937109
Supreme Court No. _____
Court of Appeals No. 32962-3-III

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Plaintiff/Respondent,

vs.

ANTHONY A. JOSEPH,
Defendant/Appellant.

APPEAL FROM THE KITTITAS COUNTY SUPERIOR COURT
Honorable Scott R. Sparks, Judge

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Petitioner, Anthony Albert Joseph, is the Appellant below and asks this Court to review the decision referred to in Section II.

II. COURT OF APPEALS DECISION

Petitioner seeks review of the Court of Appeals, Division III, published opinion filed on September 1, 2016. A copy of the opinion is attached as Appendix A. The current online version is found at *State v. Joseph*, No. 32962-3-III, 2016 WL 4572351 (Wash. Ct. App. Sept. 1, 2016).

III. ISSUE PRESENTED FOR REVIEW

Whether a vehicle is a "premises" for purposes of the second degree criminal trespass statute.

IV. STATEMENT OF THE CASE

A jury found Anthony Albert Joseph guilty of third degree assault as charged in count 1, not guilty of vehicle prowling as charged in count 2[1], and guilty of second degree criminal trespass as a lesser included of count 2. CP 8–9, 91–93.

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[1] A person is guilty of vehicle prowling in the second degree if, with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a vehicle other than a motor home, as defined in RCW 46.04.305, or a vessel equipped for propulsion by mechanical means or by sail which has a cabin equipped with permanently installed sleeping quarters or cooking facilities. RCW 9A.52.100(1).

Shortly after 11 p.m. on an October evening Mr. Joseph was awakened by the sound of police knocking on the car window and repeatedly calling out his name. RP 29, 31, 34. Mr. Joseph had appeared to be sleeping while in the recline position in the front passenger seat. RP 33–34. Police were responding to a prowl call regarding a vehicle described as a Blazer. Police knew Mr. Joseph was homeless and did not have a vehicle. RP 33–34. Mr. Joseph got out of the car as requested. He said he had permission to be inside the car from its registered owner but then admitted he did not have permission. RP 34–36. Mr. Joseph was arrested for the crime of vehicle prowling. RP 37.

During the search and while being handcuffed, Mr. Joseph was hostile and angry and tensed his body. RP 36–38. After placing him in the back passenger seat of the patrol car, the officer rolled down Mr. Joseph's rear window from the front seat. As he stood next to the rear door, Mr. Joseph spit at him through a ventilator hole in the side window's plastic protective cover. RP 39–42. The State subsequently charged Mr. Joseph with third degree assault and second degree vehicle prowl. CP 8–9.

Mackenzie Bond testified he owned the 1995 Chevy Blazer, which had broken down on the freeway and been towed into Ellensburg. RP 68–

69. At the time of the incident, it had a blown gasket and was going to be taken to the junk yard. Bond had previously busted out the triangular window behind the driver's seat to retrieve his keys locked inside and agreed someone could get into the car that way. RP 70, 72. As far as Bond knew, nothing was taken from his car. RP 71–72. Although the testimony of the two responding officers was unclear, the State and defense counsel agreed the car was not found on private property and was parked on the street adjacent to an impound lot. RP 31–32, 39, 74–76, 111.

The prosecutor sought instructions on first and second degree criminal trespass as lesser included offenses of the vehicle prowling charge. The trial court did instruct the jury, over defense objection, on second degree trespass. The prosecutor also asked the court to define the term "premises" for the jury, but did not submit a definitional instruction. The trial court did not define "premises," but allowed the parties to argue to the jury whether a vehicle was or was not a "premises." CP 59–61, 62–63, 82–85; RP 15, 102–03, 108–110, 113–14.

V. ARGUMENT IN SUPPORT OF REVIEW

This Court should accept review under RAP 13.4(b)(1), (2) and (4) to determine an issue of substantial public interest by clarifying legislative history and intent regarding the criminal trespass statute and judicial interpretations placed on it.

As a part of the due process rights guaranteed under both the Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment the state must prove every element of a crime charged beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). In a challenge to a sufficiency of the evidence, the test is whether, viewing the evidence in the light most favorable to the State, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *State v. Gentry,* 125 Wn .2d 570, 596–97, 888 P.2d 1105 (1995). "[A]ll reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." *Id.* at 597.

