1982

The State of Utah v. Jeffery Dean Baker : Brief of Respondent

Utah Supreme Court

G. Fred Matos; Attorney for Appellant;
David WIlkinson; Attorney for Respondent;

IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH,	:	
Plaintiff-Respondent,	:	
-v-	:	Case No. 18245
JEFFERY DEAN BAKER,	:	
Defendant-Appellant.	:	

BRIEF OF RESPONDENT

Appeal from a conviction and judgment of Burglary, a felony of the Third Degree, and Receiving Stolen Property, a Class B Misdemeanor, in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Bryant H. Croft, Judge, presiding.

DAVID L. WILKINSON
Attorney General
ROBERT N. PARRISH
Assistant Attorney General
236 State Capitol
Salt Lake City, UT 84114

G. FRED METOS
Salt Lake Legal Defender Assoc.
333 South 200 East
Salt Lake City, UT 84111

IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH,	:	
Plaintiff-Respondent,	:	
-v-	:	Case No. 18245
JEFFERY DEAN BAKER,	:	
Defendant-Appellant.	:	

BRIEF OF RESPONDENT

Appeal from a conviction and judgment of Burglary, a felony of the Third Degree, and Receiving Stolen Property, a Class B Misdemeanor, in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Bryant H. Croft, Judge, presiding.

DAVID L. WILKINSON
Attorney General
ROBERT N. PARRISH
Assistant Attorney General
236 State Capitol
Salt Lake City, UT 84114

G. FRED METOS
Salt Lake Legal Defender Assoc.
333 South 200 East
Salt Lake City, UT 84111

TABLE OF CONTENTS

Cases Cited

Statutes Cited

IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH,	:	
Plaintiff-Respondent,	:	
-v-	:	Case No. 18245
JEFFERY DEAN BAKER,	:	
Defendant-Appellant.	:	

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

The appellant was charged with burglary, a third-degree felony, in violation of Utah Code Ann., § 76-6-202; and theft by receiving, a Class B misdemeanor, in violation of Utah Code Ann., § 76-6-408.

DISPOSITION IN THE LOWER COURT

Appellant was tried before a jury which found him guilty on both counts on January 4, 1982, in the Third Judicial District Court, the Honorable Bryant H. Croft presiding. Appellant was sentenced on January 8, 1982 to an indefinite term of zero to five years for the burglary count and six months for the theft by receiving count. The sentence was stayed for 30 days while the Board of Pardons considered whether the State Hospital program was appropriate for appellant, and judgment was finally entered February 10, 1982.

RELIEF SOUGHT ON APPEAL

Respondent seeks an order of this Court affirming the trial court's judgment.

STATEMENT OF THE FACTS

Appellant broke into a service station located at 904 South 1300 East in Salt Lake City at approximately 3:00 a.m. on September 18, 1981 (T. 24, 25). A neighbor next door heard the chain link fence rattle at about 2:45 a.m. (T. 24) and about five minutes later heard a window break (T. 25). The neighbor notified the police, who came to the station within five or ten minutes (T. 27, 31). The police contacted the store owner, and when he arrived on the scene the officers and the owner entered the station. They "took a quick visual check" (T. 16), noticed the padlock on the desk had been broken, the desk drawer was open, and the contents of that drawer were scattered around (T. 16).

At that time, appellant was hiding in a closet (T. 18). During the next forty-five minutes (T. 18), the police officers remained on the scene, making arrangements to tow appellant's truck from the service station lot (T. 18). The owner then returned, entered the building, and heard a loud noise (T. 18, 20). He and the officers found appellant, covered with dirty uniforms, hiding in the storage area behind an air compressor (T. 18). The police officer (T. 36), the station owner (T. 18), and appellant himself (Appellant's Brief, p. 2) all state that appellant was hiding.

Although appellant did state that he was sleeping (T. 37), and now claims he only entered the building to sleep, the facts contradict this assertion. First, rather than sleeping, he made a loud noise which alerted the owner. Second, if he was searching for a place to sleep, his home was located between the service station and the place he left for the night (T. 11, 52, 53, 56, 63).

