70641-1

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NO. 70641-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

LASHAWN HOOPER,

Appellant.

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

APPELLANT'S REPLY BIRIEF

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NANCY P. COLLINS
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

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A. ARGUMENT.

1. Trespass is a lesser offense of burglary and based on Mr. Hooper's testimony, he was entitled to this lesser offense instruction.

The prosecution offers a far-fetched claim that second degree trespass is not a lesser included offense of burglary.

The State agrees, as it must, that criminal trespass in the second degree would meet the legal prong of the lesser included offense test if it was not possible to commit the greater offense of first degree burglary without also committing the lesser. Resp. Brief at 8 (citing *State v. Workman,* 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978)).

It accurately explains that second degree trespass requires that a person unlawfully enter or remain in premises belonging to another person other than a building. Resp. Brief at 9 (citing inter alia, RCW 9A.52.080). It states that first degree burglary requires the unlawful entry or remaining in premises of another person, like second degree trespass. It contains the added elements not present in second degree trespass that the premise entered is a building, the person intended to commit a crime inside, and he was either armed with a deadly weapon or assaulted someone. Resp. Brief at 10 (citing RCW 9A.52.020).

But then the prosecution spins an inapplicable scenario that would make a person liable for a burglary but not trespass in the second degree. Resp. Brief at 10. It claims that a person who lives in an apartment building and breaks into a neighbor's apartment would not commit second degree trespass because the perpetrator never went outside before illegally entering her neighbor's apartment. *Id*. It also asserts that a person could have permission to be in someone's yard, and lack permission to be inside the house. *Id*.

However, these are factual differences, not legal reasons to assert that unlawful entry is not a predicate for burglary. The possibility that first degree trespass would be a more applicable lesser offense in some situations does not mean second degree trespass is not a lesser included offense of first degree burglary.

As legal authority, the prosecution relies on *State v. Mounsey*, 31 Wn.App. 511, 517-18, 643 P.2d 892, *rev. denied*, 97 Wn.2d 1028 (1982), a case where there was no dispute that the offense occurred inside a building and yet the defense only asked for a lesser offense instruction of second degree trespass. 31 Wn.App. at 513-14. The court held that second degree trespass was not legally available as a lesser offense because it was undisputed that the defendant had entered the

building, and second degree trespass applies to premises other than a building. *Id.* at 517-18.

But *Mounsey* does not call for the same result in Mr. Hooper's case. The court in *Mounsey* agreed that second degree trespass would be an available lesser offense if a person is unlawfully "on premises other than a building, i.e., open grounds, yards, etc." *Id.* at 518. Unlike the defendant in *Mounsey*, who admitted he entered the building but claimed he did so with consent, Mr. Hooper testified that he never entered the complainant's home. 1RP 30. He said the confrontation occurred on the complainant's property, i.e., "on premises other than a building" and properly asked for the lesser offense instruction of second degree trespass. *See Mounsey*, 31 Wn.App. at 518.

The prosecution illogically asserts that a person who says he never crossed the threshold into a home may never obtain a lesser offense instruction of trespass. A defendant's right to a lesser offense instruction is provided by statute, case law and the constitutional right to be convicted based on an accurate assessment of the defendant's actual conduct. *Vujosevic v. Rafferty*, 844 F.2d 1023, 1027 (3rd Cir. 1988); *Workman,* 90 Wn.2d at 447-48; RCW 10.61.006; U.S. Const. amends. 6, 14; Wash. Const. art. I, §§ 3, 22. "When the evidence

supports an inference that the lesser included offense was committed, the defendant has a right to have the jury consider that lesser included offense." *State v. Warden*, 133 Wn.2d 559, 564, 947 P.2d 708 (1997).

The State's insistence that second degree trespass is never a legal lesser offense for burglary, based on the conceivable possibility that a person could commit a burglary within a building while never leaving that building, is an absurd construction of the law.

Mr. Hooper was entitled to the lesser offense instruction of second degree trespass based on his testimony that he encountered and tussled with the complainant outside his home. 1RP 30. The jury's failure to acquit Mr. Hooper of first degree burglary has never been the standard for determining the possibility of prejudicial effect from the court's erroneous rejection of the lesser offense instruction, as the State asserts. Resp. Brief at 13. Particularly in the case at bar, Mr. Hooper's conviction for the greater offense does not cure the deprivation of his right to have the jury properly instructed on the law.

Mr. Hooper admitted the simple assault occurred, and the court instructed the jury that a burglary occurs based on the unlawful entry "upon premises" of another, meaning "any real property." It told the jury that the "premises" means "any building, dwelling or any real

property." 3RP 98-99; CP 59, 60. The looseness of this definition of premises, combined with Mr. Hooper's admission of a physical struggle, offer no shelter for the State to prove that Mr. Hooper was not prejudiced by the court's failure to provide an applicable lesser offense instruction.

The Supreme Court "has never held that, where there is evidence to support a lesser-included-offense instruction, failure to give such an instruction may be harmless." *State v. Parker*, 102 Wn.2d 161, 164, 683 P.2d 189 (1984). Mr. Hooper's testimony supported his right to a lesser included offense instruction of second degree trespassing and he was entitled to have the jury weigh his culpability based on this potential offense.

2. **Mr. Hooper is entitled to credit for time he spent in a court-mandated full time residential facility**.

In *State v. Medina*, _ Wn.2d _, 2014 WL 1510028 (2014), the Supreme Court explained that a person may be entitled to credit for time spent in partial confinement when confinement constitutes a residence. The *Medina* Court declined to extend the definition of partial confinement to counseling or service oriented programs that did not also mandate staying in a certain facility. *Id*. at *3. Mr. Hooper was

required to remain in the IMPACT facility as a condition of his release. 1RP 41; CP 94-103. While *Medina* explains that the time Mr. Hooper spent as an out-patient at the same program would not qualify as time spent in partial confinement for which he is entitled to credit for time served, its holding supports Mr. Hooper's entitlement to credit for the court-mandated inpatient portion of this sentence.

In *Medina*, the Supreme Court disagreed with the position the prosecution takes in this appeal, claiming that Mr. Hooper's inability to obtain a certain sentencing alternative after conviction determines whether he is entitled to credit for time spent in a similar less restrictive facility before conviction. 2014 WL 1510028 at *3. "[A] defendant's ineligibility for a particular type of partial confinement *postconviction* is not relevant to the question of whether that defendant must be credited for *pretrial* time served in that same type of partial confinement." *Id.* (emphasis in original). Mr. Hooper remained in this inpatient facility for 55 days and is entitled to credit for this time spent in partial confinement. 3RP 148-49.

B. CONCLUSION.

For the foregoing reasons as well as those argued in Appellant's Opening Brief, Mr. Hooper respectfully requests this Court vacate his conviction and remand his case for further proceedings.

DATED this 16th day of May 2014.

Respectfully submitted,

NANCY P. COLLINS (28806)
Washington Appellate Project (91052)
Attorneys for Appellant

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	)	
Respondent,	)	
	)	NO. 70641-1-I
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	)	
LASHAWN HOOPER,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 15TH DAY OF MAY, 2014, I CAUSED THE ORIGINAL **REPLY 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:

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[X] LASHWAN HOOPER 338874 MONROE CORRECTIONAL COMPLEZ PO BOX 777 MONROE, WA 98272-0777	(X) ( ) ( )	U.S. MAIL HAND DELIVERY __________

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COURT OF APPEALS DIV I
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SIGNED IN SEATTLE, WASHINGTON THIS 15TH DAY OF MAY, 2014.

X____________________

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