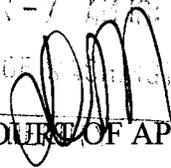


COURT OF APPEALS
DIVISION II

11 MAR -7 AM 2001

NO. 40622-5-II

STATE OF WASHINGTON
BY 

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

STATE OF WASHINGTON,

Respondent,

v.

MAURICIO JACINTO-LEON,

Appellant.

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

The Honorable James J. Stonier

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

JACINTO-LEON'S CONVICTION OF ASSAULT IN THE SECOND DEGREE WITH A FIREARM ENHANCEMENT AS CHARGED IN COUNT IV MUST BE REVERSED BECAUSE DEFENSE COUNSEL'S FAILURE TO PROPOSE AN INSTRUCTION THAT DIRECTED THE JURY TO CONSIDER THE EVIDENCE SEPARATELY FOR EACH COUNT CONSTITUTES DEFICIENT PERFORMANCE AND JACINTO-LEON WAS PREJUDICED BY THE DEFICIENT PERFORMANCE.

The State argues that Jacinto-Leon fails to show prejudice where “[u]nder the idea of transferred intent and given the transferred intent instruction states the third person must be hurt, it is unreasonable to believe the jury verdict would be different had defense counsel argued each crime must be considered separately.” Brief of Respondent at 12-15. The State’s argument is misplaced because it rests solely on Jury Instruction No. 21 which states:

If a person acts with intent to assault another, but the act harms a third person the actor is also deemed to have acted with intent to assault the third person.

CP 111.

The State overlooks the important fact that the jury was also instructed on criminal negligence:

A person is criminally negligent or acts with criminal negligence when he or she fails to be aware of a substantial risk that a wrong act may occur and this failure

constitutes a gross deviation from the standard of care that a reasonable person would exercise in the same situation.

When criminal negligence is required to establish an element of a crime, the element is also established if a person acts intentionally or knowingly.

CP 112.

The jury was instructed that when a person acts intentionally, he also acts with criminal negligence. Accordingly, even if the jury found that Jacinto-Leon acted with intent to assault the other three men and the act harmed House and therefore he is deemed to have acted with intent to assault House, the jury still could have found that he committed the lesser offense of third degree assault against House rather than second degree assault.

Consequently, contrary to the State's argument, defense counsel was ineffective in failing to propose an instruction that directed the jury to consider the evidence separately for each count. WPIC 3.01. Distinguishable from the evidence pertaining to the other three men, there was no evidence that Jacinto-Leon saw or aimed the shotgun at House.¹ The record substantiates that if the court had given the proper instruction, defense counsel could have argued alternatively that if the jury found

¹ It should be noted that the State mistakenly states that Officer Lane testified that the distance from the victims' porch and Jacinto-Leon's house "was later measured to be just under 60 yards, or 175 feet." Brief of Respondent at 6 citing 18RP 200. The records reflects that it was Officer Croco who testified estimating that the distance was "probably seventy-five yards or so."

Jacinto-Leon assaulted House, at the very most, the evidence showed that he acted with criminal negligence. In light of the evidence pertaining to House, there is a reasonable probability that the outcome would have been different but for defense counsel's deficient performance. See Brief of Appellant at 7-13.

The State argues further that defense counsel's performance cannot be challenged because his decisions were "trial tactics." The State claims that defense counsel "argued there was no physical harm to House, so an assault three was inappropriate." Brief of Respondent at 15-16. However, the record reflects that although defense counsel started to argue that House did not get injured, the court interrupted and he did not finish making his point. 19RP 86-87. Consequently, the record does not substantiate that defense counsel made a tactical decision not to request an instruction directing the jury to consider the evidence separately for each count.

Contrary to the State's argument that it was not error to omit WPIC 3.01, the record substantiates that there is a reasonable probability that the jury cumulated the evidence because it returned the same verdict of assault in the second degree on all four counts despite the fact that the strength of the evidence as to House was substantially less. WPIC 3.01 was essential as a safeguard to ensure that the jury would not improperly merge or

cumulate the evidence. State v. Eastabrook, 58 Wn. App. 805, 815, 795 P.2d 151, review denied, 115 Wn.2d 1031 (1990); State v. Standifer, 48 Wn. App. 121, 126-27, 737 P.2d 1308 (1987).

Reversal is required because defense counsel's performance was deficient and Jacinto-Leon was prejudiced by the deficient performance which deprived him of a fair trial. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); In re Personal Restraint of Rice, 118 Wn.2d 876, 888-89, 828 P.2d 1086 (1992).

B. CONCLUSION

For the reasons stated here and in appellant's opening brief, this Court should reverse Jacinto-Leon's conviction for assault in the second degree with a firearm enhancement as charged in count IV.

DATED this 4th day of March, 2011.

Respectfully submitted,


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Attorney for Appellant, Mauricio Jacinto-Leon

DECLARATION OF SERVICE

On this day, the undersigned sent by U.S. Mail, in a properly stamped and addressed envelope, a copy of the document to which this declaration is attached to Amie Hunter, Cowlitz County Prosecutor's Office, 312 SW First Avenue, Kelso, Washington 98626.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 4th day of March 2011, in Kent, Washington.


VALERIE MARUSHIGE
Attorney at Law
WSBA No. 25851

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STATE OF WASHINGTON
BY _____
DEPUTY