

NO. 50154-6-II

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

STATE OF WASHINGTON

Respondent,

v.

JOEY L. McMILLAN,

Appellant.

Appeal from the Superior Court of Thurston County

Cause No. 16-1-01085-1

APPELLANT'S OPENING BRIEF

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I. ASSIGNMENTS OF ERROR

1. The trial court committed reversible error by denying the defense request for an instruction on the lesser included offense contained within Burglary in the Second Degree of Criminal Trespass in the First Degree where there was both a legal and factual basis for the instruction.
2. The trial court erred, in this case involving a charge of Burglary in the Second Degree and a defense of voluntary intoxication, by refusing to instruct the jury, as sought by Mr. McMillan, of the scienter requirement for the element of the charged offense, specifically 'entering or unlawfully remaining'.

II. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Whether Mr. McMillan was entitled to a jury instruction on Criminal Trespass in the First Degree where there was a legal basis for the instruction as a lesser included of the primary offense, where he asked for such an instruction, and where the evidence was of an equivocal nature that provided a factual basis for the instruction in the light most favorable to the defendant?
2. Whether Mr. McMillan was entitled to have the jury instructed upon his theory of the case, where he proposed a modified instruction describing the scienter requirement for a necessary element of the charge of Burglary in the Second Degree, to wit: "entering or unlawfully remaining"?

III. STATEMENT OF THE CASE

i. Introduction/Procedural History

Joey Lee McMillan was charged by Information filed June 29, 2016, with Burglary in the Second Degree (RCW 9A.52.030(1)) and Malicious Mischief in the Second Degree (RCW 9A.48.080(1)(a)) for conduct

alleged to have occurred on June 25, 2016. CP5. Ultimately, Mr. McMillan was convicted after jury trial of Burglary in the Second Degree and, as to count two, the lesser-included charge of Malicious Mischief in the Third Degree. RP2 at 277-78. Jury trial commenced on March 6, 2017. RP1 at 3.

This was a case of a man in a seemingly animal-state engaging in bizarre and destructive drug-induced behavior within a state government building he had absolutely no logical reason to be inside of. Mr. McMillan's waxing and waning mental state throughout the duration of the incident was central to his defense. Specifically, on June 25, 2016, Mr. McMillan was encountered inside the Washington State Auditor's Office in Tumwater, Washington, in a state of partial undress, on all fours, and "playing with a plastic zip-lock bag that had some white substance in it". RP1 at 82, lns. 16-23; CP5. The defense was one of voluntary intoxication, and expert testimony was proffered through the defense expert, clinical and forensic psychologist Michael Stanfill, Ph.D. RP2 at 136.

Motions in Limine proceeded by agreement of the parties. RP1 at 6. A brief hearing on the issues of restraints in the courtroom was resolved by Mr. McMillan's stipulation to a leg restraint that was purportedly invisible to the jury. RP1 at 9-13. Specifically:

THE COURT: All right. Very good. I'll accept the parties' stipulation, and Mr. McMillan, we -- the court will order that based upon your stipulation and agreement that the mechanical leg restraint will be used during the pendency of this trial.

RP1 14.

The precise reason restraints were necessary at all in the courtroom in the first place is difficult to discern from the record. Following *voir dire* and opening, the State called its first witness. RP1 at 19.

ii. The State's Case

The State first called Officer Hollinger of the Tumwater Police Department to testify. RP1 at 19, ln 23. On June 25th, 2016, at approximately 6:40 p.m. the officer received a dispatch call to go to the State Auditor's Office in Tumwater located on the 3200 block of Capitol Boulevard. RP1 at 24, lns. 24-25; 25. The information available to the officer was that someone had called to report there was a half-dressed male inside the building who wasn't supposed to be there. RP1 at 28. The individual was described as a white male, who was approximately five feet eight inches in height and partially unclothed. RP1 at 30.

When Officer Hollinger arrived on scene, there were already a handful of Olympia Police Department officers on scene that had established a kind of a perimeter around the building to prevent anybody from getting out or escaping. RP1 at 32. Officer Hollinger had learned the emergency call had been placed by an employee of the Auditor's Office. RP1 at 31.

He made contact with this employee, Mr. Vas, to try and establish where he had seen the individual within the building. *Id.* The plan, testified to by Officer Hollinger, was to then form a search team with a K-9 in the lead, Officer Hollinger, and two other Olympia Police Department officers who would together enter the building and search for the individual. RP1 at 32, lns. 20-25. Officer Hollinger described the process of searching the

Auditor's Office:

We got down to the basement level, and it's fairly dark in there. It's dark in certain areas, certain hallways. Some of the larger cubicle areas it's a little bit lit from some overhead lighting, but you could tell it was darker than what it would be during normal business hours. The K-9 continued on what we would consider a good track, meaning it's pulling. It smells scent and it's on that track of that scent. We're continuing to make announcements as we're going. And of course one of us is a cover officer for the K-9 because the K-9 officer has the dog on a leash. The other officers are in kind of a cover position where they're watching for anyone to pop out of a cubicle or around a corner or something like that. So we're clearing the building on the bottom floor, and that's when we first observed Mr. McMillan.

RP1 at 36, lns. 11-24.

