No. SC95666

IN THE

Supreme Court of Missouri

DAVID A. MCNEAL,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

Appeal from the St. Louis City Circuit Court
Twenty-second Judicial Circuit
The Honorable Michael K. 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 that the trial court submit an instruction for the included offense of trespassing in the first degree (2nd PCR L.F. 13). The motion court denied Mr. McNeal's motion after an evidentiary hearing (2nd PCR L.F. 37-41).

* * *

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 an 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 went 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 less than 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).

The case went to trial in September, 2008 (Tr. 5). Mr. McNeal testified 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 a woman (Tracy) 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 that he wanted to speak with them to see if Tracy was busy (Tr. 231). He wanted to talk to Tracy about ten dollars that she owed him for cigarettes he had sold to her (Tr. 232-233).

He said that after speaking with the victim, he went back to the apartment and knocked on the door (Tr. 234). He said that he had had "an acquaintance" with Tracy "since last year," and that he opened the door and said, "Hey, Tracy" (Tr. 234-235). He said that he was surprised to find that the apartment was empty (Tr. 234). He said that he stepped inside, saw the radio playing, and was "in shock" (Tr. 235).

He then admitted that he saw the drill and decided to steal it (Tr. 235). He said that he ran after taking the drill because he heard the elevator ding and wanted to catch it (Tr. 235-236). He claimed that he did not have any burglarious intent when he entered the apartment (Tr. 235).

On cross-examination, he stated that he had been in Tracy's apartment "plenty of times" (Tr. 247-248). He testified, "I knocked on the door, opened, 'Hey, Tracy,' but that's the relationship that we had" (Tr. 248). He stated 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 issued its mandate on October 19, 2009.

On October 26, 2009, Mr. McNeal timely filed a *pro se* post-conviction motion (PCR L.F. 4). On March 24, 2010, the motion court appointed the public defender to represent Mr. McNeal in his post-conviction case (PCR L.F. 11). On May 13, 2010, Mr. McNeal timely filed an amended motion, alleging that trial counsel was ineffective for failing to request an instruction for the included offense of trespassing in the first degree (2nd PCR L.F. 13).

The motion court initially denied Mr. McNeal's motion without an evidentiary hearing (PCR L.F. 36-39). On appeal, after transfer, this Court remanded the case for an evidentiary hearing. *McNeal v. State*, 412 S.W.3d 886, 893 (Mo. 2013). The Court held that Mr. McNeal's claim of ineffective assistance of counsel was not conclusively refuted by the record; thus, a hearing was required to ascertain whether counsel's performance fell below an objective standard of reasonableness and whether Mr. McNeal was prejudiced by counsel's alleged error. *Id*. at 891, 893.

After remand, the motion court held an evidentiary hearing (2nd PCR Tr. 1). Trial counsel and Mr. McNeal testified (2nd PCR Tr. 3, 19).

Counsel testified that the defense theory was that Mr. McNeal "did

steal a drill, but . . . that he had not committed the crime of burglary" (2nd PCR Tr. 5). Counsel testified that he did not request an instruction for trespass in the first degree because the defense theory was that Mr. McNeal did not commit a burglary, and it "[i]t seemed inconsistent to [him] at the time to be requesting that kind of an instruction because we were arguing that his entry in there was if not legitimate at least not within the intent" (2nd PCR Tr. 8). Counsel stated that "it didn't seem to me that it fit with the facts that we were trying to argue" (2nd PCR Tr. 8).

Counsel testified that he thought they "could have requested" the instruction, but he stated that he was "not sure" that "it would have made any difference in the verdict" (2nd PCR Tr. 9). Counsel testified that, at the time of trial, he thought a trespass instruction was inconsistent with his argument, and he stated, "I think that's why I wasn't inclined to ask for it" (2nd PCR Tr. 9). Counsel also stated that "there may have been some concern that Mr. McNeal would be upset by that sort of thing, too, because he seemed to have very definite ideas about what he wanted presented and so forth that he didn't bring that up" (2nd PCR Tr. 9-10). Counsel clarified that he was not relying on Mr. McNeal to raise the issue; rather, he stated, "I don't think I would have asked for it because of the reasons I've stated" (2nd PCR Tr. 10). When asked if he had always planned not to request a trespass instruction, or whether there was a "point in trial" when he decided not to request the

instruction, counsel stated, "I'm not sure it was that much of a conscious decision as much as just it didn't seem appropriate" (2nd PCR Tr. 11).

On cross-examination, counsel agreed that it can be "a legitimate trial strategy for a defense counsel not to seek a lesser included charge and instead just go for a straight acquittal" (2nd PCR Tr. 12). Counsel testified that in this case, the defense strategy was to get the jury to enter a verdict of "[n]ot guilty based on his not having the intent to steal and his entering the room, if not perfectly lawfully, at least not unlawfully" (2nd PCR Tr. 13). Counsel stated that a person cannot commit burglary if he or she enters lawfully, and he observed that "there wasn't any breaking and entering here so we had a shot at it" (2nd PCR Tr. 14). Counsel also observed that a person cannot commit trespass if he or she enters lawfully (2nd PCR Tr. 14). Counsel testified that, in his view, Mr. McNeal had not committed a trespass (2nd PCR Tr. 14). He agreed that, as a matter of trial strategy, he decided "to seek an acquittal on the burglary and not to submit a lesser included of the trespassing" (2nd PCR Tr. 14-15).

On re-direct examination, when asked, "why not give the jurors an option of finding him guilty of trespass?", counsel stated, "Well, you know, in hindsight maybe there is some ground to consider that" (2nd PCR Tr. 15). Counsel expressed concern however, that the instruction might not have been permitted by the court "in light of the facts of the case and what we were

arguing to the jury" (2nd PCR Tr. 15). When asked, "What would have been the harm had you requested a trespass instruction?", counsel stated, "Again, now this is one of those hindsight issues, I think" (2nd PCR Tr. 16-17). Counsel stated, "I'm not sure there would have been any harm, but it didn't – I'm not sure it would have done any good either" (2nd PCR Tr. 17). Counsel continued, "But it didn't fit the theory of the case, and I'm not sure the Judge would have allowed it" (2nd PCR Tr. 17). Counsel also stated that he thought "Mr. McNeal might have objected to it," but he admitted that his concern along those lines was "speculation" (2nd PCR Tr. 17).

