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STATE OF WASHINGTON
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70608-0

COA No.70608-0-1

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

STATE OF WASHINGTON,

Respondent,

v.

ROBERT SUMPTER,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT
OF KING COUNTY

The Honorable Beth Andrus

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in failing to instruct the jury that the defendant, to be convicted of burglary, must know that his entering or remaining in the building is without license.

2. The trial court erred in failing to instruct the jury on the RCW 9A.52.090(1) statutory "abandoned building" defense to trespass.

3. The trial court erred in failing to instruct the jury on the abandoned building defense to burglary.

4. The trial court instructed the jury in a manner that lessened the State's burden of proof on every element of both trespass and burglary.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Where the crime of trespass is a lesser included offense of burglary, requiring that every element of the lesser crime be an element of the greater crime, did the trial court err in denying Mr. Sumpter's motion to instruct the jury that the defendant, to be convicted of burglary, must know that his entering or remaining in the building is without license or permission?

2. Did the trial court err in denying Mr. Sumpter's motion to instruct the jury on the RCW 9A.52.090(1) statutory abandoned

building defense to trespass, where although there was evidence that the building was not abandoned in fact, there was evidence that the building was abandoned, thus warranting the instruction?

3. Did the error in omitting the knowledge element lessen the State's burden of proof in violation of Due Process?

4. Where the trial court ruled that the abandoned building defense was legally available on a charge of burglary because it negates the unlawful presence element, and where the evidence warranted the instruction, did the trial court err in failing to instruct upon it?

5. Where the trial court failed to instruct the jury on the abandoned building defense as to both trespass and burglary, and where the State must prove the absence of unlawful entry, did the court's instructions lessen the State's burden of proof on both charges?

C. STATEMENT OF THE CASE

1. **Procedural history.** Robert Sumpter was charged with second degree burglary based on a police report and an affidavit of probable cause that alleged he was found in a burned office building in Bellevue, apparently collecting metal debris. CP 1-5, CP 6-7; 2RP 272-77. A worker in a nearby building had reported to

police that some individual or individuals had parked in his company's lot, and one was later seen loading items into his truck, but drove away. CP 3-5; 2RP 247, 257. This person was stopped by police and later pled guilty; Mr. Sumpter strenuously argued that he had nothing to do with this person, and defended that he himself was merely collecting scrap. The trial court denied the State's request to instruct the jury on accomplice liability. 2RP 374-76; 3RP 391. However, the court also denied Mr. Sumpter's request that the jury be instructed on the statutory "abandoned building" defense to trespass (a lesser included crime) and the same defense, applicable by case law to the primary charge of burglary. 2RP 372-73. See Appendices (Court's and Defense Instructions).

The jury convicted Mr. Sumpter of second degree burglary. 3RP 437; CP 80. He was given a DOSA sentence. 3RP 466; CP 117-26. He appeals. CP 127.

2. Trial testimony. According to the property management employee, Thomas Armstrong, the building in which Mr. Sumpter was found was an office building on Bel-Red Road that had burned several months before the date in question. 2RP 199-202. The second floor was demolished and had collapsed. 2RP 202. Although a fence was put up at the building with 'no trespassing'

signs, Armstrong noted the signs were 12-15 inches in size, admitted there was only one of these by the road, 2RP 204-06, and conceded that the demolition company was allowed to haul away any and all debris it cleared away. 2RP 218.

On the night of March 5, 2012, one Mr. Wiek, an employee of a nearby business, saw a truck park in his company's parking lot. Two men exited the truck and entered the burned building's compound by means of some trees where there was no fencing. When the witness called the police, one of the men, who had seemingly been loading metal into his truck, saw Mr. Wiek through a window and drove away. 2RP 237-40, 249-54. Wiek indicated the fencing around the burned building was incomplete and was later finished in this area where the trees were. 2RP 245, 260-61.

Bellevue Police Officer D.R. Robertson was dispatched to the burned-out building, and found Mr. Sumpter inside by following the obvious loud noises he heard ringing through the night air. 2RP 272-73. Officer Robertson noted that the fencing around the demolished building was made of lengths of fence that were disconnected and spread apart so people could enter and exit. 2RP 271.

Mr. Sumpter was easily located; he appeared to be using a cutting tool to cut various pieces of metal including piping. 2RP 271-76. He was surrounded by debris. 2RP 276.

