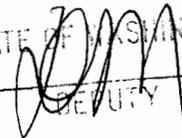


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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY 
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NO. 36802-1-II

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

STATE OF WASHINGTON,
Respondent,

v.

ANTHONY S. HELLER,
Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR GRAYS HARBOR COUNTY

THE HONORABLE, JUDGE F. MARK MCCAULEY

BRIEF OF RESPONDENT

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TABLE

Table of Contents

ISSUES PRESENTED 1

 1. May the trial court grant a good cause continuance due to the
 unavailability of a prosecutor? 1

 2. Was inclusion of Jury Instruction number 11 harmless error? 1

 3. Was the evidence sufficient to convict Heller? 1

 4. Did Heller receive effective representation? 1

STATEMENT OF THE CASE 1

ARGUMENT 6

 1. The trial court's granting of a continuance due to the
 unavailability of the prosecutor was not an abuse of discretion 6

 2. Jury Instruction number 11's inclusion of the "unless" language
 was harmless error 13

 3. The evidence was sufficient to support Heller's conviction . 19

 4. Defense counsel's performance was not ineffective 22

CONCLUSION 26

TABLE OF AUTHORITIES

Table of Cases

Brown v. United States, 411 U.S. 223, 231, 93 S.Ct. 1565 (1973) ... 16

Parker v. Randolph, 442 U.S. 62, 70-71, 99 S.Ct. 2132 (1979) 16

Strickland v. Washington, 466, U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d
674 (1984) 23, 24, 25

<i>In the Matter of the Personal Restraint Petition of Pirtle</i> , 136 Wn.2d 467, 965 P.2d 593 (1998)	23
<i>State v. Alvarez</i> , 105 Wn.App. 215, 19 P.3d 485 (2001)	20
<i>State v. Bergeron</i> , 105 Wn.2d 1, 711 P.2d 1000 (1985)	21
<i>State v. Brown</i> , 147 Wash.2d 330, 341, 58 P.3d 889 (2002)	15
<i>State v. Camarillo</i> , 115 Wn.2d 60, 794 P.2d 850 (1990)	20
<i>State v. Cantu</i> , 156 Wash.2d 819, 132 P.3d 725 (2006)	14, 15, 16
<i>State v. Carson</i> , 128 Wash.2d 805, 912 P.2d 1016 (1996).	7
<i>State v. Chichester</i> , 141 Wn.App. 446, 170 P.3d 583 (2007) ...	7, 8, 11
<i>State v. Damon</i> , 144 Wash.2d 686, 25 P.3d 418 (2001)	18
<i>State v. Deal</i> , 128 Wash.2d 693, 911 P.2d 996 (1996) ...	13, 14, 15, 16
<i>State v. Downing</i> , 151 Wash.2d 265, 87 P.3d 1169 (2004)	6, 7
<i>State v. Hanna</i> , 123 Wash.2d 704, 871 P.2d 135 (1985)	14
<i>State v. Jackson</i> , 112 Wn.2d 867, 774 P.2d 1211 (1989).	14
<i>State v. Jones</i> , 117 Wash.App. 721, 72 P.3d 1110 (2003)	7
<i>State v. Partin</i> , 88 Wn.2d 899, 567 P.2d 1136 (1977)	19
<i>State v. Raper</i> , 47 Wash.App. 530, 736 P.2d 680 (1987)	7
<i>State v. Robinson</i> , 138 Wash.2d 753, 982 P.2d 590 (1999)	24, 25
<i>State v. Stenson</i> , 132 Wn.2d 668, 940 P.2d 1239 (1997), cert. Denied 523 U.S. 1008 (1998)	22, 24
<i>State v. Thomas</i> , 150 Wn.2d 821, 874 P.3d 970 (2004)	20
<i>State v. Thomas</i> , 109 Wn.2d 222, 743 P.2d 816 (1987)	22
<i>State v. Watt</i> , 160 Wash.2d 626, 160 P.3d 640 (2007)	18

STATUTES

RCW 9A.52.040 13
RCW9A.52.030 20

COURT RULES

CrR 3.3(d)(8) 7

ISSUES PRESENTED

1. May the trial court grant a good cause continuance due to the unavailability of a prosecutor?
2. Was inclusion of Jury Instruction number 11 harmless error?
3. Was the evidence sufficient to convict Heller?
4. Did Heller receive effective representation?

STATEMENT OF THE CASE

On January 7, 2007 at approximately 7:30 p.m., Jaramie Smith saw a vehicle entering the apartment complex parking lot when it was dark.¹ The vehicle shut off its headlights and pulled into the apartment complex parking lot very slowly.² According to the testimony of Mr. Fuller, the defendant sat in his vehicle with the lights off, slowly backed up when Mr. Fuller walked by and then pulled back in and continued to sit in his vehicle.³ Mr. Smith saw a man get out of the vehicle after three minutes.⁴ The man walked between the two apartments to the laundry room.⁵ Mr. Smith then heard banging noises coming from the laundry room.⁶ Mr.

¹RP July 17, 2007, pg. 23, ln. 24-25; pg. 53, ln. 7-9.

