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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. RAMON MARTIN OCHOA, Appellant.	2 CA-CR 2010-0215 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20093673001

Honorable Jose H. Robles, Judge Pro Tempore

AFFIRMED

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E C K E R S T R O M, Presiding Judge.

¶1 Following a jury trial, appellant Ramon Ochoa was convicted of second-degree burglary and placed on probation for three years. On appeal, he claims the trial court erred by refusing to strike a juror for cause and by denying his request for jury instructions on theft and criminal trespass. We affirm for the reasons set forth below.

Factual and Procedural Background

¶2 "We view the evidence in the light most favorable to upholding the jury's verdict." *State v. Mangum*, 214 Ariz. 165, ¶ 3, 150 P.3d 252, 253 (App. 2007). Ochoa admitted to a sheriff's deputy that he had climbed through a window of a relative's house and taken a television set that was inside. He subsequently was charged with a single count of second-degree burglary.

¶3 During voir dire, at least nine prospective jurors expressed concern about whether they could render an appropriate verdict if a defendant chose not to testify or present a defense. Based on their responses, the trial court posed further questions to each of these jurors individually except one, Juror V. Ochoa included V. among the jurors he sought to strike for cause. The court removed several of the challenged jurors but deemed the others rehabilitated. Ochoa then removed V. from the venire panel by use of a peremptory strike.[1]

¶4 Over Ochoa's objection, the trial court instructed the jury only on burglary, and it returned a guilty verdict. This appeal followed the disposition and entry of judgment.

[1]Ochoa did not point out that the trial court had failed to pose any follow-up questions specifically to V.

Strike for Cause

¶5 Ochoa argues that the trial judge committed reversible error by not properly rehabilitating Juror V., causing Ochoa to use a peremptory strike on her, and allowing another "objectionable juror," Juror M., to sit on the jury during trial instead. Because Ochoa has not demonstrated that any error deprived him of a fair and impartial jury, we reject his claim.

¶6 Our supreme court joined the majority of state courts by adopting the rule "requir[ing] a showing of prejudice before a case will be reversed when a defendant uses a peremptory challenge to remove a juror the trial court should have excused for cause." *State v. Hickman*, 205 Ariz. 192, ¶¶ 20-21, 68 P.3d 418, 422 (2003). And, "a defendant is required to use an available peremptory strike to remove an objectionable juror whom the trial court has refused to remove for cause" if he wishes to maintain any error was prejudicial, and thereby preserve his claim for appeal. *State v. Rubio*, 219 Ariz. 177, ¶ 12, 195 P.3d 214, 218 (App. 2008). But, a defendant does not demonstrate prejudice by a mere showing that the trial court's error consumed one of his peremptory strikes. *See Hickman*, 205 Ariz. 192, ¶ 34, 68 P.3d at 426. Rather, Ochoa must demonstrate that, notwithstanding his use of all available peremptory strikes, he was deprived of a "fair and impartial" jury. *Id.* ¶ 41.

¶7 Here, Ochoa contends the trial court committed reversible error by not excusing V. for cause. As noted above, during voir dire, V. indicated that she would have a problem with Ochoa not testifying at trial. Each of the other eight jurors who had expressed similar reservations were questioned individually by the court and then either

were found to be rehabilitated or were excused. V. was not questioned individually. However, the court ended that segment of voir dire by asking the panel if anyone would "have any problems following the instructions of the Court," and no one responded.

¶8 Assuming *arguendo* that the trial court erred in failing to question V. individually, Ochoa has not demonstrated that the failure prejudiced him. In accordance with *Rubio*, Ochoa used a peremptory strike to remove V. from the panel. Ochoa maintains that he therefore lacked sufficient strikes to remove M. from the panel, who counsel had noted was sleeping during voir dire.[2] But M. ultimately was chosen as the alternate and took no part in the jury's deliberations. Ochoa thus has made no challenge whatsoever to the fairness and impartiality of the jurors who actually rendered the verdict in his case.

