

34731-1-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, RESPONDENT

v.

KEVIN SNOW, APPELLANT

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APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

---

**BRIEF OF RESPONDENT**

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## **I. APPELLANT'S ASSIGNMENTS OF ERROR**

1. The state failed to prove beyond a reasonable doubt the element of unlawful entry in the charge of second degree burglary.
2. The state failed to prove beyond a reasonable doubt the element of intent to commit a crime in the charge of second degree burglary.
3. The state failed to prove beyond a reasonable doubt the element of knowing possession stolen property.
4. Appellant was denied his right to effective assistance of counsel by his attorney's failure to request the lesser included offense of criminal trespass.
5. This Court should deny appellate costs.

## **II. ISSUES PRESENTED**

1. Admitting the truth of the State's evidence and drawing all reasonable inferences from that evidence, was there sufficient evidence presented from which the jury could find all of the essential elements of second degree burglary beyond a reasonable doubt?
2. Did the defendant have an invitation, license, or privilege, in perpetuity, to enter onto real property located at 2524 West Wellesley, if he had vacated that property, after it was in forfeiture and sold, to subsequently enter an enclosed garage on the property, without permission of the new owner, several years later, to store stolen property for a colleague?

3. If the defendant voluntarily vacated the real property located at 2524 West Wellesley, after it was sold to the new owner (Wells Fargo Bank) through a trustee deed of sale at a foreclosure sale, was it necessary for the bank to pursue an unlawful detainer action against the defendant to put him on notice that he could not store stolen property in the garage on the property several years later?

4. Admitting the truth of the State's evidence and drawing all reasonable inferences from that evidence, was there sufficient evidence presented from which the jury could find all of the essential elements of possession of a stolen motor vehicle beyond a reasonable doubt?

### **III. STATEMENT OF THE CASE**

#### Procedural history.

The defendant/appellant, Kevin Snow, was charged by information in the Spokane County Superior Court, with first degree theft of a cargo trailer, several counts of theft of a motor vehicle involving snowmobiles, one count of second degree burglary involving a detached garage, and several additional counts of possession of a stolen motor vehicle of the same previous snowmobiles, for offenses occurring on September 2, 2015. CP 1-2.

After a jury trial, Mr. Snow was convicted of second degree burglary, and four counts of possession of a stolen motor vehicle. CP 44-

48. With an offender score above “9,” Mr. Snow was sentenced within the standard range. CP 58-72.

Substantive facts.

Wells Fargo Bank owned the property located at 2524 West Wellesley in Spokane on September 2, 2015, on the date of the offense, RP 37-39, 45, and had paid the taxes through October 2015. RP 39. On July 19, 2013, the property was sold to the bank through a trustee deed of sale at a foreclosure sale.<sup>1</sup> RP 38. It was the bank’s policy to have a

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<sup>1</sup> If the grantor or his or her successor has failed to cure a default within 30 days after notice of default, the trustee can begin a nonjudicial foreclosure process. There must be a “notice of trustee’s sale” under RCW 61.24.040. “The notice must be conveyed in four ways, recording, mailing to the grantor and others who have interests in the land subject to the deed of trust being foreclosed, posting or personal service on the premises, and publication. In addition, a ‘Notice of Foreclosure’ in statutory form must be mailed to the grantor or his successor with the notice of sale.” *Notices of trustee’s sale*, 18 Wash. Prac., Real Estate § 20.11 (2d ed.). Mr. Snow does not contest this procedure was not followed.

In *Savings Bank of Puget Sound v. Mink*, 49 Wn. App. 204, 205-07, 741 P.2d 1043 (1987), the bank purchased a home as a result of a nonjudicial foreclosure sale and subsequently provided notice under RCW 61.24, but not chapter 59.12 RCW, to initiate an unlawful detainer action. The occupant of the property argued on appeal that he was entitled to separate notice under chapter 59.12 RCW (unlawful detainer). *See Id.* at 206-07. The *Savings Bank* court disagreed, holding that RCW 61.24 provides for detailed notices and provides opportunities to cure for the defaulting property owner. An additional notice prior to commencement of an unlawful detainer action would be superfluous. *Id.* at 208. Here, an unlawful detainer action was unnecessary as the defendant voluntarily abandoned the property after the sale of the property.

property remain vacant, pending sale of the property or other proceedings. RP 39. The bank did not give anyone permission to occupy or rent the property at the time of the burglary. RP 39-40. The defendant George Tupper and several other individuals were the previous owners of the property prior to the foreclosure. RP 38. During the investigation, the defendant acknowledged he knew the bank owned the property at the time of the event. RP 57. There was no utility service to the property at the time of the burglary, and it was vacant. RP 61.

