

FILED  
Court of Appeals  
Division III  
State of Washington  
1/22/2019 12:42 PM

NO. 36181-1-III

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

---

---

STATE OF WASHINGTON,

Respondent,

v.

EDWARD CAICEDO-OBREGON,  
Appellant.

---

---

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR BENTON COUNTY

The Honorable Bruce A. Spanner, Judge

---

---

BRIEF OF APPELLANT

---

---

LISE ELLNER, WSBA No. 20955  
SPENCER BABBIT, WSBA No. 51076  
Attorneys for Appellant

LAW OFFICES OF LISE ELLNER  
Post Office Box 2711  
Vashon, WA 98070  
(206) 930-1090

**TABLE OF CONTENTS**

	<b>Page</b>
A. ASSIGNMENTS OF ERROR.....	1
Issues Presented on Appeal.....	2
B. STATEMENT OF THE CASE.....	3
Substantive Facts.....	3
Procedural Facts.....	7
C. ARGUMENT.....	8
1. THE STATE FAILED TO PRESENT EVIDENCE TO ESTABLISH BEYOND A REASONABLE DOUBT THAT MR. CAICEDO-OBREGON ENTERED OR REMAINED UNLAWFULLY WITH SEXUAL MOTIVATION IN MS. MUNSON'S APARTMENT OR THAT HE ASSAULTED HER .....	8
a. Unlawful Entry.....	9
b. Assault.....	11
i. Kiss.....	11
ii. Windmill.....	13
c. Sexual Motivation.....	14

**TABLE OF CONTENTS**

	<b>Page</b>
2. THE TRIAL COURT ERRED WHEN IT DENIED MR. CAICEDO-OBREGON'S REQUEST TO INSTRUCT THE JURY ON THE STATUTORY DEFENSE CONTAINED IN RCW 9A.52.090(3) .....	16
a. The trial court violated Mr. Caicedo-Obregon's right to present the defense available to in RCW 9A.52.090(3) and WPIC 19.06.....	18
3. MR. CAICEDO-OBREGON RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AT HIS TRIAL WHEN DEFENSE COUNSEL FAILED TO PRESENT THE DEFENSE OF LICENSE TO ENTER AND REQUEST A JURY INSTRUCTION ON THE LESSER INCLUDED OFFENSE OF CRIMINAL TRESPASS FIRST DEGREE .....	20
a. Right to Present Defense.....	21
D. CONCLUSION.....	26

## TABLE OF AUTHORITIES

	Page
<b>WASHINGTON CASES</b>	
<i>City of Bremerton v. Widell</i> , 146 Wn.2d 561, 51 P.3d 733 (2002).....	17
<i>In re Crace</i> , 174 Wn.2d 835, 280 P.3d 1102 (2012).....	20
<i>In re Yung Cheng-Tsai</i> , 183 Wn.2d 91, 351 P.3d 138 (2015).....	23
<i>State v. Barnes</i> , 153 Wn.2d 378, 103 P.3d 1219 (2005).....	22
<i>State v. Crittenden</i> , 146 Wn. App. 361, 189 P.3d 849 (2008).....	16
<i>State v. Engel</i> , 166 Wn.2d 572, 210 P.3d 1007 (2009).....	8
<i>State v. Fisher</i> , 185 Wn.2d 836, 374 P.3d 1185 (2016).....	16, 18, 19
<i>State v. Griffin</i> , 100 Wn.2d 417, 670 P.2d 265 (1983).....	16
<i>State v. Homan</i> , 181 Wn.2d 102, 330 P.3d 182 (2014).....	8
<i>State v. J.P.</i> , 130 Wn. App. 887, 125 P.3d 215 (2005).....	9, 10, 17, 24
<i>State v. Jones</i> , 95 Wn.2d 616, 628 P.2d 472 (1981).....	25
<i>State v. Kirwin</i> , 166 Wn. App. 659, 271 P.3d 310 (2012).....	14

## TABLE OF AUTHORITIES

	Page
<b>WASHINGTON CASES, continued</b>	
<i>State v. Kylo</i> , 166 Wn.2d 856, 215 P.3d 177 (2009).....	20
<i>State v. Leavitt</i> , 111 Wn.2d 66, 758 P.2d 982 (1988).....	21
<i>State v. Madarash</i> , 116 Wn. App. 500, 66 P.3d 682 (2003).....	11
<i>State v. McCullum</i> , 98 Wn.2d 484, 656 P.2d 1064 (1983).....	17, 18
<i>State v. McFarland</i> , 127 Wn.2d 322, 899 P.2d 1251 (1995).....	20
<i>State v. O'Brien</i> , 164 Wn. App. 924, 267 P.3d 422 (2011).....	21
<i>State v. Parker</i> , 102 Wn.2d 161, 683 P.2d 189 (1984).....	25
<i>State v. Phuong</i> , 174 Wn. App. 494, 299 P.3d 37 (2013).....	8
<i>State v. Ponce</i> , 166 Wn. App. 409, 269 P.3d 408 (2012).....	17
<i>State v. Robinson</i> , 153 Wn.2d 689, 107 P.3d 90 (2005).....	20
<i>State v. Rupe</i> , 108 Wn.2d 734, 743 P.2d 210 (1987).....	20
<i>State v. Schneider</i> , 36 Wn. App. 237, 673 P.2d 200 (1983).....	9

