Affirmed and Majority and Dissenting Opinions filed March 9, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-98-01014-CR

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RUBEN PALACIOS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 184th District Court
Harris County, Texas
Trial Court Cause No. 757,349

M A J O R I T Y   O P I N I O N

Ruben Palacios appeals his conviction by jury for the felony offense of burglary of a habitation with intent to commit theft. Appellant's indictment was enhanced with two prior felony convictions. The jury assessed punishment at forty-five years confinement in the Texas Department of Criminal Justice, Institutional Division. In one point of error, appellant complains that the trial court erred in denying his request for a charge to the jury on the lesser included offense of criminal trespass. Because appellant was not entitled to such a charge, we affirm the judgment of the trial court.

BACKGROUND

Mr. Jose Rojas was at home on July 6, 1997 when he heard his dogs barking loudly. Rojas looked out of his window and observed a man and a woman trying to force their way into his neighbor's house. The man had a metal object that resembled a bar in his hand and was using it to open the neighbor's door. Rojas recalled that the man wore a white T-shirt and that the woman wore a T-shirt with green stripes. After observing the two individuals, Rojas called the police.

The police arrived shortly thereafter. Officer Alejandro Munoz proceeded in the direction where the suspects had been reported to be heading. Munoz soon spotted appellant, carrying a television, walking with a woman along a bayou. Officer Munoz identified himself and ordered the suspects to stop. Upon hearing this, appellant dropped the television, began to run, and jumped in the bayou. The female suspect complied with the officer.

Officer Ramona Parnell arrived at the bayou after the female had already been taken into custody. Along the bank of the bayou, she spotted a damaged television set, a VCR, and a white pillow case that contained a crowbar and two remote controls. She also observed appellant swimming in the bayou. The police later apprehended appellant as he made his way out of the bayou.

Gilberto Reyes, the complainant, arrived home after the suspects had been taken into custody. He noticed that his back door had been pried open and that he was missing a nineteen inch television set, a VCR, and two remote controls. He subsequently identified the property recovered from the banks of the Bayou as the same property missing from his home. The white pillow case also belonged to Reyes.

The suspects were taken to the police station, where they were later identified by Mr. Rojas. Rojas said that he recognized the clothing the suspects were wearing as being the same as he had seen earlier.

Barbara Larivee, the co-defendant, was the sole defense witness. Larivee admitted that she committed the burglary. However, she testified that she had falsely told appellant that she was going to her ex-boyfriend's house to pick up some of her belongings. Larivee claimed she instructed appellant to stay down the street while she entered the house. She stated that appellant remained outside the fence while she jumped over and went to the back door of the house. After taking the television and the VCR from

the house, Larivee said that she called to appellant to have him help her carry the objects. Appellant then jumped the fence and helped her move the stolen goods.

Larivee contended that appellant never encouraged her to commit the burglary, didn't plan the burglary with her, and that she didn't tell him that she was committing the burglary. She also testified that appellant never entered the house.

POINT OF ERROR ONE

In his sole point of error, appellant complains of the court's failure to charge the jury on criminal trespass, contending that it is a lesser included offense of burglary of a habitation with intent of commit theft. After examining the facts of this case, we agree with the State that criminal trespass of property surrounding a building is not a lesser included offense of burglary of that building with intent to commit theft. We therefore find no error in the court's exclusion of the requested charge.

An offense is a lesser included offense if: (1) it is established by proof of the same or less than all the facts required to establish the commission of the offense charged; (2) it differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property, or public interest suffices to establish its commission; (3) it differs from the offense charged only in the respect that a less culpable mental state suffices to establish its commission; or (4) it consists of an attempt to commit the offense charged or an otherwise included offense. TEX. CODE CRIM. PROC. ANN. Art. 37.09 (Vernon 1981).

