IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. CESAR OROZCO-SALAZAR, Appellant.	No. 38827-8-II UNPUBLISHED OPINION

Hunt, J.–Cesar Orozco-Salazar appeals his jury trial conviction for first degree burglary. He argues that (1) his trial counsel did not provide effective representation when he failed to request a lesser included offense instruction for first degree criminal trespass, and (2) the trial court's supplemental instruction in response to a jury question was an improper comment on the evidence. We affirm.

FACTS

I. Burglary

In November 2008, Cesar Orozco-Salazar and Antonino Gonzales-Flores were living with several other people in a rooming house on Annie's Berry Farm in La Center, Washington. The building had a large common area with individual, private locked bedrooms around the perimeter, dormitory style.

Around midnight on November 15, 2008, Orozco-Salazar and Gonzales-Flores, who were

not on speaking terms following an altercation,[1] had returned from a party where they had been drinking. They continued drinking—Gonzales-Flores, drinking alone in the common area, and Orozco-Salazar and some of the other residents, drinking and watching television in Orozco-Salazar's room. Another resident invited Gonzales-Flores to join the other men in Orozco-Salazar's room, but Gonzales-Flores declined.

According to Gonzales-Flores, he then went to his room to sleep; he had consumed about 12 beers, and he did not talk to Orozco-Salazar before retiring. A short time later, Orozco-Salazar kicked in Gonzalez-Flores' locked door, attacked him, and assaulted him for about five minutes. Gonzales-Flores did not fight back because he was drunk.

Orozco-Salazar left. Gonzales-Flores called the sheriff's office. Deputy Brent Waddell responded and noticed that the door to Gonzalez-Flores's room appeared to have been kicked in. Gonzales-Flores was shaking, upset, and scared; his face was bloody and his eye was swollen. Gonzales-Flores told Waddell that (1) he and Orozco-Salazar had been drinking and had gotten into an argument; (2) he (Gonzales-Flores) had gone into his room, locked his door, and passed out or gone to sleep; and (3) the next thing he knew, Orozco-Salazar was kicking in his door and assaulting him. Waddell called for medical assistance for Gonzales-Flores. Waddell could not find Orozco-Salazar, who had left the premises.

On November 23, Waddell returned and found Orozco-Salazar in his room. Orozco-Salazar admitted that he had been angry with Gonzales-Flores, that he had kicked in Gonzales-

[1] Gonzales-Flores asserted that this incident had happened at the residence a few weeks earlier and that Orozco-Salazar had hit him in the head a few times.

Flores' door, and that he had fought with Gonzales-Flores. Waddell arrested Orozco-Salazar and took him to jail.

II. Procedure

The State charged Orozco-Salazar with first degree burglary, based on his unlawful entry into Gonzales-Flores' room and intentional assault of Gonzales-Flores inside the room. At trial, Gonzales-Flores and Waddell testified as described above.[2] Orozco-Salazar testified as the sole defense witness.

A. Defense Testimony

Orozco-Salazar confirmed that he and Gonzales-Flores had been drinking in separate rooms and that Gonzales-Flores had initially refused an invitation to join the others in Orozco-Salazar's room because they were not on speaking terms. But Orozco-Salazar denied having broken into Gonzales-Flores' room without provocation. Instead, Orozco-Salazar asserted that Gonzales-Flores had provoked a fight by breaking a beer bottle in Orozco-Salazar's room, repeatedly insulting Orozco-Salazar and Orozco-Salazar's mother, running into his (Gonzales-Flores') room and slamming the door, and continuing to insult Orozco-Salazar through the closed door.

Orozco-Salazar admitted that he had first tried to open Gonzales-Flores' door with a key,[3] but, when that failed, he had kicked in the door. But he asserted that even though Gonzales-

[2] Orozco-Salazar does not challenge on appeal the trial court's CrR 3.5 ruling that his statements to Waddell were admissible.

