62437-7

62437-7

~~NO. 62438-5-I~~
(~~consolidated with~~ NO. 62437-7-I)

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,
Respondent,

v.

KELLIE MOI,
Appellant.

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

The Honorable Gregory P. Canova

APPELLANT'S REPLY BRIEF

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A. ARGUMENT.

1. THE TRIAL COURT ERRONEOUSLY FAILED TO PROVIDE A UNANIMITY INSTRUCTION ON THE CHARGE OF CRIMINAL TRESPASS WHERE THE STATE PRESENTED EVIDENCE OF TWO DISTINCT ACTS OF TRESPASS, EITHER OF WHICH COULD BE THE BASIS OF A CRIMINAL CONVICTION.

Criminal defendants have a constitutional right under the constitutions of the United States and Washington to a unanimous jury verdict. U.S. Const. amend. 6; Wash. Const. art. 1, § 21. Where evidence is presented of multiple distinct acts any of which could be the basis of a criminal conviction, either (1) the State must elect which act it is relying on, or (2) the trial court must instruct the jury that they must unanimously agree that the same act has been proven beyond a reasonable doubt. State v. Camarillo, 115 Wn.2d 60, 64, 794 P.2d 850 (1990); State v. Kitchen, 110 Wn.2d 403, 411, 756 P.2d 105 (1988); State v. Petrich, 101 Wn.2d 566, 572, 683 P.2d 173 (1984).

Here, there was evidence presented at trial not only of a trespass on the Seattle City Light substation property, but also on adjoining property belonging to Frank Zellerhoff. RP 260, 266, 288, 294-95. The jury was not instructed that it had to unanimously

agree as to which act of trespass had been proven beyond a reasonable doubt in order to render a guilty verdict. CP 27-50.

The State argues that since the Mois were charged with burglarizing the substation, and the criminal trespass instructions were offered as a lesser included offense of burglary, the criminal trespass conviction must necessarily relate to the substation property. Brief of Respondent at 14. The State is correct that, as a matter of law, an individual cannot properly be convicted for an uncharged crime. The problem is, as lay people, the jury cannot be expected to have so understood. The jury instructions regarding criminal trespass did not specify that the "premises" in question referred only to the substation property. CP 43-44. In fact, nowhere in the instructions was the jury directed to limit its consideration to the substation property. CP 27-50.

The State also argues that there was insufficient evidence for the jury to have based a conviction on the Zellerhoff property, given that neither Mr. Zellerhoff nor Mr. Matthews specifically told the Mois that they objected to them being on the property. Brief of Respondent at 14-15. However, both Mr. Zellerhoff and his employee, Mr. Matthews, testified that the Mois did not ask permission to cut through the Zellerhoff property. RP 266, 288.

Moreover, Mr. Zellerhoff specifically denied granting the Mois permission to be on his property:

> Q: "And did you give the people permission to exit out of your property?"
> A: "Oh, no."

RP 260. Based on this testimony, there was sufficient evidence for the jury to conclude that the Mois were not "licensed, invited, or otherwise privileged" to be on the Zellerhoff property, as required for a criminal trespass conviction. CP 39.

Finally, the State argues that the prosecutor elected in closing argument to rely solely on the trespass of the substation property as the basis for conviction. Brief of Respondent at 16. The prosecutor did no such thing, instead accusing the Mois numerous times during closing argument of trespassing on the Zellerhoff property. RP 584, 588, 594.

Prejudice from the failure to require a unanimous verdict is presumed, and the error is reversible unless harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1975); Kitchen, 110 Wn.2d at 406. Given the numerous times that the trespass on the Zellerhoff property was brought up, combined with the lack of clarity in the jury instructions, the error cannot be said to be harmless beyond a

reasonable doubt, and reversal of the criminal trespass conviction is required.

2. MS. MOI'S CONSTITUTIONAL RIGHTS TO DUE PROCESS AND FAIR NOTICE WERE VIOLATED WHERE THE JURY WAS PERMITTED TO CONVICT HER BASED ON AN UNCHARGED ALTERNATE ACT.

Both the federal and state constitutions guarantee a criminal defendant due process and fair notice of the charges against him or her. U.S. Const. amend. 6; Wash. Const. art. 1, §§ 3, 22. An accused person cannot be tried or convicted for an offense not charged. DeJonge v. Oregon, 299 U.S. 353, 362, 57 S.Ct. 255, 81 L.Ed. 278 (1937); State v. Pelkey, 109 Wn.2d 484, 487, 745 P.2d 854 (1987); State v. Valladares, 99 Wm.2d 663, 671, 664 P.2d 508 (1983).

