IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
vs.	)	No. SC 87787
	)	
TYRONE COOPER,	)	
	)	
Appellant.	)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF ST. LOUIS COUNTY, MISSOURI
21ST JUDICIAL CIRCUIT, DIVISION 6
THE HONORABLE GARY M. GAERTNER, JUDGE

APPELLANT'S SUBSTITUTE REPLY BRIEF

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JURISDICTIONAL STATEMENT

Appellant adopts and incorporates by reference the Jurisdictional Statement from his original brief.

STATEMENT OF FACTS

Appellant adopts and incorporates by reference the Statement of Facts from his original brief.

ARGUMENT

First-degree burglary requires both that the defendant knowingly entered unlawfully into a building and that he did so for the purpose of committing a crime therein. Proof that the defendant had the purpose to commit a crime at the time he entered a building is *not* proof that his entry was unlawful.

When a person enters Wal-Mart with the intent to steal something inside, is he also guilty of burglary once he commits the stealing? When someone is invited to a party and has the intent to steal jewelry from the hostess at the time he enters her home, is he also guilty of burglary once he steals the jewels?

Respondent's argument that a jury finding of Tyrone's purpose to commit assault shows that he entered the house unlawfully is incorrect. A conviction for burglary requires distinct findings of both unlawful entry and intent to commit a crime therein. ***State v. Haslar***, 887 S.W.2d 610, 614 (Mo. App. W.D. 1994).

A jury can accept part of a witness's testimony and disbelieve other parts. ***State v. Redmond***, 937 S.W.2d 205, 209 (Mo. banc 1996), *citing* ***State v. Dulany***, 781 S.W.2d 52, 55 (Mo. banc 1989). Likewise, a jury may draw

inferences from a witness's testimony and reject others. ***Id.*** It is impossible to know in this case whether the jury believed Tyrone's version of the facts (lawful entry) or Busby's (unlawful entry) because they were not instructed to make a finding of fact on whether the entry was unlawful (LF 25). Respondent is incorrect to presume that the jury's finding that Tyrone had the purpose of placing Busby in fear of physical harm necessarily means that it also found he unlawfully entered Busby's home.

If a person is privileged to enter a structure, it does not matter what crime he commits once inside. While he may be guilty of the crime he commits inside, the entry is still lawful and he is not guilty of burglary. ***State v. Chandler***, 635 S.W.2d 338, 341 (Mo. banc 1982). The jury might have believed that Busby invited Tyrone inside. Busby lived in a two-family duplex and had neighbors living in the attached apartment right next door (Tr. 138). He testified that he knew Marcus, Tyrone's nephew who said that Busby sold him fake drugs (Tr. 195). Busby had a prior conviction for stealing (Tr. 198). He was a tree-cutter by profession, and drove a Yukon SUV with chrome rims on it, televisions in it, a stereo, alarm and he had put "quite a bit of money" into the vehicle (Tr. 143, 154). The jury might have believed that Busby would want to discuss the drug issue inside his home rather than on the front porch he shared with his

neighbors. Even if the jury believed that Tyrone's intent was to place Busby in fear of physical harm, his entry was not burglary if he was invited in.

In ***State v. Nutt***, the defendant was convicted of first-degree burglary for unlawfully entering an occupied mobile home in a trailer park with the intent to steal. 703 S.W.2d 583, 584 (Mo. App. S.D. 1986). While Nutt admitted that his entry was unlawful, he testified that he believed the trailer to be vacant, and was only going inside to see if he might want to rent it. ***Id.*** The Southern District found that Nutt's testimony negated an element of burglary (entry with the intent to commit a crime), and that his request for a special negative defense should have been granted. ***Id.*** The Court did not find that his admission of unlawful entry also proved that he had the intent to commit a crime inside. Both elements had to be individually proven.

In ***State v. Krause***, the victim responded to a knock on his door and was confronted by a man asking for the victim's roommate. 682 S.W.2d 55, 55-56 (Mo. App. E.D. 1984). When the victim told the man she was not home, the man asked the victim to call her. ***Id.*** at 56. As the victim turned to make the call, two men, including Krause, "barged in" through the open door and assaulted the victim and stole some of his property. ***Id.***

Krause was charged with first-degree burglary for knowingly entering the victim's home while the victim was present for the purpose of stealing. ***Id.*** But the verdict-directing instruction omitted the word *knowingly*. ***Id.*** The Eastern District, relying on ***Chandler***, *supra*, found that "Knowledge is an essential element of burglary." ***Id.*** Since that element of the offense was not contained in the verdict-directing instruction, the jury's verdict was reversed and the case remanded for a new trial. ***Id.*** The Court did *not* find that Krause's stealing from the victim proved that he knowingly entered the apartment. ***Id.*** However, that *is* what the Eastern District found in Tyrone's case below.

