

No. 32962-3-III

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

FILED
August 24, 2015
Court of Appeals
Division III
State of Washington

STATE OF WASHINGTON,
Plaintiff/Respondent,

vs.

ANTHONY A. JOSEPH,
Defendant/Appellant.

APPEAL FROM THE KITTITAS COUNTY SUPERIOR COURT
Honorable Scott R. Sparks, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The evidence was insufficient to support the conviction of second degree criminal trespass.

2. The trial court erred in instructing the jury on second degree criminal trespass over trial counsel’s objection.

Issues Pertaining to Assignments of Error

1. Does a passenger car constitute a “premises” within the meaning of the second degree criminal trespass statute, RCW 9A.52.080?

2. Does a trial court err in instructing the jury on second degree criminal trespass where as a matter of law a passenger car does not constitute a “premises” within the meaning of RCW 9A.52.080?

B. STATEMENT OF THE CASE

Anthony Albert Joseph was found guilty of third degree assault as charged in count 1 and second degree criminal trespass as a lesser included of count 2. The jury found him not guilty of the charged crime of second degree vehicle prowl.¹ CP 8–9, 91–93.

¹ A person is guilty of vehicle prowling in the second degree if, with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a vehicle other than a motor home, as defined in RCW 46.04.305, or a vessel equipped for propulsion by mechanical means or by sail which has a cabin equipped with permanently installed sleeping quarters or cooking facilities. RCW 9A.52.100(1).

Shortly after 11 p.m. on an October evening Mr. Joseph was awakened by the sound of police knocking on the car window and repeatedly calling out his name. RP 29, 31, 34. Mr. Joseph had appeared to be sleeping while in the recline position in the front passenger seat. RP 33–34. Police were responding to a prowler call regarding a vehicle described as a Blazer. Police knew Mr. Joseph was homeless and did not have a vehicle. RP 33–34. Mr. Joseph got out of the car as requested. He said he had permission to be inside the car from its registered owner but then admitted he did not have permission. RP 34–36. Mr. Joseph was arrested for the crime of vehicle prowling. RP 37.

During the search and while being handcuffed, Mr. Joseph was hostile and angry and tensed his body. RP 36–38. After placing him in the back passenger seat of the patrol car, the officer rolled down Mr. Joseph's rear window from the front seat. As he stood next to the rear door, Mr. Joseph spit at him through a ventilator hole in the side window's plastic protective cover. RP 39–42. The State subsequently charged Mr. Joseph with third degree assault and second degree vehicle prowler. CP 8–9.

Mackenzie Bond testified he owned the 1995 Chevy Blazer, which had broken down on the freeway and been towed into Ellensburg. RP 68–

69. At the time of the incident, it had a blown gasket and was going to be taken to the junk yard. Bond had previously busted out the triangular window behind the driver's seat to retrieve his keys locked inside and agreed someone could get into the car that way. RP 70, 72. As far as Bond knew, nothing was taken from his car. RP 71–72. Although the testimony of the two responding officers was unclear, the State and defense counsel agreed the car was not found on private property and was parked on the street adjacent to an impound lot. RP 31–32, 39, 74–76, 111.

The State proposed jury instructions for first degree criminal trespass including a definition of “building” and for second degree criminal trespass but not including a definition of “premises.” CP 59–61, 62–63; RP 15. Mr. Joseph's counsel did not propose instructions regarding first or second degree criminal trespass. CP 27–45. The court and parties engaged in ongoing discussions whether a vehicle could be a “building” or “premises” under the criminal trespass statutes, and considered the holdings in *State v. Brittain*² and *State v. Brown*³. RP 15, 53–54, 57–67, 88, 96–97, 102–14. Over objection by defense counsel, the

² 38 Wn. App. 740, 689 P.2d 1095 (1984).

³ 50 Wn. App. 873, 751 P.2d 331 (1988).

court instructed the jury regarding the crime of second degree criminal trespass. CP 84–85; RP 102–03, 108–09, 113–14.

THE COURT: I know what you're saying. And -- a simpler way is to think about it like this:

If you have a -- a person that's at a state park, and they have lawful permission to be at the state park, can they go in and sit in somebody else's car that's unlocked. The answer's no. Why not? Even though they're not -- [intending to] do a crime in there, it's still -- they're trespassing in the car. Everybody knows that, not just -- question for us is -- does the criminal statute cover it. And the only way you can get there is [by arguing the car is the] "premises of another." And -- it -- it seems to me under certain circumstances a motor vehicle can be a premise. So I think that's all we need to say.