Officer Hollinger testified McMillan had jumped out from kind of a cubicle area almost horizontal to the ground and threw himself down right in front of the K-9. RP1 at 37. Mr. McMillan complied with the officers' commands. RP1 at 37. Mr. McMillan was detained in handcuffs. RP1 at 39. When asked by the officers, Mr. McMillan replied "either that he was alone or that no one else was with him". RP1 at 39. Following a search, no one else was encountered inside the building. RP1 at 33.

Mr. McMillan was taken to the ground floor and was left in handcuffs at a picnic table, while Officer Hollinger tried to obtain more information about the call and what Mr. Vas, who was still present, had seen. RP1 at 40, Ins. 10-13. Mr. Vas identified Mr. McMillan as the individual he had earlier seen in the building. RP1 at 55, Ins. 5-16. Mr. McMillan was searched after he was placed under arrest and brought to the parking lot level, and a used syringe was found on his person. RP1 at 40, Ins. 20-25. It “appeared used” because it had some sort of liquid inside of it. RP1 at 41, Ins. 8-13.

Although, there were no exterior signs of forced entry, there was damage observed inside the building. RP1 at 40, In. 19. The damage the responding officers observed within the Auditor’s Office was extensive:

The break room was just completely destroyed. There were chairs flipped over, items strewn about. It appeared like a fire alarm or something had been ripped off. It just – it appeared just destroyed. There was a hallway, and that led to the IT department and then several other rooms. I had noticed -- when I was clearing the building I noticed a knife stuck into a doorjamb of one of the adjacent rooms. It looked like there had been pry marks on some of the doors. There were ceiling tiles that were near the IT department, and one of the ceiling tiles looked like it had been pulled down or pushed up, just removed, and it looked like there were wires coming out from the ceiling area. There was -- further down the hall there was a cubicle area and it looked like there had been boxes that had been kind of stacked in there and opened. The contents of those boxes kind of spilled out.

RP1 at 42, Ins. 1-18.

Officer Hollinger testified about his post-*Miranda* interaction with Mr.

McMillan:

Q. Did Mr. McMillan at the time that you were speaking with him, what was his demeanor like?

A. Alert, and actually he was very polite.

Q. Did you see any tell-tale signs from him that he may have been under the influence of either methamphetamine or heroin?

A. It appeared to me that he was under the influence of methamphetamine.

Q. And what was it that you noticed or gave you that indication?

A. He seemed jittery, a little bit excited. He -- what I recall is a rapid not heart rate that I could see, but rapid breathing, all signs that would be indicative of some sort of a use of a stimulant like methamphetamine.

Q. Now, after you had described Mr. McMillan's rights to him did you ask him if he understood those rights?

A. Yes, I did.

Q. And did he indicate that he did understand those?

A. Yes.

Q. And then you asked him a series of questions, and I'll come back to that, but you asked him a series of questions about this incident, did you not?

A. Yes.

Q. Was -- were Mr. McMillan's responses appropriate to your questions, meaning they were in context, his responses, with what your question was?

A. Yes.

RP1 59, lns. 6-25; 60, lns. 1-8.

Statements attributed to Mr. McMillan by Officer Hollinger included:

Q. What did he tell you?

A. He informed me that around noon of that day he had gone to Safeway, which is the adjoining property, and he had purchased narcotics there.

Q. And did he tell you what narcotics he purchased?

A. He said that he had purchased ten dollars of heroin and ten dollars of methamphetamine.

Q. And did he tell you what he did with those items?

A. He did. He stated that he injected those items.

RP1 at 62, lns. 3-11

When asked about the combination of drugs involved, Officer Hollinger replied:

A. It was unusual to me too, but he had indicated that he had used both of those together in the syringe when he shot up.

RP1 at 63, lns. 4-5.

Officer Hollinger also testified Mr. McMillan told him he was able to gain access to the State Auditor's Office by finding an unlocked door. RP1 at 63, lns. 17-21. Mr. McMillan said he went into the building "because he indicated that people were hiding from him." RP1 at 64, lns. 10-13.

Officer Hollinger testified Mr. McMillan acknowledged that the damage done inside the break room was the result of his actions, as well as his attempt to gain access to other areas. RP1 64 at lns. 22-25; 65, lns. 1-3. He had been eating food that he had located inside the building. RP1 at 65. He also had visible scratches on his hands. RP1 at 66. Mr. McMillan, according to Officer Hollinger, recalled encountering Mr. Vas in the

building:

Q. And so he was able to recall that he encountered Mr. Vas inside that building, correct?

A. Yes. He indicated that while he was in the cubicle he had made contact with Mr. Vas, or vice versa, Mr. Vas had made contact with him, and at that point he put his pants back on.

Q. So he remembered he didn't have his pants on.

A. Yes.

Q. And he was able to put those back on.

A. Yes.

Q. You -- by the time you got there he had his pants on.

A. Correct.

RP1 at 68.

Officer Hollinger also described his contact at the scene with two other Auditor's Office employees who later arrived. RP1 at 58.

