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IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

GREGORY SHARLOW,
Appellant.

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

The Honorable John Skinder, Judge

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The evidence was insufficient to convict the appellant of attempted first degree burglary as alleged in Count 1.

2. The evidence was insufficient to convict appellant of second degree burglary as alleged in Count 2.

3. Ineffective assistance of counsel deprived the appellant of his constitutional due process right to a fair trial.

4. The appellant was prejudiced by his attorney's deficient performance.

5. The appellant was deprived of effective assistance of counsel because his trial counsel failed to propose jury instructions for criminal trespass for Counts 1 and 2.

6. The trial court failed to count two offenses that encompassed the same criminal conduct as a single offense in calculating appellant's offender score.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. As charged in this case, a conviction of attempted first degree burglary required the State prove the appellant took a substantial step toward either committing an assault while entering, inside, or in the flight from a building. Was the State's evidence on Count I sufficient to prove the required of these elements of first degree burglary? Assignment of Error 1.

2. Constitutional due process requires the State to prove

beyond a reasonable doubt all elements of a crime. To prove the crime of second degree burglary, the State must prove the defendant entered or remained unlawfully in a building or enclosed area with intent to commit a crime therein. Did the State prove the elements of second degree burglary where it did not prove beyond a reasonable doubt that the appellant entered the enclosed area with the intent to commit a crime. Assignment of Error 2.

3. The Sixth Amendment of the United States Constitution guarantees a defendant in a criminal case the right to effective assistance of counsel at trial, and defense counsel is responsible for investigating the facts and law of the case. There is some evidence that the appellant committed only the lesser included offense of attempted first degree criminal trespass in Count 1 and criminal trespass in Count 2, and this defense was consistent with the physical evidence and with defense counsel's arguments. A defendant is entitled to a lesser included instruction if the crime is legally a lesser crime than the charged offense and there is some evidence that only the lesser crime occurred. Should this Court reverse the convictions for attempted first degree burglary and second degree burglary because defense counsel was ineffective in failing to request a lesser offense instruction for those counts? Assignments of Error 3, 4 and 5.

4. Where the offenses of attempted burglary and second degree burglary occurred at the same time and place and involved the same victim, does the trial court's failure to count these offenses as the same criminal

conduct require remand for resentencing? Assignment of Error 6.

C. STATEMENT OF THE CASE

1. Procedural facts:

Greg Sharlow was charged by amended information filed in Thurston County Superior Court filed August 31, 2017 with attempted first degree burglary¹ (Count 1), second degree burglary² (Count 2), fourth degree assault³ (Count 3), obstructing a law enforcement officer⁴ (Count 4), third degree malicious mischief⁵ (Count 5), and two counts of second degree criminal trespass.⁶ (Count 6 and 7). Clerk's Papers (CP) 12-13.

a. Trial and verdict:

The matter came on for jury trial on September 25, 26, and 27, 2017, the Honorable John Skinder presiding. 1Report of Proceedings (RP) at 12-200,⁷ 2RP at 201-400, and 3RP at 401-500.

Defense did not contest Counts 4, 5, 6, and 7. 3RP at 481-82, 510-11.

The jury found Mr. Sharlow guilty as charged in the amended information. 3RP at 494-95; CP 86, 123, 124, 164, 165, 166, and 167.

b. Sentencing

¹RCW 9A.52.020(1).

²RCW 9A.52.030(1).

³RCW 9A.36.041(1)-(2).

⁴RCW 9A.76.020.

⁵RCW 9A.48.090(1).

⁶RCW 9A.52.080(1).

⁷The record of proceedings are designated as follows: 1RP - August 1, 2017 (arraignment); September 20, 2017 (status conference); September 25, 2017 (*voir dire*, jury trial); 2RP – September 25, September 26, 2017 (jury trial); 3RP

The matter came on for sentencing on October 3, 2017. 3RP at 501-522. Mr. Sharlow agreed with the State’s recitation of his criminal history, but argued that a 2005 conviction for attempted second degree assault should not be scored as a completed offense. 3RP at 504. Defense counsel also argued that Counts 1 and 2—attempted first degree burglary and second degree burglary—should be scored as the same criminal conduct.

The State argued that the 2005 attempted second degree assault conviction should be scored as a completed offense and scored as two points pursuant to RCW 9.94A.525(4), giving Mr. Sharlow an offender score of “6” and a standard range of 42.75 to 56.25 months for Count 1, and 17 to 22 months for Count 2. 3RP at 506. The State recommended a top of the range sentence of 56.25 months for Count 1, and 22 months for Count 2. 3RP at 506.

