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No. 36181-1-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON,

Respondent

v.

EDWARD A CAICEDO-OBREGON,

Appellant

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

NO. 18-1-00210-2

BRIEF OF RESPONDENT

ANDY MILLER
Prosecuting Attorney
for Benton County

Terry J. Bloor, Deputy
Prosecuting Attorney
BAR NO. 9044
OFFICE ID 91004

7122 West Okanogan Place
Bldg. A
Kennewick WA 99336
(509) 735-3591

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I. RESPONSE TO ASSIGNMENTS OF ERROR

- A. The trial court correctly declined to instruct the jury about defenses in RCW 9A.52.090 because that statute only applies to Criminal Trespass charges.
- B. Regarding the sufficiency of evidence of Burglary, in the light most favorable to the State, a rational jury could conclude that the defendant unlawfully entered Ms. Munson's apartment and assaulted her, both by striking her and having unwanted sexual contact with her.
- C. Regarding the ineffective assistance of attorney issue, the defendant cannot prove that his attorney's tactical decisions were not sound and cannot prove that lesser included instructions for Criminal Trespass would have been given.
- D. Regarding the sufficiency of evidence of a sexual motivation, the defendant's action of unlawfully entering Ms. Munson's apartment, getting into her bed and repeatedly caressing her thigh and kissing her leg and butt constitutes a sexual motivation for his crime.

II. STATEMENT OF FACTS

- A. **The crime on December 20, 2017 around 4:00 A.M. and investigation.**

On December 20, 2017, around 4:16 A.M., a stranger got into the bed of Jacquelyn Munson. RP at 47-48, 222. Ms. Munson assumed the person was her significant other, Rosie Pineda. RP at 222. Ms. Pineda had left the apartment around 1:00 A.M. to visit a friend and had not locked the door. RP at 155-56.

The stranger lifted a blanket off Ms. Munson's leg and began to caress her thigh. RP at 222. The stranger brought his or her hand upward. RP at 222-23. Ms. Munson pulled the blanket down, but the stranger again removed it and started to raise Ms. Munson's shorts, and kiss her thigh and butt. RP at 223-24. The kissing and caressing happened multiple times, with Ms. Munson believing this was her significant other and trying to shoo her away. RP at 224, 241-42.

Ms. Munson had a "holy shit" moment when she touched the stranger's hand. RP at 225. She realized it was a man and started yelling "Who are you?" *Id.* The man pulled the drawstrings around his face even tighter, so neither she nor her son Jordan could see his face. RP at 191, 226. Ms. Munson was trying to pull the stranger's sweater off his face and keep him in the apartment. RP at 227. She yelled at her son, Jordan, to call the police. RP at 228. The stranger was in full "flight mode" and he started taking swings at her in a windmill motion. *Id.* When he hit her in the face, she decided not to struggle with him. RP at 229. She let him go and he fled

the scene. *Id.* Jordan describes this moment as the stranger punching his mother and running out the door. RP at 191.

Because the stranger had licked or kissed Ms. Munson on her right buttocks area, the police took her to a local hospital for a DNA swab. RP at 60. The swab was a match to the defendant with the odds of a random person having the same DNA at 31 decillion, which is a “31” followed by 33 zeros: 31,000,000,000,000,000,000,000,000,000,000. RP at 136-37.

B. The defendant’s statement to police and his testimony

Officer Matt Nelson interviewed the defendant. RP at 317. The defendant previously lived at the same apartment complex as Ms. Munson but was not living there as of December 20, 2017. RP at 258-59. The defendant said he had met Ms. Munson once a couple of years before and had a recent contact, but those were the only two times and he couldn’t recall her name. RP at 318. He stated that in the early morning hours on December 20, 2017, he went to the apartment complex to check his mail. RP at 319. He saw Ms. Munson’s dog outside and went up to her apartment in order to return the dog to her. *Id.*

There were numerous differences between this statement and his testimony, beginning with:

1. Did the defendant go to Ms. Munson's apartment in the early morning hours of December 20, 2017?

Q: [D]id you enter her home the morning of December 20th?

A: In the morning I did.

Q: Okay, and did you enter her home December 20th in the morning?

A: No.

RP at 250-51

Q: So, you do admit that you were there on the 20th in the late/early morning hours.

A: I have never said the 20th at any time.

...

Q: And you told the officers that then you went up and into her apartment at that time, correct?

A: Yeah.

Q: So, in fact, you are now saying that you entered her apartment in the early morning hours of December 20th, correct?

A: I'm not understanding. Your question is confusing.

Q: You stated you went there to check your mail on the 20th of December at 3:00 A.M., correct?

A: Yeah. . . .

Q: [Y]ou saw a dog at that time.

A: Uh-huh.

Q: And then you returned that dog to Ms. Munson's apartment?

A: Yes. . . .

Q: And so I want to be very clear, this is the early morning hours of December 20th that you admit that you went to her apartment that morning?