The State argues that "it was clear from the jury instructions, the evidence presented, the closing statements of the prosecutor, and the argument of all parties that the only property at issue, for either the primary charge of burglary or the lesser included offense of criminal trespass in the second degree, was the Seattle City Light substation property." Brief of Respondent at 18-19. While it is true that the Information charged the Mois with a burglary of the substation property, none of the jury instructions specified that a

conviction must be based on the substation property. CP 1, 27-50. And as previously discussed, both the evidence at trial as well as the prosecuting attorney's closing argument discussed a trespass on the Zellerhoff property numerous times. RP 260, 266, 288, 294-95, 584, 588, 594.

The State cites to State v. Levy, 156 Wn.2d 709, 132 P.3d 1076 (2006) for the proposition that any jury instruction clarifying the property in question would have constituted a judicial comment on the evidence. Brief of Respondent at 19. In Levy, a jury instruction which referred to the apartment in question as a building was improper because it arguably suggested to the jury that the apartment was a building as a matter of law. Id. at 721. The Levy case does not address the problem that exists in this case, which is the potential that the jury convicted Ms. Moi based on the uncharged act of trespass on the Zellerhoff property. In the absence of clear evidence that the verdict was based solely on the act charged, Ms. Moi's conviction violates her constitutional rights and must be reversed. Stirone v. United States, 361 U.S. 212, 217-19, 80 S.Ct. 270, 4 L.Ed.2d 252 (1960); State v. Severns, 13 Wn.2d 542, 552, 125 P.2d 659 (1942).

3. IN REFUSING TO INSTRUCT THE JURY REGARDING THE DEFENSE OF ABANDONMENT, MS. MOI WAS DENIED EQUAL PROTECTION OF THE LAW.

The Fourteenth Amendment to the U.S. Constitution is violated when a statute creates classifications and the law (1) does not serve a legitimate government objective or (2) the means employed are not rationally related to the statute's objective. State v. Manussier, 129 Wn.2d 652, 673, 921 P.2d 473 (1996), cert. denied, 520 U.S. 1201 (1997). The trial court's failure to instruct the jury on the defense of abandonment violated Ms. Moi's constitutional right to equal protection of the law.

The State asserts that since, under the terms of RCW 9A.52.090(1), the defense is unavailable to everyone charged with burglary of a fenced area (since a fenced area is not a "building" under the criminal trespass statute), there is no equal protection violation. Brief of Respondent at 24. Under this rationale, there should be no equal protection violation where a statute excludes applicability of a firearm enhancement to possession of machine guns, but does not exclude applicability of the enhancement to possession of a short-barreled shotgun, since the firearm enhancement applies equally to everyone convicted of possession

of a short-barreled shotgun. However, in State v. Berrier, 110 Wn. App. 639, 649-50, 41 P.3d 1198 (2002) this Court held that the statute in question denied equal protection of the laws, since there was no rational basis to distinguish between people who possessed a short-barreled shotgun and those who possessed machine guns. Similarly, in this case, there is no rational basis for allowing an abandonment defense for those charged with criminal trespass in a "building" within the traditional meaning of the word, while denying the defense to people charged with trespassing in a fenced area.

The State also asserts that there is a rational basis for allowing an abandonment defense for a charge of trespass of a building but not to a fenced area, because a jury would not be able to determine whether land, fenced or not, is abandoned. Brief of Respondent at 25-26. However, this issue should be for the jury to determine. In this case, there was plenty of evidence from which the jury could make such a determination. Officer Andrews himself described the substation as "abandoned." RP 373. The substation was decommissioned and in "shambles" when visited by the Mois, having already been partially dismantled at some previous time. RP 223-24, 315, 441, 452, 512. The fence was rusted over where

a huge hole had been cut out of it. RP 377. The substation was overgrown with weeds and brush. RP 444. Neither of the two Seattle City Light employees who testified had ever been to the property prior to the incident date, and neither knew how long it had been since anyone from Seattle City Light had been to the property prior to this date. RP 235, 241-42, 318, 322-23. Neither employee knew about the hole in the fence or the damage to the property that had taken place before March 20, 2007. RP 226, 229-30, 325. Finally, there was no "no trespassing" sign posted on the substation property. RP 387-88, 444.

4. MS. MOI WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHERE HER TRIAL ATTORNEY FAILED TO OFFER A JURY INSTRUCTION REGARDING THE STATUTORY DEFENSE FOR CRIMINAL TRESPASS CONTAINED IN RCW 9A.52.090(3).

The state and federal constitutions guarantee criminal defendants effective representation by counsel at all critical stages of trial. U.S. Const. amend. 6; Wash. Const. art. 1, § 22; State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987); Strickland v. Washington, 466 U.S. 668, 685-87, 104 S.Ct. 1052, 80 L.Ed.2d 674 (1984). To obtain relief based on ineffective assistance of counsel, a criminal defendant must establish that (1) his counsel's

performance was deficient and (2) his counsel's deficient performance prejudiced his defense. Strickland, 466 U.S. at 687; Williams v. Taylor, 529 U.S. 362, 390-91, 120 S.Ct. 1479, 146 L.Ed.2d 435 (2000).

