No. 45326-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Timmy Sherman,

Appellant.

Grays Harbor County Superior Court Cause No. 12-1-00473-3

The Honorable Judge F. Mark McCauley

Appellant's Reply Brief

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

WASHINGTON STATE CASES

WASHINGTON STATUTES

ARGUMENT

I. MR. SHERMAN'S DEFENSE ATTORNEY PROVIDED INEFFECTIVE ASSISTANCE BY FAILING TO RAISE THE "REASONABLE BELIEF" DEFENSE.

To be minimally competent, a defense attorney must research the relevant law and identify the sole defense available to the accused. *State v. Kyllo*, 166 Wn.2d 856, 62, 215 P.3d 177 (2009); *State v. Powell*, 150 Wn. App. 139, 156, 206 P.3d 703 (2009). Counsel's failure to propose instructions on the defense theory prejudices the accused if the jury is left with no recognition of the legal significance of the evidence. *Powell*, 150 Wn. App. at 156-57.

The legislature has created a statutory defense to criminal trespass for situations in which:

> The actor reasonably believed that the owner of the premises, or other person empowered to license access thereto, would have licensed him or her to enter or remain.

RCW 9A.52.090(3). This statutory defense applies to any crime with an element of unlawful entry, including burglary. *State v. J.P.*, 130 Wn. App. 887, 895, 125 P.3d 215 (2005).

Mr. Sherman's attorney provided ineffective assistance by failing to properly raise the only available defense: that Mr. Sherman reasonably believed that the owner of the premises would have granted him license to enter. RCW 9A.52.090(3). The state argues, however, that Mr.

Sherman's counsel did raise the defense by arguing it during closing argument. Brief of Respondent, pp. 3-4.

Respondent's contention is incorrect for two reasons. First, defense counsel did not raise the reasonable belief defense. Instead, he merely argued to the jury that Mr. Sherman's entry into the building was not unlawful for other reasons, such as that there was not a "no trespassing" sign on the door. RP 112-13.

Second, even if defense counsel had argued the reasonable belief defense, he still failed to request an instruction informing the jury of the legal import of the argument. CP 34-41. Absent a relevant instruction, the jury would have been left believing that it was required to convict whether Mr. Sherman had a reasonable belief that he would have been allowed on the property or not. *Powell*, 150 Wn. App. at 156-57.

The reasonable belief defense negates the burglary element of unlawful entry. *J.P.*, 130 Wn. App. at 895. Once it has been validly raised, the state must prove beyond a reasonable doubt that the accused did not reasonably believe that s/he would have been granted license to enter the premises. *Id.* Even so, respondent argues that the reasonable belief defense is not available to a burglary charge. Brief of Respondent, pp. 4-6 (*citing State v. Cordero*, 170 Wn. App. 351, 369-70, 284 P.3d 773 (2012); *State v. Ponce*, 166 Wn. App. 409, 417, 269 P.3d 408 (2012)).

But neither *Cordero* nor *Ponce* dealt with a situation analogous to that in Mr. Sherman's case. In both of those cases, the accused claimed to have been invited into the premises he was alleged to have burglarized. *Cordero*, 170 Wn. App. at 357-58; *Ponce*, 166 Wn. App. at 414. The court in those cases ruled that a reasonable belief instruction was not warranted because the other instructions were sufficient for the accused to argue his theory of the case. *Cordero*, 170 Wn. App. at 370; *Ponce*, 166 Wn. App. at 419-20. Indeed, neither *Cordero* nor *Ponce* actually raised a true "reasonable belief" defense. Rather, each case dealt with a simple claim of lawful, invited entry. *Id.* As noted by the *Cordero* and *Ponce* courts, defense counsel needed only the definition of unlawful entry to argue that issue to the jury. *Id.*

Here, on the other hand, Mr. Sherman believed he would be granted license to enter the building in order to look for a job. RP (7/16/13) 66, 87. He had not been explicitly invited and none of the court's instructions informed the jury of the legal significance of his reasonable belief. Unlike in *Cordero* and *Ponce*, the court's instructions in this case were not sufficient to permit Mr. Sherman to argue his reasonable belief defense.

The state argues that *Cordero* and *Ponce* demonstrate the court's retreat from the holding of *J.P.* Brief of Respondent, p. 5. To the

contrary, however, the *Ponce* court noted that the premise of *J.P.*– that any offense negating the unlawful entry element of trespass must also negate that element of burglary – "continues to appear inescapable." *Ponce*, 166 Wn. App. at 418. The state's reliance on *Cordero* and *Ponce* is misplaced.[1]

Mr. Sherman's defense attorney provided ineffective assistance of counsel by failing to raise the reasonable belief defense. *Powell*, 150 Wn. App. at 156. Mr. Sherman's conviction must be reversed. *Kyllo*, 166 Wn.2d at 862.

