COURT OF APPEALS
DIVISION II
11 JUN 29 AM 10:20
STATE OF WASHINGTON
BY_____
DEPUTY

40771-0-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

State of Washington
Respondent

v.

TRAVIS WADE NEWSOME
Appellant

40771-0-II.

On Appeal from the Superior Court of Lewis County

Cause No. 09-1-00571-5

The Honorable Nelson Hunt

REPLY BRIEF

LAW OFFICE OF JORDAN MCCABE
P.O. Box 6324, Bellevue, WA 98008
425-746-0520~jordan.mccabe@yahoo.com

CONTENTS

I. Authorities Cited 1

II. SUMMARY OF THE CASE 4

III. ARGUMENTS IN REPLY 4

1. The jury was inadequately instructed on the deadly weapon element of first degree burglary 4

2 The evidence was insufficient to support a conviction for first degree burglary 7

3. The evidence did not support a burglary instruction that included a permissive inference of intent to commit a crime..... 9

4. Defense counsel was ineffective 11

(a) Did not object to damaging inadmissible evidence 11

(b) Disclosed that defendant was in custody instead of seeking a mistrial 12

5. The court encroached on Appellant's right to present a complete defense 12

6. The sentencing court relied on incompetent evidence 15

IV. CONCLUSION 16

Law Office of Jordan McCabe
P. O. Box 6324, Bellevue, WA 98008-0324
425-746-0520~jordan.mccabe@yahoo.com

I. AUTHORITIES CITED

Washington Cases

State v. Adamy, 151 Wn. App. 583
213 P.3d 627, 629 (2009) 15

State v. Baeza, 100 Wn.2d 487
670 P.2d 646 (1983) 9

State v. Bergeron, 105 Wn.2d 1
711 P.2d 1000 (1985) 9

State v. Bourgeois, 133 Wn.2d 389
945 P.2d 1120 (1997) 14

State v. Cantu, 156 Wn.2d 819
132 P.3d 725 (2006) 10

State v. Carlson, 65 Wn. App. 153
828 P.2d 30 (1992) 5

State v. Chiariello, 66 Wn. App. 241
831 P.2d 1119 (1992) 5

State v. Cross, 156 Wn.2d 580
132 P.3d 80 (2006) 13

State v. Darden, 145 Wn.2d 612
41 P.3d 1189 (2002) 12

State v. Goldberg, 123 Wn. App. 848
99 P.3d 924 (2004) 15

State v. Hickman, 135 Wn.2d 97
954 P.2d 900 (1998) 8

State v. Hudlow, 99 Wn.2d 1
659 P.2d 514 (1983) 12

Law Office of Jordan McCabe
P. O. Box 6324, Bellevue, WA 98008-0324
425-746-0520~jordan.mccabe@yahoo.com

State v. Kyllo, 166 Wn.2d 856
215 P.3d 177 (2009) 6

State v. Madison, 53 Wn. App. 754
770 P.2d 662 (1989) 11

State v. McDaniel, 155 Wn. App. 829
230 P.3d 245, 262 (2010) 11

State v. Nichols, 161 Wn.2d 1
162 P.3d 1122 (2007) 11

State v. Peterson, 138 Wn. App. 477
157 P.3d 446 (2007) 7, 8

State v. Powell, 139 Wn. App. 808
162 P.3d 1180 (2007) 7, 8

State v. Robinson, 24 Wn.2d 909
167 P.2d 986 (1946) 14

State v. Salinas, 119 Wn.2d 192
829 P.2d 1068 (1992) 8

State v. Saunders, 91 Wn. App. 575
958 P.2d 364 (1998) 11

State v. Shilling, 77 Wn. App. 166
889 P.2d 948 (1995) 5, 6

State v. Thompson, 88 Wn. 2d 546
564 P.2d 323 (1977) 7

State v. Winings, 126 Wn. App. 75
107 P.3d 141 (2005) 4

Law Office of Jordan McCabe
P. O. Box 6324, Bellevue, WA 98008-0324
425-746-0520~jordan.mccabe@yahoo.com

Federal Cases

Crane v. Kentucky, 476 U.S. 683
106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986) 12

In re Winship, 397 U.S. 358
90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970) 9, 15

Taylor v. Illinois, 484 U.S. 400
108 S. Ct. 646, 98 L. Ed. 2d 798 (1988) 13

Washington v. Texas, 388 U.S. 14
87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967) 14

