

62437-7

62437-7

NO. 62437-7-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL REID MOI and KELLIE ELIZABETH MOI,

Appellants.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE GREGORY P. CANOVA

BRIEF OF RESPONDENT

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STATE OF WASHINGTON
CLERK OF COURT

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A. ISSUES PRESENTED

1. A defendant has the right to a unanimous verdict as to the act charged in the information. If the evidence proves multiple acts that may support a conviction, either the court must instruct the jury to be unanimous as to the act forming the basis for conviction, or the prosecutor must make an election as to the act relied upon for conviction. However, if only one act supports the crime charged, no unanimity issue arises. Michael Moi and Kellie Moi argue that multiple acts could have supported their convictions for Criminal Trespass in the Second Degree, and that a unanimity instruction or election was required. But the evidence in this case proved that only one act of trespass could have supported a conviction for that crime. Should the unanimity claim be rejected?

2. A defendant has a right to notice of the nature of the specific charges. A denial of this right is a violation of procedural due process. Both Michael Moi and Kellie Moi argue that their due process rights were violated because they may have been convicted of an “uncharged crime” based on evidence of potential trespass on two different properties. But their “lesser included” convictions stem directly from the charged crime of burglary, and

the evidence and argument proved only one act of trespass that could have supported a conviction. Should the due process claim be rejected?

3. By statute, a defendant charged with Criminal Trespass in the First Degree can raise a defense that the building involved was abandoned. Under the trespass statute (unlike burglary), a fenced area is not a building. Kellie Moi and Michael Moi were charged with burglary of a fenced area, and convicted of the lesser included crime of Criminal Trespass in the Second Degree. The Moises' request to offer an instruction on the defense of abandonment was denied. Under the equal protection clause, were Michael and Kellie Moi treated the same as others charged with burglary of a fenced area? Is there a rational basis for permitting differing defenses between first degree and second degree trespass?

4. A trial counsel's assistance is ineffective when 1) the representation is deficient, and 2) the defendant is prejudiced as a result. Kellie and Michael Moi claim their attorneys were ineffective by failing to request an instruction that it is a defense to criminal trespass if the actor reasonably believed that the owner of the property would have licensed entry. However, no evidence was

presented during the trial to support this defense instruction.

Should this court reject the claim where the performance of trial counsel was not deficient and the Mois suffered no prejudice?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

Michael Moi and his wife, Kellie Moi, were each charged by information in King County Superior Court with the crime of Burglary in the Second Degree under cause numbers 07-C-05415-1 SEA and 07-C-05414-2 SEA, respectively. CP 1.¹ The cases were consolidated for purposes of appeal. The State alleged that on March 20, 2007, they unlawfully entered a fenced area (a decommissioned electricity substation) owned by Seattle City Light with the intent to commit a crime. CP 1-4.

Both defendants challenged the allegations in a joined jury trial. RP 3-642.² At trial, Michael was represented by Al Kitching;

¹ Unless otherwise noted, each reference to Clerk's Papers provides the numbered page in the designated papers under Kellie Moi's original court of appeals number (COA No. 62438-5-1).

² The Verbatim Report of Proceedings is comprised of six volumes, consecutively paginated. The State refers only to RP throughout.

Kellie was represented by Justin Wolfe.³ RP 1. Each was acquitted of Burglary in the Second Degree but convicted of the lesser included charge of Criminal Trespass in the Second Degree. CP 25-26. Both timely appealed the judgment. CP 56-60 (Kellie); CP 28-31 (Michael).

2. SUBSTANTIVE FACTS.

On the morning of March 20, 2007, Frank Zellerhoff and his employee, Matthew Matthews, were preparing to demolish several houses located in the 1400 block of NW 64th Street in anticipation of new construction. RP 255, 286. The northern edge of Zellerhoff's property abutted the southern edge of a fenced lot containing a decommissioned electricity substation belonging to Seattle City Light. RP 224, 256, 286. On the substation property were several "vaults" and cabinets containing copper material and equipment. RP 224, 228-29. An eight-foot-tall cyclone fence surrounded the lot on four sides, although a large hole had been cut and spread through a portion of the fence at some point in the past. RP 256. The hole was visible from the front locked gate of

³ At times, the State uses the first names of the appellants in an effort to keep the record clear. No disrespect is intended.

the substation (located on NW 65th Street), but was obscured from view from the Zellerhoff property. RP 288, 463. A sign on the front gate announced that the property belonged to Seattle City Light and that the front driveway was a tow area. RP 225, 287.