**TABLE OF AUTHORITIES**

	<b>Page</b>
<b>WASHINGTON CASES, continued</b>	
<i>State v. Southerland</i> , 109 Wn.2d 389, 745 P.2d 33 (1987) (Southerland II) .....	22
<i>State v. Southerland</i> , 45 Wn. App. 885, 728 P.2d 1079 (1986).....	22
<i>State v. Walker</i> , 136 Wn.2d 767, 966 P.2d 883 (1998).....	16, 21
<i>State v. Williams</i> , 132 Wn.2d 248, 937 P.2d 1052 (1997).....	16, 22
<i>State v. Yokel</i> , 196 Wn. App. 424, 383 P.3d 619 (2015).....	21
<b>FEDERAL CASES</b>	
<i>Jackson v. Virginia</i> , 433 U.S. 307, 99 S. Ct. 2781, 61 L.Ed.2d 560 (1979) .....	8
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) .....	20, 23
<b>RULES, STATUTES, AND OTHERS</b>	
RCW 9.94A.030 .....	9, 15
RCW 9.94A.835 .....	14, 15
RCW 9A.52 .....	8
RCW 9A.52.010 .....	9, 10
RCW 9A.52.020 .....	8, 11, 26
RCW 9A.52.090 .....	1, 2, 16, 17, 18, 19
U.S. Const. Amend. VI.....	21, 27

**TABLE OF AUTHORITIES**

	<b>Page</b>
<b>RULES, STATUTES, AND OTHERS, continued</b>	
Wash. Const. art. I, § 22 .....	21
WPIC 19.06 .....	7, 16, 17, 18, 19, 26
WPIC 35.50 .....	11

A. ASSIGNMENTS OF ERROR

1. Mr. Caicedo-Obregon was denied his constitutional right to present a defense when the trial court refused to instruct the jury on the statutory defense available to Mr. Caicedo-Obregon in RCW 9A.52.090(3) and the evidence supported an inference that he reasonably believed he was licensed to enter the apartment.

2. The state presented insufficient evidence to prove beyond a reasonable doubt that Mr. Caicedo-Obregon unlawfully entered Ms. Munson's apartment and assaulted Ms. Munson during the alleged burglary.

3. Mr. Caicedo-Obregon received ineffective assistance of counsel when defense counsel failed to request a jury instruction on the lesser included offense of Criminal Trespass in the First Degree and failed to present the defense of license to enter the premises.

4. The state presented insufficient evidence to support the sexual motivation special verdict when the only evidence presented to support the allegation was testimony that someone kissed Ms. Munson's leg.

### Issues Presented on Appeal

1. Was Mr. Caicedo-Obregon denied his constitutional right to present a defense when the trial court refused to instruct the jury on the statutory defense in RCW 9A.52.090(3) and the record contains evidence that Mr. Caicedo-Obregon reasonably believed he was licensed to enter Ms. Munson's apartment?
2. Did the state present sufficient evidence to prove beyond a reasonable doubt that Mr. Caicedo-Obregon entered or unlawfully entered Ms. Munson's apartment and assaulted her when the evidence shows he reasonably believed he was licensed to enter the apartment and he never made harmful or offensive contact with her?
3. Did Mr. Caicedo-Obregon receive ineffective assistance of counsel when defense counsel failed to request a jury instruction on the lesser included offense of Criminal Trespass in the First Degree despite evidence in the record that it was the only crime was committed?
4. Did the state fail to present sufficient evidence to support the sexual motivation special verdict, where the only

evidence of sexual motivation was the allegation that someone kissed Munson's leg?

B. STATEMENT OF THE CASE

Substantive Facts

On December 20, 2017, police officers were dispatched to 3534 Van Giesen Street in Richland, Washington at approximately 4:16 AM. RP 47-48. Upon arrival, the officers contacted Jacquelyn Munson. RP 48. Ms. Munson reported that she had been at home that night with her children and her girlfriend, who she identified as Rosibel Pineda. RP 218. Between 10:00 and 11:00 PM, Ms. Munson fell asleep in her bed with her 11-year-old son, J.D. RP 219. According to Ms. Pineda, she left the apartment at approximately 1:00 AM to go drinking with friends and left the front door to the apartment unlocked. RP 155-56.

