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COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

SCOTT ELLIS, APPELLANT

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY

BRIEF OF RESPONDENT

LAWRENCE H. HASKELL
Prosecuting Attorney

Larry Steinmetz
Deputy Prosecuting Attorney
Attorneys for Respondent

County-City Public Safety Building
West 1100 Mallon
Spokane, Washington 99260
(509) 477-3662

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I. ISSUES PRESENTED

1. Was the defendant denied his right to jury unanimity for the crimes of second-degree burglary and first degree vehicle prowling if there was substantial evidence for both offenses to support the commission of both alternate means, “unlawfully entering” and “unlawfully remaining”?

2. Is there substantial evidence to support the jury’s finding that the defendant intended to commit a crime against person or property for the crimes of second-degree burglary and first degree vehicle prowling?

3. Was the defendant’s trial counsel ineffective for failing to proffer a unanimity instruction regarding both the second-degree burglary and the first-degree vehicle prowling crimes?

4. Was the defendant’s trial counsel ineffective for not proffering a necessity defense instruction at the time of trial?

5. Was the defendant’s lawyer ineffective for failing to call a witness who had no personal knowledge of the event and who only possessed collateral information regarding defendant’s claims at trial?

6. Was the defendant’s lawyer ineffective for failing to investigate a diminished capacity claim?

7. Was the defendant’s lawyer ineffective for not requesting a bill of particulars if the lawyer had all the relevant information at the time of trial to prepare for and present a defense?

8. Did the trial court fail to comply with RCW 9.94A.500 (presentencing procedures), by not ordering a presentence investigation regarding chemical dependency and post-traumatic stress syndrome (PTSD) if there was no evidence produced at trial that a chemical dependency or PTSD contributed to the offenses or had any bearing on the defendant's culpability?

9. If the defendant did not request a continuance of the sentencing hearing, did the trial court abuse its discretion by not ordering a continuance?

10. If the defendant did not request an exceptional sentence based upon military service and acknowledged it was not a substantial and compelling reason to justify a downward departure in the present case, did the trial court err by not ordering an exceptional sentence on this basis?

11. Is "aberrant behavior" recognized as a valid mitigating factor justifying a downward departure from a standard range sentence?

12. Is the defendant's claim that his commission of the second-degree burglary was less egregious than other unreferenced second-degree burglaries a valid mitigating circumstance which would justify a downward departure of the standard range sentence?

II. STATEMENT OF THE CASE

Procedural history.

Scott Ellis was charged by amended information in the Spokane County Superior Court with second degree burglary, first degree vehicle prowling, third degree theft, obstructing a public servant, and third degree malicious mischief. CP 4-5. The case proceeded to trial and the jury found the defendant guilty on January 26, 2017, on all counts except the third-degree theft. CP 52-74.

With an offender score of “9,” the defendant was sentenced to a mid-range, determinate sentence of 55 months. CP 56-57, 59.

Substantive facts.

Adam Merrifield lived next door to the Valley Self Storage located at 15302 East Valleyway in the Spokane Valley. RP 77-81. The one-acre storage lot was completely fenced,¹ with an electronic gate, and a keypad at the entrance to the property. RP 84, 90, 99, 103. On August 31, 2016, Mr. Merrifield heard a conversation around 11:30 p.m., in the southwest corner of the lot. RP 81-82, 88. However, he did not physically observe

¹ The storage lot owner, Brian Chavez, described the fence as commercial grade, approximately six feet tall, with an additional three strands of barbed wire above the fence. RP 90. The entry gate was a 20-foot cantilever, six-foot high automatic gate, with barbed wire attached above the gate. RP 116. Mr. Merrifield described the fence’s appearance as comparable to a “prison” fence. RP 103. Throughout a given calendar year, the facility housed approximately 30 to 60 RVs. RP 112.

anyone at the time. RP 81-82. Mr. Merrifield called the storage lot owner, Brian Chavez and 911. RP 82-83.

Mr. Chavez promptly arrived at the lot sometime after 11:00 p.m., and the gate was closed. RP 104, 110. He drove around the facility looking for an intruder. RP 104. Mr. Chavez observed a flickering light in a “tour-bus-style” vehicle in the lot. RP 105-07. The light drew Mr. Chavez’s attention because no one was allowed in the lot at that time of day. RP 105. Mr. Chavez called the owner of the motorhome, Howard Braham, and requested he bring a key to the vehicle to the facility. RP 107-08, 126. The intruder, identified as the defendant, did not have permission to be inside the lot or inside the motorhome. RP 109-10, 128, 130, 179.

Canine deputy, Jason Hunt, arrived on scene and contacted Mr. Merrifield. RP 146-49. After the deputy advised the defendant, who remained inside the motorhome, that he was a law enforcement officer, the defendant told the deputy he had barricaded himself in the motorhome and was not going to leave. RP 149-50. Furniture had been stacked against the door of the motorhome and a seat belt attached to the door latch, making it very difficult to gain entry. RP 152. The defendant was advised he was under arrest and a police dog would be sent in to the motorhome to

apprehend the defendant if he did not exit. RP 150-51.² In the interim, pepper spray was squirted inside the motorhome through a vent because of the defendant's refusal to exit the motorhome. RP 151-53.

Ultimately, after getting no response, deputies cleared the items blocking the motorhome door, and made entry with a canine. RP 153-54. The defendant was eventually located inside a bedroom, inside a wood storage area underneath a mattress. RP 156, 190. Deputies had to forcibly lift the mattress up because the defendant maintained a grip on it. RP 156. The dog contacted the defendant, as he remained noncompliant, and deputies continually ordered the defendant to show his hands. RP 157. Additional pepper spray was used and the defendant ultimately surrendered. RP 157.