A: Well, I am extremely confused with the dates . . .

RP at 258-60.

2. What was the defendant's relationship with Ms. Munson?

The defendant's statement to the police that he had just two contacts with Ms. Munson seemed consistent with Ms. Munson's statement that she had no relationship with him, 11-year-old Jordan Dixon's testimony that he has only seen the defendant in the apartment complex parking lot, and Rosie Pineda saying that she also had only seen the defendant in the parking lot. RP at 153, 186-87, 218.

When testifying, the defendant claimed he had a hidden sexual relationship with Ms. Munson. RP at 249. He did not tell the police about this because he saw his wife while being interviewed. RP at 252. The defendant continued to speak with the police after his wife left the home, and he did admit having affairs with other women. RP at 255, 318.

3. Why did the defendant go to Ms. Munson's apartment?

One inconsistency: The defendant told police he saw Ms. Munson's dog outside the apartment complex while checking his mail and went to her apartment to return it. RP at 319. When testifying, he said he was returning a dog which Ms. Munson had gifted him. RP at 250. Jordan Dixon stated that the defendant did not return a dog and in fact thought the defendant had stolen their dog. RP at 211.

Another inconsistency: The defendant claimed that he went to Ms. Munson's apartment to end their affair. RP at 250. Although Ms. Munson

was angry, they ended up having sexual contact with him giving her oral sex. RP at 250-51.

III. ISSUES

- A. Would a reasonable jury, viewing the evidence in the light most favorable to the State, have concluded that the defendant unlawfully entered Ms. Munson's apartment, assaulted her and did so with a sexual motivation?
1. What is the standard on review for sufficiency of evidence challenges?
 2. In the light most favorable to the State, would a rational jury have found all the elements of the offense and found the defendant committed the Burglary with a sexual motivation?
 - a) What is the evidence that the defendant unlawfully entered Ms. Munson's apartment?
 - b) What is the evidence that the defendant assaulted Ms. Munson?
 - i) Is it correct to characterize the defendant's actions as "a kiss"?

- ii) If a person is throwing windmill punches at another to flee from a crime, is he intending to assault that person?
 - c) In the light most favorable to the State, did the defendant have a sexual motivation in committing the Burglary?
- B. Did the trial court abuse its discretion in refusing to give an instruction on a statutory defense for Criminal Trespass?
 - 1. What is the standard on review for a refusal to give an instruction?
 - 2. Is a case holding that the statutory defense of abandonment for Criminal Trespass is applicable to Burglary cases still good law, and should it be expanded to the other statutory defenses for Criminal Trespass?
 - 3. Was the defendant's proposed instruction redundant because the "enters or remain unlawfully" instruction had the same information and allowed him to argue his defense?
 - 4. Are some of the statements in the defendant's brief inaccurate?

- C. Can the defendant show that his attorney's performance was deficient and affected the trial outcome?
1. What is the standard on review for ineffective assistance claims?
 2. Can the defendant meet his burden on either prong?
 - a) Was the defense attorney's decision not to request a lesser included instruction a good tactical strategy since it was consistent with the defendant's testimony?
 - b) If asked, would the trial court have given instructions for Criminal Trespass, if there was no evidence that was the only crime committed and was the evidence of the defendant's guilt overwhelming?

IV. ARGUMENT

- A. **A reasonable jury could have concluded that the defendant unlawfully entered Ms. Munson's apartment, assaulted her, and did so with a sexual motivation.**
1. **The standard on review for sufficiency of evidence challenges is whether in the light most favorable to the State could any rational trier of fact have found the necessary elements and the presence of the aggravating circumstance beyond a reasonable doubt.**

State v. Zigan, 166 Wn. App. 597, 601-02, 270 P.3d 625 (2012) restated this well-known rule. A challenge to the sufficiency of the evidence admits the truth of the State's evidence and all reasonable inferences. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). The elements may be established by direct or circumstantial evidence; one type of evidence is of no less value than the other. *State v. Thompson*, 88 Wn.2d 13, 16, 558 P.2d 202 (1977). Reviewing courts defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992).

2. In the light most favorable to the State, a rational trier of fact could have found all necessary elements and the sexual motivation allegation.

a) There is substantial evidence the defendant unlawfully entered Ms. Munson's apartment.

The defendant's argument rests on the jury believing he was an invitee because he and Ms. Munson were having an illicit affair. Br. of Appellant at 10. Ms. Munson denied this. RP at 240. Supporting Ms. Munson's statement is her son, who only saw the defendant around their apartment parking lot, not in their apartment, and her significant other who also had only seen the defendant in their parking lot. RP at 153, 186, 211-

12. Also supporting her is that the perpetrator tried to keep his face covered. RP at 191.

The defendant's statements and testimony also support Ms. Munson's testimony. He told the police about numerous affairs with other women but said he had just a couple contacts with Ms. Munson, whose name he did not remember. RP at 318. The defendant never testified he had actually been inside Ms. Munson's apartment. Rather he said their relationship was hidden and that they went out and snuck around. RP at 249.

