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

STATE OF WASHINGTON,

Respondent,

vs.

JOSEPH A. JONES,

Appellant.

Appeal from the Superior Court of Washington for Lewis County

Respondent's Brief

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I. ISSUES

- A. Did the trial court err when it limited Jones' testimony regarding permission to be on the property, and if so, was the limitation harmless beyond a reasonable doubt?
- B. Did the trial court err when it failed to give the jury Jones' proposed lesser included instruction for Criminal Trespass in the First Degree?

II. STATEMENT OF THE CASE

Lawrence Smith lives in Woodland, but owns a 4.3-acre piece of property at 12647 US Highway 12. RP 44-45. While the property has a Randle address it is really about a half-mile from Packwood. RP 44. Mr. Smith has owned the property for five years. RP 44.

Mr. Smith does not currently live on the property. RP 44. Mr. Smith is in the process of setting up a mobile home on the property, remodeling it, and getting it livable. RP 45. Mr. Smith uses the property for storage and to do the remodeling on the mobile home he brought to the property. RP 45. Mr. Smith also uses the property for his livelihood, "which is scrap metaling." RP 46. Mr. Smith has moved a number of items from Woodland to the property, such as cars, vehicles, a couple of travel trailers, car trailers, equipment trailers, pieces of equipment, remodeling materials. RP 45-46. The

property has a carport and house. RP 50; Ex. 1, 2.¹ The carport is posted with a sign that states “POSTED private property hunting, fishing, trapping trespassing for any purpose is strictly forbidden violators will be prosecuted” RP 52; Ex. 4.

On June 21, 2017 Mr. Smith arrived at his property around 7:00 a.m. RP 46. Mr. Smith then left the property around 9:30 a.m. to go have breakfast at Cruisers in Packwood. RP 46-47. Mr. Smith returned to the property around 10:30 a.m. RP 46. As Mr. Smith returned back to his property he saw no other vehicles on Highway 12. RP 168-69. Mr. Smith was pulling his equipment trailer behind his truck. RP 47. Mr. Smith could see his property as he drove down the road and there was a white vehicle, later identified as a Blazer, backed up into Mr. Smith’s driveway close to his carport. RP 47.

Mr. Smith drove down his driveway, which is approximately 30 feet long and blocked in the Blazer. RP 47, 167. It was when Mr. Smith drove down the driveway he noticed the three individuals, two females and a male, later identified as Jones, in his carport. RP 47, 94, 169. Mr. Smith called 9-1-1. RP 48. All three people began yelling “let’s go” and jumped into the Blazer. RP 49. Mr. Smith then pushed the Blazer with his vehicle into the carport approximately three feet.

¹ The State will do a supplemental designation of Clerk’s papers to include exhibits.

RP 47, 67; Ex. 3. Jones and the two women jumped out of the Blazer, ran down to Highway 12, hitchhiked, and were picked up by a small brown car, heading west. RP 48-49.

Inside the Blazer were numerous items taken from Mr. Smith's carport. RP 54-60; Ex. 16, 17, 18, 19, 20, 21, 22, 27, 28. The items removed included, a metal tub, toolbox, pliers, a cutter, a barrel tub, electrical wire, brass, greaser for Mr. Smith's CAT, hydraulic oil for a loader, Dewalt sawzall and its case, cleaning supplies, light bulbs, a chainsaw, and a barbecue grill. *Id.* Mr. Smith did not know Jones, or the two women, later identified as Ashlie Nelson and Sunnie Stokes, or give anyone permission to be on his property, or to take any of his belongings. RP 61.

Lewis County Sheriff's Detective Seiber heard the call through dispatch and waited by the side of the road in Randle for the suspect vehicle to pass. RP 96-97. Detective Seiber stopped a vehicle carrying two males in the front and two females in the back. RP 97. The driver explained to Detective Seiber he picked up the three outside of Packwood, they were hitchhiking and he felt sorry for the girls. RP 98. Detective Seiber obtained identification from the other three occupants. RP. 98. The male was identified as Joseph Jones.

