70641-1

70641-1

NO. 70641-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

LaSHAWN HOOPER,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE LORI K. SMITH

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

Page

A. ISSUES PRESENTED 1

B. STATEMENT OF THE CASE 1

1. PROCEDURAL FACTS 1

2. SUBSTANTIVE FACTS 2

a. Facts Of The Crime 2

b. Lesser Included Offense Instructions 4

c. Credit For Time Served 4

C. ARGUMENT 7

1. THE TRIAL COURT PROPERLY DECLINED TO INSTRUCT THE JURY ON CRIMINAL TRESPASS IN THE SECOND DEGREE 7

a. Criminal Trespass In The Second Degree Is Not Legally A Lesser Included Offense Of Burglary In The First Degree 8

b. Any Error In Declining To Give The Requested Lesser Included Offense Instruction Was Harmless 12

2. THE TRIAL COURT PROPERLY RULED THAT IT LACKED AUTHORITY TO GIVE HOOPER CREDIT FOR TIME SPENT IN TREATMENT AS A CONDITION OF PRE-TRIAL RELEASE 15

D. CONCLUSION 19

TABLE OF AUTHORITIES

Page

Table of Cases

Washington State:

In re Pers. Restraint of Heidari, 174 Wn.2d 288,
274 P.3d 366 (2012) 9

Lakemont Ridge Homeowners Ass'n v.
Lakemont Ridge Ltd. P'ship, 156 Wn.2d 696,
131 P.3d 905 (2006) 18

State v. Berlin, 133 Wn.2d 541,
947 P.2d 700 (1997) 8

State v. Brittain, 38 Wn. App. 740,
689 P.2d 1095 (1984) 9

State v. Brown, 50 Wn. App. 873,
751 P.2d 331 (1988) 9, 12

State v. Cunningham, 93 Wn.2d 823,
613 P.2d 1139 (1980) 12

State v. Fernandez-Medina, 141 Wn.2d 448,
6 P.3d 1150 (2000) 7, 8

State v. Guilliot, 106 Wn. App. 355,
22 P.3d 1266, rev. denied,
145 Wn.2d 1004 (2001) 13

State v. Hale, 94 Wn. App. 46,
971 P.2d 88 (1999) 17

State v. Hansen, 46 Wn. App. 292,
730 P.2d 706 (1986) 13

State v. J.P., 130 Wn. App. 887,
125 P.3d 215 (2005) 11

State v. Kirkman, 159 Wn.2d 918,
155 P.3d 125 (2007) 14

State v. Lucky, 128 Wn.2d 727,
912 P.2d 483 (1996) 8

State v. Mounsey, 31 Wn. App. 511,
643 P.2d 892, rev. denied,
97 Wn.2d 1028 (1982) 9, 10, 11

State v. Parker, 102 Wn.2d 161,
683 P.2d 189 (1984) 13

State v. Shove, 113 Wn.2d 83,
776 P.2d 132 (1989) 16

State v. Southerland, 109 Wn.2d 389,
745 P.2d 33 (1987) 11, 12

State v. Speaks, 119 Wn.2d 204,
829 P.2d 1096 (1992) 15

State v. Swiger, 159 Wn.2d 224,
149 P.3d 372 (2006) 15

State v. Turner, 143 Wn.2d 715,
23 P.3d 499 (2001) 8

State v. Workman, 90 Wn.2d 443,
584 P.2d 382 (1978) 8, 10, 11

Statutes

Washington State:

KCC 5.12.010 16

RCW 9.94A.030 ..... 15, 16

RCW 9.94A.505 15

RCW 9.94A.680 ..... 6, 16

RCW 9.94A.731 17

RCW 9A.52.020 10

RCW 9A.52.070 9

RCW 9A.52.080 9

RCW 10.61.003 7

RCW 10.61.006 7

Other Authorities

Sentencing Reform Act 15, 16

A. ISSUES PRESENTED

1. A defendant may be entitled to a lesser included offense instruction only if each of the elements of the lesser offense is a necessary element of the crime charged. It is possible to commit burglary without having committed criminal trespass in the second degree. Did the trial court properly decline to instruct the jury on criminal trespass in the second degree as a lesser included offense of burglary in the first degree?