Brad Douma was a next door neighbor of the defendant and lived at 2518 West Wellesley. RP 71. He last saw the defendant at the property in the fall of 2011. RP 72. In September of 2015, no one resided at the 2524 West Wellesley house. RP 72-73. Mr. Douma occasionally observed people coming and going from the residence several months after Mr. Snow left the property. RP 73. The residence became vacant in the summer of 2012, at which time Mr. Snow was not residing there. RP 71, 73-74. There were foreclosure notices posted on the residence. RP 73. It had been boarded up since 2012. RP 73-74. Approximately one week before Labor Day<sup>2</sup> of 2015, Mr. Douma observed a black full size pickup arrive at the garage located at 2524 West Wellesley.

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<sup>2</sup> The date of Labor Day in 2015 was September 7. <https://www.timeanddate.com/holidays/us/labor-day>

Detective Kenneth Scott of the Spokane County Sheriff's Office executed a search warrant on the garage located at the 2524 West Wellesley address on September 8, 2015. RP 50-51. The garage was locked when the warrant was executed. RP 53. Four stolen snowmobiles were recovered inside the garage, which had been recently taken from Empire Cycle.<sup>3</sup> RP 50, 52, 69-70. The four snowmobiles were in various stages of disassembly. RP 53-54. Mr. Snow did not have permission to possess the snowmobiles. RP 70.

Eventually, Detective Scott spoke with the defendant.<sup>4</sup> The defendant told the detective he had received a telephone call from Steven Murphy. RP 55. Mr. Murphy wanted to store some "stuff" inside the garage. Mr. Murphy arrived at the address around September 2, 2015, driving a newer black Chevy pickup pulling a cargo trailer, and inside the trailer were the four snowmobiles. RP 55, 57. The defendant participated in unloading and securing the snowmobiles in the garage. RP 55-56. The defendant stated he was "reasonably sure" the snowmobiles were stolen. RP 57. Mr. Murphy

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<sup>3</sup> The snowmobiles matched the description of the stolen snowmobiles from the business and also the vehicle identification number of the stolen snowmobiles. RP 53. The theft of the trailer and snowmobiles from Empire Cycle occurred on September 2, 2015. RP 50.

<sup>4</sup> The trial court conducted a CrR 3.5 hearing and determined the statements made by Mr. Snow, during the investigation, were admissible at the time of trial. CP 14-15.

told the defendant “he would be taken care of” for storing the snowmobiles.  
RP 57.

#### IV. ARGUMENT

Mr. Snow generally claims the State failed to prove the essential elements of second degree burglary and possession of a stolen motor vehicle. Appellant’s Br. 5-11.

##### Standard of review.

When considering whether sufficient evidence supports a criminal conviction, this court must “view the evidence in the light most favorable to the prosecution and determine whether any rational fact finder could have found the essential elements of the crime beyond a reasonable doubt.” *State v. Andy*, 182 Wn.2d 294, 303, 340 P.3d 840 (2014). When the sufficiency of evidence is challenged in a criminal case, an appellate court draws all reasonable inferences from the evidence in the State’s favor and interprets them most strongly against the defendant. *State v. Partin*, 88 Wn.2d 899, 907, 567 P.2d 1136 (1977). Circumstantial evidence and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

As this Court stated in *Quinn v. Cherry Lane Auto Plaza, Inc.*, 153 Wn. App. 710, 717, 225 P.3d 266 (2009), *review denied*, 168 Wn.2d 1041 (2010): “Appellate courts do not hear or weigh evidence, find facts, or substitute their opinions for those of the trier-of-fact. Instead,

they must defer to the factual findings made by the trier-of-fact.” In like manner, the credibility of witnesses and the weight of the evidence is the exclusive function of the trier of fact, and not subject to review. *See State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

