Supreme Court No. 93943-8
COA No. 75642-7-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

RUSLAN BEZHENAR,

Petitioner.

PETITION FOR REVIEW

PETER B. TILLER
Attorney for Petitioner

THE TILLER LAW FIRM
Rock & Pine
P. O. Box 58
Centralia, Washington 98531
(360) 736-9301

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TABLE OF AUTHORITIES

A. IDENTITY OF PETITIONER

Your Petitioner for discretionary review is Ruslan Bezhenar, the Defendant and Appellant in this case, asks this Court to review the decision of the Court of Appeals referred to in section B.

B. COURT OF APPEALS DECISION

Bezhenar seeks review of Division One's unpublished opinion in *State v. Bezhenar*, No. 75642-7-I, 2016 WL 6683625, filed November 14, 2016. No motion for reconsideration has been filed in the Court of Appeals. A copy of the unpublished opinion is attached hereto in the Appendix at A1 through A10.

C. ISSUES PRESENTED FOR REVIEW

1. A defendant may not be convicted of a crime unless the State proves every element of that crime beyond a reasonable doubt. Viewing the evidence in the light most favorable to the State, was there was the evidence insufficient to sustain Mr. Bezhenar's conviction for first degree criminal trespass where the evidence does not support a finding that he was not authorized by the owners (his parents) to enter the building for the limited purpose of retrieving personal belongings where the building was posted as "uninhabitable" by the city?

2. Should review be granted where the petitioner's attorney did not seek instructions necessary to the defense of reasonable belief that he was authorized to enter the building and where the petitioner was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel?

D. STATEMENT OF THE CASE

Police were dispatched to a report of a man climbing a drain pipe leading to the second story of a closed business located in the 700 block of West Main Street in Centralia, Washington. Report of Proceedings (RP)[1] (1/21/15) at 23, RP (1/22/15) at 109. The building consisted of an unoccupied storefront and an upstairs apartment. RP (1/21/15) at 25. The front door of the building was posted on July 9, 2012 by the City of Centralia with a notice stating that the building was "unfit for habitation" and "unauthorized persons on the premises would be prosecuted." RP (1/21/15) at 25, RP (1/22/15) at 109, 134. The notice stated in full:

> This structure has been deemed unfit for habitation per CMC Title 18. Any unauthorized person found within these premises is subject to arrest and prosecution to the full extent of the law. Removal of the sign is a gross misdemeanor and is punishable by a find of $900 and one year in jail. Centralia Building Department.
> RP (1/21/15) at 28.

The notice was posted by the city because the building did not have utilities including water and electricity. RP (1/21/15) at 25.

Several officers responded to the neighbor's report, established a parameter around the building, and announced their presence. RP (1/21/15) at 29, 32. The neighbor who called

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[1] The record of proceedings consists of the following hearings: November 28, 2012 (day 1, first trial), November 29, 2012 (day 2, first trial), November 7, 2014, November 20, 2014, November 26, 2014, December 18, 2014, January 15, 2015, January 20, 2015, January 21, 2015 (day 1, second trial), January 22, 2015, (day 2, second trial), January 23, 2015 (day 3, second trial), January 26, 2015 (day 4, second trial), January 29, 2015, February 12, 2015, March 5, 2015, May 7, 2015, July 9, 2015, and August 5, 2015 (sentencing).

the police did not see anyone leave the building. RP (1/21/15) at 29.

Despite repeated announcements by different officers, the police received no response from any person inside the building. RP (1/21/15) at 32-33. Officers saw a female through a window located in the back of the building. RP (1/21/15) at 32, RP (1/22/15) at 160. The police shouted for her to open the window, but she locked the window and then walked out of view of the police. RP (1/22/15) at 161, 176. Eventually, two females left the building from a side door of the building after police announced that they were going to call for a K-9 unit. RP (1/21/15) at 34. The women—identified as Shannon West and Breanna Carothers—both exited from a door on the east side of the building and were arrested for trespassing. RP (1/21/15) at 35, RP (1/22/15) at 114. The women had apparently locked the door the building as they exited. RP (1/22/15) at 177.

Based on the report from the neighbor, police believed that a male remained in the building. RP (1/22/15) at 116. A fire truck was dispatched to the scene and a ladder was placed on a second floor metal awning on the north side of the building to gain access to a second story window. RP (1/21/15) at 36-37, RP (1/22/150 at 117.

After climbing to the metal awning, Centralia Police Officer Michael Lowrey saw Ruslan Bezhenar in the building. RP (1/21/15) at 39. Mr. Bezhenar and a woman named Darcy Negrete were both located in the upstairs apartment and were subsequently placed in handcuffs. RP (1/22/15) at 119. Officer Lowrey stated that Mr. Bezhenar was angry, argumentative and

said that the police did not have the right to be there. RP (1/21/15) at 42. Officer Lowrey stated that Mr. Bezhenar was taken out of building through the upstairs window because the interior of the apartment had not been searched. RP (1/21/15) at 65. Mr. Bezhenar refused to leave through the window and Officer Lowrey physically pulled him out of the window onto the metal awning. RP (1/21/15) at 46. While on the awing the K-9 unit Lobo bit Mr. Bezhenar on the arm. RP (1/21/15) at 50.

