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IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

T.R.C., Appellant, v. STATE OF FLORIDA, Appellee.	)	Case No. 2D18-4295

Opinion filed February 19, 2020.

Appeal from the Circuit Court for Hillsborough County; Robert Bauman, Judge.

Howard L. Dimmig, II, Public Defender, and Clark E. Green, Assistant Public Defender, Bartow, for Appellant.

Ashley Moody, Attorney General, Tallahassee, and Kelly O'Neill, Assistant Attorney General, Tampa, for Appellee.

VILLANTI, Judge.

T.R.C. appeals the disposition order finding him guilty of possession of burglary tools. T.R.C. raises two issues in this appeal: (1) that the trial court should have dismissed the possession of burglary tools charge because the blue latex gloves found in his pocket during his arrest did not provide sufficient circumstantial evidence to

prove the charge; and (2) that the trial court should have corrected a sentencing error pursuant to Florida Rule of Juvenile Procedure 8.135(b)(2). Based on precedent, we reverse on the first issue, and we also reverse on the second issue, accepting the State's correct concession of error.

At the bench trial, Officer Travis Smith testified that he was on routine patrol when he observed two males, T.R.C. and his codefendant, standing near a vehicle in a residential area. At some point the officer saw the codefendant sitting in the vehicle. Because the area was known for drug activity, the officer ran a tag check which confirmed that the vehicle was recently stolen. The officer then called for backup and detained the codefendant. Shortly thereafter, T.R.C. voluntarily approached the officer and gave him the key to the vehicle, stating that it had been in his apartment. The officer testified that T.R.C. seemed to be "attempting to wipe his fingerprints off the key [with his shirt] while he was giving it to me." T.R.C. was then arrested for grand theft auto.[1]

An officer then searched T.R.C. incident to his arrest and found two blue latex gloves in his front right pocket. Similar gloves were found inside of the vehicle. The vehicle owner's sister testified that she accidentally left the vehicle unlocked and that a spare car key had been taken from the vehicle's glovebox.

After the State rested, defense counsel moved for a judgment of dismissal on the possession of burglary tools count, citing A.R.M. v. State, 769 So. 2d 1092 (Fla. 2d DCA 2000). Defense counsel argued that there was "no evidence that th[e] gloves were used as tools to gain entry [into] the vehicle." In opposition, the State responded

[1]This conviction is not in dispute in this appeal.

that sufficient circumstantial evidence existed consisting of (1) T.R.C. having the same gloves on his person that were also found in the vehicle, (2) the officer's observation of T.R.C. wiping his prints from the key, and (3) T.R.C.'s admission to his prior use of the vehicle and intent to use the vehicle later that day. Defense counsel responded that (1) there was no testimony as to the appearance of the gloves found in the vehicle, (2) wiping the prints from the key had nothing to do with the gloves, and (3) any intent to use the vehicle later also had nothing to do with the gloves. In essence, defense counsel's position was that the latex gloves could not be considered "tools" used in the commission of a burglary.

In denying the motion, the trial court found:

> I do think the possession of burglary tools is a little bit closer. It is based on circumstantial evidence. The fact there were other gloves in the car, the fact that he's wiping down the key suggests that he doesn't want his prints on anything, which I think is a different—little bit different scenario. I think if it was just the gloves and the gloves in and of themselves I think that would be more of a reason to find in his favor. But I do believe the State has a good argument as to the circumstantial evidence regarding the gloves.

The trial court then found T.R.C. guilty of the charge. T.R.C. now appeals this denial.

The denial of a motion for judgment of dismissal is reviewed de novo. M.E.R. v. State, 993 So. 2d 1145, 1146 (Fla. 2d DCA 2008) (citing R.R.W. v. State, 915 So. 2d 633, 634 (Fla. 2d DCA 2005)). While the State bears the burden of presenting a prima facie case of the crime charged, see Fla. R. Juv. P. 8.110(k), "[t]he evidence, and all reasonable inferences from it, should be viewed in the light most favorable to the State." M.E.R., 993 So. 2d at 1146 (citing K.W. v. State, 983 So. 2d 713, 715 (Fla. 2d DCA 2008)).