**A. THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE DEFENDANT’S CONVICTION FOR SECOND DEGREE BURGLARY.**

The elements of second degree burglary are: (1) entering or remaining unlawfully in a building other than a vehicle or dwelling (2) with the intent to commit a crime against a person or property therein. RCW 9A.52.030(1). “A person ‘enters or remains unlawfully’ in or upon premises when he or she is not then licensed, invited, or otherwise privileged to so enter or remain.” RCW 9A.52.010(2). “Premises includes any building, dwelling, structure used for commercial aquaculture, or any real property.” RCW 9A.52.010(3).

Regarding the first element, Mr. Snow claims the State did not present any evidence that he was “evicted” from the home, after the bank became owner of the property, and he “had unfettered access to the abandoned garage that he once owned.” Appellant’s Br at 7. Mr. Snow provides no authority to support this claim.

Whether a defendant enters or remains unlawfully in a building is decided on a case-by-case basis, *State v. Collins*, 110 Wn.2d 253, 258,

751 P.2d 837 (1988), and the unlawful entry may be proved by circumstantial evidence. *State v. J.P.*, 130 Wn. App. 887, 893, 125 P.3d 215 (2005).

A *lawful* entry, even one accompanied by nefarious intent, is not by itself a burglary. *State v. Allen*, 127 Wn. App. 125, 137, 110 P.3d 849 (2005). Conversely, an individual's presence may be unlawful if there is an implied limitation on, or revocation of, the privilege to be on the premises. *Collins*, 110 Wn.2d. at 258. Where a defendant's initial entry was clearly unlawful, the sufficiency of evidence that he or she remained unlawfully follows automatically. *State v. Cordero*, 170 Wn. App. 351, 366, 284 P.3d 773 (2012).

Here, the State presented sufficient evidence from which any reasonable jury could find that Mr. Snow unlawfully entered or remained inside the garage. Mr. Snow had not been observed on the property since 2011, and the property was sold to a new owner in 2013. There is nothing in the trial record that Mr. Snow had permission, a license agreement (express or implied), or an invitation to enter the garage at the time of the burglary. Indeed, there was no evidence Mr. Snow ever asserted a right to possession of the property, or that he had any kind of invitation, license, or privilege to use the garage at his whim, or that he had the right to occupy the garage at the time of the burglary. He knew the bank owned the property

at the time of the charged offenses. The residence was boarded up and it had foreclosure notices posted on the exterior of the building. By moving out of the residence several years before the burglary, Mr. Snow abandoned any claimed or theoretical “possessory interest” or license to enter or inhabit the garage at the time of the burglary. In addition, there was no requirement or need to commence an unlawful detainer action against him under RCW 59.18,<sup>5</sup> as Mr. Snow knew the property had been sold to the bank and he had voluntarily surrendered possession of the property for several years prior to the burglary.

Mr. Snow has not provided any evidence or authority that he had an irrevocable license to endlessly enter, at will, the property of the bank, and use it for his own purpose, when he was not legally or equitably entitled to do so. Wells Fargo was the sole entity with a possessory interest in the garage at the time of the burglary and it did not give Mr. Snow any permission to enter or inhabit the garage.<sup>6</sup>

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<sup>5</sup> RCW 61.24.060 authorizes a purchaser at a trustee's sale to obtain possession of the purchased property using the summary proceedings in chapter 59.12 RCW (unlawful detainer).

<sup>6</sup> The jury, in finding the defendant guilty, necessarily found that Mr. Snow had no possessory interest in the property or license to be on the property, including the detached garage at the time of the burglary, and rejected Mr. Snow's theory of the case. *See* RP 105-07 (defense closing argument).

