

**FILED: April 11, 2012**

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON,  
Plaintiff-Respondent,

v.

WYMAN LEE MACON,  
Defendant-Appellant.

Clackamas County Circuit Court  
CR0300695

A142646

Thomas J. Rastetter, Judge.

Argued and submitted on June 28, 2011.

Susan F. Drake, Senior Deputy Public Defender, argued the cause for appellant. With her on the brief was Peter Gartlan, Chief Defender, Office of Public Defense Services.

Erika L. Hadlock, Senior Assistant Attorney General, argued the cause for respondent. With her on the brief were John R. Kroger, Attorney General, and Mary H. Williams, Solicitor General.

Before Schuman, Presiding Judge, and Wollheim, Judge, and Nakamoto, Judge.

WOLLHEIM, J.

Affirmed.

1                   WOLLHEIM, J.

2                   Defendant appeals a judgment of conviction for burglary in the second  
3 degree, ORS 164.215, based on his theft of a lockbox containing checks, receipts, and  
4 cash from a toy store storage room. Defendant assigns error to the trial court's denial of  
5 his motion for judgment of acquittal, asserting that the state failed to prove that defendant  
6 entered or remained unlawfully in a building within the meaning of ORS 164.205. We  
7 affirm.

8                   The relevant facts are undisputed. Defendant entered a store called Toy  
9 Bliss during business hours, where he was greeted by a store manager, Boston. Boston  
10 asked defendant if she could help him, and he said that he was just going to look around.  
11 Defendant then walked throughout the store. Twenty to thirty minutes later, Boston saw  
12 defendant at the back of the store. He was near the entrance to a separate room closed off  
13 from the rest of the store that is used by employees for storage. The door of that storage  
14 room was between two display cases, designed to look like part of the wall. In effect, the  
15 door was concealed in plain sight. The door had no doorknob and was not marked in any  
16 way except for a crack in the wall. The door, although closed, was not locked because it  
17 led to a fire exit.

18                   Boston then saw defendant walk rapidly toward the front of the store,  
19 hunched over a large bulge under his jacket. Boston followed defendant and asked him  
20 to stop, but he left through the front door. Boston later realized that the store's lockbox  
21 was missing from the storage room; the box had contained more than \$750 in cash, store  
22 receipts, and customer checks. She also discovered that the exterior door to the storage

1 room was unlocked, although it had been locked when she opened the store that morning.

2 Defendant was charged with burglary in the second degree.<sup>1</sup> A person  
3 commits the crime of burglary in the second degree if the person enters or remains  
4 unlawfully in a building with intent to commit a crime therein. ORS 164.215(1). After  
5 the trial court instructed the jury, defendant moved for a judgment of acquittal on the  
6 burglary charge, arguing that the state had failed to establish that defendant entered or  
7 remained unlawfully in the toy store. Defendant argued that the toy store was open to the  
8 public and that he had neither entered nor remained unlawfully in that building. *See* ORS  
9 164.205(3) (to "enter or remain unlawfully" means, among other things, "(a) [t]o enter or  
10 remain in or upon premises when the premises, at the time of such entry or remaining, are  
11 not open to the public or when the entrant is not otherwise licensed or privileged to do  
12 so" or "(b) [t]o fail to leave premises that are open to the public after being lawfully  
13 directed to do so by the person in charge"). In effect, defendant argued that the storage  
14 room was not a separate building and his entry into that part of the toy store--whether the  
15 storage room itself was open to the public or not--could not support a burglary  
16 conviction. The trial court denied defendant's motion and concluded that it was a  
17 question for the jury whether the storage room was open to the public and whether  
18 defendant remained unlawfully in the toy store. The trial court did not address the  
19 question of whether the storage room was a separate building.

20 On appeal, defendant argues that the trial court erred in denying his motion

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<sup>1</sup> Defendant was also charged with and convicted of first-degree theft. That conviction is not at issue on appeal.

