

No. 69293-3-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

ROBERT RALPH BERG,

Appellant.

---

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF  
WASHINGTON FOR KING COUNTY

The Honorable Barbara Linde

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Mr. Berg's Sixth Amendment and article I, section 22 rights to counsel were violated when his attorney rendered ineffective assistance of counsel.

2. Defense counsel rendered constitutionally deficient assistance of counsel in failing to proffer a jury instruction on good faith claim of title, which would have established for the jury the lawfulness of Mr. Berg's possession.

B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

A defendant has a Sixth Amendment and article I, section 22 right to counsel and to the effective representation of counsel. A defendant is entitled to a new trial where he can establish his attorney performed deficiently and that he was prejudiced by the ineffective representation. At trial, Mr. Berg defended on the grounds that he obtained the items lawfully and struck the victim in defense of his lawfully obtained property. In order to establish he obtained the items lawfully, Mr. Berg bore the burden of proving he had a good faith claim of title to the items. Defense counsel proffered, and the court instructed on, the defense of property, but counsel did not proffer an instruction on good faith claim of title. Is Mr. Berg entitled to a new

trial because of his attorney's failure to proffer a good faith claim of title instruction, which would have established to the jury a valid defense of property?

C. STATEMENT OF THE CASE

Robert Berg went to the North Park Grocery on Aurora Avenue North in Seattle to purchase some beer and cigarettes. 7/24/2012RP 52. This was a store Mr. Berg frequented regularly. *Id.* Mr. Berg's brother-in-law suggested Mr. Berg trade some commemorative coins for the beer and cigarettes as he had done in the past. 7/24/2012RP 25, 52-53. Mr. Berg grabbed two coins, and he and his fiancé drove to the grocery store. 7/24/2012RP 25-26, 55.

As he had done on past occasions, Mr. Berg entered the store, placed the coins on the counter, and took two half-cases of beer from the store's cooler. 7/24/2012RP 55. Mr. Berg stated he had engaged in a similar transaction at the store using the coins as barter only three to four days before this incident. 7/24/2012RP 61. The coins were designed to act as collateral for the store to hold until he paid for the items. *Id.* at 61. Mr. Berg did say he had never bartered the gold coins with the person behind the counter on this particular day. 7/24/2012RP 65.

According to Mr. Berg, he nodded to the woman behind the counter, Chaesun Osaka, and left the store with the beer plainly visible in his hands. 7/24/2012RP 56.

As he was getting into the car with the beer, Mr. Berg stated he was jerked backwards and saw Ms. Osaka pulling on his hair and trying to grab the beer. 7/24/2012RP 56-58, 62. In the struggle, Mr. Berg dropped one of the half-cases of beer. Mr. Berg said he shrugged off Ms. Osaka, got into the car, and he and Ms. Conger drove off. 7/24/2012RP 31.

Ms. Osaka told a different story. Ms. Osaka stated she saw Mr. Berg enter the store. 7/23/2012RP 41. She agreed Mr. Berg was a frequent customer. *Id.* Ms. Osaka watched Mr. Berg go to the cooler, take two half-cases of beer from the cooler, then walk out of the store without paying. 7/23/2012RP 41-44. Ms. Osaka ran out of the store and tried to take the beer away from Mr. Berg. *Id.* at 45. Mr. Berg and Ms. Osaka struggled, causing Mr. Berg to drop one of the half-cases of beer. 7/23/2012RP 46. According to Ms. Osaka, Mr. Berg swung his arm, striking her across the face and chest. *Id.* at 47. Ms. Osaka claimed she suffered a chipped tooth and a cut on her finger. *Id.* at 49. She denied that Mr. Berg had offered anything in exchange for the

beer. *Id.* at 58-59. Ms. Osaka acknowledged Mr. Berg did not strike her until she tried to take the beer away from him. 7/23/2012RP 67.

A passing motorist, seeing the altercation outside the grocery, called the police. 7/23/2012RP 79-82. Mr. Berg was subsequently charged with second degree robbery. CP 1.

Mr. Berg's attorney proffered a jury instruction on the defense of property, WPIC 17.02, which the trial court gave to the jury. CP 33, 49. (A copy of the jury instruction is in the Appendix). The instruction, among other things, stated that a person may use force "to prevent a malicious trespass or other malicious interference with real or personal property *lawfully in that person's possession.*" CP 49 (emphasis added). No instruction on Mr. Berg's lawfulness of possession was proffered by defense counsel.

Following a jury trial, Mr. Berg was convicted as charged. CP 20.



