Supreme Court No. 95962-5
Court of Appeals No. 75962-1-I

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ANTHONY LEE BECKWITH,

Petitioner.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Anthony Beckwith, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision 75962-1-I pursuant to RAP 13.3 issued on May 14, 2018. The opinion is attached.

B. ISSUE PRESENTED FOR REVIEW

Was Mr. Beckwith's right to due process violated by a trial court's failure to grant a motion for a directed verdict of not guilty where there was insufficient evidence of burglary, even where the jury convicted him of the lesser offense of trespass?

C. STATEMENT OF THE CASE.

Mr. Beckwith was born with fetal alcohol syndrome disorder, which for him means he has impulsive behavior, developmental delays, and writes at a second-grade level. RP 273.[1] He described to a volunteer with the National Alliance on Mental Illness that his "brain doesn't work like other people's brains." RP 273. Unable to use a computer or understand the concept of time, he has trouble finding a job or a home. RP 273.

[1] "RP" will refer to volumes I and II of the verbatim transcript which have continuous pagination from the 3.5 hearing through sentencing. Reference to the pre-trial hearings will use "RP" followed by the date of the hearing and page number.

Cynthia Bach owns and manages rental properties. RP 86. She has about 180 tenants, most of whom are college students. RP 88, 91. She rented a house on Ellis Street to five female university students, who were away at their parents' homes for the summer. RP 94, 104. One day Ms. Bach was driving by the rental property and saw a man inside. RP 96. She did not think he was the kind of person her tenants would invite over. RP 96. She called 911 call to report that she saw a man who was not supposed to be in her rental house dancing or maybe doing "calisthenics." RP 100. She observed the back door was wide open and the window on the door was broken. RP 104, 114.

When police approached the front door of the house, they knocked and announced themselves. RP 140. Mr. Beckwith answered the door. RP 140. Five additional people—three men and two women—came out when police knocked. RP 141.

After the six people exited the home, officers went inside. RP 143. The house was mostly vacant. RP 176. They discovered various clothing items, sleeping bags, and items that looked like drug paraphernalia. RP 144, 176. There were items belonging to both males and females inside the house. RP 132,176.

Damage to the house included the broken window on the back door and a broken toilet. RP 114, 118. The last time Ms. Bach had seen the window on the door was about three months prior. RP 130, 131. It was not established how the window to the back door was broken, by whom, or when. RP 113-120, 130-136, 143-149, 153-158, 165-170, 175-176, 178-180.

No evidence was presented linking any of the items found in the home to any of the specific people who exited the home, except the dog, which belonged to one of the other people found in the residence. RP 113-120, 130-136, 143-149, 153-158, 165-170, 175-176, 178-180.

When questioned by police, Mr. Beckwith told officers that his friend owned the home and had given him permission to be there. RP 145. He told another officer that he was watching the place for a friend, whose name he could not exactly remember. RP 167.

The other five occupants of the house were issued a criminal trespass citation. RP 145. Mr. Beckwith was arrested, transported to the county jail, and charged with residential burglary. RP 145; CP 1.

The prosecution rejected the defense's efforts to settle the case with a plea to trespass. RP 275. Instead, Mr. Beckwith sat in jail over

thirty days beyond his scheduled trial date due to the prosecution's trial and vacation schedule. CP 5-12; RP 9/15/16, 6-7; RP 275.

At the close of the State's case, the defense moved for directed verdict on the basis that the prosecution had presented only evidence of Mr. Beckwith's presence in the home and not evidence that he had entered or remained in the home with the intent to commit a crime. RP 186.

The trial court noted that the "crux of this case" was whether the government presented evidence Mr. Beckwith entered the home with the intent to commit a crime, and whether there was evidence sufficient to show that Mr. Beckwith, as opposed to the other five people in the residence, intended to commit any such offense. RP 189.

The trial court denied the defense's motion for directed verdict, finding that the State presented evidence of "potential misdemeanor crimes within the residence," including a broken window and a damaged toilet. RP 202-203.

