No. SC92615

IN THE

Supreme Court of Missouri

DAVID C. MCNEAL,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

Appeal from the St. Louis City Circuit Court
Twenty-second Judicial Circuit
The Honorable Michael Mullen, Judge

RESPONDENT'S SUBSTITUTE BRIEF

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STATEMENT OF FACTS

Mr. McNeal appeals from the denial of his Rule 29.15 motion, in which he alleged that trial counsel was ineffective for failing to request an instruction for the lesser included offense of trespassing in the first degree (PCR L.F. 14). This claim was denied without an evidentiary hearing.

* * *

A jury found Mr. McNeal guilty of burglary in the second degree, § 569.170, RSMo 2000, and stealing, § 570.030, RSMo 2000. *State v. McNeal*, 292 S.W.3d 609 (Mo.App. E.D. 2009) (per curiam order). The trial court sentenced Mr. McNeal, as a persistent offender, to consecutive terms of ten years and six months (Sent.Tr. 7-8). Viewed favorably to the jury's verdict, the facts of Mr. McNeal's crimes were presented at trial, as follows:

On May 8, 2008, at about 1:30 p.m., the victim, Matthew Harrison, and his co-worker, took a break from their work installing floors at the apartment complex at 4720 S. Broadway in St. Louis (Tr. 124-125). They left the apartment and closed the door, but they left the door unlocked (Tr. 126). As they headed toward the elevator, Mr. McNeal tried to stop them to speak with them (Tr. 126). Mr. McNeal followed them down the hallway to the elevator (State's Ex. 7).

After waiting in front of the elevator for a few minutes, Mr. McNeal walked slowly back to the apartment (State's Ex. 7). He knocked on the door;

when no one answered, he entered (Tr. 234). He exited a few minutes later and dashed toward the elevators (State's Ex 7).

About five minutes later, the victim and his co-worker returned to the apartment and resumed working (Tr. 127-128). About ten minutes later the victim noticed that his drill was missing (Tr. 128). He and his co-worker went down to the apartment manager's office and called the police (Tr. 128).

When the police arrived, the apartment manager showed them the surveillance tape from the floor where the victim had been working (Tr. 129, 146-147). The officers then left the apartment building to look for Mr. McNeal (Tr. 130, 147). They found him at a bus stop about a half a block away and brought him back to the manager's office (Tr. 147-148). The victim identified Mr. McNeal (Tr. 169).

After identifying Mr. McNeal, the victim spoke with maintenance employees of the apartment complex (Tr. 131-132, 172). He told them that if one of them found his drill, he would give that person a twenty-dollar reward (Tr. 132). Mr. McNeal responded that he could tell the victim where the drill was for twenty dollars if the police would unlock his handcuffs (Tr. 132).

Mr. McNeal went to trial in September, 2008 (Tr. 5). Mr. McNeal testified and said that he was at the apartment complex that afternoon to visit his son's mother, who lived next door to the apartment where the victim was working (Tr. 227). He stated that he was acquainted with the woman

who used to live in the apartment where the victim was working (Tr. 231-232). He said that he saw the victim and his co-worker come out of the apartment, and he wanted to speak with them to see if his acquaintance was busy (Tr. 231). He stated that he wanted to talk to his acquaintance about ten dollars that she owed him for cigarettes (Tr. 232-233). He testified that after speaking with the victim, he went back to the apartment and knocked on the door (Tr. 234). He said that he opened the door when he did not get any response and was surprised to find it empty (Tr. 234). He said that he saw the drill and decided to take it (Tr. 235). He said that he ran because he had heard the elevator ding and wanted to catch it (Tr. 235-236). He claimed that he did not have any burglarious intent, but he admitted that he was not on the lease for the apartment and that he did not have a key for the apartment (Tr. 235, 248).

On direct appeal, the Court of Appeals affirmed Mr. McNeal's convictions, holding that the evidence was sufficient to support his convictions for burglary and stealing. *State v. McNeal*, 292 S.W.3d at 609-610. The Court of Appeals issued its mandate on October 19, 2009.

Thereafter, on October 26, 2009, Mr. McNeal filed a *pro se* motion pursuant to Rule 29.15 (PCR L.F. 4). On May 13, 2010, Mr. McNeal filed an amended motion, alleging that trial counsel was ineffective for failing to request an instruction for the lesser offense of trespassing in the first degree

(PCR L.F. 14).

