NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

ANTHONY W. GRANT,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. 2D18-2874

Opinion filed July 17, 2020.

Appeal from the Circuit Court for Pinellas County; Philip J. Federico, Judge.

Howard L. Dimmig, II, Public Defender, and Lee Adam Cohen, Special Assistant Public Defender, Bartow, for Appellant.

Ashley Moody, Attorney General, Tallahassee, and C. Todd Chapman, Assistant Attorney General, Tampa, for Appellee.

VILLANTI, Judge.

Anthony W. Grant appeals his conviction and sentence for one count of burglary of a dwelling, raising two issues for review. We reject Grant's contention that the trial court erred by denying his motion for judgment of acquittal without further discussion. However, we agree with his contention that the trial court erred when it

refused to give the standard jury instruction on burglary when requested to do so. Therefore, we reverse Grant's judgment and sentence and remand for a new trial.

The evidence presented at trial established that a homeowner in St. Petersburg was moving items from her house to her car on the morning of April 7, 2017. Her path took her from a spare bedroom of her house, through the dining room, into the kitchen, and out the porch door to the driveway. She made several trips in and out of the house without incident. However, as she came through the dining room on about her tenth trip, she discovered Grant standing in her kitchen next to an open drawer. The drawer had not been open earlier that day as it would have blocked the homeowner's path from the dining room into the kitchen, so it seemed that Grant had opened the drawer. However, Grant was not holding any items from the drawer nor did anything else in the house appear to be disturbed.

The homeowner, startled and slightly fearful, asked Grant what he wanted. Grant responded that he needed help and said that his parents and children could vouch for him. After approximately forty-five minutes of rambling statements, Grant voluntarily left the house, retrieved his bicycle from between the homeowner's two cars, and rode away. The homeowner called the police, and Grant was apprehended a short time later. The State subsequently charged Grant with one count of burglary of a dwelling.

To prove the offense of burglary of a dwelling, the State was required to introduce evidence to show that Grant entered the homeowner's dwelling with the intent to commit an offense therein. See § 810.02(1)(b)(1), Fla. Stat. (2017). The State was not required to, and did not, allege in the information what underlying offense it believed

Grant intended to commit inside the house. See State v. Waters, 436 So. 2d 66, 69 (Fla. 1983) ("We therefore hold that an indictment or information charging burglary is not required to specify the offense which the accused is alleged to have intended to commit."). However, whatever that underlying offense might have been, it could not be burglary. See, e.g., Drew v. State, 773 So. 2d 46, 52 (Fla. 2000) (noting that "a proper analysis of the offense of burglary must focus both on the act constituting the entry and the intent to commit an offense therein" and that "entry . . . without the requisite intent to commit a separate crime therein is not a burglary" (emphasis added)); Stone v. State, 899 So. 2d 421, 422-23 (Fla. 5th DCA 2005) ("[I]t is circular to define 'burglary' by indicating the need to show the intent to commit 'burglary' within the structure [or] conveyance, rather than an intent to commit an underlying 'offense' within the structure or conveyance" and noting that the jury must be informed that the unlawful entry was done with the intent to commit an offense other than burglary (quoting Viveros v. State, 699 So. 2d 822, 824 (Fla. 4th DCA 1997))). At trial here, the State proceeded on a theory that Grant entered the house intending to commit a theft inside.

Toward the end of trial, the trial court provided the State and Grant with a draft of the jury instructions it intended to give. During a charge conference at the close of evidence, Grant requested that the trial court give the standard jury instruction on burglary, which provides as follows:

> To prove the crime of Burglary, the State must prove the following two elements beyond a reasonable doubt:
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> 1. (Defendant) entered a [structure] [conveyance] owned by or in the possession of (person alleged).
>
> 2. At the time of entering the [structure] [conveyance], (defendant) had the intent to commit [(the crime alleged)] [an

offense other than burglary or trespass] in that [structure] [conveyance].

