

63348-1

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NO. 63348-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

COLIN SMITH,

Appellant.

FILED  
2009 DEC 11 PM 2:44  
CLERK OF SUPERIOR COURT  
STATE OF WASHINGTON

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE GREGORY CANOVA

**BRIEF OF RESPONDENT**

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King County Prosecuting Attorney

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1. THE TRIAL COURT PROPERLY DENIED SMITH'S MOTION FOR INSTRUCTIONS ON THE LESSER-DEGREE OFFENSE OF CRIMINAL TRESPASS BECAUSE THE EVIDENCE DID NOT SUPPORT AN INFERENCE THAT ONLY THE LESSER CRIME WAS COMMITTED.....	6
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**A. ISSUES PRESENTED**

1. A defendant is entitled to a lesser-degree offense instruction if, after meeting the legal prong, the facts support an inference that only the lesser-degree offense was committed to the exclusion of the charged offense. Here the evidence showed that a burglary occurred. The only question for the jury was whether Smith was the person who committed the burglary. In a charge of Residential Burglary, did the court properly conclude that the facts did not support inclusion of the lesser-degree offense of First Degree Criminal Trespass?

**B. STATEMENT OF THE CASE**

**1. PROCEDURAL FACTS**

The State charged Colin Smith in King County Superior Court with one count of Residential Burglary and one count of Bail Jumping. CP 1-6. A jury trial was held before the Honorable Gregory Canova, testimony began on March 9, 2009.<sup>1</sup>

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<sup>1</sup> The Verbatim Report of Proceedings consists of three volumes of transcript ("RP"), the first volume was a motions hearing that occurred on March 5, 2009 and will not be referenced in this brief. The second two volumes are of the jury trial that occurred on March 9 -10, 2009. The pages are sequentially numbered and will be referred to as "RP".

Colin Smith proposed a jury instruction for Criminal Trespass in the First Degree. The trial judge declined to give the instruction. CP 62; CP 119-22.

The jury found Smith guilty as charged on both counts and the court imposed a DOSA sentence. CP 66-67, 78. Smith now appeals the Residential Burglary conviction. CP 80.

## **2. SUBSTANTIVE FACTS**

On June 22, 2008, Paul Jefferson had the day off from his work. He was home cleaning his apartment, located at 6700 Carlton Avenue South in Seattle, when he was suddenly confronted by Colin Smith, who was in his bedroom. RP 28-29, 31-32.

Jefferson had lived in this one bedroom apartment since 2000 and has never had a roommate. RP 23. Jefferson described the complex as six, side by side, duplex style units; each unit had its own parking space in front of each resident's front door. RP 25-26. All of the residents were long time tenants, with the newest resident having lived there for at least five years. RP 24.

Jefferson described his particular unit as "J" shaped with the front door opening into the living room and then a small corridor that led to the kitchen area and then to the only bedroom and

bathroom. The unit was small enough that if the television was on in the living room, he could hear it from the bedroom or the bathroom. From the front door one can see straight back to part of the bedroom, but not the bathroom. RP 29-30, 39, 54, 62.

Jefferson had been cleaning his apartment; the front, and only, door was open because it was a nice day and he had been going in and out to his car and to the garbage dumpster. RP 28-29.

At about 10:00 a.m., Jefferson went to his bathroom to get something, likely cleaning supplies, leaving the bathroom door open. Jefferson believed he had been in the bathroom about three to five minutes. As Jefferson came out of the bathroom he saw a shadow from his bedroom. He looked in that direction and saw a man standing in his bedroom next to his dresser. The man was later identified as Colin Smith. RP 29, 31-32.

Jefferson noticed that Smith's eyes were very bloodshot and that he had an unkempt appearance. Smith was dressed mostly in black with some red in his shirt. RP 31-32. Smith appeared intoxicated to Jefferson but did not seem confused; rather Smith seemed surprised by seeing Jefferson. RP 57.