Matthews' task that morning was to make sure the houses were clear of squatters prior to demolition. RP 286-87. As he came out of the last house, he saw Michael and Kellie, carrying a small drill and a bag or box containing tools, getting ready to cut through the Zellerhoff property from the east. RP 287-89. Both Matthews and Michael Moi report that they spoke. RP 288, 440. According to Matthews, Michael said they were "not trespassing, just cutting through," and did so without asking permission or saying where they were going. RP 288, 298. Michael claimed that he said that they weren't trespassers, and that he asked permission to cross the Zellerhoff property to go into the substation through the hole in the fence. RP 440. All agree that Matthews and Zellerhoff did not care if the Moises crossed the property, as long as they were not near the buildings scheduled to be demolished. RP 289, 291, 298, 440. Neither defense counsel objected to the testimony or requested a limiting instruction regarding crossing the Zellerhoff property.

Michael and Kellie entered the substation property from the split fence and began removing nuts and bolts in an effort to open one of the vaults. RP 288, 291-92, 441. Matthews and Zellerhoff saw what the Mois were doing after they demolished a shed that blocked their view of the substation property. RP 257-59, 291. They assumed that the Mois were stealing scrap metal. RP 259. Zellerhoff called the police only after the Mois ignored his request that they leave. RP 258, 274, 292. With notice of the police coming, Kellie and Michael packed up their tools and left, back through the hole in the fence and across Zellerhoff's property. RP 260, 274. They were apprehended nearby. RP 365-66.

Michael admitted that they did not have permission from Seattle City Light to be on the substation property. RP 378, 439. He explained that on one prior occasion he attempted to contact the company by phone unsuccessfully, and on the morning of the crime Kellie suggested that he try to call again. RP 377, 437, 439, 462, 477-78, 510. Michael told the police post-Miranda that he believed Seattle City Light had no interest in the property anymore, and he was recovering recyclable materials as a community service because the city was invested in cleaning up these areas. RP 377. At trial, however, Michael testified that he and Kellie were on the

property to determine whether they should submit a contract bid to handle the recycling of materials remaining on the site. RP 452.

Two employees of Seattle City Light testified at trial: Director of Security Roger Serra and Kari Lundquist. When asked to describe the characteristics of a decommissioned substation, Mr. Serra responded, "Those properties are not abandoned, they are just decommissioned – awaiting whether or not they will be used for some future purposes, or to be sold." RP 224. He explained that Seattle City Light recycles materials from decommissioned substations by means of soliciting contractor bids. However, a Seattle City Light employee would always be present on the site with any prospective or selected contractor because dangerous conditions exist on substation sites, including potential live electricity and hazardous waste. RP 225-26. An unescorted entry is never permitted onto any of the decommissioned substation sites, and the director of security would be informed of any authorized entry in advance. RP 249.

Kari Lundquist, a 24-year veteran of Seattle City Light, confirmed that decommissioned substations are not abandoned,

and that those sites are not open to the public. RP 315-16.

Everything remaining on decommissioned substation property belongs to Seattle City Light. RP 315.

Following the presentation of evidence, Mr. Kitching and Mr. Wolfe joined in requesting the abandonment defense instruction under RCW 9A.52.090(1). RP 541-43, 552-54. That proposed instruction read as follows:

It is a defense to a charge of burglary in the second degree or criminal trespass in the second degree that the building involved in the burglary or trespass was abandoned.

The State has the burden of proving beyond a reasonable doubt that the entry in the building 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.

CP 67. Neither counsel requested an instruction under RCW 9A.52.090(3) (that the actor reasonably believed that the owner of the premises would have licensed him or her to enter or remain). Nevertheless, the trial court rejected instructions on both defenses:

[T]he reading of the statute 9A.52 in 9A.52 [sic], makes it very clear that the abandonment defense only applies as far as a building is related, and that only applies to the crime of criminal trespass in the first degree. That is the very specific language

of the statute. The other defenses set forth in the statute do apply, potentially, but not under the facts as presented or argued in this case.

RP 553.

In closing argument, none of the attorneys argued that Michael and Kellie Moi were being prosecuted for trespassing on the Zellerhoff property. Instead, all three focused their arguments on the acts within the substation property. RP 584-629.