MS. HOOPER: A motor vehicle can be a premise?

THE COURT: Under the right -- Yeah. --possible for a motor vehicle to be a premise. But that's for the jury to decide, I think, under the facts of the case.

RP 106.

In addition defense counsel objected to the State's request to add language to the WPIC 65.01 defining "premises" to the effect that "premises" could be a motor vehicle. The court declined to alter the WPIC. RP 105–10, 112. Counsel did not request the pattern jury instruction defining "premises" be given to the jury. The jury was instructed regarding second degree vehicle prowling and second degree criminal trespass, but was not given a definition of "premises." CP 82–83,

84–85. The court declared, “I’m going to let you guys argue the facts of this case however you want to.” RP 110.

In closing, the State argued that if the jury couldn’t find Mr. Joseph intended to commit a crime inside the car, it should find him guilty of second degree criminal trespass: “... [C]ommon sense tells us, you can’t just go around walking into somebody else’s vehicle or just staying there without their permission. Everybody knows that. And – these are premises that belong to somebody else. [Mr. Joseph] was there. It was unlawful to be in that [car]. He’s – guilty, at the very least, anyway, of a criminal trespass.” RP 136–37.

In part, defense counsel responded, “And the State has argued to you, ‘Gee, its common sense.’ Yeah. They’re right. It’s common sense. I mean, you just can’t go into a place, a vehicle, that you don’t have permission to be in. But the problem is, they haven’t given us a crime the elements of which we can find based on the evidence.” RP 140. Counsel continued, “I don’t have this other alternative thing to say, ‘Well, this is the statute they should have charged it under,’ because I don’t think we have it in the State of Washington. I don’t think we have something that we can say, ‘Look, this is the one that says you can’t just go and sit in somebody else’s car and take a nap in there.’ And that’s the case

sometimes. Sometimes there is not a criminal statute to fit the situation – unfortunately. And the State is relying on, ‘Gee, don’t you have a problem with that?’ Well, yeah, but – is that really up to us? I mean, it’s up to the legislature to write these things.” RP 141–42.

In rebuttal, the State countered, “... [T]his is criminal trespass in the second degree, - there’s a ‘premises’ that belongs to people. And that includes property – of people. And that – will include this car. ... [I]f premises doesn’t include the car, (inaudible) potentially saying the legislature has not made it a crime to go into somebody else’s vehicle. So, its’ going to be up to you to make a decision as to whether or not Mr. Joseph was unlawfully on somebody else’s premises. ... [The car] in this particular case is a premises of another. It didn’t belong to him; it was somebody else’s, (inaudible) where you can go either in or on. And that’s what the statute says. And that covers a vehicle. ... But the exact statute says for criminal trespass that he has to be – knowingly entering or remaining unlawfully in or upon the premises of another. They wouldn’t have said that unless they were meaning to include various different types of property such as vehicles” RP 147.

Defense counsel did not object to the State’s remarks during its closing. This appeal followed. CP 107.

C. ARGUMENT

Mr. Joseph's rights to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment, were violated where the trial court instructed the jury and the jury was permitted to convict him based on facts that as a matter of law do not constitute the crime of second degree trespass.

As a part of the due process rights guaranteed under both the Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment the state must prove every element of a crime charged beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). In a challenge to a sufficiency of the evidence, the test is whether, viewing the evidence in the light most favorable to the State, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *State v. Gentry*, 125 Wn .2d 570, 596–97, 888 P.2d 1105 (1995). “[A]ll reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant.” *Id.* at 597.

Due process forbids the State from convicting an offender for something that is not a crime. *Johnson v. United States*, 805 F.2d 1284, 1288 (7th Cir.1986). Statutory construction is a question of law and reviewed de novo. *State v. Elmore*, 154 Wn. App. 885, 904-05, 228 P.3d 760 (2010). The primary objective of statutory construction is to carry out the intent of the Legislature. *Bellevue Fire Fighters Local 1604 v. Bellevue*, 100 Wn.2d 748, 751, 675 P.2d 592 (1984), cert. den'd, 471 U.S. 1015, 105 S.Ct. 2017, 85 L.Ed.2d 299 (1985); *Christie–Lambert Van & Storage Co. v. McLeod*, 39 Wn. App. 298, 693 P.2d 161 (1984).

