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NO. 50967-9-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

JOSEPH A. JONES,

Appellant.

BRIEF OF APPELLANT

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ASSIGNMENT OF ERROR

Assignment of Error

1. The trial court erred and denied the defendant the opportunity to present a defense when it granted the state's motion to prevent him from testifying that when he arrived at the property allegedly burglarized the two women present at that location told him that they were there with permission from the owner.

2. The trial court erred when it refused to give the defendant's proposed instruction on the lesser included offense of first degree trespass.

Issues Pertaining to Assignment of Error

1. In a case in which a defendant is charged with Burglary, does a trial court err and deny that defendant the opportunity to present a defense under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, if it grants a state's motion that prohibits that defendant from testifying that when he arrived at the property burglarized the two women present at that location told him that they were there with permission from the owner?

2. Does a trial court err and deny a defendant due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment in a case charging burglary, if it refuses to give a defendant's proposed instruction on the lesser included offense of first degree trespass when both the facts and the law support an inference that the defendant committed that lesser offense?

STATEMENT OF THE CASE

Factual History

At about 7:00 am on June 21, 2017, 52-year-old Lawrence Smith went to a 4.3 acre lot he owns at 12647 Highway 12 in Lewis County in order to continue preparing it for the eventual placement of a mobile home. RP 44-45.¹ The property has an old cinder block house facing the highway with a 30 foot driveway leading up to a carport near the house. RP 50-51, 117, 167. The carport is open in front and has a low half walls of bricks on the other sides. *Id.* It could fit two cars and he had a number of items under it. Mr. Smith has owned the property for about 5 years but has always lived elsewhere. *Id.* He uses this property to store junk that is part of his scrap metaling business. RP 46-48. On the morning of the 21st Mr. Smith worked until about 9:30 in the morning then drove into Packwood to have breakfast at a local diner. *Id.* Although his property has a Randall address it is only about one mile from Packwood. RP 44-45.

At about 10:30 am Mr. Smith returned to his property to find a white blazer in his driveway backed up to the carport. RP 46-49. Upon

¹The record on appeal includes one continuously numbered verbatim report of the jury trial held on September 19, 2017 and September 20, 2017, as well as the sentencing hearing held on September 28, 2017. It is referred to herein as "RP [page #]."

seeing this he called 911 and pulled into the driveway to block the other vehicle. *Id.* As he did he saw two women and one man behind the Blazer standing in the carport. RP 46-49, 169. When these three people saw him he said they tried to get into the Blazer and leave with one of the females in the driver's seat. *Id.* As they did, Mr. Smith drove his truck against the front of the Blazer and pushed it about half-way into the carport. *Id.* When he did this the three people ran away from the property and started walking west on the highway towards Packwood. RP 48-49, 73. Within a few minutes Mr. Smith saw a Brown vehicle stop and give them a ride. *Id.*

Once the three trespassers drove away Mr. Smith looked inside the Blazer to find a number of items belonging to him, including a chainsaw, a grease gun, a toolbox, a metal tub, a number of small brass items and some wire. RP 54-61. He had stored all of these items in the carport. *Id.* Within a few minutes a Lewis County Sheriff's Deputy arrived, took a statement from Mr. Smith, and called to another deputy to try and locate the brown vehicle. RP 69-70. A short while later another Lewis County Deputy found the vehicle and stopped it. RP 99-100. The defendant Joseph Jones was in the front passenger seat. *Id.* Sunnie Stokes and Ashley Nelson were in the back. *Id.* Mr. Smith later identified the defendant, Ms. Stokes and Ms. Nelson as the three people who he had seen on his property. RP 94, 106-

108. In fact, the Blazer was registered to Ms. Nelson. RP 72.

In his later testimony the defendant told the jury that on June 20th he drove his truck to the campground at Skate Creek Road in order to tow a camper belonging to Ms. Stokes to another location. RP 144-147, 154. However, by the next morning he had a flat tire. RP 154. He then went to look for Ms. Stokes and Ms. Nelson to take him into town to get his tire fixed but could not find them in their camper. RP 146-148, 154. He then got a ride towards Packwood, believing that they had gone this direction. Upon driving by Mr. Smith's house he recognized Ms. Stokes Blazer and had his ride let him off. *Id.* He then walked up the driveway to the Blazer to speak with Ms Stokes and Ms. Nelson. RP 146-147.

