SUPREME COURT NO. 101944-1
COURT OF APPEALS NO. 38749-6-III

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

DAVID BROWN,

Petitioner.

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

The Honorable Timothy B. Fennessey, Judge

PETITION FOR REVIEW

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

TABLE OF AUTHORITIES (CONT'D)

Page

TABLE OF AUTHORITIES (CONT'D

Page

RULES, STATUTES AND OTHER AUTHORITIES

A. IDENTITY OF PETITIONER/COURT OF APPEALS DECISION

Petitioner David Brown asks this Court to grant review of the Court of Appeals' decision in State v. Brown, No. 38749-6-III, filed on February 23, 2023. A copy is attached as an appendix.[1]

B. ISSUES PRESENTED FOR REVIEW

2. Petitioner was charged with second degree burglary. He contested the burglary, but defense counsel conceded petitioner was guilty of criminal trespass. The Court of Appeals ruled defense counsel was not ineffective for failing to request an instruction on criminal trespass, holding that contrary to several appellate court decisions criminal trespass is not a lesser included offense of second degree burglary. Is review appropriate under RAP 13.4(b)(1) and (b)(2), where the Court of

[1] The State's motion to publish is pending.

Appeals decision conflicts with other appellate court decisions holding criminal trespass is a lesser included offense of burglary?

2. Assuming criminal trespass is a lesser included offense of burglary, is review appropriate under RAP 13.4 (b) (3) and (b)(4) because this case involves a significant question of federal constitutional law and an issue of substantial public importance?

C. STATEMENT OF THE CASE

Automotive Specialties is a used car dealership that was in the process of moving its inventory to another location. RP 134. On the afternoon of March 23, 2020, Lyle Click, a tow truck operator went to dealership's property to move some of the cars to the new location. RP 108-110. The property was surrounded by a 12 foot high fence with a gate to access the property. RP 135. When Click arrived, he saw David Brown in a truck inside the fenced property. Brown's truck was hooked up to a trailer.

RP 114. The gate to the property was locked. Click blocked the gate with his truck. RP 111.

Gary Litzenberger, John Rostollan, the dealership's general manger, and Gregor Klante, who shared space with the dealership, arrived at the lot. They noticed the gate to the property was chained and locked with a lock different lock than the dealership's lock. RP 135-137, 141-142, 150. Brown's truck was hooked up to a trailer that belonged to Klante. The trailer had recently been painted red in the front and the wheels had been painted blue. RP 129, 142, 144, 150-151.

When first confronted by Litzenberger, Brown told him that it was his property and refused to unlock the gate. RP 142. Brown also said the trailer was his, but he unhooked it from his truck. RP 138.

The police were called. Brown told police and Klante he saw the trailer parked out on the road and thought it was a good idea to tow it onto the dealership's property because it appeared

someone was trying to steal it. RP 125, 152-153. Brown was arrested. RP 130.

Brown testified that he went to a homeless camp located beside the dealership's fence to look for her. RP 159-160. He had found his niece there before. RP 161. While there, Brown noticed a trailer was blocking the gate to the property. RP 162. It appeared the trailer had been painted. RP 163. There was a chain on the fence, but the gate was unlocked. RP 164.

Brown hooked the trailer up to his truck and pulled the trailer onto the property. He wrapped the chain around the gate. RP 164. He was in the process of writing a note to the owners when the state's witnesses showed up and started accusing him of things. RP 166-167.

Brown admitted he had no right to be on the property, but he thought he was doing a good deed by pulling the trailer onto the dealership's property. RP 168. He was not trying to steal anything. Id.

The defense theory was that Brown committed trespass but not burglary. In closing argument defense counsel told the jury:

- "And what I would submit to you all is that there's no doubt that this is a trespass. Mr. Brown didn't have permission to be on the property of Automotive Specialties. He admitted to as much on the stand." RP 190.
- "It's a trespass. There's been evidence of that. There's been testimony of that, and he admitted that on the stand." RP 194.
- "He [Brown] did get caught trespassing red-handed, but it doesn't necessarily rise to level of a burglary." RP 192.

On appeal, Brown argued counsel was ineffective for failing to request a lesser included instruction on criminal trespass consistent with the defense theory of the case. The Court of Appeals rejected the argument, holding that Brown would not have been entitled to the instruction because criminal trespass is not a lesser included offense of second degree burglary. Appendix at 9.

