When Did Shoplifting a Can of Tuna Become a Felony? A Critical Examination of Arkansas's Breaking or Entering Statute

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I. INTRODUCTION

You may recall the movie *My Cousin Vinny* starring Ralph Macchio and Joe Pesci. In the beginning of the movie, Ralph Macchio's character, William Gambini, is buying some miscellaneous items from the Sac-O-Suds convenience store while passing through Alabama. Because his hands are full, he places a can of tuna fish in his jacket pocket, pays for his other items, and inadvertently leaves the store without paying for the can of tuna. Of course, that turns out to be the least of his problems because someone who fits his description later enters the store and shoots and kills the clerk. Gambini is subsequently charged with murder in the first degree.

Let's change the facts of the movie just a bit. Assume that Gambini intentionally concealed the can of tuna and did in fact shoplift it. Let's also assume that it took place in Arkansas. Can Gambini be convicted of a felony? The answer is—it depends on the charge. If he is charged with shoplifting,[1] he can only be convicted of a class A misdemeanor[2] because the value of the can of tuna is far less than $500.[3] But if he is charged with breaking or entering,[4] he could be convicted of a class D felony[5] regardless of the value of the can of tuna.[6]

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1. ARK. CODE ANN. § 5-36-116 (Repl. 2006).

2. A class A misdemeanor is punishable by up to one year in jail and/or a fine up to $2500. ARK. CODE ANN. §§ 5-4-201(b)(1), -401(b)(1) (Supp. 2009).

3. ARK. CODE ANN. § 5-36-103(b)(4) (Repl. 2006).

4. ARK. CODE ANN. § 5-39-202 (Repl. 2006).

5. A class D felony is punishable by up to six years in prison and/or fines up to $10,000. ARK. CODE ANN. §§ 5-4-201(a)(2), -401(a)(5).

6. ARK. CODE ANN. § 5-39-202(c).

Part II of this essay examines Arkansas's breaking-or-entering statute. Part III discusses two Arkansas cases that attempted to provide guidance on what circumstances warrant a breaking-or-entering charge, but unfortunately have only served to muddy the waters. Part IV offers possible solutions and attempts to provide guidance on when to charge a defendant with breaking or entering.

II. ARKANSAS'S BREAKING-OR-ENTERING STATUTE

Section 5-39-202 of the Arkansas Code provides:

> (a) A person commits the offense of breaking or entering if for the purpose of committing a theft or felony he or she breaks or enters into any:
> (1) Building, structure, or vehicle;
> (2) Vault, safe, cash register, safety deposit box, or money depository;
> (3) Money vending machine, coin-operated amusement machine, vending machine, or product dispenser;
> (4) Coin telephone or coin box;
> (5) Fare box on a bus; or
> (6) Other similar container, apparatus, or equipment.
> (b) It constitutes a separate offense under this section for the breaking or entering into of each separate:
> (1) Building, structure, or vehicle;
> (2) Vault, safe, cash register, safety deposit box, or money depository;
> (3) Money vending machine, coin-operated amusement machine, vending machine, or product dispenser;
> (4) Coin telephone or coin box;
> (5) Fare box on a bus; or
> (6) Other similar container, apparatus, or equipment.
> (c) Breaking or entering is a Class D felony.[7]

Section 202(a)(1) can reasonably be read, then, to define the offense of breaking or entering as the following: "A person commits the offense of breaking or entering if, *for the purpose of committing a theft*, he or she enters into any building." The key language is "for the purpose of committing a theft." Whether a person is charged with a misdemeanor theft charge or

7. ARK. CODE ANN. § 5-39-202 (emphasis added).

a felony breaking-or-entering charge depends upon *when* the person developed the intent to steal. If William Gambini intended to steal the can of tuna *before* he entered the Sac-O-Suds, then he is guilty of breaking or entering—a class D felony. If he formulated the intent to steal *after* he entered the Sac-O-Suds, then he is only guilty of shoplifting or theft of property—a class A misdemeanor.[8]

Two problems are immediately presented: (1) whether the breaking-or-entering statute really intended to punish this type of conduct; and (2) whether it is feasible to prove beyond a reasonable doubt *when* a defendant formulates an intent to steal. The second problem will be examined in the next section by discussing the two conflicting Arkansas cases on point. In considering the first problem, the original commentary to the breaking-or-entering statute provides useful insight into the General Assembly's intent, particularly in the context of the Gambini hypothetical.

