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Court of Appeals  
Division III  
State of Washington

No. 32993-3-III  
IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

WILLIE ARREDONDO,

Defendant/Appellant.

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Appellant's Brief

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DAVID N. GASCH  
WSBA No. 18270  
P.O. Box 30339  
Spokane, WA 99223-3005  
(509) 443-9149  
Attorney for Appellant

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A. ASSIGNMENT OF ERROR

The trial court erred by instructing the jury “A person who enters or remains unlawfully in a building may be inferred to have acted with intent to commit a crime against a person or property therein unless such entering or remaining shall be explained by evidence satisfactory to the jury to have been made without such criminal intent.” Instruction No. 12, CP 22.

B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

Did the portion of Jury Instruction No. 12 that states “unless such entering or remaining shall be explained by evidence satisfactory to the jury to have been made without such criminal intent” create a mandatory presumption which improperly shifted the burden of persuasion to the defendant?

C. STATEMENT OF THE CASE

Loss prevention officers at the Moses Lake Walmart observed Mr. Arredondo and Sharon Bates enter the store and followed their movements on store cameras. 11/19/14 RP 28-29; 11/20/14 RP 39-40. A video recording of their movements was played for the jury. 11/19/14 RP 32. Upon entering the store, Mr. Arredondo proceeded immediately to the bathroom. 11/19/14 RP 46. Meanwhile Ms. Bates selected some candy

and pop. 11/19/14 RP 47. Mr. Arredondo rejoined Ms. Bates around eight minutes later at 11:51 a.m. near the women's apparel department and they proceeded to go shopping. *Id.*

At 11:52 a.m. the video showed Ms. Bates drinking a coke. 11/19/14 RP 34-35. Ms. Bates selected various female cosmetic items and put them in the shopping cart. 11/20/14 RP 41. From 11:59 a.m. to 12:02 p.m. the video showed Mr. Arredondo select various items from the cosmetics aisle and place them in the shopping cart. 11/19/14 RP 35-37.

At 12:09 p.m. the video showed Mr. Arredondo eating a candy bar. 11/19/14 RP 40. The video did not show, due to some merchandise blocking the camera's view, and the loss prevention officer testified he could not see if the candy bar was handed to Mr. Arredondo or whether he took it out of the cart. 11/19/14 RP 52-53. The same witness said he never saw Mr. Arredondo open any candy bars and admitted he did not know if Mr. Arredondo knew the candy bar had not been purchased, or whether he thought Ms. Bates was going to pay for it, or whether he intended to assist Ms. Bates in shoplifting anything. 11/19/14 RP 53-54, 74. The video also showed Ms. Bates eating some candy. 11/19/14 RP 67-68.

Two minutes later, at 12:11 p.m., Mr. Arredondo put the bag he was carrying over his shoulder and headed for the exit. He was immediately detained by the loss prevention officer and told he was seen eating a candy bar for which he had not paid. The officer testified he could not remember whether Mr. Arredondo offered to pay for the candy bar. Mr. Arredondo was then escorted to the store office. No store merchandise was found in the bag or on his person. 11/19/14 RP 41, 44, 49-50.

At 12:24 p.m. Ms. Bates was detained as she tried to leave the store without paying. The store items from the shopping cart were found inside the bag she was carrying. 11/19/14 RP 51; 11/20/14 RP 41-42. Mr. Arredondo told one of the Walmart officers he knew Ms. Bates intended to steal items and that he told her not to do it. 11/20/14 RP 45, 57.

The jury was instructed:

A person who enters or remains unlawfully in a building may be inferred to have acted with intent to commit a crime against a person or property therein unless such entering or remaining shall be explained by evidence satisfactory to the jury to have been made without such criminal intent. This inference is not binding upon you and it is for you to determine what weight, if any, such inference is to be given.

Instruction No. 12, CP 22. The jury was not instructed on accomplice liability. 11/20/14 RP 163. Mr. Arredondo was convicted of second degree burglary. CP 28. This appeal followed. CP 49-50.