An officer who accompanied Officer Robertson to the scene noted that the fence gate joints were not padlocked or were unsecured. 2RP 289. Where Mr. Sumpter was found was an area of burned debris that was simply open to the air. 2RP 292. Officer Robertson described the location as "gutted and destroyed." 2RP 281.

Mr. Sumpter was taken into custody. When interrogated by Bellevue Detective James Lindquist, Mr. Sumpter acceded to the detective's inquiries that he knew it was wrong to be in the building. 2RP 332. Mr. Sumpter's counsel argued in closing that Mr. Sumpter was simply scavenging for material he believed was nobody's, and urged the jury that the defendant understandably, under interrogation, agreed he did not have specific permission to be in the burned building. 3RP 422-24, 429-30.

D. ARGUMENT

1. THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY THAT THE DEFENDANT, TO BE CONVICTED OF BURGLARY, MUST KNOW THAT HIS ENTERING OR REMAINING IN THE BUILDING IS WITHOUT LICENSE.

a. Burglary and trespass require knowing unlawful

entry. A person is guilty of burglary in the second degree if, (1) with intent to commit a crime against a person or property therein, (2) he enters or remains unlawfully in a building other than a vehicle or a dwelling. RCW 9A.52.030(1); see CP 84 (Jury instruction no. 7). The trial court instructed Mr. Sumpter's jury as follows:

To convict the defendant of the crime of burglary in the second degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about March 5, 2012, the defendant entered or remained unlawfully in a building;
- (2) That the entering or remaining was with intent to commit a crime against property therein; and
- (3) That this act occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP 85 (Jury instruction no. 8). Instruction no. 9 stated, "A person enters or remains unlawfully in or upon premises when he or she is

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

CP 85. The State argued a person need not know he has no permission in order to be guilty of burglary. 2RP 359-60.

b. Failure to require knowledge was error. Mr. Sumpter contends that the trial court erred in denying his request that the jury be instructed on the element of “knowledge.” He asked the court to give the proposed instructions including knowledge as an element. CP 79 (Defense Proposed Instructions); 2RP 353-54 (discussing additional modification to defense burglary instruction). Mr. Sumpter contended the *mens rea* of knowledge was required to as an element of burglary just as the lesser crime of trespass required it.¹ 2RP 354-55, 357, 360. After reserving on the issue

¹ In the instructions to the jury, the trial court instructed Mr. Sumpter's jury on the lesser offense of trespassing in the first degree. CP 85-86. (Instruction nos, 11, 12, 13). The court instructed the jury that first degree trespass is committed where a person “knowingly enters or remains unlawfully in a building,” in the ‘to-convict’ instruction read:

To convict the defendant of the crime of criminal trespass in the first degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about March 5, 2012, the defendant knowingly entered or remained in a building;
- (2) That the defendant knew that the entry or remaining was unlawful; and
- (3) That this act occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

until final discussion of jury instructions, the trial court ruled that it would not include the knowledge element. 2RP 360, 378; 3RP 389.

Mr. Sumpter argues that knowledge must be a required element. It is well recognized that the offense of trespass is a lesser crime of the offense of burglary. State v. Soto, (1986) 45 Wn. App. 839, 841, 727 P.2d 999 (1986). Under this rule, knowledge is necessarily an element of burglary. Where the evidence supports it, a trial court should instruct the jury on a lesser-included offense. State v. Workman, 90 Wn.2d 443, 447, 584 P.2d 382(1978). A defendant is entitled to such an instruction if each of the elements of the lesser offense must also be a necessary element of the offense charged. Workman, 90 Wn.2d at 447–48; State v. Fernandez–Medina, 141 Wn.2d 448, 455, 6 P.3d 1150 (2000). If burglary and trespass satisfy the legal prong of the lesser-included analysis, burglary must include knowledge. See RCW 9A.52.030(1) (second degree burglary); RCW 9A.52.070(1) (first degree criminal trespass). The element of the lesser by definition is present in the greater crime. See also, e.g., State v. Jackson, 112 Wn.2d 867, 774 P.2d 1211 (1989) (malicious mischief

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP 86 (Jury instruction no. 13).

is not lesser-included offense of attempted second degree burglary, as one does not invariably cause physical damage to structure while attempting a burglary). The trial court erred.

c. The error was constitutional and not harmless. The court's instructions lessened the State's burden in violation of Due Process. U.S. Const. amend. 14.² This burden is to prove what is required for a criminal conviction. State v. Brown, 147 Wn.2d 330, 339, 58 P.3d 889 (2002) (conviction cannot stand if jury instructed in a manner that would relieve the State of burden).

