

COURT OF APPEALS
DIVISION II
12 MAR -5 AM 11:35
STATE OF WASHINGTON
BY KD
DEPUTY

No. 42310-3-II

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO**

STATE OF WASHINGTON
Plaintiff,

v.

KIRT D. JONES
Appellant.

Appeal from Thurston County Cause No. 11-1-00608-9

STATEMENT OF ADDITIONAL GROUNDS

Kirt D. Jones #924547
Appellant, Pro se
Coyote Ridge Correction Center-F-B-21
1301 N. Ephrata Avenue
P.O. Box 769
Connell, WA 99326-0769

TABLE OF CONTENTS

TABLE OF AUTHORITIES

A. GROUNDS FOR REVIEW

- I. THE TRIAL COURT VIOLATED THE DEFENDANT'S RIGHT TO DUE PROCESS UNDER WASHINGTON CONSTITUTION, ARTICLE 1 § 3, AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT WHEN IT ENTERED JUDGMENT AGAINST HIM FOR BURGLARY AND THEFT BECAUSE SUBSTANTIAL EVIDENCE DOES NOT SUPPORT THE CHARGES.
- II. THE TRIAL COURT APPLIED A IMPERMISSIBLE MANDATORY PRESUMPTION THAT SHIFTED THE BURDEN OF PERSUASION TO THE DEFENDANT TO SHOW LACK OF CRIMINAL INTENT.
- III. THE TRIAL COURT'S FAILURE TO INCLUDE A LESSER INCLUDED OFFENSE AT TRIAL WHICH WAS THE DEFENDANT'S THEORY OF THE CASE MAY VIOLATE THE SIXTH AMENDMENT AND THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT AFFORDING A DEFENDANT A MEANINGFUL OPPORTUNITY TO PRESENT A COMPLETE DEFENSE.
- IV. FAILURE OF DEFENSE COUNSEL TO OFFER THE LESSER INCLUDED OFFENSE OF TRESPASS IN THE FIRST DEGREE WHEN THERE WAS NO TACTICAL REASON FOR NOT DOING SO. THE DEFICIENT PERFORMANCE LED TO PREJUDICE THAT VIOLATES THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE 1, § 22 OF THE WASHINGTON CONSTITUTION.

B. CONCLUSION

TABLE OF AUTHORITIES

Washington State Cases

- State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983)
State v. Berlin, 133 Wn.2d 541, 545 -546, 947 P.2d 700 (1997)
State v. Brunson, 128 Wn.2d 98, 107, 905 P.2d 346 (1995)
State v. Cantu, 156 Wn.2d 819, 826 – 27, 132 P.3d 725 (2006)
State v. Collins, 2, Wn. App. 757, 759, 470 P.2d 227, 228 (1970)
State v. Deal, 128 Wn.2d 693, 699 – 700, 911 P.2d 966 (1996)
State v. Fernandez-Medina, 141 Wn.2d 448, 6 P.3d 1150, 1153 – 54 (2000)
State v. Foster, 91 Wn.2d 466, 471 – 72, 589 P.2d 789, 794 – 95 (1979)
State v. Green, 94 Wn.2d 215, 515 P.2d 628 (1980)
State v. Hanna, 123 Wn.2d 704, 710, 871 P.2d 135 (1994)
State v. Hunter, 152 Wn. App. 30, 48 – 48 (2009)
State v. Ieremia, 78 Wn. App. 746, 755 n. 3, 899 P.2d 16, 20 n.3 (1995)
State v. Johnson, 12 Wn. App. 40, 527 P.2d 1324 (1974)
State v. Jones, 95 Wn.2d 616, 628 P.2d 472 (1981)
State v. Mace, 97 Wn.2d 840, 650 P.2d 217 (1982)
State v. Mark Arnold Johnson, Court of Appeals Case 38728-0-II (See Appendix)
State v. Moore, 7 Wn. App. 1, 499 P.2d 16 (1972)
State v. Parker, 102 Wn.2d 161, 166, 683 P.3d 189 (1984)
State v. Peterson, 133 Wn.2d 885, 948 P.2d 381 (1997)
State v. Pittman, 134 Wn. App. 376, 387 – 90, 166 P.3d 720 (2006)
State v. Portee, 25 Wn.2d 246, 253 – 54, 170 P.2d 326 (1946)
State v. Rodriguez, 121, Wn. App. 180, 184, 87 P.3d 1201 (2004)
State v. Rodriguez, 48 Wn. App. 815, 817, 740 P.2d 904, 905 (1987)
State v. Taplin, 9 Wn. App. 545, 513 P.2d 549 (1973)
State v. Trombley, 132 Wash. Reports, 514, 518 – 20, 232 P. 326 (1925)
State v. Ward, 125 Wn. App. 243, 104 P.3d 670 (2004)
State v. Warden, 133 Wn.2d 564 (1997)
State v. Workman, 90 Wn.2d 443, 447 – 48, 584 P.2d 382 (1978)

Federal Cases

- Beck v. Alabama*, 447 U.S. 625, 633, 100 S.Ct 2382, 65 L.Ed.2d 392 (1980)
California v. Trombetta, 476 U.S. 479, 485, 104 S.Ct. 2528, 2532, 81 L.Ed.2d 413 (1984)
Conde v. Henry, 198 F.3d 734, 739 – 40 (9th Cir. 1999)
Dugas v. Coplan, 428 F.3d 317, 328 (1st Cir. 2005)
Fong Foo v. United States, 369 U.S. 141, 825 S.Ct. 671, 7 L.Ed.2d 629 (1962)
Hull v. Kyler, 190 F.3d 88, 110 (3^d Cir. 1999)
In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970)
Jackson v. Virginia, 443 U.S. 307, 334, 99 S.Ct. 2781, 2797, 61 L.Ed.2d 560 (1979)
Jacobs v. Horn, 395 F.3d 91, 105 n. 8 (3^d Cir. 2005), cert. denied, 126 S.ct. 479, 163 L.Ed.2d