Following Officer Hollinger, the State called the employee who saw Mr. McMillan, Noel Vas. RP1 at 79. Mr. Vas, who had gone into the Auditor's Office to do some work on the weekend, described seeing some damage that initially looked like some sort of maintenance was being done, such as: a ceiling tile on the floor, hanging wires, and removed baseboard. RP1 at 80-82. He then saw "a gentlemen on his—on all fours in a the cubicle there which belongs to Mike Pierce." RP1 at 82. He was partially unclothed, "playing with a plastic zip-lock bag that had some

kind of white substance in it, and there were some chips I think.” RP1 at 82, lns. 16-23. The following exchange occurred between the two men:

I said, "Hey, how's it going?" And I think that might have startled him. And he said "Hey," and I said "Okay." So I put the key in there trying to open the door, and I said okay, let me go ahead and ask him what he's doing here. And so I started to walk towards him, and I looked to our break room. The chairs were all overturned and there was -- it was just a mess. So then something -- then it hit me, you know, that there might be something wrong. So I turned around and I went back into my office and then went out the door that way.

RP1 at 83, lns. 1-11.

Mr. Vas left and called 9-1-1 at that time. RP1 at 83 at lns. 12-14. Ms.

Vas also described in his testimony his identification of Mr. McMillan.

RP1 at 84, lns 3-9.

The State’s final witness was Diane Perry, who was also employed at the State Auditor’s Office. RP1 at 99. Ms. Perry testified about the building, damage, and associated costs. RP1 at 102. Through direct and cross-examination of this witness, it became apparent the State would be unable to establish the requisite amount (\$750) to sustain the charge in count two of Malicious Mischief in the Second Degree. RP1 116-117; *See also* RCW 9A.48.080. The jury was later instructed regarding the lesser-included offense of Malicious Mischief in the Third Degree. See CP 72-100 (Court’s Instructions to Jury). The State rested after Ms. Perry’s excusal. RP1 at 111.

iii. The Defense

Mr. McMillan called clinical and forensic psychologist Dr. Michael Stanfill, Ph.D.. RP2 at 136. Dr. Stanfill testified he was asked to meet with Mr. McMillan and get a better understanding of his psychological health, his behavioral health, and see how that played out as it related to the alleged incident. RP2 at 138. He met with Mr. McMillan, did a mental status examination, as well as an exploration of the potential role and impact that substances may have played at the time of his alleged crime. RP2 at 148. The doctor had received and reviewed a copy of the probable cause statement, copies of the police reports that were submitted, as well as a copy of the crime scene photos. RP2 at 149. After he met with Mr. McMillan, he reviewed the diagnostic criteria for substance use disorders to make sure that he (McMillan) was meeting all criteria in different domains. *Id.* Dr. Stanfill spent time looking at voluntary intoxication, doing research on case law, as well as forensic mental health research. RP2 at 150. Dr. Stanfill opined:

Q. Okay. Now, after all of the work you've done in Mr. McMillan's case regarding the charge of burglary in the second degree, what has -- what has been your conclusion regarding his state of mind on that charge?

A. In looking at voluntary intoxication there needs to be a specific mental state element. In this case for burglary and malicious mischief the mental state element is intent. So they had to have the capacity to intentionally do something. Additionally, there has to be some amount of evidence of substance use on that time, in that timeframe, and then combining those two things the substance use needs to potentially impact the ability to form that mental state at the time of the alleged offense. So that's roughly kind of speaking what I'm trying to tease out here. On the day in question from last

Junc, Mr. McMillan reported to both myself and to law enforcement that **he had taken approximately ten dollars of methamphetamine and ten dollars of heroin intravenously and shot it up using a needle.** That kind of shows that he was under the influence. He also engaged in a series of odd and very erratic behaviors. For example, he takes off his pants while he's in the building for no apparent reason. He later tells law enforcement that he doesn't (sic) have a sweater, but they can't find a sweater. He's also very paranoid and having some delusions about there being people in the building that are trying to follow him and there was a used syringe that was found on his person. **So generally I'm concluding that he was under the influence at the time as there's really no other evidence that he experiences a psychotic disorder.** He doesn't have schizophrenia. Those types of behaviors weren't continuing well into the period of time after the incident. So I'm assuming that it's kind of at that point in time there was substance use related.

Q. And what was the -- what's the reason for his lack of capacity to be able to form that intent?

A. **His methamphetamine and heroin use at that time kind of impaired his cognitive ability to fully understand that he was entering the building, that even once in the building his mental capacity kind of comes and goes.** He has mixed awareness that he's in the building at various points in time. You know, he starts off on one floor and the next thing he remembers he's on another floor in the building, those types of things. **So taking all of that into consideration I don't think he had the capacity around intent with the burglary charge.**

RP2 at 152-53 (emphasis added).

