

COA NO. 64454-8-I

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

STATE OF WASHINGTON,

Respondent,

v.

FRED BINSCHUS,

Appellant.

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3

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

The Honorable Charles R. Snyder, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. DEFENSE COUNSEL WAS INEFFECTIVE IN FAILING TO REQUEST LESSER OFFENSE INSTRUCTION ON FIRST DEGREE TRESPASS.

a. Defense Counsel's Decision Not To Request The Lesser Offense Instruction Undermines Confidence In The Outcome.

The State asserts the failure to request a lesser offense instruction was harmless because jurors are presumed to follow instructions and will never convict for the only crime available unless the State proved its case beyond a reasonable doubt. Response Br. at 21-24.

The United States Supreme Court has already rejected the basis for the State's argument: "True, if the prosecution has not established beyond a reasonable doubt every element of the offense charged, and if no lesser offense instruction is offered, the jury must, as a theoretical matter, return a verdict of acquittal. But a defendant is entitled to a lesser offense instruction — in this context or any other — precisely because he should not be exposed to *the substantial risk* that the jury's practice will diverge from theory." Keeble v. United States, 412 U.S. 205, 212, 93 S. Ct. 1993, 36 L. Ed. 2d 844 (1973) (emphasis added).

The lesser offense rule "affords the jury a less drastic alternative than the choice between conviction of the offense charged and acquittal." Beck v. Alabama, 447 U.S. 625, 633, 100 S. Ct. 2382, 65 L. Ed. 2d 392

(1980). "Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of some offense, the jury is likely to resolve its doubts in favor of conviction." Keeble, 412 U.S. at 212-13. This result is avoided when the jury is given the option of finding a defendant guilty of a lesser included offense, thereby giving "the defendant the full benefit of the reasonable-doubt standard." Beck, 447 U.S. at 634.

In contending the lack of lesser offense instruction is not prejudicial, the State ignores the reason why lesser offense instructions are important and how the availability of lesser offense instructions can influence a jury's deliberative process. The State's argument amounts to little more than disagreement with the United States Supreme Court that lesser offense instructions can be helpful to the defendant.

The jury's deliberative process is different when it is given an opportunity to acquit on a greater offense while still convicting on a lesser offense. "The element the Court in Beck found essential to a fair trial was not simply a lesser included offense instruction in the abstract, but the enhanced rationality and reliability the existence of the instruction introduced into the jury's deliberations." Spaziano v. Florida, 468 U.S. 447, 455, 104 S. Ct. 3154, 82 L. Ed. 2d 340 (1984). The goal of the lesser offense rule "is to eliminate the distortion of the factfinding process."

Spaziano, 468 U.S. at 455. The absence of a lesser included offense instruction increases the risk that the jury will convict, not because it is persuaded that the defendant is guilty of the charged offense, but simply to avoid setting the defendant free.¹

Whether error is harmless is not determined by the existence of sufficient evidence to affirm a conviction. Rather, the crucial consideration is what impact the error may reasonably have had on the jury's decision-making process. Cf. State v. Bashaw, 169 Wn.2d 133, 147-48, 234 P.3d 195 (2010) (instructional error requiring unanimity for special verdict not harmless because it resulted in flawed deliberative process that "tells us little about what result the jury would have reached had it been given a correct instruction;" State's argument that error was harmless because all twelve jurors agreed to verdict missed the point).

The lack of a lesser offense instruction where one should be given distorts the jury's deliberative process, leading to a conviction that otherwise may not have been happened. The rationale for how the absence of lesser offense instruction influence jury deliberation due to the court's failure to give one is equally applicable to the situation where the

¹ Spaziano addressed the rationale in relation to capital cases, but that rationale is equally applicable to non-capital cases, as shown by the Beck Court's (a capital case) reliance on Keeble (a non-capital case). Beck, 447 U.S. at 633-34.

defendant is denied the jury's consideration of the lesser offense due to trial counsel's failure to offer such an instruction.

The State's assertion that no prejudice can result from the lack of a lesser offense instruction also conflicts with Washington Supreme Court precedent. The Court has never held failure to give such a lesser offense instruction may be harmless where there is evidence to support such instruction. State v. Parker, 102 Wn.2d 161, 164, 166, 683 P.2d 189 (1984).

In Parker, the trial court committed prejudicial error in failing to instruct on reckless driving as a lesser offense to felony flight from a police officer, even though there was no dispute that the evidence was sufficient to convict for the greater offense. Parker, 102 Wn.2d at 162, 166. The Court of Appeals, in affirming conviction, wrongly presumed from the jury's verdict of guilt on felony flight that the intoxication defense presented for the greater offense was rejected and a retrial would produce no different result. Id. at 166. This type of reasoning was improper because it ignored "the fact that the jury had no way of using the intoxication evidence short of outright acquitting Parker, because they were never told that the option of the lesser-included offense existed." Id. Parker refutes the State's argument that there is no possibility of prejudicial error when the jury is not instructed on a lesser offense.

