

71749-9

71749-9

NO. 71749-9-I

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

STATE OF WASHINGTON,

Respondent,

v.

MITCHELL RAMM,

Appellant.

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

The Honorable Jeffrey Ramsdell, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

Where the appellant was charged with second degree burglary, the court erred in denying appellant's request that the jury be instructed on the lesser offense of first degree criminal trespass.

Issue Pertaining to Assignment of Error

The appellant was charged with second degree burglary and requested a lesser included offense instruction on first degree criminal trespass. Viewed in the light most favorable to the defense, did the facts warrant instructing the jury on the lesser offense?

B. STATEMENT OF THE CASE¹

1. Charges, verdicts, and sentences

The State charged Mitchell Ramm with second degree burglary, a felony, as well as obstructing a law enforcement officer and third degree malicious mischief, both gross misdemeanors, for events occurring the evening of January 27 and early morning hours of January 28, 2013. The incident in question occurred at a high rise building under construction in downtown Seattle. CP 32-33.

¹ This brief refers to the verbatim reports as follows: 1RP – 9/8/13; 2RP – 1/24/14; 3RP – 2/21/14; 4RP – 3/10/14; 5RP – 3/11/14; 6RP – 3/12/14; 7RP – 3/13/14; 8RP – 3/17/14; 9RP – 3/18/14; and 10RP – 3/24/14.

Ramm was adjudicated competent before trial after a lengthy period of competency restoration at Western State Hospital. CP 9-20. He attended part of jury selection² but refused to attend his trial again until the sentencing hearing. 6RP 129-38; 7RP 16, 66; 9RP 3; 10RP 2.

As to the second degree burglary charge, the court rejected Ramm's request to instruct the jury on the lesser offense of first degree criminal trespass. 8RP 74-72; CP 36-37, 39 (defense proposed instructions). A jury convicted Ramm as charged. CP 74-76.

The court sentenced Ramm to three months on the felony and a total of 18 months on the two gross misdemeanors. The court ran the felony sentence concurrent to the misdemeanor sentences. CP 83, 94. Ramm, who served a lengthy pretrial incarceration, was released shortly after the sentencing hearing based on credit for time served. CP 9-20; 10RP 24.

Ramm timely appeals. CP 90.

² The jury selection transcripts indicate Ramm made some comments directly to prospective jurors, prompting defense counsel to admonish Ramm. 5RP 24 (Ramm's statement congratulating prospective juror on being a stay-at-home mom and commenting that his niece had a child); 5RP 32 (commenting directly to juror describing hardship that "the American economy seems like it's on the razor's edge"); 6RP 124 (comments by prospective juror during individual questioning regarding Ramm's previously-described interjections); 7RP 32-35 (in context of overruling prosecutor's objection to defense opening statement on the grounds that it inappropriately asserted a mental health defense, court's summary of Ramm's odd behavior during jury selection).

2. Trial testimony

Around 10:00 p.m., Seattle police officers were dispatched to 1915 Second Avenue to a high-rise building under construction. 7RP 46-47, 74, 87-88, 135-36, 166. The upper levels had not yet been walled in. 7RP 75.

Officers heard yelling and what sounded like items being thrown. 7RP 42, 84, 88. Using their spotlights, police saw a white male on the seventh or eighth floor, which was open to the elements. 7RP 76. Officers were unable to locate an obvious means to enter the fenced construction site and eventually cut a padlock off a gate.³ 7RP 41, 51, 88-89. A group of six officers, including a “canine” officer and a specially designated “Taser” officer, walked up ramps in the building’s parking garage before reaching a makeshift staircase at the center of the building. 7RP 43, 54, 89-90, 150.

The first out-of-place item the officers came upon was a five-gallon propane container with an open valve. The container was hissing and smelled of propane. 7RP 89. The officers soon began to notice construction debris, including cable and pipe, covering the staircase, which made the officers’ passage difficult given the lack of railings. 7RP 44-45, 89, 93.

³ It was never determined how Ramm entered the site. 7RP 94.

As they approached the eighth floor, the officers at the front of the pack saw Ramm standing near the eight floor landing. 7RP 90. He was holding a three-foot length of rebar with a large hook on the end. 7RP 45.

