

63839-4

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No. 63839-4

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

STATE OF WASHINGTON,

Respondent,

v.

NORMAN GOTCHER,

Appellant.

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
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ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR KING COUNTY

BRIEF OF APPELLANT

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TABLE OF CONTENTS

A ASSIGNMENT OF ERROR..... 1

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR 1

C. STATEMENT OF THE CASE..... 2

D. ARGUMENT..... 3

1. INSTRUCTION 5 RELIEVED THE STATE OF ITS BURDEN OF PROVING EACH ELEMENT OF THE CRIME OF ATTEMPTED RESIDENTIAL BURGLARY BEYOND A REASONABLE DOUBT 3

 a. The right to due process and the right to a jury trial require the court instruct to properly instruct the jury on every element of the offense 3

 b. Instruction 5 relieved the State of its burden of proving the elements of the crime of attempted residential burglary..... 3

 c. The error in Instruction 5 requires reversal of Mr. Gotcher’s conviction 8

2. THE STATE DID NOT PROVE BEYOND A REASONABLE DOUBT THAT MR. GOTCHERS INTENDED TO COMMIT A CRIME INSIDE THE RESIDENCE..... 10

 a. The State was required to prove the elements of the offense beyond a reasonable doubt..... 10

 b. The State did not prove Mr. Gotcher intended to commit a crime inside the residence..... 10

 c. The Court must dismiss Mr. Gotcher’s conviction 11

E. CONCLUSION 12

TABLE OF AUTHORITIES

United States Constitution

U.S. Const. amend. XIV 1, 3, 10

Washington Supreme Court Cases

State v Bencivenga, 137 Wn.2d 703, 974 P.2d 832 (1999)..... 9, 11

State v. Brown, 147 Wn.2d 330, 58 P.3d 889 (2002) 8

State v. Cronin, 142 Wn.2d 568, 14 P.3d 752 (2000)..... 7

State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980) 11

State v. Mills, 154 Wn.2d 1, 109 P.3d 415 (2005) 3

State v. Roberts, 142 Wn.2d 471, 14 P.3d 713 (2000)..... 7

State v. Smith, 131 Wn.2d 258, 930 P.2d 917 (1991) passim

State v. Stein, 144 Wn.2d 236, 27 P.3d 184 (2001) 7, 8

Washington Court of Appeals Cases

State v. Pittman, 134 Wn.App. 376, 166 P.3d 720 (2006)..... 5, 6, 8

State v. Reed, 150 Wn.App. 761, 208 P.3d 1274 (2009) 8

United States Supreme Court Cases

Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348,
147 L.Ed.2d 435 (2000) 3, 10

In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368
(1970) 3, 10

Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61
L.Ed.2d 560 (1979)10, 11

Neder v. United States, 527 U.S. 1, 119 S.Ct. 1827, 144
L.Ed.2d 35 (1999)8, 9

North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23
L.Ed. 2d 656 (1969) 12

Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61
L.Ed.2d 39 (1979)3

Statutes

RCW 9A.28.020 10

RCW 9A.52.025 10

A ASSIGNMENT OF ERROR

1. Instruction 5 relieved the State of its burden of proving each element of the offense beyond a reasonable doubt.

2. The State did not prove each element of attempted residential burglary beyond a reasonable doubt.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

1. The Due Process Clause of the Fourteenth Amendment requires the State prove each element of an offense beyond a reasonable doubt. Instruction 5 allowed the jury the jury to convict Mr. Gotcher if it found that with the intent to commit attempted residential burglary he took a substantial step towards the commission of attempted residential burglary. By defining the crime as an attempt to attempt to commit residential burglary did Instruction 5 relieve the State of its burden of proving the crime and thereby deny Mr. Gotcher due process?

2. The Due Process Clause of the Fourteenth Amendment requires the State prove each element of an offense beyond a reasonable doubt. To prove the crime of attempted residential burglary the State must prove a person took a substantial step towards unlawfully entering a residence with the intent to commit a crime inside. Where the State did not offer any evidence of Mr.

