

No. 36766-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

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DIVISION II
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STATE OF WASHINGTON
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STATE OF WASHINGTON,

Respondent,

vs.

Mark Jensen,

Appellant.

Clallam County Superior Court

Cause No. 07-1-00267-6

The Honorable Judge George L. Wood

Appellant's Opening Brief

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ASSIGNMENTS OF ERROR 1

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 1

1. Did the trial judge erroneously instruct the jury that the defense of abandonment applied only to the lesser-included offense of trespass but not to the burglary charge? 1

2. Was Mr. Jensen denied the effective assistance of counsel if his attorney failed to propose a proper instruction on the defense of abandonment?..... 1

STATEMENT OF FACTS AND PRIOR PROCEEDINGS..... 2

ARGUMENT..... 3

I. The trial judge erroneously restricted Mr. Jensen’s abandonment defense to the lesser offense of trespass.. 3

II. If defense counsel is responsible for the error in the court’s instructions, Mr. Jensen was denied the effective assistance of counsel..... 5

CONCLUSION 8

TABLE OF AUTHORITIES

FEDERAL CASES

Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963) 5

In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) 2

Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674
(1984)..... 5

U.S. v. Salemo, 61 F.3d 214 (3rd Cir. 1995)..... 5

WASHINGTON STATE CASES

In re Fleming, 142 Wn.2d 853, 16 P.3d 610 (2001)..... 5

State v. Douglas, 128 Wn.App. 555, 116 P.3d 1012 (2005)..... 2, 3

State v. Harris, 122 Wn.App. 547, 90 P.3d 1133 (2004)..... 3

State v. Horton, 136 Wn. App. 29, 146 P.3d 1227 (2006)..... 5

State v. J.P., 130 Wn.App. 887, 125 P.3d 215 (2005)..... 3

State v. Jones, 106 Wn. App. 40, 21 P.3d 1172 (2001) 4

State v. Kiehl, 128 Wn. App. 88, 113 P.3d 528 (2005)..... 4

State v. Olmedo, 112 Wn. App. 525, 49 P.3d 960 (2002)..... 3

State v. Pittman, 134 Wn. App. 376, 166 P.3d 720 (2006)..... 5

State v. Randhawa, 133 Wn.2d 67, 941 P.2d 661 (1997)..... 3

State v. Reichenbach, 153 Wn.2d 126, 101 P.3d 80 (2004) 5, 6

State v. Thomas, 109 Wn.2d 222, 743 P.2d 816 (1987) 6

State v. Thomas, 150 Wn.2d 821, 83 P.3d 970 (2004) 3

State v. Tilton, 149 Wn.2d 775, 72 P.3d 735 (2003)..... 5

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. VI..... 4

U.S. Const. Amend. XIV 2, 4

Wash. Const. Article I, Section 22..... 5

WASHINGTON STATE STATUTES

RCW 9A.52.090..... 3

ASSIGNMENTS OF ERROR

1. The trial court erred by giving an erroneous instruction on the defense of abandonment.
2. The trial court erred by giving Instruction No. 20, which reads as follows:

It is a defense to a charge of CRIMINAL TRESPASS IN THE FIRST DEGREE that a building involved in the trespass was abandoned.

The State has the burden of proving beyond a reasonable doubt that the trespass 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.

Court's Instructions to Jury, No. 20, Supp. CP.

3. If the instructional issue is not preserved for review, Mr. Jensen was denied the effective assistance of counsel.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Mark Jensen was charged with Burglary in the Second Degree and Theft in the Third Degree. Some evidence suggested that the building he entered had been abandoned. The trial court gave an instruction on abandonment that applied only to a lesser-included offense. Defense counsel did not object.

1. Did the trial judge erroneously instruct the jury that the defense of abandonment applied only to the lesser-included offense of trespass but not to the burglary charge? Assignments of Error Nos. 1, 2.
2. Was Mr. Jensen denied the effective assistance of counsel by his failure to object to the court's instruction and to propose a proper instruction on the defense of abandonment? Assignments of Error Nos. 1, 2, 3.