The prosecutor mentioned several times that the Moises crossed Zellerhoff's property without *asking* permission. RP 584-85, 588. These closing statements were made in the context of describing the actions Michael and Kellie had to take in order to get into the fenced area, and noting any omissions or misstatements of information they made to the witnesses. For example:

Prosecutor: Mr. Matthews recalls the defendants – actually, just Mr. Moi, telling him they were just passing through. He did not say anything about asking permission. Mr. Matthews was actually asked that question: Did the defendant ask you permission? He said no. The Moises never mentioned anything about going to the substation. They just said they were passing through.

RP 585.

Prosecutor: Mr. Zellerhoff indicated that he didn't like what was going on because he knew that the people were stealing property. They testified to what

saw: They saw the defendants come in onto the property, not asking permission. They then saw them in the substation working their tools.

RP 588.

Prosecutor: They walked through backyards of private property. Now Mr. Zellerhoff and Mr. Matthews indicated that they did actually have to go on to their private property to get onto the Seattle City Light substation property. They went through a fence to get in to the property.

RP 594.

The prosecutor asked the jury to find the Mois guilty of the crime of Burglary in the Second Degree, which necessarily pertains to the substation property alone. 598-99.

Mr. Kitching referenced the Zellerhoff property once in his closing argument on behalf of Michael Moi:

Mr. Kitching: And they talked to Mr. Matthews. Exactly what the conversation is, you know, I think Mr. Moi told you what happened, I think Ms. Moi told you what happened. Basically they had a conversation saying, Look, you know, we want to cross through your property. Is that okay? And Yeah, I don't care. Okay? And then they did. They went into the substation, and in the meantime, Mr. Matthews goes and tells his boss about these people, but neither of them really think much of it.

RP 606.

Mr. Kitching did not discuss the lesser included charge with the jury. Mr. Wolfe addressed that subject as follows:

Mr. Wolfe: So what I am going to suggest to you is as you begin your deliberations, you start with the criminal trespass. And here is why: There is an instruction in your packet that is going to say that criminal trespass in the second degree is a lesser included offense of burglary in the second degree. And what does that mean? That means that if there is no criminal trespass, there is no burglary. All right? Because it is included within the offense. So if they don't – if the state doesn't overcome their burden on the criminal trespass allegation, then done, end of story, no more need to deliberate.

RP 616.

In rebuttal, again the prosecutor focused her argument on the Seattle City Light property and the burglary charge. RP 628-30. Both Michael and Kellie were convicted of Criminal Trespass in the Second Degree. CP 25 (Kellie); CP 22 (Michael).

C. ARGUMENT

1. NO UNANIMITY INSTRUCTION WAS REQUIRED FOR THE LESSER INCLUDED CHARGE OF CRIMINAL TRESPASS IN THE SECOND DEGREE.

The appellants claim that their right to a unanimous jury was violated because the trial court did not give a unanimity instruction regarding the lesser included offense of Criminal Trespass in the Second Degree. In addition, they contend that their procedural due

process rights were violated because the jury might have convicted based on an “uncharged alternate act.” Each of these claims is based on their assertion that two different acts of criminal trespass in the second degree could have supported the Mois’ convictions on this charge—specifically, trespass on the Zellerhoff property and trespass on the Seattle City Light property.

These claims are without merit. The evidence presented at trial established only one act upon which a conviction for Criminal Trespass in the Second Degree could have been based. Moreover, the prosecutor elected the single act of trespass that could be the basis for conviction of either Burglary or Criminal Trespass. Under these circumstances, there was no error.

- a. The Jury’s Verdict Was Necessarily Unanimous As To The Conviction For Criminal Trespass In The Second Degree Because The Evidence Proved Only One Violation.

A criminal defendant has the right to a unanimous jury verdict as to the act charged in the information. State v. Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105 (1988). Accordingly, when the defendant has committed multiple acts that may serve as the basis for the charged offense, the trial court can ensure unanimity by

instructing the jurors that they must agree on a specific act as the basis for a conviction. This is known as a "Petrich instruction." See State v. Petrich, 101 Wn.2d 566, 569, 683 P.2d 173 (1984).

Alternatively, the State may elect a single act to rely upon as the basis for the defendant's conviction, which also ensures unanimity. State v. Bland, 71 Wn. App. 345, 351-52, 860 P.2d 1046 (1993).

