101773-1

NO. 38221-4-III

COURT OF APPEALS

STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

V.

ROBERT JAMES ROGERS

Defendant/Appellant.

PETITION FOR DISCRETIONARY REVIEW

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1. IDENTITY OF PETITIONER

Robert James Rogers requests the relief designated in Part 2 of this Petition.

2. STATEMENT OF RELIEF SOUGHT

Mr. Rogers seeks review of an Unpublished Opinion of Division III of the Court of Appeals dated February 9, 2023. (Appendix "A" 1-15)

3. ISSUE PRESENTED FOR REVIEW

Is it ineffective assistance of counsel to present evidence of a potential affirmative defense (ownership interest) and then fail to request an instruction on the good faith claim of title (RCW 9A.56.020 (2)(a))?

4. STATEMENT OF THE CASE

Mr. Rogers was charged with first degree trafficking in stolen property and third degree theft by an Information filed on January 24, 2020. (CP 6)

Mr. Rogers testified at trial. The pertinent portions of his testimony follow:

Q. Who is Tim Brauhn?

A. Tim Brauhn is my best friend and business partner.

(RP 305, ll. 11-12)

Q. What is that – what do you mean – what type of business? What type of partnership, if you could describe it?

A. We have a partnership in logging firewood, fallen trees. Kind of a season thing, as a filler for mechanical work as well.

(RP 305, ll. 19-24)

Q. ... do you know where this Husqvarna chainsaw originally came from? I mean, out of the store at some time, some year, do you know?

A. It – is was – it was bought secondhand a few years back.

(RP 308, ll. 15-19)

Q. ...As part of the business, again, what else did you two have besides saws?

A. We have a D-4 Cat, a skidder, and two log trucks.

Q. What's a D-4 Cat?

A. It's a – like a little mini dozer.

Q. Okay. What's a skidder?

A. A skidder is ... It loads log trucks, hauls logs and fallen trees out of the woods.

(RP 310, ll. 15-23)

Q. ... did you bring any of your personal items into the business?

A. Yes.

Q. Okay. Well, what ... what would you have brought into this business?

A. I brought in all of my Snap-on tools, I brought in a log truck, I brought in the D-4, extra bars, chains.

Q. Okay, what did Mr. Brauhn bring in before you started this sort of enterprise?

A. He had another – log truck. He had – a saw as well as then a couple of part saws.

Q. Okay, the saw in question that was pawned, was that brought into the enterprise by your [*sic*], or was that brought in by Mr. Brauhn?

A. Mr. Brauhn.

Q. ... Did the tools become part of the enterprise, or did you individually hold your own stuff and other people needed -- you -- you needed

permission for either other to use it, borrow it, fix it, whatever?

A. Never. Never. No. It – it was through the combined – it was a joint effort. It was a combined contribution on both ends.

(RP 312, l. 4 to RP 313, l. 2)

Q. Okay Did you have to ask each other permission to use any one of the tools for the purposes of this?

A. No.

(RP 313, ll. 17-19)

A. When Tim got sick ... I took both of our saws and some other equipment to his mom's house, put them on the porch so that they would be safe.

(RP 315, ll. 7-17)

> Q. Okay. So, this case seems to be about these two saws on a porch and that make it to a pawn shop. Okay? So, I – I want to be clear about why property gets removed from the residence that you shared with him to his mother's place.
>
> A. It – it had to be moved for safety because with no one at the other property, we had taken the stuff that people could walk off with and I put it on the porch at Tim's mom's house, along with our F-250 pickup, cables, chains, binders, padlocks because at that time, without Tim... It kind of ceased the logging operation.

(RP 318, l. 21 to RP 319, l. 7)

Q. ... [C]an you tell the jury the circumstances for taking the saw?

A. Yeah, I was going to the property because my parents live up in Ferry County. They had a tree fall down; it was a snowstorm. I used – I used our saw to clean that mess up. ... As so, I had taken that saw, that's joint and combined mine and Tim's and I pawned it.