The original commentary to the Arkansas breaking-or-entering statute indicates that the statute serves two functions:

> First, insofar as it proscribes breaking and entering a building, structure, or vehicle with the intent to commit a theft or felony, the section states a lesser included offense of burglary . . . . The second function of § 5-39-202 is to reach larcenous conduct directed against vending machines and other types of containers likely to contain money.[9]

Examining the first stated function of the statute, as a lesser-included offense of burglary, in the context of the Gambini hypothetical, the initial issue raised is whether the facts sufficiently resemble a burglary as to constitute a lesser-included offense of burglary. Section 5-39-201 of the Arkansas Code defines residential and commercial burglary. The definitions of residential and commercial burglary are identical except that the residential burglary definition refers to a "residential occupiable structure," whereas the commercial burglary definition refers to a "commercial occupiable structure."[10] Because the

8. ARK. CODE ANN. § 5-36-103(b)(4) (Repl. 2006). Although the shoplifting statute is separate from the theft-of-property statute, prosecutors follow the theft-of-property statute in determining what penalty is imposed for the act of shoplifting.

9. Original Commentary to ARK. CODE ANN. § 5-39-202 (Repl. 1995).

10. ARK. CODE ANN. § 5-39-201 (Repl. 2006).

hypothetical involves the Sac-O-Suds convenience store, the commercial burglary statute governs. The statute provides that "[a] person commits commercial burglary if he or she enters or remains unlawfully in a commercial occupiable structure of another person with the purpose of committing in the commercial occupiable structure any offense punishable by imprisonment."[11] The problem with charging Mr. Gambini under this statute is in the difficulty of arguing that he entered the Sac-O-Suds "unlawfully"—he entered during regular business hours when the store was open to the public. The original commentary supports this observation by expressly excluding individuals who enter "a business open to the public for the purpose of shoplifting" from culpability for the crime of burglary.[12] By analogy, it can certainly be argued that individuals who enter a business open to the public for the purpose of shoplifting should be excluded from culpability for the lesser-included offense of breaking or entering. But because the breaking-or-entering statute does not contain the word "unlawfully" preceding the words "breaks or enters into," it does not rule out the possibility that a shoplifter may be charged with the lesser-included offense of breaking or entering even though the individual entered a business open to the public. Based on the original commentary, this result does not comport with the legislature's stated purpose in enacting the statute.

Examining the second stated function of the breaking-or-entering statute in the context of the Gambini hypothetical, it is even more obvious that the statute was not intended to apply to shoplifters in a business open to the public during regular business hours unless the shoplifter is breaking into a vending machine or other type of container containing money while inside of the business.[13] In that case, it would be proper to charge the shoplifter with breaking or entering. Such a scenario, while possible, seems remote.

After examining the two stated functions of the breaking-or-entering statute, it is clear that at least the second of the stated functions does not apply. As to the function of being a lesser-

11. ARK. CODE ANN. § 5-39-201(b)(1).

12. Original commentary to ARK. CODE ANN. § 5-39-201 (Repl. 1995); *see also* ARK. CODE ANN. § 5-39-101(2)(B)(i) (Repl. 2006).

13. *See* ARK. CODE ANN. § 5-39-202(b)(3).

included offense of burglary, it is not as clear. The burglary statute does not fit our hypothetical because the word "unlawfully" immediately follows the language "enters or remains." However, because the breaking-or-entering statute does not contain the element of "unlawfully" either preceding or following "enters into," it can be argued that the breaking-or-entering statute should be applied to our hypothetical.

