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State v. Merlino, 131 Nev. Adv. Op. No. 65 (Sept. 10, 2015)¹
CRIMINAL LAW: BURGLARY

Summary

The issue before the Court was whether selling stolen property through a retractable sliding tray on a pawn shop’s drive-through window satisfied the element of unlawful entry of a building as defined in the burglary statute. The Court held that when the outer boundary of a building is not self-evident from the shape and contours of the structure itself, courts must apply California’s “reasonable belief” test which legally defines the outer boundary to include, “any element that encloses an area into which a reasonable person would believe that a member of the general public could not pass without authorization.”

Background

Merlino and her boyfriend took jewelry from their friend and neighbor Teresa Wilson, and pawned the jewelry without her knowledge. Merlino was charged and convicted for conspiracy to commit a crime, grand larceny, and three counts of burglary. The appeal before the Court challenged one of the three counts of burglary (“count five”). Count five charged Merlino with entering a pawn shop with intent to obtain money under false pretenses. Merlino pawned the items through a drive-through window of the store. The transaction involved Merlino placing the jewelry on a metal retractable sliding tray, and the pawn shop employee pulling the tray back into the store, then the employee slid the tray back to Merlino after placing documents and money on the tray. Merlino could only access the tray when the employee extended it, when retracted the tray was enclosed entirely within the building and could not be accessed from the outside. Given this evidence, the district court instructed the jury that an entry is complete when any portion of the intruder’s body penetrates the space inside the walls of the building. The state argued that the sliding tray constituted part of the building and thus, Merlino entered the building by using the tray. Merlino contended that no part of her body entered the building, and thus, no entry occurred.

Discussion

Merlino argued there was insufficient evidence to support her conviction on count five. The test for sufficiency of evidence in a criminal case was “whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.”² Merlino argued the “entry” element of burglary was not met.

¹ By Brittany L. Shipp.

² *McNair v. State*, 108 Nev. 53, 56, 825 P.2d 571,573 (1992) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

In Nevada, for purposes of burglary, entry is defined by NRS § 193.0145, which provides in relevant part:

“Enter . . . includes the entrance of the offender, or the insertion of any part of the body of the offender, or of any instrument or weapon held in the offender’s hand and used or intended to be used to threaten or intimidate a person, or to detach or remove property.”³

Since there was no evidence of Merlino using a weapon, or otherwise threatening or intimidating the pawn shop employee during the commission of the crime; the question before the Court was whether evidence existed showing that part of Merlino’s body or something in her hand entered the building within the meaning of the statute.

The Court determined that there was a gap in Nevada’s statutory scheme in resolving whether such an entry occurred in this case because the statute defining building did not delineate where the outer boundary of a building begins and ends, for purposes of determining when an entry has occurred.⁴ Thus, the Court looked outside of Nevada’s statutory scheme for guidance.

The Court initially looked to Nevada common law.⁵ At common law, the crime of burglary was intended to protect the sanctity of residences in the night when dwellers were likely to be vulnerable. Most states replaced the common-law crime with broader definitions in statute, which encompassed not only residences, but other structures like vehicles and commercial buildings. Thus, it has become one of the most general forms of crime.

Nevada also replaced the common law crime of burglary in statute; however Nevada never defined building in a manner that objectively determines when a building has been entered. In reviewing the common law, the Court found that the most widely used legal test for defining when a building has been entered was determining whether the “airspace” contained within it had been penetrated.⁶

³ NEV. REV. STAT. § 193.0145.

⁴ See NEV. REV. STAT. § 193.0125.

⁵ See *Vansickle v. Haines*, 7 Nev. 249, 285 (1872) (stating that the common law, “so far as it is not repugnant to or inconsistent with, the constitution or the laws of the united States, or the laws of the territory of Nevada, shall be the rule of decision in all courts of this territory . . . [the common law] should remain in force until repealed by the legislature” (internal quotations omitted)).

⁶ See *People v. Davis*, 76 Cal.Rptr.2d 770, 781, 958 P.2d 1083, 1094 (1998)(Baxter, J., dissenting); *Gant v. State*, 640 So. 2d 1180, 1182 (Fla. Dist. Ct. App. 1994), *receded from on other grounds by Norman v. State*, 676 So. 2d 7 (Fla. Dist. Ct. App. 1996).

Most states determined that a structure's outer boundary was generally understood to include its roof, walls, doors and windows.⁷ However, in an age where buildings have many exterior features such as awnings or rolling shutters, the outer boundaries of a building are no longer as easily recognizable. Thus, the Court determined that the "airspace" test was becoming increasingly subjective and arbitrary.