[3] Orozco-Salazar had keys to the individual rooms because he did maintenance work on the residence. But he acknowledged that he had to have permission to enter another person's room.

Flores had never expressly invited him (Orozco-Salazar) into the room or expressly stated that he (Gonzales-Flores) wanted to fight, the fight was mutual and consensual and that, in their community, Gonzales-Flores' actions implied that Gonzales-Flores wanted to fight, regardless of his locking himself in his room. Orozco-Salazar also denied entering Gonzales-Flores's room with intent to assault Gonzales-Flores; he (Orozco-Salazar) asserted that he had gone into the room tell Gonzales-Flores to stop insulting his mother.

B. Jury Instructions

Instruction 6[4] explained the meaning of entering or remaining unlawfully in or upon premises:

> 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.
>
> A license or privilege to enter or remain in a building which is only partly open to the person is not a license or privilege to enter or remain in that part of the building which is not open to the person.

Clerk's Papers (CP) at 11 (emphasis added).

Defense counsel did not object "to any of the instructions given or any not given" other than the trial court's decision to omit an involuntary intoxication instruction. I Report of Proceedings (RP) (Jan. 26, 2009) at 92. Nor did defense counsel request an instruction on first degree criminal trespass as a lesser included offense of burglary.

C. Closing Argument

In closing, defense counsel argued that (1) Orozco-Salazar did not assault Gonzales-

[4] The State apparently proposed this instruction.

Flores because Gonzales-Flores' behavior and insults were an implied invitation to fight; and (2) because Gonzales-Flores had invited Orozco-Salazar to fight and then continued to taunt Orozco-Salazar through the closed door, Orozco-Salazar was "otherwise privileged" to enter Gonzales-Flores' room. I RP (Jan. 26, 2009) at 110; *see also* I RP (Jan. 26, 2009) at 108-09, 111.

Defense counsel also argued:

> Now, you don't have the option of convicting my client of an assault. But even then, what he said was he went in there—he didn't go in there with the intent to commit a crime, he went in there to get him to shut up about his mother. And then they got into a fight. And he said, [Gonzales-Flores] who was waiting for him, ready to fight, and they fought. And I submit to you that that's not an assault characterized by him starting the fight. The fight started with the invitation.
>
> . . . .
>
> *There's no lesser includeds or anything like that. It's not like you find him guilty if you think he entered unlawfully, if he didn't assault*. This was a mutual combat, mutual fight, which I submit that's what the evidence shows, we don't know who started this thing, but I submit to you that if that's what this was, then that's the end of it, he's not guilty. Whether you reject the invitation or the otherwise licensed or privileged to go in.

I RP (Jan. 26, 2009) at 110-11 (emphasis added).

D. Jury Question and Supplemental Instruction

During its deliberations, the jury sent the trial court the following question:

> In closing arguments, the [defense attorney] stated that the defendant had privilege to enter the victim[']s room because he was otherwise privileged. What constitutes otherwise privileged?
> Is it because he has keys?
> Or because he was provoked?

CP at 16.

Noting that such an instruction would be a comment on the evidence, the trial court

denied the State's request to instruct the jury that there was no evidence that Orozco-Salazar was privileged to enter Gonzales-Flores' room. Instead, the trial court concluded that whether being provoked or having a key qualifies as a privilege were issues of law and gave the jury the following supplemental instruction:

> 1. Possession of keys to a building entitles a person to enter that building only for purposes related to the reason that he has the keys.
> 2. Provocation does not "otherwise privilege" a non consensual entry into a building.

CP at 17. Defense counsel objected to this instruction, arguing, in part, that it was for the jury to decide whether Orozco-Salazar's possession of a key or Gonzales-Flores' provocation gave Orozco-Salazar permission to enter the room.

The jury found Orozco-Salazar guilty of first degree burglary. He appeals.

ANALYSIS

I. No Ineffective Assistance of Counsel

Orozco-Salazar first argues that defense counsel was ineffective in failing to request a lesser included offense instruction on first degree criminal trespass. This argument fails.