Here, excluding the knowledge element violated Due Process, and was not harmless in the absence of overwhelming proof of knowledge.

2. THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY ON THE RCW 9A.52.090(1) STATUTORY ABANDONED BUILDING DEFENSE TO TRESPASS, AND THE DEFENSE TO BURGLARY.

a. Mr. Sumpter asked the court to instruct the jury on the abandoned building defense to trespass, and to burglary. The request for this defense was discussed throughout trial. 1RP 8; CP 8-10 (Defense Motion); see CP 31 (State's memorandum).

² The Fourteenth Amendment provides in part,

"[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

U.S. Const. amend. 14.

The court correctly determined that two questions were involved: first, whether the defense applied to burglary and trespass, and whether the defendant would be entitled to the jury instructions. 1RP 8-10; 172-74.

The court concluded that the defense was legally available on both charges. 2RP 183-91.

However, the court ruled that it would not instruct the jury on the defenses, apparently because it believed them to not be supported factually. 2RP 372-73.

b. The defense was available. Mr. Sumpter argues he was entitled to the abandoned building instruction on each offense. The defense proposed the jury instructions on both charges. CP 73, CP 74 (Defense Proposed Jury Instructions on burglary and trespass); see WPIC 19.06, WPIC 19.07.

The statutory abandoned building defense applies by its express language to a charge of criminal trespass. The Court of Appeals has reached different decisions as to whether abandonment is also a defense to burglary. See State v. Jensen, 149 Wn. App. 393, 401, 203 P.3d 393 (2009); and State v. J.P., 130 Wn. App. 887, 895, 125 P.3d 215 (2005).

In State v. J.P., the defendant was convicted of residential

burglary after he was caught spray painting walls inside a vacant, repossessed home. Division Three considered whether the statutory criminal trespass abandonment defense applies to burglary. J.P., at 894. The Court noted that RCW 9A.52.090(1) is limited to criminal trespass by its language. J.P., at 894. However, the Court also noted that the Washington Supreme Court held in City of Bremerton v. Widell that the statutory defenses to trespass negate the unlawful presence element. City of Bremerton v. Widell, 146 Wn.2d 561, 570, 51 P.3d 733 (2002). Because burglary and trespass share the same unlawful entry or presence element, the Court concluded that the same element of burglary must be equally negated by abandonment. J.P., 130 Wn. App. at 895.

Division Two disagreed in State v. Jensen, where the defendant was convicted of second degree burglary for entering a restaurant that appeared abandoned. Jensen, 149 Wn. App. at 397. Division Two wrote that "J.P.'s holding has a measure of logical appeal," but concluded that the plain language of the statutory abandonment defense applied only to prosecutions for trespass. Jensen, at 400–01.

Therefore, the Court held, the abandonment defense of RCW 9A.52.090(1) was not available for second degree burglary.

Jensen, at 401. See also State v. Ponce, 166 Wn. App. 409, 418-20, 269 P.3d 408 (2012).

The court below specifically agreed with Jensen's legal analysis. However, Mr. Sumpter argues that he was entitled to the jury instruction as to both charges. The Court of Appeals reviews the adequacy of the jury instructions *de novo* "in the context of the instructions as a whole." State v. DeRyke, 149 Wn.2d 906, 910, 73 P.3d 1000 (2003). And of course, instructions must be based on the evidence. State v. Hughes, 106 Wn.2d 176, 191, 721 P.2d 902 (1986).

b. The instructions were warranted. Importantly, in determining whether sufficient evidence supports an instruction, the evidence must be viewed in the light most favorable to the requesting party. State v. Fernandez–Medina, 141 Wn.2d 448, 455–56, 6 P.3d 1150 (2000). Evidence that a building was abandoned, even if other evidence or witnesses plausibly contend it was not, must be sufficient to trigger a jury instruction on the defense. Here, there was evidence of abandonment. As the police testified, Mr. Sumpter was found amongst debris, broken timbers, and "a bunch of stuff that you expect to find in a building that had been really damaged by fire and just left there." 2RP 276.

