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Summary of Smith v. State, 120 Nev. Adv. Op. 96

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Smith v. State, 120 Nev. Adv. Op. 96, 102 P.3d 569 (Dec. 2004)¹

CRIMINAL LAW—TRESPASS, BURGLARY, PROSECUTORIAL MISCONDUCT

Summary

Defendant appealed from a judgment of conviction for one count of burglary following a jury verdict. Defendant's primary contention was that the district court erred in refusing his proffered jury instruction on the lesser crime of trespass.

Disposition/Outcome²

The Nevada Supreme Court held that, under the elements test set forth in *Blockburger v. United States*,³ the crime of trespass is not a lesser-included offense of burglary. The court concluded that the district court did not err in refusing defendant's requested instruction.

Factual and Procedural History

On July 10, 2003, defendant was arrested inside another person's apartment with that person's wallet, identification, credit card, cash, and watches in his pocket. The arresting officer testified at trial that defendant explained to her that he was in the apartment to get items to take and sell. However, the defendant testified at trial that he was so intoxicated when he entered the apartment that he did not know why he was there.

Defense counsel requested a jury instruction on trespass as a lesser-included offense of burglary, arguing that defendant was only guilty of the lesser crime of trespass because he did not intend to commit larceny when he entered the apartment. The state opposed the request, and the district court refused the defense's jury instruction request.

Defendant was convicted of burglary, and sentenced to serve a prison term of 48 to 120 months. Defendant timely appealed.

Discussion

Defendant contended that the district court erred in refusing to instruct the jury on the crime of trespass because it is a lesser-included offense of burglary. The Nevada Supreme Court disagreed.

The court had previously adopted the elements test from *Blockburger* "for the determination of whether lesser-included offense instructions are required."⁴ Under *Blockburger*, an offense is lesser included only where the defendant in committing the greater offense has also committed the lesser offense. The court, in applying the *Blockburger* test to this

¹ By Sally L. Galati

² Before Shearing, C.J., Rose, and Douglass, JJ.

³ *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932).

⁴ *Barton v. State*, 117 Nev. 686, 694, 30 P.3d 1103, 1108 (2001).

case, concluded that trespass is not a lesser-included offense of burglary. NRS 207.200(1)(a) defines the elements of the crime of trespass in a manner that excludes acts that constitute burglary. Under the plain language of the statute, the elements of trespass are not an entirely included subset of burglary because, by definition, trespass cannot be committed when entry into a building is accompanied by a burglarious intent. Because the offenses of burglary and trespass each require proof of one fact not required to be proved in the other offense, trespass is not a lesser-included offense of burglary under *Blockburger*.

The Nevada Supreme Court had previously held that trespass was a lesser-included offense of burglary,⁵ but those holdings preceded the Legislature's 1989 amendment of the trespass statute, which added the language "under circumstances not amounting to a burglary."⁶ The plain language of the 1989 amendment rendered the offenses of trespass and burglary mutually exclusive, altering the essential elements of the trespass offense so as to exclude entry into a dwelling with the intent to commit any of the offenses listed in NRS 205.060(1). The court then stated that, to the extent that its prior holdings defined trespass as a lesser-included offense of burglary, they were overruled.

Defendant also contended that the prosecutor engaged in prejudicial misconduct in referencing defendant's prior burglary conviction during defendant's cross-examination and in closing arguments. The court concluded that any prosecutorial misconduct was harmless, because the state presented overwhelming evidence of defendant's guilt during the trial. "If the issue of guilt or innocence is close, [and] if the state's case is not strong, prosecutor[ial] misconduct will probably be considered prejudicial."⁷ However, "[w]here evidence of guilt is overwhelming, even aggravated prosecutorial misconduct may constitute harmless error."⁸ The court therefore concluded that the alleged isolated instances of prosecutorial misconduct, if any, amounted to harmless error.

Conclusion

The Nevada Supreme Court, after considering defendant's contentions and concluding they lacked merit, affirmed the judgment of conviction.

⁵ *Kiper v. State*, 98 Nev. 593, 595, 655 P.2d 526, 526-27 (1982); *Block v. State*, 95 Nev. 933, 936, 604 P.2d 338, 341 (1979).

⁶ 1989 Nev. Stat., ch. 466, § 1, at 997.

⁷ *Garner v. State*, 78 Nev. 366, 374, 374 P.2d 525, 530 (1962).

⁸ *King v. State*, 116 Nev. 349, 356, 998 P.2d 1172, 1176 (2000).