Howard and Donna Braham owned the 34-foot Monaco Windsor luxury motorhome, which was self-propelled, and parked in the storage lot. RP 127. The Brahams had purchased the vehicle to reside in and travel with. RP 127, 175. The couple had not previously met the defendant. RP 130. Mr. Braham gave officers permission to break a window in the bus to gain entry. RP 129-30. When Mr. Braham entered the motorhome after the defendant was removed, he observed recent damage including oak drawers

² Multiple deputies ordered the defendant out of the motorhome. RP 194.

that were forcibly removed from their hinges, strewn garbage, broken dishes, a shower door that had been dismantled, and flooring underneath the bathroom sink that had been removed by the defendant. RP 136-39, 143, 182. In addition, a storage area underneath the queen-sized bed had been disrupted. RP 138-139. Upon entry into the motorhome, Deputy Hunt described the interior as “a mess” because items had been thrown around, and furniture was stacked inside. RP 153. Mrs. Braham described the interior as “absolutely destroyed.” RP 182.

The defendant testified that he was at his ex-wife’s residence around 8:00 p.m. on the day of the incident and her boyfriend threatened to shoot him. RP 220, 240, 261. The defendant described the situation as “intense” and he left. RP 220. The defendant had his cell phone available during this time. RP 243.

Afterward, the defendant claimed he crossed a street and observed the boyfriend and another person in a pickup in an adjacent parking lot. RP 221-22. The vehicle supposedly drove toward him. RP 222. The defendant asserted he ran north through a field towards Valleyway. RP 223. At some point, he was near Sullivan road, which was a busy arterial with numerous businesses. RP 241. There were several shopping centers nearby, including a Walmart, a Fred Meyer, and an open bar and a restaurant, a pet shop, and other businesses. RP 241-42. The defendant admitted at trial that

he chose not to enter any of these businesses and use a telephone to call police. RP 243. He did not call the police from a business because he “did not want to involve other people in this issue.” RP 244.

The defendant asserted he ultimately ended up at the gate to the storage facility, and followed a vehicle through the gate into the lot. RP 225-27. He claimed he entered the motorhome and barricaded the door with a seatbelt. RP 229. He admitted he did not have permission to be in the motorhome. RP 245. He avowed he was unable to call anyone because he ostensibly lost his cell phone sometime during the event. RP 229.

Thereafter, the defendant maintained he sat quietly inside the motorhome for several hours, “became comfortable with the situation,” and then started to watch a movie. RP 182-83, 230. Shortly thereafter, the deputies arrived. RP 230. The defendant was aware they were law enforcement officers. RP 248. He asserted he was afraid of the K-9, that he told the deputies he had a “great relationship” with his DOC officer, and he would feel safer if the DOC officer was at the scene. RP 232, 248. He averred that he removed several doors and other interior items (including the shower door) upon the deputies’ arrival and barricaded himself within the motorhome. RP 232-33, 247. He further asserted he placed a mattress pad against a door and covered himself with blankets because of the pepper spray. RP 234. Once covered in the blankets, the defendant alleged he was

“soundproofed” and could not hear the deputies’ commands inside the motorhome. RP 234.

III. ARGUMENT

A. SUBSTANTIAL EVIDENCE SUPPORTS BOTH ALTERNATE MEANS OF COMMITTING SECOND-DEGREE BURGLARY, AND A UNANIMOUS JURY FINDING AS TO WHETHER THE BURGLARY WAS COMMITTED BY “UNLAWFUL ENTRY” OR “REMAINING UNLAWFULLY” WAS NOT REQUIRED. MOREOVER, BECAUSE DEFENDANT’S INITIAL ENTRY INTO THE STORAGE LOT WAS CLEARLY UNLAWFUL, THE SUFFICIENCY OF EVIDENCE THAT HE REMAINED UNLAWFULLY IS SELF-EVIDENT.

The defendant was charged with second-degree burglary of Mr. Chavez’s RV storage lot located at 15302 East Valleyway located in the Spokane Valley. CP 1. The defendant first alleges he was denied his right to a unanimous verdict because the jury was instructed on both the “unlawfully enters” and “unlawfully remains” alternative means of committing second-degree burglary. *See* Appellant’s Br. at 8-12. At the time of trial, the court instructed the jury on second-degree burglary and the lesser-included offense of first degree criminal trespass.³ CP 25, 26, 30, 31, 32.

³ A person is guilty of first degree criminal trespass if he or she knowingly enters or remains unlawfully in a building. RCW 9A.52.070(1).

1. Elements of burglary.

The elements of second degree burglary are (1) entering or remaining unlawfully in a building other than a vehicle or dwelling, and (2) with intent to commit a crime against a person or property therein. RCW 9A.52.030(1); *see State v. Brunson*, 128 Wn.2d 98, 104-05, 905 P.2d 346 (1995). “Building” includes any area that is completely enclosed either by fencing alone or fencing and other structures. *State v. Engel*, 166 Wn.2d 572, 580, 210 P.3d 1007 (2009); RCW 9A.04.110(5).

Unlawful entry occurs when an individual enters a “building” without a license, invitation or privilege, with an intent to commit a crime against person or property. RCW 9A.52.010(2). A person remains unlawfully, as an alternative means, when the entry was lawful, but nevertheless exceeds, while inside, the scope of a limitation imposed upon the license or invitation to enter or it is revoked. RCW 9A.52.010(2); *see e.g., State v. Collins*, 110 Wn.2d 253, 751 P.2d 837 (1988) (sufficient evidence supported a conviction where the defendant entered a home with permission to use the telephone, then dragged the victim and her mother into a bedroom and sexually assaulted one of them); *State v. Thomson*, 71 Wn. App. 634, 640-41, 861 P.2d 492 (1993).

Here, the defendant does not argue that the jury lacked sufficient evidence to find him guilty of second-degree burglary for unlawfully

remaining in the fenced area. Rather, he alleges that his right to jury unanimity was violated because there was no proof that he unlawfully entered the fenced area of Mr. Chavez's RV storage lot.

In *State v. Allen*, 127 Wn. App. 125, 127, 110 P.3d 849 (2005), Division One of this court considered whether a defendant's right to jury unanimity was violated by the State's failure "to establish both the 'entered unlawfully' and 'remained unlawfully' means of committing burglary." *Allen* specifically considered and rejected an argument that the "unlawfully remaining" means is restricted to factual situations in which there is an initially licensed entry but that permission is revoked or its scope exceeded. *Id.* at 133-35. Instead, when an individual enters unlawfully, that person has no permission to be inside, so any period of remaining is also unlawful, satisfying both alternate means. *Id.* at 133; *State v. Cordero*, 170 Wn. App. 351, 365, 284 P.3d 773 (2012). Ultimately, the court held, "a jury instruction requiring the State to prove the defendant entered or remained unlawfully in a building raises no unanimity concerns, even if there is no evidence to support one of the alternative means." *Allen*, 127 Wn. App. at 133.