RP 98. The two women were Ashlie Nelson and Sunnie Stokes. RP 99.

Jones was charged with Burglary in the Second Degree as a codefendant with Sunnie Stokes and Ashlie Nelson. CP 1-2. Jones filed a motion and brief for severance. CP 8-11. The State filed a response to the motion for severance. CP 12-19. The trial court ordered severance. CP 22-24.

Jones elected to try his case to a jury. *See* RP. Jones testified he had known Ms. Stokes and Ms. Nelson for about two years. RP 144. On June 20, 2017, Jones stayed at the camp ground at Skate Creek Road in his pickup truck. RP 144. According to Jones, Ms. Nelson and Ms. Stokes stayed in the RV. RP 144.

Jones stated he woke up the morning of June 21st and when he left the campground Ms. Nelson and Ms. Stokes were already gone. RP 145. Jones' intention was to catch up to the women and see if they could help Jones fix the flat tire on his pickup truck. RP 145. Jones explained he knew where the women were going to be. RP 145. Jones testified he walked until the first person who came by picked him up and gave Jones a ride to right outside of Packwood. RP 146. According to Jones he knew where to stop because he saw Ms. Stokes' white Blazer from the road. RP 146.

Jones explained he walked across the driveway and was about to the Blazer when Mr. Smith pulled into the driveway. RP 146.

According to Jones,

[Mr. Smith started] yelling at everybody, I guess. I don't know. They were yelling back, and I thought he [, Mr. Smith,] had a gun on the side, because when he went to get in his pickup, I guess it looked like he was pulling a gun, you know. It was a cell phone later on, I found out. That's when he jumped into his pickup and rammed us.

RP 146. Jones denied ever entering the carport. RP 149.

There was an evidentiary ruling that precluded Jones from testifying that Ms. Stokes and Ms. Nelson told him they had permission to be at the property to clean it up. RP 137-42. Jones' trial counsel proposed jury instructions for two lesser included offenses, Criminal Trespass in the First Degree and Criminal Trespass in the Second Degree. RP 179-84; Supp. CP Def Prop. Instructions. The trial court declined to give the lesser included instruction for Criminal Trespass in the First Degree. RP 181-83; CP 44-62. Jones was found guilty of Burglary in the Second Degree. CP 42. Jones was sentenced to 60 days in the Lewis County Jail. CP 66-74. Jones timely appeals his conviction and sentence. CP 75-84.

The State will supplement the facts as necessary throughout its argument below.

III. ARGUMENT

A. THE TRIAL COURT ERRED WHEN IT LIMITED JONES' TESTIMONY REGARDING PERMISSION TO BE ON THE PROPERTY BUT THE LIMITATION WAS HARMLESS BEYOND A REASONABLE DOUBT.

Jones argues to this Court that his right to due process, and Sixth Amendment rights to compulsory process and right to present a defense were violated by the trial court's denial of his request to present testimony regarding what Ms. Stokes and Ms. Nelson told Jones regarding permission to be on Mr. Smith's property to clean it up. Brief of Appellant 8-13. The State concedes the trial court abused its discretion and ruled in error. That error, implicating Jones' Sixth Amendment right was harmless beyond a reasonable doubt and his conviction should be affirmed.

1. Standard Of Review.

Admissibility of evidence determinations by the trial court are reviewed under an abuse of discretion standard. *State v. Finch*, 137 Wn.2d 792, 810, 975 P.2d 967 (1999) (citations omitted).²

² Simply alleging a constitutional rights violation does not make an evidentiary ruling reviewed under a de novo standard instead of an abuse of discretion standard. See *In re Pers. Restraint of Morris*, 176 Wn.2d 157, 168, 288 P.3d 1140 (2012); *State v. Aguirre*, 168 Wn.2d 350, 361, 229 P.3d 669 (2010). The State acknowledges that in *State v. Turnispeed*, 162 Wn. App. 60, 255 P.3d 843 (2011) Division 3 held that although evidentiary determinations of a trial court are reviewed under an abuse of discretion standard, when an appellant alleges a confrontation clause violation in regards to an evidentiary ruling the proper review is de novo. *Turnispeed* is incorrectly decided and contrary to the precedent.

