No. 47968-1-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

RUSLAN BEZHENAR,

Appellant.

Appeal from the Superior Court of Washington for Lewis County

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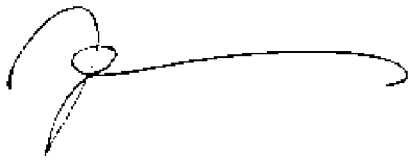
Respondent's Brief

JONATHAN L. MEYER
Lewis County Prosecuting Attorney



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I. ISSUES

A. Did the State present sufficient evidence to sustain Bezhenar's conviction for Criminal Trespass in the First Degree?

B. Did Bezhenar receive effective assistance from his trial counsel?

II. STATEMENT OF THE CASE

On July 13, 2012 at approximately 6:30 p.m., officers responded to a report that a male was seen climbing up a building and entering through a second-story window. RP [1] 22-23. The building in question had a sign posted on it that stated the building was deemed unfit for habitation and any unauthorized person found within the premise was subject to arrest and prosecution. RP 23, 28; Ex. 8. The officers knocked on the side door, announced they were with the police department, and yelled for the occupants to come to the door. RP 32. The windows to the building were open, and the officers were loud enough to draw a crowd. RP 32.

After several attempts of knocking and announcing, the officers still received no response. RP 33. The officers had dispatch attempt to locate someone with a key to the building. RP 33. After officers announced they were going to call in a K-9 unit, two women

[1] The State will cite to the transcript of the jury trial, which is in consecutive paginated volumes as RP.

exited the building. RP 34. After that, no one else exited or otherwise made their presence known. RP 38.

Officers climbed a ladder to the second story awning and continued to yell for the remaining occupants to exit the building. RP 36. The K-9 unit arrived and was also brought up to the awning. RP 36. When the dog started barking, Officer Michael Lowrey of the Centralia Police Department observed Ruslan Bezhenar inside the building. RP 36-37. Bezhenar was eventually removed from the building through the second story window and brought down the ladder. RP 45-46, 50.

Later, Bezhenar's mother arrived and spoke with Sergeant Stacy Denham. RP 285. Bezhenar's parents were the building property owners. RP 191, 196. Sgt. Denham explained to Bezhenar's mother what was going on, and she told Sgt. Denham that she had the only key to the building. RP 285.

While being treated by medics for a dog bite sustained during the contact, Bezhenar made statements to Officer Lowrey, which Officer Lowrey perceived to be a threat to kill him or his family. RP 53-55, 58-61. Bezhenar was charged with Felony Harassment – Threat to Kill and Criminal Trespass in the First Degree. CP 10-12.

At trial, Bezhenar testified to having previously lived in the building and going there that day with his girlfriend to pick up some clothes. RP 248. Bezhenar said that shortly after arriving they decided to take a nap because it was a hot day, there was no air-conditioning, and they became worn out. RP 263. Bezhenar also said he was not the person who climbed up and entered through the window and had keys with him in his pocket at the time. RP 252.[2] Bezhenar said his parents allowed him to go to the building and he went there often to pick up tools and other items. RP 261.

In his first trial, Bezhenar was convicted of felony harassment, and a mistrial was declared on the criminal trespass charge after the jury was unable to reach a verdict as to that count. CP 38-41. The conviction for felony harassment was reversed and remanded on appeal. CP 56-65. In his second trial, a mistrial was declared on the harassment charge when the jury was unable to reach a verdict, but Bezhenar was convicted of Criminal Trespass in the First Degree. CP 157-61. This appeal follows. CP 190.

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[2] Q: Okay. Did you climb through the back window?
A: No, I didn't. I had the keys in my pocket the whole – you know. I mean, I could -- you know, I could -- you never climb through the window when you go to your house, you know. I mean, we own the building so why would I have to climb through, you know, the window?

The State will supplement the facts as necessary throughout its argument below.

III. ARGUMENT

A. THE STATE PRESENTED SUFFICIENT EVIDENCE FOR A RATIONAL JURY TO FIND BEZHENAR GUILTY OF CRIMINAL TRESPASS IN THE FIRST DEGREE.

Bezhenar argues the State did not present sufficient evidence to sustain the jury's verdict of guilty in regards to Count II: Criminal Trespass in the First Degree. Brief of Appellant. The State presented sufficient evidence to sustain the jury's guilty verdict for Criminal Trespass in the First Degree.

