Supreme Court No. _____
COA No. 29785-3-III

89125-7

IN THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,
Respondent

v.

GARY McCABE,
Petitioner

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

The Honorable Jerome J. Leveque, Linda G. Thompkins,
Ellen Kalama Clark, and Maryann C. Moreno, Judges

PETITION FOR REVIEW

ERIC BROMAN
Attorney for Petitioner

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

TABLE OF AUTHORITIES (CONT'D)

A. IDENTITY OF PETITIONER

Petitioner Gary McCabe, the appellant below, asks this Court to review the following Court of Appeals decision.

B. COURT OF APPEALS DECISION

McCabe seeks review of Division Three's decision in State v. McCabe, No. 29785-3-III (May 21, 2013). The court denied a motion to reconsider by order dated June 17, 2013.[1]

C. INTRODUCTION AND ISSUES PRESENTED FOR REVIEW

McCabe was charged with residential burglary. The trial evidence would allow the jury to find that he only entered a fenced backyard, not a dwelling. Trial counsel therefore proposed instructions on the lesser included offenses of first and second degree criminal trespass.

After reviewing the statutory definitions of "building," which includes "fenced areas," appellate counsel argued the trial court erred in refusing to instruct on first degree criminal trespass. The Court of Appeals, sua sponte, cited State v. Brown, a 1988 Division One case, for the proposition that entry into a "fenced area" is second degree trespass, not first degree trespass. Division Three therefore

[1] The opinion and order are attached as appendices A and B.

concluded the trial court did not err in refusing instructions on first degree trespass.

1. Two other Court of Appeals cases have reached contrary conclusions on the question whether entry into a "fenced area" would support a first degree trespass conviction. Should this Court grant review to resolve the conflict? RAP 13.4(b)(2).

2. Where Brown is not particularly visible, where the other two decisions have not been criticized, and where burglary and trespass prosecutions are common, should this Court grant review to provide necessary guidance on an issue of substantial public interest? RAP 13.4(b)(4).

3. Was McCabe denied effective assistance of appellate counsel, and should this Court grant review, to remedy that denial and to provide guidance on how appellate courts should address such claims when raised in a timely motion for reconsideration? RAP 13.4(b)(3), (4).

D. STATEMENT OF THE CASE[2]

The state charged McCabe with residential burglary. The state theorized McCabe had entered the Spokane residence of the Millers. The two questions at trial were: (1) identity, and (2) whether the person identified as McCabe entered the building, or only the fenced area of the backyard. Brief of Appellant (BOA) at 3-21.

Evidence showed that someone entered the residence through a back window. McCabe was described as "stocky" and unlikely to be able to fit through the small window. His fingerprints were not found inside the residence. The witness who claimed to see a person who looked like McCabe only saw the person enter the fenced backyard, not the residence. Another woman, smaller than McCabe, was seen in a car that was observed parked in front of the Miller's. BOA at 4-5, 20.

At the close of the evidence, defense counsel requested instructions on the lesser included offenses of first and second degree criminal trespass. Counsel argued that a reasonable juror could find that McCabe trespassed in the Miller's fenced backyard, but also could find that someone other than McCabe actually entered the

[2] A full statement of facts is set forth in the Brief of Appellant (BOA) at 2-15.

residence. 5RP 11-27; CP 90-93 (the proposed instructions are attached as appendix C). For this reason, trespass was a proper lesser-included offense. The trial court nonetheless denied instructions on both offenses. 5RP 24-26.

On appeal, McCabe's appellate counsel argued the trial court erred in failing to instruct the jury on first degree criminal trespass. The brief cited the applicable case law and statutes on lesser-included offenses and properly discussed the legal and factual prongs of Workman.[3] BOA at 15-21.

The Court of Appeals rejected McCabe's claim, reasoning "a person cannot commit first degree criminal trespass by merely remaining in a fenced area." Slip op. at 5 (citing State v. Brown, 50 Wn. App. 873, 878, 751 P.2d 331 (1988), abrogated on other grounds by In re Restraint of Heidari, 174 Wn.2d 288, 274 P.3d 366 (2012)). "[T]he definition of 'building' for first degree criminal trespass excludes a fenced area." Slip op. at 5 (citing Brown, and the comments to WPIC 60.15). The court therefore concluded "a jury could not rationally find [McCabe] guilty of first degree criminal trespass and acquit him of residential burglary." Slip op. at 5. For that reason, the

[3] State v. Workman, 90 Wn.2d 443, 451, 584 P.2d 382 (1978).

trial court did not err in refusing the lesser-included instruction for first degree criminal trespass. Id.

