No. 93710-9

IN THE SUPREME COURT
FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

ANTHONY A. JOSEPH,

Defendant/Appellant

Answer to Appellant's Petition for Review

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I. IDENTITY OF RESPONDENT

The respondent is the State of Washington, represented by the Kittitas County Prosecuting Attorney's Office.

II. COURT OF APPEALS DECISION

The Court of Appeals, Division III, presented a decision in Case Number 32962-3-III, *State v Joseph*, a published opinion filed September 1, 2016, and found at 195 Wn. App. 737 (2016). A copy was attached to Brief of Appellant, and is likewise attached to Brief of Respondent, as Attachment A.

III. RESPONSE TO ISSUE PRESENTED FOR REVIEW

The Court of Appeals correctly decided that a vehicle is a premises for the purposes of the Criminal Trespass in the Second Degree statute.

IV. STATEMENT OF THE CASE

On October 4, 2014, Officer Caillier of the Ellensburg Police Department was working a foot beat patrol night shift. (Report of Proceedings (RP), p. 29) He was wearing a short sleeve uniform with a badge and driving a marked police car. (RP 30-31) He received a call of a vehicle prowl in the area of a towing impound lot in Ellensburg. (RP31) When he arrived, people at the area were pointing to another vehicle parked on the street. (RP 32) The officer walked over and saw a man reclined in the front passenger seat of a Blazer. (RP 33) He immediately recognized Anthony Joseph, with whom he has had contacts in the past. (RP 33) He knew Mr. Joseph did not have a vehicle. (RP 34) Since Mr. Joseph was apparently asleep, the officer got Mr. Joseph's attention by knocking on the window. (RP 34) At first, Mr. Joseph told him he had permission from the owner to be in the vehicle, but he couldn't give a name for the owner. (RP 35) Eventually Mr. Joseph admitted he did not know the owner of the car he was sleeping in. (RP35) He was arrested for vehicle prowl and searched incident to arrest. (RP 36) Mr. Joseph became very angry and hostile. (RP37) He was so hostile he said he was going to hire someone to kill the police. (RP 37) He started acting like he

was going to spit on the officer. (RP 38) The officer warned him not to spit on him. (RP 38) Mr. Joseph tensed up when they tried to handcuff him. (RP 38-39) He was placed in the patrol car, but he had a very strong odor, so the officer decided to roll down the back vehicle window. (RP 39) The window had a plastic grating when the glass was rolled down, with cutouts in it. (RP 40) The officer stood by the window. Mr. Joseph got as close as he could to the holes in the window and leaned toward them. (RP 40) He put his face up to the hole and spit a substantial amount at the officer, hitting his uniform in the chest and hitting the officer on the arms. (RP 41) He was very angry, hostile, and profane toward the officer. (RP 41-42) The officer had to decontaminate himself with hand sanitizer and later soap and water. (RP 48)

The owner of the Chevy Blazer, Mr. Mackenzie Bond, testified that this vehicle, which had a broken side window, had broken down on the freeway, and he had had it towed in to Ellensburg. (RP 69) It was parked there while he was trying to decide what to do with it. He did not know the defendant, and he did not give the defendant permission to get into his vehicle. (RP 70) It was possible to get into the car by reaching in the little triangular broken out window behind the driver's seat. (RP 70)

Mr. Bond did have some property in the car that he was planning to retrieve when his schedule allowed. (RP 71) Since Mr. Joseph was caught in the car, nothing had been stolen at that point. (RP 72)

The defendant did not testify. (RP 88, 115)

The parties and the court had a fairly lengthy discussion about whether it is a trespass to break into or get into a stranger's car just to sit in it without their permission. (RP 58-67) This discussion was renewed when the parties discussed the jury instructions. (RP 96-97, 102, 103-110) The state of the law and policy issues were discussed at length. The court finally decided not to give the Criminal Trespass in the First Degree lesser, because of *State v. Brown*, 50 Wn.App.873 (1988), but to give the Criminal Trespass in the Second Degree lesser instead and let the parties argue about whether a car in this situation fit the definition of premises. (RP 103-110 and 113-114)

