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SECOND DEGREE BURGLARY—A PROCEDURAL ANOMALY

In 1907, *State v. Copenhaver*¹ decided for Montana the fundamental procedural question whether there may be a valid conviction of second degree burglary under an information specifically charging first degree burglary. It was there concluded that such conviction would be invalid since first degree burglary, burglary committed in the nighttime, does not include second degree burglary, that committed in the daytime. In 1952 the Montana court came to the same conclusion again in *State v. Fitzpatrick*.²

In reaching the result in the *Copenhaver* case Justice Brantly also limited the duty of the jury imposed by Revised Codes of Montana, 1947, section 94-7406, to find the degree of the crime of which the defendant is guilty, at least in a burglary charge, to a case in which the state has charged the "crime generally" without specifying the degree. This Note is an attempt to show that these two cases were decided erroneously.

HISTORY OF THE RULE

Title 94, chapter 9, of the Revised Codes of Montana, 1947,³ governs the crime of burglary. The pertinent sections of the Montana burglary statute are:

94-901. *Burglary defined.* Every person who enters any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse, or other building, tent, automobile, vessel, railroad car, with intent to commit grand or petit larceny or any felony, is guilty of burglary.

94-902. *Degrees of burglary.* Every burglary committed in the nighttime is burglary in the first degree, and every burglary committed in the daytime is burglary in the second degree.

94-905. *Nighttime defined.* The phrase "nighttime" as used in this chapter, means the period between sunset and sunrise.

The decision of *State v. Fitzpatrick*⁴ rested upon the fact that, although the defendant was shown to have committed the crime there was a reasonable doubt as to whether it was committed before sunrise, since it was not proven by the state that it was committed in the nighttime as specifically charged in the information. The court formally recognized that the crime of burglary was divided into degrees, but insisted that under a specific charge of first degree burglary, second degree burglary constitutes a separate and distinct crime not included in first degree burglary, thus prohibiting a conviction, under the fundamental proposition that the defendant can be convicted only for the crime charged.

The opinion of the *Copenhaver* case was written by Chief Justice Brantly, and the situation was similar to that in the *Fitzpatrick* case—the defendant, having been charged by information with the crime of burglary in the first degree, was found guilty of burglary in the second degree, or burglary in the daytime. The defendant appealed, contending that his conviction

¹35 Mont. 342, 89 Pac. 61 (1907).

²125 Mont. 448, 239 P.2d 529 (1952).

³Hereinafter the REVISED CODES OF MONTANA will be cited as R.C.M.

⁴125 Mont. 448, 239 P.2d 529 (1952).

could not be sustained for the reason that he had been convicted of an offense with which he was not charged. Brantly upheld this contention on the premise that a charge of burglary in the nighttime does not include a charge of burglary in the daytime since the charge by its very terms alleges the aggravated offense, and thus excludes the notion that it was the purpose of the prosecutor to charge the defendant generally. He stated:

Sections 821 and 822 [Penal Code, 1895] distinguish the crime into two degrees and impose different punishments; but the degree of the offense is a matter of proof, and is for the jury to determine under proper instructions, as is provided in section 2145 of the Penal Code. But when the pleader, as in this case makes the specific charge of burglary in the nighttime, he not only unnecessarily narrows the scope of the inquiry, but he must be held to proof of the charge as made; for though the crime is distinguished into degrees, and the jury may convict the defendant of any offense necessarily included in that with which he is charged (Penal Code, sec. 2147), it is obvious that a charge of burglary committed in the nighttime does not include a charge of burglary in the daytime, for the reason that the charge, by its very terms, alleges the aggravated offense, and thus excludes the notion that it was the purpose of the prosecutor to charge the defendant generally. . . .

To support his decision Brantly relied entirely on two early California cases, *People v. Smith*⁵ and *People v. Jefferson*.⁶ In the *Smith* case the Supreme Court of California stated:

Neither one of these specific offenses, made specific by the hour of its commission, can be said to be contained in the other. The reasoning applicable to convictions under indictments in murder cases is not at all in point. The presence or absence of malice, deliberation, and premeditation there fixes the degree of the crime, while here the degree is fixed by the hour of its commission. The gravity of the punishment is no element in determining whether the essentials of one crime are embraced within another charge.