¶9 Ochoa asks that we adopt the test for prejudice set forth by the Florida Supreme Court in *Busby v. State*, 894 So. 2d 88 (Fla. 2004). There, the court found reversible error when the trial court failed to strike a juror for cause, the defense exhausted its peremptory strikes, and an "objectionable juror" participated in the jury verdict. *Id.* at 96-97. Even were we inclined to adopt a test apparently at odds with our own recent holding in *Rubio*, that test would be of little assistance to Ochoa. As noted above, Ochoa has articulated no objection to any of the jurors who deliberated in his case.

[2]Although Ochoa objected to M., designated juror number fifteen, when he was making his record relating to his peremptory strikes, before that point the trial court had twice asked counsel whether they passed the venire panel, and Ochoa had raised no express objection to juror number fifteen, though he noted for the record that "Number 15 has been kind of dozing in and out."

Because he has not demonstrated any cognizable prejudice arising from the trial court's failure to strike V. for cause, he is not entitled to relief.

Instructions

¶10 Ochoa next argues the trial court erred in refusing to give a pair of requested jury instructions on what he argues were lesser-included offenses of second-degree burglary: theft and first-degree criminal trespass. Under Rule 23.3, Ariz. R. Crim. P., a trial court must submit to the jury all offenses "necessarily included" in the crime charged. This means a trial court must provide an instruction "if the crime is a lesser[-]included offense to the one charged and if the evidence supports the giving of the instruction." *State v. Reffit*, 145 Ariz. 452, 463, 702 P.2d 681, 692 (1985); *accord State v. Wall*, 212 Ariz. 1, ¶¶ 13-14, 126 P.3d 148, 150 (2006).

¶11 "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). When analyzing lesser-included offenses, courts examine the statutory elements of the crimes, not the facts underlying the particular case. *State v. Laffoon*, 125 Ariz. 484, 487, 610 P.2d 1045, 1048 (1980). Accordingly, "[w]hether an offense is a lesser-included offense of another crime involves a matter of statutory interpretation, which we review de novo." *In re James P.*, 214 Ariz. 420, ¶ 12, 153 P.3d 1049, 1052 (App. 2007).

Theft

¶12 Ochoa argues the trial court erred in denying his request for an instruction on theft as a lesser-included offense of burglary. Specifically, he maintains that, "although generally theft may not be a necessarily-included offense of burglary, as the facts came out in this trial, the jury could have rationally found theft and not burglary." We reject this argument because theft is not a lesser-included offense of burglary, and the underlying facts therefore are irrelevant.

¶13 Theft is not a lesser-included offense of second-degree burglary because a burglary can be committed merely upon (1) formulating an intention to commit any felony, not necessarily a theft, while (2) unlawfully entering or remaining in a residence. *See* A.R.S. §§ 13-1507 (second-degree burglary), 13-1802(A) (theft); *see also State v. Arnold*, 115 Ariz. 421, 422, 565 P.2d 1282, 1283 (1977) (concluding theft not lesser-included offense of burglary); *State v. Miller*, 108 Ariz. 441, 445, 501 P.2d 383, 387 (1972) (same). Because burglary can be committed without committing a theft, the latter is not a lesser-included offense of the former, regardless of the circumstances of the burglary in this specific case. *Cf. State v. Robertson*, 128 Ariz. 145, 146, 147, 624 P.2d 342, 343, 344 (App. 1980) (upholding denial of requested verdict form for shoplifting when defendant stole ring from jewelry store, because "theft can be committed without committing the crime of shoplifting").

¶14 "Facts may support a lesser offense, but if not charged, the lesser offense may not be found." *State v. Embree*, 130 Ariz. 64, 66, 633 P.2d 1057, 1059 (App. 1981). Accordingly, although we agree with Ochoa that a jury could have found him guilty of

theft based on the underlying facts here, the indictment did not charge him with this offense; and because theft is not a lesser-included offense of burglary, Ochoa could not have been convicted of theft. *See* Ariz. R. Crim. P. 23.3 cmt. (explaining rule makes court responsible "for deciding what verdicts the jury may return" and limits jury "to returning verdicts for which forms have been submitted to it"); *State v. Parsons*, 70 Ariz. 399, 406, 222 P.2d 637, 642 (1950) ("A verdict may be rendered for an offense different from that charged only if it is included in the offense charged.").

