

69537-1

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No. 69537-1-I

COURT OF APPEALS,
DIVISION ONE
OF THE STATE OF WASHINGTON

State of Washington, *Respondent*

v.

Chad B. Olson, *Appellant*.

BRIEF OF APPELLANT

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COURT OF APPEALS
STATE OF WASHINGTON
DIVISION ONE



ORIGINAL

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I. ASSIGNMENTS OF ERROR

1. The evidence is insufficient to support Mr. Olson's conviction for Residential Burglary.
2. The trial court erred in failing to inform the jury that abandonment was a defense to a charge of Residential Burglary.
3. Mr. Olson received ineffective assistance of counsel.

Issues Pertaining to Assignments of Error

1. Whether a rational trier of fact could find that the property at issue was not abandoned.
2. Whether the trial court's jury instructions omitting the defense of abandonment to the charge of Residential Burglary properly informed the jury of the State's burden of proof regarding this defense.
3. Whether counsel's performance in failing to propose an instruction applying the defense of abandonment to the charge of Residential Burglary was defective and if so, whether counsel's defective performance prejudiced the defense.

II. STATEMENT OF THE CASE

This is an appeal from a judgment and sentence entered on October 26, 2012 following a jury trial resulting in a guilty verdict on September 26, 2012. CP at 204. On that date, the jury found Chad B. Olson guilty of the charged offense of Residential Burglary, RCW 9A.52.025. CP at 1, 204.

On November 3, 2011, the State of Washington charged Mr. Olson with one count of Residential Burglary, allegedly committed as follows:

... On or about October 12, 2011, [Mr. Olson] did enter and remain unlawfully in the *dwelling of Jane Roberts, located at 38003 43rd Avenue South*, Auburn ... with intent to commit a crime against a person or property therein[.]

See CP at 1 (emphasis added).

At trial, the State relied upon the testimony of three law enforcement witness (Deputy Denny Gulla, Det. Neil Woodruff and Deputy David Jeffries of the King County Sheriff's Office), two neighbors (Karen Everett and Harvey McClung), and Ms. Roberts herself. (The State called a fourth law enforcement witness, Joseph Eshom, for ER 404(b) purposes during rebuttal.)

Deputy Gulla testified that on October 12, 2011, he was dispatched to a house belonging to Jane Roberts located at 38003 43rd Ave South in Auburn. RP II at 193. Deputy Gulla came into contact with Mr. Olson on

that date. Id. Deputy Gulla was familiar with the property because he had been dispatched to it before on a previous occasion regarding people breaking into the house, taking property and a car from that house. RP II at 193. Deputy Gulla and Deputy Jeffries approached Mr. Olson, who was standing inside a storage shed, moving things around and picking up others. RP II at 200. When the two deputies approached Mr. Olson he was walking towards his silver pickup truck backed up in front of the storage shed. Id. The cab of the truck was filled full of various items of property and the bed of the truck was nearly overflowing with property. Id. Mr. Olson made several trips from the shed to his truck. Id. Deputy Gulla then detained Mr. Olson to determine his right to be on the property. RP at 201. Deputy Gulla went inside the house to check on it. RP at 206. He noticed footprints and some type of sticky liquid that had not been there the day before. Id. He compared the sole of Mr. Olson's shoes to the pattern print found on the floor; they appeared to match. RP at 209.

Ms. Roberts testified that she owned the house on 43rd Avenue South in Auburn and the items in the back of Mr. Olson's truck had been taken from the shed and the house. RP II at 243, 246. She further testified that Mr. Olson looked familiar, but that she didn't recognize him. RP II at 247. She further testified that she did not give him permission to go on her property on October 12, 2011 nor did she give him permission to take

anything from the house or shed. RP II at 247. While she testified that she still considered the Auburn property to be her house in 2011, she testified that she moved to Puyallup after her husband died. RP II at 243-244. With respect to the amount of time she had been off the Auburn property, she testified as follows on cross-examination:

Q Okay. A couple of these questions might be a little painful, and I apologize, but it's important that we get some basic timeframes. Do you recall when your husband passed away? What year?