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

In June of 2007, Mark Jensen was homeless in Port Angeles. RP (8/1/07) 138. Mama's Restaurant in downtown Port Angeles had been closed and unused since December of 2007. RP (8/1/07) 51-52. On June 4, 2007, suspecting that someone had illegally entered, the former operator of the restaurant (whose lease had expired and not been renewed) called the police. RP (8/1/07) 59-61, 65, 71-72. Officers came to the restaurant and searched. RP (8/1/07) 90-91. They found Mr. Jensen sitting in the office, with several beers next to him, and found empty beer bottles in the garbage. RP (8/1/07) 103-104, 136, 139. Mr. Jensen admitted he'd consumed beer. RP (8/1/07) 138.

Mr. Jensen was charged with Burglary in the Second Degree and Theft in the Third Degree. CP 17. He argued at trial that the property had been abandoned. RP (8/2/07) 8-10, 50-52, 54, 59. During a discussion about jury instructions, the court found a basis to instruct on the defense of abandonment: "...I think there's enough there that you can at least argue on abandon [sic]." RP (8/2/07) 25.

The court instructed the jury that they could find Mr. Jensen guilty of the lesser-included offense of Trespass.¹ Supp. CP. The instruction relating to the abandonment defense was as follows:

It is a defense to a charge of CRIMINAL TRESPASS IN THE FIRST DEGREE that a building involved in the trespass was abandoned.

The State has the burden of proving beyond a reasonable doubt that the trespass 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.

Court's Instructions to Jury, No. 20, Supp. CP.

Defense counsel did not object to this instruction.

Mr. Jensen was found guilty of Burglary in the Second Degree and Theft in the Third Degree. CP 6. He was sentenced, and this timely appeal followed. CP 6-16, 5.

ARGUMENT

I. THE TRIAL JUDGE ERRONEOUSLY RESTRICTED MR. JENSEN'S ABANDONMENT DEFENSE TO THE LESSER OFFENSE OF TRESPASS.

The Due Process Clause of the Fourteenth Amendment requires the state to prove every element of an offense beyond a reasonable doubt. U.S. Const. Amend. XIV; *In re Winship*, 397 U.S. 358 at 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Jury instructions, when taken as a whole,

¹ Apparently the defense did not propose any jury instructions.

must properly inform the jury of the applicable law. *State v. Douglas*, 128 Wn.App. 555 at 562, 116 P.3d 1012 (2005). An omission or misstatement of the law in a jury instruction that relieves the state of its burden to prove every element of the crime charged is erroneous and violates due process. *State v. Thomas*, 150 Wn.2d 821 at 844, 83 P.3d 970 (2004); *State v. Randhawa*, 133 Wn.2d 67 at 76, 941 P.2d 661 (1997).

Jury instructions are sufficient if they allow each party to argue their theory of the case, are not misleading, and properly inform the trier of fact of the applicable law. *Douglas*, at 562. Jury instructions must be “manifestly clear,” since juries lack the tools of statutory construction available to courts. *See, e.g., State v. Harris*, 122 Wn.App. 547 at 554, 90 P.3d 1133 (2004). Jurors should not have to speculate about the law, and counsel should not have to persuade the jury as to what the instructions mean or what the law is. *State v. Olmedo*, 112 Wn. App. 525 at 534-535, 49 P.3d 960 (2002).

RCW 9A.52.090, which provides a defense to the crime of criminal trespass, is also applicable to burglary cases. *State v. J.P.*, 130 Wn.App. 887 at 895, 125 P.3d 215 (2005). Under the statute, a person is not guilty of unlawful entry if a building involved in the offense was abandoned. RCW 9A.52.090. The defense negates the element of unlawfulness. *State v. J.P.* at 895.

In this case, the trial judge found sufficient evidence of abandonment to instruct the jury on the defense. RP (8/2/07) 25. The court gave an instruction on abandonment, but erroneously restricted the defense to the trespass charge. Instruction No. 20, Supp. CP.

The error is presumed to be prejudicial. *State v. Kiehl*, 128 Wn. App. 88 at 91, 113 P.3d 528 (2005). Reversal is required unless the prosecution can establish that the error was harmless beyond a reasonable doubt. *State v. Jones*, 106 Wn. App. 40 at 45, 21 P.3d 1172 (2001).