On April 13, 2011, the motion court denied Mr. McNeal's motion without an evidentiary hearing (PCR L.F. 36-39). The motion court cited *State v. Hinsa*, 976 S.W.2d 69 (Mo.App. S.D. 1998), for the proposition that "[W]here the evidence shows the accused entered a building and committed a crime therein, there is no ambiguity in his purpose for entering, hence there is no basis for submitting trespass in the first degree" (PCR L.F. 38). The motion court outlined Mr. McNeal's testimony and concluded that it was not "unreasonable for counsel to forego requesting an instruction on trespass" (PCR L.F. 38-39). The motion court essentially concluded that if Mr. McNeal believed that he was entering to see "Tracy" (as he claimed at trial), then his testimony did not show that he knowingly entered unlawfully, *i.e.*, that Mr. McNeal was not guilty of trespassing (PCR L.F. 39). The motion court further concluded that if Mr. McNeal entered unlawfully, then there was no basis to acquit him of burglary because "Unlawfully entering an apartment that clearly was no longer occupied by Tracy could reasonably have been only for the purpose of committing a crime therein" (PCR L.F. 39).

Mr. McNeal appealed (PCR L.F. 41), and the Court of Appeals affirmed the denial of Mr. McNeal's post-conviction motion. This Court granted Mr. McNeal's application for transfer.

ARGUMENT

I.

The motion court did not clearly err in denying Mr. McNeal's claim that trial counsel was ineffective for failing to request an instruction for the lesser-included offense of trespassing in the first degree.

Mr. McNeal asserts that his trial counsel was ineffective for failing to request an instruction for the lesser-included offense of trespassing in the first degree (App.Sub.Br. 17). He asserts that counsel had no strategic reason for forgoing the instruction, and that the instruction was supported by the evidence (App.Sub.Br. 17). He asserts further that, "[b]ut for counsel's failure, there is a reasonable probability that jurors would not have convicted Mr. McNeal of burglary in the second degree, and would have convicted him of trespass in the first degree, particularly since jurors expressed doubt about when—whether before or after he entered the apartment—Mr. McNeal had formed an intent to commit a crime" (App.Sub.Br. 17).

A. The standard of review

"Appellate review of the denial of a post-conviction motion is limited to a determination of whether the findings of fact and conclusions of law of the motion court are clearly erroneous." *Moss v. State*, 10 S.W.3d 510, 511 (Mo. banc 2000). "Findings and conclusions are clearly erroneous if, after a review

of the entire record, the court is left with the definite and firm impression that a mistake has been made." *Id.*

B. Mr. McNeal failed to allege facts warranting an evidentiary hearing on his claim of ineffective assistance of counsel

To be entitled to an evidentiary hearing, a movant must allege facts, not conclusions, that would warrant relief if true. *Barnett v. State*, 103 S.W.3d 765, 769 (Mo. banc 2003). The alleged facts must raise matters not refuted by the record and files in the case, and the matters complained of must have resulted in prejudice to the movant. *Id.*

To prevail on a claim of ineffective assistance of counsel, the movant must first "show that counsel's representation fell below an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. 668, 688 (1984). The movant must also demonstrate prejudice—that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. "When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Id.* at 695.

1. The motion court's findings and conclusions

In denying Mr. McNeal's claim, the motion court concluded that under the facts of this case it would not have been unreasonable for counsel to forgo

asking for the less-included offense instruction (PCR L.F. 39). The motion court set forth its reasoning as follows:

> "[W]here the evidence shows the accused entered a building and committed a crime therein, there is no ambiguity in his purpose for entering, hence there is no basis for submitting trespass in the first degree." State v. Hinsa, 976 S.W.2d 69, 73 (Mo.App. 1998).
>
> Movant testified at trial that he went to visit Arlene Sanders, his son's mother, at the Riverbend Apartments. He said that when he left he was going to go next door to apartment 510 to see a lady named Tracy who he claimed owed him $10. A security video that was played at the trial showed two men come out of apartment 510. Movant followed them to the elevator, and after they got on he stood by the elevator for a minute and then he went back to apartment 510. He knocked on the door, heard a radio playing, and he opened the door, "but to my surprise it's empty." He then went into the empty apartment and took a drill. He testified that he went to the apartment looking for Tracy, but it was apparent that the apartment was empty as soon as he opened the door. He stated that he did not go over to the apartment to steal anything, that he went looking for Tracy. He

took the drill and went down the street and sold it to a mechanic.