²RP July 17, 2007, pg. 36, ln. 24-25; pg. 37, ln. 7-9; pg. 40, ln. 4-10.

³RP July 17, 2007, pg. 58, ln. 19-25.3; pg. 60, ln. 9-14.

⁴RP July 17, 2007, pg. 38, ln. 16; pg. 39, ln. 11-13.

⁵RP July 17, 2007, pg. 40, ln. 14-15.

⁶RP July 17, 2007, pg. 41, ln. 8-11; pg. 42, ln. 4-6.

Smith went down to the laundry room, an external building, and saw the front door was locked. Mr. Smith walked to the back of the laundry room and saw the man hanging half in the back window of the laundry room.⁷ Mr. Smith confronted the man who pulled himself out of the window, looked at Mr. Smith, dropped something and took off running.⁸ The man arrested by police that night was the same man Mr. Smith saw hanging half in the back window of the laundry room, the defendant.⁹

The then property manager of the building, Ms. Lawrance, testified the defendant was not nor had he ever been a tenant of the apartment buildings and did not have permission to access the laundry room at the apartment buildings.¹⁰ Inside the laundry room were two coin-operated machines.¹¹ Officer Wheeler located the defendant walking later that evening wearing a blue baseball style hat, black jacket and blue jeans.¹² The defendant told Officer Wheeler he was walking from 1015 Oakhurst Drive.¹³ The laundry room was located at 101 North B. Street, a different

⁷RP July 17, 2007, pg. 42, ln. 4-10; pg. 43, ln 2-12.

⁸RP July 17, 2007, pg. 42, ln. 10-13; pg. 43, ln 5-6.

⁹RP July 17, 2007, pg. 46, ln. 1-16.

¹⁰RP July 17, 2007, pg. 64, ln 25, pg. 65, ln. 1-5; pg. 66, ln. 7-11.

¹¹RP July 17, 2007, pg. 71, ln. 14-17, ln. 24.

¹²RP July 17, 2007, pg. 74, ln 18-25.

¹³RP July 17, 20007, pg. 46, ln 14-15.

location that 1015 Oakhurst Drive.¹⁴ After arresting the defendant, Officer Wheeler observed several miscellaneous tools inside the vehicle.¹⁵

On January 9, 2007, Officer Rios of the Elma Police Department obtained a statement from Raymond Fuller. In Fuller's statement he said that on January 7, 2007, he saw a man sitting in the driver's seat of a vehicle with the lights off and the motor running in the parking lot of the 101 North B Street Apartments. Fuller said the man started to back out and when Fuller went up the stairs to his apartment, the man pulled back in and parked in front of the laundry room. A short time later, Fuller heard yelling and went outside to see his neighbor chasing the man through the backyard. When stopped by Officer Wheeler on January 7, 2007, the defendant told Officer Wheeler he was visiting a friend in at Woodsvilla Apartments and went for a walk.

Heller's wife, Cindy Miles, testified that the defendant was driving her vehicle on January 7, 2007 and that there were tools in the back. Miles said there were tools in the back of the car because Heller works on cars and is a sheet metal worker.¹⁶ Heller testified he drove the vehicle to a friend's house where he had some beers¹⁷. He then went into Elma to get

¹⁴RP July 17, 2007, pg. 76, ln. 16-25, pg. 77, ln. 1-19.

¹⁵RP July 17, 2007, pg. 80, ln 11-14.

¹⁶RP July 17, 2007, pg. 106, ln. 3-22.

¹⁷RP July 17, 2007, pg. 109, ln. 3-5.

gas for his car because he couldn't make it home.¹⁸ However, Heller needed to go to the bathroom so he drove past one gas station because he saw a police officer there and Heller's license was suspended.¹⁹ Heller went over the viaduct, turned the corner, pulled into an alley and into the apartment parking lot.²⁰ There were five or six people on the balconies and someone taking out the trash.²¹ Heller turned off his lights and coasted into the parking lot. Heller waited in his car until everyone went inside and then he went to the side of the building to go to the bathroom.²² Heller was relieving himself beside the building when he leaned up on the window and it popped out open.²³ Heller testified that Mr. Smith came around the corner, and appeared to be holding something in his hand, and asked Heller what he was doing. Heller said he hesitated, saw what looked like something in Smith's hand and then ran.²⁴ Heller was later stopped by the police officer and lied about where he'd been because he had been drinking and his license was suspended.²⁵ Heller testified the car

¹⁸RP, July 17, 2007, pg. 115, ln. 6-9.

¹⁹RP, July 17, 2007, pg. 115, ln. 11-13.

²⁰RP, July 17, 2007, pg. 110, ln. 1-4.

²¹RP, July 17, 2007, pg. 110, ln 4-6.

²²RP, July 17, 2007, pg. 110, ln. 7-24.

²³RP, July 17, 2007, pg. 110, ln. 23-25; pg. 111, ln. 23-25.

²⁴RP, July 17, 2007, pg. 112, ln. 14-22.