No person was located in the premises other than Ms. Negrete and Mr. Bezhenar after the building was searched. RP (1/22/15) at 122. Ms. Negrete was cited for occupying a residence without utilities under Centralia Municipal Code 18.40.14A. RP (1/21/15) at 133.

Mr. Bezhenar received medical attention for the dog bite. After he was taken down the ladder, Officer Lowrey stated that Mr. Bezhenar made threatening statements to him. RP (1/21/15) at 54.

The building belongs to Mr. Bezhenar's parents, Galina and Yuriy Bezhenar. RP (1/22/15) at 191, 196. Police contact Galina Bezhenar and arrived at the scene and spoke with police, but she did not have a key to the building. RP (1/22/15) at 177, 189. She explained that her husband had a key, but he did not have a phone and he could not be reached in order to bring the key. RP (1/22/15) at 177.

Galina Bezhenar testified through an interpreter that she and her husband bought the building at 708 West Main in Centralia in 2001. RP (1/22/15) at 206. She stated that her son Ruslan had previously lived in the upstairs apartment but had

moved out. RP (1/22/15) at 206-07. She stated that her son had a key to the building which her husband had provided to him. RP (1/22/15) at 207. Ms. Galina said Ruslan was not living in the building at the time of incident in July, 2012, and that he was "just being there" when the police went into the building. RP (1/22/15) at 223, 224.

Mrs. Bezhenar said that she did not receive notification from Centralia that the building was deemed to be uninhabitable and did not recognize the notice in Exhibit 8. RP (1/22/15) at 208.

Darcy Negrete, who was found by police in the apartment on July 13, 2012, testified that she had been in the apartment for approximately five minutes when the police arrived. RP (1/22/15) at 231, 242.

Ruslan Bezhenar stated that he operated a used car lot for ten to twelve years at the location and lived in the apartment for approximately two years. RP (1/22/15) at 248. He stated that his parents allow him to have access to the building in order to retrieve tools and items that are stored there, and also to have access to his personal possessions such as clothing and furniture remaining in the apartment. RP (1/22/15) at 261.

Mr. Bezhenar stated that he went to the building at approximately 2:00 or 3:00 p.m. on July 13, 2012 with his girlfriend in order to pick up some clothes. RP (1/22/15) at 248, 262. When he was there, he took a nap for 30 to 45 minutes and Darcy Negrete and Breanna Carothers came to the apartment when he was sleeping. RP (1/22/15) at 262. He fell asleep because it was a hot day and it was hot in the apartment

because there is no air conditioning. RP (1/22/15) at 263. He was asleep when his father called, telling him that police called him in order to get into the building. RP (1/22/15) at 248, 267. He said that after his father called he looked out the window and was surprised to see police cars outside. RP (1/22/15) at 249. He said that he had his parents' permission to be in the building. RP (1/22/15) at 252. He denied that he climbed through a window and said that in any case, he had the keys to the building in his possession. RP (1/22/15) at 252. He stated that it was an acquaintance named Marcus Inman who was seen by the neighbor climbing the drainpipe. RP (1/22/15) at 253. He said that Mr. Inman, who is a friend of Ms. Carothers, had left by the time he woke up when his father called. RP (1/22/15) at 265.

After the State's case-in-chief, defense counsel moved to dismiss the criminal trespass charge, arguing the State failed to present sufficient evidence that Mr. Bezhenar was there unlawfully. RP (1/22/15) at 199. The motion was denied and counsel renewed the motion at the conclusion of the defense's case. RP (1/22/15) at 278-79. The court denied the motion, stating:

> [t]hat would render a notice from the city that a building is not habitable, that would render that totally meaningless under your theory, it applies to everybody except the owner could say go ahead, you could be inside these premises despite what that notice says.
> RP (1/22/15) at 279.

Counsel argued that the owner has right to go back to his property even if it has a notice saying that it was unfit for

habitation, in order to clean the premises or do construction or repairs. RP (1/22/15) at 279-80. The court denied the motions to dismiss, stating that "entry is prohibited because of the condition of the property and the placard that's been placed on there by the City." RP (1/22/15) at 280.

