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

STATE OF WASHINGTON, Respondent, v. ANDRES ALEGRIA, Appellant.	No. 30379-9-III UNPUBLISHED OPINION

Korsmo, C.J. — Andres Alegria appeals his conviction of burglary in the second degree, arguing that the State failed to present sufficient evidence to support a conviction. We affirm.

FACTS

The Walla Walla County Sheriff's Department had impounded Mr. Alegria's car on April 20, 2011. He broke into a private impound yard later that day with intent to retrieve items from his car. After a stipulated facts bench trial, Franklin County Juvenile Court adjudicated him guilty of second degree burglary. He timely appealed to this court.

ANALYSIS

This appeal challenges the sufficiency of the evidence to support the conviction for second degree burglary. Specifically, the questions are whether the State was required to prove Mr. Alegria intended to commit theft because it specified such intent in the charging information[1] and whether it did so beyond a reasonable doubt? We conclude that whether or not the State needed to prove intent to commit theft, it did present sufficient evidence at trial.

"A person is guilty of burglary in the second degree if, with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building." RCW 9A.52.030(1).[2] Although the statute requires "intent to commit a crime," Washington has long held throughout many iterations of the burglary statute that it is not necessary to charge or prove the specific crime intended to be committed in the burglarized premises. *State v. Bergeron*, 105 Wn.2d 1, 7, 16, 711 P.2d 1000 (1985). This reasoning has its roots in *Linbeck v. State*, 1 Wash. 336, 337-38, 25 P. 452 (1890),

[1] The charging information reads: "ANDRES ALEGRIA, in the County of Franklin, State of Washington, on or about April 20, 2011, then and there, with intent to commit a crime against a person or property therein, to wit: theft, did enter or remain unlawfully in a building, other than a dwelling or a vehicle."

[2] It is uncontested that Mr. Alegria entered the impound yard unlawfully and that the impound yard is a "building" for purposes of the Washington State Criminal Code. *See* RCW 9A.04.110(5) ("'Building,' . . . includes any . . . fenced area."). Thus, the only issue in contention is whether the burglary statute requires proof of Mr. Alegria's intent to commit a crime against a person or property therein.

which held that criminal intent is presumed upon proof that the defendant entered the premises unlawfully and that the burden is on the defendant to disprove that presumption once in effect. *Bergeron*, 105 Wn.2d at 6-7 (discussing and quoting *Linbeck*). Although this presumption is no longer in effect, the *Bergeron* court upheld the rule that proof of a specific crime is not required for the simple reason that the plain language of the statute does not require such proof. *Id*. at 15.

Thus, the State did not need to specify that Mr. Alegria attempted to commit theft inside the impound yard. However, the charging document in this case specifically alleged that Mr. Alegria broke into the impound lot with the intent to commit theft. He argues that the State was therefore required to prove that specific intent, while the State contends the language is mere surplusage that did not become an additional element because no effort was made to prove it at trial. One possible answer to this question is suggested by *Bergeron*.

There the defendant complained "that absent specification of the crime intended, the jury might involve itself in 'unguided speculation' as to what crime the defendant may have intended to commit, and perhaps mistakenly consider something to be a crime that is not a crime." *Id.* at 17-18. That, in essence, is what Mr. Alegria alleges—that the juvenile court mistakenly found him guilty of something that was not a crime (i.e.

reclaiming his own property). The *Bergeron* court at first dismissed this contention by noting that the intended crime is often obvious or irrelevant. *Id*. at 18. But, it went on to provide a remedy in just such a case where the underlying crime is at issue:

> There are, of course, some cases where the specific crime intended may be material to the defendant's theory of the case as, for example, where a defendant claims to have entered and/or remained in the premises for some lawful purpose, such as at the owner's invitation *or to reclaim the defendant's own property*. In such cases, the time honored way of proceeding is for defense counsel to file a motion for a bill of particulars, make the requisite showing, and obtain an order requiring the prosecuting attorney to specify the crime intended by way of a bill of particulars, and to then propose instructions on the subject which will permit the defendant to argue his or her theory of the case in that regard.

Id. (emphasis added). Thus, when the defense hinges on proving that the defendant was either lawfully present or present for a lawful purpose then the defendant may request a bill of particulars. However, no bill of particulars was sought in this case, nor was one granted.

The parties have not presented any authority on the effect of surplusage in a charging document in a trial to the bench. At jury trial, the surplus allegations only become an additional element of the case when they are included in the jury's instructions. *State v. Hickman*, 135 Wn.2d 97, 102-03, 954 P.2d 900 (1998). We have no doubt that the same result should follow when the State seeks to prove unnecessary elements to the bench. We likewise believe that where the State does not undertake to prove an extraneous element to the bench, it

does not have a burden of doing so. It is doubtful that the State had to prove intent to commit theft in this case because it did not argue that element to the judge. Rather, both parties focused on whether or not Mr. Alegria had the intent to commit a crime when he entered the impound lot rather than whether he intended to commit theft.

Nonetheless, even if the State needed to prove Mr. Alegria's intent to commit theft, there was sufficient evidence to prove such intent. In reviewing this challenge, the court looks to the entire record, not just the juvenile court's findings of fact. *State v. Gatlin*, 158 Wn. App. 126, 130-31, 241 P.3d 443 (2010), *review denied*, 171 Wn.2d 1020 (2011). After viewing the evidence in a light most favorable to the State, this court asks whether any rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt. *State v. Rempel*, 114 Wn.2d 77, 82, 785 P.2d 1134 (1990).

Mr. Alegria's argument is that a person cannot have intent to steal their own property. However this court has previously held that a person's unauthorized attempt to reclaim property held by the State constitutes attempted theft. *See State v. Pollnow*, 69 Wn. App. 160, 848 P.2d 1265 (1993).

In *Pollnow*, the jury convicted a young woman of attempted burglary in the second degree when she tried and failed to retrieve her dog from the City of Pullman. *Pollnow*,

69 Wn. App. at 161-62. Similar to the impoundment of Mr. Alegria's vehicle, Ms. Pollnow's dog had been lawfully seized by the City. *Id*. We dismissed Ms. Pollnow's argument on the basis that the City of Pullman owned a possessory interest in the dog, even though it did not own title. *Id*. at 165. This made the City an owner for purposes of the theft statute. *Id*. (citing RCW 9A.56.010(8)) ("Owner" means a person, other than the actor, who has possession of or any other interest in the property or services involved, and without whose consent the actor has no authority to exert control over the property or services) (now recodified as RCW 9A.56.010(11)). Similarly here, because Mr. Alegria did not have authority to access his car or the items therein, his admission of intent to access his impounded vehicle provides sufficient evidence for a rational trier of fact to find beyond a reasonable doubt that Mr. Alegria had intent to commit theft. The trial court specifically found that Mr. Alegria entered the impound lot with the intent to access his car and that the impound yard had the superior possessory interest in the vehicle. Accordingly, *Pollnow* controls and there was sufficient evidence to support the bench verdict.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the

Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

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Korsmo, C.J.

WE CONCUR:

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Brown, J. Siddoway, J.