

62438-5

62438-5

NO. 62438-5-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

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STATE OF WASHINGTON,  
Respondent,

v.

KELLIE MOI,  
Appellant.

FILED  
COURT OF APPEALS DIVISION I  
STATE OF WASHINGTON  
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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Gregory P. Canova

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APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT.

In her appeal from a conviction of criminal trespass in the second degree, Ms. Moi contends that (1) the trial court violated her constitutional right to a unanimous jury verdict in failing to provide the jury with a unanimity instruction on the charge of criminal trespass; (2) her constitutional rights to due process and fair notice were violated where the jury was permitted to convict her based on an uncharged alternate act; (3) she was denied equal protection of the law when the trial court refused to instruct the jury regarding an abandonment defense; and (4) she 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). These errors require reversal of her conviction.

B. ASSIGNMENTS OF ERROR.

1. The trial court erroneously failed to provide a unanimity instruction as to the charge of criminal trespass.

2. Ms. Moi was deprived of her federal and state constitutional rights to due process and fair notice where she may have been convicted of an uncharged act.

3. Ms. Moi's right to equal protection of the laws under the federal constitution was violated when she was denied a jury instruction regarding the defense of abandonment.

4. Ms. Moi was denied effective assistance of counsel where her trial attorney failed to offer a jury instruction based on the statutory defense in RCW 9A.52.090(3).

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Criminal defendants have a constitutional right under the constitutions of the United States and Washington to a unanimous jury verdict. 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. In this case, there was evidence presented of a trespass on the Seattle City Light substation property, as well as a trespass on adjoining property belonging to Frank Zellerhoff. Where the State did not elect which act of trespass it was relying on as the basis for conviction, did the trial court's failure to provide a unanimity instruction require reversal of the criminal trespass conviction?

2. Both the federal and state constitutions guarantee a criminal defendant due process and fair notice of the charges against him or her. An accused person cannot be tried or convicted for an offense not charged. In this case, Ms. Moi was charged with burglarizing a fenced area belonging to Seattle City Light. The jury was instructed that it could consider the lesser included offense of criminal trespass in the second degree, but the instructions did not specify that the criminal trespass charge was limited to the substation property. Did Ms. Moi's conviction violate her constitutional rights where the jury was permitted to find guilt based on the uncharged act of trespassing on Mr. Zellerhoff's property?

3. The Fourteenth Amendment 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. Where there was 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 who are charged with trespassing in a fenced area, did the trial court's failure to instruct

the jury on the defense of abandonment violate Ms. Moi's constitutional right to equal protection of the law?

4. The Sixth Amendment guarantees criminal defendants the right to effective assistance of counsel. The property in question, a Seattle City Light substation, was no longer in operation and had not been maintained for a substantial period of time. In addition, there was an eight foot gap in the fence surrounding the property, and no sign marked "no trespassing." RCW 9A.52.090(3) states it is a defense to criminal trespass that the actor reasonably believed that the owner would have licensed him to enter or remain on the premises. Where the Moises went onto the property merely to determine whether to submit a salvage bid, did Ms. Moi's trial attorney provide ineffective assistance in failing to propose a jury instruction explaining this defense?

D. STATEMENT OF THE CASE.

Michael Moi is self-employed doing salvage work. RP 434-35. He became aware of a number of closed Seattle City Light substations, and was interested in placing a bid to salvage materials from them. RP 436, 438. From the driveway at the Ballard substation, Mr. Moi could see an eight foot wide hole in the chain-link fence so big "you could practically drive a car through it."

RP 436-37, 440-41, 463. On March 20, 2007, in the middle of the day, Mr. Moi, along with his wife Kellie, decided to enter the substation to take a look around. RP 438.

Frank Zellerhoff is the owner of property that borders the substation. RP 256. On this day, he was in the process of demolishing some buildings on his property. RP 255-56. Matthew Matthews, who worked for Mr. Zellerhoff, was checking the buildings to make sure that they were empty when he observed the Mois, who were carrying a drill and a bag, "cut through" the Zellerhoff property. RP 286-87, 289.