After hearing argument, the court found that the 2005 Cowlitz County case counted as a “two-point multiplier,” and that the offenses for attempted first degree burglary and second degree burglary were not part of the same course of conduct. 3RP at 518. Judge Skinder stated:

The court’s view of the evidence and the court’s view of the findings of the jury in this particular case would support the State’s argument in this court’s view that these crimes should be treated as separate courses of conduct. While the time element that [defense counsel] argues is certainly a very powerful argument, it does not change what occurred here in the court’s mind and what the jury found by their verdicts, that there was in fact a complete crime of

burglary that had ended and that Mr. Sharlow then made a separate decision to commit the attempted burglary in the first degree when he charged Ms. Atwood and slammed into her door on three occasions trying to force entry.

3RP at 518.

The court imposed a sentence of 50 months for Count 1, 20 months for Count 2, 364 days for Counts 3, 4, and 5, and 90 days for Counts 6 and 7, to be served concurrently, followed by 18 months of community custody. 3RP at 519; CP 208. The court imposed legal financial obligations including a \$500.00 crime victim penalty assessment, \$200.00 filing fee, and \$100.00 DNA collection fee. 3RP at 519-20; CP 209-10.

Timely notice of appeal was filed on October 3, 2017. CP 191-203. This appeal follows.

2. Trial testimony:

Tristin Atwood was doing yard work at her house in Thurston County, Washington in the late afternoon or early evening of July 16, 2017. 2RP at 262. As she was working in the driveway area of her house, a man tugged on the back portion of her shirt. 2RP at 270. Ms. Atwood was startled because she was wearing headphones and listening to music at the time and was not aware of his presence until he pulled on her shirt. 2RP at 271. After she felt the tug she turned around and took off the headphones and told him that he was trespassing and to get off her property. 2RP at 271. She stated that he appeared disheveled and was mumbling and gesturing incomprehensibly. 2RP

at 274. She repeatedly told him that he was trespassing and to leave at least eight times. 2RP at 274. She also asked if he needed her to call an ambulance or the police. 2RP at 274. The man, later identified as Greg Sharlow, eventually walked off her property and across the street. 2RP at 277. As he was walking he was “sort of yelling” but she could not understand what he was saying. 2RP at 278. She then called 911. The recording of the 911 call was played to the jury. 2RP at 279-83; Exhibit 22.

While making the call to 911, Ms. Atwood went inside her house and locked the front door. 2RP at 284. A wooden privacy and chain link fence encloses the perimeter of the back yard. 2RP at 257. While waiting inside the house, she heard noises behind her house from the area where a gate in the fence is located, and heard her dog barking. 2RP at 286-87. She walked outside and saw Mr. Sharlow with both hands on the gate and saw that he was “wrenching it, like he was trying to get in.” 2RP at 287. Ms. Atwood went back inside her house and called 911 a second time. 2RP at 288. The recording was played to the jury. 2RP at 291-92. As she ended the 911 call a police car arrived at her house. 2RP at 293.

Olympia police officer Eric Henrichsen responded to the report of a suspicious person at Ms. Atwood’s house in Olympia. 1RP at 188, 194. When he arrived, Officer Henrichsen saw a man later identified as Mr. Sharlow laying face up on top of the roof of the house. 1RP at 193. As Officer Henrichsen got out of his car and closed the door, Mr. Sharlow rolled off the roof and landed

on his feet. 1RP at 194. The officer stated that when Mr. Sharlow landed, "he hit his feet first and he did kind of a ninja roll, tuck and roll," and then stood up. 1RP at 194, 197. He stated that Mr. Sharlow then walked toward him, at which time the officer ordered him to sit down, but Mr. Sharlow did not comply with the officer's directives. 1RP at 198-200.

Ms. Atwood came out of the front door of the house and the officer directed her to back inside the house. 2RP at 206. As he motioned for her to move back inside the house, Mr. Sharlow, who was approximately 25 feet away from Ms. Atwood, looked at her and then "started running right at her." 2RP at 206. Ms. Atwood immediately went back inside the house and slammed the door shut. 2RP at 207. Mr. Sharlow reached the door as it closed, turned the door handle and then tried to force the door open by ramming it three times with his shoulder. 2RP at 207-08. The door did not open after he hit it, and he then ran down the steps leading from the house. 2RP at 209. Mr. Sharlow ran down the street and into a parking lot. 2RP at 210-11. Officer Henrichsen ran after him, telling him to stop or that he would be tazed. 2RP at 211. He stated that Mr. Sharlow looked back, stopped and then sat down in the parking lot. 2RP at 211. Other officers arrived and Mr. Sharlow was taken into custody. 2RP at 213.