The jury deliberated and found Mr. Joseph guilty of Assault in the Third Degree. They found Mr. Joseph not guilty of vehicle prowl, but guilty of a lesser included charge for the second offence, criminal trespass in the second degree. (CP 91-93) (RP 151)

The Defendant argued on Appeal that reaching through a back window to unlock and go into a stranger's vehicle which is lawfully parked on the street, and then staying in it without permission, but with no intent to commit a crime inside, is not a Criminal Trespass in the Second Degree, and therefore there was not sufficient evidence to convict Mr. Joseph.

The Court of Appeals determined that Criminal Trespass in the Second Degree does cover vehicles. It engaged in an analysis of the *Brown* decision and trespass definitional issues.

V. ARGUMENT

According to the Rules of Appellate Procedure 13.4, a petition for review will be accepted by the Supreme Court only under certain enumerated circumstances. The Appellant in this case relies on RAP 13.4(b)(1), (2), and (4), claiming that the petition involves a conflict with the Supreme Court, a conflict within the published decisions of the Court of Appeals, and that it represents an issue of substantial public interest that should be determined by the Supreme Court.

Subsection RAP 13.4(b)(1) does not apply. There are no decisions of the Washington State Supreme Court that discuss whether criminal trespass in the second degree applies to vehicles, and appellant cites none.

Subsection (b)(2) should not apply. There are no published previous decisions of the Washington State Court of Appeals that specifically discuss this issue either. The only decision which mentions

criminal trespass and motor vehicles together, does so only in dicta. *State v. Shelby*, 61 Wn. App. 214 (1991) indicates that the State had argued that a person who refused to leave a school-owned motor vehicle could violate the school specific statute, RCW 28A.87.055, without violating Criminal Trespass 2. *Shelby* at 220. This was said to be because Criminal Trespass 2 did not apply to vehicles. The actual decision of the Court in *Shelby*, however, revolved around the legislative history of the enactment of the school statute that showed a perceived need for a law which allowed school officials to eject disruptive or intoxicated students from the school's premises. As the court pointed out, an absurd result would follow if the State could not prosecute trespassers on school property unless they were disruptive or intoxicated. *Shelby* at 222. In the current case, an absurd result would also occur if people could not order strangers out of their cars, which are lawfully parked on a road or in a public parking lot.

Division III of the Court of Appeals analyzed the legislative history of the cases defining trespass, and concluded that the legislature meant that Criminal Trespass 1 would involve only trespasses in "buildings" in the conventional sense, and Criminal Trespass 2 would apply to all other property. This was directly in accordance with language

in *State v. Brown*, 50 Wn.App. 873 (1988) which cited the report language accompanying the 1979 amendments to the criminal trespass statutes, "Moreover, all other types of trespasses other than in a building would be covered by the second degree criminal trespass offense graded at the misdemeanor level." *Brown* at 877. The Brown court specifically said, "Premises," as it is used in the second degree criminal trespass statute, encompasses a broad range of structures and property." *Brown* at 876.

The Court of Appeals Division III decision is also in agreement with *State v. Brittain*, 38 Wn. App. 740 (1984), which held "Second degree criminal trespass is applicable only in those situations where the defendant allegedly enters or remains unlawfully on private property not constituting a building, such as fenced land." *Brittain* at 746.

Since the decision here is actually in agreement with other published decisions about the broad nature of criminal trespass in the second degree, the Supreme Court should not take review.

