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

STATE OF WASHINGTON, Respondent, v. EDWARD A. CAICEDO-OBREGON, Appellant.	)))))))))	No. 36181-1-III UNPUBLISHED OPINION

FEARING, J. — Edward Caicedo-Obregon challenges, on various grounds, his conviction for first degree burglary with a finding of sexual motivation. We affirm.

FACTS

This appeal concerns Edward Caicedo-Obregon's entry of Jacquelyn Munson's apartment during the early morning of December 20, 2017. Caicedo-Obregon admits he entered the apartment, but asserts that he entered with permission and touched Munson because of a purported long-term intimate relationship. The jury disbelieved Caicedo-Obregon's story.

Edward Caicedo-Obregon previously lived in the same apartment complex as Jacquelyn Munson. On December 20, 2017, he lived elsewhere.

On the night of December 19, 2017, Jacquelyn Munson and her eleven-year-old son Don, a pseudonym, fell asleep in her bed. Rosie Pineda, Munson's significant other, left Munson's apartment at 1 a.m. to drink with friends and left the residence unlocked.

During the early morning on December 20, Jacquelyn Munson awoke to feel a third person entering her bed. Munson believed Rosie Pineda had returned home. The interloper lifted Munson's blanket and caressed Munson's thigh. The person raised Munson's pajama bottoms and kissed Munson's exposed buttocks. Munson, believing Pineda sought sexual contact, sleepily intoned: "not tonight," and Munson pulled the blanket over her leg. Again the bedded person removed the blanket and kissed Munson. The kissing and caressing reoccurred multiple times, and Munson, still believing Pineda laid next to her and fearing her son would awaken, shooed Pineda away. Don awoke and left the bed. Munson grabbed the hand of the interloper and felt a man's hand.

A startled Jacquelyn Munson attempted to restrain the intruder. The man cinched strings on his hoodie so that Munson and Don could not see his face. Munson yelled: "[W]ho are you?" Munson hollered at Don to call the police as she attempted to remove the stranger's sweater and keep him confined to the apartment. The interloper twirled his arms in a windmill motion to escape. The spinning resulted in punches to Munson's face. Munson released her hold on the prowler, and he fled the apartment.

On December 20, 2017, at 4:16 a.m., police officers arrived at Jacquelyn Munson's apartment. Munson reported that a stranger had climbed into her bed. Munson bore a bump above her right eye.

Police officers ferried Jacquelyn Munson to the hospital to collect a DNA sample from her right buttock and underwear. The underwear tested negative for semen and saliva. The swab from Munson's skin tested positive for human amylase, indicative of saliva, from three individuals. The swab contained a major DNA profile of one person and a trace component of two persons. The major profile matched Edward Caicedo-Obregon's DNA with the odds of a random person having the same DNA at 31 decillion.

On February 13, 2018, Detective Matt Nelson questioned Edward Caicedo-Obregon at his residence about the entry of Jacquelyn Munson's apartment. Caicedo-Obregon stated he met Munson two years before and saw her recently, but he could not recall her name. We do not know how he knew that he had met Jacquelyn Munson if he did not know her name. Caicedo-Obregon volunteered numerous extramarital affairs to Nelson, but did not mention any affair with Munson.

During Matt Nelson's interview of Edward Caicedo-Obregon, Caicedo-Obregon volunteered that, early on December 20, 2017, he entered the apartment complex to check his mail. He saw Munson's dog outside and went to her apartment to return the dog.

Caicedo-Obregon explained that his saliva might have been found on Jacquelyn Munson because of talking to her when returning the dog.

PROCEDURE

The State of Washington charged Edward Caicedo-Obregon with one count of burglary in the first degree and requested a sentencing enhancement for sexual motivation. The State contended that the assault on Jacquelyn Munson qualified the burglary as first degree.

During trial, Edward Caicedo-Obregon testified that he went to Jacquelyn Munson's apartment on December 19, 2017, to end an extramarital affair and to return a dog she bequeathed him. According to Caicedo-Obregon, Munson's son opened the apartment door for him. When Caicedo-Obregon attempted to end his relationship with Munson, she fretted because he provided financial support for her and her children. Munson initiated sexual contact, and he performed oral sex on her. Caicedo-Obregon averred that he did not tell Detective Matt Nelson, during the February 13 interview, about the affair with Munson because of his wife's presence.

