29785-3-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

GARY D. MCCABE, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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INDEX

TABLE OF AUTHORITIES

WASHINGTON CASES

STATUTES

I.

APPELLANT'S ASSIGNMENTS OF ERROR

1. The trial court erred in refusing to instruct the jury regarding the lesser included offenses of first and second degree criminal trespass.

2. Insufficient evidence supported conviction of defendant of count II – unlawful possession of a controlled substance.

II.

ISSUES PRESENTED

A. Did the trial court err in deciding that there was insufficient evidence to support instructing the jury regarding a lesser included offense?

B. Did the trial court err in entering the judgment and sentence on count II – possession of a controlled substance based upon the jury returning a guilty verdict thereon?

III.

STATEMENT OF THE CASE

For purposes of this appeal only, the State accepts the Appellant's statement of the case except for arguments and mischaracterizations of the evidence included therein.

IV.

ARGUMENT

A. THE TRIAL COURT PROPERLY DECLINED TO INSTRUCT THE JURY REGARDING A LESSER/INFERIOR DEGREE CRIME BECAUSE IT WAS LEGALLY AND FACTUALLY UNSUPPORTED BY THE RECORD.

The defendant contends that a lesser included instruction should have been given based upon a review of the evidence. A trial court's decision regarding a jury instruction is reviewed for abuse of discretion, if the decision is based on factual issues and *de novo* where the decision is based on questions of law. *State v. Walker,* 136 Wn.2d 767, 771-72, 966 P.2d 883(1998) (*citing State v. Lucky,* 128 Wn.2d 727, 731, 912 P.2d 483 (1996), *overruled on other grounds by State v. Berlin,* 133 Wn.2d 541, 544, 947 P.2d 700 (1997). Here, there was no factual basis for instructing on the lesser included offense, so there was no error by the trial court.

Statutes confer the right to have a lesser offense considered by the jury making an adjudication of a criminal charge on both the defendant and the prosecution. *State v. Workman,* 90 Wn.2d 443, 447, 584 P.2d 382 (1978); *State v. Johnson,* 92 Wn.2d 671, 680, 600 P.2d 1249 (1979). As defendant noted, the governing statute is RCW 10.61.003:

> Upon an indictment or information for an offense consisting of different degrees, the jury may find the defendant not guilty of the

> degree charged in the indictment or information, and guilty of any degree inferior thereto, or of an attempt to commit the offense.

RCW 10.61.003.

A "lesser included" offense is distinctly different from an "inferior degree" or "lesser degree" offense which necessarily involves a different legal analysis despite Counsel's argument to the contrary. The Supreme Court described "lesser included offense" as:

> A lesser included offense exists when all of the elements of the lesser offense are necessary elements of the greater offense. Put another way, if it is possible to commit the greater offense without having committed the lesser offense, the latter is not an included crime.

(Citations omitted.) *State v. Bishop,* 90 Wn.2d 185, 191, 580 P.2d 259 (1978) (*quoting State v. Roybal*, 82 Wn.2d 577, 583, 512 P.2d 718 (1973). Nevertheless, it is possible to commit a greater degree offense without committing an "inferior" or "lesser degree" offense. *State v. McPhail,* 39 Wn. 199, 203, 81 P. 683 (1905).

The Washington State Supreme Court has provided the following guidance when resolving issues of this type:

> We have long applied the two-pronged *Workman* test to determine whether a lesser offense is included within the charged offense: "First, each of the elements of the lesser offense must be a necessary element of the offense charged. Second, the evidence in the case must support an inference that the lesser crime was committed." *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978) (*citations omitted*).

State v. Porter, 150 Wn.2d 732, 736, 82 P.3d 234 (2004).

In *State v. Fernandez-Medina*, 141 Wn.2d 448, 6 P.3d 1150 (2000), the Court stated that the evidence requirement for a lesser included is different than the factual requirement typically applied to jury instructions. "Specifically, we have held that the evidence must raise an inference that *only* the lesser included/inferior degree offense was committed to the exclusion of the charged offense." *Id.* at 455. (emphasis in original).

