Supreme Court No. 91080-4
(COA No. 70641-1-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

LASHAWN HOOPER,

Petitioner.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Lashawn Hooper, 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 13.3(a)(1) and RAP 13.4(b).

B. COURT OF APPEALS DECISION

Mr. Hooper seeks review of the Court of Appeals opinion entered September 29, 2014, for which reconsideration was denied on November 6, 2014. Copies are attached as Appendix A and B

C. ISSUE PRESENTED FOR REVIEW

A person charged with a crime has the right to be convicted on the least serious offense proved by the State and therefore he is entitled to have the court instruct the jury on a lesser included offense if, by taking the evidence in the light most favorable to the accused, a jury could find he committed only a lesser degree offense. Mr. Hooper's testimony showed that he crossed into another person's property without permission but he did not enter a building. Relying on an inapposite case involving an entry into a building, the Court of Appeals held that second degree trespass may never be the legal lesser offense of first degree burglary. Does the Court of Appeals opinion conflict

with this Court's precedent and misconstrue the analysis required for letting the jury consider a lesser included offense?

D. STATEMENT OF THE CASE

LaShawn Hooper cut through the yard by Michael Schutz's home as he was walking through a neighborhood one afternoon. 3RP 30. Mr. Schutz called for Mr. Hooper to come back, accused him of breaking into his house, and put Mr. Hooper into a headlock. 3RP 30, 32. Mr. Hooper fought back. 3RP 32. The two men struggled until Mr. Hooper escaped and left. 3RP 32-33. Mr. Hooper did not ever go into the house. 3RP 33.

Mr. Hooper was arrested nearby after Mr. Schutz called the police. 3RP 14. He was carrying a CamelBak backpack, which has a hydration system for holding liquid and a small space for property. 3RP 14, 34-35. Mr. Hooper's birth certificate was at the top of one zippered pocket, along with some change, keys, and other small items. 3RP 34, 35.

Mr. Schutz recounted events differently than Mr. Hooper. He said he returned home and found his door not locked as usual. 1RP 63. A person was inside the hallway, rummaging through his closet. 1RP 63. He grabbed the person, put him in a headlock, tried to stab him with

his keys, and struggled to hold on to the person so he could call the police. 1RP 65. The suspect, who he identified as Mr. Hooper, fought back and eventually escaped but left a backpack behind. 1RP 66-67. Someone had rifled through Mr. Schutz's bedroom, taking coins, a Mexican peso bill, and other odds and ends.1RP 79. Although Mr. Schutz described the perpetrator as 19 years old and 6' to 6'2" tall, Mr. Hooper was 27 years old and 5'7.5" tall. 3RP 19, 29.

Mr. Hooper was charged with first degree burglary for allegedly unlawfully entering Mr. Schutz's home and assaulting him. CP1. Based on Mr. Hooper's testimony that he never entered Mr. Schutz's house but struggled with him outside, he asked for a lesser included offense instruction of second degree trespass. 3RP 52, 57, 60. The court refused on the ground that second degree trespass was not legally a lesser offense of first degree burglary. 3RP 61-62. The Court of Appeals agreed that second degree trespass cannot be a lesser offense of first degree burglary.

E. ARGUMENT

The Court of Appeals applied the wrong framework to decide whether the jury should be allowed to consider a lesser included offense and inexplicably held that second degree trespass is not a legal lesser offense of burglary

At Mr. Hooper's trial for burglary in the first degree, witnesses offered contrary testimony about whether Mr. Hooper entered a building. He testified that he did not enter the complainant's home, while the complainant alleged that he found Mr. Hooper inside his home. 1RP 65-67; 3RP 30-33.

The well-established test for determining whether a person is "entitled" to a lesser included offense instruction rests on viewing the evidence in the light most favorable to the party requesting the instruction. *State v. Fernandez-Medina,* 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000); *State v. Workman,* 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978). RCW 10.61.006; U.S. Const. amends. 6, 14; Wash. Const. art. I, §§ 3, 22. The constitutional right to a lesser included offense instruction stems from the "risk that a defendant might otherwise be convicted of a crime more serious than that which the jury believes he committed simply because the jury wishes to avoid setting him free." *Vujosevic v. Rafferty*, 844 F.2d 1023, 1027 (3rd Cir. 1988). "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).