Under the facts of this case, it could not be unreasonable for counsel to forego requesting an instruction on trespass. Once the door was opened it was apparent the apartment was empty and there could have been no purpose at that point for movant to enter the apartment. Movant's defense was that he did not enter the apartment unlawfully because he thought Tracy lived there and he was in shock when he found the apartment vacant. This defense, if believed, would preclude a finding that he was guilty of trespass first degree, that he knowingly entered the apartment unlawfully. Unlawfully entering an apartment that clearly was no longer occupied by Tracy could reasonably have been only for the purpose of committing a crime therein. Therefore, movant's first claim is without merit.

(PCR L.F. 38-39). The motion court did not clearly err in denying Mr. McNeal's claim, and its judgment should be affirmed if "it reached the right result, even if for the wrong reason." *See Kubley v. Brooks*, 141 S.W.3d 21, 27 n. 5 (Mo. banc 2004).

2. Mr. McNeal cannot demonstrate *Strickland* prejudice

In *Strickland*, the Court observed that "a court need not determine whether counsel's performance was deficient before examining the prejudice

suffered by the defendant as a result of the alleged deficiencies." 466 U.S. at 697. "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." *Id.* Here, the Court should conclude that Mr. McNeal failed to allege facts showing prejudice.

Assuming for the moment that Mr. McNeal is correct in his assertion that the evidence would have obligated the trial court to submit the lesser-included offense instruction, *i.e.*, that Mr. McNeal's disclaimer of the requisite intent was sufficient to acquit him of burglary, Mr. McNeal's claim is fatally flawed because he cannot demonstrate *Strickland* prejudice. Mr. McNeal asserts that "[b]ut for counsel's failure, there is a reasonable probability that jurors would not have convicted [him] of burglary in the second degree, and would have convicted him of trespass in the first degree, particularly since jurors expressed doubt about when—whether before or after he entered the apartment—Mr. McNeal had formed an intent to commit a crime" (App.Sub.Br. 17).

But this speculative argument—that the jury would have made some other factual finding simply because another instruction was submitted to it—cannot support a claim of *Strickland* prejudice. Under *Strickland*, there is a presumption that the jury will act conscientiously and according to law:

> In making the determination whether the specified errors

> resulted in the required prejudice, a court should presume, absent challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury acted according to law. An assessment of the likelihood of a result more favorable to the defendant must exclude the possibility of arbitrariness, whimsy, caprice, "nullification," and the like. A defendant has no entitlement to the luck of a lawless decisionmaker, even if a lawless decision cannot be reviewed. The assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision. It should not depend on the idiosyncracies of the particular decisionmaker, such as unusual propensities toward harshness or leniency.

Strickland, 466 U.S. at 694-695; *cf. generally State v. Griffin*, 756 S.W.2d 475, 488 (Mo. banc 1988) ("It is presumed that juries follow their instructions.").

Here, the record shows that the jury found, beyond a reasonable doubt, that Mr. McNeal entered the apartment "for the purpose of committing the crime of stealing therein" (L.F. 65). The plain language of *Strickland* precludes Mr. McNeal from now speculating, for purposes of proving prejudice, that the jury made this finding by some impermissible means. *Strickland*, 466 U.S. at 695. Thus, absent the possibility of nullification, there

is no "reasonable probability" that the jury would have come to a different factual conclusion if a lesser-included-offense instruction for trespassing had been submitted.