¶15 As Ochoa correctly points out, we have stated that "'[t]he test for whether an offense is "lesser-included" is whether it is, by its very nature, always a constituent part of the greater offense, or whether the charging document describes the lesser offense even though it does not always make up a constituent part of the greater offense.'" *State v. Robles*, 213 Ariz. 268, ¶ 5, 141 P.3d 748, 750-51 (App. 2006), *quoting State v. Chabolla-Hinojosa*, 192 Ariz. 360, ¶ 12, 965 P.2d 94, 97 (App. 1998); *accord State v. Gooch*, 139 Ariz. 365, 366, 678 P.2d 946, 947 (1984). The latter analysis has been described as the "'charging document[]' test" and has been distinguished from the "'elements' test." *State v. Larson*, 222 Ariz. 341, ¶ 7, 214 P.3d 429, 431 (App. 2009).[3]

[3]We have suggested the charging document test exists as an alternative to the elements test, *In re Jeremiah T.*, 212 Ariz. 30, n.3, 126 P.3d 177, 179 n.3 (App. 2006), although the precise relationship between and rationale behind the two "tests" remain unclear. *See, e.g.*, *State v. Hanks*, 58 Ariz. 77, 81, 118 P.2d 71, 72-73 (1941) (observing longstanding practice of construing lesser-included offenses by reference to charging document); *In re Jerry C.*, 214 Ariz. 270, ¶ 7, 151 P.3d 553, 556 (App. 2007) (finding lesser-included offense under charging document test but not elements test), *questioned by State v. Ortega*, 220 Ariz. 320, ¶ 13 & n.3, 206 P.3d 769, 773-74 & n.3 (App. 2008); *State v. Garcia*, 176 Ariz. 231, 233-34, 860 P.2d 498, 500-01 (App. 1993) (finding crime qualifies as lesser-included offense under charging document test when "language . . .

¶16 In any event, the indictment here alleged Ochoa "committed burglary in the second degree of a residential structure" belonging to two named victims. It did not allege he committed theft, nor did it otherwise describe the crime of theft. Hence, Ochoa was not entitled to the requested instruction even under the charging document test. *See Robles*, 213 Ariz. 268, ¶ 9, 141 P.3d at 751 (rejecting defendant's assertion all facts in record should be considered in determining whether lesser-included offense instruction required); *State v. Brown*, 195 Ariz. 206, ¶ 10, 986 P.2d 239, 242 (App. 1999) (stating that "it is the charging document and not the evidence that determines" whether a lesser-included offense instruction should be given); *see also State v. Scott*, 177 Ariz. 131, 141, 865 P.2d 792, 802 (1993) (when indictment lacks description of lesser offense, court "need not . . . decide whether another result might be reached under some other indictment").

¶17 Although Ochoa relies on *Peak v. Acuña*, 203 Ariz. 83, 50 P.3d 833 (2002), to support his requested instruction, that case is inapposite. *Peak* allowed the possibility of a defendant who had been acquitted of both first-degree murder and manslaughter to be retried for second-degree murder. *Id.* ¶¶ 2, 5-6. In so ruling, the court described

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explicitly alleged the defendant's conduct or mental state" or document "set out facts that described [greater offense] in a way that also defined another offense," not when document merely cited other criminal statutes). If the charging document test exists as a true alternative to the elements test, rather than merely a different formulation of it, then the elements test is of dubious value, for its application alone typically will not resolve the question presented, and a crime that fails to qualify as a lesser-included offense under the charging document test likewise will fail under the elements test. *Cf. State v. Crawford*, 214 Ariz. 129, ¶ 11, 149 P.3d 753, 756 (2007) (charging document may be considered when analyzing elements of foreign offense "'to narrow the foreign conviction to a particular subsection of the statute that served as the basis of the foreign conviction'"), *quoting State v. Roque*, 213 Ariz. 193, ¶ 88, 141 P.3d 368, 392 (2006).