²⁵RP, July 17, 2007, pg. 113, ln. 2-8.

he had been driving contained screwdrivers.²⁶

On cross-examination Heller testified that to get from his friend's house to the apartment building Heller passed two gas stations, one of which had a police officer parked there.²⁷ Heller testified he turned off his lights because he didn't want them to shine in the eyes of Mr. Fuller.²⁸ Heller testified he tried to pull the window back on but stopped when Mr. Smith confronted him. Heller testified no part of his body went inside the window while he was trying to close the window.²⁹ Heller testified he had on a light blue baseball cap but no dark jacket.³⁰ Heller testified the officer was mistaken about where he stopped Heller.³¹

Heller was arraigned on January 29, 2007. On March 27, 2007 Heller filed a Motion to Dismiss. The State filed a response on April 2, 2007, the matter was heard on April 4, 2007 and the Motion to Dismiss was denied. On April 5, 2007 Heller filed a Motion to Reconsider and a Motion for Bill of Particulars. On April 10, 2007, at the Pretrial Hearing, Heller filed a waiver of time for trial indicating the last available date for trial was July 10, 2007. Also on that date, Heller's Motion to Reconsider

²⁶RP, July 17, 2007, pg. 113, ln. 18-21.

²⁷RP, July 17, 2007, pg. 115, ln. 11-24.

²⁸RP, July 17, 2007, pg. 116, ln. 3-15.

²⁹RP, July 17, 2007, pg. 118, ln. 2-13.

³⁰RP, July 17, 2007, pg. 118, ln. 14-23.

³¹RP, July 17, 2007, pg. 119, ln. 20-25; pg. 120, ln. 1-4.

was denied and the Motion for Bill of Particulars was granted. On April 11, 2007 the Grays Harbor Court Administrator set the matter for trial on June 19, 2007. On April 20, 2007 the State filed a Bill of Particulars. The State filed a Motion for continuance on May 29, 2008 setting forth the unavailability of a prosecutor due to the absence of five prosecutors from the office for training during the week of trial as the basis for the request. The State's motion for continuance for good cause was granted on May 29, 2007 and the trial was continued to July 17, 2007, just 7 days after the expiration of the time for trial according to the waiver. A Jury Trial was held on July 17, 2007 and the defendant was found guilty of Burglary in the Second Degree. The defendant was sentenced on September 24, 2007 and a Notice of Appeal was filed on August 27, 2007.

ARGUMENT

1. **The trial court's granting of a continuance due to the unavailability of the prosecutor was not an abuse of discretion.**

A continuance may be granted upon motion of either party if good cause is shown and the defendant is not substantially prejudiced by the continuance. The decision to grant or deny a continuance rests within the sound discretion of the trial court and is reviewed for abuse of discretion.³²

It has been "continuously held that unavailability of counsel may

³²*State v. Downing*, 151 Wash.2d 265, 272-73, 87 P.3d 1169 (2004).

constitute unforeseen or unavoidable circumstances to warrant a trial extension under CrR 3.3(d)(8)".³³ The trial court's decision to grant or deny a continuance shall not be disturbed by reviewing courts unless the appellant makes a clear showing that the trial court's decision was manifestly unreasonable or exercised on untenable grounds or for untenable reasons.³⁴ Unavailability of the prosecutor due to illness, a prescheduled vacation, training, or an already started trial have been recognized as good cause for a continuance unless there is substantial prejudice to the defendant in the presentation of his defense.³⁵

Heller was arraigned on January 29, 2007.³⁶ On April 10, 2007 the defendant filed a waiver of time for trial indicating the last available date for trial was July 10, 2007 and the Grays Harbor Court Administrator set the matter for trial on June 19, 2007. The State filed a Motion for continuance on May 29, 2008 setting forth the unavailability of a prosecutor due to the absence of numerous prosecutors from the office for training during the week of trial as the basis for the request.³⁷ The State's motion for continuance for good cause was granted on May 29, 2007 and

³³*State v. Carson*, 128 Wash.2d 805, 912 P.2d 1016 (1996).

³⁴*State v. Downing*, 151 Wash.2d at 272.

³⁵*State v. Chichester*, 141 Wn.App. 446, 454, 170 P.3d 583 (2007) citing *State v. Raper*, 47 Wash.App. 530, 535, 736 P.2d 680 (1987); *State v. Jones*, 117 Wash.App. 721, 728-29, 72 P.3d 1110 (2003).

³⁶CP 10.

³⁷CP 53.

the trial was continued to July 17, 2007.

Appellant argues that the trial court should have denied the State's motion to continue because the facts in the present case are the same as that in *Chichester* and therefore the trial court below lacked good cause to grant a continuance.³⁸ This is not the holding of *Chichester*. In *Chichester*, Division I held that the training and other conflicts of the prosecutor's office did not "compel the granting of a continuance".³⁹ Thus affirming that the decision to grant or deny a request for a continuance on these grounds still falls squarely within the discretion of the trial court.⁴⁰ *Chinchester* did not hold that training and other conflicts of the prosecutor's office could not be good cause for a continuance and the facts in the present case are distinct from those present in *Chinchester*.

