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No. 39870-2-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Jeffrey Dow,

Appellant.

Lewis County Superior Court Cause No. 08-1-00704-3

The Honorable Judge Nelson E. Hunt

Appellant's Opening Brief

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ASSIGNMENTS OF ERROR

1. Mr. Dow's conviction for felony harassment infringed his Fourteenth Amendment right to due process because it was based in part on propensity evidence.
2. The trial court erred by failing to instruct the jury that it could only consider Mr. Dow's prior convictions to evaluate his credibility.
3. Mr. Dow was denied his right to the effective assistance of counsel under the Sixth and Fourteenth Amendments.
4. Defense counsel was ineffective for failing to request an instruction limiting the jury's consideration of Mr. Dow's prior convictions.
5. The court's instructions impermissibly diminished the prosecution's burden to prove Mr. Dow's intent to commit a crime.
6. The trial court erred by giving Instruction No. 11.
7. The trial court erred by instructing the jury that Mr. Dow bore the burden of establishing duress by a preponderance of the evidence.
8. If the error in the court's instructions is attributed to defense counsel, Mr. Dow was denied the effective assistance of counsel.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A trial court must instruct jurors not to consider prior convictions admitted under ER 609 as substantive evidence of guilt. In this case, the trial judge failed to give a limiting instruction, and the jury was instead required to consider all the evidence when determining Mr. Dow's guilt. Was Mr. Dow's conviction based in part on propensity evidence, in violation of his Fourteenth Amendment right to due process?
2. An accused person has a constitutional right to the effective assistance of counsel. Here, defense counsel failed to request a limiting instruction prohibiting the jury from using Mr. Dow's prior convictions as substantive evidence of guilt. Was Mr. Dow

denied his right to the effective assistance of counsel under the Sixth and Fourteenth Amendments?

3. Where an affirmative defense controverts an element of an offense, the prosecution bears the burden of disproving the defense. Under the facts of this case, Mr. Dow's duress defense controverted the "intent to commit a crime" element of burglary. Did the court's instructions, requiring Mr. Dow to prove duress by a preponderance of the evidence, violate his Fourteenth Amendment right to due process?

4. To be effective, defense counsel must be familiar with applicable law. Here, defense counsel failed to investigate the possibility that Mr. Dow's duress defense required a nonstandard jury instruction. Did defense counsel's deficient performance prejudice Mr. Dow, in violation of his right to the effective assistance of counsel under the Sixth and Fourteenth Amendments?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Paul Peterson sold drugs to two addicts: Randy Blair and Jeffrey Dow. RP (9/22/09) 49, 69-71. Both were in his debt. RP (9/22/09) 49, 70; RP (9/23/09) 170.

On October 14, 2008, Peterson confronted Mr. Dow about the money he owed. Peterson, holding a gun, brought up Mr. Dow's inability to pay, and said "I have an idea how you can do this so that way you don't get hurt." RP (9/23/09) 178. Peterson's proposal was that Mr. Dow accompany him to Blair's trailer to help collect Blair's debt. RP (9/23/09) 162, 170, 178-179.

Mr. Dow was "extremely" frightened of Peterson. RP (9/23/09) 177. He knew that Peterson often "was physical" with people who owed him money. RP (9/23/09) 170. He hoped that they would be able to "negotiate" with Blair, who would hand over some money. RP (9/23/09) 170. On the way over to Blair's trailer, he considered jumping out of Peterson's car. RP (9/23/09) 177. At Blair's trailer, Mr. Dow knocked on the door, but Peterson pushed his way in, armed with the gun, and confronted Blair. RP (9/23/09) 171.

Blair said that he woke up in his trailer and saw Peterson and another man (Mr. Dow) in the kitchen area. RP (9/22/09) 46-47. Blair

observed that Peterson was obviously high, and was armed with a gun. RP (9/22/09) 47, 49, 54. Peterson announced that Blair owed him \$70 and he'd come to collect it. RP (9/22/09) 48. Blair said he thought the debt was cleared, since he had helped Peterson find new customers, and that he did not have the money to pay back what he owed. RP (9/22/09) 48, 50, 70.

