

No. 41458-9-II

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

STATE OF WASHINGTON,

Respondent,

v.

PAUL DANIELS,

Appellant.

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

The Honorable Thomas McPhee, Judge
Cause No. 10-1-00592-1

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether second degree burglary is an alternative means crime that requires the State to prove the crime, or category of crimes, that the defendant intended to commit inside the building that he entered or in which he remained unlawfully.

2. Whether Daniels can raise for the first time on appeal a claim that the court exceeded its authority when it ordered the defendant to pay more than \$250 in jury costs, and if so, whether the matter should be remanded for resentencing.

B. STATEMENT OF THE CASE.

The State accepts the appellant's statement of the substantive and procedural facts.

C. ARGUMENT.

1. Daniels did receive a unanimous verdict. He is incorrect that the required intent to commit a crime against a person or property creates alternative means of committing the offense of second degree burglary.

Daniels was convicted of second degree burglary. [CP 131]

RCW 9A.52.030 creates the crime of second degree burglary with this language:

(1) 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.

The jury instructions contained virtually the same language:

A person commits the crime of burglary in the second degree when he or she enters or remains unlawfully in a building with the intent to commit a crime against a person or property therein.

Jury Instruction No. 8 [CP 40] "Building" was defined in Jury Instruction No. 9 as including any fenced area in addition to the ordinary meaning of the word. [CP 40] The elements of the crime were defined for the jury in Instruction No. 12:

To convict the defendant of the crime of burglary in the second degree each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about April 14, 2010, the defendant entered or remained unlawfully in a building;

(2) That the entering or remaining was with intent to commit a crime against a person or property therein; and

(3) That this act occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

[CP 41]

On appeal, Daniels argues that the language of RCW 9A.52.030, "with intent to commit a crime against a person or property therein", creates alternative means of committing

second degree burglary. The information charged the statutory language and the jury instructions included the statutory language. At trial, the State did not present any evidence of intent to commit a crime against a person inside the Hertz Equipment Rental premises, and thus Daniels claims that the jury was improperly instructed on an alternative which the State did not prove. Appellant's Opening Brief at 4, 6.

To support his argument Daniels cites to State v. Tresenriter, 101 Wn. App. 486, 4 P.3d 145 (2000). However, Tresenriter addressed the sufficiency of the charging document, not whether or not the language cited creates alternative means of committing the crime of burglary. Id., at 489, 492. In that case the information charged that Tresenriter entered or remained unlawfully in a building with the intent to commit a crime against a person, without mentioning a crime against property. Id., at 490. The jury was instructed, however, that a person could be guilty of burglary (in that case first degree burglary) if he had the intent to commit a crime against either a person or property. Id., at 490. The evidence presented at trial

showed only that Tresenriter had committed a property crime, and thus the court held that he had not received adequate notice of the crime of which he was charged. Id., at 492.

Daniels, on the other hand, was charged as follows:

In that the defendant, PAUL GENE DANIELS, in the State of Washington, on or about April 14, 2010, with intent to commit a crime against a person or property therein, did enter or remain unlawfully in a building.

[CP 3]

In State v. Bergeron, 105 Wn.2d 1, 711 P.2d 1000 (1985), the Supreme Court addressed the question of whether or not the intent to commit a specific crime inside the burglarized premises is an element of the crime of burglary, and concluded that it is not. Id., at 4. “The intent required by our burglary statutes is simply the intent to commit any crime against a person or property inside the burglarized premises.” Id. In so holding, the Bergeron court overruled State v. Johnson, 100 Wn.2d 607, 674 P.2d 145 (1983), which held to the contrary, on that issue. Id. The court discussed the law relating to burglary going back to 1890, citing to Linbeck v. State, 1 Wash. 336, 337-38, 25 P.

452 (1890), which also held that the State was not required to charge or prove the specific crime committed in the premises burglarized. Bergeron, 105 Wn.2d at 7-8.

[W]e now hold that the specific crime or crimes intended to be committed inside burglarized premises in *not* an element of burglary that must be included in the information, jury instructions or in the trial court's finding and conclusions. It is sufficient if the jury is instructed (or that the court find and conclude, as it did in the present case) in the language of the burglary statutes.