In *Chichester* the court's trial calendar was set the week before trial and following that setting the State informed the court it was unavailable. In the present case the matter was set on for pre-trial conference three weeks prior to trial. At that time Heller's counsel told the court "We're going to prepare paperwork. We're ready for trial. Trial is set for June 19th."⁴¹ The State said "correct".⁴² Later during that same

³⁸Appellant's Brief, pg. 7.

³⁹*State v. Chichester*, 141 Wn.App.at 454.

⁴⁰*State v. Chichester*, 141 Wn.App. 446.

⁴¹RP May 29, 2007, pg. 33.

⁴²RP May 29, 2007, pg. 33.

docket the State recalled the matter and told the court:

We thought we were going to be able to enter an agreed order. This matter was set for trial on June 19th, and I'm going to be out of the state, going to training in South Carolina that entire week, and unfortunately also five of our deputy prosecutors will also be in training. Their July training is that week, so we have a limited number of attorneys available to try cases. I spoke with Ms. Svoboda. She has a case set that week which she has every anticipation is going to be going.⁴³

The State then asked the court for a continuance. As indicated in the proceedings there was a great deal of discussion between the State and the defense regarding moving the trial date. The state had previously informed defense counsel a continuance was needed. This is reflected in both the State's motion for a continuance and the proceedings on May 29, 2007.⁴⁴ The parties attempted to find an agreed date for re-setting the trial and spoke with the court administrator who assigns trial dates to avoid court congestion and were unable to find an agreeable date prior to the expiration of speedy trial. In addition to the State's trainings there were conflicts with other dates due to the court's other trials and the defense counsel's other trials.⁴⁵ When no agreement could be reached by

⁴³RP May 29, 2007, pg. 2.

⁴⁴CP 53, RP May 29, 2007, pg. 2.

⁴⁵RP May 29, 2007, pg. 2 "I spoke with the court administrator, and she was unable to move it to the 12th. The 26th is set extremely heavy, so we're asking it be continued. I filed a motion asking it be continued until the 10th. My understanding from Mr. Clapperton, that date isn't good for him. He has another trial. So I guess at this point I'd ask that the Court find good cause due to unavailability of the State for this trial date and continue the matter to July 17th for trial."

the parties, the matter was recalled and the State moved for a good cause continuance. The motion was granted and the case was continued. At no time did the State file a pre-trial memorandum indicating it was prepared to proceed to trial on June 19, 2007. The facts in the present case are distinct from those present in *Chichester*.

Appellant second argues that there was not good cause for the continuance because the prosecutor could have not attended the training.⁴⁶ The fact that other arrangements could have been made does not mean the court acted beyond its discretion. Good cause does not require that the basis for the continuance be irreversible. Had the request for a continuance been denied, the State could have declined training. That is not the issue. A court does not abuse its discretion when it grants a continuance simply because the State's motion was filed with sufficient time to make other arrangements if the continuance was denied.⁴⁷

There was good cause for the continuance. The unavailability of the prosecutor due to training may be good cause and in this case the continuance was granted in light of not just the unavailability of one prosecutor due to training, but five additional prosecutors and that an additional prosecutor had a trial set to go the same day as well as the court calendar with other trial settings and judge availability and the trial

⁴⁶Brief of Appellant, pg. 7.

⁴⁷Brief of Appellant, pg. 7.

schedule of the defense counsel and the work schedule of the defendant.⁴⁸ The decision to grant a good cause condition was reasonable and strongly supported by the record before this Court and should not be overturned.

The defendant was not prejudiced by the continuance. The continuance was granted three weeks prior to trial and, as indicated in the report of proceedings, due to the defendant's unavailability a date beyond the expiration of speedy was granted. Appellant argues there is greater prejudice than that in *Chichester* because the trial in this case was granted beyond the expiration of Heller's speedy trial date.⁴⁹ The trial in *Chichester* was not set outside the time for speedy because the request for a continuance was not granted.⁵⁰ The fact a trial is set past the expiration of the time for trial does not constitute prejudice.

The requirement the defendant make additional arrangements is an appropriate consideration of the court. That is not to say, however, that the mere fact the defendant must change his work schedule or travel is per se prejudicial. While the court in *Chichester* found the defendant to be prejudiced by his travel arrangements, this was the day of trial when the defendant made a motion to dismiss once the State announced it was not ready to proceed.⁵¹

⁴⁸RP May 29, 2007, Pg. 2-3.

⁴⁹Brief of Appellant, pg. 8.

⁵⁰*State v. Chichester*, 141 Wn.App. 446.

⁵¹*Id.*

The trial court in the present case did not find the defendant was prejudiced and the motion was made far before the day of trial.

THE COURT: I believe there's good cause for the matter, and we can only accommodate as many trials as we have lawyers who are available and courtrooms and judges who are available. I would try to do your client at a later date if he desires because I would like to accommodate his schedule. We just can't do it any sooner. I think the constitution works both ways. Both sides get their day in court.

THE DEFENDANT: Your Honor, I had to give up classes I was going through my union to make court dates to come down here.