D. ARGUMENTS

1. THIS COURT SHOULD ACCEPT REVIEW BECAUSE THE COURT OF APPEALS HOLDING THAT CRIMINAL TRESPASS IS NOT A LESSER INCLUDED OFFENSE OF SECOND DGREE BURGLARY CONFLICTS WITH OTHER APPELLATE COURT DECISIONS.

A defendant is entitled to a lesser offense instruction if (1) each of the elements of the lesser offense is a necessary element of the charged offense; and (2) the evidence supports an inference that the defendant committed the lesser offense. State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978). The first requirement is the "legal prong;" the second requirement is the "factual prong." State v. Berlin, 133 Wn.2d 541, 546, 947 P.2d 700 (1997).

Washington appellate courts have consistently found that under the legal prong trespass is a lesser included offense of burglary. State v. Olson, 182 Wn. App. 362, 375, 329 P.3d 121 (2014) (citing State v. Soto, 45 Wn. App. 839, 840-841, 727 P.3d

999 (1986)); see State v. J.P., 130 Wn. App. 887, 895, 125 P.3d 215 (2005). In State v. Southerland, 109 Wn.2d 389, 745 P.2d 33 (1987), this Court affirmed the reversal of a burglary conviction where the trial court failed to instruct the jury on trespass. "The Court of Appeals was correct in its legal analysis regarding the failure of the trial court to instruct the jury on criminal trespass and in its conclusion that such failure was reversible error under the facts of this case with regard to the burglary conviction." Id. at 390.

Although the Court of Appeals agreed this precedent supports the legal proposition that criminal trespass is a lesser-included offense of burglary, it relied on Division One's decision in State v. Moreno, 14 Wn.App. 2d 143, 470 P.3d 507 (2020) to conclude that legal proposition is no longer valid. The Moreno court reasoned that criminal trespass requires a person to know that their entry or remaining in a building is unlawful. However, the required mental state for burglary is the intent to commit a

crime against a person or property but not the knowledge their entry or remaining is unlawful. The court concluded therefore,

> A person could commit all of the elements of first degree burglary, but not be guilty of first degree criminal trespass because they did not know that their entry or remaining was unlawful. Thus, to the extent our previous cases support that first degree criminal trespass is a lesser included offense of first degree burglary, we disagree with them and decline to follow them.

Id. at 156.

The Court of Appeals analysis in Moreno is wrong. A person is guilty of criminal trespass in the second degree when the person (1) knowingly enters or remains unlawfully in or upon premises of another (2) under circumstances not constituting criminal trespass in the first degree. RCW 9A.52.080. A person is guilty of burglary in the second degree if, with intent to commit a crime against a person or property therein, the person enters or remains unlawfully in a building other than a vehicle or a dwelling. RCW 9A.52.030(1). Thus, under either the criminal

trespass or burglary statutes, a person can enter a building lawfully, but remaining can become unlawful. If in the case of burglary a person remains in a building unlawfully because the person intends to commit a crime, the person knowingly remains unlawfully. That is the same mental element of knowingly remaining in a building unlawfully for purposes of criminal trespass.

The Court of Appeals in this case adopted the reasoning in Moreno and likewise held criminal trespass is not a lesser included offense of burglary. Appendix at 7-9. In so doing its decision conflicts with the above cited cases holding criminal trespass is a lesser included offense of burglary.

Moreover, while this Court affirmed the decision in Moreno, it did so on the issue of whether knowledge of the unlawfulness of entering or remaining is an implied essential element of first degree burglary. State v. Moreno, 198 Wn.2d 737, 756, 499 P.3d 198 (2021). It did not reach the issue of

whether criminal trespass is a lesser included offense of burglary. However, Chief Justice González opined that because the mental states of each crime were attached to different actions, criminal trespass was not a lesser included offense of burglary. Id. at 757-58 (González, C.J. concurring). On the other hand, Justice Madsen reasoned that criminal trespass is a lesser included offense because a person who "enters or remains in a building with intent to commit a crime necessarily has the intent to enter or remain unlawfully." Id. at 758-59 (Madsen, J. concurring).

One issue in this case is whether criminal trespass is a lesser included offense of burglary. Appellate cases are in conflict on that issue, and two of this Court's justices have taken opposing views on the issue in Moreno. This Court should accept review and resolve the issue. RAP 13.4(b)(1) and (b)(2).