The jury *possibly* could have believed the defendant about an affair with Ms. Munson and *possibly* could have inferred that he had some permission to enter the apartment at 4:00 A.M. But it is much more likely that the jury considered the defendant's multiple inconsistencies, the testimony of Ms. Munson, her son, and significant other and concluded that the 4:00 A.M. entry into her apartment by a man who kept his face covered was not licensed, privileged, or invited.

b) In the light most favorable to the State, the defendant assaulted Ms. Munson inside her apartment.

i) It is not accurate to describe the sexual contact as one kiss.

With all due respect to the defendant, he minimizes the extent of the contact as "the alleged burglar kissed her on her thigh area." Br. of

Appellant at 11. Ms. Munson described the contact as the perpetrator pulling the blanket off her leg, caressing her thigh, moving his hand upward from her thigh, raising her shorts, kissing her thigh and butt, and doing this multiple times. RP at 222-24, 242. This constitutes an assault—an intentional touching that is harmful or offensive.

The defendant's argument is that there was insufficient evidence to prove he was the perpetrator around 4:00 A.M. on December 20, 2017. He may have had sexual contact with Ms. Munson on December 19, 2017 and he could have left his saliva on her then. Br. of Appellant at 12.

One problem with this argument is that no one said that the defendant came to Ms. Munson's apartment on December 19, 2017. Not Ms. Munson, not her significant other, Ms. Pineda who left around 1:00 A.M. on December 20, not her son, Jordan, not one of the six other children who were in her apartment on a sleepover. No one said anything about the defendant showing up at her apartment. RP at 153, 155, 211-12, 218.

In fact, in the light most favorable to the State, the jury could conclude that the defendant himself admitted he went to Ms. Munson's apartment in the early morning hours of December 20, 2017. He said this directly in a question from his attorney. RP at 251. He continuously claimed confusion in question from the deputy prosecutor. RP at 259-60.

He told the police that he was checking his mail at 3:00 A.M. on December 20, 2017, saw a dog belonging to Ms. Munson, and then returned the dog to her. RP at 259.

A jury would have the right to cherry-pick the defendant's testimony and conclude he was saying he went to Ms. Munson's apartment on December 19, 2017 but not December 20. A jury could also ignore the contrary statements he made to Officer Nelson. A jury could also discredit all the individuals—Ms. Munson, Ms. Pineda, Mr. Dixon—who did not see the defendant at the apartment on December 19. But it is much more likely that the jury reviewed the defendant's inconsistent testimony, his "confusion" when asked questions by the prosecutor, his statement to the police, the testimony of Ms. Munson, her son, and significant other, and concluded that he was the perpetrator at 4:00 A.M. on December 20. In the light most favorable to the State, the jury had every right to conclude he assaulted Ms. Munson by caressing her thigh, kissing her and trying to pull down her shorts.

ii) The windmill punches were intended to, and did, hurt Ms. Munson.

The defendant argues that "the suspect did not intend to assault or strike Ms. Munson, but rather was just trying to free himself from her grasp." Br. of Appellant at 14. Perhaps the perpetrator's main goal was to

escape, but he threw multiple punches at Ms. Munson to get her to release her hold on him. Perhaps a bank robber who points a gun at a security guard may primarily want to make a clean getaway, but he has also assaulted the guard.

Jordan Dixon may have been a better witness to the assault than his mother, since he did not have to defend himself from the attack. He stated the perpetrator “punched my mom, and then he ran out the door.” RP at 191. See the photo of Ms. Munson, introduced as Exhibit 3 in Appendix A if there is a question whether she was assaulted.

In shoplifting cases, it is recognized that a defendant can assault store personnel in an effort to resist detention. *State v. Miller*, 103 Wn.2d 792, 795-96, 698 P.2d 554 (1985). In this case, Ms. Munson’s attempt to detain the defendant would have been allowed under RCW 9A.16.020 (2) or (4). Further, Ms. Munson had probable cause to make a citizen’s arrest for a felony under the standard rule as stated in *State v. Williams*, 27 Wn. App. 848, 852-53, 621 P.2d 176 (1980) (Probable cause exists where the facts and circumstances within the private person’s knowledge and of which he has reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in a belief that an offense has been or is being committed.)

The jury had more than sufficient facts, especially when viewed in the light most favorable to the State, to conclude the defendant threw many punches at Ms. Munson and landed at least one.

c) A rational jury had sufficient evidence to conclude the defendant committed the burglary with a sexual motivation.

Note that the statute requires that the State prove that the defendant committed the crime with a sexual motivation, not the sole motivation. RCW 9.94A.835 (2). Nevertheless, in the light most favorable to the State, the defendant's sole motivation in committing the crime was sexual.