Finally, Subsection 13.4(b)(4) should not apply either. It is invoked if "the petition involves an issue of substantial public interest that

should be determined by the Supreme Court." (RAP 13.4(b)(4). The State contends that the decision of the Court of Appeals adequately addresses the analysis of the Criminal Trespass statutes. The Supreme Court need not analyze it in the way that the Appellant suggests, to come up with the absurd result mentioned above, that a person could not call the police to eject a stranger who broke into their car and was sitting in it, refusing to get out. Statutes should receive a sensible construction to effect the legislative intent and, if possible, to avoid unjust and absurd consequences. *State v. Vela*, 100 Wn.2d 636 (1983) In construing a statue, "a reading that results in absurd results must be avoided because it will not be presumed that the legislature intended absurd results." *State v. J.P.*, 149 Wn.2d 444 (2003) In this case, the legislature clearly did not mean to open up personal vehicles to the public at will.

A criminal trespass in the second degree is committed if a person, "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

Much is made by the appellant of the definition of "premises," which is located in RCW 9A.52.010 (6), which says, "(6) 'Premises' includes any building, dwelling, structure used for commercial aquaculture, or any real property." As argued in the original respondent's brief, use of the term, "includes" suggests by its plain meaning that it is a non-exclusive list, particularly since the legislature uses the term when it very clearly does not mean what follows is an exclusive list. For example, in RCW 9A.04.110 (1), the legislature says, "(1) "Acted" includes, where relevant, omitted to act." In that situation, the legislature obviously does not mean that the only definition of the word, "acted" is omitting to act.

RCW 9A.04.110 (30) says, "Words in the present tense shall include the future tense; and in the masculine shall include the feminine and neuter genders..." This definition obviously does not mean to restrict words in the present tense to only those in the future tense. In multiple other situations in those definitions, the legislature uses the word, "means" instead of the word "includes." The case cited by the Appellant for statutory construction, *State v. Soto*. 177 Wn. App. 706 (2013) involves quite different wording than a definition that "includes" a list. It is not

applicable to the wording in the definition of "premises." The list in "premises" is not exclusive.

Moreover, under the facts of this case, in which the vehicle involved is lawfully parked in a parking space on a public road, the car, a 1995 Chevy Blazer (RP 69), is itself occupying some 82 square feet of real property. By parking in a lawful parking space, the owner of the car is asserting an exclusive, though temporary possessory interest over that square footage of real property. Nobody can interfere with that specific spot on earth, unless some lawful time limit is exceeded, or some other parking regulation is violated. The defendant was certainly trespassing on that footage. It would be absurd to hold that a person could rent a parking space, or a camping space, or any other sort of space, for example, and exclude others if the car was not on the space, but could not exclude others from that precise location if the car is there, simply because the trespasser went into the car. The premises under these facts, was not only the personal property that was the vehicle itself, but the real property the vehicle was occupying. Real property **is** specifically mentioned in the definitional statute cited above for the term "premises." Under the facts of the case, there would be premises. The trial court allowed the jury to

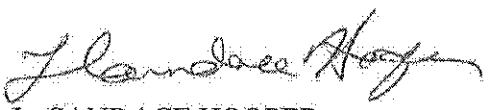
determine if, under these circumstances, Mr. Joseph was trespassing upon premises of another, and the jury determined he was.

Again, as discussed in the Brief of Respondent, it is the State's belief that all people everywhere know by common sense that they cannot reach through a back window to get into a stranger's car, unlock it, and use it for their own purposes, such as napping, without committing a crime. The State urges the Supreme Court to use a common sense interpretation and to decline to accept this case for review. The Courts should endeavor where possible to promote respect for the law.

VI. CONCLUSION

Since the decision of the Court of appeals is not in conflict with a decision of the Supreme Court or a published decision of the Court of Appeals, and since the petition does not involve an issue of substantial public interest that should be determined by the Supreme Court, the Supreme Court should decline to accept this case for review.

Respectfully submitted,



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Appendix A

FILED
SEPT 1, 2016
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON, Respondent,	)	No. 32962-3-III
v.	)	
ANTHONY A. JOSEPH, Appellant.	)	PUBLISHED OPINION

KORSMO, J. — Anthony Joseph appeals his conviction for second degree criminal trespass, arguing that the statute does not apply to a vehicle. In light of legislative history, we conclude that the statute does apply to Mr. Joseph's conduct.

