Supreme Court No. 101126-1
(COA No. 37912-4-III)

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

RAY JAY FRANETICH,

Petitioner.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Ray Franetich, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition pursuant to RAP 13.4.

B. COURT OF APPEALS DECISION

Mr. Franetich seeks review of the Court of Appeals decision dated July 7, 2022, a copy of which is attached as Appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. A lesser included jury instruction is appropriate when the elements of the lesser offense are necessarily the elements of the greater offense and there is evidence to support an inference the lesser included offense was committed. The mens rea of second degree burglary necessarily proves the mens rea of criminal trespass. Because Division Three did not address this issue, though properly raised, did the trial court commit reversible error

when it concluded as a matter of law criminal trespass is not the lesser included offense of second degree burglary and denies the lesser included jury instruction?

2. The factual prong of the *Workman* test requires affirmative evidence establishing the requesting party's theory of the case which raises an inference the lesser offense was committed at the exclusion of the greater offense. Affirmative evidence was presented that Mr. Franetich unlawfully entered a fenced area; but the trial court believed other evidence indicated Mr. Franetich committed more than just criminal trespass. Does the Court of Appeal incorrectly hold Mr. Franetich did not prove sufficient evidence to satisfy the factual prong of the *Workman* analysis?

D. STATEMENT OF THE CASE

Around 1:00 a.m. on November 18, 2018, in Spokane, Mr. Dennis Swanson, a neighbor, reported to 911 a banging noise in the automotive repair shop's back lot. This back lot is fully enclosed by a large metal fence.

Officers with the Spokane Police Department responded to the scene. Within the back lot, officers discovered a Saab where Mr. Swanson reported seeing an individual. Officers observed frost on the hood, the engine compartment was warm, and the rear window had been defrosted. Officers also noticed the vehicle's taillights were broken, the glass on the ground.

Inside the vehicle officers discovered Mr. Franetich. The officers believed Mr. Franetich had started the vehicle. Mr. Franetich told officers that he got into the vehicle to stay warm and that he did not break the taillights. RP 104, 178. No tools, large objects, or blood were discovered on or near Mr. Franetich. RP 116.

During a subsequent search of Mr. Franetich revealed several sets of keys. RP 110, 117, 163. Ms. Denean Reedy, owner and operator of the business, told officers the keys belonged to her and her vehicles on the lot. However, one vehicle was not at Ms. Reedy's shop, a second key did not belong to Ms. Reedy or any vehicle on the lot, and the third key belonged to Ms. Reedy but the vehicle was inoperative. RP 162-63. The key to the SaaB, the vehicle Mr. Franetich was found in, did not belong to Ms. Reedy or the shop. RP 148. Ms. Reedy testified the vehicle was in her lot because the vehicle broke down in "front of the building, the gentleman asked if he could leave it there for a couple days until he could come back and get it." RP 148.

The State charged Mr. Franetich with second degree burglary. CP 232.

At trial, Mr. Franetich requested criminal trespass as a lesser included offense. RP 138. The State argued the

Court of Appeals decision in *State v. Moreno*, 14 Wn. App. 2d 143, 470 P.3d 507 (2020), held criminal trespass is not a lesser included offense and the court should deny Mr. Franetich's request.

The trial court conducted a *Workman*[1] analysis to determine if second degree criminal trespass is a lesser included offense of burglary. RP 138-39. Mr. Franetich argued evidence in the record implicated criminal trespass because he knowingly entered a fenced area, not a building, without lawful permission. RP 140, 145.

The trial court asked defense counsel if the second prong of the *Workman* test required a "reasonable inference" or just an "inference." RP 142-43. Despite being told the language in *Workman* required only an "inference," the trial court found and concluded the *Workman* test "encapsulates a reasonable inference that must support the underlying lesser included." RP 146.

[1] *State v. Workman*, 90 Wn.2d 443, 584 P.2d 382 (1978).

The trial court determined that the *Workman* analysis required a "reasonable inference" and that based on its review of the case, "[t]here's an inference, a reasonable inference, and really the only inference[,]" the keys did not belong to Mr. Franetich therefore "we have evidence of a crime being committed inside the facility circumstantially based on both the vehicle damage, but also we have, even bolstering that further is we have essentially keys that he didn't have permission." RP 146. Based on these facts the court stated,

> "I'm just trying to think; could there be a reasonable inference that he was there simply committing a trespass or that that individual was there simply committing a trespass?"