"Our case law is clear, however, that 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." *State v. Fernandez-Medina, supra* at 457. "Instead, some evidence must be presented which affirmatively establishes the defendant's theory on the lesser included offense before an instruction will be given." *State v. Fowler*, 114 Wn.2d 59, 67, 785 P.2d 808 (1990). Accordingly, an instruction on an inferior degree offense is proper when (1) the statutes for the charged offense and the proposed inferior degree offense prohibit the same conduct, (2) the proposed offense is an inferior degree of the charged offense, and (3) evidence supports a finding that the defendant committed only the inferior offense. *State v. Fernandez-Medina, supra.*

Here, the defendant requested instructions on the lesser included crimes of first and second degree criminal trespass for count I -residential burglary. Initially, it is of note that defendant proffered the defense that the State could not meet its burden of proof that defendant was ever at the scene of the burglary and,

assuming, *arguendo,* that he was present, there was no proof that he entered the victim's home.

As noted, a trial court's refusal to give a jury instruction is reviewed for abuse of discretion. Here, the trial court reviewed the evidence before the jury and determined that the evidence did not support instructing on the lesser offenses of criminal trespass; rather, that the evidence supported only instructing the jury regarding residential burglary. 5RP 19-20, 21, 23-26. The trial court thus carefully exercised its discretion in evaluating the evidence in light of the charged offense and instructed the jury accordingly. The trial court's denial of defendant's motion to instruct on the lesser included offenses was proper because neither defendant's theory of the case nor the evidence before the jury supported instructing the jury regarding the lesser offense of criminal trespass.

B. SUFFICIENT EVIDENCE SUPPORTED THE DEFENDANT'S CONVICTION OF POSSESSION OF A CONTROLLED SUBSTANCE.

Appellant contends that insufficient evidence supported the jury verdict that defendant possessed a controlled substance "on or about August 24, 2010", because he was incarcerated when the contraband was discovered in his vehicle. Defense counsel proffered an essential elements instruction with the date of August 12, 2010, yet agreed that the "on or about" language was appropriate. 5RP 9-10.

Where time is not a material element of the charged crime, the language "on or about" is sufficient to admit proof of the act at any time within the statute of limitation so long as there is no defense of alibi. *State v. Hayes,* 81 Wn. App. 425, 432, 914 P.2d 788, *review denied*, 130 Wn.2d 1013, 928 P.2d 413 (1996); *see also State v. Oberg,* 187 Wash. 429, 432, 60 P.2d 66 (1936) (prosecution for sodomy where the State alleged that the act occurred "on or about April 3," yet the victim testified that the act occurred on June 20)). RCW 10.37.0505(5), which governs the sufficiency of an information, states that an information is sufficient if it alleges the crime was committed before the information was filed and within the statute of limitation.

In a prosecution for unlawful possession of a controlled substance, RCW 69.50.4013(1), time is not an element of the crime charged, and the August 24, 2010, allegation falls into the three-year statute of limitation period. RCW 9A.04.080. Here, defendant did not offer an alibi defense, merely offered a general denial of the charge. Defendant knew that the date of the charged offense was actually August 12, 2010, yet offered neither an objection to the Amended Information nor the trial court's proposed essential elements instruction for the possession of controlled substances charge. The information was, therefore, sufficient to support the crime actually proven at trial by the defendant's own acceptance.

Additionally, since time is not an essential element of the crime charged, the essential elements ("to convict") instruction contained all the essential elements of the crime. RCW 69.50.4013(1). Finally, the "to convict" instruction matched the evidence. Accordingly, substantial evidence supported the verdict. Moreover, any error in the judgment and sentence based upon the offense date was waived when defendant failed to object when the documents were presented at sentencing. *State v. Reynolds,* 80 Wn. App. 851, 860, 912 P.2d 494 (1996).

V.

CONCLUSION

For the reasons stated, the convictions of the defendant should be affirmed.

Dated this 8TH day of October, 2012.

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