Mr. Snow's reliance on *State v. Mace*, 97 Wn.2d 840, 842-43, 650 P.2d 217 (1982), is misplaced. In *Mace*, the State charged the defendant with a burglary for *initially* entering a home and *then* stealing bank cards. The State presented evidence that police found the defendant's fingerprints on a receipt and bag near a cash machine where the stolen bank cards were used, but no evidence connected Mace to the burgled home. While this evidence likely sufficed to show he had stolen property in his possession, the court held it was insufficient to support the burglary conviction, noting "[t]here was no direct evidence, only inferences, that he had committed second degree burglary by entering the premises in Richland." *Id.* at 843.

*Mace* is inapposite to the defendant's claim, as he "places the cart before the horse" with his reliance on the reasoning in that case. *Mace* is based upon the rule that proof of possession of recently stolen property, unless accompanied by other evidence of guilt, is not prima facie evidence that the individual also committed a burglary from where the property was taken. Our high court found that presence of the defendant near the previous burglary scene along with later possession of the stolen property would be sufficient corroborative evidence to support a burglary conviction. *Id.*

Viewing the evidence and all reasonable inferences therefrom in a light most favorable to the State, there is sufficient evidence to support the jury finding that Mr. Snow committed second degree burglary.

**B. THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE DEFENDANT’S CONVICTIONS FOR POSSESSION OF A STOLEN MOTOR VEHICLE.**

Mr. Snow next asserts there is not sufficient evidence to support the fact that he knew the snowmobiles was stolen.

Under RCW 9A.56.068, a “person is guilty of possession of a stolen vehicle if he or she [possesses] a stolen motor vehicle.” “Possess” is defined as “knowingly to receive, retain, possess, conceal, or dispose of stolen property knowing that it has been stolen and to withhold or appropriate the same to the use of any person other than the true owner or person entitled thereto.” RCW 9A.56.140(1). Possession of property may be either actual or constructive. *Partin*, 88 Wn.2d at 905; *State v. Summers*, 45 Wn. App. 761, 763, 728 P.2d 613 (1986). Constructive possession occurs when the defendant has dominion and control over the item itself or the premises where it is located. *Summers*, 45 Wn. App. at 763.

Thus, to be convicted of unlawful possession of a stolen vehicle, the defendant must have withheld or appropriated a vehicle for the use of a person other than “the true owner or person entitled thereto.” RCW 9A.56.140(1). “Owner” is defined as “a person, other than the actor, who has possession of or any other interest in the property or services involved, and without whose consent the actor has no authority to exert control over the property or services.” RCW 9A.56.010(11).

Mere possession of stolen property is insufficient to justify a conviction. *State v. Couet*, 71 Wn.2d 773, 775, 430 P.2d 974 (1967); *State v. McPhee*, 156 Wn. App. 44, 62, 230 P.3d 284 (2010). Our high court in *Couet* noted, however, that “[w]hen a person is found in possession of recently stolen property, slight corroborative evidence of other inculpatory circumstances tending to show his guilt will support a conviction.” *Id.* at 776. Other corroborative evidence can consist of a false or improbable explanation or inconsistent explanations, *State v. Rockett*, 6 Wn. App. 399, 402-03, 493 P.2d 321 (1972), and explanations the law enforcement cannot rebut or check.

The State was not required to prove that Mr. Snow had “actual and positive knowledge” that the snowmobiles were stolen. *See State v. Rye*, 2 Wn. App. 920, 927, 471 P.2d 96 (1970). Rather, “[i]t is sufficient if [the defendant] had knowledge of facts sufficient to put him on notice that [it] w[as] stolen.” *Rockett*, 6 Wn. App. at 402 (regarding a conviction for grand larceny by possession of four sets of stolen car seats, evidence that the defendant had a total of 22 car seats in his house that were later removed by a co-defendant, placed in a garage and covered with a sheet, together with an unlikely explanation provided sufficient evidence that defendant knew seats were stolen.)

In *State v. Lakotiy*, 151 Wn. App. 699, 214 P.3d 181 (2009), the defendant was charged with possession of a stolen motor vehicle, and the court found sufficient evidence to support the conviction.