Mr. McNeal testified that he told counsel before trial that if he was guilty of anything, "it's a trespass" (2nd PCR Tr. 20). He testified that, during plea negotiations, he told counsel he would not plead guilty to burglary (2nd PCR Tr. 20). He said that he told counsel, "If anything I'd take time served on the trespass, because that's all it is" (2nd PCR Tr. 20). Mr. McNeal testified that, at trial, he did not talk to counsel about requesting an instruction for trespass (2nd PCR Tr. 21).

Then, referring to the apartment he burgled, Mr. McNeal testified that he "wasn't supposed to have walked in that place" (2nd PCR Tr. 22). He said, "I mean, I didn't have no right to go in there, you know" (2nd PCR Tr. 22). He testified that if he had known he could have asked for a trespass instruction, he would have told counsel, "Hey, ask for that instruction" (2nd PCR Tr. 22).

On cross-examination, Mr. McNeal initially indicated that he "had that kind of relationship" that would permit him to walk into Tracy's apartment (2nd PCR Tr. 27). He then said that he could not "arbitrarily" enter her apartment (2nd PCR Tr. 27). He stated, "I mean, I didn't – to keep it real like you're trying to say, no, I didn't have a right to go in there; if that's what you're trying to say" (2nd PCR Tr. 27).

On September 2, 2014, the motion court denied Mr. McNeal's post-conviction motion (2nd PCR L.F. 37-41). The motion court observed that "[t]he decision whether to request a lesser-included offense instruction is a tactical decision" (2nd PCR L.F. 40). The motion court stated that "[w]here counsel makes an objectively reasonable decision not to request a lesser included offense instruction, there is no ineffective assistance of counsel" (2nd PCR L.FR. 40). The motion court concluded that "[t]he testimony of counsel at the evidentiary hearing indicated that counsel's decision was reasonable, and the facts of the case including movant's testimony support counsel's theory" (2nd PCR Tr. 41).

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 on the included offense of trespass in the first degree.

Mr. McNeal asserts that the motion court clearly erred in denying his claim that trial counsel was ineffective for failing to request an instruction for the included offense of trespass in the first degree (App.Sub.Br. 24). He asserts that "counsel offered no objectively reasonable strategic reason for failing to request the instruction," and he asserts that "had jurors been given the option to find trespass in the first degree there is a reasonable probability . . . that they would have so found" (App.Sub.Br. 24).

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. 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.*

"The movant has the burden of proving the movant's claims for relief by a preponderance of the evidence." Rule 29.15(*i*). "This Court defers to 'the

motion court's superior opportunity to judge the credibility of witnesses.' " *Davis v. State*, 486 S.W.3d 898, 905 (Mo. 2016) (citing *Barton v. State*, 432 S.W.3d 741, 760 (Mo. 2014)).

B. Mr. McNeal failed to prove that counsel was ineffective

To prevail on a claim of ineffective assistance of counsel, a movant must "show that counsel's representation fell below an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. 668, 688 (1984). In addition, the movant must "affirmatively prove prejudice." *Id*. at 693.

To prove prejudice, "[i]t is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." *Id*. Rather, the movant "must show 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.

1. The motion court's findings and conclusions

In denying Mr. McNeal's claim, the motion court observed that "[t]he decision whether to request a lesser-included offense instruction is a tactical decision" (2nd PCR L.F. 40). The motion court stated that "[w]here counsel makes an objectively reasonable decision not to request a lesser included offense instruction, there is no ineffective assistance of counsel" (2nd PCR L.FR. 40). The motion court concluded that "[t]he testimony of counsel at the evidentiary hearing indicated that counsel's decision was reasonable, and the

facts of the case including movant's testimony support counsel's theory" (2nd PCR Tr. 41). The motion court did not clearly err.

2. Counsel's all-or-nothing strategy as to the burglary count was objectively reasonable under the facts of the case

In *Strickland*, the Court recognized that "[j]udicial scrutiny of counsel's performance must be highly deferential." 466 U.S. at 690. The Court continued, "It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." *Id*.

The Court also made plain that "mechanical rules" are not appropriate in evaluating counsel's performance. *Id*. at 696. The Court stated, "No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant." *Id*. at 688-689. To the contrary, the Court observed, "Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions." *Id*. at 689. Moreover, the Court made plain that there is not one correct strategy in any given case; rather, "[t]here are countless ways to provide effective assistance in any given case," and "[e]ven the best criminal

defense attorneys would not defend a particular client in the same way." *Id*.

Here, at the evidentiary hearing, trial counsel testified that the defense theory was that Mr. McNeal "did steal a drill, but . . . that he had not committed the crime of burglary" (2nd PCR Tr. 5). Counsel testified that he did not request an instruction for trespass in the first degree because the defense theory was that Mr. McNeal did not commit a burglary, and "[i]t seemed inconsistent to [him] at the time to be requesting that kind of an instruction because we were arguing that his entry in there was if not legitimate at least not within the intent" (2nd PCR Tr. 8). Counsel stated that "it didn't seem to me that it fit with the facts that we were trying to argue" (2nd PCR Tr. 8). Counsel testified that he thought they "could have requested" the instruction, but he stated that he was "not sure" that "it would have made any difference in the verdict" (2nd PCR Tr. 9). Counsel testified that, at the time of trial, he thought a trespass instruction was inconsistent with his argument, and he stated, "I think that's why I wasn't inclined to ask for it" (2nd PCR Tr. 9).

On cross-examination, counsel agreed that it can be "a legitimate trial strategy for a defense counsel not to seek a lesser included charge and instead just go for a straight acquittal" (2nd PCR Tr. 12). Counsel testified that in this case, the defense strategy was to get the jury to enter a verdict of "[n]ot guilty based on his not having the intent to steal and his entering the

room, if not perfectly lawfully, at least not unlawfully" (2nd PCR Tr. 13). Counsel stated that a person cannot commit burglary if he or she enters lawfully, and he observed that "there wasn't any breaking and entering here so we had a shot at it" (2nd PCR Tr. 14). Counsel also observed that a person cannot commit trespass if he or she enters lawfully (2nd PCR Tr. 14). Counsel testified that, in his view, Mr. McNeal had not committed a trespass (2nd PCR Tr. 14). He agreed that, as a matter of trial strategy, he decided "to seek an acquittal on the burglary and not to submit a lesser included of the trespassing" (2nd PCR Tr. 14-15).

