

62392-3

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NO. 62392-3-1

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

STATE OF WASHINGTON,

Respondent,

v.

TOBY VERNON JOHNSON,

Appellant.

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STATE OF WASHINGTON
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BRIEF OF RESPONDENT

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I. ISSUES

Should the court have instructed the jury on first and second degree criminal trespass as lesser included offenses to the charged offense of burglary in the second degree? (The State concedes error requiring retrial).

II. STATEMENT OF THE CASE

Popcock Racing Shells is a manufacturer of rowing boats for racing crews located off 80th Street SW in Everett, WA. Its facilities are comprised of two buildings, a two storey and a one storey. A chain link fence surrounds the smaller building and its adjacent yard. A storage tent is in that yard. 2RP 20-21, 33; 3RP 76-77.

On Sunday, June 3, 2007, William Tytus, an employee, was at Popcock on the upper floor of the two storey building working. The business is not open on the weekend and no other employees were present. It was a warm and sunny day and his window was open. 2RP 20-23; 3RP 12.

At approximately 12:30 pm, he heard a vehicle, followed by its doors closing, then a "skateboard" type of noise. 3RP12, 16-17. Looking out his window, he saw a Dodge pick-up truck had backed into the business's driveway. A man wearing shorts was standing by it with the hood up. 2RP 24; 3RP 18. A second man, the

defendant, was walking away from it across the parking lot toward the fenced grounds of the business. He was wearing blue jeans and no shirt. 2RP 21-24.

Defendant approached a gate in the fence beneath Mr. Tytus's window. Using both hands and a good deal of force, he lifted up a bar out of the concrete and pushed open the gate, circumventing the padlock. 2RP 23, 32; 3RP 21-23, 62-63.

Once on the grounds, defendant walked directly to the storage tent. The zipper on the front of the tent was broken, its front held together with straps. Mr. Tytus described it as "very insecure." 2RP 35. Defendant made his way past the straps and entered the tent. 2RP 35-36.

The tent contains rowing boats, some ready for delivery, some waiting for repairs, as well as a large amount of aluminum and aluminum boat parts. The tent is used as a covered space to keep the parts stored and clean. 3RP 21-23. Defendant was inside the tent for approximately ten minutes. Mr. Tytus could not see inside. 2RP 27.

Upon exiting the tent, defendant approached a dumpster near the corner of the small building and looked inside. 3RP 25. He then walked to a door on the building. At this point, Mr. Tytus

noticed defendant was now holding a piece of metal that he had not entered with. 3RP 27. He identified it as aluminum that might have been stored in the tent, approximating its value at between a quarter and fifty cents. 3RP 9, 35.

Defendant grabbed at the door handle. It was locked. Defendant worked at it for a while, repeatedly pulling and pushing in an attempt to open it. 2RP 27-28. Suddenly, he stopped. 3RP 32. Defendant walked very briskly toward the truck. As fast as they could, the pair got inside, started it, and left. 3RP 28.

Mr. Tytus had been on the phone with a 911 operator since the moment defendant entered the gate. 2RP 29. Everett Police Officers had been dispatched. They contacted the truck still in the vicinity. 3RP 39-40. The occupants fit the suspects' descriptions and Mr. Tytus was called to the scene. 3RP 42. He identified defendant. 2RP 26. Two way radios were found in the glove box. 3RP 58-59.

Defendant testified that the truck had been overheating and the pair had stopped at Popcock manufacturing to obtain water. Defendant claimed he had been yelling while on the grounds to get someone's attention. 3RP 68-70. He claimed the gate was partially open and entered the property hoping to find someone and

to locate water and a container for it. 3RP 77. He argued that all his activities, those in the tent, near the dumpster, and at the door, had been made in an attempt to obtain such. 3RP 69-71. Though Mr. Tytus made clear there was a water spigot near the main gate, defendant claimed not to have seen it. 2RP 25; 3RP 71. Defendant further claimed he never intended to steal anything. 3RP 72-73.

Defendant was impeached with eight prior crimes of dishonesty. 3RP 73-75. Officers involved with the stop of the truck noted that there was no indication it was experiencing any difficulties. 3RP 83-85.

Defendant was charged with one count of second degree burglary. CP 59-60. Defense counsel submitted instructions requesting first and second degree criminal trespass as lesser included offenses, though he submitted a verdict form on first degree trespass alone, however. CP 39-51.

The court discussed the instructions it intended to give to counsel. In doing so, the following exchange occurred:

Defense: Your honor, the defense would take exception to the Court failing to give the criminal trespass instruction.

The Court: Instruction number 8, to convict of criminal trespass, you are probably objecting to the whole panoply of instructions regarding the lesser included?

Defense: Yes, your honor.