THE COURT: That's why I'd be more than willing to any other time. I'm trying to coordinate everything. I understand we all have schedules, and I realize you've been inconvenienced, and for that I would apologize, but I've got a job to do just like you. So, if there's a time later on that interferes with this gentleman, go get a better date. I don't want him to lose any more time or be any more inconvenienced than he already has been. It's a two-way street. So why don't you go ahead. I'm going to order the change.

With that in mind, Mr. Heller, if you want to figure something

THE DEFENDANT: Can we have it this week? Because I've taken off days from work. I'm going to lose my job if I keep taking off days.

THE COURT: Mr. Heller I can't do you any sooner, sir. If I could, I'd order it in an hour, but I can't. I'm more than willing to accommodate you. I've asked you to look at your calendar at a later time frame so we can get it in there. I don't want you to lose your job. That's why I'm offering you that extension.⁵²

The court recognized that re-scheduling the trial was inconvenient and,

⁵²RP May 29, 2007, pg. 3.

given concerns of availability of the State, the defense counsel, and the court, the court continued the matter beyond the expiration of the time for trial. The defendant was not prejudiced by this continuance which was granted with sufficient time for the defendant to make arrangements to be present at the new trial and with direct order of the court that the new trial date accommodate the defendant's work. The Court did not abuse its discretion, the grounds supporting the continuance were reasonable and well-founded and the continuance did not result in substantial prejudice to the defendant.

2. Jury Instruction number 11's inclusion of the "unless" language was harmless error.

The Supreme Court held in *State v. Deal* that RCW 9A.52.040's language, "unless such entering or remaining shall be explained by evidence satisfactory to the jury to have been made without criminal intent" violated the due process clause by impermissibly shifting the burden of persuasion to the defendant.⁵³ As a constitutional issue, the court should examine the effect of the error on the trial according to the harmless error standard.⁵⁴

Appellant first argues the trial court erred in including the inference instruction. The State presented evidence sufficient to allow the

⁵³*State v. Deal*, 128 Wash.2d 693, 701-04, 911 P.2d 996 (1996).

⁵⁴*State v. Deal*, 128 Wash.2d at 703.

inference instruction. When a permissible inference is only part of the proof supporting an element, the State need only show the presumed fact more likely than not flows from the proven fact. When the inference is the sole and sufficient proof of an element, the reasonable doubt standard applies.⁵⁵ The analysis is done on a case-by-case basis and considered in light of the particular evidence presented by the State.⁵⁶

If the defendant's conduct is consistent with attempted burglary or malicious mischief, the inference instruction is not proper.⁵⁷ But, as here, where the State presents evidence of actual entry or unlawfully remaining in the building, the inference instruction is proper.⁵⁸ The State did not merely present evidence of an attempt to enter the building and then fleeing the location as in *Jackson*. The State presented evidence the defendant actually entered into the laundry room and that he pushed open a window to do so. The State also presented evidence Heller wore dark clothing and a baseball cap, that he turned off his headlights as he entered the parking lot, that he waited to exit his vehicle until the tenants were inside and that he had tools inside the vehicle. The State further presented evidence the defendant fled from the scene when confronted by Mr. Smith and, when arrested by Officer Wheeler, the defendant told Officer Wheeler

⁵⁵*State v. Deal*, 128 Wash.2d at 699-700.

⁵⁶*State v. Hanna*, 123 Wn.2d 704, 712, 871 P.2d 135 (1994).

⁵⁷*State v. Jackson*, 112 Wn.2d 867, 870, 774 P.2d 1211 (1989).

⁵⁸*State v. Cantu*, 156 Wash.2d 819, 826, 123 P.3d 725 (2006).

he was walking from a completely different location. The inference instruction was proper.

The inclusion of the “unless” language was harmless error. Pursuant to *State v. Deal*, the inclusion of the “unless” language in the instruction was a Constitutional error. However, the error may be harmless if the reviewing court is convinced beyond a reasonable doubt that the jury would have reached the same result in absence of the error.⁵⁹ The inference itself is a permissive inference. It “permits the trier of fact to reject the inferred conclusion of criminal intent *regardless* of whether the defendant provides an innocent explanation of the unlawful entry or not”.⁶⁰

Appellant argues that because Heller testified he was relieving himself behind the building, a reasonable jury could have concluded Heller did not intend to commit a crime inside the building and therefore the error was not harmless.⁶¹ However, the fact that the defendant did or did not present evidence indicating a non criminal intent is not dispositive. The uncontroverted evidence test applies only when an element is missing or misstated in a to-convict instruction.⁶²

⁵⁹*State v. Deal*, 128 Wash.2d at 703.

⁶⁰*State v. Cantu*, 156 Wash.2d at 829, *citing State v. Deal*, 128 Wash.2d at 702-03.

⁶¹Brief of Appellant, pg. 13.

⁶²When an element is missing or misstated, that error is harmless only when the element is undisputed. *State v. Brown*, 147 Wash.2d 330, 341, 58 P.3d 889 (2002).