He entered late at night when people would be asleep. He may have known that Ms. Munson's significant other was not present. He got into Ms. Munson's bed, lifted her blanket, caressed her thigh, kissed her thigh and butt, tried to pull up her shorts, and did so repeatedly. RP at 219, 222-24, 241-42. The defendant stopped only when Ms. Munson realized he was not her significant other. RP at 225.

If there is any doubt, review the defendant's testimony. He stated they had sexual contact including him giving her oral sex. RP at 251.

B. The trial court did not abuse its discretion in refusing to instruct the jury on the statutory defense for Criminal Trespass.

1. The standard on review for a trial court's decision to refuse a proposed jury instruction is abuse of discretion.

A trial court's decision whether to give a particular jury instruction is reviewed for abuse of discretion. Jury instructions are sufficient when, taken as a whole, they properly inform the jury of the applicable law, are not misleading, and permit the defendant to argue his theory of the case. *State v. Chase*, 134 Wn. App. 792, 803, 142 P.3d 630 (2006). In *Chase*, the defense was charged with Theft in the First Degree. Mr. Chase argued that he had a good faith claim of title and that the jury should have been instructed on this defense. The Court affirmed his conviction holding that he had not presented sufficient evidence to support that instruction. *Id.* at 806.

2. If *State v. J.P.* is still good law, it should only apply to a defense regarding the entry onto abandoned property.

RCW 9A.52.090 sets out the defense on which WPIC 19.07 is based. *See* App. B, C. By its terms the defense only applies to Criminal Trespass in the First or Second Degrees. The defendant is correct that *State v. J.P.*, 130 Wn. App. 887, 125 P.3d 215 (2005) held the defense of "abandonment" in RCW 9A.52.090 (1) is applicable to Residential Burglary cases. *Id.* at 895. However, for the reasons stated below, *J.P.* should not be interpreted to mean that the other defenses for Criminal Trespass listed in RCW 9A.52.090 should extend to Burglary cases.

With all due respect to the Judges who decided *J.P.*, it appears to be based on a misreading of *City of Bremerton v. Widell*, 146 Wn.2d 561, 51 P.3d 733 (2002), in which two defendants were charged with multiple counts of Criminal Trespass, Second Degree. *Widell* has a significant discussion about whether the statute, RCW 9A.52.090, provides for affirmative defenses or whether they negate the unlawful presence element of criminal trespass:

Statutory defenses to criminal trespass negate the unlawful presence element of criminal trespass and are therefore not affirmative defenses. Further, the burden is on the State to prove the absence of the defense when a defendant asserts his or her entry was permissible under RCW 9A.52.090 (2) because that defense “negates the requirement for criminal trespass that the entry be unlawful”. Thus, once a defendant has offered some evidence that his or her entry was permissible under RCW 9A.52.090, the State bears the burden to prove beyond a reasonable doubt that the defendant lacked license to enter.

Id. at 570. (internal citations omitted)

State v. J.P. cited this passage from *Widell*, 146 Wn.2d at 895, but still allowed the juvenile respondent to argue “abandonment” as a defense. The *J.P.* Court did not rule on the other defenses listed in RCW 9A.52.090. (“*J.P.* persuades us that *Widell* permits him to assert an abandonment defense to residential burglary.” *J.P.*, 130 Wn. App. at 895). In reviewing the defenses listed for criminal trespass in RCW 9A.52.090,

all except the “abandonment” defense is included in the definition of “enters or remains unlawfully” in RCW 9A.52.010 (2).

RCW 9A.52.090 (2), providing for a defense to Criminal Trespass if “[t]he premises were at the time open to members of the public and the actor complied with all lawful conditions imposed on access to or remaining in the premises” tracks well with RCW 9A.52.010 (2) which provides, “[a] license or privilege to enter or remain in a building which is only partly open to the public is not a license or privilege to enter or remain in the part of a building which is not open to the public.” Likewise, RCW 9A.52.090 (3), which provides a defense if the actor believes the owner of the premises would have licensed him to enter or remain is consistent with RCW 9A.52.010 (2) which provides that “a person ‘enters or remains unlawfully’ in or upon premises when he or she is not then licensed, invited or otherwise privileged to so enter or remain.” RCW 9A.52.090 (4) provides a defense for process servers who do not enter into a private residence but go onto premises when it is reasonable and necessary. This prong is consistent with RCW 9A.52.010 (2) which provides for entry when one is privileged and into the parts of a building which is open to the public.

Only “abandonment” is a defense listed in RCW 9A.52.090 which is not incorporated in the definition of “enters or remains unlawfully” in

RCW 9A.52.010 (2). The *J.P.* court may have thought it was fair to allow a defendant to raise this defense for Burglary charges. However, other than the “abandonment” defense, *Widell* and *J.P.* do not support the extension of the defenses for Criminal Trespass to Burglary charges.