The sign stating that unauthorized persons could not enter the building was apparently posted pursuant to Centralia Municipal Code 18.40.14.A. RP (1/22/15) at 133. Counsel argued that CMC was repealed in 2006, and therefore the city should not have posted the notice that it was uninhabitable. RP (1/22/15) at 133. Counsel moved to dismiss the charge of criminal trespass, arguing that the reason for the trespass charge was based on the notice, which was placed pursuant to an ordinance that was no longer in effect. RP (1/22/15) at 137. Counsel argued that the notice was dated four days from the incident, which occurred July 13, 2012. RP (1/22/15) at 137. The court sustained an objection by the State to questions about the Ordinance but did not rule on defense counsel's motion to dismiss.

E. ARGUMENT

It is submitted that the issues raised by this Petition should be addressed by this Court because the decision of the Court of Appeals raises a significant question under the Constitution of the State of Washington and the Constitution of the United States, as set forth in RAP 13.4(b).

1. THIS COURT SHOULD GRANT REVIEW BECAUSE THE STATE PRESENTED INSUFFICIENT EVIDENCE TO UPHOLD THE CONVICTION FOR CRIMINAL

TRESPASS IN THE FIRST DEGREE

In all criminal prosecutions, due process requires that the State prove every fact necessary to constitute the charged crime beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970). Where a defendant challenges the sufficiency of the evidence, the proper inquiry is, when viewing the evidence in the light most favorable to the prosecution, whether there was sufficient evidence for a rational trier of fact to find guilt beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979); *State v. Green*, 94 Wn.2d 216, 220-221, 616 P.2d 628 (1980).

Here, Bezhenar was convicted of criminal trespass in the first degree. Clerk's Papers (CP) 10-12 . Criminal trespass in the first degree requires proof that the defendant knowingly entered or remained unlawfully in a building. RCW 9A.52.070. In this case, the evidence, taken in the light most favorable to the State, does not support a finding that Mr. Bezhenar was not then licensed to enter his parents' building in order to retrieve personal possessions in storage when he lived in the apartment. The evidence shows that his parents had owned the building since 2001, that he had lived there in the recent past and that he still had possessions such as furniture and clothing stored there. Moreover, stated that he had a key to the building and had permission to be there from his parents.

The building was marked with a notice placed on the building on July 9, 2012, four days prior to the incident. The

notice stated that the "structure has been deemed unfit for habitation" and that "any unauthorized persons found within these premises is subject to arrest and prosecution to the full extent of the law." No evidence was presented, however, that returning to the building for a limited purpose such as retrieving personal possessions is "unauthorized," or that a limited, specific entry to the building during the day constitutes "habitation" of the premises.

The evidence presented at trial is insufficient to support the jury's finding that Mr. Bezhenar was not then licensed to enter the building where he had permission by the owners (his parents) to do so, and where there was no showing that a limited presence in the building—which had been posted for only a few days—was not contemplated by the CMC as an authorized purpose.

Moreover, the trial court erred in denying defense counsel's motions to dismiss the charge.

In ruling on a motion to dismiss for insufficient evidence, the trial court does not weigh the evidence, but only examines the sufficiency thereof. *State v. Coleman*, 54 Wn. App. 742, 746, 775 P.2d 986 (sufficiency of the evidence is legally the same issue as insufficiency of the proof of a material element of the crime), rev. denied, 113 Wn.2d 1017 (1989). In reviewing a trial court's decision on a motion to dismiss, a reviewing court applies the same standard as the trial court: that is, whether there is sufficient evidence that could support a verdict. *State v. Longshore*, 97 Wn. App. 144, 147, 982 P.2d 1191 (1999), aff'd, 141 Wn.2d 414, 5 P.3d 1256 (2000). Evidence is sufficient if any

rational trier of fact viewing it most favorably to the State could have found the essential elements of the charged crime beyond a reasonable doubt. *Id.*

Here, the State was required to prove Mr. Bezhenar knowingly entered or remained unlawfully in the building. Mr. Bezhenar's motions to dismiss the charge centered on the State's failure to prove that his presence in the building was "unauthorized," and that the ordinance was repealed by the city in 2006. RP (1/22/15) at 134-35.

In any prosecution under RCW 9A.52.070, it is a defense that a defendant was licensed to enter the building by the owner of the premises. RCW 9A.52.090(3).

Here, Mr. Bezhenar was permitted to be in the building by his parents—the owners of the building. The city's notice prohibited "unauthorized" persons from being on the premises. It is not reasonable to believe, however, that the Centralia Municipal Code—assuming that it was in effect in 2012 and had not been repealed, as argued by counsel—creates a blanket prohibition against all persons from entering a posted building, including persons performing legitimate duties such as retrieving needed possessions.

The Code clearly prohibits an owner or his or her designee from "inhabiting" a posted building. There is no reason to believe, however, that an owner cannot return to a posted building for purposes such as making repairs, shutting off utilities, preventing waste, or in this case—to retrieve personal possessions from storage.