Division Three's analysis was offered sua sponte because the state did not cite Brown or WPIC 60.15. The state instead argued the trial court did not abuse its discretion in finding that the evidence supported instructions only on residential burglary. BOR at 5.

McCabe moved to reconsider Division Three's decision. The motion raised three claims: (1) in light of Brown, the trial court erred in failing to instruct the jury on second degree criminal trespass, (2) the court should reach that issue in the interest of justice, and (3) in the alternative, the court should appoint new appellate counsel for McCabe, because appointed counsel had rendered ineffective assistance by not citing Brown and by failing to challenge the trial court's denial of instructions on second degree criminal trespass.

Assuming Brown is correct, appellate counsel made an error by (1) targeting the assignment of error and argument to first degree criminal trespass, and (2) not arguing the trial court erred in failing to instruct on second degree criminal trespass. This error was based on an erroneous assumption that a "fenced area" is included in the definition of "building." BOA at 18 (citing RCW 9A.034.110(5)).

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. REVIEW SHOULD BE GRANTED TO PROVIDE CLEAR GUIDANCE ON WHAT DEGREE OF CRIMINAL TRESPASS IS A LESSER INCLUDED OFFENSE WHEN THE EVIDENCE SHOWS ENTRY INTO A "FENCED AREA."

This petition arises due to an odd quirk of Washington law. In Brown, Division One held an express statutory definition does not apply to the same statutory term in the same title of the Revised Code. While McCabe takes no issue with the substantive holding in Brown, Division Three's sua sponte citation to Brown made it clear the trial court erred in failing to instruct the jury on the lesser-included offense of second degree criminal trespass.

McCabe therefore asked Division Three to reconsider. McCabe's motion raised all of the claims raised herein, allowing Division Three a fair chance to decide them.

The legal analysis is relatively straightforward. First degree criminal trespass is committed where a person "knowingly enters or remains unlawfully in a building." RCW 9A.52.070(1). Second degree criminal trespass is committed where a person "knowingly enters or remains unlawfully in or upon premises of another under circumstances not constituting criminal trespass in the first degree."

RCW 9A.52.080(1). The operative difference is between a "building" and a "premises."

In unambiguous language, the criminal code defines "building" to include "fenced area[s]." RCW 9A.04.110(5).[4] When writing the appellant's brief, McCabe's counsel therefore concluded the proper lesser-included offense was first degree criminal trespass, because McCabe's trial theory was that the person who was seen walking in the fenced backyard was not the same person who actually entered the dwelling. A rational juror could find McCabe was the person in the fenced area, and find him guilty only of trespass rather than residential burglary.

McCabe's appellate counsel relied on fairly settled principles. The statutory definitions in RCW 9A.04.110 are used throughout RCW Title 9A. This would normally mean that "building" includes a

---

[4] RCW 9A.04.110(5) provides:

> "Building," in addition to its ordinary meaning, includes any dwelling, fenced area, vehicle, railway car, cargo container, or any other structure used for lodging of persons or for carrying on business therein, or for the use, sale, or deposit of goods; each unit of a building consisting of two or more units separately secured or occupied is a separate building[.]

Emphasis added.

"fenced area" for any offense defined in that title. WPIC 2.05; RCW 9A.04.110 ("In this title unless a different meaning is plainly required . . ."); State v. Lira, 45 Wn. App. 653, 726 P.2d 1015 (1986) ("building" includes "fenced area" for burglary in RCW Chapter 9A.52), rev. denied, 107 Wn.2d 1028 (1987).

As Division Three pointed out, however, Division One held to the contrary in Brown. Citing legislative history from 1979 amendments to the trespass statutes, the Brown court held

> The Legislature clearly intended to exclude fenced areas from the definition of "building" in the amended first degree criminal trespass statute. Rather, fenced areas were intended to be covered by the broader definition of "premises" in the second degree criminal trespass statute.