In addition, other cases have disagreed with *J.P.* *State v. Jensen*, 149 Wn. App. 393, 400-01, 203 P.3d 393 (2009) noted that RCW 9A.52.090 was specifically and plainly limited to Criminal Trespass cases and declined to extend its application to burglary cases. Likewise, *State v. Olson*, 182 Wn. App. 362, 329 P.3d 121 (2014) held that the statutory defense in RCW 9A.52.090 did not apply to Burglary cases. Further, the mental element for Criminal Trespass is “knowledge” while the mental element for Burglary is “intent.” RCW 9A.52.025; RCW 9A.52.080.

Even if *J.P.* applied, it should not apply in this case because Ms. Munson’s apartment was not abandoned. No one ever testified that the defendant had previously been inside the apartment. Ms. Munson, Mr. Dixon, and Ms. Pineda, all stated they had no relationship with the defendant and saw him only around the parking lot. RP at 154, 186, 218. The defendant testified that he and Ms. Munson had a hidden relationship and that they went out and snuck around. RP at 249. Of course, this contradicted his statement to the police that he hardly knew Ms. Munson.

RP at 318. But the defendant himself never testified that he had previously been in Ms. Munson's apartment.

3. The defendant's proposed instructions were not necessary because it was redundant with the "enters or remains unlawfully" instruction which allowed him to argue his defense.

As *Widell* stated, RCW 9A.52.090 are not defenses so much as circumstances which negate the "unlawful entry" element. The prosecution would still have to prove beyond a reasonable doubt that the defendant in this case unlawfully entered Ms. Munson's apartment, that is, that he was not licensed, invited, or otherwise privileged to enter her apartment. The trial court did not abuse its discretion because the defendant was fully able to argue this point. The defendant's proposed instructions were redundant: The jury was instructed that to find the defendant guilty, the State had to prove beyond a reasonable doubt that he was not invited, licensed, or otherwise privileged to enter Ms. Munson's apartment. See App. D for the defendant's proposed instructions, CP 156-57 for the Court's Instructions, and CP 170-71 on the issue of unlawful entry.

4. Some statements by the defendant are not accurate.

There are three additional items the in the defendant's brief that deserve comment.

First, the defendant writes that there was evidence that he had previously been allowed into Ms. Munson's apartment and cites RP at 262. Br. of Appellant at 19. That is not correct; there was no evidence, even from the defendant, that he had previously been in her apartment.

The following is the entire testimony from the referred page:

Q (By Mr. Howell): Did you speak with her son at that time?

A: No.

Q: You just walked in and let yourself into the apartment then?

A: He opened the door and he spoke to his mom, but he did not speak to me.

Q: And would this be the time that she grabbed and tried to pull you into her bedroom?

A: No. That's not how it happened. When I entered then we started talking, her and I, and that's when she wanted to have oral sex with me.

Q: And then grabbed you by your hoodie?

A: I don't recall about a hoodie.

Mr. Howell: No further questions.

The Court: All right, further direct?

Ms. Kane-Hudson: No further.

RP at 262.

Second, the defendant argues that the record showed he had an extramarital affair with Ms. Munson based on his own testimony and cites RP at 249-50 and RP at 318-19. Br. of Appellant at 19. RP at 249-50 is correctly cited; the defendant did testify he had an extramarital affair with Ms. Munson. But RP at 318-19 is not correctly cited. That portion of the transcript is his interview by Officer Matt Nelson. He told Officer Nelson

that during the years he lived in the same apartment complex, he met Ms. Munson a couple of times. RP at 318. Although he had numerous affairs, he did not name Ms. Munson as one of his paramours. *Id.* This is important because the defendant contradicted himself in various ways (why did he go to Ms. Munson's apartment, what was his relationship with her, did he have sexual contact with her?) between the interview with Officer Nelson and his testimony. This may have been an important factor for the jury to judge his credibility.

Third, the defendant argues that the trial court deprived him of the right to present a defense. Br. of Appellant at 18. With all due respect to the defendant, this is not accurate. The defendant was fully able to argue he had an invitation, license, or privilege to enter Ms. Munson's apartment.

The bottom line is the jury was properly instructed that the State had to prove beyond a reasonable doubt that the defendant was not invited, licensed, or otherwise privileged to enter Ms. Munson's apartment. There was no evidence showing the defendant had such an invitation, even from the defendant. Any additional instruction on that point is redundant.

C. The defendant received effective assistance from his attorney.

1. Standard on review

Ineffective assistance claims are subject to a two-pronged inquiry:

1) The defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed to the defendant by the Sixth Amendment; and 2) The defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless the defendant makes both showings, it cannot be said that the conviction resulted from a breakdown in the adversary process that renders the result unreliable. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987), quoting *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

To satisfy the prejudice prong, the defendant must establish that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

A fair assessment of an attorney's performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. *Id.* at 689.

There is a strong presumption that counsel's performance was reasonable. *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). When counsel's conduct can be characterized as a legitimate trial tactic, the performance is not deficient. *Id.* at 863.