366 (2006)
Jermyn v. Horn, 266 F.3d 257, 282 (3^d Cir. 2001)
Kyles v. Whitley, 514 U.S. 419, 435, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995)
Sandstrom v. Montana, 442 U.S. 510, 517, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979)
Skaggs v. Parker, 235 F.3d 261, 270 – 71 (6th Cir. 2000)
Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)
U.S. v. Smack, 347 F.3d 533, 540 (3^d Cir. 1999)
United States v. Bagley, 473 U.S. 667 682, 1055 S.Ct. 3375, 87 L.Ed.2d 481 (1985), *on remand*,
Woodford v. Visciotti, 537 U.S. 19, 22, 1235 S.Ct. 357, 154 L.Ed.2d 279 (2002).
Williams v. Taylor, 529 U.S. 362, 406, 120 S.Ct. 1479, 146 L.Ed.2d 389 (2000)

Other Authorities

4 *Clark Asahel Nichols*, *on Applied Evidence* § 29 at 3664 – 65 (1928)
Fine and Ende, *WA. Prac.*, Vol. 13A, *Crim. Law* 2d, § 306 p. 46.

Statutes (RCW's)

9A.52.030
9A.52.040
9A.52.070
10.61.006
10.61.003
10.61.010

Constitutional Provisions

Fourteenth Amendment
Sixth Amendment
Wash. Constitution, Art. 1, § 22
Wash. Constitution, Art. 1, § 3

A. GROUND FOR REVIEW

- I. THE TRIAL COURT VIOLATED THE DEFENDANT'S RIGHT TO DUE PROCESS UNDER WASHINGTON CONSTITUTION, ARTICLE 1 § 3, AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT WHEN IT ENTERED JUDGMENT AGAINST HIM FOR BURGLARY AND THEFT BECAUSE SUBSTANTIAL EVIDENCE DOES NOT SUPPORT THE CHARGES.

As a part of the due process rights guaranteed under both the Washington Constitution and the United States Constitution, the state must prove every element of a crime charged beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487,488,670 P.2d 646 (1983); *In re Winship*, 397 U.S. 358,364,90 S.Ct. 1068, 1073,25 L.Ed.2d 368 (1970). As the United States Supreme Court explained in *Winship*: "[The] use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law." *In re Winship*, 397 U.S. at 364.

Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. *State v. Moore*, 7 Wn.App. 1, 499 P.2d 16 (1972). As a result, any conviction not supported by substantial evidence may be attacked for the first time on appeal as a due process violation. *Id.* "Substantial evidence" in the context of a criminal case, means evidence sufficient to persuade "an unprejudiced thinking mind of the truth of the fact to which the evidence is directed." *State v. Taplin*, 9 Wn.App. 545, 513 P.2d 549 (1973)(quoting *State v. Collins*, 2 Wn.App. 757, 759,470 P.2d 227, 228 (1970)». This includes the requirement that the state present substantial evidence "that the defendant was the one who perpetrated the crime." *State v. Johnson*, 12 Wn.App. 40, 527 P.2d 1324 (1974).

The test for determining the sufficiency of the evidence is whether, "after viewing the

evidence in the light most favorable to the prosecution, any -rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 334, 99 S.Ct. 2781,2797,61 L.Ed.2d 560 (1979); State v. Green, 94 Wn.2d 216,616 P.2d 628 (1980).

For example, in State. v. Mace, 97 Wn.2d 840, 650 P.2d 217 (1982), the defendant was charged and convicted of burglary. At trial, the state presented the following evidence: (1) during the evening in question, someone entered the victims' home in Richland without permission and took a purse, which contained a wallet and a bank access card, (2) that the card was used in a cash machine in Kennewick (an adjoining city), at 4:30 that same morning, (3) that the victim's wallet was found in a bag next to the cash machine, (4) that the bag had the defendant's fingerprints on it, and (5) that the defendant's fingerprints were also found on a piece of paper located by a second cash machine where the card was used.

Following conviction, the defendant appealed, arguing that the state had failed to present substantial evidence to support the burglary conviction. The Court of Appeals disagreed, and affirmed. The defendant then sought and obtained review by the Washington Supreme Court, which reversed, stating as follows.

Second degree burglary is defined as follows:

A person is guilty of burglary in the second degree if, with intent to commit a crime against a person or property therein, he enters or remains unlawfully in a building other than a vehicle. RCW 9A.S2.030(1). We agree with petitioner that the State failed to sustain its burden of proof. The State's evidence proved only that petitioner may have possessed the recently stolen bank cards in Kennewick. There was no direct evidence, only inferences, that he had committed second degree burglary by entering the premises in Richland. See State v. Mace, 97 Wn.2d at

In State v. Johnson No. 38728-0-II this Court's opinion states:

“The state charged the defendant with first degree theft and second degree burglary, alleging that he had entered Mr. Rude's trailer and stolen items out of it. At trial, the defense did not dispute the state's claim that there had been a burglary and a theft, as there was overwhelming evidence of the existence of the crimes. However, the defense did argue before the trial court, and the defense again argues before this court, that there is insufficient evidence that the defendant was either the person or one of the people who committed this crime.

The sole piece of evidence that the state had connecting the defendant to the crime was the existence of a single cigarette butt with the defendant's DNA on it. Although this constituted compelling evidence that the defendant had been the person who had smoked the cigarette, it was insufficient evidence that the defendant had done so in Mr. Rude's trailer, much less that the defendant had been the person or one of the people who had committed the theft and burglary.