Gotcher's intent to commit a crime inside the home, did the State fail to offer sufficient evidence of the crime?

C. STATEMENT OF THE CASE

One afternoon, Rebecca Rohman heard a knock on the front door of her Maple Valley home, and through the peephole saw Mr. Gotcher. 6/9/09 RP 28. Because she is suspicious of any person who approaches her semi-rural home, Ms. Rohman retreated to an upstairs room, where from a window she saw Mr. Gotcher attempt to open a sliding glass door. Id. at 30-32. Mr. Gotcher climbed a ladder, walked across the roof and attempted to open a second-floor window. Id. at 34. Ms. Rohman called 911. Id. 36. Meanwhile, Mr. Gotcher climbed off the roof, returned to his car, and drove away. Police officers stopped and arrested Mr. Gotcher a short distance away. 6/9/09 RP 93-94.

The State charged Mr. Gotcher with a single count of attempted residential burglary. CP 9-10. A jury convicted Mr. Gotcher as charged. CP 74.

D. ARGUMENT

1. INSTRUCTION 5 RELIEVED THE STATE OF ITS BURDEN OF PROVING EACH ELEMENT OF THE CRIME OF ATTEMPTED RESIDENTIAL BURGLARY BEYOND A REASONABLE DOUBT.

- a. The right to due process and the right to a jury trial require the court instruct to properly instruct the jury on every element of the offense. The jury-trial guarantee of the Sixth Amendment and Article I, § 22 of the Washington Constitution, and the Fourteenth Amendment's Due Process Clause and the similar provisions of Article I, section 3 of the Washington Constitution, require the State prove each element of a criminal offense to a jury beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); State v. Mills, 154 Wn.2d 1, 6-7, 109 P.3d 415 (2005). This requirement is violated where a jury instruction relieves the State of its burden of proving any element of the crime. Sandstrom v. Montana, 442 U.S. 510, 523-24, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979).

- b. Instruction 5 relieved the State of its burden of proving the elements of the crime of attempted residential burglary.
The court instructed the jury

A person commits the crime of attempted residential burglary when, with the intent to commit that crime, he or she does any act that is a substantial step towards the commission of that crime.

CP 84.

Mr. Gotcher was not charged with attempting to attempt a residential burglary. For this reason, it was not enough for the jury to find that Mr. Gotcher had the intent to commit attempted residential burglary. Instead the jury had to find he had the intent to commit a completed residential burglary. Similarly, it was not enough that the jury find that he took a substantial step towards the commission of an attempted residential burglary. Rather, the jury must have found he took a substantial step towards the completed offense. Instruction 5, substantially misstates the State's burden of proof by requiring the jury find only that he attempted to attempt to commit a crime.

In State v. Smith, the Court concluded the court relieved the State of its burden of proving the element of the when it instructed the jury it could convict if it found

that Defendant "agreed with Marjorie Franklin and James Jeffers to engage in ... the performance of conduct constituting the crime of Conspiracy to Commit Murder in the First Degree[.]

131 Wn.2d 258, 262, 930 P.2d 917 (1991). The Court summarized the error as “Instead of listing the elements of conspiracy to commit first degree murder, the instruction described the even more inchoate crime of conspiracy to commit conspiracy to commit murder.” Id.

By requiring the jury to find only that Mr. Gotcher committed the crime of attempted attempted residential burglary, Instruction 5 contains precisely the same error. As in Smith, the erroneous instruction relieved the State of its burden of proof.

Despite Smith, this Court has previously concluded an instruction mirroring Instruction 5 was not erroneous. State v. Pittman, 134 Wn.App. 376, 166 P.3d 720 (2006). Pittman reasoned “[r]eading the instruction in a straightforward, commonsense manner, the average juror would interpret ‘that crime’ to mean residential burglary.” Id. at 382-83. But the only way for a jury to reach that supposed commonsensical outcome is to ignore the language of the instruction itself. The only crime referenced in the instruction is “attempted residential burglary.” Thus, the plain language of the instruction requires a jury to conclude “that crime” means “attempted residential burglary” as that is the only crime mentioned.