1 for two related reasons. First, defendant argues that the storage room was not a separate  
2 building under the burglary statutes and that the relevant "building" for purposes of his  
3 entry or remaining was the toy store as a whole. Second, assuming that to be the case,  
4 defendant contends that neither his presence inside the storage room nor his criminal  
5 intent were sufficient to revoke his license to be in the toy store generally. The state,  
6 meanwhile, responds that the trial court did not err, because the evidence sufficiently  
7 supported defendant's burglary conviction under either of two theories presented by the  
8 jury instructions: (1) entering the storage room, a "separate unit" within a building, with  
9 criminal intent; or (2) remaining in the toy store after losing the privilege to be there.

10 "We review a trial court's denial of a defendant's motion for judgment of  
11 acquittal to determine whether, viewing the evidence in the light most favorable to the  
12 state, a rational trier of fact could have found the elements of the charged crime beyond a  
13 reasonable doubt." [State v. Vargas-Torres](#), 237 Or App 619, 621, 242 P3d 619 (2010).

14 Defendant's arguments that the storage room was not itself a separate  
15 building under the burglary statutes and that defendant did not enter or remain unlawfully  
16 in the toy store as a whole raise questions of statutory interpretation. Applying the  
17 interpretive methodology required by [State v. Gaines](#), 346 Or 160, 171-72, 206 P3d 1042  
18 (2009), we give the text and context of the statutes primary consideration in the analysis.  
19 We may consider legislative history at any stage of analysis to illuminate and determine  
20 legislative intent. *Id.* at 172.

21 We begin with the text of ORS 164.215(1), which criminalizes the act of  
22 "enter[ing] or remain[ing] unlawfully in a building with the intent to commit a crime

1 therein." The statutory construction question presented in this case requires a two-step  
2 analysis. First, we must identify the "building" at issue in this case--the toy store as a  
3 whole or the storage room in particular. Second, we must determine whether a jury could  
4 find from the evidence presented that defendant entered or remained unlawfully in the  
5 building at issue.

6 We turn, then, first to the question whether the storage room was a separate  
7 building under the burglary statutes. ORS 164.205(1) defines the term "building":

8 "Building,' in addition to its ordinary meaning, includes any booth,  
9 vehicle, boat, aircraft or other structure adapted for overnight  
10 accommodation of persons or for carrying on business therein. Where a  
11 building consists of separate units, including, but not limited to, separate  
12 apartments, offices or rented rooms, each unit is, in addition to being a part  
13 of such building, a separate building."

14 We have recognized that the ordinary meaning of "building" includes free-  
15 standing structures used for storage. *State v. Barker/Phelps*, 86 Or App 394, 397-98, 739  
16 P2d 1045 (1987) (citing *State v. Essig*, 31 Or App 639, 571 P2d 170 (1977), *rev den*, 281  
17 Or 323 (1978) (a large potato shed used for storage was a building within the meaning of  
18 the burglary statutes)). Nonetheless, an unlocked storage room *within* a store is not a  
19 separate building under the ordinary meaning of the word. *Webster's Third New Int'l*  
20 *Dictionary* 292 (unabridged ed 2002) defines "building" as:

21 "**1** : a thing built: **a** : a constructed edifice designed to stand more or less  
22 permanently, covering a space of land, usu. covered by a roof and more or  
23 less completely enclosed by walls, and serving as a dwelling, storehouse,  
24 factory, shelter for animals, or other useful structure -- distinguished from  
25 structures not designed for occupancy (as fences or monuments) and from  
26 structures not intended for use in one place (as boats or trailers) even  
27 though subject to occupancy **b** : a portion of a house occupied as a separate

1 dwelling : APARTMENT, TENEMENT -- used only in some legal statutes  
2 \* \* \*."

3 That plain meaning of the term "building" does not encompass the toy store's storage  
4 room, which is a part of the toy store building and is not a free-standing structure or a  
5 portion of a house occupied as a separate dwelling.

6 That is not the end of the inquiry, though, because ORS 164.205(1)  
7 expands the meaning of "building" beyond its "ordinary meaning." The second sentence  
8 of the statutory definition, once again, provides that, "[w]here a building consists of  
9 separate units, including, but not limited to, separate apartments, offices or rented rooms,  
10 each unit is, in addition to being a part of such building, *a separate building*." (Emphasis  
11 added.)