State v. Grier, 171 Wn.2d 17, 246 P.3d 1260 (2011) reversed the Court of Appeals decision finding ineffective assistance for failure to propose lesser included instructions and noted multiple courts have stated that the decision not to ask for lesser included crime instructions is a legitimate trial tactic:

Our holding is in line with those of other jurisdictions that have rejected ineffective assistance claims based on defense counsel's failure to request instructions on lesser included offenses. *E.g.*, *Autrey*, 700 N.E. 2d at 1142 (where acquittal was a realistic goal, "the decision not to tender lesser included offenses was a tactical decision, not an error"); *Heinlin v. Smith*, 542 P.2d 1081, 1082 (Utah 1975) (finding defense counsel's failure to request lesser included offenses "to be a not unreasonable, but a likely tactic involving the idea that counsel quite conscientiously may have concluded should be an all-or-nothing stance that better might lead to an outright acquittal, rather than a probable misdemeanor conviction" (emphasis omitted)); *Tinsley v. Million*, 399 F.3d 796, 808 (6th Cir. 2005) (where primary defense in homicide case was that defendant was not the shooter, "it was a permissible exercise of trial strategy not to request [lesser included] instructions"); *United States ex rel. Sumner v. Washington*, 840 F. Supp. 562, 573-74 (N.D. III 1993) (omission of lesser included manslaughter instruction not ineffective assistance "under the highly deferential analysis" set forth in *Strickland*); *Moyer v. State*, 275 Ga.App. 366, 374, 620 S.E.2d 837 (2005) (all or nothing approach is a tactical decision that

cannot give rise to ineffective assistance claim), *overruled on other grounds sub nom. Vergara v. State*, 283 Ga. 175, 178, 657 S.E.2d 863 (2008); *Parker v. State*, 510 So.2d 281, 287 (Ala. Crim. App. 1987) (“Under these circumstances, counsel reasonably could have believed that it would be a bad tactical choice to offer lesser included offense instructions to give the jury the alternative of choosing a lesser included offense if it felt uneasy about convicting on the charge of murder”); *Grant v. State*, 696 S.W.2d 74 (Tex.Ct. App. 1985) (**failure to request lesser included offense instructions not ineffective assistance**); *Beasley v. Holland*, 649 F.Supp. 561, 567 (SD W. Va. 1986) (counsel reasonably could have believed that lesser included offense instruction was a poor strategic decision).

Grier, p. 44-45.

2. **The defendant cannot meet his burden on either prong.**
 - a) **The defense attorney’s decision not to request a lesser included instruction was a good tactical strategy.**

The defendant testified he did not commit any crime. He claimed 11-year-old Jordan Dixon opened the apartment door for him. RP at 251. He claimed the sexual contact with Ms. Munson was consensual. *Id.* He did not testify that he swung at Ms. Munson at all, whether in a windmill-like motion or otherwise.

To be consistent with her client’s testimony, the defense attorney argued the jury should find him not guilty. RP at 367. To suggest that the jury find him guilty of Criminal Trespass would mean that the defense

attorney would suggest to the jury that they should not believe the defendant when he stated he entered the apartment with permission.

b) The lesser included instructions for Criminal Trespass should not have been given and the evidence of the defendant's guilt was overwhelming.

A defendant is entitled to an instruction on a lesser included offense if each of the elements of the lesser offense are necessary elements of the offense charge and the evidence in the case supports an inference that the lesser crime was committed. *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978). In this case, the evidence does not support the lesser crime of Criminal Trespass. The defendant did not claim that he unlawfully entered Ms. Munson's apartment at 4:00 A.M. but did not assault her. To the contrary, he claimed he entered the apartment by invitation and engaged in sexual contact with Ms. Munson with permission.

State v. Southerland, 109 Wn.2d 389, 745 P.2d 33 (1987), cited by the defendant, is not on point. The facts in that case are recited in *State v. Southerland*, 45 Wn. App. 885, 728 P.2d 1079 (1986). Witnesses initially said that the defendant pushed his way into an apartment, pointed a gun at one individual and struck another. *Id* at 887. The defendant testified that he was never restrained from entering the apartment and no one told him

to leave. *Id.* at 890. Various witnesses recanted their statements, with one witness recanting her recantation. *Id.* at 888. The Court stated that the jury could have believed some of the defendant's version. *Id.* at 890. In other words, the jury could have believed the defendant unlawfully entered the apartment but did not assault anyone.

That is not the situation here. The defendant did not testify that he entered Ms. Munson's apartment unlawfully but did not assault anyone. No one so testified.

Finally, the case against the defendant is overwhelming. Ms. Munson was clearly injured by a perpetrator who snuck into her apartment around 4:00 A.M. with his face hidden and made sexual advances to her. App. A. The DNA result proves the defendant is the perpetrator. The defendant's trial testimony contradicted his statement to the police. In fact, his trial testimony was contradictory.