However, a neighbor testified that she observed Ms. Pineda outside the apartment building only a few minutes before police arrived after 4:00 AM. RP 290-92. Furthermore, other neighbors testified that they heard Ms. Munson arguing with someone in her apartment that night, and they suspected she was arguing with Ms. Pineda. RP 273, 279. Finally, Ms. Pineda testified that she and Ms.

Munson had a physical fight in November and that Ms. Munson had a black right eye afterwards. RP 166-67.

December 20, 2017, Ms. Munson and J.D. were asleep in bed when Ms. Pineda left. RP 156. Ms. Munson woke up in the middle of the night because her bed was creaking. RP 219. She reported that she noticed someone was at the foot of her bed, but she believed it was Ms. Pineda so she was not initially concerned, even when the person crawled into the bed and began to touch Ms. Munson's leg. RP 222-24. Ms. Munson believed Ms. Pineda was trying to initiate sexual intercourse because she had started to kiss Ms. Munson's leg. RP 224. The commotion caused J.D. to wake up and he walked out to the living room. RP 189, 223-24.

Ms. Munson became angry at the person she thought was Ms. Pineda for waking J.D. RP 224. When Ms. Munson felt the person's hand and chest and realized that it was a male. RP 224-25. Ms. Munson testified that the male was wearing a hooded sweatshirt and had the hood cinched tight to cover his face. RP 226. He began to try to flee but Ms. Munson held on to his clothing. RP 228.

Ms. Munson testified that in the middle of the night, awoken

from sleep, when she realized the person in her bed who was attempting sexual contact was not her girlfriend, she did not scream or try to push him away or get help, but rather held onto him by his clothing to prevent him from leaving. RP 225-226, 228.

Meanwhile, the “grown man” just tried to escape. RP 226-228. During his escape, the man, “[n]ot even like a skilled fighter just, you know, in a complete flight mode” trying to get away from Ms. Munson’s grasp, started “kind of like a windmill.”. RP 228. During the windmill motion, Ms. Munson was struck in the face and the man fell and then ran off. RP 228-229. Ms. Munson was unable to identify the man in her bed.

The police collected a DNA sample from Ms. Munson’s skin and clothing. RP 61, 122. Ms. Munson’s clothing tested negative for semen and saliva. RP 117. The swab from Ms. Munson’s skin tested positive for human amylase from at least three individuals. RP 122-24, 136. DNA from saliva can last for years. RP 139. The state crime lab identified one sample as the “major sample” and developed a DNA profile of this individual. RP 136. This sample matched a swab taken from Edward Caicedo-Obregon. RP 136-37.

Mr. Caicedo-Obregon is Ms. Munson’s neighbor. RP 215,

249. Before this incident, his children used to play with Ms. Munson's children. RP 215. Mr. Caicedo-Obregon testified that he was having an extramarital affair with Ms. Munson in November and December of 2017. RP 249-50. Ms. Munson denied the affair or any relationship. RP 217-18. Mr. Caicedo-Obregon also admitted to police during a police interview that he was having multiple extramarital affairs at the time of this incident. RP 318.

Mr. Caicedo-Obregon testified that he had been at Ms. Munson's apartment on December 19, 2017, to end his relationship with her and to return a dog she had given to him. RP 250, 259, 261. Mr. Caicedo-Obregon told the police that he had seen the dog wandering the parking lot of Ms. Munson's apartment complex on December 19, 2017. RP 319.

Mr. Caicedo-Obregon explained that when he attempted to end his relationship with Ms. Munson, and that after she initiated sexual contact with him, he performed oral sex on her. RP 250-51. Mr. Caicedo-Obregon told the police he did not have sexual contact with Ms. Munson because he had previously promised his wife that he was going to stop the extramarital affairs. RP 256. Ms. Munson denied that she was upset with Mr. Caicedo-Obregon ending their

relationship because he provided financial support for Munson and her children. RP 218, 250.

#### Procedural Facts

The state charged Mr. Caicedo-Obregon with one count of Burglary in the First Degree and alleged a sentencing enhancement of sexual motivation. CP 1-2. Mr. Caicedo-Obregon elected to proceed to a jury trial. CP 13.

Mr. Caicedo-Obregon moved the trial court to suppress the recorded 911 call under the hearsay rules. CP 15; RP 14-15. The trial court denied the motion. RP 183. At the close of the evidence, Mr. Caicedo-Obregon offered the affirmative defense jury instruction WPIC 19.06 based on the evidence that Mr. Caicedo-Obregon reasonably believed he was licensed to enter Ms. Munson's apartment. The trial court denied this request. RP 328.

The jury returned a guilty verdict and an affirmative response to the special verdict form regarding sexual motivation. RP 398-99. Mr. Caicedo-Obregon filed a timely notice of appeal. CP 146-47.