2. Invoking The Compulsory Process Clause And The Right Of Confrontation Guaranteed By Sixth Amendment Does Not Guarantee A Criminal Defendant's Proposed Testimony Is Admissible.

The Fourteenth Amendment to the United States Constitution guarantees that the State will not deprive a person of their liberty without due process of law. The Fourteenth Amendment guarantees that a person accused of a crime has the right to a fair trial. *State v. Statler*, 160 Wn. App. 622, 637, 248 P.3d 165 (2011), *review denied*, 172 Wn.2d 1002 (2011), *citing State v. Davis*, 141 Wn.2d 798, 824–25, 10 P.3d 977 (2000). “[T]he right to due process provides heightened protection against government interference with certain fundamental rights.” *Id.* (citations and internal quotations omitted). To satisfy the right to a fair trial, the trial court is not required to ensure the defendant has a perfect trial. *Id.*, *citing In re Elmore*, 162 Wn.2d 236, 267, 172 P.3d 335 (2007).

The due process right, in its essence, is the right for a criminal defendant to have a fair opportunity to defend him or herself against the State's accusations. *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010), *citing Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L.Ed.2d 297 (1973) (quotations omitted). A defendant is guaranteed the right to confront and cross-examine witnesses who testify against him or her and the right to compel a

witness to testify. U.S. Const. amend. VI. “A defendant’s right to an opportunity to be heard in his defense, including the rights to examine witnesses against him and to offer testimony, is basic in our system of jurisprudence.” *Jones*, 168 Wn.2d at 720. Unlike other rights guaranteed under the Sixth Amendment, the Compulsory Process Clause requires an affirmative act by a defendant and is not automatically set into play by the initiation of an adversarial process. *Taylor v. Illinois*, 484 U.S. 400, 410, 108 S. Ct. 646, 98 L. Ed. 2d 798 (1988). “The very nature of the right requires that its effective use be preceded by deliberate planning and affirmative conduct. *Taylor v. Illinois*, 484 U.S. at 410.

A defendant does not have an absolute right to present evidence. *Jones*, 168 Wn.2d at 720. Without adherence to the rules of evidence and other procedural limitations the adversary process would not function effectively because it is imperative that each party be given a fair opportunity, within the rules, “to assemble and submit evidence to contradict or explain the opponent’s case.” *Taylor v. Illinois*, 484 U.S. at 410-11.

Evidence presented by a defendant must be at the very least minimally relevant and there is no constitutional right for a defendant to present irrelevant evidence. *Jones*, 168 Wn.2d at 720. If a

defendant can show that the evidence is relevant, then the burden shifts to the State to show the trial court that the evidence is so prejudicial that it will “disrupt the fairness of the fact-finding process at trial.” *Id.* Invoking the right to compulsory process is not a free pass to present evidence that would be considered inadmissible under the Rules of Evidence. *Taylor v. Illinois*, 484 U.S. 414.

3. The State Concedes The Trial Court Erred When It Granted The States Motion To Exclude Jones’ Expected Testimony Regarding His State Of Mind.