Ms. Atwood stated that she went outside in order to tell the officer that she thought the man was behind her house and that he was trying to get through the fence. 2RP at 293-94. When she stepped out the front door, she did not

initially see Mr. Sharlow, and thought that he was at the back of the house. 2RP at 296. As she stepped on the front porch and saw him, he turned and “instantly charged” at her with his head lowered and his arms extended in front of him. 2RP at 298. She went back inside the house and locked the door using a deadbolt. 2RP at 299. He slammed against the door three times and she braced the door with her body from the other side of the door. 2RP at 300. Ms. Atwood reported that the doorjamb was cracked as a result of being rammed. 2RP at 223-25, 301, 307. Exhibit 16.

Ms. Atwood stated that to get onto the roof, a person would have to entered the portion of the yard enclosed by the fence. 2RP at 309. She stated that she believed he gained access to the roof by climbing onto a carport that adjoined the house, and noted damage that she believed was caused by Mr. Atwood. 2RP at 304. Exhibit 10.

The defense rested without calling witnesses. 3RP at 424.

D. ARGUMENT

1. THE EVIDENCE WAS INSUFFICIENT TO PROVE BEYOND A REASONABLE DOUBT THAT MR. SHARLOW INTENDED TO COMMIT ATTEMPTED FIRST DEGREE BURGLARY AND SECOND DEGREE BURGLARY

a. The State bears the burden of proving all essential elements of an offense beyond a reasonable doubt.

Greg Sharlow was convicted of attempted first degree burglary and

second degree burglary.

The State has the burden of proving each element of the crime charged beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *State v. Cronin*, 142 Wn.2d 568, 580, 14 P.3d 752 (2000). This allocation of the burden of proof to the prosecutor derives from the guarantees of due process of law contained in Article I, Section 3 of the Washington Constitution and the Fourteenth Amendment to the federal constitution. *Sandstrom v. Montana*, 442 U.S. 510, 520, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979); *State v. Acosta*, 101 Wn.2d 612, 615, 683 P.2d 1069 (1984). On a challenge to the sufficiency of the evidence, this Court must reverse a conviction when, after viewing the evidence in the light most favorable to the prosecution, no rational trier of fact could have found all the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 781, 61 L.Ed.2d 560 (1979); *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

When an innocent explanation is as equally valid as one upon which the inference of guilt may be made, the interpretation consistent with innocence must prevail. *United States v. Bautista-Avila*, 6 F.3d 1360, 1363 (9th Cir. 1993). "[U]nder these circumstances, a reasonable jury must necessarily entertain a reasonable doubt." *United States v. Lopez*, 74 F.3d 575, 577 (5th

Cir. 1996). Speculation and conjecture are not a valid basis for upholding a jury's guilty verdict. *State v. Prestegard*, 108 Wn. App. 14, 42-43, 28 P.3d 817 (2001).

b. Attempted first degree burglary

To establish an attempted first degree burglary, the State was required to prove that Mr. Sharlow had taken a substantial step toward entering or remaining unlawfully in a building with the intent to commit a crime against a person or property inside the building, and also that he assaulted a person while in the building or in immediate flight from the building. RCW 9A.52.020(1). To prove an attempt the evidence must show a person committed an act constituting a substantial step toward the commission of the crime. RCW 9A.28.020(1).

“Both the substantial step and the intent must be established beyond a reasonable doubt for a conviction to lawfully follow.” *State v. Bencivenga*, 137 wn.2d 703, 707, 974 p.2d 832 (1999) (citing *State v. Aumick*, 126 wn.2d 422, 429-30, 894 p.2d 1325 (1995)).

Here, Mr. Sharlow was never inside Ms. Atwood's house, the State could not prove unlawful entry. When there is no unlawful entry into a dwelling, the State may not rely on an inference of unlawful intent, and must prove the intent to commit a crime beyond a reasonable doubt. *County Court of Ulster County v. Allen*, 442 U.S. 140, 167, 99 S.Ct. 2213, 60 L.Ed.2d 777

(1979); *State v. Brunson*, 128 Wn.2d 98, 107-08, 905 P.2d 346 (1995). The finder of fact must look at all of the circumstances surrounding the act in determining whether the inference applies. *State v. Bergeron*, 105 Wn.2d 1, 19-20, 711 P.2d 1000 (1985).