Washington Statutes & Court Rules

RCW 9.94A.585 15

RCW 9.95.040 ..... 5, 7

RCW 9A.04.110 5

RCW 9A.52.025 9

RCW 9A.52.040 9

Law Office of Jordan McCabe
P. O. Box 6324, Bellevue, WA 98008-0324
425-746-0520~jordan.mccabe@yahoo.com

II. SUMMARY OF THE CASE

Travis Wade Newsome appeals his convictions for first degree burglary DV (Count 1); theft of a motor vehicle (Count II); second degree driving with a suspended license (Count III); fourth degree assault DV (Count IV); and Count 6, unlawful imprisonment, domestic violence. CP 84-89. A complete statement of the facts is presented in the Appellant'a opening brief (AB).

III. ARGUMENTS IN REPLY

1. Newsome was prejudiced by inadequate jury instructions on the deadly weapon element of first degree burglary.

The State claims the instructions were sufficient to support the deadly weapon element of Newsome's burglary conviction. Brief of Respondent (BR) 1. This is wrong.

Jury instructions must permit both parties to argue their theories of the case, not mislead the jury, and properly inform them the applicable law. *State v. Winings*, 126 Wn. App. 75, 86, 107 P.3d 141 (2005). The instructions here impeded Newsome's ability to argue his theory of the case, misled the jury and failed to properly inform them of the applicable

Law Office of Jordan McCabe
P. O. Box 6324, Bellevue, WA 98008-0324
425-746-0520~jordan.mccabe@yahoo.com

law. The State and the court's instructions miss the essential point that this is a case where an eighth of an inch is as good as a mile.

Newsome had a $2^{7/8}$-inch blade in his pocket when he was arrested. 2RP 173. This did not constitute evidence that he was armed with a deadly weapon.

The physical difference between $2^{7/8}$ inches and 3 inches may be small but the legal implications of that 1/8" are huge. That is because the Legislature has defined a 3-inch blade as a deadly weapon under all circumstances. Therefore, a person simply carrying a 3-inch blade in his pocket is armed with a deadly weapon. RCW 9.95.040(2);[1] *State v. Shilling*, 77 Wn. App. 166, 171, 889 P.2d 948 (1995). A knife with a $2^{7/8}$-inch blade, by contrast, is NOT deemed deadly by its mere presence. RCW 9A.04.110(6); *State v. Carlson*, 65 Wn. App. 153, 157, 828 P.2d 30 (1992). Rather, the State must prove that it acutally was used in a deadly manner. *State v. Chiariello*, 66 Wn. App. 241, 243, 831 P.2d 1119 (1992).

Newsome was entitled to have this made clear to his jury, but the court refused to tell them. 3RP 10, 46. This was reversible error.

The State's reliance on the WPIC pattern instructions is misplaced. BR 2-3, 5-6. The governing law is found in the Washington criminal

---

[1] The words "deadly weapon," ... include ... any knife having a blade longer than three inches. RCW 9.95.040(2).

Law Office of Jordan McCabe
P. O. Box 6324, Bellevue, WA 98008-0324
425-746-0520~jordan.mccabe@yahoo.com

statutes as interpreted by judicial decisions. *State v. Kyllo*, 166 Wn.2d 856, 866, 215 P.3d 177 (2009).

The bottom line is that a $2^{7/8}$-inch blade is not a deadly weapon unless the State produced substantial evidence that "the intent and present ability of the user, the degree of force, the part of the body to which it was applied and the physical injuries inflicted" rendered it deadly. *Shilling*, 77 Wn. App. at 171. It is not deadly merely because, as here, a prosecutor was able to conjure up a hypothetical circumstance under which it could have been used in a deadly manner.

The inadequate instructions prejudiced Newsome because they made it possible for the prosecutor to misinform the jury that it could lawfully find that the paring knife was a deadly weapon based solely on the fact that Newsome had it in his pocket.

The State could not have done this if the jury had received adequate instructions because they would have known that this knife was 1/8" short of mere possession being defined as a "use." Also, the sentencing court imposed the high end of the standard range in reliance on the fiction that a properly instructed jury deliberated on this issue and made a finding that Newsome used the knife in manner that rendered it a deadly weapon. 5/21 RP 23. This simply did not happen.