The court explained that the common situation where a defendant breaks into a building and continues to remain in the building without permission is an example of entering unlawfully and remaining unlawfully.

Id. The court concluded that “[r]egardless of whether the defendant possessed an intent to commit a crime at the time of the unlawful entry, if the defendant unlawfully remains with the intent to commit a crime, we see no reason such conduct does not satisfy the requirements for burglary.” *Id.* This Court found the same in *Cordero*, holding that where a defendant’s initial entry was clearly unlawful, the sufficiency of evidence that he or she remained unlawfully follows automatically. 170 Wn. App. at 366.

If there is sufficient evidence as to each alternative means or if the appellate court can determine that the verdict was based on only one means which was supported by substantial evidence, a general verdict finding the defendant guilty of burglary will stand. *Allen*, 127 Wn. App. at 130; *see, e.g., Cordero*, 170 Wn. App. at 365 (“[i]n many cases the reviewing court can tell that the verdict was based on only one means, which was supported by substantial evidence; in such a case, the court need not examine the other means[.]”).

2. *Sufficiency of the evidence regarding the alternative means of committing second degree burglary.*

Substantial evidence is “defined as a quantum of evidence sufficient to persuade a rational fair-minded person the premise is true.” *McCleary v. State*, 173 Wn.2d 477, 514, 269 P.3d 227 (2012).

The State may establish the elements of a crime by either direct or circumstantial evidence and both are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980); *State v. Brooks*, 45 Wn. App. 824, 826, 727 P.2d 988 (1986). The State may also use inferences to assist in meeting its burden of proof. *State v. Cantu*, 156 Wn.2d 819, 826, 132 P.3d 725 (2006). In addition, this Court defers to the trier of fact regarding credibility, conflicting testimony, and the persuasiveness of the evidence. *In re Pers. Restraint of Martinez*, 171 Wn.2d 354, 364, 256 P.3d 277 (2011). The “unlawfully entry” alternate means element of burglary may be established by circumstantial evidence. *State v. J.P.*, 130 Wn. App. 887, 893, 125 P.3d 215 (2005).

Here, when drawing all reasonable inferences in the State’s favor, the State presented substantial evidence that the defendant unlawfully entered and remained in the storage lot. Even by the defendant’s own admission, he did not have permission to enter the gated and fenced storage lot or into the motorhome. Likewise, he did not have the permission of the owner of the storage lot or the owner of the motorhome to remain. No reasonable jury could believe the defendant lawfully entered or remained within the storage lot. After unlawfully entering the storage lot, the defendant remained, even defying law enforcement orders to exit the motorhome. This evidence was sufficient to establish both alternate means

of the burglary statute. The defendant was not denied his right to a unanimous jury verdict.

3. *Intent to commit a crime against person or property.*

If the State has proven unlawful entry, the intent to commit a crime may be inferred, unless the evidence demonstrates the entry was without criminal intent. *State v. Bennett*, 20 Wn. App. 783, 788-89, 582 P.2d 569 (1978). The State need only establish that criminal intent was more likely than not. *State v. Brunson*, 76 Wn. App. 24, 30, 877 P.2d 1289 (1994), *affirmed*, 128 Wn.2d 98 (1995). Moreover, the inference of criminal intent may be “supported by common knowledge and experience.” *Id.* at 27. Indeed, “noncriminal reasons for unlawfully entering a dwelling are few.” *State v. Bishop*, 90 Wn.2d 185, 189, 580 P.2d 259 (1978).

Under the burglary statute, it is not necessary to charge or prove the specific crime intended to be committed in the burglarized premises. *State v. Bergeron*, 105 Wn.2d 1, 7, 16, 711 P.2d 1000 (1985). Furthermore, criminal intent may be inferred when the defendant’s surrounding conduct and the surrounding facts “plainly indicate such an intent as a matter of logical probability.” *Cordero*, 170 Wn. App. at 368.

In this case, the defendant asserts that there was insufficient evidence that he intended to commit a crime against a person or property. The evidence establishes otherwise. Specifically, there was sufficient evidence

of unlawful entry and unlawfully remaining and no evidence that the entry was without criminal intent. First, the defendant was found in the storage lot and motorhome, and by his own admission, without permission. Moreover, he unlawfully remained in the storage lot and motorhome after being ordered out by law enforcement. The defendant's assertion that he was threatened earlier in the evening, which ultimately caused his entry into the storage lot and motorhome was obviously discounted, if not outright disbelieved by the jury. His continued reliance on that assertion in the present appeal to support a claim that he did not intend to commit a crime is not well-founded.

Moreover, the State argued to the jury that the defendant intended to commit the crime of malicious mischief. *See* RP 336. The defendant does not dispute that he intentionally caused a substantial amount of physical damage to the interior the motorhome which, in and of itself, is a crime against property. Furthermore, the jury could have reasonably inferred the defendant intended to commit a theft when he entered the storage lot and motorhome, but that plan was halted or disrupted by law enforcement arriving unexpectedly at the motorhome.

There was sufficient evidence of second degree burglary and the defendant's claim fails.

4. Sufficiency of the evidence regarding the alternate means of committing first degree vehicle prowling.

The defendant advances the same argument regarding the first-degree vehicle prowling conviction. To be guilty of first degree vehicle prowling, a person must enter into or remain unlawfully in a motorhome, as defined in RCW 46.04.305, with intent to commit a crime against a person or property therein. RCW 9A.52.095; CP 34 (jury instruction).

As with second-degree burglary, first degree vehicle prowling can be committed by alternate means, “unlawfully enter” or “unlawfully remain.” Substantial evidence supports both alternate means of committing the offense. The defendant did not have permission to enter the motorhome. In addition, he rejected law enforcements repeated demands to exit the motorhome which constituted “unlawfully remaining.” Moreover, the defendant committed the crime of malicious mischief when he caused a significant amount of damage to the interior of the motorhome. The trial court ordered restitution in the amount of \$46,450.19 for physical damages to the motorhome. CP 73. There was sufficient evidence that the defendant entered and remained unlawfully in the motorhome, with intent to commit the crime of malicious mischief. When viewed in a light most favorable to the State, there was substantial evidence to support both alternative means

and the intent to commit a crime. The defendant's claim fails as to the first-degree vehicle prowling conviction.