It is true that subsection (3) of RCW 9A.52.090 provides another defense to trespass where the defendant “reasonably believed” that the owner would have licensed him to enter the premises, and in contrast, RCW 9A.52.090(1) makes no mention of the defendant's reasonable belief that the premises were abandoned. But here, there was evidence of abandonment.

The trial court appeared to rely on J.P. in declining to give the jury instruction 2RP 372-73. In J.P., the home was vacant after being repossessed by a bank. J.P., 130 Wn. App. at 893, 896. The Court of Appeals stated that because the bank did not intend to surrender the property, the home was not abandoned. J.P., at 896.

But in the present case the property manager's testimony that the building was not abandoned is only conflicting evidence, and the appellate court does not examine the various witnesses' believability. State v. Grier, 168 Wn. App. 635, 644, 278 P.3d 225 (2012). The statutory defense requires abandonment in fact, and Mr. Sumpter's counsel adduced some evidence of the same.

c. The due process error requires reversal. Mr. Sumpter argues that the instructions, in these further respects, lessened the State's burden of proof in violation of Due Process. U.S. Const.

amend. 14. Once a defendant has offered some evidence that his or her entry was permissible under RCW 9A.52.090, due process requires that the State bear the burden of proving beyond a reasonable doubt that the defendant's entry was not lawful. Widell, 146 Wn.2d at 570; State v. Deer, 175 Wn.2d 725, 734, 287 P.3d 539 (2012), cert. denied, 133 S.Ct. 991, 184 L Ed.2d 770 (2013). The State's Due Process burden to prove what is required for a criminal conviction may not be lessened. State v. Brown, supra, 147 Wn.2d at 339; U.S. Const. amend. 14; Neder v. U.S., 527 U.S. 1, 8-9, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999); see generally In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) (State must prove offense beyond a reasonable doubt), Gibson v. Ortiz, 387 F.3d 812, 814 (9th Cir.2004) (burden to prove offense beyond a reasonable doubt may not be lessened).

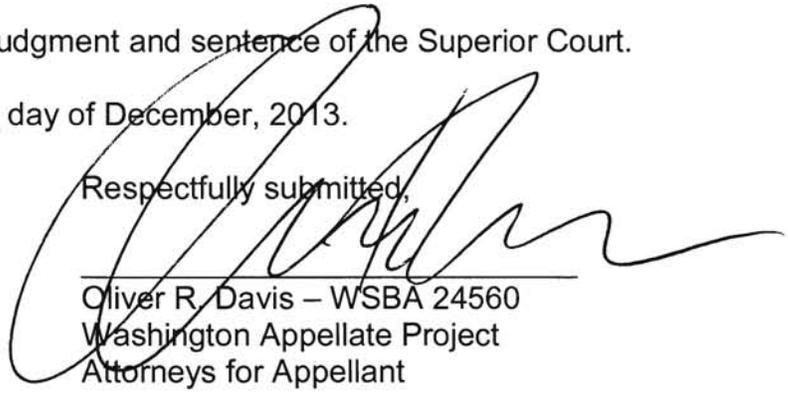
Mr. Sumpter argues that for all these reasons the Court should reverse his convictions.

E. CONCLUSION.

Based on the foregoing, Mr. Sumpter respectfully asks this Court to reverse the judgment and sentence of the Superior Court.

Dated this 31 day of December, 2013.

Respectfully submitted,

A large, stylized handwritten signature in black ink, appearing to read 'O. Davis', is written over a horizontal line. The signature is fluid and cursive, with a long horizontal tail extending to the right.

Oliver R. Davis – WSBA 24560
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Appendix – Court’s Jury Instructions

FILED
KING COUNTY, WASHINGTON

FEB 14 2013

SUPERIOR COURT CLERK
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IN THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

ROBERT SUMPTER,

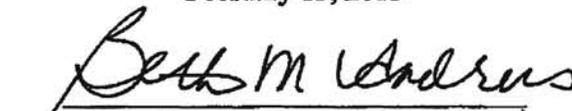
Defendant.

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No. 12-1-02898-9 SEA

COURT'S INSTRUCTIONS TO THE JURY

February 13, 2013



Judge Beth M. Andrus

No. 1

It is your duty to decide the facts in this case based upon the evidence presented to you during this trial. It also is your duty to accept the law from my instructions, regardless of what you personally believe the law is or what you personally think it should be. You must apply the law from my instructions to the facts that you decide have been proved, and in this way decide the case.