RP 146. The court denied the Defense's request stating "[i]n addition to the State's argument regarding Division I, I don't find that a lesser included is appropriate, and I'm going to deny a lesser included in this case." RP 147. The

court explained, there was no reasonable inference "that it could have been a simple trespass." RP 162.

On an independent ground, the trial court found the first prong of *Workman* was not satisfied stating "although Ms. Groller raised a good issue that we have some controlling precedent in Division III, I have no indication that that particular analysis was ever argued in Division III and rejected in Division III…" RP 162-63[2].

Mr. Franetich was found guilty and sentenced to an exceptional sentence.

On appeal, Division Three affirmed Mr. Franetich's conviction. Division Three declined to address the legal question of whether criminal trespass is the lesser included offense of burglary stating

> Because the accused must fulfill both elements of the *Workman* test, we avoid addressing the attractive and enthralling question of whether, under the elements of the respective crimes, second degree criminal trespass serves as a

[2] Ms. Groller was Mr. Franetich's trial counsel.

> lesser included offense of second degree burglary.

OP at 5.

Division Three, after analyzing the *Workman* analysis case law, asserted that under the second prong of the *Workman* analysis "trial court[s] should draw only reasonable inferences." OP at 7. Applying the facts of the case, Division Three asserted Mr. Franetich was found unlawfully on another's premises, possessing keys that did not belong to him, and broken glass of a vehicle he was sitting in. The Court determined the trial court did not abuse its discretion denying Mr. Franetich's request for a lesser included jury instruction under the factual prong of the *Workman* analysis. Slip OP at 8.

This timely petition follows.

E. ARGUMENT

1. CRIMINAL TRESPASS IS LEGALLY A LESSER INCLUDED OFFENSE OF BURGLARY.

The trial court determined that under both prongs of the *Workman* analysis, criminal trespass is not a lesser included offense. The Court of Appeals declined to address whether the legal prong of *Workman* is satisfied and instead held Mr. Franetich failed to satisfy the factual prong of *Workman*. The trial court erred when it concluded as a matter of law, criminal trespass is not the lesser included offense of burglary. The Court of Appeals erred by declining to address the issue and holding Mr. Franetich failed to present sufficient factual evidence to support the inference the jury could convict criminal trespass at the exclusion of burglary.

A defendant is entitled to argue his theory of the case including having the jury fully instructed on lesser included offenses whenever there is evidence to support it. *State v. Fernandez-Medina*, 141 Wn.2d 448, 461, 6 P.3d 1150

(2000). This means, the defendant is entitled to have the jury instructed on the offense charged but also on all lesser included offenses. RCW 10.61.006. Denial of this right implicates the defendant's constitutional due process rights. *State v. Koch*, 157 Wn. App. 20, 33, 237 P.3d 287 (2010), *review denied*, 170 Wn.2d 1022 (2011); U.S. Const. amend. XIV; Const. art 1, § 3.

The standard of review on appeal depends on how the trial court denies the defendant's lesser included jury instruction request. De novo review is used when the trial court's decision is a mixed question of law and fact. *State v. Dearbone*, 125 Wn.2d 173, 178, 883 P.2d 303 (1994); *see also Fernandez-Medina*, 141 Wn.2d at 454. An abuse of discretion standard is used when the trial court's decision is based on insufficient evidence. *State v. Henderson*, 182 Wn.2d 734, 743, 344 P.3d 1207 (2015).

a. Criminal trespass is necessarily included in burglary therefore satisfying the legal prong of the *Workman* test.

The first prong of the *Workman* test is satisfied when it is impossible to commit the greater offense without also committing the lesser offense. *State v. Soto*, 45 Wn. App. 839, 840, 727 P.2d 999 (1986); *State v. Porter*, 150 Wn.2d 732, 736-737, 82 P.3d 234 (2004). Washington Courts have routinely held first degree criminal trespass is the lesser included offense of second degree burglary. *Soto*, 45 Wn. App. at 841; *Olson*, 182 Wn. App. at 375; *State v. Ramm*, 190 Wn. App. 1003, WL 5345831 (Sep. 14, 2015)[3]; *State v. Daniels*, 185 Wn. App. 1050, WL 562885 (Feb. 10, 2015)[4]; *State v. Johnson*, 164 Wn. App. 1035, WL 2936547 (Sep. 14, 2009)[5].