This court should apply the overwhelming untainted evidence test in determining whether or not error was harmless. Under the overwhelming untainted evidence test the reviewing court looks only at the untainted evidence, as opposed to unrefuted evidence, and determines if the untainted evidence is so overwhelming it necessarily leads to a finding of guilt.⁶³

In *Deal*, the defendant's own testimony established he unlawfully remained on the premises and intentionally assaulted the victim. The Court concluded the jury would have convicted the defendant even if an improper instruction had not been given.⁶⁴ In *Cantu*, a bench trial, the Court relied upon the closing argument of the State and on the statements of the judge in finding the error to not be harmless because the State told the court inference was permitted but then went on to tell the court the inference had "not been rebutted, nor has there been any explaining that [Cantu] didn't go in without the intent to commit a crime."⁶⁵ The record in *Cantu* reflects a burden on the defendant to disprove the inference.

Clearly the facts in this case are not the same as in *Deal* because Heller's testimony did not admit that he entered the building or intended to commit a crime therein. Unlike *Cantu*, the arguments of the parties to the

⁶³See eg. *Parker v. Randolph*, 442 U.S. 62, 70-71, 99 S.Ct. 2132 (1979); *Brown v. United States*, 411 U.S. 223, 231, 93 S.Ct. 1565 (1973).

⁶⁴*State v. Deal*, 128 Wash.2d at 703.

⁶⁵*State v. Cantu*, 156 Wash.2d at 828.

jury properly informed the jury that the intent to commit a crime was an inference they could make but that they did not have to and the defendant had absolutely no burden .⁶⁶

This Court must determine whether there is overwhelming untainted evidence to prove Heller's intent. The defendant's testimony disputed that he had attempted to enter the building but admitted that he entered the parking lot while it was dark, that he turned off his headlights and parked and waited before exiting his vehicle until Mr. Fuller had gone inside. The defendant also admitted he fled the scene when Mr. Smith confronted him and that he told Officer Wheeler he had been walking from a different location when he was stopped. Heller's wife also testified there

⁶⁶RP July 17, 2007, pg. 124, ln. 22-25, "THE COURT: I'm going to stick with my decision. I still think there's substantial evidence to allow that inference. Not that the jury will make it but they have the right to make it if they want to."

RP July 17, 2007, pg. 129, ln. 23-25; pg. 130, ln. 1-7, "MS. VALENTINE: . . . "What you have to ask yourself is, why did he go into that building? Did he intend to commit a crime? Did he intend to get out of his car, go in through that window to see if he could steal out of those coin-operated laundry machines? If he wanted a tool, he could have gone out the door and gotten it. He had tools in this car. But he got caught. He didn't expect to get caught, and he ran away when he got caught because he knew what everybody in this courtroom knows today, that he went in there to commit a crime."

RP July 17, 2007, pg. 141, ln. 13-25, pg. 142, ln. 1, "MR. CLAPPERTON: . . . "We're the defense. We don't have to prove anything beyond a reasonable doubt. We don't have to prove beyond a reasonable doubt that he didn't intend. They have to prove that.

Now, if you think there's beyond a reasonable doubt that he must have entered, then you can use this. You don't think beyond a reasonable doubt, you can't - - this instruction may not be used by you. You don't have to use this. You can't come along and say, Well, I think he was in, and so since he was, he's automatically - - we can automatically go ahead and say there must have been a criminal - - you don't have to use that instruction. You may use it. And we don't have to prove the negative beyond a reasonable doubt."

were tools located in the vehicle. The evidence is untainted and overwhelmingly proves Heller intended to commit a crime such that any reasonable jury would have found Heller guilty.

Appellant points to the factual disputes to prove that the jury would not have found Heller guilty, such as the fact Heller testified he was “relieving himself” when Mr. Smith confronted him and Mr. Smith testified Heller was halfway inside the window to the laundry room. Heller contradicted Mr. Smith’s testimony that Heller entered the building and dropped something. Heller contradicted Officer Wheeler’s testimony that Heller was wearing a dark jacket and what direction he was walking. “Evidence controverting the State’s case and presenting a viable defense theory suggests that an error is not harmless.”⁶⁷ However, the issue is not whether a defense theory was presented but whether the facts to be proved are reasonably subject to dispute.

The only facts to be proved affected by the “unless language” are whether or not the defendant intended to commit a crime inside the building. Even excluding the disputed items from Smith and Wheeler’s testimony, the evidence of Heller’s intent is still overwhelming. Heller entered the parking lot while it was dark and turned off his headlights. The parking lot was accessible only through an alley, off of a road connecting two main roads. Heller parked and waited before exiting his

⁶⁷*State v. Watt*, 160 Wash.2d 626, 639, 160 P.3d 640 (2007), *citing State v. Damon*, 144 Wash.2d 686, 695, 25 P.3d 418 (2001).

vehicle until Mr. Fuller had gone inside. Heller was wearing a baseball cap and went directly to the rear of the laundry room building. Heller disturbed the window to the laundry room and was subsequently confronted by Mr. Smith. Heller fled the scene when Mr. Smith confronted him, leaving the vehicle behind. Heller was contacted walking a short time later by Officer Wheeler. Heller told Officer Wheeler he had come from a different location than the apartments from which Heller had fled. Heller and his wife also testified there were tools inside the vehicle brought to the location by Heller. Heller knew no one at the apartment building where he stopped.

