

NO. 69293-3-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ROBERT RALPH BERG,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE BARBARA LINDE

BRIEF OF RESPONDENT

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STATE OF WASHINGTON
COURT OF APPEALS
DIVISION I
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TABLE OF CONTENTS

	Page
A. <u>ISSUE PRESENTED</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
1. PROCEDURAL FACTS	1
2. SUBSTANTIVE FACTS	1
C. <u>ARGUMENT</u>	4
DEFENSE COUNSEL DID NOT RENDER INEFFECTIVE ASSISTANCE OF COUNSEL IN FAILING TO PROPOSE A JURY INSTRUCTION ON GOOD FAITH CLAIM OF TITLE.....	4
1. Defense Counsel's Failure To Request The Instruction Did Not Constitute Deficient Performance	5
2. Defense Counsel's Choice Not To Request The Instruction Did Not Prejudice The Defendant	8
D. <u>CONCLUSION</u>	10

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Strickland v. Washington, 466 U.S. 668,
104 S. Ct. 2052 (1984) 5

Washington State:

State v. Bowerman, 115 Wn.2d 794,
802 P.2d 116 (1990)..... 7

State v. Cienfuegos, 144 Wn.2d 222,
25 P.3d 1011 (2001)..... 5, 8

State v. Grier, 171 Wn.2d 17,
246 P.3d 1260 (2011)..... 5, 6

State v. McFarland, 127 Wn.2d 322,
899 P.2d 1251 (1995)..... 5

State v. Thompson, 169 Wn. App. 436,
290 P.3d 996 (2012)..... 5

Constitutional Provisions

Federal:

U.S. Const. amend. VI 5

Washington State:

Const. art I., § 22..... 5

Other Authorities

WPIC 19.08..... 4

A. ISSUE PRESENTED

Did the defendant receive effective assistance of counsel where his counsel's choice not to request a specific jury instruction was neither deficient nor prejudiced the defendant?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

The King County Prosecuting Attorney's Office charged Robert Ralph Berg with one count of robbery in the second degree. CP 1. After a jury trial, the defendant was found guilty as charged. CP 20. The defendant was sentenced, and timely appealed.

2. SUBSTANTIVE FACTS.

Chaesun Osaka, the owner of the North Park Grocery Store in Seattle, Washington, observed Robert Berg enter her store. 7/23/12 RP 39-42. Osaka had owned the store for the past seven years. 7/23/12 RP 40. On the day in question, Osaka recognized Berg as a prior customer, and greeted him briefly after he entered. 7/23/12 RP 43. Berg then walked to a cooler, removed two cases of beer, and walked out of the store without paying for the beer. 7/23/12 RP 43-44. At no point did Berg discuss bartering for the

beer, or offer any item in barter for the beer. 7/23/12 RP 58. Osaka followed Berg outside and attempted to take the beer away from him. 7/23/12 RP 45. As Osaka struggled with Berg over the beer, Berg struck Osaka in the face and chest with his arm. 7/23/12 RP 46-47. Berg dropped one case of beer on the ground, got into the passenger seat of a waiting vehicle, and swiftly left the scene. 7/23/12 RP 46-48.

Berg testified at trial that three or four days earlier, he had struck a deal with an Asian male employee at the same store to barter gold coins for beer. 7/24/12 RP 54, 59. Berg testified that on the day in question, he had struck the same deal with Osaka, and gave her two gold coins in exchange for the beer. 7/24/12 RP 55-58. Berg testified that he believed he was entitled to leave with the beer because Osaka had accepted the gold coins, and that when she subsequently tried to take the beer back, he shrugged her off and left with the beer. 7/24/12 RP 58-59. Osaka testified that she had never had a male Asian employee in all the years she had owned the store. 7/23/12 RP 59.

Defense counsel proposed, and the trial court gave the jury, the following instructions, among others:

Instruction #9:

To convict the defendant of the crime of robbery in the second degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about July 29, 2011, the defendant unlawfully took personal property from the person or in the presence of another;

(2) That the defendant intended to commit theft of the property;

(3) That the taking was against that person's will by the defendant's use or threatened use of immediate force, violence or fear of injury to that person or to that person's property;

(4) That force or fear was used by the defendant to obtain or retain possession of the property or to prevent or overcome resistance to the taking; and

(5) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP 48.

Instruction #7:

Theft means to wrongfully obtain or exert unauthorized control over the property or services of another, or the value thereof, with intent to deprive that person of such property or services.

CP 46.

Instruction #8:

Wrongfully obtains means to take wrongfully the property or services of another.

CP 47.

Defense counsel did not propose an instruction on the defense of good faith claim of title. CP 22-35. The model for such an instruction is set out in WPIC 19.08:

It is a defense to a charge of theft that the property or service was appropriated openly and avowedly under a good faith claim of title, even if the claim is untenable.

The State has the burden of proving beyond a reasonable doubt that the defendant did not appropriate the property openly and avowedly under a good faith claim of title. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty.

C. ARGUMENT

DEFENSE COUNSEL DID NOT RENDER INEFFECTIVE ASSISTANCE OF COUNSEL IN FAILING TO PROPOSE A JURY INSTRUCTION ON GOOD FAITH CLAIM OF TITLE.

Berg contends that defense counsel at trial provided ineffective assistance of counsel when counsel failed to request that the jury be instructed on a defense of good faith claim of title. This claim should be rejected. Trial counsel's failure to request a jury instruction on good faith claim of title was not constitutionally ineffective because it was not deficient and did not prejudice the defendant.