Jefferson immediately began to yell at Smith telling him that he didn't know him. Smith responded by saying that he was trying

to get a ride. Jefferson told Smith he had to leave; Smith started to walk but then paused by Jefferson's dresser as though he wanted to say something. Jefferson responded by pushing Smith out of his bedroom toward the front door. As they passed the kitchen area, Jefferson armed himself with a knife as he continued to push Smith out the front door. Once outside, Jefferson yelled at Smith one final time and then slammed and locked his front door. There was no one else in the apartment and Jefferson did not notice anyone else in the area outside of his apartment. RP 33-38.

Jefferson then called 911. While talking with 911, Jefferson looked for his wallet, which he did locate. Jefferson did not believe anything had been taken from his apartment. RP 40-41, 46.

Police, including Sergeant Pieper, arrived quickly and Jefferson gave them a description of Smith. RP 41. Within twenty minutes, Sergeant Pieper had two individuals in custody. Jefferson was driven to a shell station about three blocks away where he identified Smith as the person who had been inside his apartment. RP 41-42.

Sergeant Peter Pieper testified that after speaking with Jefferson he left to do an area check for persons matching the description. RP 70. After briefly responding to another call,

Sergeant Pieper drove around the area again. He spotted two individuals walking in a nearby alley; one of the men, Colin Smith, matched the description and was ultimately identified by Jefferson. The second man, later identified as "Kidane," wore a green jacket and black baseball cap and was carrying a backpack. RP 7-071, 74, 81. Sergeant Pieper testified that Smith was intoxicated and that he had to tell Smith several times to keep his hands on the car. RP 82.

Other officers arrived; both men were searched as was the backpack. Inside the backpack, officers located photographs of Smith, an envelope with Smith's name on it, clothing, some cigars, and a cigar cutter. RP 78-79

A short time after Jefferson had identified Smith, an officer brought the backpack to Jefferson at his apartment. Upon seeing the cigars and cigar cutter, Jefferson looked at his bookshelf, located in the living room. He noticed that his cigar box, that had contained cigars and a cigar cutter, was missing. Jefferson told the officer that the cigars belonged to him. The cigar box was not in the backpack and was never located. CP 46-47, 50-51. Jefferson did not see a backpack on Smith when Smith was in his apartment. CP 61.

**C. ARGUMENT**

**1. THE TRIAL COURT PROPERLY DENIED SMITH'S MOTION FOR INSTRUCTIONS ON THE LESSER-DEGREE OFFENSE OF CRIMINAL TRESPASS BECAUSE THE EVIDENCE DID NOT SUPPORT AN INFERENCE THAT ONLY THE LESSER CRIME WAS COMMITTED.**

Smith claims that his conviction for Residential Burglary must be reversed because the trial court refused to instruct the jury on the lesser-degree offense of Criminal Trespass. Smith is incorrect because the evidence did not support an inference that only the lesser crime was committed.

The right to an instruction on a lesser-degree or lesser-included offense is statutory. RCW 10.61.003 provides that a defendant can be found guilty of a crime that is an inferior degree of the crime charged. Similarly, under RCW 10.61.006, a defendant can be convicted of an offense that is a lesser-included offense of the crime charged, without being separately charged.

The defendant is entitled to an instruction on a lesser-degree or lesser-included offense if: (1) each of the elements of the lesser offense is a necessary element of the charged offense (the legal prong); and (2) the evidence supports an inference that only the lesser crime was committed (the factual prong). State v.

Fernandez-Medina, 141 Wn.2d 448, 454-55, 6 P.3d 1150 (2000);  
State v. Baggett, 103 Wn. App. 564, 570, 571, 13 P.3d 659 (2000);  
State v. Hernandez, 99 Wn. App. 312, 319, 997 P.2d 923 (1999),  
review denied, 140 Wn.2d 1015.

The legal prong is satisfied in this case; first degree criminal trespass is a lesser included offense of residential burglary. See State v. J.P., 130 Wn. App. 887, 895, 123 P.3d 215 (2005); State v. Pittman, 134 Wn. App. 376, 166 P.3d 720 (2006). The factual prong, however, has not been met.

