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NO. 64475-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

TROY NEAL,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE CATHERINE D. SHAFFER

BRIEF OF RESPONDENT

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FILED
COURT OF APPEALS DIVISION I
2018 DEC 28 PM 4:57

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A. ISSUE

1. A conviction for Residential Burglary requires proof that the defendant burglarized a dwelling. "Dwelling" is statutorily defined as "any building or structure, though movable or temporary, or a portion thereof, which is used or ordinarily used by a person for lodging." Neal burglarized a tool room located inside a multi-unit apartment building. Did the trial court properly omit the phrase "or a portion thereof" from the jury instruction defining "dwelling," and did the jury properly find Neal guilty of Residential Burglary?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

Troy Neal was charged by information with Residential Burglary, Possession of Stolen Property in the Second Degree, and Possession of Cocaine. The State alleged that, on December 30, 2008, Neal stole tools from an electrical/tool room in a multi-unit apartment building located at 915 Cherry Street in Seattle. When apprehended at Harborview Medical Center, Neal had in his possession a Visa card that had been taken from a jacket hanging in a waiting room at Harborview, and a pill bottle containing crack cocaine. The missing tools were found in a nearby room. CP 1-5.

A jury found Neal guilty as charged. CP 89. The trial court imposed a Drug Offender Sentencing Alternative requiring Neal to spend 36.75 months in confinement, followed by an equal term of community custody. CP 90-98.

2. SUBSTANTIVE FACTS.

Ward Nelson is a maintenance worker at the Cherry Terrace Apartments, located at 915 and 925 Cherry Street. 1RP 87.¹ The horseshoe-shaped building has three stories of apartments. 1RP 88-89. The tool room is on the ground floor in the back, down a little hallway; one has to walk through the whole apartment complex to get back there. 1RP 90-91. The room is about 10 feet by 10 feet, and is full of paints, brooms, mops, and tools. 1RP 91. The room is kept locked, and only the apartment manager, Nelson, and Nelson's coworker have a key to it. 1RP 92.

On December 30, 2008, at about 3:30 p.m., Nelson was hanging up a "for rent" sign; he grabbed a ladder from the tool

¹ The verbatim report of proceedings consists of three volumes, which will be referred to in this brief as follows: 1RP (August 3-5, 2009); 2RP (August 6, 2009); and 3RP (August 28, 2009).

room, left for three or four minutes, and returned when he realized that he needed more wire. 1RP 87-88, 92. When the door would not open all the way, Nelson realized that there was someone in there. 1RP 88. When he managed to get the door open, he saw a man loading tools, including a Skilsaw, into several bags. 1RP 88, 92. The man appeared intoxicated, and he looked "kind of desperate." 1RP 93. He was wearing blue jeans, a brown leather coat, and a "hoodie." Id.

Nelson gave the man the opportunity to drop the tools and Nelson would not call 911, but the man "muttered something at [Nelson] and hightailed it out the door with all the tools." 1RP 88. Nelson called 911 as he followed the man. 1RP 94. When the man reached the emergency entrance of Harborview Medical Center, Nelson lost sight of him. 1RP 95. Nelson waited by the entrance for police to arrive. Id.

Responding police contacted Nelson, got a description of the suspect, and broadcast it over the radio. 1RP 49. Police went to the 7th floor of the hospital, where they encountered Neal coming out of a room. 1RP 109, 134. They asked him to stop, but he continued to try to walk past them; police detected a strong odor of alcohol. 1RP 134-35. They placed Neal in handcuffs. 1RP 135.

Police brought Nelson up to the 7th floor, where Nelson identified Neal as the person who had taken the tools. 1RP 53, 98, 112, 137. In a search of Neal's person incident to arrest, police discovered a wallet containing a credit card belonging to someone else, and a pill bottle containing crack cocaine. 1RP 77-78, 81, 112, 121-22, 139-41. Police located a Skilsaw, a drill bit set, and several bags of miscellaneous items in a room on the seventh floor. 1RP 55. The tools were returned to Nelson. 1RP 56, 98.

Neal did not testify, nor did he present any witnesses.