As the defendant pointed out to the court at sentencing, it would have been easy for another person to have placed the cigarette butt in the trailer, having obtained it from his home, vehicle, or some other location where the defendant left it. As in *Mace*, this evidence only leads to a suspicion that the defendant had been involved with the crime. It does not constitute substantial evidence. As a result, this court should reverse the defendant's convictions and remand with instructions to dismiss the charges with prejudice.” **See Appendix 1**

In the case at bar, the State charged the defendant with second degree burglary and second degree theft, alleging that he had entered Mr. DyJack's business and stole item's out of it. At trial, the defense did not dispute the State's claim that there had been a burglary and a theft, as there was evidence of the existence of the crimes. However, the defendant argues before this court, there is insufficient evidence the defendant was either the person or one of the people who committed these crimes. The sole piece of evidence the State had connecting the defendant to the crimes was the existence of DNA found in the building. As in *Mace*, this evidence only leads to a suspicion the defendant had been involved with the crime; it does not constitute substantial evidence. Additionally, the State may often charge a person who possessed stolen articles, yet lack direct evidence connecting the defendant to the theft and the burglary. See, e.g., *State v.*

Trombley, 132 Wash. Reports, 514, 518 – 20, 232 P. 326 (1925). To support a conviction under these circumstances, courts have required possession of the property plus some evidence of the theft. When a person is found in possession of recently stolen property, slight corroborative evidence of other inculpatory circumstances tending to show his guilt will support a conviction. *State v. Portee*, 25, Wn.2d 246, 253 – 54, 170 P.2d (1946) (quoting 4 Clark Asahel Nichols, on *Applied Evidence* § 29 at 3664 – 65 (1928)), abrogated on other grounds by *Fong Foo v. United States*, 369 U.S. 141, 82 S.Ct. 671, 7 L.Ed.2d 629 (1962). For instance, possession of recently stolen property accompanied by additional evidence, such as the defendants' flight, the defendants' presence near the burglary scene, or the use of fictitious names could support a burglary conviction. *State v. Mace*, 97 Wn.2d 840, 843 – 45, 650 P.2d 217; *Portee*, 25 Wn.2d at 254. The only proof of the defendant's connection to these charges is DNA evidence found in the building. There is a total absence of proof that the defendant committed any crime. The essential proofs that the defendant committed the crime charged cannot be supplied by such a pyramiding of inferences. The State proved the defendants presence but did not provide evidence that the defendant took or ever possessed the owners property, or that he had the requisite intent to commit either crime. Viewed in the light most favorable to the State, the evidence shows that the defendant was in the building sometime during the period when the owner left the building unattended, but the evidence does not demonstrate that the defendant took, or ever possessed the owners property. RP at 157. The State need not have supplied direct evidence that the defendant possessed the property, but should have provided at least circumstantial evidence the defendant took the property. This circumstantial evidence could have included evidence such as witness testimony, possession of said stolen property, bank account information, or conspicuously time purchases to sustain convictions for burglary and

theft. Without more, the State's evidence is insufficient to support the defendant's convictions for second degree burglary and second degree theft. *State v. Mark Arnold Johnson, Court of Appeals Case No. 38728-0-II* (See Appendix). When the evidence is insufficient, the result should be dismissal of the theft and a remand for resentencing on the lesser included offense.

II. THE TRIAL COURT APPLIED A IMPERMISSIBLE MANDATORY PRESUMPTION THAT SHIFTED THE BURDEN OF PERSUASION TO THE DEFENDANT TO SHOW LACK OF CRIMINAL INTENT.

The defendant asks the Court to interpret a statute that could be construed to impermissibly shift the burden of persuasion to the accused and relieve the State of its obligation to prove each element of the crime. The Supreme Court held in *State v. Deal, 128 Wn.2d 693, 699 – 700, 911 P.2d 966 (1996)* (citing *State v. Brunson, 128 Wn.2d 98, 107, 905 P.2d 346 (1995)*) that under certain circumstances, RCW 9A.52.040 creates a permissive, rather than a mandatory presumption of criminal intent. A permissive presumption permits but does not require an inference of criminal intent, while a mandatory presumption mandates such an inference unless it is rebutted. Permissive presumptions do not necessarily deprive the State of its obligation to prove every element of the crime, and thus the statute is not facially invalid. However, in the defendant's case, the record suggests that the court improperly applied a mandatory presumption to criminal intent [RP 167 – 68], thus the State bore the burden of proving every element of the crime charged.

State v. Cantu, 156 Wn.2d at 825 – 828 (2006) (mandatory v. permissive inferences). Basic principles of due process require the State to prove every essential element of a crime beyond a reasonable doubt. *Deal, 128 Wn.2d at 698* (quoting *State v. Hanna, 123 Wn.2d 704, 710, 871 P.2d 135 (1994)*). Thus, the State bore the burden of proving every element of Burglary, including criminal intent. The defendant contends the trial judge employed an