The lack of a lesser offense instruction distorts the deliberative process by restricting the jury's consideration of the evidence in relation to the full range of crimes available on which to convict. See State v. Southerland, 109 Wn.2d 389, 391, 745 P.2d 33 (1987) ("The failure to give the criminal trespass instruction restricted the jury's consideration of the evidence on the burglary charge. Short of outright acquitting Southerland of burglary, the jurors had no opportunity to use Southerland's denial of remaining on the premises with the intent to commit a crime because they were never told the lesser included offense of criminal trespass existed."). In Binschus's case, the lack of instruction on trespass precluded the jury from taking into account the less culpable mental state associated with that lesser crime in determining guilt.

A trial court's wrongful failure to instruct on a lesser offense when one is requested is prejudicial when, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred. Southerland, 109 Wn.2d at 391. This is at least the same standard of prejudice used for ineffective assistance of counsel claims. Strickland v. Washington, 466 U.S. 668, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). "The prejudice prong of a claim of ineffective assistance of counsel compares well to a harmless error analysis — essentially 'no harm,

no foul.'" State v. Rodriguez, 121 Wn. App. 180, 187, 87 P.3d 1201 (2004).

There is no justifiable reason that a different type of prejudice analysis should prevail when the failure to give a lesser offense instruction stems from counsel not asking for one as opposed to the trial court not giving one. In the latter case, the jury was deprived of considering the lesser offense issue due to an error made by the trial court. In the former case, the jury was deprived of considering the lesser offense issue due to an error made by trial counsel. To the jury, it makes no difference whether the trial court or defense counsel deprived it of an opportunity to consider a lesser offense. The jury never knows why it was not given the option of convicting on a lesser offense. Who is responsible has no bearing on whether there is a reasonable probability that the lack of such instruction influenced the jury's deliberations and, ultimately, the outcome.

"A harmless error is an error which is trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case." In re Detention of Pouncy, 168 Wn.2d 382, 391, 229 P.3d 678 (2010) (quoting State v. Britton, 27 Wn.2d 336, 341, 178 P.2d 341 (1947)). Reversible error occurs "[w]hen the appellate court is unable to say from the record before it whether the defendant would or would not have been convicted

but for the error committed in the trial court, then the error may not be deemed harmless, and the defendant's right to a fair trial requires that the verdict be set aside and that he be granted a new trial." State v. Martin, 73 Wn.2d 616, 627, 440 P.2d 429 (1968).

Again, the prejudice prong of a claim of ineffective assistance of counsel compares well to a harmless error analysis. Rodriguez, 121 Wn. at 187. Prejudice in an ineffective assistance case is established when confidence is undermined in the outcome. Thomas, 109 Wn.2d at 226. This standard of prejudice is in accord with the definition of reversible error advanced by this Court in Martin. It is also in accord with Keeble, where the United States Supreme Court found prejudicial error from the lack of a lesser offense instruction because the jury could rationally have convicted the defendant of a lesser offense if that option had been presented. Keeble, 412 U.S. at 213. The Court reversed because it could not say that the availability of a third option — convicting the defendant of lesser offense — could not have resulted in a different verdict. Id. The same holds true here.

b. Defense Counsel's Decision Not To Request The Lesser Offense Instruction Was Deficient.

The benchmark for judging any claim of ineffectiveness is whether counsel's conduct resulted in a trial that cannot be relied on as having

produced a just result. Strickland, 466 U.S. at 686. The question of whether counsel's performance was ineffective is therefore not amenable to any per se rule and turns on the facts of an individual case. State v. Cienfuegos, 144 Wn.2d 222, 229, 25 P.3d 1011 (2001). In keeping with that principle, whether an all or nothing strategy is objectively reasonable is a highly fact specific inquiry. State v. Breitung, 155 Wn. App. 606, 230 P.3d 614, 619-20 (2010).

This Court recently held counsel was not deficient for failing to request lesser offense instruction in State v. Mullins, __ Wn. App. __, __ P.3d __, 2010 WL 4276621 at *8 (slip op. filed Nov. 1, 2010). Mullins is distinguishable. In that case, Mullins made a conscious choice to pursue acquittal outright rather than conviction on the lesser offense as shown by the fact that, in response to the court's questions, defense counsel twice told the court that he had discussed the options with Mullins and that lesser offense instructions would not be requested. Mullins, 2010 WL 4276621 at *7.

Unlike Mullins, the record here does not show Binschus made a conscious decision to pursue outright acquittal rather than conviction on a lesser offense. Defense counsel made no such representation.

The Mullins court also concluded it was not objectively unreasonable for Mullins to pursue a strategy of acquittal only because the

evidence proving that a first degree murder (the greater offense) occurred was very strong but Mullins testified he was innocent of the murder. Mullins, 2010 WL 4276621 at *7. "Where a lesser included offense instruction would weaken the defendant's claim of innocence, the failure to request a lesser included offense instruction is a reasonable strategy." Id. (quoting State v. Hassan, 151 Wn. App. 209, 220, 211 P.3d 441 (2009)). The court found no deficiency because Mullins would have weakened his claim of innocence had he requested lesser offense instruction. Mullins, 2010 WL 4276621 at *8.