A. Standard of Review

To establish ineffective assistance of counsel, Orozco-Salazar must show deficient performance and resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 690-91, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Deficient performance occurs when counsel's performance falls 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). Prejudice occurs when there is a reasonable probability that, but for counsel's deficient performance, the outcome of the case would have

differed. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). We start with a strong presumption of counsel's effectiveness. *McFarland*, 127 Wn.2d at 335. Additionally, legitimate trial tactics fall outside the bounds of an ineffective assistance of counsel claim. *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996).

B. Reasonable Trial Tactic

To succeed on his ineffective assistance of counsel claim, Orozco-Salazar must show that defense counsel's failure to request the lesser included instruction was an unreasonable trial tactic given the facts of this case. *See State v. Pittman*, 134 Wn. App. 376, 387, 166 P.3d 720 (2006). We agree that Orozco-Salazar would have been entitled to an instruction on first degree criminal trespass if he had requested one.[5] But he does not show that defense counsel's failure to request the lesser included instruction was not a reasonable tactical decision.[6]

We generally examine three factors to determine if counsel's failure to request a lesser included instruction was a reasonable tactical decision: (1) The difference in maximum penalties between the greater and lesser offenses; (2) whether the defense's theory of the case is the same for both the greater and lesser offenses; and (3) the overall risk to the defendant, given the totality of the developments at trial. *See Pittman*, 134 Wn. App. at 387-88; *State v. Ward*, 125 Wn. App.

[5] The State does not dispute that Orozco-Salazar meets the legal prong of the *Workman* test. *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978). And we hold that because Orozco-Salazar testified that he did not intend to assault Gonzales-Flores when he entered the room, the evidence established the factual prong of the *Workman* test.

[6] "[T]he determination of whether an all or nothing strategy is objectively unreasonable is a highly fact specific inquiry." *State v. Hassan*, 151 Wn. App. 209, 218-20, 211 P.3d 441 (2009) (citing *State v. Ward*, 125 Wn. App. 243, 104 P.3d 670 (2004)).

243, 249-51, 104 P.3d 670 (2004). First, there was a significant difference in the penalties for each offense: [7] a 21- to 27-month standard range sentence for first degree burglary,[8] compared with no more than 12 months of confinement for first degree criminal trespass.[9] Second, Orozco-Salazar's defense—that he was "otherwise authorized" or invited to enter Gonzales-Flores' room—applied to both the burglary and the lesser trespass. Nevertheless, the third factor outweighs factors one and two.

As a matter of trial tactics, defense counsel could have reasonably determined that if he had requested the lesser included trespass instruction, the only chance of a complete acquittal would have been if the jury believed that Orozco-Salazar was somehow authorized or invited to enter Gonzales-Flores' bedroom. Given that Gonzales-Flores had locked himself in his bedroom and that Orozco-Salazar had broken down the door to gain access, it is highly unlikely that the jury would have found Orozco-Salazar's entry lawful and that it would have acquitted him of the lesser offense of criminal trespass.[10] But by relying on the greater burglary offense alone, defense

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[7] *See Pittman*, 134 Wn. App. at 388-89 (penalty for class C felony with standard range of nine to ten and a half months in prison was significantly higher than maximum penalty of 90 days in jail for misdemeanor offense).

[8] First degree burglary is a class A, felony, strike offense; Orozco-Salazar had an offender score of one. RCW 9.94A.030(29), (34)(a)(ii); RCW 9.94A.510; RCW 9.94A.515; RCW 9A.52.020(2).

[9] First degree criminal trespass is a gross misdemeanor. RCW 9.92.020; RCW 9A.52.070(2).