The other California case, *People v. Jefferson*,⁷ reads in part as follows:

But while a defendant indicted for one crime may be convicted of a less offense *also charged in the indictment*, he cannot be convicted of an offense not charged in the indictment (actually or by construction created by the legislative will) and which consists of an additional element of circumstances not averred in the indictment. Prior to the amendments referred to, an indictment charging an entry in the nighttime could not be construed as averring an entry in the daytime; and as there was no allegation of an entry in the daytime, a defendant accused of "burglary" could not be convicted of "housebreaking."

The California court further states that by the California Code, whenever a crime is distinguished into degrees, the jury or court upon convicting must find the degree of the crime of which the defendant is guilty; that under this procedure, it would be illogical, and not in accord with elementary

⁵136 Cal. 207, 68 Pac. 702 (1902).

⁶52 Cal. 452 (1877).

⁷52 Cal. 452 (1877).

principles of pleading, to declare that if the indictment charged an entry in the nighttime only, the jury or court could find the defendant guilty of an entry in the daytime. Inasmuch as the indictment, to cover both degrees, must not specify either that the entry was by day or by night, it follows that the averment must be construed as charging an entry both in the nighttime and daytime.

These two California cases were decided on the basis of two California Code sections⁸ which are also found in the Montana Code,⁹ as follows:

94-7406. *Jury to find degree of crime.* Whenever a crime is distinguished into degrees, the jury, if they convict the defendant, must find the degree of the crime of which he is guilty.

94-7408. *Jury may convict of lesser offense or of attempt.* The jury may find the defendant guilty of any offense, the commission of which is necessarily included in that with which he is charged, or of an attempt to commit the offense.

In order to achieve the result he desired in the *Copenhaver* case, Brantly distinguished the leading Iowa case of *State v. Jordan*¹⁰ from the two California cases. He declared the case not in point, even though the fact situation was identical to that in the *Copenhaver* case because it was decided under a statute which declared:

Upon an indictment for an offense consisting of different degrees, the jury may find the defendant not guilty of the degree charged in the indictment, and *guilty of any degree inferior thereto*, or of an attempt to commit the offense if punishable by indictment. (Emphasis added.)

It is submitted that it was with this handling of the *Jordan* case that Brantly erred. He insisted that the Montana statute most nearly corresponding to the Iowa statute was the above section 94-7408, and that it is different in substance because it limits the conviction to such inferior crimes as are necessarily included in that with which the defendant is charged. But Brantly failed to recognize that Montana has a Code section similar to that found in *State v. Jordan*,¹¹ separate and distinct from the two above cited Montana and California Code sections. This section,¹² not found in the California Code, reads as follows:

94-6428. *Of what offense a defendant may be convicted.* Upon the trial of an indictment or information the defendant may be convicted of the crime charged therein, or of a lesser degree of the same crime, or of any crime included in the crime charged, or of an attempt to commit the crime charged, or of an attempt to commit a lesser degree of the crime charged, or of an attempt to commit any crime included in the crime charged.

⁸CAL. PEN. CODE ANN. §§ 1157, 1159 (Deering 1949).

⁹R.C.M. 1947.

¹⁰87 Iowa 86, 54 N.W. 63 (1893).

¹¹87 Iowa 86, 54 N.W. 63 (1893).

¹²R.C.M. 1947. The Code section quoted in *State v. Jordan*, *supra*, is almost identical to § 94-6428 in the respect that they both treat the handling of inferior or lesser crimes in the same manner. It should also be noted that § 94-6428 is more comprehensive than the Iowa section as it also deals with included offenses as well as lesser degrees of the same crime.

We shall consider below the failure of both the *Copenhaver* and *Fitzpatrick* cases to recognize the significance of this statute.

