NO. 46382-2-II

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

STATE OF WASHINGTON,

Respondent,

v.

KRISTEN A. MARIA HIGHSMITH,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 14-1-00159-1

BRIEF OF RESPONDENT

TINA R. ROBINSON
Prosecuting Attorney

RANDALL A. SUTTON
Deputy Prosecuting Attorney

614 Division Street
Port Orchard, WA 98366
(360) 337-7174

SERVICE		
	Richard Wayne Lechich 1511 3rd Ave Ste 701 Seattle, WA 98101-3647 Email: richard@washapp.org	This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, *or, if an email address appears to the left, electronically.* I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED April 23, 2015, Port Orchard, WA  **Original e-filed at the Court of Appeals; Copy to counsel listed at left.**

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the evidence was sufficient for the jury to find that the foss house was a dwelling?

2. Whether Highsmith cannot show ineffective assistance of counsel for failing to propose a lesser instruction where she was convicted of the greater offense?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Kristen Highsmith and codefendant Floyd Sibley were charged by amended information filed in Kitsap County Superior Court with one count of residential burglary. CP 11. At Highsmith's request, the jury was also instructed on the lesser offense of criminal trespass. CP 23-26, 55-60, 2RP325. The jury found Highsmith guilty as charged. CP 61. The jury acquitted Sibley of both burglary and the lesser offense of trespass. 3RP 417-18.

B. FACTS

Real estate broker Sandra Nelson was the listing agent for Natalie Foss and her husband. 1RP 94-95. She went out to inspect the house, which was at the end of a cul-de-sac, on December 16, 2013. 1RP 98, 102. Nelson was surprised to find a black car in front of the house when she arrived. 1RP 98. Her policy was for other agents to call her before

showing the house. 1RP 98. She did not recognize the car; it was a "beater." 1RP 99. It had a broken window and the tabs were expired. 1RP 100. She did not see anyone through the windows of the house and decided to call 911. 1RP 101.

Nelson parked at the other end of the street and waited for the police. 1RP 103. Port Orchard Police Officer Nathan Lynch arrived at the scene about 45 minutes after the 911 call. 1RP 131. He met Nelson at the end of the street. 1RP 131. After speaking to Nelson, he headed to the house, and the car that had been described came down the street toward him. 1RP 132. He activated his lights and stopped the car. 1RP 132. Highsmith and Sibley were in the car. 1RP 133. Highsmith was driving. 1RP 134.

Highsmith claimed that she was there to meet a realtor. 1RP 135. Lynch told her the realtor was down the street. 1RP 135. Highsmith responded that it was a different realtor. 1RP 135. Lynch asked her how she knew that since he had not identified the realtor. 1RP 135. Highsmith would not have been able to see Nelson from where she was. 1RP 136.

Deputy Rice, who arrived as backup, took Nelson up to the house. 136. After Nelson and Rice returned from the house, Lynch arrested them for burglary. 1RP 136-37.

Highsmith waived her Miranda rights and agreed to talk to Lynch.

1RP 139. She said that she was there to look at the house, and the items in her car were there because she was moving. 1RP 141. She said she was going to be taking care of an elderly friend who lived in the area.

When Lynch tried to get her new address from her, she was unable to remember it. 1RP 141. When asked who she was going to be taking care of, she said "Ron," but she could not remember his last name. 1RP 141. When Lynch asked her why she did not know her new address, then began to backtrack and said she was not moving; she was just taking care of someone for work.

Lynch then asked her if he could search her vehicle. 1RP 141. Highsmith told Lynch he could. 1RP 141. Lynch only took pictures and waited to get a warrant before searching the car. 1RP 142. Lynch emailed the pictures to the Fosses. 1RP 142. The car was then impounded pending a warrant. 1RP 142.