impermissible mandatory presumption shifting the burden of persuasion to the defendant to show lack of criminal intent. The burden of persuasion is deemed to be shifted if the trier of fact is required to draw a certain inference upon the failure of the defendant to prove by some quantum of evidence, that the inference should not be drawn. *Deal*, 128 Wn.2d at 701 (citing *Sandstrom v. Montana*, 442 U.S. 510, 517, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979)). RCW 9A.52.040 provides that: 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 criminal intent. RCW 9A.52.040 When permissive inferences are only part of the State's proof supporting an element and not the sole and sufficient proof of such element, due process is not offended if the prosecution shows that the inference more likely than not flows from the proven fact. *Deal*, 128 Wn.2d at 700 (citing *Brunson*, 128 Wn.2d at 107). Unfortunately, the defendant's due process rights were violated due as the State's only evidence of intent to commit a crime within is a stacking of inferences. However, mandatory presumptions are more troubling. While RCW 9A.52.040 contains a constitutionally valid permissive inference, it may also be read to unconstitutionally shift the burden of persuasion to the defendant, as it was in Mr. Jones case. In the defendant's case, it appears that the court applied a mandatory presumption to find his intent was criminal. The trial judge seemed to have found the defendant's intent criminal on the belief that he was unable to provide sufficient evidence to rebut the presumption due to the defendant's right to remain silent. Statements made by the prosecutor [RP 167 – 68] improperly placed the burden on the defendant to prove his innocence instead of the State having to prove his guilt. The fact that the State failed to include RCW 9A.52.040 in the charging information used at trial further supports the defendant's

argument that a mandatory presumption was applied.

III. THE TRIAL COURT'S FAILURE TO INCLUDE A LESSER INCLUDED OFFENSE AT TRIAL, WHICH WAS THE DEFENDANT'S THEORY OF THE CASE, MAY VIOLATE THE SIXTH AMENDMENT AND THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT AFFORDING A DEFENDANT A MEANINGFUL OPPORTUNITY TO PRESENT A COMPLETE DEFENSE.

The Sixth Amendment and the Due Process Clause of the Fourteenth Amendment require that criminal defendants be afforded a meaningful opportunity to present a complete defense. *California v. Trombetta*, 467 U.S. 479, 485, 104 S.Ct. 2528, 2532, 81 L.Ed.2d 413 (1984). As such, a court's failure to include a lesser included offense in the charging information at trial, which is the basis of the defendant's theory of the case, may violate the Sixth and Fourteenth Amendments to the United States Constitution. *Beck v. Alabama*, 447 U.S. 625, 633, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980); *Conde v. Henry*, 198 F.3d 734, 739 – 40 (9th Cir. 1999). Under Washington law, a defendant may be found guilty of an offense which is a lesser included offense of the crime charged in the information. RCW 10.61.006.

The trier of fact must consider that the defendant may be found guilty of a lesser included offense, where (1) each of the elements of the lesser offense is a necessary element of the offense charged (*Legal Prong*); and (2) the evidence supports an inference that the lesser offense was committed (*Factual Prong*). *State v. Berlin*, 133 Wn.2d 541, 545 – 46, 947 P.2d 700 (1997) (citing *State v. Workman*, 90 Wn.2d 443, 447 48, 584 P.2d 382 (1978)). In other words, if the evidence would permit the trier of fact to rationally find a defendant guilty of the lesser offense and acquit him of the greater offense than the lesser included offense should have been considered. *Berlin*, 133 Wn.2d at 551 (citing *Beck v. Alabama*, 447 U.S. 635). In reviewing whether the evidence is sufficient to warrant the consideration, the court must view the

supporting evidence in the light most favorable to the party requesting the consideration. *State v. Fernandez-Medina*, 141 Wn.2d 448, 455 – 56, 6 P.3d 1150 (2000).

1. 9A.52.070 CRIMINAL TRESPASS IN THE FIRST DEGREE SATISFIES THE LEGAL PRONG OF THE *BERLIN* TEST.

Under the Legal prong of the *Berlin* test, each of the elements of the lesser offense must be a necessary element of the offense charged. *Berlin*, 133 Wn.2d at 550 (citing *State v. Workman*, 90 Wn.2d at 447 – 48)). The Supreme Court emphasized that both the statutory language of RCW 10.61.006 and the language of *Workman* necessitate that the court must examine the elements of the offense charged. In making the determination whether a lesser offense satisfies the legal prong of the *Berlin* test, the Court must examine the crime with which the defendant is charged. *Id.*, 133 Wn.2d at 500. The defendant was charged in this case with 2nd degree Burglary, which requires an intent to commit a crime against a person or property therein. RCW 9A.52.030. Here, the State failed to supply proof that the defendant committed any crime beyond criminal trespass in the First Degree (RCW 9A.52.070), or had the requisite intent required by RCW 9A.52.030.

2. THERE WAS PROOF IN THE RECORD WHICH SATISFIED THE FACTUAL PRONG WHEN VIEWED IN THE LIGHT MOST FAVORABLE TO THE DEFENDANT.

Each side is entitled to have instructions embodying its theory of the case if there is sufficient evidence to support that theory. *Berlin*, 133 Wn.2d at 546. To satisfy the factual prong of the *Berlin* test, the evidence presented must support an inference that RCW 9A.52.070, Criminal Trespass in the First Degree, was committed. *Berlin*, 133 Wn.2d at 551. Thus, if the evidence would permit the trier of fact to rationally find the defendant guilty of Criminal

Trespass in the First Degree, and acquit him of Burglary in the Second Degree, than the lesser charge should have been included in the charging information at trial. - When the evidence supports and inference that the lesser included offense was committed, the defendant has a right to have the trier of fact consider that lesser included offense. *State v. Parker*, 102 Wn.2d 161, 166, 683 P.2d 198 (1984). Regardless of the plausibility of the circumstances, the defendant had an absolute right to have the trier of fact consider the lesser included offense on which there is evidence to support an inference it was committed. *Parker*, 102 Wn.2d at 166 (citing *State v. Jones*, 95 Wn.2d 616, 628 P.2d 472 (1981)).

3. FAILURE TO INCLUDE THE LESSER INCLUDED OFFENSE
IN THE CHARGING INFORMATION AT TRIAL
PREVENTED THE DEFENDANT FROM PRESENTING
HIS THEORY OF THE CASE.