Dr. Stanfill further opined Mr. McMillan didn't have total awareness of entering the building and formed no intention to unlawfully enter a building, or the capacity for that intention. RP2 at 154. Additionally, once inside the building he also didn't necessarily have the capacity to form intent around committing a crime. *Id.* He was following and trying to find the delusion of people that were chasing him and spying on him. *Id.* As to the Malicious Mischief count:

Q. Okay. Now, on the second charge, malicious mischief in the second

degree, which is to knowingly and maliciously cause physical damage to somebody else's property in an amount exceeding \$750, now, aside from the amount of the damage, **what is your conclusion regarding his mental state on the other elements of malicious mischief?**

A. He had awareness of poking or pulling down the ceiling tiles. He also had -- and at that time he believed that he was trying to get up into the ceiling to get over to the other side to find the people. He also had awareness of going into the break room, and by his account he was -- he had some delusional belief that he was looking for drugs at that time. **There's a paranoia component to this, but generally speaking he had the capacity around intentionally engaging in those behaviors. So ultimately my opinion was that he did have the capacity to form intent around the malicious mischief charge.**

Q. Do you think he had the capacity to understand that he was causing damage to property that didn't belong to him?

A. Not necessarily. With the caveat that I don't think at that moment he really cared. **It was more about in my assessment of him does he -- not necessarily did he mean to do it but -- because I think that's kind of the ultimate question. The question in front of me is did he have the capacity to do it.**

Q. So you're saying that he understood that he was in some way causing damage to property. He at least understood that.

A. Yes.

RP2 at 154-155 (emphasis added).

On cross-examination, Dr. Stanfill testified he did not believe Mr. McMillan could formulate the capacity to unlawfully enter at that time. RP2 at 187, lns. 13-17. When asked by the State about how he could make the differentiation between his opinions as to the two crimes, he testified:

At the time that this all happened Mr. McMillan's cognitive awareness was in and out. He was under the influence of both methamphetamine and heroin. He has some mixed awareness of different times and different moments for

different things. So that -- one's mental capacity can change pretty rapidly and congruently over a period of time. **When he entered the building and stayed in the building he didn't necessarily have the capacity of awareness of what that meant.** That's different than the capacity for the awareness of going through the kitchen, moving things, looking through the fridge and so forth.

RP2 at 199 (emphasis added).

Mr. McMillan did not testify, and the Defense rested. RP2 at 230.

iv. Jury Instructions

Defense counsel submitted a number of proposed jury instructions throughout the trial.¹ Among them was a modified version of WPIC 65.02, which read:

INSTRUCTION NO. ____

A person enters or remains unlawfully in or upon premises when he or she is not then licensed, invited, or otherwise privileged to so enter or remain, and is aware of the fact that he or she is not then licensed, invited, or otherwise privileged to so enter and remain.

CP 37.

The proposed instruction provided to the trial court cited *State v. Turner*, 78 Wn.2d 276, 474 P.2d 91 (1970) and *State v. Gregor*, 11 Wn. App. 95 (1974). *See also* RP 112. WPIC 65.02, provided by the State and upon which the jury was ultimately instructed in Instruction No. 9, states: "A person enters or remains unlawfully in or upon premises when he or she is

¹ Defendant's Proposed Supplemental Jury Instructions were submitted 3/3/17 (CP 32-35), Defendant's Additional Supplemental Proposed Instructions with Case Law were submitted on 3/6/17 (CP 36-49), and Defendant's Third Additional Proposed Supplemental Jury Instructions were submitted on 3/7/17 (CP 56-57).

not then licensed, invited, or otherwise privileged to so enter or remain.”

CP 72-100, 83; WPIC 65.02.

Trial counsel articulated his theory of the defense case behind his modified instruction as follows:

MR. HACK: Well, I -- as I explained, my only concern is that -- and you can see the issue in this case which would be in Mr. McMillan's mind finding on a Saturday-- not all businesses are closed on Saturdays -- finding an unlocked door apparently. Because as we've heard there's no evidence that he forced his way into the building, I believe that there is a possibility of the jury finding strict liability here on the issue of entering a building where he is not licensed, invited or otherwise privileged. I'm concerned that the jury is simply going to say, "Doesn't matter whether he had a reason to think the building was open to the public or not. He entered a building where he had no business being, and we're going to find that."

RP2 at 123, lns 22-25; 124, lns. 1-10.

Trial counsel further made an offer of proof that he anticipated Dr. Stanfill would testify there wasn't intent on either of the elements, unlawfully entering or remaining, as well as the intent to commit a crime.² Dr. Stanfill later did testify Mr. McMillan did not have the intention to

² MR. HACK: I believe that Dr. Stanfill is prepared to testify that he doesn't think there was intent on either of these elements, either the unlawful entering or remaining or at the time of the unlawful entering or remaining any intent to commit a crime. I believe that his testimony is essentially going to say that the moment at which Mr. McMillan realized he was in a place where he wasn't supposed to be was at some point after he had done all this damage inside of the building after he had unlawfully entered or remained, and it was only at that point. So it's an issue of timing here. But I believe that Dr. Stanfill is going to testify no intent to commit a crime at the time of the entering or remaining and no actual intent to enter or remain unlawfully until he realized that he wasn't supposed to be there which was after the fact of everything else.

RP2 at 124. lns. 20-25; 125, lns. 1-10.

unlawfully enter the building, or even the capacity for that intention. RP2 at 154, Ins. 9-11. Once inside the building, Dr. Stanfill opined, McMillan didn't necessarily have the capacity to form intent around committing a crime. *Id.* at Ins. 11-13. He was following and trying to find the delusion of people that were chasing him and spying on him. *Id.* at Ins. 13-15.

The court did not find the defense modified WPIC 65.02, "well grounded" in law. The defense objected:

MR. HACK: Then I guess I'll just register a standing objection to the court failing to modify the WPICs. As Your Honor is aware, the WPICs are not -- they're not binding obviously. I mean, we are not required to follow them verbatim. So I'll just register a standing objection to the standard WPIC on this particular instruction for appeal if need be.