2. THIS COURT SHOULD ACCEPT REVIEW ON THE ISSUE OF WHETHER COUNSEL WAS INEFFECTIVE FOR FAILURE TO REQUEST A CRIMINAL TRESPASS INSTRUCTION

If criminal trespass is a lesser included offense of burglary, counsel was ineffective for failing to request a trespass instruction and Brown was prejudiced. His conviction should be reversed.

The Federal and State Constitutions guarantee all criminal defendants the right to the effective assistance of counsel. U.S. Const. amend. VI; Const. art. 1, § 22 (amend. 10); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). A defendant is denied this right when his attorney's conduct "(1) falls below a minimum objective standard of reasonable attorney conduct, and (2) there is a probability that the outcome would be different but for the attorney's conduct." State v. Benn, 120 Wn.2d 631, 663, 845 P.2d 289 (citing Strickland v. Washington, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)), cert. denied,

510 U.S. 944, 114 S. Ct. 382, 126 L. Ed. 2d 331 (1993). "Where the claim of ineffective assistance is based on counsel's failure to request a particular jury instruction, the defendant must show he was entitled to the instruction, counsel's performance was deficient in failing to request it, and the failure to request the instruction caused prejudice." State v. Classen, 4 Wn. App. 2d 520, 539-540, 422 P.3d 489 (2018) (citing State v. Thompson, 169 Wn. App. 436, 495, 290 P.3d 996 (2012)).

In State v. Grier, 171 Wn.2d 17, 43-44, 246 P.3d 1260 (2011) and In re Pers. Restraint of Crace, 174 Wn.2d 835, 847-48, 280 P.3d 1102 (2012), this Court appeared to adopt a categorical rule that prejudice can never be shown for an ineffective assistance claim based on counsel's failure to request a lesser offense instruction because it must be assumed the jury would not have convicted of the higher charged offense unless the State had met its burden of proof.

The Ninth Circuit, in vacating Crace's conviction on habeas review, condemned this Court's prejudice analysis as "a patently unreasonable application of Strickland." Crace v. Herzog, 798 F.3d 840, 847 (9th Cir. 2015). Strickland "does not require a court to presume — as the Washington Supreme Court did — that, because a jury convicted the defendant of a particular offense at trial, the jury could not have convicted the defendant on a lesser included offense based upon evidence that was consistent with the elements of both." Id. Grier wrongly conflated sufficiency of the evidence and Strickland's prejudice inquiry, with the result being that "a defendant can only show Strickland prejudice when the evidence is insufficient to support the jury's verdict," which means "there is categorically no Strickland error, according to the Washington Supreme Court's logic." Id. at 849.

Further, in Classen, despite the seemingly categorical rule enunciated in Grier and Crace, Division Two found prejudice,

meaning a reasonable probability the result at trial would have been different had jurors been offered an opportunity to convict Classen of misdemeanor assault. Id. at 542-543 (citing In re Pers. Restraint of Lui, 188 Wn.2d 525, 538, 397 P.3d 90 (2017)). Classen was charged with assault in the second degree. While arguing to the jury for acquittal on that charge, defense counsel conceded, "[Classen] is guilty of assault. There is no question about that. What kind of assault is it? That's the question." Classen, 4 Wn. App. 2d at 530. But counsel did not request instructions on assault in the fourth degree and jurors convicted Classen of the only option available to them – assault in the second degree. Id. at 529-530. The Classen court found counsel's performance deficient, rejecting the State's argument that counsel's "all-or-nothing" approach was a legitimate tactic. Id. at 539. The court found Classen was prejudiced by counsel's failure to request the lesser fourth degree assault instruction and reversed his conviction. Id. at 543-544.

As in Classen, there is no legitimate reason for counsel to have sought an all-or-nothing approach in an attempt to secure an acquittal where counsel argued that Brown was guilty of trespass. As in Classen, because counsel failed to request a trespass instruction, Brown was prejudiced for the same reason. It was likely the jury resolved any doubts in favor of convicting Brown of second degree burglary, which was the only option it had available.