Section 810.06, Florida Statutes (2017), provides: "Whoever has in his or her possession any tool, machine, or implement with intent to use the same, or allow the same to be used, to commit any burglary or trespass shall be guilty of a felony of the third degree . . . ." To prove that an item qualifies as a burglary tool, the State must prove "that the defendant used, or actually intended to use, the [tool] to commit a burglary or a trespass." A.R.M., 769 So. 2d at 1093 (quoting Hierro v. State, 608 So. 2d 912, 915 (Fla. 3d DCA 1992), approved by Calliar v. State, 760 So. 2d 885 (Fla. 1999)). See also Remor v. State, 991 So. 2d 957, 961 (Fla. 4th DCA 2008) ("Whether an implement constitutes a burglary tool is determined from the totality of the circumstances.").

For instance, in A.R.M., a juvenile and four of his friends fled in a stolen vehicle and were subsequently apprehended. 769 So. 2d at 1092. The officers searched A.R.M., found a screwdriver, and arrested him for possession of burglary tools. Id. This court reversed the conviction for possession of burglary tools, noting that "[t]here was no evidence . . . that the defendant used the screwdriver to gain entry to the vehicle, nor evidence from which the jury could determine that the defendant possessed the screwdriver with the intent to use it to gain entry to the vehicle." Id. at 1093 (quoting Hierro, 608 So. 2d at 915).

The Florida Supreme Court has held that, generically speaking, "gloves . . . and other items of personal apparel are not objects which actually facilitate the breaking and entering of a dwelling." Green v. State, 604 So. 2d 471, 473 (Fla. 1992). The court recognized that "[w]hile gloves can provide a means for burglars to avoid leaving fingerprints," they are not typically considered burglary tools under the

plain and ordinary meaning of the statute or under the definition of the word "tool." Id. The court also noted that while some courts have upheld convictions for possession of burglary tools when the defendant was found with gloves, in those cases, "tools such as chisels, tire irons, and hammers were also found in the defendants' possession." Id. at 473 n.5.

Additionally, the court in Green emphasized that "[u]nder the doctrine of *ejusdem generis*, where an enumeration of specific things is followed by some more general word, the general word will usually be construed to refer to things of the same kind or species as those specifically enumerated." Id. at 473 (citing State ex rel. Wedgworth Farms, Inc. v. Thompson, 101 So. 2d 381, 385 (Fla. 1958)). Thus, "the word 'implement' should be interpreted to refer to objects similar in nature to 'tools' or 'machines.' " Id. The court also noted that were the phrase "tool, machine, or implement" expanded to include items of personal apparel, "we would be in grave danger of destroying both the legislature's intent as to and the common person's understanding of the statutory language." Id. For the reasons set forth below, we agree.

The State argues that the blue latex gloves in this case are distinguishable from the gloves in Green because they cannot be considered "items of personal apparel." However, there are several issues with this argument. The certified question on appeal in Green was whether "common gloves" met the definition under the statute. The court in Green did not describe the gloves in any detail. Rather, the court referred to "common household objects" in explaining how a lawful item, such as a bolt cutter or screwdriver, could be classified as a burglary tool if it was used with the intent to commit

a burglary. Id. And while the State argues that the blue latex gloves are not commonly used for purposes around the household, this argument is unsupported by the evidence and contradicts common knowledge that such gloves are indeed a household item. Even more germane, this contention ignores the Florida Supreme Court's explicit holding in Green that "gloves . . . and other items of personal apparel are not objects which actually facilitate the breaking and entering of a dwelling." Id. The Green court did not limit its holding to certain types of "gloves."

The State also argues that because Green concerned a dwelling, it is distinguishable from cases involving vehicles. However, the State cites to no case in support of this argument, and it directly contradicts cases such as A.R.M. where this court determined that the screwdriver was not a burglary tool because the evidence was insufficient to show that it was used to gain entry to the vehicle. Here, there was uncontroverted testimony that the vehicle was left unlocked that evening and that the key to the vehicle was stored in the vehicle's glove box. Simply put, there was no evidence to suggest T.R.C. used any tool to facilitate his entry into the vehicle.