Appellant does not appeal his conviction of theft by receiving. Appellant has been charged in the past with: theft, 1977; burglary, 1978; illegal consumption of alcohol by a minor, 1978; uttering a forged document, 1978; bench warrant for speeding, 1978; burglary, 1979; carrying a concealed weapon, 1979; criminal trespass and possession of burglary tools, 1981 (R. 6-8).

ARGUMENT

THE TRIAL COURT PROPERLY REFUSED TO GIVE JURY INSTRUCTIONS CONCERNING CRIMINAL TRESPASS.

In this case, appellant requested several jury instructions based on criminal trespass (R. 32-34, 37). He now claims that the trial court erred in refusing to give his requested criminal trespass instructions. First, according to appellant, criminal trespass is a lesser included offense of the crime of burglary. Second, criminal trespass is his defense theory. Thus, appellant concludes he was entitled to

a jury instruction on criminal trespass as a lesser included offense to burglary.

Appellate cites State v. Gillian, 23 Utah 2d 372, 463 P.2d 811, 814 (1970) for the proposition that an accused is entitled to jury instruction on lesser included offenses when they embody the theory on which he bases his defense. However, Gillian further requires that all of the evidence must be surveyed to see if "there is any reasonable basis therein which would support a conviction of the lesser offenses." Respondent contends that on the facts herein, there is not a reasonable basis in the evidence supporting a conviction of criminal trespass, either as a lesser included offense to burglary or as a separate offense.

A. CRIMINAL TRESPASS IS NOT A LESSER INCLUDED OFFENSE OF BURGLARY.

In determining whether an offense is a lesser included offense to another, this Court set forth the following standard:

> The rule as to when one offense is included in another is that the greater offense includes a lesser one when establishment of the greater would necessarily include proof of all of the elements necessary to prove the lesser. Conversely, it is only when the proof of the lesser offense requires some element not involved in the greater offense that the lesser would not be an included offense (emphasis added).

State v. Brennan, 13 Utah 2d 195, 371 P.2d 27, 29 (1962). See also: State v. Echevarrieta, Utah, 621 P.2d 709 (1980); State v. Cross, Utah, 649 P.2d 72 (1982); State v. Elliott, Utah, 641 P.2d 122 (1982).

Again in State v. Williams, Utah, 636 P.2d 1092, 1096 (1981), this Court ruled that:

> In order to be a "lesser included offense," the elements of the lesser offense must necessarily and always be included within the elements of the greater offense.

The Utah Legislature has also set forth the same standard in Utah Code Ann., § 76-1-402(3)(a), which states that an offense is a lesser included offense when "it is established by proof of the same or less than all the facts required to establish the commission of the offense charged." Thus both Utah case law and statutes require a lesser included offense to contain all of the elements included in the greater offense.

Respondent contends that the offense of criminal trespass is not a lesser included offense of burglary, under Utah statutes, because the elements differ. Utah Code Ann., § 76-6-202(1) describes burglary as:

> (1) A person is guilty of burglary if he enters or remains unlawfully in a building or any portion of a building with intent to commit a felony or theft or commit an assault on any person.

Utah Code Ann., § 76-6-206(2)(a) describes criminal trespass as:

> (2) A person is guilty of criminal trespass if, under circumstances not amounting to burglary . . .
> (a) He enters or remains unlawfully on property and;
> (i) Intends to cause annoyance or injury to any person thereon or damage to any property therein; or
> (ii) Intends to commit any crime, other than theft or a felony;
> (iii) Is reckless as to whether his presence will cause fear for the safety of another.

While both the burglary and the criminal trespass statutes require the actor to "enter or remain," the intent element in the burglary statute is the "intent to commit a felony or theft or to commit an assault." The intent required to commit criminal trespass is different; it is the intent to cause annoyance or injury to a person, or damage to property, or to commit any crime other than a theft or felony.