During trial testimony, Jacquelyn Munson denied any sexual relationship with Edward Caicedo-Obregon. Rosie Pineda and Don testified that each had only seen Edward Caicedo-Obregon before in the apartment complex parking lot.

At the close of evidence, Edward Caicedo-Obregon entreated the trial court to deliver one of two alternative jury instructions based on a defense to criminal trespass available under RCW 9A.52.090(3) and based on WPIC 19.06. The first proposed instruction read:

> 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.

Clerk's Papers (CP) at 156. The second proposed instruction read:

> It is a defense to a charge of burglary that the [defendant] 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.

CP at 157. The trial court denied the request for either jury instruction. The trial court reasoned that an accused's reasonable belief of a license to enter the premises did not constitute a defense under burglary. RCW 9A.52.020, the burglary statute, required intent to commit a crime once inside the building, but did not require that the accused intentionally or knowingly enter the building unlawfully or without permission.

Therefore, according to the trial court, the defense available under RCW 9A.52.090(3) was inconsistent with burglary's lack of mens rea.

The trial court's to-convict instruction, jury instruction 9 read, in part:

> 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.

CP at 170. The trial court also instructed the jury in jury instruction 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.

CP at 171.

The jury returned a guilty verdict and found the burglary to be sexually motivated.

LAW AND ANALYSIS

On appeal, Edward Caicedo-Obregon contends the evidence did not support a conviction for first degree burglary for two reasons. First, insufficient evidence established that he unlawfully entered Jacquelyn Munson's apartment. Second, insufficient evidence established that he assaulted Munson. On appeal, Caicedo-Obregon also contends the trial court committed error when refusing to instruct the jury, under

RCW 9A.52.090(3), as to the defense based on a reasonable belief that he held permission to enter the apartment. If we concluded that the evidence did not support the conviction, we would reverse and dismiss the charges. If we found instructional error, we would reverse and remand for a new trial.

Caicedo-Obregon also contends insufficient evidence supported a finding of sexual motivation. Finally, Caicedo-Obregon argues that his trial counsel ineffectively performed when she failed to request a jury instruction on the lesser included offense of criminal trespass in the first degree. We address the assignments of error in such order.

Unlawful Entry

Edward Caicedo-Obregon challenges the sufficiency of the evidence for the unlawful entry element of his conviction for burglary in the first degree. Evidence suffices for a conviction if a rational trier of fact could find each element of the crime beyond a reasonable doubt. *State v. Zigan*, 166 Wn. App. 597, 601-02, 270 P.3d 625 (2012). Direct and circumstantial evidence may be used to establish the required elements. *State v. Thompson*, 88 Wn.2d 13, 16, 558 P.2d 202 (1977). Only the trier of fact weighs the evidence and judges the credibility of witnesses. *State v. Carver*, 113 Wn.2d 591, 604, 781 P.2d 1308 (1989). A challenge to the sufficiency of the evidence admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

The jury convicted Edward Caicedo-Obregon of first degree burglary under the assault prong of RCW 9A.52.020(1)(b) which states:

> A person is guilty of burglary in the first degree if, with intent to commit a crime against a person . . . therein, he or she enters or remains unlawfully in a building and if, in entering or while in the building or in immediate flight therefrom, the actor . . . (b) assaults any person.

Caicedo-Obregon in part challenges the sufficiency of the evidence that supports a finding that he unlawfully entered Jacquelyn Munson's apartment. An unlawful entry occurs when:

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

RCW 9A.52.010(2).

We conclude that strong evidence supported a finding of an unlawful entry. The testimony of Jacquelyn Munson, Rosie Pineda, and Don established that none of the three had any relationship with Edward Caicedo-Obregon. Caicedo-Obregon entered the apartment at an odd hour without permission from anyone. The jury did not need to believe Caicedo-Obregon's story that, because of a sexual affair with Munson, he held unlimited privileges to enter the residence, particularly when he admitted no relationship to Detective Matt Nelson. The jury did not need to conclude that anyone, let alone Caicedo-Obregon, could enter the apartment freely because Pineda left the door unlocked.

Edward Caicedo-Obregon relies on *State v. J.P.*, 130 Wn. App. 887, 125 P.3d 215 (2005), to argue the State presented insufficient circumstantial evidence to convict. In *J.P.*, the trial court found J.P. guilty of residential burglary on the basis that sufficient circumstantial evidence existed to provide an inference of unlawful entry. The record demonstrated that J.P. crawled out of the window of a locked home and thereafter admitted to spray-painting the inside walls. This court affirmed the conviction because a reasonable trier of fact could infer that, based on J.P.'s activity inside the house and the manner by which he exited the residence, he had no privilege to enter the premises.