The court may not infer intent to commit a crime from evidence that is "patently equivocal." *State v. Jackson*, 112 Wn.2d 867, 876, 774 P.2d 1211 (1989) (holding that even where defendant broke a window, inference is equally consistent with two different interpretations - attempted burglary or malicious mischief); but see *State v. Bencivenga*, 137 Wn.2d 703, 711, 974 P.2d 832 (1999) (holding inference to be appropriate in situation where facts were unequivocal, including defendant who admitted to prying lock off restaurant door at 3:30 a.m.).

In this case, the inference of an intent to commit a crime was not supported by the record. There is not sufficient evidence to prove Mr. Sharlow intended to commit an assault against Ms. Atwood at the time he ran toward her and slammed into the door or that he intended to commit a crime inside the house. The defense theory that Mr. Sharlow ran toward the door of the house in order to attempt to escape from Officer Henrichsen is equally plausible. The State presented no evidence of an intent to commit assault other than Mr. Sharlow's decision to run toward her with his arms out. The State presented to

evidence that Mr. Sharlow made threats toward Ms. Atwood; the State's argument is based merely on inference. The facts presented equally support an explanation that Mr. Sharlow was trying to get away from the officer when he ran to the house.

c. Second degree burglary

To prove the charged crime of second degree burglary, the State was required to prove beyond a reasonable doubt that Mr. Sharlow entered the fence enclosing the back yard, or remained unlawfully within the fence, with the intent to commit a crime against a person or property therein. RCW 9A.52.030(1). The State's theory was that Mr. Sharlow entered the back yard to either assault Ms. Atwood for calling the police or with the intent to steal. 3RP at 463.

As an initial matter, the State failed to prove that Mr. Sharlow entered the enclosed area in order to access the roof. Ms. Atwood testified that he could have climbed onto the roof by climbing onto an adjoining structure, which is accessible through the enclosed area, but that does not preclude Mr. Sharlow's presence on the roof by scaling the house using some means other than through the enclosed area. The evidence shows that Mr. Sharlow is particularly agile; he was seen at the back of the house outside the gate by Ms. Atwood, and by the time she concluded her second 911 call, which lasted

approximately a minute and a half, Mr. Sharlow was at the front of the house, and then rolled off the roof and then leapt to his feet, seemingly unharmed. Significantly, Ms. Atwood was unaware of his presence on the roof and did not testify that she heard him climbing or otherwise walking on the roof from the back of the house to the front. Instead, the State speculates that because Mr. Sharlow was on the roof of the house, he had to have entered the enclosed area in order to get to the roof.

Assuming *arguendo* that evidence, when viewed in a light most favorable to the State, supports the element of entry into an enclosed area, the State did not prove Mr. Sharlow acted with the objective or purpose to commit a theft or assault. Ms. Atwood did not see Mr. Sharlow in the back yard, nor did he attempt to enter the house through the sliding door. She did not hear him make any threats or any discernable statements at all, except an apparent request for sun tea she was brewing outside. 2RP at 333.

In sum, the State did not present sufficient evidence to show Mr. Sharlow entered or remained in the enclosed area with the intent to steal or assault Ms. Atwood. Therefore, the evidence is insufficient to sustain the conviction. *In re Winship*, 397 U.S. at 364.

d. The prosecution's failure to prove all essential elements requires reversal.

The absence of proof beyond a reasonable doubt of an element requires dismissal of the conviction and charge. *Jackson*, 443 U.S. at 319; *Green*, 94 Wn.2d at 221. The Fifth Amendment's Double Jeopardy Clause bars retrial of a case, such as this, where the State fails to prove an essential element. *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), reversed on other grounds, *Alabama v. Smith*, 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989).

The State failed to prove beyond a reasonable doubt that Mr. Sharlow intended to commit a crime within the enclosed backyard or in the house, essential elements of the charged offenses, and failed to prove he entered the fenced back yard. Absent proof of every essential element, the convictions in Count 1 and Count 2 must be reversed and the charges dismissed. *State v. Hundley*, 126 Wn.2d 418, 421- 22, 895 P.2d 403 (1995).