Once a shed was torn down on the Zellerhoff property, Mr. Matthews could see onto the adjacent substation property. RP 291. He observed the Mois at the substation doing something with tools, and alerted Mr. Zellerhoff. RP 291. Mr. Zellerhoff, assuming that the Mois were stealing from the substation, told them that "they needed to get out of there." RP 258. According to Mr. Zellerhoff, the Mois merely shrugged their shoulders and "just basically ignored me." RP 258, 280-81. Mr. Zellerhoff threatened to call the police, but the Mois, who were not trying to hide, continued to ignore him. RP 258, 272. Mr. Zellerhoff did call the police, and eventually the Mois left the substation, exiting through the hole in

the fence and crossing Mr. Zellerhoff's property to the street. RP 258, 260, 305.

Mr. Matthews followed the Mois. RP 292. He described them as "in no rush" as they left the site. RP 305. Mr. Matthews saw the Mois get into a van that was parked across the street and one lot over from the substation. RP 292, 294. He got the license plate number of the van, which was reported to the police. RP 292. Seattle police officers spotted the van and pulled it over a short distance away from the substation. RP 366. With guns drawn, the Mois were removed from the van and placed under arrest. RP 335-36, 354-55.

Kellie and Michael Moi were each charged with burglary in the second degree for entering and remaining unlawfully in a building, "located at a substation located at the 1400 block of NW 65<sup>th</sup> Street," in King County, Washington, with the intent to commit a crime therein. CP 1. In this case, the "building" in question was the fenced area belonging to Seattle City Light. The State's theory of the case was that Mr. and Ms. Moi unlawfully went onto the Seattle City Light Property to steal parts from the decommissioned station.

At trial, the Moises testified that they were not at the substation to steal anything, but merely went onto the property to gather information before deciding whether to submit a bid for salvaging its contents.<sup>1</sup> RP 452, 509-10. Mr. Moi explained that they brought tools with them in order to look inside the substation panels. RP 439, 441-42, 479-81. When they entered the substation, they discovered it was in “shambles,” having already been partially “dismantled.” RP 441, 452, 512.

Mr. Moi acknowledged he and his wife did not have explicit permission to be on the property. RP 462, 481. However, given that they just wanted to look around what appeared to be an abandoned substation, they assumed no one would mind them being there. RP 452, 480, 483, 514. In fact, when Mr. Zellerhoff threatened to call the police, Mr. Moi suggested to Mr. Zellerhoff that he call Seattle City Light instead. RP 444.

Mr. Moi testified that there was not a “no trespassing” sign posted anywhere on the substation property. RP 444. This was verified by Officer Andrews. RP 387-88. The substation was

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<sup>1</sup> Officer Andrews testified that Mr. Moi told him that he was at the site to retrieve materials from the substation and sell them. RP 376, 380. The officer did not obtain a written statement from Mr. Moi, but rather summarized in his own statement what he recalled Mr. Moi telling him. RP 379. Mr. Moi denied telling

overgrown with weeds and brush, "completely a mess." RP 444. Officer Andrews went to the substation after the Mois were arrested. RP 372-73. He examined the fence and testified that the hole existed quite some time prior to March 20, 2007, as it was rusted over where the cut had been made. RP 377. From the condition of the substation, it was clear to the officer that prior to the incident date, unknown persons had been to the substation, partially dismantled it, and removed equipment. RP 403-04, 412-13, 418. Officer Andrews himself described the substation as "abandoned." RP 373.