Jones contends the trial court erroneously ruled he would not be able to testify that Ms. Nelson and Ms. Stokes told Jones they had permission to be on the property and take items. Brief of Appellant 9-13. Jones asserts the testimony he wished to introduce was not hearsay because he was not attempting to introduce it for the truth of the matter asserted. *Id.* Rather, Jones wished to testify regarding Ms. Stokes and Ms. Nelson’s assertion of permission to establish his state of mind and therefore, lack of intent to commit the crime of Burglary in the Second Degree. *Id.*

The deputy prosecutor in this matter brought a motion the second day of trial to exclude anticipated testimony from Jones regarding Ms. Stokes and Ms. Nelson’s statements about having permission to be on Mr. Smith’s property, asserting such testimony

would be hearsay. RP 137-42. Jones' trial counsel explained the testimony was to explain what was going on in Jones' mind, as far as believing he had permission based upon his understanding. RP 138. The trial court had a discussion with the deputy prosecutor, asking if it was truly hearsay, or if this was state of mind evidence, therefore not hearsay. RP 140-42. The trial court ultimately concluded, although stating it was a "close call," the statements were hearsay. RP 142. The State concedes the trial court's conclusion was incorrect and the statements Jones sought to introduce were not hearsay, but offered to show state of mind and were subject to a limiting instructions as such.

"Hearsay' is a statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801(c). Key to the analysis is whether the statement is being offered at trial for "the truth of the matter asserted." If the statement is being offered for some other purposes it is not hearsay. *State v. Duarte Vela*, 200 Wn. App. 306, 319, 402 P.3d 281 (2017), *citing State v. Hamilton*, 58 Wn. App. 229, 231, 792 P.3d 176 (1990). Courts have recognized a defendant has the right to offer evidence of out-of-court statements that may prove, if his or her testimony is believed, that said defendant lacked the

necessary mental state to commit the crime. *Hamilton*, 58 Wn. App. 231-32. “It is well established that out-of-court statements offered to show the defendant’s state of mind are not hearsay and are admissible.” *Id.* at 232 (internal citations omitted). Further, the Court of Appeals noted how a defendant in a criminal action, “is generally allowed to testify as to what was in his mind at the time he was engaged in the harmful conduct.” *Id.* Such testimony is subject to a limiting instruction. *Id.*

In *Hamilton* the Court ruled the trial court erred when it refused to allow Mr. Hamilton to testify about his conversations with Mr. Stratton, his client and the alleged victim, giving Mr. Hamilton permission to use the money for Mr. Hamilton’s law practice as Mr. Hamilton saw fit. *Id.* at 230-33. The State brought a motion in limine to exclude any testimony regarding permission Mr. Stratton may or may not have given to Mr. Hamilton to use the money. *Id.* Mr. Hamilton’s position was the testimony was not to show he actually had permission, therefore, not for the truth of the matter asserted, but to show Mr. Hamilton’s state of mind at the time of the thefts. *Id.* at 231. The Court of Appeals agreed, holding testimony was admissible because it would establish Mr. Hamilton’s state of mind, therefore the trial court erred in excluding it. *Id.* at 233.

The State cannot deny the similarity between Jones' case and *Hamilton*. Both cases deal with criminal intent regarding a defendant's perceived permission in a theft case. Therefore, the State has no choice but to concede that the trial court erred when it granted the State's motion to exclude the state of mind testimony. Unlike the Court in *Hamilton*, the inquiry does not end here. This Court must conduct a further inquiry to determine if the error was harmless beyond a reasonable doubt.

4. The Trial Court's Erroneous Ruling Was Harmless Beyond A Reasonable Doubt.

The trial court's limitation of Jones' presentation of evidence in this case would likely be considered a violation of his Sixth Amendment right to present a defense. Constitutional errors are subject to a constitutional harmless error analysis. *State v. Powell*, 126 Wn.2d 244, 267, 893 P.2d 615 (1995). It is the State who "bears the burden of showing that the error established by the defendant was harmless beyond a reasonable doubt." *Powell*, 126 Wn.2d at 267. The Court reviews the entire record and "must conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error" for said error to be held as harmless. *State v. Brown*, 147 Wn.2d 330, 58, P.3d 889 (2002), *citing Neederv. United States*, 527 U.S. 1, 19, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999).

