IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. NORMAN GOTCHER, Appellant.	)	No. 63839-4-I
	)	DIVISION ONE
	)	UNPUBLISHED OPINION
	)	FILED: July 19, 2010

Becker, J. — Norman Gotcher was convicted of attempted residential burglary. We reject his argument that an error in the jury instruction defining attempted residential burglary relieved the prosecution of proving all elements of his crime; this court has previously upheld the challenged instruction. We also reject his challenge to the sufficiency of the evidence. The homeowner testified that Gotcher, a stranger, approached an isolated residence, tried to open locked doors, and then climbed a ladder onto the roof. This evidence supports a strong and rational inference that Gotcher intended to commit a crime inside.

The State presented evidence that on the afternoon of November 7, 2008, Gotcher drove to the end of a long gravel road in Maple Valley, Washington, and parked at the last house. The house belonged to Rebecca Rohman. It is

situated in a wooded area, and no neighboring house is visible through the trees. Gotcher parked in the driveway, his trunk facing the house.

Inside the house, Rohman heard knocks at her front door. She was unnerved because strangers rarely came down the private road and her dog had begun, uncharacteristically, to growl. She looked through the peephole of the door. She saw a man smoking a cigarette and wearing dark sunglasses though it was a "dark" day. She later identified the man as Gotcher. As she gathered her dog to retreat upstairs, she heard a loud thud against the front door. She thought it was Gotcher kicking the door.

She observed Gotcher walk around the house. She saw him attempt to open the locked sliding glass door at the rear of the house. Once upstairs, she watched Gotcher put her ladder up against the house, climb onto the roof, and walk around to her upstairs bedroom window. She saw his silhouette from the waist up through the closed blinds. She heard him try to open the window.

Rohman called 911. Within minutes, a police helicopter in the area responded and observed Gotcher leaving the residence in a maroon sedan. The helicopter followed Gotcher and relayed his changing position to officers on the ground who had responded to the 911 dispatch.

The officers stopped Gotcher, reading his rights, frisking, and handcuffing him once he left his car. They asked him if he had been to a residence in the neighborhood. Gotcher at first said that he had not. But when confronted with the fact that he had been seen at Rohman's house, he admitted he had been

there to see if anyone was home. He first denied and then admitted to climbing the ladder onto the roof.

Police brought Rohman to the scene of the stop. She identified Gotcher as the person who had attempted to enter her house.

Gotcher did not testify and presented no witnesses. The jury found him guilty of attempted residential burglary. The jury also found the aggravating factor that the victim was home during the attempt. The court determined Gotcher's offender score at 21 and his standard range at 47.25 to 60 months. The judge sentenced Gotcher under the special drug offender sentencing alternative to 26.81 months' incarceration and 26.81 months in community custody. Gotcher appeals.

Without objection, the court instructed the jury that "a person commits the crime of attempted residential burglary when, with intent to commit that crime, he or she does any act that is a substantial step toward the commission of that crime." Gotcher now argues that this instruction impermissibly relieved the State of the burden of proving the elements of attempted residential burglary for which he was convicted.

We may consider a manifest error affecting a constitutional right raised for the first time on appeal. RAP 2.5(a)(3). A jury instruction that relieves the State of proving any element of the crime charged violates the defendant's right to a fair trial and is a manifest constitutional error. State v. Stein, 144 Wn.2d 236, 240-41, 27 P.3d 184 (2001).

Gotcher argues the instruction defining attempted residential burglary relieves the State of the burden of proving the defendant attempted to commit the actual crime charged. He reads the instruction as defining his crime as an attempt to commit attempted residential burglary. He relies on State v. Smith, 131 Wn.2d 258, 930 P.2d 917 (1997). In that case, Smith was charged with conspiracy to commit murder. The court instructed the jury that to convict Smith of criminal conspiracy it had to find that the defendant agreed with his co-conspirators "'to engage in . . . the performance of conduct constituting the crime of Conspiracy to Commit Murder in the First Degree.'" Smith, 131 Wn.2d at 261 (emphasis omitted) (quoting instruction 13). The State conceded the instruction incorrectly asked the jury to find that Smith committed the crime of conspiracy to commit conspiracy to commit murder. Smith, 131 Wn.2d at 262. The court stated that an instruction which "purports to be a complete statement of the law yet states the wrong crime as the underlying crime which the conspirators agreed to carry out" was constitutionally defective because it relieved the State of the burden of proving that Smith conspired to commit murder and the error was not cured by other definitional instructions. Smith, 131 Wn.2d at 263.

In Gotcher's trial, the instructions correctly stated the law and the underlying crime. The controlling case is not Smith, but State v. Pittman, 134 Wn. App. 376, 166 P.3d 720 (2006). Pittman, like Gotcher, was convicted of attempted residential burglary. Pittman's argument based on Smith we rejected:

> This case is distinguishable from Smith because instruction 5 is not clearly erroneous. Reading the instruction in a

> straightforward, commonsense manner, the average juror would interpret "that crime" to mean residential burglary as the parties intended. Even if instruction 5 were somehow confusing, the crucial "to convict" instruction properly asked the jury whether Pittman "did an act which was a substantial step toward commission of residential burglary," not whether he did an act which was a substantial step toward commission of attempted residential burglary. Pittman does not dispute that the "to convict" instruction accurately listed all the essential elements of attempted residential burglary. Nor does he dispute that instruction 8 accurately defined the crime of residential burglary. The jury instructions as a whole properly informed the jury of the applicable law. The alleged inadequacies in instruction 5 did not result in practicable and identifiable consequences, so Pittman cannot show manifest error reviewable for the first time on appeal.

