

65839-5

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NO. 65839-5-1

IN THE COURT OF APPEALS OF THE STATE OF  
WASHINGTON, DIVISION ONE

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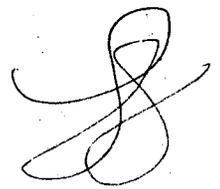
STATE OF WASHINGTON,

Respondent,

v.

KEVIN WAIS,

Appellant.



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

The Honorable Alan R. Hancock, Judge

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BRIEF OF APPELLANT

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DAVID B. KOCH  
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC  
1908 East Madison  
Seattle, WA 98122  
(206)623-2373

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A. ASSIGNMENT OF ERROR

The trial court erred when it failed to give lesser included jury instructions on criminal trespass.

Issue Pertaining to Assignment of Error

Appellant was charged with Residential Burglary. In the light most favorable to appellant, jurors could have concluded that he never entered a dwelling and never intended to commit a crime therein. Therefore, did the trial court err when it refused to give appellant's proposed instructions on Criminal Trespass in the First Degree as a lesser included offense to the charged burglary?

B. STATEMENT OF THE CASE

1. Procedural Facts

The Island County Prosecutor's Office charged appellant Kevin Wais with one count of Residential Burglary. CP 35-36. Defense counsel requested that the jury be instructed on the lesser included offense of Criminal Trespass in the First Degree. RP 23-25, 146-151, 156-160, 187-188; CP 37-43. That request was denied because the court concluded there was an insufficient factual basis for such an instruction. Specifically, the court ruled that jurors could not conclude that Wais committed only the crime of trespass. RP 190-191. Jurors convicted Wais of Residential

Burglary, the court imposed a standard range sentence of 84 months, and Wais timely filed his Notice of Appeal. CP 5-6, 14; Supp. CP \_\_\_\_ (sub no. 72, Notice of Appeal, filed 8/6/10).

2. Substantive Facts

On April 26, 2010, Oak Harbor Police Officer Serloyd Carter responded to a possible burglary at 481 S.E. Ely Street in Oak Harbor, the home of Roger Brown. RP 41, 59-60. Brown was out of town at the time. RP 41. The individual watching his house and collecting his mail placed the call to police. RP 60-61, 91.

Officer Carter entered the home and found that it had been ransacked. RP 61-62. Someone had stacked DVDs in the living room, a freezer door had been left open in the kitchen, ammunition was scattered on the floor, rifle components (wood stocks and a barrel) were on a bed, and it was apparent someone had tried to break into a gun safe – the handle to open the safe had been bent and there were scratches and dents on the door. RP 65-67. Outside the home, there was a garbage can full of unopened non-perishable food items. RP 68.

After unsuccessfully attempting to determine the point of entry, Officer Carter requested the assistance of a detective. RP 62-64. Detective Ronald Hofkamp responded to the scene. RP 90.

He identified a sliding glass door as a possible point of entry. RP 92, 97. Moreover, he found tire tracks outside the home. RP 95. A vehicle had been driven under a branch, indicating a small vehicle. RP 96. It appeared the vehicle was driven onto the lawn and then backed up towards the sliding glass door. RP 96-97.

Hofkamp spoke to Brown by phone and determined that two rifles Brown had stored in his bedroom were missing. Two toy train sets were also missing. RP 93. Further investigation, however, would wait until after Brown returned home the following day, April 27. Hofkamp and Brown agreed to meet the morning of April 28. RP 93. Hofkamp then made sure the house was locked and placed a section of metal pipe in the track of the sliding glass door to prevent anyone from coming back and entering the home through that door. RP 104.

Brown arrived home the evening of April 27 to find his home in complete disarray. RP 42-43, 56. He confirmed that several firearms that had not been in his gun safe were gone. RP 45. His safe, which is 60 inches tall and weighs about 850 lbs. empty, was still locked and up against the master bedroom wall where he kept it. RP 46, 52, 120. But the handle was bent at an angle from attempts to pry it off. RP 46. There was a hacksaw near the safe.