The untainted evidence proves the defendant was intended to commit a crime against persons or property therein beyond a reasonable doubt. However, If this Court finds the error was harmful, the State respectfully requests this court remand this matter for a new trial.

3. The evidence was sufficient to support Heller's conviction.

When the sufficiency of evidence is challenged in a criminal case, the reviewing court must draw all reasonable inferences from the evidence in favor of the State.⁶⁸ The credibility determinations of the jury are not subject to review and a sufficiency of the evidence claim admits the truth

⁶⁸*State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977).

of the State's evidence.⁶⁹ In order to prove Burglary in the Second Degree under RCW9A.52.030, the State had to show that Heller entered or remained unlawfully in a building and that he intended to commit a crime against persons or property therein. The evidence was sufficient to support Heller's conviction.

Appellant argues that there was insufficient evidence Heller entered the laundry room and absolutely no evidence presented to suggest that Heller intended to commit a crime inside the laundry room.⁷⁰ To the contrary, the evidence presented at trial shows Heller entered the laundry room. At trial there was testimony that a portion of the defendant's body entered the laundry room through the window.⁷¹ This was established not just by testimony presented by the State but also through the descriptions of the pushed open window.⁷²

The State presented evidence sufficient to prove the defendant intended to commit a crime against persons or property inside the laundry room. Appellant argues that tools would be required to break into the two

⁶⁹*State v. Thomas*, 150 Wn.2d 821, 874 P.3d 970 (2004) citing *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990); *State v. Alvarez*, 105 Wn.App. 215, 223, 19 P.3d 485 (2001).

⁷⁰Appellant's Brief, pg. 15.

⁷¹RP July 17, 2007, pg. 43, "All I seen was the windowsill on his chest. I don't know if he was going in or coming out. All I remember is seeing him halfway through the window. The windowsill right here on his chest, and I said, What are you doing? All of a sudden he pulled himself out of the window, looked at me, dropped when he had and took off running".

⁷²RP July 17, 2007, pg. 110, "I was relieving myself, and I leaned up on the window, and the window popped out open."

coin operated machines inside the laundry room but that there were no tools found inside or outside the laundry room and therefore no evidence the defendant intended to commit a crime against persons or property inside the laundry room.⁷³ The particular facts which may be used to prove intent, such as carrying tools or possessing stolen property, are not prerequisites for proving intent. Any set of facts which establish intent are sufficient. The jury may infer from all the facts and circumstances surrounding the defendant's conduct the defendant's intent if plainly indicated as a matter of logical probability.⁷⁴

Assuming the truth of the State's evidence, the evidence is sufficient to prove the defendant intended to commit a crime inside the building. Prior to entering the laundry room, Heller entered the parking lot of an apartment building, where he was not a resident. It was dark outside but Heller turned off his headlights when he entered the parking lot. After turning off his headlights, Heller drove slowly into and parked in the parking lot. Heller waited inside his vehicle until Mr. Fuller had gone inside the building. After exiting his vehicle, Heller went straight to the laundry room, a separate room attached to the apartment building. The laundry room was accessible through a locked door on the front and a window on the back of the room. Heller did not enter through the locked front door, instead he went to the laundry room window located on the

⁷³Appellant's Brief, pg. 15.

⁷⁴*State v. Bergeron*, 105 Wn.2d 1, 20, 711 P.2d 1000 (1985).

back of the building. Mr. Smith, a tenant at the apartment building, heard banging coming from the back of the laundry room and rushed downstairs. Mr. Smith found Heller hanging half inside the laundry room through the window on the back of the laundry room. Inside the laundry room were two coin operated machines. Mr. Smith confronted Heller who exited the window, dropped something and ran from the location. Heller left his vehicle, which contained tools, in the parking lot. Officer Wheeler located Heller walking on a nearby street wearing a blue baseball cap, black jacket and blue jeans. Heller told Officer Wheeler he was walking from 1015 Oakhurst Drive, not 101 North B Street.

As a matter of logical probability, a jury could reasonably infer that Heller intended to commit theft inside the laundry room as well as the surrounding circumstances. Heller's conviction should be affirmed.

4. Defense counsel's performance was not ineffective.

To support a finding of ineffective assistance of counsel, Heller must show that (1) trial counsel's performance was deficient, and (2) the deficient performance prejudiced Heller.⁷⁵ Counsel's performance is deficient if it falls below an objective standard of reasonableness.⁷⁶ The defendant is prejudiced only if, but for the deficient performance, the

⁷⁵*State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).