Mr. Hooper requested an instruction on the lesser offense of second degree trespass. 3RP 54, 60-62. Taking the evidence in the light most favorable to Mr. Hooper, his testimony showed that he entered the complainant's yard without permission, but not his home, which meets the legal elements for second degree trespass. RCW 9A.52.080.

The Court of Appeals opinion nonsensically ruled that second degree trespass is never available as a lesser included offense when the trespass involves a building, based on the difference between first and second degree trespass. Slip op. at 5. This distinction is irrelevant here, because Mr. Hooper said he did not enter any building, which made his actions akin to second degree trespass, not first degree trespass. Criminal trespass in the second degree occurs when a person "knowingly enters or remains unlawfully" in or upon premises of another under circumstances not constituting first degree criminal trespass. RCW 9A.52.080. Criminal trespass in the first degree requires an unlawful entry into a building, while second degree trespass is based

on entry upon another's "premises," which includes any building or real property belonging to another. RCW 9A.52.010(6).

The Court of Appeals opinion illogically relied on *State v. Mounsey*, 31 Wn.App. 511, 517-18, 643 P.2d 892, *rev. denied*, 97 Wn.2d 1028 (1982). Slip op. at 5. But in *Mounsey*, there was no dispute that the defendant entered the complainant's home through a window. 31 Wn.App. at 513. The factual dispute was whether the defendant was invited inside, and whether the sex that followed was consensual. *Id.* at 514.

Because it was undisputed that the defendant had entered the building, the *Mounsey* Court ruled that second degree criminal trespass was not legally a lesser offense of burglary. *Id.* at 518. Mr. Mounsey had agreed he entered a building; consequently, first degree trespass, not second degree trespass, would be the appropriate lesser offense. *Id.*

But unlike the facts in *Mounsey*, Mr. Hooper said he did not enter the complainant's home. 1RP 30. He said the confrontation occurred in the yard, i.e., "on premises other than a building." *Mounsey*, 31 Wn.App. at 518.

Mounsey demonstrates Mr. Hooper is *entitled* to an instruction for second degree trespass. It is legally a lesser included offense of

burglary and of first degree criminal trespass, and there was affirmative evidence that Mr. Hooper committed only this lesser included offense by entering the complainant's yard, without entering his home.

The Court of Appeals opinion declares that second degree trespass can never be a lesser included offense of burglary because burglary involves a building while second degree trespass is premised on entering enclosed property other than a building. Slip op. at 4-5. This legal distinction is premised on a misreading of *Mounsey*. Slip op. at 5. Unlike in *Mounsey*, Mr. Hooper presented affirmative evidence that he unlawfully entered a yard, not building. Some evidence affirmatively demonstrated a juror could find him guilty of only second degree trespass, not burglary or first degree trespass.

For example, other cases have held that criminal trespass is a lesser included offense of first degree burglary. *State v. Southerland*, 109 Wn.2d 389, 390, 745 P.2d 33 (1987) (citing with approval Court of Appeals opinion, 45 Wn.App. 885, 889, 728 P.2d 1079 (1986), which provided, "each of the elements of first degree criminal trespass is a necessary element of first degree burglary."); *see also State v. J.P.*, 130 Wn.App. 887, 895, 125 P.3d 215 (2005) ("Criminal trespass is a lesser included offense of burglary"). Although *Southerland* and *J.P.* involved

entries into buildings, so first degree criminal trespass was the requested lesser offense, the same reasoning applies to second degree trespass.

The Court of Appeals opinion misunderstands and misapplies *Mounsey* without accounting for the critical difference in the two cases based on the nature of the testimony about whether the defendant ever entered a building. Mr. Hooper's testimony – that he crossed the complainant's private yard without permission – precisely meets the legal elements of second degree trespass. "[S]econd degree trespass involves knowingly entering or remaining on premises in a situation which does not amount to first degree criminal trespass." 31 Wn.App. at 517-18.

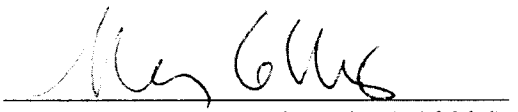
This Court should grant review because the Court of Appeals opinion shows substantial confusion about when a lesser included offense instruction must be given under the Court's precedent. Substantial public interest favors granting review based on the conflict between the Court of Appeals opinion and *Mounsey* as well as this Court's precedent.