According to Blair, Peterson looked at Mr. Dow and said “[Y]ou know what you got to do.” RP (9/22/09) 50. According to Mr. Dow, Peterson pressed the gun into his kidney, and said “[G]o get him,” RP (9/23/09) 162-163, 172. Peterson then pointed the gun at Blair while Mr. Dow assaulted Blair. RP (9/22/09) 50-53, 83; RP (9/23/09) 172-175.

After a short period of time, Peterson left the trailer, and, at that point, Blair hit Mr. Dow with a propane canister and chased him out.¹ RP (9/22/09) 52-53, 57-58. Mr. Dow got into a car with Peterson and they drove away. RP (9/22/09) 57-58.

Mr. Dow was charged with Burglary in the First Degree.² CP 15-17. At his trial, he presented a duress defense. He testified that he was

¹ Mr. Dow said that Peterson told him to stop fighting, so he gathered things that had fallen from his pockets and followed Peterson out. RP (9/23/09) 177.

² A companion charge of Possession of Methamphetamine is not at issue in this appeal. CP 15-17.

afraid Peterson would kill him or Blair, and that he would not have participated if Peterson had not threatened him with the gun. RP (9/23/09) 162-163. During cross-examination, the prosecutor elicited Mr. Dow's prior convictions for Burglary and Taking a Motor Vehicle Without Permission. RP (9/23/09) 179.

The prior convictions were admitted for impeachment; however, defense counsel did not request a limiting instruction. RP (9/23/09) 133, 179; Defendant's Proposed Jury Instructions, Supp. CP; Court's Instructions to the Jury, Supp. CP. In addition, the court instructed the jury that "In order to decide whether any proposition has been proved, you must consider all of the evidence that I have admitted that relates to the proposition." Instruction No. 1, Court's Instructions to the Jury, Supp. CP.

Defense counsel proposed an instruction on duress, based on WPIC 18.01. Defendant's Proposed Jury Instructions, Supp. CP. The court gave the instruction, which read as follows:

Duress is a defense to a criminal charge if:

(a) The defendant participated in the crime under compulsion by another who by threat or use of force created an apprehension in the mind of the defendant that in case of refusal the defendant or another person would be liable to immediate death or immediate grievous bodily injury; and

(b) Such apprehension was reasonable upon the part of the defendant; and

(c) The defendant would not have participated in the crime except for the duress involved.

The burden is on the defendant to prove the defense of duress by a preponderance of the evidence. Preponderance of the evidence means that you must be persuaded, considering all the evidence in the case, that it is more probably true than not true. Instruction No. 11, Court's Instructions to the Jury, Supp. CP.

Defense counsel did not propose an instruction defining "grievous bodily injury." Defendant's Proposed Jury Instructions, Supp. CP.

The jury convicted Mr. Dow as charged. RP (9/23/09) 222-225.

He timely appealed. CP 1.

ARGUMENT

I. MR. DOW'S CONVICTION VIOLATED HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BECAUSE THE STATE INTRODUCED PROPENSITY EVIDENCE AS SUBSTANTIVE PROOF OF GUILT, AND THE COURT FAILED TO GIVE A LIMITING INSTRUCTION.

A. Standard of Review

Constitutional violations are reviewed *de novo*. *In re Detention of Martin*, 163 Wn.2d 501, 506, 182 P.3d 951 (2008).

B. A conviction may not rest on propensity evidence.

The use of propensity evidence to prove a crime can violate due process under the Fourteenth Amendment.³ U.S. Const. Amend. XIV; *Garceau v. Woodford*, 275 F.3d 769, 775 (9th Cir. 2001), *reversed on other grounds* at 538 U.S. 202, 123 S. Ct. 1398, 155 L. Ed. 2d 363 (2003); *see also McKinney v. Rees*, 993 F.2d 1378 (9th Cir. 1993). A conviction based in part on propensity evidence is not the result of a fair trial. *Garceau*, at 776, 777-778.