Brown, 50 Wn. App. at 878. In other words, the Brown court relied on legislative history to hold the Legislature did not mean what the plain definition says. This is a fairly unusual jurisprudential event.[5]

---

[5] Courts generally do not look to legislative history to determine the meaning of unambiguous statutes. State v. Velasquez, 176 Wn.2d 333, 336, 292 P.3d 92 (2013) ("When statutory language is unambiguous, we do not need to use interpretive tools such as legislative history"); C.J.C. v. Corp. of Catholic Bishop of Yakima, 138 Wn.2d 699, 708, 985 P.2d 262 (1999) ("Where the statutory language is clear and unambiguous, the statute's meaning is determined from its language alone; we may not look beyond the language nor consider the legislative history", emphasis added).

Relying on the statute's plain meaning, McCabe's appellate counsel mistakenly overlooked Brown and its citation in the comments to WPIC 60.16. In counsel's defense, it is rare when an unambiguous statutory definition does not apply to a statutory term. It is so rare, in fact, that two Divisions of the Court of Appeals similarly overlooked Brown when addressing the same question – whether a "fenced area" is a "building" for purposes of first degree criminal trespass.

The first time, Division One overlooked its own then-recent decision in Brown. State v. Brenner, 53 Wn. App. 367, 380-81, 768 P.2d 509 (1989), overruled on other grounds in State v. Wentz, 149 Wn.2d 342, 68 P.3d 282 (2003). Brenner entered a fenced area and was convicted of burglary. On appeal he argued the trial court erred by refusing to instruct the jury on second degree criminal trespass as a lesser included. Division One rejected Brenner's claim:

> Brenner's argument assumes that the jury could have found that the fenced area entered did not constitute a building. As stated above, the fenced area of the wrecking yard constituted a building as a matter of law.

Brenner, 53 Wn. App. at 380-81. This plainly conflicts with the Brown court's conclusion.

Division Two reasoned similarly in State v. Padgett, noted at 99 Wn. App. 1012, 2000 WL 96202, rev. denied, 141 Wn.2d 1012

(2000). The Padgett court held the evidence was insufficient to prove burglary, but because there was an entry to a "fenced area," the court concluded the evidence established first degree criminal trespass. The court therefore overturned the burglary convictions and remanded for entry of first degree trespass convictions. 2000 WL 96202 at *3.[6]

The Brenner and Padgett courts both relied on the same statutory definition on which McCabe's counsel relied. Like McCabe's counsel (and the state's experienced appellate counsel), those judges (and their clerks) overlooked Brown.

After receiving Division Three's decision, the question arose as to how to fairly reconcile Brown, Brenner, and Padgett in McCabe's

---

[6] McCabe's counsel does not cite the unpublished Padgett decision as an "authority," but rather to show an interdivisional conflict justifying this Court's review. RAP 13.4(b)(2); cf. GR 14.1 (party may not cite an unpublished decision "as an authority"); State v. Franklin, 172 Wn.2d 831, 838, 263 P.3d 585 (2011) (discussing and resolving conflicting unpublished decisions from different Divisions); State v. Arreola, 176 Wn.2d 284, 297, 290 P.3d 983 (2012) (citing unpublished decisions to show how this Court had previously analyzed pretext stop issues under State v. Ladson); see also, State v. Higginbotham, 162 Wis.2d 978, 996-98, 471 N.W.2d 24 (1991) (Wisconsin has similar rule barring citation to unpublished decision as "authority"; the Wisconsin Supreme Court held it is not improper to cite unpublished decisions to show an interdivisional conflict justifying the Supreme Court's review).

case. McCabe's motion to reconsider identified three possible options.

First, McCabe asked Division Three to exercise its authority under RAP 1.2(a) and decide this issue in the interest of justice. To properly raise the issue, the appellant's brief needed no profound modification – the only changes would substitute the word "second" for the word "first" in the assignment of error and issue statement, and in a few locations in the argument. Second degree trespass meets Workman's legal prong as a lesser-included offense.[7] Division Three appears to have agreed the evidence met the factual prong when properly viewed "in the light most favorable to Mr. McCabe." Slip op. at 5. Allowing the issue to be considered would not unfairly affect the state, because the state's argument had nothing to do with Brown or the analysis of a "fenced area."