The State never asked the court to make an explicit finding that the elements of the uncharged offense of trespass had been proven beyond a reasonable doubt. RP 196-201

The court then granted the defense's request for the lesser included instruction for trespass. CP 43; RP 207. The jury acquitted Mr. Beckwith of residential burglary but found him guilty of trespass. CP 49; RP 259-261.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

This Court should accept review of whether Mr. Beckwith's right to due process requires dismissal of his conviction where the government presented insufficient evidence of the charged offense, regardless of whether the jury later found him guilty of the lesser offense of trespass.

Mr. Beckwith was charged with residential burglary, which makes it a crime for a person to enter or remain unlawfully in a dwelling with intent to commit a crime against a person or property therein. RCW 9A.52.025. At the close of the prosecution's case-in-chief, it failed to present evidence sufficient to establish Mr. Beckwith entered a dwelling with the intent to commit a crime therein. Only after the court denied his motion to dismiss did Mr. Beckwith ask for the jury to be instructed on the lesser offense of trespass, which the jury convicted him of.

Mr. Beckwith seeks review of the Court of Appeals' determination that Mr. Beckwith waived the opportunity to challenge the trial court's denial of his motion for directed verdict on appeal

because of his subsequent request to have the jury instructed on the lesser offense of trespass and failure to object to the court's comment that the evidence established a trespass. Slip Op. at 6, 7.

1. *Due process prohibits the State from circumventing its burden of persuasion through the exclusive use of a permissive inference.*

The prosecution cannot prove the offense of burglary through mere inference that a person entered a dwelling with the intent to commit a crime therein.

The words in the statute require a specific crime (a crime against a person or property) in a specific place (therein) and with a specific intent (enter or remain with the intent to commit a crime therein). *State v. Devitt*, 152 Wn. App. 907, 912, 218 P.3d 647 (2009).

The Legislature adopted the following inference of intent:

> In any prosecution for burglary, any person who enters or remains unlawfully in a building may be inferred to have acted with intent to commit a crime against a person or property therein, unless such entering or remaining shall be explained by evidence satisfactory to the trier of fact to have been made without such criminal intent.

RCW 9A.52.040.

RCW 9A.52.040 provides a permissive rather than a mandatory inference that a person found in a building intends to commit a crime in

that building. *State v. Brunson*, 128 Wn.2d 98, 107, 905 P.2d 346 (1995). Inferences are generally not favored in the criminal law. *See State v. Cantu*, 156 Wn.2d 819, 826, 132 P.3d 725 (2006) (citing *State v. Hanna*, 123 Wn. 2d 704, 710, 871 P.2d 135 (1994). Although the State may use the permissive inference as an evidentiary device to help it meet its burden of proof, "the State may not circumvent its burden of persuasion through the exclusive use of a permissive inference." *Brunson*, 128 Wn.2d at 107. Permissive inferences do not relieve the State of its burden of persuasion because the State must still convince the jury the suggested conclusion should be inferred from the basic facts proved. *Hanna*, 123 Wn.2d at 710.

2. *Evidence that a potential misdemeanor offense occurred inside a residence where Mr. Beckwith was found with five other people does not support the inference that he entered or remained with the intent to commit a crime against a person or property therein.*

The trial court's ruling on the defense's motion for directed verdict mistakes the "potential misdemeanor crimes," including the "breaking of a window" and "damaging a toilet" to be a sufficient basis from which an inference of intent could be drawn. RP 202.

A permissive inference must flow from a proven fact. *State v. Sandoval*, 123 Wn. App. 1, 5, 94 P.3d 323 (2004) (citing *State v.*

Deal, 128 Wn.2d 693, 700, 911 P.2d 996 (1996)). Intent may not be inferred from conduct that is patently equivocal, though it may be inferred from conduct that plainly indicates such intent "as a matter of logical probability." *State v. Bergeron*, 105 Wn.2d 1, 20, 711 P.2d 1000 (1985).

Mr. Beckwith was found along with five other people inside the home on July 8. The State presented no evidence establishing that Mr. Beckwith either broke the window to gain entry, or entered by way of the broken window. Thus, this is not a proven fact from which an inference can be drawn. The last time that Ms. Bach had inspected the back door of the house was about three months prior, in April. RP 130, 131. On the day she called 911, she observed that the back door was wide open. Any of the six people found in the house that day, including Mr. Beckwith, could have simply walked through the door. RP 104.