Law Office of Jordan McCabe
P. O. Box 6324, Bellevue, WA 98008-0324
425-746-0520~jordan.mccabe@yahoo.com

The State distinguishes *State v. Peterson*, 138 Wn. App. 477, 157 P.3d 446 (2007). BR 6. But that case is instructive, because the Court declined to call even a three-inch knife a deadly weapon where it was not used in the presence of another person. *Peterson*, 138 Wn. App. at 483. Likewise, the Court in *State v. Thompson*, 88 Wn. 2d 546, 564 P.2d 323, 324 (1977), gives examples of deadly weapons not listed in RCW 9.95.040. One is a knife with a short blade with which the defendant did in fact actually hurt someone. *Thompson*, 88 Wn.2d at 548-49.

There was absolutely no evidence that Newsome "used" this knife as contemplated by the Legislature and this Court in any manner whatsoever. Accordingly, he is entitled to a new trial with a properly instructed jury.

2. **The evidence was insufficient to support a conviction for first degree burglary.**

The State's argument that the evidence was sufficient to support Newsome's conviction for first degree burglary fails by the same reasoning. BR 8.

Interestingly, in contrast to the jury instruction discussed in Issue 1, it suits the State's purposes here to cite as authority a firearm enhancement case, *State v. Powell*, 139 Wn. App. 808, 162 P.3d 1180 (2007). Compare BR 6 with BR 9-10. But *Powell* concerns a different

Law Office of Jordan McCabe
P. O. Box 6324, Bellevue, WA 98008-0324
425-746-0520~jordan.mccabe@yahoo.com

definition – what constitutes being armed. *Powell*, 139 Wn. App. at 822-23. It has no application here where the issue is what Newsome was armed with.

A claim of insufficiency admits the truth of the State's evidence along with reasonable inferences. *Peterson*, 138 Wn. App. at 481, citing *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Newsome has showed that, viewing the alleged facts in the light most favorable to the prosecution, no rational trier of fact could have found beyond a reasonable doubt the essential deadly weapon element of first degree burglary. The only weapon in evidence was the $2^{7/8}$-inch paring knife that Newsome picked up and put in his pocket where no other person was present at any time. The blade was not long enough to relieve the State of the obligation to prove that this object was a deadly weapon because of the manner in which Newsome used it. The State could not and did not do this. The jury was not even asked to consider the manner in which this paring knife was used. Therefore, the evidence was insufficient to prove a deadly weapon.

The appropriate remedy is to reverse and dismiss with prejudice. *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998).

Law Office of Jordan McCabe
P. O. Box 6324, Bellevue, WA 98008-0324
425-746-0520~jordan.mccabe@yahoo.com

3. **The evidence did not support a burglary instruction that included a permissive inference of intent to commit a crime.**

The State erroneously defends the court's permissiv inference instruction. BR 11.

Due process requires the State to prove every fact essential to its case beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); *Winship*, 397 U.S. at 364. The intent to commit a crime is an essential element of burglary. RCW 9A.52.025(1); *State v. Bergeron*, 105 Wn.2d 1, 15-17, 711 P.2d 1000 (1985). Therefore, the permissive inference instruction at issue here is erroneous as a matter of law because it is not supported by the evidence.

It is inherently difficult to make an affirmative showing of a mental state such as intent. For this reason, RCW 9A.52.040 says: In any prosecution for burglary, any person who enters or remains unlawfully in a building may be inferred to have acted with intent to commit a crime against a person or property therein, *unless such entering or remaining shall be explained by evidence satisfactory to the trier of fact to have been made without such criminal intent*. (Emphasis added.) This permits the State to argue the presumption of an unlawful purpose <u>unless there is some contrary evidence</u>. Where there is contrary evidence, however, the State has to establish by a preponderance of the evidence that the contrary facts

Law Office of Jordan McCabe
P. O. Box 6324, Bellevue, WA 98008-0324
425-746-0520~jordan.mccabe@yahoo.com

support a finding of an unlawful purpose. *State v. Cantu*, 156 Wn.2d 819, 826, 132 P.3d 725 (2006).

Newsome's jury, by contrast, was told it could infer an unlawful purpose from the mere fact of an unlawful entry. Instr. 14, CP 57. This was an inaccurate statement of the law that misled the jury.