1. Standard Of Review.

Sufficiency of evidence is reviewed in the light most favorable to the State to determine if any rational jury could have found all the essential elements of the crime charged beyond a reasonable doubt. *State v. Salinas,* 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

2. The State Proved Each Element Beyond A Reasonable Doubt, As Required, And Therefore Presented Sufficient Evidence To Sustain The Jury's Verdict For Criminal Trespass In The First Degree.

The State is required under the Due Process Clause to prove all the necessary elements of the crime charged beyond a reasonable doubt. U.S. Const. amend. XIV, § 1; *In re* Winship, 397

U.S. 358, 362-65, 90 S. Ct 1068, 25 L.Ed.2d 368 (1970); State *v. Colquitt*, 133 Wn. App. 789, 796, 137 P.3d 893 (2006). An appellant challenging the sufficiency of evidence presented at a trial "admits the truth of the State's evidence" and all reasonable inferences therefrom are drawn in favor of the State. *State v. Goodman,* 150 Wn.2d 774, 781, 83 P.2d 410 (2004). When examining the sufficiency of the evidence, circumstantial evidence is just as reliable as direct evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

The role of the reviewing court does not include substituting its judgment for the jury's by reweighing the credibility or importance of the evidence. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). The determination of the credibility of a witness or evidence is solely within the scope of the jury and not subject to review. *State v. Myers,* 133 Wn.2d 26, 38, 941 P.2d 1102 (1997), *citing State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). "The fact finder…is in the best position to evaluate conflicting evidence, witness credibility, and the weight to be assigned to the evidence." *State v. Olinger*, 130 Wn. App. 22, 26, 121 P.3d 724 (2005) (citations omitted).

To convict Bezhenar of Criminal Trespass in the First Degree the State was required to prove, beyond a reasonable doubt, that on or about July 13, 2012, Bezhenar knowingly entered or remained in a building and knew that the entering or remaining was unlawful. RCW 9A.52.070(1); CP 145. The State bears the burden of proving the entry was unlawful, i.e., the person was not licensed, invited or otherwise privileged to enter or remain. RCW 9A.52.010

Bezhenar argues there was insufficient evidence to show that his entry into the building was unlawful because he had permission from his parents to be there and the posted building notice could have been interpreted to allow his entry for a limited purpose. Brief of Appellant 12-13. However, this argument fails as it is not based on viewing the evidence in the "light most favorable to the State" or drawing all reasonable inferences in the State's favor.

The State presented evidence that a man was seen climbing up the building and entering through the second story window. RP 22-23. The building had a sign on its door saying that it was unfit for habitation and any unauthorized person within the premises would be subject to arrest. RP 23, 28; Ex. 8. Bezhenar was found inside the building, where he says he had been sleeping. RP 36-37, 263. Additionally, Sgt. Denham testified that Bezhenar's mother said that

only she had a key to the building. RP 285. From this evidence, a reasonable jury could find that the sign posted on the building by the City of Centralia prohibited Bezhenar from entering regardless of his parent's wishes, and that he was not permitted to be within the premises for any reason, including picking up clothing and sleeping. Furthermore, a reasonable jury could find beyond a reasonable doubt that Bezhenar knew entry to the building was unlawful when he entered the building without a key by climbing up to the second story window.

Bezhenar's argument, that he had permission to enter the building, and that the City may have contemplated exceptions to its restriction on entry, requires viewing evidence and making inferences in his favor, which is not the proper standard of review.

In the light most favorable to the State, the State sufficiently proved, beyond a reasonable doubt, that Bezhenar committed Criminal Trespass in the First Degree and this Court should affirm his conviction.

3. The State Proved Each Element Beyond A Reasonable Doubt, And The Trial Court Did Not Err In Denying Bezhenar's Motion To Dismiss For Insufficient Evidence.

The trial court did not err in denying Bezhenar's motions to dismiss for insufficient evidence. As argued above, when the

evidence is viewed in the light most favorable to the State and reasonable inferences are drawn in the State's favor, a rational jury could find Bezhenar's entry was unauthorized, unlawful, and that he knew it to be unlawful. Bezhenar argues that there is no reason to believe that the Centralia Municipal Code intended to prevent entry into a posted building under circumstances such as his, but he does not offer authority to support this argument. Brief of Appellant 13-15.