F. CONCLUSION

Based on the foregoing, Petitioner LaShawn Hooper respectfully requests that review be granted pursuant to RAP 13.4(b).

DATED this 8th day of December 2014.

Respectfully submitted,



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APPENDIX A

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

STATE OF WASHINGTON, Respondent, v. LASHAWN D. HOOPER, Appellant.	)	No. 70641-1-I UNPUBLISHED OPINION FILED: September 29, 2014

VERELLEN, A.C.J. — In this prosecution for burglary, the trial court denied LaShawn Hooper's requests for a lesser included offense instruction and credit for time he spent in inpatient treatment prior to trial. Because Hooper fails to demonstrate any error in these decisions, and because his challenge to the sufficiency of the instructions lacks merit, we affirm.

FACTS

Based on allegations that Hooper burglarized a home and assaulted the owner, the State charged him with first degree burglary.

Following a period of competency restoration at Western State Hospital, Hooper requested release on personal recognizance for the purpose of getting "some sort of treatment." Defense counsel told the court about "the IMPACT program which is designed to provide housing for long term treatment."[1] Counsel said that IMPACT

[1] Report of Proceedings (RP) (Mar. 29, 2012) at 41.

provided inpatient treatment and classes. Over the State's objection, the court granted "the request to PR [Hooper] on the condition that he participate in this program."[2]

At trial, Michael Schutz testified that he returned to his home one afternoon to find his house in disarray and Hooper rifling through his closet. Schutz did not know Hooper and had not given him permission to be in his home. Schutz grabbed Hooper and attempted to call 911. Hooper struck and bit Schutz and stabbed him with a key. Schutz let go of Hooper and reached for his phone. Hooper then grabbed Schutz and slammed his knee into Schutz's head. Hooper eventually fled the house with a backpack.

Schutz called 911 and police responded within minutes. Schutz was bleeding from a bite mark under his left arm and an injury to his lip. He also had a large bite mark on his forehead. Officers found a stool outside the house beneath an open bathroom window. They also found fresh dirt inside the house underneath the same window.

An officer located Hooper jumping a nearby fence. After chasing Hooper down, the officer convinced him to surrender by threatening to taser him. Hooper was sweating, out of breath, and bleeding from his head and hands. Schutz later identified Hooper as the man he found in his house. Items from Schutz's house were found in the backpack Hooper was carrying at the time of his arrest.

Hooper testified that he had not entered Schutz's house and merely trespassed across his yard. He admitted fighting with Schutz and inflicting the injuries observed by

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[2] Id. at 42.

officers but claimed Schutz had grabbed him, accused him of breaking into the house, and put him in a headlock.

The defense requested lesser-included offense instructions for fourth degree assault and second degree criminal trespass. The court gave a fourth degree assault instruction but refused to give a trespass instruction because it was not legally a lesser included offense of first degree burglary. The jury found Hooper guilty of first degree burglary.

At sentencing, defense counsel and the prosecutor agreed that Hooper was ineligible for credit for time he spent prior to trial in the inpatient treatment program. Defense counsel, however, requested that the court credit the time as part of an exceptional sentence below the standard range. The trial court declined to impose an exceptional sentence, granted credit for time served, and stated, "I don't have authority under the statute to give you credit for anything else."[3]

Hooper appeals.

DECISION

Hooper first contends the court erred in refusing "to instruct the jury on the lesser included offense of criminal trespass in the second degree."[4] The court did not err.

A defendant is entitled to a lesser-included offense instruction if (1) each element of the lesser offense is a necessary element of the crime charged, and (2) the evidence in the case supports an inference that only the lesser offense was committed.[5] We

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[3] RP (July 10, 2013) at 159.

[4] Appellant's Br. at 5.

[5] State v. Fernandez-Medina, 141 Wn.2d 448, 454-55, 6 P.3d 1150 (2000) (quoting State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978)).

review a trial court's conclusion regarding the first factor—known as the "legal prong"—de novo.[6] We review a decision on the second factor, or factual prong, for abuse of discretion.[7] Only the legal prong is at issue here.