The testimony Jones wished to proffer was that the two women, Ms. Stokes and Ms. Nelson, told Jones they had permission to be on the property and to take the items. RP 137-42. This testimony would have been able to be used not for the truth of the matter asserted, but only to attempt to establish that Jones believed, after being told by these two women, they had permission to be at the property and take the items, thereby negating criminal intent, a necessary element of the crime charged, Burglary in the Second Degree. *Id.*; RCW 9A.52.030.

The State was required to prove that Jones, with the intent to commit a crime against a person or property therein, entered or remained unlawfully in a building. RCW 9A.52.030. The State in this matter had to prove Jones entered or remained in Mr. Smith's carport unlawfully, which means without permission, with the intent to commit a crime. In this case the crime alleged to be committed was theft, as Mr. Smith's property was removed from the carport and placed in the Blazer to be transported off the property. RP 55-59; Ex. 16-22, 27-28. RCW 9A.56.020. Even if Jones had been allowed to testify that he believed he was allowed on the property and they had permission to take the items it does not explain the numerous

discrepancies in the testimony between Jones and Mr. Smith and the reactions of Jones when Mr. Smith arrived at the property.

First, Jones stated he did not come to the property to help clean up, he came there to get help with his vehicle, and he only just arrived when Mr. Smith drove up. RP 145-46. At one point in the testimony Jones was asked by his attorney, "Did you believe you had permission to be there?" RP 149. Jones answered, "I really didn't think about it. I was just going to ask them to help me fix my flat tire." RP 149. Mr. Smith testified all the individuals, including Jones, were in the carport when Mr. Smith drove up. RP 47, 169. Then all three all ran from inside the carport and jumped into the Blazer. RP 48.

Jones told Mr. Smith, "Hey, we don't want no trouble. RP 158. Jones and the two women ran from the Blazer down to Highway 12 after Mr. Smith pushed the Blazer into the carport to stop it from leaving the scene. RP 48-49, 146-47. Jones claimed he was scared, believed Mr. Smith may have had a firearm, but acknowledged he never saw a gun, and no one in their group called police, even after being picked up by a Good-Samaritan motorist. RP 155, 159.

The evidence was unequivocal that Mr. Smith had not given Jones, Ms. Nelson, or Ms. Stokes permission to be on his property. RP 61. The evidence was also unequivocal that Mr. Smith had given

no one permission to take any of his property out of the carport. RP 61. Mr. Smith had only left his property for approximately one hour. RP 46-47. Further, Mr. Smith's testimony refuted Jones' testimony that Jones had been dropped off at Mr. Smith's property just prior to Mr. Smith arriving. RP 146, 150, 168-69.

Given the totality of the State's evidence, Jones was at Mr. Smith's property in the carport prior to Mr. Smith's arrival. Jones was acting in concert with Ms. Nelson and Ms. Stokes, gathering up Mr. Smith's belongings and placing them in Ms. Stokes' Blazer. The three were at the property for the sole purpose to wrongfully obtain or exert unauthorized control over property of another with the intent to deprive Mr. Smith of his property. Even if Jones had testified he had believed he had permission to be at Mr. Smith's property and take these items, his state of mind evidence was contrary to his actions and statements that he had just arrived, a story which although completely implausible he maintained.

The Court should hold the trial court's erroneous evidentiary ruling, which thereby violated Jones Sixth Amendment right, was harmless beyond a reasonable doubt. The jury verdict would have been the same absent the trial court's error. Therefore, the Court should affirm Jones conviction.

B. JONES WAS NOT ENTITLED TO A JURY INSTRUCTION FOR THE LESSER INCLUDED OFFENSE OF CRIMINAL TRESPASS IN THE FIRST DEGREE.

Jones asserts the trial court erred when it refused to give his proposed jury instruction for the inferior degree offense of Criminal Trespass in the First Degree. Brief of Appellant 13-15. Jones argues the trial court erred when it refused to give the lesser included Criminal Trespass in the First Degree instruction when Jones did not dispute he was in the carport without permission and there was substantial evidence Jones was in the carport. *Id.* at 14-15. The State respectfully disagrees with Jones' interpretation of the evidence. The trial court did not err because the evidence does not support the inference that Jones only committed the inferior offense of Criminal Trespass in the First Degree.