Although Behzenar argues that the sign on the building was apparently posted pursuant to C.M.C 18.40.14.A, this is an assumption based on the citation given to another person involved in the incident.[3] Brief of Appellant 10. This assumption is not supported by the content of the sign itself. The sign referenced C.M.C Title 18 and not a specific section of the title. Ex. 8. In 2011 the City of Centralia adopted several provisions of the 2009 International Property Maintenance Code as part of Title 18. C.M.C 18.04.010; C.M.C Ord. 2261. Under the property maintenance code, a building used for dwelling purposes may be determined by the code official to be unfit for habitation for a number of reasons, such as inadequate maintenance, light, or plumbing. 2009 International

[3] Bezhenar is correct that C.M.C 18.40.14.A was repealed in 2006 by Ordinance 2176, and the State concedes that Darcie Negrete was originally cited under a code number that was no longer valid.

Property Maintenance Code § 108.1.5.9, *available at* http://publicecodes.cyberregs.com/icod/ipmc/index.htm. If the building is vacant and unfit for habitation, the code official is authorized to post a placard of condemnation. 2009 IPMC § 108.2. A building that is placarded shall be vacated as ordered by the code official, and any person occupying a placarded premises is liable for penalties. 2009 IPMC § 108.5. This was the underlying authority of the City in effect on July 13, 2012 that made entering the building unlawful and a violation of RCW 9A.52.070. The code does not suggest that building owners are free to permit people to enter the premises to pick up clothing and sleep. *See* 2009 IPMC § 108.

Bezhenar cites *State v. Batten* to support his argument that he was in the building in good faith under a claim of right. Brief of Appellant 15. However, the holding merely permitted a defendant to assert such a claim as a defense for the jury to consider. *State v. Batten*, 20 Wn. App. 77, 80, 578 P.2d 896 (1978). Additionally, the Court held that the defendant "must not only believe he had a right to enter and remain, but have reasonable grounds for such belief." *Id*. Again, the argument that Bezhenar reasonably believed he had a right to enter the building would require viewing the facts and inferences in his favor and is not the proper standard.

Because the State sufficiently proved each element beyond a reasonable doubt, the trial court did not err in denying Bezhenar's motions to dismiss for insufficiency.

B. BEZHENAR RECEIVED EFFECTIVE ASSISTANCE FROM HIS TRIAL ATTORNEY THROUGHOUT HIS CASE.

Bezhenar's attorney provided competent and effective legal counsel throughout the course of his representation. Bezhenar asserts his trial counsel was ineffective for failing to argue and request a jury instruction on the reasonable belief defense to criminal trespass. Brief of Appellant 16-19. Bezhenar's attorney was not ineffective in any of the areas of his representation of Bezhenar. If Bezhenar's attorney was deficient in any way, Bezhenar cannot show he was prejudiced by his attorney's conduct and his ineffective assistance claim therefore fails.

1. Standard Of Review.

A claim of ineffective assistance of counsel brought on a direct appeal confines the reviewing court to the record on appeal and extrinsic evidence outside the trial record will not be considered. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995) (citations omitted).

2. Bezhenar's Attorney Was Not Ineffective During His Representation Of Bezhenar Throughout The Jury Trial.

To prevail on an ineffective assistance of counsel claim Bezhenar must show that (1) the attorney's performance was deficient and (2) the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 674 (1984); *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). The presumption is that the attorney's conduct was not deficient. *Reichenbach*, 153 Wn.2d at 130, *citing State v. McFarland*, 127 Wn.2d at 335. Deficient performance exists only if counsel's actions were "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. The court must evaluate whether given all the facts and circumstances the assistance given was reasonable. *Id.* at 688. There is a sufficient basis to rebut the presumption that an attorney's conduct is not deficient "where there is no conceivable legitimate tactic explaining counsel's performance." *Reichenbach*, 153 Wn.2d at 130.

If counsel's performance is found to be deficient, then the only remaining question for the reviewing court is whether the defendant was prejudiced. *State v. Horton*, 116 Wn. App. 909, 921, 68 P.3d

1145 (2003). Prejudice "requires 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *State v. Horton*, 116 Wn. App. at 921-22, *citing Strickland v. Washington*, 466 U.S. at 694.

a. Bezhenar was not entitled to a jury instruction on the reasonable belief defense to criminal trespass in the first degree.

