IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. MICHAEL ANTHONY MONK, Appellant.	No. 41276-4-II UNPUBLISHED OPINION

Quinn-Brintnall, J. — After a bench trial, the trial court found Michael Monk guilty of second degree burglary, in violation of former RCW 9A.52.030(1) (1989). Monk entered a restaurant and reached behind the counter to steal money from the cash register. On appeal, Monk challenges the sufficiency of evidence proving that he unlawfully remained in an area not open to the public. We affirm.

FACTS

Martin Montague is the manager of Country Café & Pizza in Centralia, Washington. On June 24, 2010, Montague was the only employee working, so he took orders, cooked the food, and delivered it to the tables. From the kitchen area, Montague could cook the food and see the cash register and counter area through a pass-through-type opening.

There were other patrons in the restaurant when Monk walked in at 3:00 pm. Montague

went to the front of the restaurant to meet Monk, who ordered a hamburger.[1] Montague went to the kitchen to cook the hamburger while Monk went to the restroom. As Monk passed by the kitchen on his way to the restroom, Montague asked Monk for clarification of his order. As Montague continued to cook the food, Monk returned to the front of the restaurant.

Montague heard the mechanical sound of the cash register drawer opening, and he immediately turned around and saw Monk standing in front of the counter "[r]eaching over the cash register and counter into the drawer," which was open. Report of Proceedings (RP) (Aug. 20, 2010) at 22. Montague testified at trial that he did not open the cash register drawer and that nobody else in the restaurant, other than Monk, could have opened the cash register drawer.[2] As soon as Montague turned around, Monk recoiled his hand and sat down at a table. Montague then walked from the kitchen to where Monk was seated and restrained him until the police arrived. Montague testified that he did not think any money was missing from the cash register drawer.

At trial, Montague testified that customers do not routinely go, nor are they allowed to go, into the kitchen area or behind the counter where the cash register sits. He further testified that, as the manager of the restaurant, he expects customers to keep out of areas where employees typically are working. Customers also are not allowed into the Café's cash register.

Based on the above incident, the State charged Monk with second degree burglary. Monk exercised his right not to testify at trial. Instead, his counsel argued that when Monk reached

[1] The record does not indicate if Monk paid for his order when placing it.

[2] The record does not clearly indicate whether other patrons were present.

over the counter to access the cash register, he had not entered an area of the restaurant not open to the public. Monk argued that the counter had items meant for public use and that nothing on the counter indicated where a private individual's access ended. Accordingly, Monk argued that he was guilty of attempted theft only and not second degree burglary.

The trial court entered written findings of fact and conclusions of law. Specifically, the trial court found that customers are not allowed behind the front of the counter where the cash register sits. The trial court also found that the counters, the top of the ice cream sign, and the top of the cash register define the space where customers are not allowed and that this space was an impliedly private area of the restaurant, obvious to all who entered. The trial court concluded that Monk exceeded the scope of his business invitation into the restaurant and remained unlawfully in the restaurant's private section with the intent to unlawfully take money that did not belong to him. The trial court then found him guilty of second degree burglary and sentenced him to 90 days of confinement. Monk timely appeals.

ANALYSIS

Monk challenges the sufficiency of the evidence proving that he entered or remained unlawfully in a building.[3] Monk assigns error to the trial court's findings regarding public versus private space in the restaurant. Monk contends that when he reached over the counter and put his hand in the cash register, he remained in a space open to the public because the cash register was on the counter near other items the public uses—such as a toothpick dispenser, bell, tip jar, and

[3] Monk does not challenge the trial court's finding that his "obvious intent from his conduct was that he intended to wrongfully take the cash" in the cash register drawer. Clerk's Papers at 6. Unchallenged findings become verities on appeal. *State v. O'Neill*, 148 Wn.2d 564, 571, 62 P.3d 489 (2003) (citing *State v. Hill*, 123 Wn.2d 641, 647, 870 P.2d 313 (1994)).

pens. And according to Monk, *State v. Miller*, 90 Wn. App. 720, 729-30, 954 P.2d 925 (1998), supports his argument that the act of opening a cash register does not constitute a burglary. The State responds that Monk did not commit his crime in a public place because the cash register was in a place closed to the general public and customers were strictly prohibited from ever going behind the counter. In addition, the State argues that Monk exceeded his business license as a customer. We have reviewed the record and photographs of the restaurant and agree that the evidence in the record is sufficient to support the trial court's determination that Monk exceeded the scope of movement of a customer within the restaurant when he reached over the counter into the cash register. Accordingly, we affirm.