In light of this testimony, the motion court did not clearly err in concluding that trial counsel reasonably opted not to request an instruction for the included offense of trespass in the first degree. The defense theory as to Count I was that Mr. McNeal was not guilty of burglary—both because he did not enter the apartment with the intent to steal and because he did not knowingly enter the apartment unlawfully (2nd PCR Tr. 5, 8, 13-14). Counsel did not think it was consistent with the defense to request a trespass instruction, because that was inconsistent with the defense theory (2nd PCR Tr. 8-9, 14). In other words, it was trial counsel's strategy to obtain an outright acquittal on the burglary charge and not give the jury an instruction on trespass (2nd PCR Tr. 14-15).

As a general proposition, counsel's strategy as to Count I did not fall

below an objective standard of reasonableness. Missouri appellate courts have repeatedly upheld the reasonableness of the all-or-nothing strategy. *See*, *e.g.*, *McCrady v. State*, 461 S.W.3d 443, 449-450 (Mo.App. E.D. 2015); *Curry v. State*, 438 S.W.3d 523, 525 (Mo.App. E.D. 2014); *Oplinger v. State*, 350 S.W.3d 474, 477 (Mo.App. S.D. 2011); *Neal v. State*, 99 S.W.3d 571, 575 (Mo. App. S.D. 2003); *see also Jackson v. State*, 205 S.W.3d 282, 286 (Mo.App. E.D. 2006) (quoting *Love v. State*, 670 S.W.2d 499, 502 (Mo. 1984)) (" '[M]ovant's counsel cannot be convicted of being ineffective for seeking to employ the best defense for [her] client by not offering the jury a middle ground for conviction.'"); *State v. Lee*, 654 S.W.2d 876, 879 (Mo. 1983) ("It is also recognized that defense counsel frequently make a conscious decision not to request a lesser offense as a matter of trial strategy. The reasoning is that the jury may convict of the lesser offense, if submitted, rather than render a not guilty verdict on the higher offense if the lesser is not submitted.").

As stated in *McCrady*, "[t]he decision not to request a lesser-offense instruction may be 'a tactical decision usually based on the belief—often a reasonable one—that the jury may convict of the lesser offense, if submitted, rather than render a not guilty verdict on the higher offense if the lesser is not submitted.' " 461 S.W.3d at 450. Moreover, "[c]ounsel has no duty to request an instruction that would undermine the defense theory presented at trial." *Id*. Accordingly, it is well settled that "[a] decision by counsel not to

offer the jury a 'middle ground' for conviction by requesting a lesser-offense instruction does not constitute ineffectiveness." *Id.* Or, as this Court has stated, "[w]hen the failure to request a lesser-included instruction is a matter of strategy, the court should not second guess the defendant's counsel." *State v. Dexter*, 954 S.W.2d 332, 344 (Mo. 1997).

Here, counsel's strategic decision was reasonable under the facts of this case. First, the defense theory was that Mr. McNeal entered an apartment of an acquaintance, and that he did not knowingly enter unlawfully. At trial, Mr. McNeal did not testify that he unlawfully entered the apartment; rather, he testified that he had a relationship with the person he believed to be the apartment resident that permitted him to knock and enter the apartment, *i.e.*, he suggested that he thought he had a license to enter the apartment (*see* Tr. 234-235). He also testified that he had no intent to steal when he entered the apartment (Tr. 235).

Consistent with that testimony, in closing argument, defense counsel argued that Mr. McNeal "did not have the intent to steal or he did not know that he was entering unlawfully when he went in" (Tr. 261). And consistent with Mr. McNeal's testimony and the strategy of obtaining an outright acquittal on Count I, counsel argued, "I think when you [deliberate] you'll find Mr. McNeal not guilty on Count I" (Tr. 268). This strategy, which was based on Mr. McNeal's own trial testimony, did not fall below an objective

standard of reasonableness, and counsel had no duty to submit a trespass instruction that would have posited that Mr. McNeal knowingly entered the apartment unlawfully. *See* MAI-CR 3d 323.56.

In *Strickland* the Court observed that "[t]he reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." 466 U.S. at 691. Thus, where a defendant takes the stand and expressly negates an element or elements of the charged offense, it is objectively reasonable to adopt a strategy that is consistent with the defendant's claim that he is not guilty of that offense. Indeed, if the jury credits the defendant's testimony and follows the law in its deliberations—as it is presumed the jury will do—the jury will necessarily acquit the defendant of the charged offense.

Counsel's strategy was also reasonable in light of counsel's belief that the jury might agree that the State had overcharged Mr. McNeal and find that Mr. McNeal had been accused of more wrongdoing than he was actually guilty of committing (*see* 2nd PCR Tr. 7-8). In many instances, it is reasonable for counsel to concede some wrongdoing (*e.g.*, that the defendant is guilty of one of several charges) and to offer up that concession to the jury in hopes of garnering credibility and persuading the jury that the defendant has been charged with too much.

Mr. McNeal acknowledges this aspect of counsel's trial strategy when

he argues that "a lesser-included trespass instruction would have been very much consistent with trial counsel's evidentiary hearing testimony that he believed the case had been over-charged or 'enhanced,' which belief formed 'part of the [defense] theory of the case' " (App.Sub.Br. 39). He asserts, however, that it would have been "impossible for the jurors to conclude [that Mr. McNeal was overcharged] when they were not given the option" to find him guilty of trespass in the first degree (App.Sub.Br. 39).

But this argument overlooks the broader strategy employed by counsel in this case. The all-or-nothing strategy *as to Count I* was only part of the defense strategy employed in this case. While counsel argued that Mr. McNeal was not guilty of burglary and should be acquitted on Count I, counsel also expressly conceded that Mr. McNeal was guilty of stealing, which was submitted to the jury in Count II (*see* Tr. 266).

In closing argument, counsel argued that the defense did not think Mr. McNeal was "going to walk out of here without some kind of a conviction" (Tr. 262). Counsel then reminded the jury that there were two counts, and he stated that based on the evidence, the jury could "find [Mr. McNeal] not guilty on Count I and . . . find him guilty on Count II" (Tr. 266). Thus, while counsel did not give the jury a "middle ground" on Count I, counsel *did* give the jury an alternative "middle ground" to find Mr. McNeal guilty of something less than what the State had charged. In short, the jury had the

option to find that Mr. McNeal had been overcharged with an offense that he did not commit, while still finding him guilty of a less serious offense.