Id., at 16, (emphasis in original).

It follows that if the State does not have to prove the specific crime the defendant intended to commit inside the premises he entered or in which he remained unlawfully, it does not have to prove the category of crime either, and therefore the language regarding the intent to commit a crime against a person or property does not create alternative means of committing the burglary. "The intent required by our burglary statutes is simply the intent to commit any crime against a person or property inside the burglarized premises." Bergeron, 105 Wn.2d at 4; *see also State v. Sandoval*, 123 Wn. App. 1, 4, 94 P.3d 323 (2004);

State v. Pollnow, 69 Wn. App. 160, 163, 848 P.2d 1265 (1993).

RCW 9A.52.030 could say “with intent to commit a crime therein,” and have the same meaning as “with intent to commit a crime against a person or property therein.” The additional words simply clarify that the intent to commit any crime will satisfy that element of the offense. Because the language does not create alternative means of committing the crime of burglary, Daniels’ analysis of the law relating to charging and instructing the jury when the crime actually does contain alternative means is irrelevant. Even Johnson, 100 Wn.2d 607, which was partially overruled by Bergeron, held that the burglary statute describes a single offense and jury unanimity on underlying intent is not required. Johnson, 100 Wn.2d at 626.

Even if there were alternative intents, there would still be no error. The State does not dispute that the evidence showed only intent to commit a property crime, not a crime against a person. However, proof of only one intent would not require reversal of the conviction because it was clear to the jury that only a property crime was involved.

If one or more of the alternative means is not supported by substantial evidence, the verdict will stand only if we can determine that the verdict was based on only one of the alternative means and that substantial evidence supported that alternative means.

State v. Fleming, 140 Wn. App. 132, 136, 170 P.3d 50 (2007), *overruled on other grounds*, State v. Mendoza, 165 Wn.2d 913, 205 P.3d 113 (2009).

Here there was ample proof of intent to commit a crime against property and none of intent to commit a crime against a person, and thus because the jury found intent, which is an element of the offense, it must have found intent to commit a crime against property.

The language referring to intent to commit a crime against a person or property does not create an alternative means crime. The charging document and the jury instructions were correct. Daniels' conviction for burglary should be affirmed.

2. The imposition of legal financial obligations cannot be raised for the first time on appeal as a matter of right. Daniels has not asked for discretionary review. Therefore, this court should decline to remand his sentence for correction.

The sentencing court imposed jury costs of \$147.50 and \$1035.50. [11/16/10 RP 11] Daniels did not object. *Id.* Daniels now argues that these costs exceed the statutory maximum and that he can raise the issue for the first time on appeal because it is an erroneous sentence. Appellant's Opening Brief at 9-14. The State agrees with the first assertion and disagrees with the second.

RCW 10.46.190 provides that a person convicted of a crime is liable for the costs of the proceedings against him, including a jury fee "as provided for in civil actions." RCW 36.18.016(3)(b) allows a jury demand fee of \$250 for a jury of twelve in criminal cases, the same amount as allowed in RCW 36.18.016(3)(a) for civil cases. RCW 10.01.160(2) includes jury fees pursuant to RCW 10.46.190 among the costs of prosecution that the State may recoup. The State agrees that the court should have imposed \$250 in jury fees.

However, because Daniels did not object in the trial court, he cannot raise the issue as a matter of right on direct appeal. Rules of Appellate Procedure (RAP) 2.5(a) provides:

The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right. A party or the court may raise at any time the question of appellate court jurisdiction. A party may present a ground for affirming a trial court decision which was not presented to the trial court if the record has been sufficiently developed to fairly consider the ground. A party may raise a claim of error which was not raised by the party in the trial court if another party on the same side of the case has raised the claim of error in the trial court.