In a Florida Supreme Court opinion, *Sanders v. State*, 946 So.2d 953 (Fla. 2006), the court held that "under *Strickland*, a defendant cannot, as a matter of law, demonstrate prejudice by relying on the possibility of a jury pardon, which by definition assumes that the jury would have disregarded the law, the trial court's instructions, and the evidence presented." *Id*. at 956. The Florida Supreme Court thoroughly addressed the applicability of *Strickland* to a claim of ineffective assistance for failing to request a lesser-offense instruction, and, recognizing that such a claim is essentially an assertion that the jury was denied an opportunity to grant the defendant mercy or leniency, the Court noted that "the jury pardon remains a device without legal foundation." *Id*. at 958. To the extent that the defendant in *Sanders* was asserting that the jury in his case was denied the opportunity to render such a jury pardon, the court emphasized the disfavor in which jury pardons are held:

> [T]he jury must anchor its verdict in, and only in, the applicable law and the evidence presented. Nothing else may influence its decision. When a jury convicts a defendant of a criminal offense, it has decided that the evidence demonstrated beyond a

> reasonable doubt that the defendant committed the crime charged. To assume that, given the choice, the jury would now acquit the defendant of the same crime of which it convicted him, and instead convict of a lesser offense, is to assume that the jury would disregard its oath and the trial court's instructions.

Id.; *see generally State v. Lane*, 629 S.W.2d 343, 346 (Mo. banc 1982) (defendant has no right to jury nullification argument).

In sum, in *Sanders*, the court concluded that counsel's failure to request a lesser-included-offense instruction could not serve as the basis for a finding of *Strickland* prejudice:

> . . . any finding of prejudice resulting from defense counsel's failure to request an instruction on lesser-included offenses necessarily would be based on a faulty premise: that a reasonable probability exists that, if given the choice, a jury would violate its oath, disregard the law, and ignore the trial court's instructions. As did the district court . . . , we, too, have difficulty "accepting the proposition that there is even a substantial possibility that a jury which has found every element of an offense proved beyond a reasonable doubt, would have, given the opportunity, ignored its own findings of fact and the trial court's instruction on the law and found a defendant guilty of only a lesser included offense."

Sanders, 946 So.2d at 960 (internal citations omitted).

Similarly, in *Johnson v. Nagle*, 58 F.Supp.2d 1303 (N.D. Ala. 1999), the defendant was convicted of capital murder, but claimed that his attorney had been ineffective in failing to request an instruction on the lesser-included offense of felony murder. *Id.* at 1347. The court examined the application of *Strickland*'s prejudice analysis; pointed out that it could see "no logical basis to conclude that an additional alternative charge would have led the jury down a different path;" and concluded that, in applying *Strickland*'s presumptions, "the court must conclude that the addition of a new lesser included charge would not have changed a rational jury's decision." *Id.* at 1347-1348. This analysis was upheld and adopted by the United States Court of Appeals for the Eleventh Circuit in *Johnson v. Alabama*, 256 F.3d 1156, 1183 (11th Cir. 2001).

In Missouri, likewise, the Court of Appeals has recognized that *Strickland* prejudice should not be premised upon the possibility that the jury, if given another option, might have convicted the defendant of a lesser offense. In *Hendrix v. State*, 369 S.W.3d 93, 100 (Mo.App. W.D. 2012), the Court recognized that the defendant's claim necessarily rested on the assertion "that the jury's conviction was erroneous in that it would have convicted him of a lesser offense had it been given the instruction." The Court refused to entertain such an argument because the Court recognized that

under *Strickland*, "[p]rejudice is determined with the underlying assumption that the jury 'reasonably, conscientiously, and impartially' applied the law." *Id*. In short, the Court concluded that the defendant's claim could not support a claim of prejudice. *Id*. ("Under the *Strickland* decision, we must find that the jury followed the law in reaching its decision to find Hendrix guilty of assault in the first degree. Thus, no prejudice can be established [from counsel's failing to request a lesser-included offense].").

Mr. McNeal recognizes these cases, but he asserts that their reading of *Strickland* is "misguided or fastidious" (App.Sub.Br. 39). He also points out that, on direct appeal, Courts are willing to indulge the possibility that the absence of a lesser-offense instruction is prejudicial (App.Sub.Br. 38-39). But the standard for prejudice on direct appeal is distinct from the standard for *Strickland* prejudice. *Deck v State*, 68 S.W.3d 418, 427-428 (Mo. banc 2002). And, as set forth above, the *Strickland* test has its own guidelines for determining prejudice—there must be a reasonable probability of a different result, and speculation and jury nullification must be cast aside.