But if the evidence produced at trial "proves only one violation, then no Petrich instruction is required, for a general verdict will necessarily reflect unanimous agreement that the one violation occurred." State v. Hanson, 59 Wn. App. 651, 657, 800 P.2d 1124 (1990). To determine whether the evidence supports multiple violations or only one, courts must examine the required proof under the applicable statute in light of the evidence presented. Id. at 656-58. When this analysis reveals that the jury could have found only one violation beyond a reasonable doubt, neither a Petrich instruction nor an election is necessary. See, e.g., State v. Jones, 71 Wn. App. 798, 822-23, 863 P.2d 85 (1993), *review denied*, 124 Wn.2d 1018 (1994) (no Petrich instruction needed because "we do not believe that there was sufficient evidence to go to the jury with respect to the other acts – the

evidence was simply not sufficiently substantial to raise this matter to a multiple acts case”); State v. Handyside, 42 Wn. App. 412, 415-16, 711 P.2d 379 (1985) (no unanimity issue presented “because there was only one incident described in the evidence which the jury could have found beyond a reasonable doubt”).

The Mois’ claim that the jury might have convicted them of Criminal Trespass in the Second Degree based on the fact that they walked across the Zellerhoff property without asking permission is without merit for several reasons.

First, Criminal Trespass in the Second Degree was offered as a lesser included offense of Burglary in the Second Degree, not charged as a separate count in the information. CP 1, 42-45. Given that this case involved a fenced area, the crime of Burglary in the Second Degree could pertain only to the Seattle City Light substation property (and the Information so states); thus, conviction for the lesser included offense could only follow if the jury came to the unanimous conclusion that a trespass occurred on the Seattle City Light substation property.

Second, the evidence presented at trial was insufficient for a jury to find beyond a reasonable doubt that the Mois unlawfully entered the Zellerhoff property. The jury was instructed that “a

person enters or remains unlawfully in or upon premises when he or she is not then licensed, invited, or otherwise privileged to so enter or remain.” CP 39.

By all accounts, Matthews granted permission for the Mois to cross the property by talking with them and then letting them walk through without objection, noting only that he didn’t want them near the demolition area. RP 287-88, 298, 476. Matthews made it clear that he did not care whether they crossed or not. RP 291, 298. Zellerhoff was also aware that the Mois had cut through, but was unconcerned. RP 291. When Zellerhoff called the police, it was to report the burglary on the Seattle City Light substation property, not the potential trespass on his own. RP 258-59, 274. Zellerhoff had previously warned the Mois to leave the substation or he would call the police, presumably knowing that the only way out was again through his own property. RP 258. When the Mois left the substation property, they crossed Zellerhoff’s property in his presence, again without objection. RP 260.

Based on the evidence presented, a reasonable jury could not find beyond a reasonable doubt that the Mois were not “invited or otherwise privileged” to pass through the Zellerhoff property by means of consent of the owner or his agent. A unanimity

instruction was not required in this case because the evidence proved only one act that could support the charge of criminal trespass in the second degree.

Finally, the prosecutor, through the evidence presented and in the context of her closing argument, elected the substation property as the basis for the burglary and, by association, the lesser included crime of criminal trespass. At no point did she argue or suggest that the Mois faced conviction for crossing the Zellerhoff property. She mentioned the Zellerhoff property only in the context of explaining the acts that Michael and Kellie Moi took in order to enter the substation property. This was reinforced by the way the evidence was presented (focusing on whether the Mois “asked” permission to cross) as well as through the closing arguments of both defense counsel – Mr. Kitching focused solely on defending against the burglary charge, and Mr. Wolfe concisely explained that the criminal trespass was an element of the burglary.

In short, nothing in the record supports a belief that the jury may have found the Mois guilty of criminal trespass in the second degree for crossing the Zellerhoff property. This Court should reject their unanimity claim.

- b. The Mois Were Informed Of The Nature Of The Charge By Means Of The Lesser Included Offense And The Evidence Presented.

A defendant has a fundamental right to be informed of the nature of the specific charges against him. Cole v. Arkansas, 333 U.S. 196, 201, 68 S. Ct. 514, 92 L. Ed. 644 (1948). Denial of this right violates procedural due process. U.S. Const. amend. XIV.

Kellie and Michael Moi contend that their due process rights were violated on the theory that they may have been convicted of an “uncharged crime,” primarily citing Cole and Stirone v. United States, 361 U.S. 212, 80 S. Ct. 270, 4 L. Ed. 2d 252 (1960).

However, Cole and Stirone are distinguishable.

In Cole, the Arkansas Supreme Court improperly affirmed Cole’s conviction by citing evidence proving a prong of the “promoting an unlawful assemblage” statute under which he was not charged. 333 U.S. at 202. This was determined to be a due process violation because Cole was not convicted by a jury of that particular prong of the statute. Id. There is no question that in our case, the jury convicted the Mois under the appropriate statutory prong.