Fla. Std. Jury Instr. (Crim.) 13.1. In response to this request, the following ensued:

> [DEFENSE COUNSEL]: Judge, when we were going over the burglary instruction, I should have stated -- but when you look at the jury instruction 13.1, burglary, 810.02, is that at the time of entering the structure or conveyance, defendant had the intent to commit the crime alleged, an offense other than burglary or trespass in that structure.
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> So in reading this provided by the Court, the language "an offense other than burglary or trespass" is not included, Judge. And the Defense would specifically be requesting that that be included in the instructions.
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> THE COURT: How does that make sense? I've never understood that. An offense other than burglary or trespass.
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> [DEFENSE COUNSEL]: What did you say, how does it make sense?
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> THE COURT: Correct.
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> [DEFENSE COUNSEL]: Judge, that's what the instructions say. We would argue that -- obviously, our argument is that if he went inside the house, he didn't intend to commit a burglary. And with the crime alleged, that's why that's in the standard jury instruction as --
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> THE COURT: A burglary is entry plus intent. So how can you put burglary in there, the intent to commit an offense other than burglary?
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> [DEFENSE COUNSEL]: Or other than trespass, one of the --
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> THE COURT: Go ahead. I mean --
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> [DEFENSE COUNSEL]: There's a lot of case law, your Honor, that talks about the problem with when instructions were given that said with the intent to commit a crime and then the Court would instruct, like burglary, they intended to commit the crime of burglary, and the case law is replete with situations where that was given and found to be reversible because the intent has to be something other than burglary or trespass. So the standard instruction saying the crime other than burglary or trespass is addressing that situation so the jury fully understands --
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> THE COURT: It's not.
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> [DEFENSE COUNSEL]: -- that the crime that is intended to be committed is not the burglary. It's the intent

to commit some other crime. And that's, I would argue, what the standard instruction is addressing.

THE COURT: You can't make any common sense out of writing that in an instruction.

[DEFENSE COUNSEL]: I think the Supreme Court finds that it makes sense because that's what the standard is.

THE COURT: So just for grins, you want it to read: At the time of entering the structure, Anthony Grant had the intent to commit an offense other than burglary or trespass in that structure.

[DEFENSE COUNSEL]: That's correct. And if the State had charged theft or if they had charged assault, then it would say at the time of entering he had the intent to commit theft or assault. But they didn't charge a specific crime. So the jury needs to be instructed that the intent is not for the burglary or the trespass. It's for some other crime.

THE COURT: If you use the word burglary, you're just repeating what the rest of the instruction is, right? I mean, I can see trespass.

[DEFENSE COUNSEL]: It's clarifying for the jury exactly what the intent has to be. It has to be intent to commit a crime, but the jury cannot be left with the impression that it's the intent to commit the burglary or the trespass.

THE COURT: The burglary is the entry with the intent to commit any crime.

[DEFENSE COUNSEL]: Right, but not the burglary. It's not entering with the intent to commit the burglary.

THE COURT: That's what -- the burglary is defined by the elements. Entry plus intent.

[DEFENSE COUNSEL]: Right.

THE COURT: So it's a circle. We're just having a circular conversation.

[DEFENSE COUNSEL]: I don't think so, your Honor. Burglary is the entering with the intent to commit a crime.

THE COURT: Correct.

[DEFENSE COUNSEL]: The case law is replete with examples of cases where it specifically said that the intent to commit a crime is not the intent to commit the burglary or the trespass. It's the intent to commit some other crime.

THE COURT: And my point is you can't be -- have the intent to commit a burglary unless you have the intent to commit a crime. So you're just running it on repeat, right?

[DEFENSE COUNSEL]: I don't think so, your Honor. If the State had charged it the way -- so back in the day there used to be --

THE COURT: Yeah, they charged theft, right. Intent to commit a theft.

[DEFENSE COUNSEL]: Now they don't have to do that anymore.

THE COURT: Right.

[DEFENSE COUNSEL]: So if they had alleged a specific crime, that's what the jury would be instructed on.

[PROSECUTOR]: But we haven't. So that's why it's an offense.

[DEFENSE COUNSEL]: So it has to be the jury is instructed we need to make clear that they know the intent is not to commit the burglary or the trespass because that would be circular. If the elements of burglary are entering with the intent to commit a burglary, that doesn't make any sense. It has to be with the intent to commit the other crime. So because we don't have another crime, we have to tell the jury specifically that the other crime is not the burglary or trespass. Because if it was, that would be circular. So that's what the standard instruction from the court says. And, again, I think that it's probably that way so that we don't have a situation where all this case law is that says that --

THE COURT: It makes sense if you put the word "trespass" in there. It doesn't make sense when you put the word "burglary" in there.

[DEFENSE COUNSEL]: I disagree because the jury could be left with the impression that the intent to commit the crime is the burglary, and that's improper.