In distinguishing the *Sanders* case, Mr. McNeal points out that Florida law is different from Missouri law because, in Florida, the jury can consider a lesser offense only if it decides that the greater offense has not been proved beyond a reasonable doubt (App.Sub.Br. 41). He points out that, in Missouri, the instructions "do not require that the defendant first be acquitted of the

greater offense before the jury can consider the lesser offense" (App.Sub.Br. 41, citing *Tisius v. State*, 183 S.W.3d 207, 217 (Mo. banc 2006)). He points out, for example, that a deadlocked jury in Missouri can move on and consider lesser offenses (App.Sub.Br. 42-43). He also asserts that the jury's verdict should not be viewed "as the only verdict the jurors would have reached" because such an approach disregards "the process of decision" (App.Sub.Br. 43). He asserts that such an approach "does not recognize that jurors may, in the course of their deliberations, entertain doubt with respect to some or all of the elements of the State's case" (App.Sub.Br. 43).

But the difference between Florida law and Missouri law is of no consequence, for while jurors may have doubts during jury deliberations, and while the jury can consider lesser offenses that are submitted to it, it must still be presumed that the jury's final verdict was rendered according to the law, and that the jury found each element beyond a reasonable doubt. Thus, even if the jury had been given another option to consider, it should be presumed that the jury would have resolved the factual questions in the same way and convicted the defendant of the same offense. Instructions are not evidence, and jurors are instructed that if they find the elements of an offense beyond a reasonable doubt they "will" find the defendant guilty of that offense (*see* L.F. 65). It is mere speculation to assume that an additional instruction would cause any juror to resolve a factual question differently.

Indeed, Mr. McNeal's case illustrates that it is the evidence—not the presence of another instruction—that gives rise to questions for the jury to resolve. As Mr. McNeal points out, the jurors in his case sent out a note asking about "intent" for burglary ("can the intent to commit the crime occur after he opens the door for burglary? Must it occur prior to opening/touching the door?") (App.Sub.Br. 12, citing L.F. 94; Tr. 272). The jury did not need another instruction to consider whether Mr. McNeal had the requisite intent when he entered the apartment, and it must be presumed that, if the jurors had concluded that he did not have the requisite intent, the jurors would not have found him guilty of burglary.

Mr. McNeal cites *State v. Patterson*, 110 S.W.3d 896, 902-907 (Mo.App. W.D. 2003), where the Court concluded (after an evidentiary hearing) that counsel's error in submitting improper instructions was prejudicial. But to the extent that *Patterson* held that *Strickland* prejudice can be based upon counsel's failing to submit a proper lesser-offense instruction, respondent submits that the case should not be followed.

In *Patterson*, in determining whether there was *Strickland* prejudice from counsel's error in failing to submit a proper lesser-offense instruction, the Court held that there was a reasonable probability of a different result "because the evidence [supporting the greater offense] was not overwhelming." *Id*. at 907. After reviewing the evidence, the Court stated:

> Although a reasonable person could believe from this evidence that he had his hand in his pocket intending that the victims think he had a weapon, his intent is a question of fact for the jury to determine. The evidence would also support a finding by the jury to find that he did not intend for the victims to believe he had a weapon.

Id. But there is a fundamental problem with this analysis. In a post-conviction proceeding, the jury's fact finding has already been completed, and the jury has made its findings beyond a reasonable doubt. And, as set forth above, under *Strickland* it must be presumed that the jury made its factual findings in accordance with the appropriate governing standards.

Mr. McNeal suggests that the Court in *Johnson v. Alabama* followed a course similar to the decision in *Patterson* (App.Sub.Br. 46). But he is incorrect. In *Johnson v. Alabama*, the United States Court of Appeals for the Eleventh Circuit expressly adopted the lower court's rationale that there could be no *Strickland* prejudice. 256 F.3d at 1181. The Court explained:

> Like the district court, we can find no logical basis to conclude that an additional alternative charge would have led a rational jury down a different path. The jury already was presented with non-capital alternatives (intentional murder and robbery) and still found Johnson guilty of capital murder. A felony murder

> instruction would not have changed the standard for a conviction on capital murder, and so for an objective and rational jury—and we must presume this was such a jury—an instruction on that offense should not have changed the outcome. [ ] Johnson's belief that the jury might have doubted the evidence of his intent to kill, but then nevertheless chosen to convict him for capital murder because it thought the only alternative was robbery and that offense would be too minor, is pure speculation, and highly strained speculation at that.