Q. You didn't sell the ... saw?

A. Never. No.

(RP 319, l. 22 to RP 320, l. 13)

Q. Did you feel that the saw that you pawned was yours to pawn?

A. It was community property with me and Tim.

Q. Okay. So, you – you pawned it in your name?

A. Correction.

Q. You didn't use another name?

A. No.

(RP 321, ll. 2-18)

On cross examination Mr. Rogers stated:

Q. Okay. Now, you went to Tim Brauhn's mother's home, correct?

A. That is correct.

Q. And you took a chainsaw off of her porch?

A. Correct.

Q. And it was the property of Tim Brauhn?

A. Correct.

Q. Did you knock on the door and ask permission to take it?

A. I didn't get permission from Tim's mother to take that community property that was mine and Tim's.

Q. Did you knock on the door and ask permission to take the chainsaw.

A. No.

(RP 325, l. 18 RP 326, l. 6)

Q. Who purchased that saw?

A. That was a combined saw actually, we put it together by parts.

Q. Okay.

A. I had some of the parts, and he had some of the parts for that.

Q. But you chose to pawn the one that was not one contributed to by both of you?

A. Correct.

Q. Okay. And you did, you're admitting you took the – the saw from the porch?

A. Yes.

Q. And you took it to the pawn shop and pawned it, correct?

A. Yes.

Q. Are you saying you used the pawn for – you say that day that you took it to clear trees?

A. I did.

Q. Okay But you pawned it the same day you took it?

A. Correct.

(RP 329, ll. 3-21, referring to the second chainsaw re: combined with parts)

During closing argument defense counsel argued ownership of the chainsaw. He stated:

> And who actually touched the chainsaws? Who brought them over there? My client. Who retrieved one of the chainsaws? My client. But Nicole Sim and Christopher Sim and Mr. Hamilton would like you to believe that they somehow are the aggrieved parties. That they somehow really have the ownership interest. Or that Mr. Brauhn has exclusive ownership interest. There is no evidence, I would submit, that Mr. Brauhn had exclusive ownership interest. Quite to the contrary.
>
> I – the witnesses yesterday did testify that they knew my client worked with

> Mr. Brauhn in cutting trees. That's not disputed. The state is making a lot of no written partnership agreements. Nothing filed. Nothing formal. But I – I -- I don't know what that's supposed to mean.

(RP 368, ll. 10-25)

> The issue in this case really is ownership and right to the chainsaw and what you could do. The State wants you to take the position that my client had no right to that chainsaw. Where is the evidence that my client didn't have a right to the chainsaw?
>
> If two people are working together and they are friends and they are also working together to make a living to survive in life so that they can eat and they

> combined resources, is that so hard to believe?
>
> ...I would submit to you that there is no proof or proof beyond any reasonable doubt that my client committed a theft of a chainsaw. The chainsaw was placed, he used his own ID and given money, a loan on it, not knowing what was going to happen with Mr. Brauhn....

(RP 371, l. 22 to RP 372, l. 6; ll. 13-16)

Mr. Rogers testimony and defense counsel's closing argument raised a defense of good faith claim of title. However, defense counsel failed to request a jury instruction on that affirmative defense.

The Court of Appeals decision essentially declares that the evidence and testimony does not properly support that affirmative defense.

5. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

RAP 13.4 (b) provides, in part:

> A petition for review will be accepted by the Supreme Court only: (1) ... (2) ... (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved....

It is Mr. Rogers position that the Court of Appeals decision is contrary to both the Sixth Amendment to the United States Constitution and Const. art. I, § 22.

> "A criminal defendant's right to present a defense is guaranteed by both the federal and state constitutions." *State v. Jennings*, 199 Wn.2d 53, 63, 502 P.3d 1255 (2022) (citing U.S. CONST. amend. VI; WASH. CONST. art. I, § 22; *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973); *Washington v. Texas*, 388 U.S. 14, 23, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967); *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010)). " 'The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations.'" *Jones*, 168 Wn.2d at 720

> (quoting *Chambers*, 410 U.S. at 294). A criminal defendant "is entitled to have the jury instructed on [their] theory of the case if there is evidence to support that theory." *State v. Williams*, 132 Wn.2d 248, 259-60, 937 P.2d 1052 (1997).

State v. Butler, 200 Wn.2d 695, 713 (2022).

Defense counsel's failure to request a jury instruction on good faith claim of title prejudiced the only available defense under the facts and circumstances of the case.