A Seven—'75.

Q '75? I'm sorry to have to ask this. Do you know when you moved down to Puyallup?

A Yes.

Q When was that?

A Uh, approximately six years, something close to that.

Q After—

A I just—I'm not exact.

Q We don't need the exact, but that would be after he passed away?

A Yes.

Q Okay.

See RP II at 249.

Mr. Olson testified in his own defense. He testified that he has a small business that does yard cleanup and recycling. RP III at 384. He further testified that he went to the Auburn property on October 12, but that he did not go into the actual house. RP III at 398. He further testified that he had permission from someone purporting to be Jane A. Roberts at Dave's Bar on September 30, 2011 (*Id.*); this person signed a note which

said the following:

I, Jane Roberts, give full permission to Chad Olson and Tim Giseler to clean up my property and my things I no longer want. They have three weeks to clean up the whole property, inside and out.

See RP III at 383; *see also* Ex. 22.

Mr. Olson said that although he didn't go into the actual house on October 12, he was going to in order to get rid of all the garbage and clean it up. RP III at 398. He acknowledged that the woman he met who said she was Jane Roberts was not, in fact, the Jane Roberts that testified in court. RP III at 407. He was doing this for free because he offered free removal of all junk metals from a property; he produced his business card with his name and phone number, which read: "Iron House Boys" (the name of his company), "Free removal of all metals from property" and "We also do yard cleanup of all materials." *See* RP III at 393-96; *see also* Ex. 49.

Of particular relevance to this appeal, Mr. Olson testified as follows with respect to the condition of the property when he arrived on October 12, 2011:

Q What did you see when you first got there?

A Uhm, when I first got there I seen a lot of, uh—lot of dirt. I mean, nobody had been there for a long time. There was a lot of dirt all over everything. There was, uh—there was garbage strewn everywhere. ***There was—it looked abandoned is what I thought.***

See RP III at 393 (emphasis added).

On September 25, 2012, after a three-day jury trial, the trial court instructed the jury on the charged offense of Residential Burglary and the lesser included offenses of Burglary in the Second Degree, Criminal Trespass in the First Degree and Criminal Trespass in the Second Degree. *See* RP IV at 504; *see also* CP at 175, 185, 188, 191.

The trial court instructed the jury as to the defense of abandonment and reasonable belief as to license with respect to the lesser included offense of Criminal Trespass in the First Degree only. CP at 189; *see also* CP at 193 (reasonable belief as to license defense instruction given as to lesser included offense of Criminal Trespass in the Second Degree.)

In his proposed instructions, defense counsel did not request an instruction on the defense of abandonment and reasonable belief as to license with respect to the charged offense of Residential Burglary or the lesser included offense of Burglary in the Second Degree. *See* CP at 83-121. He also did not object to the trial court's failure to instruct the jury as to the defense of abandonment and reasonable belief as to license. *See* RP IV at 477-493.

The jury returned a verdict of guilty on September 26, 2012. RP IV at 548. Mr. Olson was sentenced to 75 months in prison on October 26, 2012. CP at 204-211. This timely appeal followed. CP at 203.

III. ARGUMENT

A. The evidence is insufficient to support Mr. Olson's conviction for Residential Burglary.

1. *Standard of Review.*

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 220-22 (1980). When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Partin*, 88 Wn.2d 899, 906-07 (1977). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. *State v. Theroff*, 25 Wash.App. 590, 593, *aff'd*, 95 Wn.2d 385 (1980).