RP 58. Someone had cut through the "hinge pins" on the door, but the safe could not be opened in that manner. Because the pins had been cut, however, when Brown opened the door with the combination lock, the door fell off. RP 47. Brown put the door back on and locked the safe again. Given the condition of his home, Brown spent the night in a motel. RP 48.

On the morning of April 28, Detective Hofkamp had not heard from Brown and decided to drive to Brown's home. RP 105-106. As he pulled into the driveway, he saw a pickup under the carport and initially assumed it was Brown's truck. RP 106. But as he approached the house on foot, Hofkamp saw a male wearing a bright red T-shirt. The individual exited a detached garage, spotted Hofkamp, and crouched down behind the pickup in the carport. RP 106, 132-133. The individual then moved away from the pickup and out of Hofkamp's view. RP 106.

Hofkamp ran to the area and saw that the back door to the home was wide open. He saw the individual in the red shirt running up the street. A second individual then exited the front door of the home and also ran up the street. RP 107. Hofkamp gave chase but was unable to catch either individual. RP 108. Hofkamp called for assistance. RP 108. Other officers found and detained Wais

about three blocks away. RP 109, 111-113. Hofkamp then drove to the location and positively identified Wais as the individual in the red shirt. RP 112-113.

Hofkamp returned to the Brown residence and had the pickup truck impounded. It did not belong to Wais. RP 113-114. However, a key belonging to Wais was found in the passenger side door panel of the pickup. RP 117-119. There were new stacks of items inside the house and the gun safe had been moved away from the wall and was now blocking the doorway to the master bedroom. RP 53, 120. Underneath the safe were sections of galvanized steel pipe, taken from Brown's garage, used as a crude roller system to move the safe. RP 53-54, 120.

Police fingerprinted "tons of stuff" inside the home, but merely found one palm print on the safe that did not belong to Wais. RP 121, 133-134. Hofkamp could not tell whether the person he identified as Wais – the man crouching behind the pickup in the carport – had been wearing gloves. RP 135. But no gloves were found on Wais when he was arrested shortly thereafter. And a search of the area revealed no gloves. RP 140-142. The unidentified individual who ran out the front door was wearing gloves, however. RP 135.

Back at the police station, Detective Hofkamp interviewed Wais. Wais denied being at the Brown residence and denied fleeing from Hofkamp. RP 122-125. Wais explained that he had been walking from an AM/PM store, which was in close proximity to the Brown residence, to his girlfriend's house when police stopped him.<sup>1</sup> RP 125-126.

While Wais was being held in the Island County Jail, he was caught during a visit using a note – placed against the security glass – indicating to his visitor, girlfriend Bethany Rohm, that she was not required to speak with Detective Hofkamp and containing other information concerning events on the morning of April 28, 2010. RP 83-88; exhibit 27. In addition to the note, the prosecution also entered into evidence a recording from an earlier jail visit between Wais and Rohm in which the two discuss the case against Wais. RP 180-186; exhibit 31.

During closing argument, the prosecutor argued that Wais was an accomplice to the person seen running out of the Brown home. RP 195-199. Defense counsel argued the evidence was

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<sup>1</sup> Detective Hofkamp testified that he obtained and watched surveillance tape from the AM/PM store for the period when Wais claimed to be there. RP 126. Through an apparent oversight, however, the prosecutor never asked Hofkamp what the video showed.

insufficient to show that Wais was inside the home and, even assuming Wais was the individual spotted in the carport, mere presence and knowledge of the burglary was insufficient to prove accomplice liability. RP 199-205. Jurors were never given the option to consider whether Wais was merely guilty of Criminal Trespass. See CP 15-32 (court's instructions to jury).

C. ARGUMENT

THE COURT'S REFUSAL TO GIVE THE REQUESTED LESSER INCLUDED INSTRUCTIONS ON CRIMINAL TRESPASS DENIED WAIS A FAIR TRIAL.

A defendant in a criminal case is entitled to have the jury fully instructed on his theory of the case where the instructions are supported by the evidence. State v. Fernandez-Medina, 141 Wn.2d 448, 453, 461, 6 P. 3d 1150 (2000); State v. Berlin, 133 Wn.2d 541, 546-48, 947 P.2d 700 (1997); State v. McClam, 69 Wn. App. 885, 890, 850 P.2d 1377, review denied, 122 Wn.2d 1021 (1993). By statute, defendants in Washington are entitled to have their juries instructed not only on the charged crime, but also on all lesser included offenses. RCW 10.61.006 provides:

In all other cases [non-inferior degree cases] the defendant 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.