C. ARGUMENT

1. THE STATE FAILED TO PRESENT EVIDENCE TO ESTABLISH BEYOND A REASONABLE DOUBT THAT MR. CAICEDO-OBREGON ENTERED OR REMAINED UNLAWFULLY WITH SEXUAL MOTIVATION IN MS. MUNSON'S APARTMENT OR THAT HE ASSAULTED HER

In a criminal case, the state bears the burden of presenting sufficient evidence to prove every element of the charged crime beyond a reasonable doubt. *State v. Phuong*, 174 Wn. App. 494, 502, 299 P.3d 37 (2013) (citing *Jackson v. Virginia*, 433 U.S. 307, 317-18, 99 S. Ct. 2781, 61 L.Ed.2d 560 (1979)). In evaluating the sufficiency of the evidence in a criminal case, the appellate court must determine “whether any rational fact finder could have found the elements of the crime beyond a reasonable doubt.” *State v. Homan*, 181 Wn.2d 102, 105, 330 P.3d 182 (2014) (citing *State v. Engel*, 166 Wn.2d 572, 576, 210 P.3d 1007 (2009)).

To commit Burglary in the First Degree, a defendant must enter or remain unlawfully in a building with the intent to commit a crime against persons or property inside, and the defendant must either (1) be armed with a deadly weapon, or (2) assault any person. RCW 9A.52.020. *State v. J.P.*, 130 Wn. App. 887, 892, 125

P.3d 215 (2005). Mr. Caicedo-Obregon was charged under the assault prong but the evidence presented at trial was insufficient to prove both unlawful entry and an assault.

The allegation of sexual motivation required the state to prove beyond a reasonable doubt Mr. Caicedo-Obregon burglarized Ms. Munson's apartment for the purpose of sexual gratification. RCW 9.94A.030(43). The state alleged Mr. Caicedo-Obregon entered Ms. Munson's apartment with sexual motivation, but the evidence presented at trial was insufficient to uphold this special verdict because the only evidence of sexual motivation offered at trial was an alleged kiss to the thigh area. RP 224.

a. Unlawful Entry

The unlawful entry element of burglary may be proved by circumstantial evidence, as may any other element. *J.P.*, 130 Wn. App. at 892. And the resident is not required to testify that the entrant did not have permission to enter or remain in the residence. *State v. Schneider*, 36 Wn. App. 237, 241, 673 P.2d 200 (1983). A person enters or remains unlawfully if he does so without license, invitation, or privilege. However, the state must prove unlawful entry. RCW 9A.52.010(3).

Distinct from this case, *J.P.*, offers a fact pattern in which circumstantial evidence was sufficient to establish unlawful entry. Therein the defendant crawled out of a window of a locked residence after he admittedly spray-painted graffiti on a wall. *J.P.*, 130 Wn. App. at 892-93. The Court held that this evidence was sufficient to support an inference that his entry and presence was not “licensed, invited, or otherwise privileged.” *J.P.*, 130 Wn. App. at 893-94 (quoting RCW 9A.52.010(3)).

In this case, by contrast to *J.P.*, the apartment was unlocked, Mr. Caicedo-Obregon testified that he was an invitee having an illicit affair with Ms. Munson and that he had seen Ms. Munson the day before the alleged incident in this case. RP 249-50. Ms. Munson denied the affair but did not identify Mr. Caicedo-Obregon as the intruder, despite him living next door. RP 240. The facts in this case are distinct from *J.P.*, and merely establish that a male entered Ms. Munson’s apartment and rather than being afraid, she tried to hold onto this allegedly unknown male. RP 228. This evidence does not establish that Mr. Caicedo-Obregon unlawfully entered Ms. Munson’s apartment.

b. Assault

Washington courts have adopted to common law definition of assault. *State v. Madarash*, 116 Wn. App. 500, 513, 66 P.3d 682 (2003). In the context of this case, an assault is “an intentional touching of another person that is harmful or offensive.” WPIC 35.50.

The state alleged two incidents of physical contact on December 20, 2017, constituted the assault necessary to satisfy RCW 9A.52.020.

i. Kiss

The first incident was in Ms. Munson’s bed when the alleged burglar kissed her on her thigh area. RP 224. The state’s evidence of this contact came from Ms. Munson’s testimony and a DNA profile formed from the swab taken from her skin. RP 223; (CP 117, ex. 6-7).

The swab taken from Ms. Munson’s skin contained DNA from three separate people. RP 136. The state’s evidence consisted of a DNA profile from only one of those people. RP 136, 140. The state presented testimony that this sample was designated as the “major profile” because it was present in a higher

quantity than the other two samples. RP 136. Based on this DNA profile and Ms. Munson's testimony, the state alleged that Mr. Caicedo-Obregon assaulted Ms. Munson in her bed.