B. THE DEFENDANT FAILS TO ESTABLISH HIS LAWYER WAS INEFFECTIVE.

The defendant next asserts his lawyer was ineffective by not requesting a unanimity instruction for the burglary and vehicle prowling crimes. See Appellant's Br. at 14. He further argues his lawyer was ineffective by not requesting a necessity instruction; his failure to investigate and call a defense witness; his failure to investigate a diminished capacity claim; and for failing to request a bill of particulars. See Appellant's Br. at 15-25.

Standard of review regarding ineffective assistance of counsel claims.

Review of an ineffective assistance of counsel claim begins with a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. *Strickland v. Washington*, 466 U.S. 668, 689, 104 S. Ct. 205, 280 L.Ed.2d 674 (1984). "To prevail on this claim, the defendant must show his attorneys were not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment and their errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *In re Pers. Restraint of Pirtle*, 136 Wn.2d 467, 487, 965 P.2d 593 (1998). Judicial scrutiny of counsel's performance is highly deferential and requires that every effort be made to eliminate the "distorting effects of

hindsight” and to evaluate the conduct from “counsel’s perspective at the time”; to be successful on a claim of ineffective assistance of counsel, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound, reasonable, trial strategy. *Strickland*, 466 U.S. at 689; *State v. Grier*, 171 Wn.2d 17, 34, 246 P.3d 1260 (2011). To rebut the presumption of effective assistance of counsel, the defendant must establish the absence of any “conceivable legitimate tactic explaining counsel’s performance.” *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004) (emphasis added).

The first element of ineffectiveness is met by showing counsel’s conduct fell below an objective standard of reasonableness. The second element is met by showing that, but for counsel’s unprofessional errors, there is a reasonable probability the outcome of the proceeding would have been different. *In re Pers. Restraint of Rice*, 118 Wn.2d 876, 888, 828 P.2d 1086 (1992). That a defense 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 34.

1. Unanimity instruction.

The defendant has not provided any authority that he was entitled to a unanimity instruction regarding the alternative means for committing second degree burglary and first degree vehicle prowling.

To establish that his attorney's failure to propose a specific instruction constituted ineffective assistance, a defendant must show that he or she was entitled to the instruction. *State v. Johnson*, 143 Wn. App. 1, 21, 177 P.3d 1127 (2007). The defendant has not established he was entitled to a unanimity instruction.

Criminal defendants have a right to a unanimous jury verdict in Washington. Wash. Const. art. I, § 21;1 *State v. Whitney*, 108 Wn.2d 506, 511, 739 P.2d 1150 (1987) (jury must unanimously conclude that the defendant committed the crime charged in the information).

In *State v. Woodlyn*, 188 Wn.2d 157, 392 P.3d 1062 (2017), the Supreme Court held that when there is sufficient evidence to support each alternative means in an alternative means conviction, there is no right to jury unanimity as to the means in alternative means convictions. *See also State v. Sandholm*, 184 Wn.2d 726, 732, 364 P.3d 87 (2015). Where sufficient evidence supports each of the alternative means of committing the crime, specificity as to which means was proven is not required. *State v. Armstrong*, 188 Wn.2d 333, 340, 394 P.3d 373 (2017); *Woodlyn*,

188 Wn.2d at 164. But where insufficient evidence supports only one of the alternative means and “the jury does not specify that it unanimously agreed on the other alternative, ... the conviction cannot stand.” *Armstrong*, 188 Wn.2d at 343-44.

Here, as discussed above, the defendant unlawfully entered the storage lot and motorhome. He had no permission to be there. Any remaining was also unlawful, satisfying both alternative means. *See Allen*, 127 Wn. App. at 133; *Cordero*, 170 Wn. App. at 365. Regarding burglary, and by extension, vehicle prowling crimes, when there is sufficient evidence to convict presented on each means of committing a crime, a general verdict will stand, and there is no need for an instruction as to the alternate means. *State v. Johnson*, 132 Wn. App. 400, 410, 132 P.3d 737, 741 (2006), *review denied*, 159 Wn.2d 1006 (2007). The defendant’s lawyer was not ineffective for failing to proffer a unanimity instruction on the burglary and vehicle prowling crimes and this claim has no merit.

2. *Necessity defense.*

The defendant next faults his lawyer for not presenting a necessity instruction at the time of trial. *See* WPIC 18.02 (generic necessity instruction).

“Necessity” is a common-law defense with limited application. *State v. Diana*, 24 Wn. App. 908, 913-16, 604 P.2d 1312 (1979). A necessity

defense is available only when circumstances caused the accused to take unlawful action to avoid a greater injury. *State v. Jeffrey*, 77 Wn. App. 222, 224, 889 P.2d 956 (1995). The defense is not available if a reasonable, legal alternative to violating the law existed. *Id.* at 225. Thus, the defendant must prove by a preponderance of the evidence that: (1) he believed he must commit the crime to avoid or minimize a harm, (2) the harm sought to be avoided was greater than the harm resulting from the violation of the law, and (3) no legal alternative existed. *Id.* at 225; *State v. Gallegos*, 73 Wn. App. 644, 651, 871 P.2d 621 (1994).

