

FILED

MAY 09 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 30379-9-III

**STATE OF WASHINGTON
COURT OF APPEALS - DIVISION III**

STATE OF WASHINGTON,

Respondent,

vs.

ANDRES ALEGRIA,

Appellant.

**APPEAL FROM THE SUPERIOR COURT FOR
FRANKLIN COUNTY**

BRIEF OF RESPONDENT

**SHAWN P. SANT
Prosecuting Attorney**

by: **Kim M. Kremer, #40724
Deputy Prosecuting Attorney**

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Pasco, WA 99301
Phone: (509) 545-3543**

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TABLE OF CONTENTS

I. STATEMENT OF THE CASE..... 1

II. ARGUMENT..... 2

A. **INCLUSION OF THE WORD “THEFT” IN THE
INFORMATION DOES NOT CHANGE WHAT THE
STATE WAS REQUIRED TO PROVE** 2

B. **THE RECORD IS SUFFICIENT TO SHOW WHAT
CRIME APPELLANT INTENDED TO COMMIT
WHEN HE ILLEGALLY ENTERED THE IMPOUND
YARD** 2

C. **IF INCLUSION OF THE WORD “THEFT” WAS
SURPLUSAGE, BECAUSE THERE WAS NO JURY
TO INSTRUCT, THERE IS NO ERROR**..... 4

III. CONCLUSION 6

TABLE OF AUTHORITIES

Cases

<u>Stae v. Heidari</u> , 159 Wn.App. 601, 609, 248 P.3d 550, <u>review granted</u> , 171 Wn.2d 1027, 257 P.3d 662 (2011).	8
<u>State v. Bergeron</u> , 105 Wn.2d 1, 711 P.2d 1000 (1985).	6, 7
<u>State v. Berlin</u> , 133 Wn.2d 541, 947 P.2d 700 (1997)	7
<u>State v. Bray</u> , 52 Wn.App. 30, 756P.2d 1332 (1988)	7
<u>State v. Doogan</u> , 82 Wn.App. 185, 917 P.2d 155 (1996)	7
<u>State v. Gatlin</u> , 158 Wn. App. 126, 130-31, 241 P.3d 443, 446 (2010)	5
<u>State v. Hickman</u> , 135 Wn.2d 97, 954 P.2d 900 (1998)	7
<u>State v. Hobbs</u> , 71 Wn.App. 419, 423, 859 P.2d 73, 76 (1993).....	8
<u>State v. Pollnow</u> , 69 Wn.App. 160, 163, 848 P.2d 1265, 1266 (1993) (quoting CrR 2.1(b)).....	4, 6
<u>State v. Tvedt</u> , 153 Wn.2d 705, 718, 107 P.3d 738, 736 (2005)	8

Statutes

RCW 9A.56.020	6
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I. STATEMENT OF THE CASE

On April 20, 2011, at approximately 10:30 p.m., Pasco Police officers were dispatched to Casaday Bee-Line Towing at 1716 West Lewis Street in Pasco, Franklin County, Washington. CP 24. Dispatch advised responding officers that a camera in the fenced compound activated when a person entered the compound. Id. Officer Scott Warren of the Pasco Police Department arrived on scene and checked the fence line. Id. He found a section of chain link fence that was cut. Id. Officers found Appellant Andres Alegria inside the compound, hiding under another vehicle. Id., RP 7-8. Officers also found a pair of bolt cutters under the motor home where Mr. Alegria was found. RP. 8. Mr. Alegria entered the compound with the intent to access his vehicle. RP 8, 9. The vehicle in question was impounded by the Walla Walla Sheriff's Department on April 20, 2011, at approximately 1:00 a.m. CP 17.

On April 25, 2011, the State filed an Information in Franklin County Superior Court, Juvenile Division, alleging one count of Burglary in the Second Degree. CP 22-23. On September 29, 2011, Judge Cameron Mitchell heard the stipulated facts trial and found Respondent guilty of Burglary in the Second Degree. CP 13-14.

II. ARGUMENT

A. INCLUSION OF THE WORD “THEFT” IN THE INFORMATION DOES NOT CHANGE WHAT THE STATE WAS REQUIRED TO PROVE

“The ... information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged.” State v. Pollnow, 69 Wn.App. 160, 163, 848 P.2d 1265, 1266 (1993) (quoting CrR 2.1(b). When burglary is charged, “[t]he intent to commit a specific named crime inside the burglarized premises is not an “element” of the crime[.]” Id. Here, the State’s Information was sufficient to advise Appellant of the crime with which he was being charged, and what the State would prove at trial.