**2. DEFENSE COUNSEL WAS
INEFFECTIVE FOR FAILING TO
PROPOSE JURY INSTRUCTIONS FOR
TRESPASS IN COUNTS 1 AND 2**

A defendant has the constitutional right to the effective assistance of counsel under Wash. Const. art. 1, § 22; U.S. Const. amend. VI. To prevail on a claim that counsel was ineffective, an appellant must establish both deficient representation and resulting prejudice. *State v. Thomas*, 109 Wn.2d 222, 225,

743 P.2d 816 (1987). The standard for evaluating effectiveness of counsel is set forth in *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) and *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). The court must decide (1) whether counsel's conduct constituted deficient performance and (2) whether the conduct resulted in prejudice. To prevail, appellant must show (1) that his lawyer's representation was deficient and (2) that the deficient conduct affected the outcome of the trial. *State v. Aho*, 137 Wn.2d 736, 745, 975 P.2D 512 (1999); *Strickland*, 466 U.S. at 693-94.

Performance is deficient if it falls "below an objective standard of Reasonableness based on consideration of all the circumstances." *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). The defendant need show only a reasonable probability the outcome would have differed in order to undermine confidence in the outcome and demonstrate prejudice. *Strickland*, 466 U.S. at 693-94. Representation that falls sufficiently below an objective reasonableness standard overcomes the strong presumption of reasonableness. *Thomas*, 109 Wn.2d at 226.

a. Defense counsel was ineffective by failing to offer an instruction for first degree trespass

A defendant is entitled to a lesser included offense instruction if the proposed instruction meets the legal and factual "prongs" of the *Workman* test. *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978). The legal

prong is met where each of the elements of the lesser offense are included within the elements of the greater offense, while the factual prong is met where the evidence supports an inference that only the lesser offense was committed. *Id.* On review of the factual prong, a court examines the evidence in the light most favorable to the party seeking the instruction. See *State v. Fernandez-Medina*, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000). A defendant is entitled to a lesser included offense instruction when (1) each of the elements of the lesser included offense is a necessary element of the charged offense, and (2) the evidence supports an inference that the lesser crime was committed. *Fernandez-Medina*, 141 Wn.2d at 454 (citing *Workman*, 90 Wn.2d at 447-48).

There must be some evidence showing that the defendant committed only the lesser included offense to the exclusion of the greater charged offense. *Fernandez-Medina*, 141 Wn.2d at 456. Although affirmative evidence must support the issuance of the instruction, such evidence need not be produced by the defendant. Rather, the trial court "must consider all of the evidence that is presented at trial when it is deciding whether or not an instruction should be given." *Id.*

An attorney's failure to seek instructions for an offense with lower penalties can deprive an accused of the effective assistance of counsel. *State v. Pittman*, 134 Wn. App. 376, 383, 166 P.3d 720 (2006). Counsel's failure to request appropriate instructions constitutes ineffective assistance if: (1) there is a significant difference in the penalty between the greater and the lesser included

offense; (2) the defense strategy would be the same for both crimes; and (3) sole reliance on the defense strategy in hopes of an outright acquittal is risky.

Pittman, supra.

In *Pittman*, the defendant was charged with attempted residential burglary. At trial, his attorney failed to request the lesser-included instruction of attempted trespass. The Court of Appeals Division One reversed his conviction, finding that defense counsel's failure to request the instruction constituted ineffective assistance:

[C]ounsel's failure to request a lesser included offense instruction left Pittman in [a] tenuous position ... One of the elements of the offense charged was in doubt--his intent to commit a crime inside [the] home--but he was plainly guilty of some offense. Under the circumstances, the jury likely resolved its doubts in favor of conviction of the greater offense....His entire defense was that he never intended to commit a crime once he was inside [the] home. This was a risky defense [because] he clearly committed a crime similar to the one charged but the jury had no option other than to convict or acquit.

Pittman, 134 Wn. App. at 388.

In this case, defense counsel's failure to request instructions for attempted first degree criminal trespass in Count 1 denied Mr. Sharlow the effective assistance of counsel. First degree criminal trespass is committed when a person knowingly enters or remains unlawfully in a building. RCW 9A.52.070(1). All of the elements of attempted first degree criminal trespass are included within the crime of attempted first degree burglary, and the former

is a lesser included offense of the latter. *State v. Brunson*, 128 Wn.2d 98, 102, 905 P.2d 346 (1995).