Pittman distinguished Smith on two grounds; that the error in Smith was in the “to-convict” instruction and that attempt instruction was the pattern instruction. 134 Wn.App. at 382-83. But such logic misses the point of Smith. In Smith the State conceded that informing the jury they must find the defendant conspired to commit a conspiracy failed to properly instruct the jury on the defendant’s requisite knowledge. 131 Wn.2d at 162. Because of that concession, the only issue before the Court was whether the error could be deemed harmless. Id. In that context, the Court found the fact that the error was in the “to-convict” instruction precluded application of harmless error review. Id. at 162-63.

By construing the holding of Smith as finding error only because the misstatement in that case was contained in the to-convict instruction, Pittman erroneously conflates the two holdings of Smith that (1) there was error and (2) it was not harmless into a single holding. The error in Pittman’s assessment of Smith is illustrated by the fact that other cases which have found the failure to specifically tie the mens rea to the correct crime is an error even where it did not occur in the “to-convict” instruction.

In State v. Roberts and State v. Cronin, the Court found the use the words “a crime” instead of “the crime” in an instruction

defining accomplice liability failed to require the jury to find the defendant had the requisite knowledge of the crime of commission. State v. Roberts, 142 Wn.2d 471, 511, 14 P.3d 713 (2000); State v. Cronin, 142 Wn.2d 568, 578-79, 14 P.3d 752 (2000). The court has similarly found misstatements in the definition of conspiracy which did not require the jury find the defendant had the requisite knowledge relieved the State of its burden of proving the elements of conspiracy. State v. Stein, 144 Wn.2d 236, 247, 27 P.3d 184 (2001). Plainly, the Court did not rest its decision on the fact that error was in the “to convict” instruction as it was in a separate instruction. Nor did the Court reach its conclusion because the instruction did not match the pattern instruction. In fact the Court said

Because the jury instruction which was given in the [defendants’] trials permitted the jury to find accomplice liability on an incorrect legal basis, they were legally deficient. The fact that the instruction was modeled on a Washington pattern instruction for a criminal case does not alter our conclusion.

Cronin, 142 Wn.2d at 579. Pitman artificially distinguishes Smith, and by implication Roberts and Cronin as well, and fails to apply the reasoning of these decisions. The error exists whether it is in the “to convict” instruction or not.

Jurors are presumed to follow the court's instructions. State v. Stein, 144 Wn.2d 236, 247, 27 P.3d 184 (2001). Pittman, however, rests upon the conclusion that jurors will resort to common sense and simply ignore erroneous or poorly drafted instructions. Instruction 5 relieved the State of its burden of proof.

c. The error in Instruction 5 requires reversal of Mr. Gotcher's conviction. The Supreme Court has applied a harmless-error test to erroneous jury instructions. State v. Brown, 147 Wn.2d 330, 340, 58 P.3d 889 (2002) (citing Neder v. United States, 527 U.S. 1, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999)). However, the Court held "an instruction that relieves the State of its burden to prove every element of a crime requires automatic reversal." Brown, 147 Wn.2d at 339 (citing Smith, 131 Wn.2d at 265); see also, State v. Reed, 150 Wn.App. 761,770, 208 P.3d 1274 (2009) (if "a jury instruction is erroneous but does not relieve the State of its burden to prove every essential element, then the error is harmless"). Because the instruction 5 relieved the State of its burden of proof, the error cannot be harmless.

But even if the Court were to apply a harmless-error test, the State cannot meet its burden. To prevail, the State must prove beyond a reasonable doubt that the jury would have found Mr.