When interpreting a statute, "if the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent." *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002). "All words must be read in the context of the statute in which they appear, not in isolation." *State v. Lilyblad*, 163 Wn.2d 1, 9, 177 P.3d 686 (2008). Only where intent is not clear from the statute's language will a reviewing court look to the legislative history. *In re Marriage of Konzen*, 103 Wn.2d 470, 475, 693 P.2d 97, cert. den'd, 473 U.S. 906, 105 S.Ct. 3530, 87 L.Ed.2d 654 (1985); *Bellevue*, 100 Wn.2d at 754, 675 P.2d 592; *McLeod*, 39 Wn. App. at 302, 693 P.2d 161.

A person is guilty of second degree criminal trespass if he or she knowingly enters or remains unlawfully in or upon premises of another under circumstances not constituting first degree criminal trespass. RCW 9A.52.080(1). A person is guilty of first degree criminal trespass if he or she knowingly enters or remains unlawfully in a building. RCW 9A.52.070(1). For purposes of burglary and criminal trespass, “premises” is defined as including “any building, dwelling, structure used for commercial aquaculture, or any real property.” RCW 9A.52.010(6). Regarding criminal trespass, “building” means a *building in its ordinary sense* and does not include a vehicle. *State v. Brown*, 50 Wn. App. 873, 876–77, 751 P.2d 331 (1988) (concluding the broad definition of “building” found in RCW 9A.04.110(5)⁴ applies to the burglary statutes but does not apply to the criminal trespass statutes).

Mr. Joseph was found sleeping in a Chevy Blazer. A car is not a building, a dwelling, a structure used for commercial aquaculture, or real property. As a matter of law, the evidence was insufficient to establish the

⁴ RCW 9A.04.110(5) provides:

“Building”, in addition to its ordinary meaning, includes 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; each unit of a building consisting of two or more units separately secured or occupied is a separate building;

essential element that by sleeping in the Chevy Blazer Mr. Joseph knowingly entered or remained in or upon the “premises” of another and thereby committed second degree criminal trespass. RCW 9A.52.080(1); Instruction No. 11 at CP 85.

The legislature’s definition is plain. “Premises” as defined in RCW 9A.52.010(6) presents an exclusive list. "Under *expressio unius est exclusio alterius*, a canon of statutory construction, to express one thing in a statute implies the exclusion of the other. Omissions are deemed to be exclusions." *In re Det. of Williams*, 147 Wn.2d 476, 491, 55 P.3d 597 (2002) (citation omitted). Nothing in the definition suggests the language “any building, dwelling, structure used for commercial aquaculture, or any real property” is illustrative. “A court construes a statute’s identification of crimes or other items to be illustrative when the legislature states that the identification is ‘illustrative,’ or provides ‘examples,’ or extends to ‘similar’ or ‘like’ offenses; absent such a signal, we read the legislature’s list as exclusive and complete.” *State v. Soto*, 177 Wn. App. 706, 714, 309 P.3d 596, 599 (2013), as amended (Jan. 14, 2014), citing *In re Postsentence Review of Leach*, 161 Wn.2d 180, 185-86, 163 P.3d 782 (2007). The definition of “premises” is exclusive and complete, and does not include a car.

The conclusion that the criminal trespass statute does not apply to motor vehicles is reinforced by lack of any reference to a vehicle in the definition of “enters or remains unlawfully,” RCW 9A.52.010(5), for purposes of burglary and criminal trespass.⁵ The conclusion is bolstered by the legislature’s inclusion under Chapter 9A.52, Burglary and Criminal Trespass, of the separate crimes of vehicle prowling in the first and second degree. RCW 9A.52.095, .100. *Cf.*, Illinois’ criminal code concerning Offenses Directed Against Property, which instead includes in its trespass

⁵ RCW 9A.52.010(5) provides: “Enters or remains unlawfully.” A person “enters or remains unlawfully” in or upon premises when he or she is not then licensed, invited, or otherwise privileged to so enter or remain.