The evidence in this case supports an inference that the lesser crime of Criminal Trespass in the First degree was committed. See RCW 9A.52.070. (A person is guilty of criminal trespass in the first degree if he knowingly enters or remains unlawfully in a building). The trier of fact could have rationally found that the defendant lacked the intent to commit a crime against a person or property therein that is required by RCW 9A.52.030, as the defendant's DNA was found in the building and it was the only evidence connecting him to the crime. Here, the trier of fact was required to choose between convicting the defendant of Burglary in the Second Degree or acquitting him. This precluded the defendant from arguing his theory of the case. When the evidence supports an inference, that the lesser included offense was committed, the defendant has the right to have the trier of fact consider that lesser included offense. *State v. Warden*, 133 Wn.2d at 564 (1997) (citing *State v. Parker*, 102 Wn.2d 161, 166, 683 P.2d 189 (1984)). Failure to have a lesser included offense in the charging information at trial prevented the defendant

from presenting his theory of the case, and is reversible error. *State v. Jones*, 95 Wn.2d 616, 628 P.2d 472 (1981).

IV. FAILURE OF DEFENSE COUNSEL TO OFFER THE LESSER INCLUDED OFFENSE OF TRESPASS IN THE FIRST DEGREE WHEN THERE WAS NO TACTICAL REASON FOR NOT DOING SO. THE DEFICIENT PERFORMANCE LED TO PREJUDICE THAT VIOLATES THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE 1, § 22 OF THE WASHINGTON CONSTITUTION.

Effective assistance of counsel is guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, and Article 1, § 22 of the Washington Constitution. See, e.g., *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In *State v. Ward*, 125 Wn.App. at 244, the court held the failure to seek a lesser included offense, absent a legitimate strategic or tactical reason, is ineffective assistance of counsel. In *State v. Pittman*, 134 Wn. App. 376, 387 – 90, 166 P.3d 720 (2006), the court held there was no legitimate reason for failing to request the lesser charge. And in a Burglary case, failure of defense counsel to offer *Criminal Trespass in the First Degree* as a lesser included offense to Burglary, was held to be ineffective assistance of counsel. *State v. Rodriguez*, 121 Wn.App. 180, 184, 87 P.3d 1201 (2004). To establish that trial counsel's representation was constitutionally inadequate, the defendant must show counsel's performance was deficient, and that the deficient performance was prejudicial to his defense. *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064. The measure of attorney performance is reasonableness under prevailing professional norms. *Id.*, at 688; Cf *Dugas v. Coplan*, 428 F.3d 317, 328 (1st Cir. 2005)(fact that trial counsel was experienced and "generally competent" is not relevant). Further, in *State v. Hunter*, 152 Wn.App. 30, 43 – 48 (2002)(Van Deren, CJ. Per curiam) (citing *State v. Workman*, 90 Wn.2d 443, 447 – 48, 584 P.2d 382 (1978)), the Court of Appeals recently decided that a defendant is entitled to an instruction

of a lesser included offense if two conditions are met: (1) each of the elements of the lesser offense must be a necessary element of the offense charged; and (2) the evidence in the case must support and inference that the lesser crime was committed. These requirements are referred to as the “Legal” and “Factual” prongs of the test. *State v. Rodriguez*, 48 Wn.App. 815, 817, 740 P.2d 904, 905 (1987). Our Supreme Court has recognized that a second way the “Legal” prong can be satisfied, is a person can be convicted of a lesser degree of the crime charged, through the lesser degree involves entirely different elements. *State v. Fernandez – Medina*, 141 Wn.2d 448, 6 P.3d 1150, 1153 – 54 (2000) (emphasizing distinction between lesser included offenses and lesser degree offenses, analysis under the “Factual” prong is identical for lesser included offenses and lesser degree offenses, in determining whether there is sufficient evidence to support the request for the lesser included offense, the evidence will be viewed in the light most favorable to the party requesting the consideration). *State v. Foster*, 91 Wn.2d 466, 471 – 72, 589 P.2d 789, 794 – 95 (1979); *State v. Ieremia*, 78 Wn.App. 746, 755 n. 3, 899 P.2d 16, 20 n.3 (1995).

Trespassing in the First Degree is the lesser included offense of Burglary in the Second Degree. Whether the lower degree charge can be committed without also committing the higher degree charge is immaterial. See, e.g., *Fine and Ende*, WA Prac., Vol. 13A, Crim. Law 2nd, § 306, p 46 (citing *State v. Peterson*, 133 Wn.2d 885, 948 P.2d 381 (1997); *Foster*, 91 Wn.2d at 471 – 72). “A person charged with a crime can be convicted of . . . a lesser degree of the crime.” *Id.*, at § 106, p. 8. RCW 10.61.003 and 10.61.010.

Focusing on the DNA evidence (regardless of whether the court of appeals finds that there was sufficient evidence that a reasonable trier of fact could have found the defendant guilty of Burglary in the Second Degree), there was sufficient evidence to support an inference that the lesser degree crime of Trespassing in the First Degree was committed. Thus, defense counsel

was ineffective for failing to request the lesser charge. The first prong of the *Strickland* test is satisfied, as it was error for defense counsel to refuse to make the request for Trespassing in the First Degree, as there was sufficient evidence to support that theory. In addition, there was not possible tactical reason for trial counsel failing to make the request. Thus, deficient performance is established. This conclusion is further supported in the decision made by Division One of the Court of Appeals in *State v. Ward*, 125 Wn.App. 243, 104 P.3d 670 (2004), an Assault in the Second Degree case where the Court held that when defense counsel did not request instructions on a lesser included offense, that failure rendered counsel ineffective, as there was no tactical advantage and his theory of the case was an all or nothing approach. *Id.*, at 250. In that case, in the instant case counsels' decision amounted to a Burglary in the Second Degree or nothing. Thus, there was no legitimate tactical reason not to request the lesser included offense. *See, Keeble v. United States*, 412 U.S. 205, 93 S.Ct. 1993, 36 L.Ed.2d. 844 (1973).