Arizona's manslaughter statute as being "unusual" because it includes a crime that requires proof of second-degree murder under a specific "circumstance as a requirement to find the lesser offense." *Id.* ¶ 6.

¶18 Contrary to Ochoa's suggestion, *Peak* does not suggest "the [trial] court can also give instructions on lesser offenses where they do not necessarily lack an element of the greater offense, but have some different circumstance or relationship to the offense charged." *Peak* did not advance a new test for determining lesser-included offenses. In fact, it reaffirmed the familiar principles that "[a] lesser-included offense is one that contains all but one of the elements of the greater offense" and, "[l]ogically, . . . if one has not committed the lesser offense, one cannot have committed the greater." *Id.* ¶ 5. Moreover, our supreme court expressly has rejected a test requiring instructions for "lesser related offenses"—namely, those offenses "supported by the facts of the case, although not included in the charging document." *State v. West*, 176 Ariz. 432, 443-44, 862 P.2d 192, 203-04 (1993), *overruled in part on other grounds by State v. Rodriguez*, 192 Ariz. 58, n.7, 961 P.2d 1006, 1012 n.7 (1998); *see also State v. Teran*, 130 Ariz. 277, 279, 635 P.2d 870, 872 (App. 1981) ("The test which determines the appropriateness of a lesser[-]included instruction and verdict form by an analysis of the facts of a given case . . . is not followed in Arizona."). *Peak*'s holding is therefore a narrow one, and Ochoa's attempt to generalize from its language is unavailing.

Trespass

¶19 Ochoa also sought an instruction of first-degree criminal trespass as a lesser-included offense of second-degree burglary. The trial court correctly denied the

request, citing *State v. Kozan*, 146 Ariz. 427, 706 P.2d 753 (App. 1985), and *State v. Malloy*, 131 Ariz. 125, 639 P.2d 315 (1981).

¶20 Whereas second-degree burglary requires proof the defendant "enter[ed] or remain[ed] unlawfully in or on a residential structure with the intent to commit any theft or any felony therein," § 13-1507(A), first-degree criminal trespass requires proof the defendant "*knowingly* . . . enter[ed] or remain[ed] unlawfully in or on a residential structure." A.R.S. § 13-1504(A)(1) (emphasis added).[4] In *Malloy*, our supreme court noted that criminal trespass, unlike burglary, requires knowledge of the unlawfulness of one's entry or presence in the statutorily designated area. 131 Ariz. at 130-31, 639 P.2d at 320-21. Because of this disparity, criminal trespass is not a lesser-included offense of burglary. *Id.* at 131, 639 P.2d at 321; *accord Kozan*, 146 Ariz. at 429, 706 P.2d at 755. Any trespass instruction therefore was unwarranted here.

¶21 Our conclusion remains the same even when considering Ochoa's charging document. "The . . . indictment does not describe the lesser offense of criminal trespass, first degree, in that it does not specifically include the element of knowingly entering or remaining unlawfully." *State v. Ennis*, 142 Ariz. 311, 314, 689 P.2d 570, 573 (App. 1984).

¶22 Ochoa relies on *State v. Engram*, 171 Ariz. 363, 831 P.2d 362 (App. 1991), to support his position. There, Division One of this court presumed "[t]he charge of criminal trespass was a lesser[-]included offense of second-degree burglary." *Id.* at 364,

[4]We assume without deciding that a court may limit its consideration to a particular subsection of § 13-1504(A) when conducting a lesser-included offense analysis.

831 P.2d at 363. The *Engram* court neither cited *Malloy* nor discussed Arizona case law holding to the contrary, and it failed to specify whether criminal trespass was described in Engram's charging document. In any event, we as an intermediate appellate court cannot overrule or disregard the decisions of our supreme court. *State v. Sullivan*, 205 Ariz. 285, ¶ 15, 69 P.3d 1006, 1009 (App. 2003). Thus, *Engram* provides no authority for the issue presented here to the extent it conflicts with our supreme court's unambiguous holding in *Malloy*.

Disposition

¶23 For the foregoing reasons, Ochoa's conviction and disposition are affirmed.

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge