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IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH,	:	
	:	
Plaintiff-Respondent		
	:	
v.	:	
FERMIN MIERA, JR.	:	Case No. 18357
	:	
Defendant-Appellant		

BRIEF OF APPELLANT

An appeal from the conviction of Burglary, a Felony of the Third Degree, in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Jay E. Banks, presiding.

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Defendant-Appellant	:	

BRIEF OF APPELLANT

An appeal from the conviction of Burglary, a Felony of the Third Degree, in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Jay E. Banks, presiding.

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Clerk, Supreme Court, Utah

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IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH, :
:
Plaintiff-Respondent
:
v. :

FERMIN MIERA, JR. : Case No. 18357
:
Defendant-Appellant

BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

Appellant, Fermin Miera, appeals from a conviction and judgment of Burglary, a Felony of the Third Degree in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Jay E. Banks, presiding.

DISPOSITION IN THE LOWER COURT

Appellant, Fermin Miera, was charged with Burglary, a Felony of the Third Degree, in violation of Utah Code Ann. §76-6-202(1) (1953 as amended). He was convicted of the charge in a jury trial and was subsequently sentenced to incarceration at the Utah State Prison for the indeterminate term of 0-5 years.

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RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of the conviction and judgment rendered below and asks to have the judgment vacated and a judgment of acquittal entered or to have the case remanded to the Third Judicial District Court for a new trial.

STATEMENT OF THE FACTS

On New Year's Eve, December 31, 1981, at about 1:53 a.m., a police officer saw broken windows on a downtown office building and observed Appellant inside. (T. 6) Shortly thereafter, an alarm sounded from the building and two more officers arrived at the scene. (T. 11,27) Appellant was found alone inside the building with a roll of stamps and a pen and pencil set in his pockets. (T. 16) Three large rocks were found inside the building in the office adjacent to the broken window. (T. 19) The stamps and pen and pencil were believed to have been removed by Appellant from one of the offices in the building (T. 18). These stamps were returned to the owner of the building (T. 25).

Prior to being found inside the building, Appellant had consumed about 13 cans of beer, two bottles of wine and had sniffed toluene throughout the course of the evening. (T. 60-62) Appellant testified that he was aware he entered the building, but did not know why he entered (T. 64). He was heading home (T. 63) and it was cold outside (T. 69). He had no intention

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of taking anything from the building (T. 65). The officers testified to Appellant's cooperative behavior and appropriate responses to questions during the twenty minutes they were with him in the building. (T. 23,32,33,48,53).

Dr. Brian S. Finkle, Director of the Center for Human Toxicology at the University of Utah, testified that the consumption of the beer and wine caused Appellant to have a blood alcohol of .17% (T. 89). He further testified that toluene, a paint thinner, along with the alcohol would add to the effects of the alcohol (T. 91). In Dr. Finkle's opinion, Appellant would have been "seriously intoxicated". (T. 89) His eyesight, ability to focus, judgment, short-term memory, motor coordination, reaction time and manual dexterity would be "measurably impaired". (T. 91) At the same time, a person who develops a tolerance for alcohol or solvents may not exhibit signs of impairment and yet be under their influence. (T. 90,93)

Appellant was convicted after a jury trial of Burglary, a third degree felony, punishable for the indeterminate term of 0-5 years at the Utah State Prison.

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ARGUMENT

POINT I

THE TRIAL COURT ERRED IN ITS FAILURE TO GIVE APPELLANT'S JURY INSTRUCTION ON THE LESSER INCLUDED OFFENSE OF CRIMINAL TRESPASS.

Utah Code Ann. §76-1-402(4) (1953 as amended) provides:

> The court shall not be obligated to charge the jury with respect to an included offense unless there is a rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the included offense.

There was a rational basis for a conviction of criminal trespass in this case and the jury should have been instructed on the lesser included offense of criminal trespass. This Court recently set forth an analysis of whether an offense is a lesser included crime. In State v. Hill, Case No. 18180 (November 1, 1983), this Court outlined a principal test involving the statutory language and a secondary test involving the evidence in the specific case. This analysis was essentially followed in an earlier Utah case involving a request for a criminal trespass instruction in a burglary case. In State v. Baker, Case No. 18245 (September 21, 1983), this Court found that the evidence in that case was insufficient to have required the trial court to have instructed on a lesser included.

Unlike the Baker, case, each of the tests is met in this case. First, all of the pertinent elements of criminal trespass are part of the statutory definition of burglary. Secondly, the circumstances of this case compel a conclusion that criminal trespass was a lesser included of the burglary charge.