A number of officers shone their flashlights at Ramm and ordered him to drop the rebar. 7RP 45, 95, 152. Many had guns drawn. 7RP 45, 54-55, 151. Ramm did not drop the rebar. Rather, he slammed it on a drafting table and screamed unintelligibly. 7RP 46, 95. Sergeant William Edwards heard Ramm tell him and the other officers to drop their guns. 7RP 139. This resulted in a temporary stalemate, as the officers hoped to take Ramm into custody but wished to avoid shooting him. 7RP 139.

Sergeant Joseph Maccarone and the designated Taser officer, Rebecca Miller, pushed past the others. 7RP 46. Officer Miller fired the Taser at Ramm while Maccarone “covered” Officer Miller with his gun. 7RP 46; 8RP 23.

The Taser did not have the intended effect of immobilizing Ramm. 8RP 38. The officers believed it did not function as intended because the probes were unable to penetrate Ramm’s heavy winter jacket.⁴ 7RP 46, 96, 140; 8RP 23-24, 37. The Taser attempt nonetheless startled Ramm. 7RP 46-47. He raised the re-bar over his head, spun around, dropped the

⁴ Sergeant Maccarone thought one probe may have hit Ramm in the leg because he later saw Ramm pull something out of his pant leg. 8RP 24.

rebar, and ran toward the open edge of the building. 8RP 25. Maccarone feared Ramm would jump to his death. 8RP 25-26.

Instead, Ramm climbed over a safety fence consisting of two cables, then stood on the narrow exposed ledge. 6RP 46-47, 140. While on the ledge, he rambled nonsensically on subjects as diverse as California biker gangs, conspiracies, and the end of the world. 7RP 190; 8RP 44-45.

Officer Miller attempted to persuade Ramm to get off the ledge. 7RP 97; 8RP 26, 43. The police eventually called in police department hostage negotiators to talk to Ramm. 7RP 59; 8RP 45. Ramm climbed back over the wire, and was eventually arrested at around 5:00 the following morning. The surrender occurred shortly after new officers came on shift, replacing officers who had originally confronted Ramm. 7RP 98, 113; 8RP 28. Those officers had to reassure Ramm they would not hurt him to persuade him to surrender. 8RP 45.

The officers who had contact with Ramm that night believed he was enduring a mental health crisis and may have been suicidal. 7RP 62, 155; 8RP 30, 42. At the time of his surrender and arrest, Ramm seemed to have “come down” from the crisis, although he was still far from lucid. 8RP 47, 50.

Sergeant Maccarone believed Ramm may have been trying to get the officers to shoot him. 8RP 42. Maccarone was not sure if Ramm’s

behavior was mental health- or drug- related, or both, but he acknowledged no drugs were found on Ramm's person or in his backpack. 8RP 27, 47, 49-50.

Michael Finney, the construction company's site manager, was called to the scene during the early morning hours of January 28. 7RP 174. He activated an elevator so the officers could reach the eighth floor without climbing the debris-filled stairs. 7RP 77, 175.

Finney testified Ramm did not have permission to be on the site. 7RP 167-69. In addition, the fence enclosing the site had a number of "no trespassing" signs, as well as signs indicating that visitors were required to check in at the construction office. 7RP 168.

The incident began on a Sunday night and concluded early the following Monday. 7RP 193. Finney believed he was the last person on the site previous Friday, the last day the site was open. 7RP 192-94. According to Finley, between Friday and Monday morning, a number of construction-related items had been moved or thrown down the stairs or off the side of the building. 7RP 171-72, 192-94. In addition, someone had used bright pink marking paint to write words on the building's elevator core.⁵ 7RP 112, 139. Inscriptions included King, English, MI6,

⁵ The design called for exposed concrete in that area so the construction company had to pay a subcontractor to remove the paint. 7RP 180-84.

Jesus, 2013, AD, Infidel, Cannibal, Texas, and Bush. 7RP 145-47, 185-86. A cross or “T” in a similar color was painted on the front of Ramm’s brown Carhartt-style jacket. 7RP 112-13, 139, 143.

Finney saw Ramm on the ledge when he arrived and overheard him threatening to jump and ranting about conspiracies and the end of the world. 7RP 190.