RP2 127.

The objection was later reiterated by trial counsel after the conclusion of testimony. RP2 228. The court considered the two cases provided, but did not find that those cases supported the giving of the defense modification under the facts of this case. *Id.*

Additionally, Mr. McMillan asked for an instruction on the lesser included offense of Criminal Trespass in the First Degree. RP2 at 222, Ins. 1-19. Specifically, Dr. Stanfill testified McMillan had brought up in the interview with him that he estimated he was still in the building 10 or 15 minutes after seeing Mr. Vas and this was the point at which he reported that he knew he was in a place where he shouldn't be, yet he

still spent an additional 10-15 minutes in there. *Id.* This was roughly consistent with the testimony of Mr. Vas and Officer Hollinger.

Mr. Vas had earlier testified about what happened when he went into the building, and saw both the damage and Mr. McMillan, who acknowledged his presence and was startled. RP1 at 82-83. Mr. Vas testified he left the building and called a supervisor and called 911. RP1 at 83 at lns. 12-14. Mr. McMillan was still in the building for some period of time before the police encountered him in their search. *See* RP1 at 32 (officers on scene established a perimeter around the building). Mr. McMillan made a statement to law enforcement indicating recent delusions. RP1 at 64, lns. 10-13. There was also evidence Mr. McMillan was coherent, responsive, and polite to law enforcement by the time they encountered him in the building. RP1 at 37 and 59-60. This was very different than Mr. Vas' testimony of an undressed man on all fours.

Ultimately, however, the trial court was not satisfied that this would be a proper lesser included offense under the facts of this case given how that evidence emerged and denied the defense request for a Criminal Trespass lesser included instruction. RP2 at 224, lns. 7-11.

v. Verdict/Sentencing

The jury reached its verdicts on March 7, 2017. RP2 at 277. The jury found Mr. McMillan guilty of Burglary in the Second Degree as charged

in Count One. *Id.* Mr. McMillan was found not guilty of Malicious Mischief in the Second Degree as originally charged in Court 2. RP2 at 278. The jury, however, did find Mr. McMillan guilty of the lesser degree charge of Malicious Mischief in the Third Degree. *Id.*

Sentencing occurred on March 28, 2017. RP3 at 3. The State argued for the mid-point of the standard range, which was 38 months. RP3 at 4. The defense asked for a Drug Offender Sentencing Alternative (DOSA). RP3 at 8-9. Mr. McMillan was permitted his right of allocution. RP3 at 10. The trial court denied the request for a DOSA, and ordered a sentence of 38 months in-custody with the Department of Corrections in Count One and for Count Two ordered 364 days to be run concurrent to Count 1. RP3 at 14, lns. 16-23; CP 101-111. Mandatory legal financial obligations were imposed-- a \$500 Victim Penalty Assessment, a \$100 DNA collection fee, and a \$200 Criminal Filing Fee. CP 101-111. A ten-year no-contact order was imposed with the Washington State Auditor's Office located at 33200 Sunset Way SE in Tumwater, Washington. RP3 at 14, lns. 24-25. The Court signed an Order of Indigency, and Mr. McMillan timely appealed on March 31, 2017. CP 124-25; CP 112-123.

ARGUMENT

A. THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY ON CRIMINAL TRESPASS IN THE FIRST DEGREE, A LESSER-INCLUDED OFFENSE OF

BURGLARY IN THE SECOND DEGREE, REQUIRING REVERSAL.

- i. *The framework for lesser included offense analysis supports the requested instruction.*

Generally, an accused may only be convicted of offenses contained in the indictment or information. *Schmuck v. United States*, 489 U.S. 705, 717- 18, 109 S.Ct. 2091, 103 L.Ed. 734 (1989). Pursuant to statute, however, an accused “may be found guilty of an offense the commission of which is necessarily included within that with which he is charged in the indictment or information.” RCW 10.61.006.

Where requested, a party is entitled to an instruction on a lesser included offense where: (1) each element of the lesser offense must necessarily be proved to establish the greater offense as charged (legal prong); and (2) the evidence in the case supports an inference that the lesser offense was committed (factual prong). *State v. Berlin*, 133 Wn.2d 541, 548, 947 P.2d 700 (1997) (overruling *State v. Lucky*, 128 Wn.2d 727, 912 P.2d 483 (1996)); *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978). As *Workman* makes plain, the only relevant considerations are (1) whether the elements of the lesser offense are subsumed in the greater crime as it is charged and prosecuted, and (2) whether the facts viewed in the light most favorable to the defendant support the inference that the lesser crime was committed. 90 Wn.2d at 447-48; *See also*, RCW

10.61.006; U.S. Const. amends. 6, 14; Wash. Const. art. I, §§ 3, 22. The constitutional right to a lesser included offense instruction stems from the “risk that a defendant might otherwise be convicted of a crime more serious than that which the jury believes he committed simply because the jury wishes to avoid setting him free.” *Vujosevic v. Rafferty*, 844 F.2d 1023, 1027 (3rd Cir. 1988).