Although no one saw Edward Caicedo-Obregon exit Jacquelyn Munson's apartment by crawling out a window or in some other questionable mode, one need not leave a home in a surreptitious manner in order to be guilty of unlawful entry. Just as important, Caicedo-Obregon's activities inside, including drawing the strings of his hoodie and thrashing his arms in order to escape, bolstered a finding of burglary.

Edward Caicedo-Obregon curiously argues that Jacquelyn Munson must have wanted him inside the apartment because Munson grabbed Caicedo-Obregon when she realized a man caressed her body. The jury could conclude that Munson attempted to seize the intruder in order to capture him for a later arrest, not because of any desire for his presence beside her.

Assault

We have concluded that the State delivered sufficient evidence to prove the burglary element of an unlawful entry. We now address whether the State presented sufficient evidence to prove the element of assault needed to sustain a verdict of first degree burglary.

The jury may convict an accused of first degree burglary if the accused commits an assault after unlawfully entering a building. RCW 9A.52.020(1)(b). Washington statutes do not define an "assault," so Washington law employs the common law definition of the term. *State v. Madarash*, 116 Wn. App. 500, 513, 66 P.3d 682 (2003). An assault occurs under one of three possible scenarios:

> (1) an attempt, with unlawful force, to inflict bodily injury upon another; (2) an unlawful touching with criminal intent; and (3) putting another in apprehension of harm whether or not the actor actually intends to inflict or is incapable of inflicting that harm.

State v. Hupe, 50 Wn. App. 277, 282, 748 P.2d 263 (1988).

The State maintains that Edward Caicedo-Obregon committed two physical acts that constituted assault: (a) a caress of the thigh and kiss on the buttock, and (b) the windmill punches. Caicedo-Obregon contends that neither act occurred and, assuming one or more of the actions happened, neither act constituted an assault. We agree with the State.

Jacquelyn Munson testified to the touching of her thigh and the buttock buss. Munson and her son both testified to the windmill punches. The jury could believe that all acts of touching transpired.

Jacquelyn Munson testified that she did not want any touching from the interloper. She repeatedly told her prowler to cease the the physical contact. Thus, the jury could find either or both of the caressing or kissing to be unconsented offensive contact. The jury did not need to believe Edward Caicedo-Obregon's averment that Munson and he engaged in consensual sex.

Edward Caicedo-Obregon contends the evidence showed only that the burglar attempted to flee from Jacquelyn Munson's grasp, not to strike her. Some evidence destroys this theory. Munson and Don testified that Caicedo-Obregon repeatedly struck Munson in the face. A photo of Munson showed a black eye.

RCW 9A.52.090(3) Defense

Edward Caicedo-Obregon also asks that we grant him a new trial on the ground that the trial court committed error when failing to instruct the jury on the defense that, pursuant to RCW 9A.52.090(3), he reasonably believed he held permission to enter Jacquelyn Munson's apartment.

RCW 9A.52.090 declares:

> In any prosecution under RCW 9A.52.070 [criminal trespass in the first degree] and 9A.52.080 [criminal trespass in the second degree], it is a defense that:
>
> (1) A building involved in an offense under RCW 9A.52.070 was abandoned; 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. . . .

Edward Caicedo-Obregon only advances subsection (3) of RCW 9A.52.090. We include the language of subsection (1) because of a decision forwarded by Caicedo-Obregon that relies on the subsection. Note that RCW 9A.52.090 only expressly applies to charges of criminal trespass and not burglary. The title to the statute is "Criminal Trespass—Defenses."

Despite RCW 9A.52.090 referencing criminal trespass only, Edward Caicedo-Obregon asked the trial court and asks this reviewing court to apply the statute also to burglary charges. He highlights that criminal trespass is generally a lesser included offense of burglary. *State v. Olson*, 182 Wn. App. 362, 375, 329 P.3d 121 (2014).

Edward Caicedo-Obregon relies primarily on *State v. J.P.*, 130 Wn. App. 887 (2005), which superficially supports his position. We already outlined the important facts in *J.P.* The minor J.P. contended that the owner of the building he entered had abandoned the property and thus this court should reverse his conviction for residential

burglary. He relied on RCW 9A.52.090(1) despite the statutory subsection applying only to first degree criminal trespass. This court agreed to apply the defense because the unlawful entry component of the burglary statute echoes the unlawful entry element of criminal trespass. Thus, according to this court, a defense that negated the crime of criminal trespass should nullify the crime of burglary.