A good faith belief that one is entitled to be on the

premises is also a defense to a charge of trespass:

> In accordance with the general rule that the existence of a criminal intent is an essential element of a statutory offense, it is the rule in many jurisdictions that criminal intent is an essential element of the statutory offense of trespass, even though the statute is silent as to intent; and if the act prohibited is committed in good faith under claim of right or color of title, although accused be mistaken as to his right, unless it is committed with force or violence of a breach of the peace, no conviction will lie, the view taken being that it will not be presumed that the legislature intended to punish criminally acts committed in ignorance, by accident or under claim of right, and in the bona fide belief that the land is the property of the trespasser, unless the terms of the statute forbid any other construction.

State v. Batten, 20 Wn. App. 77, 79-81, 578 P.2d 896 (1978), quoting *People v. Johnson*, 16 Mich. App. 745, 750, 168 N.W.2d 913, 915 (1969).

Here, Mr. Bezhenar was in the building in good faith under a claim of right. He had a key to the building and used a side entrance on the east side of the building for access to the apartment instead of the front door facing Main Street. The front door was posted but no evidence showed that the east side door was similarly posted. Moreover, Mr. Bezhenar's entry into the building was for a specific, limited, reasonable purpose. A reasonable person would not conclude that temporary entry into one's parent's property would constitute "unauthorized" use of a posted building.

The Court of Appeals ruled that the argument "ignores that at the time he entered the building, the City had posted a notice on the building and deemed it uninhabitable and

prohibited all but authorized entry." *State v. Bezhenar*, slip op. at 6. Appendix A6. Where, as here, the petitioner asserted that his presence in the building was unlawful because he reasonably believed that the owners (his parents) had licensed him to enter or remain in the building a statutory defense to the crime of criminal trespass that "[t]he actor reasonably believed that the owner of the premises, or other person empowered to license access thereto, would have licensed him to enter or remain." RCW 9A.52.090(3).

Statutory defenses to criminal trespass negate the unlawful presence element of criminal trespass and are therefore not affirmative defenses. *State v. R.H.*, 86 Wash.App. 807, 812, 939 P.2d 217 (1997). 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. See, e.g., *State v. McCullum*, 98 Wash.2d 484, 490, 656 P.2d 1064 (1983) (self-defense is a statutory defense and, as such, once properly raised, the absence of self-defense becomes another element of the offense which the State must prove beyond a reasonable doubt).

RCW 9A.52.090(3) provides that it is a defense to the crime of criminal trespass if:

> [t]he 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[.]

Here, the court failed to consider his argument that not

only did Bezhenar reasonably believe that he had authorization to enter by his parents, but that he was reasonable in his belief that he would have been granted license to enter by the city after the building was posted. The evidence is clear that Mr. Bezhenar was not living in the building or otherwise "squatting" or that he sought to live there; the facts are that he entered the building for the purpose of retrieving personal items left when he lived there. It is reasonable for him to believe that he had authorization to enter the building despite the posted notice for a limited purpose of retrieving items. The building was not posted due to structural or safety issues; it was posted because it did not have electricity or running water. Entry into the building in the day for the purpose of obtaining items posed no danger and therefore he was reasonable that he was authorized to do by the City of Centralia if asked. The court failed to address this aspect of RCW 9A.52.090(3).

2. **INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL.**

Mr. Bezhenar's counsel provided ineffective assistance by failing to fully raise the defense that Mr. Bezhenar reasonably believed that he had license to enter the property and failed to propose an instruction to support the argument.

The right to counsel includes the right to the effective assistance of counsel. U.S. Const. Amends. VI, XIV; *Strickland*, 466 US at 685. Counsel's performance is deficient if it falls below an objective standard of reasonableness. U.S. Const. Amends. VI, XIV; *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). Deficient performance prejudices the accused when

there is a reasonable probability that it affected the outcome of the proceeding. *Id.*

To be minimally competent, an attorney must research the relevant law. *Kyllo*, 166 Wn.2d at 862. The accused is denied a fair trial when defense counsel fails to identify the sole defense available and present it to the jury. *State v. Powell*, 150 Wn. App. 139, 156, 206 P.3d 703 (2009).

A defendant has a due process right to have the jury accurately instructed on his theory of defense if the instruction is supported by substantial evidence and accurately states the law. U.S. Const. amends. 5, 6, 14; *In re Winship*,397 U.S. at 364; *State v. Hughes*,106 Wn.2d 176, 191, 721 P.2d 902 (1986). Jury instructions, when taken as a whole, must properly inform the jury of the applicable law. *State v. Douglas*,128 Wn. App. 555, 562, 116 P.3d 1012 (2005). When determining if the evidence at trial was sufficient to support the giving of an instruction, the court is required to view the supporting evidence in the light most favorable to the party that requested the instruction. *State v. Fernandez-Medina*, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000).

Counsel's failure to propose instructions on the defense theory prejudices the accused if the jury is left with no recognition of the legal significance of the evidence. *Powell,* 150 Wn. App. at 156-57.