CRITIQUE OF PRESENT MONTANA LAW

The above discussion of the relevant California and Montana cases establishes these three principles:

- (1) Burglary may be charged either generally, or expressly as either first degree or second degree burglary.
- (2) On an express charge of first degree burglary there may never be a conviction for second degree burglary.
- (3) The only time the judge or jury has any choice as to the degree of burglary of which the defendant may be convicted, is when the indictment or information charges burglary generally.¹³

The first proposition is declaratory of established practice generally and is supported by the Montana Code and decisions thereunder.¹⁴ However, the second and third propositions, though apparently well accepted in Montana at the present time, are not supported by the Montana Code. In fact, they present on careful analysis the following three fallacies:

- (1) First and second degree burglary as defined in our Code are essentially two distinct crimes.
- (2) A conviction of daytime burglary cannot be permitted on a charge of nighttime burglary, even though by statute the former is only a degree of burglary, inferior to the latter.
- (3) Second degree burglary is not an included offense in a charge of first degree burglary.

In contradistinction to the fallacies above, it is submitted that the Montana Supreme Court should establish the following as the law of Montana:

- (1) First and second degree burglary are degrees of the one crime of burglary—the distinctions of time being merely for purposes of varying the severity of the penalty.
- (2) Second degree burglary is included in a charge of first degree burglary.
- (3) A conviction of second degree burglary may be allowed on a charge of first degree burglary, as a lesser degree of the crime charged.

It is believed that proper interpretation of the above quoted Montana Code sections¹⁵ requires the adoption of these three principles.

“. . . A LESSER INCLUDED OFFENSE . . .”

As is noted in section 94-7408,¹⁶ the jury may find the defendant guilty of any offense, the commission of which is necessarily included in that with

¹³Another possible alternative is the conviction of first degree burglary on a charge of second degree burglary. Of course, a defendant is constitutionally protected against the conviction of a more serious crime than that charged.

¹⁴R.C.M. 1947, tit. 94, c. 64. It has been generally conceded in Montana that an indictment or information may be in terms of the statute. Such an interpretation would suggest the above contention since each degree as well as the general definition is in terms of the statute.

¹⁵R.C.M. 1947, §§ 94-6428, 94-7406, 94-7408.

¹⁶R.C.M. 1947.

which he is charged. We submit that the court should have found second degree burglary to be an "included" offense under a charge of first degree burglary under this section. The reason for its failure to do so is found in the early California case which it considered controlling.

In this early case, *People v. Jefferson*,¹⁷ the distinction between burglary and the other common law crimes, especially homicide, is largely based on the ground that there were no degrees of burglary at common law, and that the uniting of burglary and housebreaking in one Code section, while attempting to make them one crime, did not have that effect when pleaded specifically. By this reasoning, burglary is one crime if pleaded generally and two distinct crimes if pleaded by degree—the distinction being the element of time. The result is that because they were once two distinct crimes, daytime burglary could not be included in a charge of nighttime burglary.

This distinction between the degrees of burglary on the basis of time alone is not a valid one for purposes of pleading, for the reason that burglary has changed considerably from the form that it had at the common law. The early common law defined burglary as (1) the breaking (2) and entering (3) of a dwelling house (4) of another (5) in the nighttime, (6) with the intent to commit a felony therein. It was necessary to allege all six elements in the indictment to sustain a conviction.¹⁸

Montana's first codification of burglary was a statement of this common law definition with the exception that a breaking was not necessary if a door or window were open.¹⁹ Shortly thereafter, in 1871,²⁰ burglary in the daytime was added to the Code, and thus it became the intention of the legislature to have two crimes of burglary: (1) burglary in the nighttime or common law burglary, and (2) burglary in the daytime or housebreaking. In 1885,²¹ the legislature made a change in the codification of burglary which has remained practically unchanged²² until the present day. This modification makes it conclusive that the legislature intended to unite the two crimes of burglary and housebreaking into one crime, for the Code now defines burglary generally in a single section, with a subsequent section dividing the crime into degrees on the basis of the time of commission so as to vary the penalty.

Such a distinction between degrees of a crime for purposes of punishment is not new. The statutory modifications of murder, larceny, assault and other crimes went through a parallel development. For instance, the penalty for murder at common law was generally conceded to be death. When people became humanitarian enough to realize that there were situations in which the death penalty was too severe for the taking of a human life, they made new rules under which in certain circumstances the penalty was lessened. Thus developed the division of homicide into first and second degree murder and voluntary and involuntary manslaughter. The same sort

¹⁷52 Cal. 452 (1877).

¹⁸State v. Copenhaver, 35 Mont. 342, 89 Pac. 61 (1907); State v. Ebel, 92 Mont. 413, 15 P.2d 233 (1932).