The second inquiry than becomes one of prejudice. Prejudice is established where “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceedings would have been different.” *Strickland*, 466 U.S. at 694. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.*; *United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985), *on remand*, 798 F.2d 1292 (9th Cir. Wash. (1986)); *see also, Woodford v. Visciotti*, 537 U.S. 19, 22, 123 S.Ct. 357, 154 L.Ed.2d 279 (2002) (noting that *Strickland* had “specifically rejected the proposition that the defendant had to prove it more likely than not that the outcome would have been altered”); *Williams v. Taylor*, 529 U.S. 362, 406, 120 S.Ct. 1479, 146 L.Ed.2d 389 (2000) (rejecting State courts attempt to engraft additional burden on petitioner, rather than simply applying “reasonable probability” standard); *Jacobs v. Horn*, 395 F.3d 91, 105 n. 8 (3^d Cir. 2005), *cert. denied*, 126 S.Ct. 479, 163

L.Ed.2d 366 (2005) (petitioner need not prove “conclusively” that deficiency of counsel would have led to different results); *U.S. v. Smack*, 347 F.3d 533, 540 (3^d Cir. 2003); *Jermyn v. Horn*, 266 F.3d 257, 282 (3^d Cir. 2001) (noting that reasonable probability standard is not “a stringent one”); *Hull v. Kyler*, 190 F.3d 88, 110 (3^d Cir. 1999) (the reasonable probability standard “is not a stringent one,” and is “less demanding than the preponderance standard” (citation omitted)); *Skaggs v. Parker*, 235 F.3d 261, 270 – 71 (6th Cir. 2000) (a petitioner claiming error under this standard need not prove by a preponderance of the evidence that the result would have been different, but merely that there is a reasonable probability that the results would have been different). The Supreme Court has also explained that a “reasonable probability” of a different result is shown when the information trial counsel failed to develop and present “could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.” *Kyles v. Whitely*, 514 U.S. 419, 435, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995) (footnote omitted). At trial, the defendant was prejudiced because without the option of Trespassing in the First Degree, which is the lesser included offense of Burglary in the Second Degree, the trier of fact had no lesser degree offense to choose from; it was Burglary in the Second Degree or nothing. Additionally, the defendant was also prejudiced because failure to request the lesser included offense prevented the defendant from arguing his theory of the case.

In sum, there is a reasonable probability that, but for counsel’s errors, the result would have been different; it would likely have been more favorable to the defendant, i.e., the trier of fact could have found the defendant guilty of Trespassing in the First Degree rather than Burglary in the Second Degree, with a concomitant drastically shortened time structure at sentencing.

B. CONCLUSION

Substantial evidence does not support the defendant's convictions. As a result, this court should reverse the defendant's conviction for theft and remand with instructions for resentencing on the lesser included offense.

In the alternative, this court should reverse the defendant's convictions and remand for a new trial based upon the denial of effective assistance of counsel.

For the reasons above, this court must reverse Mr. Jones' conviction for "Burglary in the Second Degree and Theft Second Degree."

Dated this 12 day of FEBRUARY, 2012.

Kirt D. Jones
Signature

The State of Washington, *Respondent*, v. Mark Arnold Johnson, *Appellant*.
COURT OF APPEALS OF WASHINGTON, DIVISION TWO
2010 Wash. App. LEXIS 1634
No. 38728-0-II
July 29, 2010, Filed

Notice:

RULES OF THE WASHINGTON COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE WASHINGTON RULES OF COURT.

Editorial Information: Subsequent History

Reported at State v. Johnson, 2010 Wn. App. LEXIS 1736 (Wash. Ct. App., July 29, 2010)

Editorial Information: Prior History

Appeal from Clark Superior Court. Docket No: 08-1-00900-9. Judgment or order under review. Date filed: 12/12/2008.
Judge signing: Honorable Roger a Bennett.

Counsel *John A. Hays*, Attorney at Law, Longview, WA, for Appellant/Cross-Respondent.
John Peterson, Clark County Prosecuting Attorney's Offi, Vancouver, WA, for Respondent/Cross-Appellant.

Judges: AUTHOR: Marywave Van Deren, J. We concur: C. C. Bridgewater, J., J. Robin Hunt, J.

Opinion

Opinion by: Marywave Van Deren
Opinion

1 Van Deren, J. - Mark Arnold Johnson appeals his convictions for second degree burglary and first degree theft, arguing that insufficient evidence supports his convictions He also contends that he received ineffective assistance of counsel when his attorney failed to object to testimony about his arrest. And he further argues that the trial court either erred or failed to exercise its discretion when it decided that it would treat prior convictions for second degree burglary and malicious mischief as separate offenses for the purpose of his offender score. The State cross appeals Johnson's sentence, arguing that Johnson's prior conviction for attempted second degree arson did not wash out after five years under subsections (2) and (4) of former RCW 9.94A.525 (2007). We hold that insufficient evidence supports Johnson's convictions and remand for dismissal.

FACTS

2 Rude Incorporated logs lands owned by timber companies, sawmills and others in Oregon and Washington. As part of its operation, Rude stores heavy machinery and a trailer containing smaller equipment on its job sites. From the fall of 2007 until the spring of 2008, Rude logged land at DNR Road 1100 in Yacolt, Washington, for the Murphy Mill, a veneer plywood plant that had bought timber from the Department of Natural Resources. Heavy snow prevented Rude from working on the property from March 16 until April 8, and Rude managed to remove much of its equipment from the job site, but the trailer and a "Cat" 1 remained. Report of Proceedings (RP) at 15.