Keep in mind that a charge is only an accusation. The filing of a charge is not evidence that the charge is true. Your decisions as jurors must be made solely upon the evidence presented during these proceedings.

The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses, stipulations and the exhibits that I have admitted during the trial. If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict.

Exhibits may have been marked by the court clerk and given a number, but they do not go with you to the jury room during your deliberations unless they have been admitted into evidence. The exhibits that have been admitted will be available to you in the jury room.

One of my duties has been to rule on the admissibility of evidence. Do not be concerned during your deliberations about the reasons for my rulings on the evidence. If I have ruled that any evidence is inadmissible, or if I have asked you to disregard any evidence, then you must not discuss that evidence during your deliberations or consider it in reaching your verdict. Do not speculate whether the evidence would have favored one party or the other.

In order to decide whether any proposition has been proved, you must consider all of the evidence that I have admitted that relates to the proposition. Each party is entitled to the benefit of all of the evidence, whether or not that party introduced it.

You are the sole judges of the credibility of each witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things he or she testifies about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all of the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence. The evidence is the testimony and the exhibits. The law is contained

in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.

You may have heard objections made by the lawyers during trial. Each party has the right to object to questions asked by another lawyer, and may have a duty to do so. These objections should not influence you. Do not make any assumptions or draw any conclusions based on a lawyer's objections.

Our state constitution prohibits a trial judge from making a comment on the evidence. It would be improper for me to express, by words or conduct, my personal opinion about the value of testimony or other evidence. I have not intentionally done this. If it appeared to you that I have indicated my personal opinion in any way, either during trial or in giving these instructions, you must disregard this entirely.

You have nothing whatever to do with any punishment that may be imposed in case of a violation of the law. You may not consider the fact that punishment may follow conviction except insofar as it may tend to make you careful.

The order of these instructions has no significance as to their relative importance. They are all important. In closing arguments, the lawyers may properly discuss specific instructions. During your deliberations, you must consider the instructions as a whole.

As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, prejudice, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

No. 2

As jurors, you have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict. Each of you must decide the case for yourself, but only after you consider the evidence impartially with your fellow jurors. During your deliberations, you should not hesitate to reexamine your own views and to change your opinion based upon further review of the evidence and these instructions. You should not, however, surrender your honest belief about the value or significance of evidence solely because of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of reaching a verdict.

No. 3

The defendant has entered a plea of not guilty. That plea puts in issue every element of the crime charged. The State is the plaintiff and has the burden of proving each element of the crime

beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists as to these elements.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence.

No. 4

The evidence that has been presented to you may be either direct or circumstantial. The term "direct evidence" refers to evidence that is given by a witness who has directly perceived something at issue in this case. The term "circumstantial evidence" refers to evidence from which, based on your common sense and experience, you may reasonably infer something that is at issue in this case.

The law does not distinguish between direct and circumstantial evidence in terms of their weight or value in finding the facts in this case. One is not necessarily more or less valuable than the other.

No. 5

The defendant is not required to testify. You may not use the fact that the defendant has not testified to infer guilt or to prejudice him in any way.

No. 6

You may give such weight and credibility to any alleged out-of-court statements of the defendant as you see fit, taking into consideration the surrounding circumstances.

No. 7

A person commits the crime of burglary in the second degree when he or she enters or remains unlawfully in a building with intent to commit a crime against a person or property therein.

No. 8

To convict the defendant of the crime of burglary in the second degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about March 5, 2012, the defendant entered or remained unlawfully in a building;
- (2) That the entering or remaining was with intent to commit a crime against property therein; and
- (3) That this act occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

No. 9

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

No. 10

A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result that constitutes a crime.

No. 11

The defendant is charged with burglary in the second degree. If, after full and careful deliberation on this charge, you are not satisfied beyond a reasonable doubt that the defendant is guilty, then you will consider whether the defendant is guilty of the lesser crime of criminal trespass in the first degree.

When a crime has been proved against a person, and there exists a reasonable doubt as to which of two or more crimes that person is guilty, he or she shall be convicted only of the lowest crime.

No. 12

A person commits the crime of criminal trespass in the first degree when he or she knowingly enters or remains unlawfully in a building.

No. 13

To convict the defendant of the crime of criminal trespass in the first degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about March 5, 2012, the defendant knowingly entered or remained in a building;
- (2) That the defendant knew that the entry or remaining was unlawful; and
- (3) That this act occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

No. 14

A person knows or acts knowingly or with knowledge with respect to a fact when he or she is aware of that fact.