C. ARGUMENT

1. THE DEFENDANT WAS PROPERLY CONVICTED OF RESIDENTIAL BURGLARY.

Neal contends that there was insufficient evidence to support his conviction of Residential Burglary. His argument is based on an interpretation of the word "dwelling" that is not supported by the language of the statute or by case law interpreting that language. The trial court correctly interpreted the statutory language, and properly instructed the jury under the circumstances of this case. Finally, because the trial court instructed the jury on the lesser

degree offense of Burglary in the Second Degree, and because the jury necessarily found the elements of that crime, Neal's remedy, if any, is remand for entry of judgment on the lesser degree offense.

a. Relevant Facts.

At the close of the State's case, the defense moved to dismiss the charge of residential burglary, alleging that the State had failed to prove that the burglary had occurred in a "dwelling." 1RP 170. Counsel pointed out that the tool room was not a part of any apartment unit, nor was the room used for lodging.² 1RP 171. The State responded that, because the tool room was part of an apartment building, burglary of the room was burglary of a dwelling. 1RP 170.

The trial court rejected the notion that an apartment building could be parsed out in the manner urged by the defense. The court noted that multi-unit apartment buildings have many rooms, such as laundry rooms and storage rooms, in which no one "dwells," but

² Nelson, the maintenance worker, had acknowledged that one did not have to enter anyone's apartment unit to get to the tool room, and that no one lived or slept in the room. 1RP 101-02.

"[w]hat matters is the kind of building he was inside of." 1RP 173-74. The court did not believe that the legislature intended to subdivide apartment buildings in the manner urged by the defense. 1RP 174. The court accordingly denied the motion to dismiss the charge of residential burglary. Id.

After a recess, the court and the parties returned briefly to this discussion. Citing to the language of the statutes defining "building" and "dwelling," and to State v. Murbach³, wherein the court held that burglary of an attached garage was properly charged as residential burglary, the court adhered to its decision. 1RP 176-79. The court explained that, just as an attached garage is part of a dwelling, the various utility rooms located inside an apartment building are part of the dwelling as a whole. 1RP 178.

The discussion then turned to the court's instructions to the jury. The State noted that the court had removed the phrase "or a portion thereof" from jury instruction 10, the definition of a dwelling; the State asked the court to include that phrase in its instruction. 1RP 185; CP 62. The court theorized that the omitted phrase was

³ 68 Wn. App. 509, 843 P.2d 551 (1993).

meant to apply to a portion of a commercial building that a person might sleep in. 1RP 185. Reconsidering, the State withdrew its request to insert the missing phrase into the court's jury instruction. 1RP 186. The defense, however, asked that the phrase "or a portion thereof" be included in the instruction defining "dwelling," arguing that the phrase was susceptible of two interpretations. 1RP 186; CP 21.

The court further explained its decision to omit the phrase. The court believed that "or a portion thereof" was for the situation where a building housed a business, but a person lived in a portion of that building (e.g., in an apartment over the business). 1RP 187. The court was concerned that inclusion of the phrase would lead the jury to believe that a person had to be in the portion of an apartment building actually used for sleeping, eating, etc. to commit residential burglary; the court did not believe that was what the legislature intended. Id. The court noted the defense exception to jury instruction 10. Id.; 2RP 5.

At the request of the defense, the court instructed the jury on the lesser included offenses of Burglary in the Second Degree and

Criminal Trespass in the First Degree. 1RP 188-89; CP 65-69.

Because the jury convicted Neal of Residential Burglary, it did not return verdicts on the lesser charges. CP 48, 88, 89.

b. There Was Sufficient Evidence To Support The Conviction Of Residential Burglary.

Evidence is sufficient to support a conviction if, when viewed in the light most favorable to the State, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Thomas, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). A claim of insufficiency admits the truth of the State's evidence, and all inferences that reasonably can be drawn therefrom. Id.

A defendant is guilty of Residential Burglary if, with intent to commit a crime against a person or property therein, he enters or remains unlawfully *in a dwelling* other than a vehicle. RCW 9A.52.025(1). "Dwelling" is statutorily defined as "any building or structure, though movable or temporary, or a portion thereof, which is used or ordinarily used by a person for lodging." RCW 9A.04.110(7).