When considering whether the defendant has satisfied the factual prong, the court must view the evidence in the light most favorable to the defendant. State v. Fernandez-Medina, 141 Wn.2d at 455-56. However, the factual test requires a “more particularized showing than that required for other jury instructions.” Fernandez-Medina, at 455. Specifically, “the evidence must raise an inference that only the lesser included . . . offense was committed to the exclusion of the charged offense. Fernandez-Medina, at 455. (emphasis in original).

The evidence “must affirmatively establish [the defendant’s] theory of the case – it is not enough that the jury might disbelieve the evidence pointing to guilt.” Fernandez-Medina, at 456.

Consequently, the court must examine the evidence presented by the State as well as that presented by the defendant, considering all of it in its totality. Fernandez-Medina, at 456.

The State's theory of the case was that an intoxicated but coherent Smith came into the apartment, took the cigar box, and then went back to Jefferson's bedroom. After being escorted out by the homeowner, Smith met up with his companion and dumped the cigars into the backpack, discarding the cigar box. RP 137-44.

The defense theory of the case was that an intoxicated Smith came into the apartment of someone he thought he knew in order to secure a ride, and that it was Smith's companion that came in, took the cigar box, and left without being discovered by the homeowner. RP 148-156. Here, as the trial judge noted, there is no question that a burglary was committed. The factual question for the jury was whether, based on the evidence, they believed that Smith took the cigar box or whether they believed that Smith's companion took the cigar box. RP 120-22.

Additionally, criminal trespass occurs when one knowingly enters or remains unlawfully in a building. RCW 9A.52.070. Residential burglary occurs when one enters or remains unlawfully in a dwelling with intent to commit a crime

therein. RCW 9A.52.025. The law presumes that anyone who enters or remains unlawfully in a building acted with intent to commit a crime 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. While Smith did not testify, the defense theory of the case was that a very intoxicated Smith walked into the apartment of someone he thought he knew to ask for a ride. RP 148-156. Given this theory, there was no criminal trespass; either Smith committed residential burglary or he was not guilty of a crime. Thus, as the Judge noted, the facts did not support giving jury instructions for criminal trespass. RP 120-22

Given the verdict, it is clear that the jury believed that it was Colin Smith, and not his companion, who came in Jefferson’s apartment and took the cigar box.

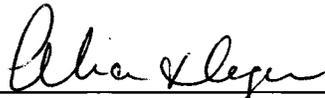
**D. CONCLUSION**

For the foregoing reasons, the State asks this court to affirm Smith's conviction for Residential Burglary.

DATED this 10<sup>th</sup> day of December 2009.

RESPECTFULLY submitted,

DANIEL SATTERBERG  
King County Prosecuting Attorney

By:   
ALICE DEGEN, WSBA #29091  
Deputy Prosecuting Attorney  
Attorneys for the Respondent  
WSBA Office #91002

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Jennifer Stutzer, the attorney for the appellant, at Washington Appellate Project, 1511 Third Ave., Suite 701, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. COLIN SMITH, Cause No. 63348-1-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

  
\_\_\_\_\_  
JULIE RICHTER  
Done in Kent, Washington

12-10-09  
Date

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1. **THE TRIAL COURT PROPERLY DENIED SMITH'S MOTION FOR INSTRUCTIONS ON THE LESSER-DEGREE OFFENSE OF CRIMINAL TRESPASS BECAUSE THE EVIDENCE DID NOT SUPPORT AN INFERENCE THAT ONLY THE LESSER CRIME WAS COMMITTED.**

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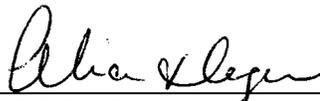
D. **CONCLUSION**

For the foregoing reasons, the State asks this court to a  
affirm Smith's conviction for Residential Burglary.

DATED this 10<sup>th</sup> day of December 2009.

RESPECTFULLY submitted,

DANIEL SATTERBERG  
King County Prosecuting Attorney

By:   
ALICE DEGEN, WSBA #29091  
Deputy Prosecuting Attorney  
Attorneys for the Respondent  
WSBA Office #91002

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I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



JULIE RICHTER

Done in Kent, Washington

12-10-09

Date