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COURT OF APPEALS  
STATE OF WASHINGTON  
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NO. 69537-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

CHAD OLSON,

Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE HOLLIS R. HILL

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**BRIEF OF RESPONDENT**

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A. ISSUES

1. “Abandonment” is not a statutory defense to residential burglary and the State has no burden to prove that the victim’s property was not abandoned. In this case, the evidence established that Chad Olson entered the victim’s home and other buildings with intent to steal property that he found therein. Was the evidence sufficient to support his conviction for residential burglary?

2. This Court generally does not review alleged errors raised for the first time on appeal unless they are manifest errors of constitutional magnitude. Olson contends for the first time that the trial court erred by failing to sua sponte instruct the jury on an abandonment defense to residential burglary that was never asserted at trial. Should this Court decline to review the claim?

3. 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. Where the State bears no burden to disprove abandonment, and Olson never requested an instruction on that defense, did the trial court properly omit such an instruction?

4. A claim of ineffective assistance of counsel cannot rest on counsel's legitimate trial strategy or tactics. Olson's counsel reasonably pursued a permissive entry theory of defense that was supported by evidence. Has Olson failed to show that his counsel was ineffective for failing to propose an abandonment defense instruction?

5. An appellant who claims ineffective assistance of counsel based upon the failure to request a particular instruction must show that he was entitled to the instruction, counsel's failure to request it was deficient performance, and the failure to request the instruction caused prejudice. Where Olson was not entitled to an instruction on the abandonment defense to residential burglary, and can establish no prejudice from its absence, has he failed to show ineffective assistance of counsel?

#### B. STATEMENT OF THE CASE

Jane Roberts owns a home in unincorporated King County, near Auburn. RP 243.<sup>1</sup> Although Roberts moved out of this home after her husband's death in 1975, she kept a great deal of property

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<sup>1</sup> The Verbatim Report of Proceedings consists of four, consecutively paginated volumes spanning September 18, 19, 20, 24, 25 & 26. In this brief, the State refers to this material by page number only.

in the house, workshop, and shed on the premises. RP 244. She also kept her Mercedes Benz convertible there. RP 170. Roberts periodically visited the property to check on her belongings.

RP 245. Her neighbors also kept an eye on the property for her, and tried to help maintain the yard. RP 171, 279, 287.

In 2011, Roberts' property became the target of burglary, vandalism, and trespass. Thieves stole Roberts' Mercedes, and neighbors noticed prowlers who seemed to be scoping out the property. RP 171-72, 176, 181, 194.

Based on reports of repeated break-ins, King County Sheriff's Office Deputies Gulla and Jeffries began making daily visits to make sure Roberts' property was undisturbed and to catch any suspects. RP 194-95, 308-10. When Deputy Gulla visited the property on October 11, 2011, he confirmed that the sliding door to the house was closed and locked; the shed door was closed and padlocked; and the shop door was closed and intact. RP 202-03.

The following morning, Roberts' neighbors called 911 to report that an unknown person was loading things from Roberts' shed into a pickup truck. RP 172, 280-81. Deputies Gulla and Jeffries quickly responded to the scene. RP 283.

When they arrived, the deputies saw a silver pickup truck backed up to the storage shed and a person, later identified as Chad Olson, inside the shed. RP 198, 310-11. A tarp had been rigged up to block the view of the shed from the street. RP 325. The cab and bed of the truck were nearly overflowing with various items, including a brass bedframe that Roberts later confirmed had been inside the house. RP 200, 204, 304. The sliding glass door of the house was open; the door to the workshop had been forced open and the frame broken; the shed door was open; and there were items strewn over the ground that had not been there the day before. RP 204, 314-15. Deputy Gulla also noticed some fresh footprints in sticky liquid inside the house. RP 206, 316. The footprints matched the size and tread of Olson's shoes. RP 209, 212-13.

When confronted by police, Olson claimed that he had permission from Roberts, and showed them a handwritten note to that effect. RP 458, 473-74. The note stated, "I, Jane Roberts, give full permission to Chad Olson and Tim Giseler to clean up my property and things I no longer want. They have three weeks to

clean up the whole property, inside and out.” RP 383.<sup>2</sup> Olson claimed that he was asked to do this work by a woman with curly blonde hair, who had since moved to Mexico. RP 460. Despite purportedly having permission to “clean” inside and out, Olson also told Deputy Gulla and Detective Neil Woodruff that “it wasn’t a burglary because he never went in the house.” RP 461, 473-74. After confirming that Roberts did not give anyone permission to enter her property or remove her things, Deputy Gulla arrested Olson.