3. Refusal to instruct on lesser offense

Following the close of evidence, the defense requested a lesser included offense instruction on first degree criminal trespass. 8RP 74-82; CP 36-37, 39 (defense proposed instructions). Defense counsel pointed out that burglary required a “higher” mental state, intent, than did trespassing, which required only knowledge. 8RP 77.⁶ Counsel argued that, based on the evidence of prominent no-trespassing and other signs warning Ramm he was not welcome, the evidence supported that Ramm could have known his entry onto the site was unlawful. 8RP 78, 80-81. But considering the evidence of Ramm’s bizarre behavior and statements, as well as the possible lengthy period between entry and Ramm’s ultimate discovery by police, there was evidence to support that Ramm did not

⁶ See *State v. Soto*, 45 Wn. App. 839, 841, 727 P.2d 999, 1000 (1986) (“intent” and “knowledge” are culpable mental states in a hierarchy) (citing RCW 9A.08.010(2)).

have the mental wherewithal to intend to commit any crime. 8RP 78. In effect, based on the evidence, Ramm could have known at some point he should not be in construction site, but never formed the intent to commit a crime. 8RP 77. Or, as the court observed, he could have entered the site without intending to commit a crime, and then decompensated, leading to the series of bizarre acts discovered by police. 8RP 77.

The court ruled, however, that if Ramm was indeed truly “disconnected” from reality, he was guilty of neither second degree burglary nor first degree criminal trespass. The court therefore refused to give the instruction. 8RP 79, 81.

C. ARGUMENT

RAMM WAS ENTITLED TO HAVE THE JURY INSTRUCTED ON THE LESSER INCLUDED OFFENSE OF FIRST DEGREE CRIMINAL TRESPASS.

A defendant is entitled to have the jury fully instructed on the defense theory of the case whenever there is evidence to support it. State v. Fernandez-Medina, 141 Wn.2d 448, 461, 6 P.3d 1150 (2000). This is a due process requirement. State v. Koch, 157 Wn. App. 20, 33, 237 P.3d 287 (2010), review denied, 170 Wn.2d 1022 (2011); U. S. Const. amend. XIV; Const. art I, § 3.

When an element of the offense remains in doubt, but an accused appears guilty of some wrongdoing, the jury is likely to resolve its doubts

in favor of conviction. Keeble v. United States, 412 U.S. 205, 212-13, 93 S. Ct. 1993, 36 L. Ed. 2d 844 (1973); see also Kyrton Huigens, The Doctrine of Lesser Included Offenses, 16 U. Puget Sound L. Rev. 185, 193 (1992) (“When faced with a choice between acquittal and conviction of a crime not quite proved by the evidence, a jury can be expected, if some sort of wrongdoing is evident, to opt for conviction.”).

This distortion of the fact-finding process is part of the rationale behind the common law rule, codified in every state and under the Federal Rules of Criminal Procedure, that an accused is entitled to have the jury instructed on lesser included offenses. Beck v. Alabama, 447 U.S. 625, 633-36, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980). Providing the jury with a third option, conviction of a lesser included offense, “ensures that the jury will accord the defendant the full benefit of the reasonable-doubt standard.” Id. at 634.

A trial court’s refusal to give a jury instruction based on the law is reviewed de novo. State v. Walker, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998). When an otherwise discretionary decision is based solely on application of a court rule or statute to particular facts, the issue is also one of law reviewed de novo. See Fernandez-Medina, 141 Wn.2d at 454 (test to be employed includes legal and factual components); State v. Dearbone,

125 Wn.2d 173, 178, 883 P.2d 303 (1994) (noting that mixed questions of law and fact are reviewed de novo).

De novo review is appropriate in this case because the court refused to give the lesser offense instruction based on an error of law – in this case, a misapplication of the law regarding the hierarchy of mental states. The court also erroneously applied the law to the facts. In doing so, the court violated Ramm’s constitutional rights by refusing to instruct the jury in such a way as to reflect his theory of the case.

By Washington statute, an accused is entitled to have the jury instructed not only on the charged offense, but also on all lesser-included offenses. RCW 10.61.006. The accused is entitled to a lesser offense instruction when (1) each element of the lesser offense is a necessary element of the charged offense (legal prong) and (2) the evidence supports an inference that the defendant committed only the lesser offense (factual prong). State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978).

Workman’s legal prong is satisfied if it is impossible to commit the greater offense without also committing the lesser. State v. Porter, 150 Wn.2d 732, 736-737, 82 P.3d 234 (2004). The elements of second degree burglary are (1) entering or remaining unlawfully in a building other than a vehicle or a dwelling with (2) intent to commit a crime against a person

or property therein. RCW 9A.52.030. A “building” includes a fenced area. RCW 9A.04.110(5).

