

63348-1

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NO. 63348-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

COLIN SMITH,

Appellant.

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

The Honorable Gregory Canova

APPELLANT'S OPENING BRIEF

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I. SUMMARY OF ARGUMENT

Appellant Colin Smith was denied his constitutional right to a fair trial when the trial court failed to instruct the jury on the lesser-included offense of criminal trespass because it failed to view the evidence supporting the lesser-included instruction in the light most favorable to the defense. When viewed in the light most favorable to the defense, the evidence shows that Mr. Smith was intoxicated, entered the apartment without permission to ask its occupant for a ride, and was not involved in the theft that occurred. The trial court erred by applying the wrong legal standard and therefore the conviction should be reversed and the case remanded for a new trial.

II. ASSIGNMENT OF ERROR

The trial court erred in failing to give the following proposed instruction on criminal trespass as a lesser-included offense for the charge of residential burglary:

If you are not satisfied beyond a reasonable doubt that the defendant is guilty of the crime charged, the defendant may be found guilty of any lesser crime, the commission of which is necessarily included in the crime charged, if the evidence is sufficient to establish the defendant's guilt of such lesser crime beyond a reasonable doubt.

The crime of residential burglary necessarily includes the lesser crime of criminal trespass.

When a crime has been proven against a person and there exists a reasonable doubt as to which of two or more degrees that person is guilty, he shall be convicted only of the lowest degree.

CP 28 (WPIC 4.11).

III. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Where there is evidence to support a defendant's theory of the case, the defendant is entitled to jury instructions that allow the defendant to argue that theory. Criminal trespass is a lesser-included offense of residential burglary. Substantial evidence showed Mr. Smith was not seen in possession of the stolen property, Mr. Smith was not carrying the backpack containing the stolen property, another man had the opportunity to enter the apartment and possessed the backpack containing the stolen items, and Mr. Smith was intoxicated during the event. Did the trial court err in failing to give the proposed lesser-included instruction for criminal trespass?

IV. STATEMENT OF THE CASE

On June 22, 2008, a very intoxicated Colin Smith entered the apartment of a man he did not know. RP 31, 57, 82. The door was "wide open" so Mr. Smith went inside. RP 53. Mr. Smith

walked through the apartment to the back bedroom and was just standing at the dresser when he encountered Paul Jefferson, the occupant of the apartment. RP 55. Startled by Mr. Smith's presence, Mr. Jefferson said that he did not know him and demanded that Mr. Smith leave his home. RP 33. Mr. Smith responded by asking for a ride. RP 33, 35. Mr. Jefferson continued to insist Mr. Smith leave the apartment at once. RP 33.

On that day Mr. Jefferson was cleaning his apartment. RP 27. Mr. Jefferson has a small apartment with a J-shaped layout, and depending on his location he can usually see straight through his residence. Exhibit 5; RP 54, 62. However, when Mr. Jefferson is in the bathroom or parts of his bedroom, he is unable to see the apartment's living area. Exhibit 5; RP 54, 56-57.

After spending three to five minutes underneath his bathroom sink to get cleaning supplies, Mr. Jefferson looked up and saw Mr. Smith. RP 29, 39, 55. The first thing Mr. Jefferson noticed about Mr. Smith was that he had "really bloodshot red" eyes. RP 31, 33, 55. Mr. Smith appeared intoxicated. RP 57. Mr. Jefferson told Mr. Smith to get out of his apartment, shoved him to get going, at one point arming himself with a knife, and proceeded to walk Mr. Smith out until he exited the apartment. RP 33-35, 37.

After Mr. Smith left the apartment, Mr. Jefferson called 911 and began to search for his wallet. RP 40. Mr. Jefferson located his wallet and did not believe anything had been stolen. RP 59. Mr. Jefferson reported that a black man wearing a black jacket and a shirt with some red had been in his apartment. RP 31-32, 70, 109-10. Police officers soon arrived at Mr. Jefferson's apartment. RP 40.

Sergeant Pieper arrived on the scene, obtained information about the suspect, and began a check of the area when he was called to a second location. RP 70-71. After Sergeant Pieper responded to the second incident, he continued to drive around the area near Mr. Jefferson's home and saw two black men in a nearby alley. RP 73. One man wore a black jacket and black baseball cap and was identified as Colin Smith; the other man wore a green jacket and black baseball cap, carried a backpack and was identified as Mr. Kidane.¹ RP 74, 81. Sergeant Pieper detained Mr. Smith and described him as intoxicated with difficulty following instructions. RP 82.

¹ In the VRP the court reporter phonetically spelled Mr. Kidane as "Mr. Kadain." However, Sergeant Pieper's police report spells the name as Mr. Kidane. This brief will use the same spelling as the police report.