Because Mr. Jensen raised the defense of abandonment and the trial judge found enough evidence to instruct the jury on the issue, the error in the instruction requires reversal. *Jones, supra*. The case must be remanded for a new trial.

II. IF DEFENSE COUNSEL IS RESPONSIBLE FOR THE ERROR IN THE COURT’S INSTRUCTIONS, MR. JENSEN WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL.

The defense failed to propose any jury instructions regarding the defense of abandonment. Therefore, Mr. Jensen was denied the effective assistance of counsel.

The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right... to have the Assistance of Counsel for his defense.” U.S. Const. Amend. VI. This provision is applicable to the states through the Fourteenth Amendment. U.S. Const.

Amend. XIV; *Gideon v. Wainwright*, 372 U.S. 335, 342, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Likewise, Article I, Section 22 of the Washington Constitution provides, “In criminal prosecutions, the accused shall have the right to appear and defend in person, or by counsel....” Wash. Const. Article I, Section 22. The right to counsel is “one of the most fundamental and cherished rights guaranteed by the Constitution.” *U.S. v. Salemo*, 61 F.3d 214 at 221-222 (3rd Cir. 1995).

An ineffective assistance claim presents a mixed question of law and fact, requiring *de novo* review. *In re Fleming*, 142 Wn.2d 853 at 865, 16 P.3d 610 (2001); *State v. Horton*, 136 Wn. App. 29, 146 P.3d 1227 (2006). An appellant claiming ineffective assistance must show (1) that defense counsel’s conduct was deficient, meaning that it fell below an objective standard of reasonableness; and (2) that the deficient performance resulted in prejudice, meaning “a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed.” *State v. Reichenbach*, 153 Wn.2d 126 at 130, 101 P.3d 80 (2004), citing *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); see also *State v. Pittman*, 134 Wn. App. 376 at 383, 166 P.3d 720 (2006).

Where the facts support a particular defense, failure to properly present the defense constitutes ineffective assistance. *State v. Tilton*, 149

Wn.2d 775 at 784, 72 P.3d 735 (2003); *see also State v. Thomas*, 109 Wn.2d 222 at 229, 743 P.2d 816 (1987) (“[a] reasonably competent attorney would have been sufficiently aware of relevant legal principles to enable him or her to propose an [appropriate] instruction.”). Reversal is required if counsel’s failure to properly present the defense prejudiced the accused. *Thomas, supra*, at 229.

In this case, defense counsel argued in closing that the building was abandoned, but did not propose a proper instruction. RP (8/2/07) 54. In the absence of a proper instruction on abandonment, the jury was unable to even consider the argument with respect to the burglary charge. Accordingly, there is a reasonable possibility that the outcome of the proceeding would have differed if defense counsel had proposed a proper instruction. *Reichenbach*.

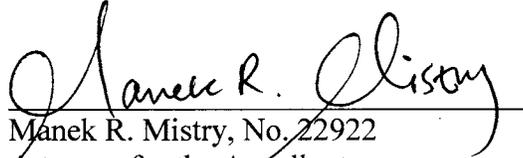
Because Mr. Jensen was denied the effective assistance of counsel, his conviction must be reversed and the case remanded to the superior court for a new trial.

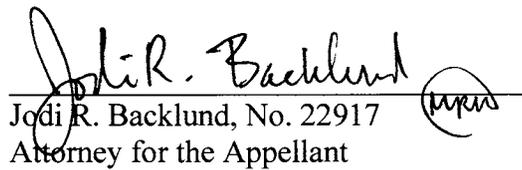
CONCLUSION

Mr. Jensen did not have the benefit of proper instructions at his trial. Because of this, his conviction must be reversed and his case remanded to the trial court.

Respectfully submitted on April 7, 2008.

BACKLUND AND MISTRY


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CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Opening Brief to:

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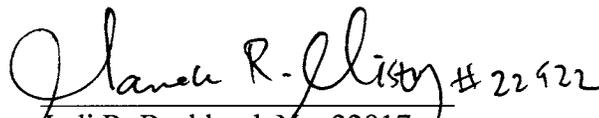
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And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on April 7, 2008.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on April 7, 2008.


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