Here, the evidence and reasonable inferences showed that (1) Lakotiy was standing next to a stolen car in a small storage unit, (2) the car had been partially disassembled and the ignition was removed, (3) several parts of the car were on the ground next to the car, (4) another individual in the storage unit was working on the stolen vehicle, and (5) when Lakotiy saw the officers, he reached back and placed a set of jiggler keys and an ignition on the rear of the vehicle.

*Id.* at 714-15.

Here, the defendant participated in unloading and securing the snowmobiles in a vacant and locked garage in which he previously owned. Moreover, Mr. Snow was “reasonably sure” the snowmobiles were stolen and there was no evidence he asked Mr. Murphy the origin of the snowmobiles, which would have been a likely question if he didn’t already know they were stolen. In addition, Mr. Murphy told Mr. Snow that “he would be taken care of” for storing the snowmobiles, an inferential quid pro quo for concealing the stolen property.

Furthermore, the snowmobiles were in various stages of being taken apart, when recovered by law enforcement. It can be reasonably inferred

that the snowmobiles were being dismantled so the parts could later be sold iniquitously without recognition, and presumably for a higher price.<sup>7</sup>

Finally, it can be reasonably inferred that the garage was used for the snowmobiles because it had been vacant for an extended period of time and the snowmobiles could remain hidden, out of the public's view. From Mr. Snow's perspective, the purpose for the storage in the locked, vacant garage would have made the prospect for discovery of the stolen snowmobiles minimal. It can be further inferred that if the snowmobiles were found in the garage, Mr. Snow or any associate could have claimed plausible deniability because he no longer had any connection to the property.

Viewing all facts and inferences in the light most favorable to the State, a rational jury could have found that Mr. Snow knew the snowmobiles were stolen.

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<sup>7</sup> A chop shop is a location or business which takes apart stolen vehicles for the purpose of selling them as parts. [http://en.wikipedia.org/wiki/Chop\\_shop](http://en.wikipedia.org/wiki/Chop_shop). "Criminals working in chop shops are interested in two things: making money and not getting caught. A dismantled vehicle is much harder to trace and identify than one that is still intact. Selling individual parts brings a much higher profit too." <https://www.trustedchoice.com/insurance-articles/wheels-wings-motors/what-are-chop-shops/>

**C. DEFENSE COUNSEL WAS NOT INEFFECTIVE FOR NOT REQUESTING A LESSER INCLUDED OFFENSE INSTRUCTION OF FIRST DEGREE TRESPASS, AS HIS DEFENSE WAS A GENERAL DENIAL AND AN “ALL OR NOTHING” STRATEGY. MOREOVER, EVEN IF MR. SNOW HAD REQUESTED THE LESSER INCLUDED OFFENSE INSTRUCTION, THERE WOULD NOT HAVE BEEN A FACTUAL BASIS IN WHICH TO INSTRUCT ON THAT CRIME.**

Mr. Snow next alleges his counsel was ineffective because he did not request a lesser included offense instruction of criminal trespass regarding the second degree burglary charge. Appellant’s Br. at 11-18.

Standard of review.

An appellate court reviews claims of ineffective assistance of counsel de novo. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). To prevail on a claim of ineffective assistance, a defendant must show both (1) deficient performance and (2) resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Counsel’s performance is deficient if it fell below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997). An appellate court’s scrutiny of defense counsel’s performance is highly deferential, and the court employs a strong presumption of reasonableness. *Strickland*, 466 U.S. at 689; *McFarland*, 127 Wn.2d at 335-36. To rebut this presumption, the defendant bears the burden of establishing the absence of any “conceivable legitimate tactic

explaining counsel's performance." *State v. Grier*, 171 Wn.2d 17, 42, 246 P.3d 1260 (2011).