To prevail on an ineffective assistance claim, the defendant must show that he was entitled to the instruction, counsel's performance was deficient in failing to request it, and the failure to request the instruction caused prejudice. *State v. Thompson*, 169 Wn. App. 436, 495, 290 P.3d 996 (2012). In this case, Bezhenar was not entitled to the instruction.

It is a defense to the charge of Criminal Trespass in the First Degree that a defendant reasonably believed the owner or other person empowered to license access to the premises would have licensed the defendant to enter or remain. RCW 9A.52.090; WPIC 19.06. Once a defendant has offered some evidence that his or her entry was permissible under RCW 9A.52.090, the prosecutor bears the burden to prove beyond a reasonable doubt that the defendant lacked license to enter. *City of Bremerton v. Widell*, 146 Wn.2d 561, 570 (2002). The present case offers an unusual situation where the

owner of the premises, by action of the City Building Department, was no longer empowered to license access to the premises. Bezhenar offered no evidence to suggest he reasonably believed the City of Centralia would have licensed him to enter the premises. Therefore, he was not entitled to the instruction. Even if his attorney had requested the instruction, it would not have been appropriate in this case.

b. If Bezhenar was entitled to a reasonable belief jury instruction, there is a strategic reason for his attorney to not request the instruction or argue the defense.

In a trial setting, if an attorney's conduct can be characterized as legitimate tactics or trial strategy the attorney's performance is not deficient. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). If an attorney's actions are trial tactics or the theory of the case the reviewing court will not find ineffective assistance of counsel. *Grier*, 171 Wn.2d at 33. Because there is a strong presumption that an attorney's performance in his or her representation of the client was reasonable, "[t]o rebut this presumption the defendant bears the burden of establishing the absence of any *conceivable* legitimate tactic explaining counsel's performance." *Id*. at 42. *Grier* goes on to state, "Although risky, an all or nothing approach was at least conceivably a legitimate trial strategy to secure an acquittal." *Id.*

Even if the court would have found Bezhenar was entitled to a jury instruction on reasonable belief, there was a conceivable, legitimate tactic for his attorney to not request the instruction and not argue the defense. At trial, Bezhenar's attorney argued that Bezhenar actually was entitled to enter the premises because he had his parents' permission and because he was only entering for a limited purpose. RP 364-66. It would be completely reasonable for Bezhenar's attorney to decide that arguing reasonable belief in the alternative would make his primary argument look weaker, and that taking a firmer, all or nothing approach, would be more effective. "That this strategy ultimately proved unsuccessful is immaterial to an assessment of defense counsel's initial calculus; hindsight has no place in an ineffective assistance analysis." *Grier*, 171 Wn.2d at 43. Because it was a reasonable trial tactic, Bezhenar has not made the required showing that his attorney's performance was deficient and his ineffective assistance claim fails. This Court should affirm Bezhenar's conviction.

3. If Bezhenar's Attorney Is Found To Be Deficient, Bezhenar Has Not Met His Burden To Show That He Was Prejudiced By The Deficient Performance Of His Attorney.

The State maintains that Bezhenar's attorney's performance was not deficient. Arguendo, if this Court were to find Bezhenar's

attorney's performance deficient, Bezhenar has not met his burden to show he was prejudiced.

Bezhenar must show that, but for his attorney's error for failing to request WPIC 19.06, and arguing a reasonable belief defense, the jury would have found Bezhenar not guilty. *See Horton*, 116 Wn. App. at 921-22. Bezhenar cites *State v. Kyllo*, 166 Wn.2d 856, 215 P.3d 177 (2009) and *State v. Powell*, 150 Wn. App. 139, 206 P.3d 703 (2009) to argue that his attorney's failure to propose the instruction and argue the defense prejudiced him. Brief of Appellant 16-19.

In *Kyllo*, the defense attorney proposed and argued an erroneous jury instruction that lowered the State's burden. 166 Wn.2d at 863-64.The Court found there was no conceivable strategy to proposing defective instructions that lower the State's burden and there was a reasonable probability the trial outcome would have been different but for the attorney's deficient performance. *Id*. at 869-70. The present case can be distinguished from *Kyllo* because Bezhenar's attorney did not present or argue an erroneous jury instruction and he did not argue in a way to lower the State's burden. *See* CP 114-27; RP 363-66, 369.