The State charged Olson with residential burglary. CP 1. At trial, Olson maintained that he had received permission from a woman to clean up her property, and stated that he agreed to do the work for free, “just ... to clean up the neighborhood, just to help out.” RP 383, 393, 434. Olson acknowledged that the woman he had met was not the same Jane Roberts who had testified during the trial. RP 406-07. His description of this woman in his testimony also differed from the one he gave to Deputy Gulla. Id.

The State impeached Olson with several prior convictions for crimes of dishonesty, including two convictions for forgery, one for

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<sup>2</sup> In another note in Olson’s possession, a person named Jimmy James purported to “give Chad Olson permission to take my washer and dryer from my house as a gift to him[.]” RP 445.

theft, and one for trafficking in stolen property. RP 426-27. The trafficking conviction arose from an incident in 2006, in which Olson had been caught removing metal siding from someone else's mobile home. RP 448. As in this case, Olson then claimed that he had permission from the owner "to clean the property up." RP 449, 497. The owner had given him no such permission. RP 503. Olson pleaded guilty in that case, acknowledging that he had "knowingly transfer[red] stolen property" belonging to the owner. RP 450.

The jury found Olson guilty as charged, and the trial court imposed a standard range sentence of 75 months. CP 165, 207. Olson timely appealed. CP 203.

C. ARGUMENT

1. SUFFICIENT EVIDENCE SUPPORTS OLSON'S CONVICTION.

Olson's only argument with respect to his claim of evidentiary insufficiency is that the State failed to prove that Roberts' property was not abandoned, and the evidence is therefore insufficient to support his conviction for residential burglary. This Court should reject the claim because the State had

no such burden, especially where Olson did not raise an abandonment defense to the residential burglary charge. In any event, when viewed in the light most favorable to the State, the evidence was sufficient to prove that Roberts had not abandoned her property.

a. The Abandonment Defense Does Not Apply To Residential Burglary.

Olson's argument is predicated on the erroneous proposition that the State was obligated to prove that Roberts' property was not abandoned. He relies on Division Three's opinions in State v. J.P., 130 Wn. App. 887, 125 P.3d 1215 (2005), and State v. Ponce, 166 Wn. App. 409, 269 P.3d 408 (2012). The analysis in these cases is flawed and should be rejected.<sup>3</sup>

In J.P., a juvenile was caught crawling out of a window of a vacant home that was being prepared for sale. 130 Wn. App. at 890. J.P. was adjudicated guilty of residential burglary. Id. On appeal, he argued, among other things, that the abandonment defense of the criminal trespass statute should have applied to his residential burglary charge. Id. Citing City of Bremerton v. Widell,

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<sup>3</sup> The application of the statutory criminal trespass defenses to residential burglary was recently briefed and argued before this Court in State v. Schumann, No. 68853-7-I. Oral argument occurred on July 18, 2013. No opinion in that case has yet been filed.

146 Wn.2d 561, 51 P.3d 733, cert. denied, 537 U.S. 1007 (2002), Division Three held that the statutory defenses to criminal trespass may be applied to a charge of residential burglary. 130 Wn. App. at 894-95. The court observed that the defenses set out in RCW 9A.52.090 operate by negating the “unlawful entry” element of criminal trespass. Since residential burglary also includes an “unlawful entry” element, the J.P. court reasoned that the criminal trespass defenses must also apply to residential burglary. Id. Because the evidence established that the house was not abandoned, however, Division Three affirmed the adjudication. Id. at 896.

In State v. Jensen, Division Two rejected J.P.'s holding as contrary to the plain language of RCW 9A.52.090, which expressly limits its application to “any prosecution under RCW 9A.52.070 [first degree criminal trespass] and RCW 9A.52.080 [second degree criminal trespass.]” 149 Wn. App. 393, 400-01, 203 P.3d 393 (2009). “When the words in a statute are clear and unequivocal, this court must apply the statute as written.” State v. Michielli, 132 Wn.2d 229, 237, 937 P.2d 587 (1997). Accord Jensen, 149 Wn. App. at 401 (citing Morgan v. Johnson, 137 Wn.2d 887, 891-93, 976 P.2d 619 (1999)). Applying RCW 9A.52.090 as

written, Division Two concluded that the statute's abandonment defense "is not available regarding Jensen's charged offense of second-degree burglary." 149 Wn. App. at 401.