In Stirone, the indictment specifically charged the defendant with impeding interstate commerce by obstructing the shipment of

sand from out of state to a steel mill in Pennsylvania. 361 U.S. at 213. Evidence was introduced that future steel shipments from the steel mill destined for other states could also have been obstructed by the defendant's actions. Id. at 214. Notably, the trial court instructed the jury that it could find Stirone guilty of the interstate commerce element of the crime charged (violation of the Hobbs Act) for either the sand or the steel, despite the specific language of the indictment. Id. Because it was uncertain whether the jury convicted based on the sand or the steel, a due process violation occurred. Id. at 219.

In contrast to both Cole and Stirone, in our case the jury was instructed on a lesser included offense of the original charge. The court did not instruct the jury that it could find the Mois guilty of the lesser included offense for trespassing on either the Seattle City Light property or the Zellerhoff property because doing so would defeat the definition of a lesser included. Had the court done so, then Stirone might apply. Instead, it was clear from the jury instructions, the evidence presented, the closing statements of the prosecutor, and the argument of all parties that the only property at issue, for either the primary charge of burglary or the lesser

included offense of criminal trespass in the second degree, was the Seattle City Light substation property (see factual argument in previous section).

The appellants argue that because the “to convict” jury instructions did not specifically name the property on which the trespass was being alleged, the jury could not know which property applied. CP 44-45; App. Br. (Kellie) at 18; App. Br. (Michael) at 9. They fail to mention that doing so would have been construed as an improper comment on the evidence. See State v. Levy, 156 Wn.2d 709, 132 P.3d 1076 (2006) (“to-wit” reference in jury instructions to apartment as a “building” in a burglary case constituted constitutionally prohibited judicial comment on the evidence).

The Mois were informed of the charge against them, and were convicted of only the charged offense. Accordingly, their due process claims should be rejected.

2. THE COURT’S FAILURE TO INSTRUCT THE JURY ON THE ABANDONED BUILDING DEFENSE DOES NOT VIOLATE EQUAL PROTECTION.

The appellants contend that the court’s refusal to instruct the jury on the abandonment defense violates the federal equal

protection clause.⁴ U.S. Const. amend. XIV. Because this defense is unavailable to all persons similarly situated to Kellie and Michael Moi, there is no equal protection violation. Moreover, there is a rational basis to the law.

Equal protection requires that similarly situated persons receive like treatment. In re Pers. Restraint of Mota, 114 Wn.2d 465, 473, 788 P.2d 538 (1990). However, equal protection is “not intended to provide complete equality among individuals or classes; rather, it is intended to provide equal application of the laws.” In re Hegney, 138 Wn. App. 511, 529, 158 P.3d 1193 (2007) (citing State v. Simmons, 152 Wn.2d 450, 458, 98 P.3d 789 (2004)).

Where a challenge, as in this case, implicates a person’s physical liberty but does not involve a suspect class or a fundamental right, any difference in treatment must pass the rational basis test.⁵ State v. Anderson, 132 Wn.2d 203, 209, 937 P.2d 581 (1997); State v. Coria, 120 Wn.2d 156, 169, 839 P.2d 890 (1992). The rational basis test requires that the court “must

⁴ The Moises do not raise this claim under Const. art. I, § 12, of the Washington State Constitution, but the analysis would be the same if they did.

⁵ There is no argument from the appellants that this case involves either a fundamental right or a suspect class that would require application of the intermediate or strict scrutiny tests, rather than the rational basis test. See App. Br. (Kellie) at 20.

uphold a law establishing classifications unless the classification rests on grounds wholly irrelevant to the achievement of legitimate state objectives.” Madison v. State, 161 Wn.2d 85, 103, 163 P.3d 757 (2007) (citations omitted). A statute is presumed to be constitutional; to prevail on an equal protection claim, the party challenging the statute bears the burden to prove that it is unconstitutional beyond a reasonable doubt. State v. Hughes, 154 Wn.2d 118, 132, 110 P.3d 192 (2005), *overruled on other grounds* by Washington v. Recuenco, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006).

The statute at issue here is RCW 9A.52.090, which reads in relevant part as follows:

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

(2) The premises were at the time open to members of the public and the actor complied with all lawful conditions imposed on access to or remaining in the premises; or

(3) The actor reasonably believed that the owner of the premises, or other person empowered to

license access thereto, would have licensed him to enter or remain; or

(4) The actor was attempting to serve legal process....