Defense counsel was ineffective and violated the right to effective assistance of counsel.

As set forth in *State v. Hicks*, 102 Wn.2d 182, 187, 683 P.2d 186 (1984):

> If an element of the defense negates an element of the offense, the prosecution must prove the absence of the defense beyond a reasonable doubt. ... The theory of the good faith claim of title defense is that the accused lacked the "animus furandi", or requisite intent to steal.

The Court of Appeals places a great deal of emphasis on *State v. Ager*, 128 Wn.2d 85, 904 P.2d 715 (1995). The *Ager* case involved the offense of embezzlement. The Court concluded at 96-97:

> We hold that before a defendant in an embezzlement case is entitled to a jury instruction on the good faith claim of title defense set forth in RCW 9A.56.020(2), the defendant must present evidence (1) that the taking of property was open and avowed and (2) showing circumstances which arguably support an inference that the defendant has some legal or factual basis for a good faith belief that he or she has title to the property taken.

Mr. Rogers contends that he met both of the factors necessary to authorize the giving of a jury instruction on good faith claim of title.

RCW 9A.56.020 (2) states, in part:

> In any prosecution for theft, it shall be a sufficient defense that:
> (a) The property or service was appropriated openly and avowedly under claim of title made in good

> faith, *even though the claim be untenable;...*

QUERY: What constitutes an "untenable claim?"

The Court of Appeals appears to look at Mr. Rogers removal of the chainsaw from Mr. Brauhn's mother's porch as being surreptitious. Yet, the Court of Appeals seems to ignore the fact that in its reliance upon *State v. Hicks* that the *Hicks* Court relied upon *State v. Steele*, 150 Wash. 466, 273 Pac. 742 (1929).

The *Steele* case involved a robbery offense where the defendants apparently used loaded dice. They subsequently forcibly took money from the other players who recovered the funds after discovering the cheating.

The *Steele* Court ruled at 473-74:

> ...[I]n the honest belief that they were entitled to the property, however ill-founded such belief may have been, the jury could not convict them of the crime of robbery...

> ... It is fundamental, of course, that a defendant on trial for crime is entitled to have his version of the transactions thought to constitute the crime given to the jury, if such version tends to disprove his guilt....
>
> ...[The defense] is wholly one of good faith, and it is manifest that an honest belief in the ownership could be had by the appellants, regardless of the tricks to which each party resorted to effect a winning.

The use of loaded dice in a gambling game seems comparable to the facts surrounding Mr. Rogers removal of the chainsaw and subsequent pawning of it.

> If an attorney's performance is deficient, the next question is whether it caused prejudice. "Prejudice exists if there is a reasonable probability that 'but for counsel's deficient performance, the outcome of the proceedings would have been different.'" *State v. Estes*, 188 Wn. 2d 450, 458, 395 P.2d 1045 (2017) (quoting *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009) and citing *Strickland*, 466 U.S. at 694). "[A] 'reasonable probability' is lower than a preponderance standard." *Id.* citing *Strickland* 466 U.S. at 694; *State v. Jones*, 183 Wn.2d 327,

> 339, 352 P.3d 776 (2015)). "Rather, it is a probability sufficient to undermine confidence in the outcome." *Id.* (citing *Strickland*, 466 U.S. 694).

State v. Lopez, 190 Wn.2d 104, 116, 410 P.3d 1117 (2018)

It is apparent that defense counsel's performance was deficient. The only defense to the charges was good faith claim of title. Mr. Rogers testified to it. Defense counsel argued it. Defense counsel failed to request a jury instruction on it.

As the *Hicks* Court noted at 186:

> The jury was not instructed that defendant's good faith claim of title was a critical factor to be considered in determining guilt or innocence. *State v. Jones*, 95 Wn.2d 616, 628 P.2d 472 (1981).

The failure to include such an instruction when the evidence supports it is reversible error. *State v. Pestrin*, 43 Wn. App. 705, 710, 719 P.2d 137 (1986).