The legal prong is not satisfied if it is possible to commit the greater offense without having committed the lesser offense.[8] A person commits first degree burglary "if, with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building and if, in entering or while in the building or in immediate flight therefrom, the actor or another participant in the crime (a) is armed with a deadly weapon, or (b) assaults any person."[9] A person commits second degree criminal trespass 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."[10] Criminal trespass in the first degree occurs when a person "knowingly enters or remains unlawfully in a building."[11]

First degree burglary can be committed without committing second degree criminal trespass. A person who knowingly enters or remains unlawfully in a building while armed with a deadly weapon commits first degree burglary and *first* degree criminal trespass, but does not commit *second* degree criminal trespass because the

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[6] State v. LaPlant, 157 Wn. App. 685, 687, 239 P.3d 366 (2010).

[7] Id.

[8] State v. Turner, 143 Wn.2d 715, 729, 23 P.3d 499 (2001) (quoting State v. Roybal, 82 Wn.2d 577, 583, 512 P.2d 718 (1973)).

[9] RCW 9A.52.020.

[10] RCW 9A.52.080.

[11] RCW 9A.52.070.

latter can be committed only under circumstances not amounting to first degree criminal trespass.[12] In reaching that conclusion, the Mounsey court stated:

> Since buildings and dwellings are equivalent under RCW 9A.04.110, first degree criminal trespass is a lesser included offense of first degree burglary. *But second degree criminal trespass is not, since 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. If a person knowingly enters or remains unlawfully in a building, he is guilty of first degree criminal trespass, which by definition cannot be second degree criminal trespass. Therefore, . . . Mounsey was not entitled to an instruction on second degree criminal trespass.[13]

Hooper does not argue that Mounsey was wrongly decided. And while he correctly points out that Mounsey involved different facts, Mounsey's holding, quoted above, applies equally to this case. Under Mounsey, Hooper's argument fails the legal prong of the lesser-included test. The court did not err in refusing to give the requested instruction.

Hooper next contends the court's instruction defining "premises" created confusion regarding the difference between a building and premises. The court instructed the jury that first degree burglary occurs when a person unlawfully enters or remains in "a building."[14] Similarly, the to-convict instruction required the jury to find that Hooper "entered or remained unlawfully *in a building.*"[15] Other instructions stated that unlawful entry or remaining "upon premises" occurs if the person is not licensed, invited

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[12] State v. Mounsey, 31 Wn. App. 511, 517-18, 643 P.2d 892 (1982).

[13] Id. at 518 (emphasis added).

[14] Clerk's Papers at 57.

[15] Id. at 62 (emphasis added).

or privileged to enter or remain, and that "premises includes any building, dwelling, or any real property."[16] Hooper contends these instructions allowed the jury to conclude "that legally speaking, premises and building, dwelling or property were essentially the same."[17] We disagree.

"'Jury instructions are sufficient when they allow counsel to argue their theory of the case, are not misleading, and when read as a whole properly inform the trier of fact of the applicable law.'"[18] The instructions in this case unambiguously required the jury to find that Hooper unlawfully entered or remained *in a building*. While they also stated that a "building" is a form of "premises," nothing in the instructions suggested that mere property or premises could be a "building." The instructions did not confuse these terms and accurately informed the jury of the applicable law.

Last, Hooper contends the sentencing court erred in denying him credit for presentence time he spent in inpatient treatment in the IMPACT program. Whether to award credit for time served is a question of law subject to de novo review.[19] The court did not err in denying the requested credit.

Under RCW 9.94A.505(6), a trial court is required to grant credit for all confinement time served prior to sentencing. "Confinement" is defined as "total or partial confinement."[20] "Total confinement" means "confinement inside the physical boundaries of a facility or institution operated or utilized under contract by the state or

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[16] Id. at 59-60.

[17] Appellant's Br. at 14.

[18] State v. Knutz, 161 Wn. App. 395, 403, 253 P.3d 437 (2011) (quoting State v. Aguirre, 168 Wn.2d 350, 363-64, 229 P.3d 669 (2010)).

[19] State v. Swiger, 159 Wn.2d 224, 227, 149 P.3d 372 (2006).