Mr. McNeal makes various arguments in an effort to show that the motion court clearly erred. He asserts that "[a] fair reading of trial counsel's evidentiary hearing testimony shows there was nothing particularly deliberate or strategic about" trial counsel's decision (App.Sub.Br. 32). He asserts, for instance, that counsel stated that "[n]ot requesting an instruction for trespass . . . was not even a 'conscious decision' " (App.Sub.Br. 32).

But as outlined above, trial counsel expressly agreed that, as a matter of trial strategy, he did not request the trespass instruction, and he explained why he was not inclined to request it (*see* 2nd PCR Tr. 5, 8-9, 13-15).[1] Moreover, counsel did not say that it was "not even a 'conscious decision.' "

[1] Mr. McNeal's reliance on *Crace v. Herzog*, 798 F.3d 840 (9th Cir. 2015), is misplaced. In that case, counsel "explicitly stated that the 'only reason [he] did not offer a lesser included instruction for unlawful display of a weapon was because [he] did not consider it.' " *Id*. at 852. Thus, the court concluded that "counsel made no strategic decision to forgo a lesser included offense instruction that commands our deference, and we hold that his outright failure even to *consider* the possibility of requesting a lesser included offense constituted deficient performance." *Id*.

Rather, when asked if there was "a specific time" or "some point in trial" that he decided that a trespass instruction "wouldn't be consistent," counsel stated, "I'm not sure it was that much of a conscious decision as much as just it didn't seem appropriate" (2nd PCR Tr. 11) (emphasis added). This testimony was offered nearly six years after the trial, and counsel's uncertainty as to particulars of his decision was an issue for the motion court to resolve. This Court should decline Mr. McNeal's invitation to reconsider the meaning and import of trial counsel's testimony.

Mr. McNeal also points out that counsel stated that he was not sure the trial court would give a trespass instruction if requested (App.Sub.Br. 32, citing 2nd PCR Tr. 9, 14, 17). But counsel's stated concern about whether the trial court would submit the instruction was in addition to his belief that a trespass instruction was "inconsistent" with the defense theory (*see* 2nd PCR Tr. 8-9, 14-15). Thus, counsel's testimony along those lines did not show that counsel lacked a trial strategy. To the contrary, as outlined above, counsel plainly employed an all-or-nothing strategy as to Count I, while urging the jury to find Mr. McNeal guilty of Count II.

Mr. McNeal asserts that, if counsel knew that Mr. McNeal would be found guilty of stealing (a class A misdemeanor), it was not reasonable to conclude "that it was in the best interest of his client to deny the jurors an opportunity to find for an even lower class misdemeanor [on Count I], instead

of the felony" (App.Sub.Br. 34). In other words, he asserts that counsel should have given the jury more "middle ground" to find Mr. McNeal guilty, since the additional middle ground of trespass in the first degree on Count I (a class B misdemeanor) did not expose Mr. McNeal to substantial additional criminal liability (*i.e.*, "it didn't matter much whether the defendant was convicted on the lesser offense") (*see* App.Sub.Br. 40).

But the *amount* of "middle ground" to give to a particular jury has subjective elements aside from the punishment that might be imposed for the lesser offense, and it is not the sort of decision that should be second guessed by a reviewing court in hindsight. In making this sort of decision, counsel must necessarily guess at what the jury might do, and counsel must take into account the perceived proclivities of the jury, the evidence presented, the effect the evidence has had upon the jury, and the possible effect that closing arguments might have thereafter upon the jury. *See generally Strickland*, 466 U.S. at 695 ("the idiosyncrasies of the particular decisionmaker, such as unusual propensities toward harshness or leniency" can "enter[] into counsel's selection of strategies").

Here, for instance, the decision to submit or refrain from submitting the instruction would have encompassed various considerations, *e.g.*, whether the proffered "middle ground" was substantial enough to persuade the jury (both in terms of the evidence and the jury's subjective need for "justice" and,

potentially, mercy), whether the submission of a trespass instruction might cause the jury (in light of subsequent arguments) to believe that the defense was waffling on its claim that the defendant was not guilty of burglary, and whether any perceived waffling by the defense might reflect poorly on the defendant and cause the jury to view the defendant's testimony with disbelief. (Being acquitted of the burglary depended largely upon the jury's crediting Mr. McNeal's disavowal of any intent to steal at the time he entered the apartment.) These sorts of nuances must necessarily be left to counsel, who is in the best position to observe the jury and make the decision.

As stated in *Strickland*, "[j]udicial scrutiny of counsel's performance must be highly deferential." 466 U.S. at 689. "It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it had proved unsuccessful, to conclude that a particular act or mission of counsel was unreasonable." *Id.* As this Court has also observed, "No matter how ill-fated it may appear in hindsight, a reasonable choice of trial strategy cannot serve as a basis for a claim of ineffective assistance." *Johnson v. State*, 406 S.W.3d 892, 900 (Mo. 2013).

The types of circumstances that counsel might consider in deciding whether to request an included offense instruction are aptly illustrated in *Immekus v. State*, 410 S.W.3d 678 (Mo.App. S.D. 2013). In that case, the

defendant was charged with the class A felony of assault in the first degree, based upon attempting to kill or cause serious physical injury to the victim and causing serious physical injury. *Id.* at 681. The charged class A felony assault was submitted to the jury, and the included offense of the class B felony assault (the same offense but without serious physical injury) was also submitted to the jury.[2] *Id.* The trial court also submitted—at defense counsel's request—the class A misdemeanor of assault in the third degree, based upon attempting to cause physical injury to the victim. *Id.* The jury found the defendant guilty of the class B felony assault. *Id.*

In a post-conviction motion, the defendant later alleged that defense counsel was ineffective for failing to submit the class C felony of assault in the second degree, based on attempting to cause or knowingly causing physical injury to another person by means of a deadly weapon or dangerous instrument. *Id.* At an evidentiary hearing, counsel testified that he believed that there was no serious physical injury, so he "debated on whether or not to

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[2] Mr. McNeal discusses the *Immekus* case in his brief, and he asserts that defense counsel requested the class B felony submission (App.Sub.Br. 36). The opinion does not support that assertion. The opinion states that defense counsel requested the class A misdemeanor of assault in the third degree. 410 S.W.3d at 681.

instruct down at all when [he] did to avoid a compromise verdict." *Id*. Counsel testified that he concluded that submitting assault in the third degree was sufficient because "if the jury wanted to compromise that they could compromise down there." *Id*. Counsel also testified that, although the evidence would have supported the class C felony assault, he chose not to request it because "from a psychological point of view" it did not differ much from the class A misdemeanor, *i.e.*, "[h]e 'felt that if the jury was going to convict [Movant] on [the class C felony of assault in the second degree], that they would convict him on the third degree assault[.]' " *Id*. And, of course, if the jury convicted the defendant of the misdemeanor (as opposed to any felony), that was advantageous to the defendant on the issue of punishment. *See id*. at 684-685.