To establish prejudice, a defendant must show a reasonable probability that the outcome of the trial would have been different absent counsel's deficient performance. *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). Failure on either prong of the test bars a claim of ineffective assistance of counsel. *Strickland*, 466 U.S. at 697. Whether to request a lesser included offense instruction is a tactical decision, for which the court grants counsel considerable deference. *Grier*, 171 Wn.2d at 39; *see also State v. Witherspoon*, 180 Wn.2d 875, 886, 329 P.3d 888 (2014). Counsel, in consultation with the defendant, may decide to take the "all or nothing" approach and forgo a lesser included offense instruction. *Witherspoon*, 180 Wn.2d at 886. However, this approach exposes the defendant to the risk that the jury will convict on the only option argued by the defense. *Id.*

In *State v. Hassan*, 151 Wn. App. 209, 218, 211 P.3d 441 (2009), the court held that an "all or nothing" strategy was a legitimate trial tactic because a lesser included offense instruction would have weakened the defense's claim of innocence. And in *Grier*, our Supreme Court rejected *Grier's* ineffective assistance claim because "[a]lthough risky, an all or

nothing approach was at least conceivably a legitimate strategy to secure an acquittal.” *Id.* at 42.

Here, defense counsel’s decision not to request a first degree criminal trespass instruction was a legitimate strategy to obtain an acquittal.

As the defense lawyer argued in closing argument:

Mr. Snow talked to Detective Scott he said [Mr. Muphy] showed up, he had a trailer with some snowmobiles, I had a garage, I helped him put them in the garage. He had the keys. He had some helmets. He had other items that a reasonable person would associate with ownership, who rightfully was allowed to have those snowmobiles.

Now, if they showed up and they were -- there were no keys or there was something about them that would suggest that they were stolen, it would be one thing, but that’s not what happened. The keys were there. The helmets were there, and other items associated with somebody who would own snowmobiles. Now, the relationship or connection between Mr. Murphy and Mr. Snow, they might know each other. They -- Mr. Murphy was obviously comfortable stealing from Empire Cycle and taking advantage of Mr. Snow in a garage that he had or used.

RP 104-05.

Now, the State’s going to suggest, well, common sense tells you’re not living there, you’re not using it, you’re not -- it’s boarded up. Nobody said he went in the house. Nobody said he was living in the house. What we do know, he had access to a garage on a -- on a piece of property he used to own and that he was using. You have no evidence, no evidence, that controverts that, and the bank, the owner of the property, provided you none. And the State wants you to just assume

from the license -- from the deed of trust that that is notice that you can't go on the property. It isn't.

RP 106-07.

And, ladies and gentlemen, I would submit to you that it is reasonable that at the time he entered the garage, the act that is the premise of the burglary, he didn't know and, therefore, he's not guilty of burglary in the second degree. And when he entered the garage with those snowmobiles, he didn't know they were stolen and, therefore, he's not guilty. Given all of the information, all of the reasonable inferences therefrom, I would submit and respectfully request "not guilty" on all five counts.

RP 112.

Therefore, it is conceivable that a lesser included offense instruction, as in *Hassan*, would have weakened Mr. Snow's claim of innocence and would have seriously undermined his goal of an outright acquittal. Given these facts, trial counsel's decision not to ask for a lesser included instruction was reasonable and he cannot show that his trial counsel's performance was deficient because her lawyer's decision to not request this instruction is recognized as legitimate trial strategy.

Even if Mr. Snow had requested a lesser included offense of first degree criminal trespass, the trial court very likely would have denied it. A defendant is entitled to a lesser included offense instruction if each of the elements of the lesser offense is a necessary element of the greater offense (the legal prong), and the evidence supports an inference that only the lesser

offense was committed (the factual prong). *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978), *superseded by statute on other grounds by State v. Adlington-Kelly*, 95 Wn.2d 917, 631 P.2d 954 (1981).

As stated above, for a second degree burglary conviction, RCW 9A.52.030 requires the State to prove that the defendant entered or remained unlawfully in a building other than a vehicle or a dwelling with the intent to commit a crime against a person or property in the building. For a first degree criminal trespass conviction, RCW 9A.52.070 requires the State to prove that the defendant knowingly entered or remained unlawfully in a building. First degree criminal trespass is a lesser included offense to the charge of second degree burglary. *See State v. Soto*, 45 Wn. App. 839, 841, 727 P.2d 999 (1986).