Two employees from Seattle City Light testified that the substation was not abandoned, just decommissioned, or no longer operational. RP 223-24, 315. Neither knew how long the Ballard substation had been decommissioned. RP 230, 317. In addition, neither employee (including Roger Serra, director of security for Seattle City Light) had ever been to the property prior to March 20, 2007, nor did they know the last time anyone from Seattle City Light had been to the property prior to this date. RP 235, 241-42, 318, 322-23. Finally, neither of the two witnesses were aware of

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the officer that he was at the substation with the intent to take property. RP 452.

the hole in the fence or of any damage to the substation property before the incident date. RP 226, 229-30, 325. Mr. Serra confirmed that Seattle City Light does take bids from salvage contractors for removal of contents from decommissioned facilities. RP 246-47.

Officer Andrews recovered a small bag of nuts and bolts from the Mois's van. These were not admitted into evidence, and were not compared with equipment at the substation to see if they matched up. RP 318, 328-29, 397-98, 406. According to all witnesses, the Mois were only on the substation property for a few minutes, and neither Mr. Zellerhoff nor Mr. Matthews observed the Mois take any Seattle City Light property from the site. RP 280-81, 309, 453. The Mois both testified they took no property belonging to Seattle City Light, and they had no intent to do so. RP 446, 453-54, 509, 514.

At trial, Ms. Moi's attorney submitted proposed jury instructions regarding the lesser included offense of criminal trespass in the first degree, and Mr. Moi's attorney submitted proposed jury instructions regarding criminal trespass in the second

degree. CP 17-18; Suppl. CP \_\_\_\_ (Appendix A at 6-8).<sup>2</sup> Relying on State v. Brown, 50 Wn. App. 873, 878, 751 P.2d 331 (1988) (a fenced in area is not a “building” within the meaning of the first degree criminal trespass statute), the trial court instructed the jury on the lesser included offense of criminal trespass in the second degree.<sup>3</sup> RP 544-45.

Next, the attorneys and the trial court discussed the applicability of an abandonment defense. RCW 9A.52.090(1) provides:

In any prosecution under RCW 9A.52.070 [criminal trespass in the first degree] and 9A.52.080 [criminal trespass in the first degree], it is a defense that:

(1) A building involved in an offense under RCW 9A.52.070 was abandoned.

In accordance with this statute, Mr. Moi’s attorney submitted the following proposed jury instruction for the defense of abandonment:

It is a defense to a charge of burglary in the second degree or criminal trespass in the second

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<sup>2</sup> The jury instructions proposed by Mr. Moi are part of the appellate record for Court of Appeals No. 62437-7-I. A supplemental designation of clerk’s papers has been submitted to make them part of the appellate record in this case, and a copy is attached as Appendix A.

<sup>3</sup> Criminal trespass in the first degree occurs where a person knowingly enters or remains unlawfully in a building, and criminal trespass in the second degree occurs where a person knowingly enters or remains unlawfully in or upon premises of another. RCW 9A.52.070, 080.

degree that the building involved in the burglary or trespass was abandoned.

The State has the burden of proving beyond a reasonable doubt that the entry in the building 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.

Suppl. CP \_\_\_\_ (Appendix A at 5). The authority cited for the proposed instruction was WPIC 19.06, modified in accordance with State v. J.P., 130 Wn. App. 887, 895, 125 P.3d 215 (2005) (a defendant is entitled to raise an abandonment defense in a charge of residential burglary, because criminal trespass is a lesser included offense of burglary).<sup>4</sup> The trial court refused to give the requested abandonment instruction, ruling that by the terms of RCW 9A.52.090(1), the defense only applies to a charge of criminal trespass in the first degree and not to a charge of criminal trespass in the second degree. RP 544.

Attorneys for both Mr. and Ms. Moi took exception to the trial court's failure to instruct the jury regarding the abandonment

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<sup>4</sup> J.P. was decided by Division III of the Court of Appeals. To the contrary, Division II has held that the abandonment defense does not apply to a charge of burglary in the second degree because by the plain language of RCW 9A.52.090(1), an abandonment defense only applies to the charge of criminal trespass. State v. Jensen, 149 Wn. App. 393, 400-01, 203 P.3d 393 (2009). In Jensen, the defendant did not argue that equal protection required the giving of the abandonment defense instruction on a burglary charge.

defense. RP 541, 546, 553-54. Neither attorney offered an instruction based on RCW 9A.52.090(3), which provides that it is a defense to a charge of criminal trespass (either in the first or second degree) that “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.”

