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No. 69537-1-1

COURT OF APPEALS,  
DIVISION ONE  
OF THE STATE OF WASHINGTON

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State of Washington, *Respondent*

v.

Chad B. Olson, *Appellant*.

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**REPLY BRIEF OF APPELLANT**

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APPELLANT'S REPLY BRIEF  
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DIVISION ONE  
SEATTLE, WA



**ORIGINAL**

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## I. ARGUMENT IN REPLY

### A. Due process compels the result that the statutory defense of abandonment applies equally to the charge of Residential Burglary.

In its response brief, the State—as it must—urges this Court to reject Division Three’s sound and logical approach to the issue of whether the defense of abandonment should apply to the charge of residential burglary. Specifically, the State argues that “[t]he analysis in [*State v. J.P.*, 130 Wn. App. 887 (2005)] and [*State v. Ponce*, 166 Wn. App. 409 (2012)] is flawed and should be rejected.” See Brief of Respondent (“Resp. Br.”) at 7. It continues, “Olson argues that this Court should adopt Division Three’s reasoning because that court relied on *Widell*<sup>1</sup>, whereas Division Two relied on a civil case for the proposition that ‘where language of a statutory defense is clear its plain language is to be applied as written.’ ... Olson does not articulate why Jensen’s citation to a civil case is problematic.” Resp. Br. at 10-11.

To be sure, the *J.P.* court carefully explained its reasoning in allowing an abandonment defense to the charge of Residential Burglary:

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

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<sup>1</sup> *City of Bremerton v. Widell*, 146 Wn.2d 561 (2002).

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).

Furthermore, in *Ponce*, Division Three was given the opportunity to reject *J.P.* (as the State would have this Court do); it declined to do so, explaining as follows:

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).

It further explained that “we do not regard *J.P.* as depending upon RCW 9A.52.090 [Criminal trespass — Defenses], but instead on the Supreme Court's decision in *Widell* that the ***defenses identified in that statute negate matters inherent in the element of unlawful entry, as to which the State bears the burden of proof.***” *See Ponce*, 166 Wn. App. at 413 (emphasis added). This is the central point that the State (and Division Two) overlook in their assertion that “the plain language of the statutory defense nevertheless applies that defense only to the prosecutions

for first degree criminal trespass.” See *State v. Jensen*, 149 Wn. App. 393, 400 (2009). There is no debate that the plain language of the statute makes abandonment a defense to criminal trespass in the first degree. That is not the point. The point is that if this defense negates the unlawful entry element of the crime of criminal trespass, it must also negate the same element of the crime of residential burglary. As noted in *J.P.* and *Ponce*, this result is compelled by due process, not the statute. As such, the statutory defense of abandonment applies equally to the charge of Residential Burglary.

The State also points out that Mr. Olson cited only one case from Maryland, *McKenzie v. State*, 962 A.2d 998 (2008), in support of the proposition that Division Three’s reasoning in *J.P./Ponce* is more in line with case from other jurisdictions regarding the law of burglary. Resp. Br. at 11. This Court need not rely on *McKenzie* for the proposition that an abandoned building is not a proper subject of the law of burglary. Rather, it need only look to *State v. Stinton*, 121 Wn. App. 569, 577 (2004) in which Division Two cited the American Jurisprudence (second edition) on the law of burglary for the following:

Sanctions against residential burglary provide heightened protection from crimes committed inside a home partly because “burglary laws are based primarily upon a recognition of *the dangers to personal safety created by the usual burglary situation.*”

*See Stinton*, 121 Wn. App. at 577 (emphasis added).

Indeed, as the Supreme Court of Louisiana observed, “[i]n the archetypal burglary an occupant of a dwelling is startled by an intruder who may inflict serious harm on the occupant in his attempt to commit the crime or to escape from the house. The frightened occupant, not knowing whether the intruder is bent on murder, theft, or rape, may in panic or anger react violently, causing the burglar to retaliate with deadly force.” *See State v. Lozier*, 375 So.2d 1333, 1337 (La. 1979) (citing *People v. Lewis*, 79 Cal.Rptr., 650, 655 (1969)).

Here, policy concerns regarding personal safety and vigilantism as expressed in *Stinton* and *Lozier* are in no way compromised by a rule allowing a defendant to raise the defense of abandonment where the central element of the offense is unlawful entry, e.g., trespass and burglary. That is, “[t]he deterrence of the trespass and the crime intended to be committed within is of secondary importance, and the laws are primarily designed not to deter the trespass and the intended crime, which are prohibited by other laws, so much as to forestall the germination of a situation dangerous to personal safety.” 13 Am.Jur.2d *Burglary* § 3, at 219 (2009) (footnotes omitted)

**B. The State failed to meet its burden of proving beyond a reasonable doubt that the building was not abandoned.**

The State next argues that it had no burden to prove an unraised defense. Citing *Widell*, it claims that (1) “the State would bear the burden of disproving [the statutory defenses to criminal trespass to residential burglary] only ‘when a defendant asserted his or her entry was permissible under’ the pertinent subsection of RCW 9A.52.090[.]” (Resp. Br. at 12), and (2) “[i]t was only with respect to the lesser included offense of criminal trespass that Olson argued abandonment.” Resp. Br. at 13.