However, there was no evidence that this sample was left on Ms. Munson on December 20, 2017, rather than the day before when Ms. Munson may have initiated sexual contact with Mr. Caicedo-Obregon. The DNA expert testified that an expert can extract DNA from a saliva sample that is many years old. RP 139. The state presented evidence that Mr. Caicedo-Obregon was one of three people to come into contact with Ms. Munson. There is insufficient evidence to conclude that he, rather than the source of one of the other two DNA samples, touched Ms. Munson on her leg while she was in bed. This evidence suggesting the possibility that the saliva came from Mr. Caicedo-Obregon is insufficient to conclude beyond a reasonable doubt that Mr. Caicedo-Obregon touched Ms. Munson's leg on December 20, 2017. RP 136, 140.

The state's evidence is insufficient to conclude beyond a reasonable doubt that the suspect in the alleged burglary on December 20, 2017, was Mr. Caicedo-Obregon. The DNA profile presented to the jury was based on a single sample when other

sources of DNA were present. While the intruder whose face was covered was unknown to Ms. Munson and the contact uninvited, there was insufficient evidence to establish beyond a reasonable doubt that the contact on December 20, 2017, came from Mr. Caicedo-Obregon rather than one of the other 2 sources of DNA. RP 226.

Ms. Munson's testimony provided evidence that an assault occurred but it does not provide any information to establish beyond a reasonable doubt that Mr. Caicedo-Obregon was the perpetrator. The only fact Ms. Munson was able to conclusively state about the alleged burglar was that he was male. RP 225. This evidence is insufficient to identify Mr. Caicedo-Obregon as the perpetrator of any burglary that occurred on December 20, 2017.

ii. Windmill

The second incident of physical contact was the alleged strike to Ms. Munson's head as the suspect was trying to flee her apartment. RP 228. Even assuming the suspect inside Ms. Munson's apartment was Mr. Caicedo-Obregon, the record establishes that the strike to Ms. Munson's head was not intentional. The suspect was attempting to flee and flailing in a

“windmill motion.” RP 228. During the struggle, Ms. Munson was hit in the head. The record demonstrates that the suspect did not intend to assault or strike Ms. Munson, but rather was just trying to free himself from her grasp. This evidence is insufficient to conclude beyond a reasonable doubt that an assault occurred.

The record in this case does not contain sufficient evidence to identify Mr. Caicedo-Obregon as the suspect in Ms. Munson’s apartment. Even assuming he was in Ms. Munson’s apartment that day, the evidence presented at trial is insufficient to prove beyond a reasonable doubt that Mr. Caicedo-Obregon assaulted her and entered her apartment unlawfully.

Accordingly, this court should vacate Mr. Caicedo-Obregon’s conviction and remand to the trial court for dismissal of the charge. *State v. Kirwin*, 166 Wn. App. 659, 670, 271 P.3d 310 (2012) (evidentiary insufficiency entitles the defendant to dismissal of the charge).

c. Sexual Motivation

A finding of sexual motivation requires that the prosecution prove beyond a reasonable doubt that the defendant committed the crime for their own sexual gratification. RCW 9.94A.835(2); RCW

9.94A.030(43). The only evidence offered of sexual motivation in this case was Ms. Munson's testimony that an intruder in her bedroom kissed her leg. RP 224. The only evidence presented that Mr. Caicedo-Obregon was at Ms. Munson's apartment on or around December 20, 2017 was evidence showing that he was at the apartment building to check his mail and return a dog he had found outside. RP 319. At that time, they had consensual sexual contact and Mr. Caicedo-Obregon was allowed into the apartment. RP 250-51. Evidence of a sexual relationship between Mr. Caicedo-Obregon and Ms. Munson is insufficient to prove beyond a reasonable doubt that he was the person alleged to be in her apartment on December 20, 2017. It is also insufficient to prove Mr. Caicedo-Obregon ever burglarized Ms. Munson's apartment for the specific purpose of sexual gratification as is required for the jury to return a special verdict under RCW 9.94A.835(2). The state's evidence of sexual motivation is insufficient and this court should reverse the special verdict.

2. THE TRIAL COURT ERRED WHEN IT DENIED MR. CAICEDO-OBREGON'S REQUEST TO INSTRUCT THE JURY ON THE STATUTORY DEFENSE CONTAINED IN RCW 9A.52.090(3)

The trial court denied Mr. Caicedo-Obregon's requests to instruct the jury on the statutory defense of license to enter pursuant to WPIC 19.06. RP 328.

A trial court's refusal to give a jury instruction based on a ruling of law is reviewed *de novo*. *State v. Crittenden*, 146 Wn. App. 361, 365, 189 P.3d 849 (2008) (citing *State v. Walker*, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998)). Failure to give an instruction that is warranted by the evidence is reversible error. *State v. Fisher*, 185 Wn.2d 836, 849, 374 P.3d 1185 (2016) (citing *State v. Griffin*, 100 Wn.2d 417, 420, 670 P.2d 265 (1983)).