---

[7] Brown, 50 Wn. App. at 878-79; State v. Brittain, 38 Wn. App. 740, 746, 689 P.2d 1095 (1984) ("[s]econd degree criminal trespass is applicable only in those situations where the defendant allegedly enters or remains unlawfully on private property not constituting a building, such as fenced land"); State v. Mounsey, 31 Wn. App. 511, 518, 643 P.2d 892 ("second degree criminal trespass involves knowingly entering or remaining on premises in a situation which does not amount to first degree criminal trespass. Second degree criminal trespass then can apply only in situations where a person enters or remains unlawfully on premises other than a building, i.e., open grounds, yards, etc."), rev. denied, 97 Wn.2d 1028 (1982).

As a second option, McCabe recognized Division Three might simply deny reconsideration without further comment. While that might seem efficient in the short term, McCabe argued it is not a just resolution and likely would create longer-term problems. Brown conflicts with Division One's decision in Brenner and Division Two's decision in Padgett, justifying further review in this Court. RAP 13.4(b)(2).

Third, the remedy for the denial of effective assistance of appellate counsel is to reinstate the appeal and start over.[8] The court therefore should appoint new counsel to argue that McCabe was denied effective assistance of appellate counsel. Current counsel has a conflict of interest that precludes counsel from arguing his own ineffectiveness. RPC 1.7(a)(2); United States v. Del Muro, 87 F.3d 1078, 1080-81 (9th Cir.1996) (counsel should not be forced to argue counsel's own ineffectiveness; In re Frampton, 45 Wn. App. 554, 559-60, 726 P.2d 486 (1986) (where effective assistance of appellate counsel is denied, the appropriate remedy is reinstatement of the appeal).

---

[8] McCabe's counsel apologized for overlooking Brown. Motion to Reconsider at 9, n.8.

As admitted supra, McCabe's appellate counsel made a mistake.[9] As a result of that deficient performance, McCabe has been prejudiced and prevented from raising a meritorious claim that would result in the reversal of his burglary conviction. New counsel should have been appointed to assist him in raising that claim.

Unfortunately, Division Three chose option two. McCabe's motion to reconsider was denied without further comment.[10] This petition therefore follows.

To summarize, review is appropriate for three reasons. First, this Court should resolve the conflict between Brown, Brenner, and Padgett. RAP 13.4(b)(2). Second, although Brown appears to have been properly decided, it is not particularly visible.[11] Brenner and Padgett remain uncriticized and can mislead unwary courts and

---

[9] Counsel relied on RCW 91.04.110(5), the definition of "building," which includes "fenced areas." BOA at 17-18. Counsel overlooked Brown, as did respondent's counsel (and the judges and clerks who reached the same conclusion in Brenner and Padgett). Whatever solace that might provide counsel's ego, counsel still erred. Counsel admits he had no legitimate tactical reason for this error. Instead, it has always been counsel's intent to raise meritorious arguments that could result in the reversal of McCabe's conviction.

[10] The order denying reconsideration was signed by Chief Judge Korsmo, who was not a member of the original panel that heard or decided the case. App. B.

[11] See note 10, supra.

counsel. Criminal trespass and burglary are relatively common offenses, and this Court should grant review to provide clear guidance on what degree of criminal trespass occurs when someone enters a "fenced area." RAP 13.4(b)(4). Third, this Court should grant review to ensure McCabe, and similarly situated others, receive effective assistance of appellate counsel. RAP 13.4(b)(3), (4).

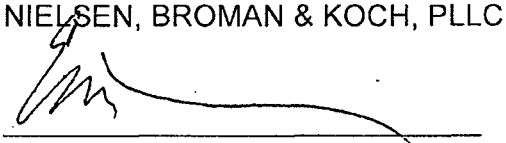
F. CONCLUSION

For the reasons set forth above, this Court should grant review. RAP 13.4(b), 13.6.

