IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JAMES R. BRADY, Appellant.	No. 41056-7-II UNPUBLISHED OPINION

Armstrong, P.J. — A jury convicted James Brady of one count of residential burglary. On appeal, Brady argues that the trial court erred by instructing the jury they could infer from his presence in the residence that he intended to commit a crime therein. In his statement of additional grounds (SAG),[1] Brady asserts that the trial court miscalculated his offender score and that his trial counsel ineffectively represented him. We affirm.[2]

FACTS

Near midnight on December 31, 2009, Keith McGowan[3] and his wife heard a loud noise from downstairs. Keith armed himself and started downstairs while his wife called 911. Keith saw a light come on in the garage and heard someone rummaging in the garage. After the police arrived, they saw Brady enter the house from a door in the garage and then run out the back door. Police caught Brady. In a search of Brady incident to his arrest, police found two car keys and a flashlight from the McGowans' cars. Keith noticed that his back door had been unbolted from the

[1] RAP 10.10.

[2] A commissioner of this court initially considered Brady's appeal as a motion on the merits under RAP 18.14 and then transferred it to a panel of judges.

[3] We refer to the McGowans by their first name for the sake of clarity. We intend no disrespect.

inside and the door left open. Police found pry marks on a window frame, the apparent point of entry.

The State charged Brady with residential burglary. Brady's defense was that he was too intoxicated to have the intent necessary to commit residential burglary. A friend testified that during the evening prior to entering the McGowans' residence, Brady consumed seven very strong mixed drinks[4] and two pitchers of beer.

The court instructed the jury on both residential burglary and criminal trespass. The court also instructed the jury regarding voluntary intoxication. Instruction 10, which Brady challenges on appeal, stated:

> A person who enters or remains unlawfully in a building may be inferred to have acted with intent to commit a crime against a person or property therein. This inference is not binding upon you and it is for you to determine what weight, if any, such inference is to be given.

Clerk's Papers (CP) at 15. Brady's counsel did not object to this instruction. The jury found Brady guilty of residential burglary.

ANALYSIS

Brady argues that the trial court violated his due process rights by giving instruction 10 because it created an impermissible presumption thereby relieving the State of its burden to prove every element of the charged crime.[5] Due process requires the State to prove beyond a reasonable doubt every element of a crime. *Francis v. Franklin*, 471 U.S. 307, 313, 105 S. Ct.

[4] Those drinks included Liquid Cocaines and Irish Car Bombs.

[5] He argues that because this is a manifest constitutional error, he can raise it for the first time on appeal. RAP 2.5(a)(3).

1965, 85 L. Ed. 2d 344 (1985); *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). To prove residential burglary, the State must establish that the defendant (1) entered or remained in a dwelling, (2) with the intent to commit a crime against a person or property therein. RCW 9A.52.025; *State v. Stinton*, 121 Wn. App. 569, 573, 89 P.3d 717 (2004). The State is permitted to use evidentiary devises such as inferences, but such a permissive inference does not relieve the State of its burden of proof. *State v. Hanna*, 123 Wn.2d 704, 709-10, 871 P.2d 135 (1994). The legislature has adopted a permissive inference to establish the requisite intent for residential burglary where the evidence shows that a person enters or remains unlawfully in a building. *State v. Grimes*, 92 Wn. App. 973, 980 n.2, 966 P.2d 394 (1998) (citing RCW 9A.52.040 and *State v. Brunson*, 128 Wn.2d 98, 107, 905 P.2d 346 (1995)).

Instruction 10 was taken directly from 11A *Washington Pattern Jury Instructions: Criminal* 60.05, at 15 (3d ed 2008) and RCW 9A.52.040. This instruction permits but does not require the jury to infer the defendant's criminal intent from his presence in the dwelling. *Brunson*, 128 Wn.2d at 105. And the inference does not relieve the State of proving a defendant's intent to commit a crime. *Stinton*, 121 Wn. App. at 573. It is constitutionally permissible only if the intent to commit a crime "more likely than not flows from unlawful entry." *Brunson*, 128 Wn.2d at 105-07, 111-12 (rejecting defendant's claim that WPIC 60.05 violated his due process).

Relying on *State v. Jackson*, 112 Wn.2d 867, 870-71, 876, 774 P.2d 1211 (1989), Brady contends that the trial court erred in giving instruction 10 because the evidence was equivocal, establishing only that he was in the residence. This reliance is misplaced because in *Jackson*, the

defendant was charged with attempted burglary, not residential burglary. *See Jackson*, 112 Wn.2d at 870-71, 876 (holding that inference could not be drawn when defendant was attempting to enter building by repeatedly kicking the door prior to police officer's approach). Further, the State proved more than Brady's presence in the residence. It proved that he had car keys and a flashlight from the McGowans' cars, he had pried open a window to gain entry, and he fled from the police. Thus, his intent to commit a crime in the dwelling flowed "more likely than not" from the unlawful entry. *Brunson*, 128 Wn.2d at 112. The trial court did not violate Brady's right to due process by giving instruction 10.

In his SAG, Brady asserts that the trial court miscalculated his offender score by counting his current conviction. The trial court counted Brady's prior juvenile adjudication for residential burglary as one point under RCW 9.94A.525(5)(b)(16), his four other prior juvenile adjudications as one-half point each under RCW 9.94A.525(5)(b)(7), his five prior adult felony convictions as one point each under RCW 9.94A.525(b)(7), and his commission of the current crime while on community custody as one point under RCW 9.94A.525(5)(b)(19). Adding a point to his offender score because he committed his current offense while on community custody does not violate Brady's right to due process. *State v. Miles*, 66 Wn. App. 365, 369, 832 P.2d 500 (1992). The trial court did not err when it calculated his offender score as nine.

Brady also asserts that his trial counsel failed to provide a "proper jury instruction that did not 'negate' his theory of events in conveying to the jury the lack of intent from Brady's conduct." SAG at 6-7. To prevail on a claim that his counsel ineffectively represented him, Brady must show that: (1) his counsel's representation fell below an objective standard of

reasonableness; and (2) that he was prejudiced because but for counsel's flawed representation, the trial result would likely have been different. *Strickland v. Washington*, 466 U.S. 668, 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995) (citing *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987)).

Brady is wrong in asserting that his counsel failed to request an instruction explaining to the jury how it could use his intoxication evidence. The court instructed the jury:

> No act committed by a person while in a state of voluntary intoxication is less criminal by reason of that condition. However, evidence of intoxication may be considered in determining whether the defendant acted with "intent."

CP at 14. Brady fails to show that his counsel ineffectively represented him.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Armstrong, P.J.

We concur:

Van Deren, J.

Johanson, J.