Criminal defendants are entitled to have the jury instructed on their theory of the case if there is evidence in the record to support that theory. *Fisher*, 185 Wn.2d at 848-49 (citing *State v. Williams*, 132 Wn.2d 248, 259-60, 937 P.2d 1052 (1997)). A trial court is only justified in denying a request for a statutory defense instruction if there is no credible evidence in the record to support it. *Fisher*, 185 Wn.2d at 849 (citing *State v. McCullum*, 98 Wn.2d 484,

488, 656 P.2d 1064 (1983)). Facts to support the defense can come from any source tending to show that the defendant is entitled to the instruction. *Fisher*, 185 Wn.2d at 849 (citing *McCullum*, 98 Wn.2d at 488).

Borrowing from, criminal trespass the unlawful entry element of first degree burglary may be negated by evidence that the person had permission to enter or reasonably believed that he had license to enter. RCW 9A.52.090 contains four defenses to the crime of criminal trespass. RCW 9A.52.090; WPIC 19.06. *J.P.*, 130 Wn. App. at 895. The “unlawful entry” element of a burglary charge is identical to that of criminal trespass. *State v. Ponce*, 166 Wn. App. 409, 411, 269 P.3d 408 (2012). RCW 9A.52.090(3) provides a statutory defense to Burglary. *J.P.*, 130 Wn. App. at 893-95.

In *J.P.* the court discussed the application of RCW 9A.52.090 in burglary cases, specifically analyzing the abandoned property defense that is not relevant to Mr. Caicedo-Obregon’s case. However, the court made clear that RCW 9A.52.090 **does** apply to negate the unlawful entry element in burglary as well as criminal trespass. *J.P.*, 130 Wn. App. at 893-95; *See also*, *City of Bremerton v. Widell*, 146 Wn.2d 561, 570, 51 P.3d 733 (2002) (holding that the

defenses in subsections one and two of RCW 9A.52.090 negate the same element).

- a. The trial court violated Mr. Caicedo-Obregon's right to present the defense available to in RCW 9A.52.090(3) and WPIC 19.06

At the close of the evidence and before closing arguments, Mr. Caicedo-Obregon requested that the trial court include WPIC 19.06 in the court's instructions to the jury to reflect the fact that there was evidence that Mr. Caicedo-Obregon reasonably believed he was licensed to enter the apartment. RP 321-325. The trial court denied his request for the instruction. RP 328. The trial court's decision not to instruct the jury on the statutory defense in WPIC 19.06 constitutes reversible error because the record contains evidence that Mr. Caicedo-Obregon reasonably believed he was licensed to enter the apartment and this fact, if found to be true, would have negated an essential element of Burglary in the First Degree. *Fisher*, 185 Wn.2d at 849 (citing *McCullum*, 98 Wn.2d at 488).

In this case, Mr. Caicedo-Obregon presented evidence that he was licensed to enter Ms. Munson's apartment. The record shows that Mr. Caicedo-Obregon was having extramarital

relationships at the time of this incident, and his own testimony establishes that one of those relationships was with Ms. Munson. RP 249-50, 318-19. The record also contains evidence that Mr. Caicedo-Obregon had previously been allowed into Ms. Munson's apartment. RP 262. Both of these points support the contention that Mr. Caicedo-Obregon reasonably believed he was licensed to enter the apartment as contemplated in RCW 9A.52.090(3) and WPIC 19.06.

The bar for instructing the jury on such a defense is low. Any evidence in the record is enough to require the instruction. *Fisher*, 185 Wn.2d at 849. The trial court erred when it refused to include WPIC 19.06 in its instructions to the jury. Failure to do so constitutes reversible error, meaning Mr. Caicedo-Obregon's conviction should be reversed and the case remanded for a new trial. *Fisher*, 185 Wn.2d at 849.

3. MR. CAICEDO-OBREGON RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AT HIS TRIAL WHEN DEFENSE COUNSEL FAILED TO PRESENT THE DEFENSE OF LICENSE TO ENTER AND REQUEST A JURY INSTRUCTION ON THE LESSER INCLUDED OFFENSE OF CRIMINAL TRESPASS FIRST DEGREE

A defendant's right to effective assistance of counsel is constitutionally guaranteed at all "critical stages" of a criminal proceeding. *State v. Robinson*, 153 Wn.2d 689, 694, 107 P.3d 90 (2005) (citing *State v. Rupe*, 108 Wn.2d 734, 741, 743 P.2d 210 (1987)). Counsel is considered ineffective if (1) their performance was deficient, and (2) the deficient performance prejudiced the defendant. *In re Crace*, 174 Wn.2d 835, 840, 280 P.3d 1102 (2012) (citing *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