2. An offender sentenced to a term of confinement is entitled to receive credit for time served before sentencing in total or partial confinement. The defendant's time in treatment as a condition of pre-trial release does not meet the statutory definition of "partial confinement." Did the trial court properly decline to give the defendant credit for time spent in treatment?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

The State charged the defendant, LaShawn Hooper, with one count of burglary in the first degree, based on the allegation that Hooper assaulted someone in the course of the burglary. CP 1. A jury found Hooper guilty as charged. CP 71. The trial

court imposed a standard range sentence. CP 84-89. Hooper timely appealed. CP 92-93.

2. SUBSTANTIVE FACTS.

a. Facts Of The Crime.

After leaving his home for about 45 minutes one afternoon, Michael Schutz returned home to find defendant LaShawn Hooper rifling through Schutz's closet. 2RP[1] 63. Schutz did not know Hooper, and had not given him permission to be in Schutz's home. 2RP 90. Schutz's home was in disarray, with rooms torn apart and items moved, as if someone had rummaged through everything. 2RP 79-80. Schutz grabbed Hooper and attempted to pull out his phone to call 911. 2RP 65. Hooper struck and bit Schutz multiple times, and Schutz stabbed Hooper with a key. 2RP 65-66. Eventually, the two men agreed to let go of each other. 2RP 67. When Schutz let go of Hooper and reached for his phone, Hooper grabbed Schutz by the head and slammed his knee into Schutz's head. 2RP 67.

[1] The three volumes of the official record of proceedings are referred to as follows: 1RP (8/10/11, 8/22/11, 9/23/11, 10/26/11, 11/30/11, 1/25/12, 2/8/12, 2/24/12, 5/10/12, & 5/29/12); 2RP (6/3/13 & 6/4/13); and 3RP (6/5/13, 6/6/13, & 7/10/13).

Hooper fled the house carrying two backpacks, but one of the backpacks got caught on Schutz's screen door and was left behind. 2RP 67. Schutz called 911, and officers responded within minutes. 2RP 68, 86. Schutz was bleeding from a bite mark under his left arm and from his lip, and had a large bite mark on his forehead. 2RP 73-75. Officers photographed Schutz's injuries and the disarray within the home. 2RP 72. They discovered that a stool had been placed outside beneath an open bathroom window, and there was dirt in the shower beneath the window that had not been there previously. 2RP 83-84.

An officer located Hooper jumping a fence nearby. 2RP 112. After chasing Hooper down, the officer convinced Hooper to stop by threatening to taser him. 2RP 114. Hooper was sweating, out of breath, and bleeding from the head and hands. 2RP 114, 118. Schutz was brought to Hooper's location and identified Hooper as the man he had found in his house. 2RP 86. Items taken from Schutz's house were found in the backpack Hooper was carrying when he was arrested. 2RP 121; 3RP 15-16.

Hooper testified at trial, claiming that he had merely been cutting across Schutz's yard when Schutz grabbed him, accused him of breaking into Schutz's house, and put Hooper in a headlock.

3RP 30-32. Hooper admitted to fighting with Schutz and inflicting the injuries observed by officers, but denied ever setting foot in Schutz's house. 3RP 32-33.

b. Lesser Included Offense Instructions.