A case which is apropos is *State v. Powell*, 150 Wn. App. 139, 206 P.3d 703 (2009). The *Powell* case involved defense counsel's failure to provide a reasonable belief instruction in

connection with a charge of second degree rape. The *Powell* Court stated at 155-57:

> ...[W]e are aware of no objectively reasonable tactical basis for failing to request a ... instruction when (1) the evidence supported such an instruction; (2) defense counsel, in effect, argued the statutory defense; and (3) the statutory defense was entirely consistent with the defendant's theory of the case. ... [W]e hold that failure to request such an instruction under these circumstances was deficient performance.
> ...
>
> Without the ... instruction, the jury had (1) no way to recognize and to weigh the legal significance of [defendant's] testimony and portions of defense counsel's closing argument ...; and (2) no way of acquitting [the defendant] even if it believed [the testimony]. Instead, it would have appeared to the jury that it had no option but to convict. ... The absence of this instruction essentially nullified [defendant's] defense.
> ...
> ...[W]e hold that defense counsel's failure to request a ... instruction could not have been a reasonable trial tactic

> and that such error deprived [the defendant] of a fair trial.

Mr. Rogers constitutional right to a fair trial under the Sixth Amendment to the United States Constitution and Const. art I, § 22 was denied as a result of defense counsel's ineffective assistance and failure to provide the requisite instruction on an affirmative defense.

6. CONCLUSION

The necessary predicates under RAP 13.4 (b)(3) are present in Mr. Rogers' case. The facts and circumstances clearly show that defense counsel's performance was ineffective and prejudicial.

Mr. Rogers respectfully requests that the Court accept the Petition for Review.

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Certificate of Compliance: I hereby certify there are 2664 words contained in this Petition For Discretionary Review.

DATED this 3rd day of March, 2023.

Respectfully submitted,

s/ Dennis W. Morgan

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APPENDIX “A”

FILED
FEBRUARY 9, 2023
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,	)	No. 38221-4-III
	)	
Respondent,	)	
	)	
v.	)	UNPUBLISHED OPINION
	)	
ROBERT JAMES ROGERS,	)	
	)	
Appellant.	)	

PENNELL, J. — Robert Rogers appeals his convictions for first-degree trafficking in stolen property and third-degree theft. We affirm.

FACTS

In January 2020, Nicole Sim advised the Stevens County Sheriff's Office that Robert Rogers had stolen a chainsaw from her porch on January 8. Ms. Sim lived, along with her two daughters and her grandmother, at the Colville property where the chainsaw was stored. On January 13, Ms. Sim informed Detective Travis Frizzell that she had been in contact with Mr. Rogers. According to Ms. Sim, Mr. Rogers had told her on January 9 "that he would return the saw the following day," but "that she had not heard from Rogers since, and he had not returned the saw." Clerk's Papers (CP) at 9.

There had been two chainsaws on the porch at the time of the theft: one belonging to Tim Brauhn and one belonging to Joseph Hamilton. Mr. Brauhn and Mr. Hamilton, apparently both woodsmen, were half-brothers and Ms. Sim's uncles. At the time she reported the chainsaw stolen, Ms. Sim believed that Mr. Hamilton's chainsaw was the one taken and advised law enforcement accordingly. In reality, the stolen chainsaw was Mr. Brauhn's.

The chainsaws were being stored on Ms. Sim's porch because friends of Mr. Brauhn had delivered the chainsaws, along with other personal effects, after Mr. Brauhn fell ill. Mr. Brauhn had been hospitalized on Christmas Eve and would die less than two months later. Mr. Brauhn apparently had his brother's chainsaw in his possession as well as his own at the time he was hospitalized, which is why both were being stored on the porch of Ms. Sim's residence.

Detective Frizzell contacted Joseph Hamilton, who lived in Airway Heights. Mr. Hamilton told the detective that he did "not really know" Mr. Rogers, and described Mr. Rogers as a friend of his brother, Tim Brauhn. *Id.* The next day, Detective Frizzell learned that a chainsaw had been pawned at a shop in Colville.[1] Detective Frizzell

[1] An employee testified that everything pawned at this shop was automatically reported to local law enforcement.

responded to the pawn shop and obtained a copy of a slip confirming that Mr. Rogers had pawned a Husqvarna 385XP chainsaw on January 8—the same day it went missing from Ms. Sim's porch—for $200. Detective Trizzell took photographs of the chainsaw and texted them to Mr. Hamilton. Mr. Hamilton responded that he was 90 percent sure the chainsaw was his. Mr. Hamilton said his nephew, who frequently used the chainsaw, lived nearby and could identify the saw. The nephew positively identified the saw as belonging to his uncle.