¹⁹Laws of Montana (Bannack), § 58 (1864).

²⁰MONT. COD. STAT. 1871, § 90.

²¹Laws of Montana 1885, § 90.

²²Laws of Montana 1949, c. 126, § 1, amending R.C.M. 1947, § 94-901 to include the word "automobile."

of modification occurred in the crime of larceny which became petit and grand larceny. Assault was given the same treatment, and, although there is no express statute defining assault generally, the common law definition provided the basis for the three statutory degrees of assault. In fact in Montana, the actual labeling of the different kinds of assaults as degrees of the crime came after that in burglary, thus further suggesting that the date of codification into degrees is of little or no importance.²³

The rule that burglary is one crime if pleaded generally and two distinct crimes if pleaded by degree is even more astonishing in view of the fact that contrary rules have been approved, not only for all informations charging first degree murder, but also for those charging grand larceny and first or second degree assault. In *State v. Copenhagen*,²⁴ Brantly distinguished homicide and the grades thereof from burglary and its degrees by stating that in a homicide there is always a killing. He apparently refused to recognize that the difference between first and second degree burglary was not that there wasn't a burglary, but that it was not committed during the time specifically alleged in the pleading.²⁵ The court has said, "There is but one crime of murder, and its division into degrees is simply for the purpose of adjusting the punishment 'with reference to the presence or absence of circumstances of aggravation.'" Likewise, for larceny, the Montana courts have found, in effect, that except for purposes of punishment the element of value is of small importance; and this element of value is the difference between grand and petit larceny.²⁶ Such division into degrees for purposes of punishment has also been the measure between the degrees of assault, and it is probably with this crime that the variation in penalty according to degrees of aggravation is best defined.²⁷

Consequently, the problem results from the fact that in burglary too much emphasis is placed on a supposed substantive distinction between the degrees. That such a distinction was once of importance in the pleading of burglary and housebreaking should have no significance today because burglary has in several respects become both procedurally and substantively a different crime from either of the earlier crimes. Indeed, it can be argued very persuasively that our statutory crime of burglary has not only absorbed the common law crimes of burglary and housebreaking but that it differs in substance in several respects. For instance, at common law, burglary was a crime solely against the habitation.²⁸ The fear of forcible invasion of one's home at night with felonious purpose led to a very severe penalty. There was then developed the desire to give protection to houses and other buildings in the daytime as well as the nighttime, expressing an increased interest and concern in the protection of economic interests generally. This led to creation of the crime of housebreaking. At this stage a

²³Burglary was labeled in terms of degree in 1885, while the labeling of assault came in 1895.

²⁴35 Mont. 342, 89 Pac. 61 (1907).

²⁵*State v. Hliboka*, 31 Mont. 455, 78 Pac. 956 (1904).

²⁶This conclusion is deduced from the fact that the Montana courts readily convict of petit larceny on acquittal of grand larceny.

²⁷The elements of aggravation are the sole distinction between the different degrees of assault; the more complex and serious the crime, the higher the degree of assault.

²⁸This was true also under Cod. STAT. 1871, c. 5.

primary distinction between "burglary" and "housebreaking" was the concern in the former for the safety and welfare of the householder in the nighttime and in the latter for the security of his property. The next legislative stage was the enlarging of the statutory definition of burglary by the merging of the two crimes as "burglary," thus protecting interests in both person and property.²⁹ The important point to note in this legislative development is that we have today a single statutory definition comprehending all of the earlier crimes.

Another distinction between the two is that under our statute "breaking" is never required as it was at the common law.³⁰ Moreover, as is indicated in the general statutory definition of burglary, time is not of substantive importance. *State v. Mish*³¹ curtly states that an information charging burglary need not allege the time of the entry or burglary. This likewise is the position of *State v. Copenhaver*³² and *State v. Fitzpatrick*.³³

If our conclusions as to the substantive singleness of burglary as defined by the statute are correct, it is submitted that there is a basic conflict between the rule governing murder, larceny, and assault and the rule governing burglary.

