2019 WL 238141
Supreme Court, Appellate Division,
Third Department, New York.

The PEOPLE of the State of New York, Respondent,
v.
Michael J. DEGNAN, Appellant.

108457
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Calendar Date: December 12, 2018
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Decided and Entered: January 17, 2019

Synopsis

Background: Defendant was convicted in the County Court, Broome County, Burns, J., of **burglary** in the second degree, endangering the welfare of a child, and three counts of petit larceny. Defendant appealed.

Holdings: The Supreme Court, Appellate Division, Clark, J., held that:

[1] evidence was insufficient to support conviction for **burglary** in the second degree, but

[2] evidence was sufficient to support conviction for criminal trespass in the second degree.

Affirmed as modified.

West Headnotes (3)

[1] Burglary

To support a conviction for **burglary** in the second degree, the defendant must have harbored a contemporaneous criminal intent other than criminal trespass at the time of the unlawful entry. N.Y. Penal Law § 140.25.

Cases that cite this headnote

[2] Burglary

Evidence was insufficient to show that defendant harbored criminal intent other than criminal trespass at the time he entered dwelling and, thus, was insufficient to support defendant's conviction for **burglary** in the second degree; given that People's argument at trial was that defendant unlawfully entered dwelling to evade arrest and formed intent to steal articles of clothing sometime thereafter, there was no evidence that defendant had a larcenous intent at time of entry. N.Y. Penal Law § 140.25.

Cases that cite this headnote

[3] Burglary

Evidence was sufficient to show that defendant knowingly and unlawfully entered a dwelling, as required to support conviction for criminal trespass in the second degree; evidence indicated that, without permission, defendant entered a fully furnished residence with working utilities that, although temporarily unoccupied at time of defendant's entry, was used by owner or guests for overnight lodging. N.Y. Penal Law § 140.15(1).

Cases that cite this headnote

Appeal from a judgment of the County Court of Broome County (Burns, J.), rendered April 1, 2016, upon a verdict convicting defendant of the crimes of **burglary** in the second degree, endangering the welfare of a child and petit larceny (three counts).

Attorneys and Law Firms

William T. Morrison, Albany, for appellant.

Michael D. Ferrarese, Acting District Attorney, Norwich (Karen Fisher McGee, New York Prosecutors Training Institute, Inc., Albany, of counsel), for respondent.

Before: Lynch, J.P., Clark, Mulvey, Devine and Rumsey, JJ.

MEMORANDUM AND ORDER

Clark, J.

***1** In September 2013, defendant was charged with various crimes stemming from allegations that he sexually assaulted a 14–year–old girl and thereafter committed a series of offenses in an effort to evade apprehension. Following a jury trial, defendant was convicted of **burglary** in the second degree, endangering the welfare of a child and three counts of petit larceny.[1] Defendant was sentenced as a persistent violent felony offender to a prison term of 25 years to life for his **burglary** conviction and concurrent one-year jail terms for each of his remaining misdemeanor convictions. Defendant now appeals.

[1] **[2]** We agree with defendant, and the People concede, that the evidence was legally insufficient to support the conviction for **burglary** in the second degree. As relevant here, that crime requires proof that defendant knowingly and unlawfully entered a dwelling with intent to commit a crime therein (*see* Penal Law § 140.25[2]). Additionally, at the time of the unlawful entry, defendant must have harbored a contemporaneous criminal intent other than criminal trespass (*see People v. Gaines,* 74 N.Y.2d 358, 363, 547 N.Y.S.2d 620, 546 N.E.2d 913 [1999]; *People v. Simmons,* 111 A.D.3d 975, 979, 974 N.Y.S.2d 185 [2013], *lv denied* 22 N.Y.3d 1203, 986 N.Y.S.2d 423, 9 N.E.3d 918 [2014]; *People v. Douglas,* 24 A.D.3d 1019, 1020, 806 N.Y.S.2d 764 [2005]). The People argued at trial that, indicative of a consciousness of guilt relating to the sex offense charges, defendant unlawfully entered the dwelling to evade arrest and that sometime thereafter he formed an intent to steal several articles of clothing. Given this theory, the People failed to present any evidence that could provide a valid line of reasoning and permissible inferences from which a rational juror could have concluded that, at the time of entry, defendant had a larcenous intent (*see People v. Beauvais,* 105 A.D.3d 1081, 1084, 962 N.Y.S.2d 764 [2013]; *People v. Rumley,* 102 A.D.3d 894, 895, 958 N.Y.S.2d 200 [2013]; *Matter of William A.,* 4 A.D.3d 647, 648–649, 772 N.Y.S.2d 130 [2004]). Absent legally sufficient proof of the intent element, the conviction for **burglary** in the second degree cannot stand.

[3] However, we find that the evidence was legally sufficient to establish the lesser included offense of criminal trespass in the second degree, which, as relevant here, requires proof that defendant knowingly and unlawfully entered a dwelling (*see* Penal Law § 140.15[1]). The trial evidence established that, without permission, defendant entered a fully furnished residence with working utilities that, although temporarily unoccupied at the time of defendant's entry, was used by the owner – or authorized guests – for overnight lodging, particularly during the warmer months. Viewed in the light most favorable to the People, such evidence was legally sufficient to establish that defendant knowingly and unlawfully entered a dwelling, so as to satisfy the elements of criminal trespass in the second degree (*see generally People v. Quattlebaum,* 91 N.Y.2d 744, 747–748, 675 N.Y.S.2d 585, 698 N.E.2d 421 [1998]; *cf. People v. Henry,* 64 A.D.3d 804, 805, 881 N.Y.S.2d 701 [2009], *lv denied* 13 N.Y.3d 860, 891 N.Y.S.2d 694, 920 N.E.2d 99 [2009]; *People v. Thomas,* 33 A.D.3d 1056, 1056–1057, 822 N.Y.S.2d 803 [2006], *lv denied* 8 N.Y.3d 850, 830 N.Y.S.2d 709, 862 N.E.2d 801 [2007]). Accordingly, pursuant to our authority under CPL 470.15(2)(a), we reduce defendant's conviction for **burglary** in the second degree to criminal trespass in the second degree (*see People v. Beauvais,* 105 A.D.3d at 1084, 962 N.Y.S.2d 764; *People v. Rumley,* 102 A.D.3d 894 at 895, 958 N.Y.S.2d 200; *People v. Green,* 24 A.D.3d 16, 20, 803 N.Y.S.2d 225 [2005]).[2]

***2** In light of our determination, defendant's remaining contentions have been rendered academic.

Lynch, J.P., Mulvey, Devine and Rumsey, JJ., concur.

ORDERED that the judgment is modified, on the law, by reducing defendant's conviction of **burglary** in the second degree under count 8 of the indictment to criminal trespass in the second degree and resentencing defendant to time served on said count, and, as so modified, affirmed.

All Citations

--- N.Y.S.3d ----, 2019 WL 238141, 2019 N.Y. Slip Op. 00327

Footnotes

1 The jury acquitted defendant of two counts of criminal sexual act in the second degree. The jury was unable to reach a verdict on one count of rape in the second degree and two counts of grand larceny in the fourth degree.

2 We need not remit the matter for resentencing because defendant has already served the maximum time to which he could have been sentenced on the misdemeanors (*see People v. Clark,* 52 A.D.3d 860, 861 n., 858 N.Y.S.2d 847 [2008], *lv denied* 11 N.Y.3d 831, 868 N.Y.S.2d 605, 897 N.E.2d 1089 [2008]; *People v. Humes,* 16 A.D.3d 844, 846, 791 N.Y.S.2d 212 [2005]).