On January 24, 2020, the State charged Mr. Rogers by information with first-degree trafficking in stolen property in violation of RCW 9A.82.050, and third-degree theft in violation of RCW 9A.56.020(1)(a). The information identified the stolen and trafficked property as a "Husqvarna 385XP chainsaw" taken on or around January 8, 2020, and identified Mr. Hamilton as the chainsaw's owner. CP at 6-7. The information accused Mr. Rogers of "wrongfully obtain[ing] control over" the chainsaw. *Id.* at 7.

The case proceeded to a two-day jury trial in March 2021. Before the jury was seated, the trial court conferred with counsel about its "initial instructions that describe the nature of the case." 1 Report of Proceedings (RP) (Mar. 24, 2021) at 209. The court previewed the instruction as follows: "It is alleged that on or about January 8, 2020, Mr. Rogers wrongfully obtained and pawned a chainsaw belonging to Joseph Hamilton." *Id.*

The prosecutor told the court, "I don't think we need the belonging to part." *Id.* The court asked Mr. Rogers's counsel if he approved of taking out the language identifying Mr. Hamilton as the chainsaw's owner, and Mr. Rogers's counsel agreed.

Detective Frizzell testified first. He described his investigation, as summarized above, and explained that "[a]t the time" Ms. Sim reported the chainsaw stolen, she had said the owner was Mr. Hamilton. *Id.* at 241.

Ms. Sim testified next. She explained:

- On January 8, 2020, she got home from work to discover the chainsaw missing.
- She apparently learned from her grandmother that "Robert Rogers showed up and took one [chainsaw] off the porch and he just walked off and put it in the car and took off." *Id.* at 245.
- Ms. Sim knew Mr. Rogers as an acquaintance of her uncle, Mr. Brauhn.
- She contacted Mr. Brauhn before he died to get Mr. Rogers's phone number, and then attempted multiple times to contact Mr. Rogers to find out what happened to the chainsaw.
- When Mr. Rogers "finally answered" Ms. Sim on January 9, she "told him that he didn't have permission to take the chainsaw[ ] or to come onto [her] property in general and [she] wanted it back." *Id.* at 246.

- Mr. Rogers replied that Mr. Brauhn had given him permission to "borrow" the chainsaw and he promised to "bring it right back." *Id.*
- She identified the pawned chainsaw in Detective Frizzell's photographs as one belonging to her uncle.
- Mr. Rogers did not tell Ms. Sim in their phone conversation that he had already pawned the chainsaw.

On cross-examination, Ms. Sim clarified that the chainsaw Mr. Rogers took belonged to Mr. Brauhn, not Mr. Hamilton. She also agreed with defense counsel that Mr. Rogers had been helping Mr. Brauhn with his woodcutting operation that year. At the time Mr. Brauhn fell ill, he was apparently living with Mr. Rogers at the home of their mutual friend, Leroy Buchanan, who had recently died.

Mr. Hamilton also testified. He explained that in January 2020 he became aware that a chainsaw had gone missing from Ms. Sim's porch, and that he initially thought it was his chainsaw that had gone missing. Mr. Hamilton testified that he contacted Mr. Rogers, who told Mr. Hamilton that Mr. Brauhn had given him permission to borrow the chainsaw. Mr. Rogers promised Mr. Hamilton he would bring the chainsaw back, but said he needed it for a few days to clear trees. Mr. Rogers never told Mr. Hamilton that he was going to pawn the chainsaw, or that he actually had already pawned it.

A pawn shop employee also testified and authenticated the pawn slip memorializing that on January 8, 2020, Mr. Rogers pawned a Husqvarna 385XP chainsaw matching the serial number of Mr. Brauhn's chainsaw.

After the State rested, Mr. Rogers testified as the defense's only witness. Mr. Rogers said that Mr. Brauhn was his "best friend and business partner," explaining that they had lived and worked together. 1 RP (Mar. 25, 2021) at 305. Mr. Rogers testified that Mr. Brauhn had purchased the Husqvarna chainsaw that he later took off Ms. Sim's porch. But Mr. Rogers characterized his work with Mr. Brauhn as a joint enterprise, explaining that their tools became part of the enterprise, and that they did not hold their tools as individual property. Mr. Rogers testified that the two men stored their tools at a residence they shared and that neither of them needed the permission of the other to use any of their tools.