Propensity evidence is highly prejudicial, and there are numerous justifications for excluding it:

For example, courts, reasoning that jurors may convict an accused because the accused is a “bad person,” have typically excluded propensity evidence on grounds that such evidence jeopardizes the constitutionally mandated presumption of innocence until proven guilty. The jury, repulsed by evidence of prior “bad acts,” may overlook weaknesses in the prosecution’s case in order to punish the accused for the prior offense. Moreover, as scholars have suggested, jurors may not regret wrongfully convicting the accused if they believe the accused committed prior offenses. Courts have also barred admission of propensity evidence on grounds that jurors will credit propensity evidence with more weight than such evidence deserves. Researchers have shown that character traits are not sufficiently stable temporally to permit reliable inferences that one acted in conformity with a character trait. Furthermore, courts have excluded propensity evidence because such evidence blurs

³ The U.S. Supreme Court has reserved ruling on this issue. *Estelle v. McGuire*, 502 U.S. 62, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991).

the issues in the case, redirecting the jury's attention away from the determination of guilt for the crime charged.

Natali & Stigall, "*Are You Going to Arraign His Whole Life?*": *How Sexual Propensity Evidence Violates the Due Process Clause*, 28 *Loyola U. Chi. L.J.* 1, at 11-12 (1996).

When a prior conviction is used to impeach an accused person's testimony, the court must give a limiting instruction to ensure that the jury considers the evidence only for the purpose of evaluating credibility.

Seattle v. Patu, 108 Wn.App. 364, 375-377, 30 P.3d 522 (2001); *see also State v. Russell*, ___ Wn.App. ___, ___, 225 P.3d 478, 483 (2010) (where evidence is admitted under ER 404(b), a limiting instruction must be given). The burden rests with the court to give the instruction, whether requested or not. *Id.*, at 483. In the absence of an instruction, the jury is likely to use the prior conviction as propensity evidence; this is especially true when jurors are required to consider "all of the evidence" relating to a proposition, "in order to decide whether [that] proposition has been proved..." Instruction No. 1, Court's Instructions to the Jury, Supp. CP. *See also Russell*, at 483-484.

C. The introduction and use of Mr. Dow's prior convictions as propensity evidence prejudiced Mr. Dow.

In this case, the state elicited testimony that Mr. Dow had previously been convicted of burglary and of TMVOP. RP (9/23/09) 179.

The convictions were admitted for impeachment;⁴ however, the court did not provide a limiting instruction. Court’s Instructions to the Jury, Supp. CP. This was error. *Russell, supra*. The problem was compounded by Instruction No. 1, which included the following language: “In order to decide whether any proposition has been proved, you must consider all of the evidence that I have admitted that relates to the proposition.”

Instruction No. 1, Court’s Instructions to the Jury, Supp. CP.

Furthermore, the error was particularly egregious, given that the prior conviction was for the same crime under consideration by the jury in this case. *See State v. Newton*, 109 Wn.2d 69, 76-77, 743 P.2d 254 (1987) (A trial judge “must be particularly conscious of the potential for prejudice where, as in this case, the prior conviction was for an offense identical to that with which the defendant is charged.”)

Evidence that Mr. Dow had previously been convicted of burglary—when combined with the language of Instruction No. 1—resulted in a conviction based on propensity evidence. *Garceau, supra*. This violated Mr. Dow’s Fourteenth Amendment right to due process. *Id*. Accordingly, his burglary conviction must be reversed and the case remanded for a new trial. *Id*.

⁴ See RP (9/23/09) 133.

II. MR. DOW WAS DENIED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

A. Standard of Review

An ineffective assistance claim presents a mixed question of law and fact, requiring *de novo* review. *In re Fleming*, 142 Wn.2d 853, 865, 16 P.3d 610 (2001); *State v. Horton*, 136 Wn. App. 29, 146 P.3d 1227 (2006).

B. Defense counsel was ineffective by failing to propose an instruction limiting the jury's consideration of Mr. Dow's prior convictions.

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.” *United States v. Salemo*, 61 F.3d 214, 221-222 (3rd Cir., 1995).

