

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,)	No. 65839-5-I
)	
Respondent,)	
)	
v.)	
)	
KEVIN DAVID WAIS,)	UNPUBLISHED OPINION
)	
Appellant.)	FILED: July 25, 2011
)	

Ellington, J. — Kevin Wais appeals his conviction for residential burglary. He contends the court erred by refusing to instruct on the lesser included offense of first degree criminal trespass. But the evidence does not permit a reasonable inference that Wais committed first degree criminal trespass to the exclusion of residential burglary. We affirm.

BACKGROUND

On April 26, 2010, Oak Harbor police responded to a possible burglary at the home of Roger Brown, who was out of town. Officer Serloyd Carter entered the home and found it ransacked. Brown owned a large gun safe, which bore marks of attempted entry. The handle had been bent, there were scratches and dents on the door, and someone had sawed through the hinge pins.¹ Police identified a sliding

¹ Even with the hinge pins cut, Brown had to open the door with the combination lock.

glass door as the possible point of entry and found tire tracks outside the home indicating that a vehicle had been backed up to that door.

When Brown returned home the following evening, he confirmed that someone had tampered with his gun safe. He stayed the night at a hotel. He agreed to meet Detective Ronald Hofkamp at his house the next morning. When Hofkamp had not heard from Brown by 10:00 that morning and could not reach him by phone, he went to Brown's house.

A pick-up truck was parked in the carport. As he approached the house on foot, Hofkamp saw a man wearing a red t-shirt coming from Brown's detached garage. The man spotted Hofkamp and crouched down behind the truck, then moved away from the truck out of Hofkamp's view. Hofkamp ran up to the house and found the back door wide open. He saw the man in the red t-shirt running up the street. A second person exited the front door and also ran up the street.

Police located Wais, out of breath and wearing a red t-shirt, about three blocks away. Wais claimed he had not been at Brown's house and had just been walking from a nearby convenience store to his girlfriend's house. Hofkamp arrived and positively identified Wais as the person who fled from Brown's garage. Hofkamp later reviewed the convenience store surveillance tape from several hours prior to Wais's arrest and did not see Wais.

Inside the house, there was evidence of a second burglary in progress. Items were stacked in the hallway that were not there after the first burglary, two days before. The gun safe, which had been against a wall in the master bedroom, had

been maneuvered onto pipes from Brown's garage, rolled about 10 feet, and was blocking the bedroom doorway.

Wais was charged with one count of residential burglary. He proposed jury instructions for the lesser included offense of first degree criminal trespass. The court declined to give those instructions. Challenges to jury instructions are reviewed de novo.²

DISCUSSION

A defendant is entitled to an instruction on a lesser included offense if he satisfies the two-prong test articulated in State v. Workman.³ Under the legal prong of the test, "each of the elements of the lesser offense must be a necessary element of the offense charged."⁴ Under the factual prong, evidence in the case must support an inference that only the lesser crime was committed to the exclusion of the charged offense.⁵ When determining whether the evidence at trial was sufficient to support an instruction on a lesser included offense, we view the evidence in the light most favorable to the party requesting that instruction.⁶ An instruction is warranted "[i]f the evidence would permit a jury to rationally find a defendant guilty of the lesser offense and acquit him of the greater."⁷ The evidence must affirmatively establish the

² State v. Jackman, 156 Wn.2d 736, 743, 132 P.3d 136 (2006).

³ 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978).

⁴ State v. Fernandez-Medina, 141 Wn.2d 448, 454, 6 P.3d 1150 (2000) (quoting Workman, 90 Wn.2d at 447-48).

⁵ Id. at 455.

⁶ Id. at 455-56.

⁷ Id. at 456 (alteration in original) (quoting State v. Warden, 133 Wn.2d 559, 563, 947 P.2d 708 (1997)).

defendant's theory of the case; it is not enough that the jury might simply disbelieve the evidence pointing to guilt.⁸

Because each of the elements of first degree criminal trespass is an element of residential burglary, the legal prong of the Workman test is satisfied. Both crimes require entering or remaining unlawfully in a building, but residential burglary also requires "intent to commit a crime against a person or property therein."⁹ Wais argues the factual prong is satisfied because the evidence indicates he committed first degree criminal trespass on Brown's property, but that he did not intend to commit or aid in residential burglary.¹⁰ We disagree. The evidence does not support an inference that Wais merely remained unlawfully without intent to commit or aid a crime.

Testimony about the size and weight of the gun safe strongly indicates involvement of more than one person in the burglary. The safe is 60 by 30 by 27 inches, weighs 850 pounds when empty, and contained guns at the time of the burglaries. Moving the safe into Brown's house required the use of a forklift to load it into a truck, a winch to remove it from the truck, the help of another person to stand it upright, and a refrigerator dolly to get it into the house. Maneuvering the safe onto pipes and moving it 10 feet across Brown's bedroom was not a one-person job. Wais

⁸ Id. (citing State v. Fowler, 114 Wn.2d 59, 67, 785 P.2d 808 (1990), overruled on other grounds by State v. Blair, 117 Wn.2d 479, 816 P.2d 718 (1991)).

⁹ RCW 9A.52.025, .070.

¹⁰ A person is an accomplice of another person in the commission of a crime if, with knowledge that it will promote or facilitate the commission of a crime, he aids or agrees to aid such other person in planning or committing it. RCW 9A.08.020(3)(a)(i-ii).

No. 65839-5-1/5

came from the garage where the pipes used to move the gun safe were kept. Further,

Wais's keys were found in the pick-up truck parked in the carport. He attempted to flee the property at the same time the other suspect emerged from the house and fled, and subsequently lied about being on Brown's property.

The evidence supports only one inference: that Wais and another person were unlawfully on Brown's premises with the intent to commit burglary. The court did not err in refusing to instruct the jury on the lesser included offense of criminal trespass.

Affirmed.

Edington, J.

WE CONCUR:

Spencer, J.

Cox, J.