Mr. Rogers testified that he took the chainsaw off Ms. Sim's porch because he needed it to clear fallen trees at his parents' property. He said he initially intended only to use the saw to clear the fallen trees, but he ended up pawning the chainsaw because "finances got hard." *Id.* at 320. Mr. Rogers explained that he believed he had the right to pawn the chainsaw because "[i]t was community property with me and [Mr. Brauhn]." *Id.* at 321. Mr. Rogers admitted he told Ms. Sim and Mr. Hamilton that he was going to

bring the chainsaw back. He said he told them that because Mr. Brauhn did not get along with his brother or niece, and that he was putting off telling them the truth "until I could converse with [Mr. Brauhn] and tell him the situation and he told me he was going to deal with it." *Id.* at 322.

On cross-examination, Mr. Rogers testified that he and Mr. Brauhn did "not really" have a business, but rather, cutting trees was "just something that we do." *Id.* at 324. He also agreed that the men had no formal property agreement. Mr. Rogers testified that he did not purchase the chainsaw, that it was "[t]echnically" Mr. Brauhn's property, and that he took it off Ms. Sim's porch.[2] *Id.* at 324-25. He also testified that he did not knock on the door and tell Ms. Sim's grandmother that he was going to take the saw, because he did not believe he needed her permission. He confirmed he pawned the chainsaw the same day he took it and that he later promised Ms. Sim and Mr. Hamilton that he would return it.

The trial court instructed the jury. Unlike the information, which had named Mr. Hamilton as the chainsaw's owner, the to-convict instruction for the theft charge did not name a victim. The instructions defined "[t]heft" as "wrongfully obtain[ing] *or* exert[ing]

[2] The State also introduced Mr. Rogers's prior convictions for theft and obtaining control over stolen property as impeachment evidence.

unauthorized control over" the property of another, as opposed to the information, which had conflated the two phrases. CP at 117 (emphasis added).

In closing argument, the prosecutor told the jury, "That was Mr. Brauhn's chainsaw and there's really nothing to suggest otherwise." 1 RP (Mar. 25, 2021) at 360. The prosecutor expressed incredulity toward Mr. Rogers's story of joint ownership, positing that if he genuinely believed he was the chainsaw's co-owner, he would not have promised Ms. Sim and Mr. Hamilton that he would bring it back.

In his closing argument, Mr. Rogers's trial counsel emphasized that his client and Mr. Brauhn had had a "business relationship[ ] and personal relationship[ ]." *Id.* at 366-67. Defense counsel invited the jury to conclude that the chainsaw was the joint property of Mr. Brauhn and Mr. Rogers and asked, rhetorically, "Where is the evidence that my client didn't have a right to the chainsaw?" *Id.* at 371-72.

The jury found Mr. Rogers guilty of both charges. The trial court sentenced Mr. Rogers to 84 months in prison, to run consecutively to sentences imposed in other cases. Mr. Rogers timely appeals.

ANALYSIS

Good faith claim of title

Mr. Rogers contends his trial attorney rendered ineffective assistance of counsel because he did not raise the defense of good faith claim of title or request an instruction on that defense. In order to establish ineffective assistance of counsel, Mr. Rogers must show counsel provided deficient performance that resulted in prejudice. *State v. Reichenbach,* 153 Wn.2d 126, 130, 101 P.3d 80 (2004). Mr. Rogers cannot establish ineffective assistance because defense counsel's performance was not deficient.

Good faith claim of title is a statutory defense, which provides:

> In any prosecution for theft, it shall be a sufficient defense that . . . [t]he property or service was appropriated openly and avowedly under a claim of title made in good faith, even though the claim be untenable . . . .

RCW 9A.56.020(2)(a). The rationale for the defense is that a good faith belief of title "negates the requisite intent to steal." *State v. Hicks*, 102 Wn.2d 182, 184, 683 P.2d 186 (1984). At trial, Mr. Rogers's attorney argued Mr. Rogers had a legal interest in the chainsaw, but as pointed out on appeal, counsel never argued that Mr. Rogers had asserted his interest in the chainsaw in a way that would meet the criteria for good faith claim of title.