DATED this 17th day of July, 2012.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



ERIC BROMAN, WSBA 18487
Office ID No. 91051
Attorneys for Petitioner

APPENDIX A

No. 29785-3-III

FILED
MAY 21, 2013
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON, Respondent, v. GARY DWAYNE McCABE, Appellant.	)	No. 29785-3-III UNPUBLISHED OPINION

BROWN, J. — Gary Dwayne McCabe appeals his residential burglary and methamphetamine possession convictions. He contends the trial court erred by declining his requested lesser included offense instruction and insufficient evidence supports the crime date stated in his to-convict instruction. We affirm.

FACTS

On August 12, 2010, Dennis and Bette Miller left their house to get lunch. While the Millers were gone, neighbor Eric Rogers saw a male walk around the side of the house and load wooden boxes into a red Dodge Neon two or three times over the span of about one and a half to two minutes. When the Millers returned, they found someone had broken a rear basement window, entered the house, and removed items including five wooden boxes holding a coin collection worth $27,340. On August 20, 2010, law enforcement stopped and arrested Mr. McCabe in a red Dodge Neon, finding a wooden

box and gold coins on the front passenger seat and a certificate of authenticity for two silver coins in his breast pocket. Law enforcement then impounded the vehicle and executed a search warrant for it five days later, finding methamphetamine and a stolen laptop computer in the back seat area.

The State charged Mr. McCabe with residential burglary, methamphetamine possession, and third degree stolen property possession. The trial court declined his request to instruct the jury on first degree criminal trespass as a lesser included offense of residential burglary. Without objection, the trial court instructed the jury that to convict him of methamphetamine possession, it must find he did so "on or about August 24, 2010." Clerk's Papers (CP) at 124. The jury found Mr. McCabe guilty of residential burglary and methamphetamine possession but acquitted him of third degree stolen property possession. He appealed.

ANALYSIS

A. Lesser Included Offense Instruction

The issue is whether the trial court erred in declining Mr. McCabe's request to instruct the jury on first degree criminal trespass as a lesser included offense of residential burglary. He contends the ruling is erroneous because the court adopted an incorrect view of the facts. We disagree.

Where, as here, the trial court declines to give a requested jury instruction based on its view of the facts, we review the decision for abuse of discretion. *State v. Lucky*, 128 Wn.2d 727, 731, 912 P.2d 483 (1996), *overruled on other grounds by State v. Berlin*, 133 Wn.2d 541, 544, 947 P.2d 700 (1997). A trial court abuses its discretion if

its decision is "manifestly unreasonable," based on "untenable grounds," or made for "untenable reasons."[1] *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

A jury cannot convict a defendant of an uncharged offense. CONST. art. I, § 22 (amend. 10); *State v. Ackles*, 8 Wash. 462, 464, 36 P. 597 (1894). But a jury may convict a defendant of a lesser offense necessarily included in a charged offense. RCW 10.61.006; *Beck v. Alabama*, 447 U.S. 625, 634, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980). If an offense is lesser included, the trial court must instruct the jury on it when either party requests. *State v. Workman*, 90 Wn.2d 443, 447, 584 P.2d 382 (1978); *State v. Mak*, 105 Wn.2d 692, 745, 747, 718 P.2d 407 (1986), *overruled on other grounds by State v. Hill*, 123 Wn.2d 641, 870 P.2d 313 (1994). An offense is lesser included if it satisfies a legal prong and a factual prong. *Workman*, 90 Wn.2d at 447-48. Under the legal prong, "each of the elements of the lesser offense must be a necessary element of the offense charged." *Id.* Under the factual prong, "the evidence in the case must support an inference that the lesser crime was committed." *Id.* at 448.

The parties dispute solely the factual prong. A lesser offense satisfies the factual

---

[1] A decision is based on untenable grounds or made for untenable reasons if it rests on facts unsupported in the record or was reached by applying the wrong legal standard. A decision is manifestly unreasonable if the court, despite applying the correct legal standard to the supported facts, adopts a view that no reasonable person would take, and arrives at a decision outside the range of acceptable choices.
State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003) (citations omitted) (internal quotation marks omitted).

prong "[i]f the evidence would permit a jury to rationally find a defendant guilty of the lesser offense and acquit him of the greater." *State v. Warden*, 133 Wn.2d 559, 563, 947 P.2d 708 (1997) (citing *Beck*, 447 U.S. at 635). But the evidence must do more than merely cast doubt on the State's theory regarding the charged offense; instead, the evidence must affirmatively establish the defendant's theory regarding the lesser offense. *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). In other words, "the evidence must raise an inference that *only* the lesser . . . offense was committed to the exclusion of the charged offense." *State v. Fernandez-Medina*, 141 Wn.2d 448, 455, 6 P.3d 1150 (2000). This analysis requires "view[ing] the supporting evidence in the light most favorable to the party that requested the instruction." *Id.* at 455-56.