Here, similarly, counsel had to consider how much "middle ground" to give the jury, and counsel had to consider whether it would have made any beneficial difference to the defense to submit trespass in the first degree as additional "middle ground" for the jury to consider. At the evidentiary hearing, counsel acknowledged that he "could have requested" the trespass instruction, but he stated that he was "not sure" that "it would have made any difference in the verdict" (2nd PCR Tr. 9). Counsel also stated, "I'm not sure there would have been any harm, but it didn't – I'm not sure it would have done any good either" (2nd PCR Tr. 17). However, as discussed above,

counsel also expressed concern that it would be inconsistent with the defense theory to request the trespass instruction, as the defense theory was that Mr. McNeal did not knowingly enter the apartment unlawfully (*i.e.*, that he was neither guilty of burglary nor guilty of trespass).

Under such circumstances, it was reasonable for counsel to conclude that urging a conviction on stealing alone was a sufficient "middle ground" that did not run the risk of appearing to be inconsistent. In short, if the jury was willing to credit Mr. McNeal's testimony and acquit of burglary at all (which was the hoped for outcome for the defense), it was reasonable to employ a strategy that sought to preserve that chance while simultaneously persuading the jury that its verdict was just under the facts of the case.

Mr. McNeal asserts that a trespass instruction would "not have 'undermined' the defense theory in light of defense counsel effectively conceding trespass during trial" (App.Sub.Br. 37-38). He asserts that "defense counsel openly expressed doubt concerning the 'intent element' of the burglary offense, questioning an officer about whether Mr. McNeal's actions could constitute a trespass" (App.Sub.Br. 38). But the record does not support these assertions.

When trial counsel suggested in questioning the officer that a hypothetical person could be guilty of a trespass if that person was "in a place where they're not supposed to be," counsel merely hypothesized an unlawful

entry (*see* Tr. 181). Mr. McNeal never testified that he unlawfully entered the apartment; rather, he testified that he had the type of relationship with the person he believed to be the resident of the apartment that permitted him to knock and enter the apartment, *i.e.*, he testified that he had a license to enter his friend's apartment (*see* Tr. 234-235). Later, in closing argument, counsel argued that Mr. McNeal "did not know that he was entering unlawfully when he went in" (Tr. 261). And consistent with Mr. McNeal's testimony (and the strategy of obtaining an outright acquittal on the burglary charge), counsel argued, "I think when you [deliberate] you'll find Mr. McNeal not guilty on Count I" (Tr. 268). In short, counsel did not concede that Mr. McNeal was guilty of a trespass, notwithstanding counsel's hypothetical question about a trespass.[3]

Mr. McNeal further asserts that there was other evidence that

[3] Incidentally, the hypothetical question about the trespass tends to support the conclusion that counsel's subsequent decision not to request a trespass instruction was not inadvertent. The hypothetical question was actually an effective means of leaving open the possibility of submitting a trespass instruction if, at the end of the trial, counsel weighed the options and concluded that, on balance, it was better to assume that the jury was not going to believe Mr. McNeal's testimony.

supported an inference that Mr. McNeal did not have permission to be in the apartment (App.Sub.Br. 38-39). He then asserts that "[i]rrespective of Mr. McNeal's testimony, there existed strong and objective evidence that Mr. McNeal was plainly guilty of at least trespass in this case" (App.Sub.Br. 38-39). But while counsel certainly could have weighed the evidence in the manner that Mr. McNeal argues for now, it was also reasonable—at trial and before the verdict—for counsel to craft a strategy in reliance upon Mr. McNeal's testimony that he did *not* know he was entering the apartment unlawfully. In a burglary case, in analyzing whether the defendant had the requisite intent to enter unlawfully, "[t]he analysis must focus on [the defendant's] subjective belief." *State v. Hunt*, 451 S.W.3d 251, 257 (Mo. 2014). Thus, even if every person in the apartment building had testified that Mr. McNeal had no permission to be in the apartment, if the jury credited Mr. McNeal's testimony that he subjectively believed that he could enter the apartment, there would have been no basis to convict Mr. McNeal of either burglary or trespassing. It did not fall below an objective standard of reasonableness for counsel to credit his own client's testimony and adhere to a defense that was wholly consistent with that testimony.

Mr. McNeal notes that this Court, in his previous appeal, observed that " '[a] trespass instruction would have been consistent with the evidence and with counsel's argument' " (App.Sub.Br. 39, quoting *McNeal*, 412 S.W.3d at

890-891). But while counsel certainly *could* have suggested that Mr. McNeal was guilty of a trespass (or at least submitted the instruction), it is now apparent in light of counsel's testimony at the evidentiary hearing that submitting an included-offense instruction for trespass was not consistent with counsel's all-or-nothing defense on Count I, which was combined with the strategy of convincing the jury to convict of only stealing.

Admittedly, it might also have been reasonable for counsel to weigh the probabilities differently (with counsel's unique insight into the case) and give the jury more "middle ground" to convict of lesser offenses instead of seeking an acquittal on Count I. But the mere fact that another course of action might also have been reasonable does not mean that counsel's chosen course of action was unreasonable. "The choice of one reasonable trial strategy over another is not ineffective assistance." *Zink v. State*, 278 S.W.3d 170, 176 (Mo. 2009); *see generally Strickland*, 466 U.S. at 689 ("There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.").

Finally, as both an introduction and conclusion to his argument about the reasonableness of counsel's decision, Mr. McNeal asserts that counsel did not discuss with him whether to submit an instruction for the included offense of trespass in the first degree (*see* App.Sub.Br. 27-31, 40-43). Mr. McNeal urges this court to hold generally that "a reasonable defense counsel

will consult and collaborate with his client about this important decision" (App.Sub.Br. 30). He notes that he is "not necessarily advocat[ing] for placing the final decision-making authority in the hands of the defendant," but he asserts that "[w]hether or not this Court would conclude that counsel retains the ultimate decision-making authority for this decision, an attorney who does not at least discuss this issue with his client—under facts and circumstances similar to those in this case—acts unreasonably" (App.Sub.Br. 42). In short, Mr. McNeal asserts that counsel's performance fell below an objective standard of reasonableness because counsel did not discuss the issue of submitting a trespass instruction with Mr. McNeal.