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, 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, 383, 166 P.3d 720 (2006).

There is a strong presumption that defense counsel performed adequately; however, the presumption is overcome when there is no conceivable legitimate tactic explaining counsel's performance. *Reichenbach*, at 130. Furthermore, there must be some indication in the record that counsel was actually pursuing the alleged strategy. See, e.g., *State v. Hendrickson*, 129 Wn.2d 61, 78-79, 917 P.2d 563 (1996) (the state's argument that counsel "made a tactical decision by not objecting to the introduction of evidence of... prior convictions has no support in the record.")

Here, Mr. Dow was entitled to an instruction limiting the jury's consideration of the prior conviction evidence. ER 105; *Russell, supra*. In the absence of such an instruction, the jury was required to consider the

prior convictions—including the prior burglary conviction—as substantive evidence of Mr. Dow’s guilt. Instruction No. 1, Court’s Instructions to the Jury, Supp. CP. Accordingly, defense counsel’s failure to request a limiting instruction constituted deficient performance, and prejudiced Mr. Dow. *Reichenbach, supra*. Mr. Dow was denied the effective assistance of counsel, and his burglary conviction must be reversed. *Id.*

III. MR. DOW’S CONVICTION VIOLATED HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BECAUSE THE COURT’S INSTRUCTIONS IMPERMISSIBLY LOWERED THE STATE’S BURDEN TO PROVE MR. DOW’S INTENT TO COMMIT A CRIME WITHIN BLAIR’S TRAILER.

A. Standard of Review

Jury instructions are reviewed *de novo*. *State v. Hayward*, 152 Wn.App. 632, 641, 217 P.3d 354 (2009). Instructions must be manifestly clear because juries lack tools of statutory construction. *See, e.g., State v. Kylo*, 166 Wn.2d 856, 864, 215 P.3d 177 (2009); *State v. Berg*, 147 Wn.App. 923, 931, 198 P.3d 529 (2008); *State v. Harris*, 122 Wn.App. 547, 554, 90 P.3d 1133 (2004).

B. Under the facts of this case, Mr. Dow’s duress defense negated the “intent” element of burglary; thus, the prosecution bore the burden of disproving the existence of duress.

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, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Instructions that relieve the state of its burden to prove an element violate due process. U.S. Const. Amend. XIV; *State v. Aumick*, 126 Wn.2d 422, 429, 894 P.2d 1325 (1995).

RCW 9A.16.060 outlines the defense of duress. Under that statute, it is a defense to any crime (other than murder, manslaughter, or homicide by abuse) that

- (a) The actor participated in the crime under compulsion by another who by threat or use of force created an apprehension in the mind of the actor that in case of refusal he or she or another would be liable to immediate death or immediate grievous bodily injury; and
- (b) That such apprehension was reasonable upon the part of the actor; and
- (c) That the actor would not have participated in the crime except for the duress involved.

RCW 9A.16.060(1). The statute does not allocate the burden for establishing a duress defense. RCW 9A.16.060.

Ordinarily, the burden is on the defense to prove duress by a preponderance of the evidence. *State v. Riker*, 123 Wn.2d 351, 368-369, 869 P.2d 43 (1994). This is because, in most circumstances, the defense will not negate an element of the offense. Instead, “a defense of duress

admits that the defendant committed the unlawful act, but pleads an excuse for doing so.” *Id.*, at 368.⁵

However, there are some circumstances in which the existence of duress negates the mental element of the charged offense. In such cases, “the nature of the *mens rea* would require the Government to disprove the existence of duress beyond a reasonable doubt.” *Dixon v. United States*, 548 U.S. 1, 7 n. 4, 126 S.Ct. 2437, 165 L.Ed.2d 299 (2006).