Mr. Bezhenar's defense attorney provided ineffective assistance by failing to properly raise the defense that he reasonably believed that he was authorized to be in the building.

In order to convict Mr. Bezhenar of first degree criminal

trespass, the State was required to prove beyond a reasonable doubt that he unlawfully entered or remained in a building. RCW 9A.52.070. As noted in Section 2, *supra*, RCW 9A.52.090(3) provides a clearly defined statutory defense when:

> [t]he 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.

The reasonable belief defense is not an affirmative defense. *State v. J.P.*, 130 Wn. App. 887, 895, 125 P.3d 215 (2005). Instead, it negates the element of unlawful entry or unlawful remaining. *Id.* (citing *City of Bremerton v. Widell*, 146 Wn.2d 561, 570, 51 P.3d 733 (2002)).

Here, Mr. Bezhenar's parents authorized him to be in the building. The front of the building was posted with the notice that unauthorized persons were prohibited from being on the premises. This necessarily implies that there is a category of persons who are authorized to be in the building.

Mr. Bezhenar's attorney argued in closing that the entry into the building was not unlawful and that he was an authorized person by dint of the permission by his parents to be there and because, assuming the Code was not repealed in 2006, it was reasonable to enter a building for purposes such as remedying the deficient condition by making repairs, or in this case picking up possessions. RP (1/23/15) at 364-69. Nevertheless, defense counsel did not propose WPIC 19.06 regarding the reasonable belief defense that he was "authorized" to be in the building. The instruction, which is specifically tailored to first degree

criminal trespass, provides:

> It is a defense to a charge of criminal trespass in the first degree that 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.
>
> 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.

11A Washington Pattern Jury Instructions: Criminal 19.06 (WPIC).

Defense counsel's failure to fully argue the defense fell below an objective standard of reasonableness. *Kyllo*, 166 Wn.2d at 862. Counsel had no reasonable strategic reason not to argue the available defense, more importantly, to request the instruction. An instruction on the reasonable belief defense would not have placed any additional burden on the defense. *J.P.*, 130 Wn. App. at 895. Such an instruction would have made clear to the jury the State's burden of disproving the reasonable belief defense. Mr. Bezhenar's attorney provided deficient performance by failing to present the reasonable belief defense to the jury. *Powell*, 150 Wn. App. at 156.

Mr. Bezhenar was prejudiced by his attorney's deficient performance. *Kyllo*, 166 Wn.2d at 862. The evidence demonstrated that Mr. Bezhenar entered the property for a short period of time, that he did not intend to 'inhabit" the property, and that he was there for a specific, limited purpose. Without an instruction on the reasonable belief defense, the jury was left

with no awareness of the legal significance of that evidence. *Powell,* 150 Wn. App. at 156-57. Instead, the jury likely believed that they were required to convict Mr. Bezhenar regardless of his belief that his presence was reasonable and lawful, even in a building posted as "uninhabitable." Failure to properly raise the reasonable belief defense relieved the State of its burden to prove unlawful entry beyond a reasonable doubt. *J.P.*, 130 Wn. App. at 895.

The jury should have been instructed that it is a statutory defense to the crime if "the actor reasonably believed that the owner of the premises, **or other person empowered to license access thereto**, would have licensed him to enter or remain." RCW 9A.52.090(3). (Emphasis added). Mr. Bezhenar contends that had the jury been properly instructed, they may likely have come to the conclusion that he reasonably believed he was given permission to enter by a person empowered to license him to enter or remain.

If the defense theory is supported by substantial evidence and the law is accurately stated, it is reversible error to refuse to give a defense-proposed instruction. *State v. Agers*,128 Wn.2d 85, 93, 904 P.2d 715 (1995). Accordingly, Bezhenar was prejudiced by counsel's failure to request an instruction to which he was entitled.

The Court of Appeals rejected the argument, stating that he was not prejudiced by counsel's failure to request an instruction under WPIC 19.06 because he was not entitled to the instruction because the City of Centralia had not licensed him to be in the building. *Bezhenar,* slip. op. at 9. However,

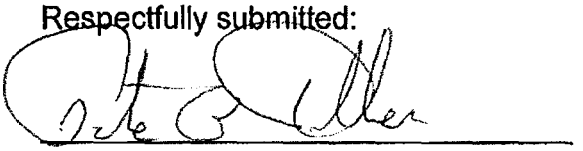
the court fails to address the second portion of RCW 9A.52.090(3), which provides that it is a defense if the actor reasonably believed that the owner or "other person empowered to license access thereto" would have granted access. Here, as argued supra, it was reasonable for Bezhenar to assume that Centralia granted access or would have granted access to the upstairs portion of the building in order to retrieve his personal property.

F. CONCLUSION

This court should accept review for the reasons indicated in Part E of this petition and reverse and dismiss Bezhenar's conviction consistent with the arguments presented herein.

DATED this 13th day of December, 2016.