3 When Rude's owner, Timothy Rude, 2 returned to the property on April 8, he found that the Cat had moved and that the trailer's back door had been removed. Little remained in the trailer, and the few items left behind had been destroyed. 3 Larger stolen items included a generator, a hose press, and a hydraulic cylinder. 4 Timothy contacted the Clark County Sheriff's Office and Deputy Sheriff Richard Guadan investigated the site.

4 Guadan could not retrieve useful fingerprints from the trailer. Initially, Guadan saw a cigarette on the floor of the trailer but did not take notice of it until Timothy commented that his only smoking employee would not have left the cigarette. Guadan photographed the trailer and then collected the partially smoked cigarette, which bore the letters "W-I-N." RP at 27. The state crime laboratory notified Guadan that deoxyribonucleic acid (DNA) on the cigarette matched a sample of Johnson's DNA that was on file at the Department of Corrections. 5

5 After Guadan retrieved Johnson's contact information, he visited Johnson at his girl friend's home on N.E. Dole Valley Road, a road that connected to DNR 1100 Road. Johnson exited the home with a pack of Winston cigarettes in his hand, which Guadan asked him to put down. Guadan "advised [Johnson] that he was under arrest for burglary [and] placed him into "custody." RP at 37. Johnson responded calmly, but asked questions, and Guadan explained that "we [c]ould discuss it when we got down to the precinct, and I specifically told him it was for burglary but we would talk about it later." RP at 38.

6 A fellow deputy sheriff collected Johnson's property, including the cigarettes, and Guadan offered Johnson a cigarette. Johnson partially smoked the cigarette, then threw it on the ground. Guadan retrieved it before Johnson could crush it. After the deputy retrieved the cigarette, Johnson's demeanor changed. He became "irate" and noted that the deputy had taken the cigarette for evidence, calling out "to his girlfriend that [the deputies] made him smoke a cigarette and now [they] were taking it as evidence." RP at 57. Johnson described these actions as "chickenshit" and "a punk move," and he commented on Guadan's sexuality. RP at 39.

7 At the precinct, Guadan explained that he had investigated the theft at Rude's trailer and showed Johnson a few pictures taken outside of the trailer. Johnson recognized the area as being near Tarbell Mountain and stated that he drove past the trailer while collecting wood with friends. They walked around it, stood at the back of the trailer, and drank some beer. Johnson said that they were at the trailer three or four months earlier. 6 He denied seeing the Cat or entering the trailer and commented "that the door was on it when he was there." RP at 46-47.

8 Guadan told Johnson that "we found something in the trailer, something of [yours] inside the trailer." RP at 46. As soon as Guadan told Johnson that he found something of Johnson's inside the trailer, Johnson responded, "My cigarette butt." RP at 47 (internal quotation marks omitted). Johnson did not explain how the cigarette found its way into the trailer. When questioned, Johnson stated, "I have an idea. It wasn't me." RP at 48 (internal quotation marks omitted). He also stated, "Even if I did tell you, you guys [would] blame me anyway," and "I'm just gonna get blamed for it anyway." RP at 48 (internal quotation marks omitted). Eventually Johnson identified "Jimmy Smith" as the culprit, but Johnson could not supply contract information for Smith. RP at 48 (internal quotation marks omitted).

9 Guadan told Johnson that "he was under arrest for burglary and theft" and "took him down to the jail" where Guadan obtained two swabs for DNA testing. 7 RP at 49. According to Guadan, Johnson "didn't understand why we were doing this because his DNA was going to be in the [trailer] anyway." RP at 49-50. Guadan spoke to Johnson's girl friend and asked "if there were any tools or anything out of the ordinary in her house." 8 RP at 60. But Guadan did not obtain a search warrant for the girl friend's home or outbuildings, did not conduct any further investigation, did not locate any stolen property, and did not attempt to contact Jimmy Smith.

10 The State charged Johnson with second degree burglary and first degree theft. The jury convicted Johnson on both charges. At sentencing, the trial court ruled that a prior conviction for attempted second degree arson washed out after five years, but that it would include John's previous convictions for second degree burglary and malicious mischief in his offender score. The trial court sentenced Johnson to 15 months of confinement for second degree burglary and 12 months of confinement for first degree theft, to run concurrently with the burglary sentence.

11 Johnson appeals his convictions and sentences. The State cross appeals the sentences.

ANALYSIS

12 Johnson argues that, although crimes occurred, insufficient evidence supports his convictions because the State's only evidence connecting him to the crimes consisted of a cigarette butt with his DNA recovered from the trailer. The State contends that sufficient evidence supports the convictions: The evidence included (1) the presence of a cigarette butt with Johnson's DNA in the trailer, (2) Johnson's admission that he was near the trailer around the time of the crime, (3) the fact that the cigarette was the same brand Johnson smoked, (4) Johnson's acknowledgment that his cigarette was found in the trailer, and (5) the fact that Johnson lived near the trailer.