The Jensen court also rejected Division Three's purported reliance on Widell. 149 Wn. App. at 401. Widell involved two defendants who were separately tried for criminal trespass after violating anti-trespass policies of the public housing facilities in which their respective fiancées resided. 146 Wn.2d at 565-67. The defendants each asserted the statutory defense that they "reasonably believed that the owner of the premises, or other person empowered to license access thereto, would have licensed him to enter or remain." Id. at 570; RCW 9A.52.090(3). On appeal, each claimed evidentiary insufficiency. In its review of the claims, the Widell court first observed that the statutory defenses to criminal trespass are not affirmative defenses that defendants must prove; instead, the defenses negate the essential element of unlawful entry. Id. at 570. Thus, as the Jensen court observed, "Widell held only that when a defendant sufficiently asserts one of the statutory defenses to criminal trespass, the burden to disprove the defense falls on the State. ... Nothing in Widell suggests that

expansion of those statutory defenses to other crimes is warranted.” 149 Wn. App. at 401.

Division Three revisited this issue in Ponce. There, as in this case, the defendant claimed to have permission to enter the premises in which he was arrested. 166 Wn. App. at 412. Ponce appealed his conviction for second degree burglary, arguing under J.P. that the trial court erred in failing to instruct the jury that his “permissible entry” defense applied equally to the crimes of criminal trespass and second degree burglary. Id. at 411. Division Three adhered to J.P.’s “inescapable” conclusion that a statutory defense that negates an element of criminal trespass must negate the same element in any other crime. Id. at 412. Nevertheless, because the jury instructions correctly conveyed the law and enabled Ponce to argue his defense theory, the court held that the trial court did not err by failing to give the requested instruction. Id. at 420.

Olson argues that this Court should adopt Division Three’s reasoning because that court relied on Widell, 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.” See Brief of Appellant at 14. But, as explained, Widell does not compel the conclusion in J.P. that statutory defenses to

one crime must apply to other crimes that are not specified in the statute but share an element. Further, Olson does not articulate why Jensen's citation to a civil case is problematic. The proposition that courts must give effect to the plain language of unambiguous statutes is hardly unique to civil litigation. See, e.g., City of Kent v. Beigh, 145 Wn.2d 33, 46, 32 P.3d 258 (2001); State v. Radan, 143 Wn.2d 323, 330, 21 P.3d 255 (2001); State v. Sweet, 138 Wn.2d 466, 478, 980 P.2d 1223 (1999); Riofta v. State, 134 Wn. App. 669, 680, 142 P.3d 193 (2006) ("If the statute is clear and unambiguous, we may not look beyond the statute's plain language or consider legislative history, but should glean the legislative intent through the plain meaning of the statute's language").

Olson also argues that Division Three's reasoning in J.P. and Ponce is more persuasive because it is "more in line with case law from other jurisdictions regarding the law of burglary." Brief of Appellant at 14. To support this proposition, Olson cites a single case: McKenzie v. State, 407 Md. 120, 962 A.2d 998 (2008). But at issue in McKenzie was whether an unoccupied apartment was a "dwelling" for purposes of Maryland's "fourth degree burglary of a dwelling" statute. 407 Md. at 121. The case is inapposite and

unhelpful here, and Olson cites no other authority to support his claim that J.P. and Ponce are “more in line with” foreign case law.

Jensen's reasoning is sound and conclusive of the issue presented here. This Court should adopt it and conclude that the State had no burden to prove that Roberts' property was not abandoned.

b. The State Had No Burden To Disprove An Unraised Defense.