B. THE RECORD IS SUFFICIENT TO SHOW WHAT CRIME APPELLANT INTENDED TO COMMIT WHEN HE ILLEGALLY ENTERED THE IMPOUND YARD

Appellant correctly states that the trial court’s conclusions read, “Respondent entered Casaday Beeline Towing’s impound yard with the intent to commit a crime within.” However, the trial court’s findings are not the only record this Court will consider. State v. Gatlin, 158 Wn. App. 126, 130-31, 241 P.3d 443, 446 (2010) (“[W]e do not review the court’s findings of fact alone in reviewing an insufficient evidence claim. We review the entire

record to determine whether any rational trier of fact could have found guilt beyond a reasonable doubt.”) The record clearly shows the evidence upon which the trial court relied. Appellant acknowledged at trial that he accessed a fenced-in compound to gain access to his vehicle to take things from within that vehicle. RP 8. The trial court found the impound yard had the superior possessory interest in the vehicle. RP 14.

A theft may be accomplished by “wrongfully obtain[ing] or exert[ing] unauthorized control over the property ... of another[,] with intent to deprive him or her of such property[.]” RCW 9A.56.020. Because the impound yard had the superior possessory interest in the vehicle and its contents, Appellant’s attempt to recover his property was an attempted theft. Pollnow, 69 Wn.App. at 165, 848 P.2d at 1267. There is ample evidence from the record to show the State proved the crime Appellant intended to commit within the impound yard was a theft.

Moreover, a similar argument was made – and rejected - in State v. Bergeron, 105 Wn.2d 1, 711 P.2d 1000 (1985). There, a juvenile appellant was convicted of attempted burglary in the second degree. Bergeron at 1002. In its findings, the trial court found the appellant “did attempt to enter and remain unlawfully in a

building [and he] did so with the intent to commit a crime therein.” Bergeron at 1002. That appellant argued “the particular crime which the defendant intended to commit inside the building or dwelling is an element of the crime of burglary, and that such crime must be specifically charged, instructed on (in a jury trial) and found as a fact (in a trial to the court).” Bergeron at 1004. That appellant further argued “the findings and conclusions do not establish that a crime has been committed and the charge must be dismissed.” Id. Bergeron is factually different in that the trial court specifically declined to make a finding as to what crime that appellant intended to commit. Bergeron at 1006-07. Both the trial court and our supreme court believed there was insufficient evidence upon which the court could determine what crime the appellant intended to commit, but “[u]nmistakably, the [appellant] intended more than a social call.” Bergeron at 1006. Here, there is sufficient evidence in the record to demonstrate Appellant intended to commit a theft within the impound yard.

**C. IF INCLUSION OF THE WORD “THEFT”
WAS SURPLUSAGE, BECAUSE THERE
WAS NO JURY TO INSTRUCT, THERE IS
NO ERROR**

Assuming, *arguendo*, that the court did not find that Appellant intended to commit a theft, the appearance of the word “theft” does not require the State prove an alternative means of committing burglary. Appellant cites State v. Bray for the proposition that this case should be reversed. 52 Wn.App. 30, 756 P.2d 1332 (1988). But Bray and the majority of the cases Appellant cites were decided based upon instructions given to the jury. Bray 133; State v. Berlin, 133 Wn.2d 541, 947 P.2d 700 (1997); State v. Doogan, 82 Wn.App. 185, 917 P.2d 155 (1996), State v. Hickman, 135 Wn.2d 97, 954 P.2d 900 (1998).

‘If there is surplusage in the information, that surplusage need not be carried over into the “to convict” instruction or proved beyond a reasonable doubt *if there is a bench trial.*” State v. Hobbs, 71 Wn.App. 419, 423, 859 P.2d 73, 76 (1993) (emphasis added). “[W]here unnecessary language is included in an information, the surplus language is not an element of the crime that must be proved *unless it is repeated in the jury instructions.*” State v. Tvedt, 153 Wn.2d 705, 718, 107 P.3d 738, 736 (2005) (emphasis added). This was a bench trial; there was no jury to instruct. In re Heidari, 159 Wn.App. 601, 609, 248 P.3d 550, review granted, 171 Wn.2d 1027, 257 P.3d 662 (2011). The State was

not required to prove beyond a reasonable doubt Appellant intended to commit a theft within the impound yard.

III. CONCLUSION

Although the word "theft" appears in the State's information, the State was not required to prove that Appellant did in fact intend to commit a theft when he entered the impound yard. Even so, there is ample information in the record to show that was Appellant's intent when he entered the impound yard. The State respectfully requests this Court affirm Appellant's conviction for Burglary in the Second Degree.

Dated this 8th day of May, 2012.

Respectfully submitted:

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