By its plain language, this statute designates defenses applicable only to the crimes of criminal trespass in the first and second degree. Subsection (1) applies only to buildings involved in first degree trespass cases.⁶ The other three subsections apply to both first degree and second degree trespass. A fenced area is not a building under the criminal trespass statute. State v. Brown, 50 Wn. App. 873, 878, 751 P.2d 331 (1988).

Once a defendant has offered some evidence that the entry was permitted under one of the statutory defenses, the State must disprove the defense beyond a reasonable doubt. City of Bremerton v. Widell, 146 Wn.2d 561, 570, 51 P.3d 733 (2002).

⁶ Recently courts have differed as to whether the abandoned building defense of subsection (1) is also a defense to burglary. See State v. J.P., 130 Wn. App. 887, 125 P.3d 215 (2005) (defendant could assert the abandonment defense in a residential burglary case on the theory that Criminal Trespass in the First Degree is a lesser included offense of Residential Burglary, and thus a defense negating the element of unlawful presence is applicable to both); *contra* State v. Jensen, 149 Wn. App. 393, 203 P.3d 393 (Div. II 2009) (defense could not be asserted in a Burglary in the Second Degree case involving the entry of a closed-for-the-winter business, based on the plain language of the statute). Notably, in both of these cases, the “abandoned” property was a building, not land or a fenced area, and the lesser included offense was criminal trespass in the first degree, not the second degree.

a. An Equal Protection Claim Fails Because The Law Was Applied Equally To Similarly Situated Persons.

To prevail on an equal protection claim, the Moises must first establish that they are similarly situated with other persons in a class who received different treatment under the same law. State v. Osman, 157 Wn.2d 474, 484, 139 P.3d 334 (2006). The class proposed by the Moises is explained in Kellie Moise's brief (as adopted by Michael Moise). She defines the class as those people charged with burglary based on the definition of "building" in RCW 9A.04.110, which includes a "fenced area." They claim that "normally" the lesser included of burglary would be criminal trespass in the first degree, not second degree as in her case, and the abandonment defense would apply. App. Br. (Kellie) at 21.

The appellants misidentify the classification to which they belong in this case. Instead, they clearly fall into the class of people charged with burglary of a fenced area. Where a fenced area is the burgled property, the lesser included offense is *necessarily* criminal trespass in the second degree. Brown, 50 Wn. App. at 877. In Brown, the court stated that "[t]he legislature clearly intended to exclude fenced areas from the definition of 'building' in the amended first degree criminal trespass statute. Rather, fenced

areas were intended to be covered by the broader definition of 'premises' in the second degree criminal trespass statute." *Id.* at 878. Therefore, everybody charged with burglary of a fenced area is denied the legal ability to assert the abandonment defense under RCW 9A.52.090(1) (assuming the lesser included offense of criminal trespass in the second degree is offered), because a fenced area under the trespass statute is *never* a building.

This law is being applied equally to everyone charged with burglary of a fenced area. Thus, there is no equal protection violation.

b. The Legislature Rationally Determined The Statutory Defenses To Criminal Trespass.

Even if the Moises satisfy the requirement that the law has not been applied equally to similarly situated people, their equal protection claim fails because there is a rational basis for the distinction of permitting the abandonment defense for those charged with trespass of a building but not for those charged with trespass to land.

It is within the legislature's policy domain to determine the allowable defenses for any particular crime. For example, in State v. Dejarlais, 136 Wn.2d 939, 945-46, 969 P.2d 90 (1998), the court recognized that the legislature intended to not allow consent as a defense to violation of a domestic violence protection order and directed requests for modification of this policy to the legislature. See also State v. Mertens, 148 Wn.2d 820, 830, 64 P.3d 633 (2003) (“[I]t is a matter of legislative policy to determine the permissible defenses for a particular statutory crime.”).

However, legislative oversight does not excuse an equal protection violation, and there still must be a rational basis for the law. State v. Berrier, 110 Wn. App. 639, 651, 41 P.3d 1198 (2002). In Berrier, after extensive statutory review, the court determined that the only justification for imposing a firearm enhancement for possession of a short-barreled rifle or shotgun but not for possession of a machine gun (altered or otherwise) was legislative oversight. 110 Wn. App. at 651.

In contrast, in our case the legislature made a clear and rational choice in RCW 9A.52.090 regarding the defenses available for criminal trespass depending on the type of property involved. It

is logical to permit a defense of abandonment of a “building” but not land, given the different inherent characteristics of the properties.