FACTS

Mr. Joseph was found asleep in an unlocked Chevy Blazer on a public street in Ellensburg late on the night of October 4, 2014. An officer responding to a report of vehicle prowling at the city's vehicle impound lot noticed Mr. Joseph sleeping in the Blazer which was parked just outside the impound lot. Recognizing Mr. Joseph and knowing both that he was homeless and did not own a vehicle, the officer knocked on a window to awaken him.

Mr. Joseph exited the vehicle and claimed to have the owner's permission to be inside, but he was unable to name the owner. He then admitted to not having permission and was arrested for vehicle prowling.

The prosecution filed charges of third degree assault and second degree vehicle prowling. The matter ultimately proceeded to jury trial. The prosecutor sought instructions on first and second degree criminal trespass as lesser included offenses of the vehicle prowling charge. The trial court did instruct the jury, over defense objection, on second degree trespass. The prosecutor also asked the court to define the term "premises" for the jury, but did not submit a definitional instruction. The trial court did not define "premises," but allowed the parties to argue to the jury whether a vehicle was or was not a "premises."

The jury found Mr. Joseph guilty of third degree assault, not guilty of vehicle prowling, and guilty of second degree criminal trespass. He then timely appealed to this court, challenging only the latter conviction.

ANALYSIS

This appeal raises a challenge solely to the trespass conviction. Mr. Joseph contends that the statute does not apply to vehicles and that the trial court therefore erred in instructing the jury on the lesser included offense of second degree trespass. Specifically, Mr. Joseph's challenge argues that a vehicle is not a "premises" within the meaning of the trespass statute. This argument requires review of the history of the statute and judicial interpretations placed on it.

Second degree criminal trespass is defined:

> A person is guilty of criminal trespass in the second degree if 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(1) (emphasis added). The crime is a simple misdemeanor. RCW 9A.52.080(2). The crime of first degree criminal trespass applies to anyone who "knowingly enters or remains unlawfully in a building." RCW 9A.52.070(1).

The critical definition at issue here is that of "premises." It "includes any building, dwelling, structure used for commercial aquaculture, or any real property." RCW 9A.52.010(6). Also important is the term "building," which is defined for the criminal code as

> "Building," in addition to its ordinary meaning, includes any dwelling, fenced area, vehicle, railway car, cargo container, or any other structure used for lodging of persons or for carrying on business therein, or for the use, sale, or deposit of goods; each unit of a building consisting of two or more units separately secured or occupied is a separate building.

RCW 9A.04.110(5).

Facially, this appears to be a very straight-forward problem. Second degree trespass involves the unlawful intrusion into a "premises." "Premises" is defined to include "building," and that latter term in turn includes "vehicle." Therefore, the transitive property of equality[1] tells us that "vehicle" equals "premises." Although

[1] If a=b and b=c, then a=c. JEROME E. KAUFMANN & KAREN L. SCHWITTERS, INTERMEDIATE ALGEBRA 6 (2010).

mathematics principles are immutable, many legal principles are not, particularly when they conflict with competing legal doctrines.

Mr. Joseph argues that the definition of "premises" is exclusive and does not encompass "vehicles." He tries to draw support for this contention from some earlier cases addressing an equal protection problem with the former first degree trespass statute and the efforts made to fix it. While he properly points to the right cases, ultimately, they do not aid his argument.

The problem initially was identified in *State v. Martell*, 22 Wn. App. 415, 591 P.2d 789 (1979). The defendant was charged with second degree burglary after being found inside a church building. The court also instructed the jury on the included offense of first degree criminal trespass, but declined to give an instruction on second degree criminal trespass requested by the defendant. *Id.* at 416-17. The defendant was convicted of first degree trespass and appealed, arguing the conviction violated his right to equal protection of the laws. *Id.* Division Two of the Court of Appeals agreed.