Neal's claim depends entirely on his interpretation of the statutory language defining "dwelling." In interpreting any statute,

the court's primary duty is to discern and implement the intent of the legislature. State v. J.P., 149 Wn.2d 444, 450, 69 P.3d 318 (2003). The starting point must always be the statute's plain language and ordinary meaning. Id. When the plain language is unambiguous, the legislative intent is apparent, and the court will not construe the statute otherwise. Id. The court employs traditional rules of grammar in discerning the plain language of a statute. State v. Bunker, ___ Wn.2d ___, ___ P.3d ___, 2010 WL 3341262 (Aug. 26, 2010).

Neal attempts to rely on the "last antecedent rule" to support his argument that "[t]he legislative definition of 'dwelling' can only be given full effect where the lodging requirement is applied to the provision of the statute immediately preceding it to require that portion of a building be used for lodging." Appellant's Opening Brief ("AOB") at 7-8. In other words, he wants the definition of "dwelling" to be read, as relevant to this case, as "a portion of a building which is used or ordinarily used by a person for lodging." This would of course exclude the tool room at issue in this case, because it is uncontroverted that no one lived in the tool room itself.

The problem with this reading is that it ignores the corollary to the "last antecedent rule": the presence of a comma before the qualifying phrase is evidence that the qualifier is intended to apply to *all* antecedents instead of only the immediately preceding one. Bunker, 2010 WL 3341262 at *3. The effect of this rule on the definition of "dwelling" thus results in two alternate definitions as relevant here: 1) any building or structure that is used or ordinarily used by a person for lodging; or 2) a portion of any building or structure that is used or ordinarily used by a person for lodging.

The tool room from which Neal stole tools is located inside the Cherry Terrace Apartments, a multi-unit apartment building. The tool room thus qualifies as a dwelling under the first alternative definition (building ordinarily used by a person for lodging). See State v. Murbach, 68 Wn. App. 509, 843 P.2d 551 (1993) (attached garage is part of a dwelling for purposes of residential burglary statute).

Neal nevertheless maintains that such a construction produces absurd results. As illustration for this point, he poses the question: "If Quasimodo sleeps in the organ loft of Notre Dame, does the entire cathedral become a dwelling because some small

portion is used for his lodging?" AOB at 8. The answer, of course, is no. This scenario implicates the second alternative definition of "dwelling." While Notre Dame Cathedral is not a building ordinarily used for lodging, the loft in which Quasimodo sleeps (and that portion of the cathedral only) is a *portion* of the building that *is* used for lodging. Thus, assuming that France shares Washington's statutory language, a person burglarizing the nave or the sacristy of Notre Dame Cathedral is guilty of Burglary in the Second Degree only, while a person burglarizing Quasimodo's loft is guilty of Residential Burglary. There is nothing absurd about this result.

The tool room that Neal burglarized was located within a building used by persons for lodging. When the definition of "dwelling" is properly interpreted, there is no question that the State produced sufficient evidence to convict Neal of Residential Burglary.

c. The Trial Court Properly Instructed The Jury.

The standard of review that applies to this alleged instructional error depends on whether the trial court's refusal to include the part of the definition of "dwelling" proposed by defense ("or a portion thereof") was based upon a matter of fact or a

question of law. State v. Walker, 136 Wn.2d 767, 771, 966 P.2d 883 (1998). If the court's refusal to give the instruction as proposed was based on a factual dispute, it is reviewable only for abuse of discretion; if based on a ruling of law, review is *de novo*. Id. at 771-72.

The WPIC⁴ definition for "dwelling" is as follows: "Dwelling means any building or structure [, though movable or temporary,] [, or a portion thereof,] that is used or ordinarily used by a person for lodging." WPIC 2.08. The "Note on Use" instructs the user to "[u]se bracketed material as applicable." WPIC 2.08 (Note on Use).