Despite these cases, the trial court in Mr. Franetich's case concluded as a matter of law second degree criminal

[3] This opinion is cited in accordance with GR 14.1 as a nonbinding authority.
[4] This opinion is cited in accordance with GR 14.1 as a nonbinding authority.
[5] This opinion is cited solely for the Court's reference.

trespass is not included within second degree burglary. And despite the cases above, Division Three acknowledges there is uncertainty as to whether, legally, criminal trespass is a lesser included offense of burglary.

In this Court's recent *Moreno* opinion, this uncertainty is compounded. The Court of Appeals in *Moreno* stated the Court's opinion in *Soto*, holding criminal trespass is a lesser included of burglary was flawed. *State v. Moreno*, 14 Wn. App. 2d 143, 156, 470 P.3d 507 (2020) (discussing *State v. J.P.*, 130 Wn. App. 887, 125 P.3d 215 (2005) and *State v. Soto*, 45 Wn. App. 839, 727 P.2d 999 (1986)). Division One asserted that "to the extent our previous cases support that first degree criminal trespass is a lesser included offense of first degree burglary, we disagree with them and decline to follow them." *Id*.

This Court affirmed the Court of Appeals in *Moreno*, but declined to address the question of whether criminal trespass is the lesser included offense of burglary. *State v.*

Moreno, 198 Wn.2d 737, 756, 499 P.3d 198 (2021). The Court emphasized that Moreno had not requested criminal trespass as a lesser included offense and therefore was not necessary to address the issue presented. *Id.*

In her concurring opinion, Justice Madsen argued criminal trespass is a lesser included offense of burglary and highlighted that Washington Courts have routinely come to the same conclusion. *Moreno*, 198 Wn.2d at 758-59. (Justice Madsen concurring) (citing *State v. Garcia*, 179 Wn.2d 828, 849, 318 P.3d 266 (2014); *State v. Allen*, 101 Wn.2d 355, 359, 678 P.2d 798 (1984); *State v. Sutherland*, 109 Wn.2d 389, 390, 745 P.2d 33 (1987); *State v. Olson*, 182 Wn. App. 362, 375, 329 P.3d 121 (2014); *State v. Allen*, 127 Wn. App. 945, 951, 113 P.3d 523 (2005); *State v. Soto*, 45 Wn. App. 839, 841, 727 P.2d 999 (1986); *State v. Mounsey*, 31 Wn. App. 511, 517-18, 643 P.2d 892 (1982)).

Justice Madsen correctly highlighted that an individual cannot commit burglary without also committing criminal trespass. The Justice stated that this is because "an individual who enters or remains in a building with intent to commit a crime necessarily has the intent to enter or remain unlawfully. This means a person may enter a building lawfully, but remaining in the building may become unlawful either because that person develops an intent to commit a crime or, in the case of trespass, for some other reason, such as being asked to leave by a rightful owner." *Moreno*, 198 Wn.2d at 759. And, under the hierarchy of mental states, the mens rea of intentionally is satisfied when the person acts knowingly. Thus, "each of the elements of criminal trespass is a necessary element of burglary, making criminal trespass a lesser included offense." *Id*.

Justice Madsen also pointed to this Court's holding and reasoning in *State v. Joseph*, 189 Wn.2d 645, 405

P.3d 993 (2017), to support her conclusion. In *Joseph*, this Court held second degree trespass is a lesser included offense of second-degree vehicle prowling. *Joseph*, 189 Wn.2d at 653. The only difference between the vehicle prowling and burglary statutes is the location: vehicle versus premises. Thus, by concluding that second degree trespass is a lesser included offense of second degree vehicle prowling, the Court "affirmed that intent to commit a crime in a location (vehicle or dwelling) is sufficient to meet the knowledge requirement in the criminal trespass statue." *Moreno*, 198 Wn.2d at 760.

Here, legally, Mr. Franetich could not legally commit burglary without also committing second degree criminal trespass. Under both crimes, the State had to prove Mr. Franetich entered or remained unlawfully in a building. But under Burglary, the State also had to prove Mr. Franetich's intent to commit a crime. And, because criminal trespass is

legally, a lesser included offense, the trial court erred concluding otherwise.

Despite the multiple cases cited by Mr. Franetich at trial and on appeal, and by Justice Madsen in *Moreno*, whether criminal trespass is a lesser included offense of burglary is completely unclear. This Court must accept review to resolve whether criminal trespass is the lessor included offense of burglary.

b. Mr. Franetich presented sufficient evidence to support an inference he committed second degree criminal trespass.

