

evidence that the events underlying either of Love's convictions involved violence or theft, or that Love engaged in any conduct during the seven months he was employed at Whataburger that would have made his participation in an aggravated robbery foreseeable. Even viewed in hindsight, Love's convictions for selling cocaine and nonpayment of child support do not indicate a propensity for violent criminal conduct, like aggravated robbery and murder.

Barton calls our attention to criminal cases that note the connection between drugs and violence. We acknowledge that courts, including ours, have recognized a street-level connection between drugs, weapons, and violence. This connection provides police officers with the constitutionally required reasonable suspicion to conduct a *Terry* stop, or a legislature with a justification for imposing harsher sentences on drug offenders.

A stereotypical connection, however, is insufficient to raise more than a scintilla of evidence that a person convicted of selling cocaine, without any accompanying evidence of violence, will foreseeably commit aggravated robbery leading to murder in the future. While the smell of marijuana or the suspicion that a defendant possesses narcotics might provide a police officer sufficient justification to frisk a suspect for weapons under *Terry*, a seven-year-old conviction for "dealing" cocaine, standing alone, does not make it foreseeable that a defendant will commit a violent crime in the future.

Failure to Provide a Safe Workplace

Barton further contends that, even if it was not legally foreseeable that Love would engineer the crime that resulted in Dean's murder, Whataburger generally knows of an increased risk of a violent crime occurring at restaurants open late at night and should have taken reasonable security measures to prevent it.

Employees are the invitees of their employer. "[w]hen general danger to invitees is the risk of injury from criminal activity by third parties, the evidence must reveal specific previous crimes on or near the premises in order to establish foreseeability of harm."

The incidence of violent crime, the foreseeability of violent crime on Whataburger's premises, and the preventative measures that Whataburger could or did implement in view of the risk of such crime were the same for Whataburger in its capacity as employer as they were for Whataburger in its capacity as premises occupier.

Barton produced some evidence of criminal activity at the Whataburger in the years preceding Dean's murder: in July 1997, six years before the incident, a customer was shot in the parking lot, and another

customer in the drive-through lane was robbed and shot in the thigh; in July 1998, a customer was robbed in the drive-through lane; in June 1999, a customer's purse was stolen; in July 2000, a customer reported an assault (without injury); in April 2001, a woman sought help in the Whataburger, reporting that she had been shot; in August 2001, a woman reported an assault (without injury); in February 2002, a woman reported that her car was stolen from her in the parking lot; in April 2002, one customer intentionally hit another customer's vehicle in the drive-through lane (with property damage but not injury); and, in February 2003, police arrested a person who refused to leave the premises.

In contrast . . . no crime similar to this one had ever occurred: no one had ever robbed the restaurant before, nor had it ever been the scene of any workplace violence, nor had anyone ever committed any sort of crime against a Whataburger employee, nor had anyone ever been murdered.

. . . the evidence does not show the rampant, violent criminal activity sufficient to raise a fact issue about the foreseeability of the aggravated robbery that resulted in Dean's murder.

. . . general evidence of crime rates and of robberies in other locales cannot create "an industry standard of foreseeability" sufficient to impose a duty to prevent crime.

Finally, Barton's contention that Whataburger's earlier employment of a security guard on the weekends proves the foreseeability of the robbery is unavailing. "The mere act of taking preventative measures to protect against the possibility of future crime is not the same as foreseeing that criminal activity." If we equated preventative measures to foreseeability, we would "virtually eliminate the foreseeability requirement for a negligence claim against a person who installs a security system or takes other preventative measures to guard against crime."

We hold that the trial court properly granted summary judgment because the diabolic conduct of others—men who committed aggravated robbery and murder—was a superseding cause of Dean's death that was not reasonably foreseeable to Whataburger. Affirmed.

CASE QUESTIONS

1. After reading the court opinion, list the type of evidence that Dean's mother would have to offer to establish foreseeability.
2. What policies should employers establish based on what happened in this case?
3. What lessons do you learn about employee screening from this case?