2. *The State bears the burden of proving beyond a reasonable doubt that the building was not abandoned.*

In *State v. J.P.*, 130 Wn. App. 887, 890 (2005), the accused (a juvenile respondent) was charged with and adjudicated guilty of Residential Burglary after he was caught crawling out of the window of a vacant home which was being prepared for sale. Division Three observed

the following with respect to the similarity between the burglary and trespass statutes:

Criminal trespass is a lesser included offense of burglary. ... Criminal trespass occurs when a person ‘knowingly enters or remains unlawfully’ in a building. ... Residential burglary is a criminal trespass with the added element of intent to commit a crime against a person or property therein. ... J.P. argues that because the unlawful entry or presence component of the burglary statute is the same as the unlawful entry or presence aspect of the criminal trespass statute it must be equally negated by the criminal trespass defenses.

See J.P., 130 Wn. App. at 895 (citations omitted).

The *J.P.* court was “persuaded” by the appellant’s argument that *City of Bremerton v. Widell*, 146 Wn.2d 561 (2002) “permit[ted] him to assert an **abandonment defense**^[1] to criminal trespass [as a defense to Residential Burglary.]” *See J.P.*, 130 Wn. App. at 895 (emphasis added); *see also State v. Jensen*, 149 Wn. App. 393, 400 (2009) (“*J.P.* held that RCW 9A.52.090(1)’s abandonment defense may be applied to a charge of residential burglary.”); *State v. Ponce*, 166 Wn. App. 409 (2012) (“In *State v. J.P.* ... this court held that because the statutory defense of abandonment of property negates the unlawful entry element of the crime of criminal trespass, abandonment should be available as a defense to residential burglary, which shares the same element.”).

¹ RCW 9A.52.090(1) provides that it is a defense to criminal trespass if a building involved in an offense under RCW 9A.52.070 was abandoned. *See J.P.*, 130 Wn. App. at 894.

The significance of *J.P.*'s holding to this case is evident from the words of the Washington Supreme Court in *Widell, supra*, in which the Washington Supreme Court held:

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 ... 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[,] the State bears the burden to prove beyond a reasonable doubt that the defendant lacked the license to enter.***

See *Widell*, 146 Wn.2d at 570 (citations omitted) (emphasis added).

Unfortunately, in *Jensen*², *supra*, Division Two declined to follow *J.P.* despite acknowledging that its "holding has a measure of logical appeal, because burglary and criminal trespass share the same unlawful entry element[.]" Instead, Division Two determined that "the plain language of the statutory defense [RCW 9A.52.090(1)] nevertheless applies that defense only to prosecutions for first degree criminal trespass." See *Jensen*, 149 Wn. App. at 400.

However, Division Three recently was provided with the opportunity to disavow its holding in *J.P.* in light of *Jensen* and declined to so. In *State v. Ponce, supra*, Division Three held to its interpretation of

² *Jensen* held that "RCW 9A.52.090(1)'s abandonment defense [was] not available regarding Jensen's charge offense of second degree burglary." See *Jensen*, 149 Wn. App. at 401 ("As with any other statute, where the language of a statutory defense is clear, its plain language is to be applied as written.").

Widell, as enunciated in *J.P.*:

In *J.P.*, this court considered a further implication of the court's decision in *Widell*. The unlawful presence element of residential burglary is identical to the unlawful presence element of criminal trespass. This court did no more than recognize that ***if proof of abandonment of property would negate the unlawful entry element of criminal trespass for due process/burden of proof purposes, as determined in Widell, then it must negate the identical unlawful entry element for residential burglary. The conclusion continues to appear inescapable.***

See *Ponce*, 166 Wn. App at 412 (emphasis added).

Here, this Court should follow *J.P.*'s reasoning and hold that the abandonment defense available to defendants in criminal trespass cases is also available to those in burglary cases. There are three main reasons which compel this Court to adopt *J.P./Ponce* as the law of this division.