Further, the trial court erroneously found that the broken window of the back door, which was argued to show evidence of an unlawful entry, could be construed as a crime committed "therein" as required by RCW 9A.52.025. RP 228, 202. A window broken as a means to gain entry into the home should not be construed as a crime committed "therein," where the window would necessarily have to be

broken from the outside to gain entry "therein." *See State v. Gilbert*, 68 Wn. App. 379, 383–84, 842 P.2d 1029 (1993), *abrogated on other grounds by In re Heidari*, 174 Wn. 2d 288, 274 P.3d 366 (2012) ("[S]ettled canons of statutory construction require that meaning be given to the word 'therein.' Accordingly, an assault outside a burglarized dwelling does not elevate residential burglary to first-degree burglary.").

The Court of Appeals has repeatedly rejected the inference that forced entry necessarily supports a finding that a crime was intended to be committed therein. *State v. Woods*, 63 Wn. App. 588, 592, 821 P.2d 1235 (1991); *see also Sandoval*, 123 Wn. App. at 5. The failure of the court to do so here is in conflict with these cases and in error.

Like the broken window, the toilet could have been broken any time prior to when Mr. Beckwith was found in the residence. It had been about three months since Ms. Bach had entered the residence to inspect it. RP 130,131. The house was rented by tenants who left the house largely vacant when they went home for the summer. RP 176, 104. It is unknown what the status of the toilet was when they left. Damage to the toilet could have been caused by anyone between April and July 8 when Ms. Bach called 911, and no evidence showed that Mr.

Beckwith in fact even used the toilet. This makes damage to the toilet an even more "patently equivocal fact" lacking any "logical probability" of intent than the broken window on the door. *See Bergeron*, 105 Wn.2d at 20. The Court's findings to the contrary are in error.

The State may not prove "intent to commit a crime therein" merely with evidence that a person unlawfully entered the premises. *See State v. Stinton*, 121 Wn. App. 569, 575, 89 P.3d 717 (2004). In Mr. Beckwith's case, it was unknown how he specifically entered the home or whether he intended to commit any crime while he was inside the home. The only evidence the prosecution established was his unlawful presence in the home. The prosecution, therefore, presented insufficient evidence upon which the trier of fact could have relied, absent the permissive inference, to find that Mr. Beckwith entered the home with the intent to commit a crime therein.

3. *Proof of Mr. Beckwith's intent did not flow from the facts presented at trial.*

When the permissive inference is the "sole and sufficient" proof of the element of intent, proof of the element must flow from the proven fact of the unlawful entry beyond a reasonable doubt. *Brunson*,

128 Wn.2d at 107, 111-112 (quoting *Ulster County Court v. Allen,* 442 U.S. 140, 167, 99 S. Ct. 2213, 60 L. Ed. 2d 777 (1979)).

On the other hand, when permissive inferences are not the "sole and sufficient" proof of such element, "[t]he standard of proof regarding a permissive inference is more likely than not." *Id.*; *Stinton,* 121 Wn. App. at 573. In such cases, the court must "determine whether the elemental fact—intent—more likely flowed from the proven or foundational facts." *Sandoval,* 123 Wn. App. at 5 (citing *State v. Farr-Lenzini,* 93 Wn. App. 453, 469, 970 P.2d 313 (1999)). The court judges the sufficiency of the inference in light of the facts of each case. *Brunson,* 128 Wn.2d at 111.

Courts have applied the lower standard of proof in cases where the State established how the accused entered the home and the conduct therein from which the trier of fact could infer intent. In *Brunson,* the court applied the lesser standard of proof for intent where police found a large hole in the business's front door, the interior of the building was in disorder, and a file cabinet with Brunson's fingerprints had been jimmied open. *Brunson,* 128 Wn.2d at 100. The lesser standard similarly applied to the other defendant, who was witnessed attempting to enter through a kitchen window, provided an implausible excuse of

entering to use the phone and left kitchenware from the home outside. *Id*. at 109. *See also Deal*, 128 Wn.2d at 700 ("Deal testified at trial that he broke a window in order to enter the premises and that once inside, repeatedly assaulted Prins."); *Sandoval*, 123 Wn. App. at 5 (Defendant loudly kicked open the door to an unknown house, broke the lock and front door casing, and assaulted the owner of the residence.).