Here, the defendant's lawyer was not ineffective by not proffering a necessity instruction because the defendant was not entitled to a necessity defense instruction in the first instance. There was no evidence presented or proffered that if the facts occurred as alleged by the defendant, that he made a good faith effort to first pursue reasonable, legal alternatives, such as calling 911 on his cell phone immediately upon leaving his ex-girlfriend's apartment; contacting a motorist for help; entering an open, nearby business on his route to the storage lot and seeking refuge or calling 911 from that business; or contacting the motorist who drove in ahead of the defendant into the storage lot. Indeed, the defendant stated he did not contact any citizen because he did not want to involve another in his situation. Consequently, the defendant's testimony was insufficient for defense

counsel to proffer such an instruction. Even if the necessity defense had potentially been available and the jury had been so instructed, there was no evidence that the defendant was not first without legal alternatives to prevent any alleged harm he may have perceived the night of the event.⁴

In addition, if the defense had requested the trial court instruct on the defense of necessity, it would have required the defense attorney to explain to the jury why the defendant had no legal alternatives available other than the action he took the night of the event. It is conceivable the defense theory and credibility would have been seriously undermined with such an effort. It is apparent the defense made a tactical decision to forego a necessity defense so that it would not have to explain the implausible reasons why the defendant had no legal alternatives, but rather the defense was allowed to argue the defendant made “quick action” decisions which led him to the storage lot, without having to sufficiently explain the

⁴ The defendant’s reliance on *Flowers v. State*, 51 So. 3d 911, 913 (Miss. 2010), is easily factually distinguished from the present case. The law of necessity in Mississippi requires “(1) the act charged was done to prevent a significant evil; (2) there must [have been] no adequate alternative; and (3) the harm caused was not disproportionate to the harm avoided.” *Id.* at 913. In *Flowers*, a neighbor saw the defendant breaking into a house. Flowers was charged with burglary. Flowers testified that someone had been trying to shoot him, so he ran to a nearby house, knocked on the door, and broke into the house to escape. *Id.* at 912. Unlike the present case, the facts as presented in that case did not offer any apparent alternative for Flowers, other than to seek refuge in the home. As stated above, the defendant in the present case had multiple, different, and potentially more expedient legal alternatives available, which he had knowledge of, and chose to ignore because he did not want to involve anyone in the situation.

cumbersome “legal alternatives” aspect of a necessity defense. *See* RP 349-51 (defense counsel’s closing argument, in relevant part).

When defense counsel’s conduct can be characterized as legitimate trial strategy or tactics, performance is not deficient. *Grier*, 171 Wn.2d at 33-34. An appellate court will not find ineffective assistance of counsel if “the actions of counsel complained of go to the theory of the case or to trial tactics.” *Id.* Conversely, a criminal defendant can rebut the presumption of reasonable performance by demonstrating that “there is no conceivable legitimate tactic explaining counsel’s performance.” *Id.* “The relevant question is not whether counsel’s choices were strategic, but whether they were reasonable.” *Id.* at 33-34.

The defense lawyer was not deficient for failing to propose a necessity defense because any explanation as to the lack of legal alternatives would have been improbable and diminished the credibility of the defendant’s case. This claim fails.

3. *Asserted failure to investigate and call a witness.*

The defendant next argues his lawyer was ineffective because she did not call Jessica Johnson as a witness. *See* Appellant’s Br. at 19. Apparently, Ms. Johnson was a friend of the defendant. At sentencing, Ms. Johnson stated she had read several Facebook posts and had heard statements over the phone made by the defendant’s ex-wife, where she

allegedly had threatened the defendant sometime before the incident. RP 405. She also maintained the defendant suffered from paranoia. RP 406. She further asserted the defendant was addicted to methamphetamine. RP 404. It was Ms. Johnson's opinion "[t]his is not anything [the defendant] would normally do if it was not for drugs." RP 406.

Deciding which witnesses to call is particularly a matter of trial strategy and will not generally support a claim of ineffective assistance of counsel. *State v. Warnick*, 121 Wn. App. 737, 746, 90 P.3d 1105 (2004). Although the decision to call a witness is generally a matter of trial strategy, the presumption of counsel's competence can be overcome by showing a failure to adequately investigate or subpoena a necessary witness. *State v. Maurice*, 79 Wn. App. 544, 552, 903 P.2d 514 (1995).

It is unclear what Ms. Johnson would have added had she been called to testify. She did not indicate any personal knowledge as to the facts of the incident in the present case. Regarding the alleged prior threats made by the defendant's ex-wife, such threats were hearsay and the substance of such threats is unknown, and how such alleged threats may have impacted the defendant's decision-making the day of the event is also unknown. If anything, the jury could have learned that the defendant potentially ingested methamphetamine the day of the event, possibly causing his paranoia and illogical decision-making, undercutting the defendant's assertion that he

was genuinely fearful and sought safety at the storage lot.⁵ Potential testimony from Ms. Johnson could have critically undermined the defense case with the introduction of defendant's methamphetamine use or ingestion the day of the event. The defendant has not overcome the presumption that counsel had good reason not to have Ms. Johnson testify.

4. Asserted failure to investigate a post-traumatic stress disorder as a diminished capacity claim.

The defendant next asserts his lawyer was ineffective by failing to investigate his PTSD. *See* Appellant's Br. at 20-23.

Defense counsel must investigate all reasonable defenses to the crimes charged, especially "the defendant's most important defense." *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 721, 101 P.3d 1 (2004). Once defense counsel reasonably selects a defense, however, "it is not deficient performance to fail to pursue alternative defenses." *Id.* at 722.

Regarding an ineffective assistance claim, a defendant "must show a reasonable likelihood that the investigation would have produced useful information not already known to defendant's trial counsel." *Id.* at 739. And in evaluating prejudice to the defendant, "ineffective assistance claims

⁵ Methamphetamine ingestion can cause paranoia and hallucinations. <https://www.drugabuse.gov/publications/drugfacts/methamphetamine>. Last accessed November 6, 2017.

based on a duty to investigate must be considered in light of the strength of the government's case." *Id.* at 739.

The record is silent as to what the defendant's lawyer knew and investigated. The defendant's claim that PTSD was not considered or known by the defense attorney is nothing more than speculation. Absent some evidence demonstrating counsel's lack of knowledge or investigation, the defendant cannot meet his burden and overcome this court's strong presumption that counsel was effective. *See State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995), *as amended* (Sept. 13, 1995).