At the conclusion of the trial, the jury found both Mr. and Ms. Moi not guilty of the burglary charge, and guilty of the lesser included offense of criminal trespass in the second degree. CP 25-26; RP 636-37. This appeal timely follows on Ms. Moi’s behalf.<sup>5</sup> CP 56-60.

E. 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.

The federal constitutional right to trial by jury and the state constitutional right to conviction only upon a unanimous jury verdict require jury unanimity on all essential elements of the crime

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<sup>5</sup> Mr. Moi has also appealed his conviction (No. 62437-7-I).

charged. State v. Camarillo, 115 Wn.2d 60, 63-64, 794 P.2d 850 (1990); State v. Kitchen, 110 Wn.2d 403, 411, 756 P.2d 105 (1988); U.S. Const. amend. 6; Wash. Const. art. I, § 21. When the evidence indicates multiple distinct acts, any one of which could form the basis for a conviction, either the State must elect which act it is relying on as the basis for the charge, or the court must instruct the jury that it must unanimously agree that the same act has been proven beyond a reasonable doubt. Camarillo, 115 Wn.2d at 64; Kitchen, 110 Wn.2d at 411; State v. Petrich, 101 Wn.2d 566, 572, 683 P.2d 173 (1984).

Where neither alternative is followed, constitutional error “stems from the possibility that some jurors may have relied on one act or incident and some another, resulting in a lack of unanimity on all elements necessary for a conviction.” Kitchen, 110 Wn.2d at 411. Such an error is a manifest error affecting a constitutional right that can be raised for the first time on appeal. State v. Crane, 116 Wn.2d 315, 325, 804 P.2d 10, cert. denied, 501 U.S. 1237 (1991); RAP 2.5(a).

During trial, the prosecuting attorney sought to establish that the Mois trespassed on the substation property. In addition, the prosecutor repeatedly elicited testimony from Mr. Zellerhoff and Mr.

Matthews that Mr. and Ms. Moi crossed over the Zellerhoff property without permission as they entered and left the Seattle City Light substation. RP 260, 266, 288, 294-95. In closing argument, the prosecuting attorney did not elect which act of trespass it was relying on for conviction. Four times, she accused the Moises of trespassing on the Zellerhoff property:

- “the defendants came onto Mr. Zellerhoff’s property without permission.” RP 584.
- “They saw the defendants come in onto the property, not asking permission.” RP 588.
- “They walked through backyards of private property.” RP 594.
- “they did actually have to go on to their private property to get onto the Seattle City Light substation property.” RP 594.

Neither the definitional instruction nor the to-convict instruction regarding criminal trespass specified the “premises” that Ms. Moi was alleged to have entered or remained on unlawfully. CP 43-44. Nowhere in the instructions was the jury directed to limit its consideration to the substation property. CP 27-50. In addition, the jury was not instructed 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. Thus, the evidence,

argument, and instructions all invited the jury to consider either a trespass on the substation or Zellerhoff properties. The failure to give a unanimity instruction was in error.

The failure to require a unanimous verdict is an error of constitutional magnitude, and as such, is reversible unless it is “harmless beyond a reasonable doubt.” Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L.Ed.2d 705 (1975); State v. King, 75 Wn. App. 899, 903, 872 P.2d 1115 (1994), rev. denied, 125 Wn.2d 1021 (1995). Prejudice is presumed, and the error is harmless “only if no rational trier of fact could have entertained a reasonable doubt that each incident established the crime beyond a reasonable doubt.” Kitchen, 110 Wn.2d at 406; State v. Jones, 71 Wn. App. 798, 822, 863 P.2d 85 (1993), rev. denied, 124 Wn.2d 1018 (1994).