Pittman, 134 Wn. App. at 382-83. In this case, the same definitional instruction and the same type of "to convict" instruction were given as in Pittman. As in Pittman, Gotcher cannot show manifest error reviewable for the first time on appeal.

Gotcher also argues that the State did not present sufficient evidence to show that he intended to commit a crime inside the residence he attempted to enter. "A person is guilty of residential burglary if, with intent to commit a crime against a person or property therein, the person enters or remains unlawfully in a dwelling other than a vehicle." RCW 9A.52.025(1). We review a challenge to the sufficiency of the evidence to determine "whether or not any rational trier of fact, viewing the evidence in the light most favorable to the prosecution, could have found, beyond a reasonable doubt, all the essential elements of the crime." State v. Bencivenga, 137 Wn.2d 703, 709, 974 P.2d 832 (1999). "Nothing

forbids a jury, or a judge, from logically inferring intent from proven facts, so long as it is satisfied the state has proved that intent beyond a reasonable doubt." Bencivenga, 137 Wn.2d at 709.

The State introduced evidence that Gotcher approached a house in a remote location and attempted to enter the house through several doors and windows. Gotcher climbed a ladder from the backyard onto the roof to attempt entry. He initially lied to police about being at the residence and climbing onto the roof. After admitting this conduct, he explained that he only wanted to see if someone was home. Given all this testimony, a reasonable jury could conclude that it was more likely Gotcher intended to commit a crime inside Rohman's house than that he merely wanted to see if anyone was home. The evidence was sufficient to prove attempted residential burglary.

Gotcher has filed in this court a statement of additional grounds for review, as allowed by RAP 10.10. A statement of additional grounds will not be considered by this court if it does not inform the court of the nature and occurrence of alleged errors. RAP 10.10(c).

Gotcher argues that the court violated his right to represent himself by denying his motion to appear pro se. But the record shows that Gotcher explicitly withdrew his motion to appear pro se after the court conducted an extensive colloquy with him on the difficulties of appearing without counsel.

Gotcher also contends the court erred by denying his motions for new court-appointed counsel and by denying defense counsel's motion to withdraw

from representation. These contentions appear to relate to the same events. Defense counsel became concerned about a possible conflict of interest when the State attempted to subpoena another lawyer from the same office and the defense investigator to testify against Gotcher. The trial court dismissed the motion to withdraw without prejudice pending the outcome of the subpoena motion. After the court denied the State's subpoena motion, no conflict existed and the motion to withdraw was not revived. Thus, Gotcher has not shown that the denial of the motions supplies a ground for review.

Gotcher complains that the court improperly admitted his criminal record into evidence. His citations to the record, however, are to pretrial motions. The court denied the State's motion to introduce Gotcher's criminal record for impeachment purposes or to prove intent.

Gotcher contends the evidence was insufficient to show he attempted to enter Rohman's house because he did not break any doors or windows. But breaking in would have been a completed burglary. The evidence was sufficient to establish an attempt. Gotcher also argues that the evidence was insufficient to support an inference that he intended to commit a crime inside the residence. We disagree. See, e.g., State v. Bergeron, 105 Wn.2d 1, 11, 711 P.2d 1000 (1985) ("Unmistakably, the defendant intended more than a social call."). Gotcher asserts that the instructions did not properly define the charge of attempted burglary. Upon reviewing the instructions, we did not discover any defects, and Gotcher's proposed definition of the crime is manifestly incorrect.

Gotcher attempts to show that the testimony of several of the State's witnesses is inconsistent with police reports or other witnesses' testimony. We defer to the jury on issues of conflicting testimony and the credibility of the witnesses. State v. Drum, 168 Wn.2d 23, 35, 225 P.3d 237 (2010). Therefore, these arguments do not furnish grounds for review.

Gotcher contends that the court miscalculated his offender score and standard range, as shown by the State's motion to admit his criminal history to prove intent and for impeachment. But what criminal history is admissible for evidentiary purposes has no bearing on what criminal history is relevant to the calculation of the offender score. See RCW 9.94A.525 (calculation of offender score). Gotcher also argues that several of his past convictions are the same criminal conduct and do not count individually toward his score. His arguments on this point are so incoherent as to be virtually incomprehensible and consequently we do not perceive grounds for review in this claim. We do not have a sufficient record to determine whether Gotcher is correct in his assertion that the required period of time elapsed between his release from confinement for one offense to his commission of the next offense was long enough that the prior offense should not have been included in the calculation of his offender score under RCW 9.94A.525(2).

Gotcher contends that his sentence must be reversed because the State did not recommend the 22 month sentence he claims was offered to him in a plea agreement before trial. He asserts that the State failed to honor the

agreement at sentencing based on "vindictive and retaliatory motive." He also asserts that his attorney refused the plea agreement without his consent, without the court holding a hearing to determine his rejection or consent to the plea, and that the failure to recommend the 22 month sentence after trial violated his civil and due process rights and constituted breach of contract. We cannot find evidence in the record concerning his factual assertions, and his legal arguments are once again not coherent. Therefore, we have no basis for review of his claim.

Gotcher makes a conclusory assertion that his speedy trial rights were violated. On June 8, 2009, the day before trial, the court discussed this concern with Gotcher and counsel. The court determined that continuances were granted for good cause at least until June 11, 2009, and no violation occurred. The record before us furnishes no basis to question the trial court's determination.

Affirmed.

WE CONCUR:

Dwyer, C.J.

Cox, J.