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A

CRIMINAL TRESPASS IS A LESSER INCLUDED OFFENSE OF BURGLARY BY THE TERMS OF THE STATUTES.

Utah Code Ann. §76-1-402(3)(a) (1953 as amended) provides that an offense is a lesser included offense when "[i]t is established by proof of the same or less than all the facts required to establish the commission of the offense charged." Utah's statutory scheme requires the court to compare the elements of the offense. If the greater offense necessarily involves committing the lesser offense, then the lesser is an included offense.

The statutes setting out the crimes of burglary and criminal trespass are as follows:

> Burglary. -- (1) A person is guilty of burglary if he enters or remains unlawfully in a building or any portion of a building with intent to commit a felony or theft or commit an assault on any person. [Utah Code Ann. §76-6-202(1) (1953 as amended)]
>
> Criminal trespass. -- (1) For purposes of this section "enter" means intrusion of the entire body.
>
> (2) A person is guilty of criminal trespass if, under circumstances not amounting to burglary as defined in sections 76-6-202, 76-6-203, or 76-6-204:
>
> (a) He enters or remains unlawfully on property and;
>
> (i) Intends to cause annoyance or injury to any person thereon or damage to any property thereon; or

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> (ii) Intends to commit any crime, other than theft or a felony;
>
> (iii) Is reckless as to whether his presence will cause fear for the safety of another. [Utah Code Ann. §76-6-205(1) and (2) (1953 as amended)].

The criminal trespass statute is intended to be a lesser included offense of burglary. The legislature even specified that criminal trespass occurs "under circumstances not amounting to burglary." Although the criminal trespass statute sets forth intentions other than the "intent to commit a felony or theft or assault" in the burglary statute, an intent to cause annoyance or to damage property [Utah Code Ann. §76-6-206(2)(a)(i)] or being reckless as to the fear caused by the actor's presence [Utah Code Ann. §76-6-206(a)(iii)] are of necessity included within the intent required under the burglary statute. One cannot intend to commit a felony, a theft, or an assault without either intending annoyance or damage or being reckless as to the reactions to his presence. There is thus considerable overlap of the statutory elements of the two crimes.

B

THE EVIDENCE AT TRIAL SUPPORTED A LESSER INCLUDED INSTRUCTION ON CRIMINAL TRESPASS.

In State v. Baker, supra, this Court recognized that an instruction on a lesser included offense is appropriate "if the evidence offered provides a 'rational basis for a verdict

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acquitting the appellant of the offense charged and convicting him of the included offense.'" Id. at 10. Such a rational basis existed in this case. As here, the defendant in Baker was charged with burglary. Police found him inside a gas station. A lock had been broken off a desk drawer and the contents of the desk were scattered. Nothing was found missing. The defendant asserted that he was too intoxicated to form an intent to commit a theft. In affirming the lower court's refusal to give a lesser included instruction, this Court held that there was insufficient evidence to support the defendant's claim of intoxication to a point of inability to form an intent. This Court further held that, even if the defendant could not form an intent, it was proper to refuse a criminal trespass instruction where intent is also required for the commission of that offense. Id. at 11.

In this case, Appellant presented considerable testimony negating his capacity to form the intent to commit any crime while inside the building. Appellant testified to his long history of glue sniffing and alcohol consumption. At the time of the offense, he had been sniffing solvents for almost 20 years. On the evening of the event in question, he had sniffed toluene, a paint thinner, and he had consumed more than a dozen cans of beer and two bottles of wine. (T. 60-62). He testified that he was aware that he was in a building only because police officers pursued him and that he did not know why he had entered the building. (T. 64) He stated that he did not know if he took anything from the building and denied having intentions to remove anything (T. 65). His recollection of the event

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was vague as to how he got into the building. (T. 67-68)

Dr. Finkle testified to the influence of the alcohol and toluene on Appellant. Dr. Finkle estimated that Appellant's blood alcohol was about .17% at the time of the event. (T. 89) The statutory presumption for for "under the influence" requires a blood alcohol of less than half Appellant's (.08%). Dr. Finkle described appellant's mental state as "drunk" or "seriously" intoxicated". (T. 89) Dr. Finkle testified to the effect of toluene enhancing Appellant's already intoxicated mental state (T. 91). Evidence of Appellant's extensive consumption of alcohol and toluene supports the theory that he would have been unable to form an intent as required by the burglary statute. The evidence of intoxication is greater in this case than was the evidence presented in Baker, supra. It is still necessary, of course, to show that criminal trespass was an appropriate lesser included offense.