Due process forbids the State from convicting an offender for something that is not a crime. *Johnson v. United States,* 805 F.2d 1284, 1288 (7th Cir.1986). Statutory construction is a question of law and

reviewed de novo. *State* v. *Elmore,* 154 Wn. App. 885, 904-05, 228 P.3d 760 (2010). The primary objective of statutory construction is to carry out the intent of the Legislature. *Bellevue Fire Fighters Local 1604 v. Bellevue,* 100 Wn.2d 748, 751, 675 P.2d 592 (1984), cert. den'd, 471 U.S. 1015, 105 S.Ct. 2017, 85 L.Ed.2d 299 (1985); *Christie–Lambert Van & Storage Co. v. McLeod,* 39 Wn. App. 298, 693 P.2d 161 (1984).

When interpreting a statute, "if the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent." *Dep't of Ecology* v. *Campbell & Gwinn, L.L.C.,* 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002). "All words must be read in the context of the statute in which they appear, not in isolation." *State* v. *Lilyblad,* 163 Wn.2d 1, 9, 177 P.3d 686 (2008). Only where intent is not clear from the statute's language will a reviewing court look to the legislative history. *In re Marriage of Konzen,* 103 Wn.2d 470, 475, 693 P.2d 97, *cert. den'd,* 473 U.S. 906, 105 S.Ct. 3530, 87 L.Ed.2d 654 (1985); *Bellevue,* 100 Wn.2d at 754, 675 P.2d 592; *McLeod,* 39 Wn. App. at 302, 693 P.2d 161.

A person is guilty of second degree criminal trespass if he or she knowingly enters or remains unlawfully in or upon premises of another under circumstances not constituting first degree criminal trespass. RCW 9A.52.080(1). A person is guilty of first degree criminal trespass if he or

she knowingly enters or remains unlawfully in a building. RCW 9A.52.070(1). For purposes of burglary and criminal trespass, "premises" is defined as including "any building, dwelling, structure used for commercial aquaculture, or any real property." RCW 9A.52.010(6). Regarding criminal trespass, "building" means a *building in its ordinary sense* and does not include a vehicle. *State v. Brown*, 50 Wn. App. 873, 876–77, 751 P.2d 331 (1988) (concluding the broad definition of "building" found in RCW 9A.04.110(5)[2] applies to the burglary statutes but does not apply to the criminal trespass statutes).

Mr. Joseph was found sleeping in a Chevy Blazer. A car is not a building, a dwelling, a structure used for commercial aquaculture, or real property. As a matter of law, the evidence was insufficient to establish the essential element that by sleeping in the Chevy Blazer Mr. Joseph knowingly entered or remained in or upon the "premises" of another and thereby committed second degree criminal trespass. RCW 9A.52.080(1); Instruction No. 11 at CP 85.

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[2] 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;

The legislature's definition is plain. "Premises" as defined in RCW 9A.52.010(6) presents an exclusive list. "Under expressio unius est exclusio alterius, a canon of statutory construction, to express one thing in a statute implies the exclusion of the other. Omissions are deemed to be exclusions." *In re Det. of Williams,* 147 Wn.2d 476, 491, 55 P.3d 597 (2002) (citation omitted). Nothing in the definition suggests the language "any building, dwelling, structure used for commercial aquaculture, or any real property" is illustrative. "A court construes a statute's identification of crimes or other items to be illustrative when the legislature states that the identification is 'illustrative,' or provides 'examples,' or extends to 'similar' or 'like' offenses; absent such a signal, we read the legislature's list as exclusive and complete." *State v. Soto*, 177 Wn. App. 706, 714, 309 P.3d 596, 599 (2013), as amended (Jan. 14, 2014), citing *In re Postsentence Review of Leach,* 161 Wn.2d 180, 185-86, 163 P.3d 782 (2007). The definition of "premises" is exclusive and complete, and does not include a car.

The conclusion that the criminal trespass statute does not apply to motor vehicles is reinforced by lack of any reference to a vehicle in the definition of "enters or remains unlawfully," RCW 9A.52.010(5), for

purposes of burglary and criminal trespass.[3] The conclusion is bolstered by the legislature's inclusion under Chapter 9A.52, Burglary and Criminal Trespass, of the separate crimes of vehicle prowling in the first and second degree. RCW 9A.52.095, .100. *Cf.,* Illinois' criminal code concerning Offenses Directed Against Property, which instead includes in its trespass subdivision the disparate and distinct crimes of Criminal trespass to vehicles[4] and Criminal trespass to real property[5].

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[3] RCW 9A.52.010(5) provides: "Enters or remains unlawfully." A person "enters or remains unlawfully" in or upon premises when he or she is not then licensed, invited, or otherwise privileged to so enter or remain.