The cases applying the lower standard of proof can be contrasted with Mr. Beckwith's case, where the State did not establish how he entered the home or what he specifically did while inside, other than coming to the door when police knocked and professing a right to be in the home. Absent such evidence, the statutory inference of intent is the sole proof of his intent to commit a crime therein. Thus, the standard of review for whether his intent flowed from an unlawful entry is beyond a reasonable doubt. *Brunson,* 128 Wn.2d at 107, 111-112.

Applying the reasonable doubt standard of proof, there was insufficient evidence that Mr. Beckwith's intent to commit a crime flowed from the potential misdemeanor acts cited by the trial court as there was no evidence he had committed these crimes.

Even if this Court applied the lesser standard of proof, that intent more likely flowed from the proven or foundational facts, the

same result holds. The prosecution did not establish that Mr. Beckwith broke the window or the toilet. It does not flow that he intended to commit a crime when he entered or remained on the premises.

The State argued that because Mr. Beckwith answered the door when police knocked and told officers that he had authority to be in the home, that this somehow made it a reasonable inference that Mr. Beckwith entered the home with the intent to commit a crime. RP 186-188. This does not establish burglary.

Like in *Sandoval*, Mr. Beckwith did not attempt to hide his presence in the home. 123 Wn. App. at 5-6. His statement of authority does not connect him to the damage or use of the home. It did not establish how long he had been there, what part of the house he had been in, or what he did while there. Like in *Sandoval*, there was "no fact, alone or in conjunction with others, from which entering with intent to commit a crime more likely than not could flow." *Id.* at 5-6. Since it cannot be shown that "that [intent] more likely flowed from the proven or foundational facts," it cannot be established that the intent flowed from the foundational facts beyond a reasonable doubt. *Id.*

4. *Viewing the evidence in the light most favorable to the prosecution, there was no reasonable inference to sustain a verdict of residential burglary; therefore, the court should*

have granted the defense's motion for directed verdict and dismissed the case with prejudice.

Review of a trial court decision denying a motion for directed verdict requires the appellate court to engage in the same inquiry as the trial court. *State v. Longshore*, 141 Wn.2d 414, 420, 5 P.3d 1256 (2000). A motion for directed verdict should be granted if, after viewing the material evidence in the light most favorable to the nonmoving party, the court determines there is no substantial evidence or reasonable inference to sustain a verdict for the nonmoving party. *Id.* (citing *Hizey v. Carpenter,* 119 Wn.2d 251, 271–72, 830 P.2d 646 (1992)).

The prosecution opposed the defense's motion for directed verdict based on other possible misdemeanor crimes that could have been committed inside the home, citing, theft of utilities and depriving the owner of the ability to rent her property, as well "drugs, and syringes and paraphernalia," which were "likely in violation of criminal code" and in violation of the "contract for rental agreement." RP 198-199. The trial court correctly ignored the State's grasping for alternative offenses, as they lacked evidentiary support and were mainly not "crimes against a person or property therein" as required by RCW 9A.52.025. *See Devitt*, 152 Wn. App. at 912 ("The statute then

requires more than just a simple showing of an intent to commit a crime."). Thus the trial court limited its denial of the defense's motion for directed verdict to the possible misdemeanor offenses of breaking the window and toilet. RP 202.

The State's efforts to establish that Mr. Beckwith committed a crime against a "person or property therein" share the same basic flaw as the potential misdemeanor crimes cited by the trial court—the evidence showed nothing more than Mr. Beckwith's presence in the home along with five other people. There is simply no ability to infer that his intent flowed "more likely than not," and certainly not "beyond a reasonable doubt," from the potential misdemeanor offenses the government alleged were committed in the house.

The Court of Appeals wrongly found Mr. Beckwith waived his right to have the charge of burglary dismissed at the close of the prosecution's case-in-chief by subsequently requesting the lesser-included jury instruction of trespass, because the court denied the defense's motion for directed verdict before ruling on the permissive inference instruction and the lesser included jury instruction. Slip Opinion at 7; RP 202, 203, 207 (the court grants the defense's request

for a lesser included instruction after the motion for directed verdict has been denied).