Even if the statutory defenses to criminal trespass apply to residential burglary, the State would bear the burden of disproving them only “when a defendant asserts his or her entry was permissible under” the pertinent subsection of RCW 9A.52.090. Widell, 146 Wn.2d at 570. Here, Olson asserted that his entry was permissible, but not because Roberts' property was abandoned. Instead, from his pre-arrest statements to police to his trial testimony to his counsel's closing argument, Olson maintained that he had written permission to enter from Roberts (or someone purporting to be her). RP 383, 392-95, 406-08, 431-37, 460-61, 473-75, 529, 533, 539-40. And as an alternative defense, he claimed that the State could not prove that he entered Roberts'

house at all. RP 461-62, 532. It was only with respect to the lesser included offense of criminal trespass that Olson argued abandonment. RP 536-37.

Because Olson never asserted an abandonment defense to the charged crime of residential burglary, he never triggered the State's supposed burden to prove that Roberts' property was not abandoned. Just as the State was not obligated to prove that Roberts' property was not open to members of the public to disprove the defense under RCW 9A.52.090(2), or that Olson was not attempting to serve legal process to disprove the defense under RCW 9A.52.090(4), the State had no obligation to disprove an abandonment defense that was never raised.

c. Sufficient Evidence Proved That Roberts' Property Was Not Abandoned.

Even if the abandonment defense applied to residential burglary and had been asserted in this case, the State met its burden to prove that Roberts did not abandon her property.

A challenge to the sufficiency of the evidence admits the truth of the State's evidence and all inferences that can reasonably be drawn therefrom. State v. Salinas, 119 Wn.2d 192, 201, 829

P.2d 1068 (1992). Evidence is sufficient to support a finding of guilt if, after viewing the evidence in the light most favorable to the State, a rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. State v. Rose, 175 Wn.2d 10, 15, 282 P.3d 1087 (2012).

The criminal trespass defense statute does not define “abandoned.” In J.P., Division Three adopted the Webster’s definition of “abandon”: “to cease to assert or exercise an 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.’” 130 Wn. App. at 895-96.

Roberts’ testimony established that she never ceased to assert her interest, right, and title to her property. She testified 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. RP 244, 256-57. She also testified that she visited the property periodically to check on her belongings, and never allowed other people to stay in the house. RP 245, 257. Roberts’ neighbors knew that she had not abandoned the property; they kept an eye on it for her and

notified Roberts when the house was previously burglarized. RP 251, 279-80. And while the house and grounds were in disrepair and may have appeared abandoned, Roberts testified that she had hired or attempted to hire people to trim trees on the property and to clean and repair the roof after one of the prior break-ins. RP 262-64. From this evidence, a rational juror could find, beyond a reasonable doubt, that Roberts' property was not abandoned.<sup>4</sup>

Because the State had no burden to prove that Roberts had not abandoned her property, and because the State nevertheless produced sufficient evidence of that fact, Olson's claim that there is insufficient evidence to support his conviction must fail.

2. THE COURT DID NOT ERR IN FAILING TO  
SUA SPONTE INSTRUCT THE JURY ON AN  
INAPPLICABLE DEFENSE.

Olson argues for the first time on appeal that the trial court erred by failing to instruct the jury that the State had the burden to

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<sup>4</sup> Notably, Olson does not argue that a reasonable but mistaken belief that the property was abandoned would negate the unlawful entry element. This may be because, unlike the permissive entry defense of RCW 9A.52.090(3), which applies when "[t]he actor reasonably believed that the owner ... would have licensed him or her to enter or remain," the abandonment defense contains no "reasonable belief" language. By its plain language, that defense only applies when "[a] building involved in an offense ... was abandoned." RCW 9A.52.090(1) (emphasis added).

prove that Roberts' property was not abandoned. Because Olson cannot establish manifest constitutional error, this Court should decline to review the alleged error. Should the Court reach the issue, it should conclude that the trial court did not err in failing to sua sponte instruct the jury on a legally inapplicable defense that Olson never asserted.

Generally, this Court will refuse to review any claim of error that was not raised in the trial court. RAP 2.5(a); State v. O'Hara, 167 Wn.2d 91, 97-98, 217 P.3d 756 (2009). "The appellate courts will not sanction a party's failure to point out at trial an error which the trial court, if given the opportunity, might have been able to correct to avoid an appeal and a consequent new trial." O'Hara, 167 Wn.2d at 98 (quoting State v. Scott, 110 Wn.2d 682, 685, 757 P.2d 492 (1988)).