In a memorandum decision, the Eastern District Court of Appeals affirmed Tyrone's conviction stating that the facts and circumstances of the case established "beyond serious dispute" the existence of the element of "unlawfully." ***State v. Cooper***, mem. op. at 6 (Mo. App. E.D., May 2, 2006). The Court compared this case to ***State v. Nolan***, 872 S.W.2d 99 (Mo. banc 1994), wherein the object crime in an attempted burglary case was not specified in the verdict director, but the instruction did require that the jury find the defendant had the intent to commit "a crime."

In ***Nolan***, the jury was still required to find all of the elements of the charged offense (they found that the defendant intended to commit "a

crime" rather than that the defendant intended to commit "stealing"). But here, an element of the crime (*unlawful* entry) was missing from the verdict director without an equivalent substitute. Because the jury was improperly instructed, we do not know whether they believed Mr. Busby's testimony that the entry was unlawful, or if they believed Tyrone's testimony that it was lawful. And since the jury obviously did believe some of Tyrone's testimony over that of Mr. Busby, it is unfair to conclude that the issue of "unlawful entry" was not seriously disputed.

The Eastern District also compared this case to ***Blackmon v. State***, 168 S.W.3d 129, 132 (Mo. App. W.D. 2005), where the defendant challenged in a 29.15 appeal the motion court's overruling his allegation that trial counsel was ineffective for not objecting to the verdict director. In that case, Blackmon was charged with violating an order of protection by harassing his ex-wife. ***Id.*** at 130. The verdict director alleged that he violated the order "by harassing," and "harassing" was defined as a "purposeful or knowing course of conduct that alarms or causes distress to another adult and serves no legitimate purpose." ***Id.*** at 132-33. Blackmon conceded on appeal that the verdict director used in his case was in compliance with the MAI-CR, but alleged that he was prejudiced because

the verdict director allowed the jury to convict him based upon one harassing act rather than a "course of conduct." ***Id.*** at 133.

The ***Blackmon*** court found that Blackmon was not prejudiced because the evidence admitted contained a number of different harassing acts committed by Blackmon, any two of which could have formed the basis of his conviction. ***Id.*** Additionally, the prosecutor told the jury in closing argument that "course of conduct" meant that they had to find more than one incident. ***Id.*** Therefore, Blackmon was not prejudiced by his attorney's failure to object to the instruction. ***Id.***

The Eastern District below said ***Blackmon*** supported the conclusion that since the prosecutor's closing argument "cured" any ambiguities in the instruction in that case, then the same logic should apply here. ***Cooper***, mem. op. at 7. But this case differs greatly from ***Blackmon***. First of all, the instruction in ***Blackmon*** was in compliance with the MAI, but Respondent concedes here that the verdict director did *not* follow the MAI and failed to include a required element of the offense: that the defendant entered the inhabitable structure "unlawfully." (Resp. Br. 12). Second, the prosecutor's argument in ***Blackmon*** "cured" ambiguities in the instruction because he told the jury exactly what was already written in the instruction. The instruction defined harassing as a "course of conduct, " which suggests

more than one incident. Here, the prosecutor's argument did not make up for the missing element in the verdict director. He only mentioned once that the jury must find that Tyrone "knowingly entered unlawfully," and his comment was followed by forty-four more pages of transcript of closing argument with not another mention of this critical, disputed element. The Court below commented that, "the jury was not wholly unaware of this essential element." ***Cooper***, mem. op. at 7. But the jury did not have the prosecutor with them during deliberations to remind them of that critical word that was missing from the instruction. And his single comment at the beginning of forty-four pages worth of argument was not enough to cure the defect. Moreover, when the jury asked during deliberations how to interpret one section of the burglary instruction, they were told to "be guided by the evidence and the instructions as given." (LF 36). They were not told to be guided by closing arguments.[1]

The Court of Appeals held, "By finding him guilty of burglary, however, [the jury] did find that he knowingly entered unlawfully, and that he had the *intent* to commit assault." ***Id.***, mem. op. at 8. The Court's logic is circular, and the ruling states that the jury found an element of

[1] The jury was also instructed that closing arguments are not evidence (LF 34).

burglary (unlawful entry) *that was not even in the verdict director!* The record, the facts, and the "not guilty" verdicts on the remaining counts in this case simply do not support the conclusion that the erroneous instruction in this case did not affect the jury's verdict. ***Id.***, mem. op. at 7.