Id. at 1183. It was only after making these observations that the Court also concluded that, based on the evidence, there was "little evidentiary foundation for Johnson's belief that the jury in his case might have been inclined to convict for felony murder in lieu of the other offenses." *Id*.

To be sure, there are federal cases that have found prejudice from counsel's failing to request a lesser offense. In *Breakiron v. Horn*, 642 F.3d 126, 138 (3rd Cir. 2011), for example, the United States Court of Appeals for the Third Circuit stated that a defendant could show prejudice from counsel's failing to submit a lesser-offense instruction. The Court found that the defendant could be prejudiced because absent a third option—*i.e.*, an option somewhere between conviction of the greater offense and outright acquittal—there is a "substantial risk" that the jury will convict the defendant (even if it

is not convinced beyond a reasonable doubt) to avoid an outright acquittal. *Id.* at 139. The Court stated that the "problem" with concluding that there can be no prejudice is "that it rests solely on the jury's duty ' "as a theoretical matter" ' to acquit if it does not find every element of a crime and does not acknowledge the ' "substantial risk that the jury's practice will diverge from theory" ' when it is not presented with the option of convicting of a lesser offense instead of acquitting outright." *Id.* (citing *Beck v. Alabama*, 447 U.S. 625, 634 (1980)).

But this analysis—*Beck*'s direct appeal analysis—cannot be imported into *Strickland* because it directly conflicts with *Strickland*'s admonition that it must be presumed that the jury abides by its duty in reaching its verdict. In short, under *Strickland*, it is not mere "theory" that the jury will acquit if it does not find every element beyond a reasonable doubt. Under *Strickland*, it must be presumed that the jury will acquit if it is not convinced of every element beyond a reasonable doubt.

Mr. McNeal suggests that if his jurors had been given a lesser offense to consider, it might have led them down a "different path" when they had doubts about the greater offense (App.Sub.Br. 46-47, citing *Bostwick v. Coursey*, 287 P.3d 1168 (Or. App. 2012)). He suggests that the jurors might then have found the elements of the lesser offense, truncated their deliberations, and announced a verdict on the lesser offense (App.Sub.Br. 47).

These are, however, only speculative possibilities, and they do not rise to the level of a reasonable probability. Moreover, the Court should not speculate that the jurors would have truncated their deliberations and simply found the defendant guilty of a lesser offense without resolving their questions related to the greater offense.

In short, the inclusion of an additional instruction would not have altered the evidentiary picture presented to the jury, and, accordingly, it cannot be said that there is a reasonable probability that the jury would have reached a different factual conclusion if a trespassing instruction had been submitted to it. Because the jury is presumed to follow the instructions and to serve conscientiously, it cannot be said that the jury would have nullified its factual findings and found Mr. McNeal guilty of trespassing. This point should be denied.

3. The reasonableness of counsel's decision

With regard to *Strickland*'s first prong, Mr. McNeal asserts that the motion court clearly erred in concluding that counsel was not "unreasonable," and he asserts that it was clearly erroneous for the court to conclude that counsel had a trial strategy for refraining from requesting a trespassing instruction (App.Sub.Br. 23-24). Mr. McNeal correctly points out that, absent an evidentiary hearing, there is no express record of the strategic reasoning counsel employed (if any) in deciding not to request an instruction for the

lesser included offense of trespassing.

Ordinarily, it is presumed that counsel acted according to a reasonable strategy. Here, for instance, it is not difficult to surmise that counsel may have believed that Mr. McNeal was better off relying on an all-or-nothing defense. Counsel may have believed that because any conviction on the lesser offense was predicated upon the jury crediting Mr. McNeal's testimony, it was better to let the jury credit his testimony and simply acquit him of the greater offense rather than giving the jury a "middle ground" to convict. *See Oplinger v. State*, 350 S.W.3d 474, 478 (Mo.App. S.D. 2011) (in upholding the reasonableness of counsel's all-or-nothing defense, the Court stated: "The reasonableness of counsel's decision is particularly apparent here because the alternative strategy set forth by Oplinger [of submitting a lesser-included offense] would also have been dependent upon the jury believing Oplinger's testimony. Oplinger argues that the jury should have been given the opportunity to credit his testimony and find him guilty of only stealing. However, because this alternative strategy would have relied on the same premise as the strategy employed by counsel at trial, it merely would have given the jury a 'middle ground' to convict instead of acquit.").