Furthermore, T.R.C.'s admitted use of the vehicle, as well as the officer's observation that he saw T.R.C. wiping his prints from the key, while factually undisputed, had nothing to do with whether T.R.C. used the gloves to enter the vehicle. While such collateral evidence may have supported the burglary and grand theft charges, it did not establish that T.R.C. used the gloves as a "tool" to commit the burglary as required by statute.

Thus, like the gloves in Green, the gloves in this case cannot be considered burglary tools under the plain and ordinary meaning of the statute. Hence, we must reverse T.R.C.'s possession of burglary tools conviction.

Turning briefly to the second issue on appeal, T.R.C. argues that that trial court failed to notify T.R.C. of his right to a hearing to contest the $100 public defender fee imposed at sentencing, and that, as such, the court should have granted his motion to correct the sentencing error pursuant to Florida Rule of Juvenile Procedure 8.135(b)(2). It is well established that when imposing a public defender fee, a trial court must first give a defendant notice and an opportunity to be heard. Newton v. State, 262 So. 3d 849, 850 (Fla. 2d DCA 2018); C.P. v. State, 31 So. 3d 976, 977 (Fla. 2d DCA 2010). The State correctly concedes that T.R.C.'s motion to correct sentencing error should have been granted. We therefore reverse this fee and remand for the trial court to either strike the fee or advise T.R.C. of his right to contest it. See Newton, 262 So. 3d at 850.

Reversed and remanded for the trial court to vacate the possession of burglary tools conviction and sentence and to enter a judgment of dismissal thereon, to resentence T.R.C. using a corrected scoresheet, and to revisit the fee imposed as instructed above.

KELLY, J., Concurs in result only.
LUCAS, J., Concurs separately with opinion.

LUCAS, Judge, Concurring separately.

I fully concur with the majority's holding on the second issue in this appeal. As to the court's reversal on the first issue concerning the charge of possession of burglary tools, I concur only insofar as we are bound to follow Green v. State, 604 So. 2d 471 (Fla. 1992). In Green, law enforcement officers responding to an emergency report of a burglary in progress apprehended the defendant running on a street near the victim's home. Id. at 472. At the time of the arrest, the temperature was "between the fifties and sixties," but the defendant was dressed in a jump suit and wearing garden gloves. Id. The State charged the defendant with burglary and, based upon the garden gloves, possession of burglary tools under section 810.06, Florida Statutes (1989). Id. After his conviction and appeal, the First District certified as a question of great public importance whether "items of personal apparel, such as common gloves" fell within the ambit of section 810.06. Id. The Florida Supreme Court answered the question in the negative. Id.

In its analysis, the Green court acknowledged that "[c]ommon household objects, which generally might have a useful and lawful purpose, may be classified as burglary tools if they are used with the intent to commit a burglary." Id. at 473 (citing Thomas v. State, 531 So. 2d 708 (Fla. 1988)). However, the court reasoned, "[w]hile gloves can provide a means for burglars to avoid leaving fingerprints, they and other items of personal apparel are not objects which actually facilitate the breaking and entering of a dwelling." Id.[2] Because Green appears to have cabined the term

[2]Curiously, while allowing that "common household objects" could be considered "burglary tools" depending on the intent of the accused defendant, the Green court also held that since gloves are neither a "tool" nor a "machine," then "the

"implement with intent . . . to commit any burglary" under section 810.06 to those that directly facilitate the discrete, temporal act of breaking and entering—and there was no evidence in this record that that was what T.R.C. had these surgical gloves in his pocket for—we are compelled to reverse the lower court's denial of the motion to dismiss.