We reject Mr. Rogers's criticism of defense counsel's trial performance because good faith claim of title was not a viable defense. *See State v. Calvin*, 176 Wn. App. 1, 14, 316 P.3d 496 (2013) (failure to request a jury instruction not deficient performance where defendant not entitled to the instruction). There is no evidence that Mr. Rogers "openly and avowedly" asserted ownership over the chainsaw. RCW 9A.56.020(2)(a); *see State v. Ager*, 128 Wn.2d 85, 93, 904 P.2d 715 (1995) (defendant not entitled to jury instruction on his theory of the case when there is no evidentiary support for the theory). Instead, Mr. Rogers appropriated the chainsaw from Ms. Sim's porch without alerting anyone to his actions. When Ms. Sim and Mr. Hamilton asked what Mr. Rogers had done with the chainsaw, Mr. Rogers did not assert an ownership interest. Nor was he truthful. When confronted with what happened to the chainsaw, Mr. Rogers deceptively claimed the chainsaw would be returned instead of disclosing that he had already pawned it. The defense of good faith claim of title does not apply in such circumstances. *See State v. Hull*, 83 Wn. App. 786, 799, 924 P.2d 375 (1996) (good faith claim of title defense not available when theft perpetrated through deception).

Counsel's failure to move to dismiss charges

Mr. Rogers contends that his trial counsel rendered ineffective assistance by failing to move to dismiss the charges after the prosecution's case-in-chief. He argues that, at

that point, the State had failed to prove a chainsaw was stolen because it had not proved the identity of the chainsaw's owner. According to Mr. Rogers, had defense counsel made a timely motion, his case would have been dismissed mid-trial and he would not have been convicted. We are unpersuaded.

In a criminal case, a defendant may challenge the sufficiency of the evidence at the end of the prosecution's case-in-chief. *State v. Jackson*, 82 Wn. App. 594, 607-08, 918 P.2d 945 (1996). The trial court analyzes such a claim "using the most complete factual basis available." *Id.* at 608-09. The relevant inquiry would have been whether "after viewing the evidence in the light most favorable to the prosecution, *any rational trier of fact* could have found the essential elements of the crime *beyond a reasonable doubt*." *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (plurality opinion) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)).

Here, by the end of the State's case-in-chief, it had presented testimony that Mr. Rogers surreptitiously took a chainsaw from Ms. Sim's porch, pawned it the same day, all while reassuring Ms. Sim and Mr. Hamilton that he would return the saw. A rational fact finder could appraise that evidence and conclude that Mr. Rogers "wrongfully obtain[ed]" someone else's property "with intent to deprive" them of that

property. RCW 9A.56.020(1)(a).[3] And a rational fact finder could conclude, on the basis of that evidence, that Mr. Rogers "knowingly initiate[d] . . . the theft of property for sale to others." RCW 9A.82.050(1). Thus, the trial court would have denied any motion to dismiss the charges, and trial counsel's failure to so move was not deficient representation.

Discrepancies between jury instructions and charging document

Mr. Rogers claims he was convicted of an uncharged crime due to discrepancies between the information and the jury instructions with respect to the charge of theft. We disagree.

"[I]t is error to try and convict a defendant of a crime that is not charged." *State v. Huyen Bich Nguyen*, 165 Wn.2d 428, 434, 197 P.3d 673 (2008). This court reviews charging documents "as a whole, according to common sense and including facts that are implied, to see if [they] 'reasonably apprise[ ] an accused of the elements of the crime charged.'" *State v. Nonog*, 169 Wn.2d 220, 227, 237 P.3d 250 (2010) (quoting *State v. Kjorsvik*, 117 Wn.2d 93, 109, 812 P.2d 86 (1991)). "|C|harging instruments which fail to set forth the essential elements of a crime in such a way that the defendant is notified of

[3] Contrary to Mr. Rogers's arguments on appeal, the theft charge did not require the State to prove who owned the chainsaw. *See State v. Lee*, 128 Wn.2d 151, 158-59, 904 P.2d 1143 (1995).

both the illegal conduct and the crime with which he is charged are constitutionally defective, and require dismissal." *State v. Hopper*, 118 Wn.2d 151, 155, 822 P.2d 775 (1992). By contrast, a charging document is sufficient if the "necessary facts appear . . . or by fair construction can . . . be found" in it, so long as "inartful language" in the charging document did not nonetheless "cause[ ] a lack of notice" of the charges. *Kjorsvik*, 117 Wn.2d at 105-06.[4]

The first discrepancy Mr. Rogers identifies pertains to the identity of the victim. The information listed the owner of the chainsaw as Joseph Hamilton, while the jury instructions did not name a victim.