Indeed, the court clarified that its ruling on the directed verdict was separate from the discussion of jury instructions. RP 196. Only after denying the defense's motion for directed verdict did the court address the jury instructions, including the lesser included instruction for trespass. RP 203

The trial court clearly stated:

> I'm going to deny the half-time motion, and then we can go ahead and move onto the rest of the instructions, if you like.

RP 207.

The court later reiterated how it was not proceeding on jury instructions until it had ruled on the motion for directed verdict. RP 207. The trial court again stated:

> And then we come to the proposed lesser included from defense, definition of criminal trespass.

RP 207.

In response, the prosecution argued Mr. Beckwith was not entitled to a lesser included instruction. RP 207. The prosecutor stated:

> I don't think that [instruction] should necessarily be offered.

RP 207.

At no time during the defense's motion for directed verdict did the prosecutor ask the court to make an explicit finding that the elements of the uncharged offense of trespass had been proven beyond a reasonable doubt. RP 196-201. Because the prosecution pursued an "all or nothing approach," arguing only the elements of residential burglary, remand for entry of conviction on this lesser offense of trespass is barred. *See Heidari,* 174 Wn.2d at 293-294. Remand for simple resentencing on a lesser included offense is only permissible "when the jury has been explicitly instructed thereon…the State can easily avoid the force of *Green* by requesting a lesser included offense instruction at trial." *Id*.

The Court of Appeals dismissed Mr. Beckwith's contention that he was entitled to dismissal based on the trial court's erroneous decision to deny his motion for directed verdict at the close of the State's case because he did not object to the court's passing comment there was evidence of trespass, and Mr. Beckwith ultimately pursued the lesser included offense of trespass. Slip Op. at 6, 7.

Had the trial court properly granted Mr. Beckwith's motion for directed verdict, the defense would not have needed to request the lesser included instruction for trespass, because the charge would have

been dismissed without the possibility of retrial. *See United States v. Pacheco,* 434 F.3d 106, 112 (1st Cir. 2006) ("It is beyond cavil that, for double jeopardy purposes, the finality accorded to jury verdicts of acquittal extends equally to judicially rendered judgments of acquittal…[a] resolution in the defendant's favor of a necessary factual element of the offense is a definitive determination that the defendant cannot be convicted."); *see also Burks v. United States,* 437 U.S. 1, 11, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978) (The Double Jeopardy Clause "forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding.").

E. CONCLUSION

Because the State presented insufficient evidence for a jury to infer Mr. Beckwith alone entered the premises with the intent to commit a crime inside the home by either standard of proof, the case should have been dismissed with prejudice pursuant to Mr. Beckwith's motion for directed verdict. *See Devitt*, 152 Wn. App. at 913(citing *State v. Hickman,* 135 Wn.2d 97, 103, 954 P.2d 900 (1998) (Dismissal with prejudice is required where there is insufficient evidence at the close of the State's case of an element for which the State has the

burden of proof). The Court of Appeals decision that fails to find Mr. Beckwith was entitled to dismissal at the close of the prosecutor's case violates his due process right to have the prosecutor establish every element of the offense charged, and warrants review by this Court.

Respectfully submitted this the 12th day of June 2018.

s/ Kate Benward

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. ANTHONY LEE BECKWITH, Appellant.	)	No. 75962-1-I DIVISION ONE UNPUBLISHED FILED: May 14, 2018

Cox, J. – Anthony Beckwith appeals his conviction for first degree criminal trespass, arguing that the trial court should have dismissed the residential burglary charge at the end of the State's case in chief. Because the jury was instructed on the lesser included offense of criminal trespass, and the evidence was sufficient to prove that Beckwith committed that crime, we affirm his conviction.

Bellingham police officers responded to a call from Cynthia Bach that she had seen unknown people in a house that she had rented to tenants who were out of town. While driving by the house, Bach had seen that the back door was wide open and that the window on that door was broken. When officers knocked on the front door of the house, Beckwith answered.

Beckwith first told the officers that he rented the house and then he said that he was watching the house for his friend. He told officers that he could not

remember the name of the friend. In addition to Beckwith, there were five people in the house.

Inside the house, officers found drug paraphernalia and garbage. In addition, a toilet on the second floor was broken. The State charged Beckwith with one count of first degree residential burglary.