Additional police arrived at the alley, including field training Officer Orneles and his student officer Sayaphouthone. RP 76-77. Sayaphouthone was the primary officer to prepare the police report for this case and took charge of this incident. RP 78. Sayaphouthone did not testify and is no longer with the Seattle Police Department. RP 112. Led by student officer Sayaphouthone, the police searched the backpack Mr. Kidane was carrying and discovered clothing, photographs of Mr. Smith, and an envelope with Mr. Smith's name on it, as well as 13 cigars and a cigar cutter. RP 79, 151.

Officer Banez was on his way to Mr. Jefferson's apartment when he was told that the police had a possible suspect in custody. RP 107. Officer Banez informed Mr. Jefferson of this situation and took him to a gas station where Mr. Smith was being held for identification. RP 42, 108. Mr. Jefferson identified Mr. Smith as the man who had been in his apartment. RP 42-43, 108.

Officer Banez took Mr. Jefferson back to his apartment where he wrote out a statement. RP 45, 110. Approximately 15 minutes later, police returned to Mr. Jefferson's apartment with a backpack. RP 45-46. Mr. Jefferson was surprised because he had not seen Mr. Smith carrying a backpack. RP 46, 60-61. Mr.

Jefferson did not believe anything had been taken until he saw cigars and a cigar cutter in the backpack. RP 46, 60, 116. The cigars and cigar cutter had been in a box on a bookshelf in his living room. RP 46, 57-58, 110. Officer Banez took photographs of Mr. Jefferson's apartment, the bookshelf where the cigar box had been, and the cigars. RP 110. Officer Banez did not dust for fingerprints. RP 113-14.

The State charged Mr. Smith with Residential Burglary. CP 5-6. The matter was tried to a jury. Mr. Smith proposed a lesser-included instruction of criminal trespass and objected to the failure to give his proposed lesser-included instruction on criminal trespass. CP 28; RP 119-20, 124. The State did not offer an accomplice liability instruction and there was no wording in the "to convict" instruction that would allow the jury to find that Mr. Smith was liable for the conduct of another person. CP 35-54. The jury found Mr. Smith guilty of Residential Burglary. CP 59.

V. ARGUMENT

THE TRIAL COURT ERRED IN REFUSING TO GIVE
THE PROPOSED LESSER-INCLUDED OFFENSE
INSTRUCTION ON CRIMINAL TRESPASS.

A. An instruction on a lesser-included offense is required whenever the evidence supports an inference that the lesser crime

was committed. A defendant in a criminal case is entitled to have the jury fully instructed on the defense theory of the case. *State v. Fernandez-Medina*, 141 Wn.2d 448, 461-62, 6 P.3d 1150 (2000). Under RCW 10.61.006 “the defendant may be found guilty of an offense the commission of which is necessarily included within that with which he is charged in the indictment or information.”

A trial court must consider all the evidence that is presented at trial when it is deciding whether or not an instruction should be given. *Fernandez-Medina*, 141 Wn.2d at 456. An instruction is appropriate and satisfies the requirement of a fair trial only when it informs the jury of the applicable law, is not misleading, and allows the defendant to argue his theory of the case. *State v. Douglas*, 128 Wn. App. 555, 562, 116 P.3d 1012 (2005). The adequacy of jury instructions is a question of law subject to de novo review. *State v. Kiehl*, 128 Wn. App. 88, 91, 113 P.3d 528 (2005).

A two-part test is used to determine if an accused person is entitled to an instruction on a lesser-included offense: (1) each element of the lesser offense is a necessary element of the charged offense (“the legal prong”); (2) the evidence in the case supports an inference that only the lesser crime was committed (“the factual prong”). *State v. Workman*, 90 Wn.2d 443, 447-48,

584 P.2d 382 (1978). See also *State v. Nguyen*, 165 Wn.2d 428, 434, 197 P.3d 673 (2008) (reiterating *Workman* test).

When determining whether or not a lesser-included instruction is appropriate under the factual prong, the appellate court is to view the supporting evidence in the light most favorable to the party that requested the instruction. *State v. Pittman*, 134 Wn. App. 376, 385, 166 P.3d 720 (2006) (citing *Fernandez-Medina*, 141 Wn.2d at 455-56). When substantial evidence in the record supports a rational inference that the defendant committed only the lesser-included offense to the exclusion of the greater offense, the factual component of the test for entitlement to an inferior degree offense instruction is satisfied. *Fernandez-Medina*, 141 Wn.2d at 461.

B. Legal Prong. The first question is whether criminal trespass in the first degree satisfies the legal prong of the *Workman* test as applied to residential burglary. The elements of residential burglary are: (1) entering or remaining unlawfully in a dwelling other than a vehicle; (2) with intent to commit a crime against a person or property therein. RCW 9A.52.025. Criminal trespass in the first degree requires the defendant knowingly enter or remain unlawfully in a building. RCW 9A.52.070.