#### D. ARGUMENT

##### DEFENSE COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL IN FAILING TO PROPOSE A GOOD FAITH CLAIM OF TITLE JURY INSTRUCTION

1. Mr. Berg had the constitutionally protected right to the effective assistance of counsel. A person accused of a crime has a constitutional right to effective assistance of counsel. U.S. Const. amend. VI;<sup>1</sup> Const. art. I, § 22;<sup>2</sup> *United States v. Cronin*, 466 U.S. 648, 654, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984); *State v. Hendrickson*, 129 Wn.2d 61, 77, 917 P.2d 563 (1996). “The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel’s skill and knowledge is necessary to accord defendants the ‘ample opportunity to meet the case of the prosecution’ to which they are entitled.” *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 276, 63 S.Ct. 236, 87 L.Ed.2d 268 (1942).

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<sup>1</sup> The Sixth Amendment provides, in relevant part, “In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.”

<sup>2</sup> Article I, § 22 of the Washington Constitution provides, in relevant part, “In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel . . . .”

An accused's right to be represented by counsel is a fundamental component of our criminal justice system. Lawyers in criminal cases are necessities, not luxuries. Their presence is essential because they are the means through which the other rights of the person on trial are secured. Without counsel, the right to trial itself would be of little avail, as this Court has recognized repeatedly. Of all the rights an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have.

*Cronic*, 466 U.S. at 653-54 (internal quotations omitted).

A new trial should be granted if (1) counsel's performance at trial was deficient, and (2) the deficient performance prejudiced the defendant. *Strickland*, 466 U.S. at 687. As to the first inquiry (performance), an attorney renders constitutionally inadequate representation when he or she engages in conduct for which there is no legitimate strategic or tactical basis. *State v. McFarland*, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1998). A decision is not permissibly tactical or strategic if it is not reasonable. *Roe v. Flores-Ortega*, 528 U.S. 470, 481, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000); *see also Wiggins v. Smith*, 539 U.S. 510, 521, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003) (“[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms”), *quoting Strickland*, 466 U.S. at 688. While an attorney's decisions are treated

with deference, his or her actions must be reasonable under all the circumstances. *Wiggins*, 539 U.S. at 533-34.

As to the second inquiry (prejudice), if there is a reasonable probability that but for counsel's inadequate performance, the result would have been different, prejudice is established and reversal is required. *Strickland*, 466 U.S. at 694; *Hendrickson*, 129 Wn.2d at 78. A reasonable probability "is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694; *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). It is a lower standard than the "more likely than not" standard. *Thomas*, 109 Wn.2d at 226.

"A claim of ineffective assistance of counsel presents a mixed question of fact and law [and is] reviewed *de novo*." *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009).

2. Mr. Berg's trial counsel rendered ineffective assistance of counsel by failing to offer a jury instruction on good faith claim of title. Mr. Berg's theory at trial was that he was in lawful possession of the beer and struck Ms. Osaka in defense of his lawful possession. To that end, defense counsel never offered a jury instruction on good faith

claim of title, which would have established the lawfulness of his possession. Thus, Mr. Berg's attorney was ineffective.

Where the claim of ineffective assistance is based upon counsel's failure to request a particular jury instruction, "the defendant must show he was entitled to the instruction, counsel's performance was deficient in failing to request it, and the failure to request the instruction caused prejudice." *State v. Thompson*, 169 Wn.App. 436, 495, 290 P.3d 996 (2012).

In any prosecution for robbery, it is a defense that the property or service was appropriated openly and avowedly under a claim of title made in good faith, *even though the claim may be untenable*. RCW 9A.56.020(2) (emphasis added). *See State v. Larsen*, 23 Wn.App. 218, 596 P.2d 1089 (1979) (self-help used to recover specific property is a defense to robbery because it asks whether the actor had the requisite intent to commit robbery); *State v. Hicks*, 102 Wn.2d 182, 187, 683 P.2d 186 (1984) (if an element of the good faith claim of title defense negates an element of the offense, the prosecution must prove the absence of the defense beyond a reasonable doubt), *citing State v. McCullum*, 98 Wn.2d 484, 490, 656 P.2d 1064 (1983). The phrase "claim of title" means a right of ownership or entitlement to possession.

*State v. Ager*, 128 Wn.2d 85, 92, 904 P.2d 715 (1995); *State v. Mora*, 110 Wn.App. 850, 855-56, 43 P.3d 38 (2002).

A defendant relying on the good-faith claim-of-title defense “must do more than assert a vague right to property.” *Ager*, 128 Wn.2d at 95. The defendant must present evidence satisfying both elements of the defense:

- (1) that the property was taken openly and avowedly and
- (2) that there was some legal or factual basis upon which the defendant, in good faith, based a claim of title to the property taken, even though the claim of title may prove to be untenable.

RCW 9A.56.020; *Ager*, 128 Wn.2d at 95. “[T]he defense is allowed because it raises the question of whether the actor proceeded with the intent necessary to constitute the crime of robbery.” *Larsen*, 23 Wn.App. at 219.