II. THE PROSECUTOR COMMITTED PREJUDICIAL MISCONDUCT BY MISSTATING THE LAW IN CLOSING ARGUMENT.

A prosecutor commits misconduct by mischaracterizing the law to the jury. *State v. Evans,* 163 Wn. App. 635, 643, 260 P.3d 934 (2011). Here, the prosecutor misstated the elements of burglary by arguing that a burglary may be committed on *any* kind of real property:

> If you leave your chainsaw out on your lawn and somebody crosses your no trespassing sign and picks up your chainsaw, it's still a burglary because they took it off of your property. Okay. They're on your real property illegally.

---

[1] The state also argues that *J.P.* does not apply to Mr. Sherman's case because (1) it was a bench trial and (2) it addressed the defense of abandonment rather than of reasonable belief. Brief of Respondent, p. 5. As noted by the *Ponce* court, however, the holding of *J.P.* is much broader than just the abandonment defense: any defense that negates the unlawful entry element of trespass must also negate that element of burglary. *Ponce*, 166 Wn. App. at 418. The state does not explain why the analysis should be any different for a jury trial than for a bench trial.

RP (7/16/13) 122.

The prosecutor's argument minimized the state's burden. The prosecuting attorney omitted the requirement that the accused enter or remain (1) unlawfully, (2) in a "building," (3) with intent to commit a crime inside. RCW 9A.52.030. Nonetheless, respondent argues that the prosecutor did not misstate the law because a person can be convicted of burglary for unlawfully entering a fenced area. Brief of Respondent, pp. 6-7.

But the prosecutor's example did not involve a fenced area. RP (7/16/13) 122. And the state does not address the prosecutor's omission of the intent element. Brief of Respondent, pp. 6-7. Respondent's failure to address the point can be treated as a concession that the argument was improper. *In re Pullman*, 167 Wn.2d 205, 212 n.4, 218 P.3d 913 (2009). The prosecutor's example misstated the law of burglary.

The prosecutor's mischaracterization of the law prejudiced Mr. Sherman. *In re Glasmann*, 175 Wn.2d 696, 704, 286 P.3d 673 (2012). There was no direct evidence that Mr. Sherman had intent to commit a crime when he entered and remained in the building. Indeed, Mr. Sherman left numerous valuable items undisturbed, taking only some change and cookies. RP (7/16/13) 51-58. Still, the state argues that the

prosecutor's improper argument was not prejudicial because it was undisputed that Mr. Sherman entered a building. Brief of Respondent, pp. 7-9.

But it was disputed whether Mr. Sherman entered the building with the intent to commit a crime *inside*. The prosecutor's improper example obfuscated that element. There is a substantial likelihood that the prosecutor's improper argument affected the verdict. *Glasmann*, 175 Wn.2d at 704.

The prosecutor committed prejudicial misconduct by mischaracterizing the elements of burglary in closing. *Evans*, 163 Wn. App. at 643. Mr. Sherman's conviction must be reversed. *Id.*

III. THE COURT MISCALCULATED MR. SHERMAN'S OFFENDER SCORE BY INCLUDING PRIOR OFFENSES THAT SHOULD HAVE "WASHED OUT."

Prior convictions for class C felonies are not included in an offender score if the accused has spent five consecutive, crime-free years in the community following his/her conviction or release from confinement. RCW 9.94A.525(2)(c).

Mr. Sherman's criminal history sheet shows three class C felony convictions between 1989 and 1993. CP 54-55. He then had six years without any convictions, from 1993-1999. CP 54. The offenses from 1989 to 1993 should have washed out. RCW 9.94A.525(2)(c). The state

does not dispute this analysis of the information in Mr. Sherman's criminal history statement. Brief of Respondent, pp. 9-10. Respondent's failure to argue the issue may be treated as a concession. *Pullman*, 167 Wn.2d at 212 n.4.

In connection with his guilty plea to the drug offense, Mr. Sherman agreed that he had committed the offenses listed on the state's criminal history sheet. CP 8. The state argues that this means he agreed his offender score. Brief of Respondent, pp. 9-10. But the statement to which Mr. Sherman agreed does not purport to calculate an offender score. CP 8. No offender score is listed anywhere on the document. CP 8. Mr. Sherman did not agree to the state's calculation of his offender score.

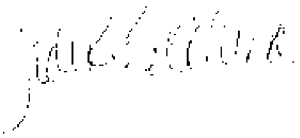
The court erred by using convictions for class C felonies that had washed out to increase Mr. Sherman's offender score. RCW 9.94A.525(2)(c). The case must be remanded for resentencing. *Id.*

CONCLUSION

For the reasons set forth above and in Mr. Sherman's Opening Brief, his conviction must be reversed. In the alterative, his case must be remanded for resentencing.

Respectfully submitted on June 16, 2014,

BACKLUND AND MISTRY



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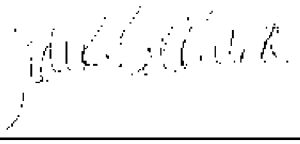
I filed the Appellant's Reply Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on June 16, 2014.



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