The trial court and Court of Appeals both determined the evidence presented at trial only supported the notion Mr. Franetich committed burglary. The Court of Appeals and trial court erred when both Courts failed to consider the evidence in the light most favorable to Mr. Franetich.

Under the second prong of the *Workman* test, the focus is on the facts of the case and whether there is evidence to support giving the requested instruction.

Fernandez-Medina, 141 Wn.2d at 455. This factual prong requires "a factual showing more particularized than that required for other jury instruction." *Id.*

This Court reviews the sufficiency of the evidence supporting the jury instruction in the light most favorable to the party requesting the instruction. *Fernandez-Medina*, 141 Wn.2d at 456. The requesting party must put forth "some evidence…which affirmatively establishes the defendant's theory on the lesser included offense before an instruction will be given." *State v. Fowler*, 114 Wn.2d 59, 67, 785 P.2d 808 (1990), *overruled on other grounds by State v. Blair*, 117 Wn.2d 479, 816 P.2d 718 (1991); *accord Fernandez-Medina*, 141 Wn.2d at 456.

The evidence "must raise an inference that *only* the lesser included/inferior degree offense was committed to the exclusion of the charged offense." *Id.* This means evidence a jury could convict the defendant of the lesser offense. *Id.* The jury is the ultimate decider of fact and

credibility. *State v. Gallagher*, 4 Wn.2d 437, 448, 103 P.2d 1100 (1940). The trial court "must consider all of the evidence that is presented at trial when it is deciding whether or not an instruction should be given." *Fernandez-Medina*, 141 Wn.2d at 456.

In Mr. Franetich's case there was ample evidence to support the inference Mr. Franetich committed second degree criminal trespass. Mr. Franetich argued he was only on the property, and in the Saab, to stay warm during a winter night in Spokane. Other facts support this argument such as Mr. Franetich was found in a warm Saab; the Saab's engine area was warm; and the window was partially defrosted; there were no tools or blood; and it was unclear whether there was evidence Mr. Franetich entered the shop and stole keys that may or may not have belonged to garage.

The trial court and Court of Appeals both focused on the keys found in Mr. Franetich's possession. The Court of

Appeals correctly noted the keys did not belong to Mr. Franetich, but did not assert who the keys belonged to and it could not because it was unclear. Ms. Reedy initially testified the three keys Mr. Franetich possessed were taken out of vehicles on the lot. However, one vehicle was not at Ms. Reedy's shop, a second key did not belong to Ms. Reedy or any vehicle on the lot, and the third key belonged to Ms. Reedy but the vehicle was inoperative. RP 162-63.

Regardless of these facts, who owns the keys and the significance of the keys were facts for the jury to consider, not for the trial court or Court of Appeals. As this Court has repeatedly stated, the factual prong only requires the evidence support the defendant's request, and that the ultimate importance and persuasiveness of the evidence is left to the jury. Here, Mr. Franetich could not argue his theory of the case. He could not argue the insignificance of the keys or some other fact. Under

Workman, Mr. Franetich provided sufficient evidence to support his request for a criminal trespass jury instruction as a lesser included offense.

The Court of Appeals erred when it held there was insufficient evidence Mr. Franetich committed only second degree burglary. Under the facts of this case, this Court must accept review to determine whether Mr. Franetich proved sufficient evidence to satisfy the factual prong of the *Workman* analysis and warrant the lessor included offense of criminal trespass.

F. CONCLUSION

Based on the foregoing, petitioner Mr. Franetich, respectfully requests that review be granted pursuant to RAP 13.4(b).

DATED this 28th day of July 2022.

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I, Kyle Bert, in accordance with RAP 18.7, certify that this document is properly formatted and contains 3001 words.

Respectfully submitted,

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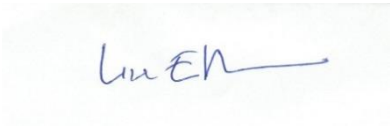

LISE ELLNER
WSBA No. 20955
Attorney for Petitioner

I, Kyle Berti, a person over the age of 18 years of age, served the Spokane County Prosecutor (scpaappeals@spokanecounty.org), Ray Franetich/DOC #267213, Airway Heights Corrections Center (PO Box 2049 Airway Heights, WA 99001-2049) a true copy of the document to which this certificate is affixed on 7/28/2022. Service was made by electronically to the prosecutor, and Mr. Frohs, by depositing in the mails of the United States of America, properly stamped and addressed.