Appellant's conduct was reckless as to whether another person would have been in fear for his or her safety. Although Appellant was unable to form a specific intent, he could act recklessly. While no one was in the business when Appellant entered, he nevertheless acted with an awareness but disregard of the risks to any potential persons inside the building. Moreover, intoxication is no defense to a mental state of recklessness. Utah Code Ann. §76-2-306 (1953 as amended). Thus, Appellant's

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theory of his defense, that any intent was negated by his intoxication, still supports a conviction of criminal trespass pursuant to Utah Code Ann. §76-6-202(2)(a)(iii). There would have been a rational basis on which a jury could have returned a verdict of guilty of the lesser included offense.

POINT II

THE TRIAL COURT ERRED IN ITS FAILURE TO INSTRUCT THE JURY THAT THE PROSECUTION MUST NEGATE THE AFFIRMATIVE DEFENSE OF VOLUNTARY INTOXICATION BEYOND A REASONABLE DOUBT.

Utah Code Ann. §76-2-306 (1953 as amended) provides that:

> Voluntary intoxication shall not be a defense to a criminal charge unless such intoxication negates the existence of the mental state which is an element of the offense. . .

The trial court's instruction to the jury in this case defining the defense essentially stated the statute. The court refused, however, to include the negation of this affirmative defense as an element that the State must prove. Appellant's proposed instruction was rejected and the Court's Instruction No. 13 was given.

This Court specifically addressed the issue of the prosecution's burden of proof when an affirmative defense is raised in State v.Torres, 619 P.2d 694 (Utah 1980). In Torres, this Court reversed a conviction where the trial court failed to give an appropriate instruction defining the burden of proof on a defendant's affirmative defense of self-defense. Although

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the State argued that the instructions as a whole informed the jury of the proper burden, this Court stated that "[i]t seems neither fair nor necessary to expect or require the jury to go through such a tortuous process when that result could have been achieved by giving the defendant's requested instruction, or one of that substance." Id. at 696.

Although the trial court instructed the jury on the burden of proof of defendant in raising an affirmative defense, the failure to instruct the jury on the State's burden when listing the elements that must be proved could easily have misled the jury. As in Torres, supra, the jury should not have had to go through a "tortuous" process to define the burden on the State. The jury, presented with specific information in Instruction No. 12 regarding intoxication, may well have been confused by the trial court's failure to include a negation of voluntary intoxication in Instruction No. 13. They might not have known how to apply the information on intoxication to the charged offense of burglary. Had they been given the requested instruction, they could have applied their findings regarding intoxication to the element of intent to commit a theft and would have been guided more specifically as to when intoxication negated one of the necessary elements of burglary.

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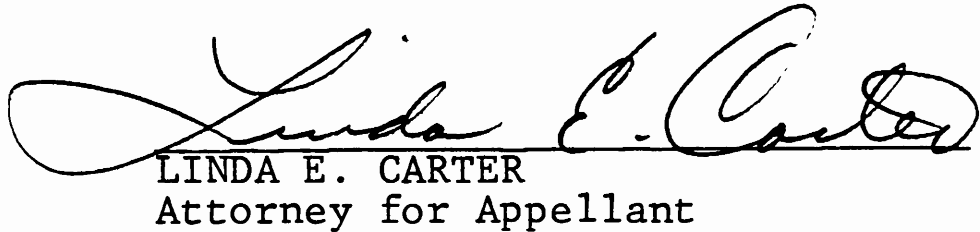
CONCLUSION

Failure of the trial court to grant Appellant's requested instruction on the lesser included offense of criminal trespass and instruction on the negation of the affirmative defense of voluntary intoxication deprived Appellant of a fair trial. For all of the reasons cited above, we urge this Court to reverse the conviction and remand this case for a new trial.

DATED this 29 day of November, 1983.



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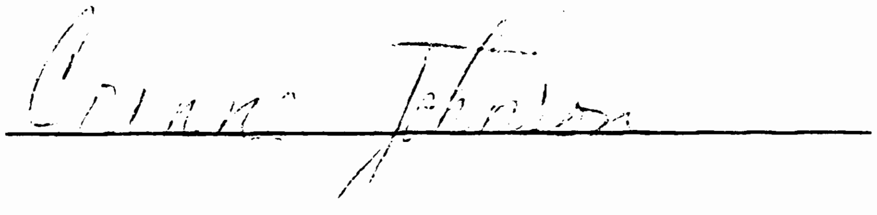
DELIVERED a copy of the foregoing to the Attorney General's Office, 236 State Capitol Building, Salt Lake City, Utah, this 30 day of November, 1983.



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