The pleading of murder at the common law was, of course, more complicated than it is today, but there are several elements which are the same, e.g., malice aforethought, unlawful killing and human being. When murder was first divided into degrees by statute, the additional distinctive elements of premeditation and deliberation were added to the definition for first degree murder. Although the Montana courts laid down the rule that in an information for murder it is sufficient merely to allege that the killing was with malice aforethought, and that the elements of premeditation and deliberation are matters of proof,³⁴ the courts frequently have held that on charges of first degree murder a defendant could be convicted of second

²⁹In extension of the crime of burglary to objects of property, two Montana cases, *State v. Green*, 15 Mont. 424, 39 Pac. 322 (1895), and *State v. Ebel*, 92 Mont. 413, 15 P.2d 233 (1932), held respectively that the words "box car" and "sheep wagon" were sufficiently definite forms of description. *State v. Ebel* stated explicitly, "While the language of the statute might have been made more definite and certain by employing words in common use, it could not well have been made more comprehensive, and we think that the absence of more particular terms of description indicates an intention, on the part of the legislature, to include every kind of buildings or structures 'housed in' or roofed, regardless of the fact whether they are at the time, or ever have been, inhabited by members of the human family." In addition thereto, one must remember that when in 1949 the legislature included the word "automobile" in its definition as being subject to burglary, it further substantiated the position taken by the above quoted case.

³⁰*State v. Copenhaver*, 35 Mont. 342, 89 Pac. 61 (1907).

³¹36 Mont. 168, 92 Pac. 459 (1907).

³²35 Mont. 342, 89 Pac. 61 (1907).

³³125 Mont. 448, 239 P.2d 529 (1952). The case of *State v. Summers*, 107 Mont. 34, 79 P.2d 560 (1938), strongly asserted that a burglary information in the usual form was sufficient, notwithstanding that it failed to state the time when burglary was alleged to have been committed, whether day or night, in view of defendant's right to a bill of particulars if he deemed the information not sufficiently definite. However, the decision of *State v. Bosch*, 125 Mont. 566, 242 P.2d 477 (1952), abolishing the bill of particulars in Montana, and thus denying the rule of *State v. Summers*, leaves the issue in utter confusion.

³⁴*State v. McGowan*, 36 Mont. 422, 93 Pac. 552 (1908); *State v. Lu Sing*, 34 Mont. 31, 85 Pac. 521 (1906); *Territory v. Stears*, 2 Mont. 324 (1875).

degree murder or even voluntary manslaughter.⁵⁵ Other cases have held that either on a general charge of murder or on a charge of second degree murder a defendant could be convicted of involuntary manslaughter.⁵⁶ This reduction, from first degree to second degree, and from murder to manslaughter, is a good example of lesser included offenses; furthermore, the treatment of involuntary manslaughter is entirely on the basis of lesser included offenses since involuntary manslaughter is not a degree of murder. It is merely associated with murder, since it, like murder, is a grade of homicide. Thus the reasoning in these homicide cases of the various homicide charges is fundamentally different from the rule governing the two degrees of burglary in the *Copenhaver* and *Fitzpatrick* cases.

Larceny is likewise divided into degrees and, although the early Montana Codes provided for both grand and petit larceny, it was not until 1895,⁵⁷ that larceny was codified in its present form. Today larceny is first defined generally and then described as being in degrees. Subsequently the distinct degrees are defined. The principal difference between the two degrees, grand and petit, is the value of the property stolen. Reasoning from the analysis already set forth in the discussion of burglary as to the forms of pleading required by our court, it would seem that to be safe larceny should be pleaded generally. But this has not been done consistently. The courts have held that petit larceny is necessarily included in the greater charge of grand larceny.⁵⁸ Consequently the state may safely charge grand larceny although it is later able to prove only petit larceny.

Assault also is a crime in which the lesser offense is treated as an included offense,⁵⁹ though there is no general statutory definition, nor has there ever been in Montana. In fact, it was not even codified into degrees until 1895. Two years prior to this codification into degrees, the case of *State v. Eschback*⁶⁰ was decided. In this case, the defendant was informed against for a felonious assault with a deadly weapon. The court under section 60 of the criminal statutes,⁶¹ which described felonious assault with a deadly weapon, stated that there were several elements necessary for this offense: (1) an assault (2) with a deadly weapon (3) with the intent to inflict upon the person of another a bodily injury, (4) where no considerable provocation appears or where the circumstances of the assault show an abandoned and malignant heart. The information charged all the elements of the offense, and the verdict of the jury found the defendant guilty of an assault with a deadly weapon. The verdict indicated the presence of the first two elements but it did not find the intent nor the malignant heart or absence of provocation necessary for the felony. Therefore, the case was remanded with instructions to assess a penalty for a simple assault, a misdemeanor,

⁵⁵*State v. Crean*, 43 Mont. 47, 114 Pac. 603 (1911); *State v. Shadwell*, 26 Mont. 52, 66 Pac. 508 (1901).