The holding in Classen is consistent with the Ninth Circuit's reasoning. The Ninth Circuit recognized it is "perfectly plausible that a jury that convicted on a particular offense at trial did so despite doubts about the proof of that offense — doubts that, with 'the availability of a third option,' could have led it to convict on a lesser included offense." Crace, 798 F.3d at 848 (quoting Keeble v. United States, 412 U.S. 205, 213, 93 S. Ct. 1993, 36 L. Ed. 2d 844 (1973)). A jury could rationally find a lesser offense to be best supported by the evidence, consistent

with its instructions. Id. "Properly understood, Strickland and Keeble are entirely harmonious: Strickland requires courts to presume that juries follow the law, and Keeble acknowledges that a jury — even one following the law to the letter — might reach a different verdict when presented with additional options." Id. at 848 n.3.

To the extent the rule in Grier stands for the legal proposition the prejudice prong of an ineffective assistance claim is not met whenever sufficient evidence supports a guilty verdict Grier is incorrect and harmful and should be overruled.[2] It effectively insulates defense counsel's objectively unreasonable decision — and therefore a client's constitutional right to effective assistance of counsel — from judicial scrutiny. In so far as the decision in Classen appears to interpret Grier's prejudice

[2] This issue is currently before this Court on direct review in State v. Andrew Bertrand, No. 100953-4.

analysis differently, if this Court does not repudiate that analysis, it should provide courts with guidance on how it is to be applied.

Because this case presents a significant question of federal constitutional law, and an issue of substantial public importance, review is appropriate under RAP 13.4(b)(3) and (b)(4).

E. CONCLUSION

Brown respectfully asks this Court to grant his petition and reverse the Court of Appeals decision in his case.

I certify that this petition contains 2,627 words excluding those portions exempt under RAP 18.17.

DATED this 17th day of March 2023.

Respectfully submitted,

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APPENDIX

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FEBRUARY 23, 2023
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WA State Court of Appeals Division III

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

STATE OF WASHINGTON, Respondent, v. DAVID RAY BROWN, Appellant.	)	No. 38749-6-III UNPUBLISHED OPINION

FEARING, J. — David Brown appeals his conviction for second degree burglary. He contends his trial counsel performed deficiently when failing to offer a lesser included offense jury instruction for second degree trespass. We reject his contention because trespass is not a lesser included offense of burglary.

FACTS

This prosecution arises from the presence of David Brown, on March 23, 2020, on the business premises of Automotive Specialties, a north Spokane used car dealership. On that day, Automotive Specialties was in the process of moving its business location two blocks hence.

Lyle Click, a tow truck operator, arrived at Automotive Specialties on the morning of March 23 to assist the dealership with moving its inventory to the new sales lot. Click noticed a person inside a truck. The truck sat on a tennis court surrounded by a twelve-foot-high gated fence. Automotive Specialties stored some of its car inventory inside the fenced area. Click blocked the outside of the gate with his truck so that the person seated in the other truck could not escape the premises. The interloper inside the other truck was David Brown. Brown owned the other truck.

A trailer owned by Gregor Klante was hitched to the truck occupied by David Brown. Klante operated a separate dealership that shared space with Automotive Specialties. Lyle Click phoned Klante, who arrived fifteen minutes later. Before Klante's arrival, Brown barked at Click to move his truck so that he could drive the truck he occupied through the gate. Brown threatened to ram Click's truck. Brown insisted that he owned the trailer, although Click knew otherwise.

Greg Klante appeared at Automotive Specialties minutes later. Automotive Specialists detailer Gary Litzenberger arrived at the location near the same time as Klante appeared. Litzenberger noticed the presence of a different lock on the fence than the lock regularly used by the dealership. The interloper, David Brown, insisted that he owned the business property. Litzenberger insisted that Brown open the gate. Brown ignored Litzenberger. Litzenberger telephoned Automotive Specialties general manager John Rostollan, who arrived five minutes later.

John Rostollan, while employing colorful language, asked the intruder, David Brown, to explain his presence. Rostollan insisted that Brown unlock the gate. After hesitation, Brown opened the gate. Brown insisted that he owned the trailer to which he had hooked his truck. Rostollan demanded that Brown unhook the trailer. Brown eventually conceded he did not own the trailer and released the trailer from his truck.

James Stewart, a Spokane Police Department detective, responded to Automotive Specialties business property. Stewart saw red paint on Brown's hands, although the detective discovered no paint cans within the vicinity. Someone had spray-painted the trailer red within the last hour because the paint still felt new. A remote control for the trailer's winch, which had been locked in a box inside the trailer, was found in Brown's truck. Stewart found a crowbar in Brown's truck.