A person commits residential burglary if he or she "enters or remains unlawfully in a dwelling" and does so "with intent to commit a crime against a person or property therein." RCW 9A.52.025(1). A dwelling is a "building" a person uses or ordinarily uses for lodging. RCW 9A.04.110(7). In this context, the definition of "building" includes a fenced area. RCW 9A.04.110(5). A person commits first degree criminal trespass if he or she "knowingly enters or remains unlawfully in a building." RCW 9A.52.070(1). In this context, the definition of "building" excludes a fenced area. *State v. Brown*, 50 Wn. App. 873, 878, 751 P.2d 331 (1988), *abrogated on other grounds by In re Pers. Restraint of Heidari*, 174 Wn.2d 288, 274 P.3d 366 (2012).

Mr. McCabe argues the evidence shows he committed solely first degree criminal trespass to the exclusion of residential burglary because he merely remained in the

fenced area and did not enter the house. But a person cannot commit first degree criminal trespass by merely remaining in a fenced area. *See id.* As the notes and comments to Mr. McCabe's own proposed instructions explain, the definition of "building" for first degree criminal trespass excludes a fenced area. 11A WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 60.15 note on use & cmt. at 20, 60.16 note on use & cmt. at 21-22 (3d ed. 2008) (citing *Brown*, 50 Wn. App. 873). Therefore, viewing the evidence in the light most favorable to Mr. McCabe, a jury could not rationally find him guilty of first degree criminal trespass and acquit him of residential burglary. It follows that the trial court did not abuse its discretion in deciding first degree criminal trespass failed the factual prong here. In sum, we conclude the court did not err in declining Mr. McCabe's requested lesser included offense instruction.

B. Evidence Sufficiency

The issue is whether sufficient evidence supports finding Mr. McCabe possessed methamphetamine "on or about August 24, 2010," the date the trial court included in the to-convict instruction without objection. CP at 124. Mr. McCabe contends no evidence supports this crime date.

Evidence is sufficient to support a guilty finding if, "'after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (emphasis omitted) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)). A challenge to evidence

sufficiency "admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

The Uniform Controlled Substances Act provides, "It is unlawful for any person to possess a controlled substance . . . ." RCW 69.50.4013(1). While the date is usually not an essential element of a crime, *State v. DeBolt*, 61 Wn. App. 58, 62, 808 P.2d 794 (1991), the State must prove otherwise unnecessary elements where, as here, the trial court includes them in the to-convict instruction without objection, *State v. Hickman*, 135 Wn.2d 97, 102, 954 P.2d 900 (1998); *see also State v. Jensen*, 125 Wn. App. 319, 325-26, 104 P.3d 717 (2005).

The State had to prove Mr. McCabe possessed methamphetamine on or about August 24, 2010. Mr. McCabe does not dispute whether he possessed methamphetamine on August 20, 2010. Viewing the evidence in the light most favorable to the State, a rational jury could find beyond a reasonable doubt that this date was on or about August 24, 2010. *See State v. Hayes*, 81 Wn. App. 425, 432-33, 914 P.2d 788 (1996) (concluding the "on or about" language allows the State to offer evidence the defendant committed the crime anytime within the statute of limitations period where, as here, the date is not an essential element of the crime and the defendant raises no alibi at the trial court).[2]

[2] Mr. McCabe argues, for the first time on appeal, his incarceration on August 24, 2010 is an alibi and precludes the State from offering evidence he possessed methamphetamine on August 20, 2010. We reject his argument because he raised no alibi at the trial court and the State consistently maintained he possessed methamphetamine on August 20, 2010. *See* RAP 2.5(a).