The *Strickland* tests may be satisfied by the failure of defense counsel to present a diminished capacity defense where the facts support the defense. *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 819 (1987). Failure to request a diminished capacity instruction does not constitute ineffective assistance of counsel per se. *State v. Cienfuegos*, 144 Wn.2d 222, 229-30, 25 P.3d 1011 (2001) (where defense counsel was able to argue his theory of the case). To show diminished capacity, a defendant must show the crime charged includes a particular mental state as an element, present evidence of a mental disorder, and supply "expert testimony demonstrating the defendant suffered from a mental condition that impaired his ... ability to form the requisite ... intent." *State v. Eakins*, 127 Wn.2d 490, 502, 902 P.2d 1236 (1995); *State v. Atsbeha*, 142 Wn.2d 904, 921, 16 P.3d 626

(2001); *State v. Nuss*, 52 Wn. App. 735, 738, 763 P.2d 1249 (1988). PTSD can affect a defendant's intent resulting in diminished capacity. *State v. Bottrell*, 103 Wn. App. 706, 715, 14 P.3d 164 (2000).

Here, even if the defendant did suffer from PTSD, there is nothing in the record to support a claim that the condition resulted in diminished capacity on the night in question. There also is nothing in the record to suggest defense counsel did not investigate defendant's asserted PTSD. In addition, the defendant has produced nothing from the record indicating how the alleged affliction with PTSD impacted his decision-making or actions on the day of the event. Accordingly, he cannot establish the requisite prejudice for an ineffective assistance of counsel claim.

In addition, such evidence, if presented, would have undermined the defendant's denial of general culpability in the commission of the offenses; i.e., that he had been threatened and acted reasonably under the circumstances. There is nothing in the record to suggest that the defendant did not appreciate the circumstances or that he could not have formed the necessary mens rea for the respective crimes.

Therefore, it was a reasonable, strategic decision to refrain from offering testimony which would have contradicted the defendant's own version of events and testimony that he rationally reacted to what he believed to be a threat of harm and took steps to avoid that alleged harm,

rather than an alternative and inconsistent theory that he could not form the intent to commit the burglary and other associated crimes. There was no ineffective assistance of counsel for failure to present a diminished capacity claim.

5. *Failure to request a bill of particulars.*

The defendant next claims that his defense attorney's failure to move for a bill of particulars as to the offense underlying the burglary and vehicle prowling charges constituted ineffective assistance of counsel. *See* Appellant's Br. at 24-25.

A criminal defendant has "a constitutional right to be informed of the nature and cause of the accusation against him" to enable him to prepare a defense. *Bergeron*, 105 Wn.2d at 18. The purpose of a bill of particulars is to "amplify or clarify particular matters essential to the defense." *State v. Holt*, 104 Wn.2d 315, 321, 704 P.2d 1189 (1985).

A bill of particulars is not required if the necessary information is already in the charging document or if the information has been provided by the State in some other satisfactory form. *State v. Noltie*, 116 Wn.2d 831, 845, 809 P.2d 190 (1991). Whether to grant a request for a bill of particulars is a matter left to the discretion of the trial court. *Id.* at 844.

On appeal, the defendant presumes what defense counsel knew and did not know with respect to defending the case without any citation to the

record or other support for his claim. His assertions are nothing but supposition. Moreover, he has not established, *from the record*, what information was not provided to his defense attorney for the purpose of establishing a defense.

Here, there was no doubt as to the underlying crimes the State would argue at trial to support the burglary and vehicle prowling convictions; it was discovered at the scene that the defendant had dismantled the interior of the motorhome and he was subsequently charged with malicious mischief. CP 1. It was also apparent from the information that the State had a reasonable belief and charged the defendant with third degree theft and would argue the defendant committed theft inside the storage lot or motorhome. CP 1. Clearly, it was the crimes of malicious mischief and theft which were the underlying offenses for the burglary and vehicle prowling crimes. A bill of particulars would not have informed the defendant of anything he did not already know. Moreover, the defendant has not established the trial court would have granted a motion for a bill of particulars.

Accordingly, it was reasonable for defense counsel not to request a bill of particulars and the defendant has not established any prejudice by counsel's lack of request for a bill of particulars. This claim has no merit.

C. THE TRIAL COURT DID NOT ERR AT THE TIME OF SENTENCING.

1. Presentence report.

For the first time on appeal, the defendant argues the trial court erred when it did not order a presentence report in violation of RCW 9.94A.500. *See* Appellant's Br. at 25-27.

At the time of sentencing, the defendant's lawyer remarked that the defendant had previously disclosed that he was using methamphetamine at the time of the offense and that he had a relapse. RP 394. Ms. Johnson also remarked that the defendant had used methamphetamine and he suffered from PTSD. RP 404.

After hearing from the parties, the Honorable Linda Tompkins remarked:

I am very mindful, however, of the need to address the substance abuse and to do that as fairly and within the realm of justice as can be. I do find chemical dependency likely contributed to these offenses. I will make some adjustments to the recommended sentence, however, short of imposing a prison DOSA.

The confinement period and the community custody treatment, neither one, in the Court's mind, would satisfy the level of intensity that's needed in drug treatment, that this is much more involved potentially with this co-occurring mental health PTSD and drug involvement. But I'm not satisfied that the significant reduction of the confinement and the 30 months of community custody would satisfy that. So I am going to be imposing an overall sentence. I'm not inclined to run the misdemeanors concurrently --

consecutively. So they will be run concurrently. And that diminishes the 12 months that would be indicated.

The reduction to a 60-month sentence in prison, certainly with the benefit of time served and good time and whatnot, results in still a very significant confinement time with no ongoing, intensive addressing of what is needed here. So the Court is going to recognize a -- I'm going to drop off another five months and impose a 55-month sentence on the burglary, 29 months on the vehicle prowling, all to run concurrently.

RP 412-13.

The trial court did not err by not ordering a presentence report for several reasons as discussed below.

- a. There was no evidence that a chemical dependency or PTSD contributed to the offenses or to the defendant's culpability in committing the offenses.

RCW 9.94A.505(9) provides, “[a]s a part of any sentence, the court may impose and enforce crime-related prohibitions and affirmative conditions as provided in this chapter. ‘Crime-related prohibitions’ may include a prohibition on the use or possession of alcohol or controlled substances if the court finds that any chemical dependency or substance abuse contributed to the offense.” In addition, under RCW 9.94A.703(3)(c)-(d), as a condition of community custody, the court is authorized to require an offender to “[p]articipate in crime-related treatment or counseling services” and in “rehabilitative programs or otherwise perform affirmative

conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community.”