This court, in *State v. J.P.*, need not have held that the defense of abandonment attached to burglary because the evidence did not support a finding of abandonment. The trial court had also agreed with J.P. that J.P. could rely on RCW 9A.52.090(1), but had found that the owner had not abandoned the residence since the bank that foreclosed on the home engaged in efforts to prepare the abode for sale. This court agreed that the evidence showed no abandonment. We affirmed the conviction of residential burglary.

The *J.P.* court relied on the Supreme Court decision in *City of Bremerton v. Widell*, 146 Wn.2d 561, 51 P.3d 733 (2002). In *City of Bremerton v. Widell*, Karl Widell challenged multiple convictions for criminal trespass based on entry into public housing to visit his girlfriend. The housing authority previously ordered him not to enter the premises. Widell challenged his findings of guilt by a jury on the ground that he reasonably believed a person empowered to license access to the property would have licensed him to enter or remain. Thus, he relied on Edward Caicedo-Obregon's defense found in RCW 9A.52.090(3). The Supreme Court wrote:

> 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). 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.

City of Bremerton v. Widell, 146 Wn.2d 561, 570 (2002) (citations omitted).

In *City of Bremerton v. Widell,* some evidence suggested that Karl Widell went outside of the public housing common areas or his girlfriend's housing unit. The Supreme Court reasoned that, assuming Widell stayed inside the common areas or his girlfriend's apartment, the defense of RCW 9A.52.090(3) shielded him from liability. Widell's convictions could stand only if a rational juror could have found beyond a reasonable doubt that Widell exceeded the scope of the invitation to visit his girlfriend's apartment on any of the occasions for which the State charged him with criminal trespass. Because the defense negated an element of the crime, the State held the burden of showing the absence of the defense. The court affirmed one conviction and reversed another conviction.

We find *City of Bremerton v. Widell* of little assistance in Edward Caicedo-Obregon's appeal. The *Widell* court did not address the need for or propriety of any jury

instruction. The court did not address whether the defenses found in RCW 9A.52.090 extended to burglary charges.

We agree with the trial court that the reasonable belief defense, listed at RCW 9A.52.090(3), conflicts with the elements of burglary. Therefore, delivery of Edward Caicedo-Obregon's proposed jury instructions would diverge from the law.

Chapter 9A.52 RCW houses both burglary and trespass statutes. RCW 9A.52.010 presents definitions common to both burglary and trespass crimes. RCW 9A.52.010(2) defines "enters or remains unlawfully" as:

> 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.

Although burglary and criminal trespass overlap in their definition of entering unlawfully the two distinct crimes disagree with respect to the mens rea element of unlawful entry. RCW 9A.52.070, one of two criminal trespass statutes, declares:

> (1) A person is guilty of criminal trespass in the first degree if he or she *knowingly* enters or remains unlawfully in a building.

(Emphasis added.) RCW 9A.52.080, the other criminal trespass statute, provides:

> (1) A person is guilty of criminal trespass in the second degree if he or she *knowingly* enters or remains unlawfully in or upon premises of another under circumstances not constituting criminal trespass in the first degree.

(Emphasis added.)

The difference between criminal trespass in the first degree and criminal trespass in the second degree lies in whether the accused entered a building or remained unlawfully on another's premises without entering a building. Nevertheless, both degrees of criminal trespass require that the offender "knows" that he entered or remained unlawfully. The reasonable belief defense found in RCW 9A.52.090(3) would negate this knowledge. Thus, the defense is consistent with a charge of criminal trespass.

In contrast, the burglary statutes lack any element of knowledge of entering unlawfully or any intent to enter unlawfully. RCW 9A.52.020(1)(b), the first degree burglary statute, states:

> A person is guilty of burglary in the first degree if, with intent to commit a crime against a person . . . therein, he or she enters or remains unlawfully in a building and if, in entering or while in the building or in immediate flight therefrom, the actor . . . (b) assaults any person.

RCW 9A.52.025, which creates the crime of residential burglary, and RCW 9A.52.030, which defines second degree burglary, read similarly as to the absence of "knowingly" entering the premises unlawfully. Thus, any reasonable belief as to the lawfulness of entering the subject property or any reasonable belief as to permission to enter clashes with the crime of burglary.