Appellant analyzes this difference in the intent elements by stating that burglary requires "a more specific intent" (Appellant's Brief at p. 10). Respondent contends that appellant's analysis is incorrect for two reasons. First, the two crimes require different specific intents; and, second, where two separate specific intents are involved, one cannot be more specific than the other.

Since burglary and criminal trespass involve different intent elements, proof of one is not proof of the other. In this case, the State proved that appellant committed burglary; however, this proof did not also establish proof that appellant committed criminal trespass. The State did not introduce testimony or evidence to show that appellant intended to annoy or harm anyone. Instead, the evidence presented was that appellant broke the lock on a desk, looked through the contents and then hid when the police appeared (T. 4, 16). Thus, the evidence introduced was intended to and did prove the burglary charge but could not also have proved criminal trespass.

Respondent contends that this Court has recognized that criminal trespass is not a lesser included offense of burglary, based on the differences in the elements of the offenses. In State v. Hendricks, Utah, 596 P.2d 633 (1979), the defendant claimed the jury should have been instructed on criminal trespass as a lesser included offense of burglary. In that case, two windows in a building were broken and two typewriters were moved near a window. The defendant, who had been hiding for an hour, was finally located in a closet. His defense was based on voluntary intoxication. This Court, in sustaining the trial court's refusal to instruct the jury on criminal trespass, thought that the evidence:

> established all of the elements of burglary but did not establish all of the elements of criminal trespass (emphasis added).

Id., p. 634. In a footnote to that statement, this Court concluded "Such in and of itself precludes the giving of the requested instructions." Id., p. 634.

Since the "unlawful entry or remaining" element was clearly established in the Hendricks case, the only element that could have differed was that of intent. Appellant, at page 11 of his brief, asserts that these statements quoted above in Hendricks, supra, indicate that this Court concluded criminal trespass was a lesser included offense to burglary. Respondent contends that the opposite interpretation is the logical conclusion from the Hendricks holding since this Court's reason for refusing to require an instruction on criminal trespass was that the elements of criminal trespass were not established.

Appellant makes an additional claim that because criminal trespass and burglary are in the same part of the Code, it can be inferred that criminal trespass is a lesser included offense of burglary. However, the offense involving possession of burglary tools is also located in the same section of the Code, yet this Court has held that it is not an included offense to burglary. State v. Sumter, Utah, 550 P.2d 184 (1978). Thus, it is incorrect to infer that offenses are lesser included offenses merely by their position in the Code.

Appellant cites three cases to support his theory that criminal trespass in Utah is a lesser included offense of burglary, Day v. State, 532 S.W.2d 302 (Tex. 1976); People v. Henderson, 41 N.Y.2d 233, 359 N.E.2d 1357 (1976); and Commonwealth v. Carter, 344 A.2d 899 (Pa. 1975). These cases are not applicable to the facts herein.

In Day v. State, supra, the criminal trespass statute differs significantly from the Utah statute. The Texas statute does not contain any of the specific intent provisions required by the Utah statute. Moreover, the test for giving lesser included instructions is less rigorous in Texas than in Utah and an instruction thereon in Texas may have been obligatory.

The criminal trespass statute in People v. Henderson, supra, is also dissimilar to Utah's statute. McKinney's Consolidated Laws of New York Ann., Book 39, §§ 140.05, 140.10, reveal that no specific intent element exists in the New York statute.

Commonwealth v. Carter, supra, indicates that Pennsylvania's criminal trespass statute proscribes only unlicensed or unprivileged entry into a building or occupied structure. Thus, the elements of intent present in the Utah criminal trespass statute are absent from the Pennsylvania statute.

Since the elements of the two offenses are not the same, proof of one is not proof of the other, and each offense

can be committed without committing the other, criminal trespass is simply not an included offense in burglary. Therefore, the trial court was correct in refusing to grant appellant's requested instruction on criminal trespass.