⁷⁶*State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), cert. Denied 523 U.S. 1008 (1998).

outcome of the trial would have been different.⁷⁷ On review, the court gives great deference to counsel's performance and begin with a strong presumption that counsel was effective.⁷⁸

Appellant argues that counsel, Mr. Clapperton, was ineffective because he did not move for dismissal once the State rested its case in chief. Defense counsel's performance was not deficient for failure to move to dismiss after the State rested its case. The State had presented sufficient evidence which supported each element of the offense charged as discussed above. Appellant argues there was no evidence the defendant committed burglary until Heller testified contrary to Mr. Smith and argues this is analogous to the facts in *Lopez*. In *Lopez* the defendant was charged with Unlawful Possession of a Firearm in the First Degree and the State failed to present any evidence of a constitutionally valid prior conviction. Appellant argues that the State in the present case failed to present any evidence Heller intended to commit a crime against persons or property inside the building and therefore Mr. Clapperton should have moved for dismissal.

The State presented sufficient evidence the defendant intended to commit the crime of theft inside the laundry room. The testimony at trial showed the crime occurred at night. Heller turned off his vehicle lights as

⁷⁷*In the Matter of the Personal Restraint Petition of Pirtle*, 136 Wn.2d 467, 487, 965 P.2d 593 (1998).

⁷⁸*Strickland v. Washington*, 466, U.S. 668, 689-90, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

he pulled into the parking lot. The parking lot was for an apartment building where Heller was not a tenant. Heller was wearing a blue baseball cap with a black jacket and jeans. Heller waited in his car until the tenant, Mr. Fuller, went inside. Heller entered the laundry room through its back window. The laundry room contained two coin operated laundry machines. Heller fled when confronted by Mr. Smith. Heller lied to the officer about where he had come from and Heller had tools inside his vehicle at the time. In addition to this evidence which proves Heller's intent, the State presented evidence supporting every other element of the crime as well.

When the State rested, the State had presented evidence to support every element of the crime. Thus, defense counsel's failure to move for dismissal was not unreasonable. Moreover, the court had previously denied a motion to dismiss brought by Mr. Clapperton in this case in which the assumed facts were those represented in the police reports and witness statements, essentially the same evidence presented by the State during its case in chief. The motion to dismiss was denied. Appellant has presented insufficient evidence to establish that Mr. Clapperton's performance was deficient under an objective standard of reasonableness.⁷⁹

The record before this Court does not overcome the strong presumption counsel was effective.⁸⁰ If Appellant fails to establish that counsel's

⁷⁹*State v. Stenson*, 132 Wn.2d 668.

⁸⁰*Strickland v. Washington*, 466 U.S. 668.

performance was deficient, the claim of ineffective assistance of counsel fails.⁸¹

Assuming arguendo that counsel's performance did fall below the objective standard of reasonableness, the Appellant still must establish that Defense counsel's failure to move for dismissal after the State rested its case prejudiced Heller. Appellant argues Mr. Clapperton's decision not to make the motion has prejudiced Heller because Heller's conflicting testimony reduced the possible closing arguments available at trial. The standard for prejudice is whether or not, but for the deficient performance, the outcome of the trial would have been different.⁸² Appellant argues that Mr. Clapperton could have presented different arguments during closing had he not had Heller testify. Advising a client to take the stand is considered a trial tactic within defense counsel's range of acceptable choices. The decision to have the defendant testify does not rise to the level of ineffective assistance unless the defendant can show, unequivocally, defense counsel forced the defendant to testify against his will.⁸³ What arguments to present to the jury also falls clearly within trial tactic. The possibility that Mr. Clapperton might have made a different argument and the jury could have found it persuasive enough to find Heller not guilty is not proof that but for Mr. Clapperton's decision the

⁸¹*Strickland v. Washington*, 466 U.S. at 700.

⁸²*Strickland v. Washington*, 466 U.S. 668.

⁸³*See State v. Robinson*, 138 Wash.2d 753, 982 P.2d 590 (1999).

outcome of the trial would have been different. Heller suffered no prejudice. Appellant's claim of ineffective assistance of counsel should be denied.

CONCLUSION

The State respectfully requests the Court affirm the trial court's granting of a continuance as it was not an abuse of discretion; affirm Heller's conviction for Burglary in the Second Degree as inclusion of the "unless" language in Jury Instruction 11 was harmless error, the evidence was sufficient to convict Heller and Heller's counsel was not ineffective.

DATED this 6th day of May, 2008.

Respectfully Submitted,

By: M. M. Valentine
MEGAN M. VALENTINE
Deputy Prosecuting Attorney
WSBA #35570

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

STATE OF WASHINGTON,
Respondent,
v.
ANTHONY S. HELLER,
Appellant.

No.: 36802-1-II
DECLARATION OF MAILING

DECLARATION

I, Barbara Chapman, hereby declare as follows:
On the 7th day of May, 2008, I mailed a copy of the BRIEF OF RESPONDENT
to Roger A Hunko, The Law Office of Wecker-Hunko, 569 Division Street, Suite E, Port
Orchard, WA 98366, by depositing the same in the United States Mail, postage prepaid.

I declare under penalty of perjury under the laws of the State of Washington that the
foregoing is true and correct to the best of my knowledge and belief.

DATED this 7th day of May, 2008, in Montesano, Washington.

Barbara Chapman