Respectfully submitted:



PETER B. TILLER, WSBA #20835
Attorneys for Petitioner

CERTIFICATE OF SERVICE

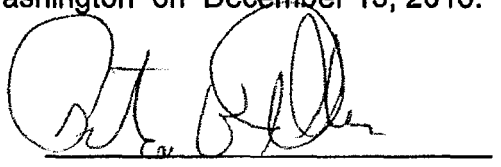
The undersigned certifies that on December 13, 2016 that this Petition for Review was sent by the JIS link to Mr. Richard Johnson, Clerk of the Court, Court of Appeals, Division I, One Union Square 600 University Street, Seattle, WA 98101-4170, and copies was mailed to the Ruslan Bezhenar, Appellant, and Ms. Sara Beigh, County Deputy Prosecuting Attorney by U.S. mail, postage prepaid, to the following:

Ms. Sara Beigh
Deputy Prosecuting Attorney
Lewis County Prosecutor's Office
345 W. Main Street, 2nd Floor
Chehalis, WA 98532-1900
appeals@lewiscountywa.gov

Mr. Richard Johnson
Clerk of the Court
Court of Appeals
One Union Square
600 University Street
Seattle, WA 98101-4170

Mr. Ruslan Bezhenar
702 W. Main St.
Centralia, WA 98531

This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on December 13, 2016.



PETER B. TILLER

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent, v. RUSLAN Y. BEZHENAR, Appellant.	)	No. 75642-7-I DIVISION ONE UNPUBLISHED OPINION FILED: November 14, 2016

MANN, J. — The City of Centralia posted a notice on a building owned by the parents of Ruslan Bezhenar as unfit for human occupation and prohibited unauthorized entry. Four days later, while responding to a possible burglary at the Bezhenars' building, the Centralia Police found Bezhenar and others inside the building with signs that they were living there. Bezhenar was arrested and charged with felony harassment and criminal trespass. A jury convicted Bezhenar of criminal trespass in the first degree. Bezhenar appeals, contending that there was insufficient evidence to sustain his conviction and for ineffective assistance of counsel.

Because a rational jury could find beyond a reasonable doubt that Bezhenar unlawfully entered and remained in the building without authorization, we affirm the judgment and sentence.

FACTS

Bezhenar's parents, Galina and Yuriy Bezhenar, own a building in Centralia, Washington. They allowed Bezhenar to live in the upstairs apartment as well as use it for storing tools. On July 9, 2012, the City of Centralia (City) posted a notice on the front door of the building deeming it uninhabitable due to a lack of utilities, including water and electricity. The notice stated in full:

> This structure has been deemed unfit for habitation per CMC Title 18. Any unauthorized person found within these premises is subject to arrest and prosecution to the full extent of the law. Removal of this sign is a gross misdemeanor and is punishable by a fine of $5,900.00 and one year in jail. Centralia Building Department.

Four days after the notice was posted, on July 13, 2012, Centralia Police Officer Mike Lowrey responded to a possible burglary in progress at the Bezhenars' building. A witness called the police after seeing a man climb up the building's drainpipe and enter through a window. Nobody saw the man leave.

The Centralia Police Officers knocked on the building's doors and yelled for the occupants to exit. After the officers announced that a K-9 unit was preparing to search the building, two women exited the building's side door, locking the door behind them.

Believing that other people were still inside, the officers used a fire truck's ladder to climb onto an awning beneath the open second story window. Once on the awning, Officer Lowrey saw Bezhenar and a woman, Darcy Negrete, through the window. Eventually, Lowrey handcuffed Bezhenar, pulled him out backwards through the open

window onto the awning, and brought him down to the sidewalk. Lobo, a police dog, was also on the awning. While Officer Lowrey was handling Bezhenar on the awning, Lobo bit Bezhenar on the arm. After Bezhenar and Officer Lowrey climbed down from the awning, another officer brought Negrete down. Officer Lowrey testified that while Bezhenar was receiving medical care for his arm, he threatened Officer Lowrey.

The State charged Bezhenar with felony harassment and criminal trespass in the first degree. A jury convicted Bezhenar of felony harassment, but deadlocked on the criminal trespass charge. On appeal, this court reversed and in an unpublished decision remanded Bezhenar's felony harassment charge due to prosecutorial misconduct. See State v. Bezhenar, noted at 181 Wn. App. 1034 (2014). We did not reach the merits of Bezhenar's appeal of his trespass conviction.

On remand, the State charged Bezhenar with felony harassment and criminal trespass in the first degree again. In the second trial, a jury convicted Bezhenar of criminal trespass in the first degree, but deadlocked on the felony harassment charge.

Bezhenar appeals his criminal trespass charge contending that there was insufficient evidence for the jury and that he received ineffective assistance from trial counsel.