A defendant in a criminal case has a constitutional right to the effective assistance of counsel. U.S. Const. amend. VI; Wash. Const. art I., sec. 22; State v. Grier, 171 Wn.2d 17, 32, 246 P.3d 1260 (2011). In order to prevail on a claim of ineffective assistance of counsel, a defendant must show that (1) defense counsel's performance was deficient, and (2) that the deficient performance prejudiced the defendant. State v. Cienfuegos, 144 Wn.2d 222, 226-27, 25 P.3d 1011, 1014 (2001); Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052 (1984). Where the claim of ineffective assistance is based upon counsel's failure to request a particular jury instruction, the defendant must also show that he was entitled to the instruction. State v. Thompson, 169 Wn. App. 436, 495, 290 P.3d 996 (2012).

1. Defense Counsel's Failure To Request The Instruction Did Not Constitute Deficient Performance.

In order to show that defense counsel's representation was deficient, a defendant must show that "it fell below an objective standard of reasonableness based on consideration of all the circumstances." State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Performance is not deficient if it represents a

legitimate trial strategy or tactic. Grier, 171 Wn.2d at 33. There is a strong presumption that counsel's representation was effective, and the defendant bears the burden of showing that the representation was deficient. Id. at 335. In this case, defense counsel's failure to request a jury instruction on good faith claim of title was not unreasonable, and thus did not constitute deficient performance.

The decision not to request an instruction on good faith claim of title was not unreasonable because such an instruction was not necessary and would not have been helpful to the jury in considering the defense's theory of the case. The jury was properly instructed on the elements of robbery in the second degree, which include, among others, that "the defendant unlawfully took personal property from the person or in the presence of another" and "that the defendant intended to commit theft of the property." CP 48. The jury was also properly instructed that "[t]heft means to wrongfully obtain or exert unauthorized control over the property or services of another, or the value thereof, with intent to deprive that person of such property or services," and that "[w]rongfully obtains means to take wrongfully the property or services of another." CP 46-47. The defense theory of the case was that Berg had paid for the beer with gold coins—essentially, that the defendant lawfully took the

property, and that he did not intend to commit theft—thus negating two elements of the crime. The jury instructions given by the court were sufficient for the defense's purposes, as they accurately stated the law and permitted the defense to argue its theory of the case. See State v. Bowerman, 115 Wn.2d 794, 809, 802 P.2d 116 (1990).

Berg provides authority for the proposition that he would have been entitled to the instruction had it been requested, but none for the proposition that it was deficient representation not to request it. Berg simply states, without support or explanation, that the only way the jury could find that Berg acted lawfully was through a defense of good faith claim of title. As already explained, this is not true. Indeed, at no point during closing argument did the prosecutor suggest that Berg's version of events, if true, would not constitute a defense to the charge under the instructions provided. RP 90-97. Given that the inclusion of an unnecessary instruction might serve only to confuse or distract the jury, the choice not to request it represented a legitimate and reasonable trial tactic, and did not constitute deficient representation.

2. Defense Counsel's Choice Not To Request
The Instruction Did Not Prejudice The
Defendant.

Even if the court finds that defense counsel provided deficient representation by choosing not to request an instruction on good faith claim of title, the defendant was not prejudiced by the deficiency. In order to show that he was prejudiced by deficient conduct, a defendant must show that defense counsel's errors were "so serious as to deprive him of a fair trial." Cienfuegos, 144 Wn.2d at 230. This requires "the existence of a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 229. Where the alleged deficiency is counsel's failure to request an instruction on a particular defense, the defendant is not prejudiced by such deficiency where the instructions given still allow the jury to consider the defense's theory of the case. See id. at 229-30 (finding no prejudice from counsel's failure to request a diminished capacity instruction where the court's instructions on knowledge and intent allowed the jury to consider the defendant's impairment in determining whether he had the required knowledge and intent).

Although Berg contends, without authority, that the failure to request an instruction on good faith claim of title in this case

negated Berg's defense and deprived the jury of the ability to acquit Berg even if it found his account credible, that is simply not the case. The court's instructions on the elements of the crime and definition of theft allowed the jury to consider the defense theory that Berg lawfully took the property after paying for it and did not intend to commit theft. Had the jury believed the defense theory that Berg did not intend to commit theft, they would have been unable to find that the State had proved all the elements of the crime beyond a reasonable doubt. In finding Berg guilty beyond a reasonable doubt, the jury necessarily rejected Berg's contention that he believed he had paid for the beer, and instead found that he had intended to commit theft. Thus, even if the jury had been explicitly instructed on good faith claim of title, the result would necessarily have been the same. Berg therefore suffered no prejudice from defense counsel's choice not to request an instruction on good faith claim of title.

Because defense counsel's representation of the defendant was not deficient in choosing not to request an instruction on good faith claim of title, and because Berg suffered no prejudice from that choice, Berg's claim of ineffective assistance of counsel fails.

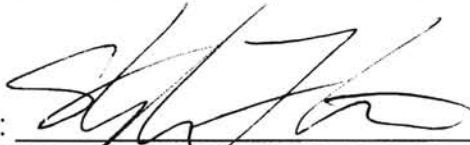
D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Berg's conviction.

DATED this 5th day of June, 2013.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Thomas M. Kummerow, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. ROBERT RALPH BERG, Cause No. 69293-3-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Kathryn LeMay
Name:
Done in Seattle, Washington

6/5/13
Date