First and foremost, Division Three felt that its result was compelled by the Washington Supreme Court's decision in *Widell*. Secondly, Division Two cited only a civil case, *Morgan v. Johnson*, 137 Wn.2d 887 (1999), for the proposition that "where the language of a statutory defense is clear, its plain language is to be applied as written." (Specifically, the *Morgan* court held that by its plain language, RCW 5.40.060's intoxication defense did not apply to intentional torts.) And finally, the holding of *J.P./Ponce* is more in line with case law from other jurisdictions regarding the law of burglary.

For example, in *McKenzie vs. State*, 407 Md. 120, 962 A.2d 998

(Md. 2008), the Maryland Court of Appeals recognized the legal distinction between “a temporarily unoccupied dwelling house from a building ... which, although at times [was] used as a dwelling, **has at the time of the breaking been abandoned by its occupants. The former is a proper subject of burglary; the latter is not.**” McKenzie, 407 Md. at 133 (citations and quotations omitted) (emphasis added).

As such, although there appears to be a divisional split on this issue, this Court should follow the reasoning of *Widell, J.P.* and *Ponce, supra*, and hold that the State bears the burden of proving a reasonable doubt that the building at issue was not abandoned once a defendant has offered some evidence of the same.

3. *The State utterly failed to meet its burden that the building was not abandoned.*

As noted in *J.P.*, the terms “abandon” and “abandoned” are not defined by statute; therefore, the J.P. looked to the plain meaning of the words as defined by the dictionary. *See J.P.*, 130 Wn. App. at 895. The *J.P.* court noted that:

“**Abandon**” is defined as “to cease to assert or exercise and interest, right, or title to esp[ecially] with the intent of never again resuming or reasserting it” and “**to give up ... by leaving, withdrawing, ceasing to inhabit**, to keep, or to operate often because unable to withstand threatening dangers or encroachments.” WEBSTER’S THIRD NEW INTERNATIONAL

DICTIONARY 2 (1993). “*Abandoned*” is defined as “*given up; DESERTED, FORSAKEN* <an [abandoned] child> <an [abandoned] house>.”

See *J.P.*, 130 Wn. App. at 895-96 (quotations and caps in original) (emphasis added).

Here, the record is replete with references to the property located at 38003 43rd Ave South in Auburn being “abandoned” on October 12, 2011, *e.g.*, within the meaning of the word as defined above.

For example, on cross-examination, Deputy Gulla testified as follows with respect to a suspicious circumstance regarding the property about a month before on September 18, 2011:

Q Did you get a report back on any prints that you processed on September 18th?

A No.

Q The door’s ajar, and you didn’t run it for prints.

A Let me back up to my previous response. On the 18th, we did not know what we had there, whether it was a burglary, *a house that had been foreclosed, something that was left behind.* So, really, we just had something very suspicious and we were *trying to track down if we had a victim*, that victim wanted to prosecute, if people had permission to be at the house. So, until then we really didn’t have much to go on. *We have a vacant house that people are removing property from, and we can’t contact the owner.*

See RP II at 230 (emphasis added).

Detective Woodruff testified as follows with respect to his observations of the property when he arrived on scene on October 12, 2011, *e.g.*, the date Mr. Olson was arrested at the premises:

- Q At that point did you have a chance to go into the house?
- A I did.
- Q Can you describe for the jury what the inside of the house was like?
- A It—for lack of a better term, *it was trashed*. The property in—the—the belongings in the house were just haphazardly thrown on the floor. There were appliances missing. The floor was sticky and wet. The—the bedrooms had just ankle- deep clothes in them. The beds had been torn apart. The— there was holes in the wall like someone was trying to get after the pipes that were in there. *The—the water had obviously been turned off, but somebody had been using the bathroom. The house just smelled of human waste. It was quite disgusting.*

RP III at 301 (emphasis added).