1. Standard Of Review.

This Court reviews refusals to give lesser or inferior offense instructions based upon the factual inquiry prong under an abuse of discretion standard. *State v. Walker*, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998). "A trial court abuses its discretion only when its decision is manifestly unreasonable or is based on untenable reasons or grounds." *State v. C.J.*, 148 Wn.2d 672, 686, 63 P.3d 765 (2003), *citing State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239

(1997). This Court will find a trial court abused its discretion “only when no reasonable judge would have reached the same conclusion.” *State v. Rodriguez*, 146 Wn.2d 260, 269, 45 P.3d 541 (2002) (internal quotations and citation omitted).

2. Jones Was Not Entitled To Have The Trial Court Instruct On His Proposed Lesser Included Jury Instruction For Criminal Trespass in the First Degree.

Jones requested the trial court give a lesser included instruction of Criminal Trespass in the First Degree. Supp CP Def Prop. Instructions; See WPIC 60.15; WPIC 60.16. Jones argued the evidence supported that he committed only the lesser offense by being in the carport without the intent to commit a crime. RP 179-81. The trial court disagreed and refused to give the instructions. RP 181-83.

Either party in a criminal action, the defense or the prosecution, has the right to request the jury be instructed on a lesser included offense or an inferior degree offense. RCW 10.61.003; RCW 10.61.006; *State v. Gamble*, 154 Wn.2d 457, 462, 114 P.3d 646 (2005). This right is established by statute and case law but it is not absolute. *Gamble*, 154 Wn.2d at 462-63. The party seeking the inclusion of an instruction on a lesser included or inferior degree offense must satisfy a factual and legal inquiry by the trial court

regarding whether the inclusion of such an instruction is proper. *Id.* at 463.

The analysis regarding whether a trial court properly denied a party's request to include a jury instruction for a lesser included offense or an inferior degree offense is broken into two inquiries, one legal and one factual. *State v. Fernandez-Medina*, 141 Wn.2d 448, 454, 6 P.3d 1150 (2000). The analysis whether an offense is an inferior charged offense as applied to the law is:

- (1) The statutes for both the charged offense and proposed inferior degree offense proscribe but one offense;
- (2) the information charges an offense that is divided into degrees, and the proposed offense is an inferior degree of the charged offense...

Fernandez-Medina, 141 Wn.2d at 454 (citations and internal quotations omitted). Burglary in the Second Degree requires the State to prove, "with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building other than a vehicle or a dwelling." RCW 9A.52.030(1). Therefore, when dealing with a crime such as Burglary in the Second Degree, which is a class B felony, it is clear that the gross misdemeanor of Criminal Trespass in the First Degree, where a person entered or remained unlawfully in a building, meets the legal prong of the analysis for an inferior charged offense, therefore the only necessary

analysis is factual. RCW 9A.52.030; RCW 9A.52.070; *Fernandez-Medina*, 141 Wn.2d at 454-55.

The factual prong of the analysis for an inferior degree offense requires, “there is evidence that the defendant committed **only** the inferior offense.” *Id.* at 454 (emphasis added). This necessitates that the inference must be that the inferior or lesser offense was the only crime committed to the exclusion of the crime charged by the State. *Fernandez-Medina*, 141 Wn.2d at 455. This standard is more particularized than the factual showing required for other jury instructions. *Id.*

The reviewing court evaluates the sufficiency of the evidence in support of the lesser included or inferior degree offense in the light most favorable to the party that requested the jury instruction. *Id.* at 455-56. The evidence is not sufficient if it simply shows the jury may disbelieve the State’s evidence that points towards guilty. *Id.* at 456. “The evidence must firmly establish the defendant’s theory of the case.” *Id.* A defendant may present inconsistent defenses, and doing such is not a bar to requesting a lesser included or inferior included offense instruction. *Id.* at 459-460. If the trial court errs by failing to give a properly requested lesser or inferior included offense

instruction, such an error is never harmless. *State v. Parker*, 102 Wn.2d 161, 164, 683 P.2d 189 (1984).