This particular allegation of deficient performance, however, was not included in Mr. McNeal's amended motion; thus, the claim is not properly asserted in this appeal. Mr. McNeal alleged in his amended motion that counsel unreasonably failed to request the instruction, and he alleged that counsel's failure was due to inadvertence (2nd PCR L.F. 13-14). There was no allegation that counsel had a duty to discuss the decision with Mr. McNeal, and there was no allegation that counsel's performance was deficient because counsel failed to discuss the decision with Mr. McNeal (*see* 2nd PCR L.F. 13-

29).[4] Accordingly, this new claim is not properly before the Court.

Under Rule 29.15 or Rule 24.035, " 'any allegations or issues that are not raised in the [post-conviction] motion are waived on appeal.' " *McLaughlin v. State*, 378 S.W.3d 328, 340 (Mo. 2012) (quoting *Johnson v. State*, 333 S.W.3d 459, 471 (Mo. 2011) (citation omitted)). " 'Pleading defects cannot be remedied by the presentation of evidence and refinement of a claim on appeal.' " *Id.* "Furthermore, there is no plain error review in appeals from post-conviction judgments for claims that were not presented in the post-conviction motion." *Id.* (citing *Hoskins v. State*, 329 S.W.3d 695, 696-697 (Mo. 2010)). "Claims are waived if not presented in the motion, regardless of whether evidence on that claim was presented." *Dorsey v. State*, 448 S.W.3d 276, 285 (Mo. 2014).

Here, Mr. McNeal has expanded his claim or refined it on appeal to suggest that counsel was constitutionally obligated to obtain Mr. McNeal's input on the issue of whether to offer an instruction on an included offense.

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[4] Mr. McNeal did allege that if counsel had "informed him he could request a jury instruction on the class B misdemeanor, of trespass in the first degree, . . . he would have demanded that his trial counsel make such a request" (2nd PCR L.F. 27). There was no allegation, however, that counsel was obligated either to obtain Mr. McNeal's input or to follow it (2nd PCR L.F. 27).

But because this particular claim of deficient performance was not presented to the motion court, it was waived.

In sum, with regard to counsel's performance, Mr. McNeal failed to prove his claim that counsel unreasonably failed to request a trespass instruction due to inadvertence. Counsel testified that he opted to seek an acquittal on Count I (while arguing for a conviction on Count II), and that he did not request a trespass instruction as a matter of trial strategy. The motion court did not clearly err in concluding that counsel reasonably decided not to request the instruction.

3. Mr. McNeal did not prove *Strickland* prejudice

The motion court did not address the prejudice prong of Mr. McNeal's claim, but Mr. McNeal also failed to prove that there was a reasonable probability that submitting a trespass instruction to the jury would have resulted in a different verdict in this case. As evidenced by the jury's verdict in this case, it is apparent that the jury concluded beyond a reasonable doubt that Mr. McNeal knowingly entered the apartment unlawfully, and that he entered the apartment "for the purpose of committing the crime of stealing therein" (*see* L.F. 69). Counsel's alleged error in this case—failing to submit a first-degree trespass instruction—would not have altered the evidence presented to the jury, and, accordingly, there is no reasonable probability that the jury would have made different factual findings if a trespass

instruction had been submitted to it.

a. *Strickland*'s presumption that the factfinder will act according to the law precludes a finding of prejudice

In *Strickland*, the Court stated that "[i]n making the determination whether the specified errors resulted in the required prejudice, a court should presume . . . that the judge or jury acted according to law." 466 U.S. 694. "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." *Id.* at 695. "The assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision." *Id.*

In light of this presumption, courts in various jurisdictions have held that it is not possible to show *Strickland* prejudice if counsel's alleged error lies in failing to give the jury a different option to convict the defendant of a lesser offense. In *State v. Grier*, 246 P.3d 1260, 1268, 1272-73 (Wash. 2011), the Supreme Court of Washington reaffirmed its "adherence to *Strickland*" and rejected the notion that prejudice could be predicated on the jury failing to follow the law. The Washington court pointed out that "[i]n *Strickland*, the Court indicated that, '[i]n making the determination as to whether the specified errors resulted in the required prejudice, a court should presume . . . that the judge or jury acted according to law.' " *Id.* Thus, the court held that

the defendant could not demonstrate prejudice from counsel's alleged error: "Assuming as this court must, that the jury would not have convicted [the defendant] of second degree murder unless the State had met its burden of proof, the availability of a compromise verdict would not have changed the outcome of [the defendant's] trial." *Id.* at 1274.

Similarly, in *Sanders v. State*, 946 So.2d 953, 956 (Fla. 2006), the Florida Supreme Court held that the defendant could not demonstrate prejudice from counsel's alleged error in failing to submit a lesser included offense because "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." The Court explained:

> [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. at 958.

In *Autrey v. State*, 700 N.E.2d 1140, 1142 (Ind. 1998), the Indiana Supreme Court similarly stated that a defendant could not demonstrate *Strickland* prejudice from counsel's failing to request a lesser-included offense instruction:

> The jury found defendant guilty of murder beyond a reasonable doubt. Had the jury been instructed on lesser included offenses to murder, they would have been presented with the same evidence and heard the same testimony. Therefore, there is no reason to believe that the inclusion of lesser included offenses would have raised a reasonable doubt as to defendant's culpability for murder.