The elements of first degree criminal trespass are: (1) knowingly entering or remaining unlawfully in a building. RCW 9A.52.070. First degree criminal trespass in the first degree is a gross misdemeanor. RCW 9A.52.070(2).

Because the element of criminal trespass — knowingly entering or remaining unlawfully in a building — must be established every time a defendant unlawfully enters or remains with criminal intent, criminal trespass satisfies the legal prong of the Workman test. See State v. Soto, 45 Wn. App. 839, 841, 727 P.2d 999 (1986) (first degree criminal trespass is a lesser included offense for the crime of second degree burglary).

As for Workman's factual prong, a court should grant a request for a lesser included offense instruction whenever the evidence, viewed in the light most favorable to the requesting party, would permit a jury to rationally find a defendant guilty of the lesser offense and acquit him of the greater. Fernandez-Medina, 141 Wn.2d at 455-56. It is not enough that the jury might disbelieve the evidence pointing to guilt. Id. Rather, the evidence must affirmatively establish the defendant's theory of the case. Id. When evidence in the record supports a rational inference that the accused committed only the lesser included offense, to the exclusion of

the greater offense, the factual component is satisfied. Id. at 461. An accused has an unqualified right to have the jury instructed on the lesser so long as there is “[e]ven the slightest evidence” he may have committed only that offense. State v. Parker, 102 Wn.2d 161, 163-64, 683 P.2d 189 (1984) (quoting State v. Young, 22 Wash. 273, 276-77, 60 P. 650 (1900)).

Considered in the light most favorable to Ramm, the evidence would have permitted the jury to conclude Ramm committed only trespass rather than burglary. The State bears the burden of proving beyond a reasonable doubt that the defendant had the requisite mental state for the crime charged. State v. James, 47 Wn. App. 605, 609, 736 P.2d 700 (1987). As the State argued, intent to commit a crime could be inferred from the fact that Ramm threw items and painted walls once inside the site.⁷ 8RP 108. The State argued, moreover, that Ramm’s bizarre behavior did not necessarily preclude him from forming intent and it

⁷ The jury was not instructed on the permissive inference under RCW 9A.52.040, which provides:

In any prosecution for burglary, any person who enters or remains unlawfully in a building may be inferred to have acted with intent to commit a crime against a person or property therein, unless such entering or remaining shall be explained by evidence satisfactory to the trier of fact to have been made without such criminal intent.

RCW 9A.52.040; 11A Washington Practice: Washington Pattern Jury Instructions: Criminal 60.05, at 15-16 (3d Ed. 2008).

would be dangerous to excuse people's behavior merely because they acted strangely. 8RP 109-10. That was the State's theory of the case, considering the facts in the light most favorable to the State. But for purposes of this analysis, the State's theory is of little consequence.

Over the State's objection, the court permitted Ramm to argue that his mental state created reasonable doubt as to his mental state required for culpability. See, e.g., 4RP 11 (motions in limine); 7RP 25-30 (defense opening statement); 7RP 31- 34 (State's objection and court's overruling of State's objection). In arguing for the lesser instruction, defense counsel correctly pointed out the hierarchy of mental states involved, as well as the affirmative evidence supporting guilt of the lesser, rather than the greater, offense. See 8RP 77-78, 80-81 (argument to the court in favor of lesser instruction).

First, as Finney's testimony established, the construction site had a number of signs alerting Ramm that his presence was unlawful. Given that knowledge is a lesser mental state under RCW 9A.08.010, the prominence of such signs was evidence that even in his addled state Ramm would have known he should not be there.

Second, the State's witnesses uniformly described bizarre behavior and statements by Ramm throughout the seven-hour ordeal. As the defense argued to the court, in the light most favorable to Ramm, this

