



State v. Anderson

121 Wash.App. 1067 (2004) | Cited 0 times | Court of Appeals of Washington | June 1, 2004

UNPUBLISHED OPINION

In the context of a prosecution for burglary based upon the State's theory that the defendant entered and stole tools from the victim's garage, it was not an irregularity or a manifest constitutional error to instruct the jury on the elements of the underlying crime of theft, to take testimony that Anderson did not have the owner's permission to possess the tools and to refer to theft in closing argument. The prosecutor's limited closing argument was not otherwise improper. We affirm Nelson's burglary conviction.

FACTS

From his bedroom window, David Van Arsdale saw a man walk from a car to the front of Van Arsdale's locked garage. From his location, Van Arsdale could not see the door to the garage, and he was unable to see the man when he arrived at the garage door. A moment later, the man came back into view as he carried a bag of Van Arsdale's tools from the garage back to the car.

Van Arsdale called the police as he saw the man loading the tools into the two-tone, four-door 'mid-80's' car. Van Arsdale could not see the facial features of the man, but he was able to describe his race and his clothing. The man drove away. No one else was in the car.

Within minutes police arrived at Van Arsdale's home. The garage door cable and locking mechanism were damaged. Van Arsdale confirmed that tools, including a weed eater and a new generator were missing from inside the garage.

Within two minutes of the dispatch regarding this incident, an officer spotted a two-tone car just four blocks from Van Arsdale's home. The officer was able to see a weed-eater was inside the car. Michael Anderson was alone. When he began to walk away, the officer directed Anderson to return to the car. Anderson returned but then began running. He was later found hiding behind a retaining wall and was detained for a 'show up.' Van Arsdale was not able to identify Anderson '100%' though he positively identified the car and his generator, weed-eater and other tools that were found in the car. The officer identified Anderson as the person who had run from the car.

Twenty minutes before being spotted with the two-tone car, Anderson had been stopped four or five blocks away by a different officer for having an expired license tab. He was given a verbal warning. There was no generator, weed-eater or other tools in the car at that time.



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Anderson was charged with second degree burglary for entering and remaining unlawfully in a building 'with intent to commit a crime against a person or property therein.' At trial, Anderson denied taking the items from Van Arsdale's garage. He testified that he was out driving when he noticed a shiny object in the bushes. When he looked around and did not see anyone in the area, he put the items in his car. Anderson acknowledged that he did not have permission from Van Arsdale.

Without objection: Van Arsdale testified that Anderson did not have permission to have the items; the State requested and the trial court gave jury instructions defining theft; and the prosecutor mentioned in closing that 'its clear from the testimony the defendant did in fact commit a theft. Mr. Van Arsdale's {sic} said, I never gave this person permission to have my tools. The defendant admitted, no, Mr. Van Arsdale never gave me permission to have those tools that were in my car.'

The jury found Anderson guilty of burglary.

DECISION

Anderson contends that the testimony, jury instructions and closing argument regarding theft are irregularities that constitute a manifest constitutional error, arguing that, in effect, he was tried on an uncharged count. His argument is not persuasive.

Burglary requires proof of entering or remaining in a building with the intent to commit a crime therein.¹ The State does not have the burden of proving the underlying crime was committed to establish burglary.² But the trial court is not precluded from taking evidence or instructing the jury on the specific underlying crime, and it is 'the better practice' to instruct the jury on the underlying crime where the underlying crime is made obvious by the surrounding circumstances.³ The surrounding circumstances made it obvious that the alleged underlying crime was the theft of the items from the garage. The State's theory was that Anderson stole items from the garage. Anderson's defense was that he found the items in bushes at another location. There was no set of facts before the jury that would implicate any underlying crime other than an actual theft of the tools from the garage.

Anderson argues that he was incurably prejudiced by the 'multiplicitous' charges that were in effect presented to the jury. But he establishes no prejudice from the jury being informed about the underlying theft that was the basis for the burglary charge.

Therefore it was not irregular or a manifest constitutional error to take testimony regarding lack of the owner's permission, to instruct the jury regarding theft, or to briefly argue the evidence and instructions regarding the underlying crime of theft in closing.⁴

Anderson's statement of additional grounds for review does not reveal any reversible error. He does not establish that defense counsel's performance was deficient for failure to request a bill of



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particulars, to object to the admission of photographs, or to move to suppress the photographs.⁵ He does not establish any due process or double jeopardy violations and does not establish prosecutorial misconduct in closing argument.

We affirm.

1. RCW 9A.52.030.

2. The specific crime intended to be committed "inside burglarized premises is not an element of burglary that must be included in the information {or} jury instructions ... It is sufficient if the jury is instructed ... in the language of the burglary statutes." (Italics omitted.) *State v. Bergeron*, 105 Wn.2d 1, 16, 711 P.2d 1000 (1985); *State v. Jackson*, 112 Wn.2d 867, 879, 774 P.2d 1211 (1989). This has been the law in Washington for some 90 years, with the exception of the period from December 15, 1983 to December 12, 1985, when jury instructions were required to specify and define the alleged intended crime to be committed during a burglary. *State v. Johnson*, 100 Wn.2d 607, 674 P.2d 145 (1983), overruled by *State v. Bergeron*, *supra*.

3. *State v. Chelly*, 32 Wn. App. 916, 920, 651 P.2d 759 (1982) ('Of course, in {burglary} cases where the specific {underlying} crime intended is made obvious by surrounding circumstances, the better practice would be to identify that crime. Nonetheless, the trial court did not err in failing to instruct on the elements of theft.')

4. In closing argument, counsel may draw reasonable inferences from the evidence presented. *State v. Millante*, 80 Wn. App. 237, 250, 908 P.2d 374 (1995).

5. To establish ineffective assistance of counsel, the defendant must show that counsel's performance was deficient by reference to "an objective standard of reasonableness based on consideration of all the circumstances." *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987).