“Abandon” under this statute is given the Webster’s dictionary definition of “to cease to assert or exercise an interest, right or title to esp[ecially] with the intent of never again reassuming or reasserting it” or “to give up...by leaving, withdrawing, ceasing to inhabit, to keep, or to operate often because unable to withstand threatening dangers or encroachments.” State v. J.P., 130 Wn. App. 887, 895-96, 125 P.3d 215 (2005) (citations omitted).

“Abandoned” is defined as “given up: deserted, forsaken.” Id. A layperson could tell from obvious external cues that a building has been abandoned, but such would never be the case for land, fenced or otherwise. Even where there is a hole in a fence without a “no trespassing” sign, the property owner cannot be assumed to have abandoned the property without intent to sell it or to use it for some other purpose.

Because there is a rational basis for the distinction, Moi’s equal protection argument fails on this prong as well.

3. NEITHER DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO REQUEST AN INSTRUCTION NOT SUPPORTED BY THE FACTS.

The Mois argue that their respective counsel was ineffective because each failed to propose an instruction that it is a defense to criminal trespass in the second degree 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). However, no facts as presented at trial supported giving this instruction, and not requesting it could be construed as strategic given each attorneys’ theory of the case. Thus, their counsel could not be ineffective for failing to request it. Moreover, the Mois were not prejudiced by the failure to present this defense.

a. Relevant Law.

Ineffective assistance of counsel occurs only where “counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The burden of proving this is placed on the defendant. Id. In order to prove this –

and thus prevail on an ineffective assistance claim – the defendant must establish both that 1) trial counsel’s performance fell below a minimum objective standard of reasonableness (the “performance prong”), and 2) but for this substandard performance, there is a reasonable probability that the trial’s outcome would have been different (the “prejudice prong”). State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (citing Strickland, 466 U.S. at 687). In this context, a “reasonable probability” is a “probability sufficient to undermine confidence in the outcome.” Strickland, 466 U.S. at 694; Thomas, 109 Wn.2d at 226. The defendant need not show that counsel’s deficient performance more likely than not altered the final outcome. Strickland, 466 U.S. at 693; Thomas, 109 Wn.2d at 226.

When reviewing any claim of ineffective assistance of counsel, courts will strongly presume that counsel’s representation was effective and competent. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). In engaging in this presumption, the court will make “every effort to eliminate the distorting effects of hindsight.” In re Personal Restraint of Rice, 118 Wn.2d 876, 888, 828 P.2d 1086 (1992). For this reason, appellate courts are loath to second-guess trial counsel’s strategic or tactical decisions. As a

result, a decision made by trial counsel for legitimate strategic or tactical reasons cannot be ineffective. State v. McNeal, 145 Wn.2d 352, 362, 37 P.3d 280 (2002). In addition, appellate courts base their evaluation on the entire record, rather than simply looking to the sections identified by the defendant. McFarland, 127 Wn.2d at 335.

b. The Appellants Have Failed To Show That Their Counsels' Performance Was Deficient.

Under the first prong, the Mois must show that their attorneys were deficient by failing to offer an instruction based on RCW 9A.52.090(3). They fail to meet this burden for two reasons. First, counsel cannot be ineffective for choosing not to offer a defense instruction for which there is no factual basis. See State v. Grier, ___ Wn. App. ___, 208 P.3d 1221, 1230 (2009) (to demonstrate that counsel performed deficiently, the record must show that the facts entitled the defendant to lesser included manslaughter instructions); State v. Kruger, 116 Wn. App. 685, 690-91, 67 P.3d 1147 (2003) (effective assistance includes a request for pertinent instructions which the evidence supports); State v. King, 24 Wn. App. 495, 501, 601 P.2d 982 (1979) (counsel not ineffective for failing to offer a self-defense instruction not

warranted by the facts). Second, failing to offer the instruction may have been strategic on the part of both counsel given the defense theories of the case.

The Mois were not entitled to an instruction under RCW 9A.52.090(3) because no evidence was presented to show that they could have had a reasonable belief that Seattle City Light would have licensed them to enter the decommissioned substation. Neither Kellie nor Michael ever spoke to Seattle City Light personnel to ask permission to enter or even to determine the status of the Ballard property – for example, whether it was open to the public to survey with intent to make a bid or whether Seattle City Light was even accepting bids for recycling. RP 462, 510. Nothing was seen by the Mois on the Seattle City Light website pertaining to this particular piece of property. RP 507-08 (website described Magnolia substation, not Ballard substation). The Mois knew that the property was accessible only through a hole in the back fence, not through the locked front gate. RP 463. Seattle City Light witnesses testified that any prospective bidders or established recycling contractors visiting decommissioned property would have to be accompanied by City Light personnel due to safety hazards, but there was no evidence, again, that this property was subject to

bids at that time. RP 224-26, 249, 315-16. Without evidence to support the defense, neither counsel was ineffective for failing to offer the instruction.