The only difference between first-degree criminal trespass and residential burglary is that residential burglary requires the additional element of intent to commit a crime inside the building. Because the element of criminal trespass (“knowingly entering or remaining unlawfully in a building”) must be established when a defendant unlawfully enters or remains with criminal intent, first-degree criminal trespass satisfies the legal prong as a lesser-included offense of residential burglary. See *State v. J.P.*, 130 Wn. App. 887, 895, 123 P.3d 215 (2005) (criminal trespass is a lesser-included offense for the crime of burglary); *State v. Allen*, 127 Wn. App. 945, 950, 113 P.3d 523 (2005) (undisputed that legal prong met because each element of first-degree criminal trespass is a necessary element of burglary).

C. Because the evidence supports an inference that only first-degree criminal trespass was committed, Mr. Smith was entitled to a lesser-included jury instruction. The factual prong of the *Workman* test is also met in this case. The evidence, when viewed in the light most favorable to Mr. Smith, supports an inference that he committed only first-degree criminal trespass and not the greater offense of residential burglary.

First, the evidence supports an inference – and a reasonable jury could have found – that it was Mr. Kidane, and not Mr. Smith, who took the cigars and cigar cutter from Mr. Jefferson’s home. Police found Mr. Kidane nearby carrying a backpack with the cigars and cigar cutter. RP 74, 79, 81. There was ample time and opportunity for Mr. Kidane to take the cigars and cigar cutter. Mr. Jefferson had been under his sink for three to five minutes when he looked up to see Mr. Smith in his bedroom. RP 29, 39, 55. There were times during their encounter when Mr. Jefferson could not see his living room area. RP 54, 56-57. It is more probable in this situation that Mr. Kidane stole the cigars and cigar cutter during this time because Mr. Jefferson ultimately escorted Mr. Smith out of the apartment, observing neither cigars nor a backpack. RP 46, 59-61.

Second, the evidence also supports an inference that Mr. Smith simply lacked the intent to steal the cigars and cigar cutter. The evidence shows, while *highly intoxicated*, Mr. Smith entered Mr. Jefferson’s apartment through an open door and walked through the apartment to the bedroom where Mr. Jefferson spotted him standing in front of the dresser.² RP 29, 39, 55. When

² Mr. Jefferson testified that the first thing he noticed were Mr. Smith’s bloodshot eyes and that he appeared intoxicated. RP 31, 33, 55, 57. Sergeant

confronted by Mr. Jefferson, Mr. Smith first asked for a ride. RP 33, 35. Mr. Jefferson never saw Mr. Smith with a backpack or any stolen property. RP 46, 59-61. Mr. Jefferson confronted Mr. Smith and aggressively escorted Mr. Smith out of his home. RP 33-35, 37. During that time, Mr. Jefferson never saw Mr. Smith take or carry away any of his property.

Based on this evidence, the jury could have found that Mr. Smith lacked the intent to steal required for residential burglary. This evidence is much more indicative of criminal trespass than residential burglary and supports the inference that Mr. Smith did not have the intent to commit a crime when unlawfully entering Mr. Jefferson's apartment.

In arguing the defense of lack of intent to the jury, Mr. Smith was entitled to argue reasonable inferences from the evidence. *State v. Smith*, 104 Wn.2d 497, 510, 707 P.2d 1306 (1985) (holding that counsel are permitted latitude to argue the facts in evidence and reasonable inferences in a criminal prosecution). However, without the criminal trespass instruction, the jury could not draw the appropriate inferences from the evidence.

Pieper also testified that Mr. Smith was intoxicated and had a difficult time following directions. RP 82.

Had the court viewed the evidence in the light most favorable to Mr. Smith, and instructed on criminal trespass, there is substantial evidence in the record from which the jury could have found that Mr. Smith unlawfully entered Mr. Jefferson's home but did not steal the cigars or cigar cutter. Thus, under these facts, if properly instructed, the jury could have found that Mr. Smith committed first-degree criminal trespass to the exclusion of residential burglary. The trial court erred in failing to instruct the jury on the elements of the lesser crime.

D. Mr. Smith is entitled to a new trial. The trial court's failure to properly instruct the jury on a lesser-included offense is presumed to be prejudicial to the defendant, unless it is affirmatively shown to be harmless. *State v. Southerland*, 109 Wn.2d 389, 390-91, 745 P.2d 33 (1987). No such showing can be made here. Without the lesser-included instruction, the jury was given the choice of either finding Mr. Smith guilty of residential burglary or of no crime related to his unlawful entry into Mr. Jefferson's apartment. By failing to give the lesser-included instruction, Mr. Smith was denied his due process right to a fair trial. Accordingly, this Court should reverse and remand for a new trial.

VI. CONCLUSION

Because the trial court denied Mr. Smith a fair trial when it refused to instruct the jury on criminal trespass as a lesser-included offense of residential burglary, this Court should reverse and remand for a new trial on the charge of residential burglary.

Respectfully submitted this 15th day of October, 2009.



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)	NO. 63348-1-I
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)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 15TH DAY OF OCTOBER, 2009, I CAUSED THE ORIGINAL **OPENING 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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