Perhaps the best description of the property came from Deputy Jeffries, who testified as follows:

- Q Okay. Can you describe the property on October 12th, 2011?
- A Yes.
- Q Please do.
- A It was—it was kind of run down. *It was like a house that looked like somebody had just walked away from it, left all their stuff, and just kind of decided that they didn't want to be there anymore.* And it was all closed up. And there was—it was—the yard was overgrown. There was moss on the roof. I mean, it was kind of run down. But, it wasn't—you know, it was a nice property; it's just-was a little run down.

RP III at 313 (emphasis added).

Neighbors Karen Everett and Harvey McClung testified that Ms. Roberts, the legal owner of the property, had not been on the property in many years; they testified as follows:

Q Does Ms. Roberts—or, excuse me, I'll back up. During the time you knew her, did Ms. Roberts live at the house across the gravel road from you?

A Uhm, when I purchased my home 14 years ago, yes. Uhm, however, she vacated the home for four or five years. She had some health issues. Uhm, my understanding she was living in Puyallup, uhm, next to her sister, and they were kind of helping her out and taking care of her. And she was closer in proximity. So, *she hadn't been there for many years.*

See RP III at 278 (Everett direct exam) (emphasis added).

Q And how did you know Jane Roberts?

A Jane Roberts and her late husband had bought the place directly behind us on 40—43rd Avenue.

...

Q How long did they live there?

A Uh, I guess about seven years—six or seven years. Then her late husband had died. And then she was living there another two or three years before she, I'll say, got incapacitated.

Q About when or about how long ago did Mrs. Roberts' husband die?

A Uh, he died sometime in the late '80s.

Q *And about when, then, did Mrs. Roberts leave the property?*

A *Oh, I'd say in 1992, possibly '93.*

VPR II at 169 (emphasis added).

Without question, however, the greatest indicator that the property at 38003 43rd Avenue South was abandoned came at the conclusion of the trial, *e.g.*, during closing arguments. During his close, defense counsel discussed the lesser included offenses of Criminal Trespass in the First Degree and Second Degree and the defenses to those offenses as set forth

in the court's jury instructions. *See* RP IV at 536; *see also* CP 189, 193.

Instruction no. 20 reads as follows³:

It is a defense to a charge of Criminal Trespass in the First Degree that:

A building involved in the trespass was abandoned, 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.

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.

See CP at 189; *see also* CP at 193.

Counsel argued as follows with respect to the abandonment defense:

Criminal Trespass in the First Degree and Second Degree, First Degree if—if the—was if the building was abandoned. That's a defense. If the Defendant reasonably believed that the owner would have given him permission to go onto the property, that's a defense. What isn't defined for you, which means you have to use your commonsense and perception, what does abandoned mean? Is it not abandoned because Mrs. Roberts still calls it home? Is that good enough? Or if we have independent evidence from other witnesses that no one has lived there since the early '80s or early '90s, that it's been ransacked multiple times, that, thanks to Det. Gulla, we don't have any photographs until October 12th. But we know it's been broken into many times in the past. So, we don't know how it—how it looked in the summer of 2011 or

³ The jury was not given similar instructions with respect to charged offense of Residential Burglary and the lesser included offense of Burglary in the Second Degree. *See* CP at 166-202.

the summer of 2010. But we do know what it looked like in March of 2012, six months later. No one bothered to clean it up or straighten it up then. So, why would one suspect it's ever been cleaned up? That, ladies and gentlemen, is what we call abandoned.

Mrs. Roberts will never ever say she abandoned her house. And we know that. But it's our commonsense, our collective definition. And under that, it was abandoned. Det. Woodruff said abandoned. The house was disgusting; no water, it stunk of human waste. That's abandoned. Holes in the wall, furniture torn apart. I can't remember which one, but one of them said it looked like a house that someone had just walked away from. That means abandoned.

RP IV at 536-537.

