

Superior Court of Arizona

Maricopa County

State of Arizona, )  
Plaintiff )  
v. )  
Jimmy Jim, a single )  
individual; and The )  
Investor Syndicate, )  
a foreign entity, )  
Defendants )

Case No. CR-3279 Destination 1

ORDER ON JURY INSTRUCTIONS  
RE LESSER INCLUDED OFFENSES

The parties have submitted proposed jury instructions. The government has submitted the following jury instruction on burglary.

**Instruction No. 40.**

For the defendants to be found guilty of burglary in the third degree, the government must prove each of the following elements beyond a reasonable doubt.

A person must:

1. Enter or remain unlawfully.

“Enter or remain unlawfully” means entering or remaining on premises when the person's intent for so entering or remaining is not licensed, authorized, or otherwise privileged.

2. In a fenced commercial yard.

"Fenced commercial yard" means a unit of real property that is:

- i. surrounded completely by fences, walls, buildings, or similar barriers, and
- ii. zoned for business operations or where commercial items are located.

3. With the intent to commit any theft therein.

Source: Revised Arizona Jury Instructions (Criminal) 6<sup>th</sup> 15.06 (modified); A.R.S. §§ 13-1506(A)(1); 13-1501(2) and (4); and 13-105(18).

Defendants have no objection to this instruction; consequently, it will be adopted by the Court.

Defendants have submitted two instructions for criminal trespass as lesser included offenses. Ariz. R. Crim. P. 21.2. For the reasons set forth in this Order, the proposed criminal trespass instructions are neither lesser included offenses nor necessarily included offenses.

### **Lesser Included Offenses.**

“To determine whether two distinct offenses charged under different statutes constitute the same offense, we apply *Blockburger’s* same elements test, i.e. ‘whether each provision requires proof of a fact which the other does not.’” [*State v. Carter*, 249 Ariz. 312, 315, ¶ 9 (2020)] (quoting *Blockburger v. United States*, 284 U.S. 299, 304 (1932)).

*State v. Andersen*, 255 Ariz. 320, ¶11, 531 P.3d 382 (App. 2023).

“An offense is lesser included when the greater offense cannot be committed without necessarily committing the lesser offense.” *Carter*, 249 Ariz. at 316, ¶ 10 (citation and internal quotation marks omitted). ... Under the *Blockburger* test, “it is the elements, not the penalty, that matter. Therefore, a lesser-included offense may have a more severe penalty.” *Id.* at 320, ¶ 26.

*Id.*

### **Necessarily Included Offenses.**

Ariz. R. Crim. P. 21.4(a)(1) provides: “the court must submit forms of verdicts to the jury for ... all offenses necessarily included in the offense charged.” “Necessarily included” means there is sufficient evidence to support a finding that the defendant is guilty of the lesser, but not the greater, offense. *State v. Dugan*, 125 Ariz. 194, 608 P.2d 771, 772-73 (1980).

The Arizona Supreme Court has set forth a two-part test: (1) whether the offense is a lesser included offense of the crime charged, and (2) whether the evidence otherwise supports the giving of the instruction. *State v. Wall*, 212 Ariz. 1, 126 P.3d 148 (Ariz. 2006).

“If requested to do so and the evidence supports it, the trial judge must also instruct the jurors on all offenses “necessarily included” in the offense charged. Ariz. R. Crim. P. 21.3(c) cmt. [now 21.4(a)]; *State v. Celaya*, 135 Ariz. 248, 251, 660 P.2d 849, 852 (1983).”

*Wall*, 212 Ariz. at 3.

### **Defendants’ Proposed Instruction No. 41. Criminal Trespass in the Second Degree**

For the defendants to be found guilty of criminal trespass, the government must prove each of the following elements beyond a reasonable doubt.

A person must:

1. Knowingly enter or remain unlawfully.

“Enter or remain unlawfully” means entering or remaining on premises when the person's intent for so entering or remaining is not licensed, authorized, or otherwise privileged.

2. In a fenced commercial yard.

"Fenced commercial yard" means a unit of real property that is:

- i. surrounded completely by fences, walls, buildings, or similar barriers, and
- ii. zoned for business operations or where commercial items are located.

Source: A.R.S. § 13-1503(A).

This crime is only a misdemeanor, A.R.S. § 13-1503(B), not a felony enabling the prosecution to assert burglary or felony murder.

**The Elements Test.** As shown in the instructions submitted, the two elements of criminal trespass in the second degree, set forth in **Proposed Instruction 41** and A.R.S. § 13-1503(A), are almost identical to the first two elements of burglary in the third degree, set forth in **Instruction 40** and A.R.S. § 13-1506(A)(1):

Criminal Trespass

Burglary

“Knowingly enter or remain unlawfully”

“Enter or remain unlawfully”

“In a fenced commercial yard”.

“In a fenced commercial yard”.

Burglary in the third degree has an additional element:

“With the intent to commit any theft therein.”

Criminal trespass in the second degree has a different additional element:

“**Knowingly** enter or remain unlawfully.”

This additional mental state is fatal to the “lesser included” characterization. A lesser included offense is a constituent part of the greater offense. *State v. Gooch*, 139 Ariz. 365, 366, 678 P.2d 946, 947 (1984); *Dugan*, 608 P.2d at 772; *State v. Magana*, 178 Ariz. 416, 418, 874 P.2d 973, 975 (App. 1994).

To constitute a lesser-included offense, the offense must be composed *solely* of some, but not all, of the elements of the greater crime so that it is impossible to have committed the crime charged without having committed the lesser one.

*State v. Celaya*, 135 Ariz. 248, 251, 660 P.2d 849, 852 (1983) (emphasis added).