The first degree criminal trespass statute at that time applied to anyone who entered or remained unlawfully "in a building or on real property adjacent thereto or upon real property which is fenced or otherwise enclosed in a manner designed to exclude intruders." *Id.* at 417.[2] Second degree criminal trespass then, as now, applied to anyone

[2] *See* LAWS OF 1975, 1st Ex. Sess., ch. 260, § 9A.52.070.

who entered or remained unlawfully "in or upon premises of another." *Id.*[3] The word "premises" was defined to mean "any building, dwelling, or any real property." *Id.*[4]

Implicitly relying on the criminal code definition of "building," the court pointed out that both statutes punished trespass in a "building," and, therefore, the defendant's equal protection rights were violated due to the difference in penalties resulting from the charging decision. *Id.* at 417-18. As a remedy, the court reduced the conviction to second degree criminal trespass since the parties agreed the elements of the two statutes were identical. *Id.* at 419.

The legislature responded as part of an omnibus bill amending portions of the criminal code. *See* LAWS OF 1979, 1st Ex. Sess., ch. 244. The legislation omitted the adjacent and fenced real property language from the first degree trespass statute and added a provision to the second degree trespass statute excluding it from applying to conduct within the scope of the first degree trespass statute. *Id.* at §§ 12, 13. Unfortunately, neither the court in *Martell* nor the legislature expressly addressed the definition of "building" in RCW 9A.08.110.

The issue was back before the appellate courts in *State v. Brown*, 50 Wn. App. 873, 751 P.2d 331 (1988).[5] There the defendant was charged with second degree

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[3] *See* LAWS OF 1975, 1st Ex. Sess., ch. 260, § 9A.52.080.

[4] *See* LAWS OF 1975, 1st Ex. Sess., ch. 260, § 9A.52.010(1).

[5] *Abrogated by* 174 Wn.2d 288, 274 P.3d 366 (2012).

burglary for entering into a fenced area behind a tire store that was used to store tires. The jury convicted Brown of the lesser included offense of first degree trespass. *Id.* at 874-75. The issue on appeal was whether the fenced area constituted a "building" under the first degree trespass statute. *Id.* at 875. Division One of the Court of Appeals noted that despite the legislative efforts, "there is still confusion regarding what constitutes a 'building.'" *Id.* at 876. The prosecutor relied on the criminal code's definition of "building" set out in RCW 9A.04.110. *Id.*

While noting that the criminal code's "building" definition had been expansively applied in burglary prosecutions, the *Brown* court concluded that expansive definition did not apply to the first degree trespass statute, citing to the 1979 bill analysis from the House Judiciary Committee. *Id.* at 877 (citing House Judiciary Committee Bill Files 307, at 5 (1979)). The bill analysis described the effects of its amendments as limiting the first degree trespass statute to "building in its ordinary sense." *Id.*

Turning to the facts before it, the *Brown* court noted that the "Legislature clearly intended to exclude fenced areas from the definition of 'building' in the amended first degree criminal trespass statute."[6] *Id.* at 878. Instead, fenced areas would be considered

[6] The Senate had amended the legislation by striking the words "other than a fenced area" from the House version of the bill. *See* H.B. 307, 46th Leg., Reg. Sess. (Wash. 1979). Ironically, the Senate bill reports indicate that the effect of that change was to include fenced areas within the scope of the first degree trespass statute. *See* SENATE JUDICIARY COMM., ANALYSIS ON H.B. 307 AS OF APRIL 18, 1979, at 2, 46th Leg., Reg. Sess. (Wash. 1979); SENATE JUDICIARY COMM., ANALYSIS ON H.B. 307 AS OF

"premises" under the second degree trespass statute. *Id.* Accordingly, since Mr. Brown had trespassed into a fenced area rather than a "building," the court reversed his first degree trespass conviction and reduced it to second degree trespass. *Id.*

Although *Brown* was able to resolve its case due to the apparent intent expressed in the House bill analysis to exclude fenced areas from the first degree trespass statute, this case is not as easily resolved. Unfortunately, the legislature did not include any language that defined the word "building" for purposes of the trespass statute and did not address the criminal code's definition of "building." Instead, the legislature appears to have treated the word "building" as having its normal meaning of an enclosed structure[7] without enacting any language to express that view. However, merely excluding fenced areas from the definition of building, while describing something a building is not, failed to affirmatively describe what a building is supposed to be.