If a person has information that would lead a reasonable person in the same situation to believe that a fact exists, the jury is permitted but not required to find that he or she acted with knowledge of that fact.

No. 15

When you begin deliberating, you should first select a presiding juror. The presiding juror's duty is to see that you discuss the issues in this case in an orderly and reasonable manner, that you discuss each issue submitted for your decision fully and fairly, and that each one of you has a chance to be heard on every question before you.

During your deliberations, you may discuss any notes that you have taken during the trial, if you wish. You have been allowed to take notes to assist you in remembering clearly, not to

substitute for your memory or the memories or notes of other jurors. Do not assume, however, that your notes are more or less accurate than your memory.

You will need to rely on your notes and memory as to the testimony presented in this case. Testimony will rarely, if ever, be repeated for you during your deliberations.

If, after carefully reviewing the evidence and instructions, you feel a need to ask the court a legal or procedural question that you have been unable to answer, write the question out simply and clearly. In your question, do not state how the jury has voted. The presiding juror should sign and date the question and give it to the bailiff. I will confer with the lawyers to determine what response, if any, can be given.

You will be given the exhibits admitted in evidence, these instructions and two verdict forms, A and B, for recording your verdict. Some exhibits and visual aids may have been used in court but will not go with you to the jury room. The exhibits that have been admitted into evidence will be available to you in the jury room.

When completing the verdict forms, you will first consider the crime of burglary in the second degree as charged. If you unanimously agree on a verdict, you must fill in the blank provided in Verdict Form A the words "not guilty" or the word "guilty," according to the decision you reach. If you cannot agree on a verdict, do not fill in the blank provided in Verdict Form A.

If you find the defendant guilty on Verdict Form A, do not use Verdict Form B. If you find the defendant not guilty of the crime of burglary in the second degree, or if after full and careful consideration of the evidence you cannot agree on that crime, you will consider the lesser crime of criminal trespass in the first degree. If you unanimously agree on a verdict, you must fill in the blank provided in Verdict Form B the words "not guilty" or the word "guilty," according to the decision you reach.

Because this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the proper verdict form(s) to express your decision. The presiding juror must sign the verdict form and notify the bailiff. The bailiff will bring you into court to declare your verdict.

Appendix – Defense Proposed Instructions

FILED
KING COUNTY, WASHINGTON

FEB 11 2013

SUPERIOR COURT CLERK
BY Carolina Cole
DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

CITY OF SEATTLE,

CAUSE NO. 12-C-02898-9 SEA

Plaintiff,

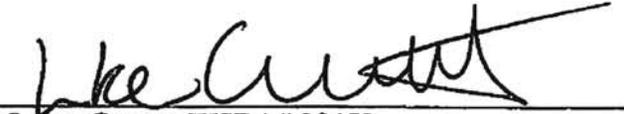
**DEFENSE PROPOSED JURY
INSTRUCTIONS (Without citations)**

v.

ROBERT JAMES SUMPTER,

Defendant.

Respectfully submitted this 11th day of Feb., 2013.



Lucas Garrett, WSBA# 38452
Attorney for the defendant

Instruction _____

The defendant has entered a plea of not guilty. That plea puts in issue every element of the crime charged. The State is the plaintiff and has the burden of proving each element of the crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence.

Instruction _____

You may consider evidence that a witness has been convicted of a crime only in deciding what weight or credibility to give to the testimony of the witness, and for no other purpose.

Instruction _____

A person knows or acts knowingly or with knowledge with respect to a fact when he or she is aware of that fact.

If a person has information that would lead a reasonable person in the same situation to believe that a fact exists, the jury is permitted but not required to find that he or she acted with knowledge of that fact.

Instruction _____

The defendant is charged with burglary in the second degree. If, after full and careful deliberation on this charge, you are not satisfied beyond a reasonable doubt that the defendant is guilty, then you will consider whether the defendant is guilty of the lesser crime of criminal trespass in the first degree.

When a crime has been proved against a person, and there exists a reasonable doubt as to which of two or more crimes that person is guilty, he or she shall be convicted only of the lowest crime.