D. ARGUMENT

The portion of Jury Instruction No. 12 that states “unless such entering or remaining shall be explained by evidence satisfactory to the jury to have been made without such criminal intent” created a mandatory presumption which improperly shifted the burden of persuasion to the defendant.

Due process requires the State to bear the “burden of persuasion beyond a reasonable doubt of every essential element of a crime.” *State v. Deal*, 128 Wash. 2d 693, 698, 911 P.2d 996 (1996) (quoting *Francis v. Franklin*, 471 U.S. 307, 313, 105 S.Ct. 1965, 1970-71 85 L.Ed.2d 344 (1985)). Here, the State needed to prove all the elements of second degree burglary. Those elements are set forth in RCW 9A.52.030(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 or she enters or remains unlawfully in a building other than a vehicle or a dwelling.

The State may use evidentiary devices, such as presumptions and inferences, to assist it in meeting its burden of proof. *Deal*, 128 Wash. 2d at 699. These devices generally fall into one of two categories: mandatory

presumptions (the jury is *required* to find a presumed fact from a proven fact) and permissive inferences (the jury is *permitted* to find a presumed fact from a proven fact but is not required to do so). *Id.* Mandatory presumptions potentially create due process problems because they run afoul of a defendant's due process rights if they serve to relieve the State of its obligation to prove all the elements of the crime charged. *Id.* (citing *Sandstrom v. Montana*, 442 U.S. 510, 523-24, 99 S.Ct. 2450, 2458-59, 61 L.Ed.2d 39 (1979)). Permissive inferences, on the other hand, do not necessarily relieve the State of its burden of persuasion because the State is still required to persuade the jury that the proposed inference should follow from the proven facts. *Id.*

The standard for determining whether a jury instruction creates a mandatory or permissive presumption is whether a reasonable juror might interpret the presumption as mandatory. *Deal*, 128 Wash. 2d at 701 (citing *Sandstrom*, 442 U.S. at 519, 99 S.Ct. at 2456-57). The constitutionality of mandatory presumptions is examined in light of the jury instructions read as a whole to make sure that the burden of the persuasion on any element of the crime does not shift to the defendant. *Id.* The burden of persuasion is deemed to be shifted if the trier of fact is required to draw a certain inference upon the failure of the defendant to prove by some quantum of

evidence that the inference should not be drawn. *Id.* (citing *Sandstrom*, 442 U.S. at 517, 99 S.Ct. at 2455-56).

In *Deal*, the instruction at issue was identical to the one in the present case. It read as follows:

A person who enters or remains unlawfully in a building may be inferred to have acted with intent to commit a crime against a person or property therein *unless such entering or remaining shall be explained by evidence satisfactory to the jury to have been made without such criminal intent.* This inference is not binding upon you and it is for you to determine what weight, if any, such inference is to be given.

*Deal*, 128 Wash. 2d at 697 (emphasis in original).

The *Deal* Court found the italicized portion of the instruction violates due process because it requires a defendant to either introduce evidence sufficient to rebut the inference that he remained on the premises with intent to commit a crime, or concede that element of the crime. *Deal*, 128 Wash. 2d at 701. The Court stated:

[A] reasonable juror could have concluded that once Deal's presence on the premises was shown, a finding that he intended to commit a crime was compelled, absent a satisfactory explanation by Deal as to why he was on the premises. This had the effect of relieving the State of its burden of proving beyond a reasonable doubt the element of intent to commit a crime and, therefore, violated Deal's due process rights.

*Id.*

Here, the situation is indistinguishable from *Deal*. The language in Instruction No. 12 following “unless” created a mandatory presumption that shifted the burden of persuasion to Mr. Arredondo and relieved the State of its burden of proving beyond a reasonable doubt the element of intent to commit a crime. Therefore, the instruction violated Mr. Arredondo 's due process rights.

This constitutional violation is not mitigated by the last sentence of the jury instruction, which reads: “This inference is not binding upon you and it is for you to determine what weight, if any, such inference is to be given.” Instruction No. 12, CP 22. As the *Deal* Court stated,

In our judgment, that additional language does not eliminate the possibility that a reasonable juror could have concluded that a finding of intent to commit a crime was required unless Deal proved otherwise.