KYLE BERTI
WSBA No. 57155
Attorney for Petitioner

APPENDIX

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

STATE OF WASHINGTON, Respondent, v. RAY JAY FRANETICH, Appellant.	)	No. 37912-4-III UNPUBLISHED OPINION

FEARING, J. — Under RCW 10.61.006, a defendant may hold the right to a lesser included offense instruction to the jury depending on the circumstances. In this appeal, we address whether Ray Franetich's conduct supported the giving of a jury instruction for second degree criminal trespass as a lesser included offense of second degree burglary. We hold in the negative and affirm Franetich's conviction for second degree burglary.

FACTS

We glean the facts from trial testimony. R and R Garage is a Spokane automotive repair shop. A fence encompasses the entirety of R and R's land. The premises displays multiple no trespassing signs.

Shortly before 1:00 a.m. on November 18, 2018, Dennis Swanson, R and R's neighbor, called 911 and reported a banging noise radiating from the shop. Swanson described the noise as a hammer smashing a vehicle. Swanson saw the silhouette of a person walking on R and R's lot.

Spokane Police Department Officers Reid Carrell and Zachary Johnson arrived at R and R within minutes of Dennis Swanson's call to 911. Officers Carrell and Johnson walked toward a Saab parked within the fence's perimeter and in the location where Swanson had seen someone. Officers found frost on the vehicle, but the vehicle's hood was warm, and its rear window was recently defrosted. The pair noticed the car's tail lights to be shattered with the lights' glass resting on the ground.

Officers Reid Carrell and Zachary Johnson espied Ray Franetich inside the Saab. Officer Carrell assumed that Franetich had started the vehicle. On questioning, Franetich stated that he entered R and R's premises by crawling through the fence. He justified his being inside the car as a method to warm himself. He denied damaging the car's tail lights. Franetich admitted that he lacked permission to be on the property. The owner

and manager of R and R, Denean Reedy, confirmed that Franetich lacked permission to be on the premises.

Officers Reid Carrell and Zachary Johnson searched the clothing of Ray Franetich and seized three car keys in his possession. Two of the keys belonged to R and R. One key fit an inoperative vehicle on the premises. The other key operated a vehicle R and R had sent to a transmission shop for service. The third key belonged to a Toyota that did not belong to R and R. R and R kept car keys in a lock box inside the shop, although the keys Franetich possessed could have been left inside the two vehicles.

The Saab, in which Ray Franetich sat, had become inoperable in front of R and R Garage's building. With permission from R and R, the vehicle's owner left the Saab with R and R until he could return in two days.

PROCEDURE

The State of Washington charged Ray Franetich with one count of second degree burglary and two counts of bail jumping. The bail jumping charges arose in connection with his failure to appear at a hearing on the burglary charge. On the second day of a jury trial, Franetich pled guilty to the two counts of bail jumping.

At the conclusion of trial testimony, Ray Franetich requested that the trial court instruct the jury on second degree criminal trespass as a lesser included offense of second degree burglary. Franetich outlined the two-part test needed for a lesser included offense jury instruction as announced by the Washington Supreme Court in *State v. Workman*, 90

Wn.2d 443, 447-48, 584 P.2d 382 (1978). Franetich contended the elements of criminal trespass echoed the elements of burglary. He added that the facts supported an inference that he committed the crime of second degree criminal trespass to the exclusion of second degree burglary. The State denied that Franetich satisfied either of the two prongs.

The trial court asked defense counsel whether, under *State v. Workman*, the second prong of the test simply required evidence to support an "inference," as opposed to a "reasonable inference," that the accused committed the lesser included offense. Report of Proceedings (Oct. 10, 2020) (RP) at 142. Counsel answered that the defense need not show a reasonable inference. Defense counsel highlighted that the *Workman* opinion did not insert the adjective "reasonable" into its elucidation of the test. RP at 142.

The trial court concluded that the defense failed to establish either of the two *Workman* prongs and refused to deliver a lesser included offense instruction. The court, when applying prong two of the *Workman* analysis, reasoned that the evidence must support a "reasonable inference" that Ray Franetich committed only the lesser included offense for the instruction to be appropriate. RP at 146. The court resolved that, based on undisputed evidence, no reasonable person could conclude that Franetich only committed trespass. The trial court highlighted that Franetich possessed stolen keys. The court recognized Franetich's defense that someone else could have been present on the premises of R and R in the early morning hour, but the court deemed this possibility highly improbable. The court also reckoned that, assuming the presence of an

undiscovered person, Franetich must have been the phantom's accomplice.