III. TWO ARKANSAS CASES ON POINT

Returning to the first problem—how can a defendant's intent to steal be proven beyond a reasonable doubt? This problem is illustrated by two Arkansas cases, *Smith v. State*[14] and *White v. State*.[15] In *Smith*, the defendant was convicted of breaking or entering for stealing a .30-06 rifle from the sporting-goods department of K-Mart in Little Rock.[16] Smith had been caught on videotape taking the rifle from the gun display case:

> The videotape reveals appellant passing in front of the gun cabinet six times. Appellant is first seen behind the counter in front of the gun case, and, while obscured by a sign on the right side of the screen, he stops briefly in front of the gun case and leaves. He later returns to the front of the counter from a shopping aisle. He walks in front of the counter three more times, looking at the gun case each time. It appears that he passes by the cabinet several times in order to see whether it is locked. Appellant is then seen behind the counter again and leaves. Appellant next appears a sixth time behind the counter. He looks back and forth two or three times, opens the glass door to the display case, removes a gun from the middle of the rack, and leaves to the left of the screen with the gun. In this sequence, the cabinet appears to open easily. Appellant does not appear to manipulate a lock; he merely opens the cabinet door and takes the gun out.[17]

The issue on appeal was whether Smith "had the 'purpose' to commit a theft when he entered K-Mart."[18] With very little discussion, the court concluded,

14. 346 Ark. 48, 55 S.W.3d 251 (2001).
15. 2009 Ark. App. 782, 2009 WL 3855689.
16. *Smith*, 346 Ark. at 50, 51, 55 S.W.3d at 252, 253.
17. *Id.* at 50, 55 S.W.3d at 252.
18. *Id.* at 53, 55 S.W.3d at 254.

> Here, appellant's purpose to commit a theft is proven by circumstantial evidence. The jury viewed a surveillance tape that shows appellant taking a gun from a gun cabinet in the sporting goods department of K-Mart. This videotape shows appellant approaching the gun cabinet six times, and walking around and behind the counter three times. The surveillance tape shows appellant during his last intrusion behind the counter, as he looked back and forth two or three times, opened the glass door to the display case, removed a gun, and walked away. Based upon the surveillance video of appellant's actions before and at the time he took the gun from the display case, there was sufficient evidence for the jury to infer that his purpose in entering K-Mart was to commit a theft.[19]

The court observed that because direct evidence of a criminal defendant's mental state is rare, intent must often be inferred from the circumstances of the crime.[20] Accordingly, the court held that there was sufficient evidence from the videotape to support the breaking-or-entering conviction.[21]

More recently, the Arkansas Court of Appeals addressed the issue in *White v. State*.[22] In that case, Marshall Shackleford had hired Keith White to do some yard work at his home.

> Shackleford gave White permission to enter the garage (where Shackleford stored his yard tools and equipment) and to use the bathroom in a storage room at the back of the garage. White did this work for about a year. At some point, Shackleford noticed that some fishing reels and a combination air compressor/battery charger were missing. He suspected White. The police found the stolen items at a pawn shop. White admitted stealing the items, and pleaded guilty to misdemeanor theft.[23]

Although White pled guilty to misdemeanor theft, he had a bench trial on the breaking-or-entering charge. White testified that he did not enter the garage or the adjoining bathroom/storage room with the intent to steal. When asked why he stole the items, White responded:

19. *Id.* at 53, 55 S.W.3d at 254-55.
20. *Id.* (citing Steggall v. State, 340 Ark. 184, 194, 8 S.W.3d 538, 545 (2000)).
21. *Smith*, 346 Ark. at 54, 55 S.W.3d at 255.
22. 2009 Ark. App. 782, 2009 WL 3855689.
23. *Id.* at 1, 2009 WL 3855689, at *1.