According to the defendant, as he walked up to the Blazer Mr. Smith drove up and tried to block the Blazer. RP 146-147. He then saw Mr. Smith apparently reach for what the defendant thought was a gun so he got into the Blazer with the two women to try to get away. RP 155. However, Mr. Smith then pushed the Blazer half way into the carport. 146-148. When he did the defendant and the two women got out of the Blazer, ran up to the highway and got a ride from a passing vehicle. *Id.* The defendant denied that they had any intent to steal any of Mr. Jones' property. RP 149.

Procedural History

By informations filed June 22, 2017, the Lewis County Prosecutor charged the defendant, Ms. Stokes and Ms. Nelson with one count each of Second Degree Burglary. CP 1-3, 8-9; RP 7-9. The defendant thereafter successfully argued a motion to sever defendants. CP 23-24. However, by the time of trial Ms. Stokes was out on warrant statutes and Ms. Nelson had already pled guilty. RP 7-8.

This case came to trial before a jury beginning on September 20, 2017. During the trial the state called Mr. Smith and two of the investigating deputies as its only witnesses. RP 44, 95, 105. The defendant then took the stand in his own defense and briefly recalled one of the deputies to the stand, after which the state called Mr. Smith in rebuttal. RP 143, 161, 164. These witnesses testified to the facts included in the preceding factual history. *See* Factual History, *supra*. In addition, just prior to the defendant's testimony the court granted a state's motion *in limine* based upon a hearsay argument precluding the defendant from testifying that when he arrived at the property the two women told him that they were there with permission. RP 137-142. As a result, the defendant made no mention of this claim during his testimony and the defense made no argument from it during closing. RP 143-160, 208-217.

After the presentation of evidence the defense asked for three instructions: (1) a missing witness instruction for the state's failure to call one of the investigating officers, (2) a lesser included offense instruction on first degree trespassing, and (2) a lesser included offense instruction on second degree trespassing. RP 175-186. The court refused to give the first two proposed instructions but did give the third. RP 179-185. The court then instructed the jury. RP 188-199; CP 44-62.

Following argument in this case the jury retired for deliberation and eventually returned a verdict of guilty to second degree burglary. RP 227-231; CP 42-43. The court later sentenced the defendant within the standard range and did not impose any discretionary legal-financial obligations upon its finding that "the defendant does not have the ability to pay his/her legal financial obligations." RP 238-247; CP 66-74. The defendant thereafter filed timely notice of appeal. CP 88-89.

ARGUMENT

I. THE TRIAL COURT ERRED AND DENIED THE DEFENDANT THE OPPORTUNITY TO PRESENT A DEFENSE WHEN IT GRANTED THE STATE'S MOTION TO PREVENT HIM FROM TESTIFYING THAT WHEN HE ARRIVED AT THE PROPERTY ALLEGEDLY BURGLARIZED THE TWO WOMEN PRESENT AT THAT LOCATION TOLD HIM THAT THEY WERE THERE WITH PERMISSION FROM THE OWNER.

As part of the due process right to a fair trial under both Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, a defendant charged with a crime has the right to present and argue from relevant, exculpatory evidence in his or her defense. *State v. Hudlow*, 99 Wn.2d 1, 659 P.2d 514 (1983); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). This right derives from the principal that in criminal prosecutions due process requires that the State prove every element of the crime charged beyond a reasonable doubt. *In re Winship, supra*; *State v. McHenry*, 88 Wn.2d 211, 214, 558 P.2d 188 (1977). Thus, when a trial court limits the defendant's argument on the effect of the evidence or lack of evidence, that trial court impermissibly reduces the state's burden of proof, thereby violating the defendant's right to due process. *See Conde v. Henry*, 198 F.3d 734, 739 (9th Cir.1999) (concluding that trial court's action in limiting scope of argument as to element of crime "relieved the prosecution of its burden to prove its case beyond a

reasonable doubt”).

A trial court’s impingement upon a defendant’s right to effectively argue from the evidence or lack of evidence also violates that defendant’s right to effective assistance of counsel under United States Constitution, Sixth Amendment, and Washington Constitution, Article 1, § 22. *Herring v. New York*, 422 U.S. 853, 858, 95 S.Ct. 2550, 45 L.Ed.2d 593 (1975); *State v. Frost*, 160 Wn.2d 765, 768, 161 P.3d 361 (2007). As with other constitutional rights, a defendant denied the right to present or argue from relevant, exculpatory evidence is entitled to a new trial unless the state can prove beyond a reasonable doubt that the error was harmless. *State v. Brown*, 147 Wn.2d 330, 344, 58 P.3d 889 (2002). Under this standard, an error is not “harmless beyond a reasonable doubt where there is a reasonable probability that the outcome of the trial would have been different had the error not occurred. . . . A reasonable probability exists when confidence in the outcome of the trial is undermined.” *State v. Powell*, 126 Wn.2d 244, 267, 893 P.2d 615 (1995) (citations omitted).