PROCEDURE

The State of Washington charged David Brown with second degree burglary. At the close of trial, Brown did not propose any jury instruction permitting the jury to convict him of a lesser included offense. Nevertheless, during closing arguments, counsel for Brown argued that the State failed to prove beyond a reasonable doubt that Brown committed second degree burglary. Brown's counsel asserted that Brown committed second degree trespass, not second degree burglary. The jury found David Brown guilty of second degree burglary.

LAW AND ANALYSIS

On appeal, David Brown contends his trial counsel performed ineffectively by failing to propose a jury instruction allowing the jury to convict him of second degree trespass as a lesser included offense of the charged crime: second degree burglary. This contention assumes that second degree trespass constitutes a lesser included offense of second degree burglary. We conclude that second degree trespass does not comprise a lesser included offense. Therefore, trial counsel did not perform deficiently. We first review principles that apply to claims of ineffective assistance of counsel, before analyzing whether trespass is a lesser included offense of burglary.

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee effective assistance of counsel. *State v. Classen*, 4 Wn. App. 2d 520, 535, 422 P.3d 489 (2018). To prevail on an ineffective assistance of counsel claim, a defendant must prove that (1) his or her counsel performed deficiently, and (2) counsel's deficient performance resulted in prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Classen*, 4 Wn. App. 2d 520, 535 (2018). Performance is deficient if it falls below an objective standard of reasonableness. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). To show prejudice, a defendant must demonstrate a reasonable possibility that, but for counsel's purportedly deficient conduct, the outcome of the proceeding would have differed. *State v. Classen*, 4 Wn. App. 2d 520, 535 (2018).

David Brown's appeal illustrates the overlapping nature of the two elements comprising an ineffective assistance of counsel claim. If second degree trespass does not constitute a lesser included offense of second degree burglary, the trial court would not have given a lesser offense jury instruction such that Brown can show no prejudice. If trespass does not act as a lesser included offense of burglary, trial counsel also did not perform ineffectively by failing to propose a jury instruction particularly since the trial court would not have delivered the instruction.

Although the common law recognized the right to a lesser included offense jury instruction, a Washington statute confirms the right to the instruction. *State v. Davis*, 121 Wn.2d 1, 4, 846 P.2d 527 (1993), *abrogated on other grounds by State v. Berlin*, 133 Wn.2d 541, 947 P.2d 700 (1997). RCW 10.61.006 reads:

> In all other cases the 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.

Both the prosecution and the defense may seek a lesser included offense jury instruction. *State v. Berlin*, 133 Wn.2d 541, 548 (1997). The rule of a lesser included offense benefits the defendant by providing a third alternative to either conviction of the offense charged or acquittal. *State v. Berlin*, 133 Wn.2d 541, 544-45 (1997). The rule seeks to ensure that juries considering the case of a defendant plainly guilty of some offense do not set aside reasonable doubt in order to convict her and avoid letting her go

free. *Keeble v. United States*, 412 U.S. 205, 212-13, 93 S. Ct. 1993, 36 L. Ed. 2d 844 (1973).

Washington law applies a two-part test, known as the *Workman* test, when ascertaining whether a party is entitled to a jury instruction on a lesser included offense. *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978). In part one, the court asks whether each of the lesser included offense elements also are necessary to conviction of the greater, charged offense. *State v. Condon*, 182 Wn.2d 307, 316, 343 P.3d 357 (2015); *State v. Workman*, 90 Wn.2d 443, 447-48 (1978). In part two, the court asks whether the evidence presented in the case supports an inference that *only* the lesser offense was committed, to the exclusion of the greater, charged offense. *State v. Condon*, 182 Wn.2d 307, 316 (2015). The first prong is the legal prong, and the second prong is the factual prong. *State v. Berlin*, 133 Wn.2d 541, 546 (1997). The proponent of the jury instruction must satisfy both prongs. *State v. Condon*, 182 Wn.2d 307, 316 (2015). We rest our decision in David Brown's appeal solely on the legal prong.

We compare the crime of second degree burglary with second degree theft. RCW 9A.52.030 creates the crime of second degree burglary:

> (1) A person is guilty of burglary in the second degree if, with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building other than a vehicle or a dwelling.