Here, the evidence does not support an inference that Mr. Snow committed only the lesser offenses of first degree criminal trespass, even viewing the evidence in a light most favorable to him.<sup>8</sup> There is no reasonable view that Mr. Snow simply went into the garage without intending to commit a crime. He unabashedly admitted he helped to unload

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<sup>8</sup> An appellate court examines the evidence in the light most favorable to the party seeking the instruction. *State v. Fernandez-Medina*, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000). It is not enough that the jury might disbelieve the evidence pointing to guilt; the evidence must also affirmatively establish the defendant's theory of the case. *Id.* at 456.

and store the snowmobiles in the vacant, locked garage, he was “reasonably sure they were stolen,” and the snowmobiles were in various stages of being stripped down when found by law enforcement. It was highly unlikely that the jury would have believed he just entered the garage without a nefarious purpose. The only conclusion that can be drawn from the evidence is that Mr. Snow entered the garage, with the intent to commit a crime.

As stated above, trial counsel’s strategy here was to adhere to a consistent defense strategy to ask the jury to reject the charged burglary and not request a lesser included trespass instruction, which was reasonable. Mr. Snow’s claim that his counsel was ineffective for failing to request an instruction on the lesser included offense of first degree trespass fails.

**D. UNLESS DEFENDANT’S FINANCIAL CIRCUMSTANCES HAVE IMPROVED SINCE THE TRIAL COURT ENTERED THE ORDER OF INDIGENCY, THE PRESUMPTION OF INDIGENCY REMAINS IN EFFECT THROUGHOUT THE APPEAL.**

Effective January 31, 2017, RAP 14.2 reads:

A commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, unless the appellate court directs otherwise in its decision terminating review, or unless the commissioner or clerk determines an adult offender does not have the current or likely future ability to pay such costs. *When the trial court has entered an order that an offender is indigent for purposes of appeal, that finding of indigency remains in effect, pursuant to RAP 15.2(f) unless the commissioner or clerk determines by a preponderance of the evidence that the offender’s financial circumstances have significantly*

*improved since the last determination of indigency.* The commissioner or clerk may consider any evidence offered to determine the individual's current or future ability to pay. If there is no substantially prevailing party on review, the commissioner or clerk will not award costs to any party. An award of costs will specify the party who must pay the award. In a criminal case involving an indigent juvenile or adult offender, an award of costs will apportion the money owed between the county and the State. A party who is a nominal party only will not be awarded costs and will not be required to pay costs. A “nominal party” is one who is named but has no real interest in the controversy.

(Emphasis added).

The trial court determined Defendant to be indigent for purposes of his appeal on September 22, 2016, based on a declaration provided by Defendant. CP 92-93. The State is unaware of any change in Defendant's circumstances. Should Defendant be unsuccessful on appeal, the Court should only impose appellate costs in conformity with RAP 14.2 as amended.

## **V. CONCLUSION**

The evidence admitted at trial was sufficient for any rational trier of fact to find beyond a reasonable doubt that Mr. Snow committed the crimes of second degree burglary and possession of stolen property. Moreover, his lawyer was not ineffective for failing to request a lesser included offense instruction of first degree criminal trespass because it was a legitimate trial tactic and, even if such an instruction had been requested, there was no an

inference that only a first degree criminal trespass was committed by the defendant. Accordingly, the State respectfully requests that this Court affirm the second degree burglary conviction and the four convictions for unlawful possession of a stolen motor vehicle.

Respectfully dated this 16 day of May, 2017.

LAWRENCE H. HASKELL  
Prosecuting Attorney



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Deputy Prosecuting Attorney  
Attorney for Respondent

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

STATE OF WASHINGTON,

Respondent,

v.

KEVIN B. SNOW,

Appellant,

NO. 34731-1-III

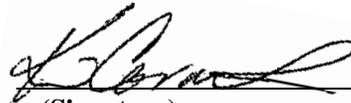
CERTIFICATE OF  
SERVICE

I certify under penalty of perjury under the laws of the State of Washington, that on May 16, 2017, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Lise Ellner  
liseellnerlaw@comcast.net

5/16/2017  
(Date)

Spokane, WA  
(Place)

  
(Signature)

# SPOKANE COUNTY PROSECUTOR

May 16, 2017 - 9:45 AM

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