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 jury may not have been unanimous as to which alleged act of trespass it was relying on when it convicted Ms. Moi. The error was not harmless beyond a reasonable doubt, and the conviction must be reversed.

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.

The United States Constitution, amend. 6 provides: "In all criminal prosecutions, the accused shall ... be informed of the nature and cause of the accusation." Notice of the true nature of the charge is "the first and most universally recognized requirement of due process." Smith v. O'Grady, 312 U.S. 329, 334, 61 S.Ct. 572, 85 L.Ed. 859 (1941). See also DeJonge v. Oregon, 299 U.S. 353, 362, 57 S.Ct. 255, 81 L.Ed. 278 (1937) ("Conviction upon a charge not made would be sheer denial of due process").

In Cole v. Arkansas, 333 U.S. 196, 202, 68 S.Ct. 514, 92 L.Ed. 644 (1948), the U.S. Supreme Court held that petitioners were denied due process of law where their convictions were affirmed by the Arkansas Supreme Court under a criminal statute different from the one under which they had been charged. Similarly, in Stirone v. United States, 361 U.S. 212, 213, 80 S.Ct. 270, 4 L.Ed.2d 252 (1960), the defendant was charged with unlawfully interfering with interstate commerce regarding shipments of sand. However, the State presented evidence that he also interfered with steel shipments, and the jury was instructed it could

convict on either ground. Id. at 214. Since it could not “be said with certainty that ... Stirone was convicted solely on the charge made in the indictment,” the error was “fatal” and the conviction ultimately reversed. Id. at 217, 219.

The Washington Constitution has similar provisions to those in the U.S. Constitution. Article 1, § 3 provides: “No person shall be deprived of life, liberty, or property, without due process of law.” Wash. Const. article 1, § 22 provides: “In criminal prosecutions, the accused shall have the right ... to demand the nature and cause of the accusation against him.”

Under both the federal and state constitutions, defendants are entitled to be fully informed of the nature of the accusations against them so that they can prepare an adequate defense. State v. Leach, 113 Wn.2d 679, 695, 782 P.2d 552 (1989). An accused person “cannot be tried for an offense not charged.” State v. Pelkey, 109 Wn.2d 484, 487, 745 P.2d 854 (1987).<sup>6</sup> In State v. Valladares, 99 Wn.2d 663, 671, 664 P.2d 508 (1983), the court held that where the defendant was charged with conspiring to

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<sup>6</sup> The only exception to this rule is where the conviction is for a lesser included offense or lesser degree of the crime charged. State v. Foster, 91 Wn.2d 466, 471, 589 P.2d 789 (1979).

commit a crime with a named individual, he could not be convicted of conspiring with someone else or with an unnamed conspirator.

As discussed earlier, the prosecuting attorney repeatedly elicited testimony from Mr. Zellerhoff and Mr. Matthews that Mr. and Ms. Moi crossed over private property without permission as they entered and left the Seattle City Light substation. RP 260, 266, 288, 294-95. And in closing argument, the prosecuting attorney stated multiple times that the Moi's trespassed on Mr. Zellerhoff's property. RP 584, 588, 594.

The court's instructions to the jury regarding criminal trespass do not specify the "premises" that Ms. Moi was alleged to have entered or remained on unlawfully. CP 43-44. Because the instructions did not clarify that the criminal trespass charge pertained only to the Seattle City Light property and not the Zellerhoff property, the jury was permitted to convict her of criminally trespassing on the Zellerhoff property. And since the denial of due process and fair notice raises a "question of constitutional due process," the error may be raised for the first time on appeal. Leach, 113 Wn.2d at 691; RAP 2.5(a)(3).

Ms. Moi's constitutional rights to fair notice and due process were violated when the court's instructions, along with the

evidence, permitted the jury to convict her of an uncharged crime. In the absence of clear evidence that the verdict was based solely on the act charged, reversal of the conviction is required. Stirone, 361 U.S. at 217, 219; 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 of the United States

Constitution prohibits the denial of equal protection of the laws:

...No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. 14, §1. Equal protection of the law requires that persons similarly situated as to the legitimate purposes of a law receive like treatment. State v. Coria, 120 Wn.2d 156, 169, 839 P.2d 890 (1992).