V. CONCLUSION

In the light most favorable to the State, the witnesses who testified that the defendant entered Ms. Munson's apartment without invitation could be believed by a jury. The defendant admitted he had sexual contact with Ms. Munson in the apartment and the DNA confirms that.

The statutory defense for Criminal Trespass charges should not apply to Burglary cases. The one outlier case applies to situations where property has been abandoned, not the case here.

The defense attorney did a good job with what she had to work with. The defendant testified that he committed no crime and she argued that he committed no crime. That is a good tactic. No one, including the defendant, testified that the only thing he did was unlawfully enter the victim's apartment but then left without sexually contacting her or assaulting her.

The defendant's conviction should be affirmed.

RESPECTFULLY SUBMITTED on April 24, 2019.

ANDY MILLER
Prosecutor



Terry J. Bloor, Deputy
Prosecuting Attorney
Bar No. 9044
OFC ID NO. 91004

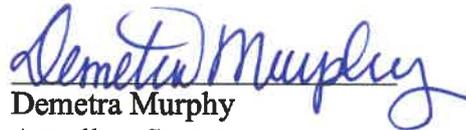
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I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

Spencer Babbit
P.O. Box 2711
Vashon, WA 98070-2711

E-mail service by agreement
was made to the following
parties: babbitts@seattleu.edu

Signed at Kennewick, Washington on April 24, 2019.


Demetra Murphy
Appellate Secretary

APPENDICES

Appendix A: Exhibit 3 - Photo of Jacquelyn Munson taken on December 22, 2017

Appendix B: RCW 9A.52.090

Appendix C: RCW 9A.52.010

Appendix D: Defendant's proposed instruction under on defense of invited entry, CP 156-57 and Court's Instructions on "to-convict" and "unlawful entry", CP 170-71.

Appendix E: Jury instruction on "Unlawfully enters or remains"

Appendix A

Exhibit 3: Photo of Jacquelyn Munson taken on December 22, 2017



Appendix B

RCW 9A.52.090

RCW 9A.52.090

Criminal trespass—Defenses.

In any prosecution under RCW 9A.52.070 and 9A.52.080, it is a defense that:

- (1) A building involved in an offense under RCW 9A.52.070 was abandoned; or
- (2) The premises were at the time open to members of the public and the actor complied with all lawful conditions imposed on access to or remaining in the premises; or
- (3) The actor reasonably believed that the owner of the premises, or other person empowered to license access thereto, would have licensed him or her to enter or remain; or
- (4) The actor was attempting to serve legal process which includes any document required or allowed to be served upon persons or property, by any statute, rule, ordinance, regulation, or court order, excluding delivery by the mails of the United States. This defense applies only if the actor did not enter into a private residence or other building not open to the public and the entry onto the premises was reasonable and necessary for service of the legal process.

[2011 c 336 § 374; 1986 c 219 § 2; 1975 1st ex.s. c 260 § 9A.52.090.]

Appendix C

RCW 9A.52.010

RCW 9A.52.010**Definitions.**

The following definitions apply in this chapter:

(1) "Enter." The word "enter" when constituting an element or part of a crime, shall include the entrance of the person, or the insertion of any part of his or her body, or any instrument or weapon held in his or her hand and used or intended to be used to threaten or intimidate a person or to detach or remove property.

(2) "Enters or remains unlawfully." A person "enters or remains unlawfully" in or upon premises when he or she is not then licensed, invited, or otherwise privileged to so enter or remain.

A license or privilege to enter or remain in a building which is only partly open to the public is not a license or privilege to enter or remain in that part of a building which is not open to the public. A person who enters or remains upon unimproved and apparently unused land, which is neither fenced nor otherwise enclosed in a manner designed to exclude intruders, does so with license and privilege unless notice against trespass is personally communicated to him or her by the owner of the land or some other authorized person, or unless notice is given by posting in a conspicuous manner. Land that is used for commercial aquaculture or for growing an agricultural crop or crops, other than timber, is not unimproved and apparently unused land if a crop or any other sign of cultivation is clearly visible or if notice is given by posting in a conspicuous manner. Similarly, a field fenced in any manner is not unimproved and apparently unused land. A license or privilege to enter or remain on improved and apparently used land that is open to the public at particular times, which is neither fenced nor otherwise enclosed in a manner to exclude intruders, is not a license or privilege to enter or remain on the land at other times if notice of prohibited times of entry is posted in a conspicuous manner.

(3) "Premises" includes any building, dwelling, structure used for commercial aquaculture, or any real property.

[2016 c 164 § 12. Prior: 2011 c 336 § 369; 2004 c 69 § 1; 1985 c 289 § 1; prior: 1984 c 273 § 5; 1984 c 49 § 1; 1975 1st ex.s. c 260 § 9A.52.010.]

NOTES:

Findings—Intent—Short title—2016 c 164: See RCW 9A.90.010 and 9A.90.020.