Counsel's performance is deficient if it fell below an "objective standard of reasonableness based on consideration of all the circumstances." *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009) (citing *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995)). To prove prejudice, the defendant must demonstrate that there is a reasonable probability the outcome of

the proceeding would have been different but for counsel's deficient performance. *Kyllo*, 166 Wn.2d at 862 (citing *State v. Leavitt*, 111 Wn.2d 66, 72, 758 P.2d 982 (1988)). A defendant must prove both deficient performance and prejudice to prevail on a claim of ineffective assistance of counsel. *Kyllo*, 166 Wn.2d at 862.

a. Right to Present Defense

The Sixth Amendment to the United States Constitution and Washington Constitution, art. I, § 22 guarantee a criminal defendant the right to present a defense to the crimes charged. A defendant has the right to present admissible evidence in his defense and must show the evidence is at least minimally relevant to the fact at issue in her case. *State v. Yokel*, 196 Wn. App. 424, 432, 383 P.3d 619 (2015).

This Court reviews a trial court's refusal to give a requested jury instruction de novo where the refusal is based on a ruling of law. *Walker*, 136 Wn.2d at 772; *State v. O'Brien*, 164 Wn. App. 924, 930-31, 267 P.3d 422 (2011). This court reviews a refusal based on factual reasons for an abuse of discretion. *Walker*, 136 Wn.2d at 771-72.

Jury instructions are adequate when they permit the parties to argue their theories of the case, do not mislead the jury, and properly inform the jury of the applicable law. *State v. Barnes*, 153 Wn.2d 378, 382,

103 P.3d 1219 (2005). A defendant is entitled to have the jury instructed on his theory of the case when evidence supports that theory. *Williams*, 132 Wn.2d at 258-60.

Mr. Caicedo-Obregon's case is analogous to *State v. Southerland*.<sup>1</sup> Our Supreme Court granted review and affirmed the Court of Appeals' holding that the failure to instruct the jury on Criminal Trespass constituted reversible error as it related to the burglary charge. *State v. Southerland*, 109 Wn.2d 389, 390, 745 P.2d 33 (1987) (*Southerland II*) (holding that the Court of Appeals correctly reversed the defendant's burglary conviction, but the error was harmless as it related to the assault convictions).

In *Southerland*, the defendant was found guilty of Burglary in the First Degree and Assault in the Second Degree after he entered an apartment to look for his wife and threatened one of the occupants with a gun while he searched. *Southerland*, 45 Wn. App. at 887. The defendant testified at trial that no one tried to prevent him from entering the apartment and that no one asked him to leave once he was inside. *Southerland*, 45 Wn. App. at 890. Other witnesses contradicted the defendant's testimony regarding his entry into the apartment and claimed that he pushed someone at

---

<sup>1</sup> 45 Wn. App. 885, 728 P.2d 1079 (1986).

the door to get inside. *Southerland*, 45 Wn. App. at 890.

On appeal, the defendant claimed that the trial court erred when it failed to instruct the jury on the lesser included offense of Criminal Trespass in the First Degree. *Southerland*, 45 Wn. App. at 888-89. The Court of Appeals agreed and reversed his convictions because it is possible the jury would have believed the defendant's testimony and possibly convicted him of Criminal Trespass had they been instructed on that offense. *Southerland*, 45 Wn. App. at 890. The Supreme Court agreed holding that the failure to instruct the jury on Criminal Trespass constituted reversible error as it related to the burglary charge. *Southerland II*, 109 Wn.2d at 390.

Trial counsel has a duty to perform research and apply relevant law to their client's case. *In re Yung Cheng-Tsai*, 183 Wn.2d 91, 102, 351 P.3d 138 (2015). "An attorney's ignorance of a point of law that is fundamental to [their] case, combined with [their] failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland*." *Yung Cheng-Tsai*, 183 Wn.2d at 102. It is settled law in Washington that Criminal Trespass in the First Degree is a lesser included offense

of burglary. *J.P.*, 130 Wn. App. at 895.

The record in this case contains evidence supporting the inference that Mr. Caicedo-Obregon only trespassed at Ms. Munson's apartment on December 20, 2017. The evidence indicating that Mr. Caicedo-Obregon was having a relationship with Ms. Munson and had been welcomed in her apartment before would allow a trier of fact to infer that his entry into the apartment was lawful. RP 251, 257-58. That does not preclude a finding consistent with evidence in the record that at some point Ms. Munson attempted to eject Mr. Caicedo-Obregon from the apartment when she became upset and he did not immediately leave. RP 250.

In this case, the jury was precluded from making such a finding because defense counsel failed to request an instruction on the lesser included offense of Criminal Trespass in the First Degree. Identical to *Sutherland*, here, defense counsel's decision not to request a lesser included instruction was reversible error because Caicedo-Obregon presented evidence that he only committed criminal trespass but the jury was not able to consider this lesser offense. As in *Sutherland*, counsel's decision not to

request a lesser included created an “unacceptable” risk of conviction for a crime not committed. *Southerland*, 45 Wn. App. at 890.

