of the crime, requiring that an additional point be added to Mr. Crocker's offender score. RP 152-155; CP 70-73.

The trial court declined to give a DOSA, and Mr. Crocker was sentenced to 36 months incarceration. 3/24/06 RP 9. Notice of Appeal was timely filed on March 24, 2006.

IV. ARGUMENT

A. There was insufficient evidence to convict Mr. Crocker of residential burglary.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Salinas*, 119 Wn.2d at 201, 829 P.2d 1068 (citation omitted). Circumstantial evidence and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980) (citing *State v. Gosby*, 85 Wn.2d 758, 539 P.2d 680 (1975)).

The elements of residential burglary are unlawful entry or remaining in a dwelling with intent to commit a crime against a person or

property therein. RCW 9A.52.025(1). Mr. Crocker admitted that he unlawfully entered the Enderle's garage. RP 102. The first element of residential burglary was thus established.

Mr. Crocker testified that he went inside the garage "looking for a bathroom." RP 101. He stated that he used his flashlight, went up the stairway in the garage "looking around up there for about – for a bathroom and the door to the bathroom" and that he laid down on the floor and went to sleep, having smoked "a lot" (CP 104) of marijuana that night. RP 101-104. He testified that he heard the garage door open, then went back to sleep, and woke up when the police arrived and "asked to see his arms." CP 104. Police found Mr. Crocker "laying face down on his stomach with his hands proned out in front of him." RP 62.

No items were missing from the Enderle's garage. RP 96. Mr. Crocker had no burglar's tools on his person. RP 67. Mr. Ederle testified that a loose dust cover he had placed over a restored car had been pulled aside and part of it was caught in the trunk, as if it had been opened, and that he did not remember leaving it uncovered. RP 87. Mr. Ederle also testified that the lid of a tool chest was opened, and some items had been stacked on top of the toolbox, and that he always put his tools back in the chest. RP 88-89.

The prosecutor summarized the “evidence” of Mr. Crocker’s intent to commit a crime to the jury in closing: tools were not in the tool chest; the dust cover over the restored car was pinched between the body of the car and the trunk lid, which Mr. Enderle stated “indicated to [him] someone had opened that and closed it again” (RP 87); Mr. Crocker was found wearing “a black hooded sweatshirt”; and Mr. Crocker had a flashlight in his pocket. RP 130.

No fingerprints were taken from the restored car, nor were any fingerprints taken from the tool chest or the items stacked on top of the tool chest. There was thus no direct evidence that Mr. Crocker had touched either the tool chest or the restored car. Mr. Crocker testified that he did not touch the tool chest or the restored car, did not intend to steal anything or to do any damage to the property when he entered the garage. RP 105. Instead, he testified that he had entered the garage to find a bathroom. RP 100-101.

Further, Mr. Enderle had testified that his contractor, who had been working on the “95% finished” (RP 82) garage, had been going in and out of the garage through the door that Mr. Enderle left unlocked for the contractor to use as he completed electrical and siding work on the garage. RP 82.

The State was required to prove Mr. Crocker's intent to commit a crime inside of the garage beyond a reasonable doubt. The State did not prove that Mr. Crocker had touched anything in the garage, Mr. Crocker had no burglar's tools and no property belonging to the Enderles on his person when he was arrested. Wearing a black hooded sweatshirt and carrying a small flashlight do not prove intent to commit a crime beyond a reasonable doubt.

The jurors were instructed on a permissive inference of intent to commit a crime based on illegal entry into a dwelling (CP 66), but the State was required to show that the inference more likely than not flow[ed] from the proven fact of illegal entry. *See State v. Deal*, 128 Wn.2d 693, 700, 911 P.2d 996 (1996) (quoting *State v. Brunson*, 128 Wn.2d 98, 107, 905 P.2d 346 (1995)). Without finding his fingerprints anywhere in the garage, finding no burglar's tools and no stolen property on his person, the inference of an intent to commit a crime inside the garage does not more likely than not flow from his admitted illegal entry.