At trial, Hooper asked the trial court to instruct the jury on assault in the fourth degree and criminal trespass in the second degree as lesser included offenses of the charged crime of burglary in the first degree. CP 33, 36. The State objected to an instruction on criminal trespass in the second degree on the grounds that it is not legally a lesser included offense of burglary. 3RP 55. The trial court agreed, and declined to instruct the jury on criminal trespass in the second degree. 3RP 62. The court did instruct the jurors to consider the crime of assault in the fourth degree if they did not find Hooper guilty of burglary in the first degree. CP 63. The jury found Hooper guilty as charged of burglary in the first degree, and did not return a verdict on assault in the fourth degree. CP 71-72.

c. Credit For Time Served.

While Hooper was awaiting trial, the court had granted Hooper's request to be released on personal recognizance on the

condition that he participate in inpatient treatment through the "IMPACT program."[2] 1RP 40-42; CP 101. The trial court ordered Hooper to turn himself in at the jail if he stopped participating in the program, and also ordered him to stay in contact with his attorney and obey the no-contact orders that were in place. 1RP 43; CP 101.

After being returned to custody at some point in the following six months, Hooper was later released again on personal recognizance on the condition that he "attend[] Project Impact Treatment Program" and reside with someone named Brittney Murry. CP 103. Hooper was not housed at IMPACT during the second period of treatment. 3RP 149.

At sentencing, defense counsel represented that "the first portion that [Hooper] did at IMPACT" was 55 days, and that "[t]he second period" totaled 24 days, spread over a longer period of time. 3RP 148. Hooper asked the sentencing court to grant him an exceptional sentence below the standard range, and to give him

[2] The record contains few details regarding the nature of this program, other than brief references to it as a program "designed to provide housing for long term treatment," as "inpatient" treatment, and as a place where Hooper also received outpatient treatment. 1RP 41; 3RP 149.

credit against his sentence for time spent in treatment at IMPACT. 3RP 147.

In its written opposition to Hooper's request, the State pointed out that Hooper was not eligible to receive credit for time spent in treatment through the IMPACT program, because the statute that allows a sentencing court to grant credit for time served in a "county supervised community option" does not apply to defendants convicted of violent offenses. CP 80; RCW 9.94A.680(3). Defense counsel conceded that Hooper could not receive credit for time spent in treatment if the court imposed a standard range sentence, and clarified that the request for credit was made only as part of the proposed exceptional sentence. 3RP 147.

The trial court declined to impose an exceptional sentence. 3RP 159. The court sentenced Hooper to 36 months in prison, the low end of the standard range, and agreed that it did not have the authority to grant credit for time spent in treatment through IMPACT. 3RP 159; CP 84-87.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY DECLINED TO INSTRUCT THE JURY ON CRIMINAL TRESPASS IN THE SECOND DEGREE.

Hooper contends that the trial court erred in refusing to instruct the jury on criminal trespass in the second degree as a lesser included offense of burglary in the first degree. This claim should be rejected. The trial court correctly ruled that criminal trespass in the second degree is not legally a lesser included offense of burglary in the first degree.

There are two statutory exceptions to the general rule that a defendant may be tried only for those offenses charged in the information. State v. Fernandez-Medina, 141 Wn.2d 448, 453, 6 P.3d 1150 (2000). The first is that a defendant may be found guilty of a crime that is an inferior degree of the crime charged (commonly referred to as a "lesser degree" offense). RCW 10.61.003. The second is that a defendant may be found guilty of a crime whose elements are necessarily included within the elements of the crime charged (commonly referred to as a "lesser included" offense). RCW 10.61.006.

Upon request, a defendant is entitled to have the jury instructed on a lesser included offense when two conditions are

met: (1) each of the elements of the lesser offense must be a necessary element of the crime charged, and (2) the evidence in the case must support an inference that the lesser crime was committed but the greater was not. Fernandez-Medina, 141 Wn.2d at 454-55 (citing State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978)). These conditions are commonly referred to as the "legal prong" and the "factual prong" of the Workman test. State v. Berlin, 133 Wn.2d 541, 546, 947 P.2d 700 (1997).