An exception exists when the claimed error is a "manifest error affecting a constitutional right." RAP 2.5(a). To raise an unpreserved error under this exception, an appellant must demonstrate both that the error is truly of constitutional dimension and that the error is "manifest." O'Hara, 167 Wn.2d at 98. To be "manifest," an error must have resulted in "actual prejudice." Id. at 99. "Actual prejudice" requires "a plausible showing ... that the

asserted error had practical and identifiable consequences in the trial of the case.” Id. (quoting State v. Kirkman, 159 Wn.2d 918, 935, 155 P.3d 125 (2007)). The focus of the actual prejudice test is whether the error is so obvious on the record that it warrants review absent a timely objection:

It is not the role of an appellate court on direct appeal to address claims where the trial court could not have foreseen the potential error or where the prosecutor or trial counsel could have been justified in their actions or failure to object. Thus, to determine whether an error is practical and identifiable, the appellate court must place itself in the shoes of the trial court to ascertain whether, given what the trial court knew at that time, the court could have corrected the error.

O’Hara, 167 Wn.2d at 99-100.

In this case, 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. As noted above, Olson’s defense was that he had permission from the ostensible owner to enter and “clean up” the premises. He asserted an abandonment defense only with respect to the lesser included offense of criminal trespass in the first degree, to which it properly applies, and he successfully sought an instruction on that defense. CP 108, 189. He neither sought an

instruction on this defense as to residential burglary, nor did he object to the instruction being limited to criminal trespass. Because the alleged error was not “practical and identifiable,” Olson can establish neither “actual prejudice” nor “manifest error.” O’Hara, 167 Wn.2d at 99-100. Accordingly, the alleged instructional error is not properly before this Court.

Should this Court reach the issue, it should conclude that the trial court did not err. “To satisfy the constitutional demands of a fair trial, the jury instructions, when read as a whole, must correctly tell the jury of the applicable law, not be misleading, and permit the defendant to present his theory of the case.” O’Hara, 167 Wn.2d at 105 (citing State v. Mills, 154 Wn.2d 1, 7, 109 P.3d 415 (2005)). As argued above, the criminal trespass defenses of RCW 9A.52.090 do not apply to residential burglary. To instruct the jury otherwise, especially when Olson never asserted abandonment as a defense to the burglary charge, would have been error.

Further, 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.” Ponce, 166 Wn. App. at 411. In Ponce, Division Three held that the trial court did not err by refusing to instruct the jury that Ponce’s statutory defense of permissible entry to the crime of criminal trespass was a defense to his second degree burglary charge as well. Id. Because the standard “to convict” instruction adequately informed the jury of the State’s burden to prove that Ponce “entered or remained unlawfully in a building,” and that “[a] person enters or remains unlawfully ... when he or she is not then licensed, invited, or otherwise privileged to so enter or remain,” Ponce was permitted to argue his theory of permissible entry. Id. at 420. Thus, the court did not err in refusing to instruct the jury on the “permissible entry” defense.

The jury instructions in this case are identical to those given in Ponce. CP 175, 179. As in Ponce, these instructions correctly stated the law and enabled Olson to argue his theory.<sup>5</sup> See RP 533-34, 539-40. Thus, as in Ponce, the instructions made the State’s burden clear, and the trial court did not err in failing to give an instruction on the abandonment defense. 166 Wn. App. at 413.

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<sup>5</sup> Although 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.

3. OLSON'S COUNSEL WAS NOT INEFFECTIVE FOR DECLINING TO REQUEST AN INSTRUCTION ON AN INAPPLICABLE DEFENSE AND INSTEAD PURSUING A STRONGER DEFENSE THEORY.

Olson next contends that he received ineffective assistance of counsel because his attorney failed to request a jury instruction on the statutory defense of abandonment with respect to the charged offense of residential burglary. His claim fails because he was not entitled to such an instruction, and because his counsel's decision not to pursue an abandonment defense to residential burglary was a matter of legitimate trial strategy.

To prevail on a claim of ineffective assistance of counsel, Olson must establish both deficient performance and resulting prejudice. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). If either prong is unmet, this Court need not consider the other. In re Personal Restraint of Crace, 174 Wn.2d 835, 847, 280 P.3d 1102 (2012).

