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MAR 04, 2016

Court of Appeals
Division III
State of Washington

NO. 33279-9-III

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

STATE OF WASHINGTON,

Respondent,

v.

BENJAMIN CASTRO,

Appellant.

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

The Honorable Scott R. Sparks, Judge

SUPPLEMENTAL BRIEF OF APPELLANT

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A. SUPPLEMENTAL ASSIGNMENT OF ERROR

Defense counsel rendered constitutionally ineffective assistance by proposing a full set of jury instructions that mostly matched the State's rather than just those instructions necessary to advance its theory of the case or dispute the State's theory of the case.

Issues Pertaining to Supplemental Assignment of Error

1. In light of the invited error doctrine, can any legitimate trial strategy explain proposing a full set of jury instructions that is almost identical to the State's rather than only those instructions necessary to advance the defense theory of the case?

2. Was defense counsel's submission of a full set of jury instructions that almost entirely duplicated the State's submission prejudicial if it bars appellant's valid challenges to the pattern reasonable doubt jury instruction?

B. SUPPLEMENTAL STATEMENT OF THE CASE

Defense counsel proposed a full set of jury instructions. CP 136-56. Defense counsel asserted his proposed instructions were "not as complete as [the State's] that [the prosecutor] sent me last night, but they are the same

except for the definition of possession.”¹ 2RP 3. The defense instructions included WPIC 4.01, the pattern instruction on reasonable doubt. CP 141.

Based on defense counsel’s submission of WPIC 4.01, the State argues on appeal that this court may not consider Castro’s challenge to WPIC 4.01, contending the invited error doctrine precludes review. Br. of Resp’t at 22-23.

C. SUPPLEMENTAL ARGUMENT

DEFENSE COUNSEL WAS INEFFECTIVE FOR UNNECESSARILY PROPOSING JURY INSTRUCTIONS IDENTICAL TO THE STATE’S

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee effective assistance of counsel. To establish a claim for ineffective assistance, counsel’s performance must have been deficient and the deficient performance must have resulted in prejudice. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). “Deficient performance occurs when counsel’s performance falls below an objective standard of reasonableness.” State v. Yarbrough, 151 Wn. App. 66, 89, 210 P.3d 1029 (2009). “Prejudice occurs when, but for the deficient performance, there is a reasonable probability that the outcome would have differed.” Id.

¹ The defense proposed instructions did not actually contain any definition of possession. See CP 136-56.

Here, defense counsel proposed a full set of jury instructions identical to the State's proposal "except for the definition of possession." 2RP 3; CP 136-56. There is no legitimate tactic or strategy that could explain submitting a full set of instructions almost identical to those an adverse party proposes, rather than just proposing those instructions necessary to assert the defense theory of the case. Indeed the sole consequence of proposing a duplicate set of instructions is risking the foreclosure any future challenge to the instructions. Indeed, there is no conceivable benefit to a criminal defendant to join in the jury instructions a prosecutor proposes. No objectively reasonable defense attorney would willingly choose to bar or burden his or her client's future claims against the jury instructions by unnecessarily submitting an independent set of instructions that almost entirely duplicate the State's. By proposing a duplicative reasonable doubt instruction rather than just not objecting or excepting to the State's proposed instruction, counsel's performance fell below an objective standard of reasonableness.

Because the State argues Castro invited the error by proposing WPIC 4.01, the prejudice prong of Strickland is self-fulfilling. Invoking the invited error doctrine, the State claims this court may not consider Castro's good faith constitutional challenge to a reasonable doubt instruction that requires jurors to articulate the reason for their doubt. Br. of Resp't at 22-23. Had

defense counsel not proposed a duplicative set of instructions, the State could not claim Castro invited the error. Nor could the State ask this court to decline to reach the merits of Castro's arguments. If this court were to apply the invited error doctrine and decline to reach the merits of the constitutional issue Castro raises, there is a reasonable probability that the outcome of this appeal would differ.

There was no objectively reasonable purpose in proposing jury instructions matching State's submission almost verbatim. If this court agrees with the State's argument that defense counsel invited any error by proposing WPIC 4.01, the resulting prejudice is Castro's inability to raise a constitutional issue on appeal. Defense counsel rendered ineffective assistance, requiring this court to reject the State's invited error argument and to reach the merits of Castro's challenge to WPIC 4.01.

D. CONCLUSION

Any invited error with regard to the jury instructions is the result of ineffective assistance of counsel. This court should accordingly reject the State's invited error claim.

DATED this 4th day of March, 2016.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

A handwritten signature in black ink, appearing to read "K. March", written over a horizontal line.

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State v. Benjamin Castro

No. 33279-9-III

Certificate of Service

I Patrick Mayovsky, declare under penalty of perjury under the laws of the state of Washington that the following is true and correct:

That on the 4th day of March, 2016, I caused a true and correct copy of the **Supplemental Brief of Appellant** to be served on the party / parties designated below by email per agreement of the parties pursuant to GR30(b)(4) and/or by depositing said document in the United States mail.

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Signed in Seattle, Washington this 4th day of March, 2016.

x 