A trial court's refusal to give a requested lesser included offense instruction is reviewed de novo when based on a ruling of law rather than the facts of the case. State v. Lucky, 128 Wn.2d 727, 731, 912 P.2d 483 (1996), overruled on other grounds by Berlin, 133 Wn.2d 541 (1997).

a. Criminal Trespass In The Second Degree Is Not Legally A Lesser Included Offense Of Burglary In The First Degree.

Because the legal prong of the Workman test requires that each of the elements of the lesser offense be a necessary element of the crime charged, the legal prong is not met if it is possible to commit the greater offense without having committed the lesser offense. State v. Turner, 143 Wn.2d 715, 729, 23 P.3d 499 (2001).

A person commits criminal trespass in the second degree when "he or she knowingly enters or remains unlawfully in or upon premises of another under circumstances not constituting criminal trespass in the first degree." RCW 9A.52.080. Criminal trespass in the first degree occurs when a person "knowingly enters or remains unlawfully in a building." RCW 9A.52.070.

Thus, criminal trespass in the second degree applies only when a person enters or remains unlawfully in or upon premises other than a building. Id.; State v. Brittain, 38 Wn. App. 740, 746, 689 P.2d 1095 (1984); State v. Mounsey, 31 Wn. App. 511, 518, 643 P.2d 892, rev. denied, 97 Wn.2d 1028 (1982). The wording of these statutes reflects the specific intent of the legislature, which was to limit first degree criminal trespass to trespasses in buildings in the ordinary sense of the word, and to have second degree criminal trespass cover trespasses on all other types of property, so that there would be no overlap between the two offenses. State v. Brown, 50 Wn. App. 873, 877-78, 751 P.2d 331 (1988), abrogated on other grounds by In re Pers. Restraint of Heidari, 174 Wn.2d 288, 274 P.3d 366 (2012).

In contrast, a person commits burglary in the first degree "if, with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building and if, in entering or while in the building or in immediate flight therefrom, the actor or another participant in the crime (a) is armed with a deadly weapon, or (b) assaults any person." RCW 9A.52.020. There are therefore many scenarios in which a person could commit burglary in the first degree without having committed criminal trespass in the second degree. A defendant who lives in an apartment building and breaks into his neighbor's apartment and assaults his neighbor inside would have done so. So too would a defendant who did something similar after receiving permission to be in his neighbor's yard, but not to enter his neighbor's house.

Because it is possible to commit burglary in the first degree without committing criminal trespass in the second degree, the legal prong of the Workman test is not met, and criminal trespass in the second degree is not a lesser included offense of burglary in the first degree. State v. Mounsey, 31 Wn. App. 511, 517-18, 643 P.2d 892 (1982).

Hooper attempts to distinguish Mounsey by misconstruing its holding as being tied to the facts of that particular case. Appellant's Brief at 8-9. However, the court's analysis was strictly legal, not factual—it turned solely on the elements of burglary in the first degree, criminal trespass in the first degree, and criminal trespass in the second degree. Mounsey, 31 Wn. App. at 517-18. Although it is true that the particular facts in Mounsey would not have met the factual prong of the Workman test, the court's decision rested on its conclusion that the unlawful entry into a building is by definition not criminal trespass in the second degree. Id.

Hooper's only cited authority for his contention that "criminal trespass is a lesser included offense of first degree burglary" are two cases that explicitly refer to criminal trespass in the first degree, not criminal trespass in the second degree. Appellant's Brief at 7; State v. Southerland, 109 Wn.2d 389, 390-91, 745 P.2d 33 (1987); State v. J.P., 130 Wn. App. 887, 895, 125 P.3d 215 (2005). Hooper cites Southerland and J.P. for the proposition that each of the elements of first degree criminal trespass is a necessary element of

first degree burglary,[3] and asserts that the same reasoning applies to second degree criminal trespass. However, because criminal trespass in the second degree applies only to premises other than buildings, the same reasoning does not apply, and criminal trespass in the second degree is not a lesser included offense of burglary in the first degree. The trial court therefore properly declined to give the requested lesser included offense instruction.

b. Any Error In Declining To Give The Requested Lesser Included Offense Instruction Was Harmless.