The question in this case is simple, in the light most favorable to Jones, was there sufficient evidence that Jones only entered or remained knowingly unlawfully in the carport, without the intent to commit a crime against a person or property therein? The answer is no, even viewing the evidence in a light most favorable to Jones, and acknowledging he can present inconsistent defenses, Jones was not entitled to a jury instruction for the lesser included offense of Criminal Trespass in the First Degree.

The trial court properly granted Jones' request for a lesser included instruction for Criminal Trespass in the Second Degree. RP 181-83; Supp CP Def Prop. Instructions, *citing* WPIC 60.17, WPIC 60.18; CP 53-54. There was testimony from Jones, which was controverted by Mr. Smith, that he had just arrived, was walking up to the back of the Blazer when Mr. Smith arrived back at his property. RP 146. Jones denied ever entering the carport, which was controverted by Mr. Smith. RP 149, 169. But, in the light most favorable to Jones, if it were believed that he never entered the carport, then he was just on the premises, the Criminal Trespass in

the Second Degree was an appropriate lesser included instruction to give.

Similarly, the trial court properly denied Jones' request for a lesser included instruction for Criminal Trespass in the First Degree. RP 181-83; Supp CP Def Prop. Instructions; WPIC 60.15, WPIC 60.16; See CP 44-62. Jones asserts in his briefing, "in this case the defendant did not dispute the claim he was in the carport without Mr. Smith's permission..." Brief of Appellant 14-15. Perhaps, this depends on the literal interpretation of what Jones said during his testimony. It is correct that Jones never stated, Mr. Smith gave me permission to be in his carport. See RP 143-60. But, this statement is misleading and it twists the testimony of Jones, as he directly denied in his testimony that he ever entered the carport. *Id.*

Q. At any time while you were on the Smith property did you enter the carport?

A. No, sir.

RP 149. While Mr. Smith testified repeatedly Jones was in the carport, absent some other evidence, there is nothing to link Jones entering or remaining in the carport unlawfully but with the absence of committing a crime against persons or property therein. The evidence must firmly establish Jones' theory of his case, not just simply show that the jury may disbelieve the State's evidence that

points towards Jones' guilt at committing Burglary in the Second Degree. *Fernandez-Medina*, 141 Wn.2d at 456.

The trial court did not abuse its discretion when it refused to give Jones' proposed instruction. The trial court correctly held that, while there was sufficient evidence of Criminal Trespass in the Second Degree, the parties conduct, fleeing immediately from the carport into a vehicle packed full of Mr. Smith's belongings was not indicative of only committing the lesser offense of Criminal Trespass in the First Degree. RP 181. The trial court's decision is not based on manifestly unreasonable or untenable grounds. *C.J.*, 148 Wn.2d at 701. Another judge would have reached the same conclusion that the actions of the parties was not indicative of simply being in the building unlawfully without the intent to commit a crime. This Court should affirm the trial court's ruling and Jones' conviction for Burglary in the Second Degree.

IV. CONCLUSION

The State concedes the trial court erred when it granted the State's motion to exclude Jones' testimony that the two women told him they had permission to be on Mr. Smith's property. Yet, the trial court's erroneous ruling was harmless beyond a reasonable doubt because absent the ruling the jury verdict would have been the same.

Jones was not entitled to the lesser included jury instruction for Criminal Trespass in the First Degree. The inference from the evidence, in the light most favorable to Jones, failed to show that only the lesser offense had been committed to the exclusion of Burglary in the Second Degree. The Court should affirm Jones' conviction.

RESPECTFULLY submitted this 17th day of April, 2018.

JONATHAN L. MEYER
Lewis County Prosecuting Attorney

A handwritten signature in blue ink, appearing to be 'SIB', written over a horizontal line.

by: _____
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