

Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

VERMONT SUPREME COURT
FILED IN CLERK'S OFFICE

SUPREME COURT DOCKET NO. 2008-253

MAY 29 2009

MAY TERM, 2009

State of Vermont	}	APPEALED FROM:
	}	
	}	
v.	}	District Court of Vermont,
	}	Unit No. 3, Franklin Circuit
	}	
Jeffrey J. Prior	}	DOCKET NO. 1289-10-07 FrCr
	}	
	}	Trial Judge: Michael S. Kupersmith

In the above-entitled cause, the Clerk will enter:

Defendant appeals from a judgment of conviction, based on a jury verdict, of unlawful trespass of a dwelling. He contends: (1) the court lacked authority to instruct the jury on unlawful trespass; and (2) the verdict was inconsistent with the jury's acquittal of defendant on the charge of burglary. We affirm.

The criminal charges arose out of an incident that occurred on September 29, 2007, when—according to the victim—defendant entered her apartment without permission and physically assaulted her. The victim testified that defendant appeared to be intoxicated, and defendant acknowledged that he had consumed a large amount of alcohol before the incident. He claimed to have general permission to enter the apartment, however, and denied committing the assault.

Defendant was charged by information with burglary of an occupied dwelling, allegedly entering the victim's residence knowing that he was not licensed or privileged to do so, with the intent to commit simple assault. After the defense rested, the court discussed jury instructions with the attorneys, asking specifically about lesser-included offenses. The prosecutor requested an instruction on unlawful trespass, the court in response observed that it was "the only one I think that fits," and defense counsel raised no objection. Accordingly, the court charged the jury on unlawful trespass of a dwelling as a lesser-included offense of the burglary charge. At the end of the instructions, the court inquired of counsel whether they had any objections. Defense counsel indicated that he had none. Thereafter, the jury returned a verdict of not guilty on the charge of burglary, and guilty on unlawful trespass. The trial court denied a subsequent motion for judgment of acquittal or a new trial. This appeal followed.

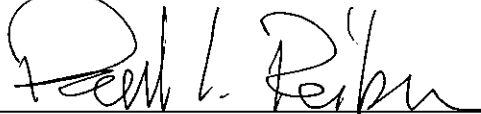
Defendant contends that the court erred in instructing on unlawful trespass because it was not a lesser-included offense of burglary. The claim fails for two reasons. First, as noted, defendant raised no objection to the instruction as given. He has not, therefore, properly preserved the objection for review on appeal, and he has raised no claim of plain error. See State v. Martin, 2007 VT 96, ¶ 39 (to preserve an objection to a jury instruction, a party must object to the charge before the jury retires so that the trial court may correct any error). Second, while defendant is correct that unlawful trespass of a dwelling is not always a lesser-included offense

of burglary, since the latter may include entry into “any building or structure,” 13 V.S.A. § 1201(a); State v. Crawford, 169 Vt. 371, 374 n.* (1999), in this case defendant was specifically charged with burglary of an occupied dwelling. Since all of the elements of the unlawful trespass charge were thus included within this particular burglary charge, it met the requirements of a lesser-included offense. See State v. Beaudoin, 2008 VT 133, ¶ 31, ___ Vt. ___ (a lesser-included instruction is called for “when the elements of a lesser offense must necessarily be included in the greater offense”). Hence, we find no error.

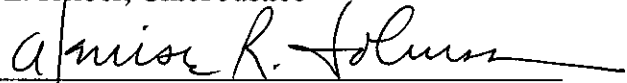
Defendant further claims that the jury’s guilty verdict on unlawful trespass was necessarily inconsistent with its acquittal on the burglary charge. Because he relied on a defense of diminished capacity at trial, defendant argues that the acquittal necessarily reflects a general finding that he lacked the capacity to know that he was not licensed or privileged to enter the dwelling, an element of both offenses. There is no necessary inconsistency in a verdict, however, when different offenses require different elements to be proved. State v. Wigg, 2005 VT 91, ¶ 37, 179 Vt. 65. Here the burglary charge required the additional element of proof that defendant entered the dwelling with the intent to commit assault. State v. Savo, 139 Vt. 644, 646 (1981) (an element of burglary is the specific intent to commit one of several crimes). The jury could have found such intent to be lacking. Hence, we discern no inherent inconsistency in the verdicts, and no basis to disturb the judgment.

Affirmed.

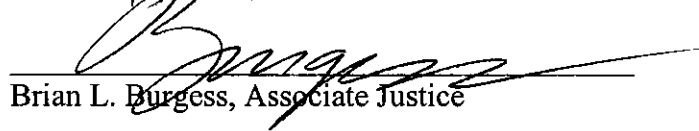
BY THE COURT:



Paul L. Reiber, Chief Justice



Denise R. Johnson, Associate Justice



Brian L. Burgess, Associate Justice