A license or privilege to enter or remain in a building which is only partly open to the public is not a license or privilege to enter or remain in that part of a building which is not open to the public. A person who enters or remains upon unimproved and apparently unused land, which is neither fenced nor otherwise enclosed in a manner designed to exclude intruders, does so with license and privilege unless notice against trespass is personally communicated to him or her by the owner of the land or some other authorized person, or unless notice is given by posting in a conspicuous manner. Land that is used for commercial aquaculture or for growing an agricultural crop or crops, other than timber, is not unimproved and apparently unused land if a crop or any other sign of cultivation is clearly visible or if notice is given by posting in a conspicuous manner. Similarly, a field fenced in any manner is not unimproved and apparently unused land. A license or privilege to enter or remain on improved and apparently used land that is open to the public at particular times, which is neither fenced nor otherwise enclosed in a manner to exclude intruders, is not a license or privilege to enter or remain on the land at other times if notice of prohibited times of entry is posted in a conspicuous manner."

[4] 720 Ill. Comp. Stat. Ann. 5/21-2 provides:

§ 21-2. Criminal trespass to vehicles.

(a) A person commits criminal trespass to vehicles when he or she knowingly and without authority enters any part of or operates any vehicle, aircraft, watercraft or snowmobile.

(b) Sentence. Criminal trespass to vehicles is a Class A misdemeanor.

[5] 720 Ill. Comp. Stat. Ann. 5/21-3 provides:

§ 21-3. Criminal trespass to real property.

(a) A person commits criminal trespass to real property when he or she:

(1) knowingly and without lawful authority enters or remains within or on a building;

Washington case law is also consistent with the conclusion that the criminal trespass statute does not apply to passenger cars. *See e.g. State v. Brittain,* 38 Wn. App. 740, 689 P.2d 1095 (1984) (second degree criminal trespass applies to unlawful entry on private property not constituting a building, such as fenced land); *State v. Mounsey,* 31 Wn. App. 511, 518, 643 P.2d 892 (1982) (second degree criminal trespass applies to unlawful entry on premises other than a building, i.e., open grounds or yards, etc.); *State v. Shelby*, 61 Wn. App. 214, 220, 811 P.2d 682 (1991) (in the context of whether statutes are concurrent, "A person may violate RCW 28A.87.055 when he or she refuses to leave a school-owned motor vehicle. However, because the criminal trespass statute does not apply to motor vehicles, the person would not have necessarily violated RCW 9A.52.080.").

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(2) enters upon the land of another, after receiving, prior to the entry, notice from the owner or occupant that the entry is forbidden;
(3) remains upon the land of another, after receiving notice from the owner or occupant to depart;
(3.5) presents false documents or falsely represents his or her identity orally to the owner or occupant of a building or land in order to obtain permission from the owner or occupant to enter or remain in the building or on the land;
(3.7) intentionally removes a notice posted on residential real estate as required by subsection (l) of Section 15-1505.8 of Article XV of the Code of Civil Procedure before the date and time set forth in the notice; or
(4) enters a field used or capable of being used for growing crops, an enclosed area containing livestock, an agricultural building containing livestock, or an orchard in or on a motor vehicle (including an off-road vehicle, motorcycle, moped, or any other powered two-wheel vehicle) after receiving, prior to the entry, notice from the owner or occupant that the entry is forbidden or remains upon or in the area after receiving notice from the owner or occupant to depart.

If the legislature made an error in drafting the statute, as the State argued in closing[6], this Court "must leave it to the legislature to correct the error." *State v. Taylor,* 97 Wn.2d 724, 728, 649 P.2d 633 (1982); see also *State* v. *Mendoza,* 63 Wn. App. 373, 378, 819 P.2d 387 (1991). Appellate courts do not supply omitted language even when the legislature's omission is clearly inadvertent, unless the omission renders the statute irrational. *In re Personal Restraint of Acron,* 122 Wn. App. 886, 891, 95 P.3d 1272 (2004). "To do so would [be] to arrogate to ourselves the power to make legislative schemes more perfect, more comprehensive and more consistent." *Taylor,* 97 Wn.2d at 729.

When interpreting a statute, a court must first assume that the legislature means exactly what it says. *State v. Keller,* 143 Wn.2d 267, 276, 19 P.3d 1030 (2001). If the statute is clear on its face, its meaning is derived from the statutory language alone. *State v. Watson,* 146 Wn.2d 947, 51 P.3d 66 (2002). Here, the essential elements of second degree criminal trespass are not met. Mr. Joseph did not enter a "premises" within the meaning of RCW 9A.52.080.

The Court of Appeals, Division Three, has determined the legislature intended the undefined term "building" in the first degree

[6] RP 147.

trespass statute to have a much narrower definition of "building" than that used in the general criminal code and reasons the term "premises" used in the second degree trespass statute is therefore a broad, catch-all provision that includes vehicles. *See Slip Opinion*, pp. 2–9. This is despite the fact the legislature defined "premises" for purposes of the criminal trespass statutes—"any building, dwelling, structure used for commercial aquaculture, or any real property"—and did not include vehicles in its definition. This Court's guidance is warranted to clarify legislative intent regarding the criminal trespass statute and whether a vehicle is a "premises" for purposes of the second degree criminal trespass statute.

VI. CONCLUSION

For the reasons stated, the petition for review should be granted under RAP 13.4(b)(1), (2) and (4), and the decision of the Court of Appeals should be reversed.

Respectfully submitted on October 2, 2016

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PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on October 2, 2016, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of appellant's petition for review and Appendix A (copy of opinion filed 9/1/16):

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CASE # 329623
State of Washington v. Anthony Albert Joseph
KITTITAS COUNTY SUPERIOR COURT No. 141002571

Dear Counsel:

Enclosed please find a copy of the opinion filed by the Court today.

A party need not file a motion for reconsideration as a prerequisite to discretionary review by the Supreme Court. RAP 13.3(b); 13.4(a). If a motion for reconsideration is filed, it should state with particularity the points of law or fact which the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration which merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of the opinion. Please file an original and two copies of the motion (unless filed electronically). If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of this opinion (may be filed by electronic facsimile transmission). The motion for reconsideration and petition for review must be received (not mailed) on or before the dates they are due. RAP 18.5(c).

Sincerely,

Renee S. Townsley

Renee S. Townsley
Clerk/Administrator

RST:ko
Attach.
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FILED
SEPT 1, 2016
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. ANTHONY A. JOSEPH, Appellant.	)	No. 32962-3-III
	)	PUBLISHED OPINION

KORSMO, J. — Anthony Joseph appeals his conviction for second degree criminal trespass, arguing that the statute does not apply to a vehicle. In light of legislative history, we conclude that the statute does apply to Mr. Joseph's conduct.

FACTS

Mr. Joseph was found asleep in an unlocked Chevy Blazer on a public street in Ellensburg late on the night of October 4, 2014. An officer responding to a report of vehicle prowling at the city's vehicle impound lot noticed Mr. Joseph sleeping in the Blazer which was parked just outside the impound lot. Recognizing Mr. Joseph and knowing both that he was homeless and did not own a vehicle, the officer knocked on a window to awaken him.

Mr. Joseph exited the vehicle and claimed to have the owner's permission to be inside, but he was unable to name the owner. He then admitted to not having permission and was arrested for vehicle prowling.

The prosecution filed charges of third degree assault and second degree vehicle prowling. The matter ultimately proceeded to jury trial. The prosecutor sought instructions on first and second degree criminal trespass as lesser included offenses of the vehicle prowling charge. The trial court did instruct the jury, over defense objection, on second degree trespass. The prosecutor also asked the court to define the term "premises" for the jury, but did not submit a definitional instruction. The trial court did not define "premises," but allowed the parties to argue to the jury whether a vehicle was or was not a "premises."

The jury found Mr. Joseph guilty of third degree assault, not guilty of vehicle prowling, and guilty of second degree criminal trespass. He then timely appealed to this court, challenging only the latter conviction.

ANALYSIS

This appeal raises a challenge solely to the trespass conviction. Mr. Joseph contends that the statute does not apply to vehicles and that the trial court therefore erred in instructing the jury on the lesser included offense of second degree trespass. Specifically, Mr. Joseph's challenge argues that a vehicle is not a "premises" within the meaning of the trespass statute. This argument requires review of the history of the statute and judicial interpretations placed on it.

Second degree criminal trespass is defined:

> A person is guilty of criminal trespass in the second degree if he or she 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) (emphasis added). The crime is a simple misdemeanor. RCW 9A.52.080(2). The crime of first degree criminal trespass applies to anyone who "knowingly enters or remains unlawfully in a building." RCW 9A.52.070(1).

The critical definition at issue here is that of "premises." It "includes any building, dwelling, structure used for commercial aquaculture, or any real property." RCW 9A.52.010(6). Also important is the term "building," which is defined for the criminal code as

> "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.