Nonetheless, the legislative action does give us some clues whether we should treat a "vehicle" as a "building" (and, thus, as a "premises"). The legislature did not believe the criminal code definition of "building" applied to the first degree trespass

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MARCH 1, 1979, at 2, 46th Leg., Reg. Sess. (Wash. 1979). *Brown* did not address the Senate bill analysis.

[7] In part, building is defined as "a constructed edifice designed to stand more or less permanently, covering a space of land, usu. covered by a roof and more or less completely enclosed by walls, and serving as a dwelling, storehouse, factory, shelter for animals, or other useful structure — distinguished from structures not designed for occupancy (as fences or monuments)." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 292 (1993).

statute, although it did apply to the burglary provisions of the same chapter of the criminal code. It did, as *Brown* observed, thereby apply a nontechnical definition of "building" to the first degree trespass statute. Further support for that view comes from the acknowledged fact that the 1979 amendments were enacted in order to avoid the equal protection problem identified by *Martell*. *See Brown*, 50 Wn. App. at 877-78 (discussing House bill analysis). If the broad definition of "building" applicable to the rest of the criminal code did apply to the first degree trespass statute, the two trespass statutes would remain coextensive and the problem would remain unsolved.[8] The nonadoption of a technical definition appears to indicate legislative satisfaction with use of the ordinary meaning of the term in the first degree trespass statute.

Accordingly, we conclude, as did *Brown*, that the legislature intended the term "building" in the first degree trespass statute to have its ordinary meaning of a constructed edifice designed for occupancy.[9] It also appears that the term "premises"

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[8] The exclusion of the fenced area language from the 1975 first degree trespass statute did not remove the fenced area language from the criminal code definition of building.

[9] One obvious problem with adopting this definition is that it appears that first degree criminal trespass, having a much narrower definition of "building" than that used in the burglary statute, is unlikely to satisfy the *legal prong* of our test for lesser included offenses because it is not necessarily established by proof of the greater crime. *See State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978) and its progeny. *But see State v. Mounsey*, 31 Wn. App. 511, 643 P.2d 892 (1982) (applying criminal code definition of "building" to first degree criminal trespass and finding it to be an included offense of burglary).

used in the second degree trespass statute is intended as a broad, catch-all provision since the 1979 amendment only excludes the narrow, ordinary "building" from the second degree trespass statute. *Accord State v. Brittain*, 38 Wn. App. 740, 746, 689 P.2d 1095 (1984) (second degree trespass applies to all situations other than entry into a building). This, too, is consistent with the broad definition of "building" found in RCW 9A.04.110. Consistent with that definition, we therefore hold that a "vehicle" is a "premises" for purposes of the second degree criminal trespass statute.[10]

The trial court correctly instructed the jury on the included offense of second degree criminal trespass. The evidence supported the jury's verdict. The conviction is affirmed.

Affirmed.

Korsmo, J.

WE CONCUR:

Siddoway, J.

Lawrence-Berrey, A.C.J.

[10] *See State v. Shelby*, 61 Wn. App. 214, 220, 811 P.2d 682 (1991) (while discussing equal protection argument, court states without analysis that second degree criminal trespass does not apply to vehicles).

PROOF OF SERVICE

I, Dustin Davison, do hereby certify under penalty of perjury that on December 12th, 2016, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of the cover page for the Respondent's Brief on Supplemental Issue:

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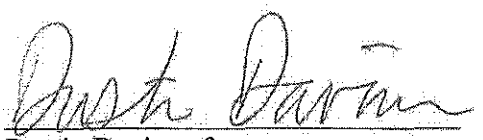

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