Under the facts of this case, it seems probable that counsel opted to employ an all-or-nothing defense. But whether counsel employed such a strategy, or whether counsel had "no strategy or reason, other than

inadvertence," as alleged in Mr. McNeal's amended motion (PCR L.F. 28), is a question that could be definitively resolved at an evidentiary hearing.

But in concluding that trial counsel was not "unreasonable" (PCR L.F. 39), the motion court was not necessarily referring to a particular strategy that may have underlay the decision to refrain from requesting a lesser-offense instruction. Rather, it appears that the motion court was examining whether, under the facts of the case (*i.e.*, in light of the evidence presented), counsel's decision fell below an objective standard of reasonableness. For, if the evidence presented at trial would not have obligated the trial court to submit the lesser-included offense instruction, then it cannot be said that counsel's performance fell below an objective standard of reasonableness. *See McKee v. State*, 336 S.W.3d 151, 154 (Mo.App. E.D. 2011) ("a trial court has no obligation to instruct on a lesser-included offense unless a basis exists for acquitting the defendant of the greater offense charged, and convicting him of the lesser-included offense"). *See generally Hairston v. State*, 314 S.W.3d 356, 359 (Mo.App. S.D. 2010) ("Trial counsel does not provide ineffective assistance by failing to make a meritless objection.").

In other words, in some cases, counsel will reasonably decide not to request a lesser-included offense instruction (even if it is warranted by the evidence) because counsel has a particular, strategic reason for avoiding the instruction (*e.g.*, the all-or-nothing defense). In other cases, counsel will be

deemed not "unreasonable" for failing to request an instruction (even if there is no particular strategy apparent) because the evidence would not have compelled the trial court to give the lesser-included-offense instruction. *See Tabor v. State*, 344 S.W.3d 853, 860 (Mo.App. S.D. 2011) ("to establish a claim of ineffective assistance of counsel for failure to submit a lesser-included-offense instruction, Movant must demonstrate that 'the evidence would have required submission of a lesser[-]included[-]offense instruction had one been requested, that the decision not to request the instruction was not reasonable trial strategy, and that ... [M]ovant was thereby prejudiced.' ").

Here, in considering the latter category, the question is whether the evidence presented at trial would have compelled the trial court to submit the lesser-included offense of trespassing to the jury. "[A] trial court has no obligation to instruct on a lesser-included offense unless a basis exists for acquitting the defendant of the greater offense charged, and convicting him of the lesser-included offense." *McKee v. State*, 336 S.W.3d at 154.

At trial, Mr. McNeal testified that he knew a woman, Tracy, who lived in the apartment from which he stole the drill (Tr. 231). He testified that he went to her apartment to see if she had ten dollars that she owed him (Tr. 232-233). He testified that Tracy had purchased cigarettes from him about a month before, and that she still owed him ten dollars from that transaction (Tr. 233). He testified that he knocked on the door and heard a radio playing

inside the apartment (Tr. 234). He testified that he opened the door and saw that the apartment was "empty," that there "wasn't nothing there" (Tr. 234). He testified that he was surprised and "in shock," and that he entered the apartment and saw the radio (Tr. 235). He testified that he then stole the drill, but he denied that he had any burglarious intent in entering the apartment (Tr. 235). He reitereated that he "went looking for Tracy" (Tr. 235).

The motion court concluded, based on this testimony, that Mr. McNeal would not have been entitled to an instruction on the lesser-included offense of trespassing in part because Mr. McNeal's commission of a crime within the apartment that he had no other purpose for entering made plain that his purpose was, in fact, to commit a crime. The motion court did not clearly err.

In *State v. Hinsa*, a case cited by the motion court, the defendant argued similarly that he was entitled to a lesser-included-offense instruction for trespassing. *State v. Hinsa*, 976 S.W.2d 69, 73 (Mo.App. S.D. 1998). The defendant pointed out that the evidence showed that he told the police that he had stopped at an unoccupied house to use the bathroom and found the door unlocked. *Id.* at 72. The defendant pointed out further that there were no signs of forced entry, and he argued that these facts supported an inference that he lacked any intent to commit a crime when he entered the building. *Id.*

The Court of Appeals disagreed, holding that "where the evidence shows the accused entered a building and committed a crime therein, there is no ambiguity in his purpose for entering, hence there is no basis for submitting trespass in the first degree." *Id.* at 73. The court pointed out that the defendant had admitted to stealing items, and that the evidence showed that the defendant did not turn on the lights in the house, ostensibly to conceal his presence within. *Id.* The court, thus, concluded that there was no evidentiary basis for submitting the lesser-included offense. *Id.* at 74. (the evidentiary basis required by § 556.046.2 for instructing on a lesser included offense must be more than mere possibility and speculation").