In this case the defense argues that the trial court denied the defendant his right to present a defense when it precluded him from testifying that when he walked onto Mr. Smith’s property, the two women present told him that they had permission to be on the property and take

items. In this case the trial court ostensibly granted the state's motion to exclude this evidence upon the argument that it was inadmissible hearsay. However, as the following explains this ruling was in error.

Under ER 801(c) hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Under this definition, if a statement is offered to prove the defendant's state of mind as opposed to the "truth of the matter asserted," it is not hearsay and not excluded under the rule. For example, in *State v. Hamilton*, 58 Wn.App. 229, 792 P.2d 176, 178 (1990), an attorney convicted of theft for taking funds belonging to a deceased client appealed his conviction arguing that the trial court erred when it precluded him from testifying that prior to death his client had granted him permission to borrow from those funds. The basis for the trial court's ruling excluding this evidence was that it constituted inadmissible hearsay. In addressing this issue the court first noted the following concerning the hearsay rule:

Whether statements are hearsay depend upon the purpose for which they are offered. If offered to prove the truth of the matter asserted, the evidence is hearsay; if offered for another purpose, it is not. ER 801(c). Evidence of out-of-court statements may prove the mental or emotional state of a person who hears the comments. 5B K. Tegland, *Wash.Prac.* § 336 (3d ed.1989). As stated by this court in *State v. Mounsey*, 31 Wn.App. 511, 522 n. 3, 643 P.2d 892, review

denied, 97 Wash.2d 1028 (1982):

The testimony would have been proper pursuant to ER 801 and would not have been hearsay because it would have been intended to go to *Mounsey's* state of mind and not to stand for the truth of the matter stated, nor was it intended to prove the complainant's conduct pursuant to ER 404. For purposes of showing *Mounsey's* state of mind, it would not have mattered if the testimony was false, so long as it tended to prove what Mounsey was told.

Here, the conversations with Mr. Stratton were offered to prove Mr. Hamilton's belief he had permission to remove the funds from the estate bank account. If Mr. Hamilton is permitted to recount his conversations with Mr. Stratton, a jury might believe he lacked the criminal intent necessary to convict him of theft. *State v. Hicks*, 102 Wn.2d 182, 184, 683 P.2d 186 (1984); *State v. Steele*, 150 Wn. 466, 273 P. 742 (1929).

State v. Hamilton, 58 Wn.App. at 231–32.

Based upon this review of the law the court of appeals reversed the defendant's conviction and remanded for a new trial, holding as follows:

It is well established that out-of-court statements offered to show the defendant's state of mind are not hearsay and are admissible. ER 801(c); see *Brown v. Coca-Cola Bottling, Inc.*, 54 Wn.2d 665, 667–68, 344 P.2d 207 (1959) (statements of doctor not offered to prove truth, but to establish state of mind of patient); *State v. Stubsjoen*, 48 Wn.App. 139, 146, 738 P.2d 306 (statements offered to show the declarant's state of mind were not hearsay), review denied, 108 Wn.2d 1033 (1987). Similar applications of this rule have been made in *United States v. Leake*, 642 F.2d 715 (4th Cir.1981), and *United States v. Jackson*, 621 F.2d 216 (5th Cir.1980). Moreover, in criminal actions, a defendant is generally allowed to testify as to what was in his mind at the time he engaged in the harmful conduct. 2 J. Wigmore, *Evidence* § 581 (rev.1979). Thus, we find the court erred by excluding the testimony on the basis it was

hearsay. However, a proper instruction limiting the jury's use of the testimony should be given.

State v. Hamilton, 58 Wash. App. at 232.

A similar conclusion follows under the facts in the case at bar. In this case the defendant claimed that when he entered onto Mr. Smith's property, the two women present told him that they had permission to be there and take items. The defense did not offer this evidence to prove the truth of the matter contained therein. Indeed, the defense did not dispute the state's claims that the two women were present without permission and with the intent to steal. Rather, the defense offered this evidence to prove the defendant's state of mind, which was that he did not know that the owner of the property had not given permission for the women to enter and take property. Thus, in the same manner that the trial court erred in *Hamilton* when it excluded the defendant's testimony concerning the decedent's statement to him, so in this case the trial court erred when it excluded the defendant's testimony that the two women present on the property told him that they were acting with permission.