The same is true of attempted first degree criminal trespass and attempted first degree burglary. A person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, the person does any act that is a substantial step toward the commission of that specific crime. RCW 9A.28.020.

In the case of attempted first degree criminal trespass, a person is guilty if, with intent to commit first degree criminal trespass, the person takes a substantial step toward committing criminal trespass, i.e. entering or remaining unlawfully in a building, which includes a dwelling. See also *State v. Soto*, 45 Wn. App. 839, 840-41, 727 P.2d 999 (1986) (first degree trespass is a lesser offense included within second degree burglary); *State v. Mounsey*, 31 Wn. App. 511, 517-18, 643 P.2d 892, review denied, 97 Wn.2d 1028 (1982) (first degree criminal trespass is a lesser offense included within first degree burglary).

Here, there was evidence that only an attempted criminal trespass occurred. The evidence showed that Mr. Sharlow ran toward Ms. Atwood and rammed against the closed front door with his shoulder three times. The evidence supported the defense theory that he did not intend to assault Ms. Atwood during the attempt to enter the house and had no criminal intent by attempting to enter the residence, and instead wanted to escape from the officer. 3RP at 475.

As argued above, the evidence similarly did not show that Mr. Sharlow

entered the enclosed back yard to access the roof, and if he did so, he did had no intent to commit a crime there.

As in *Pittman*, an all-or-nothing strategy exposed Mr. Sharlow to greater jeopardy than if his attorney had offered attempted first degree criminal trespass and criminal trespass as alternatives in Counts 1 and 2. Attempted first degree burglary is a class A felony. RCW 9A.52.020(1). By contrast, first degree criminal trespass is a gross misdemeanor with a maximum penalty of a year in jail. RCW 9A.36.041(2), RCW 9A.20.021(2). As in *Pittman*, Mr. Sharlow's defense—that he had no intent to commit a crime at the house, was the same for both the criminal trespass and the burglary. As such, the first degree criminal trespass would not require an inconsistent strategy with both burglary charges. Thus, there was no cost to Mr. Sharlow in submitting appropriate criminal trespass instructions as a lesser included offense.

Had the criminal trespass been offered to the jury, it was possible that they could have found guilt only on those respective charges. Given the unusual nature of the evidence, and Mr. Sharlow's apparent intoxication, it is not unlikely that the jury, "with no option other than to convict or acquit," would choose conviction, even if they had doubts about whether Mr. Sharlow took a substantial step toward entering the house or whether he entered the enclosed back yard with the intent to commit a crime therein. *Pittman*, 134 Wn. App. at 389.

An "all or nothing" strategy was unreasonable. Mr. Sharlow was denied

the effective assistance of counsel by his attorney's failure to request instructions on first degree criminal trespass.

Mr. Sharlow was prejudiced by his attorney's failure to offer instructions on criminal trespass. Both prongs of the *Strickland* test are met, and Mr. Sharlow was denied the effective assistance of counsel. *Pittman, supra*. Therefore, Mr. Sharlow's conviction must be reversed and the case remanded for a new trial.

3. THE COURT'S FAILURE TO RECOGNIZE THAT THE ATTEMPTED BURGLARY AND SECOND DEGREE BURGLARY CONVICTIONS ENCOMPASS THE SAME CRIMINAL CONDUCT REQUIRES REMAND FOR RESENTENCING

Under the Sentencing Reform Act, multiple current offenses are generally counted separately in determining the defendant's offender core. If concurrent offenses encompass the same criminal conduct, they are treated as one crime for the purposes of calculating the offender's sentence. *State v. Vike*, 125 Wn.2d 407, 410, 885 P.2d 824 (1994). RCW 9.94A.589(1)(a). Crimes encompass the same criminal conduct if they "require the same criminal intent, are committed at the same time and place, and involve the same victim." *Id.* All three prongs must be met, and the absence of any one prong prevents a finding of "same criminal conduct." *State v. Lessley*, 118 Wn.2d 773, 778, 827 P.2d 996 (1992). The relevant inquiry for finding the objective criminal intent is "the

extent to which the criminal intent, objectively viewed, changed from one crime to the next. . . . This, in turn, can be measured in part by whether one crime furthered the other.” *Vike*, 125 Wn.2d at 411 (citations omitted). To make that determination, the court must decide whether the defendant’s criminal intent, viewed objectively, changed from one crime to the next. *State v. Grantham*, 84 Wn. App. 854, 858, 932 P.2d 657 (1997). The standard focuses on whether the defendant’s objective intent remained the same for multiple offenses. *State v. Dunaway*, 109 Wn.2d 207, 214-15, 743 P.2d 1237, 749 P.2d 160 (1988).