[20] RCW 9.94A.030(8).

any other unit of government for twenty-four hours a day."[21] "Partial confinement" is defined as

> confinement for no more than one year *in a facility or institution operated or utilized under contract by the state or any other unit of government,* or, *if home detention or work crew has been ordered by the court* or home detention has been ordered by the department as part of the parenting program, *in an approved residence*, for a substantial portion of each day with the balance of the day spent in the community. Partial confinement includes work release, home detention, work crew, and a combination of work crew and home detention.[22]

The State points out, and Hooper does not dispute, that nothing in the record shows that the IMPACT program is "a facility or institution operated or utilized under contract by the state or any other unit of government." Nor does Hooper contend that IMPACT is a form of home detention or work crew. Instead, Hooper contends that IMPACT "is akin" to the forms of partial confinement mentioned in the last sentence of the statute. That sentence, however, merely reiterates the approved forms of residential partial confinement previously mentioned in the statute. Hooper presents no compelling authority, argument, or statutory interpretation supporting his claim that the statute authorizes credit for other programs such as inpatient treatment. Nor does he address contrary authority cited by the State.[23] Instead, he relies on State v. Medina.[24] Medina, however, is distinguishable.

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[21] RCW 9.94A.030(51).

[22] RCW 9.94A.030(35) (emphasis added).

[23] See State v. Hale, 94 Wn. App. 46, 55, 971 P.2d 88 (1999) (after reviewing the statutory definition of partial confinement, appellate court reversed credit for inpatient treatment, stating that "the SRA does not grant trial courts authority to credit drug treatment against confinement time or community service").

[24] 180 Wn.2d 282, 324 P.3d 682 (2014).

In Medina, the defendant sought credit for time he spent in the King County Community Center for Alternative Programs (CCAP) prior to his second trial. In concluding that CCAP did not constitute partial confinement, the Medina court noted that the statute defining partial confinement equates "confinement" with "residence", and that "the CCAP facility is not a residence."[25] Seizing on this portion of Medina, Hooper argues that he is entitled to credit for his time in IMPACT because his treatment was residential. But as discussed above, Hooper fails to demonstrate that credit is statutorily authorized for this type of residential program. By contrast, the CCAP program at issue in Medina, although not residential, did otherwise qualify for credit under RCW 9.94A.030(35) because the record established that CCAP was "a facility or institution operated or utilized under contract by the state or any other unit of government."[26]

Hooper's cursory claims that denying him credit violates equal protection, double jeopardy, and due process are too conclusory to merit discussion.[27]

Affirmed.

WE CONCUR:

Cox, J.

Becker, J.

[25] Medina, 180 Wn.2d at 289.

[26] See id. at 284-87 .

[27] State v. Elliott, 114 Wn.2d 6, 15, 785 P.2d 440 (1990) (appellate court need not consider claims that are insufficiently argued).

RICHARD D. JOHNSON,
Court Administrator/Clerk

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November 6, 2014

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CASE #: 70641-1-I
State of Washington, Respondent v. LaShawn Hooper, Appellant

Counsel:

Enclosed please find a copy of the Order Denying Motion for Reconsideration entered in the above case.

Within 30 days after the order is filed, the opinion of the Court of Appeals will become final unless, in accordance with RAP 13.4, counsel files a petition for review in this court. The content of a petition should contain a "direct and concise statement of the reason why review should be accepted under one or more of the tests established in [RAP 13.4](b), with argument." RAP 13.4(c)(7).

In the event a petition for review is filed, opposing counsel may file with the Clerk of the Supreme Court an answer to the petition within 30 days after the petition is served.

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

jh

Enclosure

c: The Hon. Lori Kay Smith

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

STATE OF WASHINGTON, Respondent, v. LASHAWN HOOPER, Appellant.	)	No. 70641-1-I ORDER DENYING MOTION FOR RECONSIDERATION

Appellant has filed a motion for reconsideration of the court's opinion entered September 29, 2014. After consideration of the motion, the court has determined that it should be denied.

Now therefore, it is hereby

ORDERED that appellant's motion for reconsideration is denied.

Done this 6th day of November, 2014.

FOR THE PANEL:

Verellen, ACJ

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 70641-1-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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☐ petitioner

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MARIA ANA ARRANZA RILEY, Legal Assistant
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Date: December 8, 2014