The first step in analyzing an equal protection claim is to determine which test applies. Where an individual's physical liberty is at stake but no suspect classification is involved, the rational basis test is to be applied. Coria, 120 Wn.2d at 170-71. Under this

test, the challenged law must (1) serve a legitimate government objective and (2) employ means rationally related to the objective. State v. Manussier, 129 Wn.2d 652, 673, 921 P.2d 473 (1996), cert. denied, 520 U.S. 1201 (1997). Thus, a legislative classification violates equal protection when it “rests on grounds wholly irrelevant to the achievement of legitimate state objectives.” Coria, 120 Wn.2d at 171, quoting Omega Nat’l Ins. Co. v. Marquardt, 115 Wn.2d 416, 431, 799 P.2d 235 (1990). The burden is on the party challenging the classification to show that it is purely arbitrary. Coria, 120 Wn.2d at 172. The legislature has broad discretion to determine what the public interest demands and what means are needed to protect that interest. Manussier, 129 Wn.2d at 673.

In State v. Berrier, 110 Wn. App. 639, 647-48, 41 P.3d 1198 (2002), the defendant was convicted of possessing a short-barreled shotgun and also sentenced to a firearm enhancement. By statute, the firearm enhancement did not apply to certain other offenses, including possession of a machine gun. Id. at 648. The court found that the most plausible explanation for the distinction was legislative oversight, and that the firearm enhancement statute violated Berrier’s right to equal protection. Id. at 651. The purpose

of the firearm enhancement legislation (to discourage the use of firearms by punishing armed offenders more harshly than others) was not served by distinguishing between people who possessed a short-barreled shotgun and those who possessed a machine gun. Id. at 649-50.

Ms. Moi falls into the group of people charged with burglary based on the definition of “building” in RCW 9A.04.110, which includes a “fenced area.” Normally, criminal trespass in the first degree would be the lesser included offense for burglary, and in that case, Ms. Moi would have been entitled to an abandonment defense instruction. But because a fenced area has been held not to constitute a building under the criminal trespass statute, she was denied the instruction.

There is no rational basis for allowing an abandonment defense for those charged with entering or remaining unlawfully in a “building” within the traditional meaning of the word, and denying the defense to people who are charged with entering or remaining unlawfully in a fenced area. By the trial court’s refusal to instruct the jury regarding Ms. Moi’s defense of abandonment, she was denied equal protection of the law. Her conviction must be reversed. Berrier, 110 Wn. App. at 651.

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).

To establish the first prong of the Strickland test, the defendant must first show that "counsel's representation fell below an objective standard of reasonableness based on consideration of all the circumstances." Thomas, 109 Wn.2d at 226. Reasonable attorney conduct includes a duty to investigate the relevant law in a

given case. State v. Jury, 19 Wn.App. 256, 263, 576 P.2d 1302, rev. denied, 90 Wn.2d 1006 (1978).

If defense counsel's conduct may be characterized as a legitimate trial strategy or tactic, it is not considered ineffective. Thomas, 109 Wn.2d at 229-30. However, "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) (in capital case, counsel's failure to investigate mitigation evidence suggested "inattention, not reasoned, strategic judgment").

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). In this case, trial counsel's failure to propose a jury instruction setting out the defense in RCW 9A.52.090(3) constituted deficient performance that fatally prejudiced Ms. Moi's defense.<sup>7</sup>

RCW 9A.52.090(3) provides:

In any prosecution under RCW 9A.52.070  
[criminal trespass in the first degree] and 9A.52.080

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<sup>7</sup> But see Jensen, 149 Wn. App. at 398, which suggests that the failure of the trial court to instruct the jury concerning a statutory defense in RCW 9A.52.090 raises an issue of constitutional magnitude that can be raised for the first time on appeal.