RCW 9A.04.110(5).

Facially, this appears to be a very straight-forward problem. Second degree trespass involves the unlawful intrusion into a "premises." "Premises" is defined to include "building," and that latter term in turn includes "vehicle." Therefore, the transitive property of equality[1] tells us that "vehicle" equals "premises." Although

[1] If a=b and b=c, then a=c. JEROME E. KAUFMANN & KAREN L. SCHWITTERS, INTERMEDIATE ALGEBRA 6 (2010).

mathematics principles are immutable, many legal principles are not, particularly when they conflict with competing legal doctrines.

Mr. Joseph argues that the definition of "premises" is exclusive and does not encompass "vehicles." He tries to draw support for this contention from some earlier cases addressing an equal protection problem with the former first degree trespass statute and the efforts made to fix it. While he properly points to the right cases, ultimately, they do not aid his argument.

The problem initially was identified in *State v. Martell*, 22 Wn. App. 415, 591 P.2d 789 (1979). The defendant was charged with second degree burglary after being found inside a church building. The court also instructed the jury on the included offense of first degree criminal trespass, but declined to give an instruction on second degree criminal trespass requested by the defendant. *Id.* at 416-17. The defendant was convicted of first degree trespass and appealed, arguing the conviction violated his right to equal protection of the laws. *Id.* Division Two of the Court of Appeals agreed.

The first degree criminal trespass statute at that time applied to anyone who entered or remained unlawfully "in a building or on real property adjacent thereto or upon real property which is fenced or otherwise enclosed in a manner designed to exclude intruders." *Id.* at 417.[2] Second degree criminal trespass then, as now, applied to anyone

[2] *See* LAWS OF 1975, 1st Ex. Sess., ch. 260, § 9A.52.070.

who entered or remained unlawfully "in or upon premises of another." *Id.*[3] The word "premises" was defined to mean "any building, dwelling, or any real property." *Id.*[4]

Implicitly relying on the criminal code definition of "building," the court pointed out that both statutes punished trespass in a "building," and, therefore, the defendant's equal protection rights were violated due to the difference in penalties resulting from the charging decision. *Id.* at 417-18. As a remedy, the court reduced the conviction to second degree criminal trespass since the parties agreed the elements of the two statutes were identical. *Id.* at 419.

The legislature responded as part of an omnibus bill amending portions of the criminal code. *See* LAWS OF 1979, 1st Ex. Sess., ch. 244. The legislation omitted the adjacent and fenced real property language from the first degree trespass statute and added a provision to the second degree trespass statute excluding it from applying to conduct within the scope of the first degree trespass statute. *Id.* at §§ 12, 13. Unfortunately, neither the court in *Martell* nor the legislature expressly addressed the definition of "building" in RCW 9A.08.110.

The issue was back before the appellate courts in *State v. Brown*, 50 Wn. App. 873, 751 P.2d 331 (1988).[5] There the defendant was charged with second degree

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[3] *See* LAWS OF 1975, 1st Ex. Sess., ch. 260, § 9A.52.080.

[4] *See* LAWS OF 1975, 1st Ex. Sess., ch. 260, § 9A.52.010(1).

[5] *Abrogated by* 174 Wn.2d 288, 274 P.3d 366 (2012).

burglary for entering into a fenced area behind a tire store that was used to store tires. The jury convicted Brown of the lesser included offense of first degree trespass. *Id.* at 874-75. The issue on appeal was whether the fenced area constituted a "building" under the first degree trespass statute. *Id.* at 875. Division One of the Court of Appeals noted that despite the legislative efforts, "there is still confusion regarding what constitutes a 'building.'" *Id.* at 876. The prosecutor relied on the criminal code's definition of "building" set out in RCW 9A.04.110. *Id.*

While noting that the criminal code's "building" definition had been expansively applied in burglary prosecutions, the *Brown* court concluded that expansive definition did not apply to the first degree trespass statute, citing to the 1979 bill analysis from the House Judiciary Committee. *Id.* at 877 (citing House Judiciary Committee Bill Files 307, at 5 (1979)). The bill analysis described the effects of its amendments as limiting the first degree trespass statute to "building in its ordinary sense." *Id.*

Turning to the facts before it, the *Brown* court noted that the "Legislature clearly intended to exclude fenced areas from the definition of 'building' in the amended first degree criminal trespass statute."[6] *Id.* at 878. Instead, fenced areas would be considered