Evidence is sufficient to support a conviction if viewed in the light most favorable to the verdict it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Kintz*, 169 Wn.2d 537, 551, 238 P.3d 470 (2010). A claim of sufficiency admits the truth of the State's evidence and all reasonable inferences that a trier of fact can draw from the evidence, which should be interpreted most strongly against the defendant. *Kintz*, 169 Wn.2d at 551.

Circumstantial evidence and direct evidence are equally reliable. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004); *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). Credibility determinations are for the trier of fact and are not subject to review. *Thomas*, 150 Wn.2d at 874; *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). We defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *Thomas*, 150 Wn.2d at 874-75; *State v. Walton*, 64 Wn. App. 410, 415-16, 824

P.2d 533, *review denied*, 119 Wn.2d 1011 (1992).

A person is guilty of second degree burglary if "with intent to commit a crime against a person or property therein, he enters *or remains* unlawfully in a building other than a vehicle or a dwelling." Former RCW 9A.52.030(1) (emphasis added). "A person 'enters or remains unlawfully' in or upon premises when he is not then licensed, invited, or otherwise privileged to so enter or remain." Former RCW 9A.52.010(3) (2004).

In addition, a "license or privilege to enter or remain in a building which is only partly open to the public is not a license or privilege to enter or remain in that part of a building which is not open to the public." Former RCW 9A.52.010(3). Where an individual exceeds the scope of his invitation into a building, he has remained unlawfully there. *State v. Collins*, 110 Wn.2d 253, 255, 751 P.2d 837 (1988).

In *Collins*, an elderly homeowner and her mother-in-law invited Collins into their home to use the telephone. 110 Wn.2d at 254-55. After Collins finished using the telephone, he assaulted and raped them. *Collins*, 110 Wn.2d at 255. After being tried and convicted of second degree rape, second degree assault, and second degree burglary, Collins appealed his burglary conviction challenging the sufficiency of evidence proving that he unlawfully remained in the home. *Collins*, 110 Wn.2d at 255. Our Supreme Court upheld the burglary conviction and adopted a Wisconsin Court of Appeal's analysis that there is an implied limitation on a consent to an entry. *Collins*, 110 Wn.2d at 260-61. In *Collins*, the record supported an inference that the homeowner's invitation or license to enter the home was limited to a specific area and for a single purpose. 110 Wn.2d at 260-61.

A reasonable person would not believe that a business's cash register drawer is open to the public, particularly when it is on the counter behind a raised self-serve ice cream refrigerator. As a customer of the restaurant, Monk had a license to enter the building to purchase food and to sit down and eat. His license to enter included use of the restroom for its intended purpose, but it did not extend to the cash register or other employee-only places inside the restaurant. No reasonable person would construe such a license to extend to the business's private space such as the cash register. Only restaurant employees have access to the cash register such that customers must first hand their money to the employee, who then puts the money into the drawer. As in *Collins*, no reasonable person could construe his or her entry license as a general invitation to all areas of the building for any purpose, including Monk's uncontested intended theft. 110 Wn.2d at 261.

Monk's reliance on *Miller* is misplaced. Miller used an open self-service car wash to wash his car. *Miller*, 90 Wn. App. at 723. Miller broke into the coin boxes mounted on the walls of the car wash stalls by cutting the padlocks with bolt cutters. *Miller*, 90 Wn. App. at 723. As Miller took coins from inside the boxes, the police caught him when responding to an alarm. *Miller*, 90 Wn. App. at 723. Miller was convicted of second degree burglary, making or having burglary tools, and third degree theft. *Miller*, 90 Wn. App. at 723. Division Three of the this court reversed the burglary conviction, holding that Washington law does not provide that entry or remaining in a business open to the public is rendered unlawful by the defendant's intent to commit a crime. *Miller*, 90 Wn. App. at 725.

Miller is inapposite to the present case because there, Miller broke into a coin box in a

public outdoor car wash. Customers had access to and were intended to use the entire car wash area. Customers at the car wash put their money directly into the coin box without first handing it to a car wash employee. And the coin box was not in an employee-controlled section of the car wash. Customers do not have direct access to the cash register at Country Café & Pizza.

When viewed in the light most favorable to the fact finder's determinations, any rational trier of fact could find beyond a reasonable doubt that Monk unlawfully remained in an area not open to the public intending to commit theft. Therefore, sufficient evidence supports the trial court's findings that the area behind the sign and over the cash register was an impliedly private area of the restaurant and Monk had no license to enter or remain in that part of the building which was not open to the public.

We affirm Monk's conviction for second degree burglary.

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.

QUINN-BRINTNALL, J.

We concur:

WORSWICK, A.C.J.

JOHANSON, J.