Sergeant Donna Main also interviewed Highsmith, who told her that she used to be a real estate agent, and she was looking at the house to possibly rent. 2RP188. Highsmith stated she noticed the slider was unlocked and tried to call the agent. 2RP188. When Main asked to see her phone, Highsmith said its battery had died. 2RP188. Highsmith denied leaving a voicemail. 2RP189. Highsmith stated that she did not "break into" the house. 2RP189. She admitted to entering and looking

around. 2RP189. Highsmith denied that she had taken anything from in the house. 2RP189. She admitted to taking a box of clothing that was outside the house. 2RP189.

Natalie Foss, her husband Landon, and their three children lived at the house after they purchased it in December 2012. 1RP 154. Her husband was laid off, and they moved back to Spokane. 1RP 155. They put the house up for sale in July 2013. 1RP 155. At they point they moved to Spokane and were living in an apartment. 1RP 156. Due to space constraints, they left almost all of their belongings in the house. 1RP 156, 169. The items used to stage the house were their belongings. 1RP 156.

After listing the house they came back to Port Orchard once or twice a month to continue fixing it up. 1RP 156. They painted, refinished the floor, and worked on the yard. 1RP 157. They had been at the house three weeks before the break-in. 1RP 159.

A large number of items were missing. 1RP 163. The bedroom furniture in Exhibits 20, 23, and 28 were the only furniture left. 1RP 163. The couches, lamps, rugs, coffee tables, everything out of the living room, the pictures hung from walls, clocks, etc., were all gone. 1RP 163. They took the new toilet paper holders and towel rods from the bathrooms. 1RP 163; Exh. 36-37, CP 164, 166.

Because they were still going back and forth, Foss had numerous personal care items in the bathroom, such as her curling item and other personal items. 1RP 163. They were all gone. 1RP 163. They took her husband's shaving kit. 1RP 165, Exh. 37, CP 166. They took the curtain and the shampoo rack from the shower. 1RP 163, 166; Exh 40, CP 172. They took the toilet paper. 1RP 166. . Exhibit 32, CP 156, was their towel set and the sheets off her bed. 1RP 164. Exhibit 34, was the duvet cover from her bed. 1RP 164. They also took the sheets. 1RP 168, Exh. 47, CP 186.

Because they were still going back and forth, they kept toys and clothes for the children at the house. 1RP 167. They took most of the children's toys. 1RP 164; Exh. 36-37, CP 164, 166; Exh. 40, CP 172. Exhibit 31, CP 154, showed the remotes from their TVs. 1RP 164. Exhibit 48 depicted their keyboard and mouse. 1RP 169; Exh. 48, CP 188

III. ARGUMENT

A. THE EVIDENCE WAS SUFFICIENT FOR THE JURY TO FIND THAT THE FOSS HOUSE WAS A DWELLING.

Highsmith argues that the State failed to prove that the Fosses' house was a dwelling. This claim is without merit because the evidence was more than sufficient to allow a jury to conclude that the house was ordinarily used as a lodging.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Salinas*, 119 Wn.2d at 201. Circumstantial evidence and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). Additionally, because it is the jury's responsibility to resolve credibility issues and determine the weight of the evidence, this Court defers to the jury on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

To prove residential burglary, the State had to prove that Highsmith entered or remained in a "dwelling." RCW 9A.52.025(1). The trial court instructed the jury that the term "dwelling" meant "any building or structure that is used or ordinarily used by a person for lodging." CP 50. Whether a vacant residence is a "dwelling" for the purposes of the residential burglary statute is a question of fact for the jury. *State v. McDonald*, 123 Wn. App. 85, 91, 96 P.3d 468 (2004). The use of the phrase "used or ordinarily used" in the definition of dwelling,

demonstrates that a building or structure need not be currently used for lodging in order to be considered a dwelling. The jury could take into consideration the fact that no one had been staying overnight there around the time of the burglary, but the statute does not make that fact dispositive. A jury could easily infer from the testimony and exhibits that the design, location, and outward appearance of the structure manifested its ordinary use as lodging.