A license or privilege to enter or remain in a building which is only partly open to the public is not a license or privilege to enter or remain in that part of a building which is not open to the public. A person who enters or remains upon unimproved and apparently unused land, which is neither fenced nor otherwise enclosed in a manner designed to exclude intruders, does so with license and privilege unless notice against trespass is personally communicated to him or her by the owner of the land or some other authorized person, or unless notice is given by posting in a conspicuous manner. Land that is used for commercial aquaculture or for growing an agricultural crop or crops, other than timber, is not unimproved and apparently unused land if a crop or any other sign of cultivation is clearly visible or if notice is given by posting in a conspicuous manner. Similarly, a field fenced in any manner is not unimproved and apparently unused land. A license or privilege to enter or remain on improved and apparently used land that is open to the public at particular times, which is neither fenced nor otherwise enclosed in a manner to exclude intruders, is not a license or privilege to enter or remain on the land at other times if notice of prohibited times of entry is posted in a conspicuous manner.”

subdivision the disparate and distinct crimes of Criminal trespass to vehicles⁶ and Criminal trespass to real property⁷.

Washington case law is also consistent with the conclusion that the criminal trespass statute does not apply to passenger cars. *See e.g. State v. Brittain*, 38 Wn. App. 740, 689 P.2d 1095 (1984) (second degree criminal trespass applies to unlawful entry on private property not constituting a building, such as fenced land); *State v. Mounsey*, 31 Wn. App. 511, 518, 643 P.2d 892 (1982) (second degree criminal trespass applies to unlawful

⁶ 720 Ill. Comp. Stat. Ann. 5/21-2 provides:

§ 21-2. Criminal trespass to vehicles.

(a) A person commits criminal trespass to vehicles when he or she knowingly and without authority enters any part of or operates any vehicle, aircraft, watercraft or snowmobile.

(b) Sentence. Criminal trespass to vehicles is a Class A misdemeanor.

⁷ 720 Ill. Comp. Stat. Ann. 5/21-3 provides:

§ 21-3. Criminal trespass to real property.

(a) A person commits criminal trespass to real property when he or she:

(1) knowingly and without lawful authority enters or remains within or on a building;

(2) enters upon the land of another, after receiving, prior to the entry, notice from the owner or occupant that the entry is forbidden;

(3) remains upon the land of another, after receiving notice from the owner or occupant to depart;

(3.5) presents false documents or falsely represents his or her identity orally to the owner or occupant of a building or land in order to obtain permission from the owner or occupant to enter or remain in the building or on the land;

(3.7) intentionally removes a notice posted on residential real estate as required by subsection (1) of Section 15-1505.8 of Article XV of the Code of Civil Procedure before the date and time set forth in the notice; or

(4) enters a field used or capable of being used for growing crops, an enclosed area containing livestock, an agricultural building containing livestock, or an orchard in or on a motor vehicle (including an off-road vehicle, motorcycle, moped, or any other powered two-wheel vehicle) after receiving, prior to the entry, notice from the owner or occupant that the entry is forbidden or remains upon or in the area after receiving notice from the owner or occupant to depart.

entry on premises other than a building, i.e., open grounds or yards, etc.); *State v. Shelby*, 61 Wn. App. 214, 220, 811 P.2d 682 (1991) (in the context of whether statutes are concurrent, “A person may violate RCW 28A.87.055 when he or she refuses to leave a school-owned motor vehicle. However, because the criminal trespass statute does not apply to motor vehicles, the person would not have necessarily violated RCW 9A.52.080.”).

If the legislature made an error in drafting the statute, as the State argued in closing, this Court “must leave it to the legislature to correct the error.” *State v. Taylor*, 97 Wn.2d 724, 728, 649 P.2d 633 (1982); see also *State v. Mendoza*, 63 Wn. App. 373, 378, 819 P.2d 387 (1991). Appellate courts do not supply omitted language even when the legislature's omission is clearly inadvertent, unless the omission renders the statute irrational. *In re Personal Restraint of Acron*, 122 Wn. App. 886, 891, 95 P.3d 1272 (2004). “To do so would [be] to arrogate to ourselves the power to make legislative schemes more perfect, more comprehensive and more consistent.” *Taylor*, 97 Wn.2d at 729.

When interpreting a statute, a court must first assume that the legislature means exactly what it says. *State v. Keller*, 143 Wn.2d 267,

276, 19 P.3d 1030 (2001). If the statute is clear on its face, its meaning is derived from the statutory language alone. *State v. Watson*, 146 Wn.2d 947, 51 P.3d 66 (2002). Here, the essential elements of second degree criminal trespass are not met. Mr. Joseph did not enter a “premises” within the meaning of RCW 9A.52.080.

D. CONCLUSION

For the reasons stated, the second degree criminal trespass conviction should be reversed and dismissed.

Respectfully submitted on August 24, 2015.

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PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on August 24, 2015, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of brief of appellant:

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