70641-1

70641-1

NO. 70641-1-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

LASHAWN HOOPER,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

APPELLANT'S OPENING BRIEF

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A. INTRODUCTION.

LaShawn Hooper testified that he trespassed in Michael Schutz's yard; Mr. Schutz testified that Mr. Hooper entered his home without permission. The court denied Mr. Hooper's request for a jury instruction on criminal trespass in the second degree as a lesser offense to the charged crime of first degree burglary. Because Mr. Hooper's testimony must be taken as true when deciding to provide a lesser included offense instruction, and criminal trespass includes all elements of first degree burglary, the court misapplied the law when it refused to instruct the jury to consider whether Mr. Hooper committed the lesser offense of second degree trespass. The court further erred by refusing to credit Mr. Hooper's sentence with time he spent in court-ordered partial confinement.

B. ASSIGNMENTS OF ERROR.

1. The court's refusal to provide the jury with an instruction on the lesser degree offense of second degree trespass in a prosecution for first degree burglary violated Mr. Hooper's rights to due process of law and a fair trial by jury.

2. The court confused the applicable legal standard by instructing the jury on the definition of premises. CP 59, 60 (Instructions 8, 9).

3. The trial court erred in failing to credit Mr. Hooper for time spent in partial confinement prior to conviction.

4. The trial court's failure to credit Mr. Hooper for time spent in partial confinement prior to conviction violated the Double Jeopardy Clause of the Fifth Amendment, the Equal Protection Clause of the Fourteenth Amendment, and the Due Process Clause of the Fourteenth Amendment.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. A person charged with a crime has the right to be convicted on the least serious offense proved by the State and therefore he is entitled to have the court instruct the jury on a lesser included offense if, by taking the evidence in the light most favorable to the accused, a jury could find he committed only a lesser degree offense. Mr. Hooper's testimony showed that he crossed into another person's property without permission but he did not enter a building. Did the court improperly deny Mr. Hooper's request to instruct the jury on the lesser offense of second degree criminal trespass?

2. A defendant has a statutory and constitutional right to credit for time served in confinement or partial confinement prior to conviction. While awaiting trial, Mr. Hooper was released from jail but ordered by the court to remain at an in-patient mental health and drug-treatment facility. Does the trial court's refusal to credit Mr. Hooper for the time spent in this partial confinement violate his statutory and constitutional rights?

D. STATEMENT OF THE CASE.

LaShawn Hooper cut through the yard by Michael Schutz's home as he was walking through a neighborhood one afternoon. 3RP 30. Mr. Schutz called for Mr. Hooper to come back, accused him of breaking into his house, and put Mr. Hooper into a headlock. 3RP 30, 32. Mr. Hooper fought back. 3RP 32. The two men struggled until Mr. Hooper escaped and left. 3RP 32-33. Mr. Hooper did not ever go into the house. 3RP 33.

Mr. Hooper was arrested nearby after Mr. Schutz called the police. 3RP 14. He was carrying a CamelBak backpack, which has a hydration system for holding liquid and a small space for property. 3RP 14, 34-35. Mr. Hooper's birth certificate was at the top of one zippered

pocket, along with some change, keys, and other small items. 3RP 34, 35.

Mr. Schutz recounted events differently than Mr. Hooper. He said he returned home and found his door not locked as usual. 1RP 63. A person was inside the hallway, rummaging through his closet. 1RP 63. He grabbed the person, put him in a headlock, tried to stab him with his keys, and struggled to hold on to the person so he could call the police. 1RP 65. The suspect, who he identified as Mr. Hooper, fought back and eventually escaped but left a backpack behind. 1RP 66-67. Someone had rifled through Mr. Schutz's bedroom, taking coins, a Mexican peso bill, and other odds and ends.1RP 79. Although Mr. Schutz described the perpetrator as 19 years old and 6' to 6'2" tall, Mr. Hooper was 27 years old and 5'7.5" tall. 3RP 19, 29.

Mr. Hooper was charged with first degree burglary for allegedly unlawfully entering Mr. Schutz's home and assaulting him. CP1. Based on Mr. Hooper's testimony that he never entered Mr. Schutz's house but struggled with him outside, he asked for a lesser included offense instruction of second degree trespass. 3RP 52, 57, 60. The court refused on the ground that second degree trespass was not legally a lesser offense of first degree burglary. 3RP 61-62.

After Mr. Hooper was convicted of first degree burglary, he explained to the court that he had been court-ordered to attend an intensive mental health treatment program before trial. 3RP 145, 147. He asked for credit toward his sentence for this time, but the court ruled that he was only permitted to receive credit for time spent in full custody. 3RP 159.