Here, the Fosses purchased the home and lived in it full time until July 2012, when economic circumstances forced their move to Spokane. From then until December of that year, when the break-in occurred, they returned to Port Orchard every other weekend to continue fixing the up house. When in Port Orchard, they stayed in the house. Because they were there so often, they kept clothes, toiletries, bedding and their children's toys in the house. Indeed, most of their belongings remained in the house, including furniture and décor items such as pictures. Taking this evidence in the light most favorable to the State, this evidence would allow a rational jury to find that the house was 'ordinarily used' for lodging.

Highsmith claims there was no evidence that the Fosses actually stayed in the house when they were in Port Orchard. She ignores the circumstantial evidence. If the house were only "staged" there would be

no need for there to be sheets on the beds under the comforters, but Foss testified that there were. There would be no need to keep towels and toiletries in the house, but the Fosses did.

Highsmith also asserts that the fact that the "furnace was not working in December" also shows that it was not a dwelling. She takes the evidence out of context. There was no evidence that the furnace was not functional. The reference to the furnace came in the following passage from the real estate agent's testimony:

> Well, the house was under contract, so we were doing inspections trying to get the house to close. And so he was out there checking on the property. We were trying to get the furnace to work, and he happened to be the one who contacted me about the door and the slider.

1RP 109. The jury could have reasonably taken that comment to mean that they were relighting the pilot. Moreover, the agent was talking about how the house was under contract, meaning a new resident was likely on the way, again showing that the house was a dwelling.

Highsmith also argues that the Court must look to the statutory definition of "dwelling," which she maintains would exclude the Foss home. She ignores a key part of the definition, however. Under RCW 9A.04.110(7):

> "Dwelling" means any building or structure, though movable or temporary, or a portion thereof, which is *used or ordinarily used* by a person for lodging.

(Emphasis supplied). Highsmith ignores the second part of the

highlighted phrase. At the very least, whether the Foss home was "ordinarily used" for lodging presents a question for the jury. There is no dispute that the building was a house. It was not a garage, a factory, a barn or a retail establishment. There is no dispute that until they had to move to Spokane, the Fosses lived there, and continued to do so when they returned to Port Orchard.

Highsmith's reliance on Utah authority is misplaced. Unlike the Washington statute the Utah statute requires that a dwelling be "usually occupied." Utah Code § 76-6-201(2). "Usually" implies a full-time occupancy, which is highlighted by the statute's additional caveat that the definition applies "whether or not a person is actually present." The Utah court thus concluded that the use, rather than the nature, of the structure was controlling:

> Francis contends that, to fall within this definition, "a structure must ... be the type of structure that typically houses overnight guests." Thus, he argues, "If someone burglarizes a structure in which people do not typically sleep—a garage, office, or a church—then he would receive a third degree burglary, again regardless of whether a person actually sleeps there."
>
> Francis's argument is foreclosed by this court's holding in *State v. McNearney*, 2011 UT App 4, 246 P.3d 532. *See id.* ¶¶ 9–11 (concluding that a new, never-occupied house is not a dwelling). In *McNearney*, we rejected the view that "a structure's type, or the purpose for which it was built, [is] the determining factor in applying the dwelling definition." *Id.* ¶ 9. Instead, we emphasized that the key inquiry is "the actual use of the particular structure that is burglarized, not the usual use of similar

> types of structures." *Id.* Thus, it is not the nature of the structure, but rather its use that is determinative.

State v. Francis, 284 P.3d 720, 721 (Utah App. 2012). As noted, however, Washington's statute includes both the use *and* the nature of the structure: a dwelling is a building that is "used or ordinarily used" as a lodging.

Moreover, since the definition includes buildings "ordinarily used" for lodging, Highsmith's contention that the focus is on the use on the day of the crime is also misplaced. Although Highsmith tries to paint the Foss home as an uninhabitable dump, the evidence was that they lived there full time until they had to move to Spokane. The building was clearly "ordinarily used" as a residence. At the very least a question for the jury was presented. This claim should be rejected.