[PROSECUTOR]: And it only confuses it by having trespass as a lesser included. So having the offense --

THE COURT: Burglary or burglary is entry plus intent. Trespass is entry, right, with no intent. So, logically, it makes sense that if it's trespass, that makes sense to put that, to commit an offense other than trespass in that structure. That makes sense. All you're doing is going in circles if you say other than burglary when burglary is entry plus intent.

[DEFENSE COUNSEL]: But it's intent to commit a crime therein, which is different, which makes it not circular.

THE COURT: Other than burglary, which is entry plus intent.

[DEFENSE COUNSEL]: But --

THE COURT: Right. It's the -- you just keep going on the same loop.

[DEFENSE COUNSEL]: I disagree.

[PROSECUTOR]: We've had these instructions for years.

THE COURT: I know. Most of the time people don't object, and if they do I -- it does say that in there. I just don't know how you're going to explain that to them to make it make any since [sic].

[DEFENSE COUNSEL]: It's explained by saying the elements of burglary are that he entered and that he had the intent to commit a crime therein. That crime is not the burglary or the trespass. He had the intent to commit some other crime, such as if he was charged with assault, such as -- or not charged with. Such as if the State had alleged assault or such as if the State alleged --

THE COURT: It makes sense if burglary was just entry. Then that makes sense.

[DEFENSE COUNSEL]: But burglary is intent to commit a crime therein.

THE COURT: Correct.

[DEFENSE COUNSEL]: So there has to be some crime.

THE COURT: Correct.

[DEFENSE COUNSEL]: And that crime can't be burglary because burglary is what we're defining.

[PROSECUTOR]: They get to determine what the intent was and what that offense was going to be. That's in their province.

THE COURT: He's not going to argue that the intent is either burglary or trespass. He's not gonna argue that. He's not entering. He has to have the intent to commit a crime. You can argue it can't be the burglary or the trespass. If you want me to include the words "other than trespass" in there, I'll do that because that makes sense to me. Okay? He went in with the intent to commit a trespass does not bootstrap you into the intent. I mean, it's -- in trying to make it simple, they made the instruction make no sense if you include those words. That's the problem with it, right? If you read it as part of that instruction, it makes absolutely no sense.

[PROSECUTOR]: I think it's more confusing, your Honor.

THE COURT: It is, but it's in there. So I've not really reconciled -- most of the time I just say "an offense." They argue it has to be some crime other than just making an entry in there and it's never an issue. But now it's an issue because they are raising it as an issue.

> [DEFENSE COUNSEL]: Well, I -- I think when we look at the instructions and we look at what the Court says when they issue their standard instructions, and the language they issue every time they put out standard instructions, I mean, they create the instructions and they amend them and they do things to them for a reason. And case law is replete with examples of a jury being improperly instructed and given the inference that the crime that the intent applies to is burglary or trespass. So we have the Court creating an instruction.
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> THE COURT: I don't know how to make this clear for the record.
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> [DEFENSE COUNSEL]: So -- I think the Defense position is clear. So I'll stop arguing.
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> THE COURT: My question is I'm not putting the additional words "burglary" in there. If you want to put the additional words "an offense other than trespass in that structure," I'll include those words in there because that to me makes some -- it makes sense. The intent can't be the intent to commit a trespass.
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> [DEFENSE COUNSEL]: Correct, Judge. We would want that and we still obviously want burglary. We understand the Court's ruling but just maintain our objection.

Ultimately, the trial court instructed the jury that the State had to prove only that when Grant entered the house, he "had the intent to commit an offense other than trespass in that structure." It specifically refused to instruct the jury using the standard instruction because the court did not understand the instruction and was not interested in giving it "just for grins." This was error.

"The standard jury instructions are presumed correct and are preferred over special instructions." Brown v. State, 11 So. 3d 428, 432 (Fla. 2d DCA 2009) (quoting Stephens v. State, 787 So. 2d 747, 755 (Fla. 2001)). Admittedly, the trial court does retain some discretion as to the use of standard instructions, particularly when there is a problem with a standard jury instruction or when a standard instruction is inappropriate in a particular case. See State v. Hamilton, 660 So. 2d 1038, 1046 (Fla.