RCW 9A.52.090(3) provides:

> In any prosecution under RCW 9A.52.070 [criminal trespass in the first degree] and 9A.52.080 [criminal trespass in the second degree], it is a defense that:
>
> (3) The actor reasonably believed that the owner of the premises, or other person empowered to license access thereto, would have licensed him to enter or remain.

Parties are entitled to jury instructions necessary to their theory of the case if there is evidence to support that theory. State v. Redmond, 150 Wn.2d 489, 495, 78 P.2d 1001 (2003). The State argues that counsel's failure to propose a jury instruction based on RCW 9A.52.090(3) did not constitute deficient performance because such a defense was not warranted under the facts of the case. Brief of Respondent at 29-31.

The defense under RCW 9A.52.090(3) is the same as that set out in the Model Penal Code and applies to those situations "where the actor knows that he does not have a license or privilege to enter or remain upon premises but believes that he could have

obtained permission had he sought it."[1] MODEL PENAL CODE § 221.2 comt. 2 (1980). As previously discussed, the substation property was not only decommissioned, but also had not been maintained for a substantial period of time. In addition, the eight foot gap in the fence and the lack of a "no trespassing" sign supported the Mois in reasonably believing that Seattle City Light would have licensed them to enter the property to merely look around. The Mois established a factual basis to support a request for a jury instruction based on RCW 9A.52.090(3).

The State also argues that counsel's failure to propose the instruction was a strategic decision. Brief of Respondent at 31-32. While it is true that conduct which can be characterized as a legitimate trial strategy or tactic is not considered ineffective, tactical or strategic decisions by defense counsel must still be reasonable decisions. Wiggins v. Smith, 539 U.S. 510, 526, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003). Effective assistance of counsel "includes a request for pertinent instructions which the

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[1] The only difference between RCW 9A.52.090(3) and §221.2(3)(c) of the Model Penal Code is that under the Model Penal Code, the defense is an affirmative defense, whereas under Washington law, once raised, the State must prove the absence of the statutory defense beyond a reasonable doubt. WPIC 19.07; City of Bremerton v. Widdell, 146 Wn.2d 561, 570, 51 P.3d 733 (2002).

evidence supports." State v. Kruger, 116 Wn. App. 685, 688, 67 P.3d 1147, rev. denied, 150 Wn.2d 1024 (2003); accord State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). Here, there was no tactical or strategic reason for counsel not to request the instruction. The Moi's defense was that they were not at the substation to steal anything, but merely to gather information before deciding whether to submit a bid for salvaging its contents. RP 452, 509-10. While acknowledging that they did not have explicit permission to be on the property, they just wanted to look around at what appeared to be an abandoned substation, and they assumed no one would mind them being there. RP 452, 462, 480-83, 514. A jury instruction based on RCW 9A.52.090(3) would not only be entirely consistent with this defense, it would provide a legal basis for the jury to find the Mois not guilty of the trespass charge. Counsel was deficient in failing to offer such an instruction.

Finally, the State argues that the Mois were not prejudiced by the failure to request an instruction, since the trial court would have denied the request, and since the attorneys were still able to argue their theory of the case in the absence of the instruction. Brief of Respondent at 32-34. As already set out, the Mois were entitled to the instruction. Second, an instruction under RCW

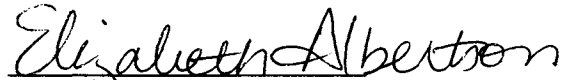
9A.52.090(3) would have informed the jury that the State bore the burden of proving the absence of the statutory defense beyond a reasonable doubt. WPIC 19.07; Widdell, 146 Wn.2d at 570. It was for the jury to decide whether the State had disproved the defense. But for the error, there is a reasonable probability that the result of the trial would have been different. Reversal of the conviction is required. Strickland, 466 U.S. at 694.

B. CONCLUSION.

For the reasons set forth above, reversal of Ms. Moi's conviction is required.

DATED this 14th day of September, 2009.

Respectfully submitted,



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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 62437-7-I
v.	)	
	)	
KELLIE MOI,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 14TH DAY OF SEPTEMBER, 2009, I CAUSED THE ORIGINAL **REPLY 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:

[X] AMANDA FROH, DPA KING COUNTY PROSECUTOR'S OFFICE APPELLATE UNIT 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
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SIGNED IN SEATTLE, WASHINGTON THIS 14TH DAY OF SEPTEMBER, 2009.

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