The statutory definition of criminal trespass in the second degree contains the additional element "knowingly." However, implicit in all criminal offenses is knowledge in the sense that the criminal act must have been voluntary. See A.R.S. § 13-201.

Hence, the word "knowingly" as used in the criminal trespass statute must have some additional meaning, for the difference in language must have been intended to bring about a difference in result. We consider that it must have been intended to have the meaning set forth in A.R.S. § 13-105(5)(b); i.e., "' Knowingly' means, with respect to conduct \* \* \* described by a statute defining an offense, that a person is aware \* \* \* that his or her conduct is of that nature \* \* \*." In order to convict a defendant of criminal trespass in the second degree, the prosecution must prove not only that the defendant knowingly, voluntarily, entered or remained, but it must also prove that the defendant was aware that his entry or remaining was unlawful.

Since in A.R.S. § 13-1506 the phrase "entering or remaining unlawfully" is not modified by the term "knowingly", in order to convict a defendant of burglary in the third degree, the prosecution need not prove that the defendant was aware of the unlawfulness of his entry. There need only be shown that the entry was knowingly or voluntarily made. Criminal trespass is not necessarily a lesser included offense of burglary.

*State v. Malloy*, 131 Ariz. 125, 130-31 , 639 P.2d 115 (1982); *Accord State v. Kozan*, 146 Ariz. 427, 706 P.2d 753 (App. 1985).

Defendants are not entitled to a lesser included offense instruction on criminal trespass in the second degree.

#### **Defendants' Proposed Instruction No. 42 – Criminal Trespass in the First Degree**

The crime of criminal trespass in the first degree requires proof that the defendant:

knowingly and unlawfully entered real property subject to a valid mineral claim or lease,

with the intent to hold, work, take or explore for minerals.

Source: Revised Arizona Jury Instructions (Criminal) 6<sup>th</sup> 15.04; A.R.S. § 13-1504.

This crime also is only a misdemeanor, A.R.S. § 13-1504(B), and would not enable the prosecution to assert burglary or felony murder.

Helium is a mineral. *Spurlock v. Santa Fe Pacific Railroad*, 143 Ariz. 469, 694 P.2d 299, 311 (Ariz. Ct. App. 1985). Once removed from the ground, and moveable apart from the ground, helium-3 is considered personal property. U.C.C. § 2-107(1). ("A contract for the sale of minerals or the like (including oil and gas) ... to be removed from realty is a contract for the sale of goods within this Article if they are to be severed by the seller ..."); Property, Black's Law Dictionary 1096 (5<sup>th</sup> ed. 1979) ("Personal property. ...any right or interest which one has in things movable.").

**The Elements Test.** Criminal trespass in the first degree requires the additional mental state (“knowingly”) discussed above and the element “subject to a mineral claim or lease.” A lesser included offense cannot include additional elements.

**The Charging Document Test.** Under Arizona law, an instruction on a lesser included offense is proper if the terms of the charging document describe the lesser offense even though the lesser offense would not always form a constituent part of the greater offense. *State v. Gooch*, 139 Ariz. 365, 366, 678 P.2d 946, 947 (1984); *State v. Magana*, 178 Ariz. 416, 418, 874 P.2d 973, 975 (App. 1994).

In this case the indictment describes theft of helium-3 from a location constituting a “fenced commercial yard”, and efforts to avoid detection of the theft (including bribery, witness tampering, and murder). The real property constituting Wide Mine is owned by EX Corp under the Charter for Destination and is not described as subject to any “valid mineral claim or lease.” Indeed, the focus of the indictment is on defendants’ efforts to remain on the property of EX Corp to commit theft, not on interference with any existing transfer of rights to exploit the helium-3.

The indictment does not describe burglary in a way that encompasses criminal trespass in the first degree as set forth in Defendants’ **Proposed Instruction No. 42**. The charging document test requires the indictment to describe burglary in a way that also indicates criminal trespass. See *State v. Robles*, 213 Ariz. 268, 270-71 ¶ 5, 141 P.3d 748, 750-51 (App. 2006).

Here, in contrast, “the indictment . . . made no reference, direct or implied,” to facts that necessarily imply [the defendants] could not have committed the charged offense without also having committed the lesser offense. [*State v.*] *Sucharew*, 205 Ariz. 16, [26] ¶ 35, 66 P.3d [59] at 69 [(App.2003)].

*Robles*, 213 Ariz. at 271 ¶9.

The prosecutor has discretion in charging decisions. *State v. LaGrand*, 153 Ariz. 21, 30 n.4, 734 P.2d 563, 572 n.4 (prosecutor has discretion on what crimes to charge and prosecute), *cert. denied*, 484 U.S. 872, 108 S. Ct. 207 (1987); *State v. Gooch*, 139 Ariz. 365, 367, 678 P.2d 946, 947 (1984) (“Choosing which offense to prosecute rests within the duty and discretion of the prosecutor.”).

“When conduct can be prosecuted under two or more statutes, the prosecutor has discretion to determine which statute to apply.” *State v. Lopez*, 174 Ariz. 131, 143, 847 P.2d 1078, 1090 (1992). In making that determination, a prosecutor may consider the available penalties upon conviction. *State v. Patton*, 136 Ariz. 243, 246, 665 P.2d 587, 590 (App. 1983).

*State v. Far West Water Sewer Inc.*, 224 Ariz. 173, 184-85 (App. 2010).

Often facts may support another lesser conviction but if not charged in the indictment, the lesser offense may not be found.

*State v. Laffoon*, 125 Ariz. 484, 487, 610 P.2d 1045, 1048 (1980).

Defendants have no right to recharacterize the crimes charged to this extent. Defendants are not entitled to a lesser included offense instruction on criminal trespass in the first degree.

/signed/

Arizona Superior Court Judge