In *Dixon*, the defendant was accused of crimes requiring proof that she acted “knowingly” and “willfully.” In rejecting her position, the Supreme Court said:

Even if we assume that petitioner’s will was overborne by the threats made against her and her daughters, she still *knew* that she was making false statements and *knew* that she was breaking the law by buying a firearm. The duress defense...may excuse conduct that would otherwise be punishable, but the existence of duress normally does not controvert any of the elements of the offense itself... [D]uress does not negate a defendant’s criminal state of mind when the applicable offense requires a defendant to have acted knowingly or willfully; instead, it allows the defendant to ‘avoid liability ... because coercive conditions or necessity negates a conclusion of guilt even though the necessary *mens rea* was present.’

⁵ The Court has since clarified that the accused person need not admit criminal liability, and may assert duress even while claiming lack of participation. *State v. Frost*, 160 Wn.2d 765, 776, 161 P.3d 361 (2007).

Dixon, at 6-7 (footnotes and citations omitted) (quoting *United States v. Bailey*, 444 U.S. 394, 402, 100 S.Ct. 624, 62 L.Ed.2d 575 (1980)).

In this case, unlike in *Dixon*, Mr. Dow's duress defense *does* "controvert [one] of the elements of the offense itself." *Id.*, at 6. Accordingly, it presents circumstances that "require the Government to disprove the existence of duress beyond a reasonable doubt." *Id.*, at 7 n. 4.

To convict Mr. Dow of burglary, the prosecution was required to prove beyond a reasonable doubt that "he entered or remained unlawfully in a building... with intent to commit a crime against a person or property therein..." RCW 9A.52.020(1); Instruction No. 6, Court's Instructions to the Jury, Supp. CP. In other words, a finding of guilt required proof that Mr. Dow's unlawful entry or remaining was done "with the intent to commit a crime." RCW 9A.52.020(1).

Here, the duress defense, if believed by the jury, established that Mr. Dow did not enter the trailer or remain inside "with the intent to commit a crime." Instead, his intent was to avoid being killed or grievously wounded (and, at least to some extent, to reduce the risk that Peterson would kill or grievously wound Blair). *See* RP (9/23/09) 162-163. Under the facts of this case, the duress defense negated the intent element of burglary. Thus, the prosecution should have been

“require[d]... to disprove the existence of duress beyond a reasonable doubt.” *Dixon*, at 7 n. 4.

C. The trial court erroneously instructed the jury that Mr. Dow bore the burden of proving duress by a preponderance of the evidence.

Instead of requiring the state to disprove the existence of duress beyond a reasonable doubt, the court’s instructions required Mr. Dow to prove duress by a preponderance of the evidence.⁶ Instruction No. 11, Court’s Instructions to the Jury, Supp. CP. This improperly reduced the prosecution’s burden to prove Mr. Dow’s intent to commit a crime inside the trailer.

If Mr. Dow’s testimony raised a reasonable doubt—suggesting to jurors that his intent was to avoid getting shot rather than to commit a crime inside the trailer—the jury should have voted to acquit. Instead, given the court’s instructions, jurors would have voted to convict (even in the face of reasonable doubt) because Mr. Dow failed to persuade them by a preponderance of the evidence that he entered or remained in the trailer solely with the intent to avoid getting killed.

Because the instructions impermissibly reduced the state’s burden to prove an essential element, Mr. Dow’s burglary conviction must be

⁶ It appears that a juror underlined the language outlining the burden in Instruction No. 11. Court’s Instructions to the Jury, Supp. CP.

reversed. *Aumick, supra*. The case must be remanded to the trial court, with directions to correct the duress instruction to reflect the prosecution's burden. *Id.*

D. If the error in the court's instructions is attributable to defense counsel, Mr. Dow was denied the effective assistance of counsel.

An attorney's misunderstanding of applicable law can constitute ineffective assistance: "[r]easonable attorney conduct includes a duty to investigate the relevant law." *State v. Woods*, 138 Wn. App. 191, 156 P.3d 309 (2007). *See also United States v. Spence*, 450 F.3d 691, 694-695 (7th Cir. 2006), *citing Williams v. Taylor*, 529 U.S. 362, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000); *Smith v. Dretke*, 417 F.3d 438, 442 (5th Cir. 2005).