The trial court's decision to omit the phrase "or a portion thereof" in this case was based on its interpretation of the statutory language. Review of that decision is thus *de novo*. For all of the reasons set forth in § C.1.b., supra, the trial court properly concluded that the bracketed phrase "or a portion thereof" did not apply to the facts of this case, and properly omitted it from the jury instruction defining "dwelling."

⁴ Washington Pattern Jury Instructions Criminal.

d. The Instruction Was Not A Comment On The Evidence.

Judges in Washington are prohibited from commenting on the evidence. Wash. Const. art. IV, § 16. A judge is thus prohibited from conveying to the jury his or her personal attitude toward the merits of the case. State v. Becker, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997). In addition, a court may not instruct the jury that matters of fact have been established as a matter of law. Id.

The factual issue for the jury in this case was whether the Cherry Terrace Apartment building was a "dwelling," not whether a single room located within that building (the tool room) separately met the definition of dwelling. The definition of "dwelling" given to the jury by the trial court did not remove that factual issue from the jury's consideration, nor did it convey to the jury the court's personal attitude toward the merits of the case.

For all of the reasons set forth in § C.1.b., supra, the trial court's interpretation of the statutory definition of "dwelling" was correct. Thus, the trial court properly instructed the jury under the law that applied to this case, and did not improperly comment on the evidence.

- e. The Remedy, If Any, Is Remand For Entry Of Judgment On Burglary In The Second Degree.

A jury in a criminal case may find the defendant guilty of any offense that is an inferior degree offense of the charged crime. RCW 10.61.003; State v. Garcia, 146 Wn. App. 821, 829, 193 P.3d 181 (2008), review denied, 166 Wn.2d 1009 (2009). The statute gives a defendant sufficient notice that he must defend against lesser degrees of the offense charged. Id. at 829-30.

Thus, when an appellate court finds that the evidence was insufficient to support conviction of the charged offense, it may direct the trial court to enter judgment on a lesser degree of the offense charged when the lesser degree was necessarily proved at trial. Id. at 830 (citing cases). See also State v. Gray, 124 Wn. App. 322, 326, 102 P.3d 814 (2004) (reversing conviction of third degree assault based on insufficiency of evidence and remanding for entry of judgment on fourth degree assault); State v. Gilbert, 68 Wn. App. 379, 384-88, 842 P.2d 1029 (1993) (reversing conviction of first degree burglary based on insufficiency of evidence and remanding for entry of judgment on residential burglary).

A person commits the crime 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 dwelling* or a vehicle. RCW 9A.52.030(1). Burglary in the Second Degree is an inferior degree offense of Residential Burglary. State v. McDonald, 123 Wn. App. 85, 90, 96 P.3d 468 (2004).

Thus, if this Court finds that the State did not present sufficient evidence that Neal burglarized a *dwelling*, an essential element of Residential Burglary, it should remand for entry of judgment on Burglary in the Second Degree. All of the other elements of the inferior degree offense are elements of the greater offense; thus, the State necessarily proved the lesser degree offense. See CP 60, 67.⁵

D. CONCLUSION

For all of the foregoing reasons, the State asks this Court to affirm Neal's conviction for Residential Burglary. If the Court finds

⁵ Neal seems to be under the mistaken impression that the trial court did not instruct the jury on the lesser degree offense. BOA at 9. The trial court did so instruct. CP 65-67.

that the evidence was insufficient to support that conviction, the State asks the Court to remand to the trial court for entry of judgment on Burglary in the Second Degree.

DATED this 8th day of October, 2010.

Respectfully submitted,

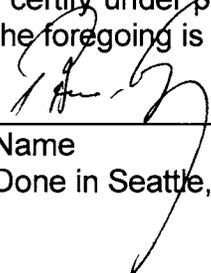
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to **David L. Donnan**, the attorney for the appellant, at **Washington Appellate Project**, 1511 Third Avenue, Suite 701, Seattle, WA 98101, containing a copy of the **Brief of Respondent**, in **STATE V. TROY NEAL**, Cause No. **64475-1-I**, in the Court of Appeals for the State of Washington, Division I.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Name
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