Is Entering a Store After Having Been "Trespassed" Chargeable as Felony Breaking or Entering?

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In a session that I taught for magistrates, I learned that there is a practice in some districts of charging suspects with felony breaking or entering of a building when they enter a store after having been told not to return—commonly referred to as being "trespassed." This may or may not be the appropriate charge, absent additional supporting facts.

As a reminder, a person commits the offense of felony breaking or entering of a building under G.S. 14-54(a) if he or she:

1) breaks or

2) enters

3) without consent

4) any building

5) with the intent to commit any felony or larceny therein.

Several issues may need to be considered in determining whether such a charge is appropriate.

Evidence of intent. Does entering a store after having been trespassed suffice to establish probable cause that the person broke or entered the store *with the intent to commit any felony or larceny therein*? It seems not. The mere exclusion of the person previously does not necessarily show an intent to commit a felony or larceny. Further, the reason for being trespassed may have been unrelated to any felony or larceny. For example, the person may have been banned from the store for loitering. ("Why wouldn't a person determined to loiter go to another store from which he isn't banned?" you might wonder. I remember asking some of my clients who were "serial trespassers" this question when I was a public defender, and the answer usually reflected that the store in question was a gathering place where they felt a sense of community.)

North Carolina cases have held that an intent to commit larceny may be reasonably inferred from an unlawful entry, but those cases typically involve the breaking and entering of a residence or a place that is closed to the public, where it was clear that the person did not have a legitimate purpose. In this line of cases, additional facts, such as entry in the middle of the night, breaking by force, etc. may shore up the inference that the defendant had unlawful intent. *See, e.g.*, *State v. Accor*, 277 N.C. 65 (1970) (breaking and entering private residence at 2:15am); *State v. Campbell*, ___ N.C. App. ___, 759 S.E.2d 380 (2014) (breaking and entering church after hours), *rev'd on other grounds*, 368 N.C. 83 (2015); *State v. Quilliams*, 55 N.C. App. 349 (1982) (breaking and entering homes of strangers in the morning, by means such as throwing a propane tank through a glass door); *State v. King*, 158 N.C. App. 60 (2003) (breaking and entering a homeowner's garage while in possession of burglary tools). The same inference does not necessarily arise when a person enters a place that is generally open to the public during regular business hours like a store, where there may be an innocent purpose such as needing to make a purchase.

Suppose a person reenters a store after he has been banned for conduct related to larceny or shoplifting. Would this constitute probable cause of the intent to commit a larceny? Without additional evidence, I continue to have reservations. There are many reasons the person may have gone back to the store. Maybe it was the only store with groceries within walking distance of his home, he didn't have transportation to get to another one, and he rolled the dice hoping no one would recognize him and headed for the bread aisle. Maybe it was the store with the lowest prices, and the person lives on a low income. Without consideration of the person's conduct, a person's mere reentry into the store may not provide a "fair probability," the standard for probable cause, of an intent to commit a felony or larceny. *See generally State v. Crawford*, 125 N.C. App. 279, 282 (1997). In short, probable cause requires an assessment of the person's actual conduct, a task magistrates are regularly called on to do.

If a person who has been banned for any reason is discovered committing a larceny, or even an offense short of a completed larceny such as putting a steak inside his coat (shoplifting), it seems that probable cause would exist of the element of intent to commit a felony or larceny. *See, e.g.*, *State v. Thompkins*, 83 N.C. App. 42, 43 (1986) (noting that the requisite intent for felonious breaking or entering may be inferred where a larceny in fact occurs). There may be an issue at trial if the facts and circumstances indicate that the defendant did not have the intent to commit the larceny when he went in the store. *See State v. Karshia Bliamy Ly*, 189 N.C. App. 422, 430–31 (2008) (a person must have the intent to commit a felony or larceny at the time of entry). For example, the defendant may have entered the store because of its low prices, but once inside, seen an item he could not afford, succumbed to temptation, and pocketed it. *See id.* (criminal intent can, but does not have to be, inferred from the defendant's actions within the building). However, at the charging stage, it is hard to imagine that a magistrate would be in a position to assess the defendant's intent at the time of entry.

Revocation of consent. Questions may also arise regarding other elements of felony breaking or entering, such as whether the breaking or entering was *without consent* of the owner or a person empowered to give consent. Entering a store during normal business hours through a door open to the public is generally lawful. *See State v. Boone*, 297 N.C. 652, 658 (1979). The owner of the store or someone empowered to withdraw consent, such as the store manager, may tell an individual that he is not permitted to enter. However, if the person who banned the defendant from entering was someone other than the owner or person entitled to possession of the premises, there may not be probable cause of the *without consent element* of felony breaking or entering. *Cf. State v. Upchurch*, 332 N.C. 439 (1992) (noting in a burglary case that person who was not owner of home had only limited authority to grant consent to another to enter the home). There may be insufficient evidence of this element, for example, where the police trespass an individual from a business where the property owner has not authorized the police to act as agents. Some police departments will not trespass individuals from a private property unless the property owner first fills out an "Authorization to Act as Agent" form, explicitly authorizing them to act on the owner's behalf. I'm aware of one case in which a North Carolina superior court judge found that the police had not been delegated the authority to trespass individuals from the grounds of an apartment complex. These issues of agency may be relevant for the charging decision, but are beyond the scope of this post.

In some circumstances, the *without consent* element may be satisfied without an express revocation of consent. For example, in some breaking or entering cases, North Carolina courts have determined that an entry was without consent where the defendant initially entered a portion of the store that was open to the public but then passed into a portion that was clearly off-limits, such as a private office. *See, e.g., State v. Rawlinson*, 198 N.C. App. 600 (2009). These cases do not mean, however, that entry into a public area would be *without consent* without evidence that the property owner or other authorized representative had revoked consent.

In sum, felony breaking or entering is a more complicated charge than it may appear, involving both factual and legal issues. Of course, if a store has barred a person from the premises, the person may be charged with first-degree trespass by entering the building or other enclosed area, G.S. 14-159.12(a), and with second-degree trespass by entering other premises. G.S. 14-159.13(a). Also, the person may be charged with any other offense the person committed while on the premises, such as larceny or shoplifting. Misdemeanor breaking or entering might be a possible charge under G.S. 14-54(b) if the person is not shown to have an intent to commit a felony or larceny at the time of the

entry.

I have heard different viewpoints on this topic from my colleagues here at SOG. For example, my colleague John Rubin has expressed reservations about a charge of either felony or misdemeanor breaking or entering when a person enters an otherwise public area during normal business hours. Stay tuned for more posts!