B. APPELLANT'S REQUESTED JURY INSTRUCTIONS ON CRIMINAL TRESPASS WERE NOT WARRANTED BY THE EVIDENCE PRESENTED.

The trial court denied appellant's requested jury instructions on criminal trespass because they were not justified by the evidence (R. 34). This Court, in State v. Close, 28 Utah 2d 144, 499 P.2d 287, 288 (1972), determined that instructions on lesser included offenses should be given "when such a conviction would be warranted by any reasonable view of the evidence. . . ." (emphasis added). In State v. McCarthy, 25 Utah 2d 425, 483 P.2d 890 (1971), this Court, in discussing when lesser included offense instructions are warranted, stated that a party is justified in receiving the instructions:

> . . . only where there is some reasonable basis in the evidence to justify the giving of such instructions (emphasis added).

Id., p. 891. Thus, even if criminal trespass were a lesser included offense of burglary, an instruction would only be warranted if based on a reasonable view of the evidence.

In addition, Utah Code Ann., § 76-1-402(4) requires jury instructions on lesser included offenses only if there is a rational basis for acquitting a defendant of the offense charged and convicting him of the included offense.

Respondent contends that in viewing the evidence, there is simply no reasonable basis upon which a finding that appellant was guilty of criminal trespass could be based. Appellant climbed a chain link fence, broke a window, and entered the gas station in the early morning hours. Nearby neighbors called the police when they heard appellant enter the building and the police arrived within a few minutes. During that short time period (approximately ten minutes), appellant had time to locate the desk, break the lock, and look through the contents for valuable items. Before he had the opportunity to take anything and escape, the police arrived. He then hid. The only possible inference from this evidence is that appellant was interrupted by the police while in the act of committing a burglary.

In State v. Brooks, Utah, 631 P.2d 878 (1981) the trial court refused to reduce the charge from burglary to criminal trespass (but did give a jury instruction on criminal trespass). In that case, the defendant entered the apartment through a window, turned off the power switch, apparently moved some jewelry (rings), and left quickly, taking nothing with him. This Court found that the trial court did not err

in refusing to reduce the charge to criminal trespass based upon the evidence of the late hour and defendant's sudden flight. However, the instruction on criminal trespass was warranted in that case because the defendant did not take anything although he had access to jewelry.

In this case, however, appellant merely had no time to take anything. If he had not broken into the desk, or had left without taking anything, the evidence might support an instruction on criminal trespass; but the evidence herein only supports a burglary charge and not a charge based on criminal trespass.

In addition, respondent contends that appellant did not base his defense on criminal trespass and therefore no instruction was necessary on this theory. To commit criminal trespass, appellant must have intended to cause annoyance or injury to any person or damage to any property or have intended to commit any crime other than theft or a felony. Since appellant broke into the station at about 3:00 a.m., when the building was obviously dark and deserted, it is unlikely that he intended to annoy or harm anyone. As to damaging property, the only damage he did was to a window (to enter) and to a desk lock (which was in furtherance of burglary and not as an end in itself). In addition, he does not contend that he planned another crime. He allegedly only wanted a place to sleep.

Appellant's friend, Poul Jensen, testified concerning appellant's alcohol consumption and activities before the burglary. Appellant's counsel asked Mr. Jensen questions concerning appellant's "hyperactivity" and he did state that appellant might want to "cause some trouble or something like that" (T. 171). However, on cross-examination Mr. Jensen admitted that appellant had not suggested that they do anything after leaving the last bar and amended his answer, stating "not so much cause trouble. Look for something to do" (T. 177). Thus, even appellant's own witness' testimony did not present a defense based on criminal trespass. Incidentally, appellant's witness does not bolster appellant's defense of looking for a place to sleep since the witness said appellant was "hyperactive" when drinking.

Appellant also claims that this case is similar to other cases in which the charge of burglary was reduced to criminal trespass, based on insufficient evidence. Appellant cites Crawford v. State, 241 N.E.2d 795 (Ind. 1968); State v. Rood, 11 Ariz. App. 102, 462 P.2d 399 (1969), and State v. Kahinu, 53 Hawaii 646, 500 P.2d 747 (1972), to support his proposition. However, these cases are factually distinguishable and support the proposition that felonious intent in a burglary case may be established by circumstantial evidence.