*Deal*, 128 Wash. 2d at 701-702.

*Not Harmless Error*. A constitutional error is harmless if the reviewing court is convinced beyond a reasonable doubt that the same result would have been reached in the absence of the error. *State v. Guloy*, 104 Wash.2d 412, 425, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020, 106 S.Ct. 1208, 89 L.Ed.2d 321 (1986). In *Deal*, the Court found the error harmless because the defendant testified that after attempting to kick in the door, he broke the window and entered the house. Therefore,

by his own admission, Deal's testimony was sufficient to establish all the elements of burglary. *Deal*, 128 Wash. 2d at 703.

However, in *State v. Cantu*, The Supreme Court found the error was not harmless where the defendant's testimony did not establish the intent element of burglary. *State v. Cantu*, 156 Wash. 2d 819, 823, 828, 132 P.3d 725 (2006), *as amended* (May 26, 2006).

The present case is more akin to *Cantu*. Mr. Arredondo did not testify, so there is no testimony from him to establish any intent element. The State's evidence also failed to establish the intent element. Ms. Bates selected some candy and pop while Mr. Arredondo was in the bathroom. Her actions do not establish the intent element for Mr. Arredondo, since Mr. Arredondo was not present and also because the jury was not instructed on accomplice liability. 11/19/14 RP 46-47; 11/20/14 RP 163.

Although he was later seen eating a candy bar, the video did not show, and the loss prevention officer could not see, how or where Mr. Arredondo got the candy bar. 11/19/14 RP 40, 52-53. The loss prevention officer also said he never saw Mr. Arredondo open any candy bars and admitted he did not know whether Mr. Arredondo knew if the candy bar had been purchased, whether he thought Ms. Bates was going to pay for it, or whether his intent was to assist Ms. Bates in shoplifting any

items. 11/19/14 RP 53-54, 74. Since the video also showed Ms. Bates eating some candy, the candy bar Mr. Arredondo ate may not have been the same one Ms. Bates placed in the cart. 11/19/14 RP 67-68. It is equally plausible that Mr. Arredondo purchased the candy bar at some other store and had it with him when he entered Walmart. Therefore, this portion of the evidence does not establish the intent element either.

Finally, it is significant that Mr. Arredondo left the store prior to Ms. Bates attempting to shoplift the items in the cart without paying for them. It is also significant that no store merchandise was found in Mr. Arredondo's bag or on his person. 11/19/14 RP 41, 49-50. The evidence does not reveal Mr. Arredondo's motive or intent when he left the store. Mr. Arredondo told one of the Walmart officers he knew Ms. Bates intended to steal items and that he told her not to do it. 11/20/14 RP 45, 57. Thus, Mr. Arredondo may have decided to leave the store when he realized Bates intended to shoplift the items in the cart. Since we don't know for sure, and since the jury was not instructed on accomplice liability, this evidence again fails to establish the intent element for burglary.

Therefore, the trial court's error in giving Instruction No. 12 was not harmless.

E. CONCLUSION

For the reasons stated, the conviction should be reversed.

Respectfully submitted September 3, 2015,

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s/David N. Gasch  
Attorney for Appellant  
WSBA #18270

PROOF OF SERVICE (RAP 18.5(b))

I, David N. Gasch, do hereby certify under penalty of perjury that on September 3, 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 the brief of appellant:

Willie Arredondo  
1112 Central Ave S #5  
Quincy WA 98848

**E-mail:** [kburns@co.grant.wa.us](mailto:kburns@co.grant.wa.us)  
Garth Dano  
Grant County Prosecutor's Office

---

s/David N. Gasch, WSBA #18270  
Gasch Law Office  
P.O. Box 30339  
Spokane, WA 99223-3005  
(509) 443-9149  
FAX: None  
[gaschlaw@msn.com](mailto:gaschlaw@msn.com)