Daniels cites to several cases to support his claim that this issue can be raised for the first time on appeal, but none of those cases deal with legal financial obligations. State v. Bahl, 164 Wn.2d 739, 193 P.3d 678 (2008), concerned a vagueness challenge to conditions of community custody. In re Pers. Restraint of Cartle, 93 Wn.2d 31, 604 P.2d 1293 (1980), was a pre-SRA case dealing with a deadly weapon sentencing enhancement. State v. Eilts, 94 Wn.2d 489, 617 P.2d 993 (1980), also a pre-SRA case, addressed a situation where probation was made contingent on restitution being paid. State v. Murray, 118 Wn. App. 518, 77 P.3d 1188 (2003), was a challenge to a sentence modification permitting electronic home

monitoring. None of these cases were about the amount of money imposed.

As Daniels argued in his brief, the authority for the court to impose costs comes from statutes, not the constitution. State v. Smits, 152 Wn. App. 514, 519, 216 P.3d 1097 (2009). He has not claimed, nor is there any reason that he could claim, that this is a manifest error affecting a constitutional right. RAP 2.5(a). Nor does his assignment of error fall under any of the other exceptions to the general rule that this court will refuse to review any claim of error not raised in the trial court. State v. McFarland, 127 Wn.2d 322, 332, 899 P.2d 1251 (1995); State v. Phillips, 65 Wn. App. 239, 243, 828 P.2d 42 (1992).

In Phillips, the court had imposed legal financial obligations without entering formal findings regarding the defendant's ability to pay. The court found that the defendant's failure to object below waived the statutory—not constitutional—right to have the findings entered by the court. In addition, because the defendant had the right, pursuant to RCW 10.01.160(4) to petition the court for remission of costs if and when the State tried to collect them,

the issue was not ripe for review. Id., at 244. Daniels does not have a constitutional claim and thus cannot bring it as of right for the first time on appeal. Further, because the State has apparently not yet attempted to collect the challenged costs, he is arguably not yet “aggrieved” such that he can seek review. RAP 3.1 provides that “[o]nly an aggrieved party may seek review by the appellate court.”

The State does recognize that this court has the authority to waive the requirements of the Rules of Appellate Procedure. RAP 1.2(c) provides:

The appellate court may waive or alter the provisions of any of these rules in order to serve the ends of justice, subject to the restrictions in rule 18.8(b) and (c).

RAP 18.8(b) and (c) concern time limits for filing notices of appeal, motions for discretionary review, petitions for review, motions for reconsideration, and motions to modify decisions.

In State v. Hathaway, 161 Wn. App. 634, 251 P.3d 253 (2011), this court did, relying on RAP 1.2(c), agree to consider a claim that the jury costs imposed exceeded the statutory maximum amount, and remanded for correction of the judgment and

sentence. The State respectfully asks this court to decline to follow Hathaway in this case. Remanding cases to the trial court to correct errors not brought to its attention at the time they occurred is an expensive and inefficient method of correcting those errors. Particularly where the defendant is facing only monetary obligations, which he can seek to remit at the time the State attempts to collect them, as opposed to incarceration or conditions of community custody, the focus should be on requiring defendants to make their objections in the trial court rather than waiting to do so on appeal.

[A]nyone familiar with the work of courts understands that errors are a constant in the trial process, that most do not much matter, and that a reflexive inclination by appellate courts to reverse because of unpreserved error would be fatal.

United States v. Padilla, 415 F.3d 211, 224 (CA1 2005) (en banc), (Boudin, C. J., concurring).

D. CONCLUSION.

Daniels is incorrect that second degree burglary is an alternative means crime because the statute requires the intent to commit a crime against a person or property. The State respectfully asks this court to affirm his conviction.

Because Daniels did not raise in the trial court the amount of jury costs imposed he cannot do so for the first time on appeal as a matter of right. He has not asked this court to grant discretionary review on this issue and the State respectfully asks this court to decline to review it.

Respectfully submitted this 9th day of August, 2011.



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CERTIFICATE OF SERVICE

I certify that I served a copy of the Brief of Respondent, on all parties or their counsel of record on the date below as follows:

- US Mail Postage Prepaid
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I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 9th day of August, 2011, at Olympia, Washington.


Chong McAfee