In this case, defense counsel's duress instruction, when combined with the court's other instructions, impermissibly reduced the state's burden to prove the elements of the offense. Defendant's Proposed Jury Instructions, Supp. CP; Court's Instructions to the Jury, Supp. CP. This was deficient performance. Counsel should have been alerted (by language in *Dixon*) to the possibility that this case might present circumstances "require[ing] the Government to disprove the existence of duress beyond a reasonable doubt." *Id.*, at 7 n. 4.

Although the instruction was based on a pattern instruction (WPIC 18.01), this should not negate Mr. Dow's ineffective assistance claim. *See State v. Studd*, 137 Wn.2d 533, 551, 973 P.2d 1049 (1999) ("counsel can hardly be faulted for requesting a jury instruction based upon a then-unquestioned WPIC..."). The U.S. Supreme Court's decision in *Dixon* was decided well before Mr. Dow went to trial and should have prompted counsel to consider whether a nonstandard instruction was more appropriate. *See Kylo*, at 866 ("[A]t the time of Kylo's trial there were several cases that should have indicated to counsel that the pattern instruction was flawed.") This is especially true given that Mr. Dow's entire defense rested on the jury's assessment of his claim of duress. Because defense counsel proposed a defective instruction, his performance fell below an objective standard of reasonableness. *Reichenbach, supra*.

Counsel's deficient performance prejudiced Mr. Dow. The duress defense rested solely on Mr. Dow's testimony. His version of events was not identical to Blair's, and his credibility was impaired by his self-interest and his prior convictions. The defective instructions permitted the jury to convict even if Mr. Dow's duress defense raised a reasonable doubt regarding his intent to commit a crime within the trailer.

Because counsel's deficient performance prejudiced Mr. Dow, his conviction must be reversed. *Reichenbach, supra*. The case must be remanded to the trial court for a new trial. *Id.*

E. If *State v. Studd* bars Mr. Dow's ineffective assistance argument, due process prohibits application of the invited error doctrine (included for preservation of error).

Under the invited error doctrine, a party may not request an instruction and later complain on appeal that the court gave the instruction.⁷ *State v. Vander Houwen*, 163 Wn.2d 25, 36-37, 177 P.3d 93 (2008). Where *State v. Studd* eliminates an ineffective assistance claim, the invited error rule allows the court to affirm convictions obtained in violation of the constitution. *See Studd*, at 555 *et seq.* (Sanders, J., dissenting); *State v. Henderson*, 114 Wn.2d 867, 871 *et seq.*, 792 P.2d 514 (1990) (Utter, J., dissenting); *In re Griffith*, 102 Wn.2d 100, 103 *et seq.*, 683 P.2d 194 (1984).

If an instruction unconstitutionally relieves the state of its burden to prove the elements of a criminal case, convictions based on that instruction should be reversed. *Winship, supra*. The sole exception should be for cases in which the error is harmless beyond a reasonable

⁷ Our Supreme Court has observed only one exception to the invited error rule: where the trial court refuses a defendant's proposed instruction, the defendant will not be penalized on appeal for offering a flawed instruction. *Vander Houwen*, at 37.

doubt. *State v. Walden*, 131 Wn.2d 469, 478, 932 P.2d 1237 (1997). If *Studd* and the invited error rule bar Mr. Dow's appeal, he'll be left without a remedy despite the prejudicial violation of his constitutional rights.

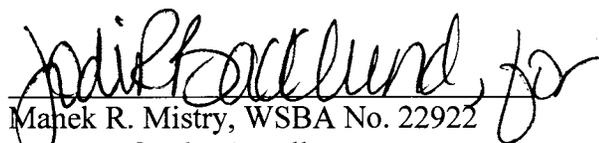
The invited error rule should not be applied in circumstances such as these. It is fundamentally unfair to affirm a conviction obtained in violation of the accused person's constitutional right to due process, solely because the error was brought about by defense counsel.

CONCLUSION

For the foregoing reasons, Mr. Dow's conviction for Burglary in the First Degree must be reversed and the case remanded for a new trial.

Respectfully submitted on April 12, 2010.

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