The Court cited numerous cases in which courts applying the airspace test struggled with slight details such as the distinction between an inner window and an outer window, or whether the distance between a roof and ceiling falls consists of "airspace" within a home.⁸

Consequently, the Court looked to California's test for determining whether a building had been entered and the location of boundary. California's burglary statute substantially similar to Nevada's,⁹ and the California courts have expressly rejected the "airspace" test.¹⁰ Instead, California has supplemented the "airspace" test with a "reasonable belief" test, which defines outer boundary as "any element that encloses an area into which a reasonable person would believe that a member of the general public could not pass without authorization."¹¹ Since the Nevada Supreme Court has recently concluded that the scope and purpose of Nevada's burglary statute follows California's burglary statute in important respects,¹² the Court considered California's jurisprudence in determining whether a building has been entered.

The Court then concluded that when the outer boundary of a building is not self-evident from the shape and contours of the structure itself, the outer boundary is legally defined to include, "any element that encloses an area into which a reasonable person would believe that a member of the general public could not pass without authorization."¹³ Yet, if the outer boundary is self-evident that the common law "airspace test may be applied, however the Court noted that in future cases the district courts should consider utilizing the reasonable belief test as a jury instruction when the jury is tasked with defining the outer boundary of a structure.

⁷ See *State v. Holt*, 352 P.3d 702, 706 (N.M. Ct. App.) (citation omitted), cert. granted, ___P.3d__(N.M. Ct. App. 2015); *State v. Kindred*, 307 P.3d 1038, 1041 (Ariz. Ct. App. 2013).

⁸ See *Commonwealth v. Burke*, 392 Mass. 688, 691, 467 N.E.2d 846, 849 (1984); *Kindred*, 307 P.3d at 1040-41; *State v. Pigues*, 310 S.W.2d 942, 944 (Mo. 1958); *Miller v. State*, 187 So. 2d 51, 52 (Fla. Dist. Ct. App. 1966).

⁹ See, e.g., *State v. White*, 130 Nev. ___, ___ n.1, 330 P.3d 482, 485 n.1 (2014) ("California's burglary statute is nearly identical to Nevada's. . ."); Cal. Penal Code § 459 (West 2010).

¹⁰ See *People v. Valencia*, 120 Cal.Rptr.2d 131, 137, 46 P.3d 920 925 (2002); *People v. Nible*, 247 Cal. Rptr. 396, 399 (Ct. App. 1988) ("in our view, the 'air space' test, although useful in some situations, is inadequate as a comprehensive test for determining when a burglarious entry occurs").

¹¹ *Valencia*, 46 P.3d at 926.

¹² See *State v. White*, 130 Nev. Adv. Op. 56, 330 P.3d 482, 485 (2014) ("We agree with the analysis of the California Supreme Court in [*People v. Gauze*, 542 P.2d 1365 (Cal. 1975)], which relied upon these policies to reach the conclusion that a person with an absolute right to enter a structure cannot commit burglary of that structure.").

¹³ *Valencia*, 46 P.3d at 926.

The Court then applied the “reasonable belief” test to the facts of this case because it supplied a superior method for identifying the protected outer boundary of a structure considering the building’s unorthodox features such as the sliding tray. The Court determined that the dispositive question in this case was whether Merlino crossed the outer boundary of the building. Thus, the inquiry under the reasonable belief test was whether the open tray, constituted a component that enclosed an area in which a reasonable person would believe was not accessible to a member of the general public.

The Court concluded it does constitute such a component, because the natural operation of the tray was retractable and was usually opened and closed by the pawn shop employee. When the tray was closed it rested entirely within the perimeter of the building and could not be accessed from outside the building. It was only opened and made accessible to the customer when the pawn shop employee manually pushed the tray out toward the customer so that it was temporarily extended beyond the perimeter of the building. Therefore, when the tray was retracted in its closed position, no reasonable person would believe that it was accessible to a member of the general public without authorization. When the tray opened, however, it was extended outward beyond the perimeter of the wall, and occupied an area outside of the wall. No reasonable person would believe that accessing that area at that time would threaten the owner's permanent possessory rights in the building.¹⁴

Conclusion

The Court held the sliding tray fails the "reasonable belief" test because the retractable tray was more analogous to a tool used to move objects into and out of the outer boundary of the building, and thus it was not a part of the boundary itself. While Merlino placed the stolen items into the tray, Merlino did not operate the tray, but rather the Pawn Shop employee’s actions caused the tray to enter the building. Thus, Merlino’s actions did not equate to a criminal entry of the building, and the entry element of burglary was not met.

¹⁴ See *People v. Davis*, 76 Cal.Rptr.2d 770, 776, 958 P.2d 1083, 1089 (1998) (holding that passing a forged check through the window chute of a business's walk-up window did not constitute a burglarious entry, because doing so did not violate the owner's possessory interest in the building).