In reaching that conclusion, the court in *Hinsa* discussed *State v. Eidson*, 701 S.W.2d 549 (Mo.App. E.D. 1985). In *Eidson*, the accused was convicted of burglary in the second degree, and he complained on appeal that the trial court erred in rejecting his tendered instruction for trespass in the first degree. *Id.* at 550. The evidence showed the accused broke into an unoccupied commercial building at night using a crowbar. *Id.* at 550-552. He was arrested by police while leaving the building. *Id.* at 551. Inside, the police found a walkie-talkie, gloves and a small flashlight. *Id.* Police found another man hiding in a nearby van. *Id.* In the van was a walkie-talkie matching the one inside the building. *Id.* The accused argued the trespass instruction was required because he told police, when arrested, that he was

thinking about renting or purchasing the building. *Id*.

The court rejected the defendant's claim, stating:

> The so-called purpose espoused by [the accused] of viewing the unit as potential rental property is inconsistent with his conduct . . . and inconsistent with an acquittal of burglary second degree and a conviction of trespass in the first degree . . . . [I]t could not be reasonably inferred that [the jury] could acquit the [accused] of burglary second degree and convict him of the lesser offense of trespass in the first degree.

Id. at 552.

Here, Mr. McNeal did not force entry into the apartment, but as in *Hinsa* (where there was also no forced entry), he took steps to ensure that he was alone when he entered the apartment. According to his own testimony, he walked to the elevator with the men who left the apartment, and, only after they left, did he enter the apartment (Tr. 234). Then, while he was in the apartment, he stole a drill (Tr. 235). He then left and immediately sold the drill (Tr. 236). He claimed at trial that he was there to look for Tracy, but that alleged purpose was inconsistent with his conduct of stealing the drill, especially where Mr. McNeal testified that he immediately realized that the apartment was empty and that Tracy had apparently moved away. In short, once he opened the door and saw the empty apartment, Mr. McNeal had no

legitimate reason to enter the apartment, and his commission of a crime inside the apartment removed any ambiguity about his purpose.

Mr. McNeal cites *State v. Moore*, 729 S.W.2d 239 (Mo.App. E.D. 1987), as analogous to his case (App.Sub.Br. 32). But *Moore* is distinguishable. In that case, the occupant of a house was in a bedroom when the accused appeared at the bedroom door. *Id*. (The accused had knocked at the front door and then entered the unlocked back door. *Id*.) After staring at the occupant, the accused fled. *Id*. There was no forced entry, nothing in the house was disturbed, there was evidence that the accused's car had become disabled near the house, and the accused had knocked on the front door before entering. *Id*. at 240.

Under those circumstances, the Court of Appeals concluded it was possible to infer that the accused entered the house to call for help or advise someone of his delay. *Id*. And, given that possibility, the court held the trial court erred in refusing the accused's requested instruction on trespass in the first degree. *Id*. at 241. The court observed that the evidence "cast substantial doubt" on the defendant's theory of mere trespass, but the court concluded that the defendant's intent could not be established as a matter of law. *Id*. The critical difference between *Moore* and Mr. McNeal's case, however, is that Mr. McNeal stole an item after he entered the unoccupied apartment. *See State v. Hinsa*, 976 S.W.2d at 73 (distinguishing *Moore* on this basis). The

motion court did not clearly err in concluding that Mr. McNeal's case was more closely analogous to *Hinsa*. This point should be denied.

CONCLUSION

The Court should affirm the denial of Mr. McNeal's Rule 29.15 motion.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify that the attached brief complies with Rule 84.06(b) and contains 6,781 words, excluding the cover, this certification, and the signature block, as counted by Microsoft Word; that the electronic copy of this brief was scanned for viruses and found to be virus free; and that notice of the filing of this brief was sent through the Missouri eFiling System this 17th day of December, 2012, to:

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