> I just, honestly just, I meant, needed money that day and it wasn't time for me to get paid and I took them. I was not going to his house to steal. I went to his house to work. And it just happened. You know. And I apologize for that. But nevertheless it happened.[24]

The trial judge apparently did not believe White's testimony and found him guilty of breaking or entering. The court of appeals pointed out that "the circuit court, as the fact-finder, was not required to believe any or all of White's testimony."[25] The court also found, however, that the "record supports two equally reasonable conclusions."[26]

> First, White could have entered the garage and bathroom/storage room intending to steal from Shackleford. Or second, White could have entered the garage and bathroom/storage room intending to get or return yard tools or to use the bathroom, and once inside decided to steal from Shackleford. Faced with these two possibilities, the fact-finder had to speculate about White's entry purpose. A judgment, however, cannot rest on speculation.[27]

The Court of Appeals distinguished *Smith v. State*[28] by stating:

> But there is no evidence here comparable to the evidence about Smith casing the K-Mart gun cabinet. There was, for example, no evidence that White entered the garage at night when there was no yard work to be done; no evidence that he entered the premises carrying a bag to hold his loot; no evidence that he had called the pawn shop before the theft to see if he could sell some fishing reels; and no evidence White had told someone that, though he was broke and it was not pay day, he would have some money after going to Shackleford's house. Evidence of any of these circumstances, or the like, could support the reasonable inference that White entered the premises intending to steal notwithstanding his permission to enter. Unlike in *Smith*, there was no substantial evidence, direct or circumstantial, showing that White entered Shackleford's garage and the

24. *Id.* at 3, 2009 WL 3855689, at *2.

25. *Id.* (citing Coggin v. State, 356 Ark. 424, 436, 156 S.W.3d 712, 720 (2004)).

26. *Id.* at 4, 2009 WL 3855689, at *2.

27. *White*, 2009 Ark. App. 782, at 4, 2009 WL 3855689, at *2 (citing King v. State, 100 Ark. App. 208, 215, 266 S.W.3d 205, 207-08 (2007)).

28. 346 Ark. 48, 55 S.W.3d 251 (2001).

> adjoining storage room/bathroom with the purpose of committing a theft or felony.[29]

The court focused on the videotape in *Smith* depicting the defendant "casing" the gun cabinet as the kind of circumstantial evidence that supports a reasonable inference that the defendant entered the particular premises intending to steal.[30] Other than the fact that White committed the theft, from the court of appeals' perspective there was no circumstantial evidence that would support an inference that White entered the garage for the purpose of committing a theft.[31] Thus, the court of appeals reversed and dismissed White's breaking-or-entering conviction.[32]

Despite the court of appeals' attempt to distinguish between *Smith* and *White*, the lack of any salient distinction between the two factual situations creates a clear conflict between the Arkansas Supreme Court and Court of Appeals on this issue. The facts of *Smith* and *White* are extremely similar. As the dissenting opinion in *White* observed, "Unlike the majority, I am unable to distinguish Smith from the facts of the case at hand, and I believe this court is constrained to follow the holding announced in that case."[33]

The conflict between these two cases raises the question of whether *Smith* was correctly decided. Where should courts draw the line between an inference of the defendant's intent from circumstantial evidence, which is permissible, and speculation, which is impermissible? As discussed previously, the court in *Smith* seemed to rely upon the fact that the defendant was apparently "casing" the gun cabinet by going back and forth six times in drawing the inference that he entered K-Mart with the purpose of committing the theft.[34] The defendant's actions certainly showed that he was trying to avoid detection. The defendant was likely nervous as well. These are reasonable inferences that can be drawn from the defendant's conduct in *Smith.* It seems unreasonable to infer that the defendant had the

29. *White*, 2009 Ark. App. 782, at 4-5, 2009 WL 3855689, at *3.

30. *Id.*

31. *Id.* at 5, 2009 WL 3855689, at *3.

32. *Id.*

33. *Id.* at 6, 2009 WL 3855689, at *3 (Baker, J., dissenting).

34. *See White*, 2009 Ark. App. 782, at 4-5, 2009 WL 3855689, at *3 (majority opinion).

intention of stealing the rifle *before* he entered K-Mart simply because he was casing the gun cabinet after he entered the store. It is certainly possible that he entered the store for another purpose, saw the rifle and was tempted, waffled on his decision a few times, and ultimately stole it. Even assuming that the casing of the gun cabinet supports a reasonable inference that Smith formed the intent to steal the rifle before he entered the store, at the very least the situation presents two "equally reasonable conclusions."[35] Smith's intent would have been more discernable if he had cased the gun cabinet, left the store, re-entered the store, and then stolen the rifle. But the facts of the case do not suggest that he ever left the store in between his trips back and forth to the gun cabinet. Consequently, the facts in *Smith* required the jury to speculate about Smith's purpose in entering the store. Because criminal convictions should not rest on speculation, the court in *Smith* should have reversed and dismissed the breaking-or-entering conviction.