[10] We note that we might have differently analyzed the reasonableness of defense counsel's tactical decision (1) if Orozco-Salazar's defense strategy (that he had implied permission to enter Gonzales-Flores' bedroom and he either did not intend to assault Gonzales-Flores when he (Orozco-Salazar) entered the room or was invited to fight) had not comported with his trial testimony; or (2) if there had been strong evidence that he had committed only the lesser offense, as was the case in *State v. Breitung*, No. 38869-3, 2010 WL 1553572 (Wa. Ct. App. April 20, 2010). The State charged Breitung with second degree assault. Unlike here, Breitung testified

counsel was able to present two arguments that could have resulted in a complete acquittal: Orozco-Salazar's authorization to enter Gonzales-Flores' room and the lack of intent to assault him once inside. Although the authorization defense was likely to fail regardless of whether the jury considered the lesser or the greater offense, submitting only the burglary charge to the jury gave Orozco-Salazar another strategy for obtaining a complete acquittal.

Moreover, we cannot say that the jury would have been more likely to acquit Orozco-Salazar on the greater offense if it had had the option of convicting him on the lesser offense. There was substantial evidence that he intended to assault Gonzales-Flores on entering his room, and the assaultive nature of this offense was by far the most egregious part of the crime.[11] The

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that he had committed acts that clearly constituted the lesser included offense of fourth degree assault and if the jury believed Breitung's testimony, it was unlikely it would have convicted him of the greater offense. Under these facts, we held that trial counsel's failure to request an instruction on this lesser offense was not a reasonable tactical decision, and we reversed based on ineffective assistance of counsel.

Here, in contrast, there was not strong evidence that Orozco-Salazar committed only the lesser offense of trespass, even viewing the evidence in a light most favorable to the defendant. *Pittman*, 134 Wn. App. at 385-386. And, under the facts of this case, even if the jury determined that Orozco-Salazar had unlawfully entered the victim's bedroom, it was highly unlikely that the jury would have believed that Orozco-Salazar did not intend to assault the victim once inside and, instead, that Orozco-Salazar had committed only a trespass. In other words, unlike in *Breitung*, trial counsel's strategy here—to adhere to a consistent defense strategy that gave the jury two ways to reject the charged burglary and not to request a lesser included trespass instruction—was reasonable.

[11] *See State v. Grier*, 150 Wn. App. 619, 645, 208 P.3d 1221 (2009*), review granted*, 167 Wn.2d 1017 (2010) (even if jury found culpable behavior, it would have option of acquittal on second degree murder charge only if not offered the option to convict on first or second degree manslaughter charges); *cf. Pittman*, 134 Wn. App. at 390 (holding that failure to request lesser included attempted first degree criminal trespass instruction and, instead, argue that the State had failed to carry its burden on an attempted residential burglary trial was unreasonable trial tactic when the evidence of the lesser offense was strong and the evidence of the greater offense was weak, concluding that there was a reasonable likelihood that the jury would have convicted defendant of lesser offense if it had been given the option).

jury is presumed to follow the court's instructions,[12] including (1) the court's preliminary instruction requiring the jury to find that the State proved each element of the crime beyond a reasonable doubt, and (2) the "to convict" instruction.[13] Therefore, if the jury had found that Orozco-Salazar did not intend to assault Gonzales-Flores when he (Orozco-Salazar) entered the bedroom, it is likely that the jury would have acquitted Orozco-Salazar of first degree burglary; thus, in the absence of an alternative lesser charge, he would have faced no conviction. This scenario is consistent with defense counsel's closing argument, in which he emphasized that the jury was required to *acquit* Orozco-Salazar if it believed Orozco-Salazar's testimony that he did not intend to assault Gonzales-Flores when he entered Gonzales-Flores' room or if it believed that Orozco-Salazar was somehow authorized or invited to enter Gonzales-Flores' room. Furthermore, defense counsel emphasized that the jury was not being asked to find Orozco-Salazar guilty of any lesser offense.

Orozco-Salazar has failed to overcome the strong presumption that defense counsel's tactical decision was reasonable under the facts of this case. Accordingly, his ineffective assistance of counsel argument fails.

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[12] *State v. Foster*, 135 Wn.2d 441, 472, 957 P.2d 712 (1998).