Pertinent facts are addressed in further detail in the relevant argument sections below.

E. ARGUMENT.

1. **Where the defendant testified he had a confrontation with the complainant on his property but outside his home, the court's refusal to instruct the jury on the lesser offense of criminal trespass in the second degree denied him a fair trial by jury**

a. *An accused person is entitled to a lesser included offense instruction based on viewing the evidence in the light most favorable to the accused.*

A person accused of a crime is "entitled" to an instruction on a lesser degree offense when two conditions are met: (1) legally the lesser offense is a necessary element of the offense charged, and (2) factually the evidence supports an inference that only the lesser crime was committed. *State v. Workman,* 90 Wn.2d 443, 447-48, 584 P.2d 382

(1978); RCW 10.61.006; U.S. Const. amends. 6, 14; Wash. Const. art. I, §§ 3, 22. The constitutional right to a lesser included offense instruction stems from the "risk that a defendant might otherwise be convicted of a crime more serious than that which the jury believes he committed simply because the jury wishes to avoid setting him free." *Vujosevic v. Rafferty*, 844 F.2d 1023, 1027 (3rd Cir. 1988). "When the evidence supports an inference that the lesser included offense was committed, the defendant has a right to have the jury consider that lesser included offense." *State v. Warden*, 133 Wn.2d 559, 564, 947 P.2d 708 (1997).

To satisfy the factual portion of the *Workman* test, the evidence is viewed in the light most favorable to the party requesting the instruction. *State v. Fernandez-Medina,* 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000). A requested jury instruction on a lesser included or inferior degree offense should be given "[i]f the evidence would permit a jury to rationally find a defendant guilty of the lesser offense and acquit him of the greater." *Warden*, 133 Wn.2d at 563 (citing *Beck v. Alabama,* 447 U.S. 625, 635, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980)).

The trial court refused to give Mr. Hooper a lesser included offense instruction for criminal trespass in the second degree because it

erroneously adopted the prosecutor's argument that it was not legally a lesser included offense. 3RP 54, 60-62. It also ignored the factual evidence in the case demonstrating that, if viewed in the light most favorable to the accused, a rational juror could find Mr. Hooper guilty of only trespass in the second degree

b. *Criminal trespass is legally a lesser included offense of first degree burglary.*

Criminal trespass is a lesser included offense of first degree burglary. *State v. Southerland*, 109 Wn.2d 389, 390, 745 P.2d 33 (1987) (citing with approval Court of Appeals opinion, 45 Wn.App. 885, 889, 728 P.2d 1079 (1986), which provided, "each of the elements of first degree criminal trespass is a necessary element of first degree burglary."); *see also State v. J.P.*, 130 Wn.App. 887, 895, 125 P.3d 215 (2005) ("Criminal trespass is a lesser included offense of burglary"). Although *Southerland* and *J.P.* involved entries into buildings, so first degree criminal trespass was the requested lesser offense, the same reasoning applies to second degree trespass.

Criminal trespass in the second degree occurs when a person "knowingly enters or remains unlawfully" in or upon premises of another under circumstances not constituting first degree criminal

trespass. RCW 9A.52.080. Criminal trespass in the first degree requires an unlawful entry into a building, while second degree trespass is based on entry upon another's "premises," which includes any building or real property belonging to another. RCW 9A.52.010(6).

First degree burglary is criminal trespass with the added restrictions that the entry involved a building, the perpetrator intended to commit a crime against a person or property therein, and while in the building or in flight therefrom, he assaulted another a person. *See J.P.*, 130 Wn.App. at 895; RCW 9A.52.020.[1]

The court refused to instruct the jury on second degree criminal trespass because it construed *State v. Mounsey*, 31 Wn.App. 511, 517-18, 643 P.2d 892, *rev. denied*, 97 Wn.2d 1028 (1982), to hold that this offense cannot be a lesser included offense of first degree burglary. 3RP 61-62. In *Mounsey*, both the defendant and complainant agreed that the defendant entered the complainant's home through a window. 31 Wn.App. at 513. The defendant claimed he was invited to enter through the window, but the complainant disagreed. *Id.* at 514. Once inside, the

[1] The other alternative means for committing first degree burglary, being armed with a deadly weapon, is not pertinent to the case at bar. RCW 9A.52.020(1).

defendant said they had consensual sex while the complainant said she was raped. *Id.*