Entry by Artifice

Respondent argues that Tyrone gained entry to Busby's home through artifice, and that the use of artifice, or fraud, in gaining entry makes the entry unlawful (Resp. Br. 14). Respondent cites ***State v. Thomas***, where the defendant asked to use the victim's telephone to gain admission to her home, then killed her once inside (Resp. Br. 14-15). 70 S.W.3d 496, 502 (Mo. App. E.D. 2002). Respondent also cites to ***State v. Rollins***, where the defendant asked to enter the apartment where the victim was babysitting in order to look for his wallet, then pushed her against the wall, pressed a knife in her back, and attempted to rape her (Resp. Br. 15). 882 S.W.2d 314, 315 (Mo. App. E.D. 1994). Citing ***Rollins***, the ***Thomas*** court held that when a defendant does not have valid license to be in the victim's house because he gained access through artifice (telling the victim he needed to use her phone or find his wallet when that was clearly not his intention), there is unlawful entry. ***Thomas***, 70 S.W.3d at 508-09.

Respondent argues that Tyrone told Busby that he wanted to talk and so Busby motioned for Tyrone to enter (Resp. Br. 16). Respondent states that the jury determined that Tyrone lied about his real purpose (talking) and gained entry into Busby's home by artifice (Resp. Br. 16). But this argument fails because there is no evidence that Tyrone ever asked to enter Busby's residence to talk. Tyrone testified that they were talking at the front door when Busby gestured for him to go into the house, and Tyrone accepted the invitation (Tr. 311). Busby testified that Tyrone never asked him anything; he just ran at Busby from the side of the house with a gun drawn (Tr. 145). This case is not analogous to ***Thomas*** and ***Rollins***.

Conclusion

Instructional error may be reviewed for plain error, which requires that the trial court so misdirect or fail to instruct the jury as to cause manifest injustice or miscarriage of justice. ***State v. Goucher***, 111 S.W.3d 915, 918-19 (Mo. App. S.D. 2003). Here, the trial court failed to instruct the jury that although they might find from the evidence that Tyrone entered Joel's house, the entry must be "unlawful" for the jury to find Tyrone guilty of first-degree burglary. Although a reasonable person could have believed Joel's testimony that Tyrone forced his way into the home, that issue was a fact for the jury to determine. *See* ***Patterson v. State***, 110

S.W.3d 896 (Mo. App. W.D. 2003). And since the jury acquitted Tyrone of two of the three counts charged, it cannot be presumed that this fact would have been decided in the State's favor.

It was improper for the Appellate Court to speculate that the jury believed that Tyrone entered unlawfully when they were not instructed to deliberate upon that fact. ***Cooper,*** *mem*. op. at 8. The trial court misdirected the jury, and a manifest injustice resulted. Tyrone's conviction and life sentence for first-degree burglary should be reversed and his case remanded for a new trial.

CONCLUSION

Under the facts of this case, unlawful entry cannot be presumed from the jury's finding that Tyrone had the purpose to assault Busby. The jury should have been instructed to decide whether they believed, beyond a reasonable doubt, that there was an *unlawful* entry, an element disputed at trial. The erroneous verdict director resulted in a manifest injustice, and Tyrone's conviction should be reversed and his case remanded for a new trial.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I, Margaret M. Johnston, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2002, in Book Antiqua size 13 point font, which is no smaller than Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 2,446 words, which does not exceed the 7,750 words allowed for an appellant's reply brief.

The floppy disk filed with this brief contains a complete copy of this brief. It has been scanned for viruses using McAfee VirusScan Enterprise 7.1.0, which was updated in October, 2006. According to that program, the disks provided to this Court and to the Attorney General are virus-free.

Two true and correct copies of the attached brief and a floppy disk containing a copy of this brief were mailed, postage prepaid this 19th day of October, 2006, to Shaun Mackleprang, Assistant Attorney General, Criminal Appeals Division, P.O. Box 899, Jefferson City, Missouri 65102.

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