At the end of the State's case in chief, Beckwith moved for a directed verdict based on insufficient evidence. The trial court denied the motion, and the jury was instructed on residential burglary as well as the lesser included offense of first degree criminal trespass. The jury convicted Beckwith of first degree criminal trespass, and he was sentenced accordingly.

Beckwith appeals.

SUFFICIENCY OF THE EVIDENCE

Beckwith argues that the trial court abused its discretion in denying his motion for a directed verdict because there was insufficient evidence to support a conviction for residential burglary. He specifically claims that the State failed to present sufficient evidence for the jury to infer that he entered or remained in the house with the intention to commit a crime therein.[1] We hold there was sufficient evidence to convict him based on the jury verdict on first degree criminal trespass.

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[1] See RCW 9A.52.025(1).

"A sufficiency challenge admits the truth of the State's evidence and accepts the reasonable inferences to be made from it."[2] On review, we will consider both circumstantial and direct evidence as equally reliable and defer to the trier of fact on issues of conflicting testimony, witness credibility, and the persuasiveness of the evidence.[3] "We will reverse a conviction 'only where no rational trier of fact could find that all elements of the crime were proved beyond a reasonable doubt.'"[4]

To convict Beckwith of residential burglary, the State had to prove beyond a reasonable doubt that Beckwith entered or remained unlawfully in a dwelling "with intent to commit a crime against a person or property therein."[5] But, Beckwith was not convicted of residential burglary. Instead, the jury convicted him of the lesser included offense of first degree criminal trespass.

To convict Beckwith of first degree criminal trespass, the State had to prove beyond a reasonable doubt that he "knowingly enter[ed] or remain[ed] unlawfully in a building."[6] Beckwith does not argue that there was insufficient evidence to prove that he knew he did not have permission to enter or remain in the house. Instead, he argues that because the trial court should have dismissed

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[2] State v. O'Neal, 159 Wn.2d 500, 505, 150 P.3d 1121 (2007).

[3] State v. Thomas, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004).

[4] State v. Fedorov, 181 Wn. App. 187, 194, 324 P.3d 784 (2014) (quoting State v. Smith, 155 Wn.2d 496, 501, 120 P.3d 559 (2005)).

[5] RCW 9A.52.025(1).

[6] RCW 9A.52.070.

the residential burglary charge with prejudice, his conviction for criminal trespass must be vacated. We disagree.

In a criminal case, a defendant has multiple opportunities to challenge the sufficiency of the evidence: before trial, after the State puts on its case in chief, at the end of all the evidence, after the verdict, and on appeal.[7] But after a verdict, this court will only review the sufficiency of evidence supporting that verdict, not the propriety of the denial of the motion to dismiss.[8]

In his reply brief, Beckwith relies on State v. Devitt as support for his contention that this court should consider whether there was sufficient evidence to support a conviction for residential burglary at the close of the State's case.[9] His reliance is misplaced because in Devitt, the jury convicted Steven Devitt of the crime of residential burglary.[10] Therefore, the appellate court did not consider the propriety of the trial court's ruling on Devitt's directed verdict motion but instead whether sufficient evidence supported his conviction.[11]

Beckwith argues that despite the jury verdict on criminal trespass, this court should consider the propriety of the trial court's denial of his motion for directed verdict because, "at no time during [his] motion . . . did the State ask the

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[7] State v. Jackson, 82 Wn. App. 594, 607-08, 918 P.2d 945 (1996).

[8] Id. at 608; see State v. Johnston, 100 Wn. App. 126, 132-33, 996 P.2d 629 (2000).

[9] 152 Wn. App. 907, 913, 218 P.3d 647 (2009).

[10] Id. at 910.

[11] Id. at 913.

court to make an explicit finding that the elements of the uncharged offense of trespass had been proven beyond a reasonable doubt." We are unpersuaded.

In considering Beckwith's motion for directed verdict, the trial court stated its understanding "that the criminal trespass in the first degree would be a lesser included, and the only difference in the elements would be an intent to commit a crime against a person and property."[12] It observed that the State had "clearly" established a trespass, or "at least enough evidence to go to the jury with a trespass." Beckwith did not object to the trial court's observation about criminal trespass but instead informed the trial court that he was putting "forward the defense on the criminal trespass that the State has to prove the reasonableness of that." He also proposed a jury instruction on criminal trespass.