The Court of Criminal Appeals has implemented a two-prong test for determining whether a jury must be charged on a lesser-included offense. *See Aguilar v. State*, 682 S.W.2d 556, 558 (Tex. Crim. App. 1985); *Royster v. State*, 622 S.W.2d 442, 444 (Tex. Crim. App. 1981) (opinion on rehearing). First, the lesser included offense must be included within the proof necessary to establish the offense charged. Second, there must be some evidence in the record that if the defendant is guilty, he is guilty of only the lesser offense. *See Arevalo v. State*, 943 S.W.2d 887, 889 (Tex. Crim. App. 1997);*Aguilar v. State*, 682 S.W.2d at 558; *Royster v. State*, 622 S.W.2d at 444.

The elements of proof for burglary of a habitation with intent to commit theft are that (1) a person, (2) without effective consent, (3) enters a habitation, (4) with the intent to commit a felony or theft. *See* TEX. PEN. CODE ANN. § 30.02(a) (Vernon 1994). The elements of proof for criminal trespass of property are that (1) a person, (2) without effective consent, (3) enters or remains on the property or in a building of another, (4) knowingly or intentionally or recklessly, (5) when he had notice that entry was forbidden or received notice to depart but failed to do so. *See* TEX. PEN. CODE ANN. § 30.05(a) (Vernon 1994). The point in controversy centers around the third element of both offenses.

Appellant was indicted and charged for the burglary of the Reyes residence. He sought the criminal trespass jury charge on the basis of Larivee's testimony that he came onto the Reyes backyard. Under a similar fact scenario, the court in *Johnson v. State* declared that the entry element of the greater offense, burglary of a building with intent to commit theft, does not include the entry element of the lesser offense, criminal trespass of property. *See Johnson v. State*, 665 S.W.2d 554, 557 (Tex. App.–Houston [1st Dist.] 1984, no pet.). The court reasoned that for the purposes of the Texas Penal Code, "*building* is included within the meaning of the more general word *property*; the word *property* is not included within the definition of *building*." *Id.* at 556. By the same reasoning, a habitation cannot be said to include the backyard property since by definition the backyard property is not a structure. *See* TEX. PEN. CODE ANN. § 30.01(2) (Vernon 1994). The offense appellant sought to have included in the charge, criminal trespass of the Reyes backyard, could not be established by proof of the same or less than all of the facts required to establish commission of the burglary of the habitation: entry onto the backyard is not the same as, or included within, entry into residence itself; it is an entirely different fact. *See* TEX. CODE CRIM. PROC. ANN. Art. 37.09 (Vernon 1981); *Johnson v. State*, 773 S.W.2d 721 (Tex. App.–Houston [1st Dist.] 1989 pet. ref'd); *Johnson v. State*, 665 S.W.2d at 556. Thus, appellant fails to meet the first prong of the *Aguilar-Royster* test because criminal trespass of property is not necessarily included within the proof necessary to establish burglary of a habitation.

The only lesser offense of trespass to which appellant could have been entitled was a trespass of the habitation itself. In fact, appellant asserts that a rational jury could have determined that he was guilty at most of criminal trespass of a habitation under the law of parties. Charged with the burglary of a

habitation, appellant did not ask for the charge of criminal trespass of the habitation. Appellant asked only for the charge of criminal trespass of the property consisting of the complainant's yard. Therefore, appellant did not preserve error regarding the denial of a lesser included charge on trespass of a habitation. *See* TEX. CODE CRIM. PROC. ANN. Art. 36.15 (Vernon Supp. 1998); *Posey v. State*, 966 S.W.2d 57 (Tex. Crim. App. 1998).

We overrule appellant's point of error and *affirm* the judgment of the trial court.

/s/ Maurice Amidei
Justice

Judgment rendered and Opinion filed March 9, 2000.

Panel consists of Justices Amidei, Edelman, and Wittig.

Do Not Publish — TEX. R. APP. P. 47.3(b).

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DISSENTING OPINION

It seems to me it's most difficult to enter the back of a house without going through the backyard! To deny the lesser included charge on a hyper-technical legal fiction closes the door of justice.

/s/ Don Wittig
Justice

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Panel consists of Justices Amidei, Edelman, and Wittig.

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