Mr. Berg’s defense at trial was that he struck Ms. Osaka in order to retain the property to which he had a good faith claim of title. He testified he bartered for the beer using gold commemorative coins. Thus, Mr. Berg was entitled to the instruction because he admitted he openly took the beer, and established a claim to the beer even though it may ultimately have been untenable.

To this end, defense counsel proffered in order to establish the lawfulness of Mr. Berg's actions, and the trial court instructed, on the defense of property. To prove that he had a valid defense of property, Mr. Berg bore the burden of establishing he had a lawful right to the beer, which he could only show by establishing a good faith claim of title. But defense counsel inexplicably did not proffer a good faith claim of title instruction.<sup>3</sup> Thus, although the defense of property was argued to the jury, the jury was left without any ability to apply it because they were not instructed on it. A defendant in a criminal case is entitled to have the jury fully instructed on the defense theory of the case. *State v. Staley* 123 Wn.2d 794, 802-03, 872 P.2d 502 (1994); *State v. Hughes*, 106 Wn.2d 176, 191, 721 P.2d 902 (1986). Failure to include a good faith claim of title instruction when the evidence supports the defense is reversible error. *State v. Hull*, 83 Wn.App. 786,

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<sup>3</sup> See 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 to the count of Robbery in the Second Degree.

799, 924 P.2d 375 (1996); *State v. Pestrin*, 43 Wn.App. 705, 710, 719 P.2d 137 (1986). When there is sufficient evidence to instruct on this defense, it is the prosecution's obligation to disprove the defense beyond a reasonable doubt. *Hicks*, 102 Wn.2d at 187; *State v. Hawkins*, 157 Wn.App. 739, 747, 238 P.3d 1226 (2010), *review denied*, 171 Wn.2d 1013 (2011).

The failure to proffer the good faith claim of title instruction, an instruction to which Mr. Berg was entitled, constituted deficient performance by defense counsel. Clearly, had Mr. Berg asked for the instruction and the court declined, he would have been entitled to automatic reversal of his conviction. *Hull*, 83 Wn.App. at 799.

3. Mr. Berg suffered prejudice from counsel's deficient performance. Trial counsel's deficient performance alone "does not warrant setting aside the judgment . . . if the error had no effect on the judgment." *Strickland*, 466 U.S. at 691. In order to establish prejudice, Mr. Berg "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. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* The defendant is not required to establish his innocence or even demonstrate "that

counsel's deficient conduct more likely than not altered the outcome in the case.” *Strickland*, 466 U.S. at 693. In order to establish prejudice, Mr. Berg need only show that had his attorney proposed a good faith claim of title instruction, there is a reasonable probability that the court's verdict would have been different. *Id.* at 694.

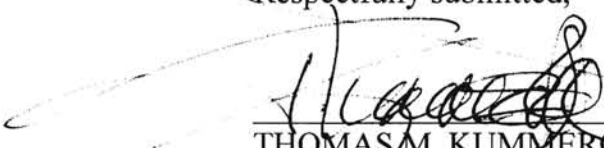
Here, there was a reasonable probability of a different outcome at trial. The jury was never instructed on the lawfulness of Mr. Berg's possession of the beer, thus leaving the jury to reject it outright as they were never instructed on it. The failure negated his defense at trial. Had the jury been properly instructed, the jury may have agreed with Mr. Berg and acquitted him. Mr. Berg is entitled to reversal of his conviction and remand for a new trial.

F. CONCLUSION

For the reasons stated, Mr. Berg asks this Court reverse his conviction and remand for a new trial.

DATED this 8th day of April 2013.

Respectfully submitted,



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## APPENDIX A

No. \_\_\_\_\_

It is a defense to a charge of robbery in the second degree that the force used was lawful as defined in this instruction.

The use of force upon or toward the person of another is lawful when used by a person who reasonably believes that he is about to be injured in preventing or attempting to prevent a malicious trespass or other malicious interference with real or personal property lawfully in that person's possession, and when the force is not more than is necessary.

The person using the force may employ such force and means as a reasonably prudent person would use under the same or similar conditions as they appeared to the person, taking into consideration all of the facts and circumstances known to the person at the time of the incident.

The State has the burden of proving beyond a reasonable doubt that the force used by the defendant was not lawful. 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.

## APPENDIX B

### **WPIC 19.08 Theft—Defense**

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][City][County]* 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][City][County]* has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty *[as to this charge]*.

#### **NOTE ON USE**

If the statutory defense is in issue, use this instruction with a to-convict instruction from WPIC Chapter 70 (Theft). In the case of robbery or taking a motor vehicle, the wording of the instruction must be modified to fit the charge.

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE**

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 69293-3-I
v.	)	
	)	
ROBERT BERG,	)	
	)	
Appellant.	)	


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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 9<sup>TH</sup> DAY OF APRIL, 2013, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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**SIGNED** IN SEATTLE, WASHINGTON THIS 9<sup>TH</sup> DAY OF APRIL, 2013.

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