Because the right to a lesser included offense instruction is statutory, the erroneous failure to give such an instruction "is not prejudicial unless, within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected." Southerland, 109 Wn.2d at 391 (quoting State v. Cunningham, 93 Wn.2d 823, 831, 613 P.2d 1139 (1980)). Where the erroneous denial of a lesser included offense instruction

[3] Technically, this is not always true, given that the current definition of "building" in the context of burglary is broader than in criminal trespass. See Brown, 50 Wn. App. at 877.

presents the jury with an "all or nothing" choice in which it has no way to consider the defendant's asserted defense short of complete acquittal, the conviction must be reversed. State v. Hansen, 46 Wn. App. 292, 296-97, 730 P.2d 706 (1986) (citing State v. Parker, 102 Wn.2d 161, 683 P.2d 189 (1984)). However, where the jury is instructed on a different lesser included offense and the jury's verdicts demonstrate an implicit rejection of the omitted lesser included offense, the failure to instruct on the omitted lesser included offense is harmless. State v. Guilliot, 106 Wn. App. 355, 368-69, 22 P.3d 1266, rev. denied, 145 Wn.2d 1004 (2001); Hansen, 46 Wn. App. at 297-98.

Here, the jury was instructed on burglary in the first degree and the lesser included offense of assault in the fourth degree. CP 62-65. In his testimony, Hooper denied ever entering the victim's home, but admitted that a physical altercation occurred. 3RP 32-33. In closing argument, defense counsel conceded that Hooper had committed assault in the fourth degree, and stated that the "real issue" in the case was whether Hooper had gone into the building. 3RP 115, 120. Thus, if the jury had a reasonable doubt

as to whether Hooper had entered the victim's home, it could have acquitted him of the burglary and convicted him of the assault.

By finding Hooper guilty of the burglary, the jury necessarily rejected Hooper's contention that the State had not proved beyond a reasonable doubt that he had gone into the victim's home.[4] Therefore, the jury still would have found Hooper guilty of burglary in the first degree even if the trial court had also instructed the jury on criminal trespass in the second degree. Because there is not a reasonable probability that the outcome of the trial would have been different had the trial court given the requested lesser included offense instruction, any error in not doing so was harmless.

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[4] Hooper's argument that the trial court's instruction on the definition of "premises" created confusion as to the meaning of the word "building" is without merit. The court properly exercised its discretion in giving the standard WPIC definition of "premises," because the term "premises" appears in the definition of "enters or remains unlawfully," which in turn appears in the definition of burglary in the first degree. CP 57, 59. The fact that "premises" was correctly defined to "include[] any building, dwelling, or any real property" would not have created confusion as to the elements of burglary, as the definitional instruction for burglary and the to-convict instruction both correctly informed the jury that the State must prove that Hooper entered or remained unlawfully in a building. CP 62; State v. Kirkman, 159 Wn.2d 918, 937, 155 P.3d 125 (2007) (jury is presumed to follow the court's instructions). The challenged instruction made it clear that "premises" is broader than "building," making it less likely that the jury would think that "building" and "premises" meant exactly the same thing, not more likely as Hooper claims.

2. THE TRIAL COURT PROPERLY RULED THAT IT LACKED AUTHORITY TO GIVE HOOPER CREDIT FOR TIME SPENT IN TREATMENT AS A CONDITION OF PRE-TRIAL RELEASE.

Hooper contends that he is entitled to credit against his sentence for time spent in inpatient and outpatient treatment through the IMPACT program as a condition of pre-trial release. This claim should be rejected. The trial court properly ruled that it lacked the statutory authority to grant Hooper credit for time spent in treatment.