The State did not prove intent to commit a crime beyond a reasonable doubt. Mr. Crocker's conviction should be reversed for insufficiency of evidence.

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B. The prosecutor committed misconduct during closing argument that prejudiced the defendant.

When a defendant claims prosecutorial misconduct, he bears the burden of establishing the impropriety of the prosecutor's comments as well as their prejudicial effect. *State v. Schlichtmann*, 114 Wn. App. 162, 167, 58 P.3d 901 (2002).

The prosecutor told the jury during closing argument:

You also heard from Mr. Enderle that his garage things have been rifled through. He knows that the trunk was opened by someone. He knows it wasn't him. **And he knows that it happened in between the time he went to bed and the time that he did the walk-through with the police. The same is true with the tools.**

RP 122 (emphasis added).

Mr. Enderle did **not** testify that he knew things had "been rifled through" between the time he went to bed on December 31, 2005 and the time he did a walk-through of the garage with the police during the early morning hours of January 1, 2006. *See* RP 79-96. Mr. Enderle stated that he "had been in the garage the night before," and **knew that the rear door of the garage had been closed the night before the incident.** RP 84 (emphasis added). The prosecutor's argument included "facts not in evidence," which constitutes misconduct. *See State v. Belgarde*, 110 Wn.2d 504, 508, 755 P.2d 174 (1988).

Hearing the “fact” that Mr. Enderle knew his property had been “rifled through” between the time he went to bed on December 31, 2005 and the time he walked through the garage with the police during the early morning hours of January 1, 2006 was highly prejudicial. The inference was that Mr. Crocker was the only person who could have “rifled through” Mr. Enderle’s property during those few hours, and eliminated the reasonable inference that Mr. Enderle’s contractor had “rifled through” Mr. Enderle’s property as he was working on the garage.

Because there is a substantial likelihood that the prosecutor’s misconduct affected the jury’s verdict, the Court should reverse Mr. Crocker’s conviction.

C. Mr. Crocker received ineffective assistance of counsel.

To show ineffective assistance of counsel, a Washington defendant must first “demonstrate that his attorney’s representation fell below an objective standard of reasonableness.” *State v. Klinger*, 96 Wn. App. 619, 622, 980 P.2d 282 (1999). “Second, a defendant must show that he or she was prejudiced by the deficient representation.” *Id.* (quoting *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995)). “Prejudice exists if ‘there is a reasonable probability that, except for counsel’s unprofessional errors, the result of the proceeding would have been different.’” *Id.* (quoting *McFarland*, 127 Wn.2d at 335, 899 P.2d 1251).

Finally, a defendant has the burden of showing that there was “no legitimate strategic or tactical rationale for the challenged attorney conduct.” *Klinger*, 96 Wn. App. at 623, 980 P.2d 619.

1. Defense counsel did not object to the prosecutor stating facts not in evidence.

As discussed above, the prosecutor stated a fact not in evidence during closing argument that was highly prejudicial to Mr. Crocker’s defense: i.e., that Mr. Enderle knew that his property had been “rifled through” between the time he went to bed on December 31, 2005 and the time he walked through his garage with police during the early morning hours of January 1, 2006. Defense counsel failed to object and request a curative instruction or to move for a mistrial.

Reasonably competent counsel would have raised an objection and requested a curative instruction or a mistrial in light of the highly prejudicial nature of the prosecutor’s statement. Counsel’s failure to do so is an appropriate basis for seeking review for ineffective assistance of counsel. *See State v. Dickerson*, 69 Wn. App. 744, 748, 850 P.2d 1366, *review denied*, 122 Wn.2d 1013, 863 P.2d 73 (1993).

Had defense counsel objected and obtained a curative instruction, the jury could have reasonably inferred that the property had been “rifled through” by the contractor who was working on the Enderles’ garage.

There is a reasonable probability that the result of the trial would have been different if an objection had been made and a curative instruction had been given.