Moreover, RCW 9.94A.703(b)(i) requires that if a defendant is convicted of a drug or alcohol related offense, the trial court is required to order the defendant to complete an evaluation by an approved agency. The statute further requires that if the defendant is found to have an alcohol or drug problem, he or she shall enter into treatment. RCW 9.94A.703(b)(i).

In *State v. Jones*, 118 Wn. App. 199, 76 P.3d 258 (2003), the court held that any court-ordered counseling or treatment must address a circumstance that contributed to the current offense. If not, it fails to satisfy the statutory requirement that it be “crime-related.” *Id.* at 207. The sentencing court in *Jones* erred by ordering alcohol counseling when the evidence indicated that only methamphetamine was involved in the crime, not alcohol. The court held “that alcohol counseling ‘reasonably relates’ to the offender’s risk of reoffending, and to the safety of the community, only if the evidence shows that alcohol contributed to the offense.” *Id.* at 208.

Similarly, in *State v. Brooks*, 142 Wn. App. 842, 851-52, 176 P.3d 549 (2008), this Court held that the trial court abused its discretion by ordering a mental health evaluation and treatment without finding that the defendant was mentally ill and that the condition likely influenced the offense. An order requiring mental health treatment must be based on a

presentence report and, if applicable, mental status evaluations that have been filed with the court to determine the offender's competency or eligibility for a defense of insanity. RCW 9.94B.080; *Brooks*, 142 Wn. App. at 851. These requirements are mandatory. *Id.*

Here, there is *no* evidence that a controlled substance or PTSD contributed to or influenced any of the offenses. Hence, it is unclear as to what the trial court relied on in making a chemical dependency finding and that the defendant suffered from PTSD as no evidence was presented at the time of trial regarding PTSD or chemical dependency or how those conditions contributed to the offenses. Rather, the court relied on unsworn, allocution statements made by the defendant and Ms. Johnson. The record is void of any testimony, documentary evidence, psychological examinations, drug evaluations, or any other competent evidence to support a claim that chemical dependency or PTSD or these alleged conditions contributed to any of these offenses. Moreover, no controlled substance was found on the defendant at his time of arrest. Indeed, “[d]rug addiction and its causal role in an addict’s offense may not serve to justify a durational departure from a standard range sentence.” *State v. Gaines*, 122 Wn.2d 502, 509, 859 P.2d 36 (1993).

Here, the trial court had no factual or legal basis to make a chemical dependency finding or to determine the impact or significance of

defendant's claim of PTSD. Such a finding was not appropriate under the facts of this case and a presentence report was not warranted.

- b. The trial court found that a Drug Offender Sentencing Alternative sentence was not appropriate in this case nor would it satisfy any potential drug rehabilitation efforts, inferentially waiving any requirement for a presentence report from DOC.

RCW 9.94A.500(1), in pertinent part, states “unless waived by the court, the court shall order the department to complete a chemical dependency screening report before imposing a sentence upon a defendant who has been convicted of ... any felony where the court finds that the offender has a chemical dependency that has contributed to his offense.”

It is clear from the language of the statute that a trial court can waive a presentence report to be completed by DOC. In the present case, defense counsel did not request a presentence report be prepared. The sentencing court clearly acknowledged that a Drug Offender Sentencing Alternative sentence would not be appropriate nor would it satisfy any potential drug rehabilitation efforts and tailored the sentence accordingly. It can be implied the trial court waived the requirement for a chemical dependency report be prepared by DOC.

The defendant relies on *State v. Brown*, 178 Wn. App. 70, 79, 312 P.3d 1017 (2013), *review denied*, 181 Wn.2d 1006 (2014), for the proposition that a presentence report was required in this case. In *Brown*,

the defendant was convicted of child rape and incest. Division Two of this Court found that former RCW 9.94A.110, recodified as RCW 9.94A.500, under which the trial court sentenced Brown, expressly mandated a presentence report, and because the appellate court could not determine what impact the report would have had on sentencing, the court vacated Brown's sentence and remanded for resentencing. The court found it most significant that a presentence report would have potentially provided the victim's perspective to the sentencing court, because the victims did not speak at sentencing. *Id.* at 84-85. Chemical dependency was not at issue in that case, nor did the appellate court address the statute's allowance for a waiver of the presentence report by the trial court.

With no evidence supporting a drug addiction or that PTSD contributed to the offenses and no request for a presentence report made by the defense at the time of sentencing, the trial court did not err by not ordering a presentence report.

2. *Military records.*

The defendant next alleges the trial court abused its discretion by not allowing him additional time to obtain his military records. However, the record below is barren of any request by the defense to continue sentencing. The defense rhetorically asked the court if it would appropriate to postpone sentencing to obtain the military records based upon the court's

inquiry regarding any military records. RP 411. The defense attorney acknowledged the defendant was not forthcoming about his military service and she had not procured the military records because of the difficulty in obtaining the defendant's military records due to his incarceration prior to trial. RP 409-11. Hence, the defense made no request for additional time to prepare or obtain the records. Moreover, the defendant has not proffered what information, if any, was contained in the military records that was relevant to crimes or to the sentencing. This claim fails.

3. Exceptional sentence.

The defendant next alleges the trial court erred when it did not impose a mitigated sentence. *See* Appellant's Br. at 25-35. When imposing the sentence, the trial court stated:

It's certainly -- truly at this point I don't want to question that statement with regard to military service and three tours, and certainly it is well understood that PTSD and this type of erratic behavior may, in fact, be linked. I have no solid evidence before me that would found [sic] a sentence that would be crafted, understanding that, understanding principles of mental health court and those types of alternative options for sentencing.

RP 410-11.

Standard of review.

With few exceptions, the defendant may not appeal a sentence within the standard range. RCW 9.94A.585(1); *State v. McFarland*, 189 Wn.2d 47, 56, 399 P.3d 1106 (2017). Review of the court's refusal to

impose an exceptional sentence downward is also limited to “circumstances where the court has refused to exercise discretion at all or has relied on an impermissible basis for refusing to impose an exceptional sentence below the standard range.” *Id.* at 56. A trial court errs when “it refuses categorically to impose an exceptional sentence below the standard range under any circumstances or when it operates under the mistaken belief that it did not have the discretion to impose a mitigated exceptional sentence for which [a defendant] may have been eligible.” *Id.*

Here, the trial court did not refuse categorically to impose an exceptional sentence below the standard range but rather declined to impose an exceptional sentence downward or an alternative sentence because there was not sufficient evidence presented to do so. Rather, the trial court exercised its discretion and imposed a standard range sentence.

a. Military service as a mitigating circumstance.