In Crawford v. State, supra, there was no evidence that the garage where defendant was found hiding contained any

property. In addition there were several broken windows through which appellant could have entered without using force. Under these facts, the court determined that the evidence was insufficient to support a conviction of burglary beyond a reasonable doubt. Thus, it was insufficiency of the evidence and not the use of circumstantial evidence which precluded conviction. In fact, the Court stated that:

> we agree with the appellee [the state] . . . that intent may be established by inference from the circumstances surrounding an act.

Id. at 797.

In State v. Rood, supra, the facts of the case again indicated that the entry was not forced (into an unlocked building). Although this entry was insufficient to establish felonious intent the court stated that "proof of intent can be shown by circumstantial evidence," Id. at 400, and "criminal intent is usually proven by circumstantial evidence." Id. at 401.

Similarly, in State v. Kanihu, supra, the evidence tended to show the motel room in which the appellant entered was unlocked. The room had been previously occupied by the defendant's girlfriend. Also, the defendant's flight from the room was justified by the evidence that appellant suffered from paranoia as a result of L.S.D. use. These facts led the court to find that the defendant lacked the requisite intent

to commit burglary. However, the court recognized that:

> Intent in a burglary case can be established by inference from the surrounding circumstances and accompanying and attendant acts of the person accused.

Id. at 749. Thus, these cases are not similar to this case because the evidence in those cases raised a close factual question concerning intent while in this case, the evidence strongly supports an inference that appellant's only intent was to commit a burglary. Since appellant's theory of criminal trespass is not supported by any evidence, the trial court correctly refused to instruct the jury on criminal trespass, whether as a lesser included offense or simply the appellant's theory of the case.

Even if appellant was entitled to jury instructions on criminal trespass, any trial court error was not prejudicial in this case. The appellant claims that his rights were prejudiced because, in deciding whether any evidence supported the intent element of criminal trespass, the trial court allegedly usurped the jury's function.

Respondent contends that the jury, in its proper role, indeed did determine the question of intent. Both appellant's and the State's closing arguments centered on this element, carefully informing the jury that it must determine the question of appellant's intent (T. 190, 191, 197, 200-203, 209). The jury instructions also emphasized that the jury was

required to determine appellant's intent (R. 75, 77). Thus, the jury's attention was focused on determining appellant's intent, which, in order to convict, had to be the specific intent to commit a felony or theft.

In this case the jury properly inferred intent from appellant's acts: breaking and entering, breaking into a desk, and hiding. State v. Baldwin, 29 Utah 2d 318, 509 P.2d 350 (1973) involved similar facts. Police officers observed the defendants entering a building at 1:00 a.m. They saw the defendants walk in and out of offices, and arrested them as they left the building. The officers found that some desk drawers had been rifled and articles removed and left in dissaray; however, the only items found on the defendants were lock pick tools. This Court found that the "failure to steal after entering with the intent is no defense to the crime of burglary." Id. at 351. Thus, although appellant did not take anything, the jury in its proper role inferred that his intent was to commit a felony or a theft.

The jury was convinced beyond a reasonable doubt of appellant's guilt, and the conviction is supported by the evidence. Thus, since there is no real evidence (beyond appellant's counsel's theory) of criminal trespass, the jury's verdict should be upheld.

CONCLUSION

The evidence in this case did not warrant a jury instruction, and the trial court properly refused to give appellant's requested instructions on criminal trespass. Thus, whether criminal trespass is an included offense of burglary is immaterial since the evidence did not support it as appellant's theory of the case either as a lesser included offense or as a separate defense.

Respectfully submitted this 5th day of November, 1982.

DAVID L. WILKINSON
Attorney General

Earl F. Dorius for

ROBERT N. PARRISH
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that I mailed three true and exact copies of the foregoing Brief, postage prepaid, to G. Fred Metos, Attorney for Appellant, Salt Lake Legal Defender Assoc., 333 South 200 East, Salt Lake City, Utah, 84111, this 5th day of November, 1982.

Susan Patton