Because it was undisputed that the defendant had entered the building, the *Mounsey* Court affirmed the trial court's refusal to instruct the jury on the second degree criminal trespass as a lesser offense. "[S]econd degree criminal trespass involves knowingly entering or remaining on premises in a situation which does not amount to first degree criminal trespass." 31 Wn.App. at 517-18. Second degree trespass applies to a person who is unlawfully "on premises other than a building, i.e., open grounds, yards, etc. If a person knowingly enters or remains unlawfully in a building, he is guilty of first degree criminal trespass, which by definition cannot be second degree criminal trespass." *Id.* at 518. In *Mounsey*, the defendant agreed he entered a building, and therefore first degree trespass, not second degree trespass, would be the appropriate lesser offense. *Id.*

Unlike *Mounsey*, Mr. Hooper testified that he did not enter the complainant's home.1RP 30. He explained that the confrontation occurred on the complainant's property, i.e., "on premises other than a building." *Mounsey*, 31 Wn.App. at 518. The court misapplied the law

by relying on *Mounsey* to reject Mr. Hooper's request for a trespass instruction.

c. *Mr. Hooper's testimony affirmatively established the factual basis for second degree trespass.*

Taking the evidence in the light most favorable to Mr. Hooper, he was confronted by Mr. Schutz outside his home, when Mr. Hooper was cutting across Mr. Schutz's property. Because second degree criminal trespass includes unlawfully entering another person's yard, Mr. Hooper presented affirmative evidence that he committed this lesser offense. 3RP 31-33. A rational juror could find that he committed only the lesser offense.

The court did not acknowledge Mr. Hooper's testimony when it refused his request for a lesser degree instruction of second degree trespass. 3RP 61-62. It did not view the evidence in the light most favorable to Mr. Hooper. Instead, it incorrectly ruled that this offense failed the legal prong of *Workman*, but that decision was incorrect. 3RP 61-62.

If the court had viewed the evidence in the light most favorable to Mr. Hooper, it would have concluded that by crossing Mr. Schutz's yard and having a confrontation with him outside the home, as Mr.

Hooper testified, it would be rational to convict him only of the lesser offense of second degree criminal trespass.

d. *The court's misleading definition of "premises" for purposes of a burglary added to the harmful effect of denying Mr. Hooper an instruction on the lesser offense of trespass.*

Jury instructions must make the legal standards manifestly apparent to the average juror. *State v. LeFaber*, 128 Wn.2d 896, 900, 913 P.2d 369 (1996). Jurors are not expected to parse grammar and apply rules of statutory construction when evaluating a jury instruction. *Id.* at 902-03. If an instruction "permits" an incorrect understanding of the law, it is deficient. *Id.*

The court instructed the jury that the unlawful entry element of a burglary requires evidence a person "enters or remains unlawfully in or upon premises" without the required permission. 3RP 98; CP 59 (Instruction 8). It told the jury that the "premises" means "any building, dwelling or any real property." 3RP 98-99; CP 60 (Instruction 9). Mr. Hooper objected to instructing the jury about unlawfully entering "premises" because first degree burglary required entry into a building, and the premises definition pertained to trespass. 3RP 52. He argued focusing the jury's attention on whether Mr. Hooper entered premises

belonging to another person diluted and confused the State's burden of proof. 3RP 52.

The court disregarded Mr. Hooper's objection after the prosecution claimed that this was a pattern jury instruction. 3RP 53. However, even a pattern jury instruction may misstate the law. *See State v. Kyllo*, 166 Wn.2d 856, 867, 215 P.3d 177 (2009). Moreover, the pattern instructions do not dictate the necessity of supplying this particular instruction.

The Notes on Use in the pattern instructions defining first degree burglary and the to-convict instruction do not list the definition of "premises" in the related instructions to be given. *See* 11A Wash. Prac., Pattern Jury Instr. Crim. WPIC 60.01 & 60.02 (3d Ed 2008) ("with this instruction, use" WPIC 2.05, Building Definition; WPIC 10.01, Intent Definition; WPIC 10.51, Accomplice Definition; and WPIC 65.02, Enters or Remains Unlawfully Definition). The pattern "Enters or Remains Unlawfully" definition applies to both burglary and criminal trespass. 11A Wash. Prac., Pattern Jury Instr. Crim. WPIC 65.02. Its Notes on Use directs the court to also instruct the jury on the definition of "premises" in WPIC 65.01, but this definition is broader than the elements necessary for burglary and the WPIC notes do not

discuss its application to a burglary. *See* RCW 9A.52.020(1). The notes in the burglary pattern jury instructions tell the court to use the definition of building, which is the only pertinent term for a burglary. WPIC 60.01 & 60.02.