Mr. McCabe relies on *State v. Mills*, 80 Wn. App. 231, 907 P.2d 316 (1995) to urge a different result. In *Mills*, law enforcement arrested the defendant for methamphetamine possession, uncovered a motel room key, executed a search warrant for the motel room, and there discovered more methamphetamine with a handgun lying beside it. *Id.* at 233. The trial court convicted the defendant of methamphetamine possession and found he committed the crime while armed with a firearm. *Id.* Division Two of this court reversed the firearm enhancement, concluding the defendant was not armed because the handgun was several miles away at the time of arrest. *Id.* at 237. The court rejected the State's request to uphold the firearm enhancement under the "on or about" language, partly because no evidence showed the defendant, the methamphetamine, and the handgun were ever present in the motel room at the same time. *Id.* at 234.

Our case is unlike *Mills*. Here, Mr. McCabe was driving the vehicle immediately before law enforcement stopped and arrested him on August 20, 2010. Because law enforcement impounded the vehicle, executed a search warrant for it and discovered methamphetamine inside it five days later, a rational jury could reasonably infer the vehicle contained the methamphetamine at the time of arrest. Thus, the evidence shows Mr. McCabe and the methamphetamine were both present in the vehicle at the time of arrest. As noted, the time of arrest was on or about August 24, 2010. In sum, sufficient evidence supports the crime date stated in the to-convict instruction.

Affirmed.

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.

Brown, J.

WE CONCUR:

Kulik, J.

Siddoway, A.C.J.

APPENDIX B

No. 29785-3-III

COURT OF APPEALS, STATE OF WASHINGTON, DIVISION III

STATE OF WASHINGTON, Respondent, v. GARY DWAYNE McCABE, Appellant.	)	No. 29785-3-III ORDER DENYING MOTION FOR RECONSIDERATION

THE COURT has considered appellant's motion for reconsideration of this court's decision of May 21, 2013, and having reviewed the records and files herein, is of the opinion the motion should be denied. Therefore,

IT IS ORDERED, appellant's motion for reconsideration is hereby denied.

DATED: June 17, 2013

PANEL: Jj. Brown, Kulik, Siddoway

FOR THE COURT:

KEVIN M. KORSMO
CHIEF JUDGE

APPENDIX C

No. 29785-3-III

JURY INSTRUCTION NO.

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 August 12, 2010, 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.

JURY INSTRUCTION NO.

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

JURY INSTRUCTION NO.

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

(1) That on or about August 12, 2010, the defendant knowingly entered or remained in or upon the premises of another under circumstances not constituting criminal trespass in the first degree;

(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.

JURY INSTRUCTION NO.

A person commits the crime of criminal trespass in the second degree when he or she knowingly enters or remains unlawfully in or upon premises of another under circumstances not constituting criminal trespass in the first degree.

LAW OFFICES OF
NIELSEN, BROMAN & KOCH, P.L.L.C.
1908 E MADISON ST.
SEATTLE, WASHINGTON 98122
Voice (206) 623-2373 · Fax (206) 623-2488
WWW.NWATTORNEY.NET

ERIC J. NIELSEN
ERIC BROMAN
DAVID B. KOCH
CHRISTOPHER H. GIBSON

OFFICE MANAGER
JOHN SLOANE

LEGAL ASSISTANT
JAMILAH BAKER

DANA M. LIND
JENNIFER M. WINKLER
ANDREW P. ZINNER
CASEY GRANNIS
JENNIFER J. SWEIGERT

OF COUNSEL
K. CAROLYN RAMAMURTI
JARED B. STEED

State v. Gary McCabe

No. 29785-3-III

Certificate of Service by email

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 17th day of July, 2013, I caused a true and correct copy of the **Petition for Review** to be served on the party / parties designated below by email per agreement of the parties pursuant to GR30(b)(4) and/or by depositing said document in the United States mail.

Spokane County Prosecuting Attorney
kowens@spokanecounty.org

Gary McCabe
DOC No. 902662
Coyote Ridge Corrections Center
P.O. Box 769
Connell, WA 99326-0769

Signed in Seattle, Washington this 17th day of July, 2013.

X Patrick Mayovsky