When determining whether a lesser included instruction is appropriate, Washington courts apply the two-prong test in State v. Workman, 90 Wn.2d 443, 584 P.2d 382 (1978):

Under the Washington rule, a defendant is entitled to an instruction on a lesser-included offense if two conditions are met. First, each of the elements of the lesser offense must be a necessary element of the offense charged. Second, the evidence in the case must support an inference that the lesser crime was committed.

Workman, 90 Wn.2d at 447-48 (citations omitted).

This rule serves many purposes. First, it ensures the defendant receives constitutionally adequate notice of all possible charges at trial. Berlin, 133 Wn.2d at 545, 548. Second, it allows the defendant to present his or her theories of the case to the jury. Id. at 545, 548. Third, it affords the jury the benefit of a third option, in addition to conviction or acquittal on the charged offense. By doing so, "it accord[s] the defendant the full benefit of the reasonable-doubt standard." Beck v. Alabama, 447 U.S. 625, 633-34, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980). The Beck Court noted the potential unfairness that arises "[w]here one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of *some* offense, the jury is likely to

resolve its doubts in favor of conviction.” Beck, 447 U.S. at 634 (emphasis in original). A lesser included instruction tends to eliminate this problem.

Workman’s legal prong is satisfied if it is impossible to commit the greater offense without also committing the lesser. State v. Porter, 150 Wn.2d 732, 736-737, 82 P.3d 234 (2004). Criminal Trespass in the First Degree clearly satisfies the legal prong as applied to Residential Burglary. The elements of Residential Burglary are: (1) entering or remaining unlawfully in a dwelling other than a vehicle and (2) intent to commit a crime against a person or property therein. RCW 9A.52.025.<sup>2</sup> The elements of Criminal Trespass in the First Degree are knowingly entering or remaining unlawfully in a building. RCW 9A.52.070.<sup>3</sup>

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<sup>2</sup> RCW 9A.52.025 – Residential Burglary – provides:

(1) A person is guilty of residential burglary if, with intent to commit a crime against a person or property therein, the person enters or remains unlawfully in a dwelling other than a vehicle.

(2) Residential burglary is a class B felony. . . .

<sup>3</sup> RCW 9A.52.070 – Criminal Trespass in the First Degree – provides:

(1) A person is guilty of criminal trespass in the first degree if he knowingly enters or remains unlawfully in a building.

The word “building” includes any dwelling. RCW 9A.04.110(5). It also includes garages. State v. Johnson, 132 Wn. App. 400, 404, 406-409, 132 P.3d 737 (2006), review denied, 159 Wn.2d 1006 (2007).

Accordingly, the only significant difference between Criminal Trespass in the First Degree and Residential Burglary is that the latter requires an additional element of intent to commit a crime against a person or property. Because Criminal Trespass in the First Degree – knowingly entering or remaining unlawfully in a building – must be established every time a defendant unlawfully enters or remains in a dwelling with criminal intent, Criminal Trespass in the First Degree satisfies the legal prong of Workman as a lesser included offense of Residential Burglary. See State v. J.P., 130 Wn. App. 887, 895, 123 P.3d 215 (2005) (recognizing that Criminal Trespass in the First Degree is a lesser included offense of Residential Burglary); State v. Pittman, 134 Wn. App. 376, 384, 166 P.3d 720 (2006) (same); see also State v. Southerland, 45 Wn. App. 885, 889, 728 P.2d 1079 (1986) (Criminal Trespass in the

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(2) Criminal trespass in the first degree is a gross misdemeanor.

First Degree is lesser included offense of former version of Burglary in the First Degree requiring unlawful entry into dwelling), aff'd in part and reversed in part on other grounds, 109 Wn.2d 389, 745 P.2d 33 (1987).<sup>4</sup> Indeed, the prosecution acknowledged, and the trial court found, Wais had satisfied the legal prong. RP 190-191.