In *Cantu*, the inference of intent to commit a crime flowed from the total lack of any evidence suggesting a non-criminal reason for a teenaged boy to break a padlock and enter his mother's room to take her things. *Cantu*, 156 Wn.2d at 826. Here, Newsome had been allowed to go in and out of Johnson's house for years. Accordingly, it was error to instruct the jury it could infer unlawful intent merely from the fact of entry.

Due process required the State to make an affirmative showing that Newsome was not expecting to meet Johnson at her own suggestion as he claimed, and that he did not enter the house for the sole purpose of collecting his four-year accumulation of personal belongings. Instead, the erroneous instruction relieved the State of its burden to prove every essential fact beyond a reasonable doubt.

Reversal is required.

Law Office of Jordan McCabe
P. O. Box 6324, Bellevue, WA 98008-0324
425-746-0520~jordan.mccabe@yahoo.com

4. **Defense counsel was ineffective.**

(a) The State claims that counsel's failure to object to extensive damaging and inadmissible hearsay from Renée Johnson by way of the police witnesses was a legitimate trial strategy. BR 14. This is wrong.

A claim of deficiency resting on counsel's failure to object will succeed if the appellant can satisfy this court that an objection likely would have been sustained. *State v. Saunders*, 91 Wn. App. 575, 578, 958 P.2d 364 (1998). Where testimony is central to the State's case, the failure to object is incompetence justifying reversal. *State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662 (1989). Counsel's performance is deficient if no legitimate reason can be discerned to explain counsel's failure to speak up on behalf of his client. *See, e.g., State v. Nichols*, 161 Wn.2d 1, 8, 162 P.3d 1122 (2007); *State v. McDaniel*, 155 Wn. App. 829, 860, 230 P.3d 245, 262 (2010).

Here, Renée Johnson's testimony constituted the essence of the State's case. Her out-of-court statements were not admissible under any hearsay exception. Please se Appellant's Brief (AB) at 21. Permitting the jury to hear her testimony out of the mouths of uniformed police officers cannot be justified as legitimate strategy.[2]

---

[2] The State complains that this argument is fatally lacking in specificity. But the 50-page brief limit would have been exceeded by separately discussing the Johnson hearsay from Officers Godsby and Adkisson.

Law Office of Jordan McCabe
P. O. Box 6324, Bellevue, WA 98008-0324
425-746-0520~jordan.mccabe@yahoo.com

(b) The State claims that counsel likely thought that having a prior refusal to take a breath test on one's record is equivalent to being currently incarcerated for DUI. BR 15-16. If true, this is even more egregiously ineffective than the error Newsome is alleging. No legitimate strategy could justify giving the jury information from which they can infer that the defendant is a serial drunk driver. More likely, the weight of counsel's caseload precluded him from starting over.

Either way, a mistrial motion is the only effective course when a jury member sees a defendant shackled.

5. **The court encroached on Appellant's right to present a complete defense.**

Unless expressly exluded by the rules, all evidence having any tendency to make the existence of a material fact more or less probable is relevant and admissible. ER 401, 402. The relevance threshold is very low. *State v. Darden*, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002). Moreover, criminal defendants have a constitutional right to present a complete defense. *Crane v. Kentucky*, 476 U.S. 683, 690, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986); *State v. Hudlow*, 99 Wn.2d 1, 14-15, 659 P.2d 514 (1983).

This response might have some merit if the State could pick a statement at random and come up with an applicable hearsay exception for it.

Law Office of Jordan McCabe
P. O. Box 6324, Bellevue, WA 98008-0324
425-746-0520~jordan.mccabe@yahoo.com

Newsome wanted to call as a witness a friend of his and Johnson's to testify that he told her he intended to end his relationship with Johnson. 3RP 45. Counsel argued that this hearsay was admissible under ER 803(a)(4) to show Newsome's then-existing state of mind, which was relevant to refute the State's accusation that Newsome assaulted Johnson out of anger because she wanted to end the relationship. 3RP 45. As part of his constitutional right to present a complete defense, Newsome was entitled present this as substantive evidence to refute the State's proposed motive for wanting to hurt Ms. Johnson.