Instruction _____

To convict the defendant of the crime of burglary in the second degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about March 5, 2012, the defendant entered or remained unlawfully in a building;

(2) That the entering or remaining was with intent to commit of theft or with intent to commit the crime of malicious mischief; and

(3) That this act occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

Instruction _____

A person intends to commit the crime of theft when he or she intends to wrongfully obtain or exert unauthorized control over property of another, with intent to deprive the other person of the property.

Instruction _____

Wrongfully obtains means to take wrongfully the property or services of another.

Instruction _____

A person intends to commit malicious mischief when he or she intends to knowingly and maliciously cause physical damage to the property of another.

Instruction _____

A person commits the crime of criminal trespass in the first degree when he or she knowingly enters or remains unlawfully in a building.

Instruction _____

To convict the defendant of the crime of criminal trespass in the first degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about March 5, 2012, the defendant knowingly entered or remained in a building;

(2) That the defendant knew that the entry or remaining was unlawful; and

(3) That this act occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

Instruction _____

It is a defense to a charge of criminal trespass in the first degree that a building involved in the trespass was abandoned.

The State has the burden of proving beyond a reasonable doubt that the trespass was not lawful. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty as to this charge.

Instruction _____

It is a defense to a charge of burglary in the second degree that a building involved was abandoned.

If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty as to this charge.

Instruction _____

When you begin deliberating, you should first select a presiding juror. The presiding juror's duty is to see that you discuss the issues in this case in an orderly and reasonable manner, that you discuss each issue submitted for your decision fully and fairly, and that each one of you has a chance to be heard on every question before you.

During your deliberations, you may discuss any notes that you have taken during the trial, if you wish. You have been allowed to take notes to assist you in remembering clearly, not to substitute for your memory or the memories or notes of other jurors. Do not assume, however, that your notes are more or less accurate than your memory.

You will need to rely on your notes and memory as to the testimony presented in this case. Testimony will rarely, if ever, be repeated for you during your deliberations.

If, after carefully reviewing the evidence and instructions, you feel a need to ask the court a legal or procedural question that you have been unable to answer, write the question out simply and clearly. In your question, do not state how the jury has voted. The presiding juror should sign and date the question and give it to the bailiff. I will confer

with the lawyers to determine what response, if any, can be given.

You will be given the exhibits admitted in evidence, these instructions, and two verdict forms, A and B. Some exhibits and visual aids may have been used in court but will not go with you to the jury room. The exhibits that have been admitted into evidence will be available to you in the jury room.

When completing the verdict forms, you will first consider the crime of burglary in the second degree as charged. If you unanimously agree on a verdict, you must fill in the blank provided in verdict form A the words "not guilty" or the word "guilty," according to the decision you reach. If you cannot agree on a verdict, do not fill in the blank provided in Verdict Form A.

If you find the defendant guilty on verdict form A, do not use verdict form B. If you find the defendant not guilty of the crime of burglary in the second degree, or if after full and careful consideration of the evidence you cannot agree on that crime, you will consider the lesser crime of criminal trespass in the first degree. If you unanimously agree on a verdict, you must fill in the blank provided in verdict form B the words "not guilty" or the word "guilty", according to the decision you reach.

Because this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the proper form of verdict or verdicts to express your decision. The presiding juror must sign the verdict form(s) and notify the bailiff. The bailiff will bring you into court to declare your verdict.

FILED
KING COUNTY, WASHINGTON

FEB 12 2013

SUPERIOR COURT CLERK
BY Carolina Ceja
DEPUTY

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

State of Washington

Plaintiff/Petitioner,

vs.

Robert Sampter

Defendant/Respondent.

NO. 12-1-02898-9

SEA
 KNT

Amendment to Jury Instructions is attached.

Instruction _____

To convict the defendant of the crime of burglary in the second degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about March 5, 2012, the defendant knowingly entered or remained unlawfully in a building;

(2) That the entering or remaining was with intent to commit of theft or with intent to commit the crime of malicious mischief; and

(3) That this act occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

WPIC 60.04 (modified)

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 70608-0-I
v.)	
)	
ROBERT SUMPTER,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 31ST DAY OF DECEMBER, 2013, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) () ()	U.S. MAIL HAND DELIVERY _____
[X] ROBERT SUMPTER 806383 REYNOLDS WORK RELEASE 410 4 TH AVE SEATTLE, WA 98104	(X) () ()	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 31ST DAY OF DECEMBER, 2013.

X _____ 

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710