To show deficient performance, Olson must show that his counsel's performance fell below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), cert. denied, 523 U.S. 1008 (1998). In judging the performance of trial counsel, courts "must make every effort to

eliminate the distorting effects of hindsight and must strongly presume that counsel's conduct constituted sound trial strategy." In re Personal Restraint of Rice, 118 Wn.2d 876, 889, 828 P.2d 1086 (1992). "If trial counsel's conduct can be characterized as legitimate trial strategy or tactics, it cannot serve as a basis for a claim that the defendant received ineffective assistance of counsel." State v. McNeal, 145 Wn.2d 352, 362, 37 P.3d 280 (2002) (citing State v. Adams, 91 Wn.2d 86, 90, 596 P.2d 1168 (1978)).

To show prejudice, Olson must show that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. A reasonable probability "is a probability sufficient to undermine confidence in the outcome." Id.

Since Olson claims ineffective assistance of counsel based upon the failure to request a jury instruction, he must show that he was entitled to the instruction, that counsel's performance was deficient in failing to request the instruction, and that the failure to request the instruction prejudiced Olson's defense. State v. Johnston, 143 Wn. App. 1, 21, 177 P.3d 1127 (2007).

If this Court agrees that the statutory defenses to criminal trespass do not apply to residential burglary, as argued above, then

it must also conclude that Olson's counsel was not ineffective for failing to request an instruction on that defense. Jensen, 149 Wn. App. at 402 (because RCW 9A.52.080(1)'s abandonment defense was not available for the charge of second degree burglary, defense counsel was not ineffective for failing to offer an abandonment instruction regarding that charge).

Further, 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 police. See State v. Garrett, 124 Wn.2d 504, 520, 881 P.2d 185 (1994) ("[T]his court will not find ineffective assistance of counsel if 'the actions of counsel complained of go to the theory of the case or to trial tactics'") (quoting State v. Renfro, 96 Wn.2d 902, 909, 639 P.2d 737 (1982)).

From the moment that he was contacted by police, Olson consistently maintained that the owner asked him to enter the premises and "clean up" the property. He produced a written permission note, purportedly signed by "Jane Roberts," which was admitted at trial. He testified that he believed that this permission was effective, and that he entered the property only at the behest of

the ostensible owner.<sup>6</sup> This defense was further supported by evidence that Olson has a recycling business license and makes a living by offering to haul recyclable material away for free and then selling the scrap metal to recycling centers. RP 384-88. He identified a number of businesses and individuals that have hired him to do such work, and explained that once hired, he would attempt to upsell the client by suggesting other work that he could do for a fee. RP 385, 387-88, 39, 394-95.

To rebut the strong presumption that counsel's performance was reasonable, "the defendant bears the burden of establishing the absence of any *conceivable* legitimate tactic explaining counsel's performance." State v. Grier, 171 Wn.2d 17, 42, 246 P.3d 1260 (2011). Olson cannot meet this burden because his attorney reasonably pursued a legitimate defense theory that was supported by the evidence and was consistent with the explanation that Olson has steadfastly maintained.

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<sup>6</sup> Although Olson also testified that he thought Roberts' property "looked abandoned," he did not indicate that he entered the premises or removed items from it for that reason, but rather in spite of it. RP 393. He testified that he had not been led to believe that the property he had been hired to clean was abandoned, and the condition of the property caused him to think that he might be at the wrong location. Id. He stated, "I didn't know what I was getting into, essentially." Id.

Neither can Olson demonstrate actual prejudice from his counsel's failure to request an instruction on abandonment as a defense to residential burglary. Roberts' 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. Given this evidence, there is no reasonable probability that the trial would have ended differently had the instruction been given.

D. CONCLUSION

For all the foregoing reasons, the State respectfully asks this Court to affirm Olson's conviction for Residential Burglary.

DATED this 16<sup>th</sup> day of August, 2013.

Respectfully submitted,

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

By:   
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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 Joseph O. Baker, the attorney for the appellant, at Law Office of Joseph O. Baker, 19550 International Blvd., Suite 312, SeaTac, WA 98188, containing a copy of the BRIEF OF RESPONDENT, in STATE V. CHAD B. OLSON, Cause No. 69537-1-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.

Dated this 16 day of August, 2013

A handwritten signature in black ink, appearing to be 'JOSEPH O. BAKER', written over a horizontal line.

Name  
Done in Seattle, Washington