While the sentencing court has discretion to determine whether offenses encompass the same criminal conduct, an appellate court must reverse a decision that constitutes an abuse of discretion or misapplication of the law. *State v. Haddock*, 141 Wn.2d 103, 110, 3 P.3d 733 (2000).

At sentencing, defense counsel asked the court to find that Mr. Sharlow’s convictions for attempted first degree burglary and second degree burglary constituted the same criminal conduct. 3RP at 511; CP 183-85 (Defense Sentencing Memorandum, at 1-3). The court found that the attempted first degree burglary and second degree burglary were not the same conduct, because the attempted burglary was the result of “a separate decision” to run at Ms. Atwood and slam against the front door of the house. 3RP at 518.

In this case, there is no question that the offense resulting in two burglary convictions occurred at the same time and place, and against the same victim. Based on the length of the second 911 call, the period of time from

which Ms. Atwood saw Mr. Sharlow “wrenching” on the gate at the back of the house and the time he performed the “tuck and roll” off the roof at the front of the house in front of Officer Henrichsen and then turning and running toward Ms. Atwood after she emerged from the house was lasted only about a minute and a half. 3RP at 474-75. The relevant inquiry for the intent prong is the extent to which the criminal intent, when viewed objectively, changed from one crime to the next. *State v. Tili*, 139 Wn.2d 107, 123, 985 P.2d 365 (1999). The court must examine the statutes underlying the charged offenses to determine whether the required intents are the same or different. *State v. Wilson*, 136 Wn. App. 596, 613, 150 P.3d 144 (2007). “Objective intent may be determined by examining whether one crime furthered the other or whether both crimes were a part of a recognizable scheme or plan.” *Wilson*, 136 Wn. App. at 613.

Here, the State elected to argue that Mr. Sharlow’s criminal intent to presumably enter the enclosed area of the house was to break into the house to take things or assault Ms. Atwood because she called the police. 3RP at 463. The testimony at trial, even when viewed in a light most favorable to the State, clearly showed that Mr. Sharlow’s objective purpose in committing the crimes did not change from one to another and each crime did in fact further another. *Lessley*, 118 Wn.2d at 778. There was virtually no break in time from the initial burglary (entry into the fenced yard) to the attempted burglary (ramming the front door), and in fact, the alleged burglary was ongoing as Mr. Sharlow rolled off the roof, was confronted by the officer and then attempted entry into the

same house. Under the State's theory, the intent was to acquire Ms. Atwood's property or commit an assault, and that intent did not change as the incident was ongoing. This constitutes the same criminal conduct and the two offenses count as one. RCW 9.94A.589. In these circumstances, the court misapplied the law and thus erred by determining the second degree burglary counted as a separate offense from the attempted first degree burglary. *State v. Tili*, 139 Wn.2d 107, 122, 985 P.2d 365 (1999). The remedy is to vacate the sentence and remand for resentencing based on the same criminal conduct.

E. CONCLUSION

Mr. Sharlow's convictions must be reversed because he was deprived of effective assistance of counsel when his attorney failed to request an instruction for criminal trespass.

Further, there was not sufficient evidence to prove beyond a reasonable doubt that Mr. Sharlow possessed an intent to commit either assault as alleged in Count 1, or a crime in the fenced area, as alleged in Count 2. These reasons require the reversal of Mr. Sharlow's convictions for those counts.

Alternatively, the trial court erred by failing to find that Mr. Sharlow's convictions in Counts 1 and 2 constitute the same criminal conduct and this matter should be remanded for re-sentencing.

DATED: May 7, 2018.

Respectfully submitted,
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CERTIFICATE OF SERVICE

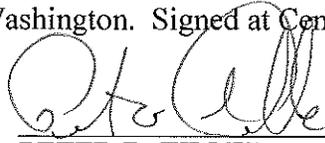
The undersigned certifies that on May 7, 2018, that this Appellant's Corrected Opening Brief was sent by the JIS link to Mr. Derek M. Byrne, Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, and Mr. Scott M. Jackson and copies were mailed by U.S. mail, postage prepaid, to the following Appellant:

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This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on May 7, 2018



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