In rebuttal to this argument, the State argued as follows:

Second point the State would ask you to consider is the concept of what it means to be an abandoned house. And—and Mr. Gehrke talked to you at length about the idea that this house was essentially abandoned. And there's a reference to the photos that show the bad shape it was in, that it wasn't cleaned up afterwards. And from this Mr. Gehrke argued that you should find that this house was abandoned. Ladies and gentlemen, this is a sad house. There are sad photos. I'm terribly sorry for Mrs. Roberts. But in this particular case, *the question of whether this house is abandoned or not is a red herring, because if you look at the instructions, the jury instructions that you were given, what you will find is that the question of whether the house was abandoned is a defense to Criminal Trespassing. There's no instruction, because it's not in the case, that the question of whether it was abandoned is not a defense to Burglary.*

So, yes, you can find if you want to that this house is abandoned within the meaning Mr. Gehrke's talking about and still find the Defendant—and you should still find the Defendant—guilty of Residential Burglary, because as the definition of dwelling told you, it's what is the building being used for? What is it ordinarily used for? Not what particular

usage is it being put to at one particular point in time. This is a house; it's a dwelling. ***And the fact that it may or may not have been, quote, unquote, "abandoned," as you understand that word, isn't a defense to that charge.***

RP IV at 542-43 (emphasis added).

As such, the State effectively conceded that the property at issue was abandoned. By and through its concession above, the State did not and cannot meet its burden of proving a reasonable doubt that the building at issue was not abandoned. Indeed, the State admitted that a reasonable trier of fact could find that the house was abandoned. The point that the State emphasized to the jury was that such a finding is immaterial since the defense of abandonment is/was not available in cases of burglary. However, as *Widell, J.P.* and *Ponce, supra*, instruct us, this is simply not the case. *See, e.g., Ponce*, 166 Wn. App at 412 ("This court [in *J.P.*] did no more than recognize that ***if proof of abandonment of property would negate the unlawful entry element of criminal trespass for due process/burden of proof purposes, as determined in Widell, then it must negate the identical unlawful entry element for residential burglary. The conclusion continues to appear inescapable.***") (emphasis added).

Therefore, because insufficient evidence exists as a matter of law to find that Mr. Olson entered or remained unlawfully in a building, his conviction for Residential Burglary must be reversed and dismissed. *See*

State v. Stanton, 68 Wash.App. 855, 867 (1993) (insufficient evidence as a matter of law requires dismissal with prejudice).

B. The trial court erred in failing to inform the jury that abandonment was a defense to the charge of Residential Burglary.

1. Standard of Review.

“Jury instructions are sufficient if they are supported by substantial evidence, allow the parties to argue their theories of the case, and when read as a whole properly inform the jury of the applicable law.” *State v. Woods*, 138 Wn. App. 191, 196 (2007).

The right to appeal instructional error on appeal without objection at trial is governed by RAP 2.5(a)(3) and *State v. Scott*, 110 Wn.2d 682 (1988). *See, e.g., State v. Phillips*, 98 Wn.App. 936, 945 (2000). "Manifest" constitutional errors in jury instructions include instructions which shift the burden of proof to the defendant. *See Scott*, 110 Wn.2d at 688, n.5. In any event, errors with respect to jury instructions may be addressed in the context of ineffectiveness of counsel where the doctrine of invited error is raised by State. *See Woods*, 138 Wn. App. at 197.

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2. *The instructions failed to inform the jury of the State's burden of proof as to Mr. Olson's defense of abandonment with respect to the charge of Residential Burglary.*

Even if the Court concludes that a rational trier of fact could find that the property at issue was not abandoned, under the analysis set forth in section A.2 above, it was a “manifest” constitutional error not to inform the jury that the State had the burden of proving the absence of the defense of abandonment, *e.g.*, to the charge of burglary, beyond a reasonable doubt.

This error clearly relieved the State of its burden of proof. Indeed, the State argued above that it had no such duty of proving that the property was not abandoned where the crime charged was burglary. That is, the State argued that abandonment was not a defense to Residential Burglary. *See* RP IV at 542-43. Therefore, the instructions were erroneous and Mr. Olson's conviction for Residential Burglary must be reversed.