13 When reviewing sufficiency issues, we view the evidence in the light most favorable to the State to determine whether "any rational trier of fact could have found the essential element of the crime beyond a reasonable doubt." *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "In determining the sufficiency of the evidence, circumstantial evidence is not to be considered any less reliable than direct evidence." *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). Facts, such as intent, may be inferred where "plainly indicated as a matter of logical probability" and the finder of fact "determine[s] what conclusions reasonably flow" from the circumstantial evidence in a case. *Delmarter*, 94 Wn.2d at 638; *State v. Bencivenga*, 137 Wn.2d 703, 711, 974 P.2d 832 (1999). We "defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence." *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004), *abrogated in part on other grounds by Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

14 The trial court instructed the jury that the State had to prove the following elements of second degree burglary beyond a reasonable doubt:

(1) That between March 26, 2008 and April 8, 2008, MARK ARNOLD JOHNSON entered or remained unlawfully in a building;(2) That the entering or remaining was with intent to commit a crime against property therein; and(3) That this act occurred in the State of Washington.Clerk's Papers (CP) at 38. The jury instructions also informed the jury that it had to find the elements of first degree theft beyond a reasonable doubt:

1) That between March 26, 2008 and April 8, 2008, MARK ARNOLD JOHNSON wrongfully obtained . . . control over property of another;(2) That the property exceeded \$ 1500 in value;(3) That this act occurred in the State of Washington.CP at 40.

15 In closing, the State recognized the limits of its case: No one saw [Johnson] go into this trailer . . . this is purely a circumstantial evidence case." RP at 99. The State reviewed the full extent of its evidence against Johnson: (1) Johnson admitted that he and friends were on the property around the time the crime occurred; (2) a cigarette butt with Johnson's DNA was in the trailer; (3) the cigarette butt in the trailer was the same brand Johnson smoked and Rude's employee would not have smoked in the trailer; (4) when interviewed, Johnson acknowledged the presence of his cigarette butt in the trailer; (5) Johnson could not explain the cigarette butt's presence in the trailer and did not supply any additional information to the police about an individual he thought might have been involved; and (6) Johnson lived near the

property. As the State noted, "[T]he bottom line is that the evidence obtained in this case is, in fact, the case of [Johnson]'s DNA [being] found on a cigarette left inside the trailer. Period." RP at 120.

16 The State may often charge a person who possessed stolen articles yet lack direct evidence connecting the defendant to the theft and the burglary. *See, e.g., State v. Trombley*, 132 Wash. 514, 518-20, 232 P. 326 (1925). To support a conviction under these circumstances, courts have required possession of the property plus some evidence of the theft: "When a person is found in possession of recently stolen property, slight corroborative evidence of other inculpatory circumstances tending to show his guilt will support a conviction." *State v. Portee*, 25 Wn.2d 246, 253-54, 170 P.2d 326 (1946) (quoting 4 CLARK ASAHEL NICHOLS, ON APPLIED EVIDENCE 29, at 3664-65 (1928)), *abrogated on other grounds by Fong Foo v. United States*, 369 U.S. 141, 82 S. Ct. 671, 7 L. Ed. 2d 629 (1962). For instance,

possession of recently stolen property accompanied by additional evidence, such as the defendant's flight; the defendant's presence near the burglary scene; the defendant's use of fictitious names; or circumstantial proof of entry, could support a burglary conviction. *State v. Mace*, 97 Wn.2d 840, 843-45, 650 P.2d 217; *Portee*, 25 Wn.2d at 254.

17 In one instance, a team that had committed burglary at a tavern where police found a tire iron was also convicted of burglary of a second tavern because the tire iron "matched marks on the sill of the forced window." *State v. Weaver*, 60 Wn.2d 87, 88, 371 P.2d 1006 (1962). The *Weaver* court reversed the conviction:

The only proof of the [defend]ants' connection with this count is the discovery in a spot where [defend]ants had been of a tool which may or may not have been used in the commission of the offense charged. There is a total absence of proof that [defend]ants used the tool. The essential proofs that [defend]ants committed the crime charged cannot be supplied by such a pyramiding of inferences. 60 Wn.2d at 88.

18 Here, the State proved Johnson's presence but did not provide evidence that Johnson took Rude's property or that he had the requisite intent to commit either crime. Viewed in the light most favorable to the State, the evidence shows that Johnson was in the trailer sometime during the period when Rude left the trailer unattended. But that evidence does not demonstrate that Johnson took or ever possessed Rude's property. The State need not have supplied direct evidence of Johnson's possession of the property, but should have provided at least circumstantial evidence that Johnson took the property. This circumstantial evidence could have included evidence such as witness testimony, bank account information, or conspicuously timed purchases to sustain convictions for burglary and theft. Without more, the State's evidence is insufficient to support Johnson's convictions for first degree theft and second degree burglary. These convictions are reversed and we remand for dismissal. 9 See State v. Stanton, 68 Wn. App. 855, 867, 845 P.2d 1365 (1993).

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

Bridgewater and Hunt, JJ., concur.

Footnotes

1

Presumably Rude left behind a machine manufactured by Caterpillar and not a feline.

2

We refer to Mr. Rude as Timothy to distinguish him from the company.

3

According to an insurance document, Rude reported a loss of \$ 37,745.32.

4

Timothy testified that two people could move the generator without difficulty, but a single person could move it with enough effort. The hose press weighed 70 pounds and the hydraulic cylinder weighed 100 to 125 pounds.

5

Timothy did not know and had never before seen Johnson.

6

Johnson made this statement on June 2, 2008.

7

Later testing confirmed that Johnson's DNA matched the DNA recovered from the cigarette in the trailer.

8

The State did not call Johnson's girl friend and the trial court sustained the State's objection that her response was inadmissible hearsay.

9

Neither Johnson nor the State discuss in their briefs whether a lesser included offense warrants resentencing following reversal of the first degree theft and second degree robbery convictions. *See, State v. Hutchins*, 73 Wn. App. 211, 218, 868 P.2d 196 (1994); *see, e.g., State v. Bingham*, 105 Wn.2d 820, 823, 828, 719 P.2d 109 (1986). Thus, we do not remand for resentencing.