This argument sidesteps this Court’s decision in *State v. R.H.*, 86 Wn. App. 807 (1997), which *Widell* cited for the proposition that “[s]tatutory defenses to criminal trespass negate the unlawful presence element of criminal trespass and are therefore not affirmative defenses.” See *Widell*, 146 Wn.2d at 57.

In *R.H.*, the State argued, as it does here, that the appellant waived (or failed to assert) an RCW 9A.52.090 defense by not raising it below. This court rejected the State’s argument as follows:

We reject that argument because while the statute was not invoked, ***the defense was implicitly raised throughout the trial.*** For example, from the State’s witnesses, defense counsel elicited testimony that the parking lot was open to the public; that customers could travel to the restaurant on skateboards; that R.H. was not specifically identified as someone Herzog wanted removed; that if R.H. was waiting for another customer, he had permission to stay on the premises; and that R.H. repeatedly

informed the arresting officer he was waiting for such a customer. Defense counsel also elicited testimony relevant to the public premises defense from R.H. and his friend. The friend testified that he and R.H. planned to meet and patronize the restaurant. Indeed, the friend met R.H. immediately before the arrest. R.H. confirmed this testimony. In closing, defense counsel argued that the officer did not have authority to evict R.H. because he was complying with Herzog's rules. Thus, defense counsel did everything to assert the defense except cite the statute. *Even if the defense was not raised below, we would still address it here because it essentially challenges the sufficiency of the State's evidence, an issue of constitutional magnitude, and therefore can be raised for the first time on appeal.*

*See R.H.*, 86 Wn. App. at 811 (citations omitted); *accord Widell*, 146 Wn.2d at 570 (“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.”)

At the minimum, the defense of abandonment was certainly raised implicitly throughout the trial. The record is replete with references to the property being abandoned. *See, e.g.*, RP at See RP II at 230 (Deputy Gulla—“We [had] a vacant house that people are removing property from, and we can’t contact the owner.”); RP III at 301 (Detective Woodruff—property “was trashed.”); RP III at 313 (Deputy Jeffries—“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.”); RP III at 278 (neighbor Everett—Ms. Roberts “hadn’t been there for many years.”); RP II at 169 (neighbor McClung—Ms. Roberts left the property “in 1992, possibly ’93.”).

Indeed, as the State concedes, defense counsel expressly argued the defense of abandonment with respect to the lesser included offense of criminal trespass in the first degree. Resp. Br. at 13. As such, the State cannot maintain that it was not on notice of the abandonment defense. “Due process requires that the State prove every element of an offense beyond a reasonable doubt; if a defense negates an element of the charged crime, the State has the constitutional burden to prove the absence of the defense beyond a reasonable doubt.” See *R.H.*, 86 Wn. App. at 811 (citations omitted).

Here, because Olson offered “some evidence” that the building was abandoned, the State bore the burden of proving beyond a reasonable that it was not. See, e.g. *Widell*, 146 Wn.2d at 570; *R.H.*, 86 Wn. App. at 812.

After arguing that it had no such burden to prove the building was not abandoned, the State next argues that it met its burden. Citing the first half of the dictionary definition of “abandon” as recited in *J.P.*, it claims that “Roberts’ testimony established that she never ceased to assert her interest, right, and title to her property.” See Resp. Br. at 13-14. This argument is invalid for two main reasons.

First, the argument relies on only one acceptable definition of “abandon” as enunciated in *J.P.* and ignores the other. As noted in *J.P.*, the

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

The State, as it must, cherry picks the “cease to assert or exercise” language from the definition of abandon, relying on Roberts self-serving testimony that “she considers the house hers even though she no longer lives there, that she keeps things in the house and storage shed, and that she kept the buildings locked against intruders.” Resp. Br. at 14. However, the State fails to address the “given up” language from the definition of abandon. And as mentioned above, the record is replete with references that the property had been given up or deserted. *See, e.g.*, RP III at 313 (Deputy Jeffries—“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.”).

Secondly and most importantly, the State's argument that it met its burden to prove beyond a reasonable doubt that the building was not abandoned completely fails to address prosecutor's concession during closing argument:

[T]he 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 [defense counsel'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.

*See* RP IV at 542-43.

The State's failure to address the effect of the prosecutor's concession in its response brief is telling. Because the State conceded that the property at issue was abandoned, the State did not and cannot meet its burden of proving beyond a reasonable doubt that the building at issue was not abandoned. Mr. Olson's conviction for Residential Burglary should be reversed and dismissed with prejudice on this ground alone.