⁵⁶*State v. Allison*, 122 Mont. 120, 199 P.2d 279 (1948); *State v. Gondeiro*, 82 Mont. 530, 268 Pac. 507 (1928).

⁵⁷MONT. PEN. CODE 1895.

⁵⁸*State v. Dimond*, 82 Mont. 110, 265 Pac. 5 (1938).

⁵⁹*State v. Farnham*, 35 Mont. 375, 89 Pac. 728 (1907); *State v. Eschback*, 13 Mont. 399, 34 Pac. 179 (1893).

⁶⁰13 Mont. 399, 34 Pac. 179 (1893).

⁶¹4th DIV. COMP. STAT. 1887.

rather than the felonious assault for which he had been sentenced. This case shows that the lesser offense was included in the greater, and yet two distinct and specific elements of the higher offense were alleged—two elements which, if present, would have required a conviction of aggravated assault.

It is submitted that the preceding discussion conclusively establishes that burglary is one crime, and that the degrees of burglary are not intended to be distinguished from one another except for purposes of punishment. This result has been reached in three other crimes, homicide, larceny, and assault. In each of these crimes the pleading of a higher degree will permit conviction for a lesser degree. Yet, in each of these crimes there are elements of aggravation such as malice, value, assault with intent to kill, which form the very basis of the crimes themselves—substantive elements. Each is expressly written into the Code as the distinction between a higher and a lower degree of a crime. But in the instance of burglary, time is not an element of the substantive crime—it is merely the difference between the two degrees of burglary as established by the Code. Giving the pleading of burglary a treatment contrary and conflicting with that of these other crimes results in erroneous and anomalous court-made law. Thus it is submitted that our court should adopt the rule that second degree burglary is included in a charge of first degree burglary.

“ . . . A LESSER DEGREE OF THE SAME CRIME . . . ”

By way of introduction to this section, it must be recognized that there are two arguments upon which a different result than that reached in the *Copenhaver* and *Fitzpatrick* cases may be achieved. The first deals with the question of “included offenses” under a burglary charge as developed in both the Montana and California cases. That has been treated above. This section deals with the argument that second degree burglary is a lesser degree of first degree burglary and for that reason is simply a lesser degree of burglary. If either of these arguments be established, *Copenhaver* and *Fitzpatrick* should be reversed. It is submitted that both are valid.

The *Copenhaver* case recognized that there are two procedural sections which govern the rendering of a verdict by a jury for a lesser degree of the crime charged and a lesser included offense. Specific reference is made to what are now sections 94-7406 and 94-7408, R.C.M. 1947. These same sections are also recognized by implication in *State v. Fitzpatrick*⁴² and *People v. Smith*⁴³ and expressly in *People v. Jefferson*.⁴⁴ They are comprehensive of the law in California since they are the only procedural sections in the California Code governing this problem. This, however, is not true of the Montana Code, since there is another section which bears directly on this subject and which would have given, were it properly employed, an entirely different perspective to this question. This is section 94-6428,⁴⁵ quoted *supra*, p. 88.

⁴²125 Mont. 448, 239 P.2d 529 (1952).

⁴³136 Cal. 207, 68 Pac. 702 (1902).

⁴⁴52 Cal. 452 (1877).

⁴⁵R.C.M. 1947.

Section 94-6428 has an early history in Montana. It was found in the Bannack Code, but was in two sections at that time.⁴⁶ These sections were:

100. Upon an indictment, for an offense consisting of different degrees, the jury may find the defendant not guilty of the degree charged in the indictment, and guilty of any degree inferior thereto, or of an attempt to commit the offense.

101. In all other cases, the defendant may be found guilty of an offense the commission of which is necessarily included in that with which he is charged in the indictment.