The differences between the wording of the information and jury instructions did not lead to an impermissible discrepancy. The identity of the victim is not an essential element of a theft prosecution. *State v. Lee*, 128 Wn.2d 151, 158-59, 904 P.2d 1143 (1995). In fact, a jury need not necessarily unanimously agree on the victim's identity for a theft conviction to be valid. *See id.* at 156-59; *see also State v. Jefferson*, 74 Wn.2d 787, 788-90, 446 P.2d 971 (1968). Mr. Rogers does not claim the discrepancy regarding the

[4] Mr. Rogers styles this claim as one of ineffective assistance of counsel, assigning error to trial counsel's "[f]ail[ure] to recognize" the discrepancies. Br. of Appellant at 1. However, he does not identify what trial counsel should have done differently. Although it is not entirely clear, it appears Mr. Rogers essentially assigns error to the purported insufficiency of the information itself.

identity of the victim misled him or impeded the preparation of his defense. The information put Mr. Rogers on notice that he was charged with stealing a Husqvarna chainsaw on January 8, 2020. The information was sufficient because it gave him "ample opportunity to prepare his defense." *Lee*, 128 Wn.2d at 160.

The second purported discrepancy involves the wording used to describe the crime of theft. The information charged Mr. Rogers with "wrongfully obtain[ing] control" over the chainsaw. CP at 7. Meanwhile, the jury instructions stated a defendant is guilty of theft if they "wrongfully obtained or exerted unauthorized control" over another's property. *Id.* at 117, 121. Again, Mr. Rogers fails to point to an impermissible discrepancy.

The theft statute, RCW 9A.56.020, lists different types of theft but nonetheless "defines a single crime." *Lee*, 128 Wn.2d at 157. Subsection (1)(a) of the statute criminalizes theft by taking, subsection (1)(b) criminalizes theft by deception, and subsection (1)(c) criminalizes appropriation of lost or misdelivered property. *See Ager*, 128 Wn.2d at 91. Theft by taking occurs when one "wrongfully obtain[s] or exert[s] unauthorized control over the property or services of another . . . with intent to deprive." RCW 9A.56.020(1)(a); *see also* RCW 9A.56.010(23) (giving "[w]rongfully obtains" and "exerts unauthorized control" the same definition). The information charged Mr. Rogers

with theft by taking under RCW 9A.56.020(1)(a). And that is the provision he was convicted of violating pursuant to the court's instructions. There was no discrepancy.

Counsel's failure to recognize a more specific alternative

Mr. Rogers argues trial counsel should have recognized he could have been charged with a more specific crime, and cites RCW 9A.56.010(23). But as the State rightly notes, that provision does not criminalize any behavior; it is merely a definitional statute. This claim is without merit.

CONCLUSION

The judgment of conviction is affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Pennell, J.

WE CONCUR:

Lawrence-Berrey, A.C.J.

Staab, J.

NO. 38221-4-III

COURT OF APPEALS

DIVISION III

STATE OF WASHINGTON

STATE OF WASHINGTON, Plaintiff, Respondent, v. ROBERT JAMES ROGERS, Defendant, Appellant.	)	STEVENS COUNTY NO. 20 1 00022 5 **CERTIFICATE OF SERVICE**

I certify under penalty of perjury under the laws of the State of Washington that on this 3rd day of March, 2023, I caused a true and correct copy of the *PETITION FOR DISCRETIONARY REVIEW* to be served on:

COURT OF APPEALS, DIVISION III — E-FILE
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Spokane, WA 99201

Stevens County Prosecutor's Office — E-FILE
Attn: Brian O'Brien
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