Thus, the elements of second degree burglary are: (1) entering or remaining unlawfully in a building other than a vehicle or dwelling, (2) with the intent to commit a crime against a

person or property therein. *State v. Brunson*, 128 Wn.2d 98, 104-05, 905 P.2d 346 (1995). "Building," in the context of the criminal code, includes any "fenced area." RCW 9A.04.110(5). David Brown does not challenge the fenced area on Automotive Specialties lot being a building.

RCW 9A.52.080 defines the crime of second degree trespass. The statute declares:

> (1) 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.

The elements of second degree trespass are (1) entering or remaining unlawfully on premises of another, and (2) knowingly doing so. The statute has an ambiguity in that the reader does not know whether the accused must know that she entered premises, that she knew the premises belonged to another, that she knew she engaged in unlawful conduct, some combination of two of the alternatives, or all three. In *State v. Moreno*, 14 Wn. App. 2d 143, 470 P.3d 507 (2020), *aff'd*, 198 Wn.2d 737, 499 P.3d 198 (2021), this court analyzed the statute as if the accused must know that he entered the premises unlawfully. This ambiguity is unimportant to this appeal regardless how one construes the statute.

The comparison of RCW 9A.52.030 and 9A.52.080 reveals that second degree trespass does not consist solely of elements necessary for a conviction of second degree burglary. The defendant must enter the building knowingly or with knowledge that the

entry is unlawful to be guilty of trespass. The accused need not knowingly enter the premises or know that entry is unlawful to be guilty of second degree burglary. The defendant need only enter a building with the intent to commit a crime to be guilty of burglary. We expect that one who enters a building with the intent to commit a crime typically knows that he enters the building and that he even knows he enters unlawfully, but still the State need not prove such for second degree burglary. We can conceive of someone entering a building lawfully and only later developing an intent to commit a crime.

David Brown cites *State v. Olson*, 182 Wn. App. 362, 375, 329 P.3d 121 (2014), *State v. J.P.*, 130 Wn. App. 887, 895, 125 P.3d 215 (2005), and *State v. Soto*, 45 Wn. App. 839, 840-41, 727 P.3d 999 (1986), to support his assertion that trespass is a lesser included offense of burglary. We agree that all three decisions contain passages that declare trespass to be a lesser included offense. In *State v. Soto*, Division One of this court held that first degree criminal trespass is a lesser included offense of second degree burglary. In *State v. J.P.*, Division Three cited *Soto* when asserting that criminal trespass is a lesser included offense of burglary. In *State v. Olson*, Division One of this court cited *Soto* for the proposition that criminal trespass in the first degree serves as a lesser included offense of burglary in the second degree.

We agree with Division One's more recent decision in *State v. Moreno*, 14 Wn. App. 2d 143 (2020) that repudiates the *Soto* rule. This court wrote in *State v. Moreno*:

> [T]he analysis in *Soto* was flawed. First degree criminal trespass requires a person to *know* that their entry or remaining in a building is unlawful. But, the first degree burglary statute requires no such knowledge. A person's entry or remaining must be factually unlawful. The required mental state for first degree burglary is the *intent to commit a crime* against a person or property therein. . . . As a result, not all of the elements of first degree criminal trespass are necessary elements of first degree burglary. A person could commit all of the elements of first degree burglary, but not be guilty of first degree criminal trespass because they did not *know* that their entry or remaining was unlawful. Thus, to the extent our previous cases support that first degree criminal trespass is a lesser included offense of first degree burglary, we disagree with them and decline to follow them.
>
> Knowledge of the unlawfulness of one's entry or remaining is not an element of first degree burglary.

State v. Moreno, 14 Wn. App. 2d 143, 156 (2020) (emphasis added).

The Supreme Court affirmed this court's decision in *Moreno*. *State v. Moreno*, 198 Wn.2d 737, 744, 499 P.3d 198 (2021). The high court focused, however, on the question of whether the crime of burglary possesses an implied element of knowledge rather than if trespass is a lesser included offense of burglary.

CONCLUSION

Because second degree trespass is not a lesser included offense of second degree burglary, trial counsel did not perform ineffectively for failing to ask for a lesser included offense jury instruction. We affirm David Brown's conviction for second degree burglary.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Fearing, J.

WE CONCUR:

Lawrence-Berrey, A.C.J.

Staab, J.

NIELSEN KOCH & GRANNIS P.L.L.C.

March 17, 2023 - 11:20 AM

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