In *Fair v. Warden*, 559 A.2d 1094, 1099-1100 (Conn. 1989), the Connecticut Supreme Court likewise cited *Strickland*'s presumption and concluded that "any possibility that the jury would have convicted the petitioner only of the lesser included larceny charge does not amount to 'a probability sufficient to undermine confidence in the outcome.' " *See also Sigman v. State*, 695 S.E.2d 232, 234 (Ga. 2010) ("Since the jury found him guilty of the felony murder counts, rejecting the lesser included offense of involuntary manslaughter based on reckless conduct or simple battery, there is no reasonable probability that the outcome of the trial would have been

different if counsel had also requested charges on reckless conduct and simple battery as lesser included offenses of the underlying felonies of cruelty to children, aggravated battery and aggravated assault."); *Commonwealth v. Breakiron*, 729 A.2d 1088, 1095 (Pa. 1999) ("The jury rejected this argument and convicted [the defendant] of robbery. … Had a theft instruction been given, it is not likely that the jury would have returned a verdict only on the theft charge."); *State v. Leon*, 638 So.2d 220, 221-222 (La. 1994) (citing *Strickland*'s presumption and holding, in light of the various other options presented to the jury that "speculation that jurors might have returned the second responsive verdict provided by law if it had been listed correctly on the verdict form does not amount to a showing that the mistake rendered the proceedings fundamentally unfair or the result unreliable"); *see generally Sims v. State*, 472 S.W.3d 107, 115 (Ark. 2015) (the jury was instructed on first and second-degree murder, and "[b]ecause the jury returned a guilty verdict on the greater offense of first-degree murder, [defendant] cannot establish that prejudice resulted from counsel's failure to request an instruction on yet another lesser-included offense).

The United States Court of Appeals has also relied on *Strickland*'s presumption to conclude that the defendant could not demonstrate prejudice in light of the instructions submitted to the jury and the jury's verdict. *See Johnson v. Alabama*, 256 F.3d 1156, 1183 (11th Cir. 2001). In that case, the

court stated:

> 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.

Id.; *see also Perry v. McCaughtry*, 308 F.3d 682, 690 (7th Cir. 2002) (observing that the jury is presumed to follow the instructions and concluding that an error in a lesser-offense instruction did not result in prejudice because "even assuming that the party to a crime instruction should have referenced the felony murder instruction, once the jury concluded that Perry was guilty of first degree intentional homicide, as a party to the crime, the jury never needed to reach the felony murder instruction."). *But see Breakiron v. Horn*, 642 F.3d 126, 138-139 (3rd Cir. 2011) (holding that a defendant can show prejudice from counsel's failing to submit a lesser-offense instruction).

Respondent acknowledges that Mr. McNeal's case was previously

remanded to determine whether there was prejudice, despite the State's argument along these lines. *See McNeal v. State*, 412 S.W.3d at 893. But the fact that Mr. McNeal's allegations of prejudice were not conclusively refuted by the record—so as to warrant an evidentiary hearing—does not mean that Mr. McNeal was, in fact, prejudiced. At the very least, the *Strickland* presumption should still be considered in evaluating whether Mr. McNeal was actually prejudiced, and this Court recognized as much when it observed that "[t]he jury's decision may make it difficult for a post-conviction movant to prove prejudice[.]" *Id*. at 892.

In any event, to the extent that the Court rejected the State's argument in Mr. McNeal's first post-conviction appeal, respondent respectfully suggests that the Court should reconsider its holding.[5]

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[5] It does appear that the Court rejected the State's broad claim that *Strickland*'s presumption precluded a finding of prejudice. *See McNeal*, 412 S.W.3d at 891-892 (declining to follow *Hendrix v. State*, 369 S.W.3d 93, 100 (Mo.App. E.D. 2012), which had held "that the movant could not establish prejudice because ' "[i]n making the determination whether the specified errors resulted in the required prejudice, a court should presume, absent challenge to the judgment on the grounds of evidentiary insufficiency, that the ... jury acted according to law." ' ").

b. The luck of a "lawless decisionmaker" or the risk that the jury will not follow the law is not sufficient to show a reasonable probability of a different result

In Mr. McNeal's first post-conviction appeal, the Court stated, "Without a trespass instruction, the jury was left with only two choices: conviction of burglary or acquittal." *McNeal*, 412 S.W.3d at 892. The Court then observed that "[w]hen 'one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of some offense, the jury is likely to resolve its doubts in favor of conviction.' " *Id.* (citing *Breakiron v. Horn*, 642 F.3d 126, 138-139 (3rd Cir. 2011) (quoting *Beck v. Alabama*, 447 U.S. 625, 634 (1980)).

The Court then further observed, "Even though juries are obligated 'as a theoretical matter' to acquit a defendant if they do not find every element of the offense beyond a reasonable doubt, there is a '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 acquittal." *Id.* (citing *Breakiron* (quoting *Keeble v. United States*, 412 U.S. 205, 212-13 (1973)). In other words, the Court suggested that it was possible that the jury's verdict on Count I (the burglary) was the product of lawless decisionmaker that was not actually convinced of Mr. McNeal's guilt but was unwilling to acquit him because he was "plainly guilty of some offense."

However, while that speculative possibility surely exists—juries are

capable of ignoring the law—in assessing *Strickland* prejudice, the jury's strict adherence to the law is not "a theoretical matter." Rather, under *Strickland*, it is a presumption that must be employed. 466 U.S. at 694-695. As the Court stated in *Strickland*, "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." *Id.* at 695. "A defendant has no entitlement to the luck of a lawless decisionmaker, even if a lawless decision cannot be reviewed." *Id.* In short, any risk or possibility that the jury's practice will "diverge from theory" must be excluded from a prejudice analysis under *Strickland*.

Accordingly, here, there was no prejudice from counsel's failing to request an instruction on the included offense of trespass. Mr. McNeal's jury found beyond a reasonable doubt that Mr. McNeal was guilty of burglary in the second degree—*i.e.*, that he knowingly unlawfully entered an apartment for the purpose of committing stealing therein (*see* L.F. 69). Merely adding an instruction on the included offense of trespass would not have altered the evidentiary picture that was presented to the jury. Thus, absent the possibility of nullification, whimsy, caprice, or compromise on the part of the jury, there is no reasonable probability that the jury would have made different factual findings and rendered a different verdict.

Stated another way, because the reliability of the jury's factual findings

was not diminished by counsel's alleged error, *i.e.*, because those findings were unaffected, there was no prejudice. And that is the question: "Taking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors." *Strickland*, 466 U.S. at 696.

Mr. McNeal notes that in *Crace v. Herzog*, 798 F.3d 840, 847-848 (9th Cir. 2015), the court rejected the argument that *Strickland*'s presumption forecloses a finding of prejudice (App.Sub.Br. 35 n. 12). In that case, in concluding that *Grier*, *supra*, was wrongly decided, the court stated:

> To think that a jury, if presented with the option, might have convicted on a lesser included offense is not to suggest that the jury would have ignored its instructions. On the contrary, it would be perfectly consistent with those instructions for the jury to conclude that the evidence presented was a better fit for the lesser included offense. The Washington Supreme Court [in *Grier*] thus was wrong to assume that, because there was sufficient evidence to support the original verdict, the jury necessarily would have reached the same verdict even if instructed on an additional lesser included offense.