These sections were codified into one, identical to section 94-6428, in the Penal Code of 1895.

Section 94-7406⁴⁷ likewise has an early history. It appeared in a somewhat similar form in section 196 of the Bannack Code, and was also found in the California Code. It was later to be codified in the Penal Code of 1895 in its present state.

However, section 94-7408⁴⁸ was first incorporated in the Penal Code of 1895, borrowed from California. There was no early history on this section. It is apparent then, that this section must be construed in the light of both 94-6428 and 94-7406, since it was preceded by both, and since it repealed neither section either expressly or by implication. However, in the *Copenhaver* case, Brantly did not recognize section 94-6428 as bearing on this issue of lesser degrees. Apparently he just overlooked it. At any rate, his failure to read section 94-6428 together with the other two sections caused him to give an unduly restrictive meaning to the two sections considered. First he recognized section 94-7406 as authorizing the jury to find the degree only on a general charge of burglary, and section 94-7408 as authorizing the jury to find a defendant guilty of a lesser offense of the same crime only when that lesser offense is necessarily included in the more severe offense.

But, had Brantly recognized and utilized the Code sections as they are today, he could only have made a different ruling. In fact, had he analyzed and interpreted the three Code sections together, he would have recognized the controlling effect of section 94-6428 on the other two sections as follows:

- (1) Section 94-6428 read together with section 94-7408 governs lesser included offenses.
- (2) Section 94-6428 read together with section 94-7406 governs two propositions:
 - (A) A conviction of a lesser degree may be found on a charge of a higher degree of the same crime.
 - (B) When a crime is charged generally, the degree of that crime of which the defendant is guilty must be found.

Of course, proposition (2)(B) is obvious when one considers that a verdict of guilty on a charge of killing with malice aforethought would sustain no penalty until the jury had determined the degree. There is

⁴⁶Laws of Montana (Bannack) §§ 100, 101 (1864).

⁴⁷R.C.M. 1947.

⁴⁸*Ibid.*

no punishment for murder, charged generally, but there is a penalty for each of the degrees of murder. This is likewise true of the pleading of burglary generally, and is one of the few valid propositions of the *Copenhaver* and *Fitzpatrick* cases.

The proposition concerning lesser included offenses has previously been discussed, but proposition (2)(A)—a conviction of a lesser degree may be found on a charge of a higher degree of the same crime—is the basis of our present discussion.

First of all, the question should be asked whether section 94-6428 even applies to the question of verdict and instructions. The answer, of course, is that it must be read together with sections 94-7406 and 94-7408 since the Code is to be considered as a whole—one section to be read in connection with, and in relation to all of the rest. *State v. Allison*⁴⁹ illustrates that such consideration has been given in connection with murder and manslaughter. While illustrating that involuntary manslaughter is an included offense in a charge of second degree murder, this case also involved the effect of section 94-6428 in connection with lesser degrees. The defendant was charged with the crime of murder in the second degree. The court advised the jury that it had taken from their consideration the question of second degree murder, and that the only question remaining for their consideration was the guilt or innocence of the defendant of the crime of manslaughter. In its instruction to the jury, the court gave the statutory definition of manslaughter, both involuntary and voluntary. The defendant conceded that voluntary manslaughter is a lesser degree of the crime charged in the information but insisted that involuntary manslaughter was not included in the information which charged murder in the second degree, and that therefore the defendant could not be convicted of involuntary manslaughter of which the jury found him guilty. The court found that involuntary manslaughter was an included offense in a charge of second degree murder; but what is more important, it cites section 94-6428 as controlling both as to the question of lesser degrees of the same crime and as to included offenses. The court held that although involuntary manslaughter was not a lesser degree of murder under section 94-6428, as characterized by the court, the conviction of the defendant was valid on the ground that it is a lesser included offense. Thus this section of the Code is used to limit the law governing variance, instructions and the duty of the jury, illustrating that it has the power to, and does in fact, govern all of these elements as well as do sections 94-7406 and 94-7408.