In the case at bar the evidence at trial showed that the defendant was neither the owner nor the driver of the vehicle at Mr. Smith's house. Rather, that vehicle was registered and driven by one of the two women

present. Consequently, the trial court's erroneous ruling precluding the defendant from testifying to the statement of the women denied him a fair trial in the same manner that it did in *Hamilton*. As a result this court should vacate the defendant's conviction and remand for a new trial.

II. THE TRIAL COURT ERRED WHEN IT REFUSED TO GIVE THE DEFENDANT'S PROPOSED INSTRUCTION ON THE LESSER INCLUDED OFFENSE OF FIRST DEGREE TRESPASS.

As was stated in Argument I, it is a fundamental principle of due process under both our State and Federal Constitutions that a defendant in a criminal proceeding must be permitted to argue any defense allowed under the law and supported by the facts. *State v. McCullum*, 98 Wn.2d 484, 656 P.2d 1064 (1983). Thus, the failure to instruct on a defense allowed under the law and supported by the facts constitutes a violation of due process under both Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment. *State v. MacMaster*, 113 Wn.2d 226, 778 P.2d 1037 (1989); *State v. LeBlanc*, 34 Wn.App. 306, 660 P.2d 1142 (1983).

A defendant is entitled to have the jury instructed on a lesser included offense if (1) each of the elements of the lesser offense is a necessary element of the offense charged; and (2) the evidence in the case affirmatively supports an inference that the defendant committed the

lesser crime. *State v. Workman*, 90 Wn.2d 443, 584 P.2d 382 (1978). In addition, “[r]egardless of the plausibility of th[e] circumstance, [a] defendant ha[s] an absolute right to have the jury consider the lesser included offense on which there is evidence to support an inference it was committed.” *State v. Parker*, 102 Wn.2d 161, 166, 683 P.2d 189 (1984) (citing, *inter alia*, *State v. Jones*, 95 Wn.2d 616, 628 P.2d 472 (1981)).

In the case at bar, the state charged the defendant with one count of second degree burglary alleging that the defendant entered Mr. Smith’s carport with the intent to steal. Under RCW 9A.52.030, a defendant is guilty of Second Degree Burglary if he “enters or remains unlawfully in a building other than a vehicle” and does this act “with intent to commit a crime against a person or property therein.” Under RCW 9A.52.070, a defendant is guilty of First Degree Criminal Trespass if he “knowingly enters or remains unlawfully in a building.”

As is apparent from a reading of these two statutes, every commission of a Second Degree Burglary also constitutes the commission of a First Degree Criminal Trespass. Thus, the crime of First Degree Criminal Trespass is “legally” available. *See also State v. Southerland*, 45 Wn.App. 885, 728 P.2d 1079 (1986) (First degree trespass is a lesser-included offense to any burglary). In addition, in this case the defendant did not dispute the

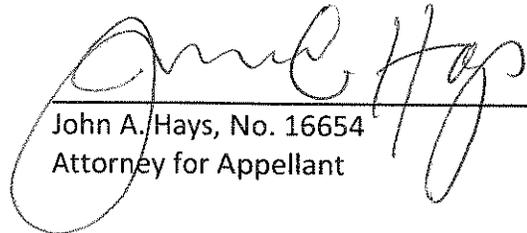
claim that he was in the carport without Mr. Smith's permission and substantial evidence presented at trial showed that he was in the carport. Thus, in this case, first degree criminal trespass was an available lesser included offense and the trial court erred when it denied the defendant's request that the court instruct on this crime. Consequently, this court should reverse the defendant's conviction and remand for a new trial in which the trial instructs the jury on the lesser included offense of first degree trespassing.

CONCLUSION

This court should reverse the defendant's conviction and remand for a new trial based upon the trial court's errors in refusing to allow the defendant to present evidence on his state of mind, and based upon the trial court's failure to give the defendant's proposed lesser included offense instruction on first degree trespassing.

DATED this 2nd day of February, 2018.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Appellant

APPENDIX

**WASHINGTON CONSTITUTION
ARTICLE 1, § 3**

No person shall be deprived of life, liberty, or property, without due process of law.

**UNITED STATES CONSTITUTION,
FOURTEENTH AMENDMENT**

All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

COURT OF APPEALS OF WASHINGTON, DIVISION II

STATE OF WASHINGTON, Respondent,	NO. 50967-9-II
vs.	AFFIRMATION OF SERVICE
JOSEPH A. JONES, Appellant.	

The under signed states the following under penalty of perjury under the laws of Washington State. On the date below, I personally e-filed and/or placed in the United States Mail the Brief of Appellant with this Affirmation of Service Attached with postage paid to the indicated parties:

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