[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.

By the clear terms of the statute, the defense applies to both first and second degree criminal trespass. 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).

This defense 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.”<sup>8</sup> 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

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<sup>8</sup> 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.

them to enter the property to merely look around. Trial counsel was deficient in failing to offer an instruction that set out this statutory defense.

The prejudice prong of the Strickland test requires that the defendant show there is a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. Strickland, 466 U.S. at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Strickland, 466 U.S. at 694.

Effective assistance of counsel "includes a request for pertinent instructions which the evidence supports." State v. Kruger, 116 Wn. App. 685, 688, 67 P.3d 1147, rev. denied, 150 Wn.2d 1024 (2003); accord Thomas, 109 Wn.2d at 229. In Kruger, the failure to propose a voluntary intoxication instruction was held to be prejudicial because "the jury, without the requested instruction, was not correctly apprised of the law, and defendant's attorneys were unable to effectively argue their theory." Kruger, 116 Wn. App. at 694 (quoting State v. Rice, 102 Wn.2d 120, 123, 683 P.2d 199 (1984)). In Thomas, the failure to propose an instruction on voluntary intoxication in a charge of attempting to elude a pursuing police vehicle was prejudicial since if they had the

instruction, “the jury may have determined that her extreme intoxication negated the required wantonness or willfulness.”

Thomas, 109 Wn.2d at 229.

Similarly, in this case, if the jury had an instruction regarding RCW 9A.52.090(3), they may have determined that the State failed to prove the required element of unlawfulness beyond a reasonable doubt. The failure to instruct the jury regarding RCW 9A.52.090(3) precluded the jury’s consideration of 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.

F. CONCLUSION.

Reversal of Ms. Moi’s conviction is required where (1) the trial court violated her constitutional right to a unanimous jury verdict in failing to provide the jury with a unanimity instruction on the charge of criminal trespass; (2) her constitutional rights to due process and fair notice were violated where the jury was permitted to convict based on an uncharged alternate act; (3) she was denied equal protection of the law when the trial court refused to instruct the jury regarding an abandonment defense; and (4) she was denied effective assistance of counsel where her trial attorney

failed to propose a jury instruction regarding the statutory defense  
contained in RCW 9A.52.090(3).

DATED this 16th day of June, 2009.

Respectfully submitted,

  
ELIZABETH ALBERTSON (17071)  
Washington Appellate Project (91052)  
Attorneys for Appellant

# Appendix A

**FILED**

KING COUNTY WASHINGTON

JUL 17 2008

SUPERIOR COURT CLERK  
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DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,  
Plaintiff,  
vs.  
Michael Moi,  
Defendant.

)  
) *05415-1*  
) NO 07-C-05425-1 SEA SEA  
)  
) DEFENDANT PROPOSED INSTRUCTIONS  
) TO JURY WITH CITATIONS  
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DEFENDANT PROPOSED INSTRUCTIONS TO JURY  
[WITH CITATIONS]



Alfred Kitching, WSBA No. 7925  
Counsel for Michael Moi  
WPIC 1.01.01

**ORIGINAL**

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No. 1

The defendant has entered a plea of not guilty. That plea puts in issue every element of the crime charged. The State is the plaintiff and has the burden of proving each element of the crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. A reasonable doubt is a doubt that would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence.

No. 2

If the State does not produce the testimony of a witness who as a matter of reasonable probability it appears naturally in the interest of the State to produce; or if the State does not produce evidence that as a matter of reasonable probability it appears in the interest of the State to produce; and if the State fails to satisfactorily explain why it has not called the witness, or produced the evidence, if you believe such inference is warranted under all the circumstances of the case, you may infer that the not produced testimony or evidence would have been unfavorable to the State.