Whether Hooper was entitled to credit for time spent in treatment is a question of law that this Court reviews de novo. See State v. Swiger, 159 Wn.2d 224, 227, 149 P.3d 372 (2006).

An offender sentenced to a term of confinement has both a constitutional and a statutory right to receive credit for time served in confinement before sentencing. RCW 9.94A.505; State v. Speaks, 119 Wn.2d 204, 206, 829 P.2d 1096 (1992). Under Washington's Sentencing Reform Act (SRA), confinement "means total or partial confinement." RCW 9.94A.030(8). A separate statute permits a sentencing court to give an offender credit for time served "in an available county supervised community option," such as King County's CCAP Enhanced program, but only for offenders

convicted of nonviolent and nonsex offenses who receive sentences of one year or less. RCW 9.94A.680(3); KCC 5.12.010.

A sentencing court has discretion in sentencing only where discretion is authorized by the SRA. State v. Shove, 113 Wn.2d 83, 83 n.3, 776 P.2d 132 (1989). Because burglary in the first degree is a violent offense, Hooper could not benefit from RCW 9.94A.680(3) even if his treatment program had qualified as a "county supervised community option." RCW 9.94A.030(54). Thus, the sentencing court had no authority to give Hooper credit for time spent in treatment unless it qualified as total or partial confinement.[5] Partial confinement is defined 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.

RCW 9.94A.030(35) (emphasis added).

Hooper's argument that his treatment constitutes partial confinement is supported by neither the law nor the record. Under the SRA, offenders who receive standard range sentences of more

[5] Hooper does not contend that his treatment qualifies as total confinement.

than one year are not eligible for credit for time spent in inpatient treatment. State v. Hale, 94 Wn. App. 46, 54-56, 971 P.2d 88 (1999). This is because treatment, even inpatient treatment ordered as a condition of pre-trial release, does not meet the definition of partial confinement.

In this case in particular, there is nothing in the record indicating that the IMPACT program was "a facility or institution operated or utilized under contract by the state or any other unit of government." Nor is there anything in the record that indicates Hooper was confined there "for a substantial portion of each day with the balance of the day spent in the community."[6] Nor, as Hooper concedes, was he in work release, home detention, work crew, or a combination of work crew and home detention.

Hooper appears to contend that a condition of pre-trial release can qualify as partial confinement as long as it is somewhat similar to work release or home detention, even if it is not confinement "in a facility or institution operated or utilized under contract by the state or any other unit of government . . . for a

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[6] Although the phrase "a substantial portion of each day" is not defined in the statute, RCW 9.94A.731(1) states that "[a]n offender sentenced to a term of partial confinement shall be confined in the facility for at least eight hours per day . . . ."

substantial portion of each day with the balance of the day spent in the community." However, such an argument inappropriately asks this Court to change the definition of "partial confinement" from what the legislature has decreed it to be to what Hooper wishes it to be. See Lakemont Ridge Homeowners Ass'n v. Lakemont Ridge Ltd. P'ship, 156 Wn.2d 696, 698, 131 P.3d 905 (2006) (court's primary duty in interpreting a statute is to "discern and implement the intent of the legislature").

Furthermore, Hooper's argument defies logic when he claims that the fact that he was ordered to turn himself in if he left treatment means that his treatment was just as much "confinement" as home detention. A trial court could order a defendant to turn himself in if he stops complying with *any* condition of release. Such an order does not convert the condition of release into "confinement."

Because Hooper's pre-trial inpatient and outpatient treatment do not meet the statutory definition of "confinement" and no other statute allowed the trial court to give Hooper credit for time spent in treatment, the trial court properly denied Hooper's request for credit against his prison sentence.

D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Hooper's conviction and sentence.

DATED this 26th day of March, 2014.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Nancy P. Collins, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the BRIEF OF RESPONDENT, in STATE V. LASHAWN HOOPER, Cause No. 70641-1-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 26th day of March, 2014.

LB Brame

Name
Done in Seattle, Washington