Moreover, not offering the instruction could be construed as a strategic decision by both Kellie Moi's counsel, Justin Wolfe, and Michael Moi's counsel, Al Kitching, but for different reasons.

Wolfe argued in closing that Kellie did not know that entering the Seattle City Light property was unlawful because she relied upon the representations of her husband and because the property was not secure. RP 617-19. To argue alternatively under RCW 9A.52.090(3) that Kellie reasonably believed that Seattle City Light would give her license to enter had she asked would seriously undermine her "unwitting trespass" argument. Given this apparent conflict, Wolfe's decision to not ask for the instruction may well have been strategic. Strategic or tactical decisions cannot be ineffective.

Kitching argued in closing that there was no unauthorized entry to the substation property because it was not a "fenced area" given the insecurity of it and because it was "abandoned." RP 602-03. Under this theory, if property is abandoned, then there is no

“owner” from whom to seek permission. Thus, as with Kellie, presenting an alternative defense under 9A.52.090(3) would have substantially undermined the primary defense because it would acknowledge that there was, in fact, an owner with an interest in the property. Kitching's decision to not offer this instruction was likely strategic.

Because neither appellant can show that their counsel's performance was deficient, their claims of ineffective assistance should be rejected.

c. The Mois Cannot Demonstrate Any Prejudice.

Even if they satisfied the performance prong, the Mois' claim of ineffective assistance still fails on the prejudice prong. Prejudice exists only where there is a reasonable probability that but for counsel's errors, the outcome would have been different.

Strickland, 466 U.S. at 694. That demanding standard cannot be met here.

The appellants, through Kellie Moi's brief, cite Kruger and Thomas in support of their claim of prejudice. In both cases, failure to offer a defense instruction on voluntary intoxication was prejudicial on the theory that without the correct statement of the

law, counsel could not effectively argue his or her theory of the case. Kruger, 116 Wn. App. at 694-95; Thomas, 109 Wn.2d at 229.

However, Kruger and Thomas do not apply. First, in both cases, the defendants were entitled to the voluntary intoxication instruction – that is, substantial evidence of intoxication was presented to the jury. Kruger, 116 Wn. App. at 692; Thomas, 109 Wn.2d at 229. As explained above, the Moises were not entitled to the defense articulated in RCW 9A.52.090(3) based on the evidence presented. Second, in both Kruger and Thomas, the lack of the instruction inhibited counsel from effectively presenting the theory that their clients' intoxication negated the *mens rea* required for the charged crimes because the parties were arguing conflicting statements of law. Kruger, 116 Wn. App. at 694-95; Thomas, 102 Wn.2d at 818-19. In our case, the State and both defense counsel argued the same law without contradictions.

In this case, there is no reason to believe that the outcome of the trial would have been different had counsel offered the instruction at issue. Even if the instruction had been offered, the court would have denied the request given the lack of factual basis. RP 553. The facts that prove the Moises were not entitled to the

instruction are the same facts that would convince a jury beyond a reasonable doubt that it is not reasonable to believe that Seattle City Light would give them license to enter. Thus, the Mois' claim of ineffective assistance fails on the prejudice prong as well.

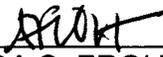
D. CONCLUSION

For all the reasons stated above, the State respectfully requests this Court to deny all claims presented by the appellants and affirm their convictions.

DATED this 13th day of August, 2009.

Respectfully submitted,

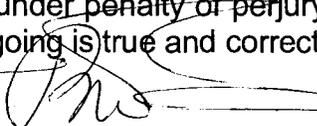
DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
AMANDA S. FROH, WSBA #34045
Deputy Prosecuting Attorney
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Jennifer L. Dobson and Dana M. Lind, the attorneys for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. MICHAEL MOI, Cause No. 62437-7-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Bora Ly
Done in Seattle, Washington

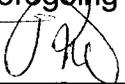
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Elizabeth Albertson, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. KELLIE MOI, Cause No. 62438-5-1 (consolidated under Cause No. 62437-7-1), in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Name Bora Ly
Done in Seattle, Washington

08/13/2009

Date

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