Respectfully, however, I believe the Green court's construction of section 810.06 was somewhat questionable. Section 810.06 casts a wide net to reach a variety of objects—tools, machines, or implements—if they are intended to be "used to commit any burglary or trespass." The boundary of what the statute proscribes as burglary tools is not limited to the qualitative nature of the object itself (because would-be burglars can be remarkably inventive with seemingly benign objects),[3] but rather by the question: what was the defendant's intent in possessing the object? See Thomas, 531 So. 2d at 710 ("The overt act necessary to prove intent need not be limited to the actual use of an item in committing the trespass or burglary, but need only manifest the specific criminal intent."); Keys v. State, 949 So. 2d 1080, 1083 (Fla. 2d DCA 2007)

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doctrine of *ejusdem generis* limits the [statute's] word 'implement' to a definition that does not include gloves." Id. I read this part of the holding as a separate basis for the court's conclusion, one of statutory construction, although, admittedly, the court never stated that the statutory term "implement" was ambiguous. Accord Zuckerman v. Alter, 615 So. 2d 661, 663 (Fla. 1993) ("If the language of a statute is clear and unambiguous, the legislative intent must be derived from the words used without involving rules of construction or speculating as to what the legislature intended." (citing Tropical Coach Line, Inc. v. Carter, 121 So. 2d 779 (Fla. 1960))); State v. Hobbs, 974 So. 2d 1119, 1121 (Fla. 5th DCA 2008) ("*Ejusdem generis* should only come into play when it is necessary to construe an ambiguous statute, not to create an ambiguity in a clearly worded statute." (citing Jacobo v. Bd. of Trs. of Miami Police, 788 So. 2d 362, 363 (Fla. 3d DCA 2001))).

[3]See, e.g., People v. Gastiaburo, 23 A.D.2d 891, 891 (N.Y. App. Div. 1965) (affirming conviction of possession of burglar's instruments where "Defendant's statement to the detective shows clearly that the toothpicks were used to prevent the owner from unlocking his apartment door while the larceny was being committed").

("Thus, the statute criminalizes the intent to use an item in an illegal way." (quoting Thomas, 531 So. 2d at 709)). As the court in Thomas explained

> What constitutes a burglary tool often cannot be determined from a particular tool or device's innate characteristics, but only from the context in which it is to be used. This is to say no more than that the intent must be gleaned from the totality of the circumstances in each case. Certainly, there will be instances in which a tool or device is so peculiarly adapted to the commission of a burglary or trespass as to render the state's burden of proof relatively easy to meet. On other occasions, because of common household usage of the tool or device, the state might not be able to shoulder its burden of proving beyond a reasonable doubt the intent to commit a felony.
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> We do not believe any purpose is served by requiring the trial court to determine as a matter of law whether specific tools per se are "common" or not. The only real issue is whether the actions of the accused showed he or she was preparing to use the tool to commit a burglary or trespass.

531 So. 2d at 710.

As I read the statute, the intended use that the statute's text references pertains to the commission of the crime of burglary or trespass; it is not, as Green, 604 So. 2d at 473, held, limited to a discrete element of "breaking and entering." Cf. State v. Peraza, 259 So. 3d 728, 730 (Fla. 2018) ("This Court is 'without power to construe an unambiguous statute in a way which would extend, modify, *or limit*, its express terms or its reasonable and obvious implications.' " (emphasis added) (quoting Holly v. Auld, 450 So. 2d 217, 219 (Fla. 1984))). In fact, that formulation of the requisite intent is problematic because "breaking" is no longer a requisite element of the crime of burglary. See Baker v. State, 636 So. 2d 1342, 1344 (Fla. 1994) (" 'The common law crime of burglary consisted of breaking and entering a dwelling house of another at

night with the intent to commit a felony therein.' There are five constituent elements of this common law crime: breaking; entering; dwelling house; night time; and felonious intent. 'Breaking' and 'night time' have been completely eliminated. The legislature added remaining on the property without invitation or license to the 'entering' element. If the property involved is a conveyance, the burglar need neither enter nor remain if he takes apart any portion of the conveyance." (citation omitted) (quoting State v. Hicks, 421 So. 2d 510, 511 (Fla.1982))); Andrews v. State, 973 So. 2d 1280, 1283 (Fla. 4th DCA 2008) ("Proof of entering a structure by fraud or deceit may be considered to show that the entry was without the consent of the owner or occupant and may justify the finding that the act of entering was with the intent to commit a crime which would thereby constitute a burglary.").