It is error to exclude any relevant evidence that may be deemed even slightly extenuating or exculpatory. *State v. Cross*, 156 Wn.2d 580, 630, 132 P.3d 80 (2006). A judge has no discretion to exclude evidence that is clearly relevant to a defense, because criminal defendants have a constitutional right to present a defense consisting of relevant, admissible evidence. *Taylor v. Illinois*, 484 U.S. 400, 408, 108 S. Ct. 646, 98 L. Ed. 2d 798 (1988) ("Few rights are more fundamental than that of an accused to present witnesses in his own defense . . . [T]his right is an essential attribute of the adversary system itself.").

The State contends this witness was correctly excluded because the hearsay was "self-serving." But evidence is either admissible or it is not. If an out-of-court statement is admissible under the hearsay rules, it is

Law Office of Jordan McCabe
P. O. Box 6324, Bellevue, WA 98008-0324
425-746-0520~jordan.mccabe@yahoo.com

admissible even if it tends to prove a fact that benefits the defense. No evidence rule creates a blanket exclusion for favorable testimony.

The State likely is referring to ER 801(d)(2), whereby a party's own statements are not hearsay and thus are admissible when offered against that party. But the State cites to no rule that excludes a statement by a party that is hearsay, provided an exception applies and the statement is relevant, regardless of which side offers it.

It was reversible error for the court to declare: "If [Newsome] wants to get his version of events before the jury, he can take the stand and testify if he wants to do that[.]" 3RP 45-46. It is simply false that only defendants who testify are entitled to offer witnesses in their defense. Every defendant has a fundamental right to establish a complete defense through witness testimony. *Washington v. Texas*, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967).

An erroneous evidentiary ruling results is reversibly prejudicial if, within reasonable probabilities, the error materially affected the outcome of the trial. *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). Erroneously excluding relevant evidence is never harmless. *State v. Robinson*, 24 Wn.2d 909, 917, 167 P.2d 986 (1946) (Courts cannot divine the effect of evidence on the minds of jurors).

The error denied Newsome a fair trial, and reversal is required.

Law Office of Jordan McCabe
P. O. Box 6324, Bellevue, WA 98008-0324
425-746-0520~jordan.mccabe@yahoo.com

6. **A standard range sentence is reviwable for error of law.**

The State correctly cites the general rule that a sentence within the standard range cannot be appealed. RCW 9.94A.585(1). BR 19. But a person can always challenge the sentencing court's interpretation of the governing law. *State v. Adamy*, 151 Wn. App. 583, 587, 213 P.3d 627, 629 (2009). And a standard range sentence can be appealed based on an alleged constitutional violation. *State v. Goldberg*, 123 Wn. App. 848, 852, 99 P.3d 924 (2004).

It violates the constitution to incarcerate a person for an offense the essential elements of which the State has not proved beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 361-62, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).

The sentencing court here imposed the high end of the standard range in reliance on the fiction that a properly instructed jury deliberated on the deadly weapon issue and found that Newsome used a short-bladed knife in a deadly manner. 5/21 RP 23. There is absolutely no evidence to support this proposition. On the contrary, the evidence was undisputed that no knife played any part in the burglary other than that Newsome was arrested with a non-deadly knife in his pocket.

Law Office of Jordan McCabe
P. O. Box 6324, Bellevue, WA 98008-0324
425-746-0520~jordan.mccabe@yahoo.com

COURT OF APPEALS
DIVISION II
11 JAN 26 AM 10:23
STATE OF WASHINGTON
BY_____
DEPUTY

IV. CONCLUSION:

For the foregoing reasons, this Court should reverse Mr. Newsome's conviction, vacate the judgment and sentence, and dismiss the prosecution with prejudice.

Respectfully submitted this January 21, 2011.

Jordan B. McCabe, WSBA No. 27211
Counsel for Travis W. Newsome

CERTIFICATE OF SERVICE

Jordan McCabe certifies that she mailed this day, first class postage prepaid, a copy of this Reply Brief to:

Sara I. Beigh, Prosecutor's Office
345 West Main Street, 2nd Floor
Chehalis, WA 98532-1900

Travis Wade Newsome, DOC # 340767
Washington State Penitentiary
1313 North 13th Avenue
Walla Walla, WA 99362

Date: January 21, 2011 Jordan B. McCabe, WSBA No. 27211
Bellevue, Washington

Law Office of Jordan McCabe
P. O. Box 6324, Bellevue, WA 98008-0324
425-746-0520~jordan.mccabe@yahoo.com