In applying the factual prong of the *Workman* test, a court must view the supporting evidence in the light most favorable to the party requesting the instruction. *Fernandez-Medina*, 141 Wn.2d at 455- 56. The instruction should be given “[i]f the evidence would permit a jury to rationally find a defendant guilty of the lesser offense and acquit him of the greater.” *State v. Warden*, 133 Wn.2d 559, 563, 947 P.2d 708 (1997) (citing *Beck v. Alabama*, 447 U.S. 625, 635, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980)).

Although affirmative evidence must support the issuance of the instruction, evidence in support of a lesser-included offense need not be produced by the defendant. *Fernandez-Medina*, 141 Wn.2d at 456. Instead, the trial court must consider the evidence as a whole to determine whether it supports the instruction. *Id.* An instruction requested by the defendant may be warranted, therefore, even if it contradicts the defendant’s theory of the case. *Id.* at 456-58, affirming *State v. McClam*, 69 Wn.App. 885, 850 P.2d 1377 (1993) and abrogating *State v.*

Hurchualla, 75 Wn. App. 417, 877 P.2d 1293 (1994) (rev. granted, 125 Wn.2d 1020 (1995)).

ii. *The legal support existed for instruction upon the lesser-included offense of Criminal Trespass in the First Degree.*

A jury may convict a defendant of any lesser degree of a crime or any lesser included crime. RCW 10.61.003; *State v. Tamalini*, 134 Wn.2d 725, 732, 953 P.2d 450 (1998).

Here, the legal prong was met because our appellate courts have held that legally, criminal trespass is a lesser-included offense of burglary in the second degree. *State v. Olson*, 182 Wn. App. 362, 375, 329 P.3d 121 (2014); *State v. Soto*, 45 Wn. App. 839, 840-41, 727 P.2d 999 (1986) (holding burglary in the second degree includes criminal trespass in the first degree). A person is guilty of criminal trespass in the first degree if he or she knowingly enters or remains unlawfully in a building. RCW 9A.52.070(1). A person commits second degree burglary if “with intent to commit a crime against a person or property therein, he enters or remains unlawfully in the a building.” RCW 9A.52.030(1). The elements of trespass are subsumed within Burglary.

iii. *The factual support existed for instruction upon the lesser-included offense of Criminal Trespass in the First Degree.*

The facts also supported the lesser-included instruction because a rational inference existed that Mr. McMillan only committed the lesser

offense. The evidence was equivocal regarding whether Mr. McMillan knowingly entered or remained unlawfully in the Auditor's office, as well as being equivocal regarding whether (and when) he formed the intent to commit a crime. He remained in the building for a significant period, and there was clear evidence his mental status was fluid enough to have changed at some point. An instruction requested by Mr. McMillan on the lesser included offense was warranted even if it contradicted his own theory of the case.

In *State v. Fernandez-Medina*, 141 Wn.2d 448, 451-52, 6 P.3d 1150 (2000), the defendant presented an alibi to two charges of first-degree assault but requested the trial court instruct the jury on the lesser offense of second-degree assault. The trial court refused the instruction and the Court of Appeals affirmed the decision, concluding the alibi defense negated the inference that only the lesser offense was committed. *Id.* at 452. The Supreme Court reversed, rejecting the theory that the inference supporting an instruction on a lesser offense must be drawn solely from the evidence of the party requesting the instruction. *Id.* at 456-57. Additionally, the Court concluded an accused is entitled to present more than one theory in his defense and it is for the jury, not the judge, to determine if any or all of the theories should be accepted. *Id.* at 460-61. The Court reasoned,

We believe that the jury's ability to "separate the wheat from the chaff" deserves more deference than was afforded by the courts below, and we are loathe to allow the expansion of the trial judge's authority into the fact-finding province of the jury.

Id. at 461.

In reaching its decision, the *Fernandez-Medina* Court adopted the rule expressed by the court in *McClam*, supra. 141 Wn.2d at 461. In *McClam*, this court stated,

[a]lthough there must be affirmative evidence from which the jury could find the facts of the lesser included offense . . . there is no requirement in case law that the evidence must come from the defendant or that the defendant's testimony cannot contradict the evidence.

69 Wn.App. at 889.

Viewed in the light most favorable to McMillan, the evidence supported the inference that he was guilty of criminal trespass in the first degree and not second-degree burglary.

Based on the evidence, the factual prong of the *Workman* test was satisfied. In this case, the evidence was equivocal that Mr. McMillan knew or had the capacity to know that he was unauthorized to enter the State Auditor's Office. Although it was a Saturday, the door was left unlocked. There is no proof Mr. McMillan forced entry. There was no evidence of anything conspicuous that would have put Mr. McMillan, particularly in his state, on notice the building was not to be accessed by the public. Significant evidence was presented as to Mr. McMillan's

mental state, which refuted he had the capacity to understand where he was at the time of his entry. A reasonable juror could have concluded from the evidence adduced at trial that when McMillan entered and caused damage within the building he was in a delusional, drug-induced state without sufficient capacity, but that his presentation improved by the time he spoke with law enforcement. In the interim, when his mental state changed, he remained in the building, which is the commission of the Criminal Trespass in the First Degree. In short, he could have unlawfully remained without an intent to commit any crime.