In addition to the speculation problem, the *Smith* and *White* cases emphasize an additional issue with the breaking-or-entering statute—the difficulty of proving that a particular defendant formed the intent to commit a theft before entering a building beyond a reasonable doubt. One of the elements of the breaking-or-entering offense is that the defendant enter the building with "the purpose of committing a theft" therein.[36] "Purpose" is defined in section 5-2-202(1) of the Arkansas Code: "A person acts purposely with respect to his or her conduct or a result of his or her conduct when it is the person's conscious object to engage in conduct of that nature or to cause the result."[37] In fact, the *mens rea* of "purpose" is the highest degree of mental culpability.[38] Both the Arkansas Code and the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution require that all elements of a crime must be proven beyond a reasonable doubt in order to sustain a conviction.[39] It

35. *Id.* at 4, 2009 WL 3855689, at *2.

36. ARK. CODE ANN. § 5-39-202 (Repl. 2006).

37. ARK. CODE ANN. § 5-2-202(1).

38. ARK. CODE ANN. § 5-2-203 (Repl. 2006).

39. ARK. CODE ANN. § 5-1-111(a)(1) (Repl. 2006); Harshaw v. State, 275 Ark. 481, 484, 631 S.W.2d 300, 302 (1982) (citing *In re* Winship, 397 U.S. 358, 362 (1970)).

> Because from the time that the law which we have inherited has emerged from dark and barbaric times, the conception of justice which has dominated

is the State that must prove beyond a reasonable doubt that the defendant had the conscious object of committing the theft *before* he entered the store in order to obtain a conviction of breaking or entering. The fact that the defendant in *Smith* cased the gun cabinet does not sufficiently support a reasonable inference of Smith's intent, and does not satisfy the high burden placed on the State to prove the defendant's mental state beyond a reasonable doubt. As the court observed in *White*, there was no evidence to support a reasonable inference that White formed the intent to steal before entering the garage, and thus surely none to support that fact beyond a reasonable doubt.

IV. THE PROPRIETY OF CHARGING A DEFENDANT WITH BREAKING OR ENTERING

Returning to the hypothetical case, should William Gambini be charged with breaking or entering for shoplifting the can of tuna? If the prosecutor can prove beyond a reasonable doubt that Mr. Gambini entered the Sac-O-Suds with the intention of stealing the can of tuna, then such a charge is legally sustainable. Of course, the prosecutor might exercise his or her discretion and only charge Mr. Gambini with misdemeanor theft. After all, it is only a can of tuna. But if Mr. Gambini is a public menace who has managed to escape punishment for his other crimes, then the prosecutor might very well want to charge him with felony breaking or entering just to get him off of the street.

As *Smith* and *White* illustrate, it is not always easy to infer a defendant's intent, particularly when you have to infer that intent at a particular place and time. The very fact that a defendant shoplifts an item proves a certain intent to steal. The problem is proving beyond a reasonable doubt that the intent to steal was formed *before* the defendant entered the store. The defendant could conceivably enter a store with no criminal

> our criminal law has refused to put an accused at the hazard of punishment if he fails to remove every reasonable doubt of his innocence in the mind of jurors. It is the duty of the Government to establish his guilt beyond a reasonable doubt. This notion—basic in our law and rightly one of the boasts of a free society—is a requirement and a safeguard of due process of law in the historic, procedural content of "due process."