[6] The Senate had amended the legislation by striking the words "other than a fenced area" from the House version of the bill. *See* H.B. 307, 46th Leg., Reg. Sess. (Wash. 1979). Ironically, the Senate bill reports indicate that the effect of that change was to include fenced areas within the scope of the first degree trespass statute. *See* SENATE JUDICIARY COMM., ANALYSIS ON H.B. 307 AS OF APRIL 18, 1979, at 2, 46th Leg., Reg. Sess. (Wash. 1979); SENATE JUDICIARY COMM., ANALYSIS ON H.B. 307 AS OF

"premises" under the second degree trespass statute. *Id.* Accordingly, since Mr. Brown had trespassed into a fenced area rather than a "building," the court reversed his first degree trespass conviction and reduced it to second degree trespass. *Id.*

Although *Brown* was able to resolve its case due to the apparent intent expressed in the House bill analysis to exclude fenced areas from the first degree trespass statute, this case is not as easily resolved. Unfortunately, the legislature did not include any language that defined the word "building" for purposes of the trespass statute and did not address the criminal code's definition of "building." Instead, the legislature appears to have treated the word "building" as having its normal meaning of an enclosed structure[7] without enacting any language to express that view. However, merely excluding fenced areas from the definition of building, while describing something a building is not, failed to affirmatively describe what a building is supposed to be.

Nonetheless, the legislative action does give us some clues whether we should treat a "vehicle" as a "building" (and, thus, as a "premises"). The legislature did not believe the criminal code definition of "building" applied to the first degree trespass

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MARCH 1, 1979, at 2, 46th Leg., Reg. Sess. (Wash. 1979). *Brown* did not address the Senate bill analysis.

[7] In part, building is defined as "a constructed edifice designed to stand more or less permanently, covering a space of land, usu. covered by a roof and more or less completely enclosed by walls, and serving as a dwelling, storehouse, factory, shelter for animals, or other useful structure — distinguished from structures not designed for occupancy (as fences or monuments)." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 292 (1993).

statute, although it did apply to the burglary provisions of the same chapter of the criminal code. It did, as *Brown* observed, thereby apply a nontechnical definition of "building" to the first degree trespass statute. Further support for that view comes from the acknowledged fact that the 1979 amendments were enacted in order to avoid the equal protection problem identified by *Martell*. *See Brown*, 50 Wn. App. at 877-78 (discussing House bill analysis). If the broad definition of "building" applicable to the rest of the criminal code did apply to the first degree trespass statute, the two trespass statutes would remain coextensive and the problem would remain unsolved.[8] The nonadoption of a technical definition appears to indicate legislative satisfaction with use of the ordinary meaning of the term in the first degree trespass statute.

Accordingly, we conclude, as did *Brown*, that the legislature intended the term "building" in the first degree trespass statute to have its ordinary meaning of a constructed edifice designed for occupancy.[9] It also appears that the term "premises"

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[8] The exclusion of the fenced area language from the 1975 first degree trespass statute did not remove the fenced area language from the criminal code definition of building.

[9] One obvious problem with adopting this definition is that it appears that first degree criminal trespass, having a much narrower definition of "building" than that used in the burglary statute, is unlikely to satisfy the *legal prong* of our test for lesser included offenses because it is not necessarily established by proof of the greater crime. *See State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978) and its progeny. *But see State v. Mounsey*, 31 Wn. App. 511, 643 P.2d 892 (1982) (applying criminal code definition of "building" to first degree criminal trespass and finding it to be an included offense of burglary).

used in the second degree trespass statute is intended as a broad, catch-all provision since the 1979 amendment only excludes the narrow, ordinary "building" from the second degree trespass statute. *Accord State v. Brittain*, 38 Wn. App. 740, 746, 689 P.2d 1095 (1984) (second degree trespass applies to all situations other than entry into a building). This, too, is consistent with the broad definition of "building" found in RCW 9A.04.110. Consistent with that definition, we therefore hold that a "vehicle" is a "premises" for purposes of the second degree criminal trespass statute.[10]

The trial court correctly instructed the jury on the included offense of second degree criminal trespass. The evidence supported the jury's verdict. The conviction is affirmed.

Affirmed.

Korsmo, J.

WE CONCUR:

Siddoway, J.

Lawrence-Berrey, A.C.J.

[10] *See State v. Shelby*, 61 Wn. App. 214, 220, 811 P.2d 682 (1991) (while discussing equal protection argument, court states without analysis that second degree criminal trespass does not apply to vehicles).