WPIC 5.20

See, also, Arizona v. Youngblood, 488 U.S. 51 (1988). where in the original criminal trial, the judge instructed the jury: "If you find that the State has . . . allowed to be destroyed or lost any evidence whose content or quality are

in issue, you may infer that the true fact is against the State's interest." 488 U.S. at 54, 59-60 (concurrency, Stevens, J.) (citing 10. Tr. 90). The Supreme Court did not criticize the judge for authorizing the inference, even though the Supreme Court found "there was no suggestion of bad faith on the part of the police." Id. at 58. Moreover, Justice Stevens highlights the trial court's use of the inference in his argument that the defendant had not been denied due process because "it [was] unlikely that the defendant was prejudiced by the State's omission." Id. at 59.

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No. 3

It is a defense to a charge of burglary in the second degree or criminal trespass in the second degree that the building involved in the burglary or trespass was abandoned.

The State has the burden of proving beyond a reasonable doubt that the entry in the building 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.

No. 4

The defendant is charged with Burglary in the Second Degree. If, after full and careful deliberation on this charge, you are not satisfied beyond a reasonable doubt that the defendant is guilty, then you will consider whether the defendant is guilty of the lesser crimes of Criminal Trespass in the Second Degree.

When a crime has been proved against a person, and there exists a reasonable doubt as to which of two or more crimes that person is guilty, he or she shall be convicted only of the lowest crime.

No. 5

A person commits the crime of criminal trespass in the second degree when he or she knowingly enters or remains unlawfully in or upon premises of another under circumstances not constituting criminal trespass in the first degree.

CP

No. 6

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

- (1) That on or about March 20, 2007, the defendant knowingly entered or remained in or upon the premises of another under circumstances not constituting criminal trespass in the first degree;
- (2) That the defendant knew that the entry or remaining was unlawful; and
- (3) 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 anyone of these elements, then it will be your duty to return a verdict of not guilty.

NO. 7

With regard to the alleged crime of Burglary in the Second Degree, you will be furnished with all of the exhibits admitted in evidence, these instructions, and two verdict forms, A and B.

When completing these verdict forms, you will first consider the alleged crime of Burglary in the Second Degree as charged. If you unanimously agree on a verdict, you must fill in the blank provided in verdict form A the words "not guilty" or the word "guilty," according to the decision you reach. If you cannot agree on a verdict, do not fill in the blank provided in Verdict Form A.

If you find the defendant guilty on verdict form A, do not use verdict form B. If you find the defendant not guilty of the crime of Burglary in the Second degree, or if after full and careful consideration of the evidence you cannot agree on that crime, you will consider the lesser crime of Criminal Trespass in the Second degree. If you unanimously agree on a verdict, you must fill in the blank provided in verdict form B the words "not guilty" or the word "guilty," according to the decision you reach. If you cannot agree on a verdict, do not fill in the blank provided in Verdict Form B.

Since this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill

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in the proper form of verdict or verdicts to express your decision. The presiding juror will sign it and notify the bailiff, who will conduct you into court to declare your verdict.

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

STATE OF WASHINGTON,                     )  
   )  
   )                     Respondent,  
   )  
   )                     v.  
   )  
KELLIE MOI,                                     )  
   )  
   )                     Appellant.

NO. 62438-5-I

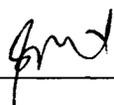
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COURT OF APPEALS DIVISION ONE  
STATE OF WASHINGTON  
2009 JUN 16 PM 4:53

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 16<sup>TH</sup> DAY OF JUNE, 2009, 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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| <input checked="" type="checkbox"/> KELLI EMOI<br>3843 26 <sup>TH</sup> AVE W<br>SEATTLE, WA 98119   | <input checked="" type="checkbox"/><br><input type="checkbox"/><br><input type="checkbox"/> | U.S. MAIL<br>HAND DELIVERY<br>_____ |

**SIGNED** IN SEATTLE, WASHINGTON THIS 16<sup>TH</sup> DAY OF JUNE, 2009.

X \_\_\_\_\_ 

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