The Court: Your exemption will be noted. It's clear to me from the case of – your gave the opinion –

Defense: State v. Brown?

The Court: Yes, State v. Brown, that a person can not be convicted of first degree criminal trespass for trespassing in premises other than a building itself. So your exception will be noted. Any other exceptions?

Defense: No, your Honor.

3RP 88-89.

The Court instructed on second degree burglary alone. CP 26-38. The jury returned a verdict of guilty. CP 25.

III. ARGUMENT

The standard as to whether an offense is legally a lesser included and the jury should, under the facts of the particular case, be instructed on such was announced in State v. Workman, 90 Wn.2d 443, 584 P.2d 382 (1978). In summarizing the Workman test, the Supreme Court has written:

First, each of the elements of the lesser offense must be a necessary element of the offense charged. Second, the evidence in the case must support an

inference that the lesser crime was committed. We refer to the first prong of this test as the “legal prong” and the second prong as the “factual prong.”

State v. Berlin, 133 Wn.2d 541, 545-46, 947 P.2d 700 (1997).

When a lesser included instruction was requested and refused, and defendant has proven both prongs above, reversal is ordinarily required. State v. Parker, 102 Wn.2d 161, 163-64, 683 P.2d 189 (1984).

A. “LEGAL PRONG” ANALYSIS OF FIRST AND SECOND DEGREE TRESPASS REVEALS THEY ARE “LESSER INCLUDED” OF SECOND DEGREE BURGLARY.

Under Workman’s legal prong, a requested charge passes lesser included analysis

only if the commission of the lesser offense is *necessarily included* within the offense with which the defendant is charged in the indictment or information.

State v. Porter, 150 Wn.2d 732, 736, 82 P.3d 234 (2004) (emphasis original).

The legal prong elements test has been restated such that “if it is *possible* to commit the greater offense without having committed the lesser offense, the latter is not an included crime.” Id. at 736 (emphasis original).

Precedent establishes that first degree criminal trespass is a lesser included of burglary in the second degree. State v. Soto, 45 Wn. App. 839, 727 P.2d 999 (1987).

With regard to second degree trespass, that offense occurs where one has entered or remained unlawfully on “premises.” RCW 9A.52.080. RCW 9A.52.010 defines premises to include “any building, dwelling, structure used for commercial aquaculture, or any real property.”

Given that one could not commit a second degree burglary offense that is not committed in a building or on any real property, it is not possible to commit a second degree burglary that does not also constitute second degree criminal trespass.

B. “FACTUAL PRONG” ANALYSIS REVEALS DEFENDANT RAISED AN INFERENCE HE DID NOT INTEND TO COMMIT A CRIME.

Even if the requested charges are *legally* lesser includeds, the jury should not be instructed on them in a given case unless the factual prong is also passed. Berlin, 133 Wn.2d at 545-46. In explaining the factual test, the Supreme Court has written:

There must be a factual showing more particularized than the sufficient evidence already required for other jury instructions. Specifically we have held that the evidence must raise an inference that *only* the lesser included... offense was committed to the exclusion of

the charged offense. In other words, the evidence must affirmatively establish the defendant's theory of the case – it is not enough that that the jury might disbelieve the evidence pointing to guilty.

Porter, 141 Wn.2d at 737 (emphasis original). That evidence should be reviewed in the light most favorable to the requesting party. Id. at 455-56.

The central distinction between trespass (both first and second degree) and burglary, is that the latter carries the additional element of “an intent to commit a crime” during the commission of the burglary. RCW §§ 9A.52.030, -.070, -.080. Thus defendant, under the factual prong, must show substantial evidence in the record affirmatively indicating defendant had no intent to commit a crime.

Defendant's arguments on appeal however, address exclusively the notion that the State submitted insufficient evidence to show defendant intended to commit a crime while on Popcock property. Arguments that the jury might not have believed the State's evidence that he *did* intend to commit a crime are irrelevant. Porter, 141 Wn.2d at 737 ([T]he evidence must *affirmatively* establish the defendant's theory of the case – it is not enough that

that the jury might disbelieve the evidence pointing to guilty.”)
(Emphasis added).

Nonetheless, defendant testified that, though he entered the property, he had no intention of stealing anything. 3RP 72, 73. And while defendant’s credibility was seriously in doubt, and his claim is in direct contravention of the entirety of the remainder of the evidence, it is entitled to be reviewed in the light most favorable to it. Given this, the State concedes defendant affirmatively established evidence in the record showing he did not intend to commit a crime.

IV. CONCLUSION

Based on the foregoing, the State concedes the matter should be remanded for retrial and the jury instructed as to first and second degree trespass as lesser included offenses.

Respectfully submitted on June 17, 2009.

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