Burglary and the related offense of trespass are defined in the same chapter, graduated in seriousness based on type of property at issue. *See* RCW 9A.52.020; RCW 9A.52.025; RCW 9A.52.030. First degree burglary is based on entry into any building, residential burglary involves a "dwelling" other than a vehicle; and second degree burglary involves a building other than a vehicle or a dwelling. *State v. McDonald*, 123 Wn.App. 85, 89-90, 96 P.3d 468 (2004). The same RCW chapter divides trespass into first degree, for entering a building, and second degree for entry into premises. RCW 9A.52.070; RCW 9A.52.080; *see generally* RCW ch. 9A.52. The instruction defining premises is broader than the elements of a burglary.

By directing the jury that it could only consider the great offense of first degree burglary when judging Mr. Hooper's entry onto Mr. Schutz's property, but defining the "premises" pertinent to burglary to include an entry onto property, the court left the jury with the impression that building and premises were equivalent terms under the

law. CP 59, 60. A lay person might not understand that the penalties for burglary are far greater than trespass and this distinction hinges on the difference between entering "premises" of another and entering a "building."

The definition of premises was irrelevant to the legal issues before the jury, but likely to cause confusion about the narrow definition of building that must govern a first degree burglary conviction. The jury could have thought that legally speaking, premises and building, dwelling or property were essentially the same, as the instructions indicated. CP 60, 62.

Mr. Hooper testified that he was on Mr. Schutz's property, but not inside a building. 3RP 33. Jurors could have believed Mr. Hooper's testimony but equated the definition of building with entry upon the premises of Mr. Schutz. The court erred by overruling Mr. Hooper's objection to the confusion caused by defining unlawful entry to include entering premises of another. The instructions do not make the legal standard manifestly apparent to the average juror. Based on this instructional ambiguity, the jury's verdict does not show that it clearly understood the law when it convicted Mr. Hooper of burglary notwithstanding his testimony that he did not enter Mr. Schutz's home.

e. *The refusal to instruct the jury on the lesser offense denied Mr. Hooper his right to a fair trial by jury.*

The court's refusal to give an instruction that prevents the defendant from presenting his defense is reversible error. *Warden*, 133 Wn.2d at 564. The right to present a defense, and to have the jury instructed on a valid theory of defense, is guaranteed by the Sixth Amendment and the more protective right to a trial by jury under article I, sections 21 and 22.

The Supreme Court "has never held that, where there is evidence to support a lesser-included-offense instruction, failure to give such an instruction may be harmless." *State v. Parker*, 102 Wn.2d 161, 164, 683 P.2d 189 (1984). RCW 10.61.006 provides that a defendant "may be found guilty of an offense the commission of which is necessarily included within that with which he is charged." Based on this statute and its underlying principles,

> the law gives the defendant the unqualified right to have the inferior degree passed upon by the jury, [and] it is not within the province of the court to say that the defendant was not prejudiced by the refusal of the court to submit that phase of the case to the jury, or to speculate upon probable results in the absence of such instructions. If there is even the slightest evidence that the defendant may have committed the degree of the

> offense inferior to and included in the one charged, the law of such inferior degree ought to be given.

Parker, 102 Wn.2d at 163-64 (quoting *State v. Young,* 22 Wash. 273, 276-77, 60 P. 650 (1900)).

"Regardless of the plausibility" of the defendant's testimony, he has "an absolute right to have the jury consider the lesser-included offense on which there is evidence to support an inference it was committed." *Id.* at 166.

Mr. Hooper testified that he was accosted by Mr. Schutz outside Mr. Schutz's home. 3RP 30-33. If he did not enter the home but was unlawfully on Mr. Schutz's property, the jury should have been able to consider whether he was guilty of second degree trespass. He had "an absolute right" to have the jury instructed on the defense that he presented. *Parker*, 102 Wn.2d at 166. He was improperly denied his ability to fully and effectively argue his theory of defense due to the court's denial of his request for a lesser included offense instruction based on the court's misapprehension of the law, which requires reversal of his conviction. *Warden*, 133 Wn.2d at 564.

2. **Mr. Hooper was entitled to credit for time spent in court-monitored partial confinement prior to the imposition of his sentence.**

At sentencing a defendant has both a constitutional and statutory right to receive credit for all confinement time served prior to sentencing. *State v. Speaks*, 119 Wn.2d 204, 206, 829 P.2d 1096 (1992); *State v. Anderson*, 132 Wn.2d 293, 213, 937 P.2d 581 (1997); RCW 9.94A.505(6). The constitutional guarantees flow from the Fifth Amendment's Double Jeopardy Clause and the Fourteenth Amendment's Equal Protection and Due Process Clauses. *Reanier v. Smith,* 83 Wn.2d 342, 517 P.2d 949 (1974); *In re Trambitas,* 96 Wn.2d 329, 635 P.2d 122 (1981); *State v. Phelan,* 100 Wn.2d 508, 671 P.2d 1212 (1983).