Regarding the second or “factual” prong of the Workman test, this Court is to view the supporting evidence in the light most favorable to the party that requested the instruction. Fernandez-Medina, 141 Wn.2d at 455-56 (although an inferior degree case, court notes that analysis of the factual prong is identical for both lesser included and inferior degree). Here, that party is Wais.

A requested jury instruction on a lesser included offense should be administered whenever the evidence would permit a jury to rationally find a defendant guilty of the lesser offense and acquit him of the greater. Fernandez-Medina, 141 Wn.2d at 456. It is not enough, however, that the jury might disbelieve the evidence pointing to guilt. Id. Rather, the evidence must affirmatively establish the defendant’s theory of the case. Id. “[W]hen

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<sup>4</sup> Criminal Trespass in the First Degree is also a lesser-included offense of Burglary in the First Degree and Burglary in the Second Degree. See State v. Soto, 45 Wn. App. 839, 841, 727 P.2d 999 (1986); State v. Mouncey, 31 Wn. App. 511, 517-518, 643 P.2d 892, review denied, 97 Wn.2d 1028 (1982).

substantial evidence in the record supports a rational inference that the defendant committed only the lesser included offense to the exclusion of the greater offense, the factual component of the test for entitlement to a [lesser included] offense instruction is satisfied.” Id. at 461.

The evidence of Wais' active participation in the burglary of Brown's home was inferential. Detective Hofkamp could only establish that Wais exited the detached garage and then hid behind the pickup in the carport before running away. RP 106, 132-133. In the light most favorable to Wais, jurors could have concluded that Wais (1) was never in a “dwelling” and (2) Wais did not intend to commit a crime against a person or property.

Regarding the first point, while Wais was unlawfully in a building on the property (the detached garage), no one saw him enter the Brown residence, i.e., a “dwelling.” A “dwelling” is defined as “any building or structure, though moveable or temporary, or a portion thereof, which is used or ordinarily used by a person for lodging.” RCW 9A.04.110(7). An attached garage is considered a part of the home and, therefore, a dwelling. See State v. Murbach, 68 Wn. App. 509, 513, 843 P.2d 551 (1993). But here, the garage was unattached. RP 132. And no Washington case has ever

determined that an open carport can constitute a dwelling. But even if a carport could be considered a dwelling, jurors may not have found it to be here.

Regarding the second point, jurors also could have concluded Wais did not intend to commit a crime and did not assist the individual inside the home in doing so. The pickup truck did not belong to Wais. RP 114. The print on the safe did not belong to Wais. RP 134. In fact, despite taking prints from "tons of stuff," Wais' prints were not found anywhere inside the home. RP 121, 133-134. And unlike the individual who fled from the house, there is no evidence Wais was wearing gloves. RP 135, 140-142. The State presented no evidence of stolen property or burglary tools found on Wais upon his arrest.

Moreover, even if Wais knew the other individual was inside the home stealing Brown's possessions, that would be insufficient to make him an accomplice to the burglary. Awareness and physical presence at the scene – even when coupled with assent – are insufficient unless the purported accomplice stands "ready to assist" in the crime at issue. In re Wilson, 91 Wn.2d 487, 491, 588 P.2d 1161 (1979); State v. Luna, 71 Wn. App. 755, 759, 862 P.2d 620 (1993). Moreover, foreseeability that another might commit the

crime is also insufficient. Accomplice liability requires knowing assistance in the precise crime. State v. Stein, 144 Wn.2d 236, 246, 27 P.3d 184 (2001).

Below, the State theorized that Wais must have helped the other individual inside the home because it would be impossible for one person to successfully move the gun safe from the master bedroom. RP 195-196. In the light most favorable to Wais, however, jurors could have concluded that the safe was not successfully removed from the bedroom because the individual inside the home *did not have* the benefit of Wais' assistance. The safe was found blocking the entrance to the bedroom door. It had been moved a mere 10 feet. RP 53, 120.

While Wais did flee from the property when confronted by Detective Hofkamp – arguably demonstrating a guilty conscience – his efforts to remove himself from the property are no more indicative of an attempt to flee from a burglary than an attempt to flee from a criminal trespass. Criminal trespass, by itself, provided an incentive to run when confronted by Detective Hofkamp.