ANALYSIS

Sufficiency of the Evidence

Bezhenar argues that the evidence at his trial was insufficient to sustain a conviction for criminal trespass in the first degree and that the court erred when it denied Bezhenar's motion to dismiss the charge for insufficient evidence.

The State is required under the due process clause to prove all of the necessary elements of the crime charged beyond a reasonable doubt. U.S. CONST. amend. XIV, § 1; In re Winship, 397 U.S. 358, 362-65, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). To determine whether the evidence is sufficient to sustain a conviction, we review the evidence in the light most favorable to the State and ask whether a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Elmi, 166 Wn.2d 209, 214, 207 P.3d 439 (2009). When a defendant challenges the sufficiency of the evidence, he admits the truth of the State's evidence. Washington v. Farnsworth, 185 Wn.2d 768, 775, 374 P.3d 1152 (2016). "[A] reviewing court makes a limited inquiry tailored to ensure that a defendant receives the minimum that due process requires: a 'meaningful opportunity to defend' against the charge against him and a jury finding of guilt 'beyond a reasonable doubt.'" Musacchio v. United States, __ U.S. __, 136 S. Ct. 709, 715, 193 L. Ed. 2d 639 (2016) (quoting Jackson v. Virginia, 443 U.S. 307, 314-15, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)). The legal determination of the sufficiency of the evidence "essentially addresses whether 'the government's case was so lacking that it should not have even been submitted to the jury.'" Musacchio, 136 S. Ct. at 715 (quoting Burks v. United States, 437 U.S. 1, 16, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978)). Deference must be given to the trier of fact who resolves conflicting testimony and evaluates the credibility of witnesses and persuasiveness of material evidence. State v. Carver, 113 Wn.2d 591, 604, 781 P.2d 1308 (1989).

"A person is guilty of criminal trespass in the first degree if he or she knowingly enters or remains unlawfully in a building." RCW 9A.52.070(1). A person "enters or remains unlawfully" in premises when he is not then licensed, invited, or otherwise

privileged to so enter or remain. RCW 9A.52.010(2). To convict Bezhenar, the State had the burden to prove beyond a reasonable doubt, that Bezhenar knowingly entered or remained in a building and knew that entering or remaining was unlawful—that he was not licensed, invited, or otherwise privileged to enter or remain.

At Bezhenar's trial, evidence of knowing "entry or remaining" included: (1) Bezhenar and three others were in the building; (2) Bezhenar was sleeping on the bed at the time the police arrived; (3) the interior of the apartment looked like someone lived there; and (4) Bezhenar's mother testified he was living or "being" in the building at the time of the arrest.[1] Evidence that Bezhenar knew entry was illegal included the obvious posting on the front door of the building. Evidence also included a witness's observation that a man was seen climbing an outside drainpipe, then entering and not leaving the building. While Bezhenar initially testified the person entering through the drainpipe was named "Marcus," Bezhenar later confirmed that he had not seen Marcus at the apartment that day. Nobody else testified that Marcus had been at the apartment.

Bezhenar argued at trial that that his entry was not unlawful because he was in the apartment with the owners' (his parents) permission. It is a statutory defense to the crime of criminal trespass that "[t]he actor reasonably believed that the owner of the premises, or other person empowered to license access thereto, would have licensed him to enter or remain." RCW 9A.52.090(3). This statutory defense negates the unlawful presence element of the criminal trespass crime. City of Bremerton v. Widell, 146 Wn.2d 561, 570, 51 P.3d 733 (2002). When a defendant asserts that his entry was

[1] Report of Proceedings (RP) (Jan. 22, 2015) at 206-207 and 228.

permissible under RCW 9A.52.090(2), the State bears the burden of proving the absence of the defense because that defense "negates the requirement for criminal trespass that the entry be unlawful." City of Bremerton, 146 Wn.2d at 570 (quoting State v. Finley, 97 Wn. App. 129, 138, 982 P.2d 681 (1999)). 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." City of Bremerton, 146 Wn.2d at 570.

Bezhenar's argument that he was in the building with his parents' permission ignores that at the time he entered the building, the City had posted a notice on the building and deemed it uninhabitable and prohibited all but authorized entry. Once the City has closed and posted a notice on the building for no unauthorized entry, the owners are no longer empowered to authorize entry. As the trial court explained in response to Bezhenar's motion to dismiss contending that the owner has the right to enter or authorize entry into a posted building:

> that would render a notice from the city that a building is not habitable, that would render that totally meaningless under your theory, it applies to everybody except the owner and the owner could say go ahead, you could be inside these premises despite what the notice says.[2]

Once a notification is posted on a building, the authorizing entity is the City. While the City could authorize the owner to reenter, Bezhenar offered no evidence that the City authorized either his entry into, or habitation, of the apartment. Because Bezhenar failed to offer evidence that his right to enter was authorized, the statutory defense in RCW 9A.52.090(3) did not apply.