In light of the equivocal evidence, the jury could have determined either that Mr. McMillan did not intend to commit a crime because he did not have sufficient capacity or that he did not know that he was not allowed to enter the building. The jury could have believed his drug induced mental state changed while he was in the building. When he was confronted by Mr. Vas, he indisputably remained in the building, and there is no evidence he committed additional crimes before being encountered by police. The jury could have accepted Mr. McMillan's drug-induced mental state changed during the time he was within the building from the testimony of Mr. Vas and Officer Hollinger, and therefore believed he a committed Criminal Trespass by remaining in the building. The jury could have discounted the testimony of the expert and still reached such a

conclusion based on the testimony of Mr. Vas and Officer Hollinger.

Under either circumstance, the facts supported the lesser included instruction on criminal trespass. *Workman*, 90 Wn.2d at 447-48.

In sum, the facts did not overwhelmingly establish that Mr. McMillan entered the building to commit a crime or that he really knew that he was unauthorized to enter. The facts did establish a change in his mental state and presentation between the observations by Mr. Vas and the interaction with police contemporaneous to his arrest process. He remained in the building after being confronted by Mr. Vas. Accordingly, Mr. McMillan was entitled to an instruction on the lesser included offense. *Id.*

The law is clear that criminal trespass is a lesser included offense of burglary in the second degree, and the facts in this case support the lesser included offense, not exclusively the greater. *Olson*, 182 Wn. App. at 375; *Soto*, 45 Wn. App. at 840-41. Accordingly, under *Hinton*, there cannot be a tactical reason to fail to request an instruction that is both supported by the law and the facts. *Hinton v. Alabama*, 134 S.Ct. 1081, 1088, 188 L.Ed.2d 1(2014); *State v. Morris*, 176 Wn.2d 157, 176, 288 P.3d 1140 (2012); *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). In fact, trial counsel here actually asked for the instruction. The court refused and defense did not formally provide a written proposed instruction.

iv. This Court must reverse McMillan's Burglary in the Second Degree Conviction.

Because evidence in the record established a reasonable fact-finder could have found Mr. McMillan guilty of Criminal Trespass in the First Degree, the trial court erred in refusing to instruct the jury on the lesser offense. *Fernandez-Medina*, 141 Wn.2d at 461-62. As such, this court must reverse Mr. McMillan's conviction for Burglary in the Second Degree. *Id.* at 462.

B. THE JURY SHOULD HAVE BEEN INSTRUCTED UPON THE SCIENTER REQUIREMENT FOR THE ELEMENT OF BURGLARY IN THE SECOND DEGREE OF "ENTER OR REMAIN UNLAWFULLY," AS PROPOSED BY TRIAL COUNSEL.

i. The jury should have been instructed on the defense theory of the case where evidence supported it

A defendant is entitled to have his or her theory of the case submitted to the jury under appropriate instructions when the theory is supported by substantial evidence. *State v. Washington*, 36 Wn. App. 792, 793, 677 P.2d 786, review denied 101 Wn.2d 1015 (1981).

The standard of review for whether evidence supports giving a jury instruction is abuse of discretion. *State v. Walker*, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998); *State v. Green*, 182 Wn. App. 133, 152, 328 P.3d 988 (2014). When the alleged error is an error of law, the court reviews jury instructions *de novo*. *State v. Wiebe*, 195 Wn. App. 252, 255,

377 P.3d 290 (2016). However, when the alleged error is based solely on sufficiency of the evidence, the appropriate standard of review is abuse of discretion. *See also, State v. Fleming*, 155 Wn. App. 489, 503, 228 P.3d 804 (2010) (this court generally reviews the trial court's choice of jury instructions for an abuse of discretion, but it reviews alleged errors of law in jury instructions *de novo*). A trial court abuses its discretion only where its decision is manifestly unreasonable or based on untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). A party is entitled to a jury instruction on a theory of the case when evidence exists in the record to support the party's theory. *State v. Hughes*, 106 Wn.2d 176, 191, 721 P.2d 902 (1986). A party is not entitled to an instruction that is not supported by the evidence. *Hughes*, 106 Wn.2d at 191.

In this case, Mr. McMillan's theory of the case was that as a result of voluntary intoxication he had neither the capacity nor knowledge to have entered and unlawfully remained in the State Auditor's Office. He further argued, as a result of his fluid mental state, he did not enter or remain with the intent to commit a crime. Through both lay and expert testimony, there was evidence that his mental state changed during the time he was within the Auditor's Office. Defense counsel proposed a modified WPIC 65.02 (CP 37) out of concern the jury would find Mr. McMillan strictly

liable on the issue of entering a building where he is not licensed, invited or otherwise privileged where the facts indicated McMillan's fluid, subjective mental state and where he went into the office that was not objectively closed at all times to the public through an unlocked door. *See* RP2 at 123, lns 22-25; 124, lns. 1-10. Very much at issue was whether Mr. McMillan formed an intent to enter and lawfully remain. For example, Dr. Stanfill testified Mr. McMillan did not have the intention to unlawfully enter the building, or even the capacity for that intention. RP2 at 154, lns. 9-11. Once inside the building, Dr. Stanfill opined, McMillan didn't necessarily have the capacity to form intent around committing a crime. *Id.* at lns. 11-13. He was following and trying to find the delusion of people that were chasing him and spying on him. *Id.* at lns. 13-15.