In *Powell*, the defendant's attorney failed to propose a jury instruction on the reasonable belief affirmative defense to the charge of second degree rape. 150 Wn. App. at 155. The Court found that without the reasonable belief instruction, it would have appeared to the jury that it had no option but to convict the defendant if it found beyond a reasonable doubt that he had sexual contact with an incapacitated victim, regardless of whether it also found that the defendant reasonably believed she had consented. *Id*. 156-57. The Court found that the absence of the instruction essentially nullified Powell's defense. *Id*. at 157.

One of the primary reasons to distinguish this case from *Powell* is because Rape in the Second Degree does not require proof of the existence of any mental state. *State v. Walden*, 67 Wn. App. 891, 895, 841 P.2d 81 (1992). It is only once the "reasonable belief" defense is raised, that the defendant's mental state, what he believed at the time, becomes an issue. RCW 9A.44.030(1). However, Criminal Trespass does require evidence of mental state within the State's burden of proof. The State has to prove that the entry was made knowingly and also that the defendant knew the entry was unlawful. RCW 9A.52.070(1). Unlike in *Powell*, arguing a reasonable belief defense without specifically including the instruction does not

nullify the defense. The defense in the present case negates an element of the offense rather than raising an affirmative defense, i.e., arguing that the conduct should be pardoned "even though it violates the literal language of the law." *State v. Riker*, 123 Wn.2d 351, 368, 869 P.2d 43 (1994).

Here, the jury was told in the to convict instruction that in order to find Bezhenar guilty of Criminal Trespass in the First Degree, they needed to find beyond a reasonable doubt that he "knew that the entering or remaining was unlawful." CP 145. Juries are presumed to follow the court's instructions. *State v. Warren*, 165 Wn.2d 17, 29, 195 P.3d 940 (2008). While defense counsel did not specifically argue using the language of the reasonable belief defense, he still argued that this element was negated because Bezhenar was there lawfully or that the State couldn't prove beyond a reasonable doubt that Bezhenar entered without lawful authority. RP 364-66. Had the jury believed that Bezhenar reasonably thought he had permission to be in the building, or if the jury even had reasonable doubt as to Bezhenar's knowledge, this element would not have been met, and the jury would have found Bezhenar not guilty. However, the jury did find Bezhenar guilty of Criminal Trespass in the First Degree. CP 159. This means that the jury found each element of the crime was

proven beyond a reasonable doubt. The jury found beyond a reasonable doubt that Bezhenar "knew that the entering or remaining was unlawful."

Although the jury did not specifically receive an instruction on the statutory defense, it was still allowed to consider whether Bezhenar knew or didn't know the entry was unlawful.

Even if the trial court gave WPIC 19.06, and Bezhenar's attorney argued that he reasonably believed he was licensed to enter the building, the jury still would have found Bezhenar guilty of Criminal Trespass in the First Degree. Bezhenar's ineffective assistance of counsel argument fails as he was not prejudiced by his attorney's performance and this Court should affirm the conviction.

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IV. CONCLUSION

The State presented sufficient evidence to sustain Bezhenar's conviction for Criminal Trespass in the First Degree, and the trial court did not err in denying his motion to dismiss for insufficiency. Bezhenar received effective assistance of counsel from his attorney throughout the trial. This Court should affirm Bezhenar's conviction.

RESPECTFULLY submitted this 18th day of May, 2016.

JONATHAN L. MEYER
Lewis County Prosecuting Attorney

by:_____
JESSICA L. BLYE, WSBA 43759
Attorney for Plaintiff

COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent, vs. RUSLAN BEZHENAR, Appellant.	No. 47968-1-II DECLARATION OF SERVICE

Ms. Teri Bryant, paralegal for Jessica L. Blye, Deputy Prosecuting Attorney, declares under penalty of perjury under the laws of the State of Washington that the following is true and correct: On May 18, 2016, the appellant was served with a copy of the **Respondent's Brief** by email via the COA electronic filing portal to Peter Tiller, attorney for appellant, at the following email address: slong@tillerlaw.com.

DATED this 18th day of May, 2016, at Chehalis, Washington.

Teri Bryant

Teri Bryant, Paralegal
Lewis County Prosecuting Attorney Office

LEWIS COUNTY PROSECUTOR

May 18, 2016 - 1:11 PM

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