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[2] RP (Jan. 22, 2015) at 279.

Reviewing the evidence in the light most favorable to the State, there was sufficient evidence that a rational trier of fact could find the elements of criminal trespass in the first degree.

Ineffective Assistance of Counsel

Bezhenar contends that his Sixth Amendment right to counsel was violated by his trial counsel's deficient performance. Specifically, Bezhenar argues that his counsel provided ineffective assistance by "failing to fully raise the defense that Bezhenar reasonably believed that he had license to enter the property and [failing] to propose an instruction to support the argument."[3]

We review ineffective assistance claims de novo. In re Pers. Restraint of Fleming, 142 Wn.2d 853, 865, 16 P.3d 610 (2001). To sustain a claim of ineffective assistance of counsel, "the defendant must show: (1) 'counsel's performance was deficient,' and (2) 'the deficient performance prejudiced the defense.'" In re Fleming, 142 Wn.2d at 865 (quoting Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). We are highly deferential to counsel's performance, In re Personal Restraint of Gomez, 180 Wn.2d 337, 348, 325 P.3d 142 (2014) (citing Strickland, 466 U.S. at 689), and strongly presume that counsel's representation was effective. State v. McFarland, 127 Wn.2d 322, 334, 899 P.2d 1251 (1995).

Bezhenar contends first that his counsel's failure to argue that Bezhenar reasonably believed that he was licensed to be in the building under RCW 9A.52.090(3) violated Bezhenar's right to counsel. This argument fails. In renewing his motion to dismiss for insufficient evidence, Bezhenar's counsel argued extensively that Bezhenar

[3] Br. of Appellant at 16.

had permission to enter the building, which is a defense to the charge under RCW 9A.52.090(2): "So my position on count two is essentially [that Bezhenar] did have permission which makes the entry or remaining not unlawful."[4] Bezhenar's counsel built his defense strategy around the fact that Bezhenar believed that he had permission to be there. Bezhenar cannot establish that his counsel's performance was deficient.

Second, Bezhenar argues that his right to counsel was violated when his trial counsel failed to propose a jury instruction. Bezhenar argues that his counsel should have proposed the "reasonable belief" instruction WPIC 19.06—a jury instruction specifically tailored to first degree criminal trespass:

> It is a defense to a charge of criminal trespass in the first degree that 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.
>
> 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.

11 WASHINGTON PRACTICE: PATTERN JURY INSTRUCTIONS: CRIMINAL.19.06 (4th ed. 2016) (WPIC).

Where a claim of ineffective assistance is based on counsel's failure to request a particular jury instruction, the defendant must show that he was entitled to the instruction, counsel's performance was deficient in failing to request it, and the failure to request the instruction caused prejudice. State v. Thompson, 169 Wn. App. 436, 495, 290 P.3d 996 (2012).

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[4] RP (Jan. 22, 2015) at 279.

Here, Bezhenar was not entitled to the instruction because, although his parents licensed him to be in the building, the City of Centralia did not. The City prohibited habitation in the building. Thus, the City would not have licensed Bezhenar to enter or live in the building. Because Bezhenar was not entitled to the instruction, we need not consider whether his counsel's performance was deficient for failing to request it.

Further, Bezhenar what not prejudiced by the lack of the "reasonable belief" instruction. The jury was instructed that in order to find Bezhenar guilty of criminal trespass in the first degree, they needed to find, beyond a reasonable doubt that he "knew that the entering or remaining was unlawful."[5] Bezhenar argued during closing argument that the unlawful element could not be met because despite the City's notice, the owners had the right to give permission for their son to enter the building or to remove things so long as he was not living there. Juries are presumed to follow the court's instructions. State v. Warren, 165 Wn.2d 17, 29, 195 P.3d 940 (2008). Had the jury believed Bezhenar reasonably believed he had permission to enter the building or had reasonable doubts as to his knowledge, they would not have found that he knew entry was unlawful. Despite Bezhenar's argument, the jury found him guilty of criminal trespass.

Bezhenar cannot establish that his Sixth Amendment right to counsel was violated by his trial counsel's performance.

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[5] Clerk's Papers (CP) at 145.

We affirm the judgment and sentence.

WE CONCUR:

TILLER LAW OFFICE

December 13, 2016 - 4:30 PM

Transmittal Letter

Document Uploaded: 756427-Petition for Review.pdf

Case Name: State v. Bezhenar
Court of Appeals Case Number: 75642-7

Party Respresented: Ruslan Bezhenar
Is this a Personal Restraint Petition? ◯ Yes ◉ No
Trial Court County: ____ - Superior Court # ____

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- ◯ Statement of Additional Authorities
- ◯ Affidavit of Attorney Fees
- ◯ Cost Bill
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- ◯ Response to Personal Restraint Petition
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Comments:

No Comments were entered.

Sender Name: Kirstie Elder - Email: Kelder@tillerlaw.com