One may wonder why the lesser crime of criminal trespass requires a "knowing" mens rea, but the higher crime of burglary requires no mens rea with regard to entering unlawfully. The answer may be that burglary also requires intent to commit a crime once

inside the building or on another's premises. First degree burglary requires an actual crime committed on the premises or being armed with a deadly weapon.

Sexual Motivation

The jury returned a special verdict that Edward Caicedo-Obregon acted with a sexual motivation when committing the crime of first degree burglary. On appeal, Caicedo-Obregon claims insufficient evidence supported the finding. He agrees that the evidence suggests he kissed Jacquelyn Munson's leg, but contends this action did not denote sexual motivation. We disagree.

RCW 9.94A.835(2); declares:

> In a criminal case wherein there has been a special allegation the state shall prove beyond a reasonable doubt that the accused committed the crime with a sexual motivation. The court shall make a finding of fact of whether or not a sexual motivation was present at the time of the commission of the crime, or if a jury trial is had, the jury shall, if it finds the defendant guilty, also find a special verdict as to whether or not the defendant committed the crime with a sexual motivation.

Edward Caicedo-Obregon's appeal falsely assumes that the State only presented evidence of a kiss on the leg. Jacquelyn Munson testified that an intruder entered her bedroom at night, climbed into her bed, and caressed her thigh with his hand moving toward her undergarment. Munson testified that the intruder lifted her underwear and kissed her buttock, not her leg. Munson also testified repeatedly that she believed that the intruder

in her bed desired to initiate sexual intercourse. Remarkably, Caicedo-Obregon contends the two engaged in sex, although he characterizes the sex as consensual.

Ineffective Assistance of Counsel

Edward Caicedo-Obregon contends that his trial counsel performed ineffectively by omitting a request that the trial court instruct the jury on the offense of criminal trespass in the first degree. The State responds that the evidence did not support the lesser crime of criminal trespass and that defense counsel made a legitimate trial strategy not to seek the jury instruction. We agree with the State.

A defendant is entitled to effective assistance of counsel at all critical stages of a criminal proceeding. *State v. Robinson*, 153 Wn.2d 689, 694, 107 P.3d 90 (2005). To prove ineffective assistance of counsel, the defendant must show that (1) counsel's performance was deficient, and (2) counsel's deficient performance prejudiced the defense. *In re Pers. Restraint of Crace*, 174 Wn.2d 835, 840, 280 P.3d 1102 (2012). Both elements must be met in order to satisfy the inquiry. *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

The appellant satisfies the first prong of the test if counsel's performance fell below an objective standard of reasonableness based on consideration of all the circumstances. *State v. Kyllo*, 166 Wn.2d at 862; *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). We apply a strong presumption that counsel performed

reasonably. *State v. Kyllo*, 166 Wn.2d at 862. Conduct that can be characterized as legitimate trial strategy or tactics is not deficient. *State v. Kyllo*, 166 Wn.2d 856, 863.

Edward Caicedo-Obregon argues that defense counsel was ineffective because the evidence supported an instruction on the lesser offense of criminal trespass and defense counsel failed to request it. A defendant is entitled to an instruction on a lesser included offense if (1) each of the elements of the lesser offense is a necessary element of the offense charged, and (2) the evidence in the case supports an inference that the lesser crime was committed. *State v. Parker*, 102 Wn.2d 161, 164, 683 P.2d 189 (1984).

The State forwards *State v. Grier*, 171 Wn.2d 17, 246 P.3d 1260 (2011) as controlling. We agree. In *State v. Grier*, our high court acknowledged that the decision to not ask for instructions on a lesser included offense can be a legitimate trial tactic. The court held that "an all or nothing approach was at least conceivably a legitimate strategy to secure an acquittal." *State v. Grier*, 171 Wn.2d at 42. The court observed that other jurisdictions had rejected claims of ineffective assistance of counsel based on a failure to request instructions on lesser included offenses.

Recall that Edward Caicedo-Obregon testified he was present on the night of December 20, 2017, in the apartment of Jacquelyn Munson with her implied consent. During closing, Caicedo-Obregon's counsel argued that Caicedo-Obregon committed no crime because of the permission. An instruction of the lesser crime of criminal trespass

would negate Caicedo-Obregon's argument that he had only ever entered the apartment with permission.

CONCLUSION

We uphold Edward Caicedo-Obregon's conviction for first degree burglary with a finding of sexual motivation.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Fearing, J.

WE CONCUR:

Pennell, A.C.J.

Siddoway, J.