[13] Jury instruction 3 stated in part:

> The defendant has entered a plea of not guilty. That plea puts in issue *every element* of the crime charged. The State is the plaintiff and has the burden of proving *each element* of the crime beyond a reasonable doubt.

CP at 8 (emphasis added). The "to convict" instruction also stated that State had to prove *each element* of the crime, including that Orozco-Salazar entered or remained "with intent to commit a crime against a person therein," and that, while in the room, he "assaulted a person." CP at 10.

II. Supplemental Instruction

Orozco-Salazar also challenges the following portion of the trial court's supplemental instruction in response to the jury's question during deliberations: "Provocation does not 'otherwise privilege' a non consensual entry into a building." CP at 17. He argues that, although an accurate statement of the law, this instruction was a comment on the evidence because it effectively directed the jury to reject his argument that Gonzales-Flores' actions amounted to an implied invitation to enter Gonzales-Flores' room. This argument also fails.

The Washington State Constitution prohibits trial courts from commenting on matters of fact and limits the court's comments to those that "declare the law." Const. art. IV, § 16. "An impermissible comment is one which conveys to the jury a judge's personal attitudes toward the merits of the case or allows the jury to infer from what the judge said or did not say that the judge personally believed the testimony in question." *State v. Swan*, 114 Wn.2d 613, 657, 790 P.2d 610 (1990), *cert. denied*, 498 U.S. 1046 (1991).[14] Whether an instruction is an impermissible comment on the evidence depends on the facts and circumstances of the case. *State v. Jackman*, 125 Wn. App. 552, 558, 104 P.3d 686 (2004), *aff'd*, 156 Wn.2d 736, 132 P.3d 136 (2006).

[14] *See also State v. Lane*, 125 Wn.2d 825, 838, 889 P.2d 929 (1995) ("The touchstone of error in a trial court's comment on the evidence is whether the feeling of the trial court as to the truth value of the testimony of a witness has been communicated to the jury.").

B. No Comment on the Evidence

The trial court's supplemental instruction merely conveyed the law;[15] it did not convey the court's attitudes toward the merits of the case. It was not improper that the supplemental instruction may have deterred the jury from finding that Orozco-Salazar was not "otherwise privileged" to enter Gonzales-Flores' room if Gonzales-Flores had *provoked* Orozco-Salazar into doing so. But the instruction did not prevent Orozco-Salazar from arguing that Gonzales-Flores' actions amounted to more than provocation and Gonzales-Flores' actions were sufficient to establish an implied *invitation* to enter the room, at least within their specific community.[16] Thus, the supplemental instruction did not prompt the jury to infer that Orozco-Salazar's implied invitation argument had no merit. We hold that the trial court did not impermissibly comment on

[15] Citing *State v. Woldegiorgis*, 53 Wn. App. 92, 765 P.2d 920 (1988), *review denied*, 112 Wn.2d 1012 (1989), Orozco-Salazar correctly argues that a statement of the law can amount to a comment on the evidence. Such was not the case here.

He also relies on *State v. Budinich*, 17 Wn. App. 336, 337, 562 P.2d 1006 (1977), *review denied*, 89 Wn.2d 1022 (1978), which involved an instruction that was not an accurate statement of the law in the context of instructing the jury, even though it was an accurate statement of the law for purposes of evaluating the sufficiency of evidence. Here, Orozco-Salazar does not argue that the instruction was not an accurate statement of the law for purposes of instructing the jury.

[16] Both the jury question and the trial court's supplemental instruction addressed only the "otherwise privileged" prong. Thus, it does not appear that the jury believed that it could not find that Orozco-Salazar was lawfully in the room based on implied consent or an implied invitation if it found that Gonzales-Flores' actions went beyond mere provocation and amounted to implied consent or an implied invitation.

the facts of the case and did not err in giving this instruction.

We affirm.

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

Hunt, J.

We concur:

Van Deren, C.J.

Penoyar, J.