In the case of Mr. Caicedo-Obregon, defense counsel failed to research and apply the well-established principle that Criminal Trespass in the First Degree is a lesser included offense of burglary by failing to request an instruction on that offense at trial. There is evidence in the record that Mr. Caicedo-Obregon entered Ms. Munson’s apartment lawfully and never intended to commit a crime once inside. “Regardless of the plausibility of this circumstance, the defendant had an absolute right to have the jury consider the lesser included offense on which there is evidence to support an inference it was committed.” *State v. Parker*, 102 Wn.2d 161, 166, 683 P.2d 189 (1984) (citing *State v. Jones*, 95 Wn.2d 616, 628 P.2d 472 (1981)). Defense counsel’s failure to uphold this right at trial constituted deficient performance.

Defense counsel’s performance prejudiced Mr. Caicedo-Obregon because the court ultimately did not instruct the jury on his theory of the case. Even if the jury accepted Mr. Caicedo-Obregon’s testimony, there was no jury instruction that reflected the

factual scenario he described. Instead, the jury was left with a choice between disregarding his testimony entirely and voting to convict or finding that everything he did was lawful and voting to acquit. There is evidence in the record that neither of these scenarios is accurate, therefore Mr. Caicedo-Obregon was entitled to a lesser included offense instruction to allow the jury to consider all the evidence in the record. Defense counsel's failure to request the instruction prejudiced Mr. Caicedo-Obregon at trial. His conviction should be reversed and the case remanded for a new trial.

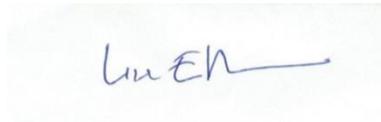
#### D. CONCLUSION

The trial court erred when it denied Mr. Caicedo-Obregon's request to include WPIC 19.06 in its instructions to the jury despite the record containing ample evidence to conclude that his entry into Ms. Munson's apartment was lawful. Furthermore, the State failed to present sufficient evidence of unlawful entry and an assault as is required to prove Mr. Caicedo-Obregon guilty of Burglary in the First Degree under RCW 9A.52.020. Finally, Mr. Caicedo-Obregon received ineffective assistance of counsel when defense counsel failed to request a jury instruction on the lesser included offense of

Criminal Trespass in the First Degree, thereby failing to have to the jury instructed on his theory of the case. This decision prejudiced Mr. Caicedo-Obregon and deprived him of his Sixth Amendment Right to counsel. Mr. Caicedo-Obregon's conviction should be vacated and the case dismissed for insufficient evidence. In the alternative, this court should reverse his conviction and remand for a new trial where he will have the opportunity to present his defense to the jury.

DATED this 22<sup>nd</sup> day of January 2019.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Lise Ellner", is written on a light-colored rectangular background.

---

LISE ELLNER, WSBA No. 20955  
Attorney for Appellant

A handwritten signature in black ink, appearing to read "Spencer Babbit", is written on a light-colored rectangular background.

---

SPENCER BABBIT, WSBA No. 51076  
Attorney for Appellant

I, Lise Ellner, a person over the age of 18 years of age, served the Benton County Prosecutor's Office prosecuting@co.benton.wa.us and Edward Caicedo-Obregon/DOC#408155, Coyote Ridge Corrections Center, PO Box 769, Connell, WA 99326 a true copy of the document to which this certificate is affixed on January 22, 2019. Service was made by electronically to the prosecutor and Edward Caicedo-Obregon by depositing in the mails of the United States of America, properly stamped and addressed.

A handwritten signature in blue ink that reads "Lise Ellner" followed by a horizontal line.

\_\_\_\_\_  
Signature

**LAW OFFICES OF LISE ELLNER**

**January 22, 2019 - 12:42 PM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division III  
**Appellate Court Case Number:** 36181-1  
**Appellate Court Case Title:** State of Washington v. Edward A. Caicedo-Obregon  
**Superior Court Case Number:** 18-1-00210-2

**The following documents have been uploaded:**

- 361811\_Briefs\_20190122124120D3236711\_6268.pdf  
This File Contains:  
Briefs - Appellants  
*The Original File Name was Caicedo AOB .pdf*
- 361811\_Other\_Filings\_20190122124120D3236711\_4927.pdf  
This File Contains:  
Other Filings - Appearance  
*The Original File Name was Caicedo-Obregon Notice of Appearance.pdf*

**A copy of the uploaded files will be sent to:**

- andy.miller@co.benton.wa.us
- babbitts@seattleu.edu
- prosecuting@co.benton.wa.us

**Comments:**

---

Sender Name: Lise Ellner - Email: liseellnerlaw@comcast.net  
Address:  
PO BOX 2711  
VASHON, WA, 98070-2711  
Phone: 206-930-1090

**Note: The Filing Id is 20190122124120D3236711**