In *State v. Scott*, 48 Wn. App. 561, 567, 739 P.2d 742 (1987), the defendant argued that in failing to define "knowledge" in the context of the accomplice liability instruction, the State was relieved of its burden of proving every element of the crime beyond a reasonable doubt. The court there was not convinced that such a term was necessarily an "element of the crime" requiring further definition and if it was not an element of the crime failure to define knowledge could not be raised for the first time on appeal. *Id.* at 568.

Scott acknowledged however that further definition of an element of a

crime is required if the element is not one of common understanding. *State v. Pawling*, 23 Wn. App. 2r26, 597 P.2d 1367 (1979); *State v. Davis*, 27 Wn. App. 498, 618 P.2d 1034 (1980). In *State v. Allen*, 101 Wn.2d 355, 678 P.2d 798 (1984), the Washington Supreme Court held that failure to define the mental element of intent is reversible error if such a definitional instruction is requested. *Allen*, at 362, 678 P.2d 798. One court has also stated in dicta that “it would be constitutional error to fail to define intent”, which would allow a defendant to raise the issue for the first time on appeal. *State v. Boot*, 40 Wn.App. 215, 218, 697 P.2d 1034 (1985). In this matter, the jury was not instructed on the definition of “knowledge” as it related explicitly to the element of “enter or unlawfully remain”.

ii. *The elements of ‘entering or remaining unlawfully’ contained in the Burglary in the Second Degree statute necessarily require proof of scienter.*

A person commits second degree burglary if “with intent to commit a crime against a person or property therein, he enters or remains unlawfully in the a building.” RCW 9A.52.030(1). A person enters or remains unlawfully in premises when he or she “is not then licensed, invited, or otherwise privileged to so enter or remain.” RCW 9A.52.010.

To enter or remain unlawfully implies a knowledge component, or scienter. *See State v. Allen*, 101 Wn.2d 355, 361, 678 P.2d 798 (1984) (The crimes of second degree burglary and the lesser-included offense of

first degree criminal trespass include specific mental states; for burglary, intent to commit a crime, and for trespass, knowing unlawful entry into or remaining in a building. Intent and knowledge have been statutorily defined by the Legislature.)

Unless the Burglary in the Second Degree statute expressly eliminates the element of intent or knowledge, which it does not, “the ingredients of intent, design and purpose should be deemed indispensable to a proof of guilt”. *State v. Thrift*, 4 Wn.App. 192, 480 P.2d 222 (1971); *Turner*, 78 Wn.2d 276 . *Turner*, cited below by Mr. McMillan, involved the burning of the flag and a jury instruction that read: “You are instructed that it is not required that you find that the defendant intended to violate the law. You are only required to find that the defendant performed the physical act charged.” 78 Wn.2d at 280. The court held, the accused’s state of mind remains an issue of fact to be inferred by the jury where intent, purpose, and design are elements of the crime charged. *Id.* at 283-84. The state, to sustain a conviction, was obliged to prove that the burning of the flag in public was done with an intent. *Id.* at 284.

Here, while the jury was instructed elsewhere on the definition of knowledge, this was not connected in any manner to the instruction that defined “enter or unlawfully remain.” The culpable mental state(s), because they have been statutorily defined, have specific legal definitions

aside from any common understanding or dictionary definitions that might be ascribed to them. *Allen* at 362. Where this linkage was not made, this court cannot assume, in the absence of the modified instruction proposed by counsel, the jury applied the correct definition to the element of the charged offense of “to enter or unlawfully remain”.

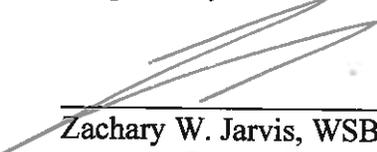
iii. Mr. McMillan was prejudiced by the refusal of the court to give his instruction and reversal is warranted.

This trial court’s refusal to give his instruction which included the scienter requirement prejudiced Mr. McMillan in that it almost certainly affected his jury verdict by relieving the State of its burden of proving his knowledge as to the “enter or remain unlawfully” element of the charged offense. The modified WPIC proposed by defense was supported by the law and the facts in this case, and, accordingly the jury should have been so instructed.

V. CONCLUSION

For the reasons set forth above, Mr. McMillan respectfully requests that this Court reverse his conviction and remand for a new trial.

Respectfully submitted this 26th day of October, 2017.



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DECLARATION OF SERVICE

I hereby declare that on October 26, 2017, I filed **Appellant's Opening Brief** in the Court of Appeals for Division II via Electronic Filing for the Court of Appeals and delivered via US Mail and E-mail the same to:

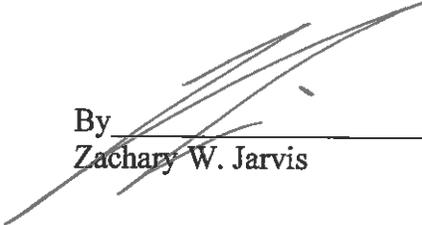
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I declare under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated October 26, 2017.

By 
Zachary W. Jarvis

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October 26, 2017 - 10:25 AM

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Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 50154-6
Appellate Court Case Title: State of Washington, Respondent v. Joey L. McMillan, Appellant
Superior Court Case Number: 16-1-01085-1

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