Hassan involved a similar scenario. Hassan, 151 Wn. App. at 220. In that case, Hassan's testimony at trial showed he was aware of the risks of pursuing an all or nothing strategy in an effort to obtain an acquittal. Id. After Hassan testified, the trial court expressly asked the defense about supplemental jury instructions. Id. Under those circumstances, the court determined the failure to request a lesser offense instruction is a reasonable strategy where a lesser included offense instruction would weaken the defendant's claim of innocence. Id.

Unlike and Mullins and Hassan, Binschus did not testify he was innocent. He did not testify at all. The trial court never asked defense counsel if Binschus wanted lesser offense instructions on trespass.

Hassan is further distinguishable because none of the three factors articulated in State v. Ward, 125 Wn. App. 243, 104 P.3d 670 (2004) were present. Hassan, 151 Wn. App. at 219. As set forth in the opening brief, all three Ward factors are satisfied in Binschus's case. Opening Br. at 12-16.

The State points to Binschus's statement that he had rejected a pre-trial plea offer for malicious mischief as evidence that he desired an all or nothing strategy. Br. at 19. But the proper focus is the overall risk to the defendant given the totality of the developments *at trial*. State v. Pittman, 134 Wn. App. 376, 387-88, 166 P.3d 720 (2006); Ward, 125 Wn. App. at 246. The evidentiary developments at trial showed Binschus's conduct amounted to first degree trespass. The need for a lesser offense instruction is strongest when guilt on the greater offense is disputable and there is strong evidence that some crime was committed. Pittman, 134 Wn. App. at 388. Yet the State's relies on these same considerations to argue it was not unreasonably risky to forgo lesser offense instructions. Response Br. at 17-19. The State's argument misses the point.

The State elsewhere argues the defense theory was that no crime at all occurred and therefore a lesser offense instruction would have weakened an absolute claim of innocence. Response Br. at 17. But the defense theory reached no further than the charged crimes on which the

jury was instructed. The defense theory was that the State had not proven beyond a reasonable doubt that residential burglary and malicious mischief had occurred. 2RP 225-30. Defense counsel argued the State failed to prove Binschus committed residential burglary on the theory that Binschus did not intend to commit a crime against person or property after entering the window. 2RP 225-29. Counsel did not say anything about the crime of trespass. Furthermore, simply allowing the jury an opportunity to convict on a lesser offense through instruction is not tantamount to admitting guilt on the lesser crime. The State retains the burden of proving all elements of any crime beyond a reasonable doubt.

The State contends the defenses for the greater and lesser offenses would not have been the same had a lesser instruction on trespass been requested. Response Br. at 19-20. But the defense theory included lack of culpable mental state as applied to the burglary charge. 2RP 227-28. The lack of culpable mental state theory could equally be applied to the trespass charge. See RCW 9A.52.070(1) ("A person is guilty of first degree trespass when "knowingly enters or remains unlawfully in a building."). Even if Binschus's *conduct* in entering the window and passing through the apartment after being told to leave amounted to first degree trespass, there was evidence from which the jury could reasonably infer Binschus did not *knowingly* enter or remain inside. This evidence

included Binschus's intoxicated, distraught and erratic state of mind, which manifested itself in his behavior. 2RP 60-63, 70, 72, 87, 95, 96, 175. According to the Officer Fountain's testimony, Binschus told her at the scene that he was "high on crack." 2RP 175. Indeed, Binschus's aunt testified she saw Binschus come through the window "[l]ike he didn't know what he was doing." 2RP 131.

Moreover, the availability of a defense capable of defeating both the greater and lesser offenses is not essential. Defense counsel in Pittman, in arguing his client had committed attempted trespass as opposed to attempted burglary, offered no defense to the lesser crime. Pittman, 134 Wn. App. at 389. Counsel was still ineffective in failing to request lesser offense instructions. Id. at 390.

In assessing ineffective assistance claims, "the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." Strickland, 466 U.S. at 696. This flows from the indisputable fact that the constitutional right to effective assistance "exists, and is needed, in order to protect the fundamental right to a fair trial." Id. at 684. The element essential to a fair trial is not simply a lesser included offense instruction in the abstract, but the enhanced rationality and reliability the existence of the instruction introduces into the jury's deliberations by the lesser offense instruction, which eliminates the

distortion of the fact finding process. Spaziano, 468 U.S. at 455. Reversal is required because Binschus did not receive a fair trial due to ineffective assistance.

B. CONCLUSION

For the reasons stated, this Court should reverse Binschus's residential burglary conviction and remand for a new trial.

DATED this 4th day of November 2010.

Respectfully Submitted,

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

STATE OF WASHINGTON,)	
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Respondent,)	
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v.)	COA NO. 64454-8-1
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FRED BINSCHUS,)	
)	
Appellant.)	

DECLARATION 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 NOVEMBER, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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SIGNED IN SEATTLE WASHINGTON, THIS 4TH DAY OF NOVEMBER, 2010.

x *Patrick Mayovsky*