Appendix D

Defendant's proposed instruction under on defense of invited entry, CP
156-57 and Court's Instructions on "to-convict" and "unlawful entry", CP
170-71

No. 4

A person has not entered or remained unlawfully in a building if the person reasonably believed that the owner of the premises or other person empowered to license access to the premises would have licensed the defendant to enter or remain.

The State has the burden of proving beyond a reasonable doubt that the trespass was not lawful. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty as to this charge.

WPIC 19.06 (modified), *State v. J.P.*, 130 Wn. App. 887, 125 P.3d 215 (2005)

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No. _____

It is a defense to a charge of burglary that the reasonably believed that the owner of the apartment or other person empowered to license access to the apartment would have licensed the defendant to enter or remain.

The State has the burden of proving beyond a reasonable doubt that the entry into the apartment was not lawful. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty as to this charge.

WPIC 19.06 (modified), *State v. J.P.*, 130 Wn. App. 887, 125 P.3d 215 (2005)

INSTRUCTION NO. 1

To convict the defendant of the crime of burglary in the first degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about December 20, 2017 the defendant entered or remained unlawfully in a building;

(2) That the entering or remaining was with intent to commit a crime against a person or property therein;

(3) That in so entering or while in the building or in immediate flight from the building the defendant assaulted a person; and

(4) That any of these acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 10

A person enters or remains unlawfully in or upon premises when he or she is not then licensed, invited, or otherwise privileged to so enter or remain.

Appendix E

Jury instruction on “Unlawfully enters or remains”

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11 WAPRAC WPIC 19.07

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Washington Pattern Jury Instructions--Criminal

11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 19.07 (4th Ed)

Washington Practice Series TM**Washington Pattern Jury Instructions--Criminal**

October 2016 Update

Washington State Supreme Court Committee on Jury Instructions

Part IV. Defenses**WPIC CHAPTER 19. Special Statutory Defenses****WPIC 19.07 Criminal Trespass—Second Degree—Defense****It is a defense to a charge of criminal trespass in the second degree that:****[the premises were at the time open to members of the public and the defendant complied with all lawful conditions imposed on access to or remaining in the premises] [or]****[the defendant reasonably believed that the owner of the premises or other person empowered to license access to the premises would have licensed the defendant to enter or remain] [or]****[the defendant was attempting to serve legal process, and the defendant did not enter into a private residence or other building not open to the public and the entry onto the premises was reasonable and necessary for service of the legal process. [Legal process includes any documents required or allowed to be served upon persons or property, by any statute, rule or ordinance, regulation, or court order]].****The [State] [City] [County] has the burden of proving beyond a reasonable doubt that the trespass was not lawful. If you find that the [State] [City] [County] has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty [as to this charge].****NOTE ON USE**

Use this instruction with WPIC 60.18 (Criminal Trespass—Second Degree—Elements), if the statutory defense is an issue supported by the evidence.

Use bracketed material as applicable.

COMMENT

RCW 9A.52.090(2), (3), (4). This instruction has been revised for this edition for the purpose of better juror comprehension. No substantive change is intended.

The offense of criminal trespass in the second degree is applicable only in those situations in which the defendant allegedly enters or remains unlawfully on private property not constituting a building. *State v. Brittain*, 38 Wn.App. 740, 689 P.2d 1095 (1984).Statutory defenses to criminal trespass negate the unlawful presence element and are therefore not affirmative defenses. *State v. R.H.*, 86 Wn.App. 807, 812, 939 P.2d 217 (1997). The burden, therefore, is on the prosecution to prove the absence of the defense when the defendant asserts that his or her entry was permissible. *City of Bremerton v. Widell*, 146 Wn.2d 561, 570, 51 P.3d 733 (2002); *State v. Finley*, 97 Wn.App. 129, 138, 982 P.2d 681 (1999). Thus, once a defendant has offered some evidence that his or her entry was permissible under RCW 9A.52.090, the prosecution bears the burden to prove beyond a reasonable doubt that the defendant lacked license to enter. *City of Bremerton v. Widell*, 146 Wn.2d at 570.There is a split of authority concerning the application of this defense to charges of burglary. In *State v. J.P.*, 130 Wn.App. 887, 125 P.3d 215 (2005), Division III of the Court of Appeals held that abandonment is a defense to a charge of burglary since it negates the trespass element of the crime. In *State v. Jensen*, 149 Wn.App. 393, 203 P.3d 393 (2009), Division II of the Court of Appeals rejected this reasoning, holding that the defense was limited by its own terms to the crimes of trespass in the first and second degrees. In *State v. Olson*, 182 Wn.App. 362, 329 P.3d 121 (2014), Division I of the Court of Appeals agreed with Division II and rejected the application of the defense to a charge of burglary. *Olson* has an extended discussion of the case law relating to the defense of abandonment and its application to charges of burglary and trespass.

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