**C. The trial court erred in failing to instruct the jury that abandonment was also a defense to the charge of residential burglary.**

The State goes on to argue that “the court did not err in failing to sua sponte instruct the jury on an inapplicable defense.”

Specifically, it claims that “the trial court could not have foreseen the alleged error in failing to instruct the jury on the abandonment defense to residential burglary because that was not Olson’s defense theory.” Resp. Br. at 17.

Citing *Ponce*, it claims that “even if the defense applied to residential burglary and had been triggered in this case ‘*J.P.* does not require that a jury be specifically instructed on matters that negate an element of the charged offense if the jury instructions as a whole make clear the State’s burden of proving unlawful entry and intent to commit a crime.’” Resp. Br. at 18-19.

It further claims that “[t]he jury instructions in this case are identical to those given in *Ponce*. ... As in *Ponce*, these instructions correctly stated the law and enabled Olson to argue his theory.” Resp. Br. at 19. In a footnote, it claims that “[a]lthough Olson’s actual defense theory was that he had permission to enter the premises, the same jury instructions would have allowed him to argue that his entry was not

unlawful and/or that he lacked intent to commit a crime because the premises had been abandoned.” Resp. Br. at 19, n.5.

This argument ignores the fact that the prosecutor expressly argued—from the instructions given to the jury—that abandonment is not a defense to the charge of Residential Burglary. RP IV at 542-43. Under *J.P.* and *Ponce*, this argument misstated the law. As such, absent a jury instruction that abandonment is also a defense to Residential Burglary, defense counsel had to convince the jury what the law was; this was prejudicial error. See *State v. Thomas*, 109 Wn.2d 222, 228 (1987) (“Defendant is entitled to a correct statement of the law and should not have to convince the jury was the law is.”).

**D. Mr. Olson received ineffective assistance of counsel.**

Finally, the State argues that Mr. Olson’s counsel was not ineffective for “declining to request an instruction on an inapplicable defense and instead pursuing a stronger defense theory.” Resp. Br. at 20.

Citing *Garrett*, it claims “even if the abandonment defense is applicable to residential burglary, Olson cannot establish ineffective assistance of counsel based upon his attorney’s tactical decision to pursue the defense that was better supported by the evidence, including his client’s testimony and statements to the police.” Resp. Br. at 22.

It further claims that “Olson [cannot] demonstrate actual prejudice from his counsel’s failure to request an instruction on abandonment as a defense to residential burglary. Robert’s testimony demonstrated that she had not abandoned the property. Olson never asserted that he believed the premises were abandoned, or that he entered the premises or took items from it for that reason.” Resp. Br. at 24. The State’s claims fail for several reasons.

First, “[r]easonable attorney conduct includes a duty to investigate the relevant law.” *See State v. Woods*, 138 Wn. App. 191, 197 (citations omitted). Put simply, there is no legitimate trial strategy in failing to research the law. Defense counsel’s failure is evident from the fact that he proposed instructions and argued the abandonment defense with respect to the lesser included offense of criminal trespass and the first degree, but failed to do so with respect to the charged crime of Residential Burglary. *See CP at 108, 112; see also RP IV at 536-537.* Mr. Olson’s trial was held in September of 2012 – nearly seven years after *J.P.* was decided and seven months after *Ponce* was decided. 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.

Secondly, the prejudice prong of the test requires only that “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 198.

Here, there is at least a reasonable probability that if the jury was instructed that abandonment was a defense to the charge of Residential Burglary, the outcome would have been different, *e.g.*, the jury would have acquitted Mr. Olson. As shown above, the record is replete with references to the property being deserted or given up. Setting aside the prosecutor’s concession during closing argument, the evidence in the record is sufficient to support a reasonable probability that had the jury been instructed properly, the State would not have been able meet its burden of proving beyond a reasonable doubt that the building at issue was not abandoned. Therefore, counsel’s deficient performance prejudiced Mr. Olsen.

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## II. CONCLUSION

For all the foregoing reasons and for the reasons stated in his opening Brief of 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 11<sup>th</sup> day of September, 2013.

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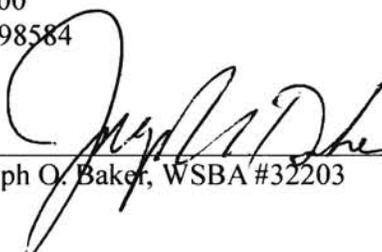
**CERTIFICATE OF SERVICE**

I certify that on September 11, 2013, I caused a copy of the foregoing **REPLY BRIEF OF APPELLANT** to be served on the following individuals, via first class mail, postage prepaid:

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And I further certify that on September 11, 2013, I caused a copy of the foregoing **REPLY 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:

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