1995). However, if a trial court determines that a particular standard instruction is erroneous or legally inadequate, the court may modify or amend the standard instruction, but it must also "state on the record or in a separate order the respect in which the judge finds the standard instruction erroneous or inadequate and the legal basis for varying from the standard instruction." Fla. R. Jud. Admin. 2.580(a) (emphasis added).[1] This procedure is important both because "[c]onfidence in the use of [standard] instructions is undermined when their use is rejected without explanation," see Hamilton, 660 So. 2d at 1046, and because the supreme court has made the trial court's obligations under rule 2.580(a) mandatory, see id. at 1045-46.

The standard jury instruction on burglary was amended in 2013 to add the "other than burglary or trespass" language that was disputed in this case. In re Standard Jury Instructions in Criminal Cases–Report No. 2012-01, 109 So. 3d 721, 721 (Fla. 2013). In adopting that amendment, the supreme court specifically stated that the addition of that language was intended "to make clear to jurors that the crime intended cannot be burglary or trespass." Id. Omitting this portion of the standard instruction allows the jury to find a defendant guilty based on the circular logic that the defendant was guilty of burglary because he entered the structure with an intent to commit a burglary.

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[1]This provision was formerly found in Florida Rule of Criminal Procedure 3.985. Rule 3.985 was deleted effective April 1, 2020, and replaced by Florida Rule of Judicial Administration 2.580(a). See In re Amendments to Fla. Rules of Judicial Admin., Fla. Rules of Civil Procedure, & Fla. Rules of Criminal Procedure-Standard Jury Instructions, 45 Fla. L. Weekly S121 (Fla. Mar. 5, 2020). The applicable language was unchanged.

Here, the jury instruction on burglary given by the trial court was erroneous and inadequate. The altered instruction given by the trial court left the jury with the impression that it could convict Grant if it concluded that he had entered the house with the intent to commit a burglary—exactly the misunderstanding that the amendment to the standard instruction was intended to address. The trial court's decision to deviate from the standard instruction simply because it did not understand the reason for the instruction was error.[2]

Moreover, the trial court failed to comply with the procedural requirement of rule 2.580(a) to state on the record or in a separate order the reason that the court found the standard instruction to be "erroneous or inadequate" and the legal basis for that ruling. Rather than making such a ruling, the trial court here simply stated on the record that it did not believe that the standard instruction made sense. This is not a sufficient reason under rule 2.580(a) to avoid giving the standard instruction when it is requested.

Finally, on this record, we cannot say that the error in refusing to give the standard instruction was harmless for two reasons. First, the State's evidence on the issue of Grant's intent to commit an offense inside the house, while sufficient to survive a motion for judgment of acquittal, was less than compelling. The only evidence of an intent to commit an offense inside the house was that Grant was found standing next to an open kitchen drawer. Grant was not holding any items from the drawer, and it did

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[2]The trial court's misunderstanding of the intent required to prove burglary is not unique. In Morgan v. State, 198 So. 3d 812, 815 (Fla. 2d DCA 2016), the trial court made a similar statement during voir dire, opining that burglary "is the entering portion." But that is simply incorrect. Burglary requires proof of an entry coupled with the intent to commit an offense once inside. See Drew, 773 So. 2d at 52.

not appear that anything in the kitchen or any other room had been disturbed. When confronted by the homeowner, Grant did not flee or act in a hostile manner; instead, he asked for help. While the State's evidence was legally sufficient to support an inference of an intent to commit a theft, when considered in light of the erroneous instruction that could allow the jury to infer that Grant's entry into the house was sufficient to support his conviction for burglary, we cannot say "that there is no reasonable possibility that the error [in the jury instruction] contributed to the conviction." State v. DiGuilio, 491 So. 2d 1129, 1138 (Fla. 1986).

Second, the statutory presumption of an intent to commit an offense based on stealthy entry does not render this error in the jury instruction harmless. Section 810.07(1) provides that "proof of the entering of such structure or conveyance at any time stealthily and without consent of the owner or occupant thereof is prima facie evidence of entering with intent to commit an offense." However, even when the statutory presumption applies, the jury must still be instructed that the offense intended to be committed was something other than burglary or trespass. See In re Standard Jury Instructions, 109 So. 3d at 721. Otherwise, the jury will be left with the impression that it can find the defendant guilty of burglary solely based on a stealthy entry, even if the defendant had no intent to commit a separate offense inside. Hence, we cannot say that the omission of this portion of the standard instruction was harmless.

For all of these reasons, we must reverse Grant's conviction and sentence and remand for a new trial.

Reversed.

ROTHSTEIN-YOUAKIM and ATKINSON, JJ., Concur.