Id. The court then observed that, "in a related context," the United States Supreme Court had recognized that "a jury presented with only two options—convicting on a single charged offense or acquitting the defendant altogether—'is likely to resolve its doubts in favor of conviction' even if it has reservations about one of the elements of the charged offense, on the thinking that 'the defendant is plainly guilty of some offense.' " *Id*. at 848 (citing *Keeble*, 412 U.S. at 205). The court then stated that "[i]t is therefore perfectly plausible that a jury that convicted on a particular offense at trial did so despite doubts about the proof of that offense—doubts that, with 'the availability of a third option,' could have led it to convict on a lesser included offense." *Id*.

There are, however, significant problems with employing this analysis in the post-conviction context. First, *Keeble v. United States* and *Beck v. Alabama* (which was cited in *Breakiron v. Horn*, as discussed above) were both direct appeal cases, and they were both decided before *Strickland*. Thus, they should not be relied on to support a finding of *Strickland* prejudice.

Second, the application of *Strickland*'s presumption in cases like *Grier* is not the equivalent of holding that "because there was sufficient evidence to support the original verdict, the jury necessarily would have reached the same verdict even if instructed on an additional lesser included offense." Rather, *Strickland*'s presumption requires a reviewing court to assume that

the jury conscientiously considered all of the evidence and made its findings of guilt because it was *convinced beyond a reasonable doubt* that the State proved every element of the offense.

In other words, under *Strickland*, a prejudice analysis begins with the proposition that the jury was firmly convinced of guilt after resolving all questionable aspects of the evidence. The reviewing court then evaluates whether it is reasonably probable that counsel's deficient performance would have affected the jury's findings. Thus, contrary to *Crace*, under *Strickland*, in assessing prejudice, it is not "perfectly plausible" to conclude that the jury convicted the defendant despite having doubts about the defendant's guilt. To entertain the notion that the jury had such doubts and nevertheless found the defendant guilty is to conclude that the jury ignored the law, which is not permitted under *Strickland*.

In attempting to reconcile its holding with *Strickland*'s presumption, the court in *Crace* suggested that "*Keeble*'s logic does not rest on the proposition that juries deliberately and improperly choose to convict in the absence of reasonable doubt." 798 F.3d 840. The court continued: "What *Keeble* teaches us is that a lesser-included-offense instruction can affect a jury's *perception* of reasonable doubt: the same scrupulous and conscientious jury that convicts on a greater offense when that offense is the only one available could decide to convict on a lesser included offense if given more

choices." *Id*.

In *Keeble*, however, which was a direct appeal case, the Court said nothing about the jury's ability to perceive reasonable doubt. Rather, as discussed above, the analysis in that case was based entirely on the notion that the jury's practice might "diverge from theory," *i.e.*, that the jury might not acquit as required by the instructions if the jury had doubts about the defendant's guilt. 412 U.S. at 212-213. Respondent acknowledges that, in *Keeble*, the court also discussed how a rational juror could have found the defendant guilty of the lesser offense under the facts of that case. But the fact that a rational jury *could* have found the defendant guilty of the lesser offense was not the equivalent of holding that there was a reasonable probability that the jury *would* have found the defendant guilty of the lesser offense. Whether a jury "could" find the defendant guilty of the included offense is the standard for determining on direct appeal whether a trial court erred in refusing to give a requested instruction. That standard should not be applied in place of *Strickland*'s standard in a post-conviction case where counsel's effectiveness is the issue.

It is true that an included offense instruction could serve to frame a closing argument or serve to guide the jury's deliberations. However, there is no reason to believe that, in evaluating the evidence in a given case, the jury is incapable of perceiving reasonable doubt with regard to the greater offense

if an included offense instruction is not given.

Here, for instance, as Mr. McNeal acknowledges in his brief, the jurors in his case sent out a note asking about "intent" for burglary (*see* App.Sub.Br. 43). Referring to the burglary instruction, the jurors asked, "Can the intent to commit the crime occur after he opens the door for burglary? Must it occur prior to opening/touching the door?" (L.F. 98). This particular issue was perceived by the jury during its deliberations, and it is evident that the jury did not need another instruction in order to consider whether Mr. McNeal had the requisite intent when he entered the apartment. A trespass instruction would not have given further guidance on the question posed by the jury; it merely would have revealed that if Mr. McNeal did *not* have the requisite intent to commit stealing, he could still be guilty of trespass in the first degree. In determining guilt on the burglary, however, the jury had to resolve the question of Mr. McNeal's intent based on its review of the evidence. And inasmuch as the jury ultimately found Mr. McNeal guilty of burglary in the second degree, it is apparent that, after considering all of the evidence, the jurors concluded beyond a reasonable doubt that Mr. McNeal knowingly entered the apartment unlawfully for the purpose of committing stealing therein.

Mr. McNeal also asserts that the evidence of burglary was "far from overwhelming" (App.Sub.Br. 43). But, again, the strength of the evidence

would not have been affected by the submission of a trespass instruction and, while rational jurors *could* have found Mr. McNeal guilty of trespass if a trespass instruction had been submitted, that does not mean there was a reasonable probability that the jury *would* have found him guilty of trespass. The jury considered all of the evidence, including its strengths and weaknesses, and the jury concluded that Mr. McNeal knowingly entered the apartment unlawfully, and that he did so for the purpose of committing stealing. If the jury had not believed he had the requisite intent, the jury would have acquitted. As such, there is no reasonable probability that counsel's alleged error affected the outcome of the trial. *See generally Strickland*, 466 U.S. at 695-696 ("Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect.").

In sum, Mr. McNeal failed to prove that there was a reasonable probability that the jury's deliberations would have resulted in a conviction of trespass in the first degree if a trespass instruction had been submitted to it. The motion court did not clearly err in denying Mr. McNeal's claim that counsel was ineffective for failing to submit a trespass instruction.

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 certify that the attached brief complies with Rule 84.06(b) and contains 11,112 words, excluding the cover, this certification, and the signature block, as counted by Microsoft Word; and that an electronic copy of this brief was sent through the Missouri eFiling System on this 26th day of August, 2016, to:

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