2. Defense counsel failed to seek instructions on a lesser included crime.

A defendant has a statutory right to present lesser included offense instructions to the jury. *State v. Gamble*, 154 Wn.2d 457, 462, 114 P.3d 646 (2005). A defendant is entitled to an instruction on a lesser included offense if two conditions are met: first, each of the elements of the lesser offense must be a necessary element of the offense charged; second, the evidence in the case must support an inference that the lesser crime was committed. *State v. Workman*, 90 Wn.2d 443, 447-448, 584 P.2d 382 (1978).

RCW 9A.52.070 describes criminal trespass in the first degree: “A person is guilty of criminal trespass in the first degree if he knowingly enters or remains unlawfully in a building.” It has been determined that first degree criminal trespass is a lesser included offense of residential burglary. *See State v. West*, 18 Wn. App. 686, 691, 571 P.2d 237 (1977), *review denied*, 90 Wn.2d 1001 (1978). *See also State v. McDonald*, 123 Wn. App. 85, 90, 96 P.3d 468 (2004) (second degree burglary is an inferior degree of residential burglary) and *State v. Soto*, 45 Wn. App. 839,

841, 727 P.2d 999 (1986) (first-degree criminal trespass is a lesser included crime of second-degree burglary). Thus, the first prong of *Workman* is satisfied.

The factual prong of *Workman* is satisfied if the evidence supports an inference that the lesser crime was committed. In this case, the evidence supports an inference that Mr. Crocker committed only criminal trespass in the first degree because he knowingly entered the Enderle's garage unlawfully, but testified that he did so without any intent to commit a crime while inside the garage. Further, when police contacted Mr. Crocker, he had no property belonging to the Enderle's on his person, no burglar's tools on his person, and did not attempt to flee when Mr. Enderle opened the garage door. The evidence supports an inference that Mr. Crocker committed the crime of first-degree criminal trespass only. He was entitled to an instruction on that lesser included crime.

Defense counsel failed to request a lesser-included instruction and did not present any argument that Mr. Crocker was guilty only of first-degree criminal trespass. There is no strategic reason for failing to request a lesser-included jury instruction or arguing that a defendant was guilty only of a lesser crime where the evidence supported the argument and instruction. Mr. Crocker received ineffective assistance from his counsel.

There is a reasonable probability that the result of the trial would have been different if the jury had been instructed on first-degree criminal trespass because the evidence supported a conclusion that Mr. Crocker committed only that lesser crime.

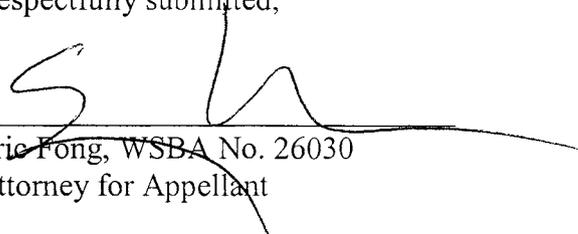
V. **CONCLUSION**

There was insufficient evidence to convict Mr. Crocker of residential burglary. His conviction should be reversed and the case dismissed.

Alternatively, the Court should reverse Mr. Crocker's conviction for residential burglary and remand for a new trial because Mr. Crocker received ineffective assistance when his counsel failed to object to prosecutor misconduct during closing argument that was highly prejudicial to the defense and failed to request a jury instruction on the lesser included crime of first-degree criminal trespass.

DATED this 11 day of July, 2006.

Respectfully submitted,


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Attorney for Appellant

COURT OF APPEALS

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STATE OF WASHINGTON

BY: mm

IN THE COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

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vs.

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AFFIDAVIT OF MAILING

The undersigned, being first duly sworn, under oath, states: That on the 14th day of July, 2006, affiant deposited in the United States mails, a properly stamped and addressed envelope directed to:

Mr. David Ponzoha
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the original and one copy of the Brief of Appellant, and to

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Mr. John Wesley Crocker
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a true copy of the Brief of Appellant.

Ann Blankenship
ANN BLANKENSHIP

SUBSCRIBED AND SWORN to before me this 14th day of July, 2006.

Meredith Nora Orpilla
MEREDITH NDRA ORPILLA
NOTARY PUBLIC in and for the State of
Washington, residing at Port Orchard.
My commission expires 9-11-06.

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