C. Mr. Olson received ineffective assistance of counsel.

1. *Standard of Review.*

In the context of instructional error, the law of effective assistance of counsel is as follows:

We start with the presumption that counsel's representation was effective. ... In order to find that trial counsel was ineffective, the defendant must show that counsel's performance was deficient in some respect, and that the deficiency prejudiced the defense. ... The defendant must also demonstrate the absence of legitimate strategic or tactical reasons for the challenged conduct. ...

Deficient performance is performance below an objective standard of reasonableness based on consideration of all the circumstances. ... *Reasonable attorney conduct includes a duty to investigate the relevant law. ... Proposing a detrimental instruction, even when it is a WPIC, may constitute ineffective assistance of counsel. ...*

The prejudice prong of the test requires the defendant to prove there is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would have been different. ...

See *Woods*, 138 Wn. App. at 197-98 (citations omitted) (emphasis added).

2. *Defense counsel was ineffective because he failed to offer an instruction applying an abandonment defense to the charge of Residential Burglary.*

As shown in section A.2 above, the abandonment defense applies equally to the charge of Residential Burglary. Further, there is/was ample evidence in the record from which a jury could find that the property at issue was abandoned. Indeed, defense counsel proposed instructions and argued the abandonment defense with respect to the lesser included offenses of Criminal Trespass and the First and Second Degrees. See CP at 108, 112; see also RP IV at 536-537. Moreover, the defenses of reasonable belief as to license and abandonment are not mutually

exclusive such that counsel was put to an election of which strategy to use at trial. In fact, the instructions proposed by counsel with respect to the defense of abandonment to criminal trespass listed both defenses (i.e. abandonment and reasonable belief as to license.) See CP at 108. Therefore, counsel's failure to offer an instruction applying an abandonment defense to the charge of Residential Burglary was deficient.

The prejudice resulting from this deficiency is evident from the State's closing argument in which it argued that "*the fact that [the house] may or may not have been, quote, unquote, 'abandoned,' as you understand that word, isn't a defense to that charge.*" See RP IV at 542-43 (emphasis added). Given the evidence in the record regarding abandonment and the State's concession regarding the same, there is a reasonable probability that, had counsel proposed an instruction applying an abandonment defense to the charge of Residential Burglary, the outcome of the proceedings would have been different. As such, Mr. Olson's conviction for Residential Burglary must be reversed.

IV. CONCLUSION

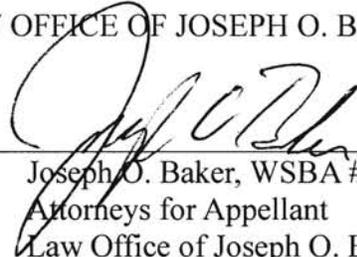
For all the foregoing reasons, the appellant, Mr. Olson, respectfully requests that this Court reverse his conviction for Residential Burglary. In the event the Court reverses Mr. Olson's conviction on the grounds of

insufficient evidence, Mr. Olson respectfully requests that the Court dismiss the charge with prejudice.

Dated this 11th day of June, 2013.

LAW OFFICE OF JOSEPH O. BAKER

By



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CERTIFICATE OF SERVICE

I certify that on June 11, 2013, I caused a copy of the foregoing **BRIEF OF APPELLANT** to be served on the following individuals by delivery to the same:

Prosecuting Atty King County
King Co Pros/App Unit Supervisor
W554 King County Courthouse
5116 Third Ave
Seattle, WA 98104

And I further certify that on June 11, 2013, I caused a copy of the foregoing **BRIEF OF APPELLANT** to be served on the appellant, Chad B. Olson via first class mail, postage prepaid. The address of the appellant is as follows:

Chad B. Olson
DOC # 907186
Washington Corrections Center
PO Box 900
Shelton, WA 98584



Joseph O. Baker, WSBA #32203