The State did not need to ask the trial court to explicitly find the elements of criminal trespass because the trial court observed that the State had established those elements sufficiently to go to the jury. And Beckwith did not object, but instead acknowledged that the State would have to prove the elements of criminal trespass.

JURY INSTRUCTIONS

Beckwith also argues that his conviction must be reversed because the State pursued an "all or nothing approach" by arguing only the elements of residential burglary. He argues that he was never charged with criminal trespass

[12] See State v. Stevens, 158 Wn.2d 304, 310, 143 P.3d 817 (2006).

and the State failed to request the lesser included instruction, so his conviction on that offense must be set aside. We again disagree.

Although the State never charged Beckwith with criminal trespass, 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 or she is charged in the indictment or information."[13] "In such instances, the State does not have to notify the defendant that he may be convicted of the lesser included offense."[14] Here, the trial court's discussion when considering Beckwith's directed verdict motion, and the statements of Beckwith's counsel during that time, show that Beckwith had ample notice he could be found guilty of first degree criminal trespass even though the State never charged him with that crime.

In addition, although the State never requested a jury instruction on criminal trespass, the jury was instructed on the elements of that crime. Under RCW 10.61.006 either the defendant or the State may "present a lesser included offense to the jury."[15] "[W]hether to request a jury instruction on lesser included offenses is a tactical decision" and the defendant may decide whether to pursue an all or nothing approach.[16]

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[13] See State v. Gallegos, 65 Wn. App. 230, 234, 828 P.2d 37 (1992).

[14] State v. Taylor, 90 Wn. App. 312, 322, 950 P.2d 526 (1998).

[15] State v. Witherspoon, 180 Wn.2d 875, 886, 329 P.3d 888 (2014).

[16] Id.

Here, it was Beckwith who made the tactical decision not to pursue an "all or nothing approach" by requesting the criminal trespass instruction. Also, during closing arguments, Beckwith's counsel argued that the evidence at most supported a conviction for criminal trespass.

By failing to object when the trial court observed that there was sufficient evidence of first degree criminal trespass to go to the jury, agreeing that the State would have to prove the elements of that crime, requesting a jury instruction on criminal trespass, and arguing that the evidence at most supported a conviction for that crime, Beckwith made it clear that he had made the tactical decision not to pursue an all or nothing strategy.[17] Thus, he waived any objection to the jury's consideration of the criminal trespass charge.

Finally, because the jury was instructed on criminal trespass, Beckwith's reliance on In re Heidari is misplaced.[18] In Heidari, Mansour Heidari's conviction for second-degree child molestation was reversed due to insufficient evidence.[19] The supreme court held that remand for entry of a conviction on a lesser offense of attempted child molestation was barred because the jury had not been explicitly instructed on the lesser offense.[20] But here, the jury was explicitly instructed on criminal trespass.

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[17] Id.

[18] 174 Wn.2d 288, 274 P.3d 366 (2012).

[19] Id. at 290-91.

[20] Id. at 293-94.

In sum, Beckwith presented his arguments regarding first degree criminal trespass during his closing, the jury was instructed on the State's burden to prove that crime, and it convicted Beckwith of that crime. Therefore, he may only challenge the sufficiency of the evidence in support of that conviction.[21] Considering the evidence in the light most favorable to the State, substantial evidence supports beyond a reasonable doubt the jury's verdict that Beckwith committed the crime of first degree criminal trespass.

We affirm the judgment and sentence.

COX, J.

WE CONCUR:

Mann, A.C.J.

Becker, J.

[21] See State v. Allen, 116 Wn. App. 454, 465 n.6, 66 P.3d 653 (2003).

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 75962-1-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

☒ respondent Hilary Thomas, DPA
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Washington Appellate Project

Date: June 12, 2018

WASHINGTON APPELLATE PROJECT

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Transmittal Information

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Appellate Court Case Number:	75962-1
Appellate Court Case Title:	State of Washington, Respondent v. Anthony Lee Beckwith, Appellant
Superior Court Case Number:	16-1-00883-9

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