The defendant asserts the trial court did not consider his military service as a basis for an exceptional sentence downward. There is no factual or legal support for this argument.

Notably, the defense never requested an exceptional sentence downward based upon the defendant's military service. At the time of sentencing, the defense attorney remarked:

It took a long time for Mr. Ellis to talk to me about his military history. I included that in court document supplemental sentencing information. Mr. Ellis was in the Army from 1999 to 2007. He did three tours in Somalia, Iraq, and Afghanistan. He suffers from PTSD and he began to use after those tours.

I think the behaviors in this case are pretty clear once you put them into that kind of imagery, once you draw that picture. You have someone who's been to three tours, who has PTSD, who only did a year of therapy, and who's barricading himself in a motorhome because he's been threatened.⁶

RP 394.

Indeed, the defense attorney acknowledged that the defendant's military service was not a substantial and compelling reason to impose a downward departure. RP 397. Rather, the defense attorney attempted to distinguish the second-degree burglary from other like crimes as a basis for the exceptional sentence, arguing that the second-degree burglary occurred within a fenced area. RP 397-99. The trial court did not find this argument persuasive stating:

The argument certainly is well-intended that this was really just a fence outside, but burglary, over centuries of

⁶ Likewise, there was no request made in the defense sentencing brief filed in the superior court based upon military service. CP 82-89.

jurisprudence, has included these types of damages to persons whose homes and curtilage has been invaded. So it doesn't really diminish the standalone damage with regard to breaking and entering that premises, chain-link fence, razor-wire barriers on top of that.

RP 412.

Similarly, there was no evidence produced that the defendant's military service directly related to the commission of the offenses or to his culpability for the crimes committed. Generally, a trial court must impose a sentence within the standard range. *State v. Law*, 154 Wn.2d 85, 94, 110 P.3d 717 (2005). A trial court has discretion to depart from the standard range either upward or downward. But this discretion may be exercised only if: (1) the asserted aggravating or mitigating factor is not one necessarily considered by the legislature in establishing the standard sentence range, and (2) it is sufficiently substantial and compelling to distinguish the crime in question from others in the same category. *Id.* at 95. A factor is sufficiently substantial and compelling to justify departure only if it relates "directly to the crime or the defendant's culpability for the crime committed." *Id.* at 95.

As discussed previously, there is no evidence that the defendant's military service related directly to the commission of any of the charged crimes or to his culpability. This claim fails.

b. “Aberrant behavior.”

The defendant additionally argues his “aberrant” conduct during the commission of the present offenses distinguishes it from other similar crimes. To support his claim, the defendant argues that he did not commit the crime with any preparation, he was not armed or motivated by pecuniary gain, he suffered from PTSD, and his conduct was spontaneous and a result of being chased. *See* Appellant’s Br. at 34. Obviously, there is no evidence to support the claims that he didn’t commit these crimes with any preparation, or that they were spontaneous and the result of being chased as the jury disagreed with these arguments at trial.

More importantly, our high court in *State v. Fowler*, 145 Wn.2d 400, 407-08, 38 P.3d 335 (2002), considered and rejected “aberrant behavior” as a mitigating factor.

Fowler argues here that federal case law supports the proposition that aberrant behavior is a valid mitigating factor. We agree with the Court of Appeals that it is not. The fact that a defendant’s criminal conduct is exceptional or aberrant does not distinguish the defendant’s crime from others in the same category. Furthermore, to say that conduct is an aberration is tantamount to saying that the defendant “has not done anything like this before.” That, in our view, is yet another way of saying that the defendant has little or no history of criminal behavior. As we have noted, that is not a valid basis for an exceptional sentence under Washington’s sentencing scheme because it has been taken into consideration in the establishment of the standard range. By contrast, under federal law, the fact the behavior is aberrational may be a valid mitigating factor because it has

not been “adequately taken into consideration by the sentencing commission in formulating the guidelines.”⁷

This claim has no merit.

c. Alleged “de minimis” nature of the second-degree burglary is not a valid mitigating factor.

The defendant further argues that his commission of the second-degree burglary was less egregious when compared to other second-degree burglaries. Notwithstanding that the defendant provides no reference point regarding the facts or circumstances of other second-degree burglaries for comparison, the assertion that a crime is de minimis is not a valid mitigating circumstance. *State v. Garcia*, 162 Wn. App. 678, 685, 256 P.3d 379 (2011), *review denied*, 173 Wn.2d 1008 (2012). This claim fails.

IV. CONCLUSION

For the reasons stated herein, the State requests this Court affirm the judgment and sentence.

Respectfully submitted this 7 day of November, 2017.

LAWRENCE H. HASKELL
Prosecuting Attorney



Larry Steinmetz #20635
Deputy Prosecuting Attorney
Attorney for Respondent

⁷ Here, the defendant had a history of criminal behavior as he had previously been convicted of crimes, six of which were felonies. CP 46.

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

STATE OF WASHINGTON,

Respondent,

v.

SCOTT M. ELLIS,

Respondent.

NO. 35146-7-III

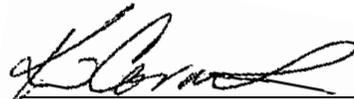
CERTIFICATE OF
SERVICE

I certify under penalty of perjury under the laws of the State of Washington, that on November 7, 2017, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Joseph Broadbent
josephbroadbentatty@gmail.com

11/7/2017
(Date)

Spokane, WA
(Place)


(Signature)

SPOKANE COUNTY PROSECUTOR

November 07, 2017 - 11:04 AM

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Sender Name: Kim Cornelius - Email: kcornelius@spokanecounty.org

Filing on Behalf of: Larry D. Steinmetz - Email: lsteinmetz@spokanecounty.org (Alternate Email: scpaappeals@spokanecounty.org)

Address:
1100 W Mallon Ave
Spokane, WA, 99260-0270
Phone: (509) 477-2873

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