The jury found Ray Franetich guilty of burglary in the second degree.

LAW AND ANALYSIS

On appeal, Ray Franetich argues that the trial court breached his constitutional right to due process by denying his request for a lesser included jury instruction on criminal trespass. Franetich contends that satisfying the elements of second degree burglary necessarily satisfies the elements of second degree criminal trespass. He further argues that evidence at trial would have allowed the jury to convict him only of criminal trespass.

The State responds that criminal trespass is not a lesser included offense of burglary, because the legal elements of trespass do not correspond to the elements of burglary. The State also argues that trial testimony did not support a finding that Ray Franetich only committed trespass. We agree with the State's second argument. Because the accused must fulfill both elements of the *Workman* test, we avoid addressing the attractive and enthralling question of whether, under the elements of the respective crimes, second degree criminal trespass serves as a lesser included offense of second degree burglary.

In *State v. Workman*, 90 Wn.2d 443, 447-48 (1978), the high court outlined a two-prong analysis for determining whether the court must grant a request for a lesser included offense instruction:

> 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 included 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.

(Internal citations omitted.)

> Under the first prong of the test (the legal prong), the court asks whether the lesser included offense consists solely of elements that are necessary to conviction of the greater, charged offense. Under the second (factual) prong, the court asks whether the evidence presented in the case supports an inference that *only* the lesser offense was committed, to the exclusion of the greater, charged offense.

State v. Condon, 182 Wn.2d 307, 316, 343 P.3d 357 (2015) (internal citations omitted). The party requesting the lesser included offense instruction is entitled to the instruction, only on satisfaction of both prongs of the *Workman* test. *State v. Condon*, 182 Wn.2d 307, 316 (2015).

The court should deliver a lesser included offense instruction "'if the evidence would permit a jury to rationally find a defendant guilty of the lesser offense and acquit him of the greater.'" *State v. Fernandez-Medina*, 141 Wn.2d 448, 456, 6 P.3d 1150 (2000) (*quoting State v. Warden*, 133 Wn.2d 559, 563, 947 P.2d 708 (1997)). To determine whether the evidence suffices to support the giving of an instruction, we view the evidence in the light most favorable to the party requesting the instruction. *State v. Henderson*, 182 Wn.2d 734, 742, 344 P.3d 1207 (2015); *State v. Fernandez-Medina*, 141 Wn.2d 448, 455-56 (2000). The evidence must "affirmatively establish the defendant's

theory of the case—it is not enough that the jury might disbelieve the evidence pointing to guilt." *State v. Fernandez-Medina*, 141 Wn.2d at 456.

Because of the qualification that the jury must rationally find the defendant guilty only of the lesser offense, we agree with the trial court that the court should draw only reasonable inferences. Otherwise, the party requesting the instruction could posit innumerable improbable scenarios to force the delivery of the lesser included offense instruction. For example, Ray Franetich could postulate that, at midnight, an airborne helicopter unexpectedly fluttered overhead and surprisingly dropped him the keys to the Saab and two other keys.

Spokane Police Department Officers Reid Carrell and Zachary Johnson found Ray Franetich situated unlawfully on R and R's property, where he sat without permission in a vehicle, with broken tail lights. The officers discovered three car keys, apart from the Saab key, in Franetich's possession, none of which belonged to him. No affirmative evidence supported Franetich's theory that another individual, present concurrently yet separately from him on the repair shop premises, damaged the Saab, stole the keys, and unpredictably tendered him the keys. The affirmative evidence demonstrated that, not only did Franetich commit more than just criminal trespass, he committed second degree burglary.

We review the trial court's decision regarding the factual prong of the *Workman* rule for abuse of discretion. *State v. Henderson*, 182 Wn.2d 734, 743 (2015). The trial court did not abuse its discretion.

CONCLUSION

We affirm Ray Franetich's conviction for second degree burglary.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Fearing, J.

WE CONCUR:

Lawrence-Berrey, A.C.J.

Staab, J.

LAW OFFICES OF LISE ELLNER

July 28, 2022 - 3:44 PM

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