12 A "unit," in this context, refers to something that is "a constituent and  
13 isolable member of some more inclusive whole." *Webster's* at 2500. Consistently with  
14 that ordinary meaning, and the "common characteristics" of the nonexclusive examples of  
15 "separate units" listed in the statute, see [State v. Kurtz](#), 350 Or 65, 75, 249 P3d 1271  
16 (2011) ("Typically, statutory terms such as 'including' and 'including but not limited to,'  
17 when they precede a list of statutory examples, convey an intent that an accompanying  
18 list of examples be read in a nonexclusive sense."), we have focused the "separate unit"  
19 inquiry on whether the area was self-contained from its parent building, including secure  
20 physical access, separate function, and separate occupation. [State v. Peña](#), 183 Or App  
21 211, 51 P3d 646 (2002);<sup>2</sup> [State v. Jenkins](#), 157 Or App 156, 969 P2d 1048 (1998); *State v.*

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<sup>2</sup> In *Peña*, we considered whether rented rooms in a house constituted separate

1 *Handley*, 116 Or App 591, 843 P2d 456 (1992); *Barker/Phelps*, 86 Or App at 398.

2           In *Barker/Phelps*, for example, we held that storage units in a commercial  
3 storage facility, each locked and rented by separate owners, constituted separate buildings  
4 under the burglary statutes. 86 Or App at 398. Similarly, in *Handley*, we held that  
5 locked storage lockers in the carport of an apartment complex, each rented by different  
6 tenants of the apartment complex, were separate buildings within the meaning of ORS  
7 164.205(1). 116 Or App at 593-94.

8           In *Jenkins*, the issue was whether the area behind the bar of a tavern was a  
9 separate building. We relied on the rule in *Barker/Phelps* that "separate units within  
10 larger buildings are separate buildings [for purposes of our burglary statutes] when each  
11 is 'self-contained.'" *Jenkins*, 157 Or App at 160 (citing *Barker/Phelps* 86 Or App at 398).  
12 The bar in *Jenkins* was open on both ends, its design offered little to impede access to the  
13 space behind it, and its function was encompassed by, and inseparable from, the purpose  
14 of the tavern. *Id.* at 158, 160. We contrasted the bar to complexes of self-contained units  
15 like apartments or an office building where the ability to control access to individual units  
16 was discrete, and where the use of individual units was usually separate from the use of  
17 units around it. *Id.* We concluded that the area behind a bar within a tavern was not a  
18 "separate unit." *Id.*

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units, but we did not resolve that issue, because the state presented no evidence that the defendant in that case had entered the room with the intent to commit a crime "therein." 183 Or App at 216; *see also State v. Cocke*, 334 Or 1, 3, 45 P3d 109 (2002) (individually rented rooms with locks were separate apartments even though the rooms were in a single house and the tenants shared other parts of the house).

1           Here, unlike the bar area in *Jenkins*, the storage room of the toy store was a  
2 self-contained unit of the building with separate physical access (a camouflaged door),  
3 separate occupation (employees only), and separate function (storage and holding money  
4 rather than merchandising). Viewing that evidence of the storage room's characteristics  
5 in the light most favorable to the state, we conclude that the state presented sufficient  
6 evidence that the storage room was a "separate unit" of the toy store and, therefore, a  
7 separate building for purposes of ORS 164.205(1).

8           Thus, the only remaining question is whether the state presented sufficient  
9 evidence that defendant unlawfully entered or remained in the storage room itself. *See*  
10 ORS 164.205(3)(a) (to "enter or remain unlawfully" means "(a) [t]o enter or remain in or  
11 upon premises when the premises, at the time of such entry or remaining, are not open to  
12 the public or when the entrant is not otherwise licensed or privileged to do so"); ORS  
13 164.205(4) ("Open to the public" means premises which by their physical nature,  
14 function, custom, usage, notice or lack thereof or other circumstances at the time would  
15 cause a reasonable person to believe that no permission to enter or remain is required.")).  
16 And, on that point, defendant offers no argument; that is, he does not argue that the  
17 storage room (as opposed to the toy store) was open to the public or that he was licensed  
18 or privileged to enter the storage room. The trial court did not err in denying his motion  
19 for a judgment of acquittal.<sup>3</sup>

20           Affirmed.

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<sup>3</sup> Because we conclude that defendant entered the storage room unlawfully, we need not address the parties' arguments regarding whether defendant remained unlawfully.