Gotcher possessed the requisite intent, if properly instructed. Neder, 527 U.S. at 15-18. The principal issue in dispute in this case was Mr. Gotcher's intent. The State's only evidence that he intended to commit the crime of residential burglary was his attempted entry. The State maintained his effort showed an intent to commit a crime, to wit, residential burglary. Mr. Gotcher argued it merely showed an intent to enter, the lesser offense of criminal trespass. Each of these is reasonable inference when the only evidence of intent is the attempt to enter. State v Bencivenga, 137 Wn.2d 703, 707-09, 974 P.2d 832 (1999). The trial court recognized the State's evidence of intent to commit a crime was weak. 6/10/09 RP 22. But Instruction 5 allowed the jury to convict Mr. Gotcher without resolving which of the two inferences was more reasonable. Instead, the jury was not required to find he had an intent to commit a crime inside, but merely the intent to attempt to enter. Because of that, the State cannot prove beyond reasonable doubt that the error was harmless. This Court must reverse Mr. Gotcher's conviction.

2. THE STATE DID NOT PROVE BEYOND A REASONABLE DOUBT THAT MR. GOTCHERS INTENDED TO COMMIT A CRIME INSIDE THE RESIDENCE.

a. The State was required to prove the elements of the offense beyond a reasonable doubt. In a criminal prosecution, the Fourteenth Amendment's Due Process Clause requires the State prove each essential element of the crime charged beyond a reasonable doubt. Apprendi, 530 U.S. at 490; Winship, 397 U.S. at 364. Evidence is sufficient only if, in the light most favorable to the prosecution, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

b. The State did not prove Mr. Gotcher intended to commit a crime inside the residence.

A person is guilty of residential burglary if, with intent to commit a crime against a person or property therein, the person enters or remains unlawfully in a dwelling other than a vehicle.

RCW 9A.52.025(1).

A person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he or she does any act which is a substantial step toward the commission of that crime.

RCW 9A.28.020.

Bencivenga concluded the evidence of an intent to commit a crime inside was sufficient to sustain a conviction of attempted burglary where the defendant attempted to enter a business at 3:30 a.m. by prying a padlock off a door, and then fled when police arrived. 137 Wn.2d at 705, 709. Here, in its most favorable light, the State's evidence established Mr. Gotcher attempted to enter Ms. Rohman's home during the middle of the day. 6/9/09 RP 32-34. There was no testimony from Ms. Rohman nor the officers that eventually stopped Mr. Gotcher that he drove away at a high rate of speed or was attempting to flee. The State offered no evidence that Mr. Gotcher damaged the windows or doors in his effort to enter. Police did not recover any burglar tools from Mr. Gotcher or his car. 6/9/10 RP 98. In the light most favorable to the State, the evidence does not establish Mr. Gotcher intended to commit a crime inside the home.

c. The Court must dismiss Mr. Gotcher's conviction.

The absence of proof beyond a reasonable doubt of an element requires dismissal of the conviction and charge. Jackson, 443 U.S. at 319; State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). The Fifth Amendment's Double Jeopardy Clause bars retrial of a case, such as this, where the State fails to prove an added

element. North Carolina v. Pearce, 395 U.S. 711, 717, 89 S.Ct. 2072, 23 L.Ed. 2d 656 (1969), reversed on other grounds, Alabama v. Smith, 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989).

Because the State failed to prove Mr. Gotcher intended to commit a crime inside the home the Court must reverse his conviction.

E. CONCLUSION

For the reasons above, this Court must reverse Mr. Gotcher's conviction.

Respectfully submitted this 28th day of January, 2010.


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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 63839-4-I
v.)	
)	
NORMAN GOTCHER,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 28TH DAY OF JANUARY, 2010, I CALLED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE COURT OF APPEALS - DIVISION ONE AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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191 CONSTANTINE WAY
ABERDEEN, WA 98520 | (X)
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SIGNED IN SEATTLE, WASHINGTON THIS 28TH DAY OF JANUARY, 2010.

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