The State may point out that jurors were instructed they could draw an inference from the fact Wais unlawfully entered a building on the property that he intended to commit a crime against

a person or property. CP 27. While such an inference is *permissible* based upon evidence of unlawful entering or remaining, it cannot be treated as *mandatory*. RCW 9A.52.040 provides:

In any prosecution for burglary, any person who enters or remains unlawfully in a building may be inferred to have acted with intent to commit a crime against a person or property therein, unless such entering or remaining shall be explained by evidence satisfactory to the trier of fact to have been made without such criminal intent.

State v. Cantu, 156 Wn.2d 819, 826-27, 132 P.3d 725 (2006) (presumptions and inferences are disfavored in criminal law, and only permissive inferences will satisfy constitutional due process). Wais' jury was expressly told the inference of criminal intent was not mandatory. CP 27 ("This inference is not binding upon you and it is for you to determine what weight, if any, such inference is given.").

In the end, it should have been up to the jury to determine whether they would draw an inference of criminal intent to steal based on Wais' unlawful presence on Brown's property. Had the court viewed the evidence in the light most favorable to Wais, and instructed on Criminal Trespass in the First Degree, jurors may have believed all of the evidence presented and yet declined to infer that Wais had acted with criminal intent while on the property.

In short, the jury could rationally have found this evidence did not support a Residential Burglary conviction beyond a reasonable doubt and that Wais was merely guilty of Criminal Trespass in the First Degree.

The Washington Supreme Court has ruled that failure to give a lesser included instruction that should have been given can never be harmless. State v. Parker, 102 Wn.2d 161, 163-64, 683 P.2d 189 (1984). The Parker Court relied upon State v. Young, 22 Wash. 273, 60 P. 650 (1900), where the Court said:

Inasmuch, then, as the law gives the defendant the unqualified right to have the inferior degree passed upon the jury, it is not within the province of the court to say that the defendant was not prejudiced by the refusal of the court to submit that phase of the case to the jury, or to speculate upon probable results in the absence of such instructions. If there is even the slightest evidence that the defendant may have committed the degree of the offense inferior to and included in the one charged, the law of such inferior degree ought to be given.

Young, 22 Wash. at 276-77 (quoted in Parker, 102 Wn.2d at 163-64).

The Parker Court then said, "This court has adhered to this test and has never held that, where there is evidence to support a lesser-included-offense instruction, failure to give such an instruction may be harmless." Parker, 102 Wn.2d at 164 (citing

Workman). Thus, well-established law precludes harmless error analysis in this case.

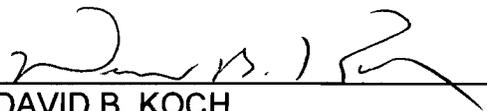
D. CONCLUSION

In the light most favorable to Wais, jurors may have concluded he did not enter a dwelling and/or he did not intend to commit a crime inside Brown's home. Because the trial court denied Wais a fair trial when it refused to instruct the jury on Criminal Trespass in the First Degree as a lesser included offense of Residential Burglary, this Court should reverse and remand for a new trial.

DATED this 29<sup>th</sup> day of November, 2010.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



DAVID B. KOCH  
WSBA No. 23789  
Office ID No. 91051

Attorneys for Appellant

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

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STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
vs.	)	COA NO. 65839-5-1
	)	
KEVIN WAIS,	)	
	)	
Appellant.	)	

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 29<sup>TH</sup> DAY OF NOVEMBER, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] GREGORY BANKS  
ISLAND COUNTY PROSECUTING ATTORNEY  
P.O. BOX 5000  
COUPEVILLE, WA 98239
  
- [X] KEVIN WAIS  
DOC NO. 777102  
COYOTE RIDGE CORRECTIONS CENTER  
P.O. BOX 769  
CONNELL, WA 99326

**SIGNED** IN SEATTLE WASHINGTON, THIS 29<sup>TH</sup> DAY OF NOVEMBER, 2010.

x *Patrick Mayovsky*

2010 NOV 29 11:46:55