It seems to me, then, that if the State can prove beyond a reasonable doubt that a defendant possessed surgical gloves (or any kind of gloves) with the intended purpose of concealing his identity in a burglary, then the State has shown that that defendant possessed an "implement with intent . . . to commit [a] burglary." Indeed, I would go so far as to suggest that if the State can make such a showing, it becomes difficult to conceive how gloves could be viewed as anything *other* than a burglary tool under the statute—unless one is prepared to defend some esoteric distinction between the specific intent to break into another's property and the specific intent to conceal that act from subsequent detection at the time of the break-in. Both intentions (to the extent they are distinct) would fall within the ambit of an intent "to commit" this crime, which is all that section 810.06 actually requires. Simply put, possessing gloves with the intent

to use them to conceal one's identity in the commission of a burglary can be part and parcel of the intent to commit a burglary for purposes of the burglary tool statute.

Numerous state courts have construed their respective burglary tool statutes to reach that very conclusion.[4] If we were not bound by controlling precedent from the Florida Supreme Court, I would align with these authorities to hold that gloves may be considered burglary tools under section 810.06, so long as the State proves the statute's requisite elements.

On a final note, I am skeptical of the majority's assertion that blue surgical gloves "are indeed a household item." I do not profess to be privy to any special consumer market data about U.S. households, but I suspect it is more likely that some homes do indeed stock surgical gloves for medical or sanitary purposes, while a

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[4]See, e.g., State v. Denson, 382 P.3d 1221, 1224 (Ariz. Ct. App. 2016) ("A person of ordinary intelligence would be able to understand what is prohibited under the burglary tools statute. It takes no special insight or understanding to recognize that possessing items such as gloves or a flashlight for the purpose of burglarizing a home is proscribed by A.R.S. § 13-1507(A)."); State v. O'Laughlin, 372 P.3d 342, 348 (Ariz. Ct. App. 2016) (holding that circumstantial evidence that defendant used gloves in a burglary was sufficient evidence to sustain conviction of possession of burglary tools); Franklin v. Commonwealth, 477 S.W.2d 788, 790-91 (Ky. Ct. App. 1972) (affirming conviction of possession of burglary tools, which included gloves); State v. Valstad, 165 N.W.2d 19, 23 (Minn. 1969) (holding that "[c]anvas gloves to avoid leaving fingerprints" could be considered burglary tools); State v. Adkins, 678 S.W.2d 855, 859 (Mo. Ct. App. 1984) ("Under the plain language of § 569.180 it is not necessary that the tools be 'breaking' tools but only that they be adapted, designed, or commonly used for committing or facilitating offenses involving forcible entry into premises."); see also Prather v. State, 88 S.W.2d 851, 854 (Ark. 1935) ("It is equally well known . . . that those who follow such crimes as burglary and larceny attempt to escape detection by wearing gloves while applying their nefarious trade, thereby preventing the discovery of fingerprints which might later cause detection.").

The District of Columbia Court of Appeals once chided a prosecutor for improperly making gloves that were found on a defendant a feature of the case: "*[T]he relevance of the gloves found on him was as a tool of the burglar trade*, so to speak, rather than as corroborative of [appellant's] identity [as the burglar]." See Smith v. United States, 175 A.3d 623, 631 (D.C. 2017) (emphasis added).

great many others do not. What I am certain of is that this teenager, who was found standing by a recently reported stolen car in a neighborhood known for drug activity, with the key to the car inexplicably available to him (and which he attempted to wipe off his fingerprints), and with blue surgical gloves stuffed in his jeans pockets, was not carrying those gloves as a "household item."

The gloves were burglary tools. Were it not for Green, I would affirm T.R.C.'s adjudication for possessing them.