RCW 9.94A.505(6) provides:

> The sentencing court shall give the offender credit for all confinement time served before the sentencing if that confinement was solely in regard to the offense for which the offender is being sentenced.

"'Confinement' means total or partial confinement." RCW 9.94A.030(8). RCW 9.94A.030(35) defines "partial confinement" as

> confinement for no more than one year in a facility or institution operated or utilized under contract by the state or any other unit of government, or, if home detention or work crew has been ordered by the court, in an approved

> residence, for a substantial portion of each day with the balance of the day spent in the community. Partial confinement includes work release, home detention, work crew, and a combination of work crew and home detention.

While this case was pending against him and after spending considerable time in custody for competency proceedings, Mr. Hooper was ordered released from jail and required to report to the Impact program immediately, a long-term inpatient treatment facility. 1RP 41. He was required to "turn himself in" to jail if he discontinued his treatment at Impact. Supp. CP _, sub. nos. 57, 64, 76. The court ordered that his release was premised on Mr. Hooper "meet all requirements" of the Impact program, including that he "reside with that program" and take required psychiatric medications. 1RP 43. Under the court's order, Mr. Hooper remained in an in-patient program for 55 days, and an additional 24 days in full treatment participation although he was not given housing for in-patient treatment during this second period. 3RP 148-49.

Prior to ordering Mr. Hooper participate in the mental health treatment program at Impact, the Court had agreed he could be released from jail if he was confined with "CCAP-enhanced" and work release. 1RP 40; Supp. CP _, sub nos. 53, 54, 55. The CCAP program requires a

person to participate in approved activities for a minimum of six hours each day. King County Code (KCC) § 5.12.010. The activities are either approved or offered by the Community Corrections Division of the King County Department of Adult and Juvenile Detention. KCC §§ 2.16.120, 2.16.122, 5.12.010.

RCW 9.94A.030(35) provides that "Partial confinement includes work release, home detention, work crew, and a combination of work crew and home detention." Had he participated in CCAP and work release, he would have received credit for this partial confinement.

But the statute does not limit itself to only the types of court-monitored restrictions as those listed by name. Instead it sets forth examples of types of partial confinement. Mr. Hooper's time in a full-time facility in lieu of jail, predicated on a court order and at the risk of immediate total confinement, is akin to these statutory examples. The only difference between his confinement and home detention, for example, is that while home detention requires electronic monitoring, RCW 9.94A.030(28), there was no need for monitoring of Mr. Hooper while he remained at the Impact program for in-patient treatment and under court order to "turn himself in" if he left the program. Supp. CP _ , sub. nos. 57, 64. Had he been subject to electronic monitoring he

would have undoubtedly been entitled to credit for that time despite his ability to leave his home. *Speaks*, 119 Wn.2d at 208-09. Yet the court refused to provide him credit spent in this facility. 3RP 159.

Because it meets the definition of "partial confinement," Mr. Hooper is entitled to credit for time served for his court-ordered in-patient treatment. The prosecutor claimed that a person is only entitled to credit for partial confinement if sentenced under RCW 9.94A.680, which authorizes a person sentenced to less than one year in jail to serve time outside of jail. CP 80. But RCW 9.94A.680 speaks to the ability to serve an entire sentence out of total confinement, it does not trump the SRA's requirement that the court credit all presentence confinement time and does not nullify the definition of confinement in RCW 9.94A.030(8) to include partial confinement. *See* RCW 9.94A.505(6).

The court refused to credit Mr. Hooper based on its mistaken belief that it lacked authority to give Mr. Hooper credit for time served unless in custody. 3RP 159. A trial court abuses its discretion when it "applies the wrong legal standard or bases its ruling on an erroneous view of the law." *State v. Lamb,* 163 Wn.App. 614, 625, 262 P.3d 89 (2011). The court's ruling that no one may receive credit for time

served in partial confinement is contrary to RCW 9.94A.505(6). This ruling also violates the Double Jeopardy Clause, the Equal Protection Clause and the Due Process Clauses.

F. CONCLUSION.

Mr. Hooper's conviction should be reversed and a new trial ordered. Alternatively, he must be credited with all time spent in confinement or partial confinement due to the charged offense.

DATED this 30th day of January 2014.

Respectfully submitted,

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,	)	
	)	
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	)	NO. 70641-1-I
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	)	
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	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 30TH DAY OF JANUARY, 2014, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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