This proposition is further substantiated by *State v. McDonald*,⁵⁰ which discusses section 94-6428 in the following words:

The statute recognizes the rule, which prevails generally, that in cases in which the charge preferred includes minor offenses or different degrees of the same crime, and the evidence is in such a condition that the jury may find the defendant guilty of a lower degree than that charged, or of an included offense, it is incumbent upon the court to so formulate the charges as to enable the jury to find according to the view of what the evidence justifies.

⁴⁹122 Mont. 120, 199 P.2d 279 (1948).

⁵⁰51 Mont. 1, 149 Pac. 279 (1915).

Moreover, it is not only oversight of section 94-6428 which results in error. Had the Montana Supreme Court analyzed the Iowa case of *State v. Jordan*,⁵¹ and the Code section cited therein, it would have realized that that Code section is in essence the same as section 94-6428 in regard to lesser degrees of the same crime. In fact, the section quoted in the *Jordan* case is identical to section 100 of the Bannack Code and section 182 of the Codified Statutes of 1871, which constitute an important part of section 94-6428 as we know it, and as it was at the time of *State v. Copenhagen*.⁵²

Thus, it is conclusive that the Montana court erred in the *Copenhagen* and *Fitzpatrick* cases by its failure to utilize section 94-6428. The adoption of the rules of the two early California cases⁵³ as law for Montana was not justified because in the California law there appears no provision equivalent to section 94-6428. Section 94-6428 should govern burglary as well as any other crime which is divided into degrees for purposes of punishment; and the obvious failure to utilize it in this respect is subject to the strongest form of criticism.

A BETTER RESULT?

As a result of the *Copenhagen* and *Fitzpatrick* cases a criminal may go free behind a cloak of time. For example, a prosecutor may feel certain that he has the defendant on a charge of first degree burglary, and pleads that charge to make sure he avoids any problem which might arise from the result reached in *State v. Bosch*,⁵⁴ *supra*. The case is tried; the crime and the defendant are linked together and proven; only the question of time is left. Suppose a doubt is raised as to exactly what time it was committed, or the evidence is conflicting, or the crime is proven to have been perpetrated one minute after sunrise. Should this man go free? An affirmative answer is untenable. No criminal should be shielded by the hands of a clock, or by the rising and setting of the sun. A result which supports this conclusion is defeating the aim of justice, and it is the more unjustifiable when such a decision is restricted to a single crime. Moreover, the Code specifically provides that a defendant may be convicted of a crime included in that with which he is charged or of a lesser degree of the crime charged. These two factors cannot be overlooked.

It is submitted that the proper way to determine the answer to this pleading question is to consider sections 94-6428, 94-7406, and 94-7408 together. This will support the following conclusions:

- (1) The jury may determine which degree of burglary the defendant is guilty of on a general charge.
- (2) The jury may, upon a specific charge of first degree burglary convict of second degree burglary as a lesser degree of the crime charged, if the evidence supports this result.
- (3) The jury may, upon a specific charge of first degree burglary, convict of second degree burglary as an offense included in the higher charge.

⁵¹87 Iowa 86, 54 N.W. 64 (1893).

⁵²35 Mont. 342, 89 Pac. 61 (1907).

⁵³*State v. Jordan*, 87 Iowa 86, 54 N.W. 63 (1893); *People v. Jefferson*, 52 Cal. 452 (1877).

⁵⁴125 Mont. 566, 242 P.2d 477 (1952). See note 33 *supra*.

These results are not new to the field of criminal procedure in Montana. Illustrations of both lesser degrees and lesser included offenses in fields of crime other than burglary have been given. Yet these crimes themselves are, for the most part, no different from burglary, either procedurally or substantively, *as far as the Montana Code is concerned*. The legislators have done their part; but the courts have not retained in all respects the uniformity which was set before them. They have failed to weight correctly the crime of burglary with other crimes of a similar nature. The result is that second degree burglary has assumed an anomalous position among the lesser degrees and offenses. But what is worse than error in this respect is the failure of the court to utilize all of those procedural tools with which it has been provided. Such is the case of section 94-6428 in relation to the crime of burglary. The use of this section would conclusively reverse the holdings of the *Copenhaver* and *Fitzpatrick* cases.

Thus it is submitted that the Montana courts should reject the rule declaring invalid a second degree burglary conviction, adopting instead a rule conforming to those procedural rules developed under the Montana Code in the crimes of homicide, larceny and assault.

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