Leland v. Oregon, 343 U.S. 790, 802-03 (1952) (Frankfurter, J., dissenting).

intent, see an item that he just cannot live without, and then develop the impulse to steal the item.[40] The court of appeals in *White* provides examples of when the timing of intent may be reasonably inferred.[41] For example, carrying in a bag in which a stolen item could be hidden might prove prior intent. But with many stores now selling canvas bags for shoppers to reuse, the fact that the shoplifter brought a bag in with him may not be dispositive. Of course, a defendant who tells someone in advance that he or she is going to shoplift an item provides the clearest case of prior intent. Unfortunately, criminal prosecutions are rarely that easy.

There are several possible solutions to this problem, with each directed towards a different player in the judicial system. From the prosecutor perspective, prosecutors should carefully scrutinize each case and charge shoplifters with breaking or entering only when they feel reasonably certain that they can prove beyond a reasonable doubt that the intent to steal was formed prior to entry into the store. Prosecutors should also consider the defendant's criminal history before bringing felony breaking-or-entering charges even in the cases where prior intent is reasonably certain.

Defense lawyers also play a role in a possible solution. One of the distinctions between *Smith* and *White* is that White took the stand and testified that he formed the intent to steal after he had already entered the storage room/bathroom, whereas Smith, neither testified in his own defense nor presented a case in chief. Granted, a defendant in a criminal case has an absolute constitutional right not to testify, and the jury will be so instructed upon request by the defendant.[42] However, I had a renowned trial attorney tell me early on in my career that he had personally never won an acquittal for a client who did not take the stand. One can only speculate about what, if any, impact Smith's failure to testify had on the jury that decided his case. The criminal defense practitioner is well advised to consider having the client take the stand in a case where the defendant

40. This gives a new meaning to the term "impulse item."

41. White v. State, 2009 Ark. App. 782, at 4-5, 2009 WL 3855689, at *3.

42. Harris v. New York, 401 U.S. 222, 230 (1971) ("Every criminal defendant is privileged to testify in his own defense, or to refuse to do so."); *see also* Rock v. Arkansas, 483 U.S. 44, 51-53 (1987).

admits the theft but disputes the breaking-or-entering charge. Defense counsel should also explain to the jury that, as an element of the crime, the prosecutor has the burden of proving the *mens rea* element beyond a reasonable doubt.

The Arkansas Legislature also could resolve this issue by amending the breaking-or-entering statute and adding the word "unlawfully" immediately preceding "enters into."[43] This would be consistent with the burglary statute of which breaking or entering is a lesser-included offense. The revised statute would then read, "A person commits the offense of breaking or entering if for the purpose of committing a theft or felony he or she breaks or unlawfully enters into any. . . ." Such a statutory revision would mean that a defendant could never be convicted of breaking or entering simply by entering a store open to the public during normal business hours for the purpose of shoplifting because, by definition, he entered the store lawfully. It would, however, not preclude charging a defendant with breaking or entering if he or she actually "breaks" into the store. Of course, under that scenario, the defendant would probably be charged with commercial burglary, a class C felony.[44]

Finally, the trial courts and appellate courts of Arkansas have a possible solution to this issue. They can rigidly apply the principle that, as an element of the offense, the prosecutors must prove beyond a reasonable doubt that the defendant entered the store with the purpose of shoplifting. The trial courts should not convict defendants upon speculation of intent or the timing of the intent. If this important element is not proven beyond a reasonable doubt, then the defendant should not be convicted of breaking or entering. If the defendant is convicted based on speculation and conjecture, then the appellate courts should not let the conviction stand.

V. CONCLUSION

It is clear that the Arkansas breaking-or-entering statute's breadth is causing confusion among prosecutors, jurors, trial courts, and even appellate courts. Defendants who commit thefts in similar circumstances are being treated very differently.

43. *See* ARK. CODE ANN. § 5-2-202 (Repl. 2006).
44. ARK. CODE ANN. § 5-2-201(b)(2) (Repl. 2006).

Under the current law, one defendant may simply pay a small fine for shoplifting a can of tuna while the other defendant may serve six years in prison for the same crime. It is imperative that either the Arkansas Legislature or the appellate courts correct this disparity. In the meantime, prosecutors should exercise their discretion judiciously and only charge shoplifters with felony breaking or entering when justice truly demands it.