B. HIGHSMITH CANNOT SHOW INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILING TO PROPOSE A LESSER INSTRUCTION WHERE SHE WAS CONVICTED OF THE GREATER OFFENSE.

Highsmith next claims that counsel was ineffective for failing to propose a lesser instruction on second-degree burglary. This claim is without merit because the Supreme Court has rejected such contentions.

In order to overcome the strong presumption of effectiveness that applies to counsel's representation, a defendant bears the burden of demonstrating both deficient performance and prejudice. *State v.*

McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995); *see also Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). If either part of the test is not satisfied, the inquiry need go no further. *State v. Lord*, 117 Wn.2d 829, 894, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 856 (1992).

The performance prong of the test is deferential to counsel: the reviewing court presumes that the defendant was properly represented. *Lord*, 117 Wn.2d at 883; *Strickland*, 466 U.S. at 688-89. It must make every effort to eliminate the distorting effects of hindsight and must strongly presume that counsel's conduct constituted sound trial strategy. *Strickland*, 466 U.S. at 689; *In re Rice*, 118 Wn.2d 876, 888-89, 828 P.2d 1086 (1992). "Deficient performance is not shown by matters that go to trial strategy or tactics." *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

To show prejudice, the defendant must establish that "there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different." *Hendrickson*, 129 Wn.2d at 78; *Strickland*, 466 U.S. at 687.

1. Highsmith fails to show deficient performance.

The Washington Supreme Court has held that the "all or nothing" approach is a legitimate trial tactic, and that it is not ineffective assistance

to fail to request a lesser included offense instruction. *State v. Grier*, 171 Wn.2d 17, 20, 44, 246 P.3d 1260 (2011). Here, while then defense did not pursue an all or nothing defense, it did seek a lesser on a misdemeanor rather than a felony charge. The defense was not unreasonable: in this joint trial, the defendants pointed the finger at each other, but there was no direct evidence as to who removed the items from the house. Moreover, offering trespass gave the jury a basis to convict if they "thought she was guilty of something." The rationale of *Grier* is indistinguishable. Highsmith fails to show deficient performance.

2. Highsmith cannot show prejudice.

Further, "in assessing prejudice, 'a court should presume, absent challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury acted according to the law' and must 'exclude the possibility of arbitrariness, whimsy, caprice, "nullification" and the like.'" *Grier*, 171 Wn.2d at 34 (*quoting Strickland*, 466 U.S. at 694-95). As such, in case like this one, where the jury convicted on the greater offense,[1] the defendant cannot show prejudice:

> Nor can Grier establish prejudice under the second prong of Strickland. Assuming, as this court must, that the jury would not have convicted Grier of second degree murder unless the State had met its burden of proof, the availability of a compromise verdict would not have changed the outcome of Grier's trial. *See Strickland*, 466

[1] As previously discussed, the evidence was sufficient. Of course, if it were not, the present claim would be moot.

> U.S. at 694, 104 S. Ct. 2052 ("a court should presume ... that the judge or jury acted according to law"); *Autrey*, 700 N.E.2d at 1142 (availability of manslaughter would not have affected outcome where jury found defendant guilty of murder beyond reasonable doubt).

Grier, 171 Wn.2d at 43-44. This claim should be rejected.

IV. CONCLUSION

For the foregoing reasons, Highsmith's conviction and sentence should be affirmed.

DATED April 23, 2015.

Respectfully submitted,
TINA R. ROBINSON
Prosecuting Attorney

RANDALL A. SUTTON
WSBA No. 27858
Deputy Prosecuting Attorney

KITSAP COUNTY PROSECUTOR

April 23, 2015 - 2:08 PM

Transmittal Letter

Document Uploaded: 5-463822-Respondent's Brief.pdf

Case Name: Kristen A. Maria Highsmith
Court of Appeals Case Number: 46382-2

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: __Respondent's__

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Deborah S Phares - Email: dphares@co.kitsap.wa.us

A copy of this document has been emailed to the following addresses:

richard@washapp.org