tended to establish reasonable doubt as to the necessary mental state for burglary, which was entering or remaining with intent to intent to commit a crime against person or property. 8RP 126-27; see RCW 9A.08.010 (3) (“When the grade or degree of an offense depends on whether the offense is committed intentionally . . . [that] shall be the lowest for which the determinative kind of culpability is established with respect to any material element of the offense.”); see also State v. Darden, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002) (accused has right to present evidence in support of his or her defense provided it meets the “very low” threshold for relevance); John Q. La Fond & Kimberly A. Gaddis, Washington's Diminished Capacity Defense Under Attack, 13 U. Puget Sound L. Rev. 1, 22 (1990) (addressing right to present mental defenses) (citing Chambers v. Mississippi, 410 U.S. 284, 295, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973)); cf. United States v. Childress, 58 F.3d 693, 730 (D.C. Cir. 1995) (“While [the defendant's] mental capacity does not 'excuse' him from culpability for his activity . . . it may well be relevant to whether the government proved an element" of the crime); United States v. Pohlot, 827 F.2d 889, 897-99, 903-05 (3d Cir. 1987) (although federal Insanity Defense Reform Act (IDRA) prohibited the “defense” of diminished capacity, it is permissible to use evidence of mental abnormality to

disprove mens rea, that is, to disprove “an element of the crime itself”), cert. denied, 484 U.S. 1011 (1988).

Moreover, as counsel argued in closing, given the bizarre behavior police observed, a trier of fact could have reasonably concluded Ramm entered for other purposes than to commit a crime. 8RP 130; see State v. Crenshaw, 27 Wn. App. 326, 332-33, 617 P.2d 1041 (1980) (“It is well-established in Washington that a lay witness may testify concerning the sanity or mental responsibility of others, so long as the witness' opinion is based upon facts he personally observed, and the witness has testified to such facts.”). Indeed, as counsel observed, the State’s witnesses acknowledged Ramm engaged in behavior suggesting he wished to commit suicide. 8RP 131. Moreover, items had been thrown down the staircase, which led to a reasonable inference that Ramm was trying to protect himself, rather than harm property. 8RP 131. The fact that Ramm sprayed a symbol on his own body also led to reasonable doubt that he intended to commit any crime using the paint.

8RP 131.⁸ Moreover, although, according to Finney, construction plans called for the affected areas to be exposed concrete, Ramm would have no way of knowing the concrete would not be covered as other components of a building's framework normally would.

In effect, given the substantial evidence of Ramm's severe mental disturbance, and considering the hierarchy of mental states required,⁹ a trier of fact could infer Ramm knowingly trespassed, but did not intend to commit any crime, and therefore did not commit burglary. This was more than the "slightest evidence" that is required to warrant the lesser degree instruction. Parker, 102 Wn.2d at 163-64.

The failure to instruct the jury on first degree criminal trespass prejudiced Ramm. See Parker, 102 Wn.2d at 166 (where accused has a right to lesser offense instruction, an appellate court is barred from holding

⁸ Defense counsel also made arguments in closing that were, arguably, inconsistent with guilt of a lesser offense, but supportive of acquittal of any crime. Indeed, having been denied the opportunity to argue Ramm was guilty only of criminal trespass, counsel argued Ramm did not make his presence on the site a secret, which may have suggested he had an actual, albeit irrational, belief that he had a right to be present. 8RP 131. But an instruction requested by the defense may be warranted even if it contradicts the defense's ultimate theory of the case. See Fernandez-Medina, 141 Wn.2d at 457-61 (rejecting State's claim that alibi defense precluded giving lesser degree instruction).

⁹ RCW 9A.08.010(2), (3); Soto, 45 Wn. App. at 841.

he was not prejudiced by failure to submit such instruction to the jury).
Reversal of the burglary conviction is therefore required.

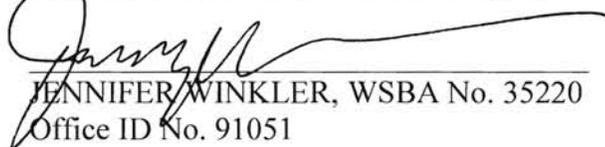
D. CONCLUSION

The trial court denied Ramm a fair trial when it refused to instruct the jury on the lesser crime of first degree criminal trespass. This Court should reverse and remand for a new trial on the burglary charge.

DATED this 22nd day of December, 2014.

Respectfully submitted,

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 71749-9-I
)	
MITCHELL RAMM,)	
)	
Appellant.)	

DECLARATION OF SERVICE

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 23RD DAY OF DECEMBER, 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] MITCHELL RAMM
NO. 214013417
KING COUNTY JAIL
500 5TH AVENUE
SEATTLE, WA 98104

SIGNED IN SEATTLE WASHINGTON, THIS 23RD DAY OF DECEMBER, 2014.

X Patrick Mayovsky